

**JUDICIAL "TRANSLATION" AND CONTEXTUALISATION OF VALUES:
RETHINKING THE DEVELOPMENT OF CUSTOMARY LAW IN *MAYELANE***

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SUMMARY

The relevance of *Mayelane v Ngwenyama* (2013 4 SA 415 (CC)) has not been exhausted. Particularly the constitutional mandate undertaken by the Constitutional Court to "develop" customary law deserves closer scrutiny. In *Mayelane* the Constitutional Court, in seeking to vindicate the dignity and equality of women in polygynous marriages, examines the validity of a second marriage in terms of "living" customary law. The Court applies customary law as a "primary" source of law, while it simultaneously promotes the values enshrined in the *Constitution*, however – bearing in mind that the constitutional values of dignity and equality have their roots in international rights law – the Court is in reality dealing with normative plurality spanning subnational (customary), national as well as international regimes. Furthermore, each of these systems is embedded in its own socio-cultural context, and therefore the liberal individualism of international law could be "foreign" in a customary context, which values communalism. Hence, it is asked whether courts can accommodate pluralism by simply transposing norms and values such as dignity and equality from one system to another, particularly in cases where the court sets out to "develop" customary law. It is argued that norms and values have to be interpreted and applied with reference to their particular context and audience. Thus, there is a need for courts to contextualise and attune, or "translate" norms, whenever they are applied to another system.

KEYWORDS: pluralism; customary law; international and constitutional rights law; role of courts; polygynous marriage; women; dignity.

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