



# The constitutionality of the non-recognition of polyandry in the Recognition of Customary Marriages Act 120 of 1998

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## **ABSTRACT**

Currently, the *Recognition of Customary Marriages Act* 120 of 1998 (hereafter the RCMA) recognises the practice of polygyny, wherein a man marries more than one wife, but does not recognise polyandry, wherein a woman marries more than one spouse. Therefore, the constitutionality of the non-recognition of the practice of polyandry in the RCMA is questionable as it may be inconsistent with the *Constitution of the Republic of South Africa*, 1996 (hereafter the *Constitution*). Therefore, this study purports to critically analyse the constitutionality of the non-recognition of polyandrous marriages in the RCMA.

This said analysis is conducted through the application of the doctrinal method of research. The dissertation is divided into five parts. The first part consists of a background and a general introduction to the study. The second part contains a discussion of the general historical background of African customary law and its treatment, and how that impacted the practice of polygamy, including polyandry. The third part offers a discussion specifically on the exclusion of polyandry in the current law that regulates marriages in South Africa. The fourth part critically analyses the constitutionality of the non-recognition of polyandry in RCMA and the implication thereof on African women who wish to enter into legally recognised polyandrous marriages as part of their customs. The last part draws a general conclusion and further provides recommendations to address the research question and aim.

The study demonstrated that although sections 2(3) and 2(4) of the RCMA in which polygamy is couched in gender-neutral language, they do not permit wives to have more than one husband/spouse at the same time.<sup>1</sup> The wife may not take another spouse (man or woman) during the subsistence of her first marriage in a way that such subsequent marriage(s) will be legally recognised as valid under the RCMA. Based on the overall analysis, it is concluded that the non-recognition of polyandry in RCMA is unconstitutional insofar as it is discriminatory against African women and infringes

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<sup>1</sup> When considering the RCMA in totality, it is more discriminating. Just like many authors, the RCMA seem to use a term polygamy in s 2(3) and (4) when referring to polygyny. This was not the oversight but the intention of the drafters of the RCMA. For instance, ss 7(1)(b)(ii) ss 7(4)(b), 7(5), 7(6) and 8(4)(b) of the RCMA are expressly couched in gender discriminate terms.

their rights, including the right to equality, the right to culture, and the right to human dignity. Based on this conclusion, it is recommended that the RCMA needs to be reformed or amended to recognise the cultural practice of polyandry.

KEYWORDS: Constitution; Culture; Polyandry; Polygyny; Polygamy; Gender Discrimination; Human rights; customary marriages

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## **LIST OF ABBREVIATIONS**

AD	Appellate Division
AIC	African Independent Churches
AJET	African Journal of Evangelical Theology
All SA	All South African Law Reports
ANZLH	Australia & New Zealand Law & History
<i>BAA</i>	Black Administration Act
BCLR	Butterworths Constitutional Law Reports
BYU J Pub L	Brigham Young University Journal of Public Law
C	Cape High Court
CC	Constitutional Court
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CODESA	Convention for a Democratic South Africa
CSSR	Centre for Social Science Research
DCJ	Deputy Chief Justice
DG	Director General
DLR	Dominion Law Reports
DR	De Rebus
DRC	Democratic Republic of the Congo
EJCL	European Journal of Comparative Law and Governance

Emory LJ	Emory Law Journal
GG	Government Gazette
GN	General Notice
HRPLJ	Hastings Race and Poverty Law Journal
ICCPR	International Covenant on Civil and Political Rights
IJGLS	Indiana Journal of Global Legal Studies
IJLPF	International Journal of Law, Policy and the Family
Int J Afr Hist Stud	International Journal of African Historical Studies
Int J Cult Hist Studies	International Journal of Culture and History
Int J Law Policy Fam	International Journal of Law and the Family
J Afr Hist	Journal of African History
J East Afr Stud	Journal of Eastern African Studies
J	Judge
JASD	Journal of African Studies and Development
MEC	Member of the Executive Council
MPA	Matrimonial Property Act
MPNF	Multi-Party Negotiating Forum
NPC	Non-Profit Company
NQHR	Netherlands Quarterly of Human Rights
NWM	North West High Court, Mafikeng
NWSAJ	National Women's Studies Association Journal

OPD	Orange Free State Provincial Division
PELJ	Potchefstroom Electronic Law Journal
RCLSA	Reform of Customary Law of Succession and Regulation of Related Matters Act
RCMA	Recognition of Customary Marriages Act
RSA	Republic of South Africa
SA	South African Law Reports
SAHO	South African History Online
SAJHR	South African Journal on Human Rights
SALC	South African Law Commission
SALJ	South African Law Journal
SAPL	Southern African Public Law
SCA	Supreme Court of Appeal
Soc Justice	Social Justice
Stell LR	Stellenbosch Law Review
TS	Transvaal Supreme Court
WCC	Western Cape High Court, Cape Town
WCD	Western Cape Division
ZAGPHC	High Court of South Africa, Gauteng Division, Pretoria

# Chapter 1 General introduction

## 1.1 Background

The RCMA officially recognises African customary marriages in South Africa to correct the historical matrimonial laws that discriminated against black South Africans, particularly women.<sup>1</sup> In terms of section 1 of the RCMA "customary marriage" refers to the marriage concluded according to customary law.<sup>2</sup> A customary marriage is regarded as "a fundamental building block in traditional African family law and is as much a social process as it is a legal one".<sup>3</sup> However, there are still inequalities in such marriages despite controversial and imbalanced positions concerning women's position in marriages that were sought to be alleviated by the RCMA.<sup>4</sup>

Section 6 of the RCMA explicitly provides that women in customary marriages are on an equal footing with their husbands in both status and capacity. However, the RCMA and its application have been criticised for adversely affecting women who are entering into customary marriages.<sup>5</sup> The Act has some negative impacts on the rights of women insofar as gender equality is concerned.<sup>6</sup>

The RCMA specifically regulates African polygamous marriages in South Africa (hereafter SA). The colonised and apartheid SA did not recognise polygamous marriages as the racialised state did not understand their nature and perceived polygamy as a form of slavery.<sup>7</sup> *Lobola* was viewed as a disbursement for the wife.<sup>8</sup>

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<sup>1</sup> See the Preamble and s 2(1) -(4) of the RCMA 120 of 1998.

<sup>2</sup> Customary law is defined in s 1 of the RCMA as "the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those people."

<sup>3</sup> Himonga and Nhlapo *African Customary Law in South Africa* 167.

<sup>4</sup> For example, the RCMA abolished marital power for all marriages entered into after the commencement of the RCMA as it repealed the relevant sections of the *Transkei Marriage Act* 21 of 1978, *Black Administration Act* 38 of 1927, the *KwaZulu Act on the Code of Zulu Law* 16 of 1985 and the Proc R151 of 1987. See also Himonga and Nhlapo *African Customary Law in South Africa* 112.

<sup>5</sup> Moore and Himonga "Protection of Women's Marital Property Rights upon the Dissolution of a Customary Marriage in South Africa" 1.

<sup>6</sup> For example, the RCMA recognise polygyny and does not recognise polyandry. See also Moore and Himonga "Protection of Women's Marital Property Rights upon the Dissolution of a Customary Marriage in South Africa" 1.

<sup>7</sup> Herbst and du Plessis 2008 *EJCL* 5.

<sup>8</sup> Herbst and du Plessis 2008 *EJCL* 5.

Failure of common law courts to recognise customary marriages significantly affected African family life.<sup>9</sup>

This exclusion caused various kinds of hardships for African families. Spouses married under customary law were not regarded as wives and husbands, and therefore, they had no duty to support each other. Children in such marriages were regarded to be illegitimate. In cases where the man subsequently entered into a civil marriage with another woman, the civil marriage extinguished the customary marriage. The first wife and her children would then be abandoned insofar as the official South African law was concerned.<sup>10</sup>

However, limited recognition was introduced through legislation to remedy conspicuous anomalies caused by the said non-recognition. Statutes were enacted to provide for limited recognition of customary marriages to relieve the difficulty of customary spouses in relation to tax,<sup>11</sup> maintenance<sup>12</sup> and the dependants' action in the case where the breadwinner was unlawfully killed.<sup>13</sup>

It is apparent that before commencement of the RCMA, customary marriages were subject to this limited recognition due to their potentially polygamous nature.<sup>14</sup> However, section 2(3) of the RCMA recognises all customary polygamous marriages entered into before the commencement of the RCMA as customary marriages, and section 2(4) provides for recognition of African customary polygamous marriages entered into after the commencement of the RCMA. To be valid, such polygamous marriages are required to further comply with the provisions of the RCMA, including section 3(1), which provides that "the prospective spouses must be above the age of 18"; and "must both consent to be married to each other under customary law"; and

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<sup>9</sup> Himonga and Nhlapo *African Customary Law in South Africa* 93.

<sup>10</sup> Himonga and Nhlapo *African Customary Law in South Africa* 93

<sup>11</sup> Section 1 of the *Income Tax Act* 58 of 1962.

<sup>12</sup> Section 5(6) of the *Maintenance Act* 23 of 1963.

<sup>13</sup> Section 31 of the *Black Laws Amendment Act* 76 of 1963. See also Himonga and Nhlapo *African Customary Law in South Africa* 94.

<sup>14</sup> Himonga and Nhlapo *African Customary Law in South Africa* 93.

“the marriage must be negotiated and entered into or celebrated in accordance with customary law.”<sup>15</sup>

One of the consequences of concluding a customary marriage is that the husband is allowed during the subsistence of an existing marriage(s) to marry another woman.<sup>16</sup> In *Mayelane v Ngwenyama*,<sup>17</sup> the Constitutional Court held that a husband has the right to enter into a polygamous customary marriage provided that he obtains consent from the first wife before concluding valid subsequent marriage.

The provisions of the RCMA recognise that a man can marry more than one wife but do not recognise polyandrous marriages in which a woman marries more than one spouse.<sup>18</sup> This study begs the question of whether this amounts to unfair discrimination based on gender, and whether the said non-recognition in the RCMA fails to align with the constitutional values of equality, freedom and human dignity. Are the rights of women less important compared to those of men? The fact that African polygamous marriages are recognised by national legislation does not invalidate the importance of this question. Was the RCMA enacted to address injustices of the past and gender discrimination? If so, why is it only a man who may marry more than one spouse? Have men been given mammoth powers while women remain largely marginalised? It seems there is a need to critically analyse the constitutionality of the non-recognition of the cultural practice of polyandry in the RCMA.

African custom of polyandry is practised in the *Balobedu* queendom, which consists of the *Mampeule*, *Molokwane*, *Modjadji* and *Mathekga* clans.<sup>19</sup> The *Balobedi* people accepted that a queen can marry more than one spouse, where she marries daughters of traditional leaders within the villages.<sup>20</sup> It remains possible that the cultural practice of polygamy can and is even likely to develop in African communities to accommodate polyandry beyond just a queen.

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<sup>15</sup> A term “spouse” is not defined in the RCMA.

<sup>16</sup> Himonga and Nhlapo *African Customary Law in South Africa* 117. See also Rautenbach *Introduction to Legal Pluralism in South Africa* 84.

<sup>17</sup> *Mayelane v Ngwenyama* 2013 8 BCLR 918 (CC) para 75.

<sup>18</sup> Herbst and du Plessis 2008 *EJCL* 5.

<sup>19</sup> Mohale *Khelobedu Cultural Evolution Through Oral Tradition* 102.

<sup>20</sup> Mohale *Khelobedu Cultural Evolution Through Oral Tradition* 102

Traditional woman-to-woman marriages are and continue to be practised all over Africa and also within numerous ethnic groups in South Africa. A woman-to-woman marriage refers to the custom in which a woman marries one or more other women due to her powerful position and economic status or because she does not have children.<sup>21</sup> It became an acceptable norm in the *Balobedu* culture.<sup>22</sup> It is usually practised in the royal family when the wife of the traditional leader from whom a prospective traditional leader has to be born was barren.<sup>23</sup>

These kinds of marriages are also practised outside the royal house by the *Balobedu* people. A woman married to a man would enter into a marriage with another woman for child-bearing purposes.<sup>24</sup> A single woman who does not have children is also allowed to marry a younger woman for the purpose of taking care of her in her older age. This younger woman is given a chance to get a man from outside the marriage to impregnate her. The children born from the latter relationship are regarded as belonging to the said marriage. The said single woman who initiated the marriage is considered as the children's father and is then responsible for the children and their mother.<sup>25</sup>

As neighbours of the *Balobedu*, the Venda people resemble some of their ways of life, and many of their social arrangements are similar.<sup>26</sup> They also practise woman-to-woman marriages.<sup>27</sup> Therefore, woman-to-woman marriages are not abnormal in African communities. Woman-to-woman marriages have gained the attention of lawmakers in that they are also catered for, albeit in a limited sense in respect of succession, in the *Reform of Customary Law of Succession and Regulation of Related Matters Act* (hereafter the RCLSA).<sup>28</sup> I come back to discuss the impact of this Act later in this dissertation.

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<sup>21</sup> Rautenbach *Introduction to Legal Pluralism in South Africa* 107.

<sup>22</sup> Mohale *Khelobedu Cultural Evolution Through Oral Tradition* 102.

<sup>23</sup> Mohale *Khelobedu Cultural Evolution Through Oral Tradition* 102.

<sup>24</sup> Mohale *Khelobedu Cultural Evolution Through Oral Tradition* 107.

<sup>25</sup> Mohale *Khelobedu Cultural Evolution Through Oral Tradition* 107.

<sup>26</sup> See also Stayt *Where on Earth?* 143-144.

<sup>27</sup> See also Stayt *Where on Earth?* 143-144.

<sup>28</sup> *Reform of Customary Law of Succession and Regulation of Related Matters Act* 11 of 2009. Relevant provisions of the Act are discussed in 1.2 below.

One may then ask what these woman-to-woman marriages have to do with the notion of polyandry that is the focus of this dissertation. The answer lies in that there is nothing that particularly precludes a woman who enters into a woman-to-woman marriage to do so with more than one spouse. Such marriages would be polyandrous marriages. As indicated above, this is the case among the Balobedu Queen, who is permitted to marry more than one woman.

Moreover, there are countries in Africa in which women marry more than one husband. There are reported cases of this practice among the *Maasai* people of Kenya.<sup>29</sup> There are also tribes in Nigeria that allow a woman may marry more than one husband.<sup>30</sup> This is a clear indication that the practice of polyandry is not an unwelcome African custom and that it has the potential for growth, especially when it is not circumscribed to do so by the law.

## **1.2 Problem statement**

Section 2(3) of the RCMA provides that if a person is a spouse in more than one customary marriage, all valid customary marriages concluded before the RCMA came into operation are for all purposes recognised as marriage. Correspondingly, section 2(4) of the RCMA recognises polygamous marriages concluded after the RCMA came into operation. Even though these two provisions are couched in gender-neutral language, other provisions in the RCMA show that polygamous customary marriages involve a husband and more than one wife. For instance, section 7(1)(b)(ii) states that the rights in customary polygamous marriages pertaining to proprietary consequences in such marriages must be exercised in respect of all family property, by the husband and all the wives, jointly and in the best interests of the whole family constituted by the various houses. Sections 7(5) and 8(4)(b) are similarly couched in gender discriminate terms. The RCMA, therefore, does not seem to allow women to marry

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<sup>29</sup> Oshin 2020 <https://agogoayonews.com/2020/03/07/5-countries-where-women-can-marry-more-than-one-husband/>.

<sup>30</sup> Oshin 2020 <https://agogoayonews.com/2020/03/07/5-countries-where-women-can-marry-more-than-one-husband/>.

more than one spouse at the same time.<sup>31</sup> This has the effect that the RCMA does not recognise polyandry but only polygyny.<sup>32</sup> It is only the husband who may conclude a further legally recognised customary marriage with more than one woman during the existence of their marriage. The RCLSA, which is limited to matters of succession and inheritance, extends some protection of children belonging to women in woman-to-woman marriages.<sup>33</sup>

The recognition of polygyny to the exclusion of polyandry by the RCMA is therefore potentially inconsistent with section 9 of the *Constitution of the Republic of South Africa*, 1996 (hereafter the Constitution), which guarantees everyone with the right to equality which includes "equal protection and benefit of the law" and unfair discrimination. Section 9(3) provides that no one should be unfairly discriminated against based on gender and certain other grounds. Preclusion of polyandry potentially infringes section 9 as it denies African women who wish to enter into legally recognised polyandrous marriages equal protection and benefit of the law based on their gender and potentially discriminates against such women. Such preclusion further potentially infringes section 10 of the Constitution, which guarantees everyone with inherent dignity and the right to have their dignity respected and protected. Non-recognition of polyandry by RCMA may also infringe section 31(1) of the Constitution, which provides that persons who belong to a cultural community may not be denied the right, with other members of that community, to enjoy their culture; and to form, join, and maintain cultural associations and other organs of civil society. Sections 181(1)(c) and 211 of the Constitution recognise and protect culture, and therefore potentially impact the non-recognition of polyandry by the RCMA.

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<sup>31</sup> See also Himonga and Nhlapo *African Customary Law in South Africa* 116.

<sup>32</sup> The difference between polygyny and polyandry is provided in chapter two, particularly in 2.1. Briefly, *Mayelane v Ngwenyama & Another* 2013 4 SA 415 (CC) para 1, Constitutional Court noted with reference to Concise *Oxford English Dictionary* that polygyny is "polygamy in which a man has more than one wife" as compared to polyandry which is "polygamy in which a woman has more than one husband".

<sup>33</sup> See ss 1 and 2(2)(c) of the RCLSA which provides that "a woman who was married to another woman under the customary law for the purpose of providing children for the deceased's house, that other woman must, if she survives the deceased, be regarded as a descendant of the deceased".

Section 2 of the Constitution provides that the Constitution is the supreme law of the country and requires that all conduct and laws align with it. All provisions of the RCMA that regulate customary marriages must be in alignment with constitutional rights and principles.<sup>34</sup> South Africa's Constitution is grounded on the values of human dignity, the achievement of equality and freedom. Therefore, if the RCMA does not align with constitutional rights and values, it may need to be changed to achieve such alignment. Laws such as the RCMA must be aligned with accurate historical developments, persisting reality, and changing convictions of modern society.<sup>35</sup> In particular, if the RCMA deprives women in cultural communities from practising their customs, it may have to be changed accordingly.<sup>36</sup>

The development and acceptance of polyandry can take place with more ease if the RCMA creates room for such development. After all, "customary law is a flexible, living system of law, which develops over time to meet the changing needs of the community."<sup>37</sup> Therefore, full recognition of both existing and future customary marriages, including polyandry, will get rid of the anomalies caused during the period of colonial-apartheid. Recognition of such cultural marriages would be in line with provisions of the Constitution, including sections 9, 15, 30 and 31, respectively. The constitutionality of the non-recognition of polyandrous marriages has hardly been given attention by legal scholars. The topic has also not received attention in the courts.

It seems that there is a need to reform the RCMA to achieve gender equality insofar as African women who wish to marry more than one spouse are concerned. Such a move may accord with the steps that Parliament has already taken in its most recent *Green Paper on Marriages in South Africa* (hereafter the Green Paper).<sup>38</sup> In this *Green Paper*, it is proposed that single new marriage legislation should be enacted to regulate the marriages of all people residing in South Africa. Three options in which such new

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<sup>34</sup> See also s 211(3) which provides that customary law is subject to the Constitution as the supreme law of the land.

<sup>35</sup> See also item 3 of GN 389 in GG 44529 of 4 May 2021.

<sup>36</sup> See s 15(3)(a) of the Constitution which states that legislation is not prevented to recognise marriages concluded under any tradition, or system of religious, personal or family law.

<sup>37</sup> See *Shilubana and Others v Nwamitwa* 2008 9 BCLR 914 (CC) para 35.

<sup>38</sup> Item 4.3 GN 389 in GG 44529 of 4 May 2021.

legislation is proposed to be designed are discussed and analysed below in chapter five, particularly in 5.4. Importantly, the Green Paper also suggests the recognition of polyandrous marriages.<sup>39</sup>

### **1.3 Research question**

The principal question this study will address is whether, and to what extent does, the non-recognition of the cultural practice of polyandry in the RCMA discriminates against African women and violates their other constitutional rights. In answering this core question, the following sub-questions will have to be answered:

- a) What is the practice of polygamy in the living African customary law context?
- b) Whether the practice of polygamy in the living African customary law context includes the practice of polyandry?
- c) Whether, and if so how, the current law of customary marriages in South Africa fails to recognise the practice of polyandry?
- d) Whether the non-recognition of the cultural practice of polyandry by the RCMA passes constitutional muster?

### **1.4 Aims and objectives of the study**

The ultimate aim of this study is accordingly to critically analyse the constitutionality of the non-recognition of polyandry in the RCMA. In so doing, it will unpack the practice of polygamy in the African customary law context, including polyandry. It will examine the exclusion of polyandry in current law that regulates marriages in South Africa to determine whether the non-recognition of the cultural practice of polyandry by RCMA passes constitutional muster, and then provide recommendations if it does not so pass constitutional muster.

### **1.5 Scope and limitations of the study**

The scope of this study seeks to address the constitutional rights of equality, non-discrimination, human dignity, the practice of one's customs and culture insofar as

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<sup>39</sup> See item 4.1 GN 389 in GG 44529 of 4 May 2021.

these impact the non-recognition of polyandry in the RCMA. Thus, the focus is on the constitutional impact of the said non-recognition on African women who wish to enter into polyandrous marriages in line with their customs. The study does not address the non-recognition of polyandrous marriages beyond the African customary law context.

## **1.6 Research methodology**

In conducting this analysis, the doctrinal method of research will be applied. This is desktop research. It will analyse both primary and secondary sources. Primary sources such as the Constitution and the RCMA will also be used. Case law will also be central to the study. The study will make use of secondary sources including books, journal articles, and any other academic material on the present topic. Furthermore, it will widely refer to internet sources.

## **1.7 Framework and outline of the study**

This study is divided into five chapters.

- Chapter one gives the background and general introduction to the study.
- Chapter two provides a discussion of the general historical background of African customary law and its treatment, and how that impacted the practice of polygamy, including polyandry.
- Chapter three examines the exclusion of polyandry in the current law that regulates marriages in South Africa.
- Chapter four critically analyses the constitutionality of the non-recognition of polyandry in the RCMA and the implication thereof on African women who wish to enter into legally recognised polyandrous marriages as part of their customs.
- Chapter five draws a general conclusion and further provides recommendations to address the research question and aims of the study.

## Chapter 2 The practice of polygamy

### 2.1 Introduction

The term "polygamy" refers to the practice when a person marries more than one wife or husband at the same time.<sup>1</sup> Polygyny is a version of polygamy where a man may marry more than one wife. Another version of polygamy is "polyandry" where a woman marries more than one spouse.<sup>2</sup> The term "polygyny" tends to be used interchangeably with "polygamy" in South Africa.<sup>3</sup> The reason for this interchangeability may be that dominant legal positions have generally not embraced polyandry and thus excluded it from mainstream fields of law. However, in strict terms, polygyny is a version of polygamy. In this study, the term "polygamy" refers to both polygyny and polyandry.

This chapter discusses polygamy in the context of African customary law, taking into account the said two types of polygamous marriages and with an aim to trace the roots of polyandry. On a topic such as the present, there is a need to trace the historical background of African indigenous/customary laws to the pre-colonial era, then consider the impact that colonialism and apartheid had on African customary law, and ultimately its place in the democratic era where there must unavoidably be an attempt at rebuilding African customary laws in a just way. Accordingly, the historical overview discussions that ensue in this chapter trace the periods including some of the pre-colonial era, the colonial-era (1652–1909), the union era (1910–1947), apartheid (1948–1990), and the democratic transitional period (1990–1996).

The practice of polygyny has long been an outcry of feminists and many other sectors of society, as it is perceived to conflict with the ideals of gender equality<sup>4</sup> on the basis

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<sup>1</sup> Rautenbach *Introduction to Legal Pluralism in South Africa* 84. See also Heaton and Kruger *South African Family Law* 15; Heaton and Kruger *Casebook on South African Family Law* 13.

<sup>2</sup> Himonga and Nhlapo *African Customary Law in South Africa* 95.

<sup>3</sup> Himonga and Nhlapo *African Customary Law in South Africa* 94.

<sup>4</sup> Gaffney-Rhys 2011 *Gender & Society* 1; CEDAW Committee "General Recommendation 21 on Equality in Marriage and Family Relations" para 14. See also Lehnert 2005 *SAJHR* 242.

that inherently subordinates women<sup>5</sup> and violates their dignity.<sup>6</sup> It has been perceived to be emotionally damaging and economically oppressive to women.<sup>7</sup> Therefore, the historical overview in this chapter will be provided with this in mind.

## 2.2 Historical overview of customary law

### 2.2.1 Pre-colonial customary law and the practice of polygamy in Africa

#### 2.2.1.1 The nature and existence of African customary law

Many scholars who wrote about African colonial history start with a brief reference to the voyage of Vasco da Gama in the Cape of Good Hope (1497-1498) and then rush on to the era of the arrival of Jan Van Riebeeck and the build-up of colonialism (1652-1909).<sup>8</sup> This leads to the notion that until the unjust colonial invaders, Africans did not have any laws that governed them. Oxford historian, Hugh Trevor-Roper,<sup>9</sup> once wrote:

Perhaps, in the future, there will be some African history to teach. But at present there is none: there is only the history of Europeans in Africa. The rest is darkness...and darkness is not a subject of history.

An anthropologist, Jack Herbert Driberg,<sup>10</sup> reported that in general there are no symbols of legal authority such as the police and prisons in Africa. R. T. Paget<sup>11</sup> opined that:

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<sup>5</sup> See e.g. Witte 2014 *Emory LJ* 1675-1746; Kaganas and Murray 1991 *Acta Juridica* 126, 127; Gaffney-Rhys 2011 *Gender & Society* 6; Howland and Koenen 2014 *Soc Justice* 12.

<sup>6</sup> CEDAW Committee "General Recommendation 21 on Equality in Marriage and Family Relations"; Jeffreys *Man's Dominion*.

<sup>7</sup> CEDAW Committee "General Recommendation 21 on Equality in Marriage and Family Relations" para 14 reaffirmed that "polygamous marriages contravene a woman's right to equality with men, and can have serious emotional and financial consequences for her and her dependants ...". See also Howland and Koenen 2014 *Soc Justice* 12. In addition, those who are against polygyny claim polygyny is rooted in violations of gender and women's rights, which are enshrined in the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966) (hereafter the ICCPR), the Convention on the Elimination of All Forms of Discrimination Against Women (1979) (hereafter the CEDAW), and the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (2003) (hereafter the *African Women's Protocol*).

<sup>8</sup> Thompson *A History of South Africa* 1.

<sup>9</sup> Trevor-Roper *The Rise of Christian Europe* 9.

<sup>10</sup> Driberg 1935 *Journal of Comparative Legislation and International Law* 237-238

<sup>11</sup> Paget *The Observer*.

Thought in tribal society is governed not by logic but by fetish. To the tribe, trial by fetish is just and trial by reason is unjust.... it is futile to seek a reason in tribal justice, as it is not rational.

M'Baye<sup>12</sup> contended that the rules that govern social behaviour in traditional African societies are the very negation of law, claiming that:

traditional Africa sees every rule as law, meaning that Africans lack not only an understanding of the dynamics and language of law but also that African law cannot be distinguished from religion or morality.

MG Smith<sup>13</sup> also claimed that Africans only knew about customs instead of law, and thus insinuated that Africans did not have the law. However, Idowu<sup>14</sup> criticises such scholarship, arguing that it is farfetched that Africans did not in the pre-colonial era have systems of law as that implies that there is nothing called African history and reality. He articulates that people's system of law, and its reality is rooted in those people's history. He views the anthropological reports by the above scholars as a mythical representation of African life and philosophy of the society.

It follows that, prior to the colonial era, customary law was practised and applied unlimitedly. It was commonly unwritten and therefore passed orally from one generation to another.<sup>15</sup> In many African states the legal systems had their base on the customs and practices of the people. Most people conducted their personal activities according to and subject to customary law.<sup>16</sup>

In South Africa, many customs underpinning customary marriages date back to the pre-colonial era. For example, *Seantlo*, where a woman becomes married to the husband of her late older sister to take care of her children and her husband, or even if there is no death, a woman can become married to give birth on behalf of the couple by reasons of infertility of the older sister (such a woman is called *hlatswadirope* in

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<sup>12</sup> Idowu 2004 *Int J Cult Hist Studies* 63. see also M'Baye 1975 IALS 1975.

<sup>13</sup> Smith "The Sociological Framework of Law" ch 2.

<sup>14</sup> Idowu 2004 *Int J Cult Hist Studies* 63.

<sup>15</sup> Morudu and Maimela 2021 *De Jure* 54-69

<sup>16</sup> Ndulo 2011 *IJGLS* 189.

Setswana, Sesotho and Sepedi languages ).<sup>17</sup> These are examples and rationales for the customs of polygyny, which is law because of community customs and practices.

Okruka<sup>18</sup> wrote about the Luo people of Kenya. It is still their custom that when a husband dies, the wife is taken over by a brother or a close relative of the deceased even if the latter is at that time married to another woman. If there is no brother or a close relative in place, a man may be brought from the outside. That man may bear children with the woman in the name of the deceased. When the children are grown-up, the man may cease the relationship with the deceased family. In South Africa amongst the Sotho polities, it is called "*go tsenela*" and amongst the Nguni polities, it is called *ukungena*; although the last part of the husband leaving the family as in the Luo culture appears to be absent in South Africa.<sup>19</sup>

These kinds of marriages are polygynous in nature — as in Africa, divorce, with the effect that the marriage relationship is ended, is not a generally accepted phenomenon. That the wife has died does not constitute a dissolution of the marriage; in effect, the practices of *ukungena* and *seantlo* in case of the death of a sister or brother, respectively, reinforce the initial marriage and continue it even when one spouse has died.<sup>20</sup>

All the procedures to bring such marriage practices into being have been followed during the pre-colonial period. To prove the existence of African pre-colonial customary law, Idowu<sup>21</sup> tells us about the way of life of the Yoruba people and what the idea of law in their society was and continues to be displayed and portrayed in cultural festivals and social dances. He submits that in a marriage there are distinct dancing steps and songs that are performed during such a gathering that tell of the kind of laws enjoined in that locality or even in the town at large. Those laws are

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<sup>17</sup> See Himonga and Nhlapo *African Customary Law in South Africa* 149, where *seantlo*, *Inhlanti* or *sororate* is defined as "a custom that enables a marriage to continue when the wife is infertile by allowing a younger sister or half-sister of the wife to marry the husband."

<sup>18</sup> Okruka 1982 *J East Afr Stud* 71.

<sup>19</sup> See Himonga and Nhlapo *African Customary Law in South Africa* 153, where levirate, *ukungena*, *kungena* or *kenela* is defined as "the practice where a man's widow may be required to cohabit with one of his brothers or some other nominated male relative, mainly for the purposes of raising an heir."

<sup>20</sup> See also Himonga and Nhlapo *African Customary Law in South Africa* 153-154.

<sup>21</sup> Idowu 2004 *Int J Cult Hist Studies* 63.

pronounced in songs and chanting. The essence of the chanting is to acquaint the people with laws that are operative within the social institution called marriage.<sup>22</sup>

Even indigenous South African people in the pre-colonial period did certain practices that involved singing and dancing, not just for recreational purposes but as part of custom and peremptory norms of practice. For instance, the practice of *Ukumekeza* amongst the Swati people, which is the bride's formal integration into the bridegroom's family usually involves her dancing in the cattle byre while mock weeping symbolically.<sup>23</sup> Since the pre-colonial era, *Ukumekeza* has been an important component of siSwati customary marriage, and for marriage to come into existence it must have complied with this custom.<sup>24</sup> These customs are still followed today and largely not written on.

All these customs adjoining marriages and other customary law practices as well as communal life, link with *Ubuntu* which has always been part of customary law.<sup>25</sup> *Ubuntu* is the cornerstone of the African philosophy of life and belief systems in which the peoples' daily-lived experiences are reflected.<sup>26</sup> In their struggles to survive and exist as a human society on this planet, Africans have had the longest experience since the Homo sapiens had their first home on this continent.<sup>27</sup> The philosophy is used on a daily basis to settle disputes and conflicts at different levels on the continent and is therefore central to the idea of reconciliation.<sup>28</sup> *Ubuntu*, which has always been part of customary law, can be traced back to the pre-colonial era. For instance,

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<sup>22</sup> See Idowu 2004 *Int J Cult Hist Studies* 63: The same can be said of cultural festivals. In most cases, these laws are unwritten down but are believed to be registered and written in the collective memory and consciousness of all and sundry in the relevant society.

<sup>23</sup> Himonga and Nhlapo *African Customary Law in South Africa* 294. See *Mabuza v Mbatha* 2003 7 BCLR 743 (C) para 22 where it is demonstrated that this custom of *kumekeza* still exists, even though it is no longer a mandatory legal requirement of marriage in the new constitutional dispensation. Parties can agree to dispense with this requirement.

<sup>24</sup> See *Mabuza* para 22 where it is demonstrated that this custom of *kumekeza* still exists.

<sup>25</sup> See Hamnett *Social Anthropology and Law* 14, in which customary law is described as "a set of norms which the actors in a social situation abstract from practice and which they invest with binding authority". See also Bennett *Customary Law in South Africa* 1 where it is explained that customary law "derives from social practices that the community concerned accepts as obligatory". However, the legal rules are not cast in stone.

<sup>26</sup> Nabudere "Ubuntu Philosophy" 1

<sup>27</sup> Nabudere "Ubuntu Philosophy" 1

<sup>28</sup> See also Nabudere "Ubuntu Philosophy" 1

Himonga referred to *Ubuntu* when discussing pre-colonial times' reality of traditional authority.<sup>29</sup>

Professor Barnard Mogobe Ramose, an African *Ubuntu* Philosopher, writes that *Ubuntu* finds its basis through various maxims such as the famous one "*umuntu ngumuntu nga bantu*" and "*motho ke motho ka batho*", construed to mean that to be a human being is to affirm one's humanity by recognising the humanity of others and, on that basis, establish humane relations with them. *Ubuntu* is understood as being human (humanness); a humane, respectful, and polite attitude towards others constitutes the core meaning of this aphorism.<sup>30</sup> He further affixes *Ubuntu* to law by emphasising that:

In the sphere of politics, the veritable arena for the making of law, ubu-ntu is reaffirmed as the basis of judgement in the three mentioned domains of human life by the maxim: kgosi ke kgosi ka batho, meaning, the source and justification of royal power are the people. Even here, ubu-ntu recurs with stubborn consistency because ba-tho (ba-ntu) is simply the plural form of mo-tho (umu-ntu). Accordingly, the sphere of politics and law is not only suffused with ubu-ntu but it is also based upon it.<sup>31</sup>

He further points out that:

Apart from a linguistic analysis of *Ubuntu*, a persuasive philosophical argument can be made that there is a 'family atmosphere', that is, a kind of philosophical affinity and kinship among and between the indigenous people of Africa.<sup>32</sup>

It is here argued that as long as there is a history of the people then the law of that tribe does exist. *Ubuntu* maxims and others have since immemorial times been used to encourage a good way of life; hence they are part of, even the basis for, the law aimed at regulating African people's conduct and what ought to be allowed and what ought not.<sup>33</sup> For instance, the customs of *ukumekeza* and *utsiki*<sup>34</sup> are aimed at

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<sup>29</sup> Himonga and Nhlapo *African Customary Law in South Africa* 229.

<sup>30</sup> Coetzee and Roux *The African Philosophy Reader* 272. See also Mbigi *Ubuntu, the Spirit of African Transformation Management* 1-7.

<sup>31</sup> Coetzee and Roux *The African Philosophy Reader* 273.

<sup>32</sup> Coetzee and Roux *The African Philosophy Reader* 271.

<sup>33</sup> See also Coetzee and Roux *The African Philosophy Reader* 271 where Ramose pointed out that "ubu-ntu is the essential epistemological and ontological category in the African thought of the Bantu-speaking people. It is the indivisible one-ness and wholeness of ontology and epistemology."

<sup>34</sup> *Utsiki* is a traditional Xhosa ritual where the new bride eats goat meat and drinks sour milk from the family she is getting married into. The special ceremony is done to welcome the *makoti* into the new family. See BeingAfrican 2021 <https://beingafrican.com/xhosa-marriage-practices/>.

respecting the ancestors and integrating the bride into the family of their spouse. Even though norms were not written, they were passed from one generation to another.

Customary law is a value and principle-laden system.<sup>35</sup> There is almost always a principle or value behind every practice in customary law. The principles and values behind customary law practices have to be unearthed and interrogated to ensure the sustainable development of the system.<sup>36</sup> The following are some of the positive aspects/values of customary law:<sup>37</sup> inherent flexibility; resolution and prevention of disagreements and disputes; consensus seeking; harmony of family structures and fostering of cooperation and a sense of responsibility;<sup>38</sup> obligation to care for family members;<sup>39</sup> perpetuation of the family;<sup>40</sup> and fostering of communitarian traditions such as *Ubuntu*.<sup>41</sup>

#### *2.2.1.2 The rationale for the practice of polygamy*

Before colonists and missionaries arrived in Africa, polygamy existed as a fundamental part of family law, which was grounded generally on cultural beliefs.<sup>42</sup> Traditionally, polygamy accomplished valued cultural and social functions.<sup>43</sup> It served as a remedy to:

- i. prevent divorce due to infertility because in African communities it is generally observed that procreation is required for a marriage to be complete.<sup>44</sup> It is presumed that a woman is at fault for her deficiency of procreation in marriage; hence the need for a remedy, which can be polygyny;

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<sup>35</sup> Rautenbach *Introduction to Legal Pluralism in South Africa* 27

<sup>36</sup> Rautenbach *Introduction to Legal Pluralism in South Africa* 28

<sup>37</sup> See *Bhe v Khayelitsha Magistrate* 2005 1 SA 580 (CC) para 43. This was one of the first major cases of the Constitutional Court dealing with customary law.

<sup>38</sup> *Bhe* para 166.

<sup>39</sup> This value was referred to in the majority judgment of Ngcobo J in *Bhe* para 166.

<sup>40</sup> This value was referred to in the minority judgment in an attempt to explain the rationale behind the now defunct rule of primogeniture in *Bhe* para 166.

<sup>41</sup> See *Bhe* para 45 it is stated that any discussion about African values in South Africa without reference to *ubuntu* will be incomplete

<sup>42</sup> Mwambene 2017 *PELJ* 4.

<sup>43</sup> Mwambene 2017 *PELJ* 4.

<sup>44</sup> See also Muthengi 1995 *AJET* 58; Mbiti *African Religion and Philosophy* 133.

- ii. resolve menopause as it was culturally believed that some women may stop engaging in sexual activities, but men will remain active in such activities;<sup>45</sup>
- iii. since some African cultures prohibit sexual relations between a wife and husband during pregnancy and nursing, polygyny also served as a practical solution in the course of pregnancy and nursing;<sup>46</sup>
- iv. remedy the negative social associations as being single is linked with evil, and single women are likely to be accused of witchcraft;<sup>47</sup>
- v. take care of a widow when a husband dies, whereby his brother would take care of both the widow and her children.<sup>48</sup> Moreover, polygyny was importantly established to solve the issues of the economy which were concentrated on subsistence agriculture;<sup>49</sup> and
- vi. to address the issue of singleness and infidelity because there is an imbalance in the ratio of men and women.<sup>50</sup>

The aforementioned social functions were arguably serving the interests of men.<sup>51</sup> It must be noted that this unreasonable presumption that a woman is at fault for her deficiency of procreation may have led to the dominance of the practice of polygyny to the exclusion of polyandry. Anyway, these social functions have not stopped with time.<sup>52</sup> The Chairperson of the Ugandan Law Reform Commission, Prof Joseph Kakooza, observed that:

polygamy as a custom will remain, not only in Uganda but also in all African countries and even beyond. What [goes] as a mistress in Europe [is a wife in Africa]. Once the first marriage is customary, you can marry under customary law even 100 or more, provided the custom allows it.<sup>53</sup>

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<sup>45</sup> See also Baloyi 2010 *Verbum et Ecclesia* 3.

<sup>46</sup> Mwambene 2017 *PELJ* 4.

<sup>47</sup> Mwambene 2017 *PELJ* 4.

<sup>48</sup> See also Muthengi 1995 *AJET* 59.

<sup>49</sup> See also Baloyi 2013 *Missionalia* 171: Most African cultures men are generally assumed to be the breadwinners. Therefore, Stock and crop farming were the common means of survival, and both require labour and strength from men.

<sup>50</sup> Mwambene 2017 *PELJ* 4.

<sup>51</sup> Mwambene 2017 *PELJ* 5. See also Howland and Koenen 2014 *Soc Justice* 37.

<sup>52</sup> Mwambene 2017 *PELJ* 5.

<sup>53</sup> Mwambene 2017 *PELJ* 5. See also Ssenyonjo 2011 *NQHR* 376.

## 2.2.2 Colonial period (1652-1909)

### 2.2.2.1 Socio-economic and political context of colonialism

Scholars generally submit that colonialism was mainly a struggle over human and natural resources and authority, as well as moral and cultural legitimacy, normally referred to as the "civilisation mission".<sup>54</sup> In the colonisation process, the colonisers asserted their power over indigenous societies and redistributed power in their favour.<sup>55</sup> The colonisers asserted their authority through legal and physical coercion. The legal coercion included their non-recognition of and destabilisation of the legitimacy of traditional institutions and traditional leaders. They asserted European culture as superior, and they disrespected local values. This cultural arrogance became channelled into law.<sup>56</sup>

Colonisers adapted these means of colonisation into law to legitimise their rule and authority.<sup>57</sup> Among their main interests was to secure control of financial dealings and contractual relationships, predominantly over the property.<sup>58</sup> Colonisers mainly wanted to lawfully possess, own and exert control over the indigenous people.<sup>59</sup> For them, there were two forms of property, those were, land and people, where the latter under the contract of *locatio conductio rei* were enslaved as subject matters of the contract. The colonisers made use of the principle of *terra nullius* to dispose of the property of the local population. *Terra nullius* is defined as:

The principle that where land has not been productively used by the people inhabiting it, it was not owned by those people who lived on and otherwise used the land.<sup>60</sup>

Based on that, colonial settler populations made themselves owners of the land which was possessed and used by African people.<sup>61</sup> They subjectively determined what it

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<sup>54</sup> Himonga and Nhlapo *African Customary Law in South Africa* 6

<sup>55</sup> Himonga and Nhlapo *African Customary Law in South Africa* 6.

<sup>56</sup> Himonga and Nhlapo *African Customary Law in South Africa* 6.

<sup>57</sup> Himonga and Nhlapo *African Customary Law in South Africa* 6

<sup>58</sup> Himonga and Nhlapo *African Customary Law in South Africa* 5-6.

<sup>59</sup> See Mann and Roberts *Law in Colonial Africa* 23: "Law was used in struggles over resources and labor, and those struggles in turn proved central to the making of customary law itself". Also see Benton *Law and Colonial Cultures*.

<sup>60</sup> Himonga and Nhlapo *African Customary Law in South Africa* 5.

<sup>61</sup> Himonga and Nhlapo *African Customary Law in South Africa* 6

meant by "property to be productively used". They manipulated their own law to benefit themselves and subjugate Black people. The principle of *terra nullius* was supplemented by the *lex nullius's* principle,<sup>62</sup> that is, the conception that the natives did not have law.<sup>63</sup> This is evidenced by adoption of direct rule. Direct rule was a colonial policy originally adopted by the colonial British government to colonise Cape in the beginning of the 1800s.<sup>64</sup> Through this policy of direct rule, they sought chiefly an assimilation of the "natives" under English common law.<sup>65</sup> It was easy to effect that in the Cape where there was a large settler population and less "natives" to deal with since conquest and diseases eliminated a Khoisan's large proportion. Nevertheless, the colony then extended into the east where there were several ethnic groups (now generally called as Xhosa people) and where colonial forces had been embroiled in nearly a century of wars.<sup>66</sup>

This policy of direct rule required the "natives" to surrender to the force and authority of the legal systems to the colonisers.<sup>67</sup> This approach gave the colonisers security in the sense that all legal disputes were to be governed by a law system that favoured them and they understood.<sup>68</sup> The British also adopted a direct rule strategy and were even more intended to include the "natives" in their culture and economy.<sup>69</sup> That arose from their belief that they had a superior economy, culture, and legal system that would be good for the natives and would "civilise" them.<sup>70</sup>

The coming of the British to South Africa was part of a "global" (European) trend of imperialism.<sup>71</sup> Primarily, the enlightenment industrialisation caused slavery to be

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<sup>62</sup> Himonga and Nhlapo *African Customary Law in South Africa* 7.

<sup>63</sup> Himonga and Nhlapo *African Customary Law in South Africa* 5.

<sup>64</sup> Himonga and Nhlapo *African Customary Law in South Africa* 5-6.

<sup>65</sup> A policy of assimilation forced people to embrace a law or culture as their own and conform to it in all practices even though they originally not subject to such law or culture.

<sup>66</sup> Himonga and Nhlapo *African Customary Law in South Africa* 5-6.

<sup>67</sup> Himonga and Nhlapo *African Customary Law in South Africa* 7.

<sup>68</sup> However, there were periodic instances in which their law led to logical conclusions that unfavoured them. Initial colonisers, that is the Dutch, capacity to realise a direct rule's strategy on a wide scale was constrained because they were physically narrowed to the Cape and their population was too small to enforce that policy outside the area that became to be known as the Cape. However, upon the arrival of the British in the early 1800s, tensions between the British and the Dutch compelled the latter to seek refuge from the British through migrating further inland.

<sup>69</sup> Himonga and Nhlapo *African Customary Law in South Africa* 7.

<sup>70</sup> See also Chanock *The Making of the South African Legal Culture* 32-33.

<sup>71</sup> Mattei and Nader *Plunder: When the Rule of Law is Illegal* 23, 81.

abolished, and henceforth the British opined that they were having a higher standard of morality and living which needed to be shared.<sup>72</sup> Of course, their reasons were more than just about sharing. They also wanted to accumulate and plunder resources that they did not have where they came from.<sup>73</sup> Enlightenment industrialisation gave the British the motivation and ability to impose their standards through force, firearms and machinery.<sup>74</sup>

It is clear from the above that the colonisers intended to destabilise or influence customary law through colonialism, globalism, Western norms, and other factors. The use of *lex nullius* indicates that colonisers claimed that African people did not have the law. This non-recognition of customary law negates the pre-colonial African practices, including polygamy. According to Mqoke, African legal tradition has many common characteristics that include oral traditions (customs and usages), communalism, collective responsibility, flexibility, reconciliation, symbolism and non-separation between law, religion, and morality. All these characteristics together form a body of tradition which he calls the African legal tradition.<sup>75</sup> African legal tradition also ties in with *Ubuntu* and other African values, as already discussed in 2.2.1 above.

### *2.2.2.2 Recognition of customary law*

It is of paramount importance to understand the recognition of customary law within the colonialism's context set out in 2.2.2.1 above. The recognition of customary law was not about recognising the indigenous or traditional people as people with equal moral worth, with the capacity to make choices, and with creative abilities, including the right to govern themselves.<sup>76</sup> Instead, the recognition of customary law was to achieve the objectives of the colonial-apartheid state to control and subjugate indigenous peoples. They realised that some recognition of African customary law and

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<sup>72</sup> Himonga and Nhlapo *African Customary Law in South Africa* 5: Enlightenment refers to "a intellectual and cultural movement in the 1600s and 1700s that served to support broadly acceptable social knowledge and developments with the premises of humanism and materialism as opposed to tradition."

<sup>73</sup> See also Mattei and Nader *Plunder: When the Rule of Law is Illegal* 23.

<sup>74</sup> Mann and Roberts *Law in Colonial Africa* 9-11.

<sup>75</sup> Mqoke *Customary Law and the New Millennium* 27

<sup>76</sup> See Himonga and Nhlapo *African Customary Law in South Africa* 7.

the use of some indigenous systems could achieve the said objectives.<sup>77</sup> In this context, the state used customary law and people who were adhering to customary law as instruments.<sup>78</sup>

It is already stated above that the official British policy was initially the use of direct rule. Nevertheless, during the late 1800s and early 1900s, the British had no unified model of “native” rule in South Africa, particularly in the Cape and east where there were many ethnic groups (currently broadly known as Xhosa people).<sup>79</sup> Even though the direct rule which over colonised peoples was the official policy of Britain, the *de facto* situation varied according to region. The practice of rule was depending on the authorities, the subjects, and the material resources available in a certain area.<sup>80</sup> They later found it difficult for a settler minority to rule the majority indigenous inhabitants successfully, worrying about their security. Therefore, the British recognised that the direct rule was failing and the remedy that arose was to change to the indirect rule.<sup>81</sup> Indirect rule was a colonial policy pronounced by Frederick Lugard who was serving the British Crown in the early 1900s.<sup>82</sup> He pointed out that indirect rule meant that:

The history, the traditions, the idiosyncrasies, and the prejudices of each must be studied ... in order that the form adopted shall accord with natural evolution and shall ensure the ready co-operation of the chiefs and people.<sup>83</sup>

In other words, the colonial British government attempted to comprehend African customary law and to legislate in line with it in order to make that the traditional leaders and the ordinary people who were living under customary law to cooperate with said government.<sup>84</sup>

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<sup>77</sup> See also Mann and Roberts *Law in Colonial Africa* 9-11.

<sup>78</sup> Himonga and Nhlapo *African Customary Law in South Africa* 7.

<sup>79</sup> Himonga and Nhlapo *African Customary Law in South Africa* 7.

<sup>80</sup> Himonga and Nhlapo *African Customary Law in South Africa* 8

<sup>81</sup> Himonga and Nhlapo *African Customary Law in South Africa* 38.

<sup>82</sup> Mann and Roberts *Law in Colonial Africa* 20; Mamdani *Citizen and Subject* 62. See Lugard *The Dual Mandate in British Tropical Africa* 193–213 for an articulation of this policy.

<sup>83</sup> Lugard *The Dual Mandate in British Tropical Africa* 211.

<sup>84</sup> Lugard *The Dual Mandate in British Tropical Africa* 211: Practically, the British implemented indirect rule in three parts: Firstly, “native” administrations were established. Traditional leaders formed of it. Secondly, “native” courts were established for dispute resolution. Thirdly, “native” coiffers were established for the “natives” pay taxes.

The British wished that the indirect rule's policy would achieve the following two main purposes:<sup>85</sup> Firstly, it would divide the majority population into "tribes" so that they view themselves as minor groups rather than a single dominant race and thus would lessen the risk of revolt. Secondly, it would make the impression of independence and group autonomy.<sup>86</sup> This is due to the fact that indirect rule would authorise the indigenous communities to rule themselves provided that their self-government did not conflict with the rules enacted by the colonial government.<sup>87</sup>

The British had officially adopted and applied indirect rule in the colony of Natal since the mid to late 1800s, under Theophilus Shepstone.<sup>88</sup> The British now also commenced to apply the policy of indirect rule, informally at first, in the Cape colony from the end of the nineteenth century. After a few years, the Natal Native Affairs Commission of 1852–1853(hereafter "commission") suggested that the native population be grouped in reservations and that their everyday affairs be managed in a way that conform that with their customary justice system provided such were in alignment with the principles of the legal system of colonial state.<sup>89</sup>

The commission decided that, under customary law, traditional leaders were despots and women were too liberated.<sup>90</sup> Practically, this means that the chiefs and courts would apply customary law subject to the provision that it was not contrary to the European view of humanity and justice. This is known as the "repugnancy clause".<sup>91</sup> It also meant that the colonial governor, a European, was the ultimate authority on customary law as "supreme chief".<sup>92</sup>

The elevation of the chiefs' role entailed that they assumed significant power which some even abused or exploited for personal gain.<sup>93</sup> Henceforth, it is noteworthy that it was not only the colonisers who used and benefited from the system. For example,

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<sup>85</sup> Mamdani *Citizen and Subject* 72-74, 294-295.

<sup>86</sup> See Mamdani *Citizen and Subject* 72-74, 294-295. See also Benton *Law and Colonial Cultures* 22.

<sup>87</sup> Mamdani *Citizen and Subject* 72-74, 294-295.

<sup>88</sup> See also Chanock *The Making of the South African Legal Culture* 243-261.

<sup>89</sup> Himonga and Nhlapo *African Customary Law in South Africa* 9.

<sup>90</sup> See Mamdani *Citizen and Subject* 81. Chanock *The Making of the South African Legal Culture* 262, 267. It is noteworthy that patriarchy was still strong under British law.

<sup>91</sup> Chanock *The Making of the South African Legal Culture* 96, 98; Mamdani *Citizen and Subject* 63.

<sup>92</sup> Church 2005 *ANZLH* 63.

<sup>93</sup> Mann and Roberts *Law in Colonial Africa* 20-21; Mamdani *Citizen and Subject* 79, 88; 122-128.

even some members of the indigenous groups benefitted themselves by assisting the colonial government's subordination of customary law and its people.<sup>94</sup> Simultaneously, there was resistance to this development from some parts of the indigenous population, especially young men and women, who were seeking refuge in the colonial courts. In this process, their actions contributed in creating more official customary law.<sup>95</sup>

### *2.2.2.3 The colonial missionaries' reaction to polygamy*

Upon their arrival in South Africa, missionaries did not approve the African marriages, particularly polygamy on the basis that it is incompatible with the Bible.<sup>96</sup> The only form of marriage which was acceptable to the Western missionaries was monogamy as their emphasis was that marriage is primarily a matter of a man or a woman "leaving his or her mother and father and the two becoming one flesh."<sup>97</sup> Roman-Dutch law had biblical inclinations as it had roots in the Roman Catholic Church. The colonial authorities always deemed certain African cultural norms and traditional laws to be immoral, thus illegitimate and condemned them. Polygamy was one of those. They complained that the polygamous husband lived in comfort where he had too much sex, leisure, and land, which would dissuade him from working for white masters.<sup>98</sup>

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<sup>94</sup> Himonga and Nhlapo *African Customary Law in South Africa* 8.

<sup>95</sup> See also Himonga and Nhlapo *African Customary Law in South Africa* 9: they contributed to the development in and authority of official customary law as appealed to the courts in order to be protected from the male elders who were abusing the power and authority which they got from government. McClendon 1995 *Int J Afr Hist Stud*: "In 1931 an African court messenger in Natal testified ... that courts undermined the authority of husbands and fathers. Wives and daughters, for instance, no longer brought their concerns to the head of the family, but instead complained to the court that the husband or father did not give them food or clothing. In the court messenger's words, the court is the husband of the wife; the court is the father of the daughter. They run there for their clothing and food". See also McClendon 1995 *Int J Afr Hist Stud* 539. Faced with the strictures imposed by the customary courts which sought to maintain their authority by allying with the government to prevent African women from going to the towns, women also sought freedom in courts which they petitioned for divorce.

<sup>96</sup> Maillu *Our Kind of Polygamy* 1.

<sup>97</sup> See Genesis 2:24 which states that "For this reason a man will leave his father and mother and be united to his wife, and they will become one flesh. That is why a man leaves his father and mother and is united to his wife, and they become one flesh. This explains why a man leaves his father and mother and is joined to his wife, and the two are united into one."

<sup>98</sup> Simons and Goldman *African Women* 15, 21-22.

Christianity dominated and its dogmas were peremptory. As a result, customary marriages were not given legal recognition because of among other things, polygyny, which was the dominant form of polygamy at the time.<sup>99</sup> It was regarded as a method of slavery that needed to be eliminated or abolished.<sup>100</sup> Generally, Christian colonists steadfastly wanted to substitute it with monogamy.<sup>101</sup> When they were attempting to replace polygamy with monogamy, they gave preferential treatment to men who are in monogamous marriages.<sup>102</sup> For instance, some Christian missionaries rejected polygamists and their families in the church.<sup>103</sup> In some instances, upon conversion to Christianity, polygynous husbands were obliged to pick one customary wife with whom to conclude a Christian marriage and renounce or abandon the remaining wives.<sup>104</sup> Thus, that led to so-called "the discarded wife syndrome" on the continent.<sup>105</sup>

In Malawi, women suffered oppression by the missionaries of the "Roman Catholic and the Dutch Reformed" churches. These churches forced polygamists to divorce their wives to remain with one upon conversion to Christianity and baptism. As a result, many deserted their wives who were left suffering economically, carrying the burden to head their houses and raise children by themselves.<sup>106</sup> It is deducible that the only solution that missionaries had towards polygamy was divorce and the best interest of the children was never of paramount to them. Bishop John Colenso of Natal acknowledged the practice of separating husbands and wives on their conversion to Christianity when he argued that it was in opposition to God's teachings.<sup>107</sup>

Legal philosophers such as Saint Augustine and Saint Thomas Aquinas expressed that polygamy *per se* is not evil, as God in the Old Testament permitted it.<sup>108</sup> Thus, to them, it was never contrary to divine law or natural law. This signifies that those

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<sup>99</sup> See also Bennett *Customary Law in South Africa* 189. Kang'ara 2012 *HRPLJ* 5.

<sup>100</sup> See also Obonye 2012 *JASD* 142-149; Bennett *Customary Law in South Africa* 189; Herbst and du Plessis 2008 *EJCL* 5.

<sup>101</sup> See also Kang'ara 2012 *HRPLJ* 2.

<sup>102</sup> Mwambene 2017 *PELJ* 5.

<sup>103</sup> See also Muthengi 1995 *AJET* 57.

<sup>104</sup> See also Kang'ara 2012 *HRPLJ* 16.

<sup>105</sup> See also Kang'ara 2012 *HRPLJ* 16.

<sup>106</sup> Phiri *Women, Presbyterianism and Patriarchy* 75.

<sup>107</sup> Hillman *Polygamy Reconsidered* 32.

<sup>108</sup> Hillman *Polygamy Reconsidered* 179

missionaries rejected polygamy because it went against their culture and wanted cultural domination over the indigenous peoples.

The rejection of polygamy led to the establishment of African Independent Churches (hereafter the AIC). Jenkins's observation gives us some insight into such churches that accommodated polygamists as full members where one would possibly find a numerous (polygamous) families among the members of their congregations.<sup>109</sup> However, missionaries could not end the practice of polygyny.<sup>110</sup> The practice continued in numerous African countries and the customary laws of various societies remained to permit it hitherto.<sup>111</sup> In some places, as a result, members formed their independent churches.<sup>112</sup> As an example, the founder of the Nazarite Baptist Church in SA had four wives; Johane Marange, the founder of the African Apostolic Church in Zambia and Zimbabwe, had sixteen wives; and Josiah Oshitelu, the founder of the Aladura (the Church of the Lord) married seven wives.<sup>113</sup>

### 2.2.3 *The Union (1910–1947)*

#### 2.2.3.1 *Political background and wider legal context of the Union era*

During the period of the Union of South Africa,<sup>114</sup> the objectives of the government on the native question became the control and the movement behaviour of the natives.<sup>115</sup> It sought to make sure that the natives were regulated using the least possible the state's administrative and resource investment, whilst safeguarding that

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<sup>109</sup> Jenkins 2010 <https://www.christiancentury.org/article/2010-01/one-man-one-woman>.

<sup>110</sup> Mwambene 2017 *PELJ* 6.

<sup>111</sup> See also Bennett *Customary Law in South Africa* 187, 192.

<sup>112</sup> Mwambene 2017 *PELJ* 6.

<sup>113</sup> See also Muthengi 1995 *AJET* 55, 57. In addition, some came a little later, such as the founders of Zion Christian Church, Shembe and Modise.

<sup>114</sup> Also see Himonga and Nhlapo *African Customary Law in South Africa* 10:

during the Union period, the four British colonies of the Cape, Natal, Orange River and Transvaal, the latter having formerly been Boer republics, were unified to form the Union of South Africa. The beginning of this period was marked by the establishment of the Union on 31 May 1910. The Union was declared by means of the *Union of South Africa Act*, 1909 which was passed by the British Parliament on 20 September 1909. This Act thereafter served as the South African Constitution.

<sup>115</sup> Mamdani *Citizen and Subject* 65-66; 70,89; Mann and Roberts *Law in Colonial Africa* 20-21.

the “natives” continued to be at the state's disposal for production purposes.<sup>116</sup> The government was slightly interested in customary law, even as a mode of rule. It therefore became easy to change it through legislation. Numerous strategic pieces of legislation were enacted during this period. However, this study draws attention to only one of them, that is, the *Black Administration Act* (hereafter the *BAA*)<sup>117</sup> which is exclusively relevant to the scope of this study. In South Africa, indirect rule was implemented nationally in 1927 when, in terms of the *BAA*, a comprehensive system of native administration was created.<sup>118</sup> A significant and offensive consequence of the *BAA* was that contributed to the perpetual minority of black women in its general policy of favouring or privileging black men. This subject is discussed further below in 2.2.3.3 (Black women's capacity concerning the inheritance under the *Black Administration Act*)

#### 2.2.3.2 Judicial application of customary law under the *Black Administration Act*

Section 11 of the *BAA* provided for a separate state court system to apply the customary law.<sup>119</sup> Notwithstanding the application of customary law in headmen's and chiefs' courts, this section further provided that customary law was also applicable in the specially created state courts, the Native Appeal Courts and Native Commissioners'

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<sup>116</sup> See also Benton *Law and Colonial Cultures* 181-183

<sup>117</sup> *Black Administration Act* 38 of 1927.

<sup>118</sup> See Rautenbach *Introduction to Legal Pluralism in South Africa* 220: the following are main features of said system:

- a) The institution of the Governor-General (subsequently replaced by the President) as supreme chief of all Bantu-speaking groups with all the powers which a traditional leader holds under indigenous law (s 1);
- b) S 25 granted the President edictal legislative powers in respect of Bantu-speaking communities;
- c) Special commissioners' courts were established to adjudicate in disputes between Africans, and chiefs were granted limited civil and criminal jurisdiction in respect of Africans (Ss 10, 12 and 20); and
- d) Last, but not least, in terms of s 1, traditional leaders were appointed by the Governor-General (subsequently replaced by the President). Although he generally had to have regard to customary rules of succession, he was not bound by it.

<sup>119</sup> Section 11(1) of the *BAA* stated:

“notwithstanding the provision of any other law, it shall be in the discretion of the commissioners' courts in all suits or proceedings between Blacks involving question of customs followed by blacks, to decide such questions according to Black law applying to such customs except in so far it shall have been repealed or modified: provided that such law shall not be opposed to the principles of the public policy or natural justice: provided further that it shall not be lawful for any court to declare that the custom of *lobala* or *bogadi* or other similar custom is repugnant to such principles.”

Courts. Additionally, customary law could be applicable in these courts provided it was in line with “public policy or natural justice”. Thus, customary law was applicable only in cases where it did not contradict the statutes and common law.<sup>120</sup> This hindered the customary law from developing.

In most provinces, there were ordinances or legislation that regulated how customary law was supposed to be applied.<sup>121</sup> In Natal, customary law was applicable to all “natives” in all probable transactions, *with the exception of where* non-Africans were involved and where foreign transactions were at issue.<sup>122</sup> The Cape followed the Transkei and applied customary law only in personal law’s matters in cases where Roman-Dutch law did not exist.<sup>123</sup>

There were various ways in which the common law infiltrated into customary law under the new order enforced via the *BAA*.<sup>124</sup> The following are a few examples:

1. Union officials operated the Native Appeal Courts and Native Commissioners' Courts. These officials were sometimes referred to as “customary chiefs” even though they were not customary chiefs and had less knowledge about customary law.<sup>125</sup> Furthermore, appeals from the Native Courts were taken to the common law courts, presiding officers of which had even less knowledge about customary law than the Native Courts. Whereas these common-law presiding officers assumed that they had much knowledge about customary law, whilst they construed customary law through the common law’s lenses and associated Western values.<sup>126</sup>
2. Common law courts placed a high value on certainty, by insisting on inflexible rules and the use of *stare decisis* (precedent) and codes such as the *KwaZulu*

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<sup>120</sup> See also Himonga and Nhlapo *African Customary Law in South Africa* 12.

<sup>121</sup> Himonga and Nhlapo *African Customary Law in South Africa* 12.

<sup>122</sup> Himonga and Nhlapo *African Customary Law in South Africa* 12.

<sup>123</sup> Himonga and Nhlapo *African Customary Law in South Africa* 12.

<sup>124</sup> See also Himonga and Nhlapo *African Customary Law in South Africa* 12.

<sup>125</sup> See also Chanock 1991 *J Afr Hist* 243-261.

<sup>126</sup> Chanock 1991 *J Afr Hist* 13-35.

*Act on the Natal Code of Zulu Law* as well as the *Code of Zulu Law*.<sup>127</sup> These statutes impacted far beyond the borders of Natal.<sup>128</sup> Luluaki shows an instance in which the common law courts were distorting customary law as follows: when giving a custom the character of certainty associated with law, courts were insisting that a bride price must be paid in order for marriage to be valid. In this manner, they could provide "the quality of certainty to marriage" whereby there was clear establishment of rights over women and their children.<sup>129</sup>

3. Courts treated customary laws as a fact that was required to be proven in all cases.<sup>130</sup> Customary law is poised inelegantly between being law and fact because it derives or originates directly from social practice. *Van Breda v Jacobs* (hereinafter *Van Brada*)<sup>131</sup> was taken as a basic precedent for proving customary law. According to *Van Breda*, the party that argues for judicial enforcement of a particular local custom was required to comply with requirements laid down to prove custom under the common law.<sup>132</sup> African customs were viewed through lenses of common law, despite that common law customs differ from customs that emanate from indigenous cultural traditions.
4. Fourthly, the application of customary law was subjected to the provision that it must not conflict with the principles of natural justice or public policy.<sup>133</sup> In the common law courts' application of customary law, the relevant public policy was that of common law observed by the white population. The courts

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<sup>127</sup> Proc R151 of 1987. See also Bennett and Pillay 2003 *SAJHR* 1 who contend that the *Natal Code of Zulu Law* is a product of early colonialism and its counterpart, KwaZulu Act on the Code of Zulu Law, is a product of the apartheid era.

<sup>128</sup> Himonga and Nhlapo *African Customary Law in South Africa* 13.

<sup>129</sup> Luluaki 1997 *Int J Law Policy Fam* 6.

<sup>130</sup> Himonga and Nhlapo *African Customary Law in South Africa* 13

<sup>131</sup> *Van Breda v Jacobs* 1921 AD 330. It is case that involved the order in which fishing nets should be cast for catching shoals of fish swimming off the shores of False Bay. This type of local practice is clearly distinguishable from the systems of law emanating from indigenous cultural traditions. As a result, witnesses had to be called – although neither the number nor their qualifications were ever specified – to attest to the existence of a particular usage. A court would then give effect to it, provided that the usage was sufficiently reasonable, certain, uniform, and must be long well-established. See Rautenbach *Introduction to Legal Pluralism in South Africa* 48.

<sup>133</sup> Himonga and Nhlapo *African Customary Law in South Africa* 13.

construed natural justice in Eurocentric terms.<sup>134</sup> For example, much later in, *Ishmail v Ishmail*,<sup>135</sup> potentially polygamous marriages were rejected.<sup>136</sup>

5. Customary law became distorted because the assessors and witnesses who assisted the presiding officers in determining the true content of customary law were usually old men who shared the interest of government to control women as well as younger men.<sup>137</sup> They thus regularly used the power offered to them to advance and secure own their interests and to safeguard that they retained control over these demographic groups in a changing economic and economic environment.<sup>138</sup> As a result, they would occasionally invent or formulate customary law rules that advanced this cause.<sup>139</sup>

The above examples illustrate how common law courts played a big role in distorting customary law. The white minority government effectively took control of customary law away from its own organic development. They took customary law in the direction of the male orientation and thus effectively prevented it from developing in the direction of giving due regard to women. In that way that would have restricted any organic development and entrenchment of polyandry.

#### *2.2.3.3 Black women's capacity concerning the inheritance under the Black Administration Act*

The *BAA* essentially contributed to the perpetual oppression of women in its general policy of benefitting the males within polities, when it comes to marriage.<sup>140</sup> According to Section 11(3)(b) of the *BAA*, a black woman's marriage makes her a minor under her husband's tutelage and consequently made her unequal to her husband.<sup>141</sup> This eliminated any chance of a woman having agency, regardless of whether there were

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<sup>134</sup> Himonga and Nhlapo *African Customary Law in South Africa* 13.

<sup>135</sup> *Ishmail v Ishmail* 1983 1 SA 1006 (A).

<sup>136</sup> *Ishmail v Ishmail I*, it was held that marriages solemnised under Islamic law do not enjoy the same status of marriage in civil law because these unions are potentially polygamous and therefore against public policy.

<sup>137</sup> See also Chanock 1991 *J Afr Hist* 329.

<sup>138</sup> See also Chanock 1991 *J Afr Hist* 329.

<sup>139</sup> See also Chanock 1991 *J Afr Hist* 329.

<sup>140</sup> Himonga and Nhlapo *African Customary Law in South Africa* 11.

<sup>141</sup> Some authors are suggesting that women never attained the status of majority. See for example, Maithufi 1998 *De Jure* 203.

African customs which gave women agency, power and authority. It is deducible that under such an environment Black men had an agency to fight and campaign for the continuation of polygynous marriages, whereas agency and opportunity for women to do the same were practically eliminated by statute declaring them "minors". It is apparent that this may have contributed to the non-recognition of polyandry because women who were regarded as minors could not enter into another marriage as they lacked the capacity.

Section 22(6) of the *BAA* provided that civil marriages concluded between black people were out of the community of property. It prescribed what and how black people's assets, mostly those in customary unions, could be disposed of. As a way of example, black people were not allowed to dispose of land held under quitrent by testament but had to dispose of it in accordance with a schedule provided in the *BAA*.<sup>142</sup> That schedule as provided in section 23 of the *BAA* allowed only men to inherit the land. Movable property that belonged to a man or his customary wife had to devolve according to "black law and custom" and it was impossible to be disposed of through a will.

In terms of section 23 of the *BAA*, "black law and custom" was construed to refer to the rule of primogeniture in which the oldest male relative of the deceased inherited his intestate estate and women were prohibited to inherit from their spouses. This is another example of prejudice suffered by women in general due to gender differentiation. Actual or potential spouses in African woman-to-woman relationships, monogamous and polyandrous, clearly stood no chance in an environment where section 23 of the *BAA* became law governing all Africans in South Africa. There was no attempt to cater to woman-to-woman marriages, regardless of whether they existed in fact as part of customary laws or not. It will be demonstrated below that during this time, in fact, many African customs recognised and embraced polyandrous relationships/marriages. Any idea of gender equality between men and women was discarded by the white law makers of the time, again regardless of whether it existed in fact or not.

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<sup>142</sup> Himonga and Nhlapo *African Customary Law in South Africa* 12.

## 2.2.4 Apartheid (1948–1990)

### 2.2.4.1 The political context of apartheid

Mamdani contends that there was a distinct continuity between the period of the colony, the period of the Union, and an era of apartheid.<sup>143</sup> This can collectively be referred to as “colonial-apartheid”. This is evidenced by the continuance of the phenomenon of patriarchy, which mostly subordinated women to power of men and wives enjoyed less entitlements in their marital relations with their husbands than husbands did. For instance, the husband was always regarded as the head of his family or household, and only a man could be the head of the family as the so-called “*pater familias*”. Accordingly, men made major decisions concerning family life, under the influence of colonial-apartheid. Further, once a man effect *lobolo* payment, the husband and his family entitled to affiliate children of the marriage with their family and exclude the mother and her family.<sup>144</sup> This contributed to the non-development of women as heads of families, and consequently the non-accommodation of polyandrous marriages.

The transition from the colonial period to the apartheid era was gradual and disordered and occurred over the few decades constituting the Union period.<sup>145</sup> Post-World War II, human rights discourse turned out to be predominant in Europe.<sup>146</sup> Nevertheless, human rights were rarely discussed in African colonies, particularly where white settlers pursued to protect their own interests.<sup>147</sup>

In South Africa, the policy of indirect rule policy started by the British in Natal was simply more formalised and entrenched in statute under the National Party (hereafter “NP”) government to become a separate development.<sup>148</sup> This was the euphemism employed to describe the apartheid system.<sup>149</sup> Aim for separate development was to lead eventually to the black people’s self-government in the homelands that were

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<sup>143</sup> Mamdani *Citizen and Subject* 6-7.

<sup>144</sup> See Bennett 1999 *Obiter* 145-157.

<sup>145</sup> See also Mamdani *Citizen and Subject* 7-8, 27-8, 89-90.

<sup>146</sup> Himonga and Nhlapo *African Customary Law in South Africa* 14.

<sup>147</sup> Mamdani *Citizen and Subject* 7-8, 27-8, 89-90.

<sup>148</sup> See BAA which nationalised indirect rule policy.

<sup>149</sup> Mamdani *Citizen and Subject* 6-7, 89.

created on a inadequate amount of land.<sup>150</sup> The real intentions of NP government to retain indirect rule arguably have more to do with its commitment to investing minimal cost and effort into the traditional communities' governance yet also ensuring the maximal control over land resources and labour.<sup>151</sup>

#### *2.2.4.2 Judicial application of customary law in the apartheid era*

During the apartheid era, in *Ex parte Minister of Native Affairs: In re Yako v Beyi*,<sup>152</sup> the Appellate Division (now the Supreme Court of Appeal) provided a standard approach to customary law. The court ruled that it must not be presumed in favour of applying either customary law or common law, but courts are required to apply the law that was most applicable to the parties and the circumstances of the case. Arguably, the ruling of this court also contributed to degrading customary law in the legal system as explained below.<sup>153</sup> This decision resulted in continuity of the colonial indirect rule policy into the apartheid era. The decision led to the recognition of customary law "only as a special and personal law that operated outside of but only as determined by the general law".<sup>154</sup> In other words, customary law was applicable only to the individual in exceptional circumstances. The state law continued to be the law of general application. Thus, customary law, remained to be viewed through the lenses of common law and would only be applicable if it was in line with the values of common law.

Bennett opines that the recognition of customary law was marked by a deficiency of autonomy (that is, there was no individual choice) as culture shaped the basis of legal segregation.<sup>155</sup> Hence, the individual had opportunity to elect whether customary law ought to apply to her or his case. Once the court determined that the individual belong to a particular culture, "it applied the customary law believed to belong to that culture to that individual".

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<sup>150</sup> *Self-Governing Territories Constitution* 21 of 1971 formed the legislative framework for this.

<sup>151</sup> Oomen *Chiefs in South Africa* 41.

<sup>152</sup> *Yako v Beyi* 1948 1 AD 388 para 397.

<sup>153</sup> *Yako v Beyi* para 397.

<sup>154</sup> See Church 2005 *ANZLH* 95.

<sup>155</sup> Bennett and Peart 1983 *Acta Juridica* 145-170.

In *Tongoane v National Minister for Agriculture and Land Affairs* (hereafter *Tongoane*),<sup>156</sup> Chief Justice Ngcobo provided a complete account of the complex relationship between the laws of apartheid and the dispossession and oppression of black people. The Chief Justice opined on the *Black Authorities Act*<sup>157</sup> which established homelands for black people and, therefore, excluded black people from being South African citizens. He held that:

The Black Authorities Act gave the State President the authority to establish 'with due regard to native law and custom' tribal authorities for African 'tribes' as the basic unit of administration ... Under apartheid, these steps were a necessary prelude to the assignment of African people to ethnically-based homelands. ... According to this plan, there would be no African people in South Africa, as all would assume citizenship of one or other of the newly created homelands...<sup>158</sup>

Throughout its historical development in South Africa, customary law has been infused with an underlying element of discrimination, and this characteristic has persisted through to its contemporary status as a legal system. In light of polyandry and polygyny, customary law tends to disregard women and view them as being on the periphery of the group, as opposed to being equal participants in that society. It is evident that polygyny has been given preference as compared to polyandry, influenced by the discriminatory legislation as applied in customary courts as well as the continued presence of rulings based on disadvantageous, gendered customary laws in South African courts.

### *2.2.5 Transitional period (1990–1996)*

#### *2.2.5.1 Evidencing the practice of polygamy in Africa*

In the modern context, even though statistics on polygynous marriages reveal that the occurrence of polygynous marriages is declining, and the general opinion is that they are disadvantageous to women, polygyny remains a popular custom and practice in the continent.<sup>159</sup> Such existence may be attributed to the fact that polygyny is legally

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<sup>156</sup> *Tongoane v National Minister for Agriculture and Land Affairs* 2010 6 SA 214 (CC) paras 10–29.

<sup>157</sup> *Merchant Shipping Act* 57 of 1951.

<sup>158</sup> *Tongoane* paras 24–25.

<sup>159</sup> Bekker 1991 *Acta Juridica* 4; Mwambene and Kruuse 2015 *IJLPF* 252; Mwambene 2015 *Speculum Juris* 76.

recognised in numerous African countries, such as Sudan, Chad, Tanzania, Gabon, Zambia and Niger.<sup>160</sup>

The practice of polygyny in Africa has been legally recognised in different forms.<sup>161</sup> Some Africa countries have given polygynous marriages an official recognition as valid marriages.<sup>162</sup> In other countries such as Malawi, polygyny is permitted under unrecorded customary laws.<sup>163</sup> In Countries such as South Africa, existing customary laws are formalised but subjected limitations on the practice.<sup>164</sup> In Some countries polygyny remains to be formally prohibited under civil law, nevertheless the practice continue to be lawful or legal under the customary law of the relevant country.<sup>165</sup> In exceptional cases, such as South Africa today, the practice is permissible provided that a man obtains the consent of his first wife when he wishes to marry another wife.<sup>166</sup>

Forty-seven percent of Senegal marriages feature multiple wives and a quarter of women in Tanzania are in a polygamous marriage(s).<sup>167</sup> In Kenya, it is a phenomenon for some men to marry many wives.<sup>168</sup> Moreover, the practice of polygyny is supported by prominent political figures in Africa.<sup>169</sup> For instance, a former of president of Sudan, Omar Hassan al-Bashir has always maintaining that polygyny is a sustainable route for population growth; Kenyan President Kibaki married two wives; the former President of South Africa, Jacob Zuma, married more than 3 wives; and King Mswati III of Swaziland is married to 14 wives.<sup>170</sup>

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<sup>160</sup> Mwambene 2017 *PELJ* 7. See also Armstrong, Beyani and Himonga 1993 *Int J Law Policy Fam* 25.

<sup>161</sup> Mwambene 2017 *PELJ* 7.

<sup>162</sup> See also Gaffney-Rhys 2011 *Gender & Society* 2.

<sup>163</sup> See also Gaffney-Rhys 2011 *Gender & Society* 2.

<sup>164</sup> Mwambene 2017 *PELJ* 7-8. See also the RCMA which recognises polygamous marriages in South Africa.

<sup>165</sup> For example, in Malawi, s 17 of the *Marriage, Divorce and Family Relations Act* 5 of 2015 prohibits civil polygamous marriages but customary and religious polygamous marriages are not prohibited. Also see the RCMA in South Africa, wherein monogamous customary marriage can be converted into a civil law marriage, but a conversion of polygynous customary marriage into a civil marriage is prohibited. See s 10(4) of the RCMA.

<sup>166</sup> See also *Mayelane v Ngwenyama*.

<sup>167</sup> See also Howland and Koenen 2014 *Soc Justice* 3-38.

<sup>168</sup> Mwambene 2017 *PELJ* 6.

<sup>169</sup> Mwambene 2017 *PELJ* 6.

<sup>170</sup> Mwambene 2017 *PELJ* 6; Ssenyonjo 2011 *NQHR* 376; AFP 2014 <http://www.nation.co.ke/news/Uhuru-assents-to-law-allowingpolygamy/1056-2297540-x731pa/index.html>; Anon2015 <https://www.polygamy.com/articles/89746509/polygamy-in-africa>.

There are countries in Africa in which women may or could marry more than one spouse, for example, South Africa. The practice of polyandry in the African customary law context is particularly discussed in detail below in 2.3.

#### *2.2.5.2 Transformative constitutionalism*

The continued practice of polygyny to the exclusion of polyandry boils the issue down to the indecision of the transitional period in which women's rights, customary law, and the role of traditional leaders were controversial issues.<sup>171</sup> An important question during the transition was whether customary law ought to be subject to or independent from the Bill of Rights.<sup>172</sup> This matter was contested at both CODESA I and II from 1991 to 1992 as well as the Multiparty Negotiating Forum (hereafter the MPNF) during 1993.<sup>173</sup>

The contestation was predominantly between women's rights activists, organised as the Women's National Coalition, and traditional leaders mostly organised as the Congress of Traditional Leaders of South Africa.<sup>174</sup> On the one hand, traditional leaders feared that the equality clause would, *inter alia*, likely cause large parts of customary law to be eradicated.<sup>175</sup> On the other hand, the women's lobby was concerned that should the appeal of the traditional leaders succeed, rural women would remain to be subjected to patriarchy in the name of customary law and would be deprived of the equality benefits based on sex and gender.<sup>176</sup>

In late 1993, the Multi-Party Negotiating Forum (hereafter MPNF) yielded the interim Constitution, slightly to break the effective deadlock between the disputing parties over what to do about customary law.<sup>177</sup> Sections 181, 182, 183, and 184 of the interim Constitution prescribed a role that ought to be played by traditional leaders. Section 181(1) permitted recognised traditional leaders to continue to perform their

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<sup>171</sup> See also Oomen *Chiefs in South Africa* 37-86.

<sup>172</sup> Himonga and Nhlapo *African Customary Law in South Africa* 17.

<sup>173</sup> Himonga and Nhlapo *African Customary Law in South Africa* 17.

<sup>174</sup> Oomen *Chiefs in South Africa* 45-50.

<sup>175</sup> Himonga and Nhlapo *African Customary Law in South Africa* 17.

<sup>176</sup> Himonga and Nhlapo *African Customary Law in South Africa* 17. Patriarchy refers to a social system norm in terms of which men hold then dominant positions and positions of authority largely to the exclusion of women.

<sup>177</sup> See also Oomen *Chiefs in South Africa* 48-49.

roles and to exercise power under respective customary laws, subject to repeal or amendment by legislation. Some perceived that the women's lobby had lost because traditional leaders were allowed to continue imposing themselves and discriminatory aspects of customary law on their subjects without giving them a choice in the matter.<sup>178</sup>

The interim Constitution also contained Constitutional Principle XI which shielded culture and language.<sup>179</sup> Principle XIII, on the traditional leaders' role, granted the recognition and application of customary law which was subject to the rights guaranteed by the Constitution and statute dealing therewith.<sup>180</sup> This illustrates that the women's lobby and women's rights activists were in fact successful in appealing for gender equality rights to extend to women who lived under customary law.<sup>181</sup>

The interim Constitution became to be interpreted to incorporate the concept of *Ubuntu* from the jurisprudence of African traditions.<sup>182</sup> This concept was referred to in the interim Constitution's epilogue under the heading, "National Unity and Reconciliation". In 1995 the Constitutional Court in *S v Makwanyane* in which the death penalty was abolished, *Ubuntu* was used as an interpretative tool.<sup>183</sup> Ackermann J observed that the history of harshly destabilising the dignity and infringing the inherent right to life of numerous South Africans needed to be rectified.<sup>184</sup> Hence, "a culture of respect for human life and dignity, based on the values reflected in the Constitution, has to be engendered, and the State must take the lead."<sup>185</sup>

Furthermore, Chaskalson P perceived that respect for life and dignity are values of the highest order under our Constitution.<sup>186</sup> Six of the eleven judges in the case of *Makwanyane* identified *Ubuntu* as a key constitutional value that:

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<sup>178</sup> See also Oomen *Chiefs in South Africa* 48-49.

<sup>179</sup> This principle specifically states that "The diversity of language and culture shall be acknowledged and protected, and conditions for their promotion shall be encouraged."

<sup>180</sup> See also Himonga and Nhlapo *African Customary Law in South Africa* 18.

<sup>181</sup> Oomen *Chiefs in South Africa* 48-49.

<sup>182</sup> Himonga and Nhlapo *African Customary Law in South Africa* 18.

<sup>183</sup> *S v Makwanyane* 1995 6 BCLR 665 (CC).

<sup>184</sup> *Makwanyane* para 111.

<sup>185</sup> *Makwanyane* para 222.

<sup>186</sup> *Makwanyane* para 111.

places some emphasis on communality and the interdependence of the members of a community. It recognises a person's status as a human being entitled to unconditional respect, dignity, value, and acceptance ... The person has a corresponding duty to give the same ...<sup>187</sup>

The Constitutional Court has several times referred to *Ubuntu* as being one of the fundamental constitutional values, amongst or embedded in other constitutional values such as equality, freedom and human dignity.<sup>188</sup> Although *Ubuntu* is not precisely mentioned in the final Constitution, through the jurisprudence of the Constitutional Court and much academic writing it continues to be a crucial part of South African law.<sup>189</sup>

The Constitutional Court in *Certification of the Amended Text of the Constitution of The Republic of South Africa*<sup>190</sup> approved the final (1996) Constitution as satisfying its obligations under the interim Constitution, which final Constitution included the following provisions:<sup>191</sup>

- a) Section 9(3) protects against unfair discrimination based on listed grounds, including ethnic or social origin, culture, sex and gender. Bennett points out that culture includes a "people's entire store of knowledge and artefacts, especially the languages, systems of belief, and laws, that give social groups their unique characters".<sup>192</sup> Thus, this provision guarantees the people the right to be regulated by the law that applies to their specific cultural group.
- b) Section 15 expands on section 14 of the interim Constitution, declaring that nothing in the section prevents legislative recognition of marriages entered into in terms of any religious or tradition, personal or family law systems. As a result, the *Recognition of Customary Marriages Act* 120 of 1998 (hereafter 'the RCMA') was enacted to recognise customary marriages.<sup>193</sup>

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<sup>187</sup> *Makwanyane* para 224.

<sup>188</sup> For example, see *Port Elizabeth Municipality v Various Occupiers* 2004 12 BCLR 1268 (CC).

<sup>189</sup> See also See also Himonga and Nhlapo *African Customary Law in South Africa* 18.

<sup>190</sup> *Certification of the Amended Text of the Constitution of The Republic Of South Africa, 1996* 1997 2 SA 97 (CC).

<sup>191</sup> See also Himonga and Nhlapo *African Customary Law in South Africa* 18.

<sup>192</sup> Bennett *Human Rights and African Customary Law under the South African Constitution* 23.

<sup>193</sup> This Act will be analysed in the next chapter wherein non-recognition of polyandry dealt with.

- c) Section 30 guarantees individuals the right to participate in a culture of their choice and section 31 enshrines a group's right to participate in cultural activities which they choose.
- d) Section 39 provides for equality between common law and customary law (and its development). Section 39(2) requires courts, "when interpreting any legislation and when developing the common law or *customary law*", to "promote the spirit, purport and objects of the Bill of Rights". Furthermore, Section 39(3) states that "the Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, *customary law* or legislation, to the extent that they are consistent with the Bill."
- e) Chapter 12 offers a role for traditional leaders, both nationally and locally, subject of course to the customs and usages of their communities, legislation, and the Constitution. In Chapter 12, section 211(3) specifically mandates the courts to "apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law."
- f) Section 235 pronounces the right to self-determination of any community sharing a common cultural and linguistic heritage and provides a basis on which the state may legislate for linguistic and cultural communities to express this international law right.

## **2.3 The Practice of polyandry in the African customary law context**

### *2.3.1 Brief overview of polyandry in the African context*

Having provided the historical overview of customary law and its position on marriage generally, this section considers the, particularly, position of polyandry, as a subset of polygamy, and its treatment in customary law and other laws. As noted above, a polyandrous marriage is when a woman is married to more than one spouse at the same time. It has been demonstrated earlier that customary law has become to largely favour men. It has given men many rights which women are not afforded or have been taken away. Such that the dominant and accepted understanding of polygamy has become one husband and several wives, arguably much to the prejudice of

women. The law continuously enforced the man's headship of the family, which placed women in a weak bargaining position and lacking agency.

African societies have become patriarchal in nature and that made it difficult for women to be involved in polyandry. It will be demonstrated below that, despite the historical subordination of women, there is evidence of the practice of polyandry in African communities, albeit limited. Central to such evidence being limited is patriarchy and subordination of women in the customary law as it has developed in the past century or so. Hence there is a need for studies such as these to consider how and toward the extent the true customs of African peoples can be rebuilt to find protection in the mainstream legal system in order to correct the injustices of the past that adversely affected and continue to affect African women in general.

A few examples of how polyandry is found in South Africa and other African countries are referred to below to indicate that the practice of polyandry has an embracement as an African custom. The reference to other African counties is important as many African peoples share a connected pre-colonial cultural identity as well as shared colonial experiences. It is a remedial, and essential part of decolonisation, for African countries to dip into each other in the rebuilding and recognition of respective customary laws and legal systems.

#### *2.3.1.1 The Balobedu people in South Africa*

Polyandry is practised in the *Balobedu* kingdom which consists of the *Mampeule*, *Molokwane*, *Modjadji* and *Mathekga* clans.<sup>194</sup> In these clans, some families take their daughters to be servants of the rain queen. These clans are closely related. Even though a queen marries other women, homosexuality is not involved in these marriage practices. Young women brought by the clans are referred to as "*Vatanoni*". These "*Vatanoni*" are considered as the wives of the queen. The chosen relatives of the queen are given permission to have sexual relations with these women for purposes of procreation. The queen is regarded as a father of the children of the women. The said children do not take the surname of their biological father. Instead, they take the

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<sup>194</sup> See Mohale *Khelobedu Cultural Evolution Through Oral Tradition* 102.

surname of the queen since she is a father according to a marriage.<sup>195</sup> It remains possible that the cultural practice of polygamy can and is even likely to develop in African communities to accommodate polyandry beyond just a queen.

### 2.3.1.2 *Gogo Skhotheni (Patricia Tumi Motsoeneng) of South Africa*

Patricia Tumi Motsoeneng, known as Gogo Skhotheni, is a female traditional healer (*sangoma*) who recently got into traditional polyandrous marriage. She asserts that when she was in the honeymoon stage her ancestors, through dreams or visions, instructed that she needs to get a second husband.<sup>196</sup> As a result, she traditionally married a second husband chosen by her ancestors in 2022 during the subsistence of her first registered marriage. Most importantly the second husband paid for the lobola to her family adhering to African customs and usages. She did not change nor intend to change her surname. Her husbands live separately, and she goes to them according to their schedule.<sup>197</sup> In November 2023, Gogo Skhotheni had an interview at “Podcast and Chill with Macg, episode 554” where she indicated that her story of the second husband was scripted and it is not real.<sup>198</sup> However, there is nothing that prohibit that kind of polyandrous marriage.

It is noteworthy that the traditional healers derive many of their powers from their relationship with the ancestral spirits who, it is believed, choose or approve of ancestral spouses for both male and female traditional healers.<sup>199</sup> A traditional healer, on the instruction of the ancestral spirit, will marry a so-called ancestral spouse.<sup>200</sup> The roles of such spouses include assisting traditional healers in their healing ceremonies and practices.<sup>201</sup>

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<sup>195</sup> Mohale *Khelobedu Cultural Evolution Through Oral Tradition* 102.

<sup>196</sup> Notho 2022 <https://www.news24.com/drum/Celebs/News/gogo-skhotheni-on-second-marriage-my-husbands-live-separately-and-we-have-a-schedule-20220721>.

<sup>197</sup> Notho 2022 <https://www.news24.com/drum/Celebs/News/gogo-skhotheni-on-second-marriage-my-husbands-live-separately-and-we-have-a-schedule-20220721>.

<sup>198</sup> Mukwevho 2023 <https://www.youtube.com/watch?v=BPM8LDf6zNg>.

<sup>199</sup> See also Mokotong and Monnye 2013 *Speculum Juris* 89

<sup>200</sup> See also Mokotong and Monnye 2013 *Speculum Juris* 89

<sup>201</sup> Bekker and Buchner-Eveleigh 2017 *De Jure* 87.

### 2.3.1.3 *The Lele People of the DRC*

Among the *Lele* people of the Congo, because young girls tended to be betrothed to older men, the younger men (who would still be in waiting for their own betrothed brides to reach their teens) could request the village elders that they be given a "common wife", that is, a wife shared by all the men in a given age group.<sup>202</sup> This woman is known as the "wife of the village". A daughter or granddaughter of an older "wife of the village" would be assigned to fulfil this role. The young men have duties to their wife. They must work for the parents of their wife, and further provide a payment to her parents for her.<sup>203</sup>

To a larger extent, they are obliged to provide a wife with a place to dwell. "Marital relations" in a polyandrous marriage take place in the order of age and due course, the village wife may choose five or six men to dwell within her house. Within her home, she would function as a traditional wife to each of these men, but she is still considered a village wife which means that any of the other men could have marital relations with her and not be infringing on anyone else's rights. Her house husbands will eventually move out and marry the girls to whom they were betrothed. They would however be obliged to take care of the village wife's children. The entire village would be obliged to pay the dowry for future wives on behalf of the village wife's sons.<sup>204</sup>

### 2.3.1.4 *The Basotho people of Lesotho*

Andrew Spiegel, in his 1991 article "Polygamy as Myth", explores the invocation of tradition in Lesotho to justify or normalise the contemporary multi-partnership sexual practice.<sup>205</sup> By the 1980s the practice of *bonyatsi*, in which married women took lovers, was extremely common. Mostly, wives opted for this when they were in material need and their migrant husbands were not present. In such circumstances, the practice served as a measure of both material and emotional support. In this

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<sup>202</sup> Ijeoma 2010 <http://africanweddingtraditions.com/polyandrous.html>.

<sup>203</sup> Ijeoma 2010 <http://africanweddingtraditions.com/polyandrous.html>.

<sup>204</sup> Ijeoma 2010 <http://africanweddingtraditions.com/polyandrous.html>.

<sup>205</sup> Spiegel "Polygyny as Myth" 145-166.

instance, the practice and acceptance of women having multiple lovers or men who would play the role of a husband were not a misnomer in African countries.<sup>206</sup>

It follows that if such a practice became institutionalised thus the result would be a kind of polyandry. Most lovers, or *nyatsi*, claimed that there was continuity between this practice and a time-honoured Sotho custom in which chiefs allowed clients, poor clients, to consort with their junior wives. This practice probably went beyond Lesotho. Sotho people are not only in Lesotho but also in South Africa.<sup>207</sup> Basotho people in Lesotho and South Africa are effectively the same people.<sup>208</sup> Where these practices to be formalised, this could easily result in a kind of polyandry.

Spiegel draws attention to a pre-colonial tradition of extra-marital sex in Southern African societies. It was argued that polygamy, though very common, was a minority activity in pre-colonial society. Moreover, a great deal of sexual relations took place outside of marriage.<sup>209</sup> The nature and extent of "*bonyatsi*" in Lesotho is presented through the images of the population.<sup>210</sup> This signifies that people commonly draw on images of the past to understand their experience of the present. The practice can be readily explained as images of the past which are regarded as their own "traditional extramarital relations."<sup>211</sup> In the case of *bonyatsi*, the author's informants referred to their own conceptions of the institution of polygamy to make sense, for themselves, of a contemporary practice that they knew to be morally non-normative.<sup>212</sup> They thus used a myth about a past normative practice to give legitimacy to a present one which

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<sup>206</sup> See Spiegel "Polygyny as Myth" 9.

<sup>207</sup> SAHO 2011 <https://www.sahistory.org.za/article/sotho-south-sotho-or-basotho>: Sotho (South Sotho or Basotho) people are concentrated in the Free State, Gauteng, and Eastern Cape Provinces, with small groups in Namibia and Zambia.

<sup>208</sup> See also SAHO 2011 <https://www.sahistory.org.za/article/sotho-south-sotho-or-basotho>: The four major ethnic divisions among Black South Africans are the Nguni, Sotho-Tswana, Shangaan-Tsonga and Venda. Together the Nguni and Sotho account for the largest percentage of the total Black population. The major Sotho groups are the South Sotho (Basuto and Sotho), the West Sotho (Tswana), and the North Sotho (Pedi).

<sup>209</sup> A numerically significant class of women lived in their fathers' homesteads – widows, divorcees, unmarried mothers – who essentially controlled their own sexuality and experienced only mild social opprobrium. Their sexual partners included unmarried men and both monogamously and polygamously married men. This was an accepted part of social interaction. "Marriage was more about rights to offspring, transaction of cattle and the organisation of homestead labour than about the control of sexuality."

<sup>210</sup> Spiegel "Polygyny as Myth" 3-19.

<sup>211</sup> Spiegel "Polygyny as Myth" 3.

<sup>212</sup> Spiegel "Polygyny as Myth" 3.

they could find no other way of condoning, and which was the result of political-economic constraints over which they had no control.<sup>213</sup> This gives meaning and cultural continuity to the present practice and legitimises the experience.

Contemporary anthropologists are concerned to record how people represent themselves and using this as a means of achieving a dehumanisation of ethnography and an escape from the detached formalism of structuralist analyses of various kinds.<sup>214</sup> The author adopted this approach to bring people's perceptions and understandings to the fore, and to examine how they use images and ideas from their own cultural stock to make sense, for themselves, of constantly changing circumstances.<sup>215</sup> It is noteworthy that the notion of extra-marital relations is also based on the author's experiences in Lesotho from the early 1970s to the 1980s. The exercise exemplifies Malinowski's notion of myth as a social charter and Spiegel's idea that reformulated traditions are a response to changes in modern practices.

Extramarital relations appeared widespread throughout Lesotho, and *bonyatsi* individuals could be easily identified in Qacha's Nek villages where the author lived.<sup>216</sup> The practice was recognised as a normal state of affairs only in private rather than in a public forum.<sup>217</sup> *Bonyatsi* is the abstract form, while *nyatsi* means paramour of any gender and *linyatsi* is the plural.<sup>218</sup> The definition is one of a relationship, which may be long-term, between already married persons. Gifts may be exchanged between *linyatsi*, but this is different from a prostitute, who is an unattached woman who sexually engages with anyone anytime usually in urban areas and in exchange for money, referred to as *botekatse* (prostitution).<sup>219</sup> The origins of *bonyatsi* were explained as being part of the creation and a feature of all human social life.<sup>220</sup> Women argued that the absence of regular sexual intercourse created severe psychological effects such as stopping the blood flow or losing one's sanity. There was an element

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<sup>213</sup> Spiegel "Polygyny as Myth" 3,14.

<sup>214</sup> Spiegel "Polygyny as Myth" 3.

<sup>215</sup> Spiegel "Polygyny as Myth" 2.

<sup>216</sup> Spiegel "Polygyny as Myth" 3-4.

<sup>217</sup> Spiegel "Polygyny as Myth" 3

<sup>218</sup> Spiegel "Polygyny as Myth" 4

<sup>219</sup> Spiegel "Polygyny as Myth" 5

<sup>220</sup> Spiegel "Polygyny as Myth" 6.

of inevitability. According to Wallman, who worked in the western border lowlands region of Lesotho during the early 1960s, even births resulting from extra-marital affairs were relatively common.<sup>221</sup> She points out that:

it was impossible to assess how often extra-marital births occurred or what sanctions were in fact brought to bear, but a comparison of the dates of husbands' absences and the birthdates of children suggests this to be a not uncommon happening which, given the lack of public outcry, must be more or less amicably settled by the parties involved.

This section shows that there is a good connection between *bonyatsi* and polyandry (i.e., a kind of marriage). It is apparent that *bonyatsi* was not just an exchange for sex - there was a kind of institutionalisation to it (i.e., with rights and responsibilities). The lack of public outcry about *bonyatsi* proves that *bonyatsi* was an acceptable practice among the Basotho people.

Other explanations are given as part of polygyny where a husband had access to other women; this was important during abstinence periods after birth. The practice of clientship among chiefs was another explanation, or exchange of wives for favours among chiefs.<sup>222</sup> Political alliances were sometimes formed in this manner to establish friendly relations.<sup>223</sup>

#### 2.3.1.5 Polyandry in Mozambique

Mazrui tells a story of polyandry that materialised in Mozambique that was caused by South African Apartheid laws:

Men in Mozambique went to work in the mines of South Africa for long periods of time and they were not allowed to take their wives and children with them because of Apartheid laws. Over the decades a reverse polygamy arose whereby an African woman had more than one husband instead of an African man having more than one wife, so in fact, polyandry was practised. When the first husband returned from the

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<sup>221</sup> Spiegel "Polygyny as Myth" 6. She points out that: "it was impossible to assess how often extra-marital births occurred or what sanctions were in fact brought to bear, but a comparison of the dates of husbands' absences and the birthdates of children suggests this to be a not uncommon happening which, given the lack of public outcry, must be more or less amicably settled by the parties involved".

<sup>222</sup> Spiegel "Polygyny as Myth" 8; 11: "the contemporary practice of *bonyatsi* was merely a continuity of this earlier practice whereby poor clients who lacked wives were given access to various of the chief's most junior wives. Men had become so used to being able to engage in relations with women other than their own wives, if they indeed had such, that they regarded this as their right."

<sup>223</sup> Spiegel "Polygyny as Myth" 11-13.

mines, the second husband would vacate the hut for the duration of the first husband's visit. Agreements were reached in terms of the paternity of the women's children. Therefore de facto polyandry, which was not sanctioned by custom and ritual but had evolved as a result of racist constraints on migrant labour in Southern Africa.<sup>224</sup>

This is exemplifying of how customs develop and come into being and become recognised. The phenomenon of African men going away to work in far-away mines for extended periods and leaving their wives became a key feature of the lives of Africans throughout Southern Africa. The account of Mazrui in respect to Mozambique possibly accounts for the experiences of people in other parts of Southern Africa. Of importance, the phenomenon of men working far away and their wives remaining behind at *home* continues to this day in a very significant way throughout Southern Africa.<sup>225</sup> Therefore, the practice of women taking on other men in a semi-institutionalised way like this whilst their husbands are away likely continues in parts of Southern Africa in contemporary times.

#### *2.3.1.6 The Giyuku people of Kenya*

In his book, "Facing Mount Kenya", Jomo Kenyatta wrote about the Giyuku people. Giyuku, the founder of the Giyuku tribe, had no male heir for his kingdom.<sup>226</sup> He had nine daughters.<sup>227</sup> He found young men to marry his daughters who agreed to live in his home in a matriarchal system.<sup>228</sup> They had descendants and thereafter each of the nine families established a clan under their names. Later after the kinship was extended, it was brought under one name to build one strong kinship under which the matriarchal system continued for many generations of women being heads of families. These women were powerful physically and by virtue of their status. They were fighters, abused men and imposed capital punishment on those who committed adultery. They also practised polyandry.<sup>229</sup>

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<sup>224</sup> Mazrui 1993 *Research in African Literatures* 87-104

<sup>225</sup> Smith and Johnson (2010)<https://hbr.org/2020/05/gender-equity-starts-in-the-home>

<sup>226</sup> Kenyatta *Facing Mount Kenya* 3.

<sup>227</sup> Kenyatta *Facing Mount Kenya* 3.

<sup>228</sup> Kenyatta *Facing Mount Kenya* 4.

<sup>229</sup> Kenyatta *Facing Mount Kenya* 4-5.

Men never liked being ruled by women, especially in a ruthless administration of justice.<sup>230</sup> They then planned to revolt against the women in leadership. They did that when the majority of them were pregnant. In that, patriarchy came into power in that community, polygyny succeeded polyandry and the women's leadership was overthrown.<sup>231</sup>

While the practice of polygyny was already there in the Giyuku tribe, Kenyatta's work shows that polyandry was still practised but indirectly. He says each wife had her hut, and the husband had his. Each of the wives had a role to play to benefit the husband's hut. For example, every morning one of them cleans the husband's hut (*thingira*) and lights the fire, while others sweep the yard and do other work. No cooking took place in the husband's hut, the wives cooked in their respective huts and then each would take a share to the husband's hut, and he enjoyed it with his age-group friends or visitors.<sup>232</sup> After meals, the wives may go and spend the rest of the evening in the company of their husbands or remain in their huts. But when there were husband's age group visitors, the wives were expected to be there. If the visitors came from far, arrangements for accommodation were made for them where the wives exercised their freedom to choose which man will each spend a night with, which may amount to something like polyamory,<sup>233</sup> if not, polyandry which is the female-focused version of polygamy.<sup>234</sup>

This is looked upon as purely social intercourse, and no feeling of jealousy or evil is attached to it on the part of the husband or wife. But it was an offence for a wife to invite a man secretly to her hut, even a member of the age-group, such was regarded as committing adultery which is a punishable offence. These arrangements differ from adultery as they are made following the rules and customs governing the social affairs among the age-group.<sup>235</sup>

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<sup>230</sup> Kenyatta *Facing Mount Kenya* 5.

<sup>231</sup> Kenyatta *Facing Mount Kenya* 6

<sup>232</sup> Kenyatta *Facing Mount Kenya* 181.

<sup>233</sup> Polyamory is the practice of romantic relationships with more than one partner at the same time, with the informed consent of all partners involved.

<sup>234</sup> Kenyatta *Facing Mount Kenya* 181.

<sup>235</sup> Kenyatta *Facing Mount Kenya* 181.

### 2.3.1.7 Other countries

Apart from the polyandry in countries discussed above, there are countries in Africa in which women may or could marry more than one spouse. There are reported cases of this practice among the *Massai* people of Kenya.<sup>236</sup> There are also tribes in Nigeria that allow a woman to marry more than one husband.<sup>237</sup>

### 2.3.1.8 The practice of woman-to-women marriages

As will be discussed in a bit more detail below, woman-to-woman marriages are not abnormal in some indigenous communities in South Africa. "Traditional woman-to-woman marriages have been found to occur in other parts of Africa."<sup>238</sup> It will be argued in this section that where woman-to-woman marriages exist, there does not seem to be any law or tradition that particularly precludes a woman who enters into such as such marriage to do so with more than one woman. Such marriages would be polyandrous marriages.

#### 2.3.1.8.1 *Balobedu* Queenship in Limpopo, South Africa

As indicated above, woman-to-woman marriages exist in the *Balobedu* culture.<sup>239</sup> Woman-woman marriages are a recommendable practice in the *Balobedu* tribe and are an acceptable norm.<sup>240</sup> The purpose of same-sex marriages which involves women within the *Balobedu* culture is twofold.<sup>241</sup> Firstly, same-sex marriages were usually

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<sup>236</sup> Oshin 2020 <https://agogoayonews.com/2020/03/07/5-countries-where-women-can-marry-more-than-one-husband/>

<sup>237</sup> Oshin 2020 <https://agogoayonews.com/2020/03/07/5-countries-where-women-can-marry-more-than-one-husband/>

See Wairimu and O'Brien 2000 *NWSAJ* 1. By region they are: (1) West Africa (mainly Nigeria) Yoruba, Ekiti, Bunu, Akoko, Yagba, Nupe, Ibo, Ijaw, and Fon(or Dahomeans); (2) most importantly, South Africa(especially the Transvaal) -Venda, Lobedu ,Pedi, Hurutshe ,Zulu , Sotho ,Phalaborwa ,Narene, Koni, and Tsawana; (3) East Africa -Kuria, Iregi ,Kenye, Suba, Simbiti, Ngoreme, Gusii, Kipsigis ,Nandi ,Kikuyu, and Luo; and (4) Sudan Nuer, Dinka, and Shilluk. In addition, others have noted the practice among the Kalahari of West Africa and the Kamba of East Africa.

<sup>239</sup> Motasa *Women as Queens on the Periphery of Their Own Reign* 57.

<sup>240</sup> These are not similar to the same-sex marriages that are practised in today's global society of gays and lesbians. In contemporary society, this trend of a man marrying another man or a female marrying another female is linked to the lesbian and gay subculture. In the lesbian and gay subculture, the same-sex union is based on affection and sexual orientation. In contrast to this, in the African context culture does not show evidence of sexual engagements between women who unite in marriage.

<sup>241</sup> Mohale *Khelobedu Cultural Evolution Through Oral Tradition* 102.

practised a long time ago in the royal family when the king's wife who had to give birth to a prince was barren. She would then marry a close relative who was to have sexual relations with the king so that he could impregnate her.<sup>242</sup> As a result, the king's wife will have two spouses of different genders, which amounts to a kind of polyandry. Secondly, a barren woman is permitted to marry a daughter-in-law who will take care of her. The daughter-in-law is given a chance to get a man from outside to impregnate her. The children born under such a relationship are regarded as the children of the mother-in-law and she is considered their father.<sup>243</sup> It follows that the mother-in-law is then responsible for the children and their mother (daughter-in-law). In other instances, the daughter-in-law would be given to the husband of the mother-in-law to bear children, and then the mother-in-law is regarded as the father of the children.<sup>244</sup>

Superior women have the right to marry their daughters-in-law. These are women who have their own money and cattle, therefore making them able to obtain wives. Such women call their wives daughters-in-law in the sense that they are married on behalf of their predeceased sons.<sup>245</sup> This may result in a kind of polyandry, in the instances where a woman marries two or more women on behalf of two or more predeceased sons.

#### 2.3.1.8.2 *Balobedu* Commoners and Bapedi tribes in Limpopo Province, South Africa

Woman-to-woman marriages in African culture are still actively practised in the *Balobedu* community on a wider scale than in any other indigenous South African communities. The *Balobedu* community forms part of the North Sotho group, located in *Nkowankowa* in the Limpopo Province. The practice of woman-to-woman marriages is a long-standing cultural practice that is widely accepted and observed among the *Balobedu* community. In the *Balobedu* culture, a woman may take on a wife. There are two ways in which this can be done. Firstly, a woman marries another woman who will give birth to an heir. A woman who is unable to bear children has a right to be cared for. In this regard, the woman's family will not have to die down. A woman,

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<sup>242</sup> Mohale *Khelobedu Cultural Evolution Through Oral Tradition* 102.

<sup>243</sup> See also Mohale *Khelobedu Cultural Evolution Through Oral Tradition* 26,27.

<sup>244</sup> Mohale *Khelobedu Cultural Evolution Through Oral Tradition* 107.

<sup>245</sup> Mohale *Khelobedu Cultural Evolution Through Oral Tradition* 107.

taken as a bride will be expected to sustain the family by bearing children for the barren woman.<sup>246</sup> This amounts to polyandry because a barren woman is still married to her original husband when marrying another woman. Secondly, a woman can marry another woman as a result of the relational links created by another marriage. The purpose of this marriage was to maintain the surname of the husband for the coming generation.<sup>247</sup>

In *Bapedi* communities, there is also a cultural practice of *ngwetsi ya lapa* which is also known as a family wife or "bride of the family".<sup>248</sup> *Ngwetsi ya lapa* is a woman who is married into a family where there is no male heir to continue the family name. When a woman is aged and left alone in her home since her children are married, she concludes a marriage with a woman who will take care of her and do the chores that she is no longer able to do such as cleaning the yard, fetching water, doing the laundry, and cooking. The woman is permitted to choose a suitor who will have sexual relations her, even though it is normally preferred that this should be with a family's close relative. "The children she bears belong to her female husband's household". There does not appear to be anything in this tradition that prevents the marriage of more than one *ngwetsi ya lapa*. Thus, it may also be polyandrous, for instance when a woman marries more than one woman for any specific reason.

#### 2.3.1.8.3 Venda people of Limpopo Province, South Africa

The Venda people have also practised woman-to-woman marriages. The Venda people are neighbours of the *Balobedu*, and they resemble them in some of their ways of life and many of their social arrangements are similar.<sup>249</sup> Barren women are also involved in same-sex marriages. They can marry young women to become their wives, but

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<sup>246</sup> See Mohale *Khelobedu Cultural Evolution Through Oral Tradition* 103: "Same sex marriages have taken place where one was unable to bear children, or one was barren and because of that she would not live alone. Then there would be negotiations to find a wife and that wife would be regarded as the wife of that barren woman. The family would arrange for her to bear children and they will be under the care of her and the barren woman would be regarded as the husband."

<sup>247</sup> See also Mohale *Khelobedu Cultural Evolution Through Oral Tradition* 103: "The woman was given to the female's husband or anyone within the family to impregnate her. This was done with the intention of getting male's descendant, so that the family name would not disappear completely. The children who resulted from such relationships called the female "husband" their father."

<sup>248</sup> See also Gumede 2009 *Speculum Juris* 112-122 where detailed discussion is provided.

<sup>249</sup> Stayt *Where on Earth?* 143-144.

some men will come in for the sole purpose of impregnating those women.<sup>250</sup> It becomes similar to what was the case in the example given in 2.3.1.1 above about the queen's wives "*vatanoni*" in the Balobedu Kingdom.

### 2.3.2 General Conclusion

Bonthuys<sup>251</sup> correctly pointed out that the customary concept of marriage is "flexible enough to accept different family formations". Above discussed traditions, including woman-to-woman marriages, are examples of marriages. It is not known how many of these traditional marriages exist and/or have been existing. Most, if not, all of these traditions such as "*go nyalela lapa ngwetsi*" (marrying a family-wife) are not registered or counted anywhere. Most, in any event, are of a personal and intimate nature. Many are only known by family members and are not publicly discussed. Even in respect of practices which relate to polygynous traditions such as *ukungena* and *hlatswadirope* which are discussed earlier in this chapter, family members are mainly involved to the exclusion of the general public because their existence is not public knowledge: the practice is a family affair. Such traditions are hardly debated on. It must always be taken into account that indigenous or customary law as systems of non-state law is mainly unwritten and flexible.

## 2.4 Polygamy (polyandry and polygyny) under international human rights law

It is broadly observed that international human rights instruments, with the exception of the *Hague Convention on the Celebration and Recognition of Marriages*<sup>252</sup> and the *African Women's Protocol*,<sup>253</sup> do not expressly consider polygamy.<sup>254</sup> Nevertheless,

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<sup>250</sup> Stayt *Where on Earth?* 143-144.

<sup>251</sup> Bonthuys 2007 *SAJHR* 534

<sup>252</sup> Article 11 of the Hague Convention on the Celebration and Recognition of Marriages (1978) mandates a contracting state to refuse to recognise the validity of a polygynous marriage. This instrument, however, does not outlaw polygamy.

<sup>253</sup> Article 6 of the *Protocol to the African Charter on the Rights of Women* states that "monogamy is encouraged as the preferred form of marriage and that the rights of women in marriage and family, including polygamous marital relationships, are promoted and protected". In art 5 of the African Women's Protocol, however, polygyny is not listed as one of the harmful cultural practices to be eliminated.

<sup>254</sup> See generally the discussions by Gaffney-Rhys 2011 *Gender & Society* 1, 2. See for instance art 16 of *CEDAW*, that just states that "men and women of full age, without any limitation due to race,

these instruments mandate States Parties to get rid of practices that may lead to discrimination.<sup>255</sup> As provided above, polygyny refers to a system that only permits men to marry more than one wife.<sup>256</sup> Therefore, most of the authors submit that non-discriminatory provisions of the international human rights instruments may be invoked to address discrimination in the polygyny context.<sup>257</sup>

International human rights instruments further consist of provisions that intend to ensure that spouses are equal before, during and after marriage.<sup>258</sup> For instance, article 23(4) of the *International Covenant on Civil and Political Rights* (hereafter the ICCPR), and article 6 of the African Women's Protocol, explicitly emphasise equality in marriage. Article 23(4) of the ICCPR provides that States:

...shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during the marriage, and at its dissolution.

The General Comments of the treaty monitoring bodies recommend that polygyny should be eliminated as it is discriminatory.<sup>259</sup> For example, the Human Rights Committee in General Comment 28 observes that equality of treatment concerning the right to marry implies that polygamy is incompatible with this principle and therefore, should be abolished.<sup>260</sup> Also, it has been found that polygamy infringes article 3 of the ICCPR,<sup>261</sup> and therefore States Parties are urged to use legislative measures to prohibit polygamy within their territories.<sup>262</sup> The *Convention on the Elimination of all Forms of Discrimination against Women* (hereafter the CEDAW)

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nationality or religion, have the right to marry and found a family [and] are entitled to equal rights as to marriage, during marriage and at its dissolution".

<sup>255</sup> Mwambene 2017 *PELJ* 8. Also see Gaffney-Rhys 2011 *Gender & Society* 1.

<sup>256</sup> Mwambene 2017 *PELJ* 8.

<sup>257</sup> Mwambene 2017 *PELJ* 8. See also Gaffney-Rhys 2011 *Gender & Society* 1.

<sup>258</sup> Mwambene 2017 *PELJ* 9.

<sup>259</sup> See CEDAW Committee "General Recommendation 21 on Equality in Marriage and Family Relations" para 21; and Human Rights Committee "CCPR General Comment No. 28" para 24; Gaffney-Rhys 2011 *Gender & Society* 10.

<sup>260</sup> Human Rights Committee "CCPR General Comment No. 28" para 24.

<sup>261</sup> The Human Rights Committee observed that art 3 of the *ICCPR* guarantees equal rights for women and men, violates a woman's right to equality in marriage, and has severe financial consequences for her and her children.

<sup>262</sup> CEDAW Committee "CEDAW General Recommendation No. 24".

Committee noted in its General Recommendation 21 that polygynous marriages contravene a woman's right to equality with men and must therefore be prohibited.<sup>263</sup>

International human rights instruments mandate States Parties in countries where polygyny is still in existence, to ensure that women are entitled to the same rights and benefits as they would enjoy in monogamous marriages.<sup>264</sup> Article 6 of the African Women's Protocol encourage monogamy as the preferred form of marriage and that the rights of women in marriage and family, including polygamous marital relationship, are promoted and protected. This is supported by the CEDAW Committee's General Recommendation 29, as it specifically provides that States Parties should take the necessary measures to protect the economic rights of women in current polygamous marriages.<sup>265</sup> Moreover, article 5(a) of CEDAW requires States Parties to utilise all appropriate measures to eradicate harmful cultural practices to guarantee equality in marriage, as it provides that:

States Parties shall take all appropriate measures: To modify the social and cultural patterns of conduct of men and women, to achieve the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

The CEDAW Committee provided further guidance as it observed that States Parties whose constitutions provide equal rights but allow polygynous marriages under personal or customary law, violate the constitutional rights of women and breach the provisions of article 5(a) of CEDAW.<sup>266</sup> For instance, the Constitution of Kenya provides for equality between spouses from when a marriage commences till when dissolves.<sup>267</sup> Constitutions of numerous countries in Africa such as Malawi,<sup>268</sup> Mozambique,<sup>269</sup>

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<sup>263</sup> CEDAW Committee "General Recommendation 21 on Equality in Marriage and Family Relations" paras 14, 21.

<sup>264</sup> See art 6 of the *Protocol to the African Charter on the Rights of Women*. Mwambene 2017 *PELJ* 9.

<sup>265</sup> CEDAW Committee "General Recommendation on Article 16 of the Convention on the Elimination of All Forms of Discrimination against Women".

<sup>266</sup> CEDAW Committee "General Recommendation 21 on Equality in Marriage and Family Relations" 21 para 41.

<sup>267</sup> Section 45(3) of the *Constitution of the Republic of Kenya*, 2010.

<sup>268</sup> Section 20 of the *Constitution of the Republic of Malawi*, 1994.

<sup>269</sup> Article 36 of the *Constitution of the Republic of Mozambique*, 2004.

Tanzania<sup>270</sup> and South Africa<sup>271</sup> prohibit discrimination on various grounds, including gender.<sup>272</sup>

One of the reasons for the international human rights position that polygyny violates the right to equality in the marriage context might be because mainstream customary law promotes polygyny and not polyandry. Would the position be different if there was equal respect for polyandry? That is an open question. However, it is a question worth exploring. This debate is reverted to later in a study. It will be argued that South Africa, as one of the countries where polygyny is largely practised and allowed to the exclusion of polyandry, must ensure that women are entitled to the same or similar rights and benefits given to men in marriages.<sup>273</sup> This simply entails that women should also be allowed to conclude polyandrous marriages, especially where custom allows it.

## **2.5 Conclusion**

This chapter finds that in many pre-colonial indigenous laws, practices and customs have survived colonialism and apartheid and continue to find expression by African peoples today. Although it is said that customary law develops, this chapter finds that many developments that took place are foreign to indigenous peoples' customs as they were brought into our system by missionaries and colonists. Particularly through the introduction of direct, indirect, and policy of assimilation rules, customary law was captured. Customary law in common law courts was applied in limited way to suit the needs of colonisers and eventually traditional courts were destroyed, especially when they were deprived of jurisdiction to serious matters. Chief among the capture of customary law by colonial-apartheid authorities is the entrenchment of patriarchy in African customary law. It is therefore argued that but for the capture and corruption of African customary law by the colonial-apartheid authorities, in many respects the African customary law did permit polyandry and was possibly on the trajectory to develop to embrace polyandry more substantially.

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<sup>270</sup> Sections 12, 13 of the *Constitution of the Republic of Tanzania*, 1977.

<sup>271</sup> Section 9(3) of the *Constitution of the Republic of South Africa*, 1996.

<sup>272</sup> See Mwambene 2017 *PELJ* 10.

<sup>273</sup> Ratification of these instruments will be dealt with later in this dissertation.

Polygamy has been practised since immemorial times in Africa. Although the most common form of polygamy has been polygyny, some history of polyandry has been found to have been practised in South Africa by the *Balobedu* people in their queenship and potentially through woman-to-woman marriages among *Bapedi*, *Vhavenda*, *Balobedu* commoners for or as a resolution to infertility or caretaking of children or elderly women. In various parts of Africa, particularly the Giyuku people of Kenya, polyandry came before polygyny. In DRC, the Lele people practise a form of it too as many young men in the community would be involved with one woman. In Mozambique and amongst the South Sotho-speaking people, forms of polyandrous relations such as *Bonyatsi* came as a result of immigration and apartheid law barriers when husbands could not return home, so it was women's solution to material and emotional needs.

It is evident that patriarchy contributed to the suppression of polyandry and led to the popularity of polygyny to the exclusion of polyandry. However, in the transitional era from apartheid to democracy, this chapter has shown that section 15 of the Constitution recognises the nature of customary marriages. This is reinforced by the recognition of customary law in sections 8(1), 30, 31, 39, 181(1)(c) and 211 of the Constitution.<sup>274</sup> Since much of contemporary customary law was captured and corrupted by the colonial and apartheid authorities, transformative constitutionalism requires the development of African customary law that embraces those aspects of it that became subjugated including polyandry. As will be further argued below, even international instruments could be interpreted to support the recognition of polyandry.

It follows that the basis for recognising customary law derives from the constitutional rights to culture (and religion).<sup>275</sup> These rights are enshrined in sections 30 and 31 of the Bill of Rights. Section 30 provides that all persons have "the right to participate in the cultural life of their choice", whereas section 31(1) states "that persons belonging to a cultural community may not be denied the right, with other members of that

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<sup>274</sup> Section 35 of the BAA which defined Black "include any person who is a member of any aboriginal race or tribe of Africa"

<sup>275</sup> See also Bennett 1991 *Acta Juridica* 21–22; Bennett *Human Rights and African Customary Law under the South African Constitution* 23–27.

community to enjoy their culture". To that effect, the parliament through the *Recognition of Customary Marriages Act* 120 of 1998 has recognised all monogamous and polygamous marriages. However, polyandrous marriages remain unrecognised. This study in the following chapter will deeply unpack the non-recognition of polyandry.

## Chapter 3 Non-recognition of polyandry in South Africa

### 3.1 Introduction

Marriages or civil unions in South Africa are currently regulated through four pieces of legislation: (a) the *Marriage Act*,<sup>1</sup> which governs civil monogamous marriages of heterosexual persons; (b) the *Black Administration Act*,<sup>2</sup> which governs monogamous marriages of heterosexual black persons who married before 1988; (c) the RCMA, which governs customary monogamous and polygynous marriages of heterosexual persons to the exclusion of polyandrous marriages; and (d) the *Civil Unions Act*,<sup>3</sup> which governs the monogamous marriages of same-sex persons.<sup>4</sup>

The purpose of this chapter is to analyse the RCMA to determine to what an extent, if at all, this Act recognises African polyandrous marriages discussed in chapter two above. In addition, this chapter seeks briefly to demonstrate that other aforementioned legislations (or regimes of marriages) do not accommodate the practice of polyandry.

### 3.2 The Recognition of Customary Marriages Act 120 of 1998

#### 3.2.1 General

A customary marriage is a marriage that is entered into, not in terms of the *Marriage Act* and the common law or a system of religious law, but in terms of customary law and the RCMA.<sup>5</sup> Customary law refers to the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples.<sup>6</sup> It has already been pointed out in previous chapters that before the commencement of the RCMA, customary marriages were recognised only for limited purposes, apparently due to their allowance of polygamy.<sup>7</sup> Section

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<sup>1</sup> *Marriage Act* 25 of 1961.

<sup>2</sup> BAA.

<sup>3</sup> *Civil Union Act* 17 of 2006.

<sup>4</sup> See also GN R398 in GG 44529 of 4 May 2021 27.

<sup>5</sup> Heaton and Kruger *South African Family Law* 211. See also s 1 of the RCMA.

<sup>6</sup> Section 1 of the RCMA.

<sup>7</sup> See also *Seedat's Executors v The Master (Natal)* 1917 AD 302; Heaton and Kruger *South African Family Law* 211

2(1)-(4) of the RCMA provides for recognition of customary marriages concluded before the Act came into operation on 15 November 2000 and those concluded after that date, whether monogamous or polygamous.<sup>8</sup>

However, it is noteworthy that this study focuses more on the relevant provisions of the RCMA to the extent of the exclusion of polyandry. Other provisions and laws which are beyond the scope of this study are not fully addressed.

### *3.2.2 The legal requirements for a customary marriage*

There is a need to discuss legal requirements for customary marriages as they determine the validity of such marriages, including polyandrous marriages which are the central theme of this study. It goes without saying that marriages not in compliance with prescribed legal requirements will be invalid. For example, in *Netshituka v Netshituka*,<sup>9</sup> the Supreme Court of Appeal declared a marriage invalid for not complying with requirements. Similarly, in *Thembisile V Thembisile*<sup>10</sup> a marriage entered into in contravention of the prescribed requirements was declared invalid.

#### *3.2.2.1 Legal requirements for a valid customary marriage concluded before 15 November 2000.*

##### *3.2.2.1.1 General*

Section 2(1) and (3) of the RCMA recognise all valid existing monogamous and polygamous marriages which were concluded in terms of the customary law before 15 November 2000.

Since part of the Zulu law is codified, there is a need to distinguish the law on the subject for KwaZulu-Natal and the rest of the country. Requirements of a customary marriage in KwaZulu-Natal are provided in section 38(1) of both Codes of Zulu Law,<sup>11</sup> and are set out as follows: (a) the consent of the father or the guardian of the intended

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<sup>8</sup> See also Rautenbach *Introduction to Legal Pluralism in South Africa* 85.

<sup>9</sup> *Netshituka v Netshituka* 2011 SA 5 453 (SCA).

<sup>10</sup> *Thembisile v Thembisile* 2002 2 SA 209 (T).

<sup>11</sup> *The KwaZulu Act on the Code of Zulu Law* and the Proc R151 of 1987. See *Gumede v President of the Republic of South Africa* 2009 3 SA 152 (CC), where it is held that these codes and legislation applies exclusively to people in KZN.

wife, which may not be withheld without good reason; (b) the consent of the father or guardian of the prospective husband who has not reached the age of majority; and (c) a declaration in public by the prospective wife to the official witness at the wedding ceremony that she voluntarily submits to the marriage and gives her consent. Even though the Codes do not mention *lobolo* as a requirement, it is a general practice that a customary marriage cannot be concluded without an agreement for the delivery of *lobolo*.<sup>12</sup>

Outside province of KwaZulu-Natal, the customary law that is applied in the rest of the country is not codified and problems of ascertainment abound.<sup>13</sup> This is the one area that reveals the highest levels of traditional activity and also exhibits the greatest variety of practices.<sup>14</sup> Part of the reason is that living customary law is able to adapt to changing expectations and needs, and there are "clan-based variations on broad-based cultural themes."<sup>15</sup>

The literature<sup>16</sup> sets out the requirements for marriages outside KwaZulu-Natal, which some are not expressly included in the RCMA and practically followed in most systems of customary law in the country. Hence applies to marriages entered into prior to the coming into operation of the RCMA. Rautenbach lists them as follows:<sup>17</sup> (a) the consent of the father or guardian of the prospective husband under certain circumstances (with some exceptions); (b) the consent of the father or guardian of the prospective wife; (c) the consent of the prospective husband; (c) the consent of the prospective wife; (d) the handing over of the prospective wife to the family group of the prospective husband or the prospective husband himself as the case may be; (e) an agreement that *lobolo* will be delivered; and (f) that there should be no existing civil marriage. The aforementioned requirements are discussed below.

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<sup>12</sup> Rautenbach *Introduction to Legal Pluralism in South Africa* 85.

<sup>13</sup> See, for example, Heaton and Kruger *South African Family Law* 206.

<sup>14</sup> See Himonga and Nhlapo *African Customary Law in South Africa* 99.

<sup>15</sup> See Himonga and Nhlapo *African Customary Law in South Africa* 99.

<sup>16</sup> Jansen "Customary Family Law" 50–58; Olivier "Indigenous Law" para 95; Bekker, Seymour and Coertze *Seymour's Customary Law in Southern Africa* 105–25; Sinclair *The Law of Marriage* 242–245; SALC "Report on Customary Marriages".

<sup>17</sup> Rautenbach *Introduction to Legal Pluralism in South Africa* 86. See also Olivier, Olivier and Bekker *Indigenous Law* 17–21. Also see the provisions of s 31 of the Transkei Marriage Act.

#### 3.2.2.1.2 Consent of the father or guardian of the man

The father or guardian of the young man had a legal obligation to help him with the lobolo for his first wife.<sup>18</sup> In the instances where a man makes payment of his own *lobolo*, the consent of his father or guardian is no longer important, unless if the son is still a minor.<sup>19</sup> Disapproval of the marriage by a father or guardian may serve as proof that there was no agreement between the two-family groups.<sup>20</sup>

#### 3.2.2.1.3 Consent of the father or guardian of the woman

The consent of the father or guardian of the woman (prospective wife) was indispensable irrespective of the woman's age.<sup>21</sup> The mother of the woman had no contractual capacity and could not negotiate marriage on behalf of her daughter.<sup>22</sup> However, in *Mabena v Letsoalo*<sup>23</sup> the High Court held that a woman's mother was legally justified to negotiate for the *lobolo* and receive *lobolo*. It further held that a woman is justified to be the woman's guardian and to approve her marriage.

#### 3.2.2.1.4 Consent of the prospective husband

The consent (whether tacit or express) of the prospective husband is vital.<sup>24</sup> The prospective husband may be represented at the formal wedding ceremony and need not necessarily be physically present himself.<sup>25</sup>

#### 3.2.2.1.5 Consent of the prospective wife

A prospective wife's consent is essential and may be in express terms or be inferred from the circumstances, for instance when she does not object to participating in arranging weddings and ceremonies.<sup>26</sup>

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<sup>18</sup> Rautenbach *Introduction to Legal Pluralism in South Africa* 86

<sup>19</sup> See also *Mabena v Letsoalo* 1998 2 SA 1068 (T).

<sup>20</sup> See also Olivier, Olivier and Bekker *Indigenous Law* 21.

<sup>21</sup> Rautenbach *Introduction to Legal Pluralism in South Africa* 86.

<sup>22</sup> Rautenbach *Introduction to Legal Pluralism in South Africa* 86

<sup>23</sup> *Mabena v Letsoalo*. This court recognised the principle of living, actually observed, law as that constitute a development in line with the purport and objects of the bill of rights.

<sup>24</sup> Rautenbach *Introduction to Legal Pluralism in South Africa* 86.

<sup>25</sup> Olivier, Olivier and Bekker *Indigenous Law* 22.

<sup>26</sup> See Olivier, Olivier and Bekker *Indigenous Law* 22-23. However, there are exceptions such as the *ukuthwala* custom which comprises the removal of the girl from her family home to the home of the man's father for marriage negotiations to commence. See Prinsloo and Ovens 2015 *Acta*

### 3.2.2.1.6 Handing over of the wife

The delivery or handing over of the wife is connected to the integration of the wife into the family of her husband, and in most cases, this was in the form of ceremonies.<sup>27</sup> The conclusion of some marriages could be a protracted process and the process was not limited to a single event.<sup>28</sup> In *Mabuza v Mbatha*,<sup>29</sup> the validity of the customary marriage was disputed as the wife alleged that she was not integrated into the family of her husband under the *ukumekeza* custom, an accepted ritual event according to Swazi law.<sup>30</sup> On appeal, the Constitutional Court held that the parties may agree to abandon the *ukumekeza* requirement and that performing such rituals is not an essential requirement. Therefore, a hand over of the wife, without a ritual or ceremony, will be sufficient.

### 3.2.2.1.7 An agreement for delivery of *lobolo*

The agreement to deliver *lobolo* relates to the amount and not necessarily the actual delivery of *lobolo*.<sup>31</sup> The amount of money or number of cattle required and the period of which *lobolo* will be delivered differ from group to group. An agreement to deliver and hand over *lobolo* is the key component of the customary marriage.<sup>32</sup>

### 3.2.2.1.8 Non-existence of a civil marriage

A person who is a party to civil marriage is prohibited to enter into a customary marriage.<sup>33</sup> Before 1988, spouses in customary marriage were allowed to enter into a

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*Criminologica*, with reference to Nhlapo's expert testimony in *Jezile v S* 2016 2 SA 62 (WCC), and paras 73–74 of said case, for essentials of *ukuthwala* custom. It must be noted that both parties must consent. If the woman was unaware, she can consent after the fact. If she does not agree, her father guardian may institute a civil claim against the guardian of the man.

<sup>27</sup> Rautenbach *Introduction to Legal Pluralism in South Africa* 86.

<sup>28</sup> See also Olivier, Olivier and Bekker *Indigenous Law* 23

<sup>29</sup> 2003 (7) BCLR 743 (C).

<sup>30</sup> See detailed discussion of *ukumekeza* customs in 2.2.1.1 above.

<sup>31</sup> Rautenbach *Introduction to Legal Pluralism in South Africa* 86.

<sup>32</sup> Also see Olivier, Olivier and Bekker *Indigenous Law* 24.

<sup>33</sup> See also s 36(2) of Proc R151 of 1987 which prohibited a man from entering into customary marriage during the existence of a civil marriage with another woman.

civil marriage with other persons or between themselves.<sup>34</sup> The preceding customary marriage was simply dissolved by civil marriage.<sup>35</sup>

#### 3.2.2.1.9 Conclusion

Having explained the above requirements about customary marriages before 15 November 2000, it is apparent that customary law was silent with regard to the minimum age to marry. In customs there is no specific age in which it can be said one has attained the capacity to marry as adulthood is defined within precincts of customs determines one's readiness to marry. For instance, after one has gone to initiation school, became mature, capacitated to establish a homestead, and has birthed children. The factors that determine adulthood differ in respect of males and females, in a nutshell, there is no specified age. However, it must be emphasised that the initiation school factor cannot stand alone in this era as children as young as 13 years do go to initiation schools. That is the reason I submit it should be coupled with other factors of human development and or rituals undergone in each tribe leading to adulthood.

#### *3.2.2.2 Legal requirements for a valid customary marriage concluded after 15 November 2000*

##### 3.2.2.2.1 General

Section 2(2) of the RCMA provides that a customary marriage concluded after the commencement of this Act, which complies with the requirements of this Act, is for all purposes recognised as a marriage.<sup>36</sup> Section 2(4) of the RCMA states that "[i]f 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."<sup>37</sup> For customary marriages concluded after the RCMA came into operation to be valid, it is required to comply with the

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<sup>34</sup> Rautenbach *Introduction to Legal Pluralism in South Africa* 87

<sup>35</sup> See *Nkambula v Linda* 1951 1 SA 377 (A).

<sup>36</sup> This refers to the monogamous marriages.

<sup>37</sup> It will be demonstrated later that this provision does not truly refer to the polygamy but polygyny.

provisions of the RCMA. These provisions are set out in section 3 of the Act. Section 3(1) of the Act sets requirements as follows:

For a customary marriage entered into after the commencement of this Act to be valid

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(a) The prospective spouses –

(i) must be above the ages 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.

Section 3(2) of the RCMA prohibits spouses in a customary marriage from entering into a civil marriage during the existence of their customary marriage. Nevertheless, in terms of section 10(1), this does not prevent parties in customary marriage from converting their marriage into a civil marriage, provided that neither of them is a partner in a subsisting civil marriage with another person.<sup>38</sup>

#### 3.2.2.2.2 Prohibition relating to degrees of relationship

Section 3(6) of the RCMA states that customary law makes determination of the disallowed degrees of relationship pertaining customary marriage. For instance, among AmaZulu, people who have any form of blood relation are not allowed to marry each other.<sup>39</sup> In the same way, among Batswana and Basotho, a man is prohibited to marry his descendants or ascendants.<sup>40</sup> Numerous cultural communities in South Africa usually follow the clan exogamy principle, to put it differently, marrying outside the clan, and the attendant taboos against incest.<sup>41</sup> However, Jansen warn us from over-generalising because the rules vary significantly from community to community.<sup>42</sup>

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<sup>38</sup> This is to cater for polygamous marriages.

<sup>39</sup> Jansen "Customary Family Law" 3.3.3.2.

<sup>40</sup> Jansen "Customary Family Law" 3.3.3.2.

<sup>41</sup> Jansen "Customary Family Law" 3.3.3.2.

<sup>42</sup> See Jansen "Customary Family Law" for examples. See also Nhlapo *Marriage and Divorce in Swazi Law and Custom* 58 on *emaSwati*.

### 3.2.2.2.3 Negotiations, conclusion, and celebration according to customary law

Section 3(1)(b) of the RCMA requires the marriage to be “negotiated and entered into or celebrated in accordance with customary law” in order to be a valid customary marriage. This provision is framed in these terms to allow new norms of customary law to be admitted as they evolve from the people’s practices when conditions change.<sup>43</sup>

In *Maluleke v Minister of Home Affairs* (hereafter *Maluleke* case),<sup>44</sup> the Gauteng Division of the High Court, Pretoria checked the meaning of “celebrated” from the Oxford English Dictionary which provides that celebrated refers to “festivities or performance of a rite or ceremony”. The court provided the meaning of the words “the marriage must be negotiated and entered into or celebrated in accordance with customary law” contained in section 3(1)(b) of the RCMA. According to the court, the word “negotiated” refers to negotiations regarding the marriage, including *lobolo*, and these negotiations must have been finalised.<sup>45</sup>

Furthermore, the court stated that the RCMA needs a customary marriage to “be negotiated and entered into or celebrated” in order to be valid.<sup>46</sup> Such negotiations must conclude on the *lobolo* payment. The court said this “seems to be the fundamental stage in the conclusions of customary marriages.” The Court then found that [t]he next stage of enquiry is to determine whether any factors show that the marriage was “entered into or celebrated”.<sup>47</sup> The Gauteng Division of the High Court provided a definition of “entered into” as it is usually used “to denote a contract, and the question is whether the parties to the marriage had agreed that they were married.” Such an agreement between parties may either be implicit or explicit.<sup>48</sup> Consent by the parties (husband and wife) is fully discussed in 3.2.2.1.2 and 3.2.2.1.3 above.

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<sup>43</sup> Himonga and Nhlapo *African Customary Law in South Africa* 103.

<sup>44</sup> *Maluleke v Minister of Home Affairs* [2008] ZAGPHC 129 para 8.

<sup>45</sup> *Maluleke* para 12.

<sup>46</sup> *Maluleke* para 12.

<sup>47</sup> *Maluleke* para 12.

<sup>48</sup> *Maluleke* para 13.

In general, the above requirements seem to be accommodating all African marriages, including current and future polyandrous marriages. What is more important is that marriages must be in accordance with customs and usages traditionally observed among indigenous African people of SA and which form part of the culture of those people.<sup>49</sup>

### 3.2.3 Registration of a customary marriage.

Section 4(1) of the RCMA places the spouses in a customary marriage under a duty to ensure that their marriage is registered.<sup>50</sup> However, failure to register a marriage does not have any impact on its validity.<sup>51</sup> Section 4(3)(a) requires marriages concluded before 15 November 2000 to be registered within a year of that date or any further period determined by the Minister by notice in the Gazette.<sup>52</sup> Section 4(3)(b) requires marriages concluded after the date of commencement to be registered within three months of the wedding or any further period determined by the Minister.<sup>53</sup> When the registering officer is convinced that there is a valid customary marriage in existence, he or she must register the marriage and issue a certificate.<sup>54</sup> Section 4(8) provides that a registration certificate is *prima facie* proof that marriage exists.

However, De Souza<sup>55</sup> notes that in practice, the registration of customary marriages has become the threshold for recognising the existence of these marriages when marital status is in question. Consequently, non-registration is effectively non-recognition and deprives women and children of the significant benefits and protections associated with marriage.<sup>56</sup> The effect of this is that non-registration may

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<sup>49</sup> See s 1 of the RCMA for definitions of both customary marriage and customary law.

<sup>50</sup> See s 4 of the RCMA which sets out a detailed registration procedure.

<sup>51</sup> Section 4(9) of the RCMA.

<sup>52</sup> Also see s 1 of the RCMA which states that Minister refers to the Minister of Home Affairs.

<sup>53</sup> The Minister has shifted the periods referred to in s 4(3)(a) and (b) from time to time. See GN 1000 in GG 38290 of 12 December 2014, in which the period was extended up to 31 December 2016.

<sup>54</sup> Section 4(5)(b) of the RCMA. See also Himonga and Nhlapo *African Customary Law in South Africa* 85.

<sup>55</sup> De Souza 2013 *Acta Juridica* 239-272

<sup>56</sup> See De Souza 2013 *Acta Juridica* 239-272 in which he, more broadly, argues that the registration process actually undermines several of the Act's objectives - leaving women living in rural, customary law contexts in a vulnerable position.

potentially have the same impacts on polyandrous marriages too as they are also customary marriages.

### *3.2.4 Consequences of customary marriage*

This section addresses the personal consequences including majority status and capacity (competencies of spouses), and proprietary consequences of customary marriages as well as how they can be altered in relation to the non-recognition of polyandry.

#### *3.2.4.1 Personal consequences of marriage*

In customary law, there is no fixed age for a person to attain full adulthood.<sup>57</sup> Therefore, there are various factors, such as marriage and initiation, that make up the process that leads to adulthood.<sup>58</sup> The RCMA changed the effect of marriage concerning the status and capacity of the spouses in customary law. The following sections of this study provide a discussion of the status and capacity of women in their marriages. As will be seen below, this has some impact on the recognition of the practice of polyandry.

#### *3.2.4.2 Majority status and capacity (competencies of spouses)*

Individuals in traditional African societies attain the status of elderhood gradually through milestones in their individual lives, such as marriage and parenthood and the kinds of rituals they undergo.<sup>59</sup> For instance, a man attains full capacity and adulthood after he has established a separate homestead after getting married.<sup>60</sup> Similarly, a woman's attainment status as an adult is indicated through things like marriage and the birth of children.<sup>61</sup>

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<sup>57</sup> Himonga and Nhlapo *African Customary Law in South Africa* 110.

<sup>58</sup> Himonga and Nhlapo *African Customary Law in South Africa* 110.

<sup>59</sup> See Mofokeng *Legal Pluralism in South Africa* 8-9.

<sup>60</sup> See also Bennett *Customary Law in South Africa* 302.

<sup>61</sup> Some authors suggest that women never attained majority status. See, for example, Maithufi 1998 *De Jure* 203. However, Himonga and Nhlapo *African Customary Law in South Africa* 111 hoped that this is not a confusion of customary law in traditional society with official customary law, which denied married women majority status.

Section 11(3)(b) of the *BAA*, before it was repealed, provided that a married black woman is a minor under the control of her husband. Nonetheless, the RCMA changed that position by making the *Age of Majority Act* to apply to persons subject to customary law too.<sup>62</sup> Section 9 of the RCMA states that, despite any rules of customary law, the age of the majority of any person is determined by the *Age of Majority Act*.<sup>63</sup> In terms of the *Age of Majority Act*, a person attains majority at the age of 21 years. However, the *Children's Act*<sup>64</sup> repealed the *Age of Majority Act*. Therefore, according to section 17 of the *Children's Act*, the age of majority is attained at 18 years. Today, all persons attain majority at the age of 18 years, and married women, including women who are married in terms of customary law, are no longer regarded as minors under the tutelage of their husbands.<sup>65</sup> It is obvious that *BAA* provided that married women were to be under the tutelage of their husbands negatively affected the development of polyandry as it made it very difficult, if not impossible, for women to enter into polyandrous marriages that could be considered legitimate in the eyes of the law.

Section 6 of the RCMA ensures that all married women are sufficiently protected in terms of equal status by providing 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 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.

Moreover, the RCMA abolished marital power for all marriages entered into after the RCMA as it repealed the relevant sections of the Transkei Marriage Act,<sup>66</sup> the *BAA*, the KwaZulu Act on the Code of Zulu Law,<sup>67</sup> and the Natal Code of Zulu Law.<sup>68</sup> Marital power may be described as a doctrine that restricts women's capacity to act and places them in a position of inferiority to their husbands.<sup>69</sup> Thus, the husband exercises his

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<sup>62</sup> *Age of Majority Act* 57 of 1972.

<sup>63</sup> *Age of Majority Act*.

<sup>64</sup> *Children's Act* 38 of 2005.

<sup>65</sup> Himonga and Nhlapo *African Customary Law in South Africa* 111.

<sup>66</sup> Act 21 of 1978

<sup>67</sup> *Universities Act* 16 of 1978.

<sup>68</sup> Himonga and Nhlapo *African Customary Law in South Africa* 112.

<sup>69</sup> Rautenbach *Introduction to Legal Pluralism in South Africa* 70.

powers as head of the family, with the effect that he exercises power over his wife and/or her property.<sup>70</sup> It limited harshly the legal status of married women in terms of customary law. Hence, in *Gumede v President*, the Constitutional Court remarked as follows:

The legislation [the RCMA] entrenches the equal status and capacity of spouses and sets itself the task of regulating the proprietary consequences of these marriages. In doing so, the Recognition Act abolishes the marital power of the husband over the wife and pronounces them to have equal dignity and capacity in the marriage enterprise.<sup>71</sup>

Abolishing married women's minority status gave married women the right to participate in taking a decision concerning marital matters such as raising children, controlling birth, and purchasing and alienating family property, subject, concerning the latter, to the matrimonial property system of spouses.<sup>72</sup>

All the changes concerning the spouses' statuses as discussed above have significance in international human rights law, in the sense that they ensure that South Africa complies with the CEDAW as it is a signatory thereto. Section 15(2) of this Convention gives states the obligation to:

accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.<sup>73</sup>

It cannot be avoided to notice that during white minority rule in South Africa, some concepts such as marital power and patriarchy discussed above were developed in a manner that inhibited the development of customary law in favour of women, including such practices as polyandry. Most of the rules benefited men at the expense of women. The male practice of polygyny flourished, and there was a limited chance for polyandry to develop as discussed in chapter 2, particularly in 2.2.2.1.2, 2.2.2.1.3 and 2.2.3.2.

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<sup>70</sup> For examples, see Heaton and Kruger *South African Family Law* 60.

<sup>71</sup> *Gumede v President of RSA*.

<sup>72</sup> Himonga and Nhlapo *African Customary Law in South Africa* 113.

<sup>73</sup> Himonga and Nhlapo *African Customary Law in South Africa* 115.

### 3.2.4.3 Proprietary consequences of marriage

The customary marriage's patrimonial consequences depend on whether the marriage is *de facto* monogamous or polygamous.<sup>74</sup> However, in this section, due to the limited scope of this dissertation, more focus is afforded to polygamous marriages to address the accommodation or recognition or non-recognition of polyandry.

#### 3.2.4.3.1 Polygamous marriages concluded before the commencement of the RCMA

In terms of Section 7(1) of the RCMA, before it was recently amended,<sup>75</sup> it provided that the patrimonial consequences of customary marriages concluded before the RCMA came into operation are governed by customary law.<sup>76</sup>

Traditionally, the position regarding polygynous customary marriages is as follows:<sup>77</sup> The husband is required to create separate houses for each wife and each house is to contain a property for the wife occupying the house concerned. The husband is the head of a family in each house. He controls house property in the polygynous marriage which most authors classify as house property and family property.<sup>78</sup> The former is property acquired by the family head that has not been allotted to the houses. Once the property is acquired, for instance, livestock, it is regarded as family property which will be allocated to the houses at a later stage. The family head draws from this property to support his dependants. The husband as a family head is required to administer family property in a way that collectively advantages the entire family. The family head is obliged to retain the estates of the different houses in his family home separately, and he must settle disputes concerning those estates.<sup>79</sup>

The position changed in 2017 when the Constitutional Court in *Ramuhovhi v President of the Republic of South Africa* (*Ramuhovhi* case) ruled that husbands and spouses will have joint and equal ownership and other rights to, and joint and equal rights of management and control over the marital property which will be exercised as

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<sup>74</sup> See Heaton and Kruger *South African Family Law* 226.

<sup>75</sup> See RCMA.

<sup>76</sup> This would have been the uncodified and uncodified customary law including living customary law.

<sup>77</sup> Rautenbach *Introduction to Legal Pluralism in South Africa* 97.

<sup>78</sup> Himonga and Nhlapo *African Customary Law in South Africa* 221.

<sup>79</sup> Rautenbach *Introduction to Legal Pluralism in South Africa* 198.

follows:<sup>80</sup> (i) concerning house property, by the wife and husband of the house concerned, jointly and in the best interests of the family unit constituted by the house concerned; and (ii) regarding all family property, by all the wives and husband, jointly and in the best interests of the whole family constituted by the various houses.<sup>81</sup> Every spouse preserves exclusive rights in their respective personal property.<sup>82</sup>

As the result of the judgment in the *Ramuhovhi* case, now section 7(1)(b)(ii) states that the rights in customary polygamous marriages pertaining to proprietary consequences in such marriages must be exercised “in respect of all family property, by the husband and all the wives, jointly and in the best interests of the whole family constituted by the various houses”. However, this provision recognises polygynous marriages concluded before the commencement of the RCMA to the exclusion of polyandry. The polygamy catered for in section 7(1) is that of one husband and many wives, and not women with more than one spouse (husband or wife).

Throughout chapter two above, it has been demonstrated that the oppression of women led to polyandry not being practised freely, hence same negated the development of polyandry.<sup>83</sup> In African communities, there has been a deeply embedded patriarchal way of living. In this new constitutional era, it is apparent that the status of women in African communities has changed dramatically as a result of economic and social circumstances. A large number of women have assumed responsibilities and powers previously reserved for males.<sup>84</sup> This may entail that such women may practise polyandry with more ease. The use of the word polygamy when actually referring to polygyny is influenced by patriarchal values and will continue to perpetuate the negation of matriarchy in our communities and lead to a gender-based understanding of the RCMA and polygamous marriages.

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<sup>80</sup> *Ramuhovhi v President of the Republic of South Africa* 2018 2 BCLR 217 (CC).

<sup>81</sup> *Ramuhovhi* para 71.

<sup>82</sup> *Ramuhovhi* para 71

<sup>83</sup> For example, see 2.2.2.1.3 in chapter two.

<sup>84</sup> Also see Bekker and Van Niekerk 2009 *SAPL* 212.

#### 3.2.4.3.2 Polygamous marriages concluded after the commencement of the RCMA

According to section 7(6) of the RCMA, a husband in an existing customary marriage, who wants to enter into one or more customary marriages with another woman post the commencement of the RCMA, is required to make an application for approval of a written contract which will regulate the future matrimonial property system of the marriages.

The RCMA does not stipulate the consequences in instances where a contract in terms of section 7(6) of the Act is not approved.<sup>85</sup> Nevertheless, considering prejudice against the second wife, in *Ngwenyama v Mayelane*,<sup>86</sup> the Supreme Court of Appeal found that section 7(6) of the Act is not a validity requirement when concluding another customary marriage. If the husband has failed to apply to the court in terms of section 7(6) of the Act, the regime that will be applied is one of out of community of property.<sup>87</sup> The Constitutional Court<sup>88</sup> confirmed that section 7(6) is not a validity requirement for a further customary marriage, but it further held that for the husband to enter into further marriage the consent of the first wife is required.<sup>89</sup>

Even in this section, it is demonstrated that the RCMA recognises polygyny to the exclusion of polyandry. It is only the husband in the customary marriage who may enter into another customary marriage with another wife during the subsistence of their marriage. Even in *Mayelane v Ngwenyama*, the Constitutional Court qualified the husband's right to enter into polygynous marriages by requiring him to acquire the first wife's consent in order to enter into a valid subsequent marriage or marriages.<sup>90</sup>

#### 3.2.4.4 Alteration of the matrimonial property regime

In terms of the RCMA, the parties in a customary marriage may alter their matrimonial property regime in the following instances: a polygamous customary marriage

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<sup>85</sup> Himonga and Nhlapo *African Customary Law in South Africa* 141.

<sup>86</sup> *Mayelane v Ngwenyama* 2012 4 SA 527 (SCA). Also cited as MN v MM.

<sup>87</sup> *Mayelane v Ngwenyama (SCA)* para 38.

<sup>88</sup> *Mayelane v Ngwenyama* para 89.

<sup>89</sup> See *Mayelane v Ngwenyama* para 87.

<sup>90</sup> *Mayelane v Ngwenyama* para 153.

concluded before the commencement of RCMA, and a monogamous marriage concluded after the commencement of the RCMA.<sup>91</sup> These instances are discussed separately below.

#### 3.2.4.4.1 Alteration of pre-RCMA polygamous marriage property regimes

Spouses that concluded customary marriage before the RCMA came into operation may jointly make an application for leave to change their matrimonial property system.<sup>92</sup> According to section 7(4) of the RCMA, [where the husband is married in more than one customary marriage], all persons with a sufficient interest in the matter, and predominantly the spouses of the applicant, must be joined in the application. Even section 7(4) of the RCMA is also couched in gender discriminate terms. It exclusively caters to polygamous customary marriages that involve a husband and more than one wife, that is polygyny.

#### 3.2.4.4.2 Alteration of post-RCMA monogamous marriage property regimes

Section 7(5) of the RCMA provides that section 21 of the MPA applies to a customary marriage concluded after the commencement of the RCMA in which a "husband does not have more than one spouse."<sup>93</sup> Even the wording of the section demonstrates that a form of polygamy that is catered to in the RCMA is polygyny and not polyandry.

#### *3.2.5 Divorce under customary marriage and consequences thereof*

Numerous writers assert that once a customary marriage is concluded, it cannot be reversed because even death does not necessarily terminate the marriage. Nevertheless, in terms of section 8 of the RCMA "a customary marriage may be dissolved only by a court by a decree of divorce" and that the only ground for divorce is "the irretrievable breakdown of the marriage".<sup>94</sup>

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<sup>91</sup> See also Heaton and Kruger *South African Family Law* 103-7.

<sup>92</sup> Section 7(4) (a) of the RCMA.

<sup>93</sup> section 21 of the *Matrimonial Property Act* 88 of 1984 provides rules that must be applied in cases where spouses married after the commencement of the Act, want to change their matrimonial property system. These rules are similar to those provided in s 7(4) of the RCMA.

<sup>94</sup> See s 8(1) of the RCMA.

The consequences of a dissolution of customary marriage through divorce is regulated by sections 8(4)(a) and 8(4)(b) of the RCMA. Most importantly, section 8(4)(b) of the RCMA requires a court that dissolves a customary marriage, [“in the case of a [husband is a spouse in more than one customary marriage”], to consider all relevant factors including any agreement, contract, or order made in terms of section 7(4), (5), (6) or (7) and must make any equitable order that it deems just.<sup>95</sup> Again, it is obvious that even this provision caters for polygynous marriages to the exclusion of polyandrous marriages.

### **3.3 Limited recognition of polyandry under the *Reform of Customary Law of Succession and Regulation of Related Matters Act***

#### *3.3.1 General*

The main purpose of the RCLSA is to modify the devolution of intestate property in relation to persons subject to customary law.<sup>96</sup> According to section 1(b) of the RCLSA the term "spouse" includes a partner in a customary marriage that is recognised in terms of section 2 of the RCMA. It has been demonstrated in chapter two that woman-to-woman marriages are actually and potentially polyandrous in nature.<sup>97</sup> Since such marriages are practised under unwritten living customary laws, our statutory law only recognises them for purposes of succession for the division of the deceased's property in terms of the RCLSA. They are not recognised for purposes of the conclusion of a polyandrous marriage in terms of the RCMA or any other statute.

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<sup>95</sup> This study is limited to divorce in relation to polyandry. Irrelevant discussions on divorces are excluded. However, for more discussion see Himonga and Nhlapo *African Customary Law in South Africa* 154-157.

<sup>96</sup> The long title and preamble of the RCLSA.

<sup>97</sup> See 2.3 in chapter two above.

### 3.3.2 Inclusion of customary law concepts: meaning of "spouse"

The intentions of section 2 of the RCLSA include, but not limited to, ensuring that all individuals who may be categorised as spouses in accordance with customary law benefit from the deceased estate as heirs.<sup>98</sup> These are:<sup>99</sup>

- a) "a wife in a customary marriage";
- b) a woman brought into the house for purposes of bearing children provided that she survives the husband;<sup>100</sup>
- c) a woman who entered into woman-to-woman marriage in terms of customary law, if she survives her woman partner, she is regarded as a spouse in respect of her woman partner's intestate estate.<sup>101</sup>

Nevertheless, it is unclear whether the women referred to in points "b" and "c" above are regarded as both "descendants" and "spouses" for purposes of succession since section 1(b) refers them as "descendants"<sup>102</sup> while section 3(1) defines them as "spouses"<sup>103</sup>. Seemingly, this was an oversight by the legislature.<sup>104</sup>

However, a position need to be clarified because rules of succession that apply to them will vary depending on whether they are considered to be "spouses" or "descendants".<sup>105</sup> Should women in points "b" and "c" above be regarded as spouses,

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<sup>98</sup> Section 2 of the RCLSA provides that "the estate or part of the estate of any person who is subject to customary law who dies after the commencement of this Act and whose estate does not devolve in terms of that person's will, must devolve in accordance with the law of intestate succession as regulated by the Intestate Succession Act, subject to subsection (2)." See also Himonga and Moore *Reform of Customary Marriage, Divorce and Succession in South Africa* 181.

<sup>99</sup> Rautenbach *Introduction to Legal Pluralism in South Africa* 197

<sup>100</sup> See s 2(2)(b): "a woman, other than the spouse of the deceased, with whom he had entered into a union in accordance with customary law for the purpose of providing children for his spouse's house must, if she survives him, be regarded as a descendant of the deceased";

<sup>101</sup> See s 2(2)(c): "a woman who was married to another woman under the customary law for the purpose of providing children for the deceased's house, that other woman must, if she survives the deceased, be regarded as a descendant of the deceased".

<sup>102</sup> Section 1(a) and (b) of the RCLSA define a descendent as a person who was accepted a child by the deceased during his lifetime or [a women referred in s 2(2)(b) or (c) of the RCLSA].

<sup>103</sup> Section 3 (1) of the RCLSA provides that: "For the purposes of this Act, any reference in s 1 of the *Intestate Succession Act* to a spouse who survived the deceased must be construed as including every spouse and every woman referred to in paragraphs (a), (b) and (c) of s 2(2)."

<sup>104</sup> See also Rautenbach *Introduction to Legal Pluralism in South Africa* 197 who also acknowledge the confusion on the use of the terms "spouse" and "descendant". For detailed discussion of this issue, see Rautenbach and Meyer 2012 *SALJ* 149–160.

<sup>105</sup> Rautenbach *Introduction to Legal Pluralism in South Africa* 197

then all of them will be eligible to inherit a "child's share or so much of the intestate estate as does not exceed in value the determined from time to time by Minister of Justice , whichever is the greater".<sup>106</sup> In the instances where the intestate estate is insufficient and the amount fixed from time to time cannot cater for women referred to in section 2(2)(a)–(c) of the RCLSA and spouse, the estate must then be divided equally among them.<sup>107</sup>

With regards to ambiguity concerning whether parties in woman-to-woman marriages should be considered to be "descendants" or "spouses", Rautenbach and Meyer asserts that the Masters of the High Court took decision to construe the inconsistency in sections 2(2)(b) and (c) to mean that women in these provisions "are spouses and not as descendants to ensure that the women are placed in the best possible situation" and to avoid prejudice.<sup>108</sup>

### *3.3.3 Limited recognition of polyandry*

Insofar as polyandry is concerned, considering the treatment of parties in woman-to-woman marriages by Masters of High Court, section 2(2)(c) read together with section 3(1) of the RCLSA seems to be catering for polyandry in the form of woman-to-woman marriages. However, the RCLSA does not cater to polyandrous marriages which involve a woman marrying more than one man or when she marries both a woman and a man. It has been demonstrated in chapter two, particularly in 2.3.1.8, that polyandry allows a woman to marry a man and another woman at the same time. RCLSA does not allow the development of forms of relationships other than woman-to-woman marriages. The RCLSA does not solve the problem of non-recognition of polyandry, even when the RCLSA is read together with the RCMA. It may only at least be interpreted to cater for polyandry in woman-to-woman marriages.

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<sup>106</sup> Section 2(2)(c) of the RCLSA. See also in the s 3(3) of the RCLSA in which A child's portion is defined as: "... in relation to the intestate estate of the deceased, shall be calculated by dividing the monetary value of the estate by a number equal to the number of children of the deceased who have either survived the deceased or have died before the deceased but are survived by their descendants, plus the number of spouses and women referred to in paragraphs (a), (b) and (c) of s 2(2) of the 298 Reform of Customary Law of Succession and Regulation of Related Matters Act 2008." See s 1(c)(i) of Intestate Succession Act 81 of 1981.

<sup>107</sup> Section 2(3) of the RCLSA.

<sup>108</sup> Rautenbach and Meyer 2012 *SALJ* 159.

The RCLSA is seen as an extension of the RCMA. The RCMA should be seen as influencing the interpretation of the RCLSA. The validity of the marriage must be determined, before addressing the issue of succession. This is due to a fact that succession is depends on the validity of the marriage. RCMA provides recognition for traditional marriages concluded under customary law.<sup>109</sup> Suppose a marriage is not recognised by the RCMA, then RCLSA cannot successfully save the RCMA. Even section 1(b) of the RCLSA states that “a spouse includes a partner in a customary marriage that is recognised in terms of section 2 of the RCMA”.

### **3.4 Non-recognition of polyandry in other marriage regimes**

As previously stated, there are four pieces of legislation that govern marriages in South Africa. The RCMA is already discussed. The remaining three statutes are briefly discussed below for the purpose of demonstrating that other regimes of marriage do not accommodate polyandry. This study exclusively focuses on the relevant provisions of the aforementioned marriage legislation to the extent of the exclusion of polyandry. Other provisions are beyond the scope of this study.

#### *3.4.1 Marriage Act 25 of 1961*

##### *3.4.1.1 General*

Civil marriage traditionally referred “the legally recognised life-long voluntary union between one man and one woman to the exclusion of all other persons”.<sup>110</sup> Due to the high rate of divorce, civil marriage is now defined as a legally recognised voluntary union of one man and one woman to the exclusion of all other persons.<sup>111</sup> Civil marriage is frequently called a contract because it is a voluntary union that is based on consensus or agreement between two distinct persons.<sup>112</sup>

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<sup>109</sup> Section 2 of the RCMA.

<sup>110</sup> Heaton and Kruger *South African Family Law* 13. For example, see *Seedat's Executors* 309.

<sup>111</sup> Heaton and Kruger *South African Family Law* 13.

<sup>112</sup> For example, see *Prinsloo's Curators Bonis v Crafford and Prinsloo* 1905 TS 669; *Pienaar v Pienaar's Curator* 1930 OPD 171; *Volks v Robinson* 2005 5 BCLR 446 (CC).

### 3.4.1.2 Lawfulness as a requirement for civil marriage

In general, an unlawful marriage is void.<sup>113</sup> Marriages between persons who are already married are unlawful. Civil marriages are monogamous in nature or by definition.<sup>114</sup> Thus, a prospective partner cannot be a party to another civil marriage, civil union or customary marriage, when entering into a civil marriage.<sup>115</sup> The attempted second civil marriage is void and the person is guilty of the crime of bigamy.<sup>116</sup> This second marriage may be putative if either or both of the spouses honestly believed that the marriage was valid.<sup>117</sup> Therefore, a party in civil marriage cannot lawfully enter into African customary marriage, including polyandry.

### 3.4.2 Civil Union Act 17 of 2006

#### 3.4.2.1 General

The *Civil Union Act* regulates the solemnisation and registration of civil unions either by marriage or a civil partnership and provides for the legal consequences of civil unions.<sup>118</sup> The term "civil union" includes civil partnership marriage concluded in accordance with the Act.<sup>119</sup> In essence, this Act seeks to govern monogamous marriages of both same-sex and opposite-sex persons.<sup>120</sup> This Act is a result of the case of *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs*,<sup>121</sup> wherein the Constitutional Court declared the common-law definition of marriage and the marriage formula provided in the *Marriage Act*

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<sup>113</sup> Heaton and Kruger *South African Family Law* 24.

<sup>114</sup> See also Heaton and Kruger *South African Family Law* 25.

<sup>115</sup> Sections 3(2) and 10(4) of the RCMA; s 8(2) of the Civil Union Act.

<sup>116</sup> See Snyman *Criminal Law* 393: Bigamy is committed if a person who is already married is unlawfully and intentionally a party to a marriage ceremony purporting to bring about a lawful marriage between himself (or herself) and somebody else. S 237 of the *Criminal Procedure Act* 51 of 1977, which enforces the criminality of bigamy. See also S 35 of the *Marriage Act* which states that marriage officer who knowingly solemnises a marriage while contravening of the provisions of this Act will be found guilty for committing an offence.

<sup>117</sup> Heaton and Kruger *South African Family Law* 25. Punitive marriage

<sup>118</sup> See the long title of the Civil Union Act.

<sup>119</sup> See s 2(a) of the Civil Union Act. See also s 11(1): civil union partners may decide whether their civil union takes the form of a civil partnership or marriage.

<sup>120</sup> See s 16 of the Civil Union Act. See also ss 1 and 8(6) of the Civil Union Act. See Smith and Smith and Robinson 2007 *BYU J Pub L* 423, who contends that one of the main obvious deficiencies of the Civil Union Act is the blanket non-recognition of polygamous marriages, insinuating that government have missed an opportunity to ensure that same sex couple can enter into polygamous civil unions.

<sup>121</sup> *Minister of Home Affairs v Fourie* 2006 1 SA 524 (CC).

unconstitutional insofar as they excluded same-sex couples from the benefits, status and responsibilities given to heterosexual couples. According to section 1 of the *Civil Union Act*, a civil union is the monogamous, voluntary union of two persons who are at least 18 years of age, which is solemnised and registered in terms of the procedures given by the Act.

#### *3.4.2.2 Lawfulness as the legal requirement for a civil union*

A party to an existing civil union, civil marriage or customary marriage cannot enter into the civil union.<sup>122</sup> In cases where either party has previously been a party to a civil union or a civil or customary marriage, the civil union can only be solemnised after a certified copy of the divorce order or the death certificate of the party's deceased spouse or civil union partner is provided to marriage officer.<sup>123</sup> This signifies that entering into subsequent marriages/unions is unlawful.

#### *3.4.2.3 Consequences of a civil union in relation to polyandry*

The consequences of a civil union correspond with those of a civil marriage.<sup>124</sup> Except in so far as the *Marriage Act* and the *Recognition of Customary Marriages Act* are concerned, any reference to "marriage" is equated with "civil union" and any reference to "husband", "wife" or "spouse" with "civil union partner".<sup>125</sup> Section 13 of the *Civil Union Act* equates a civil union with civil marriage.<sup>126</sup> As already stated above in 3.4.2.1, the term "civil union" includes civil partnership and marriage concluded in accordance with *Civil Union Act*. Therefore, in terms of Section 8(1) and (2) of the *Civil Union Act*, the parties in an existing civil union cannot conclude another civil union or a civil or customary marriage, including polyandry.<sup>127</sup> A civil union which is concluded in contravention of the abovementioned prohibition is void.<sup>128</sup>

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<sup>122</sup> Sections 8(1) and (3) of the Civil Union Act; see also s 3(2) of the RCMA.

<sup>123</sup> Section 8(4) and (5) of the Civil Union Act.

<sup>124</sup> Section 13(1) of the Civil Union Act.

<sup>125</sup> Heaton and Kruger *South African Family Law* 211-212

<sup>126</sup> Section 13(2) of the Civil Union Act. See also Heaton and Kruger *South African Family Law* 211-212

<sup>127</sup> see also s 10(4) of the RCMA.

<sup>128</sup> See also Heaton and Kruger *South African Family Law* 211.

### 3.4.3 *Black Administration Act 38 of 1927*

#### 3.4.3.1 *The non-recognition of polyandry*

The African civil marriages were firstly governed by the partly repealed *BAA* whereas Western civil marriages were governed by the *Marriage Act*.<sup>129</sup> The *BAA* regulates monogamous marriages of heterosexual black persons who married before 1988.<sup>130</sup>

The wording of sections 3(2) and 10(1) of the *RCMA* is similar to sections 22(1) and (2) of the *BAA*. Section 1(a) and (b) of the *Marriage and Matrimonial Property Law Amendment Act*<sup>131</sup> amended s 22(1) and (2) of the *BAA* to prohibit a conclusion of subsequent civil marriage with another person. Prior to the amendment (i.e., before 2 Dec 1988), a subsequent civil marriage automatically dissolved the customary marriage. This Act therefore does not allow polygamous marriages, including polyandrous marriages. As already noted in 3.3.1.2 above, the attempted second civil marriage is void and the person is guilty of the crime of bigamy.

### 3.5 **General conclusion**

Polygamous marriages are not allowed under the *Marriage Act*, *BAA* and the *Civil Unions Act*. Unlike a civil marriage, customary marriages are potentially polygamous in nature. Section 2(3) of the *RCMA* provides that “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 marriage.” In the same way, section 2(4) provides for the recognition of polygamous marriages concluded after the commencement of *RCMA*. This chapter demonstrated that although these provisions are couched in gender-neutral language, they do not allow the women to have more than one husband/spouse at the same time.<sup>132</sup> The *RCMA* does not, therefore, recognise polyandry. Therefore, for the wife (but not for the husband), the consequence of concluding a customary marriage is that the husband may at any time

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<sup>129</sup> Rautenbach and du Plessis 2012 *McGill Law Journal* 758.

<sup>130</sup> See also GN R398 in GG 44529 of 4 May 2021 29.

<sup>131</sup> *Marriage and Matrimonial Property Law Amendment Act* 3 of 1988.

<sup>132</sup> When we consider the *RCMA* in totality, it is more discriminating. Just like many authors, the *RCMA* uses a term polygamy in s 2(3) and (4) when referring to polygyny. This was not the oversight but the intention of the drafters of the *RCMA*.

marry another woman during the subsistence of their marriage. The wife may not take another spouse (man or woman) during the subsistence of her first marriage in a way that such subsequent marriage(s) will be legally recognised as valid under the RCMA.

For instance, section 7(1)(b)(ii) states that the rights in customary polygamous marriages pertaining to proprietary consequences in such marriages must be exercised in respect of all family property, by the husband and all the wives, jointly and in the best interests of the whole family constituted by the various houses. Sections 7(4)(b), 7(5), section 7(6) and 8(4)(b), as discussed above, are similarly also couched in gender discriminate terms. This was not an oversight but the intention of the drafters of the RCMA. This is evident from the recommendation in the South African Law Commission's Report on Customary Marriages which recommended recognition of polygyny to the exclusion of polyandry.<sup>133</sup> The Commission claimed that "polyandry is not accepted in any of the cultural or religious traditions of South Africa and to introduce it as a solution to objections against polygyny appears contrived".<sup>134</sup> The Law Commission seems to have overlooked the historical impacts on customary law which prevented the development or entrenchment of polyandry.<sup>135</sup> As a result, this led to the recognition of polygyny to the exclusion of the cultural practice of polyandry which has been in existence for many decades and still exists as discussed in 2.3 above.

It is noteworthy that the current marriage legislation do not regulate other customary marriages that are practised in some African or royal families, particularly polyandrous marriages, and woman-to-woman marriages which are also polygamous in nature.<sup>136</sup> The latter is only recognised indirectly or for limited purposes of succession under the RCLSA in cases of the death of a partner in woman-to-woman marriages. The RCMA should have recognised African polyandrous marriages including woman-to-woman

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<sup>133</sup> SALC "Report on Customary Marriages" 86, para 6.1.7.

<sup>134</sup> SALC "Report on Customary Marriages" 86, para 6.1.7.

<sup>135</sup> The same commission that does not recommend recognition of polyandry, in the summary of recommendations in its Report, said: "In order to remove the anomalies created by many years of discrimination, customary marriages, both existing and future unions, must now be fully recognized. To do so will comply with ss 9, 15, 30 and 31 of the Constitution, provisions which suggest that the same effect should be given to African cultural institutions as to those of the western tradition (See par 3.1.13)". see also SALC "Report on Customary Marriages" vii.

<sup>136</sup> Obonye 2012 *JASD*.

marriages. The main objectives of the RCMA include making provisions for the recognition of customary marriages.<sup>137</sup>

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<sup>137</sup> See preamble to the RCMA. See also s 1 of the RCMA which defines customary marriages as "a marriage concluded in accordance with Customary law." This section further defines a customary law as 'the custom and usages traditionally observed among the indigenous African people of south Africa and which form part of the culture of those people.'

## **Chapter 4      The Constitutionality of the Non-recognition of Polyandry in the RCMA**

### **4.1 General introduction**

It is demonstrated in the previous chapter that an overall interpretation of the RCMA reveals that the Act recognises a valid polygamous marriage as one where a man marries more than one wife, and therefore does not recognise polyandrous marriages where a woman marries more than one spouse. In a country such as South Africa, the exclusion of women from a particular institution or benefit calls for consideration of such exclusion's conformity with the Constitution. Therefore, this chapter considers whether the non-recognition of African polyandrous marriages by the RCMA infringes the constitutional rights of African women who wish to enter into polyandrous marriages in line with their customs. To put it differently, what this chapter seeks to determine is whether the non-recognition of African polyandrous marriages passes constitutional muster.

Section 7(2) of the Constitution provides that the state must respect, protect, promote, and fulfil the rights in the Bill of Rights, and section 8(1) provides that the Bill of Rights applies to all law and binds the legislature, the executive, the judiciary and all organs of the state. It follows that the state and all of its organs are obliged to provide appropriate protection to everyone through law, including Acts of Parliament. The RCMA, as an Act of Parliament, is required to be in line with the Bill of Rights. The legislature is the frontliner that is more responsible for vindicating the rights in the Bill of Rights. One of the legislature's main functions is to ensure that the constitutional values stipulated in the preamble and section 1 permeant all areas of law.

Before assessing the constitutionality of the exclusion of polyandry in the RCMA it is necessary to consider the constitutionality of polygamy. It is not plausible for the exclusion of polyandry to be unconstitutional when polygamy is itself unconstitutional, as polyandry is a form of polygamy. The constitutionality of polygamy, particularly in its dominant form of polygyny, has been the subject of a plethora of scholarly works. Hence in this dissertation, it is considered in a brief manner as a necessary sequence

of getting to the constitutionality of the exclusion of polyandry. A deeper consideration of the constitutionality of polygamy, in its dominant form of polygyny, would nevertheless be beyond the scope of this study.

#### **4.2 The constitutionality of polygamy in its dominant form of polygyny**

Although the constitutionality of polygamy has drawn the attention of many scholars, it is yet to be fully addressed by South African courts.<sup>1</sup> As indicated in the previous chapters, soon after the adoption of the 1996 Constitution, Parliament adopted the RCMA which at least recognised the validity of polygynous marriages entered into in terms of indigenous African customs. The general position taken in the RCMA has not been constitutionally challenged in South African courts. In *Mayelane v Ngwenyama*, the majority of the Constitutional Court did not entertain the question of whether the practice of polygamy is constitutional because that issue was not before the Court.<sup>2</sup> However, the Court recognised that the husband in a monogamous marriage has the right to enter into subsequent marriage(s) provided that he obtains consent from the first wife before entering into that proposed 'polygynous' marriage(s).<sup>3</sup> Similarly, the Constitutional Court glossed over this issue in *Bhe*. However, the Court, arguably, implicitly approved of the practice in holding that section 1 of the *Intestate Succession Act*,<sup>4</sup> as reconfigured by the Court, be applicable to the estate of a deceased person who is survived by more than one spouse.<sup>5</sup> Therefore, although the constitutionality of the practice of polygamy in general remains judicially untested, the Constitutional Court has at least strongly suggested that the polygamy recognised in the RCMA is constitutional.

It has been argued that the rights implicated by polygamy, particularly in its dominant form of polygyny, are the rights to equality and dignity. Dlamini observes:

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<sup>1</sup> For example, see Dlamini 1999 *Obiter*; Johan Ras 2010 *Inkanyiso, Jnl Hum & Soc Sci*; Himonga "Constitutional Rights of Women under Customary Law in Southern Africa: Dominant Interventions and "Old Pathways"326-328

<sup>2</sup> *Mayelane v Ngwenyama* para 34.

<sup>3</sup> *Mayelane v Ngwenyama* para 34.

<sup>4</sup> *Intestate Succession Act* 81 of 1987.

<sup>5</sup> See, further, Himonga "Constitutional Rights of Women under Customary Law in Southern Africa: Dominant Interventions and "Old Pathways"326-328.

It is hard to believe that a woman who decided freely to be involved in a customary marriage after taking all factors into account could be regarded as being discriminated against unfairly. If she entered into the marriage from her own free will and volition the state has no business in not recognising that marriage on the ground that it makes her unequal to whomever ... For some women, it may sound hollow that their marriage is not recognised in order to make them equal with other women or men and to protect their dignity when in fact to attack their marriage is to affront their dignity.<sup>6</sup>

When answering to criticism of Sinclair that his arguments or views "are cold comfort to women who are in favour of gender equality,"<sup>7</sup> Dlamini contends that Sinclair may be over oversimplifying the situation because there is a close connection between protection of cultural rights and the dignity of the people whose culture is in question. He points out that:

Demeaning one's culture often leads to one's dignity and feelings of self-worth being affected because culture is intimately intertwined with the emotions of the people. No woman should be compelled to be part of a customary marriage against her will. If she insists on monogamy as guarantee of equality, she must marry in terms of civil marriage because that type of marriage does not allow polygyny.<sup>8</sup>

In these contexts, Dlamini also notes the circumstances where the constitutional requirement of women's freedom of choice "may check the pursuit of her rights to dignity and dignity".<sup>9</sup> The woman's consent to be in a polygamous marriage vitiates any wrongfulness in polygamy from the fairness' point of view. To put it differently, why should a person not have a freedom to opt for a marriage of this nature or kind?

Section 9(3) of the Constitution explicitly states that:

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, birth.

This practically means that if a person wants to take more than one woman or man because of her/his religion or her/his beliefs, or simply because she/he just wants to observe and/or follow their particular culture (with all its customs, laws,

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<sup>6</sup> Dlamini 1999 *Obiter* 25.

<sup>7</sup> Dlamini 1999 *Obiter* 26, citing Sinclair "Family Rights" 563ff.

<sup>8</sup> Dlamini 1999 *Obiter* 26.

<sup>9</sup> For a more comprehensive discussion, see Dlamini 1999 *Obiter* 20-28.

and traditions), then she/he is absolutely free to do so.<sup>10</sup> The state (and by implication, every individual, church or religious group), may not directly or indirectly discriminate against anyone who does so.

In light of the above, it is the author's view that the practice of cultural polygamous marriages is in line with provisions of the Constitution, including sections 9, 15, 30 and 31, respectively.

### **4.3 The constitutionality of the exclusion of polyandry in the RCMA**

#### *4.3.1 General*

As indicated above, the relevant RCMA provisions that clearly demonstrate that the Act does not recognise the validity of polyandrous marriages are sections 7(1)(b), 7(4)(b), 7(5), 7(6) and 8(4)(b). These sections recognise polygyny to the exclusion of polyandry. In this chapter we consider whether the interpretation of the RCMA set out in chapter three, i.e., that the RCMA does not recognise polyandrous marriages as legally valid, violates the following rights: the right to human dignity (section 10 of the Constitution), the right to equality (section 9 of the Constitution), as well as the rights of individuals within communities to pursue cultural practices (sections 30 and 31 of the Constitution).

This study therefore invokes constitutional interpretation, that is, process of determining the meaning of a provision in Bill of Rights to establish whether law or conduct is inconsistent with such provision. This process involves two enquiries: Meaning or scope of the right and whether challenged law or conduct conflicts with the right.

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<sup>10</sup> Johan Ras 2010 *Inkanyiso, Jnl Hum & Soc Sci* 113

### 4.3.2 Constitutional interpretation stage (the infringements of rights)

#### 4.3.2.1 Does the exclusion of polyandry in the RCMA violate the right to human dignity?

##### 4.3.2.1.1 The nature and importance of the right to human dignity

Section 10 of the Constitution provides that everyone "has inherent dignity and the right to have their dignity respected and protected". The Constitutional Court has frequently put more emphasis on the importance of human dignity in our constitutional dispensation. In *S v Makwanyane*, Chaskalson P pointed out that the right to human dignity and the right to life were "the most important of all human rights and the source of all other rights" in the Bill of Rights as then contained in the Interim Constitution.<sup>11</sup> They constitute the basis and the inspiration for the recognition that is given to other more specific protections that are afforded by the Bill of Rights.<sup>12</sup> In *Minister of Home Affairs v Watchenuka*, the Supreme Court of Appeal persuasively described the right to human dignity as the ability to live without positive humiliation and degradation.<sup>13</sup> In *National Coalition for Gay and Lesbian Equality v Minister of Justice*, Ackermann J held that the value and worth of all individuals as members of our society must be acknowledged in order to constitutionally protect dignity.<sup>14</sup>

Kriegler J, in *S v Mamabolo (hereafter Mamabolo)*,<sup>15</sup> stated that human dignity is one of three "conjoined, reciprocal and covalent values" that are foundational to this country. In *Dawood v Minister of Home Affairs*, the Court emphasised:

The value of dignity in our Constitutional framework cannot, therefore, be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity, therefore, informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. This Court has already acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman or degrading way, and the right to life. Human dignity is also a constitutional value that is of central significance in the

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<sup>11</sup> *Makwanyane* para 144.

<sup>12</sup> *Minister of Home Affairs v Watchenuka* [2004] 1 All SA 21 (SCA) para 26.

<sup>13</sup> *Watchenuka* para 32.

<sup>14</sup> *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para 28.

<sup>15</sup> *S v Mamabolo* 2001 3 SA 409 (CC) para 41

limitations analysis. Section 10, however, makes it plain that dignity is not only a value fundamental to our Constitution, it is a justiciable and enforceable right that must be respected and protected.<sup>16</sup>

This entails that in most cases where the value of human dignity is affronted, the primary constitutional breach occasioned may be of a more specific right such as the right to equality or right to bodily integrity,<sup>17</sup> or the right not to be subjected to slavery, servitude or forced labour.<sup>18</sup> In this dissertation, however, it cannot be said that there is a more specific right that protects individuals, particularly African women who wish to conclude and sustain polyandry, than the right to dignity and the right to culture.<sup>19</sup> There is no specific provision that protects family life.<sup>20</sup> However, it may well be that legislation may have an incidental and limiting effect on the rights such as the rights of citizens to reside in South Africa<sup>21</sup> and the rights to freedom of movement,<sup>22</sup> but the primary right implicated is the right to dignity.<sup>23</sup>

From an African perspective, human dignity can be said to form part of *ubuntu*, that is "humanness" or "personhood," which values solidarity, respect, communalism or collective unity.<sup>24</sup> It obliges the state not to treat people like objects.<sup>25</sup> *Ubuntu* values that all persons must be given unconditional respect, dignity, worth and acceptance from the community of which they are part, and one has a reciprocal duty to do the same to others.<sup>26</sup>

#### 4.3.2.1.2 Is there an infringement of the right to dignity?

Non-recognition of polyandry violates women's right to dignity because only men can have more than one wife while women cannot have more than one spouse.<sup>27</sup> There is

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<sup>16</sup> *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) para 35.

<sup>17</sup> Section 12(2) of the Constitution.

<sup>18</sup> Section 13 of the Constitution

<sup>19</sup> See s 10 of the Constitution.

<sup>20</sup> *Dawood v Minister of Home Affairs* para 36.

<sup>21</sup> Section 21(3) of the Constitution.

<sup>22</sup> Section 21(1) of the Constitution

<sup>23</sup> See also *Dawood v Minister of Home Affairs* para 36.

<sup>24</sup> *Makwanyane* para 308. See detailed discussion of *Ubuntu* in 2.2.1 and 2.2.4.2

<sup>25</sup> *Makwanyane* para 26.

<sup>26</sup> *Makwanyane* para 224.

<sup>27</sup> See also *Harksen v Lane* 1998 1 SA 300 (CC)(hereafter *Harken*) para 51 where it was held that "the prohibition of unfair discrimination in the Constitution provides a bulwark against invasions which impair human dignity, or which affect people adversely in a comparably serious manner".

a sense of shame, a sense that something has been subtracted from one's human whole, and a feeling of being less dignified than before, that comes with the non-recognition of the cultural practice of polyandry. "The denial of equal dignity and worth all too quickly and insidiously degenerated into a denial of humanity and led to inhuman treatment by the rest of society in many other ways".<sup>28</sup> This is deeply demeaning and cruelly undermines "the confidence and sense of self-worth and self-respect of the African women."<sup>29</sup>

The decision to conclude a marriage, including polyandry and to sustain one, is a matter of defining significance for many, if not, most people, and disallowing the establishment of a marriage suiting a particular sector of society impairs the ability of the affected individuals to achieve personal fulfilment in an aspect of life that is of central significance.<sup>30</sup> The RCMA disallows polyandry and that constitutes a violation of the right to dignity. In *Dawood v Minister of Home Affairs*,<sup>31</sup> the Constitutional Court pointed out that:

it is not only legislation that prohibits the right to form a marriage relationship that constitutes an infringement of the right to dignity, but any legislation that significantly impairs the ability of spouses to honour their obligations to one another would also limit that right.<sup>32</sup>

A non-recognition of polyandry by the RCMA impairs the dignity of African women and thus limits their constitutional right to dignity.<sup>33</sup> Like all rights, however, the question of whether such a limitation is unconstitutional or not will depend upon findings under

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<sup>28</sup> *Harken* Para 50.

<sup>29</sup> See also *Harken* Para 50.

<sup>30</sup> For example, in *Dawood v Minister of Home Affairs* para 36, Constitutional Court noted that during apartheid, marriages between black and white people were disallowed in terms of the *Prohibition of Mixed Marriages Act* 55 of 1949. Further, court held that a legislation grievously implicates the right to human dignity. Couples whose marriage relationship was denied the right to do so, simply due to their race.

<sup>31</sup> Para 36

<sup>32</sup> *Dawood v Minister of Home Affairs* para 36 See also *National Coalition for Gay and Lesbian Equality* para 78.

<sup>33</sup> See also *Dawood v Minister of Home Affairs* para 36: The right to cohabit was another aspect of marriage and family life severely attenuated under apartheid legislation. The practice of migrant labour was legislatively imposed by a myriad of regulations the central of which was s 10(1)(d) of the *Natives Urban Areas Consolidation Act* 25 of 1945, as amended, which provided that certain black workers were permitted to enter urban areas, largely reserved for whites, for the purposes of performing their obligations in terms of employment contracts. Their families were not permitted to join them upon pain of criminal sanction.

the second leg of constitutionality enquiry herein below, being: whether it is reasonable and justifiable in an open and democratic society in terms of section 36(1) of the Constitution. This limitation stage as provided by Section 36 of the Constitution is dealt with below specifically in 4.3.3.

*4.3.2.2 Does the exclusion of polyandry in the RCMA violate the right to equality and the prohibition of unfair discrimination?*

4.3.2.2.1 Nature and importance of the right to equality, particularly marriage equality

The importance of the right to equality in South Africa is demonstrated by the right's connection to the foundational values that the very state of democratic South Africa is founded on as set out in section 1 of the Constitution, including the rule of law and the achievement of equality. The rule of law is understood to require the law to be equally applied and obeyed by all persons; and that as such no one is above the law. For instance, where differentiation would amount to unfair discrimination, that would not be legally permissible as all persons have the right to be protected against all forms of discrimination<sup>34</sup> so they can enjoy all rights, freedoms and benefits of the law.<sup>35</sup> The importance of the right to equality and its connection to the value of the "achievement of equality" in South Africa was emphasised by Ngcobo J in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* (hereafter *Bato Star Fishing*),<sup>36</sup> as follows:

South Africa is a country in transition. It is a transition from a society based on inequality to one based on equality. This transition was introduced by the Interim Constitution, which was designed to 'create a new order . . . in which there is equality between men and women and people of all races so that all citizens should be able to enjoy and exercise their fundamental rights and freedoms. 'This commitment to the transformation of our society was affirmed and reinforced in 1997, when the Constitution came into force. The Preamble to the Constitution 'recognises the injustices of our past' and makes a commitment to establishing 'a society based on democratic values, social justice and fundamental human rights.' This society is to be built on the foundation of the values entrenched in the very first provision of the Constitution. These values include human dignity, the achievement of equality and the advancement of human rights and freedoms. The achievement of equality is one of the fundamental goals that we have fashioned for ourselves in the Constitution.

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<sup>34</sup> See Art 7 of the *UDHR*; Art 3(1) & (2) of African Charter on Human and Peoples Rights (1981); Art 26 of the *ICCPR*.

<sup>35</sup> Art 2 of the *UDHR*.

<sup>36</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC).

Our constitutional order is committed to the transformation of our society from a grossly unequal society to one 'in which there is equality between men and women and people of all races'.<sup>37</sup>

Section 9 of the Constitution also guarantees the right to substantive equality to ensure that the opportunity to enjoy the benefits of an egalitarian and non-sexist society is available to all, including those who have been subjected to unfair discrimination in the past.<sup>38</sup> Therefore section 9(3) of the Constitution prohibits the state from unfairly discriminating "directly or indirectly against anyone" on grounds that include race, ethnic or social origin, gender and sex.

The right to equality stresses more on marriage equality when read together with section 15(3) of the Constitution which guarantees freedom of religion, conscience and belief.<sup>39</sup> Consistent with the theme of unity in diversity, it establishes that there is no hegemonic model of marriage inexorably and automatically applicable to all South Africans.<sup>40</sup> In this sense, section 15 acknowledges the right to be different in terms of the principles governing family life.<sup>41</sup> The provision is manifestly designed to allow Parliament to adopt legislation, if it so wishes, recognising, say, African traditional marriages, or Islamic or Hindu marriages, as part of the law of the land, different in character, but equal in status to general marriage law.<sup>42</sup> Furthermore, subject to the important qualification of being consistent with the Constitution, such legislation could allow for a degree of legal pluralism under which particular consequences of such marriages would be accepted as part of the law of the land.

Thus section 15(3) is indicative of constitutional sensitivity in favour of acknowledging diversity in matters of marriage.<sup>43</sup> At most, for present purposes, section 15(3) offers

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<sup>37</sup> *Bato Star Fishing* para 73-4.

<sup>38</sup> See *Bhe* para 50.

<sup>39</sup> (a) This section does not prevent legislation recognising—  
(i) marriages concluded under any tradition, or a system of religious, personal or family law;  
or  
(ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.

(b) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution.

<sup>40</sup> See *Fourie* para 107.

<sup>41</sup> See *Fourie* para 108.

<sup>42</sup> See also *Fourie* 108.

<sup>43</sup> *Fourie* para 109.

constitutional guidance of a philosophical kind pointing in the direction of acknowledging a degree of autonomy for different systems of family law.<sup>44</sup>

It is noticeable that it is not only the South African Constitution that emphasises the right to equality, but also the constitutions and the jurisprudence of many open and democratic foreign states value this right.<sup>45</sup> Several international instruments too, to which South Africa is a party,<sup>46</sup> also emphasise that the rights of women must be protected, and all laws that discriminate against them must be abolished.<sup>47</sup>

#### 4.3.2.2.2 The Equality Test

##### 4.3.2.2.2.1 General

The workings of section 9 were articulated by the Constitutional Court in *Harksen v Lane*. This has come to be known as the equality test. It is important to note that when the Constitutional Court articulated the equality test in *Harksen*, the Interim Constitution was still in force wherein the right to equality was provided for in section 8 of that constitution. However, since the right to equality as provided for in the Interim and the 1996 Constitutions is similar, the equality test has been easily adapted in the language of section 9 of the 1996 Constitution as follows:

(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not, then there is a violation of section 9(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.

(b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:

(b)(i) Firstly, does the differentiation amount to "discrimination"? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the

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<sup>44</sup> *Fourie* para 108.

<sup>45</sup> *Bhe* para 50. Those countries include Austria, Belgium, Canada, France, Germany, India, Italy, Singapore, Sweden, Switzerland, Turkey, the UK and the USA

<sup>46</sup> South Africa became party to the *CEDAW* on 14 January 1996; to the International Convention on the Elimination of All Forms of Racial Discrimination (1965) on 9 January 1999; to the African [Banjul] Charter on Human and Peoples' Rights *Banjul Charter* on 9 July 1996; and to the *Protocol to the African Charter on the Rights of Women* on 16 March 2004.

<sup>47</sup> Article 2(c) and (f) of the *CEDAW*; article 18(3) of the *Banjul Charter*; articles 2(1)(a) 21 and 25 of the *Protocol to the African Charter on the Rights of Women*.

potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

(b)(ii) If the differentiation amounts to "discrimination", does it amount to "unfair discrimination"? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 9(2).

(c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause.

#### 4.3.2.2.2 The application of the equality test inquiry in this study

I turn now to consider the constitutionality of the said non-recognition in light of the foregoing analysis.

##### 4.3.2.2.2.1 Differentiation

The first enquiry seeks to determine whether the impugned provisions of the RCMA differentiate between people or categories of people. The RCMA differentiates between African women and men as it recognises the cultural practice of polygyny to the exclusion of the cultural practice of polyandry. The differentiation that the impugned law draws between African women and men negates the rights of African women to equal protection and benefit of the law. The next questions are thus: What the governmental purpose of those RCMA provisions is, if any; whether that purpose is a legitimate one; and, if so, whether the differentiation has a rational connection to that purpose?

In its Report on Customary Marriages, the SALC recommended the recognition of customary marriages (both existing and future unions) to remove the anomalies created by many years of discrimination.<sup>48</sup> Some of the main objectives of the RCMA are to make provision for the recognition of customary marriages and to provide for the equal status and capacity of spouses in these marriages.<sup>49</sup>

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<sup>48</sup> SALC "Report on Customary Marriages" para 3.1.13.

<sup>49</sup> Preamble of the RCMA. See also s 2(1)-(4).

The SALC noted that if men have a right that women do not have, which is to marry more than one wife, the application of a principle of non-discrimination could require either abolishing the said male's right or conferring women the right to marry more than one husband. As a result, the SALC explored these alternatives. On the latter, the SALC concluded that polyandry is not accepted in any of the cultural or religious traditions of South Africa and to introduce it as a solution to objections against polygyny appears contrived.<sup>50</sup> Wherefore, the legislature through RCMA recognised polygyny to the exclusion of polyandry.

These arguments and/or recommendations by the SALC suggest that it overlooked the historical impacts on customary law which prevented the development and entrenchment of polyandry which are addressed in chapter two above. Apparently, it also failed to consider the cultural practice of polyandry in the form of woman-woman marriages which has been in existence for many decades and still exists, as demonstrated in chapter two above.<sup>51</sup> The legislature failed to respect, protect, promote and fulfil the rights in the Bill of Rights as mandated in section 7(2) of the Constitution. Sections 9, 15, 30 and 31 of the Constitution suggest that current and future African cultural polyandry was supposed to be given recognition like polygyny.<sup>52</sup> Then to that extent, it goes to say that the non-recognition of polyandry in the RCMA does not serve a legitimate purpose. There is no legitimate basis for this gendered differentiation of recognising polygynous marriages to the exclusion of polyandrous marriages, even though there is evidence of polyandry as forming part of customary law – at least in some indigenous communities in South Africa. As such, even in the first stage of the *Harksen* enquiry, the impugned provisions of the RCMA are likely to be found unconstitutional.

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<sup>50</sup> At the Law Commission's Workshop in the Northern Province, participants agreed that the right of polyandry was an 'invented culture.' But the Workshop felt that so many of the Commission's proposals (for instance, on registration, locus standi and contractual capacity) were invented that one more would scarcely matter.

<sup>51</sup> See chapter two which demonstrates the existence of polyandry.

<sup>52</sup> The Constitution must be interpreted generously, especially in light of the past oppression of women.

#### 4.3.2.2.2.2 Discrimination

The next question, which gives effect to one aspect of section 9(3), is whether the differentiation between African women and African men in the legislative recognition of African polygamous marriages constitutes discrimination against women.<sup>53</sup> In *Prinsloo V Van der Linde*<sup>54</sup> and *Harksen*, the Constitutional Court adequately answered the question: "What is discrimination?" The court made it clear that discrimination refers to a particular type of differentiation, and there are two categories of differentiation. The first is differentiation on one of the grounds listed in section 9(3) and the second category is on grounds that are analogous to the listed grounds. The court defined discrimination in South Africa as "treating people differently in a way which impairs their fundamental dignity as human beings".<sup>55</sup>

The differentiation between African women and African men based on gender, which is a listed ground in section 9(3), when recognising African polygamous marriages, constitutes direct discrimination because this kind of treatment is obviously or directly unequal. It has been demonstrated in chapter 2 above that both polygyny and polyandry are equally African customs. Therefore, recognising polygyny to the exclusion of the cultural practice of polyandry also has the potential to demean women in their inherent humanity and dignity.

#### 4.3.2.2.2.3 Unfair discrimination

Differentiation on a ground listed in section 9(3) will be deemed to be automatically unfair and the respondent would have to prove that it is not unfair. In the topic at hand, discrimination is on the basis of gender and sex, thus falling within the grounds specified in section 9(3) of the Constitution. Because the discrimination is on a specified ground, the unfairness of the discrimination is presumed. In *Hugo*, the Constitutional Court held that:

To determine whether that impact was unfair it is necessary to look not only at the group who has been disadvantaged but at the nature of the power in terms of which

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<sup>53</sup> Section 9(2) which is also sometimes referred to as the 'affirmative action clause' is not addressed because is not relevant for the dissertation.

<sup>54</sup> *Prinsloo v Van der Linde* 1997 3 SA 1012 (CC).

<sup>55</sup> *Van der Linde* para 31

the discrimination was effected and, also at the nature of the interests which have been affected by the discrimination.<sup>56</sup>

In the last analysis, the impact of the discrimination on African women is a factor that determines the unfairness of the discrimination.<sup>57</sup> There are various factors that must be taken into consideration to determine “whether the discriminatory provision has impacted complainants unfairly”.<sup>58</sup> In *Harksen*, the Constitutional Court identified the following three factors:

(a) the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage, whether the discrimination in the case under consideration is on a specified ground or not;

(b) the nature of the provision or power and the purpose sought to be achieved by it. If its purpose is manifestly not directed, in the first instance, at impairing the complainants in the manner indicated above, but is aimed at achieving the worthy and important societal goal, such as, for example, the furthering of equality for all, this purpose may, depending on the facts of the particular case, have a significant bearing on the question of whether complainants have in fact suffered the impairment in question. ...

(c) with due regard to (a) and (b) above, and any other relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.<sup>59</sup>

#### 4.3.2.2.2.4 The position of African women in society

The group that is affected in the present topic, namely African women, is one that has suffered discrimination in the past and is vulnerable. For instance, the *BAA* contributed to the perpetual oppression of women in its general policy of benefitting the male members within tribes when it comes to marriage.<sup>60</sup> According to section 11(3)(b) of

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<sup>56</sup> *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) para 43.

<sup>57</sup> See also *Hugo* para 43.

<sup>58</sup> *Hugo* para 43

<sup>59</sup> *Harksen v Lane* para 52. These factors assist in giving “precision and elaboration” to the constitutional test of unfairness.

<sup>60</sup> See full discussion of this subject above in chapter two, particularly in 2.2.2.1.3 on “the lack women's capacity in respect to marriage the inheritance under the Black Administration Act”.

the *BAA*, the consequence of the black woman's marriage is that she becomes a minor under the husband's tutelage and thus becomes unequal to her husband.

The contemporary position of African women has seen significantly limited improvement in the democratic dispensation because women are still being marginalised, prejudiced, and discriminated against. The RCMA still creates institutions in which African male enter into polygynous marriages and enable them to achieve the status and entitlements that flow from marriage but does not provide any mechanism for African women who wishes to achieve the same by entering into polyandrous marriages.<sup>61</sup> This shows that African women are suffering from patterns of disadvantage. Simply due to their gender, women experience different forms of violence, especially in the social sphere.<sup>62</sup> In most cases, they are the ones subjected to domination by their male spouses. As previously demonstrated, men/husbands are regarded as the heads of the households such that the wife is seen to owe obedience to her husband.<sup>63</sup> Thus, inequality in marriage remains one of the discriminatory practices against women. The perpetuated patriarchy in African societies has made it difficult for women to be involved in polyandry

#### 4.3.2.2.2.5 The impact of discrimination on African women

African women cannot enter into protected polyandrous marriages, and eventually, that adversely affects the right to culture. Additionally, such discrimination does not only violate their right to equality, which includes the right to equal protection and benefit of the law, but also impairs the fundamental human dignity of persons as human beings or affects them adversely in a comparably serious manner.

This discrimination reinforces the existing societal prejudices against African women, and that is constitutionally problematic. The Constitutional Court noted that discriminatory provisions of the legislation would be problematic where they had the effect of entrenching stigma and stereotypes and where they encouraged

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<sup>61</sup> It has been demonstrated in chapter, particularly in para 1.1 that certain powers and rights which are given to men but are still not given to women.

<sup>62</sup> Gender in Geopolitics Institute 2021 <https://igg-geo.org/?p=3863&lang=en>.

<sup>63</sup> Gender in Geopolitics Institute 2021 <https://igg-geo.org/?p=3863&lang=en>.

discrimination.<sup>64</sup> At the heart of these stereotypes lie misconceptions based solely on the gender of a specific group. There is a misconception that women are inferior to men, particularly in African communities. Where provisions would increase misperceptions and prejudice and stereotypes in the public, they would lead to psychological harm and discourage women from entering into polyandry and thus affect their confidence, dignity and self-esteem.<sup>65</sup> Just as problematic would be that discriminating provisions have the effect of demeaning the individual, thereby strengthening and perpetuating the view that women are less worthy of protection as individuals.<sup>66</sup>

#### 4.3.2.2.2.3 The end of equality inquiry's application.

Where discrimination is found to be unfair, as the study has argued it to be on the present issue, then a determination will have to be made through the second leg of enquiry, as to whether the limitation can be justified under the limitation clause. Even section 9(4) of the Constitution provides that the State may not discriminate directly or indirectly on the grounds of gender, and this is deemed unfair unless the violation of African women's right to equality can be justified in terms of section 36 of the Constitution. Section 36 (limitation clause/stage) and its application to the present issue will be dealt with below in 4.3.3.

#### *4.3.2.3 Does the exclusion of polyandry in the RCMA violate the right to culture?*

##### 4.3.2.3.1 Nature and importance of the right to culture

Section 30 entrenches the +rights to language and culture as follows:

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 any provision of the Bill of Rights.

Section 31 guarantees certain rights to members of cultural and religious communities in the following way:

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<sup>64</sup> *National Coalition for Gay and Lesbian Equality I* para 23. See also *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC) para 44.

<sup>65</sup> See also *National Coalition for Gay and Lesbian Equality I* para 23.

<sup>66</sup> See *National Coalition for Gay and Lesbian Equality I* para 23.

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

(a) to enjoy their culture, practise their religion and use their language; and

(b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

(2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

This formulation is drawn almost directly from article 27 of the *International Covenant on Civil and Political Rights* (hereafter *ICCPR*),<sup>67</sup> which provides that people who belong to a particular "minority" shall not be denied "in community with other members of their group" the right to enjoy their own culture.<sup>68</sup> Further, there are numerous international conventions, declarations and protocols which promote the recognition and protection of cultural and linguistic communities.<sup>69</sup> Most important is the *United Nations Charter on Economic, Social and Cultural Rights*.<sup>70</sup>

Both sections 30 and 31 of the Constitution protect the rights of individuals within communities to pursue cultural practices. These are significant rights that safeguard diversity within South Africa.<sup>71</sup> Just like all other rights in the Constitution, these rights need to be interpreted in view of the founding value of human dignity which avows the human beings' equal moral worth and every person's the right to elect "to live a life that is meaningful to them."<sup>72</sup> "Understanding the right to cultural life against the background of human dignity emphasises that the rights in sections 30 and 31 are associative rights exercised by individual human beings."<sup>73</sup>

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<sup>67</sup> Ratified by SA on 10 March 1999.

<sup>68</sup> Article 27 of the *ICCPR* provides "in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

<sup>69</sup> See s 39(1)(b) of the Constitution mandate the courts to consider international law when interpreting the Bill of Rights

<sup>70</sup> International Covenant on Economic, Social and Cultural Rights (1966), ratified by SA on the 12 January 2015.

<sup>71</sup> *MEC for Education: Kwazulu-Natal v Pillay* 2008 1 SA 474 (CC) para 150.

<sup>72</sup> See also Article 22 of the *UDHR* which provides that: Everyone, as a member of society is entitled to realisation of the cultural rights indispensable for his dignity.

<sup>73</sup> *Pillay* para 150.

Religious and cultural practices are protected because they are central to human identity and hence to human dignity which is in turn central to equality.<sup>74</sup> Denying an individual's right to culture is then a denial of the individual's inherent right to human dignity, which is explicitly protected by sections 1 and 10 of the Constitution as an inalienable right and as a foundational constitutional value.<sup>75</sup> Demeaning one's culture often affects one's dignity and feelings of self-worth because culture is intimately intertwined with the emotions of the people.<sup>76</sup>

#### 4.3.2.3.2 Is the right of culture being infringed?

In chapter two above, it is clearly demonstrated that particular types of polyandry in particular communities forms part of African cultures and such polyandrous marriages are being entered into under customary law.<sup>77</sup> This entails that the right of African women to polyandry or to conclude polyandrous marriages is protected by both sections 30 and 31 of the Constitution. Section 30 specifically entrenches the right to participate in the cultural life of one's choice, which includes the cultural practice of polyandry. Equally, section 31 guarantees African women as members of cultural group to enjoy their culture and to form, join and maintain cultural associations which include the institution of polyandry. Failure by the RCMA to recognise the cultural practice of polyandrous marriages infringes on the right to a culture that is protected by both sections 30 and 31 of the Constitution. This non-recognition of polyandry by the RCMA does not only perpetuate the historical injustices, it also fails to undo the injustices of the past. Both sections 30 and 31 seem to suggest that the RCMA must undo the cultural subjugation of indigenous peoples brought about by the likes of the *BAA*.

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<sup>74</sup> *Pillay* para 64.

<sup>75</sup> See, for example, *Affordable Medicines Trust v Minister of Health* 2006 3 SA 247 (CC) para 59; and National Coalition for Gay and Lesbian Equality 1999 *National Coalition for Gay and Lesbian Equality I* para 26.

<sup>76</sup> *Dlamini* 1999 *Obiter* 26.

<sup>77</sup> See 2.3 above for brief overview of polyandry in the African context.

### 4.3.3 Limitation stage (section 36 of the Constitution)

#### 4.3.3.1 General

Sections 30 and 31 of the Constitution protect the rights of individuals within communities to pursue cultural practices. Sections 10 and 9 provide for the protection of human dignity and the right to equality respectively in the Bill of Rights. Whilst section 36 of the Constitution provides for the possible limitation of these rights as follows:

(1) The rights in the Bill of Rights may be limited 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, including—

- (a) The nature of the right;
- (b) The importance of the purpose of the limitation;
- (c) The nature and extent of the limitation;
- (d) The relation between the limitation and its purpose; and
- (e) Less restrictive means to achieve the purpose.

To analyse how the limitation clause should be applied, numerous scholars have identified a two-stage interpretation process based on the principle of proportionality set out in the leading Canadian case of *R v Oakes*.<sup>78</sup> This two-staged approach was adopted by the Constitutional Court in *Ex Parte Minister of Safety and Security: In Re S v Walters*.<sup>79</sup> The first stage of the process determines whether there has been an infringement of a right or freedom protected by the Bill of Rights.<sup>80</sup> The second stage of the inquiry seeks to determine the act or omission that caused the infringement can be justified under section 36 of the Constitution.<sup>81</sup>

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<sup>78</sup> *R v Oakes* (1986) 26 DLR (4th) 200. See also Mubangizi *The Protection of Human Rights in South Africa: A Legal and Practical Guide* 67. See *Makwanyane*: Proportionality or balancing approach entails the state and individuals competing interests or values must be weighed up.

<sup>79</sup> 2002 4 SA 613 (CC) para 26.

<sup>80</sup> Mubangizi *The Protection of Human Rights in South Africa: A Legal and Practical Guide* 67. Venter *Fundamental Rights in South Africa* 17.

<sup>81</sup> Mubangizi *The Protection of Human Rights in South Africa: A Legal and Practical Guide* 67. Venter *Fundamental Rights in South Africa* 17.

In *Christian Education South Africa v Minister of Education*, the constitutional Court summarised the limitation clause in the following manner:

Limitations on constitutional rights can pass constitutional muster only if the Court concludes that, considering the nature and importance of the right and the extent to which it is limited, such limitation is justified in relation to the purpose, importance and effect of the provision which results in this limitation, taking into account the availability of less restrictive means to achieve this purpose.<sup>82</sup>

As argued above, the non-recognition of polyandrous marriages limits women's constitutional rights to culture, dignity, and equality. What must be determined is whether that limitation is reasonable and justifiable, regard being had to some of the factors listed in section 36. But before doing so, it must be determined whether the impugned provisions amount to the law of general application. The impugned provisions of the RCMA amount to a law of general application because in *Dawood V Minister of Human Affairs*, the Constitutional Court held that in order to law qualify as the law of general application, a rule must have a character of law, which means it must derive from a source with lawful authority to issue the rule and it must be accessible, clear and precise.<sup>83</sup> Based on this definition, it is clear that all forms of legislation, including the RCMA, qualify as the law of general application.<sup>84</sup>

#### *4.3.3.2 The nature of the rights*

Detailed discussions of the nature and importance of these rights are provided in 4.3 above.<sup>85</sup> Wherefore, it is needless to reiterate that.

#### *4.3.3.3 The nature, extent, purpose, and importance of the limitation*

As comprehensively discussed above, the RCMA recognises polygamous marriages in African communities, however, which recognition is not afforded to polyandrous marriages. Recognition of polygyny to the exclusion of polyandry by the RCMA is therefore potentially inconsistent with the provisions of the Bill of Rights, which *inter alia* includes section 9 of the Constitution, which guarantee everyone with the right to

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<sup>82</sup> *Christian Education South Africa v Minister of Education* 2004 4 SA 757 (CC).

<sup>83</sup> *Dawood v Minister of Home Affairs* para 47

<sup>84</sup> See also Currie and De Waal *The New Constitutional and Administrative Law* 340

<sup>85</sup> For nature of rights see 4.3.2.1 (the right to human dignity), 4.3.3.1 (the right to equality), and 4.3.3.1 (the right to culture).

equality which includes equal protection and benefit of the law and the right not to be unfairly discriminated against.

The discrimination emanates from the Parliament's legislative measures as the RCMA affords or confers only men in customary marriages the right to marry more than one spouse, and this right is not guaranteed to women as the principle of non-discrimination requires. Such non-recognition further limits the right to dignity as provided for in section 10 of the Constitution, the dignity of women would have been respected and promoted if the state treats men and women equally by affording them equal benefits of the law in matters of this nature without an unjustified discrimination. Furthermore, the dignity of women requires and deserves that they pursue their cultural practices within communities without any statutory unjustified limitations.

Having regard to historical injustices of South Africa, women have been and are still disadvantaged through beliefs, customs and or unjust laws in marital matters. In this respect, the RCMA does not remove the anomalies created during the colonial-apartheid period. Non-recognition of African polyandrous marriages is inconsistent with sections 9, 15, 30 and 31 of the Constitution which suggest that the same effect should be given to African polyandrous marriage institutions as to African polygynous marriages.

As argued above in 4.3.2.2.2.1, there is no legitimate basis for this gendered differentiation of recognising polygynous to the exclusion of polyandrous marriages, where both are actually permissible under customary law. Thus, there is no importance of, let alone purpose for, limiting the right to dignity as protected in section 10, and the rights of individuals within communities to pursue cultural practices as guaranteed by both section 30 and section 31 of the Constitution.

It has been demonstrated in chapter 3, particularly 3.3.3 above, that the overall interpretation of the RCLSA seems to suggest that RCLSA cater for polyandry in the form of woman-to-woman marriages. The effect of this is that the spouses in such polyandrous marriages can inherit. However, the RCLSA does not cater to polyandrous

marriages which involve a woman marrying more than one man or when she marries both a woman and a man. The RCLSA does not solve the problem of non-recognition of polyandry, even when the RCLSA is read together with the RCMA. It may only at least be interpreted to cater for polyandry in woman-woman marriages.<sup>86</sup> However in as much as the RCLSA was enacted for purposes of regulating matters incidental to customary succession but not recognising marriages, it does not resolve the legislative dilemma under discussion.

*4.3.3.4 The relation between the limitation and its purpose; and less restrictive means to achieve the purpose.*

Once it has been established that a limitation's objective is legitimate, it must be determined whether the means employed to achieve the objective are rationally related to, or reasonably capable of achieving, that purpose.<sup>87</sup> As demonstrated above in 4.3.2.2.2.1 and 4.3.3.3, there is no importance of, let alone purpose for, limiting the right to equality as protected in section 9, the right to dignity as protected in section 10, and the rights of individuals within communities to pursue cultural practices as guaranteed by both section 30 and section 31 of the Constitution.

Since there is legitimate governmental purpose, it makes no sense to consider a fourth factor (whether "relationship between the limitation and its purpose") and fifth factor (whether "less restrictive means to achieve the purpose" exist).<sup>88</sup>

#### **4.4 Transformative constitutionalism**

The unreasonable and unjustified non-recognition of polyandry in the RCMA does not accord with transformative constitutionalism. The concept "transformative constitutionalism" can be said to have originated from the writings of Professor Karl Klare,<sup>89</sup> who described the concept as

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<sup>86</sup> See para 3.3.3 for detailed discussion. It has been demonstrated therein that the RCLSA is an extension of the RCMA, and that the RCMA influence the interpretation of the RCLSA.

<sup>87</sup> See *National Coalition for Gay and Lesbian Equality I* where Constitutional Court held that no rational connection existed between the legitimate object of promoting and protecting the traditional family and the exclusion of permanent same-sex partners from certain benefits to which married couples were entitled.

<sup>88</sup> Section 35

<sup>89</sup> Klare 1998 *SAJHR* 146-188.

a long-term project of constitutional enactment, interpretation and enforcement committed (not in isolation, or course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. 'Transformative constitutionalism connotes an enterprise of inducing large scale social change through non-violent political processes grounded in law.'<sup>90</sup>

The Constitutional Court in some cases applied the notion of transformative constitutionalism in dealing with the complexities caused by the pluralistic legal system like customary law. In *S v Makwanyane*,<sup>91</sup> the Constitutional Court further articulated the transformative nature of the Constitution as follows:

The Constitution expressly aspires to provide a transition from these grossly unacceptable features of the past to a conspicuously contrasting future. It is apparent that non-recognition of polyandry and discrimination against African women are some of such features which cannot be accepted in this new constitutional dispensation.

The former Chief Justice Langa further explained it in the following terms:

The Constitution is located in a history that involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens and includes all in the process of governance. As such, the process of interpreting the Constitution must recognise the context in which values, social justice and fundamental human rights. This spirit of transition and transformation characterises the constitutional enterprise as a whole.<sup>92</sup>

Langa DCJ opined that the majority of South Africans have waited so long for justice, equality and freedom and that any further delay in bringing justice to the people is inappropriate.<sup>93</sup> He noted that development by the courts on a case-by-case basis is problematic because changes will occur very slowly, and it will further lead to uncertainties about the real rules of customary law being prolonged.<sup>94</sup> This is what led the Constitutional Court in the case of *Bhe* to immediately and significantly change the customary rule of male primogeniture. This reinforces that the inclusion of polyandry must be made without any further delays.

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<sup>90</sup> Klare 1998 *SAJHR* 146, 150.

<sup>91</sup> *Makwanyane* para 262.

<sup>92</sup> *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2001 1 SA 545 (CC) para 21.

<sup>93</sup> Ozoemena 2015 *PELJ* 973.

<sup>94</sup> *Bhe* para 112.

The RCMA excludes polyandry through silence and omission that is as effective in law and practice as if effected by express language. Such exclusion does not align with the idea of transformative constitutionalism. It must be noted that the Constitution is intended and committed to recognising and healing the injustices of the past, and further establishing a society based on democratic values, social justice and fundamental human rights.<sup>95</sup> It appears that the RCMA does not share the same or similar intentions and commitments with the supreme Constitution which the validity of all laws is tested against it. The simple task for the Parliament, through the RCMA, was to recognise customary marriages which were not recognised in the past. There is no constitutionally legitimate reason that this had to exclude polyandry as it did. Transformative constitutionalism requires that it does so.

#### **4.5 Conclusion**

Polygyny as a form of polygamous customary marriage directly enjoys statutory recognition in the Republic of South Africa, and thus far no court has had the privilege to adjudicate on its constitutionality. This chapter, however, focuses on legal enquiry in respect of the constitutionality of non-recognition of polyandry in the RCMA, which has an impact of impeding women from marrying more than one spouse as men do under the Act. In the determination of constitutionality whereof, section 36 constitutionality test is employed to determine whether there is any limitation imposed on women's rights and if in the affirmative, is same justifiable and reasonable.

It is the findings of this chapter that the right to human dignity, equality and cultural rights of women are violated by the RCMA as the statutory differentiation, in terms of which women are not afforded statutory benefits of marrying more than one spouse as men do, and same amounts to unfair discrimination. In absence of a just and sound reason for which the state can reasonably be said it had a governmental legitimate interest to protect through the limitation of the rights in question, then it is unlikely that the unjust law passes the constitutional muster.

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<sup>95</sup> See the Preamble to the Constitution.

It is evident that polyandry was and is not afforded equal protection or recognition not because of oversight, but due to a legacy of severe historic oppression against African women. The same demeans women's inherent worth as a human, particularly by way of being discriminated against on a gender basis, which discrimination is seen through the non-recognition of polyandry. All of the above considered, it is apparent that there is no legitimate government purpose for limiting the aforementioned rights, and there is no justification for the continuity of the non-recognition of African polyandrous marriages where they are permissible in people's customs, for it does not only limit the rights in sections 9,10,15,30 and 31 of the Constitution, but it also violates them unjustifiably. The limitation of these rights does not pass constitutional muster as they are not reasonably and justifiably limited in an open and democratic society based on human dignity, equality and freedom.<sup>96</sup>

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<sup>96</sup> See s 36 of the Constitution.

## Chapter 5 Conclusion and recommendations

### 5.1 Summary of research findings

Chapter two: Polygamy has been practised since times immemorial in Africa. Although the most common form of polygamy is polygyny, there is history of practice of polyandry in South Africa by the *Balobedu* people in their queenship and potentially through woman-to-woman marriages amongst *Bapedi*, *Vhavenda*, *Balobedu* commoners for or as a resolution to infertility or caretaking of children or elderly women. In various parts of Africa, particularly the Giryaku people of Kenya, polyandry came before polygyny. In DRC, the Lele people practise a form of it too as many young men in the community would be involved with one woman. In Mozambique and amongst the South Sotho-speaking people, forms of polyandrous relations such as *Bonyatsi* came as a result of migration and apartheid law barriers when husbands could not return home; so, it was women's solution to material and emotional needs. However, chief among the capture of customary law by colonial-apartheid authorities is the entrenchment of patriarchy in African customary law. Patriarchy contributed to the suppression of polyandry and led to the popularity of polygyny to the exclusion of polyandry. It is also argued that but for the capture and corruption of African customary law by the colonial-apartheid authorities, African customary law was probably on the trajectory to develop to embrace polyandry more fully.

Chapter three: Even though sections 2(3) and 2(4) of the RCMA are couched in gender-neutral language to recognise polygamy, the most crucial provisions of the RCMA indicate that the Act does not permit women to have more than one spouse at the same time. The RCMA does not, therefore, recognise polyandry. Thus, for the woman (but not for the man), the consequence of entering into a customary marriage is that the husband may validly marry another woman during the subsistence of their marriage. The RCLSA, which is an interpretive tool of the RCMA, seems to recognise woman-to-woman marriages. It is noteworthy that woman-to-woman marriages are polyandrous in nature as demonstrated in chapter two. This benefit for women in woman-to-woman relationships is for limited purposes of succession under the RCLSA

in cases of the death of a partner in woman-to-woman relationship. The RCLSA cannot be said to recognise and embrace polyandry as a marriage institution.

Chapter four: Recognition of polygyny to the exclusion of polyandry by the RCMA infringes the right to equality, the right to dignity and cultural rights enshrined in sections 9, 10, 30 and 31 of the Constitution, respectively. Therefore, such non-recognition is inconsistent with the requirement of "equal protection and benefit of the law" and the prohibition against unfair discrimination. The said non-recognition amounts to unfair discrimination based on gender. It fails to align with the constitutional values of human dignity, freedom, and equality. This non-recognition has been demonstrated to be unconstitutional.

It must be acknowledged that the RCMA, as enhanced by its interpretations in line with the Constitution by various courts in South Africa, played a significant role in reducing inequality between men and women practising customary law.<sup>1</sup> Nonetheless, the RCMA had no effect of doing same insofar as the rights of women to polyandrous marriages under customary law. To remedy that, this dissertation will recommend the amendment of the RCMA and the judicial development of customary law as an alternative and conditional remedy. These are discussed below in detail.

## **5.2 The need to amend the RCMA**

Despite the efforts of the RCMA to redress the injustices of the past, it still deprives certain cultural communities from concluding legally or indigenously recognised marriages under the Act. This includes customary polyandrous marriages concluded in some African communities as discussed in chapter two above. Moreover, the non-recognition of polyandrous marriages by the RCMA negatively impacts the development of customs towards the general acceptability of polyandry. Although the RCMA is a welcome relief for the majority of women, including those who are in polygynous marriages, it is insufficient to deal with the dynamics and flexibility of customary law in the direction of polyandry. This is a clear indication that the RCMA

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<sup>1</sup> For example, see s 6 of the RCMA which abolished the marital power a husband had over the wife and pronounces them to have equal dignity and capacity in the marriage enterprise.

is trailing behind the living law. Living customary law keeps on changing to suit people's circumstances, and that includes the accommodation of polyandry.

Is the RCMA in need of amendment to cater for the practice of polyandry? The amendment of the RCMA will enable African women to conclude cultural polyandrous marriages that will accord with the principles of equal protection and benefit of the law, non-discrimination, human dignity, and unity in diversity, as encapsulated in the Constitution. It is noteworthy that the solutions that do not involve amendment will not work. For example, there is the principle of constitutional subsidiarity that suggests that other non-constitutional remedies must be considered before attacking constitutionality of legislation.<sup>2</sup> This entails that the interpretation must be preferred over a finding of unconstitutionality. It has been demonstrated in both chapters three and four above that the RCMA cannot be interpreted in any way which suggests the recognition of polyandry. The study interpreted provisions of RCMA holistically considering the recommendation in the SALC's Report on Customary Marriages which recommended recognition of polygyny to the exclusion of polyandry. Major provisions of RCMA that regulate polygamy are couched in gender discrimination terms.<sup>3</sup> The study further attempted to interpret/read the RCMA and the RCLSA together to gauge whether issues of unconstitutionality could be avoided. However, in as much as the RCLSA was enacted for purposes of regulating matters incidental to customary succession but not recognising marriages, it does not resolve the legislative dilemma under discussion. The validity of all customary marriages depends on RCMA and not RCLSA.

Therefore, this study recommends the solution of adding the words "or woman" and "or her" in all areas of the RCMA which refers to "a man" and/or his", as well as "wife"

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<sup>2</sup> See Du Plessis 2000 *Stell LR* 385, where the principle of subsidiarity is defined as a reading strategy where courts will refrain from taking decisions that can be taken by lower courts or avoid a constitutional decision where a matter can be decided on non-constitutional issues. See also the case of *My Vote Counts NPC v Speaker of the National Assembly* 2016 1 SA 132 (CC), Cameron J defined subsidiarity as denoting the hierarchical ordering of institutions, of norms, of principles or remedies and signifies that central institutions or higher norm should be invoked where the more local institutions or concrete norms or detailed principles or remedy does not avail.

<sup>3</sup> For example, see ss 7(1)(b)(ii) , 7(4)(b), 7(5), 7(6) and 8(4)(b) of RCMA.

and/or "spouse" into all areas of the RCMA which refers to a "husband".<sup>4</sup> Wherefore, polyandrous marriages which include woman-to-woman marriages will be catered for in the RCMA. The amended provision must be read together with section 3(1)(b) to ensure that the amended provision will not be read to allow for blanket polyandry beyond where it is specifically provided for in specific customary communities. As a result of the amendments, the development and acceptance of polyandry can potentially take place with more ease as the RCMA will create room for such development. It remains possible that the cultural practice of polygamy can and is even likely to develop in African communities to accommodate polyandry beyond areas discussed in chapter two above. Nonetheless, the recommendation for said development is discussed in detail in 5.3 below for speedy development in order to remedy the historical impacts which delayed, if not, prohibited the development of polyandry.

### **5.3 Judicial development of Customary law**

Section 39(2) of the Constitution provides that:

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

This study further recommends, in the alternative, the development of customary law by courts, particularly the practice of polygamy to enable more African women to marry more than one spouse as transformative constitutionalism discussed above in 4.4 requires.<sup>5</sup> Customary law was robbed of its inherent capacity to evolve to keep

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<sup>4</sup> This adding wording as amendment is similar to reading-in which can only be invoked by court when a case is taken to court. See also *S v Van Rooyen* 2002 5 SA 246 (CC) para 88, where Chasklason CJ noted that: "if the legislation is held to be unconstitutional, the appropriate remedy ought, if possible, to be in the form of a notional or actual severance, **[or reading in]**, so as to bring the law within acceptable constitutional standards. only if this is not possible, must a declaration of complete invalidity of the section or subsection be made." It is noteworthy that 'reading in' takes places when a court actual adds words to the legislative provision in order to cure the constitutional defect. For example, in *National Coalition for Gay and Lesbian Equality I* para 98, the Constitutional Court extended the benefits enjoyed by foreign spouses of South African citizens under the *Aliens Control Act* 96 of 1991 to same-sex life partners of South African Citizens.

<sup>5</sup> See *National Coalition for Gay and Lesbian Equality I* para 60, where constitutional court held court held that: "Persons belonging to certain categories have suffered considerable unfair discrimination in the past. It is insufficient for the Constitution merely to ensure, through its Bill of Rights, that statutory provisions which have caused such unfair discrimination in the past are eliminated. Past unfair discrimination frequently has ongoing negative consequences, the continuation of which is

up with the changing lives of the people it served, particularly women.<sup>6</sup> Thus, if a court of law is faced with an issue of interpretation of the RCMA in a particular case involving polyandry, as long as the matter is ripe and not academic, such court shall interpret the Act as in line with section 39(2), and give effect to the spirit and purport of the Bill of Rights by granting an appropriate order that will in effect recognise polyandry in that particular set of facts before the court.

The Constitutional Court in many cases provided much-needed eradication of gender inequalities to protect and benefit women. For example, in *Bhe*, it declared the customary practice of male primogeniture unconstitutional as it violated the right to equality. In *Shilubana*,<sup>7</sup> it protected the right to gender equality by confirming the succession of a woman as hosi-chief. Even in *Gumede* the Constitutional Court protected the equal rights of women in marriage. The Constitutional Court's decision or outcome is a clear indication that legislation trailed behind the living law, and irrespective of development of the living law. This serves as a typical example of "a change in law devoid of any adequate engagement with the social norms of the community."<sup>8</sup>

There is no doubt that African customary law needs to be developed to bring it in line with the ethos of the Constitution, especially the practice of polygamy, particularly where polyandry is concerned. Nevertheless, it is noteworthy that:

when the Constitution guaranteed the continued existence of and survival of an "evolving" customary law, it intended that how customary law should develop should be best left to future social progression and not development at all costs.<sup>9</sup>

Section 39(2) of the Constitution mandate courts to develop customary law. The provision requires courts, when developing the "common law or customary law to promote the spirit, purport, and objects of the Bill of Rights". In *Gumede*, Deputy Chief

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not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and even indefinitely. Like justice, equality delayed is equality denied." See also preamble of the Constitution, and s 1 thereof, the constitutional objective to cure the divisions and injustices of the past demands and supports the recognition of polyandry.

<sup>6</sup> See also *Bhe* para 90.

<sup>7</sup> *Shilubana v Nwamitwa* 2009 2 SA 66 (CC).

<sup>8</sup> See also Ozoemena 2015 *PELJ* 973.

<sup>9</sup> Ozoemena 2015 *PELJ* 981-982

Justice Moseneke emphasised that courts are obliged to develop customary law so that it must be in alignment with constitutional dictates.<sup>10</sup> However, the development of polygamy for the entrenchment of polyandry by courts can only take place when a matter is taken to court, that is when the matter is ripe.

In *Bhe*,<sup>11</sup> Ngcobo J made reference to two contexts wherein there might be a need for development of customary law, as noted by the Constitutional Court in *Carmichele*.<sup>12</sup> The first context was where there must be an adaption of customary law to changed circumstances. This was a case in *Shilubana*, where the Valoyi tribe's traditional authority "gave effect to the nature of living customary law" by selecting the daughter of their late *hosi*, Fofeza, to be a *hosi*. She was denied to occupy this traditional leadership position because of the male primogeniture practice at the time her father's death. The second context was there is a need to align the customary law with the Bill of Rights.<sup>13</sup> For example, in *Mabena*, the High Court developed the customary rule to allow women too to take part in *lobolo* negotiations.<sup>14</sup> This practice developed based on the changed nature of the family composition in South Africa, where women are also heading households.<sup>15</sup> Prohibition of a mother who headed the household from participating in the *lobolo* negotiation based on her gender was found to be in conflict with the Constitution. In these circumstances, the living law significantly contributed in aligning customary rule with the Constitution.<sup>16</sup>

Significant principles that must be born in mind when developing customary law, as enunciated by Van der Westhuizen J in *Shilubana* and repeated in *Mayelane* were as follows:

- (a) the traditions of the community concerned must be considered;
- (b) the right of communities that observe systems of customary law to develop their law;

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<sup>10</sup> *Gumede v President of RSA*.

<sup>11</sup> *Bhe* para 212.

<sup>12</sup> *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) para 33

<sup>13</sup> See also s 2 of the Constitution which requires laws to align with Constitution.

<sup>14</sup> This issue was discussed in chapter three, particularly in 3.2.2.1.3.

<sup>15</sup> See also Ozoemena 2015 *PELJ* 982.

<sup>16</sup> See Ozoemena 2015 *PELJ* 988

(c) the need for flexibility and development must be balanced against the value of legal certainty, respect for vested rights and the protection of constitutional rights; and

(d) while the development of customary law by courts is distinct from its development by a customary community, the courts when engaged with the adjudication of a customary-law matter, must remain mindful of their obligations under section 39(2) of the Constitution to promote the spirit, purport and objects of the Bill of Rights.<sup>17</sup>

Ozoemena suggested that the Constitutional Court must begin to decipher African law and justice, and that it can do so by referring matters back to the communities before attempting to develop living customary law — in consideration of section 211(2) of the Constitution.<sup>18</sup> Therefore, this study proposes that where the recommended amendments to the RCMA made in paragraph 5.2 above are not made timeously then justice demands that the judiciary shall, in accordance with its innate duty, bring into context the values that are relevant to the community when developing customary law.<sup>19</sup> “In as much as the constitutional provisions trump any law or conduct that conflicts with the Constitution when tasked with the development of the said customary law, reference should always be made to the communities themselves”.<sup>20</sup> Even in *Shilubana*, the Constitutional Court held that communities should be afforded a chance to develop their customs and traditions to promote gender equality.<sup>21</sup> Wherefore, research and interactions should be done with those affected by the proposed changes and amendments to the laws.

Coupled with the above, when the legislation is thus amended, the state has a task to initiate educational drives in communities that are affected by the amended statute, to ensure the implementation thereof. <sup>22</sup>These drives would be successful in that the information is received by the people who would be affected by the knowledge of the

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<sup>17</sup> *Shilubana* para 44-49; *Mayelana v Ngwenyama* 2013 4 SA 415 (CC) para 45. See also Ozoemena 2015 *PELJ* 983.

<sup>18</sup> Ozoemena 2015 *PELJ* 988.

<sup>19</sup> It is noteworthy that the judiciary can only act if there is a matter of polyandry brought before them. This entails that this solution is conditional.

<sup>20</sup> See also *Magagula Reform of customary law of succession with specific reference to gender equality* 62.

<sup>21</sup> *Shilubana* paras 73-74.

<sup>22</sup> See also *Magagula Reform of customary law of succession with specific reference to gender equality* 96.

law or lack of knowledge.<sup>23</sup> It is significant to note here that, in the same way, those traditional communities cannot function in isolation. Even the judiciary and legislature cannot function in isolation. There ought to be constant interactions in both directions.

## **5.4 New marriage legislation as per Green Paper on marriages**

### *5.4.1 General*

The above recommendations may accord with the steps that Parliament has already taken in its most recent *Green Paper on Marriages in South Africa* (hereafter 'the Green Paper').<sup>24</sup> In this Green Paper, it is proposed that single new marriage legislation should regulate the marriages of all people residing in South Africa. Three options in which such new legislation is proposed to be designed are discussed and analysed below. Importantly, the Green Paper also suggests the recognition of unrecognised marriages, including polyandrous marriages.<sup>25</sup> It must be noted that it further proposes to accommodate marriages concluded with foreign nationals.<sup>26</sup> This will enable a flexible practice of polyandry in the sense that South African women will easily enter into polyandrous marriages with men/women from other African countries where polyandry is practised. That will play a crucial role in the development of polyandry in South Africa. In chapter two,<sup>27</sup> this study in relation to polyandry, made reference to other African countries as many African peoples share a connected pre-colonial cultural identity, shared colonial experiences and continued cultural similarities to date. It is a remedial and essential part of decolonisation, for African countries to dip into each other in the rebuilding and recognition of respective customary laws and legal systems.<sup>28</sup>

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<sup>23</sup> See also Magagula *Reform of customary law of succession with specific reference to gender equality* 96.

<sup>24</sup> Item 4.3 of GN R398 in GG 44529 of 4 May 2021.

<sup>25</sup> See item 4.1 of GN R398 in GG 44529 of 4 May 2021.

<sup>26</sup> See item 4.1 GN R398 in GG 44529 of 4 May 2021.

<sup>27</sup> Particularly in 2.3.1(Brief overview of polyandry in the African context)

<sup>28</sup> See chapter two above, particularly in 2.3.1.

#### 5.4.2 Option 1: Single Marriage Act

The Single Marriage Act seeks to unify different laws.<sup>29</sup> Unifying the law in this context entails completely replacing different legal systems with one uniform legal system.<sup>30</sup>

The difficulty with this approach is that it may have the unintended consequence of harmonising irreconcilable legal systems. It is doubtful whether this approach would pass constitutional muster. Secondly, this approach could also have the unintended consequence of bringing about cultural and religious discrimination. Consequently, a single Marriage Act that unifies a set of requirements and consequences applying to all marriages may not be suitable for South Africa which has a mixed legal system and might not pass constitutional muster.<sup>31</sup> A single marriage Act might dilute customary law by extending people's customs to everyone else. For instance, it may impose polyandry in general and not in respect of where customary law of a particular community allows it or may allow it.

#### 5.4.3 Option 2: Omnibus or umbrella Marriage Act

The omnibus or umbrella Marriage Act is proposed to be designed to harmonise the existing marriage legislation "to remedy and eliminate conflicts between different legal systems, although they will be allowed their distinct recognition and continuation."<sup>32</sup> Such omnibus legislation would consist of various chapters to reflect the current diverse set of legal requirements for civil marriages, customary marriages civil unions ,and other marriages that are yet to be accommodated by the legislation.<sup>33</sup>

This option may be a success provided that the chapter and provisions that regulate customary marriages recognise the practice of polyandry. This study, in 5.2 above, recommended how the RCMA should be amended. Therefore, it would be recommended that *the Omnibus or Umbrella Marriage Act* must contain such amendments.

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<sup>29</sup> Item 4.3 GN R398 in GG 44529 of 4 May 2021.

<sup>30</sup> Also see Rautenbach 2008 *EJCL* 6.

<sup>31</sup> See also Item 4.3 GN R398 in GG 44529 of 4 May 2021.

<sup>32</sup> Item 4.3 GN R398 in GG 44529 of 4 May 2021.

<sup>33</sup> Item 4.3 GN R398 in GG 44529 of 4 May 2021.

#### *5.4.4 Option 3: Parallel Marriage Acts*

This approach considers the retention of the status quo.<sup>34</sup> Although this would generally be suitable for the country's mixed legal system, retaining the status quo would be inconsistent with the transformative nature of the country's Constitution which is addressed in 4.4 above. Moreover, this would need various interlinked legislation to be amended and the new legislation to be promulgated to govern a variety of religious and cultural marriages that are excluded by the current legal regime.<sup>35</sup>

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<sup>34</sup> Item 4.3 GN R398 in GG 44529 of 4 May 2021.

<sup>35</sup> See also Item 4.3 GN R398 in GG 44529 of 4 May 2021.

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