



CONSTRUCTING EQUALITY: DEVELOPING AN INTERSECTIONALITY ANALYSIS TO ACHIEVE EQUALITY FOR THE GIRL CHILD SUBJECT TO SOUTH AFRICAN CUSTOMARY LAW

by

Jewel Dee Afua Amoah

AMHJEW001

Thesis presented for the Degree of
DOCTOR OF PHILOSOPHY
in the Department of Public Law
Faculty of Law
UNIVERSITY OF CAPE TOWN

February

2016

SUPERVISOR: T W BENNETT, DEPARTMENT OF PUBLIC LAW

The copyright of this thesis vests in the author. No quotation from it or information derived from it is to be published without full acknowledgement of the source. The thesis is to be used for private study or non-commercial research purposes only.

Published by the University of Cape Town (UCT) in terms of the non-exclusive license granted to UCT by the author.

ABSTRACT

Abstract

Equality, an ideal that like should be treated alike, lies at the heart of most national constitutions and all international human rights instruments. Despite its ancient origins, however, this principle is far from being achieved in practice. Hence, in the search for full substantive equality, critical legal scholars put forward a theory and accompanying analytical framework of intersectionality. Using South Africa as an example, this thesis examines the realisation of the constitutional promise of equality for those who have been traditionally marginalised by reason of their intersecting race and gender identities.

The process of navigating this identity intersection is complicated by the cultural diversity that is a feature of South African society. The Constitution nevertheless, encourages such diversity, and goes even further to give equal recognition to the coexisting systems of common and customary law that are rooted in Western and post-colonial African cultures, respectively. It follows that a full understanding of the different legal and social contexts in which a rights claimant lives is critical to the achievement of substantive equality.

In order to simplify the investigation of context, the thesis proposes an acronym: GRACE. This term stands for a South African girl child, who lives through the intersecting identities of **G**ender, **R**ace, **A**ge and **C**ulture in her search for **E**quality. She serves not only as an embodiment of these identities, but also as an analytical tool for those required to undertake an equality analysis.

This thesis therefore presents an opportunity for the reader to observe GRACE's journey, and along the way, to note how the rights of female litigants have been developed. The milestones of the journey are marked by the High Court case of *Mabena v Letsoala* (1998)¹ as well as the

¹ 1998 2 SA 1068 (T).

Constitutional Court cases of *Bhe v Magistrate Khayelitsha* (2005)², *Shilubana v Nwamitwa* (2008)³, and *Mayelane v Ngwenyama and Another* (2013)⁴, all of which focus on the legal agency of women in areas that had formerly been the purview of senior males. On the basis of these decisions, a hypothetical case of seduction is then presented so as to demonstrate how both the customary and common law can be interpreted to improve equality rights and develop the relevant conflicting laws.

As the argument in the thesis develops, the GRACE model of analysis emerges as a useful device for assisting the judiciary to fulfil its constitutional mandate to “develop” rather than abolish laws that infringe the Bill of Rights. Such an approach is especially appropriate when dealing with customary legal systems, because they are, by their very nature, flexible and adaptable.

² *Bhe and Others v Magistrate Khayelitsha and Others; Shibi v Sithole; South African Human Rights Commission v President Republic of South Africa* 2005 (1) BCLR 1 (CC).

³ 2009 (2) SA 66 (CC).

⁴ 2013 (4) SA 415 (CC).

DECLARATION

Declaration

I declare that this thesis for the degree of Doctor of Philosophy at the University of Cape Town hereby submitted has not been previously submitted for a degree at this or any other University, that it is my original work, and that all the materials contained herein have been duly acknowledged.

Signed

Jewel Amoah

ACKNOWLEDGEMENT

Acknowledgement

I owe an immense debt of gratitude to my supervisor, Professor T W Bennett, for his support, direction and tireless encouragement. There were many times over these long years when I was discouraged and almost ready to abandon this undertaking, but Professor Bennett quietly motivated me to give just a little bit more. This gentle encouragement was in fact a tsunami of support. His patience is unparalleled and tremendously appreciated.

I would also like to thank my academic colleagues, for their enduring support, collegiality and friendship. The thesis endeavour has been an incredibly lonely one, and even more so for an international student at a distance. Yet over the years, these colleagues have been steadfast in their camaraderie and assistance. Dr Tulia Ackson, Dr Adenike Aiyedun, Dr Tendai Nhenga, Dr Ken Nyaundi, Toyin Obadejogbin and Tamuka Mzondo: your constant concern and kind queries about my progress have meant more than you will ever know.

To my friends and colleagues outside of the University – those in both Cape Town as well as in Toronto: thanks for supporting and encouraging me in an enterprise that was not part of your world, but you understood why it was so central to mine. Marina, Chris, Zoran, Kechil and Kelly: you are my Cape Town family. Heartfelt thanks for welcoming me into your homes.

To my family: without each of you, I would not have completed this decade-long endeavour. Thanks will never be enough, but my gratitude is eternal.

DEDICATION

Dedication

This thesis is dedicated to my mother, Dr Jennifer Antonia Lewis Amoah, my first, and constant teacher. It was with her unwavering support and through God's guidance that this thesis journey was initiated, endured and completed.

I would also like to dedicate this work to the girl children of South Africa – those whose mere identify locates them at the cusp of modernity and tradition. The true test of a country coming into its own will be the equality that it demands and constructs for the girl child and the pluralist landscape where she finds her community.

TABLE OF CONTENTS

ABSTRACT	ii
DECLARATION	iv
ACKNOWLEDGEMENT	v
DEDICATION	vi
CHAPTER ONE – THESIS INTRODUCTION & INQUIRY	
1. INTRODUCTION: INTERSECTING IDENTITY AND THE QUEST FOR EQUALITY	1
2. LEGAL PLURALISM AND THE CONTEXT OF IDENTITY	6
3. BACKGROUND TO THE APPLICATION OF THE GRACE MODEL	8
4. APPLYING GRACE	9
CHAPTER TWO – THE CONCEPT OF EQUALITY	
1. INTRODUCTION	10
2. HISTORY OF EQUALITY	11
(a) <i>CONCEPTIONS OF EQUALITY</i>	13
(b) <i>THE FORM, SUBSTANCE AND FUNCTION OF EQUALITY</i>	16
3. CONTEMPORARY CHARACTERISATION OF EQUALITY	17
(a) <i>THE NATURE OF EQUALITY</i>	21
(b) <i>EQUALITY: A RIGHT OR A VALUE?</i>	23
(c) <i>EQUALITY: DIFFERENCE AND SAMENESS - MEANINGFUL IN ABSENCE</i>	26
(d) <i>EQUALITY AND THE VALUE OF DIFFERENCE</i>	27
(e) <i>THE UNIVERSAL ASSUMPTION OF EQUALITY</i>	28
(f) <i>CONTEXTUALISATION AND EQUALITY</i>	30
(g) <i>INDICATORS OF INEQUALITY</i>	32
4. EQUALITY FOR THE AFRICAN GIRL CHILD – THE IMPORTANCE OF CONTEXT AND IDENTITY	34
5. CONCLUSION	37

CHAPTER THREE – DEVELOPING AN INTERSECTIONALITY ANALYSIS

1. INTRODUCTION.....	41
2. OVERVIEW & HISTORY OF INTERSECTIONALITY	43
(a) <i>RACE AND GENDER: MOVING BEYOND THE ORIGINAL INTERSECTIONS</i>	<i>44</i>
(b) <i>CULTURAL CONSTRUCTIONS OF RACE AND GENDER</i>	<i>48</i>
(c) <i>THE SOCIAL CONSTRUCTION OF RACE AND GENDER IN A CULTURAL CONTEXT.....</i>	<i>51</i>
(d) <i>LOCATING THE INTERSECTIONAL SELF.....</i>	<i>53</i>
3. EXPANDING INTERSECTIONALITY TO MULTIPLE DIMENSIONS	55
(a) <i>MULTIPLICITY VS. ESSENTIALISM.....</i>	<i>57</i>
(b) <i>MULTIPLICITY AND MULTIPLE OPPRESSIONS</i>	<i>59</i>
4. DEMONSTRATING THE GRACE INTERSECTIONS	63
5. CONCLUSION	67

CHAPTER FOUR – LEGAL PLURALISM OR INTERSECTIONALITY: MULTIPLE PATHS TO EQUALITY FOR GRACE

1. INTRODUCTION.....	69
2. DEFINITIONAL FRAMEWORK OF LEGAL PLURALISM.....	70
(a) <i>OPERATION OF THE LEGAL PLURALISM FRAMEWORK IN SOUTH AFRICA</i>	<i>74</i>
(i) <i>South African Common Law</i>	<i>74</i>
(ii) <i>South African Customary Law</i>	<i>75</i>
(b) <i>ADDRESSING THE PRESUMPTIVE HIERARCHY BETWEEN THE COMMON LAW AND CUSTOMARY LAW.....</i>	<i>82</i>
(c) <i>EQUALITY UNDER LIVING CUSTOMARY LAW</i>	<i>83</i>
3. CUSTOMARY LAW PRIOR TO 1996 CONSTITUTIONAL RECOGNITION	86
4. CULTURE AND CUSTOMARY LAW UNDER THE CONSTITUTION	87
5. RECOGNITION OF CUSTOMARY LAW AND THE CONFLICT OF PERSONAL LAWS.....	90
6. THE SECOND AND THIRD PHASES IN THE DEVELOPMENT OF LEGAL PLURALISM	92
7. THE IMPLICATIONS OF LEGAL PLURALISM FOR WOMEN	93
(a) <i>THE PROS AND CONS OF TAKING COGNIZANCE OF PLURALISM</i>	<i>93</i>
(b) <i>NEW INTERPRETATION OF CUSTOMARY LAW.....</i>	<i>96</i>
8. PLURAL NORMATIVE ORDERS, PLURAL PATHS TO EQUALITY? ...	97
9. CONCLUSION	100

**CHAPTER FIVE – CULTURE: THE CORE OF INTERSECTIONALITY AND
THE HEART OF PLURALISM (AS EXPERIENCED BY GRACE)**

1. INTRODUCTION	103
2. THE NATURE OF INTERSECTING IDENTITIES	104
3. DEFINITIONAL POSITIONING OF CULTURE IN THE AFRICAN HUMAN RIGHTS FRAMEWORK	108
(a) <i>DEFINITION AND CHARACTER OF CULTURE</i>	110
(b) <i>CULTURE AS A KEY ASPECT OF IDENTITY</i>	115
(c) <i>CULTURE AS A KEY ASPECT OF LAW FORMATION AND INTERPRETATION</i>	117
4. CULTURE AND CUSTOMARY LAW IN THE SOUTH AFRICAN CONTEXT	121
5. CONCLUSION	122

**CHAPTER SIX – THROUGH GRACE’S EYES: AN ANALYSIS OF *BHE v
KHAYELITSHA***

1. INTRODUCTION	125
2. <i>BHE v KHAYELITSHA</i> MAGISTRATE: AN OVERVIEW	126
(a) <i>BHE v KHAYELITSHA: THE FACTS</i>	128
(b) <i>BHE v KHAYELITSHA: THE RESULT</i>	129
3. <i>BHE</i>: AN ANALYSIS IN THREE PARTS	131
(a) <i>IDENTIFICATION OF CUSTOMARY LAW</i>	131
(b) <i>THE CUSTOMARY LAW RULE OF MALE PRIMOGENITURE</i>	133
(c) <i>ADDRESSING THE PRESUMPTIVE HIERARCHY BETWEEN THE COMMON LAW AND CUSTOMARY LAW</i>	138
4. REFLECTIONS ON THE MAJORITY DECISION IN <i>BHE</i>	140
5. REFLECTIONS ON THE DISSENT IN <i>BHE</i>	142
6. APPLYING GRACE TO THE FACTS OF <i>BHE v KHAYELITSHA</i>	144
(a) <i>GENDER</i>	146
(b) <i>RACE</i>	147
(c) <i>AGE</i>	148
(d) <i>CULTURE</i>	148
(e) <i>EQUALITY</i>	149
7. CONCLUSION: POST <i>BHE</i>: THE STATE OF EQUALITY AND CUSTOMARY LAW IN THE ABSENCE OF PRIMOGENITURE	150

CHAPTER SEVEN – BEYOND BHE: APPLYING GRACE TO SELECT CASES: MABENA, SHILUBANA AND MAYELANE

1. INTRODUCTION.....	151
2. APPLICATION OF THE GRACE MODEL OF ANALYSIS BEYOND BHE	152
(a) <i>MABENA</i>	153
(i) <i>Overview of the Facts in Mabena</i>	153
(ii) <i>Application of Intersectional Components of the GRACE Model to the Facts of Mabena</i>	154
(b) <i>SHILUBANA</i>	157
(i) <i>Summary of the Facts and Decision in Shilubana</i>	158
(ii) <i>Application of GRACE to Shilubana facts</i>	160
(c) <i>MAYELANE</i>	163
(i) <i>The Facts and Decision in Mayelane: Development without Invitation</i>	165
(ii) <i>Applying GRACE to Mayelane</i>	169
3. CONCLUSION	171

CHAPTER EIGHT – APPLYING GRACE TO A HYPOTHETICAL CASE OF SEDUCTION

1. INTRODUCTION.....	174
2. KEY DEFINITIONS AND PRINCIPLES.....	175
(a) <i>DELICT - GENERALLY</i>	175
(i) <i>Common Law Delict</i>	175
(ii) <i>Customary Law Delict</i>	176
(b) <i>DELICT OF SEDUCTION</i>	177
(i) <i>Common Law</i>	178
(ii) <i>Customary Law</i>	179
3. THE SEDUCTION HYPOTHETICAL: ZINDZI AND MARCUS	181
(a) <i>MARCUS, ZINDZI AND SEDUCTION UNDER THE COMMON LAW</i>	182
(b) <i>MARCUS, ZINDZI AND SEDUCTION UNDER CUSTOMARY LAW</i>	183
4. SEDUCTION AND CONSTITUTIONAL CHALLENGES: GRACE AS REMEDY.....	185
(a) <i>SEDUCTION, CULTURE AND LEGAL PLURALISM</i>	186
(b) <i>APPLYING GRACE TO CUSTOMARY LAW SEDUCTION</i>	191
5. CONCLUSION	195

CHAPTER NINE — CONCLUSION: GRACE'S JOURNEY TO EQUALITY

1. INTRODUCTION: OVERVIEW OF THE GRACE ANALYTICAL FRAMEWORK	198
2. THE GRACE MODEL: A CONTEXTUAL APPROACH TO EQUALITY	200
3. HUMAN RIGHTS IN THE AFRICAN CULTURAL CONTEXT: INDIVIDUAL VS GROUP	203
(a) <i>THE CULTURE OF COMMUNITY – GRACE AS AN INDIVIDUAL VS GRACE AS A COMMUNITY MEMBER</i>	<i>206</i>
(b) <i>GROUP CULTURE VS INDIVIDUAL IDENTITY</i>	<i>208</i>
4. CONCLUSION: A PIT STOP IN GRACE'S THEORETICAL JOURNEY TO EQUALITY	210

BIBLIOGRAPHY

BOOKS	221
BOOK CHAPTERS	224
JOURNAL ARTICLES	228
THESES	247
CASES	247
STATUTES.....	248
INTERNATIONAL INSTRUMENTS	249
ONLINE SOURCES AND MISCELLANEOUS NON-PRINT SOURCES ...	249

CHAPTER ONE – THESIS INTRODUCTION & INQUIRY

1. INTRODUCTION: INTERSECTING IDENTITY AND THE QUEST FOR EQUALITY	1
2. LEGAL PLURALISM AND THE CONTEXT OF IDENTITY	6
3. BACKGROUND TO THE APPLICATION OF THE GRACE MODEL	8
4. APPLYING GRACE	9

1. Introduction: Intersecting Identity and the Quest for Equality

Broadly speaking, this thesis is a discussion of how best to achieve equality.¹ Equality is a principle that is the foundation of democratic societies.² Its prevalence and sustainability is a key objective against which human interaction is measured.³ This thesis advocates for equality, not to alleviate gender, cultural or other distinctions, but to celebrate and respect them. The argument advanced is that any relevant differences between individuals that would affect their access to substantive equality are contextual and not merely superficially visible. Hence, substantive equality focuses on aspects that lie within the marrow of identity, not simply on the surface.

Equality is not so much an end result as a process, a framework for interaction and social growth. This thesis considers the process as it relates

¹ By definition, a “discussion” requires two or more people. This thesis is referred to as a discussion because it incorporates the views of not only several people, but also different systems of law. The notion of mediating the discussion refers to negotiating the way through texts and ideas with which I am only vaguely familiar, but still passionately interested, as they function to enhance the broader understanding of equality. Moreover, without being paternalistic, this thesis is a discussion (from an outsider’s perspective) of the considerations related to access to equality for a South African girl child subject to customary law, as opposed to a discussion by a South African girl child herself as to what she sees as the influences in her life.

² See K S Sastry “Equality, Basic Needs and Democratic Constitution” (2002) 3 Perspectives available at http://www.oycf.net/web.archive.org/web/20101218084208/http_/oycf.org/Perspectives2/17_063002/contents.html (last accessed April 2015).

³ Equality for the present purposes is not a state of absolute homogeneity among all the citizens (which is impossible, anyway) but a condition in which the extent of inequality among citizens is not such that individual liberty is compromised. See J Scott *Poverty and Wealth: Citizenship, Deprivation and Privilege* (1994) 146.

to the girl child subject to customary law in South Africa.⁴ In mapping out the quest for equality, the thesis explores the concept of equality, as well as various aspects of the identity of the girl child and the South African landscape of legal pluralism. Identity, for present purposes, is concerned primarily with gender, race, age, and their intersection within a particular cultural context.⁵ The quest for equality includes construction of a tool to address inequality, which is presented as a tool to assist the judiciary in providing remedies for the inequalities that have been experienced by the girl child living under customary law in South Africa.

The focus of the thesis was inspired by the case of *Bhe v Khayelitsha Magistrate*⁶ and its discussion of the equality rights that apply to a South African girl child subject to the customary law rules of succession. The discussion is mediated by the perspective of one who is neither a product of South African culture nor subject to the customary laws of the country. In this way, the thesis lacks a personal experiential perspective on the subject matter. Nevertheless, the work attempts to achieve an objectivity that is often only possible from one who is located outside of the system that is the subject of examination.

Legal perspectives are often communicated and reflected through stories and storytelling.⁷ These are methods of repackaging theory and

⁴ The phrases “contemporary South Africa”, “today’s South Africa”, “the new South Africa” and “post-Apartheid” South Africa are used interchangeably in this thesis to describe the era ushered in by the 1993 Interim Constitution and solidified by the 1994 multi-party elections. This current period, which formally began in 1993 (although informally as early as 1990 with the release of Nelson Mandela from prison) is one characterised by constitutional commitments to equality and full embrace of democracy including the end of discrimination on the basis of race, culture, gender, language and religion. See Constitution of the Republic of South Africa Act 108 of 1996, Chapter 1, Founding Provisions, and Chapter 2, Bill of Rights.

⁵ Note that the aspects of identity to be focused on differ according to context and the nature of the discussion at hand.

⁶ *Bhe and Others v Khayelitsha Magistrate and Others* 2005 (1) SA 580 (CC).

⁷ One of the themes of Critical Race Theory (CRT) analysis proposed by R Delgado in his bibliography of CRT writings is storytelling /counter-storytelling and “naming one’s own reality”. To a certain extent this is about telling the story of one’s experience – essentially a legal narrative form the perspective of the litigant. Note that storytelling, as discussed in Critical Race Theory, carries no specific reference to the technical meaning attributed to the term in anthropological literature.

doctrine to be more palatable for the intended audience. Stories are more accessible – both to the reader and the storyteller – than the typical genres of legal theory. Particularly in the context of rights entitlement, the style of storytelling provides certain insight into the life perspective of a rights seeker. The notion of counter-storytelling emerges as a form to be juxtaposed against the traditional perception (story) of the law and its impact on the equality rights of marginalised peoples. The common law and the customary law within South Africa can very easily serve as examples of a story and counter-story.⁸

The thesis is the story of GRACE. This is the name given to the subject of the research: a South African girl child subject to customary law. GRACE is not one individual, but rather an entity that signifies the composition of identities that are at the root of the research. The acronym GRACE indicates that **G**ender, **R**ace, **A**ge and **C**ulture affect one's experience of **E**quality.⁹

GRACE is a fictional character, an analytical construct created to contextualise the discussion of equality rights. Thus, where we have a fictional character, a “story” cannot be far behind. GRACE is used as a tool

See R Delgado & J Stefancic “Critical Race Theory: An Annotated Bibliography” (1993) 79 Virginia Law Review 462-463. The literature in this bibliography is categorised into the following ten themes:

1. Critique of liberalism
2. Storytelling/counter-storytelling and “naming one's own reality”
3. Revisionist interpretations of American civil rights law and progress
4. A greater understanding of the underpinnings of race and racism
5. Structural determinism
6. Race, sex, class and their intersections
7. Essentialism and anti-essentialism
8. Cultural nationalism/separatism
9. Legal institutions, Critical pedagogy, and minorities in the bar
10. Criticism and self-criticism; responses.

⁸ But note that the characterisation of story and counter-story should not be taken to imply a hierarchy in which the common law takes precedence over customary law. See J M Modiri “The Colour of Law, Power and Knowledge: Introducing Critical Race Theory in (Post)Apartheid South Africa” (2012) 3 South African Journal on Human Rights 405-436.

⁹ For a discussion of the development and application of the GRACE model to certain human rights issues, see J Amoah “The World on her Shoulders: The Rights of the Girl-Child in the Context of Culture and Identity” (2007) 4 Essex Human Rights Law Review 2, available at <http://projects.essex.ac.uk/ehrr/V4N2/amoah.pdf> (last accessed August 2015).

to reify and essentialise¹⁰ the experience of the girl child under customary law. In this context, essentialism does not have the negative implication of reducing people to the least common denominator in order to form a single group whose experiences and realities can be discussed *en masse*.¹¹ Rather, by proposing GRACE as the essentialist representative of the girl child subject to customary law, the thesis can give voice and features to members of a vulnerable and disempowered group which has been marginalised and devalued, and has been considered incapable of experiencing certain critical realities worth analysing. The story of GRACE represents the story of every girl child who has been subject to discrimination and inequality by virtue of her intersecting identity.¹²

While this thesis is a story *about* GRACE, it is also a story *for* GRACE, in that it presents her perceived reality in the effort to enhance her experience of equality as meted out by the courts. Written from an outsider's perspective, the story is able to disentangle itself from the common trappings that occur when one writes about one's self, a subject that is often too close to provide the necessary objectivity. But there are also dangers with outsider storytelling.¹³

¹⁰ Essentialism refers to a broad, static definition of identity that is applied to all persons classified as manifesting or reflecting an identity trait in the same way. For example, to essentialise gender is to assume that all women experience womanhood in the same way, and such essentialism does not provide any scope for how age, culture, race, religion, marital or family status may create a very different experience of womanhood for each woman. See A K Wing (ed) "Essentialism and Anti-Essentialism: Ain't I a Woman?" in A K Wing *Critical Race Feminism: A Reader 2* ed (2003) 7; J Wong "The Anti-Essentialism v Essentialism Debate in Feminist Legal Theory: The Debate and Beyond" (1999) 5 *William and Mary Journal of Women and the Law* 273. See also the following works which critically analyse essentialism as it relates to the intersection of race and gender: A P Harris "Race and Essentialism in Feminist Legal Theory" (1989-1990) 42 *Stanford Law Review* 581; A Parashar "Essentialism or Pluralism: The Future of Legal Feminism" (1993) 6 *Canadian Journal of Women and the Law* 328; T Grillo "Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House" (1995) 10 *Berkeley Women's Law Journal* 16; T E Higgins "Anti-Essentialism, Relativism, and Human Rights" (1996) 19 *Harvard Women's Law Journal* 89; E Spelman *Inessential Woman: Problems of Exclusion in Feminist Thought* (1988).

¹¹ But see Chapter Three, part 3(a) for a discussion of the negative context of essentialism.

¹² Refer to Chapter Three, which introduces GRACE and explains the notion of intersecting identities.

¹³ For a discussion of the notion of storytelling in legal analysis, see R Delgado, "Storytelling for Oppositionists and Others: A Plea for Narrative" (1999) 87 *Michigan Law Review* 2411; D Farber & S Sherry "Telling Stories out of School: An Essay on Legal Narratives" (1992-1993) 45 *Stanford Law Review* 807-856. Storytelling in the context of this thesis is more than recounting factual occurrences, but also includes contextualising and analysing the details of

Foremost amongst these dangers are questions of legitimacy that come with writing about an experience that is not one's own. There is also the challenge of ensuring that the arbiter of equality (i.e. a member of the judiciary) is able to successfully apply the cultural insights necessary to understand and convey the reality of the subject. This application is primarily about adopting the relevant cultural tools, and not appropriating them to be reconfigured in the framework of another, or trying to adjust the culture of the rights claimant to the cultural framework of the arbiter or even the academic observer who writes about this process. All this being said, storytelling is not an easy task. Nevertheless, it is a useful tool to facilitate understanding, and, in the present context, storytelling facilitates understanding of GRACE's experience of equality.

GRACE'S story is not an account of her entire life. Instead, it is a snapshot of a moment of her young existence in a rural community in South Africa, where customary law influences many aspects of life. Although the focal point of the story is GRACE's quest for equality, it is much broader than she is. At its broadest, most general sense, the story is about equality. GRACE is just an example of the way in which equality is or is not reflected within a particular cultural context.

As the discussion of equality becomes more specialised and contextual, the thesis moves to a consideration of the South African Constitution,¹⁴ and its provision not only of equality rights generally, but specifically of the equal recognition of common and customary law.¹⁵ In many respects, this is the core issue to be resolved: where equal recognition is guaranteed to two normative systems, what happens when these systems have different approaches to equality? Should one take precedence? And which system's tools and framework of analysis should be employed?

these occurrences. Storytelling involves truth-telling, truth interpretation and truth construction.

¹⁴ Act 108 of 1996.

¹⁵ Provision for the equal recognition of the common law and customary law can be interpreted from the following sections in the Constitution: section 30, section 31 subsection 39(2) and subsection 211(3). See Chapter Four for a fulsome discussion of legal Pluralism and the coexistence of the common law and customary law.

2. Legal Pluralism and the Context of Identity

Legal pluralism, or the coexistence of multiple normative orders involves the common law and the customary law that operate within South Africa. Although pluralism can also include religious laws, this issue is not explored here.¹⁶ Nor does the thesis distinguish or identify the various different customary laws operating within South Africa.¹⁷ The exploration of the concept of equality for girls subject to customary law is framed not only by a pathway that includes certain topics, but also by the landscape of the many topics that are excluded. In this way, the discussion does not purport to be exhaustive, but it does seek to carve out a new route along which the journey to equality may be more easily traversed.

Refining the issue even further: to get closer to GRACE's situational reality in a rural South African environment, the thesis focuses primarily on customary law¹⁸. Customary law, as considered for the purposes of this thesis, has at least two clear branches: "official" and "living" law. Although each purports to reflect the same reality, they are often quite different.

¹⁶ For a broad, contemporary discussion of religious diversity and religious pluralism in South Africa with particular reference to Islam, see C Rautenbach "The Modern-Day Impact of Cultural and Religious Diversity: 'Managing Family Justice in Diverse Societies'" (2014) 17 Potchefstroom Electronic Law Journal 520-552; Waheeda Amien "Overcoming the Conflict Between the Right to Freedom of Religion and Women's Rights to Equality: A South African Case Study of Muslim Marriages" (2006) 28 Human Rights Quarterly 729-754; and E Moosa, "Prospects for Muslim Law in South Africa: A History and Recent Developments" (1996) 3 Yearbook of Islamic and Middle Eastern Law 130-155; N M Nyaundi "African Traditional Religion in Pluralistic Africa: A Case of Relevance, Resilience and Pragmatism" in T W Bennett (ed) *Traditional Religions in South African Law*, (2011) 1-18; L du Plessis, "The Constitutional Framework for the Protection of Religious and Related Rights in South Africa" in T W Bennett (ed) *Traditional Religions in South African Law*, (2011) 90-111.

¹⁷ Section 6(1) of the Constitution of the Republic of South Africa provides that the 11 official languages are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu. For more information on language distribution and cultural populations throughout the country, see: <http://www.southafrica.info/about/people/language.htm#.VODxxULE1Ck> (accessed February 2015). See also, Statistics South Africa, Census 2011, available at: http://www.statssa.gov.za/census2011/Products/Census_2011_Census_in_brief.pdf (accessed February 2015).

¹⁸ This focus assumes that the only (primary) system of law relevant to GRACE's reality is customary law. This may or may not actually be the case – in fact, it greatly depends on the particular aspect that one focuses. Note that for the purposes of the thesis, "customary law" is treated as a block of laws, but it is recognised that customary law differs from one cultural community to the next.

Official customary law is that which has been interpreted and transcribed by those living outside of the system in question;¹⁹ it is their perception of the specific content of certain customary law rules. It must be emphasised, that official customary law is *written* and applied largely, by people who are not members of the communities in which it is practised. The exception to this rule would be where traditional leaders apply certain aspects of official law, such as provisions in the Black Administration Act. Living customary law, by contrast, is by its very definition an oral expression of the normative customs and traditions currently practised by members of a community.²⁰ It is (potentially at least) constantly changing to reflect changing social issues and attitudes. The fact that it is generally unwritten means that it is not rigidified by official codes, precedents and texts.

Chapters Two, Three and Four set the definitional framework of the thesis by discussing the concepts of equality, intersectionality and legal pluralism, respectively. These concepts and their particular application to the cultural and legal position of the South African girl child living subject to customary law are the focus of Chapter Five. Chapter Six builds upon the definitional framework and contemporary application, and offers the construction of the GRACE analytical framework as a means to actualise the equality entitlement for the girl child. This is further demonstrated in Chapter Seven by application of the GRACE model to customary law cases addressed by the Constitutional Court in the past decade. Chapter Eight presents a hypothetical set of facts against which to test the application of the GRACE model in both a common and customary law context. Chapter Nine concludes with an emphasis on the importance of culture as a key navigational tool in GRACE's journey to equality.

¹⁹ See T W Bennett, *Customary Law in South Africa* (2004) 5-8.

²⁰ *Ibid* 13-23. See also, C Himonga "The Future of Living Customary law in African Legal Systems in the Twenty-First Century and Beyond, with Special Reference to South Africa" in J Fenrich P Galizzi & T E Higgins (eds) *The Future of African Customary Law* (2011) 33-50.

3. Background to the Application of the GRACE Model

The GRACE model builds upon and expands existing equality rights case law involving race and gender.²¹ Moreover, the model seeks to encompass customary law cases within this spectrum of South African equality rights analysis. Using the 2005 decision of the South African Constitutional Court in *Bhe v Khayelitsha*²² as a launching point, this thesis will show how application of the GRACE model of analysis could have enhanced the Court's decision on female succession – specifically property inheritance – in a customary law context.

The cases discussed herein involve a challenge to the application of the constitutional right to equality in a customary law context, and present an opportunity for the judiciary to apply intersectionality theory to effect a fairer and more nuanced result.²³

²¹ This expansion is focussed on four Constitutional Court cases, over the past decade, beginning with *Bhe v Khayelitsha Magistrate* (n 6) and ending with *Mayelane v Ngwenyama and Another* 2013 (4) SA 415, as well as the 1998 High Court case of *Mabena v Letsoala*. 1998 (2) SA 1068 (T).

²² *Bhe and Others v Magistrate, Khayelitsha and Others (Commissioner for Gender Equality as Amicus Curiae)*; *Shibi v Sithole and Others*; *South African Human Rights Commission and Another v President of the Republic of South Africa and Another* 2005 (n 6).

²³ As indicated earlier, customary law represents culture as an identity facet, as customary law and culture are intertwined. Similarly the identity facet of race is also embedded within customary law, as in the South African context, customary law is only applicable to those whose racial identity is “Black African”. The collapsing of race and culture into customary law does not alter the significance or applicability of the GRACE model. The crude marker of culture throughout Africa is *still* race, both because of colonial and apartheid traditions and because of ease of determination. In contemporary South Africa race is now an *unspoken* factor in deciding culture. This raises its own problematic, which is beyond the scope of this thesis.

4. Applying GRACE

Although inspired by the *Bhe* case and the issue of property inheritance under customary law, this thesis involves the hypothetical journey of GRACE, a young woman who is impacted by various challenges of life and also considers the complications that arise for the judiciary in fashioning a remedy for her in the new constitutional era. GRACE's journey takes her to destinations of succession to property and political office, negotiation of marriage contracts and a hypothetical delict of seduction. Although the thesis focuses on these particular customary law issues of analysis, the applicable scope of the GRACE analytical tool is potentially boundless.

CHAPTER TWO – THE CONCEPT OF EQUALITY

1. INTRODUCTION.....	10
2. HISTORY OF EQUALITY	11
(A) <i>CONCEPTIONS OF EQUALITY.....</i>	13
(B) <i>THE FORM, SUBSTANCE AND FUNCTION OF EQUALITY.....</i>	16
3. CONTEMPORARY CHARACTERISATION OF EQUALITY.....	17
(A) <i>THE NATURE OF EQUALITY.....</i>	21
(B) <i>EQUALITY: A RIGHT OR A VALUE?.....</i>	23
(C) <i>EQUALITY: DIFFERENCE AND SAMENESS - MEANINGFUL IN ABSENCE</i>	26
(D) <i>EQUALITY AND THE VALUE OF DIFFERENCE.....</i>	27
(E) <i>THE UNIVERSAL ASSUMPTION OF EQUALITY</i>	28
(F) <i>CONTEXTUALISATION AND EQUALITY</i>	30
(G) <i>INDICATORS OF INEQUALITY.....</i>	32
4. EQUALITY FOR THE AFRICAN GIRL CHILD – THE IMPORTANCE OF CONTEXT AND IDENTITY.....	34
5. CONCLUSION	37

1. Introduction

Equality is a foundational value and organizing principle of the new democracy.¹

The process for reaching an equal society is in reality a complex and difficult struggle between those who wish to retain inequality for their own perceived benefit and those committed to its eradication.²

It is an empirical fact that human beings are unequal in almost every way. They are of different shapes, sizes, sexes, different genetic endowments, and different abilities. ... Yet, it is one of the basic tenets of almost all contemporary moral and political theories that humans are essentially equal, of equal worth, and should have this ideal reflected in the economic, social and political structures of society.³

¹ C Albertyn & B Goldblatt “Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality” (1998) 14 South African Journal on Human Rights 249.

² Justice Z Yacoob “Some Perspectives on the Movement Towards and the Struggle for Equality in Our Context” 2001) Acta Juridica 3.

³ L P Pojman & R Westmoreland “Introduction: The Nature and Value of Equality” in L P Pojman & R Westmoreland (eds) *Equality: Selected Readings* (1997) 1.

This chapter presents a historical review of the concept of equality and in so doing, establishes a baseline understanding of the purpose of GRACE's journey.⁴ In reviewing the development of the concept of equality⁵ in Western legal philosophy and jurisprudence,⁶ this chapter begins with Plato's conception of equality,⁷ and progresses to the contemporary definitions and analyses being employed by South Africa's Constitutional Court.⁸

2. History of Equality

Equality is the endangered species of political ideas.⁹

In the course of reviewing the historical development of equality, the argument put forward in this thesis maintains that "equality is a contested concept",¹⁰ and although this chapter does not seek to resolve the contest, it posits what the

⁴ As was discussed in Chapter One, GRACE represents an equality analysis framework that considers the intersecting identity aspects of gender, race, age and culture on one's experience of equality.

⁵ For the purposes discussed herein, equality is a descriptive concept, rather than an evaluative one. Equality refers to the result of the comparative assessment of two or more entities – be they groups or individuals. Equality as discussed herein cannot exist in the absence of a comparator. While this chapter discusses the nature and history of the concept of equality generally, the thesis overall functions to explore the nature of the entities and identities that feature in the comparative equality analysis. As the various conceptions of equality are discussed, it is important to bear in mind that, equality is completely dependent upon context; if it were not, it would have a clear fixed definition. But instead, equality is defined by the context in which it is assessed.

⁶ The argument will be made that the meaning of substantive equality is culturally contextual and hence, a Western framework of equality (as derived from the ancient Greek conception of equality) may not be fully applicable to a South African customary law context. The dominance and omnipresence of Western legal philosophy is discussed by J Murungi. Even in the context of traditional and contemporary philosophical ideals and values, these are often presented in contradistinction to, or within the Western context as a point of reference. See J Murungi *An Introduction to African Legal Philosophy* (2013) 12.

⁷ Note that Plato's conception of equality was elaborated upon by Aristotle and has conventionally come to be associated with him rather than Plato. See Aristotle *The Politics of Aristotle*, Book III The Theory of Citizenship and Constitutions, chapter ix The Principles of Oligarchy and Democracy, and the Nature of Distributive Justice, 1280 a8-15; and Book III, chapter xii, 1282 b18-23.

⁸ The GRACE analytical model proposed in this thesis is intended to be a tool for the courts.

⁹ R Dworkin *Sovereign Virtue: The Theory and Practice of Equality* (2000) 1.

¹⁰ *Ibid* 2.

substantive content of equality ought to be, if it is to have any value and relevance for the South African girl child.¹¹

The contemporary nature of social interaction demands that discussions of equality move from being idealised in mere concept to being realised in life.¹² This thesis is a journey from the ideal to the actual: it begins with the idea of equality and ends with a prescriptive analytical template for the full enjoyment of equality rights for a girl child living subject to South African customary law. A successful completion of this journey will hopefully disprove the latter part of MacKinnon's assertion that "equality is valued nearly everywhere but practised almost nowhere".¹³ The journey ends where it can be seen that the "value" and the practice converge.

In considering the origin and development of equality, it is not assumed that the fundamental meaning of equality has changed through the ages. Instead, the historical review is concerned with changes to the relevant comparator,¹⁴ as well as the arbiter of equality – the one who determines whether or not equality has been attained.¹⁵ This determination is highly subjective, as each arbiter of equality may perceive things differently, and perception will vary depending upon context. Given this connection between perception and the resultant equality, the GRACE analytical tool is presented for the benefit of the judiciary in order to broaden its vision, and ultimately, the perspective from which equality emerges.

¹¹ Recall from Chapter One that the primary concern with equality herein is for the purpose of securing rights for the girl child in customary law.

¹² If equality, or the method of analysis thereof is to have any substantive meaning, then it must be considered beyond mere theory, to practical terms. This is after all, the goal of equality rights litigation. Note that Chapter Eight discusses the application of the GRACE theoretical framework to a hypothetical situation and its legal pluralism complexities.

¹³ C A MacKinnon *Women's Lives Men's Laws* (2005) 44.

¹⁴ Equality is a comparative concept between two or more entities. The idea of equality comparators will be further developed in Chapter Six and Chapter Seven, where the GRACE model is applied to South African cases.

¹⁵ Generally, law uses the standard of the "reasonable person" when an arbiter is required in the abstract. The typical reasonable person will not be used here, as it is contended in this thesis that the determination of equality (and the fashioning of a remedy to alleviate inequality) are context specific, and that this familiarisation with particular contexts may go beyond the capabilities of the mythical reasonable person. The arbiter is also one who prescribes a remedy when equality has been denied. See *S v Ngema*, 1992 (2) SACR 651 (D) for a discussion of certain contextual factors to enhance the specificity of the "reasonable person under discussion."

(a) *Conceptions of Equality*

The Western concept of equality has been a factor in human relationships since antiquity. Although its precise nature and content have been constantly debated¹⁶, it is certain that “no value is more thoroughly entrenched in Western culture than is the notion of equality”.¹⁷

As Westen states,

The study of equality begins with Plato and Aristotle, ...Aristotle, building on the work of Plato said two things about equality that have dominated Western thought ever since:

1. Equality in morals means this: things that are alike should be treated alike, while things that are unlike should be treated unlike in proportion to their unalikehood.
2. Equality and justice are synonymous: to be just is to be equal, to be unjust is to be unequal.¹⁸

This ancient Greek conception of equality dominates contemporary Western and Western-inspired legal thought. As Brown explains,

...any survey of ideas that people have held about equality must begin with the Greeks. Their city-states confronted them with the basic issues that still concern us. The democracy of Athens achieved an equality of citizenship that has remained an archetype and an inspiration ever since.¹⁹

Brown further notes that originally,

... this equality obtained only in certain respects and within certain limits. The Greeks distinguished sharply between different types of person, and thought it only

¹⁶ Although it may seem strange that despite the pervasiveness and uniformity of Western thought that there would be such a contested range of opinions of the meaning of content of equality, this contest is due more to the variable nature of equality itself than to any inherent failings of Western thought.

¹⁷ E Chemerinsky “In Defense of Equality: A Reply to Professor Westen” (1983) 81 Michigan Law Review 575.

¹⁸ P Westen “The Empty Idea of Equality” (1982) 95 Harvard Law Review 537 at 542.

¹⁹ H P Brown *Egalitarianism and the Generation of Inequality* (1988) 15.

right and proper to treat them differently. This inequality of treatment they endorsed in the name of justice...²⁰

In requiring that like be treated alike, the criteria or bases on which likeness or unlikeness were determined, were not clear, or moreover, who was charged with the responsibility for making this determination was not clear. This is where the problem begins, and it is a confusion that has persisted as the concept of equality has developed. In spite of this confusion,

[e]quality is one of the oldest and deepest elements in liberal thought, and is neither more nor less “natural” or “rational” than any other constituent in them. Like all human ends it cannot itself be defended or justified, for it is itself that which justifies other acts – means taken towards its realisation.²¹

And so it seems that the lack of clarity or precision that arises from the absence of clear criteria as to what determines “likeness” came to be developed as a feature of equality itself. This is in part what leads Westen to conclude that “equality is an empty concept” – implying that its definition tells us little more than its name. Westen’s contention is that

...equality is entirely “circular”. It tells us to treat like people alike; but when we ask who “like people” are, we are told they are “people who should be treated alike.” Equality is an empty vessel with no substantive moral content of its own. Without moral standards, equality remains meaningless...²² [footnotes omitted]

Westen’s critique of equality is applicable to both contemporary and past times. There is nothing in the historical review to suggest that equality had once been infused with meaning and substance that did not subsequently exist. Even so, much has been written about the concept of equality, although not specifically about its content. So, it is not as though something has been lost in translation along the way, but more likely that details were missing from the map before the journey began.

²⁰ Ibid.

²¹ I Berlin “Equality” in *Proceedings of the Aristotelian Society* (1955-1956) 326.

²² Westen “The Empty Idea of Equality” (n 18) 547.

Westen seems to imply that the “emptiness” of equality inevitably causes problems with its application. In response to this, Chemerinsky comments that, “there is nothing inherent in the principle of equality that makes its misuse inevitable”.²³ But this statement may also be evidence of its emptiness, for how can one misuse or misapply something for which no substantive content has been given? Former Canadian Supreme Court Justice, Claire L’Heureux-Dubé, echoes the problem of the emptiness when she says, “equality is a term that, standing alone, means nothing. It has no universally recognised, inherent or intrinsic content.”²⁴

Further, Westen’s reference to equality as an “empty vessel” suggests that at its simplest level, equality is a comparative concept, drawing meaning and substance from the content of the two entities compared.²⁵ But, before the comparison can take place, L’Heureux-Dubé cautions that the parameters or context within which it occurs must first be established:

... it is helpful to conceive of equality as a language like every other: with rules of grammar and syntax, nuances, exceptions, and dialects. After all, a language is more than a form of communication. It is an embodiment of the norms, attitudes, and cultures that are expressed through that language. Learning a language and learning a culture go hand in hand. ...[A]ll of us are already familiar with the basic vocabulary of equality. ... This language is new to us, because equality analysis does not fit easily into traditional legal discourses and concepts. It is not easy to undertake an analysis of the multiple and overlapping manifestations of inequality in our society using traditional legal tests and tools.²⁶

The GRACE model recognises L’Heureux-Dubé’s call for novel or non-traditional tools of equality analysis.

²³ E Chemerinsky In Defense of Equality: A Reply to Professor Westen” (n 17) 594.

²⁴ C L’Heureux-Dubé “A Conversation About Equality” (2000) 29 Denver Journal of International Law and Policy 65 at 74. See also C L’Heureux-Dubé “Making a Difference: The Pursuit of Equality and a Compassionate Justice” (1997) 13 South African Journal on Human Rights 335.

²⁵ S Jagwanth “What is the Difference? Group Categorisation in *Pretoria City Council v Walker* 1998(2) SA 363 (CC)” (1999) 15 South African Journal on Human Rights 201.

²⁶ C L’Heureux-Dubé “A Conversation About Equality” (n 24) 74.

(b) *The Form, Substance and Function of Equality*

The term equality functions in several ways. It may be used as a *Principle* in that it serves as a guideline for judging actions and results. Equality may be a *Rule* in that it implies an obligation to abide by the *Principle*. It is a *Notion* or an *Idea* in the sense that it is abstract, but at the same time recognisably relevant. Equality is also an *Ideology* in the way that it is a broad system of normative thinking about the relationship between the idea and practice of life. Finally, and most importantly for the purposes of this thesis, equality is a *Construct*, in that it is something to be developed, redeveloped and varied according to the (social) context in which it operates. All of these terms - Principle, Rule, Notion/Idea, Ideology and Construct - are examples of the various forms that equality may take.²⁷ To this end, it should be noted that form dictates substance (and often function).

No matter which formation equality takes, it does not operate on its own. Equality operates within or in conjunction with other systems or conceptual frameworks. For example, it has traditionally been associated with the idea of justice, in the sense that justice is the broader ideology and the application and realisation of equality is a means of attaining the end goal of justice. The full realisation of equality is a necessary precursor to the attainment of justice. “For [Aristotle], as for many other theorists, the concept of equality is in some sense central to the idea of justice.”²⁸

²⁷ See generally Westen “The Empty Idea of Equality” (n 18).

²⁸ W von Leyden *Aristotle on Equality and Justice: His Political Argument* (1985) 108-109.

3. Contemporary Characterisation of Equality

Having briefly discussed the general concept and functions of equality, this section considers its substance. As was suggested earlier, discussions of equality have usually occurred in terms of two broad perspectives: either “equality” means something definitive and substantive for societal interactions, or it is too empty and vague to mean anything at all. This thesis begins from the perspective that, as it is presently constructed and applied, there is no substantively beneficial meaning of equality for the girl child living under customary law. The purpose of further discussion, however, is to construct a concept of equality that once applied, will allow for the proper realisation of substantive equality rights for such girl child.

The crude rule of “treat[ing] likes alike” is essentially formal equality. It maintains that those who are similar should receive similar treatment, and equality is thereby attained. The understanding of equality in this form, however, is based on the fallacy that any two or more people can accurately be described as being “alike”. Such a characterisation fails to consider the reality of human individuality, and consequently, is an affront to human dignity.²⁹ The “alikehood” which is intended to justify equal or like treatment should only be taken to mean that people are alike in so far as they share a common “humanity,”³⁰ and that any other

²⁹ In delivering the Bram Fischer Lecture on 26 May 2000 Laurie Ackermann, [then] Justice of the Constitutional Court of South Africa reflected that, “on the highest level, dignity is a quality of worth or excellence, and when used in the compound term ‘human dignity,’ it suggests all that for Kant is inherent in the human ‘personhood’ of every human being.” [footnotes omitted]

See L W H Ackerman “Equality and the South African Constitution: The Role of Dignity” 60 (2000) Heidelberg Journal of International Law 541.

http://www.zaoerv.de/60_2000/60_2000_1_a_537_556.pdf [last accessed May 2015].

³⁰ The reference to “humanity” here cannot be discussed in isolation of the notion of dignity. The relationship between equality and dignity is discussed as follows:

For equality is not really about being treated the same, and it is not a mathematical equation waiting to be solved. Rather, it is about equal human dignity, and full membership in society. It is about promoting an equal sense of self-worth. It is about treating people with equal concern, equal respect and equal consideration.

See T Lindberg [quoting L’Heureux-Dubé in “Conversations on Equality”] “Rooms with ‘Traditional Views’: Justice L’Huereux-Dubé and the Expansion of Interpretive Principles Related to Equality in the Context of Indigenous Rights” in E Sheehy (ed) *Adding Feminism to Law: The Contributions of Justice Claire L’Heureux-Dubé* (2004) 375.

basis for likeness is a convenient construction. Equality is however, a comparative assessment of groups or individuals with regard to a particular aspect at a particular time.³¹ For example, equality between a male and a female worker exists where they are both paid the same amount for each widget they produce in an hour. The two are not treated equally in terms of remuneration if the woman is paid 50 cents more per widget than the man. This example demonstrates the difference between numerical and proportional equality.³²

Equality in the mathematical sense involves a precise understanding of quantity, where $2+2=4$ or $1+1+2=4$ or $3+1=4$, and it is clear that what appears on the left side of the equal sign (=) has the same value as that on the right. On the basis of the three equations above, it appears that equality is about sameness (of result). Thus, no matter what components are used ($2+2$ or $1+1+2$ or $3+1$), the same result (4) is achieved. As Gosepath explains,

Proportional equality in the treatment and distribution of goods to persons involves at least the following concepts or variables: Two or more persons (P1, P2) and two or more allocations of goods to persons (G) and X and Y as the quantity in which individuals have the relevant normative equality E.³³

Hence, it is accepted that the amount of goods may differ from one person to the next, but the basis for this difference is understood to be contextually substantive, based on an appropriate determination of need, rather than an arbitrary allocation.

³¹ As Westen explains,

Statements of equality (or inequality) entail comparisons of two things or persons by reference to some external criterion that specifies the relevant aspect in which they are the same or different. To say that an apple is “like” or “equal to” an orange means that, despite their many differences, they each possess the feature or features that are relevant to an external criterion, whether those features be weight, surface area or sugar content; to say that they are “unequal” means that they do not share the relevant feature, whether it be color, taste, or juice content. In each case, however, the comparison for purposes of equality simply spells out what it means to have tested both subjects by the controlling standard of relevance.

See P Westen “The Empty Idea of Equality” (n 18) at 553.

³² Aristotle *Nicomachean Ethics* 1130b-1132b. See S Gosepath “Equality” in *The Stanford Encyclopedia of Philosophy* (Spring 2011 Edition) Edward N Zalta (ed)

<http://plato.stanford.edu/archives/spr2011/entries/equality/>, see section 2.2 Proportional Equality.

³³ Ibid.

Westen explains that “equality” itself remains the same; it is the basis of comparison that differs. In this way, the attainment of “[e]quality conceals the diverse nature of the normative standards it incorporates by reference, and, by masking them, becomes a “bottomless pit of complexities”.³⁴ Westen’s explanation is not to be taken as contradicting the contention in this thesis that equality is variable as opposed to being fixed. It is the “standard of measurement” or the contextualisation of identities that varies. This variance moves along a spectrum of equality, and often, for the sake of convenience, is collapsed to mean equality itself. In any case, it can be said that the inclusion of social context into the equality analysis is an attempt to work with what Westen refers to as a “bottomless pit of complexities”.

The focus on equality in this thesis is not mathematical, but rather, centres around the conception of equality in a complex contextual sense. For members of the judiciary charged with addressing equality claims, equality should not be understood (and applied) strictly in the sense of sameness. In order to attain and maintain true equality for the litigants, in the contemporary context of social interaction, equality must be about respect and value for individuality.

Equality in the mathematical sense is devoid of the problems of precision and definition that plague it in the abstract philosophical sense. The reality is that “equality is such an easily understood concept in mathematics that we may not realise it is a bottomless pit of complexities anywhere else”.³⁵ Unlike mathematical equality, where numbers speak for themselves - in that they are the values that they represent - any discussion of equality in the abstract sense must first establish a value for the two entities that are being compared. This difference between abstract and mathematical concepts of equality is explained as follows:

Except with abstract ideas, such as numbers, there is no such thing as pure equality.... Two objects are always different in some way or other – even two Ping-Pong balls are made up of different pieces of plastic

³⁴ P Westen “On ‘Confusing Ideas’: Reply” (1982) 91 Yale Law Journal 1165 [footnotes omitted].

³⁵ *Ibid* 1153 [footnotes omitted].

and exist in different places. Two things A and B, if they are equal, are equal with respect to some specific property or properties. ... So statements of equality must always answer the question: Equal What?³⁶

Equality as a substantive concept alters according to who is being compared with whom and on what basis.³⁷ Context is not only about who one is, but also where one is situated, and who one is, relative to someone else. This notion of relativity could be considered to be the “=” sign, or the demarcation point along which equality is determined. In contextual equality, the relationship between the two entities being compared must always be a point of equality. How this point is attained, however, is primarily dependent upon the perspective (including considerations of social context) from which the two entities are compared.³⁸

A conception of “equality” that is not premised upon any true equality or sameness, (as we have come to understand it in the mathematical or numerical sense,) may be difficult to grasp. Nonetheless, for the purposes of this chapter, what is referred to as social context equality is still essentially about balancing both sides of an equation. In this instance, however, where each side is not a pure number (as is the case with a mathematical equation), but a human individual with his or her own identity, the “value” attached to the individuals may vary with perspective and contextual reality. Hence, a remedy must be fashioned to realise the rights of both individuals, each according to their own particular needs. In short, social equality demands an interpretation more sensitive to context.

³⁶ “L P Pojman & R Westmoreland “Introduction: The Nature and Value of Equality” (n 3) 2. Note also that:

In distinction to numerical identity, a judgment of equality presumes a difference between the things being compared. According to this definition, the notion of ‘complete’ or ‘absolute’ equality is self-contradictory. Two non-identical objects are never completely equal; they are different at least in the spatiotemporal location. If things do not differ they should not be called ‘equal’, but rather, more precisely, ‘identical’.

See S Gosepath, “Equality” in *The Stanford Encyclopedia of Philosophy* (Winter 2005 edition), E N Zalta (ed). Accessed via <http://plato.stanford.edu/entries/equality>.

³⁷ C Albertyn & B Goldblatt “Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality” (n 1) 261.

³⁸ See Peter Westen “The Empty Idea of Equality” (n 18) 553, where he explains the fallacy in the statement that an apple is “like” or “equal” to an orange.

In addition, whatever the criteria for discerning the individuals to be compared, they should be reasonably relevant to the purposes for which they are being compared (e.g. access to education, entitlement to inherit property, etc.); and once these criteria have been established, then other irrelevant identity factors (age, gender, etc.) should not form part of the analysis. But note that the identity factors must form part of the analysis that critiques a particular equality standard for not taking these contextual identity factors into account. Therefore, one must be clear in explaining when and how context becomes relevant. For instance, is it only relevant to remedy a situation where inequality has resulted because of lack of context? Or should context always be relevant from the beginning of any equality analysis? This would mean that context is a necessary component of the equality equation. Where these factors of identity do become part of the analysis, they then become the basis for differential treatment and in turn the primary factor(s) to be considered in any remedy for the resultant inequality.

(a) *The Nature of Equality*

Each of the various functions of the term “equality” reflects a contested concept.³⁹ The contest revolves around whether equality is deemed to exist at any given time between two or more comparators. The standard used for comparison varies, depending on the nature of the comparators, the purpose for which they are being compared, and the perspective of the arbiter.

³⁹ See <http://plato.stanford.edu/entries/equality> (accessed February 2015). Here, Gosepath explains that the contested nature of equality is due to:

- controversy concerning the precise notion of equality;
- the relation of justice and equality (the principles of equality);
- the material requirements and measure of the ideal of equality (equality of what?);
- the extension of equality (equality among whom?);
- the status of equality within a comprehensive (liberal) theory of justice (the value of equality).

See generally, P Westen *Speaking of Equality: An Analysis of the Rhetorical Force of 'Equality' in Moral and Legal Discourse* (1990) 61; and C MacKinnon *Women's Lives Men's Laws* (n 13) 47, where she explains that it is not the treating likes alike approach that has been challenged, but rather the application of such an approach that results in the inequitable distribution of resources, not on the basis of need, but arbitrarily on aspects of identity such as race or gender.

In other words, the meaning and content of equality vary with time and place. As a result, the attainment of equality for a group or individual within a particular context does not mean that all aspects of their lives are infused with equality; it simply means that with regard to one particular circumstance, at a particular time, they may be equal. Simply put, equality operates in snapshots: at one moment in time, the conditions are ideal for an individual to enjoy the same position or entitlement as another individual.

It can also be said that equality is not sustainable, because the conditions or social context that characterise equality in one instance may change depending on time and place. This should not be taken to mean that equality is beyond definition, but rather, that it is variable. Variability must also be taken into account in another respect:

[t]he notion of equality has matured significantly since its evocation a few thousand years ago. It has changed as we as a society became more self-conscious and self-aware, as we became increasingly cognisant of the fact that the constituent elements of society often did not conform to the white, male-dominated values and power structures to which these elements were expected to abide.⁴⁰

In this sense, not only does the nature of equality change for individuals within particular contexts, but the understanding of the concept also changes and evolves for society on the whole.

Sen suggests that, not much should rest on this “empty” construction of “equality”, because it is only an initial stage of the analysis. The whole process of analysis must be completed, and all parts of the equation filled in, before one can see that, in view of the whole picture, the concept of equality is anything but empty.⁴¹ However, Sen also cautions that, “merely demanding equality without saying equality of what, cannot be seen as demanding anything specific. ... Even at this general level, equality is a substantive and substantial requirement.”⁴²

⁴⁰ C L'Heureux-Dubé “Making a Difference: The Pursuit of Equality and a Compassionate Justice” (1997) 13 South African Journal on Human Rights 337.

⁴¹ A Sen *Inequality Reexamined* (1992) 24.

⁴² *Ibid.*

(b) *Equality: A Right or a Value?*

Before the discussion of equality can continue, and certainly before an analytical tool for the meting out of equality in a customary law context can be presented, we must establish whether we should continue to talk about equality as a right or a value. Equality is a value in the sense that it is the lens through which we – paradoxically – embrace and celebrate difference,⁴³ and it is a right in the sense that it promotes the collective belief that individuals may seek to have the right to equality enforced in their favour.

This thesis takes the position that the constitutionalisation of equality rights is really the codification of an inherent human value that pervades all human relationships.⁴⁴ Because equality is a comparative concept, it follows that any analysis concerns a relationship between people. One cannot for example, compare a boy to a table for the purposes of determining a measure of relational equality. But one can compare a boy to a man, and the relational characteristics could be anything from age to physical ability to intellect. But the relevance of these characteristics depends on the purpose for which the two individuals are being compared. The comparison is based on some notion of relationship – or group similarity. For instance, the boy and the man who are the subject of the comparison may live in the same community; they may even share the same bloodline. The point is that the nature of the relationship or association between the two entities under comparison helps in setting the context within which the equality analysis occurs.

⁴³ Yet, even in the context of our differences “humans are essentially equal, of equal worth, and should have this ideal reflected in the economic, social and political structures of society.” See L P Pojman & R Westmoreland “Introduction: The Nature and Value of Equality” (n 3) 1.

⁴⁴ This constitutional codification is a covenant between citizens and government (vertical), as well as between citizens themselves (horizontal) to engage with one another in a manner that is fair, equitable and without discrimination. Such tacit agreement reflects a commitment to substantive equality – recognising that sometimes it may be necessary to treat people slightly differently from one another in order to arrive at equality of result. See C L’Heureux-Dubé “Making a Difference: The Pursuit of Equality and a Compassionate Justice” (1997) 13 South African Journal on Human Rights 338-341 for a discussion of substantive equality.

The argument in favour of equality rights for the girl child in the context of customary law contends that full realisation of the value of equality ought to be made available to her. This is not about the creation of a right, for the right is inherent, but rather it is about improving access to certain outcomes, such as education or inheritance. Also, it should be noted that equality of access is not intended to guarantee a particular result (i.e., acquisition of wealth or social status), for this is something that is largely left to the free market of social interactions. Equality of access, or opportunity as advocated for in this thesis, does not seek a guarantee of result, but simply the availability of paths that are likely to lead to that desired result.

In discussing the portrayal of equality as a value rather than a right, one must also mention the impact of codifying values in the Constitution. All constitutions are in some respect a codification of values. They represent a social contract between the citizens as to the parameters that will govern their interactions; the process for mediating disputes that may arise from alleged violations of this contract; and the delineation of the government's role in administering a system that provides for realisation of these values as practical results. As Albertyn and Goldblatt state with respect to (the "new", post-apartheid) South Africa, "[e]quality is a foundational value and organising principle of the new democracy".⁴⁵ So, the value of equality is not simply an abstract concept, but one that is vital to the creation of a country with a particular character. And the character of South Africa is not simply of one with lofty ideals for the structuring of human relationships, but rather of a country that requires the transformation of these lofty values into practice (especially as this was not the case in the "old" South Africa).⁴⁶

⁴⁵ C Albertyn & B Goldblatt "Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality" (n 1) 249.

⁴⁶ Note that Westen cautions against emphasising the nature of equality as a right: Rights are diverse; equality is singular. ... Rights are noncomparative in nature, having their source and their justification on a person's individual well-being; equality is comparative, deriving its source and its limits from the treatment of others. Rights are concerned with absolute deprivation; equality is concerned with relative deprivation. Rights mean variety, creativity, differentiation; equality means uniformity. Rights are individualistic; equality is social. See P Westen "The Empty Idea of Equality" (n 18) 537.

The judiciary steps in when individual citizens do not have the wherewithal to accomplish this, and the government machinery is too large and unwieldy. It should be clear that it is not the function of the judiciary to create a relationship of equality between individuals, for such a relationship is pre-existing in the ideal imaginings of human dignity.⁴⁷ Rather, it is a judge's function to interpret the relationship in such a way that enables the inherent equality to be realised (and if necessary, implemented through remedial award or action). This interpretation involves the stripping away of irrelevant considerations, which have clouded or obscured the equality that was always present. In light of this function, this thesis seeks to craft a tool to assist the judiciary in securing equality rights for the girl child under customary law.

The stripping away of irrelevant considerations in order to give light to the character of equality as a right is necessary for the full realisation of human potential. The value of equality assumes that individuals interact within the context of society, and the level of interaction (or each person's ability to participate in the interaction) ought not to be constrained by irrelevant considerations. The principle of substantive equality does not require that all individuals participate in society at the same level, but simply that the participation of one person is not unfairly constrained by another.

This check on participation is what helps to ensure that the value of equality is a practicably realisable right, thus reflecting a society that is able to put the theory of equality into practice. Is this not after all why the value was constitutionally entrenched? Again, it is necessary to refer to Alibertyn and Goldblatt, who explain that

Equality as a value **and** as a right is central to the task of transformation. ... As a value, equality gives substance to the vision of the Constitution. As a right, it provides the

This is not a statement against the validity of rights, but rather a caution as to how and when to exert them. An assertion of a right is often asserted as a remedy for a denial of treatment of a particular entitlement. In heeding Westen's caution, the emphasis ought to be on applying an analytical tool that is reflective of the values espoused within South African society – and equality would be foremost amongst these, given its placement in the Constitution.

⁴⁷ This pre-existence is rooted in universal societal values about the promotion and protection of the equality and dignity of citizens.

mechanism for achieving substantive equality, legally entitling groups and persons to claim the promise of the fundamental value and providing the means to achieve this.⁴⁸ [emphasis added]

In essence then, the success of a transformative new democracy depends on the extent to which it is able to turn the value of equality into a tangible right. In the course of this transformation, “equality...has to address the actual conditions of human life and not an abstract concept of identical treatment which is equally applicable to all, whether black or white, man or woman.”⁴⁹ As Albertyn and Goldblatt state, “the fact that there is a relationship between value and right – the value is used to interpret and apply the right – means that the right is infused with the substantive content of the value.”⁵⁰ Thus, on one level it is impossible to extract equality, the value, from equality, the right. What is more, the entrenchment of the equality right in a national constitution suggests that the interpretation and application of that right is to be in accordance with the nation’s values.

(c) *Equality: Difference and Sameness – Meaningful in Absence*

Equality is only a subject for consideration when it is not present, or when it has been denied. Denial is often due to the meting out of equality on the basis of irrelevant considerations. Such a practice flies in the face of a theory that deems the essential similarity of persons to be of central concern, while at the same time acknowledging that exact sameness is neither possible nor desirable. On the basis of this premise, substantive equality is really about an acceptance of difference. Thus implicit in the value of equality is a potential celebration of difference in the realisation that difference is necessary for equality to be realised.⁵¹

⁴⁸ C Albertyn & B Goldblatt “Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality” (n 1) 249.

⁴⁹ Ibid 252.

⁵⁰ Ibid 249.

⁵¹ Jagwanth explains that in the course of carrying out this interpretive exercise, “equality as a value may be used by courts even where the right is not invoked, allowing substantive equality principles to form the lens through which application of the law takes place.” See S

In summary, one cannot speak about equality unless: one acknowledges and accepts difference and also appreciates that disregarding irrelevant considerations of difference is vital to the attainment of equality. The key then is how to determine when a particular aspect of difference is relevant. Not all issues are relevant at the same time, or in the same way. The reference to “issues” here means aspects of identity – that which makes person “A” recognisably distinct from person “B”. It is the improper consideration of aspects of identity that results in discrimination, and consequently inequality.

(d) *Equality and the Value of Difference*

The attainment of equality is premised upon a restructuring of the way in which difference is perceived – or an identification as to which aspect of difference is relevant in a particular context. In this way it is seen that “disadvantage and difference become key characteristics of equality. Moreover, difference is understood as created rather than given.”⁵² Here Albertyn and Goldblatt explain that notions of difference (which essentially lead to inequality) are constructed, or interpreted rather than inherent. And if that is the case, then a method of construction or interpretation that disregards contextually irrelevant differences can go a long way towards protecting equality. Furthermore, they state that

[D]ifference does not inhere in the individual or group but in the relationship between individuals and/or groups. It is not the characteristics of the individual or the group that are the concern, but the social arrangements that make these matter.⁵³

Hence in the ever-evolving quest to protect and promote equality, we must be ever mindful of our interpretation of constructed relationships.

Jagwanth “Expanding Equality” in *Advancing Women’s Rights: The First Decade of Democracy* C Murray & M O’Sullivan (eds) (2005) 131.

⁵² C Albertyn & B Goldblatt “Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality” (n 1) 253.

⁵³ Ibid.

Bearing in mind the importance of relationships and relatedness in the broader scheme of equality analysis, it follows that “the terms ‘equal’ and ‘equally’ signify a qualitative relationship. ‘Equality’ (or ‘equal’) signifies correspondence between a group of different objects, persons, processes or circumstances that have the same qualities in at least one respect, but not all respects.”⁵⁴ Recognising this then, it follows that

‘equality’ needs to be distinguished from ‘identity’ – this concept signifying that one and the same object corresponds to itself in all its features: an object that can be referred to through various individual terms, proper names, or descriptions. For the same reason, it needs to be distinguished from ‘similarity’ – the concept of merely approximate correspondence.⁵⁵

Gosepath’s point here is essentially that inherent within equality are differences – recognising that the purpose of the equality analysis is not to compare identical entities. However, the key to the equality analysis is being able to discern irrelevant differences and properly assess the impact that relevant considerations may have on the result of equality. Equality is not about alleviating or denying differences, but rather about how best to factor in the differences in identity that may render the attainment of equality problematic.

(e) *The Universal Assumption of Equality*

This account of the origins of equality is founded on three assumptions. First, for the sake of convenience, it is assumed that the way in which the notion of equality is thought to have originated and developed in Western thinking is also an accurate reflection of how equality developed in non-Western societies.⁵⁶ The rationale behind this assumption is that equality is such an innate moral value that all societies operate with the same understanding.⁵⁷

⁵⁴ S Gosepath "Equality" (n 32) 1.

⁵⁵ Ibid.

⁵⁶ See J Murungi *An Introduction to African Legal Philosophy* (n 6) 1-28.

⁵⁷ Consider the comment of Isaiah Berlin that,

The second assumption flows from the first: given the innate nature of equality, it could not have developed any another way. The contemporary concern with the equality rights discourse is the effort to correct any deviations from the natural path of equality of result.

The third assumption is that, although there is certainly a general ideological consensus on the existence and content of equality within different societies, this meaning varies with society and context. Although the shell of equality remains the same – it stands as a basis of comparison of two entities – the desired end result is that superficial variations between these entities should not render them substantially different, or legally unequal. The third assumption, which is a recurring theme throughout the thesis, is almost in direct contradiction to the first two.

Hence, the cloak of equality is the same, but the precise content, application and momentary relevance of it must by necessity be determined by each society and each generation for itself. In essence, it is not appropriate to take a Western notion of equality constructed in the 18th century and apply it to contemporary (21st century) non-Western societies. The result will be a distortion of the substantive content of equality and a deep frustration for those who are being subjected to a foreign (both in terms of time and place) construction of equality, rather than taking on the community-building task of defining it for themselves.

Although this chapter began by seeking to establish common notions of equality, it ends by saying that this commonality cannot readily be transposed between societies. To do so is to require sameness, rather than an acceptance of difference. Equality is not about sameness, but about ensuring that the two comparative entities are recognised for their difference, and not discriminated or disadvantaged in any way because of this.

Equality is one of the oldest and deepest elements in liberal thought, and is neither more nor less “natural” or “rational” than any other constituent in them. Like all human ends it cannot itself be defended or justified, for it is itself that which justifies other acts – means taken towards its realisation.

See I Berlin “Equality” (n 21) 326.

(f) *Contextualisation and Equality*

Equality is infused with meaning only when it is considered in context. This thesis takes the position that the understanding of equality in one cultural context (one that is notionally subject to the common law) cannot be applied to another (notionally subject to customary law). Or, put another way, the standards used for determining equality in one context cannot be used in another because the comparators are too different. Not only are the indicators of equality different in each system, but also, the contextual content of equality is and must be different.

Consequently, there is no universal standard of equality (as much as there may be universal regard for the principle of equality). Certainly, there are consistent hallmarks as to what constitutes fair and just treatment, and there are similarities in impact such as the lack of dignity and the denial of justice that result from inequality; but the particular nuances of equality will vary and shift with culture, time and location. To suppose that there is a universal form and content of equality is to be limited only to formal equality – and a superficial formal equality at that, as the concern will be only with surface appearances.

Considerations of equality imply that there are gatekeepers of equality – those who are responsible for meting it out, as well as those who are charged with adjudicating or determining the presence and extent of equality. This understanding assumes that equality is something to be created, interpreted, and assessed. If this is the case, then it lends even more support to the argument that equality differs from one social context to the next, because it will be generally created and evaluated by particular members of a given society according to the parameters of that society.⁵⁸ Young suggests that,

[c]ritical theorists argue that the law must see human beings as rooted in their social context of concrete inequality and disadvantage. The law should recognise the unequal life chances occasioned by race, gender, socio-economic status and a host of

⁵⁸ It is interesting that in South Africa that historically, “gate keepers” have predominantly been white middle class judges who are charged with fashioning equality rights remedies for Black South Africans within a context in which the judges have no familiarity. The GRACE considerations are intended to be a tool for the judiciary to use to mitigate this contextual gap.

other factors, which affect a person's ability to compete on an equal footing.⁵⁹ [footnotes omitted]

The challenge for South Africa is to realise that equality – as provided for in the Constitution – has different meanings and contexts when cases involve application of the common or customary law. Because these systems reflect different cultures and values, there will be variation in the signifiers that each attaches to the notion of equality. As Margot Young explains, in South Africa,

[t]he historical consciousness of the Constitution as an instrument committed to social reconstruction, and the substantive equality vision that is part of reconstruction, are essential elements in this project of social transformation. The challenge of such transformation lies in the eradication of systemic forms of domination and material disadvantage. Equality, as both a value and a right in the Constitution, is central to the project of transformation and social reconstruction. This understanding of the role of the Constitution points to an equality jurisprudence that requires sensitivity to social context, to the “intricate and compounding nature of disadvantage” [footnotes omitted]⁶⁰

Although this comment can be interpreted as attaching the appropriate significance to “historical consciousness”, one wonders how to ensure that, in the course of preserving it and working towards social transformation, the present contextual realities of human interactions are not neglected. Further, it seems that, from Young's comment, “equality” as it relates to social transformation, and as reflected in the Constitution, refers to the relative juxtaposition of each of two legal contexts that exist in South Africa (such as customary law and common law). Reference to “systemic forms of domination and material disadvantage” suggests that there is one context that is more readily associated with privilege, leaving the other to be more readily associated with disadvantage.

⁵⁹ M Young “Travels with Justice L'Heureux-Dubé: Equality Law Abroad” in E Sheehy (ed) *Adding Feminism to Law: The Contributions of Justice Claire L'Heureux-Dubé* (2004) 296.

⁶⁰ *Ibid* 295. See also C Albertyn & B Goldblatt “Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality” (n 1) 249-253.

(g) *Indicators of Inequality*

Talk of equality alerts one to the fact that one group or individual wields privilege and power in society and the others are disadvantaged and powerless. The line dividing them is constantly being repositioned. In this regard, consider that

Eradication of these unequal life chances and conditions requires legal sensitivity to the individual in the context of her group, social, and economic circumstances. This sensitivity necessitates an equality analysis that focuses on “difference and disadvantage” that is based on a contextual analysis of the situation.⁶¹ [footnotes omitted]

However, the factors of “race, gender, socio-economic status”⁶² determine the dividing line. But beyond the suggestion of materiality, or economics, there is a sense of equality which goes further to focus on that counterpart – dignity – which is not about things or status, but is about the self.⁶³

In any case, the line is there, and as impermanent as it may be, it clearly demarcates two separate camps: those who seek and those who bestow. It is contended here that the whole focus of equality rights activism is to unify these two camps. As Lindberg explains,

Part of the difficulty is in acknowledging that there is an absolute difference between awarding someone rights of equality and having equality awarded to you. There are different sites – those of empowered and disempowered, of namer and named, those who see that you are unequal and those who are deemed unequal.⁶⁴

In many ways, this “absolute difference” boils down to little else apart from which side of the line one falls. In other respects, however, this line in the sand signifies a whole litany of truisms about the relationship between the groups of people on either side of it. This signifying⁶⁵ (or perhaps the understanding of the

⁶¹ M Young “Travels with Justice L’Heureux-Dubé: Equality Law Abroad” (n 59) 296.

⁶² *Ibid.*

⁶³ *Ibid.* Arguably, dignity can be said to blur the line rather than define it clearly.

⁶⁴ T Lindberg “Rooms with ‘Traditional Views’: Justice L’Huereux-Dubé and the Expansion of Interpretive Principles Related to Equality in the Context of Indigenous Rights” (n 30) 371.

⁶⁵ For an explanation of the contextual use of the term “signifying”, see Henry Louis Gates Jr *The Signifying Monkey: A Theory of African-American Literary Criticism* (1988).

signifiers) is what stimulates efforts to combat inequality. Lindberg stresses the importance of being able

... to understand that the ability to name inequality and to adjudicate and assess the situations from which inequality results, without visiting or understanding the sites of the resultant oppression, prejudice and “isms” is an incomplete journey.⁶⁶

She continues to suggest that if the ultimate goal for citizens is to “identify unfair situations and have them resolved according to the standards of [their] community, then equality is just not accessible – it is achievable.”⁶⁷ In speaking from the perspective of an Aboriginal woman about the experiences of her community with European settlers in Canada, Lindberg also describes the obstacles to be overcome in the establishment of a customary law notion of equality.

Lindberg’s proposition is not really about a new or unique construction of equality, but about the struggle to have the assessment of equality in an indigenous law context made by those who are themselves products of that context. There is no way that a (Western) common law framework of equality can be applied to a customary law context in the hope of arriving at an objective and balanced determination of the existence of equality. Instead, for equality to have any meaning, it must be judged on the contextual merits of the cultural context in which it is applied.

⁶⁶ T Lindberg “Rooms with ‘Traditional Views’: Justice L’Huereux-Dubé and the Expansion of Interpretive Principles Related to Equality in the Context of Indigenous Rights” (n 30) 369.

⁶⁷ Ibid.

4. Equality for the African Girl Child – The Importance of Context and Identity

For the purposes of this thesis, we need to consider whether equality is best treated as a means or an end result, or perhaps even both. In order to arrive at a generally understandable and applicable concept of equality, the importance of identity and context must be recognised.

A comprehensive treatise on the concept of equality as it has been interpreted and applied throughout the ages is beyond the scope of this thesis. Even so, this chapter demonstrates that the notion of equality that will be applied to the rights of the African girl child is not a novel conception, but rather a clarification of the importance of multiple and diverse aspects of identity to realising substantive equality.

The present concern with equality involves the South African girl child, and so we begin with the girl child herself, as the subject of the discussion of equality.⁶⁸ By endowing the primary comparator in the equality equation with certain specific aspects of identity, the notion of social context is brought into the analysis from the very beginning. Further, this means that the attainment of equality is contingent upon identity (or at least the package of identity rather than one aspect of identity), and it is seen that

[w]hen the source of inequality is located in the individual ..., there is a ready rationale for social inequality and limiting social entitlement. ... Because entitlement to social and economic benefits and the level of benefit is argued to be based on social conformity, *the adjustment of the individual to the existing social system* and paternalism (beneficence), equal treatment and equality-of-opportunity are achieved.⁶⁹

⁶⁸ This section is based largely on readings from MacKinnon and Sen, which focus on the existence of inequality that persists along racial and gender lines. The argument being made is to unpack traditional identity categories of race, sex (and age) and argue for a new interpretation of identity that results in equality rather than the conventional default of inequality. See C A MacKinnon *Women's Lives Men's Laws* (n 13); and A Sen *Inequality Reexamined* (n 41).

⁶⁹ M H Rioux "Towards a Concept of Equality of Well-being: Overcoming the Social and Legal Construction of Inequality" (1994) 7 *Canadian Journal of Law and Jurisprudence* 131.

Here, Rioux takes issue with a distribution of equality that is based on identity. Although this thesis contends that a contemporary equality analysis must factor identity into the equation, this inclusion of identity is ameliorative, and is intended to rectify a situation of inequality that resulted from failing to consider an individual's identity more fully. Rioux's complaint, it seems, is rooted in situations where there is no rational connection between identity and the granting or denial of equality. The remedy requires a conscious link to be made between identity and equality.

Albertyn and Goldblatt acknowledge this relationship as they explain that, "systemic patterns of disadvantage are group based, meaning that their eradication requires an examination of the individual in the context of her group and social and economic conditions".⁷⁰ More than that is needed, however: the elimination of the individual in the first instance will deconstruct the nature of her disadvantage, and the correlation of this disadvantage to the various aspects of her identity. Albertyn and Goldblatt reflect the argument historically posed by critical race theorists, namely, that in the effort to analyse identity and disadvantage,

we need to understand that complex forms of disadvantage based on, for example, race, gender and geographic location, form distinct categories of disadvantage which cannot be reduced to the sum of their parts. The intersectional nature of disadvantage (based on more than one ground) is therefore complex, creating different and multiple forms of inequality which cannot be explained or understood simply by reference to one of the grounds, such as gender.⁷¹

Particularly in the context of apartheid South Africa, where identity was relevant not only for appreciating the individual, but also for being able to categorise the individual within a group, access to equality was essentially based on racial group membership. In a contemporary equality analysis relating to the girl child living in a customary law community⁷², the argument

⁷⁰ C Albertyn & B Goldblatt "Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality" (n 1) 252.

⁷¹ Ibid 253.

⁷² A customary law community is one in which customary law is adhered to for personal, domestic issues. The content of such law is defined by the community members themselves and is subject to change and development, in keeping with evolving social values.

is that the attainment of equality ought not to be circumscribed by the child's overlapping membership in certain sex and age groups. (Note that these groups are on their own generally "marginalised" groups, and so membership in one or more of them places the individual in a position of heightened marginality.) Again on this point, reference is made to Albertyn and Goldblatt who explain that,

...differences are only problematic where they perpetuate the subordination of disadvantaged groups, such as women or black people. The evil is not located in difference, but rather, in any negative impact resulting from this differentiation. The concern is not to eradicate differentiation, but to make the effects of this differentiation 'costless'.⁷³ [footnotes omitted]

Ideally, attainment of equality is not dependent on the eradication of difference (so as to create a society of similar or like individuals who would then be treated equally because of their sameness), but rather, the proposed construction of equality is one that renders certain differences irrelevant for the purposes of attaining equality.

As noted earlier, what is required is a simple acknowledgement of the (intersecting) identities of a rights claimant, and the social context within which these identities operate.⁷⁴ In the case of the South African girl child, this requires acknowledging that perspectives on her race, gender and culture have traditionally operated to place her in a position of inequality vis-à-vis those who did not share her identities. Similarly, these identities must be considered in a contemporary construction of the way in which they were interpreted to the child's disadvantage, so as to avoid any one judicial result that would flow from a lack of consideration (as opposed to a negative consideration) of the intersecting identities.

Context is a key component in any effective analytical construction of equality. Just as attention to context was key in developing an understanding

⁷³ C Albertyn & B Goldblatt, "Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality" (n 1) 252.

⁷⁴ M Young "Travels with Justice L'Heureux-Dubé: Equality Law Abroad" (n 59) 296.

of the way in which inequality is manifested, context is similarly relevant to the application of any solution or remedy to address the inequality.

Inequality does not happen in a vacuum. Rather it is a reflection of a whole system of structures that collude to establish and perpetuate inequality on the basis of the way in which certain identities are perceived. Hence, in order for the application of an equality analysis to have any substantive impact, this intricate system must be transformed.⁷⁵

5. Conclusion

Women had no voice in contesting Aristotle's formulation in his day and have had little institutional power in shaping its legal applications since.⁷⁶

This chapter advocates for a comprehensive understanding of equality to be constructed, into which issues of identity and social context must be factored. This construction must strive towards substantive equality in keeping with "the Constitutional Court's commitment to a transformative project and to the creation of an indigenous jurisprudence of transformation."⁷⁷

In promoting a substantive equality analysis, it is recognised that,

contextual analysis is at the centre of substantive equality, shifting the legal enquiry from an abstract comparison of "similarly situated" individuals to an exploration of the actual impact of an alleged rights violation within the existing socio-economic circumstances. It also requires an examination of the individual within, and outside of, different social groups.⁷⁸

⁷⁵ According to Albertyn and Goldblatt, transformation require[s] a complete reconstruction of the state and society, including a redistribution of power and resources along egalitarian lines. The challenge of achieving equality within this transformation project involves the eradication of systemic forms of domination and material disadvantage based on race, gender, class and other grounds of inequality.⁷⁵

See C Albertyn & B Goldblatt "Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality" (n 1) 249.

⁷⁶ C A MacKinnon *Women's Lives Men's Laws* (n 13) 51.

⁷⁷ C Albertyn & B Goldblatt "Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality" (n 1) 250.

⁷⁸ *Ibid* 260-1.

South Africa is in the process of developing transformative equality jurisprudence, where an appropriate contextual analysis must involve the following:

- 1) an examination of the socio-economic conditions of the individuals and groups concerned;
- 2) identification of the impact of the impugned law on social patterns and systemic forms of disadvantage;
- 3) the complex and compound nature of group disadvantage and privilege must be understood by looking at grounds of discrimination in an intersectional manner;
- 4) the historical context of the case must be fully appreciated and explored.⁷⁹

These four criteria of an equality analysis must be considered alongside the necessity of attaining equality. According to Chemerinsky, the necessity of equality is explained by the following three purposes:

- (1) Equality is *morally* necessary because it compels us to care about how people are treated in relation to one another.
- (2) Equality is *analytically* necessary because it creates a presumption that people should be treated alike and puts the burden of proof on those who wish to discriminate.
- (3) Finally, the principle of equality is *rhetorically* necessary because it is a powerful symbol that helps to persuade people to safeguard rights that otherwise would go unprotected.⁸⁰

The GRACE analytical model proposed in this thesis meets these three necessities. It contends that application of a robust intersectionality analysis within the context of an equality analysis to secure rights and enhanced social positioning of the South African girl child will facilitate the achievement of substantive equality.

It is important to stress that “equality” is not the definitive answer, but rather, is a consideration that characterises any analysis that is aimed at securing and maintaining justice. Despite its laudable attraction as a goal, we must be ever-mindful of the “empty idea” of equality cautioned by Westen. Consider that,

[a]s a source of entitlements, equality cannot produce substantive results unattainable under other forms of analysis, because, ..., equality has no substantive content of its own. As a form of analysis, equality confuses far more than it clarifies, for at least

⁷⁹ Ibid 261.

⁸⁰ E Chemerinsky “In Defense of Equality: A Reply to Professor Westen” (n 17) 576.

four reasons: (1) by masquerading as an independent norm, equality conceals the real nature of the substantive rights it incorporates by reference; (2) by framing a person's entitlements in terms of his equivalence to others, equality misleadingly suggests that one person's rights vis-à-vis another's are identical in all contexts; (3) by encouraging use of monolithic levels of judicial scrutiny undifferentiated by the importance of the underlying right, equality erroneously suggests that all questions of equality are to be scrutinised under a single (or sometimes, a two-tier) standard of justification; and (4) by emphasising that some issues of equality entail dual remedies, equality erroneously implies that it entails uniquely flexible remedies.⁸¹

Hence, the challenge and the objective in developing a tool to secure equality rights for the South African girl child is to ensure that the comparison of relevant (identity) considerations in the equality analysis does not bring the principled value of the notion of equality itself into disrepute.

As the general conception of equality is made relevant to the contextual realities of the South African girl child living subject to customary law, it is interesting to note the connection between the non-static nature of equality and living customary law.⁸² Both govern the relations between individuals in society, and both are understood to change and evolve with society. It must also be clear that the pace of this evolution is anything but slow. Especially in the "new" South Africa, which is in the throws of transformation, change has become part of the characteristic make-up of the nation, and so it is to be expected that the changing nature of equality will also be rapid. The question then becomes when an expected point where a certain fundamental level of equality has been attained, such that the pace of change in what equality means will slow down, is this when the pace of transformation will correspondingly also slow down?

This chapter on equality has sought to lay the groundwork for the argument that true, substantive equality must focus on the intersecting

⁸¹ P Westen "The Empty Idea of Equality" (n 18) 579-80.

⁸² Himonga defines living customary law as "the unwritten practices observed and invested with binding authority, by the people whose customary law is under consideration." See C Himonga "The Future of Living Customary Law in African Legal Systems in the Twenty-First Century and Beyond with Special Reference to South Africa" in J Fenrich P Galizzi & T E Higgins (eds) *The Future of African Customary Law* (2011) 35.

identity of the rights claimant. An equality analysis that does not factor intersectionality into account cannot result in true substantive equality because such an incomplete analysis has improperly characterised the entities that are to be compared in the analysis. Further, the social context in which the individuals – who are the subject of the equality comparison – live is also a key aspect of the analysis. As will be explored further in chapters three and five, context is what provides depth and substance to the particular aspects of identity that are relevant in each analysis. Context also provides insight into what certain other identity aspects may be irrelevant. The context serves as the background against which the various aspects of identity that factor into the analysis interact. The interaction, or intersections of identities, will be explored in Chapter Three.

CHAPTER THREE – DEVELOPING AN INTERSECTIONALITY ANALYSIS

1. INTRODUCTION.....	41
2. OVERVIEW & HISTORY OF INTERSECTIONALITY	43
(A) <i>RACE AND GENDER: MOVING BEYOND THE ORIGINAL INTERSECTIONS</i>	<i>44</i>
(B) <i>CULTURAL CONSTRUCTIONS OF RACE AND GENDER</i>	<i>48</i>
(C) <i>THE SOCIAL CONSTRUCTION OF RACE AND GENDER IN A CULTURAL CONTEXT.....</i>	<i>51</i>
(D) <i>LOCATING THE INTERSECTIONAL SELF.....</i>	<i>53</i>
3. EXPANDING INTERSECTIONALITY TO MULTIPLE DIMENSIONS	55
(A) <i>MULTIPLICITY VS. ESSENTIALISM.....</i>	<i>57</i>
(B) <i>MULTIPLICITY AND MULTIPLE OPPRESSIONS</i>	<i>59</i>
4. DEMONSTRATING THE GRACE INTERSECTIONS	63
5. CONCLUSION	67

1. Introduction

The last decade of the twentieth century saw a proliferation of American legal academic writing in the genre of Critical Race Theory (CRT). These writings focused on the intersection of race and sex, and the nature of the discrimination that is rooted in the intersection of these two aspects of identity.¹ Certainly discrimination on the basis of either sex or race was not unique to that decade, but in the early 1990s the time was ripe to develop an analytical method for identifying and addressing concurrent discrimination along these two axes. This method was known as intersectionality,² the basic premise of which is that the world is experienced at the point where

¹ K Crenshaw “Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color” (1990-1991) 43 *Stanford Law Review* 1241”; K Crenshaw “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscriminatory Doctrine, Feminist Theory and Antiracist Politics” (1989) *University of Chicago Legal Forum* 139; P M Caldwell “A Hair Piece: Perspectives on the Intersection of Race and Gender” (1991) 40 *Duke Law Journal* 365; T Grillo “Anti-Essentialism and Intersectionality: Tools to Dismantle the Master’s House” (1995) 10 *Berkeley Women’s Law Journal* 16.

² K Crenshaw popularised use the term intersectionality in Critical Race Theory. See *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color* (n 1), and Crenshaw “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscriminatory Doctrine, Feminist Theory and Antiracist Politics” (n 1).

aspects of identity meet or intersect.³ Intersectionality was initially, and is still, most commonly used to explain the fact that race and sex collectively impact upon one's experience of the world, as well as the way one is perceived in the world. In the three decades since the concept of intersectionality was proposed, critical writing examining identity and discrimination has done so within the framework of intersectionality.

This thesis, concerned as it is with equality rights for the African girl child, seeks to apply intersectionality as an analytical framework. The very subject of this equality inquiry is the embodiment of robust intersecting identities. GRACE is at one and the same time, African, which brings race and culture into the equation⁴, female (specifically gendered as a girl, or culturally located as an African girl⁵), and her status as a child indicates that she is below the age of 18.⁶

Having broadly explored the notion of equality in Chapter Two, Chapter Three now offers an analysis of equality that acknowledges these intersecting identities.

³ Ideally, this meeting point is an intersection, a crossing, with one avenue/axis running through another; and it is unnecessary and impossible to determine which of the two avenues is the primary one.

⁴ Within the context of South Africa, "African" is synonymous with the Black African majority population whose historical economic marginalisation by the white population during the Apartheid era has created a chasm of inequality and injustice that even now, two decades after the end of apartheid and the election of Nelson Mandela ushered in a constitutional era of democratic, non-racial, non-sexist South Africa, efforts are still under way to bridge this chasm and deliver on the promise of substantive equality for all citizens of South Africa.

⁵ This emphasis on cultural location suggests that the African girl child is different from the Asian, American, or European girl child. This chapter seeks to demonstrate that this difference is a fundamental aspect of identity. It is an aspect that influences who one is as well as how one is situated in relation to others. Consider that culture is the arbiter of difference – both intra- and inter- cultural difference.

⁶ Article 1 of the Convention on the Rights of the Child (CRC) defines a child as every human under the age of 18, unless the laws of a particular country set the age of majority lower. GA Res 44/25, adopted 20 November 1989, entered into force on 2 November 1990. For the purposes of a broader GRACE equality analysis, age is not necessarily the key determinative identity aspect. It is relevant however, to generally understand how age in conjunction with other aspects of identity may function to heighten one's relative degree of power or marginalisation. Chapter Eight discusses the application of the GRACE analysis to a hypothetical situation involving a young woman who is over 18, yet her relative youth is still a factor of consideration in terms of her agency to litigate equality in her own right.

2. Overview & History of Intersectionality

A review of the history of intersectionality indicates that the concept originally focussed on African-American women as being located at the intersection of race and gender. Intersectionality is the convergence of two or more identity factors. For the present purposes, these factors are aspects of identity such as age, race, gender⁷, etc. The point at which they intersect⁸ is the point that locates a certain individual within a certain cultural and situational context at a certain point in time.⁹ In 1989, when Kimberlé Crenshaw first posited intersectionality as a method of anti-discrimination analysis¹⁰ in the (then) nascent field of Critical Race Theory (CRT), the primary concern was with the location of African-American women at the intersection of race and sex¹¹.

Crenshaw's offering was not the first time that critical analysis focused on the heightened vulnerability experienced by racialised¹² women, but it was the beginning of a method of analysis that shifted them from the margins of power (vis-à-vis those who located themselves at the centre) and instead

⁷ In the quarter century since the dawn of the CRT movement the equality rights lexicon has evolved from its reference to "sex" to the use of "gender" which speaks to the social construction of identities beyond mere biological sex. See:

plato.stanford.edu/entries/feminism-gender/. See also E Spelman *Inessential Woman: Problems of Exclusion in Feminist Thought* (1998) and K Millet *Sexual Politics* (1970).

⁸ "Intersect" is a more appropriate term than "converge" because aspects of identity do not end at the point of meeting, but continue past the intersection. A convergence seems to suggest a final meeting point.

⁹ See P Westen "The Empty Idea of Equality" (1982) 95 Harvard Law Review 537 at 553 as previously discussed in chapter 2, footnote 30.

¹⁰ See K Crenshaw "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscriminatory Doctrine, Feminist Theory and Antiracist Politics" (n 1) 167.

¹¹ Advances in both feminist legal theory and critical race theory have contributed to considering the impact of "gender" rather than "sex" on one's access to equality. The thinking is that sex is simply a biological determination, whereas gender reflects a social construction of sex. This social construction means that gender is also interpreted within a cultural and contextual framework.

¹² The term "racialised" reflects a social construction of race or ethnicity. The underpinnings of this social construction are that those who identify (or are identified) as non-white or not of European ethnic origin are marginalised simply because of this racial affiliation and are impacted by the institutions and policies of racism as a result. "Racialised" is the term used to reflect the process that has created disadvantage based on physical attributes. This process creates categories that become socially significant for the purposes of exercising power. See G-E Galabuzzi "Race, Racialization and Multiculturalism." (2006) 5 Canadian Diversity 29-31.

positioned them at the centre of their individual intersecting identities. As Martha Minow explains, intersectionality

...refers to the way in which any particular individual stands at the crossroads of multiple groups. All women also have a race; all whites also have a gender; and the individuals stand in different places as gender and racial politics converge and diverge. Moreover, the meanings of gender are inflected and informed by race, and the meanings of racial identity are similarly influenced by images of gender.¹³

In this way, intersectionality acknowledges that a person has several different identities, or group memberships at any one time. The relevance or dominance of one identity with respect to another depends on the context.

(a) *Race and Gender: moving beyond the original intersections*

This section reviews the intersectionality analysis that began with Crenshaw's work in 1989, and discusses how the initial intersectional framework of race and gender can be broadened to require that the intersection of race and gender be grounded in a cultural context. Additionally, this section considers the notion of the intersectional self, and explains the importance of self-identifying and locating one's self in the relevant intersection.

Critical race theory and critical race feminism¹⁴ were developed as a means of addressing the discrimination and oppression experienced by those

¹³ M Minow "Not Only For Myself: Identity, Politics and Law" (1996) 75 Oregon Law Review 647.

¹⁴ In explaining the origins of critical race feminism and where it is situated in the broad field of critical legal studies, Crooms says that

Critical race feminism, as a legal theoretical stance, not only has roots in the oppositional discourses of Critical Legal Studies, Critical Race Theory, and Feminist Legal Theory, but also represents an analysis that is, itself, oppositional within these discourses. Its method includes multiple consciousness and a bottom-based focus, which illuminates the position of the ignored and disempowered to challenge the biases and privileges left unaddressed by Critical Legal Studies, Critical Race Theory, and Feminist Legal Theory.

L A Crooms "Indivisible Rights and Intersectional Identities or "What do Women's Human Rights Have to do with the Race Convention" (1997) 40 Howard Law Journal 620, footnote 6.

whose racial identity – or racial identity along with gender – relegated them to the position of “other”. This position is located at the margin, rather than the centre of society’s political, economic and social power. The very mention of margin implies remoteness, a difference that is characterised by distance from the centre or norm. Even where anti-discrimination theory recognised the detrimental impact of marginalisation based on the difference of race or sex, there was no immediate recognition of the heightened marginalisation that affects those whose identity of difference is based on *both* race and sex.¹⁵ The simple picture is that “because of their intersectional identity as both women *and of* colour within discourses that are shaped to respond to one *or* the other, women of colour are marginalised within both.”¹⁶

It is not sufficient to say that this dual-basis of identity results in double or dual discrimination. More accurately, the more ways in which one’s identity differs from the accepted, constructed norm, (i.e. white, middle-class, able-bodied, heterosexual male), the further one is removed from the centre and relegated to the margin. The discrimination is not simply dual or additive, but is also compounded by the way the various identity aspects operate or intersect.¹⁷ This compound or intersecting discrimination reflects a depth and complexity to the experience of discrimination that is not fully appreciated in the two-dimensional depiction of sex and race discrimination. It follows that, if heightened discrimination results from the intersection of

¹⁵ For example, Crenshaw’s criticism of the limited scope of feminist theory is that when it “attempts to describe women’s experiences through analyzing patriarchy, sexuality or separate spheres ideology, it often overlooks the role of race.” See K Crenshaw “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscriminatory Doctrine, Feminist Theory and Antiracist Politics” (n 1) 154.

¹⁶ K Crenshaw “Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color” (n 1) 1244. In the last two decades since Crenshaw first theorised about the identity constructions of “women of colour”, this phrase has been replaced in contemporary academic and activist work by the term “racialised women”. This reflects an acknowledgement of the impact of race on identity. The impact itself may not have necessarily changed, but it is clear that “race”, “racialised” and “racialisation” hold more theoretical and analytical weight than “colour”

¹⁷ As Crenshaw explains,

...for Black women, the problem is that they can receive protection only to the extent that their experiences are recognizably similar to those whose experiences tend to be reflected in antidiscrimination doctrine.

See K Crenshaw “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscriminatory Doctrine, Feminist Theory and Antiracist Politics” (n 1) 152.

identity factors, such as race and gender, then similarly, the redress or remedy for this discrimination must also reflect the intersection.¹⁸

As intersectionality rapidly caught on amongst critical race theorists, it became clear that the utility of this analytical method was not limited to remedying the discrimination that results when individuals are perceived and treated as possessing singular rather than intersectional identities. Intersectionality would also have a permanent, future role in influencing the way in which individuals are perceived, and appreciated as social actors.¹⁹ In this way, intersectionality is not simply a method of correcting identity, but becomes fundamental to identity itself and the understanding thereof. It is this future function of intersectionality that Moran refers to as the challenge of intersectionality. She explains it as

[a] challenge to take what our oppression has given us and use it to create something new that is ours alone, to create a critique of what we have become

¹⁸ See K Crenshaw "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscriminatory Doctrine, Feminist Theory and Antiracist Politics" (n 1) 166-167, where she discusses the limitations of both Black liberationist politics and feminist theory in failing to consider intersectionality. Also, at page 167 Crenshaw explains that "placing those who are currently marginalised in the centre is the most effective way to resist efforts to compartmentalise experiences...." The point here is that experiences occur at the intersection of aspects of identity, so any method of assessing those experiences as being positive and self-reinforcing rather than discriminatory, must focus on that intersection and not merely on the compartments of experience and identity. Further, even where a particular incident of discrimination may be based upon one identity ground, it is the entire person, located at the intersection of all aspects of identity that experiences it, and so it is at this entirety that redress and remedy, as well as future prevention efforts must be directed. As Crenshaw states:

Aiming to bring together the different aspects of an otherwise divided sensibility, an intersectional analysis argues that racial and sexual subordination are mutually reinforcing, that Black women are commonly marginalised by a politics of race alone or gender alone, and that a political response to each form of subordination must at the same time be a political response to both.

K Crenshaw "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color" (n 1) 1283.

¹⁹ A special edition of Signs Journal contains several articles to support the contention that intersectionality was not just a method to redress discrimination, but also a lens through which to analyse social actors. See S Cho, K Crenshaw & L McCall "Toward a Field of Intersectionality Studies: Theory, Applications and Praxis" (2013) 38 Signs: Journal of Women in Culture and Society at 785-810; C A MacKinnon "Intersectionality as Method: A Note" (2013) 38 Signs: Journal of Women in Culture and Society at 1019-1030.

as a result of our oppression and a vision of what we can become when we leave behind our bondage.²⁰

Similarly, Crenshaw defines intersectionality as “a provisional concept linking contemporary politics with postmodern theory.”²¹ Further, she describes her vision for the use of the intersectionality analysis as a means to “disrupt tendencies to see race and gender as exclusive or separable.”²² Although the primary intersections that are discussed in Crenshaw’s work, and that of her CRT contemporaries, involve race and gender, it is also acknowledged that intersectionality “can and should be expanded by factoring in issues such as class, sexual orientation, age and colo[u]r.”²³

Crenshaw’s vision here opens two doors. First, there is a hint of the idea of “identity politics”, which she also discusses in “Mapping the Margins”.²⁴ Second, although her work focuses on the intersection of race and sex in particular, she acknowledges that there are other aspects that are fundamental to identity and intersectionality. This second theme, and the expansion of intersectionality into multiple dimensions will be discussed in part 3.

When considering intersectionality and identity politics, it must first be understood that the latter deal with the politics of the self: the specific identity both of who one is and who one is perceived to be. Intersectionality recognises that there are different aspects of the self that converge at a point to form “the self” within a particular context. When this becomes linked with identity politics, then identity politics becomes an aspect of context that impacts upon intersecting identities. Ideally the effect of this impact is to oblige society to recognise and accept differences from the social norm.

²⁰ B I Moran “Keynote Address Delivered for the Journal of Contemporary Legal Issues Conference on the Future of Intersectionality and Critical Race Feminism” (2000-2001) 11 *Journal of Contemporary Legal Issues* 699.

²¹ K Crenshaw “Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color” (n 1) 1244-1245, footnote 9.

²² *Ibid.*

²³ *Ibid.*

²⁴ *Ibid*1241.

The following three subsections explore this notion of identity politics and consider cultural and social constructions of the self and the way in which this construction of self enables one to locate one's self within a particular intersection.

(b) Cultural Constructions of Race and Gender

If it is considered that culture is the overarching framework within which identity functions, then race and gender, and other relevant aspects of identity are each seen to be culturally constructed.²⁵

Crenshaw refers to “representational intersectionality” simply as the “cultural construction of [racialised] women.”²⁶ This interpretation recognises that there is a particular way in which racialised women are constructed, or perceived within a particular cultural context by those who are located at different identity intersections from the racialised women they are constructing.²⁷ It was mentioned earlier that an intersectionality analysis is a way of addressing the gap that either an antiracist analysis or a feminist analysis leaves in fully addressing the intersecting identities of a racialised woman. To this it should be added that a racialised woman is a product of the cultural context in which she resides.²⁸

Consequently, a thorough intersectionality analysis will include consideration of the cultural backdrop against which the intersection takes place. This is because the cultural context attaches a value or perspective to aspects of identity, such that these come to be sites of difference upon which

²⁵ A full discussion of culture as the core identity aspect in the intersectionality analysis is explored in Chapter Five.

²⁶ K Crenshaw “Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color” (n 1) 1245.

²⁷ Note that the relative disempowerment associated with racialisation is what locates racialised women in a situation where their identities and access to equality are constructed for them – rather than them having the agency to construct their own entitlement in the world.

²⁸ It is acknowledged that in some instances, this cultural context is similar to the racial context, and in other instances, culture and race are merely incidental to one another.

discrimination is based. Once the impact of the cultural context is fully appreciated, then it is seen that,

Black women are the immediate, although not exclusive, physical and material representation of the intersection of race and gender. Progress against racism and sexism requires in addition, therefore, not only an eradication of negative stereotypes about black womanhood and their associated behavioural consequences, but also a recognition that theories of legal protection that affect the material circumstances of black women are not marginal to theories regarding race or gender, but rather are central to both.²⁹

Caldwell's reference here to stereotypes reflects subtle recognition of the impact of culture on identity. Stereotype and myth are creations of culture. These creations operate to reinforce particular perceptions of identity, both by the subject of the stereotype as well as outsiders. As Caldwell further explains,

[t]hese stereotypes, and the culture of prejudice that sustains them, exist to define the social position of black women as subordinate on the basis of gender to all men, regardless of colo[u]r, and on the basis of race to all other women. These negative images also are indispensable to the maintenance of an interlocking system of oppression based on race and gender that operates to the detriment of all women and all blacks. Stereotypical notions about white women and black men are not only developed by comparing them to white men, but also by setting them apart from black women.³⁰

Intersectionality cannot succeed as only a surface approach to equality and non-discrimination: it must penetrate to the very cultural heart of society if there is any hope of effecting real, substantial and lasting change.

Caldwell's work looks at the importance of hair to cultural identity, and by extension, the identity of one's self. Culture may be more than just an intersecting aspect of identity in the way that race and sex are. Culture is the backdrop against which the intersection occurs, which makes it even more difficult, if not impossible, to separate culture from identity. This relationship is particularly important where the African girl child is concerned, an issue

²⁹ P M Caldwell "A Hair Piece: Perspectives on the Intersection of Race and Gender" (n 1) 372.

³⁰ Ibid 376.

that will be elaborated upon in Chapter Five, where the implied oppositional perspective of the individual African girl child vis-à-vis the African community is discussed.³¹

Much like representational intersectionality, the social construction of the categories of race and gender is culturally specific and culturally dependent. This is positive in the sense that one knows where to go to find the myth and stereotypes that must be reconstructed in order to promote equality. However, the negative aspect of this construction is that where an ideology is culturally created, it is very difficult to alter it without the community being suspicious of the motives for (cultural) interference and hence being resistant to any change. Consequently, negative stereotypes must be identified as misconstructions, insofar as they are oppositional to a general notion of equality and fairness, which should be a pillar in all cultural creations. This identification requires debunking “the assumption that non-Western women are situated within cultural contexts that require their subordination, achieved by a discursive strategy that constructs gender subordination as integral to culture.”³²

Volpp makes the point here that within culture, there are constructions that value, or devalue individuals on the basis of identity. All that is required is a change to the value system, so that what had been devalued is now valued. This change in the value system is simply proof that “cultures undergo constant transformation and reshaping.”³³ Furthermore, Volpp explains that “[c]ulture is constantly negotiated and is multiple and contradictory. The culture one experiences within a particular community will be specific and affected by one’s age, gender, class, race, disability status,

³¹ For a fulsome discussion of group versus individual, see Chapter 5, part 3(a) and part 5. See also Chapter 9, part 3(b).

³² L Volpp “Feminism versus Multiculturalism” (2001) 101 Columbia Law Review 1185.

³³ Ibid 1192. This change in value system reflects a change in societal attitudes. In Chapters Six and Eight this change in societal values is discussed in the context of community-driven changes to living customary law.

and sexual orientation.”³⁴ In this way not only does culture affect identity, but aspects of identity also impact on the perception and experience of culture.

(c) The Social Construction of Race and Gender in a Cultural Context

Because race and gender are socially constructed it follows that, the intersection of race and gender, or specifically, the way one experiences this intersection is also socially constructed. This intersection of race and gender has been so constructed as to relegate one to a diminished position of “other”. As Volpp explains,

[i]n the sameness/difference debate, the standard that is reified is what is male. ... Either what is different to the masculinist standard is reimagined as the same, man’s mirror image – or what is different is reduced to being man’s other. One either seeks equal status, demanding the same rights as man, or one takes an oppositional stance, constructing an alternative discourse.³⁵

This thesis, through the GRACE model, argues for an “alternative discourse” with equal status to the reified male norm. In so doing, intersecting identities are reinterpreted as something positive. Reinterpretation also applies to the impact of culture itself. Culture is not simply another aspect of intersecting identity, but rather, the backdrop, or the plane upon which the intersection occurs. In this way, culture is the broader, shared common identity aspect of all members of a community.

Much of the intersectionality analysis, as applicable to GRACE, will depend on whether culture is seen as the backdrop against which the intersection occurs, or whether culture is itself simply an axis of the intersection. The answer to this question depends on the context in which the analysis takes place, or who or what the comparator is for the purposes of assessing equality – remembering that the quest to understand and attain equality is the reason an intersectionality analysis is undertaken in the first

³⁴ Ibid.

³⁵ Ibid 1203-4.

place. When the equality comparators both operate in the same cultural context, then culture will be the background of the intersection. But when the comparators are situated in different cultural contexts, then culture becomes an aspect of the intersection, rather than the field of the intersection.

In a situation where culture is an aspect of identity, Volpp explains that, if this cultural identity is different from the equality comparator – the self-appointed “norm” - then the difference in culture is highlighted so that the difference precipitates marginalisation. Consider that,

[t]hose with power appear to have no culture; those without power are culturally endowed. Western subjects are defined by their abilities to make choices, in contrast to Third World subjects, who are defined by their group-based determinism. Because the Western definition of what makes one human depends on the notion of agency and the ability to make rational choices, to thrust some communities into a world where their actions are determined only by culture is deeply dehumanising.³⁶

In this way, culture becomes not only the marker of difference, but also the marker of disempowerment. This powerlessness results in an inability to make choices, which often manifests as a basic inability to name one’s self for one’s self, because those who are powerless find that they are defined on the terms of others: their marginalised position prevents them from presenting and relying upon their package of intersecting identities in a dignified manner.³⁷

³⁶ Ibid 1192.

³⁷ Dignity is itself provided for under the South African Constitution (section 10) and often an equality analysis is accompanied by reference to dignity. See *S v Makwanyane and Another* 1995 (3) SA 391 (CC), where the right to life was intimately connected with the inherent right to dignity; and further, any attempt to dissociate these concepts would be considered a violation of equality rights. See also L Ackermann *Human Dignity: Lodestar for Equality in South Africa* (2012); A Foster “The Role of Dignity in Canadian and South African Gender Equality Jurisprudence” (2008) 17 *Dalhousie Journal of Legal Studies* 73-97.

(d) *Locating the Intersectional Self*

The remaining preliminary aspect of intersecting identity examined in this chapter is the notion of the intersectional self, meaning, self-identifying and locating one's self within the relevant intersection. As was discussed above, when considering the social construction of intersectionality and the place of culture in this intersection, culture can operate as a marker of difference and powerlessness, preventing the subject of the intersection from self-identifying and locating herself within the intersection of her own identity. The act of constructing one's identity may result in an individual contributing to her own marginalisation, not because she does not value herself and her own identity enough to advocate for demarginalisation, but because she is powerless to change the identity intersection within which she is located. The reality is that some aspects of identity have been socially constructed to exist only on the margins. This construction is what Carbado and Gulati refer to as "identity performance"³⁸ – and it is simply understood as the way in which identity operates or performs within a particular cultural context.

The fact that the "identity performance" relegates the performer to the margin should not be interpreted as an inherent failing of the "performer" of identity, but rather as a failure of the framework within which identity has come to be socially constructed. As Harris explains,

Far more for black women than for white women, the experience of self is precisely that of being unable to disentangle the web of race and gender – of being enmeshed always in multiple, often contradictory, discourses of sexuality and colo[u]r. The challenge to black women, has been the need to weave the fragments, our many selves, into an integral, though always changing and shifting, whole: a self that is neither "female" nor "black", but both – and.³⁹

³⁸ They explain that "the theory of identity performance is that a person's experiences with and vulnerability to discrimination are based not just on a status marker of difference (call this a person's status identity) but also on the choices that person makes about how to present her difference (call this a person's performance identity)." See D W Carbado & M Gulati "The Fifth Black Woman" (2001) 11 *Journal of Contemporary Legal Issues* 701.

³⁹ A P Harris "Race and Essentialism in Feminist Legal Theory" (1989-1990) 42 *Stanford Law Review* 604.

Harris' point here goes a long way towards strengthening the argument for intersectionality in that she describes the subject of intersectionality as being at once all of the aspects of her identity, and all of these aspects are central to her identity, with none taking precedence over the others. The inability then to separate out aspects of identity is what makes the intersectional framework a reasonable way of constructing and interpreting identity.

Harris' work is nicely juxtaposed with that of Trina Grillo, who cautions that, although at any given moment the subject of identity may locate herself at an intersection of identity based on certain categories of identity, it should not be assumed that these categories will intersect in the same way for each subject, or even that each category represents the same cultural experience for each subject. In this way, Grillo seeks to differentiate intersectionality from anti-essentialism. She explains that,

The basis of intersectionality and anti-essentialism is this: Each of us in the world sits at the intersection of many categories: She is Latina, woman, short, lesbian, mother, brown-eyed, long-haired, quick-witted, short-tempered, worker, stubborn. At any one moment in time and in space, some of these categories are central to her being and her ability to act in the world. Others matter not at all. Some categories such as race, gender, class and sexual orientation, are important most of the time. Others are rarely important. When something or someone highlights one of her categories and brings it to the fore, she may be a dominant person, an oppressor of others. Other times, even most of the time, she may be oppressed herself. She may take lessons she has learned while in a subordinated status and apply them for good or ill when her dominant categories are highlighted. For example, having been mistreated as a child, she may be either a carefully respectful or abusive parent.⁴⁰

The challenge then is to find the balance between naming one's own identity, based on simultaneous membership in certain identity groups (intersectionality) and assuming that others who share similar membership

⁴⁰ T Grillo "Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House" (n 1) 17, quoting unpublished manuscript: "Koosh Balls: Rendering Privilege Visible and Other Subversive Practices".

would locate their experience at precisely the same intersection (essentialism).

Advocacy around anti-essentialism is in many ways advocacy for the right to self-identify, and to locate one's self at a particular intersection. Even where one may share identity groups with another, the location of one's self at the intersection of these identity groups is still very personal.⁴¹

3. Expanding Intersectionality to Multiple Dimensions

...while Professor Crenshaw discusses a woman standing at the single intersection of race and gender, in fact we all stand at multiple intersections of our fragmented legal selves.⁴²

Aspects of identity not only intersect, but also intersect in various dimensions and various planes, thus creating a depth to intersectionality. This intersection in multiple dimensions is referred to as multidimensionality (or multiplicity). In describing the expansion of the intersectionality framework into multiple dimensions, the argument is made that the focus should not be on the intersection of two or more axes on a single plane; rather, intersectionality occurs simultaneously on many different levels and planes, and is in fact multidimensional, multi-layered and complex.

The discussion differentiates between multidimensionality (intersectionality in multiple dimensions) and essentialism. Although individuals may have multiple intersections in common, one individual cannot fully speak for another because no two people share the same multidimensional, intersecting identity. Additionally, multiplicity may also lead to multiple systems of oppression. The broader one's membership in groups

⁴¹ On this point, Coombs states: "We will understand the categories and their intersections better if we recognise that everyone exists at the intersection of categories, but everyone is also more than the intersection of categories." See M Coombs "Review Essay: Interrogating Identity" (1996) 11 Berkeley Women's Law Journal 247. In this way, people may be identified by their location at a particular intersection. But also, individual identity is more than where one is situated in the intersection.

⁴² T Grillo "Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House" (n 1) 18.

which are culturally constructed as different or “other”, then the more likely one is to experience discrimination at each of these sites of difference, and their multiple points of intersection.

It is suggested that an individual’s intersecting identities function as a discrete package that influence the context and circumstances of one’s experience of the world. Depending on where the intersection is situated on the global map, different avenues of the intersection may be more relevant than others, or the meeting point may be at different axes on the identity plane(s). Reference is not generally made to “the intersection” where one is,⁴³ but rather, the reference is to one’s own intersection – as in, “my intersection”. This implies that the manner in which aspects of identity intersect, converge and impact is a subjective, personal experience, as opposed to an objectively identifiable and locatable position.⁴⁴

Although others may be located at various points along the same intersecting avenues, the precise intersection – and the way each person experiences it – is unique. Again, this may present problems in terms of advocating for a Universalist approach to identity, intersectionality and human rights. But the reality is that, even though the point of intersection is unique, the framework for understanding and addressing it can be general enough to be applicable to all.

On the basis of Angela Harris’s claim that “differences are always relational rather than inherent”,⁴⁵ what is particularly important is not only the identity of the equality seeker, but also that of the comparator as well as the arbiter of equality. Identity is only relevant when there is something different

⁴³ Such a reference to “the intersection” implies that there is only one intersection, and a multitude of persons congregate at this “corner”.

⁴⁴ For example, an eight-year old Xhosa girl living in the suburban community of Langa is located at the intersection of age, gender, race, culture, class and language – and these factors collectively and simultaneously will shape her experiences and interactions within various strata of South African society (i.e. school, community, ancestral home, etc.).

⁴⁵ A P Harris “Race and Essentialism in Feminist Legal Theory” (n 39) 608. This is similar to the notion expressed in Chapter 2 that “equality is a comparative concept”. Thus differences, or the determination of equality are only realised in relation to, or in comparison to something else. This requirement of “relationality” or comparison suggests that equality and “difference” are both socially and/or constructed concepts, the determination of which depends upon what value is attributed to equality or difference in each particular context.

and separate with which to compare it.⁴⁶ For example, black is a point of departure from white; female is a point of departure from male; child is a point of departure from adult, etc. The more one departs from the (self-appointed or socially constructed) “norm”, the more identity (or the root of abnormality) becomes relevant. But these are only important because the arbiter of normalcy is generally the self-appointed (white, male, Western, heterosexual, middle-class) centre. If the theoretical framework moves from one universally accepted and recognised centre to an appreciation of individuality, then what had previously been points of departure are now points of identity – and simply identity – with no inherent value attached. And these various points of departure are seen as mere differences, rather than as oppositional differences.

(a) *Multiplicity vs. Essentialism*

Although multiplicity deals with the various levels of intersecting identity of a particular individual, it is also true that there is a commonality of the experience of intersectionality and multiplicity. This commonality should not be mistaken to mean that the experience of each individual, as she locates herself within various intersections, is *the same* as other individuals, a notion that is known as essentialism. As Grillo explains, “[e]ssentialism is the notion that there is a single woman’s or Black person’s or any other group’s, experience that can be described independently from other aspects of the person – that there is an “essence” to that experience.”⁴⁷ It should be noted that this independent “essence” then means that the experiences of the group members render each one indistinguishable one from the next. Such an interpretation is counter-intuitive to the recognition of individual identity that intersectionality seeks to achieve.

⁴⁶ L P Pojman & R Westmoreland “Introduction: The Nature and Value of Equality” in L P Pojman & R Westmoreland (eds) *Equality: Selected Readings* (1997) 1.

⁴⁷ T Grillo “Anti-Essentialism and Intersectionality: Tools to Dismantle the Master’s House” (n 1)19.

In her work critiquing the essentialism of race, as addressed in feminist legal theory, Angela Harris comments that

The source of gender and racial essentialism (and all other essentialism, for the list of categories could be infinitely multiplied) is the second voice, the voice that claims to speak for all. The result of essentialism is to reduce the lives of people who experience multiple forms of oppression to addition problems: “racism + sexism = straight black women’s experience” or “racism + sexism + homophobia = black lesbian experience.” Thus, in an essentialist world, black women’s experience will always be forcibly fragmented before being subjected to analysis as those who are “only interested in race” and those who are “only interested in gender” take their separate slices of our lives.⁴⁸

Further, Harris argues that not only does essentialism function to fragment the experiences and identity of racialised women, but the harm in essentialism is that in emphasising the commonality of experiences of group members, it also ignores the experiences of some members, in that the particular is sacrificed for the general. As is often the case with power dynamics, the particular is sacrificed for the general identity of racialised women. Consequently, to de-race (or erase) the racially constructed experience of gender or femaleness is to present only half of the identity of individual racialised women. In citing this as an inherent failure of feminist theory, Harris likens it to the way in which law and legal theory generally function to obliterate the experience of racialised women. In Harris’ opinion,

[j]ust as law itself, in trying to speak for all persons, ends up silencing those without power, feminist legal theory is in danger of silencing those who have traditionally been kept from speaking, or who have been ignored when they spoke, including black women. The first step toward avoiding this danger is to give up the dream of gender essentialism.⁴⁹

The abandonment of the “dream of gender essentialism” is not necessarily a bad thing, as this will mean that a broader spectrum of female identity can be embraced in its stead. This broad range includes the diverse experiences and cultural backgrounds of women. In one respect, this broad spectrum can be seen to add depth to intersectionality, especially when

⁴⁸ A P Harris “Race and Essentialism in Feminist Legal Theory” (n 39) 588-9.

⁴⁹ Ibid 585.

acknowledging that culture is one of the intersecting aspects of identity, because culture means a range of different things.⁵⁰ On the other hand, the broad spectrum of diversity of feminist identity could also serve as a general basis of oppression for women of varying cultural backgrounds. The question as to whether multiplicity might also lead to multiple systems of oppression is explored below.

(b) Multiplicity and Multiple Oppressions

The notion of multiplicity has been presented as an extension of the intersectionality thesis, and it seeks to demonstrate that not only does identity comprise the various aspects of identity that intersect on the surface plane, but that there are also intersections that take place at various levels and dimensions, which, although not always immediately visible, equally impact upon identity. In this way, multiplicity is a method of discerning the entire scope of one's identity. This factor is intended to assist one in self-identifying, or locating one's self within various intersections and dimensions.

Hutchinson however, addresses the notion of "multidimensionality" which, although similar to the connotation given to multiplicity in this chapter, focuses on the oppression that may be linked to various aspects of identity. In his analysis, the multiple dimensions of identity translate into multiple dimensions of inequality and oppression. This seems to mean that the more precisely one can describe one's identity location, then the more one is subject to oppression and inequality. Hutchinson states that

Multidimensionality recognise[s] the inherent complexity of systems of oppression ... and the social identity categories around which social power and disempowerment are distributed. Multidimensionality posits that the various forms of identity and oppression are "inextricably linked and forever intertwined" and that essentialist equality theories "invariably reflect the experiences of class – and race-privileged" individuals.

⁵⁰ These different things that define culture include "...a peoples' store of knowledge, beliefs, arts, morals, laws and customs, in other words, everything that humans acquire by virtue of being members of society." T W Bennett *Customary Law in South Africa* (2004) 79.

Multidimensionality, therefore, arises out of and is informed by intersectionality theory.⁵¹ [footnotes omitted]

A key issue for consideration is how to ensure that the acknowledgement of identity does not open the individual up to victimisation. It is not enough to be able to name and locate for one's self where one is. What is required is a conceptual, cultural reconstruction that aims to specifically devalue certain identity intersectionalities. As Volpp explains,

[t]he tension believed to exist between feminism and multiculturalism, or universalism and cultural relativism, not only relies upon the assumption that minority cultures are more sexist, but also assumes that those cultures are frozen and static entities. Within these discourses, only minority cultures are considered traditional, and made up of unchanging and longstanding practices that warrant submission to cultural dictates. Non-western people are assumed to be governed by cultural dictates, whereas the capacity to reason is thought to characterise the West. There appears to be an inverse correlation between full citizenship and cultural visibility.⁵²

The key to alleviating this tension rests in first acknowledging that one's own identification with, and location in a particular culture comes with its own value system, and that it may be inappropriate to apply this culturally-determined and dependent value system to assess another culture. Multiculturalism, in acknowledging the co-existence of (and equality) of various cultures, implicitly recognises the right of each culture to be evaluated according to its own cultural criteria. Where this recognition fails to occur, the result is a (self-appointed) dominant culture, which determines on the basis of its own value system that another culture endorses discriminatory practices. Take for example, the position of women within various cultures:

The relative status of women across communities is still used to assess the progress of culture. And the discourse of feminism versus multiculturalism assumes that women in minority communities require liberation into the "progressive" social customs of the West. The idea that "other" women are subjected to extreme patriarchy is developed in

⁵¹ D L Hutchinson "Identity Crisis: "Intersectionality," "Multidimensionality," and the Development of an Adequate Theory of Subordination" (2000-2001) 6 Michigan Journal of Race & Law 285 at 309-10.

⁵² L Volpp "Feminism Versus Multiculturalism" (n 32) 1190-1191.

relation to the vision of Western women as secular, liberated, and in total control of their lives. But the assumption that Western women enjoy complete liberation is not grounded in material reality. Rather, Western women's liberation is a product of discursive self-representation, which contrasts Western women's enlightenment with the suffering of the "Third World women."⁵³

The very act of being able to label cultures as being "progressive" or "Third World" operates from a Western self-appointed position of power and privilege. This sense of power and privilege has constructed gender and gender equality within a particular framework and posits this framework as the ideal, without pausing to consider the impact of culture and cultural bias on the creation and application of this framework.

As Volpp points out, not only does this Western framework unfairly judge non-Western cultures, but the framework, insofar as it is self-appointing, also takes its own construction of gender as being the only *correct* one, and then simplifies this to mean that the Western construction of gender is the *only* one. The result is that there is no room for a construction of gender by other cultures; so what we are left with is feminism on the one hand, and multiculturalism on the other. This is far from a fair contest.

The discussion then becomes not one of the way in which gender is constructed in different cultures, but rather one of gender (as constructed in the West) and of multiculturalism (as referring to non-Western cultures that are so primitive as to not even be able to develop an analytical framework for gender). Volpp explains that

In this discourse feminism also stands for "rights" and multiculturalism stands for "culture." In the universalism/cultural relativism or feminism/multiculturalism debates, the values of Western liberalism are reified, defined as the opposite of culture. With the discourse of feminism versus multiculturalism, each term is presumed to exclude the values of the other. Feminism is presumed not to value the rights of minority cultures; multiculturalism is presumed not to value the rights of women.

⁵³ Ibid 1199.

Constructing feminism and multiculturalism as oppositional severely constricts how we think about difference.⁵⁴

Volpp's assessment can be taken further to conclude that not only does the oppositional construction of feminism and multiculturalism constrict how we think about difference, but it also separates gender from culture in non-Western societies. Such a separation has the consequence of not considering all aspects of intersecting identities of non-Western women. Such an incomplete intersectional analysis can only serve to further harm the experiences of racialised women.⁵⁵

The notion that multiplicity – specifically the particular delineation of all aspects of identity that intersect and the various levels and dimensions in which they intersect – is an idea born out of a Western world value system which dismisses non-Western cultures as being generally oppressive. The result is what Volpp refers to as a battle between feminism and multiculturalism.⁵⁶ The simple juxtaposition of feminism and multiculturalism is to pit gender against culture.

Such an oppositional framework leaves no room for the idea of cultural constructions of feminism or feminist constructions of culture, both of which are attainable through intersectionality. Where, however, intersectionality may require cultural considerations, Bond cautions that

[m]isguided application of qualified universalism and international intersectionality may result in simplistic “additive” approaches to multiple

⁵⁴ Ibid 1203.

⁵⁵ This harm is seen to be aggravated where,

In the feminism versus multiculturalism discourse, “gender” and “race” are portrayed as oppositional, and thus mutually exclusive. The separation of gender and race in this fashion reflects the use of a reductive framework that has been widely criticised. Opposing race with gender suggests that women of color may be better off if their cultures wither or become extinct. Women of color will still be women; they just will not have a cultural identity anymore. This suggestion relies upon two assumptions. First, it assumes that women of color gain nothing from their cultures – that cultures of color are largely oppressive and should be shed to eradicate gendered subordination. Second, the suggestion ignores the fact that race and gender are mutually constitutive of one another; one cannot simply separate them in this fashion. Vectors of identity cannot be analysed as isolated phenomena.

Ibid 1202.

⁵⁶ See generally, L Volpp “Feminism versus Multiculturalism” (n 32).

systems of subordination, and overemphasis on victimisation, and the selective invocation of culture as a subordinating force. These three problems, however, are not the result of a defect in the theory of international intersectionality itself but rather a product of the misapplication.⁵⁷

Thus, where culture generally is relevant to intersectionality, and where multiculturalism will impact upon the way in which culture operates within the intersectionality framework, caution must be applied when assessing the weight that is attributed to culture.

4. Demonstrating the GRACE Intersections

Before I am black
Before I am woman
Before I am young
Before I am African
I am Human

I am Human⁵⁸

Because I am black
Because I am woman
Because I am short
Because I am young
Because I am African

Having described the operation of intersectionality as well as multiplicity on the development and reflection of identity, the discussion now moves to the operation of this analytical framework to GRACE, the South African girl child living subject to customary law. GRACE's experience of the world is located at the intersection of gender, race, age and culture. All of these aspects of identity converge at the point where GRACE lives. Yet, GRACE's position in the world is not static. The points at which these aspects of identity intersect vary greatly with context. Particularly with respect to GRACE, culture is discussed as the lens through which other avenues of identity and difference must pass.

Intersectionality, as conceived of by Crenshaw and elaborated upon by Harris, Caldwell and others, sought to establish a framework wherein

⁵⁷ J E Bond "International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations" (2003) 52 Emory Law Journal 71 at 160.

⁵⁸ Quoting D Farris "Before I am Black" *Wild Seed, Wild Flower* (1994) Columbia Records. See L A Crooms "Indivisible Rights and Intersectional Identities or "What do Women's Human Rights Have to do with the Race Convention" (1997) 40 Howard Law Journal 619.

racialised women who have been victimised by their intersecting identities, could reclaim the construction of this identity for themselves and negotiate it in such a way that they could position themselves at a point in the intersection that is truly reflective of who they see themselves to be in the circumstances. The application of the intersectionality framework to GRACE will be slightly different because, by virtue of her age and culturally constructed social position, GRACE, as a minor is not expected to have the agency to determine her own location within the intersection, much less given full control of her destiny.

The application of the intersectionality framework is not so much a tool to be used by GRACE, as it is a tool that will be used by others to study and assist GRACE. This tool will not only help in the broader understanding of how GRACE's intersecting identities are constructed so as to ascribe her with victim status⁵⁹, but also can be used in the deconstruction of identity so as to alleviate GRACE's victim status.⁶⁰ In this way, intersectionality is both a shield and a sword. It is a shield against a myopic, singular understanding of identity, and it is a sword with which to carve out a new position of identity.

The analysis of GRACE's situation is noteworthy for the emphasis that it places on culture. As was discussed earlier, culture can function as either the backdrop to the intersection, or an aspect of the intersection itself. For present purposes, as well as for the expansion of intersectionality into the field of customary law, culture will be seen as the background or the context of GRACE's identity. Bearing in mind the notion of multiplicity, and the multiple dimensions on which the identity operates, it must be stated that culture is not a flat or stagnant background. Rather, culture is broad and it is deep, and it is fluid. Culture brings dynamism to the context of identity.

GRACE, the African girl child is identified as such simply to distinguish her from a white, male, Western adult and not because there is any particular

⁵⁹ See M Mutua "Savages, Victims, and Saviors: The Metaphor of Human Rights" (2001) 42 Harvard International Law Journal 201- 245.

⁶⁰ See generally, M Pieterse "Finding for the Applicant? Individual Equality Plaintiffs and Group-Based-Disadvantage" (2008) South African Journal of Human Rights 399, 404-6.

worth or value inherently ascribed to any one, or the intersecting bundle of identities. Within this framework, there is no normative standard of identity (and worth); each one becomes his or her own arbiter of normalcy and difference. The difference then is not who one is, relative to others, but who one is relative to oneself (or who one could possibly be).⁶¹ This, however, is not actually the case. So “differences are always relational”,⁶² and consequently identity and intersecting aspects of identity are ascribed a value based on a value system that is culturally constructed.

The focus on intersectionality implicitly acknowledges that race-neutral approaches do not work – and in fact, may make things worse, since, to consider one’s self neutral is to imply that an integrated aspect of identity is irrelevant to (and readily severable from) a full and substantive equality analysis – this is a failure to fully acknowledge and appreciate the individual. Consequently, this failure also implies an inherent hierarchy of preference for the race that is neutralised.

Essentialism, in the context of culture on the African continent,⁶³ operates on the assumption that all members have the same vision for the protection, propagation and promotion of their culture. It makes no allowance for modern variations or developments in cultural practice that might mean different things for different persons. This lack of consideration often translates to disadvantage and discrimination among certain members.

Generally, African culture is more of a collective, integrative concept; thus, so too should the framework of identity within this culture be integrated, intersectional and unfragmented. The integrated identity of the African girl

⁶¹ See generally, A P Harris “Race and Essentialism in Feminist Legal Theory” (n 39) 594-597, 608.

⁶² Ibid 608.

⁶³ The phrase “culture in Africa” is used rather than “African culture” because the latter implies that there is one form of African culture. The former on the other hand, suggests what is closer to the reality, that there is a myriad of African cultures, just as there are several African communities within the continent. However, what is consistent among African cultures and communities is the pride of place that they allocate to cultural or traditional values. Although these may vary between the communities, there is a common understanding of cultural importance. Note that culture can be law and culture can be religion – this suggests the overarching impact of the cultural umbrella – as well as various sources for culture.

child is emphasised so that she cannot say “but for my race”, or “but for my gender”, or “but for my culture, I would be treated differently in a particular context”, because, were it not for any of these characteristics, and particularly for their intersection, then she would not be who she is. Thus, although the intersectionality analysis requires that the individual components of identity be taken into consideration, the remedy for any inequality requires that the composite whole of the intersecting identities be considered.

It cannot be the case that if any aspect of GRACE’s identity is altered, she is still left intact. Critical race theorists typically have the analytical skills to criticise their own oppression and proffer a framework for remedy. The girl child in contrast, on account of to her age, does not have this level of agency, insight, sophistication and analysis, so the framework of intersectionality must be developed for and applied to her. But this must be done in a way that is not paternalistic, intrusive or oppressive – bearing in mind also that the cultural or customary law identity may imply an inferior status or lack of capacity for individual agency and decision-making.

In “A Hair Piece”, Caldwell talks about not being able to dissociate hair from gender, race and culture.⁶⁴ This is a link to the broader argument that aspects of identity cannot be separated. In Caldwell’s argument, hair is social, political, cultural and emotional, and none of these aspects can be separated from the essence of hair. Certainly, some may be more relevant in certain contexts than others, but they are all still present.

In the American context, the struggles against racism, sexism and their interactions are based on efforts to combat negative stereotypes about race and sex that are held by members of the dominant power-wielding society. Consider GRACE’s situation, however, where members of the same race, often gender, and certainly culture, determine her disadvantage.⁶⁵

⁶⁴ P Caldwell “A Hair Piece: Perspectives on the Intersection of Race and Gender” (n 1) 367.

⁶⁵ The nature of this disadvantage of discriminatory treatment endured by GRACE within her own cultural context will be explored in Chapter Five. It should be noted that GRACE’s experience may not have been definitively constructed as disadvantage or discriminatory, but this becomes the result when her experience is assessed against a cultural, political and social framework that is different from the indigenous cultural framework in which she exists.

GRACE's story is also very much about combating discriminatory treatment from her own culture. This situation is not like the American examples, where those who are discriminated against identify themselves and are identified as a cultural and/or racial group that is designated as "other" by those in the society who have the power to either confer or deny a benefit.

In the western hemisphere, the concern with culture primarily relates to the protection of minority culture. Conversely, it can be said that throughout the African continent, the concern with culture is for the preservation of the dominant, long-standing majority culture, against incursion from Western culture(s). The question is: how does one develop an equality analysis framework that promotes equality and fairness within a traditional culture, without altering the core values and principles of that culture?

5. Conclusion

This chapter has explored the development and application of intersectionality theory to equality considerations involving race, gender and culture. The intention was not to present an exhaustive discussion of intersectionality. In fact, the point was to demonstrate that intersectionality theory continues to evolve and expand in keeping with the dynamic and fluid pace of our understanding of identity and social positioning.⁶⁶ Chapters Four and Five build upon the foundational understanding of intersectionality to demonstrate its utility as an analytical tool to discern the relationship between identity and equality.

The real issue to be explored is whether GRACE is similarly disadvantaged within the parameters of her own cultural framework as she is by the standard of a foreign framework.

⁶⁶ See K Crenshaw "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color" (n 1); Crenshaw "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscriminatory Doctrine, Feminist Theory and Antiracist Politics" (n 1); P M Caldwell "A Hair Piece: Perspectives on the Intersection of Race and Gender" (n 1); T Grillo "Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House" (n 1).

Intersectionality is not an end, or a tool in and of itself. Instead, it is a frame of reference with which to apply tools of equality analysis. Intersectionality provides for a particular method and theoretical concept of viewing and identifying the individual, but this identification alone does not fully address the issue of any inequality that an individual may be experiencing. Intersectionality is offered as an appropriate means for both individual and group assessment of the attainment of equality. Moreover, intersectionality is not something that is particularly flexible – after all, identities are what they are. There is flexibility in the ability to identify and consider all relevant aspects of identity in any particular situation. Intersectionality advocates for a broader consideration of the whole person, rather than a myopic approach that reduces people to arbitrary aspects of their identity.

CHAPTER FOUR – LEGAL PLURALISM OR INTERSECTIONALITY: MULTIPLE PATHS TO EQUALITY FOR GRACE

1. INTRODUCTION.....	69
2. DEFINITIONAL FRAMEWORK OF LEGAL PLURALISM.....	70
(A) <i>OPERATION OF THE LEGAL PLURALISM FRAMEWORK IN SOUTH AFRICA</i>	<i>74</i>
(i) <i>South African Common Law</i>	<i>74</i>
(ii) <i>South African Customary Law.....</i>	<i>75</i>
(B) <i>ADDRESSING THE PRESUMPTIVE HIERARCHY BETWEEN THE COMMON LAW AND CUSTOMARY LAW.....</i>	<i>82</i>
(C) <i>EQUALITY UNDER LIVING CUSTOMARY LAW</i>	<i>83</i>
3 CUSTOMARY LAW PRIOR TO 1996 CONSTITUTIONAL RECOGNITION	86
4. CULTURE AND CUSTOMARY LAW UNDER THE CONSTITUTION	87
5. RECOGNITION OF CUSTOMARY LAW AND THE CONFLICT OF PERSONAL LAWS.....	90
6. THE SECOND AND THIRD PHASES IN THE DEVELOPMENT OF LEGAL PLURALISM	92
7. THE IMPLICATIONS OF LEGAL PLURALISM FOR WOMEN	93
(A) <i>THE PROS AND CONS OF TAKING COGNIZANCE OF PLURALISM</i>	<i>93</i>
(B) <i>NEW INTERPRETATION OF CUSTOMARY LAW.....</i>	<i>96</i>
8. PLURAL NORMATIVE ORDERS, PLURAL PATHS TO EQUALITY? ...	97
9. CONCLUSION	100

1. Introduction

This chapter explores the concept of legal pluralism in conjunction with intersectionality as an analytical means whereby members of the judiciary can better facilitate access to equality for the girl child.

Legal pluralism refers to the coexistence of multiple normative orders within the same geographical and/or social context.¹ In this chapter, the

¹ See J Griffiths “What is Legal Pluralism?” (1986) 24 *Journal of Legal Pluralism and Unofficial Law* 1 at 3. Griffiths suggests that plural normative “orderings” – such as those prescribed by the family, voluntary associations or economic organisations are all subordinate to state law, and he refers to this hierarchy as legal centralism. For additional sources of definitions of legal pluralism, see note 4, below and accompanying text. Legal pluralism also refers to various international laws that impact on domestic legal orders; however, international laws will not be thoroughly explored in this thesis.

plurality of normative orders in South Africa is described, as well as how these orders intersect and interact. For the overall purposes of this thesis, pluralism and intersectionality are presented as two frameworks for analysing the most appropriate means for applying a right to equality.² Although they are discussed as juxtapositional and distinct, it is contended that the two frameworks are a dyad in the sense that they are constituent parts of a full and substantive equality rights analysis, as is appropriate in contemporary South Africa, with its system of plural normative orders and the complex and intersecting identities.

2. Definitional Framework of Legal Pluralism

All states host a multitude of social and cultural groups.³ Although some such groups may live by their own normative orders, they are also subject to the national rules of the state within which they are found. The existence of both state and non-state systems of regulation is referred to as *legal pluralism*, a term that may be better defined as:

recognition of the existence of different semi-autonomous normative orders regulating the lives of individuals; these will inevitably at certain times overlap and thereby generate conflicting rights and obligations.⁴

² Recall that the entire thesis is an attempt to develop a tool for the courts to use in the course of constructing equality, or more precisely, constructing a remedy to address inequality.

³ See V C Suárez & F J Z Cabot “Reflections of Legal Pluralism in Multicultural Settings” ISSN: 1989-8787 (available at: http://e-archivo.uc3m.es/bitstream/handle/10016/19318/reflections_camarero_zamora_PTD_2012.pdf?sequence=3) (last accessed February 2015). See also C Rautenbach “Cultural Diversity and International Law”, in A Schwabach A J Cockfield (eds) *International Law and Institutions* (2011) (Available at SSRN: <http://ssrn.com/abstract=1788139>) (last accessed July 2015). See also I William & M Oke “Multiculturalism, Legal Pluralism and the Separability Thesis: A Postmodern Critique of “An African Case for Legal Positivism” 2008(2) Law, Social Justice & Global Development Journal (LGD) (available at: http://www.go.warwick.ac.uk/elj/lgd/2008_2/williamandoke) (last accessed February 2015).

⁴ This definition is a collective restatement of definitions of legal pluralism reflected in numerous sources: John Griffiths “What is Legal Pluralism” (n 1) 3. See also S E Merry “Legal Pluralism” (1988) 22 Law & Society Review 870; M W Prinsloo “Pluralism or Unification in Family Law in South Africa”, (1990) XXIII Comparative & International Law Journal of Southern Africa 324; and for a broad canvass of definitions of legal pluralism that build upon Griffiths’ work, see G R Woodman, “Ideological Combat and Social Observation: Recent Debate About Legal Pluralism” (1998) 42 Journal of Legal Pluralism 21-41.

The potential for overlap is significant in two respects. In the first place, it implies that individuals situated at the intersections of semi-autonomous social fields have choices as to which rules they will invoke and abide by. In the second place, it suggests that social fields do not function in isolation but in conjunction.⁵ As Merry noted, legal pluralism, “not only posits the existence of multiple legal spheres, but develops hypotheses concerning the relationships between them. The existence of legal pluralism itself is of less interest than the dynamics of change and transformation.”⁶

Normative orders constantly influence one another, either formally, as when a state court acknowledges and applies a new rule of customary law, or informally, as when a family council takes account of a state law.⁷ These dynamics happen to be particularly pronounced in the context of South Africa, where the contemporary development of customary law renders it immediately amenable to changing social and political contexts.⁸

A pluralist perspective on law is valuable because it draws attention to the fact of normative multiplicity and invites a better-informed opinion on how courts, lawyers and legislators should respond to disputes and social problems. Hence, the question considered in this chapter is: what use can be made of a pluralist perception of law in order to improve access to equality, for the individual litigant and thereby, their socio-legal standing?

Vanderlinden, in proposing an early definition and application of legal pluralism stated that it is “essentially a condition, thus a way of being, of existing. It is the condition of the person who, in his daily life, is confronted in his behaviour with various, possibly conflicting, regulatory orders, be they legal or non-legal, emanating from the various social networks of which he is, voluntarily or not, a member.” J Vanderlinden “Return to Legal Pluralism: Twenty Years Later” (1989) 28 *Journal of Legal Pluralism and Unofficial Law* 153-4.

⁵ Intersectionality is also premised on the interaction and not isolation of aspects of identity. In this way, intersectionality and pluralism are similar for their method of considering the composite whole – whether this be of aspects of identity or legal systems. Acknowledging the existence of different aspects of identity or legal systems is only part of the issue – the most important thing is how these different components interact.

⁶ S E Merry “Legal Pluralism” (n 4) 879.

⁷ T W Bennett *Customary Law in South Africa* (2004) 29.

⁸ The development of customary law in the face of changing social context is discussed in more detail in part 4 below, as well as in Chapter Five.

A normative order, for purposes of this thesis, is taken to be any more or less autonomous set of rules to which people feel a sense of obligation, and from which they derive a code of conduct from their daily interactions with one another.⁹ For present purposes, pluralist jurisprudence can be traced to a simple statement made by John Griffiths in 1986: “the presence in a social field of more than one legal order.”¹⁰ Griffiths further contended that the common assumption - that state law was the dominant system – was an illusion and an ideology. So as to reflect the contemporary operation of pluralism in South Africa, this thesis argues that customary law formally co-dominates in the same social field. The example of the delict of seduction as reflected in both legal orders will be discussed in Chapter Eight and will illustrate this co-dominance.

Griffiths’ contention posed a clear challenge to the positivist and centralist conception of law at the time, whereby:

...law is and should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions. To the extent that other, lesser normative orderings, such as the church, the family, the voluntary association and the economic organisation exist, they ought to be and in fact are hierarchically subordinate to the law and institution of the state.¹¹

Griffiths called for greater respect to be shown to all the non-state normative orders. Customary law is one such example that is discussed in detail in part 2(a)(ii) below. This is not to say that customary law is not recognised by the state, but rather, that it is not created by the state.

Historically, of course, many states had been prepared to recognise and enforce certain subordinate normative orders, as in South Africa where

⁹ For a full discussion of semi-autonomous social orders see S F Moore “Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study” (1973) 7 *Law & Society Review* 719-746.

¹⁰ Griffiths “What is Legal Pluralism?” (n 1) 2. See also J Vanderlinden “Le pluralisme juridique: essai de synthèses” in John Gilieen (ed.), *Le Pluralisme juridique* (Brussels: Université libre de Bruxelles) 19-56 as referenced in J Vanderlinden, “Return to legal Pluralism: Twenty Years Later” (n 4) 149-158. Note also that the work of Karl Renner on the development of the sociology of law pre-dates all of this and could arguably be the earliest writing on legal pluralism. See K Renner (1949) *The Institutions of Private Law and their Social Function* (1949).

¹¹ J Griffiths “What is Legal Pluralism” (n 1) 3.

customary law had long been recognised by the state. But Griffiths describes this situation as a form of “weak” legal pluralism; “weak” because everything other than the received Western law depended on recognition by the state.¹²

“Weak” pluralism was a feature of most colonial legal systems, and was continued into the post-colonial period.¹³ As established in South Africa, such pluralism was a means to accommodate indigenous systems of customary law while at the same time imposing a colonial code of rules that would dictate the general obligations and entitlements of all citizens in the public sphere.¹⁴ As Prinsloo explains, in South Africa we find the following pattern of legal pluralism with regard to family law:

[T]he South African common law based on Roman Dutch Law, English law and legislation of the central government, briefly referred to as common law; different indigenous legal systems which in particular circumstances are applicable to members of the indigenous groups; the Hindu and Islamic family laws which are practised by members of the groups concerned but are not officially recognised.¹⁵

In the place of weak pluralism, Griffiths called for a “strong” variety, one that would depict “an irreducible set of legal orders that can be partly in harmony, partly in contest with each other”.¹⁶ Such a set of circumstances

¹² R Michaels “Global Legal Pluralism” (2009) 5 Annual Review of Law and Social Science 243 at 246. The reference to “everything other than the received Western law” refers to indigenous or customary practices in operation before the imposition of legal rules by the colonial settlers.

¹³ Upon independence, the new African governments set out on law reform programs that aimed at greater race, class and gender equality. Whether it would be best to create a unified system applicable to all groups or to continue with a plural system of laws that accommodate the customary and religious laws of different ethnic populations has been a recurrent dilemma. See A Hellum “Human Rights and Gender Relations in Postcolonial Africa: Option and Limits for the Subjects of Legal Pluralism” (2000) 28 Law & Social Inquiry 636.

¹⁴ In fact, legal pluralism in South Africa, both historically and currently, acknowledges one system of rules to regulate the domestic matters for Black Africans and another set for matters related to broader areas for all other members of the population. This differentiation of normative orders on the basis of race was not unique to South Africa, but was a key feature of most colonised nations. See Hellum (n 13) 636. See also, reference to Black Administration Act 38 of 1927 and the Repeal of the Black Administration Act and Amendment of Certain Laws Act 28 of 2005. Note that further provisions of the Black Administration Act were also later repealed by Act 8 of 2006, Act 13 of 2007 and Act 7 of 2008.

¹⁵ See M W Prinsloo “Pluralism or Unification in Family Law in South Africa” (n 4) 324-5.

¹⁶ R Michaels “Global Legal Pluralism” (n 12) 5.

implied a continual dialogue between the various normative orders, such as those that are based on religion or culture, without the presumed hierarchy of one over the other. Thus, the academic researcher would be obliged to regard the various normative orders under study as more or less equal in legitimacy and authority. The prominence of one over the other, in any given instance, would depend on context.¹⁷

(a) *Operation of the Legal Pluralism Framework in South Africa*

Having discussed the general conception of the pluralism framework, it is useful now for us to begin to situate this framework in the context of South Africa and its customary law and common law.

(i) *South African Common Law*

The current common law system in South Africa is referred to as a mixed or hybrid legal system, because it was influenced successively by three main sources: Roman, Roman-Dutch and English law.¹⁸ Without delving too deeply into the history of South Africa, its settlers and occupiers, suffice it to say that the primary sources of influence were the Dutch and the English.¹⁹

¹⁷ Legal pluralism is generally defined as a situation in which two or more normative orders coexist in the same social field”, whether recognised by the state or not. See S E Merry “Legal Pluralism” (n 4).

¹⁸ See L Berat “Customary Law in a New South Africa: A Proposal” (1991-1992) 92 *Fordham International Law Journal* 102-105, where she explains the history or the acquisition of Roman Dutch Law in South Africa, even after the Dutch settlers of the 1700s were replaced by British Colonialists of the early 1800s and that regime in turn became the republic of the Union of South Africa in 1961. See also I Zajtay & W J Holsten “The Permanence of Roman Law Concepts in South African Law” (1969) 2 *Comparative and International Law Journal of Southern Africa* 181-205; H R Hahlo & E Kahn *The South African Legal System and its Background* (1968) 575; Proculus Redivivus “South African Law at the Crossroads or What is Our Common Law?” (1965) 82 *South African Law Journal* 17-25. See also M Chanock *The Making of South African Legal Culture 1902-1936: Fear, Favour and Prejudice* (2001).

¹⁹ See M C Schoeman-Malan “Recent Developments Regarding South African Common and Customary Law of Succession” (2007) *Potchefstroom Law Review* 1-33; M Herbst & W du Plessis, “Customary Law v Common Law Marriages: A Hybrid Approach in South Africa” (2008) 3 *Journal of Comparative Law* 105-118. These two articles which focus on the differences between the common law and customary law in the context of succession and marriage respectively, suggest that the character of the common law is most remarkable when contrasted with customary law. Historically, it has been our fascination with customary law and the effort to understand it within the familiar parameters of the common law that has led to specific commentary about the common law. But for that fascination, the common law

Not only is the common law of mixed origin, but also what is referred to as the common law generally, is comprised of different components, namely case law and statute law. As Van der Merwe and Du Plessis explain,

...the fundamental rules and principles of large parts of the law, especially the law of obligations and property law are not contained in legislation. By virtue of the breadth of their subject-matter and its centrality to all legal relations, these areas of law form the backdrop to those that are largely legislative in structure, so that even the latter cannot be fully stated or understood without recourse to common law principles and concepts.²⁰

The overarching law of the country – guiding both the common law and customary law is the Constitution Act, 1996.²¹ In addition to the Constitution as the guiding framework, the common law takes its distinct character from the courts, legislators, bureaucratic officials and lawyers, all of whom inherited English traditions of the common law.

(ii) *South African Customary Law*

Ironically, the very attempt to define customary law functions to misrepresent its true essence. As Bennett says, “[c]ustomary law derives from social

would likely remain an unremarkable entity. That is, until the dawn of South Africa’s new constitutional era. Just as the common law is illuminated in contrast to the customary law, similarly, the post-apartheid constitutional era has also ushered in principles and values against which the common law writ large can be compared. See C Roederer “Working the Common Law Pure: Developing the Law of Delict (Torts) in Light of the Spirit, Purport and Objects of South Africa’s Bill of Rights (2009) 2 *Arizona Journal of International and Comparative Law* 427-504; J Sarkin “The Common Law in South Africa: Pro Apartheid or Pro Democracy” (1999) 23 *Hastings International and Comparative Law Review* 1-26.

²⁰ F du Bois “Introduction, History, System and Sources” in C G Van der Merwe & J E Du Plessis (eds) *Introduction to the Law of South Africa* (2004) 40.

²¹ The importance of the Constitution as an interpretive lens through which to view both the common law and customary law was expressed in the Constitutional Court decision in *Alexkor Ltd and Another v Richtersveld Community and Others*. Specifically the point being made is that the Constitution in its supremacy is a lens through which to view both the common law and the customary law. This was to refute the perception that customary law was to be interpreted through (and hence subordinate to) the common law. The Court said:

While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common-law, but to the Constitution.

2004 (5) SA 460 at paragraph 51.

practices that the community concerned accepts as obligatory.”²² This obligation is not derived from texts, but from a system of practice and acceptance by the community. These practices, although unwritten are “lived” and adapted as circumstances require. In essence,

...law itself changed according to the needs of the people. The law was a creative response of the people to the environment in which they found themselves. As a result, African customary law embodied the common moral code of the people. There was no sharp distinction between what ordinary members of society regarded as poor conduct and what the official organs of society decreed as law.²³

To reduce these practices to writing was to stifle the ability of those within (and potentially outside) the community to interpret community practices in a way that responded and adapted according to social context.²⁴ Yet, it is only in the written form that customary law can be examined and understood by state courts and lawyers.²⁵

There are three different forms of customary law. The first, referred to as the “living law”, is what is practised and understood by the members of the communities themselves. Secondly, there is the “official customary law”, which is what has been observed and transcribed into written codes – typically by those who are outside of the customary community. Hence the

²² T W Bennett *Customary Law in South Africa* (n 7) 1.

²³ C R M Dlamini “The Role of Customary Law in Meeting Social Needs” (1991) *Acta Juridica* 71 at 72.

²⁴ The danger of stifling is wrapped up in the very attempt to capture community practices in writing which is typically attempted by outsiders in an effort to observe and understand the nature and implications of such practices. However, one wonders whether the same degree of stifling occurs where community members themselves translate their practices into writing in an effort to preserve or record them for posterity. Arguably, when community members reduce customary practices to writing, they may do so in a language, style and format that most accurately and appropriately captures the essence and character of the practice at issue. The same may not be necessarily said of those outside of the community who may observe and record what they perceive to be the essence or nature of a customary practice. Yet without any historical grounding in the community and the practice itself, it may be difficult to ascertain for sure that the essence of a practice that is captured by outsiders is indeed the essence of the practice as conducted by community members. Perhaps only when community members themselves contribute directly to official customary law would it be most apt to authentically reflect the living law (at least for the time being – until the living law is developed through changes in community practice).

²⁵ See Bennett *Customary Law in South Africa* (n 7) 5, 44.

authenticity of the official customary law may be challenged on the basis that it is not an accurate reflection of community practice.²⁶

Reference is often made to a third type of customary law – that which is recorded by academics, notably anthropologists.²⁷ This third form is not itself law, but rather is commentary on or exposition of a system of law, conducted by those who are located outside of this system. For the present purposes, the discussion will focus on “living” and “official” customary law.

Historically in South Africa, Roman-Dutch law has been the dominant legal system, and customary law, although permitted to remain as the system adhered to by the indigenous peoples, was subordinate to Roman-Dutch law. As a consequence, it has generally been judged against the standards of Roman-Dutch law.²⁸ The result of this value judgment is the “official” version of customary law that is presented in court in matters dealing with conflicts between the two legal systems.

Once customary law becomes codified, however, it is no longer “living”, and thus less likely to be an accurate reflection of the contemporary attitudes and activities of the community. In this way, official customary law cannot truly be said to be customary at all. Nevertheless, the formal courts inevitably prefer official customary law, as it is available in a form that is familiar and readily ascertainable.²⁹

The core characteristic of living customary law is its flexibility, i.e., ease with which it can be adapted to meet current social needs. Official law

²⁶ G R Woodman “A Survey of Customary Laws in Africa in Search of Lessons for the Future” in Fenrich, Galizzi & Higgins (eds) *The Future of African Customary Law* (2011) 12-26.

²⁷ See T Venter and J Nel “African Customary Law of Intestate Succession and Gender (in)Equality” (2005) 1 *Journal of South African Law* 99.

²⁸ See L Berat “Customary Law in a New South Africa: A Proposal” (n 18) 102-105, where she explains the history or the acquisition of Roman Dutch Law in South Africa, even after the Dutch settlers of the 1700s were replaced by British Colonialists of the early 1800s and that regime in turn became the republic of the Union of South Africa in 1961. See also C R M Dlamini who states the fact that “customary law has often compared unfavourably with Roman-Dutch law, is not due to its inability to develop ... but rather because of negative attitudes towards it.” C R M Dlamini “The Role of Customary Law in Meeting Social Needs” (n 23) 74.

²⁹ See W Lehnert “The Role of the Courts in the Conflict Between African Customary Law” (2005) 21 *South African Journal on Human Rights* 263.

lacks this quality, as its existence in statute or precedent means that it may not be changed at will. It is, moreover, removed from the control of the community, whereby outsiders become final arbiters as to its content and meaning.³⁰ As Lehnert explains,

The courts' lack of understanding of and sensitivity to concepts of customary law is reinforced by their preference for the official customary law. Courts only refer to the living customary law on extremely rare occasions despite the well-known distinction between the two versions and the problems of the distorting effect of official law... Important reasons for this are probably that official customary law is easily ascertainable by and accessible to the courts, and that it best satisfies the desire of courts for clear and unambiguous rules.³¹

This preference for official customary law results in a diminished appreciation of the living law. The official customary law is given more attention and is presumed to carry more weight by the judiciary, although quite the opposite may be the case from the perspective of the community. Furthermore, Lehnert's reference to "unambiguous rules" indicates that certainty has value for those who are external observers of community practice (especially the courts) and not necessarily for members of the community in question.

Living customary law, although of critical importance to members of the community it governs, faces three challenges. First, it is likely to be marginalised, because it can only continue to flourish if the state permits it to develop outside the boundaries of official customary law.³² Living customary law is a dialogue between the need for stable rules and the daily life within which the rules are applied. Official customary law functions to remove the dialogue of exchange, and instead leaves only a monologue of rigid, obligatory rules. At least, this is the case where customary law is applied by outsiders – notably those from the western-styled judiciary.³³ And it is the

³⁰ See W Lehnert, who comments: "African customary law is different from Western law in many central respects. Important differences include its unwritten nature, its flexibility and its ability to adapt to changing circumstances." *Ibid.*

³¹ *Ibid.* 265.

³² *Ibid.* 265-6.

³³ Dlamini has attributed the lack of development of living customary law (in favour of the ossified official, written customary law), to the fact that:

problem of this outsider application that makes the GRACE analysis most helpful to the judge, as well as the litigants. The GRACE analysis is a reminder and a roadmap to the identity of the litigants; including how culture operates to impact the legal issue and how it should similarly operate to influence the appropriate remedy.³⁴

However, as Himonga explains, the situation is different where customary law is applied by the traditional courts, since they are staffed by members of the community they serve. She states that,

The decisions of [local] courts are more likely to reflect norms of living customary law than those of the magistrates' courts and superior courts for three main reasons. First, the judges are lay people who are in some cases also members of the local customary community and heads of their families. ... It would be difficult to imagine that these adjudicators completely abandon their living customary law the moment they don state hat to hear disputes arising within their community in state courts. Secondly, because lawyers do not appear in these courts there is little or no influence of professionals, trained in western jurisprudence, on the interpretation of customary rules by the justices. This minimises the distortion of customary law through western legal concepts and perceptions of law. Finally, because the judges are all members of African communities, there is little chance of their being misinformed about the customary law practised by the people...³⁵

The second challenge to living customary law is that it fails the rule of law principle, which requires legal certainty. Customary law is inherently

The courts, as part of the state apparatus, have not shown any willingness to develop or adapt customary law to altered circumstances nor have they displayed any profound insight into the institutions of customary law. This in itself is understandable as the courts have largely been manned by people who had little to do with customary law.

See C R M Dlamini "The Role of Customary Law in Meeting Social Needs" (n 23) 74. Thus, the further removed the arbiter of customary law is from the context and operation of that law, the less likely the arbiter will function to develop the law so that it is more reflective of contemporary community practice. Dlamini further comments that this lack of development is often considered to be an inherent failing of customary law itself, which in actuality, it is a failing on the part of the judiciary charged with interpreting and applying the customary law. See C R M Dlamini "The Role of Customary Law in Meeting Social Needs" (n 23) 74.

³⁴ More details of the application of the GRACE analysis will be discussed in Chapters Five and Six in reviewing relevant Constitutional Court cases, as well as in Chapter Eight in presenting the seduction hypothetical.

³⁵ C Himonga & C Bosch "The Application of African Customary Law Under the Constitution of South Africa: Problems Solved or Just Beginning?" (2000) 117 South African Law Journal 306 at 323-4.

flexible and in general consists of broad, often indeterminate principles that can be adapted to changing circumstances and the particularities of the case.³⁶ Uniform application of a fixed code of rules thus becomes a more difficult goal to achieve.³⁷

Closely related to this is the third challenge: living customary law may – or may not – give better effect to human rights than official customary law.³⁸ However, caution must be exercised, as not all official law is necessarily compliant with human rights principles. Inequality appears in all forms of law, and despite historical practices, one form of customary law should not be assumed to be inherently more just than another.

It seems that although official customary law may have been developed in order to enable the understanding of living law for purposes of state courts and administration, the disproportionate attention paid to official law has had harmful consequences for living law. Given that customary law

develops from practices in the community which are considered binding, African customary law introduces a fourth actor to the trio of the legislature, the executive and judiciary – the people or the communities who live by and create customary law. Although the legislature can codify the rules of customary law and the judiciary can lay down rules in precedents, neither institution creates, they merely reproduce or ascertain customary law.³⁹

In this way, the broader importance of living customary law is clear. The same cannot be said about official customary law, as it is not dependent on input from the community. In fact, quite the opposite is true, as official customary law often operates in a sphere removed from the community.⁴⁰

³⁶ N Mbodla “Customary Law in Search of Development” (1999) 116 *The South African Law Journal* 742.

³⁷ W Lehnert “The Role of the Courts in the Conflict Between African Customary Law” (n 29) 265-6.

³⁸ *Ibid* 266.

³⁹ *Ibid* 272.

⁴⁰ It is this separation from the community, and inflexibility of official customary law, which have supported the general acknowledgement that “‘the official version’ of customary law, although frequently consulted as the most readily available source, is often inaccurate and misleading.” A P Kult “Intestate Succession in South Africa: The “Westernization” of Customary Law Practices with a Modern Constitutional Framework” (2001) 11 *Indiana International & Comparative Law Review* 709.

In discussing the broad and interactive character of living customary law, Himonga and Bosch explain that,

Living customary law is used to denote the practices and customs of the people in their day-to-day lives. ... The living customary law is dynamic and constantly adapting to changing social and economic conditions. It has been observed in this regard that “[I]t is increasingly evident that what might be observed by or recited to researchers as being new customary norms, are the product of the melding of local customs and practices, religious norms and social and economic imperatives (and one may add constitutional imperatives), with the result that living customary law is formed out of interactive social, economic and legal forces which give it its flexibility in content.”⁴¹ [footnotes omitted]

Despite the challenges faced by living customary law, in the end, it is this form that most authentically reflects the daily realities of the communities in which it operates. Official customary law on the other hand, is fixed and imposed. These characteristics are not in themselves bad, but may have the effect of entrenching negative values, such as gender inequality.⁴²

Conversely, despite the benefits of the dynamic nature of living customary law, it too has some disadvantages. Because it is so susceptible to change, it is also susceptible to abuse, misinterpretation, wide variances in application and development in ways that might be radically different and contrary to the original principle of the law, as well as contemporary perceptions of human rights.

⁴¹ C Himonga & C Bosch “The Application of African Customary Law Under the Constitution of South Africa: Problems Solved or Just Beginning?” (n 35) 319.

⁴² Himonga and Bosch state that “while living customary law is considered to be more flexible and accommodative of women’s rights, official customary law is perceived in historical and contemporary terms as the embodiment of institutionalised gender inequality.” Ibid 329.

(b) *Addressing the Presumptive Hierarchy Between the Common Law and Customary Law.*

The co-existence of normative legal orders may at times reflect a hierarchical rather than parallel relationship.⁴³ Thus it is presumed that the common law trumps customary law, creating the impression that the latter is not worthy of the rigorous analysis and efforts to maintain a certain standard of principles, one of these being equality. This section argues that the common law and customary law are equally deserving of respect and that each system should be taken to reflect the interpretive principles of the Constitution, including equality.⁴⁴

Historically, permitting customary law to address the domestic matters of the indigenous population was a convenient way of governing and pacifying the colonised.⁴⁵ The notion of permission that is associated with customary law reinforces the presumptive hierarchy of the common law over the customary law. Similarly, it was said earlier that within customary law itself official customary law is favoured over living customary law – notably because the former is something that can be readily discerned and fits within an accepted framework of deconstruction and analysis. The same applies broadly to customary law vis-à-vis the common law. The preference is for that which is accessible and therefore, understandable. The fluidity of customary law poses challenges to those who believe that a system of law must be anchored in certainty.

⁴³ Historically, this hierarchy was reflected by the fact that customary law writ large was tolerated to exist, so long as it did not contravene the repugnancy proviso. The repugnancy proviso was loosely meant to relate to principles of natural justice or public policy. But in fact such determinations were based on a common law perspective of appropriateness. See T W Bennett *Customary Law in South Africa* (n 7) 67-8.

⁴⁴ Section 1 of the South African Constitution indicates that the state is founded on certain values – first among them being: “Human dignity, the achievement of equality and the advancement of human rights and freedoms”. See the Constitution of the Republic of South Africa, Act 108 of 1996.

⁴⁵ According to Chanock,

Processes of state sponsored legislation and the disruption of family formation and workings by the money economy and labour migration, led to the dominance of a new version of customary law which suited the white administrators and African male elders who ruled colonial society.

See M Chanock “Neither Customary Nor Legal: African Customary Law in an Era of Family Law Reform” (1989) 3 *International Journal of Law and the Family* 72.

The GRACE model seeks to demonstrate that all we really know for certain is that there are elements – either of identity or legal or cultural context that we cannot always know and thus cannot always predict. Such a model of analysis encourages us to be open to variations of difference and their impact, not only on the contextual issues but also the remedies of same.

(c) *Equality under Living Customary Law*

The centre of gravity of legal development lies, in our times as well as in all times, not in legislation nor in juristic science, nor in judicial decisions, but in society itself.⁴⁶

In the midst of this discussion on legal pluralism in South Africa, the focus of this thesis remains equality for the girl child living under customary law. In this regard, the issue then is: how does pluralism affect the enjoyment of equality? In the context of plural normative legal orders, this thesis considers whether the enjoyment of equality is possible – or simply different - under each of the normative orders at issue.

Although formal academic writing on the subject of equality under living customary law may be minimal, it is said that,

[i]n South African jurisprudence, there is no single interpretation of the concept Customary Law. ... Because it is based on African traditions and customs, if it is not legislated upon, it should continuously respond to society's contemporary values, needs and practices. If it is sufficiently responsive to social reality, its contemporary value would be measured in terms of its compatibility with the contemporary values, needs and practices of its jural communities.⁴⁷

Here, Mokgoro explains that the fluidity of customary law makes it difficult to pin down, especially for those who come from outside of the community in which the particular law at issue arises.

The mere fact that a system of law cannot be immediately accessed, interpreted and assessed by others, does not, by default, render the law

⁴⁶ See translation of Ehrlich's "living law" as reflected in W F Menski *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (2000) Platinum 114.

⁴⁷ Y Mokgoro "The Customary Law Question in the South African Constitution" (1996-1997) 41 Saint Louis University Law Journal 1281.

inappropriate for people living in accordance to its dictates. For instance, Bennett explains that, “Africa has its own system of rights, but one that was ignored by the colonial powers, because they refused to believe their subjects capable of producing such standards of conduct.”⁴⁸ Moreover, living customary law “is not what the courts recognise as legally binding when they decide a case, but only that which the parties live by.”⁴⁹

As former Constitutional Court Justice Yvonne Mokgoro explains,

...because social tradition and custom are so closely connected to social lifestyles, custom should reflect society’s stage of social development. In the case of African traditional social institutions which form part of the *corpus* of “positive” customary law, however, the place and extent of evolution was the prerogative of political and legal authorities. The denial of participation of blacks in the political and judicial processes generally precluded Africans themselves from having a direct influence on the development of customary law. Moreover, the significant failure on the part of legal policy to keep customary law abreast with social reality resulted in a sharp dichotomy between custom as law and custom as social practice.⁵⁰

This dichotomy, whether real or imagined, is partly what led to the diminished authority of customary law vis-à-vis the common law.

The assumption that customary law is inferior persists and, interestingly enough, as Mokgoro points out, even at the time of the drafting of the South African Constitution, there was much surprise that such credit was given a law thought to be inferior in content and purpose to the common law. However,

[c]ontrary to popular belief, the spirit, purport, and objectives of the Bill of Rights are not foreign to African custom and tradition. African culture has its own indigenous doctrine of rights, one which European

⁴⁸ T W Bennett *Customary Law in South Africa* (n 7) 81. Further, in stressing the point that “Africa produced rules that sometimes coincided with and sometimes even exceeded Western rights, Bennett cites the example of traditional courts that give a better guarantee of procedural fairness than their Western counterparts, due to the African process of justice allowing time for a thorough examination of all disputes and allowing litigants every opportunity to voice grievances. See T W Bennett *Customary Law in South Africa* (n 7) 82.

⁴⁹ See translation of Ehrlich’s “living law” as reflected in W F Menski *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (n 46) 117.

⁵⁰ Y Mokgoro “The Customary Law Question in the South African Constitution” (n 47) 1281.

colonists overlooked because they were too blinkered by a sense of superiority to realise that Africans too could evolve ethical systems.⁵¹

From a perspective of strong legal pluralism, customary law is not necessarily inferior to the common law in the eyes of its adherents. In the framework of strong legal pluralism, customary law exists as an acceptable system of rules. Further, because customary law is adaptable to the circumstances of the case, it is better placed to ensure substantive equality for the individual, than is the formulaic, rigid common law.

To presume that there is a universal standard of equality to which all normative orders must comply flies in the face of strong legal pluralism. Certainly there are generally accepted norms of fairness in a regime such as customary law, but these are infused by a culturally specific context.⁵² To this point, consider the Constitutional Court's statement in *Alexkor* that,

... indigenous law ... is a system of laws 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. Throughout its history it has evolved and developed to meet the changing needs of the community. And it will continue to evolve within the context of its values and norms consistently with the Constitution.⁵³

Further, in his dissenting judgment in *Bhe*, Justice Ngcobo cautioned that when dealing with indigenous law every attempt should be made to avoid the tendency of construing its concepts in light of the common law. There are obvious dangers to such an approach. These two systems of law developed in two different situations, under different cultures and in response to different conditions.⁵⁴ It is the protected reality of different situations, cultures and conditions that makes legal pluralism truly possible.

⁵¹ Y Mokgoro "The Protection of Cultural Identity in the Constitution and the Creation of National Unity in South Africa: A Contradiction in Terms?" (1999) 52 Southern Methodist University Law Review 1557.

⁵² See C Himonga "Living Customary Law in African Legal Systems" in Fenrich, Galizzi & Higgins (eds) *The Future of African Customary Law* (2011) Cambridge University Press 31-57. See also M Chanock *Law Custom and Social Order, The Colonial Experience in Malawi and Zambia* (1985).

⁵³ See *Alexkor Ltd and Another v Richtersveld Community and Others* (n 21) paragraph 53.

⁵⁴ *Bhe and Others v Khayelitsha Magistrate and Others*, 2005 (1) SA 580 (CC) at paragraph 156.

3 Customary Law Prior to 1996 Constitutional Recognition

Throughout Africa, association with customary law has historically been based on race. The racial divide was a consequence of colonialism and the clash of two social and economic systems, namely, the traditional tribal society of the indigenous peoples and the new world of the colonisers. The withdrawal of the colonial powers did not resolve this divide, and the contemporary conflict between customary and common law is a result of the colonial law.⁵⁵

So too in South Africa, indigenous Blacks were expected to regulate their personal family matters (marriage, inheritance, child custody, spousal support, etc.) in accordance with customary law, while other non-family law matters (notably criminal matters) were dealt with in accordance with the common law.⁵⁶ Whites were assumed to be subject to the common law in all matters.

The regime rendering Blacks subject to two different legal systems was regulated by the 1927 *Black Administration Act* (BAA).⁵⁷ This Act established one system of courts for Black litigation – commissioners’ courts and those of traditional leaders - leaving the magistrates’ courts and High Courts for Whites. In the later 1980s, commissioners’ courts were abolished and customary law was made applicable (as a system of law) in all courts in the land. Complete unification of the court system, however, was not

⁵⁵ R S Suttner “Legal Pluralism in South Africa: A Reprisal of Policy” (1970) 19 *International and Comparative Law Quarterly* 139.

⁵⁶ In the event that an issue arose regarding a matter that was governed by both customary law and the common law, this issue was typically resolved by a conflict of laws analysis. For instance, customary law was generally presumed to apply to certain causes of action and certain classes of litigant. This application was based on the assumption that the nature of the cause of action or the class (interpreted as cultural community) of the litigant gave an idea as to their cultural orientation and preferred system of law. It would then fall to the other party to demonstrate that the presumed choice of law was inappropriate. See T W Bennett *Customary Law in South Africa* (n 7) 49-57.

⁵⁷ *Black Administration Act* 38 of 1927. Many provisions of the act became unconstitutional with the introduction of the 1993 Interim Constitution and 1996 Final Constitution and the dawn of the post-apartheid era. This new constitutional era invalidated all laws that unfairly discriminated on the basis of race. The remaining provisions of the Act were eliminated by the *Repeal of the Black Administration Act and Amendment of Certain Laws Act* 28 of 2005 (n 14); See also [Repeal of the Black Administration Act and Amendment of Certain Laws Amendment Act 20 of 2010](#).

contemplated, since the courts of traditional leaders continued to administer civil and minor criminal justice according to customary law to people living within their areas of jurisdiction. These courts were (and still are) connected to magistrates' courts and the High Court by a system of appeal.

The BAA always stood as a symbol of apartheid because it had established a racialised judicial structure: “a separate and inferior system of justice for Africans” and a more highly advanced, technical system of common law for all other South Africans.⁵⁸ With the introduction of a new democratic constitution in South Africa, the BAA was repealed (albeit piecemeal) in order to dismantle these racial divisions. But in practice race is still a major factor in determining application of customary law and access to different courts.⁵⁹ A particular problem is the courts of traditional leaders, which are still governed by the BAA.

4. Culture and Customary Law under the Constitution

During the period of constitutional negotiations, the history of the discriminatory apartheid regime in South Africa led to calls for a unification of the court system and the laws. This, however, did not happen. Customary law was maintained as a separate and discrete system, although formally elevated to equal status with the common law. The reasons, no doubt, were: a need to incorporate on an equal basis a legal system rooted in African cultural traditions; a majority of South Africans identified and conducted their lives in accordance with customary law; the state had an already functioning system in rural areas that could be incorporated into official justice and administrative structures with minimal disruption.⁶⁰

Section 211(3) of the 1996 Constitution therefore provided that “the courts must apply customary law, when that law is applicable, subject to the

⁵⁸ S Sibanda “When is the Past not the Past? Reflections on Customary Law Under South Africa’s Constitutional Dispensation” (2010) 17 No.3 Human Rights Brief 31.

⁵⁹ See T W Bennett *Customary Law in South Africa* (n 7) 111-114.

⁶⁰ S Sibanda “When is the Past not the Past? Reflections on Customary Law Under South Africa’s Constitutional Dispensation” (n 58) 32.

Constitution and any legislation that specifically deals with customary law.”

In other words, when the rules governing conflicts of law (see below) indicate that customary law is applicable to the facts of a particular case, the court is bound to apply that law, but always subject to the Constitution and any relevant legislation.⁶¹

In addition, the new Constitution introduced a right to culture, which began an association of customary law with a fundamental human right.

Sections 30 and 31 of the Bill of Rights provide that:

s 30 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

s 31(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

In the pre-constitutional era, individuals were bound by the laws of their *race* and, although they could opt out of some or all aspects of customary law, for example, by applying for exemption, marrying or making wills.⁶² In the current constitutional era however, individuals are now free to choose the law pertaining to their culture.⁶³ In this regard, customary law is not simply another legal system subordinate to the common law. It is equal in respect and consideration to the common law. As former South African Constitutional Court Justice Yvonne Mokgoro explains,

⁶¹ See T W Bennett *Customary Law in South Africa* (n 7) 78.

⁶² *Ibid* 30-33.

⁶³ See T W Bennett “The Interpersonal Conflict of Laws: A Technique for Adapting to Social Change in Africa” (1980) 18 *Journal of Modern African Studies* 130. The differences in culture were formerly seen to be rooted in race, and, where racial differences were used as the basis for different legal regimes, problems ensued. See also T W Bennett “Legal Pluralism and the Family in South Africa: Lessons from Customary Law Reform” (2011) 25 *Emory International Law Review* 1029.

...on its face, the choice of law principle in South African jurisprudence provided a person with the freedom to participate in his or her cultural life, but did not provide that as of right. Section 31 of the Interim Constitution, however, introduced the idea of that choice as of right. It has been argued that this right does not nullify the previous freedom. A person only had an additional right to insist on the application of customary law in appropriate legal proceedings. The freedom, it is further argued, comprehends the generality of social life while the right requires a special act of recognition by courts or authorities.⁶⁴

More importantly, application of customary law no longer lies exclusively within the state's power to permit or deny, although applicants may also seek such application in terms of their right to culture under s 31 of the Constitution.

Nevertheless, a law or culture may not be practised "in a manner inconsistent with any provision of the Bill of Rights." In other words, the enjoyment of a culture (including customary law) is only protected as long as it does not violate the equality and dignity rights of other individuals. This provision does not necessarily mean that all customary law or practices that are inconsistent with specific provisions of the Constitution or the spirit of equality therein should be abandoned. There is scope for the development of customary law as a means of aligning traditional practices with contemporary constitutional principles. The GRACE model is offered as a tool to facilitate such development. It is also noted that, in his dissenting judgment in the *Bhe* case, Justice Ngcobo makes an eloquent argument for the development of customary law as a means of reinterpreting and safeguarding customary practices and ensuring equality.⁶⁵ This discussion is explored in more detail in Chapter Six.

⁶⁴ Y Mokgoro "The Customary Law Question in the South African Constitution" (n 47) 1285.

⁶⁵ What is more, where a rule of indigenous law deviates from the spirit, purport and objects of the Bill of Rights, courts have an obligation to develop it so as to remove such deviation. This obligation is especially important in the context of indigenous law. Once a rule of indigenous law is struck down, that is the end of that particular rule. Yet there may be many people who observe that rule, and who will continue to observe the rule. And what is more, the rule may already have been adapted to the ever-changing circumstances in which it operates. Furthermore, the Constitution guarantees the survival of the indigenous law. These considerations require that, where possible, courts should develop rather than strike down a rule of indigenous law. See *Bhe v Khayelitsha* per Ngcobo (n 54) paragraph 215. See also *Mabena v Letsoala* 1998 (2) SA 1068 (T) and *Fanti v Boto and Others*, 2008 (5) SA 405 (C).

5. Recognition of Customary Law and the Conflict of Personal Laws

Since the new Constitution, customary law has been kept as a separate system, although formally not inferior to the common law. As a result, conflicts between the systems of law are bound to occur. When individuals find themselves subject to two or more legal streams at the same time, an issue of choice of laws arises, and a decision must therefore be made as to which law is to prevail in resolving a particular issue.⁶⁶ This choice is complicated by the absence of a clear hierarchy of one system over the other.⁶⁷

This conflict has produced a discipline that is known as the interpersonal conflict of laws. In essence, the term refers to a situation where “two or more systems of law that are potentially applicable to a particular problem and the court must choose between them.”⁶⁸ Although framed in oppositional language, as the conflict of laws applies in the contemporary South African context, it is in reality a simple choice of whether to apply the common or customary law in a particular context. To decide such matters, the South African courts have been armed with certain statutory choice of law rules,⁶⁹ together with a rich heritage of precedents.

These various rules generally required consideration of the form and function of the parties’ lifestyles -- did they follow a notionally “western” or “African” model?⁷⁰ – which could be deduced from the following factors:

- (i) *Agreement and Intention*: courts considered whether the parties formally or implicitly agreed to the application of either customary law or the common law.
- (ii) *Nature of a Prior Transaction*: The words and actions of parties could provide insight into which normative order governed

⁶⁶ Yet it is noted that often laws are blended and hence the issue of choice of law may not necessarily arise.

⁶⁷ See Griffith’s emphasis on strong legal pluralism (n 1) 5.

⁶⁸ R S Suttner “Legal Pluralism in South Africa: A Reprisal of Policy” (n 55) 139.

⁶⁹ Black Administration Act, 1927.

⁷⁰ T W Bennett, “The Interpersonal Conflict of Laws: a Technique for Adapting to Social Change in Africa” (n 63) 131.

their relationship. For instance, “transactions about *lobolo* and loans of cattle...suggest an implicit understanding to allow application of customary law.”

(iii) *Subject Matter and Environment of Transactions*: Where a particular type of transaction was found in both legal systems, courts considered its purpose, subject matter and environment in order to determine a general cultural orientation of the case.

(iv) *Form of a Transaction*: Where a transaction was known to both legal systems, the parties’ use of a form unique to one system of law could indicate an intention to abide by that system. For instance, “if a couple married in church or a civil registry office, the form of the ceremony determined application of the common law to their capacity to marry, the divorce action and most of the consequences of the marriage.”⁷¹

(v) *The Parties’ Way of Living*: Courts considered the way in which the parties lived, and their overall cultural orientation as an indication of choice of law. For instance, “people who adhere to a traditional African way of life have been deemed subject to customary law, while those who adopt a Western way of life have been deemed subject to the common law.”⁷²

(vi) *Exemption from Customary Law*: This institution (now abolished) related to the state’s practice of permitting those Africans thought to be “suitably acculturated” to be exempted from the application of customary law.⁷³

⁷¹ Himonga explains that with the case of marriage, although individuals have a choice to contract marriages under either the common law or customary law regime, in most cases, Africans who contract civil marriages also conclude customary marriages with the same partner, with the result that they combine more than one legal order in a single transaction...” See C Himonga “State and Individual Perspectives of a Mixed Legal System in Southern African Contexts with Special Reference to Personal Law” (2010) 25 Tulane European & Civil Law Forum 31.

⁷² See T W Bennett *Customary Law in South Africa* (n 7) 55-56.

⁷³ Ibid 56-57. See also Black Administration Act 38 of 1927.

6. The Second and Third Phases in the Development of Legal Pluralism

The study of legal pluralism did not begin in the field of legal philosophy, but in colonial administrations and legal anthropology. It is only over the last three or four decades that pluralism moved into the “mainstream of legal discourse”.⁷⁴ Michaels attributes this shift to globalisation. He says that the “irreducible plurality of legal orders in the world, the coexistence of domestic state law with other legal orders, the absence of a hierarchically superior position transcending the difference – all of these topics of legal pluralism reappear on the global sphere.”⁷⁵

Although, as Michaels suggests, globalisation may be responsible for the widespread interest in legal pluralism, the fact of pluralism is of course not a new phenomenon. As Merry says, “plural normative orders are found in virtually all societies”.⁷⁶ Thus, study of legal pluralism in various societies across the globe may not be so much a reaction to globalisation, as a recent awareness of the multiple normative orders regulating society.

For purposes of academic study, however, global pluralism is the third phase in a development from classical to new legal pluralism. This follows the distinction between the first two phases as set out by Merry. First that,

classical legal pluralism was confined in two ways: geographically, it concerned only the interplay of Western and non-Western laws in colonial and postcolonial settings; conceptually, it treated the indigenous nonstate law as subordinate to the official law of the state as introduced by the colonising power.⁷⁷

And second that,

the new legal pluralism extends the concept to Western societies and the interplay between official and unofficial law more generally. In this genealogy, the third stage has an even broader

⁷⁴ R Michaels “Global Legal Pluralism” (n 12) 1.

⁷⁵ *Ibid.*

⁷⁶ S E Merry “Legal Pluralism” (n 4) 873.

⁷⁷ R Michaels “Global Legal Pluralism” (n 12) 4.

focus beyond the individual localised state or community (whether colonial or Western) and toward the transnational sphere.⁷⁸

It is this broader focus that inspired the term “global legal pluralism” for the third phase. Such pluralism implies a relationship between legal systems that extends beyond national borders. For the present focus, however, the emphasis will remain on domestic legal pluralism within the borders of South Africa.

7. The Implications of Legal Pluralism for Women

Given that gender is a key component in the equality analysis, it is helpful to explore the role of women in a pluralist framework, especially because women are often able to manipulate laws and jurisdictions to obtain which remedies are most favourable to their claims.

(a) *The Pros and Cons of Taking Cognizance of Pluralism*

In environments where customary law operates, the status of women is often regulated by two or more systems of law. As a result:

First, women can seize opportunities to manipulate laws and forums to their own advantage.⁷⁹ As we have seen, “individuals situated at the intersections of semi-autonomous social fields have choices as to which rules they will invoke and abide.”⁸⁰ Over the last 25 years awareness of discrimination against women and children within customary law communities has increased considerably,⁸¹ thereby giving women a new agency, and the necessary platform to assert their rights. Even so, customary law cannot completely escape accusations of discrimination or unfavourable applications towards women, as exemplified in debates regarding Female Genital

⁷⁸ Ibid.

⁷⁹ See B Z Tamanaha “Understanding Legal Pluralism: Past to Present, Local to Global” (2008) 30 Sydney Law Review 375.

⁸⁰ T W Bennett *Customary Law in South Africa* (n 7) 29.

⁸¹ Ibid 30.

Mutilation⁸² and virginity testing.⁸³ Bronstein explains that, “in South Africa the customary law dilemma is invariably conceptualised as a terrible clash between culture or the cultural rights of historically disadvantaged communities on the one hand, and the equality rights of women (a disadvantaged group within these disadvantaged communities) on the other.”⁸⁴

Second, lawyers and law-makers can become more aware of ways to ameliorate the position of women. What is more, we are now aware that different normative orders influence one another. Thus, an increase in gender equality in one normative sphere can be used to influence another.⁸⁵

Hellum says that, “the situation in which women rely on more than one body of law has drawn attention to the need for more complex and multifaceted strategies of gender and legal change than those pointed out within the centralist notion of law.”⁸⁶ Further, acknowledgement of “intersecting and interacting normative orders” may likely result in a more coherent strategy for women’s empowerment and equality rights, as any such initiatives can be implemented within the context of each normative order.

In spite of these positive results, pluralism may have a negative effect on individuals. “The competing values of these plural legal systems more often than not result in denial of rights, and, ultimately, access to justice is adversely affected.”⁸⁷ This negative consequence for women is likely to be due to their diminished status under customary law. Full alignment of the

⁸² See generally, H Lewis “Between Irua and “Female Genital Mutilation”: Feminist Human Rights Discourse and the Cultural Divide”(1995) 8 Harvard Human Rights Journal 1-55.

⁸³ See generally, L Vincent “Virginity Testing in South Africa: Re-traditioning the Postcolony” (2006) 8 Culture Health and Sexuality 17-30; E R George “Virginity Testing and South Africa’s HIV/AIDS Crisis: Beyond Rights Universalism and Cultural Relativism Toward Health Capabilities” (2008) 96 California Law Review 1447-1518.

⁸⁴ V Bronstein “Reconceptualising the Customary Law Debate in South Africa” (1998) 14 South African Journal on Human Rights 388.

⁸⁵ On this issue, Bennett comments that, “normative systems are...regarded as processes that both influence and are influenced by the interaction of gendered human actors.” See T W Bennett *Customary Law in South Africa* (n 7) at 33.

⁸⁶ A Hellum “Human Rights and Gender Relations in Postcolonial Africa: Option and Limits for Subjects of Legal Pluralism” (n 13) 641.

⁸⁷ A Kuenyehia “Women, Marriage and Intestate Succession in the Context of Legal Pluralism in Africa”, (2006-2207) 40 U C Davis Law Review 387.

customary law with constitutional principles, such as equality, however will gradually mitigate, if not entirely reduce, this adverse impact.

Furthermore, women's lives, as well as their bodies, can become over-regulated. Consider for instance that,

[t]he regulation of women's position by more than one body of norms has given rise to different theories about the relationship between gender and legal change. Within feminist legal scholarship there has been a shift from centralist legal theory exploring the relationship between *de jure* equality and *de facto* discrimination to studies that explore the norms that surround gender relationships as a process of plurality of intersecting and interacting normative orders.⁸⁸

Over-regulation of women's issues may effectively erode the agency and autonomy that women have over their own lives.

Finally, Bonthuys and Erlank recognise a problem that arises from a formal conflict of laws in a system of weak pluralism:

Structuring a dichotomy between civil and customary law presents African women with two equally unacceptable options. They must either conform to civil law standards, which do not necessarily accommodate their cultural values and with which they may not agree, or they must retain old forms of customs or religious law which deny women power under the rules of "immutable culture". Applying customary law implies that all African women for whom *lobolo* has been paid share the same rural context and values, and ignores the fact that many women alternate between traditional and western values for different purposes. On the other hand, structuring women's rights so that they only appear accessible under civil law denies African women the opportunity to take part in internal cultural debate, to challenge detrimental customary practices and so to contribute to the evolution of customary law.⁸⁹

A system of strong pluralism which supports the validity of non-state laws provides *de facto* support and context for women to choose options which best meet their needs and best enable them to contribute to community, cultural and legal development. In this way, strong legal pluralism celebrates and promotes the agency of citizens not only as recipients of structured legal

⁸⁸ A Hellum "Human Rights and Gender Relations in Postcolonial Africa: Option and Limits for Subjects of Legal Pluralism" (n 13) 638.

⁸⁹ E Bonthuys and Natasha Erlank "The Interaction Between Civil and Customary Family Law Rules: Implications for African Women" (2004) *Journal of South African Law* 76-77.

framework, but also as invested and knowledgeable participants in the construction and revision of such frameworks.

(b) *New Interpretation of Customary Law*

Throughout the remainder of this thesis, the notion of the evolving female litigant will be explored in the context of developing the customary law in line with Constitutional principles and provisions. In particular, through discussion of the Constitutional Court's judgments in the *Bhe*, *Shilubana* and *Mayelane* cases, Chapters Six and Seven discuss the roles and entitlements of women in regard to: succession to property and to chieftainship, and consent and recognition of polygamous marriages. Following the line of reasoning explored in these cases, Chapter Eight relies on this jurisprudence and the GRACE analytical model to conduct a hypothetical analysis of the delict of seduction under both customary law and the common law.

The focus of this analysis, and in fact, this entire thesis, is to elevate customary law and ensure its alignment with the Constitutional provision for equality. Special attention is given to the following eight principles describing the place of customary law under the Constitution, as extracted from both the *Alexkor* and *Bhe* cases and eloquently presented in *Mayelane*:

- a) customary law must be understood in its own terms, and not through the lens of the common law;
- b) so understood, customary law is nevertheless subject to the constitution and has to be interpreted in the light of its values;
- c) customary law is a system of law that is practised in the community, has its own values and norms, is practised from generation to generation and evolves and develops to meet the changing needs of the community;
- d) customary law is not a fixed body of formally classified and easily ascertainable rules. By its very nature it evolves as the people who live by its norms change their patterns of life;
- e) customary law will continue to evolve within the context of its values and norms consistently, with the Constitution;

- f) the inherent flexibility of customary law provides room for consensus-seeking and the prevention and resolution, in family and clan meetings, of disputes and disagreements; and
- g) these aspects 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 the nurturing of healthy communitarian traditions like *ubuntu*.⁹⁰

8. Plural Normative Orders, Plural Paths to Equality?

The coexistence of separate systems of legal norms to address separate spheres of life, may seem to be administratively easy. The reality, however, is that spheres of life rarely, if ever, operate independently from one another, and there is often overlap amongst them, thus making it difficult for the state to maintain consistent administrative efficiency. Given this reality, it is helpful for citizens as well as the state, if the various legal systems operate under the same basic understanding of intersection and cohesion. In this regard, Prinsloo discusses the concepts of unification,⁹¹ integration⁹² and harmonisation⁹³ as approaches to eliminating or modifying legal pluralism. As each concept suggests, the focus is on working out how the various normative systems should coexist and function, where possible, cooperatively and collaboratively.

⁹⁰ See *Mayelane v Ngwenyama and Another*, 2013 (4) SA 415 (CC) per Froneman at paragraph 24.

⁹¹ Unification entails a change in the condition of legal pluralism to unity of law. Complete unification means the creation of a uniform system of law that substitutes the existing legal systems completely. In the case of family law it would mean one system with the same rules for all persons and groups in the Republic of South Africa. See Prinsloo "Pluralism or Unification in Family Law in South Africa" (n 4) 325.

⁹² Integration amounts to partial unification, however small it may be. It means bringing together under one enactment the different laws with regard to a particular branch, for example marriage or family matters, in order that the difficult systems continue to exist but without conflict and that some elements thereof may be unified. Integration embodies a practical approach to the question of unification, namely that unification can be achieved gradually or by a cumulative process, unifying rules where this is possible and leaving matters that cannot be unified to the personal laws of the parties. Ibid.

⁹³ Harmonisation is also seen as different from integration. It seeks to eliminate points of friction between the different legal systems but leaves the systems to continue to exist separately. An example of harmonisation would be to place the customary and civil marriages on an equal basis, that is considering both marriages as valid marriages with recognition and protection of the rights of the spouses and children. See Prinsloo Ibid.

Oppermann presents a different view, notably that the coexistence of different normative orders necessitates competition rather than cooperation. In Oppermann's analysis, the history of legal pluralism makes it difficult for different normative legal orders to be accorded the same degree of worth and consideration. This approach is premised on hierarchy without recognising scope for intersection. In Oppermann's analysis,

legally pluralistic countries [are those] where traditional law and national law exist side by side. Because these bodies of law grew out of culturally distinct customs and practices, their coexistence frequently results in conflict. The implications of conflicts between traditional and national law are particularly serious for women since, in many countries, women's rights – particularly in the context of traditional law – are often subordinate to those of men. Cultural norms reflecting male values and interests permeate traditional or indigenous law regulating family issues and resulting in the legal supremacy of male interests over female interests.⁹⁴

Oppermann suggests here that legal pluralism can function as a tool to enable those engaged in legal analysis to crudely separate laws that appear progressive from those that are traditional, oppressive and unenlightened. Adopting a legal

“pluralist perspective provides a means of giving recognition to those normative orders that impinge on women's lives and so factor them into analyses which can take account of the conditions under which women and men find themselves silenced or unable to negotiate with others in terms of day-to-day life, or the converse, and how this shapes their perceptions, access to and, use of law.”⁹⁵

Thus, those aspects of society that are considered to be unenlightened and unfavourable are readily identified as “other”, hiding from view the fact that, in unitary legal societies, one system of law can serve both favourable and unfavourable interests, depending on the perspective of the person engaged in the analysis.

⁹⁴ B Oppermann “The Impact of Legal Pluralism in Women's Studies: An Examination of Marriage Laws in Egypt, South Africa and the United States” (2006) 17 *Hastings Women's Law Journal* 65.

⁹⁵ A Griffiths “Legal Pluralism” in R Banakar & M Travers (eds) *An Introduction to Law and Social Theory* (2002) 304.

In contrast to Oppermann, Prinsloo offers a viewpoint that supports the intersection and collaboration of normative orders, rather than their opposition and competition. This intersection is referred to by de Sousa Santos as *interlegality*, which he describes as the phenomenological counterpart of legal pluralism.⁹⁶

The frameworks offered by Prinsloo and de Sousa Santos suggest an approach to legal pluralism which acknowledges not only the coexistence of multiple normative orders, but also a working relationship between these normative orders. This approach is also reflected by the von Benda-Beckmanns, where they explain that

under conditions of legal pluralism, elements of one legal order may change under the influence of another legal order, and new, hybrid or syncretic legal forms may emerge and become institutionalised, replacing or modifying earlier legal forms or co-existing with them. In other cases, concepts from one legal vocabulary are used to label institutions of another legal order.⁹⁷

Thus, legal pluralism in its current sense is increasingly about appreciating value in the intersections of equally weighted normative orders. In a similar vein, the modern approach to intersectionality focuses on intersecting aspects of identity. This thesis is concerned not simply with these intersections – whether they be intersections of normative orders, or intersections of identities – but also specifically with the nature of the experience for those who are located at particular intersections - of both identity and normative order.

⁹⁶ B de Sousa Santos “Law: A Map of Misreading Towards a Postmodern Conception of Law” (1987) 14 *Journal of Law & Society* 298.

⁹⁷ F von Benda-Beckman & Keebet von Benda-Beckman “The Dynamics of Change and Continuity in Plural Legal Orders” (2006) 53-54 *Journal of Legal Pluralism & Unofficial Law* 19.

9. Conclusion

Equality rights for the girl child must be considered in a scope that extends beyond the cultural community and the nation state, into the international realm. In discussing the concept of legal pluralism, this chapter has sought to describe the importance of identity and contextual considerations in the quest for equality. Acknowledgement of legal pluralism, or the co-existence of more than one normative order in operation at the same time is a major feature of context. This coexistence need not necessarily result in confusion, but is instead an opportunity to take into account the broadest possible scope of options for the interpretation and application of applicable normative orders. The result is an analytical framework that reflects both the existence of plural normative orders and the intersecting identities of the individuals who operate within and between these normative orders.

Recalling from Chapter Two that equality is a comparative concept⁹⁸, the comparative analysis that must be undertaken in a legal pluralist context is subject to the biases, level of knowledge and insight of the one conducting the comparison. But in a society with a single normative order, where full consideration is given to an intersectionality analysis, there is little room for the errors that result from impartial application of the law because what is considered is the *result*, and not the system of law. There is more objectivity to be gained from focusing on the impact or consequences of the law rather than the law itself.⁹⁹

⁹⁸ See Chapter Two, part 2.

⁹⁹ Mokgoro makes reference to Nhlapo's argument that it is not the mere recognition of customary law that creates tension in a legal pluralist context, but the technical difficulties that arise from such recognition. Consideration of customary law in the context of an intersectionality analysis, wherein customary law is part of the continuous axes of law, rather than a separate entity, alleviates the problem of recognition (and the imputed ranking that inevitably follows). See Y Mokgoro "The Customary Law Question in the South African Constitution" (n 47) 1289.

Despite the relative infancy of intersectionality¹⁰⁰, proposals for its joint application with legal pluralism are not new. For example, Anne Hellum points out that

...current trends demonstrate the need to move beyond both the anthropological approach to legal pluralism, which seems satisfied with description and analysis, and the centralist notion of law, that has tended to exclude the norms generated through human interaction in daily life. An alternative life is to move toward an integrated sociolegal scholarship that combines descriptive and normative analysis.¹⁰¹

This notion of “integrated socio-legal scholarship” could also be used to describe intersectionality as it is being applied in the current context. Further, these two approaches can also be seen to reflect two values, namely judgmental and non-judgmental.

A close examination of the two concepts reveals that legal pluralism can be viewed as a variant of intersectionality. Just as one may have a particular gender, race, religion, or adhere to a particular culture, the fact that one lives within a context of normative pluralism is also an aspect of identity. Furthermore, following the notion that such pluralism is an aspect of identity, it is suggested that a pluralist perspective allows scope for the intersection of the various normative orders. Thus intersectionality does not simply exist in one plane, but it is multidimensional, demonstrating that there are intersections within intersections. These layers of intersectionality may on the one hand suggest complexity, but they also suggest precision in characterising the context in which the rights claimant operates. And context is both a determinative and interpretive feature in the rights analysis. Essentially, intersectionality requires factual analysis, whereas pluralism requires a normative analysis.

Intersectionality as discussed in the previous chapter and legal pluralism discussed herein, both function as analytical frameworks that

¹⁰⁰ Note that intersectionality emerged in the context of critical race theory (as aspect of Critical Legal Studies) in 1988/89.

¹⁰¹ A Hellum “Human Rights and Gender Relations in Postcolonial Africa: Option and Limits for the Subjects of Legal Pluralism” (n 13) 642.

acknowledge the coexistence and collaboration of various aspects (be they of factual identity or normative order). Pluralism acknowledges and invites exploitation of different normative orders shaped by cultural context. Intersectionality acknowledges that various aspects of identity – for the present purpose, reference is made to the aspects of gender, race, age and culture – all intersect to create a unique experience (and identity) for the individual concerned. Any failure to consider all aspects of this unique identity is a failure to fully address the needs of the individual. This inspires us to recognise that those from pluralist communities arguably possess a depth and breadth of identity that is not reflected in those from non-plural communities.¹⁰²

¹⁰² In this context it is also interesting to note that pluralism has helped us to realise the biases in state managed weak pluralism, and to realise that people living under customary law may be happy to do so – and may be able to exploit its fluidity. This happiness is bolstered by the fact that in the ideal instance of legal pluralism, the various legal systems are weighted equally vis-à-vis one another, and one is not expected to be interpreted within the parameters of the other.

**CHAPTER FIVE – CULTURE: THE CORE OF INTERSECTIONALITY
AND THE HEART OF PLURALISM (AS EXPERIENCED BY GRACE)**

1. INTRODUCTION.....	103
2. THE NATURE OF INTERSECTING IDENTITIES	104
3. DEFINITIONAL POSITIONING OF CULTURE IN THE AFRICAN HUMAN RIGHTS FRAMEWORK.....	108
(A) <i>DEFINITION AND CHARACTER OF CULTURE</i>	<i>110</i>
(B) <i>CULTURE AS A KEY ASPECT OF IDENTITY.....</i>	<i>115</i>
(C) <i>CULTURE AS A KEY ASPECT OF LAW FORMATION AND INTERPRETATION</i>	<i>117</i>
4. CULTURE AND CUSTOMARY LAW IN THE SOUTH AFRICAN CONTEXT.....	121
5. CONCLUSION	122

1. Introduction

The discussion of legal pluralism in the previous chapter set the stage for the current discussion of the intersecting identities of GRACE, the South African girl child. Just as plural and parallel normative orders exist, similarly, there are plural and parallel identities. Those who promote the recognition of multiple or intersecting identities, or multiplicity,¹ argue that full access to equality is dependent upon full consideration given to all aspects of one’s intersecting identity. Any position that does not take all characteristics of identity into account fails to address the whole person.

Chapter Two made reference to equality as a comparative concept.² The measurement of the achievement of equality involves a comparative analysis of certain aspects of identity. For example, the customary law rule of male primogeniture provides that intestate succession is awarded to the eldest male in a family line. The arguments of inequality that are levelled against male primogeniture challenge it on the basis that it discriminates on

¹ See H Lewis “Embracing Complexity: Human Rights in Critical Race Feminist Perspective” (2003) 12 Columbia Journal of Gender & Law 514-515; D L Hutchinson, “Identity Crisis: “Intersectionality,” “Multidimensionality,” and the Development of an Adequate Theory of Subordination” (2000-2001) 6 Michigan Journal of Race & Law 309-10. See also Chapter Three, part 3.

² See Chapter Two, part two. See also See P Westen, “The Empty Idea of Equality” (1982) 95 Harvard Law Review 553.

the individual and intersecting identity aspects of age, gender and birth order.³ Chapter Three, in introducing the intersectionality framework and its origins, focused on the intersection of race and gender. Chapter Five now expands intersectionality beyond race and gender to focus on the importance of culture. Although Chapter Four discussed culture as a normative component of legal pluralism, the emphasis will now be on the factual elements of culture as an aspect of identity.

2. The Nature of Intersecting Identities

The concept of culture is complex to define, since it is hugely variable.⁴ The broad spectrum of what culture encompasses suggests that it is mutable and, therefore, uncertain. Ssenyonjo quotes Steiner as stating that, “culture is plastic, made and remade through the course of history, not unshakable and essentialist in character but in many respects contingent, open to evolution and to more radical change through purposeful human agency informed by human rights ideals.”⁵ Further, culture is a living aspect of identity and is susceptible to the influence of changing socio-economic contexts.⁶ To some degree gender, race and age are also fluid constructs, but they are clearly more fixed than culture.⁷

³ Some customary law cases dealing with male primogeniture also discuss the issue of legitimacy, and the case analysis first involves a determination as to whether there was a valid customary law marriage between the parents (see *Mthembu v Letsela and Another*, 2000 (3) SA 867 (SCA) and *Bhe and Others v Magistrate Khayelitsha and Others* 2005 (1) SA 580 (CC)), but for the present purposes, legitimacy is not an aspect of identity that is discussed in the GRACE analysis.

⁴ F Raday discusses “two differing perceptions of culture.” Essentially, culture can be a “relatively static and homogenous system”, or it can be “adaptive, in a state of constant change, and rife with internal conflicts and inconsistencies.” See F Raday “Culture, Religion and Gender” (2003) 1 *International Journal of Constitutional Law* 667.

⁵ M Ssenyonjo “Culture and the Human Rights of Women in Africa: Between Light and Shadow” (2007) 51 *Journal of African Law* 66.

⁶ See B Ibhawoh “Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State” (2000) 22 *Human Rights Quarterly* 841.

⁷ Culture is variable and considerably more open to shifts and interpretation than the other aspects of identity. This does not mean however that culture is incapable of being predictable and stable, but that it reflects this to a much lesser degree than gender, race and age.

Since Kimberlé Crenshaw first wrote about “demarginalising the intersection of race and sex”⁸, efforts to construct intersectionality as a legal analysis that included an appropriate remedy for multiple, simultaneous discrimination, have expanded beyond the borders of the United States, and have been applied to identity factors in addition to and apart from race and gender.⁹ In the wake of this expansion, this chapter argues that intersectionality is an appropriate theory applicable to the cultural, legal and social context of GRACE, a South African girl child, subject to customary law.

Hope Lewis presents an example of the applicability of intersectionality beyond American critical race theory as follows:

A black woman’s actual experience of discrimination might be lost in a legal system that defines violations of rights by treating race and gender as entirely separate categories. *She would be expected to claim her rights either as an African American or as a woman, but not as both at the same time.* ... This form of theoretical analysis is now referred to as “multidimensionality” theory so as to include sexual orientation, ethnicity, religion, nationality, disability status, and other forms of identity in the analysis. **A legal framework that fails to account for our complex and multilayered realities as women cannot be expected to achieve the full implementation of human rights.**¹⁰ [bold emphasis added]

That which Lewis refers to as multidimensionality – namely an intersectionality analysis that involves two or more axes of identity – has come to encompass a contemporary understanding of intersectionality.¹¹

The intersectionality analysis discussed herein demonstrates that there are not one or two “core” aspects of identity, but rather each aspect of identity is endemic to the individual. For the purposes of an equality rights

⁸ K Crenshaw “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics” (1989) University of Chicago Legal Forum 139.

⁹ See P E Andrews “Globalisation, Human Rights and Critical Race Feminism: Voices from the Margins” (1999-2000) 3 Journal of Gender, Race & Justice 373; and J Bond “International Intersectionality: A Theoretical and Pragmatic Exploration of Women’s International Human Rights Violations” (2003) 52 Emory Law Journal 71.

¹⁰ H Lewis “Embracing Complexity: Human Rights in Critical Race Feminist Perspective” (n 1) 514-515.

¹¹ See generally, Chapter Three of this thesis.

analysis, the failure to consider all identity aspects of an individual compromises the equal access to rights vis-à-vis those who may have a different set of identity aspects. Although it is true that certain aspects of identity may be more relevant to a particular situation at a certain moment, the remaining intersecting identities should not be ignored because they will provide the supporting context in which that moment's primary identity is understood.

The importance of acknowledging multiple aspects of identity in order to fully appreciate the full person is explained by Taunya Lovell Banks as she reflects upon her own intersectional experience:

My life stories influence my perspective, a perspective unable to function within a single paradigm because I am too many things at one time. My perspective often transcends race and gender and is sometimes fully or partially conscious of the complexities and intersection of race, gender and class. It is a multiple perspective...¹²

Acknowledging this multiple perspective as necessary to transition GRACE from a position of marginalisation to one of agency and enjoyment of equality,¹³ can be demonstrated by reference to a Constitutional Court case. In *President of the Republic of South Africa v. Hugo*,¹⁴ a challenge was brought against a presidential pardon directed at “mothers in prison on May 10, 1994¹⁵ with minor children under the age of twelve years.” John Hugo challenged the presidential pardon for being discriminatory on the basis of sex, as it did not extend to fathers of children under twelve. Hugo was in prison and he was also the single parent of a child under twelve. In the language of intersectionality, Hugo's claim was that the pardons were based on the intersecting identities of gender and parenthood of young children.

¹² T L Banks “Two Life Stories: Reflections of One Black Woman Law Professor” (1990-91) 6 Berkeley Women's Law Journal 56.

¹³ See Chapter Three, part 3, of this thesis for an additional discussion of multiplicity.

¹⁴ 1997 (4) SA 1 (CC).

¹⁵ This date specified in the pardon decree is the date on which Nelson Mandela was inaugurated as South Africa's first democratically elected black President.

Hugo argued that the rationale behind the pardon, namely “a concern for children who have been deprived of the nurturing and care which their mothers would have ordinarily have provided,”¹⁶ could also apply to him and his son. Hugo’s position was that gender,¹⁷ as constructed by the parameters of the pardon was merely incidental to his claim. Rather, what was key was his identity as a prisoner and as a single parent of a child under twelve. However, the pardon legislation was aimed specifically at female single parents.

The Court reasoned that the fact that Hugo could not be located at the designated intersection (of being female and a single parent) did not constitute discrimination because the legislation targeted a broad generalised category on the basis that women are typically responsible for the care and nurture of children.¹⁸ As is often the case where a majority group is targeted, a minority is neglected. Further, the Court noted that as there was no outright entitlement to a pardon, Hugo could not argue unfair discrimination on the basis of something he was not entitled to receive.

¹⁶ See *Hugo* (n 14) at paragraph 36 (referring to the affidavit of Nelson Mandela)

¹⁷ For a discussion of the complexity of “gender” and its operation in contemporary South African society and social analysis, see H Moffett “Gender” in N Shepherd and S Robins (eds) *New South African Keywords* (2008) 104.

¹⁸ This generalisation exemplifies Butler’s comment that it is “impossible to separate out ‘gender’ from the political and cultural intersections in which it is invariably produced and maintained.” See J Butler *Gender Trouble: Feminism and the Subversion of Identity* (1990) Routledge New York 3.

3. Definitional Positioning of Culture in the African Human Rights Framework

...we should talk about rights within a cultural context.¹⁹

A delicate balancing act is required in order to prioritise considerations of cultural rights vis-à-vis those of gender equality rights. For instance, the *African Charter on Human and Peoples' Rights* “places emphasis on traditional African values and traditions without addressing concerns that many customary practices ... can be harmful or life threatening to women.”²⁰ Yet, the existence of regional, African-specific human rights instruments shows that culture influences the way in which human rights norms are constructed, interpreted and applied.

It is true that in this modern era of globalisation, different nuances and cultural underpinnings create different understandings of human rights norms - so much so that it may not be accurate to use the word “norms” at all. The converse is also true, meaning that in striving towards universality (the emphasis of common similarities and the dismissal of differences), cultural variations are overshadowed by notions of commonality and sameness.²¹ But there certainly are generally accepted standards and fundamental entitlements that all societies agree to be basic human rights and responsibilities.²²

Regional instruments such as the *African Charter on Human and People's Rights*²³ and the *African Charter on the Rights and Welfare of the*

¹⁹ J A M Cobbah “African Values and the Human Rights Debate: An African Perspective” (1987) 9 Human Rights Quarterly 310.

²⁰ M Ssenyonjo “Culture and the Human Rights of Women in Africa: Between Light and Shadow” (n 5) 44.

²¹ See generally, L Volpp “The Culture of Citizenship” (2007) 8 Theoretical Inquiries in Law 571-601.

²² The generally accepted standards are reflected in the universal human rights framework as described in notes 24-27 below.

²³ See African (Banjul) Charter on Human and Peoples' Rights, adopted 27 June 1981, ratified by South African in June 1996,

Article 17(2) Every individual may freely take part in the cultural life of his community.

Article 17(3) The promotion and protection of morals and traditional values recognised by the community shall be the duty of the State

*Child*²⁴ reflect an acknowledgement of the value of culturally specific human rights instruments. Even without these Africa-centric instruments, international instruments such as the *International Covenant on Economic Social and Cultural Rights*²⁵, the *Universal Declaration of Human Rights*²⁶, the *Convention on the Rights of the Child*²⁷ and the *Convention on the Elimination of All Forms of Discrimination Against Women*²⁸ all provide for the right to culture, together with the respect for cultural diversity and difference that goes along with this. Furthermore, on the domestic level, the South African Constitution provides for cultural rights and the equal status given to customary law, alongside the common law. This equal status is an indication of the deference and respect that is given to cultural diversity.²⁹

²⁴ African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990),

Article 11(2) The education of the child shall be directed to
(c) the preservation and strengthening of positive Africa morals, traditional values and cultures.

²⁵ International Covenant on Economic, Social and Cultural Rights, UN GA Res 2200A (XXI), in force 3 January 1976,

Article 15 (1) The States Parties to the present Covenant recognise the right of everyone:
(a) To take part in cultural life

²⁶ Universal Declaration of Human Rights, UN GA Res 217A (III) December 10, 1948
Article 27,

Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

²⁷ Convention on the Rights of the Child, adopted by GA Res 44/25 of 20 November 1989, ratified by South Africa in June 1995,

Article 30

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language.

Article 31 (2)

States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.

²⁸ Convention on the Elimination of All Forms of Discrimination Against Women, in force 3 September 1981; ratified by South Africa in September 1995,

Article 5

States Parties shall take all appropriate measures

To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;

²⁹ See sections 30 and 31 of the *Constitution of South Africa*, Act 108 of 1996, which provide protection for language and culture, as well as cultural, linguistic and religious communities.

(a) *Definition and Character of Culture*³⁰

“Culture” as a concept falls into a variety of fields, such as science, law and anthropology, to name a few. For the present purposes, however, the discussion will focus on overlapping definitions of culture in the fields of law and anthropology. As Ssenyonjo explains, anthropologists commonly use the term “culture” to refer to a society or group in which many people live and think in the same ways. Culture includes “inherited ideas, beliefs, values, and knowledge, which constitute the shared basis of social action.”³¹ In this sense, culture is not only something that one observes, but is something in which one actively participates.

In the context of this “shared basis of social action”, it is important to remember that, “culture is not static. It is constantly being challenged and redefined.”³² The nature of this challenge and redefinition is that

...culture may be defined as the “integrated pattern of human knowledge, belief and behaviour,” which is dependent upon the capacity of human society to learn and transmit knowledge about their values, ideas, and beliefs to succeeding generations. In other words, culture may be taken to mean those elements that human society produces in non-materialistic terms, and transmits to posterity. A second definition of the term is more apt, for example, the customary beliefs, social forms, and material traits of a racial, ethnic, linguistic, religious or social group.³³

Culture, has a fluid, transmittable character that gives it meaning and significance from one generation to the next, even if the precise content of the culture varies. Thus, it is not the cultural content itself that is valued as significant, but rather, it is the ability of the people within the culture to

³⁰ Recall that in Chapter Three parts 2(a) and 2(b), the notion of culture as an interpretive force was discussed. Here, the discussion is expanded to define culture, not only as an interpretive lens, but also as an influential aspect that dictates the manifestation of other aspects of identity.

³¹ M Ssenyonjo “Culture and the Human Rights of Women in Africa: Between Light and Shadow” (n 5) 50.

³² F Banda “Global Standards: Local Values” (2003) 7 International Journal of Law, Policy and the Family 14.

³³ J. Oloka-Onyango “Who is Watching Big Brother”? Globalisation and the Protection of Cultural Rights in Present Day Africa” (2005) 27 Human Rights Quarterly 1247.

compel and predict behaviour within a particular group vis-à-vis another group. This juxtapositional or comparative element to cultural considerations suggests that culture is always relative.

Regardless therefore of the context in which one may choose to define culture, the social behaviour is always fluid and shifting.³⁴ Thus, even though some cultures in whole or in part may reflect elements that are contrary to full enjoyment of human rights of citizens within that particular culture, it is entirely conceivable that they will change with time. This potential for change and evolution is similarly reflected in living customary law.

The factors that influence cultural change are many, and may be external or internal. For example, external influences may come into play when identified cultural practices are contrary to international principles of human rights. Addressing these external influences brings us to the notion of a delicate balance that was discussed above. The issue is how to respect cultural integrity, and at the same time keep pace with a notion of universal human rights.

The danger is that the notion of universality can completely obliterate the uniqueness of any one particular culture. But this danger can be avoided if it is understood that “every cultural tradition contains some norms and institutions that are supportive of some human rights, as well as norms and institutions that are antithetical or problematic in relation to other human rights.”³⁵ The key is to sustain those elements that are supportive and adapt those that are not into something that is encouraging and respectful of full human rights.³⁶ In light of this, a

constructive approach to promoting human rights is to seek ways of enhancing the supportive elements of culture while redressing the

³⁴ M Ssenyonjo “Culture and the Human Rights of Women in Africa: Between Light and Shadow” (n 5) 66.

³⁵ B Ibhawoh “Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State” (n 6) 859-860.

³⁶ See the discussion of the development of customary law that occurs in part four of this Chapter.

antithetical or problematic elements in ways that are consistent with the cultural integrity of the tradition in question and the contending groups within it. It would be counterproductive to attempt to enhance the awareness of human rights within any culture in ways that are unlikely to be accepted as legitimate by that culture or significant groups within it.³⁷

The attempt to achieve this delicate balance is underscored by an appreciation that

the interplay between national human rights standards on one hand and local cultural orientations on the other should be a dynamic process of give and take, ideally through persuasion and dialogue, with legislation serving only to complement this process. ... In this way, the gap between national human rights provisions and cultural orientations can be narrowed and constitutional rights can derive their legitimacy not only from state authority but also from the force of cultural traditions.³⁸

Further, in the course of this balancing act, it must also be remembered, that culture is but one aspect of identity, and although it may function as the contextual background against which other identity aspects are realised, culture is still only one element to consider in the attempt to ensure access to equality for a particular individual. Within the broader field of international human rights, the “particularities of culture, race, nation[ality], and other forms of identity must be fully recognised as important aspects of feminist human rights discourse,”³⁹ – and it might be added, the human rights discourse generally.

Any discussion of human rights in Africa must acknowledge the operation of the cultural lens. Although, on the one hand, this acknowledgement creates space for the respect of cultural rights, on the other hand, it is clear that culture can also be “an obstacle to women’s full participation in society.”⁴⁰ In advocating for the equality rights of GRACE, an African girl child, within her particular cultural context, one must be mindful

³⁷ B Ibhawoh “Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State” (n 6) 860.

³⁸ *Ibid.*

³⁹ H Lewis “Embracing Complexity: Human Right in Critical Race Feminist Perspective” (n 1) 511.

⁴⁰ C I Nyamu “How Should Human Rights and Development Respond to Cultural Legitimation of Gender Hierarchy in Developing Countries?” (2000) 41 *Harvard International Law Journal* 381.

that it could well be culture (or at least the way it is interpreted and applied) that poses the greatest threat to her access to equality.

To avoid this, Nyamu discusses the *abolitionist* approach, which advocates for “an end to cultural practices that contravene international human rights norms.”⁴¹ Implicit in this approach is the belief that many cultural practices, or in fact “culture” itself, is devoid of women’s rights, and must therefore be replaced by an adopted (or imposed) culture that explicitly provides for women’s rights. Those who are opposed to the abolitionist approach, challenge it on the basis that it is “decontextualised, hegemonic, and counterproductive for gender equality in practice.”⁴² This “decontextualisation” is based on two assumptions: first, that culture is only manifested or reflected in one way, and second, that cultural must be assessed against a universal conception of equality.

The alternative argument (and one which this thesis supports) is that “culture is dynamic, responds to social change (as does customary law) and undergoes transformation over time. Such cultural change necessarily includes improvement in women’s rights.”⁴³ It is true, that cultural change could include an embracing of women’s rights, but it is also true that “social transformation does not always create improvement in women’s lives. It is quite possible for matters that are central to women to remain bound by tradition even after other aspects of social life have undergone significant change.”⁴⁴ In referring back to the GRACE model and the emphasis that is placed on gender, race and age in addition to culture, one must be mindful that cultural change does not have the potential to impact gender solely, but other identity aspects as well.

Full consideration of the abolitionist approach and the dynamic response approach, requires a thorough analysis of the role and function of

⁴¹ Ibid 392-393.

⁴² Ibid 394.

⁴³ Ibid 393.

⁴⁴ Ibid. See also, N Taefi “The Synthesis of Age and Gender: Intersectionality, International Human Rights Law and the Marginalisation of the Girl-Child (2009) 17 International Journal of Children’s Rights 250-1 and 367-8.

culture in a contextualised equality analysis. This thesis takes the position that culture forms the backdrop against which the equality comparison must occur.⁴⁵ This means that the comparative equality of two entities is likely to differ from one cultural context to another. Regardless of the approach to be favoured, it must be borne in mind that

it is what culture *does* rather than what it *is* which is important: it gives [people] a sense of identity. Whether the item chosen as the distinguishing feature is mutilation in the form of slit earlobes or facial marks, or rules of exogamy in marriage, or certain funeral rituals – we ignore at our peril the centrality in people’s lives of the need to belong and to be different.⁴⁶

Culture is not simply the glue that binds people to one another and satisfies their need for belonging; culture is also the framework within which people come to understand themselves and the world. As Nhlapo explains, culture is “a medium – a language or device which enables us to give meaning to the world and to go about life in more or less familiar pathways.”⁴⁷

The meaning that one gives to the world is (and can only be) relevant to the meaning that one ascribes to oneself based on the cultural context in which one lives. Although not all aspects of one’s identity (as informed by culture) may come into play at all times, at least the existence of these various aspects of identity should always be acknowledged. To demonstrate the plethora of identities that individuals possess, Nhlapo, in referring to his own cultural identity, explains that

[a] person usually has the option of emphasising or deemphasising one’s membership in the many identities which may have a claim on his/her loyalty. As a Zulu I may strongly support a particular kind of relationship between youngsters and elders; as a Christian I may abhor polygamy; as the recipient of a post-secondary education I may be indifferent to witchcraft or lukewarm to lobolo. This we may call ‘intensity of allegiance’. In the South African human rights debate this

⁴⁵ See C I Nyamu “How Should Human Rights and Development Respond to Cultural Legitimisation of Gender Hierarchy in Developing Countries?” (n 40) 392-393.

⁴⁶ T Nhlapo “Cultural Diversity, Human Rights and the Family in Contemporary Africa: Lessons from the South African Constitutional Debate” (1995) 9 *International Journal of Law and the Family* 213.

⁴⁷ *Ibid* 215.

element of ‘volition’ may yet prove to be crucial in establishing a system which allows people to ‘opt out’ of the particular cultural package attributed to their group.⁴⁸

One must also consider that a strong degree of “volition” may have the effect of reducing the compelling strength and enforcement of a cultural framework. If one can readily opt out of a cultural rule, does it hold the necessary influence that is characteristically associated with culture?

(b) *Culture as a Key Aspect of Identity*

In South Africa, culture has always been regarded as a significant tool of struggle and resistance and, more recently, as a means of constructing new identities.⁴⁹

Typically, aspects of identity are defined in a binary pattern or along a relatively static and predictable spectrum. For instance, gender is typically male or female, (or on occasion, in some state of transition between the two). Race is generally clearly defined (and reflected), but it may also be blended or manifested in ways that may not be immediately discernible. Age is considered within stages (infant, child, youth, adult, elderly), or is specified by a certain number that increases annually.

Culture is an exception to this typical pattern of identification. Like race, culture may be blended, but more specifically, culture can be fluid and is susceptible to change in manners and frequencies that are entirely unpredictable. Although in some circumstances, race and culture can be synonymous, for the most part, they are distinct identity aspects, and each may include multiple aspects of the other. For instance, Japanese culture may be synonymous with the Japanese race; further, American culture may be reflected by persons of a variety of racial backgrounds; or racialised

⁴⁸ Ibid.

⁴⁹ H Garuba & S Raditlhalo “Culture” in N Shepherd & S Robins (eds) *New South African Keywords* (2008) 43.

African Americans may reflect a range of cultural practices, originating from Africa, the Caribbean, Europe or Asia.

Some aspects of an individual's identity – and culture particularly so – are likely to change or transition over the course of her or his life. It is this propensity for change and evolution that makes culture such a fundamental aspect in the equality analysis. Unlike aspects such as religion or marital status, changes in the cultural aspect of identity are due to influences outside the control of the individual. This is largely because cultural identity is derived from the group.⁵⁰

Culture is akin to a large basket of factors affecting identity. For instance, in the case of GRACE, the particular relevance of her gender, race and age, is dependent upon her culture. For GRACE, a girl child in the South African customary law cultural context, the effect of her intersecting identity is different from what it would be for GRACE, a girl child in a Western common law cultural context.⁵¹

In posing a vivid metaphor, Volpp refers to culture as a salad bowl where, "individual cultures can coexist as equal ingredients with autonomous identities."⁵² In this image, the various aspects of identity are the different salad ingredients, and all combine to form a distinct flavour or culture. Volpp uses food to explain that the participants of a culture rely on the fact that the terrain of difference is where diversity is considered to be exciting and positive.⁵³ This perspective acknowledges that salads may have a distinctively broadly African or broadly Western flavour, yet each salad will be celebrated for this uniqueness. The ideal of celebrating uniqueness can be realised if it is accepted that diversity within and across cultures is better celebrated as a "universal homogenous whole."⁵⁴

⁵⁰ See Chapter Nine part 3(a) for a broader discussion of individual and group identity.

⁵¹ Although the discussion is based on broad generalisations of Africa versus the West, it is acknowledged that there are myriad distinct African cultures, just as there are different Western cultures.

⁵² L Volpp "The Culture of Citizenship" (n 21) 597.

⁵³ Ibid.

⁵⁴ Ibid.

Another metaphor to explain culture, or more specifically to explain the role of culture in the context of other intersecting aspects of identity, is to consider that if race, gender and age, for instance, are streets that intersect on a map, then culture is the topography that adds depth and context to the map. Culture is the landscape – the mountains and valleys, rivers and streams around which the other aspects of identity must navigate. Moreover, the cultural landscape provides character to the map on which the other avenues of identity merge intersect and travel in parallel.⁵⁵

(c) *Culture as a Key Aspect of Law Formation and Interpretation*

The notion of culture as a key aspect of the formation and interpretation of law is particularly relevant in an African context, vis-à-vis human rights universalism, where the relevance of culture is particularly heightened. As Ibhawoh explains,

...the legitimacy and acceptability of the modern universal human rights regime needs to be complemented and strengthened with the specific cultural experience of various societies. In the case of Africa, this has been interpreted to mean that the content of human rights, though founded on universal principles, has to bear what Makau Wa Mutua describes as the “African cultural fingerprint” that emphasises

⁵⁵ See A Garry “See A Garry “Intersectionality, Metaphors, and the Multiplicity of Gender” (2011) 26 *Hypatia* 216-831. Gary’s work on intersectionality focuses on the way in which multiple aspects of identity are constructed as multiple forms of oppression, but she effectively uses metaphors of traffic roundabouts and merging liquids to illustrate the operation and utility of intersectionality as both a representative and analytical tool. Similarly, for a link between culture and landscape in the South African context, see “I Am an African”, Statement of then Deputy President T M Mbeki, on Behalf of the African National Congress, on the Occasion of the Adoption by the Constitutional Assembly of “The Republic of South Africa Constitutional Bill 1996. The Statement begins:

I owe my being to the hills and the valleys, the mountains and the glades, the rivers, the deserts, the trees, the flowers, the seas and the ever-changing seasons that define the face of our native land.

My body has frozen in our frosts and in our latter day snows. It has thawed in the warmth of our sunshine and melted in the heat of the midday sun. The crack and the rumble of the summer thunders, lashed by startling lightning, have been a cause both of trembling and of hope.

...

group, duties, social cohesion and communal solidarity as opposed to rigid individualism.⁵⁶

Application of the “African cultural fingerprint” requires a particular interpretation of human rights, one that recognisably fits within an African context. This approach is not intended to contradict the universality of human rights, but rather, to demonstrate that in order to attain universality, the local relevance of these rights must be acknowledged.

One example of this is the Protocol to the *African Charter on Human and Peoples’ Rights*. The Protocol arose out of concern that

despite the ratification of the *African Charter on Human and Peoples’ Rights* and other international human rights instruments by the majority of State Parties, and their solemn commitment to eliminate all forms of discrimination and harmful practices against women, women in Africa still continue to be victims of discrimination and harmful practices.⁵⁷

In order to address this concern and the broader challenges associated with the full implementation of women’s rights, the Protocol reflects a determination on the part of State Parties to “ensure that the rights of women are promoted, realised and protected in order to enable them to enjoy fully all their human rights”.⁵⁸

The practice of customary law is often interpreted in the context of the right to culture. The customary law practice that is usually protected by the right to culture is most often in conflict with another equality right, namely the right to gender equality.⁵⁹ Thus, the issue is how to negotiate a

⁵⁶ B Ibhawoh “Between Culture and the Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State” (n 6) 843.

⁵⁷ Preamble to the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa. The Protocol was adopted on July 11, 2003, and came into force on July 25, 2005. AHG/Res. 240 (XXXI). African Union, *Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa*, 11 July 2003. Available at: <http://www.achpr.org/instruments/women-protocol/> (last accessed February 2015).

⁵⁸ Ibid.

⁵⁹ See B Mmusinyane “The Role of Traditional Authorities in Developing Customary Laws in Accordance with the Constitution: *Shilubana and Other v Nwamitwa*” (2009) 12 Potchefstroom Electronic Law Journal 136 at 149. See also, T Nhlapo “Cultural Diversity,

balance, or mediate a compromise between the right to culture and the right to gender equality. This conflict can be resolved by application of intersectionality considerations.

In the first place, intersectionality acknowledges the coexistence of gender and cultural context as equal impacting factors on one's identity. Secondly, the rights that are based on these identity characteristics are no longer viewed as being in competition, but as coexistent rights, the full acknowledgement of which is necessary to creating a sustainable human rights culture. Bennett suggests that such a creation is possible "if the advocates of human rights are prepared to give the argument of cultural relativism a sympathetic hearing, they may find that institutions peculiar to Africa can achieve the same objective as human rights."⁶⁰ This objective would be reflected in the context of a local African perspective, thus demonstrating the relevancy to cultural participants.

The question now becomes the extent to which GRACE has the option of emphasising or de-emphasising certain aspects of her identity (especially where these aspects of identity are bound up with group cultural practice). This practice of emphasising aspects of identity implies a certain amount of agency over who one is and what one's place is in society.

In section 3(a) above, when discussing the importance of culture as an aspect of identity, reference was made to Nyamu's discussion of the abolitionist approach and the contention that cultural practices that are contrary to international human rights norms ought to be abolished.⁶¹ This contention seems to prefer the notion of international human rights norms (universal) to culture (local). This leads us to consider whether international human rights norms are appropriately juxtaposed with cultural practices. The sphere of international human rights is much broader than that which is

Human Rights and the Family in Contemporary Africa: Lessons from the South African Constitutional Debate" (1995) 9 International Journal of Law and the Family 208.

⁶⁰ T W Bennett "The Equality Clause and Customary Law" (1994) 10 South African Journal on Human Rights 122 at 123.

⁶¹ C I Nyamu "How Should Human Rights and Development Respond to Cultural Legitimation of Gender Hierarchy in Developing Countries?" (n 40) 392-3.

contained within the ambit of cultural practices. In fact, it could be argued that cultural practices (or the right to engage in such), are themselves a component of international human rights. The fundamental right to dignity and self-worth is derived from the practice and enjoyment of cultural practices.

In discussing the difference between African and Western cultural interpretations (and manifestations) of human rights, it becomes clear that often what is required is not simply an understanding of the operatives at play within one's own culture, but also a sense of what issues are to be considered across cultures. This need for cross-cultural understanding is a key to contextualising both the similarities and differences amongst cultures. Gunning explains that an understanding of both the self and the "other" within the respective cultures enhances cross cultural understanding and also serves to reinforce one's understanding of one's self. She proposes a three-pronged approach to creating recognition and understanding of the uniqueness of one's own culture, as well as the similarities that exist across cultures:

[1] In order to understand the independence of the "other" one needs to be clear about one's own boundaries. [2] One has to be clear about the cultural influences and pressures that are inextricably involved in one's own sense of self. [3] This requires understanding oneself in one's own historical context with an emphasis on the overlap, influences and conditions which one is observing in the "other". Recognising interconnectedness requires two additional approaches. The first is to understand one's historical relationship to the "other" and to approach that understanding from the "other's" perspective, i.e., to see the self as the "other" might see you. Second, one must see the "other" in her own cultural context as she sees herself.⁶²

In view of this, cross-cultural understanding is important in recognising and reinforcing GRACE's equality rights.

⁶² | R Gunning "Arrogant Perception, Third World Travelling and Multicultural Feminism: The Case of Female Genital Surgeries (1991-1992) 23 Columbia Human Rights Law Review 204-5.

4. Culture and Customary Law in the South African Context

...never take for granted, ignore or erase the complexities and contradictions of women's realities. We must invoke the core values of our societies to engender transformation; find those values that resonate from indigenous cultures that will speak to the rights repertoire, as feminists know it.⁶³

In exploring the relationship between customary law and culture, specifically with regard to living customary law, this thesis takes the position that culture, like living customary law, is not static.⁶⁴ This law can nevertheless be consistent within a certain geographic and temporal framework.

Chapter Four broadly discussed the types of customary law, as well as the challenges faced in interacting with it, particularly for courts. One such challenge was with the differences between the official written customary law and the living customary law. In the attempt to observe and transcribe living customary law for future official reference, nuance and details are often lost. This result is particularly unfortunate where the untranslated (or unnoticed) cultural nuances in fact contain the key to broader understanding and interpretation. So, the real challenge is how to capture the current form of customary law adequately and reflect this in writing so that it can be observed and understood by outsiders.

Furthermore, there is the matter of how to update the written texts (or legislation) so as to keep pace with the natural development of living customary law. Once this issue has been resolved, then one can readily identify the content of the customary law at issue. It is this content (as currently practised and/or reflected in writing, as applicable) that must be considered in light of the equality provisions of the Constitution.

⁶³ S Tamale "The Rights to Culture and the Culture of Rights: A Critical Perspective on Women's Sexual Rights in Africa" (2008) 16 *Feminist Legal Studies* 47 at 60.

⁶⁴ See L Juma "Reconciling African Customary Law and Human Rights in Kenya: Making a Case for Institutional Reformation and Vitalisation of Customary Adjudication Processes" (2002) *St Thomas Law Review* 459 at 485. This conception of customary law not being static is akin to the fluidity of culture, as discussed earlier in part 2.

5. Conclusion

In presenting the GRACE model as a means of facilitating access to equality, four themes set the framework for an analysis that is applicable to GRACE's situation. Firstly, GRACE's multiple and complex identity aspects intersect to form the basis of the discrimination to which she is susceptible in the context of South African customary law. At the same time however, these intersecting aspects of her identity establish GRACE as a distinct, yet familiar individual in the context of South Africa, as a result of which she is readily absorbed into an established community.

Secondly, GRACE's contemporary existence in post-Apartheid South Africa means that she is caught between multiple contexts, each with a unique perspective on the range of human rights applicable to her. On the one hand, there is the modern drive towards globally endorsed and protected notions of human rights for the individual; on the other, there is the traditional cultural perspective, which emphasises the rights of the group over those of the individual.⁶⁵

Thirdly, acknowledgement of GRACE's intersecting identity requires a similar acknowledgement that her identity is set against a background that reflects an intersection and interdependence of economic, social, and cultural rights, as well as civil and political rights. This particular intersection acknowledges the impact that the range of rights has on influencing the context within which equality is defined and enjoyed.

And finally, if any of the discrimination or oppression that GRACE experiences is at the community or cultural level, then efforts to change this experience would require an examination of the role of these community factors. This final theme examines how citizens, through actions in their daily lives, can contribute to the oppression and marginalisation of women. This is not to ignore (or leave unchallenged) the role that state actors may

⁶⁵ See Chapter Nine, part 3 for a discussion of group and individual human rights.

play, but rather to acknowledge (as is reflected in South Africa's Constitution⁶⁶), that there is a horizontal relationship of interaction between and amongst citizens, as well as a vertical relationship between state and citizen – and both of these relationships have the capacity to either foster or diminish an individual's enjoyment of equality.

The attainment of equality rights for GRACE must be developed through a network that is applicable in her community, her country, and beyond. GRACE's attainment of equality is not only dependent upon who she is, but also upon the culture and, by implication, the legal system by which she is governed. This legal regime is another intersecting aspect of her identity. Access to equality for GRACE becomes problematic when it is determined through the conflicts of law process by an outsider to GRACE's culture and value system.

The idea of using GRACE as an analytical model is based on an acknowledgement of the impact that GRACE's intersecting aspects of identity have on her experience of the world. Similarly, the notion of a plural legal system takes into account the myriad social and legal normative legal orders at play in South Africa.⁶⁷ Both pluralism and intersectionality are contemporary theories of legal analysis that pay close attention to the legal subject and give full consideration to contextual factors related to both environment and identity. In focusing on an intersectionality analysis that seeks to secure equality rights for GRACE, the identity aspect of culture includes customary law. In fact, arguably, this aspect is at the core of her identity, just as culture was also at the core of the intersectionality analysis.

⁶⁶ See subsection 8(2) of the Constitution, which states:

A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

⁶⁷ Hellum contends that there is a current trend toward the need to move beyond both the anthropological approach to legal pluralism as well as the centralist notion of law, toward an integrated legal scholarship that combines descriptive and normative analysis. See A Hellum "Human Rights and Gender Relations in Postcolonial Africa: Option and Limits for the Subjects of Legal Pluralism" (2000) 28 *Law & Social Inquiry* 642.

Essentially, “culture represents the accumulation of a people’s wisdom and thus their identity; it is real and without it a people is without a name, rudderless and torn from its moorings.”⁶⁸ Despite its core positioning, the fluidity of culture (and by extension identity) renders it more like a pivot than an anchor. Indeed, Mutua reminds us:

culture itself is a dynamic and alchemical mix of many variables including religion, philosophy, history and mythology, politics, environmental factors, language and economics. The interaction of these variables – both within the culture and through influence by other cultures – produces competing social visions and values in any given society.⁶⁹

Hence, although culture does provide context, meaning and relational understanding among community members, it does not ascribe a meaning or definition that is fixed or intransient. Again referring to the importance of culture as being what it does rather than what it is, we see that it provides a framework for the fluid expression and development of a group’s identity, rather than prescribe a fixed label.

The issue explored in this chapter is not simply one of recognising GRACE and the intersecting aspects of her identity, but also one of accepting that an intersectionality analysis provides for full realisation and development of her rights in the context of customary law. Further, an intersectionality analysis may also make allowances for an interpretation of right that straddles both the common law and customary law.

⁶⁸ M Mutua “Savages, Victims and Saviours: The Metaphor of Human Rights” (2001) 42 Harvard International Law Journal 220.

⁶⁹ Ibid.

CHAPTER SIX – THROUGH GRACE’S EYES: AN ANALYSIS OF *BHE* v *KHAYELITSHA*

1. INTRODUCTION.....	125
2. <i>BHE</i> V. <i>KHAYELITSHA</i> MAGISTRATE: AN OVERVIEW	126
(A) <i>BHE</i> V <i>KHAYELITSHA</i> : THE FACTS.....	128
(B) <i>BHE</i> V <i>KHAYELITSHA</i> : THE RESULT.....	129
3. <i>BHE</i>: AN ANALYSIS IN THREE PARTS	131
(A) IDENTIFICATION OF CUSTOMARY LAW.....	131
(B) THE CUSTOMARY LAW RULE OF MALE PRIMOGENITURE	133
(C) ADDRESSING THE PRESUMPTIVE HIERARCHY BETWEEN THE COMMON LAW AND CUSTOMARY LAW.....	138
4. REFLECTIONS ON THE MAJORITY DECISION IN <i>BHE</i>	140
5. REFLECTIONS ON THE DISSENT IN <i>BHE</i>	142
6. APPLYING GRACE TO THE FACTS OF <i>BHE</i> V <i>KHAYELITSHA</i>	144
(A) GENDER.....	146
(B) RACE.....	147
(C) AGE.....	148
(D) CULTURE	148
(E) EQUALITY.....	149
7. CONCLUSION: POST <i>BHE</i>: THE STATE OF EQUALITY AND CUSTOMARY LAW IN THE ABSENCE OF PRIMOGENITURE.....	150

1. Introduction

The 2005 Constitutional Court decision in *Bhe v Khayelitsha*¹ can be used as a basis to demonstrate the application of the GRACE model to illuminate context and equality entitlement in future customary law situations involving female succession and property inheritance.² The analysis of select cases involving a direct conflict between customary law and (gender) equality³

¹ *Bhe and Others v Magistrate, Khayelitsha and Others (Commissioner for Gender Equality as Amicus Curiae); Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another* 2005 (1) SA 580 (CC).

² In Chapter Seven, the GRACE model is further applied to certain other customary law cases, particularly *Shilubana v Nwamitwa*. An assessment of how equality as provided for in the GRACE analysis can be realised under both the common law and customary law frameworks to address the delict of seduction will be explored in Chapter Eight.

³ The cases to be discussed here in Chapter Six and following in Chapter Seven are *Bhe and Others v Khayelitsha Magistrate and Others* 2005 (1) SA 580 (CC); *Mabena v Letsoalo*

indicates that the women litigants have a means of agency, independence and capacity to litigate, all of which women had been traditionally denied in a customary law context. This agency and capacity reflect an acknowledgement that customary law can be embraced in contemporary society in a manner that reflects principles of equality, fairness and non-discrimination.

The cases discussed in Chapter Six and Chapter Seven seek to balance the right to culture (as reflected in the form of customary law) with the right to equality or non-discrimination.⁴ The GRACE model demonstrates the fundamental connection between intersecting aspects of identity. Note that the specifics of the model are adaptable and transferable to various situations where community practice may be in conflict with constitutional provision – particularly the right to equality.⁵

2. ***Bhe v. Khayelitsha Magistrate: An Overview***

The challenge for the Constitutional Court in *Bhe* was to reconcile the customary law rule of male primogeniture⁶ with the constitutional principle of equality. Almost a decade earlier, the 1996 Constitution had been heralded as the panacea for all of the injustices that had characterised South Africa during the Apartheid era. The Constitution brought in a new regime, one governed by equality, non-discrimination and fairness. This shift would help to transform a new post-apartheid South Africa.⁷

(1998) (2) SA 1068 (T); *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC) and *Mayelane v Ngwanyama and Another* 2013 (4) SA 415 (CC).

⁴ Equality and non-discrimination are identified as two of the founding provisions of the Constitution of South Africa. See section 1, Constitution of South Africa, Act 108 of 1996. See also section 9, which provides for the framework of equality rights.

⁵ Although constructed to represent an African girl child subject to customary law, the GRACE model can be used to represent any intersecting set of identities. The purpose of the model is to demonstrate the consequences and entitlements that flow from one particular identity construction vis-à-vis another.

⁶ Simply put, the customary law rule of male primogeniture provides that succession is only through the male line; effectively excluding females from succeeding to the role of family head. See T W Bennett *Customary Law in South Africa* (2004) 335.

⁷ See *Constitution of South Africa*, Act 108 of 1996, section 1. See also: Z Motale “South Africa’s Constitutional Options in Comparative Perspective: Moving Towards a Responsible and Democratic Constitution” (1993) 2 *Journal of International Law & Practice* 253-280; Z

Bhe presented an opportunity for the Court to set the standard for future negotiations between the new constitutional principles and customary law. The negotiations also included a determination of the role that Apartheid era legislation⁸ would or should play in paving the way forward in the new South Africa. Similarly, it would include consideration of the way in which the new constitution could be used to develop the customary law while preserving cultural traditions in a way that was not contrary to the contemporary notions of equality and fairness.

The *Bhe* case required the Constitutional Court to grapple with the issue of equality balanced against customary law principles and practices. In rendering its decision, the court “found that the protection of women and children would be achieved by not allowing the development of the customary law of succession in a piecemeal and sometimes slow fashion.”⁹ Thus, in one bold sweeping decision, the (official) customary law practice of male primogeniture was abolished as being contrary to the Constitution. The issue however, is whether this one bold move would be effective in securing full access to substantive equality for GRACE, an African girl child subject to customary law.

The approach taken in Justice Langa’s majority judgment, was to remove the rule of male primogeniture from customary law altogether, and apply the common law gender-neutral rule reflected in the *Intestate Succession Act* instead. This suggested that the common law could remedy the problem of discrimination that was inherent in the customary law rule.

Motala, “Constitution-Making in Divided Societies and Legitimacy: Lessons from the South African Experience” (2005-2006) 15 Temple Political & Civil Rights Law Review 147-164; A D Lowenberg “Post-Apartheid Constitution for South Africa: Lessons from Public Choice” (1992-1993) 12 Cato Journal 297-320; C Murray “A Constitutional Beginning: Making South Africa’s Final Constitution” (2000-2001) 23 University of Arkansas at Little Rock Law Review 809-838.

⁸ A prime example of apartheid-era legislation would be the Black Administration Act 38 of 1927. Justice Ngcobo in his dissenting judgment in *Bhe* quotes his own statement from a 2000 Constitutional Court case in which the Act has been referred to as “an egregious apartheid law that anachronistically has survived our transition to a non-racial democracy”. See *Bhe* per Ngcobo at paragraph 141.

⁹ B. Mmusinyane “The Role of Traditional Authorities in Developing Customary Laws in Accordance with the Constitution: Shilubana and Others v Nwamitwa”, (2009) 12 Potchesfstrom Electronic Law Journal 141.

Although this might have produced an immediate and desirable result for the litigants in *Bhe*, it tainted the reputation of customary law, thus suggesting that it was inherently incompatible with the Constitutional provision of equality – an incompatibility that could not be resolved.¹⁰ Moreover, this approach insinuated a hierarchal preference for the common law over the customary law. Such a preference was contrary to the new position of customary law under the Constitution, and contrary to the argument for parity in a conflict of laws process and a policy of strong legal pluralism expressed in Chapter Four.¹¹

(a) *Bhe v Khayelitsha: The Facts*

The constitutional challenge in the *Bhe* case was brought on behalf of the two minor daughters of Ms Nontupheko Bhe and Mr. Vuyo Mgolombane. Mr. Mgolombane died intestate in 2002. The couple had lived together from 1990 until the time of his death. During the period of cohabitation, Ms Bhe was a domestic worker, and Mr. Mgolombane was a carpenter. They lived in a temporary informal shelter in Khayelitsha, Cape Town. Mr. Mgolombane obtained state housing subsidies that he used to purchase the property on which the family lived, as well as materials to build a house. At the time of his death, the youngest daughter lived with her parents in the temporary shelter, and the oldest daughter lived with Mr. Mgolombane's father, Maboyisi Mgolombane, in another community.

The estate of the younger Mr. Mgolombane consisted of the temporary informal shelter, and the property on which it stood, and various items of movable property that Ms Bhe and Mr. Mgolombane had acquired over the years, including the materials for the house they intended to build. When Mr. Mgolombane died, his father, who lived several hundred kilometres away, was appointed representative and sole heir of his estate, in accordance with section 23 of the *Black Administration Act*, the legislation

¹⁰ Even so, this immediate and desirable result, although providing for equality in the moment, could be construed as myopic in the customary law sense if it did not also consider the future interests of the girl child.

¹¹ See Chapter Four, part 2(b) and (c).

dealing with both choice of law and the substantive law of succession for black South Africans.¹² Essentially, section 23 provided that the intestate devolution of estates of black South Africans would be in accordance with the customary law rule of male primogeniture.

The elder Mr. Mgolombane indicated that he intended to sell the movable property to offset his son's funeral expenses. This decision did not seem to consider the consequences that would result for Ms Bhe and her daughter(s). In seeking to prevent the sale of the property, Ms Bhe argued that the automatic application of customary law and the rule of male primogeniture unfairly discriminated against her daughters by preventing them from inheriting the estate of their father.

(b) *Bhe v Khayelitsha: The Result*

The Court decided 10-1 in favour of resorting to the *Intestate Succession Act* as a stopgap measure to provide for equality rights for those subject to customary law, where such law does not clearly make such a provision.¹³ The dissent by Justice Ngcobo was not a dissent against the end result of equality; rather, his approach aimed to develop the particular customary law rule at issue so as to reflect the constitutional principles of equality.

Justice Ngcobo's suggestion that the judiciary must develop the customary law so as to align it with contemporary constitutional principles is the best way of ensuring that customary law is both preserved and developed in accordance with constitutional principles.¹⁴ The caution and

¹² The particular result in *Bhe* is that once the provisions of the Black Administrative Act are deemed contrary to the Constitution, the default fall-back position is to bring customary law of succession into the ambit of the common law regime provided for in the Intestate Succession Act 1987.

¹³ Where the majority judgment in *Bhe* found that the customary law rule of male primogeniture was inconsistent with the constitutional provisions of equality, it opted to substitute the regime detailed in the Intestate Succession Act 1987 for the customary law regime.

¹⁴ See Constitution of South Africa, Act 108 of 1996, section 39(2), which states:

deference that Deputy Chief Justice (as he then was) Langa applies to customary law should not be overlooked. However, if all law in South Africa, is to be subject to the Bill of Rights, then there is indeed a judicial obligation to ensure that this takes place. In the course of making this argument, the following discussion considers certain key issues and examines the strengths and weaknesses of each judgment in resolving these issues.

The result in *Bhe* still leaves room for further judicial intervention (or development of the customary law, as referenced by Justice Ngcobo in dissent).¹⁵ Such development would reflect an interpretation and application of contemporary equality principles in light of customary law.¹⁶ It is contended that intersectionality, even if not expressed by the rights-seeker, can be applied as an analytical method to facilitate the determination of a remedy by the courts.¹⁷ The basis of this argument is not that intersectionality should be considered only when it is pleaded by a litigant as a characteristic feature, but rather that intersectionality, and the breadth of the equality rights analysis that comes in its wake, can be applied more generally by the judiciary in the process of meting out equality rights.

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.

¹⁵ Ngcobo's argument for development of the customary law of succession begins first with a review as to how the customary law itself developed in terms of its community purpose and impact. It is only with this understanding that the judiciary can appropriately develop the customary law in line with the Constitution. See *Bhe* (n 3) at paragraphs 162-175. Further, Justice Ngcobo's argument is development of customary law, rather than simply striking it down. See *Bhe* at paragraph 215-222.

¹⁶ See J C Bekker & P D De Kock "Adaptation of the Customary Law of Succession to Changing Needs" (1992) 25 Comparative & International Law Journal of Southern Africa 366-378.

¹⁷ In his discussion on the appropriate remedy in view of the decision to develop the customary law of succession to bring it in line with the Constitution, Justice Ngcobo in dissent argues that simply substituting the principles of the Intestate Succession Act is insufficient, as this Act does not speak to the contextual realities of those to whom the customary law of succession applies. This recognition of the need for development within context does not speak directly to acknowledging the intersection identities of the rights claimant, but Ngcobo's analysis is clearly thinking along the lines of addressing individual identity as well as community cultural context. See *Bhe* at paragraphs 235-239. Note also that the broader contextual development argued here by Ngcobo was the approach taken by the majority in *Mayelane v Ngwenyama* 2013 (4) SA 415. The issue there however was whether it was appropriate for the Court to develop the customary law without being explicitly asked to do so by the parties. *Mayelane* is discussed in Chapter Seven, part 2(c) of this thesis.

3. *Bhe*: An Analysis in Three Parts

Having presented an overview of the *Bhe* judgments, we move now to an exploration of the concepts of succession and inheritance and how these are related to the customary law rule of primogeniture. This is done through a contextual analysis of the following components:

- a) identification of customary law
- b) the customary law of male primogeniture
- c) addressing the presumptive hierarchy between the common law and customary law

(a) *Identification of Customary Law*

In negotiating the balance between customary law and the common law, the first step is to determine the precise content of the customary law at issue. As was discussed in Chapter Four, there are three different forms of customary law: living, official and academic.¹⁸

Living customary law differs from both official and academic customary law in the sense that it has the capacity to change as social context and attitudes change. However, judicial intervention may be necessary to ensure that such changes are in line with the Constitution.¹⁹

At issue in this case was the validity of the customary law of succession. It may be helpful here to pause to clarify the distinction between common law inheritance and customary law succession and expound upon the content of customary law succession as it relates to *Bhe*.

¹⁸ See Chapter Four, part 2(a)(ii) for an earlier discussion of the living, official and academic forms of customary law.

¹⁹ See Constitution of South Africa (n 14) section 39(2).

Inheritance “generally refers to the testate or intestate transfer of rights, liabilities or title of the deceased.”²⁰ Succession refers to “the order in which or the conditions under which one person after another succeeds to a property, dignity, position, title or throne.”²¹ In South Africa, the common law of succession uses the two terms interchangeably. Only the term “succession” should be used for customary law in order to describe properly the “process whereby the successor steps into the shoes of the deceased with regard to the latter’s property and his status.”²² Most importantly, in the customary law context, the successor (or heir) succeeds not only to assets of the estate, but also to its liabilities.²³

It is one thing to acknowledge the force and applicability of customary law in theory. It is quite another to determine the precise content of a particular customary law rule and practice within a certain customary law community. As Bennett explains, “customary law derives from the practice of particular communities; these practices differ from place to place, and they change constantly over time. In such circumstances, a court that is not part of the community it serves cannot possibly know the law.”²⁴ Thus the potential problem of ascertaining customary law was sidestepped by the court giving preference to the official customary law²⁵

²⁰ C Rautenbach & Willemien du Plessis “Reform of the South African Customary Law of Succession: Final Nails in the Customary Law Coffin?” in J Fenrich P Galizzi & T E Higgins (eds) *The Future of African Customary Law* (2013) 336.

²¹ *Ibid* 337.

²² *Ibid*.

²³ *Ibid*. See also, *Bhe* (n 3) at paragraph 158 per Ngcobo.

²⁴ T W Bennett *Customary Law in South Africa* (n 6) 44.

²⁵ Despite the elevated status of customary law (both living and official) brought on by the 1996 Constitution, the difficulty of ascertaining the precise content of customary law and practice still remains – and was most recently an issue in the 2013 Constitutional Court case of *Mayelane v Ngwenyama*. *Mayelane*, and the Court’s difficulty in determining the customary law (for the purposes of developing it – which incidentally was not a remedy that either of the litigants requested) is discussed in Chapter Seven.

(b) *The Customary Law Rule of Male Primogeniture*

The customary law rule of male primogeniture permits only senior males to succeed to a deceased man's estate. The theory behind the original rule was sound, as it assumed that a male heir, in fulfilling the role that culture bestowed upon him within his family and community, would step into the place of the deceased and thus provide for any dependent women and children.²⁶ In essence, the heir would inherit the estate in trust so as to discharge his on going responsibility to provide for surviving dependants in the family.²⁷

Traditionally under customary law, women could not succeed to the status of a family head for at least two reasons. In the first place, they had neither the authority nor the capacity to represent the deceased's family to the outside world, in part, because they lacked the necessary *locus standi* to sue or be sued in court. In the second place, it was believed that daughters could not serve as heirs, because, in due course, they would eventually marry and move to their husband's family. Their loyalties would therefore lie

²⁶ In addition to caring for dependents, one of the main objectives of the customary law of succession was to continue the family lineage. See M Mamashela and W Freedman "The Internal Conflict of Law and the Intestate Succession of Africans: *Zondi v President of the Republic of South Africa* 2000 2 SA 49 (N)" (2003) *Journal of South African Law* 201-207. Interestingly, Maluleke notes that primogeniture was not an original aspect of customary law at all, but in fact was a construction of colonial rule, which became adopted as customary law because it served the interests of the male authorities who interpreted and applied customary law. So, although it may not be historically accurate to say that customary law originally provided for male-only inheritance, it did certainly evolve that way. Consider:

The primogeniture rule, which has just been abolished by the Constitutional Court in the case of *Bhe*, was not a customary law principle but a colonial and imperial construct imposed on Africans. The irony of it is that African males embraced it as their customary principle because it benefitted them; therefore they are the ones who were fighting against its being declared unconstitutional. The primogeniture rule was conceived by the framers of the Natal Code to be one of the main pillars of the 'native law' to their own benefit. It was imposed on Africans in order for the state to be able to litigate against one person rather than to have to join the whole family when the head of the house died.

M J Maluleke "Culture, Tradition, Custom, Law and Gender Equality" 15 (2012) *Potchefstroom Electronic Law Journal* 16.

²⁷ See T W Bennett *A Sourcebook of African Customary Law for Southern Africa* (1991) 383, where he notes the difference between "inheritance" and "succession".

with the new family and not with their natal family.²⁸ Hence, to permit a woman or girl child to inherit from her father would bring with it the risk that once she married, she would take her family's wealth to her husband's family, thus disadvantaging the family into which she was born.

The customary law rules of succession and the rule of primogeniture in particular, were not originally designed to place women and children at a disadvantage. Instead, this rule was developed in consideration of the family structure and the responsibilities between family members.²⁹ The reality is that as this traditional family structure evolved over time, what began as a protective mechanism transformed into something discriminatory and unjust. The main purpose of succession and the rule of primogeniture was to keep the family property in the family, not to disenfranchise those who have been traditionally recognised as being the most vulnerable. This vulnerability is often heightened by the fact that customary law is typically practised by those living in rural communities. This creates a further divide between the rural customary law practitioners and those who migrate to the cities in search of education and employment and in the process develop a disdain for their customary law roots and traditions.

According to the cultural context in which the rule of male primogeniture was developed, this all made perfect sense. But times and circumstances have changed and contemporary application of this rule (in both rural and urban locations) is no longer as appropriate.³⁰ The traditional rule of male primogeniture was based on the understanding that the heir

²⁸ J C Bekker & D S Koyana " The Judicial and Legislative Reform of the Customary Law of Succession" (2012) De Jure 569.

²⁹ As Justice Ngcobo explains:

The rules of indigenous law, in particular, the rule of primogeniture, have their origin in traditional society. This society was based on a subsistence agricultural economy. 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. ... 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.

See *Bhe* (n 3) at paragraph 162, 166.

³⁰ Part of the reason for this is that in contemporary South African Society, wives have begun to work outside of the home in order to contribute to the family's welfare.

would put the interests of the deceased's family before his own. This is an overly optimistic assumption in modern times, given that the demands of urban life have spawned individualism and self-interest.³¹

The customary law rules of succession, and the rule of primogeniture in particular, were originally developed as a result of the family structure and the high degree of responsibility expected of members.³² The reality is that, as the traditional family structure has changed, what began as a protective mechanism changed into something potentially discriminatory, that is, something materially prejudicial to women.³³ This prejudice is often exacerbated by the fact that tradition tends to be stronger amongst those living in rural communities.³⁴

The majority judgment held that in light of the new era of non-discrimination, estates that would previously have devolved according to the customary law rules prescribed in the Black Administration Act³⁵ and the

³¹ See W Lehnert "The Role of the Courts in the Conflict Between African Customary Law and Human Rights" (2005) 21 South African Journal on Human Rights 257:

It has been shown that under present conditions heirs, both in urban and in rural areas, increasingly ignore their obligations of support. Because heirs are becoming increasingly disobedient with regard to performing their duties, customary law no longer achieves its social purpose of protecting the interests of all family members, and the formal recognition of women and children's rights under customary law does not ensure that they will be respected.

See also M Chanock "Neither Customary nor Legal: African Customary Law in an Era of Family Law Reform" (1989) 3 International Journal of Law and the Family 72-79; A Griffiths "Legal Pluralism in Africa: The Role of Gender and Women's Access to Law" (1996) 19 Political and Legal Anthropology Review 93-94.

³² See again, Ngcobo J's comments about the origin of primogeniture rules (n 29). See *Bhe* (n 3) at paragraph 162, 166. For a further discussion of the content of the customary law of succession as it relates to this case, see part 4(a) below.

³³ See the Preamble to the *Reform of Customary Law of Succession and Regulation of Related Matters Act*, 11 of 2009, where it is noted in the Preamble that "social circumstances have so changed that the customary law of succession no longer provides adequately for the welfare of family members"

³⁴ This creates a further divide between the rural customary law practitioners and those who migrate to the cities in search of education and employment and in the process develop a disdain for their customary law roots and traditions. See T W Bennett, "The Interpersonal Conflict of Laws: a Technique for Adapting to Social Change in Africa" (1980) 18 *Africana: The Journal of Modern African Studies* 128.

³⁵ Note that at the time of the *Bhe* decision, provisions of the Black Administration Act were gradually being repealed, out of recognition of the inherent racist and divisive context in which the legislation emerged and prospered in apartheid-era South Africa. At the time of the writing of this chapter, the Act had been repealed in its entirety, thus alleviating any legislative basis for differential treatment of Black South Africans. As explained by Justice Ngcobo in *Bhe*,

customary law rule of male primogeniture, must now give way to the rules provided for in the Intestate Succession Act³⁶. Before the *Bhe* case, this Act applied to deceased persons who did not fall under customary law, and consequently the ambit of the Black Administration Act.³⁷

Justice Langa was of the opinion that development of the customary law was not the responsibility of the judiciary.³⁸ His solution was to remove the *Bhe* daughters from the operation of customary law altogether, in order to secure their right to equality.³⁹ Such an approach, although it produces the desired result for the applicants in the moment, does not satisfactorily address the long-term implications of a conflict between customary law and equality.

The Act was one of the pillars of the apartheid legal order, and together with other racially based statutes, it was part of the edifice of the apartheid legal order. The Act has been described as “an egregious apartheid law” that “anachronistically has survived our transition to a non-racial democracy.

See *Bhe* (n 3), per Ngcobo J at paragraph 141. See also *Moseneke and Others v The Master and Another* 2001 (2) SA 18 (CC) at paragraph 29, per Sachs J. This case examined the constitutionality of section 23(7)(a) and regulation 3(1) under the Black Administration Act [BAA] challenged on the basis that they disallowed black intestate estates from being administered and distributed by the Master of the High Court. The Court granted the applicant direct access and declared the section unconstitutional with immediate effect and inconsistent with the applicants’ rights to equality and dignity. An appeal by the Minister of Justice against the order of the High Court striking down the regulation was upheld in part. The regulation was struck down and the order of invalidity was suspended for a period of two years. The Court decided that the fact that the BAA brought black estates automatically into the purview of customary law (as opposed to providing for the option of having the Master administer the estates) was problematic.

³⁶ Act 81 of 1987.

³⁷ The complicating factor with devolving estates via the BAA was that the Act required the fragmentation of the estate, with widows and children inheriting fractions of estates. In the context of small estates, which might only consist of a township shack (as was the case in *Bhe*), the challenge was that these divided fractions of shacks would be impractical and useless. This example highlights the difference (namely poverty and racial divisions) between the white estates that devolved via the Intestate Succession Act and the Black estates that devolved via the Black Administration Act.

³⁸ In finding that there was insufficient evidence and material to enable the Court to develop the customary law rule of male primogeniture, Justice Langa stated that “[t]he difficulty lies not so much in acceptance of the notion of ‘living’ customary law, as distinct from official customary law, but in determining its content and testing it, as the Court should, against the provisions of the Bill of Rights.” See *Bhe* per Langa at paragraph 109.

³⁹ The assumption here is that Langa performed a deliberate choice of law (see the rules on choice of law in Chapter Four). Such an approach, however, while perfectly correct in principle, leaves customary law intact.

In terms of the argument put forward by this thesis, the decision in *Bhe* has the unfortunate effect of removing culture⁴⁰ (in the form of living customary law) as an aspect of identity for the girl child. Recall that the importance of culture as a fundamental aspect of identity was discussed in Chapter Five⁴¹. In fact, it is the position throughout this thesis that culture is the backdrop against which all aspects of identity intersect. Moreover, a cultural lens prescribes not only the determination of equality, but also the comparators upon which this determination is assessed.

In dissent, Justice Ngcobo, expressed his opinion that, before striking down customary law, courts have a constitutional obligation to “develop”⁴² it to bring it into line with the Bill of Rights, in particular, the right to equality.⁴³ Development of the customary law as proposed by Ngcobo has the advantage of allowing the judiciary to observe cultural practices as they are currently being applied in the communities.⁴⁴

While Justice Ngcobo’s dissent reflects a clear appreciation of the link between gender and discrimination in customary law, he says that the customary law rule of primogeniture is being challenged “on the basis that it

⁴⁰ Part of the consequence of removing or disregarding culture as an aspect of identity is that the entire framework of understanding becomes unmoored and essentially cast adrift without any grounding. Specifically, such removal would mean that women who have been given common law rights as a remedy from the courts, are likely to suffer persecution from their communities for drifting outside of the community framework. Additionally, given that the common law and customary law enjoy equal status under the Constitution, the removal or disregarding of culture functions to remove any distinguishing features between the two. In this respect it may then be redundant to emphasise the equal status between the two, if the removal of culture renders them characteristically equal in any event.

⁴¹ See Chapter Five, section 3(b).

⁴² But note that the argument advanced in this chapter is not that courts should “develop” customary law, but rather that the GRACE model is a tool to enhance recognition and consequently, judicial application of living customary law.

⁴³ See s 39(2) of Constitution which reads:

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.

⁴⁴ See *Bhe* (n 3) per Ngcobo J at paragraph 139. But note that the argument is not simply that the judiciary must always engage in development of the customary law, but also that the judiciary must be able to recognise the development of customary law that has taken place at the community level. In so doing, however, the living law becomes official law. Ostensibly, once it has been interpreted and reformulated by the judiciary it carries precedent value for future cases. It should be noted that any formal determination of unconstitutionality of a living law practice is pronounced when a party has raised the issue in litigation. Yet for reasons which may or may not relate to constitutionality, communities are constantly revising and developing their own living law.

discriminates unfairly on the grounds of gender, age and *birth* [order]”.⁴⁵ The acknowledgement of these two latter grounds suggests that there is a recognised aspect of intersectionality to the discrimination. Therefore arguably, intersectionality should also factor into the remedy.

Justice Ngcobo goes further to address not only the intersecting nature of the discrimination, but he also seeks to develop the customary law to alleviate that discrimination. This approach is not seen as a means of transforming it into the common law, but rather as a means of ensuring its compliance with the Bill of Rights “on its own terms and not through the prism of common law.”⁴⁶

(c) *Addressing the Presumptive Hierarchy between the Common Law and Customary Law*

Both the majority and minority judgments in *Bhe* refer to official customary law. Section 23 of the *Black Administration Act*, was understood to require the application of the customary law rule of primogeniture.⁴⁷ Neither decision contemplates a living form of the customary rule, which might have provided a different result. (In any case, the Court was entitled to consider whether the official customary law rule of male primogeniture was in conflict with the Constitution.) The present inquiry examines whether future courts should develop the customary law to bring it in line with the Constitution as per Justice Ngcobo’s decision.

⁴⁵ *Bhe* (n 3) per Ngcobo J at paragraph 147.

⁴⁶ *Ibid* paragraph 148.

⁴⁷ Note that section 23 of the Black Administration Act did not explicitly codify customary law. Instead, it provided choice of law rules, such that, it provided that movable house property and land held under quitrent tenure had to devolve by the customary law of intestate succession. In addition, in terms of Regulation *GN R200* of 1987, which was issued under s 23(10) of the BAA, the estates of Africans who died intestate were governed by customary law, unless:

- the deceased had been exempted from customary law in terms of the Zulu Code;
- the estate was devised by will; or
- the deceased was married by civil/Christian rites with an ante nuptial contract.

Such development would have meant that the impugned customary law, rather than being struck down in its entirety, would be amended in such a way that a customary norm still existed to deal with the issue raised in the case, and would no longer be offensive to the constitutional principles of fairness and equality. In this regard, mention may be made of Justice Langa's comment that,

It is important to appreciate the distinction between the legal framework based on section 23 of the [BAA] Act and the place occupied by customary law in our constitutional system. ... Certain provisions of the Constitution put it beyond doubt that our basic law specifically requires that customary law should be accommodated, not merely tolerated, as part of South African law, provided the particular rules or provisions are not in conflict with the Constitution.⁴⁸

The message here is that customary law, generally, ought to be preserved. The precise form and content that will be preserved is determined by what is left after constitutional negotiation. This commitment to the preservation of customary law alleviates any fear that it will be swallowed up by the common law.

In the effort to preserve customary law, it should not be forgotten that the true nature of the system is its ability to adapt and change with the times.⁴⁹ Strictly guarding the law stifles this quality. As Langa explains,

[t]he rules of succession in customary law have not been given the space to adapt and to keep pace with changing social conditions and values. One reason for this is the fact that they were captured in legislation, in text books, in the writings of experts and in court decisions without allowing for the dynamism of customary law in the face of changing circumstances. Instead, they have over time become increasingly out of step with the real values and circumstances of societies they are meant to serve and particularly the people who live in urban areas.⁵⁰

⁴⁸ Bhe (n 3) at paragraph 41.

⁴⁹ See *Alexkor Ltd and Another v Richtersveld Community and Others* 2004 (5) SA 460 at paragraph 53, where the Constitutional Court stated:

...unlike common law, indigenous law is not written. It is a system of law that has its own values and norms. Throughout its history it has evolved and developed to meet the changing needs of the community. It will continue to evolve within the context of its values and norms consistently with the Constitution.

⁵⁰ Bhe (n 3) at paragraph 82.

Ironically, therefore, protection of customary law in Apartheid-era statutes preserved something that may not have had any social currency. In fact, these preservation efforts have also had the effect of delegitimising customary law. People living according to customary law are told that certain rules in legal text books and legislation apply to them, although they had no hand in drafting the rules. This disjuncture between what the courts protect as official customary law and what the people have come to practise as living customary law may have done little else than solidify old relationships, some of which may, or may not pass the muster test of equality.⁵¹

4. Reflections on the Majority Decision in *Bhe*

As was discussed in Chapter Four, the existence of legal pluralism in South Africa means that, rather than being represented as a dying, outdated normative order, customary law is very much alive and thriving.⁵² The fact that the majority decision in *Bhe* opted to remove the operation of succession from the realm of the customary law (albeit, perhaps, temporarily)⁵³, did not reflect the fact that a significant population of South Africans live according to customary law, albeit one that might not have been accurately reflected in the legal texts.

It ought not to be the case that any issue of incompatibility (whether real or presumed) between customary law and the Constitutional provision of equality automatically results in the retraction of customary law. If that were the case, then customary law would soon cease to exist in post-Apartheid

⁵¹ Ibid at paragraph 83.

⁵² See C Rautenbach & W du Plessis "Reform of the South African Customary Law of Succession: Final Nails in the Customary Law Coffin?" (n 20) 340.

⁵³ This temporary state was intended to remain, until the legislature could develop a permanent solution to the problem of the incompatibility of the customary law operation of succession and the rule of male primogeniture with the equality provisions of the Constitution. See Reform of Customary Law of Succession and the Regulation of Related Matters Act, 2009.

South Africa.⁵⁴ Another solution to incompatibility lies in acknowledging that customary law is a “dynamic system of law which is continually evolving to meet the changing circumstances of the community in which it operates.”⁵⁵ This feature is common to all custom, and to that extent, customary law is a more socially responsive form of law than the precedent bound component of the common law.

In the *Bhe* case, an appropriate solution might have been found in the conflict of laws. If the parties had demonstrated a “Western” manner of living, common law might have been applied. The choice of law rule in South Africa at the time however demanded imposition of customary law regardless of the cultural orientation of the deceased or litigants by reason of section 23 of the *Black Administration Act*. What is more, the version of customary law considered in the majority judgment was an official version. The Court did not consider that there might have been a living form of this customary law rule that could have provided a different result.⁵⁶ If the Court had deliberated further on this matter, it would have been obliged to call witnesses to establish whether the community practice on succession had developed to reflect changes in the traditional gender roles.⁵⁷

Having found that the rule of male primogeniture was in conflict with the Constitution, however, the question posed to the Court was whether it was further obliged to *develop* the customary law to bring it into line with the

⁵⁴ On this point, one considers whether, once a customary law issue is resolved by reversion to the common law, the issue is forever removed from the ambit of customary law.

⁵⁵ *Bhe* (n 3) per Ngcobo J at paragraph 153.

⁵⁶ Such consideration may have required the Court to ask the parties to provide witness evidence to establish whether the community living customary law practice of succession had developed to reflect changes in traditional gender roles. This form of judicial activism was evident in *Mayelane*, where the Court took it upon itself to establish living customary law practice. There has also been much debate (beginning with the dissent in *Mayelane* as to whether this judicial activism was appropriate.

⁵⁷ Note that this issue of witness testimony to assist with ascertaining contemporary living customary law is discussed in Chapter Seven in reference to the *Shilubana v Nwamitwa* and *Mayelane v Ngwenyama* (n 3) cases.

Constitution or simply to replace it.⁵⁸ In this regard, attention is paid to Justice Langa's comment that,

It is important to appreciate the distinction between the legal framework based on section 23 of the act and the place occupied by customary law in our constitutional system. Quite clearly the Constitution itself envisages a place for customary law in our legal system. Certain provisions of the Constitution put it beyond doubt that our basic law specifically requires that customary law should be accommodated, not merely tolerated, as part of South African law, provided the particular rules or provisions are not in conflict with the Constitution.⁵⁹

The development of the (official) customary law proposed by Ngcobo is a means of ensuring that the rules keep pace with evolving social context, by reinvigorating the dynamism that is characteristic of customary law. Moreover, the importance of this development was referenced by Ngcobo, citing *Alexkor v Richtersveld*, where he says that indigenous law "has evolved and developed to meet the changing needs of the community" and that it will "continue to evolve within the context of its values and norms consistently with the Constitution."⁶⁰

5. Reflections on the Dissent in *Bhe*

The dissenting judgment of Justice Ngcobo endeavoured to preserve and develop the customary law, rather than dispense with it and resort to the common law in order to find the equality that was otherwise missing. Both majority and minority judgments arrive at the same result: that the Bhe daughters should inherit from their father. The difference is how this result is attained. The approach taken by the majority is to remove the Bhe daughters from the operation of the customary law, since it is this framework that is perceived to be at the root of the injustice and inequality that they experience.

⁵⁸ One question to bear in mind is whether this obligation to develop the customary law is a legal duty that is provided for elsewhere than section 39(2) of the Constitution.

⁵⁹ *Bhe* (n 3) at paragraph 41.

⁶⁰ *Alexkor Ltd v The Richtersveld Community* 2004 (5) SA 460 (CC) at paragraph 53, as cited by Ngcobo J in his dissenting judgment in *Bhe* paragraph 153.

However, recognising that the official customary law in its current form (as reflected in the *Black Administration Act*) was inconsistent with the Constitutional provisions of equality, Justice Ngcobo attempted instead to develop the official customary law to alleviate any inconsistency. In fact, he was of the opinion that the judiciary was obliged to undertake such development.⁶¹ Note that this obligation was not new, as the notion of judicial development of customary law has existed almost as long as customary law has been formally recognised as law in South Africa.⁶²

Although theoretically, the solution of developing the customary law is more favourable to the rights claimant than that proposed by the majority, Justice Ngcobo's approach fails to acknowledge that the official form of customary law may differ from the living law.⁶³ In dealing with this distinction from the very beginning, Ngcobo's analysis differs from that of Justice Langa, in that Ngcobo rightly identifies that the litmus test for equality must be the Constitution and not the common law.⁶⁴

⁶¹ See *Bhe*, paragraph 215, per Ngcobo J:

[w]here a rule of indigenous law deviates from the spirit, purport and objects of the Bill of Rights, courts have an obligation to develop it so as to remove such deviation. This obligation is especially important in the context of indigenous law. Once a rule of indigenous law is struck down, that is the end of that particular rule. Yet there may be many people who observe that rule, and who will continue to observe the rule. And what is more, the rule may already have been adapted to the ever-changing circumstances in which it operates. Furthermore, the Constitution guarantees the survival of the indigenous law. These considerations require that, where possible, courts should develop rather than strike down a rule of indigenous law.

⁶² See R S Suttner "The Study of Bantu Law in South Africa: A Review Article (1968) *Acta Juridica* 147-156.

⁶³ Specifically, Justice Ngcobo's proposal for development seems to be based on the official customary law – that which can be discerned, interpreted and developed by outsiders – but there is no option to defer to a form of living customary law that may not require development. Nor is there an option of how to develop the living customary law if this were necessary. This in turn poses the question as to whether it is possible and appropriate for living customary law to be developed by the judiciary, or if development of living customary law must come from within the community itself. (As noted in note 44 above, any engagement by the judiciary with living law in effect renders it official law.) Although communities are continuously varying and revising their living law, such changes are not considered to be "development" in the context of section 39(2) of the Constitution, for this power rests solely with the courts.

⁶⁴ See *Bhe* per Ngcobo J at paragraph 148. Note that for the purposes of this argument, the Constitution is not considered to be part of the common law, but rather the Constitution sits above both the common law and customary law, and both systems of law are subject to the Constitution.

Justice Ngcobo's dissent operates from the premise that the first duty of the Court is the protection of equality rights.⁶⁵ The second duty is to apply and interpret customary law in a way that is consistent with that duty.

6. Applying GRACE to the Facts of *Bhe v Khayelitsha*

This thesis takes the position that since intersection is a reality of GRACE's identity, then intersectionality is also key to the analysis that proposes a remedy to address the failed acknowledgement of GRACE's intersecting identity. In *Bhe*, development of customary law was an option endorsed by Ngcobo's dissent; it is the most authentic way of ensuring that customary law is consistent with equality principles. Further, such authenticity is enhanced if the development reflects an acknowledgement of the intersecting identity of the rights holder, for instance, GRACE.

When a matter reaches the level of judicial intervention, then it is the responsibility of the judiciary to develop the customary law at issue appropriately to avoid any conflicting interpretations or operation between the impugned law and the Constitution.⁶⁶ In the course of developing customary law, due consideration ought to be given to the current and evolving practices of the community in relation to the issue at hand.

Application of the GRACE model to the facts of the *Bhe* case involves at first instance, recognition of the importance of cultural context as the backdrop to GRACE's intersecting identity.⁶⁷ The result in *Bhe* is wholly dependent upon an acknowledgment of the customary law context and what this means in terms of the attainment of equality. Acknowledging context implies that the practice and perspective of the community is important to the task of finding the best remedy.

⁶⁵ The right to equality is provided for in section 9 of the Constitution. Moreover, section 1(a) identifies equality as one of the founding provisions of the Constitution. These founding provisions also function as interpretative principles. Thus the right to equality is intended to be a guiding principle that shapes the interpretation and application of the Constitution.

⁶⁶ See section 39(2) of Constitution.

⁶⁷ See Chapter Five, part 3(b).

The majority analysis in *Bhe* correctly identifies the relevant issues as gender, age and birth order (all within the broader context of customary law). The GRACE model further requires consideration of how the age, gender and birth order collectively impact the right of the Bhe daughters to inherit from their father.⁶⁸ An analysis that did not incorporate this perspective would look at the issues of gender, age, and birth order independently, without any consideration as to how each may inform the other, thereby further inhibiting potential access to equality.⁶⁹ Furthermore, a comprehensive GRACE analysis would recognise and apply considerations of race and culture.

Application of GRACE to the facts of the *Bhe* case involves consideration as to whether the cultural context in which the Bhe daughters live is one that can separate out the gender distinction from the inheritance entitlement. If contemporary culture, social and economic conditions do not operate to restrict family inheritance simply along male lines, then there is no basis for denying the Bhe daughters an inheritance right that they would have had if they had been Bhe sons.

The *Bhe* case turned on the issue of the right of succession – or specifically, a claimed property.⁷⁰ The inheritance of resources at the centre

⁶⁸ As Lehnert explains, the Court's application of a strict interpretation of the rule of male primogeniture in *Bhe* would mean that the deceased's father became the sole heir, and the two daughters were excluded from inheriting. "The court then assumed that male primogeniture constituted intersectional unfair discrimination based on race and gender, because it excluded persons who are black and female from inheriting." Thus this recognition of intersectional discrimination suggests that an analytical method to address the discrimination ought also to reflect an acknowledgement of intersectionality. See W Lehnert (n 31) 260.

⁶⁹ Birth order becomes an aspect of identity that forms part of the GRACE analysis, because the rule of male primogeniture in customary law held that only first-born males could inherit. This is contrary to the customary law rule of ultimogeniture, where inheritance was accorded to the youngest son. See *Bhe* (n 3) per Ngcobo J at paragraph 192.

⁷⁰ This is not intended to conflate the issues of succession and inheritance, for Bennett has clearly explained that the two issues are completely separate. However, for the purpose of simplifying the issues and making them relevant to contemporary realities, it is said that the real issue in *Bhe* was who had access to the property of the deceased. The right of access or entitlement to the property was for the purpose of controlling it – whether this meant the use, occupation or sale of the property. Simply put, the issue of succession in *Bhe* was a matter of determining who was rightfully entitled to inherit the property and thereby do with it as was necessary to preserve the best interests of the family. The constitutional issue was

of this case involved bare necessities: building materials and shack housing. As meagre as these materials may have been by some standards, they constituted the very lifeblood of existence for those concerned. And it was this grave matter of bare survival that made the case and the consequences of its analysis so fundamental to the future of the livelihoods and existence of members of customary law communities in South Africa.

The daughters' right to inherit property is not only about being recognised as legal subjects, but also about the ability to own, manage and control property as a means towards economic independence and self-sufficiency. The modernisation of the customary law rule of male primogeniture to include equal inheritance rights to women and girls reflects true development in both the political and social context fronts.

(a) *Gender*

*The problem with gender is that it prescribes who we should be rather than recognises who we are*⁷¹

Gender is quite obviously a key aspect of the official customary law rule of male primogeniture. The origins of this rule as being responsive to the social and practical realities of family relationships and family needs was explained earlier.⁷² What is less clear however, is that contemporary realities of shared contributions to the household and the diminishing rigidity of fixed gender roles, as well as the equality provisions in the Constitution have eroded the basis for differential treatment and entitlement under customary law. Hence, true gender equality would see the Bhe daughters – as opposed to sons – as heirs to their father's estate (and their mother as guardian of this inheritance on their behalf).

specifically whether this right of access was in any way diminished or compromised by age and/or gender.

⁷¹ C N Adichie *We Should All Be Feminists* (2014) 28.

⁷² See part 3(b).

The *Reform of the Customary Law of Succession Act* (RCLSA) and the post-*Bhe* regime specifically provide for spousal inheritance and the requirement that the heir administer the children's share of the estate.⁷³ This of course assumes that the mother was indeed the spouse of the deceased. In *Bhe* there was some question as to the legitimacy of the *Bhe* daughters due to questions about whether the lobolo payment had been sufficient to solemnise the marriage.⁷⁴ The *Reform of the Customary Law of Succession and Regulation of Related Matters Act* also addresses the issue of legitimacy and provides increased protection for children of customary marriages (by presuming legitimacy unless it would be inappropriate or unreasonable to do so).

(b) *Race*

The mere fact that the issue in the case involves customary law suggests that the litigants are Indigenous Black Africans. As part of the historical underpinning of official customary law, male primogeniture was only applicable to this sector of the population.⁷⁵ The BAA itself did not create customary law, but in the historical context of legal pluralism in South Africa, part of governance of two legal systems required clear demarcations as to which laws applied to which sectors of the population and for what purposes. Customary law applied to domestic matters, such as marriage and property inheritance of Black Africans.

⁷³ See Reform of Customary Law of Succession and the Regulation of Related Matters Act, 2009, s. 2(a).

⁷⁴ See *Bhe* per Langa at paragraphs 54-59. However, this question was resolved in favour of legitimacy and so this was not the obstacle for the *Bhe* daughters that it had posed in the *Mthembu* case. See *Mthembu v Letsela and Another* 2000 (3) SA 867 (SCA). This decision of the Supreme Court of Appeal predates *Bhe*, although it was based on similar facts – namely a daughter's right to inherit from her father under customary law.

⁷⁵ See Black Administration Act, 1927.

(c) *Age*

Age is only relevant in the current context because the Bhe daughters were minors. But age was not the identity aspect that restricted their ability to succeed or inherit from their father – the primary obstacle was gender. Had the Bhe daughters been Bhe sons, they would have been entitled to succession. Hence age was not the site of inequality, as logistical guardianship provisions would have been put in place to safeguard the inheritance interests of minors (this is similar to what is now reflected in the Reform of Customary Law of Succession Act and the Regulation of Related Matters Act, 2009).

The Introduction to this chapter made reference to the increased agency of female litigants in the new constitutional post-apartheid era. Age is a factor that is relevant to this agency – specifically the issue is whether minority status prevents girls from accessing a substantive equality benefit that they would otherwise be entitled to. Arguably, true equality for the Bhe daughters in this case would have resulted in their inheritance being administered by their mother on their behalf. Similarly, it is argued that development of official customary law to reflect a GRACE intersectionality analysis would provide that age should not function as a barrier to entitlement. But rather, the issue is how to manipulate the reality of age into the analysis. Such manipulation would mean that any necessary practical measures ought to be put in place to address any obstacles that might otherwise exist due to the age of the litigant (rights-seeker).

(d) *Culture*

It is somewhat of a theoretical academic debate to consider whether it is culture or race that determines the operation of customary law. Or perhaps the real consideration is whether culture is synonymous with race. It is contended that race and culture are completely different aspects of identity and to conflate the two is to engage in an essentialist colonialist practice that

does not appreciate the myriad cultural practices and communities that are embodied under the broad racial category of Indigenous Black South African.

In considering the operation of culture in the context of the GRACE analysis, one may also ask whether it is culture that determines customary law or whether it is customary law that determines culture. In any event, there is something of a symbiotic relationship between the two, such that any variation of one within a particular community will have an impact on the other. Further, it is also interesting to note that unlike gender, race and age (at least for certain contained periods of time), both culture and customary law are fluid and flexible to change. Although both expect a certain level of adherence by the community, it is also understood that the community may from time to time, vary, adjust or adapt the specific content of either culture or customary law, and such variation does not diminish the import or impact.

Note that the reasoning in *Bhe* reflects a departure from other cases where the Supreme Court of Appeal and provincial High Courts had been loathe to vitiate male primogeniture on the basis that it warranted cultural protection under the Constitution.⁷⁶

(e) *Equality*

The crux of the equality analysis is that the intersection of the gender, race, age, and culture aspects of the identity of the *Bhe* daughters should not restrict their right to inherit under customary law if such inheritance would be permitted under the common law with the same identity intersections.

In considering both the majority and minority decisions in *Bhe*, the final analysis seems to indicate that the decision is about promoting equality in an official customary law context. But perhaps a deeper question is what is the content of equality in a living customary law context. Recall that the initial theoretical inquiry posed in this thesis was the applicability of the

⁷⁶ See *Mthembu v Letsela* 2000 (3) SA 867 (SCA); *Mabuza v Mbatha*, 2003 (4) SA 218 (C), *Thembisile and Another v Thembisile and Another* 2002(2) SA 209 (T).

GRACE model to discern equality, and equality is primarily a common law concept, but when imported into customary law, it is very clearly official customary law.⁷⁷ Hence, the question still remains whether the GRACE analysis, or perhaps even equality as an evolving notion on its own, is applicable in a living customary law context.

7. Conclusion: Post *Bhe*: The State of Equality and Customary Law in the Absence of Primogeniture

Conflicts do not arise because people demand their rights but because their rights are violated⁷⁸

This chapter has provided the GRACE model of analysis as a means of both remedying the inequalities that may result from a blind adherence to customary law, as well as filling the gap that may result in the law following the swift removal of a customary law rule. An interesting consideration to ponder is whether, since the Constitutional Court decision in *Bhe v. Khayelitsha Magistrate*, there have been any improvements regarding the enjoyment of equality for young girls subject to customary law. If a marked improvement were noticeable, it might suggest that the lack of equality was attributed strictly to the rule of male primogeniture. Although it is argued that male primogeniture certainly did not contribute to equality rights for girls, it is also recognised that primogeniture may not be the only customary law issue that poses a challenge for the attainment of equality.

The discussion in *Bhe* and analysis in the context of the GRACE model has now set the stage for the discussion of *Shilubana*, *Gumede* and *Mayelane* that follows in Chapter Seven.

⁷⁷ It should be noted that there is no identifiable research indicating the nature or application of equality in living customary law.

⁷⁸ W Van Genugten "Protection of Indigenous Peoples on the African Continent: Concepts, Position Seeking, and the Interaction of Legal Systems" (2010) 104 American Journal of International Law 39.

CHAPTER SEVEN – BEYOND *BHE*: APPLYING GRACE TO SELECT CASES: *MABENA*, *SHILUBANA* AND *MAYELANE*

1. INTRODUCTION.....	151
2. APPLICATION OF THE GRACE MODEL OF ANALYSIS BEYOND <i>BHE</i> .	152
(A) <i>MABENA</i>	153
(i) <i>Overview of the Facts in Mabena</i>	153
(ii) <i>Application of Intersectional Components of the GRACE Model to the Facts of Mabena</i>	154
(B) <i>SHILUBANA</i>	157
(i) <i>Summary of the Facts and Decision in Shilubana</i>	158
(ii) <i>Application of GRACE to Shilubana facts</i>	160
(C) <i>MAYELANE</i>	163
(i) <i>The Facts and Decision in Mayelane: Development without Invitation</i>	165
(ii) <i>Applying GRACE to Mayelane</i>	169
3. CONCLUSION	171

Introduction

The previous chapter demonstrated application of the GRACE model as an interpretive tool to discern gender equality within official customary law. Given that the model is flexible according to social context, it is presented as an effective tool for the courts to apply to situations involving living customary law, since it is both reflective of and responsive to the fluid development of the law.

The particular construction of identity, as represented by GRACE, an African girl child, results in different levels of access to equality for a comparator individual, whose gender, race, age or cultural context is different than that of GRACE. The cases discussed in this chapter involve a challenge to the application of the constitutional right to equality in a customary law context, and presented an opportunity for the judiciary to apply intersectionality theory to effect the best possible equality result.¹

¹ As indicated earlier, culture as an identity facet is represented by customary law, as customary law and culture are intertwined. Similarly the identity facet of race is also

This chapter demonstrates application of the GRACE model as a means of fine-tuning the analysis of the cases of *Mabena v Letsoalo*², *Shilubana v Nwamitwa*³, and *Mayelane v Ngwenyama*.⁴ The analysis and outcome in each of these cases depicts the female litigants as exhibiting qualities of agency, such as the independence and authority that had traditionally been reserved for men. This is interpreted as acknowledgement that customary law can be embraced in contemporary society in a manner that reflects principles of equality and non-discrimination.

2. Application of the GRACE Model of Analysis Beyond *Bhe*

Discussion of the GRACE model herein focuses on succession to the office of chief and the right to negotiate a customary law marriage. Each of these issues is rooted specifically in customary law and requires the judiciary to engage in an equality rights analysis that considers the rights enjoyed by the women (or girls) who are the subjects, vis-à-vis the rights of either men within the same customary law context, or women outside of the customary law context (i.e., subject to the common law), whatever the appropriate comparator may be in the circumstances.⁵

The cases of *Mabena*, *Shilubana* and *Mayelane* all presented similar opportunities for the courts to develop the customary law in accordance with the Constitutional principles of equality. In each instance, the gender discrimination that is a feature of the particular customary law at issue is identified by the Court as an infringement of equality that must be remedied.

embedded within customary law, as in the South African context, customary law is only applicable to those whose racial identity is “Black African”. The collapsing of race and culture into customary law does not alter the significance or applicability of the GRACE model. The crude marker of culture in Africa is *still* race, both because of colonial and Apartheid traditions and because of ease of determination. In contemporary South Africa race is now an *unspoken* factor in deciding culture. This raises its own problematic, which is beyond the scope of the present work.

² 1998 2 SA 1068 (T).

³ 2009 (2) SA 66 (CC).

⁴ 2013 4 SA 415.

⁵ In view of the fact that equality is a comparative concept, then the attainment (in full or in part) of equality is considered relative to the standing and status of another individual or group. In fact, equality is only given contextual meaning through this comparison process.

(a) *Mabena*

The 1998 case of *Mabena v Letsoalo* demonstrates that cognisance of intersectionality – particularly the emphasis on gender and culture – is not a new phenomenon. This example does not, however, flow from the reasoning that develops in *Bhe* and *Shilubana*, but pre-dates it, as *Mabena* was a lower court decision that was decided at least seven years before *Bhe*.

(i) *Overview of the Facts in Mabena*

In *Mabena*, the existence of a customary marriage was challenged on the basis that the lobolo was negotiated and received by the wife's mother in the absence of her father.⁶ This situation was contrary to the official customary law, which allows only men to participate in *lobolo* negotiations. The court took a broad approach and considered the specific rules and customs that were practised on a daily basis, in essence, the living customary law. It was accepted that there are instances where a woman may act as head of a family and could receive *lobolo*, and so the Court developed the customary law to be more reflective of how the practice was actually engaged in at the community level.⁷

The notion of male authority and power that is at the heart of the customary law rule of male primogeniture was not limited to property inheritance, but was also based on the cultural practice that only senior men had the authority to represent the family and negotiate with outsiders. Negotiation of lobolo is one such issue that in terms of customary law, rested traditionally with the male head of the family.

The decision in *Mabena* suggests that Justice Du Plessis “did not perceive customary law as a closed system but rather as a fluid narrative

⁶ See T W Bennett *Customary Law in South Africa* (2004) 188-198 for a discussion of the historical and contemporary significance of *lobolo* in customary marriages.

⁷ As Lehnert explains, that the court relied on current community practice in concluding that, “...nowadays mothers of the bride can indeed negotiate lobolo with an intended bridegroom, and that the bridegroom has a right to negotiate and pay the lobolo without the consent of his father.” See W Lehnert “The Role of the Courts in the Conflict Between African Customary Law and Human Rights” (2005) 21 *South African Journal on Human Rights* 262.

which changed in light of changing gender roles”⁸. The Judge noted that it is evident that customary law is, as many systems of law should be, “in a state of continuous development.”⁹ Similar to *Shilubana*, the decision in *Mabena* reflected an acknowledgement and incorporation of the sentiments and practices of the particular community being discussed.¹⁰ Furthermore, although not decided on the basis of constitutional alignment, the decision also made reference to principles of gender equality. However, in this case, the agency of the bride’s mother to negotiate *lobolo* arose only owing to the absence of the bride’s father and the unavailability of another male relative to fulfill the technical formalities of customary law.¹¹

Bhe, *Shilubana* and *Mabena* all raised issues of the conflict between traditional customary law rules and gender equality. The conflict comes about as a result of the death (or absence) of the male family head. The issue of succession – whether it be related to the issue of negotiating and accepting *lobolo*, in the case of *Mabena*, or property succession as in the case of *Bhe* or political office in the case of *Shilubana* – only became relevant when the male family member who had charge, guardianship or ownership of the person, office or property in question, died.

(ii) *Application of Intersectional Components of the GRACE Model to the Facts of Mabena*

⁸ M Mswela “Cultural Practices and HIV in South Africa: A Legal Perspective” (2009) 12 Potchefstroom Electronic Reports 179.

⁹ See *Mabena* (n 2) paragraph 1074. The much contested concept of development of the law in terms of section 39(2) of the Constitution is discussed in *Thebus & Another v S* 2003 (6) SA 505 (CC) per Mosenke J. In this case, the issue was raised on appeal that a particular law (the law of common purpose) be developed so as to provide a remedy to the accused appellant. As an initial step, the Constitutional Court held that the law was not unconstitutional and hence was not in need of development.

¹⁰ See S Jagwanth & C Murray “Ten Years of Transformation: How Has Gender Equality in South Africa Fared?” (2002) 14 Canadian Journal of Women and the Law 297-298 and C Himonga “Implementing the Rights of the Child in African Legal Systems: The *Mthembu* Journey in Search of Justice” (2001) 9 International Journal of Children’s Rights 96-97.

¹¹ Note that the context applicable to the absence of the bride’s father is likely based on racial identity, given that the absence of men was a situation peculiar to the realities of Black Africans living in South African townships. These realities included migrant labour – a seasonal phenomenon, and not representing a permanent social practice that would justify a finding that a new rule of customary law had developed.

The aspect of gender here relates specifically to the bride's mother engaging in the negotiation of lobolo. Historically, customary law provided that this was a task for the family head, who was by definition, male.¹² In the absence of the bride's father as the typical head of the family, the assistance of another male relative would be sought. Both of these were unavailable in this case. So, the mother negotiates and accepts the lobolo as a result of the unavailability of a male family head, and not because customary law considered her eligible to do so in her own right.

For the purposes of the GRACE analysis, the race component of identity is the entry point to customary law. But more than simply prescribing the operation of customary law, race is also a marker for a host of possible contextual factors that could have contributed to the facts in *Mabena*. For instance, given economic circumstances in South Africa, the race of the bride's father could have meant that his absence was on account of his having to relocate away from his family in order to seek employment opportunities. During the apartheid era, it was not uncommon for the male family head to leave his family's rural home in search of employment in an urban area or township. In this context then, race is not simply an aspect of identity, but it is a driving factor in the situation giving rise to the very issue under consideration.¹³

Age is not a particularly relevant aspect of identity for the purposes of the analysis in *Mabena*. It is assumed that the bride is old enough to consent to the marriage, and similarly assumed that the mother is a mature woman, competent to negotiate the terms of lobolo. However, competency is not simply a matter of maturity, but also involves the ability to act in the best interests of both her family and her daughter for the purposes of lobolo negotiation.

¹² T W Bennett *Customary Law in South Africa* (n 6) 195.

¹³ See E Grant "Human Rights, Cultural Diversity and Customary Law in South Africa" (2006) 50 *Journal of African Law* 2-23; T W Bennett "Legal Pluralism and the Family in South Africa: Lessons from Customary Law Reform (2011) 25 *Emory International Law Review* 1057; J Zimmerman "The Reconstitution of Customary Law in South Africa: Method and Discourse" (2001) 17 *Harvard Black Letter Law Journal* 224.

With respect to the cultural context of identity, the issue at the heart of the *Mabena* case – namely the capacity to negotiate lobolo – is a customary law consideration. Lobolo is in fact a unique feature of customary marriages (some would argue that it is the essential component of a customary marriage).¹⁴ Given that customary law is by nature, fluid and ever evolving, the ability of the mother to negotiate lobolo in this instance speaks to the evolving role of women in customary law, which reflects the key intersections between gender and culture.¹⁵

In aspiring to meet the constitutional guarantee of equality, the decision in *Mabena* reflects the willingness of the courts to accept a new customary law rule that permits women to negotiate lobolo in the absence of the male family head. Hence, the court had to consider whether a mother could take on a responsibility that is typically reserved for the father/male family head. What is not so clear however, is whether the customary law governing lobolo negotiations has evolved to the point that either the mother or father can negotiate at any time, or whether the mother's capacity only materialises when the father is absent. Of course, true equality in line with the constitution would see no distinction between the two parental figures. The real question is whether customary law has evolved to this level of equality; if not, whether the courts can appropriately so develop it.

Following the principle in *Mabena*, the 2007 Cape High Court decision of *Fanti v Boto*¹⁶ also demonstrates that there are circumstances that permit

¹⁴ For a full discussion of the meaning and function of lobolo as a component of customary marriages, see T W Bennett *Customary Law in South Africa* (n 6) 220-236.

¹⁵ In the absence of customary law evolving on its own to permit women to negotiate lobolo, section 39(2) of the Constitution can be interpreted as requiring courts to develop customary law to permit this practice.

¹⁶ *Fanti v Boto* 2008 (5) SA 405 (C). See particularly, paragraph 21 of this case, which clearly articulates the equality argument associated with acknowledging the entitlement of mothers to negotiate lobolo:

...the mother of a girl whose father died or is for some other acceptable and understandable reason absent and/or unable to discharge duties normally meant for the "kraalhead", is quite entitled to act as the head of the family. Such mother becomes the "father" and legal guardian of the children of her family. I state categorically that such a mother would legitimately negotiate for and even receive *lobolo* paid in respect of her daughter. ... [I]f Courts do not recognise the role to be played by women in society, then that would indicate failure and/or reluctance on their

a woman to act as the head of the family. However, it still seems that this agency only applies where there is no other alternative; for instance, in the case of the death of or abandonment by the male family head. So although matters seem to have progressed to permit women to step into the role of family head, they have not yet reached the point where a woman or a man could equally serve as family head, regardless of the particular circumstances of the case. Male preference still seems to be the default standard in customary law. The fact that consideration and sometimes actual effect is given to the role of females in the absence of males does not constitute considerable movement towards gender equality, since this consideration is only made in exceptional circumstances.

(b) *Shilubana*

Shilubana represents a fine example of progressive development of the law. This “progressive” label does not speak to the sophistication of the judicial analysis, but rather to the court’s ability to trust in the community’s own analysis, development and application of customary law. Here, the Court relies on the development of customary law initiated by the community in the wake of the new Constitutional equality provisions. As was the case in the discussion of the *Bhe* case in Chapter Six, the discussion that follows here does not necessarily criticise the outcome in any of the cases, but takes issue with the method applied.

part to participate in the development of the customary law which development is clearly in accordance with the ‘spirit, purport and object’ of our Constitution.

(i) *Summary of the Facts and Decision in Shilubana*

Shilubana involved a dispute between two first cousins: Ms Shilubana and Mr Nwamitwa. The immediate issue was who would succeed Mr Nwamitwa's father, Richard as Hosi (chief) of the Valoyi traditional community. The historical context behind the dispute dated back to 1968, when Ms Shilubana's father, Hosi Fofeza Nwamitwa, died without a male heir. At the time, customary law practice did not permit women chiefs, and so Ms Shilubana could not succeed her father, although she was his eldest child. Instead, Hosi Fofeza was succeeded by his brother, Richard Nwamitwa. Fast forward almost 30 years to 1996 and 1997, in the wake of post-apartheid South Africa and its new constitutional commitment to equality and non-discrimination, where the traditional authorities of the Valoyi community passed resolutions declaring that Ms Shilubana would succeed Hosi Richard.

Indeed, the chief, Richard, was also in favour of this development of the customary practice to reflect equality considerations.¹⁷ When Hosi Richard died in 2001, his son challenged the succession of Ms Shilubana to the office of chief, claiming that the tribal authorities had acted unlawfully in suggesting that she could succeed.

In overturning the decisions of the lower courts, a unanimous Constitutional Court ruled in Ms Shilubana's favour, stating that the lower courts had failed to acknowledge the power of the traditional authorities to develop the customary law in the way that they did.

The Constitutional Court's analysis in *Shilubana* is an example of judicial recognition (and application) of the development of customary law in fulfilment of constitutional principles. In acknowledging the community's efforts in this way, the Court demonstrated a contextual approach by deferring to the cultural context to give meaning and substance to the customary law practice at issue. This judicial endorsement of community

¹⁷ The evidence adduced suggests that at least Hosi Richard was initially supportive. There is some debate as to whether Hosi Richard later withdrew his support for Ms Shilubana succeeding him in favour of his son. See *Shilubana* (n 3) at paragraphs 5-6.

practice has also been referred to as “passive development” of customary law.¹⁸

Writing for a unanimous court, the decision of Justice Van der Westhuizen illustrates willingness to defer to the activities of the community when it comes to interpreting its best interests including a commitment to gender equality.¹⁹ Where the community has not been proactive in taking such an approach, the GRACE model presents a method for the judiciary to discern what course of action would reflect both constitutional principles and at the same time preserve the spirit, purpose and intention of a particular customary law or practice.²⁰

The court’s endorsement of the Valoyoi community’s development of the customary law of succession to chieftainship reflects a common and consistent interpretation of the powers and responsibilities of the traditional authority in accordance with section 211(2) of the Constitution.²¹ To best illustrate the application of the GRACE analysis, what follows is a discussion of the elements of the GRACE model (namely the intersecting impact of gender, race, age and culture on the attainment of equality), and the applicable contextual factors of each of them.

¹⁸ See C Himonga “The Future of Living Customary Law in African Legal Systems in the Twenty-First Century and Beyond, with Special Reference to South Africa” in J Fenrich, P Galizzi & T Higgins (eds) *The Future of African Customary Law* (2011) 31 at 48. Himonga clarifies that passive development occurs where community practice is not incompatible with human rights law. In contrast, active development of customary law occurs where there is a disjuncture between living customary law practices and human rights – the judiciary can actively develop the customary practice to align it with the constitution.

¹⁹ See *Shilubana* (n 3) paragraphs 44-49.

²⁰ See Farlam’s judgment in *Nwamitwa Shilubana v Nwamitwa* [2006] SCA 174, at paragraph 7 and paragraphs 36-41, where he likened the royal council’s decision to a common-law type of ‘executive order’ and gave effect to it. Hence, customary law was not changed or upset, but the woman achieved equality.

²¹ Section 211(s) states: A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.

(ii) *Application of GRACE to Shilubana facts*

The common understanding that was the foundation of the analysis of both the community and the Constitutional Court was that gender alone should not be an automatic bar to succession to office. In view of the new constitutional dispensation and the era of equality – particularly on the aspects of race and gender, as reflected in the preamble to the Constitution, the Valoyoi community sought to fulfil its responsibilities to contribute to more equitable gender relations by eliminating a feature of customary law which reflected blatant inequality.²²

In its own assessment, the court found that there was no justifiable reason why the gender discrimination element was a necessary component of the customary law of succession to office. In this respect the community would know best what is or is not a key element of customary law. The fact that gender discrimination may have been a long-standing element of this customary law rule was not reason alone to retain the rule. In this instance, what the community is seen to value is the duty of the Hosi to act in the best interests of the community.²³ Such determination of best interest and the corresponding action is not something that can definitively be conducted better by one gender than the other. Instead, the ability to engage in a balanced consideration of community needs on the whole is required.

Ms Shilubana's gender identity initially functioned to disqualify her from succeeding to her father's position of Hosi after his death. Consequently, since Ms Shilubana was her father's only child, the customary law principle of male primogeniture in operation at the time of his death required that the position of Hosi go to the closest male relative. In this case, it was his brother, Richard.

As the years went on and the Constitutional value of equality began to take hold in South Africa, the Valoyoi community took it upon itself to change

²² The relevant phrase from the Preamble to the Constitution is as follows: "...Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equality protected by law."

²³ See *Shilubana* (n 3) at paragraphs 39, 49.

the customary law practice of succession to Hosi. The successor to Richard would not be his son (Nwamitwa) as male primogeniture would dictate. Rather, the principle of equality would take precedence to correct the situation that occurred when Richard was declared Hosi over Shilubana as the natural successor. It seems that when the community decided to eliminate the gender inequality inherent in Hosi succession, Shilubana could at that time, have put an end to Richard's rule and taken up the post immediately. She chose instead to defer this while she explored other political ambitions.²⁴

The race component of identity in this case is what brings us to the operation of chieftainship succession and male primogeniture in the first place. It is the intersection of race (which itself is accentuated by variations in culture and ethnicity) and gender that dictate the customary practice of chief succession. In choosing to eliminate the determinative feature of gender, female identity is not an automatic bar to chieftainship, and so the Valoyoi community has effectively provided for gender equality.

The aspect of race and the general operation of chieftainship succession lead to the issue as to whether the customary practices of installing Hosis as traditional leaders is itself in furtherance of equality. For instance, does the regulation of certain community affairs by traditional leaders advance the principle of equality in local government? This question is the subject of sporadic debate in South Africa.²⁵ Government by chiefs was a means for furthering the interests of white minority rule in the country. So was (arguably) the entire customary law system, insofar as it created a

²⁴ It is also interesting to note the anecdotal context that Ms Shilubana was emboldened in her claim by her experience as a member of the ANC parliament. Thus this challenge might have taken on a different dynamic had she not had this political support, insight and savvy. See: <http://mg.co.za/article/2008-09-04-a-hosi-is-truly-born> [last accessed February 2015].

²⁵ See S Düsing "The Impacts of Traditional Leadership on Gender Equality and Women's Participation in Rural Development" in *Traditional Leadership and Democratisation in Southern Africa: A Comparative Study of Botswana, Namibia and South Africa* (Hamburg: Lit Verlag 2002) at 252-257; Leslie Bank and Roger Southall "Traditional Leaders in South Africa's New Democracy" (1996) 37 & 38 *Journal of Legal Pluralism and Unofficial Law* 407-430; and T W Bennett "The Equality Clause and Customary Law" (1994) 10 *South African Journal on Human Rights* 122-130.

sphere of potential oppression for people who might otherwise have lived their lives according to the common law.

Age is not an identity aspect that has significant impact on the facts of this case. At both material times – when her father died as well as when her uncle died, and the position of Hosi was open to a successor – Shilubana was of an age that would not have impacted her ability to take on the position. Similarly, Nwamitwa, who was challenging Shilubana’s entitlement to the role, did not do so on the basis of age, but rather on the basis of gender and how this affected male primogeniture.

Moving on to consider other aspects of identity involved in the GRACE analysis, recall from Chapter Six, that although it is often difficult to separate the identity aspect of culture from that of race, it is necessary to do so, as to conflate the two is highly problematic.²⁶ The operation of customary law is a feature of race, as the nature and content of particular customary law practices relate to the local customs of the indigenous Black African community under discussion.

One of the most interesting features of the constitutional Court’s judgment is the subject of tradition. As Himonga explains, “....‘tradition’ emphasises the fact that customary law is rooted in the practices of the people, whereas reference to ‘culture’ signifies the inherent evolving nature of living customary law (as culture changes, so does the normative system regulating the lives of people under the culture concerned).”²⁷ In a sense, tradition is the conceptual handmaiden of culture, for it denotes the mode of transmitting culture from one generation to the next. Hence, culture, being the core identity aspect, is also the pivotal identity axis – as culture flexes and evolves – then so too do the contextual manifestation and interpretation of the other aspects of identity shift.

²⁶ See Chapter Six, part 6.

²⁷ C Himonga “The Future of Living Customary Law in African Legal Systems in the Twenty-First Century and Beyond, with Special Reference to South Africa” (n 18) 37.

The GRACE model involves acknowledgement of the intersection of the various identity components of the litigants in order to promote equality. However, in the *Shilubana* analysis, interestingly enough, application of the GRACE model is not required in order to demonstrate the ideal operation of equality, since the local community had already achieved the desired result by developing the law. The GRACE model is appropriate, however, for a clearer understanding of the judicial reasoning that functioned to endorse the actions of the community.

Read in succession, *Bhe* and *Shilubana* seem to reflect a trend toward interpretation and development of customary law principles in a way that takes not only gender equality into account, but is also cognisant of cultural and contextual nuances that would benefit from an intersectionality analysis.

(c) *Mayelane*

The 2013 case of *Mayelane* represents the most recent Constitutional Court consideration of customary (gender) equality right in keeping with *Bhe* and *Shilubana*. This case considers the impact of the consent (or withholding thereof) of an existing first wife in a customary marriage on the validity of her husband's subsequent polygamous unions. Resolution of this issue at both the High Court and Supreme Court of Appeal levels relied upon the *Recognition of Customary Marriages Act*.²⁸ This is somewhat similar to *Bhe*, where the issue of customary law conflict was resolved by reference to the *Intestate Succession Act*.²⁹

Mayelane is interesting, for it involves two women challenging the validity of each other's customary marriage to the same husband. (This dispute has come a long way from the time when women were not entitled to

²⁸ See Recognition of Customary Marriages Act 120, of 1998, section 7(6).

²⁹ Intestate Succession Act 81 of 1987. See *Bhe* per Langa, DCJ at paragraphs 117-121 and at paragraph 136, where he pronounces on the invalidity of certain provisions of the Black Administration Act, as well as the Intestate Succession Act, but maintains that section 1 of the Intestate Succession Act should be applicable to Black African estates (which would otherwise have devolved in accordance with the Black Administration Act and the customary law provision of male primogeniture).

act in litigation.)³⁰ The applicant sought to assert a hierarchy amongst wives in that the validity of the second wife's status was dependent upon the express approval of the applicant as the first wife. Although the first wife does not have a veto, should the husband wish to take a subsequent wife, customary law does recognise and provide for the consent of the first wife in order to legitimise any subsequent marriages.³¹

The majority decision written by Justices Froneman, Khampepe and Skweyiya, used the *Recognition of Customary Marriages Act* as a basis for developing the customary law to make the consent of the first wife a requirement for the legitimacy of any subsequent marriage. The majority took the initiative to develop the customary law. The two dissenting judgments, penned by Zondo and Jafta, took the position that the Court ought not undertake the development of customary law, as this was not a remedy requested by the applicant, and such development was not required in this instance. An interesting issue to consider is whether development of customary law is properly undertaken, even when it is not requested.

It is submitted that development of customary law, whether it be on request or on judicial initiative, is not only within the power of the judiciary, but is also incumbent upon it. Judges are therefore obliged to give remedies that reflect the needs of the broader social context and will be applicable beyond the particular case at hand. Furthermore, such development of customary law so as to bring it in line with the provisions of the Bill of Rights, is not only permitted, but also arguably required by section 211(3) of the Constitution. This provision requires courts to apply customary law.

Hence, any analysis of a case before a court first requires a determination of the customary law at issue; in this regard, ascertainment of

³⁰ See T W Bennett *Customary Law in South Africa* (n 6) 31-33.

³¹ See *Mayelane* (n 4) per Froneman at paragraphs 21-52 and 71-84 for a broad discussion of the requirements under Xitsonga customary law and the Recognition of Customary Marriages Act with respect to the first wife's consent to a subsequent marriage. See also C Himonga's case commentary on *Mayelane*: <http://www.customcontested.co.za/mayelane-v-ngwenyama-and-minister-for-home-affairs-a-reflection-on-wider-implications/> [last accessed February 2015].

the living law will point to contemporary community practice.³² Where this practice is found to reflect constitutional principles appropriately, then it is converted into official customary law through the process of judicial decision-making. The majority in *Mayelane* seems to be doing just as Ngcobo suggested in his dissent in *Bhe*, namely developing customary law, rather than striking it down, or ignoring it and relying solely on legislation.³³

It should be noted that the court's decision does not comment on the validity of polygynous marriages as a legal institution, despite their inherent inequality (men may marry more than one wife, women may not marry more than one husband). The court specifically noted that polygynous marriages "differentiate between men and women" in this way, but that their validity was not challenged by either party. Accordingly, the court had to "work within a framework that assumes ...existence and validity [of this form of marriage]". The court thus left open the possibility for a constitutional challenge to the validity of polygyny as inherently discriminatory on the basis of gender.³⁴

(i) *The Facts and Decision in Mayelane: Development without Invitation*

This case examined the rules related to customary polygamous marriages in a Tsonga community. The husband, Hlengani Dyson Moyana, died in February 2009. The issue at the Constitutional Court was a dispute between Ms Mayelane, who claimed to have married Mr Dyson in January 1984, and Ms Ngwenyama, who claimed to have married Mr Dyson in January 2008. Ms Mayelane and Ms Ngwenyama each disputed the validity of the other's marriage.

³² See B Mmusinyane "The Role of Traditional Authorities in Developing Customary Laws in Accordance with the Constitution: *Shilubana and Others v. Nwamitwa*", (2009) 12 Potchefstroom Electronic Law Journal 140-1.

³³ See *Bhe and Others v Magistrate, Khayelitsha and Others (Commissioner for Gender Equality as Amicus Curiae)*; *Shibi v Sithole and Others*; *South African Human Rights Commission and Another v President of the Republic of South Africa and Another* 2005 (1) SA 580 (CC) per Ngcobo at paragraph 139.

³⁴ See E Christie's case commentary on *Mayelane*, available at: <http://www.hrlc.org.au/human-rights-and-gender-equality-and-the-limits-of-customary-law-on-traditional-polygamous-marriages> [last accessed February 2015].

Upon the death of Mr Dyson, each woman sought to register her marriage in accordance with the Recognition of Customary Marriages Act.³⁵ Ms Mayelane then sought and obtained an order from the High Court declaring her customary marriage valid, and that the marriage of Ms Ngwenyama to Mr Dyson was void on the basis that Ms Mayelane, as Mr Dyson's first wife, had not given her consent. Ms Ngwenyama then took the matter to the Supreme Court of Appeal, which affirmed the validity of Ms Mayelane's marriage and overturned the invalidity of Ms Ngwenyama's marriage. At the Constitutional Court, Ms Mayelane appealed the Supreme Court of Appeal's determination that Ms Ngwenyama's marriage was valid.

Neither the High Court nor the Supreme Court of Appeal fully explored the Tsonga customary law requirement that the consent of the first wife was required for subsequent marriages. Both lower courts based their determination of validity of the marriages solely on the application of subsection 7(6) of the Recognition of Customary Marriages Act and did not explore the customary law rule of consent.

The primary difference between the interpretations taken by the two lower court levels was that the High Court considered subsection 7(6) of the *Recognition of Customary Marriages Act* to mean that, if the husband did not obtain court approval of the written contract regulating the matrimonial property regime of the subsequent marriage, the marriage was invalid.³⁶ The High Court on the other hand, determined that this lack of approval of the property contract did not invalidate the marriage itself, but only affected the proprietary consequences of the marriage, such that the marriage would be considered to be out of community of property.

In its deliberation, the Constitutional Court considered the following issues:

³⁵ Recognition of Customary Marriages Act 120 of 1998.

³⁶ Subsection 7(6) reads:

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 that will regulate the future matrimonial property system of his marriages.

- i) Whether the Recognition of Customary Marriages Act directly prescribes the first wife's consent as requirement for validity of a subsequent marriage;
- ii) Whether Xitsonga living customary law requires the consent of the first wife;
- iii) If neither the Recognition of Customary Marriages Act nor Xitsonga customary law creates the requirement of consent of the first wife, does the Constitution require the law to be developed accordingly?

The Constitutional Court concluded that Ms Ngwenyama's marriage was invalid because Ms Mayelane was not informed thereof, in contravention of Xitsonga customary law as it existed at the time. This conclusion was based on the majority reasoning espoused by Justice Froneman that:

... the Recognition Act is premised on a customary marriage that is in accordance with the dignity and equality demands of the Constitution and that Xitsonga 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.³⁷

In the analysis, Justice Froneman also made reference to *Shilubana* as providing guidance on what the Court should look for in terms of evidence of community development of customary law, as well as the factors the courts must consider when undertaking to develop customary law. Specifically, reference was made to Justice Van der Westhuizen's analysis that the process of determining the content of a particular customary norm is informed by the following factors:

- a) consideration of the traditions of the community concerned;
- b) the right of communities that observe systems of customary law to develop their law;
- c) the need for flexibility and development must be balanced against the value of legal certainty, respect for vested rights and the protection of constitutional rights; and
- d) while the development of customary law by the courts is distinct

³⁷ See *Mayelane* (n 4) per Froneman at paragraph 13.

from its development by a customary community, the courts, when engaged with the adjudication of a customary-law matter, must remain mindful of their obligation under section 39(2) of the Constitution to promote the spirit, purport and object of the Bill of Rights.³⁸

Justice Froneman warned that, in considering the issue of consent,

courts must understand concepts such as ‘consent’ to further customary marriages within the framework of customary law, and must be careful not to impose common-law or other understandings of that concept”. Courts must also assume that such a notion as “consent” will have a universal meaning across all sources of law.³⁹

The decision in *Mayelane* discussed at length the development of customary law. The discussion followed two tracks: community development of customary law (as most clearly stated in *Shilubana*); and judicial development of customary law. With respect to this second track, the court took its responsibility for development of customary law seriously. This approach was owing to the fact that the court set out to develop a customary law rule to which it would not be bound (as it was not part of the customary law community). Additionally, such development, although purporting to reflect the best interests of the community members, may not have occurred as a result of the contributions of all community members. On this point, Justice Froneman stated:

it is important to ensure that customary law’s congruence with our constitutional ethos is developed in a participatory manner, *reflected by the voices of those who live the custom*. This is essential to dispel the notion that constitutional values are foreign to customary law and are being imposed on people living under customary law against their will. There is untapped richness in customary law which may show that the values of the Constitution are recognised, or capable of being recognised, in a manner different to common law understanding.⁴⁰ [emphasis added]

³⁸ See *Shilubana* (n 3) per Van der Westhuizen J at paragraphs 44-49.

³⁹ See *Mayelane* (n 4) per Froneman J at paragraph 49.

⁴⁰ *Ibid* 50.

(ii) *Applying GRACE to Mayelane*

In this case, there are two relevant gender comparators, the primary one is the husband and the wife in a customary marriage. Arguably, there is a second issue between the first and second wives in a subsequent customary marriage entered into by the husband. Both comparative relationships raise the issue of equality vis-à-vis the comparator individuals. However, the second issue between the two wives is not a direct gender comparison, but rather speaks to a hierarchy between the wives. As for the key gender comparison, namely that between the husband and the first wife, the issue is with regards to the husband's duty to consult with and obtain the consent of the first wife before introducing a new party into the marriage relationship.

The identity aspect of race functions along with culture to make customary marriage – and its feature of polygyny - the focal issue in this case.⁴¹ But it should also be noted that, although the core issue is polygynous marriage, not all Black or indigenous South Africans practise polygyny. Hence, race is not an automatic determinant of the polygyny, which is essentially the system giving rise to the conflict in this case: the right of parties to alter their marital relationship. Further, this conflict is heightened by racial identity in the sense that the social construction of race and the economic and educational opportunities readily available to a Black woman in a customary law polygynous marriage, typically place her at a position of vulnerability and disadvantage vis-à-vis her husband; and moreover, her socio-economic options to address this inherent disadvantage, are also restricted by the same systems.⁴²

As has been the case with the discussion of every judgment except *Bhe*, age is not a key factor in the equality analysis. Similarly, *Mayelane* involves a discussion of the legitimacy of two customary marriages, and in neither case was the age of the parties a bar to the validity of the marriages.

⁴¹ For a broad discussion of customary law polygyny (the practice where men have multiple wives), see T W Bennett *Customary Law in South Africa* (n 6) 243-248.

⁴² *Ibid* 243-245.

The identity aspect of culture is what brings us into the realm of customary law. In particular, it is the law of customary marriages in the Tsonga community for the husband to require the consent of a first wife in a customary marriage before he can enter into a subsequent customary marriage with another woman. The analysis in this case fully explored the meaning and interpretation of consent of the first wife.

The equality analysis in the *Mayelane* case primarily concerns the equal ability of the husband and wife to alter the terms of the marriage contract. Specifically, it was argued that the husband could enter into a second marriage without the express consent of his first wife.

Secondly, this case concerns a consideration of equality between a first and second wife in a customary marriage. The identity aspect that becomes the basis of comparison in this instance is simply the order of the marriages and the designation as first or second wife. With respect to the other typical elements of the GRACE analysis - gender, race, age, and culture – both women shared these characteristics. What they did not share, or more accurately, agree on, was the interpretation of the consent requirement.

3. Conclusion

This chapter began with the premise that interdependent facets of identity intersect to impact collectively on the attainment of equality. However, what was not made clear at the onset is that for the purposes of the argument posed in this thesis, equality itself is not considered a right,⁴³ rather, it is viewed as a measurement defined as the extent to which one is able to access other rights.⁴⁴

In the lower court case of *Mabena*, and the three Constitutional Court cases of *Bhe*, *Shilubana* and *Mayelane*, culture is the key aspect of identity analysed within a customary law context. In all of these cases, resolution was based on a desire to promote and protect equality rights in keeping with the Constitution. This chapter argues that when assessing equality, the correct comparator should be taken from customary law, namely, that the comparison should be undertaken as locally as possible, within the same legal arena – and not from the common law. It does not specifically advance the analysis of equality rights if the default position is to remove the issue from the operation of customary law altogether, and interpose the common law.

In all instances, the cases discussed herein challenge the *status quo* in a particular version of customary law in order to bring it into line with the Constitution. Before the respective constitutional challenges, the women and girls concerned were denied their rights to property, the recognition of the existence of a valid customary marriage or political office, simply by virtue of their gender. The key aspects of the litigants' identity in all cases were gender and culture.⁴⁵ Since equality is a comparative concept, when the

⁴³ See Chapter Two part 3(b).

⁴⁴ This notion of equality as a measurement is in keeping with the description of equality as a comparative concept. See note 5 above.

⁴⁵ As previously mentioned, the relevant aspect of culture under discussion here is customary law generally. In this system, certain entitlements are clearly demarcated on the basis of gender. In a broader sense, that is relevant in the context of legal pluralism, customary law addresses certain areas of private law differently than would be the case under the common law. In these situations, the clear demarcation of rights entitlement is

female litigants in *Bhe*, *Shilubana*, and *Mabena* were compared to the male respondents, the Court consistently found that discrimination on the basis of gender was unfair and unjustifiable in South Africa's current constitutional context.⁴⁶

This chapter proposes the adoption and application of the GRACE model by the judiciary as a means of contextualising what might be deemed a modern interpretation and application of an established rule. Despite the flexibility that characterises the GRACE model, in terms of which aspects of identity are relevant in a particular context, and precisely how much emphasis is placed on one aspect of identity vis-à-vis others, the GRACE model can function as a useful analytical tool.

The strength of an intersectionality analysis is to ensure that the various aspects of identity are not separated from the individual thereby allowing individuals to enjoy the maximum equality and consequent dignity and freedoms, as reflected in the foundational values in the South African Constitution.⁴⁷

Using the case of *Bhe v Khayelitsha* discussed in Chapter Six as a launch point, this chapter argues that although the majority judgment may have appeared to produce a satisfactory outcome for the claimants, the Constitutional Court did not do as much as it could have done to provide an interpretation that essentially included a remaking of the law and establishing a precedent for protecting the equality rights of the African girl child living under customary law. In other words, the Court could have “developed”

determined by legal culture – and not necessarily gender (although gender divisions may be the basis for further differential treatment within each legal system).

⁴⁶ The comparator of African men is offered as an example. But the argument of differential treatment resulting in inequality could also be made with comparators outside of customary law – for instance, the inheritance entitlement of women – Black or white – who are not subject to customary law. The point of the argument is that if just one aspect of intersecting identity is altered – be it gender, race or the applicable law, then the result under examination would be different.

⁴⁷ See section 1 of the Constitution of South Africa, Act 108 of 1996, which states:

1. The Republic of South Africa is one, sovereign, democratic state founded on the following values:
 - a. Human dignity, the achievement of equality and the advancement of human rights and freedoms.
 - b. Non-racialism and non-sexism

customary law (as is required of the common law in s 8(3)(a) of the Constitution⁴⁸) to meet the demands of the section 9 equality provision more appropriately in the context of contemporary South African society.⁴⁹

In the cases under discussion, resolution was based on a desire to promote and protect equality rights in keeping with the Constitution. It seems then, that the notion of equality with which the customary law is expected to comply, is situated in the common law – given that Constitution is a creature of the common law. The courts implicitly chose as comparators for the litigants, hypothetical characters drawn from the common law. This chapter, however, argues that the context of equality, and hence the appropriate comparators against which to measure equality, must be situated within the same customary law context as the litigant.⁵⁰ The journey of GRACE involves her various identity constructions through the plural world marked by the coexistence of the common law and customary law. Beholden to both, and never forsaking one for the other, GRACE's life is a journey to seek recognition for all aspects of her identity and at the same time, to realise the equality and recognition that will render her a whole person.

⁴⁸ Section 8 addresses the Application of the Bill of Rights. Note also section 39(2) which deals with the Interpretation of the Bill of Rights.

⁴⁹ In considering section 8(3)(a) and section 39(2) together, by implication the application of intersectionality theory will be the method by which customary law can best be “developed” and furthermore, acknowledgement of intersectionality is a feature of development. This means that a “developed” customary law will acknowledge and reflect the operation of intersectionality where appropriate and applicable.

⁵⁰ See G Massell “ Law as an Instrument of Revolutionary Change in a Traditional Milieu: The Case of Soviet Central Asia” (1967-1968) 2 Law & Society Review 194-228 for a discussion of the long term consequences of employing a “surrogate” in a social engineering experiment to suggest that one identity can functionally stand in place of another.

CHAPTER EIGHT – APPLYING GRACE TO A HYPOTHETICAL CASE OF SEDUCTION

1. INTRODUCTION.....	174
2. KEY DEFINITIONS AND PRINCIPLES.....	175
(A) <i>DELICT - GENERALLY</i>	175
(i) <i>Common Law Delict</i>	175
(ii) <i>Customary Law Delict</i>	176
(B) <i>DELICT OF SEDUCTION</i>	177
(i) <i>Common Law</i>	178
(ii) <i>Customary Law</i>	179
3. THE SEDUCTION HYPOTHETICAL: ZINDZI AND MARCUS	181
(A) <i>MARCUS, ZINDZI AND SEDUCTION UNDER THE COMMON LAW</i>	182
(B) <i>MARCUS, ZINDZI AND SEDUCTION UNDER CUSTOMARY LAW</i>	183
4. SEDUCTION AND CONSTITUTIONAL CHALLENGES: GRACE AS REMEDY.....	185
A) <i>SEDUCTION, CULTURE AND LEGAL PLURALISM</i>	186
B) <i>APPLYING GRACE TO CUSTOMARY LAW SEDUCTION</i>	191
5. CONCLUSION	195

1. Introduction

Earlier discussions in this thesis have reviewed the development of right to equality case law for the (mostly young) female African litigant. Specifically, the focus has been on the increasing agency afforded African females as they navigate the intricacies of legal pluralism in South Africa. In the course of this case law review, the thesis has also proposed the GRACE analytical model as a tool for the courts to further improve the realisation of equality rights. The objective now is to further this proposal by demonstrating how the analysis developed in the previous chapters could be applicable to a hypothetical case dealing with the delict of seduction. Seduction is interesting because the putative aggrieved party entitled to a remedy is

different depending on whether the case is argued under customary law or the common law.¹

2. Key Definitions and Principles

Before the exercise of applying the GRACE model to a seduction hypothetical, it is helpful to begin with a general overview of the law of delict in South Africa with particular reference to the delict of seduction.

(a) *Delict - Generally*

A delict, whether considered in terms of customary law or the common law, is generally “the act of a person that in a wrongful and culpable way causes harm to another”.² The following five elements should be met before a person can be found liable for committing delict: (i) an act or an omission; (ii) which must be wrongful in law; (iii) fault;³ (iv) harm; and (v) causation.⁴ The crux of this definition is determining *what* constitutes harm. A complicating factor is the requirement that “harm” has both objective and subjective aspects.

(i) *Common Law Delict*⁵

Under the common law, if any one or more of the above five elements are lacking, then there is no delict and consequently no liability.⁶ The wrongful act, or delict has been defined as an unlawful, blameworthy act or omission

¹ Note that succession cases will involve a different party, depending on which system of law is used. Full consideration of equality rights in each system is a comparative analysis that is yet to be fully explored.

² C Rautenbach J C Bekker & N M I Goolam *Introduction to Legal Pluralism in South Africa* 4ed (2014). References are to C Rautenbach J C Bekker & N M I Goolam *Introduction to Legal Pluralism in South Africa* 3ed (2010) 105.

³ The element of fault is indicated as one of the five general elements of delict. But it is also noted that both common law and customary law conceptions of delict make provision to include exceptions to the fault requirement, particularly in instances of vicarious liability or strict liability. See J Neethling J Potgeiter & P J Visser *Delict* 7ed (2014) 379-81; 389-98.

⁴ E Knoetze “Fathers Responsible for the Sins of Their Children? Notes on the Accessory Liability of a Family Head in the Customary Law of Delict” (2012) *Speculum Juris* 47 at 61.

⁵ See generally J Neethling, J M Potgeiter P J Visser *Delict* (n 3).

⁶ C Rautenbach J C Bekker & N M I Goolam *Introduction to Legal Pluralism in South Africa* (2010) (n 2) 105.

which causes another person damage to person or property or injury to personality⁷, and for which a civil remedy for recovery of damages is available.⁸

(ii) *Customary Law Delict*

The official version of customary law of delict provides that redress may be claimed for the violation of any right representing material value,⁹ capable of being acquired by a family head. This refers to redress for damage to property, as well as for injury to a woman in so far as a family head's rights in her have been violated.¹⁰ Originally the customary law of delict comprised: damage to property; limited instances of defamation; and theft¹¹; various sexual wrongs, such as seduction (the defloration of a virgin); impregnation of an unmarried woman; adultery (intercourse, with or without impregnation, with a married woman); intercourse with or without impregnation;

In distinguishing between common and customary law, it is noteworthy that in customary law there is no clear and consistent difference between crime and delict.¹²

⁷ And for which redress is not usually dependent on a prior contractual undertaking to refrain from causing harm.

⁸ Further, a breach of a general duty imposed by law giving rise to a civil action at the suit of the injured person would also constitute a delict. See M Loubser, R Midgley, A Mukheibir L Niesing & D Perumal eds *The Law of Delict in South Africa* (2009).

⁹ This would include dignity or honour, which are highly valued in customary law.

¹⁰ J C Bekker *Seymour's Customary Law in Southern Africa* 5ed (1989) 342. See also C Rautenbach, J C Bekker & N M I Goolam Introduction to Legal Pluralism in South Africa (2010) (n 2).

¹¹ E Knoetze "Fathers Responsible for the Sins of Their Children? Notes on the Accessory Liability of a Family Head in the Customary Law of Delict" (n 4) 48.

¹² See T W Bennett "Customary Criminal Law in the South African Legal System" in J Fenrich P Galizzi & T E Higgins (eds) *The Future of African Customary Law* (2011) 363 at 380-83.

(b) *Delict of Seduction*

The delict of seduction gives rise to a right of action in both customary and common law.¹³ The primary difference is who is entitled to seek a remedy. In customary law, if a woman were seduced, her guardian would have an action for damages; in common law, she personally would have the action, but only if she were a virgin at the time of seduction.¹⁴ The common law action for seduction is primarily aimed at compensating the young woman for the impairment of her physical integrity, although together with any material damages she may suffer (notably medical expenses for pregnancy).¹⁵ Customary law compensates the woman's guardian for the diminution of her lobolo value.

Strategically, it is important to determine who initiates an action, because that person will have first option in choosing the governing system of law. If the defendant contests the application of one law, he or she will be put to the proof in alleging that the other is more appropriate in the circumstances. If a young woman has instituted a successful claim under the common law, her father or guardian may not thereafter institute an action in terms of customary law.¹⁶ A court will generally deem the matter under common law *res judicata*.¹⁷ If her father or guardian has already successfully instituted a claim under customary law, however, a traditional seduction beast owed to him is

¹³ South African Law Commission Project 90 the Harmonisation of the Common Law and the Indigenous Law: Report on Conflicts of Law (1999) at paragraph 1.4, p 2. Note also that: the common-law action is aimed at compensating the woman for impairment of her marriage prospects, whilst the customary action is primarily aimed at recovering a loss in the woman's lobolo value. See T W Bennett, C Mills & G Munnick "The Anomalies of Seduction: A Statutory Crime to an Obsolete, Unconstitutional Delict?" (2009) 25 South African Journal on Human Rights 342.

¹⁴ *Ibid* 330. Moreover, the woman's ability to claim an action for damages for seduction also depends her legal capacity to sue at common law. In customary law, only the woman's guardian can bring such a suit – and this is part of the gender inequality that is discussed below in part 4.

¹⁵ This may be accompanied by, or this violation of physical integrity may be amplified by a breach of promise to marry. See *Bull v Taylor* 1965 (4) SA 29 (A) at 37-38.

¹⁶ C Rautenbach, J C Bekker & N M I Goolam (2010) (n 2) 109-110.

¹⁷ T O Elias "The Customary Judicial Process" in *The Nature of Africa Customary Law* (1956) 212-213.

taken into account in determining the damages to be awarded to the young woman under the common law.¹⁸

(i) *Common Law*

The common law defines seduction as “the extra-marital defloration of a girl with her consent”.¹⁹ Two requirements must be met before a claim for seduction will succeed, namely: (i) physical defloration of the girl must have occurred, and (ii) the defloration must have occurred as a result of the man’s seductive conduct.²⁰ The consent requirement functions to differentiate the delict of seduction from the criminal action of sexual assault.²¹ Although not criminal, the delict of seduction is still actionable and deserving of remedy, if the young woman can demonstrate loss in the sense of damage to reputation and/or her future marriage prospects.²² The following factors may be taken into account in calculating the amount of damages: (i) age of the plaintiff; (ii) her circumstances in life; (iii) the measure of resistance she offered; (iv) the methods applied by the defendant to overcome her resistance; (v) whether the seduction took place when an offer of marriage was made; and (vi) whether the plaintiff was rendered pregnant by the defendant.²³

¹⁸ Ibid.

¹⁹ N Bohler-Muller “Of Victims and Virgins: Seduction Law in South Africa” (2000) 41 *Codicillus* 2 at 3.

²⁰ C Rautenbach J C Bekker & N M I Goolam *Introduction to Legal Pluralism in South Africa* (2010) (n 2) 109.

²¹ Although Bennett et al argue that it is in fact the common law delict of seduction that has essentially become obsolete and the criminal law characterisation is gaining increasing favour. See T W Bennett C Mills & G Munnick “The Anomalies of Seduction: A Statutory Crime to an Obsolete, Unconstitutional Delict?” (n 13) 347-9.

²² Note also that, in studying customary law, it must be continuously borne in mind that there is no clear distinction, as is the case in most Western legal systems, between criminal and private law sanctions and procedures. Added to that, the general elements and principles for delictual as well as criminal liability have not clearly crystallised in customary law to the same extent as in the common law. In terms of the common law, a delict is defined as “the act of a person that in a wrongful and culpable way causes harm to another”. Five elements must be met before a person can be held delictually liable in our common law, namely: (i) an act; (ii) wrongfulness; (iii) fault; (iv) harm; and (v) causation. If any one or more of these elements are lacking, in terms of the common law, there is no delict and consequently no liability. Recall that these elements are common to both common law and customary law systems of delict. See C Rautenbach J C Bekker & N M I Goolam *Introduction to Legal Pluralism in South Africa* (3ed) (n 2) 37-38.

²³ C Rautenbach J C Bekker & N M I Goolam *Introduction to Legal Pluralism in South Africa* (2010) (n 2) 110.

Seduction in the common law provides for a right of action for the female “victim” of the seduction.²⁴ It is the young woman who has experienced the harm who is entitled to the remedy directly. The harm in question must, in terms of the general definition of the common law of delict, be caused wrongfully, but, in the case of seduction, the wrongfulness of the defloration is seemingly removed by her consent. It may well be then that wrongfulness in this context is based on broader societal mores and expectations.²⁵

(ii) *Customary Law*

The customary law conception of seduction also involves consensual sexual intercourse with an unmarried woman, but requires in addition that the act take place without the consent of her guardian.²⁶

Traditionally, women did not have the capacity to litigate, and hence claims for seduction could only be made by the female “victim’s” male guardian. The rationale behind this was that the aftermath of seduction would be a reduction in any lobolo that could be offered upon her marriage. Hence any “damages” applicable could be claimed only by the one whose financial investment in the young woman was impacted by the seduction. From a

²⁴ See *Claassen v Van der Watt* 1969 (3) SA 68 (T), where the female plaintiff brought an action for breach of promise and seduction. Both claims failed because the plaintiff was aware that the defendant was a married man. However, this case is presented not so much for its facts, as for it representing that the plaintiff had standing to bring the seduction action in common law.

²⁵ For a discussion rethinking the standard of wrongfulness as an element of common law delict, See Anton Fagan “Rethinking Wrongfulness in the Law of Delict” (2005) 122 South African Law Journal 90-141. Further for exploration of the arguments that call for the abolition of common law seduction, see *Van Jaarsveld v Bridges* 2010 (4) SA 558 (SCA). In this case, the SCA held, in a strong obiter dictum, that actions for breach of promise were outdated and no longer in keeping with public policy or social mores. This case focuses on breach of promise to marry – which is not quite the issue discussed in the hypothetical case presented in part 3 below.

²⁶ See the commentary of W Ncube on the Zimbabwean case of *Katekwe v Muchabaiwa* where he states:

Under traditional customary law, the delict of seduction is defined as sexual intercourse with a woman, with her consent, but without her guardian’s consent. The delict is committed not against the woman, but against her guardian, who, is the wronged party.

W Ncube “The Decision in *Katekwe v Muchabaiwa*: A Critique” (1983-4) 1 & 2 *Zimbabwe Law Review* 220.

certain point of view, therefore, the seduction remedy constructed the “victim” as property, and, as with all damage to property, the “owner” (or guardian) was entitled to compensation for the “loss” (both current and future) resulting from the damage. Simply put, this “implies redress for damage to property, as well as for injury to a woman insofar as a family head’s rights in her have been violated.”²⁷

It follows that sexual delicts such as seduction can only be properly understood against the background of the subordinate position of women in customary law, and the fact that their sexual integrity and child-bearing capacity fall under the control of a senior male.²⁸ Furthermore, the action for defloration arises only in some systems of customary law, and in certain systems where it is available, the woman must be a virgin.²⁹ Hence, there is less precision and overall consistency about customary actions, as the rules may vary from one community to another.

The “remedy” or payment for the delict of seduction in customary law is often in the form of a “seduction beast”, i.e., one head of cattle offered to the young woman’s (typically male³⁰) guardian.³¹ Moreover, in most customary law communities, a penalty or fine is awarded to the male guardian, not only for the seduction of a virgin, but also, in most cases, for a further act of intercourse if pregnancy follows, and, in some cases at least, for a third and even subsequent pregnancies.³²

²⁷ C Rautenbach J C Bekker & N M I Goolam *Introduction to Legal Pluralism in South Africa* (2010) (n 2) 105.

²⁸ *Ibid* 108.

²⁹ *Ibid*.

³⁰ It is significant that, in customary law, only senior males in the woman’s family – whether her father or other guardians – may bring the action in this sense, seduction is seen as a form of theft or a trespass on the guardian’s property. The woman has no *locus standi*. See T W Bennett C Mills & G Munnick “The Anomalies of Seduction: A Statutory Crime to an Obsolete, Unconstitutional Delict?” (n 13) 332.

³¹ C Rautenbach J C Bekker & N M I Goolam *Introduction to Legal Pluralism in South Africa* (2010) (n 2) 109. Note also that

a distinction should be made between (i) the seduction beast, for the defloration of the girl; and (ii) the virginity beast, payable when a virgin gets married or the initial intercourse is followed by a marriage. ... [T]he payment of the seduction beast was a considered a form of ‘punishment’, whereas the virginity beast is considered a form of compensation payable to the mother of the girl for keeping her virginity intact.

³² J C Bekker *Seymour’s Customary Law in Southern Africa* (n 10) 349.

3. The Seduction Hypothetical: Zindzi and Marcus

Having outlined the basic elements of the seduction delict in both the common and customary law, the task is now to apply them to the following hypothetical:

Twenty-year old Zindzi comes from a traditional Xhosa family in the Eastern Cape. Zindzi's father died two years ago, and since then, Zindzi and her mother have been living in the homestead of her father's brother.

Up until six months ago, Zindzi had never travelled more than 20 kilometres from the village where she lives and grew up, but now she attends University 200 kilometres away, having recently received a state bursary to pursue tertiary education. Zindzi enrolled in an agricultural science program.

Three months into the school year, Zindzi began a sexual relationship with Marcus, a 26 year-old graduate student, who is Zindzi's tutor at the university.

Marcus was born in the Eastern Cape, just as Zindzi was, but he and his family left South Africa when he was only one year old, as his parents were lecturers at a university in Egypt. Marcus has only been back in South Africa for two years, and he has been studying and working at the university for that period.

Marcus was immediately smitten with Zindzi when he saw her in his tutorial class. It was not long before Marcus was able to convince Zindzi to begin a physical relationship, since she was in love with him. When Zindzi's family becomes aware of this relationship, a claim for seduction damages is brought against Marcus.

(a) *Marcus, Zindzi and Seduction under the Common Law*

As outlined above, under the common law, Zindzi can bring an action for seduction damages against Marcus, provided that she can demonstrate that she was harmed by Marcus' conduct. There is no issue as to sexual assault (rape) as Zindzi was of age to consent to the sexual relationship, and the facts do not suggest that there is an issue as to consent.³³ Neither Marcus nor Zindzi dispute the sexual relationship or the fact that Zindzi was a virgin before her relationship with Marcus. Given these agreed upon facts, the only matter for determination in the common law seduction action is to calculate the loss to Zindzi in terms of her reputation and her future marriage prospects.

Recall the following factors to be taken into account when calculating the "loss" to the female victim and the damages to be paid by the seducer: (i) age of the plaintiff; (ii) her circumstances in life; (iii) the measure of resistance she offered; (iv) the methods applied by the defendant to overcome her resistance; (v) whether the seduction took place when an offer of marriage was made; and (vi) whether the plaintiff has been rendered pregnant by the defendant.³⁴ On the basis of these considerations and the facts outlined in the scenario, Zindzi would not have a very strong claim under the common law. Although the facts indicate that Zindzi is in love with Marcus and the relationship was consensual, there is no indication that she put up much resistance, or that she suffered proprietary damage or a loss of marriage prospects. Namely, on the facts as outlined, it is not clear that preserving her virginity was a primary concern for Zindzi. Hence, it would be difficult for her to obtain compensation for this loss.

On the other hand, since the details in the factual scenario are not very explicit, it may be that, given Zindzi's relatively tender age of 20, and the

³³ It is acknowledged that there are instances where consent is vital to the power imbalance between the two parties. Although as Zindzi's tutor, Marcus is in a position of power, the facts suggest that consent to the relationship was indeed free and genuine.

³⁴ C Rautenbach J C Bekker & N M I Goolam *Introduction to Legal Pluralism in South Africa* (2010) (n 2) 110.

fact that her relationship with Marcus happened very early in her first venture away from her family and home village, Zindzi's consent is somewhat vitiated by her naïveté. Moreover, if Zindzi becomes pregnant as a result of the seduction, then she would likely have to suspend her studies (at least for a while). The birth would also result in medical expenses, as well as the loss of tuition fees. In this regard, it must be born in mind that she had embarked upon a promising career a few months previously with a scholarship. These considerations now put Zindzi in a much more vulnerable position.

Consideration should be given as to whether Marcus ever expressed any intention to marry Zindzi. If he did not, when the relationship began, and if he never expresses such an intention, even if a child is on the way, then not only is his seduction of Zindzi more "harmful", but Zindzi's future marriage prospects have been further compromised. All of these factors could effectively operate to provide Zindzi with a strong basis for her claim. In the common law assessment of damages for seduction, much is dependent upon the contextual position of the woman; and whether this position is materially impacted by the seduction (and any consequences thereof, such as a pregnancy and loss of future marriage or employment prospects).

(b) Marcus, Zindzi and Seduction under Customary Law

Unlike the common law, any seduction damages in customary law would be claimed by Zindzi's male guardian (in this case, Zindzi's paternal uncle). This particular case (as well as Zindzi's uncle's claim for a seduction beast) is complicated by the fact that Marcus may be unfamiliar with customary law given that he does not live under this system of law.³⁵ The issue is whether he can be compelled to answer a claim under customary law, or whether the matter would have to be resolved under the common law.

This raises the issue as to who determines the applicable law? It could be Zindzi, her uncle, or Marcus. Under traditional customary law, the

³⁵ Note that the converse could also be true regarding Zindzi and her family and the common law.

female “victim” has no say. In fact, she lacks *locus standi* – in the procedural sense – to bring a suit.³⁶ The issue then is whether, under the requirement of equal treatment, Zindzi can be excluded from the case. This question requires immediate reference to the constitutional right of equality, as well as section 39(2) of the Constitution (which obliges the courts to develop customary law in accordance with the spirit and purport of the Bill of Rights), an issue which is explored below in part four.

We also need to recall, from the hypothetical scenario, that Marcus is essentially a “foreigner” in South Africa. Despite being born in and currently working and residing in the country, for most of his life he was raised and educated elsewhere. There is no indication that Marcus lives his life in accordance with any customary law principles, and there is certainly no indication that he is familiar with the elements of Xhosa customary law that formed the framework for most of Zindzi’s life and that of her family. Marcus’ lack of familiarity with Xhosa customary law is an important consideration in determining which law is most appropriate for deciding this claim.³⁷

Rather than answer the many problems that arise from the case of Marcus and Zindzi, this section has highlighted the questions in an effort to demonstrate the complexity of a seduction delict in a pluralistic landscape. We can turn now to some of the particular constitutional challenges that arise from this hypothetical case of seduction, and present the GRACE model as a means of providing some clarity and resolution.

³⁶ See T W Bennett *Customary Law in South Africa* (2004) at 252-253.

³⁷ Ibid 49-69, where Bennett discusses the considerations required to resolve conflicts between customary law and common law. See especially pages 53-54 which discuss the influence that the parties’ agreement and intention has in resolving this conflict. Note however, that the decision to apply either common law or customary law is for the courts, not the parties. See also A B Edwards “Choice of Law in Delict: Rules or Approach” (1979) 96 *South African Law Journal* 64, for a discussion generally on the issue of choice of law for delict. Specific reference is made to seduction, but the options for choice are limited to various systems of private international law and do not address a domestic South African choice involving customary law as an option.

4. Seduction and Constitutional Challenges: GRACE as Remedy

In many respects, the delict of seduction is incompatible with the Bill of Rights.³⁸ In the first place, customary law violates the woman's right to equality by excluding her from the action altogether. In the second place, by allowing an action for the seduction of women only, both customary and common law discriminate against men. Section 9 of the Constitution requires equal treatment of the genders.³⁹ It therefore behoves the courts to take cognisance of broader socio-legal contexts when making decisions,

³⁸ For a broader discussion of constitutional incompatibility and customary delict in general, and the practice of virginity testing in particular, see T W Bennett C Mills and G Munnick "Virginity Testing: A Crime, a Delict or a Genuine Cultural Tradition" (2010) *Journal of South African Law* 256-259. The position taken here is that the custom of virginity testing may potentially violate a girl's right to dignity and security of her body, in terms of sections 10 and 12 of the Bill of rights respectively. See also, E R George "Virginity Testing and South Africa's HIV/AIDS Crisis: Beyond Rights Universalism and Cultural Relativism Toward Health Capabilities" (2008) 96 *California Law Review* 1465-1477. George explains virginity testing as a "prenuptial custom traditionally conducted just prior to marriage, [involves] the examination of females to ascertain whether or not they are sexually chaste." She goes on to state that the tests are generally conducted by older women and take the form of "vaginal exams to determine if a female's hymen is intact and assess other physical features held to be indicative of the innocence and purity of the individual tested such as her muscle tone and firmness of her breasts." In the battle to combat HIV/AIDS, virginity testing functions as an abstinence only enforcement mechanism. See E R George "Virginity Testing and South Africa's HIV/AIDS Crisis: Beyond Rights Universalism and Cultural Relativism Toward Health Capabilities" *Ibid* 1449-50. It is not within the scope of this chapter to delve into the fray of the debate related to virginity testing. However, it is interesting to see the resurgence of this practice in traditional communities as "promoting a return to traditional culture as a preventative public health measure to combat a modern plague." See E R George "Virginity Testing and South Africa's HIV/AIDS Crisis: Beyond Rights Universalism and Cultural Relativism Toward Health Capabilities" *Ibid* 1450.

³⁹ C Rautenbach J C Bekker & N M I Goolan *Introduction to Legal Pluralism in South Africa* (2010) (n 2) 108. Note also that section 6 of the Recognition of Customary Marriages Act gives spouses in a customary marriage equal status, including capacity to litigate. The question thus arises as to whether in terms of the equality principle, an unmarried woman can institute a claim against a female wrongdoer for committing adultery with the claimant's male partner.

Furthermore, insofar as courts have a discretion to apply either customary law or common law in terms of section 1(1) of the Law of Evidence Amendment Act, the opportunity exists for a wife to sue a female wrongdoer for alleged adultery with the former's husband in terms of the common law, or for an unmarried woman to sue the wrongdoer for defloration. This interesting idea of reciprocal enforcement of defloration rights by either gender party to a marriage is in contrast to the traditional customary law principle in *Mayelane* where the male historically had more power to negotiate the terms in the sense of bringing a new party into the marital relationship. Although contemporary practice seemed to limit this male power by requiring the first wife to consent, it still seems that there is little recourse available to the first wife if she does not consent and the husband takes on a second wife in any event.

especially in personal family relationships under customary law.⁴⁰ Presently, the lack of broad contextual analysis not only restricts the seduction action to female victims, but also makes no allowance for seduction within same sex relationships. It is not within the scope of this thesis to consider the broad development of the scope of seduction to include male victims and same sex relationships, but it is important to point out that a full examination of equality within the seduction delict must also consider its application to alternative and non-traditional relationships.

The story of Zindzi and Marcus is useful in developing theoretical underpinnings on which the legal analysis of seduction in a pluralist landscape should be based. This section will now propose the GRACE analysis as a means for remedying those conflicts.

The strength of the GRACE model lies primarily in its emphasis on culture.⁴¹ Specifically, the analysis of the right to equality must be interpreted through a cultural lens. This does not mean that the net result of equality itself changes, but rather that recognition of the fluidity and variation of culture (according to time, place, and other social contexts) is the only way to give a full and satisfactory meaning to equality.⁴²

a) *Seduction, Culture and Legal Pluralism*

The choice of law issue and the consideration of seduction in both customary and common law contexts arise on account of legal pluralism, which in South Africa is mostly concerned with differences of culture. The analysis below is conscious of the pluralistic context, and therefore considers first, which law is to be applied – the common law or customary law. The response to this

⁴⁰ C Himonga & A Pope “Mayelane v Ngwenyama and Minister for Home Affairs: A Reflection on Wider Implications” (2013) *Acta Juridica* 338.

⁴¹ See Chapter Five, generally, where it is argued that culture is the most pivotal, or important identity aspect in any analysis to secure equality rights (which essentially seeks to balance the gender equality entitlement with the cultural practice entitlement) in the context of legal pluralism.

⁴² See *Masiya v Director of Public Prosecutions*, Pretoria 2007 (5) SA 30 (CC).

initial choice may also involve consideration of which legal system is better placed to secure equality for both parties. For example, from a traditional customary law perspective, ought Zindzi's uncle to lose out on her lobolo value simply because Marcus is unfamiliar with customary law practices and requirements? Further, in the context of equality is it appropriate for Zindzi to be considered a "victim" and Marcus the "predator" – or is there scope for more flexibility within the traditional roles assigned to the parties?

The choice of law may be determined at the outset of litigation by the parties' choice of forum (subject of course, to the rules governing jurisdiction of courts). For instance, in a traditional court, customary law is almost always applied. Magistrate's courts and the High Court on the other hand are more used to entertaining conflicts of laws with a view to determining which law is the most appropriate in terms of the facts of the particular case.⁴³

Under the Constitution, parties are clearly entitled to align themselves with the culture of their choice,⁴⁴ and by implication customary or common law – although it should be noted that they should not be allowed to adopt a law in order to defeat rights already acquired by a third person or to prejudice the broader interests of justice.⁴⁵

Where the defendant contests the plaintiff's choice of law, the court must investigate the parties' conduct prior to initiating action, and, from the words and deeds out of which the claim arose, it may seek to discover whether the parties had a shared expectation as to the applicable law/culture in issue. The nature of a transaction or course of action may prove decisive, but if it is known to both systems of law, the courts must delve deeper into

⁴³ See T W Bennett *Customary Law in South Africa* (n 36) 148-149.

⁴⁴ See sections 30 and 31 of the Constitution of the Republic of South Africa, 1996.

⁴⁵ For that reason, spouses may not conclude antenuptial contracts that evade the prohibition on unfair discrimination under section 9 of the Constitution. See *Prior v Battle & Others* 1999 (2) SA 850 (T).

the circumstances of the case in order to discover its general cultural orientation.⁴⁶

With respect to actions arising out of delict in this hypothetical case, the cause of action is known to both common and customary law. In such situations, courts have made reference to the way parties live, and thus their overall cultural orientation. People who adhere to a traditional African way of life have been deemed subject to customary law, while those who adopt a western way of life have been deemed subject to the common law.⁴⁷

In instances where both the parties have the same cultural orientation, it is open to the court to infer that the parties would agree as to how to address the matter. It would be much more difficult to impute such a notional agreement or expectation if the plaintiff had been associated with one culture and the defendant another (as is the case with Zindzi and Marcus).⁴⁸ Alternatively, the choice of law issue could be resolved upon consideration of all connecting factors related to the issue, and when on balance, most point to one system of law, that is the one to apply. This method, as advocated by Bennett,⁴⁹ acknowledges that people may live their lives across or within different cultures. Even so, there is an attempt to identify a preponderance of factors indicating orientation towards a particular system.

We can turn now to the constitutional issues. According to an objective choice of law, the delict of seduction is to be considered under either the common law or under customary law. Zindzi's cultural community will provide some answers in this regard. Identification of the applicable law

⁴⁶ See also part 2 where the conflict of laws is as between common law and customary law delict is discussed.

⁴⁷ Cultural orientation, as a connecting factor, is essential, although it is obviously an artificial conception, because no one, in reality, lives wholly in one culture. Further, culture does not function as a whole, but rather in its various components – being contextually relevant. See J H Van Doorne "Situational Analysis: Its Potential and Limitations for Anthropological Research on Social Change in Africa (1981) 21 *Cahiers d'Études Africaines* 482.

⁴⁸ Confronted with this problem, most courts have simply applied the plaintiff's law (or the defendant's). This approach is based on an unspecified value judgment, in the sense that the plaintiff (or the defendant) is deemed more important for choice of law. It depends on the tactics of litigation, however, which person will take the role of plaintiff in an action, and forensic strategy is hardly an appropriate basis for choice of law.

⁴⁹ T W Bennett *Customary Law in South Africa* (n 36) 56.

will in turn identify the rights seeker (whether that is Zindzi herself, as would be the case under common law, or her guardian, as is the case under customary law). If customary law has been chosen, however, the question arises as to whether it is an infringement on Zindzi's access to equality to be denied standing in the proceedings as the right-seeker. Even so, the court should not ignore the rights of her uncle, as her guardian.

Consider then, whether, on the basis of customary law discussed in the context of *Mabena v Letsela* in Chapter Seven, it would be appropriate and necessary in Zindzi's case to develop the customary law to permit her to bring a cause of action for seduction in her own right, rather than relegating this right to her male guardian, or even to shift the claim to the common law. Such a development need not change any of the necessary elements of customary law seduction, or the factors required to determine compensation.

Exploration of the constitutional challenge should not end here, however. The court adjudicating the matter between Zindzi and Marcus might decide to choose common law as the most appropriate legal system.

But, even in this case, choice of the common law does not solve all constitutional issues arising out of seduction actions. It poses a further question as to whether only women should be entitled to sue for seduction. The delict under both common and customary law perpetuates female stereotypes and ultimately it amounts to unfair discrimination.⁵⁰ The argument has been put forward that the common law action should be abolished as it places a (masculine) value upon the virginity of the girl and her future marriage prospects. This presents a stereotype of women as a commodity (an object to be bartered with) as well as perpetuating the image of women as victims and prisoners of their own sexuality.⁵¹

For the purposes of this discussion, Zindzi is understood to be the symbolic representation of the GRACE model and it is the intersecting

⁵⁰ N Bohler-Müller "Cultural Practices and Social Justice in a Constitutional Dispensation: Some (More) Thoughts on Gender Equality in South Africa" (2001) 22 *Obiter* 150.

⁵¹ *Ibid* 151.

aspects of Zindzi's identity that provide the substantive context for the analysis of the seduction hypothetical. But not all identities within the GRACE model are given the same consideration for each litigant. The GRACE model is just that – a model. In Chapter Six of this thesis, the GRACE model was applied to the *Bhe* case to demonstrate the gaps that result from the lack of contextual analysis. From this application, it appears that the identity aspects of gender, race, age and culture are not the only ones that have significant impact on access to equality in all circumstances.⁵² Moreover, not all of these intersecting identity factors are of equal weight in all circumstances.

Gender is the primary identity aspect that is at the root of the constitutional challenge in seduction cases. As Bennett et al note:

The customary action rests on a constitutional right to culture, while the common-law action has no particular cultural connotation; the common-law action is arguably obsolete, while its customary counterpart is still very much alive and in use; the common-law action avails only women, but the customary action only men. Whichever gender is favoured, both the actions now face the possibility of review for infringing the constitutional prohibition on sex or gender discrimination, either because they allow only one sex the right of action or because they perpetuate gender stereotypes.⁵³

In this way then, gender is interpreted in a cultural context. Further, as was discussed in Chapters Six and Seven, when applying the GRACE model to certain Constitutional Court decisions, cultural context often includes the applicability of either the common law or customary law, and this was in turn, largely dependent upon race. To say that culture and race can be seen to influence one another, almost to the point where they become conflated and difficult to disentangle, would not be an exaggeration. It would, however, be an exaggeration to say that one substitutes for the other. To do so negates the reality that there exist many cultural contexts and iterations of customary law within one racial group.

⁵² For instance, birth order and legitimacy were also considerations in *Bhe*.

⁵³ T W Bennett C Mills & G Munnick "The Anomalies of Seduction: A Statutory Crime to an Obsolete, Unconstitutional Delict?" (n 13) 332-3.

It is evident that the common law delict of seduction is in conflict with the fundamental right to equality before, and equal treatment by, the law (section 9 of the Constitution), since it is only available to virgin women and not to boys or men. Hence, the delict perpetuates female stereotypes and ultimately amounts to unfair discrimination.⁵⁴

b) Applying GRACE to Customary Law Seduction

The customary law of seduction is not stagnant, but is in a dynamic process of adaptation and change.⁵⁵ Thus, any analysis that would consider the proposed facts in a customary law context must reflect the inherent fluidity and flexibility of this system of law. The reason for this fluidity is to be immediately responsive to, and reflective of, changing social context.

The very fact that Zindzi is denied the opportunity to seek redress for seduction, in her own right, in customary law is indicative of the inherent gender inequality in this system. But the issue remains as to whether enhanced gender equality in customary law would immediately lead to Zindzi being able to bring her own claim. Most likely, in view of recent developments, such as the rights of girls to inherit from their fathers, the rights of daughters to succeed as Hosi, and the recognition of a mother's right to negotiate lobolo, it is probably most reasonable as an initial step, to permit Zindzi's mother an equal claim against Marcus for her daughter's seduction.⁵⁶ This is not an unreasonable development of the customary law, as a portion of the seduction beast/damages was historically given to the young woman's mother in recognition of her efforts to safeguard the girl's virginity. Although not unreasonable, the prospect of Zindzi's mother making

⁵⁴ N Bohler-Müller "Cultural Practices and Social Justice in a Constitutional Dispensation: Some (More) Thoughts on Gender Equality in South Africa" (n 50) 150.

⁵⁵ C Rautenbach, J C Bekker & N M I Goolam *Introduction to Legal Pluralism in South Africa* (2010) (n 2) 105.

⁵⁶ This would be in keeping with the decision in *Mabena and Letsoala* 1998 (2) SA 1068 (T). Further, to immediately provide Zindzi with the right of this claim may be seen as an empowering action vis-à-vis the common law. However, such a step completely overlooks the issue of the evolving role of the mother in customary law. Hence, a recognition of Zindzi's agency ought not to be done at the expense of her mother's traditional role and cultural responsibilities.

the seduction claim on her daughter's behalf need not be the final result of the full development of the customary law in the context of the GRACE model as applicable to the situation between Zindzi and Marcus.

As suggested above, a second gender equality issue to consider is whether the customary law could be developed such that either parent could serve as family head, to whom the seduction damages would be paid.⁵⁷ Recall from the facts that Zindzi's father has died. In line with the developments in *Mabena* and *Fanti v Boto*, one consideration is whether there is anything to prevent a progressive interpretation of the customary law to permit Zindzi's mother to serve as family head. This development still reflects the deference that is given to the traditional family structure. It is the parent/guardian and not the young woman herself who has a right of action for seduction. It would also maintain the importance of lobolo – given that lobolo and a customary law claim for seduction are very closely connected.

Even though development of the customary law so as to enable the mother to make the seduction claim rather than the male guardian – which is similar to expanding the mother's agency in *Mabena* - this development is still somewhat protracted as it permits gender equality only in so far as it is applied in the context of parental hierarchy. In the facts as presented, Zindzi has attained adulthood, and consequently, a fulsome and broadly equitable development of the customary law in the context of all identity aspects contemplated in the GRACE model (including gender and age), would give Zindzi the agency to bring the seduction claim in her own right.⁵⁸

In considering the details of the GRACE analysis, as has been previously noted in this thesis, race is in practice all too often the gateway to culture. The specifics of the cultural identity analysis are largely informed, or predetermined, by race. However, one should not assume that race and culture are synonymous in all contexts. With respect to age, in the context of

⁵⁷ Ibid.

⁵⁸ Such development of the GRACE model would reflect the implication of applying the Bill of Rights, which, as the product of a Western way of thinking, favours individual rights, rather than family rights. Customary law, on the other hand, might well lean in favour of the family's right to protect the virginity of its female members.

the case between Zindzi and Marcus, age is only relevant to Zindzi's capacity to consent to the sexual relationship – particularly in a common law action for seduction. But Zindzi's age and her ability to offer genuine consent, are considerably less important in a customary law claim for seduction, even though she is the “seduced party”. But as expressed earlier, Zindzi's age may be an important factor in considering that she is legally of age to bring a seduction claim in her own right, rather than relying on a parent (or other family head) as a litigation guardian.⁵⁹

Simply put, culture is the primary lens through which the seduction should be viewed. It is culture that is largely influential in the case of the seduction delict being characterised as either a common or customary law delict. Further, it is the alignment of race and culture which in practice determines the choice of forum to characterise the seduction issue.

The GRACE analysis should be rounded off by bearing in mind that not only must enhanced equality between the parties be the goal of any claim for seduction under either customary or common law, but also that the two legal systems must also be considered as equally viable options for the litigant in meeting this goal.⁶⁰

One technical issue to consider is the particular methodology applicable when a customary law issue is at stake. Although, as discussed above, the courts are obliged to develop customary law in line with the Constitution, it may be helpful to describe the nature of this specific development in the context of living and official customary law. To begin with, any customary

⁵⁹ It is noted that adherence to the arbitrary age of 18 to reflect the division between child- and adulthood is a Western idea. Customary law might well regard a socially and economically immature female, still living with her family as a “minor” and thus incapable of interacting with full legal agency. Hence, in developing customary law in line with the Bill of Rights, and its Western-inspired notion of individual rights, there are likely to be inconsistencies with the customary law emphasis on group or family rights.

⁶⁰ The equal consideration of the common law and customary law is based on the characterisation of legal pluralism in South Africa as reflecting a dual legal system. This duality implies a parallel coexistence as opposed to a hierarchy. See C Rautenbach “Deep Legal Pluralism in South Africa: Judicial Accommodation of Non-State Law” (2010) 60 *Journal of Legal Pluralism* 143-144.

law development engaged in by the courts would refer to official customary law, because that is the law which is most readily accessible to the courts and (usually) the litigants' counsel.

The living law as practised and developed by communities, generally becomes relevant when pleaded as an exception to the official law – and it must then be proved to the court, although the court itself is entitled to call for such proof.⁶¹ A court can, of course, avoid the lengthy – and potentially inconclusive search for a definitive statement of the living law – by simply “developing” official customary law in such a way that it complies with the Bill of Rights.⁶²

It should be noted that, in all these cases, any judicial pronouncement on living law has the inevitable effect of creating new official law. It should be further noted that the clear intent behind section 39(2) of the Constitution is to place the duty to develop the law on the courts rather than individuals or communities living in accordance with that law.

⁶¹ See T W Bennett *Application of Customary Law in Southern Africa* (1985) 31-32.

⁶² See Bennett *Customary Law in Southern Africa* (n 36) 92.

5. Conclusion

*Two roads diverged in a yellow wood,
And sorry I could not travel both
And be one traveller, long I stood
And looked down one as far as I could
To where it bent in the undergrowth;
Then took the other, as just as fair,*

*And having perhaps the better claim,
Because it was grassy and wanted wear;
Though as for that the passing there
Had worn them really about the same,*

*And both that morning equally lay
In leaves no step had trodden black.
On, I kept the first for another day!*

*Yet knowing how way leads on to way,
I doubted if I should ever come back.*

*I shall be telling this with a sigh
Somewhere ages and ages hence:
Two roads diverged in a wood, and I –
I took the one less travelled by,
And that has made all the difference*

Robert Frost, "The Road Not Taken"⁶³

The customary and common-law actions for seduction have marked differences. The former is arguably obsolete, while the latter is still very much alive and in use. Only women can avail themselves of the common law action, while its customary law counterpart is available only to men as guardians of women. "... [B]oth the actions now face the possibility of review for infringing the constitutional prohibition on sex or gender discrimination, either on the grounds that they allow only one sex the right of action or because they perpetuate gender stereotypes."⁶⁴

⁶³ Frost's poem depicts a choice, not unlike the choice that lays before GRACE in the context of legal pluralism and intersectionality as to which will be the most appropriate and unobstructed path towards the equality that she seeks. In this contemporary choice of two diverging (though equal) roads, it is contended that with the navigational guidance of the GRACE analytical model, the less travelled road with its landmarks of culture is the choice for GRACE that will make all the difference.

⁶⁴ T W Bennett C Mills & G Munnick "The Anomalies of Seduction: A Statutory Crime to an Obsolete, Unconstitutional Delict?" (n 13) 332-3.

In the pluralist context of the South African legal system, Dlamini notes that,

[t]he present in South Africa is reminiscent of what Charles Dickens in *A Tale of Two Cities* characterised as the best of times and the worst of times, the age of wisdom and the age of foolishness, the spring of hope and the winter of despair, the season of light and the season of darkness, the epoch of belief and the epoch of incredulity. That these contrasting phenomena exist in the same country at the same time may seem strange, but they are typical of societies in transition. Law could be the instrument that forges order out of chaos of these contrasts.⁶⁵

The question is, which system of law will be this instrument.

Merely because the common-law action is found to constitute unfair discrimination does not necessarily mean that its customary law counterpart should also be condemned: “a classification which is unfair in one context may not necessarily be unfair in a different context”.⁶⁶ Hence full consideration of context must also factor into the determination of the appropriate system to apply in light of all of the circumstances.

Potentially, the customary law of delict is in some respects incompatible with the Bill of Rights. This is not the only customary practice where this incompatibility is evident; virginity testing, for example, is seen to violate the girl’s rights to dignity and security of her body, in terms of sections 10 and 12 of the Bill of Rights respectively.⁶⁷ The constitutionality of the continued recognition of seduction as a wrongful act in itself can also be questioned.⁶⁸

The requirement in subsection 39(2) for courts to develop customary law according to the spirit, purport and objects of the Bill of Rights, however,

⁶⁵ C R M Dlamini “Towards a New Legal Order For a New South Africa” (1992) XVI Legal Studies Forum 131.

⁶⁶ T W Bennett C Mills & G Munnick “The Anomalies of Seduction: A Statutory Crime to an Obsolete, Unconstitutional Delict?” (n 13) 345. Note that this is how pluralism operates: to demonstrate that interpretation and impact of a particular legal rule varies from one normative context to the other; hence, the choice of law issue must take into consideration what the particular implications are of each choice in each system.

⁶⁷ E Knoetze “Fathers Responsible for the Sins of Their Children? Notes on the Accessory Liability of a Family Head in the Customary Law of Delict” (n 4) 48.

⁶⁸ N Bohler-Muller Muller “Of Victims and Virgins: Seduction Law in South Africa” (n 19) 6. See also *Van Jaarsveld v Bridges*, 2010 (4) SA 558 (SCA), as discussed in note 25.

may alleviate the conflict between equality rights and the customary law delict of seduction. In essence, courts would be required to develop customary law to align it with constitutional values and principles. In this regard, precedents were set in *Mayelane* and Justice Ngcobo's judgment in *Bhe*.⁶⁹

The application of the GRACE model of intersectionality analysis to landmark customary law cases seeking to balance equality rights, as well as the hypothetical of seduction in both a common law and customary law context, has served to demonstrate the evolving agency of the female litigant on equality issues, and where these may be impacted by cultural considerations.

The GRACE model seeks to demonstrate that in equality claims, the identity of the rights seeker generally needs analysis. For instance, in the context of the hypothetical facts presented, as they relate to Zindzi and Marcus, it was proposed that customary law could be developed to permit Zindzi to raise her own claim for seduction.⁷⁰ Consider for a moment that the law could be similarly developed to permit such a claim if Zindzi were seduced by a woman – or if both parties in the seduction scenario were men. It is suggested that there ought to be a flexible and in tandem development between the scope and applicability of customary law and the scope of identity. As much as the discussions in this thesis have focused on fixed aspects of identity for particular named individuals, the GRACE model of analysis is flexible, so as to be applicable to the various combinations of identities and their intersections.

⁶⁹ Note that some have cautioned that, although the Constitution can be used as a vehicle to develop the law of delict, this should be conducted with some caution, given the longevity of that regime in Roman legal traditions, when personal rights were protected, whether of dignity or the physical self. See P J Visser "Some Remarks on the Relevance of the Bill of Rights in the Field of Delict" (1998) *Journal of South African Law* 536.

⁷⁰ Again, note that such development would be in keeping with the Western-inspired Bill of Rights, and perhaps not the traditional community perspective that the right to institute a claim properly resides with the family and not the individual.

CHAPTER NINE – CONCLUSION: GRACE’S JOURNEY TO EQUALITY

Chapter Nine – Conclusion: Grace’s Journey To Equality

1. INTRODUCTION: OVERVIEW OF THE GRACE ANALYTICAL FRAMEWORK	198
2. THE GRACE MODEL: A CONTEXTUAL APPROACH TO EQUALITY	200
3. HUMAN RIGHTS IN THE AFRICAN CULTURAL CONTEXT: INDIVIDUAL VS GROUP	203
(A) <i>THE CULTURE OF COMMUNITY – GRACE AS AN INDIVIDUAL VS GRACE AS A COMMUNITY MEMBER</i>	<i>206</i>
(B) <i>GROUP CULTURE VS INDIVIDUAL IDENTITY</i>	<i>208</i>
4. CONCLUSION: A PIT STOP IN GRACE’S THEORETICAL JOURNEY TO EQUALITY	210

1. Introduction: Overview of the GRACE Analytical Framework

Equality,...has to address the actual conditions of human life and not an abstract concept of identical treatment which is equally applicable to all, whether black or white, man or woman.¹

This thesis explores the contextual realities of the life of a South African girl child, as she strives to attain and maintain equality vis-à-vis those who appear more privileged than she. The thesis argues that, if this aim is to be achieved, close attention must be paid to various critical and intersecting identities of the girl child. Consideration of these identities through the GRACE model performs two useful functions. First it leads to a full and substantive enjoyment of equality for the litigant, rather than merely formal equality. Second, it facilitates the development of the offending laws (in keeping with constitutional requirements for implementing the Bill of Rights), rather than a simple expungement or invalidation of those laws.²

¹ C Albertyn & B Goldblatt “Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality” (1998) 14 South African Journal on Human Rights 252.

² See C Himonga “African Customary Law in South Africa: The Many Faces of *Bhe v Magistrate Khayelitsha*” in D Cornell & N Muvangua (eds) *Ubuntu and the Law: African Ideals and Postapartheid Jurisprudence* (2012) 398-399. See also *Ex parte Chairperson of*

In the course of the thesis, a framework is presented within which to analyse and construct the right to equality. This framework was specifically designed to consider the situation of a South African girl child living subject to customary law. The acronym GRACE was created to represent the key aspects of identity needed for the analysis. The acronym conveys the impact of the intersecting identity aspects of **g**ender, **r**ace, **a**ge and culture on the quest for **e**quality.

GRACE is a simple analytical tool, one that can function as a baton to be passed on to those who will be required to continue the human rights journey, in other words, the judiciary. The litigant raising the spectre of her intersecting identity represents the initial leg of the journey. The judiciary then takes the next step in the journey by applying the intersectionality analysis tool to arrive at the contextually appropriate remedy of substantive equality for the rights seeker.

The journey towards equality is not linear, but cyclical; it circles back on itself and spirals into a deeper level of understanding with each lap. Although Chapter Eight presented a hypothetical case of the delict of seduction to which the analysis could be applicable, the real value of the GRACE model is yet to be evaluated through judicial analysis. Ideally, it will have broad practical application for courts in South Africa, as the model lends itself to adaptation in order to remain current with changes in social context.³

This thesis explores the contextual realities of the life of a South African girl child striving to attain equality vis-à-vis those who are situated in more privileged positions of life than she. In order to clarify the process for analysing the claim to equality the thesis presents a framework designed to consider the situation of a South African girl child living subject to customary

the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744 (CC) at paragraphs 197 and 230.

³ Such evolution could include, as was suggested towards the end of Chapter Eight, other identity aspects such as sexual orientation. As the discussion of this identity aspect becomes increasingly mainstream, it only makes sense that this also be a consideration in judicial analysis.

law. This situation was chosen because it arises quite commonly in South Africa and represents a significant proportion of the South African population. It also provides an opportunity to analyse the tradition of patriarchy that is perceived to govern so many aspects of life in the country, thereby determining entitlement to property and status.

2. The GRACE Model: A Contextual Approach to Equality

Use of the GRACE framework requires a contextual analysis of a claimant asserting the right to equal treatment, and this thesis contends that consideration of context is critical to obtaining substantive equality. Once context is taken into account the inquiry shifts from an abstract comparison of “similarly situated” individuals to an exploration of the actual impact of an alleged rights violation within the individual’s existing socio-economic circumstances. It further requires an examination of the individual within, and outside of, different social groups.⁴

A true contextual approach to equality must be evaluated on its own terms by those to whom it is to be applied. Such an evaluation will consider equality in the process of hearing such claims vis-à-vis the litigants, as well as equality in the final result (be it a tangible award, a financial compensation, or an appropriate change in social status). Essentially, the ultimate determination as to the attainment of equality is made from the perspective of the rights seeker. The GRACE analysis is a tool to better assist the judiciary in being able to identify with this perspective.

The interpretation of equality may differ if a claim is adjudicated under the South African common or customary laws. It is in fact legal pluralism that supports these different, but not necessarily divergent or hierarchical interpretations, and the different interpretations do not entail a preference for the substantive equality of one system over the other.

In the development and application of the GRACE model, there are two principal considerations: first, equality is a comparative concept; and second the

⁴ C Albertyn & B Goldblatt “Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality” (n 1) 261.

contextual framework within which that comparison is applied is a major factor in determining the equality being sought. Hence, without a comparator and without a proper appreciation for the context in which the equality is assessed, it is impossible to construct a means to decide equality. That is to say that the comparison is most insightful if it is based on a variation of only one contextual identity factor at a time. For example, in the case of property succession as reflected in *Bhe*, the girl child living under customary law could be compared to a boy living under customary law – and whether the variant of gender impacts the equal access to property succession rights. Further, in the hypothetical seduction case involving Zindzi and Marcus as proposed in Chapter Eight, the discussion reviewed the differences between the context of customary law or the common law. Similarly, within one particular legal context – customary law for example - a comparison could be made between the differences in the sexual orientation identity of the rights claimant.

Equality is a comparative concept.⁵ The comparison between GRACE and another individual who differs from GRACE with respect to one or more aspects of identity ought not to be based on arbitrary or irrational connections between this difference and the enjoyment of equality. Rather, it is based on a direct nexus between identity and realised equality. On this basis, it is argued that the identity aspects of gender or sexual orientation directly impact the context in which the access to equality is sought.

The inspiration for GRACE was born out of a desire to analyse the patriarchy that is perceived to be rooted in some aspects of customary law. The model is proposed as a method for re-interpreting and developing customary law to bring it into line with the Constitution.⁶ The core of the

⁵ See Chapter Two, part 2.

⁶ Between the time of this original inspiration for this thesis, notably the Constitutional Court's decision in the case of *Bhe v. Khayelitsha Magistrate* and its perceived shortcomings with respect to developing the customary law so as to promote girl child equality, and the completion of this thesis, there has been much progress in diminishing the impact of male primogeniture. Most importantly, the Black Administration Act, 1927, and its attendant inequalities for Black South Africans, has been repealed almost entirely, thus paving the path for a free and fair consideration of equality rights for the South African girl child subject to customary law.

equality challenge to customary law is that gender often predetermines entitlement to property and status.

The notion of intersectionality is a key component of the GRACE framework of analysis, and it may be construed in different ways. Chapter Five part 3(b) suggested that intersectionality could be described as a two-dimensional plane with multiple interlocking axes of identity (gender, race, age, etc.).⁷ It was further observed that culture added a third dimension – or topography – the street map of intersectionality. For instance, if one wants to observe intersectionality in action, one needs to be aware that the various aspects of identity are akin to roads that intersect on a map.⁸ One avenue is used to represent race, another gender, and similarly, there are different roadways to reflect age, and the various other aspects of identity that may be relevant to analysis within a particular context. If race and gender are the major roadways (with class, age and religion, perhaps crossing these at minor intersections), the metaphor can be elaborated by adding culture as the mountains and valleys – the height and depth of the intersections. Culture could also represent the forests and lakes – in essence, culture is then, the landscape on which the intersections occur.

Although the GRACE framework in this thesis focuses on four identity factors (gender, race, age and culture), the broader argument of equality rights entitlement in South Africa is grounded in section 9 of the Constitution. This section specifies a total of 17 identity aspects against which discrimination impacting access to equality is specifically prohibited. These include religion, language, disability, sexual orientation and class.⁹ Thus, just as an analysis based on GRACE is presented as being

⁷ Chapter Five part 3(b).

⁸ See A Garry, “Intersectionality, Metaphors, and the Multiplicity of Gender” (2011) 26 *Hypatia* 826-831.

⁹ Section 9, the Equality provision is located in Chapter 2 of the South African Constitution, The Bill of Rights. Subsection 9(3) reads as follows:

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.

See Constitution of the Republic of South Africa, Act 108 of 1996.

transferrable to various situations involving customary (and the common) law, it is evident that the particular aspects of identity are fluid and transferable, such that the analysis applies to the intersection of any or all of the 17 aspects of identity detailed in section 9 (as well as any analogous identity not listed, for which a similar argument of discrimination may be made).

In the context of South Africa, race and culture have an unfortunate but persistent historical linkage. Given this linkage, and the fact that under the Apartheid regime access to equality was based on racial identity, one wonders similarly whether culture is the lens that determines equality.

Chapter Two iterated the importance of identifying the substantive meaning and content of the notion of equality under consideration. Recall further, from Chapter Five, that culture (and usually race) influence the contextual parameters of equality. It would follow that these two factors not only set the contextual platform for equality, but also function as interpretive tools that help to ascertain attainment of equality.

3. Human Rights in the African Cultural Context: Individual vs Group

Chapter Five of this thesis emphasised the importance of culture in relation to GRACE's predicament. In many respects, the very word, culture, is a marker for customary law. In fact, culture is not only a primary identity consideration in a GRACE based analysis, but also a core feature characterising the distinctions between customary law and the common law. These distinctions make customary law appear to discriminate against girl children in ways that the common law would not.

The South African Constitution recognises the importance of culture and customary law by guaranteeing cultural rights in sections 30 and 31 and, at the same time, requiring the courts to apply customary law in section 211(3) whenever that law is applicable, and not in contravention of the Bill of

Rights. This thesis examines the extent to which the general promotion of cultural rights can be balanced against securing gender rights for the girl child. The analysis applied recognises that access to, and enjoyment of rights generally, especially the right to equality, depends on the particular cultural context that forms the backdrop for these rights to be realised.

This difficult question raises, in turn, the relationship of group and individual rights. Traditionally, African societies have given preferential treatment to the community over the individual.¹⁰ According to the well-known maxim *umuntu ngumuntu ngabantu* (translated as "a person is a person through other people").¹¹ It is only through the community of others that the individual can find meaning. Consider for example, the relevance of *ubuntu* to communities particularly, and humanity in general, as expressed by Justice Mokgoro in *S v Makwanyane*, as follows:

Generally, *ubuntu* translates as *humaneness*. In its most fundamental sense, it translates as *personhood* and *morality*. Metaphorically, it expresses itself in *umuntu ngumuntu ngabantu*, describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality.¹²

This thesis does not set out to provide definitive answers to the relationship between group and individual rights, but it urges due attention be paid to the importance of community in realising individual rights in Africa. On the one hand, it is true to say that, without the participation of the individual to form common bonds, the notion of community, in the form of interaction among individuals, would not exist. On the other hand, it is equally true to say that individuals cannot function in complete isolation: we are dependent upon

¹⁰ For instance, Gyekey makes reference to the following Akan and Sudanese adages: "The left arm washes the right arm and the right arm washes the left arm"; "A single hand cannot clap." In this view, "the success and meaning of the individual's life depend on identifying oneself with the group. This identification is the basis of the reciprocal relationship between the individual and the group." See K Gyekey *An Essay on African Philosophical Thought: The Akan Conceptual Scheme* (1987) 156.

¹¹ See *S v Makwanyane* 1995 (3) SA 391 at paragraph 308 per Mokgoro J.

¹² 1995 (3) SA 391 at paragraph 308. These elements of humanity and morality suggest individuality as evidence by adherence to societal or community norms.

social interaction and structure for our survival – the group exists only as the composite of individuals.

In Africa, the latter proposition has greater cogency than in the Western world.¹³ Hence, the girl child forms part of the group. Like other members, she has a particular role to play, and a particular status has been assigned to her. The argument is simply that full consideration be given to the individual intersectional identity that is inextricably linked to this role and status.¹⁴

The universal human rights system prioritises the individual over the group, but this hierarchy is not typically recognised in an African cultural context.¹⁵ As Banda explains, “from an African woman’s perspective...[they] see themselves and are identified as being part of a collective. To say to a woman that she has entitlements which may bring her into conflict with the rights of others is to present her with a seemingly intractable problem.”¹⁶

If it is a feature of a particular culture that the group should be accorded greater importance than the individual, then it follows that there are culturally distinct conceptions of human rights. If this is the case, then rights cannot truly be universal. Similarly, if rights are not truly universal, is the content of equality universal? Certainly there may be a universal regard and respect for the principle of equality, but the substantive content of equality may vary with situational context – and context is always informed

¹³ See Article 27 of the Banjul Charter:

- (1) Every individual shall have duties towards his family and society, the State and other legally recognised communities and the international community.
- (2) The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.

¹⁴ Consider that,

As a people, Africans emphasise groupness, sameness and commonality. Rather than the survival of the fittest and control over nature, the African worldview is tempered with the general guiding principle of the survival of the entire community and a sense of cooperation, interdependence, and collective responsibility.

See J A M Cobbah “African Values and the Human Rights Debate: An African Perspective” (1987) 9 Human Rights Quarterly 320.

¹⁵ *Ibid.*

¹⁶ F Banda “Global Standards: Local Values” (2003) 17 International Journal of Law, Policy and the Family 15.

by culture, its parameters and framework of understanding. Hence, this thesis has sought to demonstrate that the content of equality in any given situation, is contextually and culturally specific.

In any event, what is conventionally touted as “universal” in the human rights sphere is in essence a euphemism for “Western”.¹⁷ But in the effort to establish human rights as being truly universal, it must be acknowledged that the interpretation, application and internal hierarchy of rights is culturally based. Thus, culture is not simply an aspect of identity, but is rather the medium through which identity operates. Again, this is to emphasise the point made in Chapter Five that culture is the key aspect of identity. Further, in the context of legal pluralism, culture is an important fact in choice of laws and the determination as to whether the common law or customary law is applicable to particular litigants.¹⁸ And, finally, culture is the medium through which equality is given substantive content.

(a) *The Culture of Community – GRACE as an Individual vs GRACE as a Community Member*

In advocating for the value of considering the intersecting identity of GRACE, this thesis does not seek to shift the African conception of rights from emphasis on the group to the individual (or *vice versa* in the case of the Western perspective). Instead, the intention is to look at the group not as a monolithic whole, but rather as the sum of its unique constituent parts. Group rights are given primary importance in the African cultural context of human rights.¹⁹ However, the rights of the group can only be as strong as the collective rights of its individual members. The relationship between

¹⁷ Naryan explains that cultural essentialism establishes sharp and distinct binaries between Western culture and other cultures. See U Naryan “Essence of Culture and a Sense of History: A Feminist Critique of Cultural Essentialism” (1998) 13 *Hypatia* 88.

¹⁸ Recall from Chapter Eight, the determination as to how to address the hypothetical case of seduction where one party was unfamiliar with and hence, a non-adherent to customary law. See also T W Bennett *Customary Law in South Africa* (2004) 54, where he states:

...because the Constitution protects an individual’s freedom to participate in a culture of choice, the courts must respect that person’s decision to have customary or common law applied in a particular case.

individuals and the cultural context in which they exist is therefore one of mutual influence. The group, as a pivotal entity in African cultures, is strengthened in the course of acknowledging and appreciating the individual identities of its members. For instance, in the case of GRACE, her access to group rights, such as the right to practice and enjoy her culture and tradition, is dependent upon her status in the group. This itself is a factor of her identity.

However, although it is readily accepted that a culture can be seen as the context forming the identity of an individual, it can also be said that, over time, individuals have a formative impact on the culture in which they exist. Thus it is the specificities of identity that give substantive content to equality rights for GRACE. As Eva Brems notes,

Inclusion of all human beings is precisely what the “human rights” concept is all about. It is central to the idea of universality. What both the feminist and cultural relativist critiques of human rights make clear is that universality is not synonymous with uniformity. Real inclusion of all human beings requires attentiveness to their *specificities*.²⁰ [emphasis added]

Many rights have to be exercised in a group context.²¹ Yet, it is noted that the rights of individuals have often been limited by the rights of the communities of which they are members.

As Ibhawoh further explains,

[i]ndividuals are actors who can influence their own fate, even if their range of choice is circumscribed by the prevalent social structure or culture. ... Culture is thus inherently responsive to conflict between individuals and social groups.²²

It is this conflict between groups and individuals that enables dominant practices and beliefs to emerge, and these dominant themes essentially comprise the cultural context. What is more, “traditional cultural

²⁰ Eva Brems “Enemies or Allies? Feminism and Cultural Relativism as Dissident Voices in Human Rights Discourse” (1997) 19 Human Rights Quarterly 164.

²¹ C R M Dlamini “The Role of Customary Law in Meeting Social Needs” (1991) Acta Juridica 73.

²² B Ibhawoh “Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State” (2000) 22 Human Rights Quarterly 841-842.

beliefs are also neither monolithic nor unchanging. In fact, they could be – and were – changed in response to different internal and external pressures. Cultural change can result from individuals being exposed to and adopting new ideas.”²³

In this way then, change is itself a characteristic of culture. Change may come about as a result of an ideological tension between groups and individuals, or it may be the result of the natural, organic development of a culture, which is typically the case in customary law. The GRACE model is a means of ensuring that the organic development also authentically acknowledges the intersecting identities of individuals within the context of culture, which in the case of the South African legal system manifests itself as legal pluralism.

It is also this conflict between groups and individuals in the customary law context that spurs development and recognition of changes in customary law and practices to align with new social mores and attitudes. Two noteworthy examples are the development in *Shilubana*²⁴ permitting women to succeed to the office of chief, and the development in *Bhe*²⁵ permitting girls to inherit property. These developments reflect an authentic embrace of identity either because of the community’s initiative in the case of *Shilubana* or because of judicial intervention in the case of *Bhe*.

(b) *Group Culture vs Individual Identity*

The group, as a pivotal entity in African cultures, is strengthened in the course of acknowledging and appreciating the individual identities of its members. For example, in the case of GRACE, her access to group rights is dependent upon her status in the group. This itself is a factor of her identity.

²³ Ibid 841.

²⁴ See Chapter Seven, part 2(b).

²⁵ See Chapter Six. Whether this development is considered to be arrived at by broadening the reach of the common law, or developing the customary law rule, focus is on the equality in the end result.

In many ways the discussion about using the analytical frameworks of intersectionality and legal pluralism within South Africa has involved a tension between individual and group rights. Some say that there is a conflict between group rights and individual rights, because the needs of the individual and the group can never be completely *ad idem*. “It has often been contended that African law is essentially a law of groups in which the individual has little or no rights.”²⁶ But individual enjoyment of rights is dependent upon specific recognition of said right. This recognition is in turn dependent upon navigating a course of action within the field of culture and legal pluralism.

As was discussed in Chapter Four, the two legal frameworks of intersectionality and legal pluralism posit different approaches to the interpretation and applicability of rights entitlements. Each approach has, at its core, a different rights holder. Intersectionality focuses on a method of rights interpretation and analysis that is best suited for the circumstances of particular individuals. Legal pluralism, on the other hand, acknowledges the existence of different legal systems, but also assumes that, whatever legal system is at play is appropriate for all members of the group²⁷ as a whole.

²⁶ C R M Dlamini “The Role of Customary Law in Meeting Social Needs” (n 21) 73. Dlamini further states that “it is well known that customary law is based on a communitarian ethic whereas the common law is based on individualism. See Dlamini at 84.

²⁷ Note that the specific identity of the “group” may change such that individuals may fit within the character identity of different groups at the same time (e.g. group can be based on religion, language ethnicity, geographic location (rural vs urban), etc.)

4. Conclusion: A Pit Stop in GRACE's Theoretical Journey to Equality

...we should not rest content with the existing theoretical framework on customary law. Theory is not the master of the material. It is the servant.²⁸

In earlier times, customary law, as inscribed in official texts and supported by the former Black Administration Act,²⁹ women had no right to inherit the property of their deceased husbands. This rule existed simply because women had no entitlement to hold and dispose of property in their own name. What women did have, however, was a right to claim support for themselves and their children from the husband's heir. The argument for gender equality would demand that women have equal right to inherit in their own right – without having to rely on the generosity of a male heir. In practice, this right did not always translate into a straightforward right to maintenance.³⁰ The journey to equality expounded in this thesis, is really a journey of the evolution of full equality rights of the female litigant in customary law.

The last decade of Constitutional Court equality rights jurisprudence in a customary law context, starting with the *Bhe* case, ushered in a new approach to the era of customary laws of succession and marriage inheritance in general, and the rights status of women female heirs in particular. Considering *Bhe* and *Shilubana* in the context of succession inheritance, and *Mayelane* in the context of a woman's right, as party to a marriage, to make decisions and provide or withhold consent, as a party to a marriage contract, there has been a marked movement towards recognising women as capable of claiming legal entitlements in their own right. Hence the focus on equality in this thesis, however, is not simply equality of result, in that a girl child should be entitled to inherit in equal measure to her male

²⁸ T W Bennett "The Contribution of Legal Theory and Judicial Practice to the Future Development of Customary Law" in Graham Glover (ed) *Essays in Honour of A J Kerr* (2006) 199.

²⁹ Now repealed.

³⁰ See generally *Mthembu v Letsela* [2000] 3 All SA 219 (SCA). See also discussion of this case by K A Bentley "Whose Right is it Anyway? Equality, Culture and Conflicts of Rights in South Africa" (2003) Human Sciences Research Council, Democracy and Governance Research Program, Occasional Paper #4 (Cape Town) 17.

sibling, but in addition, the thesis is an attempt to ensure equality in the analytical *process*. Recognising the comparative nature of equality, the issue is not so much that there are comparative differences between two litigants, but rather, the issue is the value that is ascribed to these differences. As Albertyn and Goldblatt explain,

...differences are only problematic where they perpetuate the subordination of disadvantaged groups, such as women or black people. The evil is not located in difference, but rather, in any negative impact resulting from this differentiation. The concern is not to eradicate differentiation, but to make the effects of this differentiation 'costless'. [footnotes omitted]³¹

The theory of intersectionality at the heart of the GRACE model requires us to examine individual aspects of identity and how they function collectively to place the individual in a position of disadvantage vis-à-vis another individual with a different set of intersecting identities. Although this has been the critical message throughout this thesis, it is only a partial message. In the absence of the full picture of how all of the intersecting identities of an individual rights claimant are situated within a broader context of socio-political forces and legal systems, the point of this thesis rings hollow. Equality is a comparative concept, and thus the attainment of such is dependent up a full analysis of comparative identities and cultural contexts.

The analysis cannot end with the examination of GRACE's intersecting identities in each particular case, for identity aspects on their own have no inherent value.³² It is the worth (or entitlement to power) that is socially constructed and politically and legally determined, that is of value, and that value is ascribed according to the tenets of the power systems at play. The overall conclusion therefore is this: intersectionality is not only a tool by which we come to understand and analyse GRACE's identity, but also a gateway to challenging the systems of power that assign entitlement on the basis of identity.

³² This notion of intersectionality theory as only representing part of the puzzle of access to equality is further explored in R Delgado "Rodrigo's Reconsideration: Intersectionality and the Future of Critical Race Theory" (2011) 96 Iowa Law Review 1268-1270; 1285-1288.

In this regard, and as previously discussed, it is the flexibility of customary law that renders it susceptible to change and progressive development, making it constantly relevant and reflective of community values and practices as well as the Bill of Rights. In this sense, the flexibility that facilitates transition is the gateway to equality.

In the wake of the decision in *Bhe* and the enactment of the *Reform of the Customary Law of Succession and Regulation of Related Matters Act, 2009*, as well as the endorsement of community development of customary law and judicial notice of contemporary community customary law practice (in *Shilubana* and *Mayelane* respectively), one wonders whether there is still scope for the free reign given to living customary law. One also questions if this seemingly free scope has been stifled by legislative pronouncements³³ and judicial endorsements, which effectively promote a hierarchy that favours official customary law over living customary law.³⁴

This thesis is based on a detailed analysis of intersecting identity aspects in order to secure full access to substantive equality. In the course of arguing for recognition of the complexity of intersecting identities, it has also demonstrated that because complex individuals with intersecting identities operate within the landscape of legal pluralism, appreciation must also be given to the fact that not only do identities shift and evolve with contexts, but also the very cultural landscape which gives these identities substance and relevance to one another, is itself constantly shifting. As the role of the female litigant in customary law evolves, we see that women are not only participants in culture, but are also agents of culture and, as such, engage in its creation, and thereby ultimately shape customary law. The future challenge is not so much to pinpoint the meaning of culture and identity at any particular moment, but rather to get a sense of the flexibility

³³ See Reform of the Customary Law of Succession and Regulation of Related Matters Act 11 of 2009.

³⁴ This question was thoroughly considered by C Himonga in her chapter “The Future of Living Customary Law in African Legal Systems in the Twenty-First Century and Beyond, with Special Reference to South Africa”. See C Himonga in J Fenrich P Galizzi & T Higgins (eds) *The Future of African Customary Law* (2011) 31-57.

and fluidity that is needed to interpret and apply the appropriate rules of the normative order within these intersecting and shifting contextual realities.³⁵

The GRACE model is offered as a method of analysis to assist in this regard. If nothing else, the GRACE framework is intended to convey the message that context and identity are constantly shifting, just as laws are constantly developing in response to these multiple and intersecting shifts. It is the failure to acknowledge and respond to these shifting realities that results in inequality. True progress and development lie in keeping pace with the constancy of change. Part of this process, or more specifically, its desired result is increased agency of women in customary law.³⁶ Ideally, such an outcome would influence the comparative positioning of those whose identities are captured by the GRACE analysis.

Consider in this context, the work of Spivak and her reference to the subaltern.³⁷ Armann takes the discussion of the cultural and legal contexts in

³⁵ S H Williams explains that as much as culture may be determinative or influential, culture is itself in an almost constant state of flux, being made and remade. This fluidity however, should not be mistaken for uncertainty. For in the moment culture meanings always are, or can be discernible. Williams also states that the changes that cultures undergo are often influenced by other cultures. This sphere of influence is also part of the contextual reality in which not only group or community culture, but also in which individual identities exist. Reference is made to

...a constructionist approach to culture in which cultural communities are seen neither as isolated nor as monolithic: cultures have always interacted with each other and shaped one another and they have also always been internally heterogeneous. Sarah Song describes four elements of this constructivist model:

- (1) “cultures are the product of specific and complex historical processes, not primordial entities”;
- (2) “cultures are internally contested, negotiated, and reimagined by members who are sometimes motivated by their interactions with outsiders”;
- (3) “cultures are not isolated but rather overlapping and interactive”; and
- (4) “cultures are loose-jointed...the loss or change of one strand does not necessarily bring down the entire culture”.

See S H Williams “Democracy, Gender Equality, and Customary Law: Constitutionalizing Internal Cultural Disruption” (2011) 18 *Indiana Journal of Global Legal Studies* 70.

³⁶ In the context of the power of culture in terms of its impact on identity, Williams offers the following, particularly in relation to gender:

Women are not merely the victims of culture: they “act with agency, engaging with and reformulating cultural policy ... as they work to eliminate discrimination within their cultural communities.” Constructing the problem as culture versus equality, where the legal system has to choose a side, casts women as they passive victims of culture rather than as its active creators.

Ibid 69.

³⁷ See G C Spivak *Can the Subaltern Speak?* in C Nelson and L Grossberg (eds) *Marxism and the Interpretation of Culture* (1988) 271-316. See also R Coomaraswamy “Women and

this thesis to its ultimate conclusion by extending Spivak's reference to the subaltern such that "not only must the subaltern be permitted to speak, but when she does, others must listen, must admit her as an equal to their on going conversation, and must, eventually, adjust their behaviour to accommodate her place in the world."³⁸ An intersectionality analysis in the context of legal pluralism is a means of accommodating the notional GRACE in the world.

The point of this thesis is that not only should the girl child living subject to customary law be given an agency equal to others, but also that her very existence, as a citizen of South Africa shall open up a unique world of shared possibilities as South Africa itself grows into its new and evolving identity.³⁹ The relationship between citizen, state (read landscape) and identity is evident in the following speech by Thabo Mbeki when he was Deputy President. Mbeki references the connection between historical existence, identity and landscape, as well as the equal citizenry of all living creatures who interact on the land. In this way the complexity of the identity of the nation of South Africa is intersectionality in action.

The message is a poetically inspirational call to connect Africa's dark and varied past to its bright and future potential. This rings true to the potential of GRACE, the girl child living subject to customary law, to realise that her potential for full access to equality is bound up in her intersecting identity. Mbeki eloquently states:

Children: The Cutting Edge of International Law" (2015) 30 American University International Law Review 25-26.

³⁸ D M Amann, "The Postcolonial Woman or Child" (2015) 30 American University International Law Review 45-46. Amann indicates that this process is aptly labelled "dialogic pluralism".

³⁹ This thesis has developed and applied the GRACE model as a framework for judicial analysis in the context of customary law development. In this sense, the focus has been between the female litigant and a challenge to a particular rule or practice, resulting in a development or variation of such rule in order to secure equality rights. This has largely meant that the focus of the thesis has been on the action of "authorities" (defined broadly as the state, the judiciary, or the leaders of a customary law community). The discussion has not included an analysis of horizontal application of the GRACE analysis, in recognition of the capacity for horizontal of the Constitution. Such an analysis would be an opportunity for community members to further develop the equality relationship between themselves. This may be the subject of analysis for future work.

I Am An African

On an occasion such as this, we should, perhaps, start from the beginning.
So, let me begin.

I am an African.

I owe by being to the hills and the valleys, the mountains and the glades, the rivers, the deserts, the trees, the flowers, the seas and the ever-changing seasons that define the face of our native land.

My body has frozen in our frosts and in our latter day snows. It has thawed in the warmth of our sunshine and melted in the heat of the midday sun. The crack and the rumble of the summer thunders, lashed by startling lightning, have been a cause both of trembling and of hope.

The fragrances of nature have been as pleasant to us as the sight of the wild blooms of the citizens of the veld.

The dramatic shapes of the Drakensberg, the soil-coloured waters of the Lekoa, iGqili noThukela, and the sands of the Kgalagadi, have all been panels of the set on the natural stage on which we act out the foolish deeds of the theatre of our day.

At times, and in fear, I have wondered whether I should concede equal citizenship of our country to the leopard and the lion, the elephant and the springbok, the hyena, the black mamba and the pestilential mosquito.

A human presence among all these, a feature on the face of our native land thus defined, I know that none dare challenge me when I say - **I am an African!**

I owe my being to the Khoi and the San whose desolate souls haunt the great expanses of the beautiful Cape - they who fell victim to the most merciless genocide our native land has ever seen, they who were the first to lose their lives in the struggle to defend our freedom and dependence and they who, as a people, perished in the result.

Today, as a country, we keep an audible silence about these ancestors of the generations that live, fearful to admit the horror of a former deed, seeking to obliterate from our memories a cruel occurrence which, in its remembering, should teach us not and never to be inhuman again.

I am formed of the migrants who left Europe to find a new home on our native land. Whatever their own actions, they remain still, part of me.

In my veins courses the blood of the Malay slaves who came from the East. Their proud dignity informs my bearing, their culture a part of my essence. The stripes they bore on their bodies from the lash of the slave master are a

reminder embossed on my consciousness of what should not be done.

I am the grandchild of the warrior men and women that Hintsa and Sekhukhune led, the patriots that Cetshwayo and Mphephu took to battle, the soldiers Moshoeshe and Ngungunyane taught never to dishonour the cause of freedom.

My mind and my knowledge of myself is formed by the victories that are the jewels in our African crown, the victories we earned from Isandhlwana to Khartoum, as Ethiopians and as the Ashanti of Ghana, as the Berbers of the desert.

I am the grandchild who lays fresh flowers on the Boer graves at St Helena and the Bahamas, who sees in the mind's eye and suffers the suffering of a simple peasant folk, death, concentration camps, destroyed homesteads, a dream in ruins.

I am the child of Nongqause. I am he who made it possible to trade in the world markets in diamonds, in gold, in the same food for which my stomach yearns.

I come of those who were transported from India and China, whose being resided in the fact, solely, that they were able to provide physical labour, who taught me that we could both be at home and be foreign, who taught me that human existence itself demanded that freedom was a necessary condition for that human existence.

Being part of all these people, and in the knowledge that none dare contest that assertion, I shall claim that - **I am an African.**

I have seen our country torn asunder as these, all of whom are my people, engaged one another in a titanic battle, the one redress a wrong that had been caused by one to another and the other, to defend the indefensible.

I have seen what happens when one person has superiority of force over another, when the stronger appropriate to themselves the prerogative even to annul the injunction that God created all men and women in His image. I know what it signifies when race and colour are used to determine who is human and who, sub-human.

I have seen the destruction of all sense of self-esteem, the consequent striving to be what one is not, simply to acquire some of the benefits which those who had improved themselves as masters had ensured that they enjoy.

I have experience of the situation in which race and colour is used to enrich some and impoverish the rest.

I have seen the corruption of minds and souls as (word not readable) of the

pursuit of an ignoble effort to perpetrate a veritable crime against humanity. I have seen concrete expression of the denial of the dignity of a human being emanating from the conscious, systemic and systematic oppressive and repressive activities of other human beings.

There the victims parade with no mask to hide the brutish reality - the beggars, the prostitutes, the street children, those who seek solace in substance abuse, those who have to steal to assuage hunger, those who have to lose their sanity because to be sane is to invite pain. Perhaps the worst among these, who are my people, are those who have learnt to kill for a wage. To these the extent of death is directly proportional to their personal welfare.

And so, like pawns in the service of demented souls, they kill in furtherance of the political violence in KwaZulu-Natal. They murder the innocent in the taxi wars.

They kill slowly or quickly in order to make profits from the illegal trade in narcotics. They are available for hire when husband wants to murder wife and wife, husband.

Among us prowl the products of our immoral and amoral past - killers who have no sense of the worth of human life, rapists who have absolute disdain for the women of our country, animals who would seek to benefit from the vulnerability of the children, the disabled and the old, the rapacious who brook no obstacle in their quest for self-enrichment.

All this I know and know to be true because I am an African!
Because of that, I am also able to state this fundamental truth that I am born of a people who are heroes and heroines.

I am born of a people who would not tolerate oppression.
I am of a nation that would not allow that fear of death, torture, imprisonment, exile or persecution should result in the perpetuation of injustice.

The great masses who are our mother and father will not permit that the behaviour of the few results in the description of our country and people as barbaric.

Patient because history is on their side, these masses do not despair because today the weather is bad. Nor do they turn triumphalist when, tomorrow, the sun shines.

Whatever the circumstances they have lived through and because of that experience, they are determined to define for themselves who they are and who they should be.

We are assembled here today to mark their victory in acquiring and exercising their right to formulate their own definition of what it means to be

African.

The constitution whose adoption we celebrate constitutes and unequivocal statement that we refuse to accept that our **Africanness** shall be defined by our race, colour, gender or historical origins.

It is a firm assertion made by ourselves that South Africa belongs to all who live in it, black and white.

It gives concrete expression to the sentiment we share as Africans, and will defend to the death, that the people shall govern.

It recognises the fact that the dignity of the individual is both an objective which society must pursue, and is a goal which cannot be separated from the material well-being of that individual.

It seeks to create the situation in which all our people shall be free from fear, including the fear of the oppression of one national group by another, the fear of the disempowerment of one social echelon by another, the fear of the use of state power to deny anybody their fundamental human rights and the fear of tyranny.

It aims to open the doors so that those who were disadvantaged can assume their place in society as equals with their fellow human beings without regard to colour, race, gender, age or geographic dispersal.

It provides the opportunity to enable each one and all to state their views, promote them, strive for their implementation in the process of governance without fear that a contrary view will be met with repression.

It creates a law-governed society which shall be inimical to arbitrary rule.

It enables the resolution of conflicts by peaceful means rather than resort to force.

It rejoices in the diversity of our people and creates the space for all of us voluntarily to define ourselves as one people.

As an African, this is an achievement of which I am proud, proud without reservation and proud without any feeling of conceit.

Our sense of elevation at this moment also derives from the fact that this magnificent product is the unique creation of African hands and African minds.

But it also constitutes a tribute to our loss of vanity that we could, despite the temptation to treat ourselves as an exceptional fragment of humanity, draw on the accumulated experience and wisdom of all humankind, to define for ourselves what we want to be.

Together with the best in the world, we too are prone to pettiness, petulance,

selfishness and short-sightedness.

But it seems to have happened that we looked at ourselves and said the time had come that we make a super-human effort to be other than human, to respond to the call to create for ourselves a glorious future, to remind ourselves of the Latin saying: *Gloria est consequenda* - Glory must be sought after!

Today it feels good to be an African.

It feels good that I can stand here as a South African and as a foot soldier of a titanic African army, the African National Congress, to say to all the parties represented here, to the millions who made an input into the processes we are concluding, to our outstanding compatriots who have presided over the birth of our founding document, to the negotiators who pitted their wits one against the other, to the unseen stars who shone unseen as the management and administration of the Constitutional Assembly, the advisers, experts and publicists, to the mass communication media, to our friends across the globe - congratulations and well done!

I am an African.

I am born of the peoples of the continent of Africa.
The pain of the violent conflict that the peoples of Liberia, Somalia, the Sudan, Burundi and Algeria is a pain I also bear.

The dismal shame of poverty, suffering and human degradation of my continent is a blight that we share.
The blight on our happiness that derives from this and from our drift to the periphery of the ordering of human affairs leaves us in a persistent shadow of despair.

This is a savage road to which nobody should be condemned.
This thing that we have done today, in this small corner of a great continent that has contributed so decisively to the evolution of humanity says that Africa reaffirms that she is continuing her rise from the ashes.
Whatever the setbacks of the moment, nothing can stop us now!

Whatever the difficulties, Africa shall be at peace!
However improbable it may sound to the sceptics, Africa will prosper!

Whoever we may be, whatever our immediate interest, however much we carry baggage from our past, however much we have been caught by the fashion of cynicism and loss of faith in the capacity of the people, let us err today and say - nothing can stop us now!

Thank you.⁴⁰

⁴⁰ Mbeki TM “I Am An African” Statement of (then) Deputy President TM Mbeki, on Behalf of the African National Congress, on the Occasion of the Adoption by the Constitutional Assembly of “The Republic of South Africa Constitutional Bill 1996.” Available at: <http://www.anc.org.za/show.php?id=4322> [last accessed August 2015].

CONSTRUCTING EQUALITY: DEVELOPING AN INTERSECTIONALITY ANALYSIS TO ACHIEVE EQUALITY FOR THE GIRL CHILD SUBJECT TO SOUTH AFRICAN CUSTOMARY LAW

BIBLIOGRAPHY

Books

Ackermann L *Human Dignity: Lodestar for Equality in South Africa* (2012) Juta Cape Town

Adichie C N *We Should All Be Feminists* (2014) Vintage Books New York

Alston P (ed) *The Best Interests of The Child: Reconciling Culture and Human Rights* (1994) Clarendon Press Gloucestershire

An-Na'im A & Deng F M (eds) *Human Rights in Africa: Cross-Cultural Perspective* (1990) The Brookings Institution Washington

Appiah K Anthony *In My Father's House* (1992) Oxford University Press

Banda F *Women, Law and Human Rights: An African Perspective* (2005) Hart Oxford

Bekker J C *Seymour's Customary Law in Southern Africa* 5 ed (1989) Juta Cape Town

Bennett T W (ed) *Traditional Religions in South African Law* (2011) UCT Press Cape Town

Bennett T W *Customary Law in South Africa* (2004) Juta Cape Town

Bennett T W *Human Rights and Customary Law Under the South African Constitution* (1999) Juta & Co Cape Town

Bennett T W *Application of Customary Law in Southern Africa* (1985) Juta & Co Cape Town

Berger P & Luckmann T *The Social Construction of Reality: A Treatise on the Sociology of Knowledge* (1967) Penguin London

Berting J P, Baehr J H Burgers et al (eds) *Human Rights in a Pluralist World: Individuals and Collectivities* (1990) Merkler London

Bhaba H K *The Location of Culture* (1994) Routledge

Boonzaier E & Sharp J (eds) *South African Key Words: The Uses and Abuses of Political Concepts* (1988) David Philip Cape Town

Brown H P *Egalitarianism and the Generation of Inequality* (1988) Clarendon Press

Butler J *Gender Trouble: Feminism and the Subversion of Identity* (1990) Routledge New York

Chanock M *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia* (1985) Cambridge University Press

Chanock M *The Making of South African Legal Culture 1902-1936: Fear, Favour and Prejudice* (2001) Cambridge University Press

Comaroff J L & S Roberts *Rules and Processes* (1981) University of Chicago Press

Comaroff J & Comaroff J *Ethnography and the Historical Imagination* (1992) Westview Press

Dworkin R *Taking Rights Seriously* (1977) Harvard University Press

Dworkin R *Sovereign Virtue* (2000) *The Theory and Practice of Equality* Harvard University Press

Elias T O *The Nature of African Customary Law* (1956) Manchester University Press

Fanon F *Black Skin White Masks* (1952) Gallimard Paris

Fenrich J, Galizzi P & Higgins T E (eds) *The Future of African Customary Law* (2011) Cambridge University Press

Gates H L Jr *The Signifying Monkey: A Theory of African-American Literary Criticism* (2014) Oxford University Press

Glover G (ed) *Essays in Honour of A J Kerr* (2006) LexisNexis Butterworths

Goodale M (ed) *Human Rights: An Anthropological Reader* (2009) Wiley-Blackwell

Grabham E, D Cooper, J Krishnadas & D Herman (eds) *Intersectionality and Beyond: Law, Power and the Politics of Location* (2009) Routledge New York

Griffiths A M O *In the Shadow of Marriage: Gender and Justice in an African Community* (1997) University of Chicago Press

Gyekey K *An Essay on African Philosophical Thought: The Akan Conceptual Scheme* (1987) Cambridge University Press Cambridge

Hahlo H R & Kahn E *The South African Legal System and its Background* (1968) Juta Cape Town

Hooker M B *Legal Pluralism: An Introduction to Colonial and Neo-colonial Laws* (1975) Clarendon Press Oxford

Hinz M O (ed) *The Shade of New Leaves: Governance in Traditional Authority: A Southern African Perspective* (2006) Lit Verlag Berlin 329-350

James D *Gaining Ground? 'Rights' and 'Property' in South African Land Reform* (2006) Taylor and Francis London

Kuckertz H *Creating Order: The Image of the Homestead in Mpondo Social Life* (1990) Witwatersrand University Press Johannesburg

Kuper L & Smith M G (eds) *Pluralism in Africa* (1969) University of California Press

MacKinnon C A *Women's Lives, Men's Laws* (2005) The Belkner Press of Harvard University Press Cambridge Massachusetts

Mamdani M *Beyond Rights Talk and Culture Talk: Comparative Essays on the Politics of Rights and Culture* (2000) St Martin's Press New York

Menski W F *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (2000) Platinum Publishing London

Millett K *Sexual Politics Sexual Politics* (1970) Doubleday Garden City New York

Monagu A *The Concept of Race* (1964) The Free Press New York

Murungi J *An Introduction to African Legal Philosophy* (2013) Lexington Books Plymouth

Oomen B *Chiefs in South Africa: Law, Power & Culture in the Post-Apartheid Era* (2005) Palgrave New York

Rautenbach C, Bekker J C & Goolam N M I *Introduction to Legal Pluralism in South Africa* 3 ed (2010) LexisNexis Durban

Rautenbach C, Bekker J C & Goolam N M I *Introduction to Legal Pluralism in South Africa* 4 ed (2014) LexisNexis Durban

Renner K *The Institutions of Private Law and their Social Function* (1949)
Routledge & Kegan Paul London

Rousseau J-J *The Social Contract* (1968) Penguin Classics Middlesex
England

Sen A *Inequality Reexamined* (1992) Oxford University Press

Scott J *Poverty and Wealth: Citizenship, Deprivation and Privilege* (1994)
Longman London

Shepherd N & Robins S (eds) *New South African Keywords* (2008) Jacana
Media Johannesburg

Spelman E *Inessential Woman: Problems of Exclusion in Feminist Thought*
(1998) Beacon Press Boston

Steiner H J, Alston P & Goodman R *International Human Rights in Context:
Law, Politics, Morals* 3 ed (2008) Oxford University Press New York

Von Leyden W *Aristotle on Equality and Justice: His Political Argument*
(1985) MacMillan London

Westen P *Speaking of Equality: An Analysis of the Rhetorical Force of
'Equality' in Moral and Legal Discourse* (1990) Princeton University Press

Wing A K *Critical Race Feminism: A Reader* 2 ed (2003) New York University
Press New York

Wing A K *Global Critical Race Feminism: An International Reader* (2000)
New York University Press New York

Wiredu K (ed) *A Companion to African Philosophy* (2007) John Wiley and
Sons Oxford

Book Chapters

An-Na'im A "Cultural Transformation and Normative Consensus on the Best
Interests of the Child" in Philip A (ed) *The Best Interests of The Child:
Reconciling Culture and Human Rights* (1994) Clarendon Press Oxford 62-
81

Aristotle, "Justice and Fairness" in *Nichomachean Ethics* Book V 1130b-
1132b

Aristotle *The Politics of Aristotle* Book III The Theory of Citizenship and
Constitutions, chapter ix The Principles of Oligarchy and Democracy, and the
Nature of Distributive Justice, 1280 a8-15; and Book III chapter xii 1282 b18-
23

- Baderin M A & Ssenyonjo M "Development of International Human Rights Law Before and After the UDHR" in Baderin M A & Ssenyonjo M (ed) *International Human Rights Law: Six Decades after the UDHR and Beyond* (2010) Ashgate Farnham 3-27
- Bennett T W "The Contribution of Legal Theory and Judicial Practice to the Future Development of Customary Law" in Glover G (ed) *Essays in Honour of A J Kerr* (2006) LexisNexis Butterworths 181-199
- Berlin I "Equality" in *Proceedings of the Aristotelian Society* LVI (1955) 301-326
- Chanock M "'Culture' and Human Rights: Orientalising, Occidentalising and Authenticity" in Mahmood M *Beyond Rights Talk and Culture Talk: Comparative Essays on the Politics of Rights and Culture* (2000) St Martin's Press New York 15-36
- Conagh J "Intersectionality and the Feminist Project in Law" in Grabham E, Cooper D, Krishnadas J & Herman D (eds) *Intersectionality and Beyond: Law, Power and the Politics of Location* (2009) Routledge New York 21-48
- Coombe R J "Contingent Articulations: A Critical Cultural Studies of Law" in Austin S & Kearns T (eds) *Law in the Domains of Culture* (1998) University of Michigan Press Ann Arbor 21-64
- Düsing S "The Impacts of Traditional Leadership on Gender Equality and Women's Participation in Rural Development" in *Traditional Leadership and Democratisation in Southern Africa: A Comparative Study of Botswana, Namibia and South Africa* (2002) Lit Verlag Hamburg 252-257
- Du Bois F "Introduction, History, System and Sources" in Van der Merwe C G & du Plessis J E (eds) *Introduction to the Law of South Africa* (2004) Kluwer International Law The Hague 1-54
- du Plessis L "The Constitutional Framework for the Protection of Religious and Related Rights in South Africa" in T W Bennett (ed) *Traditional Religions in South African Law* (2011) UCT Press 90-111
- Erasmus Z "Race" in Nick Shepherd and Steven Robins *New South African Keywords* (ed) (2008) Jacana Media Johannesburg 169-179
- Frost R "The Road Not Taken" in *Mountain Interval* (1920) Henry Holt and Company New York
- Garuba H & Raditlhalo S "Culture" in Shepherd N & Robins S *New South African Keywords* (ed) (2008) Jacana Media Johannesburg 35-47
- Griffiths A "Legal Pluralism" in Banakar R & Travers M (ed) *An Introduction to Law and Social Theory* (2002) Hart Publishing Oxford UK 289-311

Himonga C “African Customary Law in South Africa: The Many Faces of *Bhe v Magistrate Khayelitsha*” in Cornell D & Muvangua N (eds) *Ubuntu and the Law: African Ideals and Postapartheid Jurisprudence* (2012) Fordham University Press 388-404

Himonga C & Manjoo R “What’s in a Name? The Identity and Reform of Customary Law in South Africa’s Constitutional Dispensation” in Hinz M O (ed) *The Shade of New Leaves: Governance in Traditional Authority: A Southern African Perspective* (2006) Lit Verlag Berlin 329-350

Himonga C “Taking Stock of Changes to Customary Law in a New South Africa” in Glover G (ed) *Essays in Honour of A J Kerr* (2006) LexisNexis Butterworths 215-235

Jagwanth S “Expanding Equality” in Murray C & O’Sullivan M (eds) (2005) *Advancing Women’s Rights: The First Decade of Democracy* JUTA and UCT Faculty of Law Cape Town 131-140

Lindberg T “Rooms with ‘Traditional Views’: Justice L’Heureux-Dubé and the Expansion of Interpretive Principles Related to Equality in the Context of Indigenous Rights” in Sheehy E (ed) (2004) *Adding Feminism to Law: The Contributions of Justice Claire L’Heureux-Dubé* Irwin Law Toronto 367-378

Merry S E “Introduction: Culture and Transnationalism” in Merry S E *Human Rights and Gender Violence: Translating International Law into Local Justice* (2006) University of Chicago Press 1-35

Moffett H “Gender” in Shepherd N & S Robins (eds) *New South African Keywords* (2008) Jacana Media Johannesburg 104-115

Nyaundi N M “African Traditional Religion in Pluralistic Africa: A Case of Relevance, Resilience and Pragmatism” in Bennett T W (ed) *Traditional Religions in South African Law* (2011) UCT Press 1-18

Ndashe S “Customary Law” in Bazili S (ed) *Putting Feminism on the Agenda* (2008) 64-92 [electronic publication available at:
http://www.iwrrp.org/pdf/pfota_epub.pdf]

Nhlapo T “The African Customary Law of Marriage and the Rights Conundrum” in Mamdani M *Beyond Rights Talk and Culture Talk: Comparative Essays on the Politics of Rights and Culture* (2000) St Martin’s Press New York 136-148

Nzergwu N “Feminism and Africa: Impact and Limits of the Metaphysics of Gender” in Wiredu K (ed) *A Companion to African Philosophy* (2007) John Wiley and Sons Oxford 560-569

Phillips A “Multiculturalism without Culture” in *Multiculturalism without Culture* (2007) Princeton University Press 1-41

Pojman L P & Westmoreland R “Introduction: The Nature and Value of Equality” in Pojman L P and Robert Westmoreland R (eds) *Equality: Selected Readings* (1997) Oxford University Press New York 2-14

Rahmna M “Theorising Intersectionality: Identities, Equality and Ontology” in Grabham E, Cooper D, Krishnadas J & Herman D (eds) *Intersectionality and Beyond: Law, Power and the Politics of Location* (2009) Routledge New York 252-373

Rautenbach C “Cultural Diversity and International Law” in Schwabach A & Cockfield A J (eds) *International Law and Institutions*, Encyclopedia of Life Support Systems (EOLSS) Developed under the Auspices of the UNESCO (2011) EOLSS Publishers Oxford (Available at SSRN: <http://ssrn.com/abstract=1788139>).

Rautenbach C & du Plessis W “Reform of the South African Customary Law of Succession: Final Nail in the Customary Law Coffin?” in Fenrich J, Galizzi P & Higgins T E (eds) *The Future of African Customary Law* (2011) Cambridge University Press 336-360

Rwezaura B “The Concept of The Child’s Best Interests in the Changing Economic and Social Context of Sub-Saharan Africa” in Alston P (ed) *The Best Interests of The Child: Reconciling Culture and Human Rights* (1994) Clarendon Press Oxford 83-116

Steiner H J & Alston P “Conflict in Culture, Tradition and Practices: Challenges to Universalism” in Steiner H J, Alston P & Goodman R (eds) *International Human Rights in Context: Law, Politics, Morals* 3 ed (2008) New York Oxford University Press New York 517-569

Thomson L “Historical Perspectives of Pluralism in Africa” in Kuper L & Smith M G (eds) *Pluralism in Africa* (1969) University of California Press Berkeley 351-372

Thornton R “Culture: A Contemporary Definition” in Boonzaier E & Sharp J (eds) *South African Key Words: The Uses and Abuses of Political Concepts* (1988) David Philip Cape Town 17-28

Vanderlinden J “Le pluralisme juridique: essai de synthèses” in Gilissen J (ed) *Le Pluralism juridique* Université libre de Bruxelles (1971) Brussels 19-56

Von Benda-Beckman F, von Benda-Beckman K & Griffiths A “The Power of Law” in von Benda-Beckman F, von Benda-Beckman K & Griffiths A (eds) *The Power of Law in a Transnational World: Anthropological Enquiries* (2009) Berghahn Books New York 1-32

Young M "Travels with Justice L'Heureux-Dubé: Equality Law Abroad" in Sheehy E (ed) *Adding Feminism to Law: The Contributions of Justice Claire L'Heureux-Dubé* (2004) Irwin Law Toronto 287-302

Woodman G R "A Survey of Customary Laws in Africa in Search of Lessons for the Future" in Fenrich J Galizzi P & Higgins T E (eds) *The Future of African Customary Law* (2011) Cambridge University Press 12-26

Journal Articles

Ackerman L W H "Equality and the South African Constitution: The Role of Dignity" (2000) 60 Heidelberg Journal of International Law 537-556 available at: <http://www.zaoerv.de>

Albertyn C and Goldblatt B "Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality" (1998) 14 South African Journal on Human Rights 248-276

Amann D M "The Postcolonial Woman or Child" (2015) 30 American University International Law Review 41-53

Amoah J "The World on Her Shoulders: The Rights of the Girl-Child in the Context of Culture and Identity" (2007) 4 Essex Human Rights Review 1-23 available at: <http://projects.essex.ac.uk/ehrr/V4N2/amoah.pdf>

Amien W "Overcoming the Conflict Between the Right to Freedom of Religion and Women's Rights to Equality: A South African Case Study of Muslim Marriages" (2006) 28 Human Rights Quarterly 729-754

Anaya J "Indigenous Law and its Contribution to Global Pluralism" (2007) 6 Indigenous Law Journal 3-12

Andrews P "Women's Rights and Traditional Law: A Conflict" (1994-1995) Third World Legal Studies viii-xv

Andrews P "Who's Afraid of Polygamy? Exploring the Boundaries of Family, Equality and Custom in South Africa" (2009) 1 Journal of Law & Family Studies 303-331

Andrews P E "Globalization, Human Rights and Critical Race Feminism: Voices from the Margins" (1999-2000) 3 Journal of Gender, Race & Justice 373-400

Armstrong A, Chuulu M, Himonga C, Letuka P, Mokobi K, Welshman Ncube W, Nhlapo T, Bart Rwezaura B & Philisiwe V "Towards a Cultural Understanding of the Interplay Between Children's and Women's Rights: An

Eastern and Southern African Perspective” (1995) 3 International Journal of Children’s Rights 333-368

Asante S K B “Nation Building and Human Rights in Emergent African Nations” (1969) 2 Cornell Journal of International Law 72-107

Austin R “Sapphire Bound!” (1989) Wisconsin Law Review 539-578

Baines B “Gender and Constitution: Is Constitutionalism Bad for Intersectional Feminists?” (2010) 28 Pennsylvania State International Law Review 427-449

Banda F “Global Standards: Local Values” (2003) 17 International Journal of Law Policy and the Family 1-27

Banda F “Women, Law and Human Rights in Southern Africa” (2006) 12 Journal of Southern African Studies 13-27

Bank L & Southall R “Traditional Leaders in South Africa’s New Democracy” (1996) 37 & 38 Journal of Legal Pluralism and Unofficial Law 407-430

Banks T L “Two Life Stories: Reflections of One Black Woman Law Professor” (1990-1991) 6 Berkeley Women’s Law Journal 46-56

Bavinck E A “Conflicting Priorities? Issues of Gender Equality in South Africa’s Customary Law” (2013) Amsterdam Law Forum 20-44

Bekker J C & de Kock P D “Adaptation of the Customary law of Succession to Changing Needs” (1992) 25 CILSA Africa 366-378

Bennett T W “Ubuntu An African Equity” (2011) 14 Potchefstroom Electronic Law Journal 30-6 (available at: <http://ssrn.com/abstract=1915062>)

Bennett T W “Reflection: Human Rights and Customary Law Under the New Constitution” (2011) 75 Transformation 73-80

Bennett T W “Legal Pluralism and the Family in South Africa: Lessons from Customary Law Reform” (2011) 25 Emory International Law Review 1029-1059

Bennett T W “Re-Introducing African Customary Law to The South African Legal System” (2009) 57 American Journal of Comparative Law 1-27

Bennett T W “Proprietary Capacity of Children: A Study of Customary Law and the Bill of Rights in South Africa” (1997) 9 African Journal of International and Comparative Law 83-106

Bennett T W “The Equality Clause and Customary Law” (1994) 10 South African Journal on Human Rights 122-130

Bennett T W "The Compatibility of African Customary Law and Human Rights" (1991) *Acta Juridica* 18-35

Bennett T W "Maintenance of Minor Children: A Problem of Adapting Customary Law to Meet Social Change" (1980) *Acta Juridica* 115-126

Bennett T W "The Interpersonal Conflict of Laws: A Technique for Adapting to Social Change in Africa" (1980) 18 *Africana: The Journal of Modern African Studies* 127-134

Bennett T W & Bleazard J "The Re-Invention of Customary Law: South African Courts as Constitutional Law Makers" (2009) 12 *Law in Africa (Journal of the African Law Association-Germany)* 1-20

Bennett T W, Mills C & Munnick G "Virginity Testing: A Crime, a Delict or a Genuine Cultural Tradition" (2010) *Journal of South African Law* 254-270

Bennett T W, Mills C & Munnick G "The Anomalies of Seduction: A Statutory Crime to an Obsolete, Unconstitutional Delict?" (2009) 25 *South African Journal on Human Rights* 330-352

Bentley K A "Are the Powers of Traditional Leaders in South Africa Compatible with Women's Equal Rights?: Three Conceptual Arguments" (2005) *Human Rights Review* 48-68

Bentley K A "Whose Right is it Anyway? Equality, Culture and Conflicts of Rights in South Africa" (2003) *Human Sciences Research Council, Democracy and Governance Research Program, Occasional Paper #4 (Cape Town)* 1- 32

Berman P S "The New Legal Pluralism" (2009) 5 *Annual Review of Law and Social Science* 225-242

Berat L "Customary Law in a New South Africa: A Proposal" (1991-1992) 15 *Fordham International Law Journal* 92-128

Bohler-Müller N "Cultural Practices and Social Justice in a Constitutional Dispensation: Some (More) Thoughts on Gender Equality in South Africa" (2001) 22 *Obiter* 142 -152

Bohler-Müller N "Of Victims and Virgins: Seduction Law in South Africa" (2000) *Codicillus* XXXI 2-6

Bond J E "International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations" (2003) 52 *Emory Law Journal* 71-186

Bonthuys E & Erlank N “The Interaction Between Civil and Customary Family Law Rules: Implications for African Women” (2004) *Journal on South African Law* 59-77

Brems E “Enemies or Allies? Feminism and Cultural Relativism as Dissident Voices in Human Rights Discourse” (1997) *19 Human Rights Quarterly* 136-164

Bronstein V “Reconceptualizing the Customary Law Debate in South Africa” (1998) *14 South African Journal on Human Rights* 388-410

Brown G “The Wind Cries Mary – The Intersectionality of Race, Gender and Reentry: Challenges for African-American Women” (2010) *24 St. John’s Journal of Legal Commentary* 625-648

Burchell J “Beyond the Glass Bead Game: Human Dignity in the Law of Delict” (1988) *4 South African Journal on Human Rights* 1-20.

Caldwell P M “A Hair Piece: Perspectives on the Intersection of Race and Gender” (1991) *40 Duke Law Journal* 365-396

Carbado D W & Gulati M “The Fifth Black Woman” (2001) *11 Journal of Contemporary Legal Issues* 701-729

Chanock M “Law, State and Culture: Thinking about Customary Law After Apartheid” (1991) *Acta Juridica* 52-72

Chanock M “Neither Customary Nor Legal: African Customary Law in an Era of Family Law Reform” (1989) *3 International Journal of Law and the Family* 72-88

Chanock M “A Peculiar Sharpness: An Essay on Property in the History of Customary Law in Colonial Africa” (1991) *32 Journal of African History* 65-88

Chemerinsky E “In Defense of Equality: A Reply to Professor Westen” (1983) *81 Michigan Law Review* 575-599

Cho S, Crenshaw K & McCall L “Toward a Field of Intersectionality Studies: Theory, Applications and Praxis” (2013) *38 Signs: Journal of Women in Culture and Society* at 785-810

Church J “The Place of Indigenous Law in a Mixed Legal System and a Society in Transformation: A South African Experience” (2005) *Australia & New Zealand Law & History E-Journal* 94-106

Classens A “Women, Customary Law and Discrimination: The Impact of the Communal Land Rights Act (2005) *Acta Juridica* 42-81

- Cobbah J A M “African Values and the Human Rights Debate: An African Perspective” (1987) *Human Rights Quarterly* 309-331
- Cohen A P “Culture as Identity: An Anthropologist’s View” (1993) *New Literary History* 195-209
- Collins P H “It’s All in the Family: Intersections of Gender, Race, and Nation” (1998) *Hypatia* 62-82
- Coombe R J “Honing a Critical Cultural Study of Human Rights” (2010) *7 Communication and Critical/Cultural Studies* 230-246
- Coombs M “Review Essay: Interrogating Identity” (1996) *11 Berkeley Women’s Law Journal* 222-249
- Coomaraswamy R “Women and Children: The Cutting Edge of International Law” (2015) *30 American University International Law Review* 1-41
- Coomaraswamy R “Identity Within: Cultural Relativism, Minority Rights and the Empowerment of Women” (2002) *34 George Washington International Law Review* 483-513
- Costa A “The Myth of Customary Law” (1998) *14 South African Journal on Human Rights* 525-538
- Currie I “The Future of Customary Law: Lessons from the Lobolo Debate” (1994) *Acta Juridica* 146-168
- Crenshaw K “Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color” (1990-1991) *43 Stanford Law Review* 1241-1299
- Crenshaw K “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscriminatory Doctrine, Feminist Theory and Antiracist Politics” (1989) *University of Chicago Legal Forum* 139-168
- Crooms L A “Indivisible Rights and Intersectional Identities or “What do Women’s Human Rights Have to do with the Race Convention” (1997) *40 Howard Law Journal* 619-640
- Davis D M “Equality: The Majesty of Legoland Jurisprudence” (1999) *16 South African Law Journal* 398-414
- Davis K “The Emperor is Still Naked: Why the Protocol on the Rights of Women in Africa Leaves Women Exposed to More Discrimination” (2009) *42 Vanderbilt Journal of Transnational Law* 949-992
- Deckha M “Intersectionality and Posthumanist Visions of Equality” (2008) *23 Wisconsin Journal of Law, Gender & Society* 249-267

Deckha M "Is Culture Taboo? Feminism, Intersectionality, and Culture Talk in Law" (2004) 16 *Canadian Journal of Women & the Law* 14-53

Delgado R & Stefancic J "Critical Race Theory: An Annotated Bibliography" (1993) 79 *Virginia Law Review* 461-516

De Sousa Santos Boaventura "Law: A Map of Misreading Towards a Postmodern Conception of Law" (1987) 14 *Journal of Law & Society* 279-302

Dlamini C R M "The Role of Customary Law in Meeting Social Needs" (1991) *Acta Juridica* 71-85

Dlamini C R M "Towards a New Legal Order for South Africa" (1992) XVI *Legal Studies Forum* 131-144

Duncanson I "Cultural Studies Encounters Legal Pluralism: Certain Objects of Order, Law and Culture" (1997) 12 *Canadian Journal of Law and Society* 115-142

English R "Ubuntu: The Quest for an Indigenous Jurisprudence" (1996) 12 *South African Journal on Human Rights* 641-648

Espinoza L G "Multi-Identity: Community and Culture" (1994) 2 *Virginia Journal of Social Policy & the Law* 23-41

Ewelukwa U "Post-Colonialism, Gender, Customary Injustice: Windows in African Societies" (2002) 24 *Human Rights Quarterly* 424-486

Fagan A "Rethinking Wrongfulness in the Law of Delict" (2005) 122 *South African Law Journal* 90-141

Farber D & Sherry S "Telling Stories out of School: An Essay on Legal Narratives" (1992-1993) 45 *Stanford Law Review* 807-856

Fishbayn L "Litigating the Right to Culture: Family Law in the New South Africa" (1999) 13 *International Journal of Law, Policy and the Family* 147-173

Foster A "The Role of Dignity in Canadian and South African Gender Equality Jurisprudence" (2008) 17 *Dalhousie Journal of Legal Studies* 73-97

Gadacz R "Customary Law: Terror of Colonialism or Orphan of Tradition? Response to Obiora "Reconsidering African Customary Law" (1993) 17 *Legal Studies Forum* 261-267

Galabuzzi G E "Race, Racialization and Multiculturalism" (2006) 5 *Canadian Diversity* 29-31

Garry A "Intersectionality, Metaphors, and the Multiplicity of Gender" (2011) 26 *Hypatia* 826-850

George E R “Virginity Testing and South Africa’s HIV/AIDS Crisis: Beyond Rights Universalism and Cultural Relativism Toward Health Capabilities” (2008) 96 California Law Review 1447-1518

Grant E “Human Rights, Cultural Diversity and Customary Law in South Africa” (2006) 50 Journal of African Law 2-23

Greenhouse C J “Legal Pluralism and Cultural Difference: What is the Difference? A Response to Professor Woodman” (1992) 42 Journal of Legal Pluralism and Unofficial Law 61-72

Greycar R “Gender, Race, Bias and Perspective: Or, How Otherness Colours Your Judgment”, (2008) 15 International Journal of the Legal Profession 73-86

Griffiths A “International Human Rights, Women, Gender and Culture: Perspectives from Africa” (2008) 8 University of Botswana Law Journal 79-102

Griffiths A “Women, Status and Power” (1989) 22 Cornell International Law Journal 575-622

Griffiths A “Legal Pluralism in Africa: The Role of Gender and Women’s Access to Law” (1996) 19 Political and Legal Anthropology Review 93-108

Griffiths J “What is Legal Pluralism?” (1986) 24 Journal of Legal Pluralism and Unofficial Law 1-56

Grillo T “Anti-Essentialism and Intersectionality: Tools to Dismantle the Master’s House” (1995) 10 Berkeley Women’s Law Journal 16-30

Gunning I R “Arrogant Perception, World Travelling and Multicultural Feminism: The Case of Female Genital Surgeries” (1991-92) 23 Columbia Human Rights Law Review 189-248

Harris A “Bad Subjects: The Practice of Theory and The Constitution of Identity in Legal Culture” (2003) 9 Cardozo Women’s Law Journal 515-525

Harris A P “Race and Essentialism in Feminist Legal Theory” (1989-1990) 42 Stanford Law Review 581-616

Harris Cheryl I “Finding Sojourner’s Truth: Race, Gender and the Institution of Property” (1996-1997) 18 Cardozo Law Review 309-409

Harris Cheryl I “Whiteness as Property” (1229-1993) 106 Harvard Law Review 1708-1791

Hellum A “Women’s Human Rights and African Customary Laws: Between Universalism and Relativism – Individualism and Communitarianism” (1998) 10 *European Journal of Development Research* 88-104

Hellum A “Human Rights and Gender Relations in Postcolonial Africa: Option and Limits for the Subjects of Legal Pluralism” (2000) 28 *Law & Social Inquiry* 635-656

Herbert J “ ‘Otherness’ and the Black Woman” (1989-1990) 3 *Canadian Journal of Women and the Law* 269-279

Herbst M & du Plessis W “Customary Law v Common Marriages: A Hybrid Approach in South Africa” (2008) 3 *Journal of Comparative Law* 105-118

Higgins T E, Fenrich J & Tanzer Z “Gender Equality and Customary Marriage: Bargaining in the Shadow of Post-Apartheid Legal Pluralism” (2007) 30 *Fordham International Law Journal* 1653-1708

Higgins T E “Anti-Essentialism, Relativism, and Human Rights “ (1996) 19 *Harvard Women's Law Journal* 89-126

Himonga C “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* 82-107

Himonga C “Implementing the Rights of the Child in African legal Systems: The *Mthembu* Journey in Search of Justice” (2001) 9 *International Journal of Children’s Rights* 89-122

Himonga C & Bosch C “The Application of African Customary Law Under the Constitution of South Africa: Problems Solved or Just Beginning?” (2000) 117 *South African Law Journal* 306-341

Himonga C “State and Individual Perspectives of a Mixed Legal System in Southern African Contexts with Special Reference to Personal Law” (2010) 25 *Tulane European & Civil Law Forum* 23-36

Himonga C “Taking the Gap – Living Law Land Grabbing in the Context of Customary Succession Laws in Southern Africa” (2011) *Acta Juridica* 114-139

Hughes P “Recognizing Substantive Equality as Foundational Constitutional Principle” (1999) 22 *Dalhousie Law Journal* 5-50

Hutchinson D L “Identity Crisis: ‘Intersectionality’, ‘Multidimensionality’, and the Development of an Adequate Theory of Subordination” (2001) 6 *Michigan Journal of Race & Law* 285-317

Ibhawoh B “Cultural Relativism and Human Rights: Reconsidering the Africanist Discourse” (2001) 19 *Netherlands Quarterly of Human Rights* 43-62

Ibhawoh B “Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State” (2000) 22 *Human Rights Quarterly* 838-860

Iya P “Culture as a Toll of Division and Oppression: Towards a Meaningful Role for Culture and Customary Law in a United South Africa” (1998) 30 *Comparative and International Law Journal of Southern Africa* 228-242

Jacobs B “Unbound by Theory and Naming: Survival Feminism and the Women of the South African Victoria Mxenge Housing and Development Association” (2011) 26 *Berkeley Journal of Gender, Law & Justice* 19-77

Jagwanth S “Affirmative Action in a Transformative Context: The South African Experience” (2004) 36 *Connecticut Law Review* 725-745

Jagwanth S “What is the Difference? Group Categorisation in *Pretoria City Council v Walker* 1998 (2) SA 363 (CC)” (1999) 15 *South African Journal on Human Rights* 200-208

Jagwanth S “Expanding Equality” (2005) *Acta Juridica* 131-148

Jagwanth S & Murray C “Ten Years of Transformation: How has Gender Equality in South Africa Fared?” (2002) 14 *Canadian Journal of Women and the Law* 255-299

Johnson A M Jr “Defending the Use of Narrative and Giving Content to the Voice of Colour: Rejecting the Imposition of Process Theory in Legal Scholarship” (1993-1994) 79 *Iowa Law Review* 802-852

Juma L “Reconciling African Customary Law and Human Rights in Kenya: Making a Case for Institutional Reformation and Vitalization of Customary Adjudication Processes” 14 (2002) *St Thomas Law Review* 459- 512

Kaganas F & Murray C “The Contest Between Culture and Gender Equality Under South Africa’s Interim Constitution” (1994) 21 *Journal of Law and Society* 409-433

Kerr A J “Role of the Courts in Developing Customary Law (1999) *Obiter* 41-51

Khunou S F “Traditional Leadership and Independent Bantustans of South Africa: Some Milestones of Transformative Constitutionalism Beyond Apartheid” (2009) 12 *Potschefstroom Electronic Review* 80-122

Knoetze E "Customary law of Succession in a Dualistic System" (2005) *The Journal on South African Law (TSAR)* 137-145

Knoetze E "Fathers Responsible for the Sins of Their Children? Notes on the Accessory Liability of a Family Head in the Customary Law of Delict" (2012) *Speculum Juris* 47-65

Kuenyehia A "Women, Marriage and Intestate Succession in the Context of Legal Pluralism in Africa" (2006) *40 U C Davis Law Review* 385-405

Kult A P "Intestate Succession in South Africa: The "Westernization" of Customary Law Practices with a Modern Constitutional Framework" (2001) *11 Indiana International & Comparative Law Review* 697-730

L'Heureux-Dubé C "Making a Difference: The Pursuit of Equality and a Compassionate Justice" (1997) *13 South African Journal on Human Rights* 335-353

L'Heureux-Dubé C "A Conversation About Equality" (2000-2001) *29 Denver Journal of International Law & Policy* 65-76

Lehnert W "The Role of the Courts in the Conflict Between African Customary Law and Human Rights" (2005) *21 South African Journal on Human Rights* 241-277

Lewis H "Embracing Complexity: Human Rights in Critical Race Feminist Perspective" (2003) *12 Columbia Journal of Gender & Law* 510-520

Lewis H "Reflections on 'Blackcrit Theory': Human Rights" (2000) *45 Villanova Law Review* 1075-1090

Lewis H "Global Intersections: Critical Race Feminist Human Rights and Inter/National Black Women" (1998) *50 Maine Law Review* 309-326

Lewis H "Between Irua and "Female Genital Mutilation": Feminist Human Rights Discourse and the Cultural Divide"(1995) *8 Harvard Human Rights Journal* 1-55

López I F H "The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice" (1994) *29 Harvard Civil Rights-Civil Liberties Law Review* 1-62

Lowenberg A D "Post-Apartheid Constitution for South Africa: Lessons from Public Choice" (1992-1993) *12 Cato Journal* 297-320

MacKinnon C "Intersectionality as Method: A Note" (2013) *38 Signs: Journal of Women in Culture and Society* 1019-1030

Maguban Z “Which Bodies Matter? Feminism, Poststructuralism, Race, and the Curious Theoretical Odyssey of the ‘Hottentot Venus’” (2001) 15 *Gender and Society* 816-34

Malulek M J “Culture, Tradition, Custom, Law and Gender Equality” (2012) 15 *Potchefstroom Electronic Law Journal* 2-22

Mamashela M & Freedman W “The Internal Conflict of Law and the Intestate Succession of Africans: *Zondi v President of the Republic of South Africa* 2000 (2) SA 49 (N)” (2003) *Journal of South African Law* 201-207

Massell G J “Law as an Instrument of Revolutionary Change in a Traditional Milieu: The Case of Soviet Central Asia” (1979) 2 *Law & Society Review* 179-228

Mautner M “Three Approaches to Law and Culture” (2011) 96 *Cornell Law Review* 839-868

Mbodla N “Customary Law in Search of Development” (1999) 116 *The South African Law Journal* 742-744

McCrudden C “Human Dignity and Judicial Interpretation of Human Rights” (2008) 19 *European Journal International Law* 655-724

Merry S E “Human Rights Law and the Demonization of Culture (and Anthropology Along the Way)” (2003) 26 *Political and Legal Anthropology Review* 55-76

Merry S E “Law and Colonialism” (1991) 25 *Law & Society Review* 889-992

Merry S E “Legal Pluralism” (1988) 22 *Law and Society Review* 869-896

Mezery N “Law’s Culture and Lived Culture: A Comment on Roger Cotterrell’s ‘The Struggle for Law: Some Dilemmas of Cultural Legality’” (2009) *International Journal of Law in Context* 395-399

Michaels R “Global Legal Pluralism” (2009) 5 *Annual Review of Law and Social Science* 243-262

Minow M & Singer J W “In Favour of Foxes: Pluralism as Fact and Aid to the Pursuit of Justice” (2010) 90 *Buffalo Law Review* 903-920

Minow M “Not Only For Myself: Identity, Politics and Law” (1996) 75 *Oregon Law Review* 647-698

Modiri J M “The Colour of Law, Power and Knowledge: Introducing Critical Race Theory in (Post-)Apartheid South Africa” (2012) 3 *South African Journal on Human Rights* 405-436

Mokgoro Y "Constitutional Claims for Gender Equality in South Africa: A Judicial Response" (2003) 67 Albany Law Review 565-573

Mokgoro Y "The Protection of Cultural Identity in the Constitution and the Creation of National Unity in South Africa: A Contradiction in Terms?" (1999) 52 Southern Methodist University Law Review 1549-1561

Mokgoro Y "Ubuntu and the Law in South Africa" (1998) 4 Buffalo Human Rights Law Review 15-23

Mokgoro Y "The Customary Law Question in the South African Constitution" (1996-1997) 41 Saint Louis University Law Journal 1279-1289

Mokgoro Y "Traditional Authority and Democracy in the Interim South African Constitution" (1996) 3 Review of Constitutional Studies 60-75

Moore S F "Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study" (1973) 7 Law & Society Review 719-746

Moore S F "The Legislative Dismantling of a Colonial and an Apartheid State" (2011) 7 Annual Review of Law and Social Sciences 1-15

Moosa E "Prospects for Muslim Law in South Africa: A History and Recent Developments" (1996) 3 Yearbook of Islamic and Middle Eastern Law 130-155

Moran B I "Keynote Address Delivered for the Journal of Contemporary Legal Issues Conference on the Future of Intersectionality and Critical Race Feminism" (2001) 11 Journal of Contemporary Legal Issues 691-700

Motala Ziyad "South Africa's Constitutional Options in Comparative Perspective: Moving Towards a Responsible and Democratic Constitution" (1993) 2 Journal of International Law & Practice 253-280

Motala Z "Constitution-Making in Divided Societies and Legitimacy: Lessons from the South African Experience" (2005-2006) 15 Temple Political & Civil Rights Law Review 147-164

Mothokoa M & Freedman W "The Internal Conflict of Law and the Intestate Succession of Africans: *Zondi v President of the Republic of South Africa* 2000 2 SA 49 (N)" (2003) Journal of South African Law 201-207

Motala Z "Constitution-Making in Divided Societies and Legitimacy: Lessons from the South African Experience" (2005-2006) 12 Temple Political & Civil Rights Law Review 147-163

Mqeke R B "Customary Law and Human Rights" (1996) 113 South African Law Journal 364-369

Mswela M “Cultural Practices and HIV in South Africa: A Legal Perspective” (2009) 12 Potchefstroom Electronic Reports 172-213

Murray C “A Constitutional Beginning: Making South Africa’s Final Constitution” (2000-2001) 23 University of Arkansas at Little Rock Law Review 809-838

Muvangizi J C “Building a South African Human Rights Culture in the Face of Cultural Diversity: Context and Conflict” (2012) 5 African Journal of Legal Studies 1-20

Mmusiyane B “The Role of Traditional Authorities in Developing Customary Laws in Accordance with the Constitution: *Shilubana and Others v Nwamitwa* 2008 (9) BCLR 914 (CC)” (2009) 12 Potchefstroom Law Journal 135-161

Mutua A D “The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship” (2006-2007) 84 Denver University Law Review 329-394

Mutua M “Savages, Victims, and Saviors: The Metaphor of Human Rights” (2001) 42 Harvard International Law Journal 201- 245

Mutua M W “Hope and Despair for a New South Africa: The Limits of Rights Discourse” (1997) 10 Harvard Human Rights Journal 63-114

Mutua M W “The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties” (1994-1995) 35 Virginia Journal of International Law 339-380

Naryan U “Essence of Culture and a Sense of History: A Feminist Critique of Cultural Essentialism” (1998) 13 Hypatia 86-106

Ncube W “The Decision in *Katekwe v Muchabaiwa*: A Critique” (1983-1984) 1 & 2 Zimbabwe Law Review 217-228

Ndulo M “African Customary Law, Customs, and Women’s Rights” (2011) 18 Indiana Journal of Global Legal Studies 87-120

Nhlapo T “Cultural Diversity, Human Rights and the Family in Contemporary Africa: Lessons from the South African Constitutional Debate” (1995) 9 International Journal of Law & the Family 208-225

Nhlapo T “Indigenous Law and Gender in South Africa: Taking Human Rights and Cultural Diversity Seriously” (1994) Third World Legal Studies 49-71

Nhlapo T R “The African Family and Women’s Rights: Friends or Foes?” (1991) Acta Juridica 135-146

- Nhlapo T “International Protection of Human Rights and the Family” African Variations on a Common Theme” (1989) 3 International Journal of Law, Policy and the Family 1-20
- Nkosi “The Ending of a Customary Marriage What Happens to the Ilobolo?” (2013) De Rebus 222-226 (available at: <http://www.saflii.org/za/journals/DEREBUS/2013/222.pdf>)
- Nourse V F “Equality’s Future: An Introduction” (2008) 23 Wisconsin Journal of Law, Gender & Society 161-167
- Ntlama N “The Application of Section 8(3) of the Constitution in the Development of Customary Law Values in South Africa’s New Constitutional Dispensation” (2012) 15 Potchefstroom Electronic Law Journal 24-44
- Ntlama N “*Masiya*: Gender Equality and the Role of the Common Law” (2009) 3 Malawi Law Journal 303
- Ntlama N “ ‘Equality’ Misplaced in the Development of the Customary Law of Succession: Lessons from *Shilubana v Nwamitwa* 2009 2 SA 66 (CC)” (2009) 2 Stellenbosch Law Review 333-356
- Nwauche E B “Protecting Expressions of Folklore Within the Rights to Culture in Africa” (2010) 13 Potchefstroom Electronic Law Journal 49-92
- Nwauche E S “Distinction Without Difference: The Constitutional Protection of Customary Law and Cultural, Linguistic and Religious Communities – A Comment on *Shilubana and Others v Nwamitwa*” (2009) 59 Journal of Legal Pluralism and Unofficial Law 67-85
- Nyamu C “How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries” (2000) 41 Harvard International Law Journal 381-418
- Obiora L A “Reconsidering African Customary Law” (1993) 17 Legal Studies Forum 217-252
- O’Connell R “The Role of Dignity in Equality Law: Lessons from Canada and South Africa” (2008) 6 International Journal of Constitutional Law 267-286
- Okin S M “Feminism, Women’s Human Rights, and Cultural Differences” (1998) 13 Hypatia 32-52
- Oloka-Onyango “Who’s Watching ‘Big Brother’? Globalisation and the Protection of Cultural Rights in Present Day Africa (2005) 27 Human Rights Quarterly 1245-1273

Oloka-Onyango J & Tamale S "The Personal is Political' or Why Women's Rights are Indeed Human Rights: An African Perspectives on International Feminism" (1995) 17 Human Rights Quarterly 691-731

Omotola J A "Primogeniture and Illegitimacy in African Customary Law: The Battle for Survival of Culture" (2004-2005) 15 Indiana International and Comparative Law Review 115-145

Onwuachu-Willig A "This Bridge Called our Backs: An Introduction to 'The Future of Critical Race Feminism'" (2005-2006) 39 University of California Davis Law Review 733-742

Oppermann B "The Impact of Legal Pluralism in Women's Studies: An Examination of Marriage Laws in Egypt, South Africa and the United States" (2006) 17 Hastings Women's Law Journal 65-92

Parashar A "Essentialism or Pluralism: The Future of Legal Feminism" (1993) 6 Canadian Journal of Women and the Law 328-348

Pieterse M "Finding for the Applicant? Individual Equality Plaintiffs and Group-Based Disadvantage" (2008) 24 South African Journal on Human Rights 397-424

Pieterse M "It's a Black Thing: Upholding Culture and Customary Law in a Society Founded on Non-Racialism" (2001) 17 South African Journal on Human Rights 364-403

Pieterse M "The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: Final Nail in the Customary Law Coffin" (2000) 117 South African Law Journal 627-635

Polavarapu A "Reconciling Indigenous and Women's Rights to Land in Sub-Saharan Africa" (2014) 43 Georgia Journal of International & Comparative Law 1-33

Post R "Law and Cultural Conflict" (2003) 78 Chicago-Kent Law Review 485-508

Pothier D "Connecting Grounds of Discrimination to Real People's Real Experiences" (2001) Canadian Journal of Women and the Law 37-73

Powell C "Introduction: Locating Culture, Identity and Human Rights" (1999) 30 Columbia Human Rights Law Review 201-224

Prinsloo M W "Pluralism or Unification in Family Law in South Africa" (1990) 23 CILSA 324-336

Pruitt L R "Gender, Geography and Rural Justice" (2008) 23 Berkeley Journal of Gender Law & Justice 338-391

Pruitt L R “Towards a Feminist Theory of the Rural” (2007) *Utah Law Review* 421-488

Raday F “Culture, Religion and Gender” (2003) *International Journal of Constitutional Law* 663-715

Rautenbach C “The Modern-Day Impact of Cultural and Religious Diversity: ‘Managing Family Justice in Diverse Societies’” (2014) 17 *Potchefstroom Electronic Law Journal* 520-552

Rautenbach C “Deep Legal Pluralism in South Africa: Judicial Accommodation of Non-State Law” (2010) 60 *Journal of Legal Pluralism and Unofficial Law* 143-177

Rautenbach C “South African Common and Customary Law of Intestate Succession: A Question of Harmony, Integration or Abolition” (2008) 12 *Electronic Journal of Comparative Law* 2-15

Rautenbach C & du Plessis W “African Customary Marriages in South Africa and the Intricacies of a Mixed Legal System: Judicial (In) *Novatio* or *Confusio*?” (2012) 57 *McGill Law Journal* 749-780

Rautenbach C, du Plessis W & Pienaar G “Is Primogeniture Extinct Like the Dodo, or Is there Any Prospect of it Rising from the Ashes? Comments on the Evolution of Customary Succession Laws in South Africa” (2006) 22 *South African Journal on Human Rights* 99-118

Rautenbach I M “Constitutional Court Decisions on the Bill of Rights – 2004” (2005) *Journal on South African Law* 169-194

Redivivus P “South African Law at the Crossroads or What is Our Common Law?” (1965) 82 *South African Law Journal* 17-25

Ridgeway C “The Social Construction of Status Value: Gender and Other Nominal Characteristics” (1991) 70 *Social Forces* 367-386

Rioux M H “Towards a Concept of Equality of Well-being: Overcoming the Social and Legal Construction of Equality” (1994) 7 *Canadian Journal of Law and Jurisprudence* 127-147

Roberts R “Colonialism and Customary Law in Africa: A Response to Lesley Obiora” (1993) 17 *Legal Studies Forum* 253-259

Roederer C J “Working the Common Law Pure: Developing the Law of Delict (Torts) in Light of the Spirit, Purport and Objects of South Africa’s Bill of Rights” (2009) 26 *Arizona Journal of International Comparative Law* 427-503

Roux T “Principle and Pragmatism on the Constitutional Court of South Africa” (2009) 7 *International Journal of Constitutional Law* 106-138

Santos B de Sousa “Law: A Map of Misreading Towards a Postmodern Conception of Law” (1987) 14 *Journal of Law & Society* 279-302

Sarkin J “The Common Law in South Africa: Pro Apartheid or Pro Democracy” (1999) 23 *Hastings International and Comparative Law Review* 1-26

Schoeman-Malan M C “Recent Developments Regarding South African Common and Customary Law of Succession” (2007) 10 *Potchefstroom Law Journal* 1-33

Sibanda S “When is the Past not the Past? Reflections on Customary Law Under South Africa’s Constitutional Dispensation” (2010) 17 *Human Rights Brief* 31-35

Solanke I “Putting Race and Gender Together: A New Approach to Intersectionality” (2009) 72 *The Modern Law Review* 723-749

Ssenyonjo M “Culture and the Human Rights of Women in Africa: Between Light and Shadow” (2007) *Journal of African Law* 39-67

Suttner R S “The Study of ‘Bantu Law in South Africa: A Review Article” (1968) *Acta Juridica* 147-156

Suttner R S “Legal Pluralism in South Africa: A Reprisal of Policy” (1970) 19 *International and Comparative Law Quarterly* 134-153

Taefi N “The Synthesis of Age and Gender: Intersectionality, International Human Rights Law and the Marginalisation of the Girl-Child” (2009) 17 *International Journal of Children’s Rights* 345-367

Tamale S “The Right to Culture and the Culture of Rights: A Critical Perspective on Women’s Sexual Rights in Africa” (2008) 16 *Feminist Legal Studies* 47-69

Tamanaha B Z “Understanding Legal Pluralism: Past to Present, Local to Global” (2008) 30 *Sydney Law Review* 375-411

Tanzer Z “Social Norms and Constitutional Transformation: Tracing the Decline of the Application Distinction in South Africa” (2010) 9 *Washington University Global Studies Law Review* 457-509

Tebbe N “Inheritance and Disinheritance: African Customary Law and Constitutional Rights” (2008) 88 *Journal of Religion* 466-496

Thomas P “Harmonisation of the Law: The South African Experience” (2011)
SUBB Jurisprudence 3-18

Tsosie R “Indigenous Women and International Human Rights Law: The
Challenges of Colonialism, Cultural Survival and Self-Determination” (2010)
15 UCLA Journal of International Law & Foreign Affairs 187-238

Tsosie R “Tribalism, Constitutionalism and Cultural Pluralism: Where Do
Indigenous Peoples Fit Within Civil Society?” (2002-2003) 5 University of
Pennsylvania Journal of Constitutional Law 357-404

Van Genugten W “Protection of Indigenous Peoples on the African
Continent: Concepts, Position Seeking, and the Interaction of Legal Systems”
(2010) 104 American Journal of International Law 29-65

Van Niekerk G “Reflections on the Interplay of African Customary Law and
State Law in South Africa” (2012) SUBB Jurisprudentia 1-20

Van der Vyver J D “Human Rights Aspects of the Dual Systems Applying to
Blacks in South Africa” (1982) 15 Comparative & International Law Journal of
Southern Africa 306-318

Vanderlinden J “Return to Legal Pluralism: Twenty Years Later” (1989) 28
Journal of Legal Pluralism and Unofficial Law 149-157

Van Doorne J H “Situational Analysis: Its Potential and Limitations for
Anthropological Research on Social Change in Africa (1981) 21 *Cahiers
d'Études Africaines* 479-506

Venter C M “The New South African Constitution: Facing the Challenges of
Women’s Rights and Cultural Rights in Post-Apartheid South Africa” (1995)
21 Journal of Legislation 1-22

Venter T & Nel J “African Customary Law of Intestate Succession and
Gender (in)equality” (2005) 1 Journal of South African Law 86-105

Vincent L “Virginity Testing in South African: Re-traditioning the Postcolony”
(2006) 8 Culture, Health & Sexuality 17-30

Visser P J “Some Remarks on the Relevance of the Bill of Rights in the Field
of Delict” (1998) Journal of South African Law 529-536

Volpp L “Framing Cultural Difference: Immigrant Women and Discourses of
Tradition” (2011) 22 Differences: A Journal of Feminist Cultural Studies 90-
110

Volpp L “The Culture of Citizenship” (2007) 8 Theoretical Inquiries in Law
571-601

Volpp L "Feminism versus Multiculturalism" (2001) 101 Columbia Law Review 1181-1218

Von Benda-Beckman F & von Benda-Beckman K "The Dynamics of Change and Continuity in Plural Legal Orders" (2006) 53-54 Journal of Legal Pluralism and Unofficial Law 1-44

Waldron Jeremy "The Dignity of Groups" (2008) Acta Juridica 66-90

Weiner J "Eliciting Customary law" (2006) 7 Asia Pacific Journal of Anthropology 15-25

West C & Zimmermann D H "Doing Gender" (1987) 2 Gender and Society 125-151

Westen P "The Empty Idea of Equality" (1982) 95 Harvard Law Review 537-596

Westen P "On 'Confusing Ideas': Reply", (1982) 91 Yale Law Journal 1153 - 1166

Wiggins M J "Foreword: The Future of Intersectionality and Critical Race Feminism" (2001) 11 Journal of Contemporary Legal Issues 677-689

Williams S H "Democracy, Gender Equality and Customary Law: Constitutionalizing Internal Cultural Disruption" (2011) 18 Indiana Journal of Global Legal Studies 65-85

Wing A K "The South African Constitution as a Role Model for the United States" (2008) 24 Harvard Blackletter Law Journal 73-80

Wing A K "Polygamy from Southern African to Black Britannia to Black America: Global Critical Race Feminism as Legal Reform for the Twenty-first Century" (2001) 11 Journal of Contemporary Legal Issues 811-880

Wong J "The Anti-Essentialism v Essentialism Debate in Feminist Legal Theory: The Debate and Beyond" (1999) 5 William and Mary Journal of Women and the Law 273-296

Woodman G "Ideological Combat and Social Observation: Recent Debate about Legal Pluralism" (1998) 42 Journal of Legal Pluralism 21-41

Woodman G R "Legal Pluralism and the Search for Justice" (1996) 40 Journal of African Law 152-167

Xanthaki A "Multiculturalism and International Law: Discussing Universal Standards" (2010) 32 Human Rights Quarterly 21-48

Yacoob Z “Some Perspectives on the Movement Towards and the Struggle for Equality in Our Context” (2001) *Acta Juridica* 1-7

Zajtay I & Holsten W J “The Permanence of Roman Law Concepts in South African Law” (1969) 2 *Comparative and International Law Journal of Southern Africa* 181-205

Zimmerman J “The Reconstitution of Customary law in South Africa: Method and Discourse” (2001) 17 *Harvard Blackletter Law Journal* 197-228

Theses

Aiyedun Y A *Fair Trial and Access to Justice in South Africa: How Traditional Tribunals Cater to the Needs of Rural Female Litigants* (unpublished PhD thesis University of Cape Town 2013)

Bohler-Muller N *Developing a New Jurisprudence of Gender Equality in South Africa*” (2005) PhD Thesis University of Pretoria available at: <http://upetd.up.ac.za/thesis/available/etd-06152006-123856/unrestricted/00front.pdf>

Cases

Alexkor Ltd and Another v Richtersveld Community and Others 2004 (5) SA 460 (CC)

Bhe and Others v Magistrate Khayelitsha and Others; Shibi v Sithole; South African Human Rights Commission v President Republic of South Africa 2005 (1) SA 580 (CC)

Bull v Taylor 1965 (4) SA 29 (A)

Carmichele v Minister of Safety and Security and Another 2001 (4) SA 938 (CC)

Classen v Van der Watt 1969 (3) SA 68 (T)

Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744 (CC)

Fanti v. Boto 2008 (5) SA 405 (Western Cape HC)

Fraser v Children's Court Pretoria North and Others 1997 (2) SA 218 (CC)

Gumede (born Shange) v President of the Republic of South Africa 2009 (3) SA 152 (CC)

Harksen v Lane NO and Others 2000 (2) SA 825 (CC)

Mabena v Letsoala 1998 2 SA 1068 (T)

Masiya v Director of Public Prosecutions, Pretoria 2007 (5) SA 30 (CC)

Mayelane v Ngwenyama and Another 2013 (4) SA 415 (CC)

MEC for Education: Kwazulu-Natal and Others v Pillay 2008 (1) SA 474 (CC)

Moseneke and Others v The Master and Another 2001 (2) SA 18 (CC)

Mthembu v Letsela and Another 2000 (3) SA 867 (SCA)

President of the Republic of South Africa and Another v Hugo 1997 (4) SA 1 (CC)

Prior v Battle and Others 1999 (2) SA 850 (T)

Van Jaarsveld v Bridges 2010 (4) SA 558 (SCA)

Shilubana and Others v Nwamitwa 2009 (2) SA 66 (CC)

Statutes

Constitution of the Republic of South Africa, Act 108 1996

Black Administration Act, 38 1927

Children's Act, 38 2005

Intestate Succession Act, 81 1987

Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

Recognition of Customary Marriages Act 120 of 1998

Reform of Customary Law of Succession and Regulation of Related Matters Act, 11 2009

Repeal of the Black Administration Act and Amendment of Certain Laws Act, 28 2005

Repeal of the Black Administration Act and Amendment of Certain Laws Act, 13 2007

International Instruments

Convention on the Rights of the Child, GA Res 44/25, adopted 20 November 1989, entered into force on 2 November 1990

African (Banjul) Charter on Human and Peoples' Rights, adopted 27 June 1981, ratified by South African in June 1996

African Union, *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, 11 July 2003, available at:
<http://www.africa-union.org/root/au/Documents/Treaties/Text/Protocol%20on%20the%20Rights%20of%20Women.pdf>

African Charter on the Rights and Welfare of the Child OAU Doc CAB/LEG/24.9/49 (1990) entered into force 29 November 1999

Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), GA RES 34/18018 December 1979, in force 3 September 1981

UNESCO Universal Declaration on Cultural Diversity, adopted by the 31st Session of the General Conference of UNESCO (Paris, 2001)

Online Sources and Miscellaneous Non-print Sources

Cornell D "uBuntu, Pluralism and the Responsibility of Legal Academics to the New South Africa" (2008) Inaugural Lecture by Professor Drucilla Cornell, Department of Private Law, University of Cape Town, available at:
http://www.uct.ac.za/downloads/uct.ac.za/news/lectures/inaugurals/Drucilla_Cornell.pdf

De Vos P 'The Past is Unpredictable: Race, Redress and Remembrance in the South African Constitution' Inaugural Lecture of Claude Leon Foundation Chair in Constitutional Governance, Department of Public Law, University of Cape Town, available at:

http://www.uct.ac.za/downloads/uct.ac.za/news/lectures/inaugurals/De_Vs_inaugural.pdf

Du Plessis E & Frantz G “African Customary Land Rights in a Private Ownership Paradigm” (available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2381922&download=yes)

Farris D “Before I am Black” *Wild Seed, Wild Flower* (1994) Columbia Records

Finnis J M “Equality and Differences”, The HLA Hart Memorial Lecture in the University of Oxford, June 2011, Available at SSRN: <http://ssrn.com/abstract=2180410>

Gosepath S “Equality”, *The Stanford Encyclopedia of Philosophy* (Spring 2011 Edition) Edward N Zalta (ed) available at: <http://plato.stanford.edu/archives/spr2011/entries/equality/>

Kapai P “Building Inclusive Societies: The Role of Substantive Equality, Ideas of Justice and Deliberative Theory” Joz Motmans Daniël Cuypers Petra Meier Dimitri Mortelmans Patrizia Zanoni (eds) Conference Proceedings: *Equal is Not Enough: Challenging Differences and Inequalities in Contemporary Societies* 24-42 (2011) Hasselt University Available at SSRN: <http://ssrn.com/abstract=1988195>

Mbeki T M “I Am an African”, Statement of then Deputy President TM Mbeki, on Behalf of the African National Congress, on the Occasion of the Adoption by the Constitutional Assembly of “The Republic of South Africa Constitutional Bill 1996 available at: <http://www.anc.org.za/show.php?id=4322>

Posner E A “Martii Koskenniemi on Human Rights: An Empirical Perspective” (March 2014) Public Law and Legal Theory Working Paper #47 The University of Chicago Law School [manuscript on file with author]

Rautenbach C “Cultural Diversity and International Law” in Aaron Schwabach Arthur John Cockfield (eds) *International Law and Institutions* (2011) Encyclopedia of Life Support Systems (EOLSS) Developed under the Auspices of the UNESCO EOLSS Publishers Oxford (Available at SSRN: <http://ssrn.com/abstract=1788139>)

Sastry K S “ Equality, Basic Needs and Democratic Constitution” (2002) 3 Perspectives available at http://www.oycf.net/web.archive.org/web/20101218084208/http://oycf.org/Perspectives2/17_063002/contents.html

Sheppard C “Reducing Group-based Inequalities in a Legally Plural World” (2010) CRISE Working Paper No. 75 (Centre for Research on Inequality,

Human Security and Ethnicity), available at:

<http://r4d.dfid.gov.uk/PDF/Outputs/Inequality/workingpaper75.pdf>

South African Law Commission Project 90 the Harmonisation of the Common Law and the Indigenous Law: Report on Conflicts of Law (1999)

South Africa Language Information available at:

<http://www.southafrica.info/about/people/language.htm#.VODxxULE1Ck>

Stanford Encyclopedia of Philosophy, Equality, available at:

<http://plato.stanford.edu/entries/equality/#Bib>

Statistics South Africa, Census 2011, available at:

http://www.statssa.gov.za/census2011/Products/Census_2011_Census_in_brief.pdf

Suárez Victoria Camarero and F Javier Zamora Cabot, “Reflections of Legal Pluralism in Multicultural Settings” (available at:

<http://conflictoflaws.net/News/2012/05/REFLECTIONS-OF-LEGAL-PLURALISM-CONSOLIDER.pdf>)

Tamanaha B Z “The Rule of Law and Legal Pluralism in Development” (2011) 3 Hague Journal on the Rule of Law 1 and Washington University in St Louis School of Law Legal Research Paper Series (available at <http://ssrn.com/abstract=1886572>)

Van Rensburg A M J “Mthembu v Letsela: The Non-Decision” (unpublished manuscript on file with author)

Waldron J “Is Dignity the Foundation of Human Rights?” (2013) NYU School of Law Public Law and Legal Theory Research paper Series, Working Paper No. 12-73 (available at: <http://ssrn.com/abstract=2196074>)

Waldron J “Basic Equality” (2008) NYU School of Law, Public Law Research Paper No. 08-61 (available at SSRN: <http://ssrn.com/abstract=1311816>)

William I & Oke M “Multiculturalism, Legal Pluralism and the Separability Thesis: A Postmodern Critique of “An African Case for Legal Positivism”, 2008 (2) Law, Social Justice & Global Development Journal (available at: http://www.go.warwick.ac.uk/elj/lgd/2008_2/williamandoke)