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Of legal pluralism and secular constitutional centralism: Assessing the development and interpretation of living law through the lens of the Constitution

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Abstract

South Africa is a multicultural society with various socio-legal systems, making it a country based on legal pluralism. Such systems take the form of customary law and cultural-religious practices. "Customary law" refers to customs and usages particular to the indigenous communities of South Africa, while "cultural-religious practices" refers to the rest of these socio-legal systems, for example Islamic law. This article examines the development of living law in the form of customary law and cultural-religious practices in South Africa through the lens of the Constitution. Although the two, customary law and cultural-religious practices, are distinct from each other, they regulate the lives of people socio-culturally. The article argues that the Constitution has become the central institution through which customary law and cultural-religious practices are interpreted, developed, and applied. In the case of customary law, the test is whether its different rules are constitutionally valid, failing which the courts will either develop

it or strike it down. Where a cultural-religious practice has not been accommodated, an inquiry is conducted as to why this is so. This involves applying the test for discrimination to determine whether there are justifiable grounds for not accommodating the cultural-religious practice within the law. This article considers various instances where the development and interpretation of customary law and cultural-religious practices has been heavily dependent on the Constitution within the courts. It describes this phenomenon of subjecting of customary law and cultural-religious practices to the Constitution as "secular constitutional centralism". The latter is an inclusionary method that seeks to incorporate various socio-legal, cultural, or religious systems under the ambit of the Constitution. In this instance the Constitution plays a central role in regulating people's socio-cultural identities. Thus, what appears to be a society based on legal pluralism is one in which its various socio-legal systems are centralised around the Constitution.

Keywords: legal pluralism; constitutionalism; secularism; secular constitutional centralism; deep pluralism; living law; customary law; cultural-religious practices; freedom of religion; constitutional compatibility

1 INTRODUCTION

The article is divided into two sections. The first will discuss the meaning of "secular constitutional centralism" and relate it to the concepts of deep pluralism and living law. It will be argued that secular constitutional centralism is the basis upon which legal pluralism is realised. In particular, it will be demonstrated that tolerance and accommodation are central to the realisation of legal pluralism in South Africa. This forms the backbone of secularism in South Africa as provided for by sections 15, 30, 31, 39(2), and 211(3) of the Constitution.[1] Constitutional compatibility is fundamental to integrating customary law or cultural-religious practice into the broader South African legal framework.[2]

The second section discusses the steps taken to recognise customary law or cultural religious practices. These are dealt with separately. Customary law is recognised in terms of sections 39(2) and 211(3) of the Constitution; cultural-religious rights are provided for in terms of sections 15, 30, and 31 of the same. Although parallels can be drawn in how they are treated by the courts, this

[1] Constitution of the Republic of South Africa, 1996 (hereafter "Constitution").
[2] Moore E & Himonga C "Living customary law and families in South Africa" in Hall K, Richter L, Mokomane Z & Lake L *South African Child Gauge* Cape Town: Children's Institute, University of Cape Town (2018) at 61–62.

article highlights the nuanced ways in which they are incorporated in the broader legal system. This ranges from the identification of a rule of customary law or cultural-religious rights to the application of tests of constitutional compatibility and the remedies available in this regard.

2 AN OVERVIEW OF SECULAR CONSTITUTIONAL CENTRALISM

2.1 Why discuss customary law and cultural-religious practices together?

Although customary law and cultural-religious practices are *de jure* ("in law") distinct from each other, they form a core part of the socio-cultural identity of every person in South Africa. Aziza defines "culture" as "the totality of the pattern of behaviour of a particular group of people";[3] Idang adds that, at its simplest, "culture" refers to a "people's way of life".[4] This means that although customary law and cultural-religious practices are *de jure* distinct, they relate to the cultural identity of the persons who subscribe to them; they speak to what people believe and the customs and practices that define them.[5] A customary marriage in terms of the RCMA has the same basic significance to an African indigenous person as a Muslim or Hindu marriage has to a Muslim or Hindu follower. As such, the effect of the Constitution on the regulation of customary law and cultural-religious practices would be fundamentally similar in each case: it would be a matter of the Constitution regulating people's socio-cultural identity.

2.2 The meaning of "secular constitutional centralism"

The case of *Prince v President of the Law Society*[6] best sums up the essence of secular constitutional centralism in South Africa. The court held that "[t]he test of tolerance as envisaged by the Bill of Rights comes … in giving reasonable space for what is 'unusual, bizarre or even threatening'".[7] Fourie defines secularism is a politico-legal system in which religion is kept within the private sphere.[8] However, in the context of South Africa, secularism relates to the realisation

[3] Aziza RC "The relationship between language use and survival of culture: The case of Umobo youth" (2001) 31(4) *Nigerian Language Studies* 29 at 31.
[4] Idang EO "African culture and values" (2015) 16(2) *Phronimon* 97 at 99.
[5] Taylor EB *Primitive culture: Researches into the development of mythology, philosophy, religion, language, art and custom* 2nd ed London: John Murray (1871).
[6] 2002 (2) SA 794 (CC).
[7] *Prince v President of the Law Society of the Cape of Good Hope* 2002 (3) BCLR 231 (CC) para 172. See also *Christian Education v Minister of Education* 2000 (4) SA 757 (CC) para 32 (hereafter "*Christian Education*").
[8] Fourie P "The SA Constitution and religious freedom: Perverter or preserver of religion's contributions to the public debate on morality?" (2003) 82 *Scriptura* 94 at 95.

of the constitutional right to freedom of religious belief, and to state policy that accommodates various religious identities and practices.[9] In secular South Africa, people have rights to religion and are permitted to express their religious beliefs free of any repression or hindrance in public places.[10] In other words, the state is thereby prevented from coercing persons into religious practices.[11] People are given a choice to be religious or not, and the state is prevented from favouring one religion over another.[12] Religion is not kept in the private sphere, but instead accommodated in the public as part and parcel of a person's identity.

The recognition of religious practices is not absolute, however. It is limited by a practice's compatibility with the Constitution and the extent to which it does not unduly infringe on another person's rights. As noted above, the test is one of tolerance, depending on the reasonableness of accommodating such religious practices within the confines of the Constitution. As in *Prince*, so long as there are legislative regulations to control the smoking of cannabis, the Rastafarian community ought to be permitted to smoke cannabis in line with section 15 of the Constitution concerning the right to religious freedom.

Fourie limits this definition of secularism to religion, but this article, in line with the South African context, extends it to customary laws and cultural-religious practices.[13] This extension is necessary because customary laws and cultural-religious practices are expressed in a fundamentally similar manner. As in *Pillay*,[14] cultural and religious practices may be indistinguishable in that customary law speaks to the cultural practices of the indigenous South African community.[15] These cultural practices of the indigenous South African community can also filter into the realm of African religion and spirituality. For a rule of customary law or cultural-religious practice to be legally recognised, it must be compatible with the Constitution.[16] Secular constitutional centralism is, therefore, the term this article proposes in order to characterise the way in which courts recognise, interpret, and allow customary law and cultural-religious practices.

[9] *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC) paras 120-122.
[10] *S v Lawrence; S v Negal; S v Solberg* paras 120–122.
[11] Fourie (2003) 101.
[12] *S v Lawrence; S v Negal; S v Solberg* para 122.
[13] Fourie (2003) 95.
[14] *MEC for Education: Kwazulu-Natal v Pillay* 2008 (1) SA 474 (CC) para 59.
[15] Section 1 of Act 120 of 1998.
[16] Section 39(2) of the Constitution.

Secular constitutional centralism involves the assimilation of customary law and cultural-religious practices into the broader legal framework. As held by Langa DCJ, customary law ought to be treated as an independent source of law in its own right albeit subject to the Constitution.[17] Secular constitutional centralism acknowledges that South Africa is a diverse society with varying views regarding customary laws, cultures, and religions,[18] each of which needs accommodation. It places the Constitution at the centre of legal reasoning and recognition. That is, so long as a customary law or a cultural-religious practice is not in conflict with the Constitution, it is considered legally valid and recognised.[19] "Recognition" in this context means that the law or practice is seen as legitimate and has legal protection. It is confirmation that the law or practice is part and parcel of the existing legal framework. As such, where the law or practice is challenged, the court will uphold it, all things being equal.

An example is the recognition of Muslim marriages in the case of *Women's Legal Centre v President*.[20] Muslim marriages are not contrary to the Constitution. Given that the Constitution protects cultural-religious freedom,[21] Muslim marriages are valid, hence their recognition. Such recognition does not occur in isolation; rather, Muslim marriages are incorporated in the existing legal system. This is evidenced by the fact that the Divorce Act binds such marriages at dissolution.[22] It is this assimilative approach that constitutes secular constitutional centralism.

2.3 Deep pluralism and living law

A rule of customary law or cultural-religious practice must be ascertainable. It must first be proved to exist within the community concerned. For example, although it had been disputed in *Mabena v Lestoalo*, the court ultimately found that a mother could consent to and receive a daughter's *lobola* under customary law.[23] The same is the case with the Indian cultural-religious rule that requires girls to wear nose rings when they reach a certain age.[24] These instances relate to so-called deep pluralism, namely the realm of unofficial laws that members of religious and/or ethnic groups

[17] *Bhe v Khayelitsha Magistrate* 2005 (1) SA 580 (CC) para 41.
[18] Rautenbach C *Introduction to legal pluralism in South Africa* 5th ed Durban: LexisNexis (2018) at 7.
[19] Section 2 of the Constitution.
[20] 2022 (5) SA 323 (CC).
[21] Sections 15, 30 and 31 of the Constitution.
[22] *Women's Legal Centre Trust v President of the Republic of South Africa* 2022 (5) SA (CC) para 86.
[23] *Mabena v Letsoalo* 1998 (2) SA 1068 (T) at 1074.
[24] *MEC for Education: Kwazulu-Natal v Pillay* para 7.

follow.[25] These exist outside state law; as such, they are optional in that a person can expressly or tacitly consent or not to be bound by them. Griffiths describes deep pluralism as the co-existence of multiple legal systems within various social groups that do not necessarily belong to one single overarching legal system.[26] This article argues that in secular constitutional centralism, the legal orders of various social groups are integrated in the overarching legal system, that is, state law.

As such, customary laws and cultural-religious practices are split into living law, and official state law.[27] Living law refers to rules of customary law or cultural-religious practices as they apply to a particular group of people who subscribe to them in their daily lives.[28] These are unofficial and usually uncodified rules of customary law and cultural-religious practice. They are distinct from official state law. As noted in *Shilubana v Nwamitwa*[29] in regard to customary law, where conditions permit socio-cultural groups to develop their living law. Such development is to be done to suit their dynamic social context with the ever-evolving values in which they exist.[30]

An example of the development of living customary law relates to the role a guardian is meant to play in *lobola* proceedings for a customary marriage to be deemed valid.[31] It must be noted that the development of living law starts outside of litigation: it occurs within a social process in which rules of customary law and cultural-religious practice are pitted against ever-changing social values.[32] In the case of *Mabena v Letsoalo,*[33] this development began when a mother consented to her daughter's marriage and received *lobola*. This was contrary to the long-standing norm that this was the role of a male figure such as a father or uncle.[34] From the viewpoint of the respondents, this long-standing norm was customary law, and as such any departure from it constituted development.[35] In *Mabena v Letsoalo,* customary law was applied in context, taking into account the relevant circumstances of the case, these being the absence of the father and the presence of

[25] Griffiths J "What is legal pluralism?" (1986) 18(24) *Journal of Legal Pluralism* 1 at 2.
[26] Griffiths (1986) 8.
[27] Osman F "The consequences of statutory regulation of customary law: An examination of the customary law of succession and marriage" (2019) 22(1) *PELJ* 1 at 10–11.
[28] Osman (2019) 11.
[29] *Shilubana v Nwamitwa* para 45.
[30] *Shilubana v Nwamitwa* para 45.
[31] *Mabena v Letsoalo* 1998.
[32] *Mabena v Letsoalo* 1998 para 1074.
[33] *Mabena v Letsoalo* 1998 para 1072.
[34] *Mabena v Letsoalo* 1998 para 1074.
[35] *Mabena v Letsoalo* 1998 paras 1074–1075.

the mother and head of the family.[36] The court concluded that a mother has every right to negotiate and receive *lobola* when a father is absent.[37]

Boterere and Maimela argue that the court in *Mabena* recognised the existence of living customary law by legitimising *lobola* negotiations concluded by mothers.[38] The court's decision was based on its duty to develop customary law in line with the 'spirit, purport and objects' of the Bill of Rights.[39] Although no constitutional challenge was raised in *Mabena*, the same outcome would have been reached if it had been raised.[40] As pointed out by Mwambene, courts "develop customary law" in line with constitutional dictates.[41] The court highlighted that it has the duty to investigate the contents of a rule of customary law and, if need be, develop it in line with the Constitution.[42]

Examples of living law can also be found in cultural-religious practices, as was the case in *Prince v President of the Law Society of the Cape of Good Hope*.[43] The court conducted an inquiry into the practice of cannabis use within the Rastafari religion. It satisfied itself that, on the evidence presented, there was no dispute that the use of cannabis is an essential element of the Rastafari religion.[44] Evidence proved that it existed as a living law, with rules and regulations as to whom, when, and how cannabis is to be used. The court stressed, however, that although there is merit to a constitutional argument that those who subscribe to the Rastafari religion have a right to use cannabis as per their religious custom, factors to do with its regulation ought to be considered.[45] These range from the issue of who can issue a cannabis exemption to that of who is eligible for such an exemption – factors which the court argued are best left to the legislature.[46]

It is evident from the examples of *Mabena v Letsoalo* and *Prince* that living law exists outside state law: the development of living law occurs in response to changes in social norms. The court

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[36] *Mabena v Letsoalo* 1998 para 1074.
[37] *Mabena v Letsoalo* 1998 para 1074.
[38] Boterere S & Maimela C "Reconciling *lobolo* with the equality principle: The need to realign official customary law with living customary law in South Africa" (2023) 56 *De Jure* 704 at 709.
[39] Section 39(2) of the Constitution.
[40] *Mabena v Letsoalo* at 1075.
[41] Mwambene L "The essence vindicated? Courts and customary law in South Africa" (2017) 17 *African Human Rights Journal* 35 at 50.
[42] *Mabena v Letsoalo* paras 1072–1075; see also *Mthembu v Letsela* [2000] ZASCA 181 para 40.
[43] 2002 (2) SA 794 (CC) (hereafter "*Prince*").
[44] *Prince* para 18.
[45] *Prince* para 84.
[46] *Prince* para 84.

in *Mabena v Letsoalo* should not be seen as having developed living law but rather as having confirmed it, given that the development started before litigation commenced.

As held in *Ryland v Edros*, the test for the legal legitimacy of an act (cultural-religious practice) is whether it conforms to good morals or *boni mores* and is socially recognised.[47] Rautenbach has interpreted this as referring to the issue of whether the customary law or cultural-religious practice is compatible with the Constitution.[48] To paraphrase Cameron J, the Constitution has laid the foundation of legal and judicial thought and reasoning in South Africa.[49] As shown by *Mabena v Letsoalo* and *Prince*, this entails the question of whether the customary law or cultural-religious practice can be integrated in the legal framework without causing any conflict. Where a customary law or cultural-religious practice fails to be compatible with the Constitution, the court will attempt to develop it accordingly;[50] where this development is not possible, the law or practice is struck down and/or substituted with another one.[51]

In view of the principle of precedent, *stare decisis*, the court's action of confirming the development of the customary law or the legitimacy of a cultural-religious practice removes the law or practice from the realm of living law and shifts it to the realm of official state law. Its interpretation is then restricted to the courts: once codified in legislation or case law, the codification becomes the standard. Osman argues that customary law is held to the same standard as common law (and statutory law), in turn neglecting the nuances that exist within it.[52] As a result, the starting-point for interpreting and applying a customary law or cultural-religious practice would be to look into case law and legislation.

The requirements for a valid customary marriage are an example. These requirements are specified in section 3 of the Recognition of Customary Marriages Act (RCMA) of 1998.[53] For a customary marriage to be valid, both spouses must be above 18 and have consented to the marriage, with the latter having been negotiated, entered into, and celebrated in line with customary law.[54] This means

[47] *Ryland v Edros* 1997 2 SA 690 (C) 706B-C.
[48] Rautenbach C "Deep legal pluralism in South Africa: Judicial accommodation of non-state law" (2010) 42(60) *Journal of Legal Pluralism* 143 at 156.
[49] *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588 (W) 618C-D.
[50] *Mabena v Letsoalo* at 1075.
[51] 2005 (1) SA 580 (CC) (hereafter "*Bhe*").
[52] Osman (2019) 13.
[53] Act 120 of 1998.
[54] Section 3(1) of Act 120 of 1998.

that when determining whether a customary marriage is valid, the Act is the starting-point for this assessment. The task of ascertaining the validity of a customary marriage is thus reduced to a statutory interpretation exercise. This distorts customary law and hinders its development.[55] If the rule of customary law or cultural-religious practice is not codified, it must be ascertained within its context and evaluated against the Constitution. This entails a judicial inquiry into the practice's existence, its development, if any, and the question of whether it is compatible with the Constitution and any other law thereof.[56]

It is from this assessment stated above that secular constitutional centralism stems from. An example of this is *Bhe v Khayelitsha Magistrate*.[57] There was evidence that the rule of male primogeniture existed in customary law. In the previous case of *Mthembu v Letsela*, Mpati AJA confirmed the existence of the customary law rule of male primogeniture.[58] The judge argued that for a court "to strike down an African institution[,] proper examination must go to the essential purpose and content of the practice".[59] Similarly, the Constitutional Court in *Bhe* assessed the essential purpose of the customary law of male primogeniture.[60] It determined that although male primogeniture existed as a customary law, such a practice did not pass constitutional muster as it was contrary to the right to equality as provided by section 9 of the Constitution.[61] The court held that the right to equality is a core constitutional right, with section 9 providing for the achievement of substantive equality.[62] As such, any rule of male primogeniture was declared constitutionally invalid.[63]

To remedy this, the court in *Bhe* ruled that the Intestate Succession Act should be used instead of the rule of male primogeniture.[64] Where a rule of customary law has been struck down as constitutionally invalid and there are no prospects for its development in law, the court looks elsewhere within the legal framework for a solution which is constitutionally valid.[65] This is the

[55] Osman (2019) 13.
[56] *Bhe* paras 88–94.
[57] 2005 (1) SA 580 (CC).
[58] *Mthembu v Letsela* para 47.
[59] *Mthembu v Letsela* para 47.
[60] *Bhe* paras 75–100.
[61] *Bhe* para 109.
[62] *Bhe* para 50.
[63] *Bhe* para 136.
[64] *Bhe* paras 101–108.
[65] *Bhe* paras 107–119.

basis of secular constitutional centralism. What is central to South Africa's legal framework is the Constitution; within that framework, customary law, cultural-religious practice, and common law, although independent of each other, are intertwined. They are assimilated into a single legal system, one which, when conditions permit, allows them to borrow from each other.

3 APPLICATION OF SECULAR CONSTITUTIONAL CENTRALISM IN INSTANCES OF CUSTOMARY LAW AND CULTURAL RELIGIOUS PRACTICES

3.1 Recognition of customary law

The first step in the recognition of a rule of customary law is its ascertainment. This involves an inquiry into the past and present practices of the concerned community.[66] Judicial notice is given to the courts of the existence of the rule of customary law.[67] The courts then inquire into the content of the law to determine its true nature. This may be difficult where the customary law is "unwritten and not "reasonable and certain".[68] Thereafter, the rule of customary law is evaluated in relation to the Constitution. As Mpati AJA notes, courts must examine the "essential purpose and content" of a rule of customary law before deciding whether to apply, develop, or strike it down.[69]

The Constitutional Court in *Shilubana* held that where there is a dispute about the legal position of a rule of customary law, the court must inquire about its traditions and present practice[70] and balance the historical record of the customary law with the concerned community's "usage" thereof.[71] Such an inquiry considers submissions made by the parties and expert evidence regarding the practice.[72] As in *Mabena v Letsoalo*,[73] the court acknowledged that, at the time, only a male acting as the guardian (father or uncle) of the bride could consent to and accept *lobola*. However, present practice, according to expert evidence, paints a different picture of the situation. The court held that customary law was in a state of constant development,[74] pointing out that there were instances where a mother could consent to and receive her daughter's *lobola*.[75] Likewise, the

[66] *Shilubana v Nwamitwa* para 44.
[67] Section 1(1) of Act 45 of 1988.
[68] Kruuse H & Sloth-Nielsen J "Sailing between Scylla and Charybdis: *Mayelane v Ngwenyama*" (2014) 17(4) *PELJ* 1709 at 1717–1718.
[69] *Mthembu v Letsela* para 47.
[70] *Shilubana v Nwamitwa* para 49
[71] *Alexkor Ltd v Richtersveld Community* 2004 (5) SA 460 (CC) paras 56–57.
[72] *Shilubana v Nwamitwa* para 46.
[73] *Mabena v Letsoalo* 1998 (2) SA 1068 (T) at 1072.
[74] *Mabena v Letsoalo* para 1074.
[75] *Mabena v Letsoalo* paras 1073–1074.

South African Law Commission, in a discussion paper on harmonisation and indigenous law, noted that a mother could consent to and arrange for her son's marriage.[76] It is in the light of these considerations that the court in *Mabena v Letsoalo* held that customary law ought to be developed to allow a mother to consent to and receive *lobola* for her daughter.[77]

After identifying the practice, the second step is to determine its purpose. As Mpati AJA stresses, a court's decision must be informed by a proper investigation into the "essential purpose" of the customary law.[78] This is an enquiry into the reason for the customary law in the context in which it is applied. In *Bhe,* the court held that the rule of male primogeniture rested on the concept of custodianship.[79] The male figure who inherits the property also takes over the obligations of the deceased.[80] That is to say, the heir inherits the duty to maintain and support all of the family members who would have relied on the deceased.[81] As in the case of the identification of customary law, the sources of customary law are elucidated via evidence of present practice presented by the concerned parties as well as expert witnesses.

Following the identification of the practice and its purpose, the court enquires about its constitutional compatibility. If it is not compatible, the question is whether it ought to be developed or struck off. A rule of customary law can thus be struck off only if it is found incompatible with the Constitution.[82] In *Bhe,*[83] the court acknowledged that the rule of male primogeniture existed within customary law. However, it was incompatible with the Constitution to the extent that it violated the rights to equality afforded to women.[84] This constitutional analysis involves balancing, on the one hand, the need to incorporate and develop customary law[85] and, on the other, the need to protect such rights that a customary law might infringe upon.

A *prima facie* constitutional rights violation must first be established and assessed against any possible justification for the said violation. This is in line with section 36(1) of the Constitution,

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[76] South African Law Commission Project 90 *Discussion Paper 74 on the Harmonisation of the Common Law and Indigenous Law* (1997) at 82.
[77] *Mabena v Letsoalo* paras 1074–1075.
[78] *Mthembu v Letsela* para 47.
[79] *Bhe* para 76.
[80] *Bhe* para 76
[81] *Bhe* para 76.
[82] *Bhe* paras 101–116.
[83] *Bhe* paras 95–100.
[84] *Bhe* para 95; see also section 9 of the Constitution.
[85] Section 39(2) of the Constitution.

which provides that the rights in the Bill of Rights are not absolute and may be limited upon just cause.[86] In *Bhe*,[87] the rights to human dignity and equality, as well as the rights of children, were shown to be violated *prima facie* by the rule of male primogeniture.[88] The court maintained that the justification for the rule of male primogeniture could not be reconciled with section 36(1) of the Constitution.[89] Indeed, it held that the substance of male primogeniture was enshrined in patriarchal norms existent within customary law.[90] Male primogeniture was held to be an extreme violation of the rights to human dignity, equality, and the rights of children.[91] It unfairly discriminates, and cannot be reconciled with the Constitution.[92] The court held that the argument that the male heir becomes a custodian with a duty to support the dependants does not suffice,[93] because the reality is that most dependents are deprived of adequate support from the heir, given that there is no system by which the heir's support of the dependents can be enforced and/or monitored.[94] As such, the rule of male primogeniture was declared invalid and struck off.

An argument can be made that the rule of male primogeniture could have been developed rather than struck off. Nhlapo argues that the customary law rule of male primogeniture has been distorted to emphasise its patriarchal dimension.[95] As in *Mabena*,[96] the court correctly applied customary law, balancing present practice and expert evidence. As argued by Nhlapo,[97] a balance between the communitarian and patriarchal features of customary law would ensure that there are no direct barriers to women inheriting. If there are, these could always be reconciled with the Constitution to accommodate equality. This is more or less in line with Ngcobo J's reasoning in his minority judgment in *Bhe*.[98] Ngcobo J noted that when ascertaining a rule of customary law, a court must consider what people are actually doing.[99] At present, the practice is that the rule of male

[86] Section 36(1) of the Constitution.
[87] *Bhe* paras 47–59.
[88] Sections 9, 10 and 28 of the Constitution.
[89] *Bhe* paras 95–100.
[90] *Bhe* paras 95–100.
[91] *Bhe* paras 95–100.
[92] *Bhe* paras 95–97.
[93] *Bhe* para 96.
[94] *Bhe* para 96.
[95] Nhlapo TR "African customary law in the Interim Constitution" in Liebenberg S (ed) *Towards the final constitution: A critique of the Interim Constitution of South Africa from a gender perspective. The way forward* Cape Town: University of the Western Cape Law Centre (1995) at 162.
[96] *Mabena v Letsoalo* 1072–1074.
[97] Nhlapo (1995) 162.
[98] *Bhe* paras 219–223.
[99] *Bhe* paras 220.

primogeniture has been applied to exclude women from inheriting.[100] This negates the flexible nature of customary law, which allows for compromise where necessary.[101]An obligation thus existed on the courts to develop that rule in terms of section 39(2) of the Constitution so as to harmonise it with section 9(3) of the Constitution.[102]

The *Bhe* judgment highlights secular constitutional centralism in South Africa. Central to the ruling was a constitutional analysis of whether the rule of male primogeniture is compatible with the Bill of Rights, namely the right to human dignity, equality, and the rights of children, the result of which was a finding that the rule was constitutionally invalid.[103] The ruling appraised the customary law rule of male primogeniture not in isolation but within the context of South Africa's legal framework, with the court declaring that substituting the customary law rule of male primogeniture with the provisions of the Intestate Succession Act was an appropriate remedy.[104]

Here, the court had regard to recommendations by the South African Law Reform Commission that the Intestate Succession Act be extended to families bound by customary law.[105] Such a remedy would ensure that spouses and children enjoy preference over the estate of the deceased before any other dependent,[106] thus protecting them from a violation of their constitutional rights. These rights include the right to human dignity, equality, and the rights of children.[107] Depriving children from inheriting from their fathers based on gender or sex not only discriminates against them but also diminishes their humanity as well as limiting their access to much-needed resources.

3.2 Recognition of cultural-religious practices

Recognition of cultural-religious practice follows a similar process to that of customary law. It rests on a constitutional analysis regarding the validity of the practice. As per *Prince*, the critical question concerns the extent to which a cultural-religious practice can be harmoniously integrated in the broader legal framework.[108] Sachs J maintained that the Bill of Rights envisions a test of

[100] *Bhe* paras 219–223.
[101] Bennett TW *Human rights and African customary law under the South African Constitution* (1995) at 63.
[102] *Bhe* para 222.
[103] *Bhe* paras 95–100.
[104] *Bhe* paras 117–119.
[105] South African Law Commission Project 90 *Report on Customary Law of Succession* (2004) at 65.
[106] *Bhe* paras 117–121.
[107] Sections 9, 10 and 28 of the Constitution.
[108] *Prince* para 172.

tolerance.[109] This test has three steps: identification of the cultural-religious practice; assessment of its compatibility with the constitution and existing laws; and determining whether it is within the powers of the court to give effect to the cultural-religious practice in question.

Identification of a cultural-religious practice is seldom the difficult part. In the case of *Prince*, it was not disputed that Rastafarians consider smoking cannabis a sacred practice.[110] Professor Yawney even testified to the effect that Rastafarians regard cannabis is regarded as a sacred herb for smoking.[111] The court acknowledged this was not in dispute.[112] In another case, *Pillay*,[113] heard in the Equality Court, expert evidence by one Dr Rambilass confirmed that it was an integral practice in Hindu culture for a girl who has come of age to wear a nose ring.[114] This was not disputed by the court. In both cases, the courts satisfied themselves as to the identification of these cultural-religious practices.

There may be instances, however, where a court assesses the sincerity of a person's claim to belong to a religion.[115] This is to avoid instances where a person uses his or her asserted religious beliefs to break the law. Such an enquiry ensures that the purported beliefs are held in good faith and are not fictitious and/or capricious.[116] As held in *Christian Education*, held that to grant of exceptions to general laws to religious groups is to accommodate them and would not infringe on the rights of those who held contrary beliefs.[117] The court in *Prince* held that courts should refrain from assessing the sincerity of a person's beliefs unless there is a genuine dispute.[118] This is because matters of religious and cultural belief are difficult to prove.[119] As emphasised in *Pillay*, if a person attests to holding certain religious beliefs, it is not for the court to question her on that basis, as the court cannot relate to her cultural-religious beliefs in the same way as she herself does.[120] This would impose an unnecessary burden on the person or group that holds the beliefs.[121] In the

[109] *Prince* para 172.
[110] *Prince* paras 18–21.
[111] *Prince* paras 18–21.
[112] *Prince* paras 18–21.
[113] *MEC for Education: Kwazulu-Natal v Pillay* paras 1–14.
[114] *MEC for Education: Kwazulu-Natal v Pillay* para 59.
[115] *Prince* paras 41–42; see also *MEC for Education*: *Kwazulu-Natal v Pillay* para 52.
[116] Ebrahim S "The employee's right to freedom of religion versus the employer's workplace needs: An ongoing battle: TDF Network Africa (Pty) Ltd v Faris 2019 40 ILJ 326 (LAC)" (2021) 24 *PELJ* 2 at 17.
[117] *Christian Education* para 42.
[118] *Prince* para 42.
[119] *Prince* para 42.
[120] *MEC for Education: Kwazulu-Natal v Pillay* para 52.
[121] *Prince* para 42.

absence of sufficient and credible evidence to the contrary, then, the court will consider the applicant's beliefs to be sincere.[122]

The next step is the inquiry into the constitutional compatibility of the cultural-religious practice. Such an inquiry involves balancing the rights to cultural-religious freedom as enshrined in sections 15, 30, 31 of the Constitution with the rights and laws that may be affected by such freedom. Where a cultural-religious right has not been recognised, the starting-point is engaging in a *Harksen* test of unfair discrimination.[123] In both cases, *Prince* and *Pillay,* the courts acknowledged that sections 15, 30, and 31 provide for cultural-religious rights. In *Prince,*[124] section 31(1)(a) of the Constitution was interpreted as protecting religionists' practice of their faith. *Pillay* then held that interference with a person's rights in terms of sections 15 and 30 of the Constitution would amount to discrimination on grounds of religion under section 9(3) and (4) of the same.

Having demonstrated a *prima facie* case of discrimination, the next step is an inquiry into whether such discrimination is justified. In *Prince,* the court held that rights within the Bill of Rights could be limited only in terms of section 36(1) of the Constitution. This limitation must be reasonable and justifiable in an open democratic society, taking into account the nature of the right limited, the extent of its limitation, the importance of the limitation, and whether less restrictive means exist to achieve the purpose of the limitation.[125]

The court in *Prince* acknowledged that the purpose of criminalising the use of cannabis by both the Drug Trafficking Act and the Medicines Act was to prevent drug abuse.[126] It was established that drug abuse was a societal vice which the government had an interest in curbing.[127] The court found that criminalisation of the use of cannabis, although legitimate, constituted a violation of the Rastafarians' right to practise their religion[128] and that such violation was unjustified. In *Pillay,*[129] the court held that the Constitution protects voluntary and obligatory practices. It held that the differentiation between voluntary and obligatory practices is irrelevant for the purposes of a court

[122] *Prince* paras 41–43.
[123] *Harksen v Lane* paras 50–60.
[124] *Prince* para 39.
[125] *Prince* para 45.
[126] *Prince* para 81.
[127] *Prince* paras 51–53.
[128] *Prince* paras 51–53.
[129] *MEC for Education: Kwazulu-Natal v Pillay* para 65.

determining the extent to which the practice is protected under the Constitution.[130] Ebrahim interpretates the court in *Pillay* to mean that what is voluntary or obligatory is different depending on the person.[131] This means that it is irrelevant to the discussion whether Sunali (the applicant in *Pillay*) or Prince could wear a nose ring or smoke cannabis, respectively. In any case, where a law criminalises or bans a voluntary cultural-religious practice, the practice ceases to be voluntary as the element of choice is removed. Ngcobo J highlights that the right to freedom of religion and cultural identity implies the "absence of coercion or restraint".[132] This is the basis of secular constitutional centralism.

The last step is assessing whether a court should grant an order legally recognising the cultural-religious practice. This considers the nature of the practice and the implications of legally recognising it. In *Pillay*,[133] the court granted that public schools must make cultural-religious exceptions to their uniform or dress code. The order limits itself to public schools because discrimination in some form may be unavoidable in private schools, as, for instance, where a Christian school has a dress code that aligns with its Christian beliefs. Prior to the question of the school's cultural-religious rights, it is the case that section 18 of the Constitution provides for the right to association. As such, the school may accommodate the group of people it intends to cater to – Christians – in turn justifying its dress code. Public schools do not enjoy such a luxury: by nature, they accommodate the public, which means everyone irrespective of race and cultural-religious background.

In *Prince*, the court could not grant an order effecting an exemption for the smoking of cannabis by Rastafarians for religious purposes. Although they have a right to use cannabis for religious purposes, other considerations regarding the exemption had to be accounted for. These include who grants said exemption, who may be granted such exemption, the quantity of cannabis the authorised person may have in possession, and the legal source of the cannabis.[134] The court rightly noted that such considerations fell into the realm of the legislature.[135] As such, the order of

[130] *MEC for Education: Kwazulu-Natal v Pillay* para 65.
[131] Ebrahim (2021) 17.
[132] *Prince v President of the Law Society of the Cape of Good Hope* para 39.
[133] *MEC for Education: Kwazulu-Natal v Pillay* para 114.
[134] *Prince* para 84.
[135] *Prince* para 84.

invalidity regarding the Act criminalising the use of cannabis was granted and suspended to give Parliament time to amend it.[136]

4 CONCLUSION

In conclusion, the Constitution lies at the centre of legal pluralism in South Africa. Secularism is thus embodied in the tolerance and accommodation of differing norms and beliefs within various South African societies. This is the approach by which socio-legal norms are incorporated in the broader legal framework. A law or norm is only invalid to the extent it violates the Constitution. As explained in the second part of this article, courts must investigate and understand the nature of a rule of customary law and/or cultural-religious norms. The Constitution provides for customary law in terms of sections 39(2) and 211(3). Cultural-religious rights are provided under sections 15, 30, and 31 of the Constitution.

As regards customary laws, an obligation is placed on the courts to develop them in line with the Bill of Rights. Where such development is impossible, the rule of customary law is struck off. As regards cultural-religious practices, they must be limited only to the extent that they violate the constitution in terms of section 36(1) of the Constitution. A law that hinders the realisation of cultural-religious practice is *prima facie* discriminatory. It calls for a legitimate justification to be made. Ultimately, the Constitution is central to the application of customary law and cultural-religious rights in South Africa.

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