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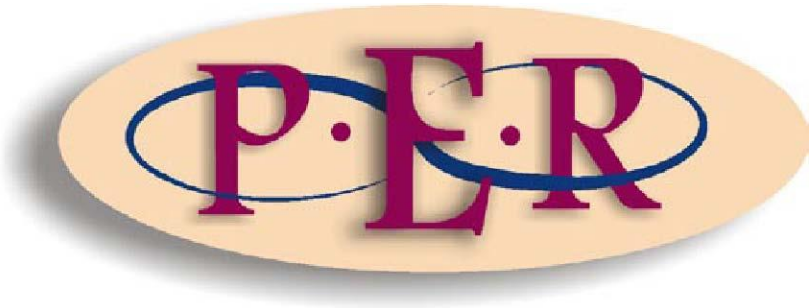

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LEGISLATION AS A CRITICAL TOOL IN ADDRESSING SOCIAL CHANGE IN SOUTH AFRICA: LESSONS FROM *MAYELANE v NGWENYAMA*

RN Ozoemena*

1 Introduction

Since 1996 the *Constitution*[1] has been the key driver of social change in South Africa in addressing the multifarious imbalances of the past. As South Africa is a constitutional democracy, one of the avenues for promoting the values of equality, dignity and freedom[2] enshrined in the constitution is through the enactment of legislation. In terms of the *Constitution*, section 211(3) provides for the "application of customary law by the courts where it is applicable, subject to the constitution and any other legislation that specifically deals with customary law". One of the pieces of legislation enacted in this regard is the *Recognition of Customary Marriages Act* (hereinafter "the *Recognition Act*").[3] Since the *Recognition Act* came into force in November 2000, it has brought both legal and social changes to the institution of marriage, particularly for African people. For instance, prior to 1994 customary marriages were not recognised by the South African state as legally valid, but they are now so recognised. Furthermore, the *Recognition Act* sought to ensure that the parties to a customary marriage enjoy equality of status within the marriage.[4] Although the *Recognition Act* was intended to bring some form of certainty to the application of customary law, determining the content of the "living law" remains a challenge.[5]

The transformative project of creating an egalitarian society based on human dignity and freedom has been driven in the main by the *Constitution* as well as by legislation

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

2 Section 1(a) of the *Constitution* provide for the values on which the sovereign democratic state is founded, such as human dignity, the advancement of equality, human rights and freedoms.

3 *Recognition of Customary Marriages Act* 120 of 1998 (the *Recognition Act*).

4 Mqeke 1999 *Obiter* 52; Dlamini 1999 *Obiter* 14.

5 Himonga and Bosch 2000 *SALJ* 306-341.

such as the *Recognition Act*. That project presupposes the existence of a culture of rights in advancing social change. In many ways, the *Constitution* has made a tangible impact on the lives of many, as noted in cases such as *Alexkor Ltd v Richtersveld Community*[6] and *Bhe v Magistrate, Khayelitsha.*[7]. In other ways, the specific legislation relating to customary law seems to have had the opposite effect and to have had unintended consequences for the majority of the people. In the *Mayelane v Ngweyama*[8] ("*Mayelane*") case, one of the issues concerned the application of the provisions of the *Recognition Act*, particularly concerning the requirements for the validity of customary marriages in the context of polygyny. The provisions in the *Recognition Act* intended to protect the parties in a polygynous marriage failed to take into account the realities of South African family relationships resulting from job migration to the cities by the husbands of many women married in terms of customary law. The unintended consequences of such migration as found in the *Mayelane* case and the application of the *Recognition Act* in the context of polygynous marriages, are that a lot of women are left unprotected, with a far-reaching effect on them and their children. This further highlighted the difficulty of ascertaining the true content of *Xitsonga* customary law.

In a constitutional democracy such as ours, how should living law be developed and what are the mechanisms that are best placed to do so? The purpose of this article is to draw attention to the inefficacy of legislation particularly in the context of African customary practices, whose nature is fluid and changes constantly with the socio-economic conditions of the people. Although the changing nature of living customary law may present challenges in ascertaining its content, change is intrinsic to this law. Hence the need for case by case development. This article argues that the notion of living law presupposes change, and that the use of legislation in certain areas of customary law may result in unintended consequences that will adversely affect the people it seeks to benefit. It is submitted that the Constitutional Court needs to engage

6 *Alexkor Ltd v Richtersveld Community* 2004 5 SA 460 (CC).
7 *Bhe v Magistrate, Khayelitsha* 2005 1 SA 580 (CC).
8 *Mayelane v Ngwenyama* 2013 4 SA 415 (CC) (hereafter *Mayelane*).

more with social norms in the community in order to adequately address the nuances that form part of the evolving nature of customary law.

2 Facts

The applicant, Mayelane, married Mr Hlengani Dyson Moyana in 1984 at the time when customary marriages were referred to as "customary unions".[9] Ngwenyama alleges that she also married Mr Moyana on 26 January 2008, after the coming into force of the *Recognition Act*. Mr Moyana died a little more than a year later, on the 28 February 2009. The *Recognition Act* converted "customary unions" that were valid and existed at the time of the commencement of the Act into customary marriages recognised by law. After the death of Mr Moyana, both Mayelane and Ngwenyama sought to register their marriages in terms of section 4 of the *Recognition Act*. Each disputed the other's marriage, and Mayelane then applied to the High Court to have her customary marriage declared valid and that of Ngwenyama to be declared invalid on the basis that she as the first wife had not consented to the marriage. The High Court granted both orders.

The matter went on appeal to the Supreme Court of Appeal (SCA), which confirmed the validity of Mayelane's marriage but overturned the order of invalidity regarding the marriage of Ngwenyama. The SCA also found both marriages to be valid under customary law. The matter before the Constitutional Court was the appeal against the decision of the SCA in which the applicant, Mayelane, alleged that in terms of *Xitsonga* customary law the consent of the first wife is required before any other subsequent customary marriage can be entered into by her husband and that she did not consent to such a marriage. In terms of section 3(1) of the *Recognition Act* dealing with the requirements for the validity of the marriage, consent relates only to the parties to the marriage, and nowhere does the Act refer to the consent of the first wife. In determining the matter, the Constitutional Court decided to engage with the question of whether the consent of an existing wife in a customary marriage is required for the validity of her husband's subsequent polygynous customary marriages. They

9 Bakker and Heaton 2012 *TSAR* 586-593.

embarked on this enquiry by looking in the first place at the provisions in the *Recognition Act* and, in the second place, to the *Xitsonga* customary law to which the parties subscribe.

3 The judgement

The main judgment of the Constitutional Court in the *Mayelane* case dealt with two related issues: the consent of an existing wife to the validity of her husband's subsequent customary marriage and the content of the applicable customary rule, including how it should be ascertained. The Court considered the consent issue by having regard to the values and rights enshrined in the Constitution, such as equality[10] and human dignity.[11] The common view is that African customs and practices infringe on the equality rights of women, denying them equal status in marriage, inheritance and succession. The Constitutional Court in a number of cases has sought to provide much needed redress to women where inequalities have been found to exist, as in *Bhe* (where the customary practice of male primogeniture was declared unconstitutional for violating the right to equality), *Shilubana* (the succession of a woman as Hosi-chief - was confirmed, thereby protecting right to gender equality) and *Gumede* (where the equal rights of women in marriage was protected).[12] In dealing with the consent issue in *Mayelane*, the Court first of all considered the recognition and application of customary law under the *Constitution* in general and, in particular, in relation to the *Recognition Act*. The Court utilised the tripartite scheme of statutory, constitutional and living law and, based on its interpretation of the applicable legislation, it sought to develop the *Xitsonga* customary law with a view to bringing it in line with the ethos of the *Constitution*.

The Court began by recognising the importance of customary law as an independent source of law that must be accorded its rightful place in the broad scheme of the South African legal system. The Court also recognised that the *Recognition Act* is premised on the notion that customary law that can be harmonised with the values of

10 Section 9 of the *Constitution.*
11 Section 10 of the *Constitution*.
12 *Shilubana v Nwamitwa* 2009 2 SA 66 (CC); *Gumede v President of Republic of South Africa* 2009 3 SA 152 (CC).

dignity and equality in the *Constitution*. So, in determining whether the consent of an existing wife in a subsisting customary marriage is necessary, the Court looked to relevant provisions in the *Recognition Act*.[13] Section 3(1) of the *Recognition Act* deals with the requirements for the validity of a customary marriage by stipulating that (a) the parties to the marriage must give their consent and (b) the marriage must be "negotiated and entered into or celebrated in accordance with customary law". It was, however, placed on affidavit by the brother to the deceased that none of his siblings went to negotiate *lobolo* and there was no ceremony in relation to marriage between his brother and the respondent. Furthermore, the respondent could not adduce evidence to the existence of any marriage, and so the Court held that the respondent could not prove the existence of a marriage between herself and the deceased according to customary law. The Court further considered section 7(6) of the *Recognition Act*, which specifically provides that a husband must approach the court for an order regarding the matrimonial regime. The Court held that this provision could not be interpreted to determine consent of the first wife. The main judgment considered it necessary to require further evidence from witnesses to determine what the "living law" of the *Xitsonga* people was. From the evidence gathered from a wide range of witnesses and experts, it was clear to the Court that:

(a) Polygynous marriages are not the norm in *Xitsonga* society, however, *VaTsonga* men have a choice to enter into further customary marriages;
(b) *VaTsonga* men when they do decide, must inform their first wife of the intention to take another wife;
(c) It is expected that the first wife agree and assist in the process leading to the further marriage;
(d) If there are disagreements regarding the first wife's consent, the families are brought in to persuade and where it fails, divorce may occur.[14]

The Court deduced that the living law of the *Xitsonga* requires that the first wife be informed of her husband's impending subsequent marriage. The wide range of evidence gathered was considered by the majority as a means of ascertaining as well as noting the nuances in the *Xitsonga* customary law. Hence the importance of developing the law to make consent a requirement for a subsequent customary marriage. It was on this point of ascertaining the relevant customary law that the

13 *Mayelane* paras 36-38.
14 *Mayelane* para 61.

dissenting judgment arose. Zondo J was of the view that the respondent could not discharge the onus of proving that marriage of any kind existed between her and the deceased when he died.[15] In his view, the requirements of section 3(1)(b) had not been met, and so the marriage was invalid as it did not comply with the "customs and usages that are traditionally observed among the *Vatsonga* which form part of their culture". According to him it was therefore not necessary to develop *Xitsonga* customary law as the majority did, because in terms of that law the husband intending to enter into a second customary marriage must inform the first wife and she must consent to it.[16] Jafta J also dissented on the grounds that it was inappropriate for the Constitutional Court to be the court of first and last instance on the matter of whether the consent of an existing wife in a customary marriage is required, where the matter had not even been raised in the court *a quo*. He concluded that the development of *Xitsonga* customary law in the main judgment was inappropriate, because it had not been canvassed by the parties and there were no exceptional circumstances warranting a departure from the precedent laid down in *Lane and Fey v Dabelstein*[17] and *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd.*[18] In both of these cases the Constitutional Court refrained from the development of common law rules, which restraint, by reason of parity, Jafta claimed, should also apply to customary law.[19] The dissenting judgments in *Mayelane* were convinced that the same outcome would have been reached without the development of *Xitsonga* customary law. The majority judgment in this case decided to develop the customary law of the *Vatsonga* with wider implications for the future of polygynous marriages in the community and, by parity of reasoning, the country as a whole. Their approach brings into sharp focus the extent of the reach of the transformative agenda of creating a new order. In this instance the court shifted from the application of the *Recognition Act* to the development of *Xitsonga* customary law. The Constitutional Court is obliged to develop customary law in terms of section 39(2) of the *Constitution*, which provides that:

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15 Per Zondo J in *Mayelane* para 108.
16 Bekker and Rautenbach "Nature and Sphere of Application" 17-23.
17 *Lane and Fey v Dabelstei* 2001 2 SA 1187 (CC).
18 *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC).
19 Per Jafta in *Mayelane* para 150.

> *... when interpreting any legislation,* and *when developing the common law or customary law*, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.[20]

This section requires proper understanding of the connection that exists between the interpretation of legislation and the development of customary law. In *Mayelane* the Court employed both customary law and the applicable legislation in determining the role of consent of the first wife to the validity of the subsequent marriage of her husband to another woman. The outcome of this approach relied on by the Court was indicative of legislation that was trailing behind the living law, and yet the living law was developed. This is a classic example of a change in law devoid of any adequate engagement with the social norms of the community.

4 Analysis

4.1 Law, social change and living customary law

Several debates have been going on regarding the relationship between law and social change.[21] Social change refers to reforms, changes or transformation within a society that has a specific impact on the lives of the people and their institutions.[22] Often times, the changing beliefs in social, political or even economic spheres in society have laid the basis for reforms in law, and in other instances the law takes the lead in laying the firm basis for changed morality. In practice, the interdependence between the two processes cannot be overlooked or underrated. One of the critical points to note is that usually the way a society functions does not rely on state rule. In other words, there are norms that influence and shape people's lives, social contracts that inform their sense of obligation towards one another and the proper sanctions for breaching these standards of behaviour, and they do not necessarily depend on state authority for their existence.[23] So law must be looked at not in isolation or separate from society but must take into account the manner in which people live. Sally Falk Moore[24] suggests that law as a semi-autonomous field should be determined not in terms of

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20 Section 39(2) of *Constitution*. Emphasis added.
21 Kok 2010 *SALJ* 66.
22 Kok *Socio-legal Analysis* 34-110.
23 Griffith 24 1986 1-55.
24 Falk Moore *Law as Process* 7-8.

territorial boundaries but rather by its measure of influence and whether it can generate rules, customs and symbols that are sacrosanct to the people living within that field, whilst it can influence and also be influenced by rules and decisions coming from other sources. In my view, the suggestion of Falk Moore establishes that custom-based rules that are meaningful to the people are largely influenced by their economic as well as their social conditions.

Vander Zanden on his part defines social change as the "fundamental alterations in the patterns of cultural structures and patterns of behaviour over time".[25] This implies that it takes time to develop custom-based norms because change occurs only over a period of time. This is the kind of approach that the majority judgment in *Bhe* rejected. Langa DCJ was of the view that the majority of South Africans have waited for so long for justice, equality and freedom that any further delay in bringing justice to the people is inappropriate. He said that:

> .. the problem with development by the courts on a case by case basis is that changes will be very slow; uncertainties regarding the real rules of customary law will be prolonged...[26]

In this instance, the majority judgment made an immediate and significant change to the customary rule of male primogeniture. This decision was considered by many, including traditional leaders, to be judicial encroachment on customary practices.[27] When such views are expressed, this may indicate the ineffectiveness of judge-made rules or legislation on the lives of majority. Many have argued that most societal ills cannot be properly addressed by law because law has no role to play in effecting social change; rather, society changes and then law adapts to those changes.[28] The notion of living customary law is predicated on this kind of premise rather than on the codified version that has been previously adopted by courts.

The first substantive case that dealt with the notion of "living law" was the Constitutional Court case of *Alexkor v Richtersveld Community*,[29] which dealt with

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25 Vander Zanden *Social Experience* 125.
26 *Bhe v Magistrate, Khayelitsha* 2005 1 SA 580 (CC) para 112.
27 Himoga 2005 *Acta Juridica* 82.
28 Kok 2010 *SALJ* 65.
29 *Alexkor Ltd v Richtersveld Community* 2004 5 SA 460 (CC).

customary land rights. The broad principles enunciated in the case were that in the first place customary law is an independent source of law that must not be interpreted through the common law lens. Secondly, customary law is recognised to the extent that it is consistent with the *Constitution* and any applicable legislation. The third principle recognised customary law as the "living" law. The Court succinctly stated in *Alexkor* and reaffirmed in *Bhe* that:

> … it is important to note that indigenous law is not a fixed body of formally classified and easily ascertainable rules. By its very nature it evolves as the people who live by it its norms change their patterns of life … In applying indigenous law, it is important to bear in mind that, unlike common law, indigenous law is not written. It is a system of law that was known to the community, practiced and passed on from generation to generation. It is a system of law that its own values and norms. Throughout history, it has evolved and developed to meet the changing needs of the community. And it will continue to evolve within the context of its values and norms consistently with the Constitution.[30]

The Court acknowledged the nature of customary law, including its fluidity and the difficulties involved in ascertaining its content. It was also acknowledged that the lives of the people who live according to its norms are critical to its evolution as a source of law, because of the constant changing patterns of their lives. This was an acknowledgement of the importance of social norms and the influence of such values on the living law of the people. It was also found necessary at this point to acknowledge the limits of state law, including legislation, in addressing issues of customary law. Clearly, it is not that law does not drive social change, but one also has to affirm that there are greater influences in other social fields at play, such as family, tribe, religious and social affiliations.[31]

Having regard to the South African context, living customary law is in competition with state law, while being shaped by it. Living customary law has powerfully guided the behaviour of a significant portion of the country's population for a long time, and therefore should then be viewed as semi-autonomous, because the ties that bind its observers together are stronger than the ties that bind them to external factors such as state legislation.

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30 *Bhe v Magistrate, Khayelitsha* 2005 1 SA 580 (CC) paras 48, 81; *Alexkor Ltd v Richtersveld Community* 2004 5 SA 460 (CC) paras 52-54.

31 Kok 2010 *SALJ* 59.

Sometimes attempts are made by government to re-regulate these "semi-autonomous fields", which already have their own rules, practices and customs, by imposing new legislation on them. Legislative interventions, however, often fail because of the pre-existing social arrangements which are considered more important and stronger by society than the new legislation.[32] In South Africa, pieces of legislation such as the *Communal Land Rights Act*[33] and the *Traditional Courts Bill*[34] have fallen into this category of "imposed law".[35] It can be argued in the South African context that the desire to make right the wrong done by the historical legacy of apartheid has contributed to these legislative interventions. For example, the *Recognition Act* requires spouses to a customary marriage to register their marriages to ensure that both spouses have equal rights in the marriage. Often the practical application of the piece of legislation poses numerous challenges with unintended consequences. For example, the *Recognition Act* requires that marriages be registered and yet it does not invalidate unregistered marriages. Notwithstanding the lack of sanction for non-registration, a woman without the certificate of registration risks her benefits, if any, from the marriage.[36]

In the *Mayelane* case, both the applicant and the respondent had not registered their marriages as required by the *Recognition Act*, and yet the respondent bore the greater burden. *Prima facie*, both parties to the case seem to be placed on the same footing by the *Recognition Act* in that they had not registered their marriages, and hence had not complied with the requirements of the Act. The proof of the validity of the marriage was not properly addressed by the Court. Instead the Court focused on the consent of the existing wife and her constitutional right to equality within the marriage to the detriment of the respondent. The validity of the second marriage was not determinable according to the Court, even though the deceased had took some guests to his home as some kind of introduction process, and not specifically for *lobolo* negotiation.[37] The

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32 Kok *Socio-legal Analysis* 66.
33 *Communal Land Rights Act* 11 of 2004.
34 *Traditional Courts Bill*, first introduced into Parliament in 2008. It was withdrawn in 2009 and was re-introduced in 2011. Both the *Communal Land Rights Act* and the *Traditional Courts Bill* have been depicted as recreating apartheid structures.
35 Mnisi-Weeks "Traditional Courts Bill".
36 De Souza 2013 *Acta Juridica* 239-272.
37 *Mayelane* para 105.

Court considered this to be a mere gesture of friendship rather than a marriage, given that the respondent was a woman with five children from a previous marriage. This was the outcome of applying the *Recognition Act* in the specific context of polygynous relationship without taking all the ramifications into account. A proper and careful balance needs to be applied where state rules and custom-based rules co-exist.

In *Mayelane*, the Court reiterated some principles regarding the status of customary law within the South African legal system. It affirmed that "…customary law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law".[38] Against this background it was pertinent to properly establish the content of *Xitsonga* customary law as a "matter of law", and the majority judgement sought to do so by directing that further evidence be provided by a number of people with knowledge regarding *Xitsonga* customary law. The fact that this evidence was contradictory did not deter the Court, which instead viewed the contradictions as providing nuance and perspectives often missed in such cases.

The majority then took an entirely fresh step in an attempt to develop *Xitsonga* customary law by making consent a requirement for subsequent customary marriage. In their view, where a husband decided to marry again without the consent of an existing wife, such a move was considered by the Court as being incompatible with the right of an existing wife to equality and dignity. The implication of the development was that consent had now to be uniformly applied in all *Xitsonga* communities. The two dissenting judgments of Zondo J and Jafta J (with Mogoeng CJ and Nkabinde J concurring) were insightful in suggesting the manner in which customary law should be developed. The view of Zondo was that there was sufficient evidence regarding the issue of consent in *Xitsonga* customary law. According to him, there were two objectives to be determined in this case. In the first instance, customary marriage depends on

> ... whether the customs and usages traditionally observed among the *Vatsonga* and which form part of the culture of the *Vatsonga* have been followed, which requires that the consent of the first wife be obtained when a further customary marriage is

[38] *Mayelane* para 23.

> entered into. Secondly, whether such marriage was 'negotiated and entered into or celebrated' according to customary law.[39]

From this standpoint, what should have been considered was what was traditionally observed by that particular community. It was clear that the customs and usages of the *Vatsonga* required that the first wife be informed of the marriage and, as she alleged, she was not informed. On this basis alone, the subsequent marriage to the respondent should be invalid. Instead, the majority judgment failed to take into account the evidence of the deceased's brother as being authentic evidence of the customs and usages of the *Vatsonga* people and went ahead to develop the law. It can be deduced from this approach of the majority that the depth of knowledge of the family regarding their law was insufficient, and so the judge-made rule took precedence over what the people who own the law said regarding their law.

The approach of the dissenting judgment in my view is preferable with regards to the development of customary law as being unnecessary in this instance. In the first place, customary marriages are not entered into secretly but are usually organised and planned with a lot of family gatherings orchestrated to such an extent that the community must know that a man is now connected to the woman's family by marriage. So, based on the nature of customary marriages in the community, the first respondent failed to show that any marriage took place between her and Mr Moyana, the deceased. In the second instance, *Xitsonga* customary law is progressive already in that it requires that the first wife be informed and a failure to inform her would render such a marriage invalid. Thirdly, the Court failed to provide clarity regarding the nature of the consent before developing the *Xitsonga* customary law. The various scenarios at play should have been taken into account, particularly as this was a polygynous marriage. For example, there was neither the floor (the threshold of consent) nor the ceiling (should the consent be express or tacit)? Clearly, the decision of the majority in *Mayelane* raised more questions than answers regarding consent, and there is no doubt that customary law should be developed. It should, however, be borne in mind that when the *Constitution* guaranteed the continued existence of and survival of an "evolving" customary law, it intended that the manner in which

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39 *Mayelane* para 103.

customary law should develop should be best left to future social progression and not development at all costs.

The development of customary law by the Court is mandated by section 39(2) of the *Constitution*. According to the provision:

> When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

In the context of *Mayelane,* the adjudication on the validity of a second customary marriage required the Court to strike a balance between customary law and the *Recognition Act*. The importance of such an approach is underscored by the nature of living customary law, which allows for the negotiation of customs and practices by the people to best suit their daily lives.

In *Bhe,* Ngcobo J referred to two contexts in which the need to develop customary law might arise, as noted by the Constitutional Court in *Carmichele*.[40] The first was where customary law needs to be adapted to changed circumstances, as was the situation in *Shilubana,* where the traditional authority of the *Valoyi* tribe gave effect to the nature of living customary law by deciding that the daughter of their late *hosi*, Fofoza, should now be named as *hosi*, a position that was denied her due to the practice of male primogeniture at the time her father passed away. The second was to bring it in line with the Bill of Rights. This was also evident in the *Mabena* case,[41] where the court developed the customary rule that it is not only men who are able to be involved in *lobolo* negotiations. This development of the practice was based on the changing nature of composition of a family in South Africa, where women are now also heads of households. The insistence that a mother who stood as the head of the household could not partake in the *lobolo* negotiation because of her gender was held to be inconsistent with the *Constitution*. In this circumstance, the living law played a significant role in bringing that particular customary rule in line with the *Constitution*.

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40 *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) para 33; *Bhe v Magistrate, Khayelitsha* 2005 1 SA 580 (CC) para 212.

41 *Mabena v Lestalo* 1998 2 SA 1068 (T).

Critical principles to bear in mind when developing customary law, as enunciated by Van der Westhuizen J in *Shilubana* and reiterated in *Mayelane,* were:

> (a) consideration of the traditions of the community concerned;
> (b) the right of communities that observe systems of customary law to develop their law;
> (c) the need for flexibility and development must be balanced against the value of legal certainty, respect for vested rights and the protection of constitutional rights; and
> (d) while development of customary law by courts is distinct from its development by a customary community, the courts when engaged with the adjudication of a customary-law matter, must remain mindful of their obligations under section 39(2) of the Constitution to promote the spirit, purport and objects of the Bill of Rights.[42]

The majority in *Mayelane* seemed to have understood this framework when it considered customary law, the *Recognition Act* and the *Xitsonga* customary law and the distinction that it made regarding the differences between development by the court and development by the communities. It must be acknowledged that the *Recognition Act* does not provide any relevant guidelines regarding the consent of the first wife. Instead, it presented a lot of difficulties in its practical application to the living conditions of many women in South Africa. The *Recognition Act* thus fails to adequately cover critical areas regarding polygynous relationships, even though it provides partial protection for the matrimonial regime of parties to polygynous marriage. The Court, on its part, focused solely on its obligation in terms of section 39(2) when it said that:

> This Court has accepted that the constitution's recognition of customary law as a legal system that lives side-by side with common law and legislation requires innovation in determining its *"living"* content, as opposed to the potentially stultified version contained in past legislation and court precedent. However, to date, this Court has not engaged in an incremental development of customary law as contemplated by section 39(2) of the Constitution. In *Bhe*, the Court invalidated the customary rule of succession regarding male primogeniture and, by a majority, replaced that rule with the statutory regime regarding intestate succession then applicable to non-adherents of customary law. *Gumede* involved confirmation proceedings relating to the invalidity of legislation. *Shilubana* gave recognition to and accepted the development of customary law already undertaken by traditional authorities.[43]

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42 *Shilubana v Nwamitwa* 2009 2 SA 66 (CC) para 44-49; *Mayelane* para 45.
43 *Mayelane* para 43.

The above paragraph clearly refers to some of the approaches adopted by the Constitutional Court in developing customary law. Although the majority judgment was able to state all the principles that support the transformation agenda, in my view their inability to contextualise the values relevant to the community in connection with the specific legislation governing customary law fell short of the desired outcome. For example, it recognised that the requirement of consent in customary marriages should not be given a meaning that does not reflect its nature in customary law, and yet, in its decision, consent in the *Xitsonga* community was generally applied to the extent that it might have implications for other communities. This will have a greater impact where customary practices are developed on a case by case basis.

4.2 Polygyny in South Africa and the Recognition of Customary Marriages Act

The practice of polygyny in African culture generally is not new. Polygyny is a well-entrenched practice of African people, and is recognised under customary law. African regional human rights instruments such as the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* also recognise that polygyny is well and alive in many communities on the African continent, regardless of social status.[44] For example, the Southern Africa Development Community boasts of two heads of government that practice polygyny.[45] Polygyny as a custom is derived from customary law, which is recognised by the *Constitution* as a system of law in South Africa in terms of section 211(3) of the *Constitution*. It follows, therefore, that polygyny is protected in our law to the extent that it is consistent with the Bill of Rights and for obvious reasons, the Court found that the practice need not necessarily in and of itself violate constitutional rights. But it has the potential to do so and regulation is required to ensure the protection of the equality of status and dignity of women in polygynous marriages.[46] For example, it is common practice in South African society that many men leave the wives whom they married under customary law in the rural

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44 Article 6(c) of the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* (2000).

45 Gender Links 2013 http://www.genderlinks.org.za/article/womens-rights-and-polygamy-2013-04-08.

46 *Mayelane* paras 20-21; Andrews 2009 *Utah L Rev* 351-379.

villages and move to the cities in search of work. A lot of men in that situation then enter into some form of marriage with another woman in the city, creating double family situations. The majority of rural women are unaware that their husbands have entered into a marriage with another woman.[47] It is usually on the death of the husband or when a dispute arises that these changes in family situations come to light, and this does not usually bode well for the women involved. In the *Mayelane* case, rather than offering protection, the *Recognition Act* complicated the situation. The effect of this conflict of systems is that the court battles to balance the competing rights in attempting to take into account the dignity and equal rights of all the women involved.

The *Recognition Act* implicitly recognises polygyny and in terms of section 7(6) provides that a husband who wishes to enter into a further customary marriage with another woman must make an application to the court to approve a written contract which will regulate the future matrimonial property system of his marriage, but it is the husband who must make written application. Most times they fail to do so, to the detriment of the women in the marriage. The failure in this case by Mr Moyana resulted in the non-registration as well as non-recognition of his subsequent marriage to Ngwenyama in terms of the law.[48] The fact that the deceased, Moyana, spent the last year of his life with the respondent did not ameliorate her position, and so she bore the adverse effects of the law, even though the *Recognition Act* clearly stipulates that a failure to register the marriages does not result in its invalidity. It is submitted that the peculiar situation regarding double families in South Africa was not sufficiently considered in the *Mayelane* case, and the court did not apply its mind to this trend and consider the adverse effect its decision would have on many women like Ngwenyama, whose rights to equality and dignity are not being taken in to account.

47 De Souza 2013 *Acta Juridica* 246.

48 Rautenbach and Du Plessiss 2012 *McGill LJ* 749, where the authors examine the literal approach of the Court in dealing with African customary marriages.

4.3 Recognition of Customary Marriages Act 120 of 1998: some reflections on its role in a changing society

The *Recognition Act* was enacted to bring a much needed remedy to the injustices faced by the majority of South African women, and twenty years into our democracy it has become clear that the nature of living customary law is being contradicted by the *Recognition Act*. For example, the Court in *Gumede*[49] declared invalid a provision of the *Recognition Act* for being inconsistent with the constitutional rights of human dignity and equality.

Although, the *Recognition Act* is a welcome relief for the majority of women, particularly those who are in polygynous marriages, it is inadequate to deal with the dynamics and flexibility of customary law. For example, many women have yet to register their marriages, and failure to register the marriage results in failure to be in possession of certificate of marriage. Clearly, such requirements are not found in living customary law, and yet the Department of Home Affairs makes this mandatory certificate a requirement for receiving the entitlements and benefits of the marriage.[50] Often it is the "urban" wife that is in possession of the certificate and then lays claim to the benefits of the marriage, to the detriment of the rural customary law wife who had been married to the man for a long time. So, without the *prima facie* proof located in the certificate of marriage, many women face numerous legal as well as social disadvantages that adversely impact on the family.[51]

Furthermore, the Department of Home Affairs charged with the registration of these marriages has to work with the *Recognition Act*; the original and the amended version.[52] Section 4(9) of the *Recognition Act* states that non-registration does not result in invalidity, yet the *Reform of Customary Law of Succession and Regulation of Related Matters Act* in section 5(1) provides further stringent processes required for the registration of marriages, particularly where there is a dispute between the

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49 *Gumede v President of Republic of South Africa* 2009 3 SA 152 (CC).
50 Mwabene and Kruuse 2013 *Acta Juridica* 292-317.
51 De Souza 2013 *Acta Juridica* 239.
52 The *Recognition Act* was amended in 2009. Also, the *Reform of Customary Law of Succession and Regulation of Related Matters Act* 11 of 2009 came into operation in the same year.

parties.[53] In addition, the Department of Home Affairs has to prevent the registration of fraudulent marriages. It is mainly women who allegedly make these claims, and the suspicions are deep-rooted, leading to lots of complex processes that ordinary folks cannot deal with. Simply put, a customary marriage becomes meaningless and unrecognised without the proof of marriage which is located in the certification of registration, an approach that was adopted by the Provincial Court in *Baadjies v Matebula*.[54] Also, aspects of these social changes in family relations have culminated in a position where the *Recognition Act* has become too specific in some areas and too vague in others. For example, section 4(4)(a) makes mention of "any *lobolo* agreed to", which has led to several cases on exactly at what point a customary marriage was entered into, as noted in *Nthenjani*,[55] or part payment was made as found in *Motsoatsoa v Roro*,[56] or the *lobolo* was paid in full, as held in *Fanti v Boro*.[57]

In my view, the *Recognition Act* has failed to alter social practice in such a manner as to engender the protection of human rights. It purports to protect the rights of women but then creates huge challenges that are contrary to the set objectives of the Act. The Constitutional Court, on its part, has not provided guidance, since it condoned the non-registration of the marriages in *Mayelane*. I argue further that there are limits to what the law can achieve, particularly in the area of customary law, and in this instance a number of laws, pieces of legislation or regulations that are subject to the *Constitution* may be outdated in the context of the way in which people live their lives, and are hence bound to lose their efficacy.[58] This is indicative of the limited role that law plays in causing positive societal change. It also suggests that legislation may be out of sync with the realities of the society. This thought echoes what Cotterrell argued when he said that "state-enforced sanctions appear to be useless in many areas of social life and tend to disrupt rather than harmonise social relations".[59] Clearly, in relation to the "grand social transformation" envisaged by the *Recognition Act*, women

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53 Meyer 2012 http://www.lawlibrary.co.za/2012/03/justicecollege_recognitionofcustomary marriages.pdf 1-33.
54 *Baadjies v Matebula* 2002 3 SA 427 (W).
55 *Nthanjeni v Road Accident Fund* 2011 ZAFHC 196.
56 *Motsoatsoa v Roro* 2011 2 All SA 324 (GSJ).
57 *Fanti v Boro* 2008 5 SA 405 (C).
58 Claassens and Smythe 2013 *Acta Juridica* 4.
59 Cotterrell *Sociology of Law* 52.

have not benefitted much, and are instead confronted with huge complications arising from the its application.

5 Conclusion

The purpose of the *Recognition Act* is to remedy the injustices of the past in relation to customary marriages, but it is evident that there is a huge disparity between the *Recognition Act* as a piece of legislation and how it is implemented for the benefit of the majority of the people. Hence, the value of the *Recognition Act* as a tool for societal transformation is questionable. At the heart of the *Mayelane* case is the issue of how society should internalise the legal framework that promises equal rights and translate it into a human rights culture. Thus far, the approach of the Constitutional Court towards its obligation to develop customary law indicates a lack of proper understanding of when it should or should not intervene. It is now twenty years into our constitutional democracy, and hence there is a need to recognise the value implicit in the transformational agenda of our law and society. To this end, it is pertinent to recognise that there are limits to the law, particularly in the context of customary law, where there are different variations of the same rule. Evidently, the Court still needs to balance competing interests relating to its obligations and the possible impact of its decisions, particularly in connection with the *Recognition Act*. Currently, it has utilised two known mechanisms in relation to the development of customary law rules, which are striking down impugned legislation and incremental development. In *Mayelane* it embarked on the incremental development of a law and practice that are already part of the lives of the people. The requirement of consent is now the law among the *Xitsonga,* and how this will be internalised by the community remains to be seen. Usually, rules that people consider an imposition are largely ignored. In my view, the Constitutional Court must begin to decipher African law and justice, and they can do so by taking into account section 211(2) through referring matters back to the communities prior to attempting to develop living customary law.

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LIST OF ABBREVIATIONS

McGill LJ	McGill Law Journal
SALJ	South African Law Journal
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
Utah L Rev	Utah Law Review