AFRICAN INDIGENOUS JUSTICE PHILOSOPHY:

The 1996 Constitution of South Africa:
On 27 April 1994, a new constitutional order came into existence with a commitment to equality, freedom and dignity for the Republic of South Africa in which the welfare and rights of the entire mass of people are the main consideration, rather than the privileges of a class or the will of a monarch.

A justiciable Bill of Rights is at centre stage in this new order. The Bill of Rights affirms a fundamental right to lawful, reasonable and procedurally fair administrative action in terms of the common law, the Constitution, other jurisdictions and the Promotion of Administrative Justice Act 3 of 2000.

A requirement of section 35(3) of the interim Constitution was that the common law, customary law and other jurisdictions such as natural law and natural justice be applied and developed, with due regard to the spirit, purport and objects of the Bill of Rights.’

In the words of retired Constitutional Court judge Albie Sachs:
“We are a new Court, established in a new way, to deal with a new Constitution. We should not rush to lay down sweeping and inflexible rules governing our mode of analysis. We need to develop an appropriately South African way of dealing with our Constitution, one that starts with the Constitution itself, acknowledges the way it came into being, its language, spirit, style and inner logic, the interests it protects and the painful experiences it guards against, its place in the evolution of our country, our society and our legal system, and its existence as part of a global development of constitutionalism and human rights.” (S v Mhlungu 1995 (7) BCLR 793 (CC) at 917 per Sachs J.)

The South African legal system is based on Constitution supremacy and any law that is inconsistent with the Constitution is null and void to the extent of its inconsistency with the Constitution. It has its roots from Roman Dutch law, from the common law owing to its English colonial history, and African Customary law and African Indigenous Justice philosophy.

Southern Africa law therefore consists of legal plurism which according to Professor Chuma Himonga is:
The various legal orders existing in a State polity, that is, State law, indigenous law, and other normative orders are not completely independent of each other; they interact in various ways and at various levels. Presumably, their respective values also interact, or in some way rub against each other, so that they influence each other. In legally pluralistic States, therefore, one may find not only one but several, even mixed, legal cultures reflecting the interacting, diverse, legal systems.

Rights of Indigenous People’s:
Courts of South Africa must consider international customary law unless it is inconsistent with the Bill of Rights as enshrined at centre stage of the Constitution and are therefore obligated to respect and promote the rights of indigenous peoples distilled into norms of international customary law.

Bill of Rights:
The 1996 Constitution ensures that Indigenous peoples may not be discriminated against on the basis of their race, culture, religion or any of the grounds envisaged in section 9(3).

Sections 30 of the Bill of Rights on language and culture provides for a legal framework for indigenous peoples to espouse their fundamental human rights without discrimination. There is thus a reasonable expectation that indigenous peoples in South Africa may find recourse within the justice system. However, evidence of indigenous peoples’ social exclusion and discrimination remains a cause for concern.

Need for Customary Courts:
Section 34 of the Constitution provides that everyone has the right to have any dispute that can be resolved by application of law decided in a fair public hearing before a court, or where appropriate, another independent and impartial tribunal or forum.

Efficient and accessible courts of law and quasi-judicial forums are therefore a constitutional obligation to guarantee access to justice to all people on the land of Southern Africa. Given that indigenous peoples have suffered historical and continued marginalisation, there is a need for more than a mere availability of courts to espouse their rights.
Most indigenous peoples decry the fact that the courts rely mainly on a statutory legal framework inconsistent with their version of justice, which prefers dialogue and negotiation, consistent with their traditions and customs.

Support and development is a constitutional obligation to ensure an improvement in the enjoyment of indigenous economic, social and cultural rights.

“Indigenous peoples in South Africa continue to lack capacity, partly due to extreme levels of poverty, and a lack of awareness to enforce these rights and provisions for their benefit and, as such, some of these issues fall within the ambit of advocacy and lobbying. The state is yet to set in motion specific measures to address these problems and empower indigenous peoples to espouse their rights.”


Although the state is still in the process of recognizing traditional leadership structures, it is the will and wish of the indigenous peoples to make all possible efforts to ensure they will be recognised.

**Differences in African Justice:**

In most living customary law institutions there is no formal lawyer present on either side; the rules of evidence are extremely flexible since the main purpose of the hearing is to let both sides tell their story; what is sought is a solution and not a winner-take-all verdict.

The solution entails the restoration of the breach of the social relationship, and therefore the remedies available go considerably beyond those of either the Roman Dutch private law or the English common law.

Often the solution and restoration is evoked through a parable rather than through a conventional rule, and it is the parable that helps guide the remedy.
Berkowitz defines a view of law doing justice: *law is the experience of friendship and mutual reciprocity that, as Aristotle writes inspires the acts of grace that unite a plurality into a unity*.

Living customary law is much closer to law as just relatedness than its other contemporaries in South Africa.

Justice Mokgoro daringly argued that the entire spirit of the South African Constitution should be interpreted to embody the spirit of uBuntu.

uBuntu is ‘the African principle of transcendence through which an individual is pulled out of himself or herself back towards the ancestors, forward towards the community, and, towards the potential each one of us has.

The famous phrase ‘umuntu ngumuntu ngabantu’ literally means ‘a people is a people by or through other people’. Each one of us has the potential to embody humanity, or peopleness from an ethical perspective.

Further, uBuntu requires us to come out of ourselves so as to realise the ethical quality of peopleness. We are required to take that first ethical action without waiting for the other person to reciprocate. uBuntu then is not a contractual ethic. It is up to me. And, in a certain profound sense, humanity is a stake in my ethical action.

We are all served by living in an ethical community. So it is in our interest, understood in a particular way, to act ethically. There is a famous isiXhosa saying ‘what goes out the front door comes in the back window’. The best way to describe uBuntu is as an activist ethics of virtue.

What is at stake in uBuntu is the promotion of a dialogue in situations of conflict. Such a dialogue is about confronting the situation at hand in its full sense. It is about deeply reflecting on what is at stake in defending natural law and what must be done to ensure the well being of the larger community. The saying ‘a botho bag ago a nne botho seshabeng’, which literally means ‘let your welfare be the welfare of the
nation’, points us again to how uBuntu calls us to an aspirational community in which my wellbeing or welfare is built and enhanced by seeking to ensure the wellbeing of the larger community in which it is necessarily rooted.

Transculturization demands that we must actually learn each other’s ways and grasp underlying competing values in order to even begin to make a judgement about the unconstitutionality of a ritual practice of customary law.

By taking uBuntu out of the Constitution in 1996 some would argue uBuntu is relegated to a background justification for dignity, rather than fore grounded as both itself a core principle, and a powerful set of ethical arguments that are uniquely African, which would bolster and defend dignity as the ground norm of the Constitution.

If the only basis for abiding by a legal system is fear and security, and there is no moral reason to do so, then there will always be acceptable reasons to opt out of the social contract. The Kantian ideal of a free people regulating themselves and their laws through the kingdom of ends is the only moral image of the world that allows us to begin to defend the Constitution. Such a moral view may well be incompatible with the brutal realities of neo-liberal capitalism. Thus, an ultimate defence of the Constitution must take seriously the dire poverty in which 50% of people in South Africa live as integral to the demand for social and economic reorganisation of society.

Sampi Terreblanche, Mahmood Mandami, and Drucilla Cornell have once again called for a Justice and Reconciliation Commission to engage in the re-evaluation of the ANC’s acceptance of the Washington Consensus. Both dignity and uBuntu demand nothing less than that we examine the reasons for the failure of the Constitution to deliver on its promise for a better life for everyone. (*uBuntu, Pluralism and the Responsibility of Legal Academics to the New South Africa*, Inaugural lecture by Professor Drucilla Cornell, Department of Private Law, Faculty of Law 10 September, 2008)

The prevailing system of European Anglo Roman Dutch law in South Africa is a foreign jurisdiction of economic apartheid from which 1994 did not free the people.
We need to develop customary and common law to a more unified legal restorative justice system that is 'of the people, for the people and by the people'.

Current South African law is burdened with serious disadvantages. The law is left exclusively to lawyers. The many cultural influences, the existence of two basically incompatible legal systems and the numerous apartheid statutes make the law hard to understand and difficult to handle. It is calling for the creation of a completely new, politically unencumbered unified law – to simplify it and to make it more easily accessible. [The History of South African Law and its Roman-Dutch Roots, Beat Lenel, 2002.]

“Most people want socialist policies, not measures inclined to serve big business interests, privatisation and neoliberal economics. There are countless patriots and comrades in existing and emerging organised formations. Then there are the legal avenues and institutions such as the public protector's office and human rights commission that – including the ultimate appeal to the constitutional court – can test, expose and challenge injustice and the infringement of rights. The strategies and tactics of the grassroots – trade unions, civic and community organisations, women's and youth groups – signpost the way ahead with their non-violent and dignified but militant action. The space and freedom to express one's views, won through decades of struggle, are available and need to be developed. (Ronnie Kasrils)

Protection of cultural rights in the South African Constitution is heavily influenced by international human rights law and is given further impetus by section 185 which mandated the creation of a Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities. At centre stage of the Constitution is the Bill of Rights, and the potential for common law, customary law and restorative justice to be developed into a comprehensive and liberating system that is accessible to all. The origin, history and elements of an African judicial system are explored below.

**African Ethics and uBuntu:**
In African ethics, quality of character is fundamental to moral life. The ability to act in accord with the moral principles and rules of the society requires the possession of a
good character. It is from a human's character that all his or her actions, good or bad, radiate. Wrong-doing is put down to bad character.

Responding appropriately to moral instruction leads to appropriate habits, and thus to good character.

Recognition, in African culture, is the sort of thing which has to be attained, in direct proportion to how one participates in communal life, by fulfilling the obligations defined by one's stations. When it is said of a people that ‘he or she is not a people’, it implies that the people’s character falls short of being recognized as a people.

In Shona the word tsika means ‘ethics’ or ‘morality’. But when they want to say of a human that “He has no morals”, or “He is unethical”, they would often use the word hunhu which directly means ‘character’. Thus, Haana hunhu means “He has no character”, “He is not moral”, “He is unethical”. In South Sotho, there are no words that are the direct equivalents of ‘ethics’ or ‘morality’, instead words are used that mean behavior or character. Thus, if it is said “he has no morals” or “his action is unethical” words such as maemo are used —which means character or behavior: thus, maemo a mabe means “he has a bad character”, “his behavior (action) is unethical.” When someone behaves (or acts) in ways that are morally right, they would say “he has a good character”, using the words lokileng or boitswaro, both of which mean good character or good behavior. The human being is endowed with moral sense and, so, has the capacity for both virtue and vice; his judgment on some moral issue could go either direction.

African morality originates from considerations of people welfare and interests, not from divine pronouncements. The basis of morality was fulfillment of obligation to kinsmen and neighbors, and living in amity with them. The right builds up society; the wrong tears it down. Morality is oriented from the social good in each situation and the focus of the African society is on people’s welfare and social harmony.

Religion does influence moral practice, but African ethics is founded rather on the people’s experience of making socially beneficial choices that lead to moral good habit.
Humanity and brotherhood are among the moral or people values in African ethics that constitute the basic criteria that motivate and also justifies people’s actions that affect other people. People are all of one kind; all people are one species with shared basic values, feelings, hopes, and desires.

In all the indigenous African languages there is really no word for ‘race.’ There are, instead, the words ‘human being’, and ‘people. Even though this family is fragmented into a multiplicity of peoples and cultures, nevertheless, it is a shared family, a shared humanity and relationships among members ought to feature a certain kind of morality: the morality of a shared humanity.

The meaning given to the word ‘brother’ in African cultures is intended, indeed, to lift people up from the purely blood-relation level onto the people level where Ubuntu transcends biology, race, ethnicity, or culture. This leads to such social and moral virtues as hospitality, generosity, concern for others and communal feeling that were noted by foreign visitors from the colonial world. Recognition of the worth of a people is more important than caring for wealth.

Common good is that which is essentially good for all human beings, embracing the needs that are basic to the enjoyment and fulfillment of the life of each people. If the common good is achieved then the singular good is also achieved. A sense of the common good, a core of shared values, is the underlying foundation of African social morality.

Therefore, it is clear that the common good is that which inspires the creation of a moral, social, political, or legal system that enhances the well-being of all people in a community.

African morality regards social life as natural to the people because every people is born into an existing society. Private ethics that focuses on the welfare and interests of the singular people is hardly regarded in African moral thought.
Many African proverbs emphasize the importance of the values of mutual helpfulness, collective responsibility, cooperation, interdependence, and reciprocal obligations.

The individual is weak and limited in many ways, and subject to vulnerable situations. Mutual aid, then, becomes a moral obligation; it is only through cooperation with other people that the needs and goals of the one can be fulfilled.

The attitude to, or performance of, duties, arises from an awareness of needs rather than of rights. In other words, people fulfill—and ought to fulfill—duties to others not because of the rights of these others, but because of their needs and welfare. Thus, moral duty of any kind is not considered extraordinary, optional, or super-prerogatory. [Summarised from http://plato.stanford.edu/entries/african-ethics/#TerEthMor]

UBUNTU means ‘I am because of who we are’ and, in a more philosophical sense ‘the belief in a universal bond of sharing that connects all people.’ “People have a dignity by virtue of their capacity for community, understood as the combination of identifying with others and exhibiting solidarity with them, where human rights violations are egregious degradations of this capacity.” (Thaddeus Metz, Humanities Research Professor of Philosophy, University of Johannesburg, South Africa)

Stanlake J. W. T. Samkange (1980) highlights the three maxims of uMunthuism (Malawi) Hunhuism (Shona) or Ubuntuism that shape this philosophy: The first maxim asserts that ‘To be human is to affirm one’s humanity by recognizing the humanity of others and, on that basis, establish respectful human relations with them.’ And ‘the second maxim means that if and when one is faced with a decisive choice between wealth and the preservation of the life of another human being, then one should opt for the preservation of life’.

The third ‘maxim’ as a ‘principle deeply embedded in traditional African political philosophy’ says ‘that the king owed his status, including all the powers associated with it, to the will of the people under him’.
The concept of Ubuntuism constitutes the kernel of African Traditional Jurisprudence as well as leadership and governance. In the concept of ubuntu or unhu, a crime committed by one individual on another extends far beyond the two individuals and has far-reaching implications to the people from among whom the perpetrator of the crime comes. Ubuntu jurisprudence supports remedies and punishments that tend to bring people together.

For instance, a crime of murder would lead to the creation of a bond of marriage between the victim's family and the accused's family in addition to the perpetrator being punished both inside and outside his social circles. The role of "tertiary perpetrator" to the murder crime is extended to the family and the society where the individual perpetrator hails from. However, the punishment of the tertiary perpetrator is a huge fine and a social stigma, which they must shake off after many years of demonstrating unhu or ubuntu. A leader who has ubuntu is selfless and consults widely and listens to subjects. Such a people does not adopt a lifestyle that is different from the subjects and lives among them and shares property. A leader who has Ubuntu does not lead, but allows the people to lead themselves and cannot impose his will on his people.

“Ubuntu speaks particularly about the fact that you can't exist as a people in isolation. It speaks about our interconnectedness. You can't be a people all by yourself, and when you have this quality – Ubuntu – you are known for your generosity.” (Tutu)

Judge Colin Lamont expanded on the definition during his ruling on the hate speech trial of Julius Malema:

“Ubuntu is recognised as being an important source of law within the context of strained or broken relationships amongst individuals or communities and as an aid for providing remedies which contribute towards more mutually acceptable remedies for the parties in such cases. Ubuntu is a concept which: is to be contrasted with vengeance; dictates that a high value be placed on the life of a human being; is inextricably linked to the values of and places a high premium on dignity, compassion, humaneness and respect for humanity of another; dictates a shift from confrontation to mediation and conciliation; dictates good attitudes and shared concern; favours the re-establishment of harmony in the relationship between parties
and that such harmony should restore the dignity of the plaintiff without ruining the
defendant; favours restorative rather than retributive justice; operates in a direction
favouring reconciliation rather than estrangement of disputants; works towards sensitising a
disputant or a defendant in litigation to the hurtful impact of his actions to the other party
and towards changing such conduct rather than merely punishing the disputant; promotes
mutual understanding rather than punishment; favours face-to-face encounters of disputants
with a view to facilitating differences being resolved rather than conflict and victory for the
most powerful; favours civility and civilised dialogue premised on mutual tolerance.”

One becomes a moral people insofar as one honours communal relationships, or a
people lives with equal regard of life and values identity and solidarity with other
people.

As John Stuart Mill argued long ago, when people are given the responsibility for
governing themselves, they tend to become more active and self-reliant. However, it
is hard to enjoy a sense of togetherness with others in society when one is seriously
impoverished. One feels a sense of shame and inferiority when one’s basic needs
are not met while substantial segments of society enjoy great wealth. In addition,
one’s ability to engage in joint projects with others is not honoured if one is lacking
means. (JS Mill Considerations on representative government (1861).

A more local sharing of power would accord every people the equal ability to have a
say in determining law and policy, as well as the right of representation with respect
to every particular decision; the right not to be utterly marginalized when major laws
and policies are actually formulated and adopted. When laws obtain the consent of
all elected representatives, it is more likely that they would benefit the public as a
whole, and not merely a subset.

In order to produce a sense of togetherness and to facilitate cooperative, mutually
beneficial endeavours between public servants acting as officials and the people
themselves, public servants must not act for only the sake of a subset of the
population.

Customary Law
**Customary law** is an established system of immemorial rules evolved from the way of life and natural wants of the people, the general context of which was a matter of common knowledge, coupled with precedents applying to special cases which were retained in the memories of the chief and his councilors, their sons and their sons’ sons until forgotten, or until they became part of the immemorial rules.

In the international sphere, it is now clear that the status of local customary law is a matter of international natural law and the ‘law of nations’ that guarantees indigenous peoples the right to enjoy their own cultures.

One aspect of this right is the right to use their own law. Customary law is a living law bridging the generations by oral tradition and constantly in a state of change as the needs of the people change: it cannot be captured by the written word.

In the traditional African law, all details of a case had to be inquired and memorised. There were no summaries, no written notes. Each detail had to be discussed in full before the leader of a tribe would arrive at a decision.

The western ideas of an undefined past, a present and a future are foreign to African communities. The African law does not differentiate between private and public law.

The Constitution of the Republic of South Africa, 1996, finally brought customary law on a par with the common law of South Africa by affording it constitutional recognition, but subject to the Constitution. It pertains to areas of law, such as family law, law of property, law of delict, traditional leadership and courts.

The development of customary law is a sensitive task. “Given the denigration of African culture in both the colonial period and subsequently under apartheid, it is entirely fallacious to imagine that living customary law has been able to develop without being tainted by this history.” (Human rights, cultural diversity and customary law in south Africa, Evadné Grant Journal of African Law, 50, 1 (2006), 2–23.)

The choice of law used must favour the protection of the rights of people: “In the absence of any agreement, it could be useful to ascertain which system of law would
provide the stronger remedy in the circumstances of the case, and to apply that system unless it can be shown that to do so would have illogical or unjust consequences.” (M. Pieterse, “It’s a ‘black thing’: upholding culture and customary law in a society founded on non-racialism”, (2001) 17 South African Journal on Human Rights 364, 368–369.)

“What is required, in ensuring both the right to culture and the right to equality, is first an acknowledgment of the importance of both culture and equality and their interrelationship. Secondly, there is a need for training and research. Thirdly, a commitment to sensitive and sustained development of both customary and common law to serve the purposes of the Constitution is necessary. And finally, in the long term, creative ways must be found of reconciling the practical needs of a modern legal system, the cultural heritage of the society it serves and the observance of internationally recognized human rights norms.” [Human rights, cultural diversity and customary law in south Africa, Evadné Grant Journal of African Law, 50, 1 (2006), 2–23.]

History:
“The colonial state used customary law as a second-tier legal and administrative order focused on asserting power over and control of the African population... This decentralized despotism informed how the post-independence state developed its urban-rural/common law-customary laws divide. If the traditional courts are to be reconstituted in a manner that truly seeks to uphold democracy, then any future bill must be organized in a way that clearly regards community participation and interests as paramount.” [When Is the Past Not the Past? Reflections on Customary Law under South Africa’s Constitutional Dispensation, Sanele Sibanda, Human Rights Brief, Volume 17, Issue 3, Article 6, 2010]

Customary law currently practiced by the Southern African people:

Customary law is based on the collective will of the people. It recognises that Africa is diverse with many different cultures and practices. These cultures co-exist with each other.

Customary law allows problems to be addressed collectively in a communal environment through a process of dialogue, where everyone contributes and consents to the resolution. In this way, values and practices can be upheld.
The people respect the natural elements of life, their shared humanity, their obligation to the future and their oral tradition. They value the spirit of caring and sharing for and with each other, and for the land, which belongs to all the people.

In a customary society no one is treated as a criminal when dealing with conflict, instead the accused is made part of the solution to the problem. Everyone in society is treated and accepted as equals, young and old, male and female, whatever the position you may hold in society.

The people value humility; tolerance and appreciation of their diversity; respect towards one another; the discipline of knowing right from wrong - each community-village has its own way of living and the discipline is guided by the people. They value honesty and the open, spontaneous and upfront nature of engaging with each other, sharing individual problems and challenges so as to provide support systems. No physical or mental harm is done to another.

In the world today people have been influenced by negative behavior, where right seems to be wrong and wrong seems to be right. The people want to restore positive behavior such as the doing of good deeds.

Decision-making takes place at a community level in which people take ownership of the environment, society and community challenges with a hands-on approach that allows for problem solving instead of adjudication.

The principles and values espoused in the Freedom Charter were driven by the desire to build togetherness, a sense of belonging and reclamation of the African identity that resonates with the customary way of living.

So far, the Court holds that the difficulties lie not so much in the recognition of living customary law, but in the determination and testing of its content. Notwithstanding, Customary law must be accepted and developed as a constitutional obligation.
Customary law is the practices of the people who live according to it and who adapt it to their changing circumstances and needs.

It is time to develop an alternative new kind of Southern African law which reconciles and unifies the old. Advocate George Bizos, lifelong friend of Nelson Mandela and renowned human rights lawyer, stated in his address at the School of Practical Philosophy Plato week, Johannesburg, April 2013, that laws need to be the product of a fundamentally just society, quoting Socrates' definition of Justice as "not preventing another from doing his job" or taking from him what was rightfully his.

“We South Africans stand at a crossroad... The one road, lined with securocrats, the plundering of the public purse and the attack on our democratic institutions, if taken, will create imbalance where law and justice cannot be reconciled with morality as our institutions and the very laws themselves will be perceived to be illegitimate.”

**Foreign Justice v. Indigenous Justice Paradigms:**

**Foreign Justice Paradigm**
- Vertical
- Communication is rehearsed
- Legalese is used
- Written statutory law derived from rules and procedure, written record
- Separation of powers
- Adversarial and conflict oriented
- Argumentative
- Isolated behavior, freeze-frame acts
- Fragmented approach to process and solutions
- Time-oriented process
- Limits participants in the process and solutions
- Represented by strangers
- Focus on individual rights
- Punitive and removes offender
- Prescribes penalties by and for the state
- Right of accused, especially against self-incrimination
- Vindication to society

**Indigenous Justice Paradigm**
- Holistic
Communication is fluid
Local language may be used
Oral customary law learned as a way of life by example
Law and justice are part of a whole
The spiritual realm may be invoked in ceremonies and prayer
Builds trusting relationships to promote resolution and healing
Talk and discussion is essential
Reviews problem in its entirety, contributing factors are examined
Comprehensive problem solving
No time limits on the process, long silences and patience are valued
Inclusive of all affected individuals in the process and solving problem
Representation by extended family members
Focus on victim and communal rights
Corrective, offenders are accountable and responsible for change
Customary sanctions used to restore victim-offender relationship
Obligation of accused to verbalize accountability
Reparative obligation to victims and community, apology and forgiveness

During his address on the future of Roman-Dutch law in Southern Africa (especially in Lesotho) Chief Justice Mahomed foresaw that the dualism of Roman-Dutch and customary law on Southern African soil might mix gradually into a more integrated system and declared, inter alia, that: ...“Southern Africa will be poorer without the sound discipline, effectiveness and historical experience of Roman-Dutch law ...[and] will also be poorer without the spiritualising, humanistic and bonding values of Customary law.”

The Subordinate Courts (Amendment) Act of 1969 provides that once a case has begun in a lower national court, the court may transfer the case to a customary court if it deems customary law applicable, provided that such a transfer is "not contrary to the interests of justice."

National courts recognise customary law in cases which its application comports with "natural justice or morality."
The way forward in South Africa:
The implication of section 8(3) of the Constitution is that customary law is on a par below common law. This inequality urgently needs reviewing in order in order to ensure its alignment on an equal status with common law.

Van der Westhuizen J (Shilubana v Nwamitwa 2008 9 BCLR 914) determined the factors that are essential for the development of customary law. “It is essential for the process of determining the content of a particular customary law [rule] to:
- consider the traditions of the community concerned [because] customary law is a body of rules and norms that has developed over the centuries [and] an enquiry into the position under customary law will therefore invariably involve a consideration of the past practice of the community where such a consideration [should] focus [on] the enquiry on customary law in its own setting rather than in terms of the common law paradigm;
- respect the right of communities that observe systems of customary law to develop their law [which] includes the right of traditional authorities to amend and repeal their own customs [because] customary law is by its nature a constantly evolving system [even though] under pre-democratic colonial and apartheid regimes, this development was frustrated and customary law stagnated. This stagnation should not continue, and the free development by communities of their own laws to meet the needs of a rapidly changing society must be respected and facilitated;
- be cognisant of the fact that customary law, like any other law, regulates the lives of people. The need for flexibility and the imperative to facilitate development must be balanced against the value of legal certainty, respect for vested rights, and the protection of constitutional rights.

[THE APPLICATION OF SECTION 8(3) OF THE CONSTITUTION IN THE DEVELOPMENT OF CUSTOMARY LAW VALUES IN SOUTH AFRICA'S NEW CONSTITUTIONAL DISPENSATION, N Ntlama, 2012 VOLUME 15 No 1]