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***First Integration Report:  
How does legal  
pluralism manifest  
itself?***

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**Title of Sub-project:**

DISSOLUTION OF CUSTOMARY  
MARRIAGE IN THE SOUTH AFRICAN  
LEGAL PLURALISM CONTEXT

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## PART I: SUBPROJECT DESCRIPTION AND METHODOLOGY

### I. Subproject description

#### 1. Background and objectives of the subproject

In South Africa, legal pluralism is a popular concept and manifests itself mainly in matters of land, personal law, marriage, divorce and other related aspects. Customary marriages, including their dissolution, are now largely regulated by the Recognition of Customary Marriages Act<sup>1</sup> (hereafter the Recognition Act). This piece of legislation symbolises South Africa's attempt to regulate several aspects of customary marriages and to bring the vulnerability of women married under customary law and the children of the marriage into the bounds of constitutional protection. The main changes brought by the Recognition Act are, among others, the need to register every customary marriage, the codification of the ground of the irretrievable breakdown of marriage as the main basis upon which customary marriages may be dissolved and the requirement that a customary marriage be dissolved only by a High Court or another court of similar status.

However, there are doubts about the reception of the Recognition Act on the ground and whether the Act actually improves the status of women under customary law.<sup>2</sup> This study investigates the nature and extent of the interactions that exist between the provisions of the Recognition Act and the living practices that govern the dissolution of customary marriages. It seeks to examine people's views about the provisions of the Recognition Act and to investigate whether the bulk of customary marriages are dissolved in line with these provisions. The study will primarily rely on the reuse of the empirical data collected during the recently concluded socio-legal study of the DST/NRF Chair in Customary Law, Indigenous Values and Human Rights (hereafter the Chair) on customary marriages.

The objectives of the research are to analyse how the State regulates the co-existence of customary law and official law and to determine the interactions between different normative systems operating in the country. While investigating the values and the principles embodied in the different legal systems and, as well, the rules and processes of their creation, interpretation and implementation, the research aims to reveal:

- (a) the taxonomy of interactions (conflictual and non-conflictual, positive and negative, collaboration, co-operation, mutual indifference, hybridisation etc.) between the different normative legal orders and how these processes are managed in the specific domains and,
- (b) the interplay between different normative orders and to understand how different normative orders appropriate and impact on each other in the specific domains.

#### 2. Research questions

This research seeks to answer the following questions:

1. What indigenous laws and state laws exist with respect to the dissolution of customary marriage and what are the interactions between the two legal systems?

<sup>1</sup> 120 of 1998.

<sup>2</sup> See Generally Himonga and Moore., *The Reform of Marriage, Divorce and Succession in South Africa: Living Customary Law and Social Realities* (2015) (Juta and Co Ltd.

2. Through which formal or informal processes are these interactions organised?
3. What is the effect of these processes and interactions on indigenous law and indigenous groups?
4. What is the effect of these processes and interaction on state law and state agents?

This first report is mainly concerned with the two first research questions. The last two questions are the subject of the report of the next phase of the project.

### 3. Theoretical framework

The theoretical focus of this research is on legal pluralism<sup>3</sup> and specifically deep legal pluralism as this is the most efficient way to capture non-state customary law. Legal pluralism as an anthropological theory, where we stand, argues that the plurality of social groups induces a multiplicity of legal systems related to each other through collaboration, coexistence, competition or negative interactions.<sup>4</sup> It has two political and methodological implications captured by the different theories of legal anthropology. Firstly, despite the pre-eminence of state law, the tendency of the State to present itself as the principal source of law should be nuanced<sup>5</sup>. Secondly, legal expressions and manifestations of law can be verified in different niches of legal actions dissimilar from those accepted in the classical theory of legal sources.<sup>6</sup>

At the practical level, African states have been confronted by these issues and many reforms deriving from the struggle for the recognition of customary law for the better framing of hybrid legal orders have taken place in recent years in South Africa.<sup>7</sup>

The proposed study takes cognisance not only of the fact that the Bill of Rights and statutory instruments have far-reaching implications for the dissolution of customary marriage, but also of the fact that living customary laws governing these areas continue to evolve in response to changing needs of the community and the normative standards laid down in state laws. The idea of legal pluralism demonstrates that non-state law operates in the same field as statutory law, leaving the possibility of choice of laws and forum-shopping. Therefore, it is necessary to analyse the subject not only in light of the way people live in traditional communities, but also in light of the formal laws that govern these areas. In this respect, this study explores the positive and negative interactive processes between living customary law and the relevant formal laws.

### 4. Glossary

**Ubuntu:** means the African communitarian ethic that promote a philosophy of solidarity based

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<sup>3</sup> As a theoretical notion, legal pluralism tends to have several meanings depending on the discipline. In the legal field, the first meaning of pluralism is the simultaneous existence within the same legal system of different legal norms applicable to identical situations.

<sup>4</sup> SF Moore *Law and Social Change: The Semi-autonomous Social Field as an Appropriate Subject of Study* in *Law as Process: An Anthropological Approach* (1978) 55.

<sup>5</sup> See, for example, J Griffiths 'What is Legal Pluralism?' (1986) 24 *Journal of Legal Pluralism* 1-50; M Chanock *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia* (1998); J Vanderlinden 'Return to Legal Pluralism: Twenty years Later' (1989) 28 *Journal of Legal Pluralism* 149-157; J Ubink *In the Land of the Chiefs Customary Law, Land Conflicts and the Role of the State in Peri-Urban Ghana* (2008) 27.

<sup>6</sup> These arguments have surrounded the theory of legal pluralism from its inception in the sociological investigation, its systemized study in the legal anthropology field at the Dutch School of Customary Law and its universal approach tilting away the colonial approaches in the late sixties.

<sup>7</sup> See, in South Africa, the Recognition of Customary Marriages Act (1998), The Reform of the Customary Law of Succession and Related Matters Act of 2009, etc.

on the idea that there is an interdependency between human beings.

**Lobola:** From a legal perspective lobola means the property in cash or in kind, whether known as *lobolo*, *bogadi*, *bohali*, *xuma*, *limalo*, *thaka*, *ikhzi*, *magadi*, *emabheka* or any other name, which a prospective husband or the head of his family undertakes to give to the head of the prospective wife's family in consideration of a customary marriage.<sup>8</sup> From an anthropological perspective, lobola is designed to distinguish the status of the married woman from that of other women, to secure her rights and to protect her from abuse<sup>9</sup>.

**Puthuma:** is a practice of the Northern Cape Nguni group that allows the wife to desert her husband when she feels mistreated and to go back to her parents/guardians home.

**Theleka:** is a practice that allows a man to fetch his wife who deserts him in accordance with the puthuma custom in order to continue the marital relationship, as desertion is not traditionally viewed as divorce.

**Tshipfumelo:** is a practice of the Venda group, which arises, in the same circumstances as theleka but where the wife will go to the husband's sister. In order to fetch his wife and "restore friendly relations with his father-in-law the husband has to approach the latter and hand to him the "tshipfumelo" (gift of reconciliation or to make amends) which is usually a beast or goat<sup>10</sup>.

**Isindlo:** according to Xhosa customs, isindlo is a maintenance fee that is paid by the husband for his wife and children in case of desertion, which in practice does not dissolve the marriage.<sup>11</sup>

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<sup>8</sup> Section 1 of the Recognition Act.

<sup>9</sup> J H Soga *The Ama-Xhosa. Life and Customs*, Cambridge University Press, (2013) 261.

<sup>10</sup> Van Warmelo *Venda Law* (1948) 465, Buchner-Eveleigh, 'Netshituka v Netshituka 2011 (5) SA 453 Revival of a Customary Marriage Previously Dissolved by a Subsequent Civil Marriage, (2012) *De Jure* 596.

<sup>11</sup> Soga, *supra* 283

## II. Methodology:

### 1. Description of data collected and analysed (source, forms, etc.)

The research methodology included desktop and empirical research to reveal the state perspectives on customary practices and the interactions between state law and the customary law. This research consisted of an analysis of legislation including the Constitution, customary law reform legislation and various legislative acts that impact on the customary law, court decisions, and the South African Law Reform Commission reports related to the dissolution of customary marriage. This documentation was compared to the indigenous laws operating in the communities as depicted in the literature based on empirical work, socio-legal studies and other academic contributions. The recent qualitative and quantitative work which is taking place in the field of customary law was exploited, particularly the empirical studies/surveys in the domains of succession done by Sindiso Mnisi<sup>12</sup> and Budlender et al<sup>13</sup>.

For the empirical part of the study, the recent work concluded by the Chair, which aimed at evaluating the practical impact of the reformed laws of customary marriage and succession has generated data which was reused in order to get a better understanding of the grounded realities of the regulation of dissolution of customary marriages in South Africa, as well as the interaction processes that occur between different normative orders. The Chair's socio-legal investigation was aimed at revealing the practical impact of the Recognition of Customary Marriages Act and the decision of the Constitutional Court in the case of *Bhe v Magistrate Khayelitsha*.<sup>14</sup> Part of this research consists of information (about views, perceptions and experiences related to dissolution of marriages) collected through community workshops with ordinary members of society and semi-structured interviews with married individuals, divorcees, intestate successors in six provinces—namely Eastern Cape, Gauteng, KwaZulu Natal, Limpopo, Mpumalanga and the North-West. Only the research in Gauteng represented the urban population. The research in the rest of the provinces was in rural areas.

The fieldwork included key informant's interviews with traditional leaders, judges, magistrates and other court officials. While the overall information of that study gave a solid background about the matrimonial issues in South Africa and which were relevant to this case study, there was a need to re-examine closely the 17 interviews done with divorcees.<sup>15</sup>

In addition to this empirical data, court cases were collected from different courts.

In sum, the data collection included several chronological steps executed as follow: Community discussion workshops, administration of semi-structured interviews with individual participants, organisation of the key informant interviews (traditional leaders, judges, and court officials), and

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<sup>12</sup>S Mnisi, (2010) *The Interface Between Living Customary Law of Succession and South Africa State Law*, D.Phil. in Law, New College.

<sup>13</sup>D Budlender, S.Mbgweba, K Motsepe & L Williams *Women, Land and Customary Law*.

Johannesburg: Community Agency for Social Enquiry (2011).

<sup>14</sup> 2005 (1) SA 580 (CC).

<sup>15</sup> The initial number of interviews with divorcees during the first research was 20. Three of them had to be dropped because of the difficulty in understanding and relating to parts of the transcripts.



review of court files (case files, High Court judgments, and files of two Regional Divorce Courts).

The workshops held in Limpopo, North-West and Mpumalanga provinces registered participation of a total of 205 community members and traditional leaders. The individual interviews sample included 109 participants distributed as follow: 62 married participants, 20 divorced participants and 27 participants involved in intestate successions. The interviews with key informants were done with 17 traditional leaders distributed geographically as follow: 3 from Eastern Cape, 2 from Gauteng, 3 from KwaZulu Natal, 7 from Limpopo and 2 from North West. Only 2 traditional leaders were women. At the courts, 3 magistrates including an acting judge in the High Court and three registrars of the High Courts were interviewed. See appendixes, for more details on the divorcee sample that is being re-used in this study.

## **2. Description of connection between data and research objectives/questions**

The desktop research on legislation and the analysis of the courts cases gave a clear picture of the legal framework of dissolution of customary marriages and its applications by the different courts. The information collected from the individual participants married under customary marriage or divorcees enhanced our understanding of the living customary law systems and how political, economic and social changes have affected the traditional normative systems in rural areas. The living customary law derived from the accounts of individual informants was supplemented by the information from the traditional leaders who are still relevant to the existence of customary law in South Africa.

## **3. Data selection criteria**

The research sites were selected mainly on the basis of accessibility of the communities. The National Movement of Rural Women facilitated this access. The criterion on which a participant was selected was that he/she was married or divorced after 2000. This criterion led to the exclusion of participants who had been married or divorced for more than 14 years from the sample for the reason explained in subsection 5 below. An effort was made to include participants with different range of experiences.

## **4. Data collection tools**

The interviews employed interview guides, which included vignettes. (See appendixes)

## **5. Limitations or reservations regarding the reliability or interpretation of data**

One of the main reservation is related to the reuse of data which was collected for a research project with different objectives. For example, because of the aim of the initial project, which was investigating the implementation of the Recognition Act after it came into force in 2000, there was exclusion of people who married or divorced 14 years before the start of the study from the sample. However, the understanding of the interactions between the different legal systems under the aim of



the current study would not have required such exclusion. In fact, the inclusion of these people in the sample would have given historical perspectives on the evolution of such interactions before and after the enactment of Recognition Act. In that sense, any historical narratives related to customary marriages in this study relied on desktop research rather than a cross analysis of personal experience of participants interviewed during the course of the study.

Furthermore, the previous research collected divorce cases on customary law from some provinces where divorce courts existed before the Jurisdiction of Regional Courts Amendment Act, 2008 (Act 31 of 2008) and at the High Court. For the purpose of the current study, these materials were screened to ensure that they comprise insights that can constitute the foreground data that focuses on the research questions<sup>16</sup> of this specific study. Where gaps were identified, we conducted further research and collected the necessary information from eighty-five (85) additional cases on dissolution of customary marriages decided between 2007 and 2013 by the North Eastern Regional Divorce Court.

In general, the following observations about the initial collection of the data that was re-used are worthy of note:

-The under representation of men in the overall sample was due to the difficulty of recruiting this category of participants because of suspicion, request of financial compensation for participation, and unavailability during weekdays.

- The under representation in the data of participants from certain regions, such as the KwaZulu Natal, has been balanced by the existence of recent empirical studies from which the report borrows insights, as well as by the additional eighty-five (85) court decisions collected from the provincial divorce court in the area.

- The problems related to the involvement of interpreters in the research process, which affect the quality, and reliability of the data.

- The interview of “family sets” rather than individuals might have given a much clear picture of what happen during different negotiations related to the divorce.

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16 LA Wynholds, JC Wallis, CL Borgman, A Sands, S Traweek (2012) Data, Data Use, and Scientific Inquiry: Two Case Studies of Data Practices. Proceedings of the 12th ACM/IEEE-CS Joint Conference on Digital Libraries. JCDL '12. New York, NY, USA: ACM. pp. 19–22.

### III. Values/Beliefs

#### 1. Indigenous Law

A Large part of South African society is still entrenched in African traditional values that are prominent in family matters. The two most important interconnected values that relate to, or impact on, ways of ending customary marital relationships are communitarianism (which we also refer to as the communal ethic) and family cohesion. While these values are presented in general terms in this report, variations due to the location, ethnic affiliation or socio-economic changes that affect the attitudes of individuals/couples/families towards these values might be revealed when the empirical data analysis is completed. However, the general hypothesis based on the desktop research and the general experience during the fieldwork is that these values are still largely prevalent. In what follows, we discuss how these values are manifested in the area of divorce.

Communitarianism is known to be one of the core values in African societies and has a central element in customary marriage. As held by the Constitutional Court of South Africa, ' [i]n our pre-colonial past, marriage was always a bond between families and not between individual spouses. Whilst the two parties to the marriage were not unimportant, their marriage relationship had a collective or communal substance'<sup>17</sup>. This communal ethic is still relevant in the dissolution of customary marriages today and justifies the processes aimed at preserving the marriage through different conciliatory mechanisms, such as family and traditional mediations.

Family cohesion, as an appendix to the value of Communitarianism is essential, and it has a central role in the process of ending the marriage, including the ending through divorce. Despite invention and re-invention of customary law, the value of family remains valid to a large extent. In fact, "the family is where African peoples construct the foundations of their social lives"<sup>18</sup>. Consequently, every member of the society is bound to respect this value by protecting the cohesion of his/her own family and kin-group as a fundamental element of social reproduction. This is captured by the spirit of the African Charter on Human and People's Rights which places the duties, inter alia, of the individual towards his family to preserve the harmonious development of the family, and the duty to respect his parents at all times.<sup>19</sup>

The fact that marriage brings together not only two individuals but also two families implies that its dissolution should take into consideration the impact on these familial relations as well. In other words, because marriage is a collective affair, divorce might be destructive to the families and therefore to the society as a whole. These considerations are important in understanding the value

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<sup>17</sup> *Gumede v President of the Republic of South Africa*, para 18

<sup>18</sup> T Nhlapo 'Cultural Diversity, Human Rights and the Family in Contemporary Africa: Lessons from the South African Constitutional Debate,' (1995) 9 *Int'l J.L. & Fam.* 208-225.

<sup>19</sup> See articles 27-29 of the African Charter on Human and People's Rights.

attached to the stability of customary marriages.

Thus, more than the rights of the individual spouses, the cohesion of the family is a critical element of the dissolution of a customary marriage in indigenous law in South Africa, as probably in other African societies. However, in the South African context, much of indigenous marriage and divorce law have, formally, been replaced by legislation as shown in the next section. The extent, to which this legislation has taken root on the ground level of society, is of course, another matter.<sup>20</sup>

## 2. State Law

In South Africa, the Recognition Act, which entered into operation in November 2000, regulates contemporary customary marriage entered into both before and after its commencement. Until the decisions of the Constitutional Court in 2008<sup>21</sup> and the High Court in 2016,<sup>22</sup> some customary marriages contracted before the enactment of the Recognition Act were governed by customary law.<sup>23</sup> These decisions have extended the application of the Act to all marriages entered into before the Act. Thus, both the marriages entered into before and after the Act are now regulated by the Recognition Act.

Before the coming into operation of RCMA, customary unions were regulated by some provisions of the repealed Black Administration Act,<sup>24</sup> the Transkei Marriage Act<sup>25</sup>, the Bophuthatswana Marriage Act,<sup>26</sup> the KwaZulu Act on the Code of Zulu Law,<sup>27</sup> The natal Code of Zulu Law<sup>28</sup> and Matrimonial Property Law Amendment Act.<sup>29</sup> The RCMA has repealed many aspects of this legislation but left into operation chapter 3 and part 2 of chapter 5 of the Transkei Marriage Act, chapter 7 of the KwaZulu Act on the Code of Zulu Law and all the provisions of the Proclamation R151 of 1987 except its sections 22 and 27(3) and all the provisions of the Bophuthatswana Marriage Act. In 2005, section 53 of the KwaZulu- Natal Traditional Leadership and Governance (Act 5 of 2005) repealed the entirety of the KwaZulu Act and the Natal code of Zulu law although such repeal is yet to come into operation. Furthermore, the Constitutional Court in *Gumede V President of the Republic of South Africa*<sup>30</sup> found section 20 of the KwaZulu Act and sections 20 and 22 of the Natal code to be unconstitutional. The Transkei Marriage Act and the

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<sup>20</sup> This is the subject of a recent study by Himonga and Moore, supra. , as well as the subject of an ongoing PhD study by Fatima Osman within the purview of this research project.

<sup>21</sup> That is, *Gumede V President of the Republic of South Africa* 2009 (3) SA 152 (CC).

<sup>22</sup> *Matodozi Ramuhovhi v Netshituka*, Case no 412/2015, Limpopo Local Division.

<sup>23</sup> These marriages were regulated by s 7(1) of the Act. However, this section was modified by the Constitutional Court in *Gumede* case, which limited the application of customary law regulating the proprietary consequences of marriage to de jure polygamous marriages only. Monogamous entered into before the RCMA are now regulated by the RCMA. For a detailed discussion of this change in the law and its practical application, see Himonga and Moore supra. In *Matodozi* case, the High Court held that the Recognition Act rather than the customary law applies to polygamous marriages as well. However, because this case nullified a provision of the Recognition it has to be confirmed by the Constitutional Court. The case has not been confirmed yet.

<sup>24</sup> 38 of 1927.

<sup>25</sup> 21 of 1978.

<sup>26</sup> 15 of 1980.

<sup>27</sup> 16 of 1985.

<sup>28</sup> Proclamation R151 of 1987.

<sup>29</sup> 3 of 1988.

<sup>30</sup> Supra.

Bophuthatswana Marriage Act have been repealed by the Draft Marriage Amendment Bill of 2009<sup>31</sup> which has not been promulgated yet.

The Recognition Act in turn borrows some concepts and principles from the common law and legislation that govern the dissolution of civil marriages,<sup>32</sup> including those contained in the Divorce Act<sup>33</sup>. While being the first Act to give full legal recognition to customary marriages, the Recognition Act also has as its aim the alignment of the customary law to constitutional principles, rights and obligations. It therefore undeniably follows the values of equality; impartiality and equity entrenched in the Constitution.<sup>34</sup>

With regard to equality, the Recognition Act symbolises an attempt to bring the vulnerability of women married under customary law into the bounds of constitutional protection. As the Constitutional Court has emphasised, the Recognition Act seeks to eliminate gender inequality within customary marriages and to abandon the husband's marital power by providing for the equal status and capacity of spouses<sup>35</sup>. This value has been entrenched in a straightforward way by section 6 of the Recognition Act, which provides for equal status and capacity of spouses by stating that: 'A wife in a customary marriage has, on the basis of equality with her husband and subject to matrimonial property governing the marriage, full status and capacity, including the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that she might have at customary law.' This value of gender equality pervades different aspects of the dissolution of customary marriages, namely, proprietary consequences, spousal and child maintenance and parental responsibilities and rights. In all these matters the equality of spouses is emphasised. Even in the case of parental responsibilities in which the best interests of the child is the primary consideration, equality between the parents underlies their eligibility for the allocation of parental responsibilities and rights in specific contexts.

Equality as the main value guides statutory norms governing the dissolution of customary marriages. However, for such equality to be realised, fair trial and equity have to be applied. For example, fair trial is supposed to be achieved through the prescription of divorce by formal courts, while equity is embedded in the redistribution of property upon divorce,<sup>36</sup> both of which were intended to protect women from the gender-based discrimination that would arise from the continued application of customary law on divorce.<sup>37</sup> It features as well in the rules applied to property sharing, maintenance and parental responsibilities and rights.

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31 (Gazette no31864 of 13 February 2009)

32 A comprehensive understanding of the different statutes that regulate the dissolution of the customary marriage and its different patrimonial and non-patrimonial consequences requires a close scrutiny, along with the RCMA, of at least the Children's Act 38 of 2005, which repealed the Age of Majority Act, of 1972; the Matrimonial Property Act 88 of 1984; the Divorce Act of 1979; the Mediation in Certain Divorce Matters Acts, 1987; the Draft Recognition of Customary Marriages Amendment Bill (Gazette no 32198 of 8 May 2009) and the Reform of the Customary Law of Succession and Related Matters Act 11 of 2009.

33 70 of 1979.

34 See sections 9 and 34 of the Constitution on equality and fair trial in the courts respectively.

35 *Gumede v President of the Republic of South Africa* 2009 (3) SA 152 (CC).

36 See section 7(3) of the Divorce Act. Essentially, this section provides that where parties were married out of community of property before the commencement of the Matrimonial Property Act, 1984, in the absence of an agreement between them and on application of a party, a court may, if it is just and equitable, order that the assets of the other party be transferred to the applicant..

37 C 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 C Murray and M O'Sullivan (eds) *Advancing Women's Rights* (2005) 82, 89.

## IV. Principles

### 1. Indigenous Law

Several principles are noticeable in the indigenous law governing the dissolution of customary marriage. These principles may not relate directly or indirectly to the traditional values described above but they do feature concomitantly or disjointedly in the process of divorce and its consequences on maintenance, property, legal status, rights and obligations of the spouses. The principles in question are stability, reconciliation, male domination and guardianship of the wife. It is necessary to briefly discuss each one of them.

First, the principle of stability ensures the protection of the marriage until its complete dismantlement. This principle is important given the fact that customary marriage involves two families and therefore aims to last long in order to avoid the deterioration of the relations between those families. Also, while the concept of grounds of divorce, in the sense of conditions that had to exist to satisfy the court to grant a divorce order was unknown to customary law,<sup>38</sup> the existence of solid reasons for divorce was vital as the return or otherwise of *lobola* partly depended on who had contributed to the collapse of the marriage.<sup>39</sup> Therefore, a wife needed to have an especially sound reason to convince her guardian to allow her to return home since her return, in certain cases, might cause the full or partial repayment of *lobola*. Consequently, although customary marriages are not bound by many formalities, the communal substance that justify the involvement of the families in the matrimonial disputes resolution and the return of *lobola* rule upon divorce play the role of stabilizing factors for the marriage.

Secondly, reconciliation is a core principle in the process of dissolution of customary marriages. Like the principle of stability, it is premised on the necessity to protect the marriage until it has disintegrated beyond restoration. Usually any behaviour from the spouses that puts at risk the matrimonial relationship can be disclosed to the senior members of the families who through proper counselling will discourage the perpetrator in his or her wrongdoing. If the families of the spouses are made aware of the unilateral or reciprocal intention to end the marriage, they can meet and try to resolve the disruptive issues by counselling the spouses. All the practices of *Theleka*, *Phuthuma* and *tshipfumelo* speak to the idea of the necessity of reconciliations at the level of the family of the spouses before divorce.

If mediation does not work the matters can be referred to a traditional court or traditional authorities who make the same attempts with the ultimate goals of reconciling the spouses. However, it has been observed that families and traditional institutions such as chiefs are not very effective in the mediation of disputes of matrimonial disputes in practice,<sup>40</sup> with the result that reconciliation of the spouses before divorce is more of an ideal than reality.

Thirdly, male domination is predominant in customary matters. It features in divorce through different aspects from the right to institute divorce, the possibility of repudiation of the wife, the control over property, etc. For example, husbands had a superior status in the divorce process as

<sup>38</sup> See the South African Law Reform Commission (SALRC), *The Harmonisation of the Common Law and the Indigenous Law: Report on Customary Marriages (Project 90 (1998) 126*, Para 7.2.1.

<sup>39</sup> M Herbst and W Du Plessis 'Customary Law v Common Law Marriages: A Hybrid Approach in South Africa' (2008) 12(1) *Electronic Journal of Comparative Law* 1, 11

<sup>40</sup> See Himonga and Moore, *supra*.

they were not under any obligation to prove the existence of a specific reason for divorce – the main disadvantage being that they had to be prepared to forfeit part or all of the *lobola* paid for their wives should they seek to divorce any of them for no sound reason.<sup>41</sup>

The prevalence of patriarchy laid the basis for male domination as elderly men have the power to establish the rules and to preside over them for the purpose of social order. The idea that many patriarchal elements of African societies were encouraged and entrenched during the colonial period to facilitate the social, political and economic control by the rulers<sup>42</sup> doesn't prevent its stubborn persistence especially in rural areas despite the end of apartheid and the new constitutional era. This is not to say that the principle of patriarchy is absolute, for as living customary law on the ground evolves so do sites for contestation of power between men and women, and the adaptation of customary law to changing conditions, including adaptations that favour and improve the situation of women albeit perhaps in small measures.

Finally, historically, unmarried women are perceived as minors in customary law, with their fathers or other male relatives as their guardians. Their legal status changes during marriage, but only with the shift of power over them from their fathers to their husbands. Under this kind of tutelage, it is expected that the father is the one who should initiate the process of divorce on behalf of his daughter if need be. Such may be the case for example when the husband is not fulfilling his marital obligations. This is compatible with the involvement of the senior members of the family in the resolution of the matrimonial disputes in which the wife doesn't traditionally take part but is usually represented by her guardian.

## 2. State Law

The principle of stability discussed in relation to indigenous law also applies under state law to protect the marriage until it has reached the stage of irretrievable breakdown. Furthermore, the constitutional protection of family and gender equality has justified the importance of stability of marriage according to state legislation. The stability is preserved through the notion of "irretrievable breakdown" of the marriage as sole ground for divorce.<sup>43</sup> According to the Recognition Act, for a court to issue a decree of divorce, it must 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.'<sup>44</sup> This provision is substantially similar to that regulating the dissolution of civil marriages under the Divorce Act,<sup>45</sup> except that it omits to mention explicitly the mental illness and the continuous unconsciousness<sup>46</sup> as grounds of divorce, as well as the guidelines for determining when the marriage can be said to have broken down irretrievably. Because of such similarity some authors have considered that the court might

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41 See *Kos v Lephaila* 1945 NAC (C&O) 4. See also M Herbst and W Du Plessis supra .

42 see generally Chanock *The Making of South African Legal Culture 1902-1936: Fear, Favour and Prejudice*, 2001. See as well SALRC, which stated that 'Because courts control the divorce procedure, they might have been expected to advance the cause of vulnerable parties when developing the 'official' version of customary law; but as it happened they did very little. Instead, by trying to remain true to African traditions, the courts gave unwarranted rights and powers to husbands and the guardians of wives.' Supra 130, Para 7.3.4.

43 Section 3 of the Recognition Act.

44 Section 8(2) of the Recognition Act.

45 Section 4 of the Divorce Act.

46 Referred to in section 3 and 5 of the divorce Act.



interpret analogically the notion of “irretrievable breakdown” while applying it to customary marriages<sup>47</sup>, others have advocated against such approach<sup>48</sup>.

Pre-divorce mediation is another prominent principle of state law embedded in the Recognition Act. The Act recognizes the principle of mediation in the divorce process in s 8 (3), which applies the Mediation in Certain divorce Matters Act<sup>49</sup> to the dissolution of the customary marriage, as well. The Act also goes further to incorporate customary law mediation by stating that nothing in the law ‘may be constructed as limiting the role, recognised in customary law, of any person, including any traditional leader, in mediation, in accordance with customary law, of any dispute or matter arising prior to the dissolution of a customary marriage by a court.’<sup>50</sup>

Another prominent principle of state law on divorce is judicial discretion. In order to promote justice, equity and equality, judicial discretion has become a main feature of the dissolution of customary marriages. According to section 8 (1) of the Recognition Act ‘A customary marriage may only be dissolved by a court by a decree of divorce on the ground of the irretrievable breakdown of the marriage’. This provision gives discretion to the court to assess whether the marriage has reached its irretrievable level of breakdown before granting divorce. The use of the word ‘may’ in this section 8(1) and in s 8(2) of the Act raises the question whether a court has the discretion to refuse a decree of divorce even if the requirements for a divorce have been met. In the context of civil marriages, the stronger view seems to be that the court has no such discretion.<sup>51</sup> 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 an absolute discretion to the courts.<sup>52</sup> In *Ex Parte Inkley and Inkley*,<sup>53</sup> Van Zyl J held that the courts have discretion not to refuse a divorce once the requirements for such divorce have been unequivocally proven, but to postpone the dissolution of the marriage until certain conditions have been met.<sup>54</sup> Nevertheless, courts have explicit power, in certain circumstances, to postpone divorce proceedings to enable the parties to make an attempt at reconciliation.<sup>55</sup> Furthermore, as already stated, unlike the Divorce Act, the Recognition Act does not provide the court with guidelines to determine the irretrievable breakdown of the marriage. This leaves more room for their exercise of discretion.

Finally, the values of equality and equity lead to the principle of individualism in rights and duties for the spouses in their marital relations including during the dissolution of such relationships by

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47 Barrat (ed) Law of persons and the family (2012).

48 C Himonga, ‘The Dissolution of a Customary Marriage by Divorce’, in J Heaton (ed) *The Law of Divorce and Dissolution of Life Partnerships in South Africa* (2014) 238.

49 Act 24 of 1987.

50 Section 8 (5) of the Recognition Act.

51 See Robinson ‘The grounds for divorce’ in Heaton eds. (2014) *The Law of Divorce and Dissolution of Life Partnerships in South Africa* 24-27.

52 *Schwartz v Schwartz* 1984 (4) SA 467 (A) at 474-75, per Corbett JA.

53 1995 (3) SA 528 (C).

54 At 531-32, 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 or if it creates the impression that it is being tendered under duress, or 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.

55 See section 4(3) and 6(1) of the Divorce Act.



divorce. In this respect, the Recognition Act has instituted the equal right of the spouses to seek a divorce quite apart from their family members or the other spouse's wishes regarding the dissolution of the marriage. Thus, contrary to customary law, the wife can now start a divorce process at the courts on her own without the involvement of any guardian.

### **3. Other legal systems**

In some cases, parties who contract customary marriages superimpose such marriages with religious marriages, albeit informally. They do this by conducting a marriage ceremony or “white wedding” before the pastor or other minister of religion who is not designated as a marriage officer for the purposes of concluding a valid marriage in terms of the Recognition Act.<sup>56</sup> In such cases, the religious tenets of divorce under a particular religion may informally influence the way a marriage is dissolved. In some Christian denominations, for example, based on the teaching of the Bible<sup>57</sup> divorce is allowed only on certain conditions, such as the commission of adultery by one of the spouses.

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<sup>56</sup> Himonga and Moore supra.

<sup>57</sup> For example Matthew chapter 19.

## V. Rules

### 1. Indigenous Law

The different values and principles described above manifest themselves in a number of rules that regulate the divorce process. In what follows, we discuss the rules pertaining to various aspects of the divorce process – grounds of divorce, the repayment of *lobola*, patrimonial consequences and spousal maintenance, and maintenance and custody of children.

With regard to grounds of divorce, there is no single ground on which a marriage may be dissolved. The parties may allege various factors that point to the breakdown of the marriage.<sup>58</sup> For example, acts of desertion from both the wife and the husband may not be considered as being solid ground of divorce in indigenous law.

In the case of desertion by the wife, the husband can always exercise his rights under the *phuthuma/theleka/tshipfumelo* custom to get back his wife who has left the matrimonial home for her parents' home for reasons of his matrimonial misconduct. However, the husband can use this same custom to repudiate his wife by not resorting to the custom in question for many years with the intention of ending the marriage. This conduct could effectively result in repudiation of the wife. Thus, the rule of repudiation would effectively constitute one of the ways of ending the marriage. Moreover, the husband could repudiate his wife by escorting her back to her family and signifying her intention to divorce to a headman. Another example of a factor that may lead to the dissolution of the marriage is the breakdown of family relations.

In addition, once a marriage has been dissolved, the husband may claim a repayment of his *lobola* or parts of it, but this is not an automatic right as *the wife's family in certain circumstances may withhold it*. If the wife's actions led to divorce, her father has to repay the *lobola* but may deduct some money or keep some of the cattle as legitimate deductions.<sup>59</sup> But the husband must forfeit the *lobola* when he deserts or repudiates his wife without solid ground and the dissolution of the marriage was due to his fault only.<sup>60</sup>

With regard to the sharing of matrimonial property, because of the almost universal principle of group ownership in the African societies, property is traditionally controlled by the head of the family, meaning the husband. Similarly, indigenous law does not recognise post-divorce spousal maintenance.<sup>61</sup>

The maintenance of children, like custody, follows the affiliation of children through *lobola* payment. The family of the father has the right to the affiliation of children once *lobola* is paid and they bear the responsibility for their maintenance.

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58 See Nhlapo 'Dissolution of Marriage' in Himonga & Nhlapo (eds) *African Customary Law in South Africa Post-Apartheid and Living Customary Law Perspectives* (2014) Oxford University Press 150-152

59 In fact, the repayment *lobola* is accepted specially: when a woman deserted her husband and her father is opposed to the conduct of the *phuthuma* custom and when a woman was found guilty by conduct that gave reasons for the husband to reject her through transparent process, or when her guardian shows intent of dissolving the marriage. See Nkosi, T. 'The Ending of a Customary Marriage: What Happens to the *Ilobolo*?' (2013) *De Rebus*.

60 M Herbst and W Du Plessis *supra*

61 Himonga in Heaton, *supra*, 259.

## 2. State Law

The situation concerning the sharing of matrimonial property under state law is different from that in indigenous law.

The need to protect individual property against the control of other members of the family has justified the introduction of legislation and the principle of individual ownership. But because such individual ownership cannot be claimed by women when it comes to the marital property, the Recognition Act imposes the application of community of property and of profit and loss regime (hereafter community of property) by default to any marriage concluded after the commencement of the Act.

As already stated, following the *Gumede* case, only marriages that were *de facto* polygynous before the Act came into force are excluded from the community of property system. The derogation for the polygynous marriage is supposed to avoid the complexity that can arise from the sharing of property that belongs to multiples spouses during the divorce of one of the wives. In the case of non-polygynous marriages, the community of property can only be infringed if specifically excluded by the spouses in an antenuptial contract which regulates the property systems of their marriage.<sup>62</sup>

The financial consequences of divorce are regulated by the Recognition Act, which extends to women married under customary law the right to claim maintenance from their husbands. Section 8(4)(a) thereof provides that '[a] court granting a decree for the dissolution of a customary marriage has the powers contemplated in sections 7, 8, 9 and 10 of the Divorce Act'. Part of s 7 of the Divorce Act governs the maintenance of parties after the dissolution of marriages. It empowers a court granting a decree of divorce to make an order, in accordance with a written agreement between the parties, regarding the payment of maintenance by one party to the other.<sup>63</sup> Alternatively, the court may make an order which it deems to be just concerning the maintenance of either party by the other for any period until the death or remarriage of the party in whose favour the order has been given, whichever occurs first.<sup>64</sup>

Post-divorce maintenance of children is also governed by the Recognition Act and the provisions of the Divorce Act which it extends to customary marriages as well,<sup>65</sup> and by the Children's Act of 2005<sup>66</sup>. The Constitution adds its weight by providing for the right of the child to family care or parental care, and to basic nutrition, shelter basic health care services and social services all of which translate into maintenance entitlements in a broad sense. The rule governing the right of the child and the duty of parents to maintain in specific contexts is the need of the children for maintenance and the ability of the parents, according to their means, to provide for the child.

However, it is noteworthy that the Recognition Act incorporates customary concepts of maintenance. S 8(4)(e) provides that a court granting a divorce 'may, when making an order for the payment of maintenance, take into account any provision or arrangement made in accordance

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62 Sect 7(2) of the RCMA.

63 Section 7(1) of the Divorce Act.

64 Section 7(3) of the Divorce Act.

65 Of relevance is s 6(3) of the Divorce Act.

66 See the definition of marriage in section 1(2) of the Act.

with customary law.’ This provision anticipates customary customs, such as *isondlo*, among others, with respect to child maintenance.<sup>67</sup>

The legal framework governing custody is quite extensive and varied. The Children’s Act explicitly applies to the custody of customary marriages as well, and it has created rules which govern parental responsibilities and rights, along with the Mediation in Certain Divorce Matters Act<sup>68</sup> and the Divorce Act<sup>69</sup> both of which have been extended to customary marriages by s 8(3) of the Recognition Act.<sup>70</sup> It should be mentioned that the best interest of the child rule, which is recognised by the constitutional principle stating that in all matters concerning the child the best interest of the child are of paramount consideration<sup>71</sup> is predominant in all matters concerning children.

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67 See Himonga in Heaton, *supra*, 277.

68 Act 24 of 1987

69 S 6(3).

70 For detailed discussion of these sections see Himonga in Heaton 269-278

71 S 28(2) of the Constitution.

## VI. Actors<sup>72</sup>/Stakeholders

### 1. Indigenous Law

The indigenous systems display Ubuntu-style values where all community members are invited to help in the resolution of disputes.

As already stated, marriage is a bond between the relevant families from customary law perspectives, and its dissolution involves these families and, in some cases, traditional authorities. Different member of the family can be involved:

- Senior members of the family
- Family councils
- Extended members of the family

In some cases, traditional leaders and traditional courts are involved in dissolution of customary marriage.

### 2. State Law

The Recognition Act has established the rule that divorce may only be granted by a court order. Thus the actors in charge of the application of the law are the judges of various courts. The general understanding is that leaving the dissolution of customary marriages to traditional institutions or senior family members would no doubt have meant the continued application of discriminatory aspects of the customary law regulating divorce and its implications for new marriages. This is particularly so in the light of the fact that traditional dispute resolution forums are largely composed of men who would seek to apply patriarchal norms which maintain their privileged position during and after the dissolution of marriages.

But state law recognizes the role of chiefs and any person involved in a pre-divorce mediation.

## VII. Process

### 1. Indigenous Law

The process through which the indigenous law including the principles and rules that guide divorce are enforced is social coercion through routinized customs and values in which the whole society place paramount attention and to which individual members are supposed to adhere.

For the resolution of the marital dispute, the process involves many conciliatory mechanisms, which are not adversarial.

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<sup>72</sup> The section 'actors' may include institutions and stakeholders

## 2. State Law

Prior to the enactment of the Recognition Act, customary marriages could be dissolved extra-judicially. Section 8(1) of the Act provides that only a court decree of divorce should dissolve a customary marriage. A court is in turn defined as the High Court or a family court.<sup>73</sup> Since the Act became operative, the only means of procuring a divorce has been the issuance of a decree of divorce by the relevant courts. In essence, the Act has abolished the customary law method of dissolving marriages out of court.

The adjudication of divorce in the courts has exposed the divorce process to adversarial forms of dispute resolution. The proceedings in courts are adversarial in nature and, therefore, foster “win or lose” solutions to family disputes. The exception is the pre-divorce reconciliatory approach that incorporates African traditional forms of mediation.

The subjection of customary marriage disputes to judicial divorce aims at promoting respect for constitutional norms and public policies imposed through the judicial discretion vested in the courts’ judges. However, the win or lose nature of adversarial divorce-related litigation works to the advantage of the rich who can afford legal representation, usually to the disadvantage of women and children.<sup>74</sup> The requirement that only a High Court or family court terminate customary marriages makes it difficult for poor women to seek divorce. For many rural women trapped in abject poverty and struggling to earn a living, this option is not only prohibitively expensive, but also associated with limited chances of success because men’s property nowadays often takes the form of wages instead of assets that can easily be divided on divorce.<sup>75</sup>

While different actors might be involved in family dispute resolution, the implementation of the decisions around the divorce should be seen as part of a complex process which represents a number of factors ranging from cultural factors regarding the position of husbands and wives and men and women in society generally; power relations between men and women against the backdrop of patriarchy; access to legal knowledge and procedures for implementing court decision to cultural legitimacy of the formal decisions based as they are on laws that are often foreign, if not strange, to people who should be benefitted by them.

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<sup>73</sup> Section 1(i) of the Recognition Act.

<sup>74</sup> See TW Bennett *Customary law in South Africa* (2004) 276.

<sup>75</sup> M Mamashela ‘New Families, New property, New Laws: The Practical Effects of the Recognition of Customary Marriages Act’ (2004) 20(4) *South African Journal on Human Rights* 616 at 636-37.

### III. Comments



It is worth mentioning that unlike other African countries, in South Africa living customary law is recognized by the State as part of the legal system. The courts are trying to ascertain it and apply it in their decisions. Therefore the distinction between state law and indigenous/customary law in this report should not be understood as an opposition between recognized and not recognized norms.

As in many African countries, ethnic diversity makes it difficult to draw a clear picture of the different indigenous systems of law that prevail. This report should therefore be seen as a descriptive attempt based on the knowledge of some main features shared by the Africans communities.



## ANNEXES

### 1. Annex A: Diagram of the presentation (mandatory)

THEME (family, justice, land, etc.)					
REGION/ CASE					
		<b>Step 1: How does legal pluralism manifest itself in the case study?</b>			
VARIABLES	QUESTIONS	ABORIGINAL LAW	STATE LAW	OTHER LAW	COMMENTS
<b>Values/beliefs</b>  	What values are at work? (ex. <i>solidarity, harmony, responsibility</i> etc.)	Communitarianism /communal ethic  Family cohesion	Equality  Impartiality  Equity		
<b>Principles</b>  	Which principles embody these values? (ex. <i>good faith, reconciliation, sharing, reparation</i> etc.)	stability, reconciliation, male domination  Guardianship of the wife.	stability  Individualism  Pre-divorce mediation  Judicial discretion		

**Rules**



<p>What rules apply these principles? (ex. <i>duty to share the hunt, duty to honour a commitment, duty to compensate etc.</i>)</p>	<p><i>Phuthuma</i> <i>Theleka</i> <i>Tshipfumelo</i> Repudiation Repayment/ Forfeiture of <i>lobola</i> Denial of women's right to claim over property Denial of post-divorce spousal maintenance Affiliation of children/ payment of <i>lobola</i> <i>Isondlo</i></p>	<p><i>De facto</i> community of property regime Women right to claim maintenance Maintenance for children Recognition of customary rules of maintenance such as <i>isondlo</i> Best interest of the child</p>		
<p>- How is the law created? (ex. <i>custom, consensus, majoritarian decision-making, central authority, natural law, sacred law etc.</i>)</p>	<p>Custom Conciliatory mechanisms Senior members of the family Family councils Extended members of the family</p>	<p>Divorce by court order Win or lose solutions Adversarial proceeding</p>		<p>Although, the data analysis is not yet integrated in this report, it worth noting that some divorces do not involve any of these actors.</p>
<p>- Who interprets the law? (<i>Elders, judges, ad hoc processes etc.</i>)</p>	<p>traditional leaders traditional courts</p>			<p>Many men married under customary law do not divorce, but simply abandon their first wives.</p>
<p>- How is the law implemented? (ex. <i>group pressure, institutionalized constraint etc.</i>)</p>				



**Process, rituals, ceremonies/Actors**

<b>Other variables</b>		Religious rules			Christianity is one of the religious systems with normative rules to which some people who are married under customary laws adhere.
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## 2. Annex B: Significant extracts from the collected data (mandatory)

### 2.1. Extracts from individual interviews with a divorcee

“Interviewee                    You never talked about your marriage properties?”

Interviewee:                    In Middleburg they told him he must share the properties I just stayed I said I would see when he’s at Moshate. The chief said there’s nothing to be shared as long as this is not sorted out from here this place belongs to me therefore when one leaves it comes back to me. In culture there’s no sharing when a man leaves his wife he just leaves alone and leave everything to his wife your husband’s properties are yours they would stay here. He said the court said we must share I then asked him what he wants to leave behind he said we can’t talk about the house but we can share other things. I said I would be happy if you can tell what you want he said I would write them down when he’s done he would come back and show you then we can talk. When I opened the letter there was nothing about sharing it only stated that I was selling the house. I wanted a lawyer then the lawyer said I mustn’t worry about these things I must stayed in the house. He never came back again.

Interviewer:                    So it ended there and the chief is involved?

Interviewee:                    Yes the chief is involved. He said he wanted the case back because it involves the kids I want to know what the kids want.

Interviewer:                    He never said he wanted his lobola back after the divorce?

Interviewee:                    No my family wants him big time they want to ask him why he never went to them and tell them about this (inaudible)

Interviewer:                    So the families never sit down and talk about this?

Interviewee:                    He met with his family they agreed with the divorce they should’ve sat down with us if the problem can’t resolved then the divorce. They agreed alone without my relative without me being involved now they are staying with their families while he’s alone.

Interviewer:                    have you talked about the children?

Interviewee:                    We never my divorce it’s not one of those divorce whereby the magistrate said wife your husband is divorcing you therefore.....I was called to finalize a certificate it ended there I didn’t know what happened before the finals. I don’t know this divorce I really don’t know I just got a finalizing certificate but what happened before?”

## 2.2. Extract from community workshops

### Respondent in North West province

“RESPONDENT: Thank you XX. I am here because of work and I work at Batsogile. We have heard that the law was done in 2000. What are we saying about the people who were married prior to this customary law? 1980 something. Those that were married before and divorced before this customary law came into place. I am one of those people. I was married in 1986 and stayed in the marriage for more than 5 years and then I got divorced and it was customary law. When I got out of the marriage I had 2 children, a car and property. I couldn't claim anything; I just came out as I am because at that time customary marriage wasn't recognised. It was only recognised traditionally where you would take a book, a man and the uncles sit down and agree and then sign. Afterwards it was done and all that was waiting would be to get a ring and go sign. Then he delayed, maybe he knew that he was not going to take long in the marriage. He said I should finish school first so as to not cause confusion over the names in the certificates. Until we divorced. The day we divorced, it's a case of we had an argument and he put me and the children in his car and sent us back to my parents, saying I should go get the law and be advised and then we will come back and fetch you. I stayed there, a year came and went and then I gave up. Then I couldn't go back to claim my things, all I had left was my two children who at that time he wasn't supporting. When I asked for support he said he wanted to support them from where he was. I was proposing that we go back a bit, yes, the law was passed in 2000, what then happens to those women who have been abused prior 2000? How can they claim their things from their ex-husbands?”

## 2.3. Extracts from traditional leaders' response to vignette

### **Vignette 4: Divorce and division of matrimonial property**

Nolundi and Moses married each other in terms of customary law, in community of property. This means that they joint own all the property they acquired before and after the marriage. Moses wants to leave the marriage but he refuses to share his property.

- What should Nolundi do? Why?

### **IN CUSTOMARY LAW, THERE IS 'IN COMMUNITY OF PROPERTY'**

Alright, so, in customary law, number one, there's no community of property because the relationship between husband and wife in customary marriage takes the understanding that everything else that is owned by the family... if the husband passes away, they accrue to the children. Because in terms of customary law when I die my things don't belong to my wife they are for my children, I work for my children. The wife is there as a custodian of our things together towards the children, because she can't take my stuff and take 50% and go spend it with another man. No, in terms of customary law you can't. I'm working for my kids. That is why in my culture when I divorce I leave the kids and everything I got for the kids, I take my stuff and I go. I'll go and start another home if I want to. ... Yeah, you don't need a court of law to tell you what you must do. When you work and you say you want to get married and then you have children and you say you're working for them... so even if you divorce, that intention still remains (**Traditional Leader 2\_GP**)

**[And if she divorces]** Well it's not allowed. No, if she wants to marry then she can go. And in terms of customary law she goes back to her home right. But the children stay. She can go, but the children remain. She didn't come with children when she came to the Kekana home. So if she wants to go she can go. Isn't it at her home they have my cows? She can go and play with those cows. {Respondent 3: And if the children want to follow her then they should leave all those assets and follow her.}...Respondent 2: Isn't it the assets... I think the principle comes from here... when I say I'm getting married... that's why when you marry a woman they say she will build the Kekana home, so I married her to build my home. Building a home means we should have children to build this home. So if she doesn't want any more then she should leave my home and she can go.

This home is for my children and my wife. So if I leave them and I see another and I leave my children and this home I just go. I don't want a paper that says "divorced". It doesn't work in terms of customary marriages. Even now, westernized as I may be, I'll go.

Yes, she must go and leave my children there. So I go or she goes, our children remain in my home. When we want them we know where we can find them. **[And if the kids are still young what happens?]** Normally the aunt... the maternal aunts... Isn't it they must be taken care of by a woman... so the maternal aunts take them in. The aunts are always there. When something happens we call my sister and say she must take care of the children and raise them. (Respondent 3: **Traditional Leader 2\_GP**)

Culturally it doesn't happen when they're divorcing. During my time it used to happen they took the wife back home she never got anything after her husband's death (Respondent 3: **Traditional Leader 2\_LP**)

It is easy because when Moses has children with this woman, the problems that might come in the future he cannot see them. Because he cannot see them, I might give her a gift in case she struggles in the future. I would give her something. **Traditional Leader 2\_NW**)

In terms of our Ndebele culture; if the relationship reaches a dead end, the woman gets nothing from the family assets (**Traditional Leader 3\_LP\_Assistant**). According to our culture, the woman leaves the marriage with nothing. The man takes all the assets.

All the assets belong to the husband, the wife leaves with only the clothes she has in the cupboard. We believe that a woman can divorce her husband today, and tomorrow she marries another man. The man should also know that the house and all the assets belong to the children. If he marries another woman, he needs to build her a new home and start from the beginning. (**Traditional Leader 4\_LP**) If the wife was working and had assets that she bought with her own money, she is entitled to take those assets when divorcing the husband. (**Traditional Leader 4\_LP\_Assistant**)

### **WHOEVER LEAVES GETS NOTHING**

In our culture we do not accept Moses' behaviour. The family assets belong to the wife and children. If he wants a divorce, he should leave everything to the wife and go start a new life. (**Traditional Leader 5\_LP**)

**[What happens if the wife wants a divorce?]** Same goes for her. She should leave everything to the husband and children. Like I said, all the family assets belong to the children. In our culture, the family assets are the children's inheritance.

I would say Moses must leave behind the properties for his children a woman is responsible for taking care of the children when a man leaves according our culture a man must leave a woman inside the house it's their home too he must leave everything in the house for his wife kids because his things are for his kids too. **(Traditional Leader 7\_LP)**

They need to share the assets equally. According to our traditional law, the party that wants a divorce is the one who needs to leave everything to the party that still wants to stay in the marriage. [If it is the husband who wants the divorce, does he leave all his assets to the wife?] Yes. We just let him take his jacket and pants only. Even if he had cows, he leaves all of them behind. The next man will come along... If a man divorces his wife, he needs to leave all his assets with the wife including the children. Same rules apply if it was the wife who wanted a divorce. The children stay with the person who still wanted to be in the marriage. The same goes for when the mother is the one who filed for divorce, the children stay with the father. **(Traditional Leader 1\_GP)**

### **COURT / "OFFICE"**

There is an office to divide their matrimonial property, as they have stipulated that their marriage is in community of property, this must be applied also when the marriage is coming to an end. They must share their property equally **(Traditional Leader 1\_EC)**

Moses is doing what I mentioned before; he uses his own discretion instead of using the law. The law will not discard this [other] person on things that belongs to her as well, that does not work, because with a husband and a wife we believe that a wife is your helpmeet. You have all that you have; who helped you to acquire them? Even if you are the only one working, but you cannot work and send money to do all those things, your wife was there to help you. That means when you are breaking your marriage the law demands that you share these things; you cannot do as you will, it is the law. Back then, if you have paid the Lobola and now you want to leave the marriage you would not go back to her family and demand your cattle back. This woman has turned your house into a home and now you want to send her away; where do you think she must go? According to the law, even customary law, this is not acceptable; when you want to leave the marriage you would go to the court of law and it is the court that will decide how your matrimonial property will be shared. You have agreed that what is yours is hers and what is hers is yours, now that you want to leave the marriage you cannot leave her empty-handed, you must know that they will be shared by the law, not even the Chief. It is the law that will decide. **(Traditional Leader 3\_EC)**

The assets should be divided equally because that is what they agreed upon at the beginning of their marriage. The woman needs to go to Home Affairs and show proof that she married in community of property. They would be able to help her share the assets equally.

**Traditional Leader\_2\_MP**

She should report the matter at Home Affairs, the officials would then be able to involve advocates who would be able to assist her in solving the matter. **Traditional Leader\_3\_MP**

I think she can consult the law for assistance because they have both signed. **(Traditional Leader 1\_LP)**

She must go straight to the magistrate anything that's related to the lobola it goes straight to the chief. **(Traditional Leader 6\_LP)**

The magistrate must intervene whether he likes it or not when it a case like that happens in Tswana we suggest that the one's who's leaving must leave but in mine is yours and yours is mine situation you must



share whether you like it or not. Maybe one would say I would leave you with the house with the children and everything its democracy now one can have a say.

**Traditional Leader\_1\_NW**

## **FAMILY**

The families should get together and discuss this and the families should see what to do. It'll be taken to the elders. **[Do you think there are occasions where it won't work?]** It might not work because other people end up going to the court of law. **(Traditional Leader 2\_Eastern Cape)**

**Have you experienced a situation like this one? Do you know of anyone in your community of family who experienced something like this? If so, how did you/they experience it and how did it get resolved?**

They are resolved by sitting down and discussing them. You will find such issues getting to High Courts or our Traditional Courts. **[How would you resolve it?]** When we sit for such issues we first consider the issue that their marriage is in community of property. We will then go back to Lobola; how many cattle were there for Lobola? How was the woman dressed? How far did they go with the marriage process? It happens at times that my son would take things that belong to Nolundi also, because it can happen that Nolundi did have the ceremony of Uduli. It is possible that many things belong to Nolundi in the house, but there must be proof for that. He may say he wants the cattle he used for Lobola while all that Lobola was used for Nolundi's clothes and furniture **(Traditional Leader 1\_Eastern Cape)**

No, they do happen and if you handle them in terms of customary law, believe me, you don't have any problems because we understand. But if you want to apply that hey you take 50% or hey you do this and that... **(Traditional Leader 2\_GP)**

In our culture it does not happen. **(Traditional Leader 5\_LP)**

They went to the magistrate **(Traditional Leader 6\_LP)**

### 3. Annex C<sup>76</sup>: Selective bibliography (mandatory)

#### **Legislation (including repealed Acts for historical understanding and draft bills), cases and reports**

##### **Legislation**

Constitution of the Republic of South Africa (1996)  
Age of Majority Act, (50 1972)  
Black Administration Act (38 of 1927)  
Bophuthatswana Marriage ( 15 of 1980)  
Children's Act ( 38 of 2005)  
Divorce Act, (n° 70 of 1979)  
Draft Marriage Amendment Bill of 2009 (Gazette 31864 of 13 February 2009)  
Draft Recognition of Customary Marriages Amendment Bill (Gazette 32198 of 8 May 2009)  
KwaZulu Act on the Code of Zulu Law (16 of 1985)  
KwaZulu- Natal Traditional Leadership and Governance (Act 5 of 2005)  
Matrimonial Property Act 88 of 1984  
Matrimonial Property Law Amendment Act (3 of 1988)  
Mediation in certain Divorce Matters Acts (24 of 1987)  
Natal Code of Zulu Law (Proclamation R151 of 1987)  
Recognition of Customary Marriages Act (20 of 1998)  
The Reform of the Customary Law of Succession and Related Matters Act (11 of 2009)  
Transkei Marriage Act (21 of 1978)

##### **Cases**

*Ex Parte Inkley and Inkley* 1995 (3) SA 528 (C)  
*Gumede v President of the Republic of South Africa* 2009 (3) SA 152 (CC).  
*Kos v Lephaila* 1945 NAC (C&O) 4  
*Schwartz v Schwartz* 1984 (4) SA 467 (A)

##### **Reports**

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<sup>76</sup> The bibliography may contain sub-sections

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#### 4. Annex D: Data collection tools (mandatory)

## II. DIVORCED INDIVIDUAL IN-DEPTH INTERVIEWS (SECTION ON DIVORCE ISSUES)

### PART A: BACKGROUND

There are a few questions I want to ask you now; just about where you were born and your current circumstances.

Can you tell me your date of birth? \_\_\_\_\_/\_\_\_\_\_/\_\_\_\_\_

Where were you born? (City/town) Can you describe that place?

\_\_\_\_\_

Where do you live now? (City/town) Can you describe that place?

\_\_\_\_\_

Have you always lived in this place? (City/town) (*Changes before and after marriage*)

\_\_\_\_\_

### EDUCATION

How far did you go with your formal education?

- How did you experience that?

### MARRIAGE

When did you marry your husband/wife?

- Where did you get married?
- Does your husband/wife come from the same area and ethnic group as you?
- Was that your first marriage?
  - If YES, is it also your husband's/wife's first marriage?
  - If NO, Can you tell me about your other marriages?
- Were you married in or out of community? **Why? Who** chose that option?
- Was the marriage polygamous?
  - If yes, how did you experience that?
  - Did you have a contract approved by the court to regulate the matrimonial property?
  - If not why not **and who** made the decision
  - What were the challenges?
- When did you divorce your husband?

### HOUSEHOLD

I need to gather some information about your household structure.

Who normally lives with you?

- How many adults live in your house now? [The interviewers need to be careful here and **listen attentively**. If the interviewee says that their new partner e.g. ‘Oliver’/‘Esther’ is living with him or her, then make sure not to ask what his or her relationship to the deceased spouse is. This is obvious, but we need to be clear]. **What** is their relationship to you or your ex-husband/ ex-wife?
- Do you or your ex-husband/ex-wife have any other children who do not live with you?
- Can you tell me about them, **where** they live, **who** they live with?

## WORK

Are you working or employed at the moment? Attending any courses or classes?

IF YES...What do you do?

How long have you been at your current job?

Do you enjoy it?

Did you do the same work when you were married?

IF NO...Were you working/ employed before or while you were married?

Have you ever had difficulty finding employment?

- What problems did you face?

If you were having money difficulties and needed to borrow some money to see you through the next few days, is there anyone you could ask for help besides a bank?

- Have you ever had to ask this person?
- Can you tell me a bit about that?

## PART C: DIVORCE PROCESS

*Now I am going to ask you some questions about your divorce. Can you tell me what steps you took to dissolve your marriage?*

Was the court involved in the divorce?

Lobolo Repaid

Customary practices followed to dissolve the marriage

Mediation by family or traditional authorities before you went to court (depending on previous answers)

Probe

- What did the negotiation entail?
- Who was involved and how were they involved?
- How did you experience the negotiations?
- How did you experience the involvement of particular people?
- What were the challenges in reaching a decision or a resolution?
- Are you satisfied with how it all went?
- If you were to do it all again, what would you do differently?

## DISTRIBUTION OF MATRIMONIAL PROPERTY UPON DIVORCE

Can you tell me how the matrimonial property was dealt with upon divorce?

- What was agreed between you?
- How did you reach this settlement?
- What role, if any, did Lobolo play in the settlement
- (What role, if any, did Lobolo play in the husband's/wife's share of the matrimonial property?)
- How did you feel about the settlement?
- How long did it take to reach a settlement/ to obtain the order?
- How did you feel about that?
- Did the court make any order about your matrimonial property?
  - If yes what did the order say or provide?
  - If the court made an order **how** long did it take to obtain the order?
- If no, do you think, with hindsight, you would have benefited from a court order?

## CUSTODY ARRANGEMENTS UPON DIVORCE

Can you tell me how the parenting arrangement was dealt with upon divorce?

- What was agreed between you and/or your families?
- How did you reach this settlement?
- What role, if any, did lobolo play in deciding the custody of the children?
- What did you feel about the settlement?
- How long did it take to reach a settlement?
- Did the court make any order concerning the children?
  - If yes, what order did the court make?
  - How did you feel about that?
  - Do you consider the order of the court to be in the best interests of the child or children?  
**Why or why not? (if the response focuses on material things only, ask whether there are any other considerations that must be taken into account when determining the best interests of the child)**
- If no, do you think, with hindsight, you would have benefited from a court order?

Since the divorce, how have the arrangements been working?

- Have the arrangements been changed? **By** mutual consent?
- Are there on-going problems?
- Have there been any significant changes in your financial circumstances?

## **PART D: VIGNETTES**

I'd like to move on a little bit now and present a series of scenarios which pose some dilemmas for people involved in these situations.

### Case 4

Nolundi and Moses married each other in terms of customary law, in community of property, which means that they own all the property they acquired before and after the marriage jointly. Moses wants to leave the marriage, but he refuses to share his property.

- What should Nolundi do? Why?
- Are there occasions where this would be unsuitable?
- Have you experienced a situation like this one? Do you know of anyone in your community or family who experienced something like this?
- If so, how did you/they experience it and how did it get resolved?

### Case 6

Mr and Mrs Zimande married each other a few years ago and Mr Zimande paid Lobolo. After their divorce, he wanted to have custody of the children of their marriage. But the court said it was in the best interests of the child for Mrs Zimande to have custody and it gave her custody of the children.

- Would you approve of the court's decision? Why?
- Are there any occasions when this decision might be suitable?
- Have you ever experienced this personally or among your relatives or in your community?
- If so how did you experience it, and how did it get resolved?

Mr Zimande has now cut off all forms of maintenance for the children. Mr Zimande is refusing to pay for the children unless he gets sole custody.

- What do you think Mrs Zimande should do? Why?
- Have you experienced this among your relatives or in the community?
- If so how did you experience it, and how did it get resolved?

### **5. Annex E: Other documents deemed relevant**

The table below describe the demographic characteristics of the divorcees' participants and the type and the duration of the marriage in which they were involved. These interviews are being analysed at the moment.



Participants N°	P1	P 2	P3	P4	P5	P6	P7	P8	P9	P10	P11	P12	P13	P14	P15	P16	P17
Gender	F	F	F	M	M	F	F	F	F	F	F	F	NA	NA	NA	NA	NA
Age Group	31-40	31-40	40-55	40-55	56-65	40-55	56-65	40-55	40-55	31-40	66-75	31-40	40-55	40-55	40-55	40-55	21-30
Residence - location	EC	EC	EC	EC	Gauteng	KZN	KZN	KZN	KZN	LP	LP	LP	LP	LP	LP	NW	NW
Ethnic group	Xhosa	NA	NA	Xhosa	Tswana	Zulu	Zulu	Zulu	Zulu	Ndebele	NA	Sepedi	Sepedi	Sepedi	NA	Tswana	Tswana
Education	S	P	S	P	S	P	P	S	S	S	P	S	NA	T	T	S	S
Occupation	WK	WK	NW	NW	WK	WK	NW	WK	WK	WK	WK	WK	WK	WK	Studying	NW	WK
Type of marriage	MG	PG	MG	MG	MG	PG	PG	MG	MG	MG	NA	MG	PG	MG	MG	MG	MG
Duration of marriage	6 -10 years	16 -20 years	- 5 years	NA	21- 30 years	NA	21-30 years	- 5 years	6 - 10 years	16 -20 years	41-50 years	- 5 years	- 5 years	6 -10 years	- 5 years	NA	- 5 years