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Tshikota, Gudani Shane

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University of the Witwatersrand, Johannesburg

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UNIVERSITY OF THE WITWATERSRAND, JOHANNESBURG

SCHOOL OF LAW

‘IN THE NAME OF MANHOOD’: RECONCILING CULTURE AND QUEER RIGHTS IN ULWALUKO THROUGH UBUNTU AND DECOLONIALITY

Submitted in fulfilment of the requirements of the degree of Master of Laws (LLM) (Dissertation) in the Faculty of Commerce, Law and Management at the University of the Witwatersrand, Johannesburg.

BY

GUDANI TSHIKOTA

STUDENT NO. 1136841

SUPERVISOR: PROFESSOR CATHI ALBERTYN

30 APRIL 2025

ABSTRACT

The Constitution and International Human Rights Law (IHRL) both guarantee the right to culture under the right to take part in cultural life. However, they also stipulate that exercising this right must not infringe upon other fundamental rights. At present, the traditional Xhosa circumcision ritual, known as 'Ulwaluko', perpetuates a dominant form of masculinity (hegemonic masculinity) that defines a man strictly as heterosexual, possessive, authoritative, and powerful. This perspective undermines the rights to equality, human dignity, and personal freedom and security for Xhosa queer men who may identify as a man, but not necessarily a heterosexual man. This dissertation investigates how the decolonisation of culture and masculinities, and the principles of Ubuntu along with other constitutional values, can be utilised to radically transform Ulwaluko to foster diverse and inclusive masculinities. The thesis presented is that while culture is protected as a fundamental right, it is not without limits, and in cases like this one of Ulwaluko conflicting with other rights, it is important to explore how other scholars, countries and courts have dealt with the issue of balancing competing rights. The need for the decolonisation of culture and masculinities is also proposed, and the central premise here is that while pre-colonial culture and masculinities are also not perfect, decolonisation is key to developing African-centered cultures and masculinities that genuinely reflect the realities, experiences, needs, and daily lives of indigenous populations, and the adoption of culture as living and forever changing. However, this is a long-term project that does not have a single solution. Accordingly, there is a suggestion to integrate Ubuntu and other constitutional principles into the Ulwaluko practice, particularly positioning Ubuntu as a value to assist in finding a remedy under PEPUDA. The premise is that the harmful parts of Ulwaluko must be removed so that Ulwaluko can be in line with the principles of the Constitution and the provisions of PEPUDA.

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DECLARATION

I, Gudani Tshikota, declare that this dissertation is my own unaided work. It is submitted in fulfilment of the requirements for the degree of Master of Laws by Dissertation in the Faculty of Commerce, Law and Management at the University of Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

GST — 30 April 2025

…….……. — ……

Gudani Tshikota — Date

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I would like to express my deepest gratitude to those who walked this journey with me — through moments of doubt, exhaustion, and perseverance. I dedicate this thesis to the following people:

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This work is the product of not just my efforts, but the collective faith, love, and strength of those who stood beside me — and the resilience I found within.

CHAPTER ONE

INTRODUCTION

> The research on homosexuality is very clear. Homosexuality is neither mental illness nor moral depravity. It is simply the way a minority of our population expresses human love and sexuality. Study after study documents the mental health of gay men and lesbians. Studies of judgment, stability, reliability, and social and vocational adaptiveness all show that gay men and lesbians function every bit as well as heterosexuals, nor is homosexuality a matter of individual choice. Research suggests that LGBT orientation is in place very early in the life cycle of an individual, possibly even before birth. It is found in about ten percent of the population, a figure, which is surprisingly constant across cultures, irrespective of the different moral values and standards of a particular culture.[1]

According to section 30 of the Constitution of the Republic of South Africa, 1996 (hereinafter 'the Constitution'), 'Everyone has the right to use the language and to participate in the cultural life of their choice'.[2] In the Eastern Cape, the Xhosa community observes a practice known as 'Ulwaluko Kwa-Xhosa,' which involves traditional male circumcision and other stages characterised by teachings of what makes a man.[3] A significant aspect of Ulwaluko is 'turning a boy into a man' through a 'rite of passage,' which aims to transition young Xhosa males into adulthood through a series of cultural lessons, culminating in circumcision performed with a spear.[4] In 1996, South Africa became the first country to prohibit discrimination based on sexual orientation, thereby protecting queer rights.[5] Research suggests that Ulwaluko currently reproduces a hegemonic masculinity that defines a man as exclusively heterosexual, possessive and

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[1] Willem J van Vollenhoven & Christo J Els 'The human rights paradox of lesbian, gay, bisexual and transgender students in South African education' (2013) 46 *De Jure* 263 at 270.
[2] Section 30 of the Constitution.
[3] Karabo Molobela 'The Development of Masculinity in Ulwaluko kwa Xhosa' 25 February 2021 available at *https://calabash.courses/article/the-development-of-hegemonic-masculinity-in-ulwaluko-kwa-xhosa*, accessed on 16 October 2023.
[4] Ibid.
[5] Van Vollenhoven & Els op cit note 1 at 265.

powerful, resulting in instances where Xhosa queer people, who 'hav[e] or relat[e] to a gender identity or a sexuality that does not fit society's traditional ideas about gender or sexuality',[6] often encounter abuse and discrimination during these initiation ceremonies, or are entirely excluded from the process. This violates their rights to equality, human dignity and freedom and security of a person. Consequently, culture becomes problematic insofar as it is practised in a way that violates other fundamental rights and values.[7] This raises the question of how to resolve what appear to be competing constitutional rights relating to equality, human dignity and freedom and security of a person, and culture.[8] For many years, legal scholars and judicial decisions have examined the challenge of interpreting and balancing conflicting rights. This study tackles the same dilemma in relation to the customary practice of Ulwaluko, specifically emphasising how to reconcile culture with these fundamental rights in a way that contributes to the decolonisation of this practice while aligning it with constitutional rights and values.

1.1. Background and Context

Very few films have encountered the level of backlash that *Ixeba*: The Wound has faced since its trailer was released.[9] The controversy escalated to the point where individuals threatened to close cinemas screening the film, directors received insults, and some lead actors were subjected to threats of violence.[10] Additionally, the film ignited extensive discussions both in public forums and academic publications, where debates arose regarding the appropriateness of its portrayal of the sacred customs associated with Ulwaluko.[11] Although numerous academic articles address the discrimination and

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[6] Cambridge dictionary 'What is queer?' available at *https://dictionary.cambridge.org/dictionary/english/queer#:~:text=queer%20adjective%20(SEX%20AND%20GENDER)&text=having%20or%20relating%20to%20a,bi%2C%20trans%2C%20whatever*, accessed on 20 November 2024.
[7] Ibid.
[8] Chapter 2 of the Constitution, 1996.
[9] *Ixeba*: The Wound accessed, available at *https://www.youtube.com/watch?v=0idwRX0d6nM&t=7s*, accessed on 20 October 2024.
[10] Heraldlive Reporter & Kyle Zeeman 'Eastern Cape Cinemas Cancel Screenings of Inxeba (The Wound) Amid Threats' Times Live 02 February 2018, available at *https://www.timeslive.co.za/tshisa-live/tshisa-live/2018-02-02-movie-houses-cancel-screening-of-the-wound-inxeba-amid-threats/, accessed on 20 August 2024.*
[11] Ibid.

mistreatment of Xhosa queer individuals during Ulwaluko, there is little literature exploring how the conflicting right to culture, that Ulwaluko is sourced from, and the rights of Xhosa queer people to equality, human dignity and freedom and security of a person, can be harmoniously balanced. This is the task that this dissertation has undertaken. This touches on a number of different themes and concepts. For the purpose of this dissertation, I define the concept queer as 'having or relating to a gender identity or a sexuality that does not fit society's traditional ideas about gender or sexuality',[12] but I limit my analysis to how the conflict of rights affects gay men.

1.1.1. Masculinities

At the centre of the rights conflict is the idea of masculinity. The notion of masculinity is rooted in the social constructs that define what it means to be a man.[13] Kimmel and Bridges characterise masculinity as encompassing the 'behaviours, social roles, and relationships of men within a specific society', along with the interpretations associated with these elements.[14] They emphasise that the term masculinity highlights gender, in contrast to male, which pertains to biological sex. Researchers in the field of masculinity frequently use the term 'masculinities' in the plural form to indicate that this concept lacks a singular definition and is subject to change over time.[15]

Colonisation in South Africa not only established new forms of masculinity but also altered pre-existing ones.[16] Morrel contends that masculinity must be analysed within the contexts of race and class.[17] Consequently, various masculinities exist within every society, each characterised by unique attributes and forms.[18] It is important to note that not all masculinities wield equal power as social forces; there are also subversive and

[12] Cambridge dictionary op cit note 6.
[13] See: Michael Kimmel & Tristan Bridges *Masculinities* Oxford bibliographies (2011).
[14] Ibid.
[15] Ibid.
[16] Robert Morrel 'Of Boys and Men: Masculinity and Gender in Southern African Studies' (1998) 24 *JSAS* 605 at 605.
[17] Ibid.
[18] Ibid.

subordinate masculinities present among marginalised and dominated groups, which may stand in opposition to the dominant masculinity.[19]

The dissertation will further explore various theories of masculinities to provide a foundational understanding of the concept and set the stage for a discussion on the reproduction of hegemonic masculinities. It will explore whether and how masculinities can be decolonised as part of the solution to harmonising culture and equality, human dignity and freedom and security of a person around the practice of Ulwaluko

1.1.2. The custom of Ulwaluko and the masculinities it creates

The isiXhosa term for the initiation ritual is 'Ulwaluko', which serves the purpose of 'rite to passage' through transforming boys into men through the cutting of the foreskin and various teachings.[20] 'The rite is practised for the fulfilment of health, cultural, identity and spiritual needs'.[21] Ulwaluko in its current form has the face of the heterosexual men who are possessive, powerful and have dominion. As a result, the masculinity that is reproduced by Ulwaluko is a hegemonic masculinity that continues to see a real man as exclusively heterosexual, powerful and possessive. This raises concerns for Xhosa queer men who identify as a man, but not heterosexual men, and would like to participate in Ulwaluko. This discussion holds significant relevance for this dissertation, as it will aid in exploring a contextual background of Ulwaluko as a cultural practice, and the masculinities it reproduces.

Drawing on the insights of Magodyo and others, I will critically examine the nature of the practice of Ulwaluko, and explore how the concept of 'culture' has led to its uncritical acceptance, and the reproduction of hegemonic masculinity.[22] Furthermore, I will explore whether and how this unquestioning adherence to the initiation process infringes upon the rights of other marginalised groups, including the rights of Xhosa queer people to not

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[19] Ibid.
[20] Aphiwe Mpateni & Simon Murote Kang'ethe '*Ulwaluko* rite of passage among the Xhosa in South Africa: the challenges relating to poor standards in unlicenced circumcision schools' (2021) 11 *AJSW* 207 at 208.
[21] Ibid.
[22] Tapiwa Madodyo, Michelle Glenda Andipatin & Kyle Jackson 'The role of Xhosa traditional circumcision in constructing masculinity' (2017) 47 *South African Journal of Psychology* 344 at 345.

be unfairly discriminated against on the ground of sexual orientation, to human dignity and freedom and security of a person.

1.1.3. Ulwaluko as a protected right

The right to culture extends beyond the confines of the South African Constitution. This right is acknowledged globally and has attained the status of a human right through its inclusion in various human rights instruments.[23] Specifically, the right to engage in cultural life is enshrined in Article 15, paragraph 1(a) of the International Covenant on Economic, Social and Cultural Rights, as well as in Article 27 of the Universal Declaration of Human Rights.[24] Furthermore, 'cultural rights are an integral part of human rights and, like other rights, are universal, indivisible and interdependent. The full promotion of and respect for cultural rights is essential for the maintenance of human dignity and positive social interaction between individuals and communities in a diverse and multicultural world'.[25]

This global recognition of the right to culture provides an international benchmark to examine the substance and implementation of the right to culture. Similarly, the increasing global recognition of queer rights can provide an international context for reconciling the right to culture with these rights. Particularly significant here is that Ulwaluko is, at least partly, protected by the right to culture embedded in International Human Rights Law (IHRL) and our Constitution. This aspect is crucial as it allows the dissertation to explore whether and how the right to culture, that Ulwaluko is sourced from, allows the practice to occur in a manner that respects the right to equality, human dignity and freedom and security of a person of Xhosa queer people.

[23] Special rapporteur on Cultural Rights, available at *https://www.ohchr.org/en/special-procedures/sr-cultural-rights/international-standards*, accessed on 16 October 2023.
[24] Ibid.
[25] Ibid.

1.1.4. The decolonisation of culture

Colonialism and apartheid dismissed the cultural significance of indigenous peoples, perceiving them as inferior and neglecting their historical narratives.[26] Consequently, colonial powers took it upon themselves to alter and reshape the culture, history, and legal frameworks of these communities to align with their own colonial perspectives. This has led to the current state where much of what is recognised as indigenous culture is either misrepresented or influenced by external forces. The dissertation will investigate whether one can draw on the idea of decolonisation to reconstruct the culture, legal systems, and notions of masculinity rooted in the indigenous peoples' histories and lived experiences. Here, it will not use decolonisation to imply a simplistic return to pre-colonial cultural and legal practices without critically examining that history, as not all aspects of it were positive.

Thus, it will investigate whether the concept of living customary law can be introduced as a means to illustrate how decolonised culture and masculinity can be perceived as dynamic and continuously evolving, reflecting the realities of modern communities and being in line with the values of the Constitution as a living document.

1.1.5. The decolonisation of masculinities and exploring Ubuntu values

The decolonisation of masculinities parallels the earlier discussion regarding the decolonisation of culture. The central premise is that the study of men and gender dynamics is also influenced by Eurocentric perspectives. For Ulwaluko to cultivate masculinities that are both diverse and inclusive, it is imperative to explore the decolonisation of these masculinities as well. It is important to acknowledge that the assertion that masculinities prior to colonialism were ideal for fostering a just and equitable society is not entirely accurate; certain African nations exhibit evidence of gender roles and hierarchies even in the pre-colonial period.[27] Furthermore, there is no

[26] See: Erna Oliver & Willem H Oliver 'The Colonisation of South Africa: A unique case' (2017) 73 *HTS Teologiese Studies* 1.
[27] Angela P Cheater 'Thee role and position of women in pre-colonial and colonial Zimbabwe' (1986) XIII *Zambezia* 65 at 66-67.

assurance that the decolonisation of masculinities and culture will alone achieve the desired outcome of Ulwaluko producing multiple and inclusive masculinities. Consequently, this dissertation explores whether the incorporation of Ubuntu values, and other values that underpin the Constitution can provide a means to address the tension between the right to culture and the rights to equality, human dignity, and freedom and security of a person.

1.2. Research objectives

The right to culture, while protected by the Constitution and IHRL is a fundamental right that must be respected. However, the same Constitution and IHRL states that such a right must not be exercised in way that violates other rights. This dissertation aims to explore how the right to culture, that Ulwaluko is sourced from, potentially violates the rights of Xhosa queer people to equality, human dignity and freedom and security of a person. It aims to investigate whether and how the decolonisation of culture and masculinities, and the values of Ubuntu and other constitutional values can be harnessed to allow Ulwaluko to reproduce multiple and inclusive masculinities and thereby resolve the conflict that exist between these rights.

1.3. Research questions

1.3.1. What is masculinity and how does it apply in the South African context?
1.3.2. How does the reproduction of a dominant masculinity in traditional circumcision violate the rights of queer people and fail to create an inclusive masculinity?
1.3.3. Can more inclusive masculinities and associated rights be developed and protected in law and by the courts?
1.3.4. What mechanisms exist in law and theory to balance competing constitutional rights?
1.3.5. How can courts help balance competing constitutional rights?
1.3.6. How can the decolonisation of masculinities and Ubuntu values be used to achieve multiple and inclusive masculinities?

1.4. Relevance of study

This research is crucial as it sheds light on the difficulties faced by Xhosa queer people within the custom of Ulwaluko, a minority group in need of safeguarding, and examines how such protection can be effectively implemented. This research also offers some valuable insights on how cultural and equality rights in particular, as well as rights in general, can be balanced in order to ensure that there is harmony. By problematising the decolonisation of culture and the role of constitutional rights and values, it contributes to wider debate about the Constitution and rights in South Africa.

1.5. Methodology

This research primarily consists of desktop analysis and qualitative methods, with no field studies involved, meaning no questionnaires or interviews were carried out. Although I reference outcomes from an interview with young Xhosa queer men who have experienced Ulwaluko, those conversations were conducted and recorded by Ntozini and Ngqangweni.[28] My goal is to address my research questions in the following manner:

- By exploring the theoretical framework of masculinities and the types of masculinities that can be reproduced in order to lay a foundation for the investigation into the masculinities that are reproduced by Ulwaluko.

- By discussing the theoretical framework and practice of the custom of Ulwaluko and identifying the types of masculinities that it reproduces in order to investigate their impact on the fundamental rights of Xhosa queer people.

- By analysing the rights violated by Ulwaluko and the theory of balancing competing rights, from an international, comparative and national perspective, in order to lay a

[28] See: Anathi Ntozini & Hlonelwa Ngqangweni 'Gay Xhosa men's experiences of ulwaluko (traditional male initiation)' (2016) 18 *Culture, Health & Sexuality* 1309.

foundation for the discussion on how the right to Ulwaluko can be balanced with other fundamental rights.

- By exploring the theoretical framework of decolonisation, analysing court cases that address the need for culture to be radically transformed, and exploring, in a normative manner, how the decolonisation of culture can lead to culture that is African-centred, dynamic and living.

- By analysing the theories of decolonising masculinities and, again in a normative manner, exploring how the values of Ubuntu and other fundamental values can be harnessed to make Ulwaluko to reproduce multiple and inclusive masculinities.

1.6. Chapter outline

This first chapter is the introductory chapter. It sets out the research problem and the research methodology. It provides the background and context of the study and the relevance of the study. It includes an outline of the theoretical legal framework for the protection of the right to culture international and domestically. This chapter sets the tone for the entire dissertation, the argument presented, and the methods used to present this argument.

The second chapter sets out the theoretical framework of the dissertation with the discussion of the theories of masculinity, the types of masculinities and how this plays out in the South African context. This is done to build a foundation for the discussion on the masculinities that are reproduced by Ulwaluko.

The third chapter sets out the theory of traditional circumcision, paying particular focus to the traditional circumcision of Xhosa people ‘Ulwaluko’. It discusses the content and

significance of the custom of Ulwaluko and the hegemonic masculinity that it reproduces in order to prepare for the discussion on the rights that are violated by Ulwaluko.

Then the fourth chapter sets out the individual constitutional rights that are infringed by Ulwaluko. This chapter dissects the rights to equality, human dignity and freedom and security of the person, and explores how the right to culture that Ulwaluko is sourced from violates these rights. This is to set the foundation for the discussion on how the conflict between these rights can be resolved.

The fifth chapter discusses the theoretical framework of the decolonisation of culture. It discusses the concept of decolonisation and contrasts it with transformation. It identifies the concepts of living and official customary law and examines how living customary law is decolonial in nature. It then discusses some of the court cases that have applied living and official customary law. This is to prepare for the discussion on the decolonisation of masculinities and the adoption of the values of Ubuntu and other constitutional values for Ulwaluko to reproduce multiple and inclusive masculinities.

The sixth chapter then discusses the reproduction of multiple and inclusive masculinities. It explores how decolonising masculinities, and adopting the values of Ubuntu and other constitutional values can aid in Ulwaluko reproducing multiple and inclusive masculinities. It discusses some of the court cases that have adopted Ubuntu in their judgments and how the results have been one that compliments the values of the Constitution. This will set the basis for the discussion on the practical implications of Ulwaluko, in other words, how a court would decide a matter of Ulwaluko being in conflict with other fundamental rights, and which legislation is applicable.

Then the seventh chapter deals with the practical implications of the argument presented in this dissertation. Basically, this chapter explores the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA), and how a court would rule a case similar to the one in this dissertation where traditional circumcision seems to be in conflict with other rights. It looks at how Ubuntu can be adopted as a remedy under PEPUDA and

how these rights can be harmonised. In essence, this chapter examines the findings of the research and some recommendations.

Finally, the eighth Chapter deals a summary of the argument that the entire dissertation discusses, in other words, this chapter is the concluding chapter which summarises the findings of the research and some of the recommendations.

CHAPTER TWO

THEORIES OF MASCULINITY AND THEIR APPLICATION IN THE SOUTH AFRICAN CONTEXT

The concept of masculinity is contested. Over the years, and particularly since its introduction into legal discourse, various interpretations and meanings have emerged.[29] In this chapter, I examine the development of masculinities theories, followed by an analysis of its diverse meanings and interpretations. I investigate how an inclination towards a singular and rigid definition of masculinity has facilitated the perpetuation of hegemonic masculinity, along with the implications of this hegemonic masculinity within legal scholarship. Finally, I address the application of masculinity from a South African perspective. Masculinities play a crucial role in this dissertation and the argument articulated within it. The framing of Ulwaluko, examined in the subsequent chapter, is viewed from a heterosexual perspective due to its existing form and content, which perpetuates a dominant (hegemonic) masculinity. This perspective characterises a Xhosa man as exclusively heterosexual, possessive, and assertive. Consequently, the exploration of masculinities in this chapter sets the stage for a deeper analysis of the masculinities that Ulwaluko reproduces in chapter three, and how they might be reconstructed in law and custom in later chapters.

2.1. The meaning of masculinity

The US National Democratic Institute (NDI) characterises masculinity as constituting 'roles, behaviours and attributes that are considered appropriate for boys and men in a given society'.[30] As such, masculinity is shaped by social constructs and is influenced

[29] See Raewyn W Connell & James Messerschmidt 'Hegemonic Masculinity: Rethinking the Concept' (2005) 19 *Gender and Society* 829.

[30] National Democratic Institute 'The meaning of masculinities' available at *https://www.ndi.org/sites/default/files/ACFrOgAZ9X_S2Bl-K9iPv3XhiQ140Fw6QWeUNSQwJwuNXzShO1b_Wv9-Vbsw1KX0rkmdxRZ-nlwzPhL-WIQLh1agPgzn5s70jFg-wYO0cIafAvyfqfNvFQQX_UYSZKGjzuPLlyl2J_UFqRjaCxNs.pdf,* accessed on 15

more by historical and political contexts than by biological factors.[31] The NDI further notes that:

> we can think of masculinity as a shorthand for talking about the social expectations and practices of manhood; expectations and practices which are reinforced everyday by individuals as well as by institutions, such as the law, the economy, religion, education and the media. Women as well as men are involved in reinforcing these social expectations of masculinity (e.g. when a mother tells her son to act like a man and not to cry).[32]

Kimmel and Bridges emphasise that masculinity includes the behaviours, social roles, and relationships of men within a particular society, as well as the interpretations linked to these elements.[33] Mankowski and Smith similarly define masculinity as:

> a form of gender, variously defined as an identity, a social role, and a form of power and is typically, though not exclusively, associated with men. In the socialisation of masculinity, boys and men are encouraged to reject or avoid anything stereotypically feminine, to be tough and aggressive, suppress emotions (other than anger), distance themselves emotionally and physically from other men, and strive toward competition, success and power.[34]

In all these definitions, the notion of masculinity underscores socially constructed gender differences, in contrast to the term male, which pertains to biological sex.[35] Morrel adds that 'masculinity is a collective gender identity and not a natural attribute. It is socially constructed and fluid. There is not one universal masculinity, but many masculinities'.[36] Furthermore, Connel argues that '"masculinity", to the extent the term can be briefly defined at all, is simultaneously a place in gender relations, the practices through which men and women engage that place in gender, and the effects of these practices in bodily

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February 2024. This NDI Programme engages male political leaders as transformative agents of change for gender equality.

[31] Ibid.

[32] Ibid.

[33] Kimmel & Bridges op cit note 13.

[34] Eric S Mankowski & R Mark Smith 'Masculinity, Male Development, Gender, and Identity: Modern and Postmodern Meanings' (2004) 59 *Journal of Men's Studies* 1 at 1.

[35] Ibid.

[36] Morrel op cit note 16 at 608.

experience, personality and culture'.[37] For Connel, any discussion regarding the essence of masculinity must necessarily include an analysis of gender relations.[38]

While many scholars characterise masculinity as a social construct encompassing the idea of manhood, what qualities and behaviours a man should resemble and what roles in the society a man should occupy; others identify masculinity in relational terms, that is, 'those behaviours, languages and practices, existing in specific cultural and organisational locations, which are commonly associated with men, thus culturally defined as not feminine'.[39] According to this perspective, masculinities should not be synonymous with men; instead, they should relate to the position of men within a structure of gender hierarchy.[40] Connel asserts that masculinity can be characterised as the patterns of behaviour through which individuals (primarily men, but also women) navigate that position.[41]

2.2. The emergence of theories of masculinity

Masculinity studies existed long before they were formally introduced in legal studies, psychology, and health research.[42] The aim initially was to 'reclaim manhood' from the distorted and negative perceptions of masculinity in industrial society, feminism and consumer culture.[43] Yaeger contends that:

> Masculinity studies is grounded in the idea of finding a space beyond patriarchy. Examining the history of the critical study of masculinity reveals this emancipatory nature, the connection between masculinity studies and freedom. When considered through either an experiential or theoretical lens, masculinity both restrains and shepherds male behaviour, thereby limiting an individual's freedom. Like feminist studies, masculinity studies strive to break free from the confines of patriarchy. In addition, and in contrast to the emphasis on freedom,

[37] Raewyn W Connell *Masculinities (1995) 71.*
[38] Ibid.
[39] Stephen M Whitehead & Frank Barret *The Masculinities Reader* (2004).
[40] Ibid.
[41] Ibid.
[42] Dylan A Yaeger 'Directions for the Study of Masculinity: Beyond toxicity, experience and alienation ' (2020) *British Journal of American Legal Studies* 1 at 4.
[43] Ibid.

> masculinity studies have focused on identity and practice, by exposing what masculinities are and how they function. In this way, masculinity studies are an inquiry into the "nature" of masculinity, but it also, in some ways, is a response to the men's movement and the "crisis" in masculinity which purportedly created it.[44]

Aresti suggests that this work referred to ancient societies in which a range of qualities were either deemed indicative of sufficient masculinity or lacking in that regard.[45] However, these ideas are not static. Just as communities comprise of diverse individuals with varying cultures, social standings, and behaviours, so multiple forms of masculinity are consequently generated.[46] Like all social constructs, masculinity possesses a historical context[47] which demonstrates evolution over different historical periods.[48]

What is evident in legal scholarship and activism is that certain explanations for human behaviour, particularly the behaviour of men, remain problematic due to the failure of lawmakers (judges, legislatures, and scholars) to understanding that law also constructs masculinities.[49] A good example is with regards to consent in the case of sexual intercourse. Yaeger contends that:

> Given the law's inability and/or unwillingness to speak to questions concerning rites of passage into manhood, the issues permeating the case are narrowed to ones of consent. This emphasis on consent suggests that consent is a more objective concept that warrants engagement as opposed to less serious cultural components. This prioritisation of consent ignores the ways in which consent is manufactured by pre-existing power relations: "power precedes consent and orchestrates the terms in which we encounter moral or practical dilemmas of consent. Thus, the law fails in its bid for neutrality, and continues to privilege and perpetuate a particular way of doing masculinity, which both undermines its claim to be above the fray and reveals a narrow grasp of the mechanics of its power".[50]

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[44] Yaeger op cit note 42 at 5.
[45] Nerea Aresti 'On masculinities, bodies and history' (2021) 54 *Revista de temes contemporanis available at https://revistaidees.cat/en/on-masculinities-bodies-and-history/, accessed on 30 November 2024.*
[46] Ibid.
[47] Ibid.
[48] Ibid.
[49] Dylan A Yaeger 'Masculinity & Law' (2019) *19 Fordham University, School of Law SJD dissertations* 1 at 7-8.
[50] Ibid.

Although the reconstructions of masculinity through legal frameworks will be addressed later in this chapter, it is essential to acknowledge at this point that the law plays a significant role in the perpetuation of specific masculinities.[51] Consequently, as Yaeger contends, a lack of understanding by lawmakers regarding this relationship leads to legal precedents that reinforce a hegemonic masculinity.[52]

Aresti argues that certain aspects of masculinity have remained consistent over time,[53] especially ideas of power and dominance.[54] In earlier eras, as today, to be considered a man, one had to exhibit traits that demonstrated strength and authority.[55]

Aresti further notes that the study of masculinity was predominantly understood within a binary framework that recognised only two sexes: male and female.[56] This perspective attracted significant criticism from feminist scholars, as women were often viewed as subservient to men, fulfilling roles as supporters and caretakers, while men were positioned as leaders, providers, and the primary authority figures within the family structure.[57] As Kiptot illustrates, such perspectives were deeply rooted in patriarchal ideologies.[58] Patriarchy is defined as 'a system of society or government in which men hold the power and women are largely excluded from it'.[59] For example, traditional African households established distinct gender roles, with men taking on responsibilities as hunters and labourers, while women were confined to domestic duties, managing the household and performing chores.[60] Aresti observes that within this binary framework, the concept of maleness was seen as the pinnacle of masculinity, whereas femininity was regarded as a flawed and inferior version.[61] This framework also encompassed a set of values that were widely regarded as inherently 'positive and typically associated with

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[51] Ibid.
[52] Ibid.
[53] Ibid.
[54] Ibid.
[55] Ibid.
[56] Ibid.
[57] See: Evelyne Kiptot 'Gender roles, responsibilities, and spaces: Implications for agroforestry research and development in Africa' (2015) 17 *International Foresty Review* 11.
[58] Ibid.
[59]Oxford languages 'what is patriarchy' available at *https://www.oxfordreference.com/display/10.1093/oi/authority.20110803100310604#:~:text=Literally%2C%20a%20community%20of%20related,patriarchal%20adj.%20%5B,* accessed on 28 November 2024.
[60] Ibid.
[61] Connell & Messerschmidt op cit note 29.

masculinity, including courage, strength, piety, loyalty, restraint, and the ability to keep secrets'.[62]

Initially, as Connell and Messerschmidt argue, the notion of masculinity was characterised as an 'internalised sex role identity,' shaped by cultural influences and role models.[63] This characterisation was influenced by the feminist theory, and the evolution of feminism led to changes in the understanding of masculinity.[64] Early masculinity studies examined the advantages and disadvantages of being male, the prevalence of male dominance in society, and the various challenges men encounter.[65] In the 1980s, the emphasis shifted towards viewing masculinity as a social construct, investigating its definitions within social environments such as educational institutions and workplaces.[66] By the 1990s, the exploration of masculinity and male identity had expanded significantly, establishing itself as a distinct academic discipline.[67] Since then, with the emergence of queer theory and multicultural studies, the focus of masculinity research has transitioned from a narrow view of male power over women and other genders to a more comprehensive understanding of masculinity.[68]

Finally, Connell and Messerschmidt note that the examination of masculinity primarily focuses on understanding how 'masculine power' is constructed and defined.[69] This idea is informed by and challenges feminist and queer theories in its quest for equality within a context where gender is mistakenly perceived as no longer solely a social construct.[70] It seeks to shift the narrative from one that positions men as the sole perpetrators of inequality, to one that highlights the difficulties men encounter as victims of a prevailing masculinity that impacts all genders.[71] Consequently, the study of masculinity argues for

[62] Ibid.
[63] Ibid.
[64] Ibid.
[65] Ibid.
[66] Ibid at 831.
[67] Ibid.
[68] Ibid.
[69] Ibid at 839.
[70] Ibid.
[71] Ibid.

a transition from opposing men to challenging the systems and structures that sustain gender inequality, thereby rendering all genders as victims.[72]

This connects closely to the concept of law reconstructing hegemonic masculinity, as previously emphasised through the issue of consent. The law's inability to recognise that masculinity shapes cultural norms and reinforces patriarchy—where men are viewed as the primary thinkers, leaders, and heads of the household, while women are confined to roles as helpers, homemakers, and expected to remain in the kitchen while men pursue work—underscores this failure.[73] This is why Yaeger suggests that 'law functions as if masculinity exists outside of culture, and therefore of patriarchy (e.g., in the realm of sexuality, the law forms and perpetuates the idea that men have uncontrollable urges and natural desires that transcend culture)'[74] This leads to a discussion on the perpetuation of a singular and dominant form of masculinity (hegemonic masculinity) that emerges amidst the diverse and contested expressions of masculinity.

2.3. The emergence of hegemonic masculinity.

The concept of hegemonic masculinity was developed about twenty years ago. Connell and Messerschmidt argue that its creation was significantly influenced by contemporary perspectives on gender, masculinity and social hierarchies.[75] The original concept of hegemony was derived from Gramsci, who used it to illustrate how class relations can be maintained.[76] Gramsci's articulation of class relations gained prominence in masculinity studies when scholars like Morrel used to it try and understand the dominant ideas of masculinity that exists in society. Gramsci asserts that the notion of hegemony is 'essentially a position of dominance attained through relative consensus rather than regular force, even if underpinned by force'.[77]

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[72] Ibid.
[73] Yaeger op cit note 49 at 7-8.
[74] Ibid.
[75] Connell & Messerschmidt op cit note 29 at 831.
[76] Ibid.
[77] See: Antonio Gramsci *Selections from a Prison Notebook* (1971).

Morrel asserts that 'the concept of hegemonic masculinity provides a way of explaining that though a number of masculinities coexist, a particular version of masculinity holds sway, bestowing power and privilege on men who espouse it and claim it as their own…'.[78] Morrel and Jewkes, in a separate article, characterise hegemonic masculinity as 'a set of values, established by men in power that functions to include and exclude, and to organise society in gender unequal ways. It combines several features: a hierarchy of masculinities, differential access among men to power (over women and other men), and the interplay between men's identity, men's ideals, interactions, power, and patriarchy'.[79]

Connell expands on the notion of hegemonic masculinity, arguing that the disparities among men can be attributed to varying access to power, which is influenced by factors such as race, class, and sexual orientation.[80] He identifies hegemonic masculinity as one of four distinct types of masculinities: hegemonic, complicit, submissive, and oppositional (or protest).[81] His framework aims to elucidate the dynamics between men and women, as well as among men themselves.[82] It is crucial to recognise that these masculinities do not possess equal status; certain forms are more dominant, while others are subjugated by less dominant masculinities.[83] Oliffe et al elaborate on this point:

> Complicit masculinity sustains hegemony by enacting traditional Western social practices that position men as family providers, stoic and autonomous; subordinate forms of masculinity embody practices associated with femininities, including domesticity, weakness and lack of authority; and marginalised masculinities are linked to de-privileged race, class and ethnic markers, a repository for all that has been expelled because it does not resemble Western, White, middle-class, masculine ideals (Connell, 1995). Protest masculinities are a type of marginalised masculinity, constructed with reference to complicit masculinity, but lacking in resources and social status.[84]

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[78] Morrel op cit note 16 at 608.
[79] Rachel Jewkes & Robert Morrel 'Sexuality and the Limits of Agency among South African Teenage Women: Theorising Femininities and Their Connections to HIV Risk Practices. Social Science & Medicine' (2012) 74 *socscimed* at 40.
[80] See: Connell op cit note 37.
[81] Ibid.
[82] Ibid.
[83] Ibid.
[84] John Oliffe et al 'Chapter 6 - "He's More Typically Female Because He's Not Afraid to Cry": Connecting Heterosexual Gender Relations and Men's Depression' (2017) *Science Direct* 776 at 776.

Hegemonic masculinity thus denotes the dominant standard of masculinity acknowledged within a particular culture at a given time.[85] Functioning as an ideological construct, it acts as a safeguard that validates and perpetuates patriarchy, simultaneously influencing how individuals understand and interact with their surroundings.[86] It also refers to a specific identity that holds a position of dominance.[87] This identity is perceived as the ideal for men, with those who strive to embody it regarded as 'real men', while those who do not conform are often viewed as inferior.[88] Essentially, hegemonic masculinity imposes a framework of values and standards that men are expected to follow in order to be recognised as real men, which the law must, in turn, uphold in order to be regarded as legitimate law. This is discussed in the next sub-section that explores the relationship between law and masculinity.[89]

Furthermore, hegemonic masculinity distinguishes itself from other gender identities by asserting its dominance,[90] and embodying the most accepted and privileged form of masculinity.[91] It not only reinforces the global narrative of women's subordination to men but also pressures other men to align with this standard.[92] Oliffe et al's observations concerning the power dynamics inherent in the notion of hegemonic masculinity merit further elaboration:

> Though socially constructed and variable across history, time and place, the embodiment of hegemonic masculinity is always synonymous with power, resource and authority; therefore, many men who strive to reproduce dominant masculine ideals (i.e., being tough, stoic, neglecting self-care) are without the social power to attain hegemonic masculinity.[93]

In addition, the notion of hegemonic masculinity inadvertently pressures both men and women who do not conform to these accepted values to adopt a subordinate role.[94]

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[85] Connell & Messerschmidt op cit note 29 at 832.
[86] Ibid.
[87] Chris Mcvittie, Julie Hepworth and Karen Goodall 'Chapter 4 - Masculinities and Health: Whose Identities, Whose Constructions?' (2017) *Science Direct* 1 at 5.
[88] Ibid.
[89] Ibid.
[90] Ibid.
[91] Ibid.
[92] Ibid.
[93] Oliffe et al op cit note 84.
[94] Ibid.

Essentially, individuals perceived as failing to embody hegemonic masculinity are marginalised and pushed into the lowest tiers of social standing.[95] Consequently, they become susceptible to abuse, violence, and the denial of certain rights and privileges, similar to the experiences of Xhosa queer people examined in this dissertation.[96]

Hegemonic masculinity, as articulated by Donaldson, is characterised as 'exclusive, anxiety-inducing, internally and hierarchically differentiated, brutal, and violent'.[97] Central to this concept are misogyny, homophobia, racism, and enforced heterosexuality. [98] It is important to note that hegemonic masculinity is not a uniform construct; rather, it evolves in response to the prevailing values and norms of society.[99] Furthermore, the status of hegemonic masculinity is not established through coercion; instead, it emerges from a collective agreement within society and it is further reproduced by legislatures and courts who make and develop the law respectively as seen with *Coko* case.[100] This construct fosters a specific identity that many men find admirable, conferring certain privileges and power, which they may pursue despite its negative implications, as it offers them a distinct status and role within the social hierarchy.[101] Thus, hegemonic masculinity serves as a model of what is perceived as a 'real man,' simultaneously denigrating those who do not conform to its standards and relegating them to the category of 'lesser men,' while women are inherently viewed as subordinate to men. [102]

2.4. The relationship between law and Masculinity

Masculinity does not exist outside the law, in fact, the law reproduces masculinity and thus hegemonic masculinity.[103] Yaeger contends that '[t]he interdependent structures of power, truth, and knowledge underlie the connections between law and masculinity.'[104]

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[95] Ibid.
[96] Ibid.
[97] Mike Donaldson 'Hegemonic Masculinity?' (1993) *University of Wollongong Research Online* 1 at 4.
[98] Morrel op cit note 16 at 608.
[99] Ibid.
[100] Ibid.
[101] Mcvittie et al op cit note 87 at 5.
[102] Ibid.
[103] Yaeger op cit note 49 at 23.
[104] Ibid.

Yaeger contends that men, being the creators of law, design legal frameworks that reinforce and safeguard their dominant masculinity.[105] He argues that the law is not just an outsider within the context of masculinity but also plays a role in shaping that masculinity.[106] Yaeger argues that:

> The ways in which the law uses its juridical power to police the boundaries of sex are numerous. The law is a prime participant in explicitly demarcating the boundaries of sex, in determining what makes a man or a woman or what prohibits an individual from being a man or a woman. Indeed, the legal and medical professions—often the medical profession with the law's blessing—play the largest roles in determining a "true" sex, when the question is at issue. The law also involves itself in policing the boundaries of sex identification by explaining what is reasonable behavior for the average man. For example, in the context of criminal law, the "in the heat of passion" defense to homicide, whereby a charge can be reduced if a defendant shows his was a "reasonable" response to "adequate provocation," is based on a conception of masculinity that views violence as a natural response to provocation.[107]

The aforementioned quote indicates that the law not only influences but also perpetuates various expressions of masculinity, including hegemonic masculinity. In turn, these masculinities significantly impact court decisions, as many cases pertain to acceptable behaviours or reactions.

The failure of legal scholarship to fully recognise the role of masculinities in shaping the behaviour of men, including that which results in crimes such as gender-based violence and rape,[108] has resulted in judgments that do not align with the principles of the Constitution. A notable illustration can be found in the widely criticised case of *Coko v S.*[109] Coko was charged with murder and sentenced to seven years in prison. His application to appeal both the conviction and the sentence was denied by the Regional

[105] Ibid.
[106] Ibid.
[107] Ibid at 29-30.
[108] See: Monument Thulani Bongani Makhanya 'Causes and Consequences of Toxic Masculinity: Can HeForShe Be a Solution for Gender-Based Violence?' (2023) *Gender Inequality - Issues, Challenges and New Perspectives*.
[109] *Coko v S* [2021] ZAECGHC 91.

Court of Grahamstown,[110] but allowed by the Grahamstown High Court later granted him leave to appeal.[111]

After considering all the evidence, the Hight Court determined that Coko should be acquitted, citing a lack of evidence indicating violence or threats.[112] A significant aspect of the case was the question of why the accused believed that on that particular day the complainant was willing to engage in sexual activity, despite her consistent indications of being unprepared for such an act in previous times.[113] The accused justified his actions by stating, 'since there was no resistance during the oral sex, I proceeded'.[114] Additionally, WhatsApp messages provided evidence that the complainant did not wish to engage in sexual relations, which the accused should have recognised. However, the court concluded that:

> In these circumstances, I should ask whether the state has succeeded in proving the guilt of the Appellant beyond reasonable doubt. I am not satisfied that they did. I do not think the evidence proved beyond reasonable doubt that that the Appellant acted intentionally knowing that there was no consent.[115]

This case serves as a compelling example of the relationship between law and masculinity, highlighting how the judge did not grasp that prevailing notions of masculinity, which often position men as dominant over women, mean that consent cannot be presumed, as suggested by the appellant. Evidence indicates that the complainant clearly expressed her unwillingness to engage in sexual activity; however, on that particular day, the accused disregarded her stance to fulfil his own desires as a man. In a society that promotes hegemonic masculinity, which views sex as a privilege accessible to men, the accused completely overlooked the complainant's feelings and rights. Consequently, this judgment has been rightly criticised by scholars and activists.

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[110] Ibid.
[111] Ibid.
[112] Ibid para 94.
[113] Ibid para 57 – 58.
[114] Ibid.
[115] Ibid para 101.

Fortunately, the Supreme Court of Appeal in *Director of Public Prosecutions, Eastern Cape, Makhanda v Coko*[116] reinstated the conviction. The SCA took into account the concept of masculinities, even though not expressly mentioned in the case. The SCA held that:

> Further, in his insightful article, Hall pertinently remarks that rape is: 'an act of violence and oppression against women. It is a sexual attack which expresses male dominance and contempt for women . . . The origins of rape are anchored in the structured imbalance of power between men and women as social groups, that is, in their political relationship.[117]

Hegemonic masculinity characterises men as powerful, assertive, and possessive. Therefore, it is essential for courts to first comprehend how masculinity influences interactions and decision-making processes in legal contexts. The *Coko* case exemplifies how judges and lawmakers' failure to grasp the implications of masculinity within the legal framework leads to the reinforcement of traditional, dominant, oppressive, and exclusionary forms of masculinity.

Moreover, McGinley contends that the law necessitates interpretation by judges and lawyers regarding acceptable conduct, which raises the critical question of what constitutes appropriate behaviour and whose standards are being applied.[118] Understanding masculinity within the legal framework is crucial, as it allows judges and lawyers to consider the various forms of masculinity that exist, and aim to promote the reproduction of multiple and inclusive masculinities that are consistent with the principles of the Constitution. This approach aims to ensure that legal outcomes are fair and equitable. McGinley further emphasises the connection between law and masculinity when he states that:

> So how does law fit in? Law requires interpretation that depends largely on the interpreter's (judge, jury, lawyer, etc.) experience to analyse behaviour. This interpretation often occurs through a screen of cognitive biases and stereotypes that are likely not conscious to the decision maker, many of which involve how a man should act or how a man has acted. Much

[116] *Director of Public Prosecutions, Eastern Cape, Makhanda v Coko* [2024] ZASCA 59 para 99
[117] Ibid 92 para 96.
[118] Ann C McGinley 'Introduction: Men, Masculinities, and Law: A symposium on multidimensional masculinities theory' (2013) 13 *Nevada Law Journal* 315 at 317.

> of these judgments will depend on the race, sexual identity, class, and other identities of the man. In criminal law, family law, employment law, and immigration law, legal decision makers determine whether an individual's behavior was appropriate, often viewed through identity prisms[119]

Essentially, the connection between law and masculinity is rooted in the presence of various masculinities within legal frameworks, which are shaped and reinforced by lawmakers and judges through their interpretations and rulings. However, predominantly male judges and lawmakers often fail to recognise or comprehend this dynamic, leading to the continued reinforcement of a singular, dominant form of masculinity, known as hegemonic masculinity. If this relationship is acknowledged and examined, judgments such as the first *Coko* judgment can be avoided.

2.5. The idea of contested masculinity.

The concept of a singular, dominant masculinity has faced criticism from numerous scholars. For example, Martin argues that the application of this concept has been inconsistent[120] and ambiguous, sometimes referencing a fixed archetype of masculinity while at others identifying the form of masculinity that prevails within a specific society.[121] Wetherell and Edley further argue that the concept of hegemonic masculinity fails to clearly define what conforming to it entails or how it manifests in practice.[122]

There is also disagreement on the idea that hegemonic masculinity, itself, operates to reinforce power dynamics or toxic behaviours.[123] Addressing this, Connell and Messerschmidt contend that:

> The concept constructs masculine power from the direct experience of women rather than from the structural basis of women's subordination. Holter believes that we must distinguish between "patriarchy," the long-term structure of the subordination of women, and "gender," a

[119] Ibid.
[120] Patricia Yancey Martin 'Why Can 't a Man Be More Like a Woman Reflections on Connell's Masculinities' (1998) 12 *Sage journals* 472 at 473.
[121] Ibid.
[122] Margaret Wetherell and Nigel Edley 'Negotiating Hegemonic Masculinity: Imaginary Positions and Psycho-Discursive Practices' (1999) 9 *sage journals* 335 at 336.
[123] Ibid.

> specific system of exchange that arose in the context of modern capitalism. It is a mistake to treat a hierarchy of masculinities constructed within gender relations as logically continuous with the patriarchal subordination of women. Holter (1997, 2003) certainly is correct that it is a mistake to deduce relations among masculinities from the direct exercise of personal power by men over women. At the least, we also must factor in the institutionalisation of gender inequalities, the role of cultural constructions, and the interplay of gender dynamics with race, class, and region.[124]

Connell and Messerschmidt further argue that the idea of singular dominant form of masculinity often marginalises less dominant forms.[125] Indeed, hegemonic masculinity tends to be rooted in a detrimental and rigid understanding of masculinity and gender studies. Rather, we should conceive of masculinity as encompassing a range of meanings and interpretations. Many contemporary scholars thus advocate for the recognition of inclusive and multiple forms of masculinity. Pinheiro articulates this effectively by stating that:

> Critical feminist and men and masculinities studies have both highlighted that neglecting to consider where male-identified people fit into the conversation on gender and security ultimately sustains unequal power relations, legitimises militarism, and undermines gender equality. A more critical and expansive view of gender reveals that masculine identities are expressed in plural and fluid ways; that dominant and stereotypical performances of masculinity not only cause problems for women and girls but also undermine the well-being and safety of men and boys who express and live their identities in myriad ways.[126]

In this sense, masculinity is not an inherent trait, but a construct of various gender identities that are shaped by societal influences and are subject to change over time.[127] Accordingly, there are numerous characterisations of masculinity.[128] Oliffe et al argue that these expressions are dynamic, significantly affected by the social, political, cultural, and economic contexts that govern the interactions between men and women, and among

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[124] Connell & Messerschmidt op cit note 29 at 839.
[125] Ibid.
[126] Gabriela Pinheiro '(En)gendering Peace: A Queer Feminist Analysis of South Africa's (2020-2025) National Action Plan on Women, Peace, and Security' (2020-2025) *Revista de Estudios Sociales* 99 at 104.
[127] Oliffe et al op cit note 84.
[128] Ibid.

men themselves.[129] Furthermore, the manifestation of masculinity is also influenced by factors such as class and race.[130] Thus, in any given society, the dominant forms of masculinity will reflect the values and norms associated with the prevailing race and class structures.[131] Therefore, it is essential to recognise that masculinity is not uniform; instead, it encompasses a variety of forms. It is this notion that masculinity is fluid and subject to change, that is perceived as a way to foster diverse and inclusive forms of masculinity.[132]

2.5.1 The emergence of inclusive masculinities

Bridges and Pascoe have pointed to the new concepts and theories that have recently emerged to better characterise masculinity in 'gender egalitarian and LGBTQI+ friendly countries', prompted by critiques of the existing frameworks.[133] Among the most prominent theories in both empirical and theoretical research are hybrid masculinities and inclusive masculinities.[134]

They define hybrid masculinity as the selective adoption by men of performances and identity traits linked to marginalised and subordinated masculinities and femininities.[135] This is distinguished from hegemonic masculinity by emphasising the 'experiences of subordinate and marginalised men' rather than those of white heterosexual men.[136] It explores the interplay between men's social identities and their environments, as well as how these dynamics shape the expression of masculinity within evolving cultural contexts.

The inclusive masculinity theory (IMT) was formulated by Anderson in response to the growing participation of gay men in peer groups of young men, alongside a rise in inclusive behaviours exhibited by heterosexual men within these groups.[137] Anderson

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[129] Ibid.
[130] Ibid.
[131] Ibid.
[132] Ibid.
[133] Tristan Bridges & Cheri Jo Pascoe 'Hybrid Masculinities: New Directions in the Sociology of Men and Masculinities' (2014) 8 *Sociology Compass* 246 at 246.
[134] Ibid.
[135] Ibid.
[136] Ibid.
[137] Bridges & Pascoe op cit note 133 at 248.

sought to establish a framework that elucidates the evolving dynamics between young men and their expressions of masculinity, as well as the influence of homophobia on the formation and regulation of masculinities in contexts where homophobia is diminishing.[138] Central to this theory is Anderson's concept of homohysteria, which refers to the anxiety surrounding the social perception of being gay.[139] The theory asserts that men's behaviours are significantly restricted, masculinity is organised in a hierarchical manner, and a singular hegemonic masculinity is disproportionately valued in societies characterised by homohysteria.[140]

For Owen and Riley:

> Inclusive masculinity theory (IMT) offers an important framework for conceptualising masculinity in post-industrial consumer cultures. The main tenant of IMT is that there are new forms of masculinity – inclusive masculinities – that, contextualised within consumer culture and a cultural acceptance of egalitarian values, are not shored up by homophobia and associated fear of femininity.[141]

This theory is not without critique. Owen and Riley argue that it is 'fundamentally challenged by theorising masculinities as relatively stable sets of attitudes and behaviours in the context of complex and dynamic contemporary gender practices and identifications'.[142] Consequently, this dissertation seeks to develop the theory of inclusive masculinities through the decolonisation of culture and masculinities, as well as by incorporating the values of Ubuntu. This approach aims to ensure that the masculinities expressed within Ulwaluko are inclusive and represent multiple, fluid forms of masculinity that adapt to the needs, lived experiences, and realities of contemporary indigenous Xhosa communities. This will be elaborated upon in chapters 5 and 6.

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[138] Ibid.
[139] Ibid.
[140] Ibid.
[141] Craig Owen & Sarah Riley 'A poststructuralist-informed inclusive masculinity theory (PS-IMT): Developing IMT to account for complexities in masculinities, using learning to dance Latin and ballroom as an example' (2019) *Journal of Gender Studies* 533 at 524.
[142] Ibid.

2.6. The reproduction of masculinities through culture

Culture is a powerful site for the reproduction of masculinities and their normative ordering in any given society. Of course, this has changed and evolved over time. A discussion of the reproduction of masculinities through cultural influences must first differentiate between the period prior to colonisation and the era that followed. In this context, it is essential to recognise the diverse scholarly perspectives concerning the nature and structure of gender relations prior to colonisation. While some contend that gender roles and social hierarchies did not exist in Africa before colonial influences, others challenge this by asserting that, although colonialism significantly affected and, to some extent, altered the cultural, social, and political dynamics of indigenous communities, there is substantial evidence indicating the presence of gender roles and social hierarchies prior to colonisation.[143] Therefore, it is crucial to understand that, while some elements of culture and tradition were indeed compromised and altered during the colonial period, the claim that patriarchy and gender inequality were solely introduced by colonialism is not entirely accurate.

Msuya asserts that during the pre-colonial period, there was no cultural discrimination based on gender. She posits that:

> History reveals that before colonialism in Africa, there was no cultural discrimination against women by men. Power was based on seniority, not gender. Both men and women played economic and political roles in society, each having their own unique roles within the family and society. Like men, women engaged in fishing, farming, herding and commercial activities such as making clothes, pottery and handcrafted work, and enjoyed the profits of their work. Women were not stereotyped in Africa; rather men's and women's responsibilities complemented each other. In some societies, women possessed power, binding society together, and were depended upon for the survival of the family and marriage.[144]

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[143] Christine Saidi 'Women in Precolonial Africa' (2020) *Oxford Research Encyclopedia of African History,* available at *https://oxfordre.com/africanhistory/display/10.1093/acrefore/9780190277734.001.0001/acrefore-9780190277734-e-259?d=%2F10.1093%2Facrefore%2F9780190277734.001.0001%2Facrefore-9780190277734-e-259&p=emailAYIem8VFw3CDQ* , accessed on 15 January 2025.

[144] Norah Hashim Msuya 'Advocating positive traditional culture to eradicate harmful aspects of traditional culture for gender equality in Africa' (2020) 41 *Obiter* 45 at 50.

In contrast, literature on gender inequality in pre-colonial Africa reveals that there was some level of gender inequality and social hierarchy before colonialism.[145] For example, Cheater suggests that '[if] we look first at the relations of production in pre-colonial Zimbabwe, it seems that women were excluded from access to land in their own right, although they could and did invest in livestock'.[146] Similarly, Irakoze reveals how in African countries, like the German Colony of the kingdom of Urundi-Ruanda (now Rwanda-Burundi), society was characterised by a strong patriarchal structure and allowed for polyamorous relationships among men who possessed the social capital to support multiple partners.[147] Irakoze asserts that:

> Women were properties to be exchanged between men. The father would marry his daughter at a good price to a man who could afford her. Other factors came into play as the social class of the family and the girl's reputation. It was very important that the girl remains a virgin, briefly never know another man besides her husband. Virginity was very crucial in a young woman's life. Child marriages were also the norm.[148]

Saidi notes that prior to colonialism in Africa, the dynamics between men and women were culturally distinct and subject to change, yet certain common characteristics were evident.[149] Many African societies sought to achieve forms of heterarchy, which involved the establishment of multiple centers of authority and a commitment to fostering communities where gender relations between women and men were balanced.[150] However, it is essential to recognise the impact of colonialism on the cultural lives of indigenous populations.[151] As Said further argues, understanding contemporary African communities without considering the influence of colonialism poses significant

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[145] See: Boris Bertolt 'Thinking otherwise: theorizing the colonial/ modern gender system in Africa' (2021) *22 African Sociological Review* 2.
[146] Cheater op cit note 27 at 66.
[147] Judicaelle Irakoze 'Pre-colonial Africans were also patriarchs' 29 March 2020, available at *https://www.judicaelleirakoze.org/pre-colonial-africans-were-also-patriarchs/,* accessed on 16 January 2025.
[148] Ibid.
[149] Saidi op cit note 143.
[150] Cheater op cit note 27 at 66
[151] Ibid.

challenges, as ‘new African subjectivities and identities have been shaped by Western’ hegemony.[152]

Accordingly, it is essential to also recognise that insights from African cultures, free from the colonial distortions of their gender dynamics, could aid in the reproduction of multiple and inclusive forms of masculinity. Scott highlights that ‘African familial systems had their own gender order, a gender order that was not necessarily egalitarian, but was African’.[153] Msuya states that evidence suggests that in certain regions of Africa during the pre-colonial era, women were held in high regard due to their perceived closeness to the creator, attributed to their ability to give birth.[154] They were recognised for their significant role in nurturing future generations.[155] Women were permitted to assume leadership roles within their communities, and there was no gender-based discrimination regarding who could speak or lead.[156] In fact, women were often regarded as leaders because of their responsibilities as caregivers.[157]

Notable examples include Queen Modjadji of the Balobedu in the pre-colonial era, who ruled the Balobedu chieftaincy, and the Igbo women of Nigeria, who played vital roles in both cultural and political spheres.[158] Additionally, Aunts or queen mothers held considerable influence in determining the succession of kings and queens.[159] A prominent illustration is found among the Vhavenda people, where Vho-Makhadzi is the primary decision-maker regarding the ascension of kings or queens and is tasked with connecting the monarch to the ancestors.[160] Furthermore, in these parts of Africa, Msuya argues that masculinities shaped by culture during the pre-colonial period were devoid of patriarchy, as substantial evidence indicates that some African societies prior to colonisation did not adhere to rigid gender roles, allowing for the inclusion of all individuals regardless of

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[152] Ibid.
[153] Lwando Scott ‘African masculinities’ available at *https://humanities.uct.ac.za/sites/default/files/media/documents/humanities_uct_ac_za/1758/lwando-scott-african-macsulinities.pdf*, accessed on 20 January 2025.
[154] Msuya op cit note 144 at 51
[155] Ibid.
[156] Ibid.
[157] Ibid.
[158] Ibid at 52.
[159] Ibid.
[160] Pfarelo Eva Matshidze *The role of Makhadzi in traditional leadership among the venda* (Unpublished PhD Thesis, University of Zululand, 2013) 43.

gender.[161] These masculinities did not position men as aggressors and women as victims; rather, they recognised that roles are socially constructed and that individuals with the ability and desire should be free to pursue their interests without societal expectations tied to their gender.[162]

2.7. Critical analysis

This dissertation advocates for multiple and inclusive masculinities. Unfortunately, the advent of colonisation brought significant transformations, altering our understanding of gender and masculinity to align with exploitative and advantageous notions imposed by colonial powers.[163] Culture reproduces various forms of masculinity, which should be examined through a perspective that recognises the fluid and changing characteristics of society. Nevertheless, the refusal to embrace this multifaceted understanding of masculinity has resulted in a rigidity that favours a singular, hegemonic model within these cultural structures. This has contributed to pervasive discrimination and violence directed towards women, children, and members of the queer community.[164] The prevailing masculinities shaped by these cultural norms define a man primarily through his physical attributes, his control over women and others, and his status within the societal hierarchy.[165]

Consequently, this dominant masculinity positions men as the primary providers, heads of households, and leaders within their communities or societies.[166] The construction of masculinity is further reinforced by the colonial imposition of patriarchal and misogynistic systems.[167] This perspective perpetuates the notion that men are the sole rational and normative beings, while anything and everyone that deviates from this standard is

[161] Msuya op cit note 144 at 52. Patriarchy is defined in its initial meaning ; please see fn 59.
[162] Ibid.
[163] Ibid.
[164] UN Fact Sheet No. 23 'Harmful Traditional Practices Affecting the Health of Women and Children' (1995) https://www.ohchr.org/Documents/Publications/FactSheet23en.pdf (accessed 20 November 2024).
[165] Wetherell & Edley op cit note 122.
[166] Thomas Hakansson 'The Detachability of Women: Gender and Kinship in Processes of Socio Economic Change Among the Gusii of Kenya' (1994) 21 *American Ethnologist* 516 at 516–538.
[167] Msuya op cit note 144 at 53.

deemed inferior and subordinate.[168] In summarising the creation of masculinities through culture, Division 51, an organisation of scholars, educators and clinicians dedicated at assisting men, boys and the people close to them, writes that:

> Culture plays a role in how we conceptualise gender as well as what is considered "masculine" and "feminine." Cultural values are commonly communicated at an early age, and children learn cultural concepts of gender and gender roles through witnessing social practices (e.g., dressing children in "gender-appropriate" clothing, gifting them gendered toys, etc.)[169]

Culture, as a social construct, shapes the definitions of masculinity and femininity, establishing customs and norms that dictate the expected behaviours of men and women. In certain cultures, the preference for men as heirs in succession plans or inheritance has led to the normalisation of the belief that leadership roles are reserved for men, while women are relegated to supportive positions. However, as previously mentioned, valuable insights from various regions in Africa illustrate that culture, away from colonial distortions, can also foster inclusivity and diverse expressions of masculinity by challenging traditional gender roles in leadership and domestic settings. This is further discussed in chapter 5 where the decolonisation of culture is proposed as a way that could lead to culture reproducing inclusive and multiple masculinities that will account for the needs and lived realities of the ever-changing society.

2.8. Masculinities in the South African context

A valuable approach to examining masculinity within any country involves considering how historical factors have influenced the ways in which contemporary societies express masculinity. In the context of South Africa, the legacies of colonialism and apartheid are particularly significant.[170] Ratele argues that to grasp the masculinities that emerge in

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[168] Ibid.

[169] Division 1 'Men & Masculinities 101: How Culture Shapes Masculinity' October 29, available at *https://www.division51.net/blog/masculinities-101-how-culture-shapes-masculinity, accessed on 22 February 2025.*

[170] See: Kopano Ratele *Conceptualising African Masculinity Studies. In:* Chitando, E., Mlambo, O.B., Mfecane, S., Ratele, K. *African Masculinities in a Globalising World* (eds) (2024) 33-48.

South Africa, it is essential to account for the struggles faced by both men and women against dehumanisation.[171] These struggles, he asserts, are fundamentally struggles for existence:[172]

> 'as such, given that at one point some men and women were outside of society, considered property or not quite human, we must endeavour to comprehend the question of being unhumaned, of the subhuman, of being nonmen (and nonwomen), in order to understand African masculinities more fully'.[173]

The history of South Africa is characterised by the normalisation of violence as the State normalised violence against indigenous communities and, at some point, the indigenous populations had to use violence to protect themselves or protest the oppressive State.[174] Consequently, during this era, men were categorised either as 'anti-colonial/apartheid' fighters or as labourers who had assimilated and accepted that opposing the oppressive regime was not their path. This led to a societal perception where those who engaged in combat were regarded as embodying dominant masculinity and were celebrated as 'real men,' while those who refrained from fighting were viewed as inferior and associated with subordinate masculinities. This legacy of violence has perpetuated a notion of masculinity in South Africa that equates manhood with being a fighter, one who believes that violence is a viable solution to problems, while those who do not conform to the idea of violence yet participate in anti-colonial or anti-apartheid demonstrations through alternative methods are disparaged, often being labelled as women or accused of hiding behind the skirts of women, thereby implying cowardice.

Scott contends that 'South African history set up a perfect storm for gendered violence which entails a protracted history of colonialism and apartheid, colluding with a simultaneous de-masculinisation and hardening of African men through state violence, and their fight against that violence'.[175] Morrel et al suggest that the masculinities formed during the colonial era persist in contemporary South Africa, characterised by multiple

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[171] Ibid.
[172] Ibid.
[173] Ibid.
[174] See: Jasmina Brankovic et al *Violence, inequality and Transformation. Apartheid survivors on South Africa's ongoing transition* (2020).
[175] Scott op cit note 153 at 2.

forms of masculinity rooted in patriarchy, misogyny, and gender inequality.[176] However, while various forms of masculinity are present in contemporary South Africa, one prominent type is hegemonic/dominant masculinity.[177] They specifically examine the manifestations of hegemonic masculinities that emerged in the post-apartheid era.[178]

The introduction of the concept of masculinity aimed to investigate and enhance the understanding of gender relations in post-apartheid South Africa, particularly the hierarchies that exist among men.[179] This exploration is crucial, given South Africa's historical backdrop of colonisation and apartheid, which starkly revealed economic and political disparities along racial and class lines.[180] Morrel et al have utilised the concept of hegemonic masculinity to elucidate the complexities surrounding male power, including its forms and characteristics.[181] They contend that to fully grasp the dynamics of male power in South Africa, it is essential to consider not one form of hegemonic masculinity, but three distinct types of masculinity. They examine these in detail by highlighting that:

> ‘‘white’’ masculinity (represented in the political and economic dominance of the white ruling class); an ‘‘African,’’ rurally based masculinity that resided in and was perpetuated through indigenous institutions (such as chiefship, communal land tenure, and customary law) and finally a ‘‘black’’ masculinity that had emerged in the context of urbanisation and the development of geographically separate and culturally distinct African townships.[182]

I have previously emphasised that the concept of hegemonic masculinity is intricately connected to the social, political, economic, and cultural fabric of the society in question. Therefore, to gain a comprehensive understanding of the dynamics surrounding male power and hierarchy in South Africa, it is essential to recognise its historical context and

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[176] Robert Morrel, Rachel Jewkes & Graham Lindegger 'Hegemonic masculinity/masculinities in South Africa: Culture, power, and gender politics. *Men and Masculinities (2012) 15 American Psychological Association* 11 at 12.
[177] Ibid.
[178] Ibid.
[179] Ibid.
[180] Ibid.
[181] Ibid.
[182] Ibid at 12.

investigate the effects of that history.[183] This is fundamentally what Morrel et al seek to achieve in their analysis of three types of masculinities.

The prevailing notion was that masculinity was equated with detrimental male behaviours and attitudes, including the abuse of women and children, violence against other men, promiscuity, and substance abuse.[184] Morrel et al's interpretation of masculinity was founded on the understanding that men, too, are victims of the societal 'gendered order' due to factors such as sexual orientation, poverty, and race.[185] This perspective acknowledges the existence of subordinate masculinities alongside hegemonic masculinity, which may include women, queer people, and other men who do not conform to the ideals of hegemonic masculinity. Morrel advocated for the involvement of men in gender discussions, positing that: ‘Interventions with boys and men could facilitate changes in their attitudes and behaviours, allowing them to renegotiate their social roles and identities’.[186] This marked a shift from the notion of viewing all men as adversaries in the fight against gender inequality to recognise that men could be allies in the pursuit of gender equality. Furthermore, it was suggested that by challenging the values that underpin male violence, hegemonic masculinity itself could be confronted and transformed.

Morrel et al offer a profound conclusion regarding the application of masculinities within the South African context:

> It also shows a disjunction between a masculinity which dominates at a national level, the repository of greatest power, and masculinities that enjoy popular support in communities at the grass roots. This demands a recognition of multiple levels (or contexts) on which masculinities can be hegemonic, in terms of expressing cultural ideals, as well as disjunction between these and the exercise of particular types of power.[187]

[183] Ibid.
[183] Ibid.
[183] Ibid.
[184] Ibid at 18.

Morrel et al remind us that the concept of masculinity, which embodies the values and standards defining what it means to be a man, is not fixed and lacks a singular interpretation. Its significance varies according to the social, political, economic, and cultural contexts of specific societies.[188] This understanding of masculinity is dynamic and evolves over time to reflect the prevailing conditions.[189] This variability accounts for the existence of multiple forms of masculinity. Among these forms is the contentious idea of hegemonic masculinity. This prevailing form of masculinity is problematic as it promotes a singular dominant standard that dictates what constitutes manhood. It is evident that masculinities are shaped through various mediums, particularly culture. In the South African context, this dominant masculinity is rooted in the historical, cultural, political, and social realities of the country, characterised by racial and class disparities, as well as violence.[190]

In the next chapter, I examine the practice of Ulwaluko as a protected right, analysing its meaning and implications, the masculinities it reproduces, and the ways in which it marginalises Xhosa queer people in order to lay a foundation for the discussion on how the custom of Ulwaluko and the masculinity it reproduces violates the rights of Xhosa queer people to equality, human dignity and freedom and security of a person.

[188] Ibid.
[189] Ibid.
[190] Mpateni & Kang'ethe op cit note 20 at 208.

CHAPTER THREE.

THE CUSTOM OF ULWALUKO AND THE MASCULINITIES IT CREATES

Traditional circumcision is a cultural practice deeply embedded in the traditions of all Nguni communities, regarded as a sacred and significant aspect of their heritage.[191] The Nguni people represent one of the four principal ethnic groups among the black population of South Africa, alongside the Sotho, Shangaan-Tsonga, and Venda groups.[192] Within the Nguni classification, there are four distinct ethnic subgroups: the Southern Nguni, comprising the Xhosa-speaking individuals; the Northern and Central Nguni, represented by the Zulu-speaking population; the Swazi people originating from Eswatini and surrounding regions; and the Ndebele-speaking communities found in Mpumalanga and Limpopo.[193] Despite ongoing discussions and uncertainties regarding the participation of Zulu individuals in traditional circumcision—particularly following its purported prohibition by King Shaka—the practice has garnered substantial support and dedication from the majority of Nguni people over the years.[194] While the execution of this custom varies according to the unique characteristics of different Nguni cultures, the fundamental principles of traditional circumcision, as part of initiation rites, remain largely consistent across the Nguni population.[195]

In this chapter, I explore the custom of Ulwaluko, which is a customary form of circumcision that facilitates the transition of young boys to men, representing a significant 'rite of passage' within the cultural practices of the Nguni communities. Subsequently, I analyse the various forms of masculinities that are perpetuated by this practice and, ultimately, scrutinise how this leads to the exclusion and unfair discrimination of Xhosa queer people thereby violating their right to equality, human dignity and freedom and

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[191] Feri Gwata 'Traditional male circumcision: What is its socio-cultural significance among young Xhosa men?' (2009) *CSSR Working Paper* 1 at 2.
[192] See: Stan Schoeman 'Settlement in South Africa: Early migrants and the Nguni' (1987) *Africa Insight* 192.
[193] Ibid.
[194] Promise N. Sangweni, Thandisizwe R. Mavundla & Pule S. Moabi 'Factors hindering effective uptake of medical male circumcision at Untunjambili area in KwaZulu-Natal, South Africa' (2019) *Health SA Gesondheid* 1 at 1.
[195] Ibid.

security of a person. Finally, I examine the implications of Ulwaluko endorsing inclusive masculinities

3.1. The traditional custom of Ulwaluko

The custom of Ulwaluko involves the surgical removal of the foreskin, the imparting of cultural values and standards regarding acceptable masculinity, and celebrations marking the return of the initiates.[196] This practice is particularly common among the Xhosa and Ndebele communities in South Africa.[197] It is anticipated that upon their reintegration into everyday life, the initiates will have undergone a transformation into true 'men' or 'women' through the teachings associated with traditional circumcision.

According to Manona and Hurst, the endurance of pain associated with the circumcision process is a significant aspect of Ulwaluko.[198] Consequently, upon their return, initiates are rewarded with money or gifts from their families and community members as a recognition of their bravery in enduring the pain without the aid of modern medication.[199] This ritual also involves the practice of abstaining from consuming water or other liquids, as it is thought to inhibit urination and facilitate the healing process of the wound.[200] While these aspects contribute to a creation of a masculinity that emphasises strength and the absence of pain, it is essential to critically examine these practices, as they are linked to a high incidence of fatalities among initiates.[201] Investigations indicate that dehydration is a leading cause of death during the Ulwaluko initiation.[202] As will be discussed in chapters 5 and 6, decolonising Ulwaluko to foster inclusive and multiple forms of masculinity may also help mitigate the risks associated with these initiation practices.

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[196] Mpateni & Kang'ethe op cit note 20 at 208.
[197] Ibid.
[198] Lungelo Manona & Andrea Hurst '"what is it to be a man?" Rites, hashtags and Outrages' (2018) 32 *Image & Text* 1 at 5.
[199] Ibid.
[200] Mpateni & Kang'ethe op cit note 20 at 209.
[201] Lauren Isaacs 'EC COGTA says dehydration the leading cause of death this initiation season' *EWN* 20 December 2024, available at *https://www.ewn.co.za/2024/12/20/ec-cogta-says-dehydration-the-leading-cause-of-death-this-initiation-season,* accessed on 21 January 2025).
[202] Ibid.

As argued by Van Vuuren and De Jongh, in most African communities, traditional circumcision is aligned with the onset of puberty.[203] This period marks the transition of an individual's body from childhood to adolescence, necessitating the shaping of that individual into adulthood.[204] While the practice predominantly targets young males, it is important to recognise that certain Nguni groups also observe this tradition for females.[205] For instance, Van Vuuren and De Jongh contend that:

> Initiation is gender specific, and boys and girls initiation are distinct and separate notions. Collective initiation for girls is prominent among the Venda (the vhusha and domba), Pedi or Northern Sotho (the bojale) and Tsonga (ku tomba) communities. Girls are individually initiated amongst the Zulu, Ndebele, Swazi and Xhosa (the intonjane). Clitoridectomy has not been part of female initiation, except probably in the Tsonga community in Mozambique where it is apparently still practised.[206]

The traditional practice of female circumcision receives limited attention in this dissertation, as the primary focus is on the masculinities shaped by the traditional circumcision of males. Nonetheless, it is essential to acknowledge its existence. Essentially, the traditional circumcision of girls parallels that of boys in that both are intended to facilitate the transition from childhood to adulthood; the former guides girls in their evolution into women, while the latter assists boys in their maturation into men.[207] Moreover, to effectively convey the argument presented in this dissertation, it is crucial to concentrate the discussion of traditional circumcision on the Xhosa Nguni people, who exhibit the highest prevalence of the practice.

In *isiXhosa*, the traditional circumcision of males is referred to as Ulwaluko.[208] While I use the term 'young boys' throughout this dissertation, it is somewhat misleading, as within Xhosa culture, an individual is considered a 'boy' until he has undergone Ulwaluko.[209] Thus, even a 40-year-old man would still be regarded as a boy until he partakes in this

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[203] Chris J. van Vuuren & Michael de Jongh 'Rituals of manhood in South Africa: circumcision at the cutting edge of critical intervention' (1999) 22 *S.Afr.Tydskr.Ethnol* 142 at 143.
[204] Ibid.
[205] Ibid.
[206] Ibid.
[207] Ibid.
[208] Manona & Hurst op cit note 198 at 143.
[209] Ibid.

custom.[210] Manona and Hurst assert that extensive research has been conducted on the practice of Ulwaluko, and recent studies, particularly those authored by Xhosa speakers, indicate that the process has remained relatively unchanged over time.[211] The Ulwaluko process can be delineated into four distinct stages: the 'pre-ritual preparation, the circumcision operation itself, the period of seclusion in the lodge, and [finally], the reintegration into society'.[212]

According to Ntozini and Ngqangweni, the pre-ritual preparation phase represents the initial step in which all necessary arrangements for the initiate are made.[213] This includes the selection of the initiation school designated to host the initiate, referred to as *umninisisusu*; the construction of a temporary shelter for the initiate, known as *itonto*; the designation of the individual responsible for performing the circumcision, termed the ichibi; and finally, the appointment of the *ikhankata*, who will oversee and guide the initiate throughout the entire process.[214] The subsequent phase entails the circumcision procedure conducted by the *ichibi*, which may take place at a river or using a bucket of water, after which the initiate returns to their shelter.[215] Following the circumcision, the *ichibi* instructs the initiate to declare the phrase 'I am a man-*Ndiyindoda*,' at which point the initiate is recognised as a man.[216]

Ntombana asserts that at the third phase, initiates are required to withdraw from public life and refrain from specific activities.[217] Traditionally, this period of isolation lasted between three to six months.[218] However, in urban settings, this has been shortened to approximately three to four weeks.[219] During their isolation, initiates are prohibited from consuming certain foods or even handling their food for the initial eight days.[220] They are

[210] Ibid.
[211] Ibid.
[212] Ibid.
[213] Ntozini & Ngqangweni op cit note 28 at 1310.
[214] Manona & Hurst op cit note 198 at 143.
[215] Ibid.
[216] Ibid.
[217] Luvuyo Ntombana 'Xhosa male initiation and teaching of moral values : an exploration of the role of traditional guardians in teaching the initiates : IKS in other contexts' (2009) 8 *Indilinga-African Journal of Indigenous Knowledge Systems* 73 at 75.
[218] Manona & Hurst op cit note 198 at 143.
[219] Ibid.
[220] Ibid.

also not permitted to leave the isolation area, gaze upon women who are not veiled, smoke, engage in arguments, or allow boys who have not undergone Ulwaluko to view their unhealed wounds.[221]

The final phase entails the return of the initiates to their homes, marked by a series of celebrations.[222] This occasion sees women and family members of the initiates preparing meals, gifts, and various celebratory acts to honour the individual who has transitioned into manhood.[223] The initiates will don distinct attire to set themselves apart from others, serving as a means to gain respect.[224] Furthermore, Ulwaluko is regarded as a significant milestone in the lives of young Xhosa men and the Xhosa male community as a whole. Participation in this rite of passage garners a distinct level of respect, advantages, and esteem within society. This significance will be further elucidated when I explore the masculinities that are shaped by Ulwaluko.

To accurately convey the significance of Ulwaluko, Mpateni and Kang'ethe emphasise aspects that I also seek to underscore in this dissertation concerning both the content and structure of Ulwaluko when they assert that:

> Among the AmaXhosa, male circumcision is done to instil maturity, and it shapes good behaviours and morals, and marks transition from boyhood to manhood. This practice, and socio-cultural perspective is not only found among the Xhosa, but many other African societies. Traditional male circumcision as a cultural practice contributes social cultural capital as those who undego the rite are respected and play a significant role in maintaining order and stability in societies. The rite builds social relations and contributes to psychological, cultural and social development of human beings.[225]

This quote indicates that the practice of Ulwaluko contributes to the formation of masculinities by aiming to instil values and criteria for what constitutes an acceptable man. In essence, Ulwaluko seeks to reinforce prevailing standards and norms.

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[221] Ibid.
[222] Manona & Hurst op cit note 198 at 144.
[223] Ibid.
[224] Ibid.
[225] Mpateni & Kang'ethe op cit note 20 at 208.

3.2. The creation of masculinities within Ulwaluko.

The notion of 'rite of passage' is extensively documented and encompasses a range of cultural practices regarded as sacred.[226] Gwata contends that historically, this process served as a means for young individuals to learn the responsibilities associated with manhood within society.[227] It was believed that boys were imparted with knowledge regarding the standards and values defining an acceptable man.[228] It has been established that Ulwaluko is intrinsically connected to the transformation of boys into men.[229] This holds significant importance for the Xhosa community, as attaining manhood entails greater responsibilities, including the right to inherit land, marry, and engage in both formal and informal community and family events.[230] Essentially, Ulwaluko fosters a specific understanding of masculinity, and those who embrace this ideology gain the associated privileges.[231] This concept aligns with the notion of hegemonic masculinity, which is critically examined in this dissertation.

Gwata contends that the reproduction of masculinities among the Xhosa community, influenced by Ulwaluko, is not isolated from the broader discourse surrounding the formation and perpetuation of masculinities.[232] The distinction only lies in that the masculinities created by Ulwaluko among the Xhosa people differ from those produced by circumcision practices amongst other cultural groups. For example, a particular group in Uganda will differ from the amaXhosa as the two communities and regions possess unique social, political, cultural, and economic contexts.[233] The masculinities that emerge will reflect the values and norms that are most dominant within each society.[234] Furthermore, it is important to recognise that multiple forms of masculinity can coexist within a single society.[235] For example, despite the shared political, cultural, and economic

[226] See: Rachel T Lebese et al 'Rite of passage: An African indigenous knowledge perspective' (2022) *Aosis publishing, available at https://www.ncbi.nlm.nih.gov/books/NBK601357/pdf/Bookshelf_NBK601357.pdf*, accessed on 30 April 2024.
[227] Gwata op cit note 191 at 10.
[228] Ibid.
[229] Ibid.
[230] Ibid.
[231] Ibid.
[232] Ibid at 11.
[233] Ibid.
[234] Ibid.
[235] Ibid.

environment of the Xhosa and Zulu peoples, their expressions of masculinity are not identical.[236]

Moreover, as a core element of Ulwaluko, and in an effort to maintain its 'sacred' character, women are excluded from the Ulwaluko process.[237] Gwata explores how this process is exclusively conducted by men, primarily involving elder males, while women are confined to domestic roles.[238] Their involvement is limited to the fourth stage, where they are responsible for preparing food and organising celebrations for the initiates.[239] Women are prohibited from accessing information or knowledge about the significant events that occur during Ulwaluko.[240] As Dambuza asserts:

> In the olden days, in some communities, when the time came, before going out to discuss the a 'boy's impending initiation with close male family members, the father would first discuss the matter privately with the boy's mother. Preparations for ukungena komkhwetha (the ceremony marking the start of initiation) would be a joint project between the parents of the prospective initiate assisted by family, friends and other members of the community. The women would cut the grass for the building of ibhoma, in some community women were responsible for the building of ibhoma (also known as ithonto or isuthu) as they were said to possess the skill necessary to tie the idobo grass tightly such that ibhoma would be warm during the cold winter months.[241]

Likewise, males who have not undergone circumcision are barred from understanding the proceedings of Ulwaluko.[242] This highlights how Ulwaluko establishes distinctions not only between men and women but also among men themselves, particularly between those who have participated in Ulwaluko and those who have not, often referred to as 'boys'.[243]

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[236] Ibid.
[237] Ibid.
[238] Ibid.
[239] Ibid.
[240] Ibid.
[241] Nambitha Dambuza 'Womens' Parental Rights in Ulwaluko – A Parodox?' 24 April 2018, Public lecture at Rhodes University, available at *file:///C:/Users/WitsUser/Downloads/Womens_%20Parental%20Rights%20in%20Ulwaluko%20-%20A%20Paradox_.pdf,* accessed on 27 February 2025.
[242] Ibid.
[243] Ibid.

Mavundla et al contend that individuals who have undergone Ulwaluko are regarded as true men and afforded a certain degree of respect and honour within their communities.[244] In contrast, those who have not yet engaged in this rite face ridicule, mockery, and are often relegated to a status perceived as inferior.[245] Uncircumcised males are derogatorily labelled as '*ikwenkwe*-boy,' while those who have been circumcised are referred to as '*indoda*-men'.[246] This distinction has, in some regions of the Eastern Cape, led to instances of violence.[247] Mavundla et al discuss how 'these individuals are not afforded respect and are continuously subjected to ridicule through associations with immaturity and inferiority, by being referred to as boys or dogs'.[248]

Furthermore, uncircumcised individuals are prohibited from sitting or sharing meals with other 'men' (those who are circumcised) during traditional ceremonies.[249] Regardless of age, circumcised individuals are expected to show deference to their uncircumcised counterparts.[250] As a result, some young men feel pressured to undergo Ulwaluko due to the stigma associated with being an uncircumcised Xhosa male. This discussion highlights that Xhosa queer individuals who choose to participate in Ulwaluko may encounter treatment that infringes upon their rights to equality, human dignity, and freedom and security of a person. Chapter 4 will further explore how these issues manifest within the framework of the relevant rights.–Conversely, those who decide against participation also experience discrimination and mockery.[251] In other words, we are confronted with a scenario where homophobia is disguised as cultural practice, as Xhosa queer individuals are impacted regardless of their involvement in the tradition.

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[244] Thandisizwe R Mavundla et al 'How Boys Become Dogs: Stigmatisation and Marginalisation of Uninitiated Xhosa Males in East London, South Africa' (2010) *Qual Health Res OnlineFirst* 931 at 937.
[245] Ibid.
[246] Ibid.
[247] Ibid.
[248] Ibid.
[249] Ibid.
[250] Ibid.
[251] Ibid.

3.3. Ulwaluko and Xhosa queer people

Over the years, Ulwaluko has been predominantly associated with the image of a heterosexual man, a reflection of the oppressive circumstances faced by queer people in Colonial-apartheid South Africa.[252] During this period, queer people not only experienced a significant reduction in rights but were also unable to openly express their sexuality due to widespread discrimination and violence.[253] The introduction of Christianity and its accompanying values during colonisation deemed homosexuality as sinful, while the subsequent statutory criminalisation of homosexuality during apartheid entrenched homophobia within South African society.[254] Consequently, in contemporary indigenous societies, cultural and traditional practices have the face of the heterosexual man. This is equally applicable to Ulwaluko, where traditional circumcision is closely linked to the identity of a heterosexual man.[255] The archetype of the man envisioned following initiation is one who embodies the ideals and values associated with heterosexual masculinity.[256] Some scholars argue that the culture and traditions of South Africa's indigenous people have historically been represented through a heterosexual lens, even during the pre-colonial era.[257] This view that does not imply that other sexualities did not exist. This perspective posits that homosexuality is not an import from colonial influences but rather a behaviour that has always existed, albeit often suppressed due to societal pressures or the dominance of a singular sexual identity that has overshadowed other orientations.[258] Nevertheless, it is crucial to acknowledge that colonialism and apartheid have significantly shaped African societies' perceptions and understandings of sexual orientation. In emphasising that homosexuality is not a concept introduced by colonial forces, Montle asserts that

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[252] Claire Stephanie Westman 'Colonialism and Sexual Orientation and Gender Identity: South Africa' (2013), available at *https://www.ohchr.org/sites/default/files/documents/cfi-subm/2308/subm-colonialism-sexual-orientation-oth-westman.pdf*, accessed on 29 April 2024 at 4.
[253] Ibid.
[254] Ibid.
[255] Ibid.
[256] Ibid.
[257] See: Malesela Edward Montle 'The Myths and Stereotypes Against Homosexuality in the African Context: A Literary Analysis of Nadine Gordimer's the House Gun' (2021) 19 *Gender & Behaviour* 17776.
[258] Ibid at 17777-17778.

The conception about homosexuality being un-African is enkindled by the notion that it is an import from the coloniser's world. The late president of Zimbabwe, Robert Mugabe lent support to the above claim as he referred to homosexuality as un-African and a white disease (Muparamoto, 2020). The then vice-president Zimbabwe, Emmerson Mnangagwa also said, "With regards to areas that we felt we would not accept, it is issues of gays and homosexuality, which is unlawful in our country" (Herald news, 07/11/2016). However, several scholars have risen to invalidate the postulation that homosexuality is un-African and attempt to substantiate that it has pre-existed before the advent of colonialists in the African continent. Tamale (2015: i) affirms:

> African history is replete with examples of both erotic and nonerotic same-sex relationships, For example, the ancient cave paintings of the San people near Guruve in Zimbabwe depict two men engaged in some form of ritual sex. During pre-colonial times, the "mudoko dako", or effeminate males among the Langi of northern Uganda were treated as women and could marry men. In Buganda, one of the largest traditional kingdoms in Uganda, it was an open secret that *Kabaka* (king) Mwanga II, who ruled in the latter half of the 19th century, was gay.[259]

Montle demonstrates that the belief that homosexuality was absent prior to colonialism, and that all aspects of African culture were free from critique, is unfounded.[260] He provides evidence indicating that homosexuality existed before colonisation.[261] This acknowledgment is crucial, as further discussions in chapters 5 and 6 will illustrate that the decolonisation of culture and masculinities does not imply a return to pre-colonial times. Instead, it necessitates a thorough dismantling of Eurocentric views regarding African individuals, their cultures, and their ways of life. Additionally, it requires a critical examination and challenge of certain African perspectives to ensure they resonate with the communities these theories aim to represent and align with the principles outlined in the Constitution.

[259] Ibid.
[260] Ibid.
[261] Ibid.

3.3.1. The portrayal of Ulwaluko in the '*Ixeba:The Wound' film*

In 2017, a film titled *Ixeba: The Wound* made its debut through a trailer that generated significant buzz on social media.[262] This controversial film focuses on Xhosa gay men participating in Ulwaluko.[263] It portrays aspects of Ulwaluko that are traditionally considered sacred, including a sexual encounter between two gay men during the ceremony.[264] The film's directors, along with one of its leading actors, Nakhane Toure, a prominent gay activist, stated that the film's purpose was to raise awareness about the diversity of sexual orientations and to highlight that not all men identify as heterosexual.[265] Furthermore, it aimed to provoke discussions about the potential reform of the Ulwaluko practice to be more inclusive of different sexual identities.[266]

Toure contends that some responses to this film highlighted the deeply rooted homophobic attitudes within Xhosa culture, especially concerning Ulwaluko.[267] This is particularly poignant given that queer people within the Xhosa community often experience abuse and discrimination due to their sexual orientation; thus, the depiction of a sexual encounter between queer people during Ulwaluko was perceived as an insult to the Xhosa culture.[268] Furthermore, the concept of power and dominance associated with Ulwaluko makes it difficult for Xhosa men to accept that some men can participate in this rite while not conforming to the heterosexual identity that Ulwaluko aims to instill.[269] Ratele articulates this notion effectively, stating that 'perhaps the most disquieting challenge that non-conforming, queer Africans pose for masculine traditionalism is that they represent the fact that "we" can be "us" and "them" at once'.[270]

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[262] Lwando Scott 'Inxeba (The Wound), Queerness and Xhosa Culture' (2021) 33 *Journal of African Cultural Studies* 26 at 26-27.
[263] Ibid at 26
[264] Ibid at 27.
[265] Nakhane Toure Interview (2017), available at *https://www.inxeba.com/#interview-1*, accessed on 28 November 2024 & John Trengove Interview (2017), available at *https://www.inxeba.com/#interview-2,* accessed on 30 November 2024.
[266] Ibid.
[267] Ibid.
[268] Ibid.
[269] Ibid.
[270] Ratele op cit note 170.

The controversy surrounding this film highlighted troubling aspects of the prevailing masculinity fostered by the practice of Ulwaluko within Xhosa culture.[271] The producer Trengove argued that it was not unexpected that, despite the film's aim to challenge the notion of a dominant heterosexual masculinity, it faced significant backlash rooted in homophobia.[272] The focus here is on the type of dominant masculinity perpetuated by Ulwaluko, which portrays men as powerful and aggressive.[273] Upon the release of the film's trailer, a considerable number of men emerged to defend this prevailing masculinity.[274] Scott contends that ironically, the film also illustrates how Ulwaluko perpetuates a violent form of masculinity, and in their efforts to prevent the film's screening, many Xhosa men pledged to disrupt theatres and boycott the production.[275] This escalated to the point where the lead actor received death threats.[276] All of these events underscore the problematic nature of the reproduction and acknowledgment of a singular dominant masculinity, which is based on ideals of power, assertiveness, and violence.

Furthermore, it is evident from the preceding discussion that Ulwaluko fosters a dominant form of masculinity that participants aspire to attain, thereby reaping the associated benefits and prestige of this custom.[277] Nevertheless, those who exemplify this dominant masculinity are not exempt from its adverse characteristics, which include power, assertiveness, and violence.[278] As will be elaborated later, individuals who embody this dominant masculinity often engage in the oppression of men who represent a different, subordinate form of masculinity. To comprehend the essence of the dominant masculinity perpetuated by Ulwaluko, it is crucial to recognise that when Xhosa men, and potentially men in general, challenged the masculinity depicted in the film, some women also aligned themselves with the notion that Ulwaluko represents a heterosexual male identity and should also remain sacred from women and males who have not undergone Ulwaluko.[279]

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[271] Ibid.
[272] Ibid.
[273] Ibid.
[274] Ibid.
[275] Scott op cit note 262 at 29.
[276] Ibid.
[277] Ibid.
[278] Ibid.
[279] Ibid.

This aligns with Connell's analysis regarding the problematic aspects of hegemonic masculinity, which not only subjugates women but also marginalises other men. Essentially, the backlash against 'Ixeba: The wound' can be attributed to its depiction of Ulwaluko as a symbol of multiple and inclusive masculinities, extending beyond the traditional representation of heterosexual men. It can therefore be anticipated that any critique directed towards Ulwaluko will likely encounter resistance. Nonethless, as Scott highlights, 'Ixeba: The Wound' 'offers us alternative ways of thinking about the queer black body, and how it can be represented. It disrupts the heteronormative representations of black bodies in post-apartheid South Africa and asserts that there are other bodies in this landscape'.[280]

3.3.2. The masculinities created by Ulwaluko

Accordingly, the central thesis of this dissertation emphasises the necessity of investigating the avenues available for cultivating alternative and more inclusive forms of masculinity. It has been previously established that Ulwaluko fosters a prevailing masculinity characterised by a heterosexual male archetype that is powerful, assertive, and prone to violence. To further exemplify the argument that Ulwaluko perpetuates heteronormativity, Ntozini and Nqgangweni state that '[n]ine participants aged between 18 and 26 reported their reasons for becoming traditionally circumcised, which included personal validation of cultural manhood, the desire to conform to societal norms and expectations, and pressure from family members to 'convert' them to heterosexuality'.[281]

Ntozini and Nqgangweni's study of the experiences of Xhosa gay men involved in Ulwaluko indicates that the form of masculinity fostered by Ulwaluko perceives men as heterosexual figures characterised by control, aggression, and self-sufficiency.[282] They highlight the experiences of a Xhosa gay man named Themba, who expressed feelings of not being able to 'fit in' with his fellow initiates.[283] Themba reported that he struggled to engage in the conversations prevalent among the group, experienced differential

[280] Ibid.
[281] Ntozini & Ngqangweni op cit note 28 at 1309.
[282] Ibid at 1313.
[283] Ibid.

treatment from the other initiates, and often encountered ridicule.[284] As a Xhosa gay man who openly accepted his sexuality, Themba embodied a masculinity that challenged the prevailing norms that Ulwaluko seeks to uphold.[285] His identity did not align with the traditional expectations of what it means to be a Xhosa man.[286]

One of the key elements of Ulwaluko explored by Ntozini and Nqgangweni is the initiation language referred to as *Isikhwetha*.[287] This language is framed within a heterosexual context, reinforcing the heteronormative aspects of Ulwaluko.[288] It is essential for initiates to learn and master *Isikhwetha* prior to their graduation.[289] Communication among initiates and those who have already undergone the initiation process is conducted using this specific vocabulary.[290] This serves not only as a means of affirming masculinity but also as a method for establishing social identity and a sense of belonging.[291] Initiates utilise this language to differentiate themselves and to earn respect from individuals who have not participated in Ulwaluko.[292] It provides a means for those who have been initiated to assert their identity and be recognised by those outside the initiation, thereby granting them a degree of power, honour, and respect.[293]

This dynamic perpetuates a dominant form of masculinity within the Xhosa community, portraying the ideal man as a heterosexual semi-God figure deserving of respect, honour, and even fear. Conversely, individuals who fail to conform to these ideals are perceived as exhibiting an undesirable masculine identity.[294] As elaborated in the following sections, the dominant masculinity perpetuated by Ulwaluko serves to oppress both women and men who do not meet its criteria for acceptable masculinity.[295] However, in this

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[284] Ibid.
[285] Ibid.
[286] Ibid.
[287] Ntozini & Ngqangweni op cit note 28 at 1310.
[288] Ibid.
[289] Ibid.
[290] Ibid.
[291] Ibid.
[292] Ibid.
[293] Ibid.
[294] Ibid.
[294] See: Connell & Messerschmidt op cit note 29.
[294] Ibid.

dissertation, my primary focus is on the influence of dominant masculinity on Xhosa queer men, as opposed to Xhosa women.

3.3.3. The creation of hegemonic masculinity by Ulwaluko

Connel's analysis of hegemonic or dominant masculinity merits significant attention. The conception of a man as a heterosexual figure who must possess power, command respect, and instill fear aligns with the prevailing masculine ideals among the Xhosa community engaged in Ulwaluko.[296] As Connel also acknowledges, there are alternative masculinities that may be perceived as less powerful than the dominant form.[297] From the initial discussion, one can discern a subordinate or 'regressive' masculinity represented by Xhosa queer people. This form of masculinity is regarded as weaker, as it fails to conform to the dominant standards and values that define an acceptable man within the context of Ulwaluko.

Gelunas captures the essence of dominant masculinity, stating that:

> Power, aggression, rationality, authority, technical competence, physical prowess, and wealth are some of the main features one can find thematised in this kind of [dominant] masculinity. By opposition, femininity or subordinate masculinities would to some extent feature vulnerability, non-confrontational attitudes, emotionality, submissiveness, social/emotional competence, financial dependence, etc. Thus, hegemonic masculinity is closely related to patriarchal social arrangements and sexist stereotyping—it functions as a form of legitimising patriarchy by demonstrating what kind of ‘masculine’ men deserve to dominate over women and ‘less masculine’ men.[298]

This indicates that the overarching narrative surrounding dominant masculinities tends to remain relatively consistent across various societies, including the one established by Ulwaluko.

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[296] Benediktas Gelunas ‘Depathologising Addiction: Considerations of Hegemonic Masculinity in and Around Problematic Video Gaming’ (2023) 31 *Journal of Men’s Studies* 1 at 3.

3.4. The creation of inclusive masculinities within Ulwaluko

Scholars such as Connell and Messerschmidt have posited that masculinity is best understood as a fluid and dynamic construct, rather than a fixed entity.[299] This perspective opens the door to diverse interpretations and meanings of masculinity, thereby encompassing various forms that do not conform to the ideals of dominant masculinity.[300] When we conceptualise masculinity as fluid, there is no room for a singular dominant masculinity within Ulwaluko.[301] Instead, this leads to a recognition of multiple masculinities that are observed through the lens of diversity and adaptability.[302]

Nonetheless, this is not a straightforward endeavour, nor is there a singular resolution. Traditional leaders, communities, civil society, the judiciary, and lawmakers encounter considerable challenges, and we can only hope that this dissertation offers viable solutions for harmonising Ulwaluko with constitutional principles. Fortunately, section 1 of the Constitution asserts that:

> The Republic of South Africa is one, sovereign, democratic state founded on the following values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms. (b) Non-racialism and non-sexism. (c) Supremacy of the constitution and the rule of law.[303]

Section 1 of the Constitution establishes that South Africa, as a democratic country, is governed by a Constitution that holds supreme authority.[304] It further asserts that the principles outlined are the bedrock of democratic governance in South Africa.[305] Therefore, when a court hears a case, it is obligated to interpret the issues in a manner that aligns with these principles. In the context of Ulwaluko, this means that the practice must function within the framework of the Constitution, and those facilitating Ulwaluko are required to adhere to this obligation. If this adherence is lacking, as I illustrate in this dissertation, the practice forfeits its legitimacy by operating outside the constitutional

[299] See: Connell & Messerschmidt op cit note 29
[300] Ibid.
[301] Ibid.
[302] Ibid.
[303] Section 1 of the Constitution.
[304] Ibid.
[305] Ibid.

principles and rights. Viewing masculinity as fluid and evolving suggests that in contemporary South Africa governed by a supreme Constitution, which has increasingly acknowledged the rights and values of queer people, the interpretation and understanding of masculinity in the context of Ulwaluko should be approached from a different perspective. Consequently, the significance of the discussions in Chapters 5 and 6, which address the necessity of decolonising culture and the concept of masculinity to better align with the needs, lived experiences, and realities of indigenous populations, cannot be overstated. Additionally, the values associated with Ubuntu, a concept that is also subject to debate, can play a crucial role in developing an African-centered perspective on the study of men and gender relations that is in line with the principles of the Constitution.

Furthermore, embracing inclusive masculinities within the custom of Ulwaluko would imply that we attribute varied interpretations to masculinity based on the diverse individuals within that specific community, and this is exactly what the Constitution envisages.[306] In this context, Ulwaluko would be viewed through the lenses of various groups or individuals in society, rather than being solely representative of dominant heterosexual men. The incorporation of inclusive masculinities into Ulwaluko would enable the tradition to evolve in alignment with the needs, realities, and experiences of modern society. Inclusive masculinities suggest that rather than adhering to a singular dominant form of masculinity that marginalises other groups, we embrace variety, which recognises the concept of masculinity as encompassing diverse meanings and interpretations.[307]

The dominant masculinity associated with Ulwaluko is characterised by homophobia, dominance, and violence directed towards both men and women.[308] However, the concept of inclusive masculinities can reframe Ulwaluko as a custom primarily centred on its intended purpose as a rite of passage, moving away from the traditionally rigid interpretations of the custom. Acknowledging that Ulwaluko does not solely produce a singular form of masculinity would allow for a broader range of meanings and

[306] Ibid.
[307] Ibid.
[308] Ibid.

interpretations regarding manhood. This discussion is crucial, as the perception of Ulwaluko as exclusionary or discriminatory towards Xhosa queer people stems from the notion of a singular dominant masculinity. Embracing inclusive masculinities in the context of Ulwaluko would enable us to view it as a tradition that reflects the diverse values and standards of the various men within that society, and not just a particular type of man.

This is a fundamental responsibility that courts must uphold. The judiciary plays a crucial role in shaping the law, and when it begins to embrace and reflect masculinities that align with constitutional principles, practices such as Ulwaluko can also foster masculinities that are consistent with these ideals. How that may be done is explored in chapter 7.

In the subsequent chapter, I will explore the implications of the hegemonic masculinity perpetuated by Ulwaluko on constitutional rights. I will demonstrate how the current practice of Ulwaluko infringes upon the rights to equality, human dignity, and freedom and security of a person. This will lay a foundation for the argument regarding the ways in which Ulwaluko can be balanced with the right of Xhosa queer people to equality, human dignity and freedom and security of a person.

CHAPTER FOUR

THE CONSTITUTIONAL AND LEGISLATIVE FRAMEWORK FOR EVALUATING ULWALUKO.

After the conclusion of apartheid, a time marked by inequality and discrimination, the drafters of the Constitution recognised the necessity of embedding rights and values aimed at eradicating such disparities within the democratic structure. As previously mentioned in Chapter 1, section 1 of the Constitution asserts that it serves as the foundation of South Africa's democracy. It declares that the country shall be built upon fundamental values previously highlighted. To reiterate, the relevant values for this dissertation include human dignity, the pursuit of equality, the promotion of human rights and freedoms, the supremacy of the Constitution, and the rule of law.[309] Although all rights enshrined in the Constitution are regarded with equal importance, South African courts, as demonstrated later in this chapter, appear to prioritise rights that also embody these values. The drafters of the Constitution anticipated potential conflicts among rights, which is why section 36, the limitation clause, and other provisions emphasise that the exercise of one right should not unjustly restrict or infringe upon other rights protected by the Constitution. This chapter aims to investigate how Ulwaluko can be safeguarded by constitutional rights while simultaneously not posing risks to other constitutional rights. This will be achieved by first outlining the rights protected by the Constitution and analysing the potential infringements associated with Ulwaluko. Subsequently, I will examine the theoretical and legal frameworks that could promote the reconciliation of these rights, along with comparisons to practices in other countries.

[309] The Constitution op cit note 308.

4.1. Ulwaluko protected under the right to culture.

4.1.1. Constitutional rights

The South African Constitution does not define the term 'culture' and the way this term is used in the Constitution differs.[310] However, Venter argues that 'the varying application of the term is however not conflictual, but rather suggests the wealth of meaning attached thereto'.[311] Venter further contends that the meaning of culture in dictionaries also shows the different and contested meanings of the term.[312] The Oxford dictionary defines the term as 'Improvement or refinement of mind, manners, etc., by education and training; condition of being thus trained and refined; particular form or type of intellectual development or civilisation'.[313] On the other hand, the Cambridge dictionary defines culture as 'the way of life, especially the general customs and beliefs, of a particular group of people at a particular time' and 'the attitudes, behaviour, opinions, etc. of a particular group of people within society'.[314]

South African courts have emphasised the importance of the right to culture. Their argument has been that South Africa, as a diverse country, needs to acknowledge and respect the cultural practices of all the distinct groups in South Africa. In *MEC for Education: Kwazulu-Natal v Pillay,*[315] Langa CJ held that 'culture generally relates to traditions and beliefs developed by a community'. The chief justice continued to argue that:

> ' . . . cultural convictions or practices may be as strongly held and as important to those who hold them as religious beliefs are to those more inclined to find meaning in a higher power than in a community of people. The notion that "we are not islands unto ourselves" is central to the understanding of the individual in African thought. It is often expressed in the phrase umuntu ngumuntu ngabantu which emphasises "communality and the interdependence of the members of a community" and that every individual is an extension of others. According

[310] Francois Venter 'The protection of cultural, linguistic and religious rights: the framework provided by the Constitution of the Republic of South Africa, 1996' (1998) 13 *SAPRIPL* 438 at 439.
[311] Ibid.
[312] Ibid.
[313] The Oxford illustrated dictionary 2 ed (Oxford 1979).
[314] Cambridge Dictionary, available at *https://dictionary.cambridge.org/dictionary/english/culture*, accessed on 10 March 2025.
[315] *MEC for Education: Kwazulu-Natal v Pillay* [2007] ZACC 21 para 47.

> to Gyekye, “an individual human person cannot develop and achieve the fullness of his/her potential without the concrete act of relating to other individual persons”. This thinking emphasises the importance of community to individual identity and hence to human dignity. Dignity and identity are inseparably linked as one's sense of selfworth is defined by one's identity. Cultural identity is one of the most important parts of a person's identity precisely because it flows from belonging to a community and not from personal choice or achievement. And belonging involves more than simple association; it includes participation and expression of the community's practices and traditions.[316]

Similarly, in *Christian Education South Africa v Minister of Education,*[317] the court highlighted the importance of acknowledging and respecting the diverse nature of our country, and of upholding the right to culture. The court held that:

> There are a number of other provisions designed to protect the rights of members of communities. They underline the constitutional value of acknowledging diversity and pluralism in our society and give a particular texture to the broadly phrased right to freedom of association contained in section 18. Taken together, they affirm the right of people to be who they are without being forced to subordinate themselves to the cultural and religious norms of others, and highlight the importance of individuals and communities being able to enjoy what has been called the “right to be different”. In each case, space has been found for members of communities to depart from a general norm. These provisions collectively and separately acknowledge the rich tapestry constituted by civil society, indicating in particular that language, culture and religion constitute a strong weave in the overall pattern.[318] (footnotes omitted)

These cases reveal the extent to which the courts will go to protect the right to culture. They show the importance of this right, particularly in a diverse country. Importantly, these cases all dealt with instances where the right to culture was challenged. They effectively deal with alleged violations by emphasising the need for society to acknowledge pluralism and accept that, while people might be different, it does not make them unequal. Neither does it make their right to culture unworthy of protection.

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[316] Ibid para 53.
[317] *Christian Education South Africa v Minister of Education* [2000] ZACC 11 para 24.
[318] Ibid para 24.

The right to culture was recognised by the 'Constitutional Principle XI of the Interim Constitution' which 'declared that the diversity of language and culture should be acknowledged and protected in the final Constitution and conditions for its promotion encouraged'.[319] Accordingly, the Constitution now acknowledges and protects the rights that would safeguard the cultural identities and choices of South Africa's diverse population. Sections 30 and 31 establish protections for the customs, beliefs and practices of various cultures and traditions.[320] Ulwaluko, as a cultural practice, is thus protected by the rights to culture established in sections 30 and 31 of the Constitution.[321] Section 30 states that 'everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights'.[322] Section 31 (1) stipulates that:

> Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community—
>
> (a) to enjoy their culture, practise their religion and use their language; and
>
> (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.[323]

Section 31(2) then states that 'the rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights'.[324] These sections clearly articulate that the exercise of cultural rights must occur with an awareness of the obligation to uphold other constitutional rights.[325] Specifically, section 31(1)(a) and (b), along with section 31(2), place internal limitations on the right to culture, delineating that the enjoyment of cultural rights should not conflict with the values and rights enshrined in the Bill of Rights.[326] This was emphasised by the court in *Christian Education* when it held that 'section 31(2) ensures that the concept of rights of members of communities that

[319] Constitutional Principle XI, Schedule 4, The Constitution of the Republic of South Africa, Act 200 of 1993 (the interim Constitution).
[320] Sections 30 & 31 of the Constitution .
[321] Ibid.
[322] Section 30 of the Constitution.
[323] Section 31 (1) of the Constitution.
[324] Section 31 (2) of the Constitution.
[325] Ibid.
[326] Sections 31(1)(a), (b) & 31 (2) of the Constitution.

associate on the basis of language, culture and religion, cannot be used to shield practices which offend the Bill of Rights'.[327]

4.1.2 Legislation

In line with the specific rights enshrined in the Constitution that advocate for and safeguard the right to culture, South Africa has enacted legislation aimed at regulating the practice of traditional circumcision. In 2021, the Customary Initiation Act was introduced to facilitate effective oversight of traditional circumcision practices and to establish mechanisms for enforcement at both provincial and national levels.[328]

This Act requires that initiation schools should be registered and failure to do so will result in the initiation school being bogus and unlawful.[329] It requires that registration must be done in accordance with section 15(1)(g) of the Act. This section states that the Provincial Initiation Coordinating Committee (PICC), established in terms of section 11 of this Act to oversee initiation schools, must develop criteria and requirements with which prospective initiation schools must comply prior to such schools being registered and opened, including health, water, sanitation and safety requirements, and taking into account the standards for initiation school premises insofar as such standards are not inconsistent with this Act, to ensure that the overall objectives and directives of this Act are met.[330]

Moreover, the Customary Initiation Act explicitly states that traditional circumcision shall not be conducted on individuals under the age of 16.[331] For those aged 16 to 18, written consent from the initiate or their parent or guardian may be required, depending on the circumstances surrounding the circumcision.[332] Notably, the most significant provision of this Act is section 2(7), which prohibits any participant in initiation practices from unfairly

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[327] *Christian Education* supra 317 para 26.
[328] Customary Initiation Act of 2021.
[329] Section 26 of the Customary initiation Act.
[330] Section 11 of the Customary Initiation Act states that '(1) In a province where a provincial house has been established and initiation takes place within such province, the Premier of such province must, subject to subsections (4) and (6) and sections 16 (4) and 38, and after consultation with the provincial house, by notice in the Provincial Gazette establish a Provincial Initiation Coordinating Committee'
[331] Section 28 (2) of the Customary Initiation Act.
[332] Section 28 (3) (a) of the Customary Act.

discriminating, either directly or indirectly, against an initiate or prospective initiate based on disability, gender, or sexual orientation.[333] Furthermore, section 29 (3) (c) of the Act mandates that initiation teachings must not be prejudicial, biased, or discriminatory.[334]

There are not many court cases dealing with the Customary Initiation Act and, in particular, where there is alleged discrimination or ill-treatment of queer people. The only case that seems to exist is *Members of the Executive Council v Mathopo,*[335] where the court had to determine whether the initiation school in question was illegal as per the Customary Initiation Act. The court held that;

> Following the hallowed approach adopted in Allpay Consolidated Investments Holdings (Pty) Ltd and Others v Chief Executive Officer of South African Security Agency and Others7, this Court, having considered the practical effect of the relief sought and the exigency of the matter as a whole, arrived at the conclusion that it would be a grave violation of deep rooted custom to order effective closure of the initiation schools. This decision was by no means condonation of illegality and any benefit which we thought should accrue to the initiates themselves.[336]

It is clear that the introduction of the Customary Initiation Act in 2021 came at a much-needed time when the country was plagued by bogus initiation schools, that were unregistered and unregulated, and this fostered a lot of unlawfulness. The main reason for the registration of initiation schools is to allow the provincial oversight team to regulate and be watchdogs of these initiation schools.

However, four years later, nothing much has changed in initiation schools, particularly those in question, in the Eastern Cape, where these schools continue to have the face of a heterosexual man and exclude other sexual orientations. This is against the Customary Initiation Act and the Constitution. Moreover, the remarks by the court in the *Montsha* case are very disappointing as the court should have protected the rights of vulnerable initiates who found themselves at the hands of bogus initiation schools and shut down the

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[333] Section 2 (7) Customary Initiation Act.
[334] Section 29 (3) (c) of the Customary Initiation Act.
[335] *Member of the Executive Council For Co-Operative Governance Human Settlement and Traditional Affairs, Limpopo Province v Mathopo* [2019] ZALMPPHC 47 para 40. (I use Montsha and Mathopo interchangeably as the court is also not consistent in that regard).
[336] Ibid.

school immediately. The court failed to set a strong precedent in this case by closing the initiation school and seeking to transfer the initiates to other registered initiation schools.

Furthermore, sections 2(7) and 29 (3)(c) of the Customary Initiation Act echo the internal limitations in sections 30 and 31, insofar as they place a limitation on the cultural practice, in this instance, with specific reference to equality and non-discrimination. Consequently, this prompts an inquiry into which practices may be deemed discriminatory and how the practice of Ulwaluko can be adapted to mitigate such discrimination. Rights are fundamental to individual well-being, necessitating protection from violations by both individuals and the state, while also being accompanied by corresponding responsibilities. Moreover, all rights may be subject to limitations, provided that such limitations are legally justified. The right to culture, protected by the Constitution and recognised by international entities, must be exercised in a manner that does not violate other rights without valid legal justification. Other rights are equally important, and any limitations imposed without a legal basis would be considered unlawful. This leads us to explore constitutional rights that may potentially conflict with the right to culture, particularly in relation to Ulwaluko.

4.2. Ulwaluko and its potential violations of other constitutional rights.

It has been established that Ulwaluko, as a cultural practice, is safeguarded by sections 30 and 31 of the Constitution; however, its practice must be conducted in a way that honours other constitutional rights. In this section, I identify those rights that are potentially violated by the practice of Ulwaluko in its current form and content, particularly focusing on the rights of queer Xhosa men. These include the rights to equality, dignity, and the freedom and security of the person. As noted at the beginning of the chapter, South Africa is also founded on the democratic values of human dignity, freedom and the achievement of equality. Let us now ponder on the implications of Ulwaluko on the constitutional rights just mentioned.

4.2.1 The right to equality and non-discrimination

Section 9 of the Constitution stipulates that:

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.[337]

Given South Africa's history of colonialism and apartheid, characterised by exclusionary laws and discrimination, the equality clause plays a crucial role in the Constitution.[338] A primary objective of this provision is to rectify historical injustices and guarantee equality for all individuals.[339] However, the concept of equality is also a contested concept that does not have a single meaning. In order to understand equality in the context of the equality clause in section 9, Maseko contends that there is a need to differentiate between formal and substantive equality.[340] He argues that:

> Formal equality is often traced back to the Greek philosopher Aristotle, who in the Niomachean Ethics, defined formal equality as follows: 'When two persons have equal status in at least one normatively relevant aspect, they must be treated equally in this respect. Formal equality therefore requires that similarly situated people are treated the same on the

[337] Section 9 of the constitution.
[338] Ella McKelvey 'LGBTQIA+ in South Africa: The Legacy of Colonialism and Apartheid (2019) available at *https://www.onewomanproject.org/lgbtqia/lgbtqia-in-south-africa-the-legacy-of-colonialism-and-apartheid,* accessed on 14 December 2024.
[339] Preamble of the Constitution.
[340] Bongani Maseko 'Chapter 8: Equality' available at *https://openbooks.uct.ac.za/uct/catalog/download/30/44/1485?inline=1,* accessed on 20 November 2024.

> basis that people are equal to the extent the law treats similarly situated people the same way and does not make arbitrary distinctions between them.[341]

In contrast, substantive equality refers to an interpretation of equality that accepts that sometimes in order to achieve substantive equality, you must treat people differently. Maseko asserts that

> In other words: 'substantive equality requires the law to ensure equality of outcome and is prepared to tolerate different treatment to achieve this goal'. The Constitutional Court ('CC') has unequivocally held that equality must be interpreted in a 'substantive' and not a 'formal way'. This is because it has unequivocally held that different treatment between groups is not necessarily a violation (or aberration) of the right to equality. Rather, it is an intrinsic part of the constitutional objective of achieving true substantive equality.[342]

Maseko's insights indicate that the equality clause is designed to address historical injustices, emphasising that it does not advocate for a uniform approach to all individuals. The premise is that treating everyone equally does not inherently lead to true equality; rather, differentiated treatment may be necessary to attain substantive equality, which remains lawful and justifiable when viewed in the context of equality as both a right and a value. This principle was underscored by the Constitutional Court in *National Coalition for Gay and Lesbian Equality v Minister of Justice,*[343] where it stated that:

> Particularly in a country such as South Africa, persons belonging to certain categories have suffered considerable unfair discrimination in the past. It is insufficient for the Constitution merely to ensure, through its Bill of Rights, that statutory provisions which have caused such unfair discrimination in the past are eliminated. Past unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and even indefinitely. Like justice, equality delayed is equality denied.

Similarly in *Minister of Finance v Van Heerden*[344] the court held that:

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[341] Ibid at 311. Footnotes omitted.
[342] Ibid at 315.
[343] *National Coalition for Gay and Lesbian Equality v Minister of Justice* [1998] ZACC 15 para 60.
[344] *Minister of Finance v Van Heerden* [2004] ZACC 3 para 27.

> This substantive notion of equality recognises that besides uneven race, class and gender attributes of our society, there are other levels and forms of social differentiation and systematic under-privilege, which still persist. The Constitution enjoins us to dismantle them and to prevent the creation of new patterns of disadvantage. It is therefore incumbent on courts to scrutinise in each equality claim the situation of the complainants in society; their history and vulnerability; the history, nature and purpose of the discriminatory practice and whether it ameliorates or adds to group disadvantage in real life context, in order to determine its fairness or otherwise in the light of the values of our Constitution.[345]

The insights derived from the two cases and Maseko's discussion indicate that the notion of equality is complex and contentious. Nevertheless, South African courts appear to have adopted a position favoring substantive equality. Their reasoning suggests that when addressing issues of equality, it is insufficient to apply a uniform standard that treats everyone identically.[346] Instead, it is essential to examine the specific context, historical background, and vulnerabilities of the individual or group involved, with the aim of rectifying past injustices through the promotion of substantive equality. This argument will be further elaborated in chapters 4 and 5 of this dissertation.

The perspective that Ulwaluko should be examined through the framework of substantive equality emphasises the necessity of recognising that treating all individuals within Ulwaluko identically may not be appropriate. Instead, it may be essential to address certain groups differently to attain true equality and justice.

In this respect, section 9(2) clearly states that equality encompasses the full and equal enjoyment of all rights and freedoms.[347] Consequently, it would be inconsistent with the principle of equality if certain individuals are permitted to fully exercise a right while others are not. Maseko contends that this section aims ‘to expressly permit the state to use the law as an instrument to achieve redress for previously disadvantaged groups to achieve substantive equality’.[348] In our context, Ulwaluko has become an exclusive practice for heterosexual men, thereby excluding men who would want to participate in the rite to

[345] Ibid.
[346] Ibid.
[347] Section 9(2) of the Constitution.
[348] Maseko op cit note 340 at 321.

passage, but do not necessarily identify as heterosexual men. This exclusion means that Xhosa queer people, who also seek to partake in their cultural rights, are denied the opportunity for full and equal enjoyment of that right, which contradicts section 9(2) of the Constitution.

Apartheid and colonialism in South Africa involved not only the exclusion and discrimination of individuals based on race but also the marginalisation of women and queer individuals.[349] Consequently, the equality clause also encompass the rights of women and queer individuals. In terms of women's rights, section 9(3) of the Constitution states that the state shall not engage in unfair discrimination on various grounds, including gender and sex.[350] However, our primary focus is on queer people, and as result, the discussion on women is given little attention. Section 9(3) clearly prohibits the state from unfairly discriminating against anyone based on grounds such as sexual orientation, while section 9(4) further asserts that no individual may unfairly discriminate, either directly or indirectly, on any of the grounds specified in section 9(3).[351] In other words, section 9(3) (state) and section 9(4)'s (private persons) aim is 'to expressly prohibit the state, and private persons, from treating people differently in ways which undermine their human dignity and worth'.[352]

The above examination of Ulwaluko, particularly the various stages of the initiation process, has highlighted that this tradition is predominantly situated within a heteronormative framework. Most activities associated with Ulwaluko are conducted using heterosexual norms, standards, and languages. Furthermore, reports indicate that Xhosa people who identify as queer and have engaged in Ulwaluko often feel a sense of alienation, with some being encouraged by their parents to participate in an effort to conform to heterosexuality. This situation illustrates that Ulwaluko is a practice that marginalises sexual orientations outside of heterosexuality, thereby contravening sections 9(3), and 9(4) of the Constitution.

[349] Madodyo et al op cit note 22.
[350] Sections 9(3) & 9(4) of the Constitution.
[351] Ibid.
[352] Maseko op cit note 348 at 322.

Accordingly, it becomes essential to determine what ‘sexual orientation’ entails. Cameron defines it as follows:

> sexual orientation is defined by reference to erotic attraction: in the case of heterosexuals, to members of the opposite sex; in the case of gays and lesbians, to members of the same sex. Potentially a homosexual or gay or lesbian person can therefore be anyone who is erotically attracted to members of his or her own sex.[353]

Similarly, in *National Coalition for Gay and Lesbian Equality v Minister of Justice*[354] *(hereinafter ‘the National Coalition for Gay and Lesbian Equality* case*’),* the court determined that the term ‘sexual orientation,’ as referenced in section 9(3) of the Constitution, should be interpreted broadly, as it is both linguistically and textually equipped to support such an interpretation. These definitions encompass the orientations of individuals who identify as bisexual or transsexual, as well as those who may experience erotic attraction to a member of the same sex on a singular occasion.[355]

The two definitions provided indicate that 'sexual orientation,' as referenced in section 9(3) of the Constitution, should be interpreted in a broad manner to encompass all sexual identities beyond heterosexuality.[356] These definitions further highlight that sexual orientation primarily relates to an individual's attraction to the same sex, the opposite sex, or both. Consequently, there are men who identify as male but do not exclusively identify as heterosexual due to their attractions. Therefore, these men may still wish to undergo Ulwaluko and engage in the rite of passage.

In this dissertation, I use the term queer, which is defined by the Cambridge dictionary as ‘having or relating to a gender identity or a sexuality that does not fit society's traditional ideas about gender or sexuality’.[357] This is perhaps a wider group than those defined by sexual orientation. Essentially, the significance of examining the definitions of queer and

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[353] Edwin Cameron ‘Sexual Orientation and the Constitution: A Test Case for Human Rights’ (1993) 110 *SALJ* 450 at 452.
[354] *National Coalition* supra 343 para 21.
[355] Ibid.
[356] Ibid.
[357] Cambridge dictionary ‘what is queer’ available at *https://dictionary.cambridge.org/dictionary/english/queer#:~:text=queer%20adjective%20(SEX%20AND%20GENDER)&text=having%20or%20relating%20to%20a,bi%2C%20trans%2C%20whatever),* accessed on 20 November 2024.

sexual orientations lies primarily in refining the focus of this dissertation to concentrate on gay men. Furthermore, this analysis is crucial for dispelling the myths surrounding the notion of a singular sexual orientation and the marginalisation of other sexual identities. This aspect is vital to this dissertation as it highlights the existence of various sexual orientations that are safeguarded by the Constitution, ensuring that individuals who identify outside of heterosexual norms are also afforded legal protection and treated equitably.

Finally, it is evident that in nearly all instances where the equality clause is invoked, the right to dignity is inherently applicable. In other words, in most cases of alleged discrimination, if such discrimination is proven to be unfair, it will likely result in a violation of the victim's human dignity. This was highlighted in Minister of *Home Affairs v Fourie*[358] (*Fourie*) where the court held that '[Discrimination] denied to gays and lesbians that which was foundational to our Constitution and the concepts of equality and dignity, which at that point were closely intertwined, namely that all persons have the same inherent worth and dignity as human beings, whatever their other differences may be.'

Similarly, in *Qwelane v South African Human Rights Commission,*[359] the court emphasised the fact that while equality and dignity are separate and self-existing concepts, they are inseparable:

> This Court emphasised in *Harksen* that the prohibition of unfair discrimination in the Constitution is instrumental in that it provides a bulwark against invasions of the right to human dignity. While equality and dignity are self-standing rights and values axiomatically, equality is inextricably linked to dignity. As *Hugo* expounds:
>
> > At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply

[358] *Home Affairs v Fourie* [2005] ZACC 19 para 15.
[359] *Qwelane v South African Human Rights Commission* [ZACC] 22 para 62.

> inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked.[360]

The aforementioned quote underscores that, despite Xhosa queer individuals being a minority, their entitlement to engage in cultural practices should not be diminished by the notion that certain traditions must remain sacred and static. This perspective is essential, given that society is in a state of constant evolution, necessitating that laws, cultural norms, and ideologies remain adaptable and responsive to contemporary realities. In this context, the equality clause is crucial. Subsequently, equality and human dignity are intrinsically linked. Thus, it is vital to examine the effects of Ulwaluko on the human dignity of Xhosa queer individuals.

4.2.2 The right to dignity

Human dignity is also a value and a right. Section 1(a) of the Constitution states that human dignity forms part of its founding values.[361] The drafters of the Constitution were deliberate in laying down dignity as a founding value of the Constitution to ensure that democratic South Africa is driven by values that ensure that everyone co-exists in harmony. In emphasising the importance of the dignity value, in *S v Makwanyane*[362] the court held that:

> The importance of dignity as a founding value of the new Constitution cannot be overemphasised. Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. . . . Respect for the dignity of all human beings is particularly important in South Africa. For apartheid was a denial of a common humanity. Black people were refused respect and dignity and thereby the dignity of all South Africans was diminished. The new constitution rejects this past and affirms the equal worth of all South Africans. Thus, recognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new Constitution. (footnotes omitted).

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[360] Ibid.
[361] Section 1(a) of the Constitution.
[362] *S v Makwanyane* [1995] ZACC 3 para 328.

However, the Constitution does not provide a definition of human dignity, despite its significance in the Bill of Rights. While legal systems may vary across different nations, most have integrated the concept of human dignity into their constitutional frameworks and have accorded it considerable importance.[363] The recognition of human dignity is further emphasised in modern constitutions through its inclusion in the Universal Declaration of Human Rights (1948) and the International Charter of Human Rights (1948), both of which acknowledge human dignity as a fundamental principle. Regrettably, these international documents also fail to define the concept of human dignity.[364]

The significant challenges in defining dignity may explain the hesitance of various legal sources to provide a clear interpretation. Steinmann asserts that:

> Law, and more specifically public law, lacks a principled definition of human dignity. The modern legal notion of dignity displays a complex character between an illustrative quality and a prescriptive concept, the so-called is-ought dilemma in law, a legal phenomenon which was described by Habermas as a "fusion of moral content with coercive law". Dignity represents a "wide moral view"; a metaphysical notion which implies an objective moral principle on the one hand and on the other hand legal recognition of equal human rights. As a moral view, dignity represents the essence of what it means to be a human being; as a recognition of a human right, it legalises the notion that the essence of humanity must be recognised and respected in equal quantum.[365] (footnotes omitted)

Steinman argues that there is a degree of ambiguity over the definition of human dignity within academic literature; however, most scholars agree on three fundamental components that originate from Kantian moral philosophy.[366] According to Kantian ethics, an individual's autonomy is grounded in universal dignity, which implies that a person should never be treated merely as a means to an end, but rather as an end in themselves.[367] The following elements are generally recognised as essential in defining human dignity:

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[364] Rinie Steinmann 'The Core Meaning of Human Dignity' (2016) 19 *PER / PELJ* 1 at 1.
[365] Ibid at 2.
[366] Ibid.
[367] Ibid.

> The ontological element which entails that human beings have equal inherent human dignity that cannot be waived or diminished; the second element being the claim that inherent human dignity has to be recognised and respected; and the limited-state claim as the third element which entails that states have a positive obligation to progressively realise human dignity through the mechanism of socioeconomic rights.[368]

With regards to dignity as a right, section 10 of the Constitution states that 'everyone has inherent dignity and the right to have their dignity respected and protected'.[369] In *Prinsloo v Van der Linde,*[370] the court held that 'in our view unfair discrimination [the linchpin of equality analysis] . . . principally means treating people differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity'. Similarly, this principle was further enunciated by the court in *President of the Republic of South Africa v Hugo*[371] when it held that:

> [D]ignity is at the heart of individual rights in a free and democratic society. . . [E]quality . . . means nothing if it does not represent a commitment to each person's equal worth as a human being, regardless of their differences. Equality means that our society cannot tolerate legislative distinctions that treat certain people as second-class citizens.

Scholars and courts thus emphasise that human dignity is central to cases of unfair discrimination. For example, in *National Coalition for Gay and Lesbian Equality,*[372] the court held that 'the present case illustrates how, in particular circumstances, the rights of equality and dignity are closely related'. Dignity being a value does not take away the fact that it is also a right. This was enunciated in *Dawood v Minister of Home Affairs*[373] where O'Regan held that 'section 10 makes it plain that dignity is not only a value fundamental to our Constitution, but also a justiciable and enforceable right that must be respected and protected' (emphasis added). Woolman has noted that the right to dignity often overlaps with other rights such as privacy and freedom.[374] Nevertheless, as discussed by

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[368] Ibid.
[369] Section 10 of the Constitution.
[370] *Prinsloo v Van der Linde* [1997] ZACC 5 para 31.
[371] *President of the Republic of South Africa v Hugo* [1997] ZACC 4 para 41.
[372] *National Coalition* supra 343 para 30.
[373] *Dawood v Minister of Home Affairs [2000] ZACC 8* para 35.
[374] Stu Woolman et al *The Dignity Jurisprudence of the Constitutional Court of South Africa: Cases and Materials* (2013) 61.

O'Regan and Sachs in *S v Jordan,*[375] 'the challenges brought in terms of each of these rights cannot be consolidated into a single challenge grounded in some 'unenumerated' right to autonomy. Each challenge based upon a specific right must, they say, be considered individually'.[376] This means that while the right to human dignity permeates the rights in the Bill of Rights, it remains a stand-alone right and is independent.

These cases suggest that the right to human dignity is one of the most important provisions in the Bill of Rights because, in many cases, if a right is violated, it will also trigger the right to dignity. We also see that courts express that the right to dignity correlates with the right to equality or not be unfairly discriminated against, an idea that is apparent in this dissertation. In *Freedom of Religion South Africa v Minister of Justice and Constitutional Developmen*t,[377] the court again emphasised the importance of this right:

> There is a history and context to the right to human dignity in our country. As a result, this right occupies a special place in the architectural design of our Constitution, and for good reason. As Cameron J correctly points out, the role and stressed importance of dignity in our Constitution aim 'to repair indignity, to renounce humiliation and degradation, and to vest full moral citizenship to those who were denied it in the past'. Unsurprisingly because not only is dignity one of the foundational values of our democratic state, it is also one of the entrenched fundamental rights"

In the context of Ulwaluko, reports indicate that Xhosa queer people who have participated in Ulwaluko have experienced various forms of exclusion, ridicule, and humiliation due to the failure of Ulwaluko to reproduce multiple and inclusive masculinities that will cater for a variety of sexualities.[378] Some queer individuals have faced harassment and violations from initiates who have completed the Ulwaluko process, based on perceptions of not conforming to traditional notions of masculinity.[379] This situation highlights how the framing of Ulwaluko within a heterosexual context undermines

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[375] See: *S v Jordan (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae* [2002] ZACC 22.
[376] Woolman op cit note 374.
[377] *Freedom of Religion South Africa v Minister of Justice and Constitutional Development [*2019] ZACC 34 para 45.
[378] Mavundla et al op cit note 244 at 931.
[379] Ibid.

the dignity of Xhosa queer individuals. The prevailing heteronormative attitudes contribute to this violation.

4.2.3 Security and freedom of the person

Section 12 reads as follows:

> (1) Everyone has the right to freedom and security of the person, which includes the right
> c. to be free from all forms of violence from either public or private sources
>
> (2) Every individual has the right to bodily and psychological integrity, which includes the right —
>
> (a) to make decisions regarding reproduction;
>
> (b) to security in and control over their body; and
>
> (c) not to be subjected to medical or scientific experimentation without informed consent.

This right originates from section 11 of the interim constitution.[380] However, the language of this section was modified in the Constitution, leading to significant debates about the implications and interpretation of this right. In *Coetzee v Government of the Republic of South Africa,*[381] the court seems to have expected this debate when it held that:

> My principal focus is on the rights subsumed in the expression 'freedom and security of the person'. The issue of determining the precise limits and content of these words will no doubt exercise this court for a long time to come. Other jurisdictions have battled with the problem of whether the phrase should be construed as referring to one right with two facets, or two distinct, if conjoined, rights. Another jurisprudentially controversial matter has been whether the words should be considered as applying only or mainly to the absence of physical constraint or whether it should be regarded as having the widest amplitude and extend to all the rights and privileges long recognised as central to the orderly pursuit of happiness by free men and women. Even more fundamental (and even more difficult) are questions relating to the nature of citizenship and civic responsibility in a modern industrial-

[380] The interim Constitution op cit note 319.
[381] *Coetzee v Government of the Republic of South Africa, Matiso v Commanding Officer Port Elizabeth Prison* [1995] ZACC 7 para 44.

> administrative state, the degree of regulation that is appropriate in contemporary economic and social life and the extent to which freedom and personal security are achieved by protecting human autonomy on the one hand and recognising human interdependence on the other.[382]

This underscores the contested nature of the right. Currie and de Waal observe that section 12 of the Constitution has maintained its significance in our developing legal framework because it provides extensive protection in the specific areas it covers.[383] Nienaber and Bailey contend that 'the right to physical integrity amounts essentially to a "right to be left alone"; in other words, a right to make decisions concerning one's body without undue interference by others'.[384] Njotini highlights that

> "Security in" and "control over" have a particular meaning for the purposes of section 12(2) of the *Constitution.* The former relates to the 'protection of bodily integrity against intrusions by the state and others"[19] and the latter has to do with the "protection of what could be called bodily autonomy or self-determination against interference".[385]

Essentially, the right to freedom and security of a person comprises a range of rights designed to safeguard against violations of bodily integrity. This extends to acts of violence perpetrated by individuals or the state. The right should be interpreted expansively and in accordance with constitutional principles to eliminate the systemic and structural normalisation of violence, whether it occurs during police interrogations or in daily life.

Reports indicate that Xhosa queer men have been subjected to violence by heterosexual Xhosa men and women who reject their identity as men due to nonconformity to the norms and expectations of heterosexuality.[386] This situation has led to homophobic killings and

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[382] Ibid.
[383] See: Iain Currie & Johan De Waal *The Bill of Rights handbook* (2013) 6.
[384] Annelize Gertruid Nienaber and Karsyn N Bailey 'The right to physical integrity and informed refusal: Just how far does a patient's right to refuse medical treatment go?' (2016) *SAJBL* 73 at 74.
[385] Mzukisi Niven Njotini 'Preserving the Integrity of Medical-Related Information – How "Informed" is Consent?' (2017) 2018(21) *PELJ* 1 at 4
[386] See: Sbongile Barbara Langa *Lived experiences of Xhosa gay men who have undergone ulwaluko* (Unpublished Master of Arts thesis, University of Johannesburg, 2023)

a pervasive fear for the safety of Xhosa queer people.[387] Such actions may constitute a violation of the section 12 right to freedom and security of the person.[388]

In the context of Ulwaluko, it can be posited that the violence directed at Xhosa queer individuals—whether they have participated in Ulwaluko without conforming to traditional gender roles or have chosen not to participate at all—constitutes a breach of this constitutional provision. This situation underscores the discourse surrounding Ulwaluko, which is characterised by a dominant notion of masculinity that perceives men as powerful, possessive, and assertive. Consequently, men who have undergone Ulwaluko and internalised this dominant masculinity may exhibit violence towards those who represent subordinate masculinities, including women, men, and queer people. This dynamic infringes upon the right to be free from all forms of violence, both in public and private spheres, guaranteed in section 12(1)(c).[389]

4.3. The balancing of competing rights

It appears that the right to culture always requires balancing against other rights - as evident in text itself (and in the legislation). It is important then to determine how this can be done in a way that does not negate cultural rights whilst - at the same time – respecting other rights. I use balancing in the sense defined by Giovanella who asserts that 'balancing consists in finding an equilibrated solution between the two sides of a set of scales, protecting both rights, trying not to sacrifice one in favour of the other; the solution adopted should be the one that allows one of the rights to be applied with the least sacrifice of the other'.[390]

The task of balancing competing rights presents significant challenges. Although the South African Constitution does not explicitly tackle the issue of reconciling conflicting constitutional rights, sections 30 and 31 implicitly require such balancing by stipulating

[387] Washington Blade 'Another gay man murdered in South Africa' (2024), available at *https://www.washingtonblade.com/2024/09/18/another-gay-man-murdered-in-south-africa/c,* accessed on 2 December 2024.
[388] Section 12 of the Constitution.
[389] Ibid.
[390] Ibid.

that the right to culture must be exercised in a manner that does not infringe upon other constitutional rights.[391] In addition, the section 36 imitation clause is not relevant in this context, as highlighted in chapter 1, as the discussion does not pertain to a law of general application that restricts a right, but rather to a scenario in which the exercise of one right may potentially violate another. Consequently, we turn to section 39, which provides guidance on how the rights in the Bill of Rights may be harmonised.

Section 39(1)(a) of the Constitution imposes an obligation to interpret the Bill of Rights in a manner that fosters transformation, stating that 'when interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom'.[392] Mokone contends that:

> There is, therefore, a further obligation on the courts to give effect to these values whenever they interpret the Bill of Rights. Even though values are not justiciable, they do provide an important framework within which the rights in the Constitution are to be interpreted and given effect to; more particularly, they provide guidance to the courts on how rights are to be interpreted and ultimately given effect to.[393]

However, the difficulty in defining values presents a significant challenge, particularly for courts tasked with interpreting them, as this often results in inconsistent precedents or applications. The content and interpretation of this section remain contentious, given that the Constitution provides no guidance as highlighted above. Consequently, this section is susceptible to multiple interpretations. Moosa has identified several challenges arising from this situation:

> The Constitution omits defining the contours of this phrase. Its precise meaning has also not been the subject of a comprehensive exposition by South African courts. Thus, uncertainty exists as to the exact import of this imprecise, somewhat vague phrase. What is clear is that the Constitution differentiates between the 'spirit', the 'purport' and the 'objects' of the Bill of Rights. Therefore, they must bear different meanings for its purposes.[394]

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[391] The Constitution.
[392] Section 39 (1) (a) of the Constitution.
[393] Glancina Mokone 'The constitutional role of the judiciary in cases of sexual GBV: an analysis of Tshabalala v S; Ntuli v S 2020 (5) SA 1 (CC)' (2021) *Sabinet African Journal* 406 at 407.
[394] Fareed Moosa 'Understanding the "Spirit, Purport and Objects" of South Africa's Bill of Rights' (2018) 4 *Journal of Forensic Legal & Investigative Sciences* 1 at 1.

To address the challenges arising from the differing definitions or interpretations of section 39, Moosa argues that it is crucial for those interpreting this section to recognise that:

> By virtue of s 39(1)(a) read with (2) of the Constitution, constitutional values orientate interpreters to understand the purpose of a constitutional provision in a manner that, on the one hand, underscores respect for the Constitution's transformational objectives and, on the other, promotes, protects or fulfils the fundamental rights in the Bill. Section 39(2) is not the *fons et origo* of the modalities applicable to statutory interpretation nor the development of common law or customary law. Section 39(2) merely indicates an outcome that, as a minimum, an interpretive exercise or legal development must satisfy in order to pass constitutional muster. That outcome is the promotion of 'the spirit, purport and objects of the Bill of Rights'. Although this phrase expressly refers to the Bill and not the Constitution per se, this article shows that the former is an inseparable, integral part of the latter so that 'the spirit, purport and objects of the Bill of Rights' is infused by the spirit, purport and objects of the rest of the Constitution. Therefore, reference in 39(2) to the 'spirit, purport and objects of the Bill of Rights' of necessity, and by necessary implication, includes the spirit, purport and objects of the Constitution read as a whole.[395]

Consequently, the interpretation of section 39(1)(a) in conjunction with sections 30 and 31 indicates that exercising the right to culture in ways that infringe upon the rights to equality, human dignity, and personal freedom and security would be inconsistent with the Constitution.[396] Likewise, any efforts to reconcile the conflict between the right to culture and the rights to equality, dignity, and personal freedom and security must begin with the premise that the exercise of cultural rights must align with the values and rights enshrined in the Bill of Rights and the Constitution. The interpretation of section 39 necessitates that interpreters grasp the Constitution's overarching purpose and subsequently apply its foundational values alongside those specified in section 39, ultimately leading to an outcome that furthers the Constitution's objectives. While the Constitution offers some basic direction, as discussed further below, first, I turn to International Human Rights Law (IHRL) for more comprehensive guidance.

[395] Ibid at 7.
[396] Section 39 (1) (a), Sections 31 & 32 of the Constitution.

4.3.1. The balancing of rights to culture and equality: lessons in IHRL

The International Covenant on Civil and Political Rights underscores the importance of safeguarding minority rights, as evidenced by its declaration that 'in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language'.[397] This is an important start towards balancing rights in IHRL, the understanding that there are minority groups that are worth protecting, and at times, they require special protection due to their position in society and the historical violation of their rights. In South Africa, of course, it is often the culture of the majority that might need protection.

The right to culture is not explicitly protected as an individual right to culture by IHRL but is recognised in the context of participation in cultural life, similar to its treatment in the Constitution. This right is recognised both implicitly and explicitly on an international scale. For example, Article 27 of the Universal Declaration of Human Rights (UDHR) and Article 15.1(a) and Articles 2 and 3, of the International Covenant on Economic, Social and Cultural Rights (ICESCR) provide such recognition.[398] Article 27 of the UDHR asserts that 'everyone has the right freely to participate in the cultural life of the community, to enjoy the arts, and to share in scientific advancement and its benefits'.[399] Article 15 indicates that the States Parties to the ICESCR acknowledge the right of everyone to, among other things, participate in cultural life.[400] Furthermore, article 2 of the ICESCR states that 'each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present

[397] Article 27 of the International Covenant on Civil and Political Rights, available at *https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights,* accessed on 28 March 2024.
[398] International Covenant on Economic, Social and Cultural Rights *https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights* (accessed on 17 December 2024) & Universal Declaration of Human Rights *https://www.un.org/en/about-us/universal-declaration-of-human-rights* (accessed on 17 December 2024).
[399] Universal Declaration of Human Rights *https://www.un.org/en/about-us/universal-declaration-of-human-rights* (accessed on 17 December 2024).
[400] ICESCR op cit note 398 Article 15.

Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.[401]

At the same time, the right to non-discrimination is also central to IHRL. For example, Article 7 of the UDHR states that 'all are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.'[402] Similarly, article 26 of the ICCPR states that 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.[403] Finally, article 2.1 of the ICESRC states that '2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'[404]

However, the recognition of sexual orientation discrimination is relatively recent and is given substance by various human rights bodies. For example, the Office of the United Nations High Commissioner for Human Rights asserts that discrimination against individuals based on various factors, including sexual orientation, fundamentally contradicts the principles outlined in the Universal Declaration of Human Rights.[405] In addition UN Secretary, General António Guterres ,declared on 11 May 2023 that 'every attack on LGBTQI+ individuals is an attack on human rights and the values we cherish'.[406] He emphasised that 'we cannot and will not regress. The United Nations stands resolutely

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[401] Ibid Article 3
[402] UDHR op cit note 399 Article 7.
[403] International Covenant on Civil and Political Rights Article 26., available at *https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights,* accessed on 30 June 2024.
[404] ICESCR op cit note 398 Article 2.1.
[405] OHCHR 'About LGBTI people and human rights' available a *https://www.ohchr.org/en/sexual-orientation-and-gender-identity/about-lgbti-people-and-human-rights (accessed on 05 December 2024*), accessed on 30 June 2024.
[406] Ibid.

with the LGBTQI+ community and will persist in our efforts until human rights and dignity are realised for all'.[407] Similarly, on 17 May 2023, the UN High Commissioner for Human Rights stated that 'the human rights of all LGBTIQ+ individuals, as equal members of the human family, must be respected'.[408]

In other words, it is clear that IHRL acknowledges both the right to participate in cultural life and the equality rights of LGBTQ+ individuals. Consequently, the issue of finding a balance between these competing rights becomes significant. Here it is useful to turn to the work of the UN Special Rapporteur on cultural rights for guidance. The Rapporteur was established by resolutions of the Human Rights Council, which initially established the position of an independent expert and subsequently renewed the mandate of the Special Rapporteur in the field of cultural rights.[409] These resolutions also affirm the right of all individuals to participate in cultural life and to benefit from scientific advancements and their applications.[410]

The UN Special Rapporteur on cultural rights was established in 2009 as a policy body that provides interpretation of international human rights policy.[411] The functions of rapporteurs include 'contributing to the development of international human rights standards, engage in advocacy and raise public awareness, and provide advice for technical cooperation'.[412] This Rapporteur aims to provide advice on how the right to culture might be harmonised with other human rights, including the right to equality. While the primary focus of this Rapporteur is on women's rights, certain elements regarding the balancing of women's rights with cultural rights are relevant to this dissertation.

While equality of cultures is important, so too is equality within cultures. Special Repporteur, Karima Bennoune, emphasises this in stating that the right to culture should

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[407] Ibid.
[408] Ibid.
[409] The UN Special Rapporteur on Cultural Rights, available at *https://documents.un.org/doc/undoc/gen/n12/459/30/pdf/n1245930.pdf?token=5z5Ahsy1EKCWeHvGwQ&fe=true*, accessed on 28 April 2024, at 4. The rapporteur references the Human Rights Council Resolutions 10/23 and 19/6, which initially established the position of an independent expert and subsequently renewed the mandate of the Special Rapporteur in the field of cultural rights.
[410] Ibid.
[411] Ibid.
[412] Ibid.

not be used to diminish or limit other human rights.[413] In this respect, she denounces the notion of cultural relativism and its destructive impact 'which uses culture to take away rights rather than amplify them'.[414] She notes that:

> So-called "sensitivities" and relativist arguments invoking culture do not absolve States from their human rights obligations, "Sensitivities" cannot justify the criminalisation of sexual orientation or gender identity or racial discrimination. Tradition is often invoked to justify the status quo and diversity is not a threat to universal rights, but a reality and a resource.[415] (emphasis added)

The Rapporteur stresses the necessity of acknowledging multiple identities and distinctions present within any society: 'Recognising and protecting multiple identities helps to resist and overcome political forces, in particular identity politics, which seek to deny any possibility of pluralism within self and society, as well as gender equality'.[416] Similarly, the UNESCO Declaration on Cultural Diversity asserts that the promotion of cultural diversity must not infringe upon or restrict the exercise of other human rights as established by international law.[417] This indicates that while international legal frameworks and policy emphasise the importance of cultural diversity and associated rights, such rights must be exercised in a way that respects and does not violate other human rights.

Accordingly, the idea that society comprises of a diverse array of individuals from various cultures, age groups, and sexual orientations, among other factors, is widely held and significant. Wedgwood argues that this perspective aligns with Connel's assertion that masculinity should be interpreted within the framework of the specific social, political, economic, and cultural contexts of that society.[418] Clearly, the concept of social construction highlights the significance of examining prevailing ideas within society. In essence, while the UN Rapporteur advocates for the recognition and safeguarding of

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[413] United Nations 'Relativist Claims on Culture Do Not Absolve States from Human Rights Obligations, Third Committee Expert Says as Delegates Denounce Country-Specific Mandates' 23 October 2018, available at *https://press.un.org/en/2018/gashc4241.doc.htm*, accessed on 20 March 2025.
[414] Ibid.
[415] Ibid.
[416] Ibid.
[417] UNESCO Universal Declaration on Cultural Diversity, Art. 4. The Declaration was adopted on 2 Nov. 2001. For the text see *https://www.unesco.org/creativity/en/2005-convention,* accessed on 2 May 2024.
[418] See: Nikki Wedgwood 'Connell's theory of masculinity – its origins and influences on the study of gender (2009) 18 *Journal of Gender Studies* 329.

various perspectives, this must begin with an acknowledgment of the social construction of culture and gender, alongside efforts to deconstruct these frameworks.

Consequently, scholars have posited that it is essential to achieve a balance between cultural rights and the human rights of other groups. They highlight the challenges faced by the international community in defining the parameters of cultural diversity and rights, as cultural rights are inherently fluid and influenced by the specific social and political circumstances of each society.[419] This underscores the absence of a singular definition of culture, which should be regarded as dynamic and evolving in response to changing societal conditions.[420]

This discussion is further elucidated in Chapter 5, where I argue for the decolonisation of culture to ensure it authentically reflects the lived realities, experiences, needs, and contexts of the indigenous population, while also respecting the fundamental rights of others. Essentially, the argument is not that culture in the pre-colonial era is all perfect and that decolonisation means a pure return to pre-coloniality, but that there are lessons from pre-colonial era that can be supplemented with the principles of the Constitution and thus offer solutions to be harnessed. Similarly, this perspective underlies my arguments in Chapter 6, where I propose that the decolonisation of masculinities and the adoption of African-centred ideologies, laws and perspectives can offer solutions to be explored for Ulwaluko to reproduce multiple and inclusive masculinities. However, this dissertation does not suggest that a return to pre-coloniality alone is the solution.

In addition, the UN Rapporteur on Cultural Rights emphasises that cultural rights encompass not only the freedom of individuals to express themselves, select their identities, and engage in their cultural practices, but also the right to abstain from participating in certain traditions, customs, and practices, especially those that violate human rights and dignity.[421] The UN Report of the Working Group on the Issue of Discrimination Against Women in Law and in Practice (the Working Group), while primarily

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[419] Ibid.
[420] Ibid.
[421] *Report of the Special Rapporteur in the Field of Cultural Rights* A/67/287 (10 August 2012), available at *https://documents.un.org/doc/undoc/gen/n12/459/30/pdf/n1245930.pdf?token=aeormZUHrdfCMWVDsG&fe=true*, accessed on 17 June 2024).

addressing the discrimination faced by women and children—topics not central to this dissertation—raises several critical issues.[422] It underscores how cultural practices have been employed to rationalise discrimination against women and children, noting that women who challenge such discrimination are often perceived as violating cultural norms.[423] This is similar to Connell's discussion of hegemonic masculinity, where he argues that hegemonic masculinity seeks to subordinate both women and other men, and that those who do not seem to embody hegemonic masculinity tend to be treated as subordinates or deflectors, and thus often discriminated against, oppressed and treated violently.

In addition, the Working Group Report advocates for the acknowledgment of diverse family structures beyond the traditional heterosexual model.[424] The Report proposes that:

> It is the opinion of the Working Group that the understanding and legal definition of the family in national legislation should be extended to recognise different forms of family. The recognition of same-sex couples, for both women and men, and other forms of family is an example of good practice that a number of States have already implemented.[425]

The quote above refers to same-sex relationships, and thus fits into my definition of queer in this dissertation. The Report indicates that balancing rights must also involve the dismantling of stereotypes perpetuated by patriarchy and sexism. This is important, particularly in light of the fact that some parents send their Xhosa sons, who identify as gay, to Ulwaluko with the expectation that they will emerge as heterosexual.

Essentially, the principles derived from IHRL can be summarised as follows: the right to cultural enjoyment is a fundamental right that is safeguarded, and the right to equality within cultural rights is equally upheld. This means that while an individual may assert their right to cultural enjoyment, the rights of individuals, such as those who identify as gay, to enjoy culture are equally protected. Furthermore, IHRL underscores that the right

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[422] UN *Report of the Working Group on the Issue of Discrimination Against Women in Law and in Practice* A/HRC/29/40 (2 April 2015), available at *https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WG/Family/A.HRC.29.40_E.pdf,* accessed on 18 June 2024.
[423] Ibid.
[424] Ibid.
[425] Ibid.

to cultural enjoyment must be exercised in a way that does not infringe upon other rights. This implies that the exercise of this right may be limited if it conflicts with these rights. Additionally, IHRL highlights the importance of recognising and valuing diversity within society. It acknowledges that although individuals are part of a broader community, they possess distinct rights that necessitate protection.

This reasoning suggests that Ulwaluko, as a cultural practice derived from the constitutional right to culture, should be regarded as adaptable and subject to change in response to societal evolution. This adaptability is essential to ensure that Ulwaluko reproduces inclusive and multiple forms of masculinities that accurately reflect the experiences and requirements of the community it serves. Both the contemporary international community and South Africa have evolved sufficiently to acknowledge the necessity of safeguarding the rights of queer people. If Ulwaluko is perceived as static and unchanging, it risks becoming obsolete and inflexible, which could lead to the infringement of other constitutional or human rights. IHRL emphasises that cultural rights should not be exercised in ways that infringe upon other human rights, advocating for a harmonious balance rather than allowing one right to overshadow another.[426]

Furthermore, this perspective is relevant to the experiences of Xhosa queer men who have taken part in Ulwaluko, as discussed in the previous chapter. These individuals have expressed feelings of alienation from other initiates, noting that the language of *Isikhwetha*, which they are expected to learn and use, is rooted in a heterosexual framework.[427] Additionally, they have encountered mockery, violence, and discrimination due to their sexual orientation.[428] IHRL underscores the necessity of equality within culture, by recognising diverse identities and affirming individuals' rights to embrace specific cultural elements while rejecting others. This dialogue is crucial for addressing the balance of rights within cultural contexts.

[426] Ibid.
[427] Ntozini & Ngqangweni op cit note 28 at 1310.
[428] Ibid.

4.4. The balancing of competing rights or interests through the courts

Courts establish legal precedents that remain in effect until overturned by a higher court, unless the court in question is the apex court. Over the years, the judiciary has played a pivotal role in shaping democratic South Africa, evidenced by landmark decisions such as the abolition of the death penalty, the legalisation of same-sex marriages, and the prohibition of corporal punishment in educational institutions. This section examines how South African courts have navigated the complexities of competing rights and interests, to shed light on the principles established by the courts in reconciliating cultural rights with the rights to equality, human dignity, and personal freedom and security.

In *Christian Education,*[429] the Constitutional Court addressed legislation banning corporal punishment in educational institutions, requiring it to evaluate whether section 10 of the South African Schools Act 84 of 1996 infringed upon the rights of parents of children attending independent schools who had, in accordance with their religious beliefs, agreed to the practice of their children being disciplined using corporal punishment. Christian Education approached the court on behalf of 196 schools urging the court to hold the Schools Act to be unconstitutional as it violated their right to practise their religion, which allowed them to discipline their children using corporal punishment.[430] Christian Education argued that the prohibition of corporal punishment 'interferes with the right to establish independent schools, the right to participate in the cultural life of their choice, the right to enjoy their culture and to practise their religion.'[431] The Minister in turn argued that the corporal punishment violated the right to equality, human dignity and freedom and security of a person.[432] The court determined that:

> To sum up: limitations on constitutional rights can pass constitutional muster only if the Court concludes that, considering the nature and importance of the right and the extent to which it is limited, such limitation is justified in relation to the purpose, importance and effect of the provision which results in this limitation, taking into account the availability of less restrictive means to achieve this purpose. Though there might be special problems attendant on

[429] *Christian Education* supra 317 para 3.
[430] Ibid para 52.
[431] Ibid para 3.
[432] Ibid para 8.

> undertaking the limitations analysis in respect of religious practices, the standard to be applied is the nuanced and contextual one required by section 36 and not the rigid one of strict scrutiny.[433]

The court's reference to the limitation of rights suggests that it is generally reluctant to permit the restriction or infringement of rights, particularly when such rights pertain to minority groups that warrant robust protection. Limitations may only be considered acceptable if they are justifiable in terms of their intended purpose, the impact they impose, and the absence of less restrictive alternatives to achieve that purpose, as stated in section 36.[434] The Constitutional Court dismissed the appeal as 'when all these factors are weighed together, the scales come down firmly in favour of upholding the generality of the law in the face of the appellant's claim for a constitutionally compelled exemption'.[435]

As highlighted in chapter 1, this section 36 analysis specifically pertains to instances where a right is violated by legislation.[436] For instance, if X believes that the Customary Initiation Act, which prohibits unfair discrimination against queer people based on sexual orientation, infringes upon their cultural rights, the principles and criteria outlined in section 36 of the Constitution would be relevant to this situation. However, the situation is different when dealing with two competing rights in the absence of legislation, as will be subsequently elaborated.

As argued in the discussion on IHRL, the issue of minority rights and groups seems to be an important aspect of balancing competing rights or interests. This is a similar to the approach adopted by courts in South Africa. For example, in *Minister of Home Affairs v Fourie,*[437] the court emphasised the significance of safeguarding minority rights, designating queer individuals as a 'permanent minority'. The court determined that:

> Gays and lesbians are a permanent minority in society which in the past has suffered from patterns of disadvantage. The impact of discrimination on them has been severe, affecting

[433] *Christian Education* supra 317 para 31.
[434] Section 36 of the Constitution.
[435] *Christian Education* supra 317 para 52.
[436] Ibid.
[437] *Fourie supra* 358 para 15.

> their dignity, personhood and identity at many levels. The sting of the past and continuing discrimination against both gays and lesbians lies in the message it conveys, namely that, viewed as individuals or in their same sex relationships, they do not have the inherent dignity and are not worthy of the human respect possessed by and accorded to heterosexuals and their relationships. This denies to gays and lesbians that which is foundational to our Constitution and the concepts of equality and dignity, namely that 'all persons have the same inherent worth and dignity', whatever their other differences may be.[438]

This indicates that South African courts are prompt in safeguarding the rights of minority groups. According to these courts, individuals identifying as gay are recognised as a permanent minority. Consequently, in any case involving allegations of rights violations against gay individuals, the courts will regard them as a minority whose rights have not yet been fully acknowledged. The courts aim to ensure that their interpretations do not exacerbate the marginalisation of this group. Therefore, the judiciary consistently strives to uphold the rights to equality and human dignity for gay individuals, and any limitations on these rights will be subjected to rigorous scrutiny.

Prince v President of the Law Society of the Cape of Good Hope[439] addressed the issue of the government's conflicting interests with the appellant's right to freedom of religion. The court emphasised the necessity of establishing the nature and importance of the right in question, particularly within an open and democratic society that values human dignity, equality, and freedom.[440] It also considered the importance of cannabis use for the Rastafari community and the effects of the limitation on their religious rights.[441] The importance of this for my argument is the court's conclusion that:

> The balancing has always to be done in the context of a lived and experienced historical, sociological and imaginative reality. Even if for purposes of making its judgment the Court is obliged to classify issues in conceptual terms and abstract itself from such reality, it functions with materials drawn from that reality and has to take account of the impact of its judgments on persons living within that reality. Moreover, the Court itself is part of that reality and must engage in a complex process of simultaneously detaching itself from and engaging with it.

[438] Ibid.
[439] *Prince v President of the Law Society of the Cape of Good Hope* [2002] ZACC 1 para 46.
[440] Ibid.
[441] Ibid.

> For the purposes of balancing, some laws (or parts of laws) will of necessity be more equal than others.[442] (emphasis added)

This highlights that, in an attempt to balance competing rights or interests, a court must take into account the history and context of the right or right holder, their status in society and what their decision could mean on the life of that person for whom the court's decision has now become their reality. In that regard, the court emphasises that some rights may be more preferred than others.

Similarly, in addressing the need to strike a balance between the fundamental rights to freedom of expression, dignity and equality, in *Qwelane v South African Human Rights Commission,*[443] the court examined the factors outlined in the Equality Act, also discussed below in chapter 7. It underscored the significance of both the purpose of the limitation and the rights holders in its deliberation.[444] In balancing the right to freedom of expression with the right to equality and human dignity of queer people, the court recognised that queer individuals constitute a minority deserving of protection.[445] It further underscored that the rationale for regulating freedom of expression carries significant implications for South Africa's democracy, particularly in light of the historical discrimination, insults, and derogatory labelling faced by minority groups such as Black individuals, women, and queer people during the apartheid era.[446] This case reiterates that when balancing competing rights or interests, courts will always first look at the right holder, their position in society and the historical violation of their rights. When dealing with queer people, the guideline in *Qwelane* is very important as they are a minority, whose rights were violated during colonial-apartheid South Africa and even before, and continue to fight for the protection of their rights in democratic South Africa.

The above analysis reveals that the judiciary remains committed to the foundational objectives of the Constitution, which include rectifying historical injustices and promoting transformation.[447] A key principle that emerges is the acceptance of diversity or

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[442] *Prince* supra *439 para* 151 & 154.
[443] *Qwelane* supra 359 para 170.
[444] Ibid.
[445] Ibid.
[446] Ibid para 1.
[447] Preamble op cit note 339.

pluralism.[448] Courts underscore the importance of recognising South Africa as a society composed of individuals from various backgrounds, races, cultures, and sexual orientations, highlighting the necessity of acknowledging this diversity in all interactions involving conflicting rights or interests. This directly addresses the argument in this dissertation concerning the necessity for Ulwaluko to reproduce multiple and inclusive masculinities that cater to the various individuals present within South African indigenous Xhosa communities.

Moreover, courts underscore the significance of safeguarding minority rights and ensuring that certain practices do not unjustly discriminate against individuals who have historically faced disadvantages due to colonial and apartheid legislation. South African courts appear to stress that they are unlikely to permit the limitation or infringement of multiple rights solely for the sake of exercising a single right.[449] Key considerations highlighted by the courts include the intention behind the limitation and whether it effectively fulfils that intention.

Furthermore, courts appear to underscore the necessity of considering that, in the pursuit of reconciling conflicting rights or interests, it is crucial to recognise that certain rights may consistently take precedence over others. In the context of Ulwaluko, we are addressing the rights of a minority, as queer individuals continue to be a marginalised group in South Africa. Additionally, the limitation of the rights of Xhosa queer people is not connected to the purpose of Ulwaluko, as the heterosexual components can be excluded while preserving the fundamental purpose of Ulwaluko as a 'rite of passage.' Ultimately, given that we are examining the rights to dignity, equality, and personal freedom and security, which may be compromised by a singular right, the aforementioned courts indicate that, in their deliberations, they will strive to ensure that the rights to dignity and equality are afforded greater weight due to South Africa’s history of dehumanisation and exclusion.

Ulwaluko, as a right to participate in cultural life is protected by both the Constitution and IHRL. However, both the Constitution and IHRL impose restrictions on the practice of Ulwaluko to ensure that it does not infringe upon other rights. This situation requires a

[448] Ibid.
[449] See: *Fourie* Supra 358 para 15.

careful consideration of the right to culture alongside other rights, particularly the rights to equality, human dignity, and personal freedom and security. In the pursuit of this balance, courts maintain that certain rights, such as equality and dignity, must take precedence. Additionally, courts assert that achieving this balance necessitates an examination of various factors, including the identity of the right holder, the nature and significance of the right, any limitations imposed, and the rationale behind those limitations. In the subsequent chapter, I explore how the decolonisation of culture can contribute to the development of multiple and inclusive masculinities, as well as how courts have approached the decolonisation of culture to prevent the infringement of other rights.

CHAPTER FIVE

DECOLONISING CULTURE TO FOSTER MULTIPLE AND INCLUSIVE MASCULINITIES.

South Africa experienced colonisation beginning in 1652 when the Dutch East Indian Company, Vereenigde Oostindische Compagnie (VOC), arrived at the Cape to set up a refreshment station, and but ended up settling on the land and imposing their cultural, social and political ideologies on the native people.[450] This resulted in the colonisation of various regions that are recognised as provinces of South Africa today.[451] The primary objectives of colonisation were to establish a settler state through conquest, impose a Eurocentric form of education and knowledge, and infiltrate and distort the cultures of the indigenous populations.[452] Today, as a result of the intertwined effects of colonialism, Christianity and capitalism, the cultures of the indigenous populations reflect certain Eurocentric influences and some customs do not accurately represent the lived experiences, geographical context, or needs of the native communities.[453] In this chapter, I discuss the decolonisation of culture to ensure it resonates with those who engage in its practice. By this I mean the culture of indigenous people of South Africa must represent their lived realities, history (no matter how unperfect it is) and needs. Consequently, by decolonising culture, culture will now be seen as a living thing, adaptable, fluid and forever changing in order to not only resonate with the indigenous people, but will also seek to complement the principles of the Constitution.

I commence the chapter by outlining the concepts of decolonisation and transformation, articulating my inclination towards the former. Following this, I delve into customary law, highlighting the differences between living and official customary law, and identifying

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[450] South African history online 'Britain takes control of the Cape' 08 November 2011, available at *https://www.sahistory.org.za/article/britain-takes-control-cape#:~:text=With%20colonialism%2C%20which%20began%20in,and%20the%20Zuid%2DAfrikaansche%20Republiek*, accessed on 30 December 2024.
[451] Ibid.
[452] Joel M Modiri 'Conquest and constitutionalism: first thoughts on an alternative jurisprudence' (2018) 34 *South African Journal on Human Rights* 300 at 320.
[453] Oliver & Oliver op cit note 26.

which system is best suited to address the conflicts arising from Ulwaluko in relation to other constitutional rights. Thereafter, I analyse the role of courts, both at the international level and within South Africa, in decolonising cultural practices in order for them to not infringe on other rights.

5.1. The concepts of decolonisation and transformation

The interpretation of decolonisation and transformation varies significantly based on geographical location and the individuals involved in the discussions. In South Africa, the notion of decolonisation is often viewed with skepticism due to its perceived potential for destruction, whereas transformation is generally embraced as a constructive approach for countries such as South Africa, which have emerged from a history marked by inequality and discrimination.[454] Consequently, it is essential to adopt a clear stance on both concepts to justify the choice for one over the other. This requires a thorough examination of the meanings and implications associated with these concepts. Although the concepts appear to be intertwined, there exists a certain degree of distinction that will soon become evident.

5.1.1. The definition of Decolonisation

The meaning and content of decolonisation have been articulated by numerous scholars in diverse manners. A common thread among these definitions is the understanding that decolonisation entails a significant dismantling of colonial structures, rather than merely integrating indigenous populations into systems that continue to operate under colonial rule. This is captured in the following definition of decolonisation:

> Decolonisation involves identifying colonial systems, structures and relationships, and working to challenge those systems. It is not “integration” or simply the token inclusion of the intellectual achievements of non-white cultures. Rather, it involves a paradigm shift from a culture of exclusion and denial to the making of space for other political philosophies and

[454] See: Gudani Tshikota ‘Dismantling racial ontology: Constitutional abolitionism as a solution to South Africa’s antiblackness and white supremacy’(2021) 15 *Pretoria Student Law Review* 255.

knowledge systems. It is a culture shift to thinking more widely about why common knowledge is what it is, and in so doing adjusting cultural perceptions and power relations.[455]

The Cambridge Dictionary provides a social science-oriented definition of decolonisation, describing it as the process of modifying elements such as a curriculum or concept to take into account the underlying cultural beliefs.[456] For Massey-Jones, decolonisation is 'the dismantling of colonial systems that were established during a period when a nation maintains dominion over dependent territories'.[457] South African scholars such as Modiri characterise decolonisation as the eradication of colonial systems and frameworks, aimed at dismantling the conquerors' version of South Africa.[458] Decolonisation, as articulated by Fanon, is characterised by the establishment of a new humanism.[459] Fanon emphasises that the path to transcending colonisation necessitates the total dismantling of the structures established by colonial rule, which must then be substituted with entirely new systems.[460] These various definitions of decolonisation clearly indicate the necessity of a revival of African values, cultures, and legal systems, rather than simply advocating for inclusion within frameworks and structures that continue to be influenced by Eurocentric perspectives.

Fanon's definition is significant and frequently misused. My interpretation suggests that it advocates for the replacement of Eurocentric systems with those centred on African perspectives. This aligns with the argument I present regarding living and official customary law in this chapter. Furthermore, it is crucial to note that within the scope of this dissertation, the term 'decolonisation' does not imply a mere acceptance of African-centred systems without critical examination; rather, it necessitates ensuring that these systems are consistent with the values enshrined in the Constitution.

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[455] University of Essex Library, available at *https://library.essex.ac.uk/edi/whatisdecolonisation*, accessed on 28 December 2024.
[456] Cambridge Dictionary, available at *https://dictionary.cambridge.org/dictionary/english/decolonization*, accessed on 28 November 2024.
[457] Messey-Jones 'Why decolonizing education is important' (2019) available at *https://medium.com/@eec/why-decolonizing-education-is-important-77fc6b3e9085,* accessed on 28 December 2024.
[458] Modiri op cit note 452 at 320.
[459] Frantz Fanon Black Skin, White Masks (1967) 33.
[460] Ibid.

Decolonisation aims to bring about radical transformation in the power dynamics, as well as the epistemological and ontological structures, of South African society.[461] Its goal extends beyond simply granting rights and integrating the marginalised into the current system; it seeks to fundamentally reorganise and restore the political landscape to one based on the values, tradition, history and location of the indigenous people, and many of these values are already incorporated into the Constitution.[462] This process dismantles the political order conceived and established by European colonialists, effectively erasing the distinctions between 'coloniser and colonised, settler and native, and Black and white', treating these categories as tangible social realities rather than mere legal designations.[463] Decolonisation as a theoretical framework aims to contest colonial and imperialist viewpoints regarding Africa and its peoples.[464] It endeavours to dismantle dominant narratives about Africa by persistently opposing and resisting ideas that portray Africans as primitive and underdeveloped.[465]

Turning to law, various scholars have argued that colonialism in South Africa was characterised by the imposition of racial epistemology, which posits that the legal frameworks of indigenous communities are deemed invalid due to their unwritten nature and belonging to a lesser, uncivilised populace.[466] Consequently, these indigenous legal systems were supplanted by Western legal systems such as Roman-Dutch and English law, especially in their common law manifestation, while African law was often vilified and manipulated to align with colonial perspectives.[467] This underscores the necessity of decolonisation, which must include the transformation of the legal system.[468]

Moreover, this compels us to examine the fundamental nature of the Constitution and its significance in the process of decolonisation. Scholars such as Ramose, Madlingozi and Modiri have critiqued the Constitution from a decolonial perspective, arguing that the

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[461] Joel M Modiri 'Race, history, irresolution: Reflections on City of Tshwane Metropolitan Municipality v Afriforum and the limits of "post"-apartheid constitutionalism' (2019) *De jure Journal* 27 at 35.
[462] Ibid.
[463] Ibid.
[464] Asikia Karibi-Whyte 'An Agenda for Decolonising Law in Africa: Conceptualising the Curriculum' (2020) 2 *Journal of Decolonising Disciplines* 1 at 1.
[465] Ibid.
[466] See: Gudani Tshikota op cit note 454.
[467] Ibid.
[468] Ibid.

Constitution is incapable of delivering justice and accounting for the injustices of the past because it failed to represent a significant breakaway from the colonial and apartheid structures and thinking.[469] However, while I have agreed with this notion elsewhere,[470] in this dissertation, I investigate how the values and rights enshrined in the Constitution can be leveraged to effectuate a radical transformation of the legal system. My central thesis is that, although the Constitution, in its present form, is not decolonial, I contend that if courts were to adopt a decolonial interpretation of the law that acknowledges the values, lived experiences, and needs of indigenous peoples, the legal system could indeed undergo decolonisation. For instance, in Chapter 6, I advocate for the integration and application of Ubuntu by courts in their legal interpretations, particularly by the Constitutional Court, the highest authority in legal matters. The significance of the Constitution cannot be overstated.

Furthermore, Anwana argues that this transformation can only be achieved through 'the decolonisation of the law curricula in South Africa requires the encompassing of the traditions and customs of the African people into the methodologies, epistemologies, scholarships, content and process of how law is taught in these universities'.[471] Similarly, decolonisation cannot be realised without first addressing the decolonisation of systems of law.[472] This arises from the fact that law has predominantly served to legitimise colonial rule.[473] For instance, Van Eck reveals how the criminal and civil systems of law in South Africa remain a product of colonialism and apartheid, and African law was replaced with customary law, a system of law that was infiltrated and distorted in order to suit the colonial agenda.[474] This is why Himonga and Diallo emphasise the necessity of decolonising the law as part of the broader effort to decolonise culture.[475] They contend

[469] Tshikota op cit note 454. This article explores the different arguments by Ramose, Madlingozi and Modiri regarding the Constitution's failure to usher justice.
[470] Ibid.
[471] Emem Anwana 'Decolonising the law curricula at universities of technology: students' perspective on content' (2020) *South African Journal of Higher Education* 59 at 61.
[472] Chuma Himonga & Fatimata Diallo 'Decolonisation and Teaching Law in Africa with Special Reference to Living Customary Law' (2017) 20 *PER / PELJ 1* at 5.
[473] Ibid.
[474] Michele Van Eck 'Decolonising legal education in South Africa: Is it time to press the reset button?' (2020) 2 *Journal of Decolonising Disciplines* 1 at 6-7.
[475] Himonga & Diallo op cit note 472 at 5.

that in order to decolonise the law, it is essential to first define law away from colonial influences:

> [W]hile indigenous approaches should, in our view, be central to the decolonisation of law, this is not a call for the unconditional indigenisation of law in which an anti-colonial discourse, which is frequently trapped within the same colonial epistemology, is advanced uncritically. Instead, we suggest that a more meaningful point of departure in the decolonisation of law is the defining of law from a 'non-colonial' position and from alternative legal epistemologies. In this respect, decolonisation draws from different sources of law and normative agencies to promote the transformative potential of law in achieving more social and economic justice.[476]

This underscores my argument regarding the uncritical acceptance of Africa-based perspectives or epistemologies. Decolonisation involves seeking alternative legal viewpoints and epistemologies, that are African-centred, to attain economic and social justice. Consequently, the decolonisation of law in South Africa must investigate how African values, ideologies, and legal frameworks can be adopted to fundamentally reshape the legal system. It is crucial, however, that this process of decolonisation aims to incorporate African-centred approaches that align with the principles enshrined in the Constitution.

5.1.2. The definition of Transformation

The preamble of the Constitution acknowledges the injustices of the past and emphasises the need to progress towards a just and equitable society.[477] Consequently, scholars like Klare and judges such as Justice Langa regard the Constitution as a transformative instrument, serving as a means to transition from a history marked by inequality and discrimination to a present and future that champions equality, human dignity, and freedom.[478] This vision aligns with the interim Constitution's description of the Constitution's role in this transformative process as 'a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice,

[476] Ibid.
[477] Preamble op cit note 339.
[478] Pius Langa 'Transformative constitutionalism' (2006) 17 *Stellenbosch* 351 at 352.

and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex'.[479]

The idea of transformation has been central in legal discourse since the onset of democracy. The Cambridge dictionary simply defines transformation as a complete change in the character or appearance of something in order for it to be improved.[480] However, its application to constitutional democracy in South Africa is debated. According to a widely referenced interpretation, Albertyn and Goldblatt assert that:

> Transformation requires a complete remake of the state and society, and the distribution of power and resources in an equitable manner. The aim is to address structural forms of domination, and material disadvantages anchored by race, gender, class, and other related grounds. The eradication of structural forms of domination and material disadvantage will ensure the improvement of the quality of life for all citizens and free the potential of each person in line with the Constitution's vision.[481]

Justice Langa asserts that transformation is attainable through alterations in the social and economic conditions of marginalised individuals.[482]

The concept of transformation in South Africa is rooted in the Constitution, although the Constitution does not explicitly refer to the term.[483] In *S v Makwanyane,*[484] Mohamed J held that 'what the Constitution expressly aspires to do is to provide a transition from these grossly unacceptable features of the past to a conspicuously contrasting peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex'.

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[479] The interim Constitution op cit note 319.
[480] Cambridge dictionary 'what is transformation' available at *https://dictionary.cambridge.org/dictionary/english/transformation,* accessed on 30 December 2024.
[481] See: Cathi Albertyn & Beth Goldblatt 'Facing the Challenges of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14 *South African Journal on Human Rights* 248.
[482] Langa op cit note 478 at 352.
[483] Ibid.
[484] *Makwanyane* supra 362 para 262.

The diverse interpretations of transformation have prompted De Vos to challenge its significance and fundamental nature in South Africa:

> What is transformation? Can one eat it and use it as a blanket at night to ward off the cold? Will it provide a roof over one's head, clean drinking water and electricity and a job that will allow one to live with a semblance of dignity? Can one feed one's children with transformation and send them to school on it? Can one get good medical care (I have not yet seen any pharmacy stocking transformation pills that will make us all healthy) and protect oneself and one's loved one's from crime with a transformation blanket? Don't think so.[485]

De Vos suggests that the concept of transformation has been rendered ineffective due to its manipulation by the state. This indicates that one significant factor contributing to the dilution of transformation's genuine significance is the state's failure to implement its intended goals. The state's inability to provide essential services to its citizens has diminished the authentic meaning of transformation, reducing it to merely the provision of basic services, while systemic and structural inequalities continue to exist.

5.1.3 Decolonisation v transformation – the distinction

It is evident that both transformation and decolonisation emphasise the necessity of dismantling colonial-apartheid systems and structures, which aligns with the earlier discussion regarding the interconnectedness of these concepts. What then is the difference between the two? One could assert that decolonisation represents a specific type of transformation. The distinction, however, lies in the fact that decolonisation, in contrast to general transformation, places a greater emphasis on radical change through methodologies that are rooted in African perspectives and frameworks. This distinction is crucial for this dissertation, as I propose the principles of Ubuntu, an African concept, as a catalyst for fostering multiple and inclusive masculinities within Ulwaluko.

[485] Pierre de Vos 'What do we talk about when we talk about transformation? 12 August 2010, available at *https://constitutionallyspeaking.co.za/what-do-we-talk-about-when-we-talk-about-transformation-2/* , accessed on 31 December 2024.

5.1.3.1. The Fourie case

I will illustrate the differences with reference to the *Fourie v Minister of Home Affairs*[486] case. *Fourie* serves as a significant example of a non-transformative legal decision. This case centred on an effort to challenge the constitutionality of certain provisions of the Marriages Act, which defined marriage exclusively as a union between a husband and wife, thereby excluding same-sex couples.[487] The court, responsible for developing common law, also had the opportunity to revise the Marriages Act to allow for same-sex marriages.'. The Court found that 'the common law definition of marriage is declared to be inconsistent with the Constitution and invalid to the extent that it does not permit same-sex couples to enjoy the status and the benefits coupled with responsibilities it accords to heterosexual couples'.[488] However, instead of reading in words into the marriages Act, the court decided to suspend this invalidity to allow parliament time to resolve this.[489]

The court's decision to suspend the invalidity of the Marriages Act to allow Parliament the opportunity to formulate legislation that would recognise same-sex partnerships was contested at the time as scholars argued that the Court could have, itself, vindicated the rights and provided immediate relief.[490] Subsequently, Parliament passed the Civil Unions Act, which has been criticised for establishing two separate, and partly unequal, systems of marriage.

However, the main critique of the case is that it is not transformative insofar as it maintains the dominant norm of 'marriage' as the standard. These shortcomings of this case are well captured by Albertyn who contends that:

> Although a hugely important case, it is primarily a case about allowing gays and lesbians into the protected social institution of marriage without challenging its position and the wider idea of family in our law. While the cases extend the net of recognition and rights, they do not immediately shift the dominant norms and institutions, and do not fully embrace a future based on difference. these cases thus demonstrate the powerful tug of formal equality and

[486] See: *Fourie* supra 358.
[487] Ibid para 3.
[488] Ibid at 101.
[489] Ibid.
[490] Ibid.

> social inclusion of selected groups into the existing institutions and norms. As a result, although successful in extending rights, they tend to be more inclu]sive than transformatory.[491]

This highlights the contrast between transformative and non-transformative approaches. A transformative approach aims to dismantle established norms and institutions, whereas a non-transformative approach, exemplified by *Fourie*[492], focuses on integrating specific groups into these existing frameworks. Furthermore, a decolonial approach differs from a transformative one in that the former emphasises the need to dismantle prevailing norms and institutions through African-centered perspectives and epistemologies. In contrast, the transformative approach seeks radical change without sufficiently promoting systems rooted in Africa, developed by African scholars and communities. Thus, the differentiation between transformation and decolonisation suggests that the decolonial approach can enhance the process of transformation. This distinction is further emphasised by Albertyn, who asserts that:

> The idea of transformation is a politically and legally contested space in which the possibilities of substantive equality/transformation are limited by 'inclusionary' approaches and remedies or bolstered by those that are truly 'transformatory'. One would thus expect transformatory claims for social, cultural or political recognition, at minimum, to dislodge the dominant and systemic cultural and social norms and stereotypes that suppress and subordinate unequal groups, and to engage in the creation of new norms of equality.[493]

It is crucial to recognise this distinction, as it provides a rationale for the adoption of the concept of decolonisation in this dissertation. Ultimately, the argument is not only that any proposed solution or approach must align with the values and rights enshrined in the Constitution, but that these also need to be read through the lens of African values and value systems. This should not be a difficult task as some courts have throughout the years aimed to see values through an African lens. For example, in *King N.O. v De Jager*[494], a case discussed in chapter 7 again, the court emphasised that it is important

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[491] Cathi Albertyn 'Substantive Equality and Transformation in South Africa' (2007) 23 *SAJHR* 253 at 272.
[492] Ibid.
[493] Albertyn op cit note 491 at 257.
[494] *King N.O. v De Jager* [2021] ZACC 4 para 202.

that when courts are deciding a matter, they should seek to reach an outcome that not only promotes equality but also complements Ubuntu values. Basically, the call for the decolonisation of culture in this dissertation is a call for culture to be in line with the values of the Constitution (including those not expressly stipulated in the Constitution such as Ubuntu) such as human dignity, equality and freedom. It is now important to ponder on the tenets of a decolonised culture.

5.1.3.2. The tenets of a decolonised culture

Bennett captures the fundamental nature of cultural decolonisation:

> Customary law is supposed to develop spontaneously in a given legal community. However, during colonialism and apartheid it became alienated from its community origins. The result was that the term "customary law" had 'three quite different meanings: the official body of law employed in the courts and by the administration (which, he points out, diverges most markedly from actual social practice); the law used by academics for teaching purposes; and the law actually lived by the people.[495] (emphasis added)

I have acknowledged in this dissertation that the idea of African culture completely being devoid of patriarchy and anti-queer sentiments before colonialism cannot be entirely supported, as little evidence exists that African countries did not experience patriarchy and anti-queer attitudes. However, Buckel argues that 'many African countries did not see gender as a binary in the way that their European colonisers did, nor did they correlate anatomy to gender identity. In no African country prior to colonisation do we see any persecution of LGBT individuals because of their sexuality, nor any anti-LGBT laws'.[496]

One must consider the characteristics of a decolonised culture. Such a culture would involve dismantling dominant Western Christian values that acknowledge only two sexes, male and female, while marginalising all others. This consideration is crucial given the influence of Christianity on people's lives in South Africa during and after colonialism. A

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[495] See: William T Bennett *A Sourcebook of African Customary Law for Southern Africa* (1991).
[496] Leah Buckel 'African sexuality and the legacy of imported homophobia' 1 October 2020, available at *https://www.stonewall.org.uk/news/african-sexuality-and-legacy-imported-homophobia#:~:text=Many%20African%20countries%20did%20not,nor%20any%20anti%2DLGBT%20laws,* accessed on 15 February 2025.

decolonised culture would be dynamic, adapting to the evolving societal landscape to reflect the needs, lived experiences, and diverse cultures of modern African communities. This is where the concept of living customary practices becomes relevant, as will be elaborated below. Overall, my argument is that the process of decolonisation would promote the reproduction of inclusive and multiple masculinities by prioritising African values over Western Christian values during Ulwaluko.

This process would enable a perspective on Ulwaluko that is rooted in African traditions, particularly the concept of Ubuntu, which emphasises the interconnectedness of individuals and their reliance on one another for existence and well-being. Moreover, it is important to recognise that the distortion of African culture has also been perpetuated by the infiltration and exploitation of traditional leaders on the continent. Consequently, the decolonsation of culture often faces resistance from these leaders. Therefore, the process of cultural decolonisation must also entail the dismantling of Western forms of teaching and their replacement with African cultural perspectives, as articulated by African scholars. This is further discussed in chapter 6 when I discuss the decolonisation of masculinities.

Furthermore, a decolonised Ulwaluko would recognise the dynamic nature of society, understanding that laws, cultures, and traditions must evolve to reflect the needs and realities of modern life. As contemporary society increasingly acknowledges and safeguards the rights of queer people, a decolonised Ulwaluko would similarly embrace this inclusivity. Finally, a decolonised Ulwaluko would not be confined to a singular sexual identity, aligning with the Constitution's recognition of diverse sexual orientations and its prohibition against discrimination based on sexual orientation.[497]

It is notable that although some rulings from South African courts may have dealt with cases that address decolonisation, the term itself is seldom employed; instead, the focus remains on transformation. Examples of his include *City of Tshwane Metropolitan Municipality v AfriForum,*[498] dealing with the renaming of street names and the role this has on the colonial-apartheid history of South Africa, and *AfriForum v University of the*

[497] Section 9 of the Constitution.
[498] *City of Tshwane Metropolitan Municipality v Afriforum* [2016] ZACC 19.

Free State,[499] where the court had to determine whether the discontinuing of Afrikaans as a primary medium of instruction at the University of Free State passed constitutional muster. These cases can be said to be decolonial because they addressed the removal of colonial-apartheid symbols. This should also not be seen as if I am saying that the mere removal of symbols alone is decolonial in nature. However, it is part of the broader decolonial journey.

In addition, there are cases that are directly decolonial in their approach, but also seldom use the word decolonisation. These cases seek to decolonise cultural practices in South Africa. For Ulwaluko to evolve in a manner that reflects the interests of all indigenous South Africans, regardless of sexual orientation and gender, it is essential to embrace decolonisation to reform cultural practices, particularly those associated with Ulwaluko. This is necessary to dismantle certain colonial influences on how Africans see gender and gender relations, and this is why this dissertation prefers the concept of decolonisation over transformation.

It is important to reiterate that the claim is not that African culture, free from colonial influences, is entirely praiseworthy and without flaws; instead, it emphasises the valuable insights that can be drawn from other African countries that celebrated diversity and oneness prior to colonial rule, where individuals coexisted peacefully despite their differences. Although differences existed, African countries addressed these differences in their own unique ways, whereas colonialism introduced a new framework for responding to these disparities, which institutionalised certain forms of discrimination. It is important to recognise that colonialism has significantly influenced African views on culture, gender, and equality. The concept of decolonisation promotes the idea of addressing African challenges through indigenous methods, acknowledging that while these approaches may not be perfect, they are fundamentally grounded in the continent's own realities.[500] This is supported by Himonga and Diallo:

> The first premise is that decolonisation cannot be achieved without the development of indigenous systems of law through legal education. In essence, the development and survival

[499] *AfriForum v University of the Free State* [2017] ZACC 48.
[500] Himonga & Diallo Op cit note 472 at 3.

> of living customary law cannot be divorced from the decolonisation of law in Africa. The second premise is that living customary law as a concept of law represents a move away from the colonial (and apartheid) heritage of the distortion of customary law. This makes this system of law the appropriate basis for, and object of, decolonisation of law in comparison with its counterpart, official customary law. The third premise is that living customary law has a distinctive character of its own, which requires special consideration for the purposes of teaching law in a decolonised context.[501]

Essentially, the development and adoption of systems that are African-based, from African people, their location and experiences, is the first step towards decolonisation. However, this is not just a call for the blind adoption of African-based systems, it is a call for African-based systems that are based on the perspectives of communities that are forever changing. Basically, it is a call for attention to living law or living customary law. The idea that in order for decolonisation to take place, there is a need for customary law to regain its prominence, to be the main system of law and not just customary law, but living customary law, which is forever changing to suit the needs of the ever-changing communities. The following discussion explores the concepts of living and official customary law.

5.2. Official Customary law vs Living Customary Law

Customary law existed and was practised without restriction before the colonial era.[502] It was unwritten and passed from generation to generation orally.[503] Morudu and Maimela argue that the most prominent type of customary law was the rulings passed by the monarch in which their orders and judgments made the law and amended existing laws.[504] According to Ndulo:

> The law before colonialisation in most African states was essentially customary in character, having its bases in the practices and customs of the people. The great majority of people conducted their personal activities in accordance with and subject

[501] Ibid.
[502].Ibid.
[503] Ntebo L Morudu & Charles Maimela 'The indigenisation of customary law: Creating an indigenous legal pluralism within the South African dispensation: possible or not?' (2021) *De Jure* 54 at 56
[504] Ibid.

> to customary law. 'African customary law' does not indicate that there is a single uniform set of customs prevailing in any given country.[505]

The implication of Ndulo's remarks is that law during colonisation was based on the communities' perception of what was right and wrong, and the community striving for harmony. Same with culture. The fate of customary law changed when the British took over in 1806. From this point forward, Morudu and Maimela argue that:

> The current colonial power confirmed the Roman-Dutch law already operating in the Cape from 1600s, as the general law of the land, for that system was deemed to be suitably "civilised", unlike customary law.[20] Roman-Dutch law as influenced by English law is what makes up common law, as currently observed in South Africa.[506]

Throughout colonialism and apartheid, customary law received less recognition as a legitimate legal system compared to common law and Roman-Dutch law.[507] Its only recognition by the state occurred primarily in conjunction with traditional leaders, utilised to advance the colonial objectives of segregation and population control, a practice referred to as indirect rule.[508] Consequently, official customary law was infiltrated and distorted to align with western ideas and the interests of the colonial administration.[509]

Morudu and Maimela argue that customary law gained a subservient status to legal systems of the colonisers.[510] The declaration of the Union of South Africa further complicated things for customary law as the separation of South Africa into provinces and the allocation of various traditional leaders led to 'a system of confusion and complexities in terms of court application and interpretation because of the fragmented system of customary law'.[511] Furthermore, with regards to how customary law plays out during apartheid, Morudu and Maimela suggest that:

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[505]. Muna Ndulo 'African Customary Law, Customs, and Women's Rights' (2011) *Cornell Law Faculty Publications* 87 at 187
[506] Morudu & Maimela op cit note 503 at 57.
[507] Ibid.
[508] Ibid.
[509] Ibid.
[510] Ibid.
[511] Morudu & Maimela op cit note 503 at 58.

> During the advent of apartheid, the systematic oppression of Black indigenous people of South Africa augmented and it also extended to their legal regimes. Customary law was only recognised under a legal exception. This was the apartheid government form of cultural segregation, through enacting of the Bantu Authorities Act 68 of 1951, power was centralised under the tribal rulers, who controlled land and indigenous people, where the tribal ruler was subject to state control and authority. Section 4(1)(d) of the Bantu Authorities Act stated that.
>
> > "A tribal authority shall, subject to the provisions of this Act - generally, exercise such powers, and perform such functions and duties, as in the opinion of the Governor-General fall within the sphere of tribal administration as he may assign to that tribal authority." (footnotes omitted).

This reveals that customary law during apartheid was infiltrated and distorted in order to further push the colonial-apartheid agenda. It was degraded and given lesser status. Indigenous people practised it with restriction and at times supervision. Consequently, it can be argued that during apartheid, indigenous people only practised customary law insofar as it was allowed by the apartheid rule. As a result, the customary law that was practised, applied and later written to be law was based on customary law that did not represent the culture, lived realities and location of the indigenous people.

In contemporary South Africa, section 1 of the Recognition of Customary Marriages Act defines customary law as 'the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples'.[512] Customary law originates from social practices that are recognised as binding by the community, and Ulwaluko as a custom is part of the broader system of customary law.[513] Although a significant number of South Africans adhere to customary law, the regulations or norms governing individuals' lives differ among various communities, ethnic

[512] Section 1 of the Recognition of Customary Marriages Act.
[513] Elena Moore & Chuma Himonga 'Living Customary Law and Families in South Africa'(2015) available at *https://ci.uct.ac.za/sites/default/files/content_migration/health_uct_ac_za/533/files/living%2520customary%2520law%2520and%2520families%2520in%2520South%2520Africa.pdf,* at 6, accessed on 02 January 2024.

groups, and provinces.[514] Osman defines official customary law as 'versions of law found in legislation, precedent and books'.[515] Whereas, Maimela and Maunatlala define living customary as follows:

> Living customary law is used to denote the practices and customs of the people in their day-to-day lives and is customary law which emerges from what people do, or more accurately – from what people believe they ought to do, and not from what a class of legal specialists considers they should do. Accordingly, living customary law refers to the original customs and usages of African indigenous people. The unique character of living customary law is that it is a system that is consensus-seeking and is accountable to the people to whom it applies.[516]

When South Africa adopted a Constitution in 1996, it recognised the 'state' and customary law, making South Africa a pluralist state.[517] Section 211(3) of the Constitution stipulates that 'the courts must apply customary law, when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law'.[518] However, the Constitution neither mentions the two systems of customary law nor differentiates between them.[519] This is problematic as some courts have applied living customary law, while others applied official customary law thus leading to the inconsistent application of customary law.

It is important to now turn on how the courts have applied official and living customary law, and the implications for indigenous people. *Mabena v Letsoalo*[520] exemplifies the necessity for courts to recognise and apply living customary law. The court contended that culture is capable of evolving in response to changing economic and gender dynamics, especially within the context of urban households led by women.[521] This

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[514] Ibid.
[515] Fatima Osman 'The Consequences of the Statutory Regulation of Customary Law: An Examination of the South African Customary Law of Succession and Marriage' (2019) 22 *PER / PELJ* 1 at 11.
[516] Charles Maimela & Kgopotso Maunatlala 'The implementation of customary law of succession and common law of succession respectively: With a specific focus on the eradication of the rule of male primogeniture' (2020) *De Jure Law Journal* 36 at 37.
[517] The Constitution op cit note 308.
[518] Section 211 (3) of the Constitution.
[519] Morudu & Maimela op cit note 503.
[520] See: *Mabena v Letsoalo* 1998 2 SA 1068 (T).
[521] Ibid para 1070.

transformation enabled a woman to legitimately consent to a customary marriage and to negotiate and secure lobola on behalf of her family. In this instance, the court utilised living customary law to adjudicate a matter related to lobola.[522]

Ozoemena argues that the courts' acceptance of official customary law leads to injustices and outcomes that fail to reflect the needs, culture, and realities of the individuals involved in the case.[523] A pertinent example of this are the three *Mthembu v Letsela*[524] cases where the court had to determine whether the decision to exclude the appellant from inheriting her father's intestate estate due to her being a woman and her mother not being married to her father. The court had the opportunity to declare that the principle of male primogeniture is unconstitutional. However, it declined to do so, holding that:

> To strike down the rule would be summarily to dismiss an African institution without examining its essential purpose and content. "Decisions like these can seldom be taken on a mere handful of allegations in a pleading which only reflects the facts on which one of the contending parties relies", per Hefer JA in Minister of Law and Order v Kadir 1995 (1) SA 303 (A) 318 H.[525]

The problem with the above decision is well articulated by Ozoemena:

> The three *Mthembu v Letsela* judgments demonstrate the persistence of legal conservatism even after the Constitution had come into force. The judgments depict the initial approach of the courts to customary law with their strict and narrow interpretation with little attention to the changes brought about by the Constitution – particularly the prohibition of unfair discrimination in s 9 of the Constitution.[526]

In *Alexkor Ltd v Richtersveld Community*[527] (the first case to recognise customary law) the court reiterated section 211(3) of the Constitution to hold that customary law now enjoys greater status in South African law and is no longer measured against common law, but the Constitution:

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[522] Ibid.
[523] Rita Ozoemena 'Living Customary Law: A Truly Transformative Tool?' (2014) 6 *Constitutional Court Review* 147 at 149.
[524] *Mthembu v Letsela* [2000] ZASCA 181.
[525] Ibid para 47.
[526] Ozoemena op cit note 523.
[527] *Alexkor Ltd v Richtersveld Community* [2003] ZACC 18 para 50.

> 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.[44] Its validity must now be determined by reference not to common law, but to the Constitution.[45] 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.[528]

This shows that customary law now enjoys the same status as other systems of law, and is only accountable to the Constitution. As a result, courts are obliged to apply it. However, due to the distortions of colonialism and apartheid, and the adoption of rigid customary law practices, customary law has not developed that much, which has led to courts applying it inconsistently. The argument that the Constitution should be seen as a living document is a suggestion that all laws must be living in order to pass constitutional muster.

Despite the Constitutional Court's recognition of living law, courts generally seem hesitant to implement living customary law, which, as will be elaborated below, supports my assertion that embracing living customary law represents a decolonial strategy aimed at fostering African values. For instance, in *Bhe v Khayelitsha Magistrate,*[529] the court had the opportunity to declare the principle of male primogeniture unconstitutional, thereby aligning customary law with the Constitution. However, in a surprising turn of events, the court opted to substitute the customary law rules of succession with the common law rules governing intestate succession.[530] This is well-captured by Albertyn when she critiques the *Gumede (born Shange) v President of the Republic of South Africa* case. Albertyn contends that the Court:

> Misses another opportunity (after Bhe) to engage the idea of living law. In deciding 'how' to harmonise customary law with the Constitution, the Court elects not to develop living

[528] Ibid.
[529] See: *Bhe v Khayelitsha Magistrate* [2004] ZACC 17.
[530] Ibid.

customary law to remove the marital power, but rather to include ‘old order’ customary marriages under the 1998 legislation.[531]

This reveals how the adoption of official customary law leads to results that the parties do not live by or even recognise. Fortunately, in the *Shilubana v Nwamitwa,*[532] the Constitutional Court applied living customary law to further develop customary law regarding chiefly succession, aligning with the Valoyi community's decision to promote gender equality principles as articulated in the Bill of Rights by appointing a woman as hosi. This once again highlights the fact that the values and rights in the Constitution have the potential of facilitating the decolonisation of culture and, in particular, the values, most of which form part of the values that indigenous people live by under the umbrella of Ubuntu, a concept discussed in chapter 6. This discussion raises important points about the need for customary law to be living, and thus consistent with the Constitution. The implications of applying official customary law are that the parties receive unjust outcomes that neither them nor their communities apply in their everyday life.

A good example of a case where the court did an injustice to the parties in a matter by applying fixed ‘official customary law’ rules is *Matlala v Dlamini.*[533] Here, the high court relied on precedents from *Fanti v Boto*, which pertained to Xhosa customary law, despite neither of the parties in the *Matlala* case being Xhosa. *Matlala*[534] dealt with an order aimed at declaring marriage between the deceased son and the respondent as invalid. Consequently, it is argued that the respondent should not inherit from the deceased's estate due to the non-payment of the complete lobola amount.[535]

Surprisingly, the court referenced the *Fanti v Boto* case in its decision to dismiss the application, affirming that a valid customary law marriage had indeed taken place.[536] As a result, the court applied isiXhosa customs, despite the parties involved being of Bapedi

[531] *Bhe* supra 529 para 200.
[532] *Shilubana v Nwamitwa* [2008] ZACC 9 para 35.
[533] *Matlala v Dlamini* [2010] ZAGPPHC 277 at 6.
[534] Ibid.
[535] Ibid.
[536] Ibid.

and Swati descent, thus reaching a decision based on fixed customary law rules that neither parties in the case recognises or even apply in their everyday lives.

In *Mayelane v Ngwenyama,*[537] the Constitutional Court emphasised the need to apply the correct customary law rules. Here, the Constitutional Court examined the requirement for the first wife to provide consent in polygamous marriages and concluded as follows:

> This Court has accepted that the Constitution's recognition of customary law as a legal system that lives side by side with the common law and legislation requires innovation in determining its 'living' content, as opposed to the potentially stultified version contained in past legislation and court precedent. In order to adjudicate Ms Mayelane's claim we must determine the content of Xitsonga customary law regarding a first wife's consent to her husband's subsequent marriage.[538]

The court accordingly developed customary law by adding the consent of the first wife as a requirement for the validity of polygamous marriages.[539] This case is important as it shows that if courts interpret the law with the aim of radically transforming society, the outcome can be one that not only the parties recognise and apply in their daily lives, but one that is consistent with the purpose and content of the Constitution, and most importantly, the values of human dignity, equality and freedom upon which the Constitution is founded.

Section 39(2) of the Constitution mandates that courts interpret and develop customary law to ensure its alignment with the spirit, purport, and objects of the Bill of Rights.[540] In *Pilane v Pilane,*[541] the court reaffirmed that 'the true nature of customary law is a living body of law, active and dynamic, possessing an inherent ability to evolve in accordance with the changing circumstances of the people it governs'. Accordingly, living customary law is characterised by the real practices of individuals within a community and courts should not apply rules and practices that the parties and their communities do not live by

[537] *Mayelane v Ngwenyama* [2013] ZACC 14.
[538].Ibid para 43.
[539] Ibid.
[540] Section 39 (2) of the Constitution.
[541] *Pilane v Pilane* [2013] ZACC 3 para 34.

or recognise.[542] As the SCA states in the 2023 case *Tsambo v Sengadi*[543], 'when dealing with customary law, it should always be borne in mind that it is a dynamic system of law customs have never been static. They develop and change along with the society in which they are practised'. This emphasises that customary law, if not seen and applied as living law, has the potential of not only continuing the distortion of customary law but also violating the values and rights enshrined in the Constitution.

This legal framework is dynamic and continuously evolves alongside societal changes to reflect the needs, culture, and lived experiences of contemporary indigenous communities.[544] Unlike formal legal systems, this body of law is unwritten and has not been disrupted by colonial influences, as it remains adaptable to the shifting circumstances of society. For Moore and Himonga:]

> living customary law […] exists in the system of living norms that regulate the everyday lives of people who live according to customary law. This system of law is dynamic, evolving and context-specific as it adapts to changes in the beliefs and circumstances of the people it applies to.[545]

It is, however, important to acknowledge that merely adopting living customary law alone will not necessarily result in Ulwaluko producing multiple and inclusive masculinities that do not unfairly discriminate against Xhosa queer people. This is the reason why I also propose decolonising the masculinities that are currently reproduced by Ulwaluko, and propose the values of Ubuntu to also assist in this facilitation.

it is worth noting that living customary law prevalent among the populations of African states originates from customary law practised prior to the colonial era, yet it has evolved and been modified to suit contemporary conditions.[546] Consequently, it can be stated that the lives of individuals are continually reshaped by their own established norms and practices, which in turn evolve as society experiences transformation.[547] Official customary law pertains to the codified and static framework of customary law that was

[542] Ozoemena op cit note 523.
[543] *Tsambo v Sengadi* [2020] ZASCA 46 para 15 & 18.
[544] Ibid.
[545] Moore & Himonga op cit note 513 at 61.
[546] Ozoemena op cit note 523.at 148.
[547] Ibid.

altered during the colonial period, whereas living customary law denotes a dynamic system that evolves alongside the communities it governs. This encompasses the everyday beliefs and perspectives of the indigenous populations that it aims to regulate.

5.2.1. Living customary law and decolonisation

This dissertation prefers living customary law rather than official customary law for this reason. Hamnett asserts that:

> Customary law [which emerges] from what people do, or – more accurately – from what people believe they ought to do, rather than from what a class of legal specialists consider they should do or believe. The ultimate test is not, 'what does this judge say?' but rather, 'what do the participants in the law regard as the rights and duties that apply to them?[548]

Moreover, the principles derived from instances where courts have refrained from applying living customary law reveal that such judgments often result in injustice. This occurs because they rely on customary rules and principles that the parties involved neither recognise nor adhere to, just like the case where the rules of Xhosa people are applied to Vatsonga people.[549] I argued above that this is one of the cases that reveals how the application of rigid customary law rules without measuring them against the values of the Constitution results in an injustice for the parties in the case and the broader community that will be left with a precedent that they do not recognise or live by in their everyday lives. Consequently, this not only inflicts injustice upon the parties concerned, but also perpetuates the misrepresentation of customary law and the potential violation of the principles of the Constitution. Furthermore, it is evident from these cases that courts appear hesitant to develop customary law in alignment with the Constitution. In some instances, courts fail to differentiate between the two legal systems: official customary law and living customary law. This oversight leads to undesirable outcomes and exacerbates the uncertainties inherent in customary law. For instance, when a court opts to supplant

[548] Ian Hamnett 'Chieftainship and Legitimacy: An Anthropological Study of Executive Law in Lesotho' (1975) 10 at 316, as quoted by Himonga & Bosch 'The Application of Recognition of Customary Marriages Act: Problems Solved or Just Beginning' (2000) 17 *South African Law Journal* at 306.
[549] *Matlala* supra 533.

a customary law rule with a common law rule, it reflects a significant type of interpretation of customary law by the court.

In general, however, many courts implementing the customary legal framework are committed to developing customary law in accordance with the Constitution. Many cases interpret customary law in a manner that reflects the intentions of the communities from which the parties originate, taking into account their cultural beliefs and the specific issues at hand. These courts emphasise the dynamic and adaptable nature of customary law, which must evolve to meet the needs, cultures, and lived experiences of contemporary indigenous communities. Consequently, these courts will first assess the customary rule against the Constitution, followed by an examination of evidence from diverse sources to ascertain contemporary societal perspectives on the rule in question. However, the main idea is to ensure that customary law and culture are in line with the values, objects and purport of the Bill of Rights.[550]

Reliance on living customary law actively rejects the influences and distortions of colonial and apartheid systems by embracing adaptability in response to societal changes. When living customary law has been recognised by the courts, the results have been acknowledged and implemented by the involved parties and their communities in their everyday lives. Fundamentally, living customary law aspires to ensure that customary law and culture is fluid and ever-changing in order to effectively represent contemporary societies. Reliance on living customary law strives to embody the cultures, needs, and lived experiences of South Africa's indigenous populationfs. From this analysis, I maintain that living customary law possesses a decolonial character, and its judicial application, despite being overlooked, represents a decolonial initiative. This further emphasises the distinction between transformation and decolonisation. The concept posits that the culture and legal frameworks of the indigenous populations of South Africa ought to be interpreted in relation to their geographical context, needs, and lived experiences. This implies that neither law nor culture is static, as communities continuously evolve and adapt over time, reflecting their shifting needs, realities, and experiences.

[550] Morudu & Maimela op cit note 503 at 59.

Accordingly, while Ulwaluko has fallen under living law because it is unwritten, it has also presented some elements of official law by refusing to be fluid and moving with the ever-changing society: a society that now lives by a Constitution that prohibits unfair discrimination, inequality and violence against oneself. In contrast, the argument is that if living customary law is applied within Ulwaluko, then the custom can explore the potential of being fluid and changing with the ever-changing society in order to account for the needs, lived realities and experiences of contemporary Xhosa communities, and be consistent with principles of the Constitution. Neglecting this evolution may result in cultural practices that are disconnected from the needs, lived experiences, and realities of contemporary Xhosa communities, as well as practices that could infringe upon constitutional rights and IHRL.

Cultural practices and perceptions in South Africa require significant reform. To achieve this, prioritising decolonisation over mere transformation is essential, as decolonisation addresses the foundational colonial-apartheid influences that have distorted the culture of the indigenous populations. The integration of living customary law within South African institutions and judicial systems represents a substantial advancement toward cultural decolonisation. Various court cases in South Africa illustrate how living customary law can facilitate this process. In the subsequent chapter, I explore the ways in which decolonising masculinities and embracing the principles of Ubuntu can facilitate the development of inclusive and diverse masculinities within the tradition of Ulwaluko.

CHAPTER SIX

FOSTERING THE REPRODUCTION OF MULTIPLE AND INCLUSIVE MASCULINITIES THROUGH DECOLONISING MASCULINITIES AND UBUNTU VALUES.

The study of men and gender relations was not excluded from influences of the racial epistemology of conquest. This is the idea that any knowledge produced by Black people did not qualify as real knowledge. As a result, knowledge produced by African scholars, communities and activists was belittled and not given space for development. Consequently, the concept of masculinities as understood in South Africa has some Eurocentric influences stemming from colonialism and apartheid.[551] However, this is not the only problem with this field. Due to the non-development of the field of masculinities, masculinities today do not embody the values that underpin the Constitution, and a result, they tend to produce behaviour that similarly violates the rights enshrined in the Constitution. While it is generally argued that the decolonisation of culture can address some of the distortions caused by these historical contexts, it is equally important to note that this alone cannot effectively lead to the reproduction of multiple and inclusive masculinities. This is because the masculinities that are currently reproduced by Ulwaluko also have some Eurocentric influences, and they are problematic as they represent a hegemonic masculinity that sees a man as exclusively heterosexual, possessive, and powerful. Failure to change these masculinities will result in Ulwaluko perpetuating masculinities rooted in colonial and apartheid ideologies. These not only see and understand masculinity based on Eurocentric paradigms, but also as rigid and discriminatory, thus violating the values and rights that underpin the Constitution.

In this chapter, I argue that it is essential to decolonise masculinities manifest in Ulwaluko in order to end the reproduction of a hegemonic masculinity that exclusively recognises heterosexuality and excludes other sexual orientations, including that of Xhosa queer people. To do this, I outline the legal and non-legal methods by which masculinities can

[551] See: Morrel op cit note 16.

be decolonised and examine how the values of the African principle of Ubuntu, together with other values expressly stated in the Constitution, can contribute to this process and ultimately promote the reproduction of inclusive and multiple masculinities within the framework of Ulwaluko to ensure that the practice of Ulwaluko passes constitutional muster. This is an important argument as the Constitution now recognises different sexual orientations, which means that queer rights are now protected, and any violation of these rights must be justifiable.

6.1. The Decolonisation of Masculinities

Currently, most South Africans lack a clear understanding of masculinity and the underlying reasons for male behaviour.[552] For example, in many communities, gender-based violence is still viewed as an acceptable way for a man to 'discipline' his spouse, and traditional gender roles within households are often viewed as normal.[553]

In his call to decolonise masculinities in South Africa, Mfecane highlights the need to critically examine the theoretical framework for understanding the study of men and masculinities.[554] This should aim to ensure that such theoretical frameworks are relevant and responsive to the needs and lived experiences of contemporary communities.[555] In recent years, there has been a growing demand in South Africa to decolonise knowledge by challenging the prevailing dominance of epistemologies from the Global North and instead highlighting sources of knowledge from the Global South.[556] Mignolo and Walsh point to similar movements in Latin America, where decolonisation scholars have worked with local communities and grassroots organisations to develop innovative knowledge and educational approaches that honour the history and philosophy of indigenous peoples.[557] The motivation behind these collaborations is the recognition that knowledge

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[552] See: Malan van der Walt *South African men and their construction of masculinities in relation to women and homosexual men: A thematic analysis* (unpublished Honours thesis, University of Capet Town. 2017)
[553] Indiran Govender 'Gender-based violence – An increasing epidemic in South Africa' (2023) 65 *SA Family Practice* & Harrichurran 'Persistent gender roles in South Africa deprive women of leisure time' (2021), available at *https://www.wider.unu.edu/publication/persistent-gender-roles-south-africa-deprive-women-leisure-time*, accessed on 10 January 2025.
[554] Sakhumzi Mfecane 'Towards African-centred theories of masculinity' (2018) 44 *Journal of African Studies* 291 at 292.
[555] Ibid.
[556] Ibid.
[557] See: Walter D Mignolo, & Catherine E Walsh *On Decoloniality: Concepts, Analytics, Praxis*. (2018).

production goes beyond academic institutions and is deeply rooted in the everyday lives of ordinary people.[558] Consequently, a fundamental aspect of decolonising knowledge about men and masculinities is for researchers to engage with the lived realities, needs and experiences of people in their communities.[559] This is essential to the development of theories and knowledge that truly reflect and address the concerns of the average citizen.[560] This is similar to the discussion in chapter 5 regarding the adoption of living customary law by the courts, government and the indigenous communities.

Mfecane notes that many of the contemporary theories used to address societal issues related to male violence come from the Global North.[561] In particular, concepts such as 'toxic masculinities' and 'hegemonic masculinities' have their roots outside of Africa.[562] Therefore, he argues that it is crucial to initiate the decolonisation of knowledge about men and gender studies by committing to the development of Africa-centred knowledge systems.[563] These systems should account for male behaviour through frameworks created by Africans in collaboration with the communities these theories are intended to represent. Mfecane proposes that:

> We can then develop policy interventions and gender transformation programmes that are aligned with local understandings of masculinities and gender-based violence, and also partner with indigenous populations to educate those working in black African communities – researchers, policy-makers, students, media, and activists – about African cultures and epistemologies to ensure that they have common understanding of the issues and dynamics at play. This will result in accurate reporting and analysis of our social issues and furthermore give ordinary people a voice in the academy, media, and policy development platforms.[564]

Fundamental to the decolonisation of masculinities is the need to acknowledge that while there are Eurocentric influences that must be undone, it is equally important to ensure

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[558] Ibid.
[559] Ibid.
[560] Ibid.
[561] Ibid 293.
[562] Sakhumzi Mfecane 'Decolonise Men and Masculinity Studies to end Gender-Based Violence' 13 September 2019, *Just Gender*, available at *https://www.justgender.org/decolonise-men-and-masculinity-studies-to-end-gender-based-violence/*, accessed on 22 February 2025.
[563] Ibid.
[564] Ibid.

that we cannot adopt African-based theories based on the past of the African people without interrogating that past, as not all of it was positive. Essentially, the idea is that there is a need to understand masculinities in the context of the African people's story, their history, location and experiences, however, this should not be blindly followed. This is why there is a strong argument for the adoption of living customary law in this dissertation.

Similarly, Heleta argues that decolonising masculinities in South Africa requires the creation of a knowledge framework that authentically reflects the culture, ways of life and geographical context of the indigenous population.[565] This initiative aims to promote alternative knowledge systems that have their origins and relevance in South Africa.[566] While Eurocentric frameworks have historically dominated discourse on men and gender relations, often reinforcing patriarchal and sexist ideologies, there is a growing demand for knowledge systems rooted in African perspectives.[567] This shift requires a reassessment of men's and gender studies within South Africa's unique social, cultural and political landscape.[568] This can take place in multiple institutions, including education institutions, traditional institutions and the courts, as discussed further below.

6.1.1 Educational institutions

There is a lack of awareness of the impact of masculinities in these contexts, highlighting the critical importance of education and awareness in our efforts to decolonise notions of masculinity. Savo asserts that:

> Decolonised curriculum must be relevant, appropriate, and meaningful for local, national, and continental settings as well as for functioning in our complex, interconnected, and unjust world. The curriculum must strike the right balance that considers the past and current injustices, structural domination, oppression, and exploitation in South Africa, Africa, and the world, as well as the skills and knowledge needed to overcome these in the future. Moreover,

[565] Savo Heleta 'Decolonizing knowledge in South Africa: Dismantling the "pedagogy of big lies"'(2018) 40 *Ufahamu* 46 at 57.
[566] Ibid.
[567] Ibid.
[568] Ibid.

> a decolonised curriculum needs to "reconstruct the African story based on its past, in a manner that does not seek to engage in a feel-good, nationalist historiography but challenges the prevailing climate of falsehoods, distortions and outright lies" about the continent and its peoples.[569]

Heleta therefore suggests that educational institutions play a crucial role as they are the primary venues for knowledge creation.[570] This is a similar argument that I propose in chapter 5. Nevertheless, this is a challenge as the South African education system itself is heavily influenced by Eurocentric paradigms.[571] Heleta thus raises the question of how such a system can effectively support the decolonisation of research on men and gender relations.[572]

Consequently, the decolonisation of masculinities in South Africa must begin with the decolonisation of the education system. Even if the student activists' calls for the decolonisation of higher education are not being implemented, it is important to understand that the call for the decolonisation of knowledge remains more urgent than ever.[573]

In order for the study of men and gender relations in South Africa to fully take into account the needs and realities of South Africa's indigenous population, a bottom-up approach is proposed.[574] In this bottom-up approach, the curriculum will be changed from as early as primary school where young children will be taught about men and gender relations from an African-centred perspective. This then requires teachers to also be roped into this curriculum change so that they can also understand what they are teaching. In doing so, we not only raise awareness of men's behaviour in society but also creating an African-based approach to men's and gender studies. This is relevant because, as things stand, the study of men and gender relations in South Africa continues to be a topic for psychology, philosophy and health students, while other students do not even know or

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[569] Ibid at 59.
[570] Ibid.
[571] Ibid.
[572] Ibid.
[573] See: Gudani Tshikota 'Racial epistemology at a time of a pandemic: A synopsis of South Africa's persisting inequalities through the lens of the #feesmustfall #FreeDecolonisedEducation' (2021) 15 *Pretoria Student Law Review* 25.
[574] Heleta op cit note 565 at 35.

understand what these concepts mean. However, this is a very challenging task because African knowledge has been neglected and to some extent rejected as a knowledge system.

6.1.2 Traditional sphere/initiation schools

Investigations conducted by various scholars have revealed that many initiation schools are run by older traditional men.[575] It is widely recognised that a significant number of these men continue to grapple with the concept of gender equality, often perceiving anything that deviates from their rigid traditional views as inferior or defiance.[576] Any effort to reform Ulwaluko from within must confront this perspective. As noted above, it is necessary for customary law to evolve in order to meet the demands of a dynamic African society. It is thus essential for the Provincial Initiation Coordinating Committees (PICCs), established in terms of the Customary Initiation Act, to regulate and play an oversight role on traditional circumcision, to provide some form of education or effective oversight to the facilitators of initiation schools.[577] If these facilitators are educated about values of the Constitution as a living document, the need for culture to be seen through the lenses of living law and the importance of decolonisation, they will be better equipped to convey this knowledge to the initiates, who hold them in high regard. However, it is important to acknowledge that such initiatives may face resistance, as change can often be challenging. In such instances, implementing these progressive measures should be made a prerequisite for the operation of initiation schools.

While the Customary Initiation Act requires that facilitators of initiation schools must register before operating, there has been a lack of follow up and oversight as the custom continues to be operated illegally.[578] There is a need for enhanced oversight by the PICCs. I propose that communities be engaged in workshops to emphasise the

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[575] Sello Martin Blase Mohlaloka, Lynette Jacobs & Nita Corene de Wet 'Insights from traditional initiation teachers (*Basuwe*) on the influence of male traditional initiation (*lebollo*) on the behaviour of schoolboys' (2016) 34 *Perspectives in Education* 19 at 20.
[576] Cathi Albertyn 'The stubborn persistence of Patriarchy? *Gender equality and cultural diversity in SA* (2009) 2 Constitutional Court Review 165 at 167.
[577] Section 11 of the Customary Initiation Act.
[578] Section 26 of the Initiation Act.

importance of registering initiation schools and to inform them on how and where to report bogus institutions. I contend that if the registration process is made more stringent and mandates that all facilitators undergo workshops, there is potential for reforming the custom. Although some progress may be occurring, the current state of Ulwaluko indicates that existing workshops are not sufficiently effective. This highlights the necessity to reevaluate the content and curriculum of these workshops, underscoring the importance of living law and decolonisation.

This requires all role players, including traditional leaders, gender activists, scholars, the PICCs, researchers and the community itself to convene workshops and round tables and discuss strategies that can facilitate the development of indigenous knowledge about men and gender that will ensure compliance with the Customary Initiation Act. This will further enable discussions on men and gender studies to take place during Ulwaluko and other traditional events to promote a collective awareness of the importance of multiplicity and inclusivity in a country that is so diverse.

6.1.3 The courts.

It is vital to initiate or support research institutions that focus on decolonising perspectives on men and gender studies, raise community awareness of men and gender dynamics, and ensure that these concepts are integrated into our everyday interactions and institutions such as the judiciary. Accordingly, and as seen with the court cases that adopted living customary law discussed in chapter 5, the role of the court is very important in ensuring that there is compliance with the current Customary Initiation Act and that stricter penalties are imposed for non-compliance. This is an important point that I raise in chapter 3 with the discussion of the *Montsha*[579] case where the court allowed an illegal initiation School to continue because closing it would affect the initiates already admitted to the bogus school. This was an opportunity missed by the court to act against illegal or non-compliant initiation schools. As discussed further below, the courts can play a role in

[579] *Montsha supra 335.*

developing Ulwaluko in order to ensure that it represents the needs, lived realities and experiences of contemporary Xhosa communities.

It is important to highlight that in the past, African people had their own expressions of masculinity that despite being perfect, represented their needs, culture, location, lived realities and experiences. This is highlighted by Judge Dambuza:

> In the olden days, in some communities, when the time came, before going out to discuss the a 'boy's impending initiation with close male family members, the father would first discuss the matter privately with the boy's mother. Preparations for ukungena komkhwetha (the ceremony marking the start of initiation) would be a joint project between the parents of the prospective initiate assisted by family, friends and other members of the community. The women would cut the grass for the building of ibhoma, in some community women were responsible for the building of ibhoma (also known as ithonto or isuthu) as they were said to possess the skill necessary to tie the idobo grass tightly such that ibhoma would be warm during the cold winter months.[580]

Furthermore, the result of decolonising masculinities will be the establishment of a knowledge framework within men's and gender studies that recognises men not only as aggressors but also as victims. This is based on the understanding that society is in a state of constant evolution and that the social, cultural and political contexts surrounding masculinities are changing with it. Consequently, masculinities must be viewed as dynamic entities that adapt to the needs of contemporary communities.

In the context of Ulwaluko, decolonised masculinities, through teachings from facilitators and oversight from traditional leaders or an oversight institution to be created, will influence the rejection of the Eurocentric concept of hegemonic masculinity in favour of African-centred theories that will be created by African scholars in African and in collaboration with civil society and communities. This would promote the understanding that, given South Africa's diverse population, a range of masculinities should be represented. Consequently, the idea of a singular dominant masculinity within Ulwaluko,

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[580] Nambita Dambuza 'Womens' Parental Rights in Ulwaluko – A Parodox?' 24 April 2018 Public Lecture delivered at Rhodes University, available at *https://www.supremecourtofappeal.org.za/index.php/speeches-and-conferences/category/13-public-lecture?download=31:womens-parental-rights-in-ulwaluko-a-paradox*, accessed on 25 February 2025.

which perceives a man exclusively as a heterosexual figure while relegating others to a lower status, would be challenged. While imperative, the decolonisation of culture and masculinities alone may also fall short of ensuring that Ulwaluko reproduces multiple and inclusive masculinity. Consequently, it is important to ponder on how the values of Ubuntu can also assist in this reproduction.

Furthermore, decolonising masculinities will enable South Africans to recognise and understand that due to the fluid nature of masculinities, there is no singular form, but rather multiple expressions of masculinity. This will promote the development of multiple and inclusive masculinities that reflect and accept the diversity of South Africa, where different people hold different beliefs and values, as envisaged by the Constitution.

The implications of this discussion are that indigenous communities possess their own understandings of masculinity and gender dynamics. Throughout this dissertation, I have acknowledged that I do not claim these understandings, ideologies, and legal frameworks to be flawless. Rather, I contend that these indigenous perspectives are valuable as they originate from the communities themselves. Furthermore, I propose that if these African-centred or indigenous knowledge systems, along with their associated perceptions and laws, can be evaluated in relation to the values enshrined in the Constitution—Ubuntu being one of them, even if not explicitly mentioned—there exists the potential to cultivate diverse and inclusive forms of masculinity within Ulwaluko that aligns with constitutional principles.

6.2. Ubuntu values

The notion of Ubuntu, while present in academic literature and informal indigenous discussions, first entered South African formal discussions during the negotiations of the Convention for a Democratic South Africa (CODESA).[581] Gade argues that the principles of Ubuntu were instrumental in facilitating a peaceful transition from violence to a democratic society.[582] Subsequently, these principles were appropriately integrated into

[581] Christian BN Gade 'The Historical Development of the Written Discourses on Ubuntu' (2011) 30 *S. Afr. J. Philos*. 303 at 312.
[582] Ibid.

the Interim Constitution.[583] Specifically, section 251 (4) of the Interim Constitution articulates that 'these can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation'.[584] Therefore, the concept of Ubuntu was integral to the establishment of the interim Constitution.[585] It is, therefore, regrettable that this concept is not explicitly referenced within the final Constitution.[586] One of the primary arguments for the inclusion of Ubuntu in South African jurisprudence has been the need for the incorporation of values that resonate with the lived experiences, realities, and contexts of the indigenous population of South Africa.[587]

6.2.1. Historical overview of Ubuntu

While Ubuntu is widely accepted and implemented in various African countries, including Zimbabwe, Tanzania and Mozambique, its origins can be traced back to the Bantu communities across the sub-Saharan regions.[588] This historical significance is why Archbishop Tutu described Ubuntu as 'the gift that South Africa will give to the world'.[589] Although it is difficult to pinpoint the precise temporal origin of the term, its philosophical use can be traced back to the early 1980s, particularly through the contributions of Ramose and Tutu.[590] In its earliest application, the term was a tool to fight against the colonial-apartheid imposition of Western values and traditions and to ground the idea that there should be a set of values that speaks to the experiences, cultures and lived realities of Black people in order uproot the colonial-apartheid ideologies imposed on Black people.[591]

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[583] The interim Constitution op cit note 319.
[584] Ibid Section 251 (4).
[585] Koos Malan 'The suitability and unsuitability of ubuntu in constitutional law - inter-communal relations versus public office-bearing' (2014) *De Jure* 231 at 233.
[586] Ibid.
[587] Gade op cit note 581 at 318.
[588] Ibid at 304.
[589] Desmond Tutu *God has a dream: A vision of hope for our time. Cape Town: Africa* (2004) 25.
[590] Fainos Mangena 'Hunhu/Ubuntu in the Traditional Thought of Southern Africa' (2023) *Internet Encyclopedia of Philosophy, available at https://iep.utm.edu/hunhu-ubuntu-southern-african-thought/,* accessed on-3 September 2024.
[591] Ibid.

One of the key initiatives of South Africa's transition project, the Truth and Reconciliation Commission (TRC), was founded on the principles of Ubuntu.[592] The underlying idea was that the truth must be articulated to provide closure to those affected, while individuals who admitted their wrongdoing would receive pardons, facilitating harmony in the nation's journey toward a democratic framework.[593] The TRC attracted much criticism for its failure to establish mechanisms to ensure restoration and reparations. Scholars like Ramose argue that there can never be justice without restoration and reparations.[594] He contends that the values of Ubuntu would require restoration and reparations because in Africa a debt does not expire, meaning prescription does not apply.[595] I will refrain from delving deeply into this debate, as it is less relevant to the central argument of this dissertation. It is, however, important to note this criticism as the next discussion which explores the content and meaning of Ubuntu will draw from this criticism.

The interim Constitution does not provide a definition or elaborate on the concept of Ubuntu; it simply acknowledges it as a significant principle for the transition project.[596] Likewise, in one of the initial court cases in democratic South Africa, the *Makwanyane*[597] case, Ubuntu was incorporated into the country's legal framework as a core constitutional value. Although the majority judgment by Chaskalson J does not provide a definition for the term, the concurring opinion by Mokgoro J does shed light on the matter. This case was particularly significant as it addressed a fundamental right—the right to life—and examined the implications of the death penalty in relation to crime reduction. The majority judgment quoted from the Constitution and held that:

> The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge.

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[592] Headman S Ntlapo & Peter White 'Ubuntu Justice and the South African Truth and Reconciliation Commission: An African missiological response' (2022) 8 *STJ* 1 at 3.
[593] Ibid at 11.
[594] Mogobe B Ramose 'An African perspective on justice and race' (2001), available at *https://them.polylog.org/3/frm-en.htm*, accessed on 01 September 2024.
[595] Ibid.
[596] The interim Constitution op cit note 319.
[597] *Makwanyane* supra 362.

> These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation.[598]

In *Makwanyane,*[599] all the judges wrote concurring judgements, emphasising the significance of Ubuntu in their reasoning. Chaskalson, P, writing for the court initially concluded that while this principle primarily pertains to political reconciliation, it remains pertinent to the matter at hand. In alignment with the values of Ubuntu, our society should aspire to 'prevent crime... [rather than] to execute criminals merely for the sake of retribution'.[600] The court concluded that the death penalty is unconstitutional, as it violates the rights to life, dignity, and personal freedom and security.[601] This determination underscores a values-based perspective, asserting that the death penalty appears to undermine the fundamental rights and values that underpin South Africa's constitutional framework.

As there are multiple concurring judgments, to prevent redundancy, I will focus on those that contribute meaningfully to this dissertation. In this context, Langa J expresses his agreement with the majority decision but emphasises the necessity of providing an additional perspective on Ubuntu. He asserts that:

> An outstanding feature of ubuntu in a community sense is the value it puts on life and human dignity. The dominant theme of the culture is that the life of another person is at least as valuable as one's own. Respect for the dignity of every person is integral to this concept. During violent conflicts and times when violent crime is rife, distraught members of society decry the loss of ubuntu. Thus heinous crimes are the antithesis of ubuntu. Treatment that is cruel, inhuman or degrading is bereft of ubuntu.[602]

Similarly, Madala J contends that Ubuntu necessitates a reconciliation of societal interests with those of the individual, aimed at preserving law and order, however, it should not

[598] Ibid para 130.
[599] Ibid para 131.
[600] Ibid.
[601] Ibid para 141.
[602] Ibid para 255.

result in the dehumanisation or degradation of the individual.[603] In a similar vein, Mahomed J maintains that:

> The need for ubuntu expresses the ethos of an instinctive capacity for and enjoyment of love towards our fellow men and women; the joy and the fulfilment involved in recognising their innate humanity; the reciprocity this generates in interaction within the collective community; the richness of the creative emotions which it engenders and the moral energies which it releases both in the givers and the society which they serve and are served by.[604]

Finally, Mokgoro J elaborates on specific aspects of that ruling.[605] She asserts that when courts engage in the responsibilities assigned to them by section 35 of the Constitution and strive to interpret the Bill of Rights in a manner that advances the fundamental principles of an open and democratic society, they must refrain from the error of assuming that indigenous values are irrelevant or disconnected from this endeavour.[606] Mokgoro J asserts that courts ought to embrace a value system that is representative or widely accepted in South Africa, as this approach can contribute to the evolution of a distinct South African human rights jurisprudence.[607] She contends that

> Not only is the notion of ubuntu expressly provided for in the epilogue of the Constitution, the underlying idea and its accompanying values are also expressed in the preamble. These values underlie, first and foremost, the whole idea of adopting a Bill of Fundamental Rights and Freedoms in a new legal order. They are central to the coherence of all the rights entrenched in Chapter 3 - where the right to life and the right to respect for and protection of human dignity are embodied in sections 9 and 10 respectively.[608]

All these judgments are commendable, particularly as they emerge from one of the earliest cases following the end of apartheid. They underscore the imperative of safeguarding rights and ensuring they are not infringed upon without a legitimate basis. They also highlight the foundational nature of certain rights within the Bill of Rights, notably the right to dignity, which is integral to the values underpinning the Constitution

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[603] Ibid para 250.
[604] Ibid para 263.
[605] Ibid para 300.
[606] Ibid.
[607] Ibid.
[608] Ibid para 307.

and which is prioritised over other rights. Additionally, they advocate for the incorporation of African values, particularly those rooted in the principle of Ubuntu, whenever constitutional interpretation or legal decisions are made. For instance, Justice Sachs references the indigenous communities of the Basotho and Barolong, noting their historical rejection of violence as a means of retribution under the leaderships of Moshoeshoe and Montshiwa respectively.[609] All judgments assert that the death penalty is unconstitutional, as it contradicts the core values of the Constitution, including Ubuntu and dignity and several rights of the Constitution. While the judgments convey similar sentiments, the opinions of Mokgoro J and Sachs J are noteworthy due to their strong emphasis on the necessity of enforcing Ubuntu and African values, which are inherently part of the Constitution, despite the absence of explicit mention in the text.

6.2.2. The meaning and content of Ubuntu African Philosophy

Prior to delving into the content and significance of Ubuntu, it is essential to recognise that this concept encompasses multiple interpretations. Various scholars, political figures, and ordinary people have ascribed different meanings and values to Ubuntu. Even Tutu, a prominent advocate for Ubuntu who has implemented it across various platforms and initiatives, acknowledges that providing a definitive definition of Ubuntu poses a considerable challenge for scholars and writers.[610] One of the primary obstacles is the attempt to articulate Ubuntu through the lens of Western languages. In this regard, Tutu states that:

> Ubuntu is very difficult to render into a Western language. It speaks to the very essence of being human. When we want to give high praise to someone we say, “Yu, u nobuntu.”; “Hey, he or she has ubuntu.” This means they are generous, hospitable, friendly, caring, and compassionate. They share what they have.[611]

[609] Ibid para 378.
[610] Collium Banda ‘Ubuntu as human flourishing? An African traditional religious analysis of ubuntu and its challenge to Christian anthropology’ (2019) 5 *STJ* 203 at 206.
[611] Desmond Tutu *No Future Without Forgiveness.* (2009) 34.

Nevertheless, scholars have made efforts to articulate the concept of Ubuntu, as elaborated below.

Khomba et al argue that Ubuntu is fundamental to African Philosophy, emphasising the significance of existence through others.[612] Within the framework of Ubuntu, one's existence is intertwined with that of others, necessitating compassion and harmony in interpersonal relationships.[613] This concept encompasses ethical principles that reflect the essence of Africa, its people, and their diverse social behaviours.[614] Africans, who value communal ties, recognise that their existence is linked to that of their neighbours.[615] Consequently, Ubuntu advocates for the enhancement of these communal bonds while rejecting Eurocentric notions of individualism.[616] According to this concept, one's humanity is defined by the manner in which one engages with and treats others.[617]

In many indigenous languages, mistreating others is often expressed by stating that one is not human, as reflected in the Tshivenda expression ‘Ani muthu’ or the *Isixhosa* phrase ‘*awungomntu’*. This conveys that, within the framework of Ubuntu, the essence of humanity is determined by the way individuals treat one another.[618] The well-being, livelihood, and survival of an individual are intrinsically linked to the community and society at large.[619] Therefore, in the context of Ubuntu, it is imperative for individuals to conduct themselves in a manner that does not endanger others.[620] Moreover, the term Ubuntu originates from the Nguni maxim in Isizulu, which translates to ’a person is a person because of or through others’.[621] In Tshivenda, it is referred to as 'Vhuthu,' in

[612] James Kamwachale Khomba, Frans Vermaak & Daan G Gouws ‘Redesigning the Balanced Scorecard Model: An African Perspective’ (2011) 15 *Southern African Business Review*.1 at 4.
[613] Ibid.
[614] Ibid.
[615] Ibid.
[616] Ibid.
[617] Ibid.
[618] Ibid.
[619] Ibid.
[620] Ibid.
[621] Obuaku Igwe ‘Umuntu ngumuntu ngabantu’ (A person is a person because of other people): Reflections on student’s experiences of social isolation and the impact of a peer to peer mental health support group during covid-19 lockdown in South Africa. (2020) *Youth Voice Journal* 58.

Sepedi as 'Botho,' and in Zimbabwe as 'hunhu'.[622] The concept of Ubuntu, Khomba et al argue, embodies the ability within African culture to demonstrate dignity, compassion, humanity, mutual support, and reciprocity, all aimed at fostering and sustaining communities characterised by justice and mutual care.[623] Although Bantu languages have evolved over time, the fundamental meaning and essence of Ubuntu have remained largely unchanged.[624]

The values of Ubuntu advocate for a society founded on mutual respect for both individuals and the community, irrespective of one's circumstances, differences, or societal position.[625] Ubuntu emphasises not only the importance of harmony within the community but also the necessity for communal spaces to be utilised by all in a manner that is respectful and compassionate.[626] The concept of Ubuntu can also be linked to biblical teachings found in Luke 6:31 and Matthew 7:12, which convey the idea of treating others as one would wish to be treated.[627] This is relevant because it also aligns with the point made throughout this dissertation regarding the impact of Christianity on the culture of indigenous people and the way they understand and embody masculinities. Connell and Van Marle assert that Ubuntu serves as a guiding principle for all social and political relationships, promoting peace and social harmony by fostering a culture of sharing in communal life.[628]

In *Makwanye,*[629] Mokgoro J endeavours to define the concept of Ubuntu as follows:

> Generally, ubuntu translates as humaneness. In its most fundamental sense, it translates as personhood and morality. Metaphorically, it expresses itself in umuntu ngumuntu ngabantu, describing the significance of group solidarity on survival issues so central to the survival of

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[622] Mangena op cit note 590 & see; Nomonde Mnukwa 'Reigniting the spirit of ubuntu', available at *https://www.gov.za/blog/reigniting-spirit-ubuntu,* accessed on 20 February 2025, for various translations of the term Ubuntu in other indigenous South African languages.
[623] Ibid.
[624] Khomba et al op cit note 612 at 128.
[625] Igwe op cit note 621.
[626] Ibid.
[627] Bible study tool, available at *https://www.biblestudytools.com/bible-study/topical-studies/what-does-do-unto-others-mean.html#:~:text=%22Do%20unto%20others%20as%20you,(Matthew%207%3A12)*, accessed on 20 March 2024.
[628] Drucilla Cornell & Karin Van Marle 'Ubuntu feminism: Tentative reflections' (2015) 36 *Verbum et Ecclesia* 1 at 4.
[629] *Makwanyane* supra 362 para 308.

> communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation.

Many interpretations of Ubuntu encompass the concept of compassion.[630] Compassion itself is characterised in numerous ways. The definition presented by Straus and colleagues aligns with the principles of Ubuntu as articulated in the Interim Constitution and the *Makwanyane*[631] case. These scholars assert that.

> According to the Oxford English Dictionary, the word 'compassion' stems from the Latin 'compati', meaning 'to suffer with'. In the literature, there appears to be a broad consensus that compassion involves feeling for a person who is suffering and being motivated to act to help them.[632]

Lazarus characterises compassion as the emotional response elicited by another's suffering, accompanied by a desire to assist.[633] Similarly, Goetz et al describe it as the emotion that emerges upon witnessing another's pain, which subsequently inspires a wish to provide aid.[634] A common theme in these definitions is that compassion encompasses not only the emotional reaction to observing someone in distress but also the intrinsic motivation to alleviate that individual's suffering.

Mangena identifies approximately ten qualities or values that encapsulate the essence of Ubuntu African Philosophy.[635] These include humanness, gentleness, hospitality, empathy or the willingness to assist others, profound kindness, friendliness, generosity, vulnerability, resilience, and compassion.[636] For the purposes of the argument in this dissertation, I will focus exclusively on the values of compassion, humanness, and empathy or the willingness to assist others as these are the values that most scholars,

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[630] See the definition provided by Mokgoro J in the *Makwanyane* supra 362, and Clara Straus et al as referenced in the next footnote.
[631] Clara Straus et al 'What is compassion and how can we measure it? A review of definitions and measures' (2016) 47 *Clinical Psychology Review* 15 at 16
[632] Ibid.
[633] See: Richard Lazarus *Emotion and Adaptation* (1991).
[634] See: Jennifer L Goetz, Dacher Keltner & emiliana simon-thomas 'Compassion: An evolutionary analysis and empirical review'. (2010) 136 *Psychological Bulletin 351*.
[635] Mangena op cit note 590.
[636] Ibid.

activists and traditional leaders ascribe to Ubuntu. However, it is important to note that the concept of Ubuntu is also a contested concept and, as such, has no one meaning. What seems to be generic throughout various discussions of Ubuntu is that the concept aims to ensure that people live together in harmony regardless of their differences. Whether this is the case every time Ubuntu is applied is another discussion. What I can acknowledge however is that while Ubuntu, like any other concept, is not free from critiques, hierarchies and judgments by its practitioners and others, it is equally important to acknowledge Ubuntu's value.

The concept of humanness pertains to the criteria or attributes that define what it means to be human.[637] A significant aspect of humanness is morality.[638] It emphasises the importance of moral conduct as a distinguishing feature that separates humans from animals.[639] In the context of Ubuntu, a lack of moral integrity or ethical behaviour renders an individual unworthy of the title of being human. Therefore, humanness underscores the imperative to act rightly and to refrain from wrongdoing. Tutu asserts that humanness embodies 'moral consciousness and reason', which differentiates humans from animals, who are governed by instinct, or from inanimate objects that lack emotional depth.[640]

Finally, empathy, or the willingness to care for others, pertains to the ability to understand and share the feelings of another individual.[641] It involves the process of placing oneself in another person's situation, thereby perceiving their experiences from their perspective.[642] Empathy may be defined as follows:

> Empathy is often defined as understanding another person's experience by imagining oneself in that other person's situation: One understands the other person's experience as if it were being experienced by the self, but without the self actually experiencing it. A distinction is maintained between self and other. Sympathy, in contrast, involves the experience of being moved by, or responding in tune with, another person.[643]

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[637] Banda op cit note 610 at 206.
[638] Ibid.
[639] Ibid.
[640] Tutu op cit note 611.
[641] Helguide 'Empathy' available at *https://www.helpguide.org/relationships/communication/empathy,* accessed on 29 August 2024.
[642] Ibid.
[643] The Lesley Uninversity 'The Psychology of Emotional and Cognitive Empathy' available at

Like any contested concept, Ubuntu is not without critique. Banda asserts that a significant issue with viewing Ubuntu as synonymous with personhood or human identity lies in its inherent masculine and patriarchal tendencies, which can render Ubuntu 'exclusive and discriminatory'.[644] This raises broader questions regarding the application of Ubuntu's values in fostering inclusive and positive masculinities. Therefore, it is essential to highlight that the concept of Ubuntu is inherently dynamic and subject to evolution. As an African value, Ubuntu must be engaged in discussions surrounding living customary law and values, ensuring that it adapts over time to address the needs of modern society.

This is further highlighted by Simba when she asserts that:

> The feminist critique of ubuntu demonstrated that there is a challenge in dislodging male-centred tendencies and privileges when ubuntu is prescribed narrowly (or neutrally as is the case in the new Zimbabwean policy) as a series of observable ethics. The critique evidenced the point that the moral in education is often enacted along gendered and engendering lines, hence reproducing set binaries rather than challenging them. An expanded interpretation of ubuntu as a framework of encounter informed by a social script or isintu opens an opportunity to re-write the social script along the lines of a feminist ethics of care.

Moreover, Connel and Van Marle suggest that:

> Critics of ubuntu, including those who conflate ubuntu with outdated modes of social cohesion and hierarchies, make the mistake of reducing ubuntu to an ethical ontology of a purportedly shared world. What is missed in the conservative critique is precisely the activism inherent in making a difference. In this manner, ubuntu clearly has an ideal edge. There is no end to the struggle to bring about a human world and to become an individual person who makes a difference within it.[645]

These criticisms aid in the development of an Ubuntu concept that is aware of its limitations and constantly strives for flexibility. This brings up the topic of living customary

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https://lesley.edu/article/the-psychology-of-emotional-and-cognitive-empathy, accessed on 10 September 2024.

[644] Ibid.

[645] Cornell & Van Marle op cit note 628 at 2.

law once more. If Ubuntu is viewed as a concept that is dynamic and constantly evolving to appeal to its practitioners, then the criticisms are relevant in that sense. Furthermore, this dissertation has pointed out the shortcomings of Ubuntu, which is the reason the decolonisation of culture and masculinities, in addition to Ubuntu values, are offered as a remedy rather than Ubuntu alone.

The values inherent in Ubuntu suggest that, although Xhosa queer individuals are regarded as a minority and their rights are yet to be fully realised, they deserve to be treated with dignity. The value of compassion would encourage initiates to consider the effects of their actions on Xhosa queer people, thereby cultivating an atmosphere conducive to health and harmony. The underlying notion is that there exists a shared understanding among African communities that the manner in which one treats others reflects on their own humanity. Consequently, the mistreatment of Xhosa queer people would indicate that those who engage in unjust discrimination are at odds with the principles of Ubuntu, which should not be accepted as typical human conduct. Furthermore, as highlighted in *Makwanyane*, the essence of Ubuntu is intertwined with the right to dignity and other constitutional rights, indicating that any exercise of a right that contravenes Ubuntu is inconsistent with the Constitution. The proposition is that the custom of Ulwaluko can evolve through the values of Ubuntu to foster multiple and inclusive masculinities that embrace all sexual orientations. This is fundamentally a call for reconciliation and for the Xhosa community to coexist harmoniously, irrespective of their differences, in alignment with the values of Ubuntu, and the Constitution. However, it is worth highlighting that Ubuntu is also not a perfect concept, neither is living law. This is why the argument is that the broader goal is for the custom of Ulwaluko also to be reconciled with the values and rights of the Constitution. This is a long and difficult project that needs multiple inputs. It is therefore important to explore how courts can assist in that regard.

6.2.3. The application of Ubuntu by the courts

After *Makwanyane*, Ubuntu was applied by other courts, but increasingly rarely. It is interesting to note how an idea that is widely held by indigenous people is seldom used

by the courts, and in recent years, with the courts' infrequent reference to it, it has appeared to be non-existent. Why would a court in Africa not apply a concept that originated in Africa and was applied in one of the earliest cases in constitutional democracy? This seems to further emphasise the need for the decolonisation of the legal system. Below I traverse the few cases where Ubuntu has been applied.

In *Port Elizabeth Municipality v Various Occupiers,*[646] the Constitutional Court emphasised that Ubuntu is integral to the Constitution's fundamental values. The court recognised that the matter at hand necessitated a careful balancing of competing interests to uphold the rights and values established in the Constitution.[647] It was determined that both the PIE Act and the Constitution affirm the principle that individuals are interconnected and not isolated entities.[648] This is due to the fact that the values associated with Ubuntu are deeply rooted in the cultural fabric of the majority of South Africans, influencing the Constitution as a whole. Ultimately, the court underscored that:[649]

> Ubuntu combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern.[650]

Similarly, in *Dikoko v Mokhatla,*[651] dealing with the issue of a claim for damages against defamatory remarks made by municipal councillor, Mokgoro, J contends that Ubuntu is connected to the concept of restoring or maintaining the dignity of both others and oneself, this time in relation to compensatory measures. Mokgoro J asserts that:

> The primary purpose of a compensatory measure, after all, is to restore the dignity of a plaintiff who has suffered the damage and not to punish a defendant. A remedy based on the idea of ubuntu or botho could go much further in restoring human dignity than an imposed

[646] *Port Elizabeth Municipality v Various Occupiers* (2004 12 BCLR 1268 (CC) para 37.
[647] Ibid.
[648] Ibid.
[649] Ibid.
[650] Ibid.
[651] *Dikoko v Mokhatla* [2006] ZACC 10 para 68.

monetary award in which the size of the victory is measured by the quantum ordered and the parties are further estranged rather than brought together by the legal process.".[652]

Additionally, the concept of 'we are not islands unto ourselves' is articulated in *Pillay*[653] which was examined in a previous chapter. The Constitutional Court emphasised the idea of community, asserting that in Africa, one cannot exist in isolation from others, which is encapsulated in the IsiZulu saying 'umuntu ngumuntu ngabantu'.[654] This phrase reflects the principles of communal living and the interdependence among community members, supporting Gyekye's assertion that in Africa, an individual is unlikely to achieve success without the backing of others. This case illustrates the significant emphasis the court placed on Ubuntu in addressing a conflict between a right and an interest. The court's incorporation of Ubuntu values, particularly the principle of empathy towards others, played a crucial role in guiding its decision-making process.

It is evident that when courts invoke Ubuntu, they have also drawn upon other constitutional values such as human dignity, equality, and freedom. This suggests that the judiciary believes that when Ubuntu is complemented by the foundational values of the Constitution, the resulting judgments are more likely to be equitable. This forms the basis of my argument in this dissertation. I contend that Ubuntu, recognised and elevated by the Constitutional Court as a constitutional value, possesses the potential to address conflicts of interests or rights effectively. Ubuntu, as an African principle, provides a unique perspective on conflict resolution. Despite its imperfections, it represents an African theoretical framework that aims to challenge prevailing norms and institutions rooted in the colonial-apartheid legacy of South Africa, which have been distorted by the codification of customary law and the rigid adherence to cultural practices that undermine constitutional principles.

This dissertation accordingly recommends the application of Ubuntu's values in reconciling the tension between the right to culture that Ulwaluko is derived from, and the

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[652] Ibid. In a footnote, Mokgoro refers to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. This Act makes provision in section 21(2)(j) for an equality court to make an order that an unconditional apology be made if it determines under section 21(1) that unfair discrimination, hate speech or harassment has taken place).
[653] *Pillay* supra 315 para 53.
[654] Ibid.

right of Xhosa queer individuals to equality, human dignity and freedom and security of a person.

The existing portrayal of the Ulwaluko custom, in both structure and substance, reinforces a dominant model of masculinity that characterises men as solely heterosexual, possessive, and assertive, among other attributes. This paradigm encapsulates the traits of a heterosexual male and seeks to nurture initiates who will perpetuate this heteronormative ideology. As a result, Xhosa queer men who aspire to engage in this 'rite of passage', but do not necessarily identify as heterosexual, often experience marginalisation and exclusion from this cultural practice. This situation contradicts the principles of ubuntu and dignity upon which the Constitution is built, along with the rights to equality, dignity, freedom, and personal security. The argument is that while it is essential to maintain the purpose of Ulwaluko, it is equally important to eliminate the detrimental aspects associated with its heterosexual framework. This calls for a cultural re-evaluation of Ulwaluko to align it with the aforementioned rights.

Moreover, the first step in achieving this objective is to decolonise culture and acknowledge the relevance of living customary law, allowing customs such as Ulwaluko to be adaptable and dynamic in order to meet the needs of modern indigenous communities. Subsequently, it becomes crucial to decolonise notions of masculinity to establish an African-centered philosophy regarding the study of men and gender relations. Following this, the principles of Ubuntu, along with other constitutional values, should be utilised to address this conflict. Dignity, recognised as both a right and a value, is favoured by the courts and serves as a foundational principle of the Constitution, intersecting with numerous rights enshrined in the Bill of Rights. In the following chapter, I will explore the practical implications of this issue, specifically how courts would handle a case related to Ulwaluko.

CHAPTER SEVEN
THE ADJUDICATION OF DISPUTES UNDER ULWALUK

Ulwaluko, as a cultural practice, is rooted in the right to culture in sections 30 and 31 of the Constitution. However, these same sections that affirm the right to cultural expression also restrict cultural practices that infringe upon other fundamental rights. As previously mentioned, Ulwaluko is currently interpreted in a manner that reinforces a dominant form of masculinity, which defines a man as strictly heterosexual, possessive, and assertive. Those who challenge this representation are often viewed as rebellious and may face oppression from this prevailing masculinity. This situation creates a conflict between the right to cultural expression and the rights to equality, human dignity, and personal freedom and security. The decolonisation of culture and masculinities, along with the constitutional values, particularly Ubuntu, can facilitate the emergence of diverse and inclusive masculinities that acknowledge and respect the various sexual orientations protected by the Constitution. Nevertheless, as previously indicated, reconciling these rights is a long-term endeavour that needs various contributions. In this section of the dissertation, I examine how a court might resolve the conflict between the cultural rights associated with Ulwaluko and the rights of Xhosa queer individuals to equality, human dignity, and personal freedom and security. This will involve a discussion of the PEPUDA and its application in the context of Ulwaluko, and how courts would apply this Act in this instance, with due regard to the arguments I have made in this dissertation. As discussed further below, I deal with the hypothetical scenario is which a queer, Xhosa man challenges his exclusion from Ulwaluko.

7.1. The Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA)

PEPUDA is the relevant legislation as it would deal with a claim of unfair discrimination that does not does not involve legislation. The principle of subsidiarity requires that PEPUDA, the legislation established in terms of section 9(4) must be used.[655] As will be

[655] *Pillay* supra 315 para 39.

seen below, PEPUDA allows for the balancing of competing rights. Therefore, it is crucial to assess how the Equality Court would approach the task of reconciling rights to equality and culture. This section introduces PEPUDA and its operation.

The purpose of PEPUDA is to 'prevent and prohibit unfair discrimination and harassment; to promote equality and eliminate unfair discrimination; to prevent and prohibit hate speech; and to provide for matters connected therewith'.[656] Additionally, this Act 'endeavours to facilitate the transition to a democratic society, united in its diversity, marked by human relations that are caring and compassionate, and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom', Essentially, PEPUDA gives effect to the right to equality in section 9 of the Constitution.

PEPUDA encompasses a number of equality and dignity related offices. Section 6 of PEPUDA explicitly prohibits the state and individuals from engaging in unfair discrimination against any person, including on the basis of sexual orientation.[657] In addition, section 10 forbids the dissemination, publication, advocacy, and communication of harmful or hateful speech directed at any individual, which could reasonably be interpreted as intending to cause harm or incite hatred based on sexual orientation, gender, or sex, including intersex individuals.[658] Additionally, section 11 of PEPUDA asserts that no individual may subject another person to harassment, which encompasses queer people. This chapter will concentrate solely on unfair discrimination.

The operation of a claim of unfair discrimination is set out in sections 13 and 14 of the Act, read with the definitions in section 1. Essentially, it comprises of two steps: is there discrimination? and it is unfair?

[656] Purpose of PEPUDA, see: PEPUDA at 2.
[657] Section 6 of PEPUDA, read with the definitions in sections 1.
[658] Section 10 of PEPUDA.

7.1.1 is there discrimination?

In terms of section 13 of PEPUDA, the complainant must first set out a prima facie case that indeed the discrimination did occur. Whereafter the respondent will have to prove that the discrimination either did not occur, or does not fall under the grounds listed for prohibited unfair discrimination.

In proving discrimination, one must have reference to the definition of discrimination in section 1. This section defines discrimination as:

> any act or omission, including a policy, law. Rule, practice, condition or situation which directly or indirectly— (a) imposes burdens, obligations or disadvantage on; or (b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds;'[659]

7.1.2 Is the discrimination unfair?

If the discrimination is found on the basis of prohibited grounds, then in terms of section 13(2)(a) it will be deemed unfair, unless the respondent can prove the contrary.

In order to determine the fairness of the discrimination, section 14 establishes the following factors that must be considered:

(1) It is not unfair discrimination to take measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination or the members of such groups or categories of persons.

(2) In determining whether the respondent has proved that the discrimination is fair, the following must be taken into account:
   a. the context;
   b. the factors referred to in subsection (3);
   c. whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned.

[659] Section 1 of PEPUDA.

(3) The factors referred to in subsection (2)(b) include the following:

a. Whether the discrimination impairs or is likely to impair human dignity;
b. The impact or likely impact of the discrimination on the complainant;
c. The position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage;
d. The nature and extent of the discrimination;
e. Whether the discrimination is systemic in nature;
f. Whether the discrimination has a legitimate purpose;
g. Whether and to what extent the discrimination achieves its purpose;
h. Whether there are less restrictive and less disadvantageous means to achieve the purpose;
i. Whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to-
ii. address the disadvantage which arises from or is related to one or more of the prohibited grounds; or
iii. accommodate diversity.

Scholars such as Albertyn, Kok, and De Waal have written extensively on the application of section 14. Kok argues that section 14 (1) of PEPUDA 'mirrors section 9(2) of the Constitution and seems to create a complete defense to a claim of unfair discrimination'.[660] Then, section 14 (2) has various factors that courts must consider when determining whether the discrimination is unfair.[661] Kok writes that in terms of section 14 (2)(a) of PEPUDA, the determination that the court must make is a contextual one, and this includes the current 'South African social, economic and political circumstances' at the time the particular case is heard.[662] Section 14(2)(b) then takes the reader to section 14(3) of PEPUDA, which lists factors the court must consider, most of which have their roots in *Harksen v Lane NO*.[663] In terms of section 14 (2)(c), Kok contends that

[660] Anton Kok 'The promotion of Equality and Prevention of Unfair Discrimination Act of 2000: How to balance religious freedom and other human rights in the higher education sphere'(2017) 31 *South African Journal of Higher Education* 25 at 32.
[661] Ibid.
[662] Ibid.
[663] Kok op cit note 660 at 33.

> Section 14(2)(c) contains a number of factors that will be of assistance to a respondent who wishes to disprove that he unfairly discriminated against the applicant: if the discrimination was 'reasonable' and 'justifiable', followed 'objectively determinable criteria' and if the discrimination was 'intrinsic to the activity', such discrimination may be found to be fair. This subsection is the result of a very clumsy attempt by the drafters of the Act to address the concerns of mainly the insurance industry and to distinguish between 'discrimination' and '(mere) economic differentiation'.[664]

Turning then to the factors in section 14(3). Sections 14(3)(a) to (3) largely relate to the impact and effects of the discrimination on the complainant. In terms of section 14(3)(a) of PEPUDA, Albertyn et al argue that if the alleged conduct seems to impair the complainants' human dignity, then such discrimination is likely to be declared unfair.[665] Loenen subsequently asserts that section 14(3)(b) of PEPUDA implies that the greater the effect of discrimination on the complainant, the higher the chances that the discrimination will be labeled as unfair.[666] Following this, Kok argues that section 14(3)(c) of PEPUDA indicates that the more privileged the accused perpetrator is, the stronger the case they must present for justification.[667] This point was emphasised by Albertyn and Kentridge, who suggest that the more disadvantaged the group to which the complainant belongs, the more probable it is that the discrimination will be deemed unfair.[668] However, section 14(3)(d) of PEPUDA indicates that if the discrimination is minor or trivial, it may be deemed fair.

Nonetheless, De Waal argues that if the discrimination happens repeatedly, it is more likely to be declared unfair.[669] According to section 14(3)(e) of PEPUDA, discrimination is prone to be unfair if it is systemic, and conversely, it can be seen as fair if it is not.

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[664] Ibid.
[665] See: Cathi Albertyn, Beth Goldblatt & Chris Roederer *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (2001).
[666] Titia Loenen 'The equality clause in the South African Constitution: Some remarks from a comparative perspective' (1997) 13 *SAJHR* 401 *at 412.*
[667] Kok op cit note 660 at 33.
[668] Ibid.
[669] Johan De Waal 'Equality and the constitutional court' (2002) 14 *SA Mercantile Law Journal* 141 at 141–156.

Section 14(f) to (e) relates to the actions and justifications of the respondent. As for section 14(3)(f) relating to a legitimate purpose, De Waal claims that the discrimination could be viewed as fair if its purpose is constructive, such as promoting equality.[670] Kok argues that section 14(3)(g) indicates that if there is no rational link between the discrimination and its intended purpose, it will likely be considered unfair.[671] He further states that section 14(3)(h) is rooted in section 36(1)(e) of the Constitution, demanding that the alleged offender demonstrate the absence of less restrictive alternatives to achieve the intended objective, or else the discrimination is likely to be unfair.[672] Kok effectively highlights the importance of section 14(3)(h) when he states that:

> In theory, it is almost always possible to think of less serious ways of achieving the same purpose. This factor should therefore not be used to mark almost all instances of discrimination as unfair. A value judgment must be made taking into account all relevant factors. If an entirely inappropriate method had been used to achieve a (legitimate) purpose, such discrimination is more likely to be unfair.[673]

Lastly, Kok contends that section 14(3)(i) of PEPUDA seems to reward alleged perpetrators that seem to have taken steps to alleviate the impact of their alleged discriminatory conduct.[674] In other words, if the perpetrator takes steps to alleviate the impact or harm, then the discrimination is likely going to be declared fair, and vice versa.

How then have the courts applied PEPUDA? The first Constitutional Court case on the Act, the *Pillay* case, discussed above, serves as a notable illustration of its application.[675] Initially, the Equality Court ruled that the prohibition of Sunali Pillay's nose stud by the School did not constitute unfair discrimination.[676] This was reversed on appeal to the High

[670] De Waal op cit note 669 at 154.
[671] Kok op cit note 660 at 33.
[672] Ibid.
[673] Kok op cit note 660 at 34.
[674] Ibid.
[675] *Pillay* supra 315.
[676] Ibid para 14 - 15.

Court,[677] whereafter the school and the Department of Education turned to the Constitutional Court.[678]

In the Constitutional Court, the majority applied the factors in section 14 to determine that the action of forbidding Pillay from wearing a nose stud, an element of her religious observance, while permitting others to practice their faith, constitutes indirect discrimination against her.[679] Chief Justice Langa asserted that there was no evidence to demonstrate that permitting Pillay this exemption would negatively impact the school's discipline or its uniform policy.[680] He further argued that the possibility of allowing Pillay to express her religion or culture should be viewed as a positive development rather than a cause for concern.[681]

In concluding its deliberation on the rationale behind its decision, Langa CJ asserted that:

> I am therefore not persuaded that refusing Sunali an exemption achieves the intended purpose. Indeed, the evidence shows that Sunali wore the stud for more than two years without any demonstrable effect on school discipline or the standard of education. Granting exemptions will also have the added benefit of inducting the learners into a multi-cultural South Africa where vastly different cultures exist side-by-side.[682]

The factors in section 14 of PEPUDA were analysed in *Du Preez v Minister of Justice and Constitutional Development.*[683] The Equality Court held that:

> The list is wide and comprehensive, but not necessarily exhaustive. Furthermore, not all the criteria there mentioned are applicable in all cases, nor do those that are relevant necessarily bear the same weight in the enquiry. Each case is to be decided on its own particular facts and circumstances. This requires 'a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not'.[684]

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[677] Ibid.
[678] Ibid.
[679] Ibid para 102.
[680] Ibid.
[681] Ibid.
[682] Ibid.
[683] *Du Preez v Minister of Justice and Constitutional Development* [2006] ZAECHC 17.
[684] Ibid para 23.

This judgment highlights how the factors in section 14 should be carefully interpreted and applied. The courts will not just accept any reason for unfairly discriminating against people on listed grounds while the factors listed in this Act are not met.

Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park[685] dealt with a claim brought in terms of PEPUDA wherein Strydom alleged that Moreleta Park (the church) had discriminated against him on the ground of sexual orientation. The complainant had worked as a music student teacher at the church, but his contract was terminated due to his sexual orientation.[686]The church argued that Strydom, as a lecturer of students within the church, also served as a spiritual leader.[687] Therefore, his homosexuality was seen as incompatible with setting a good example for students in accordance with Christian teachings.[688] The court held that the argument presented by the church failed to prove that the discrimination was not unfair. In the court's words:

> I repeat that the impact on religious freedom of not granting the church an exemption from the anti-discriminatory legislation is minimal in the case of the complainant remaining on in his position as a lecturer of music. On the other hand, the fact of being discriminated against on the ground of his homosexual orientation had an enormous impact on the complainant's right to equality, protected as one of the foundations of our new constitutional order. Likewise his right to dignity is seriously impaired due to the unfair discrimination. As a result, the following order is made; The respondent unfairly discriminated against the complainant on the ground of his sexual orientation.[689] (emphasis added).

The court applied the factors in section 14 in an attempt to balance the right to freedom of religion and equality. The court emphasised that it is important to look at these factors broadly. To give an example of how the court applied some aspects of section 14, the court held that:

> In deciding whether the unfair discrimination had a legitimate purpose (section 14(3)(f) of the Act) the church argued that it was to ensure that persons in positions of leadership do not set bad examples and that the church must not be seen to condone the sin of living in a

[685] *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* [2008] ZAGPHC 269 para 1.
[686] Ibid.
[687] Ibid para 16.
[688] Ibid.
[689] Ibid para 2 & para 41.1.

> homosexual relationship. This purpose was achieved by terminating the complainant's contract (section 14(3)(g) of the Act). These issues were already discussed above: the complainant was not in a position of leadership and the church did not have to "*condone*" homosexual relationships by not terminating his contract. In the event, the unfair discrimination did not have a legitimate purpose. This means that the question whether there are less restrictive or less disadvantageous means to achieve the purpose (section 14(3)(h) of the Act) becomes moot. In my view, the respondent has also taken no steps as being reasonable in the circumstances to address the disadvantage which arises from the unfair discrimination of the complainant or to accommodate diversity (section 14(3)(i) of the Act).[690]

Finally, in the *King N.O. v De Jager*[691]*(King)* matter, Victor AJ writes a separate concurring judgment wherein she argues that where appropriate, common law principles should be 'recalibrated towards more egalitarian and *ubuntu* based ends'. While this case deals with freedom of testation, it offers some important principles that can be applicable in this dissertation. Victor AJ begins by examining the concept of Ubuntu, including its meaning and importance within South Africa's legal framework.[692] This discussion parallels the one in chapter 6, so there is no need to reiterate it. However, it is crucial to highlight that Victor AJ advocates for the inclusion of Ubuntu in judicial decision-making or judicial adjudication.[693] The judgment suggests that cases heard by the Equality Court should consider the concept and significance of Ubuntu in the protection and realisation of rights, as well as in balancing conflicting rights. Victor AJ concluded that:

> Transformative constitutionalism and the obligation to ensure substantive equality means that the first judgment should take this into account in its assessment of freedom of testation. While the argument that freedom of testation is closely related to several rights-such as dignity, privacy and property - may have some merit, this approach de-contextualises what freedom of testation really means in a grossly unequal society such as South Africa. The countervailing values of equality and *ubuntu* require this Court to consider the significant distributive consequences that placing a high premium on freedom of testation has meant. Amongst these consequences is the glaring wealth inequality based on the fault lines of race,

[690] Ibid para 32.
[691] *King N.O. v De Jager* [2021] ZACC 4 para 202.
[692] Ibid para 238 – 241.
[693] Ibid para 237.

> gender and class that has endured after apartheid. Balancing freedom of testation against equality both as a right and value should mean more than treating women with equal concern and respect. It should mean more than social inclusion and instead move towards systemic justice that seeks to abolish or root out common law rules which simultaneously sustain women's subordination and prop up male privilege.[694]

The principles we gain from these cases indicate that courts are generally unwilling to allow discrimination against historically disadvantaged individuals, especially those from minority groups. Furthermore, courts appear hesitant to endorse restrictions on fundamental rights that would further disadvantage specific individuals or groups. There is also a push for judges to incorporate the values of Ubuntu and other constitutional principles in their decision-making, using these values to shape common law in alignment with the Constitution. This aligns with the argument presented in this dissertation. It is now crucial to consider how a court would handle a case involving the rights conflict presented by Ulwaluko and how the integration of constitutional values and Ubuntu could aid in this process.

7.2. Practical application in the courts

To comprehensively convey the core of the discussion presented in this dissertation, it is essential to provide a hypothetical illustration of how a court would address a conflict between the right to culture, as derived from Ulwaluko, and the rights to equality, dignity, and personal freedom and security. The parties to the case would be the applicant (Chumani) and the respondents cited would be the Minister of Minister of Cooperative Governance and Traditional Affairs, the Mthatha Initiation school, the Provincial Initiation Coordinating Committees and the Eastern Cape House of Traditional leaders.

> Chumani Bidliza, a 20-year-old individual of Xhosa descent, hails from Mthatha in the Eastern Cape but currently resides in Johannesburg, Gauteng. He openly identifies as gay, and his parents are aware of his sexual orientation. The subject of Ulwaluko has always been contentious, as Chumani wishes to participate; however, his parents, cognisant of the stigma surrounding gay men in the Eastern Cape, have been hesitant to support this decision due to concerns for his safety. After numerous discussions, Chumani and his parents reach a

[694] Ibid para 244.

> consensus that he will indeed partake in Ulwaluko. They plan to travel from Johannesburg to the Eastern Cape on December 6, 2024, in preparation for Chumani's participation, scheduled for December 15, 2024. However, on December 17, 2024, when the Bidliza family begins their preparations, they discover that no initiation school in the Eastern Cape is willing to accept Chumani because of his sexual orientation. Consequently, the Bidliza family decides to pursue legal action regarding this matter.[695]

The first step would be to look at section 13 and section 1. In terms of section 13, if Chumani proves a prima facie case that discrimination took place,[696] the respondent must prove that the discrimination did not occur or that the conduct was not based on one of the prohibited grounds.[697] Chumani is being excluded from Ulwaluko because of his sexual orientation. This is discrimination and it also falls under the section 1 definition of 'prohibited grounds' since Chumani is a queer individual and his discrimination is based on a prohibited ground of sexual orientation. Turning to whether the discrimination was unfair, we need to invoke the factors in section 14 of PEPUDA. The court is tasked with assessing whether the denial of Chumani's access to Ulwaluko due to his sexual orientation constitutes unfair or fair discrimination, considering the criteria outlined in section 14 of PEPUDA and the theory on the implications of this section.[698]

According to section 14(1) of PEPUDA, implementing measures to protect individuals who face discrimination does not equate to unfair discrimination.[699] Consequently, Xhosa heterosexual men cannot assert claims of unfair discrimination when the heterosexual framework of Ulwaluko is modified to accommodate diverse sexual orientations. Furthermore, under section 14(2)(c) of PEPUDA, the differentiation against Chumani lacks justification, as it does not fulfil any legitimate purpose within Ulwaluko. The exclusion of queer people from Ulwaluko is unfounded, stemming solely from Ulwaluko's reluctance to evolve in order to reflect the realities of modern society.

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[695] This is not a quote. The reason it is indented is to reveal it more as a hypothetical scenario.
[696] Section 13 of PEPUDA.
[697] Ibid.
[698] Ibid.
[699] Section 14 of PEPUDA.

The substance of the enquiry, however, is in section 14(3). Here, it is notable that the first five factors (a) to (e) refer to the nature of the discrimination and its impact on the complainant, while the next four – (f) to (i) – speak to the justification of the respondents.

In the context of the first five factors outlined in section 14(3), the discrimination faced by Xhosa queer people undermines their dignity. They experience isolation and are made to feel as though they are sub-humans. Queer people are often subjected to mockery and ridicule based on their sexual orientation, and their masculinity is frequently deemed inadequate according to the norms established by heterosexual standards. Consequently, Xhosa queer people may experience heightened anxiety and fear, and they are at risk of physical violence due to their sexual orientation. As a minority group, queer people have endured discrimination throughout the periods of colonialism and apartheid in South Africa.[700] Although there has been legislation aimed at safeguarding their rights, they continue to be targeted and are victims of homophobic killings.[701] Moreover, the pervasive nature of this discrimination has resulted in the infringement of several constitutional rights, including the rights to equality, dignity, and personal freedom and security.[702]

Now I turn to the possible justification by the respondent. The respondent would defend the discrimination by claiming it is not unfair, as Xhosa queer men are allowed to take part in Ulwaluko, and no one is explicitly barred from attending based on their sexual orientation. They would contend that the alleged discrimination is justified because it serves a legitimate purpose: preserving their sacred culture, which has established rules that have been in place for many years. Altering these rules would threaten their cultural integrity and infringe upon their right to practice their culture. The respondent would argue that the discrimination is purposeful, aiming to cultivate strong, heterosexual young men who are expected to marry and procreate. They would assert that there are no less restrictive alternatives available, as the cultural practice is considered sacred and has

[700] Centre for American Progress 'Discrimination and Barriers to Well-Being: The State of the LGBTQI+ Community in 2022' available at *https://www.americanprogress.org/article/discrimination-and-barriers-to-well-being-the-state-of-the-lgbtqi-community-in-2022/,* accessed on 17 August 2024.
[701] ICJ 'South Africa: the ICJ calls on the authorities to ensure that justice is rendered for killings of four gay men'.(2021) available at *https://www.icj.org/south-africa-the-icj-calls-on-the-authorities-to-ensure-that-justice-is-rendered-for-killings-of-four-gay-men/*, accessed on 11 January 2025.
[702] Sections 9, 10 & 12 of the Constitution.

always been conducted this way. Finally, the respondent would point out that efforts are made to accommodate different sexual orientations during Ulwaluko by promoting mutual respect and equality among initiates.

The court would therefore need to adjudicate the issue in a manner that aligns the traditional practice of Ulwaluko with the principles of PEPUDA. To address this, a court might also incorporate the values of Ubuntu. Although not explicitly mentioned, as demonstrated in previous cases where a decolonial perspective was applied but not explicitly mentioned, the court would utilise the living customary laws and practices currently observed in Xhosa communities to nuance the custom of Ulwaluko to be more aligned with the principles of PEPUDA. This approach is grounded in the understanding that society is in a state of constant evolution; therefore, for customary practices to accurately reflect this dynamic society, they must also evolve. To ensure that the judgment aligns with their lived experiences and needs, it is essential to consider the values that inform their daily lives.

The principles of Ubuntu would require careful consideration of African-centered values and values that underpin South Africa's constitutional dispensation. Ultimately, the court would determine that the current practice of Ulwaluko is discriminatory, and it needs to accommodate queer people. The aim of the court would be for the custom to be more aligned with the principles of PEPUDA.

Essentially, the court would hold that the discrimination in question lacks a legitimate justification, as the essence of Ulwaluko is to serve as a 'making a man out of a boy' through the 'rite of passage'. This objective can be fulfilled without confining Ulwaluko to a heterosexual framework and thus discriminating against queer people. There are indeed alternative, less restrictive methods to achieve this goal, as the essence of Ulwaluko can be realised without being exclusively tied to heterosexual norms. Limiting Ulwaluko to a heterosexual context does not contribute meaningfully to the rite of passage, which is fundamentally the core purpose of Ulwaluko. This is an important point as not only heterosexual men are men, and PEPUDA prohibits unfair discrimination on the ground of sexual orientation.

In contemporary society where the rights of queer people are recognised and protected, it is not justifiable that there would be a custom that only sees a real man as a heterosexual man, thereby excluding all other sexual orientations who still identify as a man. Notably, the court Could also borrow from the *King* case and incorporate the principles of Ubuntu in its adjudication by arguing that Ubuntu requires that everyone be treated with human dignity and equality. The court would borrow para 244 of the *King* case and argue that Ubuntu requires that:

> The narrow-minded and self-indulgent understanding of [culture] should be tempered by considerations of social justice and equity. In this context *ubuntu* means nothing more than the adage that none of us are free until all of us are free when dealing with [the right to culture] within the context of equality. [The right culture] should not be used as a smokescreen to shield structural inequality from constitutional scrutiny.[703] (emphasis added and 'freedom of testation' replaced with 'culture' and 'right to culture')

Accordingly, as per the section 14 criteria and the cases discussed above, the Equality Court would likely determine that there are grounds for unfair discrimination based on sexual orientation against Chumani. Consequently, the denial of Chumani's participation in Ulwaluko due to his sexual orientation would violate section 6 of PEPUDA, leading the court to mandate his inclusion and to encourage the development of Ulwaluko in alignment in order for it to be more aligned with the principles of PEPUDA.

This necessitates an examination of the potential remedies the court may impose in this case. However, it is crucial to highlight that the discussion pertains solely to one case presented to the court, and certain remedies may be an overreach in a single case. Consequently, the remedial discussion presented in this dissertation suggests the necessity for nationwide advocacy — spearheaded by Provincial Initiation Coordinating Committees (PICCs) or civil society organisations — that documents instances of discrimination within Ulwaluko and engages in strategic litigation.. Once multiple cases are available, it would be beneficial to conduct a case study and explore additional remedies. It is likely that a single case won't solve the matter, as this is part of a much

[703] *King* supra 691 para 245.

longer engagement aimed at ensuring that the customary practice of Ulwaluko is more aligned with the principles of PEPUDA.

For now, here are the suggested remedies. According to section 21 (2) of PEPUDA, the court has several options for remedies, including an interdict, a declaratory order, and a monetary payment order, amongst others. While these remedies are broad, my suggestion is that a court would prioritise an interdict where the Mthatha initiation school that is discriminating against Chumani is prohibited from operating until the custom is aligned with the principles of PEPUDA, in that, the discrimination of queer people on the ground of sexual orientation is addressed. The court could also give a declaratory order on the Mthatha initiation school and the PICC for the initiation school to submit a report of steps taken to address the discrimination of queer people. After the advocacy and most initiation schools have been found to violate PEPUDA, the court can interdict all initiation schools that continue to discriminate against queer people to cease operations until the PICC has conducted the trainings and workshops that require these schools and their facilitators to recognise and accept queer rights, and incorporate the values of Ubuntu and other Constitutional values within Ulwaluko. Secondly, the court might also issue a declaratory order wherein it orders the Minister of Cooperative Governance and Traditional Affairs to gazette declarations that are aimed at ensuring that the custom of Ulwaluko is more aligned with the principles of PEPUDA. The next chapter is the concluding chapter which discusses a summary of the argument presented throughout the dissertation and some of the recommendations.

CHAPTER EIGHT

CONCLUSION

The Constitution and International Human Rights Law (IHRL) both acknowledge and safeguard the right to cultural expression. However, they also impose restrictions on cultural practices that infringe upon other fundamental rights. Furthermore, the principle of equality within cultural practices is assured. The current interpretation of the Ulwaluko custom perpetuates a dominant form of masculinity that defines men as solely heterosexual, possessive, and authoritative. This creates a tension between the right to cultural expression and the rights to equality, human dignity, and personal freedom and security. This conflict arises from the ways in which culture and concepts of masculinity were compromised during colonial and apartheid eras. Consequently, the contemporary understanding of indigenous cultures and masculinities is often influenced by Eurocentric standards of acceptable behaviour, largely derived from Christian values imposed during these periods. Nevertheless, the challenges facing Ulwaluko are not solely attributable to these external influences. The indigenous understanding of masculinity prior to colonialism was also flawed. Therefore, this dissertation explores how the decolonisation of culture and masculinities can lead to the emergence of diverse and inclusive forms of masculinity within Ulwaluko. Additionally, it explores the potential for the Ubuntu principle to assist in reconciling the conflicts between these rights. The overarching argument is that these proposed solutions must be grounded in the values enshrined in the Constitution, such as equality, human dignity, and freedom. Ultimately, the endeavor to harmonise the right to cultural expression with the rights to equality, human dignity, and personal freedom and security is a long-term undertaking that necessitates various contributions. This is why the dissertation critically examines the roles of law and courts, but also looks to legislators, communities, and all relevant stakeholders.

8.1. Decolonising Ulwaluko and the creation of inclusive and positive masculinities

In addition to the exclusion of Xhosa queer individuals from Ulwaluko, Ulwaluko has faced numerous challenges, including the tragic deaths of initiates, instances of mistaken castration, and occurrences of violence. These issues have led to calls for the abolition of the practice, as it has been deemed hazardous. In contrast, traditional leaders contend that the problems associated with Ulwaluko stem from its exploitation by individuals seeking financial gain. This dissertation argues for the preservation of Ulwaluko to honour and protect the cultural rights of the Xhosa people. Simultaneously, it emphasises the critical need to uphold the rights of Xhosa queer individuals, ensuring they are not subjected to discrimination based on their sexual orientation.

Accordingly, the necessity for Ulwaluko to cultivate multiple and inclusive masculinities becomes inevitable. To begin with, I propose that the examination of men and gender relations must undergo a process of decolonisation. As discussed, traditional leaders, teachers, the legislature and the courts can facilitate this. This decolonisation will facilitate the removal of Eurocentric notions of masculinity and gender dynamics from the South African context. Furthermore, supplemented by Ubuntu and other constitutional values, this will enable Ulwaluko to foster masculinities that are free from colonial and apartheid legacies through the creation of African-based theories of men and gender relations. Again, the role of traditional leaders, the courts and the teachers is noteworthy as all these begin with changing our current information and knowledge systems to ones that speak to the past, location, needs, and lived realities of the native people of South Africa. It also speaks to the need for a living law that is in touch with the everchanging society. As previously mentioned, this represents the initial step towards the establishment of multiple and inclusive masculinities.

8.2. Reconciling Ulwaluko with the constitution

The second and linked approach involves reconciling the practice of Ulwaluko with the principles and rights enshrined in the Constitution. In considering the necessity to address historical injustices and progress towards a more equitable South Africa, where

individuals coexist harmoniously irrespective of their sexual orientation, it is essential to explore viable mechanisms. Queer individuals represent a historically marginalised group whose rights, while acknowledged, have not yet been fully realised in South Africa and around the world. This situation indicates that we are dealing with a minority group whose rights violations may exacerbate the existing discrimination and homophobia they endure.

Therefore, a crucial step is to advocate for the practical and effective implementation of the overall rights of Xhosa queer people as a minority group. This can be achieved through empowering civil society and communities that represent queer people in the Eastern Cape to have advocacy programs aimed at raising awareness about queer people, their rights and their right to be treated fairly even within the custom of Ulwaluko. Such advocacy must be aimed at canvasing support from the parties represented in the legislature to push for the Customary Initiation Act to be amended to have stricter penalties and incorporate Ubuntu values and other constitutional values as part of their teachings.

Additionally, the role of courts can never be overstated. Therefore, approaching the courts to develop the custom in order for it to be in line with the values and rights in the Constitution is also presented throughout this dissertation. This should not be difficult as the courts are tasked by the Constitution to align customary law and culture with its principles. Eitherway, in an ideal world, customary law and African culture would not need to be developed because, they in their nature, are supposed to be living and developed by the communities that practice them daily.

8.3. The role of ubuntu

The concept of Ubuntu can significantly contribute to the internal reform of Ulwaluko. The principles of Ubuntu, which emphasise compassion, humanity, and empathy, can aid in the transformation of Ulwaluko from within. If these values are integrated into Ulwaluko by the facilitators of these initiation schools, and the law mandates such, this can foster an environment that prioritises the emotional well-being of individuals. This, in turn, could mean that Xhosa heterosexual men, along with those who adhere to heteronormative

beliefs, will be more inclined to empathise with Xhosa queer individuals who face unjust discrimination. This shift in perspective will encourage more proactive steps to support the welfare of these individuals. By incorporating this these values in the teachings of Ulwaluko, all initiates and participants in this tradition will become more cognisant of the diversity within the community, striving to treat everyone with respect, kindness, and understanding. This places greater responsibility on the facilitators of these initiation schools. It would also help if there were teachings or workshops reserved for all stakeholders involved in Ulwaluko before it begins, including traditional leaders, parents, the initiates, law makers and the broader community to debunk some of the distortions and myths around the traditional masculinities that are reproduced by Ulwaluko.

The principles of Ubuntu can contribute to the understanding that individuals within the same culture may articulate their identities or engage in their traditions in varied ways. This diversity does not render them rebellious or nonconformist; rather, it highlights the diversity of humans, which Ubuntu also recognises. The main purpose of Ulwaluko is ‘making man out of boys’ through ‘rite of passage’. Consequently, I argue that the values of Ubuntu should be employed to uphold the 'rite of passage' associated with Ulwaluko, while eliminating aspects of Ulwaluko that infringe upon the rights of Xhosa queer individuals, particularly regarding discrimination based on sexual orientation. Essentially, this approach does not seek to exploit Ubuntu to undermine the cultural rights of Xhosa queer people, but rather aims to harmonise this right with other constitutional rights and values.

Furthermore, Ubuntu is aligned with the principle of human dignity. This alignment ensures that the values inherent in Ubuntu promote dignity within the practice of Ulwaluko. In this context, Ubuntu aims to cultivate a culture of mutual respect, encouraging individuals to treat others as they themselves wish to be treated. If the situation were reversed, and Ulwaluko was to exclusively embody the traits of queer individuals, heterosexual men would similarly experience discrimination based on their sexual orientation. Therefore, the task of reforming Ulwaluko from within involves the challenge of reconciling these competing rights, striving not for the supremacy of one right over another, but for the harmonious coexistence of both. By embracing the principles of

Ubuntu, we can explore how these values can enhance and fortify communal relationships among the Xhosa people while simultaneously acknowledging and respecting the rights of the queer community.

Finally, the subsequent step involves leveraging the principles of Ubuntu to foster multiple and inclusive forms of masculinity. At the core of Ubuntu is the belief that an individual's well-being is intertwined with that of others. This philosophy acknowledges the diversity of beliefs and identities within a society while underscoring the significance of communal bonds. In African communities, it is feasible for individuals with varying perspectives to set aside their differences and coexist harmoniously.

8.4. The role of the court

The significance of the judiciary cannot be underestimated. According to section 211 (3) of the Constitution, 'courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law'. Furthermore, section 39 (2) of the Constitution mandates that 'when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights'. This indicates that courts are tasked with the responsibility of applying customary law when appropriate and developing it as necessary to ensure compliance with constitutional principles and PEPUDA. Consequently, when confronted with a custom that fails to meet constitutional standards or does not align with PEPUDA principles, it is the court's duty to declare such a custom discriminatory and to modify it to conform with the Constitution and PEPUDA. Nevertheless, this task presents significant challenges for the judiciary.

The analysis presented in this dissertation illustrates the inconsistencies exhibited by courts in interpreting and applying customary law. For instance, in the *Bhe*[704] case, the court had the chance to develop the principles of customary law regarding succession but opted instead to substitute it with a common law principle. In a later case, the *Gumede*[705]

[704] *Bhe* supra 529.
[705] *Gumede (born Shange) v President of the Republic of South Africa* [2008] ZACC 23.

case, the court again failed to build upon the developments from the *Bhe* case, neglecting the opportunity to develop the customary law rules of succession. Consequently, the outcomes in these cases are often unrecognised and unutilised by the parties involved in their everyday lives. However, there are notable exceptions, such as the *Shilubana*[706] case, where the court adopted living customary law and aligned the rules of succession with constitutional principles. This underscores the significant role that courts play in the development of the law and the necessity for laws to be adapted in accordance with constitutional values. By integrating the principles of Ubuntu into their rulings and consistently aiming for judgments that harmonise customs with constitutional principles, the custom of Ulwaluko can also be refined to better align with the tenets of PEPUDA and the Constitution.

As highlighted throughout this dissertation, this is a long-term project that does not have a single solution. This is why the argument is that the decolonisation of culture and masculinities and the principles of Ubuntu, supplemented by the values that underpin the Constitution, should be harnessed to see if Ulwaluko can reproduce multiple and inclusive masculinities. This approach will facilitate the development and acknowledgment of multiple interpretations of masculinity, moving beyond the singular, rigid definition currently perpetuated by Ulwaluko that fosters traditional norms and institutions of systemic and structural oppression and inequality. Nonetheless, it is worth highlighting again that this is not an easy task. This is a task that requires all stakeholders, in other words; courts, communities, civil society, academics and government to produce further discussions and research aimed at ensuring that the custom of Ulwaluko is nuanced to be more aligned with PEPUDA and the principles of the Constitution, and we can only hope that this dissertation offers some valuable insight into that endeavor.

[706] *Shilubana* supra 523

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