



INSIGHTS INTO THE LEGISLATIVE FRAMEWORK ON CUSTOMARY MARRIAGES IN SOUTH AFRICA

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DEDICATION

- To my late mother Makhulu Dhlolongwane, I may not feel your presence physically but I know you are still in my heart.
- Rorisang and Tumisang Magano, thank you for being there for me and for always believing in me.

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- I thank my supervisor Professor Avitus Agbor for the patience, support and guidance given to me throughout this research. Working with him has always been humbling and encouraging. He pushed me to the limits that I never thought I could reach. Thank you for making me realise my capabilities in my academic journey.
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ABSTRACT

The *Recognition of Customary Marriages Act (RCMA)* of 1998 regulates customary marriages in South Africa. This *Act* was enacted in 2000 and it brought a difference in the rights of both the husband and wife within South African customary marriages. The *RCMA* is an important piece of legislation because it has changed how the South African law treated customary marriages in the past, as opposed to civil marriages. However, this does not take away the fact that there have been a lot of discrepancies and vagueness concerning some of the provisions of this *Act*. The law concerning customary marriages in South Africa is ambiguous and, in some instances, it fails to provide legal protection altogether.

There has been a lot of misunderstanding about the essentials required for a customary marriage to be valid. According to the *RCMA*, there are only three requirements for a customary marriage to be valid. These include that both parties must be 18 years or older, the parties must both consent to the marriage and lastly, the marriage must be negotiated, entered into and celebrated according to customary law. Even though there is a statute governing customary marriages in South Africa, it is a requirement that the marriage be celebrated according to the custom of the parties. There has been a high level of contradiction not only around the requirements of customary marriages, but largely around what constitutes a valid customary marriage in South Africa, and the rules applicable thereto.

The law is silent about many issues concerning customary marriages, hence the legal implications. This study seeks to address these legal implications together with the shortfalls of the law and where applicable, provide possible clarification and solutions. It therefore focuses on the 1996 *Constitution* of South Africa and the *RCMA*, as these are the two main legislations for customary marriages in South Africa. The aim of this study is to ensure equal legal protection of the rights of the parties married in a customary marriage; be it through multi-party marriages, divorce, property etc. It explores the many conflicts in the legislation guarding against customary marriages in South Africa. Lastly, the objective is to reflect on what the law regards as a customary marriage and address the controversy

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surrounding the contradictions that the law pertaining to customary marriages has created.

OPSOMMING

Die Wet op Erkenning van Gebruiklike Huwelike (*RCMA*) van 1998 reguleer gebruiklike huwelike in Suid-Afrika. Hierdie wet is in 2000 goedgekeur en dit het 'n verskil gemaak in die regte van die man en die vrou binne huwelike in Suid-Afrika. Die *RCMA* is 'n belangrike stuk wetgewing omdat dit verander het hoe die Suid-Afrikaanse wetgewing in die verlede gebruiklike huwelike hanteer het, in teenstelling met burgerlike huwelike. Dit verwyder egter nie die feit dat daar baie onenigheid en vaagheid was rakende sommige van die bepalings van hierdie wet nie. Die wet rakende gebruiklike huwelike in Suid-Afrika is dubbelsinnig en in sommige gevalle bied dit nie 'n regsbeskerming nie.

Daar was baie misverstand oor die noodsaaklike vereistes vir 'n gebruiklike huwelik om geldig te wees. Volgens die *RCMA* is daar slegs drie vereistes dat 'n gebruiklike huwelik geldig is. Dit sluit in dat albei partye 18 jaar of ouer moet wees, die partye moet albei tot die huwelik instem en laastens moet die huwelik volgens die gewoontereg onderhandel, aangegaan en gevier word. Alhoewel daar 'n wetgewing oor die gebruiklike huwelike in Suid-Afrika is, is dit 'n vereiste dat die huwelik volgens die gewoonte van die partye gevier word. Daar was 'n hoë teenstrydigheid nie net rondom die vereistes van gebruiklike huwelike nie, maar grotendeels rondom 'n geldige gebruiklike huwelik in Suid-Afrika en die reëls wat daarop van toepassing is.

Die wet is stil oor baie sake rakende gebruiklike huwelike, vandaar die wetlike implikasies. Hierdie studie poog om hierdie regsimplikasies saam met die tekortkominge van die wet aan te spreek en, waar van toepassing, moontlike toeligting en oplossings te bied. Dit fokus dus op die 1996-grondwet van Suid-Afrika en die *RCMA*, aangesien dit die twee belangrikste wetgewing vir gebruiklike huwelike in Suid-Afrika is. Die doel van hierdie studie is om gelyke wetlike beskerming van die regte van die partye wat in die gewone huwelik getroud is, te verseker; dit is deur middel van veelparty-huwelike, egskeidings, eiendom, ens. Dit ondersoek die vele konflikte in die wetgewing wat beskerm word teen gebruiklike

huwelike in Suid-Afrika. Laastens is die doel om na te dink oor wat die wet as 'n gebruikelike huwelik beskou, en die kontroversie rondom die teenstrydighede wat die wet rakende gebruikelike huwelike geskep het, te bespeur.

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LIST OF ABBREVIATIONS

ASA	Anthropology Southern Africa
BAA	Black Administration Act
BLAA	Black Laws Amendment Act
CILSA	Comparative and International Law Journal of Southern Africa
HC	High Court
J. Comp. L	Journal of Comparative Law
J. GLS	Journal of Global Legal Studies
J. PAS	Journal of Pan African Studies
J. Sys.T	Journal of System Therapies
MA	Marriage Act
McGill LJ	McGill Law Journal
Missionswiss. Abh und Texte Texte	Missionswissenschaftliche Abhandlungen und Texte
Para	Paragraph
PELJ	Potchefstroom Electronic Law Journal
PULP	Pretoria University Law Press
RCMA	Recognition of Customary Marriages Act
SALC	South Africa Law Commission
SALJ	South African Law Journal
SCA	Supreme Court of Appeal

SPECJU	Speculum Juris
STD	Sexually Transmitted Diseases
Stell. LR	Stellenbosch Law Review
TBVC	Transkei, Bophuthatswana, Venda and Ciskei
TLGFA	Traditional Leadership and Governance Framework Act
TMA	Transkei Marriage Act
TSAR	Tydskrif vir die Suid-Afrikaanse Reg

LIST OF CASES

Alexkor Ltd v Richterveld Community 2003 12 BCLR

Bhe v Khayelitsha Magistrate 2005 (1) SA 580 (CC)

Botha v Botha 2008 ZAGPHC 169

Breda v Jacobs 1921 AD

EH v SH 2012 (4) SA 164 (SCA)

Economic Freedom Fighters v Speaker of the National Assembly 2016 3 SA 580 (CC) ZACC 11

Fanti v Boto 2008 (5) SA 405 (C)

Gumede (born Shange) v President of the Republic of South Africa 2008 ZACC

M v M 1962 2 SA 114 (GW)

Maloba v Dube 2010 (GSJ) SA

Matlala v Dlamini 2010 ZAGPPHC 277

Mayelane v Ngwenyama 2013 CCT 57/12 ZACC

Moropane v Southon 2014 (755/12) ZASCA

Motsoatsoa v Roro 2010 JOL 26460 (GSJ)

Mthembu v Letsela 1997 (2) SA 936 (T)

Mthembu v Letsela 2000 3 ALL SA 219 (A)

Mxiki v Mbata in re: *Mbata v Department of Home Affairs* (GP) (unreported case no A844/2012) case number A844/2012) of 23 October 2014

Netshituka v Netshituka (426/2010) 2011 ZASCA 120

Nhlapo v Mahlangu (59900/14) 2015 ZAGPPHC 142

Nkabinde v Road Accident Fund 2003 1 ALL SA 72 (SCA)

Nkambula v Linda 1951 1 SA 377 (A)

Prince v President of Law Society of the Cape of Good Hope 2002 ZACC (1); 2002 (2) SA 794; 2002(3) BCLR 231

Road Accident Fund v Mongalo 2002 ZASCA 158

S v Lawrence, S v Negel; S v Solberg 1997 ZACC 11; 1997 (10) BCLR 1348; 1997 (4) SA 1176 (CC)

Sehloho v Minister of Home Affairs 2013 ZAFSHC 157

Sengadi v Tsambo 2019 1 ALL SA (GJ)

Shilubana v Nwamitwa 2008 (9) BCLR 914 (CC)

Suid Afrikaanse asionale Trust en Assuransie Maatskappy Bpk v Fondo 1960 2 S Afri R

Volks NO v Robinson 2005 (5) BCLR 446 (CC)

LIST OF LEGISLATION

Bantu Laws Amendment Act 76 of 1963

Black Administration Act 38 of 1927

Black Administration Act 28 of 2005

Chief Master's Directive 2 of 2015

Code of Zulu Law Act 16 of 1985

Constitution of the Republic of South Africa, 1993

Constitution of the Republic of South Africa, 1996

Divorce Act of 1979

Maintenance Act 23 of 1963

Marriage Act 25 of 1961

Matrimonial Affairs Act 37 of 1953

Natal Code of Zulu Law of 1987

Native Administration Act 38 of 1927

Recognition of Customary Marriages Act 120 of 1998

Traditional Leadership and Governance Framework Act 41 of 2003

Workmen's Compensation Act 30 of 1941

Chapter 1 Introduction

1.1 Background to the study

Customary marriages date back to ancient times when the laws of marriage and slavery were closely linked.¹ As with slavery, a customary marriage specified the amount, in goods or otherwise, by which the prospective wife was to be paid for.² It also provided for the custody of the children and the terms of refund of the bride price.³ Culturally, these types of marriages were a way of securing rights to land and property. They were also a method of assigning to the children born within the marriage the status and privilege of lawful successors.⁴ As cultures developed and multifaceted over time, customary marriages became an formal tradition administered through religious and public establishments. As such, customary marriages were well-established long before they were recognised by law. In South Africa, the *Natal Code of Zulu Law*⁵ was one example of law regulating customary marriages.

Some customary marriages comprise more than two spouses. Such marriages are called polygamous. Polygamy means 'often married' and can be broken down to two categories: polygyny and polyandry.⁶ Polygyny refers to a man marrying more than one woman at the same time.⁷ Polyandry refers to the marriage of a woman to more than one man at the same time.⁸ In South Africa, prospective spouses to a customary marriage must satisfy several requirements to conclude a valid customary marriage.⁹ The *RCMA* provides that-, for a polygamous marriage to be valid, it is essential for the prospective husband to get permission from the High Court to enter into such a union in addition also provide the Court with a written

¹ Joffe and Neil *Gender, Religion and Family Law* 196.

² Joffe and Neil *Gender, Religion and Family Law* 196.

³ Joffe and Neil *Gender, Religion and Family Law* 196.

⁴ South African Law Commission *Report on the Customary Law of Succession: Project 90* 13.

⁵ *Code of Zulu Law* 16 of 1985.

⁶ Zeitzen *Polygamy: A Cross-Culture Analysis* 3.

⁷ Song *Justice, Gender and the Politics of Multiculturalism* 142.

⁸ Song *Justice, Gender and the Politics of Multiculturalism* 142.

⁹ Section 3(1) of the *Recognition of Customary Marriages Act* 120 of 1998.

agreement on how the property in the marriages will be controlled.¹⁰ This is meant to safeguard the property benefits of both the current and future spouses.¹¹

Whereas South African customary law allows only men to have additional wife(s) in a customary marriage, tables have turned against men in other cultures. Some cultures provide for a woman to have multiple husbands. In some instances, the cultures allow brothers in one family to marry the same wife to avoid the division of the family into different households.¹² This is a form of polyandry.¹³ However, South African law does not recognise polyandry as a marital institution.

Commented [Edit2]: Not sure in what context this is used. The practise alluded to here has been in existence for a while in certain societies, the 'tables have not turned', it has been the way.

Customary marriages differ regarding the number of people involved in them. Some are monogamous, while some are polygamous, depending on the societal values and individual choices in each case.¹⁴ What have-has been common to all these marriages, however, are the objectives towards security of property and reproduction. In the past, some customary marriages were oppressive.¹⁵ Families or leaders of the community often arranged customary marriages without the need for the consent of the prospective spouses. For those marriages in which there was some degree of choice, the consent of the prospective bride and groom to be married at the given time was nothing more than a mere courtesy and form of practicality.¹⁶

Modern day customary marriages, entered into because of love and a desire for companionship, emerged in the 20th Century.¹⁷ Encouraged by new ideas and enlightenment on customary marriage, societies started to emphasis more on individual contentment and love as opposed to family responsibilities, status and prosperity.¹⁸ This led to transformation and the easing of restrictions on divorce.¹⁹

¹⁰ Section 7(6) of the *Recognition of Customary Marriages Act* 120 of 1998.

¹¹ Section 3(1) of the *Recognition of Customary Marriages Act* 120 of 1998.

¹² Adler *International Handbook on Gender Roles* 381.

¹³ Zeiten *Polygamy: A Cross-Culture Analysis* 3.

Polyandry is defined as a form of polygamy in which a woman has more than one husband.

¹⁴ Kanazawa and Still 1999 *Oxford University Press* 25.

¹⁵ Stock *Africa South of the Sahara* 108.

¹⁶ Stock *Africa South of the Sahara* 108.

¹⁷ Coontz *Marriage, A History: How Love Conquered Marriage* 5.

¹⁸ Coontz *Marriage, A History: How Love Conquered Marriage* 5.

¹⁹ Coontz *Marriage, A History: How Love Conquered Marriage* 6.

Consequently, legislation including the *Black Administration Act*,²⁰ *Natal Code of Zulu Law*²¹ and the *Interim Constitution*²² were enacted in several jurisdictions to protect the human rights of the spouses to the customary marriage. As the discussion on the role of customary marriages in the contemporary world continues, it is important to keep in mind that customary marriages have always been shaped by society. As such, customary marriages have evolved and continue to evolve alongside changes in societies.

Customary marriages present numerous challenges in South Africa today. In most cases, these problems negatively affect the spouses, particularly women. The bulk of South African case law on customary marriages shows that a customary marriage is only sought to be recognised when there are crucial challenges relating to the determination of rights.²³ This is most prevalent in succession and inheritance issues. *Volks v Robinson*²⁴ is a case in point: in this case, a woman who had looked after her husband of fifteen years, was denied from claiming maintenance from her husband's estate upon his death because she was not married to him in civil law. This case is one of many examples of women denied financial and legal benefits of a marriage because of their weak position in customary marriages.²⁵

Previously, South African law did not recognise customary marriages.²⁶ This was due to the non-recognition of some key aspects of indigenous customary law by both colonial and apartheid governments. The adoption of the *Interim* and *final Constitution* in 1993 and 1996 respectively changed this position through the Bill of Rights. The *Constitution of the Republic of South Africa* 1996 (hereafter the

²⁰ The *Black Administration Act* 38 of 1927.

²¹ The *Natal Code of Zulu Law* 16 of 1985.

²² The *Constitution of the Republic of South Africa* 200 of 1993.

²³ For example, see *Mabena v Letsoalo* 1998 (2) SA 1068 (T) where it was held that women were allowed to negotiate and receive *lobola*; *Nhlapho v Mahlangu* 2015 ZAGPPHC 142 para 34, where it was held that a woman should give consent to her husband's second marriage.

²⁴ *Volks v Robinson* 2005 5 BCLR 446 (CC).

²⁵ *Mayelane v Ngwenyama* 2013 (4) SA 415 (CC) para 15. See also *Ramuhovhi v The President of the Republic of South Africa* 2018 (2) BCLR 217 (CC) para 38-39 and *Fanti v Boto* 2007 (5) SA 405 (C) para 21.

²⁶ Section 11(2) of the *Native Administration Act* 38 of 1927 (*Repealed*).

Constitution)²⁷ recognises the rights and culture of indigenous South African communities. Section 31 of the Bill of Rights in the *Constitution* provides that

Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community-

To enjoy their culture, practice their religion and use their language; and

To form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

Section 31 of the *Constitution* is reinforced by section 9(3) of the equality clause,²⁸ which prohibits the state from discriminating

... directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, *religion, conscience, belief, culture,* language and birth.²⁹

The rights of cultural, religious and linguistic communities are subject to the general limitations clause of the *Constitution*: Section 36. This section provides for the limitation of the rights in the Bill of Rights only "in terms of the law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, [taking into account] all relevant factors..."³⁰ The factors to be considered in limiting a right are "the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose."³¹

In addition to the provisions of the limitations clause, section 31(2) of the *Constitution* affirms the supremacy of the *Constitution* and provides a specific

²⁷ The *Constitution of the Republic of South Africa*, 1996.

²⁸ Section 9 of the *Constitution* is on equality before the law. Throughout this study, this section is referred to as the equality clause.

²⁹ Emphasis added.

³⁰ Section 36 (1) of the *Constitution*.

³¹ Section 36 (1) (a)-(e) of the *Constitution*.

caveat against the practice and observance of harmful cultural practices. It stipulates that:

“...the rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Right”

In addition to the Bill of Rights provisions on the human rights of cultural, religious and linguistic communities, the *Constitution* provides for the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities as one of the Chapter 9 institutions supporting constitutional democracy.³²

The legislature and the executive branches of government have a constitutional obligation to enact legislation recognising the rights of cultural, religious and linguistic communities. This is part of the constitutional requirement in section 9(4) of the *Constitution* to prevent discrimination against anyone or group of persons by enacting legislation "to prevent or prohibit unfair discrimination." In compliance with this constitutional duty, the executive and the legislature enacted the *Recognition of Customary Marriages Act* in 1998 (the *RCMA* hereinafter).³³

The *RCMA* was enacted

...to make provision for the recognition of customary marriages; to specify the requirements for a valid customary marriage, to regulate the registration of customary marriages; to provide for the equal status and capacity of spouses in customary marriages; to regulate the proprietary consequences of customary marriages and the capacity of spouses of such marriages; to regulate the dissolution of customary marriages; to provide for the making

³² Section 181(c) of the *Constitution*. Other Chapter 9 institutions provided in section 181 of the *Constitution* are the Public Protector; the South African Human Rights Commission; the Commission for Gender Equality; and the Electoral Commission. The binding force of the decisions and recommendations of these institutions was affirmed in *Economic Freedom Fighters v Speaker of the National Assembly* 2016 3 SA 580 (CC) in which the Constitutional Court held that the recommendations of the Public Protector to the executive and legislative arms of government are binding, unless taken on review and set aside by the courts.

³³ The *RCMA* 120 of 1998.

of regulations; to repeal certain provisions of certain laws; and to provide for matters connected therewith.³⁴

The *RCMA* defines a customary marriage as “a marriage that is negotiated, celebrated or concluded according to any of the systems of indigenous African customary law in South Africa.”³⁵ The Act is specific in defining customary law as “the customs and the usages traditionally observed amongst the indigenous African people of South Africa and which forms part of those people.”³⁶ As such, a customary marriage in South Africa can be either polygamous or monogamous.

1.2 Problem Statement

One of the purposes of the *RCMA* is to alleviate issues of the past, particularly the inequality between men and women in customary marriages.³⁷ However, in endeavouring to do so, the *RCMA* has brought up some issues that cause ambiguity in the interpretation and the application of some of its provisions. Despite the clear wording of this Act, there are some inconsistencies about the position of women in customary marriages.

There are academic and jurisprudential challenges emanating from the *RCMA*'s observance of the equality clause, which prohibits both direct and indirect discrimination against certain persons on one or more grounds, which as quoted above, include sex and sexual orientation. Issues of equality arising out of the *RCMA* bring to the fore philosophical questions regarding the position and need for development of customary law and practices in South Africa, particularly in light of the Bill of Rights and evolving social trends.

One instance, forming the subject of this study, is section 6 of the *RCMA* that provides that both husband and wife/wives in a customary marriage are equal. Problems arise because the same *Act* provides that only the husband may have multiple spouses.³⁸ This is a direct exclusion of women from exercising choice,

³⁴ Preamble to the *RCMA*.

³⁵ Section 1 of the *RCMA*. See also Maithufi and Bekker 2009 *Obiter* 405.

³⁶ Section 1 of the *RCMA*.

³⁷ Section 6 of the *RCMA*.

³⁸ Section 7(6) of the *RCMA*.

where the circumstances allow, on having more than one husband as spouses. Whereas on the face of it this argument may seem moot, or even hilarious, given the nature of South African customary law founded on patriarchy and the inferior position of women, there is a potential conflict between this provision and the equality clause.

The exclusion of same-sex couples from the benefits accorded to heterosexual spouses by the *RCMA* carries with it the connotation that same-sex unions are alien and the spouses to such unions have no right whatsoever, based on their sexual orientation, to enjoy the benefits of African customary law. To this end, same sex spouses are excluded directly and indirectly based on their sex and sexual orientation. This is so in that the silence of the *RCMA* and other legislation on the recognition of the potential right of same-sex couples to have multiple spouses. This exclusion also extends to white South Africans who may desire to enjoy the benefits of customary marriages for personal and taxation reasons. Without fear of contradiction, it is submitted that discrimination of this nature is conspicuous and thus needs to be addressed. It is on this basis that the legal ramifications of customary marriages are examined in this study.

1.3 Aims and objectives

This study examines the legal implications of customary marriages as provided for and regulated by the *RCMA* and relevant legislation, including but not limited to the *Constitution* and legislation on customary law in South Africa. It examines academic and jurisprudential problems emanating from the nature and wording of the *RCMA* and complementary legislation *vis-à-vis* the principles and ideals of the Bill of Rights, particularly the equality clause.

“A husband in a customary marriage who wishes to enter into a further customary marriage with another woman after the commencement of this *Act* must make an application to the court to approve a written contract which will regulate the future matrimonial property system of his marriages.”

By explicitly using the term ‘husband’, the *RCMA* shows intent not to include women in this provision or if otherwise the term ‘spouse’ could have been used.

1.3.1 Aims

The aim of this research is to explore the legislative framework governing customary marriages in South Africa, identify and discuss aspects thereof, which affect the norms and ideals of the *Constitution* such as equality and non-discrimination.

1.3.2 Objectives

The objectives of the study are designed to:

- Review the legal status of customary marriages in South Africa;
- Examine the legal implications of customary marriages on all the spouses and discuss how the spouses to a customary marriage are protected by the law;
- Discuss constitutional principles, ideals and values on customary marriages as implied in the provisions on the rights of cultural, religious and linguistic communities and traditional leadership and their impact thereof;
- Analyse the *RCMA*, its complimentary legislation and government policies on customary marriages; and
- Explore the feasibility of the development of legislation on customary marriages to dispense with potential conflict to the Constitution; emphasise the need to revisit and develop legislation regarding customary marriages.

1.4 Research questions

The study answers the following questions:

- What is the legal status of customary marriages in South Africa?
- What are the legal ramifications of customary marriages on both spouses and how does the law protect their rights and interests?
- Which constitutional principles, values and provisions on the rights of cultural, religious and linguistic communities and traditional leadership impact on customary marriages?

- How does the *RCMA*, its complimentary legislation and government policies impact on customary marriages?
- What is the feasibility of the development of legislation on customary marriages in dispensing with potential conflict of the *RCMA* with the Constitution and other potential conceptual problems?

1.5 Significance of the Study

This study finds legal and philosophical relevance in that it examines the *RCMA* and other laws regarding customary marriages. It interrogates inconsistencies with constitutional principles and values with a view to proposing legislative amendment of law regulating customary marriages to dispense with potential conflicts with the equality clause. The study raises arguments on the exclusive enjoyment of specific rights by particular groups, which though not currently viewed as direct or indirect discrimination on single or more grounds prohibited in section 9(3) of the *Constitution*, are worthy analysing and investigating due to rapidly evolving societal values.

1.6 Literature review

Herbest and Du Plessis note that previous marriage laws in South Africa oppressed women and discriminated against them as well.³⁹ They observe that a husband was superior to his wife and was in control of the marriage property, as well as the children. They further submit that before the enactment of the *RCMA*, women married according to customary law did not have equal legal status as their husbands.⁴⁰ These views correctly state the position of women in South Africa and elsewhere in Africa before the adoption of progressive legislation because of independence from colonial rule and constitutional amendments consequent to the

³⁹ Herbest and Du Plessis 2008 *J. Comp. L.*

⁴⁰ Herbest and Du Plessis 2008 *J. Comp. L.* 12.

signing and ratification of key international and regional human rights instruments,⁴¹ including the International Bill of Rights,⁴² by African states.

Crumrin and Prairie observe that patriarchal laws prohibited women from performing legal acts without the consent and assistance of their husbands.⁴³ The legal status of women, which relegated them to minors incapable of performing independent juristic acts, extended to basic decision-making in the household. This study concurs with such a view. The minor-status of women cut across racial boundaries which defined both colonial and apartheid regimes. There is ample literature on this. Boberg, for instance, provides a comprehensive discussion of the position of women and children in pre-1994 South Africa.⁴⁴

The adoption of the *Interim* and final *Constitutions* removed the patriarchal-based discrimination of women. The equality clause of the *Constitution* guarantees everyone in South Africa equality before the law and equal benefit in the courts. However, the gains of these democratic constitutions benefited only women married under civil law.⁴⁵ Women married in customary law remained under the control of their husbands under the guise of culture. This led to the enactment of the *RCMA*, which provides for the equality of men and women in customary marriages.⁴⁶

Bonthuys and Albertyn observe that indigenous African women are affected by customary marriages.⁴⁷ The disadvantages of customary marriages to women include low capital income, lack of access to municipal services, low educational levels, and high levels of unemployment and high prevalence of HIV infections. They further argue that African households built on customary marriages are more likely to depend solely on a woman's income for her labour in the fields and other income-

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⁴¹ The *Convention on the Elimination of All Forms of Discrimination Against Women* (1979), the *African Charter on Human and Peoples' Rights* (1981) and the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* (2001) are examples of such instruments.

⁴² The International Bill of Rights is comprised of three instruments: the *Universal Declaration of Human Rights* (1948), *International Covenant on Civil and Political Rights* (1966) and the *International Covenant on Economic, Social and Cultural Rights* (1966).

⁴³ Crumrin and Prairie *Women and the Law in Early 19th-Century Indiana* 3.

⁴⁴ Boberg *The Law of Persons and the Family* 321-322.

⁴⁵ The *Marriage Act* 25 of 1961.

⁴⁶ Section 6 of the *RCMA*.

⁴⁷ Bonthuys and Albertyn *Gender Law and Justice* 7.

generating exercises. As a caveat, Bonthuys and Albertyn⁴⁸ substantiate their argument to mean that the labour provided by women in customary marriages in supporting their households does not mean that all African women who are married customarily are poor. Nevertheless, they recognise that this raises the urgency of evaluating the effects of customary rules in the context of greater female poverty and reduced agency.

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Classens, Smythe and Bradfield argue that the *RCMA* is unsuccessful in resolving all tensions between the equality clause and the customary law of marriage.⁴⁹ For example, they argue that even though the *RCMA* uses the term 'polygamy', the periodic but consistent use of the term 'husband' and 'wife' shows that the Act only allows men to have multiple wives. They further contend that if the *RCMA* is to comply with the demand for equality, women would also have more than one husband. The authors emphasise that the *RCMA* covers all customary marriages. This emphasis is correct in that section 2 of the *RCMA* gives legal recognition to all monogamous and polygamous customary marriages, be it existing marriages or new marriages, as long as they comply with all the requirements.

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Classens, Smythe and Bradfield further argue that regardless of section 2 of the *RCMA*, it remains unclear whether certain categories of old marriages are recognised by the Act.⁵⁰ The accuracy of this reasoning depends on one's interpretation of the Act. The assertion can thus be concurred with and contradicted at the same time. For the avoidance of doubt, this study aligns itself with the authors' views. The basis of the concurrence with their assertions is that the denial of women to enter into polyandrous marriages prohibits them not only from being part of marriages which are legally binding, but also forces them to enter into extra marital relationships while they are married. The *RCMA* is thus discriminatory for allowing only men to marry more than one spouse. This fundamentally affects the constitutional right to equality and women's right to freedom of association as enshrined in section 18 of the *Constitution*. The law protects each and every citizen in the country and ensures that their rights are not defeated or discriminated against.

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⁴⁸ Bonthuys and Albertyn *Gender Law and Justice* 7.

⁴⁹ Classens *et al Marriage, Land and Custom* 76-77.

⁵⁰ Classens *et al Marriage, Land and Custom* 76-77.

Simon and Altstein argue that the implementation of the *RCMA* has succeeded in narrowing the equality gap between men and women in customary marriages.⁵¹ They observe that the adoption of the *RCMA* has removed the erstwhile stigma and labelling of some wives and children in customary marriages as illegitimate and therefore without legal rights.⁵² The authors discuss changes brought by the *RCMA*, including the distribution of matrimonial assets.⁵³ This study concurs with the views without reservations.

Simon and Altstein fail to note that the *RCMA* is inadequate in dealing with some factors that are related to customary marriages. For instance, the *RCMA* is silent on what happens to *lobola* upon the dissolution of a customary marriage.⁵⁴ Several issues regarding *lobola* come to the fore at the dissolution of a customary marriage, particularly whether it should be returned. The *RCMA* is thus not clear on this aspect. It is submitted that this aspect needs to be addressed and clarified to achieve a fair and clear settlement between the families upon dissolution of a customary marriage.

Nichols argues that *lobola* has become a contractual accessory to a marriage because without it, a customary marriage cannot be concluded.⁵⁵ He asserts that many South Africans are still part of the practice of *lobola* because they believe that payment of the bride price shows that a wife is valued and creates a bond between the two families. His argument is that most people who champion *lobola* have the impression that it compensates the bride's family for the cost and effort of raising

Commented [Edit7]: Okay, but under customary marriages itself, what happens in a case of dissolution?

⁵¹ Simon and Altstein *Global Perspective on Social Issues, Marriage and Divorce* 90.

⁵² South African common law divided children into two categories; legitimate and illegitimate children, based on the relationship of their parents at the time of conception. In *M v M* 1962 2 SA 114 (GW), the court ruled that 'legitimate children' were children born to parents married in a valid marriage. According to Boberg *The Law of Persons and the Family* 321-322, 'illegitimate children' were divided into three categories: 'ordinary illegitimate children (children whose parents could have been validly married but were not married at the time of their conception; 'adulterine children (children conceived in adulterous encounters – i.e. when one or both parents were validly married to someone else; and 'incestuous children' (children conceived by parents who were prohibited by law from marrying due to their close family relationship, as in brother and sister.

⁵³ Simon and Altstein *Global Perspective on Social Issues, Marriage and Divorce* 90-91.

⁵⁴ Section 1 of the *RCMA* (the definitions clause), defines *lobola* as "property in cash or kind, whether known as bride wealth, *bogadi*, *bohali*, *xuma*, *lumalo*, *thaka*, *ikhazi*, *magadi*, *emabheka* or by any other name, which a prospective husband or the head of his family undertakes to give to the head of the prospective wife's family in consideration of a customary marriage."

⁵⁵ Nichols *Marriage and Divorce in a Multi-cultural Context* 53.

her.⁵⁶ This is the true position of the state of affairs on the ground, particularly among indigenous South Africans residing in villages.

However, Fenrich, Higgins and Galizzi hold a different view from Nichols.⁵⁷ They contend that *lobola* is not a general requirement for the conclusion of a valid customary marriage. They argue that *lobola* is just a choice implemented by the families traditionally and can be used as an excuse by the bride's family to prevent a potential groom from marrying their daughter. This is achieved through the levying of an exorbitant *lobola* price beyond the potential groom and their family's reach, thus effectively thwarting a marriage endeavour.⁵⁸ This study concurs with the view. Like all laws, the requirement of *lobola* is not immune to abuse by families seeking to enrich themselves or prevent particular individuals from marrying into their families.

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This is not necessarily correct.

1.7 Research Methodology

This study is an examination of South African legislation and policies on customary marriage. The materials used to conduct the study include the *Constitution*, legislation, case law, academic writings, books and journal articles. The nature of these materials and the study itself called for a doctrinal research approach in which primary and secondary data are used. The purely jurisprudential nature of the study does not require field research.

1.8 Chapter outline

This study is divided into five chapters briefly summarised below.

Chapter One: Introduction

This chapter outlines the philosophical context, methodology and structure of the study.

Chapter Two: Delineating the Nature of Customary Marriages in South Africa

⁵⁶ Nichols *Marriage and Divorce in a Multi-cultural Context* 53.

⁵⁷ Fenrich *et al The Future of African Customary Law* 443.

⁵⁸ Fenrich *et al The Future of African Customary Law* 443.

This chapter discusses customary marriages in South Africa. It distinguishes customary marriages from civil marriages and other forms of matrimonial unions. The chapter sets out the requirements for the conclusion of a valid customary marriage, the applicable traditional rules to such marriages and the dissolution thereof.

Chapter Three: New Constitutional Dispensation and the Legal Structure of Customary Marriages

The influence of the *Interim Constitution* and the 1996 Constitution, together with other legislation on customary marriages, is examined in this chapter. Specific focus is placed on the applicable provisions of the *RCMA*, the Bill of Rights and the general principles, values and aspirations of the Constitution.

Chapter Four: Shortcomings of Customary Marriages

This chapter interrogates the legal ramifications of customary marriages on constitutional principles.

Chapter Five: Findings, Recommendations and Conclusion

The chapter comprises of findings of the study and also makes recommendations for possible solutions identified. In closing, the major conclusions of the study are presented in this chapter.

1.9 Chapter Summary

In summary, it is important to note that this study does not challenge the existence of customary marriages but rather, it outlines how some of the provisions of legislation regarding customary marriages are regulated (especially in issues including *lobola*, equality, divorce, requirements of a valid customary marriage and so forth). In most cases, customary laws do not give women favourable treatment. The elucidation in this regard would be to have standard rules for every party involved irrespective to their social status, gender or culture. This research study therefore brings issues around customary marriages in South Africa to the fore.

Chapter 2 Delineating the Nature of Customary Marriages in South Africa

2.1 Introduction

Customary marriages, also referred to as traditional marriages,⁵⁹ came about as an outcome of the diversity of religions and cultures found in South Africa.⁶⁰ Since 1994, South African courts have been working to find a fair balance between African customary law as acknowledged by the *Constitution* and some of the fundamental rights and freedoms contained in the Bill of Rights.⁶¹ South African law furthermore identifies customary matrimonies through the *RCMA*. In terms of this statute, “customary marriages must be entered into in terms of the traditions and customs of indigenous South Africans”.⁶² With the introduction of the *RCMA*, all customary marriages in South Africa were legally recognised and therefore, were granted the same legal protection as civil marriages.⁶³ This chapter is a synoptic delineation of the institution of customary marriages in South Africa with specific focus on the history, rules and requirements for their validity as well as the nature of customary marriages. However, before developing the arguments in this chapter, it is important to explain customary law in general and its place in South Africa.

2.2 Scope of Customary law

In general parlance, the word ‘custom’⁶⁴ refers to “a traditional and widely accepted way of behaving or doing something that is specific to a particular society, place and time”.⁶⁵ For custom and traditions to be developed as law, they must be familiar to the public; they must be followed; in addition they must be able to be carried out.⁶⁶

⁵⁹ Claasens *et al Marriage, Land and Custom* 146.

⁶⁰ Kuhle *et al The Critical Analysis of Religion* 273.

⁶¹ Wall 2015 <http://www.sahistory.org.za>.

“The 1996 South African *Constitution* incorporated customary law into the South African legal system. The ensuing legislative tensions between customary law, the *Constitution*, and the Bill of Rights gave rise to concerns regarding the protection of women’s rights. This legislative conflict is illustrated by cases related to inheritance and succession.”

⁶² Section 27 of the *Transkei Marriage Act* 21 of 1978 and Section 3(1)(b) of the *RCMA* 120 of 1998.

⁶³ Section 2 of the *RCMA*.

⁶⁴ Practice_ a thing that one does habitually.

⁶⁵ Weiner and Simpson *Oxford English Dictionary*.

A custom is an activity, a way of behaving, or an event which is usual or traditional in a particular society or in particular circumstances.

⁶⁶ South African Law Commission “Customary Law” 210.

Customary law refers to “the written and unwritten rules that have been developed from the customs and tradition of communities”.⁶⁷ It is one of the sources of law that is made up of certain practices from that community. Such practices have been passed from generation to generation and developed into law. Customary law is a traditional common rule that has become a natural part of the accepted and expected norms and conduct in the community, profession or trade and is treated as a legal institution. It exists where a certain legal practice is observed and the relevant actors consider it to be law⁶⁸ (*opinio juris*).⁶⁹ The ruling by the Constitutional Court in the case of *Bhe v Magistrate of Khayelitsha*⁷⁰ specified that customary law was “protected by one subject to the Constitution in its own right”.⁷¹

In the cases of *Van Breda v Jacobs*,⁷² “a local custom amongst fishermen was that once they set their lines on the beach where no boats are permanently stationed, for the purpose of catching a shoal of fish seen moving along the coast, no other fishermen are entitled to set lines within any reasonable distance in front of the lines already set. This was held to be duly established by the evidence as a valid custom”.⁷³

As set out in the foregoing judgments, the following features can be extrapolated for a customary rule to be recognised as a legal rule:

- (a) It must be reasonable;
- (b) It must have existed for a long time;
- (c) It must be generally recognised and observed by the community;
and
- (d) The contents of the customary rule must be certain and clear.

⁶⁷ South African Law Commission “Customary Law” 210.

⁶⁸ Owen *The Complete Guide to Investigations and Enforcement* 42.

⁶⁹ *Opinio juris sive necessitatis* “an obligation to be bound.” In addition to recurrent and widespread practice, there should be an obligation to be bound.

⁷⁰ *Bhe v Magistrate of Khayelitsha* 2005 (1) SA 66 (CC).

⁷¹ 2005 (1) SA 66 (CC) para 41.

⁷² *Van Breda v Jacobs* 1921 AD.

⁷³ *Van Breda v Jacobs* 1921 AD para 330.

In South Africa, there is a distinction between living and official customary law. Living customary law refers to the real practices and customs as lived and observed by traditional communities.⁷⁴ Living customary law refers to the relationships in these traditional communities and the rules that bind the people.⁷⁵ This is constantly changing and constitutes the fluidity or flexibility of customary law.⁷⁶ For example, many urban people would say that they do not observe customary law, but they do expect *lobola* before marriage and they might even have the traditional ceremony where the bride is handed over. This constitutes living customary law as adopted by the urban setting. When defining living customary law, it is important to clarify in the definition that it is unwritten customs and these customs regulate the day-to-day lives of people. Before a customary law is regarded as a legal binding rule, two aspects have to be present, which are custom and acceptance.⁷⁷

Official customary law refers to the law that the courts or state institutions apply. This includes codes and other legislation, old court cases and textbooks. The problem with official customary law is that, official customary law is so much different from people's experiences because of history. However, it is still applicable in as far as it is not unconstitutional or overturned by living customary law.⁷⁸ The mixed customary law is customary law that results from certain legislation that makes room for customary law but also lays down some rules that mimic the common law. For example, the *RCMA* allows for customary marriages and a certain degree of living law to apply, but also makes a provision for consequences that look very similar to the operations in common law.⁷⁹

As indicated above, customs refer to the repetitive behaviour of people or the community. Acceptance is crucial for a custom to be binding and this usually comes

⁷⁴ Oomen *Chiefs in South Africa: Law, Culture and Power in the Post-Apartheid Era* 78.

⁷⁵ Oomen *Chiefs in South Africa: Law, Culture and Power in the Post-Apartheid Era* 78.

⁷⁶ Oomen *Chiefs in South Africa: Law, Culture and Power in the Post-Apartheid Era* 78.

⁷⁷ Maluleke 2012 *PER* 3. See also Jakhu and Dempsey *Routledge Handbook of Space Law* 8.

⁷⁸ Ozoemena 2016 *SAFLII* 151.

⁷⁹ Section 4(1) of the *RCMA* provides for the parties to the marriage to ensure that their customary marriage is registered; and in (9) it states that failure to register the marriage does not affect the validity of the marriage. See also section 7 of the *RCMA* which permits for polygamous marriages however throughout the section, reference is only made to a 'husband' with no mention of a woman who wishes to enter into a further customary marriage.

from the community itself.⁸⁰ This is what makes customary law different from other laws in South Africa and elsewhere.⁸¹ The pressure to follow the rules is not from the state; it comes from the rules that are negotiated by the community themselves.⁸² It is important to understand that the living law is constantly changing. If the claimant can show that the rule that they want to enforce is the rule in the community, then, despite what old legislation says, it should be possible to enforce that rule.⁸³ This is what the Constitutional Court reiterated a few times in recent rulings.

For example, in the case of *Shilubana v Nwamitwa*,⁸⁴ the Court held that “living customary law is adductive by nature; change is intrinsic to and can be invigorating of customary law”.⁸⁵ In this case, Ms Shilubana of the *Valoyi* traditional community in Limpopo was selected as *hosi* (chief) opposing past practices where the eldest son of the previous chief succeeded his father as the new chief. The respondent in this matter, Mr Nwamitwa, disputed Ms Shilubana’s appointment because of his status as the eldest son and therefore he would automatically become chief. The matter had previously been taken to the High Court and the Supreme Court of Appeal where judgment was rendered in favour of Mr Nwamitwa. The matter was later taken to the Constitutional Court, where a different view was taken and the judgment delivered in favour of Ms Shilubana, stating that she was legitimately appointed as the chief of the Valoyi people.⁸⁶

The Constitutional Court emphasised that “African customary law is a living system of law, not bound by historical precedent”.⁸⁷ The Court also found that “African customary law is meant to reflect the current practices of a particular community and hence was developed with reference to the constantly evolving practices underlining the current system of norms by which that community has chosen to live”.⁸⁸ The Court further said that, living customary law is adapted by nature, definition and

⁸⁰ Bekker *Introduction to Legal Pluralism in South Africa* 2.

⁸¹ Bekker *Introduction to Legal Pluralism in South Africa* 2.

⁸² Bekker *Introduction to Legal Pluralism in South Africa* 4.

⁸³ Bekker *Introduction to Legal Pluralism in South Africa* 4.

⁸⁴ 2008 (2) SA 66 (CC).

⁸⁵ *Shilubana v Nwamitwa* 2008 (2) SA 66 (CC) para 54.

⁸⁶ *Shilubana v Nwamitwa* 2008 (9) BCLR 914 (CC) para 81.

⁸⁷ *Shilubana v Nwamitwa* 2008 (9) BCLR 914 (CC) para 44.

⁸⁸ *Shilubana v Nwamitwa* 2008 (9) BCLR 914 (CC) paras 44-46.

change. The Court, therefore, held that African customary law regarding the chief had legally advanced to permit women to be chosen as chiefs and that this advancement was in line with the *Constitution*.⁸⁹ The appeal was supported, the Court finding that Ms Shilubana was validly appointed. In short, living customary marriage is determined by the repetitive behaviour of people or the community and that behaviour must be accepted to be a binding rule.

In the case of *Bhe v Magistrate of Khayelitsha*,⁹⁰ the Constitutional Court held that “living customary law is a dynamic system of law which is continually evolving to meet the changing circumstances of the community in which it operates”.⁹¹ In *Alexkor v Richterveld Community*,⁹² it was said that, “customary law is a system of law that throughout its history has evolved and developed to meet the changing needs of the community and it would continue to evolve within the context of its values and norms consistent with the *Constitution*”.⁹³ When living customary law is applied in the courts, it becomes a part of precedents until it is proven wrong. It is there for state living customary law.⁹⁴

Hlophe alludes that the criticism in *Mthembu v Letsela* is justified but he maintains “that in deciding to assess an African customary practice on its own merits without assuming its inferiority to some other mainstream notions of propriety, the Court sent a strong signal that in future an attempt would be made to understand an impugned practice holistically.⁹⁵ If only to establish whether it continued to serve a

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⁸⁹ *Shilubana v Nwamitwa* 2008 (9) BCLR 914 (CC) para 44.

⁹⁰ 2005 (1) SA 66 (CC). See also

⁹¹ *Bhe v Magistrate of Khayelitsha* 2005 (1) SA 66 (CC) para 153.

⁹² 2004 (5) SA 460 (CC).

⁹³ *Alexkor v Richterveld Community* 2004 (5) SA 460 (CC) para 53.

⁹⁴ Moore and Himonga “Living Customary law and families in South Africa” 64.

⁹⁵ *Mthembu v Letsela* 1997 (2) SA 936 (T).

“The applicant, Hleziphi Mthembu, a Zulu woman, approached the Constitutional Court for relief in a matter of succession to the estate of Watson Letsela, to whom she claimed to have been married by customary law, and who had left a house in which she had lived with him together with his parents, his sisters and her daughters. Letsela, father of the deceased, claimed that the house should devolve upon him according to the rules of customary law, in terms of which only first-born or precedent males may inherit in cases of intestacy to the exclusion of females and junior males. The applicant sought an order declaring this rule to be inconsistent with the interim Constitution and consequently invalid. The High Court found that the customary law rule excluding women from inheritance was prima facie discriminatory on grounds of sex or gender but not unfairly so because of the existence of a concomitant duty of support placed on an heir to see to the needs of the whole family. The court referred the matter for the hearing of oral evidence on whether there was a valid customary marriage between the applicant and the

purpose or whether circumstances had so changed as to render it outdated, anachronistic or downright harmful".⁹⁶

2.3 The nature of customary marriages in South Africa

In South Africa, historically, customary marriages have always been polygamous, with one man marrying more than one wife.⁹⁷ The common requirement for all customary marriages was the payment of *lobola* (bride price).⁹⁸ This payment, mostly in cattle and or any other valuable goods, was paid to the bride's father or her family.⁹⁹ Although traditional marriages were not recognised by law in the past, they were entered into and honoured across most parts of South Africa.¹⁰⁰ Before the adoption of the *Interim Constitution*, there was legislation against customary marriages such as the *Black Administration Act* (hereafter the *BAA*),¹⁰¹ the *Bantu*

deceased. In the hearing, reported later as *Mthembu v Letsela and Another*, counsel for the applicant requested the court to develop customary law in line with the spirit, purport and objects of the Bill of Rights, as provided for in section 35(3) of the interim Constitution. The Court declined the request on the ground that it was the job of the legislature to bring changes to customary law in this instance".

"In the appeal, reported as *Mthembu v Letsela and Another*, the Supreme Court of Appeal (hereafter SCA) considered the same grounds of attack against the customary law rule of male primogeniture, which had been dismissed in the court a quo. The Court dismissed these grounds and went on to consider the invitation to develop customary law in terms of section 35(3) so that it sheds its discriminatory elements. The Court declined the invitation arguing that Tembi was excluded by illegitimacy not gender and that it was undesirable to pronounce on such an important constitutional question in a case in which the issue was academic. The appeal was dismissed.⁹⁵ The earliest criticism of the outcome in the first Mthembu case was that it was wrong to use the traditional duty of support placed on an heir to maintain the rest of the family of the deceased to save the customary law rule of male primogeniture. According to Albertyn, the conclusion had no factual basis and indeed ignored the widespread non-compliance by heirs with this obligation, especially in the urban areas.⁹⁵ Mthembu was also criticised for the failure by the court to recognise the existence of a marriage between Hleziphi Mthembu and the deceased, which would have ensured the centring of the real constitutional issue, sex and gender, as opposed to illegitimacy. I share these sentiments. There are strong grounds for arguing that there was enough in the relationship to ground the existence of a customary marriage: discussions about *lobola*, cohabitation, pregnancy and the birth of a child".

⁹⁶ *Mthembu v Letsela* 1997 (2) SA 936 (T).

⁹⁷ Njoh *Tradition, Culture and Development in Africa: Historical Lessons for Modern Development Planning* 53. See also Halwani *Philosophy of Love, Sex and Marriage: An Introduction* 290.

⁹⁸ It is similar to dowry as it exists in most other African customs. See also Belay *Marriage markets and virility in South Africa with comparisons to Britain and Sweden* 36.

⁹⁹ Belay *Marriage markets and virility in South Africa with comparisons to Britain and Sweden* 36.

¹⁰⁰ Belay *Marriage markets and virility in South Africa with comparisons to Britain and Sweden* 37.

¹⁰¹ The *BAA* 38 of 1927.

According to the Preamble to the *Act*, its purpose was to provide for the better control and management of black affairs.

Laws Amendment Act (hereafter the *BLAA*)¹⁰² and the *Code of Zulu Law*.¹⁰³ A perusal of the substance of these legislative pieces reveals that these legislations were oppressive to women.¹⁰⁴

According to the *BAA*, women married under customary marriages were regarded as a minor irrespective of their age and marital status.¹⁰⁵ “The *BAA* applied to customary marriages only, and as a result in terms of the position of South African women, it placed prohibitions on specific property which they could own”.¹⁰⁶ Women were unable to acquire credit; they were not permitted to enter into contracts without the consent of the husband and they had limited access to the courts.¹⁰⁷ As time went by, section 11A of the *BAA*¹⁰⁸ was incorporated. Unfortunately, it did not improve the legal status of women in terms of their legal capacity, especially with respect to contracts and the acquisition of property. An attempt to develop the status of women in customary marriages was made in the *Zulu Code* which stated, amongst other things, that women over the age of 21 had attained majority.¹⁰⁹ However, section 27(3) of the *KwaZulu Act* complicated the position of women by

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¹⁰² Section 31 of the *BLAA* 76 of 1963.

This *Act* afforded female partners in a customary marriage the opportunity to be eligible to claim for damages upon the death of their husbands.

¹⁰³ The *Code of Zulu Law Act* 6 of 1981.

According to its Preamble, the purpose of this *Act* is to bring equality between Zulu men and women who were in customary marriages.

¹⁰⁴ See for example, section 11(3) (b) of the *BAA* which provided that “a woman is deemed to be a minor and her husband was regarded as her guardian. She could not enter into contracts without her husband’s consent and she was also not allowed to ask for divorce and even request the custody of her children upon the dissolution of the customary marriage.” See also section 31 of the *BLAA* provided that “a partner in a customary union shall be entitled to claim damages for loss of support from any person who unlawfully causes the death of their partner to such a union or is legally liable other partner is in respect thereof, provided such partner is not at the time of such death a party to a subsisting marriage”.

¹⁰⁵ Section 11(3)(b) of the *BAA*.

“Such a woman is deemed to be a minor and her husband is regarded as her guardian. As a result, the woman cannot contract without the consent of her husband. According to this section, women were also not allowed to ask for a divorce and even request the custody of their children upon the dissolution of their customary marriage”.

¹⁰⁶ Himonga 2005 *Juta* 92. See also South African History Online 2016 <http://www.sahistory.org.za>.

¹⁰⁷ Section 11(3) (b) of the *BAA*. See also South African History Online 2016 <http://www.sahistory.org.za>.

¹⁰⁸ Section 11A inserted by section 1 of *Act* 90 of 1985, substituted by section 1 of *Act* 32 of 1987 and repealed by s 1(1) of *Act* 28 of 2008.

¹⁰⁹ Section 16 *KwaZulu Act* 6 of 1981.

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stating that married women were the subjects of their husbands. This meant that although they attained majority, these women remained, in practice, minors.

Customary marriages were an aftermath of British colonialism in parts of Africa.¹¹⁰ Customary marriages were an integral part of precolonial African culture that allowed families to be both spectators and controllers of the marriage institution outside the colonial laws. These marriages also accommodated the African peoples' propensity for polygamy.¹¹¹ Customary marriages differ considerably from civil marriages in that customary marriages are founded on tradition and customs, while civil marriages are Western-oriented unions emanating from Roman-Dutch law and the *Marriage Act* in South Africa regulates them.¹¹²

Civil marriages have always been entered into voluntarily, as opposed to customary marriages, which in most cases, were arranged by the elders of the two families. The validity and recognition of a customary marriage depends on the payment of *lobola*, the bride price, to the prospective wife's family. The question remains whether the payment of *lobola* does not violate natural law.¹¹³ It is noted that, previously, *lobola* was regarded as a sign of appreciation to the bride's family for raising and giving up their daughter. However, the same gratitude is not shown to the groom's family. Customary law imposes the requirement to pay *lobola* on the prospective husband and not his wife. It is taboo for a prospective wife to contribute to the payment of her *lobola*, no matter how affluent she is.¹¹⁴

The law recognised customary marriages for a limited purpose. The *Constitution*, more especially the Bill of Rights,¹¹⁵ played a very big role in recognising customary

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¹¹⁰ Nagmabadi and Joseph *Encyclopaedia of women and Islamic cultures: Family, Law and Politics* 425.

¹¹¹ Sheleff *The Future of Tradition: Customary Law, Common Law and Legal Pluralism* 337.

¹¹² The *Marriage Act* 25 of 1961 "is an Act of the Parliament of South Africa governing the solemnisation and registration of marriages in South Africa".

¹¹³ Ngema 2012 *SPECJU* 30.

¹¹⁴ Rudwick and Posel 2014 *J.CAS* 127.

"Almost all men exclude the possibility that their fiancées contribute to *lobola*, particularly on the ground that this would erode their status in the marriage. A few, however, acknowledged that a fiancée might assist indirectly, for example, by paying relatively more of the mutual living costs or by contributing to the wedding itself."

¹¹⁵ Chapter 2 of the *Constitution*.

marriages as it provided for the right to culture.¹¹⁶ Historically, when the British colonialists arrived in South Africa, polygamy, like many other customary marriages, was a new phenomenon to them.¹¹⁷ Customary marriages were perceived as a form of slavery as women were bought and sold through the token *lobola*.¹¹⁸ Over time, customary marriages grew to become arrangements wherein families met in a formal traditional setting, at the prospective groom's request, to negotiate for the girl's hand in marriage.¹¹⁹ At times, these marriages were arranged by the families of the prospective spouses. In both instances, the groom's family would pay *lobola* in livestock or money as determined by the bride's family.¹²⁰ It has been observed that the payment of *lobola* was also a demonstration to the bride's family that their daughter was going to be cared for.¹²¹

Traditionally, a customary marriage is concluded after *lobola* has been paid and accepted. Unlike civil marriages, there was no ante nuptial contract or certificate of solemnisation of a customary marriage. A customary marriage is celebrated in accordance with the traditions and customs of a people.¹²² During such celebrations, rituals are performed to consolidate and recognise the marriage.¹²³ Customary marriages have been regarded as inconsistent with the principles of natural law.¹²⁴ For this reason, they were not recognised by civil law for many years.¹²⁵ This position changed in 1927 when the customary practice of *lobola* was given legal

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"The Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom. The state must respect, protect, promote and fulfil the rights in the Bill of Rights."

¹¹⁶ Section 31 of the *Constitution*.

¹¹⁷ Bennett *Customary Marriages in South Africa* 188.

¹¹⁸ Hubbard and Terry *Marital property in Civil and Customary marriages: proposals for law reform* 240.

¹¹⁹ Nkosi 2013 *De Rebus* 223.

¹²⁰ Gopal and Salim *Eastern Africa Speaks* 104.

¹²¹ Gopal and Salim *Eastern Africa Speaks* 104.

¹²² Section 3 *RCMA*.

¹²³ Rituals differ from culture to culture, for instance, in the Batswana community, some of these rituals may include amongst many others, changing of bride's name, exchange of gifts between both families, slaughtering of a sheep to welcome the bride, *go laiwa* etc. which means to be counselled by married representatives of both families and also advising the new couple on how to conduct themselves in a marriage.

¹²⁴ Rautenbach and Du Plessis 2012 *McGill* 749.

¹²⁵ *Suid Afrikaanse Nasionale Trust en Assuransie Maatskappy Bpk v Fondo* 1960 2 S Afri R para 467.

recognition by the *BAA*.¹²⁶ This Act prohibited the courts from finding the custom of *lobola* as inconsistent with natural law.¹²⁷ Regardless of the existence of the *BAA*, customary marriages remained unrecognised even though there was legislation in place to protect it.¹²⁸ The legal uncertainty on customary marriages in South Africa continued until the enactment of the *RCMA* in the year 2000.

Prior to the entry into force of the *RCMA*, a customary marriage was recognised only for a limited purpose.¹²⁹ This was because custom and practice permitted polygamy even though the marriages were not solemnised in terms of the *Marriage Act*.¹³⁰ “The *RCMA* confers full legal recognition on customary marriages regardless of when they were concluded and regardless of the number of wives involved in the marriage”. The *RCMA* preserves the old customary law requirements for and consequences of customary marriages concluded prior to its commencement in 1998. It also creates different requirements and consequences for customary marriages entered into operation.¹³¹

The essential requirement for a valid customary marriage is consent.¹³² The wife-to-be must publicly announce to the official witnesses that the marriage is taking place in her own free will, volition and with her consent.¹³³ If either of the future spouses is a minor, his or her father/ guardian provides consents to the marriage.¹³⁴ In addition,

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¹²⁶ Customary marriages were recognised for a limited purpose. They were recognised if they were registered under the *BAA*.

¹²⁷ Section 11(1) *BAA* 38 of 1927.

¹²⁸ Section 31(1) of the *BAA* 76 of 1963 provides as follows:

“A partner in a customary union...[Shall] be entitled to claim damages for loss of support from any person unlawfully causes the death of the other partner to such union or is legally liable in respect thereof, provided such partner or such other partner is not at the time of such death a party to a subsisting marriage.”

Section 4(3) of the *Workmen's Compensation Act* 30 of 1941 provides as follows:

“In a case of a Native, ‘widow’ includes any woman who was associated with a deceased native workman in a relationship according to native law and custom were either the man or the woman was a party to the subsisting marriage.”

Section 5(6) of the *Maintenance Act* 23 of 1963 provides as follows:

“For the purposes of determining whether a [Bantu African] is legally liable to maintain any person, he shall be deemed to be the husband of any woman associated with him in a customary marriage.”

¹²⁹ Section 3 of the *BLAA* 76 of 1963. See also *South African Law Report* (2004) 358.

¹³⁰ *South African Law Report* (2004) 358.

¹³¹ Cronje and Heaton *South African Family Law* 191.

¹³² Cronje and Heaton *South African Family Law* 191.

¹³³ Horrell and Cillie 1963 *Missionswiss. Abh und Texte* 226.

¹³⁴ Horrell and Cillie 1963 *Missionswiss. Abh und Texte* 226.

lobola, which is bride price, is customarily delivered in the form of livestock and/or money given to the head of the bride's family in consideration of the marriage.¹³⁵ A ceremony is not a prerequisite but such an occasion often takes place.¹³⁶ "The wife must then leave her family home and live with her husband. Certain specified family members are not allowed to marry within the prohibited degrees of relationship for purposes of entering into a customary marriage".¹³⁷ Customary marriages concluded before the coming into operation of the *RCMA* had to be registered with the Department of Home Affairs before 15 November 2002.¹³⁸ However, non-registration does not affect the validity of the marriage.¹³⁹ The proprietary consequences remain unchanged since the entry into force of the *RCMA*. Thus, customary marriages continue to be governed by customary law.¹⁴⁰

Since customary marriages were not fully recognised by law, so too was their matrimonial property regime: this necessitated a difference between a customary marriage in community of property and out of community of property. In customary law, there was no such marriage as one in community of property or out of community of property.¹⁴¹ The husband, as head of the household, controlled the entire family property. Even though rare, upon dissolution of a customary marriage, the wife had to return to her family where the male head of her family had an obligation to take care of her.¹⁴² Prior to the enactment of the *RCMA*, it was not a requirement to register a customary marriage, except in the former homelands of Transkei, Bophuthatswana and KwaZulu.¹⁴³ In contemporary times, once a customary marriage has been concluded, it may be registered in terms of the *RCMA*. "The failure to register a customary marriage does not render the marriage invalid".¹⁴⁴

¹³⁵ Horrell and Cillie 1963 *Missionswiss. Abh und Texte* 226.

¹³⁶ Horrell and Cillie 1963 *Missionswiss. Abh und Texte* 226.

¹³⁷ Section 3(6) *RCMA*.

¹³⁸ Section 4(3)(a) *RCMA*.

¹³⁹ Section 4(9) *RCMA*.

¹⁴⁰ Meyer "Recognition of Customary Marriages" 14-15.

¹⁴¹ Rautenbach and Du Plessis 2012 *McGill Law Journal* 749.

¹⁴² Bennett *Human Rights and African Customary Law under the South African Constitution* 125.

¹⁴³ Rautenbach and Du Plessis 2012 *McGill Law Journal* 750.

¹⁴⁴ *Sehloho v Minister of Home Affairs* 2012 ZAFSHC 157 para 19.

However, failure to register a customary marriage may make it difficult to prove its existence and validity. It is therefore important for the spouses to register their customary marriage by lodging their application for registration of a customary marriage with the Marriages Registration Officer. The prescribed application form must be completed and submitted to the Officer.¹⁴⁵ The Registration Officer, in terms of the *RCMA*, is any person who is appointed as such by the Minister of Home Affairs or any person acting under the Minister's authorisation.¹⁴⁶ Before registering a customary marriage, the Registration Officer must satisfy himself that a valid customary marriage was concluded. If so satisfied, the Registration Officer must issue the spouses with a certificate of registration.¹⁴⁷

A case in point regarding the registration of a customary marriage and the consequences thereof is *Kambule v The Master and Others*.¹⁴⁸ The applicant was married in the Republic of Transkei (one of the TBVC created by the apartheid government)¹⁴⁹ with civil rights in terms of the provisions of the *BAA*. She later claimed she also got married to the same husband in terms of customary law. The Court held that it was not important for the purposes of the case to determine the effects of non-recognition of a customary marriage in terms of the *Transkei Marriage Act* (hereafter the *TMA*)¹⁵⁰ because that *Act* had been repealed by the *RCMA*. The Court further held that "the provisions of sections 4 and 10(1) and of the *RCMA* which preclude the recognition of a customary marriage entered into during the subsistence of a civil marriage were prospective and not retrospective in effect".¹⁵¹

The *Kambule Case* established judicial authority that spouses in a customary marriage are not competent to enter into a marriage in terms of the *Marriage Act* during the subsistence of their customary marriage. However, this applies only to customary marriages entered into after the commencement of the *RCMA*. It does

Sepato AJ argued that: "it is correct that failure to register a customary marriage does not invalidate an otherwise valid customary marriage. But registration can only follow a validly concluded marriage; that it one according to a specific customary law."

¹⁴⁵ Department of Home Affairs 2016 <http://www.home-affairs.gov.za>.

¹⁴⁶ Section 1(vii) of the *RCMA*.

¹⁴⁷ Section 4(4)(b) of the *RCMA*.

¹⁴⁸ *Kambule v The Master* 2007 (3) SA 403 (E).

¹⁴⁹ The TBVC states included the Transkei, Bophuthatswana, Venda and Ciskei.

¹⁵⁰ The *Transkei Marriage Act* 21 of 1978.

¹⁵¹ *Kambule v The Master* 2007 (3) SA 403 (E).

not apply to marriages concluded prior to the commencement of the *RCMA*. The decision in *Kambule* further shows that a customary marriage concluded in accordance with customary law as defined in section 1 of the *RCMA* and entered into prior to the commencement of the *RCMA* is valid regardless of whether or not it had been registered.

Although the naturalistic element of customary marriage has been questioned in the new era, customary marriages have some advantages for people involved in them. Customary marriages help in procreating children and they provide one of the best options for raising children. They enable an adequate replacement of birth rate and also provide a healthy and secure home to live in. In cases, where a man is married to more than one wife and has children with all his wives, the family is bound to live happily together. The children are taught to acknowledge all their father's wives as their mother. Polygamous marriages also confer more responsibilities on the man, given the big families they often have. This makes them more responsible for their children as they have more responsibilities than their counterparts in monogamous marriages.

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Customary marriages in South Africa are different from civil marriages. There are a lot of cultural processes that one needs to go through in order to conclude a valid customary marriage depending on the ethnic group or tribe where one comes from.¹⁵² Traditionally, in South Africa there were no uniform customary marriage guidelines because of the diversity of cultures concomitant in the country.¹⁵³ Every tribe or ethnic group has its own marriage procedures.¹⁵⁴ Legislation has not generated a clear procedure that must be fulfilled for a customary marriage to be concluded. Customary law concerning customary marriages in South Africa remains vague.¹⁵⁵ That is the locus of the problem with customary marriages in South Africa (legislative vagueness).

¹⁵² Maluleke 2012 *PER* 4.

¹⁵³ Ozoemena 2015 *PER* 976-978.

¹⁵⁴ Maluleke 2012 *PER* 6.

¹⁵⁵ Some provisions of the law regarding customary marriages are vague and contradictory. Such will be discussed in chapter three and four of this research study.

2.4 Polygamy in South Africa

When the British came to South Africa, they did not recognise customary marriages because of their polygamous nature.¹⁵⁶ These British colonisers did not understand the nature of customary marriages and thus viewed them as a form of slavery. They saw *lobola* as a payment for a slave-cum-wife.¹⁵⁷ Put simply, polygamy entails marrying more than one spouse. It is divided into two forms: polygyny and polyandry. South African customary law and statutory law recognises one form of polygamy, which is polygyny. This requires some synoptic discussion. Polygyny gives a man the authority to marry more than one wife. A woman is allowed to marry only one husband. There is no restriction as to the number of wives a man can take as long as he pays *lobola* for all his wives and he can maintain all of them.¹⁵⁸

Over the years, instances of polygyny have been declining in urban South Africa, specifically with the advent of modernity and its practices. This is due to the preference of civil marriages as the marriage of choice. In rural areas, polygyny is also becoming less common.¹⁵⁹ This is attributed to rapid development, the enlightenment of women through education; economic independence as well as the rising costs of living and surreptitious sexual encounters that characterise many-a-marriage and the risks of sexually-transmissible diseases where multiple partners are shared.

In *Maloba v Dube*,¹⁶⁰ the applicant applied for a declaration stating that her late husband had not been married to the first respondent in terms of customary law and that the certificate of registration of the alleged customary marriage that was issued by the Department of Home Affairs in respect of that marriage was invalid. The applicant raised two issues: first, that the alleged marriage between her late husband and the first respondent was not concluded in accordance with customary law; and secondly, that after the *lobola* negotiations her late husband had informed his mother that he no longer wanted to be married to the first respondent. The Court

¹⁵⁶ Herbst and Du Plessis *EJCL* 12.

¹⁵⁷ Herbst and Du Plessis *EJCL* 12.

¹⁵⁸ Herbst and Du Plessis *EJCL* 12.

¹⁵⁹ Herbst and Du Plessis *EJCL* 12.

¹⁶⁰ *Maloba v Dube* 2008 ZAGPHC 434.

had to determine if the requirements of a valid customary marriage were satisfied. The legal question was whether the marriage had been entered into and celebrated in accordance with customary law. After examining the facts and the evidence, the Court concluded that the marriage between the applicant's husband and the first respondent was valid as it had been entered into and celebrated in terms of customary law.¹⁶¹

A customary marriage may be dissolved the same way as a civil marriage is: through an application for divorce lodged with the High Court.¹⁶² All the spouses to a customary marriage are recognised by law as married until such time that a decree of divorce has been granted by the High Court or until the husband or wife are deceased. A customary marriage may not be dissolved by simply telling another person, including the spouse, that the other party does not want to continue with the marriage. The law recognises both spouses as part of the customary marriage, until a decree of divorce has been issued.¹⁶³

The *RCMA* provides that if the husband wants to take a second wife, "he must enter into a written agreement stating what should happen with the property and how it should be shared amongst his wives".¹⁶⁴ The husband needs to apply to the court to approve the written contract and the court then ensures that the interests of all the wives are protected.¹⁶⁵ The problem with not registering customary marriages arises when the marriage is not formalised in a contract and the parties cannot prove that a valid customary marriage has been entered into.¹⁶⁶ This would mean that the spouses would not have evidence to prove that a valid customary marriage has been concluded.¹⁶⁷ If one of the spouses claims that something is rightfully theirs, then, they will have to prove that specific right in the form of an agreement in order to avoid dispute over ownership. If there is no contract or agreement to prove the

¹⁶¹ *Maloba v Dube* 2008 ZAGPHC 434 para 26.

¹⁶² Section 8 of the *RCMA*.

¹⁶³ Section 8(1) of the *RCMA*.

¹⁶⁴ Section 7(6) of the *RCMA*.

¹⁶⁵ Section 7(6) of the *RCMA*.

¹⁶⁶ Demonstrated in *Motsoatsoa v Roro* 2010 JOL 26460 (GSJ).

¹⁶⁷ Section 3 of the *RCMA*.

marriage, then the *RCMA* will consider the marriage to be in community of property.¹⁶⁸

Polygamous marriages have both negative and positive consequences and the reality is that the most negative consequences are faced by women. These could be financial, health or emotional. In many polygamous marriages, the wife and children depend solely on the husband financially, therefore, they are expected to obey and be submissive to him as the head of the family.¹⁶⁹ Health consequences are experienced through STDs (Sexually Transmitted Diseases) from the infected spouse to the other through the man and emotional consequences come in when the senior wife has to deal with the fact that her husband will not always be around but with another woman and their children.

In the past, when a man had more than one wife, this was perceived as signifying wealth and status on his part.¹⁷⁰ With modern education, increased dependence from additional relatives, plus the rising costs of living, this trend is changing. Even though the law does not prohibit men from contracting polygamous marriages, there is an increasing decline in this option. Nowadays, polygyny is often used as an escape route by men who are caught in adulterous relationships as they would prefer to marry the woman as an additional wife instead of enduring the shame and legal consequences of adultery. Although polygyny in the past was conducted for religious reasons, today, it does not hold the same relevance as in the past because it discriminates against women. Therefore, the decision to marry multiple spouses should not be restricted by the law, rather be made a choice that grants women, like men, the power to marry multiple men instead of restricting them because of their gender.

Polygamy should not be banned because it is a significant aspect of cultural marriages. However, it needs to be reviewed, and the choice of a woman to marry multiple men should be expanded. On the other hand, some people who are involved in polygamous marriages have learnt to love the custom and they have

¹⁶⁸ Section 7(2) of the *RCMA*.

¹⁶⁹ Zeitzen *Polygamy: A Cross-Cultural Analysis* 76.

¹⁷⁰ Zeitzen *Polygamy: A Cross-Cultural Analysis* 76

their reasons for doing so which are sound and understandable to some point. Seen from a normative perspective, gender equality as a constitutional norm is highly compromised in such polygamous marriages, even though the parties thereto have contracted to it. Although it is a legislative requirement that the husband consults with the wives prior to contracting a subsequent marriage,¹⁷¹ in practice, this is hardly done.

The case of *Mayelane v Ngwenyama and Another*, focused on the issue of the validity of a man's polygamous marriage if the previous wife or wives were not aware that the other marriage has taken place and none of the women has given consent to it.¹⁷² In this case, the applicant married her late husband under the Tsonga customary law on 1984. After the death of her husband, she found out that her husband was involved in another customary marriage with another woman (the first respondent). The applicant took the matter to court, where it was argued that the marriage to the second woman was invalid because she did not give consent to it. However, on appeal, the Supreme Court of Appeal ruled that "both women had contracted valid customary marriages with the deceased husband. She then took the matter to the Constitutional Court". The Constitutional Court's judgment was in favour of the applicant. The judgment stated that when the second marriage took place, it was a statutory requirement that the first wife be informed of the marriage and a contract entered into. The failure to inform her meant that a formality was not fulfilled, rendering the marriage invalid.

The judgment also stated that "Tsonga customary law has to be developed to include a clear requirement that the first wife's consent to subsequent marriages is necessary for them to be valid".¹⁷³ In addition, the Constitutional Court held that "customary polygamous marriages need to comply with the consent requirement in order to be valid".¹⁷⁴ "The Constitutional Court directed that the judgment must be published; a summary drafted; and circulated to the House of Traditional Leaders and the Minister of Home Affairs". The Constitutional Court also based its decision

¹⁷¹ Section 7(4)(b) of the *RCMA*.

¹⁷² *Mayelane v Ngwenyama* 2013 CCT 57/12 ZACC 14.

¹⁷³ *Mayelane v Ngwenyama* 2013 4 BCLR 918 (CC) para 44.

¹⁷⁴ *Mayelane v Ngwenyama* 2013 4 BCLR 918 (CC) para 85.

on “developing customary law in line with the rights to equality and dignity enjoyed by wives in customary marriages. All customary law is subject to these rights, including other customary marriage systems”.

The question whether polygyny is constitutional or not is debatable,¹⁷⁵ because in this regard, a balance between the right to culture and the right to equality has to be weighed procedurally. Polygyny discriminates against the right to equality of women as it allows a man to marry many wives but not a woman to marry many husbands. In addition, the ensuing weakness suffered by these wives (and their children too) both emotionally and financially when the husband takes up an additional wife is challenging and complicated. In practice, this is probably true for many polygamous marriages as many men have both the financial and physical power over their wives and are often domineering as they expect their wives to serve and obey them.

Polygamous marriages are practiced in South Africa and sanctioned by the law. Before a man marries another woman customarily, his spouse or spouses and his prospective spouse must be joined in the proceedings and must in effect give permission for the further marriage.¹⁷⁶ “A Court can amend any agreement to ensure that the existing wives are not prejudiced financially; even where such wives purport to give consent to the terms of the new marriage”.¹⁷⁷ Where the husband and his wives respect one another and get along and where the husband’s conduct does not get unreasonable and unbecoming, this would mean that the wives are likely to enjoy considerable protection from discrimination.

2.5 Chapter Summary

There have been massive changes in customary marriages in the past and now. Today, the husband and wife have equal rights and status with regards making the decisions on the property they own jointly. The *RCMA* has made it possible that a

¹⁷⁵ In the sense that scholars hold different views about this subject; some are for the practice while others are against it. See also Calder and Beaman *Polygamy’s Rights and Wrongs: Perspective on Harm, Family and Law* 47-48.

¹⁷⁶ *Mayelane v Ngwenyama* 2013 4 BCLR 918 (CC) para 69.
“The Constitutional Court held that the consent of the first wife in a polygamous marriage is a requirement for a subsequent marriage of her husband to be valid, even though the *RCMA* is silent on the issue”.

¹⁷⁷ Section 7(4)(a) of the *RCMA*.

woman married in a customary marriage should be recognised in terms of the law as well as having a legal standing.¹⁷⁸ With all the changes that the *RCMA* came with, the question is whether those laws are effective, especially in achieving equality in such marriages in South Africa. The *RCMA* has buttressed the recognition of customary marriages in South Africa and ensuring that they are legally protected. However, South Africa still has a long way to go in order to reconcile legislative prescripts and cultural practices, especially those that perpetuate practices that are not in conformity with constitutional values and norms. It can be concluded that the law ensures that the rights of the people in customary marriages are recognised and protected. More importantly, in all of this, the law protects the rights of women and more importantly, preserves South African customs and traditions. People married customarily also do have the rights and protection that people married in civil marriages have

¹⁷⁸ Section 6 of the *RCMA*.

Chapter 3 Legal Structure of Customary Marriages in South Africa in the new constitutional dispensation

3.1 Introduction

The legal status of customary marriages in South Africa is intriguing given the new constitutional dispensation.¹⁷⁹ Since 1994, legislation on customary marriages has been improved.¹⁸⁰ The laws, enforcement and the general practice at large have significantly changed from how they operated in the past.¹⁸¹ The *Interim Constitution* and the 1996 *Constitution* have had a great impact on the implementation of these new laws.¹⁸² Customary marriages were previously protected by the *Interim Constitution* but not effectively so.¹⁸³ This was because, during this time, customary marriages were not fully accepted by the law. When the apartheid era came to an end in 1994, the *Constitution* gave legal recognition to customary marriages. As a result, customary marriages were fully recognised by law, leading to the enactment of the *RCMA* in 1996. In this chapter I examine and interrogate the institution of customary marriages within South Africa's legislative arrangements since 1994 when a new constitutional era commenced.

3.2 Overview

Constitutional supremacy is a fundamental tenet of the 1996 *Constitution*, and any law that is inconsistent with it is deemed invalid.¹⁸⁴ Although the *Constitution* does not have direct provision on customary marriages specifically, it indirectly allows and protects customary marriages through some of its provisions.¹⁸⁵ According to Herbst

¹⁷⁹ Maithufi *The Shade of New Leaves* 251.

¹⁸⁰ Bekker 2003 *ASA* 124.

¹⁸¹ Bekker 2003 *ASA* 124.

¹⁸² Murray and O' Sullivan *Advancing Women's Rights: The First Decade of Democracy* 17.

This is seen through section 15(3) of the *Constitution* which permits legislation recognising traditional marriages.

¹⁸³ The *Interim Constitution* was enacted during the last phase of the Apartheid system in South Africa (1993), therefore some laws were difficult to implement given the nature of the beneficiaries of such law. Customary marriages in South Africa only got the same legal standing and protection as civil marriages after 1998 *RCMA* was enacted.

¹⁸⁴ Section 2 of the *Constitution*.

"It provides that the *Constitution* is the supreme law of the Republic. Law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled".

¹⁸⁵ Examples include sections 9, 15 and 31 of the *Constitution*.

and Du Plessis, “before the *Interim Constitution*, customary rules were only recognised if they were not in conflict with natural justice or public policy”.¹⁸⁶ After the *Interim*, the rules of natural justice and public policy were substituted by the rules contained in the *Constitution*.¹⁸⁷ In *Alexkor Ltd v Richterveld Community*, the Constitutional Court affirmed that “customary law is part of South African law and that it should be regarded as such”.¹⁸⁸ It has been observed that there are rules of customary law that are in conflict with the Bill of Rights. Those in conflict with the Bill of Rights are discussed below.

It has been argued by some scholars that there can never be a balance between customary law and the Bill of Rights. It should be noted that the Bill of the Rights is part and parcel of the *Constitution*: the supreme law of the country. All customary laws should be in line with the Bill. It is clear that the legislative framework that was previously in place promoted the inequality in customary marriages because of its ambiguity.¹⁸⁹ It supported the notion that men are more privileged than women.¹⁹⁰ Hence, there was a need for reform which was initiated by the adoption of a Constitution in 1996 wherein the norm of gender equality was stipulated.

South African customary marriages in the past were governed by living customary law.¹⁹¹ Customs, together with the advice of the traditional council and the elders of the respective families, were only used as guidelines. As time passed, it was noticed that there was a need for official customary law in order to guard against customary marriages as such marriages did not get the same legal protection as civil marriages. The law was successful in changing this notion and the first Laws¹⁹² were

¹⁸⁶ Herbst and Du Plessis 2008 *EJCL* 12.

¹⁸⁷ Section 211(3) of the *Constitution* provides that:

“The courts must apply customary law where the law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.”

¹⁸⁸ *Alexkor Ltd v Richterveld Community* 2003 12 BCLR 1301 (KH) para 51.

“The Bill of Rights does not deny the existence of any other rights and freedoms that are recognised or conferred by common law, customary law, customary law or legislation, to the extent that they are consistent with the Bill of Rights.”

¹⁸⁹ Section 11(3)(b) *BAA* 38 of 1927.

Section 16 *KwaZulu Act* 6 of 1981.

¹⁹⁰ Section 11(3)(b) *BAA* 38 of 1927.

Section 16 *KwaZulu Act* 6 of 1981.

¹⁹¹ Ndulo 2011 *IUP* 87.

¹⁹² These include the *BLAA*, *BAA*, *Administration of Estates Act* 66 of 1965 and the *Code of Zulu Law*.

implemented under the apartheid regime.¹⁹³ These Laws did not do any justice as they were oppressive and regarded women as minors in their own marriages.¹⁹⁴ After 1994, new Laws¹⁹⁵ were developed, with the intention of aligning customary marriages with the *Constitution* in order for the whole concept of customary marriages to be constitutional. As explained earlier, according to South African law, a customary marriage is defined as “a marriage which is entered into in accordance with the traditions and customs of indigenous African customary law”.¹⁹⁶ “A marriage, in terms of customary law, is a familial matter and does not require the approval of an officiator in order to be regarded as valid”.¹⁹⁷

3.3 Legislative Framework

In South Africa, there has always been legislation on customary marriages. However, the said legislation was invalid in that its provisions were oppressive and provided for inequality between men and women,¹⁹⁸ hence the introduction of the *RCMA*. Customary marriages in South Africa were not treated the same as civil marriages and they were not recognised by law at some point.¹⁹⁹ There was need for legislation guarding against customary marriages because the inequalities between the two marriages made it seem as if customary marriages were legally isolated and abandoned. Regardless of these laws, there are still some inconsistencies within the rules of customary marriages that are discussed below. However, the legislative framework which was implemented after the new *Constitution* brought about change in attempting to alleviate inequalities and oppression within customary marriages by protecting the rights of the parties to the customary marriage.

¹⁹³ These laws included the *BAA*, the *BLAA* and the *Code of Zulu Law* 6 of 1981.

¹⁹⁴ Section 11(3) of the *BAA* and section 27(3) of the *Natal Code of Zulu Law* of 1985.

¹⁹⁵ The *RCMA*: the *Repeal of the Black Administration Act and Amendment of Certain Laws Act* 28 of 2005.

¹⁹⁶ The *RCMA*.

¹⁹⁷ Section 4(9) of the *RCMA*.

¹⁹⁸ According to section 11(3)(b) of the *BAA*, women married under customary marriages were seen as minors irrespective of their age and marital status.

¹⁹⁹ *Nkambule v Linda* 1951 SA 377 (A) 381A-D.

As intimated above, legislation on customary marriages has always been there before the introduction of the *RCMA*.²⁰⁰ However, this legislation was oppressive and did not benefit equally the parties to the marriage. Firstly, there was discrimination between the two types of marriages: customary marriages and civil marriages.²⁰¹ Civil marriages were protected in terms of the law and the rights of the people married in this type of marriage. Their rights were protected.²⁰² With customary marriages, there was no equality between the parties and no protection whatsoever.²⁰³ This type of marriage was practiced by black communities mostly and therefore, less protection was accorded to it.²⁰⁴ In 1998, the first ever legislation that dealt specifically with customary marriages was enacted. Legislation which had an impact on the introduction of the *RCMA* is therefore highlighted below.

3.3.1 *Interim Constitution and Customary Marriages*

Customary marriages were specifically not provided for in the *Interim Constitution*. However, there were some provisions that indirectly dealt with this type of marriage. This *Interim Constitution* was the first in South Africa to explicitly provide for equality between men and women.²⁰⁵ Its Preamble provides for equality between men and women and people of all races in order to afford every citizen their fundamental rights and freedoms.²⁰⁶ Chapter 1 of the *Interim Constitution* provided for the supremacy of the *Constitution*.

“The *Constitution* shall be the supreme law of the Republic and any law or act inconsistent with the provisions shall, unless otherwise provided expressly or by necessary implication in this Constitution be of no force and effect to the extent of the inconsistency.”²⁰⁷

²⁰⁰ This legislation includes the *BAA*, the *Marriage Act*, the *Administration of Estates Act* 66 of 1965 and the *Code of Zulu Law*.

²⁰¹ *Nkambule v Linda* 1951 SA 377 (A) 381A-D.

²⁰² *Marriage Act* 25 of 1961.

Civil Marriages were protected in the above-mentioned *Act*.

²⁰³ Moore and Himonga 2016 <http://www.groundup.co.za>.

Before 1994, customary marriages were not recognised by the law.

²⁰⁴ Moore and Himonga 2016 <http://www.groundup.co.za>.

²⁰⁵ Section 8 of the *Interim Constitution*.

²⁰⁶ Preamble to the *Interim Constitution*.

²⁰⁷ Chapter 1(4)(1) of the *Interim Constitution*.

Section 8 of the *Interim Constitution* provided for the right to equality.²⁰⁸ Before the introduction of this *Interim Constitution*, men and women in customary marriages were not treated equally.²⁰⁹ Women were inferior while men were superior.²¹⁰ Black women, in particular those married under customary law, were treated as perpetual minors, unable to transact businesses without their husbands or even have custody of their own children in divorce.²¹¹ The property would now belong to the heir even though the wife was still alive and in some instances she would be forced to marry the brother of her husband.²¹² This happened because most women in the past did not have much to say in their respective marriages and the husband's family was the arbiter of the marriage.²¹³

Gender inequality does not only refer to black women. Instead, it has been evident that over the years, black women are the ones most affected by this form of discrimination especially in their marriages.²¹⁴ Regardless that the *Interim Constitution* provided for the right to equality, black women still found themselves discriminated against and not being protected by the law in their marriages.²¹⁵ There was a need to enact legislation to guard against customary marriages and give equal protection to both spouses. Previously, when the husband died the wife would not have a claim against his property, because there was no law to protect her. However, the *Interim Constitution* was, on its own, not sufficient to protect these

²⁰⁸ Section 8(1) of the *Interim Constitution* provides that:
"Every person shall have the right to equality before the law and to equal protection of the law."
Section 8(2) of the *Interim Constitution* provides that:
"No person shall be unfairly discriminated against, directly or indirectly, and without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic, age, disability, religion, conscience, belief, culture or language."
Section 8(3)(a) of the *Interim Constitution* provides that:
"This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms."
²⁰⁹ Bekker 2003 *ASA* 124
²¹⁰ Bekker 2003 *ASA* 124
²¹¹ Section 11(3) of the *BAA* and section 27(3) of the *Natal Code of Zulu Law* of 1985.
²¹² Section 27 2010 <http://section27.org.za>. See also Alabama Supreme Court *et al The Southern Reporter, Volume 4* 89
²¹³ Section 27 2010 <http://section27.org.za>.
²¹⁴ Maluleke 2012 *PER* 5.
²¹⁵ Maluleke 2012 *PER* 5.

marriages.²¹⁶ This led to the abolition of other legislation on customary marriages that were inconsistent with the *Interim Constitution*.²¹⁷

3.3.2 The 1996 Constitution

The *Constitution* is the supreme law of the country and every other law should be consistent with it in order for such law to be valid.²¹⁸ It indirectly provides for, and protects, customary marriages.²¹⁹ Before 1996, customary marriages had limited protection of the law.²²⁰ However, since the inauguration of the *1996 Constitution*, the rights of people married through customary law are protected.²²¹ The *1996 Constitution* has not only alleviated discrimination between the husband and wife in a customary marriage, but it has also brought about equality between civil marriages and customary marriages.²²² These two types of marriages, even though different, are now close to equal in terms of the law.²²³

The *Constitution* provides for the right to equality.²²⁴ In the past, there was no equality between men and women in customary marriages.²²⁵ With the enactment of the *Constitution*, there have been some changes in the legal status of women in

²¹⁶ Bennette *Human Rights and African Customary Law under South African Constitution* 82.

²¹⁷ These include the *BAA* 38 of 1927, the *BLAA* 76 of 1963 and the *Code of Zulu Law* 6 of 1981.

²¹⁸ Section 2 of the *Constitution*.

²¹⁹ Through Section 30 and section 31 of the *Constitution*.

²²⁰ Ozoemena 2015 *PELJ* 969.

²²¹ Ozoemena 2015 *PELJ* 969.

²²² *K v K* 2010 ZAGPJHC 93 para 5.

²²³ *K v K* 2010 ZAGPJHC 93 para 5. See also

Moore and Himonga 2016 <http://www.groundup.org.za>.

"A customary marriage and a civil marriage are both legal and can both be registered at the Department of Home Affairs. A civil marriage is entered into through the Marriage Act while a customary through the RCMA. A civil marriage is strictly between one man and one woman while customary can be between one man and one or more women."

²²⁴ Section 9 of the *Constitution* stipulates that:

"(1) Everyone is equal before the law and has equal protection and benefit of the law; (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken; (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; (4) No person may be unfairly discriminated directly or indirectly against anyone on one or more grounds in terms of subsection 3. National legislation must be enacted to prevent or prohibit unfair discrimination and (5) Discrimination on one or more grounds listed in subsection 3 is unfair unless it is established that the discrimination is fair."

²²⁵ Bekker 2005 *ASA* 124.

customary marriages. Section 9(3) of the *Constitution* stipulates that no one may be discriminated based on gender.²²⁶ The practice of polygyny in customary marriages is in direct conflicts with the right to equality.²²⁷ This type of marriage only allows men to have multiple wives. There is a similar practice in some other African states, which is known as polyandry.²²⁸ It allows women to marry multiple men at the same time. However, this practice is prohibited in South Africa.²²⁹

South African law, through the *RCMA*, violates this section of equality because it recognises polygamy but only allows for polygyny. Denying women the freedom to practise polyandry conflicts with their right to equality and make the whole concept of polygamy voidable.²³⁰ In order to advocate for equality in South African customary marriages, polyandry should be legalised for women who want to practice it and the same rules applicable to polygynous marriages should be applied in polyandrous marriages. Women should also have the right to practice any custom they prefer. They should not be deprived of this right just because a particular practice has not been done before.

The issue of inequality in customary marriages continues to be a contested one. The said inequality is also seen through the practice of *lobola*²³¹ in customary marriages. Culturally, the reasons for paying *lobola* include a show of appreciation from the groom's family to the bride's family for raising the bride. In tandem, *lobola* also shows that the groom is able to care of the bride. However, the same appreciation is not shown to the groom's family. What gratitude is given to the groom's family with regards the *lobola* proceedings? Previously *lobola* was used to strengthen alliances between families and clans. Therefore, a gift of cattle as living

²²⁶ Section 9(3) of the *Constitution*.

²²⁷ Only men are allowed to have multiple wives and again women are inherently subordinated. Mwambene 2017 *PER* 2.

²²⁸ Polyandry refers to polygamy in which a woman has more than one husband.

²²⁹ The *RCMA* or any other law, does not state anything about polyandry. The inexistence of any provision for the practice of polyandry makes it void and a taboo. Emphasis added.

²³⁰ Chireshe and Chireshe 2010 *J.PAS* 217.

²³¹ Section 9 of the *Constitution*.

creatures was a powerful and symbolic gesture of a social and spiritual link between African families.²³²

The practice of *lobola* could and should be a procedure where both families exchange gifts equally in celebration of the union, instead of having only the groom's family paying huge amounts of money for that both the bride and groom cherish. Currently, the practice of paying *lobola* deviates from its initial purpose.²³³ From the amounts that are paid for *lobola* today, it cannot be said that of the token is a gesture appreciation.²³⁴ It has become commercialised to a point where the groom buys another human being as a part of property. How is *lobola* different from slavery and prostitution other than the embedded willingness to participate?

Lobola has lost its relevance and value in the 21st century, because it is used for all the wrong reasons. Some families use *lobola* to enrich themselves. Some women even assist their men in raising the requisite funds for the *lobola*. Some other men turn to banks for loans to pay the *lobola*; it is their hard earned cash. The requirement of *lobola* may also be a contribution to the increase of cohabitations that have become a current feature in the country.²³⁵ This is because some men cannot afford to pay the *lobola* amount that is requested from the girl's family. Therefore, the couple ends up living together as if they were a married couple and disregard marriage because *lobola* is expensive. Statistics in South Africa also show that there are more civil marriages than customary marriages.²³⁶ This is because, in civil marriages, *lobola* is not a requirement; therefore getting married becomes easy and also many couples still hold the view that customary marriages are not legally protected which is not the case.

Section 15 of the *Constitution* provides for "the right to religion, belief and opinion".²³⁷ In my interpretation, this should include the right to marry into a

Commented [Edit20]: This is important and necessary as indicated already. there is need to analyse what lobola was meant to achieve and what it means originally in customary marriages, before the reinterpretation by the west.

Commented [Edit21]: This is an emphatic statement to make. Is there overwhelming support for this?

²³² Kotze 2013 "Journal of Systemic Therapies" 19.

²³³ Galvan *They do what?* 180.

²³⁴ Ntimi *Living with Divorce* 33.

²³⁵ Section 15 of the *Constitution*.

²³⁶ Statistics South Africa "Marriages and Divorces 2014" 19-26.

²³⁷ Section 15 of the *Constitution* stipulates that:

"(1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion; (2) religious observances may be conducted at state or state-aided institutions, provided that those observances follow rules made by the appropriate public authorities, they are conducted on an

customary marriage. However, there are always limitations to these provisions. In *Prince v Law Society of the Cape of Good Hope* it was stated that the “right to freedom of religion is especially important for our constitutional democracy which is based on human dignity, equality and freedom.”²³⁸ Section 15 of the 1996 *Constitution* also provides that a customary marriage must take place in a way that is consistent with the Constitution and must be solemnised by a person who has the authority to do so.²³⁹ Customary marriages in South Africa may only be entered into by South African nationals²⁴⁰ and it also must be by people of different sex.²⁴¹ The law is vague about this provision and the *RCMA* does not address it. This means that same sex couples may not marry through customary marriage and when a South African citizen gets married to a foreign citizen through a customary marriage, it would not be regarded as a customary marriage.²⁴²

Section 30 of the *Constitution* provides for the right to culture and language.²⁴³ Customary marriages form part of the culture and tradition of the South African people and this section allows them to take part in the culture of their choice. Customary marriages differ from culture to culture and they are not celebrated in the same way. They are celebrated according to different traditions, customs and

equitable basis and attendance at them is free and voluntary; (3)(a) this does not prevent legislation from recognising marriages concluded under any tradition or system of religious, personal or family law or systems of personal and family law under any tradition or adhered to by persons professing a particular religion; (b) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the *Constitution*’.

²³⁸ *Prince v President of Law Society of the Cape of Good Hope* 2002 (2) SA 794; 2002 (3) BCLR 231 para 49.

²³⁹ Section 15(2) of the *Constitution*.

²⁴⁰ Department of Home Affairs 2019 <http://www.dha.gov.za>.

In South Africa, the definition of a customary marriage is one that is “negotiated, celebrated or concluded according to any of the systems of indigenous African customary law which exist in South Africa”. This does not include marriages concluded in accordance with Hindu, Muslim or other religious rites.

²⁴¹ De Vos and Barnard 2015 *SALJ* 816.

²⁴² Emphasis added. See also Department of Justice 2011 <http://www.justice.gov.za>.

According to section 1 of the *RCMA* ‘customary marriage’ means “a marriage concluded in accordance with customary law, while ‘customary law’ means the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples. The Act does not apply to customary marriages concluded by African people outside of South Africa”.

²⁴³ Section 30 of the *Constitution* provides that:

“Everyone 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 the provisions of the Bill of Rights”.

languages. This normally depends on the groom's tradition. Section 31 of the *Constitution*, on the other hand, provides for the right to culture, religion and language.²⁴⁴ Every citizen is allowed by law to enter into a customary marriage provided they meet the requirements of satisfying a valid customary marriage in section 3 of the *RCMA*.

3.4 Legislative Enactments

3.4.1 RCMA 120 of 1998

The *RCMA* is the core legislation on customary marriages recognised by South African law. One of the aims of this study is to highlight the discrepancies found in this *Act*. The *RCMA* fails to address some of the challenges faced in customary marriages to some extent. Therefore, as a point of departure, focus is on highlighting these challenges and demonstrating the extent of the application of the *RCMA* in such matters. The *RCMA* was legislated in 1998 and came into operation in 2000.²⁴⁵

The introduction of the *RCMA* therefore formalised the recognition of both customary marriages and polygamous marriages. There are certain requirements that need to be satisfied in order for a customary marriage to be valid. These requirements are set out by the *RCMA* as follows:²⁴⁶

- Both spouses must be over the age of 18 years;
- Both parties must both consent to be married to each other under customary law; and

²⁴⁴ Section 31 of the *Constitution* provides that:

"(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of the community to enjoy their culture, practice their religion and use their language and to form, join and maintain culture, religious and linguistic associations and other organs of civil society; (2) the rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights."

²⁴⁵ According to the preamble of the *RCMA*, the purposes of this Act "is to make provision for the recognition of customary marriages; to specify the requirements for a valid customary marriage; to regulate the registration of customary marriages; to provide the equal status and capacity of spouses in customary marriages; to regulate proprietary consequences of customary marriages and the capacity of spouses of such marriages; to regulate the dissolution of customary marriages; to provide for the making of regulations; to repeal certain provisions of certain laws; and to provide for matters connected therewith."

²⁴⁶ Section 3 of the *RCMA*.

- The marriage must be negotiated and celebrated according to the rules set out in customary law.

However, the court in *Fanti v Boto* held that the requirements for a valid customary marriage may also include the following:²⁴⁷

- A consensual arrangement among the family groups with respect to the two persons who are to be married and the *lobola* to be paid; and
- The handover of the bride by her family group to the family of the prospective husband.

In *Mxiki v Mbata*, it was held that the payment of *lobola* is not the only requirement for the validity of a customary marriage as normally practiced by the African traditional people.²⁴⁸ In the requirements of a customary marriage listed in the *RCMA*, the payment of *lobola* is not listed as one of the requirements. However, that the *RCMA* stipulates that, in order for a marriage to be valid, the marriage should be negotiated and celebrated following the rules set out in customary law.²⁴⁹ Paying *lobola* is one of the practices of customary law and shows that the groom-to-be has followed the custom of traditional marriages. Usually, a customary marriage is concluded if full or a critical part of the *lobola* money is paid.

This was also confirmed in *Bhe v Khayelitsha Magistrate*,²⁵⁰ where the Court ruled that “it is not a requirement that *lobola* should be paid in full before a marriage is concluded”.²⁵¹ In *Matlala v Dlamini*,²⁵² it was also extended that a mere promise or agreement to pay *lobola* was sufficient for the courts to conclude that there was a valid customary marriage. When a couple chooses to marry in a customary marriage, it automatically means that the couple will be married in community of

²⁴⁷ *Fanti v Boto* 2008 (5) SA 405 (C).

²⁴⁸ *Mxiki v Mbata*, In Re: *Mbata v Department of Home Affairs* (GP) (unreported) case number A844/2012) of 23 October 2014.

²⁴⁹ Section 3 of the *RCMA*.

²⁵⁰ *Bhe v Khayelitsha Magistrate* 2005 (1) SA 580 (CC).

²⁵¹ *Bhe v Khayelitsha Magistrate* 2005 (1) SA 580 (CC) para 5.

²⁵² *Matlala v Dlamini* 2010 ZAGPPHC 277.

“The applicant, the mother to the deceased sought an order to declare that no valid marriage existed between the deceased and the first respondent (wife of the deceased) and should not be entitled to any benefits from the estate or from the pension fund of the deceased”.

property, unless the parties to the marriage have stated otherwise in an ante-nuptial contract. If the parties are already married and they did not intend to marry in community of property, they can apply to the High Court to change their status.²⁵³

Section 2 of the *RCMA* provides for the recognition of customary marriages and also makes provision for more than one spouse in a customary marriage.²⁵⁴ Section 2(3) of the *RCMA* recognises all the polygamous marriages concluded before the recognition of the *RCMA*,²⁵⁵ and section 2(4) provides for the conclusion of polygamous marriages that took place after the commencement of the Act.²⁵⁶ However, a customary marriage that has been entered into after the commencement of the *RCMA* must comply with its requirements.²⁵⁷ Polygamy is divided into two types, which include polygyny and polyandry.²⁵⁸ The concept of polygamy in South Africa provides that only polygyny may be practiced to the exclusion of polyandry. Section 9 of the *Constitution* provides for equality between men and women. The recognition of polygynous marriages over polyandrous marriages raises the question of equality and therefore makes the recognition of polygamous marriages questionable.

Section 4 of the *RCMA* provides for the registration of customary marriages.²⁵⁹ It states that “the spouses in a customary marriage have the duty to ensure that their marriage is registered”.²⁶⁰ This section further provides that if a customary marriage is not registered, any person who has an interest in the marriage might apply to the

²⁵³ Section 7(4) of the *RCMA*.

²⁵⁴ Section 2(3) and (4) of the *RCMA*.

“(1) A marriage which is a valid marriage at customary law and existing at the commencement of this Act is for all purposes recognised as a marriage; (2) a customary marriage entered into after the commencement of this Act, which complies with the requirements of this Act, is for all purposes recognised as a marriage; (3) if a person is a spouse in more than one customary marriage, all valid customary marriages entered into before the commencement of this Act are for all purposes recognised as marriages; and (4) if a person is a spouse in more than one customary marriage, all such marriages entered into after the commencement of this Act, which comply with the provisions of this Act, are for all purposes recognised as marriages.”

²⁵⁵ Section 2(3) of the *RCMA*.

²⁵⁶ Section 2(4) of the *RCMA*.

²⁵⁷ Section 3(1) of the *RCMA*.

²⁵⁸ Rauch *Cultural Anthropology* 72.

“Polygyny is when a man is married to more than one wife simultaneously; Polyandry is when a woman is married to more than one husband simultaneously.”

²⁵⁹ Section 4 of the *RCMA*.

²⁶⁰ Section 4(1) of the *RCMA*.

registering officer to get the marriage registered.²⁶¹ The question that arises is whether this section does not conflict with section 3(1) (a) (ii) of the *RCMA* which provides as follows: “the prospective spouses must both consent to be married to each other under customary law”.²⁶² Say, for instance the parties have entered into an arranged customary marriage and they personally choose not to register the marriage because they never wanted it to happen in the first place, then the elders go on to register the marriage without the knowledge of the concerned parties. This would result in the marriage being invalid because it was not voluntarily entered into by the concerned spouses.

With civil marriages, a lot of false marriages have been registered throughout the country.²⁶³ Some foreign nationals would steal the identity documents of South African women to marry them without these women knowing in order for them to acquire legal papers and status in South Africa. However, this is not possible with customary marriages in South Africa because the law does not make provision for foreign nationals to enter into customary marriages.²⁶⁴ According to the *RCMA*, in order for a marriage to be valid, it must be registered with the Department of Home

²⁶¹ Section 4(5)(a) and (b) of the *RCMA*.

“(a) If for any reason a customary marriage is not registered, any person who satisfies a registering officer that he or she has a sufficient interest in the matter may apply to the registering officer in the prescribed manner to enquire into the existence of the marriage; (b) If the registering officer is satisfied that a valid customary marriage exists or existed between the spouses, he or she must register the marriage and issue a certificate of registration as contemplated in subsection (4).”

²⁶² Section 3(1) (a) (ii) of the *RCMA*.

²⁶³ Department of Home Affairs 2019 <http://www.dha.gov.za>.

²⁶⁴ Department of Home Affairs 2019 <http://www.dha.gov.za>.

In South Africa, the definition of a customary marriage is one that is “negotiated, celebrated or concluded according to any of the systems of indigenous African customary law which exist in South Africa. This does not include marriages concluded in accordance with Hindu, Muslim or other religious rites”.

Affairs within a specified period.²⁶⁵ Regardless of this provision, the *RCMA* provides that “failure to register the marriage does not affect the validity of that marriage”.²⁶⁶

From the case law above, it could be said that the main dispute in these cases is for the court to regulate whether a valid customary marriage has been established or not because the requirements of a valid customary marriage were not observed fully. This exercise can be regarded as an abuse of customary law. To elaborate further on this point, if the *RCMA* stipulates the requirements of a valid customary marriage, why then should the courts continue to deal with such matters? The problem here lies with the vagueness of the requirements of a valid customary marriage, in particular section 3(1) (b) of the *RCMA*²⁶⁷ and the failure to register the customary marriage. Because of these reasons, the courts are left to decide on the matter, taking into consideration all the circumstances of each individual case. Thus, the essential requirements of custom cause a lot of conflict.²⁶⁸

Commented [Edit22]: Which one specifically?

Registering a customary marriage enables the parties to the marriage to enjoy the benefits of their marriage.²⁶⁹ The first benefit includes the certainty that a marriage certificate shall be issued. The issued certificate becomes valid proof that indeed the parties to the marriage are married to each other unless there is a contrary view accompanied by evidence to show that the parties are not married. In other instances, one or both of the parties in a customary marriage want to travel to European countries or even conduct business globally. Marriage status is important and a marriage certificate is recognised as proof of such marriage. Registering a

²⁶⁵ Section 4(3) (a) and (b) of the *RCMA*.

“(a)A customary marriage entered into before the commencement of this *Act*, and which is not registered in terms of any law, must be registered within a period of 12 months after the commencement or within such longer period as the Minister may from time to time prescribe by notice in the *Gazette*; or (b) Entered into after the commencement of this *Act*, must be registered within a period of three months after the conclusion of the marriage or within such longer period as the Minister may from time to time prescribe by notice in the *Gazette*.”

²⁶⁶ Section 4(9) of the *RCMA* provides that “failure to register a customary marriage does not affect the validity of that marriage.”

²⁶⁷ Section 3(1)(b) of the *RCMA*.

“The marriage must be negotiated and entered into or celebrated in accordance with customary law. This section fails to stipulate or give further guidance as to the essential requirements of custom.”

²⁶⁸ Mwambene and Kruuse *The practical implication of the Recognition of Customary Marriages Act 1998 in South Africa* 304.

²⁶⁹ Benefits such as making the marriage legal and the ownership of the marriage property.

marriage is also important for the purposes of intestate succession law. One would stand a great chance of benefiting from the rulings in succession law; therefore, as a spouse if that person proves that there was indeed a valid marriage by producing a marriage certificate. It is legally important to encourage the registration of customary marriages because it also assists in controlling the misuse of customary marriages.

Section 4 of the *RCMA* places a duty on the spouses to a customary marriage to register their marriage within the specific time period.²⁷⁰ However, it further states that “upon failure to do so, the validity of the marriage will not be affected”. This provision generates a contradiction that has the potential to render the compulsory aspect of the provision ineffective. It is evident that the registration process was intended to be purely administrative but in practice, it is the deciding factor as to whether such a customary marriage is considered valid. By way of example, it would not be possible to make claims for benefits or divorce if the marriage is not registered irrespective of the fact that there is a provision in the *RCMA* which states that no link between registration and validity exists.

In *Baadjies v Matubela*,²⁷¹ the High Court dismissed the application for maintenance because the applicant was unable to provide a certificate proving the registration of their customary marriage. The same occurred in the cases of the *Road Accident Fund v Mongalo* and *Nkabinde v Road Accident Fund*,²⁷² which stated that a marriage certificate would be conclusive proof of a customary marriage. Regardless of these judgments, as perplexing as it is, the *RCMA* itself states that it is not compulsory to register a customary marriage. In most instances, this is always the end result.²⁷³

²⁷⁰ Section 4(3) of the *RCMA*.

“(a) A customary marriage entered into before the commencement of this Act, and which is not registered in terms of any law, must be registered within a period of 12 months after the commencement or within such longer period as the Minister may from time to time prescribe by notice in the Gazette; or (b) Entered into after the commencement of this Act, must be registered within a period of three months after the conclusion of the marriage or within such longer period as the Minister may from time to time prescribe by notice in the Gazette.”

²⁷¹ *Baadjies v Matubela* 2002 (3) SA 427 (W) para 19.

²⁷² *Road Accident Fund v Mongalo and Nkabinde v Road Accident Fund* 2002 ZASCA 158 2003 1 ALL SA 72 (SCA) para 4.

²⁷³ Section 4(9) of the *RCMA*.

The *RCMA* also states that “either spouse can apply for the registration of a customary marriage”.²⁷⁴ However, in practice, the registering officers require both parties to the marriage to be present.²⁷⁵ In *Ngwenyama v Mayelane and Another*,²⁷⁶ “the Constitutional Court considered the issue that arose when the wife wanted to register a new marriage, but could not do so because there was already a marriage that was registered between her deceased husband and another woman. The Court held that the consent of the first wife was necessary for the validity of the second marriage. By requiring this, the law affords the most meaningful way of protecting her rights in the marriage. It is clear that the decision is consistent with *RCMA* in terms of sections 6 and 7”.

In terms of the registration of a customary marriage by the Department of Home Affairs, it is difficult for such an official to prove that the requirements of a valid customary marriage have been adhered to, especially the third requirement.²⁷⁷ The prospective spouses can state that the requirements have been fulfilled even when such is not the case. South Africa is a vast country and there are not enough registration facilities especially in the rural areas which are far from urban centres. People who enter into customary marriages are largely from the rural areas but in most cases not a single registration facility exists in the rural area. Such facilities are commonly available in distant urban areas, yet spouses are expected to register their customary marriages. One questions whether South Africa has enough resources to enforce the existing legislation on customary marriages. The available registration criteria are not clear enough to guide the process of customary marriage. Usually when the law is legislated, the people it applies to must be consulted.

However, the shortcomings of this decision lie in that the Constitutional Court only paid regard to the protection of the rights of the first wife and consequently

“Failure to register a customary marriage does not affect the validity of that marriage”.

²⁷⁴ Section 4(2) of the *RCMA*.

“Either spouse may apply to the registering officer in the prescribed form for the registration of his or her customary marriage and any additional information which the registering officer may require in order to satisfy him or herself as to the existence of the marriage”.

²⁷⁵ Department of Home Affairs 2017 <http://www.dha.gov.za>. See also Department of Justice and Constitutional Development 2011 <http://www.justice.gov.za>.

²⁷⁶ *Ngwenyama v Mayelane* 2013 ZACC 14.

²⁷⁷ Manyathi 2012 <http://www.derebus.org>.

disregarded the rights of the second wife. The competing rights of the two women ought to have been balanced. One could argue that the reason is because the courts do not consider the second wife to be a wife as there is no valid legal marriage. However, in terms of the constitutional rights of women, this should be considered. There is no empirical way for a woman to inform herself of the existence of a previous marriage before she enters into a marriage and it cannot be expected of the first wife to inform her either. Therefore, in terms of this decision by the Court, the subsequent wife or wives get disadvantaged and prejudiced. However, it was stated by the Court that whoever is married under customary law inevitably voluntarily places herself at legal risk.

Section 6 of the *RCMA* provides for “the equal status and capacity of spouses”.²⁷⁸ One of the purposes of the *RCMA* is to provide equal status between the parties to the marriage, thereby improving the position of women.²⁷⁹ Regardless of this, there are still some inconsistencies and uncertainties with regards the position of women married customarily. The *RCMA* has not been successful in reconciling the equality clause in terms of the *Constitution* and customary law on the other hand. For instance, only men in customary marriages are allowed to have more than one spouse. In the *RCMA*, there is no particular section that speaks directly about polygamy. However, the wording used in the *Act* makes it clear that it allows only the ‘husband’ to have more than one spouse.²⁸⁰

By so doing, the *Act* entrenches inequality by not providing the same practice for women. There is a tacit endorsement of the practice of polyandry. However, polyandry is not recognised and practiced in South Africa. The *RCMA* has given men the freedom to choose how many women they would want to marry and also allows them to marry in civil marriages after they have been married in customary

²⁷⁸ Section 6 of the *RCMA*.

“A wife in a customary marriage has, on the basis of equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity, including the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that she might have at customary law”.

²⁷⁹ Section 6 of the *RCMA*.

²⁸⁰ Section 7(4)(b) *RCMA*.
Section 7(6) *RCMA*.

marriages.²⁸¹ Initially, polygamy was a practice that was observed by the kings and chiefs; but nowadays it is followed by more South African men who choose to be part of it because they have found more reasons to practice it in the transformed postcolonial culture.

The *RCMA* does not prohibit the marriage of the second wife: it prohibits the taking of the second wife under the pretext that it is recognised by the *RCMA*. Everything done here in terms of the marriage is inconsistent with the *RCMA* and will not be considered as a marriage for the purposes of this *Act*. A marriage concluded in terms of the *RCMA* is deemed by law to be a marriage in community of property. If there is no will when one of the spouses dies, the property regime is determined in terms of the laws governing in community of property. The spouse will be entitled to half of the property subject to any exclusion by customary law. If the husband wants to enter into a subsequent marriage, he has to apply to the court so that the in community of property can be abolished and enter into a contract which will regulate future marriages.

Section 7 of the *RCMA* provides for “the proprietary consequences of customary marriages and contractual capacity of spouses”.²⁸² Subsection 2 provides that “a customary marriage is automatically in community of property, unless one of the parties (the husband) is involved in another marriage or they have both stipulated otherwise in an ante-nuptial contract”.²⁸³ A wife in a customary marriage is also allowed to enter into contracts without the permission of the husband.²⁸⁴ The *RCMA* has made a provision regarding the proprietary consequences should the husband decide to marry another wife customarily.²⁸⁵ “The husband must enter into a written agreement stating what should happen to the property and how it should be shared

²⁸¹ Department of Justice 2011 <http://www.justice.gov.za>.

“A married man in a customary marriage can still marry in civil marriage, however this will prohibit him from getting married again thereafter”.

²⁸² Section 7 of the *RCMA*.

²⁸³ Section 7(2) of the *RCMA*.

“A customary marriage entered into after the commencement of this Act in which a spouse is not a partner in any other existing customary marriage, is a marriage in community of property and of profit and loss between the spouses, unless such consequences are specifically excluded by the spouses in an anti-nuptial contract which regulates the matrimonial property system of their marriage.”

²⁸⁴ Section 6 of the *RCMA*.

²⁸⁵ Section 7 of the *RCMA*.

amongst his wives. The husband must apply to the court to approve the written contract".²⁸⁶ The court will ensure then that all the property interests of the wives are protected.

In *Gumede v President of the Republic of South Africa*,²⁸⁷ focus was put on the property rights of women under customary law. It was also determined whether sections 7(1) and 7(2) of the *RCMA* discriminate on the basis of gender contrary to the Constitution. In this case, the applicant Mrs Gumede wanted confirmation from the Constitutional Court in terms of section 167(5) of the Constitution.²⁸⁸ Mrs Gumede and her husband entered into a monogamous customary marriage in 1968 that lasted forty years where they lived together in KwaZulu Natal. In their marriage, they had two houses and furniture worth R40 000. Their marriage broke down in 2003 and Mr Gumede instituted divorce proceedings to end the marriage. In response, Mrs Gumede tried to pre-empt the divorce court in the division of their assets and took her case to the High Court in order to procure an order invalidating the statutory provisions that regulate the proprietary consequences of her marriage. Mrs Gumede argued that the provisions unfairly discriminated against customary law wives on the grounds of gender and race. Section 7(1) of the *RCMA* states that:

"The proprietary consequences of a customary marriage entered into before the commencement of the *RCMA* will continue to be governed by customary law".

Section 7(2) of the *RCMA* provides that

"Customary marriages entered into after the commencement of the *RCMA* will automatically be regarded as a marriage in community of property."

Mr and Mrs Gumede's marriage was governed by the customary law of *KwaZulu-Natal as codified in the Natal Code of Zulu Law 1987 ('Natal Code')* and in the *KwaZulu Act*²⁸⁹ in the *Code of Zulu Law*. Section 20 of the *Natal Code* provides that:

²⁸⁶ Section 7(6) of the *RCMA*.

²⁸⁷ *Gumede v President of the Republic of South Africa* 2008 ZACC 23.

²⁸⁸ Section 167(5) of the *Constitution*.

"An order or decision issued by a court binds all persons to whom and organs of state to which it applies."

²⁸⁹ The *KwaZulu Act on the Code of Zulu Law* 6 of 1981.

The family head is the owner of all family and, therefore, his wife would not have any claim to the family property upon dissolution of the marriage.²⁹⁰

In addition, section 22 of the *Natal Code* provided that the inmates of a family home owe obedience and are subject to the head of the family. The High Court found that these provisions unfairly discriminated on the grounds of gender and race and therefore offended the equality protection in section 9(3) and 9(5) of the Constitution. Section 7(1) and 7(2) of the *RCMA* are discriminatory on the basis of gender. The provisions discriminate not only between a wife and husband but also between an old customary law marriage and a new customary law marriage. Under the *KwaZulu Act* and the *Natal Code*, affected wives in customary marriages are considered incapable or unfit to hold or manage property. This is a violation of women's right to dignity, property and equality.²⁹¹

The law recognises polygamous customary marriages and they have some of their own benefits. Unfortunately, it is not unusual for married women to find out much later that she is not the only wife. It happens frequently in a situation whereby the husband is forced to leave the village to seek employment or to work in the city. With customary marriages, the *RCMA* provides that a man cannot just marry another wife secretly; there are certain basic requirements that he has to conform to in order for the second marriage to be valid. Section 7(6) of the *RCMA* provides that "a husband in a customary marriage who wishes to enter into another customary marriage with another woman must make an application to the court to approve a written contract that would then regulate future matrimonial property system of his marriage".²⁹²

²⁹⁰ Section 20 of the *Natal Code of Zulu Law* of 1987.

²⁹¹ *Gumede v President of the Republic of South Africa* 2008 [2009] 3 S Afr LR 152 para 154. "At one level, the case underlines the stubborn persistence of patriarchy and conversely, the vulnerability of many women during and upon the termination of a customary marriage. At another level, the case poses intricate questions about the relative space occupied by pluralistic legal systems under the umbrella of one supreme law, which lays down a common normative platform".

²⁹² Section 7(6) of the *RCMA*.

"A husband in a customary marriage who wishes to enter into a further customary marriage with another woman after the commencement of this Act must make an application to the court to approve a written contract which will regulate the future matrimonial property system of his marriages."

The above was shown in the case of *Nhlapo v Mahlangu*,²⁹³ where two wives were married to the same man and only found out about each other after the husband's death. Nhlapo, who was the applicant in the matter, went to Court to have her customary marriage to the late Thomas Mahlangu declared valid after the Department of Home Affairs refused to register the marriage due to the existence of her husband's civil marriage to another woman, Mahlangu. Nhlapo argued that her husband's civil and customary marriage to the second wife was invalid because she had not been aware of the marriage and had not agreed to it in terms of Ndebele customary union laws.²⁹⁴ The second wife opposed the application, saying her husband never told her he was already married. She claimed her husband's brother, Jacob, and her uncle, were witnesses to the part payment of *lobola* but her late husband's family submitted he had no brother named Jacob.

The respondent's relationship with the deceased started in 2005, but ended in 2007 because she could not bear children. Nhlapo said her late husband's family had never met the second wife and was not aware of her existence. She did not even attend his funeral to pay her last respects. She submitted that she was her husband's only legal customary spouse even though the marriage had never been registered and they had four children together. According to Nhlapo, there had been customary marriage negotiations between the two families and the last payment of the agreed 16 head of cattle as *lobola* was made in 2000 in terms of their agreement. The two families had a big hand-over celebration through the *ukuvunula*²⁹⁵ ritual in 1986. Cattle were slaughtered and her family handed her over to her husband's family. She still lived with her mother-in-law. Judge Molefe ruled in favour of the first wife, finding that the failure to register the marriage did not affect its validity and that the marriage had been valid.

She set aside the second marriage, finding that Mr Mahlangu's civil marriage to the second woman had contravened the *RCMA*, which clearly provided that no spouse in a customary marriage could enter into a marriage under the Marriage Act while

²⁹³ *Nhlapo v Mahlangu* 2015 ZAGPPHC 142.

²⁹⁴ A valid Ndebele customary marriage requires payment of *lobola* to be made to the bride's family and could also not be concluded without the active participation of the first wife.

²⁹⁵ *Ukuvunula* ritual refers to a big handing over celebration during which cattle were slaughtered and the bride's family would hand her over to her husband's family.

the customary marriage still existed. A valid Ndebele customary marriage could also not be concluded without the active participation of the first wife, she added. Molefe said, the man's second customary marriage had not been celebrated in accordance with customary law. His new wife was not handed over to his family through a traditional ceremony and the customary marriage did not comply also with the *RCMA*. She said it was very strange that the second wife was not curious to meet her husband's family during their marriage and did not even attend his funeral. The judge further declared that the first wife's customary marriage was valid and declared the second civil marriage invalid.

She instructed the Master of the High Court to withdraw the second wife's appointment to handle her late husband's estate and ordered her to disclose all funds she had collected and pay these over into the trust account of the first wife's attorney. The second wife was also ordered to pay the legal costs. If there is another customary marriage that already exists, under the new legislation, it is required that the existing wife or wives that are recognised must give consent to the arrangements, especially property arrangements which constitute a critical factor. In other words, it must be clarified what share of the husband's property ought to be apportioned to the new wife? The husband cannot just go and marry another wife; he has to consult with the current wife and if she agrees in a contract, he has to apply to the Court with the same contract that stipulates how the property shall be governed. Before the application can be approved, the Court must be able to divide the estate equitably and state what belongs to whom. The estate will no longer be in community of property but out of community of property. Hence, it is important for them to sign a contract that states what everyone owns.

Failure to register the first marriage does not invalidate the marriage. A woman who is married customarily is protected even if the marriage is not registered. But for the second wife, non-registration of the marriage invalidates the marriage, provided it is a civil marriage.²⁹⁶ Most women from rural areas would marry a man customarily then the same man would marry another woman from the city in a civil marriage. It normally happens that the woman from the village is robbed consequently of her

²⁹⁶ Classens *et al Marriage, Land and Custom* 332.

property. The enactment of the *RCMA* was meant to protect such women. When a man approaches the court for the contract in respect of a second wife, the court has to consider a number of issues²⁹⁷ First, the court must establish whether this is a second marriage. Secondly the court must establish whether the first wife has been made aware of the intent to marry. In the penultimate the courts should verify whether the first wife has been given an opportunity to be present in a court so that the court can determine the impact of the second marriage on her and her own family.

The court will consider the circumstances of other people that might be affected by the contract, mostly the children from the first marriage. The court can then grant the order and legalise the contract. The court can seek to amend the contractual arrangements and it has the power to refuse to recognise the contract. Most people think that the *RCMA* was enacted to protect men's rights to marry many women, but this is not true. The requirement that the man must register a contract is to protect the wife. It can protect the husband if the wife has property because he is also going to get half of her estate.

In *Netshituka v Netshituka*,²⁹⁸ the SCA upheld an appeal in part against an order of the Limpopo High Court, Thohoyandou. The appellant, Ms Netshituka, sought an order declaring two things: that the marriage between the first respondent and the late Mr Netshituka (the deceased), null and *void ab initio*,²⁹⁹ and that the last will and testament of the deceased in which he appointed the first respondent as executrix of his estate, invalid. The High Court dismissed the application with costs. At the time of his death the deceased was married to three different women by customary rights. He was also married to the first respondent by civil rights which was contracted on 17 January 1997. Following the death of the deceased, the appellant and the previous wives decided to contest the validity of both the will and the deceased's marriage to the first respondent.

²⁹⁷ Section 7(7) (a) of the *RCMA*.

²⁹⁸ *Netshituka v Netshituka* (426/2010) [2011] ZASCA 120.

²⁹⁹ "The term *void ab initio*, which means to be treated as invalid from the outset, comes from the Latin phrase *ab initio* (from the beginning) as a qualifier".

In contesting the appellant's application, the first respondent argued that the customary marriages between the deceased and the appellant's previous wives were rendered invalid when the deceased married Martha Mosele Netshituka by civil rights, which marriage was subsequently dissolved divorce on 5 July 1984. Following such dissolution, the deceased continued his customary marriage relationships with his customary law wives who were subsisting when he married Martha Mosele Netshituka by civil rights and consequently such unions were revived after the divorce. The question before the Court was whether the deceased was competent to contract a civil marriage with the first respondent during the subsistence of the aforesaid customary unions. The Court held that a civil marriage contracted while the man was a partner in an existing customary union with another woman was a nullity.

Another question before the Court was whether the appellant was able to prove on a balance of probabilities that the deceased was not of a sound mental state when he attested to his last will and testament. The appellant could not produce any medical report that supported these allegations. On the contrary, a medical report placed before the Court stated that, despite being chronically physically ill, the deceased was mentally normal and fully conscious, aware of his surroundings and oriented in time, place and person. Therefore, the Court held that there was no evidence that the deceased was mentally incapacitated when he attested to his last will and testament. For the reasons stated above the SCA upheld the appeal in part declaring the marriage between the first respondent and the deceased null and void.

Before the enactment of the *RCMA*, a man had effective control over family, land and, in some instances, personal property. This had a detrimental impact on women in general and wives in particular. Women were granted only the right to prevent their husbands from moving property from the house if such a move was not substantiated with a good reason. The *Matrimonial Property Act* thus provides three possible matrimonial systems: "in community of property and of profit and loss; out of community of property with the accrual system and thirdly; and out-of-community-of-property without the accrual system".³⁰⁰ In terms of application, any of these three

³⁰⁰ The *Matrimonial Property Act* 88 of 1984.

matrimonial systems would be suitable to a marriage that is monogamous but only the last possibility would apply in the event of a polygamous marriage.

In terms of section 7(1) of the *RCMA*,³⁰¹ “the traditional patrimonial system for all marriages entered into before the Act came into operation. This evidently means that where the marriage was concluded before the Act commenced, the traditional customary law will be applicable”. However, section 7(4) of the *RCMA*³⁰² affords a certain level of protection where the spouses in a customary marriage concluded before the commencement of the *Act*. They may apply jointly to a court for leave to change the matrimonial property system that applies to their marriage, subject to certain satisfactions of the court. Even though this possibility exists, it is seldom that spouses use this; spouses are required to apply jointly, and in certain cultural contexts it may be difficult for a wife to persuade the husband to let go of his control and sole discretion in the marriage”.

“Furthermore, the application process is expensive and where there exists a lack of information and education, it makes this option inaccessible to those for whom it was intended to help^h. Section 7(1)³⁰³ becomes problematic when considering that even though section 6 affords equal status, the proprietary implications are not altered with respect to customary marriages which have been concluded before the commencement of the *Act*. This suggests that the drafters of the *RCMA* had the opportunity to equalise the position before and after commencement but failed to do

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³⁰¹ Section 7(1) of the *RCMA*.

“The proprietary consequences of a customary marriage entered into before the commencement of this *Act* continue to be governed by customary law.”

³⁰² Section 7(4) of the *RCMA*.

“(a)Spouses in a customary marriage entered into before the commencement of this *Act* may apply to a court jointly for leave to change the matrimonial property system which applies to their marriage or marriages and the court may, if satisfied that- (i) there are sound reasons for the proposed change;(ii) sufficient written notice of the proposed change has been given to all creditors of the spouses for an amount exceeding R500 or such amount as may be determined by the Minister of Justice by notice in the Gazette; and (iii) no other person will be prejudiced by the proposed change, order that the matrimonial property system applicable to such marriage or marriages will no longer apply and authorise the parties to such marriage or marriages to enter into a written contract in terms of which the future matrimonial property system of their marriage or marriages will be regulated on conditions determined by the court. (b) In the case of a husband who is a spouse in more than one customary marriage, all persons having a sufficient interest in the matter, and in particular the applicant’s existing spouse or spouses, must be joined in the proceedings.”

³⁰³ Section 7(1) of the *RCMA*.

so. This is due to the fact that women are given equal status in terms of section 6, but section 7 excludes them from exercising their rights in terms of section 6 as the marriage is regulated by traditional customary law. The *RCMA* also states that “the polygamous marriages will be governed by customary law but it does not clarify and provide guidelines as to what exactly comprises a customary law marital property system”.

Section 8 of the *RCMA* provides for the dissolution of a customary marriage. It states that “a customary marriage may only be dissolved by a court through a court order ~~on the~~ on the grounds of the irretrievable breakdown of the marriage”.³⁰⁴ Subsection 2 further states that “any court may grant a decree of divorce on the ground of the irretrievable breakdown of a marriage if it is satisfied that the marriage relationship between the parties to the marriage has reached such a state of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between them”.³⁰⁵ The *RCMA* does not state anything on the refund of *lobola* upon the dissolution of a customary marriage. Therefore, upon dissolution there is no section that gives a man the right to request refund on *lobola* price from the bride or her family.

Previously, the refund of *lobola* was a binding factor upon the dissolution of a customary marriage, especially in cases where the woman was the cause of the divorce or was unable to perform her wifely duties in the household. Usually, the groom’s family would return such a woman to her family and *lobola* had to be refunded to him. There are still some cultural communities who still request the refund of *lobola* upon the dissolution of a customary marriage. Irrespective of this, the *RCMA* is silent about this issue, resulting in its failure to protect the rights of women in customary marriages. Subsection 5 states that nothing in this section may be construed as limiting the role, recognised in customary law, of any person, including any traditional leader, in the mediation, in accordance with customary law, of any dispute or matter arising prior to the dissolution of a customary marriage by

³⁰⁴ Section 8(1) of the *RCMA*.

³⁰⁵ Section 8(2) of the *RCMA*.

a Court.³⁰⁶ This section gives leaders in the community the right to continue with their everyday duties, including practicing customs as their tradition permits.

There are no legal consequences for failing to pay *lobola* in South Africa. According to the South African law, the customary marriage would still be valid even if *lobola* was not paid.³⁰⁷ *Lobola* and the law are not intertwined even though the token remains an intrinsic part of getting married for many South African. According to the *RCMA*, *lobola* does not constitute a customary marriage;³⁰⁸ it is part of a traditional process of getting married customarily. The *RCMA* needs to revisit its provision on the requirements of a valid customary marriage. It is essential to express explicitly whether the requisition of the payment of *lobola* forms part of the requirements for a valid customary marriage.³⁰⁹

Culturally, for a customary marriage to be concluded, the prospective spouses and their families needed to have entered into the *lobola* negotiations and the groom's family pay the requested *lobola* amount; the parties were allowed to get married even if they were under the age of 18 years (with parental /guardian consent). Lastly, the bride had to be taken to the groom's family and a welcoming ceremony concluded. The celebration could be done differently given the diversity of culture that South Africa has.³¹⁰ For example in the Zulu culture such celebration is referred to as *umembeso*³¹¹ and in the Setswana culture such is usually known as *go-*

³⁰⁶ Section 8(5) of the *RCMA*.

³⁰⁷ *Lobola* is not listed as a requirement to conclude a valid customary marriage: Section 3(1) of the *RCMA*.

³⁰⁸ Section 3(1) of the *RCMA*.

³⁰⁹ Section 3 of the *RCMA*.

Requirements for validity of customary marriages are as follows:

"(1) For a customary marriage entered into after the commencement of this *Act* to be valid- (a) the prospective spouses- (i) must both be above the age of 18 years; and (ii) must both consent to be married to each other under customary law; and (b) the marriage must be negotiated and entered into or celebrated in accordance with customary law."

³¹⁰ In brief, usually in the Setswana culture the couple's family would go through the process of *patlo* (*lobola* negotiations) then there is a celebration which could be same day or in months to come. Then the bride will be handed over to the groom's family home bearing a bed and Kist as gifts. This process is known as *kgoroso ya ngwetsi*.

In the Zulu culture marriage starts with *izibizo* (goods given as part of *lobola*) followed by *lobola* negotiations. Then followed by *umabo* (a traditional ceremony). The will then be taken to the groom's family home then there is *umembeso* (where the groom's family presents gifts to the bride and her family).

³¹¹ *Umembeso* is a Zulu traditional ceremony that is part of the *lobola* negotiations where the groom presents gifts to the bride's parents and family before the wedding.

tlhabela-magadi.³¹² In many instances, some couples would complete the process of *lobola* and take a long break without celebrating or consummating their marriage. This type of arrangement has recently become a problem in South Africa with regards identifying such as valid customary marriages or not.³¹³ According to the *RCMA*, in such an instance a valid customary marriage is not concluded as the marriage was not celebrated. This would mean that the parties attain the same status as cohabitating couples.³¹⁴

3.4.2 The BAA 38 of 1927

Previously, customary marriages were recognised for limited purposes.³¹⁵ They were recognised if they were registered under the *BAA*.³¹⁶ Customary marriages were referred to as customary unions and were not recognised as legal marriages.³¹⁷ According to the *BAA*, women married under customary protocols were seen as minors irrespective of their age and marital status.³¹⁸ Women did not have certain rights under this Act which included the right to litigate under their own name, to sue or even enter into contracts.³¹⁹ Customary unions were regulated by section 22 of the *BAA*.³²⁰ These unions were not considered legal because of two

³¹² *Go tlhabela magadi* is a Setswana term which translates to celebrating *lobola*. It is a Setswana traditional ceremony where the bride's family slaughter livestock and cook a feast immediately after the *lobola* negotiations have been successfully concluded. This is to show acceptance and appreciation of the *lobola*.

³¹³ *Sengadi v Tsambo* 2019 1 ALL SA (GJ) para 38.

³¹⁴ Section 3(1)(b) of the *RCMA*.

³¹⁵ Section 31 of the *BLAA*.

³¹⁶ Act 38 of 1927.

The purpose of the *Act* was to provide for the better control and management of black affairs.

³¹⁷ Section 11 of the *BAA*.

³¹⁸ Section 11(3)(b) of the *BAA*.

"Such a woman is deemed to be a minor and her husband is deemed to be her guardian. This would mean, that she cannot contract without the consent of her husband. According to this section, women were also not allowed to ask for a divorce and even request the custody of their children upon the dissolution of their customary marriage."

Section 11 A inserted by s 1 of *Act* 90 of 1985, substituted by section 1 of *Act* 32 of 1987 and repealed by section 1(1) of *Act* 28 of 2008.

³¹⁹ Meyer *Recognition of Customary Marriages* 173.

³²⁰ Section 22 of the *BAA*.

"(a)By the substitution for subsection (1) of the following subsection:

(1) A man and a woman between whom a customary union subsists are competent to contract a marriage with each other if the man is not also a partner in a subsisting customary union with another woman;

(b) by the substitution for subsection (2) of the following subsection:

reasons: their polygamous nature and because they were not solemnised by authorised marriage officers.³²¹ They were seen as a contract between two groups (families), rather than of two individuals.³²²

There were various attempts to amend such discriminatory provisions. Specifically, in 1988, there were amends made in order to verify such oppression.³²³ As part of the amendments, the spouses to a customary marriage were now allowed to convert their customary marriages into civil marriages.³²⁴ People married customarily were also not allowed to enter into a civil marriage with other people while they were still married.³²⁵ The *BAA* also provided that, if a man wanted to enter into a civil marriage, he had to ensure that he had dissolved all of his marriages previously entered into (both civil and customary), and had to identify all of his children and wives from previous marriages.³²⁶ If the man went over this rule, he would be punished through a fine or imprisonment.³²⁷ However, this rule did not stop men from marrying under different regimes.³²⁸

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- (2) Subject to subsection (1), no person who is a partner in a customary union shall be competent to contract a marriage during the subsistence of that union;
- (c) by the substitution for subsection (3) of the following subsection:
- (3) No marriage officer shall solemnize the marriage of a Black man unless he has first taken from him a declaration to the effect that he is not a partner in a customary union with any woman other than the one he intends marrying;
- (d) by the substitution for subsection (5) of the following subsection:
- (5) A Black man who wilfully makes a false declaration to a marriage officer with regard to the existence or not of a customary union between him and any woman, shall be guilty of an offence and liable on conviction to the penalties which may by law be imposed for perjury;
- (e) by the deletion of subsection (6); and
- (f) by the substitution for subsection (7) of the following subsection:
- (7) No marriage contracted after the commencement of this Act but before the commencement of the *Marriage and Matrimonial Property Law Amendment Act, 1988*, during the subsistence of any customary union between the husband and any woman other than the wife shall in any way affect the material rights of any partner of such union or any issue thereof, and the widow of any such marriage and [any] the issue thereof shall have no greater rights in respect of the estate of the deceased spouse than she or they would have had if the said marriage had been a customary union."

³²¹ Meyer *Recognition of Customary Marriages* 178.

³²² Meyer *Recognition of Customary Marriages* 178.

³²³ Rautenbach and Du Plessis *African Customary Marriages in South Africa and the Intricacies of a Mixed Legal System: Judicial (In) novation or Confusio?* 759.

³²⁴ Section 22(1) of the *BAA* 38.

³²⁵ Section 22(2) of the *BAA* 38.

³²⁶ Section 22(3) of the *BAA* 38.

³²⁷ Section 22(4) of the *BAA* 38.

³²⁸ Rautenbach and Du Plessis *African Customary Marriages in South Africa and the Intricacies of a Mixed Legal System: Judicial (In) novation or Confusio?* 759.

3.4.3 The BLAA 76 of 1963

The *BLAA*³²⁹ afforded female partners in a customary marriage the opportunity to be eligible to claim for damages upon the death of their husbands.³³⁰ Section 31 (1) of the *BLAA* provided that:

“A partner in a customary union [shall] be entitled to claim damages for loss of support from any person who unlawfully causes the death of the other partner to such a union or is legally liable other partner is in respect thereof, provided such a partner is not at the time of such death a party to a subsisting marriage.”³³¹

This is one of the sections that has led to the recognition of wives in customary marriages and it is perceived as a significant development to South African customary law.³³² The purpose of this was to give widows the right to claim from the person who caused the death of their husbands, provided that neither of them were not part of a polygamous marriage. Before this provision, customary marriages were not recognised by law, therefore, there was no legal duty for spousal maintenance.

The *Act* also prescribed circumstances in which the widow is liable to claim for loss of support and these are as follows:³³³

- The claimant or such other party (the deceased) was not, at the time of death, a party to a subsisting marriage;
- The claimant produces a certificate stating her name as a party to a customary marriage or in the case of a customary marriage with more than one spouse, the names of all the spouses with whom the deceased was married; and

³²⁹ Section 31 of the *BLAA* 1963.

“Rights of a partner to a customary union to claim damages from a person unlawfully causing death or other partner.”

³³⁰ Nichols “Marriage and Divorce in a Multicultural Context: Multi-tiered Marriage and the Boundaries of Civil Law and Religion” 204.

³³¹ Section 31(1) of the *BLAA*.

³³² Dlamini 1984 *SALJ* 346.

³³³ Maithufi and Bekker *The existence and proof of customary marriages for purpose of road accident fund claims* 164.

- The customary marriage must have been in existence at the time of the death of the deceased.

3.4.4 *The Code of Zulu Law (KwaZulu Act) 6 of 1981*

The purpose of this *Act* was to inscribe equality between Zulu men and women who were in customary marriages. Before the enactment of this *Act*, African women in Natal were seen as minors.³³⁴ They would only acquire the limited status of majority when they reached the age of 21. Zulu women were not recognised by the law. They did not have the legal status to transact under their own name, to sue or be sued in a court of law or even to enter into contracts.³³⁵ It was important that they get the necessary consent from their guardian (husband) in order to take any legally binding decision.³³⁶

The *Natal Code* provided for equality and freedom, but this did not make provision for the women being in better positions in their marriages. This also did not loosen restricted laws against women in customary marriages. For example, in order for a woman to be recognised, she had to be an owner of immovable property, and this was not possible because she was disadvantaged in that domain by the same law. A Zulu woman had to apply to the court in order for her status to be recognised as major even though she was married or over the age of 21. However, section 16 of the new code made it possible for a woman to acquire the status of majority without applying to a court of law and afforded her the freedom to become the head of the family.³³⁷ Because of this law, a woman was now able to make decisions regarding the household without requesting consent from her husband and she was also allowed to make juristic acts on her own.³³⁸

However, this was not the same position for wives in customary marriages. Section 16 of the *KwaZulu Act* provided that women acquired the status of majority upon

³³⁴ Hlophe *The KwaZulu Act on the Code of Zulu Law 6 of 1981* 163.

³³⁵ Hlophe *The KwaZulu Act on the Code of Zulu Law 6 of 1981* 163.

³³⁶ Hlophe *The KwaZulu Act on the Code of Zulu Law 6 of 1981* 163.

³³⁷ Section 16 of the *KwaZulu Act 6 of 1981*.

³³⁸ Bekker *The Official Status of Customary Law-Ten Years Later* 125.

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marriage.³³⁹ This was in conflict with majority of the cultural laws.³⁴⁰ If a woman was a major, it would put her at the same level as her husband and this was in conflict with many cultural beliefs that stated that the husband is the head of the family.³⁴¹ Regardless of this belief, changing the status of a woman to a major was seen as an essential requirement for the validity of a customary marriage. For a customary marriage to be valid, the consent of a guardian was needed and if the woman was a major her consent alone was necessary. In the past, many customary marriages were invalid because of the lack of consent from guardians, and a woman had less power to intervene in the matter because she had no legal capacity to do so. Section 16 therefore allowed a woman to have a say if she wanted to get married or not regardless the consent of her parents or guardian.

Before the enactment of the *KwaZulu Act*, marrying without a parent or guardian's consent was unlawful.³⁴² This would automatically result in the marriage being illegal, even if the couple had expressed their interest to marry. The *KwaZulu Act* did not only bring the freedom to choose to get married on the part of woman, but it also gave her the freedom to deny having *lobola* paid if she did not want it.³⁴³ Nevertheless, the marriage would be binding and recognised by the law provided all the requirements of a customary marriage have been fully abided to and there was no way that the parents could object to the marriage. This provision gets interesting because, although the woman can deny having *lobola paid* for, the *KwaZulu Act* provided that her parents, particularly the father, still holds the right to request *lobola* as a form of security against his daughter.³⁴⁴ Section 42(2) does not necessarily state that *lobola* is a requirement for a customary marriage to be concluded; it simply provides that, the fact that the woman has refused to be paid *lobola* for, does not affect her family rights to request *lobola* from her husband.³⁴⁵

³³⁹ Section 16 of the *KwaZulu Act 6 of 1981*.

³⁴⁰ Bekker *The Official Status of Customary Law-Ten Years Later* 125.

³⁴¹ Bekker *The Official Status of Customary Law-Ten Years Later* 125.

³⁴² Hlophe 1984 *CILSA* 164.

³⁴³ Section 16 of the *KwaZulu Act 6 of 1981*

³⁴⁴ Section 42(2) of the *KwaZulu Act 6 of 1981*.

This section provides that "the mere fact that the consent of the father or guardian is not required in respect of the entrance into customary marriage by a major female shall not be interpreted as prejudicing the right of any person entitled to the *lobola* payable in respect of such major female by her intended husband."

³⁴⁵ Hlophe 1984 *CILSA* 166.

If it happens that the husband denies to pay *lobola*, the father of the bride may institute a civil claim in order to recover the *lobola*.³⁴⁶

There were a lot of uncertainties and misunderstandings that were created under customary marriages. Therefore, there was need to revisit these sections and identify more consistent rules. As part of the laws that were reinvented as part of this Act, it was stated that, in order for a customary marriage to be validly entered into, and for it to be recognised by law, *lobola* had to be paid or some arrangement could be entered into between the two families and agree on how the *lobola* will be paid. According to customary law, the non-payment of *lobola* would demonstrate that the parents of the woman have not consented or given their blessings to the marriage which is an important part of a cultural marriage. One of the purposes of the *KwaZulu Act*, was to refrain from this rule of making the payment of *lobola* compulsory, however, this was in conflict with the indigenous law of South Africa. This also made sense because, in section 42(1) of the *KwaZulu Act*,³⁴⁷ the requirements of a valid customary marriage were outlined and the payment of *lobola* was not listed as one of them, therefore one could dismiss this as marginal.

Bekker holds the view that if the *lobola* is not paid, it cannot really be said that there was a proper marriage that has been concluded.³⁴⁸ He further argues that even if a customary marriage was concluded, some women cannot proudly attain this status simply because there was no *lobola* paid for them. Because of this, he views *lobola* as an important element for the validation of a customary marriage. Regardless of his view, the *KwaZulu Act* does not insist on *lobola* to be paid, but still allows for the claim of *lobola* to be made even after the marriage has been concluded by the bride's parents. When a customary marriage has been dissolved, traditionally, the father of the bride or the person who received the *lobola*, is expected to support the bride financially and assume guardianship. This would only be the case provided the bride was under the age of twenty-one and therefore still

³⁴⁶ Hlophe 1984 *CILSA* 166.

³⁴⁷ Section 42(1) of the *KwaZulu Act* 6 of 1981.

³⁴⁸ Bekker *The Official Status of Customary Law-Ten Years Later* 125.

confined to status of a minor. If no *lobola* was paid, the bride would forfeit the right to claim support from her parents or guardians.

3.4.5 *Traditional Leadership and Governance Framework Act 41 of 2003*

The *Traditional Leadership and Governance Framework* (hereafter *TLGFA*) forms one of the most important laws in customary law because it recognises the existence of traditional leaders. In particular, section 5 provides as follows: “a traditional leader performs the functions provided for in terms of customary law and customs of the traditional community concerned, and in applicable legislation”.³⁴⁹ Whenever a role for the traditional council is allocated, one of the most important factors an organ of state needs to consider is the customary law and customs of the affected community. Furthermore, that role should be consistent with the Constitution. If it happens that there is a dispute regarding the customary rules of that community and this *Act* cannot be implemented, members of that community and traditional leaders may request to resolve the problem amongst themselves with agreement on how their custom has been practiced over the years.

Traditional leaders are of essence when coming to customary law. Traditional leaders do have power and authority over customary marriages, especially those that take place in communities that are led by chiefs.³⁵⁰ Traditional leaders express what they want to see happen through the National and Provincial Houses of Traditional leaders.³⁵¹ The traditional council comprises of the traditional Courts. These are the courts for the chiefs and headmen. They perform an important role in the administration of justice in tribal areas.³⁵² Traditional courts are protected in this *Act*, which assists in allowing the courts to function and exercise jurisdiction in terms of legislation applicable to it until Parliament amends or repeals such legislation; and as long as the legislation is consistent with the Constitution.

³⁴⁹ Section 5 of the *TLGFA* 41 of 2003.

³⁵⁰ Bekker *The official status of customary law- ten years later* 128.

³⁵¹ The National House of Traditional Leaders Act 22 of 2009.

The purpose of the Act is to “provide for the National House of Traditional Leaders; to determine the powers, duties and responsibilities of the House; to provide for support to the House by government; to provide for the relationship between the House and the provincial houses; to provide for the accountability of the House; and to provide for the matters connected therewith.”

³⁵² Bekker *The official status of customary law- ten years later* 128.

The logical question consequent on the issues raised above, is whether a divorce of a customary marriage can be instituted in a tribal court? The answer to this question is no; tribal courts cannot adjudicate over divorce matters. This is because during the 1990s, tribal divorce courts were abolished, therefore, its jurisdiction over divorce matters was transferred to the civil courts.³⁵³ This was also formalised in the *Magistrate Courts Amendment Act of 1993*.³⁵⁴ Customary courts do not have the power to issue binding decisions in marital disputes, although they retain mediation authority.³⁵⁵

3.5 Chapter Summary

It is clear that the *Constitution* of South Africa provides and protects customary marriages. However, there are limitations because the custom has to be consistent with the provisions of the *Constitution* at all times. Sections from both the Interim and the final *Constitution* that relate to customary marriages were highlighted and elaborated on. It is noted that some of the provisions of customary law are inconsistent with the Bill of Rights. Everyone has the right to exercise their constitutionally given rights and being unable to enjoy them because of marrying in a customary marriage makes the legal status of customary marriages questionable.

There seems to be conflict between the Bill of Rights and customary marriages. The reality is that culture must evolve with successive generations. If it does not, it makes it difficult for it to be recognised and respected for what it is. Not every custom that was practiced in the past could still be relevant today given the new constitutional dispensation and the dynamic changes in marital patterns. Since 1994, South African Courts have been working to find a balance between African customary law as recognised by the Constitution and some of the Fundamental rights and freedoms contained in the Bill of Rights.

Prior to 1998, African customary marriages and polygamous marriages were recognised by common law. In 1998, the *RCMA* was enacted to formalise the

³⁵³ Nichols *Marriage and Divorce in a multicultural context* 50.

³⁵⁴ *Act 120 of 1993*.

If there is no family court in the area, jurisdiction lies with the High Court.

³⁵⁵ Bennett *Customary law in South Africa* 143.

recognition of customary marriages and this repealed all the other Acts which caused inequalities in customary marriages. The *RCMA* also gave women the legal status in their respective marriages and also outlined some compulsory rules that have to be adhered to in order for a legally binding customary marriage to be concluded. From the above, it has been highlighted how legislation relating to customary marriages was enacted and modified in some instances. Today, customary marriages are on the same legal footing as civil marriages, although there are still discrepancies regarding this subject. The *RCMA* is the main legislation pertinent to customary marriages; however, its provisions should be consistent with the provisions of the Constitution at all times. The *RCMA* with the assistance of other Acts above, have aided in affording customary marriages the respect, equality and the protection it deserves.

Chapter 4 The shortcomings of Customary Marriages

4.1 Introduction

Traditional marriages have had a lot of challenges, mostly caused by the limitations attached to them. Complications in these marriages usually begin when the marriage is not formalised in a contract. This can only be done by registering the marriage with the Department of Home Affairs. Not registering the customary marriage makes it almost impossible for the parties to the marriage to prove the existence of such marriage, especially when *lobola* was not paid.³⁵⁶ However, even though the marriage is not registered with the Department of Home Affairs, the *RCMA* still recognises the customary marriage as valid.³⁵⁷ Other problems in customary marriages emanate from the nature of the marriage itself.

This chapter focuses on the limitations of customary marriages consisting of the legal and financial implications. Culturally, when prospective spouses agree to become husband and wife, the obligation and undertaking goes beyond that. The union and contract also includes their families, who then also establish a relationship. Therefore, the challenges in customary marriages do not only affect the parties to the marriage, but also their families. This chapter deals with such legal challenges as faced in customary marriages and the affected parties. Special focus is directed on issues including registration of customary marriages, spousal maintenance, *lobola*, property, polygamy and divorce.

4.2 The Legal Ramifications of Customary Marriages

Customary marriages have been part of the African custom for thousands of years,³⁵⁸ including laws related to them even though they were not codified.³⁵⁹ Today, customary marriages are not entered into as much as they were in the past as more couples opt to marry in civil marriages.³⁶⁰ This is because customary marriages are misconstrued and some people still hold the view that these

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³⁵⁶ Phiri 2017 <http://www.News24.com>

³⁵⁷ Section 4(9) of the *RCMA*.

³⁵⁸ Fenrich *et al The Future of African Customary Law* 457.

³⁵⁹ Fenrich *et al The Future of African Customary Law* 457.

³⁶⁰ Department of Home Affairs 2016 <http://www.dha.gov.za>.

marriages are not legally protected or they automatically carry a polygamous possibility. Provisions of customary marriages need to be consistent with the *Constitution* at all times. The *RCMA*, in dealing with some of its provisions, is vague and ambiguous. This chapter deals with those specific provisions and some of the disadvantages of customary marriages in South Africa.

In the past, wives in customary marriages did not have any legal status.³⁶¹ They were regarded as minors in their respective customary marriages.³⁶² They were under the control and guardianship of their husbands.³⁶³ However, since the enactment of the *RCMA*, the legal position of wives has changed. According to the *RCMA* both parties are equal to each other.³⁶⁴ A key purpose of the *RCMA* is to alleviate discrepancies in customary marriages and bring about equality. Therefore, the legal question that arises is whether the *RCMA* is sufficient to protect customary marriages? The *RCMA*, complemented by the *Constitution*, is capable of protecting customary marriages, provided some of its provisions are amended. The *RCMA* has brought freedom with regards women and finances in customary marriages. The fact that such wives can now access economic resources has also totally changed and improved over the years.

Today, parties to a customary marriage can choose their marital regime by entering into an ante-nuptial contract. If there is no contract, the marriage is deemed to be in community of property.³⁶⁵ One other area which tends to create a problem in customary marriages is succession. Succession becomes a problem especially if the customary marriage is not registered. When there is no proof of the existence of the marriage, the remaining spouse does not have the legal protection to claim their partner's estate at the time of their death.³⁶⁶ This mostly happens when the husband dies first; the husband's family characteristically deny the wife to lay a claim, stating

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³⁶¹ Section 11(3)(b) of the *BAA*.

³⁶² Swart *Personal Financial Management* 114.

³⁶³ Swart *Personal Financial Management* 114.

"In traditional marriages, women would become minors after getting married. For this reason, they did not have bank accounts, nor could enter into contracts of sale and purchase. When the husband dies, the eldest son would inherit everything leaving the women with nothing."

³⁶⁴ Section 6 of the *RCMA*.

³⁶⁵ Section 7(2) *RCMA*.

³⁶⁶ Illustrated in the case of *Sengadi v Tsambo* 2019 1 ALL SA (GJ).

that they do not recognise the marriage because it was not registered.³⁶⁷ According to the *RCMA*, this is not permissible. The fact that a customary marriage is not registered does not confirm the marriage as invalid.³⁶⁸ The marriage will continue to be treated as such until the contrary has been proven.

However, this can happen in two instances. In *Ngwenyama v Mayelane*,³⁶⁹ a man who was involved in two polygamous marriages died without registering his second marriage in accordance with the *RCMA*. The North Gauteng High Court found the second marriage to be invalid.³⁷⁰ However, on appeal, it was held that the interpretation favoured by the High Court breached the right of affected women in terms of equality.³⁷¹ Because of this judgment, the second wife was not liable for maintenance because, according to the Court, she was not registered as a wife to the marriage.³⁷² There are instances where by the parties to a customary marriage have no intention to marry through customary law. In such instances the parties can apply to the High Court to have their marriage transferred to a civil marriage and create a post-nuptial contract setting out the same terms and conditions as the previous marriage. On the following segment describes the areas where the *RCMA* is inadequate, vague and where it fails to give legal protection.

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4.2.1 Registration of a Customary Marriage

The *RCMA* provides for the registration of a customary marriage.³⁷³ It provides that customary marriages must be registered, even though failure to do so does not nullify the marriage.³⁷⁴ This causes uncertainty; hence, couples are reluctant to register their customary marriages. Not registering a customary marriage often results in disputes over the validity of the marriage. Many customary marriages are not registered with the Department of Home Affairs. The problem arises when one party to the marriage dies. In such a circumstance, the remaining spouse has to prove that they were married to the deceased. Without a marriage certificate, it

³⁶⁷ Emphasis added. See also *Sengadi v Tsambo* 2019 1 ALL SA (GJ) para 38.

³⁶⁸ Section 4(9) of the *RCMA*.

³⁶⁹ *Ngwenyama v Mayelane* 2012 (4) SA527 (SCA).

³⁷⁰ *Ngwenyama v Mayelane* 2012 (4) SA527 (SCA) para 34.

³⁷¹ Currie and De Waal *The Bill of Rights Handbook* 223.

³⁷² *Ngwenyama v Mayelane* 2012 (4) SA527 (SCA) para 87.

³⁷³ Section 4 of the *RCMA*.

³⁷⁴ Section 4(9) of the *RCMA*.

becomes challenging for them to prove that they were married, especially when the family disputes the validity of the marriage.

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This was demonstrated in the recent case of *Senyadi v Tsambo*,³⁷⁵ where Lerato Senyadi (the wife of the late Jabulani Tsambo famously known as HHP) took the deceased's father to court. In her founding affidavit Lerato argued that she and Jabulani Tsambo entered into a customary marriage, whereas the Tsambo family claimed that the couple was never married. The Tsambo family intimated that the *lobola* negotiations for Lerato were not completed and that was the reason they did not view her as the legal customary wife of Jabulani. They alleged that there also needed to be a handing over ceremony before Lerato could have been pronounced as Jabulani's legal customary wife.³⁷⁶

The Tsambo family also brought up the issue of the payment of *lobola* negotiations. Lerato stated that an amount of R45 000.00 was agreed upon for her *lobola* but Jabulani only proceeded to make a deposit of R35 000.00. The Tsambo family stated that only R30 000.00 was deposited and there needed to be more negotiations in order to pay the remainder of R15 000.00.³⁷⁷ The South Gauteng High Court ruled that Sengadi was the late Jabulani's customary law wife.³⁷⁸ The Judge, however, denied the interdict instituted by Lerato to hold the funeral from taking place. The above matter is one of many cases proving that the issues around *lobola* are recognised by the South African courts, although the subject matter is still a contentious one.

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The *RCMA* does not make it mandatory for the marriage parties to register their customary marriages.³⁷⁹ As stated above, it states that the parties to a customary marriage must register their customary marriages but ~~it~~ proceeds to state that even if the marriage is not registered, it will not affect the validity of the marriage.³⁸⁰ Such an inherent contradiction in the *RCMA* spur the spouses into not seeing the importance of such an undertaking since it is not mandatory. According to the

³⁷⁵ 2019 1 ALL SA (GJ).

³⁷⁶ *Sengadi v Tsambo* 2019 1 ALL SA (GJ) para 8.

³⁷⁷ *Sengadi v Tsambo* 2019 1 ALL SA (GJ) para 5.

³⁷⁸ *Sengadi v Tsambo* 2019 1 ALL SA (GJ) para 41.

³⁷⁹ Section 4(9) of the *RCMA*.

³⁸⁰ Section 4(1) and Section 4(9) of the *RCMA*.

RCMA, “parties to a customary marriage must register their marriage with the Department of Home Affairs within three months after the marriage”.³⁸¹ However, when both spouses are still alive, they can get the marriage registered even after the three months have lapsed.

In some instances where proof of a customary marriage is needed during registration, the parties can produce the *lobola* agreement letter.³⁸² The agreement letter normally contains the date of the negotiations, the *lobola* amount and other conditions and information upon which the parties agreed. If the agreement was made in a rural area, usually the confirmation might be from the tribal chief (*kgosi*) as a witness or any of the parties who were present during the *lobola* negotiations. If there is no paper trail at all, as some people have never been to school and most of these unregistered customary marriages pre-date the year 2000, the spouse would need someone to prove that the marriage does exist. The problem arises if one of the spouses has died, because the remaining spouse would now need to prove the existence of the marriage. The remaining spouse will need witnesses from both families and that is usually problematic.

Many disputes commence at this point because there are assets and children involved. The Department of Home Affairs allows that a customary marriage can be registered even if the other spouse has passed away.³⁸³ However, there was a change to this provision as from the 31st December 2016.³⁸⁴ Today, registering a customary marriage where one party is deceased is done through a High Court application. There have been some challenges in terms of validating customary marriages in terms of the *RCMA*. These include the interpretation of the requirements that the *Act* provides, more especially the third requirement;³⁸⁵ and also the procedures of registering a customary marriage with the department of

³⁸¹ Section 4(3)(b) of the *RCMA*.

³⁸² Section 4(a) of the *RCMA*.

³⁸³ Section 7.2(b) of the *Chief Master's Directive 2* of 2005.

³⁸⁴ Section 7.2(b) of the *Chief Master's Directive 2* of 2005.

³⁸⁵ Section 4(a) of the *RCMA*.

The marriage must be negotiated and entered into or celebrated in accordance with customary law.

Home Affairs as the parties can state that the requirements have been followed even though that is not the case but the marriage will still be registered (no credibility).

Another concomitant challenge involves the registration facilities. South Africa has a very large population,³⁸⁶ and this facet has given rise to the development of new residential areas and new settlements. There are inadequate registration facilities that are accessible for people to register their customary marriages, especially in the rural areas that are far from the urban centres. The *RCMA* does not put much effort in ensuring that there are enough resources to ensure that the registrations are successful. Registering customary marriages is therefore uniquely problematic to every community and the hurdles associated with registration need careful scrutiny.

4.2.2 Lobola as an essential requirement for a valid Customary Marriage

When the British colonisers arrived in South Africa, they viewed *lobola* as a purchase of a wife and they have always compared it to the buying of a slave.³⁸⁷ As such, there were quite number of attempts to ban this practice.³⁸⁸ Culturally, *lobola* is paid when the prospective husband asks for the prospective wife's hand in marriage. The ultimate value is determined and accepted by the woman's family. If the prospective wife's family is not happy about the *lobola* that has been offered by the prospective husband's family, they will deny it and the customary marriage will not be concluded. According to the South African black cultures and traditions,³⁸⁹ *lobola* is one of the most important requirements for a valid customary marriage to be concluded. In this cultural context, *lobola* represents the bringing together of two families, including several gatherings and bargaining meetings that impute a transactional element to the practice. Even though a marriage might not be registered with the Department of Home Affairs, because *lobola* has been paid, the marriage is recognised as valid by both families.

³⁸⁶ The current population of South Africa is 58,128,458 as of 07th August 2019 based on the latest United Nations estimates.

³⁸⁷ Sekai 2013 <http://www.herald.co.za>.

³⁸⁸ Herbst and Du Plessis *EJCL* 12.

³⁸⁹ These include Zulu, Xhosa, Pedi, Tswana, Sotho, Ndebele *etc.*

Lobola is culturally viewed as the most important element of a customary marriage.³⁹⁰ However, the *RCMA* fails to address *lobola* as a practice and to frame its legal requirements. It is for this reason that there are many uncertainties regarding *lobola* and its legal status. It would be legally wrong to refer to *lobola* as a compulsory practice because there are some South African families that do not even request *lobola* before a customary marriage is concluded. The practice of *lobola* amongst different South African cultures serves several contextual purposes. In some South African cultures, it symbolises that the parties are in a valid marriage while in some, it signifies the promise to marry. The *RCMA* is silent about the practice of *lobola* and neither is it listed as a requirement for a valid customary marriage. Does this then mean that *lobola* is not a compulsory practice among the African cultures of South Africa?

The issue of *lobola* has caused a misperception in customary marriages for a long time hence it remains such a powerful construct and practice. There are quite a number of problems related to *lobola* when concluding a customary marriage as the purpose of paying *lobola* has been misunderstood in many circles. Initially, its purpose was to show appreciation to the prospective wife's family as she would now be an asset to her prospective husband's family.³⁹¹ Some families take advantage of this process. They make high demands for *lobola*, and in most instances, they ask for more than what the man and his family are willing to pay. In some instances, when the bride's family does not want the marriage to take place, they would deliberately ask for an exorbitant amount knowing that the man would not be able to afford it, and in that way, they will be able to reject the marriage. It is for such reasons that the *RCMA* needs a provision that could oversee the processes entailed in *lobola* in order to prevent the practice from being commercialised and abused. This would bring consistency and save the practice from losing its significance.

Another purpose for paying *lobola* is to bring stability in customary marriages and equally assure the protection of wives.³⁹² Culturally, it is assumed that if a man is able to pay *lobola*, then such a man is able to take care of his wife. To a certain

³⁹⁰ Mahomed *et al* 1998 *SALC* 50-51.

³⁹¹ Darko-Yeboah and Nyandoro *Bride Price: Lobola Narrative and Interpretations* 126.

³⁹² Nowrojee *Violence against women in South Africa* 30.

extent, this is not true. The ability of a man paying *lobola* cannot be used as a measure of his wealth nor his capacity to provide adequately for the wife. Nowadays *lobola* can be generated in many ways: some men turn to banks to borrow the money (as a loan). In other cases, their prospective wives' or families assist them by giving them the *lobola* to take to the bride's family. *Lobola* also becomes a problem at the time of the dissolution of a customary marriage. In some cultures, when the marriage ends, half or full *lobola* has to be returned to the groom's family, depending on the circumstances of the divorce. This is culturally and morally wrong because then women are treated as objects that can be purchased and returned for refund if the buyer is unsatisfied.

The purpose of *lobola* in the 21st century has been desecrated, as many people can get married without paying *lobola*. It places a price tag on women and in the process degrades women by categorising them according to the *lobola* that has been paid for them. Women whose *lobola* amount is low usually feel undervalued in the society and around their families. Women who are not married or have not had *lobola* paid are treated differently in many ethnicities. For example, in the Setswana cultural ceremonies, there is often as *kwa-kgotleng*,³⁹³ where only married men are allowed and married men eat certain foods during that gathering. Paying *lobola* today is akin to buying property because if the practice was essentially a sign of appreciation the groom would be allowed to offer any value that he could afford. To enhance its significance, *lobola* should be used as a tool to benefit the newly-weds in buying them a house, furniture, or assist in the planning of the wedding itself. Instead, the bride's family, in many instances, charges *lobola* not for the support of the bride and groom but for their own financial gain.

Lobola has also caused custody disputes where the parents fight for the custody of the female children even if they cannot afford to take care of them because they would want benefit from the children's *lobola*. This further demonstrates that *lobola* in some South African cultures has become a way of making money. If a family has many girl children, such a family is deemed worthy prospectively rich family because of the *lobola* that is anticipated when marriage occurs. Even though *lobola* continues

³⁹³ It is a spot where men gather during occasions, where they normally sit in a circle and have their own separate pots to cook.

to be a problem in customary marriages, there has not been much intervention do to address this issue, and yet the practice of *lobola* still enjoys legal recognition and is not prohibited by law.

The *RCMA* states that “for a customary marriage to be concluded, the parties must be 18 years or older; they must consent to the marriage and the marriage must be negotiated and celebrated according to customary law”.³⁹⁴ According to the *Act*, there is no specific mention that *lobola* must be paid. Permitting to the wording of this subsection (c), there must be ‘negotiation’. This is where the *lobola* comes in because it is a process of negotiation; furthermore, there must be a celebration. However, this might not be the true understanding for all families. In the case of *Sengadi v Tsambo*,³⁹⁵ the negotiation part had taken place which is the payment of *lobola*, meaning that the families met together and they negotiated on what would be the appropriate amount for *lobola*. However, in this case the dispute was to find out if the second part had been done, which is the entrance of the marriage according to the *RCMA*.

This contention involves the second part of subsection (c), which is the celebration part, which includes the handing over or the receiving of the bride. This is important because a customary marriage is a process that markedly differs from the proceedings in a civil marriage. *Lobola* is not a transaction that could happen in one day (although some families can afford to do it in one day). In *Fanti v Boto*,³⁹⁶ it was held that *lobola* alone does not constitute a valid customary marriage. The bride must have been transferred to the groom’s family even if the *lobola* has not been fully paid; the parties must come to an agreement in their negotiations.³⁹⁷ The negotiations could also mean that the families must agree that the two parties (bride and groom) are given into marriage to each other.

The essence in this process is that the family of the bride must accept that she is now a bride to her husband’s family and her prospective husband’s family must receive and acknowledge her according to the customs that they need to perform.

³⁹⁴ Section 3 of the *RCMA*.

³⁹⁵ [2018] ZAGPJHC 613.

³⁹⁶ *Fanti v Boto and Others* 2008 (5) SA 405 (C).

³⁹⁷ *Fanti v Boto and Others* 2008 (5) SA 405 (C) 413-414.

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This would now mean that the bride has been incorporated into the family and consequently becomes the wife. According to the *RCMA*, if the above has not happened then the customary marriage is not fully entered into. Legally, the presentation of *lobola* alone is not enough according to both living and official customary law. It is therefore important that people who enter into customary marriages ensure that there has been a transfer and incorporation of the bride into the groom's family.³⁹⁸

4.2.3 Ownership and Property

In the past, the husband in a customary marriage was regarded as the head of the family. They had complete control over the property of the marriage household.³⁹⁹ It was for this reason that women were immensely discriminated in a customary marriage because they were deemed inferior.⁴⁰⁰ When the *RCMA* was enacted, it brought about stabilisation regarding equity; one being the ability to choose the type of matrimonial system that the couple want to be married in.⁴⁰¹ The challenge with customary marriages and property is that the *RCMA* does not deal adequately with rules pertaining to the marriage property. In the past, the husband was the sole provider of the family, therefore upon the dissolution of such marriage, all the property belonged to him or his family.⁴⁰² This perception is still supported in most customary marriages in rural areas; husbands are still the providers for their families and they regard themselves as the head of the family. However, this position has been challenged and wives are now protected by the law so they do not leave empty-handed when the marriage is dissolved.

Some South African black wives have never had it easy in their marriages in past.⁴⁰³ They were dependent on their husbands and they survived through their husband's

³⁹⁸ *Fanti v Boto and Others* 2008 (5) SA 405 (C) 413-414.

³⁹⁹ Bennett *Human Rights and African Customary Law under the South African Constitution* 125.

⁴⁰⁰ Bennett *Human Rights and African Customary Law under the South African Constitution* 125.

⁴⁰¹ Section 7 of the *RCMA* provides that "parties to a customary marriage may choose to marry through the following matrimonial systems; a) In community of property and profit and loss; b) Out of community of property with the accrual system; and c) Out of community of property without the accrual system."

⁴⁰² Bennett *Human Rights and African Customary Law under the South African Constitution* 284.

⁴⁰³ Section 11(3)(b) of the *BAA*.

benevolence for financial support.⁴⁰⁴ A wife's duties entailed taking care of household chores and ensuring that the husband and the children were fed and well taken care of.⁴⁰⁵ In instances where the wife had a day-to-day job, once married, the husband would advise her to quit her job in order to be a house wife.⁴⁰⁶ Problems regarding property in customary marriages usually occur when such a marriage is dissolved. Although in most instances, it may be found that the husband provided the majority of the marriage property, the wife also had a hand in the acquisition of the property because of the support and care she gave her husband. Because of the perception that the husband is the head of the family, upon divorce, it is a common practice that the husband continues to support the wife and the children.⁴⁰⁷

After the dissolution of a customary marriage and it happens that the children are left under the care and support of their father, the law allows that the husband can also request maintenance from his wife on his behalf and the children.⁴⁰⁸ However, most men do this because traditionally the man will be perceived as a man being weak for being maintained by his wife. When a customary marriage is dissolved, in most instances the process is always at the detriment of the woman. They are usually sent back to their family homes as it is often difficult for a woman who has been married in a customary marriage to recover after a divorce in terms of employment. They have depended so much on their husband and this is compounded by the reality that they have neither education nor skills.

⁴⁰⁴ Catsouphes *et al* *The Work and Family Handbook: Multi- Disciplinary Perspectives and Approaches* 251.

⁴⁰⁵ Catsouphes *et al* *The Work and Family Handbook: Multi- Disciplinary Perspectives and Approaches* 251.

⁴⁰⁶ Catsouphes *et al* *The Work and Family Handbook: Multi- Disciplinary Perspectives and Approaches* 255.

⁴⁰⁷ *EH v SH* 2012 (4) SA 164 (SCA).

"The Supreme Court of Appeal found that a person claiming maintenance must establish a need to be supported by the other spouse and that if no such need is established, it would not be 'just' for a maintenance order to be issued. Therefore, proving a need for maintenance is vital for obtaining maintenance. The Court also found that the fact that a spouse who is claiming maintenance post-divorce while living with another person is not necessarily barred to claim maintenance, however, if the spouse is being fully maintained by the other person with one he/she is living, he/she does not need maintenance from his or her former spouse after the divorce and such a claim will be dismissed."

⁴⁰⁸ Section 7 of the *Divorce Act* 70 of 1979.

The *RCMA* provides that “a husband in a customary marriage who wishes to enter into an additional marriage must make an application to the High Court”.⁴⁰⁹ This application is for the approval of a written contract which will regulate the future matrimonial property system of his marriages.⁴¹⁰ The problem with polygamous marriages arises when the first marriage is in community of property, and then the husband wants to enter into another marriage. The marital system of the first marriage will have to be terminated and the property has to be divided and a new system followed.⁴¹¹ This process is the same as the one for dividing property in a divorce of a customary marriage in community of property. This causes an inconvenience to women who find themselves in the first or existing polygamous marriage.

Customary marriages are considered to be in community of property. Disputes in property rights usually begin when the husband enters into a second marriage. According to the *RCMA*, the first marriage remains in community of property. In terms of the *Act*, parties have to approach the court to form an agreement as to what are the proprietary rights to the marriage.⁴¹² If the court does not take the necessary steps, that second marriage will be considered as out of community of property. It is for this reason that many women choose not to marry in customary marriages completely. An alternative to this inconvenience to women would be made better if women in customary marriages were given a choice from the commencement of the customary marriage to choose the marital regime they would want to get married in, rather than in community of property being obligatory.

4.2.4 Equality

The *RCMA* and the *Constitution* both provide for equality between a man and a woman in customary marriages.⁴¹³ Because of this, legal protection inequalities in customary marriages have been alleviated to some extent. For instance, the wife is now allowed to sell livestock without her husband’s consent whereas in the past,

⁴⁰⁹ Section 7(6) of the *RCMA*.

⁴¹⁰ Section 7(7) of the *RCMA*.

⁴¹¹ De Jong *The need for legislation and/or divorce mediation to counter some commonly experienced problems with the division of assets upon divorce* 229.

⁴¹² Section 7 of the *RCMA*.

⁴¹³ Section 6 of the *RCMA* and Section 9 of the *Constitution*.

this was impossible.⁴¹⁴ It was perceived that women did not have the experience that men had; therefore, they would need their help in many aspects especially in financial decision-making.⁴¹⁵ Women were not allowed to hold or dispose of property, sue or be sued in their own name, and were also not allowed to enter into contracts.⁴¹⁶ The main duties of a woman were to produce food and ensure that the husband and the children were fed.⁴¹⁷

New laws were enacted to guard against such inequalities in customary marriages.⁴¹⁸ Regardless of the implementation of these laws, there are still inconsistencies in the equality between a husband and a wife, especially in the rural areas. The wife is expected to be submissive to her husband and abide by his orders. This inequality also extends to polygynous marriages. Wives in a polygynous marriage are usually not treated the same in terms of who was married first. The first wife is usually accorded superiority compared to all the other wives and is often deemed as the mother or elder sister to all the other subsequent wives. The *RCMA* repeatedly uses the term 'husband' when dealing with provisions relating to polygamy, which according to its definition, includes multiple marriages for both men and women.⁴¹⁹ However, polygyny is the only type of marriage that is allowed and protected by the law in South Africa.⁴²⁰ The questions that arise are, first, whether the prohibition of polyandry is proscribed by the law or by the society; and secondly, whether the fact that only polygyny is practiced to the exclusion of polyandry makes the whole practice of polygamy invalid?

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Husbands still have power in their customary marriages and they are often favoured by some provisions of such marriage practices to the exclusion of women. Traditionally, men were seen as superior and often held authority, which is the

⁴¹⁴ Zibane Zulu *Cultural Traditions: A Draw Card for Tourism in KwaZulu Natal, with Special Reference to the Lebombo Spatial Development Initiative* 56.

⁴¹⁵ Zibane Zulu *Cultural Traditions: A Draw Card for Tourism in KwaZulu Natal, with Special Reference to the Lebombo Spatial Development Initiative* 56.

⁴¹⁶ Zibane Zulu *Cultural Traditions: A Draw Card for Tourism in KwaZulu Natal, with Special Reference to the Lebombo Spatial Development Initiative* 58.

⁴¹⁷ Zibane Zulu *Cultural Traditions: A Draw Card for Tourism in KwaZulu Natal, with Special Reference to the Lebombo Spatial Development Initiative* 60.

⁴¹⁸ The *RCMA*.

⁴¹⁹ Sections 7(4)(b), 7(5) and 7(6) of the *RCMA*.

⁴²⁰ There is no specific ban on the practice of polyandry. However, through the *RCMA* and customary law, only men have been enjoying the status of having multiple wives.

reason why it is difficult to depart from the view they are the head of the family. In most families in South Africa, the husband still holds the power to lead the family and make binding decisions on behalf of his entire family. Since legislation has been implemented with regards equality, the status of women in customary marriages has been considerably improved. One of the core purposes of the *RCMA* is to ensure equality between the husband and wife in customary marriages, including a fair settlement when the marriage is dissolved.⁴²¹ To ensure this equality and fair settlement, husbands or ex-husbands go to the extent of claiming back their *lobola* money upon divorce. The reason for this claim is that they no longer have the control over their wives, which is what they initially paid for. Before equality can be realised in customary marriages, the legal status of women needs to be improved. Wives should be allowed to do everything that their husbands are allowed to do in their marriages, especially if the marriage is in community of property.

Since the recognition of customary marriages in South Africa, the protection of customary marriages has also been included in the *Marriage Act*. This was to ensure that there were more measures taken in promoting equality between men and women. The challenge here is that even though this legislation promotes and encourages equality in customary marriages, it does not prevent wives from referring to their husbands as the head of the family. It does not prevent husbands from acting as such. It is evident that the powerlessness that wives experience in their marriages is derived from the reality that they do not have authority. The *RCMA* provides that “a wife in a customary marriage has, on the basis of equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity, including the capacity to acquire assets and dispose of them”. Women are also allowed to enter into legal agreements and to sue and be

⁴²¹ Preamble to the *RCMA* provides as follows:

“The purpose of the Act to make provision for the recognition of customary marriages; to specify the requirements for a valid customary marriage; to regulate the registration of customary marriages; to provide for the equal status and capacity of spouses in customary marriages; to regulate the proprietary consequences of customary marriages and the capacity of spouses of such marriages; to regulate the dissolution of customary marriages; to provide for the making of regulations; to repeal certain provisions of certain laws; and to provide for matters connected therewith.”

sued in their own name, in addition to any rights and powers that she might have at customary law.

4.2.5 Dissolution of a Customary Marriage

In the past, it was believed that customary marriages are indissoluble.⁴²² In that, if there was any problem with regards the marriage, elders of both spouses would intervene to resolve the problem.⁴²³ Due to this belief, there was no law to guard against divorce in customary marriages.⁴²⁴ In the olden days, when a customary marriage was dissolved and it was believed that the wife was the reason why the marriage did not work, the husband's family would usually demand the refund of *lobola* and return the wife to her family home.⁴²⁵ If the husband caused the dissolution of the customary marriage, then he would lose the *lobola*. This has been the position in some South African cultures up until the 21st century where the husband would request back his *lobola*, to the extent that he sues for it.

Under common law, a marriage may only be dissolved through a court order.⁴²⁶ However, customary law allows the parties to the marriage and their families to intervene by negotiating as to what would happen to the marriage property and the custody of the children.⁴²⁷ In the past, people did not believe in the termination of a traditional marriage. A customary marriage would not be dissolved for any of the reasons that are included in the irretrievable breakdown of a marriage.⁴²⁸ The elders believed that no problem could not be resolved within a marriage. Therefore, whatever reason it may be, it could be resolved. In most instances, problems that are normally commonplace in a customary marriage include disputes over property, custody of the children and the refund of *lobola*.

⁴²² Mahomed *et al The Harmonisation of the Common Law and the Indigenous Law* 121.

⁴²³ Mahomed *et al The Harmonisation of the Common Law and the Indigenous Law* 121.

⁴²⁴ Mahomed *et al The Harmonisation of the Common Law and the Indigenous Law* 128.

⁴²⁵ Mahomed *et al The Harmonisation of the Common Law and the Indigenous Law* 128.

⁴²⁶ Nkosi 2013 *De Rebus* 224.

⁴²⁷ Nkosi 2013 *De Rebus* 224.

⁴²⁸ Section 4 of the *Divorce Act* 70 of 1979 maintains that "the circumstances that a court may accept as evidence of the irretrievable breakdown of a marriage includes that the parties have not lived together as husband and wife for a continued period of at least one year immediately prior to the date issuing summons for divorce; the defendant has committed adultery and the plaintiff finds it irreconcilable with a continued marriage relationship or that the defendant was declared a habitual criminal and is undergoing imprisonment."

Before the enactment of the *RCMA*, there was no specified ground for the dissolution of a customary marriage.⁴²⁹ However, the parties had to have valid reasons for them to be granted a divorce. The question as to whether *lobola* is returned to the groom's family usually depended on the behaviour of the wife while she was still in the customary marriage. For example, if the wife could not bear children for her husband, if she was involved in extramarital relationship(s) or did not perform her wifely duties as expected, then for those reasons, *lobola* would be returned.⁴³⁰ On the other hand, the man would forfeit this *lobola* if he was the reason for the breakdown of the marriage. Such instances entailed being involved in an extramarital relationship, abusing one's wife in any form or if he failed to support and maintain his wife and children. The question of whether the council of traditional leaders can grant a divorce of a customary marriage also continues to be unclear. Traditional leaders play a key role in customary law; therefore, they should be included in decision making on these.

According to the *RCMA*, an unregistered customary marriage is considered valid provided all the requirements thereof have been satisfied.⁴³¹ Dissolving a customary marriage has to be done through a court order (whether registered or not). Walking away from the marriage does not constitute a divorce even if the two families are aware of this arrangement. Traditionally, there were mechanisms in place to resolve matters of this nature. These included meetings between both sides of the family (elders) with the intention of resolving the dispute in the marriage, intervention from the traditional leadership (*kgosi*) and some would even go back to the community that they married in and announce that the community should formally recognise the marriage as being dissolved. There are still people who still dissolve their customary marriages in such a manner and this is legally not acceptable and tends to become a problem when either of the parties to the marriage dies or wants to enter into a new marriage.

⁴²⁹ Buchner-Eveleigh 2012 *De Jure* 589.

⁴³⁰ Nkosi 2013 *De Rebus* 224.

⁴³¹ Section 4(9) of the *RCMA*.

4.2.6 Spousal Maintenance

In the past, there was no system of maintenance put in place in terms of South African customary law.⁴³² Customary marriages did not provide for the maintenance of the wife. Usually, when a customary marriage was dissolved, the bride would return to her family and all ties based on the marriage were severed.⁴³³ Children born into these marriages would normally remain with their fathers; therefore, they were not affected by maintenance.⁴³⁴ The *RCMA* now provides for maintenance in a customary marriage.⁴³⁵ There are certain guidelines as to who is liable to receive maintenance in a customary marriage.⁴³⁶ Even before the enactment of the *RCMA*, there was legislation in place to protect and assure maintenance in customary marriages. This legislation included the *BAA* that was later repealed by the *Marriage Act*.⁴³⁷

Therefore, customary law was amended to include fathers in customary marriages as liable for the support of their children. Maintenance has also been extended to include husbands as beneficiaries. This duty arises when the customary marriage is terminated through divorce or death of either of the spouses. Usually, the party

⁴³² *Botha v Botha* 2008 ZAGPHC 169. "It is an accepted principle of the South African law that neither spouse has a right to maintenance upon divorce".

"The payment of maintenance to a spouse upon divorce is the creation of a statute. The *Matrimonial Affairs Act* 37 of 1953 permitted a court to make an award against a guilty spouse for the maintenance of the innocent spouse. The current *Divorce Act* of 1979 permits a court to make an award which finds it just for maintenance by one party of the other party".

⁴³³ Bonthuys and Albertyn *Gender, Law and Justice* 187.

"During this time, customary marriages were not fully recognised as legal marriages, therefore, the wife had no legal status to claim support after divorce."

⁴³⁴ Adams and Trost *Handbook of World Families* 60.

⁴³⁵ Currie and De Waal *The Bill of Rights Handbook* 223.

Section 8(4) (e) of the *RCMA* provides that:

"A court granting a decree for the dissolution of a customary marriage may, when making an order for the payment of maintenance, take into account any provision or arrangement made in accordance with customary law."

⁴³⁶ The *Divorce Act* 70 of 1979.

"Section 7(1) provides that the court, when granting a decree of divorce, may in accordance with the written agreement between the parties; make an order with regard to the payment of maintenance by one spouse to the other. This is usually in the case where a settlement agreement is entered into between the parties prior to finalisation of the divorce."

"Section 7(2) provides that in the absence of a written agreement (settlement agreement) the court may make an order which it finds just in respect of the payment of maintenance by the one spouse to the other by taking various factors into account. The court is required to consider the factors referred to in section 7(2) in order to decide, firstly whether maintenance is to be paid at all and, if so, the amount to be paid and the period for which maintenance is to be paid."

⁴³⁷ The *Maintenance Act* 23 of 1963.

leading to the breakdown of the marriage is liable to paying maintenance to the other spouse based on his or her financial circumstances.⁴³⁸ If there is no will, normally the family of the husband would forcibly determine what happens to the property, and in most instances this is to the disadvantage of the wife and the children.

4.3 Chapter Summary

Even though Parliament has enacted the *RCMA* to guard against customary marriages, the stipulations contained in this Act are challenging to implement if not implemented at all, especially in rural areas. The shortcomings of customary marriages in South Africa have been discussed. It is evident that there is still room for improvement in this type of marriage. It is unfortunate that most of these shortcomings always put women in vulnerable positions when the marriage ends. Some of these problems have been created by the *RCMA* itself. Although the *RCMA* was enacted to end the inconsistencies in customary marriages, it has inadvertently brought up some inconsistencies in the way it is interpreted. It is important that the *RCMA* is amended in order to address the limitations discussed above and for it to be consistent with the *Constitution* of South Africa.

⁴³⁸ Section 7 of the *Divorce Act* 70 of 1979.

Spousal maintenance will be granted if either or all of the below factors are satisfied:
"The parties' existing and prospective means; the parties' respective earning capacities and financial needs and obligations; the age of the Plaintiff; the duration of the marriage; defendant's conduct in so far as it caused the breakdown of the marital relationship; the parties' standard of living; and any other factor."

Chapter 5 Findings, Recommendations and Conclusion

5.1 Introduction

Upon conducting this research study, I realised that many people have been disseminating the wrong information of what constitutes a valid customary marriage. The *RCMA* itself is lacking to a certain extent, in clarifying some issues concerning South African customary marriages. Because of this, there has been some stigma attached to customary marriages by some yet these marriages have the same legal status as civil marriages. This is the concluding chapter, and it amplifies the findings of the research study and outlines recommendations. At this point of the research study, findings are addressed, then possible solutions with regards problems identified are proffered, culminating in the conclusion. The recommendations suggested are made in the interests of both parties of the marriage and are feasible suggestions that seek to provide consistency and balance in customary marriages through the *RCMA*.

5.2 Findings

In South Africa, the main legislation governing customary marriages is the *RCMA*, which defines and delimits a customary marriage.⁴³⁹ There are requirements for a valid customary marriage. These include that the prospective couple must be 18 years and above,⁴⁴⁰ they must give consensus to marry in terms of customary law⁴⁴¹ and the marriage must be negotiated and celebrated in line with customary law.⁴⁴² According to the *RCMA*, customary law is nothing more than the customs and usages made and observed amongst black people of South Africa.⁴⁴³

In the past, it was difficult to determine what were the customs and usages of black South Africans, taking into consideration that the different ethnic groups have their own ways of doing things culturally. Throughout the research study, illustrations through case law demonstrated disputes that are related to customary marriages in

⁴³⁹ Section 1 of the *RCMA*.

⁴⁴⁰ Section 3(1)(a)(i) of the *RCMA*.

⁴⁴¹ Section 3(1)(a)(ii) of the *RCMA*.

⁴⁴² Section 3(1)(b) of the *RCMA*.

⁴⁴³ Section 1 of the *RCMA*.

South Africa and decisions made therefrom. Some of the decisions are accepted as law because the Courts also form part of the sources of law in South Africa.

For example, the case of *Motsoatsoa v Roro* clarified what constitutes a customary marriage and outlined it as follows:

- The prospective husband's family must go to the prospective bride's home to start the *lobola* negotiations.
- The negotiations must be conducted and *lobola* must be agreed upon. (Whether the *lobola* is paid or not, according to the courts that is not an issue; the issue is that it must be agreed upon).
- Once *lobola* has been agreed upon, then there must be an exchange of gifts between the two families.
- Then there must be a celebration of the union.
- There should be a hand-over of the bride to the groom's family and the groom's family needs to accept her as their bride.⁴⁴⁴

According to the Judge, once there has been a handing over of the bride to the groom's family, a valid customary marriage has been concluded. If there has not been any celebration or handing over of the bride then no customary marriage has been concluded.⁴⁴⁵

Historically most women who were married through customary law perceived themselves as dis-empowered victims.⁴⁴⁶ They were usually left in the village while the husband went to the city to seek for employment. These women would live in fear that one day their husband would die and they would have no rights and not be entitled to any proprietary rights and access to assets accrued in the marriage.⁴⁴⁷ This is because before 1994, wives in customary marriages had no legal security, they were regarded as minors and they could not make decisions without the consent of their husbands.⁴⁴⁸ The law recognised and protected civil marriages

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⁴⁴⁴ *Motsoatsoa v Roro and Another* 2010 (GSJ).

⁴⁴⁵ *Motsoatsoa v Roro and Another* 2010 (GSJ) para 20.

"The handing over of the bride is what distinguishes mere cohabitation from marriage. Until the bride has formally and officially handed over to the groom's people there can be no customary marriage."

⁴⁴⁶ Ntwape *A historiography of South African women's history from c.1990-90*.

⁴⁴⁷ Ntwape *A historiography of South African women's history from c.1990-90*.

⁴⁴⁸ Section 11(3)(b) of the *BAA*.

more than it did with customary marriages.⁴⁴⁹ With the enactment of the law governing customary marriages, this position and many others were set to change.⁴⁵⁰

One of the purposes of this research study was to establish whether the *RCMA* has been successful in regulating customary marriages from a legal perspective. The *RCMA* has improved the rights of women in South African customary marriages by introducing laws that bettered the status of customary marriages.⁴⁵¹ This research study aligns itself with the improved status of women without condoning the fact that there is still room for improvement because of the points that were raised in the preceding chapters. The challenging aspect about finding a common ground in customary law and reaching a solution that works for everyone is that some cultural practices have been observed for thousands of years. Therefore, it makes it very difficult to implement the laws because of the ongoing battle between the law and culture.

Customary marriages have always been there; but because they were previously not recognised by law, they never had any societal recognition. When the *RCMA* came into operation it gave legal recognition to customary marriages and the status of rural women has changed dramatically. Today in South Africa, there are modern women in business and career women who are living in customary marriages by choice and they are not victims in their marriages. Some women even suggest that their husband marry another wife in the fear of losing him to another woman.⁴⁵² On the face of it, such a gesture also makes the wife feel in control because the decision of taking another wife was not imposed on her.⁴⁵³ Polygamous marriages have also been abused; in the sense that when the husband was having an affair, as a way of

⁴⁴⁹ Moore and Himonga 2016 <http://www.groundup.org.za>.
"Before 1994, the law hardly recognised customary marriages as opposed to marriages entered into in accordance with the *Marriage Act* 25 of 1961".

⁴⁵⁰ Moore and Himonga 2016 <http://www.groundup.org.za>.
"The *RCMA* improved women's access to the economic resources from a marriage. The new laws introduced principles of gender equality and non-discrimination and the protection of the rights of children in the family".

⁴⁵¹ Section 6 and section 7 of the *RCMA*.

⁴⁵² Baloyi 2013 *Missionalia* 168.

⁴⁵³ Baloyi 2013 *Missionalia* 170.

avoiding scandal in family or community, he and his wife would agree he takes that other woman as a second wife in order to sanitise the situation.⁴⁵⁴

In the [above](#) chapter, the study pointed out that the *RCMA* does not list *lobola* as one of the requirements of a valid customary marriage; therefore, more people disregard this practice while others regard it as the most essential aspect for the conclusion of a customary marriage. This led to the debate relating to *lobola* and the practice of polygamy being abolished in order to have rational customary marriages throughout South Africa.⁴⁵⁵ It was further stated that the existing irrationality causes inequality between men and women, and forces a lot of men not to get married because they do not have money to pay *lobola*. This study established that *lobola* impoverishes many families because for those who cannot afford the bride price have to work harder to gather the *lobola*. Some even sell their livestock or assets in order to pay *lobola*.

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This study has also found that the purpose of *lobola* in customary marriages has been misunderstood and commercialised in some instances. Today, most families strictly want *lobola* in cash; most of it goes to the parents or guardian of the bride. Today, it is difficult for some men to raise *lobola* money; hence there are massive numbers of cohabitants and illegitimate children in the black communities more than there is in white communities. The *lobola* process itself comes at a price; the process also includes gift exchange amongst both families, the groom's family is expected to pay damages if there are any and *pula-molomu*⁴⁵⁶ has to be observed in many cases.

There are some women who do not want *lobola* to be paid on their behalf.⁴⁵⁷ However, if they override this practice they will not be recognised as married

⁴⁵⁴ Baloyi 2013 *Missionalia* 168.

⁴⁵⁵ Chanock *The making of South African legal culture 1902-1936: Fear, favour and prejudice* 262. See also Mokotong and Monnye *A Study of Complex and Unfamiliar Customary Marriage outside the Recognition of Customary Marriages Amendment Bill*: Distortion of a Traditional Customary Marriage* 93.

⁴⁵⁶ *Pula-molomu* is a Setswana term which directly translates as opening of the mouth. It refers to money that is given to the prospective bride's family by the prospective groom's family in order for them to welcome the groom's family in their home have *lobola* negotiations with them. This money does not form part of the *lobola*.

⁴⁵⁷ Hlophe 1984 *CILSA* 166.

women.⁴⁵⁸ The problem with *lobola* is that nowadays huge amounts of money are required as *lobola* which turns women into commodities exchanged for cash. Most women also feel that *lobola* delays their process of getting married, because if their partners do not have sufficient money, they will be sent back by the bride's family. The argument with regards *lobola* is why it is commercialised and why the system does not come up with new ways of earning men the 'same respect' as they get from paying *lobola*. There should be other ways of earning that respect culturally without having to prove yourself with money. What is also perplexing is that even if a woman chooses to marry in a civil marriage, majority of the black South African families still require *lobola* before the conclusion of the civil marriage.

There are always two sides to the coin and this topic will always remain debatable. Some people regard the process of getting a wife as a man does not have to come easy. Culturally, a man has to work hard to get a wife in order for him to appreciate and respect the wife.⁴⁵⁹ In the previous chapters, this view has been illustrated where certain scholars⁴⁶⁰ are convinced that *lobola* is important because it protects a woman's likelihood of having a stable life and that it provides surety that the woman will be cared for.⁴⁶¹ This research study has once again proven that this view is incorrect.

Traditionally, when the husband had taken a wife in marriage, the husband had the duty to take care of his wife, failure. Failure to do so resulted in him losing his *lobola* if the marriage comes to an end; provided the divorce was caused by the wife's misconduct.⁴⁶² In some cultures, when a customary marriage comes to an end, the father of the bride or the person who received the *lobola* has the duty to return it when the marriage fails due the conduct of the wife.⁴⁶³ However, if the daughter (wife) is over the age of twenty-one, then the refund of *lobola* falls away because

⁴⁵⁸ Hlophé 1984 *CILSA* 166.

⁴⁵⁹ Soyoye *Marriage, a Miracle of Completion* 50.

⁴⁶⁰ Semenya 2014 *AOSIS* 3.

⁴⁶¹ Semenya 2014 *AOSIS* 1-6.

⁴⁶² Bennett *Customary Law in South Africa* 221-222.

⁴⁶³ Bonthuys and Albertyn *Gender law and Justice* 175.

there is no longer a duty to support and maintain from her family. Such a woman is now expected to take up the age of majority and take care of herself.⁴⁶⁴

South Africa has transformed in tandem with its different cultures. This research study takes the view that paying *lobola* in South Africa is not obligatory according to existing law, despite its massive influence. A woman can refuse *lobola* to be paid on their behalf when she is entering into a customary marriage. Some do so because they feel that their families abuse the process and for some it is just a personal stance where they could have lost both parents (death) or they have been orphans throughout their lives. *Lobola* is not prohibited in South African law; in fact, section 64 of the *KwaZulu Act* provides how *lobola* should be measured.⁴⁶⁵ This was an important provision but it was never carried over to the *RCMA*. The issue of *lobola* is really a choice depending on the family and its socialisation. It should not be imposed nor should it be abolished since it forms a cultural template for South African customary marriages. It should be treated as open practice for people who want to practice it, and for those that do not want to be part of it, they too must satisfy the requirements of a customary marriage as set out in the *RCMA*.

The inconsistencies found in the *RCMA* complicate misunderstandings, with some that are inconsistent with the *Constitution*, making them void. The *RCMA* was enacted by South African parliament together with the interest of traditional authority. It is evident that some of its provisions need to be amended in order to address the commuter's legal needs. The current law on customary marriages does not address the existing problems regarding customary marriages and a balance must be found between the two. This system of South African cultures requires customary marriages to be concluded disadvantages for its own people. Men are left broke after customary marriages because they have to buy gifts for everyone in the wife's family, including extended families presented during the wedding celebrations.

Therefore, *lobola* should not be forced on anyone; it must be a choice that the couple agree to undergo together. In South Africa, there are a lot of scenarios where

⁴⁶⁴ Bonthuys and Albertyn *Gender law and Justice* 175.

⁴⁶⁵ Hlophe 1984 *CILSA* 166.

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families have requested ridiculous amounts of *lobola*, of which the groom has paid and the marriage does not even last for a year.⁴⁶⁶ Hence, the disputes of most men requesting their *lobola* when the marriage comes to an end; –because they feel robbed. This research study concludes that the refund of *lobola* should be banned through the *RCMA*. Refunds of *lobola* infringe on the right of woman because they end up choosing to stay in marriages that have reached an irretrievable breakdown because they fear that they will not afford to pay back the *lobola*. This *lobola* and placing a price on women turns them into some piece of commodity. As a country, it is important to move away from cultures that have that have kept the country in bondage, so these abusive cultures have to be done away with.

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All cultural practices that infringe on the Bill of Rights should be abolished. Married women are rated on the how much *lobola* money or cows were paid for them. This is immoral because a human being cannot really be rated on the basis of such monetary value. All the provisions of the *RCMA* must take into account both men and women because everyone is equal according to the South African Constitution. This research study highlighted a great deal of confusion brought by the *RCMA*. Despite the *RCMA* protecting and recognising customary marriages in South Africa, it is vague and inconsistent. Even though the *RCMA* does not list *lobola* as the requirements of a valid customary marriage, it is evident that throughout the case law that has been presented in this research study, the payment of *lobola* remains one of the important elements used by most cultures to determine whether a valid customary marriage has been concluded.

One other aspect that has been raised in this research study is the issue of same sex marriages. According to customary law, same sex couples may not get into customary marriages, only civil marriages.⁴⁶⁷ The inequality in this provision is that

⁴⁶⁶ Times Live 2015 <http://www.timeslive.co.za>.

"A celebration in honour of Tau and his girlfriend, Sizakele Manonga apparently took place in the lavish suburb of Pretoria East two weeks ago. The family bash was to celebrate Tau finishing off *lobola* for Manonga whom he got engaged to a few months ago. According to Sunday Sun Newspaper, Tau paid the hefty amount to the Manonga family who are known for their immense wealth - they own a mansion with fourteen bedrooms on a private estate and are in possession of more than 30 German cars. They broke up even before the marriage celebration could be conducted."

⁴⁶⁷ The *RCMA* 1998 explicitly make use of the words 'husband' and 'wife' and not merely of the term 'prospective spouses'. See also Bekker and Buchner-Eveleigh 2017 *De Jure* 88.

in South Africa, there is no ban on same sex customary marriages and the *RCMA* is silent about these marriages.⁴⁶⁸ Different kinds of relationships serve different purposes, and therefore the law has an obligation to give every type of relationship the same entitlement. Heterosexual marriages have a unique role in society which is to sustain civilisation through reproduction. Hence the law automatically grants related benefits. This research study is against the 'rule' that same sex couples may not marry through customary marriages. Culture does not construct marriage; marriage and family construct culture.

5.3 Recommendations

5.3.1 Lobola

Based on the history of *lobola*, it commoditised women.⁴⁶⁹ It was paid because people in the olden days were living in patriarchal societies; where women were very submissive to men and were subjected to abuse and slavery.⁴⁷⁰ *Lobola* in the modern times is based on the mentality of the concerned man. There is a class of men that views *lobola* as a sale of a woman and there as those that view it as a sign of appreciation to the bride's family/parents.⁴⁷¹ In answering the question of whether the practice of *lobola* is essential; the answer to the question is no. In spite of all, scrapping the practice out will take away the beauty and uniqueness of African traditional marriages. *Lobola* does not have any legal significance but it carries cultural and social capital.

This research study holds the view that the practice of *lobola* is no longer necessary because of what the society has made it to be. It must therefore be left as an option whether to pay the *lobola* or not because the practice is not a requirement for a valid customary marriage. The issue of *lobola* is attached to the concept of entitlement. Some families take this process as if the bride's family is doing a favour for the

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⁴⁶⁸ Bekker and Buchner-Eveleigh 2017 *De Jure* 88.

⁴⁶⁹ Mvududu *Lobola: its implications for women's reproductive rights in Botswana, Lesotho, Malawi, Mozambique, Swaziland, Zambia and Zimbabwe* 9.

⁴⁷⁰ Mvududu *Lobola: its implications for women's reproductive rights in Botswana, Lesotho, Malawi, Mozambique, Swaziland, Zambia and Zimbabwe* 23.

⁴⁷¹ Mvududu *Lobola: its implications for women's reproductive rights in Botswana, Lesotho, Malawi, Mozambique, Swaziland, Zambia and Zimbabwe* 41.

groom's family by giving them their daughter therefore they are entitled to the *lobola* (based on their demands). Initially *lobola* was a token; it was not exorbitant prices. Nowadays it is like men are forced to show appreciation, and why is it that men are given a figure of how much they have to pay.

This practice is taken as if men have to pay the bride's parents for doing their job which is raising their child. In such a view, the practice is abused. *Lobola* should only be used to symbolise traditional customs and not for financial gain. It is a valid custom within the African culture and therefore nobody must be forced to pay money what they cannot afford. Even for those that opt to observe this practice, the *RCMA* should create guidelines to guard against this practice as it continues to cause legal disputes. For instance, issues including the process of acquiring *lobola*, its requirements and its retention upon divorce. There is no provision for the refund of *lobola*, whether or not *lobola* is to be returned to the groom's family upon divorce or not but some families still request it upon divorce. The *RCMA* should also clarify whether *lobola* is a requirement or not. Even if it is not an essential requirement, such provision must be clearly expressed in the *Act*.

The payment of *lobola* is often used as a checklist of whether a valid customary marriage exists. Most South African court cases have focused on this point in determining the validity of a customary marriage and the Courts (judges) themselves cannot agree if this practice is a requirement or not. Therefore, the requirements listed in the *RCMA* should be the determining factor of a valid customary marriage or if intended, *lobola* must be clearly stated as the fourth requirement. *Lobola* has become outdated and irrelevant since many things have changed in modern societies. Women do not observe some cultural practices that are labelled as unconstitutional but *lobola* holds the same bearing for men. *Lobola* as a sign of appreciation has become problematic because as long as this culture still exists, most black children will never progress. Therefore, this research study does not does not disregard the practice of *lobola* but it questions its validity.

5.3.2 Dissolution of a Customary Marriages

A dissolution of a customary marriage also has some cultural requirements which tend to complete the process. Some cultures require that when a customary marriage is dissolved, the parties must go through the same process as when it started.⁴⁷² Only that during this time the parties will negotiate the termination of the marriage including issues such as the return of *lobola*.⁴⁷³ The *RCMA* states in section 8 that the marriage must be dissolved by the High Court.⁴⁷⁴ However, some people especially in the rural areas continue to terminate their customary marriages through family/tribal negotiations without going to court. There are a lot of customary marriages which are terminated but according to the law the parties are still married. Therefore, this research study concludes that customary marriages in South Africa must only be terminated by a competent Court of law, to the exclusion of Tribal courts in order to have a legally fair settlement in terms of division of property and maintenance of both the spouses and the children. Therefore, the law enforcers together with the concerned government institutions should make divorce institutions (courts) more accessible, especially for those couples that live in rural areas.

5.3.3 Registration of a Customary Marriage

The *RCMA* should amend the provision that, customary marriages may not be registered.⁴⁷⁵ Registering a customary marriage should be mandatory. It should emphasise that these marriages are registered in order to make it easier to prove the existence of such marriages through a marriage certificate. Instead of providing that the marriage may not be registered, the provision can be changed to say that, the marriage may be registered through a certified marriage official if not the Courts or the Department of Home Affairs. Where the customary marriage is not registered for whatever reason, the parties must be allowed to give other forms of binding evidence that there was a conclusion of a valid customary marriage. The registering

⁴⁷² Nkosi 2013 *DeRebus* 224.

⁴⁷³ Nkosi 2013 *DeRebus* 224.

⁴⁷⁴ Nkosi 2013 *DeRebus* 225.

⁴⁷⁵ Section 4(9) of the *RCMA* provides that failure to register a customary marriage does not affect the validity of that marriage.

officer must explain to the newlyweds the difference between customary marriages and civil marriages at all times and ensure that the parties have chosen the correct marriage type.

5.3.4 Definition of a Customary Marriage

The *RCMA* defines customary marriage as “a marriage concluded in accordance with customary law”.⁴⁷⁶ In this respect, customary law is defined as “the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples”.⁴⁷⁷ These definitions are too restricted and they lead to some form of discernment and therefore becomes unconstitutional. The definition of customary marriages should be extended to include all races in South Africa (include interracial couples) and also go to the extent of including gays and lesbian couples who live in South Africa and want to marry through customary law.

5.3.5 Equality

Since the introduction of the *RCMA*, women now do enjoy equal control and management of marital property.⁴⁷⁸ However the *RCMA* does not grant women the same rights as that it did for men. The Act does provide for polygamous marriages but only polygyny; it limited women’s right to polygamy. The *RCMA* does not state anything about polyandry even though the practice is not banned by any law in South Africa. This is unfair and discriminatory to women who want to have multiple husbands. The *RCMA* needs to revisit this provision and state the position of polyandry in South Africa. Women should be treated equally to men regardless of the perception that people still hold on men as the heads of the family. Wives are encouraged to respect their husbands, but it should be noted that they are at equal level.

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If it is extended to include all races in South Africa, does it then not lose the quality of being 'customary' or 'indigenous' law?

⁴⁷⁶ Section 1 of the *RCMA*.

⁴⁷⁷ Section 1 of the *RCMA*.

⁴⁷⁸ Section 6 of the *RCMA*.

5.4 Conclusion

The recommendations that are made in this research study are relevant to the challenges faced with regards the rules of customary marriages, in particular the existing law (*RCMA*). These recommendations are significant because they will assist in the development of the legal status of customary marriages and therefore, should be considered. It is evident that there is still room for improvement with regards to the legislation against customary marriages. The problems that have been raised with regard to customary marriages create not only inconsistencies in customary marriages, but a clash with between the *Constitution* and Customary law. The recommendations suggested in this research study are tentative and may be used as possible solutions to the problems identified.

The legislative framework on customary marriages in South Africa is questionable and this research study has proven that the *RCMA* needs to be revisited. This topic is relatively thought-provoking as it is usually difficult to question tradition. In closing, this research study confirms that the *RCMA* conflicts with the *Constitution* and by so doing, according to the law, it should be amended. It is important to note that there are people who are married in customary marriages, therefore there has to be a way of protecting customary marriages as an equal part of the legal system. In order to achieve this, the law governing customary marriages must be conforming to the provisions of the *Constitution* and at the same time it must respect cultures and societies.

When South Africa was colonised by the British, the colonisers did not recognise customary law and wanted to abolish their alien practices.⁴⁷⁹ However, in the Transkei, customary law was recognised and codified in the *Natal Code of Zulu Law*.⁴⁸⁰ This resulted in the colonial and apartheid authorities giving recognition and at the same time modifying the content of customary law in the way that it impacted on women's rights.⁴⁸¹ It is significant to note that during that time women in customary marriages did have property rights.⁴⁸² The patriarchal elements that

⁴⁷⁹ Herbst and Du Plessis *EJCL* 12.

⁴⁸⁰ Bennett and Vermeulen 1980 *Journal of African Law* 206.

⁴⁸¹ Bennett and Vermeulen 1980 *Journal of African Law* 206.

⁴⁸² Bennett and Vermeulen 1980 *Journal of African Law* 210.

characterised the past were made even more excessive and this exacerbated difficulties for women to escape their customary marriages.

The *RCMA* created a uniform procedure and administration of South African customary marriages. The *Act* was meant to recreate the atmosphere where people married in customary law would feel protected and have their own law without the technicalities of civil marriages. Irrespective of the above, customary marriages today are still very technical in that if people want to get married customarily *lobola* is required, handing over of the bride, slaughtering of beasts, revels, welcoming rituals and so forth.

The *RCMA* also does not take adequate consideration of the different customs in South Africa and this has restricted customary marriages. Customary marriages should be regarded as a living law and societies need to recognise that new customs are being created. The general view of this research study is that the *RCMA* must be amended and people who want to observe certain traditional customs including *lobola* and polygamy should be allowed to do so. The *RCMA* should take into consideration that there is a duty under the *Constitution* to ensure the way customary law develops in line with the Bill of Rights and other provisions of the law. When this *Act* is amended, it should be borne in mind the context is different from before and also take into consideration that now there are other types of relationships that are recognised such as same sex relationships.

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