

CUSTOMARY (COMMUNAL) LAND TENURE IN SOUTH AFRICA: DID *TONGOANE* OVERLOOK OR AVOID THE CORE ISSUE?

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I conceive that land belongs to a vast family of which many are dead, few are living and countless members are unborn**

1 Introduction

In a developmental African state such as South Africa, judges face land issues which are sensitive, complicated, challenging, and controversial.¹ When adjudicating upon these issues, the judiciary should courageously face the challenges head-on and deal with the issues decisively as and when they arise, in order to, among others, play their transformative role, and also ensure legal certainty. This task is particularly important in a constitutional state, with a transformative mandate, like South Africa. However, in doing so, the judiciary must be sensitive to the unique and complicated character of land holding, the controversies around it, and the sensitivities of the land holders.

The sensitivity of land issues arises from the fact that African communities share special, intimate, and intricate relationships with

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** A Nigerian chief's submission to the West African Land Commission in 1912.

¹ E Johnson 'Communal land and tenure security: analysis of the South African Communal Land Rights Act 11 of 2004' unpublished LLM dissertation, Stellenbosch University, 2009 15; B Cousins 'Contextualising the controversy: dilemmas of communal tenure reform on post-apartheid South Africa' in A Claassens & B Cousins (eds) *Land, power and custom: controversies generated by South Africa's Communal Land Rights Act (2008)* 3; B Cousins 'Legislating negotiability: tenure reform in post apartheid South Africa' in K Juul & C Lund (eds) *Negotiating property in Africa* (2002) 67.

their land. To Africans, land is more than a mere asset of economic value. It is not merely 'a material and productive resource that enables survival, livelihoods, and agricultural production. It is also an important symbolic resource that heavily influences status, rites of passage, and identity.'²

Vermu explains that 'land is deeply laden with cultural and spiritual meanings that are context and culturally specific'.³ Therefore, in Africa, land embodies significant cultural and spiritual values, or what Dannenmaier refers to as a 'unique or distinctive connection to the land with deep social, cultural, and spiritual meaning'.⁴ The African Union also indicates that, 'land [in Africa] is regarded not simply as an economic or environmental asset, but also as a social, cultural, and ontological resource ... embodied in the spirituality of society'.⁵ This view is shared by Anaya. He indicates that, 'indigenous [African] peoples' rights over land and natural resources flow not only from possession, but also from their articulated ideas of communal stewardship over land and a deeply felt spiritual and emotional nexus with the earth and its fruits'.⁶ Stavenhagen attests to this unique and significant cultural and spiritual connection between Africans and their land. He testifies that:

the relationship between indigenous [African] peoples and the land is an essential tie which provides and maintains the cultural identity of those peoples. One must understand that the land is not a mere instrument of agricultural production, but part of a geographic and social, symbolic and religious space, with which the history and current dynamics of those peoples are linked.⁷

Nkosi takes this spiritual and cultural nexus to land even further. He explains that:

[i]n many African families the umbilical cord of a new born baby is buried. In other communities when a boy is circumcised, the foreskin

² R Vermu "Without land you are nobody": critical dimensions of women's access to land and relations in tenure in East Africa' *IDRC Scoping study for East Africa on women's access and rights to land and gender relations in tenure 2007* http://www.landcoalition.org/program/wa_programmes_afr_4.html (accessed 15 November 2011).

³ n 2 above, 55.

⁴ Dannenmaier refers to this as the 'distinctive connection doctrine'. E Dannenmaier 'Beyond indigenous property rights: exploring the emergence of a distinctive connection doctrine' (2008) 86(53) *Washington University Law Review* 101.

⁵ African Union, 2009 'Framework and guidelines on land policy in Africa' (Addis Ababa: African Union) adopted by the Thirteenth Ordinary Sessions of the African Union. Sirte, Libya 1 - 3 July 2009, Assembly/AU/DEC.1(XIII).

⁶ SJ Anaya's *Indigenous peoples in international law* (2004) 141.

⁷ R Stavenhagen *Social classes in agrarian societies* (1975) 83, as quoted in Dannenmaier (n 4 above) 90.

and blood is also buried. The sacredness of land in Africa is further linked to the fact that our ancestors are buried in it. Without land, we [Africans] would not have a home for a dead body. That is why we kneel barefooted next to the grave when we want to communicate anything to our ancestors, showing a lot of respect for the land on which they lie. When death strikes in a family, no one is allowed to till the land. We mourn until that person is buried. After a funeral, in some cultures, we do not touch the soil with a hoe, do not plough or till the land until a ritual of cleansing the family is performed. Some communities like the AmaZulu, do not till the land for a year when a member of a royal family has passed away. The Zulu tribe believes that the elders and young men must go to hunt so that a sacrifice can be made to the ancestors before the land where a leader is to be buried is touched.⁸

This is also echoed by Lilongula. She highlights that before the Korekore people of Zimbabwe touch their land, they go to the spirits, which are said to be linked to certain animals or trees.⁹ Similarly, an indigenous ‘declaration’ to the 2002 World Water Forum in Kyoto proclaimed that indigenous African people reaffirm their relationship to ‘Mother Earth’, on which they are placed in a sacred manner.¹⁰ Their relationship with their traditional lands and territories is proclaimed to be the fundamental physical, cultural, and spiritual basis for their existence.¹¹

It is, indeed, this unique and special cultural and spiritual connection between Africans and their lands that poses serious challenges and complexities when it comes to the regulation of land issues, including land holding and security of tenure. In Africa, these issues are regulated under a complex system of customary law. Under this system, Africans do not hold land simply as individuals.¹² The concept of individual land ownership is, therefore, generally foreign to Africans. Shipton and Coheen highlight that ‘personal land claims always depend on broader social entities, or combinations of them: whether on extended homestead families, lineages, villages, chiefdoms, ethnic sections, or other groups or networks’.¹³ In African societies, land is generally held communally or collectively.¹⁴ It

⁸ Z Nkosi ‘Spirituality, land and land reform in South Africa’ <http://www.wcc-coe.org/wcc/what/jpc/echoes-16-05.html> (accessed 01 December 2011) 1.

⁹ R Lilongula, Statement in *Voices of the earth: cultural and spiritual values of biodiversity* (2000) <http://www.unep.org/OurPlanet/imgversn/105/voices.html>, quoted in Dannenmaeir (n 5 above) 88.

¹⁰ Third World Water Forum, Kyoto, Japan, March 2003, *Indigenous Peoples Kyoto Water Declaration 1* <http://www.indigenouswater.org/user/IPKyotoWaterDeclarationFINAL.Pdf>, quoted by Dannenmaeir (n 4 above) 88.

¹¹ n 10 above, 88.

¹² P Shipton & M Goheen ‘Understanding African land-holding: power, wealth, and meaning’ (1992) 62(3) *Journal of the International African Institute* 307 308.

¹³ n 12 above, 307.

¹⁴ DD Ndima ‘Judicial review and the transformation of the South African jurisprudence with specific reference to African customary law’ (2007) 21(1) *Speculum Juris* 84.

belongs to some group, be it a household, chiefdom, community, or even a combination of these groups, whether the living, the living-dead¹⁵ (ancestors), or the unborn. Awuah-Nyamekye and Sarfo-Mensah explain that '[land] ownership is often tied to the living, the dead and unborn. In the various tribal societies that constitute the traditional areas, the living with the chief as trustee is said to be holding the land in care for their ancestors and the unborn'.¹⁶ It is this complex system¹⁷ that poses challenges to modern land law reform.

These challenges are varied. However, relevant for purpose of this article, is the challenge identified by Cousins and Claassens, namely, 'how to recognise and secure land rights that are clearly distinct from "Western legal" forms of private property but are not simply "customary", given the impacts of both colonial policies and of past and current processes of rapid social change'.¹⁸ According to du Plessis,¹⁹ the problem is how to recognise and secure tenure rights.²⁰ Should it be secured in the private ownership paradigm, or should

¹⁵ According to Gehman 'the phrase "the living-dead" expresses the living relationship between the living and their dead ancestors: for the ancestral spirits are the "living dead" and not the "dead ancestors". The living dead for five generations enjoys a state of "personal immortality", while they are being personally remembered by first name by their living descendants "their process of dying is not yet complete". They are partly spiritual and partly human with one foot in the spirit world and one foot in the world of the living. When the last person dies who could remember them, however, the living dead have completed the dying process and move into the past (*zamani*) as impersonal spirits ...' RJ Gehman *African traditional religion in biblical perspective* (2005) 217.

¹⁶ S Awuah-Nyamekye & P Sarfo-Mensah 'Ensuring equitable distribution of land in Ghana: spirituality or policy? A case study from the forest-savanna agro-ecological zone of Ghana' (2011) 10(21) *The International Indigenous Policy Journal* 1; See also Okoth-Ogendo 2005 www.plaas.org.za (accessed 20 November 2011).

¹⁷ H Mostert 'Tenure security reform and electronic registration: exploring insights from English law' (2011) 14(3) *PER/PELJ* 85; M Adams & S Tenure 'Legal dualism and land policy in Eastern and Southern Africa' UNDP-International Land Coalition Land rights for African Development: From Knowledge to Action Nairobi, October 31 - November 3 conference proceedings www.undp/drylands (accessed 30 January 2012). See also DW Nabudere 'Cheikh Anta Diop: The social sciences, humanities, physical and natural sciences and transdisciplinarity' (2007) 2(1) *International Journal of African Renaissance Studies – Multi-, Inter and Transdisciplinarity* 6 18; Nisbert Taringa 'How environmental is African traditional religion?' <http://enviro.lclark.edu/resources/EastAfrica/Hadzabe/How.pdf> (accessed 02 May 2012); Workineh Kelbessa *Traditional Oromo attitudes towards the environment* 25 - 26 <http://www.ossrea.net/publications/images/stories/ossrea/ssrr-19-p-3.pdf> (accessed 02 05 2012).

¹⁸ B Cousins & A Claassens 'More than simply "socially embedded": recognising the distinctiveness of African land rights' in Claasens & Cousins (n 1 above) 3. According to them, this is always the 'central question' on land issues in Africa.

¹⁹ WJ du Plessis 'African indigenous land rights in a private ownership paradigm' (2011) 14(7) *PER/PELJ* 46.

²⁰ Land tenure refers to 'the terms and conditions on which land is held, used and transacted'. In simple terms, it means how the right to land is obtained and distributed in a particular society or legal system. Land tenure reform, on the other hand, refers to changes or improvement of these terms and conditions, such as the amendment of the terms of contracts between land owners and tenants, or the conversion of more informal tenancy into formal property rights. (M Adams *et al* 'Land tenure reform and rural livelihoods in Southern Africa' (1999) 39 *Natural Resources Perspectives* 1; D Mzumara 'Land tenure systems and

indigenous forms of land tenure be fully recognised and thus protected?²¹ It is submitted that this is exactly the main challenge that the Constitutional Court was confronted with in *Tongoane*,²² and as du Plessis correctly indicates, despite the *Tongoane* judgment, the problem as to secure indigenous land rights remains unresolved.²³

In this note I do not purport to provide an answer to this difficult question. Rather it is I seek to highlight that *Tongoane* deliberately avoided this core issue which was raised by the applicants, namely, that their use and occupation of the lands under dispute, as regulated by customary law,²⁴ is being threatened by the introduction of CLARA.²⁵ I will, therefore, critique the Court's avoidance of this core or substantive issue, and then also provide a very brief comment on the procedural issues raised. As a point of departure, I provide a very brief contextual historical background to the complex land issues in South Africa, including security of communal land tenure.²⁶ This is followed by a discussion of the *Tongoane* case, after which a critical comment is made. In this critical comment, I start with the procedural issues raised in *Tongoane*, namely, the issue of proper tagging; and the issue of Parliament's failure to facilitate public involvement in its law making process. This is followed by a critique of the Court's decision not to deal with the substantive issue, namely whether the introduction of CLARA threatens security of communal land tenure as provided for under customary law. As indicated earlier, it is not the purpose of this note to provide an answer to this difficult question or to attempt to resolve this complex matter. Instead the article is essentially focussed around two issues (a) the Court's focus on tagging, a procedural matter, as opposed to the substantial issue of tenure reform, and (b) the Courts' non-development of the customary law.

sustainable development in Southern Africa' *ECA/SA/EGM Land* (2003) 2), as was the case with CLARA, as the applicants argued in *Tongoane*. A fundamental goal of land tenure is to enhance, secure and protect the people's land rights against arbitrary evictions, expropriation and landlessness in general (Auwah-Nyamekye & Sarfo-Mensah (n 16 above) 6). This also serves to ensure a sustainability usage of land and a complete peace of mind to rights holders who make considerable investment in the land in question.

²¹ Du Plessis (n 19 above) 46.

²² *Tongoane v National Minister for Agriculture and Land Affairs* 2010 6 SA 214 (CC) (*Tongoane*) para 33.

²³ n 19 above, 46.

²⁴ *Tongoane* (n 22 above) paras 31 - 33.

²⁵ The Communal Land Rights Act 11 of 2004.

²⁶ Here, I do not intent to go into a comprehensive historical narration but merely to give a concise contextual background to put the issues in their proper context. This is covered comprehensively in *Tongoane* (n 22 above) para 9 - 27. As will be demonstrated later, it is quite bizarre that the Court spend such a substantial time investing in a historical narration of the consecutive historical land tenure system, which later becomes useless as the Court does not ultimately address the issue.

2 Contextual background

The genesis of the challenges relating to communal security of land tenure in South Africa can be traced to its initial colonisation by Britain, and to its own subsequent apartheid regime, both of which resulted in communal land dispossession.²⁷ Land dispossession was, in fact, the actual linchpin of the apartheid policy a few decades ago.²⁸ Lahiff captures the essence of land dispossession in South Africa when he says that:²⁹

[t]he extent of land dispossession of the indigenous population in South Africa, by Dutch and British settlers, was greater than any other country in Africa, and persisted for an exceptionally long time. European settlement began around the Cape of Good Hope in the 1650s and progressed northwards and eastwards over a period of three hundred years. By the twentieth century, most of the country, including most of the best agricultural land, was reserved for the minority white settler population, with the African majority confined to just 13% of the territory, the 'native reserves', later known as African Homelands or Bantustans ...³⁰

For centuries prior to colonisation and apartheid in South Africa, the majority of land rights in African societies, including land tenure, was

²⁷ B Cousins 'More than socially embedded: the distinctive character of 'communal tenure' regimes in South Africa and its implications for land policy' (2007) 7(3) *Journal of Agrarian Change* 281 283; Du Plessis (n 19 above) 51; Dannenmaeir (n 4 above) 72; Shipton & Goheen (n 12 above) 317.

²⁸ Since 1913 the notorious apartheid government enacted various pieces of legislation that generally had the cumulative effect of dispossessing the black majority of their land and putting their security of tenure over the remnants of such lands, or the reserves, in a precarious position. The principal legislative instruments of land dispossession included, among others, the Native Land Act 27 of 1913, and the Native Trust and Land Act 18 of 1936, both of which restricted the African population to 13% of the total land area of South Africa; the Group Areas Act 41 of 1950, which allocated certain areas to specific race groups; the Natives Laws Amendment Act 54 of 1937, which served to prohibit Africans from buying land in urban areas; the Bantu Authorities Act 68 of 1951, which allowed the establishment of tribal, regional, and territorial authorities; the Prevention of Illegal Squatting Act 52 of 1951, which allowed the government to establish resettlement camps for surplus people evicted from white farms; the Blacks Resettlement Act 2 of 1954, to give the state the authority to remove Africans from any area in the magisterial district of Johannesburg and adjacent areas; the Promotion of Bantu Self-Government Act 46 of 1959, to establish the Bantustans and make the reserves the political homeland of black South Africans.

²⁹ The history of land dispossession in South Africa is well documented (and, therefore, beyond the scope of this note). See for instance, MA Yanou *Dispossession and access to land in South Africa: an African perspective* (2009); MC Lee *Unfinished business in the Southern African Development Community: the land crises in South Africa* (2003).

³⁰ E Lahiff 'Land reform and poverty in South Africa' Research Report 36 of the Institute for Poverty, Land and Agrarian studies (PLAAS) at University of the Western Cape 18 June 2007, 1 - 2, available at http://www.plaas.org.za/pubs/rr/PLAAS_RR36_Lahiff.pdf/ (accessed 02 May 2012).

managed and controlled under a system of customary law.³¹ As Cronkleton and others state, the:

customary tenure systems by definition have evolved over long periods of time in response to local specific conditions. And in the process of recognition, such customary systems have been ignored, subordinated or, at times, effectively accommodated. The scholarly debate on whether to accept one legal system over the others, or what their respective weights should be, continues. There is a call for a paradigm shift from legal pluralism, which recognizes parallel systems to legal integration which would mesh them. Integration would require understanding of the major constituents of each other.³²

According to Cousins, pre-colonial land tenure was both ‘communal’ and ‘individual’, and could be seen as ‘a system of complementary interests held simultaneously’.³³ This meant that different interests in the same property could vest in different holders.³⁴ These complementary interests were, (and still are) also dynamic and ‘ever changing’.³⁵

This system was (and still is) generally referred to either as ‘customary tenure’,³⁶ ‘customary land tenure’,³⁷ or ‘communal land tenure’,³⁸ as it is an important component of customary law or indigenous law.³⁹ Customary tenure refers to a ‘set of rules and norms that govern community allocation, use, access, and transfer of land and other natural resources’.⁴⁰ As Freudenberger indicates,

the term “customary tenure” invokes the idea of “traditional” rights to land and other natural resources – the tenure usually associated with

³¹ TM Mends & J de Meijere ‘A study of the institution of the customary land tenure system in the supply of property rights for urban development – an example of Accra, Ghana’ 3 http://www.fig.net/pub/accra/papers/ts03/ts03_01_mends_demeijere.pdf (accessed 1 October 2010).

³² P Cronkleton *et al* ‘The devolution of management rights and co-management of community forests’ in AM Larson *et al* (eds) *Forests for people: community rights and forest tenure reform* (2010) 70; quoted, with approval, by Awuah-Nyamekye & Sarfo-Mensah (n 16 above) 12.

³³ B Cousins ‘Characterising “communal” tenure: nested systems and flexible boundaries’ in Claassens & Cousins (n 1 above) 111; Du Plessis (n 19 above) 49; TW Bennett *Customary law in South Africa* (2007) 381.

³⁴ Du Plessis (n 19 above) 51.

³⁵ Du Plessis (n 19 above) 53.

³⁶ Adams *et al* (n 17 above).

³⁷ J Pottier ‘Customary land tenure in sub-Saharan Africa today: meanings and contexts’ in C Huggins & J Clover (eds) *From the ground up: land rights, conflict and peace in sub-Saharan Africa* (2005) 55 - 76; Cousins & Claassens (n 18 above) 4.

³⁸ Cousins & Claassens (n 18 above) 4; C Boone ‘Property and constitutional order: land tenure reform and the future of the African state’ (2007) *African Affairs* 576; Shipton & Coheen (n 12 above) 311.

³⁹ In this article the phrases ‘customary law’ and ‘indigenous law’ are used interchangeably.

⁴⁰ MS Freudenberger ‘The future of customary tenure’ *United States Agency International Development (USAID) Issue Paper* (2011).

indigenous communities and administered in accordance with their customs, as opposed to statutory tenure usually introduced during the colonial period.⁴¹

As du Plessis puts it:⁴²

African indigenous law in property was more concerned with relationship status and people's obligation towards one another in respect of the property rather than the rights to people's ownership of the property.

She explains that the relationships between people were more important than an individual's ability to assert his or her interest in property against the world.⁴³ 'Entitlements to property were more in the form of obligations resulting from family relationships rather than a means to exclude people from the use of certain property'.⁴⁴

In African customary law, although a measure of individual control over the broad interests that were embedded in land is recognised, the paramount title to land is 'perceived as vested above society and whatever rights any one person had to the land were subordinate to the entire community's rights'.⁴⁵ This is what Allot refers to as the institution of 'paramount control of land by "tribes", "village communities", and other territorial groupings, "family land" or "clan land", where the individual's enjoyment of land may be fettered by the superior rights of the social group to which he belongs'.⁴⁶

This system was changed by colonial rule, which often tried to retain a form of 'communal' land tenure that could suit its interests.⁴⁷ As a result, African communities' security of land tenure has, since colonial times,⁴⁸ remained precarious and insecure. This

⁴¹ n 40 above.

⁴² n 19 above, 49.

⁴³ As above.

⁴⁴ As above.

⁴⁵ P Kameri-Mbote 'The land has its owners! Gender issues in land tenure under customary law in Kenya' *International Environmental Law Research Centre (IELRC) Working Paper* No. 9 of 2005, <http://www.ielrc.org/content/w0509.pdf> (accessed on 02 November 2011).

⁴⁶ AN Allot 'Towards a definition of "absolute ownership"' (1961) 5(2) *Journal of African Law* 99.

⁴⁷ Claassens & Cousins (n 33 above) 111.

⁴⁸ The history of land dispossession under African colonisation in general, and colonisation and apartheid in South Africa in particular, is well documented. See for instance, in the broader African context, Pottier (n 37 above); Mends & de Meijere (n 31 above); and in the South African context, L Ntsebeza & R Hall (eds) *The land question in South Africa: the challenges of transformation and redistribution* (2007); WD Thwala 'Land and agrarian reform in South Africa', in P Rosset *et al* *Promised land: competing visions of agrarian reform* (2006) 57; Awuah-Nyamekye & Sarfo-Mensah (n 16 above); Du Plessis (n 19 above).

was exacerbated by gradual land dispossessions,⁴⁹ or what Adams and others refer to as ‘enforced land alienation at the hands of Europeans’.⁵⁰ As Cousins puts it,

[t]his history [of land dispossession] has involved major modification and adaptation of indigenous land regimes, but seldom their complete destruction and replacement. Conquest and settlement in the colonial period, followed by twentieth-century policies of segregation and apartheid, saw white settlers and their heirs take possession of most of the land surface of South Africa. State policies attempted to reconfigure the livelihood and land tenure systems of the indigenous populations in ways that served the interests of the dominant classes. African “reserves” were created as a way to contain resistance and to facilitate the supply of cheap labour for the emerging capitalist economy. They also functioned to lower the cost of colonial administration through a system of indirect rule, within which traditional leaders undertook local administration on behalf of the state – often in a highly authoritarian manner, termed “decentralized despotism” by Mamdani (1996).⁵¹

This threat to communal security of land tenure still remains to date. This fact was acknowledged in *Tongoane*, as follows:⁵²

[W]hat emerges ... from [the Bantu Areas Land Regulation] is that (a) the tenure in land which was subject to the provisions of the Black Land Act and the development Trust and Land Act and which was held by African people was precarious and legally insecure; (b) indigenous law governed succession to land in these areas ...

At paragraph 26, Ngcobo CJ continued as follows:

The Bantu Homelands Citizenship Act, 1970 and the Bantu Homelands Constitution Act, 1971 further entrenched land dispossession as a key policy of the apartheid edifice. African people would, as a consequence, have no claim to any land in “white” South Africa ... They had precarious title to the land they occupied to remind them of the impermanence of their residence in “white” South Africa.

Ngcobo CJ concluded that African people were relentlessly dispossessed of their land and given legally insecure tenure over the land they occupied.⁵³

⁴⁹ B Cousins ‘More than socially embedded: the distinctive character of ‘communal tenure’ regimes in South Africa and its implications for land policy’ 7(3) *Journal of agrarian change* 281 283. *Tongoane* (n 22 above) paras 9 - 33; R Hall ‘Land and agrarian reform in South Africa’ a Status Report of the Programme for Land and Agrarian Studies, University of the Western Cape (2004) 48.

⁵⁰ Adams *et al* ‘Land tenure reform and rural livelihoods in Southern Africa’ 39 (1999) *Natural resources perspective* 3.

⁵¹ Cousins (n 27 above) 283.

⁵² *Tongoane* (n 22 above) para 21.

⁵³ *Tongoane* (n 22 above) para 27.

Our Constitution has as one of its objects the reversal of this history. It requires the restoration of land to people and communities that were dispossessed of land by colonial and apartheid laws after 19 June 1913.⁵⁴ It also requires that people and communities whose tenure of land is legally insecure as a result of racially discriminatory colonial and apartheid laws be provided with legally secure tenure or comparable redress.⁵⁵ CLARA was enacted to 'provide for legal security of tenure'.⁵⁶ Ironically,⁵⁷ it is for this very reason that the constitutional validity of CLARA was challenged in *Tongoane*.

In this case, as Ngcobo CJ succinctly observed, there were basically two broad categories of grounds/objections: (a) procedural and (b) substantive.⁵⁸ The procedural issue was twofold: (1) whether CLARA was correctly tagged, and (2) whether Parliament complied with its constitutional obligation to facilitate public participation in its law-making process. The substantive issue, on the other hand, involved whether the provisions of CLARA, instead of providing legally secure tenure, actually undermines it. As he correctly identified:⁵⁹

What lies at the heart of the confirmation proceedings is the question whether CLARA undermines the security of tenure of the applicant communities. The applicants submit that it does, and that for this reason CLARA is inconsistent with section 25(6) read with section 25(9) of the Constitution which requires Parliament to enact legislation to provide for legally secure tenure or comparable redress ...

However, the Court opted to deal with the procedural issue only and decided not to deal with the substantive issue. In this regard the Court, per Ngcobo CJ, explained as follows:⁶⁰

Once it is concluded that CLARA is unconstitutional in its entirety because it was not enacted in accordance with the provisions of section 76, it seems to me that that is the end of the matter. Although the anxiety of the applicants to finalise the matter in the light of the energy and time they invested in it is understandable, there is nothing left for this Court, as a court of final appeal, to consider.

As will be demonstrated later, it is submitted that the Court was misguided in this regard.

⁵⁴ Section 25(7) of the 1996 Constitution (the Constitution).

⁵⁵ Section 25(6) of the Constitution.

⁵⁶ Preamble to CLARA.

⁵⁷ H Mostert 'South Africa's Communal Land Rights Act: a plea for restraint in reform' (2010) 54(2) *Journal of African Law* 301.

⁵⁸ See also W du Plessis & JM Pienaar 'The more things change the more they stay the same: the story of communal land tenure in South Africa' (2010) 16(1) *Fundamina* 86.

⁵⁹ *Tongoane* (n 22 above) para 39.

⁶⁰ *Tongoane* (n 22 above) para 116.

3 The *Tongoane* judgment

The applicant communities submitted that, far from securing their land tenure, CLARA actually undermines it and makes it more insecure. Ngcobo CJ summarises this argument as follows:⁶¹

The communities are concerned that their indigenous law-based system of land administration will be replaced by the new system that CLARA envisages. They are concerned that this will have an impact on the evolving indigenous law which has always regulated the use and occupation of land they occupy. They are further concerned that their land will now be subject to the control of traditional councils which, as is apparent from the record, they consider to be incapable of administering their land for the benefit of the community. All the communities claim that the provisions of CLARA will undermine the security of tenure they presently enjoy in their land, and those who own the land fear that they will be divested of their ownership of the land. While some of these claims are disputed by the government respondents, what is not disputed is that the land occupied by the communities is administered in accordance with indigenous law, and that traditional leaders, in particular the tribal authorities, play a role in the administration of communal land. There is some issue as to the extent to which the role of traditional leaders and tribal authorities accords with indigenous law.

On this basis, it was argued on the applicants' behalf, that CLARA is inconsistent with section 25(6) of the Constitution, and therefore invalid.

3.1 The issues

The applicants sought confirmation of an order of the North Gauteng High Court,⁶² which declared certain provisions of CLARA unconstitutional for undermining the security of tenure of certain communities⁶³ in respect of their lands, in contravention of sections 25(6), read with section 25(9), of the Constitution. Read together, these sections require Parliament to enact legislation to provide for

⁶¹ *Tongoane* (n 22 above) para 33.

⁶² *Tongoane v The National Minister of Agriculture and Land Affairs* 2010 8 BCLR 838 (GNP).

⁶³ These were four communities that occupied land to which the provisions of CLARA would apply, namely the Kalkfontein community, which owns and occupies two farms known as Kalkfontein B and C in the Mpumalanga province; the Makuleke community which owns and occupies a piece of land known as the Pafuri Triangle in the Limpopo province; the Makgobistad community, which allegedly established rights in respect of land in the area known as Mayayane in the North West province; and the Dixie community, which occupies and independently control the farm known as Dixie 240 KU, in the Pilgrims Rest District in the Limpopo province. In all cases, the land falls under a tribal authority's jurisdiction and the use and occupation thereof is regulated by indigenous law.

legally secure land tenure or comparable redress.⁶⁴ CLARA was the legislature's response to this constitutional requirement.⁶⁵ Ironically, CLARA is challenged as contravening the very same constitutional requirement it seeks to accomplish, namely 'to provide for legal security of tenure'.⁶⁶

In addition, the applicants sought leave to appeal against the same judgment, which dismissed their application to have CLARA declared unconstitutional in its entirety, for Parliament's failure to enact it in accordance with the procedure prescribed by section 76, rather than section 75, of the Constitution. Relying on the *Liquor Bill*⁶⁷ case, the applicants argued that, as CLARA affects the provinces, it should have been tagged or classified as a section 76 Bill, because its 'provisions in substantial measure fall within a functional area listed in Schedule 4'.⁶⁸ They submitted that the provisions of CLARA, in a substantial measure, deal with 'indigenous and customary law', and 'traditional leadership', which are functional areas that are listed in Schedule 4,⁶⁹ that is, functional areas on which the national and provincial legislatures have concurrent legislative competence. Parliament, on the other hand, argued that the test for tagging a Bill was the substance of the legislation which was referred to as the 'pith and substance' test.⁷⁰ As Ngcobo CJ indicated, the phrase, 'pith and substance', is borrowed from other jurisdictions and refers to the 'substance', the 'purpose and effect', or the 'subject-matter' of legislation and was developed by the Constitutional Court to determine whether the National Assembly or provincial legislature has the competence to legislate in a particular field.⁷¹ Based on this test, Parliament argued that the 'pith and substance' of CLARA was land tenure, and any provision of CLARA dealing with indigenous law or traditional leadership is incidental to land tenure and, therefore, irrelevant for tagging purposes.⁷²

Lastly, the applicants lodged an application for direct access to the Constitutional Court seeking an order declaring CLARA

⁶⁴ Section 25(6) of the Constitution provides that 'a person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress'; sec 25(9) provides that 'Parliament must enact the legislation referred to in subsection (6)'.

⁶⁵ Cousins & Claassens (n 18 above) 8; Cousins (n 27 above) 284.

⁶⁶ The Preamble to CLARA, *Tongoane* (n 22 above) para 28.

⁶⁷ *Ex Parte President of the Republic of South Africa: In re constitutionality of the Liquor Bill* 2000 1 SA 732 (CC); 2000 1 BCLR 1 (CC).

⁶⁸ *Tongoane* (n 22 above) para 49. Schedule 4 of the Constitution contains a list of matters that fall within the concurrent legislative competence of the national and provincial legislatures.

⁶⁹ n 61 above.

⁷⁰ *Tongoane* (n 22 above) para 50.

⁷¹ *Tongoane* (n 22 above).

⁷² *Tongoane* (n 22 above) para 50 read with para 95.

unconstitutional on the ground that Parliament failed to comply with its constitutional mandate to facilitate public involvement in its legislative process in contravention of sections 59(1)(a) and 72(1)(a) of the Constitution.⁷³

3.2 The decision

On the issue of tagging, after reconsidering the *Liquor Bill* case, the Court held that a distinction should be drawn between determining whether the National Assembly or NCOP has the competence to legislate in a particular field, that is, the ‘characterisation of a Bill’; and determining how a Bill ought to be properly tagged and ultimately enacted.⁷⁴ It was held that these are two different processes for which two different tests must be applied.⁷⁵ According to Ngcobo CJ,

[t]here is an important difference between the “pith and substance” test and the “substantial measures” test. Under the former, provisions of the legislation that fall outside of its substance are treated as incidental. By contrast, the tagging test is distinct from the legislative competence. It focuses on all the provisions of the Bill in order to determine the extent to which they substantially affect functional areas listed in Schedule 4 and not on whether any of its provisions are incidental to its substance.⁷⁶

Based on this important distinction, the Court upheld the applicants’ contention, thus reaffirming the test for the determination of the procedure to be followed in enacting a Bill as developed in the *Liquor Bill* case, namely that any Bill of which the provisions in a substantial measure fall within a functional area listed in Schedule 4, must be dealt with under section 76.⁷⁷ It was held that while the main subject-matter of a Bill, which is a key factor in determining legislative competence, may not affect provinces, some of its provisions may, nevertheless, have a substantial impact on the interests of provinces.⁷⁸ The Court held that the test for the tagging of Bills must be informed by the need to ensure that the provinces exercise their appropriate role, fully and effectively, in the process of considering national legislation that substantially affects them.⁷⁹ After analysing

⁷³ *Tongoane* (n 22 above) paras 3, 43, 113, and 114. Both sections 59(1)(a) and 72(1)(a) of the Constitution provide for public participation in Parliament’s law making process. Section 59(1)(a) obliges the National Assembly to facilitate public involvement in its legislative and other processes including those of its committees. Section 72(1)(a) makes exactly the same provision in respect of the National Council of Provinces.

⁷⁴ *Tongoane* (n 22 above) para 58.

⁷⁵ *Tongoane* (n 22 above) para 59.

⁷⁶ *Tongoane* (n 22 above) para 59.

⁷⁷ *Tongoane* (n 22 above) paras 55 - 58.

⁷⁸ *Tongoane* (n 22 above) para 58.

⁷⁹ *Tongoane* (n 22 above) para 60.

the provisions of CLARA, Ngcobo CJ held that the inescapable conclusion is that various provisions of CLARA affect, in substantial measure, indigenous law and traditional leadership, both being areas of concurrent national and provincial competence.⁸⁰ He found that CLARA replaces the living indigenous law regime which regulates the occupation, use, and administration of communal land.⁸¹ He further found that it replaces both the institutions that regulated these matters and their corresponding rules. He accordingly concluded that Parliament followed an incorrect procedure in enacting CLARA.⁸²

In considering the appropriate remedy, Ngcobo CJ held that where the Constitution prescribes a legislative procedure, that procedure must ordinarily be followed. Enacting legislation that affects the provinces in accordance with the procedure prescribed in section 76 is a material part of the law-making process relating to legislation that substantially affects the provinces. He held that failure to comply with the requirements of section 76 renders the resulting legislation invalid. He accordingly held CLARA to be unconstitutional and invalid for want of compliance with the procedures set out in section 76 of the Constitution.

4 Comment

The confirmation of the invalidity of CLARA in *Tongoane* did not come as a surprise to many in South Africa, as CLARA clearly fails to meet, among others, an important constitutional mandate to provide for security of tenure over land. The controversial nature of CLARA was well acknowledged and appreciated by some in the academic fraternity⁸³ and other sectors.⁸⁴ For instance, commenting on the provisions of CLARA, Cousins wrote that ‘the controversies over land tenure reform in post-apartheid South Africa resonate strongly with those raging elsewhere in Africa’.⁸⁵ To me at least, what did come as a surprise, as indicated earlier, is the Court’s decision to entertain only one procedural issue and not to entertain the substantive issue raised by the applicants at all. I will revert to this issue later.

⁸⁰ *Tongoane* (n 22 above) paras 74 - 97.

⁸¹ *Tongoane* (n 22 above) paras 74 - 97.

⁸² *Tongoane* (n 22 above) paras 98 - 110.

⁸³ See for instance, H Mostert ‘(n 57 above) 398 & 298; Cousins & Claassens (n 18 above) 1; AJ van der Walt *Constitutional property law* (2005) 334.

⁸⁴ For instance, non-governmental organisations such as the Legal Resources Centre and some communities whose security of land tenure was threatened as a result of the introduction of this piece of legislation.

⁸⁵ Cousins (n 33 above) 281.

4.1 Tagging

The *Tongoane* Court should be commended for reaffirming the test for tagging as the ‘substantial measure’ test. The Court made a very important distinction for the test for tagging or classification,⁸⁶ which is a procedural matter, and the test for characterisation⁸⁷ or competency, which is a jurisdictional matter. In other words, determining how to tag or classify legislation, for the purpose of enactment, is a step in the process of law making and, therefore, a procedural matter. Characterising a Bill, on the other hand, is a jurisdictional issue, which involves determining whether a particular legislative authority has legislative competence on a particular matter. The test for the two can, therefore, not be the same. The Court indicated the important difference between the two, namely that in determining classification or tagging, what matters is whether a particular Bill, in a substantial measure, falls within a functional area listed in Schedule 4 of the Constitution; while in determining competence, characterisation or jurisdiction, the test is ‘the subject matter’ or the ‘pith and substance’⁸⁸ of the particular Bill.

The whole idea of tagging a Bill correctly is to allow provincial interests to be adequately considered and promoted in the national legislative process. If a Bill, in a substantial measure, affects the interest of the provinces, such a Bill must be tagged as a section 76 Bill, and the procedure provided for in section 76 should be followed in passing that Bill. If it does not, it must be tagged as a section 75 Bill and the less onerous procedure provided for in section 75 should be followed. On the other hand, the idea behind legislative competence is to ensure co-operation between different spheres of government and to avoid or minimise potential legislative conflicts or disputes between two different spheres of government, namely, the national and the provincial spheres.⁸⁹ However, as Murray and Simeon indicate, the fact that many potential jurisdictional disputes are ‘avoided’ by the granting of concurrent powers to provinces and the new national sphere does not avoid the need to classify or categorise new national laws.⁹⁰ In other words, both the classification and the competency issues are important aspects that need to be considered in any given case.

It is for this reason that I submit that although different, the classification, categorisation or tagging of Bills and their

⁸⁶ *Tongoane* (n 22 above) para 58.

⁸⁷ C Murray & R Simeon “‘Tagging’ Bills in Parliament: section 75 or section 76?” (2006) 123 *South African Law Journal* 242.

⁸⁸ Murray & Simeon (n 87 above) 245.

⁸⁹ Murray & Simeon (n 87 above) 232.

⁹⁰ Murray & Simeon (n 87 above) 233.

characterisation are inextricably entwined and mutually and reciprocally dependent. In order to determine whether a particular legislative authority has competence to legislate on a particular matter, one needs to look at the Schedules, including Schedule 4. Although the test for legislative competence is the determination of the subject-matter or the ‘pith and substance’ of the particular Bill, this cannot realistically be done without also looking at whether that subject matter, in a substantial measure, affects the interests of the provinces, so that the section 76 procedure should be adopted. In other words, it is difficult to imagine a situation in which the subject matter of a particular Bill is clearly within the concurrent legislative competence of both legislatures, but the provisions of the particular Bill do not in a ‘substantial measure’ fall within a functional area listed in Schedule 4 of the Constitution. By the same token, it cannot be practically possible to determine the subject matter of a particular Bill without having to look at how it substantially affects the interests of the province.

However, the judgment should be commended for making this important distinction between the test for tagging and the test for characterisation, and authoritatively setting the test. It should be noted, however, that this test for tagging was actually pre-empted by Murray and Simeon, prior to *Tongoane*. They suggested that

[t]he same argument, (that the substantial measure test, rather than the “pith and substance” test should be used in tagging CLARA) applies to the Communal Land Rights Act. As we note above, it was tagged to follow the s 75 process because the parliamentary law advisers concluded (probably correctly) that its pith and substance is “the provision of legal security of tenure by transferring communal land to communities, or by awarding comparable redress”. The law advisers commented that substantive provisions in the bill that referred to customary law did not “render the Bill a s 76 Bill” but, at most, were “matters incidental to the ‘pith and substance’ of the Bill”. But the Act has a direct impact on matters relating to traditional leadership and customary law. Moreover, a Bill cannot escape being tagged s 76 simply because its ends fall outside schedule 4.⁹¹

This was echoed by Claassens and Cousins, also commenting on CLARA, as follows:⁹²

... [T]he “pith and substance test” does not provide appropriate criteria for tagging Bills. The question instead must be whether or not provisions of the law in a substantial measure fall within a functional area listed in schedule 4. It is clear that they do in this case [of CLARA].

⁹¹ Murray & Simeon (n 87 above) 254.

⁹² Claassens & Cousins (n 1 above) 81.

What is not clear from this test is what ‘substantial measure’ entails. It is submitted that the phrase ‘substantial measure’ is vague and open to varied interpretations. Does it refer to the impact of the individual provisions of the Bill looked at individually or does it refer to the cumulative impact of the different provisions of the Bill? It is submitted that ‘substantial measure’ refers to the extent or degree to which a particular Bill deals with a matter of concurrent legislative competence as listed in Schedule 4. To put it differently, it refers to the extent of, or the degree of impact of the particular Bill on provincial interests as listed in Schedule 4. The impact or effect of the Bill on the interests of the provinces must be of substantial extent, degree or measure for it to be tagged as a section 76 Bill. In my view, what is important should be the cumulative or combined effect of the Bill rather than how individual provisions individually affect a particular concurrent matter. Although the individual provisions will be considered, it is their cumulative or combined impact that is ultimately determinative of whether a particular Bill in a substantial measure falls within a concurrent legislative competency of the two spheres of government.

In *Tongoane*, the Court spent a considerable amount of time and energy on the issues of tagging for the first time. In fact, it is no exaggeration to state that the case could mistakenly be perceived as being solely about tagging. The other issues were pushed to the periphery. However, it still remains uncertain as to what exactly this loaded test of ‘substantial measure’ entails. Although it is conceded that this issue will probably be answered authoritatively in a subsequent case, it is submitted that the Court has missed a good opportunity to provide clarity and certainty on this issue once and for all.

4.2 Constitutional obligation to facilitate public participation in legislative processes

Parliament’s obligation to facilitate public participation in its legislative processes arises from sections 59(1)(a) and 72(1)(a) of the Constitution.⁹³ Read together, these sections require both houses of Parliament to facilitate public involvement in the legislative and other processes including processes in their respective committees.⁹⁴

⁹³ See also sec 118(1)(a) of the Constitution.

⁹⁴ Section 59(1)(a) of the Constitution obliges the National Assembly to ‘facilitate public involvement in the legislative and other processes of the Assembly and its committees’. Section 72(1)(a) and 118(1)(a) echoes the same obligation to facilitate public involvement in the legislative and other processes of the Assembly and its committees in respect of the National Council of Provinces and provincial legislatures, respectively.

This obligation is informed by our government system of participatory democracy.⁹⁵ Participatory democracy requires decision makers, including the legislatures, to involve the people in all decisions affecting them.⁹⁶ This system is one of the values upon which the new constitutional dispensation is based. The 1996 Constitution of South Africa is founded on numerous values, designed to shape a particular type of society South Africa envisions.⁹⁷ Public participation in the law making process⁹⁸ is a cornerstone of modern democracy.⁹⁹ It ensures that people are listened to during the law making process and thus treated with dignity and respect. As Czapanskiy and Manjoo state,

... in the interest of promoting human rights [including human dignity] and democracy, the legislative duty to facilitate public participation is an important one. Hence, *Doctors for Life* may provide valuable lessons with respect to citizen participation in the law-making process, thereby further promoting human rights values of, amongst others, dignity and respect ...¹⁰⁰

The idea of democracy is about respect for the people, it's about people themselves having a say in matters that affect their lives, and it's about self-determination or people determining what is best for them. This is in accordance with both the classic and modern advocates for participatory democracy, who hold that the more that citizens are engaged in self-governance, the more they gain in self-respect, autonomy and empathy for others.¹⁰¹ It should, therefore, always be conceived and understood from a bottom-up perspective.

⁹⁵ KS Czapanskiy & R Manjoo 'The right of public participation in the law-making process and the role of the legislature in the promotion of this right' (2008) 19 (1) *Duke journal of comparative & international law* 1.

⁹⁶ A du Plessis 'Public participation, good environmental governance and fulfillment of environmental rights' *PER/PELJ* 11(2) (2008) 174.

⁹⁷ Section 1 of the Constitution of the Republic of South Africa. These values include freedom, equality and human dignity.

⁹⁸ See generally Czapanskiy & Manjoo (n 95 above); R Scott 'An analysis of public participation in the South African legislative sector' unpublished MA dissertation, Stellenbosch University, 2009; C Evans & S Evans 'Evaluating the human rights performance of legislatures', (2006) 6 *Human Rights Law Review* 545-548; I Buccus 'Towards developing a public participation strategy for South Africa's provincial legislatures' *Special Focus: Centre for Public Participation* (2006); L Nyati 'Public participation: what has the Constitutional Court given the public?' (2008) 12(2) *Law, Democracy & Development* 102; T Karl & QC Hudson-Phillips 'A case for greater public participation in the legislative process' <http://slr.oxfordjournals.org/content/8/2/76.full.pdf> (accessed 04 May 2012); T Roux 'Democracy' in S Woolman *et al* (eds) *Constitutional Law of South Africa* (2006 2nd edition part II) 10 - 18.

⁹⁹ See generally for the importance of and the reasons for public participation D Brynard *Public participation in local government administration: bridging the gap* (2009); SX Hanekom *Public policy* (1987); JE Anderson *Public policymaking* (1990); S Langton *Citizen participation in America* (1978).

¹⁰⁰ Czapanskiy & Manjoo (n 95 above) 3 - 4.

¹⁰¹ C Pateman *Participation and democratic theory* (1970) 22 - 44 cited by Czapanskiy & Manjoo (n 95 above) 15.

In other words, it should be about what people at the grassroots level need and not what a particular authority wants for the people.

The issue of determining whether the legislature had complied with the constitutional requirement of facilitating public participation in the law making process was left open in *Tongoane*. However, the judiciary has on numerous occasions dealt with this issue in the past. For instance in *Matatiele*, Ngcobo J (as he then was) held that

[o]ur constitution contemplates a democracy that is representative, and that also contains elements of participatory democracy. As the Preamble openly declares, what is contemplated is “a democratic and open society in which government is based on the will of the people”. Consistent with the constitutional order, section 118(1)(a) calls upon the provincial legislatures to facilitate involvement in [their] legislative and other processes’ including those of their committees. As was held in *Doctors for Life International v Speaker of the National Assembly and Others* (CCT 12/05), our Constitution calls for open and transparent government and requires legislative organs to facilitate public participation in the making of laws by all legislative organs of the State.¹⁰²

In addition to *Matatiele* and *Tongoane*, in 2010 alone the Court spent quite some time on issues of participatory democracy, including the right to be heard. In at least four of the 24 cases decided in that year, the Court either directly or indirectly, dealt with the issue of participatory democracy. These cases included *Poverty Alleviation Network*,¹⁰³ which dealt with the issue of facilitating public participation in Parliament’s law making process; *Tongoane*, in which a similar issue was raised but not dealt with; *Albutt*,¹⁰⁴ which dealt with the issue of victim participation in the consideration of presidential pardons (the right of victims of crime to be heard before the offenders are pardoned); and *Bengwenyama*,¹⁰⁵ which dealt with a local community’s right to be consulted on mining and prospecting activity in respect of their land.

Although this matter was left open in *Tongoane*, I am of the view that it was exhaustively and adequately dealt with in previous cases including the 2010 cases highlighted above. I, therefore, express no opinion on this issue.

¹⁰² *Matatiele Municipality v President of the Republic of South Africa* 2007 1 BCLR 47 (CC) (*Matatiele*) para 40.

¹⁰³ *Poverty Alleviation Network v President of the Republic of South Africa and other Case* 2010 6 BCLR 520 (CC).

¹⁰⁴ *Albutt v Centre for the Study of Violence and Reconciliation* 2010 3 SA 293 (CC).

¹⁰⁵ *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 4 SA 113 (CC).

4.3 Avoiding the core/real issue: whether CLARA, rather than providing security of tenure communal land, actually threatens it.

As soon as the constitutional judge's decision is issued, the debate ceases.¹⁰⁶

At first blush, the *Tongoane* judgment might seem very convincing and solid. At the very beginning of this judgment, Ngcobo CJ acknowledged and appreciated the significance of CLARA as legislation intended to meet a very sensitive outstanding constitutional imperative of providing legally secure tenure or comparative redress to African communities whose tenure of land is illegally insecure as a result the racist policies of apartheid, that were imposed under the colour of the law.¹⁰⁷

Ngcobo CJ emphasised the importance of this legislation by outlining, from the outset, the important constitutional mandate given to Parliament to address the issue of insecurity of communal land rights. He did this by quoting in the very second paragraph, section 25(6) of the Constitution, which requires Parliament to provide persons and communities whose security of tenure is insecure, with secure land tenure or comparable redress.¹⁰⁸

Ngcobo CJ, 'in order to put the issues presented into context, ... consider[ed] it desirable to sketch briefly the legislative scheme which brought about our colonial and apartheid geography and which facilitated land dispossession of African people, the resultant insecure land tenure for the majority of our country, and the history of land occupation by the four applicant communities'.¹⁰⁹ This historical background is comprehensive, accurately narrated, and well written.

However, one finds it difficult to understand the relevance of this long historical narration. Despite spending so much time, energy, and effort on identifying the substantive issue and providing a proper contextual background, Ngcobo CJ regrettably failed to deal with it. He failed to determine the real or the substantive issue that was raised by the applicants, namely that the provisions of CLARA actually undermine security of communal land tenure instead of protecting it,

¹⁰⁶ L Favoreu 'Actualité et légitimité du contrôle juridictionnel des lois en Europe occidentale' (1984) *Revue de droit public et de la science politique* 1195 trans E Rosenfeld (ed) *Constitutionalism, identity, difference, and legitimacy; theoretical perspectives* (1994) 272.

¹⁰⁷ *Tongoane* (n 22 above) para 1.

¹⁰⁸ *Tongoane* (n 22 above) para 2.

¹⁰⁹ *Tongoane* (n 22 above) para 9.

as required by the Constitution. The historical narration given by the CJ is, therefore, at best obiter and at worse irrelevant. This history has very little (if anything) to do with ‘tagging’ which is the only issue the Court ultimately considers. It is submitted that the Court took an easy way out of a difficult issue.

After clearly setting out the issues for determination,¹¹⁰ Ngcobo CJ indicated that ‘it is convenient to consider *first* (own emphasis) whether Parliament followed the correct procedure in enacting CLARA, or the classification or tagging question’.¹¹¹ This creates the impression that the judge will proceed to deal with the second and then the third or last issue. This amounts to a reasonable expectation that all the issues raised, or at least more than one of the issues, will ultimately be considered. However, as one reads further, it is discovered that in the Ngcobo ‘s opinion, ‘once it is concluded that CLARA is unconstitutional in its entirety because it was not enacted in accordance with the provisions of section 76, it seems ... that that is the end of the matter’.¹¹² As he continued, ‘although the anxiety of the applicants to finalise the matter in the light of the energy and the time invested in it is understandable [but not appreciated],¹¹³ there is nothing left for this Court, as a Court of final appeal, to consider’.¹¹⁴

He does not rely on any authority for this statement. Despite a diligent search, I could not find any established legal principle to this effect.¹¹⁵ It is submitted that this statement is derived from what could at best be a rule of logic, and at worst a rule of convenience. However, a rule of logic to this effect could only arise if the remaining issues are irrelevant or unnecessary. In my view, the Chief justice merely found it convenient not to deal with this difficult and, perhaps, also political issue.

4.3.1 No reason why the Court failed to deal with the core issue

Although there are various reasons why a court would avoid dealing with a particular issue raised by an applicant in any given case, I could not find any reason for this in *Tongoane*. Normally such reasons could include instances where the applicant does not have standing; where the case is not ready for adjudication or when the matter is not ripe; or cases where the matter does no longer require adjudication or the

¹¹⁰ *Tongoane* (n 22 above) para 43.

¹¹¹ *Tongoane* (n 22 above) para 44.

¹¹² *Tongoane* (n 22 above) para 116.

¹¹³ Author’s insertion.

¹¹⁴ *Tongoane* (n 22 above) para 116.

¹¹⁵ This does not appear in the rules of the Constitutional Court, the Uniform Rules, any related rules or statute, or case law.

matter is moot.¹¹⁶ There was no dispute about the parties' standing and this matter was beyond doubt in *Tongoane*. As Vrancken and Killander observe, the issue of standing and ripeness often overlap because an applicant often lacks sufficient interest if the matter is not ripe.¹¹⁷

The principle of ripeness requires that if, in any given case,

a constitutional issue can be dealt with more conveniently at a later stage [rather than at the stage in which it is raised] and the applicant will get no tangible advantage from an earlier ruling, ... the applicant [must] wait until the court can ground its decision on concrete relief'.¹¹⁸ According to Hoexter, the idea behind ripeness is that a complainant should not go to court before the offending action or decision ripe for adjudication.¹¹⁹

The issue of threat to security of tenure in *Tongoane*, which the Court avoided, was ripe. The issue of ripeness was not raised as an objection by the respondents and consequently not considered by the Court in *Tongoane*. For this reason, ripeness as a reason for not dealing with threat to security of tenure cannot be sustained.

With regard to whether a matter is moot, the Constitutional Court has stated that a matter is 'moot and therefore not justiciable if it no longer represents an existing or live controversy which should exist if the court is to avoid giving advisory opinions on abstract propositions in law'.¹²⁰ For instance, in *JT Publishing* the Court refused to declare that certain provisions of the Publications Act 42 of 1974 were unconstitutional and invalid, because the Act, which was in force when the action was instituted, was in the process of being repealed when the Court heard the case.¹²¹ In contrast to *JT Publishing*, CLARA was not in the process of being repealed when the matter was heard in *Tongoane* and the matter was not moot. The court merely relied on a statement of the Minister,¹²² to the effect that CLARA would be repealed *in toto*, despite caution from the applicant's counsel.¹²³ Ncgobo CJ could 'not see anything wrong with the Minister informing [the] Court that CLARA, as it stands, is not consistent with

¹¹⁶ P Vrancken & M Killander 'Human Rights Litigation' in A Govindjee (ed) *et al Introduction to human right law* (2009) 251 258 - 259.

¹¹⁷ n 116 above, 258 - 259.

¹¹⁸ Currie & de Waal *Bill of rights handbook* (2005) 92, referring to *SAPT v Director: Directorate for Organised Crime and Public Safety* 2000 2 BCLR 200 (C) 2061; also quoted by Vrancken & Killander (n 116 above) 258.

¹¹⁹ C Hoexter *et al* (eds) *The new constitutional and administrative law* (2003) 302.

¹²⁰ *National Coalition of Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC) (*National Coalition of Gay and Lesbian Equality*) para 21 fn 18.

¹²¹ *JT Publishing v Minister of Safety and Security* 1997 3 SA 514 (CC) para 16.

¹²² Minister for Agriculture and Land Affairs, who was one of the respondents.

¹²³ *Tongoane* (n 22 above) para 117.

government policy'.¹²⁴ This was a surprising and disappointing misdirection on the part of the Court. The Minister's mere political statement has no legal effect. The Court is also not accountable to the Minister or to 'government policy'. It is subject only to the Constitution and the law which it must apply without fear, favour or prejudice.¹²⁵ This Constitution is the supreme law of the land,¹²⁶ binding all organs of state including the executive and the legislature. Government policy, like all law or conduct, is subject to the supremacy of the Constitution. Furthermore, although the Minister made such a political statement, he is not a law-maker. The Court could not even rely on the statement if it was made by Parliament, because Parliament itself is a deliberative organ which might or might not decide to repeal CLARA *in toto*. Parliament follows democratic processes and there is no guarantee that CLARA will be repealed *in toto*.

In any event, the Court may, indeed, decide to deal with a matter even if the matter has become moot in the course of the proceedings with regard to the parties concerned, if it is in the interest of justice to do so. For instance, in Pillay,¹²⁷ despite that fact that the issue was found to be moot at the time it reached the Constitutional Court, because the party concerned had completed high school, the Constitutional Court, nevertheless, granted leave to appeal because it was in the interest of justice to hear the case as it raised

vital questions about the extent of protection afforded to cultural and religious rights in the school setting and possibly beyond. The issues are both important and complex, as is evidenced by the varying approaches of the courts below as well as courts in foreign jurisdictions. Extensive argument has been presented, not only from the parties but from three *amici curiae*. There is accordingly no doubt that the order, if the matter is heard, will have a significant practical effect on the School and all other schools in the country, although it will have no direct impact on Sunali [the pupil concerned]. It is therefore in the interests of justice to grant leave to appeal.¹²⁸

In *Langeberg*, Yacoob J held that

[e]ven though a matter may be moot as between the parties in the sense defined by Ackermann J [in *National Coalition for Gay and Lesbian Equality* n 120], that does not necessarily constitute an absolute bar to

¹²⁴ *Tongoane* (n 22 above) para 117.

¹²⁵ Section 165 of the Constitution.

¹²⁶ Section 2 of the Constitution.

¹²⁷ *MEC for Education: KwaZulu-Natal v Pillay* 2008 2 BCLR 99 (CC).

¹²⁸ *Pillay* (n 127 above) para 35. In this case the issue was whether prohibiting a high school pupil from wearing a nose ring in accordance with her religious and cultural beliefs violated the Bill of Rights, but before the matter reached the Constitutional Court, the pupil had finished high school and the decision would therefore not have any direct impact on her.

its justiciability. This Court has discretion whether or not to consider it. Langa DP, in *President, Ordinary Court-Martial and Others v Freedom of Expression Institute and Others*, throws some light on how such discretion ought to be exercised. The conclusion in that judgment is that section 172(2) of the Constitution does not oblige this Court to hear proceedings concerning confirmation of orders of unconstitutionality of legislative measures which have since been repealed but has a discretion to do so and should consider whether any order it may make will have any practical effect either on the parties or on others.¹²⁹

As Yacoob indicated, in high courts, sitting as courts of appeal, and in the Supreme Court of Appeal (SCA), the situation is governed by section 21A of the Supreme Court Act 59 of 1959.¹³⁰ A number of SCA judgments¹³¹ have dealt with the exercise of discretion in terms of this section. However, the *Natal Rugby Union v Gould* case¹³² is illustrative of the application of this section. It concerned the correctness of the procedure that had been followed in electing the president of the Union. By the time the appeal was heard, the Union had held a re-election in accordance with the procedure contended for by the respondent. Howie JA held that

[h]ad there been no appeal the judgment of the Court below would in all probability have continued to influence the procedure adopted in respect of office bearer elections at future union meetings. There was, of course, nothing irregular or unfair in the procedures adopted at the re-election meeting, viewed purely in isolation, without regard to the constitution. But the union does have this constitution. It is the chosen instrument by which the union's affairs are to be regulated and the union, its office bearers and council members are entitled to have it interpreted in order to guide them in the future. In the circumstances I consider that determination of the appeal will, quite apart from the issue of costs in the Court below, have a practical effect or result within the meaning of s 21A of the Supreme Court Act.¹³³

This is to be contrasted with the position in this Court where there is no equivalent statutory provision. As Yacoob J indicated in *Langeberg*:¹³⁴

¹²⁹ *Independent Electoral Commission v Langeberg Municipality* 2001 3 SA 925 (CC); 2001 9 BCLR 883 (CC) para 9 (*Langeberg*). In this case the respondent resisted an appeal on the ground of mootness and contended that the elections have come and gone and that the IEC has, by creating an additional voting district after the judgment of the High Court had been given, removed the possibility of any live dispute between the parties.

¹³⁰ *Langeberg* (n 129 above) para 10.

¹³¹ *McDonalds Corporation v Joburgers Drive-Inn Restaurant* 1997 1 SA 1 (A) 14C; *Premier, Provinsie Mpumalanga v Groblersdalse Stadsraad* 1998 2 SA 1136 (SCA) 1143A - B; *Western Cape Education Department v George* 1998 3 SA 77 (SCA); 84G; *Simon NO v Air Operations of Europe AB* 1999 1 SA 217 (SCA) 226I - 227A; *Natal Rugby Union v Gould* 1999 1 SA 432 (SCA) 444I - 45B.

¹³² n 131 above.

¹³³ *Natal Rugby Union* (n 131 above) para 45B.

¹³⁴ n 129 above, para 10.

[T]his Court has a discretion to decide issues on appeal even if they no longer present existing or live controversies. That discretion must be exercised according to what the interests of justice require. A prerequisite for the exercise of the discretion is that any order which this Court may make will have some practical effect either on the parties or on others. Other factors that may be relevant will include the nature and extent of the practical effect that any possible order might have, the importance of the issue, its complexity, and the fullness or otherwise of the argument advanced. This does not mean, however, that once this Court has determined one moot issue arising in an appeal it is obliged to determine all other moot issues.

It is submitted that the substantive issue raised by the applicants in *Tongoane* was not moot at the time of hearing in *Tongoane*. Even if it was found to be moot, which is not the case, the Court could have exercised its discretion and dealt with this issue. The Court was, therefore, misguided in relying on a mere statement of a cabinet minister to whom it is not accountable.

4.3.2 *The need for judicial activism in the context of transformative constitutionalism*

Diescho correctly indicates that

through judicial activism, judges influence the direction of the law. This happens when their interpretation of the law goes beyond the mere words of the texts at hand and beyond the matters mentioned: when they interpret the law purposefully, and say the unsaid through their interpretation.¹³⁵

According to du Plessis ‘judicial activism is, therefore premised on the belief that judges have a creative role to play in the interpretation and application of enacted law’.¹³⁶ As Dugard proposes, judges in a post-apartheid and constitutional democratic South African society should play an activist role or function.¹³⁷ Justice O’Regan also stated in *Fourie*, that ‘the power and duty to protect constitutional rights is conferred upon the courts and courts should not shrink from that

¹³⁵ See JD Diescho ‘The paradigm of an independent judiciary: Its history, implications and limitations in Africa’ http://www.kas.de/upload/auslands/homepages/namibia/Independence_Judiciary/diescho.pdf, (accessed 19 January 2012) 38; H Botha ‘Rights, limitations and the (im)possibility of self government’ in H Botha *et al* (eds) *Rights and democracy in a transformative constitution* (2003) 14; RE Levy & RL Glicksman ‘Judicial activism and restraint in the Supreme Court’s environmental law decisions’ (1989) 42 *Vanderbilt law review* 343.

¹³⁶ L du Plessis ‘Some of Frank Michelman’s prospects for constitutional interpretation in South Africa – in retrospect’ in H Botha *et al* (n 135 above) 89; C Hoexter *Administrative law in South Africa* (2007).

¹³⁷ J (Jackie) Dugard ‘Judging the judges: towards an appropriate role for the judiciary in South Africa’s transformation’ (2007) 20 *Leiden Journal of International Law* 965.

duty'.¹³⁸ Moseneke also indicates that the task to fulfil the transformative design of the Constitution is a collective one, and falls to be obeyed by all state functionaries including the judiciary.¹³⁹ He continues that the judiciary should acknowledge and recognise that the Constitution was developed within a particular historical and social context and that the Constitution is set to redress this legacy. It was a context of social exclusion, unequal power relations and material dispossession.¹⁴⁰

However, Dugard concluded that both during apartheid and post-apartheid, South African judges 'have not assumed an activist role in society',¹⁴¹ as they should, and she correctly blames this (in the post-apartheid constitutional democracy) on what she calls 'jurisprudential conservatism'.¹⁴² She indicates that the South African Constitution is not only 'moral', but also inherently transformative, and that it thus obliges the judiciary to play an active role in advancing socio-economic equality.¹⁴³ Quoting Moseneke,¹⁴⁴ she notes that the Constitution 'enjoins the judiciary to uphold and advance its transformative design'.¹⁴⁵ In his seminal article on transformative constitutionalism, Klare also highlights what he terms the 'inherent conservatism' of South African legal culture.¹⁴⁶ As he correctly indicates, this approach to legal interpretation is 'highly structured, technicist, literal and rule bound' as opposed to the 'policy-oriented and consequentialist' approach that he favours.¹⁴⁷ Klare observes that formalist legal reasoning operates to mystify the choices that judges make in their interpretative work.¹⁴⁸ According to him, this discourages appropriate constitutional innovation and leads to less generous or innovative interpretation, which may result in even progressive judges comfortable with an activist role taking for granted limitations on their interpretative scope that owe more to

¹³⁸ *Minister of Home Affairs v Fourie* 2005 1 SA 524 (CC) para 171.

¹³⁹ D Moseneke 'Transformative adjudication in Post-apartheid South Africa – taking stock after a decade' (2007) 21(1) *Speculum Juris* 6.

¹⁴⁰ Moseneke (n 139 above) 6.

¹⁴¹ Dugard (n 137 above) 967.

¹⁴² Dugard (n 137 above) 967.

¹⁴³ Dugard (n 137 above) 970.

¹⁴⁴ D Moseneke 'The fourth Bram Fischer Memorial Lecture' (2002) 18 *South African Journal on Human Rights* 314.

¹⁴⁵ Dugard (n 137 above) 971. See also M Pieterse 'What do we mean when we talk about transformative constitutionalism?' (2005) 20 *SA Public Law* 155 157.

¹⁴⁶ K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146. See also H Botha 'Freedom and constraint in constitutional adjudication' (2004) 20 *South African Journal on Human Rights* 249; A van der Walt 'Tradition on trial: a critical analysis of the civil-law tradition in South African property law' (1995) 11 *South African Journal on Human Rights* 169; S Mothupi 'Transformation of the judicial system: the debate continues' (2006) 47(2) *Codicillus* 1.

¹⁴⁷ Klare (n 146 above) 168.

¹⁴⁸ Klare (n 146 above) 170 - 173. See also D Brand 'The proceduralisation of South African socio-economic rights jurisprudence, or "what are socio-economic rights for?"' in Botha *et al* (n 135 above) 51.

tradition than to responsibility and obligations of their role under the Constitution.¹⁴⁹

It is submitted that the Tongoane judgment is a classic example of this ‘jurisprudential conservatism’. It is further submitted Tongoane regrettably resorted to the classical English law doctrine of legal positivism.¹⁵⁰ As Ndima observes, unfortunately this positivistic approach of Western law, ‘... continues to bedevile judicial efforts to transform African jurisprudence today’.¹⁵¹ Tongoane was a typical case of mechanical,¹⁵² and technical or formal judicialism. It exemplifies what Hoexter refers to as ‘extreme judicial conservatism or restraint’.¹⁵³ Botha summarises Michelman’s illustration of a commitment to a style of adjudication that is

based on practical reason rather than the mechanical application of legal rules; that is sensitive to context and the concrete circumstances in which litigants find themselves; that resist the bureaucratic impulse to repress social difference in the name of order, uniformity and control; and that acknowledges the responsibility of judges for their decisions, rather than deferring to external authority.¹⁵⁴

As Christiansen indicates:¹⁵⁵

The [Constitutional] Court’s expansive power to advance substantive justice comes from institutional characteristics as much as from the generous enumeration of political and social rights ... the Court has very broad jurisdiction over constitutional matters and has far-reaching, discretionary remedial powers ... These procedural characteristics form a critical aspect of the power and authority of the judiciary and the Court. In some ways these qualities were necessary for a transition like South Africa’s, but they also reflect the conscious vesting of authority in the Constitutional Court.

As Moseneke indicates, a judicial exercise must not be merely positivistic, but should rather be value-drenched and sensitive to the broader social context and peculiarities presented by each case at hand.¹⁵⁶ Dugard correctly points out a ‘judge is not a mere automaton

¹⁴⁹ Klare (n 146 above) 170 - 173.

¹⁵⁰ See for instance, J (John) Dugard ‘Should judges resign? – a reply to Professor Wacks’ (1984) 101 *South African Law Journal* 286; B Schlink ‘German constitutional culture in transition’ in Rosenfeld (n 106 above) 198.

¹⁵¹ Ndima (n 14 above) 83.

¹⁵² D Rousseau ‘The constitutional judge: the master or the slave of the constitution’ in Rosenfeld (n 106 above) 262.

¹⁵³ Hoexter (n 119 above) 135.

¹⁵⁴ n 146 above, 17 - 18.

¹⁵⁵ E Christiansen ‘Transformative constitutionalism in South Africa: creative uses of constitutional court authority to advance substantive justice’ (2010) 13 *Journal of Gender, Race & Justice* 581.

¹⁵⁶ n 143 above.

who declares law ... he has a wide range of options open to him in fact finding ...'¹⁵⁷

4.3.4 Lessons from socio-economic rights jurisprudence?

Although the constitutional property clause,¹⁵⁸ which includes access to land, is from a purely legalistic point of view not a socio-economic right, it is linked either directly or indirectly to some socio-economic rights. This link is attributed to at least two factors. Firstly, similarly to access to other socio-economic needs such as adequate housing,¹⁵⁹ access to basic health care services, sufficient food and water, and social security,¹⁶⁰ access to land is a basic socio-economic need. Actually access to most socio-economic needs such as housing, food, and water, depends on access to land for their realisation. As Roodt puts it, 'in theory these rights allow citizens to demand from the state access to basic needs, such as adequate land, housing, education, health care, nutrition, and social security'.¹⁶¹ Relying on a quote from Dumbutshena,¹⁶² Dugard suggests that South Africa needs an activist judiciary that purposively pursues transformative adjudication with the goal of achieving socio-economic equality.¹⁶³ Secondly, both the right of access to land and the socio-economic rights are meant to redress South Africa's past of racial discrimination and to advance the constitutional values of freedom, equality and human dignity.¹⁶⁴ Thirdly, this link is clear from language used in the Constitution for protecting and promoting typical socio-economic rights. Section 25(5) of the Constitution provides that 'the state must take reasonable legislative and other measures within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis'. This language is similarly used in sections 26(1),¹⁶⁵ 26(2),¹⁶⁶ 27(1),¹⁶⁷ and 27(2)¹⁶⁸ of the Constitution. At the risk of overstressing it, one could also argue that the textual juxtaposition of these constitutional provisions indicates to some extent the indirect link

¹⁵⁷ n 137 above, 286.

¹⁵⁸ Section 25 of the 1996 Constitution.

¹⁵⁹ See sec 26(1) of the Constitution.

¹⁶⁰ See sec 27 of the Constitution.

¹⁶¹ MJ Roodt 'Impediments to the delivery of socioeconomic rights in South Africa' Paper delivered at SASA (South African Sociological Association) Conference, Stellenbosch 2008, 1.

¹⁶² E Dumbutshena 'Judicial activism in the quest for justice and equality' in B Ajibola & D van Zyl (eds) *The judiciary in Africa* (1998) 188.

¹⁶³ n 150 above, 979.

¹⁶⁴ See the Preamble to and sec 1 of the Constitution.

¹⁶⁵ This section provides that everyone has a right to have access to adequate housing.

¹⁶⁶ This section provides that the state must take reasonable legislative and other measures within its available resources, to achieve the progressive realisation of each of these rights.

¹⁶⁷ This section provides that everyone has the right to have access to health care services, including reproductive health care; sufficient food and water; and social security ...

between these rights. It is submitted that security of communal land tenure involves the provision and security of a critical socio-economic resource, namely land. Rights relating to the provision of socio-economic provision are classed in section 25-29 of the Constitution.

Therefore, when adjudicating upon land issues such as the threat to security of tenure, courts could to some limited extent also be influenced by the socio-economic rights jurisprudence.

Socio-economic rights, judicial activism and separation of powers

The jurisprudence of the Constitutional Court regarding the use of remedial powers in respect of socio-economic rights demonstrates judicial activism.¹⁶⁹ According to Hoexter, this means that judges cannot, and should not, try to avoid involvement in the adjudication of social and economic policy.¹⁷⁰ However, Dugard notes that the Constitutional Court has failed, in its adjudication of socio-economic rights, to promote meaningfully the realisation of these rights for poor South Africans, and as such, it has not met the challenge to uphold and advance the Constitution's transformative design.¹⁷¹ She argues that the post-apartheid judiciary shies away from an activist role in a socio-economically divided society, claiming separation of powers in a legitimate democracy as a shield against playing a more activist role in the transformation of South Africa.¹⁷² Liebenberg argues that a rigid model of separation of powers in socio-economic rights adjudication is particularly ill-suited to the South African transformative Constitution, in which co-operation between the three branches of government is essential for empowering government to take the necessary developmental and redistributive measures envisaged by the Constitution, particularly in relation to socio-economic rights.¹⁷³ Brand criticises the Constitutional Court for 'proceduralising its adjudication of socio-economic rights',¹⁷⁴ which, he points out, has certain important negative practical consequences, including its potential to discourage future socio-economic rights litigation, providing limited tools for the Court to deal with possible, really difficult, future cases, and its failure to set substantive

¹⁶⁸ This section provides that the state must take reasonable legislative and other measures within its available resources, to achieve the progressive realisation of each of these rights.

¹⁶⁹ Dugard (n 137 above) 965; Christiansen (n 155 above) 589; M Pieterse 'Coming to terms with the judicial enforcement of socio-economic rights' (2004) 20 *South African Journal on Human Rights* 383; Hoexter (n 121 above) 142.

¹⁷⁰ Hoexter (n 119 above) 139.

¹⁷¹ n 137 above, 971.

¹⁷² Dugard (n 137 above) 977.

¹⁷³ S Liebenberg 'Towards a transformative adjudication of socio-economic rights' (2007) 21(1) *Speculum juris* 52.

¹⁷⁴ Brand n (148 above) 33.

standards to guide future social- and economic policy-making.¹⁷⁵ He further argues that such a proceduralisation approach is theoretically disappointing from a transformative constitutional point of view because it fails to give any form of expression to the substantive political philosophy underlying the Court's socio-economic rights judgments.¹⁷⁶ In addition to *Tongoane*, the Court, has thus, deliberately avoided to provide a satisfactory description of the substance or content of socio-economic rights in three important socio-economic judgments.¹⁷⁷

A counter argument could be made that courts should exercise restraint or deference, in the light of separation of powers. Although this is often only viewed from the perspective of administrative law, with particular reference to the courts exercising deference when it reviews administrative conduct for unreasonableness, or an enquiry about expertise and separation of powers,¹⁷⁸ Davis would prefer this to extend 'towards a proper consideration of the role of a court in a constitutional democracy.'¹⁷⁹ However, restraints and deference applies in the context of competency.¹⁸⁰ For instance, in the *Phambili Fisheries* case, Schultz JA emphasised that judicial deference 'does not imply judicial timidity or unreadiness to perform the judicial function'.¹⁸¹ This was endorsed by O'Regan J in *Bato Star*¹⁸² by making it clear that 'respect', which is the term she preferred to 'deference', does not mean simply rubberstamping an unreasonable decision in recognition of the complexity of the decision or the identity of the decision-maker.

The court has played a limited but pivotal activist role as far as socio-economic rights are concerned.¹⁸³ As Liebenberg indicates, one of the major obstacles to the judicial enforcement of socio-economic

¹⁷⁵ Brand (n 148 above) 37.

¹⁷⁶ As above.

¹⁷⁷ *Soobromoney v Minister of Health (Kwazulu-Natal)* 1998 1 SA 765 (CC) (*Soobromoney*); *Government of the Republic of South Africa & Others v Grootboom & Others* 2000 1 SA 46 (CC) (*Grootboom*); *Minister of Health v Treatment Action Campaign* (No. 2) 2002 5 SA 721 (CC) (*TAC*).

¹⁷⁸ Y Burns & M Beukes *Administrative law under the 1996 Constitution* (2006) 31; C Hoexter 'The current state South African administrative law' in C Hoexter & L van der Vyver (eds) *Realising administrative justice* (2002); C Hoexter 'The future of judicial review in South African administrative law' (2000) 17 *South African Law Journal* 484 510 - 512.

¹⁷⁹ D Davis 'To defer and when? administrative law and constitutional democracy' (2006) *Acta juridica* 40 - 41.

¹⁸⁰ Hoexter (n 119 above) 143 - 144.

¹⁸¹ *Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd* 2003 6 SA 407 (SCA) para 50.

¹⁸² *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC) para 48.

¹⁸³ For example, *Soobromoney* (n 177 above); *Grootboom* (n 177 above); and *TAC* (n 177 above).

rights is formalistic conceptions of the separation of powers doctrine.¹⁸⁴

4.3.6 Failure to comply with the Constitutional obligation to develop customary law

In South Africa, customary law is given constitutional,¹⁸⁵ statutory,¹⁸⁶ and judicial recognition.¹⁸⁷ For instance, section 39(2) of the Constitution provides that, a court, tribunal or forum must, in an adjudicative context, develop customary law in accordance with the spirit, purport and objects of the Bill of Rights; the Traditional Leadership and Governance Framework Act¹⁸⁸ which recognises the role and institution of traditional leadership in the administration of justice; and in *Alexkor* the Constitutional Court held that 'the courts are obliged by section 211(3) of the Constitution to apply customary law when it is applicable, subject to the Constitution and any legislation that deals with customary law'.¹⁸⁹

What is customary law?

As indicated earlier, communal land tenure is regulated under customary law. There are many definitions of customary law,¹⁹⁰ but

¹⁸⁴ Liebenberg (n 173 above) 53.

¹⁸⁵ See for instance, sections 39(2) & 211 of the Constitution.

¹⁸⁶ For instance, the Recognition of Customary Marriages Act, as amended by the Judicial Matters Second Amendment Act 42 of 2001, which recognizes customary marriages; the Traditional Leadership and Governance Framework Act 41 of 2003 which recognises the role and institution of traditional leadership in the administration of justice; and the long outstanding Traditional Courts Bill [B 15-2008] published in GG 30902 of 27 March 2008, which provides for the structure and functioning of traditional courts.

¹⁸⁷ *Bhe v the Magistrate, Khayelitsha*; *Shibi v Sithole Case CCT69/03*; *South African Human Rights Commission v President of the Republic of South Africa* 2005 1 SA 580 (CC) (*Bhe*) para 43; *Alexkor Ltd v Richtersveld Community* 2003 12 BCLR 1301 (CC) (*Alexkor*) para 51; *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa* 2000 2 SA 674 (CC) para 44; *Mabuza v Mbatha* 2003 4 SA 218 (C) (*Mbatha*) para 32; *Mthembu v Letsela* 2000 3 SA 867 (SCA) (*Letsela*); D Mailula 'Abdication of judicial responsibility, cultural self-determination and the development of customary law: Lessons from *Shilubana*' (2008) 23(2) *SA Public Law* 215.

¹⁸⁸ Act 41 of 2003.

¹⁸⁹ M Herbst & W du Plessis 'Customary law v common law marriages: a hybrid approach in South Africa' (2008) 12(1) *Electronic Journal of Comparative Law* <http://www.ejcl.org> (accessed 15 November 2011) 4.

¹⁹⁰ See, for instance, Kameri-Mbote (n 45 above); M Chanock 'Neither customary nor legal: African customary law in an era of family law reform' (1989) 3 *International Journal of Law and Policy* 72 - 88 74; and A Clarke 'Securing communal land rights to achieve sustainable development in Sub-Saharan Africa: critical analysis and policy implications' (2009) 5(2) *Law, Environment and Development Journal* 130 134, wherein it is defined as 'legal rules and processes that have become an intrinsic part of accepted legal conduct and arise from social practices rather than positive law'.

the following summary by Herbst and Du Plessis suffices for the purpose of this note.¹⁹¹

African customary law in the modern sense of the word (i.e., with Western influence):

denotes all those legal systems originating from African societies as part of the culture of particular tribes or groups that have been maintained, supplemented, amended and or superseded in part by:

- (a) changing community views and the demands of the changing world;
- (b) contact with societies with other legal systems;
- (c) contact with and the influence of other legal systems; and
- (d) the direct and indirect influence of foreign (non-indigenous) government structures.

It is generally accepted that customary law is characterised by unwritten¹⁹² rules, practices or principles; it is dynamic and not static,¹⁹³ it relates to and binds a specific indigenous community or area;¹⁹⁴ and it generally regulates private relations.¹⁹⁵

Although one accepts the first two characteristics, in the light of the new constitutional dispensation, it is difficult to accept the last two, namely that indigenous or customary law only relates to or binds specific indigenous communities within which it applies, and that it relates only to private relations or applies only within the private sphere.

Firstly, from a conflict of law perspective,¹⁹⁶ there is no legislative or judicial certainty as to how to resolve a conflict between the application of customary law and common law in a particular situation. Bennett set out the following rules or guidelines as to how to deal with this conflict:¹⁹⁷ where there is an agreement between the parties, the courts must enforce such agreement; where there is a dispute on the choice of law, the court must be guided by the nature of a prior transaction; where the transaction is known to both systems of law, the court must look at the circumstances of the particular case to determine general cultural orientation by looking at the subject

¹⁹¹ Herbst & du Plessis (n 189 above) 3.

¹⁹² L Cotula (ed) *Changes in 'customary' land tenure systems in Africa* (2007) 10.

¹⁹³ M Herbst & W du Plessis (n 189 above) 3; Pottier (n 37 above) 55.

¹⁹⁴ Section 1 of the Traditional Leadership and Governance Framework Act 41 of 2003.

¹⁹⁵ C Rautenbach 'South African common and customary law of intestate succession: a question of harmonisation, integration or abolition' (2008) 12(1) *Electronic Journal of Comparative Law* <http://www.ejcl.org> (accessed 15 November 2011) 4.

¹⁹⁶ TW Bennett 'Conflict of laws – the application of customary law and the common law in Zimbabwe' (1981) 30(1) *The International and Comparative Law Quarterly* 59.

¹⁹⁷ Bennett (n 33 above) 53 - 57.

matter and environment in which the transaction was concluded; where the transaction is known to both legal systems, the parties use of a form peculiar to one system may be indicative of an intention to abide by that system; the parties ways of living and their overall cultural orientation also has a strong influence on the choice of law; and the parties exemption from customary law.¹⁹⁸

I find it difficult to agree with these rules. Customary law and common law are constitutionally placed on the same level as equal systems of law in South Africa by section 39(2) of the Constitution. Why is it necessary for the parties to agree to the application of customary law if they are not given the same choice in respect of the application of the common law? If the application of the common law to everybody is compulsory, why should the application of customary law be dependent on some rules such as the parties consent, the nature of their prior transaction, their general cultural orientation or way of living? Why should they be exempt from the application of customary law, if they cannot be exempt from the application of the common law?

The Constitution does not limit the application of customary law to specific indigenous communities or limit its application to their culture. It only recognises indigenous law as a system of law applying parallel to the common law.¹⁹⁹ What is required is that its application must be consistent with the purport, spirit and object of the Bill of Rights.²⁰⁰ Section 211(3) of the Constitution expressly states that 'courts must apply customary law when that law is applicable'. What determines whether customary law applies in a particular matter is, in my view, not the subject of the matter or the person, but the nature of the transaction, irrespective of who the subjects are, where the subjects are resident, what their general cultural orientation is, whether they chose it to apply, or whether they choose to be exempt from its application. Whether indigenous law applies should, therefore, be determined with reference to the transaction itself. In other words, the question should be whether indigenous law applies in a particular transaction rather than whether it applies to a particular person.

Secondly, although one concedes that 'the traditional public/private law divide in Western legal systems²⁰¹ is unknown in customary law',²⁰² we cannot take it for granted that all relationships to which indigenous law applies, are of a private nature and within a

¹⁹⁸ Bennett (n 33 above) 57.

¹⁹⁹ Section 211 of the Constitution.

²⁰⁰ Section 39(2) of the Constitution.

²⁰¹ Actually this division is also artificial in common law. Hoexter (n 119 above) 136.

²⁰² Rautenbach (n 195 above) 4 n 19.

private sphere.²⁰³ Under customary law, the relationship between a traditional authority such as a chief, traditional council, or headman and his or her subject is not a private matter if that authority is exercising his official powers. That is certainly a public matter regulated under customary public law. For instance, when a chief allocates residential, agricultural or grazing land to his or her subject, he or she is exercising a public power or performing a public function and thus the relationship is of a public nature, it is unequal and it is regulated by public law rather than private law. This is, of course, one of the confusions we often observed not only from the judiciary, but also from some academics.²⁰⁴ For instance, by declaring unconstitutional the principle of male primogeniture in the context of succession to chieftaincy in *Shilubana*,²⁰⁵ the Constitutional Court failed to recognize and acknowledge the difference between the application of this principle in private law relationships of estate succession or inheritance of private property, as was the case in the *Bhe*,²⁰⁶ and the application of this principle in the public law context of succession to official title of chief, as was the case in *Shilubana*.²⁰⁷ It is in this context of the public law nature of customary law that the *Tongoane* judgment was involved, namely customary or communal land law with specific reference to security of land tenure.

The court acknowledged that the security of tenure of communal land is regulated by customary law, as follows:²⁰⁸

[W]hat is not disputed is that the land occupied by the communities is administered in accordance with indigenous law, and that traditional leaders, in particular the tribal authorities, play a role in the administration of communal land.

Despite the Court acknowledging this fact, it failed to deal with the core issue and as a result contravened its constitutional mandate to

²⁰³ Contrary to this, Rautenbach believes that customary law generally deals with private relationship and therefore operates in the private sphere only. She mentions that it pertains to limited areas of law such as family law, law of property, law of delict, traditional leadership and courts, and finally, intestate succession. How she arrives at the conclusion that traditional leadership is a private law matter leaves much to be desired. See Rautenbach (n 195 above) 4 - 5.

²⁰⁴ Rautenbach (n 195 above) 4 - 5.

²⁰⁵ *Shilubana v Nwamitwa* 2008 (9) BCLR 914 (CC) 926 (*Shilubana*).

²⁰⁶ *Bhe* (n 187 above).

²⁰⁷ *Shilubana* (n 205 above).

²⁰⁸ *Tongoane* (n 22) para 33.

develop customary law²⁰⁹ as required by section 39(2) of the Constitution.

Failure to comply with the constitutional obligation to develop customary law

On several occasions, the judiciary has attempted to comply with the constitutional mandate to develop customary law.²¹⁰ However, the Constitutional Court has, at least once,²¹¹ arguably failed to live up to this constitutional imperative. As I have argued elsewhere, the Constitutional Court has abdicated its responsibility.²¹² It is submitted that this abdication is becoming a worrying trend as it resurfaced in *Tongoane*.²¹³ As indicated earlier, the Constitutional Court has, yet again, conveniently overlooked the real issue, namely the development of communal security of land tenure under customary land law. This development should involve the 'integration' or 'harmonisation' of customary and statutory law.²¹⁴ As to how to develop customary law, the Court could, and should have learned and borrowed from its own jurisprudence on the development of common law.

As indicated earlier, the aim of this note is not to suggest specific recommendations as to the manner in which the development of customary law should take place. However, section 39(2) of the Constitution provides that, a court, tribunal or forum must, in an adjudicative context, develop customary law or the common law, in accordance with the spirit, purport and objects of the Bill of Rights. Although successful in the development of the common law, the Court is not doing well in the sphere of customary law. This is despite the fact that the common law and customary law have been placed at the same level in section 39(2), namely, at the level where they are both recognised as part of our legal system and both need to be developed

²⁰⁹ This argument relates only to security of communal land tenure as provided for in CLARA and not the other areas beyond customary law, which are nevertheless covered by CLARA. The land control areas that are not covered exclusively by customary law but also by other legislative measures, but which nevertheless fall within the ambit of CLARA include areas covered by the Upgrading of Land Rights Act 112 of 1991 and Proclamation R188 of 1969 which is yet to be repealed. See in this regard, Du Plessis & Pienaar (n 59 above) 81.

²¹⁰ *Alexkor* (n 187 above) para 51; *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa* 2000 2 SA 674 (CC) para 44; *Mbatha* (n 187 above) para 32; *Letsela* (n 187 above).

²¹¹ *Shilubana* (n 205 above).

²¹² See Mailula (n 187 above). See also Hoexter (n 161 above) 143; H Botha 'Rights, limitations and the (im)possibility of self government' in H Botha *et al* (eds) *Rights and democracy in a transformative constitution* (2003) 18; See also S Woolman 'The amazing, vanishing Bill of Rights' (2007) 124 *South African Law Journal* 762.

²¹³ See Mailula (n 187 above).

²¹⁴ *Cousins* (n 1 above) 9.

in accordance with the values and ideals of the constitution. The obligation to develop the two systems of law similarly or equally is peremptory rather than discretionary. In fact, this is an inherent power of the courts.²¹⁵ As indicated in *Alexkor*

while in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common law, but to the Constitution.²¹⁶

If the courts have developed the common law, it should not be difficult to develop customary law.

The development of the common law was dealt with comprehensively by Ackerman and Goldstone JJ in *Carmichele*,²¹⁷ in which the duty of the courts which is derived from sections 7,²¹⁸ 8(1),²¹⁹ 39(2), and 173²²⁰ of the Constitution was emphasised. The peremptory nature of this obligation was acknowledged in *Masiya*, as follows:²²¹

It needs to be stressed that the obligation of the Courts to develop the common law, in the context of section 39(2) objectives, is not purely discretionary. On the contrary, it is implicit in s 39(2) read with s 173 that where the common law as it stands is deficient in promoting the s 39(2) objectives, the courts are under a general obligation to develop it appropriately.

The judges were, however, reminded in *Carmichele*, that when developing the common law in accordance with section 39(2) and 173, they 'must be mindful of the fact that the major engine for law reform should be the legislature and not the judiciary'.²²² With approval, the Court quoted the following remarks by Iacobucci J in *R v Salituro*:²²³

²¹⁵ Section 173 of the Constitution.

²¹⁶ *Alexkor* (n 187 above) para 51.

²¹⁷ *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC). In this case, one of the issues was whether the Court should develop the common law of delict in order to afford the applicant a right to claim damages if the police or the prosecutor were negligent.

²¹⁸ This section deals with the general significance of the Bill of Rights within the framework of the new constitutional dispensation.

²¹⁹ This section provides that the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary, and all organs of state.

²²⁰ This section makes provision for the inherent powers of the Court to develop the common law.

²²¹ *Masiya v Director of Public Prosecutions* 2007 5 SA 30 (CC) para 39. See also *Carmichele* (n 217 above) para 33.

²²² *Carmichele* (n 217 above) para 36.

²²³ (1992) 8 CRR (2d) 173; [1991] 3 SCR 654, cited in *Carmichele* (n 217 above) para 36 from a similar citation by Kentridge AJ in *Du Plessis v De Klerk* 1996 3 SA 850 (CC) para 61.

Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless there are significant constraints on the power of the Judiciary to change the law ... In a constitutional democracy such as ours it is the Legislature and not the courts which have the major responsibility for law reform ... the Judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.

However, in *Carmichele* the Court held that ‘courts must remain vigilant and should not hesitate to ensure that the common law is developed to reflect the spirit, purport and objects of the Bill of Rights ... whether or not the parties in any particular case request the Court to develop the common law under s 39(2)’.²²⁴ This jurisprudential approach was also followed in *Masiya*,²²⁵ where the Court, in the interest of justice and in order to promote the values, ideals and principles underlying the Constitution, developed the common law definition of rape to include non-consensual intentional anal penetration of females but not males.²²⁶ As Mienie says, although the Court acknowledged and appreciated that the non-consensual penetration of a male victim is ‘no less degrading, humiliating and traumatic’²²⁷ than that of a female victim, it nevertheless held that law reform is the major responsibility of the legislature.²²⁸ The Court held that ‘the power given to the court to adopt a method of common law development which is closer to codification than incremental fact driven development codification’.²²⁹ However, as Dersso argues the ‘partial development of the rights [dignity, equality, freedom and bodily integrity] may ... be considered as amounting to a failure on the part of the Court to discharge its mandate and obligations.’²³⁰

²²⁴ *Carmichele* (n 217 above) para 36.

²²⁵ *Masiya* (n 221 above).

²²⁶ The *Masiya* judgment has received criticism from several academics. For instance, Mienie argues that the definition of rape should have been extended to include the non-consensual intentional anal penetration of any other person (not only females), particularly in the light of the fact that the victim in this case was a young child. According to her, ‘the refusal to engage the judiciary in legal reform is both disappointing and puzzling, given the Court’s own celebration of the centrality of individual rights in rape law reform’. CA Mienie ‘Child rape and the development of the common law: *Masiya v Director of Public Prosecutions*’ (CC 54/06; unreported) (2007) 22 SA Public Law 576. For criticism of the *Masiya* judgment, see also SA Dersso ‘The role of courts in the development of the common law under sec 39(2): *Masiya v Director of Public Prosecutions Pretoria (The State)*’ http://www.saifac.org.za/docs/res_papers/RPS%20No.%2035.pdf (accessed 09 May 2012); N Ntlama ‘*Masiya*, gender equality and the role of the common law’ (2009) 3(2) *Malawi Law Journal* 303.

²²⁷ *Masiya* (n 221 above) para 30.

²²⁸ Mienie (n 227 above) 579.

²²⁹ *Masiya* (n 221 above) para 31.

²³⁰ SA Dersso ‘The role of courts in the development of the common law under s 39(2): *Masiya v Director of Public Prosecutions Pretoria (The State) and Another*’ http://www.saifac.org.za/docs/res_papers/RPS%20No.%2035.pdf (last visited 20 August 2012) 13.

As the Court has managed to develop the common law, there is no reason why it should be unable or unwillingly to develop customary law, particularly because it has an obligation to do so in terms of section 39(2). As Van der Walt indicates, ‘during the apartheid era customary law was largely ignored and underrated, especially in the context of property law [including communal land tenure].’²³¹ Rautenbach also indicates that ‘customary law was initially ignored by the colonials, then later tolerated and eventually recognised, albeit with certain reservations and conditions’.²³² In the light of its current explicit constitutional recognition, customary law must be developed in accordance with the spirit, purport and objects of the Bill of Rights.

As Hlophe J states:²³³

If one accepts that African customary law is recognised in terms of the Constitution and relevant legislation to give effect to the Constitution, ... there is no reason, in my view, why the courts should be slow at developing African customary law. Unfortunately one still finds dicta referring to the notorious repugnancy clauses as though one were still dealing with a pre-1994 situation. Such dicta, in my view, are unfortunate. The proper approach is to accept that the constitution is the supreme law of the Republic ... In line with this approach, my view is that it is not necessary at all to say African customary law should not be opposed to the principles of public policy or natural justice. To say that it is fundamentally flawed as it reduces African law (which is practiced by the vast majority in this country) to foreign law – in Africa!

5 Conclusion

As indicated earlier, the main challenge facing issues of land in Africa is always, how to ‘recognise and secure land rights that are clearly distinct from “Western legal” forms of private property but are not simply “customary”, given the impacts of both colonial policies and of past and current processes of rapid social change’.²³⁴ As indicated earlier, in *Tongoane*, this challenge was identified, acknowledged, confirmed and summarised by Ngcobo CJ as follows:

[t]he communities are concerned that their indigenous-law-based system of land administration will be replaced by the new system that CLARA envisages. They are concerned that this will have an impact on the evolving indigenous law which has always regulated the use and occupation of land they occupy. They are further concerned that their land will now be subject to the control of traditional councils which, as is apparent from the record, they consider to be incapable of

²³¹ AJ Van der Walt *Constitutional property law* (2005) 402.

²³² Rautenbach (n 195 above) 1.

²³³ *Mbatha* (n 187 above) para 30.

²³⁴ Cousins & Claasens (n 18 above) 3.

administering their land for the benefit of the community. All the communities claim that the provisions of CLARA will undermine the security of tenure they presently enjoy in their land, and those who own the land fear that they will be divested of their ownership of the land. While some of these claims are disputed by the government respondents, what is not disputed is that the land occupied by the communities is administered in accordance with indigenous law, and that traditional leaders, in particular the tribal authorities, play a role in the administration of communal land. There is some issue as to the extent to which the role of traditional leaders and tribal authorities accords with indigenous law.²³⁵

However, the Court conveniently failed to consider the core issue raised by the applicants, namely the threat to security of customary land tenure pursuant to the introduction of CLARA. This is despite the Court acknowledging that, ‘what lies at the heart of the confirmation proceedings is the question whether CLARA undermines the security of tenure of the applicant communities’.²³⁶ Surely this was the substantive matter, or core issue that the Constitutional Court was confronted with. The applicants challenged CLARA mainly because the new statutory system of land tenure it introduced sought, among others things, to replace the customary land tenure or land tenure under customary law, and this threatens and puts in a precarious position, their security of tenure over the lands they use or occupy. It is upon this basis that CLARA was argued to be unconstitutional. However, this issue was not dealt with by the Court, probably because it was ‘not disputed ... that the land occupied by the communities is administered in accordance with indigenous law’.²³⁷ Moseneke has indicated that judges are required to, and should at all times stay faithful to the facts before them.²³⁸ However, in *Tongoane* the judges deliberately ignored some of the facts before them and focused only on others.

It is submitted that the Court should have addressed this issue because it has a constitutional mandate not only to redress societal inequalities caused by the apartheid regime, but most importantly to develop the indigenous law system as a parallel system to the common law and statutory law, and actually integrate it into, and harmonise it with the new constitutional dispensation. In other words, the Court failed to ‘recognise and secure land rights that are clearly distinct from “Western legal” forms of private property but are not simply “customary”, given the impacts of both colonial policies and of past and current processes of rapid social change’.²³⁹ The Court should

²³⁵ *Tongoane* (n 22 above) para 33.

²³⁶ *Tongoane* (n 22 above) para 39.

²³⁷ *Tongoane* (n 22 above) para 33.

²³⁸ Moseneke (n 139 above) 8.

²³⁹ Cousins & Claassens (n 18 above) 3.

play what Hoexter refers to as ‘the transformation enhancing role of the judiciary’.²⁴⁰ Furthermore, it is submitted that the sensitivity of land issues, and in particular the security of tenure of communal land, warrants a different approach from other issues in order to ensure legal certainty.

However, the Court found it convenient to avoid the core issue and to deal with the incidental or secondary procedural issues only as discussed earlier. It is submitted that it was incorrect for the Court to avoid dealing with the substantive issue of security of tenure. As highlighted in *Port Elizabeth Municipality v Various Occupiers*, ‘the procedural and substantive aspects of justice and equity cannot always be separated. The managerial role of the courts may need to find expression in innovative ways’.²⁴¹ It is submitted that the Court has failed to play this critical ‘managerial role’ in *Tongoane*.

This was either a misdirection, or a deliberately and concerted effort to avoid facing the core substantive challenge head-on probably because of the sensitivity of the issue, its complexity, and its political nature.

²⁴⁰ Hoexter (n 119 above) 138.

²⁴¹ 2005 1 SA 217 (CC) para 39.