

THE IMPOSITION OF COMMON LAW IN THE INTERPRETATION AND APPLICATION OF CUSTOMARY LAW AND CUSTOMARY MARRIAGES

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Abstract

South Africa has, over the past few years, seen the development of its jurisprudence in respect of the interpretation and application of African customary law under the new constitutional dispensation as it now also forms an integral part of South African law. Our courts are, in terms of the Constitution, required to apply African customary law when it is applicable, but like any other law, it is also subject to the Constitution. It is also submitted that due to the repercussions of the past, African customary law and laws regulating customary marriages are yet to reach their proper development, and this slow development is also caused by inconsistencies and the imposition of common law in the interpretation and application of African customary law and laws regulating customary marriages. Furthermore, African customary law should not be hinged on what colonisation bequeathed us, as the interpretation of our customary law through the prisms of common law frustrates the development of customary law – which has for a long time been prevented from developing securely alongside common law.

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1 Introduction

There has been development in the jurisprudence of African customary law within South Africa over the past few years. African customary law is an integral part of South African law and our courts are directed to apply it when it is applicable, however, like any other law it is subject to the Constitution.¹ Furthermore, it is an original and distinct independent source of norms within our legal system which feeds into, nourishes, and fuses with the rest of South African law.² It is not formally classified and easily ascertainable and by its very nature evolves alongside the evolution of the people who live by its norms. As their patterns in lives change, so does the law.³ It is therefore expected that the law's development and interpretation ought to be based in the context of social evolution, legislative deliberation, and academic writings.

The Constitution aims to give recognition to African customary law and marriages solemnised customarily which were previously denied the necessary space to evolve but were instead fossilised and stonewalled.⁴ Moreover, the Constitution also aims to facilitate the preservation and evolution of African customary law as a legal system that conforms to its provisions.⁵ The Constitution is highly commended for the changes and transformation it has brought to the development and building of a united South Africa, however, the after-effects of the past are still evident even today.⁶ Inference can be drawn from the jurisprudence of our courts in the resolution of customary law disputes, where the courts appear to import common law values in addressing customary law issues.⁷

Hlophe JP⁸ stated in the matter between *Mabuza v Mbatha* that:⁹

If one accepts that African customary law is recognised in terms of the Constitution and relevant legislation to give effect to the Constitution, such as the Recognition of Customary Marriages Act No 120 of 1998, there is no reason as to why the courts should be slow at developing African customary law. Unfortunately, one still finds dicta referring to the notorious repugnancy clause as though one were still dealing with a pre-1994 situation. Such dicta, in my view, are unfortunate. The proper approach is to accept that the constitution is the supreme law of the

1 Constitution of the Republic of South Africa, 1996 (Constitution) sec 211(3).

2 *Alexkor Ltd v The Richtersveld Community* 2004 (5) SA 460 (CC) (*Alexkor*) paras 51-58.

3 *Mbungela and Another v Mkabi and Others* 2020 (1) All SA 42 (SCA) para 17.

4 *Pilane v Pilane* 2013 4 BCLR 431 (CC) para 35.

5 *Pilane* (n 4) para 35.

6 N Ntlama 'The Application of Section 8(3) of the Constitution in the Development of Customary Law Values in South Africa's New Constitutional Dispensation' (2012) 15(1) *Potchefstroom Electronic Law Review Journal* at 2.

7 Ntlama (n 6) 2.

8 *Mabuza v Mbatha* 2003 (4) SA 218 (*Mabuza*) para 30.

9 As above.

Republic. Thus, any custom which is inconsistent with the constitution cannot withstand constitutional scrutiny. In line with this approach, my view is that it is not necessary at all to say African customary Law should not be opposed to the principles of public policy or natural justice. To say that is fundamentally flawed as it reduces African law which is practised by the vast majority in this country to foreign law in Africa.

Furthermore, the application of African customary law is made obligatory by the provisions of the Constitution. In terms of section 211(3) of the Constitution, all courts must apply customary law subject to three conditions: (1) when the law is applicable; (2) subject to the Constitution; and (3) subject to any law that specifically addresses customary law.¹⁰

2 The application of African customary law through common law values

The repercussions of the past are still perceptible as they have resulted in the marginalisation of customary law by the common law which is a theme that permeates the history of colonialism in Africa and has led to African customary law being unreformed.¹¹ African customary law was recognised for its economic benefits and these benefits accrued to white settlers when Africans were placed under the European-sanctioned Native Administration Act.¹² The Act absorbed Africans under the formal system of colonial justice and allowed traditional leaders to handle civil and/or traditional disputes between black and indigenous people instead of through the government courts. This contributed to the marginalisation of customary law and furthered the conflict between customary law and common law.¹³ The promulgation of the Black Administration Act of 1927 further exacerbated this conflict. Its purpose was to provide for a separate court system for Africans and for the limited recognition of indigenous law.¹⁴ In addition, the promulgation of the aforesaid Act was not only effected with black or African people's interest at heart but was also done to secure authority through colonial administration in order to govern indigenous people through traditional authorities.¹⁵ This not only contributed to the distortion of African customary law, but it also caused the present difficulty in its application and

10 Constitution (n 1) secs 39(2)-(3).

11 *Bhe v Khayelitsha Magistrate* 2005 (1) SA 580 (CC) (*Bhe*) para 43.

12 Native Administrative Act 38 of 1927.

13 N Ntlama "Equality" misplaced in the development of the customary law of succession; lessons from *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC)' (2009) 2 *Stellenbosch Law Review* at 333.

14 Black Administration Act 38 of 1927.

15 GJ van Niekerk 'The Interactions of Indigenous Law and Western Law in South Africa: Historical and Comparative Perspective' PhD thesis, University of South Africa, 1995 at 72.

interpretation. This is because African customary law was relegated to the background, robbed of its inherent capacity to evolve in keeping with the changing life of the people it served, and the validity of it was assessed based on common law principles and ideas of justice.¹⁶

African customary law was also negatively affected by the mere fact that it was prevented from evolving and adapting to meet changing circumstances within many communities.¹⁷ It was recorded and enforced by those who neither practised it nor were bound by it. In addition, those who were bound by customary law had no power to adapt it.¹⁸

Throughout the years, customary law was recognised as part of the state law, however, it has never been considered equal to common law.¹⁹ Western laws and the common law, in general, have always been regarded as 'dominant law' and customary law as the inferior law.²⁰ This means that western legal principles and underpinnings are still seen as the dominant system with the implied basis that any development must take place under this system.²¹

Even under this new constitutional dispensation, there are still cases where the application and interpretation of customary law are undertaken through the lens of common law. In the *Alexkor* case, the Constitutional Court stated that the application of customary law must be determined by reference to the Constitution and not common law.²² Furthermore, the Court reaffirmed that African customary law is afforded the same status as the common law in sections 39(2) and (3) of the Constitution which provides that:²³

... (2) 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;

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognized or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

The Constitution also provides, in section 211(3), for the application of African customary law provided that it is consistent with the provisions of the Constitution. Therefore, this new constitutional dispensation is expected to promote and restore the dignity of African customary law.

16 *Bhe* (n 11) paras 43 & 90.

17 *Bhe* (n 11) para 20.

18 As above.

19 P Coertzen 'Constitution, Charter and Religions in South Africa' 14(1) *African Human Rights Law Journal* (2014) at 138.

20 Coertzen (n 19) 138.

21 As above.

22 *Alexkor* (n 2) para 57.

23 Constitution (n 1) sec 39(2).

African customary law has reached a stage where its continued relevance is dependent on it being better developed. However, it is yet to reach its proper development due to inconsistencies in its interpretation and uncertainty in its application which, to some degree, is drawn from our courts. An inference can be drawn from section 173 of the Constitution which stipulates that the Constitutional Court, Supreme Court of Appeal, and High Courts have the inherent power to protect and regulate their own processes and to develop the common law, taking into account the interests of justice.²⁴ Notably, the aforementioned provision of the Constitution is silent on the development of African customary law and our courts are only conferred inherent power to protect the common law. Another inference can also be drawn from the jurisprudence of our courts in the resolution of customary law disputes whereby the courts import common law values in addressing customary law issues.²⁵

In *Bhe v Khayelitsha Magistrate*, the Constitutional Court dealt with a matter between two extra-marital daughters who failed to qualify as heirs in the intestate of their deceased father.²⁶ Under the system created by section 23 of the Black Administration Act, minor children did not qualify to be heirs and the intestate fell to be distributed in accordance with African law and custom.²⁷ Additionally, in accordance with the male primogeniture rule, only the elder legitimate son could inherit the deceased's estate to the exclusion of other siblings. The Court, in addressing the aforesaid rule, imported common law values as endorsed in the Intestate Succession Act,²⁸ to resolve the question of succession in African customary law.²⁹ Furthermore, the Intestate Succession Act is still seen as an imposition of western ideologies.³⁰ The Court, in developing the male primogeniture rule, should have acquired assistance from cultural experts in respect of whether men and women could enjoy equal ownership in respect of the joint estate under customary law. This would have ensured that the values that African customary law aims to protect are not lost.

In most cases, African customary law may, at first glance, conflict with the Bill of Rights. The male primogeniture rule is noted as one such example for its lack of sensitivity to gender equality by excluding women and children.³¹ The Court stated that the common law

24 Constitution (n 1) sec 173.

25 *Bhe* (n 11) paras 43 & 90.

26 *Bhe* (n 11) paras 1 & 7.

27 As above.

28 Intestate Succession Act 81 of 1987.

29 *Bhe* (n 11) paras 1-7.

30 K Maunatlala & C Maimela 'The Implementation of Customary Law of Succession and Common Law of Succession Respectively: With a Specific Focus on the Eradication of the Male Primogeniture Rule' (2020) 53 *De Jure* at 9.

31 *Bhe* (n 11) paras 1-7.

principles provided in the Intestate Succession Act are the basic mechanisms for determining the content of the regime that would ensure that all children, including extramarital children, women in monogamous unions, and unmarried women would not be discriminated against.³² This approach is not in line with the role that African customary law has to play. It has limited the development of the principles of equality and non-discrimination within the framework of customary law. Again, the application of African customary law must be determined by reference not to common law rights analyses, but to the Constitution.³³ Moreover, customary law ought to be treated, interpreted, and applied as an integral part of South African law that is only subject to the Constitution. This was also echoed by Ngcobo J when he stated that African customary law, particularly the rule of male primogeniture, in this case, should be developed in line with the Bill of Rights.³⁴

In the matter between *Shilubana v Nwamitwa*, issues concerning a traditional community's authority to develop its customs and traditions were brought before the Court.³⁵ A woman was appointed to a chieftainship position for which she was previously disqualified by virtue of her gender.³⁶ The Constitutional Court then was called on to decide whether the community has the authority to restore the position of traditional leadership to the house from which it was removed by reason of gender discrimination, even if this discrimination occurred prior to the enactment of the final Constitution.³⁷ Ntlama³⁸ noted the similarities between the *Bhe* case and *Shilubana* case, in that the *Bhe* case dealt with the right to succession in terms of family and private law relationships and *Shilubana* dealt with the important role of the functioning of traditional authorities which is governmental in character:³⁹

Subsequent to that African customary law empowers traditional leaders to carry out functions of a public law nature, which is quite distinct from succession in a private law relationship. In addition, traditional leaders are given a constitutional role to be involved in the administration of customary law, to engage in rule-making and law enforcement and dispute resolution. This also means that the administration of African customary law lies in the hands of traditional leaders and further that the chiefs employ traditional authority to administer the affairs of the community and extended family groups.

32 As above.

33 *Bhe* (n 11) para 211.

34 As above.

35 *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC) (*Shilubana*) para 1.

36 *Shilubana* (n 35) para 1.

37 As above.

38 Ntlama (n 13) 354.

39 Ntlama (n 13) 350 & 354.

The Court confirmed the ‘election’ of Ms Shilubana and noted that the leader did not take into consideration the status of chieftom but instead destroyed the ‘cardinal rule of customary law’ of patrilineage as it was intended to preserve the family and cultural identity of the community.⁴⁰ The Court further provided that although past customs are cardinal in African customary law, they merely constitute one integral factor to be contemplated with other integral factors where a cultural pattern is apparent from traditional practice, and where there is no further evidence that modern development has occurred or is still occurring, past practice will suffice in establishing such a rule.⁴¹

However, where the modern custom of the community intimates that development has taken place, past practice alone is insufficient and cannot, on its own, confirm a right with certainty.⁴² The Court then stated that traditional authorities have the power to consider the constitution when determining matters of traditional leadership and that the conduct of the royal family in appointing Ms Shilubana as *hosi* of the Valoyi clan amounted to a development of African customary law.⁴³ Furthermore, when delivering this judgment, the Constitutional Court sought to interpret the customary laws pertaining to the succession of women to traditional leadership in a manner that would bring it in line with section 9 of the Constitution.⁴⁴ Although this is commendable, the Constitutional Court also had an obligation to give directions in respect of the development of inter-generational customary law succession. In addition, the Constitutional Court also did not discharge its obligation to develop customary law in accordance with section 39(2) of the Constitution as it accepted the development of customary law by the community to arrive at the decision that Shilubana was the legitimate *hosi*. Therefore, section 39(2) was not properly deliberated by the Court as considerations such as the rule of male primogeniture in the context of succession to chieftaincy was not considered against the values of the Constitution, particularly that of equality. Ntlama also argues that:⁴⁵

Another problem that may be caused by the Constitutional Court judgment in the matter of *Shilubana* is its uncertainty regarding the sociological approach to chieftaincy. The Constitutional Court held that neither the sons nor the daughters of Ms Shilubana would succeed her, but that a child born of the male Nwamitwa bloodline would succeed her instead. This uncertainty has the potential to create a pool of candidates, which may arise either by their own efforts or by those of a

40 Ntlama (n 13) 354.

41 *Shilubana* (n 35) para 56.

42 As above.

43 *Shilubana* (n 35) para 56.

44 As above.

45 Ntlama (n 13) 355.

powerful group, where there is no definite successor determined by customary law. This does not prevent Ms Shilubana's own daughters from being discriminated against in the near future for no other reason than by being born of a woman within the Nwamitwa bloodline. It also has the potential for the creation of factionalism and competition where strong individuals could manipulate the flexibility and vagueness embedded in the development of the customary rules of succession. This competition would enable the rich and powerful, as shown in *Shilubana*, to use the gap as a strategy to empower themselves at the expense of upholding South Africa's cultural heritage.

It is thus opined that the sociological approach in respect of chieftaincy was not properly addressed so as to avoid the potential creation of factionalism and competition. In addition, the Court's disallowing of the children of Shilubana to succeed her was a feeble attempt on the Court to strike a balance between the competing interests such as the right to equality and the right to practise culture.⁴⁶ In striking the balance between these two interests, the Court was misdirected by its assumed need to afford protection to the right to equality and did so to the detriment of the right to culture, the practice of customary traditions and customs, and the development of African customary law.⁴⁷

3 The promulgation of the Recognition of Customary Marriages Act and its impact on the development of African customary law

The Recognition of Customary Marriages Act provides that customary law consists of customs and usages traditionally observed among the indigenous African people of South Africa and which form part of the culture of those people.⁴⁸ The element of the statutory definition of customary law is the customs of indigenous African people. The term 'custom' refers to the traditions, practices (rituals), and the rules for living that are adhered to by members of the community.⁴⁹ The customs of an indigenous community are well-known by every member of the community as they are passed down from generation to generation by older members of the group.⁵⁰ Customs commonly transform into customary law over time especially when they are endorsed by the group's belief in its indispensability and desirability, and through the recognition of the judicial decisions handed down by

46 I Madondo *The Role of Traditional Courts in the Justice System* (2007) at 61.

47 Madondo (n 46) 62.

48 Recognition of Customary Marriages Act 120 of 1998 (RCMA).

49 M Gluckman *Order and Rebellion in Tribal Africa* (1963) at 198.

50 *Alexkor* (n 2) paras 52-53.

authorities.⁵¹ This, therefore, proposes the notion that custom and customary law are interrelated.

The Recognition of Customary Marriages Act brought about changes in respect of the legal position of customary marriages in South African law. In the matter between *Gumede v President of the Republic of South Africa and Others*, Moseneke DCJ stated that the aforementioned Act represents a belated but welcome and ambitious legislative effort to remedy the historical humiliation and exclusion meted out to spouses in marriages that were entered into in accordance with the law and culture of indigenous people of this country.⁵² In a nutshell, the Recognition of Customary Marriages Act provides that a customary marriage is, for all purposes of South African law, recognised as a valid marriage.

In the matter of *K v P*, the High Court stated that although the legislature's intention in enacting the Recognition of Customary Marriages Act was undoubtedly noble in recognising customary marriages previously ignored, the ideals proposed by the Act have still not yet been realised.⁵³ It is therefore submitted that the problem areas and shortcomings of the Recognition of Customary Marriages Act stem from the fact that African customary law has, in the past, been marginalised and, presently, the marginalisation of African customary law is perpetuated by its indirect application through common law values. In addition, Osman opines that the Recognition of Customary Marriages Act incorporates large amounts of common law, such as the Matrimonial Property Act and Divorce Act, to regulate customary law marriages.⁵⁴ Moreover, this incorporation of common law into African customary law has led to it being seen as 'common law African customary marriages'.⁵⁵

Furthermore, the requirements of a valid customary marriage which are found in section 3 of the Recognition of Customary Marriages Act provides that for a customary marriage entered into after the commencement of this Act to be valid, the prospective spouses above the age of 18 years must consent to be married to each other under customary law and that the marriage must be negotiated and entered into or celebrated in accordance with customary law.⁵⁶ Section 3(1)(b) of the said Act has resulted in a plethora of cases in courts. Many of these cases arise due to the fact that our courts have not been consistent in the way disputes arising out of this subsection

51 LJ Pospisil *Anthropology of Law: A Comparative Theory* (1971) at 169-170.

52 *Gumede v President of the Republic of South Africa and Others* 2009 (3) SA 152 (*Gumede*) paras 17-21.

53 *K v P* (GSJ) (09/41473) ZAGPHC 93 para 11.

54 F Osman 'The Consequences of the Statutory Regulation of Customary Law: An Examination of the South African Customary Law of Succession and Marriage' (2019) 66 *Potchefstroom Electronic Law Journal* at 7.

55 Osman (n 54) 7.

56 RCMA (n 48) sec 3.

are addressed. The said sub-section stipulates that a marriage must be negotiated and entered into or celebrated in accordance with customary law.⁵⁷

Furthermore, the misinterpretation and inconsistencies therein come in respect of a lack of proper understanding of what section 3(1)(b) means to lawyers and courts versus what the provision means to ordinary persons who are not schooled in law. It may be argued that these inconsistencies emanate from the fact that African customary law is as diverse as the number of different ethnic groups present in this beautiful country.⁵⁸ Although Africans share very similar customs, rituals, and overall cultural values, there are some subtle differences that, for example, pertain exclusively to the Ngunis, Basotho, Bapedi, VhaVenda, and the Vatsonga.⁵⁹ This is due to the pluralistic nature of African societies.⁶⁰ However, this should not be used as a scapegoat in respect of the misinterpretation of the Recognition of African Customary Marriages Act.

To address the inconsistencies of the aforesaid subsection and what it entails, a clear understanding of what constitutes a customary marriage must be established in line with the values and underpinnings found in African traditions and societies. Across all ethnic groups and even in pre-colonial African society, a customary marriage in true African tradition is a cultural process that entails the performance of certain rituals and as such, one cannot merely dispense with the need for the ancestors to recognise and bless the marriage.⁶¹

In addition, a customary marriage in African traditions is not an event but a process that comprises a chain of events.⁶² In *Mabena v Letsoalo*, the High Court (Transvaal Provisional Division) opined that a customary marriage is not purely a matter between the bride and the bridegroom, but is also a group concern realising a relationship between two groups of relatives.⁶³ In addition, the Court noted that because African societies are communal in nature, the parties' marriage relationship had a collective and communal substance.⁶⁴ Furthermore, procreation and survival were important goals of this type of marriage and indispensable for the well-being of the larger

57 RCMA (n 48) sec 3(1)(b).

58 *Southon v Moropane* (14295/10) [2012] ZAGPJHC 146 (*Southon*) para 35.

59 As above.

60 As above.

61 van Niekerk (n 15) 115.

62 IP Maithufi & JC Bekker 'Recognition of Customary Marriages Act 1998 and its Impact on Family Law in South Africa' (2002) 35 *The Comparative and International Law Journal* at 182.

63 *Mabena v Letsoalo* 1998 (2) SA 1068 (T) (*Mabena*).

64 *Mabena* (n 63)

group as opposed to a western setting where its principles stem from western individualism.⁶⁵ In respect of western individualism, the betterment concentrates on the immediate of the family unit, and the primary focus is on the immediate family itself. Additionally, in the *Gumede case*, the Court opined that in our pre-colonial past, customary marriage was always a bond between families and not individual spouses.⁶⁶

Furthermore, the basic formalities which lead to a customary marriage are:⁶⁷

- (a) The two parties man and woman have agreed to marry each other;
- (b) A letter is sent to the woman's family and/or emissaries are sent by the man's family to the woman's family to indicate interest in the possible marriage;
- (c) A date is set for a meeting of the parties' relatives will be convened where lobolo is negotiated and the negotiated lobolo or part thereof is handed over to the woman's family and the two families will then agree on the formalities;
- (d) However, in the Zulu culture there are other pre-marital ceremonies like *Umabo* and *Umembeso* that takes place before the actual wedding;
- (e) After those pre-marital ceremonies, a date for the wedding is set on which the woman will then be handed over to the man's family which handing over may include but not necessarily be accompanied by celebration.

Even though *ilobolo* is not mentioned as one of the requirements for a valid customary marriage, it plays a significant role in the conclusion of a customary marriage. Section 3(1)(b) stipulates that the marriage must be negotiated and entered into or celebrated in accordance with customary law.⁶⁸ Therefore, during the negotiation stage, there will always be negotiations and an agreement concerning the payment of *ilobolo*, which may be paid in part or in full.⁶⁹ In *Southon v Moropane*, the Supreme Court of Appeal stated that the agreement to marry in customary law is predicated upon *ilobolo* in its various manifestations and that the agreement to pay *ilobolo* underpins the customary marriage.⁷⁰

It is common cause that there is always a form of a small celebration conducted after the payment or part payment of *ilobolo* in African cultures. These small celebrations should not be construed

65 T Metz 'How the West was One: The Western as Individualist, the African as Communitarian' (2014) 47(11) *Educational Philosophy and Theory* at 4.

66 *Gumede* (n 52) para 18.

67 *Motsoatsoa v Roro* 2011 2 All SA 324 (GSJ) para 17.

68 RCMA (n 48) sec 3(1)(b).

69 NM Ngema 'The Enforcement of the Payment of Lobolo and its Impact on Children's Rights in South Africa' (2013) 16 *Potchefstroom Electronic Law Journal* at 406.

70 *Southon* (n 58) para 40.

as celebrating the conclusion of a customary union. These celebrations are normally conducted in the interest of ubuntu with the purpose of celebrating the first meeting of the two families and the prospective marriage that is to take place soon thereafter.⁷¹ It is also important to note that after the payment of *ilobolo*, there are other pre-marital ceremonies that take place. Interestingly, in European cultures, *ilobolo* would otherwise be considered as a dowry, however, with the difference being that the payment would be from the bride's family to the groom's family.⁷²

Other crucial elements of a customary marriage are celebration and the handing over of the bride by her family to her new family, namely that of the groom. Section 3(1)(b) of the Act stipulates that the marriage must be negotiated and entered into or celebrated in accordance with customary law. The celebration of the traditional marriage is also known as '*Umgcagco*' in isiZulu.⁷³ When the traditional marriage has been concluded, people who observed the celebration say words like '*Ugcagcile*' the bride and '*Ugcagcelwe*' as the groom's family gained a daughter through the marriage.⁷⁴ From her family, the bride is invariably handed over to the groom at his family's residence. In addition, *Umgcagco* symbolises that the bride has been formally introduced and/or handed over to the ancestors as a new member of the husband's family and has also obtained the ancestors' blessing and acceptance of the new member of the family.⁷⁵

Moreover, in respect of the celebration of the customary marriage, it is important to reiterate that African customary law and its customs are not static but dynamic.⁷⁶ It is therefore subject to constant development and interpretation in the context of social evolution, legislative deliberation, and additional interpretation.⁷⁷ It is not a written set of laws but known to the community practicing it and passing it on from generation to generation, which throughout history has evolved and developed to meet the change in needs of the community.⁷⁸ This capacity to change requires the court to investigate the customs, cultures, rituals, and usages of a particular ethnic group to determine whether a marriage was celebrated and concluded in terms of customary law. This is the case particularly

71 S Van Niekerk & S Masumpa 'Customary Law Marriages and "Izibizo" – Is the Tradition Becoming Extortion' 26 May 2021 <https://www.mondaq.com/south-africa/family-law/1072684/customary-marriages-and-izibizo-is-the-tradition-becoming-extortion> (accessed 12 September 2021).

72 DD Nsereko 'The Nature and Function of Marriage Gifts in Customary African Marriages' (1975) 23 *The American Journal of Comparative Law* at 686.

73 N Nxumalo *Inqolobane Yesizwe (the Storehouse of the Nation)* (1980) at 118.

74 As above

75 As above.

76 *Bhe* (n 11) para 153.

77 *Alexkor* (n 2) para 57.

78 As above.

because 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 cultures of those people.

The importance of the pre-marital ceremonies and their significance in the conclusion of customary marriages is yet to be argued and/or stressed either by litigants, courts, or academics, but the importance of observing them can also assist in the determination of what constitutes a valid customary marriage. Furthermore, the performance of pre-marital ceremonies may assist in this determination but the failure to complete these ceremonies cannot result in the marriage being declared invalid.

The Court stated in *Motsoatsoa v Roro* that the handing over of the bride (*go gorosa ngwetsi* (Tswana)/ *ukusiwa ko makoti e mzini e hamba noduli* (Xhosa) is not only about the celebration with the attendants, feast, and rituals. It encompasses the most important aspect associated with the married state namely *go laya/ukuyala/ukulaya*.⁷⁹ There is no English equivalent of this word or process but loosely translated, it implies 'coaching' which includes educating and counselling both the bride and the groom on their rights, duties, and obligations which a married state imposes on them.⁸⁰ This is the most important and final step in the chain of events which happens in the presence of both the bride and the groom's families.⁸¹ One can even describe this as the official seal, in the African context, of the customary marriage.⁸² Furthermore, not only is the handing over an important requirement for the validity of a customary marriage, it is inevitably the final step that the parties need to take before they are regarded as married in terms of customary law.⁸³

4 The abandonment of celebration/handover as crucial elements that validate invalid customary marriages

The greatest challenge for the development of customary law also arises from the inconsistencies in the way it has been applied and interpreted. These inconsistencies are caused by the fact that not much attention is given to understanding the importance and significance of the crucial elements of African customary law, particularly traditional marriages. In the matter of *MM v MN*, the High Court stated that in determining the requirement of section 3(1)(b) of

79 *Motsoatsoa v Roro* (n 67) para 19.

80 As above.

81 *Motsoatsoa v Roro* (n 67) para 19.

82 As above.

83 *Southon* (n 58) paras 39-40.

the Recognition of Customary Marriages Act, regard must be given to the relevant customary practices of a community and that such practices will be an addition to the requirements of section 3(1)(a).⁸⁴

It has also been argued that customary law is a dynamic, flexible system that continuously evolves within the context of its values and norms to meet the changing needs of the people who live by its norms.⁸⁵ The system, therefore, requires its content to be determined with reference to both the history and the present practice of the community concerned.⁸⁶ Furthermore, although various African cultures generally observe similar customs and rituals, it is not unusual to find variations in their local practice because of the pluralistic nature of African societies.⁸⁷ It is argued that for this purpose, the drafters of legislation may have left it open for the various communities to give context to section 3(1)(b) in accordance with their lived experiences.⁸⁸ It is therefore submitted that because of the pluralistic nature of African customary law, our courts should look at approaching *amicus curiae* who are practically knowledgeable with customs and who are cultural experts and not simply academics. The use of knowledgeable cultural experts in cases will enable courts to address arguments concerning the evolvement of customary law as they will be able to give evidence as to how customary law has evolved.

Moreover, our courts should investigate and understand the significance of the rituals that are conducted during the handover and celebration of the traditional marriage. Extending invitations to cultural experts and investigating the importance and/or significance thereof will assist the courts in understanding the importance and determination of living customary law and further aid in finding solutions that may assist courts in making informed decisions.

5 Recently decided cases addressing section (3)(1)(b) of the Recognition of Customary Marriages Act.

5.1 *Tsambo v Sengadi* (244/19) [2020] ZASCA 46

In this matter, the Supreme Court of Appeal had to decide whether the conclusion of the *lobolo* negotiations and handing over of the bride ensued in satisfaction of the requirement that the marriage be

84 *MM v MN* 2010 (4) SA 286 (GNP) para 17.

85 *Mbungela* (n 3) para 17.

86 As above.

87 *LS v RL* 2019 (1) ALL SA 569 para 85.

88 As above.

negotiated and entered into or celebrated in accordance with customary law in terms of section 3(1)(b) of the Recognition of Customary Marriages Act.⁸⁹ The respondent contended that a valid customary marriage was concluded between her and the late Mr Tsambo. The appellant argued that no customary law marriage had been concluded between her and the deceased and argued that at best for the deceased, the necessary customs, rituals, and procedures required for the conclusion of a customary marriage may have begun but were not proceeded with or completed.⁹⁰

Similarly, the Court opined that the requirements of a valid customary marriage had been met even though the official handover was not conducted.⁹¹ I submit that the aforementioned Court was correct to note that the respondent and the deceased had intended to marry customarily and further that they regarded themselves as a married couple as evidenced by their continued cohabitation and the respondent's registration of the deceased as a beneficiary and spouse on her medical aid scheme.⁹² However, this should not be construed as having complied with section 3(1)(b) particularly, the 'handover' requirement.

The appellant correctly argued that the handing-over ceremony was not conducted. The Court should not have overlooked the issue of the ceremony not being conducted. The rituals serve as the introduction of the bride to the groom's ancestors as a new member of the husband's family and are significant in obtaining the ancestors' blessing and acceptance.⁹³ In *Moropane v Southon*, the Supreme Court of Appeal was legally correct to hold that handing over is a crucial requirement for a customary marriage.⁹⁴ The waiver of such a requirement cannot be assumed. However, the courts may then be justified if the decision to recognise a marriage was taken solely on the intentions of the parties.

5.2 *Mbungela & Another v Mkabi & Others* (820/2018) [2019] ZASCA 134

This matter also dealt with the requirements of a valid customary marriage, particularly section 3(1)(b) where the bride was not handed over and the *lobolo* was not paid in full. The practice of *ilobolo* has been referred to by many as the bridal-price, or bridewealth.⁹⁵ However, these concepts are not the true meaning of what this

89 *Tsambo v Sengadi* (244/19) [2020] ZASCA 46 (*Tsambo*) paras 3-7.

90 *Tsambo* (n 89) paras 3-7.

91 *Tsambo* (n 89) para 30.

92 As above.

93 Nxumalo (n 73) 118.

94 *Southon* (n 58) para 35.

95 D Posel & S Rudwick 'Marriage and ilobolo [Bridewealth] in contemporary Zulu society' (2012) 57(2) *African Studies Review* at 51.

practice is and stands for. *Ilobolo* has been warped by common law to be synonymous with ‘buying a wife’, which is misleading.⁹⁶ It is worth noting that *lobolo* forges a relational bond among African families, it creates friendship, and it is also a way of facilitating a relationship between two families.⁹⁷ Through the negotiation of *lobolo*, families are brought together and united. In addition, the transfer of *lobolo* creates a web of affiliations that stretches across generations.⁹⁸ It is also the language that the ancestors understand and bless.⁹⁹ Ngema also argues that people who adhere to the custom of *lobolo* view it as a significant custom that connects them with their ancestral spirits.¹⁰⁰

Moreover, in the *Mbungela* matter, during the *lobolo* negotiations, no mention was made of a handing over or a bridal transfer ceremony, which is not an absolute requirement to complete a customary marriage in Mr Mkabi’s own culture.¹⁰¹ He stated that according to his own understanding, *lobolo* may suffice in Swati culture, depending on the negotiations. Moreover, he was never informed that the marriage would be complete only when the entire *lobolo* amount was paid.¹⁰² There was no demand for the balance of R3 000 which he intended to pay in due course despite his understanding that *lobola* is never paid in full.¹⁰³ The Supreme Court of Appeal opined that the handing over of a bride is meant to mark the beginning of a couple’s customary marriage and to introduce the bride to the groom’s family.¹⁰⁴ However, it is not necessarily a key determinant of a valid customary marriage.¹⁰⁵ The Court further stated that it cannot be placed above the couple’s clear volition and intent where their families, who come from different ethnic groups, were involved in and acknowledged the formalisation of their marital partnership.¹⁰⁶

What is notable about the two aforementioned matters is that the Court had denounced handing over the bride as being an essential requirement where parties had intended to get married and where they recognised themselves as having been married. Notably, the intention of the parties as opposed to what the provision requires is considered over statutory requirements because if the orders were to

96 S Sibisi ‘The Juristic Nature of iLobolo Agreements in Modern South Africa’ (2021) 42 *Obiter* at 59.

97 J Shope ‘“Lobolo is here to stay”: Rural black woman & the contradictory meanings of lobolo in post-apartheid South Africa’ (2006) 20 *Agenda* at 66.

98 As above.

99 South African Law Reform Commission *The Harmonisation of the Common Law and the Indigenous Law: Report on Customary Marriages* (1998) at 49.

100 Ngema (n 69) 406.

101 *Mbungela* (n 3) para 6.

102 As above.

103 *Mbungela* (n 3) para 7.

104 *Mbungela* (n 3) para 30.

105 As above.

106 As above.

be granted as per the requirements of the Recognition of Customary Marriages Act, it may result in marriages being nullified.

6 The urban and rural division

In *Bhe v Khayelitsha Magistrate*, the Constitutional Court noted that modern urban communities and families are structured and organised differently and no longer purely along traditional lines,¹⁰⁷ and further that the rules had become increasingly out of step with the real values and circumstances of the societies they were meant to serve and particularly the people who live in urban areas.¹⁰⁸ However, Bekker and van der Merwe¹⁰⁹ noted that despite whatever social changes have occurred, placing the emphasis on urban and rural areas is a cause for concern as there are several continuous urban networks/communities where people have not entirely adapted to an urban lifestyle.¹¹⁰ Furthermore, even if people have moved to urban areas and have been exposed to western influences, it does not change and/or devalue the significance of ancestral rituals.

7 Conclusion and recommendations

The development of African customary law jurisprudence is dependent on its proper interpretation uninfluenced by what colonisation has bequeathed us. The interpretation of our customary law through the prisms of common law has frustrated the development of customary law, which has, unlike the common law, been downtrodden and stifled in its development.

In the case of traditional marriages, it is imperative that for a court to have a clear picture in respect of what constitutes a valid traditional marriage, it should investigate the elements of a customary marriage using African values and underpinnings and should make use of cultural experts to determine whether the rituals are observed as a social practice or out of a sense of obligation. If a ritual is a social practice, it binds no one and should not be developed. If, however, a ritual is observed out of a sense of obligation, it may then mean that it is a norm that cannot be deviated from without consequences.¹¹¹ The task of the courts would then be to test the norm against the Constitution for consistency and thereafter develop it to comply with constitutional muster.

¹⁰⁷ *Bhe* (n 11) para 80.

¹⁰⁸ As above.

¹⁰⁹ JC Bekker & IA van der Merwe 'Proof and Ascertainment of Customary Law' (2011) 26 *Southern African Public Law* at 124.

¹¹⁰ Bekker & van der Merwe (n 109) 124-125.

¹¹¹ TA Manthwa 'The Interplay between Proving Living Customary Law and Upholding the Constitution' (2019) 3 *Stellenbosch Law Review* at 468.