An Analysis of the Significance of Integration of the Bride in Customary Marriages and its Potential Constitutionality

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Abstract

Firstly, this contribution opts for the words "integration of the bride" rather than "handing over of the bride" during customary marriages. It is argued that the term "handing over of the bride" is problematic because it creates the impression that a woman is being treated as property or that she is being sold to the groom's family. The integration of the bride is a significant step in the conclusion of a customary marriage. However, this does not mean that the process carries the same importance and weight for all traditional groups in South Africa. Some groups may regard a ritual performed during the integration of the bride so important that a customary marriage cannot be concluded without it. It is therefore important for courts to focus on cultural nuances and differences between various groups when determining if certain rituals can be waived. Courts recognise an intimate relationship as a valid customary marriage even when it has not complied with an important ritual regarded as significant for the conclusion of a customary marriage. The courts should rather focus on other available avenues to protect vulnerable partners from the consequences of an intimate relationship's not being recognised as a valid customary marriage. The courts must recognise the fact that the consent of the bride-to-be is important when determining whether a marriage was concluded. This refers to the consent of the bride to perform a ritual which is part of the ceremony of the integration of the bride. So, a marriage must not be recognised as valid if the bride did not consent to it or did not consent to a ritual performed as part of concluding a customary marriage. While the constitutionality of the integration of the bride was raised in an *obiter dictum* in the 2019 case of *Sengadi v Tsambo*, the primary consideration should be the consent of the bride. Integration should not be a problem where the bride has consented to it.

Keywords

Customary law; customary marriage; integration of the bride; ritual; cultural group; waiver; consent.

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1 Introduction

Several customary law practices have been misunderstood and misinterpreted since the country was colonised.[1] Colonialism was amongst other things a power struggle, largely motivated by economic exploitation.[2] The colonists managed to position themselves as the natural and undisputed masters of large parts of Africa, and in the process also invented tradition with the aim *inter alia* of defining and conquering Africa. They recognised that to further the colonial mission they needed collaboration with African elites to acquire economic, political and territorial control of Africa.[3] To a large extent the colonists intended to eliminate and obliterate indigenous law and replace it with the common law. In many instances the English law of contract, for example, had taken over the indigenous law of marriage and property.[4] Law emerged from indigenous law as people started to distort indigenous law for various reasons, including often for selfish interests.[5] Customary law today is a response to how communities respond to socio-economic interests and is influenced by a variety of factors, such as acculturation and urbanisation.[6] For example, practices such as the integration of the bride and *lobolo* were interpreted to mean the selling of a woman, when in truth they were about thanking the parents of the bride for their role in raising their daughter.[7] One of the objectives of the integration of the bride during marriage ceremonies is to introduce the bride to the ancestors of the groom as a new member of the groom's family[8] and to receive the blessing of the bride's ancestors.[9] In *Sengadi v Tsambo*, a 2019 case, the High Court raised the issue of the constitutionality of the integration of the bride in an *obiter dictum*,[10] on the basis that it was only women who were integrated into the family of the husband.[11]

This contribution analyses the significance of the integration of the bride as a requirement for the validity of a customary marriage and the potential unconstitutionality of the said requirement. The Supreme Court of Appeal (SCA) did not address this particular concern when the matter was referred

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1 Ndima 2003 *CILSA* 325.
2 Craven 2015 *Lond Rev Int Law* 32.
3 Diala and Kangwa 2019 *De Jure* 194-197.
4 Allott 1984 *JAL* 57.
5 Diala 2017 *J Legal Plur* 158.
6 Diala 2017 *J Legal Plur* 158.
7 Ndima 2003 *CILSA* 325.
8 Manthwa 2021 *TSAR* 207.
9 Raphaphalani 2016 *Journal of Sociology and Anthropology* 264.
10 *Sengadi v Tsambo* 2019 4 SA 50 (GJ).
11 *Sengadi v Tsambo* 2019 4 SA 50 (GJ) paras 40-44.

to it.[12] The other requirements for the conclusion of a customary marriage are the consent of the two parties to the marriage and the delivery of *lobolo*. The integration of the bride remains contentious as it continues to be interpreted by courts in a contradictory manner.[13] Courts often confuse the integration of the bride with other rituals which are part of the integration.[14] Hence the courts have in some instances recognised the conclusion of a customary marriage even when there was no integration of the bride.[15]

Courts accept that the integration of the bride is a problem without interrogating it further.[16] It is automatically accepted that the integration of the bride is a problem and can be declared unconstitutional, as has been done with primogeniture. The courts accept in some instances that the integration of the bride is no longer important and can be waived entirely. While the courts mostly focus on whether the integration of the bride can be waived, some other contributions have focussed on the integration of the bride and the accompanying rituals.[17] This contribution focusses on the constitutionality and the significance of rituals in the process of the integration of the bride.[18] Problems may arise if the bride does not freely consent to a ritual, as may be the case with arranged marriages or distorted versions of *ukuthwala* (marriage through kidnapping).[19] To be discussed first is the significance of the integration of the bride, after which the contradictory precedents set in *Moropane v Southorn*[20] and *Mbungela v Mkabi* will be dealt with, followed by a discussion of whether customary law marriage is flexible.[21] In conclusion, it is finally argued that the matter must rest with the consent of the bride.

2 Significance of the integration of the bride

Importantly, this contribution opts for the term "integration of the bride", rather than "handing over of the bride". It is argued that the term "handing over of the bride" is problematic because it creates the impression that a woman is being treated as property or that she is being sold to the groom's

12 *Mbungela v Mkabi* 2020 1 SA 41 (SCA).

13 *Mbungela v Mkabi* 2020 1 SA 41 (SCA) para 26; *Maluleke v Minister of Home Affairs* (02/24921) [2008] ZAGPHC 129 (9 April 2008) para 16; *Mxiki v Mbata in re: Mbatha v Department of Home Affairs* (A844/2012) [2014] ZAGPPHC 825 (23 October 2014) para 10. Also see Manthwa 2021 *TSAR* 202.

14 Sibisi 2020 *De Jure* 96.

15 *Nthejane v Road Accident Fund* (3183/2010) [2011] ZAFSHC 196 (1 December 2011); *Mmutle v Thinda* (20949/2007) [2008] ZAGPHC 352 (23 July 2008).

16 Bakker 2018 *PELJ* 6-12.

17 Bakker 2018 *PELJ* 1; Bakker 2022 *PELJ* 3.

18 See heading 2 below.

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

20 *Moropane v Southon* (755/2012) [2014] ZASCA 76 (29 May 2014).

21 *Shilubana v Nwamitw*a 2009 2 SA 66 (CC) para 44; *Bhe v Magistrate Khayelitsha* 2005 1 SA 580 (CC) paragraph 86*:* customary law is a flexible body of law; also see Nkosi and Van Niekerk 2018 *THRHR* 350.

family.[22] Rituals are significant in customary law to mark an event as socially legitimate.[23] Thus, the purpose of the integration and the attendant rituals is to obtaining social legitimacy from the families, the community and also the ancestors. Ancestral acquiescence is particularly significant in customary law.[24] What is key is that the entire community consisting of the groom's family, the bride's family and the ancestors of both families must be informed of the new development in the family.[25] This is necessary as it is believed that the marriage might be cursed or children born of the marriage might be cursed if the marriage is not blessed by the ancestors. Regrettably the significance of particular rituals that play a legitimacy role in customary law is not always considered in customary law disputes in the courts. Customary law is recognised in terms of the Constitution and case law as part of South African law.[26]

The courts must understand that there are rituals that can be waived and there are also rituals that are so important that they cannot be waived. For example, *utsiki* is observed by the Xhosa traditional group, where an animal is slaughtered after the arrival of the bride to the groom's family, as part of integrating her into the family. This ritual cannot be waived because it is considered a significant stage in the conclusion of a customary marriage. Therefore, before a court can accept that the parties to a marriage have waived *utsiki*, evidence must be provided confirming that the specific community rules allow for the waiver of *utsiki* in the first place. Notably, two parties cannot be given the power to decide what is and is not customary law as this could result in the distortion of customary law.[27] It could also result in new norms being alleged every time parties approach a court. It must also be understood that parties must follow customary law if they have agreed to marry in terms of it. However, the significance and observance of rituals differ amongst different traditional groups.

Accordingly, the validity of a customary marriage can depend on the value placed on a particular ritual by a certain traditional group. Rituals are not only significant for the conclusion of a customary marriage but are generally important for all occurrences or events in customary law. For example, at the birth of a child a ritual must be performed to introduce the child to the ancestors. Similarly, a bride must be integrated into the groom's family through the observance of a ritual linked to legitimacy to introduce the bride

22 Ndima 2003 *CILSA* 325.

23 Bekker 2004 *THRHR* 150; *Fanti v Bonto* 2008 5 SA 405 (C); *Ndlovu v Mokoena* 2009 5 SA 400 (GNP); *Mthethwa v Road Accident Fund* (48435/2013) [2016] ZAGPPHC 893 (30 September 2016).

24 Ntsoane and Manthwa 2020 *THRHR* 614.

25 Ramose 2007 *GLR* 323.

26 See ss 15, 30, 31 and 211 of the *Constitution of the Republic of South Africa*, 1996 (the Constitution); *Alexkor v Richtersveld Community* 2004 5 SA 460 (CC) para 52.

27 *Miya v Mnqayane* (3342/2018) [2020] ZAFSHC 17 (3 February 2020) para 29.

to the ancestors and have them bless the occasion. This can be done by smearing with *libovu*. This is the smearing of the bride's face with red ochre, which is considered an important stage in the conclusion of a customary marriage in Swati traditional society. In *ND v MM* the court correctly came to the conclusion that the requirements for the validity of an eSwatini customary marriage included that the bride must be smeared with *libovu* during the marriage ceremony (*umtsimba*), *lobolo* must be delivered in full or guaranteed, and the *lugege* and *insulamnyambeti* beast must be handed over and slaughtered as part of the integration process.[28] The traditional leader or his representative must be present at the ceremony to witness the moment when the bride freely consents to the smearing with red ochre. This highlights the importance of the consent of the bride. It is important to note that a bride to be does not have to consent to the integration or the performance of rituals if she does not value them. However, this does not mean that a customary marriage can be concluded without them if the traditional group from which the bride hails does not recognise a customary marriage without those rituals.

It can be argued that the legislature has left it up to various communities to give effect to section 3(1)(b) of the *Recognition of Customary Marriages Act* (RCMA).[29] Yet, individual parties and the courts cannot be allowed to distort customary law.[30] It is left to communities to give effect to the section, given that customary law changes all the time and continues to adapt to socio-economic changes. Although the court can develop customary law in terms of section 39(2) of the Constitution, it has found in cases such as *Shilubana v Nwamitwa* that the content of customary law must be established from community practices.[31] Section 3(1)b of the RCMA provides that a marriage must be negotiated and entered into or celebrated in accordance with customary law. Section 3(1)(b) enables courts to appreciate the cultural nuances found in customary law. As explained above, the heart of the problem is the incalculable ways in which the courts have interpreted the section.[32] When a party alleges a version of customary law, the onus is on that party to prove that what he/she is alleging to be a true reflection of living law is in fact so. This can be done by calling witnesses from the community to testify on the alleged version.

The courts can take note of past practices, take judicial notice of customary law and be informed by official law as a starting point, but they need

28 *ND v MM* (18404/2018) [2020] ZAGPJHC 113 (12 May 2020).
29 *Recognition of Customary Marriages Act* 120 of 1998.
30 *Miya v Mnqayane* (3342/2018) [2020] ZAFSHC 17 (3 February 2020) para 29.
31 *Shilubana v Nwamitwa* 2009 2 SA 66 (CC) para 44-49.
32 *PSC v LPM* [2013] JOL 29847 (GNP); *Eunice Xoliswa Ngema v Sifiso Raymond Debengwa* (2011/3726) [2016] ZAGPJHC 163 (15 June 2016); *Rasello v Chali* (A69/2012) [2013] ZAFSHC 182 (23 October 2013).

evidence from living law that a practice is indeed observed in the way that is alleged.[33] It is argued that rituals such as *utsiki* and *libovu* may not lose their relevance and stop being observed simply because the courts have pronounced that they are no longer relevant today. This is because communities regard them as significant and as a way of communicating with the ancestors about a new development in the family, as explained. In *Maluleke v Minister of Home Affairs*, the court condoned the non-performance of *imvume*, which is part of integrating the bride into the groom's family, as not affecting the validity of a marriage,[34] while in *Mabuza v Mbatha*, Hlophe J concluded that *ukumemeza* could be waived as it was practised differently today.[35]

Ntlama argues that certain rituals may be irrelevant in concluding a customary marriage if *lobolo* has been delivered partially or in full.[36] This refers to rituals such as *umendiso/uikutyiswa amasi*, which are observed during the integration of the bride. The stance of the court and community should be guided by the consent of the bride. Rituals can be important but what is also important is the consent of the bride to perform the ritual. Depending on the particular community, the bride might not automatically acquire the status of being a *makoti* (bride) in terms of customary law. For example, the Xhosa group does not recognise a bride-to-be as a daughter-in-law before *utsiki* is performed. This status must be earned through the observance of the specific ritual. Nor does the delivery of *lobolo* afford her this status if a crucial ritual was not observed. Therefore, it cannot merely be accepted that a customary marriage was concluded through constructive delivery without understanding the significance of a certain ritual in the conclusion of a customary marriage.

3 *Moropane* and *Mbungela* SCA judgments

The High Court in *Sengadi v Tsambo* stated in an *obiter dictum* that the integration of the bride was unconstitutional as it infringed on the right to equality and dignity of a woman.[37] From the High Court the matter was then referred to the SCA to consider the recognition of a valid customary marriage without the integration of the bride. The SCA upheld the High Court judgment that the integration of the bride could be waived. In this case the respondent argued that the integration of the bride, which was crucial for the conclusion of a customary marriage, had not taken place. This needed to happen through slaughtering a lamb or a goat and using the bile therefrom to cleanse the couple. This signalled the stage when a customary

33 Himonga and Pope 2013 *Acta Juridica* 322-323.
34 Maluleke v Minister of Home Affairs (02/24921) [2008] ZAGPHC 129 (9 April 2008).
35 *Mabuza v Mbatha 2003 4 SA 218 (C).*
36 Ntlama 2019 *Obiter* 211.
37 *Sengadi v Tsambo* 2019 4 SA 50 (GJ) paras 35-37 and 42.

marriage had been concluded in terms of Tswana customary law.[38] The primary issue in the appeal was whether a customary marriage had been concluded between the deceased and the applicant. Secondly, whether the integration of the bride had taken place to conclude the customary marriage.[39] The SCA concluded that the bride had been integrated into the groom's family by being formally introduced to and welcomed into the groom's family.[40] The court pointed out that the purpose of the integration of the bride was to mark the beginning of a couple's marriage.[41] It was not clear whether the bride-to-be had consented to the ritual's being performed, but she argued that she had been integrated into the groom's family through wearing a different attire. It is argued that the matter should be about whether the bride consented to being integrated through the performance of a ritual. If she consented, constitutionality should not arise, unless it could be argued that her consent was not obtained voluntarily.

In *Mbungela v Mkabi* the SCA did not determine the constitutionality of the integration of the bride but focussed on whether a customary marriage could be concluded without the integration of the bride.[42] This SCA judgment is important because it reached a different outcome from its earlier decision in *Moropane v Southon*, where the integration of the bride was said to be important to the extent that a customary marriage could not be concluded without it.[43] The court's reasoning was that the integration of the bride was a symbolic customary practice that highlighted the fact that the daughter-in-law had been integrated into the groom's family as a new member.[44]

The two decisions have been criticised for not focussing on the issue of precedent, where the SCA in *Mbungela* could have taken the opportunity to explain why it was departing from *Moropane*.[45] It would have been better for the court to explain its departure to avoid causing legal uncertainty and the public's losing confidence in the proper administration of justice by the courts.[46]

The SCA could simply have stated that the principle of precedent does not bind in the case of customary law because customary law is dynamic and the precedent may have changed since the court last heard the matter.[47] The salient issue was that the court needed to address the precedent in

38 *Tsambo v Sengadi* (244/19) [2020] ZASCA 46 (30 April 2020) para 16.
39 *Tsambo v Sengadi* (244/19) [2020] ZASCA 46 (30 April 2020) para 35.
40 *Tsambo v Sengadi* (244/19) [2020] ZASCA 46 (30 April 2020) para 1.
41 *Tsambo v Sengadi* (244/19) [2020] ZASCA 46 (30 April 2020) para 26.
42 Manthwa 2021 *THRHR* 408. Spacing?
43 *Moropane v Southon* (755/2012) [2014] 2016 ZASCA (29 March 2014) paras 29 and 40.
44 *Mbungela v Mkabi* 2020 1 SA 41 (SCA) para 40.
45 Manthwa 2021 *TSAR* 199.
46 Manthwa 2021 *TSAR* 203.
47 Himonga 2019 *PELJ* 2-3; O'Regan 2001 *Advocate* 31.

Moropane, not to agree with it, but to explain why it was justified in arriving at a different conclusion.

The court could have argued that they were dealing with a different cultural group. For example, in *Moropane*, the parties were of the Sotho traditional group, while in *Mbungela* the parties were of the Setswana traditional group.[48] The author has personal knowledge that there is generally not much difference between these two traditional groups when it comes to the requirements of a customary marriage. The RCMA is silent on what happens if the husband and wife are not from the same traditional group. Whose customary law would apply?.[49] It is possible for the two families negotiating the customary marriage to reach an agreement on which norms must apply, informed by the parties' cultural orientation or specific lifestyle.[50] In cases where parties are from different countries, the better approach is to be guided by private international law.[51] It is argued that the starting point should be an agreement that may have been reached between the parties at the marriage negotiations.[52]

In *Mbungela* it was concluded that it was not necessary to observe all the requirements for the integration of the bride or the conclusion of a customary marriage. Times have changed and today many rural people have moved to urban areas, where they are governed by municipal by-laws which prevent them from engaging in certain practices, for example, the slaughtering of an animal, which is a ritual observed during the integration of the bride.[53] Unemployment may also affect the integration, as the parties may not be able to buy the gifts that must be exchanged between the two families. Nor could the animals intended to be slaughtered be purchased. The integration of the bride can be an expensive process, as explained, given the requirement of the exchange of gifts, the purchasing of animals for slaughter and the need to travel to the groom's home – often involving long distances, across different provinces.[54]

However, this does not mean that all requirements can be waived. It would ultimately depend on their significance. It is thus important for courts to first ascertain which rituals under living law can and which rituals cannot be waived. Living law is determined by the community which observes particular norms as obligatory. In my opinion, the two parties to the marriage should not make their own laws or determine if a ritual has changed. The courts must also consider how the ritual is observed in the community or the

48 *Mbungela v Mkabi* 2020 1 SA 41 (SCA).
49 Manthwa 2022 *Speculum Juris* 228.
50 Rautenbach *Introduction to Legal Pluralism* 47.
51 Rautenbach *Introduction to Legal Pluralism* 47.
52 Himonga and Nhlapho *African Customary Law* 74.
53 *Tsambo v Sengadi* (244/19) [2020] ZASCA 46 (30 April 2020) paras 15-18.
54 *Miya v Mnqayane* (3342/2018) [2020] ZAFSHC 17 (3 February 2020*)* para 20.

cultural group concerned.[55] The parties have the option of concluding a civil marriage if they do not want to consent or do not want to observe significant rituals linked to concluding a customary marriage. For example, *dombo* is observed by Vhavenda traditional groups. This is a ritual performed by parents on daughters to ensure that they prepare their children for marriage. Only a female who has been subjected to *dombo* may be considered eligible for marriage.[56] Boys must similarly undergo a form of training before they can be considered ready for marriage, called *thondo.* The key is that these rituals should be practised in ways that do not infringe on human rights.

The other significant purpose behind integration among different traditional groups is *go laya ngwetsi*, which means the pre-marriage counselling of the bride. The groom is also pre-counselled, as was emphasised in the 2011 Gauteng case of *Motsoatsoa v Roro*.[57] It is often argued that customary marriages that go through a form of education have a better chance of success. Similar to this is *ukuthwala*, provided that the process is followed properly, without the distorted version where women are abducted, raped and in some cases killed. The true versions of *ukuthwala* afford the bride and groom a trial marriage and a preparation for the marriage, with the full participation of their families.[58] It is argued that waiving a ritual considered indispensable for the conclusion of a customary marriage may result in harsh consequences from the ancestors and may even include death.[59] These rituals are determined by communities and must be accepted by community members as obligatory. It is therefore important for courts to understand this rather than merely to rely on the flexibility of customary law, although the flexibility of customary law remains relevant, as elaborated on in more detail below.

Consent to observe a ritual can be affected by pressure from the families. Unequal bargaining power between two parties to the marriage may also play a part, resulting in a bride-to-be consenting although she may not want to. The weaker party can be exploited through factors such as lineage and inferiority. In some cases, the issue of lineage causes women in a polygamous marriage to have insufficient access to resources, as lineage and the seniority of the wives play a role upon the dissolution of marriages. These are the kinds of issues that courts try to resolve by recognising a valid customary marriage, even when integration was entirely waived.[60]

55 Hund 1998 *Archives for Philosophy of Law and Social Practice* 420.
56 Raphaphalani and Musehane 2013 *Journal of Languages and Culture* 19.
57 *Motsoatsoa v Roro* 2011 2 All SA 324 (GSJ).
58 Mwambene and Mgidlana 2021 *PELJ* 11.
59 Bogopa 2010 *IPJP* 1.
60 Manthwa 2019b *THRHR* 659.

In *Mkabi v Minister of Home Affairs* the court concluded that adhering to Swazi and Tsonga customary laws, including delivering *lobolo* in full, could not be considered essential to the extent that a marriage was not valid if they are not observed.[61] Judges must not be informed by their personal views when it comes to customary law disputes, but by the living law. Although the parties before the court have rights, they are also bound to the rules of the specific community's living customary law. Parties cannot distort customary law to suit their case or to move the court to make a decision that suits their interests.[62]

4 Integration of the bride and gender equality

The fact that it is only women who are integrated into families can lead to the conclusion that the practice is gender-discriminatory, especially in contemporary South Africa, where the rights to equality and dignity have become central to the country.[63] One cannot deny that several customary law practices have gender-defined roles, where certain practices are observed only by men or only by women. However, it is important to recognise the legitimate purpose served by these practices.[64] Section 211 of the Constitution recognises the application of customary law subject to consistency with the Bill of Rights. The decision to determine whether customary law is consistent with the Constitution is in the hands of the courts. However, an assumption cannot be made that a practice is inconsistent with the Constitution without first testing it.[65] Courts do not consider section 36 of the Constitution to determine whether the integration of the bride and its associated rituals serve a legitimate purpose.[66] Section 36 requires the court not only to focus on enforcing rights in the Bill of Rights but also to consider the nature and purpose of the impugned provision, thus balancing competing interests, and to act accordingly. Lehnert argues for such a balancing act as it can assist in the survival of customary law ritual. A balancing of competing interests in terms of section 36 could result in a practice's surviving constitutional scrutiny although it may appear inconsistent with the Constitution.[67] As stated in *Harksen v Lane*,[68] the

61 *Mkabi v Minister of Home Affairs (*2014/84704) [2016] ZAGPPHC 460 (9 June 2016) para 35.

62 Manthwa 2019b *THRHR* 662.

63 *Hoffman v South African Airways* 2001 1 SA 1 (CC); *Prinsloo v Van der Linde* 1997 3 SA 1012 (CC); also see *National Coalition for Gays and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC).

64 Manthwa 2019a *THRHR* 416.

65 Ndima *Re-imagining and Re-interpreting African Jurisprudence 188*.

66 Ntlama 2020 *PELJ* 18.

67 Lehnert 2005 *SAJHR* 248.

68 *Harksen v Lane* 1997 1 SA 300 (CC).

discrimination must be unfair.[69] The problem lies in the distortion of practices such as the integration of the bride and initiation into manhood.[70]

Mwambene and Kruuse argue that courts focus so much on enforcing gender neutrality in customary law that the end goal may be lost in the process, because the environment where women must enjoy the benefit of their rights is not considered.[71] Nevertheless, Osman posits that living law may reflect power dynamics in a community and may reflect the interests of elderly males and traditional leaders in the community, while ignoring the voices or participation of the marginalised, such as women and children.[72] If a woman is not complaining about constitutionality, then courts should not *mero motu* bring it up.[73] For example, a woman must be the one who complains that her right to equality and dignity is being infringed upon by being the only one integrated. Of note is the view of Jafta J in *MM v MN*, who held that the issue of constitutionality should perhaps be raised by the parties and not the court.[74] Similarly, in *Tsambo* it was not supposed to be the court that raised the issue of constitutionality, even though it was mentioned in an *obiter dictum*. Parties should be afforded the opportunity to have their disputes settled on the law they alleged was in dispute.[75]

If *lobolo* and the integration of the bride were to be declared unconstitutional, this would essentially be declaring all the requirements of a customary marriage unconstitutional. Such a declaration would make a mockery of the commitment made by the courts and the Constitution that customary law exists side by side with the common law and is important in South Africa.[76] This leads to the question whether courts are adapting or developing customary law, or are they creating a new form of marriage law that could be called constitutional customary marriage? Indeed, Diala asks to what extent foreign values of equality and dignity reflect African value systems.[77] Integration of the bride is also sometimes observed when parties conclude a civil marriage.[78] It has, in fact, become common to conclude, what can perhaps be termed "dual marriage", where parties pay *lobolo* and observe integration and then move on to conclude a civil marriage. This is

69 *Harksen v Lane* 1997 1 SA 300 (CC) paras 43 and 60.
70 Mfecane 2016 *Anthropology Southern Africa* 204.
71 Mwambene and Kruuse 2013 *Acta Juridica* 294; also see Kaganas and Murray 1991 *Acta Juridica* 125.
72 Osman 2019 *J Legal Plur* 101.
73 Ntlama 2020 *PELJ* 17-18.
74 *MM v MN* 2013 4 SA 415 (CC) para 133.
75 Manthwa 2017 *THRHR* 306-307.
76 *Alexkor v Richtersveld Community* 2004 5 SA 460 (CC) para 51.
77 Diala 2020 https://theconversation.com/understanding-the-relevance-of-african-customary-law-inmodern-times-150762.
78 Manthwa 2017 *Obiter* 438.

evidence of the high esteem in which parties still hold the integration of the bride.

The courts have made significant inroads into transforming customary law to achieve gender equality, as seen in cases such as *Bhe v Magistrate*.[79] The Constitutional Court in *Fraser v Children's Court*[80] stated that the right to equality is at the centre of the constitutional dispensation. The Constitutional Court highlighted the need to address patriarchy as a problem in customary law.[81] What this means is that several customary law practices that on face value appear to be inconsistent with the Bill of Rights arguably cannot survive the test of constitutionality. It is noteworthy that it is under a constitutional dispensation that aims to recognise customary law that such practices can be declared unconstitutional.[82] Complaints for protecting women's rights in customary law are generally brought by friends of the court, such as *amici curiae*, who represent women as victims of patriarchy, which they argue is a problem in customary law.[83]

In my opinion the courts have relied too much on *amici curiae* such as the National Movement of Rural Women to assist them in the determination of validity.[84] These organisations do not live in terms of or base their lives on customary law, and are very often driven by organisational goals, which can lead them to present a biased understanding of gender-defined roles in customary law.[85] The legitimate purpose played by the integration of the bride may therefore be ignored.[86] It must also be stated that although it is the bride who is integrated, this does not mean that the groom can do as he pleases.[87] The groom and his family are expected to treat the bride with care; her family can request her return if she is not treated with respect (*theleka*).[88] This happens if the groom has not treated the bride as well as promised. Part of the *lobolo* negotiations involves commitments made by the groom's family that they will treat the bride with respect and protect her from any form of abuse.[89] Courts do not take note of the purpose served by practices such as *theleka*. *Theleka* enables the bride's family to claim her back from the groom's family after marriage if the latter fails to take care of her as agreed in the marriage negotiations or if it fails to deliver on its

79 *Bhe v Magistrate Khayelitsha* 2005 1 SA 580 (CC).
80 *Fraser v Children's Court* 1997 2 SA 261 (CC) para 20.
81 *Certification of the Constitution of the Republic of South Africa* 1997 2 SA 974 (CC) para 200.
82 Manthwa and Ntsoane 2022 *THRHR* 519.
83 Spies 2016 *Stell LR* 156.
84 Radebe 2022 *De Jure* 81.
85 Spies 2016 *AHRLJ* 262.
86 Manthwa and Ntsoane 2022 *THRHR* 516.
87 Manthwa and Ntsoane 2022 *THRHR* 514.
88 Ngema 2013 *PELJ* 405; Bekker and Boonzaaier 2007 *De Jure* 277.
89 Manthwa and Ntsoane 2022 *THRHR* 511; Sibisi 2021 *Obiter* 61.

obligations.[90] The groom and his family can correct this through *phuthuma*, which enables them to renegotiate her release from her family after the *theleka* incident.[91] Courts must consider these practices to understand that rights and interests are protected and the bride may have consented to integration.

5 Consent of the bride to integration

Consent of the bride is an important observance of rituals and should not be ignored. There are cases where persons may be forced to give consent or may not have a say in whether they consent to the marriage, for example in arranged marriages.[92] This contribution argues that in cases where an arranged marriage happened without the consent of the bride, then the issue of constitutionality comes into play, and such a marriage must be declared unconstitutional.[93] Courts must understand that people also have the right to culture and the right to self-determination.[94] It is argued that these rights should enable women to determine which customary law practices they want to adhere to, rather than the law's making these decisions on their behalf. Courts must balance competing rights where the rights of women compete with the rights of communities and/or their families. This, however, does not entail endorsing forcing women to consent to rituals they do not want to perform. It must be seen as a violation of the rights to equality and dignity of women to make choices about them without their participation. As stated above, no right is absolute and may be subjected to law of general application in terms of section 36 of the Constitution. A woman may not be allowed to voice her views on whether she consents to the integration of the bride. There may be accepted practices in relation to which a woman should not have a voice. Even if the courts were to conclude that the integration of the bride was unconstitutional, this would not guarantee that communities would change and stop observing the integration of the bride.[95]

A study limited to urban areas only conducted by Himonga and Moore has indicated that women value the custom of the integration of the bride.[96] Still, the living law reflects that women continue to value the integration of the bride even after being affected by urbanisation. The Constitutional Court has on several occasions concluded that the version of law recognised in post-apartheid South Africa is living law. In *Shilubana v Nwamitwa* Van der Westhuizen J pointed out that customary law must be given the space to

90 Himonga and Nhlapho *African Customary Law* 188.
91 Himonga and Nhlapo *African Customary Law* 188.
92 Diala and Diala 2017 *JCLA* 104.
93 Manthwa 2019a *THRHR* 424-428.
94 Van der Vyver 2011 *PELJ* 2-28.
95 Manthwa 2017 *THRHR* 307.
96 Himonga and Moore *Reform of Customary Marriage* 85-94.

adapt to changes in society.[97] The Judge held that development means departing from past practices. If the court required continued compliance and consistence with past practices even when development may have occurred, then the court would be stifling changes. This approach cannot be seen as consistent with the Constitution.[98] In *MM v MN* the Constitutional Court made it clear that in considering the requirements for the validity of an African marriage, for example, the court must satisfy itself on the position of living law on the ground.[99] The Supreme Court of Appeal in *Moropane v Southon* also made it clear that the requirements for the validity of a customary marriage were to be found in living law.[100] It should be noted that although the courts have confirmed this approach, they do not always determine the content of customary law on the basis of living law.[101]

It is argued that the courts must consider the significance of the integration of the bride and the fact that women have a choice to consent. The courts must specifically consider the fact that integration took place with the consent of the bride. Customary laws in communities are generally made by traditional leaders or the royal house with the participation of community members.[102] If the bride-to-be refuses, she should then not be integrated, resulting in the refusal negating a valid customary marriage.

It is argued that courts and law reform in general must not underestimate the power of women to refuse to be integrated or to be married in terms of customary law. As Hlope posits, a woman is not traditionally helpless or without a voice in the conclusion of a customary marriage – she may decide not to be integrated.[103] Things have changed considerably, including the participation of the respective families, as the bride- and groom-to-be are often already active in the labour market and can pay their own *lobolo* and other costs associated with the integration of the bride, such as the cost of buying animals for slaughter.[104]

Importantly, complaints that customary law is largely patriarchal cannot be ignored.[105] No person should use customary law or marriage as a defence or ground to violate women's rights. What is important is to consider the voice of women and the fact that they have a right to self-determination.[106]

97 *Shilubana v Nwamitwa* 2009 2 SA 66 (CC) 55.
98 *Shilubana v Nwamitwa* 2009 2 SA 66 (CC) 55.
99 *MM v MN* 2013 4 SA 415 (CC) 48; also see Mwambene 2017 *AHRLJ* 40.
100 *Moropane v Southon* (755/12) [2014] ZASCA 76 (29 May 2014) para 40.
101 Manthwa 2019 *Stell LR* 465.
102 Bekker and Boonzaaier 2009 *SAPL* 449.
103 Hlophe 1984 *CILSA* 165.
104 Manthwa and Ntsoane 2022 *THRHR* 517.
105 Moore 2015 *Gender and Society* 19.
106 Section 235 of the Constitution; Mailula 2008 *SAPL* 221.

6 Conclusion

The courts must make decisions based on living customary law and should not speak on behalf of women in a hegemonic manner. It is true that it is only women who are integrated into customary marriages, a fact which may raise issues of constitutionality. However, every case must be judged on its own merits and the courts must recognise and appreciate the cultural nuances that exist in customary law, including among different traditional and cultural communities. The principle of precedence is often problematic and not suitable to use in customary law because it potentially ossifies customary law.

It is further critical that the courts must keep in mind that they are dealing with different traditional groups. Even if a matter concerns the same traditional group as in a previous case, customary law may have developed and adjusted since the previous adjudication. The courts continue to make the mistake of not focussing on which traditional group they are dealing with. Accordingly, the courts very often assume that the requirements for the validity of a customary marriage are the same for all . However, there are differences in the observance of rituals, which differences must be appreciated. Critically important is the significant roles rituals play in the conclusion of a customary marriage. It is imperative that the voice of women must be heard regarding integration. Problems may arise where their voices are not heard, and they are consequently forced to consent, as may happen in arranged marriages. A declaration of the invalidity of a customary marriage has far-reaching consequences that the courts may want to ignore. However, there are other ways to solve the issue, such as recognising a universal partnership, while still upholding basic human rights.[107]

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List of Abbreviations

AHRLJ	African Human Rights Law Journal
CILSA	Comparative and International Law Journal of Southern Africa
GLR	Griffith Law Review
IPJP	Indo-Pacific Journal of Phenomenology
J Legal Plur	Journal of Legal Pluralism and Unofficial Law
JAL	Journal of African Law
JCLA	Journal of Comparative Law in Africa
Lond Rev Int Law	London Review of International Law
PELJ	Potchefstroom Electronic Law Journal
RCMA	Recognition of Customary Marriages Act 120 of 1998
SAJHR	South African Journal on Human Rights
SAPL	Southern African Public Law
SCA	Supreme Court of Appeal
Stell LR	Stellenbosch Law Review
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
TSAR	Tydskrif vir die Suid-Afrikaanse Reg