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Second Integration Report: What are the Interactions between Indigenous and State Legal Systems and how are Such Interactions Managed?

Title of sub-project :

DISSOLUTION OF CUSTOMARY MARRIAGE IN THE SOUTH AFRICAN LEGAL PLURALISM CONTEXT

SSHRC -AUF Partnership 2012-2018

THE RESEARCH PARTNERSHIP

The objective of the research partnership *« The State and Indigenous legal cultures: law in search of legitimacy* » is to compare and assess -through case studies conducted in Canada, Africa and the Pacific- practices and experiences regarding the management of legal pluralism in order to identify models of interaction between western state law and indigenous law that are potentially more legitimate and effective. The study of these practices unfolds in three phases (observation, classification and evaluation) in order to answer the following research questions:

- How does legal pluralism manifest itself in the case studies?
- How are the interactions and relationships between indigenous law and state law managed?
- What practices or models are likely to create a more legitimate and effective management of legal pluralism?

The team is composed of four research groups, including three regional groups conducting field research (Africa Group, Canada Group and Pacific Group) and the Integration Group. The role of the latter is to foster a coordinated research approach in order (1) to achieve the team's comparative objectives as approved by SSHRC, (2) insure that the data collected will lend itself to a rigorous comparative analysis in accordance with our legal pluralism theoretical framework, (3) produce a comparative study of practices and experiences with respect to managing legal pluralism and (4) identify possible avenues for innovation in the management of legal pluralism in the regions being studied.

This second report shall contain the data that will answer the following question: *What are the interactions between the indigenous and state legal systems and how are such interactions managed in the regions studied?*

After receiving the reports from regional groups, the Integrator Group will conduct a comparative synthesis and propose a mapping of legal pluralism management in an overall integration report. A draft report will be shared and discussed with researchers and partners whose input will be key for the completion of the final overall integration report.

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PART I: OVERVIEW OF INTERACTIONS BETWEEN THE LEGAL SYSTEMS

I. General description and characterisation of the relationship between legal systems

Describe in general the current state of interactions between the legal systems.

How would you describe the current relational dynamic that characterises the relationship between the legal orders? (Example: hierarchical, egalitarian, vertical, horizontal, etc.). Illustrate your analysis with several examples.

Living customary law has been recognised officially in South Africa since the 1994 constitutional dispensation. Nevertheless, we regard this system of law as non-state law as its source is located in the communities that constitute the various ethnic groups of South Africa. Customary law co-exists with the official customary law of the old legal older, such as the KwaZulu and Natal codes of customary law, and post-1994 official customary law, such as the Recognition of Customary Marriages Act 120 of 1998 (RCMA).[1]

The interactions between customary rules and state rules, principles and processes are premised on the approach that the indigenous systems of law must be reinstated to their 'rightful place as one of the primary sources of law' under the South African Constitution. This approach, captured in *Alexkor Ltd and Another v Richtersveld Community and Others*[2] and *Mayelane v Ngwenyama and Another*,[3] regards customary law as a system of law with its own values and norms practised by the community, which will be subject to two kinds of evolution. First, customary law 'evolves and develops to meet the changing needs of the community';[4] second, it 'will continue to evolve within

[1] Himonga and Bosch have argued that what the Constitution recognises is living customary law as opposed to official customary law. According to this argument, while official customary law is part of state law, it is not constitutionally recognised. Thus its continued existence is transitory until it is removed from the legal system by appropriate mechanisms. (see C Himonga & C Bosch 'The Application of Customary Law under the Constitution of South Africa: Problems Solved or Just Beginning? (2000) *SALJ Vol.* 117 306-341).
[2] 2004 (5) SA 460 (CC).
[3] 2013 (4) SA 415 (CC).
[4] *Alexkor Ltd* note 2 above at para 53.

the context of its values and norms consistently, with the Constitution'.[5] The flexibility inherent in customary law allows for both its social evolution and its constitutional development.

Thus, although the RCMA has replaced the customary law of divorce with its legislative provisions, there are pockets in almost every aspect of divorce law – the validity of the marriage being dissolved, grounds for divorce, arrangements for children upon divorce, maintenance of children, and the proprietary consequences of marriage – that provide for the co-existence of official customary law (in the form of the RCMA) and living customary law.

Some of these pockets of co-existence of official customary law and living customary law of divorce provided us with material for analysing the interactions (or the absence thereof) between the two systems in respect of the actors, processes, rules, principles and values, and the consequences of such interaction or the absence thereof.

Before we discuss the interactions, it is necessary to highlight a major finding of our research: The court judgments we examined did not provide reasons for the courts' decisions, with the result that it is impossible to fully discern the interactions or the absence thereof between living customary law and official customary law. This constitutes a significant limitation of our study. Nevertheless, the analysis of the information available on the judgments, together with other litigation documents, such as affidavits in support of various claims and reports of the Family Advocate, provide a basis on which we can reach reasonable conclusions about the interactions or the absence thereof between the two systems of law for this report.

[5] *Bhe and Others v Magistrate, Khayelitsha, and Others (Commission For Gender Equality As* Amicus Curiae*); Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic Of South Africa* (here after *Bhe and Others v Magistrate*) 2005 (1) SA 580 (CC) paras 46 and 81.

PART II: DETAILED PRESENTATION OF INTERACTIONS BETWEEN THE LEGAL SYSTEMS IN TERMS OF VARIABLES

I. Actors/stakeholders

1. **Identify and set out the interactions that take place between the legal systems as well as the formal or informal processes whereby such interactions occur (imposition, negociation, consultation, agreement, imitation and so on). Provide as many examples as possible of the interactions and processses observed with respect to specific actors.**

2. **Identify areas or situations in which no interaction takes place between principles. Provide as many examples as possible of such areas or situations with respect to specific actors.**

3. **Describe and illustrate with as many examples as possible the effects of the interactions on the indigenous AND state legal system with respect to specific actors (recognition, confirmation, reinforcement, suppression, amputation, modification, hybridisation, harmonisation, unification and so on).**

The prominent state actors identified are the courts that dissolve marriages; the attorneys who represent spouses in divorce proceedings; the Family Advocate and Family Counsellors, who conduct enquiries regarding the arrangements for children of divorcing parents in terms of the Mediation in Certain Divorce Matters Act; the Amici, who in some cases are admitted to the court proceedings as friends of the court; and the Department of Home Affairs, which registers customary marriages. The non-state actors are the families of the parties to the marriage and representatives of the customary law communities (ethnic groups) from which the marriage parties come. The processes whereby the interactions between state and non-state actors occur

are imposition and co-operation. The context in which the interactions occur is the legislation aimed at reforming customary marriages to align their provisions with the Constitution.[6] The legislation comprises primarily the Recognition of Customary Marriages Act,[7] the Children's Act38 of 2005, and the Mediation in Certain Divorce Matters Act 24 of 1987.

The first set of interactions between state and non-state actors involves the courts, the divorcing spouses' attorneys, and the Department of Home Affairs, on the one hand, and the families of the spouses and representative members of the communities of divorcing parties, on the other hand. The interactions occur in the area of the contract of marriage and the validity of the marriage contract.

Before a court can dissolve a marriage, it must establish the validity of the marriage before it. This determination requires an investigation into the legal requirements for the existence of a valid marriage. The requirements for a valid customary marriage entered into after 15 November 2000 are stated in section 3 of the RCMA. The relevant subsections state that a customary marriage entered into after the commencement of the Act will be valid if 'the prospective spouses … both consent to be married to each other under customary law; and the marriage [is] … negotiated and entered into or celebrated in accordance with customary law.'[8]

Arguably, the customary law envisaged by this section is the living customary law of the parties' communities (ethnic groups). Thus, in order for the court to determine the validity of the marriage it must ascertain the living customary law of the parties. This was underscored by the Constitutional Court in *Mayelane v Ngwenyama*, where it was stated that in order to determine the requirements of a valid marriage under this section, 'a court would have to have regard to the customary practices of the relevant community.'[9] Clearly, the co-operation of the state actors (the

[6] Regarding the RCMA, the Constitutional Court in *Mayalane v Ngwenyama* said: 'Its enactment was inspired by the dignity and equality rights and the normative value system of the Constitution.' (para 26)
[7] The provisions of the RCMA regarding the reform of customary law and the implications and subsequent amendment by case law have already been outlined in the first integration report. They will therefore not be repeated in this report.
[8] Section 3(1)*(a)*(ii) and *(b)*.
[9] At para 29.

courts) with non-state actors (members of the living customary law community) in determining the existence of a marriage in the context of divorce is mandated by the RCMA.

The legislation that facilitates the ascertainment of customary law by the courts in divorce and other matters in South Africa is the Law of Evidence Amendment Act, which provides for two methods of ascertaining customary law. In the first instance, section 1(1) of the Act provides that any court may take judicial notice of 'indigenous [customary law] law in so far as such law can be ascertained readily and with sufficient certainty.' According to this section, a court may take cognisance of living customary law that has become notorious through, for example, repeated proof in the courts by witnesses acquainted with the system of law concerned.[10] The second method is more amenable to the proof of living customary as an oral tradition. In section 1(2), the Act states that the 'provisions of subsection 1 shall not preclude any party from adducing evidence of the substance of a legal rule contemplated in that subsection which is in issue at the proceedings.'

Additional methods of ascertaining customary law within the constitutional framework have emerged from the jurisprudence of the Constitutional Court, particularly *Shilubana v Nwamitwa*,[11] a detailed discussion of which is beyond the scope of this report. Suffice to mention that one aspect of these methods gives the customary community whose customary law is being ascertained a central role in the ascertainment process.

Among other things, the court considered how customary rules were to be ascertained by the courts, taking into account section 211 of the Constitution.[12] In answering this question, the court stated, first, that the court must ascertain the content of customary law from both the past and

[10] This definition of judicial notice appears in an old colonial decision of the Privy Council: *Angu v Attah* PC (1874–1928) 43.
[11] 2009 (2) SA 66 (CC).
[12] Section 211 states that: '(1) The institution, status and role of traditional leadership, according to customary law, are recognised subject to the Constitution. (2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs. (3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.'

present usage of the specific community. Where a customary rule is in issue and 'there is no indication that a contemporary development had occurred or is occurring, past practice will be sufficient to establish a rule.' Second, the court said that where there is a dispute about the content the parties must present evidence of the present practice, and the court must acknowledge any developments in customary law that have occurred within that community. In other words, the court must first defer to the developments to customary law that have taken place within the community. For present purposes, the important point is that these answers emphasise the fact that the living customary law that the divorcing parties must bring to court is that of the community or communities of which they are members. Thus, the interaction of official and living customary law in the context of divorce is mandated not only by legislation but also by the highest court in the country. Furthermore, the court emphasises the role of members of the community as actors in the ascertainment of living customary law.

Mayelane v Ngwenyama provides a good example of the participation of representative members of the community in ascertaining living customary law in a matter before the court. The case also illustrates the interaction that takes place between the amici and the customary community in the process of ascertaining living customary law.

The case concerned the validity of marriage in the context of intestate succession. Two women, Mayelane and Ngwenyama, claimed to have been married to the deceased man in accordance with customary law. They both sought registration of their respective marriages under the RCMA after the man's death. Each disputed the validity of the other's marriage. Mayelane applied to the High Court for an order declaring her customary marriage valid and that of Ngwenyama null and void on the basis that she (Mayelane) had not consented to it, contrary to Xitsonga customary law. She alleged that Xitsonga customary law requires the consent of the first wife for the validity of a husband's subsequent customary marriages, and that she was never informed nor asked by her husband to consent, nor provided any consent, to his alleged customary marriage to Ngwenyama. Ngwenyama did not deny these allegations, but sought to establish the validity of her own marriage to the man by denying that Mayelane was ever married to him, and by stating that *ilobolo* negotiations were conducted in relation to her own marriage.

Mayelane pointed out in the High Court that the documents to prove the validity of Ngwenyama's marriage were not attached to her affidavit and that this, coupled with the failure to challenge Mayelane's legal assertion regarding the content of Xitsonga customary law and her factual assertion regarding her lack of consent to the marriage, was sufficient evidence to decide the matter in her favour. Ngwenyama and all the amici opposed this approach, mainly on the basis that there was insufficient evidence to establish the proper content of the alleged customary rule. They argued, among other things, that, from available formal sources in the legal literature, it is not clear whether, or to what extent, consent is a requirement for the validity of a subsequent marriage in Xitsonga customary law. They therefore contended that further information on this aspect was required.

After a long journey through the High Court and Supreme Court of Appeal, the matter came to the Constitutional Court. The amici – the Women's Legal Centre Trust, the Commission for Gender Equality, and the Rural Women's Movement – were admitted to the proceedings. Regarding the role of the amicus in the ascertainment process, the court stated that the amici 'have provided invaluable submissions throughout the proceedings before this Court. In particular, the amici's submissions in response to this Court's request for further information regarding Xitsonga customary law have been crucial to the outcome of this case.'[13]

Among the issues the Constitutional Court had to decide was whether the consent of a first wife was necessary for the validity of her husband's subsequent customary marriage, according to living Xitsonga custom. In this respect the court stated: 'In order to adjudicate Ms Mayelane's claim we must determine the content of Xitsonga customary law regarding a first wife's consent to her husband's subsequent marriages.'[14] The court accordingly directed the parties to the case and the amici to make further representations on Xitsonga customary law. Notably, the court stated that more information about the content of living customary law had to be gathered in order 'to treat customary law with the deference and dignity it deserves as one of the

[13] At para 18.
[14] At para 44.

constitutionally-recognised sources of our law. The mere assertion by a party of the existence of a rule of customary law may not be enough to establish that rule as one of law.'[15] Thus, the process of ascertaining living customary law itself acts as a proxy for state negotiation of the legitimacy of living customary law within the new constitutional order. Another reason for the court's direction to gather further evidence of living customary law was to ensure 'that customary law's congruence with our constitutional ethos is developed in a participatory manner, reflected by the voices of those who live the custom.'[16] This was 'essential to dispel the notion that constitutional values are foreign to customary law and are being imposed on people living under customary law against their will.'[17] This statement suggests that ascertainment plays a reverse proxy role: it is used to negotiate the legitimacy of state law (the Constitution) with non-state living customary law communities.

The evidence tendered before the court by affidavit represented diverse people from the community: individuals in polygynous marriages under Xitsonga customary law, an advisor to traditional leaders, traditional leaders, and expert testimony (by academics). The evidence given by the people about the content of living customary law was not always consistent, but the court considered the differences not to be a matter of 'contraction but of nuance and accommodation.'[18] Interestingly, however, instead of proceeding on the basis of the evidence gathered from the community and elaborating on the notions of 'nuance' and 'accommodation', the court imposed its own understanding of the content of customary law, 'peppered' with constitutional principles. The court remarked: 'It is not necessary to go further than this and it must be emphasised that, in the end, it is the function of a court to decide what the content of customary law is, as a matter of law not fact. It does not depend on rules of evidence: a court must determine for itself how best to ascertain that content.'[19]

The court then launched into a long discussion of the equality and dignity principles guaranteed by the Constitution, and concluded that it was 'in the light of these constitutional guarantees that

[15] At para 47.
[16] At para 50.
[17] Ibid.
[18] At para 61.
[19] At para 61.

[the Court] must determine whether the Constitution demands that the consent of the first wife be given before a subsequent customary marriage can validly be entered into.'[20] Pursuing this line of reasoning further, the court stated:

'There is no doubt that the exercise to determine the content of Xitsonga customary law has shown that it displays a generous spirit that is rooted in accommodating the concerns of the first wife and her family when the husband seeks to enter into another marriage. But it remains his choice to marry again. She does not have that choice. It requires little imagination or analysis to recognise that polygynous marriages differentiate between men and women. Men may marry more than one wife; women may not marry more than one husband.'[21]

Accordingly, the court held that while it must accord customary law the respect it deserves, and the court could not shy away from its obligation to ensure that customary law 'develops in accordance with the normative framework of the Constitution.'[22] The court also held:

'In accordance with this Court's jurisprudence requiring the determination of living customary law that is consistent with the Constitution, we thus conclude that Xitsonga customary law must be developed, to the extent that it does not yet do so, to include a requirement that the consent of the first wife is necessary for the validity of a subsequent customary marriage. This conclusion is in accordance with the demands of human dignity and equality.'[23]

It is clear from the discussion of this judgment and its reasoning that what started as an ascertainment of living customary law by representatives of the customary community concluded with an imposition by state actors of the principles of equality and dignity, derived from the Constitution, on living customary law. Furthermore, while the state actors did not altogether abolish the living customary law rule concerned, they evidently 'amputated' it by pruning away much of its content. These actions of the court were not surprising, given its two-fold stance on the relationship between customary law and the Constitution. The first stance is that while living

[20] At para 69.
[21] At para 70.
[22] At para 71.
[23] At para 75.

customary law is part of the legal system, it is subject to the Constitution and has to be interpreted in the light of constitutional values.[24] The second is that there is a need for the court to ensure that 'in taking its place as an institution of our democratic dispensation, living customary law reflects the rights and values of the Constitution from which it draws its legal force.'[25]

Another area in which interaction between the two legal systems occurs by means of the imposition and suppression of non-actors by state actors is the allocation of parental responsibilities and rights in respect of children following divorce. The rules and principles applied by actors in this area are discussed in the rules and principles sections of this report. Suffice to say in this section is that the principle of the best interests of the child is paramount. This is stated in section 28(2) of the Constitution, which guarantees the best interests principle as one of the fundamental rights of the child.

In the specific context of divorce, the Mediation in Certain Divorce Matters Act 24 of 1987 provides for the best interests of the child, where a Family Advocate may be requested by a divorcing spouse to institute an enquiry leading to a recommendation to the court regarding the parental responsibilities and rights of divorcing parents in respect of their children.[26]

The previous discussion about the inclusion of living customary in disposing of matters concerning arrangements for the children of divorcing parents suggests that the state actors – the courts, Family Advocate, Family Counsellors and attorneys – are all required to take living customary law into account when determining parental responsibilities and rights. However, from the divorce court records examined, none of the listed actors takes living customary law principles or cultural considerations into account when dealing with parental responsibilities and rights. On the contrary, the affidavits drawn by attorneys, the recommendations of the Family Advocate and the court orders all refer only to sections of the Children's Act as the basis for

[24] At para 24 (citing *Alexkor* para 51).
[25] Para 46.
[26] See section 8(3) of the RCMA read with section 4(2) of the Mediation Act.

awarding parental responsibilities and rights. They therefore impose state law on living customary law. There is also no evidence in the Family Advocates' reports to the court of any engagement with the families of divorcing parents about the children. Similarly, the affidavits drawn by attorneys are devoid of claims involving the parents' families, except in one case in which a party claimed the award of care and primary residence of the child in favour of the paternal grandfather.

Typically, the documents relating to the specific actors referred to the award of parental rights and responsibilities, with care and primary residence being awarded to one parent while the other parent was granted reasonable contact. The Children's Act was cited as the basis for the claim or award of the parental responsibilities and rights.

However, there are instance in which the interaction between state and non-state actors takes the form of co-operation as opposed to imposition. This kind of interaction occurs between the Department of Home Affairs (DHA) and the families of the spouses when customary marriages are registered. The RCMA requires customary marriages entered into after the Act came into force to be registered within a specified period after the conclusion of the marriage.[27] For some time, marriages entered into before the Act came into force could also be registered in terms of the Act.[28] For the purposes of registration, the DHA must be satisfied that the customary marriage exists before it registers the union. The Act states: 'A registering officer must, if satisfied that the spouses concluded a valid customary marriage, register the marriage by recording the identity of the spouses, the date of the marriage, any *lobola* agreed to and any other particulars prescribed'.[29]

The point of interaction between state and non-state actors is where the DHA relies on the testimony of the families of the parties to establish the existence of the marriage in order to register it. Another point of interaction is when the DHA relies on traditional leaders from the

[27] Section 4(3)*(b)* of the Act.
[28] Section 4(3)*(a)* of the Act.
[29] Section 4(4)*(a).*

village(s) of the prospective spouses parties to the marriage who witnessed the marriage of the spouses in the village.[30] In this process of registration, the interaction between state and non-state actors takes the form of co-operation.

Once the DHA has registered the marriage, the DHA issues a marriage certificate,[31] which is used as prima facie evidence of the existence of the marriage,[32] and the courts can use it to establish the existence of the marriage before it. In the majority of the divorce cases we examined, the court relied on the marriage certificate to determine the existence of the marriage. Thus, the DHA acts as a link between other state actors and non-state actors while it is also a site of interaction with non-state actors in its own sphere of work.

If the marriage is not registered for any reason in the first instance, it may still be registered[33] through a process in which the court interacts with the family of the parties directly. The latter would be required to confirm the existence of the marriage to the court for it to make the order for its registration by the DHA. For example, in one case, the marriage had not been registered. Affidavits of family members of the couple on both sides were submitted to the court for purposes of making an order to have the couple's marriage registered out of time. The affidavits testified to the payment of *lobola* and the fulfilment of the requirements and rituals of marriage according to custom. Apparently, on account of these affidavits,[34] the court made an order for the registration of the marriage by the DHA, and the latter registered the marriage on account of the court order.

The next level of interaction involves the attorneys representing the divorcing spouses, who mediate between the spouses and state actors in drawing up relevant divorce documents in the

[30] For a detailed discussion of registration of marriages see C. Himonga and E. Moore. *Reform of Customary Marriage, Divorce and Succession Living Customary Law and Social Realities*, 2015, Juta & Co. (Pty) Ltd, 102-128.
[31] Section 4(5)*(b)*.
[32] Section 4(8) of the Act.
[33] Section 4(7) of the Act. However, the Department of Home Affairs has discontinued the posthumous registration of customary marriages in the context of succession – see Himonga and Moore note 34 above.
[34] The full judgment was not available to show the role the families' affidavits played in the court's decision.

language of official customary law. The RCMA now provides that there is only one ground of divorce, which applies to marriages entered into both before and after the RCMA came into force.[35] The ground of divorce is that the marriage has broken down irretrievably. Elaborating upon this ground, section 8(2) of the Act states that the marriage has broken down when it has reached such a state of disintegration that there is no reasonable prospect of restoring a normal marriage relationship between the parties.

The attorneys draw up the affidavits of claims and counter-claims in the legal terminology used by the RCMA for submission to the courts on behalf of the divorcing spouses as stated above. However, in the majority of cases examined, there was evidence in these affidavits of factors that would justify divorce under living customary law as well, such as adultery, refusal to reconcile, desertion, the husband not maintaining his wife and children, the wife not treating the husband with respect, etc. There is also evidence from the court orders dissolving the marriages that the courts act on the affidavits of claims drawn by attorneys as well. The typical order reads: 'Having heard the plaintiff and *having read the documents filed on record*,[36] and/or having heard the evidence viva voce the bonds of customary marriage subsisting between plaintiff and defendant … are dissolved.'

Thus, through the medium of attorneys as allies of both state actors (the courts) and divorcing spouses, there is a form of cooperation between official customary law and living customary law in defining the factors that justify the dissolution of the marriage on the official customary law ground of irretrievable breakdown.

Finally, in the area of matrimonial property after the divorce, the co-existence of living customary law and official customary law remained after the enactment of the RCMA, until the decision of the Constitutional Court in *Gumede v The President of the Republic of South Africa* in 2008.[37] Before the decision in this case, the proprietary consequences of customary marriages

[35] Section 8(1) of the Act.
[36] Our emphasis.
[37] 2009 (3) SA 152 (CC).

(both monogamous and polygamous) entered into before the RCMA came into force were regulated by customary law, which would thus apply to the regulation of the proprietary consequences of marriage following divorce. A court dissolving such a marriage would then be required to determine the relevant living customary law of the parties before it. *Gumede* changed this position by applying official customary law (section 7(2) of the RCMA) to all monogamous marriages in this category, and this system of law applies retrospectively to all monogamous marriages entered into before the RCMA.

In the recent case of *Matodozi Ramuhovhi v Netshituka*,[38] the High Court essentially completed the changes to section 7 of the RCMA left by *Gumede*. The court declared the application of section 7(1) to 'old' polygamous marriages unconstitutional, with the result that polygamous marriages are also now marriages in community of property, in accordance with section 7(2) of the Act. This decision is yet to be confirmed by the Constitutional Court. Its confirmation will effectively bring an end to the application of living customary law to customary marriages entered into before the RCMA. It will therefore eliminate the co-existence of living customary law and official customary law in this area of divorce altogether.

In other words, these two cases present an interesting dimension of the interaction of state actors and non-state actors. Before these cases, non-state actors had a sphere of operation in matters of property adjustment following a divorce where the parties had married before the RCMA. By moving these matters out of the sphere of living customary law to that of official customary law (the RCMA), the state actors have completely suppressed or isolated or 'starved to death' the non-state actors from their sphere of operation. In order to do this, the state actors invoked the hierarchical relationship that exists between the Constitution and customary law – living customary law had to be suppressed because it did not meet the standards of the Constitution

The next question is: what are the effects of the interaction on the indigenous legal system and

[38] Case no 412/2015, Limpopo Local Division.

the state legal system?

The effects of the interactions on the indigenous legal system and the state legal system revealed by the discussion above may be summarised as follows:

- In the areas of the contract of marriage and the ascertainment of customary law, the state ignores or suppresses non-state actors when constitutional principles are at stake. In other cases, the state uses the ascertainment process to legitimise or recognise the non-state actors while at the same time seeking its own legitimacy or recognition by non-state actors.

- In the area of the registration of customary marriages and the ground of divorce, the two systems agree and co-operate with each other.

- In the field of parental responsibilities and rights there is total suppression of the non-state actors and the resulting unification of the two systems.

- In the field of the proprietary consequences of divorce, the cases of *Gumede* and *Matodozi Ramuhovhi v Netshituka* represent a complete suppression of living customary law principles by official customary law. The court decisions have, furthermore, shrunk the area of the application of customary law in the future by removing the matrimonial property matters of marriages concluded before the RCMA out of the sphere of living customary law and into the sphere of official customary law.

II. Processes (rituals, ceremonies etc.)

1. **Identify and set out the interactions that take place between the legal systems as well as the formal or informal processes whereby such interactions occur (imposition, negociation, consultation, agreement, imitation and so on). Provide as many examples as possible of the interactions and processses observed with respect to specific processes.**

2. **Identify areas or situations in which no interaction takes place between principles. Provide as many examples as possible of such areas or situations with respect to specific processes.**

3. **Describe and illustrate with as many examples as possible the effects of the interactions on the indigenous AND state legal system with respect to specific principles (recognition, confirmation, reinforcement, suppression, amputation, modification, hybridisation, harmonisation, unification and so on).**

According to state legislation, customary marriages can be dissolved only in court. This process of the dissolution of customary marriages interacts with living customary divorce in two respects. First, the state law recognises some customary law processes, and, second, it has provided for the principles of pre-divorce mediation and reconciliation largely accepted by living customary law. In fact, section 8(5) of the RCMA considers that the processes of judicial divorce should not be seen as a limitation to the 'role, recognised in customary law, of any person, including any traditional leader, in the mediation, in accordance with customary law, of any dispute or matter arising prior to the dissolution of the marriage by the court.'

In the customary setting, divorce is seldom a process dissociated from its social context. It is a social event comprising several stages in which conciliation and mediation by the family and community members feature greatly. In this study, a recurring pattern that emerged from the

interviews was the trend to not involve the courts in the divorce as much as possible. For the majority of the cases, the use of the courts was seen as the last option. All respondents used their family structure, as there was a clear trend of collectivism in the way in which the women dealt with marriage problems in their lives. These problems were seen as issues that could be resolved between the couple in question and with the help and advice of the wider family group. Uncles and elders in the family were held in high regard by the women.

The specific importance of the husband's family was a prominent feature in the discussions and action taken in attempting to preserve marriages. The female respondents commonly called upon the husband's family e.g. mother and uncles, in the hope that family pressure from his relatives might rectify the social problems in their relationship. The social structures observed in this study often seem to place more importance on the husband's family in its role as mediator than on the wife's family. A small number of female respondents highlighted the fact that they themselves did not have physical access to their marriage registration documents, which were sometimes required during the divorce process. In some cases the women stated that the documents were kept at the husband's family's house and therefore gaining access to these documents could be difficult. These small factors help to shed light on how integral the husband's family can be to the divorce processes. In a way they can act as the 'gatekeepers' for the relationships.

The different mediation roles of the group members at these different stages are recognised by the law although the divorce itself can take place only at the court. The interactions between the state law and customary law here are those of complementary collaboration aiming at protecting the marriage relationship until complete breakdown.

Also, during the judicial dissolution of customary marriage itself, the judges can engage in a conciliatory process. In the context of civil marriages, courts have the power, in certain circumstances, to postpone divorce proceedings to enable the parties to attempt reconciliation.[39]

[39] See section 4(3) of the Divorce Act.

Even the provisions of the Divorce Act, which are designed to safeguard the interests of young or dependent children of the marriage, have not been interpreted as conferring a curial discretion on the courts.[40]

Some authors emphasise the difference between the western style of divorce mediation and the African traditional mediation mechanisms[41] and debate the appropriateness of the western style mediation model for use in a country marked by distinct cultural affinities and adherence to cultural and communal values. Yet, mediation in family matters – including during the dissolution of customary marriages – have complementary relationships where indigenous values fuse seamlessly with western logic to generate better restorative outcomes.

III. Rules

1. **Identify and set out the interactions that take place between the legal systems as well as the formal or informal processes whereby such interactions occur (imposition, negociation, consultation, agreement, imitation and so on). Provide as many examples as possible of the interactions and processses observed with respect to specific rules.**

2. **Identify areas or situations in which no interaction takes place between principles. Provide as many examples as possible of such areas or situations with**

[40] *Schwartz v Schwartz* 1984 (4) SA 467 (A) at 474–475, per Corbett JA.
[41] A Boniface 'African-style mediation and western-style divorce and family mediation: Reflections for the South African context' (2012) 15 *PER / PELJ* 5.

respect to specific rules.

3. **Describe and illustrate with as many examples as possible the effects of the interactions on the indigenous AND state legal system with respect to specific rules (recognition, confirmation, reinforcement, suppression, amputation, modification, hybridisation, harmonisation, unification and so on).**

The RCMA does not make any reference to the restoration of *lobola* as an important consideration in the dissolution of customary marriages. Thus, the position seems to be that the restoration of *lobola* is not necessary for the dissolution of customary marriages.[42] This partly follows from the idea that, although the agreement on the payment of *lobola* is an essential requirement for a customary marriage, it is distinct from the marriage contract itself.[43] Scholars and courts have insisted that if the customary marriage is to be regarded as having been concluded and celebrated in terms of customary law, as required by section 3(1)*(b)* of the RCMA, then the *lobola* contract should be regarded as an essential requirement for a valid customary marriage.[44] In *Thembisile and Another v Thembisile and Another,*[45] the court held that:'[i]t appears to be well established, however, that in customary law the central issue in divorce proceedings is refund of bridewealth, an obligation taken so literally that the husband could demand return of the same cattle he had originally given. If they had died in the interim, the defendant could settle the claim with a cash equivalent.'[46]

From the customary perspective, refund or retention of *lobola* occurs in instances where (1) the wife's father repaid it in order to end the marriage; (2) the wife had not conducted herself with due decorum and was deemed to have given the husband good reason to end the marriage; and

[42] C Himonga 'Marriage' in F du Bois (ed) *Wille's Principles of South African Law* 9 ed (2007) 227, 323.
[43] See B Clarke *Family Law Service* (1987) G59 at 31.
[44] In *Maloba v Dube and Others* (GSJ) (unreported case no 08/3077, 23-6-2008) para 26, where Mokgoatlheng J held that '[t]he agreement to marry in customary law is predicated upon lobolo in its various manifestations. The agreement to pay lobolo underpins the customary marriage' and *Southon v Moropane* (GSJ) (unreported case no 14295/10, 18-7-2012) para 81, where Saldulker J held that '[t]he traditional principle that there can be no [valid] customary marriage without lobolo being delivered or at least negotiated, still prevails'. See also L 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) 68 *THRHR* 277, 278.
[45] 2002 (2) SA 209 (T).
[46] Para 28.

(3) where a wife deserted her husband for no reason. However, *lobola* could be retained if a husband was deemed to have rejected his wife without sufficient cause.[47]

Yet, from a living customary perspective, this study shows that such restoration is not always practised as disintegration of the marriage relationship happens often by mere desertion of the husband or the wife. Also, some women displayed a certain level of agency by rejecting everything of their husbands, including the thorough rejection of all their rights to property. These women showed very little interest in any restitution of *lobola* as the most important aspect for them was to escape their relationships.

These social behaviours towards the restitution of *lobola* resonates with the RMCA silence on the legal significance of *lobola* upon dissolution of the customary marriage. Hence, gradually, due to the different social and economic circumstances, the main differences between state law rules and customary rules are blurred. Such reality is reinforced by the interactions between these two normative systems.

This hybridisation is also apparent in the context of the rules that guide the *affiliation of children in customary marriages.* Historically, the question of who is entitled to the custody of children on divorce turned on whether the obligations under the *lobola* contract had been performed. Principles governing custody and guardianship revolved around the operative principle that 'cattle beget children'.[48] Holleman observes that 'reproduction and marriage are essentially a question of exchange of reproductive power, a reciprocal arrangement which serves the vital needs of both parties contracting the marriage'.[49] Where *lobola* has been paid, children 'belong'

[47] J Bekker 'Grounds of divorce in African customary marriages in Natal' 1976 *CILSA* 346.
[48] M Gluckman 'Kinship and marriage among the Lozi of Northern Rhodesia and the Zulu of Natal' in AR Radcliffe-Brown and D Forde (eds) *African Systems of Kinship and Marriage* (1950) 166, 184. See also DS Koyana et al *Customary Marriage Systems in Malawi and South Africa* (2007) 38.
[49] JF Holleman *Issues in African Law* (1974) 91.

to the paternal family because *lobola* would have transferred the woman's reproductive capacity from her family to that of her husband.[50] On divorce, children should and often do remain with their paternal family. If *lobola* has not been paid, children born of the marriage belong to the maternal family and may be demanded by them on the dissolution of a customary marriage.[51]

A South African court once declared that:

'[B]y nature the progeny of a woman accrue to her father's group and are members of his group … for religious and political reasons … These rights and duties are transferred by Native law to another group only on contraction of a valid union whereby the woman's group receives "lobolo" from the other group transfers the natural right to the woman's reproductive power and her progeny to the group providing the "lobolo".'[52]

In the event that the amount of *lobola* paid does not adequately compensate for the number of issue born during the marriage, the wife-giving family could retain some of the children for some time; and allow the father to 'redeem' them through the payment of a few head of cattle.[53] Literally, these principles meant that women would be reluctant to contest custody of their children if the marriage had been dissolved after the full payment of *lobola*. It also meant that men had no right to claim custody of their children if they had not paid the *lobola* required by their in-laws.

Today, from the state perspective, the custody and guardianship of children on divorce are governed by codified common-law principles. The RCMA determines that a court dissolving a

[50] CRM Dlamini 'The need for social research in the social sciences for family law in respect of blacks' in AF Steyn et al (eds) *Marriage and Family Life in South Africa: Research Priorities* (1987) 636, 649; HF Child *Compendium of Native Case Law of the Colony of Southern Rhodesia* 2 ed (1960) 11.
[51] H Bosman-Swanepoel et al *Custody and Visitation Disputes: A Practical Guide* (1998) 48–49.
[52] *Madyibi v Nguva* 1944 NAC (C&O) 36.
[53] TW Bennett *Customary Law in South Africa* (2004) 285. See also JC Bekker *Seymour's Customary Law in Southern Africa* 5 ed (1989) 195, where the author argues that among the Venda, Tswana and Sotho, the wife-giving family could keep *lobola* if the wife had substantially given effect to the primary purpose of marriage, namely bearing children.

customary marriage 'may make an order with regard to the custody or guardianship of any minor child of the marriage'.[54] However, a court may not make an order of divorce until it is convinced that satisfactory arrangements have been made with regards to the welfare of the children as required by the provisions of the Divorce Act.[55] The determination of who should have custody of children after the dissolution of customary marriages is made by recourse to the best interests of the child. This standard is constitutionally and statutorily protected.[56] The primary source of this principle is section 28 of the Constitution, which guarantees it as one of the fundamental rights of the child. Section 6 of the Children's Act promotes this constitutional guarantee by laying down the principles that must guide the implementation of all legislation, the courts and other organs of the state in matters concerning the child. These principles include the best interests of the child as set out in section 7 of the Act.[57] Section 7 in turn provides for a closed list of factors that a court must apply in determining the best interests of the child.

Accordingly, *lobola* no longer strictly decides the issue of custody on divorce. There is nothing new about this development as authorities had already argued that, under living customary law, the role of *lobola* in determining the issue of custody had changed over time.[58] However, individual and collective constructions of the best interests of the child are shaped by cultural and religious values and backgrounds.[59]

In the context of custody on divorce, the interaction between state law and customary law might be implicitly conflictual, particularly in matters relating to custody and guardianship. While state law concentrates on the best interests of the children affected by divorce, living customary law concentrates on the interests of the group and allows them to take precedence over the interests of the child or the individual. This should not be read to suggest that customary law is

[54] Section 8(4)*(d)* of the Recognition Act.
[55] Section 84(d)*(a)* of the RCMA, incorporating section 6 of the Divorce Act.
[56] See section 28(2) of the Constitution, and sections 7 and 9 of the Children's Act.
[57] For detailed discussion, see Himonga 'Dissolution of a customary marriage by divorce' in J Heaton (ed) *The Law of Divorce and Dissolution of Life Partnerships in South Africa* (2014), Juta & Co. Ltd, 231-278 at 262-278.
[58] C Himonga 'Implementing the rights of the child in African legal systems: The *Mthembu* journey in search of justice' (2001) 9 *The International Journal of Children's Rights* 89, 109, doubting whether the role of *lobola* (in determining custody and guardianship) was so dominant as to relegate the consideration of the best interests of the child in the decision-making process.
[59] See TW Bennett 'The best interests of the child in an African context' (1999) *Obiter* 145.

inconsistent with the best interests of the child, but to demonstrate that, while customary law focuses on the interests of the child as a member of the group, state law emphasises the interests of the child as an individual.[60]

Moreover, it has been argued that the courts should consider any other factors outside the closed list that would enhance the best interests of the child.[61] These factors include living customary law – African cultural or customary practices – and the value of ubuntu and its tenets of interdependence, solidarity, and communal ethic.[62]

The anticipation of the inclusion of cultural factors and customary norms was the basis on which the South African Law Commission recommended that the best interests of the child should govern all aspects of parental responsibilities and rights under the RCMA. Furthermore, section 7 of the Children Act implicitly supports the argument for the inclusion of some of the elements of the living customary law under discussion in determining the best interests of the child. In this respect, the section provides for 'the need for the child to remain in the care of his or her parents, family and extended family, culture or tradition.'[63]

Most importantly, the argument for the inclusion of factors derived from living customary law in determining the best interests of the child is consistency with the rights in sections 30, 31 and

[60] See R Cohen 'Endless teardrops: Prolegomena to the study of human rights in Africa' in R Cohen et al (eds) *Human Rights and Governance in Africa* (1993) 1, 14, arguing as follows: corporate kinship in which individuals are responsible for the behaviour of their group members is a widespread tradition. But in addition, the individual person and his or her dignity and autonomy are carefully protected in African traditions, as are individual rights to land, individual competition for public office, and personal success.

[61] See Himonga in Heaton note 57 above, 266–267.

[62] See Himonga in Heaton note 57 above, 268–269, and Himonga and Nhlapo (eds) *African Customary Law in South Africa Post-Apartheid and Living Law Perspectives* (2014), Oxford University Press Southern Africa (Pty) Ltd at 123. Himonga has argued that 'cultural norms or values associated with the principle or idea of group solidarity as an element of Ubuntu' enhance the best interests of the child in so far as they place responsibility for the care and welfare of the child on a larger group of family members than just their parents.' (See Himonga in Heaton note 57 above, 268).

[63] Section 7*(f)*.

39(3) of the Constitution. These sections guarantee the right of everyone to 'participate in the cultural life of their choice'; the group right to culture;[64] and the application of customary rights subject to the Bill of Rights respectively. These constitutional guarantees are bolstered by other recognitions of customary law (living customary law), especially by section 211 of the Constitution, which provides for the recognition of the institution of traditional leaders. Traditionally, traditional leaders are the custodians of living customary law. The section also compels the courts to apply customary law. Section 211 provides:

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

There are other legislative provisions relating to the best interests of the child, such as the Mediation in Certain Divorce Matters Act 24 of 1987, which provides for the appointment of a Family Advocate in appropriate cases. The Advocate is authorised to institute an enquiry should he or she consider such an enquiry to be in the best interests of the child of divorcing parents.[65] According to the aforegoing arguments about the inclusion of living customary law in making arrangements for the children of divorcing parents, the Family Advocate would be required to take living customary law into account when this system of law serves the best interests of the child.

In sum a court hearing a matter about the care and custody of children upon divorce must base its decision on the best interests of the child, which includes customary practices, principles and values, and the court will therefore be required to ascertain these principles on a case by case

[64] Section 31 of the Constitution states that 'Persons belonging to a cultural … community may not be denied the right, with other members of that community – to enjoy their culture …; and to form, join and maintain cultural … associations and other organs of civil society.'
[65] See section 8(3) of the RCMA read with section 4(2) of the Mediation Act.

basis.

Yet, while theoretically both state law and customary law might take cognisance of the principle of the best interests of the child, the empirical evidence in this study shows that after divorce, the children remained with their mothers, as very few fathers sought custody. For most of the cases that were heard in court, children were discussed in the context of child maintenance, not custody.

IV. Principles

1. **Identify and set out the interactions that take place between the legal systems as well as the formal or informal processes whereby such interactions occur (imposition, negociation, consultation, agreement, imitation and so on). Provide as many examples as possible of the interactions of processses observed with respect to specific principles.**

2. **Identify areas or situations in which no interaction takes place between principles. Provide as many examples as possible of such areas or situations with respect to specific principles.**

3. **Describe and illustrate with as many examples as possible the effects of the interactions on the indigenous AND state legal system with respect to specific actors (recognition, confirmation, reinforcement, suppression, amputation, modification, hybridisation, harmonisation, unification and so on).**

The need for stability in the marital relationship features in at least three aspects of the dissolution of customary marriages. The first aspect is the principle of the irretrievable breakdown of the marriage (addressed below) as a ground of divorce. The second relates to the power given to the courts to postpone the dissolution of the marriage until certain conditions have been met, although they have no discretion to refuse a divorce once the requirements for such divorce have been unequivocally proven.[66] The third aspect that shows the commitment of state law to the principle of stability is the recognition of the traditional mechanisms of divorce mediation and reconciliation. The non-adversarial logic and restorative functionality of such customary mechanisms are based on the need for marital stability in relation to the cohesion of the group in the Ubuntu-style settings of indigenous norms.

[66] In *Ex Parte Inkley and Inkley*, at 531–532, Van Zyl J held as follows:
'It is improbable that a Court would refuse a divorce if the said grounds have been proved unequivocally. If, however, the evidence tendered raises any doubt in the mind of the Court, for example if the evidence smacks of insincerity of it if creates that impression that it is being tendered under duress, of if the marriage was of a very short duration or the parties are particularly youthful, the Court may feel constrained to refuse a divorce until such as sufficient corroborative evidence can be tendered.'

The interactions between these customary principles and state law principles are a form of horizontal hybridisation of the two legal systems. Hybridisation appears also in other principles of the dissolution of customary marriages, such as the one of *irretrievable breakdown of the marriage*.

Today, a customary marriage may be dissolved based on the ground of the irretrievable breakdown of the marriage.[67] For the court to issue a decree of divorce, it should be 'satisfied that the marriage relationship has reached such a state of disintegration that there is no reasonable prospect of the restoration of a normal marriage between' the parties.[68] These provisions are similar to those regulating the dissolution of civil marriages under the Divorce Act.[69] However, this ground of divorce does not preclude the court[70] from taking into account reasons or justifications that were 'traditionally available to the spouses'.[71] This means that in determining whether the marriage has disintegrated to the point of justifying a divorce the court can have recourse to living customary law norms and values on the dissolution of marriage, including the principle of stability of the marriage.[72] And equally important, the courts will, in granting divorce, seek to ascertain the living customary law to establish the relevant 'traditional' reasons and justifications or principles of divorce in a matter before them, since there is no uniform system of customary law in South Africa.

Also, while the ground of the 'irretrievable breakdown of marriage' may have been unknown to customary law, the general emphasis on forgiveness and reconciliation in customary law tends to suggest that marriages could only be dissolved after frantic attempts at reconciliation had been made. This implies that, while the term 'irretrievable breakdown of marriage' is essentially a common-law concept, its application to customary marriage and divorce is not necessarily inconsistent with the way the process of granting a divorce is perceived under customary law. In

[67] Section 3 of the RCMA.
[68] Section 8(2) of the RCMA.
[69] Section 4 of the Divorce Act.
[70] In terms of the RCMA a customary marriage can only be dissolved by a court order.
[71] Himonga and Nhlapo note 62 above, 149 (citing Jansen).
[72] See Himonga and Nhlapo note 62 above, 152.

both civil and customary marriages, divorce should be granted only if the marriage has reached such a state of disintegration that there is no reasonable prospect of a return to a normal marriage relationship between the spouses.

The reasons given for the proposed divorce should be concrete and compelling in both cases, and a divorce should not be granted for frivolous reasons. In both civil and customary marriages, attempts should have been made to reconcile the parties before a divorce is granted. In other words, a divorce decree should be granted as a last way out of the differences between spouses in both customary marriages and civil marriages. Thus, while there are differences between the grounds of divorce under customary marriages (based on living customary law) and civil marriages, the spouse seeking a divorce in both cases should demonstrate that the reason for which divorce is being sought is so compelling that there is no reasonable prospect of a return to a normal marriage relationship. This reality is further exemplified by the analysis of the court cases in this study. In the large majority of the cases before the courts, the parties (both wife and husband) claim divorce on the ground of irretrievable breakdown of the marriage based on factors similar to those defining such breakdown in civil marriages and/or on different factors. This finding led to the conclusion that this concept indeed represents a lived principle for the dissolution of customary marriages, rather than simply being a legal requirement for divorce. The parties also prominently invoke the concept due to the involvement of lawyers (attorneys and advocates) in the judicial process, who frame claims in state law phraseology. These observations demonstrate that there is an interaction between customary law (both living and official) and the common law.

V. Values/beliefs

1. **Identify and set out the interactions that take place between the legal systems as well as the formal or informal processes whereby such interactions occur (Example: imposition, negociation, consultation, agreement, imitation and so on). Provide as many examples as possible of the interactions and processses observed with respect to specific values.**

2. **Identify areas or situations in which no interaction takes place between values. Provide as many examples as possible of such areas or situations with respect to specific values.**

3. **Describe and illustrate with as many examples as possible the effects of the interactions on the indigenous AND state legal system with respect to specific values (recognition, confirmation, reinforcement, suppression, amputation, modification, hybridisation, harmonisation, unification and so on).**

The values of communality and family cohesion underlie the divorce processes. Communality is evident in the participation of the families of the parties in concluding the marriage under living customary law.[73] It is also implicitly recognised by official customary law, which defers to living customary law in respect of the requirements for a valid marriage;[74] the communitarian ethic is part of this living customary law. Furthermore, the RCMA requires the participation of the parents of the intended parties to the marriage in certain circumstances,[75] thus implicitly acknowledging the value of communality. Moreover, since *lobola* is negotiated by the families of the parties to the marriage and paid to the family of the wife, the requirement in the RCMA of the recording of *lobola* upon the registration of marriage recognises that not only the parties to the marriage are involved in contracting the marriage. It therefore endorses the value of communality. Thus, there is generally agreement by both systems about the value of

[73] On the role of the family in the conclusion of a customary marriage in the context of a polygamous marriage, see evidence given in *Mayelane* at paras 55–58.
[74] See section 3 of the RCMA.
[75] See section 3(3)*(a)* with regard to the marriage of minors.

communality.

With regard to cohesion, this is seen in the need to keep the marriage relationship intact and, as far as possible, to avoid its dissolution, as already indicated in the preceding section. Both official customary law and living customary law agree with this value, as apparent from formal and informal attempts at the reconciliation of the spouses whose marriage is in trouble. Official customary law provides that the marriage of the parties will be dissolved only if 'there is no reasonable prospect of the restoration of a normal marriage relationship between [the parties].'[76] This hesitancy about the dissolution of the marriage anticipates the informal processes of the parties to avoid the dissolution of the marriage as far as possible. The provision in the RCMA for the mediation of marital disputes before the dissolution of a marriage by the court[77] may equally be seen to promote this goal. On the other hand, the families of the parties to the marriage are the focal point of dispute resolution in living customary law.[78] That informal reconciliation is attempted before the marriage is dissolved in some cases is apparent from the litigation documents for divorce. Some affidavits of divorce claims or counterclaims list as factors for proving the irretrievable breakdown of the marriage the fact that the other party refused to be reconciled or that the petitioner tried to seek reconciliation by their family members.

The effect of interaction in respect of both the values of communality and cohesion is reinforcement. In the first place, the legislative provision requiring marriages to be dissolved only after they have they disintegrated beyond any possibility of restoring the marriage relationship reinforces the value of cohesion in living customary law and vice versa. Secondly, by providing for a marriage to be concluded in accordance with customary law, which has been interpreted as the living customary law of the prospective spouses, state law reinforces the application of living customary law that include the values of communality and cohesion of the family.

[76] Section 8(2) of the Act.
[77] Section 8(5) of the Act.
[78] See Himonga and Moore note30above.

PARTIE III: FURTHER ANALYSIS OF INTERACTIONS BETWEEN THE LEGAL SYSTEMS

I. Reactions of indigenous and state actors

How the actors perceive and experience the interactions between the legal systems? Illustrate your analysis with as many examples as possible.

The courts, as state actors, view the co-existence of state law and customary law positively and as an important aspect of fostering an inclusive legal system based on the Constitution. Thus, while they insist and ensure that customary law, like any other legal system in the country, adheres to constitutional principles and values, they are clear that this system of law develops to take its place as a part of the post-apartheid legal system. In the following excerpts the court in *Mayelane v Ngwenyama* draws from its decisions in other cases involving customary law[79] to emphasise se this point.

First, referring to a section of the Constitution that provides for the development of customary law in accordance with the spirit, purport and objects of the Bill of Rights in the process of its

[79] The cases that the court quotes from are: *Bhe and Others v Magistrate, Khayelitsha, and Others* note 5 above; *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC); *Gumede v President of Republic of South Africa and Others* note 37 above. and *Alexkor Ltd and Another v Richtersveld Community and Others* note 2 above..

application by the courts, the court states: 'The Constitution "acknowledges the originality and distinctiveness of indigenous law as an independent source of norms within the legal system" such that customary law "feeds into, nourishes, fuses with and becomes part of the amalgam of South African law".'[80]

Second, the judges of the court are conscious of the importance of lifting customary law out of its degraded status during the years of colonialism and apartheid, as the following statement shows: 'This Court has, in a number of decisions, explained what this resurrection of customary law to its rightful place as one of the primary sources of law under the Constitution means. This includes that: customary law must be understood in its own terms, and not through the lens of the common law.'[81]

Thirdly, the court extols the potential of customary law and its contribution in the legal system as follows:

'[C]ustomary law is a system of law that is practised in the community, has its own values and norms, is practised from generation to generation and evolves and develops to meet the changing needs of the community; the inherent flexibility of customary law provides room for consensus-seeking and the prevention and resolution, in family and clan meetings, of disputes and disagreements; these aspects provide a setting which contributes to the unity of family structures and the fostering of co-operation, a sense of responsibility and belonging in its members, as well as the nurturing of healthy communitarian traditions like Ubuntu.'[82]

However, as already stated, the courts perceive the co-existence of customary law with state law on its own terms, within a hierarchy of sources of law taking into account the Constitution as the supreme law. It this respect, the Constitutional Court has in all of its jurisprudence recognising customary law underlined its position that customary law 'is subject to the Constitution and has to

[80] At para 23.
[81] At paras 23 and 24.
[82] *Mayelane* at para 24 (footnotes omitted).

be interpreted in the light of its values, [and that its future evolvement or development will have to take place] within the context of its values and norms consistently, with the Constitution.'[83] This approach speaks to the potential processes of amputation and suppression of customary law by state actors, as well as their imposition of state principles and values on customary law. These values may be derived from the Constitution, as happened in *Mayelane*, where the living customary law of consent to marry was supplanted by the constitutional principles of equality and dignity, or from ordinary legislation aimed at implementing these and other constitutional principles, such as the RCMA.

Finally, as already stated, some of the decisions of state actors connected to the approach under consideration reveal an aggressive form of suppression of customary law by state law. This is because the courts have effectively reduced the area of living customary law that the RCMA had preserved for application to some polygamous marriages.

II. Other aspects of the interactions between legal systems

What other aspects or issues of interaction between the legal systems do you judge relevant and why? Illustrate with examples the points raised.

In at least two cases, the parties were married before the RCMA came into force, but dissolved after *Gumede*. The applicable ground for divorce should therefore have been the irretrievable breakdown of the marriage prescribed by section 8 of the RCMA. However, in both cases, the ground of divorce cited in the litigation documents was that of a civil marriage, thereby setting in motion some interaction between living customary law, official customary law and the common law of divorce. Since this study is limited to interactions between official customary law and living customary law, this scenario does not fall within the scope of this study. However, it is relevant to the study to the extent that it shows that the interaction of state law and indigenous law could be much broader and

[83] *Mayelane* at para 24.

complex than this study has revealed, and therefore requires further research.

APPENDICES

I. Appendice A: Diagram of the Presentation (mandatory, but template optional)[84]

THEME				
REGION / CASE				
Step 2: What are the interactions between the indigenous and state legal systems and how are such interactions managed?				
VARIABLES	**EXAMPLES OF INTERACTIONS BETWEEN THE LEGAL SYSTEMS**	**EFFECT OF INTERACTIONS ON LEGAL SYSTEMS**	**REACTIONS OF STATE-ACTORS AND ABORIGINALS TO THESE INTERACTIONS**	**COMMENTS**
Values / beliefs ↕	Cohesion Communality	Hybridisation Recognition		
Principles ↕	stability Irretrievable breakdown of the marriage	Hybridisation Imposition		

[84] The template provided is optional. You may opt for any graphic design that will effectively sum up your findings.

Rules 	Non restitution of lobola Best interest of the child	Hybridisation Imposition		
Actors 	Attorneys, Family Advocate Family Counselors Couple	Cooperation Imposition		
Process, rituals, ceremonies 	Mediation conciliation	Recognition		
Others				

II. Appendice B: Selected Bibliography (Mandatory)

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III.

IV. Significant Extracts from the Collected Data (optional)

V. Annex D: Other Documents Deemed Relevant (optional)