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CHERISHING CUSTOMARY LAW: THE DISPARITY BETWEEN LEGISLATIVE AND JUDICIAL INTERPRETATION OF CUSTOMARY MARRIAGES IN SOUTH AFRICA

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SUMMARY

The constitutional recognition of customary law in South Africa has opened a new conduit for the development of customary law. With the courts taking the lead in addressing customary law disputes, the interpretation of customary law has come with setbacks. This article argues that the development and reform strides made by the judicial and legislative institutions appear of modest benefit to the people they strive to protect, advance and regulate, especially during interpretation and reform. The article seeks to confront the judicial interpretation of customary law based on the recent High Court case of *Sengadi v Tsambo.* The court had to consider an application for four types of relief. The court deviated from the factual nature of customary law in relation to a spouse's burial rights when it concluded that a valid customary marriage and all the validity requirements outlined under the Recognition of Customary Marriages Act had been met. Indicating the factuality of customary law when it relates to marriage and its link to burial rights, "that a male descendant of the household belongs to his paternal family, his place and existence being one with his paternal roots. His right to belong to his paternal family is absolute and customary." The above ignored, yet crucial cultural practice informs the interpretation of customary law under the constitutional guise. The Constitution affirms the right to practise and observe one's culture. In *Sengadi v Tsambo*, to determine the burial rights of a spouse, the court employed a narrow and strict interpretation instead of interpreting the cultural practice of bridal integration against a holistic customary background. The article advocates for courts to adopt purposive interpretational approaches in reforming customary law. It emphasises for the consideration of the interpretational rules and theoretical frameworks proposed by legal scholars to reflect the factual nature of customary law. As the positivist approach to customary law

undermines the pluralistic nature of the South African legal system. The article pioneers for the recognition of living customary law as holistic, and an integral normative system of indigenous people of South Africa, while taking into account the history and context of this legal system.

1 INTRODUCTION

The Constitution of the Republic of South Africa, 1996 (Constitution) prides itself on the recognition of indigenous languages and the right of choice of religion and culture.[1] Section 31 of the Constitution recognises the existence of culture and its practices. It is commendable that the drafters of the Constitution saw it imperative to recognise the culture and the customary practices of the marginalised ethnic South African, whose cultures were overlooked during the colonial struggle and the apartheid era.[2]. Despite the positive constitutional advancements in customary law, there remain several concerns regarding its interpretation and application by the judiciary. This tension arises from the clash between the Constitution and customary law, which often cannot be fully reconciled, leading to dissension.[3] The judicial interpretation of living customary law tends to favour a positivist approach, emphasising legislation over normative stances based on people's daily experiences. In essence, while customary law has evolved and adapted to current circumstances, challenges persist in harmonising it with constitutional principles. The courts grapple with striking a balance between tradition and modernity, seeking to ensure justice and fairness for all.[4] The judiciary's disposition to apply common-law principles and remedies during customary law disputes creates the impression that this is the standard approach to solve customary law disputes;[5] however, such remedies never address the normative position of living customary law.[6] The main argument in the article asserts that the judiciary overlooks the nature and deep-rooted meaning of customary practices when interpreting customary law. Based on the above points, it is evident that parties approached the court and claimed that they have subscribed to customary law and its practices, when in fact they have only managed to perform partial customary ceremonies pursuant to a valid conclusion of a customary marriage.[7] Parties fail to distinguish between a practice of convenience and actual living customary law, as observed by the relevant tribe(s). The customary law normative systems and

1 The right to language and to belong to a linguistic community is protected and recognised under ss 6 and 30; and culture, religion and belief systems are protected and recognised under ss 15 and 31 of the Constitution.

2 See s 39(3) of the Constitution.

3 Ozoemena "Living Customary Law: A Truly Transformative Tool" 2014 Constitutional Court Review 6 152.

4 See the decision of *Bhe v Khayelitsha Magistrate* 2005 (1) SA 580 (CC), where the court replaced the rule of male primogeniture with a common-law statute – the Intestate Succession Act 81 of 1987.

5 This was the stance in *MM v MN* (29241/09) [2010] ZAGPPHC 24 (24 March 2010) where the courts claimed that the first respondent to remedy her current void marriage by claiming damages from the deceased estate of the spouse who deceived her into a marriage without complying with the s 7(6) of the Recognition of Customary Marriages Act 120 of 1998.

6 See the decision of *Bhe v Khayelitsha Magistrate supra*.

7 *Maisela v Kgolane* NO 2000 (2) SA 370 (T) par 1–8.

practices are caught between an appreciation and observance of customary practices, and piecemeal application of customary practices pursuant to the conclusion of a customary marriage.[8] Many parties approaching the courts have performed partial customary ceremonies and rites, and thereafter live in a common household as though they are living as husband and wife.[9] This state of affairs has been observed in the recent case of *Sengadi v Tsambo*.[10] The judgment affects not only the parties' rights and status in terms of a customary marriage, but also distorts the process, which goes beyond marriage and affects also the familial rights of the parties. In the above matter, the court overlooked the nature and observance of the marriage ceremonies. Furthermore, the court interpreted and reasoned that customary practices have evolved;[11] and that such practices have succumbed to the effects of globalisation, a change in lifestyles, and individuals changing how they observe and subscribe to customary law.[12] In those terms, there is no strict line that differentiates customary marriage ceremonies that have been fully observed in full from incomplete ceremonies in which parties have waived the inherent right to observe these ceremonies.

Despite legislative attempts to codify customary law or tend to its legal protection and recognition,[13] the legislature and courts, as discussed above, have not captured the essence of customary law. This article seeks to investigate the current interpretation and application of customary law in the guise of customary practices concerning the celebration and conclusion of a valid customary marriage. The current legislative stance on customary marriages, as regulated by the Recognition of Customary Marriages Act (RCMA)[14] and its amendments, manages to offer guidance on the valid conclusion of a customary marriage.[15] However, courts are still inclined to overlook customary practices during the legal interpretation of customary law. As highlighted under section 3(1)(*b*) of the RCMA, "customary marriages must be entered into, negotiated, and celebrated according to customary law". There are several crucial, necessary and required rituals to be observed during the traditional celebration of customary marriages, but the courts have in many cases overlooked these to offer a resolution to discontented parties.[16] The judicial approach creates disharmony and distorts the nature of customary law practices.[17] The article focuses attention

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8 See s 3(1) of the Recognition of Customary Marriages Act 120 of 1998.

9 This has been evident in major cases such as *Bhe v Khayelitsha Magistrate supra*; *Sengadi v Tsambo* 2019 (4) SA 50 (GJ); *Mabuza v Mbatha* 2003 (4) SA 218 (C).

10 *Supra*.

11 *Mabuza v Mbatha supra* par 13.

12 *Ibid*.

13 See the Recognition of Customary Marriages Act 120 of 1998.

14 120 of 1998.

15 S 3(1) of the RCMA.

16 See *Moropane v Southon* [2014] JOL 32177 (SCA); *Maisela v Kgolane* NO *supra*; *Mabuza v Mbatha supra* and *Bhe v Khayelitsha Magistrate supra* as reference.

17 According to s 1 of the RCMA, customary law is defined as, "custom and usages traditionally observed among the indigenous African peoples of South Africa and which forms part of their culture". Note that this translates to Black South Africans. This is elucidated in s 1 of the Law of Evidence Amendment Act 45 of 1988, which explicitly states that "'indigenous law' means the law or custom as applied by the Black clans in the Republic". Note that this stance may be discriminatory in light of the current South African dispensation and the fact that the Constitution recognises a plural normative legal order.

and academic interpretation on the *Sengadi v Tsambo* and *Tsambo v Sengadi* case insofar as what the customary law repercussions are for those who still subscribe to customary law.[18] In addition, the article looks into the pragmatic customary practices and ceremonies that are required, and which must be fulfilled and observed during the marital procession, and which embed the correct reflection of the nature and form of customary law. Concluding remarks and recommendations are made.

2 CASE ANALYSIS

2 1 Facts of the case

In the matter of *Sengadi v Tsambo,*[19] the court had to consider several legal aspects concerning customary practices relating to the parties' marriage and burial rites. The applicant contended that she was the customary wife of the deceased, and brought an urgent application to court seeking four types of relief against the respondent, who was the father of the deceased.[20] The deceased in question was known as HHP or Jabba, formally named, Jabulani Tsambo. The applicant sought a declaration from the court that she was the customary wife of the deceased, and an interdict prohibiting the respondent from burying the deceased at his paternal home; as well as a declaration to allow her to bury the deceased at their matrimonial home, and a spoliation order against the respondent to return access and use of the matrimonial home and effects.[21] The applicant claimed that she married the deceased according to customary rites and that their customary marriage was valid regardless of whether *lobola* was tendered in full. She claimed that the handing over of the bride celebration was conducted, that the final ritual of killing the beast was observed, and that they adhered to section 3(1)(*b*) of the RCMA.[22] The applicant contended that the customary celebration had been observed after the conclusion of the *lobola* negotiations (also known as bride wealth), in which the husband's family tendered two-thirds of the payment as per negotiations.[23] To this effect, the RCMA does not prescribe that *lobola* is a strict or a validity requirement for a valid conclusion of a marriage. In the case of *Moropane v Southon*,[24] it was held that full payment of *lobolo* is a strict requirement for the valid conclusion of a customary marriage. However, this was overturned in the case of *Bhe v Khayelitsha Magistrate*.[25]

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18 See both proceeding judgments, *Sengadi v Tsambo* 2019 (4) SA 50 (GJ) *and Tsambo v Sengadi* [2020] ZASCA 46.

19 *Sengadi v Tsambo* 2019 (4) SA 50 (GJ).

20 *Sengadi v Tsambo supra* par 1.

21 *Ibid*.

22 *Sengadi v Tsambo supra* par 4–16.

23 *Sengadi v Tsambo supra* par 5.

24 *Supra* par 41–42.

25 *Supra*. Originally, *lobola* was a payment in consideration of marriage. However, traditionally, *lobolo* is a payment to acknowledge the integration of two families when asking the hand in marriage of a daughter from another family. *Lobola* harbours more significant meaning and its ethos is discussed below. *Bhe and Others v Khayelitsha Magistrate and* Others 2005 (1) SA 580 (CC).

Although the Tsambo family failed to observe the initial step of concluding the negotiation procedures, they tendered to celebrate and welcome the applicant into the matrimonial household and family.[26] They observed the celebration of welcoming the bride regardless, and this led to the contention that the deceased and the applicant entered into a valid customary marriage, even if only a portion of the matrimonial rituals and procedures had been observed, and others were overlooked. The contention raised by the applicant, that she was the customary wife of the deceased, was strengthened by the conduct of the Tsambo family in allowing her and the deceased to reside or cohabitate in the matrimonial home bought by the deceased.[27] The deceased and the applicant faced matrimonial issues, mainly owing to the deceased's infidelity and drug abuse, which led the applicant to leave the matrimonial home.[28] The tumultuous issues faced by the deceased, coupled with untreated depression, led the deceased to commit suicide.

During the funeral arrangements, the applicant returned to the matrimonial home, but the deceased's father denied her entry.[29] The respondent refused to accept the applicant as the customary wife of the deceased, and claimed that customary rites and rituals were not strictly and customarily observed, and thus she could not be accepted as Tsambo's bride.[30]

2 2 Decision of the court *a quo*

According to the RCMA, a valid customary marriage needs to meet the requirements provisioned under section 3 of the Act, which states:

> "For a customary marriage entered into after the commencement of this Act to be valid – (*a*) the prospective spouses must both be above the age of 18 years; and must both consent to be married to each other under customary law; and (*b*) the marriage must be negotiated and entered into or celebrated by customary law."

The High Court accepted that the initial intention by the Tsambo family was to accept the applicant as married to the deceased, and ascertained this fact in the partial celebration. It is clear that the court wanted to provide relief to the applicant, but the court ignored the symbolic feature and link between marriage and burial rites. Although the court focused on the aspect of the

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26 *Sengadi v Tsambo supra* par 6–9.

27 *Sengadi v Tsambo supra* par 9.

28 *Sengadi v Tsambo supra* par 10–11. Note that under the common-law lens, this will be viewed as wilful abandonment of the matrimonial home, and this would serve as a ground for divorce on the basis of the irretrievable breakdown of the marriage. S 4(2)(*a*) of the Divorce Act 70 of 1979 states that, subject to the provisions of subsection (1), and without excluding any facts or circumstances which may be indicative of the irretrievable break-down of a marriage, the court may accept evidence – (a) that the parties have not lived together as husband and wife for a continuous period of at least one year immediately prior to the date of the institution of the divorce action. Also, in respect to customary practices and beliefs, a wilful abandonment of the matrimonial home is a ground for a customary divorce. The above practice holds that a wife who abandons the matrimonial household is regarded to have consented to a customary divorce. Therefore, the spouse may approach the court and adduce evidence to that effect for the court to order a decree of divorce.

29 *Sengadi v Tsambo supra* par 12.

30 *Sengadi v Tsambo supra* par 14–16.

validity of the customary marriage, the matter of burial rites should have been addressed in tandem. The aspects pertaining to burial rights are linked not to the marriage but to the status that exists under customary law, which is "the right to belong to one's paternal family even after death".[31] In relation to section 3(1)(*b*) of the RCMA, the court elected to interpret the customary law of bridal integration using a liberal and idealistic approach. There is no denying that not all customary law and practices are made official through codification, since there are no uniform standards in customary law owing to the flexibility of the legal system.[32] The court's interpretative approach sought to dwell only on the aspect of marriage although the reason for the dispute related to burial rites, albeit informed by the observance of matrimonial ceremonies related to the valid conclusion of a customary marriage. The court proceeded to make a close analysis of the respondent's contention that the ceremony of bridal integration was not observed. Known in Tswana culture as "*go goroswa*", this is an official and sacrosanct customary practice that cannot be taken out of the equation through the negligence or unwillingness of the parties involved. Since the court chose to interpret the practice liberally, not much could be contested. The court asserted:

> "Customary law is living law because its practices, customs and usages have evolved over the centuries. The handing over custom as practised in the pre-colonial era has also evolved and adapted to the changed socio-economic and cultural norms practised in modern times."[33]

The court gave socio-economic justification for the family's ignorance of the initial requirement to observe bridal integration practice. Casting customs away for convenience and removing the due process is ignorant and synthesised as pleasure seeking. The initial manner in which the respondent's family carried themselves was in response to a "need for convenience", but means omitting long-observed traditions and customary practices inherent to a matrimonial ceremony. It is well noted that African customary practice embraces a consonant belief system. The interrelationship between culture and spirit is entwined in its nature and form. Every customary practice is imbued with what Asian communities call yin and yang (connecting opposite sides of darkness and light in order to obtain a balance); the harmony of observing cultural practices brings about spiritual harmony and existence. Simply removing a practice because it is time-consuming or aligns with the current *bourgeois* lifestyle that deems it to have evolved disturbs the harmony of the cultural practice. The court stood firm and further held:

> "The existential reality that customary law is dynamic and adaptive finds resonance … the notion that physical (virilocal) handing over of the bride to the bridegroom's family being the be-all and end-all of customary marriages is

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31 This custom is elucidated below. Also, see deposed affidavits by the Fanti family regarding oral evidence of the living customary law they practice under Xhosa tribe. *Fanti v Boto* 2008 (5) SA 405 (C) par 2–5.

32 Bennett "Customary Criminal Law in the South African Legal System" in Fenrich, Galizzi and Higgins (ed) *The Future of African Customary Law* (2012) 376.

33 *Sengadi v Tsambo supra* par 20.

> not correct, because the handing over of the [bride] can also take a symbolic or uxorilocal form."[34]

The court's stance and reasoning seek to cast out any customary practice that seems not to fit in with modern ideals or that does not make literal sense. This mentality and legal interpretation forgo the essential element of customary interpretation and the fundamental customary practices that are observed, and that should be observed to maintain the cultural form and nature of customary law, especially when it comes to customary practices informed by a spiritual connection. To maintain its reasoning, the court relaxed the customary practice of bridal integration, using a flexible approach to the requirement in section 3(1)(*b*) of the RCMA regarding observing cultural ceremonies, and found that according to the modern requirement, the parties could be declared validly married.[35] The court confirmed its decision that:

> "[t]he customary law custom of handing over the bride to the bridegroom's family as an essential pre-requisite for the lawful validation and the lawful existence of a customary law marriage declared to be not a lawful requirement for the existence of a customary law marriage when section 3(1) of the Recognition Act have been complied with."[36]

The court's *ratio decidendi* undervalues the long-standing and purposeful customary practice of "*go goroswa*" as a prerequisite for the valid conclusion of a customary marriage. The court's pragmatic approach to interpreting customary law, in condemning the necessary practice of *go goroswa*, falls short of the required intentional, holistic, and purposeful interpretation of the customary practices as observed. Furthermore, the court elucidated its purview of the initial practice of *go goroswa* by stating:

> "The customary law custom of handing over the bride is self-evidently discriminatory on the ground of gender and equality as between the prospective wife and the prospective husband. Because only women, after consenting to enter a customary law marriage are subject to this unequal treatment by the custom of handing over which overrides the statutory requirements of section 3(1) of the Recognition Act as the essential requirements for a valid customary marriage."[37]

This belief that handing over the bride is gender prescriptive because it seeks to undermine women when they need to be handed over is misguided and misdirected. Handing over the bride is a prerequisite that must be fulfilled owing to the nature and the embedded meaning of customary marriage. It signifies the acceptance of both physical and spiritual integration of the wife into the husband's family.[38] The judge crystallised his position on bridal integration by stating:

> "In my considered view the requirement of handing over the bride to bridegroom's family does not pass Constitutional muster as it is not in

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34 *Sengadi v Tsambo supra* par 22.

35 *Sengadi v Tsambo supra* par 36–38.

36 *Sengadi v Tsambo supra* par 42.

37 *Sengadi v Tsambo supra* par 36.

38 See *Fanti v Boto* 2008 (5) SA 405 (C) judgment on this; and *Mabuza v Mbatha* 2003 (4) SA 218 (C) par 223.

> accordance with the Bill of Rights and it does not promote the spirit, purport and objects of equality and dignity clauses in the Constitution because this handing over custom as a determinative prerequisite for the existence of a customary law marriage unfairly and unjustly discriminates against the gender of the applicant as a woman and denies her constitutional right of equality and dignity."[39]

The abandonment of a longstanding and obligatory tradition in favour of modern convenience within the institution of marriage also undermines the constitutionally protected right to freely practice and observe one's cultural heritage.[40] The court's interpretation of customary marriage, while narrow and individualised, stands in contrast to the prevailing view among the advocates of customary law, who recognise these practices as communal, traditional, and imbued with spiritual significance.[41]

2 3 Ambiguity in interpretation: the Supreme Court of Appeal (SCA)

The respondent appealed to the Supreme Court of Appeal (SCA) to declare the customary marriage between the applicant and the deceased invalid for not complying with section 3(1)(*b*) of the RCMA. The SCA confirmed the High Court's decision. On the question of the validity of the marriage between the deceased and the applicant, there should have been reference to experts' evidence to confirm the normative stance regarding customary law in terms of marriage and burial rights. The court *a quo* allowed the respondent to bury the deceased solely based on economic convenience and the fact that preparations were already underway at the deceased's hometown of Mahikeng.[42] However, and according to the nature of customary law as discussed, a deceased male has to be buried near his family household. This custom is still observed by indigenous communities of South Africa.[43] Given the court's departure from looking at the purpose, nature and form of customary marriages, the court's interpretation fell short of ascertaining this important aspect when interpreting living customary law, which is described as the law that is applied and practised by the indigenous communities of South Africa.[44] It is to be noted further that the interpretation clause provides both narrow and broad powers to the judiciary.[45] Before the above statement is alluded to, the interpretation clause as provisioned under section 39 of the Constitution states that when any court or legal forum interprets the rights under the Bill of Rights in the Constitution they must promote the values that underlie an open and democratic society based on

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39 *Sengadi v Tsambo supra* par 37.

40 S 31 of the Constitution of the Republic of South Africa, 1996.

41 *Bhe v Khayelitsha Magistrate* 2005 (1) SA 580 (CC) par 45.

42 *Sengadi v Tsambo supra* par 40–41.

43 *Finlay v Kutoane* 1993 (4) SA 675 (W) 679I–680A.

44 See argument made by Himonga "The Living Customary Law in African Legal Systems: Where to Now?" in Fenrich, Galizz and Higgins (ed) *The Future of African Customary Law* 31–57.

45 The court has narrow powers based on interpreting customary law under the constitutional guise, and broader power to take cognisance of living customary law when it interprets customary law or any other law.

human dignity, equality and freedom;[46] and 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.[47] This shows that the Constitution gives due recognition to customary law and it further guides the judiciary to interpret customary law in light of the constitutional provisions that seek to protect vulnerable and marginalised individuals, being women and children. However, the pursuit of substantive equality within the Constitution, particularly in the context of customary law disputes, has been distorted, resulting in the emergence of a "customary monster" that disproportionately marginalises women and children.[48] Section 39(3) of the Constitution states:

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

The expansive authority vested in section 39 grants the courts considerable discretion to adapt customary law, thereby facilitating its assimilation and evolution within the existing legal framework.[49] The judiciary may take cognisance of the existence of unofficial and official legal systems, being indicative of the appreciation of deep legal pluralism, which speaks to living customary law.[50] The constitutional viewpoint recognising non-state law normative systems is indicative of the progressive nature of our constitutional dispensation. Insistence on binding customary law to the Constitution and the Bill of Rights tends to move away from a holistic approach to interpreting customary law, and creates a distorted view of customary law. It suggests the only view is the Eurocentric position in which the Constitution is fully entrenched. During the drafting of the South African Constitution, the basis of the principles and values adopted and embedded were sourced from Western laws and principles.[51] This obscures the view of customary law as a specific and purposeful law to which many indigenous communities subscribe. The nature of customary law is described by Ndulo as follows:

> "The law before colonialization 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 to customary law. 'African customary law' does not indicate that there is a single uniform set of customs prevailing in any given country."[52]

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46 Ss 39(1) of the Constitution.

47 Ss 39(2) of the Constitution.

48 See *Bhe v Khayelitsha Magistrate supra*.

49 *Ibid*.

50 Rautenbach and Bekker *Introduction to Legal Pluralism in South Africa* (2014) ch 1.

51 The major source during the drafting of the Constitution of the Republic of South Africa was the Netherlands Constitution. See Discussion Document "Drafting of the Constitution: Topics, Detail, Language" (1995) https://www.justice.gov.za/legislation/constitution/history/LEGAL/CP108055.PDF (accessed 2021-09-24).

52 Ndulo "African Customary Law, Customs, and Women's Rights" 2011 *Cornell Law Faculty Publications* Paper 187 http://scholarship.law.cornell.edu/facpub/187 (accessed 2021-09-19) 88.

The courts are allowed to develop customary law, and are imbued with such powers, subject to the Constitution and the law, which they must apply without fear, favour, or prejudice.[53] This is historically significant because, during the apartheid regime, courts did not have the powers to develop non-state law even when fairness would dictate otherwise.[54] Nevertheless, the Constitution of South Africa in its Preamble acknowledges:

> "As the people of South Africa, we recognise the injustices of our past and believe that South Africa belongs to all who live in it, united in our diversity. Human dignity, the achievement of equality and the advancement of human rights and freedoms form part of the founding provisions of our Constitution."[55]

Significantly, this places on the courts the burden of ascertaining living customary law, as it is still an important source of law in South Africa, and is still observed by indigenous communities across the country. According to the practice of *go goroswa,* the two families have to agree on formalities and the date on which the bride will be "handed over" to the bridegroom's family.[56] Upon arrival of the bride and the conclusion of the ceremonial processions, a lamb or goat is slaughtered, and its bile is used to cleanse the couple.[57] This customary observance signifies the union of the couple and the joining of the two families.[58] The ritual is followed by a celebration during which the slaughtered lamb or goat is consumed.[59] This is a precondition for the valid conclusion of a customary marriage, but the court nevertheless overlooked this important ceremonial procession. Furthermore, it could be alluded that the above evidence presented in court *a quo* further ascertains living customary law as required under s 1(1) of the Law of Evidence Amendment Act.[60] It is argued the court's interpretation is illogical; it adopted a constitutional interpretation to suit the modern lifestyle and not customary practice as observed by the relevant indigenous clan. The SCA took an elaborate stance to diminish the normative nature of customary law in relation specifically to customary marriages. The court maintained:

> "[b]ased on the evidence, tendered by the applicant and her witnesses, it is symptomatic of the fact that the aunts tendered to dress her up in a traditional attire and welcome her into the Tsambo family was not an anticipation of a valid customary marriage and mere elucidations."[61]

The court was inclined to recognise the aunts' sentiments as pointing to a valid conclusion of customary marriage, and thus a tacit waiver of the

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53 S 165 of the Constitution.

54 Rautenbach "Deep Legal Pluralism in South Africa: Judicial Accommodation of Non-State Law in South Africa" 2010 60 *Journal of Legal Pluralism and Unofficial Law* 152.

55 Preamble of the Constitution.

56 *Sengadi v Tsambo supra* par 10.

57 *Ibid*.

58 *Ibid.*

59 *Tsambo v Sengadi supra* par 26.

60 45 of 1988. Which states that any court may take judicial notice of the law of a foreign state and of indigenous law in so far as such law can be ascertained readily and with sufficient certainty: Provided that indigenous law shall not be opposed to the principles of public policy and natural justice: Provided further that it shall not be lawful for any court to declare that the custom of *lobola* or *bogadi* or other similar custom is repugnant to such principles.

61 *Tsambo v Sengadi supra* par 25. (sic) authors emphasis.

required formalities and ceremonial prescriptions of *go goroswa*.[62] The court's stance was affirmed by the earlier case of *Mbungela v Mkabi*,[63] where the court succinctly held:

> "The importance of the observance of traditional customs and usages that constitute and define the provenance of African culture cannot be understated. Neither can the value of the custom of bridal transfer be denied. But it must also be recognised that an inflexible rule that there is no valid customary marriage if just this one ritual has not been observed, even if the other requirements of section 3(1) of the Act, especially spousal consent, have been met, in circumstances such as the present ones, could yield untenable results."[64]

The court's final stance seems to justify the parties' actions as a valid customary practice as observed by the community and which has evolved.[65] However, allowing parties, at their convenience, to elect to forgo a necessary and required cultural practice based deviates greatly from the normative nature of custom. By definition, "custom" refers to what people practise communally and in uniformity; it is the actual observance of practices that form part of the identity of each group, community, or clan.[66] While customary law prescribes what one ought to do, custom regulates what people do.[67] Custom pursuant to customary practices does not emphasise on the individuality or personal choices of the members of the community or tribe, but the court seemed to prefer a Eurocentric approach to customary law by emphasising on self-reliant people which is out of touch and hypocritical toward customary law and its innate values, including communities who still hold their customs close.

3 TRADITIONAL INTERPRETATION

The conclusion drawn by the High Court and the SCA raises an important issue that needs to be considered regarding the interpretation of customary law. In customary law, it is imperative to view customs holistically in light of fairness, observance and appreciation of the relevant practices which are not uniform and differ from tribe to tribe.[68] Regarding the interpretation of customary practices pursuant to the conclusion of a valid customary marriage, courts can only make decisions based on the facts because the RCMA does not specify the requirements for the celebration of a customary marriage.[69] In this way, the legislature purposefully embraces a living customary law. In tandem, the requirement relating to a ceremonial celebration is fulfilled when customary law celebrations are generally in

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62 *Ibid.*

63 2020 (1) SA 41 (SCA).

64 *Mbungela v Mkabi supra* par 27.

65 *Ibid.*

66 Juma "From 'Repugnancy' to 'Bill of Rights': African Customary Law in Lesotho and South Africa" 2007 1 *Speculum Juris* 92.

67 See Posner "A Theory of Primitive Society, With Special Reference to Primitive Law" 1980 *Journal of Law & Economics* 1–5.

68 *MM v MN* 2013 (4) SA 415 (CC) par 48–51.

69 *Ngwenyama v Mayelane* 2012 (4) SA 527 (SCA), and emphasised in *Tsambo v Sengadi supra* par 15.

accordance with the customs applicable in those particular circumstances.[70] However, once the three requirements have been fulfilled, a customary marriage, whether monogamous or polygamous, comes into existence.[71] It is an embedded law and customary practice that places significant appreciation on communal integration and relationships in indigenous communities of South Africa. The indigenous people of South Africa hold close to the values of communion and exclude the notion that "a man is an island".[72] The structure of individualism and exclusivity does not exist under the customary guise. The belief that a man belongs to his family even in matrimonial communion is an embedded feature that cannot be replaced with modern and Western notions and ideas.[73] The initial rule of handing a bride over is both symbolic and spiritual; it is embedded in the prescripts relating to a family unit created through affinity, and exists to ensure that couples do not deal with issues such as death aside from the family unit, which is defined by the paternal connection of male descent. Therefore, one cannot enter into a customary marriage without consideration of the custom that exists in respect of marriage, and which is sustained through mutual consent and acceptance of the wives into the husband's family, and is connected though marital spirituality to the husband's paternal side.[74] The meaning that is attached to this significant practice, even when distorted and abandoned by selected modern observers in order to speed up marital processes, is what needs legislative consideration and a novel judicial perspective. Handing over of the bride is part of a matrimonial procession, in which is also held firm the notion that a married male descendant belongs to his paternal household. This is not related to gender discrimination or male primogeniture as the High Court in *Sengadi v Tsambo* interpreted it to be.[75] The concept under consideration acknowledges the dynamic and shifting roles of a husband, particularly in the spiritual dimension of his being. That means he moves from being an unmarried man to a husband and thus affirms himself as the protector and guide in matters affecting his family.[76] According to traditional and customary practices, the husband does not change his paternal surname (or maternal name, depending on whether his parents are married or not), and as such, the male descendant will remain

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70 Ss 3(1)(*b*) of the RCMA.

71 Highlighted in *Tsambo v Sengadi supra* par 15.

72 Discussed in Himonga in Fenrich et al *The Future of African Customary Law* 45.

73 In the context of this article the West means a conceptual space, and it is trite to note that decolonial scholar refers to the West as conceptual space marked by colonial-imperial logics and predations. See Himonga, Nhlapo, Badejogbin, Luwaya, Hutchison, Maithufi, Weeks, Mofokeng, Ndima and Osman *African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* 2ed (2023) 10.

74 Mtuze *Hidden Presences in the Spirituality of the amaXhosa of the Eastern Cape and the Impact of Christianity on Them* (published master's thesis, Rhodes University) 2000 20.

75 In *Bhe v Khayelitsha Magistrate supra*, the court affirmed that the "[male primogeniture] … general rule is that only a male who is related to the deceased qualifies as intestate heir. Women do not participate in the intestate succession of deceased estates. In a monogamous family, the eldest son of the family head is his heir. If the deceased is not survived by any male descendants, his father succeeds him. If his father also does not survive him, an heir is sought among the father's male descendants related to him through the male line."

76 See Himonga *et al African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* 281–285 on the discussion of this changed status *quo*.

within his paternal household even after marriage.[77] In contrast, a female descendant is considered to belong to her husband's paternal household.[78] In African customary law, there is a notion and belief that a female descendant does not hold her paternal or birth surname long,[79] under the assumption that female descendants are bound to be married; owing to the nature of marital status, she is physically and traditionally handed over to her husband's paternal household. (Note that maternal descendants or descendants of unmarried mothers are excluded in the above phrasing, as the rules, practices and processes above only apply when one is married). Such interpretations require a purposeful and holistic consideration of customary practices which enlightens and commends living customary law and affording it its constitutional status.[80] The nature and form of customary law emanate from raw and validified practices that transcend human form and knowledge.[81] There is an element of pseudo-religious and spiritual existence in every ritual and ceremony, and this is evident in all customary practices.[82] Indigenous people of South Africa have over thousands of years closely held onto their belief in an ancestral system.[83] This was so before the introduction of the Bible during colonisation.[84] Currently, most African indigenous communities hold to their belief in a three-tier system that is based on "God", followed by "ancestry" and then "man".[85] Every ceremony celebrated – whether the birth of a child; their progression in life; their entry into marriage; or even after death – their existence of within their immediate context never ceases, and is linked to their spiritual belief. Therefore, when the court in *Sengadi v Tsambo* was faced with the two important and spiritually connected rites of the parties (one of marriage, and one of death, which led to the question of burial rites by the disputing parties), the court failed to honour these beliefs even when confronted with evidence from the relevant witnesses.[86] It is paramount to emphasise that the practice of the handing-over of the bride/*go goroswa* has nothing to do with discrimination.[87] It is based on the wife leaving her home and establishing a new family unit and being integrated within her husband's family. The court in the *Sengadi v Tsambo* case sought to establish that, and pursuant to the marriage between the applicant and the deceased, the applicant (wife) was entitled to bury the deceased.[88] The court in *Sengadi* deviates from the nature and accuracy of customary practices concerning marriage. The courts placed an individualistic filter on a normative system, which goes beyond custom

77 *Ibid*.
78 Mentioned and affirmed in *Moropane v Southon* [2014] ZASCA 76 par 40.
79 Also noted in *Sengadi v Tsambo supra*.
80 Customary law is afforded the same status as common law. See s 39(2) and (3) of the Constitution.
81 Bradley *The Celtic Way* (1993) 5.
82 Mtuze *Hidden Presences in the Spirituality of the amaXhosa* 20.
83 Tamanaha "Legal Pluralism Across the Global South: Colonial Origins and Contemporary Consequences" 2021 *Journal of Legal Pluralism* 185.
84 Mtuze *Hidden Presences in the Spirituality of the amaXhosa* 22.
85 *Ibid*.
86 *Sengadi v Tsambo supra* par 3, 11, 12, and 40–42.
87 *Sengadi v Tsambo supra* par 40.
88 Said with conviction in *Tsambo v Sengadi supra* par 41.

however, treads on its spirituality. The concept of *ubuntu,*[89] and its interpretation, seeks to confirm the communal and close-knit connection of everyone to his or her *familiar* household. The court insisted that the principle of *ubuntu* in light of its emphasis on human dignity must be upheld to protect and ensure that rights under the Bill of Rights were not infringed upon owing to customary law practices that seek to exclude and marginalise women.[90] The robust approach undertaken by the court in *Sengadi* seems to overlook and undermine the nature and form of customary law in its essence and context. Furthermore, the supposed "practical common-sense approach" adopted by the courts deviates profoundly from how living customary law is applied by communities.[91] Depending on isolated practices and ceremonies relating to the marriage itself may as well be a new culture and not the one to be associated with the Tswana people, who may still argue that celebrations must be adhered to especially if they have imbued rituals.[92] It can be observed that parties are using financial incapability to justify random practices as customary law, and this is considered a far stretch from customary law. These sentiments were shared by the respondent in *Mabena v Letsoalo,*[93] concerning the observance of customary law in relation to marriages:

> "Their marriage was performed according to Pedi custom. However, she also said: 'My people and I, we do not engage in these customary traditions. We did it as it pleased my mother. It is how we do it at home, it is how we do it according to our custom'. When it was put to her in cross-examination that they did in several respects not properly follow the Pedi customs, she replied: 'Well, customs differ, it depends on an individual, how does he or she want to do it'."[94]

It can be adduced from such an approach that customary marriage is concluded by implication, even if the physical handing over of the bride does not happen. If that is the case, why then still classify this as being subject to customary law? Should it not rather be personal/private law? At their own convenience, parties elect to perform some rituals while waiving others. Parties do not understand, nor want to understand, the nature and form of customary law and its implication for their spirituality, and the courts are in support of such demeanour. To view customary law in light of individual circumstances, and to pedantically accept them as actual customs, eradicates the normative stance of customary law. Personal circumstance cannot be afforded the same status as culture. Pseudo-customary practices impact the development of customary law in its entirety.

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89 The principle expresses "[the] communality and the interdependence of the members of the community, a respect of life and human dignity, humaneness, social justice and fairness, and an emphasis on the reconciliation rather than confrontation". In *State v Makwanyane* 1995 (3) SA 391 (CC) par 223–225 237, 250, 263, 300, 308 and 309.

90 *Sengadi v Tsambo supra* par 42.

91 *Sengadi v Tsambo supra* par 41.

92 See evidence presented by Robert Tsambo in *Sengadi v Tsambo supra* par 13–6.

93 [1998] JOL 3523 (T).

94 *Mabena v Letsoalo supra* 4.

4 COURTS' EUROCENTRIC AND CENTRALIST INTERPRETATION OF CUSTOMARY LAW

Academic authors have always discussed the status of customary law under the constitutional dispensation, especially living customary law, which is uncodified and unofficial. Without a legislative remedy and a clear interpretative guide, it is left open to misconception and misunderstanding.[95] Customary law as law was historically marginalised, distorted and considered uncivil.[96] For as long as customary law has existed, the positivistic views consistently undertaken during customary law litigation has influenced most of the interpreters and developers of customary law in recent cases.[97] However, the law that could be readily ascertained was, over time, codified through rigorous legislative enactments and court's interpretation always formed a biased and misinterpreted perception. The perception was taught and was part of the educational background of every legal practitioner and graduate.[98] This has undermined the recognition of the existence of normative orders within a single state-law order – in South Africa, a constitutional order. Rautenbach affirms the assertions above that

> "[t]he judiciary, in particular the Constitutional Court, has been less passive in affording individuals belonging to religious or cultural groups protection where needed. The relevant cases deal mostly with legal pluralism issues in the context of human rights law and read like a jurisprudential chronicle reflecting the changing values of a diverse society on the move."[99]

Rautenbach tends to assert that the judiciary merely recognises the existence of customary law and religious law when suited and she confirms the aspect of accepting and acknowledging the deep legal pluralism of South Africa.[100] While not denying that courts are allowed to interpret unofficial law to offer a legal solution to parties in dispute, a misconceived or injudicious application and interpretation may not serve the initial purpose of a specific customary practice. It is therefore submitted that flexibility and consistency of the law during its development and interpretation must be balanced against the values underpinned by the Constitution.[101] This should not eradicate the nature of a particular practice even in the perception of constitutional advancement. The interpreters and developers of customary law must have an intentional, purposeful, and contextual approach to living customary law, especially if courts are faced with evolved practices.

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95 These arguments are adduced by socio-legal theory. They conclude, based on the idea that law can be found in tangible sources, that it is scientifically or logically verifiable. They reject morality and ethics as a source of law. They further argue that law is and should be the law of the State, uniform for all persons, exclusive of all other law, administered by a single set of institutions. See Rautenbach 2010 *Journal of Legal Pluralism and Unofficial Law* ch 1.

96 See Himonga and Nhlapo (eds) *African Customary Law in South Africa: Post Apartheid and Living Law Perspective* (2015) ch 1.

97 See the trend from major reported cases such as *Bhe v Khayelitsha Magistrate supra*; *Sengadi v Tsambo supra*; *Mabuza v Mbatha supra*; *Mabena v Letsoalo supra*.

98 Zgaga "Between Global Inequalities and World Ethics: Personal Reflections on Internationalisation of Higher Education Over the Past Seventy Years" in Van't Land *The Promise of Higher Education Essays in Honour of 70 Years of IAU* (2021) 50–51.

99 Rautenbach 2010 *Journal of Legal Pluralism and Unofficial Law* 147.

100 *Ibid*.

101 *Mayelane v Ngwenyama* 2013 (4) SA 415 (CC) par 24.

5 INTENTIONAL, PURPOSEFUL INTERPRETATION OF CUSTOMARY LAW

Requiring courts to have a purposeful and intentional approach is a daunting task, however, genuineness within the interpretational context could form a new approach within customary law. This approach eliminates malice or distortion, which is the view reiterated in the matter of *Nortje v Attorney-General*, the court adduced that

> "[i]t is no doubt correct to say that the constraints imposed by the traditional rules of interpreting statutes result in too restrictive and 'legalistic' an approach to legislation of this kind and will frustrate both contemporary and future Courts' efforts to accommodate changing social dynamics over the years."[102]

It has been suggested that disputes about customary marriages, contrary to what is enacted in legislation, should be determined under customary law.[103] Parties to a dispute concerning the observance of marital ceremonies in *lieu* of a valid conclusion of a customary marriage where it relates to the observance of customary practices need to be interpreted according to the actual practices of the related tribe.[104] Customary law requires that parties who are bound by it should celebrate it and live according to its tenets, especially if such practices are still uniform within the actual tribe, however, contrary practices may be agreed to be altered by mutual consent. A casual waiver of practices that should be observed, owing to the nature and grassroots connection to spirituality, should not be taken lightly by any legal forum or institution. It is adduced in *Mayelane v Ngwenyama*[105] that customary law is

> "a system of law prevailing in a community with its own norms and values, that was handed from generation to generation".[106]

The court further emphasised "understanding customary law in its own perspective and not in a Western or common-law lens, after all they are systems of law that are parallel to each other one is not above the other".[107] The court further developed an interpretative approach to understanding customary law during its application and interpretation that employs caution, patience, and respect.[108] It should be noted that living customary law or practices must conform to constitutional norms, principles, values and laid-down provisions. However, such an approach should not seek unreasonably or unconsciously to downplay or disregard the intricacies of customary law and its importance to those who subscribe to it. It has been suggested by Van der Westhuizen J, in the matter of *Shilubana v Nwamitwa*,[109] that

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102 See the discussion of *Nortje v Attorney-General* 1995 (2) SA 460 (C) 471.
103 *Mbungela v Mkabi supra* par 17.
104 *Mayelane v Ngwenyama supra* par 24.
105 *Ibid*.
106 *Mayelane v Ngwenyama supra* par 24.
107 *Mayelane v Ngwenyama supra* par 43.
108 *Mayelane v Ngwenyama supra* par 44.
109 2009 (2) SA 66 (CC) par 44–49.

> "[a] process of ascertaining customary law norms requires an analysis of several and imperative factors, namely, 'a consideration of the traditions of the community concerned; the right of communities that observe systems of customary law to develop their law; the need for flexibility and development must be balanced against the value of legal certainty, respect for vested rights and the protection of constitutional rights; and while the development of customary law by the courts is distinct from its development by a customary community, the courts, when engaged with the adjudication of a customary-law matter, must remain mindful of their obligations under section 39(2) of the Constitution to promote the spirit, purport and objects of the Bill of Rights, and not in piecemeal or singular viewpoint, but in a holistic and interactive viewpoint and investigation."[110]

The court in *Mayelane v Ngwenyama* adduced the sentiments that,

> "[t]o afford customary law its place as the primary source of law under the constitutional dispensation requires the observance of the following factors, which are imperative and necessary to guide the legislature and the judiciary: to interpret customary law within its own source and tenets and not within the western view of the law and the normative system; to still subject it to the constitutional test and the values underpinned in the Constitution; to acknowledge that customary law is a system of law that is adept within its community, and it has its own values and norms, that are practised from generation to generation and continuously evolves and develops to meet the changing needs of the community not individuals."[111]

The inherent flexibility of customary law allows for communities to embark on consensus-seeking and on prevention and resolution, in family and clan meetings, of disputes and disagreements; and the above-highlighted aspects provide a setting that contributes to the unity of family structures and the fostering of cooperation, a sense of responsibility and belonging in its members, and the nurturing of healthy communitarian traditions like *ubuntu*.[112] These clear-cut sentiments come from the very judiciary that often allows for deviation from the nature and form of customary law. What is required is to ensure that each consideration and interpretation approach is adopted and dispensed with to guard against means to downplay or ignore customary practices. If living customary law and its practices are approached with caution, respect, and patience, this will allow customary law to evolve according to its nature, and not be tainted by the cynical tales of individual parties. To follow through, parties who waive customary practices for convenience should be recognised as life cohabitating partners and the law of life partnership will apply incessantly to their relationships. Many pseudo-customary marriages accept partial payment of *lobola* or neglect of observing required celebrations or ceremonies, and then parties cohabitate under the assumption that they are husband and wife. This ridicules inherent cultural practices that are observed by tribes who respects and still wants to observe ceremonies as they ought to be. This status *quo* is believed to bring spiritual harmony to marriage and family relationships and creates legal certainty. Within judicial context and the fact that the court's are supposed to take judicial notice of customary practices informed from customary law the intention of the parties to conclude the marriage can be established or

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110 *Ibid*.

111 *Alexkor Ltd v Richtersveld Community* 2004 (5) SA 460 (CC) par 53–4.

112 *Mayelane v Ngwenyama supra* par 24.

determined, which was the case in the *Sengadi* court case. However, a one-size-fits-all approach does not work owing to the diverse and flexible nature of customary marriages, and this fact should also be taken under judicial notice when the court's hear customary law matters.

6 CONCLUSION

Although section 39 of the Constitution introduces interpreters and developers of customary law to a new approach to interpretation, especially concerning human rights issues, this does not necessarily mean that orthodox methods should always be deviated from; a conscientious approach to interpreting and developing customary law according to its nature and form can also involve a re-evaluation of these methods.[113] The judicial recommendations sound good on paper, but they should not merely be made parenthetically. Neglecting laws because they tend to be complex in their nature due to their diverse practices as informed from their respective should not be a resorted by the judiciary and the legislature.[114] In respect, these factors should not deter lawmakers and interpreters of customary law they should be a proactive approach that is undertaken so that customary law serve communities as it should within the constitutional backdrop. Means should be employed to ensure that the sanctity of customary practices as informed by customary law are nurtured and correctly viewed from their communal perspective, thus embracing the nature and form of customary law as the law observed by communities who still believe in its existence, respect its practices, constitutionally observe it, and embrace its normative existence.

[113] Rautenbach 2010 *Journal of Legal Pluralism and Unofficial Law* 147.

[114] See the approach discussed in *S v Makwanyane* 1995 (3) SA 391 (CC) par 156.