

Using Margaret Archer's sociological concepts of *structure*, *culture*, and *agency* to investigate the dissemination of customary marriage literature in South African Higher Education Institutions

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SUMMARY

Before colonialism, apartheid, and democracy, customary marriages were regulated by customs and practices under living customary law. The advent of these systems introduced official customary law. This introduction brought about changes to customary marriages, which are known and understood by the people of South Africa who subscribe to living customary law. The existence of official customary law as a result of actions from colonialism, apartheid, and democracy impacted the literature of customary marriages that is disseminated by South African Higher Education Institutions (HEIs). These institutions disseminate customary marriage literature that often fails to capture the lived realities of African South African people. This led to the subjugation and marginalisation of the literature of customary marriages as practised by most South African people under living customary law. Unavoidably, the status quo concerns epistemological access to customary marriage literature based on living customary law. Against this backdrop, this paper adopts a multidisciplinary approach to investigate what led to the status quo and how the status quo could be changed. This will be done using Margaret Archer's sociological concepts of *structure*, *culture*, and *agency*, typically known as *Margaret Archer's Morphogenesis Theory*. In this contribution, this theory mainly denotes the relationship between the systems and interactions through systemic conditioning.

1 Introduction

In South Africa, the literature on customary marriages is found in two different versions of customary law i.e., living customary law and official customary law. There exists sufficient literature that provides the

difference between these two versions.¹ The Constitutional Court has, on several occasions, recognised living customary law as a legitimate form of customary law in the post-apartheid legal system.² The court further indicated that where official customary law conflicts with living customary law, living customary law prevails. However, living customary law should be developed in line with the Constitution. The obsession to develop living customary law in line with the Constitution often creates a situation where the courts avoid developing living customary law in line with customary law but opt to whip it into shape using common-law lenses.³ In consequence, an official customary law is formed. Hence, Charnock rightly averred that official customary law is the combination result of actions by colonial, apartheid, and post-apartheid officials.⁴ Unlike living customary law, official customary law often bears little resemblance to the lived experiences of African people on the ground.⁵ Despite failing to resemble the lived realities of African people who practice customary law, HEIs in South Africa disseminate customary law literature predominantly centred on official customary law and not living customary law.⁶ This tends to render the literature based on living customary law unimportant or non-existent in South African HEIs. Consequently, African students are subjected to literature that alienates them from their lived reality. Maithufi and Maimela lament the inadequate period of tuition dedicated to customary law. They argue that it affects the effective dissemination of customary law literature.⁷ Based on what this paper has presented thus far, we have considered it essential to adopt Margaret Archer's sociological concepts of *structure*, *culture*, and *agency* to investigate customary marriage literature disseminated in South African HEIs.

This investigation seeks to answer two questions i.e., (a) why HEIs in South Africa still disseminate customary marriage literature that is centred on official customary law and not living customary law and (b) what could be done to ensure the dissemination of customary marriage literature that is centred on living customary law in South African HEIs.

- 1 Diala "The Concept of Living Customary Law: A Critique" 2017 *Journal of Legal Pluralism and Unofficial Law* 144; Himonga and Bosch "The Application of African Customary Law under the Constitution of South Africa: Problems Solved or Just Beginning" 2000 *South African Law Journal* 319 and Sanders "How Customary is African Customary Law?" 1987 *The Comparative and International Law Journal of Southern Africa* 406.
- 2 See *Alexkor Ltd v Richtersveld Community* 2004 5 SA 460 (CC) para 51; *Bhe v Magistrate, Khayelitsha* 2005 BCLR 1 (CC) para 43 and *Mayelane v Ngwenyama* 2013 4 SA 415 (CC) para 23.
- 3 *Bhe v Magistrate, Khayelitsha* para 43.
- 4 Charnock "Neither Customary nor Legal: African Customary Law in an Era of Family Law Reform" 1989 *International Journal of Law, Policy and the Family* 75.
- 5 *Bhe v Magistrate, Khayelitsha* para 87.
- 6 Himonga and Diallo "Decolonisation and Teaching Law in Africa with Special Reference to Living Customary Law" 2017 *PELJ* 16.
- 7 Maithufi and Maimela "Teaching The 'Other Law' In A South African University: Some Problems Encountered and Possible Solutions" 2020 *Obiter* 8.

In answering these questions, we shall use the concept of *structure* to demonstrate how the structural conditioning of HEIs in South Africa influenced the dissemination of customary marriage literature that is centred on official customary law and not living customary law. The concept of *culture* shall expose the cultural conditioning in HEIs that stifles epistemological access to living customary law literature. In this contribution, epistemological access is not limited to access to the physical entrance of the University. Rather, it includes ways of knowing. The last concept of *agency* shall demonstrate how the dissemination of living customary law literature in HEIs could be achieved.

Lastly, a conclusion shall be provided, followed by recommendations.

2 Customary marriages in South Africa

2.1 Living Customary Law

Before colonialism, apartheid, and the advent of democracy, customary marriages were regulated by living customary law.⁸ This paper argues that people who conclude customary marriages under living customary law had measures in place to deal with the salient features of a customary marriage, namely (a) the conclusion/requirements of a customary marriage; (b) the administration of matrimonial property; and (c) the dissolution of a customary marriage. Under living customary law, marriage is concluded through an agreement between families, as negotiated by the elders of the respective families and finalised by the transfer of lobolo. In this version, marriage is construed as a contract that connects two families.⁹ Upon its conclusion, an affinity relationship between the bride's family and the groom's family comes into existence. This means the marriage is not only centred on the couple. This is confirmed by Mbiti when he posits that customary marriages under living customary law are foregrounded on communal setup and togetherness. He categorically stated as follows:

When a man gets married, he is not alone, neither does his wife belong to him alone. So also, the children belong to the corporate body of kinsmen, even if they bear only their father's name. Whatever happens to the customary marriage happens to the whole group, and whatever happens to the whole group happens to the marriage. The spouses can only say 'I am because we are, and since we are, therefore I am'.¹⁰

His averments buttress why the core requirement for a valid customary marriage under living customary law is an agreement between two families. This is mainly because after the conclusion of a marriage, the two families are joined, and the members of the husband's family are

8 Ndima *Re-Imagining and Re-Interpreting African Jurisprudence Under the South African Constitution* (PhD thesis 2013 UNISA) 1.

9 Jansen "Family Law" in Bekker, Rautenbach and Goolam (eds) *Introduction to legal pluralism in Southern Africa* (2006) 31.

10 Mbiti *African Religions and Philosophy* (1969) 109.

converted into the brothers and sisters of the husband's in-laws.¹¹ Equally, all the members of the wife's family are also converted into the husband's sisters and brothers.¹² At this stage, it is apparent that the requirement of "an agreement between two families" creates a special bond. This type of bond snubs a nuclear family setup and promotes a communal setup. Scholars such as Coertze underscore the promotion of a communal setup. He submits that "among Africans, the social structure is not composed of several separate nuclear family atoms, but it is constituted by networks of family connections within which the reciprocal relationships between all members may also be governed by legal maxims".¹³

The practice of communal setup is not limited to the conclusion of a customary marriage. It extends to the regulation and management of matrimonial property. Under living customary law, it is an accepted practice that both husband and wife do not have ownership in respect of their matrimonial property. The husband, as the head of the family, administers the matrimonial property for the benefit of the collective family.¹⁴ Since customary law permits the conclusion of polygynous marriages, it is important to differentiate between house property and family property. Bennet explained the former as a "property that was allotted or accrued to a specific house (which consisted of a wife and her children) and was to be used for the benefit of that house".¹⁵ On the issue of control of this property, Pienaar avers that the "family head had control over the property but had to consult his wife and oldest son in the house in the use and control of the property".¹⁶ The question of what constitutes house property was answered by Ker, who indicated as follows:

house property typically consisted of the house itself, fields assigned to a particular wife, anything the wife brought into the marriage or the members of the house earned, damages paid for adultery, lobolo received for the marriage of a daughter, cattle earmarked for the house, and furniture and household items used in the house.¹⁷

Ndima explained the latter as a "property belonged to the home".¹⁸ Even though the head of the family had control over this property, he was never the owner of the said property.¹⁹ The head of the family merely exercised his right over the property in the interest of other family

11 Ndima (2013) 65.

12 As above.

13 Coertze *Bafokeng Family Law and Law of Succession* (1990) 3.

14 Osman "Mshengu v Estate Late Mshengu 9223/2016P: Considering the Ownership of House property in Customary Law" 2023 *De Jure* 20.

15 Bennett *Customary law in South Africa* (2004) 256.

16 Pienaar "Law of Property" in Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* (2018) 122.

17 Osman 2023 *De Jure* 18.

18 Ndima "The African Law of the 21st century in South Africa" 2003 *Comparative and International Law Journal of Southern Africa* 330.

19 Pienaar (2018) 20.

members. Mbatha provides that family property comprises “fields and livestock that have a production function and serve family interests”.²⁰

On the dissolution of a customary marriage, Ndima posits that “divorce” is a foreign concept in customary marriages.²¹ Due to the connection formed by a marriage between two families, members of the respective families must ensure that the couple’s marriage works. In other Black tribes, there are practices available to resolve separation and avert dissolution. For example, where the wife left the matrimonial home due to ill treatment or other reasons related thereto, the parties’ families intervene to foster reconciliation by invoking the practice of *ukuphuthuma*. The authors refrain from providing a direct translation of the word *ukuphuthuma* because this may alter the true meaning of the practice. Instead, we attempt to provide a brief explanation of this practice hereunder as follows:

The practice requires negotiations between spouses and their families upon the occurrence of a dispute that leads to a separation. The spouses are required to open negotiations in the presence of their respective elders to solve their disputes. During the negotiations, the spouses should account for their wrongful acts to their families. The wrong spouse is bound to apologise profusely and unreservedly. The wrong spouse should undertake not to continue with the same behaviour in the future. Henceforth, the wrong spouse will be bound by the terms agreed upon in the negotiation process. The parties are then reconciled and their marriage continues.

The practice of *ukuphuthuma* demonstrates that living customary law values reconciliation. Admittedly, sometimes, it is difficult to foster reconciliation. Therefore, dissolution of a marriage may take place. In South Africa and other Southern African countries like Swaziland, the dissolution typically occurs in extreme circumstances under specific recognised grounds such as, but not limited to, adultery, witchcraft, failure to render conjugal rights, and other issues related thereto.²²

The discussion on the dissolution of a customary marriage shows that even in difficult times, the bond between the families resulting from the conclusion of a marriage is still respected. The families are still part of the couple’s marital journey. The practice of *ukuphuthuma* demonstrated the importance of families in reconciling the couple. Generally, there is less or no judicial reliance on the dissolution of a marriage under living customary law.

20 Mbatha “Reforming the Customary Law of Succession” 2002 *South African Journal of Human Rights* 262.

21 Ndima 70.

22 Mkhabela “The Effects and Human Rights Implications of the Dissolution of a Swazi Customary Law Marriage” (LLM Mini-dissertation 2017 University of Pretoria) 29.

2 2 Official customary law

We have already indicated that official customary law is the combination result of actions by colonial, apartheid, and post-apartheid officials.²³ Therefore, customary marriage literature under official customary law is foregrounded on the Constitution, Recognition of Customary Marriages Act 120 of 1998 (RCMA), and court precedents. Under the Constitution, customary marriages are protected under section 15(3).²⁴ The Constitution also promotes customary marriages in terms of sections 30²⁵ and 31²⁶ respectively. In essence, these sections guarantee everyone a right to participate in the cultural life of their choice and further afford those belonging to any cultural community an opportunity to practice and enjoy their culture. This is because sections 39(2)²⁷ promote rights conferred by customary law on the condition they are in line with the Constitution. Furthermore, section 211(3) compels the courts to apply customary law where applicable.²⁸

These constitutional provisions instigated the promulgation of the RCMA as legislation that governs customary marriages in South Africa. Having examined the RCMA, this paper argues that most of the content in the Act should have represented living customary law. This is not far-fetched because when the RCMA was drafted and enacted, the literature of customary marriages as practised under living customary law had long existed and was prevalent. Notwithstanding this, the RCMA incorporated some content representing Western values. This content conflicts with the true meaning of customary marriage as known and understood by customary law subjects who practice living customary law. This is evidenced in section 3(1)(a) (ii), 7(2) and 8(1) of the RCMA. These sections promote individualism, while on the contrary, living customary law promotes collectiveness when coming to customary marriage.

23 Chanock 1989 *International Journal of Law, Policy and the Family* 75.

24 S 15(3) of the Constitution: This section does not prevent legislation recognising- (i) marriages concluded under any tradition, or a system of religious, personal or family law; or (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.

25 S 30 of the Constitution provides that “[e]veryone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights”.

26 S 31 of the Constitution: stipulates that “[p]ersons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community- (a) to enjoy their culture, practise their religion and use their language; and (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society”.

27 S 39(2) of the Constitution: “The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.”

28 S 211(3) of the Constitution: provides that “[t]he courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.”

Section 3(1)(a)(ii) deals with consent as part of the requirements for a valid customary marriage. This section promotes a nuclear setup in customary marriages. The section stipulates that the couples should consent to be married under customary law. Juxtaposing this with the living customary law requirement of “agreement between the families”, there is a clear paradigm shift in the consent of customary marriage. Families no longer play any role in this regard. The fact that families are discarded from agreeing to the marriage and consent only involves couples drifts away from the classical essence of customary marriages being to connect families and promote communal setup. It is not far-fetched to say section 3(1)(a)(ii) deals with couples as separate beings from the collective family. Sibisi emphasised the issue of consent between the parties as follows:

A distinction can be drawn between consent to marry in general and the more specific consent to be married under customary law. ... section 3(1)(a)(ii) requires specific consent to be married under customary law. Such consent must come from both parties to the intended marriage. Strictly speaking, in the absence of the specific consent there can never be such a marriage. Having an opportunity to consent may be seen as a basic human right. Anything less than this is a violation of the rights to human dignity and freedom. In essence, the resultant marriage could then be regarded as a forced marriage.²⁹

At this juncture, one may be tempted to argue that families still play a role in the negotiation stage, as stipulated in section 3(1)(b).³⁰ Save to admit that families are involved in the negotiation stage, sight should not be lost on the fact that negotiations are preceded by consent to the marriage. This means families convene after the couple as individuals have already decided they are getting married under customary law. In essence, they inform families of their agreement to marry each other.

Regarding the regulation of proprietary consequences of customary marriages, section 20 of The Natal Code of Zulu Law (Natal Code) and section 7 of the RCMA introduced concepts amiable to civil marriage as regulated by the Divorce Act 70 of 1979. As indicated above, under living customary law, both the husband and the wife had no ownership in respect of matrimonial property, the property belongs to the family and is administered to the benefit of a collective family. In contrast, sections 20 and 7 of these respective Acts introduced the concept of “ownership” in customary marriages. The introduction of this concept brought complications and disputes in customary marriages. Thus, the proprietary consequences of customary marriages became a contentious issue in South Africa. This led to the Constitutional Court declaring section 20 and 7(1) of the respective Acts invalid. The declaration of

29 Sibisi “Consent and Other Ancillary Matters as Requirements of a Customary Marriage: LNM v MMM (2020/11024) [2021] ZAGPJHC 563” 2023 *PELJ* 9.

30 S 3(1)(b) of the RCMA provides that the marriage must be “negotiated and entered into or celebrated in accordance with customary law”.

invalidity was pronounced in the landmark cases of *Gumede v President of the Republic of South Africa*³¹ and *Ramuhovhi v President of the Republic of South Africa*.³² In both cases, the issue of “ownership” was a bone of contention.

Section 8(1) of the RCMA deals with the dissolution of a customary marriage.³³ This section allows couples to have their marriage dissolved in the absence of their families or without their families’ knowledge. This is despite section 3(1)(b) of the RCMA requiring the spouses to ensure that their marriage is negotiated and entered into or celebrated in accordance with customary law. To satisfy this requirement, families of the prospective spouses must intervene and play a vital role in ensuring that the negotiations are concluded and that other related roles are successful. It is through the intervention and the role played by the prospective spouses’ families in ensuring that a valid customary marriage is concluded that a bond/connection between these families is created. To later exclude them from the dissolution of a customary marriage, which they played a role in its conclusion, is to undermine the importance of the bond created between the families through marriage.

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- 31 2009 3 SA 152 (CC). The High Court declared the following legislative provisions that regulate the proprietary consequences of a customary marriage as being inconsistent with the Constitution and invalid: (a) S 7(1) of the RCMA which provides that “the proprietary consequences of a customary marriage entered into before the commencement of the Recognition Act continue to be governed by customary law”. (b) The inclusion of “the words “entered into after the commencement of this Act” in section 7(2) of the Recognition Act. The inclusion provides that a customary marriage entered into after the commencement of the Recognition Act is a marriage in community of property subject to a number of exceptions which are not, for present purposes, relevant”. (c) S 20 of the KwaZulu Act on the Code of Zulu Law (KwaZulu Act) which provides that “the family head is the owner of and has control over all family property in the family home”. (d) S 20 of the Natal Code of Zulu Law (Natal Code) which provides that “the family head is the owner of and has control over all family property in the family home”.
- 32 2018 2 SA 1 (CC). The declaration of constitutional invalidity of S 7(1) of the RCMA by the High Court of South Africa, Limpopo Local Division, Thohoyandou is confirmed. The declaration of constitutional invalidity is “suspended for 24 months to afford Parliament an opportunity to correct the defect giving rise to constitutional invalidity. During the period of suspension referred to in paragraph 4, the following regime will apply to polygamous customary marriages concluded before the Act came into operation: (a) Wives and husbands will have joint and equal ownership and other rights to, and joint and equal rights of management and control over, marital property, and these rights shall be exercised as follows: (i) in respect of all house property, by the husband and the wife of the house concerned, jointly and in the best interests of the family unit constituted by the house concerned; and (ii) in respect of all family property, by the husband and all the wives, jointly and in the best interests of the whole family constituted by the various houses. (b) Each spouse retains exclusive rights to her or his personal property”.
- 33 S 8(1) of the RCMA provides that “[a] customary marriage may only be dissolved by a court by a decree of divorce on the ground of irretrievable breakdown of the marriage”.

This creates an impression that marriage is between the couple to the exclusion of their respective families.

At this stage, one may understandably be tempted to inquire about the current lived realities regarding divorce among people who practice living customary law. This inquiry should be responded to by reference to the wording of section 8(1) which states that “[a] customary marriage may only be dissolved by a competent court on the ground[s] of irretrievable breakdown of the marriage”. It is important to note the wording of this section, particularly “only a competent court”. This means, currently, there is no alternative means to dissolve a customary marriage without going to court. Therefore, an inquiry into the current lived realities regarding divorce in people who practice living customary law under the prevailing circumstances is neither here nor there because they are not given any option to practice living customary law in dissolving their marriage.

Having provided an overview of customary marriages literature, which indicated the transition and differences in customary marriages under living customary law and official customary law, the next section uses Margaret Archer’s sociological concepts of *structure*, *culture*, and *agency* to investigate this literature, particularly, how the literature of customary marriages based on official customary law became the one currently disseminated by South African HEIs as opposed to living customary law.

3 Margaret Archer’s sociological concepts of *structure*, *culture*, and *agency* on the literature of customary marriages

Margaret Archer is a systematic theorist who has carefully developed a series of fundamental concepts over the past decades.³⁴ These concepts include morphogenetic theory, which posits there are three primary causal powers in society, namely *structure*, *culture*, and *agency*.³⁵ There is a growing trend of scholars employing the concepts of *structure*, *culture*, and *agency* to investigate different issues in different disciplines. For example, Monnapula-Mapesela employed these concepts to investigate “enablement and constraints of causal powers for research and innovation in the South African higher education”. The scholar explicitly stated that:

34 Mutch “Margaret Archer and a morphogenetic take on strategy” 2017 *Critical Perspectives on Accounting* 1.

35 Newman “Morphogenetic Theory and the Constructivist Institutional Challenge” 2019 *Journal for the Theory of Social Behaviour* 2.

I employ Margaret Archer's social realist theory and stratified construct of *structure*, *culture*, and *agency* to understand various emerging transformation discourses exerting enabling or constraining causal powers for research and innovation.³⁶

Dutta also adopted these concepts to communicate social change.³⁷ In this paper, the authors employ the same concepts to investigate the dissemination of customary marriage literature in South African Higher Education institutions.

The concept of *structure* involves roles, organisations, and institutions that create and sustain a particular system.³⁸ In the context of this paper, this includes the structural effects of colonialism and apartheid. *Culture* refers to the world of ideas, beliefs, ideologies, and values existing in society.³⁹ This part relates to how society knows and understands customary marriage literature and how South African HEIs disseminate it. *Agency* is a sphere of human action and interaction.⁴⁰ This speaks to the agential roles of the HEIs agents. It relates to possible measures to be adopted by HEIs to ensure epistemological access to the literature of customary marriages centred on living customary law.

3 1 Structure

In South Africa, HEIs are founded on the values of colonialism and apartheid.⁴¹ This led to unequal representations in terms of class, race, gender, and epistemology.⁴² During the period of colonialism, these institutions were assigned a duty to reproduce ideological, economic, and social functions that relate to colonial and apartheid social order.⁴³ During that time, in terms of academic, political, and economic representations, Whites were the most privileged, Indians and Coloureds held intermediate status, and Africans were the most marginalised.⁴⁴

36 Monnapula-Mapesela "Enabling and Constraining Causal Powers for Research and Innovation in the South African Higher Education" 2024 *South African Journal of Higher Education* 217.

37 Dutta *Communicating Social Change: Structure, Culture, and Agency* (2011) 1878.

38 Mutch 2017 *Critical Perspectives on Accounting* 3.

39 Zauner "Review: Margaret Archer on Structural and Cultural Morphogenesis" 1999 *Acta Sociologica* 84.

40 Newman "Re-Addressing the Cultural System: Problems and Solutions in Margaret Archer's Theory of Culture" (*Conference Paper: Political Sciences Association*) Glasgow: Scotland 10-11 April 2017 5.

41 Badat "Redressing the Colonial/Apartheid Legacy: Social Equity, Redress, and Higher Education Admissions in Democratic South Africa" (*Conference Paper: Affirmative Action in Higher Education India, the United States and South Africa*) New Delhi: India 19-21 March 2008 3.

42 As above.

43 As above.

44 Schlemmer and Møller "The Shape of South African Society and its Challenges" 1997 *Social Indicators Research* 18.

The advent of democracy brought about changes in HEI representations.⁴⁵ The government made a concerted effort to redress past injustices and ensure access to HEI for everyone. This was driven through different initiatives, such as the promulgation of inclusive policies and access to bursaries. The passages contained in the 1997 White Paper on Higher Education underscore this submission.⁴⁶

Regulatory bodies such as the Council on Higher Education (CHE) also emerged. The body's vision is geared towards transformation, equitable, and quality Higher Education and training system, and its mission includes, amongst others, initiating critical discourse on contemporary Higher Education issues. The National Plan for Higher Education was also founded to produce the graduates needed for social development and achieving diversity in the Higher Education system. This legal framework catalysed the availability of bursaries to fund students who cannot afford Higher Education tuition fees.⁴⁷ The legal framework also prompted the introduction of extended curriculum programmes.⁴⁸ These initiatives were adopted to enhance access to HEIs. This is supported by Coleman, who stated as follows:

Extended curriculum programmes are part of a suite of government interventions that attempt to offset South Africa's structural inequalities. Without this alternative, many students particularly from under resourced schools might otherwise be excluded from being academically successful at university. Financial aid, scholarship[s], and bursary schemes provide access to students who can't afford tertiary education. But extended curriculum programmes go further. They're credited with contributing significantly to ensuring the academic success of thousands of students who might have otherwise been excluded from university.⁴⁹

These initiatives yielded positive results and gave rise to a wider and more diverse group of students in HEIs, with the number of African

45 Leibowitz and Bozalek "Access to higher education in South Africa: A Social Realist Account" 2014 *Widening Participation and Lifelong Learning* 100.

46 1997 White Paper on Higher Education: "The principle of equity requires fair opportunities both to enter higher education programmes and succeed in them. Applying the principle of equity implies, on the one hand, a critical identification of existing inequalities, which are the product of policies, structures and practices based on race, gender, disability and other forms of discrimination or disadvantage, and on the other, a programme of transformation to redress. Such transformation involves not only abolishing all existing forms of unjust differentiation but also measures of empowerment, including financial support to bring about equal opportunity for individuals and institutions."

47 Wangenge-Ouma "Funding and the Attainment of Transformation Goals in South Africa's Higher Education" 2010 *Oxford Review of Education* 482.

48 Ogude, Majozi, Mathabathe and Mthethwa "The Management of Student Success in Extended Curriculum Programmes: A Case Study of the University of Pretoria's Mamelodi Campus, South Africa" 2021 *South African Journal of Higher Education* 238.

49 Coleman "Extended courses and lecturers who care can help ensure no student gets left behind" 2019 <https://health.uct.ac.za/caresa/health-electives/health-electives/articles/2019-01-17-lecturers-reflect-their-efforts-ensure-no-student-gets-left-behind> (last accessed 2024-10-24).

students increasing exponentially.⁵⁰ It is at this point that structural conditioning in HEIs underpinned by colonial and apartheid values was exposed, and students questioned the lack of transformation in HEIs.⁵¹ Some of the structural conditioning includes but is not limited to (a) staff composition, where the majority of lecturers in the Historically Advantaged Institutions (HAI) are Whites and Blacks are in the minority;⁵² (b) the epistemological and curriculum alienation wherein African students constantly felt that knowledge production is alienated from their lived realities,⁵³ and (c) the commercialisation of education subsequently leading to the exclusion of the majority of African students due to socio-economic issues.⁵⁴ These structural conditions prompted the 2015 famous post-apartheid students' protests dubbed #RhodesMustFall, #FeesMustFall, and other "fallist" movements. These "fallist" movements, amongst other things, were centred on the demand for the decolonisation and Africanisation of the curriculum.

In essence, this section has elucidated how HEIs were formulated. It made it apparent that they (HEIs) were not formulated to accommodate or serve the interests of non-White subjects. This is because they were founded on colonial and apartheid orders. Needless to say, the systems of colonialism and apartheid were created to suppress non-White

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- 50 Higher Education South Africa in the presentation to the Portfolio Committee on Higher Education and Training, showed that on the eve of democracy, the gross participation rate in higher education was 17%. "Participation rates were highly skewed by 'race': approximately 9% for Africans, 13% for Coloured, 40% for Indians and 70% for whites". In 1993, while black (African, Coloured and Indian) South Africans comprised 89% of the population; black students constituted 52% of 473 000 students. Although African South Africans constituted 77% of the population, they made up just 40% of enrolments. White South Africans comprised 11% of the population, but white students constituted 48% of enrolments. At 43%, there was also an under-representation of women as students. Post-1994, significant achievements have been the almost doubling student enrolments, more equitable access to higher education and a more representative student body. By 2011, black students comprised 81% of the total student body of 938 200, and women 58%. Several mechanisms have supported greater equity and redress in higher education enrolments: the outlawing of racial and sex discrimination; affirmative action; alternative admissions tests to complement the national final secondary school examination; the recognition of prior learning to facilitate access for mature students; extended curriculum programmes for students that show potential, and a state-funded national student financial aid scheme.
- 51 Heleta "Decolonisation of Higher Education: Dismantling Epistemic violence and Eurocentrism in South Africa" 2016 *Transformation in Higher Education* 1.
- 52 Albertus "Decolonisation of Institutional Structures in South African Universities: A Critical Perspective" 2019 *Cogent Social Sciences* 2.
- 53 Lumadi "Decolonising the Curriculum to Reinstantiate Equity in Higher Education: A Linguistic Transformation" 2021 *South African Journal of Higher Education* 45.
- 54 Rammbuda "Analysis of Funding and Access Challenges to Higher Education in Post-Apartheid South Africa" 2023 *Journal of Public Administration and Development Alternatives* 35.

subjects. Although the advent of democracy and its democratically crafted legal framework disrupted colonialism and apartheid social orders and, by extension, their structural conditioning, there is much to deliberate concerning epistemological access to African literature in HEIs, including the literature of customary marriage in HEIs. This is discussed in the next section.

3 2 Culture

The preceding section indicated the promulgation of a legal framework resulting from the advent of democracy. Central to this legal framework is the need to transform Higher Education from its past injustices that promoted a culture of inequality and marginalisation. Although some of these injustices were addressed, this paper argues that epistemological access to African literature is still difficult in other disciplines in HEIs in South Africa. For example, customary marriage literature based on living customary law is still marginalised in HEIs. In trying to unpack the concept of epistemological access, we preface it by borrowing from scholars such as Themane and Mabasa, who argue that the concept of epistemological access does not lend itself to an easy explanation because there are different views surrounding it.⁵⁵ They aver that, on the one hand, there is a view that epistemological access is a mere physical entrance into HEIs.⁵⁶ On the other hand, there exists a view that physical entrance is not enough, and epistemological access should involve ways of knowing.⁵⁷ This paper concurs with the latter view and further draws from Boughhey's idea of epistemological access, explaining it as follows:

[E]pistemological access involves more than introducing students to a set of a cultural, social skills and strategies to cope with academic learning and its products. Rather, it is about bridging the gaps between the respective worlds students and lecturers draw on. Bridging those gaps not only requires negotiation and mediation, but also making overt the 'rules and conventions' that determine what can count as knowledge.⁵⁸

This paper argues that, through education, students should be able to contribute to societal development. Thus, there is a need to offer education that is relevant to the students' societal values and norms. This is because epistemology has the power to shape ontology. The knowledge taught in the classroom can shape students to become particular types of individuals in society. Therefore, it is argued in this paper that disseminating the literature on customary marriage that does not often represent the lived realities on the ground detaches African students from their lived realities and alienates them from their societal values and norms.

55 Themane and Mabasa "Epistemic Access and Success of Historically Disadvantaged Students during the COVID-19 pandemic: A South African Experience" 2022 *Perspectives in Education* 20.

56 As above.

57 As above.

58 Boughhey "Epistemological Access to the University: An Alternative Perspective" 2005 *South African Journal of Higher Education* 240.

Given South Africa's chequered past of colonisation and apartheid that marginalised and subjugated African ways of knowing, there is a need to preserve and promote customary marriage literature that represents the lived realities of African people. This will challenge the dominance of Western world views of knowing and knowledge production as the only way of knowing.⁵⁹ It is worth mentioning that South African HEIs have, for the longest time, normalised the culture of epistemic imbalance. Heleta backs this as she averred a decade back to say, "two decades after the end of apartheid, the curriculum at South African universities is still largely Eurocentric, rooted in the colonial and apartheid dispossession, looting and humiliation of Africa and its people"⁶⁰. Students need to be understood as social beings, and HEIs are social spaces that not only impart knowledge but also introduce the students to the values and norms that are relevant to them and the society they live i⁶¹n. Therefore, literature should be presented in a way that appreciates the existence of both ontological and epistemological dimensions. The students' societal norms, cultural capita, and world views need to be taken into consideration when disseminating literature. The Eurocentric conditioning in the dissemination of knowledge as underpinned by colonial and apartheid social orders needs to be disrupted. The democratisation of the legal framework indicated in the preceding section should translate into an equal acceptance and distribution of knowledge. In the context of this contribution, customary marriage literature centred on living customary law should be accepted and distributed in HEIs. It should not be acknowledged as a mere historical event or footnote. To disrupt the underserving Eurocentric dominance in the literature of customary marriages, the concept of agency becomes crucial.

3 3 Agency

Having outlined the structural and cultural conditioning, we now look at the concept of agency. In the context of this contribution, agents include but are not limited to, lecturers and HEIs' management. These agents could develop useful strategies to solve structural and cultural conditioning. Leibowitz Bozalek, Van Schalkwyk and Windberg support this averment by stating that "in any setting, an entity will have cultural or structural properties. These properties will play the role of enablement or constraints. It is how they interplay with the third domain of human agency that leads to the variability of outcome in any situation".⁶² Thus far, this contribution demonstrated that the structure of HEIs was

59 Kaya and Seleti "African Indigenous Knowledge Systems and Relevance of Higher Education in South Africa" 2013 *The International Education Journal: Comparative Perspectives* 33.

60 Heleta 2016 *Transformation in Higher Education* 8.

61 Boughey and McKenna *Understanding Higher Education: Alternative Perspectives* (2021) 76.

62 Leibowitz, Bozalek, Van Schalkwyk and Windberg "Institutional context matters: the professional development of academics as teachers in South African higher education" 2015 *Higher Education* 318.

founded on colonial and apartheid social orders. This permeated the culture in HEIs, and Western hegemony was accepted as the dominant way of knowing. For want of relevance, customary law literature disseminated in HEIs in South Africa is laden with common law principles. This stifles epistemological access to customary marriage literature based on living customary law.

In the judicial space, when the courts are confronted with matters that involve customary marriages, they tend to pass judgments that move away from the lived realities of the African people who subscribe to living customary law. This is often done under the fallacious efforts to develop living customary law in line with the Constitution. Unavoidably, these cases become the law and are disseminated in HEIs as study materials and acceptable customary marriage literature.

This paper argues that this is a call for concern because the perpetuation of this conduct presents the potential to exterminate existing customary marriage literature that is based on living customary law. Therefore, agents in academia need to mitigate or avoid this concern. Academics could attempt to prevent or mitigate this by embracing and promoting existing global initiatives on inclusive education, such as Goal 4 of the United Nations Sustainable Development Goals. This goal aims to “[e]nsure inclusive and equitable quality education and promote lifelong learning opportunities for all” by 2030.⁶³ It further seeks to ensure education is provided to all, without discrimination, and it reaches Indigenous peoples and ethnic minorities.⁶⁴

This paper argues that the current literature on customary marriages as disseminated by HEIs is not inclusive. More often than not, it promotes a Eurocentric epistemic agenda that does not represent the lived realities of African communities. As a result, it subjugates and marginalises most of the African literature and world views. It is also not compatible with the pluralistic nature of South Africa and the diversity of students existing in HEIs. On the one hand, African students are denied an opportunity to study most African practices existing under living customary law and African worldviews being embraced by HEIs. On the other hand, other races are denied an opportunity to learn some of the existing African practices under living customary law and familiarise themselves with African worldviews.

Given the pluralistic nature of South Africa and its diverse culture, students could benefit from learning the literature on customary marriage that predominantly represents the lived realities of African communities. Inclusive education is premised on ensuring inclusivity and equitable quality education for all people, including Indigenous people and ethnic minorities. This paper argues that the best way to

63 UN “Sustainable Development Goal 4 (SDG 4)” 2024 <https://sdg4education2030.org/the-goal> (accessed 2024-10-24).

64 As above.

achieve inclusivity is to disseminate customary marriage literature that represents the lived realities of people who subscribe to living customary law.

Worth mentioning is that scholars such as the late Maithufi and Maimela, in their quest to provide solutions to customary law literature in the broader sense, recommended that HEIs should consider inviting people who practice living customary law to give guest lectures and seminars.⁶⁵ Furthermore, prominent scholars such as Himonga and Diallo, in their well-thought-out contribution to decolonisation and teaching law in Africa, argued that the dissemination of living customary law would contribute to alternative epistemologies in academia. This paper concurs with Maithufi and Maimela's proposition and endorses Himonga and Diallo's argument. Furthermore, the paper cautions against the universities' appetite to invite legal practitioners such as practising attorneys, advocates, and presiding officers to give guest lectures and seminars on customary marriage literature. This is because most of them studied official customary law and were trained in line with it.

Worthy of recollection is that official customary law does not often represent the lived realities of African communities who subscribe to customary law. Therefore, it is submitted in this paper that inviting these legal practitioners as guest lecturers could perpetuate the injustice of epistemological access to customary marriage literature based on living customary law. Himonga and Diallo augment the need to avoid inviting legal practitioners to give guest lectures and seminars on customary marriage literature. They aver as follows:

... the legal education of judges and lawyers in Africa exclusively within the theoretical frameworks of legal positivism and centralism do not adequately prepare them to deal with the application of non-western legal orders, such as living customary law, in which law and its values are viewed differently. The result is that lawyers and judges view living customary law as non-existent, or regard living customary law as informal law that is irrelevant to state institutions.⁶⁶

The paper reiterates that people who should be invited as guest lecturers to teach the literature on customary marriages based on living customary law are the customary law experts in the communities who practice living customary law. This paper argues that inviting these experts in "formal" spaces is neither unfamiliar nor uncommon. The courts often invite them as expert witnesses in formal court proceedings. Therefore, there is no reason why they should not be invited to HEIs as guest lecturers to teach the students about the literature of customary marriages that is in line with the realities on the ground. Inviting these experts would be a step in the right direction in dismantling the HEIs' structural and cultural conditioning of what is accepted as legitimate

65 Maithufi and Maimela 2020 *Obiter* 9.

66 Himonga and Diallo 2018 *PELJ* 16.

knowledge in Higher Education. Mheta supplements this by arguing for a need to incorporate the perspectives of Indigenous people with different epistemologies, ontologies, and philosophies of life into the classroom.⁶⁷

3 Conclusion and recommendations

The question of why HEIs in South Africa disseminate customary marriage literature that is based on official customary law and not living customary law was answered in this paper through Margaret Archer's Sociological Concept of *structure* and *culture*. These concepts demonstrated that the structural and cultural conditionings of HEIs were premised on colonial and apartheid social orders. Therefore, this affected how the literature on customary marriages is disseminated in South African HEIs. Colonialism and apartheid were systems promoting Eurocentric or Western ideas. Therefore, since most of the content contained in official customary law represents Western worldviews as opposed to African worldviews, official customary law could best fit into the structural and cultural conditionings of HEIs. Despite this, the paper showed that the advent of democracy led to the promulgation of the legal framework aimed at redressing past injustices and inequalities in HEIs. However, the epistemological access to African literature that represents the lived realities of African South African people and the promotion of their African worldviews remains a challenge. This is where the question of what could be done to ensure the dissemination of living customary law literature in South African HEIs needed to be answered.

The paper answered this question through the concept of *Agency*, which demonstrated that HEIs' agents could activate their agential role and ensure that epistemological access to the literature of customary marriage that represents the lived realities of African South African people is realised. Admittedly, some of the scholars with research interests in the field of customary law have identified the need to preserve customary literature based on living customary law. They made recommendations, however implementation remains a challenge.

On this strength, it is recommended that agents in HEIs should go a step further by implementing their recommendations. They should invite experts practising living customary law in different communities to share knowledge and experiences on customary marriages centred on living customary law with the students in the classroom. They should also be open to the idea of setting formative and summative assessments based on the literature taught by these experts. This should not be frowned upon because the courts invite the same experts as expert witnesses to assist in arriving at a fair and just judgment. The experts invited into the classroom should be sought from communities that conclude, regulate,

67 Mehta, Alter, Semali and Maretzki "Academic Connections: Bringing Indigenous Knowledge and Perspectives into the Classroom" 2013 *Journal of Community Engagement and Scholarship* 83.

and dissolve customary marriages in terms of living customary law. At all times, these experts should disseminate this knowledge in the presence of the lecturer responsible for the module. It is important to highlight that allowing these experts into the academic spaces would not only benefit the students and preserve customary marriage literature based on living customary law but could also promote broader stakeholder engagement/collaboration. Furthermore, it could bridge the existing gap in the role of communities in enhancing the curriculum in higher education institutions.