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Constitutionally Transforming South Africa by Amalgamating Customary and Common Law: *Ramuhovhi*, the Proprietary Consequences of Marriage and Land as Property

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ABSTRACT: In this article, the cases of *Ramuhovhi and Others v President of the Republic of South Africa and Others* [2017] ZACC 41 and *Minister of Justice and Correctional Services v Ramuhovhi and Others* [2019] ZACC 44 form the departure point for analytical discussion of the proprietary consequences of marriage and their relationship to South African law's conception of land as property under customary law. Beyond that, this substantive issue provides the backdrop for the article's critical discussion of the possibility (and limitations) of fully establishing living customary law – that is, vernacular law – and its indigenous values, on its own terms under South Africa's Constitution. The challenge the article confronts is that, in South Africa, customary law and common law currently exist as two more-or-less separate systems of law under a single Constitution. Consequently, vernacular law is presently constitutionally accommodated, rather than integrated, and is thus subject to the dominant nature of South African law's form and culture resulting in a cultural and epistemic power or capital differential between the systems of customary and common law that needs to be addressed. As part of the solution, the article therefore canvasses the prospects of amalgamating customary and common law as a way of constitutionally transforming South African law and society as a whole. It argues that, in some key, albeit imperfect, ways, *Ramuhovhi I* (and, to a lesser extent, *Ramuhovhi II*) has demonstrated the feasibility of this amalgamation and has thus laid the groundwork for a future in which South Africa truly has the single (amalgamated) legal system first projected by the Constitutional Court in *Alexkor Ltd and Another v The Richtersveld Community and Others* [2003] ZACC 18.

KEYWORDS: constitutionalism, courts, indigenous law, legal culture, postcolonial, vernacularisation

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I INTRODUCTION

In the 2019 case of *Minister of Justice and Correctional Services v Ramuhovhi and Others*[1] ('*Ramuhovhi II*'), the Department of Justice applied for extension of the 24-month period that the Constitutional Court had previously granted it in which to remedy the injustice in the Recognition of Customary Marriages Act[2] ('RCMA'), which had been passed in 1998. Section 7(1) of the RCMA had provided that '[t]he proprietary consequences of a customary marriage entered into before the commencement of this Act [on 15 November 2021] continue to be governed by customary law'; as of 8 December 2008, when the Constitutional Court opined on the matter, this provision only applied to polygamous marriages. The Court dismissed the application and the order of the Court in *Ramuhovhi and Others v President of the Republic of South Africa and Others*[3] ('*Ramuhovhi I*') continued to apply. In June 2021, the legislature finally amended the RCMA to regulate the proprietary consequences of customary marriages entered into before the commencement of the Act in accordance with the order handed down by the Court in *Ramuhovhi I*.

Ramuhovhi I came before the Constitutional Court in 2017 when the constitutionality of the section's application to polygamous marriages was successfully challenged. The applicants were three of Mr Musenwa Joseph Netshituka's biological children. His estate was the third respondent. The applicants argued that s 7(1) of the RCMA discriminated against and violated the dignity of women like their mothers (Ms Tshinakaho Netshituka and Ms Masindi Netshituka), who had been two of three customary wives married to Mr Netshituka prior to 1998. All three parents named above, plus Mr Netshituka's third customary wife, Ms Diana Netshituka, were deceased at the time of the proceedings. The 'proprietary consequences of a customary marriage' that governed the deceased estate were described by Madlanga J as follows: 'the parties are agreed that Venda customary law – this being the law at issue here – vests no rights of ownership or control over marital property in wives.'

The reason that the children of Mr Netshituka's first and second customary wives had brought the complaint was that his fourth wife, Ms Munyadziwa Joyce Netshituka, with whom he had purported to conclude a civil marriage (which was later declared null and void by the Supreme Court of Appeal in 2011), claimed half ownership of the real property that was his primary asset and had been named in Mr Netshituka's will (which the 2011 SCA decision declared valid) as the executrix of the estate. His children contested the validity of both s 7(1) of the RCMA and Ms Munyadziwa's registered ownership of an undivided half share of the 'immovable property upon which a business called the Why Not Shopping Centre is located'. The question before the Court, as Madlanga J expressed it was therefore: 'does this customary law rule comport with our Constitution and the values it espouses?'

The Court agreed with the applicants' assessment that the section was unconstitutional because it discriminated against the three previous wives. Writing on behalf of a unanimous court, Madlanga J observed:

> No sooner is this equality of wives and husbands in customary marriages ushered in by section 6 [that provided for the equal status and capacity of the spouses] than it is denied – in section 7(1) – to

[1] *Minister of Justice and Correctional Services v Ramuhovhi & Others* [2019] ZACC 44, 2020 (3) BCLR 300 (CC).
[2] Act 120 of 1998.
[3] *Ramuhovhi & Others v President of the Republic of South Africa & Others* [2017] ZACC 41, 2018 (2) BCLR 217 (CC), 2018 (2) SA 1 (CC).

> wives in pre-Act customary marriages. Of course, *Gumede* rescued wives in pre-Act monogamous customary marriages from this disquieting situation.

The last sentence highlighted that *Ramuhovhi I* was actually concluding the matter that the Court had left 'unfinished' when, in 2009 in *Gumede v President of the Republic of South Africa and Others*,[4] it had found the same s 7(1) of the RCMA to be constitutionally invalid in so far as it extended to monogamous customary marriages predating the legislation. At that time, the Court had specifically excluded polygamous marriages in the following terms: 'The order of constitutional invalidity in relation to s 7(1) of the Recognition Act is limited to monogamous marriages and should not concern polygamous relationships or their proprietary consequences.'[5] It therefore excluded women such as the three Netshituka children, born of polygamous marriages, from the benefits of the Constitution's protection that the Court had affirmed in *Gumede*. As Madlanga J put it in *Ramuhovhi I*: '*Gumede* had rescued wives in pre-Act monogamous customary marriages from this disquieting situation.'[6] Thus, the Court in *Ramuhovhi I* summarised the situation:

> In a sense this application is a sequel to *Gumede*. In that case, the *amicus curiae* (friend of the court) urged this Court to extend its declaration of invalidity to encompass pre-Act polygamous customary marriages. The Court declined to do so. What it said, instead, was that it would draw the Legislature's attention to what appeared to be a *lacuna*. However, in the almost ten years since *Gumede*, the Legislature has not filled the gap. That explains how section 7(1) continues to govern pre-Act polygamous customary marriages.[7]

In light of that history, the legislature had already had significant opportunity to remedy the defect in the legislation but had failed to do so.

Yet, at the same time that the Court sought to give the applicants immediate relief,[8] the Court gave Parliament one last opportunity. This was mainly because it recognised the complexity of the matter and the possibility of its omitting certain key considerations in single-handedly trying to address the problem.[9] As the Court put it, '[t]he proposed relief traverses

[4] *Gumede v President of the Republic of South Africa & Others* [2008] ZACC 23, 2009 (3) BCLR 243 (CC), 2009 (3) SA 152 (CC). This case concerned a couple who were in a customary law union since 1968. The Natal Code of Zulu Law said that 'the family head is the owner and has control over all the property in the family home.' Section 7(1) of the RCMA, which provided for community of property, marriages concluded before 2000. In her claim for a half share of the joint estate, Mrs Gumede contended that the section was unconstitutional because, inter alia, it discriminated against women. The Constitutional Court confirmed the high court's declaration of invalidity.

[5] *Gumede* (note 4 above) at para 58.

[6] *Ramuhovhi I* (note 3 above) at para 34.

[7] Ibid at para 3.

[8] Ibid at para 47: 'What was said in *Gumede*, though, is still a strong indication that, in this matter as well, we must grant relief that significantly improves the situation of wives in pre-Act polygamous customary marriages. Their rights have been denied for far too long. There is an urgent need for effective redress.' Concerning the objection to making its order retrospectively applicable, the Court said in para 58: 'We must balance this against the need to provide adequate relief to the litigants before us and similarly placed people.'

[9] *Ramuhovhi I* (note 3 above) at paras 48–50. In para 50, in particular, the Court explained: 'I think it best to leave it to Parliament to finally decide how to regulate the proprietary regime of pre-Act polygamous customary marriages. I consider appropriate relief to be a suspension of the declaration of invalidity accompanied by interim relief. This twin-relief has the effect of granting immediate succour to the vulnerable group of wives in pre-Act customary marriages whilst also giving due deference to Parliament. In the event that Parliament finds the interim relief unacceptable, it is at liberty to undo it as soon as practically possible. Should Parliament fail to do anything during the period of suspension, the interim relief must continue to apply until changed by Parliament.'

terrain that is fraught with imponderables. I cannot discount the possibility that – despite the effort that has been made – someone may suffer harm not foreseen in this judgment.'[10] It therefore allowed parties so affected to approach it for a variation of the order if it caused them unforeseen harm.[11] To my knowledge, no such claim has been brought.

As a temporary measure, to give the executive and legislature the time needed to pass a more permanent solution, the Court in *Ramuhovhi I* had ordered that the declaration of constitutional invalidity be suspended for 24 months, during which time the section would be replaced by the following provision:

> (a) Wives and husbands will have joint and equal ownership and other rights to, and joint and equal rights of management and control over, marital property, and these rights shall be exercised as follows—
>
> (i) in respect of all house property, by the husband and the wife of the house concerned, jointly and in the best interests of the family unit constituted by the house concerned; and
>
> (ii) in respect of all family property, by the husband and all the wives, jointly and in the best interests of the whole family constituted by the various houses.
>
> (b) Each spouse retains exclusive rights to her or his personal property.[12]

The Court provided further that if Parliament did not 'address the defect' during the period of the declaration's suspension,[13] the Court's order (as per the provisions in (a) and (b) above) would continue to apply. In other words, equal ownership between husbands and wives in terms of the Court's provisions 'a' and 'b' above would apply even though no legislation had been passed to that effect at that stage.

With the suspension period due to end on 29 November 2019, the Minister of Justice brought an application on 15 October 2019 requesting a further extension of 12 months. With multiple opportunities having been provided by the Court and no perceptible sign that such an extension would reasonably result in a different outcome – that is, a legislative amendment as required by the Court's finding in *Ramuhovhi I* – the Court in *Ramuhovhi II*, as stated above, denied the unopposed application. The Minister's application was thus dismissed without costs and the Court's prescript therefore continued to regulate pre-RCMA polygynous marriages until June 2021.

While there are many strands of interest in this pair of *Ramuhovhi* cases (such as the legislature's lethargy when it comes to addressing the challenge of effectively regulating customary law), in this article, I focus on the proprietary consequences of marriage as discussed in *Ramuhovhi I* and their relationship to South African law's conception of land as property under customary law. I use this substantive issue as the backdrop for discussion of the possibility (and limitations) of fully establishing living customary law – which I refer to as vernacular

[10] Ibid at para 65.

[11] Ibid at paras 65 and 71.

[12] Ibid at para 71 and *Ramuhovhi II* (note 1 above) at para 4 fn 1 and para 2.

[13] *Ramuhovhi I* (note 3 above) at para 71.

law[14] – and its indigenous values, on its own terms[15] under South Africa's Constitution. This argument is presented as part solution to the challenge of vernacular law's present constitutional accommodation being subject to the dominant nature of South African law's form and culture and there existing a cultural and epistemic 'power' or 'capital'[16] differential between the systems of customary and common law that needs to be addressed.

The article therefore canvasses the prospects of amalgamating customary and common law as a way of constitutionally transforming South African law and society as a whole. It argues that, in some key, albeit imperfect, ways, *Ramuhovhi I* (and, to a lesser extent, *Ramuhovhi II*) has demonstrated the feasibility thereof and thus laid the groundwork for a future in which South Africa truly has a single (amalgamated) legal system[17] rather than two more-or-less separate systems of law under a single Constitution, which is the arrangement that currently exists.

II *RAMUHOVHI I*: PROPRIETARY CONSEQUENCES OF MARRIAGE AND LAND AS PROPERTY

The key question in *Ramuhovhi I*, as the Court described it, was whether the customary law to which the polygamous wives were subject under s 7(1) of the RCMA – and its proprietary consequences – was consistent with the Constitution. As Madlanga J wrote:

> Although, in some respects, 'official' customary law differs from 'living' customary law, it cannot be gainsaid that what rights of ownership wives enjoy at customary law are so attenuated as not to amount to much. Unsurprisingly, the parties are agreed that Venda customary law – this being the law at issue here – vests no rights of ownership or control over marital property in wives. The question then is: does that customary law rule comport with our Constitution and the values it espouses?[18]

Agreeing with the findings of the High Court of South Africa, Limpopo Local Division, Thohoyandou (High Court), the Court leaned heavily on the reasoning in *Gumede*, highlighting the discriminatory impact of the RCMA's distinction between women who married before and after the Act had recognised customary 'unions' as marriages.[19]

In *Ramuhovhi I* the Court emphasised that, it 'is section 9(5) of the Constitution that decrees that discrimination on any of the grounds listed in section 9(3) is unfair unless shown to be fair.'[20] The government respondents had duly made no attempt to show fairness of discrimination on the basis of gender and, while the deceased's estate and fourth wife had

[14] As explained in S Mnisi Weeks *Access to Justice and Human Security: Cultural Contradictions in Rural South Africa* (2018), vernacular law more accurately captures the reality that 'living customary law' is, in fact, a hybridised form of law in much the same way that the languages that indigenous South Africans speak have integrated elements from other languages (including those brought by 'settlers' to form languages that are more functional and better suited for use in their ever-evolving day-to-day realities. In other words, living (customary) law is rightly termed vernacular law just as South Africans commonly refer to the local languages they speak as 'the vernacular'.

[15] A Claassens & G Budlender 'Transformative Constitutionalism and Customary Law' (2013) 6 *Constitutional Court Review* 75.

[16] P Bourdieu *Outline of a Theory of Practice* (1977).

[17] See this aspiration as set out in *Alexkor Ltd & Another v The Richtersveld Community & Others* [2003] ZACC 18, 2004 (5) SA 460 (CC), 2003 (12) BCLR 1301 (CC) at para 51 ('*Alexkor*').

[18] *Ramuhovhi I* (note 3 above) at para 1.

[19] Ibid at paras 37–38.

[20] Ibid at para 26.

objected to the arguments presented by the applicants, their protestations had not spoken to fairness.

Key to the Court's reasoning on discrimination on the grounds of marital status was the consideration that '[t]he situation of wives in pre-Act polygamous customary marriages is one of lack of ownership and control of property within the marriage.'[21] As the Court in *Gumede* had found, in the words of Moseneke DCJ, 'the affected wives in customary marriages are considered incapable or unfit to hold or manage property. They are expressly excluded from meaningful economic activity in the face of an active redefinition of gender roles in relation to income and property.'[22]

In his findings in *Gumede*, Moseneke DCJ had quoted Langa DCJ's words in *Bhe v Khayelitsha Magistrate*,[23] as follows:

> At a time when the patriarchal features of Roman-Dutch law were progressively being removed by legislation, customary law was robbed of its inherent capacity to evolve in keeping with the changing life of the people it served, particularly of women. Thus customary law as administered failed to respond creatively to new kinds of economic activity by women, different forms of property and household arrangements for women and men, and changing values concerning gender roles in society. The outcome has been formalisation and fossilisation of a system which by its nature should function in an active and dynamic manner.[24]

Based thereon, the Court in *Gumede* had concluded, 'Langa DCJ proceeded to hold that a rule of customary law that implies that women are not fit or competent to own and administer property violated their right to dignity and equality.'[25] The Court in *Ramuhovhi I* strongly agreed.

Faced with the question of whether there was an interpretation that could be applied in order to redeem s 7(1) of RCMA, the Court in *Ramuhovhi I* took a pragmatic approach and emphasised that s 7(4), in terms of which women could apply to have their share of the marital property secured by a court order, did not help women in pre-RCMA customary marriages:

> The fact of not owning or having control over marital property renders wives in pre-Act polygamous marriages particularly vulnerable and at the mercy of husbands. They cannot be in an equal-bargaining footing for purposes of reaching agreement to make an approach to court in terms of section 7(4). In fact, some may even be cowed not to raise the issue at all. To ask rhetorically, how many husbands would readily give up their position of dominance? Worst of all, it does not require rocket science to realise that some – if not most – wives in these marriages may not even be aware of the existence of the provisions of section 7(4). Thus I think preponderantly wives have not managed to extricate themselves from their pre-Recognition Act woeful situation.[26]

Thus, the Court agreed with the High Court that section 7(1) was constitutionally invalid because of how 'odious'[27] its violation was in the way that it limited the rights women in polygamous marriages entered into before 1998 have to human dignity and not to be discriminated against unfairly.[28]

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[21] Ibid at para 37.

[22] *Gumede* (note 4 above) at para 35.

[23] *Bhe & Others v Khayelitsha Magistrate & Others* [2004] ZACC 17, 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC).

[24] Ibid at para 90.

[25] *Gumede* (note 4 above) at para 35.

[26] *Ramuhovhi I* (note 3 above) at para 42.

[27] Ibid at para 45.

[28] Ibid at para 43.

Nonetheless, the Court's order varied from that of the High Court in notable terms:

> The interim relief that I propose making is one that best accords with the equality of spouses. It is that, pending the remedying of the legislative defect: a husband and his wives in pre-Act polygamous customary marriages must share equally in the right of ownership of, and other rights attaching to, family property, including the right of management and control of family property; and a husband and each of his wives in each of the marriages constituting the pre-Act polygamous customary marriages must have similar rights in respect of house property. This is a significant departure from the High Court's interim relief in terms of which the rights shared by wives with their husbands were only rights of management and control – not ownership – in respect of marital property.[29]

The Court in *Ramuhovhi I* thus ruled in favour of full equality between men and women in polygynous[30] customary marriages.

In support of its reasoning, the Court in *Ramuhovhi I* quoted *Gumede* as follows:

> Whilst patriarchy has always been a feature of indigenous society, the written or codified rules of customary unions fostered a particularly crude and gendered form of inequality, which left women and children singularly marginalised and vulnerable. It is so that patriarchy has worldwide prevalence, yet in our case it was nurtured by fossilised rules and codes that displayed little or no understanding of the value system that animated the customary law of marriage. ... [D]uring colonial times, the great difficulty resided in the fact that customary law was entirely prevented from evolving and adapting as the changing circumstances of the communities required. It was recorded and enforced by those who neither practised it nor were bound by it. Those who were bound by customary law had no power to adapt it.[31]

As was the Court in *Gumede*, the Court in *Ramuhovhi I* was therefore clearly resistant to patriarchy's colonially infused and persistent hold on customary law.

While, as shown above, the *Ramuhovhi I* case was a continuation of *Gumede*, it was also a continuation from *Bhe*. This became most evident in the Court's discussion of the retrospectivity of its order, concerning which the Court held that '[i]t seems just and equitable, therefore, that the retrospective effect of the declaration of invalidity must be as extensive as possible but not affect estates that have been wound up or transfers that have taken effect.'[32] Here, Madlanga J drew on *Bhe*, in which Langa DCJ had concluded that:

> What will accordingly be just and equitable is to limit the retrospectivity of the order so that the declaration of invalidity does not apply to any completed transfer to an heir who is *bona fide* in the sense of not being aware that the constitutional validity of the provision in question was being challenged. It is fair and just that all transfers of ownership obtained by an heir who was on notice ought not to be exempted.[33]

Yet, the Court in *Ramuhovhi I* added to its reasons for the extensive retrospectivity of its order's application the fact that the customary context specifically warranted it, in particular, because of the multigenerational emphasis of customary law's indigenous value system, thus in some

[29] Ibid at para 51.

[30] Whereas polygamous refers to marriage in which one person has multiples spouses of any sex, polygynous refers more precisely to a marriage in which a man has multiple wives.

[31] *Gumede* (note 4 above) at paras 17 and 20, as quoted in *Ramuhovhi I* (note 3 above) at para 1 fn 2.

[32] *Ramuhovhi I* (note 3 above) at para 59.

[33] *Bhe* (note 23 above) at para 127.

ways privileging the sub-family unit (defined by the 'house', or wife and children who primarily comprise it) and showing determination to ensure the perpetuity of its descendants thereby.[34]

Bhe has been extensively criticised,[35] in part, for its failure to sufficiently take into account the communal nature of family and house property ownership as distinct from individual property ownership, as well as its implications for the security of persons who rely on the communal home for a place to live or (as the intervening party, Ms Thokozani Thembekile Maphumulo, argued in *Ramuhovhi I*) fulfilment of their right to housing.[36] This was part of the essence of Ngcobo J's minority judgment in that case.

Ramuhovhi I made strides toward attending to the essence of those concerns[37] by observing:

> The termination of a customary marriage by whatever means has unique consequences insofar as marital property is concerned. … a house does not necessarily come to an end just because the wife whose marriage brought it into existence has died or has had her marriage terminated. A house is made up not just by the wife, but also by the children who are born into it. This must mean that, first, as a unit – and distinctly from other houses that, together with it, make up a polygamous relationship – that house has certain proprietary rights and interests. Needless to say, the most important asset that each house has is the home that its members occupy. Second, house property that accrued after the house had come into existence continues to exist and to attach to that house. Third, only members of that house have an entitlement to enjoy benefits that flow from the existence of the house property, including rights of inheritance to the house property. That must mean, for example, the family head cannot lawfully divest a house of its home and purport to bequeath it as an inheritance to members of another house.[38]

Based thereon, the Court concluded that 'there is no need to limit the retrospectivity of this Court's order in respect of house property to marriages not yet dissolved [as] [n]o disruption

[34] To make this point, the Court quoted JC Bekker *Seymour's Customary Law in Southern Africa* (5th Ed 1989) at 198, yet this point is made in some way in virtually all empirically based literature concerning customary communities throughout South Africa. See generally, S Mnisi Weeks *The Interface between Living Customary Law(s) of Succession and South African State Law* (2010); Mnisi Weeks (note 14 above); R Kingwill 'Custom-Building Free Hold Title: The Impact of Family Values on Historical Ownership in the Eastern Cape' in A Claassens & B Cousins (eds) *Land, Power and Custom: Controversies Generated by South Africa's Communal Land Rights Act* (2008) 184; L Mbatha 'Reforming the Customary Law of Succession' (2002) 18 *South African Journal on Human Rights* 259; JL Comaroff & S Roberts 'Marriage and Extra-Marital Sexuality – The Dialectics of Legal Change among the Kgatla' (1997) 21(1) *Journal of African Law* 97; J Comaroff & S Roberts *Rules and Processes: The Cultural Logic of Dispute in an African Context* (1981).

[35] S Mnisi Weeks 'Customary Succession and the Development of Customary Law: The *Bhe* Legacy' (2015) *Acta Juridica* 215; S Sibanda & TB Mosaka '*Bhe v Magistrate, Khayelitsha*: A Cultural Conundrum, Fanonian Alienation and An Elusive Constitutional Oneness' (2015) *Acta Juridica* 256; C Himonga 'Reflection on *Bhe v Magistrate Khayelitsha*: In Honour of Emeritus Justice Ngcobo of the Constitutional Court of South Africa' (2017) 32(1&2) *Southern African Public Law* 1.

[36] *Ramuhovhi I* (note 3 above) at para 64. See discussion of intersectional dynamics relating to this point in E Moore & C Himonga 'Centring the Intersection of Race, Class, and Gender When a Customary Marriage Ends: An Intersectional Critique of the Recognition of Customary Marriages Act of 1998' (2017) 31(1) *Agenda* 104 as well as empirical evidence in D Budlender, S Mgweba, K Motsepe & L Williams *Women, Land and Customary Law* (2011) Community Agency for Social Enquiry (CASE), available at https://idl-bnc-idrc.dspacedirect.org/handle/10625/47347.

[37] Concerns voiced in disagreement with the majority judgment in *Bhe* (note 23 above) and kept 'alive' by Ngcobo J's dissent, to quote the former Chief Justice P Langa 'The Fifth Bram Fischer Memorial Lecture: The Emperor's New Clothes: Bram Fischer and the Need for Dissent' (2007) 23 *South African Journal on Human Rights* 362, 370.

[38] *Ramuhovhi I* (note 3 above) at para 60.

would arise purely from the fact of dissolution.'[39] Something more than dissolution of the customary marriage would have to occur in order to strip a 'house' of its property and, thus, for family falling under such 'house' to lose their rights in property associated with it. Once established, a 'house' technically continues to exist indefinitely so long as there remain living members (whether wife, children or more distant descendants) who fall under it – whether biologically or through customary modes of 'adoption'.

In its considerations of the right solution to the problem of the proprietary consequences of polygynous customary marriages, the Court therefore attempted to centre the importance of indigenous values for their adherents. Furthermore, in its recognition of the import of the home as the most essential asset possessed by 'house' members in customary families and communities, it agreed with its sentiments in a landmark 2018 decision on land rights, *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Ltd and Another* (*Mdumiseni Dlamini and Another as amici curiae*),[40] in which Petse AJ (on behalf of a unanimous court) had opened:

> The statement by Frantz Fanon in his book titled 'The Wretched of the Earth' is, in the context of this case, apt. It neatly sums up what lies at the core of this application. He said that '[f]or a colonised people the most essential value, because the most concrete, is first and foremost the land: the land which will bring them bread and, above all, dignity'. Thus, strip someone of their source of livelihood, and you strip them of their dignity too.[41]

This was a value that the *Bhe* Court had appreciated, yet without appropriately dwelling on the full context in which customary communities live, in which women are not only wives and children but also grandchildren, sisters, cousins, aunts, nieces, and grandmothers – all depending on 'family' property for their livelihood, survival and thus dignity. In his dissent, Ngcobo J had sought to address this imbalance by highlighting the fundamental distinction between individual and collective ownership of ('family') property.[42] Moreover, he had sought to do so without downplaying the crucial importance of the fact that successional issues do not necessarily revolve around ownership but collective occupation, use and access to property, thus 'bearing in mind the interests of minor children and other dependants of the deceased family head'.[43]

By contrast with the majority in *Bhe*, perhaps because specifically presented with a more complex (and less urban-based) family system in this case, the *Ramuhovhi I* Court took seriously the various configurations of customary family and property. The Court therefore spoke specifically to 'family' property in an attentive way that the *Bhe* Court had not done by adding to its findings on 'house' property that:

> With regard to family property, the family head does not only enjoy the right of ownership and control of family property, he has a corresponding obligation to use the family property for the benefit of each house and its members. Each of the houses constituted by the marriages of the various wives thus has an entitlement to the family property. This endures even if there is no longer a wife in a given house; that is, post-dissolution.[44]

[39] Ibid at para 61.

[40] *Maledu & Others v Itereleng Bakgatla Mineral Resources (Pty) Ltd & Another* (*Mdumiseni Dlamini & Another as amici curiae*) [2018] ZACC 41, 2019 (1) BCLR 53 (CC), 2019 (2) SA 1 (CC).

[41] Ibid at para 1.

[42] *Bhe* (note 23 above) at para 164.

[43] Ibid at para 139.

[44] *Ramuhovhi I* (note 3 above) at para 62.

In other words, the *Ramuhovhi I* Court confronted the nuanced complexity of vernacular law and the social and proprietary relations that exist in terms of it in a way the *Bhe* majority had seemed hesitant – and had not been forced – to do.

To be clear, my argument here is certainly *not* that the decision in *Ramuhovhi I* is perfect. The judgment certainly has many weaknesses. For a start, it takes a single author's say-so in an academic text as authority on the content of vernacular law when it should rather have invested more into explicitly weighing this scholar's account of the living law against the testimony received in the case on whether their particular living law's content is the same as that of the communities studied by Professor Bekker.[45] So far as the reader of the *Ramuhovhi I* judgment can tell, it did not even occur to the Court to ask this important question. Incidentally, this clarity and investment by courts in grasping the more localised particularities of vernacular law's content is crucial for the purposes of ensuring equality between different systems of vernacular law and preventing the hegemony of more widely used systems of vernacular law in the amalgamation argued for below. Another weakness in *Ramuhovhi I* is that the Court appears to give no consideration to the question of citational justice: that is, whether, well into post-apartheid South Africa, it ought to be relying on a white person as the sole supposed authority on a substantive point of vernacular law without at least simultaneously considering (or even just referencing) the diverse body of scholarship that exists on the subject of living law.[46]

A further limitation in the decision is that, as discussed with respect to the virtues of the normative repertoire dynamic in living law below, the Court's analysis appears to remain embedded within the fixity of the dominant civil law culture of precedent and its orientation toward emphasising the universality of normative principles over the pluriversality[47] and situationality of same. This means that, even in its recognition of living law values such as provision for multiple generations, it did so rather perfunctorily. It did not robustly situate its decision in the corresponding worldview of *ubuntu/botho*,[48] in terms of which discussion of the 'house' as 'home' would extend far beyond conceiving of it as merely jointly patrilineal and matrilineal family property or a set of resources on which the descendants collectively depend.

Nonetheless, I do argue that the *Ramuhovhi I* judgment presented strengths such as dividing individual and family property, as well as distinguishing house property (that is, predominantly

[45] Ibid at paras 60–62 cite to Bekker (note 34 above) at 198. With reference to personal property, at para 63, the Court in *Ramuhovhi I* also cites the work of TW Bennett *Customary Law in South Africa* (2004) at 254.

[46] The other academic authority on customary law quoted shortly after Prof Bekker is Prof Thomas Bennett, thus making two white men the academics turned to by the Court in this decision. Had the decision been issued in 1996 or even 2006, this might be understandable, if not justifiable, because of the relative paucity of scholars (let alone black scholars) writing on customary law at the time. Yet, in 2017, it seems all but unforgivable.

[47] A Escobar *Pluriversal Politics: The Real and the Possible* (2020).

[48] Refer to M Letseka 'In Defence of *Ubuntu*' (2012) 31(1) *Studies in Philosophy and Education* 47; M Mnyaka & M Motlhabi 'The African Concept of *Ubuntu/Botho* and its Socio-Moral Significance' (2005) 3(2) *Black Theology* 215; P Mwipikeni '*Ubuntu* and the Modern Society' (2018) 37(3) *South African Journal of Philosophy* 322; GM Nkondo '*Ubuntu* as Public Policy in South Africa: A Conceptual Framework' (2007) 2(1) *International Journal of African Renaissance Studies – Multi-, Inter- and Transdisciplinarity* 88; MB Ramose 'The Ethics of *Ubuntu*' (2003) 2 *The African Philosophy Reader* 324; M Ramose 'Ecology Through *Ubuntu*' in R Meinhold (ed) *Environmental Values Emerging from Cultures and Religions of the ASEAN Region* 69–76. Also see JY Mokgoro '*Ubuntu* and the Law in South Africa' (1998) 1(1) *Potchefstroom Electronic Law Journal/ Potchefstroom Elektroniese Regsblad* 1; CI Tshoose 'The Emerging Role of the Constitutional Value of *Ubuntu* for Informal Social Security in South Africa' (2009) 3(1) *African Journal of Legal Studies* 12; C Himonga, M Taylor & A Pope 'Reflections on Judicial Views of *Ubuntu*' (2014) 16 *Potchefstroom Electronic Law Journal/ Potchefstroomse Elektroniese Regsblad* 369.

matrilineally-defined family assets) from family property (that is, predominantly patrilineally-defined family assets). It was also strong in so far as it reached the correct conclusion by allowing the daughters to recover and inherit their deceased mothers' estates even after their father had purported to partly dispose of them to his civil wife at the expense of the polygynous wives he had married under apartheid's official customary law. Further still, it corrected the demonstrated faults and omissions (that is, considering customary law through a common law lens and not providing for polygynous families) in the *Bhe* and *Gumede* judgments, respectively.

Presented with similar complexity pertaining to social and proprietary relations under living law, the *Bhe* Court had found that it was unable to enter into such nuances as *Ramuhovhi I* attempted to unravel as described above. For its reasons, the *Bhe* Court did not feel that it had enough information on the changes that were taking place in customary communities on the ground to decide as to the best way to develop customary law. It, therefore, elected to 'develop' customary law by means of (temporarily) replacing its content with modified content from a civil law statute,[49] which the legislature then made permanent through a 'customary law' statute.[50] The *Ramuhovhi I* Court identified the nested systems of social organisation relevant to the conflict before it that exist in terms of vernacular law and their corresponding rights to occupy, use, access as well as manage and control real property or, more specifically, land as property. It then planned for how to at least try to, honour the constitutional demand that all parties have equal rights by appealing to the values and norms that exist within customary law itself, thus using academic customary law's content and living law's values as the primary resource from which to derive solutions on how to strike a balance between custom and the Constitution.

In my view this is meaningful progress on the part of the Court, which has steadily been growing in its confidence and competence in dealing with customary law cases.[51] Yet, the Court remains largely locked in an imaginary that sees customary and civil law as almost entirely separate (or otherwise sees common law as the primary source from which customary law content's redemptive development is to come). Such a view of customary and civil/common law is inconsistent with the Court's own professed interpretation of the Constitution's vision of a unitary system of law and may not be as necessary and unavoidable as the Court and most people seem to think. Put differently, it is possible that the amalgamation of customary and common law is not as unthinkable – or, more importantly, impossible – as has been assumed. Therefore, against the backdrop of *Ramuhovhi I* and *II*, the rest of this article contemplates the possibilities that presently appear to be outside of the Constitutional Court's plausibility framework but perhaps should *not* be.

[49] Intestate Succession Act 81 of 1987.

[50] Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009. The legislature's adoption of the order handed down by the Court in *Ramuhovhi I* (note 3 above) as its amendment of the RCMA in June 2021 was therefore a repeat action in so far as the legislature had struggled to develop a solution independently of litigation and the Court had thus had to undertake the challenging work of parsing the sometimes competing evidence to develop a workable policy solution for families living under vernacular law. The argument here is that, with more experience under its belt and following much scholarly criticism and debate over the decision handed down in *Bhe* (note 23 above), the Court in *Ramuhovhi I* undertook that task of discernment with greater care and attention to living customary law's areas of uniqueness than had the majority in *Bhe*.

[51] Examples of significant improvements on *Bhe* (note 23 above) can be seen in *Shilubana & Others v Nwamitwa* [2008] ZACC 9, 2008 (9) BCLR 914 (CC), 2009 (2) SA 66 (CC) and *Mayelane v Ngwenyama & Another* [2013] ZACC 14, 2013 (4) SA 415 (CC), 2013 (8) BCLR 918 (CC).

III THEORETICAL FRAMEWORK

The place to start in thinking about 'harmonising' or 'amalgamating' customary law with the common law is to understand that this is not fundamentally a new or particularly radical idea. Firstly, it is by no means new to think of the common law and customary law as being of a similar nature. The Austrian legal theorist and Professor of Roman Law, Eugene Ehrlich (who lived in 1862–1922), argued that the law, in its propositions, cannot capture the entire body of norms constituting it for, even as soon as the living law is codified, the practice moves on and is (in some way) immediately at variance with the written law.[52] As a consequence, Ehrlich argued for a view of law that refers to sources beyond statutes and precedents, and advocated an approach to the ascertainment of law that looks to that which the institutional law has ignored and even censured, determined by 'direct observation of life'.[53] This is what customary law scholars argue today. In essence, even Ehrlich understood that the common law is effectively Euro-American customary law. By the same token, then, so-called living customary law – that is, vernacular law – is effectively African common law.

Secondly, there is little novelty in thinking about the common law and customary law together, as being very deeply entwined in South African law. Martin Chanock's 2001 treatise, *The Making of South African Legal Culture, 1902-1936: Fear, Favour and Prejudice*, systematically shows how what we refer to as 'the common law' and (official) 'customary law' were actually created in tandem. Both are products of the social imagination and agenda of the regime of the time. Thus, Chanock actually describes 'the common law' as 'Common Law A' and 'customary law' as 'Common Law B'. He therefore argues that customary law – and he does not distinguish between official and living – is a product of the same legal culture as the common law: 'customary law cannot be understood without its white "other"'[54] because customary law and the common law 'were mutually constructed as mirror images of each other.'[55]

In sum, therefore, it is somewhat artificial to think of (especially official) customary law and common law as separate beasts because they are deeply conjoined by the history of their origins as part of the making of racist South Africa in and through its laws. When the Constitutional Court describes the Constitution as 'the umbrella of the one controlling law'[56] to which all others are subject and 'one supreme law, which lays down a common narrative platform',[57] declaring that customary law and common law are 'united in diversity'[58] as it did in *Gumede*, there is a sense in which it sounds as if what is being proposed is more radical and transformative than it actually is. That is because the separation and diversity between these forms of law is actually arguably quite limited. They have always shared a 'common narrative platform';[59] it is the platform's change from colonialism and apartheid (or colonial–apartheid) to constitutional democracy that is the variable here.

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[52] E Ehrlich *Fundamental Principles of the Sociology of Law* (2000) 488.

[53] Ibid at 493–495, 504.

[54] M Chanock (2001) at 35.

[55] RA Kingwill *The Map is Not the Territory – Law and Custom in 'African Freehold': A South African Case Study* (PhD thesis University of the Western Cape 2013) 36, available at http://etd.uwc.ac.za/xmlui/handle/11394/3597.

[56] *Gumede* (note 4 above) at para 22.

[57] Ibid at para 1.

[58] Ibid at para 22.

[59] Ibid at para 1.

But then, why does harmonisation and, all the more so, amalgamation feel like such a daunting task? Most of the difficulty is political. Put differently, as is the case with trying to address any 'wicked', 'emergent' problems, the 'adaptive' challenge is greater than the 'technical' challenge.[60] First, we all are accustomed to thinking of customary and common law as more separate and different than they actually are. Rhetorically, they have come to occupy very divergent imaginative spaces. That was a core part of the project of apartheid in much the same way that we have been socialised to think of racial differences as real, grounded in biology, when in fact they are socially constructed.[61] Therefore, it is a difficult conversation to start and extends far beyond people's plausibility frameworks to suggest that the two could conceivably be unified into a single legal system.

However, to say that the political challenge is greater than the technical challenge is not to say that there are no technical challenges worth mentioning because there are legitimate questions about how to practically unite these two forms of law. In fact, to suggest that political and technical challenges are always entirely separate is itself misleading and erroneous because these are mutually reinforcing challenges. That said, it may be that the technical challenges are eminently surmountable if only we can overcome the adaptive challenge.

A The technical challenge: what forms could amalgamation take?

Before proceeding, it is worth clarifying some terms, especially as relates to the distinction between 'harmonisation' and 'amalgamation'. Harmonisation refers to bringing the two systems together and integrating them with one another without joining them into a single entity – keeping them separate under the umbrella of the Constitution.[62] One could therefore say that harmonisation is what we already have, as demonstrated in *Ramuhovhi I*. Amalgamation is used to refer to bringing them together into a single form of law so that they are not regarded or treated separately.[63] Part of the inspiration for this approach can be found in the decision in *Alexkor*, wherein the Constitutional Court first affirmed that customary law was a legitimate component of the South African legal order, not subordinate to the common law but similarly subject to the Constitution.[64] In this case, the Court then stated: '[i]n the result, indigenous law feeds into, nourishes, fuses with and becomes part of the *amalgam* of South African law.'[65]

In his Master's thesis in anthropology completed at Yale University in 1934, Zacharia Keodireleng Matthews (who would later become the first black man to be appointed as a law professor in South Africa) presented three possible fates of 'Native Law' in South Africa's

[60] RA Heifetz, A Grashow & M Linsky *The Practice of Adaptive Leadership: Tools and Tactics for Changing your Organization and the World* (2009).

[61] FS Collins & MK Mansoura 'The Human Genome Project: Revealing the Shared Inheritance of All Humankind' (2001) 91 *Cancer* 221, 222; SC Schuster, W Miller, A Ratan, LP Tomsho, B Giardine, LR Kasson, RS Harris, DC Petersen et al. 'Complete Khoisan and Bantu Genomes from Southern Africa' (2010) 463 *Nature* 943, 944. Also, see generally A Nelson *The Social Life of DNA: Race, Reparations, and Reconciliation after the Genome* (2016); T Coates *Between the World and Me* (2015).

[62] Refer to 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; SA Law Reform Commission Issue Paper 03 *Harmonisation of the Common Law and the Indigenous Law (Customary Marriages)* (1996), available at http://www.doj.gov.za/salrc/ipapers/ip03prj90l1997.pdf.

[63] For instance, refer to Claassens & Budlender (2013)(note 15 above).

[64] *Alexkor* (note 17 above) at paras 51 and 55.

[65] Ibid at para 51 (emphasis added).

future.[66] First, he considered the possibility of 'the complete disappearance of Native Law and its replacement by European law'.[67] Second, he described the possibility that 'Native Law might develop "as a separate substantive system of jurisprudence"' (which 'parallel development' track he also said was a slim possibility because of the strength of Roman-Dutch law as the law of the 'dominant group').[68] Then, third, he envisioned customary law's 'gradual assimilation to European law so that it will contribute its quota to what will ultimately be called not Roman Dutch law nor Native law, but South African law'.[69] Aninka Claassens and Geoff Budlender write that '[i]n his view, this was the only viable option for the future.'[70] In the present journal in 2013, the two agreed with Matthews' assessment. In this article, I use Matthews' breakdown as a springboard for clarifying the distinction between harmonisation and amalgamation (Matthews' option 3)[71] and for, ultimately, attempting to independently articulate a transformative vision for equitable amalgamation under South Africa's Constitution *sans* subordination of customary law to the common law as the presumed dominant partner.

1 *Customary law ceases to exist*

Matthews' three part typology is somewhat confounded by Ehrlich's claim that there can never be a perfect union between living law and formal law since Ehrlich observes that, as soon as customary law is captured in legislation or precedent, it moves on in people's real lives or their lived experiences.[72] If Ehrlich is correct, then, firstly, option one largely falls away as a possibility because only the official version of 'Native Law' could possibly disappear but the living version would always exist, even if its content were to change radically or if it were to absorb much of 'European law' into its content. Indeed, as Jack Simons (1968) later describes, Matthews served on a sub-committee of the Native Representative Council (with three other councillors named Sakwe, Champion and Xiniwe) which reported in 1943 that 'judicial segregation violates the principle of equality before the law, [and] implies that Native life is static whereas in point of fact it is gradually becoming integrated with the general life of the country'.[73] It therefore seems that Mathews clearly recognised the implausibility of vernacular law (that is, living customary law in society) ceasing to exist rather than organically amalgamating with the rest of South African law and society as both naturally evolved.

[66] The discussion of Matthews' thesis here is based on both the original text and the discussion in Claassens & Budlender (note 15 above); however, the emphasis in the critical discussion here is placed on Claassens & Budlender's discussion as a means of continuing the conversation these authors began in the present journal. See ZK Matthews *Bantu Law and Western Civilization In South Africa: A Study in the Clash of Culture* (1934), available at: http://uir.unisa.ac.za/handle/10500/5046

[67] Matthews ibid at 347.

[68] Claassens & Budlender (note 15 above) at 102–103; and Matthews ibid at 352.

[69] Matthews ibid at 354.

[70] Claassens & Budlender (note 15 above) at 103.

[71] Of course, Matthews' arguments and breakdown have been discussed by other scholars since then. See, for example, M Pieterse '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; and J Bekker & G Van Niekerk '*Gumede v President of the Republic of South Africa*: Harmonisation, or the Creation of New Marriage Laws in South Africa? Case Note' (2009) 24 *SA Public Law* 206. My focus on Matthews is partly to emphasise the historical embeddedness of the arguments around harmonisation and amalgamation, and partly to build on the more recent discussion of these ideas in Claassens & Budlender (2013)(note 15 above) in the present journal.

[72] Ehrlich (note 52 above) at 488.

[73] HJ Simons (1968) *African Women: Their Legal Status in South Africa* (1968) at 61.

This fact of living law's organically integratively evolutionary nature lies at the very core of the distinction often made – and now mostly accepted by the Constitutional Court as shown above – between 'living customary law' and 'official customary law'. Hence, in my view, the term 'living customary law' is sometimes erroneously used because it should really only refer to customary law as it operates *outside* of formal legal institutions. What the Constitutional Court sometimes refers to as 'indigenous law' or 'living customary law', once it has been absorbed into the annals of law that are controlled by formal legal institutions (that is, legislation and court precedent), therefore really ceases to be living customary law or what I have termed *vernacular* law. Just as Ehrlich intimated, as quoted above, by definition, living law cannot be contained in aspirationally clear, specific and consistently applicable texts such as written legal sources.[74] It is too dynamic for that. Hence, even vernacular law that has been embraced or accepted by courts or the legislature – or, further still, recognised and then 'developed' by courts or the legislature in accordance with the Constitution – must, in essence, be regarded as official customary law. This is true even if, by some measure, its content is consistent with the living law that can be found (by means of 'observation') being practised outside of the corridors of legal power.

By the same token, official customary law that is absorbed and integrated into vernacular law, because of living law's very nature, cannot remain static and must therefore develop some dynamism (whether in its interpretation or application) that would render it no longer official but rather living. Furthermore, this recognition is an important dimension of appreciating that vernacular law is porous and will certainly absorb normative influences from outside of its own setting, even if what becomes of those influences is that they are rendered unrecognisable when compared with their original state.[75]

As it happens, on this point that 'European law' principles infiltrate living law, Chanock observes that the elements of customary law that survive and are not displaced or replaced by common law norms and values are those relating to kinship, marriage, children and such. State law principles concerning contract, buying and selling, mercantile, etc. were integrated with relative ease, though colonial authorities did not want members of customary communities to become freely or equitably integrated into the economy.[76] In other words, the customary normative aspects that endure mainly concern family. This, as Rosalie Kingwill observes, may be because they are so personal in nature.[77] The latter, then, certainly do not cease to exist – only be adapted to evolving social, political and economic conditions.

2 *Customary law develops as separate system of law*

Concerning the second scenario that Matthews identifies as plausible, the Constitution's mandate to develop both common law and customary law has brought a new vigour to state investment in the development of customary law.[78] Nonetheless, it seems fair to say that customary law has not developed into a wholly independent and substantive system any more than what already existed on the ground has ceased to exist or evolve as before. This is especially true in the sense that, within the parameters of state law in which official customary law exists,

[74] Ehrlich (note 52 above) at 488.

[75] The summary of this dynamic provided by Claassens & Budlender (note 15 above) at 103–104 is fitting here.

[76] Chanock (note 54 above) at 197–200, 280 and 298; also see Kingwill (note 34 above) at 198 fn 145, 264, 270.

[77] Kingwill (note 55 above) at 36.

[78] C Himonga, M Taylor & A Pope 'Reflections on Judicial Views of *Ubuntu*' (2014) 16 *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 369.

there has been limited development and it would be overly generous to call official customary law 'a separate substantive system of jurisprudence' that has been developed in parallel with the common law.

3 *Customary law is united with common law*

In the third possibility Matthews presents (amalgamation), it is striking that he envisions customary law integrating into the common law, rather than the other way round – even as he imagines them forming a new, unified body of law. Again, this would seem to be grounded in his belief that the dominance of the group that governs in terms of the common law is too great and that customary communities are becoming integrated into this dominant system, not vice versa. Taken to its extreme, Matthews' assumption therefore amounts to acceptance that the argument for unification of laws is implicitly an argument for the prevalence of the common law as the foundation upon which the single South African law would be built.

Yet, this assumption is confounded by an extension of the reality named above in reliance on Ehrlich's findings – the fact that there is really no 'living law' (singular), only 'living laws' (plural).[79] Customary law is inherently pluralistic. In a sense, therefore, the mention of especially living customary law should always be read as referencing living customary laws – that is, multiple expressions of vernacular law (whether you consider these expressions to be akin to accents, dialects or languages in their own right).[80] Hence, the second and third possibilities Matthews presents – that is, the full, separate development of (official) customary law and customary law's full integration into a common body of state law – are troubled by a single enduring challenge. Namely, they would both naturally co-exist with vernacular law because it is most likely that the state law would never *wholly* meet the needs of people on the ground, if only because it is so far removed and evolves relatively slowly.[81]

Given the enduring livelihood of the study of the relationship between law and society, it seems that there may be no place in the world that has succeeded at making the law unitary. Thus, while socio-legal scholars certainly recognise state law's *claims* of dominance and exclusive normative authority, they continue to show how the law's grand claims are overstated given its 'highly circumscribed ability to control behaviour'.[82] In reality, state-issued law is constantly in competition, under contestation, negotiation and rejection, and being reinterpreted, vernacularised, subverted, undermined, ignored or rendered outright invisible, invalid and

[79] This answers one of the questions posed by K O'Regan 'Tradition and Modernity: Adjudicating a Constitutional Paradox' (2013) 6 *Constitutional Court Review* 105, 125.

[80] For discussion of the relationship between customary law and vernacular language, see Mnisi Weeks (note 14 above). Also see SE Merry 'Legal Vernacularization and Ka Ho'okolokolonui Kanaka Maoli, The People's International Tribunal, Hawai'i 1993' (1996) 19 *PoLAR: Political and Legal Anthropology Review* 67; SE Merry & P Levitt 'The Vernacularisation of Women's Human Rights' (2017) in S Hopgood, J Snyder & L Vinjamuri (eds) *Human Rights Futures* 213–236; C Nyamu-Musembi 'Are Local Norms and Practices Fences or Pathways? The Example of Women's Property Rights' in AA An-Na'im (ed) *Cultural Transformation and Human Rights in Africa* (2002). On language theory pertaining to black languages also see S Makoni, G Smitherman, AF Ball & AK Spears *Black Linguistics: Language, Society and Politics in Africa and the Americas* (2003).

[81] Illustration of this point can be seen in S Mnisi Weeks 'Securing Women's Property Inheritance in the Context of Plurality: Negotiations of Law and Authority in Mbuzini Customary Courts and Beyond' (2011) *Acta Juridica* 14.

[82] M Chanock 'Introduction' in SF Moore *Law as Process: An Anthropological Approach* (2003) 1. Also see M Chanock 'Law, State and Culture: Thinking about "Customary Law" after Apartheid' (1991) *Acta Juridica* 5 and 2–70, and M Chanock (note 54 above) at 22.

ineffectual, by all sorts of alternate authorities, institutions, and actors (both those recognised by law as being legitimate and those the state explicitly declares illegal).[83] This teaches us that the law (understood more holistically than that which devolves from 'the sovereign') is never unitary, and it is these dynamic manifestations of law that Ehrlich would say need to be identified by means of 'direct observation of life'.[84]

To be clear, then, because of the inherent nature of living law as *living outside* of legal institutions, discussion of an amalgam is in fact discussion of a single *official* South African law that draws to varying degrees from *living* law values and rules found in customary and common law in society.[85] In other words, in practical terms, this unified law is institutionally-bound, even as it is informed and inspired by the actions and agency of ordinary people and how they are choosing to live their lives out in the world. It is in its efficacy, in this sense, that I celebrated *Ramuhovhi I* above. Yet, as I noted, the decision left untouched a set of practical possibilities that I think are worthy of exploration, if not adoption.

What form should amalgamated *official* law take then in practical terms? There are at least three possibilities. The first possibility would be to retain the choice of law departure point that currently prevails in South Africa but make both options (that is, common and customary law content) generally applicable to everyone. The second would be to retain choice of law but have the common law draw in principles from customary law to make the common law more African in its content[86] until perhaps the two forms of law are essentially unified. The third possibility would be to do away with choice of law altogether and merge customary law and common law content outright, thus saying we have only one law and all courts must apply the same. While there are variances in the degrees to which the three options draw upon customary law, not mentioning the primary basis for political differences on the desirability of amalgamation, there are technical challenges embedded in all steps as well. I turn to discussing these next.

B Debates over technical challenges to unifying customary and common law

Readers will remember that what we are discussing when referring to amalgamation is the integration of *official* law by taking three possible steps – possibly in a gradual fashion. The first step might be to retain the choice of law, which is the prevailing departure point, but

[83] WL Felstiner, RL Abel & A Sarat 'The Emergence and Transformation of Disputes: Naming, Blaming, Claiming' (1980) 15(3&4) *Law and Society Review* 631; RE Miller & A Sarat 'Grievances, Claims, and Disputes: Assessing the Adversary Culture' (1980) 15(3&4) *Law and Society Review* 525; K von Benda-Beckmann 'Forum Shopping and Shopping Forums: Dispute Processing in a Minangkabau Village in West Sumatra' (1981) 13 *The Journal of Legal Pluralism and Unofficial Law* 117; A Sarat 'The Law is All Over: Power, Resistance and the Legal Consciousness of the Welfare Poor' (1990) 2 *Yale Journal of Law & Humanities* 343; P Ewick & SS Silbey 'Conformity, Contestation, and Resistance: An Account of Legal Consciousness' (1991) 26 *New England Law Review* 731; A Griffiths 'Legal Pluralism in Botswana: Women's Access to Law' (1998) 30 *The Journal of Legal Pluralism and Unofficial Law* 123; O Lobel 'The Paradox of Extra-legal Activism: Critical Legal Consciousness and Transformative Politics' (2006) 12 *Harvard Law Review* 937–988; C Lund 'Twilight Institutions: An Introduction' (2006) 37 *Development and Change* 673; U Mattei & L Nader *Plunder: When the Rule of Law is Illegal* (2008); LJ Chua & DM Engel 'Legal Consciousness Reconsidered' (2019) 15 *Annual Review of Law and Social Science* 335.

[84] Ehrlich (note 52 above) at 493–495, 504.

[85] Again, this answers one of the questions posed by O'Regan (note 79 above) at 125.

[86] A narrower variation of this argument is presented by D Davis & K Klare 'Transformative Constitutionalism and the Common and Customary Law' (2010) 26 *South African Journal on Human Rights* 408–413.

extend both common and customary law coverage to all South Africans so that all have the same choices available. The second step would continue with retention of choice of law but engage the common law in transformation by means of drawing in principles from customary law to progressively Africanise common law's content until customary and common law were unified, thus leading to the final step. The third step would be to eliminate choice of law altogether and have all courts apply the same unified version of common and customary law, called South African law.

The first step is riddled with challenges around the sheer diversity of expressions of customary law. Thus some basis would need to be set on which – amidst customary law's then being a law of general applicability – persons could pick a specific localised iteration of it (vernacular law) and compelling reasons for applying that iteration over another expression of vernacular law in court in the given case (with that living law thereby becoming official customary law). Perhaps the averring party's mere belief that the developing practice in a particular locale of which they are aware is a more morally compelling expression of South Africa's shared constitutional values would suffice.

However, to embrace that kind of choice of law system would require a radical shift in plausibility frameworks because such would quite likely be seen as 'forum shopping'. 'Forum shopping' is the movement done by people between forums (or authoritative legal audiences) that observe different legal systems; this 'shopping' is done based on the individual parties' determinations of what will yield the best outcome in their particular case at that time.[87] Yet, this practice is frowned upon in formalistic legal systems like South Africa's, attracting such disdain as is often expressed by resort to the speculation that something would 'open the floodgates'.

The second step is challenged by similar concerns as the first. Which vernacular law do you infuse into the common law in any single case? This, especially considering that, as Kirby P of the Court of Appeal in Botswana in *Ramantele v Mmusi and Others* appropriately observed, 'it will seldom be an easy task for the court to identify a firm and inflexible rule of customary law for the purpose of deciding upon its constitutionality or enforceability.'[88] How do you find that vernacular law and choose it?

Even if you say that most communities observing customary law in South Africa observe some core, shared values and norms, is it correct to unify common law with a single expression of vernacular law? That is, what about the minority groups who do not share the majority's vernacular law norms and values? One must also accept that, if such a process would be undertaken gradually through the courts, it would take a very long time to transform the common law. Furthermore, as already shown by Dennis Davis and Karl Klare, this depends on

[87] 'Von Benda-Beckmann (note 83 above) at 137. Von Benda-Beckmann writes at 142: 'The state courts are an alternative to dispute processing within the villages. Through their mere availability, they form a threat to the authority of village institutions… [and] the courts are by no means only a theoretical alternative. Villagers regularly employ courts in their forum shopping, thus demonstrating the relativity of village dispute settlement'. For discussion of this phenomenon's history in South Africa, see S Mnisi Weeks (note 81 above).

[88] *Ramantele v Mmusi & Others* Court of Appeal Civil Appeal CACGB-104-12 (2013) at para 29. He stated this after observing the dynamism recorded by scholars including Isaac Schapera in 1938, Simon Roberts in 1969–1972, and Comaroff & Roberts (1981)(note 34 above). As he drew on Roberts' summary to say: '[Stated legal norms] are seldom a reliable guide to the law actually applied in dispute settlement.' (Citing S Roberts in *Restatement of African Law Volume 5: Botswana* (1972) xi and xii).

a communal will on the South African bench that presently seems largely wanting in practice, especially when it comes to issues of 'economic distribution'.[89]

Since the first and second options could be said to be more harmonisation than amalgamation in its fullest sense, the rest of my discussion in this article focuses on the third option. However, it is worth reiterating that the first two options might be reasonable, graduated steps to be taken sequentially toward the third. Nevertheless, one should not lose sight of the contrast between the degrees to which the three options draw upon customary law in particular, which is what grounds the political and adaptive challenge of amalgamating the common law and customary law to form a single South African law, to which I will return in a later part of this article.

1 *Ascertaining the content of vernacular law for amalgamation*

Evidently, based on the above discussion of the technical challenges presented by the first and second options, the third step is bedevilled by the same concerns as the first two. Even if one jumped ahead and sought to amalgamate the common law and official customary law through a legislative process initially led by the South African Law Reform Commission, these myriad questions would need to be answered first. This therefore does not sound very hopeful. However, there is hope for amalgamation in the simple fact of what the Constitutional Court has achieved thus far.

While previous benches of the Constitutional Court had all struggled with this question,[90] *Shilubana* was the first to articulate a really clear test for determining the content of customary law.[91] Yet it is worth going over what was established at least in the first customary law case to come before the Constitutional Court: *Alexkor.* In that case, the Court first recognised the difficulty of ascertaining customary law's principles, but then concluded that the meaning of customary law in the Constitution included living law.[92] The Court then settled the question of the applicability of subsection 8(3)[93] to customary law in the same way that it applies to the common law, as in section 39(2): that is, applying customary law directly between individuals and corporations and subjecting it to development by courts when found to be in conflict with rights in the Bill of Rights. Finally, the Court acknowledged that customary law 'is a system of law that has its own values and norms.'[94]

In *Shilubana*, the Court outlined a three-part test for ascertaining the content of customary law and developing it as necessary. First, the content of customary law must be ascertained from both the past and present usage of the specific community concerned in any one case; it must be studied in its historical and current context. Second, where the content is under dispute, evidence of the present practice must be presented by the parties and the courts must acknowledge developments within that community, if they have occurred, and give effect to them in as far as it is possible to do so without compromising rights.[95] Third, while courts should first defer to the developments by customary communities, they must also not shy away

[89] Davis & Klare (note 86 above) at 413–415.

[90] *Alexkor* (note 17 above), *Bhe* (note 23 above) and, to a limited extent, *Gumede* (note 4 above).

[91] *Shilubana* (note 51 above).

[92] Ibid at paras 52–54. Also see discussion of this 'paradox' in O'Regan (note 79 above) at 122–125.

[93] Refer to Himonga & Bosch (note 62 above) for a discussion of the question of the direct or indirect applicability of the Bill of Rights to customary law in light of the phrasing of section 8 in relation to that of subsection 39(2) of the Constitution.

[94] *Shilubana* (note 51 above) at para 53.

[95] Ibid at paras 44–46, 49.

from developing the customary law in order to ensure 'the continuing effective operation of the law.'[96] Courts should thus pay particular attention to the fact that '[t]he need for flexibility and the imperative to facilitate development must be balanced against the value of legal certainty, respect for vested rights, and the protection of constitutional rights.'[97]

This formed an important basis for the decision that was then made by the Court in *Mayelane*,[98] wherein the Court solicited additional evidence after the hearing and received from the parties affidavits on the content of Xitsonga customary law from individuals in polygynous marriages, traditional leaders, and experts, among others. In that case, the Court had reached a unanimous decision that the second marriage was not valid and upheld the appeal; yet the justices were not unanimous in how they arrived at their shared conclusion. The main judgment was written by Froneman J, Khampepe J and Skweyiya J (with Moseneke DCJ, Cameron J and Yacoob J concurring). These justices in the majority found that the RCMA, which recognises the consent requirements under vernacular law, did not require that consent be given by the first wife, that there was no uniform rule under vernacular law, and that development of Xitsonga law was necessary. So they wrote:

> The perspective we gain from the evidence is not one of contradiction, but of nuance and accommodation. It seems to us that one can safely say the following: (a) although not the general practice any longer, Vatsonga men have a choice whether to enter into further customary marriages; (b) when Vatsonga men decide to do so they must inform their first wife of their intention; (c) it is expected of the first wife to agree and assist in the ensuing process, leading to the further marriage; (d) if she does so, harmony is promoted between all concerned; (e) if she refuses consent, attempts are made to persuade her otherwise; (f) if that is unsuccessful, the respective families are called to play a role in resolving the problem; (g) this resolution process may result in divorce; and finally, (h) if the first wife is not informed of the impending marriage, the second union will not be recognised, but the children of the second union will not be prejudiced by this as they will still be regarded as legitimate children.[99]

In the above, the majority of the Court observed the subtleties embedded in vernacular law such that the 'normative repertoire' described by John Comaroff and Simon Roberts means that sometimes principles coexist even when they disagree and which principles prevail is ultimately determined based on negotiation in the context of an actual dispute.[100] At the end of the quoted paragraph from the main judgment we see a second key dimension of their reasoning: how they believed customary law's content is to be decided. They concluded that 'it must be emphasised that, in the end, it is the function of a court to decide what the content of customary law is, as a matter of law, not fact. It does not depend on rules of evidence: a court must determine for itself how best to ascertain that content.'[101]

Zondo J differed with the main judgment on what evidence was needed to arrive at their conclusions and how the content of customary law should be ascertained by courts. He held that the Court had not needed additional evidence in order to determine the content of the Xitsonga law. Nonetheless, using the additional evidence he argued that it was clear that there

[96] Ibid at paras 47–49.
[97] Ibid at para 47.
[98] *Mayelane* (note 51 above).
[99] Ibid at para 61; footnotes omitted.
[100] Comaroff & Roberts (1981)(note 34 above) at 80–81, 180.
[101] *Mayelane* (note 51 above) at para 61; footnotes omitted.

was a material dispute on the content of Xitsonga law.[102] The fundamental differences in Zondo J's view was that, firstly, he saw a direct contradiction in what the parties and witnesses averred in the affidavits was Xitsonga consent requirements and, secondly, that he was of the view that a dispute over the content of customary law should be decided as a dispute of fact rather than law.

In addition to the disagreement between the justices outlined above was the perspective taken by Jafta J (in whose decision Mogoeng CJ and Nkabinde J concurred) who held that development of the customary law had not been necessary in this case. Jafta J's bases for disagreement are worth recounting here because of how they shed additional light on the difficulty courts face in ascertaining the content of vernacular law, but also the possibilities inherent therein.[103] The key points in Jafta J's decision were that, firstly, there is a way of reading the evidence such that the vernacular law principle testified to is in keeping with the Constitution; secondly, it is important to appreciate the nuance in how vernacular law exists as a 'normative repertoire' and, further still, how vernacular law is in fact highly localised and thus variable from subgroup to subgroup within even a single language group like the Vatsonga. In addition, such variability may be produced by the variegated rates of normative development between subgroups.

We can say that some of the contestation in *Mayelane* was around the need to develop customary law when it was found that there was some divergence of opinion (among observers of vernacular law) on the particulars of its content. Jafta J, with Mogoeng CJ and Nkabinde J, made the case that there need not have been development of the existing rules according to what was said in the written testimony provided. In essence, they were arguing that the matter could have been decided by giving vernacular law the most generous interpretation possible within its own terms, worldview, and context. They essentially argued for the Court to rely upon the most favourable (that is, constitutionally-compliant) interpretation of the values and norms that are already inherent in vernacular law.

This argument did not position them too far away from the majority; after all, the majority had itself tried to ascertain and interpret the testimony they had received on the content of customary law in a manner that is fundamentally grounded in customary law's own values and priorities. As they so importantly appreciated, 'The perspective we gain from the evidence is not one of contradiction, but of nuance and accommodation.'[104] In other words, they demonstrated sensitivity to the negotiated nature of vernacular law's content and thus made great strides toward seeing it as the 'normative repertoire' that it is.[105]

The point of recounting these internal debates among the judges themselves is as support for the argument that the Constitutional Court has made significant progress in South African law's understanding of the nature of vernacular law. Where further development of the Court's own thinking on how to regard and treat customary law may well still be needed is in how it approaches the *development* of customary law, when it determines that such is necessary.

Sanele Sibanda and Tshepo Bogosi Mosaka and I raise separate concerns about the way in which the Court in *Bhe* resolved the problem of the vernacular law practice it had determined required development by replacing it with a statutory solution founded in common law

[102] Ibid at paras 126–127.
[103] Ibid at paras 139–141.
[104] Ibid at para 61.
[105] Comaroff & Roberts (1981)(note 34 above).

principles and values.[106] The Court in *Mayelane* did not technically turn to the common law for solutions on how to develop customary law. However, it would have been good to see that, even when developing customary law, it considered what the purposes and objectives are for which the principle at issue originally existed, then consider how the political and social economy of customary communities have been altered, and finally the implications all of that has had for rural people and the ability of the normative ideal to achieve the originally intended results in contemporary circumstances. This is effectively the approach that was taken by the Botswanan Court – particularly Lesetedi JA – in *Ramantele*.[107] As shown, the Court's reasoning in *Ramuhovhi* takes a welcome (if still incomplete) step toward this.

That deals with the issue of ascertainment of living law for the purposes of amalgamation. What about the politically charged issue of valuing customary law appropriately in the proposed amalgamation project?

2 *Assigning vernacular law due value in the amalgamated law*

If one engages with scholars who have considered and discussed the idea of an amalgamated South African law, one quickly learns that a big sticking point is often the very different nature of the processes observed in vernacular law. This essentially gives rise to the debate between those scholars who enthusiastically support amalgamation and those others who resist it.

In short, those who argue for the amalgamation of customary and common law into a single legal regime[108] express optimism that it can be done while preserving the integrity of both normative frameworks and their distinctive features, which they perceive to be more limited than conventional narratives claim is the case. These advocates argue that amalgamation means that each element is part of the product, neither is obliterated. They argue that a fundamental change to the South African legal culture would be necessary, agreeing with Chanock that legal formalism is a way of suppressing alternative understandings of law, and the experiences and notions of law held by people other than legal experts.[109]

These advocates ask why only customary law should be living law. They argue that, surely, the same principle that law should be infused by practice, and courts should be transparent about the ways in which the politics and context in which law happens inform jurisprudence (a principle they attribute to the Constitutional Court), should apply to all law. They also argue that the mythology of the common law as grounded in people's practice has now been displaced by a notion of common law as the preserve of experts. In fact, they stand with Chanock to say that, like customary law, the European common law is about an imagined past. Put differently, English common law is custom from 'time immemorial' – built on reasonableness and accessibility, but it became stultified in South Africa through the application of the doctrine of precedent. Thus, what ultimately separates customary and common law in the South African legal systems is that they were crafted to be separate, to be the flip sides of one another.[110]

[106] Sibanda & Mosaka (note 35 above).

[107] *Ramantele* (note 88 above) at para 81.

[108] Claassens & Budlender (note 15 above); M Chanock 'African Constitutionalism from the Bottom-up' in H Klug & SE Merry (eds) *The New Legalism Realism Volume 2* (2016) ch 2; Matthews (note 66 above); Davis & Klare (note 86 above).

[109] On this point, also see P Bourdieu 'The Force of Law: Toward a Sociology of the Juridical Field' (1986) 38 *Hastings Law Journal* 805.

[110] Refer to A Claassens Untitled Land and Accountability Research Centre seminar paper (11 August 2015)(on file with the author).

On the other hand, those who resist the case for amalgamation do so largely from a place of doubt about the feasibility of merging customary and common law without compromising customary law at the expense of common law.[111] The latter argue that, given the history of formalism and a legal culture that centres largely on positive sources of law have prevailed in South Africa to the detriment of customary law's ability to fully flourish, they doubt that customary law will thrive in the context of amalgamation, and that it may be completely overtaken. In addition, they even doubt that the vision of 'transformative constitutionalism' put forward by the Constitution will flourish.

One reason given for this doubt is that, as observed by Thandabantu Nhlapo, the difference between the customary and common law systems is one of worldview.[112] Sibanda and Mosaka also highlight this epistemological (and oft even ontological) difference from which the two spheres of law draw their essence.[113] Their contention suggests that this concern is more fundamental than the advocates for amalgamation give recognition to in what seems an optimistic view of the possibility of merging these systems.

Ultimately, these scholars who caution against the perils of amalgamation contend that the greatest weakness with the amalgam idea is that it assumes that the South African legal system will be able to take aspects of customary law and incorporate them on their own terms and with their own content when this is likely to be impossible because of the conservatism and formalism of mainstream law, as well as the deeply embedded assumptions that the common law's substance and practice are inherently superior to customary law.[114] In its simplest terms, the debate between the pro-amalgamation scholars and those wary of amalgamation boils down to the former believing that we should not be worrying that much about protecting customary law from the common law while the latter believe that such protective impulse is essential because, to do otherwise, is likely to allow colonialism to persist by allowing customary law to be overtaken and predominantly displaced by common law.

The former scholars' reason for their lack of concern is that customary law is not fundamentally about traditional content of yore that must remain stagnant and protected (from change) in order to preserve its integrity.[115] To this the sceptical scholars respond that they too believe that Chanock is correct in holding that customary law is predominantly about the process by which it comes into being, and this belief is what leads them to be immensely

[111] For the sake of complete transparency, I will share that for the longest time I was in this camp – until I embarked upon writing this thought piece as a way of exploring the idea and experimenting with the plausibility of amalgamation.

[112] T Nhlapo 'Customary Law in Post-Apartheid South Africa: Constitutional Confrontations in Culture, Gender and 'Living Law'' (2017) 33 *South African Journal on Human Rights* 1–24; TR Nhlapo 'The African Customary Law of Marriage and Rights Conundrum' in M Mamdani *Beyond Rights Talk and Culture Talk: Comparative Essays on the Politics of Rights and Culture* (2000) 136–148. TR Nhlapo 'The African Family and Women's Rights: Friends or Foes' (1991) *Acta Juridica* 135

[113] Sibanda & Mosaka (note 35 above).

[114] Ibid; T Nhlapo 'Customary Marriage: Missteps Threaten the Constitutional Ideal of Common Citizenship' (2021) 47 *Journal of Southern African Studies* 273; T Nhlapo (2017)(note 112 above); S Mnisi Weeks Untitled Land and Accountability Research Centre seminar paper (11 August 2015)(on file with the author).

[115] Yet, in fairness, they acknowledge the need for caution in recognizing the dominance of the common law's worldview. For instance, Claassens & Budlender (2013)(note 15 above) at 104 say: 'There are inherent difficulties in the concept of a unified South African law that incorporates strong elements of customary law alongside other strands of law. The primary problem is the dominance of western and common law constructs that fail to recognise, let alone accommodate, indigenous values on their own terms.'

concerned about protecting it from the common law, which observes a different process grounded in legalism, positivism, formalism. They give as an illustration of their concern the fact that, under apartheid, the requirements of legality formed the basis for the recognition of the legitimacy of a principle of law such as a principle of (business) custom and these same requirements historically infused courts' tests of the admissibility of customary law principles.[116]

What the pro-amalgamation and cautious scholars may have in common is a desire to move South African law from an approach of merely safeguarding space for customary law to continue to exist in its own little universe or enclaves of subjecthood (that is, the former Bantustans or 'Homelands', which have been given over by the democratic government to be governed almost at will by traditional leaders).[117] They all are trying to do more than find a place where customary law can be protected in its difference, as *Alexkor* set the stage for, by increasingly asserting it against hegemonic systems like the common law. In that sense, they may have a basis for conversation with another set of thinkers who present a different idea that moves towards amalgamation but much more slowly.

This third group of scholars (whose expertise is not in customary law but in common law) suggest that the development of customary law and common law should go hand in hand; for instance, Davis and Klare argue that we should use the terms, customary and common law interchangeably wherever they appear in the Constitution.[118] We need to draw on customary law principles to develop the common law in future. Thus, just as *Barkhuizen v Napier* tells us we must look at the context of a contract when interpreting it (particularly considering the 'relative situation of the contracting parties' in light of 'the potential injustice that may be caused by inequality of bargaining power'),[119] the same thinking should apply to customary

[116] The principles for establishing business custom were generally applicable to living law. In proving a business custom to be in existence, one had to show 'the alleged trade usage … to be universally and uniformly observed within the particular trade concerned, long-established, notorious, reasonable and certain'. See *Golden Cape Fruits (Pty) Ltd v Fotoplate (Pty) Ltd* 1973 (2) SA 642 (C) 645G–I ('*Golden Cape*'). The court comments, at 646A–B, that '[g]enerally speaking the Courts require convincing evidence of the existence of a trade usage conforming to the requirements listed above.' See also *Coutts v Jacobs* 1927 EDL 120; *Crook v Pedersen Ltd.* 1927 WLD 62; *Catering Equipment Centre v Friesland Hotel* 1967 (4) SA 336 (O); also, *Frankv Ohlson's Cape Breweries Ltd.* 1924 AD 289, 297. One also had to prove that it is not contrary to 'positive law' (and thus, that it did not attempt to modify a legal rule that the parties cannot contract out of) or the terms of the legal agreement between the parties. (*Golden Cape* at 645G–I) The legal requirements for the proof of a trade usage or mercantile custom were explicitly transposed to the establishment of living law: in *Mosii v Motseoakhumo* the Supreme Court dictated that 'in the ordinary courts of law native custom must be proved in the same manner as any other custom.' *Mosii v Motseoakhumo* 1954 (3) SA 919 (A) 930. See also *R v Dumezweni* 1961 (2) SA 751 (A) 756E. There were clear parallels between subsections 1(1) and (2) of the Law of Evidence Amendment Act 45 of 1988 and the principles governing the admission and recognition of business custom or trade usage. Furthermore, the prerequisites for proving a business custom echo those of legality. The ready ascertainability and sufficient clarity required of customary rules was consonant with the certainty expected of business customs and law in general, in terms of legality. Public policy and natural justice were, in their interpretation, not dissimilar to the reasonableness and conformity with positive law demanded of business custom (the latter requirement self-evidently referring to the doctrine of legality). In practice, the prerequisites for establishing customary law rules in terms of the LEAA had been its universal observance, extended existence and notoriety as in business custom. These criteria gave expression, respectively, to the requirements of consistent applicability, foreseeability and publicity in the principle of legality. Incidentally, ready ascertainability and certainty also go toward satisfying these legality requirements.

[117] Refer to, for example, the challenge against the manifestation of this trend in *Maledu* (note 40 above).

[118] Davis & Klare (note 86 above).

[119] *Barkhuizen v Napier* [2007] ZACC 5, 2007 (5) SA 323 (CC), 2007 (7) BCLR 691 (CC) at para 59. Cf. Moseneke DCJ's dissent (Mokgoro J concurring) at paras 96, 99 and at 104, where he writes: 'Whilst there is often merit in

law principles. In fact, the process that the Constitutional Court sets out to determine the content of customary law is an almost exact overlap with the principles of transformative constitutionalism – that is, being backwards- and forward-looking at the same time, and having transformation never be a finite program but a processual one whereby it is positive to pursue increasing alignment even if it is never completed or final.[120]

C Overcoming the technical challenges

The debate above ultimately points to the centrality – if not indispensability – of protecting vernacular law process in any amalgam, even as the amalgam should protect the core normative content and values of vernacular law. In fact, it seems that at least some of the scholars argue that protecting the *process* is the only way to really protect the *content* of vernacular law. Thus, scholars on both sides of the amalgamation debate seem to agree on at least the point that the vernacular law processes need to be protected and that key values such as need, and multigenerational provision (thus indicating the importance of children) must be protected as well. The latter is a key part of what *Ramuhovhi* captured. Moreover, if vernacular law values can align with (not be forced to align with) constitutional rights, then some see that there is a double protection built into the enterprise. This is because certain need-based claims fit within the framework of socio-economic rights protection under the Bill of Rights.[121] This too is perceivable in *Ramuhovhi*'s findings.

All argue that centralising process and value concerns in the discussion of an amalgam could perhaps open up a way for protecting the key essence of vernacular law in a unitary state law system. Yet many stress the critical need for some oversight of the vernacular law processes, especially to protect vulnerable groups and ensure the accountability of traditional elites and local powerholders. Scholars on both sides of the debate also share the concern that official customary law – especially as legislated – has often tried to destroy the vernacular law processes that exist on the ground, and their in-built accountability systems of 'checks and balances'. They point to evidence showing that, time and again, process is pre-empted or discounted in a whole lot of cases – especially those pertaining to governance.[122] Primarily, this happens in the course of the intense struggles that many communities are having over resources, which end up playing out in terms of the challenge of distinguishing land as territory from land as property under customary law.[123]

contextual analysis, it is clear that contractual terms should not be tested for their consistency to public norms by merely observing the peculiar situation of contracting parties.'

[120] Comment made by Michael Bishop at Land and Accountability Research Centre Seminar (11 August 2015) at University of Cape Town (per author's notes).

[121] Refer to S Mnisi Weeks & A Claassens 'Tensions Between Vernacular Values that Prioritise Basic Needs and State Versions of Customary Law that Contradict Them' (2011) 22(3) *Stellenbosch Law Review* 823, also published in A Liebenberg & G Quinot (eds) *Law and Poverty: Perspectives from South Africa and Beyond* (2012) 381.

[122] For example, see *Shilubana* (note 51 above); *Pilane & Another v Pilane & Another* [2013] ZACC 3, 2013 (4) BCLR 431 (CC); *Sigcau and Another v Minister of Cooperative Governance and Traditional Affairs & Others* [2018] ZACC 28, 2018 (12) BCLR 1525 (CC); and now *Maledu* (note 40 above).

[123] C Cross 'An Alternate Legality: The Property Rights Question in Relation to South African Land Reform' (1992) 8(3) *South African Journal on Human Rights* 305; B Cousins 'Characterising "Communal" Tenure: Nested Systems and Flexible Boundaries' in Claassens & Cousins (note 34 above) at 109; HW Okoth-Ogendo 'The Nature of Land Rights Under Indigenous Law in Africa' in Claassens & Cousins (note 34 above) at 95–108; S Mnisi Weeks (note 81 above).

1 *Clarifying content vs process in vernacular law*

Readers will rightly ask what is the essence of vernacular law processes? Essentially, what is the vernacular law process these scholars have in mind when describing the need for its protection as central? The core elements of this process – to do with consultation and consent – are captured in the Interim Protection of Informal Land Rights Act 31 of 1996 ('IPILRA') as canvassed in insightful detail by the Court in *Maledu*.[124] Words often associated with this process include 'fluid', 'flexible', 'malleable', 'nuanced' and 'negotiated'.

A good example of this process is what was described by Comaroff and Roberts in 1981 in their work, *Rules and Processes*. In essence, they show that vernacular law (in their particular study, Tswana 'mekgwa le melao') is made up of a 'normative repertoire' which is a variegated set of norms that exist in an undifferentiated repertoire.[125] In other words, there is a multitude of norms that exist at different levels of specificity and generality, and these norms may even contradict one another; but contradictions are resolved by interpreting some norms figuratively (that is, elevating the norms to the metaphorical or symbolic level as opposed to understanding them literally). This determination – that is, the differentiation of an otherwise 'undifferentiated repertoire of norms' – is made on a situational basis.

There are obviously certain norms that enjoy wide social acceptance, and these are typically complied with and regarded as obligatory; but this may change over time as the community's lived reality and its demands shift. Thus, the specific value of most norms is meaningfully determined only in terms of the situation in which the norms are invoked, which happens in relation to contingent or opposing norms. This means that the statement of a particular – even widely held – norm is not *necessarily* determinant of a dispute's outcome. Of course, there are some non-negotiable norms, but these are not determined by any individual but are typically demonstrated in practice. Yet it is true that, even while norms are generally negotiable and offer manoeuvrability to the authorities overseeing dispute management, norms are not *completely* non-determinant of outcomes. This is one of the fundamental tensions that must be balanced within the flexibility that is offered by the nature of vernacular law.

This fundamental negotiability of norms constituting vernacular law is achieved through what the authors describe as the 'paradigm of argument', which they explain operates as follows in the context of cases under Tswana 'mekgwa le melao'. Dispute processes are sometimes devoted primarily to debate over precisely the question of competing norms. Disputing parties and authorities managing disputes organise their utterances (their statements in argument) with reference to the referential principles (the various norms available for them to select from). Disputes are *seldom* decided by the *prescriptive* application of norms alone. Rather, the parties will contrive a 'paradigm of argument' that is a coherent picture of relevant events and actions in terms of one or more *implicit* or *explicit* normative referent.

The 'paradigm' they formulate is case-specific, not fixed or predetermined. The complainant will establish the paradigm by ordering the facts around normative referents that may or may not be made explicit. In fact, the party will not typically refer to norms explicitly except if anticipating that their opponent will question his/her/their characterisation of the dispute, thus attempting to erode his/her/their opponent's paradigm in advance. The other party may then either stay within the paradigm that was established by the complainant – thus, arguing over

[124] *Maledu* (note 40 above). These principles also come out strongly in the key sections from the majority judgment in *Mayelane* (note 51 above).

[125] Comaroff & Roberts (1981)(note 34 above) at 80–88, 180.

the circumstances of the case – or the respondent may choose to present a *competing* paradigm while accepting the presented facts. In the latter case, the explicit reference to norms seems necessary especially because the respondent is imposing a different paradigm on the case and attempting to assert *control* over or *change* the terms in which the debate is proceeding.

It is evident from this that power to negotiate is an essential factor in any party's being able to win when disputing under vernacular law and in influencing the ways in which vernacular law develops in and through pronouncements made in the context of dispute resolution.[126] The necessity of power to negotiate is made even more evident when one considers what options the dispute resolution forum is presented with when presented with competing paradigms of argument and, hence, competing norms as prevailing norms in a factual scenario. The authority responsible for resolving the dispute and/or the senior men who are observing the case may (a) accept the paradigm agreed to by the parties (if such exists), (b) choose between the competing ones presented by the parties, or (c) impose a completely new paradigm on the disputed issues. If they go with option (b) or (c) then they will most often refer to rules explicitly (though usually indirectly, even then) because they are seeking to legitimise the distinction and justify the finding. The dispute resolution authority may also distinguish the issues and thus put two or more frames on the case.

Under Tswana 'mekgwa le melao', legislative pronouncements *can sometimes* customarily become part of the normative repertoire of the governed communities when they are issued by the customary authority, however, their legitimacy and chances of execution depend on:

(aa) their reflecting public opinion,

(bb) their being delivered by an authority considered legitimate, and

(cc) their utility to individuals in the circumstances in which they might be raised.

This is fundamentally different from the claim of their being determinative merely at the sovereign's say-so – the latter being the way in which state law is authoritative (at least, in principle).

As you can see from the detailed description above, the vernacular law system is based on negotiated processes at *every* level. This is so in engagements ranging from between parties in their day-to-day interactions, in the home and in the streets, right up to between community members who comprise the dispute management forums that, in most traditional communities, collectively decide the outcome of the dispute to be resolved before the relevant traditional authority at whose level the forum sits[127] summarises the majority view as the dispute management forum's decision. In respect thereof, Dutton observed of Sotho speaking communities:

> Anyone can ask questions and there is no unseemly hurry; ... Then the smaller fry among the men of the lekhotla give their opinion, the more important people next, and finally the headman gives his decision, which is generally the summing up of the views of the majority. In theory, he can give any decision he likes, but in practice, ... the final verdict is really the general opinion of all present.[128]

[126] S Mnisi Weeks (note 81 above); S Mnisi Weeks 'The Violence of the Harmony Model' in M Buthelezi & D Skosana (eds) *Traditional Leaders in a Democracy: Resources, Respect and Resistance* (2019) 182.

[127] There are several levels, as shown by H Mönnig *The Pedi* (1967); D Reader *Zulu Tribe in Transition: the Makhanya of Southern Natal* (1966) 308; Wilson et al. (note 34); I Schapera, *Tribal Innovators: Tswana Chiefs and Social Change, 1795–1940* (1970) London School of Economics Monographs on Social Anthropology no 43, 92.

[128] Major E Dutton *The Basuto of Basutoland* (1923) 5.

Similar observations have been made in other South African cultural communities.[129]

It is therefore significant when customary authorities adopt the language of their legislative rules being determinative in order to advance their institutional legitimacy claims. This is because this argument gives them more law-making authority than they have under vernacular law and when they succeed at having it enacted in state legislation it is extremely difficult to overcome. Their claims of this type of authority are therefore usually made at the expense of the authority of ordinary rural people to form their vernacular law through their values, choices and evolving practices. Again, this is a fundamental disturbance of the delicate power balance that is essential to vernacular law and makes vernacular law the effective legal system that it can be when it is honoured in its true essence as described above.

2 *The case for the feasibility of amalgamation*

With a clear view of what is meant by vernacular law's emphasis on 'process' in mind, the final question remaining to be answered in this exploration is this: could such a process as described above be brought into the state legal system? If so, what could such a process look like if it were to form the basis of an amalgamated South African legal system? Arguably, such a process is very well suited to the task of rapidly amalgamating customary and common law into a unified state legal system and doing so with the least possible difficulty. The reason is that the notion of a 'normative repertoire' is not fundamentally different from the concept of the law comprising a variety of rules and principles from which judges must commonly select and determine which prevails in the circumstances of a given case. However, importing the concept of a 'normative repertoire' comprised of common and customary law rules, principles, norms and values definitely presents a difference of degree: that is, it vastly expands the range of norms that can be considered and applied in any one case.

The concept of a 'paradigm of argument' is also not *fundamentally* different to what happens in legal disputes in state courts today. After all, parties appear before the court with their representatives having framed the disputes in very particular ways and strategically presented the argument that they believe will lead to the most favourable outcome for their client. In that sense, the court making the decision presents what could legitimately be described as a 'negotiated' conclusion that is reached by a more adversarial interaction heavily mediated by experts, with the judges ultimately making the determination. Therefore, one can see how there may be a kernel that might tentatively be described as a common base to the amalgamation processes under discussion, even if the common law system tends heavily toward formalism and

[129] P Cook *Social Organisation and Ceremonial Institutions of the Bomvana* (1931) 146; Reader (note 127 above) at 259. With regard to the amaXhosa, WD Hammond-Tooke *Command or Consensus: The Development of Transkeian Local Government* (1975) notes at 68, 74 fn 13 that decisions are made by the 'community-in-council'. Indeed, he writes (at 67) that '[a] chief who dared to go against the wishes of his people ran the risk of losing their support, and perhaps his chieftainship. ... Consensus was all important.' Also see the following cases for the claims made to them, more than for the findings of the courts: in *Morake v Dubedube* 1928 TPD 625, 630 the court describes the chief as 'sitting in that capacity, advised by his counsellors' and wrongly rejects the contention that the chief (and his council) does not possess in him the customary law; *Rex v Kumalo and Others* 1952 (1) SA 381 (A) speaks of the chief and members of his council as deciding upon the proper punishment for a man for contempt of court; *Rex v Ntwana* 1961 (3) SA 123 (E) also notes the council's and headmen's role in the traditional dispute resolution process; *State v Mngadi* [1971] 2 All SA 394 (N) similarly notes the headmen's involvement in the processes of dispute resolution.

thus explicit invocation of norms while the vernacular law system leans in favour of informality and subtlety when invoking norms to make arguments.

It would seem, therefore, that in principle it should be very feasible for a unified legal system to be developed that allowed parties to draw on both vernacular law and common law norms and placed the burden on the parties averring that the vernacular law norms are applicable to the case at hand to show how and why this is so. This would not be that different to what parties have to do now with the common law. In such a scenario, admissibility of the norms averred by parties would be decided by the judges of that case – as is the norm with cases before the state courts today – whose determination would be based explicitly on alignment with the Bill of Rights. Such a shift would make South African law more expansive and capacious rather than constricted and legalistic. It would also readily make the whole body of (official) law more thoroughly South African.

To be clear, I do not mean to elide the magnitude of the task before the courts if they are to proceed with adoption of my proposal. It is indeed correct to say, as did one reviewer of this article, that 'change, even if deliberate and cumulative, cannot entail things remaining largely the same'. And, as both reviewers legitimately pointed out, the path is riddled with obstacles based on the enduring centripetal force of South Africa's conservative legal culture rooted in a pre-1994 common law and colonial logics,[130] which resists real change in favour of a depoliticised conception of legal transformation. There are certainly deeper systemic and epistemic challenges that would have to be faced in order to overcome the obvious disharmony between a system favouring the keeping of rules as what it deems to align with justice versus one where justice is seen to be embedded in the processes that lead to socially just outcomes. This undertaking will definitely require further consideration, theorisation and judicial strategising.

My point in noting the similarities between the limited 'normative repertoire' and 'paradigm of argument' approach expressed in common law today and the vastly expanded scope I propose for an amalgamated legal future for South Africa based on the processual nature of vernacular law is to hearken back to the observation with which I opened my discussion of amalgamation. Namely, drawing on Chanock, I mean to remind the reader that we tend to think of common law and customary law as more different than they are when, in fact, they should rightly be understood as two forms of 'common law' that are somewhat distinct and yet related and, in some ways, similar in their essence. This reminder is not just a matter of offering assurances to some vested audiences that, once the changes I propose of crossing over into a new paradigm of amalgamation are implemented, the amalgamated South African legal system will not be so different from the common law they know and love, to which they evidently are unwilling and/or unable to stop clinging. I would argue that this reminder is a matter of historically grounded descriptive and analytical accuracy. Frankly, if legal history and sociolegal studies teach us nothing else, they teach us that we must be very careful not to wholly believe the formally institutionalised common law's *myths* about itself.

Nevertheless, to those readers who find themselves drawn to the comforts of interpreting the proposed amalgamated way forward as a means by which customary law can be assimilated

[130] For more on colonial logics, see T Zuberi & E Bonilla-Silva *White Logic, White Methods: Racism and Methodology* (2008); S Grande *Red Pedagogy: Native American Social and Political Thought* (2015); T Madlingozi 'Social Justice in a Time of Neo-Apartheid Constitutionalism: Critiquing the Anti-Black Economy of Recognition, Incorporation and Distribution' (2017) 28(1) *Stellenbosch Law Review* 123; JM Modiri 'The Jurisprudence of Steve Biko: A Study in Race Law and Power in the "Afterlife" of Colonial-Apartheid' (DPhil thesis University of Pretoria 2017), available at https://repository.up.ac.za/handle/2263/65693.

into the common law as we know it, customary law adherents and their incessant demands 'accommodated', and the common law's sources 'diversified', allow me to clarify. What I am advancing is a novel approach that exceeds the formalistic demands of the current system of precedent in which classification according to colonial logics is often determinative of the range of outcomes; in that sense, the system of precedent as we know it cannot be sustained as it is. Mine is a strong claim: amalgamation would only be feasible if the courts *wholly* embraced the vernacular law concept of a 'normative repertoire' comprised of customary and common law rules, principles, norms and values when deciding cases. This article is therefore an invitation to all readers to seriously explore the possibilities that emerge when, instead of falling back on precedent, this concept is coupled with serious engagement with the 'paradigm(s) of argument' presented in the cases courts hear.

The proposed process of amalgamation would constitute a process of value-making and aligning customary law and constitutional values. What are those essential vernacular law values? We see these indicated in *Ramuhovhi I* yet I will summarise them briefly here. Intergenerational equity and provision are always important, and it is largely with respect thereto that children are a central concern alongside marriage and kinship. In a similar vein, provision for the needs of the family (conceived of in extended terms) is essential. Finally, making determinations of what is *just* based on the means available, and therefore arriving at a fair negotiated solution, is the perennial challenge that each vernacular law dispute ultimately presents.

The latter is often glibly referred to as vernacular law's tendency toward 'reconciliation' and 'harmony'. In some instances, this language of a conciliatory and harmonious normative system is employed so cheaply as to elide the silencing of vulnerable groups, entrenching of inequality, and other injustices embedded in differences of access to decision-making power and governing authority that these words, when weaponised as the traditional leader lobby often does,[131] can conceal.[132] A different way of grounding the same ideas at the foundation of vernacular law is to describe them in terms of *ubuntu/botho* (which the Court has repeatedly said is implicitly recognised in the Constitution's protection of dignity)[133] and its implication of a process of shared value-making, balancing interests and needs, ensuring intergenerational access, and providing for those in need.

[131] Comaroff & Comaroff *Ethnicity Inc.* (2014).

[132] L Nader *Harmony Ideology: Justice and Control in a Zapotec Mountain Village* (1990); S Mnisi Weeks (note 126 above).

[133] *Bhe* (note 23 above) at paras 45, 163; *S v Makwanyane & Another* [1995] ZACC 3, 1995 (3) SA 391 (CC) at para 224; *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7, 2005(1) SA 217 (CC) at para 37; *Dikoko v Mokhatla* [2006] ZACC 10, 2006 (6) SA 235 (CC) at paras 68–69; *Union of Refugee Women v Director: Private Security Industry Regulatory Authority* [2006] ZACC 23, 2007(4) SA 395 (CC) at para 145; *Koyabe v Minister for Home Affairs* [2009] ZACC 23, 2010 (4) SA 327 (CC) at para 62; *The Citizen 1978 (Pty) Ltd v McBride* [2011] ZACC 11, 2011 (4) SA 191 (CC) at para 243; *Van Vuren v Minister of Correctional Services* [2010] ZACC 17, 2012 (1) SACR 103 (CC) at para 51; *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* [2011] ZACC 30, 2012(1) SA 256 (CC) at paras 71–72. Also see generally, CBN Gade 'What is Ubuntu,? Different Interpretations among South Africans of African Descent' (2012) 31(3) *South African Journal of Philosophy* 484–503; R Songca 'The Africanisation of Children's Rights in South Africa: Quo Vadis?' (2018) 13(1) *International Journal of African Renaissance Studies - Multi-, Inter- and Transdisciplinarity* 77, 82; C Himonga 'African Customary Law and Children's Rights: Intersections and Domains in a New Era' in J Sloth-Nielsen (ed) *Children's Rights in Africa: A Legal Perspective* 73, 81.

In incorporating vernacular law into an amalgamated state system, it is necessary for parties and courts to look at the first principles stated above and whether the outcome of the case will align with those. It is obviously also essential to test the outcome against the Constitution as the foundation of South Africa's democracy and law. Madlanga J's judgment in *Ramuhovhi I* went some ways toward demonstrating these two steps that I have said would be essential to the development of an amalgamated South African law that integrates vernacular law and common law under the Constitution in a way that gives vernacular law due respect and position. Taken further, such steps would align the customary law that is embraced in the amalgam of official law with constitutional values even as it would align the common law with those same constitutional values. Such moves would also align and, in time, integrate the common law and customary law into each other.

3 *What, then, of land? A few representations*

I have described above how the focus on process and value concerns would be essential to respecting customary law in an amalgamated state legal system comprised of vernacular law's 'normative repertoire' as the base combined with the content of common law rules and principles made equally accessible and thus utilised alongside living-turned-official customary law rules and principles to form state law's dynamically integrated content. How might such an amalgamation look if it were to be given expression with respect to the regulation of land, particularly as a way of resolving the perennial perilousness of regarding land as property under customary law and in South Africa more generally?

It is beyond the scope of this article to provide a thorough answer to this seminal question. However, I can attempt to provide a rough sketch of amalgamation in the realm of land law. I do this here by contemplating how the Court in *Ramuhovhi I* might have possibly stretched further – beyond handing down a decision that would be fair and just under customary and constitutional law – to articulate an amalgamated state law that is more representative of all South Africans (or, at least, the vast majority of the 80.7% of South Africans who identify as Black Africans).

First, it is important to understand *ubuntu/botho* more broadly than in the trite ways in which it is often mobilised in common parlance, even by the Court. When duly understood as not simply a 'worldview' but a larger web of indigenous values and ethics, meaning and significance, and worldview – that is, epistemology, ontology and methodology,[134] or what Oyèrónké Oyěwùmí collectively terms 'world-sense'[135] – the principle of *ubuntu/botho* is all-encompassing. Hence, it should naturally arise in any discussion of land, which, interestingly, it does not even in the otherwise compelling decision delivered in *Maledu*.[136] Further still, it should not arise only with reference to the people who seek to make a historically-based claim to the land at issue, but more comprehensively.

[134] For comparative context, see Grande (note 130 above).

[135] O Oyěwùmí *The Invention of Women: Making an African Sense of Western Gender Discourses* (1997) 2–3 ('The term "worldview", which is used in the West to sum up the cultural logic of a society, captures the West's privileging of the visual. It is Eurocentric to use it to describe cultures that may privilege other senses. The term "world-sense" is a more inclusive way of describing the conception of the world by different cultural groups. In this study, therefore, "worldview" will only be applied to describe the Western cultural sense, and "world-sense" will be used when describing the Yoruba or other cultures that may privilege senses other than the visual or even a combination of senses.')

[136] *Maledu* (note 40 above).

There is so much that could be said in unpacking this observation that it is difficult to know where to start. But what I focus on here, based on 15 years of ethnographically based research and writing on the subject, is that animals and land are not regarded as *fundamentally* separate or different from human beings. In the indigenous world-sense, all three categories of 'things' – land, people and livestock – are essential to life and, therefore, living. To make better sense of that idea concerning land, we must confront something that is probably difficult for outsiders to such a world-sense to wrap their heads around: what does it mean for land to be viewed as living? It is not possible to provide a comprehensive answer but, at the risk of being dangerously reductive, I will dare to sketch a general principle here by sharing some basic and curt illustrations of how land is a living and spiritual being.

Land breathes; it moves, shifts and changes; it grows and births things – that is, it gives new life. Land is part of a loving and reciprocal relationship. We live with the land. The land gives us food and water. We care for it, and it cares for us. While it often yields to and embraces our actions, it sometimes (or in some parts) resists. The land can hurt, ail, and mourn. In droughts, it starves and can die, as well as kill. Thus, rather than an inanimate object, land is a living subject.

The land can be good or bad (*umhlaba omuhle/omubi*), just as the ancestors can be good or bad (*idlozi elihle/elibi*). It is crucial to understand the land – and its sacredness – in relation to the ancestors and other spiritual forces.[137] After all, the land welcomes our bodies and spirits into its fold and hides them under its cover. Furthermore, in a sense, the land is our oldest and most enduring ancestor of all because it has cared for us since time immemorial – that is, over multiple generations, which readers will recall is one of the highest vernacular law values.

While it is beyond the scope of this article to expound upon this, it is nonetheless evident that this world-sense has all sorts of temporal implications as well, calling for engagement with the dominance of settler European time[138] in South African common law and legal culture, and the implications of such dominance for land debates. For now, suffice it to say that the above pronouncement makes clear that the key question that is really presented in the present part of this article is: what happens to South African land laws when you situate them within the vernacular law 'normative repertoire' which necessarily includes norms and values such as the land is a living subject? I can only make some constrained suggestions with respect to *Ramuhovhi I* here because it deals with land only notionally. The broader land question – what would this amalgamation idea mean for restitution claims, for instance? – will surely remain to be answered in a separate work.

I have already stated above that one of the strengths of *Ramuhovhi I* was that it reached the correct conclusion by allowing the deceased's daughters to inherit. However, it did not adequately engage with the profundity of vernacular law's values and their contribution to understanding the depth of significance of the case or its outcome on its own terms. To do so, it would have had to articulate more explicitly the fact that the maintenance of 'house' property is important because of the value of providing for multiple generations in the particular context of land as a living subject and situate the discussion within the context of vernacular law's

[137] Even with more than 80 per cent of South Africans identifying as Christians, belief in ancestors remains prevalent as people find ways to reconcile their indigenous and embraced beliefs, for example, by drawing comparisons between their ancestors and the Catholic saints as intercessors who are closer to and therefore appeal to Jesus, the mediator of sins, on their behalf.

[138] M Rifkin *Beyond Settler Time: Temporal Sovereignty and Indigenous Self-Determination* (2017); Zuberi & Bonilla-Silva (note 130 above).

comfort and ease with correcting one's faults or omissions after one has died as an extension of the indigenous world-sense's alternative temporal scope.

For deeper grounding in vernacular law's values, the *Ramuhovhi I* decision might have recognised that, in posthumously correcting one's faults and omissions, vernacular law seeks to give expression to *ubuntu/botho* as prioritising wholeness of life (that is, the essential life principle) through restoration and healing of all relationships – past and present, human and otherwise. For instance, it is commonplace in vernacular law that marriages get completed after one or both of the parties has died. This might happen by means of their children finishing off payment of outstanding *lobolo* in order to finalise their parents' marriage posthumously and thus legitimate their own births long after the fact.[139] Similarly, children's births are often legitimated by their kin, such as their grandfathers, paying damages (often referred to as *lobolo*, if not the technical term of *inhlawulo*) after the children's fathers have died, something that the *Bhe* case might have benefited from having considered in its interrogation of (il)legitimacy.

In other words, it was fitting that the father's transfer of property to his civil wife be revisited, questioned and corrected in *Ramuhovhi I*. This revisitation was due, not just in terms of some narrow, functionalist and materialist textbook conception of customary law that acknowledges a difference between 'house' property and family property (separately from personal property) as material assets to be passed down to descendants of the matrilineage and patrilineage, respectively. Rather, revisitation of the father's decision and actions was fitting as part of the extensive web of indigenous epistemologies, ontologies and methodologies that I have borrowed from Oyěwùmí to collectively refer to as world-sense.[140]

In her compelling discussion of the need for the academy to move beyond settler or colonial logics in order to make room for and 'imagine alter-Native modes' of social and material existence as well as political participation, Sandy Grande writes of '*the difference between subjectivities produced in and through relationship to land and those produced under and through significations of property*.'[141] What does this difference mean practically? As one who knows little about Venda culture, I can only speculate about the meaning of the difference identified by Grande in Venda culture by departing from cultures with which I am both personally and professionally more familiar. I should add that, of course, the parties' drawing from these other indigenous normative traditions to the extent that doing so could be shown to be consistent with constitutional protections, would have been fair game under my proposed idea of embracing the vernacular law's 'normative repertoire' as the base form of an amalgamated South African law.

When Swati people say, '*ngimuva ngengati*' (I feel them with/in my blood)[142] to refer to someone to whom they are related, they are expressing a deep value of kinship that is at once

[139] For example, see M De Souza 'When Non-Registration Becomes Non-Recognition: Examining the Law and Practice of Customary Marriage Registration in South Africa' (2013) *Acta Juridica* 239 and MW Yarbrough 'Very Long Engagements: The Persistent Authority of Bridewealth in a Post-Apartheid South African Community' (2018) 43(3) *Law & Social Inquiry* 647.

[140] Oyěwùmí (note 135 above).

[141] Grande (note 130 above) at 3 (italics in original text).

[142] Such articulations among the Zulu people can be seen in records dating back to the end of the 19th century, such as AT Bryant *A Zulu-English Dictionary* (1905), available at http://archive.org/details/zuluenglishdicti00brya with notes on pronunciation, a revised orthography and derivations and cognate words from many languages; including also a vocabulary of Hlonipa words, tribal-names, etc., a synopsis of Zulu grammar and a concise history of the Zulu people from the most ancient times.

materially based (biological relationship matters) and spiritually based (there are a multitude of ritual ways by which children who are *not* biologically related can be 'adopted' into a family's blood line). In a case like *Ramuhovhi I*, the difference described by Grande might have been reflected through some recognition of the material importance placed, under vernacular law, in the fact that the applicants are biologically related to their deceased father and the material asset he gave away in a manner that the civil wife to whom he gave their right to inherit is not related to either the deceased or the land.

Put differently, the ancestral heritage that resides in the land on which the 'house' (or, in that case, commercial) property is located runs deep in tying the applicants and their identities to the land through multigenerational relationship in a manner that the fourth respondent cannot emulate. To engage with vernacular law on its own terms, in such a way, the *Ramuhovhi I* decision would thus have acknowledged the temporal shifts that this world-sense entails, thus pushing beyond the chronological progression of time that prevails in settler European conceptions and the linear establishment of relationships and other social formations.[143]

I could say more about this line of reasoning by way of illustration but will not because I do not want to venture too far into the realm of speculation. However, I trust that the point is clear: that, by engaging with the legal question before the Court in a way that is not just grounded in the material and positivist conception of 'house' or land as property but also grounded in the indigenous world-sense, the Court would have enriched its perspective and understanding and, as I am ultimately arguing, enriched South African law as a whole by making it more resonant with the realities of more South Africans. Yet, to grasp or engage as such, the Court would have needed to tap into a different set of logics, assumptions, and ways of seeing the world – something that presently appears to stand outside of South African law's plausibility framework.

Before proceeding, however, some important qualifications must be registered. The key thing about embracing the 'normative repertoire' approach is that it does not bind the Court to a single form of reasoning or ultimate outcome. The Court could engage the indigenous world-sense and find that it leads it down a path of reasoning that is inconsistent with core constitutional values or produces an outcome that is inconsistent therewith. However, that conclusion does not have to result in perpetual rejection of the vernacular law rules, principles or values; perhaps they are ill-suited to the particular case before the Court at that moment but may add value to courts' reasoning in future factual scenarios when they might be brought into conversation with other norms in the broader South African repertoire. Indeed, this is a departure from the doctrine of precedent as we know it – and this, as I have already explained above, is one of the novelties of the approach to amalgamation that I have proposed.

In a sense, such a finding is just the flip side of what the Court said in *Ramuhovhi I* when, in humility, it observed that, despite its efforts, its judgment presented many possibilities for unforeseen consequences, including harm, and thus warranted leaving the door open for

[143] For example, see C Mhongo & D Budlender 'Declining Rates of Marriage in South Africa: What Do the Numbers and Analysts Say' (2013) *Acta Juridica* 181; De Souza (note 139 above); JL Comaroff & S Roberts 'Marriage and Extra-Marital Sexuality – The Dialectics of Legal Change among the Kgatla' (1977) 21(1) *Journal of African Law* 97; E Thornberry 'Ukuthwala, Forced Marriage, and the Idea of Custom in South Africa's Eastern Cape' in A Bunting, BN Lawrance, & RL Roberts (eds) *Marriage by Force? Contestation over Consent and Coercion in Africa* (2016) 137–158; and N Luwaya 'Land, Status and Security – A Burden Borne by Women' (2018) 32(4) *Agenda* 103.

revisiting the question.[144] Instead, in this instance, the Court would be saying that, despite its best efforts, its judgment of vernacular law rules, principles or values is always profoundly shaped – and thus constrained – by the factual circumstances of the case and the limited surrounding norms that have been selected from the expansive South African repertoire relative to which the rejected vernacular law rules, principles and values have been considered at that moment in time. It would therefore leave the door open for revisiting the 'rejected norms' in a different set of circumstances.

So, for instance, in pursuing this course the Court in *Ramuhovhi I* could have acknowledged elements that might cause some discomfort in the values outlined above, such as the implication that the civil law wife in *Ramuhovhi I* does not have as much investment or deep relational connection with the land/property at issue as the applicant children because her attachment to the land is mostly material (that is, her connection is to the land *qua* property), contemporary (rather than retrospectively multigenerational), and mediated by marital relationship (as opposed to patrilineal or matrilineal kinship). In other words, there might be times when the vernacular law principle and values that prevailed in *Ramuhovhi I*, or their implications in the particular factual scenario presented to the Court, should be read figuratively or be seen as suitably superseded by other principles and values that are more constitutionally compelling and/or lead to a more constitutionally consistent outcome in the circumstances.

Appreciative enquiry[145] seriously engaging vernacular law rules, principles and values, and their adherents, need not *always* lead to an affirmative result – that is, a result that applies such rules, principles and values to the final outcome of the case – in order to be worthwhile. Each encounter of such a kind between the vernacular law, common law and constitutional norms and values is another welcome opportunity to amalgamate them more deeply into a single system and enrich the whole. This is so, especially, when the ultimate goal is the radically constitutional transformation of the South African legal system by drawing upon the wisdom and contributions from the cultural and normative heritage of *all* the country's peoples which, as I have argued here, should indeed be the case.

IV CONCLUSION

In the end, such an amalgamated system as proposed in the previous sections would heavily depend on courts to do the transformative work. As *Ramuhovhi II*, as well as *Gumede* and *Bhe*, shows, the legislature has not demonstrated eagerness to resolve these prickly issues – especially where they concern protection of the rights of vulnerable groups such as women and children in customary communities. Whenever the legislature tries to address questions of regulating vernacular law, it falls back on dangerous platitudes like 'traditional leaders are the custodians of our culture and land', thus more deeply entrenching the static patriarchy imposed by colonial and apartheid authorities in legislation like the Traditional and Khoi-San Leadership Act 3 of 2019 and Traditional Courts Bill (B1D-2017) instead of the vibrancy and dynamism of vernacular law's deeply negotiated, internally contested and richly contextualised 'normative

[144] *Ramuhovhi I* (note 3 above) at paras 65 and 71.

[145] GR Bushe 'Appreciative Inquiry is Not About the Positive' (2007) 39(4) *OD Practitioner* 33; J Reed *Appreciative Inquiry: Research for Change* (2006); SA Hammond *The Thin Book of Appreciative Inquiry* (3rd Ed 2013).

repertoire'.[146] Even as communities and civil society continue to press the legislature to deliver just results, the courts have become the bearers of the justice hopes of South Africans.[147]

In the recently published *Oxford Handbook of Law and Anthropology*, Rachel Sieder argues that:

> The recognition of legal pluralism in Latin America's new constitutional regimes, however limited or ambiguous in normative and practical terms, has meant that lawyers, who defend Indigenous Peoples' collective rights to autonomy, land, and territory, and judges, who adjudicate these cases, have had to engage with alternative cultural conceptions and representations of what 'law' itself is.[148]

There is a sense in which the body of (living) customary law cases that have come before the Constitutional Court[149] can be said to have accomplished similar engagement with vernacular concepts of law in South Africa. Indeed, as I have argued above, I would go further to say that, in addition to a different '*law*-sense', the legal professionals listed by Sieder have been pressed to engage with a different *world*-sense. Yet, as I have demonstrated, such 'limited' and 'ambiguous' engagement by the relevant attorneys, advocates and justices of the Constitutional Court is not enough to fundamentally transform our entire system in the ways in which we need it to be rendered wholly South African and thus relevant to all South Africans. Indeed, as reviewers correctly pointed out, lower court decisions – and I would add, the arguments presented by many lawyers who appear before those lower-level courts – should give us pause because of how they prove that even the courts are hard-pressed to realise this constitutional aspiration.[150] Yet we cannot refrain from asking more of the courts simply because the precise details of what is asked are difficult for them to do.[151]

What then are the courts to do? The courts must 'refuse'[152] to continue perpetrating the

[146] For examples, refer to Claassens & Cousins (note 34 above); and *Tongoane & Others v National Minister for Agriculture and Land Affairs & Others* [2010] ZACC 10, 2010 (6) SA 214 (CC), 2010 (8) BCLR 741 (CC).

[147] For instance, refer to S Budlender, G Marcus & NM Ferreira *Public Interest Litigation and Social Change in South Africa: Strategies, Tactics and Lessons* (2014), available at www.atlanticphilanthropies.org/wp-content/uploads/2015/12/Public- interest-litigation-and-social-change-in-South-Africa.pdf; M Langford, B Cousins, J Dugard & T Madlingozi *Socio-Economic Rights in South Africa: Symbols or Substance?* (2013); *High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change* (Report)(2017), available at: https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf; W Beinart, R Kingwill & G Capps *Land, Law and Chiefs in Rural South Africa: Contested Histories and Current Struggles* (2021).

[148] R Sieder 'The Juridification of Politics' in MC Foblets, M Goodale, M Sapignoli, & O Zenker (eds) *The Oxford Handbook of Law and Anthropology* (2020).

[149] Particularly, *Alexkor* (note 17 above), *Bhe* (note 23 above), *Gumede* (note 4 above), *Shilubana* (note 91 above), *Pilane* (note 150 below), *Sigcau* (note 121 above), *Mayelane* (note 51 above), *Maledu* (note 40 above) and *Ramuhovhi* (note 3 above).

[150] For example, see *Pilane & Another v Pilane & Another* [2011] ZANWHC 80 (High Court judgment) which was overturned by the Constitutitonal Court on appeal in *Pilane* (note 121 above).

[151] It is crucial to note that the difficulty is on the side of the courts. South Africans live vibrantly culturally and legally hybridised lives. This is what is appropriately described as legal syncretism by BA Gebeye *A Theory of African Constitutionalism* (2021). One sees legal syncretism practised all over the world where different normative systems exist together in people's lives.

[152] A Simpson *Mohawk Interruptus* (2014) describes the indigenous people as engaging in a 'politics of refusal'. It is in this politics that I am calling the courts to notionally engage in solidarity, even as they are inherently limited by their institutional position within the modern Westphalian conception of the nation-state and the concomitant permanent minoritisation (or 'Othering' of indigenous peoples that is part of the political legacy of colonialism detailed by M Mamdani *Neither Settler nor Native: The Making and Unmaking of Permanent Minorities* [2020]). M Mamdani 'Beyond Settler and Native as Political Identities: Overcoming the Political Legacy of Colonialism' (2001) 43(4) *Comparative Studies in Society and History* 651–664. Legal amalgamation,

extant 'epistemic violence'[153] in terms of which the South African legal order continues to 'constitute the colonial subject'[154] – that is, the four fifths or more of South Africans who are Black and/or Indigenous Africans – and the ways in which they ordinarily view the world and themselves[155] within it 'as Other'.[156] Whether in terms of the Constitution's vision or morality, it is incumbent on the courts to stand in solidarity in challenging and ultimately overcoming 'the colonial erasure'[157] that is at the foundations of the prevailing logics of South African (common) law as we know it and the ways in which these logics are incommensurate with the indigenous 'epistemologies and ontologies of law grounded in [profound] conceptions of time, space, and personhood'[158] that I have described above as the indigenous world-sense embodied by *ubuntu/botho* properly understood.[159]

Such 'judicial activism' is, in fact, foreseen by South Africa's democratic Constitution.[160] As Klare wrote when he argued that South Africa's Constitution mandates 'transformative constitutionalism': '[t]he Constitution invites a new imagination and self-reflection about legal method, analysis and reasoning consistent with its transformative goals'.[161] Further still, 'the Constitution suggests not only the desirability, but the legal necessity, of a transformative conception of adjudicative process and method'.[162] Largely agreeing, former Deputy Chief Justice Dikgang Moseneke wrote that 'the judiciary is commanded to observe with unfailing fidelity the transformative mission of the Constitution'.[163]

It is probably fair to say that the degree or nature of transformation envisioned by Klare and Moseneke is exceeded by the vision presented in this article. However, it does not seem fundamentally inconsistent. There is no question that amalgamation of customary and common law would be deeply transformative of South African law. Proceeding with it is not for the fainthearted. But, with judicial (or, alternatively, political) will, it is very feasible.

It does *not* require codification of vernacular law norms – a futile task anyway, as explained above. It does *not* require that the judges be radically retrained to become 'experts' in customary law – certainly no more so than they would need to be to proceed with a system of choice of law wherein parties could legitimately choose to have their cases heard and decided under their customary law. Moving ahead with amalgamation in the manner proposed does *not* need courts to do anymore additional legal research into vernacular law than would be required

as I have proposed it, more deeply accomplishes this than any other strategy because of its simultaneous defiance and destruction of the binaries imagined and imposed by colonial authorities.

153 G Spivak 'Can the Subaltern Speak?' in C Nelson & L Grossberg (eds) *Marxism and the Interpretation of Culture* (1998) 24, 24.

154 Ibid at 24–25.

155 F Fanon *The Wretched of the Earth* (1963).

156 Spivak (note 153 above) at 25.

157 Sieder (note 148 above) at 6–7.

158 Ibid. Also refer to Simpson (note 152 above) and Rifkin (note 138 above).

159 Again, refer to Ramose (note 48 above) and others listed there.

160 M Le Roux & D Davis *Lawfare: Judging Politics in South Africa* (2019); J Fowkes *Building the Constitution: The Practice of Constitutional Interpretation in Post-Apartheid South Africa* (2016); C Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice Between Corrective and Distributive Justice* (2009).

161 KE Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14(1) *South African Journal on Human Rights* 146, 153.

162 Ibid at 156.

163 D Moseneke 'Transformative Adjudication' (2002) 18(3) *South African Journal on Human Rights* 309, 319.

under the present choice of law system.[164] As seen, to determine a fair, informed and reasonable outcome, courts like those in *Alexkor, Bhe, Gumede, Shilubana, Pilane, Sigcau, Mayelane*, *Maledu*, *Ramuhovhi* and the many other cases that have come before the lower courts have taken one or more of several steps. First, they have requested that the parties provide additional testimony and evidence. Second, they have drawn upon the resources of *amici curiae*. Third, they have gathered the academic materials that they could and regarded them with some healthy scepticism and discernment. Those courts that have been most successful – of which the higher courts certainly make up a larger share – have benefited from all three sets of resources in order to judge vernacular law content more capably than what their training has prepared them for. They have also benefited from a less protectionist approach to the formally institutionalised common law and the colonial logics upon which it is premised. More precisely, such courts have benefited from greater willingness to embrace democratic transformation by, at a minimum, parting with the dominant legal culture of colonial–apartheid.

In keeping therewith, readers will not be surprised to learn that what the proposed undertaking *does* require is that courts be open to being presented with innovative and unfamiliar arguments drawing on the social science evidence of the vernacular law in any and every case where the South African public takes them up on the invitation to draw from all South Africa's normative traditions to make a constitutionally adherent argument. It asks that the courts delve deeply in those cases to enquire into what the purposes and objectives are for which the vernacular law principles brought before them originally existed.

It also demands that, whatever living law principles are presented to them for consideration, the courts consider how the political and social economy of customary communities have changed since the inception of any precolonial norms presented. Moreover, it necessitates that courts dwell on the implications such changes in political and social economy have had for South African communities and the ability of the (often precolonial) normative ideals to achieve their originally-intended results in the context of contemporary circumstances of material poverty and precarity.[165] In short, it requires that courts hold the doctrine of precedent much more loosely than they have ever before, thus drawing again on the character of vernacular law as a system under which rules 'are open-textured and without strong predictive force'.[166]

All of this ultimately suggests the need for courts striving to honour the nature of vernacular law's processes to grapple with questions of what kind of agency the parties to the dispute at hand were attempting to exercise, and how, and the long-term relational impact of the decision that is reached in the present case. As Former Justice Kate O'Regan describes what is needed of courts faced with the 'systemic aspect of the paradox' of tradition and modernity, 'it will require

[164] Indeed, this entails doing as JA Lesetedi argued in *Ramantele* (note 106 above) and privileging vernacular law in court determinations of the content of custom by drawing upon more modern sources such as contemporary records, recent case studies and oral evidence to obtain a more accurate understanding of vernacular law as it exists at present. This unavoidably entails relying upon factual evidence for the purpose of determining the content of law. Yet, as O'Regan (note 79 above) delineates the distinction:

> Recognising that customary law is a question of law, not fact, does not mean that evidence of both members of a community, and expert witnesses, will not be relevant in the determination of the content of customary law. The Recognition of Customary Marriages Act defines 'customary law' as the 'customs and usages traditionally observed among the indigenous peoples of South Africa and which form part of the culture of those peoples. What constitutes a 'traditionally observed' custom will be properly a matter for evidence. Nevertheless, as the majority in *Mayelane* [note 51 above at para 61] held, once that evidence has been heard, it is the 'function of a court to decide what the content of customary law is, as a matter of law not fact' (references omitted).

[165] For example, see Mnisi Weeks (note 34 above) at 210–217.

[166] O'Regan (note 79 above) at 124.

careful contextual analysis and review, to determine which remedy will best accommodate the competing concerns.'[167]

In other words, courts would need to ask: what outcome were each of the parties trying to *negotiate* and might there be a creative way to help them overcome the present hurdle (that is, the point at which they reached an impasse) by drawing upon different norms in the full repertoire that exists in all of South Africa? It may even occur that the parties did not realise that they had access to the norms upon which the court might draw.

This element may be the most radical transformation proposed in the idea of amalgamation because it calls upon courts to become 'allies' and strategise with the parties to the conflict rather than engage in a winner-takes-all calculus as typically produced by emphasis on the adversarial nature of South African law. In other words, more 'mediators' than 'adjudicators'. In a broader sense, it also calls upon the courts to become 'allies' with the ordinary people of the land as a whole in their efforts to conquer the ongoing oppression they experience through the silencing that continues to be perpetrated by the legacy of colonial–apartheid in South African law. Yet, even setting aside the deliberately collective, reparative and transformative language of the Constitution's Preamble,[168] this is the logical conclusion of *ubuntu/botho*: that we are *all* in it *together* – and that must surely include our justices of the courts.

While, in this article, I have deliberately drawn the idea that we are *all* in it *together* – and so too the justices of the courts – from the indigenous world-sense, there is evidence of this more humane/humanistic legal and judicial set of ideals being excavated from within the European-American worldview by critical scholars in the Global North.[169] Those who find it helpful might therefore think of the recasting of the judicial role that I am proposing under *ubuntu/botho* in a manner similar to the critique levelled by the feminist political theorist, Jennifer Nedelsky, against liberal rights wherein she argues for 'reconceiving rights as relationship'.[170]

Nedelsky objects to the concept of rights that casts them as 'boundaries others cannot cross and it is those boundaries, enforced by the law, that ensure individual freedom and autonomy'. Instead, Nedelsky argues that this view is impoverished by its belief that 'autonomy is independence, which thus requires protection and separation from others.'[171] Instead, she demonstrates that '[w]hat makes autonomy possible is not separation, but relationship. This approach shifts the focus from protection against others to structuring relationships so that they foster autonomy.'[172]

The vernacular law understanding of land rights under IPILRA defended by the Court in *Maledu* is representative of this 'rights as relationship' conception[173] but, as shown, it could

[167] Ibid at 126.

[168] The Preamble reads: 'We, the people of South Africa, Recognise the injustices of our past; … Believe that South Africa belongs to all who live in it, united in our diversity … [and] adopt this Constitution as the supreme law of the Republic so as to Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law'.

[169] For instance, the work of critical race theorists, such as Derrick Bell and Kimberlé Crenshaw, and decolonial and critical indigenous scholars such as Sandy Grande (note 130 above). One helpful articulation of this argument recently is H McGhee *The Sum of Us: What Racism Costs Everyone and How We Can Prosper Together* (2021).

[170] J Nedelsky 'Reconceiving Rights as Relationship' (1993) 1 *Review of Constitutional Studies* 1.

[171] Ibid at 7–8.

[172] Ibid at 8.

[173] For further explication of this central ideal in vernacular law, see Kingwill (note 34 above), and Mnisi Weeks & Claassens (note 120 above).

go further and deeper into the indigenous values and world-sense embodied in a robust understanding of *ubuntu/botho*. A parallel argument can be made about the move from an adversarial system to one in which the courts are effectively mediators and co-strategists to help find the best solution for the dispute with which the parties are confronted: it is a move from courts as *security guards* of 'boundaries' to *facilitators* of healthy social 'relations' or, in terms of a robust appreciation of *ubuntu/botho*, mediators of reconciliation.

Might it be conceivable in South Africa for the judicial system to be recrafted as part of a 'relationship' with the parties to a case (such as between the state and its citizens) that provides the 'support that make[s] the development of autonomy possible'? An amalgamated system as proposed above would certainly invite just that; thus arguing that, as part of the circle of existence defined by *ubuntu/botho*, the courts might play a collaborative role in helping parties achieve true freedom as is only possible in the context of healthy relationships that sustain us.