# THE FUTURE OF LEGAL ORDERS IN AFRICA

CENTRE FOR LEGAL
INTEGRATION IN AFRICA

UNIVERSITY of the WESTERN CAPE

FACULTY of LAW
DEPARTMENT OF PRIVATE LAW

## INAUGURAL SYMPOSIUM

## CENTRE FOR LEGAL INTEGRATION IN AFRICA

## DEPARTMENT OF PRIVATE LAW

## UNIVERSITY OF THE WESTERN CAPE, SOUTH AFRICA

**Friday, 22 October 2021**

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# BOOK OF ABSTRACTS

## (AND CONFERENCE PROGRAMME)

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# ABOUT CLIA

## Our history

The Centre for Legal Integration in Africa (CLIA) was 'born' on 12 October 2020 after its approval by the Council of the University of the Western Cape. With a stellar team of researchers and advisory board, CLIA is designed to be a confluence of interdisciplinary research on the interaction of legal orders in sub-Saharan Africa. Its high-quality research will be disseminated through scholarly publications, workshops, conferences and visiting fellowships, as well as postgraduate teaching and supervision.

## Our mission

From the colonial era, the interaction of legal orders, otherwise known as legal pluralism, has been problematic in sub-Saharan Africa. However, history suggests that the laws imposed on African countries through colonial transplants and their accompanying socioeconomic changes will eventually merge with indigenous African laws. While post-apartheid law reforms point towards a South African common law, systematic research on legal integration is missing.

To fill this gap, CLIA pioneers interdisciplinary research, policy engagement, and social outreach on legal pluralism in Africa. It uses the innovative concept of adaptive legal pluralism to shift scholarly and policy attention from conflict of laws to dialogue between state laws and indigenous African laws. Through the interdisciplinary expertise of its members and research associates in law, anthropology, history and political science, it targets development practitioners and policy makers such as judges, ministry of justice officials, traditional leaders and law reform commissions.

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### About

Professor Brian Z. Tamanaha is a jurisprudence and law and society scholar, and the author of ten books and over seventy-five articles and book chapters. His latest book is *Legal Pluralism Explained: History, Theory, Consequences* (Oxford 2021). His previous book, *A Realistic Theory of Law* (Cambridge 2017), received the 2019 IVR Book Prize from the International Association of the Philosophy of Law and Social Philosophy for best legal philosophy book published in 2016-18, as well as an Honorable Mention for the 2018 Prose Awards in Law by the Association of University Presses. Four of his books have received international awards, including *A General Jurisprudence of Law and Society* (Oxford 2001), which won a law and society prize and a legal theory prize. *On the Rule of Law* (Cambridge 2004) has been translated into ten languages, and altogether, his publications have been translated into thirteen languages.

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## Expert panel: Inheritance and identity

### Speaker bio: Chuma Himonga

Chuma Himonga is Professor of Law at the University of Zambia, Emeritus Professor of the University of Cape Town and a member of its College of Fellows. She held the Department of Science and Technology South African Research Chairs Initiative (SARChI) Chair in Customary Law, Indigenous Values and Human Rights at the University of Cape Town, which was funded and managed by the National Research Foundation (NRF). The Chair was initially awarded for the period 2010-2015. It was renewed for a second term to 2019 upon a successful review. She is an NRF-Rated Researcher (until 2022). The University of Cape Town awarded her the 2016 Alan Pifer Research Award in recognition of outstanding research that demonstrates relevance to the advancement and welfare of South Africa's disadvantaged people, and the Vice-Chancellor's Exceeds Award in recognition of exceptional performance in the 2015/2016 annual performance cycles.

She was a member of the South African Law Reform Commission Project on the Harmonisation of the Common Law and Indigenous Law from 2003-2006, and has served on the Boards of the International Association of Law Schools and the Commission on Legal Pluralism, among others. She is currently the Dean of the University of Zambia School of Law. Chuma Himonga has published in the areas of her research interest: Law of person and marriage, customary law, children's rights, women and law in Africa, legal pluralism, indigenous values and human rights. She has collaborated in several

international and regional research projects in Europe and Africa in the areas of family law, customary law and human rights.

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**Speaker bio: Enyinna Nwauche**

Enyinna Sodienye Nwauche is a professor of law at the Nelson Mandela School of Law, University of Fort Hare, East London, where he is Head, Department of Private Law. He previously taught at Rhodes University Grahamstown, the University of Botswana and the Rivers State University of Nigeria.

He is a rated NRF scholar and has held fellowship and visiting positions at the Max Planck Institute for Public International Law Heidelberg, the Max Planck Institute for Tax Competition and Intellectual Property in Munich Germany, the AHRC Research Centre for IP and IT Law at the University of Edinburgh, Scotland and the South African Institute for Advanced Constitutional, Public Human Rights and International Law (SAIFAC).

Prof Nwauche is a member of the editorial boards of the *Constitutional Court Review*, *Scholarly and Research Communication (SCR)* and *Speculum Juris*. He is acting chair of the Coordinating Committee of the African Network of Constitutional Lawyers (ANCL), member of the African Union (AU) Working Group on a Model Law for the Protection of Cultural Goods and Heritage and former Director General of the Nigerian Copyright Commission.

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**Expert panel: Traditional leadership**

**Speaker bio: Janine Ubink**

Janine Ubink is professor of law, governance and development at the Van Vollenhoven Institute for law, governance and society, of Leiden University. Her research centers around African law and governance, with a primary focus on customary law and its relation to state law, traditional authorities, land law and policy, gender, transitional justice and rule of law reforms and legal empowerment. Her regional focus is on Africa, particularly Ghana, Namibia, Malawi, Somalia, and South Africa, but she has also been involved in comparative research in Asia and Latin America. She is the President of the international Commission on Legal Pluralism, and also works as a consultant in this field, most recently as an advisor to the Ministry of Justice of Somalia. Ubink has taught at the law schools of University of California Irvine, New York University and Australia National University as well as at the FHR Lim A Po Institute for Social Studies (Paramaribo, Suriname). She studied law at Leiden University (1995-2000) and acquired her PhD in legal anthropology from Leiden University with her thesis "In the land of the chiefs: Customary law, land conflicts, and the role of the state in peri-urban Ghana" (2008).

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**Speaker bio: Aninka Claassens**

Aninka Claassens is the former Director of the Land and Accountability Research Centre (LARC) and currently a chief researcher at LARC. Aninka has a PhD in Development Studies from Roskilde University in Denmark. Her overarching research focus is on the nature and content of customary law in the South African constitutional dispensation. In particular, she focuses on the tensions between the jurisprudence of open-ended 'living' customary law emanating from the Constitutional Court, and the bounded and autocratic version of custom contained in traditional leadership laws that have been enacted since 2003.

In 2009 she brought the Rural Women's Action Research programme (RWAR) into the (then) Law Race & Gender Unit (LRG) at UCT. Soon after that, Sindiso Mnisi joined RWAR and they worked together on the Traditional Courts Bill. Aninka coordinated the research for the legal challenge against the Communal Land Rights Bill, which was struck down by the Constitutional Court in 2010.

She worked closely with the Community Agency for Social Inquiry in designing a survey of three thousand women to ascertain rates of change in relation to unmarried women accessing residential sites in 'communal' areas and has published many articles that pertain to changing marriage rates and land rights. In 2015, RWAR became a separate research centre, which is now known as LARC.

Aninka has been engaged in land issues in South Africa for 25 years. She began her working life as a trade union organiser. During the 1980s she worked closely with rural communities resisting forced removals. From 1990 she was senior researcher in the Land Rights Project at the Centre for Applied Legal Studies (CALS) at Wits University. During South Africa's transition, Aninka participated in working groups that developed proposals pertaining to legislation dealing with restitution and the protection of labour tenant and farm worker rights. She was a member of the ANC's land desk and was a technical expert to the Constitutional Assembly on land rights and the property clause.

From 1997-1999 she was an Advisor to the Minister of Land Affairs. At the Ministry she was engaged in the process of drafting and negotiating legislation pertaining to land rights on white farms and in developing proposals for tenure reform. From 2000-2003 she undertook various research projects with PLAAS at UWC, and also worked on urban land issues. From 2003-2009 she worked for the Legal Resources Centre, where she co-ordinated the rural consultation and research process pertaining to a legal challenge to the Communal Land Rights Act and other customary law related cases. In 2009 she moved to the Law Race and Gender Unit at UCT and founded the Rural Women's Action Research Project (RWAR) there.

Today, LARC is part of a collaborative network constituted as the Alliance for Rural Democracy, which provides strategic support to struggles for the recognition and protection of rights and living customary law in the former homeland areas of South Africa. It is particularly

interested by the ways in which laws and policies frame power relations within these areas and threaten ongoing initiatives for democratic change and accountability at the local level.

In 2016, Aninka was appointed to chair the land component in a High Level Panel headed by former president, Kgalema Motlanthe, which has been engaged in public hearings about poverty and inequality, land reform and social cohesion throughout South Africa. The Panel reported to Parliament on its findings and recommendations in November 2017.

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**Expert panel: Gender and marriage reforms**

**Speaker bio: Elsje Bonthuys**

Professor Elsje Bonthuys completed her BA, LLB and LLM degrees at Stellenbosch University in South Africa and her Ph.D. on the allocation of child custody at Cambridge University. After a short stint at the bar, she taught at Stellenbosch University and at the University of the Witwatersrand where she has been a professor of law since 2007. Her research covers the interaction between race, class, gender and sexual orientation in family law rules. She is currently researching the intricate legal and social problems produced by the interface between contract law and family law, which have emerged as more legal systems start to enforce prenuptial and partnership contracts between married and unmarried family members.

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**Sindiso Mnisi Weeks**

Sindiso Mnisi Weeks is an Associate Professor of Law and Society in the School for Global Inclusion and Social Development at the University of Massachusetts Boston, and Adjunct Associate Professor in Public Law at the University of Cape Town. She previously served as a senior researcher in the Centre for Law and Society at UCT, where she worked in the Rural Women's Action Research Programme (now the Land and Accountability Research Centre), combining research, advocacy and policy work on women, property, governance, dispute management, and participation under customary law and the South African Constitution. Dr. Mnisi Weeks received her DPhil from the University of Oxford's Centre for Socio-Legal Studies, as a Rhodes Scholar, and previously clerked for then Deputy Chief Justice of the Constitutional Court of South Africa, Dikgang Moseneke. She has taught African Customary Law at UCT, Law and Society at the University of Massachusetts Amherst, and for the Consortium for Graduate Studies in Gender, Culture, Women, and Sexuality (GCWS) based at the Massachusetts Institute of Technology.

Dr. Mnisi Weeks has authored Access to Justice and Human Security: Cultural Contradictions in Rural South Africa (Routledge, 2018) and co-authored African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives (OUPSA, 2015). She is also a contributing

author of leading South African law textbooks on Constitutional Law and Family Law, as well as the Oxford Handbook on Law and Anthropology (OUP, 2021). Dr.

Mnisi Weeks's current projects include authoring a book on Rule of Law in Context: South Africa (Hart Publishing) with Heinz Klug and Sanele Sibanda, and a new monograph whose working title is Behind the Veil of Isidwaba: Rural South African Women Lay Down the Law. She is an in-coming editor of one of the American Anthropological Association's official journals, Political and Legal Anthropology Review (PoLAR).

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## ABSTRACTS AND BIOS OF PARALLEL SESSION SPEAKERS

**Professor Thuli Madonsela**

**Transforming indigenous law beyond assimilation: Social justice issues in the harmonisation of indigenous law with the Constitution**

A recent Pietermaritzburg High Court judgement declaring unlawful and unconstitutional the leasing of land held under the Ingwenyama Trust brings to the fore some unintended social injustices of state attempts to harmonise indigenous law rights relating to land, succession, and traditional leadership with the Constitution since the advent of the 1993 Constitution. At the core is interpreting indigenous law through the lens of colonially imposed European laws in the pursuit of human rights, particularly regarding gender equality and equality between groups and communities.

A challenge in this regard is lack of equivalents to customary law tenets within the imposed legal frameworks. One example is the distortion of the user rights enjoyed by members of traditional communities in respect of land that is collectively and indivisibly owned and where traditional leaders are overseers. In pursuit of greater security of tenure, the outcome of using the common law lens and its legal concepts such as leasing and trusteeship, is often less security, ambiguity, loss of traditional claims, and heightened vulnerability for historically marginalised groups such as women, children and poor families.

This paper discusses selected areas of South African indigenous law and points out key constitutional inconsistencies. It outlines attempts that have sought to move the needle regarding constitutional congruence. It demonstrates that certain changes have been more about super imposing the received law than developing customary, and points out the salient unjust outcomes of these jurisprudential inadequacies. It explores the link between uncomfortable contemporary undertones to historical perceptions of indigenous law and customs as repugnant. It concludes with thoughts on discarding harmful dimensions – authentic or bastardised – while retaining Ubuntu-aligned tenets, exploring plasticity, and remoulding same to foster greater constitutional and global human rights congruencies.

**Speaker bio: Professor Thulisile Madonsela**

Professor Thulisile "Thuli" Madonsela, an advocate of the High Court of South Africa, is the law trust chair in social justice and a law professor at the University of Stellenbosch, where she conducts and coordinates social justice research and teaches constitutional and administrative law. She is the founder of the Thuma Foundation, an independent democracy leadership and literacy public benefit organisation and convener of the Social Justice M-Plan, a Marshall Plan-like initiative aimed at catalysing progress towards ending poverty and reducing inequality by 2030, in line with the National Development Plan (NDP) and Sustainable Development Goals (SGGs). She is a monthly columnist for the Financial Mail and City Press/Rapport, and occasionally writes for other newspapers.

A multiple award-winning legal professional, with over 50 national and global awards, Thuli Madonsela has eight honorary doctor of laws degrees, one of which was awarded by the Law Society of Canada. She holds a BA Law from Uniswa, a Bachelor of Laws from Wits University and a Harvard Advanced Leadership Certificate, and has been trained in legal drafting, leadership, strategic planning, scenario planning, gender mainstreaming, mediation and arbitration, and training facilitation, among other things.

Thuli Madonsela was the Public Protector of South Africa from 2009 to 2016. She is credited with transforming the institution by enhancing its effectiveness in promoting good governance and integrity – including ethical governance and anticorruption in state affairs – through her reports, jurisprudence on the powers of the Public Protector and introduction of ADR. She is the architect of the OR Tambo Declaration on the minimum standards for an effective ombudsman institution and cooperation with the African Union on strengthening good governance and co-founder of the African Ombudsman Research Centre (AORC) at the University of KwaZulu-Natal, and served as AORC's founding chairperson. As a full-time commissioner of the South African Law Commission, she supervised several investigations – among them Project 25 – on aligning all laws with the Constitution, and participated in the drafting of several laws. She chaired and later project-managed the Equality Legal Education Training Unit (ELETU), which provided foundational training for Equality Court judicial officers. She is the co-founder and one of the inaugural leaders of the South African Women Lawyers Association (SAWLA).

Named one of Time 100's Most Influential People in the World in 2014, Forbes Africa Person of the Year in 2016 and one of BBC's 100 Women, her peer recognition includes the Commonwealth Lawyers Association's Truth and Justice Award, Transparency International's Integrity Award, the South African Law Society's Truth and Justice Award, General Council of the Bar membership, the Sydney and Felicia Kentridge Award, the SAWLA Women in Law Icon Award, Botswana Lawyers Association Honorary Bar membership, the German Presidential Medal, the German Africa Prize, the African Peer Review Mechanism Anticorruption Crusader Award, Tällberg Global Leader recognition, Rotary International's Paul Harris Fellow recognition, the Gauteng Premier's Provincial Achiever Award, and having a rose named after her in recognition of her social justice and integrity work. Recently, Madonsela was appointed as Knight of the Legion of Honour by French President Emmanuel Macron. Viewed as the highest decoration in France, the Knight of Legion was bestowed on

Madonsela in recognition of her remarkable achievements in defence of the rule of law and the fight against corruption in South Africa

Thuli Madonsela is one of the drafters of South Africa's Constitution and co-architect of several laws that have sought to anchor South Africa's democracy. Among the laws she has helped draft are the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA), the Employment Equity Act (EEA) and the Recognition of Customary Marriages Act. She also contributed to the conceptualisation and quality assurance of laws such as the

Promotion of Administrative Justice Act, the Domestic Violence Act and the Repeal of the Black Administration Act. Her policy contributions have focused on the transformation of the judicial system, the promotion of equality – particularly gender equality – and the Victims Charter. She has also participated in the drafting of several international instruments, mainly on human rights, gender, race, disability, development and gender-based violence, in addition to participating in the preparation of country reports and representing the country.

Her extensive publishing record includes books/learning resources, book chapters/forewords, journal articles, newspaper articles and papers. She is a sought-after speaker and has presented several memorial lectures, including international memorial lectures for Kofi Annan, John Wendell Holmes and Oliver Tambo, and the Desmond Tutu International Peace Lecture.

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**Professor Bonolo Dinokopila**

**Contemporary challenges to the application of customary law in Botswana**

The reception of Roman Dutch Law (RDL) in Botswana in 1891 and the existence of a dual legal system have brought challenges to the Botswana legal system. Several commentators have warned about the dangers of the 'haphazard introduction of foreign principles into an existing legal system' (van Niekerk; 1970). Others have written on the problems associated with criminal justice and the traditional courts (Boko; 2002). However, Customary Law, or at the very least, a semblance of such, continues to be applied in Botswana. The application of Customary Law has thus far revealed that it is under pressure from the dictates of the Constitution and its Bill of Rights, as well as various pieces of legislation. This is because Customary Law in Botswana is applicable in so far as it is not incompatible with the provisions of any written law or contrary to morality, humanity or natural justice.

Teaching Customary Law has since become complex. Customary Law, as a course, has been transformed into a technical subject necessitating one to traverse a mountain of statutes that this 'Law' is subject to. Customary criminal laws having been abolished, the traditional courts continue to try cases involving people charged with offences listed under the Penal Code and other written penal laws. The powers of the chiefs can be located between Customary Law and state law, a situation that has since created dispute between the government and some traditional rulers. This dispute relates to the nature of the powers of the chiefs and in particular, whether they have the power to impose summary corporal punishment.

This chapter examines the unclear status and application of customary law in Botswana, specifically the increasing confusion as to whether customary law is still a question of fact and

how Schapera's Handbook on Tswana Law and Custom is afforded the status of a legal text. It identifies the challenging situations concerning the application of Customary Law and State Law, the problem of judicial ascertainment of Customary Law, the relationship between customary law and human rights, and the increasing issue of chieftainship in contemporary Botswana. It also examines how the courts and the legislature have succeeded in addressing some of these challenges. The chapter will conclude by looking at areas of law reform, including, but not limited to, codification of customary law and law reform in Botswana.

**Speaker bio: Professor Bonolo Dinokopila**

Associate professor Dinokopila graduated from the University of Botswana in 2007. He read for and completed his Master's Degree (cum laude) in Human Rights and Democratization in Africa at the University of Pretoria in 2008. He obtained his Doctor of Laws (LLD) degree in 2013 at the same University specialising in international human rights law, public international law and international institutional law. He subsequently joined Duma Boko & Company as an Associate Attorney from October 2009 to November 2012. From April 2010 to June 2013 he worked as a lecturer and later as a senior lecturer at the University of Botswana during which time he attended international conferences and published widely on international human rights and constitutional law. He joined the Administration of Justice in July 2013 as the Assistant Registrar & Master of the High Court. Prof. Dinokopila was Head of the Department of Law, University of Botswana from 2016 - 2019. He is currently a Legal Consultant at Babuseng Maswabi Attorneys at Law & the Chairperson of the Board of Directors of the Botswana Network on Ethics, Law & HIV/AIDS (BONELA).

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## Dr Phillip Odiase

## Sustaining the organic fluidity of customary law arbitration vis-à-vis the rigidity of judicial precedent in Nigeria

The geographical landmass of Nigeria is home to many ethnic groups with diverse languages, cultures and religions. Prior to colonization, the indigenous people maintained social order and control within the various groups regulated by indigenous laws, developed over several generations. On uniting the several ethnic groups into one geopolitical territory, the colonialist imposed their laws on the people. The transplanted law embodied cultural values and procedures different from that of the people and as a result has never been fully accepted. Interestingly, the imposed law did not abolish in totality the existing indigenous laws, rather, it permitted the continuous application of it to well-defined areas; private arrangements and personal law. This compromise created a plurality of legal order even in the sphere of justice administration. This dichotomy inures to date. At the moment, the Nigerian legal system consists of two streams of laws; the general law and customary law (the general law includes all existing laws in Nigeria, except customary law).

In recent times, arbitration has become a popular choice of private dispute resolution. Due to the bifurcation, the Nigerian legal system recognises arbitration conducted under the general as well as under customary law. Customary law arbitration was until recently a popular option among Nigerians. However, resort to customary arbitration has been on the decline. Among the principal factors responsible for this dwindling fortune of customary arbitration are the uncertainties created by the Constitution of the Federal Republic of Nigeria and some legislation along with the validity tests developed by case law. In providing a comprehensive insight into the underlying challenges, the paper

draws from some selected landmark cases and questions the propriety of judicial legislation with specific regards to customary law. The paper concludes that while it is imperative to ensure predictability and certainty in the law and practice of customary law arbitration, these qualities would be better secured if they are balanced with the inherent organic nature of Nigerian customary laws.

**Speaker bio: Dr Phillip Odiase**

Philip Osarobo Odiase holds a PhD in commercial arbitration, lectures law at the Department of Commercial Law, Faculty of Law, Adekunle Ajasin University, Akungba-Akoko, Ondo State, Nigeria. He is also the Principal Partner of Philip Odiase & Co. He was a former lecturer at and Sub-Dean of College of Law, Igbinedion University, Okada, Edo State, Nigeria. He has wide experience in arbitration and dispute resolution, legal consultancy, advocacy and advisory services.

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**Mr Joseph Garske**

**Global, Territorial, and Tribal: Constitutional challenges in the twenty-first century**

Among the challenges of governance in the global age, none is more fraught than that of administering and maintaining a conventional law-based, territorially defined, nation-state. Ironically when that structure is now employed to provide more services and protections than ever in its history, its basis of legitimacy and cohesion--Westphalian sovereignty—is rapidly eroding. This deteriorating circumstance is reflected in a political atmosphere characterized by confusion, impotence, and divisiveness.

At the same time in a corresponding phenomenon of the global age, a similar debilitation is occurring among the tribal peoples of the earth. Ironically, at a time when they are widely becoming politically and legally articulate, the single essential foundation of their way of life—the hereditary connection between parent and child, ancestor and descendent—is becoming obscured as such attachments are diffused within the artificial juridic category of indigenous peoples. By this manner of recognition, the significance of their natural and ineradicable bond is being diluted and emptied of content.

There are many ways to understand the parallel plight of state and tribe. One way is to view it as a superseding of both territorial sovereignty and tribal custom by an immersive atmosphere of global law. Understanding the sources of that law, the mechanism in which it exists, and the instruments by which it works is important. The purpose here is to understand the nature and locus of its constitution by examining its two legal sources, the principled predictability of the Civilian tradition and the malleable adaptability of the Anglophone tradition. Understanding these sources as they converge to produce a single inclusive regimen of authority will clarify the constitutional challenge it represents and what that portends for a global future.

**Speaker bio: Joseph Garske**

Joseph P Garske writes and speaks internationally on topics of legal culture, technology, and globalization. He holds a Bachelor Degree in Social Science (History) from Harvard University and is Chairman of The Global Conversation.

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**Mr Rodrigo Ferreira**

**Community protocols as a self-determination strategy: indigenous experiences of legal pluralism in the global South – the cases of Brazil and South Africa**

Legal pluralism is an expression that addresses the co-existence of more than one justice system operating in the life of a social group. In the cases of Brazil and South Africa, the struggles of self-declared indigenous communities are some of the most iconic and dramatic claims of democracy itself, since these groups account up to 1% of their national populations, and demand recognition as beneficiaries of specific rights. These rights are to some extent recognized and protected by national and international legislation in both of these countries, but implementing them in practical cases is also still challenging for governments and indigenous communities.

Despite legal recognition of some of their institutions and some acknowledgement of their presence, it has been considerably difficult for the communities to achieve proper representation in the formal spaces and deliberative stances of politics. Even in the cases that regard their own lands and their specific traditional knowledge they struggle to be considered in the decision-making processes. To address these issues, indigenous peoples draft, translate and try to execute self-legislation pieces, such as community protocols, as an exercise of decolonization and autonomy, stablishing the “terms of engagement” that must guide the dialogue and relationships of the communities with external agents, such as the government, companies, entrepreneurs, researchers, etc. These documents aim to regulate national and international legal devices that deals with self-determination and free, prior and informed consent, such as the UN Declaration of Indigenous Rights, the 169 ILO Convention and the Nagoya Protocol, and also constitutional rights specific to each country. The efforts made by these two recent democracies on indigenous related matters are very symbolic on how national states deal with sociocultural diversity, and comparing them can help to highlight key factors and strategies of legal pluralism in the global South.

**Speaker bio: Mr Rodrigo Ferreira**

Rodrigo Ferreira Barros is a social anthropologist from Brazil dedicated to the research of national state interactions with traditional and indigenous communities in the Global South, currently developing research on Brazilian and South African indigenous policies and legal arrangements. The author has previous work experiences inside Brazilian government human rights institutions such as the Public

Prosecution's Office (Ministério Público Federal), in a department specifically dedicated to the defence of indigenous and traditional communities' rights, and in the National Truth Commission (Comissão Nacional da Verdade), dedicated to investigating the crimes committed by state authorities during the Brazilian military dictatorship. He also has work experience in non-governmental organisations dedicated to the defence of indigenous societies, like OPAN – Operação Amazônia Nativa, having developed different field projects in the Amazon with focus on territorial protection, land claims, sustainable production, assessment of indigenous organisations and basic legal training for indigenous youth. Some of these experiences have been collected in the books "*Waatakakje'y: material de apoio para formação em gestão territorial indígena*", and "*Elos Associativos: gestão, participação e representação*", co-written in partnership with indigenous communities from the state of Mato Grosso.

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**Dr Helen Kruuse and Professor Lea Mwambene**

**Recognising form through function within the context of integrating the bride requirement in customary marriages**

In previous scholarship, we argued how the state and courts have tended to favour a formal or definitional approach to customary marriages, leaving vulnerable parties, particularly women, not adequately protected. In this paper, we focus on a new approach emerging from the courts, particularly relating to the integration of the bride as a requirement for validity of a customary marriage. Integration of the bride is commonly held by most ethnic groups in South Africa to be an essential requirement for a valid customary marriage to come into being. It serves an important purpose in a customary marriage, i.e. – that of integrating the families, paying particular regard to the cultural importance of bringing together two families (as opposed to two individuals).

Despite this, the Supreme Court of Appeal has recently found in two cases, *Mbungela and Another v Mkabi and Others* 2020 (1) SA 41 (SCA) and *Tsambo v Sengadi* [2020] ZASCA 46, that the requirement is not mandatory and can be waived by the parties/families. These cases have been criticised by a number of academics who consider the court to have variously (1) ignored their own precedent; (2) ignored actual custom; and (3) 'constitutionalised' the issue. These criticisms seem to suggest that there cannot be a valid customary marriage if integration of a woman in the 'prescribed customary form' has not been met. However, in as much as we sympathise with the criticisms regarding the lack of regard for the prescribed customary form, we suggest that the court's approach affirms the flexibility of customary rules generally, even though the court's reliance or use of the term 'waiver' is regrettable. Although the court does not explicitly rely on Ramose's 'social acceptance' thesis as to the validity of law, we believe that adopting his approach is appropriate in the circumstances. It will do much to assuage concerns about courts ignoring custom, and also not protecting vulnerable parties. Essentially then, we argue that Ramose's approach is a much more balanced approach in this context than a typically western approach which sees certainty as a necessity.

**Speaker 1 bio: Dr Helen Kruuse**

Helen Kruuse is a senior lecturer in the Faculty of Law at Rhodes University, South Africa. She lectures in family law, legal ethics, legal skills and jurisprudence. Helen's research interests lie in legal ethics and family law, with a particular interest in customary law marriages. Prior to academic life, Helen worked for a law firm in East London, and spent two years in legal services at the London Borough of Brent. She has also taught in the Faculties of Law at the University of Cape Town as well as the University of the Western Cape. She is an admitted attorney, an editor of the South African Law Journal and sits on the board of the International Association of Legal Ethics.

**Speaker 2 bio: Professor Lea Mwambene**

Lea Mwambene is a Professor of Law in the Department of Private Law at UWC, as well as the Faculty of Law's Deputy Dean: Teaching and Learning. Her teaching and research interests are in the general fields of African customary law and human rights.

Driven by concern about the interaction between law, ideology and social practice, her recent research, in collaboration with national and international experts, includes fieldwork that measures the impact of reformed laws and policies on the enjoyment of human rights by women and children governed by customary rules and practices.

An Honours graduate of the University of Malawi, Lea holds an LLD and LLM from UWC. She was the winner in 2016 of the UWC Law Faculty's Best Emerging Researcher's Award, and is, among other things, the author of numerous book chapters and journal articles.

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**Professor Boitumelo Mmusinyane**

**The customary law of marriage of the Batswana in South Africa in the face of a constitutional transformation**

Batswana are one of the ethnic groups that still practice and conform to their customs when a marriage takes place sometimes against the set constitutional values and norms. In cognizance of the contemporary Constitution requiring reform in marriages, Batswana still want to practice the old way of negotiating, organizing and celebrating the marriage of their children, and they find the constitutional reform to be encroaching on their right to practice their cultural rights which they view as sacrosanct to their way of life and blessings to their children who needs to be the custodian of their marriage culture.

It cannot be faulted that the World is evolving and people need to adapt to the changing times. But Batswana people still believe and want to move into the new world order with their culture intact and being passed from generation to generation. At the crossroad is the pace at which these constitutional transformative changes are seen as assimilating or drowning Batswana marriage customs at the behest of the western systems that are seen as ruling or taking control of Africans way of life. In that, it appears Africans are the only ones to bend and adapt to the so-called constitutional transformation aspirations.

This chapter aims at critically evaluating the Constitutional reforms that endeavour to harmonize the Batswana marriage customs and how to a certain extent such is seen as encroaching on the Batswana's right to freely enjoy and practice their marriage culture. At the same time, the chapter analyses the need for the development of the Batswana Marriage customs to reflect the dynamic world that demands adaptations to remain relevant.

**Speaker bio: Professor Boitumelo Mmusinyane**

Boitumelo Mmusinyane is an Associate Professor of Law at North-West University South Africa, an accredited commercial mediator, former Commissioner for the Broadcasting Complaints Commission of South Africa (BCCSA) from 2012 to 2016, and former Chairperson of the National Home Builders Registration Council Disciplinary Committee (2015-2018. He is a registered assessor, moderator and facilitator for SASSETA.

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**Professor Adeniyi Olatunbosun and Mr Samson Odetayo**

**Problem of recognition of woman-to-woman marriage under the imported laws and African customary laws**

African traditional conception of marriage is teleological, in that its primary focus is procreation. The death of a man does not necessarily mean the death of his name as long as he has somebody to bear his name. For example, the Yorubas of south-western part of Nigeria attach much importance to child-bearing as unfruitful marriage is not regarded as just a misfortune but as a curse on the couple. The importance of children in marriage among the traditional Africans is understandable in an agrarian society where the worth of a man was measured by his farm produce. The higher the produce, the greater the respect accorded to the man. Many hands in the farm led to greater output. Also, leadership roles and chieftaincy titles were reserved for men who had many wives and children under them. The reasoning behind this is that, a man who could control many wives and children, if given leadership roles, would be effective. Under the Yoruba customary law, a party to a marriage can seek for the dissolution of such marriage on the ground of childlessness; this could be as a result of the impotency of the husband, the sterility of the wife or as a result of harmful diseases which affect procreation Therefore, a barren woman would do everything humanly and spiritually possible to have children for her husband. It is the premium placed on child-bearing (especially bearing of male children) that has led certain African communities to devise woman-to-woman marriage as a way of raising children to a barren couple or to couples who have no male children.

Unfortunately, marriage under African laws and customs has consistently been treated as an aberration, a sub-standard or a second-class by the colonialists and, by extension, the Western world. This position explains why African marriages were (and are) subjected to the colonialists' test of repugnancy in order to determine the level of their conformity to the Western understanding of what marriage should be. The Western approach to marriage as an institution is simplistic, to say the least. Marriage is treated as a union of a man and a woman

(or two consenting adults depending on one's view of marriage) to the 'exclusion' of all others. Where the husband is infertile or the wife is barren, there are two solutions: either they wait for the death of either of the parties or they file for divorce. However, the Africans believe that there are various options opened to a childless couple and one of them is the practice of woman-to-woman marriage.

Therefore, this paper examines the practice of *woman-to-woman marriage* and its functional relevance in the societies it is practised. The paper questions the justifications for subjecting such marriages to an alien test of repugnancy and also reviews the possibilities of harmonisation of customary (African) and statutory (English) marriages against the backdrop of legislation for recognising parity of status of both marriages. The paper posits that marriage, whether customary or statutory, performs essentially the same basic function, companionship and procreation, which *woman-to-woman marriage* portends to promote as well.

The paper explores the practice of *woman-to-woman marriage* in some traditional African societies (e.g. the Ibo people of south-eastern Nigeria; the Kikuyus, the Kipsigis and the Nandis of Kenya and; the Lovedu of South Africa); its purpose and the problems of recognition under Private International Law as well as the prospects of harmonisation of marriage rules (both statutory and customary) in order to liberate the practice from the albatross of repugnancy test.

The paper concludes that the dichotomy between the customary and statutory marriages must be abolished while legal denunciation of inter-border *woman-to-woman marriage* needs to be jettisoned going by the rule of *lex loci celebrationis*, that the validity of marriage is hinged on the law of the place where it was celebrated.

**Speaker 1 bio: Professor Adeniyi Olatunbosun**

Prof. Adeniyi Olatunbosun is a Professor of Law and Vice Chancellor, KolaDaisi University, Ibadan, Nigeria. He is a specialist in Criminal Jurisprudence, Private International law, Labour Law and Environmental Law. He has 32 years post call to Bar experience and 27 years teaching experience. He was a former Head of Department Jurisprudence and International law 2013-2014 and a former Dean of Law, University of Ibadan 2014-2020. The Pioneer Dean of Law, KolaDaisi University 2020-2021, Ag. Vice Chancellor KDU 2020-2021. He was appointed Vice Chancellor of KolaDaisi University, Ibadan for 5 years with effect from 1 August 2021.

**Speaker 2 bio: Mr Samson Odetayo**

Samson Odetayo graduated from the Faculty of Law, University of Ibadan, Ibadan, Nigeria in 2008 and he was called to the Nigerian Bar in 2009. After the mandatory one-year national youth service, he returned to his *alma mater* where he obtained his Master Degree in Law in 2014. He is currently studying for his Ph.D in the same University.

Samson has worked with notable law firms in Oyo and Lagos states both in the western part of Nigeria. He has represented clients in cases involving land disputes litigations, property Acquisitions and legal documentations, etc.

He is currently a lecturer at the Faculty of Law of the KolaDaisi University, Ibadan, Nigeria where he teaches Constitutional Law, Law of Human Rights, Nigerian Legal System, among others. Samson has particular interest in the area of Conflict of Laws (Private International Law) and this explains why his first published article is on that aspect of law. He has also published in the area of Human Rights.

Samson is a member of four notable professional bodies which include the Nigerian Bar Association, Chartered Institute of Arbitrators, among others.

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**Dr Rita Ozoemena, Fordam Wara, and Khupi Ramarumo**

**Consequences of proposed registration and spousal consent requirements on customary marriages in South Africa**

This paper will analyse South Africa's proposed Single Marriage Bill to test whether it strikes the correct balance between the pluralist legal systems in South Africa. The proposed legislation strongly encourages registration of customary marriages by aiming to gradually deprive the benefits of recognition from unregistered customary marriages. Given the policy preference for registration, we will examine the proposed legislation's potential for eventually extinguishing unregistered customary marriages. We will also interrogate avenues for the proposed legislation to adopt widespread customary practices such as the use of the lobola letter to prove the conclusion of customary marriages, and the requirement of spousal consent for subsequent customary marriages. Under the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998), a husband in a customary marriage who wishes to enter into a further customary marriage with another woman must make an application to the court to approve a written contract which will regulate his future matrimonial property system. The Supreme Court of Appeal in Mayelana v Ngwenyama has held that failure to seek such court approval does not invalidate the subsequent marriage. On appeal, however, the Constitutional Court held that if the husband does not obtain the consent of the first wife to take a further wife, the subsequent marriage is invalid. The proposed Single Marriage Bill requires a husband who wishes to enter into a subsequent marriage to obtain prior consent from his wife or wives. We will study these apparently conflicting court rulings and the prevailing customary practices to assess the proposed legislation's potential to reform the customary practices of South African communities.

**About the authors:**

Dr Rita OZOEMENA is a Senior Lecturer and Coordinator, Legal Division Free State Centre for Human Rights, University of the Free State, South Africa. She is also a member of Johannesburg Society of Advocate (Johanneburg Bar). She focuses her research on gender justice in Africa and the Right to Development. She received her LLD from Centre for Human Rights, University of Pretoria, South Africa. She serves as the Executive Secretary of a Non-Governmental Orgaisation, International Network

on Corporate Social Responsibility (IN-CSR) which focuses on sustainable business practices.

**Dr George Fordam Wara**

George Fordam Wara is a postdoctoral fellow at the University of the Free State Centre for Human Rights. He focuses his research on law reform as a tool for transforming the interface of dominance by states over communities. He is an Advocate of the High Court of Kenya and is also licensed to practice law in Minnesota, U.S.A. He obtained his Doctor of Laws (LLD) degree from the University of Pretoria, South Africa.

**Adv. Khupi Ramarumo**

Khupi Ramarumo is an Advocate of the High Court of South Africa having been admitted in April 2018. He practices as a member of both the Johannesburg Bar and the Limpopo Bar. He specialises in Family Law and Labour Law. Prior to admission to the Bar, he practiced as an Attorney for more than a decade.

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**Ms Moyahabo Thoka**

**Customary law in practice from a children's rights perspective**

South Africa is a constitutional democracy that operates with a pluralistic legal system. This means that customary laws and practices apply in conformity with the spirit, purport and objects of the Bill of Rights. Children form a fundamental part of the family structure. However, in the customary context, their position is a peripheral one. Put differently, children are to be seen and not heard. This situation places them in a precarious position characterised by voice-lessness and disregard. Although children are legal subjects, they have limited legal capacity under customary law and depend on their adult parents and guardians to protect them against rights violation. However, the parent-child relationship is paternalistic, in that the child is expected to adhere to her parents' or communities' values, irrespective of whether these values diminish the child's rights. Examples include the custom of male primogeniture and child marriage.

This contribution aims to dissect the social and legal position of children in communities that practice cultural norms and identify strategies for strengthening their rights. It further aims to provide a balanced perspective that takes due cognisance of the right to practice and enjoy one's culture, the advancement of positive cultural practices, and the extermination of harmful cultural practices that contradict and compromise the human rights of children. It utilises content analyses of the South African Constitution, relevant legislation, and the jurisprudence of South African courts and foreign courts in the region.

**Speaker bio:**

Moyahabo Thoka holds an LLB & LLM from the University of Pretoria. She currently works as a candidate attorney at the Centre for Child Law housed at the University of Pretoria's Law Faculty. Moyahabo's work centers on research, litigation and advocacy to strengthen the protection, promotion and respect for children's rights in South Africa and the African region.

She has previously worked as a researcher for the African Committee of Experts on the Rights and Welfare of the Child; for the Centre for Human Rights' Disability Rights Unit; and for the SARChI Chair in International Constitutional Law housed at the Institute for International Comparative Law in Africa.

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**Dr Fatima Osman**

**The communal nature of the customary law of succession**

Customary law is generally described as a communal or group-orientated system of law. The communal nature of the law manifested in the law of succession through norms which provided support to the family at a vulnerable time and identified a successor to the status of family head to ensure the stability of the family and community. The collective well-being of the family and community was emphasised rather than rights of individual family members.

This chapter examines the evolution of the communal nature of succession through a case study conducted in a rural village in South Africa. It reveals a significant shift towards the individualised acquisition of assets and away from succession to the position of household head. This seems to have been shepherded by the positive law which, at first glance, extinguishes the group and communal nature of customary law. Moreover, while families may support each other, it depends on the particular family dynamics and there is a significant risk that heirs may not only shirk their duty of support but also attempt to oust the rights of others.

However, the communal nature of the customary law of succession permeates the current framework. The extended family and community provide invaluable emotional and financial support to the deceased's close family. Socio-economic considerations in the village (such as poverty and unemployment) and broader country (such as lack of access to courts) have in many ways led to a strengthening of communal ties in the village.

**Speaker bio: Dr Fatima Osman**

Fatima Osman is a senior lecturer in the Department of Private law at the University of Cape Town where she lectures African Customary Law and the Law of Succession. Her research interests are primarily in notions of legal pluralism and customary law. She has written extensively on customary law in South Africa, the intersection between state and non-state law and the implications of bans on religious and cultural attire.

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**Adv. Kagiso A. Maphalle**

## The Modjadji Queenship: Tensions in living vs statutory customary law in succession to traditional leadership in Limpopo, South Africa

The relationship between living and statutory customary law in South Africa is filled with contentious debates within the field of legal pluralism. This is depicted more eloquently in succession to traditional leadership disputes, where questions arise on which between living and statutory customary law is the authority. The recent tensions and ensuing legal debacle within the Modjadji Queenship have brought these seemingly opposing views to the forefront. This chapter interrogates the interaction of statutory law with living customary law in the succession dispute of the Modjadji Queenship, utilising the recent Modjadji Royal Council decision on the next heir to the throne in contrast with provisions of the Traditional Leadership and Governance Framework Act of 2003. This chapter further uses empirical research collected at Bolobedu as a case study to highlight the impact and interpretation of varying provisions of both living and statutory customary law in the traditional leadership dispute of the Balobedu. It assesses how this relationship has an impact on the future of the Queenship, and further argues that legislative provisions in their static nature have not taken into consideration the complexities that are involved in the processes of traditional leadership appointments which the fluidity of living customary law accommodates. The chapter aims to show the consequences and impact of the non-alignment within provisions of legislation with cultural provisions on the history, heritage, and customary laws of rural communities.

**Speaker bio: Adv. Kagiso Maphalle**

Kagiso A. Maphalle is the Head of Core Business at the National Heritage Council of South Africa. She is an Advocate of the High Court of South Africa, and a legal anthropologist in training. She has worked for the Commission for Gender Equality, NRF Chair in Customary Law, Indigenous Values and Human Rights, and Parliamentary Monitoring Group. She holds an LLB degree from the University of Venda, a Master of Laws from the University of Cape Town, and is a Ph.D. candidate in the Department of Private Law under the Chair in Customary Law, Indigenous Values and Human Rights at the University of Cape Town. She is the founder of the Kagiso Maphalle Foundation, which holds empowerment workshops on women and children's socio-cultural and legal issues in rural communities. Her research interests are in customary law, legal pluralism, gender law, succession and inheritance rights, heritage protection and preservation, intellectual property rights, child rights, human rights, and development.

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**Mrs Ugochi Eleanya**

## An analysis of the pervasive impact of colonialism on customary laws of inheritance in Nigeria

The quest for social, economic, legal and environmental dimensions of sustainable development necessitates rapt attention to the rule of law in any country. Historical makings of the rule of law in any country are essential in charting a way forward for sustainable development. In Nigeria, colonialism introduced the concept of legal pluralism which has perpetuated conflict of legal systems by introducing a multitude of incoherent systems working side by side, weakly enforced and usually operating contradictory one to another. Development

of customary laws which are home grown is generally subject to the repugnancy doctrine of the colonialists and the constitutional requirement, but not the attendant attitudes of the citizens whose customs still forms the fabrics of their thoughts and actions. Formations of attitudes are rudimentary family values in society shaping individuals, whether enlightened or otherwise. This paper is historical in its approach and finds that the legal pluralism introduced by colonialism has had a pervasive effect on the application of customary laws in Nigeria. The societal reflections is consequently exhibited in the recent interpretations of the constitution exposing global attitudes, the high level of illiteracy in regular rights of citizens, consistent patriarchy and general ignorance of existing legislations and court judgments by the citizens which continues to hinder the attitudinal changes required. This work suggests a deliberate examination and recognition of pre-colonial, colonial and post-colonial operative legal systems by all for situational understanding of application of customary laws in Nigeria.

**Speaker bio: Ugochi Eleanya**

Ms. Ugochi Eleanya is an alumnus of the prestigious University of Lagos, Nigeria. She graduated with honours in LL.M and LL.B from the Faculty of Law, University of Lagos. She is a member of the Nigerian Bar Association, Lagos Chapter and a passionate academician. She currently runs her own Research based organization and law firm, both registered with the Corporate Affairs Commission of Nigeria. She is an alumnus of the Enterprise Development Centre of the PanAtlantic University where she was selected for a Social Sector Management programme. She is a participant of the Justice Entrepreneurship School Program for Africa by Fate Foundation currently holding in Nigeria. She was also a speaker at the recently concluded Lagos-African Cluster Centre Graduate Conference in African Studies with the theme: Studying Contemporary Africa: Politics, Society and Decoloniality. The settlement of Matrimonial Properties on women forms the subject of her doctoral dissertation at the University of the Western Cape, South Africa.

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**Mr. Sipho Nkosi**

**African law of succession and traditional leadership through the prism of the Zulu Royal House**

The recent passing of King Goodwill Zwelithini kaBhekuzulu, and the subsequent death of his "Main wife" has brought into sharp focus the clash between traditional African customs and South Africa's current constitutional dispensation and values. It is important to mention that he - and his deceased wife (the erstwhile widow) - leaves behind five widows, twelve "homes" (as distinct from "houses"), twenty-four children (among them daughters) including a son who was born "off the mat" or out of wedlock (but was raised by the deceased Queen at her palace).

These developments are forcing jurists to examine and re-examine customary practices as they relate to Family Law, Law of Succession as it relates to property and to the position of traditional leadership. The exercise necessitates reflecting on the provisions of the Constitution, applicable pieces of legislation and recent court decisions, and the accompanying jurisprudence. And, the question to be answered, therefore, is whether these practices and the

Constitution are diametrically opposed to each other and irreconcilable; or whether a middle course can be found or accommodation between them possible.

**Speaker bio: Sipho Nkosi**

Sipho Nkosi is a Lecturer in the Department of Practical Business Law, at the University of Johannesburg. He holds a B Juris and an LLB degree from the University of Zululand. He also holds an LLM degree from the University of Johannesburg; and is an advocate of the High Court of South Africa. He is currently a doctoral student, researching into the impact of Ubuntu on the Law of Contract in South Africa, with the University of the Western Cape.

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**Ms Ntebo Lauretta Morudu**

**Romancing customary law: The disparity between the legislative and judicial interpretation of customary practices in South Africa**

The constitutional recognition of customary law in South Africa has opened a new conduit for the codification and development of customary law. The paper argues that the development and reform strides made by the judicial and legislative institutions appear to be of modest benefit to the people it strives to protect, advance, and regulate, especially during the interpretation and reform proceedings. In light of the above, the paper seeks to look at the judicial interpretation of customary law based on the recent high court case of Sengadi v Tsambo. The court had to consider four interdictory reliefs as applied by the applicant. In light of the judgment, there was an interpretative deviation from the factual nature of customary law. Under the communal interpretation the factual nature of customary law is that 'the male descendant of the household belongs to his paternal family; his place and existence is being one with his paternal roots. His right to belong to his paternal family is absolute and customary.' The ignored yet crucial cultural practice informs the interpretation of customary law under the constitutional guise. Under the above stance, this paves a way to undermine cultural practices by interpreting them in view of Eurocentric ideas. The court employed a narrow and strict interpretation instead of interpreting the cultural practice of bridal integration in a customary holistic pretext. This paper will seek to consider an interpretative approach to customary law, and the court's preference of the positivistic viewpoint. The above legal standpoint undermines the pluralistic nature of South African legal system. Furthermore, the paper will seek to inform the legislature to recognise living customary law in a holistic, purposeful, and customary context during the development and reform process. The paper will further consider comparative analysis regarding the purposeful interpretation of customary law that reflects its factual nature, by considering the interpretation rules and theoretical approaches pioneered by legal scholars and theorists.

**Speaker bio: Ntebo L. Morudu**

Ntebo Lauretta Morudu is a lecture at Rhodes University; She holds three degrees in Bachelor of Education, which she received with distinction, an LLB, and a Master of Laws, all acquired from University of Pretoria. She is a dedicated writer and researcher with main legal focus on Customary Law, Constitutional Law and Criminal Law. She is currently studying for a doctorate in the University of Pretoria, focusing on customary law practices and their deregulation.

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**Professor Salvatore Mancuso**

**Law and glocalization: An African perspective**

As it is well known, the word "glocal" is the result of the merger between global and local and is the result of the observation that locality is not overridden by globalization, that the universal and the particular can and should be combined. After having been coined, the term has been increasingly used across different disciplines. The term "glocalization" came after the word "glocal" to represent a new idea not coinciding with that of globalization.

Many authors engaged in providing a definition of glocalization, mainly taking into consideration the creation of products or services intended for the global market but adapted to suit the local cultures. The common denominator is the connection between the global and the local levels. The variations produced by such interaction are indefinite, and each result is an example of glocality, defined as approaching the global locally or through local lenses, a blend of the global with the local.

The concept of glocalization has been exported in the legal field too. Apart from other possible applications, it seems to have a great potential in the African legal situation where global legal models are imported and used, often colliding with the local legal culture.

The paper seeks to explore how the concept of glocalization can contribute to untangle the African legal skein. It seeks to understand how the global legal models can be filtered through the local African situations, to determine a situation where global and local elements are contaminated to produce outcomes that might better fit the African legal needs.

**Speaker bio: Professor Salvatore Mancuso**

Salvatore Mancuso was born in Palermo (Italy) on 26 October 1963. He got his Bachelor of Law at the University of Palermo (Italy) and has obtained its Ph.D. in Comparative Law at the University of Trieste (Italy) with specialization on African law. He is a Professor of Comparative Law and Legal Anthropology at the University of Palermo (Italy), and Honorary Professor of African Law at the Centre for African Laws and Society of Xiangtan University (P.R. of China). He is also Visiting Professor at Somali National University in Mogadishu (Somalia) and Adjunct Professor at the Loyola University Chicago – John Felice Rome Center.

He has been the Chair, Centre for Comparative Law in Africa, University of Cape town, Professor of Comparative Law and Legal Anthropology at the University of Macau, Adjunct Professor at the University of Trieste, Visiting Professor at the Universities of Paris I, Panthéon-Sorbonne (France), Limoges, Réunion and Lisbon, and has given lectures, among the others, at the Universities of Milan, Turin, Trento, and Salerno (Italy), Asmara (Eritrea), Bissau (Guinea-Bissau), Hargeisa (Somalia), Omar Bongo (Gabon), Ghana – Legon in Accra (Ghana), Mauritius, Eduardo Mondlane in Maputo (Mozambique), Instituto Superior de Ciências Jurídicas e Sociais (Cape Verde), National Taipei University in Taiwan, China University of Political Sciences and law in Beijing, and East China University of Political Sciences and law in Shanghai (P.R. of China).

He has published and edited some books and several articles on Comparative and African Law. He is a member of the International Academy of Comparative Law, and Vice President (Events) of the *Juris Diversitas* group. He is a member of the editorial board of several law journals focused on comparative law and African law.

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**Dr Jennifer Mike**

**Punishing passion: A reflection of the offense of adultery within the context of human rights, culture and religion**

Marriage, a socially desirable institution, is the exclusive union that requires fidelity, trust, harmony and mutual confidence. Adultery and all forms of infidelity in marriage are therefore considered destructive vices to the very foundation of marriage, even if they are private acts between consenting adults. To guarantee a stable and unimpaired system of marriage, the state may legally intervene to require a husband and wife to be mutually bound to each other by a duty of faithfulness. Many justifications have been given for the entrenchment of these laws. The prominent support for laws intruding into the personal space of individuals are rooted in cultural relativism and strong attachment to religious ideologies.

In this light, the extant laws and jurisprudence in Nigeria also support the moral, religious and social indignation against the act of adultery. On the other hand, it has been argued that that any activity between two consenting adults is not a matter for state's regulation. As the world evolves and new legal orders take shape, it is imperative to review and question existing norms, behaviors and cultures in order to determine if they conform to the standards of human rights as guaranteed to all humans, or they another constitute an infringement of those rights, directly or indirectly. This paper essentially reflects on the religious and cultural justification for the criminalization of adultery in Nigeria and calls for the re-examination of the legal effect of the law from a human rights perspective. It examines whether the criminalizing non-harmful consensual acts between two (or more) people, could in effect, interfere with the Fundamental and Constitutional rights to private and family life, liberty, freedom of association, right to human dignity and even, the right to life.

**Speaker bio:**

Dr Jennifer H M Mike obtained her PhD at the University of Exeter, UK, LLM at London Metropolitan University and LLB at the University of Jos, Nigeria. She is currently an Assistant Professor of Law at the American University of Nigeria. Dr Mike teaches Criminal Law, Labour Law and Human Rights law. She is also the Chair, Department of Public and International Law (Interim), a Director of AUN's Centre for Governance, Human rights and Development, and the GLAA Liaison Rep for AUN.

Dr Mike previously worked as a Postgraduate Teaching Assistant (PTA) with the University of Exeter. Her teaching portfolio includes Criminal Law for undergraduates. She also undertook workshop sessions and seminars to facilitate student's learning. As a qualified legal practitioner, Dr Mike has worked with the law firms of Atlantic Solicitors in the UK, Edu

and Edu Solicitors, Lagos, Streamsowers and Khon Solicitors, Lagos and O.C. Edeji & Co, Katsina. Dr Mike was also the Legal Advisor/Company Secretary of EcoSpectra Ltd.

As a human Rights advocate and activist, Dr Mike campaigned for women's rights and contributes to the cause of human rights. Dr Mike is a member of Rotary International and as a past Club President, she has won an award for Award for best club humanitarian project and best club president. Dr Mike's scholarly engagements draw on the principles, concepts, literature and studies that inform international law, human rights, public health, economics, medicines and gender studies. Her research interest is to further explore the connections between human rights and other disciplines. She has written extensively on the right to health and other human right issues and is a reviewer of several journals.

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**Dr Olaniyi Olayinka**

**Incorporating indigenous legal tradition towards better access to justice: The case of South Africa and Nigeria**

Each Indigenous community in the pre-colonial Africa had its peculiar process of dispensation of justice, built particularly on the "ubuntu" principles, denoting that selective application of justice hinder the attainment of "the common good." Equal access to land as factor of production was a product of the communal legal tradition and the communal ownership, laid on a foundation of unwritten customary law and procedures, having binding regulation in a community. Equitable access to justice was attained as everyone also had access to land as a key factor of production and participated actively in economic development of his community. Colonial administration introduced the private property ownership, which undermined the communal bonds and independent states in Africa have not been able to operate the western legal system successfully. The indigenous political elites are alleged of public office abuses and corruption, such that most citizens are denied the opportunities to participate in production and development. Given the fact that corruption hinders the ease of doing business and the fact that public office holders are major violators of rights, the paper investigates which jurisdiction provides better access to justice in terms of bringing corrupt political leadership to book. In the circumstances that civil litigation is frustrating and unhelpful in terms of accessibility, affordability and general user-friendliness, the indigenous legal system which invokes ancestral spirits, indigenous oath taking is considered as a viable option towards restorative punishment. Given a western system of litigation without the African cultural blend, the paper considers which of Nigeria and South Africa affords better access to justice, adopting a historical and comparative investigation of issues.

**Speaker bio:**

Olaniyi Felix Olayinka obtained his first degree in Law from Lagos State University and master's degree from the Obafemi Awolowo University, Nigeria. He was called to the Nigerian Bar in 1995. Olayinka obtained his Doctor of Laws degree from the University of Pretoria, South Africa in 2016. He is a Senior Lecturer and Head of Department of Private and Property Law at Redeemer's University, Nigeria. His research focuses on international law and human

rights, democratic governance and institutions, gender, and indigenous legal system. Olayinka has presented papers in local and international events and published in reputable local and international journals, as evident in his ResearchGate, Google Scholar, and ORCID accounts. Olayinka is a member of professional bodies like the Nigerian Bar Association, the Nigerian Institute of Management, and research outfits like Law and Research Development Network, and London Journal Press. He is a United Nations Online Volunteer, just as he contributes to the World Justice Project on the Rule of Law.

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**Mr Reshard Kolabhai**

**Constituting capitalism, coercing custom: The articulation(s) of "Western" and "customary" law in South African political-economy**

A central development in South Africa since 1994 has been the simultaneous introduction of liberal political democracy on the one hand, and neoliberal economic policies on the other. I am interested in how these two directions – seemingly in tension – are linked at the nexus of customary law. What does customary law – the supposed democratic State recognition of "living law", "law-in-the-now", "law-close-to-communities" – have to do with large commercial law firms in Sandton, with financialisation, with the motor of globalisation, with environmental collapse? While "conflict of laws" and "clash of cultures" approaches to customary law are important, I believe that they are unable to address these questions on their own, and that political-economic analysis is also necessary.

I thus first argue that custom cannot be considered in isolation, but must be viewed in dynamic articulation with its social context. I focus here on custom's articulation with the hegemonic influence of (neo-)colonial capitalism, given the latter's historical significance. I discuss how capitalism in South Africa is itself constituted by the ordinary "Western" legal system of common law and statute, and discuss some examples of how Western and customary law thus interact via political economy. No custom can develop free of social context; but I suggest that there is a meaningful difference between more coercive and less coercive (ie freer) contexts. As capitalism is particularly coercive, I argue that it is not enough to merely recognise custom as law; rather, we must begin to free custom from the coercion of the Western legal system as expressed through capital's influence on custom.

Thus, while recent customary legal studies have naturally tended to centre on customary recognition and the Constitution, I argue that – for customary law to have a meaningful future – the ordinary Western capitalist legal system of common law and statute must also be a crucial site of study and political contestation.

**Speaker bio: Mr. Reshard Kolabhai**

Reshard Kolabhai is a lecturer in constitutional law and fundamental rights at North-West University (NWU), South Africa. He completed his LLB and LLM at Stellenbosch University. His LLM thesis considered the implications of the South African Bill of Rights and international law for the regulation of South African companies. His research centres on a critique of the law's role in constituting capitalism, and on the tension between capitalism and meaningful liberation.

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**Mr Lesala Mofokeng**

## The never-ending legacy of colonial 'unions', 'repugnant customs' and 'houses' of apartheid

The main objective of the Reform of Customary Law of Succession and Regulation of Related Matters Act ("the Reform Act") is to eliminate discrimination against women and children in the customary law of intestate succession. Although the Act appears to achieve this objective, the application of some of its provisions has proved challenging. This is mainly due to the use of bizarre and illogical words that are unknown to indigenous African law. Obviously, this situation arises from post-apartheid laws that continue to impose Eurocentric values and interpretations on customary law, both in terms of law-making processes and application. While some of the provisions of the Reform Act are a welcome development of customary law, others overshadow these developments in unexpected ways that cause frustration and legal uncertainties for those who are subject to customary law.

This paper argues that the words "customary law", "union" and "house" which are used in the Act, are foreign to indigenous African law. The context under which these words are used or defined, as the case may be, is contrary to the values of indigenous law. Firstly, the purported definition of "customary law" in the Act, which appears to be more than a description rather than a definition, is fatally flawed and misleading, both as a description and as a definition. Secondly, the word "union", which the Reform Act does not define, is incompatible with customary law, and introduces new forms of discrimination into customary law. Thirdly, the word "house," although defined in the Reform Act, has been fundamentally misconstrued by both the legislature and the courts. The meanings associated with these words are viewed as by-products of colonial and apartheid era constructions, which were intended to dismiss African customary laws as repugnant to colonial and western concepts of acceptable moral standards. This chapter proposes alternatives.

**About the Author:**

Lesala Mofokeng is a Senior Lecturer who joined the UKZN, School of Law, Howard College Campus, Durban in 1999. He holds qualifications in Bachelors in Arts (BA), Bachelors of Law (LLB) obtained at the University of Natal as well as a Masters in Law (LLM) which he obtained from Georgetown University. Lesala is an Advocate of the High Court, South Africa and has lectured at the South African Law Society's School for Legal Practice since 2004. He has presented lectures at the University of Pretoria's Good Governance Academy (co-hosted by the Centre for Human Rights, University of Pretoria [winner of the 2006 UNESCO Prize for Human Rights Education] & the Norwegian Centre for Human Rights, University of Oslo) in 2008 and facilitated numerous succession planning workshops. His main research areas are African customary law, religious law, legal pluralism, international law and humanitarian law. He has authored and co-authored books in legal pluralism.

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**Ms Davinia Gómez-Sánchez**

## A is for apple, M for mongongo: An alter-native conceptualisation of the right to property from an indigenous peoples' perspective

Legal orders rooted in western hegemonic legal paradigms are proving limited in addressing historical discrimination, structural inequalities and current human rights challenges. Pointing at the ideological coloniality in the legal realm, this presentation aims at recapturing the validity

and meaning of indigenous peoples' perspectives in an attempt to contest and expand the prevailing human rights discourse. Against the dominant values underpinning the mainstream conceptualisation of rights (secularism, autonomy, anthropocentrism, economic growth), an alternative construction will be advanced here.

Building on epistemically neglected legal world-views and cultural traditions, this piece will explore and identify valuable aspects stemming from indigenous peoples in Southern Africa to put forward a reformulation of rights. In opposition to liberal conceptions of property epitomised in positive laws, this contribution will present an alternative conceptualisation of property, ownership and non-exclusive uses of land based on the San, highlighting aspects such as mutual dependence, egalitarianism, sharing, redistribution and reciprocity.

**Speaker bio: Davinia Gómez-Sánchez**

Davinia Gómez-Sánchez is completing her PhD degree within the program 'Human Rights: ethical, social and political challenges' at the Pedro Arrupe Human Rights Institute University of Deusto (Bilbao, Spain). In her research she examines the dominant human rights grammar from a decolonial perspective. Seeking to expand the mainstream human rights discourse with elements from non-Eurocentric epistemologies and world-views, she focuses on Indigenous Peoples in Southern Africa to advance an alternative conceptualisation of rights. This research project is set within the framework of the DIRS-COFUND European Union's Horizon 2020 research and innovation programme under the Marie Skłodowska-Curie grant agreement Nº 665959.

Davinia holds degrees in Law and in Philosophy (University of Deusto) as well as a Master degree in Human Rights and Democratization (EMA, Global Campus of Human Rights). She has worked for different NGDOs, UNESCO, think tanks and research centres in the human rights and development fields in Europe, South America, MENA region, and Southern Africa. Having experience as human rights consultant, she is currently engaged in a multi country research project on procedural rights within the EU.