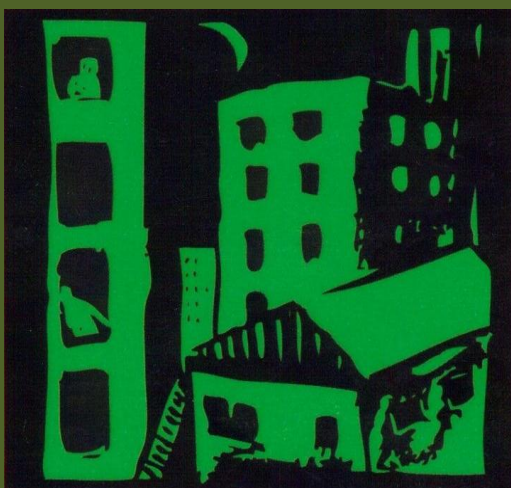


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Reflections on the rejection of the right to sexual orientation by the institution of traditional leadership: lessons from South Africa

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1 INTRODUCTION

The submission¹ made by the National House of Traditional Leaders² to the

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¹ See Report No 49 – 2012, Submission 5, Fourth Session, Fourth Parliament of the Constitutional Review Committee on 2011 Public Submissions, dated 26 April 2012, at 1055 (“submission”). Although the submission has been rejected by the Committee, the commentary is essential considering the persecution that is faced by couples in same-sex relationships in all walks of life, and is not limited to the rejection of sexual orientation by the institution of traditional leadership. See also the Legal Opinion of the Committee dated 11 August 2011 (reference 129/11).

² Established in terms of s 2 of the National House of Traditional Leaders Act 22 of 2009 (“institution of traditional leaders”).

Constitutional Review Committee³ for the removal of sexual orientation from the protection accorded to it in section 9(3) of the 1996 Constitution⁴ has sparked debate on the regulation of traditional authority by the institution of traditional leadership in accordance with the foundational values⁵ of the new constitutional dispensation. The debate is, amongst others, related to the impact of the submission on the rights of couples in same-sex relationships within the framework of the traditional system of governance. It further raises questions as to the effect of traditional values, such as *Ubuntu*, in the protection of these rights under the system of traditional authority. *Ubuntu* is proclaimed as an overarching African philosophy which encapsulates the collective respect for all rights for all people without distinction.

Against this background, this article focuses on the importance of *ubuntu* in the protection of the rights of couples in same-sex relationships in the regulation of the traditional authority. The objective is to ensure the advancement of traditional values within the context of the new constitutional dispensation in the regulation of traditional authority. This article argues and adopts the position that traditional leaders cannot use their position of authority and influence to promote divisive and stereotypical attitudes which have the potential to undermine the communal understanding of traditional values encapsulated in *ubuntu*. The intention is not to define *ubuntu* here, but merely to focus on the manner in which it is used within the African value system of regulating authority.⁶

2 THE ESSENCE OF *UBUNTU* IN THE REGULATION OF TRADITIONAL AUTHORITY

Ubuntu is a traditional value that has attained a universal status not only in South Africa but also in Africa. *Ubuntu* is not an easily defined principle and is traced back to the Nguni concept of *umntu ngumntu ngabanye abantu*, which translates to the interrelationship that exists between the individual and the community in which he or she lives or *vice-versa*. The significance of *ubuntu* in this context was conceptualised by Mokgoro J in *S v Makwanyane and another*⁷ as she pointed out that its broad framework:

[T]ranslates as humaneness. In its most fundamental sense, it translates as personhood and morality. Metaphorically, it expresses itself in *umuntu ngumuntu ngabantu*, describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to

³ The Committee is required to review all submissions it receives from the public concerning constitutional matters.

⁴ The Constitution of the Republic of South Africa 1996 ("Constitution").

⁵ See s 1 of the Constitution which provides that: "The Republic of South Africa is one sovereign, democratic state founded on the following values:

- (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
- (b) Non-racialism and non-sexism..."

⁶ See Tambulasi R & Kayuni H "Can African feet divorce western shoes? The case of Ubuntu and democratic good governance in Malawi" (2005) 14 *Nordic Journal of African Studies* 147.

⁷ 1995 (6) BCLR 665.

basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation. In South Africa, *ubuntu* has become a notion with particular resonance in the building of a democracy. It is part of our “rainbow” heritage, though it might have operated and still operates differently in diverse community settings.⁸

Basically, *ubuntu* is infused within the African concept of inclusivity as an ancient principle that has evolved through generations of laying the foundation for cultural norms and standards by which people should regulate their lives.⁹ In its role as the driver of the democratic system of governance in South African jurisprudence,¹⁰ *ubuntu* has emerged as a trans-disciplinary force over the exercising of common law, customary law and legislative powers. This contention was given credence by Mokgoro J in *Makwanyane* as she held that “one shared value and ideal that runs like a golden thread across cultural lines, is the value of ubuntu...”¹¹ *Ubuntu* is then formally recognised in the White Paper for Social Welfare for the Republic of South Africa, (August 1997):

[T]he principle of caring for each other’s well-being will be promoted, and a spirit of mutual support fostered. Each individual’s humanity is ideally expressed through his or her relationship with others and theirs in turn through recognition of the individual’s humanity. Ubuntu means that people are people through other people. It also acknowledges both the rights and the responsibilities of every citizen in promoting individual and societal well-being.¹²

Drawing from the above, *ubuntu* is characterised as:

[T]he understanding of the value of the human person; the ability to use the good for the common cause; teaching one to love oneself, others and respect for their belongings; and helping the community to achieve common goals.¹³

Murithi emphasises the character of *ubuntu* and correctly points out that the principle:

[S]heds lights on the importance of inclusivity and a shared sense of identity between people; provides a value system for giving and forgiving; provides an inspiration and suggests guidelines for societies and their governments on how to legislate and establish laws that promote humanity; can culturally re-inform and reconstruct our practical efforts to establish more and effective ways of communal understanding; and can serve to re-emphasise the essential unity of humanity and gradually promote attitudes and values

⁸ At para 308. See also Sachs J in *PE Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC) as he reinforced the significance of *ubuntu* that “[its] spirit combines individual rights with communal philosophy. It is a unifying motif [of traditional values] which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern” (at para 37).

⁹ See Chaplin K “The Ubuntu spirit in African communities” (2006). Available at www.coe.int/t/dg4/cultureheritage/Cities/Publication/BookCoE20-Chaplin (accessed 12 February 2014). He states that *ubuntu* “regards humanity as an integral part of the eco-system that lead to a communal responsibility.” (At 1).

¹⁰ See Mokgoro Y “Ubuntu and the law in South Africa” (1998) 1:1 *Potchefstroom Electronic Law Journal* 15 affirming that “*ubuntu* can therefore become central to a new South African jurisprudence and to the revival of sustainable African values as part of the broader process of the African Renaissance.” At 15.

¹¹ At para 307.

¹² See s 24.

¹³ See Iya PF “Ubuntu and human dignity: analysing concepts and exploring relationship for in-depth understanding and application directed towards improving the quality of life in Africa” in Cornell D & Muvangua N (eds) *Law in the ubuntu of South Africa* (2012) 383. Available at www.isthisseattaken.co.za (accessed 29 August 2012).

predicated on the promotion and protection of human rights, including emphasising the sharing of resources and reinforcing a collective commitment to co-operation as the means for resolving humanity's common problems.¹⁴

Ubuntu is, therefore, not a “throat clearing exercise”,¹⁵ considering the historical legacy of bitterness, anger and hatred which South Africa inherited from its past.¹⁶ *Ubuntu* signifies human interdependence and group solidarity which are central to the survival of communities. This is an imperative that plays a fundamental role in supporting the advancement of the values of humanness, compassion, respect, caring, sharing and associated values.¹⁷ These factors provide a framework that should enable the institution of traditional leadership to “embody the preservation of culture, traditions and customs”¹⁸ in the promotion of the philosophy of *ubuntu*. They require the institution of traditional leadership to facilitate the advancement of traditional values without discriminating against people under its jurisdiction according to their social status or class. In turn, such a role would enable everyone, including couples in same-sex relationships, to actively participate in the consolidation and development of the moral fibre of the communities in which they live.

The importance of *ubuntu* is directly linked to the Constitution which recognises the legitimate status of the institution of traditional leadership that is deeply entrenched in section 211. This section provides that:

- (1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.
- (2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to or repeal of, that legislation or those customs.
- (3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

The status is reinforced by the role of the institution in advancing the values of traditional governance in accordance with the values of the new democratic system of governance. This role is drawn from section 212 of the Constitution which provides that:

¹⁴ Murithi T “A local response to the global human rights standards: The ubuntu perspective on human dignity” (2007) 5 *Globalisation, societies and education* 277 at 282.

¹⁵ Sachs J in *S v Mhlungu & others* 1995 (7) BCLR 793 (CC) at para 112.

¹⁶ See Khunou SF “Traditional leadership and governance: legislative environment and policy development in a democratic South Africa” (2011) 1:9 *International Journal of Humanities and Social Science* 278. See Chaplin (2006) emphasises the impact of the apartheid system in the re-building of the nation as he holds (at 4) “South Africa is emerging from a long period of severely constrained and constraining socio-political and cultural, religious thinking and behaviour [which] resulted in the climate of conformity, control, interpersonal caution, subversive and aversive racism and non-acceptance of [same-sex couples] that still persists among many of its citizens and in nations all around the world and became a huge barrier to the progress and essence of what a true rainbow nations requires and embodies.” Without a further focus on this history as its impact has been highlighted in Ntlama N, “Equality misplaced in the development of the customary law of succession: lessons from *Shilubana v Nwamitwa* 2009 2 SA 66 (CC)” (2009) 20: 2 *Stellenbosch Law Review Journal* 333. See also Ntlama N & Dima D “The significance of South Africa’s Traditional Courts Bill to the challenge of promoting African traditional justice systems” (2009) 4 *International Journal of African Renaissance Studies* 6.

¹⁷ Iya (2012) at 384.

¹⁸ Iya (2012) at 384.

- (1) National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities.
- (2) To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law - (a) national or provincial legislation may provide for the establishment of houses of traditional leaders; and (b) national legislation may establish a council of traditional leaders.

The significance of the two provisions is substantiated by Hinz who points out that:

South Africa restored ... and gave [the institution] its recognised place in the country's constitutionally guaranteed legal orders. After years of marginalisation and exposure to abolition according to the whims of colonial and apartheid politics, [the institution] received a constitutionally safeguarded place ... and re-dignified [the institution] towards the overall re-dignification of customary law.¹⁹

These provisions lay the foundation upon which the institution of traditional leadership must regulate its own affairs. They encompass the affirmation of the institution of traditional leadership and the restoration of its role to the early form of its societal organisation.²⁰ They provide an opportunity for the institution to continue to exercise its function and traditional authority in order to promote the values of the new democratic dispensation in its own context. They broaden the scope of protection and form the basis upon which the institution should itself gauge whether the rejection of sexual orientation enhances indigenous values in a manner that ensures the participation of everybody in the regulation of traditional authority. As the institution operates under the system of customary law which is recognised as a legitimate system alongside other systems in South Africa, it is, like any other system, equally bound by the constitutional foundation which has been laid. The contention was endorsed in *Alexkor*,²¹ as the Constitutional Court held that:

[A]t the same time the Constitution, while giving force to indigenous law makes it clear that such law is subject to the Constitution and has to be interpreted in the light of its values. Furthermore, like the common law, indigenous law is subject to any legislation, consistent with the Constitution that specifically deals with it.²²

In this instance, the system of customary law has become part of the amalgam of the broader framework of the South African legal system. The Constitutional Court had also, for example, long laid the foundation in respect of the way in which all institutions, including traditional leaders, should regulate their authority without discriminating against anyone within their jurisdiction. The Court had in *National Coalition for Gay and Lesbian Equality & another v Minister of Justice & others*²³ decriminalised the crime of

¹⁹ Hinz M "Human rights between universalism and cultural relativism? The need for anthropological jurisprudence in the globalising world." Paper presented at the XIth International Congress of the Commission on Folk Law and Legal Pluralism (1997) 3. Available at www.kas.de/upload/auslandhomepages (accessed 12 August 2013).

²⁰ Khunou SF "Traditional leadership and independent Bantustans of South Africa: Some milestones of transformative constitutionalism beyond apartheid' (2009) 12 *Potchefstroom Electronic Law Journal* 81at 81.

²¹ 2003 (12) BCLR 1301 (CC).

²² At para 51.

²³ 1998 (12) BCLR 1517 (CC).

sodomy and enabled same-sex couples to have an open relationship with each other. This was further reinforced in *Minister of Home Affairs & another v Fourie & another*²⁴ when the Court granted same-sex couples the right to marry.

Following these judicial developments, the Civil Union Act²⁵ was adopted to consolidate the right of couples in same-sex relationships to marry. As argued elsewhere,²⁶ and without engaging with these developments, the protection, including that to be enforced by the institution of traditional leadership, of the rights accorded to same-sex couples encapsulates the “nature of a democratic, universalistic and caring society [which] embraces everyone and accepts people for who they are”.²⁷ The institution of traditional leadership is therefore, not a separate entity that can operate outside the constitutional framework in the regulation of its traditional authority in ensuring the advancement of the values of the new dispensation including the protection of the rights of couples in same-sex relationships within the traditional system of governance.

3 THE MISCONCEPTION OF TRADITIONAL VALUES IN THE REGULATION OF TRADITIONAL AUTHORITY

As indicated above, South Africa has, since its new constitutional dispensation came into force, made fundamental changes in relation to the status of the institution of traditional leadership. These changes provide an opportunity to eliminate any historic prejudices that continue to plague South African society today, particularly prejudices against same-sex couples. The prejudices which continue to manifest themselves today are evident in the attitude displayed by the institution of traditional leadership towards same-sex couples.

The submission by the institution of traditional leadership for the removal of the right to sexual orientation in the Constitution²⁸ was reinforced by comments made by the Eastern Cape Provincial Secretary of the Congress of Traditional Leaders; *Nkosi Xolile Ndevu*, who stated that:

*Gays and lesbians need not fear traditional courts since traditional leaders wanted nothing to do with homosexuality [because] the latter does not exist. This sexual orientation is uncustomary, un-African, ungodly and non-existent. We apologise if this view makes people misjudge us as not operating in accordance with the Constitution. But it should be understood we are custodians of customs and culture.*²⁹

²⁴ 2006 (3) BCLR 355 CC.

²⁵ Act 17 of 2006.

²⁶ See Ntlama N “A brief overview of the Civil Union Act” (2010) 13 *Potchefstroom Electronic Law Journal* 191.

²⁷ Sachs J in *Fourie* at para 60.

²⁸ See Report No. 49 (2012) at 1055.

²⁹ See Feni L “Traditional leaders won’t touch gay cases” *Daily Dispatch*, 2 May 2012. Emphasis added. *Nkosi Ndevu* was also on a live television show on e-tv on 10 July 2012, advocating the same.

The hostile attitude shown by the institution of traditional leadership is evidence of the struggle for the recognition of the right to sexual orientation that is faced by same-sex couples in other African countries as well. These other countries have not only shown negative attitudes against the protection of the rights of couples in same-sex relationships but have gone further and enshrined the prohibition of these relationships in the laws of their respective countries. For example, Nigeria passed the Same-Sex Marriages Prohibition Bill into law on 17 December 2013.³⁰ The Act criminalises same-sex marriages and provides for the imposition of a sentence of up to 14 year's imprisonment.³¹ Apparently fearing objections from the international community, the Bill was already passed in May 2013, but President Goodluck Jonathan finally succumbed to internal pressures and assented to it on 07 January 2014.³²

Uganda is also not left out of the debate in relation to its position on the protection of the rights of couples in same-sex relationships. Parliament passed the Anti-Homosexuality Bill on 20 December 2013 which was signed into law by President Yoweri Museveni on 24 February 2014 and came into force on 10 March 2014.³³ The passage of this Act provides both the state and the general populace with an instrument to subject people in same-sex relationships to persecution as it provides for life imprisonment as a maximum penalty for committing an 'act of homosexuality'³⁴ which is characterised as:

- (a) the penetration of the anus or mouth of another person of same-sex with his penis or any other sexual contraption;
- (b) the use of any object or sexual contraption to penetrate or stimulate sexual organ of a person of the same sex;
- (c) the touching of another person with the intention of committing the act of homosexuality.³⁵

Basically, the Act 'prohibits any form of sexual relations between persons of the same-sex, promotion or recognition of such relations...' ³⁶ At a public ceremony to assent to the Anti-Homosexuality Act, the President made degrading comments and reduced same-sex couples to nothing more than 'prostitutes' who behave like mercenaries.³⁷ These comments were substantiated by Ugandan Foreign Minister, Sam Kutesa, as he

³⁰ Same-Sex Marriages Prohibition Bill SB 05, 2011.

³¹ See the Explanatory Note which states that: "This Bill seeks to prohibit marriage between persons of same gender and witnessing same and provide appropriate penalties of the marriage penalties thereof." See also Debusmann B "Dozens arrested after anti-gay law is passed in Nigeria" *The Telegraph* 14 January 2014. Available at www.telegraph.co.uk/news/worldnews/afri accessed (17 January 2014).

³² See Gladstone R "Nigerian President signs a ban on same-sex relationships" *New York Times* 13 January 2014. Available at www.nytimes.com accessed (17 January 2014).

³³ See Young M and Muhumuza R 'Ugandan president Yoweri Museveni signs world's toughest anti-gay laws, compares them to 'prostitutes',' 25 February 2014 accessed at www.news.com.au/lifestyle/gay-marriage (12 June 2014).

³⁴ See Part II and Part III on the prohibition of the acts homosexuality and the related offences that may be meted out for contravening the Act.

³⁵ See section 2(1) of the Act.

³⁶ See Preamble of the Act 2014.

³⁷ See Young (note 33).

reportedly said that “same-sex relationships needed to be condemned by law because the majority of Africans abhor this practice”, which is “wrong for our young people, and it offends our culture”.³⁸

The Act “contributes directly to the discrimination and stigmatisation of same-sex couples and may incite violence against people perceived as sexually and gender non-conforming and would allow their abusers to act with impunity”.³⁹ In fact, since its commencement many people in same-sex relationships “have been arrested, beaten, kidnapped, evicted from their homes, harassed and forced underground or flee the country”.⁴⁰ Without exhausting the developments in Uganda since the enactment of the Act which has an impact in the rest of the African continent, it is an indication of the deep-rooted negative attitudes against same-sex couples in the rest of the African continent.⁴¹

Further developments in the rejection of the right to sexual orientation in Africa, the survey conducted by the Pew Research Global Attitudes Project is an indication of the fact that the struggle for the promotion of the rights of couples in same-sex relationships is far from being won in Africa. The Project established that nine out of ten countries in Sub-Saharan Africa reject the protection of same-sex relationships.⁴² This includes South Africa, where 61% of the sampled population reject the protection of these relationships.⁴³ This means that same-sex couples in South Africa are struggling for acceptance notwithstanding the progress made since the attainment of democracy by prohibiting any conduct or law that runs contrary to the spirit and purport of the Bill of Rights.⁴⁴

The legislative developments in other African countries and the quest for removal of the right to sexual orientation by the institution of traditional leaders in

³⁸ See also Yoon S “Uganda anti-gay law advocate to head UN-General Assembly” 11 June 2014 accessed at www.bloomberg.com/news (16 June 2014).

³⁹ See the Report by Amnesty International “Making love a crime: criminalization of same-sex conduct in Sub-Saharan Africa (2013) Amnesty International Ltd, Index: AFR01/001/2013 accessed at www.amnesty.org 16 June 2014 at 19.

⁴⁰ See Brydum S “First LGBT Ugandans to face trial for ‘sex against the order of nature’ 06 May 2014 accessed at www.advocate.com/WORLD 16 June 2014.

⁴¹ See the Report by Sexual Minorities Uganda entitled: *Expanded criminalisation of homosexuality in Uganda: A flawed narrative, empirical evidence and strategic alternatives from an African perspective* (2014). Available at www.iranti-org.co.za accessed (13 February 2014).

⁴² The top five of these countries are: Nigeria (98%), Senegal (96%), Ghana (96%), Uganda (96%), and Kenya (90%).

⁴³ See Kohut A *The global divide on homosexuality: greater acceptance in more secular and affluent countries*, 04 June 2013. Available at www.pewglobal.org/files/2013/06/Pew-Glob. Accessed (10 February 2014).

⁴⁴ It is true and a fact that the struggle for the recognition of same-sex relationships is still far from being won in South Africa notwithstanding its legislative and jurisprudential development in this regard. This is evidenced by hate crimes against same-sex couples, such as, corrective rape being meted against same-sex women, and even to an extent of them being killed. On 16 February 2014 a documentary titled “Why are we so angry” was also presented on SABC 2 showing the impact of crimes against same-sex couples.

South Africa are an “affront”⁴⁵ to the evolution of the principle of *ubuntu*. The developments compromise the domestication of international obligations which encapsulate the principle of *ubuntu* in the protection of the rights of couples in same-sex relationships, as States are required to protect individuals from homophobic and transphobic violence;⁴⁶ prevent torture and cruel, inhuman and degrading treatment;⁴⁷ repeal laws criminalising homosexuality;⁴⁸ prohibit discrimination based on sexual orientation and gender identity;⁴⁹ and safeguard freedom of expression, association and peaceful assembly for all LGBT people.⁵⁰

Considering South Africa’s progressive role and the fact that it is still a newcomer in the advancement of the values of the new dispensation,⁵¹ the above factors entrench the firm principle of *ubuntu*. Governments, including the local structures of governance as exercised by the institution of traditional leadership, are in the forefront of playing a pertinent role in “capturing a normative account of what is most valued in life”.⁵² It is in this context that traditional leaders should not be associated with the attitude of rejecting the humanity of couples in same-sex relationships and which cannot be equated with or attributed to any traditional value or principle. The use of traditional authority in the rejection of the right to sexual orientation under the pretext of upholding traditional values is misconceived and misdirected. Traditional authority cannot be used to advance stereotypical attitudes that are divisive and that do not include the core essence of *ubuntu* in the regulation of authority in traditional law.

The fallacy⁵³ driving the institution’s conduct in the name of being custodians of traditional values would mean that couples in same-sex relationships will never play a part in developing the moral fibre which the principle of *ubuntu* encapsulates.⁵⁴ This means that they will never be able to express their ideas, opinions or grievances in a traditional public forum and contribute to how the society they live in should be regulated, simply because of their sexual orientation. The conduct suggests that same-sex couples are not worthy of the status of a human being, yet *ubuntu* gives credence to everyone to engage in debates on issues of public significance. In essence, *ubuntu*, which is regarded as the treasure of the African heritage, would lose not only its magnanimity

⁴⁵ Dignity A “An affront to human dignity: electronic mail monitoring in the private sector workplace” (1995) 8 *Harvard Journal of Law and Technology* 345.

⁴⁶ Office of the High Commissioner for Human Rights, *Born free and equal: sexual orientation and gender identity in international human rights law* (2012) at 12.

⁴⁷ Office of the High Commissioner (2012) at 20.

⁴⁸ Office of the High Commissioner (2012) at 26.

⁴⁹ Office of the High Commissioner (2012) at 36.

⁵⁰ Office of the High Commissioner (2012) at 52.

⁵¹ Despite the fact that South Africa has recently attained its democracy as compared to other African countries, such as, Nigeria, Uganda, Zimbabwe, it has to date made tremendous progress as it is the first country in Africa to legalise same-sex marriages.

⁵² Metz T “Ubuntu as a moral theory and human rights in South Africa” (2011) 11 *African Human Rights Law Journal* 532 at 538.

⁵³ *Alexkor* at para 63.

⁵⁴ See also *Fourie* at para 17.

that reflects the diversity, cultural identity and uniqueness of traditional communities, but also its role in nation building.⁵⁵

The institution of traditional leadership embodies core communal values that embrace everyone on a firm foundation of the principle of *ubuntu*. It is, therefore, untraditional for the institution to draw a distinction between people within its jurisdiction and compromise their potential to share and take co-responsibility in the promotion of traditional values. The co-sharing of responsibilities had long been established under the system of traditional governance through *imbizos* which are still followed today in many traditional communities. *Imbizos* are a traditional way in which everyone is able to discuss and resolve issues that affect their community.⁵⁶ The essence of *imbizos* under the traditional system of governance was re-affirmed by Froneman J in *Albutt v Centre for the Study of Violence and Reconciliation & others*⁵⁷ as he pointed out that “the notion of participa[tion]... is a tradition that runs deep in the lives of many people in this country... and that is my understanding of African tradition”.⁵⁸

Therefore, the the call for the removal of the protection accorded to same-sex couples also has serious and negative consequences for the institution of traditional leadership’s own legitimacy. The establishment of a society based on the “lived and living experiences”⁵⁹ encapsulated in the principle of *ubuntu* includes the broadening of its scope of operation – without pigeonholing people in a way that compromises the legitimate status of the institution which recognises the *iNkosi* as “...the father of his people and a binding and spiritual factor that serves as a symbol of the unity of the group ... seen by most people as the embodiment of law and order, the upholder of values and as provider for the needs of the community”.⁶⁰

It is this status that places the institution in good stead to ensure the development of traditional values in accordance with the broad principles of the new democratic dispensation. At the heart of the promotion of these values is the link that they have with the foundational values of the Constitution. The interdependence of these values is reinforced by the prohibition of any discriminatory conduct which is inconsistent with the supremacy of the Constitution.⁶¹ According to Moseneke “[the supremacy of the Constitution] represents the common convictions of our people ... record[ing] not only our joint hope to create a non-racial, non-sexist and open democratic society but also [the elimination of any conduct] and reversal of [underlying

⁵⁵ See Dusing S *Traditional leadership and democratisation in Southern Africa: A comparative study of Botswana, Namibia and South Africa* (2002) at 97.

⁵⁶ See Ngcobo J in *Doctors for Life International v Speaker of the National Assembly & others* 2006 (12) BCLR 1399 (CC) at para 102.

⁵⁷ 2010 (5) BCLR 391.

⁵⁸ *Albutt* case at para 91.

⁵⁹ Ramose M “Law through ubuntu in African philosophy through ubuntu’ in Cornell and Muvangua (2012) at 398.

⁶⁰ See Du Plessis W & Scheepers T “House of Traditional Leaders: Role, problems and the future” (2000) 3:1 *Potchefstroom Electronic Law Journal* 73 at 74.

⁶¹ See s 2 of the Constitution.

systemic prejudices which South Africa inherited from its past]”.⁶² The affirmation of the supremacy of the Constitution entails:

- the recognition of [same-sex couples] as human beings, entitled to unconditional respect, dignity, value and acceptance from the members of the community of which such couples happen to be part;⁶³
- the corresponding duty that couples in same-sex relationships may bring towards an understanding of people who may not be in a dominant position;⁶⁴
- the existence of an imperative constitutional need to acknowledge the long history in our country and abroad of marginalisation and persecution of couples in same-sex relationships who have the same characteristics as the rest of the population, save for their sexual orientation;⁶⁵ and
- the Constitution’s representation of a radical rupture with a past based on intolerance and exclusion, and the movement forward to the acceptance of the need to develop a society based on equality and respect by all for all.⁶⁶

These factors are endorsed in the Traditional Leadership and Governance Framework Act⁶⁷ which seeks to ensure “the restoration of the integrity and legitimacy of the institution of traditional leadership in line with [traditional values] and practices”.⁶⁸ In turn, the institution must -

[P]romote freedom, human dignity and the achievement of equality and non-sexism; strive to enhance tradition and culture; promote nation building and harmony and peace amongst people; and promote an efficient, effective and fair dispute resolution system and a fair system of administration of justice...⁶⁹

The requirements reinforce the principle of *ubuntu* and require the institution of traditional leadership to align its exercise of traditional authority in a manner that gives effect to the broader context of the new constitutional dispensation. The Constitutional Court has held in this regard:

[T]he institution of traditional leadership] is called upon to balance competing interests in a principled way and promote the constitutional vision of a caring society based on good neighbourliness and shared concern. The [requirements] confirm that *we are not islands unto ourselves*. The spirit of *ubuntu*, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy ... in our evolving society of the need for human interdependence, respect and concern.⁷⁰

⁶² See Moseneke D “A journey from the heart of apartheid darkness towards a just society: Salient features of the budding constitutionalism and jurisprudence of South Africa.” Annual Senator Philip A Hart Memorial Lecture, 4 April 2012, delivered at Georgetown University, 4 April 2012, at 12.

⁶³ See Langa J in *Makwanyane* at para 224.

⁶⁴ L’Heureux-Dube C “Making the difference: The pursuit of equality and a compassionate justice” (1997) 13 *SAJHR* 335 at 338 quoted in Albertyn C & Goldblatt B “Facing the challenges of transformation: Difficulties in the development of an indigenous jurisprudence of equality” (1998) 14 *SAJHR* 248 at 249.

⁶⁵ See *Fourie* at para 59.

⁶⁶ *Fourie* at para 59.

⁶⁷ Act 41 of 2003 (“Framework Act”).

⁶⁸ Preamble to Framework Act.

⁶⁹ Preamble to Framework Act. Emphasis added.

⁷⁰ Sachs J in *PE Municipality* at para 37. Emphasis added.

In line with the principle of *ubuntu*, the institution of traditional leadership is required to balance competing interests in a manner that reflects the character of our society, acknowledge difference, and accept people for who they are.⁷¹ The acceptance of difference is an acknowledgement of the prejudices and discrimination that couples in same-sex relationships continue to face across the globe and is not limited only to the attitude displayed by the institution of traditional leadership.⁷² On the whole, the acceptance of difference has the potential to build a society wherein people, including traditional leaders are able to tolerate the distinction and accept same-sex couples as human beings who are entitled to equal respect and responsibility as ordinary citizens of the country.⁷³ As Swanson states “it makes a fundamental contribution to indigenous ways of knowing and being”.⁷⁴

4 CONCLUSION

The rejection of sexual orientation as non-existent by the institution of traditional leadership under the traditional system of governance undermines the significance that *ubuntu* holds in the institution’s regulation of its own authority. An acceptance of the principle of *ubuntu* requires that the institution manifest conduct that acknowledges the human worth of any other person. In essence, the institution has undermined its own legitimate status – a status essential to ensuring the proper balance of traditional values with those entrenched in the Constitution. It also destroys the essence of *ubuntu* which “[f]or the first time in the history of South African law...was adopted into the general law of the land”.⁷⁵

⁷¹ See *Fourie* at para 60.

⁷² See Belkin A & Canaday M “Assessing the integration of gays and lesbians into the South African National Defence Force” (2010) 38 *South African Journal of Military Studies* 1.

⁷³ See Chaplin (2006) also argues that “ubuntu emphasises the notion of mutual understanding and the active appreciation of the value of human difference...[in order to] know and understand others within a multicultural environment” (at 3).

⁷⁴ Swanson DM “Ubuntu: An African contribution to (re) research for/with a humble togetherness” (2007) 2:2 *Journal of Contemporary Issues in Education* 53 at 55.

⁷⁵ See Bennett TW “Ubuntu: An African equity’ (2011) 14 *Potchefstroom Electronic Law Journal* 30 at 30.