Gender, Law and Justice

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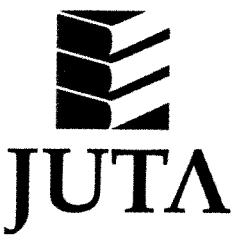

CHAPTER 6

Culture and religion

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6.1 Introduction

This chapter deals with the relationship between gender equality and rights to practise culture and religion. In South Africa this relationship is of crucial importance to women who live according to the rules and principles of customary law and Muslim Personal Law (MPL).[1] Both these groups of women have experienced two sets of problems as a result of the historic non-recognition of their marriages by the civil law. On the one hand, they were unable to access the remedies and enforcement mechanisms provided by the civil law because their marriages were not recognised, while on the other hand, civil law structures could also not be used effectively to enforce the remedies afforded by MPL and customary law. They were therefore effectively denied legal remedies in the civil law. Because married women are usually economically dependent on husbands, non-recognition protected husbands against financial claims by wives, thus exacerbating existing economic inequalities.

Hindu marriages have also not traditionally received civil law recognition, but the reason seems to be that Hindu priests were not generally registered as marriage officers.[2] There are also problems with obtaining religious decrees of divorce in the case of Jewish marriages.[3] However, this chapter focuses mainly on MPL and customary law. The reason is

[1] A religiously-based private law deriving from the Qur'an (holy book) pertaining to, among other things, marriage, divorce, inheritance, polygyny, custody and guardianship. Laws affecting the status of Muslim are part of this law. Henceforth the abbreviation MPL will be used.

[2] S 3 of the Marriage Act 25 of 1961 allows for the appointment of marriage officers to celebrate marriages according to 'Mohammedan rites or the rites of any Indian religion.' Even if Muslim clerics were to be appointed as marriage officers, however, the possibility of polygyny would render Muslim marriages invalid.

[3] See generally Burman, & Franketal *Unto the Tenth Generation: Jewish Illegitimacy* in Burman & Preston-Whyte (eds) *Questionable Issue: Illegitimacy in South Africa* 116. On Hindu and Jewish marriages see Gokul, Goldstein, Goolam, Badat & Moosa *Law of Marriage* in Rautenbach & Goolam (eds) *Introduction to Legal Pluralism* 41.

that the civil law response to them displays certain common features which highlight the contest between culture and religion, and gender equality, particularly well.

This does not, however, imply that women subject to MPL and to customary law are in exactly the same legal position. One important difference is that the Constitution treats them differently. While s 15 (3)*(a)*(ii) and (i) allows for the introduction of legislation recognising religious personal law and religious marriages respectively, the Constitution recognises customary law as a component of South African law.[4] This means that customary law is treated as being already part of the law of the land, while MPL must first be recognised by statute. This difference makes it easier to institute legal challenges to sexist provisions of customary law than to challenge MPL and contributes to the more rapid development of customary law.

We start the chapter with a description of the current and historical relationship between civil law and the rules of customary law and MPL. We also draw attention to the ways in which culture and religion overlap with race and class in the South African context. In the following paragraph we describe the inadequacy of mainstream feminist responses to the positions of African and Muslim women and the alternative theoretical engagements formulated by these women. Most legal issues for both groups of women are located in the 'private' sphere of family relationships, and the disposition of property at the time of death. The following sections deal with these issues in more detail, systematically comparing the legal regulation of customary marriages with Muslim marriages.

6.2 Race, religion, culture, class and gender in South Africa

6.2.1 *History of the recognition of customary law and Muslim Personal Law*

South African statutory and common law rules show a bias towards western, Judaeo-Christian moral values in spite of South Africa being a multi-cultural and multi-faith society on the African continent.[5] This bias was also reflected in the former 1909, 1961 and 1983[6] Constitutions. Between 1858 and 1902 there was an official preference for the two major Dutch churches, but after 1902 no established church enjoyed official preference.[7] Neverthe-

[4] See ss 39(2), 39(3) and s 211(3). However, customary rules must comply with the Bill of Rights.

[5] The constitutionality of such laws is, however, suspect and many of these provisions will not survive constitutional review. See Du Plessis *Religious Human Rights in South Africa* in Van Der Vyver & Witte (eds) *Religious Human Rights in Global Perspective* 465.

[6] For example the preamble of Act 110 of 1983 advocated freedom of religion by providing that the State aimed '[t]o uphold Christian values and civilized norms, with recognition and protection of freedom of faith and worship. . .'

[7] Van der Vyver *Religion* in Joubert & Scott (eds) *The Law of South Africa* Volume 23 par 179.

less, the religious and cultural backgrounds of the ruling white minority were clearly reflected in legislation and in judges' responses to issues of morality in the common law, particularly in relation to non-Christian, non-western family forms and marriages.

Customary law in South Africa is the personal law of the majority of the African people who live in rural and in some urban areas. In the past it existed alongside, but subordinate to, the common law. In particular, the application of customary law was subject to the repugnancy clause[8] which meant that it could only apply if it contradicted neither the common law nor the policies of the government of the day. Customary practices such as polygyny and *lobolo*[9] were condemned as a contravention of public policy and morality,[10] since the spread of Christian norms was a concomitant of colonialism. Nevertheless, these practices were never completely abolished, because colonial authorities to a large extent depended upon the cooperation of the indigenous people. The compromise was to allow the application of 'official' customary law to African people,[11] while at the same time inducing middle class or educated Africans to apply civil law to their marriages and succession.

This resulted in the partial recognition and application of customary law under the Black Administration Act.[12] Section 11 of this Act determined that courts could not declare the custom of *lobolo* contrary to public policy. Customary marriages were not fully recognised in civil law, but given limited legal effect[13] and rendered subordinate to civil law marriages.[14] This meant that a subsequent civil marriage concluded by a customary spouse nullified an existing customary marriage, usually leaving the customary wife and children without rights to property and maintenance.[15] If a spouse married in terms of the civil law subsequently contracted a customary marriage, the customary marriage was void, again to the detriment of the customary wife.[16] After 1988 spouses in customary marriages were forbidden to contract subsequent civil marriages with people other than their customary spouses.[17]

Within customary marriages, wives occupied a position of economic, so-

[8] Law of Evidence Amendment Act 45 of 1988 s 1(1).

[9] Also known as *lobola*, *bohali*, *bogadi*, *rovoro*, *munywalo* and *ikhazi*.

[10] Bennett *Sourcebook of African Customary Law for Southern Africa* (1991) 171 fn 106.

[11] See the discussion of 'official' customary law in par 6.3.2 below.

[12] 38 of 1927.

[13] Specific Acts like the Maintenance Act 23 of 1963 recognised the existence of customary marriages. See Sinclair & Heaton *The Law of Marriage Vol I* (1996) 252-255 for a list and discussion of this legislation.

[14] Black Administration Act s 35.

[15] Bennett *Customary Law in South Africa* (2004) 239-240. S 22(7) of the Black Administration Act attempted to protect discarded customary wives by safeguarding their material rights.

[16] Bennett *Customary Law in South Africa* 241.

[17] Black Administration Act s 22(1) and (2) as inserted by the Marriage and Matrimonial Property Law Amendment Act 3 of 1988.

cial and legal subordination to their husbands. Section 11(3)*(b)* of the Black Administration Act relegated customary wives to the status of legal minors.[18] According to official customary law, in monogamous marriages[19] all marital property, apart from purely personal items like clothing, was controlled by the husband who had sole capacity to perform juridical acts in respect of this property. This included money earned by the wife from work done outside the home.[20] This situation clearly deprived wives of any economic benefits from the marriage and restricted their ability to divorce their husbands.[21]

The most significant and systematic reform of customary law occurred after the advent of democracy and in extensive consultation with both women's groups and African traditional leaders. The Recognition of Customary Marriages Act[22] gives full legal recognition to both existing and future customary marriages and alleviates women's unequal status in marriage. Recently, the 'official' customary rules of succession, which exclude women from acting as heirs to family property, were declared unconstitutional in the Constitutional Court.[23]

Moral disapproval of polygyny was also cited as the reason for refusing to recognise Muslim marriages. Courts adopted the common law approach that Muslim marriages were potentially polygynous, offended against public policy (*contra bonos mores*) and were therefore invalid.[24] This was even the case where parties were in a *de facto* monogamous marriage.[25] Children born of such marriages were regarded as illegitimate[26] and parents of such children were stigmatised as 'natural father', 'common law' wife and so on.

[18] For more information see Bennett *Human Rights and African Customary Law under the South African Constitution* (1995) 80-94; Robinson 'The Minority and Subordinate Status of African Women under Customary Law' 1995 *SAJHR* 457.

[19] In polygynous marriages the 'house property' of the various houses was separated, but the husband effectively controlled all property, except for wives' personal property. See Bennett *Customary Law in South Africa* 254-260.

[20] Bennett *Customary Law in South Africa* 254-255 argues that traditionally, 'living' law allowed wives ownership of property which they accumulated in their work outside the home. However, official versions of customary law failed to take this into account

[21] According to the Matrimonial Property Act 88 of 1984 before the amendment in 1988, African women who married in terms of civil law were likewise in a worse economic position than their non-African counterparts, because, in the absence of antenuptial contracts, their marriages were out of community of property and of profit or loss. Since 1988, all civil marriages are automatically in community of property, allowing wives a share in the assets amassed by their husbands.

[22] Act 120 of 1998.

[23] *Bhe v Magistrate Khayelitsha; Shibi v Sithole* 2005 1 BCLR 1 (CC). These and other reforms of customary law will be discussed in more detail below.

[24] *Seedat's Executors v The Master (Natal)* 1917 AD 302; *Ismail v Ismail* 1983 1 SA 1006 (A).

[25] For a short time, the former province of Natal recognised polygynous marriages of Muslim immigrants of Indian origin which were concluded before their arrival in South Africa. See Rautenbach 'Islamic Marriages in South Africa: Quo vadimus?' 2003 *Koers* 1 7.

[26] Recent exceptions to this rule include the Births and Deaths Registration Amendment Act 40 of 1996 s 1(a) and s 1(b) and the Child Care Amendment Act 96 of 1996, s 1(d).

The consequences of non-recognition of marriages are particularly detrimental to women who are financially dependent on husbands or who do not work outside the home. Because their marriages are not recognised, they cannot claim property or maintenance according to the civil law at divorce. Nor would the courts enforce the MPL rules for maintenance or property distribution at divorce. In the enforcement of their entitlements to marital property, women therefore have little recourse to the law of the land and are subject to the jurisdiction of, often unsympathetic, informal tribunals manned by religious authorities (Ulama). Unless husbands voluntarily, or as result of religious pressure, agreed to comply with MPL, wives were left without any redress whatsoever. Given the effects on women of non-recognition, the judgment in *Kalla v The Master* is therefore particularly cynical in citing an additional ground for the invalidity of Muslim marriages, namely that they do not comply with the constitutional need for gender equality.[27]

Since 1994 there has been a change in the courts' approach to Muslim marriages. The content and meaning of the *boni mores* have been reinterpreted to accord with the new constitutional ethos of tolerance, pluralism and religious freedom. Although no court has yet declared a Muslim marriage valid, and although they mostly refrain from expressing approval of polygyny,[28] courts have given effect to some of the obligations arising from Muslim marriages.[29] In 1999 a Project Committee of the South African Law Reform Commission was constituted by government to consider those aspects of MPL most in need of reform. The consultation process took four years and culminated in a report for consideration in July 2003.[30] The suggested legislation has not yet been adopted by Parliament.[31]

6.2.2 *Intersecting grounds of disadvantage: the socio-economic positions of women subject to customary law and Muslim Personal Law*

The women to whom customary law applies are African and often live in rural areas. As we pointed out in the introductory chapter, African women are the most disadvantaged group in the country with the lowest per capita income, the least access to resources like municipal services, the lowest educational levels and the highest rates of unemployment and HIV infec-

[27] 1995 1 SA 261 (T) 270G-H.

[28] The exception is *Khan v Khan* 2005 2 SA 272 (T).

[29] See for instance *Ryland v Edros* 1997 2 SA 690 (C); *Amod v Multilateral Motor Vehicle Accidents Fund* 1997 12 BCLR 1617 (D); 1999 4 SA 1319 (SCA); *Daniels v Campbell NO* 2003 9 BCLR 696 (C); 2004 7 BCLR 735 (CC). These will be discussed in more detail in subsequent paragraphs.

[30] South African Law Reform Commission *Report on Islamic Marriages and Related Matters*, Project 59 (2003).

[31] This will be discussed in more detailed in the paragraphs dealing with Muslim marriages below.

tion. These disadvantages are particularly prevalent amongst rural African women.[32] African households are more likely than others to depend solely on women's income and they are also more likely to contain dependent children whose fathers do not live with them.[33] This does not mean that all African women who are subject to customary law are poor, but it does alert us to the importance of evaluating the effects of customary rules in a context of great female poverty. Affluent, urban and professional African women may have greater ability to negotiate the application of customary rules and may have more choice to enter into civil, rather than customary marriages, but in keeping with our focus on the most disadvantaged of women,[34] we particularly wish to highlight the consequences of customary law for the most disadvantaged group of women.

It is important to recognise that African women do not necessarily experience the application of customary law and civil law as mutually exclusive. In fact, *lobolo* is often paid in respect of civil marriages, thus incorporating customary norms about the formation and dissolution of marriage into the civil law context.[35] Bronstein points out that[36]

> 'although culture is integral to the lived reality of people's lives, it does not possess or own its subjects. People have multi-faceted identities and we all function in a wide range of situations in which different segments of South African society are implicated.'

This point is illustrated by research on the resolution of family disputes in Botswana. Griffiths showed that courts and litigants use customary law and civil law interchangeably and pragmatically. Whether or not women used the civil law or the customary mechanisms to claim property or maintenance at divorce, depended on a practical assessment of their positions in the community and the kinds of networks and resources to which they had access.[37]

The application of religious rules and traditional practices in 'modern' secular conditions also characterises the lives of many South African Muslim women, for whom this often results in a (mostly unresolved) dichotomy between their public lives governed by secular laws, and their private lives governed by religion and culture. In the public sphere many local Muslim women have a professional identity and are financially self-reliant. They have the right to vote. They have an official identity — they own passports,

[32] See par 1.4.1.

[33] Budlender *Women and Men in South Africa: Five Years On* (2002) figure 47.

[34] See par 1.3.

[35] South African Law Reform Commission *Report on Marriages and Customary Unions of Black Persons* 160-180 reviewed a number of surveys and concluded that *lobolo* had been paid in at least 90% of African marriages.

[36] Bronstein 'Reconceptualising the Customary Law Debate in South Africa' 1998 *SAJHR* 388 394.

[37] Griffiths *In the Shadow of Marriage: Gender and Justice in an African Community* (1997) 118-122.

for example, and they can travel when they want. They drive cars. They can dress fashionably and modestly. They can enter public spaces and all public professions are open to them with laws protecting and safeguarding their rights in this sphere. In the private sphere, however, they are wives, mothers and homemakers, subject to MPL.

The 2001 Population Census indicated that there are just over 550 000 Muslims in the South African population, compared to 30 million Christians.[38] Muslim women therefore form a relatively small part of the total population. South African Islamic communities have different cultural systems, reflecting the differences between traditionally Arabian and hybridised local cultures. Although no economic statistics are available specifically for South African Muslim women, they mostly form part of the 'Indian' group, which is second only to white women in terms of economic and educational privilege. However, there are also members of the 'coloured' community who are Muslims and women from this group are generally more economically disadvantaged.[39]

To summarise: African women face discrimination and disadvantage as a result of their race, their gender and generally as a result of their economic position. Non-recognition of their cultural identities and practices also constitutes a potential form of disadvantage. On the other hand, certain interpretations of their culture could in themselves contribute to gender disadvantage. Muslim women face discrimination on the basis of gender and as a result of the non-recognition of certain consequences of their religion, but generally do not belong to a disadvantaged economic class. As is the case of African women, however, their religious norms can in themselves also contribute to gender disadvantage.

6.3 The human rights of women subject to customary law and Muslim Personal Law

6.3.1 *International and constitutional law*

The authors of the chapter on constitutional and international human rights showed how international human rights instruments protect both rights to culture and religion on the one hand, and gender equality on the other hand.[40] These include the Universal Declaration of Human Rights, the African Charter on Human and People's Rights, the International Covenant

[38] Statistics South Africa *2001 Census, Primary Tables*, table 5.1 accessed on 29 July 2005 at http://www.statssa.gov.za/census01/html/RSA.Primay.pdf.

[39] See par 1.4.1.

[40] See par 3.4.2.

on Civil and Political Rights and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Some of these instruments clearly indicate that States Parties must abolish practices associated with customary and religious marriages, like polygyny. For instance, the UN Human Rights Committee expressed the view that:

> 'equality of treatment with regard to the right to marry implies that polygamy is incompatible with this principle. Polygamy violates the dignity of women. It is an inadmissible discrimination against women. Consequently it should be abolished wherever it continues to exist.'[41]

Article 16 of CEDAW requires State Parties to take measures to eradicate various forms of discrimination against women in matters relating to marriage, including polygyny. In 1994 the CEDAW Committee recommended that polygyny and the payment of bride price should be outlawed and that family law rules should be determined by CEDAW rather than customary or religious systems.[42]

The provisions dealing with culture and religion in the South Africa Constitution are less prescriptive, guaranteeing rights to freedom of religion and the practice of culture, but subjecting these rights to the other provisions of the Bill of Rights, which include the prohibition on sex and gender discrimination.[43] In addition, the ability of the State to give legislative recognition to customary and religious marriages is subject to the same limitation.[44] These provisions are the result of a long process of negotiation to which both women's groups and traditional leaders were parties.[45]

Blunt assertions that elements of customary and religious law, like polygyny, are irrevocably opposed to gender equality and demands for their immediate abolition tend to antagonise many African and Muslim gender activists. Such arguments assume that African and Muslim women are in need of help, that customary and religious laws are always opposed to gender equality and that western feminists are qualified to define the problems and solutions facing African and Muslim women. They fail to take account of the social, cultural and economic contexts in which customary and religious systems operate. They also assume that the western feminist analyses

[41] United Nations Human Rights Committee *General Comment No 28 on the International Covenant on Civil and Political Rights*, 68th Sess., 1834th mtg., 29 March 2000, source 2001 *IHRR* 303 par 24.

[42] Committee on the Elimination of Discrimination Against Women *General Recommendation 21: Equality in Marriage and Family Relations* (1994), source 1995 *IHRR* 1 par 14, 16, 17.

[43] Ss 30, 31(2), 15.

[44] S 15(3)(b).

[45] See Albertyn, Goldblatt, Hassim, Mbatha & Meintjes *Engendering the Political Agenda: A South African Case Study* (1999) chapter 4. See also par 3.3.1.

of patriarchy can be transposed unchanged into other contexts.[46] Oyewùmí summarises the problem:[47]

> 'Perhaps the two questions that are most asked by Westerners of African women are ... "how it felt to share a husband with another woman?"... and "did spouses love one another?"... No doubt, foreigners are often obsessed with perceived curiosities they encounter in other cultures. However, the problem is that in feminist discourse, these questions are rhetorical not because they demand no answers, but because they have pre-ordained answers, such as, monogamy is the only "normal" (read "civilized," "true") form of marriage, and polygamy and love are mutually exclusive. For many Western feminists, polygamy is barbaric, it degrades and oppresses women, and it is alien to the civilized (read "Western") societies from which they come. No attention is paid to the feelings and perspectives of those who experience it as the only form of marriage, and no examination is made of its implications of social organization.'

The same assumption is often made of Muslim women, namely that they are uniquely oppressed by Islam and in need of 'rescue' by western feminist solutions.[48]

However, African and Muslim women have taken the lead in criticising certain aspects of customary law and MPL. For instance, the Rural Women's Movement concentrated relentlessly on the exclusion of women from participation in traditional customary structures. Since 1990 it has focused on the status of African women in the family and community, including issues facing women married under customary law. The Rural Women's Movement identified polygyny, the legal status of women married under customary law, access to resources by women and access to health facilities in the areas where they live as issues requiring urgent reform.[49] During constitutional talks in Kempton Park in 1993, African women united with other women to lobby against the traditional leaders' proposal to exempt customary law from the application of the equality clause in the Bill of Rights.[50] During the Law Reform Commission's investigations into Islamic marriages Muslim women participated actively both as members of the

[46] Oloko-Onyanga & Tamale '"The Personal is Political," or Why Women's Rights are Indeed Human Rights: An African Perspective on International Feminism' 1995 *HRQ* 697; Illumoka *African Women's Economic, Social and Cultural Rights Rights — Toward a Relevant Theory and Practice* in Cook (ed) *Human Rights of Women* 307 319-321. See also the discussion in par 3.2.4.

[47] Oyěwùmí *The White Woman's Burden: African Women in Western Discourse* in Oyěwùmí (ed) *African Women and Feminism* 25 31-32.

[48] Ahmed 'Western Ethnocentrism and Perceptions of the Harem' 1982 *Feminist Studies* 521 as quoted by Taiwo *Feminism and Africa: Reflections on the Poverty of Theory* in Oyěwùmí (ed) *African Women and Feminism* 45 54.

[49] See Rural Women's Movement *Demands for a New South Africa* (1992) in which rural women demanded that customary law have a legal status equal to civil law.

[50] Kaganas & Murray 'The Contest between Culture and Gender Equality under the South African Interim Constitution' 1994 *J of Law & Society* 409. See also Albertyn 'Women and the Transition to Democracy in South Africa' 1994 *Acta Juridica* 39 42-46.

committee, attendants at workshops and in submitting comments on the existing situation and the proposed reforms.

6.3.2 *The contest between rights to culture and religion and gender equality*

In absolutist terms, the debates on customary or religious law and gender equality are often framed as ones in which cultural and religious practices must invariably be abolished to achieve gender equality.[51] However, the constitutional provisions can accommodate both rights to gender equality and the practice of culture and religion. To a large extent South African scholarship has sought ways of achieving this. Sachs, for example, argued for consultation to ensure that distortions of actual customary practices were corrected and that positive aspects of the customary system were emphasised and developed.[52] Channock pointed to the erroneous assumptions underlying the association of customary law with gender inequality. He showed that in the past both civil and customary law failed African women by restricting the rights of women and children.[53] Bekker made the same point by objecting to the way in which patriarchy is often regarded as a uniquely African problem, whereas in fact it is a feature of most legal systems.[54]

This leads to an analysis of the ways in which 'official' customary law[55] failed accurately to reflect the gender relations in pre-colonial or colonial African societies. Firstly, the patriarchal bias of male anthropologists distorted their investigations into customary rules, and secondly, they tended to consult with older, powerful African men, who presented a view of customary law which limited the power and agency of African women.[56] The result of this process was that the existing patriarchal bias in customary law

[51] See Bonthuys & Erlank 'The Interaction between Civil and Customary Family Law Rules: Implications for African Women' 2004 *JSAL* 59. Channock *'Culture' and Human Rights: Orientalising, Occidentalising and Authenticity* in Mamdani (ed) *Beyond Rights Talk and Culture Talk* 15 20 notes that when subordinate groups like women challenge the *status quo*, they often rely on notions of rights and gender equality, while elites often justify the *status quo* by appealing to culture.

[52] Sachs 'Towards a Bill of Rights in a Democratic South Africa' 1990 *SAJHR* 1 18, 19.

[53] Channock 'Law, State and Culture: Thinking about "Customary Law" after Apartheid' 1991 *Acta Juridica* 52.

[54] Bekker 'The Interaction between Constitutional Reform and Family Law' 1991 *Acta Juridica* 1 4, 5; Channock *'Culture' and Human Rights* 19.

[55] Sanders 'How Customary is Customary Law?' 1987 *CILSA* 405 distinguished between 'official customary law,' which are the rules applied by customary court officials to decide cases, 'academic customary law,' and 'autonomic customary law' which constantly changes in response to altering economic, social and cultural factors.

[56] Channock 'Neither Customary, Nor Legal: African Customary Law in an Era of Family Law Reform' 1989 *Int J of Law & Fam* 72 77-81; Robinson 1995 *SAJHR* 460; Gordon 'Vernacular Law and the Future of Human Rights in Namibia' 1991 *Acta Juridica* 86.

was exaggerated by colonialism.[57] The implication of the view that 'official' customary law was not authentic, and that it does not accord with contemporary social practice, is that it can be adjusted and improved, rather than being completely discarded.

This vision of achieving gender equality within a particular cultural or religious paradigm also forms the basis of women's responses to the debate. Seizing on the important distinction between 'official' customary law and living customary law, women have started to highlight the ways in which contemporary African practices actually embody gender equality within a customary framework. Rules of customary law which disadvantage women, by for instance excluding them from becoming heirs and from receiving *lobolo* for the marriage of their daughters, have been repeatedly challenged in courts. Victories in these cases have increased the pressure on government for statutory reform.

In addition to legal challenges, African women are increasingly engaged in intra-cultural debates about the meanings, manifestations and implications of particular customs. They aim to contest and re-define cultural norms and practices and, in the process, to redress the gendered balance of power represented by the present system of customary law[58] The agency and effectiveness with which African women participate these debates is illustrated in the context of the revival of virginity testing of young girls. Testing is carried out by women who claim that it will prevent the sexual exploitation of young girls and curb the spread of HIV in a way which is consonant with indigenous African knowledge. Other community-based women's groups argue that the practice will expose young women to rape and that it reinforces sexual double standards which place the sole responsibility for controlling sexual interaction on women.[59] It is important that both proponents and opponents of virginity testing formulate their arguments in terms of gender equality and the rights of girl children to bodily integrity and privacy. The result of this intra-cultural debate is reflected in the Children's Act which allows the practice only in relation to older girls who consent and under conditions which aim at protecting young girls from sexual assault.[60]

Muslim feminists throughout the world have also attempted to maintain their adherence to their faith together with a commitment to gender equal-

[57] Nhlapo *African Customary Law in the Interim Constitution* in Liebenberg (ed) *The Constitution of South Africa from a Gender Perspective* 157 162.

[58] An-Na'Im 'Cultural Transformation and Normative Consensus on the Best Interests of the Child' 1994 *Int J of Law & Fam* 62 71; An-Na'Im *State Responsibility Under International Human Rights Law to Change Religious and Customary Laws* in Cook (ed) *Human Rights of Women* 167 173.

[59] Scorgie 'A Battle Won? The Prohibition of Virginity Testing in the Children's Bill' 2006 *Agenda* 19; Leclerc-Madlala 'Protecting girlhood? Virginity Revivals in the Era of AIDS' 2003 *Agenda* 16; Rankhotha 'Do Traditional Values Entrench Male Supremacy?' 2004 *Agenda* 80.

[60] Act 38 of 2005 s 12.

ity. They point to the opportunities to reinterpret rules of MPL in a way which would both advance gender equality, and be true to the spirit of Islam. In particular, women have been engaged in highlighting aspects and rules of their religion which empower them, appropriating traditions and customs for feminist ends and formulating gender equal interpretations of the Qur'an.[61] Nevertheless, Moghadam notes that:[62]

> 'It is, at any rate, very difficult to win theological arguments. There will always be competing interpretations of the religious texts, and the power of the social forces behind it determines the dominance of each interpretation . . . [A]lthough religious reform is salutary and necessary, it is important to acknowledge its limitations. Women's rights and human rights are best promoted and protected in an environment of secular thought and secular institutions, including a state that defends the rights of all its citizens irrespective of religious affiliation, and a civil society with strong organizations that can constitute a check on the state.'

South African Muslim feminists point out that the relative gender equality found in the true or original form of Islam has been distorted by patriarchal interpretations of the texts, by cultural factors which are not part of Islam and by women's illiteracy and inability to participate in the development of Islamic law.[63] For this reason, one of the projects of Muslim scholars who espouse gender equality is to argue for more equitable interpretations of religious texts.[64]

6.4 The public/private dichotomy in customary and religious law

Other chapters have shown how the public/private dichotomy structures two spheres of life: the public arena of work and politics in which legal intervention is encouraged, and the private realm of family life and sexuality into which the law is not supposed to intrude.[65] Equality, individualism and rationality are associated with the public sphere, while in the private sphere

[61] Moghadam 'Islamic Feminism and its Discontents: Toward a Resolution of the Debate' 2002 *Signs* 1135; Mashhour 'Islamic Law and Gender Equality: Could There be a Common Ground? A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt' 2005 *HRQ* 562.

[62] 2002 *Signs* text with note 29.

[63] Moosa 'Human Rights in Islam' 1998 *SAJHR* 508 510 citing Honarvar '"Behind the Veil": Women's Rights in Islamic Societies' 1988 *Journal of Law and Religion* 355 365; Shaheed 'The Cultural Articulation of Patriarchy: Legal Systems, Islam and Women' 1986 *South Asia Bulletin* 38; Gordan *Women of Algeria: An Essay on Change* (1968) 31; Engineer *The Rights of Women in Islam* (1992) v-vi.

[64] See for instance Goolam 'Gender Equality in Islamic Family Law: Dispelling Common Misconceptions and Misunderstandings' 2001 *Stell LR* 199; Cassim 'Understanding Women's Rights in Islam' 1999 *Codicillus* 2; Agherdien Domingo 'Marriage and Divorce: Opportunities and Challenges Facing South African Muslim Women with the Recognition of Muslim Personal Law' 2005 *Agenda Special Focus: Gender, Culture and Rights* 68.

[65] See pars 2.2.4, 4.3.8, 7.3.2 and 8.2.1.

people are supposed to act altruistically, to benefit the wider group rather than themselves.

This distinction is particularly important for religious and cultural legal systems. It is significant that all laws affecting the status of Muslim women have historically been relegated to MPL, associated with the private sphere. The implications are that discrimination against women is based on the choice to practise a particular religion, rather than the result of systems of power and disadvantage, and that the state should therefore not intervene to change these rules.[66] However, it should be remembered that for Muslims the application of MPL to their marriages is not purely an issue of personal choice, but a system of law which applies regardless of whether specific believers agree with the details or not.[67]

A similar argument in relation to customary law can be found in *Mthembu v Letsela*[68] in which a wife challenged the constitutionality of the customary rules of succession. The judge held that '[i]n view of the ... freedom granted to persons to choose this system as governing their relationships, ... I cannot accept the submission that the succession rule is necessarily in conflict with section 8'.[69] In other words, the application of customary law is seen as a matter of choice, and therefore falls within the realm of the private into which the law should not intervene. At the same time, however, the indications that the particular litigant, who lived in an urban area, did not make a choice to have the customary law of succession apply to her husband's estate were not taken into account.[70]

The best answer to the use of the public/private dichotomy to screen cultural and religious laws from the need for gender equality is probably found in the provisions of the Constitution which determine that rules of customary law and religious law can apply only insofar as they do not contravene the other provisions of the Bill of Rights.[71] In the paragraphs which follow, we will discuss issues and solutions around specific rules of customary law and MPL, especially in the private realm of family relationships.

6.5 Family law

6.5.1 *Non-recognition of marriages*

Muslim spouses are free to celebrate civil marriages in addition to their

[66] Moosa 1998 *SAJHR* 510.

[67] Moghadam 2002 *Signs* citing Moghissi 'Women, Modernity, and Political Islam' 1998 *Iran Bulletin* 42-44.

[68] 1997 2 SA 936 (T).

[69] 945J-946A. The reference is to the interim Constitution's anti-discrimination clause. See par 6.6 below for a discussion of customary and MPL rules of succession.

[70] Bonthuys 'The South African Bill of Rights and the Development of Family Law' 2002 *SALJ* 748 757.

[71] Ss 15(3)(b), 30, 31(2).

religious marriages and such civil marriages will be fully recognised. However, the consequences of MPL are not automatically incorporated into civil marriages.[72] Women can benefit from civil law rights to maintenance and property which are more generous than some interpretations allowed under Islamic law. When spouses do not also conclude civil marriages, their Muslim marriages have traditionally not received legal recognition, with detrimental consequences for wives who cannot obtain maintenance or a share of husbands' property at divorce.[73] Following the adoption of the interim Constitution, however, courts have started to recognise some effects of Muslim marriages, thus providing relief to wives.

In *Ryland v Edros*[74] the court upheld the contractual consequences of a *de facto* monogamous Muslim marriage and in so doing afforded a Muslim wife limited protection at the dissolution of the marriage. This judgment did not, however, recognise the validity of a Muslim marriage or decide on the position of polygynous marriages. In *Amod v Multilateral Motor Vehicle Accidents Fund*[75] the Supreme Court of Appeal found that the deceased Muslim husband had a legally enforceable duty to support his wife, which arose from a solemn marriage in accordance with the tenets of a recognised and accepted faith, and that it was a duty which deserved protection for the purposes of the dependant's action.[76] The court did not give general recognition to Muslim marriages and specifically limited its judgment to monogamous marriages.[77] In *Daniels v Campbell* the constitutionality of certain sections of the Intestate Succession Act[78] and the Maintenance of Surviving Spouses Act,[79] which failed to include spouses married in terms of MPL, was at issue. Although the High Court[80] held that a wife in Muslim law could not be regarded as a spouse in terms of this legislation, it also found this exclusion to be unconstitutional and discriminatory. When the case was referred for confirmation of the order, the Constitutional Court[81] held that the word spouse in the statutes should be interpreted widely to include people married according to MPL.[82] However, the effect of this judgment

[72] Couples can effect the same consequences by concluding antenuptial contracts to regulate the proprietary consequences of marriage and settlement agreements at divorce. The grounds of divorce are, however, determined by civil law.

[73] *Ismail v Ismail supra.*

[74] *Supra.*

[75] *Supra* (SCA) pars 20, 23.

[76] Pars 26, 30.

[77] Pars 24, 27.

[78] 81 of 1987.

[79] 27 of 1990.

[80] *Supra.*

[81] *Supra.*

[82] Pars 19-22.

was expressly limited so that it cannot be argued that Muslim wives are now entitled to all benefits conferred on spouses in terms of other statutes.[83] What these cases have in common is that, while they give effect to certain incidences of Muslim marriages, the courts are unwilling to grasp the nettle of simply declaring Muslim marriages valid for all purposes and limit their judgments to monogamous Muslim marriages.[84] This has been criticised for excluding women in polygynous marriages who may be in great need of legal assistance and for perpetuating the common law bias in favour of monogamous, nuclear families.[85]

The main reason for the courts' position is the view that complex issues around the recognition of Muslim marriages should be resolved by the legislature following the Law Reform Commission's *Report on Islamic Marriages and Related Matters*. The draft legislation by the Commission envisages the recognition of both monogamous and polygynous Muslim marriages under certain conditions. Existing Muslim marriages will automatically be recognised, but spouses may opt out of recognition. Muslim marriages concluded after the commencement of the Act will not be recognised unless the spouses opt into recognition. Muslim spouses in existing civil marriages can incorporate the provisions of the Act into their marriage by opting into the Act, but civil marriages concluded after the commencement of the Act cannot be rendered subject to the Act.[86] Marriages to which the Act does not apply will be governed 'by the law as it was before the Act came into operation'.[87] Apart from the confusion likely to be caused by this complicated arrangement, the fact that many people will remain ignorant of the legal provisions obliging them to opt into the provisions of the Act, will mean that many future Muslim marriages may remain outside the ambit of the Act and will continue to suffer the consequences of non-recognition by the civil law. This will be especially detrimental to Muslim wives.[88] They may also be detrimentally affected by the rule that, after commencement of the Act, spouses in Muslim marriages may not apply the consequences of a civil marriage to their union.[89]

[83] Pars 26, 27.

[84] *Khan v Khan supra* extended the recognition to polygynous marriages, but this judgment needs to be confirmed by a higher court.

[85] Goldblatt 'Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening) 1999 4 SA 1319 (SCA)' 2000 *SAJHR* 138; Clark 'Dependant's Action for Loss of Support: Are Women Married by Islamic Rites Victims of Unfair Discrimination?' 1999 *SALJ* 20.

[86] Law Reform Commission *Report on Islamic Marriages and Related Matters* Draft Muslim Marriages Act clause 2.

[87] Clause 2(3).

[88] Sinclair & Bonthuys 'Law of Persons and Family Law' 2003 *Annual Survey of South African Law* 144 156; Agherdien Domingo 2005 *Agenda* 75.

[89] Clause 5(2).

This latter provision differs from that applicable to customary marriages, where spouses in a monogamous customary marriage may change their marital regime from customary law to civil law at any time. However, people married in terms of civil law may not thereafter marry in customary law.[90] Academic authors argue that the provisions which allow a customary marriage to be converted into a civil law marriage, but disallow the opposite change is an indication that customary marriages are still regarded as inferior in status to civil law marriages.[91] Interviews conducted by Likhapha Mbatha indicate that this view is shared by African people and that many people have a negative attitude towards the legal status of customary marriages.[92]

Questions arise about the validity of customary marriages, which were concluded after civil marriages, before the date of commencement of the Act. Because a civil marriage does not allow any other form of marriage either to precede or to follow it, existing customary marriages are nullified by a civil marriage,[93] while subsequent customary marriages were void *ab initio*,[94] except in the former Transkei.[95] The position under the Recognition of Customary Marriages Act is not clear. Two diametrically opposed views exist on the effect of the provisions of the Recognition of Customary Marriages Act on the status of customary marriages that had previously been nullified by co-existence with civil marriages, with one view supporting the revival of these marriages and the other not.

The supporters of revival focus on the negative impact on customary wives arising from the failure to recognise their marriages.[96] Customary wives are penalised, despite their ignorance of the existence of a civil law marriage and their inability to prevent their husbands from concluding civil

[90] Recognition of Customary Marriages Act s 10(1), 10(4).

[91] Bonthuys & Pieterse 'Still Unclear: The Validity of Certain Customary Marriages' 2000 *THRHR* 616 619; Sinclair & Heaton *The Law of Marriage* 225 note 54. Another indication of the inferior status of customary marriages can be found in the first version of the Civil Union Bill 26 of 2006 which did not allow unregistered domestic partnerships to co-exist with civil marriages, or even registered domestic partnerships. They were, however, allowed to co-exist with customary marriages. See clause 38(4). The provisions in respect of domestic partnerships and same-sex civil partnerships were less clear, since the Bill simply determined that they may not co-exist with 'marriages.' The latter term was, however, not defined. The final version of the Bill does not, however contain provisions about domestic partnerships. See B26B of 2006 as passed on 28 November 2006.

[92] Reasons include the perception that civil marriages carry greater legal status, the greater economic benefits available to wives from civil marriages and the association of civil marriages with monogamy. See Mbatha *The Content and Implementation of the Recognition of Customary Marriages Act 120, 1998: A Social and Legal Analysis* chapter 5; Fishbayn, Goldblatt & Mbatha *The Harmonisation of Customary Law and Civil Law Marriage in South Africa* Paper delivered at the 9th World Conference of the International Society of Family Law, Durban, 28-31 July, 1997. See also par 6.5.3 below.

[93] *Nkambula v Linda* 1951 1 SA 377 (A).

[94] Black Administration Act s 22 prohibits parties to customary marriages from entering into civil marriages with third parties during the subsistence of their customary marriage. Dlamini *Family Law* in Bekker, Labuschagne & Voster (eds) *Introduction to Legal Pluralism in South Africa* 37 37–9 shows that the status of civil marriages entered into in contravention of s 22 is not clear.

[95] See the provisions of the Transkei Marriage Act 21 of 1978.

[96] Workshop for magistrates by the Women's Legal Centre in Port Elizabeth in June 2002.

law marriages. They argue that the current legal position should be informed by the purpose of the Recognition of Customary Marriages Act, namely, to correct past injustices due to the failure to recognise African marriages. On the other hand, opponents of reviving these marriages argue that if the legislature had intended to revive such customary marriages, it would have clearly stated so.[97] Ultimately the issue must be decided by the courts. We would argue in favour of revival, but the proprietary consequences of these marriages may yet provide a stumbling block.[98]

6.5.2 *Lobolo*

One issue, which does not arise in Muslim marriages, is the payment of *lobolo* in customary marriages. For customary marriages concluded before the commencement of the Recognition of Customary Marriages Act, *lobolo* forms the main ingredient. For those that follow the commencement date, s 3 merely determines that 'the marriage must be negotiated and entered into or celebrated in accordance with customary law'. Because *lobolo* is not listed as a requirement of a customary marriage, it could be included or excluded when discussing and negotiating customary marriages under s 3.[99] However, empirical research shows that community members and government officers tasked with the registration of customary marriages continue to regard the payment of *lobolo* as integral to determining the existence of a customary marriage under the Recognition of Customary Marriages Act. In fact, community members agree that *lobolo* is what distinguishes a customary marriage from an informal cohabitation relationship. In civil marriages where one of the parties is African, *lobolo* is often agreed upon, even where the spouses themselves indicated that they were not interested in giving *lobolo* on marriage. [100]

The fact that *lobolo* is not a statutory requirement for a valid customary marriage has been criticised by African people.[101] However research also indicates that many African women favour civil marriages for which *lobolo* is given over customary marriages, especially because civil marriages are monogamous. One respondent said:

[97] View shared by some of the magistrates who participated in the workshops convened to discuss the Bench Book on the Recognition of Customary Marriages Act held at Rose Lodge (Gauteng) in 2004. For more information see Maithufi 'Do we have a New Type of Voidable Marriage?' 1992 *THRHR* 628–630.

[98] See the discussion in par 6.5.6 below.

[99] Mofokeng 'The *Lobolo* Agreement as the "Silent" Prerequisite for the Validity of a Customary Marriage in Terms of the Recognition of Customary Marriages Act' 2005 *THRHR* 277 argues that the payment of *lobolo* constitutes a 'tacit' requirement for a customary marriage.

[100] Mbatha *The Content and Implementation of the Recognition of Customary Marriages Act* chapter 5.

[101] See the responses of radio listeners interviewed by Mbatha *The Content and Implementation of the Recognition of Customary Marriages Act* chapter 5.

'If your husband can still give *lobolo/bohadi* to your parents/guardians why marry under custom? Why give your husband ideas of marrying another wife?'[102]

Despite the prevalence of *lobolo* in African marriages, the institution is not entirely uncontested from a gender perspective. Certain explanations link the payment of *lobolo* to the good treatment of wives by their husbands and families-in-law and to protecting wives from abandonment by husbands (who would have to return the *lobolo* if they ended the marriage without good reason).[103] Others explain that *lobolo* used to be received as a right by the father of the bride who would divide it into portions, one of which was set aside to look after the interests of his daughter and her minor children if the marriage failed.[104] Many of the 600 rural women interviewed by Shope 'cling to *lobolo* for the respect and dignity it confers and for the relational bonds of interdependence it cultivates amongst families'.[105] However, these considerations are counterbalanced by arguments that practices around *lobolo* could be detrimental to women.

In the first place, according to official customary rules, *lobolo* is negotiated and received by male family members, with mothers of brides receiving only a portion of the *lobolo*. It can therefore be argued that 'the process of marriage is between men' and excludes women.[106] Second, it is alleged that the fear of having to return the *lobolo* to her husband could contribute to a woman's family discouraging her from leaving an unsatisfactory and possibly even violent marriage.[107] Fishbayn *et al* argue that[108]

> '*Lobola* no longer provides a safety net for those fleeing bad marriage but may be a straightjacket holding them in. This is so even though successful demands for repayment of *lobola* is rare. While subjects of research could not identify a single case in which it had been repaid, they suggested that the possibility of having to pay still played a powerful role in shaping responses to marriage breakdown.'

Moreover, practices around *lobolo* have changed. It is now often paid by the groom rather than his family and in cash rather than by cattle. *Lobolo* 'inflation' has meant that it has changed from a token of appreciation to an

[102] Mbatha *The Content and Implementation of the Recognition of Customary Marriages Act* chapter 5.

[103] Bennett *Customary Law in South Africa* 221-222.

[104] Murray *Families Divided: The Impact of Migrant Labour in Lesotho* (1982).

[105] Shope '"*Lobola* is Here to Stay": Rural Black Women and the Contradictory Meanings of *Lobolo* in Post-Apartheid South Africa' 2006 *Agenda* 64 66.

[106] Women and Law in Southern Africa Research Trust (WLSA) *Lobola: Its Implications for Women's Reproductive Rights* (2002) 21.

[107] Curran & Bonthuys 'Customary Law and Domestic Violence in Rural South African Communities' 2005 *SAJHR* 607 616-617, quoting the unreported case of *S v Mvamu* in which the High Court held that a man's belief in the continued existence of a customary marriage where no *lobolo* had been returned, could justify departing from the mandatory minimum sentence for rape in respect of his ex-wife. This was overturned in *S v Mvamu* 2005 1 SACR 54 (SCA).

[108] *The Harmonisation of Customary Law and Civil Law Marriage*; WLSA *Lobola* 23.

expensive and unaffordable practice.[109] In a situation where *lobolo* is now largely paid in money, the likelihood of the *lobolo* being kept aside to protect women and children at divorce is small in indigent families. However, the same fact means that a husband is unlikely to sue for the return of *lobolo* if a wife leaves the marriage without sufficient justification, since he would not be successful.[110] Men who paid large amounts of cash as *lobolo* without family assistance may use arguments that they have 'bought' their wives to justify demands for wifely obedience or even domestic violence.[111] Decreased family involvement in the payment of *lobolo* may also limit the ability and willingness of the husband's family to intervene in the marriage and to stop domestic violence.[112]

However, claims of increased vulnerability because of the payment of *lobolo* have not always been substantiated by research. Research conducted by the Gender Research Project of the Centre for Applied Legal Studies found that most of the men in their sample who had committed domestic violence, had not transferred *lobolo*. The GRP concluded from this finding that there was no necessary correlation between domestic violence and *lobolo*. The same study failed to find any instances where *lobolo* was claimed back in its 180 interviews and twelve discussion groups.[113]

The wide acceptance of *lobolo* in African communities means that abolition is not a realistic or viable state response, but that judicial and community development of the practice may be more effective in advancing gender equality. An example of judicial reform can be found in *Mabena v Letsoalo*[114] where *lobolo* was not paid to a father, who had long abandoned his wife and children, but to the mother who raised the daughter by herself. Although this did not accord with official rules of customary law, the court held that developing the customary law to allow the mother of the bride to receive *lobolo* was in accordance with actual customary practices and with the spirit and objectives of the Bill of Rights.[115] One could also argue that, given the insistence in s 6 of the Recognition of Customary Marriages Act that customary wives are equal to their husbands, wives should not only take part in *lobolo* negotiations, but should receive an equal share of the *lobolo* upon the marriage of their daughters.

The issue of *lobolo* is linked to the problem of proving the existence of customary marriages. This, in turn, relates to the ability of a customary wife

[109] Bennett *Customary Law in South Africa* 223, 225, 228, 230, 234.
[110] South African Law Commission *Report on Customary Marriages* par 7.1.3.
[111] Bennett *Customary Law in South Africa* 235, 250; Shope 2006 *Agenda* 69.
[112] Curran & Bonthuys 2005 *SAJHR* 617.
[113] Mbatha *The Content and Implementation of the Recognition of Customary Marriages Act* chapter 3 par 3.5.2.
[114] 1998 2 SA 1068 (T).
[115] 10674H-I, 1075B.

to access the benefits of marriage upon dissolution. It is clear that in many situations where wives claim maintenance, custody or inheritance rights, husbands and their families strategically deny the existence of customary marriages.[116] Before the commencement of the Recognition of Customary Marriages Act it was not certain which requirements were necessary to constitute a customary marriage, nor was it clear whether *lobolo* merely had to be agreed upon, or whether some or all of the *lobolo* had to be paid in order for a customary marriage to exist.[117] The possibility of registration under the Act may make it easier to prove the existence of customary marriages, but it does not mean that all marriages will necessarily be registered. Evidence indicates that 60 000 customary marriages were registered from November 2000 to July 2003.[118] However, registration is hampered by problems like a lack of sufficiently trained officials, practices by officials which contradict the Act, insufficient knowledge about registration requirements by users and officials and the long and tedious process of registration.[119] In addition, the Act does not clearly stipulate whether the payment of *lobolo* is necessary for a valid customary marriage, leaving the situation unclear.

6.5.3 *Polygyny*

Despite its prominence as a reason for denying legal recognition to Muslim and customary marriages, the practice of polygyny is actually rare in contemporary South Africa. The 2001 census indicates that out of a population of more than 30 million people over the age of 15, only 26 651 Africans, 1 444 coloured and 484 Indian or Asian people were involved in polygynous marriages.[120] This translates to 0.1 percent of the population over the age of 15.

Muslim men are allowed, according to MPL, to have up to four wives on condition that the wives receive equal treatment, both materially and otherwise.[121] Customary law places no limit on the number of wives which a man can have and also obliges a man to treat all wives equally in terms of material and emotional needs.

The reasons generally given for the legal antipathy towards polygyny are firstly, that it does not accord with the Judaeo-Christian ideal of monogamy

[116] See for instance *Mthembu v Letsela supra* and *Mabuza v Mbatha* 2003 4 SA 218 (C).

[117] De Koker 'Proving the Existence of a Customary Marriage' 2001 *JSAL* 257.

[118] Telephone interview by Likhapha Mbatha with Ms Mostert Department of Home Affairs, 5 July 2003.

[119] Mbatha *The Content and Implementation of the Recognition of Customary Marriages Act* chapter 5.

[120] Statistics South Africa *2001 Census Primary Tables* accessed on 26 May 2006 at www.statssa.gov.za/census01/html/C2001PrimTablesasp tables 6.3 and 6.4. An interesting fact is that 1 188 white people also live in polygynous marriages.

[121] Cassim 1999 *Codicillus* 3.

and secondly, that it embodies gender inequality and the oppression of women.[122] We will deal only with the second contention. Both in relation to customary law and MPL it is argued that polygyny originally arose to provide materially and socially for women who would otherwise be destitute.[123] In addition, studies indicate that women may experience some benefits from polygyny, such as sharing the burden of work with other wives and so obtaining opportunities to work outside the home and to accumulate wealth.[124] On the other hand, the social and economic conditions which made polygyny a beneficial option for women no longer exist. Nowadays marriage is no longer women's sole avenue to obtain material resources, while unemployment and poverty make it difficult for men to support several wives.

It can also be argued that polygyny provides men with access to the sexual, reproductive and other services of several women, while wives in polygynous marriages have to share the material and emotional benefits provided by a single man. The counter-argument is that this 'depends on the value placed on husbands'.[125] Sharing the demands of a husband with other women may prove to be a benefit to wives in polygynous marriages. One solution would be to allow wives to marry several husbands, thus treating women the same as men.[126] However, this solution is based on a formal notion of equality and in a patriarchal society it may, in fact, expose women to greater oppression, rather than empowering them.[127] It is also not likely to be accepted in either customary or Muslim communities.

Empirical research on polygyny in customary law[128] points to the fact that while men are generally in favour of retaining the institution of polygyny, women are not. Women argue that recognition of these marriages would entice men to enter into polygyny and they therefore prefer to enter into civil rather than customary marriages.[129] Interviews with wives in polygynous marriages indicate that they did not wish their children to be party to polygyny as it forced women into endless strife over a man and his resources. Younger wives claimed they were ill-treated and abused by their senior co-wives, and were expected to discharge domestic chores, while older wives

[122] Kaganas & Murray 'Law, Women and the Family: The Question of Polygyny in a new South Africa' 1991 *Acta Juridica* 116 119, 124; Dlamini 'Should We Legalise or Abolish Polygamy?' 1989 *CILSA* 330.

[123] Dlamini 'The Role of Customary Law in Meeting Social Needs' 1991 *Acta Juridica* 71 77; Cassim 1999 *Codicillus* 3.

[124] Kaganas & Murray 1991 *Acta Juridica* 130.

[125] Ware 'Polygyny: Women's Views in a Transitional Society, Nigeria 1975' 1979 *J of Marriage & the Fam* 194 as quoted by Kaganas & Murray 1991 *Acta Juridica* 128.

[126] See Banda *Between a Rock and a Hard Place: Courts and Customary Law in Zimbabwe* in Bainham (ed) *International Survey of Family Law 2002* 471 478.

[127] Kaganas & Murray 1991 *Acta Juridica* 127.

[128] Mbatha *The Content and Implementation of the Recognition of Customary Marriages Act* chapter 5.

[129] See the discussion in par 6.5.1 above.

condemned their young co-wives for appropriating their husbands and for being more interested in the financial benefits of the marriage than in the husbands. Senior wives wanted the law to oblige their husbands to treat all wives equally and they wanted their consent to be necessary for subsequent marriages by their husbands.[130]

While the gender implications of polygyny are a matter for debate, it is clear that non-recognition of polygynous marriages disadvantages those women who are involved in such marriages. By not recognising their marriages, the legal system prevents them from accessing the material benefits controlled by their husbands, in effect punishing the women for choices made by their husbands over which they had little control. Kaganas and Murray observe that:[131]

> 'A legal system can never prevent people from establishing family relations outside its ambit and women who are positioned in oppressive structures are often the least able to resist the demands of tradition. To say that a woman who has grown up in a patriarchal cultural setting and who has no obvious alternatives should defy the community and resist polygyny because this is required by law is unrealistic.'

It is for this reason that the Recognition of Customary Marriages Act gives full legal effect to existing and future polygynous marriages. The retention of polygyny can be said to be contrary to the provisions of international instruments on this issue,[132] but the effects of non-recognition would have deprived those women involved in polygynous marriages of substantial gender equality. Nevertheless, the concerns expressed by wives in polygynous marriages have not been adequately addressed by the Act.

The Recognition of Customary Marriages Act contains no provision for the equal treatment of wives in polygynous marriages. As far as the existing wives' consent to further marriages is concerned, the Act requires only the consent of the parties to the marriage.[133] Although this provision could be interpreted to include the consent of existing wives, this is unlikely. The existing position means that a second wife has a choice of whether or not to enter into a polygynous marriage, while the first wife has no such choice, unless she is prepared to divorce her husband.[134] The first wife is therefore not treated on an equal footing with the second wife and the husband, both of whom can choose whether or not to be parties to a polygynous marriage.

[130] Study by the Centre for Applied Legal Studies quoted in Mbatha *The Content and Implementation of the Recognition of Customary Marriages Act* chapter 4.

[131] Kaganas & Murray 1991 *Acta Juridica* 133.

[132] See the discussion in par 6.3.1 above.

[133] S 3(1)(a)(ii) requires that prospective spouses 'must both consent to be married to each other in accordance with customary law'.

[134] See also Bronstein 'Confronting Custom in the New South African State: An Analysis of the Recognition of Customary Marriages Act 120 of 1998' 2000 *SAJHR* 558 558–575, where s 3 of the RCMA is criticised for being vague.

Section 7(6) indirectly protects the property interests of existing wives by requiring that a husband who wishes to enter into a further marriage must apply for a court's endorsement of a written contract regulating the proprietary consequences of his marriages. This provision has the potential to discourage further polygynous marriages, or at least to encourage men to obtain the permission of existing wives. However, it remains to be seen whether it will be applied in practice.

As far as Muslim marriages are concerned, a woman can include a stipulation in the marriage contract to the effect that the husband will not take further wives. If he does marry another wife in contravention of this contract, the existing wife may divorce him.[135]

The provisions dealing with polygyny in the proposed new Muslim Marriages Act have raised criticism, especially from men. While both activists and lawyers have called for a ban on the taking of further wives, this was vehemently opposed by clergy, many Muslim men and some Muslim women. The compromise is contained in s 8 of the proposed draft Bill. It requires a court to approve an application by a husband to take another wife. Approval will be given only if the husband can satisfy the court that he will be able to treat his wives equally, as required by the Holy *Qur'an*, and that the financial consequences of all marriages have been satisfactorily arranged.[136] An existing spouse must be given notice of the intention to take a further wife.[137] This would prevent the current situation where existing spouses are often unaware of second marriages until after their conclusion. Failure to obtain the consent of court would render a husband liable to a fine of up to R20 000.[138] According to the draft Bill, the wife in a polygynous Muslim marriage can insist on equal treatment between wives and failure to do so provides a wife with grounds for divorce.[139] It remains to be seen whether these provisions constitute sufficient legal redress for a wife who wants to remain married, but does not want to be part of a polygynous marriage. However, the inclusion of this provision in the legislation would place Muslim wives in a better position than wives in polygynous customary marriages.

6.5.4 *Women's status as wives and husbands as heads of families*

Both the Recognition of Customary Marriages Act and the proposed Muslim Marriages Act contain provisions which determine that wives have full legal status and capacity and that they may independently acquire and own

[135] Goolam 2001 *Stell LR* 201; Agherdien Domingo 2005 *Agenda* 74.
[136] Clause 8(7).
[137] Clause 8(8).
[138] Clause 8(11).
[139] See the grounds upon which a *faksh* can be obtained by the wife in clause 1(x)(h).

assets and litigate.[140] There are slight differences in wording, though. A wife in a customary marriage has these capacities 'on the basis of equality with her husband, and subject to the matrimonial property system governing the marriage', while the Muslim wife and husband are 'equal in human dignity and both have, on the basis of equality', full capacity.

MPL has always allowed Muslim wives full capacity to own and acquire assets separately from their husbands.[141] The concept of the marital power or the limitation of women's capacity to act in the public sphere is therefore foreign to MPL. This is merely confirmed by the proposed legislative provision. According to 'official' customary law, however, women were regarded as perpetual minors, lacking in capacity to deal even with the assets which they themselves amassed through working outside the home.[142] This position was retained long after the abolition of the marital power in the common law.[143] The equality provision therefore represents a significant advance towards gender equality in customary marriages.

A potential problem, however, is that women's equal status is dependent on their matrimonial property regime. Unless spouses conclude antenuptial contracts, marriages concluded before the commencement of the Act continue to be governed by the system whereby everything that women earn is effectively owned and controlled by their husbands. In such a matrimonial property regime full status and capacity make little difference to the concrete economic disadvantage suffered by wives.[144] Another problem relates to women's knowledge of, and ability to enforce, legal provisions which grant them full status and equality. In a study of customary wives in KwaZulu-Natal, Mamashela shows that many wives were unaware of the change to their status brought about by s 6 of the Act and that, because their husbands' main form of property was wages, wives were unable to access a share of this property.[145]

6.5.5 *Divorce — grounds of divorce*

According to MPL there are various ways to end a marriage. The first is by way of *talaq* which is a unilateral renunciation of the marriage by the husband. Ideally a *talaq* should be followed by a waiting period of three months (the *iddah*), during which the parties can reconcile. However, in practice

[140] Recognition of Customary Marriages Act s 6; Draft Muslim Marriages Bill clause 3.

[141] Badat *Matrimonial Property* in Rautenbach & Goolam (eds) *Introduction to Legal Pluralism in South Africa* 63. See par 6.5.6 below on the matrimonial property systems.

[142] Black Administration Act s 11(3)(b).

[143] See for instance *Prior v Battle* 1999 2 SA 850 (Tk) which abolished the marital power for civil marriages in the former Transkei, but retained it for customary marriages.

[144] Bronstein 2000 *SAJHR* 563.

[145] Mamashela 'New Families, New Property, New Laws: The Practical Effects of the Recognition of Customary Marriages Act' 2004 *SAJHR* 616.

husbands sometimes issue the 'triple *talaq*' which effects an instant divorce without a waiting period. Although this may be frowned upon, it is practised by certain religious authorities, who sometimes even grant divorces without consulting with wives.[146] A husband may delegate the ability to issue a *talaq* to his wife (*talaq al-tafwid* or delegated divorce), usually in the antenuptial contract, but also at any other time during the marriage. The wife may then unilaterally end the marriage. A further method of divorce is by way of agreement, termed *khula*. The third method is by way of a judicial divorce, called a *faskh*, which can be sought either by a husband or a wife, but which is mostly used by wives. Unlike divorce by way of *talaq*, divorce by way of *faskh* is not available except on limited grounds.[147] Generally therefore, women need the co-operation of their husbands to divorce, unless they use the *faskh*, which is not freely available. Practices which enable wives to issue a *talaq* are not widely known or used.[148]

The disparity between the abilities of wives and husbands to end marriages has been criticised by gender activists and the Draft Muslim Marriages Bill embodies an attempt to expand the grounds on which women can obtain divorces while also rendering the divorce by way of *talaq* or *khula* subject to the judicial process. In the first place, extensive grounds for the issue of a *faskh* have been set out in the Draft Bill, including a provision which would allow a wife to obtain a divorce in situations:[149]

> 'where discord between the spouses has undermined the objects of marriage, including the foundational values of mutual love, affection, companionship and understanding, with the result that dissolution is an option in the circumstances (*Shiqâq*)'.

This section is wide enough to allow a wife to terminate a marriage on the basis of what is legally known as an irretrievable breakdown of marriage and was criticised by Islamic clergy for 'westernising' the Islamic basis for dissolution of marriage. However, given the fact that husbands may issue a *talaq* without providing good reason, supplying wives with a similar ability is necessary. The possibility of a husband unilaterally ending the marriage without his wife's knowledge has been foreclosed by the provisions requiring that a *talaq* must be registered in the presence of both spouses or their representatives and that it must be confirmed by a court order.[150]

A different issue relates to the mandatory waiting period of approximately three months, which must expire before a divorced Muslim wife can remarry (*iddah*). The *iddah* is said to have two aims. Firstly, it gives time to establish

[146] Agherdien Domingo 2005 *Agenda* 71.
[147] Moosa *Forms of Divorce* in Rautenbach & Goolam (eds) *Introduction to Legal Pluralism in South Africa* 67 70-71.
[148] Agherdien Domingo 2005 *Agenda* 74.
[149] Clause 1(x)(j).
[150] Clause 9(3).

whether the wife is pregnant with the husband's child. Secondly, it gives the parties an opportunity to reflect and reconcile with one another.[151] No similar waiting period is imposed on divorced husbands. This dissimilarity in the positions of husbands and wives caused expressions of concern during the Law Reform Commission's investigation into Muslim marriages. It was argued that the efficacy of modern methods of determining paternity rendered the *iddah* unnecessary. However, the Project Committee decided to retain the *iddah* to effect reconciliation between the spouses.[152] The submission by the Women's Legal Centre and the Gender Unit of the Black Lawyers' Association that, if the *iddah* is to be retained for the purposes of reconciliation it should apply to both spouses,[153] was therefore not adopted.

Unlike the Draft Muslim Marriages Bill, which aims to retain a reformed yet distinctively Muslim law of divorce, the Recognition of Customary Marriages Act has dispensed with customary grounds for divorce. It determines that a court must issue a decree of divorce on the grounds of irretrievable breakdown of the marriage.[154] The concept of irretrievable breakdown can include,[155] but also extends beyond, customary grounds of divorce. This has the benefit of equalising the grounds of divorce for women and men, since in official customary law men have wider latitude to dissolve their marriages than women.[156] Basing divorce on irretrievable breakdown therefore serves the twin purposes of accommodating customary bases for divorce and pursuing gender equality. The interesting question, yet to be decided, is whether a man's insistence on taking a second or third wife against the wishes of an existing wife would constitute irretrievable breakdown of the marriage.[157]

Before the adoption of the Recognition of Customary Marriages Act, divorce occurred by way of negotiated agreement between the families of the spouses and courts were involved only when families could not agree on the return of *lobolo* and custody issues under customary law.[158] The South African Law Reform Commission indicated that the failure of courts to become involved in customary divorce operated to the detriment of women and children by leaving decisions about custody, maintenance and

[151] Moosa *Forms of Divorce* 68.
[152] Draft Muslim Marriages Bill clause 1(xi).
[153] South African Law Reform Commission *Report on Islamic Marriages* par 3.25, 3.26.
[154] S 8(1), 8(2).
[155] Dlamini *Family Law* 47.
[156] Bennett *Customary Law in South Africa* 269.
[157] Mbatha *The Content and Implementation of the Recognition of Customary Marriages Act* chapter 5 found that African women argued that attempts to enter into polygyny against the wishes of his wife is an indication that the marriage has irretrievably broken down.
[158] Olivier, Bekker & Olivier *Indigenous Law* (1995) 58-59. Bennett *Human Rights and African Customary Law* 124 is also of the view that customary marriages were not dissolvable by courts. He refers to *Saulos v Sebeko & Another* 1947 NAC (N&T) 25 and *Duba v Nkosi* 1948 NAC 7 (NE).

the division of matrimonial property up to an agreement between the husband and the father of the bride. A father facing the loss of *lobolo* upon the divorce of his daughter may not be supportive of her wish to leave an unsatisfactory marriage.[159]

The Act is therefore clear in stipulating that a decree of divorce will be issued only by a High Court or a Family Court.[160] It does not specifically empower a court to make an order regarding the return of the *lobolo*, instead it preserves the powers of traditional leaders to mediate 'any dispute or matter arising prior to the dissolution of a customary marriage by a court'.[161] It seems, therefore that families are expected to agree on issues of *lobolo* before the divorce is brought before courts.

The Draft Muslim Marriages Bill and the Recognition of Customary Marriages Act present two different solutions to the problem of accommodating religious or cultural divorces in the civil law system. The Draft Muslim Marriages Bill, although giving the civil courts some power over divorce, aims to keep the religious grounds of divorce relatively intact, with some changes to achieve greater gender equality. The Recognition of Customary Marriages Act, on the other hand, attempts to incorporate customary grounds of divorce into the wider civil law concept of irretrievable breakdown. In both cases jurisdiction over divorce is transferred to courts, which must protect the interests of wives and children.

Research on attitudes towards the Recognition of Customary Marriages Act shows that people believe that irretrievable breakdown as a ground for divorce accurately reflects customary law. Community members were also excited and empowered by the fact that customary marriages must now be terminated in the courts of law. This, in their view, would put an end to the complaints of bias often levelled against family councils in dealing with divorce matters.[162] Whether courts will be more able than family councils to ensure gender equity in the distribution of assets remains to be seen, especially in the light of the fact that the return of *lobolo* remains an issue to be resolved between families. Himonga makes the counterargument that the Act has made such radical changes to customary marriages that communities will be alienated under the implementation of the Act, thereby limiting the benefits to customary wives.[163]

One of the consequences of transferring jurisdiction over divorce to the courts, and giving more extensive rights to wives, is that men who face

[159] *Report on Customary Marriages* par 7.1.10, 7.1.12.
[160] S 8(1).
[161] S 8(5).
[162] Mbatha *The Content and Implementation of the Recognition of Customary Marriages Act* chapter 5.
[163] Himonga *The Advancement of African Women's Rights in the First Decade of Democracy in South Africa: The Reform of the Customary Law of Marriage and Succession* in Murray & O'Sullivan (eds) *Advancing Women's Rights* 82 91.

divorce actions are more likely to dispute the existence of the marriages. This happened in *Mabuza v Mbatha*[164] where the husband alleged that the marriage did not comply with the Swazi custom of *ukumekeza*. This not only gives courts opportunities to make rulings on the validity of customary marriages, but also to develop customary law to reflect current customary practices and to comply with the requirements of gender equality. Whether a similar development of MPL is likely to happen through the courts is difficult to predict. On the one hand, courts cannot effectively change religious law on behalf of religious communities. On the other hand, the proposal in the Draft Bill that disputes about MPL should be heard by Muslim judges and with the assistance of Muslim assessors[165] may well add to the persuasive value of judgments in Muslim communities. Whether these judges and assessors will further the aim of gender equality, remains to be seen.

6.5.6 *Divorce — division of assets and maintenance*

The approaches to regulating the matrimonial property regimes for Muslim and customary marriages are also different. Originally, both systems were based on some form of exclusion of community of profit, with official customary law even denying the wife ownership of assets which she had amassed with her own earnings.[166] In official customary law the husband controlled all assets, but the concept of the marital power is foreign to MPL.[167]

The proposed Draft Bill on Muslim Marriages envisages a residual matrimonial property regime of separate estates without sharing of profits or losses unless an antenuptial contract is concluded.[168] By way of contrast, the Recognition of Customary Marriages Act determines that for monogamous marriages concluded after the commencement of the Act, the residual property regime is community of property.[169] However, marriages which existed before the commencement of the Act 'continue to be governed by customary law'[170] unless the spouses have applied for a change of their matrimonial property regime.[171]

[164] *Supra.*
[165] S 15.
[166] This is probably not a correct reflection of past customary practices and it does not reflect contemporary reality when women earn their own money.
[167] See generally Badat *Matrimonial Property.*
[168] Clause 8(1).
[169] S 7(2).
[170] S 7(1).
[171] According to s 7(4).

One of the main causes of women's poverty after the dissolution of their marriages is the fact that they have limited rights to share in the assets amassed by their husbands. Because of their responsibilities as bearers and nurturers of children and their lack of occupational training, many women have a limited ability to earn money outside the home and so to amass property. It is therefore generally agreed that they should be compensated for this work and for the loss to their earning power by obtaining a share of their husband's assets.[172] It is for this reason that s 8 of the Draft Muslim Marriages Bill has been severely criticised. However, the Law Reform Commission considered a regime of community of property to be in conflict with the provisions of substantive Islamic law. Women who do work and earn money and women who conclude antenuptial contracts as a result of legal advice will be less disadvantaged by the provision in the proposed Muslim Marriages Draft Bill than less educated and poorer women. In order to accommodate some of the needs of women, the Draft Bill does contain extensive redistribution powers upon dissolution of marriages.

Similar considerations of economic equality during and after marriage underlie the criticisms of the provision of the Recognition of Customary Marriages Act which relegate women married before the commencement of the Act to a system which allows husbands to control all assets without giving women a right to share in the assets accumulated by husbands.[173] It should be argued that the 'customary law' referred to is subject to constitutional development and interpretation in line with the right to gender equality and with actual customary practices. A further concern is that, although customary wives should share in the property amassed during their marriage, family property owned or controlled by a husband on behalf of family members should be excluded from community of property. This is necessary to protect the interests of family members who depend on family property inherited by the heir and which would otherwise fall into the communal estate.[174] Mamashela raises an important question about the extent to which the provisions of the Act will be applied to customary marriages by showing that very often customary husbands do not divorce their wives, but simply desert them to take another wife or girlfriend. Women then bear the burden of instituting divorce proceedings in the High Court. This is not only prohibitively expensive for rural women, but the chances of obtaining any prop-

[172] Bonthuys 'Labours of Love: Child Custody and the Division of Matrimonial Property at Divorce' 2001 *THRHR* 192 193-196. See also the discussion in par 7.4.3 on maintenance.

[173] Bronstein 2000 *SAJHR* 563-570. S 7(1) determines: '[t]he proprietary consequences of a customary marriage entered into before the commencement of this Act continue to be governed by customary law.'

[174] Mbatha *The Content and Implementation of the Recognition of Customary Marriages Act* chapter 5; Mbatha 'Reflection on the Rights Created by the Recognition of Customary Marriages Act' 2005 *Agenda Special Focus on Gender, Culture and Rights* 42 45-46. See also Mamashela 2004 *SAJHR* 633.

erty from their husbands are slim, since the main form that men's property takes nowadays is wages rather than assets that can be divided.[175]

The effects of the exclusion of community of property in Muslim marriages are mitigated by the provision that a court must make an order for the equitable sharing of assets between husband and wife if it finds that the wife either contributed to the operation of a family business or to the increase in her husband's estate during the marriage.[176] This is a welcome provision which should be extended to all civil marriages out of community of property. It should also take account of the indirect contributions made by wives as homemakers.[177]

A different way of redistributing wealth accumulated during marriage is by maintenance orders. The Draft Bill on Muslim Marriages determines that the provisions of the Maintenance Act[178] apply, but then determines that 'notwithstanding' this Act, the court should take account of the rules of maintenance in MPL. According to these rules the ex-wife is entitled to maintenance only for the period of *iddah*, or if she is pregnant, for a breast-feeding period of two years. Ex-wives with custody of children are entitled to remuneration 'for the period of such custody only'.[179] As compared to the civil law where an ex-wife may, in certain circumstances, be entitled to maintenance for the rest of her life, these provisions are rather meagre. The wording of the Draft Bill is unclear on the competency of the court to order maintenance for an ex-wife beyond the confines of MPL, but it is suggested that it should be competent to do this. There is also an argument that MPL allows for maintenance beyond the period of *iddah* (*mata'a*) and that this could form the basis for extending Muslim women's rights to post-divorce maintenance.[180]

By way of contrast with the proposed legislation for Muslim marriages, the Recognition of Customary Marriages Act extends to customary wives' rights to claim maintenance from husbands.[181] Previously parties to customary marriage were not entitled to claim maintenance from each other.[182] However, courts awarding maintenance in customary marriages may consider any agreements for the return of *lobolo*.[183] Failure to return *lobolo* by

[175] 2004 *SAJHR* 636-637.

[176] S 9(7)(b).

[177] Sinclair & Bonthuys 2003 *Annual Survey* 160.

[178] 99 of 1998.

[179] Clause 12(1) and (2).

[180] Moosa & Karbanee 'An Exploration of *Mata'a*' Maintenance in Anticipation of the Recognition of Muslim Marriages in South Africa: (Re-)opening a Veritable Pandora's Box' 2004 *Law, Democracy & Development* 267.

[181] In *Wormald NO v Kambule* 2006 3 SA 562 (SCA) par 21 the court held that a customary marriage would provide a destitute wife with a maintenance claim against the estate of her deceased husband.

[182] See Channock *Acta Juridica* 1991.

[183] Recognition of Customary Marriages Act s 8(4), 8(5).

the wife's family may conceivably be used to reduce her right to post-divorce maintenance. If the unreturned *lobolo* is used to maintain her and her children, then the provision makes sense. However, if the *lobolo* has been spent on other purposes, then the ex-wife will suffer financially without receiving benefits from the *lobolo*.

6.5.7 *Divorce — custody of children*

It is generally accepted that custody and access must be determined according to the best interests of the child. This standard is also mandated by the Constitution.[184] However, people's perceptions of the best interests of children are influenced by their social position and their cultural and religious backgrounds.[185] The Draft Muslim Marriages Bill proposes that courts should make orders in relation to children 'with due regard to Islamic law'.[186] Although the Islamic law on this issue is not entirely clear, there is authority that mothers are preferred as custodians until children reach the age of puberty, when custody reverts to their fathers.[187] Although custodian mothers would receive child maintenance for the period during which they exercise custody, having the responsibility for children would continue to erode their earning power in the wage market and we should keep in mind that these women are not necessarily entitled to maintenance for themselves while they take care of children.[188] When older (and less troublesome) children revert to their fathers' custody, women may be financially disadvantaged as a result.

In the past, women married according to customary law were reluctant to contest custody of their minor children at divorce, because of the view that the woman's procreative capacity was exchanged for cattle given to the woman's parents as *lobolo*.[189] The Recognition of Customary Marriages Act determines that a court granting a divorce may make an order determining the custody or guardianship of a child, but does not stipulate the incorporation of customary rules in this regard.[190] In *Hlophe v Mahlalela*,[191] a custody battle between child's father and her maternal grandparents, the court would not allow the custody of the child to be determined by cultural issues such as the transfer of *lobolo*, but held that it should be determined by the

[184] S 28(2).

[185] Bennett 'The Best Interests of the Child in an African Context' 1999 *Obiter* 145; Vahed 'Should the Question: "What is in a Child's Best Interest?" be Judged According to the Child's Own Cultural and Religious Perspectives? The Case of the Muslim Child' 1999 *CILSA* 32.

[186] Clause 11.

[187] Goolam *Custody* in Rautenbach & Goolam (eds) *Intoduction to Legal Pluralism in South Africa* 72.

[188] See par 6.5.6 above.

[189] Guy *Gender Oppression in Southern Africa's Pre-Capitalist Societies* in Walker (ed) *Women and Gender in South Africa to 1945* 33.

[190] S 8(4)(d).

[191] *Hlope v Mahlalela* 1998 1 SA 449 (T), decided before the RCMA came into force.

best interests of the child. In *Mabuza v Mbatha*[192] the female plaintiff used the provisions of the Recognition of Customary Marriages Act successfully to claim custody of, and maintenance for, a minor child at divorce. This would not have been possible under customary law before the Act.

Once again the difference between the legal consequences of customary marriages and Muslim marriages is that in the latter case, an attempt is made to retain and enforce standards of MPL in civil courts, while for customary law, general civil law concepts like the best interests of the child replace specific customary law rules.

6.6 The law of succession

Unlike the issues relating to marriage and divorce, problems with customary and Muslim rules of succession have not yet been fully addressed in the civil law. The problems are broadly similar in both systems.

According to the Sunni rules of succession, a portion of a deceased estate may devolve according to a will, but the remainder must be distributed according to the rules of intestate inheritance.[193] These rules are sophisticated and relatively complicated. However, for our purposes it is sufficient to highlight the problematic issue of gender differences. Put simply, daughters are only entitled to inherit half of what is due to sons.[194] However, the rule functions in the context of a duty upon brothers to maintain their sisters and the rights of women to obtain a substantial dower[195] from their husbands upon marriage. Moreover, when there are no brothers, then female children inherit the same as other male relatives.[196] It is not clear from academic writing whether, in practice, these duties are diligently discharged in favour of female relatives.

A similar reason, namely that the male heir bears responsibility for the maintenance of destitute female relatives, is given for the customary rule of intestate succession which enables men, but not women, to be appointed as universal heirs of deceased estates (primogeniture). In *Mthembu v Letsela*, this duty upon the heir was cited as one of the reasons why the customary rule of succession was held not to be unconstitutional.[197] In fact the values underlying the customary rules of succession are, firstly, that there is a distinction between private property and family property, and secondly, that inheritance of family property by the heir comes with responsibilities to

[192] *Supra.*

[193] Goolam *Islamic Law* in Rautenbach & Goolam (eds) *Introduction to Legal Pluralism in South Africa* 100 101.

[194] See Goolam *Islamic Law* 103-106 for a description of the rules.

[195] A sum of money or other property given to the wife as an effect of marriage, which becomes her exclusive property.

[196] Goolam *Islamic Law* 106-107.

[197] *Supra* 945E-F.

administer this property for the benefit of the family and to care for widows and dependent family members.[198]

Unfortunately, the evidence shows that this ideal, which would have protected female family members, is no longer adhered to. Instead, there is evidence that male family members lay claim to the family property, but do not discharge their responsibilities as heirs. Sometimes widows and their children are evicted from their homes, often on the basis of arguments that their marriages were not valid.[199] A vivid illustration of the plight of wives and female children is found in the *Bhe* case.[200] An African woman claimed ownership of a plot of land in Cape Town on behalf of her two young daughters and herself after the death of her customary husband. The father of the husband, who lived in the Eastern Cape, claimed that he was the customary heir and entitled to the property, which was to be used to defray funeral expenses for his son. He disputed the validity of the marriage and at the same time also claimed custody of the children. This was a clever manipulation of official rules of customary law, since, if the wife insisted on the validity of the customary marriage, she would have had to send her children to live with their grandfather. If she wanted to retain custody of her children, she would have had to concede that the customary marriage was not valid, and she and her children would then have had no claim to the property. When the wife refused to accept this, threats of assault were used to evict her from the property.

There are several options for dealing with this problem. There is evidence that in African communities widows are allowed to administer family property for their own and their children's benefit. Communities also distinguish between the status of heir, which is often occupied by men, and the inheritance of property by dependent wives and children.

> '[P]arents reported that it is no longer fair for the law to allow one child to take over family property. They would like the law regulating the devolution of customary estates to be reformed so as to protect widows and dependants, not heirs, and to reflect changes in practice.' [201]

The first initiative towards legislative change was the Amendment of Customary Law of Succession Bill[202] which essentially aimed at extending the civil law of intestate succession to African families, with some modifications to allow for polygynous marriages. This was, however, not implemented. Next, the majority of the Constitutional Court in the *Bhe* case held that the rule of primogeniture discriminated against women and infringed their

[198] Mbatha 'Reforming the Customary Law of Succession' 2002 *SAJHR* 259 260-262.
[199] Mbatha 2002 *SAJHR* 266-267.
[200] *Bhe v Magistrate Khayelitsha* 2004 1 BCLR 27 (C); *Bhe v Magistrate Khayelitsha* (CC) *supra*.
[201] Mbatha 2002 *SAJHR* 274.
[202] Bill 109 of 1998.

human dignity and that it also discriminated against female and extra-marital children.[203] However, the Court held that due to lack of evidence on contemporary customary practices, it was not in a position to develop egalitarian customary rules of succession.[204] Although the legislature was in the best position to formulate new rules of customary law, the urgent needs of women subject to customary law dictated that the Court fashion an interim remedy, which was a declaration of unconstitutionality and an order that the civil rules of intestate succession, modified for polygynous marriages, should apply to the administration of deceased estates of African people.[205]

The Law Reform Commission's Discussion Paper on Customary Law: Administration of Estates[206] contains a Draft Bill which is similar to the 1998 Draft Bill. Neither are entirely satisfactory, since they mainly replace customary law of succession with civil law. The problem is that the individualistic basis of the civil law of intestate succession cannot accommodate the need, in customary law, to devolve property to *houses* rather than individuals. The effect may, in fact, exacerbate the difficulties faced by female relatives when a male heir is married in community of property. House property will then form part of the communal marital estate and become less accessible to female family members.[207] Himonga adds that merely replacing customary law with the civil law of succession fails to take account of gender equal developments in customary practice. Furthermore the Constitution envisages the development, not the mere replacement of unconstitutional customary law rules. Where customary law is simply discarded, gender equality may not result because[208]

> '[t]he disagreement of the local leaders of the communities living under customary law with the method of the reform of customary law may in turn result in the leaders and their communities or sections of these communities frustrating the implementation of new laws.'

In the long run, a solution should be found which gives legal effect to gender equal customary practices which are developing in African communities. One option would be to determine that, on the death of a husband, his property devolves to his wife's house. Since the woman is the head of this house, she should then administer the property for her own and her children's benefit. Once the woman dies, the eldest child, whether male or

[203] Pars 91-93.
[204] Pars 109-115.
[205] Par 136.
[206] Project 90.
[207] Mbatha 2005 *Agenda* 45-46. See also par 6.5.6 above.
[208] Himonga *The Advancement of African Women's Rights* 99.

female, should inherit the house property and administer it to the benefit of all the children and dependants.

Customary widows' access to communal land may in future also be improved by s 4(2) of the Communal Land Rights Act[209] which holds that:

> 'A woman is entitled to the same legally secure tenure, rights in or to land and benefits from land as is a man, and no law, community or other rule, practice or usage may discriminate against any person on the ground of the gender of such person.'

Section 4(2) determines that customary rights to land held by married men are also held by their spouses 'jointly in undivided shares irrespective of the matrimonial property regime applicable to such marriage'. However, it is not yet clear whether marriage in this section includes a customary marriage and what the effect of the provision would be upon the death of the husband. The best interpretation for widows would be that they have a legally enforceable right to remain on the land after the death of their husbands which can be asserted against heirs. However, Aninka Claassens argues that[210]

> 'in fact the Act has little to do with custom or tradition. Instead it entrenches key colonial and apartheid distortions which exaggerate the power and status of the government and traditional leaders in relation to land, and undermine the strength and status of the land rights vesting in people, and in women in particular.'

Unless they are married in community of property, customary wives, like civil law wives, do not have rights to land which their deceased husbands owned under civil law. However, if they are indigent, these wives may have claims for maintenance against the estates of their deceased spouses.[211]

6.7 Women in the public sphere

Although the subordination of women subject to customary law and MPL mostly emanate from laws dealing with the 'private sphere' such as families and inheritance, there are also some limitations on their abilities to act as leaders in customary and religious community structures. In the case of customary law, this relates to women's positions as traditional leaders and in the Muslim community, to women's ability to act as religious leaders. There are no official plans to deal with the Muslim community at the moment, but in relation to customary law, some developments have taken place.

Women's inability to be appointed as heads of families[212] meant that they were technically also excluded from positions as ward heads and chiefs,

[209] Act 11 of 2004 s 4(3).

[210] Claassens *Women, Customary Law and Discrimination: The Impact of the Communal Land Rights Act* in Murray & O'Sullivan (eds) *Advancing Women's Rights* 42 43.

[211] *Wormald NO v Kambule supra.*

[212] See par 6.6 above.

although they could serve as regents for chiefs who were too young to exercise authority. Their exclusion from positions of customary authority in turn meant that women tended not to form part of customary 'court structures'.[213] Female litigants were traditionally not allowed to approach customary courts on their own behalf, but had to be represented by male family members.[214] However, there is documented evidence that in some areas women have acted as traditional leaders and have thus taken part in customary judicial processes.[215]

The Traditional Leadership and Governance Framework Act[216] does not specifically indicate that succession to traditional leadership should henceforth be gender neutral, but s 2(3) indicates that

> '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.'

In addition, at least one third of the members of a traditional council should be women.[217]

6.8 Conclusion

The fact that customary law automatically forms part of the law of South Africa, together with the fact that it potentially governs the lives of a large part of the population, has meant that the integration of customary law into the civil law structures is relatively well advanced as compared with MPL, which first needs to be incorporated into the law. For both customary law and MPL the guiding vision seems to be simultaneously to recognise rights to practice culture and religion and to improve the substantive equality of women living under these systems.

The most important distinction in the legal treatment between customary law and MPL at this stage is not, however, the extent of integration into civil law, but the extent to which the integrity of specifically customary or religious rules have been preserved. In the case of customary law, it seems that some distinctive customary features have been subsumed under broad civil law con-

[213] Bennett *Customary Law in South Africa* 121.
[214] Schapera *A Handbook of Tswana Law and Custom* (1970) 284, 288; Bennett *Customary Law in South Africa* 166. Koyana & Bekker *The Judicial Process in the Customary Courts of Southern Africa* (1998) 256.
[215] Koyana & Bekker *The Judicial Process in the Customary Courts of Southern Africa* 259.
[216] Act 41 of 2003.
[217] S 3(2)(b).

cepts and rules. The accommodation of MPL, on the other hand, seems to lean towards manipulating the religious rules to accommodate gender equality, while expressly retaining the religious nature of the rules and institutions.

It remains to be seen which of the two models is best at delivering gender equality. The danger of the customary law model is that it may end up as a disguise for the gradual abolition of the customary law. This will mean that communities will continue to practice their customs, but without the protection of the law, thus replicating the position of customary law in Apartheid South Africa.[218] That this is a realistic fear appears from the fact that there has been no formal guarantee of the continuation of customary law, either in the Constitution or by government. On the other hand, retaining the religious rules and giving religious officers an important role in the enforcement of these new rules, as in the case of MPL, may limit the possibility that MPL will in fact evolve to achieve substantive gender equality.

The real effects of the legislation will also depend on the social and economic contexts of the communities which apply them. In the case of customary law, there is evidence that the 'official' rules of customary law have been replaced by more equitable measures in contemporary society. Broad civil law concepts may enable courts to develop the rules of customary law in line with these new practices and the dictates of gender equality. At the same time, it should be kept in mind that neither the Recognition of Customary Marriages Act nor the proposed legislation regulating Muslim marriages are writ in stone and that Parliament should not hesitate to change them if they have unforeseen consequences.[219]

6.9 Questions to think about

- Would you agree with the argument that individual women choose to adhere to the Muslim faith or to be governed by customary law? If not, how would you refute this argument?
- If an African man who is also a Muslim marries an African woman, would the marriage be governed by customary law or MPL? What would the gender implications be?
- What is the effect of the Recognition of Customary Marriages on the payment of *lobolo* in customary marriages? What are the gender implications of these provisions in the Act?
- If traditional authorities may deal with the return of *lobolo* at the time of divorce, would this tend to benefit women?
- Should customary and Muslim marriages also allow for same-sex marriage?

[218] See Pieterse 'Killing it Softly: Customary Law in the New Constitutional Order' 2000 *De Iure* 35; Himonga *The Advancement of African Women's Rights*.

[219] Bronstein 2000 *SAJHR* 573-574.