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**THE LEGAL CONSEQUENCES OF *ILOBOLA* IN AFRICAN CUSTOMARY
MARRIAGES IN SOUTH AFRICA**

By

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Declaration

DECLARATION OF ORIGINALITY

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Abstract

South Africa has a hybrid legal system which comprises of among others, common law and customary law. Customary marriages are officially recognised under the Recognition of Customary Marriages Act 120 of 1998, however, unwritten living customary law plays a pivotal role in the validation of such marriages. The enactment of the Recognition of Customary Marriages Act ensured that customary marriages received equal status like other legally protected marriages in South Africa. However, section 3(1)(b) of this statute which outlines the validity requirements of a customary marriage has had the unintended consequences of creating an inconclusive locus in respect of what a valid customary marriage entails. This provision requires that a marriage be “negotiated” and “entered into” or “celebrated” in accordance with customary law.

In terms of living customary law, *ilobolo* must be followed by the handing over of the bride in order to conclude a customary marriage. This comprises of various events and rituals depending on the ethnic groups involved. In essence these two practices are mandatory for the valid conclusion of a customary marriage. The position is however unclear within the prism of official customary law. This is elaborate in the dissensus within the judiciary in respect of the customary marriage practices that confirm the valid conclusion of a customary marriage. Due to the contestation centred around proving the existence of a valid customary, there are growing debates as a result of the judiciary’s inconsistent and at times misinterpretation on the provisions of section 3(1)(b). In light of this background, this research explores this debate and aims to provide clarity regarding the essential requirements for the valid conclusion of customary marriages in South Africa.

In summary, this research investigates the legal consequences that the practice of *ilobola* paired with the custom of handing over the bride as an integral part of the marriage, have in the validation of a customary marriage. In doing so, the research considers official and living customary law by analysing various conflicting judgments on this debate. The study makes recommendations on how to resolve the inconsistencies, misinterpretations, and discord of what validates a customary marriage.

CHAPTER ONE: INTRODUCTION

“*iLobolo* is [...] one of the indispensable essentials of a customary marriage”.¹

1.1. Introduction and background

The purpose of the Recognition of Customary Marriages Act,² is to improve the position of women’s rights.³ This was achieved through, among others, implementing measures, which sought to bring customary law in line with constitutional provisions.⁴ Women had reason to celebrate this milestone.⁵ In this context, the RCMA was introduced to, among others formalise customary marriages and also address the recognition, status and rights of women in such marriages. The enactment of the RCMA sought to ensure that customary marriages are recognised as valid marriages for the purposes of South African law, and that they have the same proprietary consequences as that of any other recognised marriage.⁶

South Africa has a hybrid legal system which comprises of amongst others common law and customary law. Customary marriages are officially recognised under the Act, and they are also fundamentally characterised by the application of living customary law which, is where the customs naturally originate from.⁷ As a result of the hybrid system, the judiciary is seen to be found wanting based on their inconsistent and, at times, misinterpretation of what constitutes a valid customary marriage.

¹ *Fanti v Boto and Others* 2002 (5) SA 405 (C) para 22 (hereafter “*Fanti v Boto and Others*”).

² The Recognition of Customary Marriages Act 120 of 1998 (hereafter “RCMA” or the “Act”).

³ South African History Online <https://bitly.ws/UgSp> (accessed 21 August 2023).

⁴ S 9 of the Constitution of the Republic of South Africa, 1993 enshrines the right to equality; Osman “The Consequences of the Statutory Regulation of Customary Law: An Examination of the South African Customary Law of Succession and Marriage” 2019 *PER/ PELJ* 5.

⁵ Radebe “*Tsambo v Sengadi* (244/19) [2020] ZASCA (30 April 2020) *Sengadi v Tsambo*: In Re Tsambo (40344/2018) ZAGJHC 666; [2019] All SA (GJ) (8 November 2018)” 2022 *De Jure Law Journal* 77.

⁶ The Preamble of the RCMA.

⁷ Official customary law refers to codified or written law found in statutes like the RCMA while on the other hand, living customary law refers to the unwritten law. It entails the day to day and way of life of indigenous people. The study will consider the difference between customary marriages in the official and living sense.

Living customary law recognises the payment of *ilobolo* and the handing over the bride as requisite steps for the valid conclusion of a customary marriage.⁸ Further this includes the involvement of the two kinships groups, which are central to the formulation, and in some instances, until the dissolution of such marriages.

While the judiciary has successfully commenced with the ascertainment of the protection of women's rights and the recognition of customary marriages,⁹ over the recent years, there has been growing debates and legal disputes around the valid conclusion of a customary marriage. The debates centre around proving the existence of a valid customary marriage within the prism of section 3(1)(b) of the RCMA. Section 3(1)(b) provides that a marriage must be negotiated and entered into or celebrated in accordance with customary law.¹⁰

Recent judicial findings and the inconsistent treatment of customary law have perpetuated the narrative that there exists uncertainty in some aspects of customary marriages. The uncertainties emerge from two practices which are required in order to conclude a customary marriage. These are namely *ilobolo*¹¹ and handing over of the bride. The difficulties with these practices emerge in instances of a dissolution of a marriage or the death of a spouse and the proprietary consequences of the marriage must be considered.

Ancillary to this uncertainty lies the questions of when and how a valid customary marriage is concluded. To this end, the study aims to explore the legal consequences which the *ilobola* practice has on the validation of a customary marriage, paired with the concept of "handing over a bride" as an integral part in the finalisation of a valid customary marriage.¹² In light of this, this study explores whether the delivery of *ilobolo* and the handing over of the bride are indispensable requirements of concluding a valid customary marriage.¹³

⁸ Mofokeng "The *lobolo* agreement as the 'silent' prerequisite for the validity of a customary marriage in terms of the Recognition of Customary Marriages Act" 2005 *THRHR* 279.

⁹ This point will be explored by way of discussing the case of *Sengadi v Tsambo* (40344/2018) ZAGJHC 666; [2019] All SA (GJ) and others (hereafter "*Sengadi v Tsambo*").

¹⁰ The RCMA S 3(1)(b).

¹¹ See s 1 of the RCMA, the term *lobolo* means the property in cash or in kind, whether known as *lobolo*, *bogadi*... or by any other name which a prospective husband or head or his family undertakes to give to the prospective wife's family in consideration of a customary marriage.

¹² Legal consequences in this context refers to the requisite practices required in the entering and finalisation of a valid customary marriage.

¹³ *Fanti v Boto and Others* para 22.

1.2. Research problem and objectives

Over the years, there has been an increased call for certainty amongst communities that have found themselves at loggerheads with two customary marriage practices that give rise to the conclusion of a valid customary marriage. These are specifically whether the payment of *ilobolo* alone validates a customary marriage and whether the “handing over the bride” is an essential step that must be satisfied for the conclusion of a valid customary marriage.¹⁴ While the two practices are complimentary to each other in the conclusion of a customary marriage, difficulties arise in instances where a marriage is being dissolved or the death of a spouse and the proprietary consequences of the marriage must be considered.

In light of this, this study aims to explore the decisions and approaches taken by the South African judiciary thus far in their application of what constitutes a valid customary marriage. The different positions will be determined by examining living customary law of select ethnic groups that are recognised in South Africa and specifically how they recognise and follow the practices of *ilobola* and handing over of the bride albeit in their unique ways. This is important for this study because it demonstrates the different approaches of various South African tribes. It further considers the different approaches by the judiciary in their attempt to guide through what constitutes a valid customary marriage.

As a result, the main objective of this study is to examine the legal consequences of the *ilobolo* practice and handing over of the bride practice in African Customary law. In the quest of this main objective, the related aims of this study are to:

- a. Determine the genesis of the *ilobola* practice;
- b. Determine the purpose of *ilobolo* in the conclusion of a valid customary marriage and whether the practice of handing over a bride is a requisite step in the conclusion of a valid customary marriage;
- c. Critically examine the position(s) adopted by the judiciary in pursuit of addressing the uncertainty of the conclusion of a valid customary marriage; and
- d. Advance relevant recommendations for developing the customary practice of *ilobola* with the consideration of living customary law and official customary law.

¹⁴ *Sengadi v Tsambo* para 16.

1.3. Delineation and limitations

The study does not discuss the unequal status of customary law as a system of law in South Africa and the extent to which it is being limited. Rather the study focusses on what constitutes a valid customary marriage. The broad interpretation of customary law will divert the focus of this study. Customary law is discussed in as far as it is relevant to this study.

1.4. Literature review

1.4.1. What is the genesis of the *ilobola* practice?

The practice of *ilobola* has been part of the African landscape for many generations as a phenomenon associated with African people. The *ilobola* practice has been in existence since 300BC and practiced in most South African cultures albeit in their different ways.¹⁵ In most parts of South Africa if not all, the pre-colonial law was essentially of a customary nature.¹⁶ Customary law derived its sources in the practices and customs of its people in order to regulate their way of living.¹⁷

The practice of *ilobola* is premised under customary law. Customary law is a system unique to the indigenous African people, from various ethnic groups in Africa.¹⁸ It is a multidimensional legal system comprising of living customary law and official customary law,¹⁹ in which both recognise the practice of *ilobola* and its relevance to

¹⁵ Art of Women <https://bitly.ws/36QZN> (accessed 01 October 2023).

¹⁶ Ndulo "African customary law, customs and women's rights" 2011 *Cornell Law Faculty Publications* 88.

¹⁷ Ndulo 2011 *Cornell Law Faculty Publications* 88.

¹⁸ Ndulo 2011 *Cornell Law Faculty Publications* 88. Customary law is the indigenous law of the various ethnic groups of Africa. The term African Customary law does not indicate that there is a single uniform set of customs prevailing in any given country. S 30 and 31 of the Constitution provides for the right to participate in their culture of their choice.

¹⁹ Bekker and Maithufi "The dichotomy between "official customary law" and "non-official customary law"" 1992 *Tydskrif vir Regswetenskap* 48; Official Customary law is written law that can be found under legislation. Living Customary law is an unwritten/ unofficial system of law that governs the conduct of a traditional community. It is also binding on the community in which it is found.

Authors like Bennett and Armstrong posit that there are three versions of customary law. Bennett divided customary law into 3 versions namely, the living customary law, official customary law and customary law recorded by anthropologists and lawyers.

Armstrong argues that the 3 versions of customary law are namely living customary law, traditional law, and official customary law; Rautenbach *Introduction to legal pluralism in South Africa* (2018) 41.

African people.²⁰ It is codified and now provided for under the RCMA.²¹ Section 3(1)(b) outlines the requirements of a valid customary marriage entered into after the commencement of the Act.²² The requirements are that the parties entering into the marriage must be 18 years of age or above, they must both consent to being married to each under customary law and the marriage must be negotiated and entered into or celebrated in accordance with customary law.²³ The latter of which is tied to the constitutional right to participate in a culture of one's choice.²⁴

South Africa currently recognises three types of marriages namely civil marriages, customary marriages, and civil unions.²⁵ However, family law in South Africa is currently undergoing an active reform process, and to this end the South African Law Reform Commission has recently proposed for the consolidation of a fragmented approach to marriage regulation by proposing the introduction of a consolidated Single Marriage Statute.²⁶ Once enacted, the proposed Single Marriage Statute will regulate all marriages in South Africa and it also proposes to provide the much needed recognition to the presently non-recognised religious marriages within the country.

Customary marriages comprise of two types of marriages namely monogamous customary marriages and polygynous customary marriages. On the one hand a customary marriage is concluded in accordance with traditions of indigenous African customary law.²⁷ While on the other hand a civil marriage needs to be formalised through the signing of a ceremonial document and must be officiated by a marriage officer.²⁸ As such, a customary marriage is entered into through a series of events that show the intent to form a union by all concerned, including the families of those entering into the marriage.²⁹

²⁰ Ndulo 2011 *Cornell Law Faculty Publications* 88; Bekker and Maithufi 1992 *Tydskrif vir Regswetenskap* 48.

Justice Ngcobo provided three forms namely official customary law, living customary law and academic customary law. *Bhe v Magistrate, Khayelitsha and Others* 2005 1 SA 580 (CC) para 152.

²¹ See s4 of the RCMA.

²² The RCMA also recognises all customary marriages that were concluded before its enactment. See ss2(1) and 2(2) of the RCMA.

²³ S3(1) of the RCMA.

²⁴ Section 30 and 31 of the Constitution of the Republic of South Africa.

²⁵ Civil Unions Act 17 of 2006; Marriage Act 25 of 1961

²⁶ Project 144 Single Marriage Statute issue Paper 35 1.

²⁷ Contractual Matters <https://rb.gy/k13up> (accessed 12 October 2023).

²⁸ As above.

²⁹ As above.

Customary law does not recognise same sex marriages.³⁰ What is prudent to note is that fundamentally customary marriages must satisfy practices such as *ilobola* and the handing of the bride in order to be validly concluded. This supposition by the researcher is proven in the subsequent chapters.³¹ *iLobolo* custom and the handing over practice go hand in hand in the conclusion of customary marriages. A bride must be formally transferred and integrated into the family of her prospective husband through the observation of the relevant customs and rituals after the *lobolo* negotiations. Once this is done, she is then formally regarded as part of the latter family. A bride's release from her paternal family and her integration into her husband's family is celebrated with extensive public rituals and ceremonies.³² This is a very important requirement for the valid conclusion of customary marriages.³³

1.4.2. What is the purpose of *ilobolo* in the conclusion of a customary marriage?

The purpose of *ilobolo* is to commence with the engagements of concluding a customary marriage between the bride and the bridegroom and their families. Another debate exists wherein some researchers have suggested that the purpose of *ilobolo* is to "buy" the bride or a purchase and sale agreement.³⁴ However, in its true nature, *ilobola* is considered a milestone in which a prospective husband or the head of his family gives the head of the prospective wife's family property in cash or kind to show gratitude for being allowed to marry their daughter. It is aimed at showing thanksgiving and respect to the family of the bride and their respective customs.³⁵ Furthermore, it is a sacrifice made to forge new relations between two families.³⁶

³⁰ There are growing debates around this issue wherein researchers are arguing that customary law must recognise same sex marriages. See Osman who states that in practice, the courts will have to consider whether to develop customary law in order to include same sex marriage. Osman and Baase "The recognition of same-sex customary marriages under South African customary law" 2023 *South African Journal on Human Rights* 38 1-2.

³¹ See chapter 4 para 4.2 discussion on official and living customary law considering judgments *Mrapukana v Master of the High Court and Another* (6567/2007) [2008] ZAWCHC 113 (21 November 2008) para 25 (hereafter "*Mrapukana v Master of the High Court and Another*").

³² *Thibela v Minister of Wet en Orde en Andere* 1995 (3) SA 147 (T); *Maluleke v Minister of Home Affairs and Radebe* 2008 ZAGPHC 129 para 8 (hereafter "*Maluleke v Minister of Home Affairs and Radebe*").

³³ Sibisi 2020 "Is the requirement of integration of the bride optional in customary marriages?" 2020 *De Jure Law Journal* 93.

³⁴ As above.

³⁵ As above. There is also an adage in Sepedi that says "*mosadi ga fetswe go nyalwa*" without giving a literal translation, the adage symbolises that a bride is priceless and no amount of

Customary marriages are in their nature family orientated or communal. This means that the beginning of such a marriage extensively involves the families of both the bride and the bridegroom. Members of both families have specific roles they play in the conclusion of such a marriage.³⁷ One of the reasons for this is that customary law in its very nature is a communal concept. It is essentially premised on the principle of *ubuntu*.³⁸ Van Niekerk³⁹ posits that the essence of *ubuntu* is encapsulated in the belief that the welfare of the individual is linked to the welfare of their group or family. Therefore the conclusion of a customary marriage reflects the intention of an individual which translates to the inclusion of his family members and the family of the prospective bride.

Before the codification of customary marriages, the fathers or guardians of the prospective newlyweds traditionally played an important role in the conclusion of the marriage. Prior to the enactment of the Act, the requirements for the conclusion of a customary marriage were namely the explicit transfer of *ilobolo*, integration of the bride, consent of the bride's father or guardian and consent of the bridegroom's father or guardian.⁴⁰ Although marriage negotiations under customary law can include complex dynamics, transfer of *ilobolo* and the integration of the bride were fundamental for the valid conclusion of a customary marriage.⁴¹

1.4.3. What stances have been adopted by the judiciary in pursuit of addressing the uncertainty of the conclusion of a valid customary marriage?

The judiciary is mostly guided by the provisions of the RCMA, and the evidence placed before it for purposes of making their own determinations on whether or not a

ilobolo can quantify her worth. A husband remains forever indebted to his in-laws for the gift that is his wife.

³⁷ An example is the aunts and uncles of the couple who are usually sent to delegate the lobolo negotiations.

³⁸ Ubuntu is defined as an ancient African word meaning "humanity" to others. It is often described as reminding us that "I am what I am because of who we all are". <https://www.thoughtco.com/the-meaning-of-ubuntu-43307> (accessed 10 October 2023).

³⁹ Van Niekerk "Succession, Living Indigenous Law and Ubuntu in the Constitutional Court" 2005 *Obiter* 479.

⁴⁰ Himonga and Moore *Reform of Customary Marriage, Divorce and Succession in South Africa: Living Customary Law and Social Realities* (2015) 54; Chapter 4 of the South African Law Reform Commission Report 90.

⁴¹ Manthwa "Lobolo, consent as requirements for the validity of a customary marriage and the proprietary consequences of a customary marriage: N v D (2001/3726) [2016] ZAGPJHC 163" (2017) *Obiter* 438.

customary marriage has been concluded. Customary law plays a significant role in the lives of the majority of African people.⁴² Customary law practitioners are mostly conformant to living customary law. Since its codification, the nature of customary law and its operation has been subverted among the people who identify with it.⁴³ It has led to the disparity and inconsistency of the practices between official customary law and living customary. However, even with the presence of official customary law, the majority of South Africans remain true to their customs, practices, and the processes of customary law as binding on them.⁴⁴ Further, amongst the different ethnic groups in South Africa, the practices of negotiations and the payment of *ilobolo* are common to the different ethnic groups in the pursuit of concluding a customary marriage.⁴⁵

Proximate to the challenges experienced in the application of section 3(1)(b) of the RCMA and as a result, there are growing judicial findings around the concept of “handing over the bride” as a requisite step necessary to conclude a valid customary marriage and whether the payment of *ilobolo* alone constitutes a valid customary marriage. In the case of *Mabuza v Mbatha*, the court held that there are two requirements for a marriage, namely the payment of *lobolo* and the “formal” handing over of the bride to the bridegroom’s family (the isiSwati custom of *ukumekeza*).⁴⁶ The court further held that *ilobolo* does not change the status of a woman to that of a wife. It is only the *ukumekeza* custom, according to Swati people, which makes a woman a wife.⁴⁷

The RCMA requires that a marriage to be “negotiated” and “entered into” or “celebrated” in accordance with customary law. The Act does not direct how a customary marriage should be “negotiated” and “entered into” or “celebrated”. Although section 3(1)(b) does not define the kind of negotiation it refers to, negotiations of a customary marriage are associated with the practice *ilobolo* and payment thereof.⁴⁸ In *Maluleke v Minister of Home Affairs*, the court held that since the

⁴² Ndulo 2011 *Cornell Law Faculty Publications* 89.

⁴³ Ozoemena “Living customary law: A truly transformative tool” 2013 *Constitutional Court Review* 147.

⁴⁴ Ozoemena 2013 *Constitutional Court Review* 147.

⁴⁵ Sibisi 2020 *De Jure Law Journal* 90.

⁴⁶ *Mabuza v Mbatha* (1939/01) [2002] ZAWCHC 11; 2003 (4) SA 218 (C); 2003 (7) BCLR 743 (C) (4 March 2003) para 21 (hereafter “*Mabuza v Mbatha*”).

⁴⁷ *Mabuza v Mbatha* para 21.

⁴⁸ This position is confirmed by Himonga and Nhlapo (eds) *African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* (2014) 103. They say that “it is accepted that ‘negotiated’ is associated with negotiations for the payment of *ilobolo*”.

RCMA requires the validity of a customary marriage to be “negotiated and entered into or celebrated”, which culminate in the payment of *lobolo*, seem to be the fundamental stages in the conclusion of a customary marriage.⁴⁹

The court in *Ndlovu v Mokoena*⁵⁰ echoing *Fanti v Boto*⁵¹ held that *ilobolo* is one of the prerequisites of a customary marriage and non-compliance of the practice invalidates the customary marriage.⁵² In *Mrapukana v Master of the High Court and Another*⁵³ it was held that “[i]t is fairly simple to determine whether or not a party has successfully proved the existence of a customary marriage. There are requirements for a valid customary marriage, namely consensus between the parties, a formal ceremony to transfer the bride to the other family and the payment of *lobolo*.⁵⁴ Initially the consensus referred to was not concerned with consensus between the two marrying parties. The marriage was and is still regarded as a union between two families rather than two individuals.⁵⁵ It is inconceivable that individuals to such a marriage can exclude the two families.⁵⁶ The new provision in the RCMA compliments the agreement between two families”.⁵⁷

In order to appreciate what constitutes a valid customary marriage, it is important to understand living customary law and the role it plays in the process of concluding a valid customary marriage. This is because it is not mandatory to register a customary marriage, and non-registration of the marriage does not affect its validity.⁵⁸ Owing to the lack of explicit wording in the RCMA in terms of how the “negotiations” or “celebration” should take place for the conclusion of a valid customary marriage; different tribes engage in customary marriages based on their norms and standards. In an attempt to address the uncertainties of how customary marriages are validated, this study explores the mechanisms adopted by the judiciary and further consider the

⁴⁹ *Maluleke v Minister of Home Affairs and Radebe* para 12.

⁵⁰ *Ndlovu v Mokoena* 2009 (5) SA (GNP) para 11.

⁵¹ *Fanti v Boto and Others* para 28.

⁵² Sibisi 2020 *De Jure Law Journal* 90.

⁵³ *Mrapukana v Master of the High Court and Another* para 25.

⁵⁴ *Mrapukana v Master of the High Court and Another* para 25.

⁵⁵ *Mabena v Letsoalo* 1998 (2) SA 1068 (T); *Mrapukana v Master of the High Court and Another* para 25.

⁵⁶ *Mrapukana v Master of the High Court and Another* para 25.

⁵⁷ S 3(1) of the RCMA.

⁵⁸ S 4(9) of the RCMA; Machedi “Does the non-registration of customary marriage affect its validity?” 2020 *De Rebus*.

different views of scholars and existing legislation in the determination of the conclusion of a valid customary marriage.

1.5. Methodology

This research is conducted by way of qualitative research methodology. This research is based on literature review of the sources of law namely, legislation, case law, journal articles. The study relies on several international reports such as Universal Declaration of Human Rights, 1948⁵⁹ that recognise customary law practices. The study also engages theses, and books to the effect that they expand this study and its focus into the legal consequences of the practice of *ilobolo* in African Customary law. This study critically examines judicial findings by the South African courts in their attempts to remedy the uncertainty of customary law marriages.

1.6. Chapter overview

- a. Chapter one provides an introduction into the study. It highlights the significance for the study through the background and motivation for the study. The chapter further outlines the research objectives, delineations and limitations of the study, and the methodology.
- b. Chapter two provides a historical background of customary marriage practices. It examines the nature and purpose of customary marriages in the current legal system.
- c. Chapter three explores the westernisation of customary marriage practices. This chapter discusses the transformation of customary marriages and the practices thereof.
- d. Chapter four provides the juristic nature of customary marriages. This chapter outlines various conflicting judgments by the judiciary in their determinations of a valid customary marriage.
- e. Chapter five is the concluding chapter. This chapter provides commentary and possible recommendations for the reform of the validation of customary marriages

⁵⁹ Universal Declaration of Human Rights 1948.

1.7. Reference methods

- a. The De Jure referencing style is followed and full citation of sources together with abbreviated citations are used in the study. Where abbreviated citations were used, same is expanded in full in the bibliography.
- b. The following terms are used interchangeably in the course of this study:
 - i. “*ilobolo*” and “*ilobola*”, however *ilobola* is used where the context requires it instead of *ilobolo*.
 - ii. Indigenous people, African people, and Black people.
 - iii. The “RCMA” and the “Act”.

1.8. Conclusion

The practices of *ilobolo* and handing over of a bride are integral customs under the African Customary Law. Some commentators argue that these customs are cemented in section 3(1)(b) of the RCMA which outlines the validity requirements of customary marriages. However, over the years, a debate has emerged regarding the significance of these customary practices because different conclusions have been reached regarding their positioning under customary law. In light of this background, this study explores this debate and the following discussion provides viable recommendations aimed at advancing a favourable standpoint.

This chapter introduces the aims and objectives of this research. The research provides an overview to give an elaborate explanation of the legal consequences that the practices of *ilobola* and handing over have on conclusion of a valid customary marriage. The researcher poses questions that she aims to find answers on the discord between official and living customary law. The literature review provides a brief summary of *ilobola* and its development in the official and living customary glance. It further discusses various court decisions which will be explored in greater detail in the subsequent chapters of this research.

CHAPTER TWO: THE HISTORICAL BACKGROUND OF CUSTOMARY MARRIAGE PRACTICES

2.1 Introduction

This chapter focuses on the genesis of the *ilobola* practice in the context of precolonial and apartheid South Africa. The subject of *ilobola* remains nebulous and has undergone changes, which require further investigations to determine its nature.¹ This chapter further explores the transformation imposed on the African customs by western influence particularly in relation to the *ilobola* practice.

The practice of *ilobola* is derived from culture in African communities. Culture is important in this context because it describes the way of life for a designated group. This encompasses the values held by the group and the norms they follow or conform to as part of their living customs. *iLobolo* has been prevalent for centuries in many African cultures including South Africa, Swaziland, Zimbabwe and many others.² *iLobolo* serves various functions such as cultural, social, legal³ and economic within its societies.⁴ The exact origins of *ilobolo* are unknown because African customs predate written history. The lack of historical background of customary law mainly emanates from the lack of documentation of customary practices by its custodians, the indigenous people.⁵

The result of oral African tradition is that it is difficult to ascertain whether what is written regarding the practice by colonial missionaries and administrators or anthropologists reflects the true intention of the participants or the nature of events as they unfolded.⁶

¹ Bayi and Hawthorne "Colonisation of lobolo" 2018 (81) *THRHR* 577.

² Parker "The practice of lobola in contemporary South African society" 2015 *Journal of Third World Studies* 175.

³ The legal function of *ilobola* is to facilitate the registration of a customary marriage.

⁴ Msweli *i-lobola in Contemporary South Africa: Perspectives and Experiences of Young People* (Masters Dissertation, 2020 University of KwaZulu-Natal) 4; Sibisi "The juristic nature of *ilobolo* agreements in modern South Africa" 2021 *Obiter* 60.

⁵ Roederer and Moellendorf (eds) *Jurisprudence* (2004) 449; Schapera *A handbook of Tswana law and custom* (1970) 35. See the influence by Theophilus Shepstone through among others, Christian missions formalised the amount of *ilobolo*. Being an arbiter of native law, he strived to produce a much more "civilised" group of native in Natal during the 19th century. Through his writings and missions he sought and encouraged the distortion of customary law. Himonga and Nhlapo (eds) *African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* (2014); Msweli 17.

⁶ Roederer and Moellendorf (2004) 449; Schapera (1970) 35.

This has contributed to the unfortunate misinterpretation of the system.⁷ This lack of documentation has opened a doorway for the transformation of customary law through common law.⁸ As a result of this imposed transformation, it may be argued that this change in the practice is but another instance of distorting African identity and its history.⁹

2.2 Historical background and purpose of *ilobolo*

South African communities have different names for *ilobolo*. In the Banguni communities (amaZulu, amaSwati, and amaNdebele) it is referred to as *ilobolo* or *ilobola*. The Bapedi, Basotho and Batswana communities refer to it as *magadi*, *bohali* or *bogadi*.¹⁰ It is noteworthy that the Nguni name of *ilobolo* or *ilobola* has gained popularity and is commonly used by most South African communities. Mofokeng states that the term *ilobolo* is derived from 'ukulobola' which means to deliver cattle for marriage.¹¹ *iLobolo* is paid by the prospective husband's family to the bride's family.¹²

Traditionally, before the colonial era, there was no separation between the practice of *ilobola* and marriage.¹³ *iLobola* constituted a part of the process of concluding a customary marriage.¹⁴ The unique customs and requirements for concluding a customary marriage can differ between the ethnic groups and tribes, but the fundamental principle of delivering *ilobolo* remains consistent at the core of the marriage institution in African customary law.¹⁵ Traces are found in most of the South

⁷ Mofokeng "The *lobolo* agreement as the 'silent' prerequisite for the validity of a customary marriage in terms of the Recognition of Customary Marriages Act" 2005 *THRHR* 280.

⁸ Bekker "Grounds of divorce in African customary marriages in Natal" 1976 *CILSA* 346; Bennett *Customary law in South Africa* (2004) 220; Bennett "Ubuntu: An African equity" 2011 *PELJ* 30; Dlamini "The ultimate recognition of the customary marriage in South Africa" 1999 *Obiter* 16; Knoetze "The modern significance of lobolo" 2000 *TSAR* 532 538; Maithufi and Moloi "The current legal status of customary marriages in South Africa" 2002 *TSAR* 600.

⁹ Bayi and Hawthorne 2018 *THRHR* 577; Mbembe *Critique of black reason* (2017).

¹⁰ The Tsonga community refer to it *xuma*, *lovola* or *ndzovolo*. The Vhavenda community call it *thakha* and the Xhosa community *ikhazi*. The RCMA in defining lobolo includes all the different names of the practice as recognised in South Africa.

¹¹ Mofokeng 2005 *THRHR* 277 279.

¹² Himonga and Nhlapo (eds) (2014) 189.

¹³ Mofokeng *Legal Pluralism in South Africa: Aspects of African Customary, Muslim and Hindu Family Law* (2009) 43; Claassens and Smythe "Marriage, land and custom: What's law got to do with it?" 2013 *Acta Juridica* 7ff.

¹⁴ Claassens and Smythe 2013 *Acta Juridica* 7.

¹⁵ As above.

African cultural groups such as the Banguni, Basotho and Vatsonga, that the practice of *ilobola* remains part of concluding a customary marriage.¹⁶

Traditionally, the consent of the couples' fathers was very important in concluding a customary marriage.¹⁷ Further, customary marriages could also be concluded through, with the consent of the fathers or guardians, several customs such as *ukuthwala* and *ukungena* practices.¹⁸ The requirements for the conclusion of a customary marriage were explicit delivery of *ilobolo*, transfer of the bride, consent of the bride's father or guardian and consent of the bridegroom's father or guardian.¹⁹ According to Maithufi²⁰, the consent of the parent to a marriage is a requirement even where the child is a major.

Historically, *ilobola* served various purposes. Importantly, the institution of customary marriages must be understood in relation to the communities the individuals come from. This is because kinship is tantamount to a traditional society and fundamentally *ilobola* was traditionally designed to unite families and forge a new relationship.²¹ *iLobolo* is commonly understood as among others, compensation for the expenses incurred for the bride's upbringing and forging a new family by way of marriage.²² The practice of *ilobola* involves the transfer of property, in cash or kind, to the prospective bride's family by the prospective bridegroom or his family in consideration of a customary marriage.²³

The practice symbolises the bridegroom's willingness to enter into a marriage and it also reflects his commitment to take care of his bride and to form a bond between the

¹⁶ Knoetze 2000 *TSAR* 536; Mofokeng (2009) 44; Prinsloo *et al* "Knowledge and experience of lobolo in Mamelodi and Atteridgeville" 1997 *De Jure* 325.

¹⁷ The position has changed in terms of the RCMA – s3(1)(a) which requires consent of the individuals who intends to marry each other. Himonga and Nhlapo (eds) (2014) 99.

¹⁸ Customary marriages took many forms, *ukuthwala*, *ukungena* – Himonga Nhlapo (eds) (2014) 99 36. *Ukuthwala* is the abduction of an unmarried womsn, with or without her consent by man who intends to marry her. *Ukungena* is a union with a widow undertaken on behalf of her deceased husband by his brother or other paternal relative.

¹⁹ Himonga and Moore *Reform of Customary Marriage, Divorce and Succession in South Africa: Living Customary Law and Social Realities* (2015) 54; Chapter 4 of the South African Law Reform Commission "Customary Law of Succession" 2017 Report 90.

²⁰ Maithufi "The Requirements for Validity and Proprietary Consequences of Monogamous and Polygynous Customary Marriages in South Africa: Some Observations" 2015 *De Jure* 265.

²¹ Parker 2015 *Journal of Third World Studies* 177-178.

²² Some academics opine that this is a secondary function of *ilobolo* and will be elaborated on in the following paragraphs of the chapter. The primary function is the creation of a new family relationship.

²³ Bennett *Customary law in South Africa* (2004) 220; Mofokeng 2005 *THRHR* 278.

two families.²⁴ Therefore, it is a symbolic act which is necessary for upholding the African tradition of marriage. According to Msweli,²⁵ *ilobolo* has served to symbolise the transition to adulthood, the legitimacy of a marriage and various other social identity and relationships. Therefore, it can be concluded that *ilobola* is premised on thanksgiving and forming new relations, in the quest to conclude a customary marriage. Depending on the means of the bridegroom, rights to labour and land may be transferred through the practice, as well as material goods to the family of the bride in pursuit of the bride's hand in marriage.²⁶ Koyana posits that *ilobolo* is the rock on which African marriages are founded.²⁷

The essence of a customary marriage is also translated to the families of the couple. An African customary marriage is not an affair between the couple, but it is a family affair.²⁸ This is supported by the belief that *ilobolo* is accompanied by rituals which are to be performed when it is tendered. The rituals are performed by specific family members, thus also supporting the position that customary marriages are a family affair.²⁹ The significance of the practice is that it connects the ancestors of the two families creating a stronger bond between them.³⁰ Seeing that it is essential to recognise the families of the couple, it is prudent to emphasise that the primary function of *ilobolo* is to connect the families embarking on a relationship. It is the proverbial 'rock' on which African customary marriages are founded.³¹ It is known as "*uku akha ubuhlobo*" in Nguni, and "*go aga sekgotse*" in Sepedi which means to build familial relations or creating a relationship.³²

Apart from embarking on new family relations, *ilobolo* also fulfils several functions. These include, among others, the transfer of a woman's reproductive capacity from

²⁴ Bayi and Hawthorne 2018 *THRHR* 582.

²⁵ Msweli 3.

²⁶ Ansell "Because It's Our Culture! (Re)Negotiating the Meaning of 'Lobola' in Southern African Secondary Schools" 2001 *Journal of Southern African Studies* 199 – the significance also emphasises on what can be delivered as *ilobolo* and the idea is not to sell the bride but it is thanksgiving.

²⁷ Koyana *Customary Law in a Changing Society* (1980) 5. Koyana refers to "ikhazi".

²⁸ Bennett (2004) 22; *Mrapakana v Master of the High Court and Another* (6567/2007) [2008] ZAWCHC 113 (21 November 2008) para 25.

²⁹ Some rituals are performed by aunts and uncles of the bride and bridegroom. An example of a ritual is *go phasa* which means appeasing the ancestry and is commonly performed by the paternal aunts of the bride and the bridegroom respectively.

³⁰ Mqeke "The rainbow jurisprudence and the institution of marriage with emphasis on the recognition of customary marriages Act 120 of 1998" 1999 *Obiter* 60.

³¹ Himonga and Nhlapo (eds) (2014) 189.

³² Being African <https://beingafrican.com/zuli-test/> (accessed 08 October 2023).

her father or guardian to her husband.³³ Bennett³⁴ states that *ilobolo* “operated to determine the family to which a child would belong”. The legal status of the children is according to Olivier³⁵ determined primarily by the payment of *ilobolo*. According to Parker,³⁶ *ilobolo* serves to legalise a marriage and ensures the transfer of certain rights, such as the rights of the children born from the marriage that would legally belong to their father’s lineage group. The researcher submits that this position differs in relation to customs where the child is born of married parents or otherwise.³⁷

Additionally, *ilobolo* reflects the bridegroom commitment to take care of his bride.³⁸ Normally during the wedding ceremony and or the handing over process, the bride’s in-laws usually mention how they have gained a daughter and further give her a new name as their bride. This function is ancillary to *ilobolo* being viewed as thanksgiving or as a token of appreciation by the bridegroom’s family to the bride’s family. Secondary to this function is that *ilobolo* can serve as financial security for the bride in the event of depletion of finances in her marital home.³⁹ Although this would signify that a man has dishonoured his commitment to care for his wife. By this time, the *ilobolo* funds would have probably been used up. The father or guardian is then inclined to help their daughter because *ilobolo* was not meant to relinquish the duty of care of the father over their child.⁴⁰ To this end, it is clear that the creation of a relationship between the two families remains of paramount importance.⁴¹ This further emphasises and symbolises the essence of *ilobola* in the conclusion of a customary marriage.

³³ Horn and Janse van Rensburg “Non-recognition?: Lobolo as a requirement for a valid customary marriage” 2002 *JJS* 170; Knoetze 2000 *TSAR* 532; Bennett (2004) 222. This is what is defined as child price.

³⁴ Bennett (2004) 222.

³⁵ Olivier et al *Indigenous law* (1995) 33.

³⁶ Parker 2015 *Journal of Third World Studies* 175.

³⁷ Essentially guardianship traditionally rested with the mother’s family unless it has been transferred to the father’s family in accordance with the relevant customs like *ilobolo* or *ukuhlawulwa kwe ngane* which means paying damages for impregnating an unmarried woman (asking for forgiveness from the woman’s guardian) and assuming guardianship over the child(ren). Also see *Hlophe v Mahlalela* 1998 (1) SA 449 (T) 457

³⁸ Dlamini 1999 *Obiter* 37; SALRC project 90 51; Mofokeng (2009) 52; 284.

³⁹ Sibisi 2021 *Obiter* 63.

⁴⁰ Sibisi 2021 *Obiter* 63.

⁴¹ Knoetze 2000 *TSAR* 533 mentions the sociological function of lobolo in enhancing the girl’s status and seeking her family’s friendship. Ngema 2012 *Speculum Juris* 32.

Other commentators also posit that, *ilobolo* is also utilised by the prospective bride's family to buy gifts for their in-laws and for the wedding celebration(s).⁴² For instance, for a Zulu wedding, the bride usually uses *ilobolo* to purchase gifts for her in-laws.⁴³ In the Sepedi culture, the *ilobolo* is used for the wedding. However the South African Law Commission cautions against this because it is of the view that *ilobolo* should be saved by the bride's guardian.⁴⁴ The justification is that should the marriage be dissolved and there are children born from that marriage, the bride's guardian should use the *ilobolo* funds to maintain the children.⁴⁵ It is further submitted that how the father or guardian of the bride uses or saves *ilobolo* is of no relevance because essentially a household has a guardian whose responsibility is to care for the children as the head of his household.⁴⁶ This discussion confirms that *ilobolo* is an indispensable requirement for the validation and conclusion of a customary marriage.

2.3 How much is *ilobolo*?

There is no set amount for *ilobolo*. During the *ilobolo* negotiations, there is usually no fixed offer but an invitation to enter into the negotiations.⁴⁷ This invitation comes from the bridegroom's family and is directed to the bride's family by delivery of a letter.⁴⁸ This offer or invitation is liaised through the family's appointed representatives known as "*bommaditsetsela*" in Sesotho/ Sepedi, and "*abakhongi*" in Nguni tribes to enter and continue the *lobolo* negotiations.⁴⁹ The representatives accept and officiate the *ilobolo* negotiations on behalf of the parents or guardians of the couple. This is commonly known as the *lobolo* contract.

The *ilobolo* contract is entered into at the time a marriage is negotiated in accordance with customary law.⁵⁰ It is one of the most important features that distinguishes a valid

⁴² Knoetze 2000 *TSAR* 540; Mofokeng (2009) 52.

⁴³ Magwaza *Orality and its Cultural Expression in Some Zulu Traditional Ceremonies* (MA dissertation, 1993 University of Natal) 53; Sibisi 2021 *Obiter* 63.

⁴⁴ SALRC project 90 52.

⁴⁵ SALRC project 90 52.

⁴⁶ Previously women had no income, it was the responsibility of their guardian to care for them - Knoetze 2000 *TSAR* 533

⁴⁷ Bayi and Hawthorne 2018 *THRHR* 579.

⁴⁸ Malete "The Recognition of Customary Marriages Act and the practice of lobola through the lens of the SCA" 2020 *De Rebus*.

⁴⁹ Bayi and Hawthorne 2018 *THRHR* 579.

⁵⁰ Himonga and Nhlapo (eds) (2014) 189.

customary marriage from other forms of relationships in customary law.⁵¹ Importantly a customary marriage is also a matter of law and obligations in that there must be an agreement between the woman's guardian and her prospective husband and his family.⁵² The woman's guardian renders performance by transferring the bride to her husband. Thereafter, the groom's family make counter-performance by delivering *ilobolo*.⁵³

During the negotiations there are offers and counter offers that will be made. Maphalala⁵⁴ posits that often there is no fixed, determined, or determinable offer however there are factors such as the bride's changing status which may affect that the amount of lobolo agreed upon. Pre-colonisation, *ilobolo* was not fixed and a bridegroom would give what he could afford.⁵⁵

Traditionally the reason why *ilobolo* was not fixed was because of the customary belief that the worth of a person is priceless.⁵⁶ Essentially a customary marriage created a special relationship between the two families which is not measured in money or kind. Consequently, every time the father-in-law was in need, he turned to his son-in-law for assistance.⁵⁷ This would continue indefinitely, the underlying reason being that, a bridegroom is a helper.⁵⁸ It is submitted that this also reflected the promise and commitment by the bridegroom that he would take care of his bride. Also bearing in mind that customary law is communal in nature and the principle of *ubuntu* was significant in the African way of life.⁵⁹

⁵¹ Himonga and Nhlapo (eds) (2014) 189.

⁵² Koyana (1980) 5. Himonga and Nhlapo (eds) (2014) 189-190.

⁵³ Koyana (1980) 5.

⁵⁴ Maphalala *Aspects of Zulu rural life during the nineteenth century* (1985) 7.

⁵⁵ Dlamini *A juridical analysis and critical evaluation of ilobolo in the changing Zulu society* (LLD thesis 1983 UniZulu) 83. Customary law did not discriminate against a man according to their financial status.

⁵⁶ Dlamini 83. It means you cannot buy a person. The worth of a person is priceless *umuntu akapheli*. In Sepedi the adage says *motho / mosadi ga fele* meaning that a person's worth is priceless, or it cannot be measured in money or otherwise.

⁵⁷ Dlamini 83.

⁵⁸ Dlamini 84 - This was the idea held in particular by the early Zulu kings. *Umkhwenyana yisigodo sokughuzula*

⁵⁹ Parker 2015 *Journal of Third World Studies* 177-178.

2.4 The practice of handing over the bride

Different traditions vary in terms of the essential steps for the validation of a customary marriage. In the Nguni communities, the handing over of the bride is an essential step for the conclusion of a customary marriage while in the Bapedi and Basotho communities, the delivery of *ilobolo* and handing over of the bride are essential steps for the conclusion of a customary marriage.⁶⁰ In some instances, after the payment of *ilobolo* couples are allowed to live together. Although there are minor differences in the traditions relating to the customs that validate a customary marriage, the position is that there will be delivery of *ilobolo*. It is submitted that *ilobolo* and handing over the bride go hand in hand, with *ilobolo* being the primary step for the conclusion of a customary marriage.

Of note is that the integration of the bride takes place at the groom's home and the bride is handed over to her new family. The bride is introduced to the ancestry through the ritual of slaughtering a sheep and having her feet smeared with gall.⁶¹ This ritual is common in the Bapedi and Banguni communities. In the Swati community, the integration of the bride includes the ceremony of the *ukumekeza* custom.⁶² Bekker⁶³ correctly provides that handing over is not optional and it is an essential requisite that cannot be waived in the integration of the bride.

After *ilobolo* proceedings have commenced, there are rituals or customs that are observed for customary marriages, and an example is the custom of handing over. Traditionally, handing over of the bride takes place after partial or full payment of *ilobolo*, depending on the agreement concluded by the families. The practice of handing over of the bride takes different forms in different cultures. An example is in the Bapedi or Basotho tribes where when they perform the "*mahlabiso*" or "*go hlabisa magadi*" ceremony, half of the *ilobolo* will have been paid over to the bride's family. Additionally the family of the husband, may request to go home with their bride and

⁶⁰ Maithufi 2015 *De Jure* 266.

⁶¹ Nel *The Ancestors and Zulu Family Transitions: A Bowen Theory and Practical Theological Interpretation* (PhD dissertation 2007 UNISA) 167.

⁶² In isiXhosa they have a ceremony of *utsiki* where the bride has to eat meat from the slaughtered sheep or goat to symbolise her integration into her new family.

⁶³ Bekker "Integration of the Bride as a requirement for a Valid Customary Marriage: Mkabe Minister of Home Affairs [2016] ZAGPPHC 460" 2018 PER/ PELJ 1 11.

this happens after either half of the *ilobolo* amount or any amount has been accepted by the bride's family.⁶⁴

It should be pointed out that *ilobolo* negotiations are not a simple offer and acceptance transaction, the finalisation usually takes place over a long period of time.⁶⁵ While this happens, the couple continues with their relationship and the on-going meetings between the families in the process of *ilobolo* solidifies their bond even more. However, until there has been at least partial tendering of *ilobolo*, the ostensible husband who stays with his future wife is not acknowledged as a husband to this wife or a son-in-law to the girl's parents but he viewed as a boyfriend.⁶⁶

Posel and Rudwick⁶⁷ opine that the payment of *ilobolo* is made in instalments, which must be finalised before the couple can get married. The researcher disagrees with this position because in terms of customary law, there is no such thing as an incomplete marriage because of the partial delivery of *ilobolo*.⁶⁸ There is also no requirement to receive the entire *ilobolo* for a customary marriage to be regarded as valid. The validation of the marriage is confirmed once a bride has been integrated into her husband's family. Colonial rulers incorrectly assumed it to be a prerequisite that all negotiations had to be finalised, and that full delivery of *ilobolo* had to be made prior to the marriage, because the *ilobolo* agreement was deemed to be a contract of sale rather than a ceremony that intended to form a relationship between two families and to legalise a marriage.⁶⁹ This incorrect assumption by the colonisers resulted in the prejudices on the African traditions.

⁶⁴ Mofokeng (2009) 46; Mofokeng 2005 *THRHR* 279. *Go kgopela ngwetsi* does not mean she has been handed over, she is simply being invited to formally be able to visit her in-laws accordingly. The father of a bride can according to the *ukutholeka* custom go and fetch his daughter from the bridegroom or his family in order to enforce the bridegroom to complete the *ilobolo*. See Himonga and Nhlapo (eds) (2014) 187.

⁶⁵ Bayi and Hawthorne 2018 *THRHR* 588.

⁶⁶ Mofokeng (2009) 46. The researcher argues until the integration of the bride is finalised then will the man be regarded to as the husband of his wife. This position is arguably ancillary to the *Mabuza* judgment in respect of the *ukumekeza* custom. *iLobolo* without the integration of the bride into his family also does not change the status of a man to husband.

⁶⁷ Posel and Rudwick "Contemporary functions of *ilobolo* (bridewealth) in urban South African Zulu society" 2014 (32) *Journal of Contemporary African Studies*

⁶⁸ Claassens and Smythe 2013 *Acta Juridica* 8.

⁶⁹ Posel et al "Is marriage a dying institution in South Africa? Exploring changes in marriage in the context of *ilobolo* payments" 2011 *AGENDA* 109.

2.5 Conclusion

The customary marriage custom of *ilobola* and the handing over practice are deeply rooted in the African culture and traditions. These practices confirm that the living law of indigenous people is but the basis at which customary marriages are concluded. In terms of living customary law, *ilobolo* and handing over the bride are the requisite steps which must be satisfied in order to conclude a valid customary marriage. The discussion above highlights how in terms of living customary law and historically, rituals associated with *ilobolo* and handing over are of significance in the conclusion of customary marriages. Further, this chapter has illustrated the importance of the families as role players in the creation of a new familial relationship.

The chapter has illustrated that the *ilobola* practice is a fundamental step for the conclusion of a valid customary marriage. As discussed above, for customary marriages, it is important for *ilobolo* to be delivered as it not only symbolises the creation of a new family, but it also legalises the marriage and sets it apart from other informal relationships. Among the different ethnic groups, the practice still reflects its similarities and various purposes in the communities it is practiced.

The handing over of the bride is also essential in the conclusion of a customary marriage. What is further clear is that handing over of the bride only takes place after *ilobolo* therefore showing how these requirements go hand in hand in the valid conclusion of a customary marriage and that they are both necessary for same. The fact that handing over takes place after *ilobolo* does not in any way relegate its importance and necessity in the finalisation of a customary marriage. This confirms the nature of customary marriages, and it is illustrated in the study how the practice also reflects on the indigenous people's communal way of life thus demonstrating the significance of both practices in the conclusion of a customary marriage.

CHAPTER THREE: THE WESTERNISATION OF CUSTOMARY MARRIAGE PRACTICES

3.1. Introduction

The focus of this chapter is on the westernisation of customary marriage practices, particularly *ilobola* and the handing over of a bride. This chapter discusses the impacts which westernisation has had, specifically in relation to the practices of customary marriages under consideration.

The westernisation of *ilobola* came as result of colonisation and the apartheid regime.¹ Westernisation as a direct result of colonisation, has led to the diminishing of African traditional beliefs and culture, in that the proliferation has resulted in the increment of “westernised-elites”.² The usurpation by colonisers brought about a lot of changes to Africa in particular customary law and the way of life of indigenous people across the continent. With the spread of European occupation both by conquest of African land or through settlement in areas controlled by white settlers, the white legislators and administrators criticised and misconceived the customary legal system.³ Christianity was introduced, churches and religious followers began criticising and fighting against African traditions on the basis that it was incompatible with Christian beliefs. One other practice in particular that had been met with ridicule was polygamy.

When the white settlers came to Africa, they and the churches combined their endeavours to abolish polygamy because they insisted that monogamous marriages are the only marriages prescribed by natural law.⁴ *iLobolo* was abhorred and regarded as a contract of sale by the white missionaries.⁵ They believed that women were sold into slavery by their fathers or guardians, hence the terms bride price and bride wealth

¹ Obioma “Westernization in Africa: Another Perspective” 2017 Link: <https://bitly.ws/36QZq> (accessed 16 October 2023).

² Obioma 2017.

³ Dlamini *A juridical analysis and critical evaluation of ilobolo in the changing Zulu society* (LLD thesis 1983 UniZulu 87.

⁴ Himonga and Nhlapo (eds) *African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* (2014) 3-17 – historically customary law was not recognised as a valid system of law; Independent News Worlds <https://bitly.ws/36QZv> (accessed 27 October 2023).

⁵ Bennett *Customary law in South Africa* (2004) 221; Mndaweni “African Marriages Still at the Crossroads in South Africa” 23 1990 *CILSA* 366; Mofokeng “The lobolo agreement as the ‘silent’ prerequisite for the validity of a customary marriage in terms of the Recognition of Customary Marriages Act” 2005 *THRHR* 278 280.

were used as an equivalent of *ilobolo* in the western language.⁶ This interpretation did not conform to social reality because many members of the public rejected the term of bride wealth.⁷ The cultural shock experienced by colonialists led to the disruption of the African customary way of life. It is submitted that this view was erroneously attributed to the practice which as a result was often misunderstood.⁸

Prior to the enactment of the Black Administration Act,⁹ the *ilobolo* contract was erroneously equated with contract of sale or exchange. The *ilobolo* contract was aimed at distinguishing a valid marriage and other forms of informal relationships.¹⁰ This is because black South Africans do not regard to a marriage whether civil or customary as valid without the provision of *ilobolo*.¹¹ Therefore, the effect of the contract is to legalise the marriage being entered into.¹²

Customary law is without a doubt the oldest system of law in most African societies, thus, the administration of justice within these societies lay in the hands of the traditional leaders.¹³ Morudu and Maimela¹⁴ state that during the advent of apartheid, the systematic oppression of Black indigenous people of South Africa was augmented and it also extended to their legal regimes. Post-Apartheid South Africa recognises customary law and its practices like *ilobola* that had been demoted of its status during the apartheid era.¹⁵ In terms of the repugnancy clause, customary law still had to

⁶ Mokotong and Monnye “A study of complex and unfamiliar customary marriage outside the Recognition of the Customary Marriages Amendment Bill: Distortion of a traditional customary marriage” 2013 *Speculum Juris* 86; Ngema “Considering the abolition of *ilobolo*: Quo vadis South Africa?” 2012 *Speculum Juris* 32.

⁷ Dlamini 83 -87. Dlamini posits women did most of the household, however they were not enslaved.

⁸ Bekker and Buchner-Eveleigh “The Legal Character of Ancillary Customary Marriages” 2017 *De Jure* 80 88 – the practice was given English equivalents like bride-price, bridewealth, dowry and marriage goods.

⁹ Black Administration Act 38 of 1927. (hereafter “BAA”).

¹⁰ Himonga and Nhlapo (eds) (2014) 189.

¹¹ As above.

¹² Koyana *Customary Law in a Changing Society* (1980) 5 describes this as follows: ikhazi is correctly described as the rock on which the Africans’ marriages is founded, and thus an essential of the customary marriage. Without transfer of *ilobolo*, the marriage is under a big question mark even if the parties are living together and beget children.

¹³ Soyaphi “Regulating traditional justice in South Africa: A comparative analysis of selected aspects Traditional Courts Bill” 2014 *PER/PELJ* 1441.

¹⁴ Morudu & Maimela “The indigenisation of customary law: Creating an indigenous legal pluralism within the South African dispensation: possible or not?” 2021 *De Jure Law Journal* 58.

¹⁵ Fishbayn et al “Gender, Religion and Family Law: Theorizing Conflicts between Women’s Rights and Cultural Traditions” 2012 *Brandels University Press ProQuest Ebook Central* <https://bitly.ws/36R2D> (accessed: 30 October 2023). Customary marriages were not legally recognised.

comply with the common law standards of public policy and natural justice in order to be valid.¹⁶ Today, customary marriages are officially recognised under the RCMA and the Constitution.¹⁷

The Constitution under Chapter 2 namely the Bill of Rights provides for an individual's right to culture and to be treated equally in their enjoyment and use of such rights.¹⁸ Sections 30 and 31 of the Constitution protect the right to culture of people and freedom to take part in this culture.¹⁹ This aligns with international law in that Article 27 of the Universal Declaration of Human Rights provides that everyone has the right to freely participate in a cultural life of their community, to enjoy the arts and share in scientific advancements and its benefits.²⁰ *iLobolo* as a cultural practice is provided for under these aforementioned provisions.

3.2. Impacts of westernisation on *ilobolo*

Western influence has had an impact in the transformation of customary marriages, particularly on the practice of *ilobola*. The impact has led to the modernisation of *ilobola* in certain aspects namely urbanisation, globalisation, and gender dynamics. In modern day, the language and focus around *ilobola* has evolved. The focus is now on asking "what is the *ilobola* price?" as opposed to "what can I offer as a token of my appreciation?".²¹ The former is heavily influenced by amongst other things, the education and job status of the bride, as well as her family's societal status.²² It is submitted such influence is one of the reasons customary marriages are being altered to suit western standards.

Firstly, western influences have introduced a monetary value to *ilobola*. Traditionally indigenous people had livestock and therefore *ilobolo* was usually expressed in cattle.²³ It is submitted that cattle held a significant cultural and economic value in the African communities. Today the western influence of monetary funds as *ilobolo* has

¹⁶ S11(1) of the BAA.

¹⁷ The Recognition of Customary Marriages Act 120 of 1998 (hereafter "RCMA" or the "Act"); The Constitution of the Republic of South Africa (hereafter "the Constitution").

¹⁸ S 9(3) of the Constitution.

¹⁹ S 30 and 31 of the Constitution.

²⁰ Article 27 of the Universal Declaration of Human Rights 1948.

²¹ Art of Women <https://bitly.ws/36QZN> (accessed 01 October 2023).

²² As above.

²³ Bayi and Hawthorne "Colonisation of lobolo" 2018 (81) *THRHR* 582.

become more common in contemporary South Africa. In other instances, the payment of *ilobolo* was both money and property. In a survey by Prinsloo *et al*,²⁴ in the townships of Atteridgeville and Mamelodi, the participants indicated that money or a combination of money and property was included as *ilobolo* in their marriages.

In its truest form, African customary law also did not discriminate against the indigent men as they were allowed to sacrifice what they could as *ilobolo*.²⁵ Money was not necessarily considered for the negotiating and payment of *ilobolo*, it was colonisation that brought about such changes.²⁶ The shift to money as payment for *ilobolo* came as a result of the demographics and change in living conditions of the indigenous people which increased urbanisation and made livestock a scarce commodity for people living in urban areas.²⁷ Such urbanisation was imposed onto the indigenous people during the apartheid era.²⁸ After colonisation in South Africa, *ilobolo* was capped to five herds of cattle and it included gifts such as blankets, hoes, and baskets of grain.²⁹ It is submitted that according to living customs, this cap is not stringently applied because the purpose of *ilobolo* is thanksgiving to the prospective wife's family and not on the value of *ilobolo*. Further, because it is not a contract of purchase and sale, there cannot be a fixed price for showing gratitude in that thanksgiving is going to be expressed for a lifetime and therefore is not going to be limited to the amount paid for *ilobolo*.

The economic aspect of *ilobolo* was not regarded as the primary purpose of the custom. An example is in the Zulu tradition where if a man who could not afford *ukulobola*, he could be permitted to negotiate with the father of the bride to agree to the marriage by undertaking that the cattle paid for the groom's first daughter would belong to their father-in-law.³⁰ Yet there is another view wherein when an indigent man

²⁴ Prinsloo *et al* "Knowledge and experience of lobolo in Mamelodi and Atteridgeville" 1997 *De Jure* 325–326.

²⁵ Dlamini 83.

²⁶ Parker "The practice of lobola in contemporary South African society" 2015 *Journal of Third World Studies* 184.

²⁷ Mofokeng 2005 *THRHR* 279.

²⁸ Bakker *et al* Migration and Urbanisation in Post-Apartheid South Africa 2016 *IZA Discussion Paper No.* 10113 2.

²⁹ Ansell "Because It's Our Culture! (Re)Negotiating the Meaning of 'Lobola' in Southern African Secondary Schools" 2001 *Journal of Southern African Studies* 701. In some cultures, 11 cattle was required as *ilobolo* for a virgin girl.

³⁰ Dlamini 83.

could not afford to deliver *ilobolo*, he was obliged to deliver at least one beast for the ancestors (*eyamadlozi*) to appease and inform them about the intended marriage.³¹

Ancillary to the transition of *ilobolo* being negotiated in money, urbanisation and globalisation are also some of the western influences which had an effect on customary marriages. The proliferation of western influence on customary marriages has resulted in some African individuals and their families incorporating elements of western wedding traditions into their ceremonies by among others, having a white wedding.³² White weddings are common to Christian tradition which in itself reflects the colonisation of Africa, however the issue now is that communities who engage in white weddings deem that to be a customary marriage and compliance with the practice of handing over of the bride.

This trend is also common in the courts wherein it was incorrectly concluded in the case of *Mbungela*,³³ that parties that opted to conclude a white wedding in a church had complied and/ or waived the requisite step of transferring the bride, which is important for the conclusion of a customary marriage. Although it is the choice of a couple, it is submitted that a white wedding is for all its intents and purposes not a customary marriage. Further it is argued that the processes undertaken during handing over the bride wherein the slaughtering and appeasing for ancestors takes place, it can be described as the solemnising of a customary marriage. The same way it would be done in religious tradition for a white wedding concluded in a church. Thus, handing over remains a requisite step which cannot be excluded for the valid conclusion of customary marriage.

The *ilobolo* negotiations process has also been impacted by western influence in that traditionally, *ilobolo* was negotiated by the fathers and guardians of the spouses together with their elders. Consent of the couple's fathers was essential for the conclusion of a customary marriage. The result of western influence is that individualism and personal choices of the bride as well as her consent are taken into account at the negotiation process.³⁴ In terms of official customary law, women specifically mothers, are now allowed to be part of the *ilobolo* negotiations. In *Mabena*

³¹ Dlamini 83.

³² The so called white wedding or the English wedding.

³³ *Mbungela v Mkabi* para 7.

³⁴ S3(1)(a) of the RCMA provides for the consent of the couple and does not mention their fathers of guardians as a requirement for concluding a valid customary marriage.

v Letsoalo,³⁵ the court held that the mother of the bride-to-be was legally competent to negotiate and receive *ilobolo* for her daughter. It has been correctly suggested that the decision sought to align customary law with the constitutional equality principles.³⁶ Further the mother is also competent to act as a guardian in the approval of her child's marriage.³⁷ It is submitted that the result of western influences on the negotiation processes, has not entirely negatively affected the nature of customary marriages. This is because some households are female headed therefore having women lead in negotiations as done in the case of *Mabena* encourages and reinforces the rights of women accordingly in line with the constitutional principles.

Lastly, the western influences are mostly engraved in gender dynamics. Customary law has over the years gained a repute of discriminating against women and treating them as second-class citizens.³⁸ This is expressed through the rule and customs of among others, male primogeniture which took many forms and perpetuated the tendency to discriminate against women in areas dealing with inheritance, guardianship, appointment to traditional office (chieftaincy), legal capacity being age of majority and polygamous marriages.³⁹ Commendably, the researcher submits that westernisation and official law have played a huge role in ensuring that women and children are protected in the areas of inheritance and traditional office.

The development of gender dynamics is reflected in *Bhe v Magistrate*,⁴⁰ where the court dealt with customary law of succession under s 23 of the now repealed Black Administration Act, which provided for the rule of male primogeniture which excluded women within the customary law relations to inherit property.⁴¹ The court held that the customary law rule of male primogeniture which was applied to inheritance in customary law is inconsistent with the constitutional guarantee of equality.⁴²

³⁵ *Mabena v Letsoalo* 1998 (2) SA 1068 (T) (hereafter "*Mabena v Letsoalo*").

³⁶ Church and Church "The Constitutional Imperative and Harmonisation in a Multicultural Society: A South African Perspective on the Development of Indigenous Law" 2008 (14-2) *Fundamina* 10.

³⁷ *Mabena v Letsoalo* para 1068 the decision in *Mabena* is important because it reinforces the protection of women's rights and also affords equality and dignity to female headed households.

³⁸ Ndulo "African customary law, customs and women's rights" *Cornell Law Faculty Publications* 2011 89.

³⁹ Ndulo 2011 *Cornell Law Faculty Publications* 89.

⁴⁰ *Bhe v Magistrates, Khayelitsha and Others* 2005 1 SA 580(CC) (hereafter "*Bhe v Magistrates*").

⁴¹ *Bhe v Magistrates* para 19.

⁴² *Bhe and Shibi*: the court further held that the premise for legislature to work on enacting the appropriate legislation for the regulation of women's rights under customary law.

The case of *Shilubana and Others v Nwamitwa*⁴³ dealt with the customary law rule of primogeniture in relation to taking up the traditional position of office – chieftaincy. The court in this matter held that the appointment of Ms Shilubana as a *Hosi* represented the development of customary law which was an essential step in respecting community-led change parallel with the value of legal certainty and the need to protect rights.⁴⁴ This is yet another development in the gender dynamics brought about by westernisation.

As discussed above, the purpose of *ilobola* is to create and solidify the relationship of two kinship groups by way of a marriage and arguably, it remains its purpose to date. It is not a commercial transaction of the bride. The result of western influences is that not only has it shifted the dynamic of the bride to being an individual, however, it has also led to the debates about the commodification and discrimination of women through *ilobola*.⁴⁵ It has been argued that *ilobolo* is in its nature oppressive and violates the bodily integrity, compromises a woman's personhood by treating her as a commodity and further legalises violence against women.⁴⁶ The Convention on Elimination of Discrimination against Women has concluded that *ilobola* was a harmful cultural practice which unfairly discriminated against women.⁴⁷ Disagreeing with CEDAW, Ngema⁴⁸ finds that rather than violating women's rights to human dignity, *ilobola* guarantees them dignity. Bekker and Boonzaaier⁴⁹ found that among the various ethnic groups in the rural parts of South Africa, the transfer of *ilobolo* is not a sale transaction and it also does not give the man rights of ownership over his wife.

⁴³ *Shilubana v Nwamitwa* 2008 (9) BCLR 914 (CC) para 1-3 (hereafter "*Shilubana v Nwamitwa*").

⁴⁴ *Shilubana v Nwamitwa* para 75. There are conflicting views and criticism on this judgment. The researcher without deviating from the study posits that the court may have erred in their decision because the throne has certain consequences and obligations like ensuring that the children born are of royal descent in order to continue the royal lineage which the daughter might not be forced to comply with as per her constitutional rights.

⁴⁵ Ansell 2001 *Journal of Southern African Studies* 715; Essof and van der Wijk, "Women in Zimbabwe: A Fact Sheet on Gender Issues" 1996 19. There are calls for the relegation and extinguishment of the practice on the basis of its alleged unconstitutional treatment towards women.

⁴⁶ Chireshe and Chireshe "Lobola: The Perceptions of Great Zimbabwe University Students" 2010 (3) *The Journal of Pan African Studies* 212

⁴⁷ The Convention on Elimination of Discrimination against Women ('CEDAW'); Ngema 2012(2) *Speculum Juris* 30.

⁴⁸ Ngema 2012 (2) *Speculum Juris* 30. The researcher agrees with Ngema in that the practice extends honour to women through thanksgiving and expressing good intentions to take care of them. And because it not a purchase and sale agreement, a woman can also return home in the event that the marriage does not work out.

⁴⁹ Bekker and Boonzaaier "How equal is equal? A legal-anthropological note on the status of African women in South Africa" 2007 *De Jure* 283-284.

Furthermore, it does not give a man the right to sell or transfer his wife, but rather one of its most important functions is to serve as a guarantee that the woman will be well treated by her husband and her in laws.⁵⁰

The debates further exaggerates *ilobola* to be a contract of purchase and sale. Dlamini⁵¹ and Sibisi⁵² respectively opine that to “conclude that an *ilobolo* agreement is a contract could easily lead to the conclusion that it is a contract of sale in terms of which a wife is sold and bought – something that is repugnant”. Ultimately it is submitted that while it is commendable that women’s rights and agency are encouraged through western influences, the miscomprehension of *ilobola* has created a negative conception of the nature of the practice and dynamic of women. It further encourages the distortion and abuse of customary law and the practices thereof. The court in *Bhe* correctly concluded that the abuse of indigenous law is at times misconstrued to be the true reflection of such law, and such abuse tends to distort and undermine its value.⁵³ It is further submitted that despite all the western influences and impositions, customary marriage practices remain significant to the indigenous people in the conclusion of a customary marriage.

3.3. Conclusion

The impact of westernisation on customary marriages are undeniably present in the practices of *ilobola* and handing over. The way in which these practices have transformed, has resulted in western misconceptions of customary marriages. As discussed above, the influences are evident in among others, the urbanisation and gender dynamics of indigenous people who partake in these practices. This is not to say that the influences have entirely adversely impacted customary law. In some ways it has transformed customary law for the better and we see this in light of the *Mabena*, *Bhe* and *Shilubana* judgments.

However, in some instances like in customary marriage practices, it has had a negative conception and change which has resulted in some conflicting findings by the courts

⁵⁰ Bekker and Boonzaaier 2007 *De Jure* 283-284.

⁵¹ Dlamini 319.

⁵² Sibisi “The juristic nature of ilobolo agreements in modern South Africa” 2021 *Obiter* 68.

⁵³ *Bhe v Magistrates, Khayelitsha* para 154.

on how a customary marriage is validly concluded.⁵⁴ Although this being the case, the practices remain of significance in the conclusion of a valid customary marriage. It has not discouraged the indigenous people from continuing to celebrate customary marriages amongst their communities in their truest form. From whichever perspective the impacts of westernisation in customary marriages are considered, the inferences drawn are not endorsed by the living customs and realities of indigenous people.

⁵⁴ A comprehensive discussion of various judgments is provided in chapter 4 para 4.3 of the study.

CHAPTER FOUR: THE JURISTIC NATURE OF *ILOBOLO*

4.1 Introduction

This chapter focuses on the legal consequences of customary marriage practices in the conclusion of a customary marriage. It provides a distinction between living customary law and official customary law in order to consider the uniform approach to follow for the conclusion of a valid customary marriage. This is done by discussing various judgments that have given conflicting conclusions on what constitutes a valid customary marriage.

Customs by their operation transform into customary law over time.¹ This happens especially when they are endorsed by the communities' belief in its indispensability and desirability.² Magubane³ opines that this proposes the notion that customs and customary law are mutually connected. Like with other customs, customary marriages have evolved over time. The relationship between customary law and *ilobola* is founded in customary marriages.⁴ Customary law takes up two forms, namely living customary law and official customary law. Living customary law refers to the customs and usages of the African indigenous people.⁵ It consists of actual practices and unwritten customs that regulate the lives of indigenous people.⁶ Living customary law is significant for denoting the practices and customs of people in their daily lives.⁷

Customary law emerges from what people do through the beliefs set by customary law and not from what others consider and decide they should do.⁸ It is proposed that for customs and traditions to become law, they must be known, followed and enforceable to and by the community. The system of customary law draws its focus

¹ Pospisil *Anthropology of Law: A Comparative Theory* (1971) at 169-170.

² As above.

³ Magubane "Imposition of common law in customary law and customary marriages" 2021 15 *Pretoria Student Law Review* 344.

⁴ Art of Women <https://bitly.ws/36QZN> (accessed 01 October 2023).

⁵ Rautenbach *Introduction to legal pluralism in South Africa* (2018) 23.

⁶ Himonga and Nhlapo (eds) *African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* (2014) 27.

⁷ Himonga & Bosch "The Application of African Customary Law under the Constitution of South Africa: Problems solved or just the beginning" 2000 *SALJ* 306 328.

⁸ As above.

on the people it governs therefore, it is flexible in accommodating them. According to Ozoemena,⁹ it is unique as a system because it is consensus-seeking and accountable to the people to whom it applies. Official customary law is the formal and codified version of customary law.¹⁰ It is made up of statutes and recorded in law reports interpreted in a procedural and substantive framework. Statutes of customary law are among others, the Constitution,¹¹ the Recognition of Customary Marriages Act,¹² the Reform of Customary Law of Succession and Regulation of Related Matters Act¹³ and the Traditional Leadership and Governance Framework Act.¹⁴ Official Customary law is also sourced from court decisions and academic or scholarly writing.¹⁵

The introduction of legislation has in a sense, made an ongoing attempt to proclaim the rights and interests of parties in customary marriages more so, it has played a significant role in reinforcing the rights of women and the equality of spouses in both monogamous and polygamous customary marriages.¹⁶ Such rights are reinforced for the affected spouses through the South African judicial structure, which is a constitutionally independent and impartial structure mandated with the role to dispense justice without fear, favour, or prejudice.¹⁷ While this is a commendable move, there has however been a lot of scrutiny pertaining to formal courts adjudicating on customary matters instead of relaying them to the traditional courts as relevant courts to hear and try such matters.¹⁸

⁹ Ozoemena "Living customary law: A truly transformative tool" 2013 *Constitutional Court* 162.

¹⁰ Rautenbach (2018) 23.

¹¹ The Constitution of the Republic of South Africa (hereafter "the Constitution").

¹² Recognition of Customary Marriages Act 120 of 1998 (hereafter "RCMA").

¹³ Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009.

¹⁴ Traditional Leadership and Governance Framework Act 41 of 2003.

¹⁵ Rautenbach (2018) 23.

¹⁶ Dyani-Mhango "The Consent of the First Wife in a Polygamous Marriage as a Requirement for the Validity of her Husband's Subsequent Marriage under South Africa's Recognition of Customary Marriages Act: *Mayelane v Ngwenyama*" 2016 *Journal of African Law* 156-169.

¹⁷ Humby et al *Introduction to Law and Legal Skills in South Africa* 2012 Oxford University Press Southern Africa. A question may be posed as to whether this move has been positively effected.

¹⁸ Aiyedun & Ordor "Integrating the Traditional with the Contemporary in Dispute Resolution in Africa" 2016 *Law, Democracy and Development* 155, 157; Ntlama "The Centrality of Customary Law in the Judicial Resolution of Disputes That Emanate from It: *Dalisile v Mgoduka* (5056/2018) [2018] ZAECMHC" 2019 *Obiter* 202.

The reason being that there has been a trend of courts imposing common law rules to matters of customary law.¹⁹ Maunatlala and Maimela²⁰ propose that traditional courts should become more involved in matters and questions relating to customary law rules and practices such as male primogeniture. However, there still might be mistrust in the system of traditional courts as a result of the historically discriminatory nature of customary law when coming to women and children. Therefore, it is proposed that the involvement of such courts be progressively introduced in a manner that promotes restorative justice, *ubuntu*, peaceful co-existence reconciliation, accordance with constitutional imperatives, customary norms, and provisions of the Traditional Courts Act.²¹

The researcher submits that traditional courts are in essence the correct courts to adjudicate on customary law matters but currently this is not happening and is unfortunately stifling the development of the system. In terms of the Traditional Court's Bill²², traditional courts are distinct from courts referred to in section 166 of the Constitution, and operate in accordance with a system of customary law and custom. This system seeks to prevent conflict; maintain harmony and resolve disputes where they have occurred, in a manner that promotes restorative justice and reconciliation and in accordance with the norms and standards reflected in the Constitution.²³

It is noteworthy to mention again that communities make their own rules and live by them. These are communities commonly resident in rural areas. Further, in traditional courts, there is a sense of ownership by the people as the community is bound by its own rules.²⁴ Equally, people are going to be more comfortable in their

¹⁹ According to Ntlama 2019 *Obiter* 202, the *Dalisile* case has elicited much jubilation over the permeation of customary-law principles into the judicial resolution of disputes that emanate from a customary-law context. The judgment comes at a time when common-law principles appear to have infiltrated the resolution of disputes that originate from customary law. This case paves the way and provides a foundation for the resolution of customary-law disputes within their own context.

Also see Ntlama "Equality Misplaced in the Development of Customary Law of Succession: Lessons from *Shilubana v Nwamitwa* 2009 2 SA 66 (CC)" 2009 *Stellenbosch Law Review* 333–356.

²⁰ Maunatlala & Maimela "The implementation of customary law of succession and common law of succession respectively: With a specific focus on the eradication of the rule of male primogeniture" (2020) *De Jure Law Journal* 36-53.

²¹ S 6 of the Traditional Courts Bill of 2017.

²² S 7 of the Traditional Courts Bill of 2017,

²³ As above.

²⁴ The African Human Security Initiative.

own community courts because they are going to be included in the processes. Furthermore, they are going to be governed by a law that is indigenous and not foreign to them.²⁵ These courts are going to be beneficial because they will also adjudicate on such as, criminal and family law related matters.²⁶ Ancillary to this debate, the researcher submits that in cases that customary marriage disputes are adjudicated in the traditional community courts, this will have the benefit of reducing the misinterpretations of customs and alleviate the current judiciary from the growing disputes centred around the provisions of section 3(1)(b). The researcher posits that the integration of traditional courts will encourage a more uniform approach and application of customary law.

Within the current judicial system, cases like *Dalisile v Mgoduka* confirm that the judiciary is able deliver satisfactory judgments that reflect the essence of customary law. However, it is argued that due to it being a westernised judiciary, it is not all judges at the bench and legal practitioners that will apply customary law where and when it is mandatory to do so. Therefore, the researcher argues that the integration of traditional courts is the most suited approach to ensure the upholding and correct development of customary law. Although section 211 of the Constitution mandates the courts to apply customary law when it is applicable subject to the Constitution, and any other legislation dealing specifically with customary law.²⁷ It is submitted that currently section 211 is not fully effective because we see how western and common law end up succeeding in customary law matters.

4.2 The Recognition of Customary Marriages Act

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.²⁸ Customary

²⁵ Litigants are going to be able to argue matters at close proximity to their homes. They will also not suffer a language barrier because if such courts are in their communities, they will communicate in the language(s) they speak in their community. The procedures are going to complement the community, but importantly they will need to align with the constitutional principles like equality and dignity.

²⁶ Traditional Court Bill.

²⁷ S 211(3) of the Constitution.

²⁸ See RCMA definition of customary law.

marriages are recognised under this Act which came into effect in November 2000.²⁹ Marriages under the RCMA do not have to be registered. Under the Act, customary marriages concluded in accordance with customary law recognises all the marriages concluded before or after it came into effect, be it a monogamous or polygamous marriage.³⁰ In the case of *Gumede v President of the Republic of South Africa and Others*, Moseneke DCJ opined that the RCMA 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.³¹

In *K v P*, the court held that the legislature's intention in enacting the RCMA was undoubtedly noble in recognising customary marriages previously ignored, however, the ideals proposed by the Act have still not yet been realised.³² Magubane³³ correctly submits that the problem areas and shortcomings of the RCMA 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 the imposition of common law values. Osman³⁴ opines that the RCMA incorporates too much of common law, such as the Matrimonial Property Act and Divorce Act, to regulate customary law marriages. This incorporation of common law into African customary law has led to it being seen as blended law "common law African customary marriages", thus distorting the identity, nature and purpose of African customary law.³⁵

The requirements for a valid customary marriage are provided for under section 3 of the RCMA.³⁶ Section 3 provides that the prospective spouses must be the age of 18 years and above, must consent to be married to each other under customary law, and that the marriage must be negotiated and entered into or celebrated in

²⁹ See RCMA definitions – defines a customary marriage as a marriage concluded in accordance with customary law.

³⁰ S 2 of the RCMA.

³¹ *Gumede v President of the Republic of South Africa and Others* 2009 (3) SA 152 paras 17-21 (hereafter "*Gumede v President of the Republic of South Africa and Others*").

³² *K v P* (GSJ) (09/41473) ZAGPHC 93 para 11 (hereafter "*K v P*").

³³ Magubane 2021 *Pretoria Student Law Review* 344.

³⁴ 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* 7.

³⁵ Osman 2019 *Potchefstroom Electronic Law Journal* 7.

³⁶ S 3 of the RCMA.

accordance with customary law.³⁷ Section 3(1)(a) provides for consent of the prospective spouses to conclude a customary marriage.³⁸ Maithufi³⁹ correctly posits that this provision fails to reflect on the position of living customary law. Living customary is indicative of the role of families consenting to the conclusion of a customary marriage.⁴⁰ The researcher submits that since the nature of customary marriages is to form new relations amongst the families, the consenting roles should reflect in line with living customary law. As a result, the position is that official customary law has narrowed the application and interpretation and has further deflected from the fundamental basis of customary marriages by altering the requirements thereto.

Section 3(1)(b) provides that a customary marriage must be negotiated, entered into or celebrated in accordance with customary law. Unlike Section 3(1)(a), this provision has attracted disputes which require the faculty of the courts. It is argued that the disputes that arise are as a result of the inconsistent application of this provision by the courts. According to Magubane⁴¹ the misinterpretation and inconsistencies come as a result of a lack of proper understanding of what section 3(1)(b) means to legal practitioners and the judiciary versus what the provision means to laymen. An argument may be brought to the fore that these inconsistencies emanate from the fact that customary law is as diverse as the various ethnic groups recognised in South Africa and the subtle differences are not given due regard as needed.⁴² Thus an application of a fact-intensive inquiry is essential to determine the meaning of “negotiated and celebrated in terms of a customary marriage”.⁴³

4.3 Living customary law vs official customary law

The Act defines *ilobolo* as property in cash or in-kind which a prospective husband or the head of his family undertakes to give to the head of the prospective wife’s

³⁷ S 3(1) of the RCMA.

³⁸ S 3(1)(a) of the RCMA

³⁹ Maithufi 2015 *De Jure* 265.

⁴⁰ This is discussed at length in chapter of the study.

⁴¹ Magubane 2021 *Pretoria Student Law Review* 345.

⁴² As above; *Southon v Moropane* (14295/10) [2012] ZAGPJHC 146 para 35 (hereafter “*Southon v Moropane*”).

⁴³ *Southon v Moropane* paras 35 -37.

family in consideration of a customary marriage.⁴⁴ This definition does not assume that *ilobolo* constitutes a customary marriage rather it states that it is paid in consideration of a customary marriage. According to Seema,⁴⁵ *ilobola* is part of the process of getting married under customary law and *ilobolo* itself does not constitute a marriage. In terms of living law, *ilobolo* must be accompanied by the integration of the bride into her new family in order to conclude a valid customary marriage. Sibisi⁴⁶ correctly states that the integration comprises of many events depending on the respective ethnic groups concluding the customary marriage.

Due to the unwritten nature of living customary law, the research considers various judgments in order to assert the essentials for the valid conclusion of a customary marriage. Further, the research considers some cases in which it will advance and address the inconsistencies of section 3(1)(b). This is important because the judiciary is obligated to among others, confirm the ethnic group(s) to which the parties belong and ascertain the living customary law of the respective group(s) and apply them accordingly when adjudicating on such matters. This was done in the case of *ND v MM*,⁴⁷ wherein it was emphasised that the ethnic groups to which the parties belong is the relevant source of law and that the court must verify the origins of the litigants before it can make an informed decision about the disputes before it. This means that the court ought to consider the living customary law of parties before making a ruling.

However, the judiciary in its application of section 3(1)(b), has in some cases deferred from living customary law in order to confirm the valid conclusion of a customary marriage.⁴⁸ Although *ilobolo* is not expressly stated as the requirement referred to in section 3(1)(b), it is an essential custom to a customary marriage.⁴⁹ It is observed that the courts have erred in its interpretation of the RCMA as *ilobolo* is regarded as the whole when it is in fact a part to a whole. The intention of this

⁴⁴ RCMA definition of *lobolo*.

⁴⁵ Art of Women <https://bitly.ws/36QZN> (accessed 01 October 2023).

⁴⁶ Sibisi "The Supreme Court of Appeal and the handing over of the bride in customary marriages" 2021 *De Jure Law Journal* 370.

⁴⁷ *ND v MM* unreported case number 18404/2018 SGJ (12 May 2020) para 5.

⁴⁸ *Tsambo v Sengadi* (244/19) [2020] ZASCA 46 (30 April 2020) (hereafter "*Tsambo v Sengadi*") and *Mxiki v Mbata; Mkabe* (GP) (unreported case no A844/2012, 23-10-2014) are among the cases which illustrate the courts' deference.

⁴⁹ Maithufi and Bekker "The recognition of the Customary Marriages Act of 1998 and its impact on family law in South Africa" 2002 *The Comparative and International Law Journal of Southern Africa* 186.

chapter is to investigate the meaning “negotiated and celebrated in accordance with a customary marriage”. The proposition is that the terms “negotiated and celebrated” translate to two practices which are arguably indispensable requirements for the conclusion of a customary marriage for their different yet ancillary purposes. These practices are namely *ilobola* and handing over of the bride which currently the RCMA makes no express regard to them as requirements for a valid customary marriage.

In *Motsoatsoa v Roro*⁵⁰ the court provided formalities that result in a customary marriage as follows:

- a. “The two parties have consented to marry each other;
- b. 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 couple’s delegates will be convened where *ilobolo* 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; and
- d. after the pre-marital ceremonies, a date is set on which a woman will then be handed over to the man’s family which handing over may include but not necessarily be accompanied by celebration.”

Mofokeng⁵¹ correctly states that in an analysis of every ethnic group, it will result in the conclusion that *ilobolo* is a requisite for the conclusion of a customary marriage. In *Mxiki v Mbata in re: Mbata v Department of Home Affairs* the court of first instance ordered that a customary marriage had been concluded on the basis of an undertaking to pay *ilobolo*.⁵² On appeal the court held that *ilobolo* on its own did not constitute a customary marriage. The court was of the view that handing over was the most essential step in concluding a customary marriage and in this case, it was never done.⁵³ It was held that although a customary marriage was negotiated, it was however never entered into or celebrated in accordance with customary law as

⁵⁰ *Motsoatsoa v Roro* 2011 2 All SA 324 (GSJ) para 17 (hereafter “*Motsoatsoa v Roro*”).

⁵¹ Mofokeng “The lobolo agreement as the ‘silent’ prerequisite for the validity of a customary marriage in terms of the Recognition of Customary Marriages Act” 2005 *THRHR* 278–279.

⁵² *Mxiki v Mbata in re: Mbata v Department of Home Affairs* para 6 (hereafter “*Mxiki v Mbata*”).

⁵³ *Mxiki v Mbata* para 11.

required by the RCMA.⁵⁴ Nkosi⁵⁵ disagrees with the *Mxiki* judgment by stating that the court erred in characterising physical handing over of the bride to be the “be-all and end-all” to customary marriages. Nkosi further contends that this is because handing over can also take a symbolic or uxorilocal form.⁵⁶ Disagreeing with Nkosi, the researcher submits that handing over is not an option but is mandatory for the valid conclusion of a customary marriage. Further, it is argued that the court of first instance may also have disregarded the analysis of the respective ethnic groups in what is reasonably applicable to their customs particularly in handing over for the conclusion of their customary marriages in light of living customary law. In doing so, the court followed a narrow approach and cannot have fully satisfied itself of the requirements for valid customary marriage.

The court in *Maloba v Dube*⁵⁷ held that an agreement that *ilobolo* would be paid is important. Once such an agreement exists between the parties, a marriage can be regarded to have been concluded on the date of such agreement.⁵⁸ In contrast to *Maloba*, in *Fanti v Boto* the court held that *ilobolo* is an indispensable requirement for the conclusion of customary marriage.⁵⁹ Ethnic groups may differ in how they view *ilobolo* however, the evidence does suggest the delivery or agreement of *ilobolo* and the handing over of the bride are still deemed requirements in the validation of a customary marriage.⁶⁰ It is submitted that the court in *Maloba* was incorrect in finding that once an agreement of *ilobolo* exists between the parties, then a marriage is deemed to have been concluded without taking into account the delivery of the *ilobolo* and the requirement of handing over.⁶¹ The RCMA also states *ilobolo* is delivered in consideration of a marriage and not that *ilobolo* constitutes a marriage.⁶²

⁵⁴ *Mxiki v Mbata* para 11.

⁵⁵ Nkosi “Customary marriage as dealt with in *Mxiki v Mbata* in re: *Mbata v Department of Home Affairs and Others* (GP) (unreported case no A844/2012, 23-10-2014) (Matojane J)” 2015 *De Rebus*.

⁵⁶ Nkosi 2015 *De Rebus*.

⁵⁷ *Maloba v Dube* ((08/3077) [2008] ZAGPHC 434) para 26 (hereafter (“*Maloba v Dube*”).

⁵⁸ *Maloba v Dube* para 26.

⁵⁹ *Fanti v Boto and Others* 2002 (5) SA 405 (C) para 22 (hereafter “*Fanti v Boto and Others*”).

⁶⁰ The case of *Fanti v Boto and Others*. Commentators like Koyana and Mofokeng confirm that the delivery *ilobolo* and handing over the bride are essential for the conclusion of a customary marriage.

⁶¹ *Maloba v Dube* para 26.

⁶² RCMA definition of *lobola*.

In *Tsambo v Sengadi*,⁶³ the Supreme Court had to grapple with whether the parties concluded a valid customary marriage. In this case, the respondent had accepted a marriage proposal from the appellant's deceased son.⁶⁴ A letter was sent to the respondent's family as the bride.⁶⁵ The letter requested that the families meet to discuss the parties' union. Pursuant to the successful conclusion of *ilobola* negotiations, an agreement detailing what was discussed was drafted and signed. The salient terms of the agreement included the agreed *ilobola* amount to be paid by the deceased and how the amount will be paid upon signing of the agreement. It was the respondent's version that shortly after the negotiations and payment of the *ilobolo* amount, a celebration ensued, and the respondent was welcomed as a bride. The appellant contended that there was no handing over of the respondent thus no customary marriage has been concluded.⁶⁶

The court of first instance held that symbolic handing over of the bride had taken place.⁶⁷ This involved the deceased's aunts congratulating their bride, dressing her in the traditional regalia for the marriage which led to the cohabitation of the couple.⁶⁸ The researcher disagrees with the court and submits that "celebrating after the negotiations" is not handing over. In this case the respondent did not elaborate what this "celebration" resembled in respect of the Setswana traditions, thus it couldn't have been confirmed by the court that the requirements for a customary marriage were complied with. Further, the Bapedi and Batswana communities do not recognise symbolic handing over. It is not uncommon that the families would on the day of *ilobolo* negotiations, have a celebration or feast together as a start to a bond of a new familial relationship. Importantly, it must be emphasised that handing over only takes place at the groom's home which did not happen in *Sengadi v Tsambo*.

The Supreme Court of Appeal held the position that failure for one to strictly observe cultural practices and ceremonies that were observed historically cannot invalidate

⁶³ *Tsambo v Sengadi* para 1 - the facts are provided for as in the SCA, but the decision of the court a quo will be discussed first.

⁶⁴ *Tsambo v Sengadi* para 3.

⁶⁵ *Tsambo v Sengadi* para 3.

⁶⁶ *Tsambo v Sengadi* para 10.

⁶⁷ *Sengadi v Tsambo* (40344/2018) ZAGJHC 666; [2019] All SA (GJ) para 19 (hereafter "*Sengadi v Tsambo*").

⁶⁸ *Sengadi v Tsambo* para 19.

a marriage, albeit being negotiated, concluded, or celebrated, owing to the dynamic nature of living customary law.⁶⁹ It is submitted that the SCA in *Tsambo* failed to sufficiently satisfy itself with the requirements of a customary marriage. The court of first instance also erred by not confirming which ethnic groups the litigants belonged to thus omitting to consider the applicable living customary law. As a result of its decision, where a bride did not have to be physically handed over, Manthwa⁷⁰ and Sibisi⁷¹ opined that the court may have accepted the incorrect notion that the mere finalisation of *ilobolo* negotiations amounts to concluding a customary marriage. It is submitted that the researcher agrees with both Manthwa and Sibisi.

In the case of *M v M*,⁷² the court considered factors such as cohabitation as significant to ascertain whether a valid customary marriage has been concluded. The court stated that to a large extent, the defendant's case centred around the celebrations and rituals contending that if these were essential aspects for the validity of a customary marriage, they could have been performed by now.⁷³ It was then held that there was a handing over of the bride post the payment of the full *lobola* and this occurred after the second *lobola* meeting.⁷⁴ In the case of *Mkabe v Minister of Home Affairs* the court *a quo* stated that the transfer and/or integration of the bride requirement cannot be given more weight such that its absence culminates in invalidating a customary marriage.⁷⁵ The SCA went on to also to endorse this interpretation and confirm the decision of the court *a quo*.⁷⁶ It is submitted that in both cases, the courts erred in nullifying the value of handing over the bride in the conclusion of a customary marriage.

The study now discusses judgments that considered the significance of the physical handing of the bride as an integral part of a customary marriage. The court in *Motsoatsoa v Roro*⁷⁷ articulated the true essence of handing over the bride by

⁶⁹ *Tsambo v Sengadi* para 18.

⁷⁰ Manthwa "Lobolo, consent as requirements for the validity of a customary marriage and the proprietary consequences of a customary marriage: N v D (2001/3726) [2016] ZAGPJHC 163" (2017) *Obiter* 438; 442.

⁷¹ Sibisi 2021 *De Jure Law Journal* 372.

⁷² *M v M* (63162/2020) [2022] ZAGPPHC 912 (23 November 2022) para 86 (hereafter ("*M v M*").

⁷³ *M v M* para 86.

⁷⁴ *M v M* para 17.

⁷⁵ *Mkabe v Minister of Home Affairs* para 38.

⁷⁶ *Mbungela v Mkabi* ((820/2018) [2019] ZASCA 134) para 30 (hereafter "*Mbungela v Mkabi*").

⁷⁷ *Motsoatsoa v Roro* para 19.

elaborating the importance of handing over the bride in a customary marriage.⁷⁸ The court stated the following:

“[h]anding over of the bride is not only about celebration with the attendants having feasts and rituals. It encompasses the most important aspect associated with married state namely *go laya/ukuyala/ukulaya*.⁷⁹ The custom refers to the teachings and counselling provided to the couple by the elders of their rights, duties, and obligations which the marriage status imposes on them. This is the most important and final step in the chain of events that takes place in the presence of both the bride and the groom’s families. One can even describe this as the official seal in the African context, of the customary marriage”.⁸⁰

In the case of *Mabuza v Mbatha*, the court held that there are two requirements for a marriage, namely the payment of *ilobolo* and the “formal” handing over of the bride to the bridegroom’s family - the isiSwati custom of *ukumekeza*.⁸¹ The court further held that *ilobolo* does not change the status of a woman to that of a wife. It is only the *ukumekeza* custom, according to the Swati community, which makes a woman a wife.⁸² In *Moropane v Southon*,⁸³ the court had found that after the payment of *ilobolo*, the handing of gifts and sharing of the slaughtered sheep amongst the respective families, it confirmed the conclusion of customary marriage. Further in *Moropane* the bride was draped in a blanket and later counselled by the elders which was followed by a celebration.⁸⁴ The court found that in terms of customary law and the Bapedi community, the handing over of the bride was the most crucial aspect of the customary marriage.⁸⁵ Accordingly, it is submitted that the court was

⁷⁸ *Go gorosa ngwetsi (Tswana)/ ukusiwa ko makoti e mzini e hamba noduli (Xhosa)*.

⁷⁹ *Motsoatosa v Roro* para 19.

⁸⁰ *Motsoatosa v Roro* para 19.

⁸¹ *Mabuza v Mbatha* (1939/01) [2002] ZAWCHC 11; 2003 (4) SA 218 (C); 2003 (7) BCLR 743 (C) (4 March 2003) para 21 (hereafter “*Mabuza v Mbatha*”).

⁸² *Mabuza v Mbatha* para 21.

⁸³ *Moropane v Southon* unreported case number 755/2012 SCA (29 May 2014) paras 8, 9, 10 (hereafter “*Moropane v Southon*”).

⁸⁴ *Moropane v Southon* para 10.

⁸⁵ *Moropane v Southon* para 40.

correctly guided by the applicable living law to confirm that a valid customary marriage had been concluded.

It is submitted that unlike in *Mxiki*,⁸⁶ *Tsambo, M v M* and *Mkabi* cases, the court in *Motsoatsoa v Roro*, *Mabuza v Mbatha* and *Moropane v Southon* correctly addressed what handing over signifies in the validation of a customary marriage. The aforementioned four cases addressed the living conditions and or cohabiting of the couples during the subsistence of their relationships. Although a factor, it cannot be regarded as one in the lens of customary law and more specifically in a customary marriage, for the reason that the cohabitation is not a custom given traditional consideration.⁸⁷ It is submitted that handing over of the bride is also significant to distinguish between marriage and cohabitation. Thus, without the official handing over of the bride, it is argued there can be no valid customary marriage concluded.

What the courts fail to consider in their interpretation of customary law, is that customary marriages comprise of a chain of events as opposed to a single event. These events lead to the requisite steps of handing over of the bride for the validation of a customary marriage. Additionally, it is submitted that the chain of events are but the processes that speak to the nature of a customary marriage which creates a new family relationship. Moreover, the courts failed to fully consider the practices of the relevant ethnic tribe(s) or community in ascertaining the requirements of a customary marriage in an ethnic tribe. To enable proper redress, a clear understanding of the traditional practices and culture in line with African traditions and communities must be established especially in the lens of living customary law.

The jurisprudential disposition of the judiciary is that the courts are more inclined to the western influence of what constitutes a valid customary marriage with the formal interpretations thereto. To this end, the court in *Bhe*⁸⁸ correctly stated that “the problem with development [of living customary law] by the courts on a case-by-case basis is that changes will be very slow; uncertainties regarding the real rules of

⁸⁶ In the court of first instance.

⁸⁷ A man who cohabits is regarded to be a boyfriend and not a husband.

⁸⁸ *Bhe v Magistrates, Khayelitsha and Others* 2005 1 SA 580(CC) (hereafter “*Bhe v Magistrates*”) para 112.

customary law will be prolonged and there may well be different solutions to similar problems.” Therefore, it is also for this reason that the judiciary needs to integrate traditional courts for the adjudication of customary matters, because this will assist in the inconsistent and misinterpretation of the requisite steps to conclude a valid customary marriage. Further while we wait for such involvement of the traditional courts, the judiciary as it stands will need to give more regard to the living customs of indigenous people in order to better remedy the uncertainties in the disputes of customary marriages.

4.4 Conclusion

This chapter has addressed the misinterpretation and inconsistent application by the judiciary in addressing what constitutes a valid customary marriage. Moreover, the chapter has advanced how the judiciary is not observing living customary law as the primary source to consider the validity of customary marriages. It is observed in how the judiciary is commonly reliant on the law in order to consider the contentions before it about what constitutes a valid customary law.

Importantly, it is observed that the courts have given conflicting judgments on what constitutes a valid customary marriage and as discussed above the lawmaker, legal practitioners and the judiciary are not on the same page with laymen and indigenous people. The courts have in some cases further disregarded the practices of the relevant ethnic groups wherein it was incorrectly concluded amongst others that *ilobolo* alone results in the valid conclusion of a customary marriage and that handing over can be done symbolically. This unfortunately deflects from the nature customary marriages and is leading to a western jurisprudence of customary marriages and the practices respectively. It is submitted that the current failure can be circumvented by the introduction of the traditional courts to adjudicate customary matters.

CHAPTER FIVE: CONCLUSION

5.1 Summary

This study has highlighted the legal consequences of customary marriage practices namely *ilobola* and handing over of a bride. Importantly, the study has highlighted that prerequisites of a customary marriage are essential and non-compliance of the practices invalidates such marriage.¹ The study illustrated the disparity between living and official systems of customary law.² It has further shown the ununiformed stance between law makers, the judiciary and the indigenous people on the steps required to validly conclude a customary marriage.

The discussions of the historical position of customary marriages, the westernisation of customary marriage practices and the judicial position of customary marriage practices reflect on what is seen as the current inconsistencies of the valid conclusion of a customary marriage.³ Although there are evident inconsistencies as discussed herein, the study has illustrated that *ilobola* and handing over of the bride are indispensable requirements in the conclusion of a valid customary marriage as is reflected in living customary law. In the select ethnic groups as discussed in the study, it is shown that these two customary practices are necessary for the valid conclusion of a customary marriage.⁴

The discussion of the historical background of customary marriages and the practices of *ilobola* and handing over reflect the most accurate of what a valid customary marriage ought to look like.⁵ Although the natural form of customary law is undocumented, the discussed pieces from academics and researchers has shed some light on what customary marriages encompasses from select ethnic groups. The position is that although living customary law is flexible and ever-changing according to the needs to of the ethnic groups, the principles of customary law remain embedded

¹ See Ch 1 para 1.4.

² See Ch 4, para 4.3 on living and customary law.

³ See chs 2, 3 and 4 which ventilate the issues in great detail. Reference can be made to para 2.2; para 2.3; para3.2 and para 4.3 respectively.

⁴ Ch 4 para 4.3.

⁵ Ch 2 discussion para 2.2 and para 2.3.

in the lives of the indigenous people. This also illustrates how customary law can exist as an independent system for the majority of indigenous people who conform to it.

Further the discussion on the westernisation of customary marriages and the Recognition of Customary Marriages Act, confirm the unclear position at which customary marriages are placed in the current dispensation.⁶ The study has illustrated how the judiciary is mostly reliant on applying customary law through the legislative framework.⁷ Of note is that this position is also confirmed by the judiciary in their misinterpretation and inconsistent application of the RCMA in their consideration of a valid customary marriage.

A discussion of the various cases shows the inconsistent approaches by the judiciary. It is important to mention that in other cases the judiciary failed to consider the ethnic groups of the litigants and the practices they apply in order to confirm that a valid customary marriage has been concluded, while they did so in others. It has been discussed how the disregard of traditions of the relevant ethnic groups has illustrated how the court incorrectly concludes on the validity of a customary marriage.

It is for this purpose that the study recommends the integration of traditional courts to decipher on customary matters.⁸ This is because the inconsistent application of what constitutes a valid marriage by the judiciary does not fully reflect customary traditions. Further it is encouraging the distortion of customary practices. While in some cases there has been a proper analysis of the purpose of *ilobola* and handing over the bride, in other cases as discussed above, it is shown that the judiciary is on its own at loggerheads about the correct legal position of customary marriages. Therefore, the recommendation of traditional courts being sought to preside over customary matters, best assists this uncertainty.⁹

5.2 Final remarks and recommendations

The current legal position of what constitutes a valid customary marriage is unclear. It is debatable that this is due to the continuous attempt by the legislator to blend

⁶ See ch3 para 3.2 and 4: see discussion 4.2 on RCMA case law discussions on 4.3.

⁷ See ch 4 para 4.3 and 4.4.

⁸ Ch 4 last two paras of 4.3 and para 4.4.

⁹ Ch 4: para 4.4.

customary marriage into a system that conforms to westernised norms. Notwithstanding the criticism on the modern approach to customary marriages and the practices, the proposition to integrate traditional courts and to hopefully afford customary law the independence it requires, might just be the solution to alleviate the uncertainty on what constitutes a valid customary marriage.

It is also judicious to commend the legislator for the protection afforded to vulnerable parties through the regulation of customary marriages.¹⁰ While this does set the standards to ensure equality and dignity of the vulnerable and aggrieved, it remains important for the legislator, legal practitioners and the judiciary to ensure that they do so in a broader approach that acknowledges customary law in its truest form and develop it accordingly. If this is done it will also cater to the indigenous community and advance customary law positively. It is needless to say that customary law is very broad in its nature therefore the interpretation of its practices cannot be done in isolation of the system as a whole. Doing so will not only lead to more uncertainty but will result in the furtherance of distorting customary law and the practices thereto.

¹⁰ Radebe “Tsambo v Sengadi (244/19) [2020] ZASCA (30 April 2020) Sengadi v Tsambo: In Re Tsambo (40344/2018) ZAGJHC 666; [2019] All SA (GJ) (8 November 2018)” 2022 *De Jure Law Journal* 77 See chapter 1 para 1.1 introduction.

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