



MINISTRY OF JUSTICE AND CORRECTIONAL SERVICES

Republic of South Africa

**Speech By Minister Ronald Lamola Customary Law and Social
Justice: Has Transformative Constitutionalism Advanced Equality
and Other Human Rights In Customary Law Hosted Virtually By The
University of Stellenbosch Held on 25 August 2021**

Our Esteemed Program Director Ms. Cathy Mohlahlana;

**Law Trust Chair in Social Justice, Professor Thuli
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Distinguished Guests;

Ladies and Gentlemen on the platform

In this month of August, we continue to celebrate women and commemorate the 150 Years of Charlotte Manya Maxeke, a courageous leader and women's rights activist.

I am thankful to the Chair of Social Justice Trust for inviting me to interrogate this critical question: “Has Transformative Constitutionalism Advanced Equality and Other Human Rights In Customary Law?”

In my attempt to pursue this question to its logical conclusion, I was confronted with another question, and that is,

What is the true status of women in society, particularly a society like ours which is governed by a Constitution which by all accounts, is the best in the world?

The question in my view becomes even more pointed, if we concede that in spite of us celebrating 25 years of our Constitution which is a lode star towards a new society, the cultural and economic dominance of colonialism still live deep within our communities.

Constructing a new society, finding balance and creating an equitable economic system and redefining cultural norms which are confined to the household, require a systemic shift in all aspects of society.

It is only if we consistently probe the true status of women, broadly in our communities, in our private spaces, in our churches, in the workspace and in our economy, that only then can we advance as a society.

As a result of sacrifices by many of our people, South Africa has become a democratic system where the constitution is the supreme law of the land.

The preamble of our constitution further emphasizes the healing of the injustices of our past and unity in diversity.

The late Chief Justice Pius Langa wrote:

"The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance. As such, the process of interpreting the Constitution must recognise the context in which we find ourselves, and the Constitution's goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterises the constitutional enterprise as a whole". Unquote

The theme of this conference is very integral in the process of building a solid and coherent state.

The coming into effect of the interim and later the 1996 Constitution became a watershed moment in the history of South Africa.

The supremacy of the constitution demanded transformation in many areas of the existing laws including customary law and this demanded transformation in many areas and sectors.

Different role players significantly contributed to shape and transform our customary law and cultural practices to be in conformity with our constitution.

Academics, researchers, the judiciary, traditional leaders and many others, have been very instrumental in aligning the customary law with the constitution and more particularly, with the rights in the Bill of Rights.

The jurisprudence has been broadened in this regard, just to mention but few courts cases:

SHILUBANA AND OTHERS v NWAMITWA (2008), BHE v MAGISTRATE KHAYELITSHA AND OTHERS (2004)

The above cases were very instrumental in doing away with the principle of primogeniture that unconstitutionally suppressed females in various sectors in communities.

For instance, in the BHE matter, the Constitutional Court addressed patriarchy squarely when it said:

The exclusion of women from heirship and consequently from being able to inherit property was in keeping with a system dominated by a deeply embedded patriarchy which reserved for women a position of subservience and subordination and in which they were regarded as perpetual minors under the tutelage of the fathers, husbands, or the head of the extended family.

In the Shilubana case, the Court invoked the Bato Star judgment by seeking to explain what equality truly entails:

"South Africa is a country in transition. It is a transition from a society based on inequality to one based on equality. The achievement of equality is one of the fundamental goals that we have fashioned for ourselves in the Constitution. Our constitutional order is committed to the transformation of our society from a grossly unequal society to one 'in which there is equality between men and women and people of all races. "

The **Alexkor case in 2003**, laid very important principles which addressed customary land rights and in the following **year (2004)**, the **Bhe case** addressed the customary succession and the inheritance rights of woman and children.

Importantly, the two cases taught us that customary law is subject to constitution, it evolves and develops to meet the changing needs of the community. Customary law is a living law, and this is important in a community that is willing to transform.

Alexkor in particular reminds us of intersection between customary law and the land question in particular. The Court held that Customary Law illustrates vividly the political and conceptual difficulties which are inherent in the public-private divide.

An interesting aspect of this case is that it centered the importance of customary law. The nature and the content of the rights that the Richtersveld Community held in the subject land prior to annexation must be determined by reference to indigenous law. That is the law which governed its land rights.

The Alexkor judgment goes on further, 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.

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. In doing so the courts must have regard to the spirit, purport and objects of the Bill of Rights.

The distortion of customary law did not arise only from the imposition of statutory ‘customary law’ under colonialism and apartheid. It also arose from the failure to recognize the nature of customary law and its dynamism in the face of changing circumstances.

In relation particularly to the land question and customary law we see an important transformation in our law which we must sustain.

Which in effect is moved away from state ownership to recognizing communal ownership in terms of customary law.

The transformation project therefore requires a fundamental re-assessment. These exercises demand the attention and participation of all of us.

This conference is taking place at a very important phase of our democracy where we are working on addressing the imbalances of the past, including the issue of land ownership.

As South Africans, we know very well the crimes committed against women and vulnerable groups in our societies. Some of these violations were perpetrated motivated by some of customary practices.

It is still concerning that some areas in our country are still abducting females more particularly children in the name of Ukuthwala practice, women are still suppressed and forced into marriages in the name of Ukungena practice.

It is in platforms like this one, where we need to educate society, help the law makers and the courts with our well researched papers to promote social justice by shaping our country with the laws that are in line with the supreme law of the land.

We need to interrogate the status of women across the board.

Customary law can exist within the prescripts of the Constitution. The Constitution (Section 211) says that customary law is protected, but the rules of customary law must be in line with the principles in the Bill of Rights.

The Bill of Rights protects the right to culture and also protects the right to equality, non-discrimination, and the right to dignity.

Transformation is important in building and shaping the South Africa that many sacrificed their lives for. We must all commit to stand against anything that may diminish the gains we have made as a constitutional democracy.

I wish you a successful conference

Thank you.