An Appraisal of the Requirements for the Validity of a Customary Marriage in South Africa, Before and After the *Recognition of Customary Marriages Act* 120 of 1998

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Abstract

This article appraises the requirements for the validity of a customary marriage. It peruses two eras separated by a statute called the *Recognition of Customary Marriages Act* 120 of 1998 (*RCMA*). Prior to delving into what the requirements for validity before the *RCMA* were, the article differentiates between peremptory and directory provisions. These terms are usually applied in interpreting statutes. They also find application in determining the requirements of the validity of customary law. The era before the *RCMA* lists essential requirements for a valid customary marriage. The gist of these requirements is as follows: consent of the bride and bridegroom (spouses), consent of the bride's father or guardian (parents), payment of *lobolo*, the handing over of the bride and the absence of a civil marriage by either spouse. If any of these requirements were not met, there was no valid customary union. The *RCMA* added more requirements which seem to address formal and customary law requirements. Both prospective spouses need to be 18 years or older, with certain exceptions, and must consent to getting married in terms of customary law. These requirements are peremptory. The customary law requirements relate to the negotiation and celebration of such a marriage. These requirements remain essential. Unlike formal requirements, these requirements allow indigenous African people a certain latitude. As a result, they are directory. This article further deliberates on certain issues regarding the requirements of customary marriages that became contentious. This includes the delivery of *lobolo*, the handing over of the bride, polygamous and dual marriages, and the registration of customary marriages. In conclusion, it is shown that customary law is a rapidly growing independent source of law. The requirements for validity must be comprehended with this flexibility in mind and should not unnecessarily be held as being static.

Keywords

Customary marriages; customary union; *Recognition of Customary Marriages Act*; *RCMA*, registration of customary marriages; peremptory provision; directory provision; civil marriages; consent spouses; consent of the bride's parents; *lobolo*; handing over bride; repugnancy clause; polygamy; Minister of Home Affairs.

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1 Introduction

A customary marriage is defined as "a marriage concluded in accordance with customary law".[1] For such a marriage to be recognised, it must meet certain requirements. These requirements can be comprehended in trilogy. The first two parts of this trilogy entail comprehending these requirements in line with requirements set by law prior to and after the enactment of the *Recognition of Customary Marriages Act* 120 of 1998 (hereafter the *RCMA*). The last part of the trilogy relates to the customs practised by each tribe or family. In all aspects of the stated trilogy, it must be kept in mind that the *Constitution of the Republic of South Africa*[2] will always shape how we should understand and interpret these requirements.

The last of the trilogy is not explored because within indigenous Africans, multiple tribes (ethnicities)[3] are recognised. These ethnicities can further be divided into subgroups. In addition to these divisions, the places (urban/rural) and types of communities (homogenous/heterogenous) indigenous African people find themselves in, have an impact on their views and understanding of culture. As a result, attempting to point out what these requirements entail in each ethnic group or community is a huge and costly exercise, filled with multiple contrasts, and as such it is considered outside the scope of this article.

The first segment (first and second parts of the trilogy) is vital as events need to be understood in line with the history of apartheid in South Africa which has influenced how customary marriages are perceived. The apartheid regime was replaced by a democratic and constitutional governance system which also had an impact on how we view customary marriages. These two eras make it important to appraise how the

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1 Section 1 of the *Recognition of Customary Marriages Act* 120 of 1998 (hereafter the *RCMA*). The same statute defines customary law as "the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples".

2 *Constitution of the Republic of South Africa*, 1996 (hereafter the Constitution).

3 This is sometimes described as a nation, for instance, the Zulu nation.

requirements for the validity of a customary marriage were affected over time. Furthermore, their status over time is also important.

As part of the historical appraisal, it is vital to determine what changed due to the new democratic constitutional dispensation. This era is rich in terms of case challenges. It shapes what is now viewed as the current requirements for a customary marriage.

The above briefly sets the tone as to what the authors intend to achieve, namely an appraisal of the requirements set for the validity of a customary marriage in South Africa. This will ultimately determine whether a static or flexible approach is followed in determining if a customary marriage meets the set requirements of validity. To arrive at a conclusion on this matter, the following issues are explored: the distinction between peremptory and directory provisions (this is necessitated by the fact that similar terms are used in determining if a customary marriage meets the requirements for the validity), the requirements for the validity of a customary marriage prior to the *RCMA* and its legal status, the legal status and requirements for the validity of a customary marriage set by the *RCMA*, concretisation of requirements in the *RCMA* era and principles associated with the interpretation of customary law, such as principles embodied in the Constitution.

2 The distinction between peremptory and directory provisions

It is commonly accepted that when one interprets statutes, one must distinguish between provisions that are peremptory and those that are directory (see Table 1). The distinction between these two terms is not cast in stone in the new constitutional order; it merely serves as guidance and the dictates of the Constitution play a more pivotal role in determining how a provision should be comprehended. In addition to this, the purpose of whatever legislation one deals with and the consequences of the non-adherence to the legislation, are the final determinants of the status and interpretation of a provision or statute.[4]

4 *Weenen Transitional Local Council v Van Dyk* [2002] 2 All SA 482 (A) para 13; Botha *Statutory Interpretation* 175-176. For more factors that may be considered in arriving at a decision whether a provision is peremptory or directory, see Du Plessis *Re-interpretation* 250-251.

Table 1: Distinction between peremptory and directory provisions[5]

Peremptory	Directory
Requires exact compliance.	Requires substantial compliance.
Provision is mandatory.	Provision is merely directory.[6]
Failure to comply with it renders any action related to it null and void.	Failure to comply with it does not render any action related to it null and void.

In most instances where the statute states what will happen if there is non-compliance with its provisions, the distinction becomes unnecessary. However, the opposite may be true. When the statute does not prescribe what will occur if there is non-compliance, it is left to the courts to determine if a provision is either peremptory or directory. Over and above the issues stated in the preceding paragraph, a court can rely on semantic guidelines, jurisprudential guidelines and presumptions about specific circumstances.[7]

The above distinction not only applies to statutes but has also been applied in determining the requirements for the validity of a customary marriage.[8] Courts have used it to determine if a valid customary marriage existed or did not exist.

3 Requirements for the validity of a customary marriage prior to the Recognition of Customary Marriages Act and their legal status

Customary marriages existed prior to the new constitutional order and the *RCMA*. As such, one must examine the requirements for its validity prior to the commencement of the *RCMA*. This is further necessitated by the fact that the *RCMA* recognises monogamous and polygynous customary marriages concluded prior to its commencement and the validity of such marriages may also be at the centre of court proceedings.[9]

As previously stated, the requirements for validity vary from ethnicity to ethnicity. As a result, the below narration is based on what is commonly

5 Adapted from Botha *Statutory Interpretation* 175-176.

6 Du Plessis *Re-interpretation* 249 states that this indicates that a person who deals with such a clause has some latitude or discretion.

7 Botha *Statutory Interpretation* 175-180. See Du Plessis *Re-interpretation* 250-254 for a discussion of these guidelines without putting them in the three broad categories.

8 In *Fanti v Boto* [2008] JOL 21238 (C) (hereafter the *Fanti* case), the court ruled that in the absence of the handing over of the bride, there is no customary marriage.

9 Section 2(2) of the *RCMA*. See, for instance, *Gumede v President of the Republic of South Africa* 2009 3 SA 152 (CC) para 6 (hereafter the *Gumede* case). The marriage between Mr and Mrs Gumede was entered into on 29 May 1968.

accepted to apply to the various tribes and does not incorporate any changes related to the codification of customary law.

When one deals with the requirements for the validity of a customary marriage prior to the commencement of the *RCMA*, one comes across the words "essential and non-essential requirements."[10] This can be viewed as an equivalent of peremptory and directory provisions. The following are accepted as essential elements for a customary marriage to be viewed as concluded and binding: consent of the bride and bridegroom (spouses), consent of the bride's father or guardian (parents), the payment of *lobolo*,[11] and the handing over of the bride.[12]

The requirement of consent of the bride and bridegroom (spouses) was not always strictly adhered to. Due to public policy[13] considerations, the requirement was demanded by the courts even in the absence of legislation.[14] Another element of consent is the requirement of consent of the bride's father or guardian (parents). This consent may be express or tacit.[15] It is express if they give their blessings, and it is tacit if they accept any fine associated with *lobolo*, *lobolo*, or cattle for the marriage. Such

10 *Mmutle v Thinda* (20949/2007) [2008] ZAGPHC 352 (hereafter the *Mmutle* case) para 12; Bekker *Seymour's Customary Law in Southern Africa* 105-109. Prior to the *RCMA* these requirements were found in academic writings and in case law. Thus they had the status of law through their application by our courts (through the principle of *stare decisis*). Courts are still guided today by legal academic writings when addressing customary law challenges. Over and above this general avenue, Natal (which was a province) and Transkei (which was a homeland), had legislative instruments dealing with customary marriages. In Natal the Natal Code of Zulu Law, Proc R151 in GG 10966 of 9 October 1987 applied to Zulu customary marriages and Transkei customary marriages were regulated by the *Transkei Marriage Act* 21 of 1978.

11 Section 1 of the *RCMA* defines *lobolo* as "the property in cash or in kind … which a prospective husband or the head of his family undertakes to give to the head of the prospective wife's family in consideration of a marriage". Other equivalent terms are *bogadi*, *bohali*, *xuma*, *lumalo*, *thaka*, *ikhazi*, *magadi*, and/or *emabheka*.

12 The *Fanti* case para 19; Bekker *Seymour's Customary Law in Southern Africa* 105. Bennet *Customary Law in South Africa* 199-219 added the following: age, prohibited degrees of relationships, negotiation (an equivalent of *lobolo*), and registration. See also Himonga *et al African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* 99-100. Himonga *et al African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* 100 add that there should not be any prior civil marriage by either spouse.

13 This relates to the so-called "repugnancy clause". The failure to obtain consent from the spouses was viewed as being against this clause. See *Zulu v Mdhletshe* 1952 NAC 203 (NE); *Mgomezulu v Lukele* 1953 NAC 143 (NE); Bennet *Customary Law in South Africa* 199.

14 *Sila v Masuku* 1937 NAC (T & N); Bekker *Seymour's Customary Law in Southern Africa* 107-108; Bennet *Customary Law in South Africa* 199-202.

15 See Bennet *Customary Law in South Africa* 205. He views this requirement in modern times as to "approve and ratify a match already made".

consent can further be inferred if the parents allowed the spouses to cohabit without demanding that *lobolo* be negotiated prior to such continued cohabitation.[16]

When all the consents are attained, the actual negotiation for a customary marriage commences. This culminates in the payment of *lobolo*. Traditionally, this was in the form of cattle.[17] In modern times, either money,[18] cattle, or a combination of the two is acceptable as a form of *lobolo*. The payment of *lobolo* needs not be complete, but there must at least be some contributions towards it.[19]

After the payment of *lobolo*, it is anticipated that there will be a handover of the bride.[20] Most cultures in South Africa have a name for the handing over of the bride and have unique customs associated with the process.[21] The issue pertaining to the handing over of the bride can be interpreted narrowly or widely. In a narrow sense, it refers to the actual or physical handing over of the bride. In a wider sense, it refers to a series of ceremonies aimed at the integration of the bride into the in-laws' family and/or associated with the physical handing over.[22]

The handover is premised on the notion that the bride still lived with her parents. The handing over is aimed at ensuring that the bride officially becomes part of her husband's family (is integrated) and symbolises that the bride has been brought and accepted into the *kraal* of her new in-laws.[23] The handing over need not be formal (actual).[24] In instances where there

16 Bekker *Seymour's Customary Law in Southern Africa* 106; Bennet *Customary Law in South Africa* 205-207.

17 See *Lutoli v Dyubele* 1940 NAC (C & O); *Mvolo v Bokleni* 1948 NAC (S) 62.

18 In most instances it is delivered in the physical form. However, due to the evolution of time and customary practices, electronic funds transfer is acceptable. See *Tsambo v Sengadi* [2020] JOL 47138 (SCA) para 4 (hereafter the *Tsambo* case).

19 Bekker *Seymour's Customary Law in Southern Africa* 107-108; Bennet *Customary Law in South Africa* 209-213; Bakker 2022 *PER* 7.

20 Bakker 2022 *PER* 3 states that it is more desirable to use the term "integration of the bride." This shows the purpose as opposed to an activity.

21 Terms associated with this custom include the following: *ukuvunula*, *ukumekeza*, *go gorosiwa*, and *imvume.* Note that Bakker 2022 *PER* 7 argues that in the Swati tradition, *ukumekeza* is but one of many traditions associated with the handing over of the bride.

22 Bakker 2022 *PER* 3; Bennet *Customary Law in South Africa* 217.

23 *Mbungela v Mkabi* [2019] JOL 45887 (SCA) para 25 (hereafter the *Mbungela* case); Bakker 2022 *PER* 3.

24 There are arguments that the handing over can either be actual or constructive (symbolic); see *Dlomo v Mahodi* 1946 NAC. (C & O) 61 (Tsolo); *Mmutle* case para 13; Bakker 2022 *PER* 6; Bapela and Monyamane 2021 OBITER 189.

was *ukuthwala*[25] and where an animal was slaughtered by the bride's family of the *Sotho* and *Hlubi* clans the handover is often marked by a ceremony.[26]

During the handing over certain ceremonies are performed to introduce her to her in-laws' ancestors. During this process, she will be introduced to how her in-laws do things.[27]

If all the above requirements were met, there was a possibility that the government of the day prior to the commencement of the *RCMA* would recognise such a union (not marriage).[28] The inability to comply with these requirements could lead to the courts not recognising the customary union.[29]

It should be noted that prior to the *RCMA*, customary marriages did not have the legal status of a marriage. They were merely recognised as customary

25 Himonga *et al African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* 294 define this custom as "literally meaning 'to carry away', the custom to which a man and a woman resort where they agreed to marry each other, but there is an obstacle to their marriage and that becomes a delict when it does not result in a negotiated marriage because of the refusal of the bride's family to consent to the marriage". This needs to be differentiated from the abduction and forced marriage of children. Last mentioned must be treated as abduction and be prosecuted since it is against the law.

26 Bekker *Seymour's Customary Law in Southern Africa* 108-109; Bennet *Customary Law in South Africa* 213-217.

27 *Moropane v Southon* 2014 JOL 32177 (SCA) para 40 (hereafter the *Moropane* case); Himonga *et al African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* 100; Mwambene 2017 *AHRLJ* 42; Bakker 2018 *PER* 3; Manthwa 2021 *TSAR* 207.

28 Section 1 of the *Black Administration Act* 38 of 1927 defines a customary marriage as "an association between a man and a woman". See also Osman 2019 *PER* 3. There is a distinction between a mere association and a marriage. Maithufi 1986 *De Rebus* 555 advances the notion of the unequal status of a customary marriage and a civil marriage. Rautenbach 2008 *EJCL* 2-3 states that this unequal status began in 1652 and continued over a long period of time. See also in this regard: Mwambene and Kruuse 2015 *IJLPF* 237; Maithufi and Bekker 2002 *CILJSA* 183-184. Chidoori 2009 *Agenda* 51-52 also advance the argument that prior to the adoption of the *Interim Constitution (Constitution of the Republic of South Africa* Act 200 of 1993), no recognition was given to customary marriages; instead, they were viewed as unions. See also *Mrapukana v Magwaxaza* [2008] JOL 22875 (C) para 20 (hereafter the *Mrapukana* case); Jamneck 2014 *PER* 978; Mamashela 2004 *SAJHR* 617; Herbst and Du Plessis 2008 *EJCL* 1.

29 See Himonga *et al African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* 92-93. Prior to the *RCMA*, customary marriages were regarded as unions and their recognition was subject to the repugnancy clause. The then administration refused to recognise them because they were potentially polygamous and did not comply with the Western definition of marriage of "a voluntary union for life of one man and one woman." See further *Seedat's Executors v the Master* 1917 AD 302.

unions and their recognition was not on the same footing as that of civil marriages.

4 Legal status and the requirements for the validity of a customary marriage set by the Recognition of Customary Marriages Act

The recognition of customary marriages reached a milestone with the promulgation and commencement of the *RCMA*.[30] The *RCMA* reconciled two eras by recognising customary marriages concluded prior and after its commencement.[31]

Customary marriages concluded after the commencement of the *RCMA* are valid if they comply with section 3 of the *RCMA*.[32] This section addresses the following three broad issues: age and consent of the spouses,[33] negotiation or celebration(s) of the marriage, and acceptable degrees of relatedness.[34]

The requirement of age and consent of the spouses is twofold. Both spouses need to be 18 years or older. In addition to the age requirement, both spouses need to consent to getting married to each other in terms of customary law.[35] In instances where either spouse is under the age of 18, his or her parents or guardian must also give consent for him or her to get married.[36] The *RCMA* also makes provision for the Minister of Home Affairs

30 This brought about an end to an era of non- or partial recognition of customary marriages. Prior to the *RCMA* customary marriages were merely seen as unions at most - see s 1 of the *Black Administration Act* 38 of 1927; Osman 2019 *PER* 3; Maithufi 1986 *De Rebus* 555.

31 Sections 2(1) and 2(3) of the *RCMA*; Himonga *et al African Customary Law in South Africa Post-Apartheid and Living Law Perspectives* 95. It is shown in this section that the requirements prior to the *RCMA* are still applicable.

32 Himonga *et al African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* 294.

33 This is in line with requirements set in A 16 of the Convention on the Elimination of All Forms of Discrimination Against Women (1979) and A 2 of Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1964). Bakker 2022 *PER* 2 refers to these as formal requirements.

34 Bakker 2022 *PER* 2 refers to these as customary law requirements.

35 Section 3(1)(a) of the *RCMA*; Bennet *Customary Law in South Africa* 203-204; Bakker 2018 *PER* 2; Bakker 2022 *PER* 2.

36 Section 3(3)(a) of the *RCMA*; Bennet *Customary Law in South Africa* 203-204. S 3(3)(b) of the *RCMA* deals with instances where the consent of the minor's parents or guardian is not obtainable for whatever reason. The consequences of s 25 of the *Marriage Act* 25 of 1961 will apply. The provision makes it possible for either the Commissioner of Child Welfare or a judge to grant consent. The Commissioner of Child Welfare needs to submit Form D in GN 1101 GG 21700 of 1 November 2000 (giving effect to reg 4).

or any person duly delegated by the minister to consent to a marriage of a minor if it is in the best interest of a minor.[37]

When all the consent issues are settled, there is a negotiation or celebration(s) of the marriage.[38] The *RCMA* puts these two requirements in the alternate, which entails that compliance with either one is adequate.[39] In relation to negotiation, this entails that the representatives of the two families need to meet and agree that are associated with such an agreement on the actual marriage and items related to such an agreement[40].

It should be noted that negotiation is an important aspect of a traditional marriage. It should not be used as a mere formality of simply agreeing on the *lobolo* terms. The two families must agree on what must occur for the marriage to be valid.[41] This opportunity can be used to determine at what point a customary marriage will be deemed to have come into existence.[42]

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37 Section 3(4) of the *RCMA*; Bennett *Customary Law in South Africa* 203-204. This stipulation is most likely to remain an illusion as customary marriages often occur outside the ambit of administrative authority. In most instances, authorities only know about their existence after their first year of existence or when disputes arise (divorce or estate matters). As a result, it is less likely that the provision will be given effect to or tested in real life.

38 According to Himonga *et al African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* 103, this requirement was left open ended. This was due to the difficulty of attempting to capture the requirements of different ethnicities. The advantage of this being open ended is that it allows for culture to evolve with time and for courts to apply the actual living customary law. See also Bakker 2022 *PER* 1-2, who argues that s 3(1)(b) of the *RCMA* brings the living law into the Act. This view is supported by cases such as the *Moropane* case 39-40 and the *Gumede* case para 29. In essence, issues discussed in paragraph 3 find meaning and/or existence in this subsection. It should be further noted that requirements in this subsection only need to be "generally" observed. This classifies them as directory. See further *Ngwenyama v Mayelane* 2012 10 BCLR 1071 (SCA) para 23; Bakker 2022 *PER* 14.

39 Section 3(1)(b) of the *RCMA*. See *Maluleke v Minister of Home Affairs* [2008] JOL 21827 (W) para 16 (hereafter the *Maluleke* case), where it was accepted that the fact that only a negotiation (in the absence of a celebration) was adequate to meet the requirements set in s 3 of the *RCMA*.

40 This may be in the form of *lobolo* (cattle, money, or a combination), exchange of gifts and ceremonies that either side is meant to perform in relation to the marriage.

41 Cultural differences may come into play when consensus on the requirements of validity is discussed during negotiations. If both spouses are of the same ethnicity, they are most likely to adhere to the same requirements of validity for the customary marriage. However, this may not always be the case. In instances where the prospective spouses come from different ethnicities and have, to some extent, been influenced by the area in which they live, there is a strong need for them to be clear on the requirements to be met.

42 See *Mathaba v Minister of Home Affairs* ([2008] JOL 21827 (W) para 17 (hereafter the *Mathaba* case); Himonga *et al African Customary Law in South Africa Post-Apartheid and Living Law Perspectives* 103.

The issue pertaining to a celebration[43] can be interpreted narrowly or widely. In a narrow sense, as soon as an agreement is reached and there is a down payment of *lobolo*, the two families will naturally rejoice (celebrate) their new relations (association by marriage). This may be in the form of ululations[44] or sharing a meal together.[45] In a broader sense, this may relate to the celebrations associated with the handing over of the bride or a big celebration often referred to as a white wedding.[46] The issue of handing over can also be viewed in the same sense, as elaborated above.

The presence of relations through blood or affinity is one of the matters that must also be concretised when one deals with the requirements set by section 3 of the *RCMA*. In fact, if it is discovered that all the requirements above are met but the spouses are related in a way that will cause their culture to not recognise their marriage, compliance with the above requirements would be in vain. The RMCA left it up to the customs of the prospective spouses to determine if the spouses are related or not related in a way that would prohibit a marriage between them. This requirement is aimed at preventing incest. In most instances, persons from the same clan or same surname are prohibited from marrying each other. Other provisions include the prohibition of marrying stepchildren, maternal and paternal aunts and uncles, *etcetera*.[47]

Over and above the above-noted matters, one must also consider the requirements regarding polygamy according to the *RCMA*. The *RCMA* provides that those polygamous marriages concluded before its commencement would remain valid. In relation to those that came into existence after it, a husband must obtain a court-approved contract before

43 In the *Maluleke* case para 8, it was accepted that the term refers to "festivities or performance of a rite or ceremony". See also Himonga *et al African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* 103.

44 Other equivalent terms include *menkulungwane* (Xitsonga) and *megolokwane* (Sepedi).

45 The *Tsambo* case paras 4-6. In this case, the appellant argued for the wider view of a celebration. Even though the court acknowledged its importance, his view was not adequate to declare that there was no customary marriage between the respondent and the deceased.

46 The *Mathaba* case para 17; Himonga *et al African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* 101. The usage of the so-called white wedding has been criticised as distorting customary law. In this regard, see Bapela and Monyamane 2021 *OBITER* 191. Note that Bakker 2022 *PER* 3 accepts it as an alternative (modified) way of viewing integration (handing over). This may be argued to be in line with the living customary law. In some instances, spouses convert their customary marriages to civil marriages before their registration. See Bennet *Customary Law in South Africa* 239.

47 Section 3(6) of the *RCMA*; Bennet *Customary Law in South Africa* 207-208; Himonga *et al African Customary Law in South Africa Post-Apartheid and Living Law Perspectives* 102-104.

concluding any other further marriage.[48] This aspect and others covered in this paragraph need further elaboration which is done in the next paragraph.

5 Concretisation

The concretisation of the work covered thus far links two vital sources of customary law, namely statutes and customs. Statutes are written by the legislature. Customary law is determined by those practising it. However, the eventual meaning of these sources of law (including how they must be interpreted) is ordinarily determined by the courts. This is often referred to as concretisation, contextualisation, harmonisation, correlation, or actualisation.[49] Over time, numerous issues have been before the South African courts and the courts have not always taken the same position when addressing these issues. The following issues regarding the requirements for the validity of customary marriages are harmonised briefly: payment of *lobolo*, handing over of the bride, polygamy (dual marriages), and registration of customary marriages.

5.1 Payment of lobolo

The requirement of the payment of *lobolo* does not feature as an absolute requirement in the *RCMA* era. Despite this not being stated as a requirement, the practice itself is defined in the Act. Regulations made in terms of the *RCMA* make provision for the details of the *lobolo* agreement to be inserted into the customary marriage registration form.[50] At face value, the *RCMA* makes the payment of *lobolo* directory.

Case law dictates otherwise. Based on the *Maluleke* case, the negotiation of a customary marriage culminates in the payment of *lobolo*. It was set as a requirement before the *RCMA* era. The payment of *lobolo* is thus mandatory.[51]

A great deal of freedom is given to the negotiating families regarding the terms of marriage. As to what the quantum and type of *lobolo* are, the duty to pay it in full and how it will be paid are left to the two families. It is

48 Sections 2(1) and 7(6) of the *RCMA*; Himonga *et al African Customary Law in South Africa Post-Apartheid and Living Law Perspectives* 95-97; Bennet *Customary Law in South Africa* 247-248.

49 Botha *Statutory Interpretation* 159-161.

50 See Form A in GN 1101 GG 21700 of 1 November 2000 (giving effect to reg 2).

51 The *Maluleke* case para 12; Bekker *Seymour's Customary Law in Southern Africa* 107-108; Bennet *Customary Law in South Africa* 209-213; Bakker 2022 *PER* 7

advisable that this needs to be well documented in the *lobolo* agreement. This determines if a marriage is completed with or without *lobolo*.[52]

5.2 Handing over of the bride

As with the payment of *lobolo*, the *RCMA* is not clear on the handing over of the bride. For many years, the handing over of the bride was seen as an essential item when one considers the requirements for a valid customary marriage to have been concluded. Many marriages were found to be invalid by the courts due to not complying with the requirement of handing over of the bride.[53] Applying this requirement without a degree of flexibility left some surviving spouses, children, and vulnerable spouses in a very negative position.[54] Surviving spouses could not claim any benefit from the estate of the deceased, their children had to contest to benefit from the estate, and vulnerable spouses had no legal recourse if their status or share of a joint estate fell under any legal challenge.[55]

Some authors argue that the handover of the bride should be peremptory[56] and its non-compliance should be seen as not meeting the minimum requirements for a valid customary marriage. The view of strictly adhering to the requirement that handing over of the bride must occur, is supported

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52 The *Mathaba* case para 17; Himonga *et al African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* 101.

53 The *Fanti* case; *Motsoatsoa v Roro* [2011] 2 All SA 324 (hereafter the *Motsoatsoa* case); *Machika v Mthethwa* (55842/2011) [2013] ZAGPPHC 308 (hereafter the *Machika* case); *Mxiki v Mbata* [2014] ZAGPPHC 825 (hereafter the *Mxiki* case); *Nhlapo v Mahlangu* (59900/14) [2015] ZAGPPHC 142 (hereafter the *Nhlapo* case); *DRM v DMK* [2017/2016] [2018] ZALMPPHC 62 (hereafter the *DRM* case).

54 Reference to case law is testament to these facts. In the *Fanti* case the husband lost the right to bury his wife as his; in the *Machika* case a divorce was denied which led to the loss of a share of the joint estate that would have been provided by marriage; in the *Mxiki* case the efforts that the woman thought were towards a joint estate proved to be futile towards her and her child; and in the *DRM* case both spouses lost the right to call each other such and could not claim any patrimonial benefits from each other.

55 Herbst and Du Plessis 2008 *EJCL* 2; Chidoori 2009 *Agenda* 52; De Souza 2013 *Acta Juridica* 243.

56 Bakker 2018 *PER*; Bapela and Monyamane 2021 *OBITER*. See also Sibisi 2020 *De Jure* 95, who states that integration needs to occur but the manner in which it is done needs to change (some of the ceremonies associated with it may be "waived, varied or abbreviated"). Sibisi's idea can be traced back to Bekker *Seymour's Customary Law in Southern Africa* 108, who stated that the handing over need not be in a formal ceremony. In his recent article, Bakker 2022 *PER* 3 puts this in clear light. He argues that it is a requirement; however, parties are free to have it "waived, abbreviated, or modified". He further argues that s 3(1)(b) of the *RCMA* grants a court freedom to dispense of strict compliance with requirements. However, this should never be interpreted to mean that the customary law requirements are no longer essential.

by the importance of the custom (see paragraph 3) and certain case law stemming from the era before and after the *RCMA*.[57]

There has, however, been a substantial departure from seeking strict compliance with this requirement. The current view is that the handing over can be dispensed with in a manner that does not require strict compliance. There is a strong and growing view that parties are free to dispense with this requirement or settle for alternative ways on how it should be done.[58]

There is case law to the effect that if the parties were already cohabiting, the handing over can be done away with, and be deemed to have occurred constructively.[59] This is necessitated by the fact that customary law is not static and the circumstances that people who practise customary law find themselves in are always changing. Courts must make a point to apply the living law, as opposed to the codified version of customary law.

As a result of the above-mentioned factors, parties are free to agree to do away with the physical handing over of the bride. This was the case in *Mbungela v Mkabi*.[60] The court stressed that the intention of the spouses outweighed a ceremony. This was subsequently affirmed in *Tsambo v Sengadi*.[61] It is now a clear position that the requirement of handing over the bride can be waived or condoned by the parties. Furthermore, it cannot be the sole reason why a customary marriage is said to be unrecognised. Over time, this approach has been followed in numerous court judgments.[62] Due to this, the handing over of the bride can now be seen as a directory requirement, which is a departure from the position in the *Fanti* judgment.

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57 The *Fanti* case; the *Motsoatsoa* case; the *Machika* case; the *Mxiki* case; the *Nhlapo* case; the *DRM* case.

58 As already indicated, cases which opted for a strict interpretation of the handing over of the bride include the following: the *Fanti* case; *Motsoatsoa* case; *Machika* case; *Mxiki* case; *Nhlapo* case; *DRM* case. There is now a move towards a less strict adherence of the requirement as seen in the following cases: the *Mbungela* case; *Tsambo* case; *FM v NR* (CA04/2020; 6254/2018) [2020] ZAECMHC 22 (hereafter the *FM v NR case*); *Pilato v Fakude* [2021] JOL 53602 (MM) (hereafter the *Pilato* case); *M v Road Accident Fund* (28602/2017) [2020] ZAGPPHC 63 (hereafter the *M v RAF* case).

59 *Road Accident Fund v Mongalo; Nkabinde v RAF* [2003] 1 All SA 72 (SCA); *Msutu v Road Accident Fund* (18174/14) [2011] ZAGPPHC 232 (hereafter the *Msutu* case); the *Mmutle* case. In *Mabuza v Mbatha* 2003 4 SA 218 (C) (hereafter the *Mabuza* case), the integration (*ukumekeza)* and the handing over of the bride are not used interchangeably. From a purpose perspective, there should be no variance between these two. See also Bakker 2022 *PER* 7, who states that *ukumekeza* is but one of many traditions associated with the handing over of the bride.

60 The *Mbungela* case para 30.

61 The *Tsambo* case para 31.

62 See, for instance, the *FM v NR* case; the *Pilato* case and the *M v RAF* case.

An alternative view on the matter can be presented based on section 3(1)(b) of the RMCA. If parties negotiate and agree that there is no marriage in the absence of handing over the bride and such an agreement is put in writing, in their *lobolo* agreement, it is most likely to stand in court.[63] This should be coupled with the fact that such spouses are not already living the life of husband and wife (cohabiting, without any objection or action taken by either family). The prospects of success are limited as more weight is placed on the age and consent of the spouses (formal requirements). This will be further worsened by the fact that, in most instances, persons who get married are already cohabiting or are most likely divorcees or surviving spouses (marrying for the second or third time).

5.3 Polygamy (dual marriages)

Polygamy[64] in relation to customary marriages needs to be understood in two ways. Firstly, it could be a man marrying as many wives as he wants to in terms of customary law. Secondly, it could be a man marrying many wives using two (irreconcilable) systems. For instance, A (husband) marries B (customary wife) and without dissolving his marriage to B, marries C (another woman) in terms of civil rites.

The former situation presented many challenges prior to the *RCMA*. If such marriages complied with the essentials contained in paragraph 3, such polygamous marriages were recognised.

The issue is with the latter example. In the early days when customary marriages were still not afforded full recognition, a civil marriage was deemed to have "extinguished" the first customary marriage.[65] This was the position until the late 1980s. Legislative changes were made that barred native people from contracting civil marriages with others (other than B, in the example given above) if they were in monogamous or polygamous customary marriages.[66] This was necessitated by the fact that many customary spouses (mostly wives) were being disadvantaged by civil marriages which were concluded later with another person. The legislative

63 The *Mmutle* case para 11; the *Maluleke* case para 17.

64 In its original meaning, it denotes having more than one spouse. With gender specifications, if a man has more than one wife, such an instance is referred to as polygyny. If it is a wife with more than one husband, it is called polyandry. In South African customary law, the latter is not recognised. The former is ordinarily referred to as the general term. See Himonga *et al African Customary Law in South Africa Post-Apartheid and Living Law Perspectives* 94.

65 *Nkambula v Linda* [1951] 1 All SA 412 (A); Himonga *et al African Customary Law in South Africa Post-Apartheid and Living Law Perspectives* 102-104; S 3(6) of the *RCMA*; Bennet *Customary Law in South Africa* 207-208.

66 Section 1 of the *Marriage and Matrimonial Property Law Amendment Act* 3 of 1988.

changes brought about the same protection afforded to spouses married in terms of civil rites. The *Marriage and Matrimonial Property Law Amendment Act* made the requirement of not being in a civil marriage peremptory. This has been strengthened in the *RCMA* which states that parties in a customary marriage are not eligible to conclude a civil marriage.[67]

The matter regarding polygamous customary marriages was not addressed in the context of the *RCMA* and polygamy is allowed.[68] A duty is placed on the husband to obtain a court-approved contract before the conclusion of further customary marriages.[69] The contract has, however, not been interpreted as a legal requirement for a valid customary marriage.[70] In certain instances, courts have overlooked the non-compliance with obtaining a court-approved contract.[71] This then leads one to the view that the requirement to obtain a court-approved contract is directory.

In addition to a court-approved contract, the consent of the first wife has been elevated to a requirement. There is case law in relation to the Tsonga, Ndebele, and Xhosa traditions. Of the three noted cases, only the *Mayelane*

67 Section 3(2) of the *RCMA*; the *Nhlapo* case; Bennet *Customary Law in South Africa* 239-240. The only exception is in terms of s 10 which allows parties in a monogamous customary marriage to convert their marriage to a civil one. Note that the protection is not only afforded to customary marriages. In instances where the civil marriage was first, it will enjoy preference over any other customary marriage. See *Ntsukunyane v Moleko* [2013] JOL 30594 (GSJ); *None v Tshabalala* [2016] JOL 36713 (GSJ); *K v P* (09/41473) [2010] ZAGPJHC 93.

68 This is so even though s 9 of the *Constitution* prohibits unfair discrimination based on gender. The fact that only men are allowed to marry more than one wife can be argued to constitute unfair discrimination. Both genders must enjoy equal benefits and protection of the law.

69 Section 7(6) of the *RCMA*.

70 Note that the Constitutional Court had a quandary that pertained to s 7(6) of the *RCMA* in *Mayelane v Ngwenyama* 2013 8 BCLR 918 CC. The North Gauteng High Court served as the court *a quo* and had decided that non-compliance with the clause renders a subsequent marriage null and void. See *Mayelane v Ngwenyama* [2010] JOL 25422 (GNP) (commonly cited as *MM v MN*) para 41. This decision was subsequently overturned by the Supreme Court of Appeal in *Ngwenyama v Mayelane* 2012 (10) BCLR 1071 (SCA). The court was of the view that a subsequent marriage concluded in the absence of a s 7(6) contract was valid and that it was out of community of property (see para 38). The Constitutional Court had the last say in the matter. As opposed to dealing with it in line with s 7(6) of the *RCMA* the court relied on s 3. It held that it was a requirement in terms of the Tsonga culture that the first wife be informed of an "impending subsequent marriage". It went further to develop the Tsonga customary law, in line with s 39(2) of the Constitution, to require consent of the first wife for subsequent customary marriage(s) to be valid. See para 87 and 89 of the judgment.

71 *Gama v Mchunu* (10/37362) [2015] ZAGPJHC 273 (hereafter the *Gama* case); the *Msutu* case; *Ledwaba v Monyepao* (HCAA06-2017) [2018] ZALMPPHC 61; *Monyepao v Ledwaba* [2020] JOL 47353 (SCA).

case can be stated to have application throughout the country, since it was decided by the Constitutional Court.[72]

5.4 Registration of customary marriages

Registration was never a universal requirement for the validity of a customary marriage. Before the *RCMA*, it was a requirement in Natal and Transkei. However, not registering a customary marriage during the pre-*RCMA* era would not render the marriage void, voidable, or invalid.

During the *RCMA* era, there were attempts to change the approach to the registration of customary marriages. The *RCMA* placed a duty on spouses to register their customary marriage. It further states that non-registration has no effect on the customary marriage.[73] The language used in the *RCMA* makes the registration of a customary marriage directory. This has been confirmed by the courts in multiple cases.[74] The rationale behind this view was that it would have been unfair to those who failed to register their marriages as non-compliance would render such marriages to be null and void. Furthermore, it would go against the spirit of the *RCMA* which sought to have customary marriages recognised and protected by the judicial and administrative system in the country.[75]

6 Principles associated with the interpretation of customary law: *Recognition of the Customary Marriages Act* and the Constitution

For many years, customary law has been viewed as inferior when compared to other sources of law in South Africa. It was applied subject to the repugnancy clause. Whenever it conflicted with common law and statutes, it would not be given a fair chance to succeed in any instance. Granting it partial recognition was done to control the indigenous population as opposed to granting indigenous African people the ability to regulate their

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72 *Mayelane* case (Tsonga custom); the *Nhlapo* case (Ndebele custom); the *Mrapukana* case (Xhosa custom).

73 Section 4(1) of the *RCMA* read with s 4(9); Mamashela 2004 *SAJHR* 616; Herbst and Du Plessis 2008 *EJCL* 9; Mwambene and Kruuse 2015 *IJLPF* 238; Chidoori 2009 *Agenda* 52; De Souza 2013 *Acta Juridica* 243; West 2002 *De Rebus* 47.

74 Section 4(1) of the *RCMA* read with s 4(9); the *Gama case* para 13; *Wormald v Kambule* [2005] 4 All SA 629 (SCA) para 37; *Ngcwabe-Sobekwa v Sitela* [2020] JOL 48747 (ECM).

75 *SALC Project 90, Discussion Paper* viii-ix; De Souza 2013 *Acta Juridica* 243-244; Mwambene and Kruuse 2015 *IJLPF* 237-238. This view is further reinforced by s 8(1) of the *RCMA* which states that a customary marriage can only be dissolved by a court on the grounds of an irretrievable breakdown of the marriage. Note that, like all other marriages, death does bring such a marriage to an end.

affairs.[76] As a result, its growth and development have not had the same trajectory as common law and statutes.

The Constitution recognises and advocates for customary law to be applied when it is appropriate.[77] In line with the need to comply with the Constitution, there have been court challenges that provided guidelines as to how indigenous law must be interpreted. These guidelines are explored shortly below (paragraph 6.1). As the current offering focuses on the requirements set for the validity of a customary marriage in South Africa, the *RCMA* has also been a subject of interpretation (as part of customary law), and, as a result, the next paragraph also addresses it directly or indirectly.

The jurisprudential guidelines need to be comprehended in terms of the Constitution which is the highest law of the land.[78] This necessitates those principles associated with constitutional interpretation to be factored into the discussion. In relation to these principles, the Constitution provides the framework for the interpretation of customary law. Furthermore, courts have also developed guidelines relating to constitutional interpretation. These guidelines can be applied to the *RMCA*, even though it is not a "constitutional Act".[79] This is because it gives effect to numerous constitutional rights and its (future) existence is acknowledged by the Constitution.[80]

The presence of an act that deals with cultural rights and thus also constitutional rights necessitates further comprehension as to how such an act and rights are to be interpreted. This is done in the next two sub-paragraphs. The guidelines and principles that are discussed next are not

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76 The *Gumede* case para 20; the *Mrapukana* case para 22; Himonga *et al African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* 7-8; Bennet *Customary Law in South Africa* 34-44; Bekker *Seymour's Customary Law in Southern Africa* 57-58; Bakker "Patrimonial Consequence of the Conversion of a South African Customary Marriage to a Civil Marriage" 61. In *Bhe v Khayelitsha Magistrate* 2005 1 BCLR 1 (CC) para 41 (hereafter the *Bhe* case), the Constitutional Court used the word "tolerated" to describe an instance where customary law was given minimal recognition.

77 See s 211 of the Constitution; *Shilubana v Nwamitwa* 2008 9 BCLR 914 (CC) para 42 (hereafter the *Shilubana* case); the *Gumede* case para 12.

78 See ss 2, 7, and 8 of the Constitution.

79 Botha *Statutory Interpretation* 23 refers to such statutes as "constitutional Acts". This kind of act finds a specific mention in the Constitution - in essence parliament was compelled to promulgate them to give effect to a specific provision. Examples of such acts include the following: The *Promotion of Access to Information Act* 2 of 2000, *Promotion of Administrative Justice Act* 3 of 2000 and *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000. These Acts were promulgated in terms of the following provisions of the Constitution: ss 32,33 and 9.

80 See ss 15, 30, and 31 of the Constitution.

comprehensive. The ones chosen and discussed are most relevant to the comprehension of the requirements for the validity of a customary marriage.

6.1 Jurisprudential guidelines on the interpretation of customary law

With a new Constitution advocating for equal human rights, there were numerous challenges to customary practices. In deciding such disputes, courts also played a role in helping with the interpretation and understanding of customary law. The following guidelines have been lain down by the courts:

- Customary law is a living law. "Its practices, customs and usages have evolved over centuries".[81] As a result, when courts interpret it, they must strive to apply its living version. This will take into account changes related to social imperatives, economic reasons, urbanisation, and cross-cultural relations.[82] The burden of showing the content of living customary law rests on the litigants. As such courts are bound to ascertain the living law as opposed to merely applying codified customary law.
- Customary law exists as an independent source of law. Looking at it through the lens of common law is a thing of the past. It is now only subject to the Constitution, international law, and relevant legislation.[83]
- When interpreting customary law, one must also take into consideration a historical review. Such a review needs to be comprehended with an appreciation that, over time, customary law has been distorted by the interplay with other sources of law, including foreign law, as well as colonial and apartheid policies.[84] Attempting to apply it in line with its historical view may lead to it losing its flexibility and ability to address the issues of those it was meant to benefit.
- Room must be created for customary law to evolve.[85] As already stated above, such room was not always available or utilised due to

81 *Sengadi v Tsambo In re: Tsambo* 2019 4 SA 50 (GJ) para 20.

82 The *Shilubana* case para 46; the *Tsambo* case para 20; the *Maluleke* case para 10; the *Mmutle* case para 24. See also *Mabena v Letsoalo* [1998] JOL 3523 (T).

83 See s 211 of the Constitution; the *Shilubana* case para 43; the *Bhe* case paras 41-42; *Alexkor Ltd v Richtersveld Community* 2003 12 BCLR 1301 (CC) para 51 (hereafter the *Alexkor* case); the *Gumede* case para 21.

84 The *Shilubana* case para 44; the *Bhe* case paras 86-87. In the *Bhe* case, reference is made to official customary law. This is normally captured in textbooks and statutes. In relation to case law, the distortion may be associated with the fact that presiding officers may not be well versed in the context of customary law problems they are dealing with, and they might not have studied customary law during their training. See the *Mrapukana* case para 22.

85 This is an ongoing activity and courts have played a significant role in the evolution of customary law to be able to comply with the Constitution and still meet the needs

numerous reasons which include the use of the repugnancy clause and the distortion of customary law though codification. These factors hampered the natural evolution of customary law. The created room will enable customary law to meet the needs of those who practise it. It will further facilitate a space for customary law to comply with the dictates of the Constitution and international law.[86] This is in line with the view that customary law is dynamic and flexible. In instances where the evolution is too slow to meet constitutional imperatives, adversely affected indigenous African litigants must approach the courts for interventions to reach this desired state.[87]

- The interpretation of customary law is a balancing act. In allowing for customary law to remain flexible, courts must balance this against vested and constitutional rights.[88]

6.2 Principles of constitutional interpretation

Cultural rights are recognised in Chapter 2 of the Constitution, the Bill of Rights. Therefore, when one interprets constitutional rights, section 39(1) of the Constitution applies. Institutions[89] that interpret cultural rights have the following three obligations in terms of section 39(1) of the Constitution: they must promote the values that underlie an open and democratic society, they must consult international law, and they may consider foreign law.[90] This should be understood in line with the founding provisions in section 1 of the Constitution.[91]

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of a community. One can cite the handling of the handing over requirement as an example relevant to the matter under consideration.

86 The *Shilubana* case para 45; the *Bhe* case para 43; the *Alexkor* case para 54; the *Mabuza* case paras 26 and 28.

87 The *Shilubana* case paras 47-48; the *Bhe* case paras 110 and 130. This is in line with the duty to develop customary law as outlined in s 39(2) of the Constitution.

88 The *Shilubana* case para 47; the *Bhe* case paras 110 and 130; the *Mbungela* case para 18.

89 Section 39 of the Constitution specifically mentions "courts, tribunals and forums". The last two mentioned entities may include organs of state such as the Department of Home Affairs and institutions mentioned in Chapter 9 of the Constitution such as the Public Protector and the Commission for Gender Equality.

90 In relation to international law and foreign law, courts have warned that their application must be approached with caution: see *S v Zuma* 1995 3 SA 391 (CC) para 17; *S v Makwanyane* 1995 3 SA 391 (CC) para 39. These obligations amount to teleological and comparative interpretation - see Botha *Statutory Interpretation* 193-194.

91 The section advocates for a country in which human dignity, equality, advancement of human rights and freedoms, non-racialism, accountability, openness, and non-sexism are advanced. See also *Shabalala v Attorney-General of the Transvaal* 1995 12 BCLR 1593 (CC) para 26; Botha *Statutory Interpretation* 190.

Over and above the interpretation clause in the Constitution, courts have given guidelines as to how the Constitution (including customary rights) must be interpreted. The following guidelines are applicable to the interpretation of the Constitution (arguably also to the *RCMA*):

- Courts must give the Constitution a generous (liberal) and purposive interpretation. In relation to this, when one interprets the Constitution (and the *RCMA*), one must endeavour to give effect to its terms, spirit and purpose.[92] This entails that the values and morals of the country must be given effect to in interpretation. This allows for adaptable and flexible interpretation, as opposed to literal interpretation.[93]
- Parts of the Constitution must not be interpreted in isolation. They must be read as a whole and with context in mind. This includes the historical background and what led to the creation of such a law.[94]
- There is a need to respect the language used in the Constitution. This means that the comparative and historical considerations of the legal instrument cannot outweigh its language. Such respect does not mean the reincarnation of literal interpretation.[95]
- In interpreting the Constitution, institutions must always endeavour to use the supremacy of the Constitution to advance human rights.[96]
- The Constitution was created with the future in mind. When it is interpreted, the interpreter must do so with this in mind, and not seek to give it the meaning it would have had retrospectively.[97]
- Constitutional interpretation is an exercise of balancing various societal interests and values.[98]

7 Conclusion

This submission sought to appraise the requirements set for the validity of a customary marriage in South Africa, through various eras. It also examined the legal status of such marriages through the various eras. This

92 The *Shabalala* case para 26.

93 The *Mbungela* case para 18; Botha *Statutory Interpretation* 190-193. Botha discusses this form of interpretation as teleological.

94 Botha *Statutory Interpretation* 190-193. Botha discusses this form of interpretation as systematic and historical.

95 The *Shabalala* case para 27.

96 *S v A Juvenile* 1990 4 SA 151 (ZSC) 176. This is an example of the utilisation of foreign law as this case emanates from Zimbabwe.

97 *Khala v The Minister of Safety and Security* 1994 2 BCLR 89 (W). Despite the notion that it is forward looking, it should be noted that the Constitution is a bridge between apartheid and the democratic era. The same as the *RCMA*, it links the old with the new, with the aim of reconciling and paving the way forward for customary marriages.

98 Botha *Statutory Interpretation* 191.

paragraph concludes whether a static or flexible approach is followed in determining if a customary marriage meets the set requirements of validity.

Customary marriages existed prior to the current legal system in South Africa. Prior to the *RCMA*, they were recognised as unions, as opposed to marriages. Before delving more into the subject, a distinction was drawn on peremptory and directory provisions. It was explained that this distinction is not cast in stone. The Constitution and the purpose of the statute in question determine if a provision in a statute requires exact or substantial compliance. In arriving at a decision, institutions must ultimately be guided by the Constitution, the purpose of the statute in question, semantic guidelines, jurisprudential guidelines and presumptions about specific circumstances.

Prior to the *RCMA*, a static approach regarding the requirements for a recognised customary marriage was followed. The following were accepted as essential elements for a customary marriage to be viewed as concluded and binding: consent of the bride and bridegroom (spouses), consent of the bride's father or guardian (parents), payment of *lobolo*, and the handing over of the bride. These requirements still find application in the *RCMA* era but there have been instances where strict adherence was not required. There was also an evolution in the payment of *lobolo*; from cattle to cash or a combination of the two.

The *RCMA* was enacted with the intention of moving away from non- to partial recognition of customary marriages. This further complied with the dictates of the Constitution and certain international conventions such as the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages. For instance, the age issue was not addressed in requirements predating the *RCMA*. The *RCMA* has a tone of making marriage voluntary and for persons of a consenting age. It also makes provision for other formalistic requirements.

The *RCMA* is clear that before anything can be put in motion, the prospective spouses must be of the right age and consent to get married in terms of customary law. This is followed by a negotiation and/or celebration of their customary marriage, according to customary law requirements.

Section 3(1)(b) of the *RCMA* has been a bone of contention in many court battles. When parties negotiate a customary marriage, they most often dwell too much on the *lobolo*. This is a missed opportunity for a true negotiation between the families of the prospective spouses. According to the *Maluleke* and *Mmutle* cases, the prospective in-laws were supposed to delve deeper

and agree on all potential terms. This includes issues such as the terms of payment for *lobolo* and handing over of the bride. These issues eventually affect how the clause of the celebration is comprehended. It is accepted that if the prospective spouses are of the appropriate age, they consent to being married in terms of customary law, and there is a negotiation between the two families (acceptance of the marriage, which culminates in a *lobolo* agreement), then one can state that a valid customary marriage exists.

The consent of the spouses to wed in terms of customary law is peremptory. There is room for flexibility on the issues of age and negotiation. Alternatives are set in instances where either or both spouses may still be minors. On the negotiation aspect, the *RCMA* only determines that it needs to occur but the format or content of such a negotiation is left to the ethnic groups or negotiating families involved. This will also impact on whether there will be a big or a small celebration of the agreement and the actual wedding ceremony.

The interplay between the requirements that were set prior to and by the *RCMA* has led to numerous court challenges. It is now settled by the South African courts that the negotiation will culminate in the payment or delivery of *lobolo*. Parties are free to determine for themselves if partial or complete payment constitutes a valid customary marriage. It is peremptory that there should be payment or delivery of *lobolo*.

The issue of the handing over of the bride has also come before the courts. In the past it used to be a deal breaker in that its non-compliance would entail that there was no valid customary marriage. This has been reviewed by the Supreme Court of Appeal in *Mbungela v Mkabi* and can now be dispensed with, abbreviated, or modified. It is no longer the sole reason why a customary marriage is found to be invalid. This development makes the handing over of the bride directory.

As part of further battles pertaining to customary marriage, the issue of polygamous and dual marriages also featured in the courts. Dual marriages relate to having marriages concluded in terms of both customary and civil rites by either spouse to any other person. A party to a civil marriage is not allowed to conclude a customary marriage. The opposite is also true, with the exception of monogamous customary marriages. This thus makes it peremptory that any party intending to conclude a customary marriage must not be a party to an existing civil marriage. Despite this legislative certainty, persons in unregistered customary marriages may not enjoy this benefit. This makes this part of the requirement peremptory.

In relation to polygamy, the section 7(6) of the *RCMA* requires the husband to obtain a court-approved contract before marrying a subsequent wife. This is not classified as part of the requirements for the validity of a customary marriage. From a compliance perspective, however, it should be. Courts have condoned non-compliance with this obligation and, as a result, it is viewed as a directory requirement.

In some cultures, such as the Tsonga culture, the consent of the first or preceding wives is required. There is case authority that supports the view that this is also applicable to the Ndebele and Xhosa ethnic groups. This entails that for people within these ethnic groups, the consent of the first or preceding wives is peremptory, and, in its absence, any subsequent customary marriage would be invalid *ab initio*. When all requirements are met, there is a duty on the parties to register their customary marriages. This duty is, however, directory and does not affect the validity of the customary marriage.

Before the current constitutional era, customary law did not enjoy the same status as common law and statutes. It was subject to the repugnancy clause, of which utilisation was minimal and aimed at the control of the indigenous African population. This deprived it of natural growth and development. It remained static for a long time and was subjected to distortion.

With its recent recognised status as an independent source of law and the need to comply with constitutional and international imperatives, customary law is now rapidly developing. As alluded to in paragraph 6.1, courts have provided guidelines as to how it needs to be understood and interpreted. These guidelines must be understood in line with principles of constitutional interpretation. In summation, the guidelines propose the following:

- Customary law is a standalone, living source of law. When courts apply it, they must strive to apply it in its most recent form, as opposed to being stuck on what is termed codified customary law.
- A historical view is vital but it must not be used to hamper the development of customary law.
- Customary law must always be seen as a dynamic and flexible source of law.
- Interpreting customary law is a balancing act. In striving for this balance, the spirit and purport of the Constitution must be advanced.
- In relation to dual marriages, the legislative framework protects (favours) whichever marriage system was used first by the parties to wed.

- Legislation that deals with customary law, such as the *RCMA*, must never be interpreted in a piecemeal fashion. It must be interpreted as a whole.
- When interpreting customary law, one needs to be mindful that it will most likely develop further; as a result, one must not overemphasise the customs as they were applied many generations ago. Furthermore, the current interpretation must suit the current circumstances.
- Being flexible and dynamic is not necessarily a free pass to interpret as one pleases. There is still a need for legal certainty, preservation of vested rights, and compliance with the Constitution and international law.

At the end of this appraisal, one needs to draw a conclusion on whether a static or flexible approach needs to be followed in determining if a customary marriage meets the set requirements of validity. Customary law has never been a rigid system. In the era before the *RCMA*, strict compliance with the requirements for the validity of a customary marriage was sought. This is associated with the development of official customary law (codification). This is slowly changing, and there is a call for flexibility and for communities to develop their living customary law to be in line with the Constitution and international law. As a result, a flexible approach must be followed in determining if a customary marriage meets, or fails to meet, the set requirements.

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List of Abbreviations

CILJSA	Comparative and International Law Journal of Southern Africa
EJCL	Electronic Journal of Comparative Law
IJLPF	International Journal of Law Policy and Family
PER	Potchefstroom Electronic Law Journal
RCMA	*Recognition of Customary Marriages Act* 120 of 1998
SAJHR	South African Journal on Human Rights

TSAR	Tydskrif vir die Suid-Afrikaanse Reg (Journal of South African Law)