

**THE 'OFFICIAL' VERSION OF CUSTOMARY LAW *VIS-À-VIS* THE
'LIVING' HANANWA FAMILY LAW**

BY

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Declaration

I declare that the thesis hereby submitted to the University of South Africa for the degree of Doctor of Laws has not been previously submitted by me for the degree at this or any other University; that it is my own work in design and in execution; and that all materials contained herein had been duly acknowledged.

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(MR) CW RAMMUTLA

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DATE

Preface

The study sought to determine, first, what the rules of the Hananwa family law were and, second, whether those rules were compatible with the *Constitution*. First, it documented the rules of the official family law. The problem that the study countenanced is that customary law is "corrupted, inauthentic and lacking authority".¹ Second, it established and documented the rules of the Hananwa family law. The problem that the study countenanced in respect of Hananwa law was that it was difficult to ascertain the content of the rules of the "living" Hananwa law in order to determine their compatibility with the provisions of the Bill of Rights. Moreover, the traditional Hananwa community is inegalitarian and patriarchal.

Section 9 of the *Constitution* provides that everyone is equal before the law and enjoys equal and full protection and benefit of the law. The study found that the Hananwas still observe their system of customary law. However, there are visible changes. For instance, nowadays the spousal consent is a validity requirement for all customary marriages. A parent or legal guardian must consent to a customary marriage of a minor. The individual spouses, not their families, are parties to their own customary marriages. African women enjoy equal status. This development is consistent with section 9 of the *Constitution* read with section 6 of the *Recognition of Customary Marriages Act* 120 of 1998. According to the Constitutional Court, in *MM v MN and Another* 2013 4 SA 415 (CC), the first wife must consent to her husband's customary marriage to another woman in addition to her customary marriage to him.

However, some rules of the Hananwa law do not comply with the provisions of the Bill of Rights. For instance, according to the Hananwa law, extramarital children do not enjoy equal inheritance rights and maintenance rights yet. This discrimination is inconsistent with the constitutional right to equality and the provisions of the *Reform of Customary Laws of Succession and Regulations of Related Matters Act* 11 of 2009.

1 Costa 1998 SAJHR 525, 534.

The *Constitution* puts common law and customary law on a par. However, the courts have often replaced customary law dispute resolution rules with the common law rules. For instance, the Constitutional Court in *Bhe and Others v Magistrate, Khayelitsha and Others; Shibi v Sithole and South African Human Rights Commission and Another v President of the Republic of South Africa and Another* 2005 1 SA 580 (CC) and the High Court in *Maluleke v Minister of Home Affairs* 2008 JDR 0426 (W) substituted the rules of common law for those of customary law in order to resolve customary law disputes.

The legislature could not be outdone. A meticulous study of the *Recognition of Customary Marriages Act* 120 of 1998 and the *Reform of Customary Laws of Succession and Regulations of Related Matters Act* 11 of 2009 reveals that their provisions almost appropriately reflect the common law marriage and intestate succession rules respectively. The *Recognition of Customary Marriages Act* has, furthermore, adopted the provisions of the *Divorce Act* of 1979. Section 28 of the *Constitution* read with the *Children's Act* 38 of 2005 has generally substituted the fundamental human rights for the unequal rights provided by the customary law of parent and child. The *Maintenance Act* 99 of 1998 has substituted the communal form of maintenance under customary law.

Keywords

Bill of Rights, capacity to act, capacity to litigate, divorce, emancipation, engagement, extramarital children, customary marriage, group rights, individualisation, individual rights, intestate succession, legal capacity, *lobolo*, maintenance, marital children, marital guardianship, natal guardianship, polygamy, polygyny, polyandry, spousal consent, spousal equality, parental consent

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List of abbreviations

ACHR	American Convention on Human Rights
AJ	Acta Juridica
ANC	Antenuptial contract
BAA	Black Administration Act
BCLR	Butterworths Constitutional Law Reports
CC	Constitutional Court
CEDAW	Convention on Elimination of all Forms of Discrimination against Women
CILSA	Comparative and International Law Journal of South Africa
Electronic J of Comp L	Electronic Journal of Comparative Law
Int'l J Soc L	International Journal of the Sociology of Law
J Hum Rts	Journal of Human Rights
J Leg Plur	Journal of Legal Pluralism and Unofficial Law
JRAS	Journal for the Royal Anthropological Society
LAWSA	Law of South Africa
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act
PER/PELJ	Potchefstroom Elektroniese Regstydskrif/ Potchefstroom Electronic Law Journal
S Afr J Ethnol	South African Journal of Ethnology
SACJ/SAS	South African Journal of Criminal Justice/Suid-Afrikaanse Tydskrif vir Strafrepleging
SACR	South African Criminal Reports
SAJHR	South African Journal on Human Rights
SALC	South African Law Commission
SALJ	South African Law Journal
SALR	South African Law Reports
SALRC	South African Law Reform Commission

SAPR/PL	SA Publiekreg/SA Public Law
SCC	Supreme Court Cases
SCJ	Supreme Court Journal
Stell LR	Stellenbosch Law Review
THRHR	Tydskrif vir die Hedendaags Romeins-Hollandse Reg/Journal of Contemporary Roman-Dutch Law
TRW	Tydskrif vir Regswetenskaps/Journal for Juridical Science
TSAR	Tydskrif vir Suid-Afrikaanse Reg/Journal for South African Law
UDHR	Universal Declaration of Human Rights
WLSA	Women and Law in Southern Africa
ZAR	Zuid-Afrikaansche Republiek
ZLR	Zimbabwe Law Review

Glossary

Hlatswadirope: Sororate. According to this custom, if a woman is barren the families negotiate an ancillary marriage involving the husband of the barren woman and her sister or close female relative for purposes of raising a seed for the house of the barren woman. The ancillary marriage is a subsidiary to the primary marriage between the man and the barren woman.

Go ageletsa motshidi: Same as *go beeletsa*.

Go beeletsa: An act of betrothal.

Go e gapa le namane: When a man marries a woman who has extramarital children, the children become his children too.

Go fiwa dipitsa: To be released (emancipated) from the guardianship of the family head.

Go kgopela sego sa meetse: To ask for a hand in marriage.

Go ntsha ngwana ntlong: To take a baby out of a quarantined hut after the fall of an umbilical cord.

Go nyalwa ke lapa: To be married to a house without a specific husband. See *ngwetsi ya lapa*.

Go thiba sefero: Same as *go beeletsa*.

Go tsena ntlong: To take the widow of your close relative as a wife.

Go tshabisa mosadi: To elope.

Go tsosa: To raise the deceased by raising a seed for him or her.

Lebitla la mosadi ke bogadi: Customary marriage is a permanent marriage. Literally, it means the grave of a woman is at her marital family's.

Lobolo: Cash or kind in consideration of marriage.

Magadi: Same as *lobolo*.

Ngwetsi ya lapa: This is a woman who marries into a family without a male heir in order to raise a seed for the family. The family will allocate her a *tsena* husband from among the closest relatives of the house to which she is married. The children of the house of the *ngwetsi ya lapa* belong to her house and not her *tsena* husband or his house.

Seyantlo: Levirate. In the case of levirate, a sister or a close female relative of a deceased woman marries her widower in order to raise seed(s) for her sister or deceased relative. The children of *seyantlo* belong to her deceased sister.

Traditional leadership: This is the leadership that governs communities in accordance with customary law and custom. In accordance with the *Traditional Leadership and Governance Act* 41 of 2003, the indunas are traditional leaders and chiefs are senior traditional leaders. There are principal leaders to whom traditional leaders are subordinate. There are also kings and queens to whom principal leaders report.

Ukungena: Same as *tsena*.

Ukuvusa: To raise a deceased person from the dead (to raise a seed for a deceased person). Same as *go tsosa*.

Ukuvusa husband: Same as *go tsosa* husband.

CHAPTER 1

INTRODUCTION TO CUSTOMARY FAMILY LAW

1.1 Introducing the issues

In 2005, in *Bhe and Others v Magistrate, Khayelitsha and Others; Shibi v Sithole and South African Human Rights Commission and Another v President of the Republic of South Africa and Another*,¹ the Constitutional Court had to decide whether or not to develop the customary rule of male primogeniture because of its apparent inconsistency with the constitutional right to equality.² Besides the fact that the court, in *Bhe*, eventually found that the rule of male primogeniture as it applies in customary law to the inheritance of property is inconsistent with the *Constitution* and thus invalid "to the extent that it excludes or hinders women and extra-marital children from inheriting property",³ it also clearly came to the fore that the genuine rules of customary law are not always easy to find.⁴

1.2 The problem statement

South Africa is a multi-faith and multi-cultural society that has a multi-layered legal system shaped by a *Constitution* which is the supreme law of the land.⁵ One of the layers of this legal system is customary law. Customary law, in particular the living customary law, is community-based, unwritten and generally unknown to those who are not members of the community in which it is found.

1 *Bhe v Magistrate, Khayelitsha; Shibi v Sithole and South African Human Rights Commission v President of the Republic of South Africa* 2005 1 SA 580 (CC). Hereafter *Bhe*. See also Bekker and Koyana 2012 *De Jure* 568, 571.

2 The equality clause is contained in s 9 *Constitution of the Republic of South Africa*, 1996, hereafter the *Constitution*.

3 For commentary on the customary law of succession, see, among others, Himonga 2005 *Acta Juridica* 82; Rautenbach 2008 *Electronic J of Comp L* 1.

4 See, among others, Heaton *South African Family Law* 206 and 210 and the authorities in it.

5 *Pharmaceutical Manufacturers Association of South Africa; In re: Ex parte Application of the President of the Republic of South Africa* 2000 2 SA 674 (CC) para 44; Hosten *et al South African Law* 1248-1249. See also s 15(3) of the *Constitution*, which provides that the *Constitution* does not prohibit legislation that recognises marriages under a system of religious law, customary law, traditional law and personal or family law.

The rules of customary law must be predictable and certain.⁶ They must promote the constitutional values of human dignity, equality and freedom as well as the spirit, object and purport of the Bill of Rights.

Obviously, there are problems that affect the interpretation and application of customary law. The first problem is that the official customary law is "corrupted, inauthentic and lacking authority".⁷ The second problem is that the rules of the living customary law are not always readily ascertained and, if they are, are not always ascertained with sufficient certainty.⁸ Just as the system of customary law mirrors what goes on in a community in which it is found,⁹ so the community itself is the main source of its own system of customary law. Elias¹⁰ points out that the customary law of a given community "is the body of rules which are recognised as obligatory by its members". Although customary law is known to recognise a group as a legal subject, the piercing of the corporate veil reveals that each individual member of the group "has fairly well-defined rights and duties".¹¹ Koyana¹² points out that law, in a real sense, "is a reflection of the way people live" and law, being a discovery more than an invention, has to be expressive of the value system of the society in which it is found.¹³ All law is generated by and develops within society.¹⁴ The genuine rules of customary law are flexible and adaptive.¹⁵

Matthews¹⁶ points out that one of the ways of getting to know something of the mind of a people is through the study of their legal system. The converse is that one of the ways of getting to know the genuine legal system of a people is through the study of something of their mind: their ways and wants. A legal

6 Grenfell *Legal pluralism and the Rule of law* 60-70.

7 Costa 1998 SAJHR 525, 534.

8 See s 1 of the *Law of Evidence Amendment Act* 55 of 1998.

9 See among others *S v Acheson* 1991 2 SA 805 (Nm) 831A-B; Anyebe *Customary law* 7.

10 Elias *Nature of African Customary Law* 55.

11 Elias *Nature of African Customary Law* 82-83.

12 Koyana *Customary Law* 91.

13 Koyana *Customary Law* 156.

14 Koyana *Customary Law* 156.

15 Koyana *Customary Law* 157.

16 Matthews *Bantu Law* 14-15.

system contains what a people considers to be worthy of preservation among its customs and practices.¹⁷ It is said that customary law is "a mirror of accepted usage".¹⁸ Anyebe¹⁹ points out that law "is an expression of the ideals and aspirations of [a] given people". Salmond²⁰ points out that customary law embodies the principles of truth, justice and public utility. Genuine rules of customary law reflect the soul of the society.²¹ The *Constitution*²² expressly provides that a court must apply customary law when it is applicable subject to the *Constitution* and any legislation that specifically deals with customary law.²³ The court, in *S v Acheson*,²⁴ described our legal system as:

[the] mirror reflecting the natural soul, the identification of the ideals and aspiration of a nation, the articulation of the values bonding its people and disciplining its government.

The rules of customary law must pass the muster of the *Constitution*, in particular the Bill of Rights.²⁵ The court must actually apply the genuine rules of customary law. If those rules are not consistent with the *Constitution*,²⁶ they must be developed²⁷ or struck down to the extent of the inconsistency.²⁸ The Bill of Rights²⁹ provides, among other matters, that everyone is equal before the

17 Matthews *Bantu Law* 14-15.

18 *Omidkun Owonyin v Omtosho* (1961) AILNLR 304 309.

19 Anyebe *Customary law* 7.

20 Salmond *Jurisprudence* 203.

21 Anyebe *Customary law* 21.

22 For detailed discussion on the *Constitution* and constitutional law, see among others De Villiers *Birth of a Constitution*; Chaskalson *et al Constitutional Law*; Devenish *Commentary*; Currie and De Waal *Constitutional Law*; Motala and Ramaphosa *Constitutional Law*; Woolman *et al Constitutional Law*; Rautenbach and Malherbe *Constitutional Law*.

23 S 211(3) of the *Constitution*; *Gumede v President of the Republic of South Africa* 2009 3 BCLR 243 (CC) (hereafter *Gumede*); Bekker and Rautenbach "Application of African Customary Law" 43; Bekker and Van Niekerk 2009 *SAPR/PL* 206-222. For further reading, see, among others, Kerr 1994 111 *SALJ*; Kerr 1997 *SALJ*; Kerr 2001 *THRHR*; Maithufi 1998 *THRHR*.

24 *S v Acheson* 1991 2 SA 805 (Nm) 831A-B.

25 Ss 2, 39 and 211(3) of the *Constitution*.

26 See s 211(3) of the *Constitution*.

27 S 8 read together with s 39 of the *Constitution*.

28 S 39(2) of the *Constitution*; Mbatha 2002 *SAJHR* 260; Mbatha 1999 *Bulletin* 7; Bekker and Koyana 2012 *De Jure* 568-582; Rautenbach 2008 *Electronic J of Comp L* 1; Himonga 2005 *Acta Juridica* 82.

29 Chapter 2 of the *Constitution*.

law and has the right to equal and full protection and benefit of the law.³⁰ Justice Yacoob³¹ states that equality is a foundational norm and indispensable element of our constitutional order. Mahomed DP (as he then was), in *Fraser v Children's Court, Pretoria-North and Others*,³² said:

There can be no doubt that the guarantee of equality lies at the very heart of the Constitution. It permeates and defines the very ethos upon which the Constitution is premised.

In *Hugo*³³ the court stated that an equal society accords all its members as human beings "equal dignity and respect regardless of their membership of particular groups".³⁴

The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked.³⁵

Moseneke³⁶ puts it thus:

The Constitution set for itself the object of healing these divisions by establishing common citizenship in an undivided country which must strive to be united in its diversity. It reaffirms our common conviction that South Africa belongs to all who live in it, that the choice we make is of a *democratic and open society in which every citizen is equally protected by the law*. [My emphasis]

According to Albertyn and Goldblatt,³⁷ transformation requires "a complete reconstruction of state and society, including redistribution of power and resources along egalitarian lines". All forms of domination and material disadvantages based on gender, race, class and other grounds of inequality must be eradicated.³⁸ Surprisingly, in *Mthembu v Letsela*³⁹ the court, per Le

30 S 9(1) of the *Constitution*.

31 Yacoob "Some Perspectives" 1.

32 *Fraser v Children's Court, Pretoria-North* 1997 2 SA 261 (CC) para 20, 272A. Hereafter *Fraser*.

33 *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC). Hereafter *Hugo*.

34 *Hugo* para 41.

35 *Hugo* para 41.

36 Moseneke 2007 *Speculum Juris* 4.

37 Albertyn and Goldblatt 1998 *SAJHR* 248-249.

38 Albertyn and Goldblatt 1998 *SAJHR* 248-249.

39 *Mthembu v Letsela* 1997 2 SA 936 (T) 945E-946C.

Roux J, concluded that the customary rule of male primogeniture was not inconsistent with the *Constitution*. In a follow-up case of *Mthembu v Letsela*,⁴⁰ the court again held that the rule was not against the principles of natural justice. In *Mthembu v Letsela*⁴¹ the court upheld the two *Mthembu v Letsela* decisions.⁴² However, in *Bhe v Magistrate, Khayelitsha*,⁴³ the court held that the male primogeniture rule was unconstitutional and invalid. The Constitutional Court confirmed that the customary rule of male primogeniture is constitutionally invalid.⁴⁴

However, sight must not be lost of the fact that it is not easy to find and pin down the rules of the "living" customary law. The Constitutional Court, in *Bhe*,⁴⁵ pointed out that the difficulty "lies not so much in the acceptance of the notion of 'living' customary law ... but in determining its content and testing it, as the court should, against the provisions of the Bill of Rights". What complicates the difficulty is that, while some of the systems of customary law such as the Zulu law,⁴⁶ Tswana law,⁴⁷ Tsonga law,⁴⁸ Ndebele law,⁴⁹ Swazi law⁵⁰ and Pedi law⁵¹ are largely documented, others such as the Hananwa law remain undocumented and inaccessible to outsiders. Although the rules of the Hananwa family law may be found and ascertained, it is not conclusively clear yet as to what would finally become of them when they are judicially subjected to the *Constitution*, in particular the Bill of Rights, through whose prism they should be construed.

40 *Mthembu v Letsela* 1998 2 SA 675 (T).

41 *Mthembu v Letsela* 2000 3 SA 867 (SCA).

42 See further *Mthembu v Letsela* 1997 2 SA 936 (T) 945E-946C; *Mthembu v Letsela* 1998 2 SA 675 (T).

43 *Bhe v Magistrate, Khayelitsha* 2004 2 SA 544 (C).

44 The Constitutional Court decision in *Bhe* is discussed in detail in ch 3 of this thesis.

45 *Bhe* para 109. Notes omitted.

46 See, among others, Dlamini *Ilobolo*.

47 See, among others, Schapera *Tswana Law*.

48 See, among others, Hartman *Tsonga Law*.

49 See, among others, Myburgh and Prinsloo *Indigenous Public Law*.

50 See, among others, Nhlapo *Swazi Law and Custom*.

51 See, among others, Monnig *Pedi*.

1.3 The aim of the study

Against this background, this study seeks to determine, first, what the rules of the Hananwa family law are and, second, whether those rules are compatible with the *Constitution*.

1.4 The research objectives

In order to achieve this modest aim, the following research objectives are pursued:

- i. to establish the rules of the official customary family law and the "living" Hananwa family law respectively;
- ii. to determine whether the community still observes the rules of the Hananwa family law;
- iii. to document the most important rules of the Hananwa family law; and
- iv. to determine whether those rules of the Hananwa family law are compatible with the *Constitution*.

1.5 The research methodology

As stated above, Koyana points out that law, as a discovery more than an invention, is expressive of the value system of the society in which it is found.⁵² Holmes⁵³ argues that:

The actual life of law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, borrowed out of [the] unconscious, even prejudices which judges share with their fellow-men, have a great deal more to do than the syllogism in determining the rules by which law shall be governed.

The writer did not conduct an empirical enquiry in order to perform this research, but engaged in some unstructured face-to-face interviews of community leaders,

52 Koyana *Customary Law* 156.

53 Holmes *The Common Law* 1.

experts and community members over a long period of time. The interviews were conducted in an informal, flexible and conversational atmosphere.⁵⁴ Where the need arose, the writer solicited the services of assistants who enjoyed easier access to some of the community-based experts. A list of a few of the selected informants and their standing in the Hananwa community appears at the end of this thesis. Of course, the following factors limited the study, interpretation and application of Hananwa family law to a great extent:

- i. the shortage of literature on Hananwa family law; and
- ii. the generally oral nature of the Hananwa history, culture and religion.

The writer reviewed a body of literature that comprised, among others, statutes, court judgments, commission reports, common law and customary law textbooks as well as related scholarly writings such as articles and court cases.

1.6 The structure of the study

The thesis is structured as follows:

Chapter 1 introduces customary law. Chapter 2 sets out the general principles of customary law. Chapter 3 deals with the forms of customary law. Chapter 4 deals with the official customary marriage. Chapter 5 deals with the customary law of parent and child. Chapter 6 deals with the general principles and history of Hananwa law. Chapter 7 deals with the Hananwa customary marriage. Chapter 8 deals with the dissolution of a Hananwa customary marriage. Chapter 9 deals with the Hananwa law of parent and child. Chapter 10 sets out the research findings.

1.7 The significance of the study

The study is significant for a number of reasons, for example:

54 Choongh "Doing Ethnographic Research" 76.

- i. In order to interpret the rules of customary law, and more specifically Hananwa family law, one has to know what the rules are. One cannot interpret the unknown. As far as it could be ascertained, there is a lack of documented information regarding the rules of the Hananwa family law.
- ii. Similarly, in order to develop customary law, particularly Hananwa family law, one has to know its content. In acquiring such knowledge it is necessary to take into account such positive aspects of customary law as its flexibility and its consensus-seeking and group orientation to dispute resolution.
- iii. It is important to study the context in which the rules of customary family law operate by looking at the kind of community they serve.
- iv. There is a causal link between the changing circumstances of the community served by a particular customary law and the customary law itself. In order to understand the living phenomenon of customary law, one must therefore study the effect of the changing circumstances of society on the rules of customary law.
- v. The rules of the official customary law have not kept pace with the changing circumstances of society. It is important to determine whether the rules of Hananwa family law need to be changed or developed as a result of constitutional inconsistency.⁵⁵
- vi. It is important to determine whether the Hananwa community observes official and or living customary law. Generally, official customary law becomes ossified and obsolete over time. It will be significant to determine whether this has indeed happened with Hananwa law. Communities develop new rules of customary law to regulate their changed circumstances. The communities may make requisite legislative

55 Heaton *South African Family Law* 206 para 17.2.1, in which the author indicates that it is difficult to ascertain "what the content of a specific customary law-rule is, for many of the official sources on customary law set out a version which is out of touch with current customary practices".

interventions. However, the true community law is the living customary law because it keeps pace with evolving circumstances. There is thus a need to find out what these changes are and to develop a knowledge base which is accessible to others.

- vii. Most notably, all versions of customary law must be compatible with the *Constitution*. If incompatible, customary law is invalid to the extent of the inconsistency. It follows, therefore, that once one knows the rules of customary law it will be possible to develop them consistent with the *Constitution*.
- viii. A study of Hananwa family law has the potential to create certainty about its rules, which will be conducive to the general growth and development of customary law on a par with the common law of South Africa.
- ix. The documentation of the genuine rules of Hananwa family law will make it easier for the legislature to develop them consistent with the *Constitution* and/or legislation specifically dealing with customary law.
- x. In addition, the documentation of the rules of the Hananwa family law will make them readily accessible to the legal fraternity in general and the courts in particular.
- xi. The study might encourage the South African Law Reform Commission (SALRC) and others to determine the rules of customary law of various other communities in South Africa to create more certainty. However, care must be exercised not to perpetuate the ossification of customary law.

1.8 Terminology

Some of the terminology used in the study warrants some explanation. In all other cases words and phrases will be defined when used for the first time.

1.8.1 Affiliation

This is a custom in accordance with which an extramarital child is transferred from the guardianship of the family head of its mother to the guardianship of the family head of its father. The primary requirement for the custom of affiliation is that the family of a biological father must pay special *lobola* for his extramarital child.

1.8.2 African

In this study the term "African" refers to Bantu-speaking peoples who generally live together according to communally accepted African customs and usages.

1.8.3 Customary law, African law, African indigenous law, native law and Black law

These terms are used interchangeably. The definition of customary law in chapter 2 applies also to these other terms.

1.8.4 Extramarital child

This is a child whose biological parents were not married to each other at the time of its conception, birth or subsequently.

1.8.5 Hananwa law

This is a system of customary law according to which the Hananwa community lives.

1.8.6 Hlatswadirope

This is a woman who marries her sister's husband in order to raise a seed for her barren sister.

1.8.7 Male primogeniture

This is a customary rule according to which a person succeeds the deceased by virtue of being the first-born son or senior male member of the family.

1.8.8 Patriarchy

The concept of patriarchy refers to the domination of society by men.

1.8.9 Polygyny and polyandry

There are two types of polygamy: polygyny and polyandry. Polygyny is a marriage of one man to more than one woman. Polyandry is a marriage of one woman to more than one man.

1.8.10 Seyantlo

This is a woman who marries her brother-in-law after the death of her sister.

1.9 Concluding remarks

The *Constitution* recognises both common law and customary law as equal parts of the basic law of the country.⁵⁶ Customary law is subject to both the *Constitution* and legislation that deals specifically with customary law.⁵⁷ However, the living customary law lacks certainty because it constantly evolves commensurate with the conditions of the society and varies from community to community. In order to be able to determine their constitutionality, the rules of customary law must be found and ascertained.⁵⁸ The definition, sources, nature, status and application of customary law are dealt with in the next chapter.

56 Bekker 2003 *Anthropology Southern Africa* 124-130.

57 S 211(3) of the *Constitution*.

58 S 1(1) *Law of Evidence Amendment Act* 45 of 1988.

CHAPTER 2

GENERAL PRINCIPLES OF CUSTOMARY LAW

2.1 Introduction

Chapter 2 deals with the general principles of the official version of customary law. Hananwa law falls under the broad concept of customary law. It is thus important to know what exactly the meaning and scope of customary law are.

2.2 Defining customary law

Bekker and Rautenbach submit that there is a need to address and find a workable definition of customary law.⁵⁹ Although there are many varieties of such definitions, there is some consensus on what customary law is. In the following passages, reference is made to a few definitions. According to Bennett,⁶⁰ "[e]ven within Western jurisprudence, we should not expect to find a generally agreed definition of law".

Matthews⁶¹ points out that the expression "customary law" is generally used in two senses in South Africa. In the first sense, "customary law" means the indigenous system of customary jurisprudence existing among the various African communities of South Africa, while in the second sense "customary law" alludes to legislation that applies to Africans as a special grouping.⁶² Bekker⁶³ said the following about customary law:

During the existence of the pre-colonial sovereign Black 'states', customary law was an established system of immemorial rules which had evolved from the way of life and natural wants of people, the general contexts of which was a matter of common knowledge, coupled with precedents applying to special cases, which were retained in the

59 Bekker and Rautenbach "Application of African Customary Law" 17-19.

60 Bennett *Customary Law* 11.

61 Matthews *Bantu Law* 19-20.

62 Matthews *Bantu Law* 19-20.

63 Bekker *Seymour's Customary Law* 11.

memories of the chief and counsellors, their sons and their sons' sons, until forgotten, or until they became part of the immemorial rules.

The living customary law is a non-specialised system of law that governs the conduct of and is binding upon members of a traditional community in which it is found. Undoubtedly those rules evolve "from the way of life and natural wants of people".⁶⁴ Save that it shows only implicit apparent regard for the communal orientation of customary law, Bekker's is quite comprehensive a definition of customary law. Myburgh⁶⁵ describes customary law thus:

Indigenous law, meaning the traditional law of the indigenous peoples as adapted to change by themselves may be said to fall within the sphere of what is known in Germany as *Rechtsethnologie* or juristic anthropology.

Myburgh's approach of sourcing customary law from the confluence of law, anthropology, linguistics and government seems to be the right one. The term "traditional law" implies that customary law originates from a binding custom or usage which the community has traditionally observed to the extent that the custom or usage has become a part of the community's generally acceptable *modus vivendi*.⁶⁶ According to Hamnett,⁶⁷ customary law is "a set of norms which the actors in a situation abstract from practice and which they invest with binding authority". This definition indicates that the rules of customary law bind members of a particular group because they accept them as obligatory.

Customary law is a form of personal law.⁶⁸ Mofokeng⁶⁹ defines personal law as a system of law recognised by a traditional community as binding on its members "in accordance with the rules of an established and legally recognised custom".⁷⁰ However, it is submitted that even non-members may subject

64 Bekker *Seymour's Customary Law* 11; Kleyn and Viljoen *Beginner's Guide* 96.

65 Myburgh *Indigenous Law* 1. Notes omitted.

66 See Bennett *Customary Law* 1-5 and 20-23 for a discussion on the role of tradition in the making of customary law.

67 Hamnett *Chieftainship and Legitimacy* 14.

68 S 15(3) of the *Constitution*.

69 Mofokeng *Legal Pluralism* 1ff.

70 See also the definition in s 1 of the *Recognition of Customary Marriages Act* 120 of 1998.

themselves to the customary law of that community. Mofokeng sourced his definition, with express acknowledgement, from Bennett's.⁷¹

In South Africa a number of acts attempt to define customary law as well. For example, section 1(4) of the *Law of Evidence Amendment Act*⁷² defines customary law as "Black law or customs applied by the Black communities in the Republic ...". The *Recognition of Customary Marriages Act*⁷³ defines customary law as "the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the cultures of those peoples". In line with this definition, section 1 of the *Reform of Customary Law of Succession and Regulation of Related Matters Act*⁷⁴ defines "customary law" as "the customs and practices observed among the indigenous African people of South Africa which form part of the culture of those people". Note, however, how the term "peoples" in the *Recognition of Customary Marriages Act* has been changed to refer only to the term "people" in the *Reform of the Customary Law of Succession and Regulation of Related Matters Act*. The significance of this change is unclear. Furthermore, section 1 of the *Reform of the Customary Law of Succession and Regulation of Related Matters Act* substitutes the word "practices" for the word "usages" and excludes the words "traditionally" and "and" which are included in the definition of customary law in the *Recognition Act*. However, save to say that the words "practices" and "usages" are often used interchangeably in this thesis, the thrust of the exclusion of the words "traditionally" and "and" is equally unclear.

In 1998 the South African Law Commission (as it then was)⁷⁵ introduced a definition of customary law that discarded any reference to the obligatory nature of customary law.⁷⁶ Some subsequent legislation applicable to customary law

71 Mofokeng *Legal Pluralism 1ff*; Bennett *Customary Law 1*.

72 *Law of Evidence Amendment Act 45 of 1988*.

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

74 *Reform of the Customary Law of Succession and Regulation of Related Matters Act 11 of 2009*.

75 Hereafter SALC.

76 Bekker and Rautenbach *Application of African Customary Law 19-20*. Notes omitted.

adopted a similar approach.⁷⁷ However, the observation of a constitutionally valid customary law is mandatory. For instance, the court may enforce the nomination of the successor to the position of the head of a household, family or community.⁷⁸ In conclusion, customary law may be defined as a constitutionally and statutorily compatible system of personal law⁷⁹ of a particular cultural, religious or linguistic group whose body of rules the members of the group as well as consenting non-members recognise as obligatory.⁸⁰

2.3 Sources of customary law

Olivier *et al* point out that customary law may be accessed through oral or written sources.⁸¹ According to Myburgh, "[s]ources may refer to origins or to stores of information, and may be termed sources of origin and sources of reference respectively".⁸² While Myburgh lists custom and legislation as sources of origin, he regards the people themselves as the only sources of reference yielding data on customary law.⁸³ Obviously, he is alluding to data collected by means of field work research methods.⁸⁴ On the other hand, Hosten *et al*⁸⁵ categorise the sources of law into formal and material sources. While the formal sources of law are binding, law-generative or law-constitutive media,⁸⁶ the material sources are the sources of law that put emphasis on the contents or materials of the rules of law.⁸⁷ The sources of customary law include the *Constitution*, customs and practices, legislation, case law and

77 For example, the *Recognition Act*, and the *Reform of the Customary Law of Succession and Regulation of Related Matters Act* 11 of 2009.

78 *Masela Mpolo v Cawe Nozihamba* 1964 BAC 75 S.

79 See, among others, s 211(3) of the *Constitution*.

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

81 Olivier *et al Indigenous Law* 215-216.

82 Myburgh *Indigenous Law* 50-51. Notes omitted.

83 Myburgh *Indigenous Law* 51.

84 For a discussion of current data collection methods see Bennett *Customary Law* 23-33.

85 Hosten *et al South African Law* 379.

86 Hosten *et al South African Law* 379.

87 Hosten *et al South African Law* 381.

commissions' reports⁸⁸ and textbooks written by legal and anthropology scholars.⁸⁹

2.3.1 Constitution

The *Constitution* is the primary source of all law. It empowers parliament and provincial legislatures to pass, for instance, legislation that deals specifically with customary law.⁹⁰ It expressly recognises customary law⁹¹ and puts it on an equal footing with common law.⁹² It bestows power on a court, forum or tribunal to develop customary law in a manner that promotes "the spirit, purport and objects of the Bill of Rights" and "[t]he 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".⁹³ It is thus an imperative source to determine the scope and application of customary law rules, and the development of these rules in line with the constitutional values of human dignity, equality and freedom.

2.3.2 Legislation

Legislation derives its authority and validity from the *Constitution*.⁹⁴ It overrides customary law and customs.⁹⁵ Bekker and Rautenbach⁹⁶ put it thus:

Although the process to codify customary law by means of legislation has been criticized as an ossification of customary law, which is in essence a flexible, ever-changing legal system, it is still one of the methods to find at least the official version of customary law. It is also a means to change or develop customary legal rules which are regarded as unconstitutional. One example is the Recognition of Customary Marriages Act that regulates customary marriages in South Africa.

88 See also Bennett *Customary Law* 23; Olivier *et al* "Indigenous Law" 6-7.

89 Bekker and Rautenbach *Application of African Customary Law* 31.

90 S 43 read together with s 211 of the *Constitution*.

91 S 211 of the *Constitution*.

92 Bekker 2003 *Anthropology Southern Africa* 124.

93 S 39(3) of the *Constitution*.

94 Ss 43, 44 and 104 of the *Constitution*.

95 S 211 of the *Constitution*.

96 Bekker and Rautenbach "Application of African Customary Law" 31.

Legislation is one of the methods that are used to find at least the official customary law. It may also be used to amend or repeal customary law. Bekker and Rautenbach⁹⁷ put it thus:

It is also a means to change or develop customary legal rules which are regarded as unconstitutional.

Classic examples of national legislation that deals specifically with customary law are the *Traditional Leadership and Governance Framework Act*,⁹⁸ the *Reform of Customary Law of Succession and Regulation of Related Matters Act* and the *Recognition of Customary Marriages Act*. Examples of provincial legislation include the *KwaZulu Act on the Code of Zulu Law*,⁹⁹ the *Natal Code of Zulu Law*¹⁰⁰ and the *Limpopo Traditional Leadership and Institutions Act*.¹⁰¹

2.3.3 Customs and practices

The living customary law is founded on customs and practices.¹⁰² Customs and practices are basically binding social practices. According to *Van Breda v Jacobs*,¹⁰³ for custom to be recognised as obligatory and enforceable, it must be certain, uniformly observed for a long period of time, and reasonable.¹⁰⁴ It must also be consistent with the *Constitution* and applicable legislation.¹⁰⁵ Matthews¹⁰⁶ points out that customs have to come to a certain standard of general acceptance and usefulness and be obligatory before they can be regarded as forming part of the law of the community in which it is found. According to Ubink, "custom, in order to be law, must be commonly believed to

97 Bekker and Rautenbach "*Application of African Customary Law*" 31.

98 *Traditional Leadership and Governance Framework Act* 41 of 2003.

99 The *KwaZulu Act on the Code of Zulu Law* 16 of 1985. In terms of Proc 107 in GG 15813 of 17 June 1994 the Act has been assigned to the Province of KwaZulu-Natal.

100 The *Natal Code of Zulu Law*, 1987 (Proc 151 in GG 10966 of 9 October 1987). In terms of Gen N R166 in GG 16049 of 31 October 1994 this Code has been assigned to the Province of KwaZulu-Natal.

101 *Limpopo Traditional Leadership and Institutions Act* 6 of 2005.

102 Soga *Ama-Xhosa* 130.

103 *Van Breda v Jacobs* 1921 AD 330. Hereafter the *Van Breda* case.

104 *Van Breda* case 330.

105 S 211(3) of the *Constitution*.

106 Matthews *Bantu Law* 37.

be obligatory".¹⁰⁷ Nowadays some judges seem to prefer the application of the living version over the official version.¹⁰⁸ In *Mabuza v Mbatha*¹⁰⁹ the court rejected the submission that a cultural practice should be adhered to as a validity requirement for a customary marriage.

Customs vary from community to community. They are imprecise, flexible and liable to constant and subtle change. Not only is the law diverse and volatile but it also exists in at least two versions. The version usually relied upon by the courts and other state organs is a so-called 'official law'. This collection of rules [of official law] has been called into question by modern scholarship on the grounds that it is tainted by apartheid, out of date and a distortion of genuine community practice. In consequence, a distinction is now generally drawn between 'official' and 'living law', the latter denoting law actually observed by African communities.¹¹⁰

According to the Constitutional Court in *Shilubana v Nwamitwa*,¹¹¹ customary law must be determined by reference to both the history and usage of the community concerned. The evidence of the history and usages of the community must be adduced. Usually, the community would know their history and usage and recognise their law as being obligatory. Juma¹¹² says:

African customary law is often perceived to be synonymous with culture and customs. Its content is thought to be no more than a repertoire of traditional practices and customs that derive from culture and which dictate people's modes of behaviour. That is why Eurocentric ideologues of the past century believed it had no role in matters of public law and commerce.

Mofokeng¹¹³ submits that lawyers must always rely on this expert evidence to establish the following factors:

- i. whether a particular customs still exists or has fallen into disuse; and
- ii. whether such a custom is binding or merely optional to the community.

107 Ubink *In the Land of the Chiefs* 221.

108 *Mabena v Letsoalo* 1998 2 SA 1068 (T); *Kewena v Santam Insurance Co Ltd* 1993 4 SA 771 (T); *Mthembu v Letsela* 1998 2 SA 675 (T); *Metiso v Padongeluk Fonds* 2001 3 SA 1142 (T); *Mabuza v Mbatha* 2003 4 SA 218 (C).

109 *Mabuza v Mbatha* 2003 4 SA 218 (C).

110 SALC *Project 90* 18-19.

111 *Shilubana* 13.

112 Juma 2007 *Speculum Juris* 88, 92.

113 Bekker and Rautenbach "Application of African Customary Law" 30.

Section 1(1) the *Law of Evidence Amendment Act* empowers a court to take judicial notice of customary law under which a particular community lives in so far as such law can be ascertained readily and with sufficient certainty. The *Law of Evidence Amendment Act* further provides that customary law must not be considered to be repugnant to the principles of public policy and natural justice.¹¹⁴ A court must, therefore, apply the contemporary version of the custom or usage.¹¹⁵ The custom or usage, as does living law, evolves to meet the demands of new communities.¹¹⁶ However, as explained in paragraph 2.6 below, the court has no discretion to apply customary law instead of applicable legislation. However, the legislation itself must be consistent with the *Constitution*.

2.3.4 Case law

Another source of law is judicial precedent, particularly the judgments of the High Courts, Supreme Court of Appeal and Constitutional Court. According to Hosten *et al*,¹¹⁷ the doctrine of *stare decisis* is the cornerstone of orderly and systematic judicial adjudication. The decisions of courts serve as precedents for future court proceedings within the judicial hierarchy. In other words, the precedent system creates an authoritative hierarchy in the court decision-making processes. Accordingly, the decision of a higher court binds the lower courts. In other words, the decision of a High Court binds all the courts subordinate to it within a particular jurisdictional division. It is authoritative. However, the decisions of horizontal courts, in other divisions, are merely persuasive. A high court may, where appropriate, depart from its previous decisions. In any view, a full bench may overrule the decision of a single judge. The decision of the Supreme Court of Appeal binds all the courts except the Constitutional Court. The decisions of the Constitutional Court bind all the courts in the country.

114 See s 1(1) *Law of Evidence Amendment Act* 45 of 1988.

115 *Mabuza v Mbatha* 2003 4 SA 218 (C).

116 Van Niekerk 2005 *Obiter* 474-487.

117 Hosten *et al South African Law* para 4.3.2.2.

The precedent system was introduced into South Africa through the English law.¹¹⁸ Roman-Dutch law has no equivalent concept.¹¹⁹ The Roman-Dutch law courts merely regarded "a previous judgment as being of persuasive authority".¹²⁰ The adoption of the precedent system was, therefore, a divergence from the Roman-Dutch law practice.¹²¹ After the adoption of the precedent system, the judicial precedents began to play a decisive role in the development of South African jurisprudence.

Bennett¹²² points out that the traditional authority courts are not bound by the strict rule of *stare decisis*. This is aggravated by the general lack of written records of the court. In contrast, the courts of state apply the precedent system. This is a common law approach to customary law. In effect, the court decisions which had nothing to do with customary law are generally used to decide customary law disputes.

2.3.5 Commission reports

Former Commissioners, referred to as Native Commissioners, published various reports on aspects of customary law. These reports still serve as valuable sources of customary law. Sight must, however, not be lost of the fact that only constitutionally compliant reports may be accepted as a source of customary law. The following are some of the commission reports:¹²³

- i. Report of the Natal Native Commission, 1881-1882;
- ii. Report and Proceedings, with Appendices, of the Government Commission on Native Law and Customs, 1883, (Cape) (G4 OF 1883);
- iii. Report of the South African Native Affairs Commission 1903-1905 with Minutes of Evidence and Appendices.

118 Hosten *et al South African Law* para 4.3.2.2.

119 Hosten *et al South African Law* para 4.3.2.2.

120 Hosten *et al South African Law* para 4.3.2.2.

121 Hosten *et al South African Law* para 4.3.2.2.

122 Bennett *Customary Law* 3. Notes omitted.

123 Kerr *Customary Family Law* para G9.

The SALC (as it then was) had, in terms of its Project 90 on the Harmonisation of the Common Law and Indigenous Law, published a number of informative reports, *inter alia*¹²⁴

- i. Issue Paper 4: Application of Customary Law: Conflicts of Personal Law (1996);
- ii. Issue Paper 3: Customary Marriages (1996);
- iii. Discussion Paper 76: Conflicts of Law (1998);
- iv. Discussion Paper 74: Customary Marriages (1998);
- v. Report: Customary Marriages (1998);
- vi. Issue Paper 12: Succession in Customary Law (1998);
- vii. Report: Conflicts of Law (1999);
- viii. Discussion Paper 95: Customary Law: Administration of Estates (2000);
- ix. Discussion Paper 93: Customary Law (2000);
- x. Report: Customary Law (2003);
- xi. Report: Customary Law of Succession (2004).

2.3.6 Textbooks written by legal and anthropology scholars

According to Bennett:¹²⁵

When the process of colonizing Southern Africa began, all the customary laws of the region were unwritten ... Hence the business began of capturing oral custom in written texts, so that the courts would have a single authoritative code of rules.

Over many years, successive South African governments and legal and anthropological scholars documented customary law¹²⁶ and attempted to ensure that "the courts would have a single authoritative code of rules".¹²⁷ For instance, the Natal Administration commissioned a research into Zulu laws resulting in the

124 These reports are available on the official website of the South African Law Reform Commission at <http://www.justice.gov.za/salrc/index.htm>.

125 Bennett *Customary Law* 5.

126 Bekker and Rautenbach "Application of African Customary Law" 31-32.

127 Bennett *Customary Law* 5; Twining *Place of Customary Law* 32ff.

enactment of a code of Zulu laws.¹²⁸ Presently, there has been a relative paucity of Malinowski-style¹²⁹ field work studies of the living customary law.¹³⁰

Reference could be had to statute books and text books to ascertain the statutory and customary law taught in the universities.¹³¹ Although one can study tomes of law text books, case law and legislation dealing with customary law, the *Constitution* and the Bill of Rights may still be found to be out of touch with the customary law lived in the sanctuary of the villages. Bennett states that before 1988 the courts treated customary law as if it was the same as common law custom,¹³² which had to be proven in court.¹³³

2.4 The status of customary law

Section 11(1) of the *Black Administration Act* 38 of 1927 (*BAA*) regulated the official version of customary law after the former came into operation. However, there was always a system of customary law that continued to exist adventitious to the province of state law.¹³⁴ Rautenbach points out that the status of customary law in South Africa has always been a controversial issue.¹³⁵ Section 54A of the *Magistrates' Courts Act*¹³⁶ repealed section 11(1) of the *BAA*. Furthermore, thereafter, section 1(1) of the *Law of Evidence Amendment Act*¹³⁷ repealed section 54A of the *Magistrates' Courts Act*¹³⁸ but retained the indomitable repugnancy clause with all its substance, spirit, purport and object.

128 Bennett *Customary Law* 5; Twining *Place of Customary Law* 32ff.

129 See Malinowski *Crime and Custom*.

130 However, some academics still do. For example, Whelpton has been doing field work on Swazi law in the Kingdom of Swaziland as he did among Bakwena BaMokgopa. See Whelpton 2005 *TSAR* 828; Whelpton 2005 *Stell LR* 150. The universities of Fort Hare and Rhodes publish an important law journal focusing mainly on customary law called *Speculum Juris*.

131 *S v Makwanyane* 1995 6 BCLR 665 (CC) 376-377; *Alexkor*.

132 Bennett *Customary Law* 44.

133 Bennett *Customary Law* 48. See, also, s 1(1) *Law of Evidence Amendment Act* 45 of 1988.

134 See Van Niekerk "Legal Pluralism" (2002) 8, 16; Kerr 1999 *Obiter* 41.

135 Rautenbach 2003 *Stell LR* 107.

136 *Magistrates' Courts Act* 32 of 1944.

137 *Law of Evidence Amendment Act* 45 of 1988.

138 *Magistrates' Courts Act* 32 of 1944.

According to Maithufi,¹³⁹ customary law is the legal system that is generally applicable to the majority of the black population of South Africa. Van Niekerk¹⁴⁰ puts it modestly as follows:

Unfortunately, through the years, the existence of the unofficial laws was to a large extent ignored. The perceived superiority of the imposed Western law prevailed and a legal order was created which is primarily suited to the needs of that section of the community whose traditions and way of life may be classified as Western and capitalist.

At this stage, the authorities practised legal centralism.¹⁴¹ As time went on, the authorities accepted that the application of customary law was inevitable.¹⁴² Bennett¹⁴³ puts it thus:

Initially at least, nineteenth century colonial policy on customary law was no more than a pragmatic response to the fact that governments were incapable of forcing a subject population to observe a completely alien legal regime. Indeed, anthropologists could produce abundant evidence to show that, for nearly all Africans, customary law remained a primary source of regulation.

However, the courts interpreted customary law consistent with the Roman-Dutch law.¹⁴⁴ In their interpretation the courts changed customary law.¹⁴⁵ According to the *dictum* in the decision of the Privy Council in *Oke Lanipekun v Amao Ojetunde*¹⁴⁶ the policy of the British Government was to use native law and custom subject to British law. Unsurprisingly, government recognised customary law albeit for selected and limited purposes.¹⁴⁷ The authorities

139 Maithufi "Best Interests of the Child" 137.

140 Van Niekerk "Legal Pluralism" (2002) 3.

141 Griffiths 1986 *J Leg Plur* 1ff.

142 See chs 2 and 8 of this thesis for a detailed discussion of the recognition and application of customary law by authorities to resolve customary law disputes.

143 Bennett "Conflict of Laws" 21. Notes omitted.

144 In De Koker 1996 *TRW* 75 and Koyana 2002 *Obiter* 98-115, the writers demonstrate that the basic validity requirement for customary law was consistency with public policy or the principles of natural justice. Sometimes, public policy or natural justice is put up as Western civilisation. Western civilisation is a reflection of Western values which are generally alien to African value systems. See, also, Bennett "Conflict of Laws" 21-22 (fn 13).

145 Maithufi "Best Interests of the Child" 137.

146 *Oke Lanipekun v Amao Ojetunde* 1944 AC 170.

147 See, for instance, s 31 of the *BAA* regarding claims by a customary widow for loss of support as a result of the death of her husband. S 1 *Income Tax Act* 58 of 1962 deemed

treated customary marriages as mere sexual associations among "primitive" African communities.¹⁴⁸ Customary marriages were deemed contrary to the Western conception of the principles of public policy or natural justice¹⁴⁹ and the *Marriage Act*.¹⁵⁰ Generally, the courts declared customary marriages invalid on the grounds that they were potentially polygynous.¹⁵¹

2.4.1 The recognition of customary law 1652-1909

When Jan van Riebeeck and company arrived at the Cape of Good Hope in 1652, the various systems of customary law of the black people in Southern Africa were still completely unwritten.¹⁵² The law of the conqueror (common law) overrode the law of the conquered (customary law).¹⁵³ The relationship of

customary unions as valid marriages. S 56 *Maintenance Act* 23 of 1963 regarded customary marriages as valid for the purposes of maintenance claims against African men. S 1 *Child Care Act* 74 of 1983 deemed a customary union to be a valid marriage. For the purposes of the status of a child as a marital child, s 1(2) *Births and Deaths Registration Act* 51 of 1992 regarded customary unions as valid marriages. See ch 2 of this thesis for a detailed survey of the long distance covered from 1652 to the ultimately full and formal recognition of customary law effective from 1994. However, it will soon be shown that the *Constitution*, legislation and court decisions which purport to equalise all legal systems such as common law, traditional law (customary law) and religious laws only scratch the surface of the inequalities of the erstwhile plural but unequal legal systems. There is no responsible effort to achieve substantive equality within the conspicuous South African legal pluralism (i.e. equality of the contents and results of the comparative legal rules, norms, concepts and principles). The *Recognition Act* and the *Reform of Customary law of Succession and Regulation of Related Matters Act* 11 of 2009 equalise the rules of common law and the rules of customary law by transposing the rules of common law into the sphere of customary law. Where there is a *lacuna* the rules of common law fill it and where the rules of customary law are incompatible with the *Constitution*, the constitutionally compatible rules of common law are transplanted to replace those of customary law. See *Maluleke v Minister of Home Affairs* 2008 JDR 0426 (W).

148 In *Hyde v Hyde & Woodmansee* (1886) LR 1 P & D 130, the court expressed its exclusive recognition of civil marriage between a man and a woman. The *Marriage Act* 25 of 1961 recognised only a civil monogamous marriage.

149 See *Seedat's Executors v The Master (Natal)* 1917 AD 302; *Ismail v Ismail* 1983 1 SA 1006 (A). Generally, customary marriages and Muslim marriages were deemed to be contrary to public policy or the principles of natural justice. Common law and the *Marriage Act* 25 of 1961 prescribe a monogamous marriage but proscribed polygamy (i.e. polygyny and polyandry).

150 *Marriage Act* 25 of 1961.

151 Dlamini 1985 SALJ 701. See also Dlamini "Family Law" 49. The same fate befell religious marriages such as Muslim marriages. See, for instance, *Seedat's Executors v The Master (Natal)* 1917 AD 302; *Ismail v Ismail* 1983 1 SA 1006 (A).

152 Bennett *Customary Law* 5.

153 Koyana 2002 *Obiter* 98-115.

inequality between common law and customary law was manifest in the inequality between the civil marriage and customary marriage.¹⁵⁴ The colonial and, later, apartheid government accorded customary law an inferior status.¹⁵⁵ Koker¹⁵⁶ puts it thus:

Die inheemse reg mag egter nie toegepas word indien dit in stryd is met die beginsels van staatsgedragslyn of natuurlike geregtigheid nie.

As Bennett explained,¹⁵⁷ the courts treated customary law as if it were a common-law custom.¹⁵⁸ Parliament passed statutes that treated customary unions as marriages only for the purposes of those statutes.¹⁵⁹ During the 20th century the government attempted to equalise spouses.¹⁶⁰ Du Plessis¹⁶¹ puts it thus:

The history of the recognition of indigenous law in the Zuid-Afrikaansche Republiek followed a pattern very similar to that in the Cape Colony. Initially the indigenous law of black people was not officially recognized. By 1885 [legislation] was adopted which recognized it (in so far as it did not conflict with civilized standards as recognized by the state and "the civilised world").

The authorities regarded customary law as savage law or the "childish notions of an uncultured people".¹⁶²

2.4.1.1 *The Cape*

Britain occupied the Cape Colony twice: first in 1795 and again in 1806 under the 1806 Treaty of Capitulation in terms of which Netherlands ceded the Cape to

154 *Kumalo v Jonas* 1982 AHK 111 (S).

155 De Koker 1996 TRW 76.

156 De Koker 1996 TRW 76.

157 Bennett *Customary Law* 44.

158 See, also, *Ex parte Minister of Native Affairs: In re Yako v Beyi* 1948 1 SA 388 (A) 394-395; *Masanya v Seleka Tribal Authority* 1981 1 SA 522 (T) 524; *Mosisi v Motseoakhumo* 1954 3 SA 919 (A) 930.

159 See, among others, s 5(6) *Maintenance Act* 23 of 1963; s 1 *Income Tax Act* 58 of 1962; s 27 *Child Care Act* 74 of 1983; s 31 of the BAA.

160 See the *Matrimonial Affairs Act* 37 of 1953; the *Divorce Act* 70 of 1979; the *Matrimonial Property Act* 88 of 1984; the *Marriage and Matrimonial Property Law Amendment Act* 3 of 1988; see also s 29 of *General Law Fourth Amendment Act* 132 of 1993.

161 Du Plessis *Introduction to Law* 68.

162 Quoted in Darboe *Integration of Western and African Traditional Systems* 188.

Britain.¹⁶³ Britain confirmed Roman-Dutch law as the basic law of the Cape Colony¹⁶⁴ and retained the local laws as the basic laws provided they were suitably "civilized".¹⁶⁵ The Cape Colony included areas inhabited by indigenous peoples (Khoisan and other ethnic groups which are now generally known as the Xhosas). The official view of the Colonial Administration was that differences between "those who lived according to [customary law] were settled in principle according to the official law of the colony".¹⁶⁶ The courts did, in exceptional cases, recognise African customs provided that such customs were not inconsistent with the perceptions of the colonists of "morality, the public interest and fairness".¹⁶⁷ Allott¹⁶⁸ points out that the colonial powers were in favour of partial recognition of customary law for the following four reasons:

- i. fear of discontent;
- ii. economic considerations;
- iii. treaties with traditional leadership;
- iv. the belief that English law was too advanced to be applied to the indigenous people.

2.4.1.2 *Natal*

The Zulu law was recognised in Natal and codified in 1878 and 1891.¹⁶⁹ The codification of the Zulu law obviously led to its ossification. The courts of the chiefs, magistrates and special African higher courts were conferred with the jurisdiction to adjudicate cases among Africans. The traditional authority courts

163 Koyana 2002 *Obiter* 98, 100.

164 Bennett "Conflict of Laws" 21; Koyana 2002 *Obiter* 98, 100; Bennett *Application of Customary Law* 40; Whitfield *Native Law* 5.

165 *Campbell v Hall* (1774) 1 Cowper 204.

166 Du Plessis *Introduction to Law* 67-70.

167 Du Plessis *Introduction to Law* 67-70; Brookes *Native Policy* 182; Hooker *Legal Pluralism* 130-133; Allott *New Essays* 44; Ndima 2007 *Speculum Juris* 82.

168 Allott *New Essays* 12-13.

169 Du Plessis *Introduction to Law* 69.

were subordinate to the magistrates' courts. Here customary law was also subject to the European version of morality, public interest and fairness.¹⁷⁰

2.4.1.3 *Zuid-Afrikaansche Republiek (ZAR)*

Initially, the ZAR did not officially recognise the customary law of the indigenous peoples within its "area of jurisdiction".¹⁷¹ However, by 1885 it had adopted legislation which recognised customary law in so far as it was not inconsistent with "the civilized standards as recognised by the state and 'the civilized world'".¹⁷² Polygyny and *lobola* were regarded as being contrary to "the civilized standards as recognised by the state and 'the civilized world'".¹⁷³ The ZAR recognised the traditional authority courts and established commissioners' courts empowered to settle disputes among the indigenous communities. During this phase, the Western courts in the ZAR had no jurisdiction over the disputes among Africans. Higher Courts in the ZAR were conferred with appeal jurisdiction over disputes among African people for the first time only in 1907.¹⁷⁴

2.4.1.4 *The Orange Free State (OFS)*

The OFS never officially recognised customary law.¹⁷⁵ However, the failure to do so does not mean that the traditional communities did not practise customary law. They continued to live in accordance with their living customary laws in spite of the attitude of the foreign state in authority over them.

2.4.2 *The Union of South Africa 1910-1961*

The Union of South Africa came into being on 31 May 1910 in terms of the *Union of South Africa Act* of 1909.¹⁷⁶ The Union retained a hybrid of Roman-

170 Du Plessis *Introduction to Law* 69.

171 Du Plessis *Introduction to Law* 69.

172 S 2 *Transvaal Law* 4 of 1885; SALC *Project 90* 25.

173 S 2 *Transvaal Law* 4 of 1885; *R v Mboko* 1910 TPD 445, 447; *Kaba v Ntela* 1910 TPD 964, 969; SALC *Project 90* 25.

174 Du Plessis *Introduction to Law* 69.

175 Du Plessis *Introduction to Law* 69.

176 Hosten *et al South African Law* para 4.5.1.

Dutch law and English law as the common law of the Union.¹⁷⁷ The Union passed the *BAA* as a *Grundnorm* for the South African customary law. In *Bhe v Magistrate, Khayelitsha*,¹⁷⁸ per Ngwenya J, the court stated that the recognition and application of African customary law in South Africa was controversial, spasmodic and inconsistent until 1927, when the Union of South Africa enacted the *BAA*. African civilisation and, by extension, customary law were subject to Western civilisation.¹⁷⁹ Grenfell puts it thus:

The repugnancy clause meant that the common law had always been regarded as the 'dominant' system while customary law had been relegated to the position of 'servient' law, applying only to 'blacks'.¹⁸⁰

According to section 11(1) of the *BAA*, customary law was applicable on the proviso that it was not repugnant to the principles of public policy or natural justice. First customary law had to be proven by means of expert evidence¹⁸¹ and, second, if proven it had to pass the test of the repugnancy clause.¹⁸² In his interpretation of section 11 of the *BAA* in *Ex parte Minister of Native Affairs: In re Yako v Beyi*,¹⁸³ Schreiner JA noted that when the law of the colonisers became the law of a colony difficult questions of policy arose as to the proper extent of recognition and use at any particular period of the customary law of the inhabitants.

2.4.3 The Republic of South Africa 1961-1994

In 1986, on the recommendation of the Hoexter Commission for the abolition of the separate jurisdiction of the commissioners' courts, Parliament enacted the *Special Courts for Blacks Abolition Act*,¹⁸⁴ which substituted section 54A(1) of

177 Hosten *et al South African Law* para 4.5.

178 *Bhe v Magistrate, Khayelitsha* 2004 2 SA 544 (C) 549.

179 *Transvaal Law* 4 of 1885.

180 Grenfell *Legal pluralism and the Rule of law* 104.

181 S 1 *Black Administration Act* 38 of 1927 (hereafter *BAA*). S 1(1) *Law of Evidence Amendment Act* 45 of 1988 has been substituted for s 1 *BAA*.

182 S 1 of the *BAA*. S 1(1) *Law of Evidence Amendment Act* 45 of 1988 has been substituted for s 1 *BAA*.

183 *Ex parte Minister of Native Affairs: In re Yako v Beyi* 1948 1 SA 388 (A) 396-388.

184 *Special Courts for Blacks Abolition Act* 34 of 1986.

the *Magistrates' Courts Act*¹⁸⁵ for section 11(1) of the *BAA*. As explained in paragraph 2.4 above, in 1988, section 2 of the *Law of Evidence Amendment Act* repealed section 54A of the *Magistrates' Court Act*. However, the *Law of Evidence Amendment Act* adopted a similar repugnancy clause. Section 1(1) of the *Law of Evidence Amendment Act* provided that a court may apply customary law provided that such customary law must not be opposed to the principles of natural justice and public policy and provided further that it shall not be lawful for any court to declare that the custom of *lobola* or *bogadi* or other similar custom was repugnant to such principles.¹⁸⁶ It subjects the application of customary law to the discretion of the court. Academics criticised this reinforcement of the repugnancy clause.¹⁸⁷

2.4.4 The recognition of customary law, 1994 to date

There are two successive authoritative sources of the recognition of customary law for the period effective from the 27th of April 1994, namely the *Interim Constitution* and the final *Constitution*. Almost all independence movements had, upon attaining liberation, demanded that customary law be recognised as a starting point of legal harmonisation.¹⁸⁸

2.4.4.1 The Constitution of the Republic of South Africa 2000 of 1993¹⁸⁹

The *Interim Constitution* recognised customary law as a law forming part of the legal system of South Africa.¹⁹⁰ Principle XIII provided thus:¹⁹¹

The institution, status and role of traditional leadership, according to indigenous law, shall be recognized and protected in the Constitution. Indigenous law, like common law, shall be recognized and applied by the courts, subject to the fundamental rights contained in the Constitution and to legislation dealing specifically therewith.

185 *Magistrates' Courts Act* 32 of 1944.

186 See, among others, Peart 1982 *Acta Juridica* 110.

187 Bennett *Sourcebook* 132-133.

188 Elias *Nature of African Customary Law* Preface.

189 *Constitution of the Republic of South Africa*, 200 of 1993 (hereafter *Interim Constitution*).

190 See Principle X111 (schedule 4) and ss 33(3) and 181 of the *Interim Constitution*.

191 See Principle X111 (schedule 4) and ss 33(3) and 181 of the *Interim Constitution*.

The courts were to apply customary law subject to the fundamental rights and legislation specifically dealing with customary law.¹⁹² Section 181 of the *Interim Constitution* provides:

- (1) A traditional authority which observes a system of indigenous law and is recognised by law immediately before the commencement of this Constitution, shall continue as such an authority and continue to exercise and perform the powers and functions vested in it in accordance with the applicable laws and customs, subject to any amendment or repeal of such laws and customs by a competent authority.
- (2) Indigenous law shall be subject to regulation by law.

According to Bekker, the *Interim Constitution* put the African customary law on an equal footing with common law.¹⁹³

2.4.4.2 *The Constitution of the Republic of South Africa 1996*¹⁹⁴

The new *Constitution* follows the trend set by the *Interim Constitution* by expressly recognising customary law and putting it on a par with the common law.¹⁹⁵ Section 211 of the *Constitution* reads as follows:

1. The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.
2. A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.
3. The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

Section 212 of the *Constitution* provides as follows:

1. National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities.

192 See, among others, *Thibela v Minister van Wet en Orde* 1995 3 SA 147 (T); *Mabuza v Mbatha* 2003 4 SA 218 (C) 228.

193 Bekker 2003 *Anthropology Southern Africa* 124-130.

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

195 See ss 39(2), 39(3) and 211 of the *Constitution*. See also *Alexkor* 51; *Bhe* paras 40, 148 regarding the status of customary law in relation to the common law.

2. To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and customs of communities observing a system of customary law-
 - a) national or provincial legislation may provide for the establishment of houses of traditional leaders; and
 - b) national legislation may establish a council of traditional leaders.

The Constitutional Court held, in *Pharmaceutical Manufacturers Association of South Africa; In re: Ex parte Application of the President of the Republic of South Africa*,¹⁹⁶ per Chaskalson P, that there is only one legal system in South Africa of which the *Constitution* is the supreme law:¹⁹⁷

I cannot accept this contention, which treats the common-law as a body of law separate and distinct from the Constitution. There are not two systems of law, each dealing with the same subject-matter, each having similar requirements, each operating in its own field with its own highest court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common-law, derives its force from the Constitution and is subject to constitutional control.

Section 39(2) and (3) expressly refers to customary law. It may be argued that the *Constitution* gives recognition to official customary law only, especially in the light of the wording of section 211(3) and that the *Constitution* thus applies only to official customary law. Kerr even suggests that customary law should be exempted from the *Constitution*.¹⁹⁸ However, the exemption would result in leaving a whole body of "living" customary law outside the scope of constitutional scrutiny. Although this scenario turned out not to be true,¹⁹⁹ section 2 of the *Constitution* is broad enough to subject living customary law to

196 *Pharmaceutical Manufacturers Association of South Africa; In re: Ex parte Application of the President of the Republic of South Africa* 2000 2 SA 674 (CC) para 44.

197 *Pharmaceutical Manufacturers Association of South Africa; In re: Ex parte Application of the President of the Republic of South Africa* 2000 2 SA 674 (CC) para 44. In this case counsel argued that reliance on the common-law grounds of review automatically means that the matter must be treated as a common-law matter and not a constitutional matter. Although the case essentially dealt with the relationship between the common law and the *Constitution*, the same reasoning can be followed in describing the relationship between the customary law and the *Constitution*. There is only "one body of law" consisting of both the common and the customary law and being shaped by the *Constitution*.

198 Kerr 1999 *Obiter* 42.

199 See the discussion of legal scholars and the judiciary's approach to official and living customary law in ch 3 of this thesis.

the muster of the *Constitution* as "conduct" which must be consistent with the *Constitution*. The Bill of Rights binds both law and conduct.²⁰⁰ Clearly, the *Constitution* recognises and has given proper status to customary law which is bound by the justiciable Bill of Rights. The import of this binding by the Bill is that the organs of state and individuals living under customary law must observe the *Constitution*, in general, and the Bill of Rights, in particular.²⁰¹ The Constitutional Court in *Alexkor v The Richtersveld Community*²⁰² had the following to say:

While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common law, but to the Constitution.

Section 8(1) provides that the Bill of Rights is the cornerstone of democracy and applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.²⁰³ Every law must be construed through the prism of the Bill of Rights.²⁰⁴ Customary law must pass the muster of the *Constitution*.²⁰⁵ However, customary law is largely inconsistent with the constitutional values and the individual fundamental human rights enumerated in the Bill of Rights in chapter 2 of the *Constitution*.²⁰⁶ As explained above, Kerr²⁰⁷ holds a view that customary law must:

... by virtue of the contradictions in the Constitution (which does not apply to South African common law) be exempt from being treated in the same way as South African common law although, of course, the values of the Bill of Rights may influence a court when it considers, in terms of its general powers, the direction in which customary law should be developed

200 See s 2 read together with s 8 of the *Constitution*.

201 Ss 8 and 211 of the *Constitution*.

202 *Alexkor* para 51.

203 See, among others, Burns *Administrative Law* 15.

204 *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re: Hyundai Motor Distributors (Pty) Ltd v Smit* 2000 10 BCLR 1079 (CC) para 21.

205 S 2 read with ss 72 and 211(3) of the *Constitution*. See also Bennett *Human Rights*; Dlamini "Indigenous Law" para 6A5.

206 Kerr 1999 *Obiter* 42.

207 Kerr 1999 *Obiter* 42-43; Kerr 1998 *SALJ* 262; Kerr 1997 *SALJ* 346-355.

According to Lehnert, the expressive reference to the superiority of the *Constitution* in section 211(3) leaves it beyond doubt that the drafters of the *Constitution* did not intend to give customary law special protection.²⁰⁸ The *Constitution*, therefore, fully recognises customary law as a part of the basic law of South Africa on a par with common law.²⁰⁹ Section 2 of the *Recognition Act* read with section 15(3) of the *Constitution* accords full recognition to registered and unregistered customary marriages.²¹⁰

In *Alexkor Ltd and Another v Richtersveld Community and Others*,²¹¹ the court said that the *Constitution* "acknowledges the originality and directiveness of indigenous law as an independent source of norms within the legal system" and recognises customary law as "part of the amalgam of South African law".²¹² In *Pilane and Another v Pilane and Another*,²¹³ the Constitutional Court said:

It is [well-established] that customary law is a vital component of our constitutional system, recognised and protected by the Constitution, while ultimately subject to its terms. The true nature of customary law is as a living body of law, active and dynamic, with an inherent capacity to evolve in keeping with the changing lives of the people whom it governs.

Furthermore, the Constitutional Court said that the history of South Africa is replete with instances in which customary law was not given the necessary space to evolve, but was instead fossilised and "stonewalled" through codification, which distorted its mutable nature and subverted its operation. It further said that the *Constitution* is designed, firstly, to reverse the trend of codifying customary law in a way that essentially distorts it and, secondly, to facilitate the preservation and evolution of customary law as a legal system that conforms to the provisions of the *Constitution*.

208 Lehnert 2005 SAJHR 244-245.

209 Bennett "Conflict of Laws" 22.

210 See the comments of Heaton *South African Family Law* 205.

211 *Alexkor Ltd v Richtersveld Community* 2004 5 SA 460 (CC) para 51.

212 *Alexkor* para 51.

213 *Pilane v Pilane* 2013 4 BCLR 431 (CC) paras 34-35. Notes omitted.

2.5 The nature of customary law

Customary law is "a separate legal and cultural system which may be freely chosen by persons desiring to do so".²¹⁴ Differently put, it is a "parallel system, different in concept and effect",²¹⁵ which exists in a multi-cultural society in which various other legal systems are observed.²¹⁶ Myburgh²¹⁷ states that the divisions distinguishable in customary law are those typical of legal systems. The main divisions are public law and private law. These divisions comprise various sub-divisions. It is worth mentioning that, as shown later, customary law is underdeveloped and obscurely categorised. In South Africa the "other" legal system is the common law. Needless to state that common law constitutes a constitutionally recognised legal system²¹⁸ which has its own area of application, rules, categories, concepts and principles, among others. It is a hybrid law²¹⁹ that applies to South Africa without discrimination and to the exclusion of no community of people. On the other hand, customary law has its own, unique salient features as well as its own sphere of application. The central feature is that customary law consists of various systems of law, each regulating a particular indigenous community.²²⁰ Hosten *et al*²²¹ put it as follows:

The South African legal system is a mixed or hybrid system that has been likened to 'a three-layered cake' which consists of Roman law, Dutch and English law. It would be appropriate to add a fourth layer, namely [customary] law, since a large proportion of the South African population adhere[s] to its principles. However, indigenous laws (variously termed autochthonous, customary and African customary law) have, in the past, not been recognised as part of the general law of the land but only as part of a special system of law.

214 *Mthembu v Letsela* 1997 2 SA 936 (T) 944B-C.

215 *Bhe* 604 para 40. For further comments on this issue, see among others Van Niekerk "Legal Pluralism" (2010) 3; Bekker and Rautenbach "Application of African Customary Law" 17.

216 Van Niekerk "Legal Pluralism" (2010) 3.

217 Myburgh *Indigenous Law* 2.

218 See, *inter alia*, ss 8 and 39 of the *Constitution*.

219 It consists of Roman-Dutch law, which is supplemented by English law and amended continually by legislation. S 39(3) gives a court and legislature the power to develop common law and customary law consistent with the *Constitution*.

220 Bekker and Rautenbach "Application of African Customary Law" 17.

221 Hosten *et al South African Law* 1248-1249.

In *Pharmaceutical Manufacturers Association of South Africa; In re: Ex Parte Application of President of RSA*²²² the court declared: "all law derives its force from the *Constitution* and is subject to constitutional control". Maithufi²²³ puts it thus:

Side by side with customary law exists what is termed the common law of South Africa. This system of law is of Western origin in that its main source is Roman-Dutch tradition, coupled with certain influences of English law. This is the law that is applicable, with a few exceptions, to the whole population of South Africa. Courts in South Africa may therefore apply this system as well as customary law.

The African peoples²²⁴ share common features.²²⁵ These commonalities are also manifest in the various systems of customary law.²²⁶ Hosten²²⁷ lists the following features:

- i. the communal character of the law.
- ii. the oral nature of the law.
- iii. the lack of abstract concepts.
- iv. a group as a legal subject.
- v. shared duties and rights.

Customary law has the following salient features:²²⁸

2.5.1 Specialised and non-specialised systems of law

Common law is an example of a specialised legal system. This is a developed system of law. Its rules are, generally, readily ascertainable from legislation, judicial precedents, text books and, in some countries, codes of law.²²⁹

222 *Pharmaceutical Manufacturers Association of South Africa; In re: Ex parte Application of the President of the Republic of South Africa* 2000 2 SA 674 (CC) para 44.

223 Maithufi "Best Interests of the Child" 137-138.

224 See ch 4 for the comment on the various African ethnic groups in South Africa in general and Limpopo Province in particular.

225 Myburgh *Indigenous Law* 1.

226 Myburgh *Indigenous Law* 1.

227 Hosten *et al South African Law* 1252.

228 Bekker and Rautenbach "Application of African Customary Law" para 2.3.

229 Bekker and Rautenbach "Application of African Customary Law" para 2.3.1.

Customary law is an example of a non-specialised system of law. It is generally unwritten and does not have immutable rules. Each system of customary law specifically applies to the community in which it is found.

2.5.2 Language as a medium of description

The Kenyan writer, Ngugi wa Thiong'o, says the following about language:²³⁰

One of the basic, most fundamental means of individual and communal self-realisation is language. That's why the right to language is a human right, like all the other rights, enshrined in the Constitution. Its exercise in different ways, communally and individually chosen, is a democratic right.

Language is an aspect and carrier of culture. A dominant language reflects the superiority of its cultural basis and context. The teaching and learning of language are accompanied by a direct or indirect teaching and learning of a culture of which the said language is part. The marginalisation of a language translates into the marginalisation of the embodied culture. For instance, in South Africa the English language in its varied social, political, economic, legal and other manifestations reflects the dominant Western culture. Rukuni²³¹ puts it thus:

I also realised that the schools and the curriculum had become one big education system that created a bias to leave behind our Afrikan culture, and learn to live according to a Western culture. Schools were basically used to wipe out our culture by teaching that the Western culture was supposedly more modern and therefore more advanced.

English and Afrikaans were the exclusive official languages in South Africa for a long time. This official status assured them of dominance in the government and business domains, at least. It is noteworthy that, while Afrikaans is the mother-tongue of the Afrikaners and some coloured communities in the country, English enjoys a comparatively universal use by all races. Moreover, English is a medium of instruction in many educational institutions, especially former black

230 Ngugi wa Thiong'o *Sunday Times Review* 1.

231 Rukuni *Being Afrikan* 14-15.

universities and schools. The sources of the official version of customary law are written in English and Afrikaans for obvious reasons. Two of those reasons are:

- i. English- and Afrikaans-speaking peoples have been the dominant components of the South African nation for many centuries; and
- ii. most of the founding scholars in customary law are either English-speaking or Afrikaans-speaking.

The recorders of the systems of customary law see it "through the prism of legal conceptions that were foreign to customary law".²³² It is for this reason that customary law is infused with structures, systems, concepts and principles of common law and not *vice versa*. One notable exception is the African principle of *Ubuntu*, which has been seeping into the South African legal system through judicial adjudication and jurisprudence since 1994.²³³

Bennett²³⁴ correctly points out that the practice of using European languages as a medium of description of customary law is firmly entrenched, both in legal practice and scholarly writings. He indicates, furthermore, that the use of European languages is justified on the grounds that the use of vernacular is counterproductive, when a text is intended to be read by an international audience. The disregard of an African language as a medium of description has provided impetus to the hegemony of European languages and European laws.

It is submitted that, though it is a fact that customary law may be relatively more accessible to the international audience if it is written in English, it is not obvious that the use of Afrikaans as a medium of description improves the accessibility

232 Bekker and Rautenbach "Application of African Customary Law" para 2.5.4.

233 See, for instance, Mokgoro 1998 *PER/PELJ* 14-26; *MEC for Education: KwaZulu-Natal v Pillay* 2006 10 *BCLR* 1237 (N) para 53; *Albut v Centre for the Study of Violence and Reconciliation* 2010 3 *SA* 293 (CC) para 91; *M v S (Center for Child Law Amicus Curiae)* 2007 12 *BCLR* 1312 (CC) para 63; *Ryland v Edros* 1997 2 *SA* 690 (C) 708; *Badenhorst v Badenhorst* 2005 *JOL* 13583 (CC) para 45.

234 Bennett *Customary Law* 8.

of customary law to international audience. The following points, among others, are noteworthy:

- i. First, unlike English, Afrikaans is neither an international nor a European language. The Apartheid government purposefully elevated Afrikaans to the level of an official language as well as of one of the languages of instruction in public institutions of learning. However, just as Afrikaners resisted Anglicisation, so Africans resisted "Afrikanerisation". The imposition of Afrikaans as a medium of instruction in African schools triggered the Soweto student riots which began on the 16th of June 1976.²³⁵
- ii. Second, as Afrikaans is a foreign language in the international community, it would be illogical to justify its use instead of the vernacular as a medium of description of customary law on the grounds that Afrikaans has an international audience.

2.5.3 Constant change and development

The definitions of customary law show that it is not a static but a dynamic law. Bennett²³⁶ puts it thus:

The most striking feature of nearly all customary laws is the fact that, in their original form at least, they are unwritten. Laws of this nature have a distinctive character. In the first place, they are, at one and the same time, both young and old. Although the legitimacy of custom depends on its age, customary law is always up to date, because, ancient though it may seem, no custom is ever older than the memory of the oldest living person. Systems of custom therefore have the remarkable ability of to allow forgotten rules to sink into oblivion, while simultaneously accepting new rules to take their place, always on the understanding that the new is old.

According to Olivier *et al*²³⁷ the following factors contribute to the evolution of customary law:

235 Mashabela *People on the Boil* 1 ff.

236 Bennett *Customary Law* 2.

237 Olivier *et al* "Indigenous Law" 5.

- i. changing community views and the demands of a changing world;
- ii. contact with societies that function within other legal backgrounds;
- iii. contact with and being influenced by other legal systems; and
- iv. the direct and indirect influence of foreign (non-indigenous) government structures.

2.5.4 African government and administration

While in the Western democratic system of government, the governmental authority is vested in the three branches of government, namely the legislature, executive and judiciary, in terms of the doctrine of the separation of power,²³⁸ in the African traditional system of government there is no separation of power.²³⁹

Mandela²⁴⁰ describes a traditional community system thus:

The land, then the main means of production, belonged to the whole tribe, and there was no individual ownership whatsoever. There were no classes, no rich or poor and no exploitation of man by man. All men were free and equal and this was the foundation of government. Recognition of this general principle found expression in the constitution of the council, variously called Imbizo, or Pitso, or Kgotla, which governs the affairs of the tribe. The council was so completely democratic that all members of the tribe could participate in its deliberations. Chief and subject, warrior and medicine man, all took part and endeavoured to influence its decisions. It was so weighty and influential a body that no step of any importance could ever be taken by the tribe without reference to it.

People, men and women, were assigned roles in society. Both the traditional leader and ordinary community members were subject to the rule of law.

Excesses were subject to censorship. Myburgh²⁴¹ puts it thus:

... the chief cannot make laws, fulfil judicial functions, or call an assembly of the people without his council's cooperation ...

238 *South African Association of Personal Injury Lawyers v Heath* 2001 1 SA 883 (CC).

239 *Bangindawo v Head of Nyanda Regional Authority* 1998 3 SA 262 (Tk); *Mhlekwa and Feni v Head of the Western Transvaal Regional Authority & Another* 2001 1 SA 574 (Tk).

240 *Mandela Freedom* 20.

241 *Myburgh Indigenous Law* 2.

In other words, popular participation in the affairs of the community was of paramount importance. The court in *Bangindawo v Head of Nyanda Regional Authority*²⁴² dispels the myth that the western notion of the separation of powers is the exclusive best practice model for democracy.

2.5.5 Moments in time

In common law, prescriptive time is of the essence.²⁴³ For instance, there is time within which to institute court processes. Any lawsuit that is out of time-lines may not be accepted by the courts. On the contrary, customary law does not insist on rigid time-lines. There are no time-frames in terms of seconds, minutes, hours, days, weeks, months, years, decades, centuries and millennia. In other words, Africans have no numerical calendars but phenomenal calendars.²⁴⁴ Mbiti²⁴⁵ puts it thus:

The question of time is of little or no academic concern to African peoples in their traditional life. For them, time is simply a composition of events which have occurred, those which are taking place now and those which are inevitably or immediately to occur. What has not taken place or what has no likelihood of an immediate occurrence falls in the category of 'No-time'. What is certain to occur, or what falls within the rhythm of natural phenomena, is in the category of inevitable or potential time.

Mbiti points out, furthermore, that the western linear concept of time, "with an indefinite past, present and indefinite future, is practically foreign to African thinking".²⁴⁶ African time comprises only the past and present. Africans reckon time for a concrete and specific purpose in connection with events and not for the sake of mathematics. People cannot and do not reckon time in a vacuum.²⁴⁷

242 See, *Bangindawo v Head of Nyanda Regional Authority* 1998 3 SA 262 (Tk); *Mhlekwana and Feni v Head of the Western Tembuland Regional Authority & Another* 2001 1 SA 574 (Tk).also, *Mhlekwana and Feni v Head of the Western Tembuland Regional Authority & Another* 2001 1 SA 574 (Tk).

243 Myburgh *Indigenous Law* 2.3.4.

244 Mbiti *African Religions* 17-19.

245 Mbiti *African Religions* 16. Italics omitted.

246 Mbiti *African Religions* 16. Italics omitted.

247 Mbiti *African Religions* 16. Italics omitted.

2.5.6 Categorisation

Bekker and Rautenbach²⁴⁸ indicate correctly that specialised legal systems are comparably well-developed and "clearly distinguish categories, institutions and concepts". On the other hand, customary law does not have rigid categories, institutions and concepts.

2.5.7 Traditional authority courts and procedure

In common law the judiciary and administration of courts are staffed by trained, dedicated human resources. The system of judicial precedent imposes pattern and consistency. Legal representatives enjoy the right of audience. The proceedings are regulated by a presiding judicial officer. Only people with direct and substantial interest in the matter subject to adjudication or their witnesses participate in the proceedings, and they do so in an orderly, controlled fashion. Bekker and Rautenbach²⁴⁹ put it thus:

In specialised legal systems, there are, for the most part, formal court structures, but in non-specialised legal systems, there are no such structures. In the latter legal systems, there are neither professional judges nor legal practitioners. As a matter of fact, the principal dispute settlement bodies can hardly be called courts.

Usually, in customary law, the family is the structure of the first instance that adjudicates disputes among family members, and between family members and members of other families. For instance, if a member of a family seduces a member of another family, the aggrieved will send an intermediary to bring to the attention of the other family the wrongs committed by their member. The family council of the accused will deliberate upon the matter. If needs be, the attendance of the girl and boy will be sought. Both of them will be given the opportunity to give testimony in support of their respective sides of the story. If the dispute remains unresolved, the aggrieved may refer the dispute to the local traditional authority court at the great place of a traditional leader (headman or

248 Bekker and Rautenbach "Application of African Customary Law" 25.

249 Bekker and Rautenbach "Application of African Customary Law" 25.

headwoman) of the village. The traditional leader will convene the assembly of the community to serve as a court charged to adjudicate the dispute between the two families. No legal practitioners represent the parties before a traditional authority court. The court is not manned by professional judges. All members of the assembly are allowed to participate in the proceedings.²⁵⁰ Historically, only adult circumcised married men were fit and proper members of the traditional authority court. Women, uncircumcised men and minor children were disqualified on the grounds of sex, culture and age respectively.

2.5.8 Marriage and family

In common law marriage is a contract between an individual man and an individual woman to the exclusion of others while it lasts.²⁵¹ However, traditionally the parties to a customary marriage are the families of a man and a woman respectively.²⁵² Bennett²⁵³ puts it thus:

Traditionally, customary law treated marriage as an agreement between families, to be negotiated by senior males and sealed by payment of *lobola*.

Both families are represented by their respective family heads. However, each family usually has a delegation of negotiators who conduct and conclude the contract of marriage on behalf of their respective families. Generally the spouses and their offspring become members of an already established family group. Usually the household of a newly-wed couple exists within their marital family group. Later the family head may give the couple the pots ("go fiwa dipitsa").²⁵⁴ This rite symbolises the emancipation of the spouses from their

250 *Mandela Freedom* 20.

251 *Hyde v Hyde & Woodmansee* (1886) LR 1 P & D 130 133; Van Heerden *et al* *Boberg's Law of Persons* 164 and authorities cited in it; Costa 1994 *De Rebus* 914. See also *Ex parte Inkley and Inkley* 1995 3 SA 528 (CC) 535-536; *Seedat's Executors v the Master (Natal)* 1917 AD 302 309; *Ismail v Ismail* 1983 1 SA 1006 (A).

252 Bennett *Customary Law* 199.

253 Bennett *Customary Law* 199.

254 To be emancipated from the guardianship of his family head.

patrilocal guardianship.²⁵⁵ The man is then allowed to establish his own neolocal homestead.²⁵⁶ Bennett²⁵⁷ points out quite correctly that an African traditional family lay at the heart of the African socio-political order.

2.5.9 Contract

In customary law a contract is an agreement between two families.²⁵⁸ A family head concludes contracts on behalf of his family. He exercises the rights and discharges the obligations *in contractu* or *ex lege* in community with other adult members of the family.

2.5.10 Concrete as opposed to abstract legal facts

Customary law is almost entirely based on the concrete performance of an act. For instance, after the conclusion of a valid marriage, her family physically hands a bride over to the family of a groom to physically symbolise the transfer of the bride from her family to the family of the groom.²⁵⁹

2.5.11 Groups rather than individuals as legal subjects²⁶⁰

In common law, without legal disabilities, individual persons enjoy the legal capacity to act, to litigate, and to enter into contracts. The minor children may conclude valid marriages or contracts with the assistance of their natural or legal guardians.

In accordance with customary law a family or community is a legal subject. A family is represented by its family head, while a community is usually represented by its traditional leader. The duty that customary law imposes upon

255 The marital guardianship of the wife.

256 The new matrimonial residence.

257 Bennett *Human Rights* 5.

258 Bekker "Customary Law of Contract" 93.

259 Bekker and Rautenbach "Application of African Customary Law" para 26.

260 The terms "legal subject" and "legal person" are often used interchangeably. However, the practice is to use the term "legal subject" as an umbrella term for both natural persons (human beings) and juristic persons (i.e. creatures of statute). The term "juristic person" and the term "legal person" are understood to be synonymous.

a family or community is a group obligation as opposed an individual obligation as in common law.

2.5.12 Customary law and the values of Ubuntu

According to Bennett²⁶¹ the constitutionalisation of the African philosophical normative value system of *Ubuntu* has provided a gateway for African ideas and values to infuse South African law. The *Constitution* makes a passing reference to the doctrine of *Ubuntu*. However, the judiciary and academia have given and continue to give *Ubuntu* serious consideration. The courts have had reference to the doctrine in *S v Makwanyane*, for instance.²⁶² There is a development of the common understanding of the notion of *Ubuntu*. For instance, Pieterse²⁶³ puts it thus:

The Nguni word *Ubuntu* represents notions of universal human interdependence, solidarity and communalism which can be traced to small-scale communities in pre-colonial Africa, and which underlie virtually every indigenous African culture. While the values the word encapsulates are not themselves unique to African thought, the significance for law and society is arguably much more pronounced in African communities.

According to Van Niekerk²⁶⁴ the principles of *Ubuntu* require that people should live in harmony with one another, with nature, with the gods and with the ancestors. The interests of an individual are served as part of a collectivity. The life and welfare of an individual are inextricably linked with the life and welfare of the community and are in harmonious relationship with the ancestors and nature. This is an anthropocentric view of the universe. However, Van Niekerk puts emphasis upon the bi-dimensional universe in which the relationships have both vertical and horizontal dimensions (ie the dual and reciprocal relationships between the living human persons *inter se*, on the one hand, and the living human persons and the ancestors, gods or God, on the other).

261 Bennett 2011 *PER/PELJ* 30.

262 *S v Makwanyane* 1995 6 BCLR 665 (CC) para 300. Hereafter *Makwanyane*.

263 Pieterse "Traditional African Jurisprudence" 441.

264 Van Niekerk 1998 *CILSA* 159, 168-169.

In *S v Makwanyane*²⁶⁵ the Constitutional Court, per Langa J (as he then was), defined *Ubuntu* as follows:

... a culture which places some emphasis on communality and on the interdependence of the members of the community. It recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such a person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance [to] each member of that community.

Langa J argues, furthermore, that the notion of *Ubuntu* regulates the exercise of rights by putting the emphasis on sharing and co-responsibility and the mutual enjoyment of rights by all. *Ubuntu* places value on life and human dignity. The life of another is as valuable as one's own. *Ubuntu* puts the value of human dignity at the centre of human life.

Clearly, Langa's concept of *Ubuntu* resonates with the African idiom, "a person is a person through other persons". Mahomed J (as he then was) and Mogoro J also expressed profound understanding of the notion of *Ubuntu* in their concurring judgments in *S v Makwanyane*. Ironically, these eminent jurists expounded this African philosophical value in a review of the constitutionality of the death penalty. In *Albut v Centre for the Study of Violence and Reconciliation and Others*,²⁶⁶ the Constitutional Court, per Froneman J, stated that the participatory system of government in South Africa is built upon an ancient principle of traditional African methods of government. *Ubuntu* informs all African systems of government. Restorative justice is rooted in the value of *Ubuntu*. *Ubuntu* is an expression of group solidarity, compassion and communal orientation to problem-solving and crime control. Crime control, for instance, resides in the community.²⁶⁷

265 *Makwanyane*.

266 *Albut v Centre for the Study of Violence and Reconciliation* 2010 3 SA 293 (CC) para 91.

267 *M v S (Center for Child Law Amicus Curiae)* 2007 12 BCLR 1312 (CC) para 63.

In the area of family law the courts invoked the concept of *Ubuntu* in, among others, *Ryland v Edros*,²⁶⁸ *Badenhorst v Badenhorst*²⁶⁹ and *Bhe and Others v Magistrate, Khayelitsha and Others; Shibi v Sithole and South African Human Rights Commission and Another v President of the Republic of South Africa and Another*.²⁷⁰

There are objections to *Ubuntu* as a metanorm on the grounds, among others, that it is too vague to be of any use, that it is redundant, and that its communal orientation undermines individual autonomy.²⁷¹ However, Bennett²⁷² concludes that *Ubuntu* as a lived system of norms is a metanorm that is almost similar to the English concept of equity. *Ubuntu* involves mutual regard, compassion, respect, equal treatment and acceptance of the humanity and humaneness of all.

2.6 The application of customary law in South Africa

Each system of customary law applies to a local customary community and regulates the family relationships and relationships among the members of such a community. It may happen that a member of one community, ethnic group or race migrates to another community. If this were to happen, the immigrant would become a member of the community with the accompanying rights, duties and responsibilities. In such an instance, the customary law of the receiving community would apply equally to such a member. A different scenario may be that a non-member may choose to subject him/herself to the law and custom of another community in order to resolve a dispute that has arisen between him or her and a member of the said community.

As explained already, the systems of customary law that regulate indigenous African peoples predate both the *Interim Constitution* and the 1996 *Constitution*.

268 *Ryland v Edros* 1997 2 SA 690 (C) 708.

269 *Badenhorst v Badenhorst* 2005 JOL 13583 (CC) para 45.

270 *Bhe*.

271 Bennett 2011 *PER/PELJ* 46-47.

272 Bennett 2011 *PER/PELJ* 52.

They are part of the cultures of their respective indigenous peoples. Before 1994, systems of customary law applied to the communities they regulated, subject to the rules of common law as amended and supplemented by applicable legislation and court decisions. Any rule of customary law which was repugnant to the principles of public policy and natural justice was invalid to the extent of the repugnancy. If the rules of customary law were rendered invalid or a hiatus existed, common law applied. It took a long time before customary law could assume full status as a legal system "living side by side with common law and legislation".²⁷³

According to Anyebe,²⁷⁴ customary law has always been applied with the following qualifications –

- i. It is applicable to the local community where it holds sway.
- ii. It must be an existing customary law and not a mere ancient custom.
- iii. It must not be contrary to public policy.
- iv. It must not be inconsistent with legislation applicable to customary law.
- v. It must not be repugnant to the principles of natural justice, equity and good conscience.

Both the *Interim Constitution* and the *Constitution* have expressly recognised customary law. Constitutional Principle XIII of Schedule 4 provides that customary law, like common law, must be recognised and applied by the courts subject to the fundamental rights contained in the Bill of Rights in chapter 3 of the *Interim Constitution* and to legislation specifically dealing with legislation. Section 211(3) of the 1996 *Constitution* provides that the courts must apply customary law when that law is applicable, subject to the *Constitution* and any legislation that specifically deals with customary law. Both Constitutional Principle XIII of Schedule 4 of the *Interim Constitution* and section 211(3) of the

273 Bennett 2011 *PER/PELJ* 52.

274 Anyebe *Customary law* 7-8. Notes omitted.

1996 *Constitution* recognise customary law and elevate it to a position on a par with common law.²⁷⁵

According to Bekker and Rautenbach, "[s] 211(3) is mandatory; in other words, the courts do not have discretion to apply customary law and they must apply it when the conditions (or qualifications) for its application have been met".²⁷⁶ Customary law is recognised subject to the following qualifications:²⁷⁷

- i. It must be applicable. Both customary law and common law are components of the South African legal system. The court should determine, in accordance with the choice of law rules, whether customary law or common law is applicable.
- ii. It must be compatible with the *Constitution*. For instance, the tradition of patriarchy or the principle of male primogeniture obtrudes the constitutional values of human dignity and equality as well as the fundamental rights to human dignity and equality. The Constitutional Court, in *Bhe*, declared the customary rule of male primogeniture to be incompatible with the *Constitution* and thus invalid.²⁷⁸ In other words, the court must no longer apply the customary rule of male primogeniture to resolve customary law disputes.
- iii. It must not be superseded by any legislation that specifically deals with customary law.²⁷⁹ The court has no discretion to apply customary law instead of such applicable legislation but must, perforce, apply the applicable legislation to the customary law dispute in question. The legislature has enacted a number of items of legislation that specifically deal with customary law.²⁸⁰ However, the legislation itself must be

275 Bekker and Rautenbach "Application of African Customary Law" 39.

276 Bekker and Rautenbach "Application of African Customary Law" 39.

277 Bekker and Rautenbach "Application of African Customary Law" 39.

278 See also *Mahala v Nkombombini* 2006 5 SA 524 (SE).

279 Bekker and Rautenbach "Application of African Customary Law" 39-43.

280 See, for instance, the *Recognition Act, Traditional Leadership and Governance Framework Act* 41 of 2003; *Reform of Customary Law of Succession and Regulation of Related Matters Act* 11 of 2009.

consistent with the *Constitution*. For instance, in *Gumede*, the Constitutional Court declared section 7 of the *Recognition Act* unconstitutional and invalid in so far as it discriminated between customary marriages entered into before the *Recognition Act* came into operation and customary marriages entered into after the *Recognition Act* came into operation.

2.7 Conclusion

The *Constitution* recognises customary law as part of the legal system of South Africa.²⁸¹ In *Mabena v Letsoalo*²⁸² the court acknowledged that the law had over time evolved to accommodate the contemporary affairs of a community to which the family of the prospective spouse belonged. In the *Shilubana*²⁸³ case the Constitutional Court held that the traditional authorities are empowered to make, amend and repeal the rules of customary law of their communities consistent with the applicable provisions of the *Constitution*, in particular the Bill of Rights. The *Reform of Customary law of Succession and Regulation of Related Matters Act* has extended the application of the *Intestate Succession Act* to Black Africans who die *ab intestato*. In consequence, widows and extramarital children of the deceased may inherit *ab intestato* from the deceased. Chapter 3 deals with the forms of customary law.

281 *Alexkor* para 51.

282 *Mabena v Letsoalo* 1998 2 SA 1068 (T).

283 *Shilubana*.

CHAPTER 3

THE FORMS OF CUSTOMARY LAW

3.1 Introduction

Chapter 3 analyses the official and living versions of customary law.²⁸⁴ The Bill of Rights applies to both the official and living versions of customary law.²⁸⁵ According to the report of the SALC (as it then was),²⁸⁶ the indirect application of the Bill of Rights would give the courts grounds for applying the living version of customary law. According to Currie,²⁸⁷ the Bill of Rights may apply differently to the different forms of customary law.

3.2 Ascertainment of customary law

Section 1(1) of the *Law of Evidence Amendment Act*²⁸⁸ provides, among others, that the courts may take judicial notice of customary law "insofar as it can be ascertained readily and with sufficient certainty". As explained above, according to Bekker and Rautenbach, "[s] 211(3) is mandatory; in other words, the courts do not have discretion to apply customary law and they must apply it when the conditions (or qualifications) for its application have been met".²⁸⁹ Section 1(1) of the *Law of Evidence Amendment Act*²⁹⁰ is subject to the *Constitution*, which recognises customary law as part of the basic law of South Africa,²⁹¹ and the court must apply customary law subject to the *Constitution* and any applicable

284 See Himonga and Bosch 2000 SALJ 318-331 for a detailed discussion of the differences between official and living versions of customary law.

285 Kerr 1997 SALJ 347; *Du Plessis v De Klerk* 1996 5 BCLR 658 (CC) 691D; *Mthembu v Letsela* 1998 2 SA 675 (T).

286 SALC *Discussion Paper* 93 10; Rautenbach *Legal Position of South African Women* 334.

287 Currie "Minority Rights" para 36.20.

288 *Law of Evidence Amendment Act* 45 of 1988. See Rautenbach *Legal Position of South African Women*; Kerr 1994 SALJ 725-729, 735.

289 Bekker and Rautenbach "Application of African Customary Law" 39.

290 *Law of Evidence Amendment Act* 45 of 1988. See Rautenbach *Legal Position of South African Women*; Kerr 1994 SALJ 725-729, 735.

291 Ss 1, 8, 39 and 211(3) of the *Constitution*.

legislation.²⁹² However, it is worth mentioning that, while the official version of customary law is easy to find, the living version cannot always be "ascertained readily and with sufficient certainty".²⁹³ According to the report of the SALC,²⁹⁴ unlike the living version, the official version of customary law is disposed towards the interests of the state rather than the interests of the community living under it.²⁹⁵ The SALC²⁹⁶ reports, further, thus:

Thus, the 'official' version of customary law described less what people previously did (or were actually doing) and more what the government and its chiefly rulers thought they ought to be doing. As several historians of customary law have said, it is an 'invented tradition'.

Molokomme points out that the difficulty about the ascertainment of the living version of customary law is that customs vary from community to community.²⁹⁷

3.3 The forms of customary law

According to Maithufi,²⁹⁸ there are two versions of customary law, namely the official and non-official versions. Van Niekerk²⁹⁹ also divides customary law into two versions, namely the unofficial indigenous law and official indigenous law. The court in *Mabena v Letsoalo*, per Le Roux J, divided customary law into the official and unofficial versions of customary law.³⁰⁰ While Kerr,³⁰¹ Maithufi,³⁰² Bekker and Maithufi³⁰³ and Van Niekerk³⁰⁴ divide customary law into two

292 Bekker and Rautenbach "Application of African Customary Law" 39.

293 S 1(1) *Law of Evidence Amendment Act* 45 of 1988.

294 SALC *Project 90* para 2.2.5. It is noteworthy that the SALC was renamed as the South African Law Reform Commission in 2003.

295 SALC *Project 90*. Notes omitted.

296 SALC *Project 90* para 2.2.5. Notes omitted.

297 Molokomme "Women's Law in Botswana" 13.

298 Maithufi 2002 *De Jure* 212-213. See further Maithufi "Best Interests of the Child" 137; Bekker and Maithufi 1992 *TRW* 47; Kerr 1999 *Obiter* 41; Sanders 1987 *CILSA* 405ff; Van Niekerk 2005 *Obiter* 480; *Bhe* per Ngcobo J 643; Nhlapo 1991 *Acta Juridica* 135; Bekker 2003 *Anthropology Southern Africa* 124; Mbatha 1999 *Bulletin* 7; *Mahala v Nkombombini* 2006 5 SA 524 (SE).

299 Van Niekerk "Legal Pluralism" (2002) 8-9, 16-17.

300 *Mabena v Letsoalo* 1998 2 SA 1068 (T).

301 Kerr 1999 *Obiter* 41.

302 Maithufi 2002 *De Jure* 212-213.

303 Bekker and Maithufi 1992 *TRW*.

304 Van Niekerk "Legal Pluralism" (2002) 8-9, 16-17.

versions, Bennett³⁰⁵ divides customary law into three versions, namely the official customary law, the customary law recorded by anthropologists and lawyers, and living customary law. According to Armstrong,³⁰⁶ there are three versions of customary law, namely official customary law, traditional law and living customary law. According to Ngcobo J (as he then was), in *Bhe*, there are three forms of customary law, namely the customary law that is practised in the community, customary law that is found in statutes, case law and textbooks, and academic customary law (i.e. the customary law that is used for teaching purposes). Closer scrutiny reveals that, in the final analysis, there are two forms of customary law, namely the living and official versions. On the one hand, an analysis of the sources indicates that the so-called third form is, in effect, an official version of customary law, while, on the other, the traditional version of customary law is actually the living version. This view will be borne out by the analyses of the forms of customary law in the following paragraphs.

3.3.1 The official customary law

Generally, the official customary law reflects state interests³⁰⁷ and is part of state law.³⁰⁸ The official version of customary law is found in statutes, law reports, the South African Law Reform Commission reports, text books, university lectures and other public documents.³⁰⁹ According to Ndima, the official version of customary law depends on alien values for validity.³¹⁰ Mogoro J, in *Du Plessis v De Klerk*,³¹¹ points out that customary law "has lamentably been marginalised and allowed to degenerate into a vitrified set of norms alienated from its roots in the community". Costa puts it thus:

305 Bennett *Sourcebook* 49-50.

306 Armstrong *Law and Family* 2-5.

307 Kuper *Anthropology and Anthropologists* 99ff.

308 Van Niekerk 2001 *CILSA*. The term "state law" alludes, primarily, to common law (ie Roman-Dutch law and adopted aspects of English law). The pre-constitutional official customary law may be counted as part of state law as it reflected common law and was required not to be repugnant to public policy and natural justice. These concepts, public policy and natural justice, are common law concepts.

309 Van Niekerk 2001 *CILSA* 480.

310 Ndima 2007 *Speculum Juris* 82.

311 *Du Plessis v De Klerk* 1996 5 BCLR 658 (CC).

[C]ustomary law as it stands is corrupted, inauthentic and lacking authority. It is a foreign imposition, a stranger in Africa.³¹²

In *Fosi v Road Accident Fund*,³¹³ the court put it as follows:

Indigenous African customary law has occupied an unfortunate position in the legal history of our country. The fact is that it was hardly recognized by the law-makers and was accordingly scarcely applied in the South African courts. It enjoyed the status of being known that it existed and its continued existence was merely tolerated as a necessary evil.

In *Sigcau v Sigcau*,³¹⁴ the Appellate Division held that the individual person was the owner of the royal family home and not merely the controller of the property.³¹⁵ Ndima³¹⁶ puts it thus:

However, the learned Chief Justice refused to vacate his common law comfort zone, although he was dealing with an African customary law problem. He continued to use the same institution, which his experience of common law made him use, to describe the rights of the defendant, in an African matter. By doing this he unwittingly committed an unforgivable comparative law mistake, namely, looking at foreign law (African customary law) with the eyes of his own system (common law).

The facts in *Sibasa v Ratsialingwa*³¹⁷ and *Ratsialingwa v Sibasa*³¹⁸ decisions are as follows:

Chief Ramaremisa was a polygamist. His community's headquarters had been at Mokumbani for many generations. He was married among others to Nyapopi. Nyapopi was from the male side (i.e. a male house). Another woman, namely Nyamoufe, was married to his mother's house. She was from the female side (i.e. a female house). She was later allocated to Ramaremisa as a junior wife.

Ramaremisa had a son, namely Phiriphi Sibasa, by his senior wife, Nyapopi. He died in 1930. Sibasa stepped into his shoes and succeeded to the

312 Costa 1998 SAJHR 525, 534.

313 *Fosi v Road Accident Fund* 2008 3 SA 560 (CPD) 567.

314 *Sigcau v Sigcau* 1944 AD 67 79.

315 Ndima 2007 *Speculum Juris* 83-82.

316 Ndima 2007 *Speculum Juris* 83-84.

317 *Sibasa v Ratsialingwa* 1947 4 SA 369 (T).

318 *Ratsialingwa v Sibasa* 1948 3 SA 781 (A).

chieftainship of that section of the vhaVenda. However, there was a faction of the royal family that was intent on installing Ratsialingwa as a chief. The Native Commissioner, Sibasa, objected on the grounds that the nomination of Ratsialingwa contravened the Venda law and custom of succession. One of the requirements for a valid chieftainship was that an heir to the throne must swallow a stone retrieved from the bowels of a crocodile. A successor inherits the stone retrieved from the decomposed corpse of his predecessor.

The Governor-General recognised Sibasa as a senior traditional leader. However, in 1948 he deposed Sibasa. He appointed Ratsialingwa in his place. The legal question was whether the appointment of Ratsialingwa amounted to both the assumption of chieftainship and the ownership of the property inherited by Sibasa from the deceased chief. The courts in *Sibasa v Ratsialingwa* and *Ratsialingwa v Sibasa* held that the statutory appointment of a chief who was not an heir of the deceased chief did not affect the inheritance rights of the lawful heirs of the deceased at customary law.

Notably, in *Ratsialingwa v Sibasa* the Appellate Division (as it then was) had reference to its own decision in *Sigcau v Sigcau*.³¹⁹ According to the *Ratsialingwa v Sibasa* decision, a traditional leader inherits the property of his father in his personal capacity and becomes the personal owner thereof. This interpretive approach to customary law of succession contradicts the communal character of the indigenous customary law of property. According to customary law of succession, the first son would step into the shoes of his deceased father in the capacity of a family head. He would become the nominal owner of the family or house property. He is obliged to administer the family or house property in the best interest of his family or house. The family council would intervene if the family head transgressed the family code. The *Ratsialingwa v Sibasa* decision approximates the common law of succession and inheritance, in

319 *Sigcau v Sigcau* 1944 AD 67 79.

particular intestate succession.³²⁰ In any view, although a family head may express his will on his death bed, the indigenous living customary succession is, by operation of law, intestate succession.

In *Buthelezi v Minister of Bantu Administration*,³²¹ Mathole Buthelezi, the hereditary chief of the Buthelezi community in the Mahlabathini area, Zululand, died in 1942. His eldest surviving son was one Bongefile Buthelezi. It was alleged that Bongefile was, in terms of the indigenous customary-law rule of male primogeniture, the heir-apparent/successor-apparent to Chief Mathole Buthelezi, the deceased. The institution of traditional leadership among Africans was embedded in patriarchy.³²² This means that the positions of traditional leadership were limited to male members of the chief's family and, in particular his first-born or eldest son of the senior wife.³²³ However, the customary law differs from one community to the next depending on the circumstances of the community in question. Allegedly, according to the law of the Buthelezi community, Bongefile had to step into the shoes of his deceased father. If he were appointed he would have become the head of the family and community composed of males and females. It was not to be.

By virtue of the powers vested in him as the statutory paramount chief, the Governor-General chose to appoint Mangosuthu Gatsha Buthelezi³²⁴ as the chief of the Buthelezi community instead of Bongefile Buthelezi. Bongefile did not, therefore, succeed his deceased father, Mathole Buthelezi, as hereditary chief of the Buthelezi community.

Hoexter ACJ (as he then was) held that there was "nothing in the Act which gives the son of a hereditary chief any claim whatever to the chieftainship; on

320 Cobert, Hofmeyer and Kahn *Law of Succession 1 ff.*

321 *Buthelezi v Minister of Bantu Administration* 1961 4 SA 635 (AD).

322 Vorster "Institution of Traditional Leadership" 131.

323 Vorster "Institution of Traditional Leadership" 131.

324 Chief Mangosuthu Gatsha Buthelezi later became the Chief Minister of KwaZulu, the President of Inkatha Freedom Party, the Minister of Home Affairs in the Mandela and Mbeki administrations, and a Member of Parliament of the Republic of South Africa.

the contrary, the object of the legislation appears to have been to put an end to hereditary chieftainship for the purposes of this Act". Literally construed, the court held that the Governor-General could appoint anyone to the position of a traditional leader irrespective of whether or not he/she was of royal blood and/or the most senior surviving son.³²⁵

*Mgoza v Mgoza*³²⁶ is another example in which the court preferred common law to customary law. The facts are as follows. Cornelius, the deceased, died intestate. His eldest son, Mgoza, stood to become the sole and general heir in accordance with "Black law and custom".³²⁷ In terms thereof, males would inherit from males but females would not inherit at all. Needless to say, in indigenous African customary law a person did not inherit in his personal capacity but in his nominal capacity as a representative of a family group. Put simply, he supposedly entered into the shoes of the deceased family head. The successor could not "inherit," and neither could the deceased "bequeath" to his nominal successor.

The matter went through the former Native Commissioner's Court, then the now defunct North-Eastern Bantu Appeal Court and, lastly, the Appellate Division. The latter court held that Mgoza had inherited the land to the exclusion of all and had the right to eject whosoever occupied his property because he was "the sole and general heir" of the property. At the outset, the notions of "stepping into the shoes of the deceased" and "the sole and general heir" are mutually exclusive. The first notion is a customary law concept of group-oriented succession, while the latter is an individualistic common law concept of succession.

Indeed, the holding of the court sounds more like an adoption of a principle of common-law intestate succession in terms of which property devolves upon an

325 See also *Sibasa v Ratsialingwa* 1947 4 SA 369 (T); *Ratsialingwa v Sibasa* 1948 3 SA 781 (A).

326 *Mgoza v Mgoza* 1967 2 SA 436 (A).

327 The official version of the customary law of succession as embodied *inter alia* in the partly repealed BAA.

heir to the exclusion of grandchildren during the lifetime of such an heir. It put emphasis on individual rights rather than on collective family rights to what was otherwise family property. This holding misses the point that indigenous customary law recognises three types of property, namely general, family and personal property. In indigenous customary law, land is either general or family property. The family head administers the estate in the interest of the given house or family. The rights to the property vest in the given house or family represented by the family head. The heir cannot inherit more or better rights than the deceased had. If the deceased was a vicar of the family the successor or heir cannot, at succession or inheritance, succeed to a higher status and inherit better rights than the ones the deceased had at the time of death. This is so because, in terms of indigenous customary law, a successor/heir steps into the shoes of the deceased.

The law of intestate succession prohibits the inheritance of the grandchildren from their grandparents, without the authority of a will to the contrary, if such grandparents predecease the parents of their grandchildren. Differently put, if a parent survives his own parent his children are incompetent to inherit from their paternal grandparent. Thirdly, in terms of the customary-law rule of male primogeniture, the younger sons are discriminated against. Fourthly, the customary-law rule of male primogeniture discriminates against women. These legal questions never arose in the *Mgoza* case. Seemingly, it was not yet their time.

It is incontrovertible that the Appellate Division decided the question of indigenous customary law through the common-law lenses. In other words, while it paid lip service to the fact that the applicants and respondent were members of a traditional community whose dispute fell to be determined within the purview of customary law rules, it had recourse to common law rules and remedies to answer what were clearly customary law questions between tribesmen. The approach maimed the rules of customary law, in particular, the

customary law of property and customary law of succession and the customary law rule of male primogeniture.

In *Tshabalala v Estate Tunzi*³²⁸ the court said:

According to pure native law no woman can own property but the native Appeal Court has held that the widow is entitled to retain in her own right property earned by her [husband upon her] husband's death; the court was aware that this is in conflict with native custom, but when native custom is repugnant to justice and equity it must give way.

The courts, generally, justified their marginalisation of the rules of customary law on the grounds that where the rules are repugnant to justice and equity (previously "western civilization") they must give way to statutory law and the rules of common law.³²⁹ According to Ndima, African customary law's adaptation in practice to accommodate women, many of whom are now heads of households, was ignored.³³⁰ Mqeke,³³¹ in his comments on *Thembisile v Thembisile*,³³² highlighted a myriad burial disputes: between a widow and her in-laws;³³³ between a father-in-law and the relatives of his daughter-in-law;³³⁴ between a widow and the children of the deceased from his previous marriage;³³⁵ between the deceased's families in a polygamous marriage;³³⁶ and between the deceased's children *inter se*.³³⁷ The grandfathers, granduncles, uncles and brothers of the deceased decide as to where, when and how the remains of the deceased are to be interred. Though the women of the extended family are consulted, the public faces of the extended family are males. Often the widow and her in-laws would differ about the burial place of the deceased. Generally, if she produces a marriage certificate the police would protect her

328 *Tshabalala v Estate Tunzi* 1950 NAC 46 (C) 48.

329 *Tshiliza v Ntshongweni* 1908 NHC 10 11; *Tshabalala v Estate Tunzi* 1950 NAC 46 (C) 48.

330 Ndima 2007 *Speculum Juris* 84-85.

331 Mqeke 2003b *Speculum Juris* 125.

332 *Thembisile v Thembisile* 2002 2 SA 209 (TPD).

333 *Tsheola v Maqutu* 1976 2 SA 418 (THC); *Mnyama v Gxalaba* 1990 1 SA 650 (C).

334 *Mbanjwa v Mona* 1977 4 SA 403 (TK); *Mankahla v Matiwane* 1989 2 SA 920 (C).

335 *Khumalo v Khumalo* 1984 2 SA 229 (D).

336 *Makholiso v Makholiso* 1997 4 SA 509 (TKSC).

337 *Mabulu v Thys* 1993 4 SA 701 (SECLD); *Kwitshane v Magalela* 1994 4 SA 610 (TK); *Thembisile v Thembisile* 2002 2 SA 2009 (TPD).

rights to bury her husband. However, if the burial rights disputes are referred to courts, the courts often adjudicate them in accordance with common law. Indeed, in common law it is the widow, as an individual spouse, who enjoys the burial rights in respect of her husband and *vice versa*. Simply put, common law individualises the burial rights of a widow.

3.3.2 Living customary law

Living customary law is the "law actually observed by African communities".³³⁸ It is the unwritten law that is passed on from generation to generation and is part of the culture and tradition of the community.³³⁹ It evolves as the circumstances of society change.³⁴⁰ However, a change of legislation, in particular, and written law, in general, often if not always requires legislative intervention. Ndima³⁴¹ puts it as follows:

When it comes to the pervasive problem of developing African customary law, the judiciary faces the additional challenge of determining the living version of customary law for the community concerned. *One of the injustices of the past, which our constitutional interpreters must reject in striving to heal our historical divisions, is the distortion caused to African law by the application of the interpretive technique of repugnancy.* This method removed the philosophical underpinnings (which the colonial officials perceived to be in conflict with Western morality) from African customary law.

The development of the law is not only a catholic but is also an age-old world-wide phenomenon. For instance, according to Hahlo,³⁴² western European marriage law developed in three stages. During the first stage, marriage was a private matter between spouses and their families. During the second stage, marriage was under the jurisdiction of the church. During the last stage,

338 *Mabena v Letsoalo* 1998 2 SA 1068 (T) 1074.

339 Du Plessis *Introduction to Law* 67.

340 Koyana *Customary Law* 157.

341 Ndima 2007 *Speculum Juris* 81-82. Emphasis added.

342 Hahlo *Law of Husband and Wife* 1.

marriage passed under the control of the state. The court, in *Rolfes, Nebel and Co v Zweigenhaft*,³⁴³ said:

This court would be loath to upset a [contemporary] practice that had become a general custom of South Africa, even if it were somewhat different from the Roman-Dutch [legal] practice.

In the case under discussion,³⁴⁴ a principle of Roman-Dutch law in question had fallen into disuse and an indigenous "customary"³⁴⁵ legal principle had come into effect. The court accepted that the law had developed and that the established contemporary legal custom overrode the Roman-Dutch legal practice which had fallen into disuse. The legal development was not legislated but had evolved in response to the changing circumstances of society. In *Henderson v Hanekom*,³⁴⁶ Sir Henry de Villiers CJ put it thus:

[T]here must, in the ordinary course, be progressive development of the law keeping pace with modern requirements.

In *Blower v Van Noorden*,³⁴⁷ Sir James Rose-Innes CJ put it thus, in his classic *dictum*:

There come times in the growth of every living system of law when old practice and ancient formulae must be modified in order to keep in touch with the expansion of legal ideas, and to keep pace with the requirements of changing conditions.

It follows from the *Blower* dictum that, where the law is outpaced by the requirements of the changing conditions of a given society, the legislature must develop the law consistent with those requirements of a changing society to avoid the probable irrelevance of the law. The law is meant to serve the people and not the other way round. If a rule of law outgrows its usefulness and purpose, it becomes a misrule of law, which people may defy consciously or unconsciously. The *Henderson* and *Blower* cases indicate that, though there

343 *Rolfes, Nebel and Co v Zweigenhaft* 1903 TS 185 206.

344 *Rolfes, Nebel and Co v Zweigenhaft* 1903 TS 185 206.

345 The term "customary" here does not allude to indigenous African customary law but to "home-grown" practice.

346 *Henderson v Hanekom* 1903 20 SC 513 519. Hereafter the *Henderson* case.

347 *Blower v Van Noorden* 1909 TS 890 905. Hereafter the *Blower* case.

were conservative and purist judges on the bench, there were quite influential modernist judges who recognised the progressive development of the law, in particular in the sphere of custom. The law responds to the changing values of society. The evolution of law sustains its legitimacy. The recognition of the evolution of the living law in response to the changing conditions of societies is, therefore, not a new phenomenon imposed by the *Constitution*. The living law is subordinate to the democratic constitution. Frederick Maitland states the following in respect of the continual development of the English law:³⁴⁸

Hardly a rule remains unaltered and yet the body of law that now lives among us is the same body of law that Blackstone described in the eighteenth century, Coke in the seventeenth, Littleton in the fifteenth, Bracton in the thirteenth, Glanville in the twelfth.

In *MM v MN and Another*,³⁴⁹ the Constitutional Court said:

Paradoxically, the strength of customary law – its adaptive inherent flexibility – is also potentially difficult when it comes to its application and enforcement in a court of law.

The *Constitution* imposes a duty upon a competent court to develop customary law consistent with its provisions.³⁵⁰ "It follows implicitly that, wherever common law or customary law deviates from the spirit, purport and objects of the Bill of Rights the courts have an obligation to develop it by removing the deviation."³⁵¹ In other words, the courts in carrying out their section 39(2) developmental function must have regard to the spirit, purport and objects of the Bill of Rights. Section 39(2) provides:³⁵²

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.

Customary law, essentially the customs of indigenous communities, is also subject to change and may be developed by the court and the legislature. In a

348 Maitland "Origins of Legal Institutions" 6 cited in Mqoke 2003a *Speculum Juris* 25.

349 *MM v MN and Another* 2013 4 SA 415 (CC) para 25.

350 S 39(2) of the *Constitution*.

351 *Carmichele v Minister of Safety and Security* 2001 10 BCLR 995 (CC).

352 S 39(2) of the *Constitution*.

minority judgment Ngcobo J, in *Bhe*, pointed out that there are two instances in which customary law should be developed.³⁵³

- i. where customary law should be aligned with the *Constitution*; and
- ii. where the changing needs of society demand development.³⁵⁴

Van Niekerk³⁵⁵ states that:

State regulation, which often resulted in distortion, could not suppress the natural development of indigenous law and its institution. The unofficial application of indigenous law by both official and unofficial institutions bears witness to the tenacity of indigenous law and to its inherent ability to adapt to changing circumstances without losing its character. This is apparent in the administration of justice by the community courts of the metropolitan areas. It is also evidenced by various indigenous institutions which still find application in black metropolitan areas.

Legal norms regulate the conduct of persons against a socially acceptable value system. The values of society are dynamic. The living version keeps pace with the changing circumstances of the community it serves.³⁵⁶ Juma³⁵⁷ puts it as follows:

Living law is a concept which reflects the understanding of African law as an evolving phenomenon. Thus, it is often used to distinguish the 'official customary law' from the 'law actually lived by people'.

Bennett puts it as follows:³⁵⁸

Nowadays people are more sceptical of the provenance and authenticity of customary law they find in official legal text. The modern legal order is now openly acknowledged to be a pluralistic one, a series of interrelated normative spheres. It includes the formal legal code, containing a written version of customary law, and of course the common law, both of which are regularly applied in official courts and in the state bureaucracy. Then there is a version of customary law that has been recorded by

353 *Bhe* paras 216-223.

354 See also Van Niekerk 2005 *Obiter* 478.

355 Van Niekerk "Legal Pluralism" (2002) 16.

356 See also *Thibela v Minister van Wet en Orde* 1995 3 SA 147 (T).

357 Juma 2007 *Speculum Juris* 88, 109 and authorities cited in it. See also *Mabena v Letsoalo* 1998 2 SA 1068 (T); *Mabuza v Mbatha* 2003 4 SA 218 (C).

358 Bennett *Sourcebook* 49-50.

anthropologists and lawyers. This is used in more informal contexts and for teaching purposes. And finally there is the customary law that is actually lived out by the people and applied in the various traditional and informal tribunals. The legal orders are not unconnected, nor should it be assumed that the people concerned are unaware of how to manipulate the resources offered them by legal pluralism.

In *Hlope v Mahlalela*,³⁵⁹ the applicant entered into marriage with the daughter of Mahlalela. One child, a daughter, namely, Sihle, was born to the couple. Sihle's mother died. *In casu* there was a dispute between the biological father of their girl-child and her maternal grandparents as to who should get her custody. Both parties invoked the rules of the Swazi customary law and called Swazi law expert witnesses to give evidence in their cases. According to the court the basic principles of the Swazi law have to a certain extent been excluded in favour of the common law. It appears to be uncertain whether the common law has been incorporated into customary law or whether customary law has simply been excluded in favour of common law.

A father of an extra-marital³⁶⁰ child may deliver a beast for such a child and the extra-marital child would then be handed over to her biological father. Section 28(2) and (3) of the *Constitution* provides that "[a] child's best interests are of paramount importance in every matter concerning the child". Accordingly, the court awarded the custody of the child to the father on account of the dictates of the best interest of the child.³⁶¹ It is noteworthy that section 28 mirrors human-rights norms of foreign and international law orientation, in particular the Romano-Germanic and Anglo-American hybrid of law and international human rights law.³⁶²

359 *Hlope v Mahlalela* 1998 1 SA 449 (T).

360 The *Constitution* has done away with inequalities and discrimination between marital and extra-marital children: see the *Bhe* case. See also *Minister of Home Affairs v Fisher* 1979 3 All ER 21 (PC); the *European Convention on the Legal Status of the Children Born out of Wedlock* (1978); *Clark v Jeter* 486 US 456; *Marckx v Belgium* 2 EHRR 330; *Johnston v Ireland* 9 EHRR 203.

361 S 28(2) of the *Constitution*; *W v F* 1998 9 BCLR 1199 (N); *Fraser v Naude* 1998 11 BCLR 1344 (CC) para 9.

362 The *Universal Declaration of Human Rights* (1948); the *European Convention on Human Rights* (1950); the *United Nations Declaration of the Rights of the Child* (1959); the *European Social Charter* (1961); the *International Covenant on Economic, Social and*

*Mabena v Letsoalo*³⁶³ is a typical "daughter-in-law" and "parents-in-law" dispute. The respondent and her husband married in accordance with the rules of the living customary law of marriage. Traditionally, such a marriage required the consent of both family groups in addition to those of the bridegroom and bride. On both sides, family heads would represent their respective family groups. Over the years, as the living customary law evolved in response to the "changing circumstances" of the traditional communities, the consent of the fathers of the bridegroom and bride was substituted for that of the family groups as represented by family heads. In the matter under discussion, the fathers of both the bridegroom and bride did not give their consent. On the one hand, the father of the bridegroom refused to give his consent and, on the other, the father of the bride had deserted their family. Her mother was "the family head". Living customary law accepts the family headship of women. The court held that the mother could give consent to the customary marriage and receive *magadi*³⁶⁴ in respect of the customary marriage of her daughter.

The synopsis of the facts of *Zondi v President of the RSA*³⁶⁵ is as follows. In terms of the repealed section 22(6) of the *BAA*, Africans could enter into three types of marriage, namely marriage entered into by antenuptial contract (ANC); in community of property; or out of community of property. Regulation 2 of the *Estate Regulations*³⁶⁶ provides different succession rules for these three types of marriage. The *Intestate Succession Act*³⁶⁷ governed ANC and marriage in community of property, while customary law governed marriage out of

Cultural Rights (1966); the *International Covenant on Civil and Political Rights* (1966); the *American Convention on Human Rights* (1969); the *African Charter on Human and Peoples' Rights* (1981); the *African Charter on the Rights and Welfare of the Child* (1990); and the *United Nations Convention on the Rights of the Child* (1989).

363 *Mabena v Letsoalo* 1998 2 SA 1068 (T).

364 In statutory customary law *magadi* is not a peremptory requirement for a valid marriage. *Magadi* is generally subject to separate agreement and ancillary to a civil marriage. See Bekker, Labuschagne and Vorster *Legal Pluralism* 41; *Fuzile v Ntloko* 1944 NAC (C&O) 2; *Raphuti v Mametsi* 1946 NAC (T) 19; *Matchika v Mnguni* 1946 NAC (N&T) 78; *Mbonjiwa v Scellam* 1957 NAC (S) 41; *Sekupa v Jonkman* 1966 BAC (C) 20; *Khumalo v Ntshalintshali* 1971 BAC (C) 59.

365 *Zondi v President of the RSA* 2000 2 SA 49 (N).

366 *Estate Regulations*, 1987 (Gen N R200 in GG 10601 of 6 February 1987).

367 *Intestate Succession Act* 81 of 1987.

community of property. In the particular case Simon Mfana Ngidi (the deceased) and Beauty Ngidi (born Ngcobo) (the wife) married on 24 July 1953. The marriage had no consequences of community of property, profit and loss. He was not a partner to a customary union. The couple had no children. The deceased, however, had two extra-marital children. The wife died in 1992. He died intestate on 24 July 1995. The estate fell to be administered in terms of Black law and custom. The deceased's brother was, in terms of the customary-law rule of primogeniture, the only "heir". Extra-marital children were incompetent to inherit because their parents were not married. The court held that the distinction between extra-marital children and children born in marriage in relation to intestate succession (ie Regulation 2) was unconstitutional and declared the equality of the rights of both "categories" of children in that regard.³⁶⁸

In the instance of *Mthembu v Letsela*³⁶⁹ the court held that the principle of male primogeniture did not constitute unfair discrimination. In *Mthembu v Letsela*,³⁷⁰ the court held that discrimination on the basis of extra-marital birth was not unfair. In *Mthembu v Letsela*³⁷¹ the Supreme Court of Appeal confirmed the decisions in *Mthembu v Letsela*³⁷² and *Mthembu v Letsela*.³⁷³ Such a holding went against the grain of the equality rights enshrined in the Bill of Rights. In this case, the deceased was not survived by a male child. In consequence, the "inheritance" "ascended to his father" in accordance with the common-law rules of succession. The decision of the court breached the living primogeniture jurisprudence, which does not recognise the transfer of ownership rights to property from the deceased to his heirs in their individual capacities. Living law recognises communal ownership of family property. In other words, the family is

368 See also *Moseneke v The Master* 2001 2 SA 18 (CC) regarding the discrimination in relation to the administration of estates.

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

370 *Mthembu v Letsela* 1998 2 SA 675 (T).

371 *Mthembu v Letsela* 2000 3 SA 867 (SCA).

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

373 *Mthembu v Letsela* 1998 2 SA 675 (T).

the dominant legal unit, which is composed of members of the family, at whose helm is the family head. The death of a family head does not change the collective nature of the ownership of family property. What it changes is the incumbent of the position of the head of the family. In other words, the status of the deceased family head devolves from the deceased to his eldest surviving child.

It is trite that, under the pre-colonial law, the deceased, unless he was emancipated, would have been subordinated to a family head (his father, in this case). Be that as it may, his father would have been in control of the family property without the stricture of personal ownership. On the other hand, the deceased would be the family head "in his own right" if he were emancipated. In those circumstances, the proverbial shoes of the deceased would ascend to the deceased's father, who would step into those shoes in the interest of his family. This customary-law rule is distinguishable from the common-law one in that "inheritance" in common law amounts to personal ownership of the inheritance (the property).

During the pre-constitutional era, customary law was a system of law parallel to the official South African legal system, namely statutes and common law. This accounts for the concept of legal pluralism. The erstwhile principle of the state law was that if the indigenous customary law was inconsistent with common law, common law prevailed to the extent of the inconsistency. Put differently, in accordance with a repugnancy rule, indigenous customary law was subordinate to common law and statutes, on the one hand, and statutes overrode both common law and indigenous customary law, on the other. The court actions in the *Bhe* case sought to "set the legal position straight". It is worth mentioning that the *Constitution* recognises the indigenous customary law and the concomitant rights. The question is whether the residual indigenous customary

law³⁷⁴ is of any consequence extraneous to the purview of common law and statutes.³⁷⁵

The Constitutional Court adjudicated the disputes in the *Bhe* case through the prisms of the *Constitution* and applicable statutory law, in particular the *Intestate Succession Act*.³⁷⁶ Historically, the general principle was that, unless the statutes or common law provided otherwise, the succession to and inheritance of the status and estate of a Black person had to take place in terms of "Black law and custom". Generally, if not always, the Black law and custom imposed a hierarchical social class system in which, among other issues, men were superior to women. Olivier *et al* submit correctly that in traditional society and its legal system gender was and still is a differential factor, because a woman was and is:³⁷⁷

... regarded as a perpetual minor, always under the guardianship of a male (her father when she was unmarried; her husband when married; and again her father or his successor should she become widowed or divorced).

In 2004, Ngwenya J, in *Bhe and Others v The Magistrate Khayelitsha*,³⁷⁸ declared the provisions of the *BAA* regarding the principle of male primogeniture unconstitutional and invalid. In *Shibi v Sithole and Others*,³⁷⁹ Maluleke J held that intestate succession rules that discriminate on the grounds of sex or gender were unconstitutional and invalid. The decisions in both *Bhe and Others v The Magistrate Khayelitsha*³⁸⁰ and *Shibi v Sithole and Others*³⁸¹ were confirmed by the Constitutional Court in *Bhe*.³⁸²

374 The residual indigenous customary law may be termed "constitutional customary law".

375 The *Intestate Succession Act* 81 of 1987; the *Black Administration Act* 38 of 1927; and the accompanying Regulations deal exclusively with the intestate succession of the Africans.

376 *Intestate Succession Act* 81 of 1987.

377 Olivier *et al* *Indigenous Law* para 4.

378 *Bhe v Magistrate, Khayelitsha* 2004 2 SA 544 (C).

379 *Shibi v Sithole* Case No 7292/01 (TPD) November 2003 (unreported).

380 *Bhe v Magistrate, Khayelitsha* 2004 2 SA 544 (C).

381 *Shibi v Sithole* Case No 7292/01 (TPD) November 2003 (unreported).

382 *Bhe*.

The facts of *Bhe and Other v Magistrate, Khayelitsha*,³⁸³ are as follows. Ms Nontupheko Maretha Bhe cohabited with one Vuyo Elius Mgolombane. They were poor and lived in a temporary informal shelter in Khayelitsha, Cape Town. He was a carpenter and she was a domestic worker. The liaison produced two daughters, namely Nonkululeko Bhe, born in 1994, and Anelisa Bhe, born in 2001. Vuyo obtained a state housing subsidy to build a family house on the site. Unfortunately, he died intestate in October 2002 before he could build the house. The magistrate of Khayelitsha appointed Vuyo's father, Maboyisi Nelson Mgolombane, as the representative of the deceased's estate in terms of the official version of the indigenous customary law.³⁸⁴ Nontupheko and her two daughters were excluded by operation of the law from being appointed as the representatives of the intestate estate of Vuyo Mgolombane on the grounds that they were women and, therefore, perpetual minors in terms of the indigenous customary law. The relationship between Mr Mgolombane, the deceased's father, and Nontupheko broke down. Mgolombane intended to sell the residential property and building material to defray the funeral expenses of the deceased, Vuyo. The applicants challenged the appointment of Mgolombane as heir and representative of the estate. The interpretation of the magistrate was, to all intents and purposes, *ex facie* the *BAA* and its accompanying regulations correct. However, the magistrate disregarded the fact that the relevant provisions of the *BAA* and its regulations were inconsistent with the *Constitution*, in particular section 9 in the Bill of Rights. The Constitutional Court had to determine whether such an apparent inconsistency and, therefore, contravention of section 9 were unconstitutional and invalid.

In the second case, *Shibi v Sithole*, Daniel Solomon Sithole died intestate in Pretoria in 1995. He was neither married nor a partner to a customary union. He was not survived by descendants or ascendants. He was survived only by

383 *Bhe v Magistrate, Khayelitsha* 2004 2 SA 544 (C).

384 The *BAA* and its accompanying Regulations. The *BAA* "appoints" the closest male relative of the deceased as his successor and "heir" in spite of the evolved rules of the living customary law.

his sister, Ms Charlotte Shibi. His nearest male blood relations were his two cousins, namely Mantabeni Sithole and Jerry Sithole. In terms of the indigenous customary-law rule of male primogeniture, section 23 of the *Black Administration Act*, read together with its regulations as well as the *Intestate Succession Act*, Ms Shibi was disqualified as an heir of her uterine brother's intestate estate. Her cousins were the only competent heirs. This position was confirmed in *Mthembu v Letsela*. The *Bhe* case followed the *Mthembu* case and appointed the cousins, one after the other. Ms Shibi challenged the decision of the magistrate.

In the matter of the *South African Human Rights Commission v President of the RSA*, the South African Human Rights Commission and the Women's Legal Centre Trust acted in their own interest and in the public interest. The applicants sought that the whole of section 23 of the *Black Administration Act* or alternatively sections (1), (2) and (6) of section 23 be declared unconstitutional. Section 23 of the *Black Administration Act*, its Regulation 2 read together with section 1 of the *Intestate Succession Act*, provided a legislative framework for the intestate succession and inheritance of Blacks.

As shown in chapter 2 above, customary law is not only subject to the *Constitution* but is also recognised by it as an integral part of the South African legal system.³⁸⁵ There is no question of parallel legal systems, one subject to the *Constitution* and another outside the ambit of the *Constitution*.³⁸⁶ On the one hand, customary law rules that are not consistent with the *Constitution* are invalid and, on the other hand, the customary law rules which are consistent with the *Constitution* are valid. Common law cannot invalidate customary law rules.

Statutory provisions which are unconstitutional cannot override customary law rules because such statutory provisions are themselves invalid and therefore of

385 *Alexkor* para 51.

386 *Pharmaceutical Manufacturers Association of South Africa; In re: Ex parte Application of the President of the Republic of South Africa* 2000 2 SA 674 (CC) para 44; *Mabuza v Mbatha* 2003 4 SA 218 (C) para 32.

no force and effect. The question of law that fell to be determined was whether section 23 of the *Black Administration Act*, its Regulation 2, and section 1 of the *Intestate Succession Act* were consistent with the *Constitution*, in particular section 9 (the right to equality). The Constitutional Court declared section 23 of the *BAA* and, therefore, the customary rule male primogeniture unconstitutional and invalid on the grounds that it unfairly discriminated against widows, daughters, younger sons and the extra-marital children.

Ngcobo J delivered a dissenting minority judgement. He held that the customary law of succession including the customary law rule of primogeniture is capable of being developed to a level consistent with the *Constitution*. Customary law succession consists in the succession to the status of the family head and control of property. The narrow notion of "inheritance" is different from the notion of the state law of succession (the so-called official version of the customary law of succession).

In its original customary law sense, succession or inheritance does not involve the transfer of the property of the deceased to the successor/heir in his personal capacity. Family headship is a nominal office. However, living customary law has generally evolved to the point of equalising the rights of males and females. Women (daughters, widows and sisters) inherit from the deceased in the deep rural villages. Primogeniture no longer determines succession. Generally, succession is no longer communal but individual. In this sense, all children of the deceased born in marriage share in the inheritance of the deceased's estate. Children do not contribute as a matter of customary law to the common family property but to private property (owned individually). This being the case, the majority decision in the *Bhe* case, per Langa DCJ (as he then was), albeit a mirror of the common law principles, is a closer reflection of the grassroots experiential and existential intestate succession. Bennett states that the official version of customary law does not reflect the law at the grassroots level.³⁸⁷

387 Bennett *Customary Law* 341-345.

As previously indicated, *Shilubana v N'wamitwa*³⁸⁸ concerned a hereditary chieftainship succession dispute. According to the principle of primogeniture, males succeed males to the positions of traditional leadership. Females do not qualify to succeed their family heads, headmen, ward heads or chiefs/kings. Furthermore, the eldest son succeeds his father. If the former predeceases the latter, the eldest son of the former succeeds the latter and so on. If the former predeceases the latter without a male descendant, his most senior younger brother succeeds him. If the latter died without a male issue, his brother, the former's uncle, succeeds the latter. In other words, a brother succeeds a brother.

In the instant case, the chief of the Valoyi tribe had two sons in the senior house, namely Fofeza N'wamitwa, the elder son, and Richard N'wamitwa, the younger son. Hereditary succession among the Valoi tribe has always been patrilineal. After the death of their reigning father, Fofeza became the chief. He married three wives. The senior wife, Queen Favazi, bore only one child, a daughter called Tinyiko Philia. The two junior wives did not bear him sons. He left no male issue. His younger brother, Richard, succeeded him in terms of the Valoyi tribal law. Had the customary law rule of primogeniture of the Valoi tribe been predicated upon non-sexism, gender equality and equalitarianism at the time of the decease of Hosi Fofeza, his eldest daughter, Philia, would have been a logical successor and "heiress" to her father. But the tribal law of the Valoi tribe was not gender neutral. After the death of Hosi Fofeza, Philia could not succeed her father as Hosi because she was a woman. Her uncle, Richard, succeeded Hosi Fofeza. He died in 2001. His eldest son, Sidwell N'wamitwa, survived him. Philia and a section of the tribe decided that she should assume the office of traditional leadership. Her cousin, Sidwell, contested her claim.

The succession of Hosi Richard to Hosi Fofeza took place under the living Tsonga-Shangana law, which at the material time did not recognise matrilineal

388 *Shilubana v N'wamitwa* 2007 2 SCA 432 (SA).

succession to traditional leadership. The question of whether the *Constitution*, in general and the Bill of Rights, in particular have retrospective effect was besides the point before the Constitutional Court. The salient question decided by the court was whether the traditional authority had the authority to make, amend or repeal customary law within the limit of the *Constitution* and legislation which specifically deals with customary law.

The principle of male primogeniture was declared unconstitutional in the *Bhe* case because of its lack of constitutional consistency. The Constitutional Court substituted the provisions of the *Intestate Succession Act* for the rules of customary law of succession based on the principle of primogeniture. In *Shilubana v N'wamitwa*³⁸⁹ the Constitutional Court recognised three organs of state that may change the customary law of a tribe, to wit the legislative branch of government, the judiciary and the traditional authority. Of course the executive may formulate policy and subordinate legislation which impact on customary law within the limit of the *Constitution* and legislation dealing with customary law. The Constitutional Court deferred to the power of the traditional authorities to determine their domestic affairs. In this case, the Valoi traditional authority resolved to appoint Philia to the position of senior traditional leader. The Constitutional Court held that the traditional authority acted *intra vires* its powers and that its resolutions were not unconstitutional. Philia succeeded Hosi Richard, not Hosi Fofeza.

If the living version is not consistent with the *Constitution*, it must be developed to the extent of the inconsistency. It must be mentioned, in passing, that Principle XIII of the *Interim Constitution* recognises cultural pluralism³⁹⁰ and, therefore, legal pluralism. Nowadays, individual members of families or communities are replacing groups as legal subjects in many spheres of life. There are statutes that regularise this trend of individualising legal subjects. For instance, the *Natal Code of Zulu Law, 1967*, the *Natal Code of Zulu Law 151* of

389 *Shilubana*.

390 Kerr 1997 SALJ 353-354 and the authorities cited in it.

1987 and *KwaZulu Act on the Code of Zulu Law*³⁹¹ individualise the legal persons. Maithufi states that the piecemeal recognition and enforcement of customary law was occasioned by the predominance of Roman-Dutch law.³⁹² All customary law was applied subject to public policy or the principles of natural justice or *bonos mores*.³⁹³ However, it is not an easy task to develop living customary law. Ndima³⁹⁴ puts it thus:

When it comes to the pervasive problem of developing African customary law, the judiciary faces the additional challenge of determining the living version of customary law for the community concerned. One of the injustices of the past, which our constitutional interpreters must reject in striving to heal our historical divisions, is the distortion caused to African law by the application of the interpretive technique of repugnancy. This method removed the philosophical underpinnings (which the colonial officials perceived to be in conflict with Western morality) from African customary law.

In addition, the living version of customary law as a part of an oral tradition and an ever-changing culture is difficult to pin down. It is the law that is actually lived by a community.³⁹⁵ According to Ndima,³⁹⁶ in construing customary law the courts relied on:

their own perceptions of justice and equity in order to determine that a particular African customary practice was repugnant to civilized behaviour, and therefore should be 'elevated' to their standard of morality.

Ndima believes that the Constitutional Court in *Bhe* failed to debunk this particular colonial construct before it decided to strike down the rule of primogeniture. Juma³⁹⁷ puts it thus:

391 *KwaZulu Act on the Code of Zulu Law* 16 of 1985.

392 I understand Maithufi to mean common law, which consists mainly of Roman-Dutch law and English law (Maithufi 2002 *De Jure*).

393 Maithufi 2002 *De Jure* 208.

394 Ndima 2007 *Speculum Juris* 81-82.

395 *Bhe* 657 para 219.

396 Ndima 2007 *Speculum Juris* 82. See also Whiteford and Friedl *Human Portrait* 66.

397 Juma 2007 *Speculum Juris* 88.

The contest between African law and western law in plural legal societies is an enduring clash of cultures played out on an uneven socio-legal field.

In *Gumede v President of the RSA*³⁹⁸ the Constitutional Court referred to some of the difficulties customary law faced during the previous epochs in South Africa and declared:³⁹⁹

... [D]uring colonial times, the great difficulty resided in the fact that customary law was entirely prevented from evolving and adapting as the changing circumstances of the communities required. It was recorded and enforced by those who neither practised it nor were bound by it. Those who were bound by customary law had no power to adapt it. Even when notions of spousal equality and equity and the abolition of the marital power of husbands over wives were introduced in this country to reform the common law, 'official' customary law was left unreformed and stone-walled by static rules and judicial precedent, which had little or nothing to do with the lived experience of spouses and children within customary marriages. *With the advent of democratic rule much had to give away.*

The *Constitution* puts common law and customary law on an equal footing.⁴⁰⁰ In *Alexkor Ltd v Richtersveld Community* the Constitutional Court stated:⁴⁰¹

While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common-law, but to the Constitution.

And again in *Gumede v President of the RSA*,⁴⁰² the court confirmed that customary law "lives side by side with the common law and legislation". However, the worrying trend is that the courts sometimes substitute the rules of common law for the rules of customary law.⁴⁰³ In *Mthembu v Letsela*, the court, per Mynhardt J, said the following:

I believe the aforesaid rule cannot be looked at in isolation. It must be seen in perspective. If regard is had to the relevant customary family law

398 *Gumede v President of the Republic of South Africa* 2009 3 BCLR 243 (CC).

399 *Gumede* para 20. Footnotes omitted and emphasis added.

400 Bennett "Conflict of Laws" 22.

401 *Alexkor* para 51.

402 *Gumede* para 22.

403 For example *Maluleke v Minister of Home Affairs* 2008 JDR 0426 (W).

rules then it becomes apparent that the rule of succession fits in with those rules.

In *Bhe*, Ngcobo J (as he then was) held that it was possible to develop the customary rule of primogeniture consistent with the *Constitution*. He put it thus:⁴⁰⁴

In my view, the rule of male primogeniture should be developed in order to bring it in line with the rights in the Bill of Rights.

He suggested that African customary law has adapted to accommodate women. Many women are now heads of households. The courts ignore this fact. Ndima contradicts both the majority decision, per Langa DCJ (as he then was) and the minority decision, per Ngcobo J (as he then was) in *Bhe*. The majority decided that the rule of male primogeniture is not capable of development consistent with the *Constitution*, while the minority decided that, although it was unconstitutional, the rule was capable of development consistent with the *Constitution*. Ngcobo J alluded to *Carmichele v Minister of Safety and Security*,⁴⁰⁵ in which the Constitutional Court demonstrated that where a rule of common law deviates from the spirit, purport and objects of the Bill of Rights the courts have an obligation to develop it so as to remove the deviation. He held that the *Carmichele* case applies equally to the development of indigenous law. Ngcobo⁴⁰⁶ stated, further, that:

By contrast, the development of indigenous law in order to adapt it to the changed circumstances requires the courts to have regard to what people are actually doing. It is here where the living indigenous law – law as actually lived by the people – becomes relevant. It is here, too, where the problem of identifying living indigenous law arises. The court must have regard to what people are actually doing in order to adapt the indigenous law to the ever-changing circumstances.

However, Ngcobo J⁴⁰⁷ emphasised that that "is not to say that in this process the courts should not have regard to the Constitution". Ndima concludes that

404 *Bhe* 636 para 139.

405 *Carmichele v Minister of Safety and Security* 2001 10 BCLR 995 (CC).

406 The *Bhe* case.

407 The *Bhe* case.

both the majority and minority decisions in *Bhe* are wrong because living customary law had already developed consistent with the *Constitution* at the time of judgment.

The Court in *Leboho and Others v Premier of Limpopo and Others*⁴⁰⁸ had to decide as to who should be the rightful successor of Kgosi Seiphi Leboho.⁴⁰⁹ As it is shown in chapter 6 below, Seiphi and his senior wife, Mosima Rangata, were not survived by any heir-apparent because they lost their biological children in their infancy. Matome, Seiphi's cousin, acted as a senior traditional leader. The Royal Family sought a nubile for Seiphi. The Rangata family was one of the families designated to provide the Royal Family with a nubile. However, the Rangata family could not provide the Royal family with a nubile. Fortunately, the Mokgobu family provided them with a nubile, Mmangako Mokgobu. They nominated Matome as her *tsena* husband "in order to revive the house of Mosima". The liaison produced a son, named Ngako.⁴¹⁰ Matome and his senior wife had three sons, Ramamphu Matee Leboho, Pheeha Ben Seraki Leboho and Tlabo Joseph Leboho. Matome died in 1979. Matee succeeded his father and acted as a senior traditional leader on behalf of Ngako who was still a minor. Matee died in 1999. Ben Seraki Leboho acted as a senior traditional leader. Sadly, Ben Seraki died in or about 2005. Tlabo Joseph Leboho succeeded Seraki. Ngako successfully took court action and removed Tlabo from the throne.⁴¹¹

The court, in *Leboho and Others v Premier of Limpopo Province and Others*, pointed out the following requirements for a valid appointment of a person to the position of a senior traditional leadership among the Hananwa of Maleboho –

408 *Leboho and Others v Premier of Limpopo Province and Others* (37898/07) [2011] ZAGP. Hereafter *Leboho*.

409 The facts of the case and historical background are dealt with below.

410 *Leboho and Others v Premier of Limpopo Province and Others* (37898/07) [2011] ZAGPPHC 22 (28 January 2011) para 30.

411 *Leboho and Others v Premier of Limpopo Province and Others* (37898/07) [2011] ZAGPPHC 22 (28 January 2011) para 30.

- i. The candidate must be the eldest son of the deceased traditional leader and his senior wife (*masechaba*).
- ii. Masechaba must come from a family designated by the royal family across generations.
- iii. The candidate must have completed his initiation school of which he was a leader.
- iv. The candidate must be a leader of a regiment.
- v. The candidate must have a traditional healer of the family lineage designated by the royal family across generations.

3.4 Conclusion

Customary law has two versions, namely the official customary law and the living customary law. The official version is customary law that is found in statutes, textbooks, publications and other scholarly writings. It leans towards common law and is not in keeping with the changing or changed circumstances of society. On the other hand, the living version is the lived law. It reflects the actual goings-on in society and changes commensurate with the changing circumstances of society. Since the advent of constitutional democracy, the living version has been growing in prominence.⁴¹² However, the living version is not in a better condition, either.⁴¹³ The courts have recourse to it subject to the *Constitution*.⁴¹⁴ The court, tribunal or forum may develop customary law consistent with the *Constitution*.⁴¹⁵ The most cardinal distinction between the two versions is the dynamic nature of living customary law as against the vitrified nature of the official version of customary law.⁴¹⁶

412 See, for instance, *Mabena v Letsoalo* 1998 2 SA 1068 (T); *Alexkor*.

413 Poulter *Basotho Society* 167ff.

414 Poulter *Basotho Society* 167ff.

415 S 39(3) of the *Constitution*.

416 In *Du Plessis v De Klerk* 1996 5 BCLR 658 (CC), Mogoro J said that "official customary law has degenerated into a vitrified set of norms alienated from its roots in the community".

CHAPTER 4

OFFICIAL CUSTOMARY FAMILY LAW

4.1 Introduction

Chapter 4 examines the requirements for and consequences of a customary marriage entered into in accordance with the official customary law. While the family as an institution is the cornerstone of a community, marriage perpetuates the family as its foundation-stone. Every person has a right to freely marry and to establish and raise a family. In *The Certification of the Constitution of the Republic of South Africa*, 1996, the court said, among other things, that any arbitrary prohibitions on the right to freely marry and to establish and raise a family; or any oppressive interference of the state in the institutions of marriage or family would be constitutionally invalid.⁴¹⁷ A customary marriage entered into voluntarily by a woman and a man in accordance with a constitutionally compatible customary law and the *Recognition Act* will pass the muster of the *Constitution*.⁴¹⁸ Although it is not provided for in constitutionalised terms, the freedom to marry and establish and raise a family is protected.⁴¹⁹

Section 15(3) of the *Constitution* provides thus:

- (a) This section does not prevent legislation recognising –
 - (i) marriages concluded under any tradition, or a system of religious, personal or family; 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 other provisions of the Constitution.

417 *Certification of the Constitution of the Republic of South Africa*, 1996 1996 4 SA 744 (CC); 1996 10 BCLR 1253 (CC) paras 96-103.

418 *Certification of the Constitution of the Republic of South Africa*, 1996 1996 4 SA 744 (CC); 1996 10 BCLR 1253 (CC) paras 96-103.

419 *Certification of the Constitution of the Republic of South Africa*, 1996 1996 4 SA 744 (CC); 1996 10 BCLR 1253 (CC) paras 96-103.

Section 15(3) of the *Constitution* does not prohibit the enactment of legislation such as the *Marriage Act*, the *Recognition Act* and the *Civil Union Act*. It recognises different systems of matrimonial law such as the customary law of marriage, common law of marriage, Hindu law of marriage and Muslim law of marriage. However, the *Constitution* expressly recognises the statutory law, common law and customary law. The recognition of other systems of law is inferred from sections 15(3), 30 and 31 of the *Constitution*. It follows, therefore, that the members of cultural, religious and linguistic communities who regard these religious and other systems of law as obligatory may negotiate, enter and celebrate marriage in accordance with them.

4.2 The forms of customary marriage

The *Recognition Act* recognises two main categories of customary marriage, namely monogamy and polygamy.⁴²⁰ For the present purposes, monogamy is divided into civil marriage concluded in accordance with the *Marriage Act*⁴²¹ and customary monogamous marriage concluded in terms of the *Recognition Act*. On the other hand, polygamy is divided into polygyny and polyandry.⁴²² Polygyny is concluded under customary law, Hindu law or Muslim law.⁴²³ Although the *Constitution* recognises religious marriages such as Hindu and Muslim marriages, the legislature has not yet passed legislation that recognises those marriages.

African customary law recognises the custom of engagement or betrothal.⁴²⁴ In the usual order of events, the conclusion of an engagement precedes the formation of a customary marriage and addresses the preliminary issues

420 Mofokeng *Legal Pluralism* 20. There are only two parties to a monogamous marriage. However, polygyny comprises more than one marriage between a man and each woman as parties to each marriage.

421 *Marriage Act* 25 of 1961.

422 Mofokeng *Legal Pluralism* 20. Polygyny differs from polyandry. Polygyny involves a man and more than one woman. Polyandry involves a woman and more than one man.

423 Mofokeng *Legal Pluralism* 20.

424 Jansen "Customary Family Law" 47-49.

requisite to pave the way for a future marriage.⁴²⁵ There are such other forms of conjugal associations as same-sex unions⁴²⁶ and life partnerships as well as supplementary marriages such as *hlatswadirope* (sororate) and substitute unions such as *seyantlo* (levirate) and *tseña* marriage (cognate union). The examples of a revival or seed-raising union are *ukuvusa* union (ghost marriage) and *go nyalwa ke lapa* (family marriage). The wife of a family marriage is called *ngwetsi ya lapa*.⁴²⁷ There may also be some forms of woman-to-woman marriages.⁴²⁸

4.3 The recognition of customary marriages

Previously, unless a conjugal association complied with the provisions of the *Marriage Act*⁴²⁹ or was not repugnant to the principles of public policy or natural justice,⁴³⁰ it was not recognised as a marriage in the proper legal sense. As time went by, Parliament passed statutes that treated customary unions as marriages only for the purposes of those statutes.⁴³¹

However, surprisingly, in spite of the provisions of section 15 of the *Constitution*, Muslim and Hindu marriages have not been statutorily recognised as

425 Jansen "Customary Family Law" 47-49.

426 See Mofokeng *Legal Pluralism* 20. This is a union entered into by people of the same sex (ie homosexual people). Traditionally, homosexual relationships are not popular among African traditional communities. Traditionally, only heterosexual relationships are regulated by marriage. The *Constitution* prohibits discrimination on the grounds of sexual orientation. The court declared the restriction of civil marriage to heterosexual spouses invalid. The *Civil Union Act* 17 of 2006 has legislated same-sex unions.

427 Family wife. The family wife is wedded to the family and not a specific man. The family will establish her house within the household and appoint a *tseña* husband for her.

428 This is a marriage between a woman (usually with considerable wealth) and another woman aimed at bearing children for the former. The former woman is regarded as the husband. Generally, a brother or close relative is appointed as a consort of the wife. See, among others, Oomen 2000 *THRHR* 274; Bennett *Customary Law* 197-198.

429 *Marriage Act* 25 of 1961.

430 Koyana 2002 *Obiter* 98-115.

431 S 5(6) *Maintenance Act* 23 of 1963; s 1 *Income Tax Act* 58 of 1962; s 27 *Child Care Act* 74 of 1983; s 31 of the *BAA*.

marriages.⁴³² In *Moola v Aulsebrook*,⁴³³ *Ex parte L*⁴³⁴ and *Desai v Engar and Engar*⁴³⁵ the court declared a Muslim marriage to be a putative marriage with juristic consequences. In *Solomons v Abrams*⁴³⁶ the court held that only a marriage solemnised in accordance with the *Marriage Act* is valid and refused to even declare a Muslim marriage a putative marriage. In *Ramayee v Vandiyar*⁴³⁷ Didcott J held that, notwithstanding that the parties had concluded their marriage in accordance with their Hindu religion and were recognised as husband and wife by their family groups and communities, the Hindu marriage was still not a marriage but a mere liaison because of its non-compliance with the *Marriage Act* or any other applicable legislation. Six years or so later, Van Reenen J confirmed this legal position in *Ismael v Ismael*⁴³⁸ and described the Muslim marriage as a "sexual cohabitation". He stated, further, that the legislature had tolerated such a "sexual cohabitation" because it could not be considered *contra bonos mores*.⁴³⁹ In *Dauids v The Master*,⁴⁴⁰ Vivier J held that the word "spouse" in section 59(1) of the *Administration of Estates Act* excluded women married in accordance with Muslim rites. In *Kalla v The Master*,⁴⁴¹ the court restated the upholding in *Ismail v Ismail* that polygynous marriages are *contra bonos mores* and *void ab initio*.

Farlam J, in *Ryland v Edros*,⁴⁴² rejected the decision in *Ismail v Ismail*⁴⁴³ and concluded that, based on the *Constitution*, a Muslim marriage is not *contra bonos mores*. In *Amod v Multilateral Motor Vehicle Accidents Fund*

432 *Solomons v Abrams* 1991 4 SA 437 (W).

433 *Moola v Aulsebrook* 1983 1 687 (N).

434 *Ex parte L* 1947 3 SA 50 (C).

435 *Desai v Engar and Engar* 1965 4 SA 81 (W).

436 *Solomons v Abrams* 1991 4 SA 437 (W).

437 *Ramayee v Vandiyar* 1977 3 SA 77 (D) 78.

438 *Ismael v Ismael* 1983 1 SA 1006 (A).

439 *Ismael v Ismael* 1983 1 SA 1006 (A).

440 *Dauids v The Master* 1983 1 SA 458 (C).

441 *Kalla v The Master* 1995 1 SA 261 (T).

442 *Ryland v Edros* 1997 2 SA 690 (C).

443 *Ismael v Ismael* 1983 1 SA 1006 (A).

(*Commission for Gender Equality Intervening*),⁴⁴⁴ Mohamed CJ held that the decision that a customary marriage (or Muslim marriage) was *contra bonos mores* on the grounds of its potentially polygynous nature was not consistent with the *Constitution*. The *Constitution* recognises all law and, therefore, the marriages in terms of all law subject to the *Constitution*.⁴⁴⁵ It is noteworthy that the Constitutional Court, per Sachs J, in *Daniels v Campbell*,⁴⁴⁶ in its purposive interpretation, held that section 15(3)(a) of the *Constitution*: provides for the recognition of marriages concluded under any tradition or system of religion, personal or family law.

The court decisions in *Khan v Khan*,⁴⁴⁷ *Hassam v Jacobs*,⁴⁴⁸ *Mahomed v Mahomed*⁴⁴⁹ and *Hoosein v Dangor*⁴⁵⁰ confirmed the recognition of section 15(3)(a) of "marriages concluded under any tradition or a system of religion, personal or family law". The constitutional interpretation is therefore shaped and informed by the democratic values of human dignity, equality and freedom.⁴⁵¹

Previously, the legal position was that the potentially polygynous customary, Hindu and Muslim marriages were against the principles of public policy and natural justice or were *contra bonos mores*.⁴⁵² Bennett⁴⁵³ puts it thus:

A marriage may have complied with customary law but may none the less have fallen foul of public policy. General considerations of policy have always been used to judge the validity of juristic acts, and, unlike the rights contained in the Bill of Rights, which are notionally at least

444 *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 4 SA 1319 (SCA).

445 S 8 read together with s 15(1)-(3) of the *Constitution*.

446 *Daniels v Campbell* 2004 4 BCLR 735 (CC).

447 *Khan v Khan* 2005 2 SA 272 (T).

448 *Hassam v Jacobs* 2009 5 SA 572 (CC).

449 *Mahomed v Mahomed* 2009 JOL 23733 (ECP).

450 *Hoosein v Dangor* 2010 4 BCLR 362 (WCC).

451 *Ryland v Edros* 1997 2 SA 690 (C) 705D-E.

452 *Nqgobela v Sihele* (1893) 10 SC 346; *Kaba v Ntela* 1910 TS 964; *Docrat v Bhayat* 1932 TPD 125; *Ismail v Ismail* 1983 1 SA 1006 (A); *Seedat's Executor v The Master (Natal)* 1917 AD 302; *Nkambula v Linda* 1951 1 SA 377 (A); *Santam v Fondo* 1960 2 SA 467 (AD); *Malaza v Mndaweni* 1974 BAC (C) 45; *Mokoena v Laub* 1943 WLD 63; *Zulu v Minister of Justice* 1952 2 SA 128 (N).

453 *Bennett Customary Law* 197; *Bennett Application of Customary Law* 84, 86.

timeless, the content of public policy may change to suit the needs of the moment.

4.4 Defining official customary family law

Official customary family law is a division of official customary law which regulates the relationships among members of a family group *inter se* and a family group and third parties.⁴⁵⁴ According to Armstrong:⁴⁵⁵

...family law must be investigated not by looking at court cases or into legal textbooks, but by looking at the customary legal norms of individual families and communities, the practices that both follow the values and principles of traditional law and have crystallised into 'law' by repetition.

The point made by Armstrong is valid insofar as the living version of customary law is concerned. According to Bennett,⁴⁵⁶ there are two forms of families: nuclear families and extended families.⁴⁵⁷ The nuclear family comprises at least one parent and his/her child or children. The extended family comprises more than one or two parents and their children as well as other relatives such as blood relatives and/or affine relatives.

While a nuclear family is usually associated with modern industrial societies, an extended family is generally associated with traditional agrarian societies.⁴⁵⁸ In South Africa, the nuclear family system among African peoples is a product of colonisation and its concomitants.⁴⁵⁹ Urbanisation gave impetus to the evolution of a traditional form of family into a nuclear family among Africans, especially in

454 Myburgh *Indigenous Law* 83.

455 Armstrong *Law and Family* 2-5.

456 Bennett *Customary Law* 180.

457 Bennett *Customary Law* 180-186.

458 Bennett *Customary Law* 180. For further analysis of the impact of industrialisation and the migrant labour system see, among others, Durand *Swartman*; Eekelaar and Katz *Marriage and Cohabitation*; Mayer *Black Villagers*; Meulders-Klein and Eekelaars *Family*; Moller and Welch *Polygamy and Well-being*; Murray *Families Divided*; Pauw *Second Generation*.

459 Bennett *Customary Law* 180.

far-flung urban settlements.⁴⁶⁰ Urban marriage has generally become a union of two individual spouses.⁴⁶¹

4.5 A definition of customary marriage

According to Bekker:⁴⁶²

Customary marriage is a relationship which concerns not only the husband and wife, but also the family groups to which they belonged before marriage. The consummation of the customary marriage brings into being reciprocal rights and obligations between the spouses for which their respective family groups are collectively responsible.

In 1989, Bekker's definition was already identifying the spouse-specific reciprocal rights and obligations. However, the role of the family groups was also prominently and manifestly defined. Bekker's conception of reciprocal rights and obligations leans towards the common law concept of consortium.

According to Mbiti,⁴⁶³ marriage is a complex affair which has interrelated and inseparable economic, social, legal, cultural and religious aspects.⁴⁶⁴ It is the focus of existence and the point where all the members of a given community meet: the departed, the living and those yet to be born.⁴⁶⁵ Mbiti⁴⁶⁶ argues that customary marriage:

... is a 'process'. In many societies that 'process' is complete only when the first child is born, or when all the marriage presents have been paid, or even when one's first children are married. Marriage involves many people, and not just the husband and wife, and the transfer of gifts in the form of livestock, money or labour.

Mbiti approaches customary marriage from the African religious viewpoint, according to which marriage involves at least the respective families of spouses

460 Bennett *Customary Law* 180.

461 Bennett *Customary Law* 182.

462 Bekker *Seymour's Customary Law* 96.

463 Mbiti *African Religions* 130.

464 Mbiti *African Religions* 130.

465 Mbiti *African Religions* 130.

466 Mbiti *African Religions* 45. See also Bekker and Van Niekerk 2009 *SAPR/PL* 214, 215.

and at most the living, the dead and the not-yet-born. In *Gumede*,⁴⁶⁷ Moseneke, DP, put it thus:

In our pre-colonial past, marriage was always a bond between families and not between individual spouses. Whilst the two parties [husband and wife] to the marriage were not unimportant, their marriage relationship had a collective or communal substance. Procreation and survival were important goals of this type of marriage and indispensable for the well-being of the large group. This imposed peer pressure and a culture of consultation in resolving marital disputes. Women, who had a great influence in the family, held a place of pride and respect within the family. Their influence was subtle although not lightly overridden. Their consent was indispensable to all crucial family decisions. Ownership of property was never exclusive but resided in the collective and was meant to serve the familial good.

According to Gough, "[m]arriage is a union between a man and a woman such that children born to the woman are recognised legitimate offspring of both parents".⁴⁶⁸ It is worth mentioning that neither marital nor extramarital children are illegitimate on account of the fact that their biological parents were not married to each other at the time of their conception, birth or subsequent thereto. The marriage of their parents to each other determines the marital or extramarital birth and not the legitimacy or illegitimacy of the children. The demands of equality and dignity of the *Constitution* dictate that the rights of a child should not depend on the marital or extramarital nature of his or her birth.⁴⁶⁹ By like token, the rights to equality and dignity of a spouse should not depend on his or her gender.⁴⁷⁰

However, at face value the law restricts the right to *consortium omnis vitae*⁴⁷¹ to spouses for the duration of the marriage. One of the most important aspects of *consortium* is sexual intercourse. The fact that customary marriage is potentially

467 *Gumede v President of the Republic of South Africa* 2009 3 BCLR 243 (CC).

468 Gough 1959 JRAS 49. The contemporary and judicially correct terms are marital and extramarital children. See, for instance, *Bhe* in which the Constitutional Court deliberately substituted the term "extramarital child" for the term "illegitimate child".

469 S 9 read with ss 10 and 28 of the *Constitution*.

470 Ss 9 and 10 of the *Consition*. See, also, s 6 of the *Recognition Act*.

471 See Visser and Potgieter *Family Law* 74-75 in which the concept of *consortium omnis vitae* is dealt with from the perspective of common law.

polygynous obtrudes on the concept of *consortium omnis vitae* in that while the polygynous husband enjoys the right to have sexual intercourse with all his wives, none of his wives enjoys an equally exclusive right to *consortium*.

In *MM v MN and Another*,⁴⁷² however, without deciding on the constitutionality of polygyny, the Constitutional Court said:

The potential infringement of the dignity of and equality of rights of wives in polygynous marriages is undoubtedly present.

However, the *Recognition Act* does not prohibit polygyny in spite of its apparent unconstitutionality.⁴⁷³ It is noteworthy that in *Gumede* the *Recognition Act* was hailed as a praiseworthy exercise in the reform of customary law. According to Bekker, under the guise of recognising customary marriages the *Recognition Act* has converted them into civil marriages in all but name.⁴⁷⁴

The *BAA*⁴⁷⁵ defined "customary union" as "the association of a man and a woman in a conjugal relationship according to Black law and custom, where neither the man nor the woman is a party to a subsisting marriage".⁴⁷⁶ Clearly, the *BAA* saw customary marriage through a common law lens and not a customary law one. The phrase, "where neither the man nor the woman is a party to a subsisting marriage" betrays the adoption of the ethos of the civil marriage.⁴⁷⁷

In *Hyde v Hyde & Woodmansee*,⁴⁷⁸ the court defined marriage, as understood in Christendom,⁴⁷⁹ as being a legally recognised "voluntary union for life in

472 *MM v MN and Another* 2013 4 SA 415 (CC).

473 *MM v MN and Another* 2013 4 SA 415 (CC).

474 Bekker and Van Niekerk 2009 *SAPR/PL* 214.

475 S 1 of the *BAA*.

476 S 5 of the *BAA*; Mofokeng *Legal Pluralism* 112.

477 See also *Ex parte Inkley and Inkley* 1995 3 SA 528 (CC) 535-536; *Seedat's Executors v the Master (Natal)* 1917 AD 302, 309; *Ismail v Ismail* 1983 1 SA 1006 (A).

478 *Hyde v Hyde & Woodmansee* (1886) LR 1 P & D 130 133; Van Heerden *et al* *Boberg's Law of Persons* 164; Costa 1994 *De Rebus* 914.

479 The notion of Christendom betrays the bias of common law towards Christianity. This approach to marriage rubbishes the value-systems of other religions such as traditional African Religion, Hinduism, Islam, Taoism and Judaism.

common of one man and one woman to the exclusion of all others while it lasts".⁴⁸⁰ Previously the term "marriage" excluded polygyny, same-sex marriage (civil union)⁴⁸¹ and extramarital relationships (cohabitation).⁴⁸² Dlamini⁴⁸³ defines customary marriage as a marriage concluded in accordance with customary law. In conclusion, nowadays customary marriage may be defined as a marriage concluded between a man and a woman negotiated and celebrated in accordance with a system of customary law of a particular traditional community subject to the *Constitution* and applicable legislation such as the *Recognition Act*.

4.6 The *Recognition of Customary Marriages Act* 120 of 1998

According to Bennett,⁴⁸⁴ the two most important provisions in the *Recognition Act* are sections 2 and 3. Section 2 gives full recognition to all existing customary marriages and section 3 stipulates the requirements for all future customary marriages. The *Recognition Act* sets out, among others, the provisions on the recognition of customary marriages,⁴⁸⁵ the requirements for the validity of customary marriage,⁴⁸⁶ the registration of a customary marriage,⁴⁸⁷ the determination of the age of a minor,⁴⁸⁸ equal status and the capacity of spouses,⁴⁸⁹ the consequences of a customary marriage,⁴⁹⁰ the dissolution of a customary marriage,⁴⁹¹ the consequences of the dissolution of a customary marriage,⁴⁹² and the change of the marriage system.⁴⁹³

480 See also *Ex parte Inkley and Inkley* 1995 3 SA 528 (CC) 535-536; *Seedat's Executors v the Master (Natal)* 1917 AD 302, 309; *Ismail v Ismail* 1983 1 SA 1006 (A).

481 *Civil Union Act* 17 of 2006.

482 See, for comparison, *Drummond v Drummond* 1979 1 SA 161 (A) 170; *Basetti v Louw* 1980 2 SA 225 (W).

483 Dlamini "Family Law" 35.

484 Bennett *Customary Law* 194.

485 S 2 of the *Recognition Act*.

486 S 3 of the *Recognition Act*.

487 S 4 of the *Recognition Act*.

488 S 5 of the *Recognition Act*.

489 S 6 of the *Recognition Act*.

490 S 7 of the *Recognition Act*.

491 S 8 of the *Recognition Act*.

492 S 8 of the *Recognition Act*.

4.6.1 The requirements for a valid customary marriage

The *Recognition Act* recognises a customary marriage "which is a valid marriage at customary law and is existing at the commencement of this Act".⁴⁹⁴ However, the marriage must have been valid to earn the recognition of the Act. In other words, such a marriage must have met the customary law requirements for a valid customary marriage.⁴⁹⁵ Prior to the *Recognition Act*, while the codes of Zulu law⁴⁹⁶ applied to the traditional communities in KwaZulu-Natal, the *BAA* applied country-wide. While the *BAA* did not disregard spousal consent, it emphasized parental consent more than spousal consent.⁴⁹⁷ However, neither a man nor a woman was compelled to marry against their will.⁴⁹⁸

Bekker and Van Niekerk⁴⁹⁹ submit that the requirements for a valid marriage under the *Marriage Act*⁵⁰⁰ and the *Recognition Act* are almost the same because "customary marriages have become civil marriages in all but name".⁵⁰¹ Heaton⁵⁰² puts it thus:

Many of the requirements and consequences the [Recognition] Act imposes in respect of customary marriages are the same as those of which apply to civil marriages.

Section 3 of the *Recognition Act* stipulates the requirements for a valid customary marriage. The individual spouses are the parties to the marriage to the exclusion of their respective families or parents. The Act is silent on the role of parents or guardians of a major spouse in the formation of his or her

493 S 10 of the *Recognition Act*.

494 S 2(1) of the *Recognition Act*.

495 S 2(1) of the *Recognition Act*; Heaton *South African Family Law* 206.

496 See *KwaZulu Act on the Code of Zulu Law* 16 of 1985 and the *Natal Code of Zulu Law*, 1987 (Proc 151 in GG 10966 of 9 October 1987).

497 Bennett *Customary Law* 199.

498 *Presenti v Mashalaba* 1941 NAC (C&O) 78.

499 Bekker and Van Niekerk 2009 *SAPR/PL* 214; s 3 of the *Recognition Act*.

500 *Marriage Act* 25 of 1961.

501 Heaton *South African Family Law* 205.

502 Heaton *South African Family Law* 205.

customary marriage. However, the Constitutional Court, in *MM v MN and Another*, said:⁵⁰³

Customary law may thus impose validity requirements in addition to those set out in subsection 1(a). In order to determine such requirements a court would have to have regard to the customary practices of the relevant community. The Recognition Act does not regulate, in some detail, various aspects and incidents of customary marriages.

Customary law thus determines other rules.⁵⁰⁴ The communities may develop their rules subject to the *Constitution*.⁵⁰⁵ It follows, therefore, that customary law will be able to retain its living nature.⁵⁰⁶ The requirements for a valid customary marriage must be sourced from the legislation (i.e. the *Recognition Act*), the living customary law of the community concerned, and the *Constitution*.⁵⁰⁷

A customary marriage must be registered.⁵⁰⁸ However, the failure to register it does not result in nullity.⁵⁰⁹ The registration of customary marriages may provide proof of the existence of such marriages.⁵¹⁰ The court in *Ramoitheki v Liberty Group Ltd t/a Liberty Corporate Benefits and Others*⁵¹¹ indicated that the following factors prove the existence of a valid customary marriage:

- i. the payment of *lobola*;
- ii. the duration of the relationship between the parties;
- iii. the formal nature of the relationship;

503 *MM v MN and Another* 2013 4 SA 415 (CC) paras 29-30.

504 *MM v MN and Another* 2013 4 SA 415 (CC) para 32.

505 *MM v MN and Another* 2013 4 SA 415 (CC) para 32.

506 *MM v MN and Another* 2013 4 SA 415 (CC) para 32.

507 *MM v MN and Another* 2013 4 SA 415 (CC) para 33.

508 Ss 4(1) and 4(2) of the *Recognition Act*; Mofokeng *Legal Pluralism* 73; Jansen "Customary Family Law" 59-60; Heaton *South African Family Law* 208; *Wormald v Khambule* 2006 3 SA 562 (SCA) paras 27-37.

509 S 4(9) of the *Recognition Act*.

510 *Mateza v Mateza* 2005 JOL 14332 (Tk); *Baadjies v Marubela* 2002 2 All 623 (W); Mofokeng *Legal Pluralism* 73; De Koker 2001 *TSAR*.

511 *Ramoitheki v Liberty Group Ltd t/a Liberty Corporate Benefits* 2006 JOL 18075 (W). See also Mofokeng *Legal Pluralism* 75 citing *Ramoitheki v Liberty Group Ltd t/a Liberty Corporate Benefits* 2006 JOL 18075 (W).

- iv. the involvement of the customary wife in the affairs of the family of the husband.

However, these factors are not validity requirements. The following are the requirements for a valid customary marriage:

4.6.1.1 Customary marriage must be negotiated⁵¹²

The representatives of the parties to a customary marriage negotiate and take steps to ensure compliance with the requirements for a valid customary marriage. There are three phases of negotiation.

4.6.1.1.1 The first stage of negotiations: the marriage proposal

The first stage involves the introductory interactions between the two family groups.⁵¹³ Traditionally, the parents of prospective spouses arrange marriages for their children.⁵¹⁴ A young man must seek the approval of his father for his marriage to his love-match.⁵¹⁵ The family of the prospective husband proceeds to negotiate with the family of his prospective wife.⁵¹⁶ The affinitation agreement comes into being when the parties agree on the payment of *lobola*.⁵¹⁷

Although there are incidents of premarital sex, the initiation schools teach chastity.⁵¹⁸ The chastity of a prospective spouse is a sign of honour.⁵¹⁹ Premarital pregnancy is an abomination. The prospective husband may refuse to proceed with marriage negotiations on the ground that his future wife has

512 See Bennett *Customary Law* 209-213; Mofokeng *Legal Pluralism* 63-67; Jansen "Customary Family Law" 47, 55-56.

513 Jansen "*Customary family law*" 56.

514 Bennett *Customary Law* 209.

515 Bennett *Customary Law* 209.

516 Bennett *Customary Law* 209.

517 Bennett *Customary Law* 209.

518 Hammond-Tooke *Bantu-speaking Peoples* 236ff.

519 Particularly a bride.

engaged in premarital sex. However, if he condones her misconduct he will lose his claim.⁵²⁰

The marriage negotiations are usually set in motion by sending the emissaries of the family of the man to the family of the woman. According to *Sila v Masuku*,⁵²¹ the first stage "involves visits, pourparlers and the exchange of social courtesies, all designed to establish concord between the groups, [and] culminates in the consent of the groups to the marriage". Mofokeng⁵²² puts it thus:

This stage involves the first visits and exchange of social courtesies designed to create a unity and friendship between the groups, which culminates in the second stage.

The first stage culminates in mutual consent to the marriage. Previously, family consent or parental consent constituted sufficient consent for a valid customary marriage. Nowadays, the spousal consent is a peremptory validity requirement. The lack of spousal consent to the marriage renders it void *ab initio*. The parental consent or consent of a legal guardian is requisite if one or both prospective parties to the marriage were minors. It is worth mentioning that the marriage negotiators must always act with the authority of a prospective spouse they represent.

4.6.1.1.2 The second stage of negotiations: *lobola* agreement

According to Dlamini, the engagement or wedding becomes official once *lobola* has been agreed on.⁵²³ The second stage involves the agreement about the kind and amount of *lobola*.⁵²⁴ The parties must agree on *lobola*. However, the delivery of *lobola* to the family of a woman is not a prerequisite for the formation of a customary marriage. Traditionally, the families perform rituals and

520 *Mlakalaka v Bese* 1936 NAC (C & O) 32.

521 *Sila v Masuku* 1937 NAC (N&T) 121.

522 Mofokeng *Legal Pluralism* 64.

523 Dlamini "Family Law" 42; De la Harpe *et al Zulu* 122; Vorster, Prinsloo and Van Niekerk *Urbanites' Perceptions of lobola*.

524 Mofokeng *Legal Pluralism* 65; Jansen "Customary Family Law" 52.

ceremonies.⁵²⁵ In *Mabuza v Mbatha*,⁵²⁶ the court rejected the attempt to elevate the performance of a ritual or conduct of a ceremony to the level of a requirement for the validity of customary marriages.

However, in *Fanti v Boto*⁵²⁷ the court intimated that the performance of rituals, ceremonies and other customary practices is valuable. However, it is submitted that this performance of rituals is a directory requirement whose non-performance is not necessarily fatal. In *Maluleke v Minister of Home Affairs*,⁵²⁸ a man died before his customary marriage was celebrated. The court held that the parties had entered into a valid customary marriage in spite of the lack of its celebration in accordance with customary law.⁵²⁹

4.6.1.1.3 The third stage of negotiations: approved cohabitation

The parties agree to the choice of the marital home of the spouses. For instance, among the Hananwas the marital home is patrilocal. In this context, after the conclusion of the marriage negotiations and the performance of the requisite rituals, the family of the woman must transfer her to her husband's family.⁵³⁰

4.6.2 Consent

Traditionally, parties to customary marriages were groups, particularly families of the prospective husband and prospective wife.⁵³¹ Nowadays, there are two main forms of consent, namely spousal consent and parental consent.

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

526 *Mabuza v Mbatha* 2003 4 SA 218 (C).

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

528 *Maluleke v Minister of Home Affairs* 2008 JDR 0426 (W).

529 *Maluleke v Minister of Home Affairs* 2008 JDR 0426 (W).

530 Mofokeng *Legal Pluralism* 65; Jansen "Customary Family Law" 52.

531 Hammond-Tooke *Baca Society* 102-105; Van Tromp *Xhosa Law of Persons* 40ff.

4.6.2.1 Spousal consent

Spousal consent is consent proffered by a man and a woman in regard to their marriage to each other.⁵³² Traditionally, the consent of a spouse was, strictly speaking, irrelevant.⁵³³ However, the authorities at the Cape of Good Hope came to duly accept the relevance of the spousal consent, as was the case in Europe.⁵³⁴ Any marriage contracted without the consent of one of the spouses was deemed "repugnant to our civilized conscience".⁵³⁵ The law did not permit of a forced marriage or marriage under duress.⁵³⁶ In the same vein, child betrothals were deemed against the principles of public policy and natural justice.⁵³⁷ Nobody could be married against his or her will.⁵³⁸ However, to avoid immediate payment of *lobola*, the bride and groom might elope together.⁵³⁹ Needless to say, the abduction of a bride was a mechanism used among some African communities in the past.⁵⁴⁰

4.6.2.1.1 The consent of the prospective husband

The consent of the prospective husband is essential for the validity of the customary marriage.⁵⁴¹ No customary marriage may be validly concluded without the voluntary participation and therefore the consent of the prospective husband. It is only after the prospective husband and prospective wife have reached an agreement to marry each other that they may separately inform their respective families of their intention to enter into marriage with each other.⁵⁴²

532 Bennett *Human Rights* 115-116.

533 Matthews *Bantu Law* 13.

534 Glendon *State, Law and Family* 24.

535 Bennett *Customary Law* 199. See also *Zimanade v Sibeko* 1948 NAC 21 (C); *Zulu v Mdhlelentshe* 1952 NAC 203 (NE); *Mngomezulu v Lukele* 1953 NAC 143 (NE).

536 Bennett *Customary Law* 199. See also *Zimanade v Sibeko* 1948 NAC 21 (C); *Zulu v Mdhlelentshe* 1952 NAC 203 (NE); *Mngomezulu v Lukele* 1953 NAC 143 (NE).

537 *Buthlezi v Ndhlela* 1938 NAC (N&T) 175. See also Phillip and Morris *Marriage Laws* 98.

538 *Presenti v Mashalaba* 1941 NAC (C&O) 78.

539 Simons *African Women* 102-103.

540 Hunter and Wilson *Reaction to Conquest* 187-188.

541 Jansen "Customary Family Law" 52.

542 Raum and De Jager *Rural Community* 43; Monnig *Pedi* 130ff; Krige *Social System of Zulus* 126-128; Holleman *Shona Customary Law* 99ff.

4.6.2.1.2 The consent of the prospective wife

A woman is a party to her customary marriage. No marriage may be validly concluded without the consent of the prospective wife.⁵⁴³

4.6.2.2 Parental consent

The *Black Administration Act*⁵⁴⁴ substituted parental consent for the communal consent of the family.

4.6.2.2.1 The consent of the parents of the man

The consent of the parents of the man is divided into paternal consent and maternal consent.

4.6.2.2.1.1 The consent of the father of the man

Previously, the non-approval of the marriage by the father or a mere lack thereof was sufficient to show that there was no marriage.⁵⁴⁵ It might show that there was no agreement between the families of the man and the woman.⁵⁴⁶ However, if the man were to provide for his wife-to-be with his own money, he would be exempted from the strictures of the requirement of the consent of his father.⁵⁴⁷

Nowadays, the consent of the father or legal guardian of a man who has achieved his majority is no longer a requirement for the validity of the customary marriage.⁵⁴⁸ Traditionally, the family of the man was obliged to pay *lobola* to his in-laws, particularly for his first wife.⁵⁴⁹ Dlamini⁵⁵⁰ points out that the paternal

543 Jansen "Customary Family Law" 52.

544 The BAA.

545 Dlamini "Family Law" 43.

546 Olivier *et al Indigenous Law* 17ff.

547 Dlamini "Family Law" 43.

548 Jansen "Customary Family Law" 51; *Mabena v Letsoalo* 1998 2 SA 1068 (T).

549 Jansen "Customary Family Law" 51.

550 Dlamini "Family Law" 43.

consent became a *sine qua non* to the validity of the customary marriage. Nowadays, the general trend is that the grooms pay *lobola* for their brides out of their own treasuries.⁵⁵¹ Historically, uncles and aunts are common role-players in the marriage of their nieces or nephews.⁵⁵²

4.6.2.2.1.2 The consent of the mother of the man

The *Recognition Act* does not provide for the parental consent as a sufficient consent for the validity of a customary marriage. However, traditionally the communal consent of the family group was a legal requirement for the validity of the customary marriage of a man. The customary law of marriage evolved to the extent that the paternal consent became the substitute for the communal consent. The need for the maternal consent was obviated by the perpetual minority of the mother. However, the father would give his consent after consultation with the mother of the man. The *Constitution* has laid the foundation for an equal society and prohibits unfair discrimination on the grounds of gender. The *Recognition Act* imposes spousal equality upon the man and the woman. On this point only, the parents of the man are equal before the law and may, if it were required of them, enjoy equal rights to consent to the marriage of their minor son. In *Fanti v Boto*⁵⁵³ the court held that the mother of the woman had the legal capacity to negotiate and receive *lobola* in respect of the woman.

4.6.2.2.2 The consent of the parents of the woman

4.6.2.2.2.1 The consent of the father of the woman

Previously the non-approval of the marriage by the father or a mere lack thereof was sufficient to show that there was no marriage.⁵⁵⁴ It might show that there

551 *Mabena v Letsoalo* 1998 2 SA 1068 (T).

552 See Nathan 1987 CILSA 421.

553 *Fanti v Boto* 2008 5 SA 405 (C). See also *Mabena v Letsoalo* 1982 2 SA 1068 (T).

554 Dlamini "Family Law" 43.

was no agreement between the families of the man and the woman.⁵⁵⁵ Dlamini⁵⁵⁶ points out that the paternal consent was a *sine qua non* to the customary marriage irrespective of the age of the man. The consent of the father of the woman is equally no longer a statutory requirement for the validity of a customary marriage.⁵⁵⁷ However, the marriage must be negotiated, entered into and celebrated in accordance with customary law.

4.6.2.2.2 The consent of the mother of the woman

Nowadays, the mother of the woman enjoys equal status in relation to, among others, the marriage negotiations and attendant agreement on *lobola* in consideration of her daughter's marriage. A mother is competent to give consent to the marriage of her child if the child is under the age of 18 years.

4.6.2.3 *The transfer of a bride to her matrimonial home*

Historically, the handing over of the woman amounted to the transfer of the woman from her natal family home to the parental home or the home of the man.⁵⁵⁸ The converse is unheard of in South Africa. According to customary law in South Africa, a bride is expected to live with her husband, either at his own or his father's homestead.⁵⁵⁹

The purpose of the handing over of the woman is to integrate her into her marital family group.⁵⁶⁰ In *Mabuza v Mbatha*,⁵⁶¹ there was a dispute about whether the woman had been integrated into her marital family because *ukumekeza* custom had not been performed. The court held that the non-compliance with

555 Olivier *et al Indigenous Law* 17ff.

556 Dlamini "Family Law" 43.

557 Jansen "Customary Family Law" 51.

558 Jansen "Customary Family Law" 52.

559 Bennett *Customary Law* 213.

560 Jansen "Customary Family Law" 52.

561 *Mabuza v Mbatha* 2003 4 SA 218 (C).

ukumekeza custom was not fatal.⁵⁶² The parties might waive it.⁵⁶³ Jansen⁵⁶⁴ is of the view that the court missed the point. He argues that it is the integration into the man's family through the handing over of the bride and not necessarily the *ukumekeza* custom that is a requirement for a valid customary marriage. However, ritual and ceremonies are important.⁵⁶⁵

Neither the *Constitution* nor the *Recognition Act* provides for the custom of the handing over and transfer of a woman to the man or *vice versa*. However, the right to equality in the *Constitution* and spousal equality in the *Recognition Act* proscribe unfair discrimination on the grounds of gender. As explained above, according to *MM v MN and Another*,⁵⁶⁶ customary law may impose rules additional to those set out in the *Recognition Act* provided they are not inconsistent with the *Constitution*.

4.6.2.4 *The lobola agreement*

According to Ramphele:⁵⁶⁷

The cornerstone of 'traditional' control of women by men among Africans in most parts of South Africa is the system of *lobola* (bridewealth), which is used to secure control of the reproductive power of women. *Lobola* also plays an important role in ordering relations between men, both as individuals and as groups.

The custom of *lobola* is a well-entrenched practice among traditional African communities.⁵⁶⁸ Prior to the enactment of the *Recognition Act*, the SALC (as it then was) conducted consultations on customary marriages including the custom and practice of *lobola*.⁵⁶⁹ Divergent views were expressed on the

562 *Mabuza v Mbatha* 2003 4 SA 218 (C); *Ramoitlheni v Liberty Group Ltd t/a Liberty Corporate Benefits* 2006 JOL 18075 (W); *Bennett Customary Law* 214-215.

563 *Ramoitlheni v Liberty Group Ltd t/a Liberty Corporate Benefits* 2006 JOL 18075 (W).

564 Jansen "Customary Family Law" 52.

565 *Fanti v Boto* 2008 5 SA 405 (C); Bekker 2008 *THRHR* 146-150.

566 *MM v MN and Another* 2013 4 SA 415 (CC) paras 29-30.

567 Ramphele *Migrant Labour Hostels* 70.

568 Nhlapo *Swazi Law and Custom* 47ff.

569 *SALC Project* 90 50.

custom of *lobola* as a validity requirement for a customary marriage.⁵⁷⁰ The pros and cons of *lobola* were aired.⁵⁷¹ While traditionalists advocated its retention, modernists and women's lobby groups were vehemently opposed to the retention of *lobola* as a validity requirement for customary marriages.⁵⁷²

The *Recognition Act* does not abolish *lobola* but only defines it. The parties must agree that the family of the man or the prospective husband will pay *lobola*. However, the actual payment of *lobola* is not a requirement for the validity of a customary marriage.⁵⁷³ However, although, the delivery of *lobola* may happen long after the conclusion of the marriage,⁵⁷⁴ the payment of *lobola* is still socially and culturally essential.⁵⁷⁵ In any view, section 1(1) of the *Law of Evidence Amendment Act* exempts custom of *lobola* from the repugnancy clause despite that the payment of *lobola* may be mistaken for the sale of a woman to a man.⁵⁷⁶

Maithufi⁵⁷⁷ says the following regarding the purposes of *lobola*:

Lobola is believed to have various purposes in customary law. Among others, it is used to stabilize the marriage, legitimate the children, act as a form of compensation, place the responsibility upon the father or guardian of the wife to support should it become necessary, and ensure proper treatment of the wife by her husband and his family.

Save for one question, that which regards *lobola* as an act of compensation, all of the other purposes listed by Maithufi are not controversial. The compensatory purpose may turn *lobola* into a contract of sale. It is worth stating in passing that in some communities the value of *lobola* is commensurate with the extent of the education of the woman.⁵⁷⁸

570 SALC *Project 90* 49ff.

571 SALC *Project 90* 49ff.

572 SALC *Project 90* 49ff.

573 Dlamini "Family Law" 44; Olivier *et al* *Indigenous Law* 28ff.

574 Kuper *Wives for Cattle* 127.

575 Kuper *Wives for Cattle* 127; Mofokeng 2005 *THRHR*.

576 Bennett *Human Rights* 118-119; Lye and Murray *Transformation on the Highveld* 112ff; Chigwedere *Lobola* 1ff. See also *Meesadoosa v Links* 1915 TPD 357 359.

577 Maithufi "Best Interests of the Child" 141. See also Comaroff *Meaning of Marriage Payments* 17-18.

578 The writer puts on record the statement that he has not empirically validated these allegations. For further reading, see, among others, Brandel 1958 *African Studies* 34ff.

According to Ellenberger and McGregor,⁵⁷⁹ the notion of *lobola* originated from the fact that in ancient times the family head (the *paterfamilias*) had the right of life and death over his children and had the power to sell them in bondage or give them away in marriage.

Chinyenze⁵⁸⁰ submits that *lobola* reduces a woman to a position subordinate to that of a man and renders her inferior in all spheres of life including spousal, family and social power relations. According to this viewpoint, *lobola* therefore serves to confirm the traditional perpetual minority of a woman in a patriarchal system. However, the anthropologists "of the functionalist school showed that *lobola* was no more than a consideration for a wife's reproductive potential".⁵⁸¹ *Lobola* was therefore a *quid pro quo* that compensated the woman's family for the loss of their daughter.⁵⁸² It is paid in cash or kind.⁵⁸³ The use of livestock as *lobola* has declined drastically among urban and peri-urban communities. However, among rural communities the payment of *lobola* through livestock is still a respectable option.

According to Dlamini⁵⁸⁴ traditional communities do not regard a relationship as a marriage unless the man or the family of the man has paid or agreed to pay *lobola* to the family of the woman. Bennett states that *lobola* is the most important aspect for a valid customary marriage.⁵⁸⁵ *Lobola* gives customary marriage a distinctive African character.⁵⁸⁶

According to Welch and Sachs,⁵⁸⁷ a survey of the practice of the custom of *lobola* in Mozambique indicates that it has three fundamental characteristics:

579 Ellenberger and McGregor *History of the Basutho* 272-274. See also Bekker *Seymour's Customary Law* 150.

580 Chinyenze 1984 *ZLR* 229. See also Terray *Marxism and 'Primitive' Societies* 163ff; Engels *Family Private Property* 67.

581 SALC *Project 90* 50; Reuter *Native Marriages* 218-222.

582 SALC *Project 90* 50; Hammond-Tooke *The Bantu-speaking Peoples* 187-188.

583 Simons *African Women* 95.

584 Dlamini 1984 *De Jure* 149.

585 Bennett *Human Rights* 118; Dlamini *I* 198.

586 Bennett *Human Rights* 118.

587 Welch and Sachs 1987 *Int'l J Soc L* 369-392.

cultural, economic and legal dimensions. They state, further, that Junod, a Christian priest, divides the Christian attitude towards *lobola* into two world-views, namely the Christian individualist world-view and the pagan collectivist world-view. He categorises *lobola* as a pagan practice. He propounds that while pagans are at liberty to pay *lobola* and conclude polygynous marriages, such practices as *lobola* and polygamy are abominations among Christians. To him and to like-minded people of the West *lobola* is a pure purchase price for the woman. It reduces a woman to a slave and she is therefore an object over whom the husband has rights. Clearly, Junod was caught in the contradictions between the Christian and traditional African belief systems. He viewed *lobola* as pagan because it was not practised in the Western churches. This smacks of prejudice and intolerance of diversity.

According to Prinsloo, Van Niekerk and Vorster⁵⁸⁸ *lobola* has frequently been discussed in terms of its social, psychological and legal significance. It has been construed as a contract of sale, a requirement for the validity of a customary marriage, and as legitimating children. According to indigenous African customary law, marriage determines the marital or extramarital status of the birth of a child. The marital or extramarital birth of a child determines its position in the family (the natal or marital family of the mother) or society. The *lobola* agreement is a requirement for the validity of a customary marriage. In traditional African communities in Southern Africa, *lobola* has had an impact not only on the validity of a customary marriage but also on the rights of the African woman and her children. In the United States, Bell⁵⁸⁹ submits, there is no causal *nexus* between the marital or extramarital birth of a child and his or her entitlement to fundamental rights. The fact that a child has had an extramarital birth does not affect his or her rights. Bell⁵⁹⁰ puts it thus:

In the United States the children of never-married mothers are 'illegitimate' in customary speech, but the citizenship rights of children,

588 Prinsloo, Van Niekerk and Vorster 1998 *De Jure* 73.

589 Bell 1997 *Current Anthropology* 237.

590 Bell 1997 *Current Anthropology* 237.

their rights to support of their father (and to his legacy if he dies intestate), and other rights do not require marriage to the mother. Legal fatherhood, with its attendant rights and responsibilities, exists without modification in the absence of the relationship between the father and the mother.

Ashton⁵⁹¹ submits that the main objection to *lobola* is that a woman is sold as a commodity to her husband. *Lobola* derogates the inherent dignity of women and imposes upon them an inferior status. Ashton, however, acknowledges that the Basotho do not regard *lobola* as a purchase price for the woman. African peoples do not regard a woman as a commodity.⁵⁹² Among African peoples, *lobola* is regarded as a token of appreciation of the family of the man for the role played by the family of the woman in bringing up the woman as well as an appreciation of the value that the woman brings to the family of the man.⁵⁹³

No marriage is socially acceptable among the traditionalists if *lobola* is not at least agreed upon.⁵⁹⁴ Urbanised or industrialised African people may look down upon *lobola* but it is a custom that still enjoys universal recognition and appreciation among traditional communities. Africans often agree on *lobola* even prior to entering into civil or Christian marriages.⁵⁹⁵

4.6.2.5 *The non-existence of civil marriage*

A civil marriage is entered into in terms of the *Marriage Act*. The *Marriage Act* prohibits a party to a civil marriage from entering into another civil marriage *stante matrimomo*.⁵⁹⁶ Nobody may enter into a customary marriage while he or she is a party to a civil marriage.⁵⁹⁷ Before 1988, the effect of the conclusion of a civil marriage by a husband or wife in a customary marriage was the

591 Ashton *The Basuto* 71-72.

592 See debates in SALC *Project 90*.

593 Hammond-Tooke *Bantu-speaking Peoples* 187-188.

594 Gluckman *African Customary Law* 62-63.

595 Koyana *Customary Law* 27ff; Raum and De Jager *Rural Community* 55ff; Phillip and Morris *Marriage Laws* 29.

596 Jansen "Customary Family Law" 52.

597 Mofokeng *Legal Pluralism* 68.

annulment of the existing customary marriage between the parties *inter se*⁵⁹⁸ However, section 1 of *Marriage and Matrimonial Property Law Amendment Act*⁵⁹⁹ improved the position of a customary wife.⁶⁰⁰ Further to the above, a party to a civil marriage could not enter into a valid customary marriage during the subsistence of the civil marriage.⁶⁰¹ If it were concluded, such a marriage would be null and void.⁶⁰² However, a party to a customary marriage could enter into a valid civil marriage. It is worth mentioning that the annulment of customary marriages through civil marriages had a negative impact on customary wives.⁶⁰³ The *Recognition Act* does not prohibit polygyny.⁶⁰⁴ As customary marriages are potentially polygynous, a man may marry more than one customary wife⁶⁰⁵ but on the *proviso* that the first wife must consent to any subsequent marriage.⁶⁰⁶ Polygyny was regarded as a source of wealth.⁶⁰⁷ There are pros and cons for the practice of polygyny.⁶⁰⁸ For instance, polygyny is discriminatory and morally reprehensible because it confers a right to marry more than one spouse upon males only.⁶⁰⁹ It is said that polygyny is obsolescent, but migrant workers resort to cohabitation in the urban areas while their wives languish in loneliness back in the rural villages.⁶¹⁰

598 *Nkambula v Linda* 1951 1 SA 377 (AD); Jansen "Customary Family Law" 52, 71-74; Jansen 2003 *TRW* 120-132.

599 *Marriage and Matrimonial Property Law Amendment Act* 3 of 1988.

600 SALC *Project 90* 32 and authorities cited in it.

601 SALC *Project 90* 32 and authorities cited in it.

602 SALC *Project 90* 32 and authorities cited in it; Maithufi 2002 *De Jure* 207; Jansen 2003 *TRW* 120-132; Jansen "Customary Family Law" 72-73; *Hyde v Hyde & Woodmansee* (1886) LR 1 P & D 130; *In re Bethel v Hildyard* (1888) Chd 220; *Nkambula v Linda* 1951 1 SA 377 (A); Sinclair and Heaton *Law of Marriage* 305.

603 See, among others, Peart 1983 *CILSA*.

604 Bekker 2009 *Obiter* 170-171.

605 Singh 1999 *De Jure* 314; SALC *Project 90* 32 and authorities cited in it.

606 *MM v MN and Another* 2013 4 SA 415 (CC).

607 Marwick *The Swazi* 38.

608 SALC *Project 90* 84ff and authorities cited in it.

609 See Women and Men in Southern Africa *Uncovering Reality* 25ff; Simons *African Women* 1ff; SALC *Project 90* 85 and authorities cited in it. See also Becker and Hinz *Marriage and Customary Law* 118-119.

610 SALC *Project 90* 84 and authorities cited in it.

4.6.2.6 *Parties must not be related within prohibited degrees*

The prohibited degrees of relationship are defined in terms of consanguinity and affinity. A relationship of consanguinity is a relationship by virtue of birth, while a relationship of affinity is a relationship through marriage. According to Bekker,⁶¹¹ the prohibited degrees often differ from community to community or from clan to clan. Among the *Thembu*, *Xhosa* and *Bomvana* a marriage or sexual intercourse is prohibited between a clansman and a clanswoman. Among the *Zulu*, no marriage or sexual intercourse between blood relations or a clanswoman and a clansman is allowed. No marriage of cross-cousins is allowed. Among the *Pondo*, no marriage or intercourse between members of the clan on both the maternal and paternal sides is allowed. One may not marry or have sexual relations with one's mother's or grandmother's clansman or clanswoman. Among the *Venda* it is a practice for cross-cousins to marry. Among the *Tsonga* a man may not marry the daughter of his maternal uncle's family. Among the *Sotho* and the *Tswana*, a man may not marry an antecedent or descendant nor his sister, half-sister, father's sister or mother's sister. The marriages of cross-cousins are allowed.

4.6.2.7 *Parties must be above the age of 18 years*

Traditionally, customary law did not set a marriageable age. But, as already pointed out, one of the determinants of marriageable age was graduation from the initiation school.⁶¹² The rite of passage conferred the status of adulthood upon the initiates.⁶¹³ The age of puberty is another indicator of a marriageable age. However, the age of puberty is unique to each woman.⁶¹⁴ The *Age of Majority Act*⁶¹⁵ prescribed the age of majority as the 21st birthday. A person aged 21 years or above was a major and a person aged below 21 years was a

611 Bekker *Seymour's Customary Law* 123-125.

612 Bennett *Customary Law* 203.

613 Bennett *Customary Law* 203.

614 Bennett *Customary Law* 203.

615 The *Age of Majority Act* 57 of 1972.

minor. The question was whether this Act applied to customary law. The courts answered in the affirmative.⁶¹⁶ As shown below, the *Constitution*, *Recognition Act* and *Children's Act* now prescribe the age of majority. The purpose of the prescription of the age of majority is to protect the interests of the minors.

4.6.2.7.1 The *Constitution*

Section 28(2) of the *Constitution* provides that the term "child" means a person under the age of 18 years. A child is subject to parental authority. Parental authority includes guardianship, custody, access and maintenance.

4.6.2.7.2 Statutory recognition of the age of majority

Section 9 of the *Recognition of Customary Marriages Act* provides that a child is a person under the age of 18 years. Section 17 of the *Children's Act*⁶¹⁷ provides:

A child, whether male or female, becomes a major upon reaching the age of 18 years.

In other words, the age of majority is 18 years for all men and women.⁶¹⁸ Marriage confers the status of majority upon a party to a valid marriage. Unless there are other legal disabilities, a major has full competencies: legal capacity, the capacity to act and the capacity to litigate.

4.6.3 The consequences of customary marriage

Section 6 of the *Recognition Act* provides as follows:

616 *Mnyandu v Mnyandu* 1974 BAC (C) 459; *Mpanza v Qonono* 1978 AC (C) 136; *Khumalo v Dladla* 1981 AC 95 (NE). See also *Katekwe v Muchabaiwa* 1982 2 ZLR 112 (S) in which the Supreme Court of Zimbabwe, per Dumbutshena CJ held that, according to the *Legal Age of Majority Act* 15 of 1982, when a woman turns 18 years of age, she becomes completely independent and emancipated so that she does not require the assistance of a parent or guardian to enter into marriage, contracts or perform juristic acts, and may even negotiate and receive in her own right.

617 *Children's Act* 38 of 2005.

618 Heaton *South African Family Law* 207.

On the basis of equality with her husband and subject to the matrimonial property system governing the marriage, [a wife has] 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 powers that she might have at customary law.

4.6.3.1 *Personal consequences*

There are a number of consequences on the person of a spouse. The *Marriage Act*⁶¹⁹ and the *Recognition Act*⁶²⁰ find expression within the *Constitution* and the family relationships. They equalise the personal relations of family and community members, in general, and spouses, in particular.⁶²¹ These personal relations manifest in the legal capacity, the capacity to act, the contractual capacity, and the freedom (the capacity) to marry.⁶²² In our pre-colonial past these capacities resided communally in the family represented by a male family head.⁶²³ Generally the husband as the family head was liable for the actions of his family members and responsible for the fulfillment of the contractual obligations of his family and family members.⁶²⁴ Whelpton⁶²⁵ submits that the Western legal concept of representation is not consistent with the customary law concept of representation among the *Bakwena Ba Mkgopa* of Hebron. Bekker⁶²⁶ argues that the keeper and intermediary are examples of representation.

The *BAA* began the process of individualising familial, personal and spousal relations, and by extension, capacities. However, family headship and traditional leadership generally continued to exist subject to the customary rule of male primogeniture.⁶²⁷ South Africa signed the *International Convention on Elimination of all Forms of Discrimination against Women* (CEDAW) on 21

619 The *Marriage Act* 25 of 1961.

620 The *Recognition Act*.

621 S 6 of the *Recognition Act* gives effect to the provisions of ss 9 and 10 of the *Constitution*.

622 See s 6 of the *Recognition Act*.

623 Bekker "Customary Law of Contract" 93.

624 Prinsloo and Vorster "Parties" 21. See also Whelpton *Swazi Law of Contract* 14.

625 Whelpton *Inheemse Kontraktereg* 121.

626 Bekker "Customary Law of Contract".

627 Bennett *Human Rights* 80-83.

January 1993.⁶²⁸ The *Constitution* prohibits unfair discrimination on the grounds among others of gender, sex and marital status.

4.6.3.1.1 Legal capacity

This is the capacity of a person to have and enjoy rights and have duties. A person has rights and responsibilities towards other persons. A right imposes duties on other persons, to respect the right of the right-holder. The notion of individual rights constitutes a departure from a customary law notion of group rights. In customary law a group is a vestee of rights. These are group rights as opposed to the common law notion of individual rights. In the same vein, our pre-colonial customary law did not recognise the exclusively individual rights of spouses. There were no matrimonial spousal capacities that existed adventitious to the collective capacities of the families of husbands and wives.

The *Recognition Act* individualises and equalises capacities. Husband and wife enjoy equal capacity. In other words, they enjoy equal rights as parties to customary marriage and community members.

4.6.3.1.2 Capacity to act

Historically a family used to have the capacity to perform juristic acts on behalf of its members. The family head represented the family in, among others, contracts, suits of law, criminal matters and public arenas. He acted in consultation with the adult members of family group, in particular males. Patriarchy imposed perpetual minority on women (in general, and wives in particular). The capacity of a woman, as a minor, was an incomplete capacity to act. She required the assistance of her husband, parent or guardian to perform a valid juristic act. The *Matrimonial Property Amendment Act* abolished inequality between a man and a woman, particularly at common law. The

628 See the *Age of Majority Act* 57 of 1972; s 8 of the *Interim Constitution* and s 9 of the *Constitution*.

Recognition Act put into effect the equality clause of the *Constitution* in regard to husband and wife married in accordance with customary marriage. The spousal equality finds expression in, among others, the capacity of the spouses to act.

4.6.3.1.3 Contractual capacity

The *Matrimonial Property Amendment Act* abolished the marital power. However, it did not proscribe patriarchy and the customary rule of male primogeniture altogether. The *Constitution* ushered in the ideal of an equal society. The *Recognition Act* equalises the contractual capacities of husband and wife. In the result, husband and wife enjoy equal status and capacities.

4.6.3.1.4 Freedom to marry

Freedom to marry is an aspect of the capacity to act. At common law, a spouse cannot marry another person while a marriage to which he/she is a party still subsists.⁶²⁹ While a woman cannot enter into more than one marriage contemporaneously, a man is at liberty to enter into more than one marriage.

4.6.3.2 Proprietary consequences

According to Pienaar,⁶³⁰ customary law recognises three categories of property, namely family property, house property and personal property. While personal property is vested in an individual member of a family group, the family property and house property are the objects of shared group rights. These are communal property rights. However, the customary law communal property rights must "be understood within the framework of family relationships".⁶³¹ Historically, the individual family member acquires and protects rights through the family at whose helm is a male family head. The individual rights are submerged in the family group rights. Family members owe their family a duty

629 *Hyde v Hyde & Woodmansee* (1866) LR 1 P & D 130 133. For a South African position, see, *inter alia*, *Seedat's Executors v The Master (Natal)* 1917 AD 302 307-308.

630 Pienaar "Customary Law of Property" 77-79.

631 Maithufi "Law of Property" 54.

to co-operate and foster unity among family members and to act in unison in the name of the family. The actions of each member are imputed to the family. No member is more of a group rights-holder than others. The family head's hegemony is nominal and is exercised in the best interest of the family group. The system has entrenched checks and balances that curb the excesses of any member including the family head. The family head accounts to the family group. His abuse of power is subject to the veto of the family council. The family head is, therefore, not above the law. Bekker⁶³² puts it thus:

In original customary law, both in theory and practice, a family head was in control of the family home and its property. An unemancipated individual could not own anything individually, and whatever he might have acquired vested in the family head. Yet, as has been shown, the property of the family home was not owned outright by the family head, but was held in communal ownership by the family as a unit, under his administration and control.

While common law recognises individual ownership, co-ownership and a matrimonial property system, traditional customary law recognises communal ownership. Customary law does not vest property in the individual spouses after a husband and wife have entered into marriage. Upon the formation of the marriage, a woman becomes a full member of her marital family. In other words, her matrimony endows her with an indivisible share in the communal property of the family group, namely the family and house property. Section 6 read together with section 7 of the *Recognition Act* substitutes the individual matrimonial property for the customary law communal property.

The Constitutional Court in *Gumede*⁶³³ was called upon to determine the constitutionality and validity of the provisions of the *Recognition Act*, that distinguish between the rights of women who entered into customary marriage before the coming into operation of the Act and those of women who entered into customary marriage after the coming into operation of the Act. The Court held that the Act discriminated unfairly against the women who entered into

632 Bekker *Seymour's Customary Law* 82.

633 *Gumede v President of the Republic of South Africa* 2009 3 BCLR 243 (CC).

customary marriages before the coming into operation of the *Recognition Act*. In other words, the *Gumede* judgment equalises all wives in customary marriages. The right to equality is brought to bear upon the person and property of the spouses of a customary marriage. In this context, the Act founds spousal equality. Having founded spousal equality as a core value of customary marriage, the value of equality permeates all subjects and objects of customary marriage. The personal relations as much as property relations are constructed on the footing of equality.

Unless the parties have concluded an antenuptial contract or the husband is a party to an existing marriage to another woman, a customary marriage entered into in terms of the *Recognition Act* is a marriage in community of property and of profit and loss.⁶³⁴ Sections 14 to 20 and section 24 of the *Matrimonial Property Act*⁶³⁵ apply to customary marriage.⁶³⁶ Heaton⁶³⁷ puts it thus:

Thus, the rules that govern administration of the joint estate, litigation by or against a spouse who is married in community of property, damages paid or recovered by such a spouse, the spouse's delictual liability, and the statutory protective measures one spouse can employ against the other are exactly the same in civil and customary marriages in community of property.

The parties are equal co-owners of undivided and indivisible half-shares of their matrimonial property: all the assets and liabilities they had at the time of concluding the marriage and all the assets and liabilities acquired during the subsistence of the marriage.⁶³⁸ Upon concluding marriage, their separate estates merge.⁶³⁹ Section 11 of the *Matrimonial Property Act*⁶⁴⁰ abolished the marital power of the husband. By like token, section 6 of the *Recognition Act* equalises the spouses of customary marriages.⁶⁴¹ The husband of a customary

634 S 7 of the *Recognition Act*.

635 The *Matrimonial Property Act* 88 of 1984.

636 S 7(3) of the *Recognition Act*.

637 Heaton *South African Family Law* 209-210. Notes omitted.

638 Heaton *South African Family Law* 66-74 and authorities in it.

639 Heaton *South African Family Law* 66-74 and authorities in it.

640 The *Matrimonial Property Act* 88 of 1984.

641 See also the *Gumede* case.

marriage is no longer a family head by operation of the law.⁶⁴² The spouses are equal co-administrators of the joint estate.⁶⁴³ Both spouses must consent to the alienation of any asset of the joint estate. Of course, a spouse does not require the consent of another spouse for the purposes of acquiring or purchasing the household necessities. In any view, nowadays, women are competent to hold land and other property on their own account.⁶⁴⁴

However, it is noteworthy that a marriage in community of property, profit and loss is unsuited to polygynous households. It is for this reason that a polygynous marriage is automatically a marriage out of community of property. In fact, the traditional communal property system is suitable for a polygynous household in which each house has its own property (i.e. house property). The family as a whole has general (family) property. The family head may allot assets of family property to houses to create house property for each house within the polygynous household.

4.7 The dissolution of a customary marriage⁶⁴⁵

According to Bekker,⁶⁴⁶ customary marriage may be dissolved in any of the following ways:

- i. by the death of a spouse or both spouses;
- ii. by common consent;
- iii. at the instance of the husband;
- iv. at the instance of the wife and her guardian.

Nowadays customary marriage may be dissolved through divorce or death.

642 S 6 of the *Recognition Act*.

643 S 6 of the *Recognition Act*.

644 Monnig *Pedi* 153; Letsoalo *Land Reform* 20; Duncan *Sotho Laws* 87, 90-1; Kuper *African Aristocracy* 149; Schapera *Tswana Law* 202; Schapera *Native land Tenure* 150; Sheddick *Land Tenure* 164; Wilson and Mills *Land Tenure* 10.

645 Jansen "Customary Family Law" para 3.3.7.

646 Bekker *Seymour's Customary Law* 171-194.

According to Myburgh:⁶⁴⁷

Marriage is dissolved by cessation of the woman's membership of her husband's group owing to her death or to forfeiture or abandonment of the marital guardianship on recognized grounds or return of such guardianship with the consent of the woman's father and husband's groups, the return or provision of marriage-goods depending on the performance of the wife and her group during the marriage.

Myburgh has captured the ways of dissolving a customary marriage relatively well. However, it must be mentioned that at customary law death does not necessarily terminate the membership of the woman of the husband's family group. In accordance with African customs and religion, marriage is a meeting point of the dead, the living and the yet-to-be-born.⁶⁴⁸ The dead retain the membership of their family in spite of death.

4.7.1 The dissolution of a customary marriage through divorce

It is a moot question whether or not the pre-colonial Southern African peoples recognised divorce, particularly if the concept of divorce is assessed against the maxim of *lebitla la mosadi ke bogadi*.⁶⁴⁹ According to Mofokeng "[t]raditionally, divorce as we understand it today was unknown".⁶⁵⁰ If there were differences between husband and wife, he could return her to her natal family group.⁶⁵¹ However, such a separation did not amount to divorce in the common-law sense as the marriage was entered into between the family of the husband and the family of the wife and not between an individual husband and an individual wife.⁶⁵² That being the case, a husband could go to fetch the wife again if she wished to return. However, she could always refuse to return to him.⁶⁵³ Bennett puts it thus:⁶⁵⁴

647 Myburgh *Indigenous Law* 111-112.

648 Mbiti *African Religions* 130.

649 The grave of a married woman is at her natal family. In other words, marriage is permanent.

650 Mofokeng *Legal Pluralism* 85.

651 Mofokeng *Legal Pluralism* 85-87.

652 Mofokeng *Legal Pluralism* 85-87.

653 Mofokeng *Legal Pluralism* 87.

654 Bennett *Customary Law* 266 and authorities cited in it.

Some works on customary law avoid this word ['divorce'] altogether, on the ground that the common-law concept of divorce was unknown in Southern Africa, where marriages were either indissoluble or, at least, very rarely dissolved.

The *Recognition Act* departs fundamentally from this traditional customary law position and provides for the dissolution of a marriage through divorce.⁶⁵⁵ A party to a customary marriage may apply to the High Court, Family Court or Divorce Court for the dissolution of the marriage.⁶⁵⁶

4.7.1.1 *Grounds for divorce*

The *Recognition Act* provides for only one ground for divorce, namely the irretrievable breakdown of a marriage.⁶⁵⁷ The desertion or continuous unconsciousness of a spouse is not a customary law ground for divorce.⁶⁵⁸

4.7.1.1.1 The irretrievable breakdown of a marriage

The *Recognition Act* provides that customary marriage may be dissolved by court on the grounds that it has irretrievably broken down.⁶⁵⁹ Previously, the conception of irretrievable break-down of marriage was not a ground for divorce in customary law.⁶⁶⁰ The court is required to satisfy itself that the marriage relationship between the parties has reached such a state of disintegration that there is no prospect of restoring a normal marriage relationship between them.⁶⁶¹ It is noteworthy that, correctly construed, the irretrievable breakdown of marriage is not necessarily exclusive of the pre-constitutional customary law grounds for divorce. At customary law the husband could divorce the wife on any of the following grounds, among others: adultery by a wife (more than one incident), incest, pregnancy and abscondence by the wife and refusal to return.

655 S 8(1) of the *Recognition Act*.

656 S 8(1) read together with s 1 of the *Recognition Act*.

657 S 8(1) of the *Recognition Act*.

658 Mofokeng *Legal Pluralism* 87.

659 S 8(1) of the *Recognition Act*. See also Mofokeng *Legal Pluralism* 87.

660 Jansen "Customary Family Law" 64; Bekker 1976 *CILSA* 346; Whelpton and Vorster 2001 *SA Journal for Ethnology* 56-61.

661 S 8(2) of the *Recognition Act*.

The wife may raise the following as some of the grounds for divorce: serious assault and physical ill-treatment by the husband, the husband's accusing the wife of witchcraft, expulsion, long-term desertion, and impotence, if the wife was unaware of the husband's condition at the time of their marriage. This is not a closed list.⁶⁶²

4.7.1.2 *The consequences of the dissolution of a customary marriage through divorce*

There are two categories of consequences of the dissolution of a customary marriage through divorce, namely the personal consequences and the patrimonial or proprietary consequences.

4.7.1.2.1 Personal consequences

After the dissolution of their marriage, the status of a former husband and a former wife changes to that of an unmarried man and an unmarried woman. They can perform juristic acts, enter into contracts and even marry without the consent of each other. The capacities of a man and a woman are dealt with, with the necessary differences, in paragraph 4.6.3 above.

4.7.1.2.2 Proprietary consequences

The control of the matrimonial property is a controversial issue. It is the source of social power.⁶⁶³ Traditionally, women had no capacity to act as and no contractual capacity.⁶⁶⁴ The control of communal property (family property and house property) was vested in the male family head, who administered and alienated it in consultation with the male members of the family.⁶⁶⁵ He was enjoined to act in the interest of the family group.⁶⁶⁶ Traditionally, the proprietary

662 Jansen "Customary Family Law" 65.

663 Hirschon *Women and Property* 1.

664 Hirschon *Women and Property* 1.

665 Bekker "Customary Law of Contract" 93-94.

666 Bekker "Customary Law of Contract" 93-94.

consequences of divorce were less favourable for women than for men. The *Recognition Act* altered the property system. The *Recognition Act* governs the contemporary customary marriages and their consequences, including their dissolution by death or divorce. The Act provides that all customary marriages are marriages in community of property unless the parties thereto enter into ante nuptial contracts antecedent to the formation of the marriage. If the matrimonial property system was a joint estate, the dissolution of the marriage would result in the division of the estate into two equal shares. Section 8(4)(a) provides that sections 7 to 10 of the *Divorce Act* and section 24(1) of the *Matrimonial Property Act*⁶⁶⁷ are applicable in the dissolution of customary marriages through divorce and the attendant division of property. If the contrary was the case and the spouses kept two separate estates, the individual spouses would retain their own separate estates.

4.7.1.2.3 The interests of children

The *Mediation in Certain Divorce Matters Act*⁶⁶⁸ and section 6 of the *Divorce Act*⁶⁶⁹ apply to the interests and welfare of the children of the spouses at divorce. The law equates all children at the divorce of their parents regardless of whether the parents married in accordance with civil marriage or customary marriage.⁶⁷⁰ In terms of the *Mediation in Certain Divorce Matters Act*,⁶⁷¹ the court may decide on the guardianship, custody, access and maintenance of a minor child. The decision must be made in the best interests of the child⁶⁷² on the advice of the family advocate and family counselors. Jansen⁶⁷³ states that,

667 The *Matrimonial Property Act* 88 of 1984.

668 The *Mediation in Certain Divorce Matters Act* 24 of 1987.

669 The *Divorce Act* 70 of 1979.

670 Jansen "Customary Family Law" 65. See also Van Schalkwyk 2003 *De Jure*.

671 The *Divorce Act* 70 of 1979.

672 S 28(2) of the *Constitution*; *Hlope v Mahlalela* 1998 1 SA 449 (T); Devenish *Commentary* 371; Jansen and Ellis 1999 *TRW* 47-49; Vorster, Dlamini-Ndwandwe and Molapo 2001 *S Afr J Ethnol* 62-66; Jansen "Customary Family Law" 66.

673 Jansen "Customary Family Law" 66.

in determining the best interests of the child, the court may take into account African cultural values and belief systems.

4.7.2 The dissolution of a customary marriage by death

Historically, death does not terminate a customary marriage. If a man dies the wife remains a member of his family and, if she is still of a child-bearing age, she may even enter into a substitute marriage with a close relative of her deceased husband, particularly his uterine younger brother.⁶⁷⁴ This substitute marriage is called a *tseña* marriage.⁶⁷⁵ The substitute husband is called a *tseña* husband and the widow of the deceased is called a *tseña* wife. However, for all legal purposes she is still the wife of the deceased and her *tseña* children belong to her deceased husband.

Historically, if a wife of a customary marriage predeceases her husband, the marriage does not dissolve. The husband may marry a *seyantlo* (levirate).⁶⁷⁶ The levirate steps into the shoes of the deceased wife.

Nowadays there are two categories of the consequences of the dissolution of a customary marriage through the death of a spouse, namely the personal consequences and the patrimonial or proprietary consequences. These categories of consequences are discussed *seriatim* in the following paragraphs:

4.7.2.1 Personal consequences

Among some Pedi and other Northern Sotho groups, the wife mourns her husband for about a year and becomes his perpetual widow. She may even be allocated a *tseña* husband among her deceased husband's closest male relatives of comparable age. However, the death of a spouse does not

674 Koyana *Customary Law* 83-84 indicates that the Xhosa prefer a stranger as *ukungena* husband other than a deceased's brother or relative. See also Bekker and Koyana 2012 *De Jure* 568, 577.

675 Mofokeng *Legal Pluralism* 87.

676 Phillips *Survey of African Marriage* xi-xii.

terminate their marriage. The *Recognition Act* regulates the personal consequences of the dissolution of customary marriage by death.

4.7.2.2 *Proprietary consequences*

Unless the parties concluded an antenuptial contract or the husband is a party to an existing marriage to another woman, a marriage entered into in terms of the *Recognition Act* is a marriage in community of property and of profit and loss. The parties are equal owners of the matrimonial property. In the absence of a will, the property of the marriage is dissolved and the estate of the deceased, which is the equal part of the joint estate, is abstracted from the joint estate and distributed *ab intestato*.

4.8 Conclusion

The customary marriage in terms of the *Recognition Act* must be negotiated and celebrated in accordance with customary law.⁶⁷⁷ However, nowadays the individual spouses must consent to it. However, in accordance with the *Recognition Act*, parental consent is necessary for the validity of the marriage of a minor party to a customary marriage. The *Recognition Act* does not prohibit *lobola* and polygyny.

⁶⁷⁷ S 3(1)(b) of the *Recognition Act*.

CHAPTER 5

THE OFFICIAL CUSTOMARY LAW OF PARENT AND CHILD

5.1 Introduction

This chapter deals with the official version of the customary law of parent and child. The children in a traditional community setting are affiliated either to their mother's family group or their father's family group.⁶⁷⁸ The father may pay a special *lobola* for his extramarital child. Among other functions, *lobola* establishes a family relationship between the family of the father and the child.⁶⁷⁹

5.2 Defining a child

The occurrence of majority has changed from the 21st birthday to the 18th birthday. For instance, in terms of section 17 of the *Children's Act*⁶⁸⁰ "[a] child whether male or female, becomes a major upon reaching the age of 18 years". Section 28 of the *Constitution* provides that a child is a person who is under the age of 18 years.⁶⁸¹ A parent or guardian may assist a minor to enter into valid contracts. In its section 3(1)(a)(i), the *Recognition Act* provides that "the prospective spouses must both be above the age of 18 years". The *Civil Union Act*⁶⁸² provides, in its section 1, that a civil union is "the voluntary union of two persons who are both 18 years of age or older ...". Even section 2(3) of the *Domicile Act*⁶⁸³ provides that a child is "any person under the age of 18 years, excluding such a person who by law has the status of a major".

678 Mofokeng *Legal Pluralism* 101-108; Poulter *Basotho Society* 237-239.

679 Mofokeng *Legal Pluralism* 101-108; Bennett *Sourcebook* 358-369.

680 *Children's Act* 38 of 2005.

681 See s 1 read together with s 17 of *Children's Act* 38 of 2005. The *Children's Act* has repealed the *Age of Majority Act* 57 of 1972 wholly.

682 The *Civil Union Act* 17 of 2006.

683 The *Domicile Act* 3 of 1992.

Bekker⁶⁸⁴ correctly points out that African people never viewed childhood in terms of chronological age. Among other African customs, initiation and circumcision constitute a step into adulthood.⁶⁸⁵ From time immemorial, African females were regarded as perpetual minors.⁶⁸⁶ In the original customary law, the following factors used to determine a person's status of majority:

- i. initiation;
- ii. marriage;
- iii. emancipation;
- iv. own family home.

5.3 The legal status of a child

Kruger and Robinson⁶⁸⁷ state that the legal status of a child revolves around two basic factors, namely:

- i. the commencement of legal subjectivity; and
- ii. what the legal status of a child or young person entails.

5.3.1 Legal subjectivity

The legal subjectivity of a person starts at birth while that of a juristic person starts at registration or incorporation. Common law protects the interests of an unborn child through *nasciturus* fiction⁶⁸⁸ on the proviso that the child was conceived at the material time and is born alive. It is noteworthy that, without giving a name to the factual situation, customary law recognises the rights due to a posthumous child.

684 Bekker 2008 *Obiter* 398.

685 Bekker 2008 *Obiter* 398.

686 Bekker "Children and Young Persons" 191.

687 Kruger and Robinson "Legal Status of Children" 1.

688 Kruger and Robinson "Legal Status of Children" 3-7; Gordon and Shapiro *Forensic Medicine* 379; Davel and Jordaan *Law of Persons* 12; *Pinchin v Santam Insurance Co Ltd* 1963 2 SA 254 (W).

5.3.2 The legal status of a child

The law of persons determines the status of a legal subject.⁶⁸⁹

5.3.2.1 The capacities of a child

The capacities of a child are generally the same as the capacities of a man and a woman dealt with in chapter 4 of this thesis. This chapter gives only the highlights that are specific to a child.

5.3.2.1.1 The legal capacity

The legal capacity begins at birth.⁶⁹⁰ Legal capacity means that a person is the bearer of juridical competencies, subjective rights and legal obligations.⁶⁹¹

5.3.2.1.2 The capacity to act

According to the *Children's Act*, a child may perform juristic acts with the consent of his or her parent or guardian. The *Children's Act* does not discriminate on the ground of gender.

5.3.2.1.3 The contractual capacity

According to the *Children's Act*, a child may enter into contracts with the consent of his or her parent or guardian. The law does not discriminate on the ground of gender.

5.3.2.1.4 The capacity to litigate

According to the official version of customary law, a child may litigate with the consent of his or her parent or guardian.⁶⁹² A child may even have legal

689 Barnard, Cronjé and Olivier *Law of Persons* 39.

690 Davel "Status of Children" 15-16.

691 Davel "Status of Children" 15-16.

692 *Du Toit v Minister of Welfare and Population Development* 2002 10 BCLR 1006 (CC).

representation⁶⁹³ and voice in a court of law.⁶⁹⁴ The law does not discriminate on the ground of gender.

5.4 Categories of children

There are two main categories of children, namely marital and extramarital children. According to the *Reform of the Customary Law of Succession and Regulation of Related Matters Act*,⁶⁹⁵ marital and extramarital children enjoy equal status and may inherit *ab intestato* irrespective of their gender.

5.5 Maintenance and support

Previously only a father had a duty to maintain his marital children.⁶⁹⁶ Upon divorce the fact that the father compensated the child-care provider had to be taken into account.⁶⁹⁷ The maintenance for the child was called *maswi a ngwana* or *isondlo*.⁶⁹⁸ The family head maintained the family out of the communal property, that is, the family property and the house property. However, while the family property was used to maintain the entire family, the house property was used to maintain the members of a house only. In this context, *isondlo* for an extramarital child was defrayed from the communal property of the family,⁶⁹⁹ while *isondlo* for the maintenance of a marital child was defrayed from the treasury of the house to which the child was affiliated.

693 *Centre for Child Law v Minister of Home Affairs* 2005 6 SA 50 (T); *Soller v G* 2003 5 SA 430 (W); *Seodin Primary School v MEC of Education, Northern Cape* 2006 1 All SA 154 (NC).

694 *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC).

695 *Reform of Customary Law of Succession and Regulation of Related Matters Act* 11 of 2009.

696 Mofokeng *Legal Pluralism* 91-92; *Hlangabeza v Bacela* 1982 AC 168 (S); *Gujuluwa v Bacela* 1982 AC 168 (S); *Hlengwa v Maphumulo* 1972 BAC 58 (NE).

697 Maithufi 2000 *THRHR* 515.

698 Mofokeng *Legal Pluralism* 91-92; *Hlangabeza v Bacela* 1982 AC 168 (S); *Gujuluwa v Bacela* 1982 AC 168 (S); *Hlengwa v Maphumulo* 1972 BAC 58 (NE).

699 Mofokeng *Legal Pluralism* 91-92; *Hlangabeza v Bacela* 1982 AC 168 (S); *Gujuluwa v Bacela* 1982 AC 168 (S); *Hlengwa v Maphumulo* 1972 BAC 58 (NE).

Nowadays parents and their family group must provide their dependent children with maintenance within their respective means while the State may provide care to the children if their parents or family group is incapable of doing so due to a lack of or inadequate means.⁷⁰⁰ Section 5(6) of the *Maintenance Act* imposes upon the parents the obligation to maintain their children within their means on a *pro rata* basis.⁷⁰¹ The *Constitution* provides that every child has a right to "basic nutrition, shelter, basic health services and social services".⁷⁰²

Maintenance generally includes a common list of necessities of life (food, clothing and shelter).⁷⁰³ The standard of living of the rights-holder is a critical and essential factor in the determination of the right and extent of maintenance of an indigent dependent.⁷⁰⁴ In this sense, adequate care consists of food, clothing, shelter, medical care and education, amongst other things.⁷⁰⁵ Depending on the objective circumstances of each case, the duty of support may even include the duty to offer a child a university education.⁷⁰⁶

5.5.1 The duty of support

The duty of support rests with the members of the family in the following order:

- i. parents;⁷⁰⁷
- ii. ascendants (e.g. grandparents);⁷⁰⁸

700 S 5(6) of the *Children's Act* 38 of 2005; Heaton *South African Family Law* 321-329; Heaton *Casebook* 23; *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC); *Minister of Health v Treatment Action Campaign (1)* 2002 12 BCLR 1033 (CC); *Minister of Health v Treatment Action Campaign (2)* 2002 5 SA 721 (CC); *Bannatyne v Bannatyne (Commission for Gender Equality as Amicus Curiae)* 2003 2 SA 363 (CC).

701 S 15(3)(a) of the *Maintenance Act* 99 of 1998.

702 S 28(1)(c) of the *Constitution*.

703 Spiro *Law of Parent and Child* 397.

704 Davel *Child Law* 43.

705 See, among others, Van der Vyver and Joubert *Persone- en Familiereg* 631; Spiro *Law of Parent and Child* 397; *Schmidt v Schmidt* 1996 2 SA 211 (W) 220B.

706 *Ex Parte Pienaar* 1964 1 600 (T) 607C.

707 S 15(3)(a) of the *Maintenance Act* 99 of 1998.

708 *Cliksman v Talekinsky* 1955 4 SA 468 (W); *Ex parte Jacobs* 1936 OPD 31. Previously paternal grandparents were liable for the maintenance of their son's extramarital children (*Motan v Joosub* 1930 AD 61).

- iii. descendants (e.g. children and grandchildren);
- iv. collateral relatives (e.g. brothers, sisters, aunts and uncles);⁷⁰⁹
- v. care providers;⁷¹⁰
- vi. step-parents.⁷¹¹

A duty bearer contributes towards the maintenance of a dependant according to his or her ability.⁷¹² Firstly, the duty to support a child rests upon his or her biological parents or adoptive parents in the case of an adopted child. The parents contribute towards the child's maintenance on a *pro rata* basis. The duty of support is reciprocal. Simply put, also a biological or adopted child has a primary duty to support his biological or adoptive parents within his or her means.

Secondly, if the parents have no means to provide maintenance and support to their child, are deceased or unable to maintain their dependent child for whatsoever reason, the duty shifts to the paternal and maternal ascendants. The ascendants are to contribute to the child's maintenance on a *pro rata* basis.

Thirdly, if there are no ascendants or if the ascendants have no means to support the child, the duty of support shifts to the child's collateral relatives (i.e. the paternal or maternal uncles and aunts) who must contribute towards the maintenance of the child on a *pro rata* basis. If there is no natural duty-bearer to provide adequate maintenance to a child, the duty of support shifts *in toto* or *pro tanto*⁷¹³ even to the state.

5.5.2 The extent of maintenance

The following are the factors that must be taken into consideration to determine the extent of maintenance:

709 *Oosthuizen v Stanley* 1938 AD 322; *Ex parte Pienaar* 1964 1 SA 600 (T).

710 S 1(1) of the *Children's Act* 38 of 2005.

711 *Heystek v Heystek* 2002 2 All SA 401 (T).

712 Davel *Child Law* 51.

713 S 28(1)(c) of the *Constitution*; *United Nation Convention on the Rights of the Child* (1959); *International Covenant on Economic, Social and Cultural Rights* (1966).

- i. the standard of living;
- ii. the social status;
- iii. the means (ability) of the duty-bearer to maintain a dependent.

5.6 The Bill of Rights

While prior to *Bhe* customary law differentiated the rights of support or inheritance of marital children from those of the extramarital children, common law was no longer discriminating between children on the grounds of birth, age, or gender.⁷¹⁴ Section 28 of the *Constitution* provides specifically for the rights of children to the exclusion of everyone else. According to Bekink and Brand,⁷¹⁵ section 28 constitutes a mini-charter of children's rights. However, section 28 is not the only mini-charter in the *Constitution*. Section 28 does not discriminate between marital and extramarital children.

5.7 Conclusion

There are two main categories of children, namely marital and extramarital children. Previously, the right to support or succession and inheritance was exercised in accordance with the customary rule of male primogeniture. Nowadays, children are equal before the law and enjoy full and equal protection and benefit of the law. They enjoy equal status including competencies such as the legal capacities, the capacity to act and the capacity to litigate. The law no longer discriminates on the grounds of gender or birth. Nowadays, the duty to support a child rests primarily with the biological parents. If the biological parents do not have the means to maintain their children, the law obliges siblings with the requisite means to do so.

Chapter 6 deals with the general principles and history of Hananwa law. It shows that Hananwa law is part of a broader body of customary law. It gives

714 Van Schalkwyk "Maintenance for Children" 45-50.

715 Bekink and Brand "Constitutional Protection of Children" 173 para 9.3.2.1.

attention to the historical development of the Hananwa community, the definition of Hananwa law, the sources of Hananwa law, the status of Hananwa law, the nature of Hananwa law and the application of Hananwa law.

CHAPTER 6

THE GENERAL PRINCIPLES AND HISTORY OF HANANWA LAW

6.1 Introduction

This chapter gives an historical background to the Hananwa law. Hananwa law is the indigenous law of the Hananwa community. The tradition of patriarchy dictated the status of African women among the Hananwas, to a great extent. One of the manifestations of the tradition of patriarchy is the role of the customary rule of male primogeniture⁷¹⁶ in the succession of an heir apparent to the positions of family heads and traditional leaders.

6.2 The constitutional and legal status of the Hananwa community

This study acknowledges that the Hananwa community is indeed a community in terms of sections 30 and 31 of the *Constitution* read together with section 2 of the *Traditional Leadership and Governance Framework Act*.⁷¹⁷ Sections 2(1) and (2) of the *Traditional Leadership and Governance Framework Act*⁷¹⁸ provide as follows:

1. A community may be recognised as a traditional community if it-
 - a. is subject to a system of traditional leadership in terms of that community's custom; and
 - b. observes a system of customary law.
2. (a) The Premier of a province, by notice in the Provincial Gazette, in accordance with provincial legislation and after consultation with the provincial house of traditional leaders in the province, the community concerned, and, if applicable, the king or queen under whose authority that community would fall, may recognise a community envisaged in subsection (1) as a traditional community. ...

716 See, among others, Rautenbach and Du Plessis "Customary Law of Succession" for an in-depth discussion of the customary law of succession and inheritance; Bekker and Rautenbach "Application of African Customary Law" para 2.3.10.

717 *Traditional Leadership and Governance Framework Act* 41 of 2003.

718 *Traditional Leadership and Governance Framework Act* 41 of 2003.

3. A traditional community must transform and adapt customary law and customs relevant to the application of this Act so as to comply with the relevant principles contained in the Bill of Rights in the Constitution, in particular by-
 - a. preventing unfair discrimination;
 - b. promoting equality; and
 - c. seeking to progressively advance gender representation in the succession to traditional leadership positions.

The Premier may recognise a traditional community which adheres to a system of customary law.⁷¹⁹ The investiture of the power to recognise traditional communities and appoint categories of traditional leaders in the Premier "after consultation with provincial house of traditional leaders in the province, the community concerned, and, if applicable, the king or queen under whose authority that community would fall" amounts to the subordination of the traditional communities, traditional council and royal house to the government of the day.

The *Constitution* recognises the institution of traditional leadership,⁷²⁰ cultural, religious and linguistic communities,⁷²¹ customary law,⁷²² religious law,⁷²³ customary and religious marriages⁷²⁴ and the rights to culture,⁷²⁵ language⁷²⁶ and religion.⁷²⁷ According to Olivier *et al* "... [the] membership of a community is determined by, at least, birth".⁷²⁸ This is true, also, with regard to the Hananwa community. The Hananwa of Maleboho thus qualifies as a community for a number of reasons:

- i. they have a recognised senior traditional leader;⁷²⁹

719 Ss 2(1) and (2) *Traditional Leadership and Governance Framework Act* 41 of 2003.

720 S 211 of the *Constitution*.

721 S 31 of the *Constitution*.

722 Ss 8, 15, 30, 31, 39 and 211 of the *Constitution*.

723 S 15 of the *Constitution*.

724 S 15 of the *Constitution*.

725 S 30 of the *Constitution*.

726 Ss 30 and 31 of the *Constitution*.

727 Ss 15, 30 and 31 of the *Constitution*.

728 Olivier *et al Indigenous Law* 3.

729 Olivier *et al Indigenous Law* 3.

- ii. the senior traditional leader has a substantial number of followers and headmen;
- iii. the followers constitute a cohesive group with a common culture, including a common language;⁷³⁰
- iv. the official language of the community is Northern Sotho. Its distinct dialect is, however, Sehananwa;⁷³¹
- v. the community occupies a defined territory;
- vi. the community observes a system of customary law called the Hananwa law.

The Hananwa community is subject to the *Constitution* and legislation dealing specifically with customary law.⁷³² Hananwa law is not specifically recognised in terms of section 211 of the *Constitution* but it falls under the general term customary law. Hananwas may thus conclude valid customary marriages in terms of the *Recognition of Customary Marriages Act*⁷³³ and may insist on the application of their laws by the courts when applicable.⁷³⁴

6.3 The role of patriarchy and male primogeniture in the origin and development of the Hananwa

The tradition of patriarchy and its corollary of male primogeniture played a critical role in the coming into being and development of the Hananwas into an independent community. The two principles influenced the social, political, economic and legal culture of the Hananwas. While patriarchy emphasised male dominance of society, the doctrine of male primogeniture confers the right

730 S 31 of the *Constitution*.

731 According to informants, the Hananwa are Sehananwa-speaking. Sehananwa is a dialect of Tswana. It is the language that the Hananwa spoke in Botswana. The language evolved over the centuries into a unique language. However, due to cross-cultural diffusion, Sehananwa is distorted. The vernacular that is used in schools among the Hananwa is Northern Sotho as opposed to Sepedi. It must be stated, in parenthesis, that Sepedi is the language of the Pedi in the Sekhukhune District. It is not necessarily the common language of all Northern Sotho-speaking people of Limpopo Province.

732 S 211 of the *Constitution*.

733 The *Recognition Act*.

734 S 211 of the *Constitution*.

to succeed to the family headship first and foremost to the first-born son of the family or house. Both patriarchy and male primogeniture prescribe that males succeed males. It follows, therefore, that according to the customary rules women do not enjoy equal inheritance rights. The following paragraphs examine the effect of these customary rules on the historical development of the Hananwa community.

6.3.1 *The early roots of the Hananwa*

The early roots of the Hananwas are causally linked to the history and legal system of the pre-colonial Maletse community. This being the case, this rubric surveys this causal link and the cause for the secession from the Maletse people of a section of the community that came to be known as the Hananwas.

According to Setumu, the Hananwa originated from the Maletse community in the present-day Botswana.⁷³⁵ The Maletse people are a community within the broader "Bahurutse branch of the Batswana nation".⁷³⁶ There are various reasons for the emigration of the Hananwa from the Maletse community. One reason was that the senior wife could not produce a male issue for the purposes of succession to the position of a senior traditional leader and family head. Setumu⁷³⁷ puts it thus:

Oral history has it that this break away was caused by the fact that Kgosi Maletse had no sons by his senior wife to succeed him in his throne. This wife only had one child, Mmatsele, a girl.

The proximate cause of the rupture was cultural-legal in nature. According to the Maletse law of succession, an heir to the throne had to be an eldest son of the senior traditional leader and his senior wife. The designated family provided a senior wife to the Royal House. Put differently, the two family groups entered an agreement that provided that one would provide a senior wife to the other. In

735 Setumu *Our Heritage* 4.

736 Setumu *Our Heritage* 4.

737 Setumu *Our Heritage* 4.

the ultimate, a web of closely related families was established. In most instances, the royal marriages involved cross-cousins. In other words, if a man's sister was married to a senior traditional leader as a senior wife, her son would later marry the daughter of his paternal uncle. Usually, this took place by arranging a marriage between the eldest surviving son of the senior wife and the daughter of her brother (preferably the eldest surviving daughter of her brother's senior wife). In the final analysis, the marriage of these cross-cousins would remain endogamous over generations. Any departure from this system of inter-family marriages was frowned upon by the clan and the community at large.

The age and chronology of the marriage of a woman who married within the extended family of her aunt or in that of any other close relative did not affect her seniority in the polygamous household or extended family at large. She assumed the rank of her family and, in particular, her household in her marital family group. It was for this reason that a young woman might be a senior to a woman who had married her husband even before she was born. The children of the senior wife were also senior to those whose parents were junior to their parents within the extended family group.

It is worth mentioning that the customary obligation of a senior wife in the royal house was to bear a future senior traditional leader of the community and future head of the royal family. In the normal course of events, a senior traditional leader would marry a senior wife from a senior house of their equivalent royal house in other communities. Females were disqualified from succeeding to the throne on account of their gender.

As shown above, Malete had more than one wife. The mother to Mmatsela was his senior wife. Mmatsela was therefore senior to all of the women in the community except her own mother. She was even senior to all of the daughters of her father by all other women. However, according to the Malete law, Mmatsela was junior to all of the men in the community including all of the sons of her father by all other women. She could not succeed to the position

of a senior traditional leader of the community because the customary rule of male primogeniture dictated otherwise. Kgosi Malete was of the view that the customary rule of male primogeniture had to be suspended in order to make it possible for Mmatsetla to succeed him as a senior traditional leader at the opportune time. Setumu⁷³⁸ puts it thus:

Without sons, Mmatsetla was the natural heir to succeed her father. However, there were people who strongly opposed the fact that they could be ruled by a woman. As a result, there were plots to kill Mmatsetla, especially by Kgosi Malete's son by a junior wife.

Mmatsetla fled to South Africa. Her flight led to the founding of the Hananwa community. Her group duly appointed her as their senior traditional leader. Nonetheless, having been uprooted from their traditional setting, the Hananwa royal house practised endogamy.⁷³⁹ The Hananwas met, intermingled and intermarried with the Morudu community at a place called Thabana ya Morudu.⁷⁴⁰ The Morudu community was relatively small in size. It was therefore easily swallowed by the Hananwa community. However, the two communities concluded a covenant that provided that, thenceforth, the Hananwa Royal House would marry a senior wife from the Morudu family. Mmatsetla had a liaison with one of one Kgwedjana.⁷⁴¹ It is unclear whether Kgwedjana was a Morudu or not. It is worth noting, in parenthesis, that the situation was complicated at the beginning because Mmatsetla was a woman and not a man. The Hananwa Royal House, therefore, could not marry a senior wife from the Morudu in terms of the covenant. There is neither evidence that a woman-to-woman marriage was arranged between Mmatsetla and another woman nor that *ngwetsi ya lapa* was married to produce an heir to the throne.

The liaison between Mmatsetla and Kgwedjana produced a son, named Leboho. Mmatsetla became Maleboho.⁷⁴² Thereafter, every senior traditional leader, with

738 Setumu *Our Heritage* 4.

739 Endogamy means marriage within the same group.

740 Literally, it means the Mount of Morudu.

741 Setumu *Our Heritage* 4.

742 Literally, it means the mother of Leboho.

the exception of the Hananwa of Kibi, had to assume the name "Maleboho". Leboho succeeded Mmatsela. Thenceforth, Maleboho began to marry a senior wife from the Morudu family.

The Hananwas spent an inordinate period in the wilderness *en route* to an unknown secure environment. After settling at Thabana ya Morudu the Hananwas proceeded farther into the hinterland in search of a safe land for residential and agricultural purposes. The elders conserved the traditions and secrets of the community, generation after generation. Over the years they were generally blessed with capable leaders who safeguarded the interests of the Hananwa community every step of the way. Leadership disputes were kept in check and nipped in the bud. Community customs regulated dispute resolution. Absent any community custom to resolve a particular dispute, the community developed rules in response to the changing circumstances of the community.

Other key figures who helped to lead and guide the Bahananwa during their exodus included Sebudi and Lerokolole.⁷⁴³

The Hananwas kept migrating from one place to the other, mainly for security reasons. They even stayed at Baltimore before they migrated finally to Blouberg (their present-day headquarters). In the middle of the 19th century, Matswiokwane led the Hananwas to Blouberg. Matswiokwane built his "Great Place" on the summit of Blouberg. Setumu⁷⁴⁴ puts it, further, thus:

They moved slowly until they eventually reached the Blouberg Mountains which they turned into their permanent home until the present day.

The Hananwas interacted with other communities before and after they arrived at Blouberg. For instance, the Morudu and Madibana communities practised their own cultures and laws. The Hananwas learnt from these communities and *vice versa*. As shown below, the Hananwas met the Europeans in the form of

743 Setumu *Our Heritage* 5-6.

744 Setumu *Our Heritage* 4.

the citizens of the ZAR, a Boer Republic, and members of a Western church. The ZAR and the Western church provided a fillip to the diffusion of Western culture, religion and laws and African culture, religion and laws.

Cultural exchanges played significant roles in the development of the Hananwa law. The change in culture and religious ethos gave impetus to the change in the legal norms. These cultural exchanges were generally the exchange and diffusion of African traditional culture. However, as was bound to happen, different African communities met Western communities at different places and times. These meetings led to the diffusion of the African and European cultures at different paces and to different degrees. During the 19th century, while some communities were fighting one another for tribal supremacy, others were waging wars of resistance against the ZAR. The following paragraphs deal with the encounter between the Hananwas and the Europeans.

6.3.2 The Maleboho-Boer War: the African war of resistance⁷⁴⁵

The Hananwas met the white people in the 19th century. For instance, they met the Native Commissioner of the Zoutpansberg district, Barend Vorster, and missionaries such as Rev Beyer in 1868 and Rev Stech in 1874. Rev Trumpelmann established the Makgabeng Mission in 1870. The Europeans had already established themselves in South Africa. The establishment of the ZAR paved the way for advent of the missionaries. In effect, there was cooperation and collaboration between the ZAR and the missionaries. The culture, religion and legal system which the missionaries and the Boers abided by were almost similar. They emphasised the notion of individual rights above that of group rights. In other words, in their system the individual played a greater role as a legal person than a group in legal, political, social, economic, cultural and similar matters. This paradigm was diametrically opposed to the *modus vivendi* of the Hananwas, which was communalistic in focus. The missionaries were Christians, while the Hananwas were African traditionalists. The Hananwas

745 Setumu *Our Heritage* 1ff.

practised customs foreign to the missionaries, such as polygamy, *magadi* (*bogadi*), *koma* (the initiation school) and similar customs. The missionaries regarded these customs as backward, savage, evil and heathen. They interfered in community politics, incited leadership power struggles and applied divide-and-rule tactics in order to weaken the Hananwas. Setumu⁷⁴⁶ puts it thus:

The attacks of the ways of life of the communities by the missionaries created divisions and confusion among the communities. Those who were converted began to look down upon those who resisted conversion. Tensions among communities due to missionaries varied. In most instances, the missionaries used the political interventions of the colonialists in order to overthrow the Black tribal system which disabled them to achieve their goal of converting Blacks into Christianity.

The attacks on the ways of life of the Hananwa community went directly against the essence of the African philosophy of life: *motho ke motho ka batho ba bangwe*;⁷⁴⁷ *kgosi ke kgosi ka batho*;⁷⁴⁸ *maoto a kgobe ke bana*;⁷⁴⁹ *mahlaku a maswa a ema ka a matala*⁷⁵⁰ and *rutang bana ditaola le se ye le tsona badimong*.⁷⁵¹ As indicated the missionaries targeted customary marriage, *magadi* (so-called bridewealth) and *koma* (the initiation school). However, their attacks were ontological and spiritual. It follows therefore that they struck out at African traditional religion and *bongaka* (traditional medical practice). An African traditional community is a spiritual system. For instance, a traditional leader is at the helm of the community. His inner circle includes people who play spiritual roles in the life of the royal house: the royal traditional doctor and *rakgadi* (female father).⁷⁵² Both these persons intermediate between the living and the living dead, the ancestors. The importance of the roles they play reposes in a system of African spirituality. African spirituality integrates a community of

746 Setumu *Our Heritage* 8.

747 A person is a person through other people.

748 A king is a king through his people.

749 A fish's feet are its own offspring.

750 New bush leans upon the old ones.

751 Teach your offspring the divination bones lest you pass on with the knowledge.

752 This is a paternal aunt who is assigned to be a spiritual intercessor for the royal family, in particular the traditional leader.

ancestors, a community of the living and a community of the-not-yet-born. These communities interface, intersect, interrelate and interdepend. The interconnectedness of these communities ontologically pervades kinship in the three spheres of life: the anteriority, the living and the posterity.

The African God is believed to be both the apical ancestor and the creator of the heavens and earth. The African traditional communities involve the community of ancestors in the life of a family, clan and community, everywhere, every step of the way, always and every time. An African traditional family is because God is. The ancestors are the departed members of the family. Death is regarded as a gateway to the ancestral realm. Every person has a guardian angel which guides him or her throughout his or her earthly life. The guardian angel leads the person to the community of ancestors and through the initiation into "ancestorhood". The living and the living dead maintain an eternal communion. An attack on African spirituality amounts to an attack on this integrated system.

Customary marriage, *bogadi*, *koma*,⁷⁵³ *komana*,⁷⁵⁴ *kgopa*,⁷⁵⁵ *bongaka*,⁷⁵⁶ *mephato*,⁷⁵⁷ *masolo*⁷⁵⁸ and similar customs are some of the manifestations of this system of spirituality. An attack on one is an attack on all of them. Obviously, the Europeans attacked African customs, primarily because they were relatively inconsistent with their European equivalents. For instance, the African customary marriage is potentially polygynous; the common law dowry is obsolete; *koma* is more than circumcision; and *bongaka* is more spiritual than mental. The Europeans set both the anthropologists and the missionaries on the African traditional communities ahead of the colonisers. The anthropologists turned the African culture upside down and showed it up as barbaric, savage, primitive and uncivil. The missionaries demonised these aspects of African

753 Undergraduate initiation of males.

754 Postgraduate initiation of males.

755 Special initiation for a woman.

756 Traditional medical and spiritual practice.

757 Regiments or military companies.

758 Military campaigns.

spirituality in order to pave the way for Western spirituality. The attack on African spirituality and religion was an onslaught on the realm of the African ancestry. Truth be told, a society without anteriority is a society without history or a spiritual anchor.

The clash between European culture and African culture was, in essence, a conflict of two types of spirituality. One wanted the other to bend a knee before it. It was the battle for supremacy. The foreign invaded the domestic. The intercultural conflicts reached a boiling point. Matswiokwane ordered Rev Stech to leave his jurisdictional area. The latter obliged. Rev Stech then coordinated the mission activities from the Makgabeng Mission. Matswiokwane was assassinated in 1879. Matswiokwane was a polygamist. According to informants he had eleven or so wives. His senior wife, Maseketa, hailed from the Morudu family. He had an heir to the throne, named Ratshatsha Masilo seketa Kgalushi Leboho, who was the son of Maseketa. Ratshatsha married, among others, Maserule Morudu and Mamphoku Rangata.⁷⁵⁹ Maserule was married as a senior wife, but after she was allegedly involved in an adulterous relationship Ratshatsha demoted her and elevated Mamphoku to the position of senior wife. The elevation of Mamphoku indirectly upgraded the Rangata family a notch above the Morudu family. However, as the study shows, it was Mabea who would directly and overtly substitute the seniority of the Rangata family for that of the Morudu family.⁷⁶⁰

Mamphoku was not married as a senior wife. Ratshatsha elevated her to the position of senior wife only after his senior wife, Maserule, allegedly committed adultery. There is a dispute about whether or not Maserule bore an extramarital child from the adulterous relationship. If there was such a child, there is no data as to whether he repudiated it or accepted it as his marital child. The saying goes thus, "ngwana ke wa dikgomo".⁷⁶¹ What is clear is that, after consulting his

759 See *Leboho*.

760 *Leboho*.

761 A child is a child of *magadi* cattle.

people, Ratshatsha conferred the position of senior wife upon Mamphoku Rangata and demoted Maserule to the position of junior wife. In the result, Mamphoku's son, Mabea, became an heir apparent to the throne.

A senior wife is a candle wife. The community treasury defrays the expenditure for her bridewealth. The community treasury is distinct from the communal property of the family, namely the family property, house property and personal property. The senior wife is "the mother of the nation" because she is married by the community at its own expense so that she should bear a *kgosi* for them. A *kgosi* is both the father and child of the community. The saying goes thus: "*kgosi ke kgosi ka batho*".⁷⁶²

After the death of Matswiokwane traditional leadership disputes arose between the two members of the royal family, namely Ratshatsha and Kibi. Ratshatsha emerged victorious.

The support-base of Kibi was the Christian group. Following Ratshatsha's victory, Kibi fled. He formed his own community which he led as a senior traditional leader.

In 1892 Rev Christoph Sontag was allowed to resume missionary activities among the Hananwas in Blouberg. The ZAR was divided into districts and the Hananwa chiefdom fell within the Zoutpansberg district. Government desired that the Hananwas should submit to the authority of the ZAR, but Maleboho resisted these attempts. Rev Sontag was unsuccessful in his attempts to persuade Maleboho to submit to the political authority of the ZAR. The Hananwas suspected that Sontag was gathering intelligence for the ZAR.

The Maleboho-Boer War broke out in 1894. Kibi joined the Boer commandos against his father's people. As he had personal knowledge of the lifestyles and the ins and outs of the Hananwa territory, he was important for intelligence-

762 A king is a king through his people.

gathering purposes. It was this intelligence that ultimately decided the war. Oral history has it that the basic need for water was a determining factor in the Maleboho-Boer War. The commandos besieged the Hananwas, who were fighting a rear-guard action on mountaintops. The vulnerable community members, such as women and children, were hidden in the caves. Unfortunately, the Hananwas were cut off from the basic water sources. Setumu⁷⁶³ puts it thus:

These large numbers of commandos were also aided by Black warriors from allied chiefs such as Kibi and Mabena. With these numbers on the side of the Boers it was inevitable that the Bahananwa were going to lose.

Of course, the Maleboho-Boer War of 1894 aggravated the split. Maleboho regarded Kibi as a traitor and never forgave him. Maleboho surrendered and was jailed in a Pretoria prison in 1894. During the interregnum his mother led the Hananwas as a regent. She was assisted by Maleboho's son and heir-apparent, named Mabea. The great place was temporarily relocated to Kwarung at the foot of Blouberg.

During Maleboho's incarceration Mabea decided to get married. His choice was unorthodox. He did not ask his family to choose a wife for him in accordance with the Hananwa custom and family practice. Of course he was free to marry any woman of his choice as a junior wife. However, tradition required his family to conclude a customary marriage with the Morudu family or a historically designated family for a senior wife, otherwise known as the candle wife. Mabea departed from the tradition of the Royal House and married a senior wife from the Rangata family. This rebellious behaviour offended the Hananwas. However, the Hananwas eventually reconciled themselves to it. The saying goes thus: "*ngwana llela nakana ya mokhure sehla o mo fe*".⁷⁶⁴

763 Setumu *Our Heritage* 15.

764 Literally, this means if a child weeps for a penny whistle, cut it out and give it to the child.

Unfortunately, Mabea was killed a short while after the war. It is alleged that he was killed by the Boers while he and others were pushing a cannon left by the Boer commando after the war to a nearby royal homestead. He was survived by his son named Seiphi, among others. Maleboho was released from prison in 1900. He resumed his position and returned his headquarters to the mountain summit. He died in 1939. His grandson, Seiphi, succeeded him as a senior traditional leader in 1939. Seiphi married Mosima Rangata as a senior wife. Seiphi died in the 1950s.

Mosima acted as a regent. After the removal and death of Mosima, the community was ruled by a succession of regents. Matome was the first of such regents, while three of his sons by his senior wife succeeded him, one after the death of the other. It is noteworthy that the *ngwetsi ya lapa* produced a son, named Ngako. After a protracted leadership struggle Ngako was enthroned as the senior traditional leader. It is noted, in parenthesis, that the followers of Maleboho and Kibi are now independent communities.⁷⁶⁵

6.3.3 Non-cooperation and the marginalisation of the Hananwas

As the *Leboho* case indicates, the dispute between the ZAR and the Hananwa did not end when the Maleboho-Boer War ended. The Maleboho-Boer War was followed by a "cold war": an ideological conflict between Western and African culture, Western and African religion, common law and Hananwa law, and so forth. There was a protracted dispute between Maleboho and native commissioners, magistrates and similarly situated government officials over governance issues. After the death of Ratshatsha the Union government delayed the installation of Seiphi as a senior traditional leader of the Hananwa on the grounds, among others, that he was unco-operative and insubordinate. He was inaugurated only in 1946. He died in 1953. After his death the government refused to install his widow, Mosima. Later she was installed only to be deposed in 1957. Manchako's son, Matome, replaced Mosima. However,

⁷⁶⁵ Ss 31 and 211 of the *Constitution*.

he was appointed as an acting *kgosi*. Mosima died in 1960. According to informants the Hananwas did not apply the rules of common law to resolve disputes among themselves. They administered living Hananwa law as a matter of course. A family council existed which was "a court of first instance". If disputes were not resolved at its level, they were referred to the headwoman/headman's traditional authority court and from there to the apex traditional authority court at the King's great place.

6.3.4 Social classification

According to informants, the Hananwa community is hierarchical and patriarchal. For instance, nowadays the community is stratified into higher, middle and lower classes. The higher class comprises the traditional leadership (ie the nobility) such as members of the royal house, *bakgoma*,⁷⁶⁶ *bakgomana*⁷⁶⁷ and headmen and headwomen. The middle class comprises business people and intellectuals such as teachers, nurses and doctors. The lower class comprises ordinary village peasantry and the blue-collar working class. Most of the latter group are migrant workers. The members of each social class relate to one another according to the order of seniority. The families are ranked in order of seniority based on their blood relationship or affinity to the traditional leadership. Members of the family and agnatic group relate to one another according to a system of age differentiation and family ranking. Informants indicate that gender discrimination is found among all the social classes of the Hananwa.

Women as a social category are reduced to positions of subservience. They constitute a subordinate class. It is ironic that women as a social category among the nobility and commoners in the Hananwa community are equally subjected to the public and private authority of men. However, there are also systems of seniority among women within any class whatsoever. The higher class women are regarded as superior to the women in the other classes. The

766 A council of senior councillors.

767 A council of junior councillors.

middle class women are regarded as superior to the women in the lower class. Men often use law as a tool in their domination of women.⁷⁶⁸ It is worth mentioning that the social profile of the Hananwa mirrors that of other similarly situated communities in South Africa.

6.3.5 The place of the Hananwa in society

Historically there are two major population groups in South Africa, namely white people and black people. The black people are generally divided into Africans, Coloureds and Indians.⁷⁶⁹ The court has extended the term 'black people' to the Chinese people.⁷⁷⁰

African peoples are heterogeneous and multi-cultural. Bekker and Rautenbach⁷⁷¹ put it as follows:

African peoples are usually grouped on the basis of language and other cultural features such as clothing. They comprise groups and communities that speak African (formally called Bantu) languages. They occupy virtually the whole of the Southern part of Africa, but differ from other African groups in that all of them speak the languages of one family of languages.

The African peoples in South Africa are divided into four main groups, namely the Nguni, Venda, Tsonga (Shangana) and Sotho.⁷⁷² While the Nguni group comprises the Zulu, Xhosa, Swazi and Ndebele, the Sotho group is further

768 For instance, after the death of a husband, first his widows are enjoined as a matter of law and custom to wear mourning attire (called *diswiswi*) for a period as a symbol of mourning the deceased. This tradition is known as *go roula*. Second, his widows are proscribed from engaging in sex during the mourning period. However, if a wife predeceases her polygamous husband, he is not prohibited from engaging in sex with his other wives and even concubines, for that matter. Second, the surviving husband is not enjoined to put on mourning attire. He may sew a black patch on his sleeve as a symbol of bereavement.

769 S 1 of the *Broad-based Black Economic Empowerment Act* 53 of 2003; *Employment Equity Act* 55 of 1998.

770 *Chinese Association of South Africa v Minister of Labour* [2008] ZAGPHC 174 (18 June 2008).

771 Bekker and Rautenbach "Application of African Customary Law" para 2.2.2. Notes omitted.

772 Myburgh *Indigenous Law* 1. See also Bekker and Rautenbach "Application of African Customary Law" para 2.2.2.

divided into Northern Sotho, Southern Sotho and Western Sotho (Tswana).⁷⁷³ The Venda, Tsonga-Shangana and Northern Sotho groups are found mainly in Limpopo Province. The Northern Sotho group comprises, among others, the Pedi, the Kgaga, the Lobedu, the Birwa, the Tlhaloga, the Roka-Kwena, the Tlokwa, the Kone and the Hananwa. Each constituent community in a group has its own system of law. However, these systems of law have important similarities and dissimilarities.⁷⁷⁴ It is for this reason that customary Hananwa law is distinguishable from other systems of customary law.

6.4 The status of Hananwa law

The *Constitution* recognises customary law as a part of the legal system of the country and consequentially any customary law of a community is a part of the basic law of South Africa.⁷⁷⁵ It follows, therefore, that Hananwa law is a part of the legal system of this country subject to the *Constitution* and legislation that deals specifically with customary law. If there is inconsistency between the *Constitution* and Hananwa law, Hananwa law is invalid to the extent of the inconsistency.⁷⁷⁶

6.5 The nature of Hananwa law

The main sources of Hananwa law are also the *Constitution*, legislation, custom and practice, case law (judicial precedents) and text books written by anthropology scholars. The salient features of Hananwa law are generally similar to the salient features of customary law as discussed in chapter 2 of this thesis.⁷⁷⁷

773 Bekker and Rautenbach "Application of African Customary Law" para 2.2.2. I must submit that there are, in fact, three Sotho sub-groups, namely Southern Sotho, Northern Sotho and Western Sotho (Tswana). The Pedi are but a component within the Northern Sotho.

774 Bekker and Rautenbach "Application of African Customary Law" para 2.2.2.

775 See discussion in ch 2.

776 The supremacy of the *Constitution* is confirmed in s 2 of the *Constitution*.

777 Bekker and Rautenbach "Application of African Customary Law" para 2.3.

6.6 Conclusion

The Hananwas originated in Botswana and migrated to South Africa because a leadership dispute. In South Africa they encountered white people and other African communities. In 1894, they were involved in a colonial war, commonly known as Maleboho-Boer War. The Hananwas were defeated. After the war, Maleboho was arrested and jailed. After his release, he resumed his chiefly leadership. The community split into the Hananwas of Maleboho and the Hananwas of Kibi. Each section lives according to its system of Hananwa law which is a form of customary law.

The Hananwa law is a mirror of what goes on in the Hananwa community. It evolves consistent with the conditions of the Hananwas. It is a form of personal law. Previously, a group and not an individual was a legal subject. Family heads and traditional leaders acted on behalf of their groups. Obviously, the tradition of patriarchy together with its corollary of male primogeniture dictated the power relations in private and public spheres among the Hananwas over centuries. Accordingly, women had acted as regents for male senior traditional leaders only on a few occasions. The Hananwas are part of the Northern Sotho-speaking people in Limpopo Province.

The following chapter deals with the Hananwa family law.

CHAPTER 7

HANANWA FAMILY LAW

7.1 Introduction

Chapter 7 deals with the Hananwa law of marriage. Hananwa family law comprises, mainly, the law of marriage (the law of husband and wife) and the law of parent and child (guardianship, custody, access and maintenance). Nowadays women act as household heads together with or without their husbands. Nevertheless, as this chapter shows, the major decisions of the family are generally taken in community with other members of their family groups.

7.2 Hananwa law of marriage: general principles

According to the informants, traditionally and historically a Hananwa marriage is a marriage entered into between the family of a man and the family of a woman in terms of which a man and a woman are joined together as husband and wife. Properly construed, a family acts as a legal subject with corporate competencies such as the legal capacity, the capacity to act and the capacity to litigate. However, as will be shown below, Hananwa law is constantly undergoing change.

7.3 The parties to engagement

According to the informants, traditionally Hananwa marriage is usually preceded by a contract of engagement. The parties to a Hananwa contract of engagement are the family of a prospective husband on the one side, and the family of a prospective wife on the other. Engagement is known among the Hananwa as *go beeletsa mosadi*,⁷⁷⁸ *go ageletsa motshidi*⁷⁷⁹ or *go thiba sefeko*

778 To lodge a claim for a woman one proposes to marry in advance.

779 To safeguard one's interests in a woman one intends to marry.

(*sefero*).⁷⁸⁰ Usually, it is the family of a man that proposes marriage to the family of a woman (*go kgopela sego sa meetse*).⁷⁸¹ The parties may agree to conclude the marriage immediately or on a specific or determinable future date. If both families are ready, a marriage is negotiated, *lobola* is paid and a bride is subsequently transferred to a groom's family.

7.4 The requirements for a valid Hananwa marriage

According to the informants, the following are the salient requirements for a valid Hananwa marriage:

- i. The consent of the family of the prospective husband;
- ii. The consent of the family of the prospective wife;
- iii. A *Lobola* agreement; and
- iv. The transfer of the bride to the family of the groom.

In Hananwa law, the term "father" or "mother" does not mean only the biological father or mother of a child. A father of a child could be a *tsena* husband of his or her mother, or his or her adoptive father or his or her social father, while the mother of a child could be a *seyantlo* (levirate) of his or her widowed father, or his or her adoptive mother or his or her social mother.⁷⁸²

7.4.1 The consent of the family of the prospective husband

According to the informants, traditionally the consent of males is required for the validity of the marriage of their family member. However, the parents of the groom have to consent to his customary marriage. If one parent has deceased, the consent of the surviving parent would be a sufficient parental consent. If a parent unreasonably withholds the requisite consent, an aggrieved person may

780 To block the gateway. The family of a man gives the family of a woman engagement gifts to ensure that nobody else takes her hand in marriage.

781 To ask for a jug of water.

782 For the discussion of a social or community parentage, see, among others, Bekker 2008 *Obiter* 399-400.

have recourse to the family council for relief. If the family council were to fail to resolve the dispute, he or she may take his or her suit to the traditional authority court for relief. The family council or traditional authority court may substitute its consent for that of a "defaulting" parent. Nowadays, a spouse must consent to his or her own marriage.

7.4.2 The consent of the family of the prospective wife

Historically it was male members of the family group who would finally decide whether to accept or reject the marriage proposal of the family of a prospective husband to their daughter. Nowadays the bride's parents must consent to the marriage. However, the bride must personally consent to her own marriage after consultation with her family group, particularly her parents.

7.4.3 The Lobola agreement

The parties on both sides must agree on the payment of *lobola*. The actual payment of *lobola* is not a requirement for a valid customary marriage. Nowadays *lobola* is paid in cash or in kind. Historically livestock such as cattle, goats and sometimes sheep served as *lobola*. However, only the groom pays *lobola* for a prospective wife.

The *Constitution*, the *Recognition Act* and the *Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA)* *ipso iure* equalise husbands and wives. This being the case, the question is: is the custom of *lobola* not inconsistent with the rights in the Bill of Right, in particular the rights to human dignity, equality and freedom? There is a cogent view that *lobola* degrades women and consolidates the domination of women by men in a patriarchal social system.⁷⁸³

The question is whether or not any discrimination that emanates from the custom of *lobola* is not unfair in that it cannot be justified by the limitation clause

783 Chinyenze 1984 ZLR 229-230.

in section 36 of the *Constitution*. It may even be argued that the right to adhere to the custom of *lobola* finds expression within the right to culture.⁷⁸⁴ This right to culture, if the custom of *lobola* is an aspect of culture, competes with the rights to human dignity and equality. They and the corresponding constitutional values of human dignity, equality and freedom take primacy over the right to culture. Of course, the right to culture may not be exercised in a manner that is inconsistent with any provision of the Bill of Rights.⁷⁸⁵ This constitutional subjection of the right to culture to any provision of the Bill of Rights constitutes an internal limitation. Properly construed, the phrase "any provision of the Bill of Rights" has the effect of subjecting sections 30 and 31 to other provisions of the Bill of Rights. This subjection creates a hierarchy between sections 30 and 31 rights and the other rights in the Bill of Rights. It implies that sections 30 and 31 rights are subordinate to the other rights in the Bill of Rights. In the premise, the rights to human dignity and equality override the right to culture.

7.4.4 The transfer of the bride to the family of the groom

According to informants, the family of the bride transfers or hands her over to the family of the groom. The bride becomes a member of the family of her husband. The members of both families may attend the ritual functions at their respective homes. The object of this rite is to transfer the bride's guardianship from her natal family's head to her marital family head. In other words, the marital guardianship supersedes the plenary guardianship of the bride. The family group of the bride may give gifts and presents to the bride to tide her over in her new household.

784 Ss 30 and 31 of the *Constitution*.

785 Ss 30 and 31 of the *Constitution*.

7.5 The consequences of customary marriage

There are two main types of matrimonial consequences, namely personal and proprietary (patrimonial) consequences. Olivier⁷⁸⁶ states that marriage changes the status and legal rights of an individual spouse.

7.5.1 Personal consequences

The following paragraphs deal with the capacities of spouses.

7.5.1.1 Married status

Marriage effects changes to the status of individual spouses. Traditionally, the emancipated husband replaces the father or family head of his wife as her "guardian". The position of the wife in the spousal relationship and matrimonial household is relatively subordinate to that of her husband. Generally the husband has power over the person and the "property" of his wife. He represents her, *nomine officio*, in the performance of juristic acts, the conclusion of contracts, in legal proceedings, and in other family group responsibilities. Her legal capacity subsumes in the legal capacity of the family. Her husband controls her life and demands absolute obedience and loyalty from her.

In the past, a breach of the wife's duty to obey her husband could earn her chastisement or even actual reversion to her natal family for the purposes of correctional education (*go rutwa molao*). Her husband gains this power (guardianship over his wife) not only by virtue of the marriage but, primarily, by virtue of being the head of their matrimonial family, that is, by operation of the law which is informed and shaped by the tradition of patriarchy and its corollary of the customary rule of male primogeniture. This being the case, the wife at Hananwa law is impeded by onerous legal disabilities.

786 Olivier *et al Indigenous Law* para 6.

During the subsistence of a valid customary marriage, the wife cannot marry another man. She "belongs" to her marital family in general, and her husband in particular. Her husband is the only man who may exercise conjugal rights over her. If she commits adultery, her husband may claim damages from her seducer. On the other hand, her husband may marry other wives in spite of the existing marriage. Hananwa law recognises polygyny.

If her husband predeceases her, his family may nominate a *tsena* husband, preferably his younger uterine brother, for the widow. However, the widow and her *tsena* husband must consent to the *tsena marriage*. The children of the *tsena* marriage belong to her deceased husband, assume his surname and are members of his family group. On the other hand, if she predeceases him, he may marry one of her close female relatives, preferably her uterine sister, as a levirate (*seyantlo*).

The wife may assume the surname of her husband. Her household in a monogamous household or house in a polygamous household confers a rank, within the agnatic group, upon her. She assumes the dignities of her husband. However, her dignities are limited by the fact of her gender.

Customary marriage is patrilocal (virilocal)⁷⁸⁷ and not matrilocal (uxorilocal).⁷⁸⁸ It is for this reason that a wife factually becomes a member of the family of her husband. She is physically transferred or handed over to her marital family and integrated into it. However, a husband does not join his in-laws' family. The most that happens is that the customary marriage establishes inter-familial relationships. In any way, a husband becomes a member of his wife's family by affinity and *vice versa*. Marriage creates cognates.

Traditional Hananwa family law does not know the dual headship of a family (ie headship by both husband and wife). Only a male is competent to become the

787 The spouses must reside at the family home of the husband.

788 The spouse must reside at the family home of the wife.

head of a household. Of course, traditionally members of the family share in the collective responsibility for the affairs of the family group. However, males were regarded to all intents and purposes as senior members of the family group. Among themselves, females rank themselves according to the order of seniority.

According to the informants, traditionally a wife lacks the status and full capacity to perform juristic acts. A female must always act with the assistance of a male. This is so because in the traditional Hananwa law a woman is regarded as a perpetual minor and a ward of a man, that is, a father or a guardian. Marriage and age do not accord equal status and full capacity to a wife. Marriage creates a relationship of affinity between each spouse and the blood relations of the other.⁷⁸⁹ In consequence, a spouse is prohibited from entering into marriage with the ascendants or descendants of his or her spouse. Affinity is a legal impediment to a valid customary marriage. However, there are exceptions. A spouse may marry a collateral relative of his or her spouse. For instance, a husband may marry the sister of his wife as a sororate (*hlatswadirope*) or levirate (*seyantlo*). A wife may "marry" a brother of her husband as a *tsena* husband.

The family of each spouse becomes the in-laws of the other spouse. The parents of his wife become his parents-in-law (mother-in-law and father-in-law) and *vice versa*. The ascendants and descendants of her husband are her in-laws and *vice versa*. Her husband may not marry her ascendants and descendants in the direct line *ad infinitum*. The collateral relatives of his wife become his collateral relatives and *vice versa*. Collateral relatives of her husband may marry her collateral relatives.

789 Hahlo *Law of Husband and Wife* 106.

7.5.2 Proprietary consequences

According to Hananwa law and custom, the head of the family administers the affairs of his family or house for the benefit of his family or house. Traditionally the family property and house property are examples of a communal property.

7.5.2.1 Forms of Hananwa law property

The Hananwa law recognises three forms of property: family property, house property and personal property.⁷⁹⁰ Traditional authorities do not allot land for residential, agricultural and grazing purposes to a "loose" resident who is not affiliated to a family. Land is for family and communal use. It is for this reason that the Hananwa property law knows only communal land as a landed property: house landed property, family landed property and tribal property as opposed to individually owned land. House property and family property are pieces of communal land allotted to a house and family respectively for use and so forth.

Customary law property ownership is not limited to landownership. However, the right to landownership resides in the community at large. Individual families enjoy some limited rights such as the rights to use and enjoy the fruits of and occupy land. These limited rights naturally encumber the right of the community to the ownership of its land.

The ultimate legal question is whether spouses enjoy equal rights in property at customary law. At the very least, the rights in property are the following:

- i. the right of ownership;
- ii. the rights to use and enjoy the fruits of and occupy a property;
- iii. the right to alienate or dispose of a property;
- iv. the right to encumber a property.

790 Maithufi "Law of Property" 54-56.

In the customary law of property these rights are communal property rights or group rights. They belong to a house, family or community.

7.5.2.1.1 Family property

Family property is property which is not allocated or does not automatically accrue to any house, but is generally owned by the family group as a whole. It is for this reason that it is also called general property. Family property includes property to which the family head succeeded upon the death of his predecessor; the land allocated to the family group for use by the family group; the property which the family head "inherited" from his mother's house property; and the property earned by the family head himself.

7.5.2.1.2 House property

A house consists of a wife and her children. However, her husband, who is the family head of the polygamous household, doubles as a member and head of each house. House property is property which accrues to a particular house. House property comprises, *inter alia*, livestock allocated to the house, and its increase; property given to the wife upon her marriage, or received for daughters of the house; compensation received for delicts committed against members of the house; land allocated to the house; agricultural products produced by members of the house on their fields; and the earnings of the members of the house.

The family head controls the family property and the house property in each house in a polygamous household. The house is for the exclusive benefit and use of those to whom it belongs. A member of a house has no personal but a collective interest in his or her house property.

7.5.2.1.3 Personal property

Personal property is property that has been acquired by an individual person. It consists of property of an individual, personal nature such as clothing, a walking stick, a tobacco pipe, and so forth. The individual may use or dispose of it at will.

7.6 Conclusion

The Hananwa law of marriage, like any customary law of marriage, governs the relationship between the parties to a customary marriage. The parties to customary marriage are the families of a prospective husband and a prospective wife. It is for this reason that traditionally the communal consent of the family group or parental consent is a requirement for the validity of customary marriage. However, Hananwa law has evolved to the extent that spousal consent has become a peremptory requirement for a valid customary marriage. Only a husband or his family pays *lobola*. Only a bride is delivered to the groom or his family. Chapter 8 explores the dissolution of Hananwa marriage.

CHAPTER 8

THE DISSOLUTION OF A HANANWA MARRIAGE

8.1 Introduction⁷⁹¹

This chapter explores the dissolution of a marriage under Hananwa law and the consequences thereof. In short, the dissolution of marriage alludes to the termination of the bond of marriage existing between its parties. Customary marriage among the Hananwas was understood to be a permanent marriage which would evolve into a kind of perpetual widowhood if the husband predeceased the wife or wives.⁷⁹²

8.2 The general principles of the dissolution of a Hananwa marriage⁷⁹³

The dissolution of a customary marriage must be understood as being contrary to the intrinsic nature of customary marriage, which is uniquely collective. As chapter 7 shows, according to the original Hananwa law, the families of the spouses are the parties to a customary marriage.⁷⁹⁴

791 There are no scholarly writings on the Hananwa law of marriage including the law of dissolution of a marriage through death or by divorce. This thesis may be the first written contribution of its kind on Hananwa law. However, the living Hananwa law regulates customary marriages and the dissolution of customary marriages. The writer held face-to-face discussions with selected community experts (collectively and singly). See ch 1 of this thesis for details of how a leadership dispute led to the establishment of a community of rebels - the Hananwas. The Hananwas later split into the Hananwa of Maleboho and the Hananwa of Kibi.

The data collection and interpretation were made easy by the fact that the writer is also a member of the Hananwa community. Setumu *Our Heritage* 1ff gives a general outline of the historical development of the Hananwa community. He explores the disputes related to succession to the positions of traditional leadership. See ch 3 of this thesis regarding the decision of *Leboho* in which the court dealt with Hananwa law, in broad terms, in order to resolve a dispute about the succession to the position of traditional leadership of the Hananwas.

792 For a general discussion of permanent marriage and perpetual widowhood, see Mofokeng *Legal Pluralism* 20-21.

793 This paragraph was sourced from face-to-face discussion with the community experts.

794 For a detailed comparative discussion of individual spouses or families as parties to customary marriage in general see, for instance, Jansen "Customary Family Law" 45ff; Mofokeng *Legal Pluralism* 43ff; Bennett *Customary Law* 188-293; Bennett *Human Rights* 115-128; Bekker *Seymour's Customary Law* 98-214; Myburgh *Indigenous Law* 83-89.

8.3 How a Hananwa marriage dissolves

Not all of the ways for terminating a civil marriage are applicable to the dissolution of a traditional Hananwa marriage. Generally, there are only two ways for the dissolution of a marriage: death and divorce. Furthermore, by its nature and purpose, traditional customary marriage continues to exist beyond the duration of the earthly lives of the individual spouses. It is for this reason that, according to the informants, the dissolution of a customary marriage by death and divorce in a traditional context, if it were to occur, would be an exception rather than the rule. The dissolution of a Hananwa marriage (as against separation in the sense of simply living apart) is a rarity if not an oddity. If irreconcilable differences arise between a husband or his family and his wife, the husband or his family may solicit the intervention of her family or even return her to her natal family for them to call her to order. *Lebitla la mosadi ke bogadi*.⁷⁹⁵ Even widowhood does not dissolve marriage. *Lehu ga le hlalwe*.⁷⁹⁶

8.3.1 The death of one or both spouses

The concept and practice of Hananwa marriage involve a hybrid of religious and secular rites and its dissolution concerns both. The spirits of the ancestors are invoked during the *lobola* negotiations, the conclusion of the Hananwa marriage, and the burial of a spouse. In other words, the marriage in the realm of the living reverberates in the council of the living dead. The marriage is deemed to continue after the death of a spouse or both.⁷⁹⁷ Traditionally it is a marriage first between the family of a man and the family of a woman and second between individual spouses.⁷⁹⁸

795 Literally, a woman's grave is at her marital home. A wife stays truthful to her vows until the end of her days.

796 African tradition prohibits the divorce of the dead. Literal translation: death may not be divorced.

797 Mofokeng *Legal Pluralism* 85.

798 *Gumede v President of the Republic of South Africa* 2009 3 BCLR 243 (CC).

After the death of a spouse the surviving spouse continues his or her marital relationships within the "cognate group". A surviving husband remains a *mokgonyana* (son-in-law) of his late wife's natal family. Conversely, if a woman is widowed she would continue to be a *ngwetsi* (daughter-in-law) of her late husband's family group. Hananwa law complements the doctrine of perpetual marriage with the invocation of the doctrine of spousal substitution. If a wife dies her sister, *seyantlo*,⁷⁹⁹ will replace her as her widower's wife. Conversely, if a husband dies one of his closest male relatives will replace him as a *tseña* husband.⁸⁰⁰

The children born of the liaison between a *tseña* wife (a widow) and a *tseña* husband belong to her deceased husband and assume his surname. On the other hand, the children of a *seyantlo* belong to her husband. At any rate, the children of a customary marriage are the children of the husband's family group, in general, and the husband of a customary marriage, in particular. *Monna o tswala ngwana mosadi a mmelega* (a man begets a child; a woman gives birth to it).

In Hananwa family law a woman can have no children because they belong to her husband. The mother of customary children is in the situation of a daughter in relation to her customary husband and in the situation of a sister in relation to her children.⁸⁰¹ Of course, the sororal and fraternal substitutes serve to preserve and perpetuate a marriage between the two families after the death of a spouse or both spouses.

8.3.2 The dissolution of Hananwa marriage by divorce

Nowadays, divorce is one of the ways of dissolving a customary marriage.

799 A sororal husband.

800 A substitute husband.

801 This compares with the status of women in Roman law. See, in this regard, among others, Van Zyl *Roman Private Law* 103.

8.3.2.1 *Defining divorce*

A divorce action is not heard in a court of law but is initiated by a party as a private matter purely between the families. If the divorce is at the instance of the family of the husband, the onus rests upon the family of the husband to return the wife to her natal family with the demand that her natal family should return the *lobola* or its value to her marital family. If the family of the wife is awarded custody of her marital children, her family may deduct *maswi a bana* (maintenance cattle) from the returnable *lobola* cattle. However, if the wife was not at fault the *lobola* or its value is not returnable.

If the divorce was at the instance of the wife and she was the cause of the breakdown of the marriage, her marital family or husband may reclaim the full value of the *lobola* cattle. However, if the marriage has already produced offspring and their custody is vested in her natal family, her natal family may retain some of the *lobola* cattle as *maswi a bana* (maintenance cattle). It is noteworthy that maintenance is payable if the marital children are transferred to the guardianship of their mother's natal family head.

8.3.2.2 *Who may institute divorce?*

According to the informants, traditionally the following persons were competent to take action to cause the dissolution of a traditional Hananwa marriage:

- i. the family of the husband (the family head/guardian);
- ii. the family of the wife (the family head/guardian).

However, nowadays Hananwa family law has changed to such an extent that the following have become legal subjects and may institute divorce in their own right:

- iii. the husband;
- iv. the wife.

8.3.2.3 *Grounds for divorce*⁸⁰²

According to the informants, the following are some of the main grounds for divorce among the Hananwa:

8.3.2.3.1 Adultery

Adultery is an unlawful intentional consensual sexual relationship between a married woman and a man other than her husband. Both the man and the woman are guilty of adultery. If a man has sexual intercourse with a married woman *without her consent* he commits both adultery and the offence of rape. On the other hand, she does not commit adultery but is a victim of rape. A husband may have consensual sexual relations with an unmarried woman other than his wife without committing adultery. Neither is guilty of adultery. For a man to commit adultery the woman concerned must be another man's wife. On the other hand, a married woman commits adultery whether or not a man she has sexual intercourse with is married. Her husband has the right to claim damages for adultery or even divorce his wife.

8.3.2.3.2 Barrenness

Reproduction is essential for the achievement of the purpose of Hananwa marriage. If a wife is barren the lineage of the husband cannot be furthered through her. The family of her husband may, on this basis, dissolve the marriage. However, the Hananwa family law has creative ways of ensuring the achievement of the purpose in spite of the barrenness of the wife, besides the dissolution of the marriage. The family of the wife may allocate the husband a

802 There are diverse views regarding divorce, in general, and grounds for divorce, in particular. Some people state that divorce is part of the Hananwa law of marriage, while others are adamant that divorce is foreign to the Hananwa law of marriage. These contradictions must be understood against the backdrop that the Hananwa community is a migrant community as well as that other families and clans, among the Hananwas, are not the Hananwas by origin and that they still live by some aspects of the customary laws of their communities of origins, particularly in respect of family law which is largely a family-based law.

sister of the wife as *hlatswadirope* (sororate) for the purposes of bearing children on behalf of her sister. This is called a sororal marriage. The principle operates appropriately in the context of arranged marriages. If the husband repudiates the sororal wife and dissolves the marriage he forfeits *lobola* for his barren wife.

8.3.2.3.3 Impotence

The ability to have sexual intercourse and procreate children is essential for the realisation for the purpose of the Hananwa marriage. If the husband is impotent the guardian of the wife or the wife may, on that basis, dissolve the marriage. Unlike the disability of barrenness, a notion of a substitute husband for the impotent husband is unheard of in the Hananwa family law. There is an allegation that if a husband were sterile the family may arrange that his uterine brother or a close relative to sleep with his wife in order that he should bear children for his brother. However, the research failed to find classical examples of this practice.

8.3.2.3.4 Neglect of the family

The family head controls the family property and, if the household were polygamous, also the house property. He has a legal duty to take care of his family. The duty of care includes maintenance and support. The family members, including his wife, have a right to be cared for. If the family head were to neglect his responsibilities towards his family in general and his wife in particular, the family has recourse to remedies. The strongest action is to remove him from the position of the head of the family. However, if the husband denies his wife conjugal rights or maintenance and support and if his family group fails to remedy the situation, the natal family head of the wife may sue for divorce.

8.3.2.3.5 Ill-treatment

The spousal relationship is a relationship of love. A spouse has a right to *consortium omnis vitae*. The husband has no right to abuse his wife and *vice versa*. In other words, no domestic violence may be visited upon a spouse by another. Domestic violence includes physical, emotional, psychological, economic, sexual or any other abuse. It diminishes a love relationship which is the basis of a spousal relationship. If a husband were to abuse his wife and his family group were to fail to remedy the situation, the natal family head of the wife may sue for divorce.

8.3.2.3.6 An accusation of witchcraft

An accusation of witchcraft is a form of abuse. It may come in the form of emotional or psychological abuse. It may lead to death. If a husband were to accuse his wife of witchcraft and if his family group were to fail to remedy the situation, the natal family head of the wife may sue for divorce.

8.4 The consequences of the dissolution of a Hananwa marriage

There are two categories of consequences of the dissolution of a customary marriage in accordance with Hananwa law, namely personal consequences and proprietary consequences.

8.4.1 Personal consequences of the dissolution of a Hananwa marriage

This rubric explores the consequences of the dissolution of the marriage on the person of the parties to the customary marriage and/or individual spouses. The personal consequences of marriage are expressed in the form of competencies such as the legal capacity, the capacity to act and the capacity to litigate.

8.4.1.1 *The competencies of a divorcee*

8.4.1.1.1 The legal capacity

Historically, after divorce the guardianship of the woman reverts to the family head of her natal family. The guardianship of the man does not change. Nowadays, as a consequence of the individualisation and equalisation of legal persons in customary law a divorced woman becomes an independent householder. She enjoys equal rights.

8.4.1.1.2 The capacity to act

A divorcee may perform any juristic act without any restriction on the grounds of gender.

8.4.1.1.3 The contractual capacity

Historically a male family head, for instance the husband, could enter into contracts on behalf of the family. The wife was afforded a status of permanent minority and could therefore not enter into a contract. However, nowadays married and unmarried women may enter into binding contracts provided that the requirements for a valid contract must be met. A married woman is regarded, for all legal purposes, as a major.

8.4.1.1.4 The capacity to litigate

Historically the male family head litigated on behalf of the family. However, he was enjoined to consult his family, in particular the senior male family members. Nowadays women may hold their own houses and act for their own accounts. They litigate in their own right. Divorcees are equally competent to litigate.

8.4.2 The proprietary consequences of the dissolution of Hananwa marriage

The nature of property in customary law determines the patrimonial consequences of marriage. As explained above, the customary law property system is communal in orientation. The right of ownership to property in customary law is not an individual right but a group right belonging to an agnatic group and not an individual member. This being the case, in the indigenous context Hananwa law does not recognise a matrimonial property system. Family or house property belongs to the family collective.

However, owing to the individualisation and equalisation of the legal persons in customary law, it seems that the individual spouses have been substituted for their families as parties to the customary marriage. Similarly, the individual rights of spouses have to an extent superseded the group rights of the family groups. Equally, the matrimonial property system has superseded the communal family and house property system. Be that as it may, there is a dimension of co-ownership of property by individual spouses. It follows, therefore, that if their marriage were to dissolve the joint estate ought to be divided.

8.5 Conclusion

Customary marriage is very rarely dissolved. In other words, the dissolution of customary marriage is the exception rather than the rule. If it were to dissolve, it might do so on account of death or divorce. While the *Recognition Act* stipulates only the irretrievable breakdown of a marriage as the ground for divorce,⁸⁰³ there are various reasons that can come into play. The consequences of the dissolution of marriage on any ground are unfavourable to the interests of a customary wife. The dissolution of marriage has juristic consequences: personal and proprietary consequences. The interests of the

803 See s 8(1) of the *Recognition Act*.

wife are not only inferior to those of her customary husband under the traditional Hananwa law but are also secondary to those of the family. This state of affairs is consequent upon the perpetual minority of the wife and, therefore, her perpetual subjection to the guardianship of either her natal family (if unmarried) or her husband or her husband's family head (if married). The traditional Hananwa family law is, therefore, discriminatory.

Chapter 9 deals with the law of parent and child.

CHAPTER 9

THE HANANWA LAW OF PARENT AND CHILD

9.1 Introduction⁸⁰⁴

Chapter 9 deals with the Hananwa law of parent and child, which pertains to parent-child relationships and the relationships between children *inter se*.

9.2 The general principles of Hananwa law of parent and child

Hananwa law does not prescribe the age of majority. Strictly speaking, a person is a major only when he is no longer a "child". Traditionally, an African woman is perpetually a minor. On the other hand, a man ceases to be a minor when he is emancipated from the guardianship of his family head. The Hananwas call the custom of emancipation *go fiwa dipitsa* (to be given one's own pots). An emancipated person enjoys the competencies of a major while the competencies of an unemancipated person are equal to the competencies of a minor.⁸⁰⁵ These competencies include the legal capacity, capacity to act and capacity to litigate. However, in accordance with the traditional Hananwa law these competencies are embedded in the communal rights of the family group to which an individual child belongs. The family head exercises group rights and performs group duties in consultation with the responsible family members.

804 There are no scholarly writings on the Hananwa law of parent and child. However, the living Hananwa law regulates the relationship between parents and children. The writer held face-to-face discussions with selected community experts (collectively and singly). See ch 1 of this thesis for details of the method of the research. The discussions were made easy by the fact that the writer is also a member of the Hananwa community. Setumu *Our Heritage 1ff* gives a general outline of the history of this community and the succession to traditional leadership. See ch 3 of this thesis regarding the decision of *Leboho* in which the court dealt with the Hananwa law of parent and child, in broad terms, in order to resolve a dispute about the succession to the position of the traditional leadership of the Hananwas.

805 Bekker "Children and Young Persons" 192.

9.3 Categories of children

There are four main categories of extramarital children, namely (a) children of an unmarried woman (*bana ba lefetwa*); (b) pre-marital children; (c) adulterine children of a married woman (*bana ba bohlotlolo*); and (d) children of a widow. Children are also classified in accordance with their marital or extramarital birth, the social ranks of their parents (and households) and their own individual age, for instance. Bekker⁸⁰⁶ states correctly that the status of an African mother determines the status of her children at birth or thereafter. Wives rank in seniority according to the chronological order of their individual marriage or according to the order of seniority, which accrues by virtue of the social rank of the natal family or natal house of a wife. For instance, a daughter of a paternal uncle is senior to a daughter of a maternal uncle in respect of the ranking system of the wives of a polygynous husband. The wives of a polygynous husband rank in a declining order of seniority in respect of the applicable ranking system. Each wife is attached to a house which is accorded a rank within the polygynous household. The rank of each house is commensurate with the rank of the wife who is attached to it.

9.3.1 Children of a married woman

According to Bekker,⁸⁰⁷ a child born of African parents who are married to each other is regarded in law as a marital child. The labelling of children born in wedlock as legitimate and of children born out of wedlock as illegitimate is absolutely unfortunate. An unmarried mother has only natural or biological children and not "legitimate" or "illegitimate" children.⁸⁰⁸ On the other hand, a father may have marital and extramarital children.⁸⁰⁹ In effect, the innocent children (because they are born innocent) are punished for the "sins" of their

806 For a full comparative discussion, see Bekker "Children and Young Persons".

807 Bekker "Children and Young Persons" 187.

808 Gough 1959 *JRAS* 49.

809 Gough 1959 *JRAS* 49.

parents. In a roundabout way, the law visits the sins of parents who are not married to each other upon the children born of their liaison.

In traditional Hananwa law, if the parents of the children are married to each other the children belong to their father and are subject to the guardianship of their father's group. Nonetheless, the marital children are specifically attached to their mother's house within a polygynous household. This legal principle accords with the two sayings: *the cattle bring forth children* and *the children belong where the cattle are not*.⁸¹⁰ In other words, the children of a married woman belong to her husband. Hence, the maxim: cattle beget children.⁸¹¹ The marital children enjoy the right to inherit from, their father or the family head of their father through their father, while the extramarital children acquire the right to inherit from their mother's natal family head through their mother. In effect, the extramarital children enjoy unequal or ultimate rights because their mothers do not enjoy equal status in their natal families. In other words, the extramarital children could only inherit if there was no other heir in the family.

Hananwa law does not regard unmarried parents and their extramarital children as an autonomous and close-knit nuclear family. Generally, unmarried parents belong to two different and separate families or households. An unmarried mother and her children are members of her natal family, while an unmarried father of the extramarital children is a member of his natal family. If a man wants to adopt his extramarital children he must pay special *lobola* for them. This adoption affiliates the extramarital children to their father's family. The father's affiliation to his extramarital children transforms their extramarital status into the status of marital children.

The traditional Hananwa law of succession distinguishes between males and females, sons and daughters, first-born sons and sons who are not first-born sons, and marital children and extramarital children (*bana ba hlaba*). However,

810 Bekker "Children and Young Persons" 187.

811 See, for comparison, *Madyibi v Nguva* 1944 NAC (C) 36.

one of the corollaries of the Hananwa customary family law is that a child is a child of *lobola* cattle or a child is begotten by *lobola* cattle (*monna o e gapa le namane*⁸¹² and *ngwana ke wa dikgomo*⁸¹³). According to this custom the marriage of a mother legitimises her extramarital child as a child of her husband. If a customary husband affiliates or adopts an extramarital child of his customary wife the child becomes his legitimate child for all legal purposes.

The living Hananwa law has developed to the extent that nowadays the parental power over the extramarital children is vested in their natural mother. The transfer of the parental power from the father, guardian or husband to the natural mother of the extramarital children does not include the equal vesting of the parental power in both of their natural parents (including his or her natural father). Both the common law father and the customary law father are on the same page in so far as the parental power over an extramarital child is concerned. It is obvious that the substitution in common law of individual rights for the collective rights of customary law empowers the natural mothers of extramarital children to the exclusion of their natural fathers, while customary marriage subjects a wife to the marital guardianship of her husband or his family head and her children to the parental power of her husband or family head.

The *Constitution* makes everyone equal before the law and provides everyone with equal protection and benefit of the law. The *Constitution* protects the rights of every person and not some persons to the unfair exclusion of others. In the past the law constitutionalised political, social, economic, religious and cultural discrimination. The protection of the rights of man amounted to the protection of some persons and not all citizens. Correctly construed, the *Constitution* has codified the progression of the law from the law that entrenches the hegemony of the parental power (the rights of the parent) over the person and property of the child to the law that entrenches the rights of the child. The complex rights of the child are euphemistically called the best interests of the child, which are

812 Literally, a cowherd takes home a cow together with its calf.

813 A child is a child of cattle.

paramount in matters affecting a child.⁸¹⁴ No child may be discriminated against on the grounds of birth.⁸¹⁵ Extramarital children have equal rights to maintenance from the estate of their father. Both parents enjoy the right to parental power over their children regardless of whether they are married to each other or not, unless a competent court orders otherwise. The Constitutional Court intervened in *Fraser v Children's Court, Pretoria North*,⁸¹⁶ and declared the equality of the rights and duties of the natural parents towards their extramarital child. The consent of both natural parents is a prerequisite for a valid adoption of a child by a third party.⁸¹⁷ However, the consent may not be withheld unreasonably.⁸¹⁸ A competent court may substitute its consent for the one unreasonably withheld by a parent.

9.3.2 Extramarital children of an unmarried woman

There are two types of children born out of wedlock: extramarital children and adulterine children. Posthumous children may fall within either of these categories. In terms of traditional Hananwa customary law a *lefetwa* (an unmarried woman) is a ward of her natal family head, who exercises guardianship over his ward within the group right context of the family.⁸¹⁹

The family head plays a leading role⁸²⁰ in the administration of the affairs of his family. He controls the persons and properties of his wards in his family. In any event, the family or house property is communally owned. The individual property rights are inseparable from and not external to the rights to the communal property of the household. The children inherit the "rank" of their mother's house. In other words, her children are the wards of her family head

814 See s 28 of the *Constitution*.

815 See s 9(3) of the *Constitution*.

816 *Fraser*.

817 *Fraser*.

818 *Fraser*.

819 See Church 1979 *CILSA* 328 and authorities cited in it.

820 See Church 1979 *CILSA* 328 and authorities cited in it.

as a guardian.⁸²¹ If their mother enters into a marriage after their birth, her husband becomes their *de iure* father and guardian. This principle applies universally to both the husband's premarital children with his wife and her premarital children with another man because children are the children of the *lobola* cattle. However, in both cases the groom or his family group offers the bride's family something such as a beast in lieu of pre-marital children as *quid pro quo* for pre-marital support and maintenance by his wife's natal family.

The natal family of the wife has a duty to take care of and maintain the extramarital children of an unmarried woman. In effect, the children belong to the father of the unmarried woman or the family head. If her subsequent husband intends to adopt her premarital extramarital children, he must negotiate a special *lobola* for those children.⁸²² He would then be liable for the maintenance of her adopted premarital extramarital children.⁸²³ If the adoption of such children is valid in law, as the *Kewana*⁸²⁴ and *Metiso*⁸²⁵ cases seem to suggest, those children would enjoy the right to inherit from their adoptive father. The husband would also enjoy the right to be maintained by and inherit from them.

The extramarital children are transferred to their mother's marital family together with their natural mother. However, the husband of their mother may repudiate her premarital, extramarital children. If a man repudiates the premarital children of his wife, the children would remain the members of the natal family of their mother. The head of the natal family of the mother of the premarital, extramarital child or adulterine child would control the person and property of the child. If the husband did not expressly repudiate his wife's premarital extramarital children, the *lobola* negotiations would include the special *lobola* for

821 For the purposes of comparison see Olivier *et al Indigenous Law* para 146 and the authorities cited in it.

822 See Hartman *Tsonga Law* 88-89 about customary adoption among the Tsonga.

823 See *Thibela v Minister van Wet en Orde* 1995 3 SA 147 (T).

824 *Kewana v Santam Insurance Co Ltd* 1993 4 SA 771 (T).

825 *Metiso v Padongeluk Fonds* 2001 3 SA 1142 (T).

any extramarital child. If the husband or his family head paid *lobola* together with the special *lobola* in respect of the affiliation of the premarital, extramarital children of his wife to his family the said children would acquire equal status of his marital children and would be competent to claim maintenance and inherit from him.

According to traditional Hananwa law, the father of a child of an unmarried woman is fined for her seduction and impregnating her. He must also "pay" a cow for the child's milk. In Hananwa law, if the extramarital children are not affiliated they would seldom enjoy equal rights. The extramarital children may not even enjoy the ultimate rights of succession and inheritance in their father's family. This disadvantaged status constitutes unfair discrimination on the grounds of extramarital birth of the child and, indirectly, on the grounds of the gender of the mother, and the marital status of the natural parents.⁸²⁶ The law again visits the sins of the parents upon their extramarital children.

9.3.3 Adulterine children of the wife of customary marriage

In Hananwa law the husband may repudiate his wife's adulterine children. If the husband of the adulteress repudiates the children her "natal family head" would assume the custody and guardianship of the rejected children.⁸²⁷ It follows that the children would "lose" any rights to be maintained and inherit from their mother's husband or his family. However, the children may enjoy the right to be maintained by their mother's natal family head and enjoy the ultimate rights of succession in their mother's natal family.

If the husband accepts the extramarital (adulterine) child of his wife as his own son or daughter, the child would enjoy any rights due to a marital child. If he were "his" eldest son the child would step into the shoes of the deceased family head after his decease like his eldest natural son. However, in most instances,

826 See s 9 of the *Constitution*; the *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000; and *Fraser*.

827 The *Maintenance Act* 99 of 1998.

the "legitimate" children of the husband dispute the right of an extramarital child to step into the shoes of their natural father or family head.

9.3.4 Children born to a widow

The biological posthumous children of the widow's husband are the children of her deceased husband and are in the same position as his children who were born son before his death. However, the first-born son would enjoy the rights due to a first-born in terms of the doctrine of male primogeniture. The children who are born of the *tseña* husband and the widow belong to her deceased husband and assume his surname. His successor-family head is their custodian and guardian.

9.4 Conclusion

A child has at least the following competencies: legal capacity, the capacity to act and the capacity to litigate. Age and mental illness are two of the factors that affect the status of a person to perform juristic acts such as entering into contracts and marriages or engaging in suits of law. The law protects a minor child by putting impediments or encumbrances upon his or her capacity to freely administer his or her estate or affairs. However, a child may validly enter into contracts and perform juristic acts with the assistance or consent of his or her parents or guardian. According to section 28(3) of the *Constitution* read with section 17 of the *Children's Act*⁸²⁸ a child is a person who is below 18 years of age. The *Children's Act* has repealed the *Age of Majority Act in toto*. Section 9 of the *Recognition Act* provides that a groom or bride must be at least 18 years of age at the time of the formation of their customary marriage to each other. Bekker⁸²⁹ correctly points out that Africans never viewed childhood in terms of chronological age. Among other African customs, initiation and circumcision

828 The *Children's Act* 38 of 2005.

829 Bekker 2008 *Obiter* 398.

constitute a step into adulthood.⁸³⁰ This implies that childhood ends at different ages for different persons. Hananwa law recognises different categories of children. It distinguishes *inter alia* between females and males, first-born sons and sons who are not first-born, marital children and extramarital children. The rules of Hananwa law may discriminate unfairly. However, the *Constitution* and legislation override the rules of customary law.

830 Bekker 2008 *Obiter* 398.

CHAPTER 10

CONCLUSION

10.1 Introduction

The study sought to determine, first, what the rules of the Hananwa family law were and, second, whether those rules were compatible with the *Constitution*. In doing so, it countenanced two problems. The first problem was that the official customary law is generally "corrupted, inauthentic and lacking authority".⁸³¹ The official customary law is found in the written texts such as the legislation, textbooks, commission reports and law reports. The BAA was the main source of the official customary law. However, it subjected customary law to the repugnancy clause (i.e. the principles of natural justice and public policy). The *Recognition Act* and the *Reform of Customary law of Succession and Regulation of Related Matters Act* have repealed the BAA inasmuch as it applied to the customary law of marriage and the customary law of succession respectively. The second problem was that the rules of the Hananwa family law could not be readily ascertained and, if they were, could not be ascertained with sufficient certainty.⁸³² This problem originated from the oral nature of the Hananwa law which is characterised by its adaptive inherent flexibility. The solution of this problem was found in the documentation of the Hananwa family law in chapters 7, 8 and 9 of this thesis.

Every community has a system of law that governs its goings-on. Reference was had to the systems of law enumerated in section 15(3) of the *Constitution* which provides thus:

- (a) This section does not prevent legislation recognising –
 - (iii) marriages concluded under any tradition, or a system of religious, personal or family; or

831 Costa 1998 SAJHR 525, 534.

832 See S 1 of the *Law of Evidence Amendment Act* 55 of 1998.

- (iv) 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 other provisions of the Constitution.

Section 15(3) provides for such different systems of matrimonial law as the customary law of marriage, common law of marriage, Hindu law of marriage and Muslim law of marriage. However, as things stand, the *Constitution* expressly recognises the following systems of law: the statutory law, common law and customary law. Hananwa law is part of the broad concept of customary law. The thesis has shown that customary law is a form of personal law that forms part of the basic law of the country on a par with common law.

10.1.1 Background

The *Constitution* includes the Bill of Rights⁸³³ and affirms fundamental values such as *Ubuntu*, human dignity, equality and freedom.⁸³⁴ It is the metanorm or repugnancy law to which all law and conduct are modified.⁸³⁵ As already pointed out, any law or conduct that is inconsistent with the *Constitution* is invalid to the extent of the inconsistency.⁸³⁶ Customary law, in any form, must pass the constitutional test.⁸³⁷ The sources of the living version of customary law are customs and practices, whereas the sources of the official version of customary law are the *Constitution*, legislation, case law, commission reports and scholarly writings.⁸³⁸ Historically, customary law protects individuals through family groups.⁸³⁹ However, customary law rules evolve over time, commensurate with the changing circumstances of the community in which they are found.⁸⁴⁰ Against this backdrop, generally, the customary law group rights

833 See ch 2 of the *Constitution*.

834 S 39 of the *Constitution*.

835 S 2 of the *Constitution*.

836 S 2 of the *Constitution*.

837 Ss 2, 8(1), 39 and 211(3) of the *Constitution*.

838 Ss 2, 8(1), 39 and 211(3) of the *Constitution*.

839 Maithufi "Best Interests of the Child" 137.

840 See ch 6 of this thesis.

and group duties have generally already metamorphosed into individual rights and individual duties consistent with the conditions of society.

The rules of customary law must be construed through the prism of the Bill of Rights and, if necessary, must be developed consistent with the *Constitution*. Although it is provided in section 39 of the *Constitution* that the Bill of Rights does not deny the existence of the rights recognised or conferred by customary law, the Bill of Rights and the accompanying legislation, on the whole, substitute individual human rights for group rights.⁸⁴¹ Of course, sections 30 and 31 of the *Constitution* recognise the group rights of language, cultural and religious communities. However, the piercing of the corporateness of the group has revealed the fairly well-defined competing individual rights and individual duties shrouded in the notions of group rights and group duties respectively.

The evolution of customary law from a largely communal law to an individualistic law manifests also in the customary family law in general and the law of marriage and the law of parent and child in particular. This evolution has, to an extent, reduced to a bare minimum the dissimilarities between the common law of marriage and the official customary law of marriage. A customary marriage concluded under the *Recognition Act* is not only on an equal footing with but is also almost the same as a civil marriage concluded under the *Marriage Act*. Prior to the coming into operation of the *Interim Constitution*, customary marriages were not on an equal footing with civil marriages.

All children of customary marriages were, originally, indiscriminately treated as if they were tantamount to extramarital children.⁸⁴² Traditionally the guardianship of extramarital children was vested in the heads of their mothers' natal families. Unless they had paid special *lobola* and affiliated their extramarital children to their family groups, biological fathers could not be their guardians. This customary rule discriminated against both the biological fathers and their

841 See chs 2, 3, 6 and 9 of this thesis.

842 *Samente v Minister of Police* 1978 4 SA 632 (E).

extramarital children in violation of their fundamental human rights.⁸⁴³ However, there are fundamental changes. The *Children's Act*⁸⁴⁴ appoints both biological parents as equal and competent guardians of their natural (biological) extramarital children.⁸⁴⁵

The *Constitution* equalises all members of South African society and therefore proscribes unfair discrimination on the grounds of sex, gender, marital status, birth or age.⁸⁴⁶ It provides that everyone is equal before the law and has the right to equal and full protection and benefit of the law.⁸⁴⁷ Women and men are equal.⁸⁴⁸ Women may not suffer legal disabilities on the grounds that they are women. Spouses are equal.⁸⁴⁹ Boys and girls are equal.⁸⁵⁰ Nobody is more equal than another.⁸⁵¹ Section 15 of the *Constitution* does not prohibit the enactment of legislation recognising marriages concluded under any tradition or system of religious, personal or family law.

The legislature has passed some legislation to align customary law with the applicable provisions of the *Constitution*.⁸⁵² Once again, unfortunately, the legislature often substituted common-law rules for the customary-law ones.⁸⁵³ Of course, there are times when the courts have shown a preference for the living customary law over the official version.⁸⁵⁴

The study divides the thesis into two main parts: the official customary law and the Hananwa family law. The analyses in both parts put the emphasis on the law of marriage and parent-child law. Chapter 1 argues that South Africa is a

843 See ch 10 of this thesis.

844 The *Children's Act* 38 of 2005.

845 See ch 10 of this thesis.

846 See ch 1 of the thesis.

847 See ch 1 of the thesis.

848 See ch 1 of the thesis.

849 See ch 4 of the thesis.

850 See ch 1 of the thesis.

851 S 9 of the *Constitution*.

852 See chs 2, 3 and 4 of the thesis.

853 See *Bhe* in ch 1; *Mabena v Letsoalo*, *Hlope v Mahlalela*, *Mabuza v Mbatha* and so forth in ch 3 of this thesis.

854 See ch 3 of this thesis.

multi-faith and multi-cultural society that has a multi-layered legal system shaped by a *Constitution* which is the supreme law of the land.⁸⁵⁵

Chapter 2 sets out the general principles of customary law. The thesis argues that customary law belongs to the family of non-specialised, underdeveloped system of law. It further argues that customary law evolves constantly consistent with the circumstances of the community in which it is found.

Chapter 3 deals with the versions of customary law. There are two versions of customary law, namely the official and living versions. On the one hand, the official version is found in written texts. It is generally ossified, distorted and closely aligned with the interests of the State. During the colonial and apartheid eras its application was subject to the repugnancy clause (i.e. the principles of natural justice and public policy) which mirrored the western conception of civilisation and morality. On the other, the living version changes as the conditions of the society change. It mirrors the ideals, aspirations, wants and ways of the community in which it is found. The thesis shows that, while in the past the court was reliant on the official version, nowadays regard is frequently being had to the living version. The *Recognition Act* and the *Reform of Customary Law of Succession and Regulation of Related Matters Act*, among others, give effect to the provisions of the *Constitution*, particularly the fundamental rights to human dignity, equality and freedom. However, the problem that these acts pose is that they often replace the rules of customary law with common-law principles. It is concluded that this approach to customary law will render customary law irrelevant and obsolescent, at least in the public sphere.

855 *Pharmaceutical Manufacturers Association of South Africa; In re: Ex parte Application of the President of the Republic of South Africa* 2000 2 SA 674 (CC) para 44; Hosten *et al South African Law* 1248-1249. See also s 15 of the Constitution, which provides that the Constitution does not prohibit legislation that recognises marriages under a system of religious law, customary law, traditional law and personal or family law.

Chapter 4 deals with the official version of customary marriage. The thesis argues that, besides the fact that customary law must be negotiated, entered into and celebrated in accordance with customary law, the *Recognition Act* has almost completely individualised customary marriage and replaced the family groups with spouses as parties to customary marriages. As a result the spousal consent is a peremptory requirement while parental consent is required only with regard to the customary marriage of a minor. The spouses enjoy equal status and are competent to perform juristic acts regardless of gender. Chapter 5 deals with the customary law of parent and child. According to the *Children's Act*, children enjoy equal status and rights without regard being had to their gender, whether or not they were marital or extramarital children or whether they were first-born children or not. For instance, the enjoyment of the right to support or inheritance is not based on gender.

Chapter 6 deals with the general principles and history of Hananwa law. The thesis argues that a leadership dispute occasioned by a system of patriarchy precipitated the secession of the Hananwas from the Maletse people in Botswana. Although there are examples of women who led them in the past, the Hananwa community is generally male-led. Chapter 7 deals with the Hananwa customary marriage. The thesis argues that the Hananwa customary marriage has evolved in response to the changing conditions of the community. As a result, although Hananwa law is almost completely unwritten, the research found that nowadays the spouses and not the family groups are the parties to the Hananwa customary marriages. Chapter 8 deals with the dissolution of a Hananwa customary marriage. The thesis concludes that nowadays Hananwa customary marriage may be dissolved through divorce. To the contrary, the death of a husband does not dissolve Hananwa marriage but results in perpetual widowhood of the surviving wife. A widow remains a member of her husband's family group. She may even consent to a *tsena* marriage with a close relative of her deceased husband. However, a widow is at liberty to have a consort of her choice. Chapter 9 deals with the Hananwa law of parent and child. Previously, the customary rule of male primogeniture dictated the status

of children. Boys and girls did not enjoy equal rights. Nowadays children enjoy equal status irrespective of their gender, whether or not they were marital or extramarital children or whether they were first-born children or not. Both natural parents have a duty to support their natural children and *vice versa* without gender discrimination.

The following paragraphs present a systematic comparative summary of the research findings:

10.1.2 The main findings

The following are the main findings of the study:

10.1.2.1 The requirements for a valid customary marriage

Although there are others, the following are the main requirements for a valid customary marriage:

- i. consent;
- ii. the transfer of the bride to the groom's family;
- iii. a *lobola agreement*.

10.1.2.2 Consent

As previously stated, the study differentiates between spousal consent and parental consent.⁸⁵⁶

10.1.2.2.1 Spousal consent

10.1.2.2.1.1 Hananwa law

Both the prospective husband and the prospective wife must consent to their customary marriage. However, customary marriages are negotiated, entered into and celebrated in accordance with customary law.

856 See ch 4 and 7 of this thesis.

10.1.2.2.1.2 The Recognition of Customary Marriages Act

Both the prospective husband and the prospective wife must consent to their marriage. However, customary marriages are negotiated, entered into and celebrated in accordance with customary law.

10.1.2.2.2 *The parental consent or the guardian's consent*

10.1.2.2.2.1 Hananwa law

Historically Hananwa law recognised the communal form of consent. Parental consent and spousal consent were subsumed in the communal consent of the family group.⁸⁵⁷ Later the father was required to give consent to his child's marriage after consultation with the mother of his child. The family head of an unmarried mother was required to give consent to the marriage of her child. Nowadays, both parents are required to consent to the marriage of their child. A widow, divorcee or unmarried woman must consent to the marriage of her child.

10.1.2.2.2.2 The Recognition of Customary Marriages Act

Parental consent is no longer a requirement for the validity of the customary marriage of a person who is 18 years of age or above.⁸⁵⁸ However, the *Recognition Act* provides that a parent or guardian must give consent to the customary marriage of his minor child. That notwithstanding, the parental consent to the customary marriage of a minor does not supersede but complements the consent of the minor spouse. However, all customary marriages must be negotiated, entered into and celebrated in accordance with customary law.

857 See ch 4 of this thesis.

858 See ch 4 of this thesis.

10.1.2.2.3 The consent of the family group

This kind of consent alludes to the consent of a family group.⁸⁵⁹

10.1.2.2.3.1 Hananwa law

The communal consent of the family group is no longer a peremptory requirement for the validity of a customary marriage. Individuals have largely replaced agnatic groups as legal subjects. This being the case, although customary marriages are negotiated and celebrated communally, only spousal consent is a peremptory requirement for the validity of the customary marriage of a major prospective spouse.

10.1.2.2.3.2 The Recognition of Customary Marriages Act

The *Recognition of Customary Marriages Act* does not recognise any form of communal consent to the customary marriage of a major prospective spouse, but only the spousal consent. As said before, the consent of a parent or legal guardian is required only if a prospective spouse is not yet 18 years of age. However, although the Act makes no mention of the consent of the family of the prospective husband or wife, it provides that a customary marriage must be negotiated, entered into and celebrated in accordance with customary law.

10.1.2.2.4 The *Constitution*

Save for a few group rights such as sections 30 and 31 rights to culture, most of the fundamental rights in the Bill of Rights are individual in nature. In most sections the rights-holder is "everyone", "anyone" or "a person". Most of the provisions of the *Constitution* are therefore couched in singular terms and manifest an individual orientation. In this paradigm shift the *Constitution* confirms the substitution of the spouses for their respective families as parties to

859 See chs 4 and 7 of this thesis.

their marriages. The *Recognition Act* has given effect to this orientation. The individual spouses are competent to consent to their customary marriage to each other. The *Constitution* and the *Recognition Act* apply to Hananwa law as well. The spousal consent in Hananwa law and the celebration of marriage in accordance with Hananwa customs and practices are consistent with the *Constitution*, particularly with sections 9, 10, 15, 30, 31 and 211(3) of the *Constitution*.

10.1.2.3 *The transfer of the bride to the groom's family*

According to customary law, the family of a wife has to give her away in marriage.

10.1.2.3.1 Hananwa law

Marriages that take place under Hananwa law are patrilocal. The wife follows the domicile or residence of her husband and not *vice versa*. The patrilocal system of marriage is clearly a residual aspect of the tradition of patriarchy and its corollary of male primogeniture. After the conclusion of the negotiations for the formation of the customary marriage and the performance of the requisite rituals, the woman is handed over to the family of the man. Usually, after all is said and done, the family of the man asks the family of the woman to hand the woman over. The custom is that the family of the woman requests that they be given a week or so to prepare for the delivery of the woman. On the appointed day the woman would leave, in the company of her escort, for the family of the husband. The delivery and integration of the wife into her husband's family founds her membership of her marital family group.

10.1.2.3.2 The Recognition of Customary Marriages Act

Understandably the *Recognition Act* is silent on the topic of the delivery and integration of the woman into her husband's family. In other words, the Act does not provide whether the system of marriage is patrilocal, matrilocal or neolocal.

Obviously, the Act equalises spouses. However, in practice the family of the woman hands over the woman to the man. Correctly construed, a customary marriage under the Act is neolocal. This inference is bolstered by the fact that customary marriage under the Act is, generally, a marriage in community of property. In other words, the home of the parties to the marriage is a matrimonial property that is owned jointly and equally by the spouses.⁸⁶⁰

10.1.2.3.3 The *Constitution*

At first sight, the delivery of a bride to the family home of the groom and not *vice versa* offends sections 9 and 10 of the *Constitution*. A marriage is a consensual relationship. It follows that the couple must enjoy the right to choose to reside at the homestead of the husband's or wife's parents or a residence of spousal choice (a neolocal residence). If the situation of the matrimonial home were a matter of their choice, this would not offend the *Constitution*. In constitutional terms, both parties to the marriage must consent to the domicile or residence of the spouses as a family. It is unconstitutional for the marriage to be automatically patrilocal by operation of the law.

10.1.2.4 The *lobola* agreement

10.1.2.4.1 Hananwa law

The family of a man or a man himself and the family of a woman may agree on the payment of *lobola* to the family of the wife. It is noteworthy that the agreement imposes a duty only upon the family of the man or a man to pay *lobola* and not the family of the woman.

860 S 7 of the *Recognition Act*.

10.1.2.4.2 The Recognition of Customary Marriages Act

The *Recognition Act* does not expressly provide that a man or a woman or both should pay *lobola*. According to the Constitutional Court, in *MM v MN and Another*,⁸⁶¹ the *Recognition Act* "does not regulate, in some detail, various aspects and incidents of customary marriages". Accordingly, customary law may thus impose validity requirements in addition to those set out by the *Recognition Act*. It follows, therefore, that in order to "determine such requirements a court would have to have regard to the customary practices of the relevant community".⁸⁶² Customary law imposes the duty to pay *lobola* as a validity requirement additional to the ones the *Recognition Act* imposes.

10.1.2.4.3 The Constitution

The *Constitution* recognises customary law subject to the *Constitution* and any legislation that specifically deals with customary law.⁸⁶³ Section 39(3) of the *Constitution* provides thus:

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.

The members of traditional communities have the right to freely marry and establish and raise their families. Their right to culture includes the right to perform rituals and practise customs such as *lobola*. However, these customary law rights must not be inconsistent with the Bill of Rights. For instance, the custom of *lobola* must be consistent with the rights to human dignity, equality and freedom. Unlike the *BAA* and the *Law of Evidence Amendment Act* which exempted it from their repugnancy clauses, the *Constitution* did not exempt the rules of customary law such as those relating to the customary duty to pay *lobola* and its corresponding right from the provisions of the Bill of Rights.

861 *MM v MN and Another* 2013 4 SA 415 (CC) paras 29-30.

862 *MM v MN and Another* 2013 4 SA 415 (CC) paras 29-30.

863 S 211(3) of the Constitution.

It is the *Recognition Act* that gives effect to section 15(3) of the *Constitution* insofar as it relates to customary marriages. For the sake of completeness, it is noteworthy that the *Marriage Act* is a competent legislation under section 15(3) of the *Constitution* in respect of civil marriages. The *Recognition Act* defines *lobola* as property in cash or kind given to the family of the woman in consideration of marriage. In other words, the duty to pay *lobola* is not reciprocal. *Lobola* is paid only to "the head of the prospective wife's family in consideration of marriage". No *lobola* is given to the head of the family of the prospective husband. This being the case, a *lobola* agreement or a duty to pay *lobola* discriminates against the family of the man or the man by imposing a duty to pay it only upon the man or family of the man and conferring a right to receive it only upon the family of the woman. It is noteworthy that traditionally *lobola* is not paid to the bride but to her family. The custom of *lobola* is part of African culture. The Constitutional Court has not yet pronounced on the constitutionality of the custom.

10.2 Proprietary consequences

10.2.1 Hananwa law

Hananwa law recognises communal property (family property and house property) and personal property. Although personal property is one of the three categories of African customary property, historically the Hananwa property law mainly revolves around the communal property system (i.e. the family and house property regime), which transcends the ambit of the property relations of the individual husband and wife and encapsulates the whole family group as a communal property rights holder. Accordingly, the earnings and accruals of individual family members accrue to the communal property of their common household within either a polygamous or monogamous household system regardless.

However, the individualisation and equalisation of the legal subjects in Hananwa law has resulted in the individualisation and equalisation of family and house

property relations. Husband and wife may hold equal shares in a family property system. During the subsistence of the marriage the earnings and accruals of the individual spouses contribute towards the growth of the matrimonial property. Unlike the situation in the communal system of family and house property, the minor children do not share in the matrimonial property of their parents but are mere dependants. The major children may hold their own houses and work for their own accounts.

10.2.2 The Recognition of Customary Marriages Act

The *Recognition Act* provides that a customary marriage is a marriage in community of property, profit and loss unless the parties enter into an antenuptial contract prior to the formation of the marriage.⁸⁶⁴ If a man and a woman are parties to a customary union and the husband wants to enter into another additional customary marriage with another woman, he must obtain an order of the High Court in terms of which the existing matrimonial property (the joint estate) is divided between the spouses as separate estates.⁸⁶⁵ The property of the additional marriage therefore excludes the separate estate of the first wife. This being the case, each house within the polygamous household has its separate estate. The separate estates of the house approximate to the erstwhile communal property of the house (i.e. the house property), on the one hand. On the other hand, the separate estate of the husband approximates to the general family property. This is so because while the husband has a duty of support towards the entire family (i.e. all the houses within the polygamous household), the house property is liable for the maintenance of the members of the house in question. Any use of the house property for the benefit of another house creates a claimable and reimbursable inter-house debt.

Clearly, there are three forms of matrimonial property system under the *Recognition Act*, namely in community of property, profit and loss, out of

864 See ch 4 of this thesis.

865 See ch 4 of this thesis.

community of property but with an accrual system, and out of community of property without an accrual system.

10.2.3 The Marriage Act⁸⁶⁶

A marriage entered into in terms of the *Marriage Act* may be concluded in community of property, profit and loss, or out of community with an accrual system and out of community of property without an accrual system.⁸⁶⁷ The parties to the marriage may conclude an antenuptial contract prior to the formation of the marriage. The contract serves to exclude the pre-marital assets from the joint estate.

10.2.4 The Constitution

Section 25 of the *Constitution* protects property rights. It does not specifically deal with matrimonial property but property in general. However, section 15(3) recognises marriages under traditional system of family law, personal law and religious law. Customary law is a hybrid of the traditional and religious systems of law. On the face of sections 8(1), 30, 31, 39(3) and 211(3) of the *Constitution*, customary law is recognised subject to the *Constitution*. Section 211(3) subjects customary law both to the *Constitution* and to legislation that specifically deals with customary law. The question is whether the rules of the customary law of property are constitutional. The Constitutional Court answered this question in both *Bhe* and *Gumede*. *Bhe* individualises and equalises the inheritance of the intestate estates of African persons. *Gumede* individualises and equalises the spousal rights in the matrimonial property. The *Recognition Act* recognises marriages in community of property (joint estates), out of community of property (separate spousal estates) without an accrual system, and out of community of property with an accrual system. The family property

866 *Marriage Act* 25 of 1961.

867 See ch 4 of this thesis.

and house property systems that obtain in polygynous households are not inconsistent with the *Constitution*.

10.3 Personal consequences

The formation of a marriage has a bearing on the persons of the parties to the marriage.⁸⁶⁸

10.3.1 The legal capacity

10.3.1.1 Hananwa law

In its original indigenous form, Hananwa law is not predisposed towards the concept of individual rights.⁸⁶⁹ On the contrary, it is set on the notion of group rights. These group rights are enjoyed and exercised in community with other members of the agnatic group. Individual rights subsume in a system of group rights. In other words, the individual rights are protected through the family group. Notwithstanding the group orientation of customary law, historically males play the leading roles in the administration of family and community affairs.⁸⁷⁰ Accordingly, they enjoy more and better rights than women. In consequence, they enjoy the rights to succeed to the office of family head on the basis of the tradition of patriarchy and its corollary customary rule of male primogeniture. The husbands are the sole heads of the households. In a polygamous household a husband is the head of both of the family as a whole and of each house within the family. During a lengthy period of his absence from home, the husband might often ask one of his senior male relatives to keep an eye on his family.

However, the circumstances of society have been changing over the decades. The tradition of patriarchy and the customary rule of male primogeniture are

868 See chs 4 and 7 of the thesis.

869 See chs 6 and 7 of this thesis.

870 See chs 6 and 7 of this thesis.

obsolescent not because of but alongside the *Constitution*. However, the new constitutional dispensation has given impetus to the individualisation and equalisation of rights and of the corresponding duties. Nowadays, married women generally act as *de facto* heads of their households in the absence of their husbands and as co-heads of households in the presence of their husbands. Most unmarried women hold their own houses.

10.3.1.2 *The Recognition of Customary Marriages Act*⁸⁷¹

The *Recognition Act* gives effect to the provisions of the *Constitution*.⁸⁷² It goes further to give effect to the relevant and applicable rights in the Bill of Rights, such as the rights to human dignity,⁸⁷³ equality⁸⁷⁴ and culture.⁸⁷⁵ In this context the Act has given effect to the right to equality between husband and wife i.e. spousal (gender) equality. It actually confers, with specificity and precision, equal rights upon husband and wife. Properly construed, both husband and wife enjoy equal rights by virtue of being human beings and not because of but in spite of their gender. Married women administer family affairs together with their husbands. Unmarried women may hold their own houses and enter into juristic acts in spite of their gender. They have full and equal status and capacity.

10.3.1.3 *The Marriage Act*

Some members of the Hananwa community conclude marriages in terms of the *Marriages Act*⁸⁷⁶ but continue to abide by Hananwa law in the conduct of their lives as spouses and community members. Over the years the legal effect of the *Marriage Act* was felt only at the point of the dissolution of civil marriages by divorce or death. During the subsistence of a marriage, families lived by the rules of Hananwa law as if they were married in accordance with customary

871 *The Recognition Act.*

872 See ss 15 and 211 of the *Constitution*.

873 S 10 of the *Constitution*.

874 S 9 of the *Constitution*.

875 Ss 30 and 31 of the *Constitution*.

876 *Marriage Act* 25 of 1961.

marriage in spite of their civil marriages. In practical terms, the *Marriage Act* confers equal status and equal rights upon husband and wife.

10.3.2 *The capacity to act*

10.3.2.1 Hananwa law

Historically, women were regarded as perpetual minors.⁸⁷⁷ They did not have equal capacity to perform juristic acts without the assistance or consent of their male family heads. Their actions were ascribed to their male family heads. Nowadays, an adult woman has the capacity to act without the assistance of a guardian.

10.3.2.2 The Recognition of Customary Marriages Act

The husband and wife have equal capacity to act. The *Recognition Act* gives effect to sections 9 and 15 of the *Constitution*. It has adopted, furthermore, most of the provisions of the common law matrimonial legislation such as the *Marriage Act* (as amended) and the *Divorce Act* (as amended).

10.3.2.3 The Marriage Act

The legislature abolished marital power and repealed the *Age of Majority Act*. The husband and wife have equal capacity to litigate. The Act puts spouses on an equal footing.

10.3.3 *The contractual capacity*

10.3.3.1 Hananwa law

Nowadays married women generally act as *de facto* heads of their households in the absence of their husbands and as co-heads of households in the presence of their husbands. They are competent to enter into contracts. Most unmarried women hold their own houses. The *Constitution* has given impetus to

⁸⁷⁷ See chs 5 and 7 of this thesis.

the individualisation and equalisation of spouses' rights and corresponding duties.

10.3.3.2 The Recognition of Customary Marriages Act

The husband and wife have equal capacity to conclude contracts.

10.3.3.3 The Marriage Act

The husband and wife have equal capacity to conclude contracts.

10.3.4 The capacity to litigate

10.3.4.1 Hananwa law

Historically the family head acts on behalf of the family group in suits of law. Nowadays, individual members of the family may sue in their own right. Married and unmarried women enjoy equal rights to litigate in their own names.

10.3.4.2 Recognition of Customary Marriages Act

Flowing from spousal equality, a spouse has the capacity to litigate.

10.3.4.3 The Marriage Act

Each spouse has the capacity to litigate.

10.3.4.4 The Constitution

According to section 9 of the *Constitution* everyone is equal before the law and enjoys full and equal protection and benefit of the law. Section 6 of *Recognition Act* put effect to section 9 inasmuch as it applies to the parties to the customary marriages. It follows therefore that spouses enjoy equal status including legal competencies such as the legal capacity, the capacity to act and the capacity to litigate.

10.4 The dissolution of customary marriage

10.4.1 By death

Generally, the death of a spouse does not dissolve customary marriage. If a husband dies, a *tsena* husband replaces him as the husband to his wife. If a wife dies, a *seyantlo* replaces her as the wife to her husband.

10.4.1.1 Hananwa law

According to Hananwa law the death of a spouse does not dissolve customary marriage. This position resonates with the African saying that "*lebitla la mosadi ke bogadi*".⁸⁷⁸ The context of marriage is permanence. This legal position was made possible by a system of substitute and supplementary marriages. However, substitute marriages are becoming obsolete.

10.4.1.2 The Recognition of Customary Marriages Act

According to the *Recognition Act* the death of a spouse dissolves a customary marriage.

10.4.1.3 The Marriage Act

According to the *Marriage Act* the death of a spouse dissolves a customary marriage.

10.4.2 By divorce

10.4.2.1 Grounds for divorce

10.4.2.1.1 Hananwa law

Marriage may dissolve on the grounds *inter alia* of adultery, witchcraft and barrenness.

878 The grave of a married woman is at her natal family.

10.4.2.1.2 The Recognition of Customary Marriages Act

The *Recognition Act* recognises only one ground for divorce, namely the irretrievable breakdown of the marriage.

10.4.2.1.3 The *Marriage Act*

Marriage may dissolve on the grounds of the irretrievable breakdown of the marriage and the mental illness or the continuous unconsciousness of a party to the marriage.⁸⁷⁹

10.4.3 The consequences of the dissolution of a customary marriage

Both versions of customary law divide matrimonial consequences into patrimonial and personal consequences.

10.4.3.1 Personal consequences of the dissolution of customary marriage

10.4.3.1.1 Legal capacity

10.4.3.1.1.1 Hananwa law

Historically after divorce the guardianship of the woman reverts to the family head of her natal family. The guardianship of the man does not change. Nowadays as a consequence of the individualisation and equalisation of legal subjects in customary law a divorced woman becomes an independent householder. She enjoys equal rights.

10.4.3.1.1.2 The Recognition of Customary Marriage Act

A divorcee enjoys equal rights in law.

⁸⁷⁹ S 3 of the *Marriage Act* 25 of 1965.

10.4.3.1.2 The capacity to act

10.4.3.1.2.1 Hananwa law

A divorcee may perform any juristic act without any restriction on the grounds of gender.

10.4.3.1.2.2 The Recognition of Customary Marriage Act

The *Recognition Act* ceases to regulate the affairs of the husbands and wives upon the dissolution of their customary marriage. Divorce does not affect their constitutional rights. A divorcee may perform any juristic act without any restriction on the grounds of gender. She or he does not require the consent of her or his former spouse in order to enter into binding contracts.

10.4.3.1.3 The contractual capacity

10.4.3.1.3.1 Hananwa law

Historically a male family head, for instance the husband, would enter into contracts on behalf of the family. However, nowadays married and unmarried women may enter into binding contracts.

10.4.3.1.3.2 The Recognition of Customary Marriages Act

Divorcees enjoy equal rights to conclude contracts.

10.4.3.1.4 The capacity to litigate

10.4.3.1.4.1 Hananwa law

Historically the male family head litigates on behalf of the family. Nowadays divorcees are equally competent to litigate.

10.4.3.1.4.2 The Recognition of Customary Marriages Act

Divorcees are competent to litigate in their own right and on behalf of their households.

10.4.3.2 The Constitution

The divorcees enjoy equal status as explained in 10.3.44 above but with the necessary qualification that they do not require the consent of their former spouses to perform juristic acts validly.

10.4.3.3 The proprietary consequences of the dissolution of a customary marriage

10.4.3.3.1 Hananwa law

The nature of property determines the patrimonial consequences of a marriage. As explained above, the customary law property system is communal in orientation. The right of ownership to property in customary law is not an individual right but a group right belonging to an agnatic group and not an individual member.

However, owing to the individualisation and equalisation of the legal subjects in customary law, the individual spouses have been substituted for their families as parties to the customary marriage. Similarly, individual rights of spouses have, to an extent, superseded the group rights of the family groups. Equally, the matrimonial property system has superseded the communal family and house property system.

10.4.3.3.2 The Recognition of Customary Marriages Act

The *Recognition Act* governs customary marriages and their consequences including their dissolution by death or divorce. The Act provides that all customary marriages are marriages in community of property unless the parties thereto enter into ante nuptial contracts antecedent to the formation of the

marriage. If the matrimonial property system was a joint estate, the dissolution of the marriage would result in the division of the estate into two equal shares. If the contrary was the case and the spouses kept two separate estates, the individual spouses would retain their own separate estates.

10.4.3.4 The Constitution

Section 25 of the *Constitution* protects property rights. It does not specifically deal with matrimonial property. However, section 15(3) of the *Constitution* recognises marriages under the traditional system of family law, personal law and religious law. On the face of sections 8(1), 30, 31, 39(3) and 211(3) of the *Constitution*, customary law is recognised subject to the *Constitution*. Section 211(3) subjects customary law both to the *Constitution* and to legislation that specifically deals with customary law. The question is whether the rules of the customary law of property are constitutional. These rules are communalistic in focus. The Constitutional Court answered this question in both *Bhe* and *Gumede*. *Bhe* individualises and equalises the inheritance of the intestate estates of African persons. *Gumede* individualises and equalises the spousal rights in the matrimonial property.

10.5 The parent-child relationship

Customary law recognises and distinguishes between two main categories of children: marital and extramarital children. Traditionally, a customary marriage determines the rights of children and differentiates between the rights of marital children and those of extramarital children. In so far as intestate succession is concerned, first-born children and junior sons are treated differently. Boy-children and girl-children are treated differently. However, as pointed out later, both customary law in general and Hananwa law in particular have evolved and been reformed by legislation. Boy-children are senior to girl-children. Senior girl-children are superior to junior girl-children.

A marital child belongs to his father's family group and enjoys maintenance and inheritance rights in his father's household. An extramarital child belongs to his mother's natal family and is an ultimate heir in the natal family of his mother. He can enjoy inheritance rights in his father's household only if his biological father affiliates him to his family.

This discrimination between marital and extramarital children offends section 9 and section 28 of the *Constitution* and the children's rights in the *Children's Act*⁸⁸⁰ and *Maintenance Act*.⁸⁸¹ The *Constitution* does not discriminate between the rights of marital and extramarital children. From a constitutional perspective, the gender of a child or the marriage of the biological parents of a child is neither constitutive of the legitimacy or illegitimacy nor the fundamental human rights of the child. A child is a holder of fundamental human rights in the Bill of Rights by virtue of being a human being and a holder of children's rights in section 28 of the *Constitution* (i.e. the mini-charter of children's rights) by virtue of being a child. The best interests of the child are paramount in all matters affecting a child.⁸⁸²

10.5.1 Marital children

Marital children are the children whose biological parents are married to each other at the time of their conception or birth or whose parents marry each other after the conception or birth of those children. The tradition of patriarchy informed this legal position. However, although the tradition of patriarchy has weakened and is unconstitutional, it has not, in practice, completely fallen into disuse. The *Constitution*, in particular the fundamental values of human dignity, equality and freedom in tandem with the Bill of Rights has equalised society in general and marital and extra-marital children in particular. The gender of a child or whether it was born in or out of wedlock no longer determines the

880 The *Children's Act* 38 of 2005.

881 The *Maintenance Act* 99 of 1998.

882 See ch 4, 8 and 9 of this thesis.

legitimacy or illegitimacy of the child. The *Constitution*, therefore, delinks the question whether a child is born in or out of wedlock or the gender of a child from the entitlement of the child to the enjoyment of maintenance and inheritance rights from his father or mother or their respective families.

10.5.1.1 Boy-children

Marital boy-children belong to the marital family of their parents. Historically they were subjected to the authority of the family head of their parents. The family head was the most senior male person within the family group. It often happened that their father doubled as a family head.

10.5.1.1.1 Maintenance and support

Historically, the family to which a child belonged bore the responsibility for the maintenance and support of the child. The communal property of the family defrayed the expenses of each of its members. Nowadays, customary law recognises the reciprocal duty of a parent and a child to maintain and support each other if the situation so dictates.

10.5.1.1.1.1 Hananwa law

Historically the communal property was legally intended for the maintenance and support of all the children belonging to the family without discrimination on the grounds of gender. The family of the father has always been legally responsible for the upkeep of the marital children. However, it had only a natural obligation to provide care to the extramarital children of the family. Nowadays, the duty to maintain the marital children resides in both parents (i.e. their mother and father). If a child is adopted or affiliated to a family he enjoys equal rights in the family. While as an extramarital child he enjoys equal rights in his mother natal family or his mother's single-parent household, the adoption or affiliation of the extramarital child extinguishes his extramarital status and

confers upon him equal rights in her or his adoptive or affiliated family and household.

10.5.1.1.1.2 Official customary law

The duty to maintain a marital child rests upon his parents. If the parents are deceased or incapable of maintaining a child, the ascendants or collateral relatives, the former excluding the latter, have a duty to maintain the child. There is no discrimination on the grounds of gender and birth in this regard.

10.5.1.1.1.3 The *Maintenance Act*

The *Maintenance Act* does not discriminate between a mother and a father or a male child and a female child. It imposes the duty to maintain a child primarily upon his natural parents or adoptive parents. If the parents are deceased or incapable of maintaining a child, the ascendants or collateral relatives, the former being capable the latter being excluded, have a duty to maintain the child.

10.5.1.1.2 Inheritance

Customary law recognises the right to succeed to the position of and inherit from the deceased person. The individualisation of the customary law of succession foregrounded the common-law notion of inheritance over the notion of succession. This change has turned the customary law of succession on its head. The following paragraphs deal with the findings on the customary law of succession.

10.5.1.1.2.1 Hananwa law

Historically, an eldest marital male child succeeded to the family headship and the control of the communal property in his father's household, while an extramarital child was an ultimate heir in his mother's natal household. In other

words, the extramarital children did not enjoy equal status in both their father's family group and mother's family group. Nowadays, marital children enjoy equal rights to succeed and inherit irrespective of their gender. However, Hananwa law still discriminates against an extramarital male child in his father's household.

10.5.1.1.2.2 Official customary law

The marital male child enjoys an equal right to inherit intestate from his parents. If parents are deceased or incapable of maintaining a child, the ascendants or collateral relatives, the former being capable the latter being excluded, have a duty to maintain the child. The birth norm has ceased to determine the inheritance rights of a child. A child has no less equal rights to inherit on the grounds of his extramarital birth alone.

10.5.1.1.2.3 The Reform of the Customary Law of Succession and Regulation of Related Matters Act⁸⁸³

The Act does not discriminate on the grounds of gender or birth.

10.5.1.2 *Girl-children*

All people have a right to maintenance either as self-providers or dependants irrespective of their gender or birth. Girl-children, therefore, have equal rights to maintenance and support to the extent of their need. However, the duty of support is dependent upon the ability of the duty-bearer to support the rights-holder.

883 *Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009.*

10.5.1.2.1 Maintenance and support

Historically, the family to which a girl-child belonged bore the responsibility for her maintenance and support. The communal property of the family defrayed the expenses of each of its members including a girl-child. Nowadays, customary law recognises the reciprocal duty of a parent and child, regardless of gender, to maintain and support each other if the situation so dictates.

10.5.1.2.1.1 Hananwa law

Nowadays both parents (father and mother) have a duty to maintain and support their marital children regardless of their gender. A parent may contribute in cash or kind. If parents are deceased or incapable of maintaining a child, the ascendants or collateral relatives, the former being capable the latter being excluded, have a duty to maintain the child.

10.5.1.2.1.2 Official customary law

The parents have a duty to maintain and support their marital children regardless of their gender. If the parents are deceased or incapable of maintaining a child, the ascendants or collateral relatives, the former being capable the latter being excluded, have a duty to maintain the child.

10.5.1.2.1.3 Maintenance Act

The *Maintenance Act* does not discriminate between a mother and a father or a male child and a female child. It imposes the duty to maintain a child primarily upon his or her natural parents. If the parents are deceased or incapable of maintaining the child, the ascendants or collateral relatives, the former being capable the latter being excluded, have a duty to maintain the child.

10.5.1.2.2 Inheritance

The estate of a person who deceases intestate devolves upon his or her dependants, particularly family members.

10.5.1.2.2.1 Hananwa law

Nowadays marital girl children enjoy equal rights to succeed and inherit irrespective of their sex. Hananwa law discriminates against an extramarital girl child in the household of her biological father. However, an extramarital male child enjoys equal rights to inherit from her mother.

10.5.1.2.2.2 Official customary law

The marital female child enjoys equal rights to inherit intestate from her parents. A child has no less equal rights to inherit on the grounds of her extramarital birth alone.

10.5.1.2.2.3 The Reform of Customary Law of Succession and Regulation of Related Matters Act

Girl children enjoy equal rights to inherit intestate. The Act does not discriminate on the grounds of gender or birth.

10.5.2 Extramarital children

Over the centuries an extramarital child has suffered legal disabilities only because it was a child of parents who were not married to each at the time of his or her birth or thereafter.

10.5.2.1 Boy-children

Historically, a boy-child was viewed as the most important future of his paternal family.

10.5.2.1.1 Maintenance and support

Generally, the biological parents must maintain their children and children must maintain their indigent parents. However, the following systems of law have rules that apply to the members of the community they serve.

10.5.2.1.1.1 Hananwa law

A mother or natal family has a duty to maintain and support her children without gender-based discrimination. The legal duty of the natural father to maintain and support is limited to the payment of the milk cows (*maswi a ngwana*).

10.5.2.1.1.2 Official customary law

A mother or natal family has a duty to maintain and support her children without gender-based discrimination. The legal duty of the natural father to maintain and support is limited to the payment of the milk cows (*maswi a ngwana*).

10.5.2.1.1.3 The *Maintenance Act*

The *Maintenance Act* does not discriminate between a mother and a father or a male child and a female child. It imposes the duty to maintain a child primarily upon his natural parents. If the parents are deceased or incapable of maintaining a child, the ascendants or collateral relatives, the former being capable the latter being excluded, have a duty to maintain the child.

10.5.2.1.2 Inheritance

Generally, nowadays, children have equal rights to inherit their lawful share of the intestate estate of their parents.

10.5.2.1.2.1 Hananwa law

Nowadays extramarital children enjoy equal rights to succeed and inherit from their mother irrespective of their sex or chronology or sequence of birth. Hananwa law discriminates against an extramarital male child *vis-a-vis* the family of his natural father. A marital child enjoys better inheritance rights than an extramarital, unaffiliated male child of an unmarried woman. However, as an unmarried woman owns property and could inherit from her own parents, her extramarital male child enjoys an equal right to inherit from her.

10.5.2.1.2.2 Official customary law

The extramarital male children enjoy equal rights to inherit intestate from their parents. The birth norm has ceased to determine the inheritance rights of a child. A child has no less equal rights to inherit only on the grounds of his extramarital birth.

10.5.2.1.2.3 The Reform of Customary Law of Succession and Regulation of Related Matters Act

Children enjoy equal rights to inherit intestate. The Act does not discriminate on the grounds of gender or birth.

10.5.2.2 *Girl-children*

10.5.2.2.1 Maintenance and support

Traditionally, the family head has a duty to support his children irrespective of their gender or birth. The costs of maintenance were chargeable against the communal property of the household. In the case of a polygamous household, each house has a duty to maintain and support its members. However, nowadays, the parents of a child are obliged to maintain and support his or her children.

10.5.2.2.1.1 Hananwa law

Historically extramarital girl-children belonged to the natal family of their mother. Their mother was herself subject to the authority of her natal family head. However, Hananwa law has done away with the ancient legal disabilities that a woman endured only on the grounds that she was a woman. Single-parent women are now heads of their own households. They maintain and support their own offspring. On the other hand, the duty of a natural father to maintain and support his extramarital children is, to the extent of his customary law obligation, to pay milk cows (*maswi a ngwana*) to the family of the mother of the child.

10.5.2.2.1.2 Official customary law

A parent has a duty to maintain and support his or her children without discrimination on the grounds of gender or birth.

10.5.2.2.1.3 The *Maintenance Act*

Each of the natural parents has a duty to maintain and support their child. A child may sue each of them for maintenance and support. Although the financial means of a parent is critical, the best interests of the child are decisive in the determination and enforcement of the duty of support. If the parents are deceased or incapable of maintaining a child, the ascendants or collateral relatives, the former being capable the latter being excluded, have a duty to maintain the child.

10.5.2.2.2 Inheritance

Generally, the extramarital and marital children have equal rights to inherit their lawful share of the intestate estate of their parents.

10.5.2.2.2.1 Hananwa law

Hananwa law no longer discriminates between the inheritance rights of extramarital boy-children and extramarital girl-children in regard to their deceased mother's estate.

10.5.2.2.2.2 Official customary law

A child enjoys equal rights in relation to the intestate estate of his or her deceased parents (its father and mother).

10.5.2.2.2.3 The Reform of Customary Law of Succession and Regulation of Related Matters Act

Marital and extra-marital children enjoy equal inheritance rights.

10.5.3 The Constitution

The *Constitution* equalises everyone including spouses and marital and extramarital children. All children are equal before the law and enjoy equal protection and benefits of the law. Marital and extramarital children, boy-children and girl-children, and first-born and junior children have the right to maintenance and inheritance irrespective of the nature of their birth, the chronology of birth, their gender and age, or whether or not their parents were married. However, the blood relationship is a paramount consideration in claims of maintenance or intestate succession.

10.6 Concluding remarks

In conclusion, it is noteworthy that the study has substantively achieved the research objectives set out in chapter 1 of this thesis.

First, the study established the selected rules of the official customary family law.

- Chapter 4 analysed, among others, the validity requirements for and the consequences of the customary marriages negotiated, entered into and celebrated in accordance with the *Recognition Act*. The study found that the *Recognition Act* has converted customary law into a statutory customary marriage in almost all respects. Some of the validity requirements for a customary marriage imposed by the *Recognition Act* are similar to those of the civil marriage under the *Marriage Act*. However, as explained earlier in this chapter, the Constitutional Court, in *MM v MN and Another*,⁸⁸⁴ said that customary law imposes some validity requirements for a customary marriage in addition to the ones set out in the *Recognition Act* but subject to the provisions of the Bill of Rights.
- Chapter 5 analysed the rules of the official version of customary law of parent and child. The *Children's Act* regulates the affairs of all the children regardless of whether or not they are marital or extramarital children. The Act gives effect to chapter 28 of the *Constitution*. All children are equal before the law and enjoy full and equal protection and benefit of the law. The *Constitution* and the *Children's Act* impose the demands of human dignity and equality and bring the customary law of parent and child on a par with the common law of parent and child. Customary law imposes the rules of customary law of parent and child additional and subject to the *Constitution* and applicable legislation such as the Children's Act.

The study also established the selected rules of the Hananwa family law.

- Chapter 7 analysed, among others, the validity requirements for and the consequences of the customary marriages negotiated, entered into and celebrated in accordance with the Hananwa law. The study found that Hananwa law of marriage has evolved to the extent that the individual

884 *MM v MN and Another* 2013 4 SA 415 (CC) paras 29-30.

spouses are the competent parties to a customary marriage. The communal consent of the family group or the parental consent has given way to the spousal consent. However, the family group, in particular the parents of the parties still play important roles in the negotiation, conclusion and celebration of the marriages of their children.

- Chapter 8 analysed the rules of Hananwa law that regulate the dissolution customary marriages. The study found that according to the Hananwa law the dissolution of customary marriages may happen only through divorce. Chapter 9 analysed the rules of Hananwa child law. The Hananwa law differentiates the maintenance and inheritance rights of the marital children from those of extramarital children. As a result, an extramarital child may not inherit from his or her biological father unless he or she has been affiliated to the household of his or her biological father. However, the biological father has a duty to support his extramarital children, at least, through *dikgomo tsa maswi a bana* (milk cows).

Second, the study found that the Hananwas still observe the rules of Hananwa family law. Third, the study documented the rules of the official customary family law in chapters 4 and 5 as well as the rules of the "living" Hananwa family law in chapters 7, 8 and 9. Fourth, the study found that the rules of Hananwa family law are generally compatible with the *Constitution*. However, some of its rules are apparently inconsistent with the Bill of Rights. The following are classic examples:

- First, the imposition of the duty to pay *lobola* upon the prospective husband discriminates against the prospective husbands on the grounds of gender.
- Second, the practice of polygyny discriminates against women in that only males may enter into customary marriages with more than one woman in a polygynous household.

- Third, the Hananwa law of parent and child generally discriminates against extramarital children and their fathers. For instance, the guardianship and custody of extramarital children whose fathers have not paid special lobola to affiliate them to their fathers' families are vested in the natal families of their unmarried mothers or their natural mothers.
- Fourth, the natural father's right of access to his extramarital children is not well-defined because the extramarital children belong to the natal family of their unmarried mother.
- Fifth, the acceptance and affiliation of a man of his wife's extramarital children as his children, generally, result in the violation of their natural father's rights of guardianship, custody and access.
- Sixth, the imposition of the status of the ultimate heir upon an extramarital child abstracts from the equality of his or her inheritance rights at Hananwa law in contravention of the provisions of the Bill of Rights read together with those of the Reform of Customary Law of Succession and Regulation of Related Matters Act.

The Constitutional Court has not as yet pronounced itself on the constitutionality of the customs of *lobola* and polygyny.

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Shibi v Sithole Case No 7292/01 (TPD) November 2003 (unreported)
Shilubana v N'wamitwa 2007 2 SA 432 (SCA)
Shilubana v N'wamitwa 2008 9 BCLR 914 (CC)
Sibasa v Ratsialingwa 1947 4 SA 369 (T)
Sigcau v Sigcau 1944 AD 67
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Solomons v Abrams 1991 4 SA 437 (W)
South African Association of Personal Injury Lawyers v Heath 2001 1 SA 883 (CC)

T

Thembisile v Thembisile 2002 2 SA 209 (TPD)
Thibela v Minister van Wet en Orde 1995 3 SA 147 (T)
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Register of interviews

The following were some of the most senior community leaders and experts interviewed:

- Mr NP Leboho, Chief Counsellor, Bahananwa Traditional Authority: 10 January 2008
- Kgosi TJ Leboho, senior traditional leader of Bahananwa for the period commencing from the death of Kgosi Ben Seraki Leboho to the installation of Kgosi Ngako Leboho: 4 February 2009
- Mr Jimmy Mohlapi, special advisor to Kgosi TJ Leboho: 4 February 2009
- Ms Mmankoto Leboho, wife of the late senior traditional leader, Kgosi Matome Wilson Leboho: 21 March 2008
- Mr Makwena Ephraim Rammutla, traditional leader, Letswatla, part of the Hananwa community: 30 June 2008

The people such as Mmamoloko Wilmont Mashamaite, Daniel Moremi and Molatelo T Pitsi often acted as research assistants.