

THE SIGNIFICANCE OF THE LIVING CUSTOMARY LAW FOR AN UNDERSTANDING OF LAW: DOES CUSTOM ALLOW FOR A WOMAN TO BE HOSI?*

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1 Introduction

This may seem a strange title for a note on the *Shilubana* case.¹ Why? Because ultimately, the argument of the National Movement of Rural Women – an invited *amicus* for the case – that the living customary law does not develop in the sense that Anglo-American lawyers are used to understanding the word was not determinative of the outcome of the case. However, as we will see, I defend the Rural Women’s notion of the customary law and the significance it has for the understanding of both the role of custom in law and the place of the past in living customary law.² Justice Van Der Westhuizen summarised their argument as follows:³

The Rural Women emphasise that customary law is a flexible, living system of law, which develops over time to meet the changing needs of the community. It is not rigidly rule-based, and courts must exercise caution in ascertaining the content of customary law from the written records of apartheid-era administrators, legislators and courts. Accordingly, the choice of Ms Shilubana as Hosi should not be viewed as a ‘development’ of the customary law, as customary law is necessarily flexible.

* I deliberately use the word ‘Hosi’ to address the specificity of the leadership that was at stake in this case. The word ‘chief’ has understandably been criticised for its association with notions of leadership imposed by Western ideas of what constituted a tribe. Yet the word ‘tradition’ or ‘traditional leadership’ is also problematic, because it assumes that somehow, these forms of leadership are artificially separated from modernity, when, as this case shows, they are clearly closely connected to it.

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¹ *Shilubana & Others v Nwamitwa* (CCT 03/07) [2008] ZACC 9; 2008 (9) BCLR 914 (CC); 2009 2 SA 66 (CC).

² I need to note at the outset that the argument of the National Movement of Rural Women was not available to the High Court or the Supreme Court of Appeal.

³ *Shilubana* (n 2 above) para 35.

Thus, in a certain sense the very question of development necessarily puts the customary law within the framework of the hegemonic notion of positive law as rule bound. This may seem a minor point in a carefully crafted case that justifies a decision made by Valoyi authorities to install a woman as their leader. But, indeed it is not, as we will discuss shortly. The living customary law has a different notion of living law and thus of custom than the one that dominates, certainly in English and American notions of the common law. Justice Van Der Westhuizen takes major steps in the direction of recognising this difference and we will return to those shortly. But if true respect is to be given to the living customary law, it will ultimately be necessary to think deeply about the reigning notion of what law is and why we have it. That is the sweeping jurisprudential challenge of the living customary law. That said, the judgment is a huge step forward in the careful consideration it gives to the place of the customary law in the new dispensation, its analysis of who has authority within the specifics of a particular community and royal family, and the capacity of living customary law to grapple with the mandates of a new constitution that protects gender equality.

2 Background

As Justice Van Der Westhuizen rightly notes, the issue in the case is not primarily about gender equality, but instead about the community's authority to promote gender equality in the succession of their leadership. In this particular case the promotion of gender equality also involved the question of whether or not 'traditional' leadership had the authority to restore 'chieftainship' to a house from which it had been removed because of gender discrimination, a discrimination that took place long before the passage of the 1994 Interim Constitution. In this case it was not the Constitution's protection of gender equality that went up against custom, because it was a certain part of the Valoyi leadership that had resolved to confer the position of Hosi on Ms Shilubana.

Let us briefly review the facts of the case. The dispute arose in the Valoyi community in Limpopo. Mr Nwamitwa – the son of Hosi Malathini Richard Nwamitwa – challenged Ms Shilubana's right to succeed Hosi Richard after his death. Ms Shilubana was the daughter of Hosi Fofeza Nwamitwa, who died in 1968. The history of this dispute is as follows. Hosi Fofeza had no male heirs, and at the time of his death customary law was understood to confer succession to the eldest son. Since there was no son, Hosi Fofeza's younger brother Richard became chief or Hosi of the Valoyi. In December of 1996, the Royal Family of the Valoyi met and unanimously decided to confer the position of Hosi on Ms Shilubana. Ms Shilubana did not want to replace Hosi Richard at that time and indeed wanted him to remain the Hosi

for an unspecified period of time. In July 1997, Hosi Richard, in the presence of a Chief Magistrate and 26 witnesses, recognised Ms Shilubana as the one to succeed him as chief. The Valoyi Tribal Authority sent a letter to the Commission for Traditional Leaders of the Northern Province of Limpopo stating that Ms Shilubana would succeed Hosi Richard. In August 1997 the Royal Council confirmed that Hosi Richard would transfer his chieftainship to Ms Shilubana. That same day, a ‘duly constituted meeting of the Valoyi tribe’ under Hosi Richard resolved that ‘in accordance with usages and customs of the tribe’, Ms Shilubana would be appointed Hosi.⁴ Hosi Richard wrote a letter two years later, that both the High Court and The Supreme Court of Appeal interpreted as withdrawing his support for Ms Shilubana, even though the letter was not unequivocal. After Hosi Richard’s death in November of 2001, the Royal Family, Tribal Council, representatives of local government, civic structures, and stakeholders in various organisations met and again agreed that Ms Shilubana would succeed Hosi Richard. Some community members voiced support for Mr Nwamitwa at about that same time. In July 2002, the Provincial Executive Council in a letter approved Ms Shilubana’s succession to Hosi. The Department of Local Government and Housing scheduled an inauguration ceremony on November 29th 2002. This ceremony was interdicted by Mr Nwamitwa. In September 2002, Mr Nwamitwa instituted proceedings in the High Court of Pretoria seeking a declarator that he and not Ms Shilubana was heir to the position of Hosi. He also sought an order that letters of support for Ms Shilubana be withdrawn.

3 Judgments and analysis

Both the High Court and The Supreme Court of Appeal held in Mr Nwamitwa’s favor.⁵ They held that that even if the living customary law of the Valoyi now permitted women to be Hosis, Mr Nwamitwa as the eldest child of Hosi Richard still had the right of succession. Central to their holdings was a view as to what the customary law was and indeed, what it means to claim that some custom is law. Despite their nod to the living customary law’s promotion of gender equality, at the end of the day and despite of some language to the contrary, these two courts questioned whether the change in ‘law’ had truly become the law and replaced the much older custom of succession by the eldest son. We need to review a little more closely how the courts came to this decision. The High Court addressed four questions on

⁴ *Shilubana* (n 2 above) para 5.

⁵ *Nwamitwa v Phyllia & Others* 2005 3 SA 536 (T) (*Shilubana* (High Court)); *Shilubana & Others v Nwamitwa (Commission for Gender Equality as Amicus Curiae)* 2007 2 SA 432 (SCA) (*Shilubana* (SCA)).

which oral evidence was to have been presented. To quote the Constitutional Court's restatement of those questions:⁶

(1.1) Whether in terms of the customs and traditions of the Tsonga/Shangaan tribe, more particularly the Valoyi tribe, a female can be appointed as Hosi of the Valoyi tribe?

(1.2) Whether [Hosi Richard] was appointed as Hosi or acting Hosi since October 1968?

(1.3) Whether when appointing [Ms Shilubana] as a Hosi of the Valoyi tribe the royal family acted in terms of the customs and traditions of the Valoyi tribe i.e. of the Tsonga/Shangaan nation?

(1.4) Whether decision No 32/2002 by the Executive Council of Limpopo Provincial Government dated 22 May 2002 appointing [Ms Shilubana] as chief of the Valoyi tribe, is in accordance with the practices and customs within the meaning of the Constitution of the Republic of South Africa Act 108 of 1996?

All the relevant authorities recognised that the interim Constitution could have changed the social reality of the Valoyi so that even if a woman could not have been appointed Hosi prior to the new dispensation, the living customary law could possibly have changed as a result of the new constitutional regime. The nod to the possibility that a woman could be appointed chief after the Interim Constitution in a way affected the social reality that prior to that a woman could not be appointed Hosi of the Valoyi. On the third issue, the Court strongly argued that there was no precedent in the applicable customary law that allowed leadership to be transferred from one line of Hosi to another, particularly when this transference took place because of the appointment of a woman. The Court attributed the conferral of the position of Hosi on Ms Shilubana to a 'bout of constitutional fervor'.⁷ The Court also defended the proposition that proper customary proceedings for the appointment had not been followed, because the Royal Family can only recognise a Hosi and not appoint one. The other bodies and their role in the appointment were ignored and instead the Court held that without a 'general poll' the customary law had not been changed.⁸ According to the Court, Hosi Richard had a successor. The reason why Hosi Richard had a successor was that he was appointed in 1968 and the customary law at that time held a right to succession as belonging to the eldest son. The problem was not one of gender but of lineage, since the appointment of Ms Shilubana shifted the lineage of the chief to another line. Since

⁶ *Shilubana* (n 2 above) para 19, quoting from *Shilubana* (High Court) (n 3 above) 539B-E.

⁷ *Shilubana* (High Court) (n 6 above) 544G.

⁸ *Shilubana* (High Court) (n 6 above) 546D-547D, 548E-H.

gender discrimination was not the central issue there was no constitutional question.⁹

The Supreme Court of Appeal actually suggested that the Valoyi might be confused about the own customary law.¹⁰ It held that the Royal Family, Royal Council and Tribal authority decisions could alter the customary law so as to eliminate gender discrimination after 1994.¹¹ By so doing it implicitly disagreed with the High Court. But that difference noted, the Court continued, the gender discrimination took place before the Interim Constitution. Therefore, Hosi custom in 1968 demanded that succession should proceed down Hosi Richard's family line. Although the authorities involved in the decision to appoint a woman could alter the customary line in accordance with the new constitutional dispensation, the Royal Family could not 'elect' a Hosi and therefore the appointment of Ms Shilubana as Hosi was against their custom.¹²

To the degree that this decision by the traditional authorities was inspired by 'constitutional fervor' to eliminate gender bias, this was, for the Supreme Court of Appeal, a dangerous fervor because it could never go far enough and would inevitably be ad hoc. Thus it would in a basic sense undermine legal certainty and the customary law of succession, which provided that certainty. Ultimately the Court agreed with the High Court that there was no issue of gender discrimination.¹³ The Supreme Court of Appeal also agreed with the High Court's response to the fourth question, namely that the official appointment of Ms Shilubana was not in accordance with custom and since there was no constitutional issue that problematised custom, Ms Shilubana should not be allowed to become Hosi.¹⁴ It declined to order that the relevant authorities issue letters of appointment for Mr Nwamitwa or that the required ceremonial function should still be performed by the Royal Family. Instead, it simply ordered that Mr Nwamitwa be appointed Hosi.¹⁵ Thus, the manner in which the order was articulated was itself disrespectful of the central importance of Hosi customs of inauguration.

Ms Shilubana applied to the Constitutional for leave to appeal. The Chief Justice issued an invitation to *amici* to supply further arguments on a case of this magnitude. In his argument before the Constitutional Court, Mr Nwamitwa refined two of his earlier arguments. First, if the rule of primogeniture was discriminatory it

⁹ *Shilubana* (High Court) (n 6 above) 548E-H.

¹⁰ *Shilubana* (SCA) (n 6 above) para 47.

¹¹ *Shilubana* (SCA) (n 6 above) para 49.

¹² *Shilubana* (SCA) (n 6 above) para 50 - 51.

¹³ As above.

¹⁴ *Shilubana* (SCA) (n 6 above) para 51.

¹⁵ *Shilubana* (SCA) (n 6 above) para 53 - 54.

was fair because if Ms Shilubana would be appointed chief, a chief would not father the next Hosi and this would cause chaos in the community. A second, colorful and rather bizarre argument was also added, namely that Ms Shilubana actually accepted male lineage since she intended to appoint a male successor.

Before turning to The Constitutional Court's judgment we need to make two important observations. The first is that both the High Court and the Supreme Court of Appeal failed to understand the meaning of the substantive revolution in South Africa and in a very specific sense. A substantive revolution is a term used by Hans Kelsen to describe a legal transfer of power where the reigning government gives up its sole hold on state authority.¹⁶ This is precisely what the National Party did. But the word substantive is key here and has admittedly caused confusion in the judiciary and the South African academy. What was the substantive change? For purposes of this short comment, I am going to defend the proposition, which I have justified at length elsewhere, that the substantive revolution inverted the order of apartheid which denied the dignity of the black majority, by making the respect for the dignity of all others the *Grundnorm* of the entire Constitution.¹⁷ Emeritus Justice Laurie Ackermann has most powerfully defended this proposition, relying heavily, at least at times, on Immanuel Kant. The *Rechtsstaat* established by the new Constitution did not create this demand for respect because it was always a moral demand, at least if one follows Kant. All human beings are of infinite worth because of an ideal attribution. We can lay down a law unto ourselves, the moral law, and do the next right thing. By following the moral law we act in accordance with our freedom. Morality is the realm of internal freedom. The realm of external freedom or *Recht* in Kant always turns on the recognition of the respect for all others. This respect is always a demand of any system of right. So in a sense then, the Constitution of the New South Africa did not create this respect when it made it law. It recognised a moral *Grundnorm* that is the basis of all right and that should have been respected all along. Thus, the Valoyi's bout of constitutional fervor, if that is what it was, was based on an understanding of how the substantive revolution of the New South Africa demanded the recognition of and the correction of the past wrong of gender discrimination, which was wrong before the Constitution was passed. Admittedly, the idea of an objective normative order that is discovered by law goes against the grain of the dominant idea in Anglo-American law, which holds that a legal wrong is not a wrong

¹⁶ H Kelsen *General theory of law and the state* (1949) 117.

¹⁷ D Cornell 'Bridging the span toward justice: Laurie Ackermann and the ongoing architectonic of dignity jurisprudence' in AJ Barnard-Naudé *et al* (eds) *Dignity; Freedom, and the post-Apartheid legal order. The jurisprudence of Justice Laurie Ackerman* (2008) 18-46.

until it is legally created as such. Hence the courts do not find it acceptable to correct discrimination before the 1994 Constitution because there was not discrimination before law announced it. The concern, of course, of the other way of thinking about law is that people's expectations will be violated because they will be held responsible for wrongs that were not illegal in the positive law. Of course the Valoyi were not following Kant. They were following their own understanding of the customary law. Whether or not the Royal Family and other authorities were following the view of the living customary law as always changing, as the National Movement of Rural Women suggests, may be an open question. To a certain extent, this is an empirical question, and there is now increasing ethnographic evidence that the living law proceeds as the Rural Women suggest. Therefore the Valoyi were following their own customary law.

To answer the concern that expectations must be taken into account, Justice Van Der Westhuizen gives three considerations for determining what the customary law is. As Justice Van Der Westhuizen emphasises, the customary law is the law of the majority, and millions of people live by and respect its dictates. Therefore, the question of how to determine what the customary law is, is crucially important.¹⁸

The first step is to consider the traditions of the community concerned. However, how to uncover this past is complicated by the distortion of the written customary law under apartheid and colonialism.¹⁹ Secondly, the right of authorities to change and amend their law must be recognised. The stagnation of law, as Justice Van Der Westhuizen well recognises, was inevitable under apartheid. As he also recognises, the very notion of a living law is precisely that it can adapt to the circumstances of the New South Africa. Thus, it is crucial for the courts to respect the free development of this law by the communities that know it best because it is 'their law.' Where there is a dispute over what is the living customary law, evidence must be produced not only about the past but also about the present development and the reasons for it.²⁰ Third, there must be the recognition that people do have expectations and that flexibility of the living customary law must be balanced against other factors such as legal certainty, vested rights and the protection of constitutional rights under the new dispensation. To quote Justice Van Der Westhuizen:²¹

¹⁸ *Shilubana* (n 2 above) para 43.

¹⁹ *Shilubana* (n 2 above) para 44.

²⁰ *Shilubana* (n 2 above) para 45 - 46.

²¹ *Shilubana* (n 2 above) para 47.

The outcome of this balancing act will depend on the facts of each case. Relevant factors in this enquiry will include, but are not limited to, the nature of the law in question, in particular the implications of change for constitutional and other legal rights; the process by which the alleged change has occurred or is occurring; and the vulnerability of parties affected by the law.

Even though the development of the customary law by the courts must remain distinct from the community's own practice and process, so he continues, both must remain mindful of obligations under section 39(2) of the Constitution. The Court held in *Carmichele*²² that section 39(2) imposes on all courts of law an obligation that law be developed so as to bring it in line with the substantive revolution and the objective normative order of the New South Africa. This obligation is imposed on the 'traditional authorities' as well, even if their freedom to change the law in accordance with their own practice of custom must also be respected.²³

The Rural Women challenged Mr Nwamitwa's primary argument that the customary law upheld male primogeniture and even the idea that male primogeniture, an English law for the transference of property, was an adequate understanding of the practice of succession in which the position of Hosi usually passed to the first born son. This challenge was part of their larger challenge as to what kind of law customary law actually is, as a flexible set of practices and ethical principles. But for Justice Van Der Westhuizen it was necessary to address a prior question as to what role past practice can play in establishing customary law as law. To do so, he reviews the *Van Breda v Jacobs* test, which has been used to determine when custom can be a source of law in the common law.²⁴ That test was that a set of practices must be 'recognised as law, a practice must be certain, uniformly observed for a long period of time and reasonable'.²⁵ But he discusses this test only to then argue that this test cannot and should not be used for the customary law.²⁶ Here Justice Van Der Westhuizen comes very close to the Rural Women's understanding of the customary law or at the very least, he recognises, that the customary law incorporates a completely different understanding of law and custom than the one used in the common law. Again to quote Justice Van Der Westhuizen:²⁷

²² *Carmichele v Minister of Safety and Security & Another (Centre for Applied Legal Studies Intervening)* [2001] ZACC 22; 2001 4 SA 438 (CC); 2001 10 BCLR 995 (CC), referring to paras 34 - 36.

²³ *Shilubana* (n 2 above) para 48.

²⁴ *Van Breda & Others v Jacobs & Others* 1921 AD 330.

²⁵ *Shilubana* (n 2 above) para 52, referring to *Van Breda* (n 22 above) 334.

²⁶ *Shilubana* (n 2 above) para 54.

²⁷ As above.

Van Breda dealt with proving custom as a source of law. It envisaged custom as an immemorial practice that could be regarded as filling in normative gaps in the common law. In that sense, custom no longer serves as an original source of law capable of independent development, but survives merely as a useful accessory. Its continued validity is rooted in and depends on its unbroken antiquity. By contrast, customary law is an independent and original source of law. Like the common law it is adaptive by its very nature. By definition, then, while change annihilates custom as a source of law, change is intrinsic to and can be invigorating of customary law.

Indeed the practice of the living customary law is flexible and context specific and thus always changing. This is the Rural Women's understanding of customary law, and it is obvious by now that I am in agreement with them and with the intellectual sources they rely on, primarily the outstanding work of John and Jean Comaroff. Although Justice Van Der Westhuizen does not go that far, he does understand that the legal status of the customary law cannot turn on whether it has been consistently practiced. The reason for Justice Van Der Westhuizen's recognition of a more nuanced practice in customary law is that a more rigid view would deny their right to develop. Since such development is amongst other things required by the Constitution, such an understanding of what makes custom law would be unconstitutional.²⁸

As we have already noted, the Rural Women argued that women have, even if infrequently, been installed as leaders and that both the authorities who are in charge of such installation and the law of succession itself has been flexible because that is the nature of customary law. There is, in other words, no rule of recognition in HLA Hart's sense of the phrase that tells us once and for all which body must do what when it comes to succession. Nor is there a rule of succession carved in stone. The Comaroffs have long since argued – and their work is cited by the Rural Women – that the process – and it is a process – of succession has always been adaptable to the needs of the community.²⁹ On the understanding of the Rural Women the installation of Ms Shilubana as chief was the practice of the customary law and that should be the end of the story. Their alternative argument, however, was that this could be considered a development of the customary law and one that was mandated by the new Constitution. Justice Van Der Westhuizen ultimately does not think that enough evidence was offered by the Rural Women that this is how the customary law is practiced as law, although he obviously takes

²⁸ *Shilubana* (n 2 above) para 55.

²⁹ J & J Comaroff 'Reflections on liberalism, policulturalism and ID-ology: Citizenship and difference in South Africa' New Social Forms Seminar Series, University of Stellenbosch Department of Sociology and Social Anthropology (15 August 2003).

their submission very seriously, referring to it over and over again in his judgment.

Several of the most important commentaries on *Shilubana* have powerfully argued that the living customary law must be developed according to its own principles. JC Bekker and CC Boonzaaier agree with the Rural Women's submission that the customary law of succession does have the flexibility to allow a woman to be a chief.³⁰ But there is an irony to my mind in their argument. They are critical of the Constitutional Court's judgment because Justice Van Der Westhuizen did not recognise the flexibility of the customary law on the question of succession, and instead insisted that Ms Shilubana's appointment was a development of the law. If it was a development of the law, it was a legislative function, and the Royal Family did not have such a legislative function. So on the one hand, they want to protect the customary law and its development on its own principles, and, on the other hand, they argue that the distinction between interpreting and making law, a Western distinction, should be applied to customary authorities. The reason for so doing is that it would be impracticable to allow such authorities to have such a legislative function:³¹

In the present structures of government and administration, it would be impractical to accommodate lawmaking by traditional authorities. As has been pointed out above, there are some 800 traditional authorities. There will obviously be differences of opinion on what the law ought to be. The question also arises whether the laws are to be personal, or confined to the area of jurisdiction of the community concerned. If the laws are to be personal, should the law apply to the subjects wherever they are? If the laws are to be territorially restricted, would the laws have an impact on local government functional areas? Such permutations would clearly be untenable.

But the significance of the Camaroff's work and the Rural Women's submission is that there are no rigid rules for which body is appropriate for which kind of decision. Thus there is not the familiar distinction between interpreting law and making law, nor, as I have suggested, a rule of recognition that would tell us when a certain kind of law-making is legislative and when it is judicial. Thus, even though Bekker and Boonzaaier rightfully argue that the customary law would allow the succession of women, they still are imposing Western categories on what law is in their criticism of the constitutional decision, which they read as at least implicitly giving the Royal Family legislative capacity.

³⁰ JC Bekker & CC Boonzaaier 'Succession of women to traditional leadership: is the judgement in *Shilubana v Nwamitwa* based on sound legal principles?' (2008) XL *Comparative and International Law Journal of Southern Africa* 449, in general.

³¹ As above 460-461.

Nomthandazo Ntlama also argues that the living customary law should be allowed to develop in accordance with its own principles.³² Here, however, we have another important misunderstanding of Justice Van Der Westhuizen's judgment. This does not concern his worry about bestowing legislative capacity on traditional authorities. Instead, the author is worried about Justice Van Der Westhuizen's argument that *Van Breda* did not apply to living customary law:³³

According to the Court in *Shilubana*, the effect of such a treatment is that the proving of a custom no longer serves as an original source of law capable of independent development, but survives merely as a useful accessory. What is of greatest concern is the contention that the interpretation of the decision of the Valoyi community in the development of their own customs could also mean that, even if it had hitherto not been lawful under customary law, the authorities effected a development to the law to bring it in line with the Constitution.

I have already argued that Justice Van Der Westhuizen does distinguish *Van Breda* as it deals with custom in the common law from the appropriate use of custom in the customary law. He does so precisely to recognise the living and flexible nature of the customary law. But he does not entirely disavow the past or past practice as one aspect of determining the customary law. Again, we are returned to the question: are the Rural Women correct in their understanding of the customary law as a very different notion of doing law, and indeed doing justice, than the one we have developed in the West? Thus, my criticism of both commentators is that they don't go far enough in recognising the difference in customary law from our Western notions of law, and that indeed Justice Van Der Westhuizen is beyond them in at least his attempt to see that which body decides is not engraved in legal stone, nor should custom and its use in law be interpreted through the lens of the common law.

This said, Justice Van Der Westhuizen still stops before the full recognition of the Rural Women's view of the customary law. Instead, he argues that the Valoyi authorities developed their laws and values in accordance with a very important aspect of the Constitution, which has as its very basis the assumption of the equal worth of all persons. Again, as we have already discussed, if this equality is understood to be premised on the ideal attribution of dignity to all persons, it can and should be understood as the *Grundnorm* of the entire dispensation. Thus, the Valoyi are promoting the spirit of the objective normative order that is the New South Africa and should be

³² N Ntlama "Equality" misplaced in the development of the customary law of succession: Lessons from *Shilubana v Nwamitwa* 2009 2 SA 66 (CC) (2009) 20 *Stellenbosch Law Review* 333.

³³ Ntlama (n 33 above) 352.

applauded for their ‘bout of Constitutional fervor.’ As Justice Van Der Westhuizen concludes:³⁴

In deciding as they did, the Valoyi authorities restored the chieftainship to a woman who would have been appointed Hosi in 1968, were it not for the fact that she is a woman. As far as lineage is relevant, the chieftainship was also restored to the line of Hosi Fofozza from which it was taken away on the basis that he only had a female and not a male heir.

Let me stress again, however, that the issue of gender equality is not the primary issue of the case, and was not the only issue of the Valoyi authorities. The primary issue was the practice and flexibility of the living customary law, which in this case would allow a woman to become Hosi.

Justice Van Der Westhuizen finally addresses the question of whether the Valoyi authorities and the Royal Family were the ‘right’ bodies to make this decision. Again Justice Van Der Westhuizen strongly disagrees with the position of the High Court, which was that the Constitutional Court could not overturn the High Court’s finding that in terms of existing customary law the role of the Royal Family was only formal and that there was not a legitimate appointment to Hosi according to Valoyi custom.³⁵

It must be noted that the traditional authorities’ power is the high water mark of any power within the traditional community on matters of succession. If the authorities have only the narrow discretion the High Court found them to have had, it follows that no other body in the community has more power in this regard, since no other body has more power here than those authorities. This would mean that no body in the customary community would have the power to make constitutionally-driven changes in traditional leadership. The result can be seen if we consider what would have happened, on the narrow view, if the traditional authorities in the present case had simply sought to install a woman as Hosi. Even if she were the eldest child of the previous Chief, it would follow on the narrow view that the traditional authorities would have no power to appoint her, unless there was no other heir or the male heir was unfit to rule. It would be necessary, on this view, to approach the courts before a woman could be installed as Chief.

For Justice Van Der Westhuizen – and I applaud his decision – the narrow view is thus unconstitutional and in violation of Section 211(2). Justice Van Der Westhuizen then applies his balancing test to this case arguing that this contemporary development should indeed be recognised as law.³⁶ Justice Van Der Westhuizen further notes

³⁴ *Shilubana* (n 2 above) para 70.

³⁵ *Shilubana* (n 2 above) para 72.

³⁶ *Shilubana* (n 2 above) para 78.

what this case is not. It does not change the position of Hosi to an elected position. Ms Shilubana was born into her position as daughter of a Hosi.³⁷ It is not just any woman who was selected. Since this altered position is now law, Mr Nmamitwa does not have a vested right in the position of Hosi. To the degree that the appointment of Ms Shilubana leaves unanswered questions, these questions will be answered in the future by the living customary law. The future decisions of the living customary law were not before the Constitutional Court.³⁸ Justice Van Der Westhuizen does address the rather bizarre argument that there was no constitutional issue because Ms Shilubana holds to the validity of gender discrimination and the argument that this kind of change will bring chaos with it. To this second argument Justice Van Der Westhuizen argues that, for now at least, discrimination is only being undone until 1968, although he notes that the Valoyi tribal authorities could take further steps as long as they were constitutional. Ms Shilubana's decision as to who was to succeed her does not amount to gender discrimination, or her own investment in such discrimination.³⁹

4 Conclusion

Shilubana is indeed a big step forward in the respect for the customary law and its powers to change laws. As such it should be applauded. Still, we will need to return to the Rural Women's argument that the correct understanding of the customary law is that it is a flexible set of practices, processes and ethical principles. This concept of the customary law needs to be studied more carefully. The challenge there is not just about this case, but about a much bigger set of issues. Philosophers like John Murungi have argued that African jurisprudence has an entirely different view of law as the doing of justice.⁴⁰ At least according to a powerful argument made by Roger Berkowitz, this understanding of law as the doing of justice has died out in the West. To quote Berkowitz: '[T]he divorce of law from justice informs our modern condition. Lawfulness in other words, has replaced justice as a measure of ethical actions'.⁴¹ Law is the positive law and exists precisely because we no longer believe in the doing of justice. For John Murungi on the other hand:⁴²

Each path of jurisprudence represents an attempt by human beings to tell a story about being human. Unless one discounts the humanity of

³⁷ *Shilubana* (n 2 above) para 76 - 77.

³⁸ *Shilubana* (n 2 above) para 81.

³⁹ *Shilubana* (n 2 above) para 88 - 91.

⁴⁰ J Murungi 'African jurisprudence: hermeneutic reflections' in K Wiredu (ed) *A companion to African Philosophy* (2006) 525.

⁴¹ R Berkowitz *The Gift of Science* (2005) IX.

⁴² Murungi (n 34 above) 525 - 526.

others, one must admit that one has something in common with all other human beings. To discount what one has in common with other human beings is to discount oneself as a human being. What is essential to law is what secures human beings in their being. The pursuit and the preservation of what is human and what is implicated by being human are what, in a particular understanding, is signified by African jurisprudence. Being African is a sign of being African, and being African is a sign of being human. African jurisprudence is a signature. In this signature lies not only what is essential about African jurisprudence, but also what is essential about the Africanness of African jurisprudence. To learn how to decipher it, which, in a sense, implies learning how to decipher oneself, paves the way to genuine understanding.

We need such understanding of law and justice in South Africa if we are to overcome the disconnection of primarily white academics from the view of law and justice that may predominate in the black communities that comprise the majority of the population. The ultimate challenge of the Rural Women's submission is that it calls us to that process of carefully deciphering a view of law that is different than our own; perhaps even more importantly, that preserves the view of law as the doing of justice. More work needs to be done, much more work, on what the living customary law is in the different black communities and nations in South Africa. But *Shilubana* shows that the call for careful deciphering has at least been heard.