An Appraisal of the Borrowing of European Values to Systematically Convert Customary Law into "Constitutional Customary Law"

Aubrey Manthwa
https://orcid.org/0000-0001-5510-3558
University of South Africa
lesedimanthwa@gmail.com

Abstract

Customary law has survived centuries of colonial onslaught whereby it was seen as uncivilised and in need of reform. Customary marriages were not viewed as marriages but as unions. Today, however, they enjoy recognition as marriages. The Constitutional Court stated in *Alexkor v Ritchsveld* that customary law would no longer be viewed with the eyes of the common law in the post-constitutional era but would be equal with the common law. It is argued, however, that the position of customary law has not changed since the enactment of the 1996 Constitution. It was hoped that this would bring change as it was an affirmation that customary law is recognised. However, the old order repugnancy clause only allowed customary law to be recognised only if it was consistent with rules of natural justice and public policy. This happens through using the right to equality and dignity in their Western setting rather than interrogating them and trying to infuse an African understanding and interpretation of these rights. Similarly, the LLB curriculum needs to be decolonised because it remains Eurocentric and produces judges and lawyers who also see customary law as a problem and see the common law as the solution. There is, therefore, a need to embrace African law as part of a dispute resolution avenue.

Keywords: customary law; constitutional customary law; bottom-up; top-down; LLB curriculum; judge

UNISA university of south africa PRESS
Journal of Law, Society and Development
Volume 12 | 2025 | #14739 | 20 pages
https://doi.org/10.25159/2520-9515/14739
ISSN 2520-9515 (Online), ISSN 2313-8289 (Print)

Introduction

It was hoped that the coming into existence of the 1996 Constitution would change the fortunes of customary law in South Africa. Customary law and African law are used interchangeably in this contribution to denote an African system of law. Customary law continues to be subjected to an onslaught in the post-Constitutional era. The demise of customary law has been topical among scholars who use phrases such as "the end of the road," "killing it softly," and "obituary of customary law succession," amongst others, to correctly describe what is happening to African law in South Africa (Himonga 2011, 31). The former Minister of Justice and Correctional Justice, Ronald Lamola, speaking at a conference convened on social justice and customary law in 2021 pointed out the need for customary law to be allowed to adapt and develop on its own terms by communities before it reaches the court (Pikoli 2021). It was further pointed out at the conference that "customary law was bastardised to become a vehicle of oppression" against women and children (ibid). Therefore, this called for social justice to reverse the oppression caused. The above sentiments about customary law being bastardised and needing to be developed by communities are correct and scholars support them (Manthwa 2019, 465). This contribution argues that rather than customary law being afforded space to develop on its own terms, it is reconstructed into constitutional customary law. Constitutional customary law refers to the conversion and reconstruction of customary law to Western notions and meaning of human rights far away from its Ubuntu and communal setting in terms of the African normative system. This is because the development of customary law largely happens through mainstream courts by relying on constitutional values that are foreign to customary law communities in South Africa (Lewis 2014, 1140). Although it is accepted that customary law must be in line with the Constitution, courts do not interrogate the values embodied in the Constitution that customary law must be in line with.

It is argued that the right to equality and dignity is currently received in a Western setting. The question is, to what extent do an understanding and interpretation of human rights in a Western setting assist customary law? It is argued that they do not assist customary law, and this is a problem. This contribution revisits the conversation relating to the interplay between customary law and the Constitution of South Africa. The debate is significant when also considering the existing debate in institutions of higher learning in relation to debates and commitments towards curriculum transformation and decolonisation of the legal system and LLB curriculum. The contribution will attempt to achieve its objectives by looking at the space of customary law and answering whether customary law is evolving or being replaced by a foreign legal system with the emergence of constitutional customary law. It looks at this by viewing how courts have dealt with customary marriages and the role of judges in judicial pronouncements. In the final analysis, it will look at the role of the LLB curriculum in addressing constitutional customary law.

The Treatment of Customary Law under a Constitutional Dispensation

The Constitutional Court has stated that customary law is part of South African law. However, how it is treated by courts and the legislature determines its fate. If the attitude of courts is that customary law is a relic of uncivilised people and needs change, then it is this attitude that results in the demise of customary law (Sheleff 1999, 84). For example, gender discrimination has been seen as a problem in customary law. However, the focus of the court is misplaced since the problem that courts seek to protect people from is not a true reflection of customary law, but a result of distorted versions of gender-defined roles (Ndima 2013). Gender-defined roles were complementary rather than treated as a requirement for the position of head of the family (Diala and Kangwa 2019, 198). The position epitomised shared responsibility, communal living, and collective ownership of material values of the collective family (Ndima 2013). Although every member of the communal family participated in the maintenance of the collective, the family head was mainly responsible for ensuring that the material resources were properly managed and distributed equally for the benefit of all family members (Mahao 2010, 321). Regrettably, this is the moral fibre of customary law that was distorted to create an environment where many men started seeing themselves as owners of property when they were merely caring for it for the benefit of the family (Chanock 2001, 267). Western imperialism influenced this attitude after African leaders encountered colonialism. Customary law practices have traditionally been distorted since contact with colonialism and this continues to be the case today (Bennett 2009, 5).

This shows that the problem is not customary law but people who distort it. However, judges ignore distortions and merely view the African legal system as a patriarchal problem and proceed by imposing the supremacy of the Constitution on it. One argument is that customary law permits polygamy, and only men can have more than one wife. Polyandry is not recognised where women have the option of marrying more than one husband. Some of the international treaties that South Africa has ratified encourage monogamy, with the result that polygyny might not survive constitutional scrutiny if brought to court for constitutionality. Moreover, as Tladi states, South Africa is desperate to be accommodated by the international community and to feel part of it; as a result, South Africa may value monogamy over polygyny (Tladi 2016, 310). The South African Constitutional Court has referenced more international law than African laws (Isanga 2017, 752). This is not a problem but the lack of developing a human rights discourse that speaks relevance to the South African customary law context is a concern. South Africa will always look at section 39(2) of the Bill of Rights to justify finding space for international values and apply them in South Africa, especially in customary law disputes (Duly 2019, 404).

South Africa and its courts are international law friendly and will likely call practices such as lobolo, polygyny, and integration of the bride unconstitutional to maintain its international law reputation of compliance (Duly 2019, 387). The High Court in *Sengadi v Tsambo* raised the issue of the constitutionality of the integration of the bride in an

obiter dictum. This entails that should the Constitutional Court be approached to announce their constitutionality, they are likely to be declared unconstitutional. The reason for this is that the bride is the only one integrated, and this is not consistent with the Bill of Rights. This would be the end of customary marriages. Similarly, polygyny can easily be declared unconstitutional as lobolo and integration of the bride, which are the distinguishing features of a customary marriage compared to a civil marriage.

This contribution does not argue that the supremacy of the Constitution is a problem or ratification of international treaties is but the values upon which the Constitution is founded are problematic because they are transposed in their Eurocentric understanding to customary law disputes. Although it can be argued that African concepts such as ubuntu can be inferred from the right to human dignity in the Constitution, the Constitution still does not mention ubuntu as an independent normative value in Africa. For example, in *MM v MN*, the Constitutional Court protected the right to equality and dignity of the first wife by recognising a first marriage. However, it is argued that this kind of equality and human dignity is naked because it does not consider the value of other people but of only one person. With ubuntu in the African context, you also must consider other people's right to equality and human dignity. After all, the term means that you are a person through others. Most Bill of Rights in the world did not merely find their way into a constitution. Some of its founding values directly and indirectly borrow from other jurisdictions such as the German and Canadian jurisdictions. This notwithstanding that it also incorporates values and principles from other international treaties and instruments such as taking from the African Charter and the International Covenant on Civil and Political Rights. It has largely borrowed from Eurocentric values and interprets rights in their European and individual rights perspective and lacks a communal approach in the interpretation of human rights. There is, therefore, the existence of convergence that has arisen from the fact that states are not independently relying on what their domestic laws may offer in terms of human rights and are mostly guided by a hegemonic approach found in Western and liberal constitutions. There is a need to interrogate mainstream human rights before they can be applied to customary law. It is argued that judges only focus on the need to protect vulnerable parties from discriminatory elements of customary law. This does not overlook the role of Parliament which is largely black and has for long been given the mandate to enact laws that promote customary law. However, the problem with the South African Parliament is that the African National Congress (ANC), which has ruled the country for the better part of the South African democracy, is suffering from what can be termed "aspiration towards a Eurocentric ideal of the nation state" (Comaroff and Comaroff 2004, 521). Although there is a commitment towards enhancing customary law and in cases such as *Bhe v Magistrate Khayelitsha*, the court passed the burk to Parliament but nonetheless, the intention is still to clown South Africa in the Western image. They do not critically engage with the Eurocentric nature of the human rights discourse where customary law is generally swept aside to give effect to foreign values (Nhlapo and Himonga 2014, 160). This attitude is adversely the result of colonialism and its legal culture which left South African judges in a state whereby they merely accept without questioning the

unjustified superior status of foreign values. The court needs to find a balance by ensuring that it considers the African concept of ubuntu in all its pronunciations. It is argued that the African value system with its communal laws can eliminate all practices that undermine the collective rights of women as endowed in ubuntu and communalism. For example, within this arrangement, the king or queen as a leader is responsible for protecting African heritage and it is his or her responsibility to protect his or her people, particularly vulnerable women. The failure of a king or queen to meet their responsibilities is not tolerated. Communal laws make provision for this, entailing that one does not have to look at international laws for solutions to protect women. State institutions must understand and give effect to the true role of traditional leadership to ensure that they do not respond based on a distorted view of the significance of traditional leadership.

Therefore, courts resolve disputes based on a top-down approach whereby customary law has to fit into the external forces (Lewis 2014, 1131). A bottom-up approach where courts would be expected to look at the nature and legitimate purpose served by a customary law practice within the existing legal order can be ignored in the final judicial pronouncement. The right to equality and dignity would need to be translated and interpreted within a customary law context for them to be relevant (ibid). This requires that courts recognise that an individual does not exist in isolation from his or her family and community. This is not to argue that individual rights do not matter but must be considered in the context of the individual's family. However, distorted versions of customary law must accordingly be punished as crimes. Cases such as *S v Jezile,* where a man used *Ukuthwala* as an excuse to justify his criminal conduct, must be rejected as the court rightfully did. The practice of *Ukuthwala* does not make provision for the rape and killing of women and young girls. Good living customary law must be separated from bad living law and what is good about living law free of distortions must be maintained. When approached with a customary law dispute, the judge must look at the values that customary law is expected to comply with and ask how to work with contrasting values such as the individualisation of rights such as the right to equality and dignity, private ownership over communal ownership (Lewis 2014, 1133). Since customary law is part of South African law, outcomes should reflect it. However, courts treat customary law as not belonging to the mainstream but as a law that should be accommodated provided this is not to the inconvenience of foreign values embedded in the Constitution (Lewis 2014, 1132).

Continuation of Common Law Paradigm

In *Bhe v Magistrate Khayelitsha*, then-Deputy Chief Justice Langa stated that "[c]ertain provisions of the Constitution put it beyond doubt that our basic law specifically requires that customary law should be accommodated, not merely tolerated, as part of South African law, provided the particular rules or provisions are not in conflict with the Constitution" (*Bhe-Shibi*, para 41). This statement is problematic as it reflects a case of resilience of colonial influence in South African law. The question is, how does one

accommodate the law of the land? The question should rather be, how best should one ensure that customary law regains its independent and sovereign status, free from subjection to a de-Africanised Constitution? In this context, a de-Africanised Constitution refers to the fact that the South African Constitution is not founded on customary law values such as communalism and ubuntu despite customary law being the law by which the majority of South Africans live (Moosa 2000, 121). The majority judgment in *MM v MN* waded into dangerous waters by creating the concept of a superwoman. This is a woman who has been afforded all the powers to determine whether a subsequent marriage is legal. The problem here is that the court ignored the right to equality of the second wife when this would not happen under the concept of ubuntu because ubuntu does not exclude people. Vulnerable members of society must be protected from greedy males who want to take ownership of property they do not have a right to claim. However, this does not have to happen through creating classes of women and protecting some while others are left in the cold. This refers to the situation whereby the fate of other women depends on one woman to consent to the marriages of other women to her husband. It is argued that this can be the case where community interests require that a second wife must be married as a great wife to give birth to an heir or successor to the kingship. If the first wife says no to the second marriage, then all subsequent marriages cannot be concluded irrespective of their significance and legitimate purpose they will serve such as the great wife.

For example, the mother of King Misuzulu, the successor to King Zwelithini was not the first wife (Manthwa 2022, 2). She was a great wife chosen from another royal family to give birth to Misuzulu as the next king of the Zulu nation in KwaZulu-Natal (Manthwa 2022, 2). Therefore, if it was up to the consent of the first wife, who in this case has disputed the validity of the subsequent marriages to King Zwelithini, then this means that the subsequent marriages would be invalid even though they were significant in terms of customary law to allow the birth of a successor (Manthwa 2022, 12). The South African Law Reform Commission (SALRC) issued both a Paper[1] and a Discussion Paper (ibid)[2] in 2019 and 2020 towards enacting new legislation in the form of a single-marriage legislation. Two draft bills are proposed in the Discussion Paper; the Protected Relationships Bill,[3] and the Recognition and Registration of Marriages and Life Partnerships Bill.[4] Clause 6(4) of the Recognition and Registration of Marriages and Life Partnerships Bill, like the Constitutional Court judgment in *MM v MN,* states that the first wife and other wives where there is more than one wife must consent to the husband's intention to marry again.

There must, however, be consent from the first wife before the second and other marriages can be concluded. It is argued that the option of marrying a second wife must be open for a king in customary law. This is to serve group interests, for example, the

1 SALRC. 2019. *Project 144 Single Marriage Statute Issue Paper 35*. SALRC: Pretoria.
2 SALRC. 2021. *Discussion Paper 152 on the Single Marriage Statute: Project 144*. SALRC: Pretoria.
3 SALRC *Discussion Paper 152* Annexure B1, 135–152.
4 SALRC *Discussion Paper 152* Annexure B2, 153–171.

need to marry a second wife may be motivated by the fact that the first wife may not be a candle wife to give birth to an heir or may not be able to have children. The great wife is a wife of the nation; therefore, communal or national interests cannot merely play second fiddle without considering their legitimate purpose. While it may be acknowledged that polygamous marriages are no longer popular, they still play a significant role and space must be made for them. People who observe living law will not merely change their lives and laws to accommodate and respond to values brought by the colonists (ibid). Courts will argue that they are developing customary law, however, when it comes to the development and recognition of customary law, all courts do is cast aside the requirements of customary marriages and replace them with civil marriage requirements. This is done without interrogating foreign value and looking at how best to create a model that customary law as the law of the land. Ramose argues that the wars of colonialism are unjust because of the doctrine of the conqueror that says the conqueror is not supposed to continue to subjugate the conquered through appeal to an untenable right of conquest as underscored by the British Philosopher John Locker, who said that one who gains title of territory through unjust wars cannot justifiably continue to exercise any right over the conquered (Ramose 2017, 23). Thus, one cannot continue to be a master while the position of master is gained through force.

Interplay of Constitutional and African Indigenous Values

This exposes the hypocrisy in the doctrine, whereby borrowed Constitutional values continue to govern the African knowledge system. This is unjustifiable and a violation of the conqueror's own philosophy. The truth is that constitutions create state institutions, afford them power, and allocate the limits of that power. They posit themselves as the higher law of the land, seeking to protect fundamental human rights and make provision for the separation of powers and independence of the judiciary (Kibet and Fombard 2017, 343). Transformation should not be only in the form of race but must be seen in how judges address the issue of the interplay between constitutional values and customary law. This is important to embrace the indigenous knowledge system and extricate customary law from the quagmire in which it was placed by the common law. As stated in *S v Makwanyane*, achieving this requires more than just the judiciary to play a role. Mokgoro J in *S v Makwanyane* asserted that:

> the broad legal profession, academic and those sectors of organised civil society, particularly concerned with public interest law, have an equally important responsibility and role to play by combining their efforts and resources to place the required evidence before courts. It is not as if these resources are lacking: What has been absent is the will, and the acknowledgement of the importance thereof.[5]

As stated earlier, this contribution is not arguing that the supremacy of the Constitution is a problem but the values upon which it is based in contrast to African value systems such as ubuntu and communalism. Although this may not be absolute, post-conquest

5 *S v Makwanyane* 1995 (3) SA 392 (CC) para 305.

constitutions are often accepted as settled law, that is not subjected to debate, and all that is required is implementation (Cachalia 2018, 381). Some judges interpret and apply Western values in a way that suggests that they get trained to interpret and enforce legal instruments as abstract versions of the mainstream dialogue. As stated above, customary law is the law found in existence when the colonists arrived in 1652 and continues to be the law of the majority. However, it is treated as an inferior legal system while the common law paradigm continues notwithstanding the existence of a constitution that was meant to change its fortunes (Ntlama 2020, 2). The human rights script that is used and relied on in South Africa is from international law and is similarly used by other countries in the world (Davies 2018, 362). What this entails is that the script is not neutral but a mirror of Eurocentric values, particularly the West (Cachalia 2018, 381). Therefore, it is justified to argue that these ideological values are foreign to South Africa in relation to their intersection with customary law (Lewis 2014, 1134).

The question is "In what way do constitutional values reflect indigenous customs? What is their significance for the behaviour of Africans? Would constitutional values eventually become customary law?" (Diala 2020). It is argued that this is what is happening; foreign values are becoming customary law as courts are creating constitutional customary law. Diala points out that African ancestors lived according to rules considered valuable to them and did not know the Constitution and this is an important issue to consider when developing customary law in the image of the Constitution (Himonga 2011, 31). The systematic killing of customary law entails that courts are now turning indigenous people into islands in themselves, this notwithstanding its realisation in *Port Elizabeth Municipality v Various Occupiers* that we are "not islands unto ourselves," locating as well the relevance of ubuntu in the interlock between individualism and communalism as intertwined.[6]

Customary law has its own normative framework found within the concept of ubuntu which captures the notion of human rights but in the context of the environment in which a person lives.[7] For example, the legitimate purpose served by rituals in legitimising an event should not be lost as it is based on the social, political, and legal organisation of society where the interests of vulnerable members must be protected (Ndima 2013). Section 3 of the Recognition of Customary Marriages Act 1 of 1998, for instance, allows for this and it is a step in the right direction, and courts have used lobola and other rituals as enough evidence. However, some rituals which are significant in the conclusion of the marriage and form part of the integration of the bride are in many cases ignored and courts allow their waiver (Manthwa 2023, 2). Ubuntu embodies African values such as ancestral acquiescence and if properly understood, this concept has the same connotations as human rights. Bennett asserts that Africa has an indigenous normative framework in the form of ubuntu which was regrettably misunderstood and deliberately

6 *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 37.
7 ibid.

overlooked since contact with colonialism (Bennett 1991, 30). He goes further to argue that:

> The so-called "African concept of human rights" is therefore actually a concept of human dignity. The individual feels respect and worthiness as a result of his or her fulfilment of the socially approved role. Any rights that might be held are dependent on one's status or contingent on one's behaviour. Such a society may well provide the individual with a great deal of security and protection. He adds that one may even argue that people may well value such dignity more than their freedom to act as individuals. In relatively homogeneous static and small-scale societies, this tendency is likely to be stronger than the tendency towards individualism (ibid).

Mahao further points out that humanness has always been engraved in the African way of living (Mahao 2010, 323). What is required is that judges must have the appetite to infuse African jurisprudence when adjudicating disputes. Pieterse argues that the Bill of Rights does not entail that African jurisprudence or practices not consistent with the Bill of Rights should be abandoned in favour of the latter (Pieterse 1991, 392). However, a judge is required to have an element of creativity and innovation when faced with a conflict between the two systems. Otherwise, all that is achieved is re-imaging customary law in the mirror of Western law. For Ntlama (2020, 344), the way the court attempted to achieve gender equality in cases such as *Nwamitwa v Shilubana* is problematic because importing section 1 of the Intestate Succession Act limits the right to equality within the framework of customary law.

This for Ntlama again re-affirms the position of customary law as the subservient legal system. Ntlama argues that, while decisions such as *Nwamitwa v Shilubana* and *Bhe-Shibi* are celebrated because they achieved a measure of gender equality, this is nonetheless compromised by the heavy reliance on Western conceptions of gender equality and failure to allow customary law to achieve the same end. She refers to *Dalindyebo v State*,[8] where an opportunity to develop the African philosophy of ubuntu was wasted in the interpretation of the criminality of a king or queen within the framework of customary law. There is a need to protect vulnerable parties from distorters of customary law for personal gains. However, this must be done while taking African values such as ubuntu into account and integrating them.

The regulation and treatment of customary marriages are discussed below to highlight how courts have been continuing the common law paradigm and creating constitutional customary law in the case of marriages.

Treatment of Customary Marriages

Customary marriages were only partially recognised and regarded as unions rather than marriages. The use of the term "marriage" was deliberately avoided when it came to customary marriages because of their polygamous nature (Kovacs et al. 2013, 275).

8 (2016) (1) SACR 329 (SCA).

Colonial administrators encouraged indigenous people to conclude a civil marriage and convert to Christianity whereby a man could only marry one wife (Ndima 2013, 329). This, despite the fact that some customary marriages were monogamous and went through the requirements of negotiating lobolo and integrating the bride (Maithufi and Bekker 2002, 182). This process was only recognised as being a contract between two families (Mdluli 2016). A party who had concluded a customary marriage was allowed to further conclude a civil marriage as the customary marriage was not regarded as a formal marriage (Osman 2019, 5). Customary marriages could not be afforded all the benefits of a civil marriage. For example, in terms of section 22 of the Black Administration Act, marriages by black people were regarded to be out of community of property.[9] Children born of such a marriage were regarded as illegitimate and no duty of support was established between the spouses (Dlamini 1999, 16).

It is argued that this position has not changed despite the existence of the Constitution and the enactment of legislation such as the Recognition of Customary Marriages Act (Recognition Act), which safeguards the right to equality and dignity of parties in customary marriages. Section 10 of the Recognition Act, for example, is a perpetuation of the old colonial order and apartheid arrangement because it openly allows parties to conclude a customary marriage and can convert it into a civil marriage. Scholars have argued that the silence of the Recognition Act on what happens to the customary marriage when a civil marriage is concluded creates what can be called "dual marriages" (Osman 2019, 25). It is, however, argued that this is a continuation of the repugnancy clause that did not allow parties to a civil marriage to conclude any other marriage while the civil marriage was subsisting. Osman argues that this could not be the position anticipated by the legislature to create the perpetuation of the old order repugnancy clause (2019, 24). Evidence of continuing the old order repugnancy clause can be found in section 211 of the Constitution that recognises the application of customary marriage, subject to consistency with the Constitution. Thomas and Tladi state that section 211 of the Constitution is merely a repetition of the repugnancy clause because of its internal limitation that customary law can only be recognised if it is consistent with the Constitution (Thomas and Tladi 1999, 361). Himonga argues in light of the subjection of customary law legislative provisions such as section 211(3), that this has the effect of providing a shadow view of African law as far as its equal status is concerned with the common law, which further paints a picture of ambiguity regarding its application under the Constitution (Himonga 2017, 101). This is notwithstanding the fact that the common law is similarly subject to the Constitution and can be developed where inconsistencies with the Constitution are found. Customary law is regulated with suspicions as evidenced by the internal limitation which results in preferences for common law in customary law disputes (Himonga 2017, 101). Osman argues that the internal limitation of section 211 subjects living customary law to official law even if the former may have a solution and protect rights better (Osman 2017). Ndima posits that section 211 of the Constitution places an obligation on the courts to apply customary

9 *Bhe v Magistrate, Khayelitsha* 2005 1 BCLR 1 (CC) paras 112–113.

law and the only way the court can satisfy itself of this obligation is by first affording customary law the space to resolve the dispute in question (2013). Only when customary law has fallen short of this can the court then apply the Constitution; however, this does not happen in some cases. Therefore, the conclusion flowing from this is that the Constitution betrays its own mandate of applying customary law in terms of section 211. It is argued that it was unnecessary to subject customary law to further internal limitations because a section of the Constitution already states that the Constitution is the supreme law of the land and any law inconsistent with it will be declared inconsistent to the extent of its inconsistency. Moreover, if customary law was indeed on an equal legal footing with the common law, then the legislature would not have created this conundrum in section 10 of the Recognition Act. Judges in courts do not always consider and prioritise the distinctive features of customary marriages. This cannot be seen as development but freezing requirements of a marriage in favour of the common law.

With the enactment of the Recognition Act, the legislature has mostly imitated the requirements of a civil marriage into the customary marriage except that lobolo can be negotiated and the bride be integrated (Bekker and Koyana 2014, 28). The Act also appears to recognise polygamous marriages; however, this can be referenced from section 7(6) which is meant to regulate the proprietary consequences of a polygamous marriage by requiring that a court-approved written contract must be concluded to regulate the proprietary consequences of a customary marriage. However, this section has been a source of debate as the court in *MM v MN* concluded that the second marriage would be out of community of property if the first marriage was in community of property. This is not good for the second wife who may not have amassed property during the subsistence of the marriage. However, the Act does not state what the requirements of a polygamous marriage are. This had to be part of the points of contestation in *MM v MN,* whereby the Constitutional Court attempted to address the issue of whether the consent of the first wife is indeed a requirement for a marriage in living law (Radebe 2022, 781). The Constitutional Court in *MM v MN* did try to visit the living law of the Tsonga traditional group to ascertain how the consent issue was resolved. What this suggested was that the court was going about the matter the right way (Radebe 2022, 786).

Highlighting a willingness to be guided by the living law of the community on the content of customary law, the court did this while acknowledging that perhaps it was not the appropriate platform to deal with the issue of developing customary law. This could have been done in the High Court or the SCA.[10] However, it then argued that the second issue in relation to whether consent is a requirement for the validity of a marriage is a constitutional issue as it involves the power of the court to develop and apply customary law to promote the spirit and objects of the Constitution as the supreme law of South Africa. This can be commended as a departure from other judicial

10 *MM v MN* para 12.

pronouncements such as *Bhe v Magistrate Khayelitsha*, where the Constitutional Court merely opted to replace a customary law practice with a common law practice, thereby continuing the common law paradigm to end gender discrimination in customary law which was perceived as problematic for women to own property.[11] The majority judgment waded into dangerous waters by creating a third requirement with the right to equality and dignity of the first wife being treated as a requirement although this is not what is observed in living law (Bakker 2016, 365). It was not necessary to rely on constitutionality because Tsonga customary law does not recognise a marriage without consent as valid, but efforts may be made to address the consent issue if the second marriage will serve a legitimate purpose (Manthwa 2019, 427). This is not to force the first wife to consent to a subsequent marriage but to engage her and her family to find a common ground for the second marriage to be concluded.

The Role of a Judiciary

The judiciary carries the task of giving effect to these divergent ideologies which are Western oriented. The judiciary is arguably grounded in the constitutional text and must not alter it materially (Selzer 1995). It must act in line with judicial activism, which in the South African context, can be defined as a process whereby judges are allowed to have their personal whims take over in their decision-making and should also consider public policy issues among other factors to guide the outcome (Campbell 2003, 307). The fundamental ideology of judicial activism is the notion that judges must or may be activists or advocates and reform the existing principles or rules that appear to bring injustice to the public. They should not hesitate to go beyond their defined roles as merely interpreters of the Constitution in their functions as an independent body (Jipping 2001, 152). It is argued that constitutional principles and values are relative to a society under which the Constitution is meant to regulate people, including the country's culture, historical context, and injustices. These are subject to change based on movements in society which will inform what needs to be done by judges to meet changing circumstances (Mathebe 2021, 19). It is argued that in South Africa, the principle of judicial activism is well entrenched as judges in some cases can strike down a legislative provision as unconstitutional.

In the case of customary law, which is not largely regulated through legislative provisions but through living law practices, the court has been able to strike down as unconstitutional practices such as primogeniture. The problem, however, is that when the judiciary exercises its judicial activism, it does so in ways that look down on customary law and view the common law as a saviour to what is perceived as problems. This approach is problematic because it should not be the role of the judiciary to advance one legal system over another when two legal systems are said to be on an equal footing (Pieterse 2005, 161). People approach the court because they want to advance the protection of their socio-economic interests and rights, and this may require the court to

11 *Bhe v Magistrate, Khayelitsha* paras 112–113.

follow a particular approach that is removed from the normal process. For example, it may have to transform or opt for a different form of equality such as substantive equality (Chaskalson 2009, 36). Therefore, constitutional interpretation becomes significant as it becomes not about what the Constitution states but how it is to be interpreted. Judges are thus allowed to be innovative and not see the Constitution as immutable. Judges are directly involved in giving effect to constitutional provisions and values. Judicial activism has been criticised because it gives courts too much power to temper with the Constitutional text. In the customary law context, judges have been activists for imposing Western values and understanding of the right to equality without interrogating the relevance and role they will play once translated. Hence one is not seeing a deliberate and conscious effort from judges when engaging the content of customary law.

Many lawyers and judges who are responsible for determining the content of African law and its development have received their legal education in the common law tradition with little or no emphasis on customary law (Kibet and Fombard 2017, 346). After centuries of being bombarded with Western legal epistemology on how to deal with the application of African law, one finds that such judges have not demonstrated an appetite to engage with a legal system often seen as unsophisticated and mirrored in uncertainty (Ntlama 2009, 344). For them, common law is the mainstream and civilised law against which other systems of law must be tested. It is true that African law is dynamic and can change to meet the socio-economic changes of contemporary society (Lehnert 2005, 255). However, this alone cannot be enough to justify a judge merely deciding that a practice is observed differently. There must be evidence from living law apart from that African law is adaptive. For example, in *Mbungela v Mkabi*, the court agreed with the decision of the High Court that the integration of the bride could be waived. The fact that one party who is of Xhosa traditional group and the other of Setswana group did not matter to the Court. This should be because although the requirements of a marriage may be similar across different groups, there are variances in how they are observed (Manthwa 2019, 465). Similarly, there are differences in terms of how much different groups view each requirement or ritual as significant. It is argued that it is important that one also looks at the LLB curriculum with a decolonisation view because it has a role in producing lawyers and judges responsible for dispute resolution.

Contribution of the LLB Curriculum to the Common Law Paradigm

Tertiary institutions must always retain the spirit of indigenous law and ensure that it leaves into the Constitution. Some scholars speak about embracing the country's indigenous knowledge system and for this to be reflected in its curriculum, particularly the LLB curriculum (Himonga and Diallo 2017, 10). The teaching of customary law in tertiary education is not based on a national curriculum but reflects the identity of that university and each university can design its own expectations of the curriculum (Badejogbin 2017). Customary law requires specific focus pedagogically and epistemologically due to factors that today affect it such as urbanisation and

constitutionalism. Coupled with the fact that many people grow up on distorted versions of customary law and may not be able to distinguish between true versions and distorted ones, there is a need for the teaching of customary law in terms of what it is and what it ought to be to assist judges and lawyers in their adjudication of customary law disputes.

Some LLB graduates who later become judges and lawyers are not likely to be vexed with customary law due to cultural nuances. Also, because some universities do not offer the subject as an independent module, it is in some cases taught as part of legal pluralism, which creates a negative perception of customary law by LLB graduates about customary law as a legal and knowledge system (Badejogbin 2017, 130). Customary law in universities is also referred to by different names, which include African customary law, legal diversity, customary law, and legal pluralism.

Legal pluralism does not necessarily refer to customary law but is a broad term to incorporate more than one legal system in South Africa, including customary law. This is different from Roman-Dutch law, which in some universities still enjoys independence as a module in that it is not part of a broader module (Maithufi and Maimela 2020, 2). Tertiary institutions have in the wake of the Department of Higher Education threatening de-accreditation and in the wake of the Fees Must Fall and Rhodes Must Fall protests undertaken to transform their LLB curriculum. Several modules such as Constitutional Law and Citizenship, Participation, and Democracy have been reviewed to transform their content to reflect Africanisation and decolonisation of the LLB curriculum at the University of South Africa. It is argued that the Council of Higher Education's focus on some universities was a missed opportunity to decolonise the LLB curriculum.

It followed narrow interests that required that certain modules that were in some cases identified as modules at risk incorporate constitutionalism and some customary law concepts while the modules and the LLB curriculum remained largely Eurocentric. An opportunity was missed to reconstruct the LLB curriculum and ensure that African literature becomes the mainstream theme of teaching law. For example, why do students at tertiary institutions continue to learn modules such as Legal Ethics and Legal Philosophy that teach them about Greek philosophers, when Africa has its own philosophers who base their ideology on African values and unmasking the Western epistemology for what it is? Why is Steve Biko's book *I Write What I Like* not part of any syllabus at tertiary institutions? People ought to ask why the books of African heroes and anti-colonial activists such as Thomas Sankara are not part of the syllabus. But students are bombarded with lessons about people like Emmanuel Kant and Aristotle. Until the 1996 Constitutional order, students were forced to study in Afrikaans as a medium of instruction. Afrikaans was promoted above all other languages in South Africa (Nudelman 2015). This was largely because the National Party imposed the language on other races (Hofmeyer and Buckland 1992, 20). Five universities offered education only in Afrikaans and these include the University of Stellenbosch, the University of the Free State, the University of Pretoria and Randse Afrikaanse

Universiteit now known as the University of Johannesburg and the then-University of Potchefstroom for Christian Higher Education, now North-West University.

In the post-apartheid era, these universities merely added English as another official language. Section 29(b) of the Constitution provides that everyone has the right to learn in a language of their preference and legislative means must be taken to ensure that these rights are enforced. Almost three decades into the post-apartheid era, students are still offered LLB and other curricula in English and Afrikaans. Tertiary institutions such as the University of Stellenbosch have included IsiXhosa as part of the teaching and learning curricula today. The call for decolonisation of law is seen by some scholars as a solution to determining the content of living customary law. They are calling for an end to the domination of Western pedagogy and epistemology in South African education, and an end to their historical figures and traditions (Iya 2001, 141). Mbembe argues that something is completely wrong when a syllabus that was designed for colonialism continues to be used post-colonialism (Mbembe 2016, 32). The LLB curriculum is problematic because it mirrors that of the commonwealth tertiary institutions except that in some quarters, efforts may have been made to integrate the concept of ubuntu (Muvangua and Cornell 2001, 141).

Conclusion

Courts must consider that rights such as the right to equality and dignity are aspirational values that cannot have a blanket approach but must be motivated by surrounding conditions in terms of the direction they should take. A blanket approach that seemingly says the rights of women are protected and therefore its job well done, ends up losing the true objective of protecting women (Albertyn 2009, 201). The Constitutional Court's understanding of developing customary law has always been understood to mean replacing customary law with a common law practice and justifying this outcome on the need to develop customary law to align with Constitutional principles. It is, therefore, argued that courts use the Constitution as a weapon to justify its systematic killing of customary law and creating constitutional customary law.

References

Albertyn, C. 2009. "The Stubborn Persistence of Patriarchy? Gender Equality and Cultural Diversity in South Africa." *CCR* 2(1): 165–208.

Badejogbin, R. E. 2017. "An Analysis of the Process of Ascertainment and Application of Customary Law in Formal Institutions of Adjudication: Nigeria and South Africa." PhD Dissertation, University of Cape Town.

Bakker, P. 2016. "The Validity of a Customary Marriage under the Recognition of Customary Marriages Act 120 of 1998 with Reference to Section 3(1)(b) and 7(6)-Part 2." *THRHR* 79: 357–68.

Bekker, J. C., and D.S. Koyana. 2014. “The Legislative Reconstruction of the Customary Law of Marriage.” *THRHR* 77: 568–584.

Bennet, T. W. 2009. “Re-Introducing African Customary Law to the South African Legal System.” *Am J Comp Law* 57(1): 1–31.

Bennett, T. W. 1991. “The Compatibility of African Customary Law and Human Rights.” *Acta Juridica* 18–35.

Cachalia, F. 2018. “Democratic Constitutionalism in the Time of the Post Colony: Beyond Triumph and Betrayal.” *SAJHR* 34(3): 375–397.

Campbell, T. 2003. “Judicial Activism – Justice or Treason?” *Otago Law Review* 10(3): 307–326.

Chanock, M. 2001. *The Making of South African Legal Culture, 1902–1936: Fear, Favour and Prejudice.* Cambridge: Cambridge University Press.

Chaskalson, A. 2009. “Dignity and Justice for All.” *Maryland Journal of International Law* 24(1): 24–39.

Comaroff, J., and J. L. Comaroff. 2004. “Policing Culture, Cultural Policing: Law and Social Order in Post-colonial South Africa.” *Law and Social Inquiry* 29: 513–546.

Davies, D. M. 2018. “Is the South African an Obstacle to a Democratic Post-colonial State?” *SAJHR* 34(3): 359–374.

Diala, A.C., and B. Kangwa. 2019. “Rethinking the Interface between Customary Law and Constitutionalism in Sub-Saharan Africa.” *De Jure* 52(1): 189206.

Diala, A. C. 2020. “Understanding the Relevance of African Customary Law in Modern Times.” *The Conversation.* Accessed July 14, 2023. https://theconversation.com/understanding-the-relevance-of-african-customary-law-inmodern-times-150762

Dlamini, C. M. R. 1999. “The Ultimate Recognition of the Customary Marriage in South Africa.” *Obiter* 20: 14–40.

Duly, T. S. 2019. “Kindred Strangers: Why has the Constitutional Court of South Africa Never Cited the African Court on Human and People’s Rights.” *CCR* 9: 387408.

Himonga, C., and C. Diallo. 2017. “Decolonisation and Teaching Law in Africa with Special Reference to Living Customary Law.” *PELJ* 20: 1–19.

Himonga, C. 2017. “The Constitutional Court of Justice Moseneke and the Decolonization of Law in South Africa: Revisiting the Relationship between Indigenous Law and Common Law.” *AJ* 101–123.

Himonga, C. 2011. "The Future of Living Customary Law in African Legal Systems in the Twenty-First Century and Beyond, with Special Reference to South Africa" In *The Future of African Customary Law***,** edited by Jeanmarie Fenrich, 31–57. Cape Town: Cambridge University Press.

Himonga C, M. Taylor, and A. Pope. 2013. "Reflections on Judicial Views of Ubuntu." *PELJ* 16(5): 371–402.

Hofmeyer, J., and P. Buckland. 1992. "Education System Change in South Africa." In *McGregor Education Alternatives,* edited by McGregor and McGregor, 15–59. Kenwyn: Juta.

Isanga, J. 2017. "African Judicial Review, the Use of the African Jurisprudence and the Judicializing of Politics." *George Washington International Law Review* 49: 1–49.

Iya, F. P. 2001. "The Legal System and Legal Education in Southern Africa: Past Influences and Current Challenges." *J Leg Ed* 141–61.

Jipping, T. L. 2001. "Legislating from the Bench: The Greatest Threat to Judicial Independence." *South Texas Law Review* 43: 141–152.

Juliane, K, S. Ndashe, and J. Williams. 2013. "Twelve Years Later: How the Recognition of Customary Marriages Act of 1998 is Failing Women in South Africa." *Acta Juridica* 273–91.

Kibet, E., and C. Fombard. 2017. "Transformative Constitutionalism and the Adjudication of Constitutional Rights in Africa." *AHRLJ* 17(2): 340–366.

Lehnert, W. 2005. "The Role of the Courts in the Conflict between African Customary Law and Human Rights." *SAJHR* 21: 241–77.

Leon S. F. 1999. *The Future of Tradition: Customary Law, Common Law and Legal Pluralism.* London: Routledge.

Lewis, L. 2014. "Judicial 'Translation' and Contextualization of Values: Rethinking the Development of Customary Law in *Mayelane*." *PELJ* 18(4): 1125–60.

Mahao, N. L. 2010. "*O se e ho morwa 'morwa a towe*'- African Jurisprudence Exhumed." *CILSA* XLIII: 310–336.

Maithufi, I. P., and J.C. Bekker. 2002. "The Recognition of the Customary Marriages Act of 1998 and its Impact on Family Law in South Africa." 2002 *Comp & Intl LJ S Afr* 35(2): 182–197.

Maithufi, M., and C.A. Maimela. 20202. "Teaching the 'Other Law' in a South African University: Some Problems Encountered and Possible Solutions." 2020 *Obiter* 41(1): 1–9.

Manthwa, T. A. 2019. “Handing over of the Bride as a Requirement for Validity of a Customary Marriage.” *THRHR*: 652–662.

Manthwa, T. A. 2019. “A Re-interpretation of the Families’ Participation in Customary Law of Marriage.” *THRHR* 82: 416–428.

Manthwa, T. A. 2022. “Towards an African Approach in Resolving the Conundrum between a Civil and Customary Marriage.” *SAPL* 1–19.

Mathebe, L. 2021. “The Constitutional Court of South Africa: Thoughts on its 25-Year-Long Legacy of Judicial Activism.” 2021 *Journal of Asian and African Studies* 56(1): 3–167.

Mbembe, A. 2016. “Decolonising the University: New Directions.” 2016 *AHHE* 15(1) 29–45.

Mdluli, P. 2016. *Black Marriages and Customary Marriages Before 1988*. Pietemaritzburg: Tomlinson Mngun James.

Moosa, E. Tension in Legal and Religious Values in the 1996 South African Constitution’ In *Beyond Rights Talk and Culture Talk: Comparative Essay on the Politics of Rights and Culture,* edited by Mamdani, M, 121–135. New York: St Martin’s Press.

Muvangua, N., and D. Cornell. 2001. “Ubuntu and the Law.” 2001 *J Leg Ed* 23(2): 352–69.

Ndima, D. 2013. “Re-imagining and Re-interpreting African Jurisprudence under the South Africa Constitution.” PhD Dissertation, University of South Africa.

Nhlapo, T., and C. Himonga. 2014. *African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives.* Cape Town: Oxford University Press.

Ntlama, N. 2009. “Equality Misplaced in the Developments of the Customary Law of Succession: Lessons from *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC).” *Stellenbosch Law Review* 20: 333–56.

Ntlama, N. 2020. “The Changing Identity on Succession to Chieftaincy in the Institution of Traditional Leadership: *Mphephu v Mphephu-Ramabulana*: (948/17) [2019] ZASCA 58.” (23) *PELJ* 20: 1–25.

Nudelman, C. 2015. “Language in South Africa” Higher Education Transformation: A Study of Language Policies at Four Universities.” LLM Dissertation, University of Cape Town 2015.

Osman, F. 2017. “The Administration of Customary Law Estates, Post the Enactment of the Reform of Customary Law of Succession Act: Case Study from Rural Eastern Cape, South Africa.” PhD Dissertation, University of Cape Town.

Osman, F. 2019. “The Million Rand Question: Does a Civil Marriage Automatically Dissolve the Parties’ Customary Marriage?” *PELJ* 22(1): 1–25.

Pieterse, M. 2001. “It’s a Black Thing: Upholding Culture and Customary Law in Society Found on Non-racialism.” *SAJHR* 17: 364–403.

Pieterse, M. 2005. “What Do We Mean When We Talk About Transformative Constitutionalism.” *SAPL* 20: 155–166.

Pikoli, Z. 2021. “Customary Law Was Bastardised to Become a Vehicle of Oppression, Thuli Madonsela Tells Conference.” https://www.dailymaverick.co.za/article/2021-08-25-Customary law was bastardised to become a vehicle of op... (dailymaverick.co.za).

Radebe, K. M. 2022. “*Tsambo v Sengadi* (244/19) [2020] ZASCA 46 (30 April 2020); *Sengadi v Tsambo*; In Re: Tsambo (40344/2018) [2018] ZAGPJHC 666; [2019] 1 All SA 569 (GJ) (8 November 2018) Assessing the Insurmountable Challenge in Proving the Existence of a Customary Marriage in Terms of Section 3(1)(b) of the Recognition of Customary Marriages Act 120 of 1998 and the Misplacing of Gender Inequality.” *De Jure* 55: 77–86.

Ramose, M. B. 2017. “Reconciliation and Reconciliation in South Africa.” *Journal of African Philosophy* 5: 20–39.

SALRC. 2019. *Project 144 Single Marriage Statute Issue Paper 35*. SALRC: Pretoria.

SALRC. 2021. *Discussion Paper 152 on the Single Marriage Statute: Project 144*. SALRC: Pretoria.

Selzer, H. 1995. “Judicial Activism as Exponent of the Unwritten Values Inherent in the South African Bill of Rights.” LLM Dissertation, University of South Africa.

Sheleff, L. 1999. The Future of Tradition Customary Law, Common Law and Legal Pluralism Routledge: London.

Thomas P.J., and D.D. Tladi. 1999. “Legal Pluralism or A New Repugnancy Clause.” *CILSA* 32(3): 354–363.

Tladi, D. 2016. “International Law in South African Courts: The Supreme Court of Appeal and the Al Bashir saga.” *AHRLJ* 16(2): 310–338.

Cases

Alexkor v Richtersveld Community 2004 (5) 460 (CC).

Bhe and Others v Khayelitsha Magistrate and Others 2005 (1) SA 580 (CC).

Mbungela v Mkabi 2020 1 SA 41 (SCA).

Port Elizabeth Municipality v Various Occupiers 2005 1 SA 217 (CC).

S v Makwanyane 1995 (3) SA 392 (CC).

Sengadi v Tsambo 2019 4 SA 50 (GJ).

S v Jezile 2016 (2) SA 62 (WCC).

United States v Wade 1967 388 U.S. 218, 249–250.