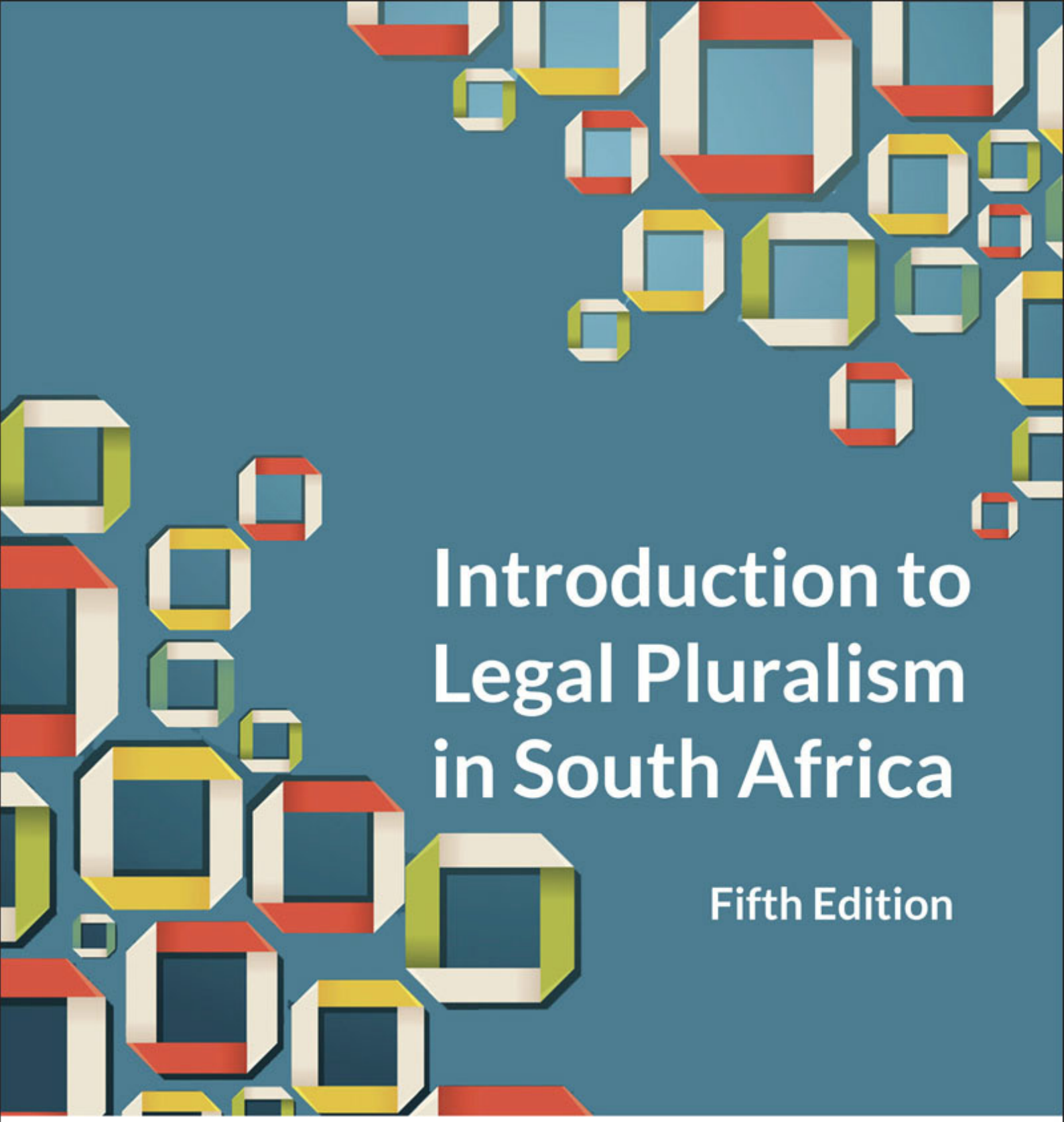


Introduction to Legal Pluralism in South Africa

Fifth Edition

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Introduction to Legal Pluralism in South Africa

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Preface

> Legal Pluralism within a South African context reflects the realities and complexities of a diverse society and the impact it has on a legal system. (Watney "Book Review" 2012 *TSAR* 202.)

South Africa's official legal system comprises a number of distinct legal traditions; a common-law mix of transplanted European laws (Roman-Dutch law and English law), as well as traditional community laws, collectively known as customary law. The South African Constitution provides for the future recognition of other legal traditions founded on religion or custom. The personal laws of Hinduism, Judaism and Islam increasingly enjoy attention from the judiciary and legal scholars but are not officially recognised (yet).

Based on the recommendations made by Watney in 2012 *TSAR* 202, the book is divided into three parts. The first part discusses the phenomenon of legal pluralism in South Africa. Chapter 1 deals with the phenomenon of legal pluralism, while chapters 2 and 3 cover the nature, sphere, application and ascertainment of customary law. The transformation of legal education necessitates a re-evaluation of the notion of decolonisation, and we have added a section dealing with some of the issues in chapter 3. Chapter 4 discusses the incidence of deep legal pluralism and more specifically the incidence of Hindu, Jewish and Muslim personal law in South Africa.

The second part of the book is aimed at covering the core content of African customary law as applied in South Africa. Given the fact that customary law consists of both official and living law, and that living law changes from place to place as well as from time to time, and is differently interpreted from one person to the next, it is almost impossible to reduce it to a text for use by the legal fraternity. Nevertheless, the contributors have tried to discuss at least the official laws and those living laws that have – to a certain extent – certain commonalities.

The third part of the book is aimed at the core contents of Hindu, Jewish and Muslim personal law, albeit only in an introductory fashion. The focus is on family law and the law of succession.

This fifth edition was necessary because the law has developed considerably in several areas since the publication of the fourth edition in 2014. Barring a few exceptions, the research that preceded the publication of this book was concluded in January 2018.

Since the inception of this book a number of editors have been involved in developing it into what it is today. When the first edition was published as two volumes in 2002, five editors were involved: JC Bekker, JMT Labuschagne, LP Vorster, C Rautenbach and NMI Goolam. Sadly, two editors, JMT Labuschagne and LP Vorster, passed away before the second edition was published. We incorporated the two volumes into one book and it was edited by the remaining

editors: JC Bekker, C Rautenbach and NMI Goolam. They remained involved in the second edition published in 2006 and also the third edition in 2010. The fourth edition was edited by C Rautenbach and JC Bekker only and was published in 2014. After a lifetime of scholarly contribution to African customary law, JC Bekker retired this year. This book is dedicated to him and all the other editors who were involved in the editorial processes over a span of 16 years.

Ultimately, it is hoped that the fifth edition of the *Introduction to Legal Pluralism in South Africa* will continue to make a meaningful contribution to the introduction of law students and scholars into the rich and complex legal culture that underpins our constitutional democracy.

This edition is published in English only.

Christa Rautenbach
November 2018

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The following contributors either rewrote, modified or updated various chapters or sections in this edition. In the case of a modification or update of the original text written by an author other than the one who did the modification or update, the name of the author who wrote the original text is not listed but can be found in one of the earlier editions.

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The first edition of *Introduction to Legal Pluralism* was published in 2002. Twenty-one authors participated in the writing of the original text. With the publication of the second, third and fourth editions, the text was either rewritten, modified or updated by the same authors, or, if they were no longer able or willing to contribute, by others.

The term "contributor" refers to either the author of the original text or the updater of the same. In some instances quite a number of contributors have added to the content of a chapter or section over the years, and it is sometimes difficult to pinpoint who wrote exactly what. Also, in some instances, the contents of chapters were reshuffled, and this complicates our efforts to acknowledge the exact contribution of each and every author who has participated in this book since the first edition. The alphabetical list of contributors to the first four editions provided below should therefore be read in conjunction with the information provided in the first four editions, where the contributors concerned were listed at the beginning of the book, on the contents page, or in a footnote at the beginning of a section. In a case where a chapter or section was updated by an author other than the one who wrote the original text, the name of the original author has not been listed again; instead, only the name of the updater has been included. The name of the original author can, however, be found in a previous edition. The biographical particulars of the contributors are given as they were at the date of their participation in the previous editions.

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Abbreviations

AHRLJ	African Human Rights Law Journal
Am J Comp L	American Journal of Comparative Law
Am J Juris	American Journal of Jurisprudence
CARSA	Child Abuse Research in South Africa
CILSA	Comparative and International Law Journal of Southern Africa
ICLQ	International and Comparative Law Quarterly
IJLSE	International Journal of Liability and Scientific Enquiry
Int'l J Children's Rts	International Journal of Children's Rights
J Afr L	Journal of African Law
J Law & Soc	Journal of Law and Society
HRCLJ	Human Rights and Constitutional Law Journal of Southern Africa
LQR	Law Quarterly Review
OUCLJ	Oxford University Commonwealth Law Journal
PER/PELJ	Potchefstroom Elektroniese Regstydskrif/Potchefstroom Electronic Law Journal
S Afr J Philos	South African Journal of Philosophy
SACJ	South African Journal of Criminal Justice
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SAPR/PL	Suid-Afrikaanse Publiekreg/South African Public Law
Stell LR	Stellenbosch Law Review
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
TRW	Tydskrif vir Regswetenskap/Journal for Juridical Science
TSAR	Tydskrif vir die Suid-Afrikaanse Reg/Journal of South African Law

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Part 1

Legal Pluralism in South Africa

1

The Phenomenon of Legal Pluralism

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1.1 Introduction

South Africa has a multicultural society in which various legal systems are observed. Although legal effect is given to certain institutions of, for example, the Hindu and Muslim communities, customary law[1] is the law that was originally applicable in this country and the only legal system other than the Western system[2] which is, albeit to a limited extent, officially recognised. Legal pluralism exists as a result of the prevailing cultural pluralism. But what exactly this legal pluralism encompasses is not so clear. Narrowly interpreted, it may be construed as the coexistence of various officially recognised state laws. The term "state laws", in the South African context, refers to Roman-Dutch law as influenced by English law, adapted and developed through judicial decisions and legislation, as well as customary law incorporated into legislation or pronounced in judicial decisions, and living customary law.[3]

This narrow interpretation of legal pluralism, called "state-law pluralism" does not, however, adequately explain the social reality in South Africa. It does not make provision for the various laws which are unofficially observed. These are the laws of religious communities such as the Hindu, Muslim and Jewish communities, as well as people's law.[4]

Through the years, the existence of unofficial laws was to a large extent ignored and only state-law pluralism was accommodated in the South African legal order. Today, however, the courts show greater tolerance towards unofficial laws.[5] Moreover, the South African Law

---

1 "Customary law" is used as a generic term to denote the various laws of the African indigenous people of South Africa. The concept "indigenous peoples" has a contested meaning in South Africa. According to Seymour-Smith (1986) 149, the term "indigenous" in the context of populations "refers to the original inhabitants of an area which has subsequently been occupied by migrants". History shows us that the original inhabitants of South Africa were mainly Khoi and San people, but other African people are the descendants of immigrants from the north of Africa (at least north of the Zambezi River). The African people and the European immigrants (colonists) met, the Europeans moving east and north, the Africans moving south. Both played a part in practically eradicating the Khoi and San people. The Africans and Europeans were more or less simultaneous immigrants, each occupying specific tracts of land. They met and clashed in the vicinity of the Kei and Great Fish Rivers. Later, when the Europeans migrated inland, north over the Orange River and across the Drakensberg and the Vaal River, the two groups fought numerous wars against each other for some time in order to gain supremacy and territory. For detailed discussions of the early history of South Africa, see Muller (1990) and Kerr (1961) 1–5.

2 The common law in South Africa is characterised as "Western law" as it shares a basic intellectual and jurisprudential tradition with other legal systems belonging to the Romano-Germanic and common-law legal families.

3 Living customary law is the law that is followed by traditional communities. This law often conflicts with the official customary law that is applied by the State courts or entrenched in legislation. The South African courts are increasingly taking cognisance of living customary law. In this regard, see e.g.: *Bhe v Magistrate, Khayelitsha* 2005 (1) BCLR 1 (CC); *Alexkor Ltd v Richtersveld Community* 2003 (12) BCLR 1301 (CC); *Shilubana v Nwamitwa* 2008 (9) BCLR 914 (CC); *Gumede v President of the Republic of South Africa* 2009 (3) BCLR 243 (CC); *Pilane v Pilane* 2013 (4) BCLR 431 (CC); *Ramuhovhi v President of the Republic of South Africa* 2018 (2) BCLR 217 (CC); *Sigcau v Minister of Cooperative Governance and Traditional Affairs* [2018] ZACC 28 (11 September 2018); *Lurhani v Premier of the Eastern Cape Provincial Government* [2018] 2 All SA 836 (ECM); *Mayelane v Ngwenyama* 2013 (8) BCLR 918 (CC); *Jezile v S* [2015] 3 All SA 201 (WCC); *Motsoatsoa v Roro* [2011] 2 All SA 324 (GSJ); *Ramoitheki v Liberty Group Ltd t/a Liberty Corporate Benefits* [2006] JOL 18075 (W); *Nkabinde v Road Accident Fund* [2001] 3 All SA 611 (W); *Mabena v Letsoalo* 1998 (2) SA 1068 (T). Also see the discussion of "living and official versions of customary law" in ch 2.

4 People's law is generated by the community through unofficial dispute resolution institutions. This law displays many similarities to traditional customary law. See discussion of "people's courts" in ch 11.

5 See, e.g., the decisions regarding Hindu law, Jewish law and Islamic law in chs 12 to 14. Also see the discussion of Rautenbach (2010) *Journal of Legal Pluralism* 143–178 and Rautenbach (2015) 225–244.

Reform Commission's[6] work on the recognition of Islamic personal laws, demonstrates the state's commitment to accommodating unofficial laws.[7]

This chapter provides a brief overview of the concept of legal pluralism in a theoretical context with the emphasis on South Africa.

1.2 Theoretical overview

1.2.1 *Narrow interpretation: State-law pluralism (weak legal pluralism or official legal pluralism)*

The concept legal pluralism may be interpreted in different ways.[8] The narrow interpretation is often based on a "dual systems"[9] theory of legal pluralism. In a simplistic sense, this type of pluralism exists where European/Western law (in South Africa referred to as the common law) and traditional forms of law (customary law) operate in a single society and are officially recognised by the state. In other words, at least two officially recognised legal systems run parallel and interact in limited, prescribed circumstances.

The narrow concept of legal pluralism goes hand-in-hand with two jurisprudential theories of law, namely legal positivism and centralism.

> *Legal positivism*: The expression "legal positivism" is used in many ways, but in general its proponents would ascribe to at least two propositions. The first one is that law can only be found in tangible or empirically observable sources such as legislation, case law and the law of old authorities. The second one flows from the first one; if law can only be found in tangible sources, it means that law cannot be based on moral values.[10] In other words, the law as it *is* and not what it *ought* to be. If one follows this approach, only the common law and official customary law will be regarded as law.
>
> *Legal centralism*: Legal centralism is the idea that law should be state-sanctioned, uniform for everyone, "exclusive of all other law, and administered by a single set of state institutions".[11] According to this theory, the state has the monopoly to make laws and other, what Griffiths calls "lesser normative orderings, such as the church, the family, the voluntary association and the economic organization", are subordinate to the law and institutions of the state. According to this theory, unrecognised religious legal systems are thus not regarded as law in South Africa.

The narrow understanding of legal pluralism thus flows from the perception that law consists of norms that are created and sanctioned by official state organs in accordance with a basic rule of recognition.[12] Laws derived from sources other than state institutions become "law properly so called" only when they are authorised by the state. Their recognition inevitably goes hand-in-hand with the formulation of practical rules to determine when they may be applied; when they should be regarded as acceptable (generally when they are not repugnant to Western perceptions of what is moral and in the public interest); how they should be ascertained; and what should happen when there is a conflict with the national law (common law).

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6 The South African Law Reform Commission's previous title was the South African Law Commission. It was amended on 17 January 2003 by s 8 of the Judicial Matters Amendment Act 55 of 2002.

7 See Project 59: Islamic Marriages and Related Matters (July 2003), and also the discussion in ch 4.

8 Griffiths (1986) *Journal of Legal Pluralism* 1–55 discusses a number of early conceptualisations of legal pluralism. Also see the convenient overview by Menski (2006) 82–128.

9 See generally Griffiths (1998) *Journal of Legal Pluralism* 123, 133; Woodman (1988) *Lesotho Law Journal* 33, 36; Merry (1970) *ICLQ* 868–869.

10 Harris (1997) 16–17.

11 Griffiths (1986) *Journal of Legal Pluralism* 3.

12 See generally Hooker (1975) 1; Griffiths (1998) *Journal of Legal Pluralism* 2; Prinsloo (1994) *TSAR* 696.

In South Africa, the dominance of Western law dates back to the time when the colonisers superimposed European law upon the customary legal systems. There was neither a desire by the local people, nor any degree of consciousness and voluntariness on their part to receive foreign law and, therefore, this process cannot be likened to the process of reception of Roman law in Europe during the Middle Ages. Today, even though customary law is recognised by the Constitution[13] as a source of South African law, Western law is sometimes still regarded as the dominant system and legal development is largely directed by Western values. The situation is however rapidly changing. In *Alexkor Ltd v Richtersveld Community* it was stated:[14]

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

1.2.2 *Broad interpretation: Deep legal pluralism (strong, unofficial or non-state legal pluralism)*

Deep legal pluralism regards pluralism in a wider sense; legal pluralism should be regarded as a factual situation which exists in a society in which various legal systems are observed. Griffiths calls this "a social state of affairs".[15] It is, in other words, a feature of a social field and not an attribute of a legal system or legal order. Official recognition of certain legal systems and non-recognition of others has no effect on the factual existence of legal pluralism; recognition simply determines the status of the legal systems which are officially and unofficially observed in a society. This type of legal pluralism is not founded upon relations of unequal power, as is the case in state-law pluralism. The dominance of the central or state law is in fact irrelevant to the continued existence of the unofficial laws.

Religious legal systems discussed in the third part of this book fall mainly within this category. The followers of those religious laws (Islamic law, Hindu law and Jewish law) often adhere to the normative authority of non-state authorities because they feel socially obliged to do so. Although the Constitution allows for the recognition of other systems of family or personal law under any tradition or adhered to by persons professing a particular religion, the emphasis seems to be on state-law pluralism, because recognition remains a requirement for the existence of those other systems of law. There are examples, however, where the courts have acknowledged the existence of deep legal pluralism in South Africa, especially in the context of Islamic law.[16]

1.3 Historical emergence of state-law pluralism in South Africa

Generally speaking, state-law pluralism originated in South Africa during the second British occupation of the Cape. Although Europeans, through missionaries and traders, had some effect on the traditional cultures of Southern Africa long before the first British annexation of the Cape in 1795 and even before the Dutch East India Company (DEIC) set foot on South African soil in 1652, their influence was very limited. There is no record, during this early period, of the recognition of customary laws or the imposition of a European system upon the local population, and thus no traces of any form of state-law pluralism. In addition, there was no evidence of state-law pluralism during the Batavian control of the Cape (1652–1795).[17] The DEIC had little interest in the Southern African interior, mainly inhabited by African language speakers, but also by some

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13 The Constitution of the Republic of South Africa, 1996.

14 2003 (12) BCLR 1301 (CC) para 51.

15 Griffiths (1986) *Journal of Legal Pluralism* 13.

16 See Rautenbach (2010) *Journal of Legal Pluralism* 143–178 for a detailed discussion of this phenomenon. Also see the discussion in chs 4 and 14.

17 The Netherlands was conquered by the Republic of France and named "The Batavian Republic" between 1803 and 1806.

groups of Khoi and San. Their main interest in this part of Africa was its strategic position. The Company's judicial administration of the Cape during this period was primitive and not well ordered.[18] The highest court, the *Raad van Justitie* which was established in 1685, as well as all the lower courts, were initially staffed by laymen and "inexperienced" lawyers almost until the end of the Batavian rule. It naturally follows that almost no attention was paid to the administration of justice in the interior and there was no question of recognising the laws observed by African language speakers. Likewise, the laws of the Khoi and the San were of little consequence.[19]

As a result of the British policy that the laws of a conquered territory would remain in force until altered by the conqueror, the change from Dutch to British rule in 1795 had no impact on the administration of justice and it remained as it was under Batavian rule. It was only from the second British occupation of the Cape (1806) that the application of customary law was officially regulated for the first time.

By the middle of the 19th century, South Africa was divided into various autonomous areas – which included British colonies (Natal and the Cape), numerous traditional kingdoms (the Zulu and Basuto being the largest) and two Boer Republics (Transvaal and the Orange Free State). The administrators of the various territories, to a greater or lesser extent, all aspired to "civilise" the local population and to oust their "barbarous" laws and customs.[20] Where customary law was recognised, it was subject to the strict application of a repugnancy clause.

In the Cape, the British introduced a treaty system in 1833 whereby direct rule of the traditional communities could be avoided. The policy was to control traditional communities through treaties with their chiefs.[21] Some of these treaties may be regarded as the first formal instruments entrenching state-law pluralism. Through the treaty system, the chiefs and their people became British subjects and fell under the control of the Cape government, but retained their customary laws and customs. The treaty system was abolished after 1845.

In British Kaffraria, a reserve for the local population between the Kei and Keiskamma Rivers, state-law pluralism was introduced when the inhabitants were allowed to administer their own customary laws and practise their customs, subject to the revision of colonial officials.[22] The Cape Native Succession Act of 1864 and the Kaffraria Native Succession Ordinance of 1864 were the first official instruments explicitly recognising certain customary institutions.

During the first half of the 19th century, state-law pluralism was similarly introduced in Natal, the Transvaal and the Orange Free State, when legislation giving limited recognition to customary law was promulgated. The Code of Zulu Law of 1878 was one of the most comprehensive laws in this regard.

By 1910, customary law was recognised to some extent in all the areas which were to constitute the provinces of the Union of South Africa. There was no conformity in the mass of diverse laws which regulated customary law. The colonial legislation was eventually consolidated in the

---

18 Edwards (1996) 65.

19 In the Cape, the reason for this was that these people had been overpowered and dispersed by the settlers who had moved out of the area to the Eastern Cape.

20 See Allott (1993) *Law and Justice* 84, 87.

21 The first such treaty was concluded between Sir Benjamin D'Urban and Andries Waterboer of the Griqua community on 11 December 1834.

22 At a special meeting with the chiefs of the territory, their position as British subjects was explained to them. Besides the fact that they were expected to obey the laws of England and to force their subjects to do so too, they were to "disbelieve in and cease to tolerate or practice witchcraft in any shape", to "acknowledge no chief but the Queen of England and her representative", and to "abolish the sin of buying wives". Brookes (1927) 33.

Black Administration Act,[23] the first legislative instrument entrenching state-law pluralism for the country as a whole.

1.4 Historical emergence of deep legal pluralism in South Africa

1.4.1 *Unofficial customary law*

The history of Africa and African customary law is essentially unwritten history and the main source of information is oral tradition.[24] The earliest history of this law is, consequently, fairly difficult to trace and it is hard to establish to what extent legal pluralism existed in pre-colonial Africa. The various Bantu speakers, the Khoi and the San, lived largely independently from each other and within each autonomous community a single legal order prevailed. However, interaction between the different communities took place, especially in the area of the present Ciskei.[25] But, being unwritten history, there is insufficient evidence of the observance of more than one legal system in a single society, or of the co-existence of heterogeneous communities with different legal systems within a single society.

Deep legal pluralism originated somewhat earlier than state-law pluralism. It actually originated when the DEIC established a trading post in the Cape.[26] From the earliest days of the Dutch settlement, there was contact with the Khoi. The Khoi employed at the refreshment station, like the other employees of the DEIC, were subject to the same imposed Western laws. Although disregarded by the official state authority, the traditional communities continued to observe their customary laws. Thus, within a single territory controlled by a central authority, the law of the DEIC as well as the laws of the Khoi were observed.

During the British rule, the first Magistrates' Courts were widely dispersed over large areas. Due to a lack of police officials and military troops, the South African government was unable to enforce the foreign official law imposed on the traditional communities and to curb the influence of the unofficial traditional courts. Magistrates, as well as chiefs and headmen, continued to apply customary law, despite the Cape government's policy of non-recognition of that law.[27] In addition, in the Voortrekker Republics (Transvaal and the Orange Free State) as well as in Natal, customary courts continued to operate unofficially.

By the late 19th century, the application of unofficial customary law by magistrates and unofficial customary institutions alike had become so general that the Native Laws and Customs Commission of 1883[28] recommended that customary law be recognised as an uncodified system of common law.[29] However, the Cape government gave no effect to the Commission's recommendations. Magistrates and customary institutions continued to apply unofficial customary law in civil cases between African people, whilst the Cape High Court refused to apply customary law in the absence of statutory indication to that effect.[30]

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23 38 of 1927. The Act was repealed in 2005 except for the provisions dealing with land tenure (ss 6 and 7) and traditional courts (ss 12 and 20).

24 Oral traditions are unwritten communications of the past through legends, emblems, songs and poems.

25 See, in general, Hammond-Tooke (1993) 23.

26 It has to be accepted that the missionaries had converted some indigenous people to Christianity, and that these early African Christians observed some of the Western laws introduced by the missionaries, thus giving rise, to a very limited extent, to deep legal pluralism.

27 Brookes (1927) 181, 184.

28 Cape of Good Hope *The Report and Proceedings with Appendices of the Government Commission on Native Laws and Customs* 18–20.

29 Cape of Good Hope *The Report and Proceedings with Appendices of the Government Commission on Native Laws and Customs* xi–xii.

30 See *Ngqobela v Sihele* 10 SC 346 (1893).

There is nowadays no doubt that customary law (official and living) is constitutionally recognised and thus part and parcel of state-law legal pluralism in South Africa. There is also evidence that the courts are willing to apply living customary law instead of its official versions when it is prudent to do so.[31]

What terminology to use:

There is an on-going debate regarding the correct terminology for describing the group of people to whom customary-law rules apply. The term "black people" is a remnant of the apartheid regime and is thus regarded as offensive. Nevertheless, legislation such as the Broad-based Black Economic Empowerment Act[32] uses the term to distinguish between people to whom the Act applies and those to whom it does not apply. In terms of section 1 of this Act, the term "black people" is a generic term that includes "Africans, Coloureds and Indians". This definition has been extended by the High Court to include Chinese people.[33] Another term, "indigenous peoples", is used in the most recent legislation dealing with customary-law issues. For example, the Recognition of Customary Marriages Act[34] refers to the "indigenous African peoples of South Africa".[35] Although this term is also not without its complications,[36] within the context of this Act it is accepted that "indigenous African peoples" refers to South African ethnic groups traditionally grouped together on the basis of language and other cultural features.[37] The third term, "African", is nowadays used to refer to a certain category of black people (excluding Coloureds, Indians and Chinese). It is evidently also the term the legislature had in mind if one considers the reference to "African peoples of South Africa" in the Recognition of Customary Marriages Act.[38] Therefore, without giving preference to any of the terms mentioned above, the authors have used the term "African" throughout this book, unless circumstances dictated otherwise.

1.4.2 *Islamic law*[39]

Islamic law was introduced in South Africa as early as the 17th century. The first Muslims who came to South Africa were soldiers employed by the DEIC in the 1650s. Although an Act of 2 August 1657 determined that they were not to be troubled about their religion, they were prohibited, on penalty of death, from practising Islam publicly, or propagating it. Muslim slaves from East India, as well as political prisoners who included Muslim priests, princes and rulers, arrived in the Cape a decade later. During the 17th and 18th centuries, Muslim slaves from Bengal, the Malabar Coast and the mainland of India formed the majority of the total slave population in the Cape. Freedom of religion was declared by the Dutch authorities in 1804 and the first mosque was built within a year of the second British occupation of the Cape, however, Islamic law was never officially recognised.

During the 1860s, Muslims came to Natal to work as labourers on sugar plantations. They soon sought other employment, and many became astute businessmen. The Natal Muslims did not experience the same kind of hardship as the Cape Muslims, and it was easier for them to

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31 See the discussion of living customary law in ch 2.
32 53 of 2003.
33 *Chinese Association of South Africa v The Minister of Labour* [2008] ZAGPHC 174 (18 June 2008).
34 120 of 1998.
35 See the definition of "customary law" in s 1 of the Recognition of Customary Marriages Act 120 of 1998.
36 See the discussion of "indigenous peoples" in ch 2 of this book.
37 See the discussion in ch 2 of this book.
38 120 of 1998.
39 See generally Hacq Nadvi "Towards the recognition of Islamic personal law" in Sanders (ed) (1990) for an exposition of the history of Islamic law in South Africa. Also see ch 14 for a discussion of Muslim personal law.

practise their personal law and religion. Yet, even in Natal, their law was not officially recognised.

1.4.3 *Hindu law*[40]

Like the Muslims, Hindus from India came to the British colony of Natal to work on the sugar cane plantations during the 1860s, and Hinduism was introduced into South Africa. However, these were not the only Hindus who came to South Africa. There was also a small group of so-called "passenger Indians", who came at their own expense as traders or merchants under the ordinary immigration laws.

The first Hindus brought with them their religion and concomitant personal laws. Early reports documented their struggle for areas in which temples could be erected and for holidays to celebrate religious festivals. In 1862, it was reported by the Methodist Mission that they had begun to celebrate their customary festivals. An important method of transmitting Hindu culture was by example and through storytelling at home. Thus, from the earliest times, private rituals played a pivotal role in the preservation of Hindu culture and laws. In 1891, all Indians were prohibited by law from entering or living in the Republic of the Orange Free State. The arrival of Mahatma Gandhi in 1893 inaugurated a period of Indian political activism and the struggle for basic human rights.

It was only in 1905, almost half a century after their first arrival in Natal, that the first Hindu preacher, Bhai Parmanand, came to South Africa. In later years, other prominent Hindu intellectuals followed, all of whom contributed to the strengthening of Hindu law and culture in South Africa. In 1920, all Indians were removed from the voter's roll and their freedom of movement, domicile and trading opportunities were severely curtailed. Indian personal laws were so insignificantly regarded that Muslim and Hindu laws were often mentioned as if they were the same – not only in academic writing, but also by the courts.

Severe social, political, economic and cultural pressure, as well as their effective isolation from India until the advent of a new constitutional dispensation in South Africa, could not suppress Hinduism in this country. Today, Hindus comprise approximately 60% of the Indian population in South Africa, but Hindu law is not a recognised legal system.

1.4.4 *Jewish law*[41]

Jews first entered South Africa as early as 1669.[42] However, since the DEIC had a policy of employing only Protestant Christians and because Christianity was the only public religion permitted in the Cape, many Jews converted to Christianity. During the early 1820s, large numbers of Jewish settlers came to South Africa from England, Germany and Holland, some arriving with the British settlers. During the 1860s, when diamonds were discovered, and during the 1880s gold rush, there was a considerable influx of Jewish immigrants, especially from Eastern Europe.

Like other religious minority groups in South Africa, the Jews experienced much discrimination. Yet their position differed from, for example, the Hindus and Muslims, since they belonged to the privileged "white classes". During the 1880s, anti-Semitic propaganda led to much

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40 See generally Sooklal "The Hindu diaspora. Challenge of the South African context" in Platvoet, Cox and Olupona (eds) (1996) 332–342. Also see ch 12 for a discussion of Hindu personal law.

41 See generally Hellig "The study of Judaism in Africa" in Platvoet, Cox and Olupona (eds) (1996) 354–355; Hellig "The Jewish community in South Africa" in Prozesky and De Grunchy (eds) (1995) 160–173. Also see ch 13 for a discussion of Jewish personal law.

42 The Lemba should not be overlooked in the history of Judaism in Southern Africa. The Lemba are a group of Jews who migrated from Ethiopia to Southern Africa many centuries ago, and who claim to be a lost tribe of Israel. Interestingly, the Lemba still observe traditional Judaic laws and rituals.

prejudice against the Jews, but they were never prevented from practising their religion.[43] In fact, the first Jewish synagogue was established in Cape Town in 1884.

The Jewish community has been subjected to various discriminatory laws, for example the Immigration Act of 1902, which determined that immigrants should be able to write their disembarkation application in Roman (European) characters, which was aimed at curbing the influx of both Asians and European Jews, who spoke Yiddish and wrote in Hebrew. In the 1930s, further legislation, notably the Immigration Quota Act[44] and the Aliens Act,[45] virtually put a halt to the immigration of Jews to South Africa. Yet, there was never any official anti-Semitic government policy, and nationalist state policies which encouraged separateness made it possible for the Jews to maintain their identity and observe their religion and laws, though their laws were never officially recognised.

1.4.5 *People's law*

People's law developed in urban areas populated mainly by African people in reaction to the lack of legitimacy of the official legal order of the state.[46] Class contradictions, the inefficiency of the existing justice system, a lack of legal resources and access to justice, as well as economic factors, played a role in the emergence of people's law and popular justice.[47]

Informal structures for the administration of justice came in a variety of forms. The earliest known[48] unofficial urban institution with dispute-settlement functions was the Uitvlugt Committee which was formed in 1901 in the first Cape Town township, Uitvlugt.[49] By the 1950s, informal courts, which seem to have existed even prior to that time, were reportedly run by the Cape African Congress[50] in most Western Cape townships. In the single-sex hostels for male migrant workers of the Langa township, unofficial courts came to the fore in the early 1950s. The urban communities continued establishing informal dispute-settlement structures which applied an adapted urbanised customary law.[51]

1.5 State-law pluralism in South Africa today

As indicated, in South Africa, state law consists of a Western component and an African component. The Western component comprises the common law,[52] legislation, judicial precedent and custom (not African customary law) which developed within the framework of the Roman-Dutch/English common law.

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43 In the Zuid-Afrikaansche Republiek (ZAR) (the former Transvaal, presently Gauteng), e.g., Jews suffered discrimination, not on anti-Semitic grounds but because they were regarded as "uitlanders" (foreigners). One of the first campaigners for Jewish and Catholic equality was Rabbi Dr Joseph Hertz, who was expelled from the ZAR for his support of the *uitlander* cause.

44 8 of 1930.

45 1 of 1937.

46 See generally Hund and Kotu-Rammopo (1983) *CILSA* 179, 205; Burman and Schärf (1990) *Law and Society Review* 693, 706; Schärf (1990) 8; Van Niekerk (1994) *De Jure* 23.

47 For example, court procedure was conducted in an unfamiliar language; interpreters who had to be relied on were often inaccurate and unreliable in their interpretation; legal representation became too costly; unfamiliar highly technical procedure was followed; foreign Western law was applied; and the "winner-takes-all" philosophy of that law was foreign to customary procedures.

48 The only comprehensive study of the development of unofficial dispute-settlement structures in urban areas, which spans the 20th century, was done by Burman and Schärf on the townships of the Cape Town area.

49 Burman and Schärf (1990) *Law and Society Review* 697.

50 A branch of the African National Congress.

51 Also see the discussion of "people's courts" in ch 11.

52 It is generally accepted that Roman-Dutch law, as influenced by English law and adapted and developed through judicial decisions and legislation, is the common law of South Africa.

The African component comprises official customary law, that is, customary law incorporated into legislation, or pronounced in judicial decisions as well as a body of substantive customary law (living law) which has not been explicitly included in legislation or confirmed by the courts. In terms of section 211(3) of the Constitution and section 1(1) of the Law of Evidence Amendment Act,[53] this body of law would include all customary law which is readily ascertainable with sufficient certainty (in authoritative texts), not opposed to the Western perceptions of natural justice and public policy and not in conflict with the Constitution.[54] Its application is subject to legislation which deals with customary law.[55] Whether such laws are applicable in specific circumstances will be determined by choice of laws rules.[56]

In spite of the fact that customary law is regarded as a source of South African law in terms of the Constitution, its status remains problematic. The work of the South African Law Reform Commission on harmonising customary law and common law, the promulgation of new legislation,[57] as well as the decisions of the high courts and Constitutional Court, indicate that the state is aware of the need to strengthen the position of customary law and to accommodate unofficial laws in the state legal order. Overtly, there seems to be a commitment, at least to state-law pluralism. Yet, a closer look at some legal developments reveals a movement towards a forced convergence of common law and customary law – a blending of the various systems of law into a new unified law, within a framework of Western values. A number of examples exist in this regard.

In a discussion paper on customary law of succession, which was issued in August 2000, the Law Reform Commission observed that "the fact of legal and cultural diversity in this country, . . . is a reality that the Constitution demands we respect" and recommended that "legal dualism" be retained.[58] However, the Commission stated that its recommendations were aimed at an *assimilation* of common law and customary law into one legal system. These comments seem to set as the goal the unification of the two systems into a single converged system, rather than the preservation of legal pluralism.

In addition, the Recognition of Customary Marriages Act[59] which, for the first time in South African legal history, gave official recognition to customary marriages, evidences a movement towards the common law. The dominance of Western values is apparent in the imposition of the antenuptial contract, Western concepts of divorce and division of property.[60]

Another example can be found in *Bhe v Magistrate, Khayelitsha*,[61] where the Constitutional Court (by a majority) declared the rule of male primogeniture in customary law of intestate succession to be unconstitutional. It chose to strike it down rather than retain the rule and develop it in line with the Constitution.[62]

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53 45 of 1988.

54 See generally Bennett (2004) 44–49 for a discussion of the proof and ascertainment of customary law.

55 As such, customary law which is found to be discriminatory in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 will not form part of state law. See generally Pieterse (2000) *SALJ* 627.

56 See ch 2 for a discussion of some of the choice of law rules.

57 See Bennett (2004) 96–98 for a discussion of the work of the South African Law Reform Commission and of legislation.

58 South African Law Commission *Project 90: Discussion paper 93* (2000) 13.

59 120 of 1998.

60 See generally Church (1999) *Fundamina* 8, 13.

61 2005 (1) BCLR 1 (CC).

62 In a dissenting judgment, Ngcobo J in paras 212 and 215 said that customary law is part of South African law and should be developed rather than struck down.

In 1996, the recommendations of the Law Reform Commission investigation[63] into Jewish divorce laws culminated in the integration of Jewish personal laws into the Divorce Act[64] by the inclusion of section 5A. The aim of this provision is to achieve equality between women and men in Jewish marriages.[65] It gives the courts the power to refuse a decree of divorce in terms of the Western law if one of the parties will be prevented, by a religious law, from marrying again.

1.6 Deep legal pluralism in South Africa today

The remarkable resistance to Western influences, not only of customary law, but also of Islamic, Jewish and Hindu cultural institutions, is evidenced by the fact that these laws and institutions are today still widely observed even though they are not officially recognised.

1.6.1 *Unofficial customary law*

State regulation, which often resulted in distortion, could not suppress the natural development of customary law and its institutions.[66] The unofficial application of customary law by both official and unofficial institutions bears witness to the tenacity of customary law and to its inherent ability to adapt to changing circumstances without losing its customary character.

Today, there are many informal dispute-settlement institutions such as family councils and regimental and/or age-group institutions which settle disputes out of court and apply living customary law. The courts of the ward heads[67] are traditional administrative and judicial tribunals which function unofficially in rural areas. It is not only these unofficial institutions that apply living customary law – in addition, the official traditional authority courts sometimes act as unofficial tribunals. This happens when they adjudicate upon cases that fall outside the jurisdiction laid down by legislation and apply the living customary law.

The courts are more often recognising the fact that official customary law has fallen out of step with the changing needs of the society it serves and that there is a widening divergence of the living customary law and the official version that is applied by the state courts.[68] In the dissenting judgment in *Bhe v Magistrate, Khayelitsha*,[69] the judge pointed out that official customary law should be brought in line with the living customary law, and in *Mabena v Letsoalo*,[70] the court gave effect to living Pedi law, confirming that a woman could be the head of a family and receive *lobolo*.

1.6.2 *Islamic law*

The courts are increasingly tolerant towards Islamic personal laws.[71] Yet, guided by an ethos of legal positivism, the courts still shy away from giving recognition to institutions which are not consonant with Western values. In *Amod v Multilateral Motor Vehicle Accident Fund*,[72] the court granted relief to the plaintiff by giving effect to a contract flowing from a marriage concluded according to Islamic rites, but explicitly declined to recognise a Muslim marriage (which

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63 South African Law Commission *Project 76: Working paper 45* (1992).
64 70 of 1979. Also see discussion of "divorce" in ch 13.
65 In Jewish law, a wife cannot remarry unless her husband grants her a religious divorce. See the discussion of the practical application of s 5A by Heaton (2010) 120–122.
66 Also see the discussion in ch 14.
67 See in general, e.g., Myburgh and Prinsloo (1985) 15, 112–115.
68 See *Bhe v Magistrate, Khayelitsha* 2005 (1) BCLR 1 (CC) paras 81, 152 and 153.
69 2005 (1) BCLR 1 (CC).
70 1998 (2) SA 1068 (T); see further Mbatha (2002) *SAJHR* 259, 278; Mbodla (1999) *TSAR* 742.
71 See Rautenbach "The Contribution of the Courts in the Integration of Muslim Law into the Mixed Fabric of South African Law" in Mattar, Palmer and Koppel (eds) (2015) 225–244 for examples.
72 1999 (4) SA 1319 (SCA).

is potentially polygynous) as a marriage. In *Daniels v Campbell*,[73] the Constitutional Court declared that the word "spouse" as used in the Intestate Succession Act[74] includes the surviving partner to a monogamous Muslim marriage, and that the word "survivor" as used in the Maintenance of Surviving Spouses Act[75] includes the surviving partner to a monogamous Muslim marriage. In *Hassam v Jacobs*,[76] the meanings of "spouse" and "surviving partner" were extended to polygynous Muslim marriages.

The status of Islamic personal law came under the official scrutiny of the South African Law Reform Commission for the first time some 14 years ago, when the nature of Islamic law and the conflict between Islamic law and the common law were investigated. The transformation to a constitutional democracy in the early 1990s and the constitutional entrenchment of religious freedom sparked a renewed effort to recognise aspects of Islamic personal law. This culminated in the 2003 report by the South African Law Reform Commission, *Islamic Marriages and Related Matters*, which contained a draft Bill recognising Muslim marriages. In 2010 an amended Bill was published to invite public comments but to date no legislation has been enacted.[77] In 2009, the Women's Legal Centre Trust applied for a Constitutional Court order declaring that the president and parliament have failed to fulfil their obligations to prepare, initiate, enact and implement an Act to recognise Muslim marriages, but they failed.[78] Recently, the Trust tried again in the Western Cape High Court in *Women's Legal Centre Trust v President of the Republic of South Africa.*[79] This time the court ordered the State to prepare, initiate, introduce, enact and bring into operation legislation within the next 24 months to recognise Muslim marriages in South Africa.[80] Should this happen, Islamic law will become part of state law.

1.6.3 *People's law*

Urban communities developed a unique mode of social ordering which resulted in the development of a system of justice rooted in traditional Africa but adapted to the needs of urban life. In the Western Cape during the 1960s and 70s, civic structures acted as unofficial courts, and in the latter half of the 1970s, the *makgotla*[81] gained prominence in the Pretoria-Witwatersrand area. People's courts made their appearance in early 1985 and were forced underground within a year of their inception.[82] By mid-1986, there was at least one people's court in operation in every African township in South Africa.

People's courts were instituted as alternative structures to substitute state institutions which were regarded as instruments of the apartheid regime, used to enforce apartheid laws. In the late 1980s, a process of restructuring the people's courts emerged in many townships. This process went hand-in-hand with the renaming of the courts in an attempt to rid them of the stigma of violence attached to them through the abuse of the revolutionary concept of people's power by

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73 2004 (7) BCLR 735 (CC), 2004 (5) SA 331 (CC) para 56.
74 81 of 1987.
75 27 of 1990.
76 2009 (5) SA 572 (CC).
77 Draft Muslim Marriages Bill (X-2011). The closing date for comments was 15 March 2011.
78 *Women's Legal Trust v President of the Republic of South Africa* 2009 (6) SA 94 (CC). The court refused to grant them direct access to the Constitutional Court because it is not a court of first and last instance and the trust should have exhausted its litigation options first. The court added, however, that "it is important to emphasise once again that this outcome does not reflect on the substance of the claim that the President and Parliament are under a duty to enact the legislation in question." See para 31.
79 [2018] ZAWCHC 109 (31 August 2018).
80 Para 252. The order was delivered on 31 August 2018. Also see the discussion in ch 4.
81 *Makgotla* is the plural of *lekgotla*, which literally means "a gathering". In this context, the term *makgotla* refers to the unofficial customary courts that developed in some areas.
82 In terms of the Emergency Regulations Proclamation 109 of 1986.

the marginalised youth, when the responsible leadership was detained. Generally, the new courts came to be called "community courts".

These institutions were impossible to dislocate. Their official regulation or incorporation into the state justice system was considered for the first time in 1997 by the South African Law Reform Commission.[83] At that stage, the Commission seemed to be in favour of an integrated, regulated system of justice, not the superimposition of the Western model. It recognised that "[c]ommunity courts are a fact of life" and stated, among others, the objectives "to assist in transforming the formal structures by introducing customary models" and "to strengthen popular justice further by introducing alternative dispute resolution models".[84] In 1999, the South African Law Reform Commission issued a discussion paper on traditional courts and the judicial function of traditional leaders.[85] In this discussion paper, it was recommended that traditional courts, presided over by traditional leaders, either continue to operate in the rural areas where they were established or become informal arbitration tribunals while special customary courts take their place in the current justice system. It was further recommended that community courts be established in metropolitan areas where there are no traditional leaders.

It is apparent that these recommendations are aimed at an accessible system based on restorative participatory justice. Thus, the retention of some customary characteristics of dispute resolution is envisaged, namely, no legal representation, the participation of all adults by asking questions or giving opinions and the application of customary rules of evidence and procedure, based on the principles of natural justice. Importantly, it is also recommended that the repugnancy clause be repealed.[86]

However, the recommendations of the South African Law Reform Commission were not implemented and to date these institutions continue to operate unofficially.

1.7 Conclusion

Legal pluralism is a reality of the South African legal order. Customary and common law, as well as all the other systems of personal law which are not officially recognised, should be brought together in a relationship of equality through a process of harmonisation.

The multicultural South African society demands a system of law which will accommodate the needs of all sectors of society – a legal system which will revolve around a core of parallel, yet different residual sources. It is not impossible for the different legal systems which currently apply in this country, be it officially or unofficially, to coexist in a harmonious pluralistic relationship.

> The principles of African customary law as a manifestation of official or state legal pluralism are discussed in chapters 5 to 11, and a few religious legal systems as examples of deep legal pluralism are dealt with in chapters 12 to 14. They include Hindu, Jewish and Muslim personal law.

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83 South African Law Commission *Project 94: Issue paper 8* (1997) 24. See Makgompi (2000) *Codicillus* 36 for a discussion of state initiatives to legitimise these courts.

84 South African Law Commission *Project 94: Issue paper 8* (1997) 53 and 26 respectively.

85 South African Law Commission *Project 90: Discussion paper 82* (1999). The full report was issued in 2003.

86 See generally Bennett (2004) 156 for a detailed discussion of current developments in this regard.

2

Nature and Sphere of African Customary Law

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2.1 Separate legal system consisting of various systems

In chapter 1, we explained that South Africa has a multicultural society in which various legal systems are observed. Some of these systems are officially recognised, for example customary law, while others are not, for example the religious legal systems discussed later in this book.[1]

For many years, the dominant legal system in South Africa was the common law, which is a conglomeration of transplanted Western laws (the core being Roman-Dutch law which was subsequently influenced by the English common law).[2] Customary law was merely tolerated and viewed through a common-law lens and, in many instances, it had to take a back seat if its rules were deemed to be against the public policy shaped by common-law ideals.

However, since 1994, customary law has been accepted as a separate legal system. Section 211(3) of the Constitution provides that "[t]he institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution." More importantly, the Constitution provides further that "[t]he courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law." In *Mthembu v Letsela*,[3] the High Court of South Africa confirmed that "customary law has been accepted by the framers of the Constitution as a separate legal and cultural system which may be freely chosen by persons desiring to do so".

This means that the current South African legal system consists of two officially recognised legal systems, namely the common law and customary law. In *Gumede v The President of the Republic of South Africa*,[4] the Constitutional Court confirmed that customary law "lives side by side with the common law and legislation".

It is further important to note that "customary law" refers to something which is, in actual fact, not a unified system of law. South African customary law consists of the various "customs and usages traditionally observed among the indigenous African people of South Africa and form[s] part of the culture of those peoples".[5] In other words, there are various customary legal systems in operation in our country. Nevertheless, there are enough common features of these legal systems which may be discussed together, for instance the principles applicable to customary marriages and succession. Where differences between the systems are material to the resolution of issues, knowledge of the common features will facilitate application of the legal rules.

It should be clear that the coexistence of more than one legal system in one legal order is complicated and fairly problematic, and some of the issues and challenges facing South Africa will be dealt with in the next few chapters.

2.2 Problems of definition

Finding a workable legal definition of customary law is one of the first issues that need to be addressed. Earlier definitions focused on how customs "bind" members of a particular cultural

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1 Some authors share the viewpoint that customary law is also a religious system because it is difficult to separate between legal, religious and cultural rules. See Mqeke (2003) 3–4. Nevertheless, for the purpose of this book, customary law will be viewed as a separate legal system based on culture.

2 One of the features of the South African legal system is the fact that it is largely uncodified. Every lawyer knows that he or she has to consult various sources to find the law. These sources include legislation, precedent, old authorities (Roman-Dutch law), custom, customary law, modern legal textbooks and the supreme Constitution. See 2.5 for a discussion of the sources of customary law in South Africa.

3 1997 (2) SA 936 (T) 944B–C.

4 2009 (3) SA 152 (CC).

5 See s 1 of the Recognition of Customary Marriages Act 120 of 1998 under the lemma "customary law". All references to the Recognition of Customary Marriages Act in this chapter will be to this Act unless indicated otherwise.

group to the exclusion of outsiders. In the words of Hamnett,[6] customary law can be described as "a set of norms which the actors in a social situation abstract from practice and which they invest with binding authority".

In a similar vein, Bennett[7] explains that customary law "derives from social practices that the community concerned accepts as obligatory". However, the legal rules are not cast in stone. Bennett[8] explains this as follows:

> Systems of custom therefore have the remarkable ability to allow forgotten rules to sink into oblivion, while simultaneously accepting new rules to take their place, always on the understanding that the new is old.

The first statutory definition of customary law in South Africa is found in the Law of Evidence Amendment Act,[9] which defines "indigenous law" as "the law of custom as applied by the Black tribes in South Africa". This definition still appears in statute books, but it should be clear that its reference to race is objectionable and, therefore, it should either be scrapped or changed to reflect the democratic values of human dignity, equality and freedom.

In 1998, the South African Law Reform Commission (formerly known as the South African Law Commission)[10] introduced a new definition that discarded any reference to the obligatory nature of customary law. This definition was incorporated into the Recognition of Customary Marriages Act[11] and reads:

> . . . 'customary law' means the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples.

The same definition was included in the Reform of Customary Law of Succession and Regulation of Related Matters Act.[12] For legal purposes, the definition is void of meaning, unless one knows (a) what the relevant customs and usages are; (b) who the indigenous people are; and (c) what their culture is.

The "customs and usages" of the indigenous people will be described in the relevant parts of this book. Some of the customs are unwritten and others have been embedded in legislation, for example the lobolo custom, which is seen as a ubiquitous cultural phenomenon still practised in rural and urban areas. Lobolo is defined in the Recognition of Customary Marriages Act[13] as:

> . . . property in cash or in kind, whether known as lobolo, bogadi, bohali, xuma, lumalo, thaka, ikhazi, magadi, emabheka or by 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.

The entrenchment of some of the customs and usages into legislation gave rise to the debate on whether customary law should be made into a fixed legal system by means of codification or whether it should continue as an ever-changing or "living" legal system.[14]

The expression "indigenous law" is sometimes used in legal literature instead of "customary law", especially in earlier scholarly sources and other legislation.[15] Although "customary law" and "indigenous law" are used as synonyms in South African law, the first is preferred, since it is also the expression used in the Constitution.[16]

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6 Hamnett (1977) 14.
7 Bennett (2004) 1.
8 Bennett (2004) 2.
9 45 of 1988, s 1(4). All references to "this Act" in the rest of this chapter are to the Law of Evidence Amendment Act, unless indicated otherwise.
10 South African Law Commission *Project 90: Report on customary marriages* (1998) 43 and also cl 1 of the Recognition of Customary Marriages Bill included in the Report.
11 Section 1.
12 Section 1 of Act 9 of 2009. The Act came into operation on 20 September 2010. See the discussion in ch 9.
13 Section 1 under the lemma "lobolo". See ch 3 for a discussion thereof.
14 See 2.4 for a discussion.
15 For example, s 1(1) of the Law of Evidence Amendment Act.
16 For example, s 211(3) of the Constitution.

Another issue that needs to be highlighted is "Who are the "indigenous African peoples". In other words, who is bound by customary law? It is generally accepted that "indigenous African people" refers to the black African population only, but how are black Africans to be distinguished from other population groups without reference to race? These questions have led to an academic debate on the scope and implications of the definition of customary law. On the one hand, it is argued that customary law applies on the basis of race[17] and, on the other hand, it is argued that such law applies on the basis of culture.[18]

Furthermore, the term "indigenous" normally refers to someone's origins; in other words, the place where a person is originally from. Who the indigenous people of South Africa are, remains a contentious issue. Nevertheless, for the purposes of this book, the matter will not be pursued any further and indigenous African people are the ethnic groups traditionally grouped on the basis of language and other cultural features.[19]

The third issue arising from the definition of customary law is the meaning of "culture". The concept "culture" is a central theme of this book and, although various provisions of the Constitution relate to culture, the Constitution does not define culture.[20] Bennett's[21] discussion of the meaning of culture seems to capture the very essence of the concept, namely:

> In common parlance . . . 'culture' implies high intellectual or artistic endeavour. . . . But 'culture' may also denote a people's entire store of knowledge and artefacts, especially the languages, systems of belief, and laws, that give social groups their unique characters. This meaning would encompass a right to customary law, for customary law is peculiarly African, in contrast with the law of a European origin.

Nevertheless, there is no exact definition of culture, especially in the South African context, and further developments are envisaged.[22]

2.2.1 *Customs and usages traditionally observed*

The first element of the statutory definition of customary law is "customs and usages traditionally observed". Traditions have normally existed for a long time without changing, but this is not necessarily the position with regard to customary law. Seymour-Smith[23] states that:

> . . . a set of interrelated cultural elements or traits which persist over a relatively long time span is called a tradition . . . Modern anthropologists and ethnologists however tend not to place so much emphasis on the centrality of the concept of tradition, since it does not allow for the essentially dynamic and adaptive nature of socio cultural systems. As these writers have pointed out, the uncritical use of the concept of tradition may make us fail to examine the key problem of the relationship between cultural persistence or continuity and cultural change, a problem which is to be approached not only in terms of cultural elements in themselves but also in terms of the historical process of social reproduction and social change in the population concerned.

This line of reasoning is in accordance with the viewpoint that customary law is flexible and ever-changing, a fact that has recently also been recognised by the South African courts. In *Bhe v Magistrate, Khayelitsha*,[24] the Constitutional Court observed as follows: "True customary law will be that which recognises and acknowledges the changes which continually take place".

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17 Pieterse (2001) *SAJHR* 373 and 381.
18 Himonga and Bosch (2000) *SALJ* 314–315. Also see Bennett (2004) 42.
19 See 2.2.2.
20 Sections 9(3), 30, 31(1), 185, 186 and 235 refer to culture explicitly, and ss 15(3) and 143(1)(*b*) have cultural undertones. Also see Venter (1998) *SAPR/PL* 439.
21 Bennett (1995) 23–24.
22 Also see the discussion in 2.2.3.
23 Seymour-Smith (1986) 279.
24 2005 (1) BCLR 1 (CC) para 86.

In addition to socio-cultural change, the difficulty in determining true customary law has been exacerbated by colonial-apartheid laws adapting customary law and by court judgments cast in a Eurocentric mould. Authors have tried to distinguish between the adapted law by calling the former "official" customary law in comparison to "living" law, which is the law actually observed by the indigenous communities. The official law is easily ascertainable because it is, for the most part, written, but the living customary law is not recorded and is, therefore, more difficult to ascertain. To reduce living customary law to a body of rules for use by the legal fraternity is practically impossible.[25] Nevertheless, the courts have recently adopted the attitude that the living customary law is the authentic version and the one that should be applied.[26]

"Tradition" can also be used in another context, namely in referring to the concept "legal tradition". Merryman[27] points out that "legal tradition" refers to:

> . . . a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the way law is or should be made, applied, studied, perfected and taught. The legal tradition relates the legal system to the culture of which it is a partial expression. It puts the legal system into cultural perspective.

If this is what legal tradition means, it is easy to see why the legal systems of the various cultural groups are different. In order to understand these systems, one has to study, teach and apply their rules within their own unique perspectives. Mqeke[28] is of the opinion that it would not be wrong to refer to an African legal tradition as opposed to a Western legal tradition, in spite of the fact that customary law consists of multiple legal systems that have, over the years, been influenced by colonialism, globalism, Western norms and other factors. According to Mqeke, African legal tradition has a number of common characteristics that include oral traditions (customs and usages), communalism, collective responsibility, flexibility, reconciliation, symbolism and non-separation between law, religion and morality. All these characteristics together form a body of tradition which he calls the African legal tradition.[29] African legal tradition also ties in with the concept of *ubuntu* and other African values, which will be discussed later in this chapter.[30]

Mqeke's viewpoint is also in accordance with the viewpoint of the Constitutional Court that customary law must not be viewed through a common-law lens, but be regarded as an integral part of South African law.[31]

That said, it is important to point out that the right to practice one's culture is recognised in sections 30 and 31 of the Constitution.

2.2.2 *Indigenous African people of South Africa*

As already hinted above, the second element of the statutory definition of customary law refers to the "indigenous African people of South Africa". In the definitions above, the term is qualified by adding that the "people" are those of South Africa. Black Africans from other African countries would therefore not qualify as indigenous people of South Africa.

As already pointed out, black Africans are usually grouped on the basis of language and other cultural features such as clothing.[32]

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25 Bekker and Maithufi (1992) *TRW* 47–60. Also see the discussion at 2.4.
26 See the discussion at 2.4.
27 Merryman (1985) 3.
28 Mqeke (2003) 16.
29 Mqeke (2003) 16–27.
30 See 2.3.12.
31 *Alexkor Ltd v Richtersveld Community* 2003 (12) BCLR 1301 (CC) para 51. Also see *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) para 44; *Mabuza v Mbatha* 2003 (4) SA 218 (C) para 32.

Based on their languages and other cultural features, black Africans of South Africa can be classified into the following ethnic groups:

Groups	**Language**[33]	**Original settlement in South Africa**[34]
Nguni group		
Zulu	isiZulu	KwaZulu-Natal
Xhosa	isiXhosa	Eastern Cape
Swazi	siSwati	Mpumalanga
Ndebele	isiNdebele	Mpumalanga and Limpopo
Tsonga group (sometimes referred to as the Shangaan)		
Tsonga	Xitsonga	Limpopo
Sotho group		
Pedi	Sepedi	Limpopo
Sotho	Sesotho	Free State and Eastern Cape
Tswana	Setswana	North-West
Venda group		
Venda	Tshivenda	Limpopo

The customs and legal systems of the various groups differ in some respects. Yet, there are many similarities between the groups, to the extent that their rules of law may be discussed together, for instance, all of them recognise a male family head that is responsible for the care and maintenance of the whole family and that a marriage is a union between two families.

2.2.3 *"Form part of the culture of those peoples"*

The third element of the statutory definition is the provision that the customs and usages traditionally observed by indigenous African people have to "form part of the culture of those peoples".[35] Culture is one of the most contested concepts in scholarly literature and has been the subject of deliberations by mainly cultural anthropologists for many years. Legal scholars, too, have a deep interest in the concept owing to the national and international legal protection of the right to culture and have also struggled to find a legally relevant and all-encompassing definition for culture.[36] This has given rise to a vast amount of research and legal commentaries which would be impossible to discuss fully within the confines of this book.

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32 There are numerous publications on the origins, classification and distribution of African people in South Africa. The following are two of them: Bruwer (1956) and Levitas (1983).

33 In terms of s 6(1) of the Constitution, the official languages of South Africa are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.

34 Nowadays, vast numbers of the various ethnic groups are dispersed all over the country, but the majority is still settled in these provinces. They have also intermingled with other groups by marriage and social interaction and it is becoming more and more difficult to draw clear lines between the various groups.

35 Rights to culture are also protected in terms of ss 6 (language), 30 (language and culture), 31 (cultural communities) and 185 (Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities).

36 See Rautenbach, Jansen van Rensburg and Pienaar (2003) *PER/PELJ* 1–19.

To date, a few useful attempts have been made to define culture. Anthropologists continue to advance numerous definitions and explain what they mean. For the purpose of showing what "culture" means in the context of the definition of customary law, the following succinct description seems to be adequate:[37]

> . . . when we speak of culture we mean a way of life that is common to a group of people, a collection of beliefs and attitudes, shared understandings, and patterns of behaviour that allow people to live in relative harmony, but set them apart from other people.

The above definition is in line with that given in 2001 by the UNESCO Universal Declaration on Cultural Diversity. The latter definition received a good deal of attention in legal literature, and stated that culture is:[38]

> . . . a set of distinctive spiritual, material, intellectual and emotional features of society or a social group, that encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs.

Different authors have defined culture to mean, *inter alia*: a collective term for aesthetical expression (for example a sculpture) by means of literature, theatre, music and sculpture; ways of living;[39] a modality that identifies and binds a specific group of people;[40] and a determining source of identity that draws distinctions between people on the grounds of a number of characteristics such as language, religion, beliefs and traditions.[41] Bennett's[42] description of culture acknowledges that the concept "culture" bears at least two meanings in a legal context, namely "intellectual or artistic endeavour" and "a people's store of knowledge, beliefs, arts, morals, laws and customs, in other words, everything that humans acquire by virtue of being members of a society". A right to culture, in the context of the first meaning, implies that culture entails the freedom to perform and practise the arts and sciences. The right to freedom of expression as guaranteed in the Constitution is one example that comes to mind here.[43] The second meaning of culture, as argued by Bennett, is the one that is most relevant to African customary law.[44]

Admittedly, language is not the only criterion to determine a person's cultural affiliations. Personal identity is of equal importance. To determine whether somebody is an indigenous African person, one would also have to consider descent and association. Both raise a new set of problems. Many people are of mixed descent, having, for example, a Xhosa mother and Tswana father. In the colonial-apartheid era, a derogatory test[45] was used to determine whether someone was a full-blooded indigenous person. If not, he/she could be regarded as an African if he/she behaved like one. Presently, with the emphasis on culture of choice, it may be said that adopting the ways of life of an African would be a yardstick to test whether customary law is applicable or not. This again raises the question: what are the ways of life of an African? The Constitution guarantees freedom of association, and nothing prevents a person of Western descent to follow what some perceive to be an "African" lifestyle.[46] Pre-ordained legal rules will probably be inadequate to adjudicate particular identity claims.

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37 Whiteford and Friedl (1992) 56.

38 See the preamble to the Declaration accessible at *http://www.unesco.org*.

39 Hawkes (2001) 3; World Commission for Culture and Development (1998) 14.

40 Albertyn and Goldblatt "Equality" in Woolman *et al* (eds) (2008 looseleaf) 35.72–73 points out that culture, although difficult to define, "refers to the values, practices, rules and behavior of different social groups".

41 Sections 30 and 31 of the Constitution do not refer to culture in general but to "cultural life" and "their culture".

42 Bennett (2004) 78–79. Also see Bennett (1995) 23–24.

43 Section 16(1)(*c*) reads: "Everyone has the right to freedom of expression, which includes – freedom of artistic creativity".

44 Bennett (2004) 78–79.

45 The test was a discretionary judgment based on a number of factors such as colour, family relations and any other evidence that could be relevant in making the determination.

46 Section 18 of the Constitution.

Be that as it may, for practical purposes, it may be assumed that language and personal identity may be sufficient to identify a person as a member of the "indigenous African peoples", and disputes will have to be resolved on an *ad hoc* basis.

A moment's reflection will show that different people have distinct ways of life. The languages, eating habits, marriage customs and inheritance rules of the Germans and Japanese are clearly different. Many different kinds of behaviour are shared by all, no matter where they are in the world, but there are, all the same, many fundamental differences. One outstanding example is that Western families are nuclear (husband, wife and children), whereas African families are generally extended to include even distant relatives.

Lawyers should therefore have no problem in identifying "culture" when it is in issue. A real danger, though, is that lawyers steeped in Western legal systems (as is predominantly the case in South Africa) will unwittingly have an ethnocentric view of customary law. This is the belief that one's own patterns of behaviour are the best.[47]

2.3 Some key features of customary law

Lawyers and students alike often fail to understand customary law, the reason being that they do not appreciate that the premises on which it is based are different from other legal systems. The following is a selection of some key features of customary law. Where appropriate, comparison with the common law is drawn in order to illustrate the uniqueness of customary law.

How, then, does one go about studying customary law? Myburgh[48] explains that the two systems of law are comparable in one important respect, namely that law is closely interlinked with the culture of the people that it regulates; in other words, law is one of the aspects of the culture of all people. Customary law covers the same ground as and comprises similar divisions as other legal systems, for example marriage, succession and property. If one understands the cultural context within which the legal rules operate, one will also be able to understand the differences and commonalities between the common and customary law.

However, lawyers trained within the Western legal traditional normally take Western cultural norms for granted, for instance, the monogamous nature of marriage. When applying customary law, they need to make a paradigm shift because customary marriages may be polygynous – a fact which is normal to the cultural group within which customary law is practised but which may be foreign to the Western lawyer.

2.3.1 *African community government and administration*

The apex of a traditional African community is a hereditary king or traditional leader. Although the king and the traditional leader would normally give effect to the will of the people, they do not operate as democratically elected functionaries such as cabinets, legislative assemblies and trained and remunerated judges. The system functions in such a way that it allows for free participation in making decisions that affect members of the community. This happens through mechanisms such as *khoro* (in Tshivenda) and *lekgotla* (in Sesotho) which can be referred to as a community gathering which normally takes place at the King's or traditional leader's kraal.

2.3.2 *Moments in time*

In other legal systems such as the common law, moments in time are often important. For instance, there are rules determining that an action must be instituted before a certain time. Claims and even crimes become prescribed after a certain period of time. In customary law,

47 Whiteford and Friedl (1992) 66.
48 Myburgh (1985) 98.

however, time plays a minimal role in determining when rights and duties come into existence. The actual occurrence of the event is the crucial factor. Undue delay may, at most, affect the credibility of the evidence.

2.3.3 *Traditional authority courts and procedure*

In customary courts, there are neither professional judges nor legal practitioners.[49] As a matter of fact, the principal dispute settlement bodies can hardly be called courts as commonly known. Adult family members will ideally meet to discuss a dispute. If they do not succeed in reconciling their differences, the matter will be taken to the offending party's headman. If the headman does not succeed in resolving the matter, resort may be had to the senior traditional leader's court.[50] Even though senior traditional leaders are granted civil and criminal jurisdiction,[51] the court council performs the judicial function.

The procedure in traditional authority courts is informal – it is more in the nature of mediation or reconciliation than a trial. Reconciliation of the parties is one of the important elements of a traditional dispute resolution system. The outcome of a case has been referred to as restorative justice[52] or even therapeutic jurisprudence.[53]

2.3.4 *Marriage and family*

In customary law, a marriage is a union of two families as opposed to simply being a special contract between a man and a woman at common law. Representatives from both families will negotiate the marriage, come to an agreement about *lobolo*, exchange gifts and participate in the relevant ceremonies. Ultimately, and essentially, the wife is integrated in her husband's family, so much so that when he dies, she belongs to his family. However, the Recognition of Customary Marriages Act brought some reforms to customary marriages as traditionally known.

2.3.5 *Contract*

In customary law, the head of the family usually concludes contracts on behalf of his family. He will even incur obligations under contracts entered into by members of his family with his consent. This is in contrast with the position in common law, where the contracting parties themselves acquire rights and incur liabilities.

2.3.6 *Concrete as opposed to abstract legal facts*

Customary law is almost entirely based on the concrete performance of an act. Thus, a marriage is concluded in a manner that can be observed by all concerned. The bride is actually "handed over" to the bridegroom's family. Also, a contract of sale is dependent upon the physical, observable handing over of the price agreed upon in exchange for the article or goods purchased. Although the practice of handing over the bride is also observed by the father of the bride or another family member in some Western traditions, it is not a legal requirement for the validity of the marriage. Furthermore, in the case of common-law contracts, it is possible to effect transfer of the property without the physical handing over of the articles or goods.

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49 Also see discussion in ch 11.

50 For a description see Koyana (1980) 128–134.

51 Sections 12(1)(*a*) and 20(1)(*a*) of the Black Administration Act. Also see ch 11 for a discussion of the customary court system.

52 Skelton and Batley (2008) *Acta Criminologia* 49; and *S v Maluleke* 2008 (1) SACR 49 (T).

53 Rautenbach (2005) *SAJHR* 323–335.

2.3.7 *Groups rather than individuals as legal persons*

In customary law, the group (a family or community) constitutes a legal entity. In the field of customary law, the family head is the representative of the legal unit (the family) who can, *inter alia*, enter into contracts, acquire property and even incur liability for delicts committed by members of the family home. The same cannot be said of common law.

The group dimension of African people is closely linked to the concept of *ubuntu*, which is explained later in this chapter. In *MEC for Education: KwaZulu-Natal v Pillay*,[54] the court explained as follows:

> The notion that 'we are not islands unto ourselves' is central to the understanding of the individual in African thought. It is often expressed in the phrase *umuntu ngumuntu ngabantu* which emphasises 'communality and the inter-dependence of the members of a community' and that every individual is an extension of others. According to Gyekye, 'an individual human person cannot develop and achieve the fullness of his/her potential without the concrete act of relating to other individual persons'. This thinking emphasises the importance of community to individual identity and hence to human dignity. Dignity and identity are inseparably linked as one's sense of self-worth is defined by one's identity. Cultural identity is one of the most important parts of a person's identity precisely because it flows from belonging to a community and not from personal choice or achievement. And belonging involves more than simple association; it includes participation and expression of the community's practices and traditions.

In modern customary law, the position has changed to a large extent,[55] the reason being that modern living and the Constitution (in particular the Bill of Rights) inevitably brought about emphasis on individualisation.[56] Ndulo explains it well when he says that "[d]evelopment and industrialisation have caused an irreversible breakdown in the traditional African social order."[57] More to the point, he states further that "[t]he society is now highly individualistic, competitive and acquisitive."[58]

2.3.8 *Constant change and development*

All legal systems are in a constant process of change and development. African individuals and communities have undergone change as a result of modern social circumstances. Mbiti[59] comments on this change as follows:

> Within one family or household may be found two different worlds coexisting: the children may be attending university studies, while the parents are illiterate and concerned mainly with cultivating their fields with wooden sticks. In such a family, there are two sets of expectations, economic standards, cultural concerns and world view.

Customary-law rules must therefore be viewed against the backdrop of the social environment and cultures in which they apply.

2.3.9 *Values and principles of customary law*

Customary law is a value and principle laden system. These can also be referred to as positive aspects of customary law.[60] There is almost always a value or principle behind every practice in customary law. Historically, the subject has not been approached from a value or principled

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54 2006 (10) BCLR 1237 (N) para 53.
55 Myburgh (1985) 11.
56 For some discussion on the place of traditional African values in modern Africa see Gyekye (1996) 171–178.
57 Ndulo (1995) 92. These remarks were cited with approval by Ngcobo J in a minority judgment in *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 580 (CC) para 189.
58 Ndulo (1995). See, further, para 2.4 below on this topic.
59 Mbiti (1969) 218–219 [1990 2nd ed].
60 See comments of the Constitutional Court in *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 580 (CC) para 45 which seem to support this.

perspective for various reasons primarily linked to its vilification, distortion and marginalisation by the colonial and apartheid authorities.[61] The values and principles behind customary law practices have to be unearthed and interrogated in order to ensure a sustainable development of the system. According to the Constitutional Court, we need to interpret customary law in its own setting instead of seeing it through the prism of the common law or other systems.[62] This setting must include the values and principles of customary law.

One does not need to look too far to isolate some of the values and principles of customary law. Some of the judgments of the Constitutional Court attempt to isolate some of these values and principles. A good example is the *Bhe* judgment[63] which isolated the following positive aspects/values of customary law:

- inherent flexibility;
- consensus seeking;
- prevention and resolution of disputes and disagreements;
- unity of family structures and fostering of cooperation and a sense of responsibility;[64]
- obligation to care for family members;[65]
- perpetuation of the family;[66] and
- nurturing of communitarian traditions such as *ubuntu*.[67]

A lot has been and can be said about *ubuntu* as a value. Any discussion about African values in South Africa without reference to *ubuntu* will be incomplete. The African concept of *ubuntu* is a value-laden concept and has drawn a fair amount of criticism and praise. What does *ubuntu* mean and what is its importance for customary law in South Africa? It is difficult, if not impossible, to answer these two questions in a tangible way. The term *ubuntu* carries many meanings and, to date, it has been the topic of many controversial debates.[68] However, for the purposes of this book, an introductory discussion of the concept should suffice.[69] In general, the following values can be regarded as *ubuntu* values or principles:

- *uBuntu* refers to the key values of group solidarity, namely compassion, respect, human dignity and conformity to basic norms and collective unity. *uBuntu* refers to universal values that apply to individuals and groups alike;[70]
- *uBuntu* is an indigenous, purely African philosophy of life;

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61 See sentiments of the Constitutional Court regarding marginalisation and alienation of customary law in *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 580 (CC) para 43.

62 *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 580 (CC) para 43.

63 This was one of the first major cases of the Constitutional Court dealing with customary law.

64 *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 580 (CC) para 166.

65 This value was referred to in the majority judgment of Ngcobo J in *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 580 (CC) para 166.

66 This value was referred to in the minority judgment in an attempt to explain the rationale behind the now defunct rule of primogeniture in *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 580 (CC) para 166.

67 *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 580 (CC) para 45.

68 Also see Rautenbach (2015) *Journal of International and Comparative Law* 275–304 for a discussion of the links between *ubuntu*, restorative justice and therapeutic jurisprudence.

69 Although many publications, especially since 1994, exist, a useful publication on the topic of *ubuntu* is Cornell and Muvangua *Law in the ubuntu of South Africa* (2009), which contains a compilation of articles and decisions dedicated to *ubuntu.* Also see Cornell (2004) *SAPR/PL* 666–674; Praeg (2008) *S Afr J Philos* 367–385; Mukheibir (2007) *Obiter* 583–589.

70 See, e.g., *S v Makwanyane* 1995 (6) BCLR 665 (CC) paras 307–308, 313; Devenish (1998) 12; Du Plessis (1998) *Stell LR* 253–254; Barrie (2000) *TSAR* 271–278; Lemmer and Olivier (2000) *De Jure* 143.

- *uBuntu* requires Africans to express the distinctive collective consciousness in their behaviour, expression and spiritual self-fulfillment, demonstrating values such as brotherhood for Africans, sharing, and treating and respecting other people as human beings;
- *uBuntu* principles are sharing, loving, trust, commitment, discipline and respect;
- *uBuntu* creates a conducive atmosphere for people to relate well to each other and promotes group solidarity, which are essential to the survival of communities or societies; and
- *uBuntu* means that a person cannot exist of himself, by himself, for himself; he or she comes from a specific social order. This social order serves to nurture him or her into realising the promise of being human and the glory of being a self-defining value.

Although *ubuntu* has mostly been described in the context of African religion, philosophy or world-view, it is clear that it plays a major role in customary law because (as already explained) it is almost impossible to distinguish between law, religion or custom in the context of customary law. Ever since the interim Constitution and a few important judgments, *ubuntu* has come to play a major part in constitutional law, especially in the interpretation of constitutional values and rights.

uBuntu was expressly provided for in the epilogue to the interim Constitution, which read:

> . . . there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimisation . . .[71]

It was also brought into the discourse of the judiciary in 1995 by *S v Makwanyane.*[72] Mokgoro J's judgment played an important part in all future debates regarding *ubuntu*. She commenced her judgment by declaring:

> . . . when our Courts promote the underlying values of an open and democratic society in terms of section 35 [of the interim Constitution] when considering the constitutionality of laws, they should recognise that indigenous South African values are not always irrelevant nor unrelated to this task. In my view, these values are embodied in the Constitution . . .

Her ensuing discussion of the concept of *ubuntu* leaves no doubt that she was referring to, amongst other things, *ubuntu*, as one of the African values which must be taken into account when considering the constitutionality of laws. She also gave a definition of what she meant by the concept of *ubuntu* by saying:[73]

> Generally, *ubuntu* translates as humaneness. In its most fundamental sense, it translates as *personhood* and *morality*. Metaphorically, it expresses itself in *umuntu ngumuntu ngabantu,*[74] describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation.

Since then, Mokgoro J has been an active advocate for the advancement and development of the concept of *ubuntu*. Although the final Constitution contains no explicit reference to *ubuntu*, she emphasised that the key values of *ubuntu* are consistent with constitutional values and that "law reform can harness the spirit of *ubuntu(ism)* to achieve appropriate responses to the demands of constitutionalism".[75]

Since the passing of this judgment, *ubuntu* continues to be used at all levels by the judiciary as a grounding principle in the interpretation of the Bill of Rights, and certainly has a place in

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71 The word *ubuntu* has been translated with "humanity".

72 1995 (6) BCLR 665 (CC) para 300.

73 *S v Makwanyane* 1995 (6) BCLR 665 (CC) para 308. Also see her discussion of *ubuntu* in Mokgoro (1998) *PER/PELJ* 15–26.

74 The phrase *umuntu ngumuntu ngabantu* literally means that "a person is a person by or through other people".

75 Mokgoro (1998) *PER/PELJ* 21.

customary law despite its broadness. According to Rautenbach, the acceptance of *ubuntu* as a legal concept by the judiciary goes a long way towards facilitating the process of Africanisation or indigenisation of South African law.[76]

Other African values/principles which can be linked to customary law are as follows: family as a value and the notion of an individual's duties and responsibilities towards the family, and marriage.[77] There are many other values or principles linked to different aspects of customary law which must be unearthed and studied for the meaningful development of the system.

2.4 Living and official versions of customary law

For various reasons, the law as reflected in textbooks and applied by the courts is not always the original version. Virtually from the time when the first colonists set foot on South African soil, the colonial and African legal systems needed to exist together, although widely divergent in some respects. Western legal categories and terminology were used to categorise and make sense of customary law for the colonists. Women have, for example, been described as "minors" under the "guardianship" of their husbands or fathers and they were said to be under the "marital power" of their husbands. The colonial administrations also reduced some customs to fixed rules by codifying them. An outstanding example is the codification of customary law in the Natal Code of Zulu Law, initially done in 1878, but which survives to this day.[78]

Moreover, administrators, anthropologists and lawyers produced a number of treatises, again in terms of Western legal categories and terminology. All along, Eurocentric courts applied and interpreted customary law. By virtue of the doctrine of judicial precedent, their judgments constituted a source of customary law. The courts include, for example, the Appeal Court for Commissioners' Courts and the various divisions of the High Court (formerly the Supreme Court). Thus, a source of customary case law came into being.

Lastly, the colonial administrations passed Acts, such as on marriages and succession.[79] As a result, a version of customary law, called "official" customary law, developed. This version has been called into question by some scholars. Their objections run along the following lines: from a position of dominance, the administrators more or less decided what the law ought to be rather than giving a true account of what it was. What is more, customary law could not be rendered in a Western formula.

On account of the rigidity of legislation, the official customary law, like the Codes of Zulu law and the *stare decisis* doctrine, became ossified. In the meantime, living customary law has undergone considerable change as a result of the colonial (Western) environment. The following are a few examples:

- It was not possible to maintain cohesion of the families and communities. Individuals automatically became autonomous.
- Women acquired a large measure of independence – earning cash income and inevitably functioning independently. Also, a large number of female-headed households came into existence – so much to say that societies were no longer purely patrilineal.

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76 See Rautenbach "Exploring the contribution of *ubuntu* in constitutional adjudication – towards the indigenization of constitutionalism in South Africa" in Fombad (ed) (2017) 293–312.

77 For a discussion of how these are understood in an African setting, see Gyekye (1996) 75–78. For some reflections on the place of traditional African values in modern Africa also see Gyekye (1996) 171–178.

78 The KwaZulu Act on the Code of Zulu Law 16 of 1985 and the Natal Code of Zulu Law, Proc R151 of 1987. These two Acts are known as the KwaZulu-Natal Codes. Also see Bennett and Pillay (2003) *SAJHR* 217–238.

79 See chs 3 and 9.

As a result, customary law has adapted to fit the circumstances. There are numerous examples. It became acceptable for female family-heads to negotiate and receive *lobolo*.[80] It is not known how widespread this practice is, but, in some communities, a system of ultimogeniture developed.[81] The reason for this is said to be that the eldest son would leave the family home early while a younger son, the last-born, stayed and took care of the family home and his ageing parents. The African lifestyle changed dramatically due to Western influence. Communal life disintegrated. Economic, social, religious and political changes necessitated the adaptation of rules and procedures. An interesting example is that nowadays spouses combine their civil marriages with customary marriages.

Living customary law, unlike official customary law, refers to the original customs and usages, and are in constant development. Communities change and so do their rules. The ideal situation would be to apply living customary law. The courts have lately intimated that living customary law is preferred.[82] However, as pointed out by the South African Law Reform Commission in its Report on Customary Marriages,[83] it is virtually impossible to apply living law because it is not always readily ascertainable. It can be proved by expert evidence, but there is no comprehensive source. The official version is accessible, and it does have merit because it is mostly a feasible synthesis of the living and official customary law. It was suggested that a restatement be considered. In this regard, the Commission responded:[84]

> Even if resources were available, it would be a mistake to assume that the restatement would be a final and definitive account of all systems of customary law in South Africa. What legal status would the restatement enjoy? Should it be preferred to the writings of anthropologists? How would it relate to existing precedent and codified law? Would its existence preclude parties from leading evidence of new rules to the contrary?

It is difficult to apply living customary law across the board. The solution is that in appropriate cases it could be proved by expert evidence. Meanwhile the legislature has added to the official version of customary law by Acts recognising customary marriages,[85] casting traditional leadership and governance in a new statutory mould[86] and regulating certain aspects of the customary law of succession.[87] In one judgment after another, the courts have, by virtue of the doctrine of *stare decisis*, cast what they perceive to be the living law in immutable case law or resolved what the law ought to be, in order not to be in conflict with the precepts embodied in the Constitution.

For example, in *Mabuza v Mbatha*,[88] Hlope J stated:

> In my judgment, there is no doubt that *ukumekeza*, like so many other customs, has somehow evolved so much that it is probably practised differently than it was centuries ago. I got a firm impression that Mr Shongwe was not being truthful to the court in so far as he attempted to elevate *ukumekeza* into something so indispensable that without it there could be no valid siSwati marriage. As Professor De Villiers testified, it is inconceivable that *ukumekeza* has not evolved and that it cannot be waived by agreement between the parties and/or their families in appropriate cases.

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80 In *Mabena v Letsoalo* 1998 (2) SA 1068 (T), the judge held that the mother of a daughter may negotiate and receive *lobolo* for her.

81 See Watney (1992) LLD thesis.

82 Among others, in the *Bhe* case para 87, it was held that "the official rules of customary law were sometimes contrasted with what was referred to as 'living customary law', in which the rules were adapted to fit in with changed circumstances. The problem with these adaptations was, however, that they were *ad hoc* and not uniform. Magistrates and the courts responsible for the administration of intestate estates continued to adhere to the rules of official customary law, with the consequent anomalies and hardships as a result of changes which have occurred in society."

83 South African Law Commission *Project 90: Report on customary marriages* (1998) 21.

84 South African Law Commission *Project 90: Report on customary marriages* (1998) 22.

85 The Recognition of Customary Marriages Act.

86 The Traditional Leadership and Governance Framework Act 41 of 2003.

87 The Reform of Customary Law of Succession and Regulation of Related Matters Act.

88 2003 (4) SA 218 (C).

Academic scholars are also more and more in favour of applying living customary law instead of its official version. For example, Van Niekerk[89] forcefully argues that the living law should stand on its own feet. She says, *inter alia*:

> The living law that is currently applied has grown and developed to meet the demands of new communities. Therefore, although some rules of the indigenous law that have been entrenched in legislation may be characterised as "pure" indigenous law which is in conformity with traditional indigenous law, more often they are instances of a petrified law which has not kept pace with change.

2.5 Sources of customary law

It should be clear by now that a list of sources of customary law will be both controversial and incomplete but, in general, the following sources can be identified:

2.5.1 *Customs and usages*

The customs and usages of a cultural group are the main source of customary law. Of course, the whole debate regarding the official and living versions of customary law comes into play, including the difficulties of proving the existence of a particular custom or usage. The requirements for proving existence of a custom or usage through the lens of common law are the following:[90]

- the custom or usage must have been in existence for a long period;
- the relevant community must generally observe the custom or usage;
- the custom or usage must be reasonable; and
- the custom or usage must be consistent with or subject to the Constitution and other legislation.[91]

Lawyers who want to prove the existence of a binding custom or usage (thus customary law) should always make sure of the following:[92] Firstly, that the particular custom or usage that is being relied on, is still in existence. Secondly, whether the custom or usage is legally binding upon the community or is merely optional.

Customs or usages are usually proven by means of expert evidence. In *Sigcau v Sigcau*,[93] the court held that

> [t]he only way in which the court can determine a disputed point, which has to be decided according to Native Custom is to hear evidence as to that custom from those best qualified to give it and to decide the dispute in accordance with such evidence as it appears in the circumstances to be most probably correct.

It is also important to remember that courts may take judicial notice of customs and usages as set out in the Law of Evidence Amendment Act[94] which reads as follows:

> Any court may take judicial notice of the law of a foreign state and of indigenous law in so far as such law can be ascertained readily and with sufficient certainty: Provided that indigenous law shall not be opposed to the principles of public policy and natural justice: Provided further that it shall not be lawful for any court to declare that the custom of *lobola* or *bogadi* or other similar custom is repugnant to such principles.

This provision, especially the repugnancy clause, has been subject to severe criticism over the years and it should be used with caution and with due consideration of the values contained in the Constitution.

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89 Van Niekerk (2005) *Obiter* 474–487.
90 *Van Breda v Jacobs* 1921 AD 330.
91 See s 211(3) of the Constitution and also the discussion in ch 3.
92 Mofokeng (2009) 13.
93 1944 AD 67.
94 Section 1(1) of the Law of Evidence Amendment Act.

2.5.2 *Legislation*

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

2.5.3 *Judicial precedent*

Another important source of customary law is judicial precedent. Some courts dealing with customary law in particular have been abolished, but their decisions still form precedent, for example, the Appeal Court for Commissioners' Courts.[95]

The courts also have a responsibility to develop the customary law when interpreting any legislation, and when developing the customary law in line with the spirit, purport and objects of the Bill of Rights.[96]

Since 1994, a number of important decisions which dealt with various aspects of customary law have seen the light of day. These decisions will constantly be referred to in the chapters dealing with customary law.

2.5.4 *Scholarly and other writings*

Although they carry less weight than legislation and judicial precedence, various scholarly legal and anthropological writings have been used in the past as a source of customary law. For example, in *S v Makwanyane*,[97] the court emphasised the importance of research materials to determine how disputes were resolved and punishments meted out in traditional African society. In *Alexkor Ltd v Richtersveld Community*,[98] the court held that customary law may be established by reference to writers on customary law and other authorities and sources. It may include the evidence of witnesses if necessary. Caution must be exercised when dealing with textbooks and old authorities because of the tendency to view customary law through the prism of legal concepts that were foreign to customary law. In the course of establishing customary law, courts may also be confronted with conflicting views on what customary law on a subject provides.

A number of Commission Reports are also important to determine the rules of customary law.[99] These Reports include:

- *Report of the Native Natal Commission* (1881–1882);
- *Report and Proceedings with Appendices of the Government Commission on Native Laws and Customs* (1883 Cape); and
- *Report of the South African Native Affairs Commission*, *with Minutes of Evidence and Appendices* (1903–1905).

The various Discussion Documents and reports of the South African Law Reform Commission issued in terms of Project 90 on the Harmonisation of the Common Law and the Indigenous

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95 For a discussion of these courts, see Kerr (2005) *Family law service* para G6, and also the discussion in ch 11.
96 Constitution, s 39(2).
97 1995 (6) BCLR 665 (CC) 376–377.
98 2003 (12) BCLR 1301 (CC).
99 Kerr (2005) *Family law service* para G9.

Law[100] will also provide valuable insight into the customary law and have been used on a few occasions by the courts.[101] These reports include:

- *Issue Paper 4: The Application of Customary Law: Conflict of Personal Law (1996)*;
- *Issue Paper 3: Customary Marriages (1996)*;
- *Discussion Paper 76: Conflicts of Law (1998)*;
- *Discussion Paper 74: Customary Marriages (1998)*;
- *Report: Customary Marriages (1998)*;
- *Issue Paper 12: Succession in Customary Law (1998)*;
- *Report: Conflicts of Law (1999)*;
- *Discussion Paper 95: Customary Law: Administration of Estates (2000)*;
- *Discussion Paper 93: Customary Law (2000)*;
- *Report: Customary Law (2003)*; and
- *Report: Customary Law of Succession (2004)*.

2.6 Conclusion

Customary law is a unique system of law recognised by the Constitution with its own values and principles. It should be studied within the context of its setting.

Similar to the common law that can be adapted by means of legislation, customary law can also be subject to legislation that specifically deals with customary law. There are some pre-1994 laws dealing with aspects of customary law which will be discussed throughout the book. Readers may rest assured that if any of the laws fall foul of the Constitution they will be declared invalid. Some of the legislation has already been repealed and some stands to be repealed.

The legislature has (as a substitute to "old order" legislation) embarked on a law reform. It now constitutes a new body of law that is a mixture of statutory and customary law. The South African Law Reform Commission has also been active in advising the government in matters concerning the harmonisation of customary and common law. Since 1994 a number of pieces of legislation has been enacted to signify the need to accommodate, or rather adapt, customary law. The contents of these Acts will be discussed in the following chapters of this book. The next chapter deals with the recognition, application and ascertainment of customary law in South Africa.

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100 These documents are all accessible at *http://www.salrc.org.za*.

101 For example, the *Bhe* case.

3

Recognition, Application and Ascertainment of Customary Law

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3.1 A brief overview of the earlier recognition of customary law

As already alluded to in chapter 1, for the first two centuries of colonial rule, no account was taken of the laws of the traditional communities of South Africa. Instead, when the Netherlands ceded the Cape Colony to Britain in 1806, Roman-Dutch law was recognised as the basic law of the land.[1] However, as Britain extended its rule inland, it was forced to acknowledge that imported European laws were unlikely to be obeyed by the vast majority of the subject populations. A grudging recognition was therefore extended to the local systems of customary law, albeit limited by considerations of colonial policy and natural justice.[2]

This approach was no more than a pragmatic response to the realities of colonial rule. Indeed, customary law remained a primary source of regulation for nearly all Africans, as was shown by later anthropological research.[3] These studies fell into a specific sub-discipline of legal anthropology termed "legal pluralism", as discussed in chapter 1.[4]

Whenever a state is prepared to recognise normative orders other than its own, which had been the case in South Africa, it acknowledges the innate plurality of its legal system. Nevertheless, because it is the state that decides whether and to what extent these orders should be applied, Griffiths described this approach as "weak" pluralism (thus, state-law pluralism).[5] It is simply a modified version of legal centralism, because its validity remained a state issue.

Weak legal pluralism denotes the inferior position of non-state normative orders in at least three respects. First, overriding authority is given to national legislation and all other rules emanating from the central state. Second, the laws of only certain semi-autonomous social fields are singled out for recognition; they do not apply automatically. Third, the state decides, via the provision of choice of law rules, when the subordinate legal regimes will apply.

These three propositions used to be true of the position of customary law in South Africa, in particular the first, because it is clear that, until recently, customary law was a subordinate element in the country's legal order. For example, customary law was subject to state legislation;[6] certain courts could not take judicial notice of it;[7] and it could be applied only if compatible with principles of public policy and natural justice.[8]

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

2 By Ordinance 3 of 1849, customary law was recognised in the former colony of Natal except in "so far as it was not repugnant to the general principles of humanity observed throughout the civilized world". More or less the same terms were used for the Transkeian territories (s 23 of Procs 110 and 112 of 1879), the South African Republic (Law 4 of 1885) and Southern Bechuanaland (s 16 of the Annexation Act 41 of 1895 (Cape)).

3 This was apparent even in the Cape courts, which were formally competent to apply only the common law. See Brookes (1924) 183.

4 In 1986, one of the foremost scholars in the field, John Griffiths, published a manifesto for the discipline based on this evidence.He firmly rejected the prevailing doctrine of legal centralism, which is based on the idea that "law is and should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions". In its place, Griffiths advocated acceptance of the fact that various independent, but related normative orders were equally authoritative. Griffiths insisted that these modes of self-regulation – in what were termed "semi-autonomous social fields" – should be deemed as valid as state law. Griffiths (1986) *Journal of Legal Pluralism* 1–5.The concept of the semi-autonomous social field is defined "by a processual characteristic, the fact that it can generate rules and coerce or induce compliance to [its normative order]". See Moore (2000) 57.

5 Griffiths (1986) *Journal of Legal Pluralism* 9–14. Also see Woodman (1998) *Journal Legal Pluralism* 22–29.

6 Although not all state legislation. See below.

7 Until the Law of Evidence Amendment Act 45 of 1988, Magistrates' Courts and the then Supreme Court could not take judicial notice of customary law. Hence, in these courts it was treated as if it were common-law custom: *Ex parte Minister of Native Affairs: In re Yako v Beyi* 1948 (1) SA 388 (A) 394–395, *Mosii v Motseoakhumo* 1954 (3) SA 919 (A) 930 and Kerr (1957) *SALJ* 313.

8 The requirements of the so-called "repugnancy proviso". See below.

On 1 September 1927, the controversial Black Administration Act[9] made uniform recognition and application of customary law throughout South Africa possible for the first time, even though this recognition was only half-hearted. The purpose of this Act was to unify the recognition and application of customary law throughout South Africa. In *Motaung v Philemon Dube*[10] it was declared:

> By the Act 38 of 1927 the legislature has sought to bring into being Courts – of Native Chief, Native Commissioner and of Appeal – designed to suit the psychology, habits and usage of the Bantu, creating as nearly as possible the atmosphere of the Lekgotla to the arbitrament of which they have from time to time immemorial been accustomed to submit their disputes. While the attempt has been made to create forums and forms of practice and procedure approximating to Bantu conceptions of legal jurisprudence, the machine has been made sufficiently flexible to meet the needs of the Native who has emerged from the tribal state to the wider and more enlightened one of western [Western] civilisation and to systems of legal jurisprudence.

The most important provision in this Act for the recognition of customary law was section 11(1), which gave Native (later Bantu) Affairs Commissioners' Courts a discretion to apply customary law in all suits involving questions of customs followed by African people, provided that the customs have not been repealed or modified by law, and provided also that they accord with public policy and natural justice. The custom of *lobolo* or *bogadi* was entrenched. Nevertheless, this section, however important in itself, was of limited application. Although it tended to give but half-hearted expression to the principle of recognition, it did not definitely state that customary law would be accepted as the applicable law but clothed its recognition in vague and general terms. The recognition given to customary law was limited. The legislature, by imposing all manner of restrictions, had weakened the measure of recognition in spite of the fact that it had in view the recognition of customary law. Section 11(1) was repealed in 1986 and in 1988 the Law of Evidence Amendment Act[11] came into operation.

In terms of section 1(1) of the Law of Evidence Amendment Act, any court may:

- take judicial notice of indigenous law;
- in so far as such law can be ascertained readily and with sufficient certainty;
- provided that indigenous law shall not be opposed to the principles of public policy or natural justice; and
- provided further that it shall not be lawful for any court to declare that the custom of *lobolo* or *bogadi* or other similar custom is repugnant to such principle.

This implies that there are substantial customary law rules that are so well-known that a court may without more ado take judicial notice of them in the same manner that courts take judicial notice of common law. There is, however, a condition to it, namely that it must be ascertainable readily and with sufficient certainty. The Act did not change the rule that judicial notice was discretionary and it did not do much to resolve the so-called conflict of laws discussed below. Application of customary law has always been subject to that hallmark of colonialism: the so-called "repugnancy proviso", and the Law of Evidence Amendment Act is no exception. This general limitation on the recognition of customary law allowed state courts to ignore or strike down any rule that happened to conflict with European ideas of justice, morality or good order. Although often condemned, the repugnancy proviso is still on the statute books. Some courts have also relied on section 1(1) to prevent the application of customary law. For example, in *Maisela v Kgolane*[12] the High Court held that where a party intends to rely on customary law, it must be raised in the pleadings. It is many years since it has been invoked, however, and not surprisingly, there have been widespread calls for its repeal.[13]

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9 38 of 1927. Sections 6–8, 12 and 20 of the Act are still in operation but stand to be repealed.
10 1930 BAH (N&T).
11 45 of 1988.
12 2000 (2) SA 370 (T).
13 Including that of the South African Law Commission *Project 90: Report on conflicts of law* (1999) paras 2.11–13. See Taiwo (2009) *TRW* 89 *et seq*.

However, the situation has changed dramatically since the commencement of the 1993 Constitution[14] followed by the 1996 Constitution of South Africa.[15] Customary law has been accepted as a separate legal system. In *Mthembu v Letsela*,[16] the High Court of South Africa confirmed that "customary law has been accepted by the framers of the Constitution as a separate legal and cultural system which may be freely chosen by persons desiring to do so". This also means that the South African legal system consists of two distinct legal systems; one based on Western principles (common law) and the other on indigenous principles (customary law). In *Gumede v The President of the Republic of South Africa*,[17] the Constitutional Court confirmed that customary law "lives side by side with the common law and legislation".

Although section 1(1) of the Law of Evidence Amendment Act remains on the statute books, it seems to be redundant. It is no longer a matter of taking judicial notice of customary law or not. The courts must apply customary law when that law is applicable. Even if a court cannot ascertain it readily (which means quickly and easily) the court concerned is obliged to find out what that law is.[18] Furthermore, the repugnancy clause has become irrelevant to a large extent, because it is applicable "subject to the Constitution and any legislation that specifically deals with customary law".[19] The Constitution and particularly the Bill of Rights are now the benchmarks. The further proviso protecting *lobolo, bogadi* or other similar customs from being declared repugnant to natural justice and public policy is also under present circumstances meaningless. Its constitutionality may be tested despite this proviso.

It is further important to note that the expression "customary law" refers to something which is, in actual fact, not a unified system of law. South African customary law consists of the various "customs and usages traditionally observed among the indigenous African peoples of South Africa and form[s] part of the culture of those peoples".[20] In other words, there are various customary legal systems in operation in our country. Nevertheless, there are enough common features of these legal systems which may be discussed together, for instance the principles applicable to customary marriages and succession. Where differences between the systems are material to the resolution of issues, knowledge of the common features will facilitate application of the particular legal rules.

3.2 The new terms of recognition for customary law

3.2.1 *Constitutional provisions recognising customary law*

The advent of a new democratic government in South Africa provided the occasion for introducing a much stronger policy of legal pluralism, from which customary law was to be a particular beneficiary. Both the interim and final Constitutions have provisions dealing with customary law specifically.

Customary law was initially recognised under the interim Constitution. Section 181 recognised customary law indirectly and specified:

(1) A traditional authority which observes a system of indigenous law and is recognised by law immediately before the commencement of this Constitution, shall continue as such an authority and continue

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14 Act 200 of 1993.
15 Act 108 of 1996.
16 1997 (2) SA 936 (T) 944B–C.
17 2009 (3) SA 152 (CC) para 22.
18 See discussion below.
19 Section 211(3) of the Constitution, discussed below.
20 See s 1 of the Recognition of Customary Marriages Act 120 of 1998 under the lemma "customary law". All references to the Recognition of Customary Marriages Act in this chapter will be to this Act unless indicated otherwise.

> to exercise and perform the powers and functions vested in it in accordance with the applicable laws and customs, subject to any amendment or repeal of such laws and customs by a competent authority.
>
> (2) Indigenous law shall be subject to regulation by law.

In addition, Constitutional Principle XIII of Schedule 4 provided that:

> . . . Indigenous law, like common law, shall be recognised and applied by the courts, subject to the fundamental rights contained in the Constitution and to legislation specifically dealing therewith.

This provision formed the basis of the recognition in terms of section 211(3) of the final Constitution that reads –

> The courts *must* apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.[21]

The mandatory wording of section 211(3) has the effect of elevating customary law to the same position as the common law (and subject to the same provisos as application of the common law). Hence, the courts may apply customary law:

(a) only if it is compatible with the Constitution;

(b) only to the extent that it is not amended by legislation; and

(c) only if it is *applicable* (in terms of choice of law rules, a topic that is considered in more detail below).

Proviso (a) is the most complex, for it has the effect of subjecting all law to the Bill of Rights, even in situations where private relationships are concerned.[22] The scope of this provision is extended even further by section 39(2) of the Constitution, which obliges courts "[w]hen developing the common law or customary law" to "promote the spirit, purport and objects of the Bill of Rights".

As part of the transformation of South African law in the last two decades, the courts might have been expected to seize upon section 39(2) as a basis for implementing much needed incremental change in customary law. As it happens, however, this has seldom proved necessary.[23] Instead, the most urgent reforms were enacted in the Recognition of Customary Marriages Act[24] and the Reform of Customary Law of Succession Act.[25] In addition, the courts used the more subtle technique of invoking the Bill of Rights as a ground for abandoning the version of customary law used by state courts and administrative authorities in favour of rules actually observed by people in their everyday lives.[26]

The latter species of customary law is termed "living" law, whereas the former is generally called the "official" law. Because official customary law was captured – often many years ago – in codes, restatements, judicial precedents or academic works, it was unlikely to reflect current

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21 Emphasis added. All South African courts may also apply common law, with one exception: s 12(1) of the Black Administration Act 38 of 1927 provides that the courts of traditional leaders are competent to apply *only* customary law in civil suits. Under s 20(1)(*a*) of the Act, however, they may apply either common or customary law in criminal cases.

22 Section 8(2) of the Constitution declares that a provision in the Bill of Rights will bind natural persons "if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right".

23 The Constitutional Court, in particular, has not played an active role in this regard. See *Mayelane v Ngwenyama* 2013 (4) SA 415 (CC) para 43. In *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 580 (CC), the court simply invalidated a customary rule of succession; in *Gumede v President of RSA* 2009 (3) SA 152 (CC), it ruled on the validity of legislation concerning customary law; and, in *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC), it approved the development of customary law undertaken by traditional authorities. In *Mayelane v Ngwenyama* 2013 (4) SA 415 (CC), however, the court "developed" Tsonga customary law to remedy what appeared to be the absence of a rule requiring a husband to secure his first wife's consent before he entered into another customary marriage. See below.

24 120 of 1998.

25 11 of 2009.

26 See Himonga and Bosch (2000) *SALJ* 319, especially at 326.

social practice. Less obvious distorting factors were the processes of translation to legal language: these could never hope to present an accurate picture of the social reality.[27]

Mabena v Letsoalo[28] is a good example of the way in which the courts dealt with living and official law. According to a long-established rule of official customary law, *lobolo* agreements required the consent of the bride's and groom's guardians. The court, however, gave effect to a new social practice, whereby the groom could negotiate *lobolo* with his prospective wife's mother. This gender-neutral custom was upheld because it was consonant with the "spirit, purport and objects" of the constitutional rights.[29]

The second proviso to section 211(3) – customary law must be deemed subject to legislation – clarified a surprisingly nebulous issue. According to generally accepted legal doctrine, statutes automatically override any conflicting precedent, custom or other authority. Customary law, however, was sometimes considered exempt.[30] It was taken for granted, for instance, that the Divorce[31] and Matrimonial Property Acts[32] superseded only Roman-Dutch law. The effect of other family-law enactments, such as the Age of Majority Act,[33] was uncertain.[34] Section 211(3), however, now makes it clear that statutes will prevail only if they are specifically aimed at amending customary law.[35]

3.2.2 *Laws recognised under the Constitution*

Section 211(3) of the Constitution speaks only of "customary law", a term that is not defined in the Constitution. Nevertheless, it is generally taken to mean the unwritten laws of the indigenous peoples of South Africa, as distinct from the laws that were imported from the Netherlands and England, and developed into what came to be termed the "common law".

During the colonial and apartheid eras, customary law was almost always defined in racial terms,[36] but, since the new Constitution, it is now, more correctly, regarded as part and parcel of African cultural traditions. It follows that the basis for recognising customary law derives from the constitutional rights to culture (and religion).[37]

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27 Sanders (1987) *CILSA* 405.

28 1998 (2) SA 1068 (T) 1074–1075. Also see *Fanti v Boto* [2008] 2 All SA 533 (C) 457–458 and the comment by Bekker (2009) *THRHR* 684.

29 Also see *Metiso v Padongelukfonds* 2001 (3) SA 1142 (T), which involved the validity of a customary-law adoption, where the biological mother and her family had not been informed of the act. The court decided the question primarily on the basis of the child's best interests (s 28(2) of the 1996 Constitution), holding that it would be both irrational and, on the facts, contrary to this principle to allow failure to inform to upset the adoption.

30 See Bennett (1981) *ICLQ* 86–87.

31 70 of 1979.

32 88 of 1984.

33 57 of 1972.

34 See Bekker (1975) *THRHR* 394. It was therefore necessary to pass s 9 of the Recognition of Customary Marriages Act 120 of 1998 to provide that the Age of Majority Act has supervening force.

35 See, in this regard, *Pilane v Pilane* 2013 (4) BCLR 431 (CC), where a majority of the Constitutional Court held that statutory recognition of a traditional leader did not preclude another (unrecognised) authority from exercising certain rights in terms of customary rules, notably freedom of expression, association and assembly. See *Maneli v Maneli* 2010 (7) BCLR 703 (GSJ), where the court held that the phrase "for the adoption of children" in the preamble to the Child Care Act 74 of 1983 should be interpreted purposively so as to include customary law, but not to abolish the validity of customary-law adoptions. This decision was taken with a view to promoting the best interests of the child under s 28(2) of the Constitution.

36 It was also variously referred to as "native" or "black" law. "Black" was defined in s 35 of the Black Administration Act 38 of 1927 to "include any person who is a member of any aboriginal race or tribe of Africa". The racial terminology is preserved in s 1(4) of the Law of Evidence Amendment Act 45 of 1988, which provides that, for the purposes of the Act, "indigenous law" means the Black law or customs as applied by the African communities in the Republic or in territories which formerly formed part of the Republic.

37 Bennett (1991) *Acta Juridica* 21–22 and Bennett (1995) 23–27.

These rights are contained in sections 30 and 31 of the Bill of Rights. Section 30 provides that all persons have the right to "participate in the cultural life of their choice", while section 31(1) provides that:

> Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community . . . to enjoy their culture, practise their religion and use their language.

Formerly, the state assumed an absolute discretion in deciding whether and to what extent customary law should be recognised. Now, however, it is obliged to allow people to participate in the culture (or religion) they choose, and implicit in this obligation is a duty to uphold the institutions pertaining to that culture (or religion).[38] On this understanding, for instance, the courts have taken cognisance of systems of religious law, whether Muslim, Hindu or Jewish law.[39]

It follows from the above that "culture" and "religion" are critical terms for determining whether a social group can demand recognition of its laws. Neither word, however, enjoys a statutory or a (decisive) judicial definition.[40] As a result, no distinction is drawn between the different groups producing the various culturally (and religiously) defined laws now recognised by the courts, although a social practice lacking the endorsement of a local culture or religion may not warrant state recognition.[41] For instance, the recently adopted practice of female genital mutilation would not attract constitutional protection, because, *inter alia*, it is not associated with an indigenous culture(or religion).[42]

3.3 Conflicts of laws

Because legal pluralism is about multiple and overlapping normative orders, it will inevitably produce situations in which individuals find themselves subject to contradictory obligations. To avoid having to solve the ensuing conflicts of law, states usually provide special choice of law rules, which indicate which law (common or customary law) should be applied. There is no specific list of choice of law rules and the rules must be determined by looking at existing legislation and judgments dealing with the application of customary law.

3.3.1 *Statutory choice of law rules*

Previously, the South African legislature provided only minimal statutory guidance on when to apply customary law. In general, the repealed section 11(1) of the Black Administration Act gave a discretion to the former commissioners' courts and their courts of appeal to apply customary law "in all suits or proceedings between Blacks involving questions of customs followed by Blacks . . .". The courts were thus left to devise their own more precise guidelines on choice of law. Initially, their attempts were frustrated by a divergence of views in the two divisions of the

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38 This argument finds additional support in two sections of the Constitution. Section 15(3)(*a*)(i) provides that legislation may be passed to recognise "marriages concluded under any tradition, or a system of religious personal or family law", and s 15(3)(*a*)(ii) provides that legislation may be passed to recognise "systems of personal and family law under any tradition, or adhered to by persons professing a particular religion". See Himonga and Bosch (2000) *SALJ* 330–331.

39 See part 3 of this book.

40 See the description of religion by O'Regan J in *MEC for Education, KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC) para 47. With regard to definition, the judgment in *Pilane v Pilane* 2013 (4) BCLR 431 (CC) para 65 is significant, because the court accepted a group's right to determine its cultural identity subjectively, even if others disagreed, as part of the its right to culture. Also see, Rautenbach, Jansen van Rensburg and Pienaar (2003) 1–20.

41 Conversely, in *Pilane*'s case, because the group had a separate cultural identity, the Constitutional Court found that it had the right to hold a traditional gathering to determine whether to secede from a traditional authority. See Bennett (2009) *Am J Comp L* 25–29.

42 Bennett (2004) 303–304. The customs associated with African cultures enjoy certain evidentiary privileges: they are deemed part of the state legal order, and, as such, may be treated as law, to be argued on the basis of authoritative texts. Customs of the sort alleged in *Van Breda v Jacobs* 1921 AD 330, however, must be proved by witnesses whenever they are asserted. Also see discussion below.

Court of Appeal for commissioners' courts. One held that common law was primarily applicable; customary law could be applied only in matters that were "peculiar to Native Customs falling outside the principles of Roman-Dutch law".[43] The other division took the contrary view, namely, that customary law was primarily applicable to Africans, and only as a matter of exception the common law.[44] No satisfactory solution to those opposing views has been found.[45] Hence, it remains an open question as to which system of law the courts should take to be primarily applicable.

The task of defining choice of law was further bedevilled by certain decisions holding that customary law could be applied only if it had a rule governing the facts at issue.[46] By implication, there could be gaps in the law, a supposition prompted by the wording of section 11(1) of the Black Administration Act that customary law was applicable only when it involved "questions of customs followed by Blacks".

On this understanding, the courts held that customary law was applicable only if it contained a remedy.[47] So persistent was this view that it survived two decisions of the Appellate Division of the Supreme Court,[48] which held that justice might best be served by applying the law that did not have a remedy.[49] In principle, of course, any choice of law rule predicated on the existence or absence of remedies is bound to be arbitrary, and so cannot be supported.[50]

Choice of law rules were also contained in specific legislation. For example, in the case of the customary law of succession or inheritance (see ch 9), the Black Administration Act[51] restricted an African's power to bequeath property by will, and made the application of the customary law of intestate succession mandatory to certain estates.[52] Regulations promulgated under the Act further provided that customary law was to apply if a deceased person had married by customary law or by civil/Christian customs but out of community of property.[53] These provisions have all been repealed, and potential choice of law issues has been largely obviated by legislation imposing a unified system of law for succession.[54] In terms of section 2(1) of the Reform of Customary Law of Succession and Regulation of Related Matters Act:[55]

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43 *Nqanoyi v Njombeni* 1930 NAC (C&O) 13.

44 *Matsheng v Dhlamini* 1937 NAC (N&T) 89, 92, *Kaula v Mtimkulu* 1938 NAC (N&T) 68, 71 and *Yako v Beyi* 1944 NAC (C&O) 72, 77.

45 The decision in *Ex Parte Minister of Native Affairs: In re Yako v Beyi* 1948 (1) SA 388 (A) 397 was supposed to resolve the problem, but it was not specially helpful. The court held that s 11(1) allowed "some elasticity and provide[d] scope for development, so as to achieve the primary desideratum of an equitable decision between the parties without laying down any hard and fast rule as to the system of law to be used to attain that end". Perhaps the most useful part of the judgment is that courts should finally decide which system of law to apply only after considering all the evidence and argument on the case.

46 *Nzalo v Maseko* 1931 NAC (N&T) 41, *Magadla v Hams* 1936 NAC (C&O) 54 and *Mkize v Mnguni* 1952 NAC (NE) 242.

47 *Ntsabelle v Poolo* 1930 NAC (N&T) 13, *Nqanoyi v Njombeni* 1930 NAC (C&O) 13, *Magidela v Sawintshi* 1943 NAC (C&O) 47, 53, *Mtolo v Poswa* 1950 NAC (S) 253 and *Sibanda v Sitole* 1951 NAC 347 (NE).

48 *Ex parte Minister of Native Affairs: In re Yako v Beyi* 1948 (1) SA 388 (A) 399 and *Umvovo v Umvovo* 1953 (1) SA 195 (A) 201.

49 Also see *Mahashe v Mahashe* 1955 NAC (S) 149 and *Togo v Molatoli* 1976 AC 20 (C) 20.

50 Bennett (1979) *SALJ* 413–414. See the "gap filling" approach of the court in *SS v Presiding Officer, Children's Court, Krugersdorp* 2012 (6) SA 45 (GSJ) paras 33–36, where the court noted (*obiter*) that s 150(1)(*a*) of the Children's Act 38 of 2005 should be interpreted to take into account customary law when determining which relatives were responsible for children "in need of care and protection". Also see the interesting decision in *Fosi v Road Accident Fund* 2008 (3) SA 560 (C) para 16 *et seq*, where Dlodlo J adverted to customary law as the basis for a parent's claim for support from a deceased son, implicitly, it would seem, because the duty in customary law was stronger than that under the common law.

51 Section 23 of Act 38 of 1927.

52 Annexure 24 of the Black Areas Land Regulations R188 of 1969.

53 GN R200 of 1987.

54 Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009. Also see discussion at ch 9.

55 11 of 2009. Also see discussion at ch 9.

> [t]he estate or part of the estate of any person who is subject to customary law who dies after the commencement of this Act and whose estate does not devolve in terms of that person's will, must devolve in accordance with the law of intestate succession as regulated by the Intestate Succession Act . . .

The provisions leave little doubt that the customary law of succession is no longer applicable to people living under a system of customary law. However, the Act gives some consideration to cultural sensibilities through elaborate modifications of the common law to accommodate polygynous unions,[56] even the rare cases of seed-raiser unions and women-to-women marriages.[57] There are thus circumstances where it would be necessary to determine which law is applicable in order to decide if these modifications apply.

The Recognition of Customary Marriages Act[58] is another example that modified customary marriages quite considerably (see ch 5). Although the Act removed the elements of discrimination that resulted from a strict separation between customary and common law, it did not eliminate the need for choice of laws in its entirety. The requirements for a valid customary marriage are listed in section 3(1): the prospective spouses must be over the age of 18, they must consent to be married under customary law and the union must be "negotiated and entered into or celebrated in accordance with customary law". By virtue of the latter phrase, the courts have been directed to apply the requirements considered necessary under the various systems of living customary law, especially, of course, agreement on or payment of *lobolo*, and the handing over of the bride to the groom's family.[59] There are thus still circumstances where it would be necessary to choose between customary and common law, even if it is only to determine if the marriage was validly concluded.

3.3.2 *Judge-made choice of law rules*

Due largely to the vagueness of the statutory rules, the courts set about establishing principles to determine choice of law. These were based on a sense of reasonableness, namely, given the circumstances of a case, what law would a reasonable person have expected to be applied.[60] Since 1994 there have been no decided cases that had to deal with this question specifically. In most cases, it was evident that the applicable law was customary law, but, as pointed out recently in *Gumede v President of the Republic of South Africa*,[61] it might be a difficult question to determine the exact reach of customary law in a given situation. The following guidelines or indicators have been identified by the courts.

(a) Express agreement between the parties: If the parties had concluded an express agreement that a particular law should govern their relationship, then the court need only enforce that agreement. In fact, courts everywhere welcome advance agreement on choice of law, because it removes much of the uncertainty inherent in the conflict of laws.[62] Scholars, however, have been reluctant to allow parties complete autonomy.[63] They have argued that individuals should not be permitted to "contract out" of the mandatory rules of a legal system that would otherwise bind them, on the grounds that they might defeat rights acquired by a third person or might prejudice the broader interests of justice.[64]

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56 Sections 2(2) and 3(1) of the Reform of Customary Law of Succession and Regulation of Related Matters Act.
57 Section 2(1)(*b*) and (*c*).
58 120 of 1998. Also see ch 5.
59 See *Ndlovu v Mokoena* 2009 (5) SA 400 (GNP) para 11 and *Motsoatsoa v Roro* [2011] 2 All SA 324 (GSJ).
60 Bennett (1985) 105–106.
61 2009 (3) SA 152 (CC) para 23.
62 Hence, agreements between the parties featured as statutory choice of law rules in certain African countries, e.g., s 6(1) Rule 2 of Botswana's Common Law and Customary Law Act Cap 16:01 and s 3(1)(*a*)(i) of Zimbabwe's Customary Law and Local Courts Act Cap 7:05.
63 Forsyth (2012) 317–319.
64 Moreover, it could be argued that, despite the parties' freedom to adopt a culture of choice, in conflict cases, the power to decide whether to apply customary or common law rests ultimately with the court. See *Lebona v Ramokone* 1946 NAC (C&O) 14, 16.

Notwithstanding these caveats, the courts usually allowed litigants to choose whichever law best suited their purposes.[65] This standpoint was evident in the fact that persons subjected to customary law were permitted to use the forms and institutions of the common law, notably, of course, commercial contracts and civil/Christian marriage. Today, however, party autonomy in choice of law may more appropriately be based on the constitutional principle that everyone is free to participate in a culture of choice.[66]

(b) Tacit agreement between the parties: An agreement to apply customary law may be explicit, but in nearly all instances it must be inferred from the parties' behaviour. Very often, it is apparent from the face of the plaintiff's summons that, by seeking a particular remedy or a type or quantum of damages, she was contemplating customary or common law as the foundation of the suit.[67] If the defendant does nothing to contest this choice, the court may infer acquiescence.[68]

If a defendant does contest the plaintiff's choice of law as it appears in the pleadings, however, the court may then investigate the parties' conduct prior to instituting action and, from the words and deeds out of which the claim arose, seek to discover a common intention.

(c) Cause of action: Choice of law has often been inferred from the nature of a cause of action. Transactions typical of customary law, such as *lobolo* and loans of cattle, for example, suggest that the parties had probably envisaged application of customary law,[69] whereas the ordinary commercial contracts suggest the common law.[70]

In a post-1994 case, *Maisela v Kgolane*,[71] the court held that customary law applies only to contracts of sale where the principles of customary law provide for sale of the thing sold. In this case, the sale of a tractor formed the basis of the claim. The court laid down two important criteria:

- It is wrong to adjudicate on a sale not governed by customary law merely because the parties are black.
- It is also wrong to regard a sale as regulated by customary law if common law principles (the so-called "voetstoots" clause applied) are not known to the customary law agreed upon by the parties.

(d) Distinctive cultural practices: Some juristic acts are marked by culturally distinctive forms or rituals, from which the parties' intention to abide by a particular system of law can be inferred. Marriage by Christian customs, for instance, used to be considered as a sign not only of religious commitment but also as an indication that the spouses had decided to follow a Western way of life. This assumption had a direct bearing on the law chosen to govern the subsequent marital relationship.[72]

Where, however, parties engaged in the common practice of marrying by civil or Christian customs and also concluding a *lobolo* agreement, two different legal relationships ensued, ones that were bound to generate contradictory obligations. According to common law, the marriage is exclusively the concern of the bride and groom, while, according to customary

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65 It is only where there happen to be mandatory *choice of law* rules, such as those formerly contained in s 23 of the Black Administration Act 38 of 1927, that the parties may not choose their law.
66 In terms of ss 30 and 31 of the Constitution.
67 *Mbaza v Tshewula* 1947 NAC (C&O) 72.
68 See *Du Plooy v Du Plooy* [2012] 4 All SA 239 (SCA) paras 22–23. That the courts have consciously inferred consent is evident in cases where the principle of estoppel was invoked. See *Warosi v Zotimba* 1942 NAC (C&O) 55, 57 and *Goba v Mtwalo* 1932 NAC (N&T) 58.
69 *Nxumalo v Ngubane* 1932 NAC (N&T) 34 and *Mhlongo v Sibeko* 1937 NAC (N&T) 124, 125–126. Also see *Peme v Gwele* 1941 NAC (C&O) 3 and *Fuzile v Ntloko* 1944 NAC (C&O) 2 for *lobolo* transactions.
70 *Dhlamini v Nhlapo* 1942 NAC (N&T) 62 and *Maholo v Mate* 1945 NAC (C&O) 63.
71 2000 (2) SA 370 (T).
72 Bennett (1991) 437.

law, the *lobolo* contract is between the groom and the bride's guardian. In the event of a conflict, which obligations were to prevail? The courts decided that *lobolo* is ancillary to the marriage, and must therefore be modified by the principles on which the union is based.[73] Hence, in what are probably the most litigated issues – claims for return of *lobolo*[74] and parental rights to children[75] – the courts applied the common-law standards of behaviour.[76]

(e) Ways of life: When a juristic act is not culturally marked in any way, and is thus known to both systems of law, the courts have delved deeper into the case in order to discover a general cultural orientation. This they have discerned from the purpose,[77] environment and subject matter of a transaction.[78] Delicts, of course, seldom involve prior transactions, and, as a result, reference to the parties' way of living and their overall cultural orientation has had a strong influence on choice of law.[79] People who adhered to a traditionally African way of life were deemed subject to customary law, while those who had become acculturated to a Western lifestyle were deemed subject to the common law.[80]

If both parties had the same cultural orientation, the choice of law was fairly clear, but, if the plaintiff was attached to one culture and the defendant to another, the solution was far from obvious. Although we have no precedent to guide us here, the only feasible approach would be to take into consideration not only the parties' cultural backgrounds, but whatever other connecting factors might be relevant, such as the nature of a transaction and the general environment of a claim.[81]

3.3.3 *Conflicts between different systems of customary law*

3.3.3.1 Conflict between different South African systems of customary law

South Africa does not have a single, uniform system of customary law, although no criteria are available to determine the divisions between the different systems.[82] To cater for potential

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73 *Mbonjiwa v Scellam* 1957 NAC (S) 41.

74 If a husband committed adultery, customary law does not always afford the wife cause for complaint (or justification for ending the marriage). By contrast, under common law, adultery by either spouse may lead to irretrievable breakdown. See, e.g., *Fuzile v Ntloko* 1944 NAC (C&O) 2.

75 *Morai v Morai* 1948 NAC (C&O) 14 and *Madlala v Madlala* 1975 BAC 96 (NE) 99.

76 No such categorical solution was possible where one of the spouses died. According to the common law, death automatically terminates a marriage, but under customary law the union continues until *lobolo* obligations have been settled. The courts adopted an expedient approach by supporting continuation of the *lobolo* agreement, even after the marriage had ended. See e.g. *Mrubata v Dondolo* 1949 NAC (S) 174, 176 and *Makedela v Sauli* 1948 NAC (C&O) 17.

77 See *Mpikakane v Kunene* 1940 NAC (N&T) 10 and *Warosi v Zotimba* 1942 NAC (C&O) 55.

78 In *Sawintshi v Magidela* 1944 NAC (C&O) 47, for instance, the critical factor was the general environment in which a sale was concluded. The court found that the parties lived in a reserve, and the object of the transaction was home-grown mealies. The parties were therefore presumed to have intended customary law to apply.

79 See, in this regard, *Ramothata v Makhothe* 1934 NAC (N&T) 74, 76–77; *Sibanda v Sitole* 1951 NAC 347 (NE) 350, and, more recently, *Du Plooy v Du Plooy* [2012] 4 All SA 239 (SCA) paras 22–23, where the court held that customary law did not apply because the parties did not live according to the relevant life style nor did they relate to one another in terms of customary law.

80 Reference to an overall cultural orientation obviously entails a degree of artificiality, since no-one, in reality, can be said to be wholly centred in one culture. In life experience, culture "does not function as a whole but in bits": Van Doorne (1981) *Cahiers d'Études Africaines* 482.

81 Bennett (1985) 110.

82 See the problem of culture discussed above.

conflicts between different customary laws, choice of law rules can be found in section 1(3) of the Law of Evidence Amendment Act.[83] This section provides:

> In any suit or proceedings between Blacks who do not belong to the same tribe, the court shall not in the absence of any agreement between them with regard to the particular system of indigenous law to be applied in such suit or proceedings, apply any system of indigenous law other than that which is in operation at the place where the defendant or respondent resides or carries on business or is employed, or if two or more different systems are in operation at that place (not being within a tribal area), the court shall not apply any such system unless it is the law of the tribe (if any) to which the defendant or respondent belongs.

Although not explicitly stated, this section contains a hierarchy of choice of law rules. In the first instance, courts are directed to apply whatever law was agreed upon by the parties. Because the section does not stipulate an express agreement, the courts are free to impute a tacit or implied agreement and, to do so, they may refer to the parties' prior conduct, the nature or form of a transaction or, more generally, the parties' cultural orientation.[84]

If the appropriate law cannot be chosen by reference to an agreement, a court must then consider the remaining choice of law rules listed in section 1(3). It would have to apply the law of the place where the defendant resided, carried on business or was employed,[85] provided that only one system of law prevailed in that area. This rule bristles with difficulties. What if the defendant is resident in one area and employed in another? What if he is resident in Johannesburg but has a closer attachment, such as domicile, with the Eastern Cape? Why should the common-law connecting factor of residence be preferred to a traditional customary-law connecting factor, such as allegiance to a traditional authority?

If more than one system of law is applicable in the defendant's area, and, if the place of residence, business or employment is not within a "tribal area"– an anachronistic term that presumably means an urban area – and, further provided that the defendant's tribal law is one of the systems applicable within the area, the court is obliged to apply the law of the defendant's community (tribe). This rule is also highly unsatisfactory.[86] On the one hand, the concept of "tribe" is vague and confusing,[87] and, on the other, it is arbitrary to prefer the defendant's, as opposed to the plaintiff's "tribal" law. The roles of plaintiff and defendant are determined by the tactics of litigation, which is hardly a principled foundation for choice of law.

3.3.3.2 Conflict between different regional systems of customary law

Given the influx of foreign workers and refugees to South Africa, conflict problems may well arise concerning both a system of customary law and the law of a foreign state. For example, one of the parties might be domiciled in Namibia or the cause of action might have arisen there. Section 1(3) does not directly address this situation, although, arguably, it might be applicable because it refers simply to parties "who do not belong to the same tribe". If, however, a foreign law is in issue, the better approach to the choice of law problem is to refer to rules provided by private international law. This subject is designed to cater for conflicts conceived in territorial terms.[88]

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83 45 of 1988. The difficulty of applying these rules consistently was apparent in the case of the former Natal and KwaZulu Codes (Proc R151 of 1987 and Act 16 of 1985, respectively). Customary law is personal in the sense that it should apply to litigants by reason of their cultural orientation, regardless of where they happen to be. Both Codes purported to apply to the Zulu *people*, but several cases held that the Natal Code was territorial in application, namely that within the province it overrode any other potentially applicable system of personal law. Thus "foreigners" could escape the effect of the Code only by entering into an agreement to apply another system of law: *Molife v Molife* 1934 NAC (N&T) 33 and *Ndhlovu v Molife* 1936 NAC (N&T) 33.

84 See e.g. *Mahlaba v Mdladlamba* 1946 NAC (C&O) 51 and *Govuzela v Ngavu* 1949 NAC 156 (S).

85 See *Govuzela*'s case above and *Rubushe v Jiyane* 1952 NAC (S) 69.

86 See Forsyth (1979) *SALJ* 418 and Lewin (1944) *SALJ* 269.

87 Bennett (1985) 118–119.

88 Bennett (1980) *THRHR* 28.

Hence, when two or more territorially defined systems of law appear to be applicable to a case, and, when one or both of them recognise systems of customary (or religious) law, the forum must first apply choice of law rules derived from its own system of private international law to decide which country's law is applicable. The court must then ask whether the customary law or state law of the foreign country is applicable, and, to answer this question, it must apply internal conflict rules from that country.

Cases falling into this category of conflict of laws are rarely reported, but recently one appeared. *Chitima v RAF*[89] concerned a claim for loss of support caused by the death of a breadwinner in a motor car accident. The plaintiff had married her husband by customary law in Zimbabwe. To discover whether the validity of the marriage was to be tested by South African or Zimbabwean law, the court first referred to the South African rules of private international law. The choice of law rule was the *lex loci celebrationis* (law of the place where the marriage is celebrated), which indicated *in casu* Zimbabwean law. The court then turned to the rules in that country governing recognition of customary marriages to determine validity of the union.

3.4 Ascertainment and proof of customary law

In ordinary parlance, the term "ascertain" denotes removing doubt, but, in the more specialised sense used for systems of customary law, it usually means the gathering of information, thereby linking ascertainment with methods of proof.[90]

In courts operating according to a Western tradition, custom always presents itself as troublesomely ambiguous, because it can be construed as either fact or law. Facts need proof, a process governed by rules of evidence, whereas everyone is presumed to know the law (although disputes as to meaning and interpretation may be argued with reference to authoritative texts). Because customary law derives directly from social practice, it is poised awkwardly between being law and fact.

Formerly, the Supreme Court and the Magistrates' Courts treated customary law in the same way as the custom of the common law. In consequence, a party arguing that a court should enforce a particular local custom had to comply with requirements laid down for proving custom under the common law. The leading authority in this regard was *Van Breda v Jacobs,*[91] a case that involved the order in which fishing nets should be cast for catching shoals of fish swimming off the shores of False Bay.

This type of local practice is clearly distinguishable from the systems of law emanating from indigenous cultural traditions – as the Constitutional Court later made clear.[92] Nevertheless, *Van Breda's* case was taken as a basic precedent for proving customary law. As a result, witnesses had to be called – although neither the number nor their qualifications were ever specified – to attest to the existence of a particular usage. A court would then give effect to it, provided that the usage was sufficiently reasonable, certain, uniform and well-established.[93]

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89 [2012] 2 All SA 632 (WCC). Also see *Chirwa v Mandah* 1956 NAC (C) 209.
90 Hinz (2012) *Oñati Socio-Legal Series* 85, 89.
91 1921 AD 330.
92 See below.
93 In principle, courts should apply only obligatory norms, and they cannot assume that all patterns of behaviour are obligatory. See Himonga and Bosch (2000) *SALJ* 321, citing *Hlophe v Mahlalela* 1998 (1) SA 449 (T) 457 and Tamanaha (1993) *J Law & Soc* 192, 207. Some norms are binding laws, others are mere customs, conventions, habits, etc. Specifying the difference is admittedly a difficult, if not intractable, problem, and there are no established rules for dealing with it. The South African courts seem simply to overlook the issue by accepting that rules adduced by the parties are considered by the communities concerned to be obligatory. Nevertheless, in certain cases, this approach seems questionable. See, e.g., *Hlophe v Mahlalela* 1998 (1) SA 449 (T) 457–458 and *Mabena v Letsoalo*1998 (2) SA 1068 (T).

In 1988, the legislature put an end to this cumbersome procedure through the enactment of section 1(1) of the Law of Evidence Amendment Act[94] (mentioned above) which provides that all the courts in the country may take "judicial notice" of customary law 'in so far as such law can be ascertained readily and with sufficient certainty . . .". In practice this provision was applied only when an official version of customary law was in issue. The courts did not feel comfortable taking judicial notice of the living law, which, by its nature, is usually an as yet unrecorded social practice.

The next milestone in the history of customary law was set by the new Constitution. Because customary law was now considered the equal of the common law, it was to be treated with the respect due to law, as opposed to local custom, a change that required a new approach to ascertainment of the rules.

The courts immediately accepted what had previously been only an academic distinction between the official and living versions of customary law: they held that constitutional protection of customary law also included the living law.[95] On the one hand, the living law often appeared more likely to comply with constitutional values than the official code,[96] and, on the other, law emanating directly from the people, uncorrupted by contact with the state, would obviously be a truer realisation of the right to culture.[97]

A consequence of giving the living law a privileged status, however, was to exacerbate problems of proof and ascertainment.[98] Initially at least, the courts seemed little concerned, for, in most cases, they continued to apply the law as presented in precedents and texts. On occasion, they did so deliberately, but, more often, unthinkingly.[99] Sometimes, a generic brand of customary law was applied, without any inquiry into which particular form or system was in issue.[100]

When the courts turned their minds to the problem of proving living law, they played fast and loose with rules of evidence.[101] Without deciding whether or not reference to textual authority was appropriate, they vacillated between taking judicial notice of customary law and requiring proper proof.[102] The overriding consideration seems to have been a desire to show that living customary law can change as freely as any other law.[103]

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94 45 of 1988.

95 *Alexkor Ltd v Richtersveld Community* 2003 (12) BCLR 1301 (CC) para 52, *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 580 (CC) para 109 and *Ex Parte Chairperson of the Constitution Assembly: In re Certification of the Constitution of the RSA* 1996 (4) SA 744 (CC) para 197. The South African Law Commission also used this version as the basis for its recommendations on the laws of marriage and succession: South African Law Commission *Project 90: Report on customary marriages* (1998), *Project 90: Report on conflicts of law* (1999) and *Project 90: Discussion paper 93* (2000).

96 See, for instance, Mbatha (2002) *SAJHR* 259, 268ff; Claassens and Mnisi (2009) *SAJHR* 276ff and Weeks and Claassens (2011) *Stell LR* 823ff.

97 Himonga and Bosch (2000) *SALJ* 329.

98 As Langa DCJ said in *Bhe*'s case above, para 109, "(t)he difficulty lies not so much in the acceptance of the notion of living customary law . . . but in determining its content and testing it, as the court should, against the provisions of the Bill of Rights". Cited in *Mayelane v Ngwenyama* 2013 (4) SA 415 (CC) para 25.

99 In *Wormald v Kambule* 2006 (3) SA 562 (SCA) paras 7 and 14, for instance, both the Supreme Court of Appeal and the High Court spoke of a widow's personal servitude of *usus* or *habitatio* over a deceased estate. Both these concepts, however, are derived from Roman law, and are entirely alien to customary law.

100 The most egregious example of this approach was *Mthembu v Letsela* 1997 (2) SA 936 (T) 938–939, 1998 (2) SA 675 (T) 682 and 2000 (3) SA 867 (SCA) para 8 concerning the customary law rules of succession. Also see *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 580 (CC) paras 77–79. In *Thembisile v Thembisile* 2002 (2) SA 209 (T) 214, the court used the official version to determine whether there had been a divorce.

101 In one case, *Mabena v Letsoalo* 1998 (2) SA 1068 (T) 1073, the judge accepted as the only evidence of a social practice the testimony of a friend of an interested party. In another, *Mabuza v Mbatha* 2003 (4) SA 218 (C), testimony was at least backed up by two expert witnesses.

102 See *Bhe* above para 58 and *Bangindawo v Head of Nyanda Regional Authority* 1998 (3) SA 262 (Tk) 267, 271 and 272.

103 Good examples are *Mabena* (above) 1070 and 1074, *Mabuza Mabuza v Mbatha* 2003 (4) SA 218 (C) para 9 and *Fanti v Boto* [2008] 2 All SA 533 (C) para 21.

The main precedent for this confused area of law is an almost sixty-year-old decision by the former Appellate Division. In *R v Dumezweni,*[104] the court noted that a dispute about a rule of customary law could emerge either because the rule was not yet well-known or because one of the parties contested what was already established law. In the former case, the court had to hear evidence, but, in the latter, it could rely on its own knowledge of the law, although it should, for purposes of the record, note the parties' contentions and the reasons for not hearing evidence.[105] Unfortunately, the danger then arises that a judge may deem a certain rule common knowledge, when it is in fact questionable. Procedural justice, however, would demand that care is always taken to ensure that parties have sufficient opportunity to present their own accounts of customary law.[106]

A clearer perspective was eventually brought to bear on the situation by the Constitutional Court's decision in *Shilubana v Nwamitwa.*[107] This case concerned a woman's right to become a traditional leader, or *hosi*, of the Valoyi people. The royal family had decided to allow the oldest daughter to succeed to this office.[108] The court accepted the family's decision as a valid instance of customary law-making, and, in so doing, distinguished customary law from the common-law concept of custom. The court said that custom is an exception to the general law of the land, and, as such, fills "normative gaps". Unlike customary law, it is not an "original source of law capable of independent development". It is rather a subsidiary source of rules, whose "validity is rooted in and depends on its unbroken antiquity".[109]

> By contrast, customary law is an independent and original source of law . . . adaptive by its very nature. By definition, then, while change annihilates custom as a source of law, change is intrinsic to and can be invigorating of customary law.[110]

Given the differences between the two species of norm, the court found that *Van Breda's* case was an inappropriate basis for dealing with customary law.[111] It followed that the usual test for custom – that it was certain, uniformly observed for a long period of time and reasonable – was not applicable to ascertainment of a developing living law.[112] *In casu*, the court could obviously not insist on a uniform and long established practice to uphold the validity of the Valoyi royal family's decision. Instead, Justice van der Westhuizen said that, whenever "the contemporary practice of the community suggests that change has occurred, past practice alone is not enough . . .[and it] will also not be decisive where the Constitution requires the development of the customary law in line with constitutional values".[113]

The judge then continued to prescribe a new approach to ascertaining the rules.[114] Henceforth, although the traditions of the community were to be taken into account, they were to be

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104 1961 (2) SA 751 (A) 756–757. Also see *S v Phokoane* [1962] 2 All SA 381 (T) 384 and *S v Ngidi* [1969] 2 All SA 82 (N) 85–86.

105 *Smit v His Majesty King Goodwill Zwelithini Kabhekuzulu* 2009 JDR 1361 (KZP) 10 serves as an example where the court relied on its own knowledge of the ritual of bull-killing. The court commented as follows: "As will appear from the direct evidence of persons who have attended the ceremony, such as myself, and the evidence of experts on Zulu customs and traditions, the applicants' belief is ill-informed and is based on a jaundiced and distorted view of the Ukweshama [bull-killing]", and also "I have on many occasions attended the ceremony and have personally witnessed the killing of the bull. I dispute the allegations regarding the killing of the bull".

106 Dlamini (1998) paras 7.4.2.3–4.

107 2009 (2) SA 66 (CC).

108 The respondent, of course, opposed the claim on the basis of the traditionally accepted customary rule of male primogeniture.

109 Paragraph 54.

110 Paragraph 54.

111 Paragraph 53. The court cited in support *Alexkor Ltd v Richtersveld Community* 2004 (5) SA 460 (CC) para 27.

112 Paragraph 56.

113 Paragraph 56.

114 Paragraphs 44–49. See Bekker and Van der Merwe (2011) *SAPR/PL* 115–127 who question whether there has been any appreciable difference to proving customary law.

considered together with the community's right to develop its law. Considerations of flexibility and development, however, were to be weighed against the need for legal certainty, protection of acquired rights and, of course, constitutional rights; in this respect, the courts were to remain conscious of their duty under section 39(2) of the Constitution to promote the Bill of Rights.[115]

The Constitutional Court's next major judgment on the ascertainment of customary law appeared five years later in *Mayelane v Ngwenyama.*[116] Drawing on earlier constitutional jurisprudence, Froneman J, speaking for the majority of the court, proceeded to refine the requirements for dealing with living law.[117] Although always subject to the Constitution, customary law should be understood in its own terms, and not from a common-law perspective. It should not be regarded as a body of fixed, formally classified and easily ascertainable rules, but rather as a system of law prevailing in a community with its own norms and values, that were handed down from generation to generation. The courts should therefore be aware that the rules were constantly changing to meet the needs of the community concerned, a flexibility that allows for consensus-seeking and the prevention and resolution of disputes. These features contribute to family unity and encourage co-operation, as well as a sense of responsibility, which combine to nurture a sense of *ubuntu*.

Froneman J laid down three basic principles: the need for "caution, patience and respect" to ensure that living customary law reflects constitutional norms;[118] such concepts as a first wife's "consent" to polygynous marriages must be understood from a customary-law perspective, not from a common-law or notionally "universal" understanding;[119] customary law must be developed "in a participatory manner, reflected by the voices of those who live the custom", so as to dispel the idea that constitutional values are foreign impositions.[120]

When the court came to deal with the particular rule in issue – and it will be recalled that this was a custom concerning a first wife's consent to her husband's subsequent customary marriages – Justice Froneman expressly stated that he was dealing with a matter of law not fact.[121] It followed that the issue was, technically speaking, not a question of proof but rather of ascertainment. The court nevertheless accepted the well-established evidentiary practices for proving customary law. It entertained testimony and affidavits from: (a) individuals living in polygynous marriages under Tsonga law; (b) an advisor to traditional leaders; (c) various traditional leaders and (d) two experts – one an anthropologist with extensive research experience in Tsonga customary law, and the other a senior lecturer in law and jurisprudence – who drew conclusions from the primary materials.[122]

Perhaps not surprisingly, this abundant evidence proved to be inconclusive in establishing the custom. The court, however, did not decide the matter on the usual balance of probabilities test used for weighing factual evidence. Instead, it remarked on the

> nuances and perspectives that are often missed or ignored when viewed from a common-law perspective. Nevertheless, while we must treat customary law with respect and dignity, it remains the courts' task to bring customary law, as with the common law, into line with the values of the Constitution.[123]

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115 Cited with approval in *Mayelane v Ngwenyama* 2013 (4) SA 415 (CC) para 45.
116 Above.
117 Paragraph 24, drawing on the judgments in *Gumede v President of the RSA* 2009 (3) SA 152 (CC), together with *Alexkor, Bhe* and *Shilubana* above.
118 Paragraph 46.
119 Paragraph 49.
120 Paragraph 50.
121 Paragraph 61.
122 Paragraph 54. Also see para 98, the judgment by Zondo J, noting that the witnesses need not be experts or persons in positions of authority.
123 Paragraph 54.

As a result, the court perceived not contradiction in the evidence, but "nuance and accommodation".[124] In other words, it found that Tsonga law sought to "accommodat[e] the concerns of the first wife and her family when the husband seeks to enter into another marriage".[125] Notwithstanding the "generous spirit" of Tsonga law, the court found that the decision to marry again clearly rested with the husband, not his first wife. It then proceeded to resolve this impasse by "developing" customary law (in terms of section 39(2)) in accordance with the first wife's rights to equality and human dignity.[126] Thus, a subsequent marriage contracted by the husband without his first wife's consent would be invalid.

As a highly authoritative precedent, this judgment places a heavy burden on future courts. They will be required to reconcile both conflicting evidence and conflicting legal principles to present conclusions that will harmonise not only with traditional African conceptions of justice, but also those of the new constitutional era.[127]

In conclusion, two matters should be noted. First, in spite of the courts' clear preference for living customary law, reference to an existing textual authority is, almost always, the starting point in litigation. Indeed, given the time and cost of proving customs, courts and litigants tend to look no further. More is at stake, however, than mere convenience. The very structure of the adjudicatory process compels litigants to open proceedings with at least implicit reference to a pre-existing set of rules,[128] and, for their part, the courts cannot decide disputes with a clean slate: the official law serves as a broadly accepted legal framework.

Although critical scholarship may have cast doubt on this body of rules, not all parts of it are equally suspect,[129] and, conversely, not all living law is consonant with the Constitution.[130] It follows that the courts must take care to determine the validity of each rule of the official law, a process that requires careful scrutiny of the sources.

The rules most likely to be at odds with the Constitution and current social practice are to be found in codifications of customary law: the Natal and KwaZulu Codes are typical examples.[131] Restatements are also suspect, although they have been widely used in Africa to circumvent the rigidity of codified law.[132] While of some authority, these instruments are not binding, leaving courts and litigants free to adduce new or more accurate rules.[133]

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124 Paragraph 61. See Zondo J's dissenting judgment in this regard (para 114).

125 Paragraph 71.

126 See paras 71 and 75.

127 Also see the criticisms raised by Rautenbach (2017) *PER/PELJ* 14–15. She prefers the dissenting viewpoint of Zondo J, who held that "[c]ustoms and usages 'traditionally observed' by a group of people [are] a question of fact and not of law. When there is a material dispute of fact in a matter brought to court by way of motion proceedings, it cannot be decided on the papers" and evidence needs to be provided, and parties have to get the chance to cross-examine the witnesses.

128 As was clearly shown in *Ruzane v Paradzai* 1991 (1) ZLR 273 (SC) 278.

129 Or offensive to constitutional values. E.g., early cases insisting on spousal consent in marriage (*Gidja v Yingwane* 1944 NAC (N&T) 4) or the best interests of children in custody claims (*Matsupelele v Nombakuse* 1937 NAC (C&O) 163) can hardly be regarded as objectionable.

130 Himonga (2001) *Int J Children's Rts* 97.

131 See the comment by Moseneke J in *Gumede v President of Republic of South Africa* 2009 (3) SA 152 (CC) para 17ff: "Whilst patriarchy has always been a feature of indigenous society, the written or codified rules of customary unions fostered a particularly crude and gendered form of inequality, which left women and children singularly marginalised and vulnerable. It is so that patriarchy has worldwide prevalence, yet in our case it was nurtured by fossilised rules and codes that displayed little or no understanding of the value system that animated the customary law of marriage". These Codes were repealed by the Repeal of the Black Administration Act and Amendment of Certain Laws Act 28 of 2005.

132 A classic example of a restatement is Schapera (1938), which was commissioned by the colonial administration of the Bechuanaland Protectorate in the 1930s, and still has authority in Botswana's courts. Subsequently, private organisations in South Africa have produced similar instruments, and, in Namibia, communities themselves have produced so-called "self-statements" of their law: Hinz (assisted by Joas) *Customary Law in Namibia: Development and Perspective* (1995) 91ff. In South Africa, the Centre for Indigenous Law, a research unit in the Law Faculty at the University of South Africa was also active in producing

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Final authority to declare the law lies, of course, with the courts.[134] They are therefore entitled, of their own accord, to call for evidence on disputed or questionable rules.[135] This power does not, however, allow judges to engage in private investigations.[136] They should observe the principles of procedural fairness, which means that, if any rule is in doubt, the parties must be informed so that they have an opportunity of calling witnesses of their own.[137]

Scholarly research is another standard source of customary law. Although these works may offer better representations of social practice than codes or precedents, all such texts are, to a greater or lesser extent, the product of the authors' own preoccupations and intellectual milieu.[138] Lawyers, especially, have a professional concern to reduce the undifferentiated repertoires of norms that are typical of oral traditions to a coherent system of rules, and this process inevitably requires substantial changes to the original regime.[139]

In fact, whenever community practices are recorded for public consumption, whether as a result of field work or judicial inquiry, they begin a process of transformation into the official code. Thereafter, as courts or legislatures pronounce on these practices, they incorporate the rules into the formal system, severing them from their origins in society.[140] As far as state law is concerned, however, these rules remain binding until challenged again in the proper manner.[141]

Hence, because the sources of customary law are so varied in both form and content, it may not always be possible to draw clear-cut distinctions between official and living law. Some sources are closer to the one pole of this continuum than others.

3.5 Decolonisation of customary law and legal education[142]

The discussion in the foregoing sections of this book has shown the importance of living according to customary law on the one hand and the complexity of the process of its ascertainment with its attendant uncertainties in judicial decision-making. Some uncertainties are inherent in the nature of this system of law – its oral and evolving nature and flexibility – all of which are conducive to the treatment of cases on a case-by-case basis not linked to the common law doctrine of precedent. However, the uncertainties produced by the nature of customary law also arise from the orientation and training of lawyers and judges in Western legal ideas about law, lawyering and decision-making. Arguably, the challenges and solutions on the ascertainment of customary law in particular cannot be thought of only in terms of the inherent nature of customary law but must also be thought of in terms of the idea of law and the legal education of

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restatements. See, e.g., Myburgh (ed) (1980); Prinsloo (1983); Myburgh and Prinsloo (1985); Centre for Indigenous Law (ed) (1990).

133 See Allott (1984) *J Afr Law* 67–68 and Allott and Cotran (eds) (1971) 18–20.

134 Although the courts should be cautious about arrogating to themselves knowledge of community practice. To ensure transparency, *S v Sihlani* 1966 (3) SA 148 (E) held that, if judges decided to rely on their own knowledge to reach a finding, the points on which judicial notice was taken should be recorded in open court.

135 *Morake v Dubedube* 1928 TPD 625, 631.

136 *Rowe v Assistant Magistrate, Pretoria* 1925 TPD 361, 369–370.

137 Whenever a court is uncertain whether the rule before it is an authentic representation of customary law, its approach should in principle be that outlined by in *R v Dumezweni* 1961 (2) SA 751 (A) 756–757. See above.

138 For these reasons, amongst others, the South African Law Commission *Report on Customary Marriages* (1999) paras 2.2.10–13 refused to entertain a call for the restatement of customary law. It said that the facilities for such a project were not available in South Africa, and that, unless regularly updated, the restatement would inevitably fall behind social practice to become yet another "official" version of customary law.

139 See Bennett and Vermeulen (1980) *J Afr Law* 206–217.

140 See Allott (1977) *J Afr Law* 5.

141 Namely, in terms of s 1 of the Law of Evidence of Amendment Act 45 of 1988.

142 This section is an adaptation of an article written by Himonga and Diallo (2017) *PER*/*PELJ* 1–19. Also see Himonga (2017) *Acta Juridica* 101–123.

professionals who interpret and apply the law in the context of dispute resolution. Consequently, the recognition, application and ascertainment of customary law calls for a rethinking of traditional concepts and the way we have been teaching customary law at universities. Thus, the debates on decolonisation and the teaching of law in decolonised contexts are relevant to discussions of ascertainment of customary law. This section of the chapter incorporates some thoughts on the issues of decolonisation of law and the teaching of customary law in universities.

The transformation of legal education includes the rethinking of broader issues such as the decolonisation of customary law, which in turn raises questions about the legal history of African countries; the concept of law; the role of law in African societies; the status of indigenous systems of law in post-independence or post-apartheid systems, and how customary law is or should be taught in law schools.[143]

Alex Hotz, for example, wrote: "As a law student, I believe decolonising the law faculty goes beyond the faculty and the institution. It speaks to what the law is and how it is used within society."[144] The meaning of decolonisation is unsettled, if not contested.

In their joint reflection on decolonising the University of Cape Town, Max Price and Russel Ally stated that "decolonisation . . . should certainly not be reduced to some naïve . . . desire to return to a pristine, unblemished Africa before the arrival of the settlers".[145] This statement seems to allude to a non-romanticised and non-rhetorical concept of decolonisation, on the one hand, and a dynamic meaning of decolonisation, on the other hand. Himonga and Diallo agree that the decolonisation of the law should not mean the "unconditional indigenisation of law" and suggests that:[146]

> a more meaningful point of departure in the decolonisation of law is the defining of law from a "non-colonial" position and from alternative legal epistemologies. In this respect, decolonisation draws from different sources of law and normative agencies to promote the transformative potential of law in achieving more social and economic justice.

Decolonisation should move away from a hegemonic or Eurocentric conception of law connected to legal cultures historically rooted in colonialism (and apartheid) in Africa to more inclusive legal cultures.[147] Decolonisation refers to locating the paradigmatic and theoretical shifts that are required for the teaching of law, especially in teaching both the official and living versions of customary law.[148]

Official customary law refers to a variety of sources of state law. In some countries, such as South Africa, official customary law may be divided into two categories. The first category, the old order category, consists of codifications of customary law, such as the KwaZulu and Natal Codes of customary law; legislation purporting to embody customary law, such as the Black Administration Act;[149] court precedents or case law; and textbooks whose content is based on legislation and court precedents or other state law sources of customary law.

The second category of official customary law, the new order official customary law, consists of legislation arising from the provisions of the Constitution that recognise customary law. For example, section 15 of the Constitution states that legislation may be enacted to recognise traditional forms of marriage or marriages concluded according to custom. Section 211(3) of the same Constitution provides that the courts must apply customary law subject to, among other

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143 In 2015, during the student protests, one of the demands was the decolonisation of the curricula in law schools.
144 See UCT (2015) *Year in Review* 23.
145 UCT (2015) *Year in Review* 23.
146 Himonga and Diallo (2017) *PER/PELJ* 5. Also see Himonga (2017) *Acta Juridica* 108.
147 Himonga (2017) *Acta Juridica* 108.
148 Also see the discussion of official and living customary law in ch 2.
149 Black Administration Act 38 of 1927.

things, legislation dealing specifically with customary law. In 1998, the Recognition of Customary Marriages Act[150] was enacted to reform the customary law of marriage in line with the South African Constitution, including the constitutional provisions on gender equality. This Act makes provision for the application of both customary law and the common law. It is therefore a hybrid form of official customary law linked to new efforts aimed at transforming indigenous institutions within African constitutional frameworks.[151]

Although both the old order and new order categories of official customary law bear the appellation of customary law, they often bear little resemblance to the living customary law regulating the day-to-day lives of people on the ground.[152] Most importantly, the old order category of official customary law bears the marks of colonialism (and apartheid). This is because it was designed to advance colonial or apartheid state interests, in the process of which it was distorted.[153] For these reasons, the inclusion of old order official customary law in legal education would perpetuate the colonial legal legacy, which is contrary to the idea of decolonisation. Therefore, this category of official customary law should not form a core part of the legal curriculum. In contrast, the new order official customary law should be included in legal education, because it forms part of the constitutionalisation of customary law, along with living customary law.

Arguably, three elements are essential for decolonising law and legal education. These are the inclusion of living customary law in legal education; a shift in theoretical paradigm within which law is taught, and the interdisciplinary study of law.

(a) Inclusion of living customary law in legal education: living customary law is the law that governs the legal relations of people who are subject to a given system of customary law in their day-to-day life. An equally fitting definition is that adopted by South African legislation: "the customs and usages traditionally observed among the indigenous African peoples of South Africa which form part of the culture of those people".[154] The use of the term "culture" in this definition is significant, as it seems to allude to the dynamic nature of living customary law – as culture is dynamic, so is living customary law. Living customary law represents the practices or customs observed and invested with binding authority by the people whose customary law is under consideration.[155]

That living customary law is distinct from other legal systems comprising African legal systems is clear from both academic literature and post-apartheid jurisprudence in South Africa. In this respect, Bennett has observed:[156]

> [R]ules of an oral regime are porous and malleable. Because they have no clear definition, it is difficult to differentiate one rule from another, and, in consequence, to classify rules according to type. If rules cannot be classified, they cannot be arranged into a system, and without the discipline of a system, rules may overlap and contradict one another. In fact strictly speaking, the oral versions of customary law should not be called systems at all. They are probably better described as repertoires, from which the discerning judge may select whichever rule best suits the needs of the case.

What emerges from this statement is a distinctive legal tradition whose logic and methodology does not place primary value on organisation or systemisation, and does not aspire to be a rigid framework of regulation, like other systems such as official customary law or the common law.

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150 120 of 1998.
151 The Reform of the Customary Law of Succession and Regulation of Related Matters Act 11 of 2009 also falls into this category of official customary law.
152 See generally Himonga and Moore (2015).
153 See generally Chanock (1985).
154 Section 1 of the Recognition of Customary Marriages Act 120 of 1998 and of the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009.
155 See further Hund (1998) *ARSP* 420–429.
156 See Bennett (2004) 3 note 6.

Similarly, the Constitutional Court of South Africa implicitly describes living customary law as a distinctive and original source of law.[157] Referring to the recognition of customary law by sections 211 and 39(2) of the Constitution, the Constitutional Court has stated: "The Constitution thus 'acknowledges the originality and distinctiveness of indigenous law as an independent source of norms within the legal system . . '."[158]

Arguably, the source of living customary law (i.e. the people subject to customary law); the value of its flexibility and adaptability as an evolving oral system, and its recognition as a distinctive and original source of indigenous law are all positive elements in the decolonisation of law. These attributes also qualify this system of law for inclusion as a core subject of study in a decolonised system of legal education. Moreover, these qualities of living customary law justify its development and retention in a decolonised legal system, also bearing in mind the fact that this system of law regulates the lives of the majority of the population in African legal systems.

Living customary law should be taught in all law faculties or law schools and at appropriate levels of the law degree that enable students to comprehend the significance and complexity of the subject within the constitutional frameworks of African countries. Future lawyers and judges need to have an understanding of important aspects of this customary law, including its conceptualisation; its methodology in a broad sense,[159] and its development as a system of law within African constitutional frameworks. If future lawyers and judges are not given appropriate legal training about living customary law, they will not have the right lens[160] through which to view customary law – in its own right, and not from the perspective of other legal systems. The relevant pronouncements of the South African Constitutional Court above will therefore be devoid of any practical significance.

Teaching living customary law at law schools will not be easy. A host of issues concerning living customary law demand the attention of scientific thought in institutions of higher learning if this system is to develop into a modern African legal system. These issues include: the long-standing challenge of how to ascertain living customary law, with the attendant question of how to ensure a measure of certainty about the rules of this system in the context of judicial decision-making; the manipulation and distortion of living customary law, especially in the context of power relations among different sections of the community living under customary law, and because of its evolving and oral nature;[161] appropriate methods of aligning this system of law with constitutional principles and international and regional human rights; the endurance and social legitimacy of living customary law;[162] and issues of the universal application of human rights *vis-a-vis* cultural rights, and whether and how the fundamentally different world views represented by the living customary law and common law can be merged and reconciled in one body of law – for example, that body of

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157 See discussion at ch 2, para 2.4.

158 *Alexkor Ltd v Richtersveld Community* 2004 (5) SA 460 (CC) para 51. Also see *Mayelane v Ngwenyama* 2013 (4) SA 415 (CC) para 23; *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 580 (CC) para 41; *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) para 197.

159 For example, including case-by-case approaches and reconciliation as the goal of dispute resolution.

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

161 See Chanock (1985) 81; Kameri-Mbote, Odote and Nyamu-Musembi (2013) 50. In *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 580 (CC) para 154, the minority judgment of Ngcobo J identified the issue of distortion of living customary law associated with this law's evolving and oral nature in the following terms: "The evolving nature of indigenous law and the fact that it is unwritten have resulted in the difficulty of ascertaining the true indigenous law as practiced in the community. . . . What is more, abuses of indigenous law are at times construed as a true reflection of indigenous law, and these abuses tend to and undermine its value. The difficulty is one of identifying the living indigenous law and separating it from its distorted version."

162 See, for example, Kane, Oloka-Onyango and Tejan-Cole (2005) *New Frontiers of Social Policy* 22.

law which has to regulate commerce. There is however no better place for addressing these issues, or for the development of customary law in relation to these issues, than in the academy, in legal education.

(b) The legal theoretical framework for customary law: The predominant legal theoretical framework within which law is taught, at least in law schools under the historical influence of English and Roman-Dutch common law, is legal centralism and positivism. This theory prepares future lawyers and judges to engage with western-type legal systems and legal cultures and not with non-western African legal systems, let alone oral legal traditions. For example, an important aspect of legal positivism is formalism. This strand of legal theory separates legal rules from "nonlegal normative considerations of morality or political philosophy"[163] and requires judges to apply the rules to the facts of the case before them deductively, with the value of legal certainty as a goal, among other things.[164] However, the rules of living customary law cannot be abstracted from their social contexts. They are embedded in the social realities within which people live their lives. In addition, the values of certainty, stability and predictability – which are core to western legal cultures – are not necessarily the primary goals of dispute resolution in living customary law.[165]

The legal education of judges and lawyers in Africa exclusively within the theoretical frameworks of legal positivism and centralism does not adequately prepare them to deal with the application of non-western legal orders, such as living customary law, in which law and its values are viewed differently. The result is that lawyers and judges view living customary law as non-existent, or regard living customary law as informal law that is irrelevant to state institutions.

South African judges have shown a remarkable willingness to step beyond the influence of the dominant mode of their legal education to embrace and recognise concepts of law, such as living customary law, that are located in non-western legal pluralistic theoretical frameworks. However, these judges sometimes seem to retreat into their predominantly western law and legal theoretical training and orientation when applying customary law. The result is that they bring ideas of legal centralism and positivism into the domain of customary law as well.

A classic example of this retreat is the decision of the majority in *Bhe v Magistrate, Khayelitsha*.[166] In this case, the Constitutional Court recognised the concept of living customary law, including its flexibility. This flexibility means that the system of law is relatively "processual", and hence less rule-bound than the "positivist/centralist" system of law, in the sense that the application of the rules to disputes follows the repertoire of norms approach Bennett alludes to above.[167] Inherently, this attribute of living customary law entails a case-by-case approach to the application of customary law in decision-making. It also entails some uncertainty in the outcomes of cases. In other words, ideally there is no precedent value in cases decided under customary law, as each case is decided entirely on its own merits.[168] Interestingly, however, the majority of judges in *Bhe v Magistrate, Khayelitsha*[169] focused on the values of certainty and uniformity associated with legal centralism and positivism in deciding whether to develop customary law in accordance with constitutional

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163 Leiter (2010) *Legal Theory* 111.
164 See generally Posner (1986–7) *Case W Res L Rev* 179–217; Winerib (1988) *Yale LJ* 949–958.
165 With regard to certainty, see Bennett *Human Rights and African Customary Law* 61; Himonga (2017) *Acta Juridica* 117.
166 2005 (1) SA 580 (CC).
167 See Bennett (2005) 3 fn 6.
168 Himonga (2017) *Acta Juridica* 120.
169 2005 (1) SA 580 (CC).

provisions. The response of the court to the argument on this issue is quoted at length in order to underscore this point.

It was argued by one of the parties that if the court was not in a position to develop the rules of customary law in this case, it should allow for flexibility in order to facilitate the development of the law. The majority, rejecting this argument, reasoned as follows:[170]

> The import of this [argument] was that since customary law is inherently flexible with the ability to permit compromise settlements, courts should introduce into the system those principles that the official system of succession violates. It was suggested that this could be done by using the exceptions in the implementation of the primogeniture rule which do occur in the actual administration of intestate succession as the applicable rule for customary law succession in order to avoid unfair discrimination and the violation of the dignity of the individuals affected by it. These exceptions would, according to this view, constitute the "living" customary law which should be implemented instead of official customary law. . . There is much to be said for the above approach. I consider, however, that it would be inappropriate to adopt it as the remedy in this case. What it amounts to is advocacy for a case by case development as the best option. . . The problem with development by the courts on a case by case basis is that changes will be very slow; uncertainties regarding the real rules of customary law will be prolonged and there will be different solutions for similar problems . . .

Underpinning this reasoning is the court's support for the values of certainty and uniformity associated with the concept of law within the legal theoretical framework of centralism and positivism, as well as its affinity to the doctrine of precedent. Thus, the ghost of the training of judges in legal centralism and positivism sometimes seems to follow them when they apply customary law in decision-making.[171] The training of lawyers and future judges should therefore equip them to deal not only with the dominant common-law systems of African countries but with living customary law as well.

This shift could be made by teaching law within legal theoretical frameworks that are closely associated with the concept of living customary law, the most appropriate of which is the theoretical perspective of legal pluralism.

Legal pluralism is the coexistence of distinctive legal systems in a specific social field where "laws and institutions are not subsumed within one system but have their sources in the self-regulatory activities of all the multifarious social fields present, activities which may support, complement, ignore or frustrate one another".[172] Within this theoretical framework, the existence of one legal order does not depend on its recognition by other legal orders, including the legal order of the state. Living customary law fits perfectly into this theoretical framework.[173]

Additionally, the sociological theoretical framework that deals with the concept of living law[174] could also be explored for its relevance to the teaching of law in a decolonised context.[175] Both the teaching of living customary law within the legal pluralistic (and sociological) theoretical framework and the decolonisation of law would benefit from an interdisciplinary approach to the teaching of law.

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170 *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 580 (CC) paras 110–112. Emphasis added.

171 See, however, Himonga (2017) 119 *Acta Juridica* for the view that the statement concerned may have been limited to the exceptional circumstances of the decision in *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 580 (CC).

172 Griffiths (1986) *Journal of Legal Pluralism* 39.

173 For detailed discussion see Himonga and Bosch (2000) *SALJ* 306–341.

174 See, for example, Ehrlich (1936).

175 For a discussion of the conceptualisation of living customary law within a sociological theoretical framework, see Himonga and Bosch (2000) *SALJ* 306–341.

(c) The interdisciplinary teaching of customary law: An interdisciplinary approach to the study of a subject is defined as:[176]

> [A]n approach that integrates information, data, techniques, tools, perspectives, concepts, and/or theories from two or more disciplines or bodies of specialised knowledge to advance fundamental understanding or to solve problems whose solutions are beyond the scope of a single discipline.

Interdisciplinary studies of law therefore offer a platform for a more profound understanding of the relationship between law in all its manifestations and regulatory practice in society. Law, as a social practice or legal science, has often closed itself off in epistemological monism. Yet, the apparent assumption underlying this monism that law can explain itself, both as theoretical *corpus* and social practice, cannot be established. Legal science therefore needs to open itself up to other disciplines through interdisciplinary studies. This is also essential to enhance the power of law to elucidate and transform social reality. Moreover, the problems that law is supposed to address in society often lie beyond a single discipline. Understanding the epistemological problems and sharpening the instrumentality of law in solving these problems therefore requires an integration of knowledge from different disciplines.

The proposed interdisciplinary positioning that connects legal science to other social sciences is especially important in the African context. Africa is characterised by plural legal systems, originating in colonial and, in South Africa, apartheid history, with their roots, definitions and structures in different legal traditions, frameworks and paradigms.

Interdisciplinary studies in the fields of law and anthropology, law and sociology, and law and history would introduce students and the legal profession to a way of understanding social realities that is gleaned from the lived experiences of people. This would be achieved through the multiple layers of observing, interviewing, translating, writing and interpreting (asking questions such as how to capture and understand the norms of a community, how to understand a community or ethnic group etc.), as well as through understanding of how legitimacy and authority are multi-vocal and often contested. Furthermore, studies in these fields would help law students and the legal profession generally to better understand issues concerning inequality, modes of oppression, and social justice.[177] Studies in law and history, in particular, would assist students to understand the neglect of the study of living customary law in African colonial (and apartheid) history, as well as the need for a paradigm shift in the thinking about customary law as a source of law in post-colonial contexts exhibiting new constitutional mandates regarding the recognition of customary law in the legal system.

The decolonisation of law in South Africa is important for the survival of living customary law as a distinct legal system which regulates the lives of millions of people in Africa. This not only reflects African legal realities, but also contributes to alternative epistemologies that reveal the transformative potential of law in dealing with the social realities of Africa. The teaching of living customary law and law generally is critical to both of these contributions. Unless law teaching is redesigned to shift the legal theoretical paradigm within which law is taught and to adopt an interdisciplinary approach to the teaching of law, the project of decolonising law in African legal systems will falter, if not fail to materialise. The overall shift in the paradigm of teaching law will increase the potential of law to transform African societies and enhance social justice in a manner that is consistent with decolonisation.

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176 National Science Foundation (USA) "What is interdisciplinary research?" accessible at *http://nsf.gov/od/oia/additional_resources/interdisciplinary_research/definition.jsp*.

177 This idea emerged from academic discussions between Chuma Himonga and Elena Moore in 2017.

4

Religious, Personal and Family Law Systems in South Africa

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4.1 Introduction

South Africa's "rainbow nation" is reflected among others in its multi-religious make-up. The most recent statistics for South Africa's religious demographics are contained in the 2015 Statistics South Africa General Household Survey.[1] The latter indicates that of South Africa's total population in 2015, its religious communities comprised mainly Christians (86%), traditional African religions (5,4%), Muslims (1,9%), Hindus (0,9%) and Jews (0,2%). At least 5,2% of the population professed to not follow any religion and 0,4% were categorised as "other religion".

For historical reasons, there is a strong link between apartheid racial classifications and the religious association of communities. For instance, during colonialism, there was an influx of slaves, indentured labour, political prisoners and traders from the east. Consequently, Muslims are located mainly within the coloured and Indian communities, while Hindus make up the majority of the Indian community in South Africa. Although traditional African religions are practised within black African communities, many black Africans also follow the Christian faith due to the missionary work of colonisers, as do members of the coloured and white communities. Judaism is practised predominantly within the white South African community.

Religious marriages, which form a component of personal and family laws, are entered into in all of the aforementioned religious communities. This chapter is concerned with the legal approach to religious, personal and family law systems with particular emphasis on religious marriages in South Africa that are currently unrecognised in terms of South African law, thus operating in a non-state law or unofficial sphere.[2] It commences with a brief synopsis of the South African law relating to marriages, followed by a discussion about the doctrine of religious entanglement in South Africa. Consideration is then given to whether or not the South African Constitution applies to unrecognised religious, personal and family laws, including religious marriages. The potential conflict between freedom of religion and sex and/or gender equality is also briefly explored and the implications of international law for religious, personal and family laws in South Africa are addressed. More detailed discussions about the Muslim, Hindu and Jewish religious marriage and inheritance laws are offered in separate chapters elsewhere in this book.

4.2 South African law relating to religious marriages

Colonialism influenced the official legal framework in South Africa. Prior to the advent of constitutional democracy in 1994, South African law was primarily a Western-based common law system. Various aspects of the common law system were influenced historically by Christian underpinnings. For example, in the family law sphere, the common law definition of marriage mimicked the Christian heteronormative and monogamous expectation that marriage is "a union of one man with one woman, to the exclusion, while it lasts, of all others."[3] A marriage that had the potential to be anything other than monogamous or between members of the opposite sex was considered anathema,[4] uncivilised,[5] contrary to public policy and not legally enforceable.[6] On this basis, African customary marriages, Muslim marriages, Hindu marriages, Jewish marriages and unions between same-sex couples were treated as unlawful.

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1 See *http://www.statssa.gov.za/publications/P0318/P03182015.pdf* (accessed 30 July 2018).
2 Also referred to as "the other law". See Schärf and Nina "Introduction: The other law" in Schärf and Nina (eds) (2001) 1–4.
3 *Mashia Ebrahim v Mahomed Essop* 1905 TS 59 61. Also see *Minister of Home Affairs v Fourie* 2006 (3) BCLR 355 (CC) para 3.
4 *Kader v Kader* 1972 (3) SA 203 (RAD) 207B.
5 *Seedat's Executors v The Master* (Natal) 1917 AD 302 307–308.
6 *Ismail v Ismail* 1983 (1) SA 1006 (AD) 1024E, 1025G.

Given the various forms of discrimination that black South Africans (black Africans, coloureds and Indians) suffered under colonialism and apartheid, which included religious marginalisation, the Constitution seeks among other things to recognise, respect and promote religious diversity.[7] For example, section 15(3) of the Constitution states:

> (a) This section does not prevent legislation recognising–
>
> (i) marriages concluded under any tradition, or a system of religious, personal or family law; or
>
> (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.
>
> (b) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution.

Section 31 provides:

> (1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community–
>
> (a) to enjoy their culture, practise their religion and use their language; and
>
> (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.
>
> (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

Section 15(3) creates the possibility for religious communities to have their marriages and personal and family laws regulated by their religious laws. At the same time, sections 15(3) and 31 contain internal limitations, which respectively require legislation that recognises religious marriages or religious, personal and family law systems and religious practices to be consistent with provisions of the Constitution. This effectively means that exercising one's right to religious freedom should not be achieved at the expense of sex and/or gender equality.[8]

In accordance with section 15(3)(*a*), the Recognition of Customary Marriages Act (RCMA)[9] was introduced to legally recognise African customary marriages, including those that are polygynous.[10] Subsequently, the Civil Union Act (CUA)[11] was passed to afford legal recognition to same-sex unions. One could therefore argue that through legislative intervention, the common law definition of marriage is becoming more inclusive and reflective of the diversity of South Africa's family forms.

Notwithstanding the above, neither religious marriages nor other personal and family law systems have been afforded legal recognition. While African customary law is now officially part of the South African legal system, religious marriages and personal and family law systems continue to operate in the unofficial or non-state law sphere. In some communities, religious marriages and personal and family laws are regulated by the religious clergy or religious leadership within those communities. For instance, in the Muslim community, Muslim personal law[12]

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7 *Prince v President of the Law Society of the Cape of Good Hope* 2002 (3) BCLR 231 (CC) para 49; *MEC for Education, KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC) para 62.

8 Amien (2006) 729–754, 750.

9 120 of 1998.

10 Polygyny is a form of marriage where a man has more than one wife. On the question of polygamy and public policy, see Goolam (2000) *THRHR* 522–524.

11 17 of 2006.

12 Muslim personal law embodies family law and inheritance, which are based on the tenets of Islamic law. Muslim family law includes Muslim marriage, divorce, and issues emanating from marriage and divorce such as parental rights and responsibilities associated with children born of a Muslim marriage. Muslim inheritance involves the administration of a deceased person's estate according to Islamic law. See Pearl and Menski, *Muslim Family law*, 3rd ed (1998) 29; Najma Moosa, "Muslim Personal Law Affecting Children: Diversity, Practice and Implications for a new Children's Code for South Africa", 115 *SALJ* (1998) 479; Amien (2014) 192–218, 192; Rautenbach (2006) *CILSA* 244.

is regulated by the *Ulama* (Islamic law scholars) and in the Jewish community, Judaic personal law is regulated by the *Beth Din* (Jewish ecclesiastical court). Any rulings emanating from the aforementioned religious authorities carry only moral weight and are not legally enforceable.[13]

Non-recognition of religious marriages leaves parties who are married only by religious rites unprotected. Wives in religious marriages are especially vulnerable, because many find themselves financially destitute when their marriages end in death or divorce. Several cases involving Muslim, Hindu and Jewish marriages have been adjudicated during the post-apartheid era, in which wives have approached the courts seeking relief during the course of their religious marriages or as a result of the termination of their religious marriages.[14] Some of these cases are discussed elsewhere in this book, particularly in the chapters dealing with Muslim, Hindu and Jewish personal law. With the exception of a few instances,[15] the South African judiciary has been proactive in providing relief to parties, especially women married by religious rites. Consequently, the Muslim marriage has been recognised as a contract (*nikahnama*) and proven terms of the Muslim marriage contract may be enforced through the courts.[16] A Jewish marriage contract (*ketubah*) containing an agreement to divorce (*get*) was similarly recognised by the court.[17] Several pieces of legislation have also been amended to enable spouses married by religious rites to be treated as beneficiaries under the legislation.[18] For example, monogamous Muslim wives may claim compensation under the Multilateral Motor Vehicle Accidents Fund Act,[19] may be treated as a surviving spouse for the purpose of the Wills Act[20] and may, under the Uniform Rules of Court, be awarded interim maintenance and/or access, custody and guardianship of minor children born of the marriage when there is a matrimonial action pending in the High Court.[21] Monogamous and polygynous Muslim spouses and monogamous Hindu spouses may also inherit intestate from each other through the Intestate Succession Act[22] and monogamous Muslim surviving spouses may claim maintenance from their deceased spouses' intestate estates under the Maintenance of Surviving Spouses Act.[23] Monogamous and polygynous Muslim wives may further claim spousal maintenance from their husbands through the Maintenance Act.[24]

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13 Amien (2006) 729–754, 731.

14 *Ryland v Edros* 1997 (1) BCLR 77 (C); *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 (4) SA 1319 (SCA); *Amar v Amar* 1999 (3) SA 604 (W); *Daniels v Campbell* 2004 (7) BCLR 735 (CC); *Khan v Khan* 2005 (2) SA 272 (T); *Singh v Ramparsad* 2007 (3) SA 445 (D); *Hassam v Jacobs* 2009 (5) SA 572 (CC); *Govender v Ragavayah* 2009 (3) SA 178 (D); *Hoosain v Dangor* [2010] 2 All SA 55 (WCC); *Arendse v Arendse* 2013 (3) SA 347 (WCC); *Moosa v Minister of Justice and Correctional Services* 2018 (5) SA 13 (CC); *Women's Legal Centre Trust v President of the Republic of South Africa, Faro v Bingham, Esau v Esau* [2018] ZAWCHC 109 (31 August 2018).

15 For example, see *Singh v Ramparsad* 2007 (3) SA 445 (D). In this case, the Durban High Court refused to recognise a Hindu marriage as a civil marriage for the purposes of the Marriage Act 25 of 1961 and consequently also refused to grant the wife a civil divorce under the Divorce Act 70 of 1979.

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

17 *Raik v Raik* 1993 (2) SA 617 (W).

18 Apart from the legislation listed in text, other pieces of legislation that also afford partial recognition to certain aspects of religious marriages in limited instances include the Insolvency Act 24 of 1936 (s 21(13)), Births and Deaths Registration Act 51 of 1992 (s 1(2)(*a*)), Special Pensions Act 69 of 1996 (s 31) and Demobilisation Act 99 of 1996 (s 1).

19 93 of 1989.

20 7 of 1953.

21 *Amod v Multilateral Motor Vehicle Accidents Fund*; *Moosa v Minister of Justice and Correctional Services*; *Hoosain v Dangor*.

22 81 of 1987. See *Daniels v Campbell*; *Hassam v Jacobs*; *Govender v Ragavayah*.

23 27 of 1990. See *Daniels v Campbell*.

24 99 of 1998. See *Khan v Khan*.

The aforementioned judicial findings and legislative amendments have afforded *ad hoc* and partial or limited recognition to certain aspects of Muslim, Hindu and Jewish family law. To date, the judiciary has been reluctant to provide wholesale legal recognition to religious marriages.[25] One of the reasons that the South African judiciary appears to have been willing to provide *ad hoc* relief thus far in the area of religious family laws is ostensibly because it did not have to navigate issues of religious doctrine in those cases. The South African judiciary considers itself bound by the common law doctrine of religious entanglement, which prevents judges from becoming entangled in religious doctrinal issues.

4.3 The doctrine of religious entanglement in South Africa

South African common law contains a rule called 'the doctrine of religious entanglement'. This doctrine requires that South African courts avoid becoming entangled in religious doctrine "unless some proprietary or other legally recognised right [is] involved."[26] Subsequent to the enactment of the South African Constitution, the issue of religious doctrinal entanglement surfaced in the area of religious family laws in the cases of *Ryland v Edros*,[27] *Taylor v Kurtstag*[28] and *Singh v Ramparsad*.[29]

In *Ryland v Edros*,[30] the parties had been married and divorced by Muslim rites. Among others, the ex-wife had claimed an equitable distribution of her ex-husband's estate. By relying on the testimony of an expert witness, she claimed that the Malaysian custom of *harta sepencarian* was applicable to their former Muslim marriage, since Malaysia is a *Shafi'i* jurisdiction and both parties to the marriage followed the *Shafi'i* school of thought (*madhhab*).[31] *Harta sepencarian* is part of Malaysian family law and enables a Malaysian court to order the equal distribution of estates between husband and wife upon the dissolution of the marriage.[32] By relying on the testimony of his expert witness, the ex-husband in the *Ryland* case argued instead that a custom akin to that of *harta sepencarian* is not practised in the Western Cape Muslim community. The Cape High Court (as it then was) chose to be guided by the religious practices of the community where the parties had resided and found against the ex-wife's claim for an equitable distribution of her ex-husband's estate.[33]

In *Taylor v Kurtstag*, during the course of civil divorce proceedings between the parties, the parties agreed that they would submit their dispute relating to, among other things, financial, maintenance and custody considerations to an *ad hoc Beth Din* for settlement.[34] The *ad hoc Beth Din* delivered a Jewish law (*halachic*) ruling in which it awarded custody of the children to the wife and directed the husband to pay arrears maintenance and ongoing maintenance to the wife in respect of the children born of the marriage.[35] When it became clear to the *Beth Din* that the husband had no intention of honouring their *halachic* ruling, it issued an excommunication order (*cherem*) to shun him from most aspects of the Jewish community.[36] A *cherem* is a mechanism

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25 See, e.g., *Amod v Multilateral Motor Vehicle Accidents Fund*.
26 *Allen v Gibbs* 1977 (3) SA 212 (SE) 218A–B.
27 1997 (2) SA 690 (C).
28 2005 (1) SA 362 (W).
29 2007 (3) SA 445 (D).
30 See a more detailed discussion of this case in Amien (2016) 57–59 and Rautenbach 2000 *Recht van de Islam* 54–57.
31 *Ryland v Edros* at 698H–I, 715B–716D.
32 Malaysian Islamic Family Law (Federal Territory) Act of 1984.
33 *Ryland v Edros* at 717D–E.
34 *Taylor v Kurtstag* para 4.
35 Paragraph 6.
36 Paragraph 9.

through which the *Beth Din* attempts to enforce its rulings within the Jewish community.[37] The husband applied for an interdict to prevent the *ad hoc Beth Din* from publishing the *cherem*.[38] In considering the application, the Witwatersrand Local Division (as it then was) held that "[to] question whether the proposed *cherem* or a lesser sanction would have been appropriate would be to interfere in matters of faith, and arrogate to the court a power not constitutionally provided for: The threshold for intervention is and should be high."[39] The court accordingly dismissed the application.[40]

In *Singh v Ramparsad*, the parties had been married to each other by Hindu rites only, more specifically according to the tenets of the *Vedic* tradition, which does not allow for divorce.[41] The parties chose not to register their marriage under the Marriage Act.[42] [43] Subsequently, the marriage broke down irretrievably and the wife approached the Durban and Coast Local Division (as it then was) asking the court to recognise her Hindu marriage as legally valid under the Marriage Act and to be granted a civil divorce under the Divorce Act.[44] By relying on the doctrine of religious entanglement, the court held that "it is not for the court to pronounce the parties as being divorced if they elected to practise a faith and took vows which did not countenance divorce." [45] The court adopted the view that if it were to rule in the wife's favour and grant her divorce, it "would be interfering in theological issues which may cause offence to members of the Hindu community."[46] The wife's action was accordingly dismissed.[47]

Considering the outcomes of the *Ryland* and *Singh* cases, it appears that reliance on the doctrine of religious entanglement has the potential to militate against the protection of women's rights in the area of unrecognised religious, personal and family laws. Legal recognition of religious marriages or personal and family laws is therefore necessary, because it will bring those laws within the domain of the judiciary.[48] Section 39(2) of the Constitution requires South African courts "[w]hen interpreting any legislation, and when developing the common law or customary law, . . . [to] promote the spirit, purport and objects of the Bill of Rights." Thus, through legal recognition of religious marriages or personal and family laws, the doctrine of religious entanglement will most likely be rendered ineffective in respect of those laws. Legal recognition could be achieved in one or more of the following ways: (a) develop the common law definition of marriage to include religious marriages; (b) amend existing marriage legislation such as the Marriage Act or the Recognition of Customary Marriages Act to bring religious marriages within their ambit; (c) enact legislation to afford recognition to religious marriages; (d) enact legislation to recognise and regulate the features of different religious marriages. Among the aforementioned options, women's right to equality will most likely be best protected through the enactment of legislation that will not only recognise religious marriages but also regulate the specific features of each religious marriage.[49] A good example of legislation seeking to recognise and regulate the features of a religious marriage is the Muslim Marriages Bill that

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37 *Taylor v Kurtstag* para 56.
38 Paragraph 24.
39 Paragraph 58.
40 Paragraph 65.
41 Paragraphs 1, 3.
42 25 of 1961.
43 *Singh v Ramparsad* para 3.
44 70 of 1979. See *Singh v Ramparsad* paras 4–5.
45 Paragraphs 50–51.
46 Paragraph 50.
47 Paragraph 55.
48 Amien (2013) 241–256, 255.
49 Amien (2018) *The Daily Maverick* accessible at *https://www.dailymaverick.co.za/author/waheeda-amien/#.Wxd3d6m-nq0*.

was adopted by Cabinet in 2010 but has not yet entered the parliamentary process.[50] A bit more is said about the Muslim Marriages Bill at the end of this chapter. At this stage, it is not clear if the Muslim Marriages Bill will be enacted. On 31 August 2018, the Western Cape High Court delivered judgment in the case of *Women's Legal Centre Trust v President of the Republic of South Africa*,[51] in which the court ordered the South African state to prepare, initiate, introduce, enact and bring into operation legislation within the next 24 months to recognise Muslim marriages in South Africa.[52] The court left it to the Executive and Legislature to decide which form the legislation should take.[53] The South African state could therefore decide to present the Muslim Marriages Bill for parliamentary consideration or it could proceed to draft an omnibus legislation to afford recognition to all forms of marriages, including religious marriages, in South Africa.

In the event that legal recognition and/or regulation is not afforded to Muslim or any other religious marriages or personal and family laws, and the latter continue to operate within the non-state sphere, the question arises whether or not unrecognised religious, personal and family laws can be subjected to the Constitution. In other words, could parties to a religious marriage or personal and family law system or member of a religious community challenge religious rules and practices on the basis that they offend the Constitution? This question is considered in the next section.[54]

4.4 Does the Constitution apply to unrecognised religious, personal and family laws?

Section 8(1) of the Constitution provides that "[t]he Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state."

> The phrase "all law" has been interpreted to include customary law, common law and legislation.[55] Whether or not it also includes unrecognised religious personal and family laws depends on the interpretation of "law".

It has been suggested that when one considers the text of both the interim (1993) and current (1996) constitutions, the definition of "law" in respect of state law versus non-state law' and the ambit of custom as a source of law in South Africa, the term "law" can be interpreted to encompass unrecognised religious, personal and family laws. To illustrate this contention, each of the aforementioned considerations is considered below:[56]

(a) **Constitutional text**: Firstly, section 15(3)(*a*) of the 1996 Constitution refers to systems of religious personal or family "law". The use of the word "law" in section 15(3)(*a*) indicates that the drafters of the 1996 Constitution regarded religious, personal and family laws as "law". Secondly, section 7 of the interim Constitution made the Bill of Rights applicable to "all law in force". Undoubtedly, law "in force" refers to officially recognised laws. In contrast, the words "in force" were omitted in section 8(1) of the 1996 Constitution. Read with section 15(3)(*a*) of the 1996 Constitution, there is a strong indication that religious, personal and family laws can be considered "law" for the purposes of section 8(1) of the 1996 Constitution. Secondly, as mentioned previously, section 31 of the 1996 Constitution

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50 The Muslim Marriages Bill is available online at *https://www.gov.za/sites/www.gov.za/files/33946_gen37.pdf*.
51 [2018] ZAWCHC 109 (31 August 2018).
52 Paragraph 252.
53 Paragraph 188.
54 Also see the discussion of Mofokeng (2009) 163–167.
55 In a previous edition of Burns (1998) 15.
56 Some of these issues are explored by Rautenbach (2003) *Fundamina* 134–150 and Rautenbach (1999) *PER*/*PELJ* 50–70. Also see Amien 2010 *International Journal of Law, Policy and the Family* 364–365.

recognises the right of members of religious communities to, among others, practise their religion in association with other members of their community, provided the right is exercised in a manner that is not inconsistent with any other provision of the Bill of Rights. It would be anomalous to suggest that on the one hand, religious communities have the right to practise their religion, which includes legal rules, but that on the other hand, the enjoyment of the right is not subject to the Bill of Rights because it is not included in the phrase "all law". Thirdly, section 2 of the 1996 Constitution affirms the supremacy of the Constitution and invalidates law or conduct that is inconsistent with it. In terms of section 172(1)(*a*) of the 1996 Constitution, it is the duty of a court to declare any law or conduct that is inconsistent with the Constitution invalid "to the extent of its inconsistency". Even if unrecognised religious, personal and family laws are not considered "law" as envisaged by the 1996 Constitution, they would certainly constitute "conduct" that would be subject to the Constitution. Moreover, a view that there may be certain areas of "law" that are not subject to the scrutiny of the Bill of Rights would make a mockery of the supremacy of the Constitution.

(b) **State law and non-state law**: Arguments have been raised that "law" comprises positive state law (official law) and positive non-state law (unofficial law).[57] Positive state law includes legislation, custom and case law. Positive non-state law includes rules of a sports club or rules that a family head lays down for her or his family.[58] Similarly, personal and family laws of a religious community such as Muslims, Hindus and Jews also make up positive non-state law, which could equate to "law" in terms of the Constitution.

(c) **Custom**: It is trite in South Africa that new legal principles can be created by means of custom. The requirements for a custom to be recognised as law were formulated in *Van Breda v Jacobs*,[59] namely that the custom must have been in existence for a long period, it must be observed in general by the relevant community, it must be reasonable, and its content must be certain and clear. Religious customs would usually meet the aforementioned requirements and could therefore be treated as law.

In light of the above, there are strong arguments to suggest that unrecognised religious, personal and family laws can be held accountable to the Constitution. However, this has not yet been decided by our courts. The question of whether or not unrecognised religious, personal and family laws are subject to the Constitution is therefore still an open one. If the courts were to find that the Constitution applies to unrecognised religious, personal and family laws, a conflict between certain rights may arise, especially between sex and/or gender equality and freedom of religion. The next section considers how such a conflict could manifest and would most likely be addressed by our courts.[60]

4.5 The potential conflict between sex and/or gender equality *vis-à-vis* freedom of religion in religious, personal and family laws in South Africa

The main religious, personal and family law systems that operate within South African communities fall within the Christian, traditional African, Muslim, Hindu and Jewish faiths. There are rules and practices emanating from the aforementioned personal and family law systems that

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57 Van Zyl and Van der Vyver (1982) chs 7–9.
58 Van Zyl and Van der Vyver (1982) 273.
59 1921 AD 330.
60 For a more detailed discussion about the conflict between the right to freedom of religion and women's right to equality in the context of Muslim marriages in South Africa, see Amien (2006) *Human Rights Quarterly* 729–754. Also see Rautenbach (2003) *Queensland Law and Justice Journal* 168–181; Rautenbach (2006) *Griffin's View on International and Comparative Law* 55–68.

arguably discriminate against women. For example, Catholicism prohibits women from terminating their pregnancies. Islamic inheritance law requires females to inherit half of what their male counterparts are permitted to inherit. African customary marriages, Muslim marriages, Hindu marriages and Jewish marriages permit polygyny, which means that only men are entitled to take multiple spouses. Although under Muslim and Jewish family law, both spouses are permitted to divorce, women experience great difficulty obtaining religious divorces. The negative effect of this difficulty is compounded, because while their husbands may remarry, regardless of the status of their existing religious marriages, women are unable to enter into further religious marriages while their existing religious marriages remain intact. In contrast, Hindu family law does not permit either party to divorce. Yet, women are disparately affected – while Hindu men may take multiple wives, Hindu women may not take multiple husbands. So Hindu wives, along with Jewish and Muslim wives, may be held prisoner in unwanted marriages without being able to move on with their lives.

In the above examples, a husband's right to freedom of religion potentially comes into conflict with his wife's right to sex and/or gender equality. A conflict between these kinds of rights has not yet been adjudicated by our courts, so there is no certainty as to how it would be decided. If such a conflict were to be presented to court while religious, personal and family laws remain unrecognised, the court would first have to decide whether or not the Bill of Rights applies to unrecognised religious, personal and family laws and secondly, whether or not the Bill of Rights applies horizontally to the dispute. Since the dispute would be between two natural persons, the court would have to consider section 8(2) of the Constitution, which provides that the Bill of Rights "binds a natural . . . person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right." If the court finds that the Bill of Rights is applicable to the dispute, it would have to consider whether or not the husband's constitutional right to freedom of religion in terms of sections 15 and 31 violates his wife's constitutional right to not be unfairly discriminated against on the basis of sex and/or gender in terms of section 9(3). Depending on the outcome, the court may have to prioritise one right above the other.

To date, the jurisprudence in respect of freedom of religion and equality has developed separately. The jurisprudence on religious freedom is underscored by four pivotal cases, namely, *S v Lawrence; S v Negal; S v Solberg*;[61] *Christian Education South Africa v Minister of Education*;[62] *Prince v President of the Law Society of the Cape of Good Hope*;[63] and *MEC for Education, KwaZulu-Natal v Pillay*.[64] The following core elements of freedom of religion are identifiable from the jurisprudence:[65]

(a) the belief or practice must be based in a religion;

(b) protecting the right to freedom of religion is of particular importance to marginalised religious communities;

(c) the religious belief or practice must be sincerely held by the person invoking the right;

(d) a court may not decide a dispute involving whether or not a belief or practice forms part of a religion unless the dispute is concerned with the centrality of the belief or practice to the religion;

(e) compulsory and voluntary beliefs and practices are protected by the right to freedom of religion;

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61 1997 (10) BCLR 1348 (CC).
62 2000 (10) BCLR 1051 (CC).
63 2002 (3) BCLR 231 (CC).
64 2008 (1) SA 474 (CC).
65 For a more detailed discussion about the jurisprudence on religious freedom in South Africa, see Amien (2013) 241–256.

(f) people may not be coerced by the state to behave in a manner that is antithetical to their religious beliefs;

(g) state endorsement of religion must be equitable; and

(h) freedom of religion must be reasonably accommodated.

South Africa therefore adopts a form of "inclusive secularism", which accommodates religion in both the public and private spheres.[66] In this way, South Africans are enjoined to celebrate the religious diversity of their country. At the same time, the internal limitation in section 31(2) of the Constitution provides that the right of persons to practise their religion and to be involved in religious associations in association with other members of their religious community "may not be exercised in a manner inconsistent with any provision of the Bill of Rights." The Constitutional Court interprets the section 31(2) internal limitation as ensuring that "religion cannot be used to shield practices which offend the Bill of Rights".[67] This necessarily includes the right to sex and/or gender equality.[68]

As far as the jurisprudence on equality is concerned, the South African Constitutional Court has adopted a substantive approach as opposed to a formal approach to equality.[69] This means that we are concerned with the impact of discriminatory treatment. However, not all forms of discrimination are prohibited; only unfair discrimination is proscribed, both by section 9(3) of the Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA).[70] What has come to be known as the *Harksen* test postulates the factors that our courts must consider when facing an equality challenge.[71] If the discrimination is on a ground listed in section 9(3) of the Constitution, such as sex, gender and religion, unfair discrimination is presumed.[72] If the discrimination is on an unspecified ground, the impact of the discrimination on the complainant becomes crucial.[73] To determine whether or not the complainant has been unfairly discriminated against, due regard must be had to:

(a) the position of the complainant in society (whether or not she is a member of a historically disadvantaged group);

(b) the nature of the provision or power and the purpose sought to be achieved by it;

(c) the extent to which the complainant's rights or interests have been impaired by the discrimination; and

(d) whether or not the discrimination, among others, impaired her human dignity.[74]

If unfair discrimination is established, it must then be tested against the requirements of section 36 of the Constitution, which is the general limitations clause.[75]

Section 36(1) permits a right to be infringed or limited by a "law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom". Human dignity, equality and freedom are the founding values of the Constitution.[76] In assessing the limitation, the court must consider several factors listed in section 36(1), namely, the nature of the right that is being limited; the

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66 Amien (2013) 241–256, 255.
67 *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) para 26.
68 Amien (2006) 729–754, 750.
69 *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) para 43.
70 4 of 2000.
71 *Harksen v Lane* 1998 (1) SA 300 (CC) para 53.
72 Section 9(5) of the South African Constitution.
73 *Harksen* para 53.
74 Paragraph 51.
75 Paragraph 53.
76 Section 1(a) of the Constitution.

importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and whether or not there were less restrictive means that could have been used to achieve the purpose. Section 36 involves a proportionality analysis in which the court balances competing rights and interests against each other.[77] If the unfair discrimination meets the section 36(1) test, it could pass constitutional muster.

In light of South Africa's history of discrimination, marginalisation and oppression on the basis of, among others, race, gender and religion, it is not surprising that the jurisprudence on religious freedom and equality seeks to both protect religious diversity and prevent unfair discrimination. But what will a court do when faced with a case where freedom of religion clashes with sex and/or gender equality?

In the case of unrecognised religious, personal and family laws, if the matter involves discrimination on the grounds of sex and/or gender and the court finds that the Bill of Rights applies, unfair discrimination would be presumed. However, there would be no law of general application to potentially save an infringement of section 9(3). Instead, the infringement on the wife's right to not be unfairly discriminated against on the basis of sex and/or gender would be subject to the internal limitation contained in section 31(2). An application of the latter could ensure that the wife's right to not be unfairly discriminated against on the basis of sex and/or gender is prioritised above her husband's right to freedom of religion. Moreover, section 36(2) provides that "[e]xcept as provided in [section 36(1)] or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights." In the absence of legislation recognising religious, personal and family laws and assuming that a court accepts religious, personal and family laws as "law", a religious belief or practice founded in religious law would most likely not be permitted to limit the wife's right to sex and/or gender equality.

In the event that legislation were to be enacted to recognise religious marriages or religious, personal and family law systems, and the dispute involves a wife's right to not be unfairly discriminated against on the basis of sex and/or gender equality, sections 8 and 14 of PEPUDA would be applicable. Section 8 of PEPUDA prohibits unfair discrimination on the ground of gender. Section 14 of PEPUDA sets out the factors that must be considered to determine whether the discrimination is fair or unfair. The factors listed in *Harksen* to ascertain unfair discrimination and those listed in section 36 of the Constitution to determine whether the unfair discrimination is justifiable or not, are combined in section 14(2)–(3) of PEPUDA. The two subsections read as follows:

> (2) In determining whether the respondent has proved that the discrimination is fair, the following must be taken into account:
>
> (a) the context;
>
> (b) the factors referred to in subsection (3);
>
> (c) whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned.
>
> (3) The factors referred to in subsection (2)(b) include the following:
>
> (a) whether the discrimination impairs or is likely to impair human dignity;
>
> (b) the impact or likely impact of the discrimination on the complainant;
>
> (c) the position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage;
>
> (d) the nature and extent of the discrimination;
>
> (e) whether the discrimination is systemic in nature;
>
> (f) whether the discrimination has a legitimate purpose;
>
> (g) whether and to what extent the discrimination achieves its purpose;

77 *S v Makwanyane* 1995 (3) SA 391 (CC) para 104.

(h) whether there are less restrictive and less disadvantageous means to achieve the purpose;

(i) whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to–

(i) address the disadvantage which arises from or is related to one or more of the prohibited grounds; or

(ii) accommodate diversity.

In other words, section 14 of PEPUDA involves a proportionality analysis to ascertain whether the discrimination is fair or unfair. If the discrimination is found to be unfair, PEPUDA will trump the impugned legislative provision, and the religious belief or practice in question could be rendered unlawful.[78]

In light of the above, although each case would have to be considered on its own merits, a court may be hard pressed to prioritise freedom of religion above sex and/or gender equality when the latter are undermined by a religious belief or practice.

4.6 Implications of international law for religious, personal and family laws in South Africa

At this stage, a few comments on the impact of international law on religious, personal and family laws in South Africa merit elucidation. To illustrate the impact, Muslim personal law will be used as an example.

The drafters of the South African Constitution "sourced" values and principles supporting the rights found in international human rights instruments and moulded them to conform to local circumstances. The Constitution therefore incorporates a range of both civil and political rights and social, economic and cultural rights.

> International law is important in the context of religious personal and family laws in South Africa. Section 39(1)(*b*) of the Constitution clearly provides that international law "must" be considered when a court interprets the Bill of Rights. Most notably, section 231(4) requires domestication of international instruments in order for the international agreement to become law. Furthermore, section 231(5) stipulates that South Africa "is bound by international agreements which were binding . . . when this Constitution took effect, and section 232 provides that "customary international law is law . . . unless it is inconsistent with the Constitution or an Act of Parliament." Lastly, section 233 requires the courts to "prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law" when interpreting legislation.

International instruments, however, do not provide a clear-cut answer to the question as to whether or not freedom to believe includes the freedom not to believe. The narrow construction of section 15(1) (freedom of religion) in the Constitution does not include the freedom to change one's religion or belief. The right to change one's religion conflicts with the constitutions of Muslim countries, because interpretations of Islamic law do not allow a Muslim such freedom and apostasy (or conversion from Islam, which implicitly would also include the right to change one's religion or belief) is punishable by death. The narrow construction of section 15(1) can also be compared with analogous constructions of human rights instruments, which normally include the right to practise religion alone or in community, in private or public.[79] A broader construction of section 15(1) would have allowed a Muslim the freedom to practise religion alone, which freedom could then be extended to include the freedom to practise religion according to a particular (modernist, conservative, feminist) interpretation of it. On the other hand, mere recognition of Muslim personal law automatically extends to it a public and perforce

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78 Section 5(2) of PEPUDA provides: "If any conflict relating to a matter dealt with in this Act arises between this Act and the provisions of any other law, other than the Constitution or an Act of Parliament expressly amending this Act, the provisions of this Act must prevail".

79 See 4.6 for examples.

communal character and would thereby defeat the right to practise religion alone and in private. For example, although the latest version of the proposed legislation in terms of which Muslim marriages are expected to be formally recognised in South Africa, namely, the 2010 Muslim Marriages Bill (MMB),[80] defines both a "Muslim"[81] and "Islamic law",[82] it cannot just be presumed that only Muslims would want to be parties to a Muslim marriage in terms of the MMB. Although the MMB is silent on interreligious marriages, which, although only permitted for Muslim men, do occur among Muslims of both sexes locally, this does not detract from the fact that potential human rights-related implications might arise from such interreligious marriages (both those permitted and not permitted by Islam).

If legal effect is given to the practice of religion, a wider construction of section 15(1) has the implication that, even if Muslim personal law is subject to the Bill of Rights, a Muslim could exercise his or her freedom of choice to practise religion alone or in community, and as a citizen opt for the provisions of secular law to govern both his or her public and private affairs. The MMB has realised such by making provision for choice between systems. The general application of the MMB addresses the situation where parties marry in terms of Islamic law either prior to or after its enactment – in seeking to directly redress past injustices of non-recognition, the MMB will by default (automatically) apply to all Muslim marriages already in existence prior to its enactment, unless the parties jointly opt out of it.[83] The lack of freedom of choice is understandably a matter of concern for those religious authorities who may not approve of the MMB and who may, therefore, question the fairness of this position on the spouse who does not want to be bound by its provisions but who would be because he or she is being "forced" or "coerced" into it by the other spouse who wants to be so bound. However, in doing so, the MMB is seeking to ensure the practical application of its provisions by holding Muslim husbands legally accountable, for the first time, for the consequences of such marriages. However, if both parties do not want the MMB to apply to their marriage and choose to exclude the marriage from its ambit, the marriage is not invalidated, nor is it considered illegal, and the spouses are certainly not placed beyond having recourse to existing constitutional and common law rights and protections.[84] More in alignment with freedom of choice, the MMB squarely places the responsibility on Muslims who wish to get married in terms of Islamic law to regulate their marital affairs in accordance with a number of options available to them after the enactment of the MMB. For example, the MMB will only apply to Muslim marriages contracted after its enactment where parties elect to have it apply.[85] Constitutionally, this approach accords with the right to culture provided for in section 30, namely, that all individuals are free to participate in whatever culture they choose. While it may ultimately be a matter of conscience, no person or organisation can force a Muslim to regulate his or her personal affairs according to religious law. Conservative or restrictive interpretations of Islamic law would, however, deny a Muslim such a choice. The above approach also appears to be in line with section 31(1)[86] of the Constitution, which deals with minority rights.

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80 The 2010 MMB is available at *http://www.gov.za/sites/www.gov.za/files/33946_gen37.pdf* (accessed 21 July 2018).

81 " 'Muslim' means a person who believes in the oneness of Allah and who believes in the Holy Messenger Muhammad as the final prophet and who has faith in all the essentials of Islam . . . ." (Clause 1).

82 " 'Islamic Law' means the law as derived from the Holy Qur'ān, the Sunnah (Prophetic model), the consensus of Muslim Jurists (*Isma*) and analogical deductions based on the primary sources (*Qiyās*)." (Clause 1).

83 Clause 2(2) of the MMB.

84 Clause 2(3).

85 Clause 2(1).

86 "Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community – (a) to enjoy their culture, practise their religion and use their language; and (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society. (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights."

Section 31 is closely modelled on Article 27 of the International Covenant on Civil and Political Rights (ICCPR) of 1966,[87] which is a major international instrument dealing with minority rights protection. However, unlike Article 27 of the ICCPR, section 31 of the Constitution uses the term "community" instead of "minority" and "cultural" instead of "ethnic" community. Furthermore, although section 39 of the Constitution uses imperative language when it states that a court "must consider" international law when interpreting the Bill of Rights, this consideration does not mean that it is obliged to "apply" it. Nonetheless, the fact that South Africa has subsequently (in 1998) also ratified the ICCPR, does oblige a court to also apply its provisions.[88]

However, while "minorities" would include a minority religious group, Article 27 of the ICCPR is strewn with controversial provisions and lacks an authoritative definition of "minority". Statistically, women are definitely not a minority in South Africa. Within a religious minority group, however, they may be considered a minority within a minority, so to speak, prejudiced by, for example, religious laws. Equal treatment under the law, although an individual right, could also be claimed by a member of a minority group. Such an approach could have interesting consequences for recognised Muslim personal law in South Africa. Although the rights mentioned in Article 27 are individual rights, human rights ultimately function in social contexts rather than on a purely "individual" basis. Section 31 of the Constitution seems to provide adequate protection for minority rights and in this sense conforms to the provisions of international instruments. This is furthermore reinforced by the national legislation[89] giving effect to sections 185 and 186 of the Constitution, which respectively deal with the establishment and composition of a Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.

Article 1(1)[90] of the United Nation's Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief of 1981 states that freedom of religion includes the freedom to manifest one's religion. Furthermore, while the Declaration does not directly refer to the issue of marriage, Article 5 recognises the right to organise one's family life in accordance with one's religion or belief. Section 15(1) of the Constitution has been construed to include the right to have *inter alia* religiously based personal laws or marriages recognised in order to give effect to a manifestation of such religion.[91] An equitable interpretation of Islam indicates that recognising religious and cultural rights in terms of section 30 of the Constitution does not necessarily have to mean discrimination against women. Besides not being a binding instrument, the Declaration has as yet not been recognised in South Africa. This does not, however, mean that non-binding international law does not constitute international law in terms of section 39(1)(*b*) of the Constitution.[92] It can, therefore, also provide guidance in this regard.

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87 "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language." See *http://www1.umn.edu/humanrts/instree/b3ccpr.htm* (accessed 21 July 2018). The ICCPR was signed on 3 October 1994 and ratified on 10 December 1998. See *http://www1.umn.edu/humanrts/research/ratification-southafrica.html* (accessed 21 July 2018).

88 In the event of domestication of the international laws, as per s 231(4) of the Constitution, courts are obliged to do it. In other instances, they must consider it in terms of s 39(1)(*b*) when they interpret the Bill of Rights.

89 See the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act 19 of 2002.

90 "Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching." See *http://www1.umn.edu/humanrts/instree/d4deidrb.htm* (accessed 21 July 2018).

91 Section 15(3)(*a*)(i)–(ii) and (*b*).

92 In *S v Makwanyane* 1995 (6) BCLR 665 (CC) para 35, Chaskalson P clearly stated (although he did so in the context of s 35(1) of the interim (1993) Constitution which is the equivalent of the current s 39), that ". . . public international law would include non-binding as well as binding law" and further that ". . . [t]hey may both be used under the section as tools of interpretation."

The Bill of Rights, especially the equality clause (section 9), guarantees that the status of Muslim women in South Africa can be different to, or better than, that of their counterparts elsewhere in the world. However, provisions in international instruments have not been of much help in this regard. The Convention on the Elimination of All Forms of Discrimination Against Women of 1979 (CEDAW) is a United Nations (UN) document that embodies women's rights and makes provision for states "to embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realisation of this principle".[93]

While acceptance of CEDAW by South Africa certainly marks an enormous step forward, it also has the limitations of all similar international instruments insofar as there is little power to demand its implementation. Within the UN itself, it is not regarded as an instrument with strong "teeth" since countries, especially Muslim countries, often do not comply with its provisions (and ratify it with reservations). "The most contentious reservations by far, are those which indicate that the obligations of major articles of the Convention are accepted only to the extent that they are compatible with the Islamic Sharia or with traditional customs and practices."[94]

While it may be encouraging that the Bill of Rights has both a direct (section 8(2)) and indirect (section 39(2)) horizontal application and may in this way include Muslim personal law within its ambit, not enough protection is provided for women who are subjected to discrimination in both public and private spheres. Since South Africa ratified CEDAW[95] in 1995 without any reservations, its requirements, for example in Article 2, which includes a general condemnation of discrimination against women, and Article 16, which directs states to take steps to eliminate discrimination against women in the sphere of personal law, can also provide additional protection and furthermore affirm South Africa's commitment to its obligations under CEDAW.

A horizontal operation of international instruments also means that the state as well as private bodies and individuals can be held accountable for international human rights violations and infringements. In this way, wrongs in the private sphere can be brought within the ambit of human rights protection without abolishing the distinction between the public and private spheres.[96] Forming part of the international Bill of Rights, both the 1966 Covenants,[97] for example, contain a [fifth] preambular paragraph that reads as follows: "Realising that the individual, [having duties to other individuals and to the Community] to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognised in the present Covenant". Ratification of these instruments, which helped shaped our Bill of Rights, could, therefore, provide weight in favour of a direct horizontal operation of the South African Bill of Rights to unrecognised religious legal systems.

Similar arguments may be raised regarding the implications of international law on other religious, personal and family law systems, including Jewish and Hindu law.[98]

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93 CEDAW part 1: s 2(*a*).

94 Kathree (1995) *SAJHR* 432.

95 CEDAW was signed on 29 January 1993 and ratified on 15 December 1995. See *http://www1.umn.edu/humanrts/research/ratification-southafrica.html* (accessed 21 July 2018).

96 Clapham (1993) 91–94, 134.

97 The United Nations International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966 and the ICCPR of 1966. South Africa signed the ICESCR on 3 October 1994 and eventually ratified it on 18 January 2015. See *http://www1.umn.edu/humanrts/research/ratification-southafrica.html* and *https://www.escr-net.org/news/2015/government-south-africa-ratifies-icescr* (both accessed 21 July 2018).

98 Also see the discussion by Rautenbach (2001) 353–356.

Part 2

African Customary Law

5

Family Law

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5.1 Introduction

Customary family law is an important branch of customary law, and family relationships are of fundamental importance as far as customary law is concerned. Traditional customary family law was drastically amended by the Recognition of Customary Marriages Act.[1] The Act requires that customary marriages be negotiated, entered into or celebrated in accordance with customary law. While this chapter focuses on and discusses the various sections of the Act, attention is also given to other aspects of customary family law.

5.2 Betrothal

5.2.1 *Marriage negotiations*

In traditional customary law, marriage is a matter between two family groups and not merely a bond binding two parties. Betrothal is therefore mainly an agreement between two family groups.[2] Marriage negotiations were usually initiated by the man or his family group, approaching the woman's (the prospective wife's) family with a request. These days, however, the parties are regarded as individuals. If it is the man's first wife, the initiative for negotiations will be taken by his father or guardian. The man may also initiate negotiations himself, in which case they are conducted with the father or the guardian of the woman. Negotiations without the approval of the man or the woman will, however, be futile as their consent is a requirement for the marriage.[3] The negotiations take place in order to reach consensus regarding the proposed marriage and, more specifically, the amount of *lobolo* to be paid. Reaching consensus leads to a formal betrothal.

For a variety of reasons, the initiative for the negotiations can also be taken by the woman's father. This could be to strengthen relationships with an important family or to avoid her from becoming a spinster.[4]

The *ukuthwala*[5] custom is especially prevalent among the Xhosa. This custom is still popular and widely practised in rural areas where people follow a traditional lifestyle. A case study also shows that *ukuthwala* is still "vigorously" practised in certain rural areas of KwaZulu-Natal.[6] The woman is "abducted" by the suitor or his friends to force her family to enter into negotiations regarding the conclusion of a marriage[7] or differently put, to open marriage negotiations between two families.[8] In most instances, this is done with the woman's consent, but she will feign resistance. The woman is taken to the young man's parental home, where she is received and cared for with the utmost kindness.[9] There are three forms of *ukuthwala*, namely (a) where the woman is aware of the intended abduction and there is therefore collusion between the parties, (b) where the families agree, but the woman is unaware, and (c) where neither the woman nor her family has prior knowledge of the abduction. If the woman was abducted without her parents' consent, it would, under certain circumstances, constitute a delict, and

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1 120 of 1998 (hereafter the Act/ the Recognition of Customary Marriages Act).
2 Olivier *et al* (1998) 12.
3 Also see Van Schalkwyk (2003) *De Jure* 296 and the authorities cited therein.
4 Olivier *et al* (1998) 10.
5 *Ukuthwala* literally means "to carry off". See Karimakwenda "Today it would be called rape: a historical and contextual examination of forced marriage and violence in the Eastern Cape" in Claassens and Smythe (eds) (2013) 340.
6 Matshidze *et al* (2017) 9010.
7 For different views on whether the *ukuthwala* custom may be prosecuted under the crime of abduction see Kruger and Oosthuizen (2012) *PER/PELJ* 285–287.
8 Matshidze *et al* (2017) 9007.
9 Bekker and Koyana (2007) *De Jure* 139–144.

damages, in the form of cattle,[10] could be claimed.[11] This will, for example, be the case where *thwala* took place but was not followed up by a marriage proposal. Traditionally, the young man is not allowed to have intercourse with the woman during this time.[12] If the young man seduces the woman, a seduction head of cattle and, in appropriate circumstances, a pregnancy beast will be payable.[13] Negative press reports in the recent past indicate that offences are committed against minors and forced marriages[14] take place under the pretence of a so-called *thwala* action. In *State v Mvumeleni Jezile*[15] a man was convicted on accounts of human trafficking, assault and three accounts of rape and was sentenced to 22 years in prison for abducting a girl from her home and forcing her into a customary marriage. On appeal, apart from the assault convictions which were set aside, the human trafficking and rape convictions and sentences were confirmed.[16] Therefore, a totally different content and colour is given to this recognised customary practice through the abuse thereof.[17] Consequently, the South African Law Reform Commission drafted the "Prohibition of Forced Marriages and Child Marriages Bill".[18]

Although successful marriage negotiations usually result in a betrothal, an engagement is not a prerequisite for a valid marriage. Betrothals of infants and children are void *ab initio*. Betrothals can be either short or long. This is determined by agreement between the parties and is usually dependent on the period of time required by the man/his father to gather the *lobolo* cattle.

5.2.2 *Consequences of betrothal*

No enforceable rights are created by the betrothal agreement. An engagement could be terminated, and the aggrieved party would have no claim for breach of promise. The legal consequences of termination are limited to patrimonial consequences where property was transferred. In this regard, a distinction has to be made between the following categories of property:

(a) **Betrothal gifts:** Betrothal gifts are given as a symbol of the betrothal promise and can consist of clothing, blankets, other household articles and cattle.[19] Right of ownership of these articles passes to the recipient (the woman or her father) upon delivery.[20] If the engagement is terminated for some or other reason, the gifts are not returned to the man or his family as a matter of course. Blameworthiness determines whether gifts have to be returned. If the man is to be blamed for the termination of the engagement, the gifts are not returned, but if the woman carries the blame, the gifts are to be returned. If the engagement is terminated by agreement, the gifts are usually returned to the giver, or the parties can reach an agreement about the matter.[21]

(b) ***Lobolo* handed over during the betrothal:** It is customary that a reasonable amount of *lobolo* is handed over before the wedding takes place. The parties can also agree that all the

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10 The so-called *bopha* cattle.
11 Bekker (1989) 98.
12 The girl would be under the supervision of the older women of the house. See Matshidze *et al* (2017) *Gender & Behaviour* 9007 and the authorities cited there.
13 Bekker and Koyana (2007) *De Jure* 141.
14 See Kruger and Oosthuizen (2011) *CARSA* 51–52 in this regard.
15 Wynberg Regional Court, Case number SHM59/11.
16 *Jezile v S* 2015 (3) All SA 201 (WCC).
17 See Matshidze *et al* (2017) *Gender & Behaviour* 9013–9014 for case studies of the original version of *ukuthwala* versus the distorted version of *ukuthwala* as well as an analysis thereof. Also see Mabasa (2015) *De Rebus* 1–5.
18 See South African Law Reform Commission *Discussion Paper on the Practice of* Ukuthwala (2015) 57.
19 The so-called "earnest cattle".
20 Olivier *et al* (1998) 13–14.
21 Olivier *et al* (1998) 17.

lobolo is to be delivered before marriage. Custom sometimes prescribes the amount. Ownership over *lobolo* property and any accrual of livestock remains vested in the giver until the conclusion of the marriage. After the marriage, the *lobolo* becomes the property of the recipient, and outside KwaZulu-Natal, any accrual is not added to the original number. The giver bears the risk of loss/deaths during the betrothal, but the recipient is obliged to report any loss of livestock.[22] Upon termination of the engagement, all the *lobolo* gifts plus the accrual have to be returned, regardless of whose fault it was.[23]

(c) **KwaZulu-Natal – *Sisa* cattle:** In terms of section 58(1) of the Codes,[24] any cattle given before the marriage has been contracted are regarded as *sisa*[25] cattle. The position is the same as in (b) above, except that any accrual forms part of the *lobolo*.[26]

5.2.3 *Ways of terminating the engagement*

(a) **Mutual agreement:** The parties may, for a variety of reasons, agree to terminate the engagement, for example, if they realise that the marriage will not be a success or if the relationship between the family groups has soured. The agreement to terminate cannot be effected without the co-operation of the woman.

(b) **Unilaterally:** The engagement can be terminated by either of the parties with or without good reason. The marriage agreement is entered into in good faith and any act of the other party contrary to this is a good reason for termination.[27]

Good reasons for the man (and his family) would be the indecent behaviour of the woman; breach of accepted norms of behaviour[28] by the woman, especially towards her future husband and his family; an unreasonable postponement of the marriage by the woman's father, more specifically when it is accompanied by demands for more *lobolo* despite delivery of the agreed or a reasonable number; and where the man, after having become engaged, has developed a serious disorder making the marriage impossible.

Good reasons for the woman and her father are where the man/his father refuses to deliver the agreed amount of *lobolo*; the man's continuous neglect of the woman or any other behaviour signifying the fact that he will be an unfit spouse; or when the man, who was unmarried at the time of the betrothal, enters into a customary marriage with another. The woman herself has to decide whether or not she wants to terminate the engagement.[29]

(c) **The death of the man or woman:** The engagement is terminated when either the man or the woman dies, but in certain communities, provision is made for substitution. The place of the deceased man or woman is usually taken by a brother or sister. Their co-operation is inevitably required.[30]

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22 Olivier *et al* (1998) 13.

23 Olivier *et al* (1998) 17. In the Cape, Transkei and Ciskei, the courts, incorrectly, also refer to these cattle as "earnest cattle" and blameworthiness also applies when considering what has to be returned. Olivier *et al* (1998) 13.

24 The KwaZulu Act on the Code of Zulu Law 16 of 1985 and the Natal Code of Zulu Law Proc R151 of 1987 (*GG* 10966 9 October 1987). However, the Codes stand to be repealed, see para 5.3.2 below.

25 Section 1 of Act 16 of 1985 defines "*sisa*" as "a custom whereby cattle or other livestock are deposited by their owner with some other person on the understanding that such person shall enjoy the use of them, but that the ownership shall remain with and increase accrue to the depositor".

26 Bekker (1989) 99; Olivier *et al* (1998) 14.

27 Bekker (1989) 101. See Olivier *et al* (1998) 14–16 for a short discussion of the reasons.

28 "*Hlonipa* rules" or "a particular form of respect". See Nkosi (2007) *International Journal of African Renaissance Studies* 204.

29 *Mehlomakulu v Jikejela* 1942 BAC (C&O) 110.

30 Olivier *et al* (1998) 16.

5.3 Customary marriage

5.3.1 *Recognition of customary marriages*

The Recognition of Customary Marriages Act came into operation on 15 November 2000 and brought to an end the uncertainties and the doubtful nature of the recognition of a customary marriage.[31] The Act provides for monogamous and polygamous[32] customary marriages that were concluded before as well as after the commencement of the Act. The Act retains the customary law requirements for customary marriages that were concluded before the commencement of the Act.[33] In order to be recognised, monogamous and polygynous customary marriages concluded after the commencement of the Act must comply with the requirements of the Act.[34] The requirements and consequences of these marriages are, in many ways, similar to those that apply to civil marriages. A customary marriage is defined as a "marriage concluded in accordance with customary law". Customary law is defined as the "customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples".[35] In terms of this definition, it is clear that "customary law" implies African customary law. A superficial reading of this section could lead to the impression that such a marriage can be concluded only by and between Africans. Section 30 of the Constitution provides, *inter alia*, that everyone has the right to take part in the cultural life of his or her choice. This means that any person who wishes to do so could get married according to customary law. It should, however, be borne in mind that section 3(1)(*b*) of the Recognition of Customary Marriages Act requires that "the marriage must be negotiated and entered into or celebrated in accordance with customary law". During registration of the customary marriage, the husband has to make a declaration stating the traditional community's rules and customs in accordance with which the marriage has been concluded. The traditional leader or his delegate (if available) and the representatives of the different marriage parties (who serve as witnesses) have to make similar declarations.[36]

The Recognition of Customary Marriages Act repeals sections 3[37] and 38[38] of the Transkei Marriage Act.[39] However, it does not specify whether marriages concluded according to the Transkei Act, where the man is a party to both a customary marriage and a civil marriage out of community of property, are valid. Such marriages are valid in the Transkei, and it is suggested that they should be regarded as valid customary marriages in terms of present law.[40]

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31 A detailed discussion of developments since the commencement of the Act is provided by Bakker (2016) *THRHR* 231–247 (Part 1) and 357–368 (Part 2).

32 "Polygamy", *strictu sensu*, means that either a man or a woman can have more than one spouse at the same time; "polygyny" means the husband is allowed to take more than one wife; "polyandry" means that a wife may have more than one husband simultaneously. Heaton (2010) 15. Also see Heaton and Kruger (2015) 13.

33 Some authors contend that there is still no clarity about the validity of certain marriages. See, e.g., Bonthuys and Pieterse (2000) *THRHR* 621–622; Maithufi (2000) *THRHR* 511.

34 Section 2 of the Recognition of Customary Marriages Act. For the requirements of a valid customary marriage, see, *inter alia*, Bekker (1989) 105–109; Olivier *et al* (1998) 17–21.

35 Section 1 of the Recognition of Customary Marriages Act.

36 The registration procedure and the various forms that have to be completed are contained in GN 6909 *GG* 21700 of 1 November 2000.

37 Section 3 of the Transkei Marriage Act permitted dual marriages under certain circumstances in the Transkei.

38 In brief, s 38 stated that the status and legal rights of women and children in dual marriages would be determined by customary law.

39 21 of 1978; s 13.

40 Bonthuys and Pieterse (2000) *THRHR* 623.

Statistics South Africa reported that the number of marriages recorded in the marriage registration system of the Department of Home Affairs for the period 2013–2015 was:[41]

	2013	**2014**	**2015**
Customary marriages	3 498	3 062	3 467
Civil unions	993	1 144	1 185
Civil marriages	158 642	150 852	138 627

5.3.2 *Requirements for customary marriages concluded before 15 November 2000*

The validity of marriages concluded before 15 November 2000 is determined by the customary law which was in force at the time of concluding the marriage.[42] Since the Zulu law is partly codified, a distinction has to be drawn between KwaZulu-Natal and the rest of the country. The requirements for a customary marriage in KwaZulu-Natal are contained in section 38 of both of the Codes of Zulu Law,[43] namely:

(a) the consent of the father or guardian of the intended wife (where such is legally necessary (if she is a minor)), which may not be withheld without good reason;

(b) the consent of the father or guardian of the prospective husband (if he is a minor); and

(c) a public declaration by the prospective wife to the official witness or witnesses at the wedding ceremony that she voluntarily submits to the marriage and that she gives her consent thereto.

Although the Codes do not expressly require it, it is in fact inconceivable that a customary marriage can be concluded without an agreement for the delivery of *lobolo*.[44]

Certain sections in the Codes have been found by the courts to be invalid[45] and the Codes stand to be repealed in their entirety by the KwaZulu-Natal Traditional Leadership and Governance Act.[46] The Codes are seen as "remnants of an apartheid South Africa."[47]

According to Olivier *et al*,[48] the requirements outside KwaZulu-Natal are:

(a) the consent of the father or guardian of the man under certain circumstances;

(b) the consent of the father or guardian of the woman;

(c) the consent of the prospective husband;

(d) the consent of the prospective wife;

(e) the handing over of the woman to the family group of the man or to the man himself (as the case may be);

(f) an agreement that *lobolo* will be delivered; and

(g) that there should be no existing civil marriage.

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41 The results are accessible at *https://www.enca.com/south-africa/marriage-stats* and *http://www.statssa.gov.za/publications/P0307/P03072014.pdf* (accessed 30 November 2017).

42 Section 2(1) and (3) of the Recognition of Customary Marriages Act.

43 The KwaZulu Act on the Code of Zulu Law 16 of 1985 and the Natal Code of Zulu Law Proc R151 of 1987. As regards customary marriages, the Codes are basically identical.

44 See 5.3.3.4 for a discussion of the institution of *lobolo*.

45 For example, s 20 of the Codes was found to be unconstitutional. See para 5.3.5 below.

46 5 of 2005, s 53(1).

47 See ch 9 on Law of Succession and Inheritance.

48 Olivier *et al* (1998) 17–21. Also see the provisions of s 31 of the Transkei Marriage Act.

5.3.2.1 Consent of the father or guardian of the man

The consent of the father or guardian of the man is, strictly speaking, no longer required. This is rather significant, as, traditionally, there used to be a legal obligation on the father or guardian of the young man to help him with the *lobolo* for his first wife. Where a man provides his own *lobolo*, the consent of his father or guardian becomes unimportant, except if the son is a minor.[49] A father's disapproval of the marriage can be used to prove that there was no agreement between the two contracting family groups.[50]

5.3.2.2 Consent of the father or guardian of the woman

The consent of the father or guardian of the woman (prospective wife) was a *sine qua non*, regardless of the age of the woman. Tacit consent could be inferred from the circumstances. If the father, for example, accepted *lobolo* or allowed the couple to live together as man and wife, consent could be inferred.[51]

The mother of the woman did not have any contractual capacity and could, in any case, not enter into marriage negotiations on behalf of the group. In *Mabena v Letsoalo*,[52] Le Roux held that a woman's mother was legally justified to negotiate for the *lobolo* and receive it in respect of the woman. She is also justified to act as the woman's guardian and in approving her marriage. Although this decision was criticised by some as a distortion of African marital law, it can also be regarded as an illustration of the application of unofficial customary law ("living law") and of the fact that customary law is not static.[53]

5.3.2.3 Consent of the prospective husband

The consent of the prospective husband, whether express or tacit (for example through behaviour), is imperative. The prospective husband may be represented at the formal wedding ceremony and need not necessarily be physically present himself.[54]

5.3.2.4 Consent of the prospective wife

In earlier days, marriages were arranged, but since official courts came into existence, presiding officials have insisted that the woman's consent is essential. Her consent may be in express terms, but it can also be inferred from the circumstances, for example that she had no objection to participating in the wedding arrangements and ceremonies.[55]

5.3.2.5 Delivery or handing over of the wife

The delivery or handing over of the wife was related to the fact that the wife had to be integrated into her husband's family in some or other way. This was usually accompanied by ceremonies. Subsequent circumstances would indicate whether she had indeed been "handed over". Couples could agree to live together before the wedding, or circumstances could prevent them from living together after the wedding. Non-integration was usually related to other factors such as neglecting to deliver the object of the *lobolo* or failure to make satisfactory arrangements relating to the *lobolo*. In some cases, the deal might have turned sour, or the parties might have

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49 *Mabena v Letsoalo* 1998 (2) SA 1068 (T).
50 Olivier *et al* (1998) 21.
51 See above.
52 1998 (2) SA 1068 (T). Also see *Fanti v Boto* 2008 (5) SA 405 (C).
53 In *Bhe v Magistrate, Khayelitsha* 2005 (1) BCLR 1 (CC) para 111, Langa referred with approval to *Mabena* as indicative of the development of customary law in accordance with the "spirit, purport, and ideals" of the Bill of Rights.
54 Olivier *et al* (1998) 22.
55 Olivier *et al* (1998) 22–23.

lost interest in each other before the marriage had been concluded. The conclusion of some marriages could be a protracted process. The process was not limited to a single event as in the case of a civil marriage ceremony.[56] In *Mabuza v Mbatha*,[57] the existence of a valid customary marriage was in dispute because of the wife's alleged non-integration into her husband's family according to the *ukumekeza* custom (which is an accepted ritual in terms of Swazi law). The court found that the parties could agree to waive the *ukumekeza* requirement and that performance of these specific rituals is not an essential requirement. The decision was criticised in that the real issue, namely whether the wife had in fact been integrated into her husband's family, had been overlooked. The integration of the wife into the husband's family runs like a golden thread through all customary marriages.[58]

5.3.2.6 Agreement that *lobolo* will be delivered

The agreement that *lobolo* will be delivered relates to the measure and not to the actual delivery of *lobolo*. The number of cattle or the amount of money required and the period of delivery differ from group to group. An agreement that *lobolo* will be handed over is the main component of the customary marriage.[59]

5.3.2.7 Non-existence of a civil marriage

A person married according to civil customs cannot enter into a customary marriage. Until 1988, parties to a customary marriage could freely conclude a civil marriage between themselves or with some other person. The civil marriage simply dissolved the preceding customary marriage.[60] Knowledge of the above requirements is still important, as the existence of a valid customary marriage concluded before the commencement of the Recognition of Customary Marriages Act has, on several occasions, been disputed in the courts.[61] An example of such a matter is the case of *Nontobeko Virginia Gaza v Road Accident Fund*.[62] The deceased was killed in a motor vehicle accident in February 2000. At the time of his death, he was married to the plaintiff by customary rites. The customary marriage was registered in terms of the Natal Code of Zulu Law[63] on 15 July 1987. The deceased was also married by civil rights to another woman. The civil marriage was contracted before the conclusion of the customary marriage with the plaintiff. Both women claimed for loss of maintenance as a result of the negligent death of their breadwinner. The trial court[64] granted absolution from the instance on the basis that the legislature "did not intend to afford a person such as the present plaintiff a right to claim for loss of support".

In terms of section 36(2) of the Natal Code of Zulu Law, a man was prohibited from contracting a customary marriage during the continuation of a civil marriage with another woman. The plaintiff's marriage to the deceased therefore seems to be invalid. Furthermore, section 31(1) of the Black Laws Amendment Act[65] provides for a partner to a customary union to claim for loss of support from any person who unlawfully causes the death of the other partner, provided such partner or such other partner is not at the time of such death a party to a subsisting marriage.

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56 Olivier *et al* (1998) 23.
57 2003 (7) BCLR 743 (C); 2003 (4) BCLR 1 (CC).
58 Bekker (2004) *THRHR* 146–150. Also see the discussion of *Fanti v Boto* 2008 (5) SA 405 (C) in 5.3.3.3.
59 Olivier *et al* (1998) 24. Also see 5.3.3.4.
60 *Nkambula v Linda* 1951 (1) SA 377 (A). For further discussion, see 5.5.
61 See, e.g., *Mabena v Letsoalo* 1998 (2) SA 1068 (T); *Mabuza v Mbatha* 2003 (7) BCLR 743 (C); *Mthembu v Letsela* 1997 (2) SA 936 (T).
62 Durban and Coast Local Division, unreported, Case number 314/04.
63 Proclamation R151 of 1987.
64 Durban and Coast Local Division.
65 76 of 1963.

Hence, as the deceased was a party to a civil marriage, the judgment of the trial court seems to be correct.

However, leave to appeal was granted by the Supreme Court of Appeal (SCA) in September 2006[66] and on 19 November 2007, without dealing with the legal issues between the parties, the SCA set the judgment of the trial court aside. The SCA ordered that any claimant who was a spouse in a customary marriage where her spouse was, at the time of his death, a spouse to a civil marriage as well, be compensated by the Road Accident Fund. The Minister of Justice and Constitutional Development was also ordered to review the continued existence of the relevant legislation within a specific time.[67]

According to Maithufi and Bekker[68] this is clearly a matter that requires the urgent attention of the legislator.

5.3.3 *Requirements for customary marriages concluded after 15 November 2000*

5.3.3.1 General

In terms of the Recognition of Customary Marriages Act, each of the parties of the marriage has to be 18 years or older, both must have consented to the customary marriage,[69] and the marriage has to be negotiated and entered into or celebrated in accordance with customary law.[70]

Spouses married according to customary law are precluded from concluding a civil marriage during the continuance of the customary marriage.[71] However, this does not prevent a husband and wife who are married in terms of customary law from converting their marriage into a civil marriage, as long as neither of them is a partner in a subsisting marriage with another person.[72]

The Act further provides that if either of the spouses is a minor, both of the parents or the guardian of that spouse have/has to consent to the marriage.[73] Despite the rules of customary law, the age of majority for men and women is now 18 years.[74]

If the consent of the parents cannot be obtained, section 25 of the Marriage Act applies.[75] Section 25 provides that the Commissioner of Child Welfare may grant consent to the marriage of a minor. If the parents, guardian or Commissioner of Child Welfare refuse/refuses to give consent, the minor can approach the court for consent. This implies that the Commissioner may withhold consent to the marriage if the parents refuse to grant consent. The court will give permission only if the refusal to give consent by the parents, guardian or Commissioner was without adequate reason and contrary to the best interests of the minor.[76] Apart from this, the

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66 See Maithufi and Bekker (2009) *Obiter* 168.

67 The continued existence of s 31 of the Black Laws Amendment Act 76 of 1963 is discussed in ch 8 on the Law of Delict.

68 Maithufi and Bekker (2009) *Obiter* 170–171.

69 Section 3(1)(*a*) of Act 120 of 1998. The requirement of consent is essential to prevent the conclusion of a forced marriage. There has to be consensus that it is going to be a *customary marriage*, otherwise the marriage will be void because of *error in negotio*: Van Schalkwyk (2003) *De Jure* 297. The age requirement was never part of customary law and is a new concept.

70 Section 3(1)(*b*) of the Recognition of Customary Marriages Act. This requirement is discussed more fully in 5.3.3.3. For a general discussion of the customary marriages in South Africa, see Rautenbach and Du Plessis 2012 *Mc Gill Law Journal* 749–780.

71 Section 3(2) of the Recognition of Customary Marriages Act.

72 Section 10(1). Also see the discussion in 5.5.

73 Section 3(3).

74 Section 17 of the Children's Act 38 of 2005. This section repeals the Age of Majority Act 57 of 1972 and commenced on 1 July 2007.

75 25 of 1961.

76 See further Van Schalkwyk (2000) *THRHR* 483–486 regarding customary marriages and the requirement of consent by a minor.

Minister of Home Affairs, or any officer in the public service authorised thereto by him or her in writing, is empowered to grant written permission to a person under the age of 18 years to conclude a customary marriage if the Minister or the said officer considers the marriage desirable and in the interests of the parties concerned.[77] Permission by the Minister or somebody authorised by him or her, however, does not exempt the parties to the marriage from the obligation to comply with other requirements stipulated by law.[78]

If a person under the age of 18 years has entered into a customary marriage without the written permission of the Minister or the relevant officer, the Minister or his or her delegate has a discretion to declare the marriage (in writing) to be a valid customary marriage if he or she regards the marriage as being desirable and in the interests of the parties concerned, and as long as it was concluded according to the Act[79] in all other respects.

If a minor concludes a customary marriage without the consent of a parent, guardian, Commissioner of Child Welfare or judge, as the case may be, the marriage is voidable and the provisions of section 24A of the Marriage Act apply.[80] Section 24A stipulates that an application for annulment must be brought by a parent, guardian or by the minor personally. The application must be lodged with the High Court within prescribed time limits set by the section. If the parents or guardian of a minor apply/applies for annulment, they must do so before the minor reaches the age of 18 years and within six weeks after they have become aware of the existence of the marriage. The minor may bring an application for an annulment at any time before he or she reaches the age of 18 years, or within three months after having turned 18.[81] The court will grant the application for annulment only if it is convinced that it is in the minor's best interests to do so.

The Recognition of Customary Marriages Act does not alter the prohibition of a customary marriage between persons on account of their relationship by blood or affinity. This is still determined by customary law.[82]

The state is not involved when the marriage is concluded: no provision is made for the services of a marriage officer, and registration of the marriage after it has been concluded is also not a requirement for the validity of the marriage. This is seen as a grave omission in the Act and a speedy amendment of the Act is neccesary, especially in view of the fact that under traditional customary law, it is difficult to ascertain at what point the marriage is concluded.[83]

Some aspects need further discussion.

5.3.3.2 Prohibition relating to blood and affinity relations

Prohibited marriages cannot be treated generally, as the laws and customs of the various ethnic groups differ. The following could serve as guidelines:

The Nguni group

Among the Thembu, Xhosa, Bomvana, Pondo and Bhaca in the Transkei, sexual intercourse with a woman in the same clan (that is, having the same *isibongo*) as the man, irrespective of how distant their relationship may be, and even if there is no relationship, is regarded as incest.[84]

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77 Section 3(4)(*a*) of the Recognition of Customary Marriages Act 120 of 1998.
78 Section 3(4)(*b*).
79 Section 3(4)(*c*).
80 Section 3(5).
81 See Heaton and Kruger (2015) 220, 227–228 for a discussion of the patrimonial consequences of a customary marriage of a minor who did not have the proper assistance to be married.
82 Section 3(6) of the Recognition of Customary Marriages Act.
83 Van Schalkwyk (2003) *De Jure* 299.
84 Bekker (1989) 123.

Among the Zulu, marriage with blood relations of any kind is strictly prohibited. A Zulu member may not marry another of the same clan nor of the clan of his mother's people.[85]

On the other hand, the Swazi consider certain marriages between relatives desirable, especially between a man and a woman belonging to the clan of his paternal grandmother or maternal grandparent of either sex.

The Sotho group

Among the Sotho and the Tswana, a man may not marry an ascendant or descendant. Cross-cousin marriages, that is, marriages between a man and a daughter of his mother's brothers, or his father's sisters, are preferred. Marriages between other cousins are allowed.

The Tsonga group

Among the Tsonga, a man may not marry the daughter of a paternal or maternal uncle or aunt.

The Venda group

The Venda also have a preferred form of marriage. It is desirable for a man to marry a woman from his maternal uncle's family.[86]

5.3.3.3 Negotiations, conclusion and celebration according to customary law

As has been pointed out above, section 3(1)(*b*) of the Recognition of Customary Marriages Act requires the marriage to be negotiated, concluded or celebrated according to customary law. Customary marriages have not been completely codified and are therefore not marriages if these requirements are not met. Without these requirements, it would be rather difficult to say whether a customary marriage existed because there are numerous similarities between the other requirements and the requirements of civil marriages. This provision has raised the indigenous negotiations and ceremonies to a statutory level.[87]

To indicate what makes a customary marriage binding and valid, we quote an excerpt from the decision in *Sila v Masuku*,[88] which should give the reader an understanding of the subject:

> [The] process of [marriage] is gradual and involves a series of changes in (1) the attitude of the two contracting groups towards each other; (2) the actual transaction which consists of the exchange of the rights in the woman for cattle and thereafter follows, (3) the adjustment of the woman in her new office: (a) her elevation from maidenhood to wifehood; (b) her departure from and farewell to the group and its ancestors; and (c) her introduction to the new group and its ancestors and her affiliation thereto.

These are still the underlying components of a customary marriage. There are usually three distinct stages:

(a) The first stage, as described in *Sila v Masuku,* "involves visits, pourparlers and the exchange of social courtesies, all designed to establish concord between the groups, culminating in the consent of the groups to the marriage".

(b) In the second stage, the extent of the *lobolo* is arranged. This is the most important legal aspect of the marriage and is the contract proper.[89] It is often accompanied by other social and religious ceremonies, but as between the groups, the contracting parties, this stage completes the transaction. As recently as 1998, it was stated that "negotiations to determine the amount of *lobolo* (bride wealth) still form the basis of most Zulu weddings. Although many rituals and ceremonies precede a wedding, only once agreement on the *ilobolo* has been reached does the engagement become official".[90]

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85 Bekker (1989) 124.
86 Bekker (1989) 125.
87 Bekker (2004) *THRHR* 146.
88 1937 NAC (N&T) 121.
89 Also see Himonga and Nhlapo (eds) (2014) 188–191 for a discussion of *lobolo* as a customary law contract.
90 De la Harpe *et al* (1998) 122. In general, also see Vorster *et al* (2000).

Although *lobolo* is not mentioned as a requirement for a customary marriage in the Recognition of Customary Marriages Act, it is obviously a requirement.[91]

(c) The third stage involves the bride in person and not the groups as contracting parties. She must formally leave her ancestral family home. This is usually accompanied by some symbolic ritual. Thereafter she is aggregated to her husband's group, again symbolised by rituals. Once she is aggregated, she "belongs" to her husband's group. Any children born to her belong to the husband's group, and even death does not dissolve the marriage.[92]

In *Fanti v Boto*,[93] the importance of performing customary practices, ceremonies and rituals was again emphasised. The non-performance of the ceremonial handing over of the bride to the husband's family and the fact that there was no agreement on or *lobolo* paid, resulted in a finding that no customary marriage came into existence. Criticism against the judgment is that although it was alleged that the marriage was contracted in 2005, no mention was made of the Recognition of Customary Marriages Act and the requirements stipulated therein.

In *Motsoatsoa v Roro*[94] the court dismissed the application for registration of a customary marriage as the handing over of the bride in the presence of the families of both spouses did not take place, in spite thereof that the *lobolo* negotiations had been done and part of it had been delivered. The court held that a wife cannot hand herself over; she must be accompanied by family members.[95]

In *Ntoagae v Makabanyane*,[96] the court referred to *Fanti v Boto* and *Motsoatsoa v Roro* to also come to the conclusion that a customary marriage could not have been concluded where the bride was not handed over to the bridegroom's family. The court found that the applicant's argument "that the deceased handed herself over by residing with him cannot stand."[97] The court came to this conclusion even though *lobolo* was paid and referred to the fact that a customary marriage is not only about the parties themselves but "envelopes [*sic*] the families of the respective parties," hence this requires the involvement of both families "from the inception of the *lobola* negotiations to the ultimate handing over of the bride."[98] Therefore the court found that the mother of the deceased could bury the deceased as the applicant had not established a right to do so.[99]

In *Mkabe v Minister of Home Affairs*[100] however, the court stated that the handing over of the bride cannot be over emphasised and also referred to the financial constraints and huge cost of traditional ceremonies.[101] The court found that there was indeed a customary marriage in light of the other rituals performed as well as the fact that part of the *lobolo* was paid.[102] The court in *Mkabe* referred to the *Mabuza* case where it was stated that "it is inconceivable that *ukumekeza* has not evolved and that it cannot be waived by agreement between the parties and/or their families in appropriate cases".[103] The court in *Mkabe* found that the handing over of the bride to

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91 Also see Bekker and Koyana (2014) *THRHR* 28–30.
92 Bekker (1989) 108–109.
93 2008 (5) SA 405 (C).
94 [2011] 2 All SA 324 GSJ paras 19–24.
95 *Motsoatsoa v Roro* 2011 (2) All SA 324 (GSJ) para 20. Also see Heaton (2011) *Annual Survey of SA Law* 475–476 in this regard.
96 [2015] ZANWHC 78 (12 November 2015).
97 Paragraph 15.
98 Paragraph 15.
99 Paragraph 16.
100 [2016] ZAGPPHC 460 (9 June 2016) (hereafter *Mkabe*).
101 Paragraph 38.
102 Paragraphs 39–40.
103 Paragraph 34.

the family of the plaintiff was condoned and/or waived by the parties.[104] However the *Mabuza* case was, as stated earlier, criticised in that the real issue, namely whether the wife had in fact been integrated into her husband's family, had been overlooked.[105]

5.3.3.4 *Lobolo*

The importance of the *lobolo* custom is obvious from the previous paragraph. In the Recognition of Customary Marriages Act,[106] *lobolo* is defined as:

> . . . property in cash or in kind, whether known as *lobolo*, *bogadi*, *bohali*, *xuma*, *lumalo*, *thaka*, *ikhazi*, *magadi*, *emabheka* or by 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.

In the case of the man's first marriage, it is customary that his father takes part in the marriage negotiations and also provides the *lobolo*. If the man is a major and economically self-sufficient, he undertakes the negotiating himself. Traditionally, *lobolo* consisted of cattle, which were occasionally supplemented with sheep, horses or money. Nowadays, *lobolo* consists of money, property or both, but is generally still referred to as "cattle".[107] There are differing approaches to the size of the *lobolo* and how it is determined. The size can be determined in various ways,[108] such as negotiation procedures and agreement between the parties[109] or by tradition.[110]

It is probably impossible and unwise to provide a narrow description of the meaning and function of the *lobolo* custom. Olivier *et al*[111] summarise the traditional functions of *lobolo* as follows:

> It serves to legalise the marriage, to legitimate the children born of the woman, to act as a form of compensation in a general sense, to place the responsibility upon her father to support her if it should become necessary, to stabilise the marriage, and to ensure proper treatment of the wife by the husband and his family. It is clear, however, that the primary function of the *lobolo* is to transfer the reproductive capacity of the woman to the family of her husband; in other words, there is a direct correlation between (a) the transfer of *lobolo*, and (b) the reproductive potential of the woman.[112]

There are diverging opinions among writers about whether the handing over of *lobolo* is an essential requirement for the validity of a customary marriage and whether it is a relative requirement, which naturally belongs to the matrimonial agreement, but does not affect the contractual validity of the marriage and can therefore be amended by agreement between the parties.[113]

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104 *Mkabe*, para 39.

105 See 5.3.2.5 above.

106 Section 1 of the Recognition of Customary Marriages Act.

107 Olivier *et al* (1995) 28; Mofokeng (2005) *THRHR* 277–288.

108 Olivier *et al* (1995) 30–31.

109 Various groups use these methods, including the Tsonga, Ndebele, Swazi and some Xhosa communities. The KwaZulu-Natal Codes also provide that *lobolo* can be determined by means of negotiations, but prescribes the maximum number of cattle that may be received in specific instances. Also see the Transkei Marriage Act 21 of 1978.

110 Including the Hlubi and the Venda. It can also be determined unilaterally by the man's family, e.g., the Tswana. Among some Xhosa communities, it is not agreed upon beforehand, but depends on the circumstances. These communities follow the *theleka* custom according to which the wife's father is permitted to remove the wife and her children from time to time and "impound" her. The husband has to deliver additional *lobolo* for their return. This process continues until the wife's family has received a reasonable amount of *lobolo* in this manner.

111 Olivier *et al* (1995) 38–39.

112 For an evaluation of the present functions of *lobolo*, see Labuschagne (1991) *THRHR* 545–550; Knoetze (2000) *TSAR* 532–542; Mofokeng (2005) *THRHR* 277–288; Bekker and Boonzaaier (2007) *De Jure* 283–285.

113 Vorster and De Beer (1988) *SA Journal of Ethnology* 182–188; Knoetze (2000) *TSAR* 532–542; Church in Sanders (ed) (1981) 29; Bekker (1989) 107; Van Schalkwyk (2003) *De Jure* 299–301.

Although the institution of *lobolo* has traditionally been regarded by the various communities as an essential requirement for a customary marriage,[114] it is not expressly provided for in the Recognition of Customary Marriages Act, and the debate as to whether it is an essential requirement continues.[115] Dlamini[116] is of the opinion that the fact that *lobolo* is not an express requirement for a valid customary marriage implies that *lobolo* in the customary marriage fulfils the same function as in civil marriages. This is the approach that was previously accepted in KwaZulu-Natal.[117] For a civil marriage, *lobolo* is not a necessity. However, Africans still regard *lobolo* as indispensable, even for a civil marriage. The courts have decided that it is a subject of a separate agreement and subsidiary to a civil marriage.[118] Therefore, *lobolo* has social implications only, for example, serving as a sign of appreciation and enhancement of the wife's dignity. It also acts as a cultural symbol to obtain the approval of and the gift of fertility from the ancestral spirits. Traditionally, *lobolo* transfers the authority that the family head has over his daughter to her husband, and the status of a wife is therefore subject to a deep-rooted tradition of patriarchy. For this reason, *lobolo* is often regarded, especially by feminists, as a way of reinforcing the authority of the husband over his wife.[119] Research undertaken by the Law Reform Commission has shown that African women do not agree as to the effect of *lobolo* on their status. Some hold the view that the giving of *lobolo* enhances their status, while others find it demeaning and they argue that they are treated as mere pieces of property.[120] Empirical research by Prinsloo, Van Niekerk and Vorster, published in 1998, showed that the greater majority of African women (85%) and African men (82,2%) do not regard the *lobolo* institution as demeaning of the wife's dignity and that in fact *lobolo* enjoys general support.[121]

Additional criticism against the *lobolo* custom involves its changing composition. The fact that these days it is usually paid in cash leads to the emphasis on the economic aspect.[122] Originally, commercialising the custom was opposed. At present, the economic side has influenced the custom to such an extent that the amounts to be paid have, in some instances, become excessive. Therefore, it may take some time to gather the *lobolo*, which in its turn causes the proliferation of cohabitation and uncommitted relationships. This instability promotes additional social problems.[123] Limiting the extent of the *lobolo* through legislation will most probably be ineffective as it cannot be successfully enforced.[124]

The reason for the continued popularity of *lobolo*, in spite of changes in African communities, is that for many Africans *lobolo* is an essential constituent of a valid marriage. Even if there is full compliance with all the prescribed requirements of a valid marriage, most Africans will still not regard it as a "real" marriage if no arrangements have been made for the payment of *lobolo*.[125]

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114 Vorster and De Beer (1988) *SA Journal of Ethnology* 182–188.

115 Mofokeng (2005) *THRHR* 277–288; Horn and Janse van Rensburg (2002) *TRW* 170–179.

116 In Bekker *et al* (eds) (2002) 41.

117 Dlamini (1984) *De Jure* 148.

118 *Fuzile v Ntloko* 1944 NAC (C&O) 2; *Raphuti v Mametsi* 1946 NAC (T) 19; *Matchika v Mnguni* 1946 NAC (N&T) 78; *Mbonjiwa v Scellam* 1957 NAC (S) 41; *Sekupa v Jonkman* 1966 NAC (C) 20; *Khumalo v Ntshalintshali* 1971 NAC (C) 59.

119 Knoetze (2000) *TSAR* 536.

120 South African Law Commission *Project 90: Discussion Paper 74* (1997) 41.

121 Prinsloo, Van Niekerk and Vorster (1998) *De Jure* 314; (1997) *De Jure* 99. However, the situation might have changed, and fresh research is needed in this regard.

122 See e.g. Reddi (2007) *Obiter* 511–512.

123 Labuschagne (1991) *THRHR* 550; Dlamini (1985) *CILSA* 365; South African Law Commission *Project 90: Report on customary marriages* (1998) 51–52; Jansen and Ellis (1999) *TRW* 46–47.

124 Jansen and Ellis (1999) *TRW* 46–47 and the authorities cited there.

125 Also see *Southon v Moropane* (14295/10) 2012 ZAGPJHC 146 para 81 (hereafter *Southon*).

In *Southon v Moropane*[126] the court indicated that provision of the *lobolo* in part will not render a customary marriage invalid as long as there is an undertaking to provide the agreed *lobolo*. The court in *Mkabe v Minister of Home Affairs*[127] also confirmed that payment of *lobolo* in full cannot be such an essential requirement as to invalidate a customary marriage.

Lobolo therefore embodies and expresses the views and convictions of the African community in terms of the distinction between a real and binding marriage and an informal relationship.[128] The cultural importance of *lobolo* should not be under-estimated.[129] For this reason, the South African Law Reform Commission felt that it would be premature to abolish it without further ado. The dismantling of *lobolo* should be left to other forces, but the Commission does not see it as a requirement for a valid customary marriage.[130] In terms of section 1 of the Law of Evidence Amendment Act,[131] the courts are prohibited from declaring this institution as being inconsistent with public policy. Bekker and Koyana[132] predict that the constitutionality of the institution will be scrutinised sooner or later.

5.3.4 *Registration of a customary marriage*

A customary marriage entered into before the commencement of the Act had to be registered at the Department of Home Affairs before 15 November 2002.[133] A customary marriage concluded since the commencement of the Act, has to be registered within three months after such conclusion or within such longer period as determined by the Minister from time to time in the *Gazette*.[134]

Although the Act provides for registration, this is not a requirement for a valid customary marriage.[135] A registration certificate serves as *prima facie* proof of the existence of a customary marriage and of the particulars contained therein. It makes it easier to prove the existence of a marriage.[136] The spouses of a customary marriage are placed under a duty to ensure that their marriage is registered.[137] Any spouse may apply for the registration by completing the prescribed form and supplying the prescribed information as well as any additional information that the registration official may require (to allow him or her to ascertain whether the marriage exists).[138] Should the registration official be satisfied that the spouses have concluded a valid customary marriage, then he or she must register the marriage and issue them with a registration

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126 *Southon* paras 82–83.

127 *Mkabe* para 35.

128 Dlamini (1984) *De Jure* 154–155. Also see Mofokeng (2005) *THRHR* 279–280; Bekker (1989) 107 and Bennett (1995) 118, where he observes "[t]o the African way of thinking, the most important ingredient of a valid marriage is bridewealth, the time-honoured practice that gives the union its distinctively African character".

129 Knoetze (2000) *TSAR* 539.

130 South African Law Commission *Project 90: Report on customary marriages* (1998) 61. However, see Mofokeng (2005) *THRHR* 277–288.

131 Law of Evidence Amendment Act 45 of 1988.

132 Bekker and Koyana (2014) *THRHR* 31.

133 The registration period was originally limited, in s 4(3)(*a*), to one year after the commencement but the period was extended by GN 1228 *GG* 22839 of 23 November 2001.

134 Section 4(3)(*b*) of the Recognition of Customary Marriages Act.

135 Section 4(9). With regard to the registration requirement in the Transkei Marriage Act 21 of 1978, there is no unanimity: see the minority judgment of Combrinck in *Wormald v Kambule* 2006 (3) SA 562 (SCA) 27–37. After 15 November 2000, s 4(9) of Act 120 of 1998 is also applicable in the Transkei.

136 Section 4(8). In the absence of a registration certificate, the existence of the marriage can be proven in other ways. This can, however, be a difficult task: see *Baadjies v Matubela* 2002 (3) SA 427 (W) De Koker (2001) *TSAR* 257.

137 Section 4(1) of the Recognition of Customary Marriages Act.

138 Section 4(3).

certificate which contains the prescribed particulars such as their identity, the date of the marriage, any *lobolo* agreed upon and other prescribed particulars.[139]

In addition, the Act provides that if a customary marriage is not registered, any person who has sufficient interest in the matter may apply to the registration official to determine the existence of the marriage. If the registration official is convinced that a valid marriage exists or did exist between the spouses, he or she must register the marriage and issue a registration certificate.[140] Should the registration official not be convinced that a valid customary marriage had been concluded between the parties, he or she must refuse to register the purported marriage.[141] The court can order the registration or cancellation of the registration of a customary marriage if such application has been made and after the court has investigated the matter.[142]

The Act determines that the Minister of Justice, in consultation with the Minister of Home Affairs, may make regulations relating to: the requirements to be complied with and the information to be furnished to the registering officer in respect of the registration of a customary marriage; the manner in which the official must satisfy himself or herself as to the existence or validity of the customary marriage; the manner in which any person, including any traditional leader, may participate in the proof of the existence or in the registration of any customary marriage; the form and content of certificates, notices, affidavits and declarations required for the purposes of the Act; the custody, certification, implementation, rectification, reproduction and disposal of any document relating to the registration of customary marriages or of any document prescribed in terms of the regulations; any matter that is required or permitted to be prescribed in terms of the Act; and any matter that should be prescribed for the effective registration of customary marriages or the efficient administration of the Act.[143]

Unfortunately, spouses (and their children) whose marriages are not registered might have valid marriages according to the law, but the full enjoyment of their rights is sometimes restricted as a registration certificate is necessary to, for example, access pension benefits.[144] A massive publicity campaign[145] regarding the importance of registration is desperately needed.

The fact that one party can apply for registration, enhances the chance of a fraudulent registration of an alleged customary marriage.[146]

An alternative to late registration is to obtain a court order that the customary marriage be registered.[147] On account of the exorbitant costs of this option, it is virtually inaccessible for poor and middle-class people and the position is currently unsatisfactory. Many customary marriages are in fact not registered and, as indicated, this aggravates the plight of people who have to prove the existence of the marriage to claim their rights.[148]

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139 Section 4(4) of the Recognition of Customary Marriages Act.
140 Section 4(5).
141 Section 4(6).
142 Section 4(7).
143 Section 11(1). These regulations were published in GN 6909 *GG* 21700 of 1 November 2000.
144 Müller-van der Westhuizen and Nhlapo (2016) *Journal for Juridical Science* 12 and the authorities cited there.
145 Maithufi and Bekker (2009) *Obiter* 174.
146 De Kock (2007) *Without Prejudice* 52–53.
147 Section 4(7)(*a*) of the Recognition of Customary Marriages Act.
148 Maithufi and Bekker (2009) *Obiter* 174.

5.3.5 *Equal status and competencies of spouses*

In the past, the wife in a customary marriage was subject to the marital power of the husband and was regarded as a perpetual minor.[149] Section 6 of the Recognition of Customary Marriages Act now provides that the wife in a customary marriage has:

> On the basis of equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity, including the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any powers that she might have at customary law.

This is in accordance with the equality clause as contained in section 9 of the Constitution. The proviso that the wife's status is subject to the matrimonial property system means that sections 6 and 7(1) go hand in hand. Section 7(1) provides that the patrimonial consequences of a customary marriage which was concluded before the commencement of the Act are subject to customary law. This means that the husband remains the family head and controls all family property. The wife's capacity to acquire and deal with property and her contractual capacity are therefore severely restricted by this section.[150]

In *Gumede v President of the Republic of South Africa*,[151] section 7(1) was declared unconstitutional as far as it relates to monogamous customary marriages. All monogamous customary marriages entered into before the Act came into operation are, as from 8 December 2008 (the date of the judgment), *ipso facto* in community of property and of profit and loss between the spouses.[152] It has no bearing on customary marriages which had been terminated by death or by divorce before the date of the judgment.[153] Section 7(2) was also declared unconstitutional insofar as it distinguishes between a customary marriage entered into before and after the commencement of the Act. The court in *Gumede* took note of the fact that the judgment perpetuates the existing inequality between women in monogamous marriages and those in polygynous marriages but declared that "the proprietary consequences of polygamous relationships will be regulated by customary law until parliament intervenes."[154]

To date, Parliament has not intervened with respect to the issue of polygamous customary marriages, although it was addressed in the High Court in 2016. The court, in *Ramuhovhi v President of the Republic of South Africa*,[155] found that section 7(1) of the Recognition of Customary Marriages Act is inconsistent with the Constitution with respect to polygamous customary marriages as well. It found that the provision is discriminatory also on the basis of race and/or ethnic or social origin insofar as women in "old" polygamous customary marriages are excluded from the protection afforded to women in monogamous marriages.[156] The declaration of constitutional invalidity of section 7(1) by the High Court was confirmed by

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149 Section 11(3) of the Black Administration Act; s 27 of the Natal Code of Zulu Law Proc R195 of 1967.

150 Heaton and Kruger (2015) 229; Vorster (1999) *Obiter* 90; Horn and Janse van Rensburg (2002) *TRW* 61; Jansen (2002) *TRW* 115; Pienaar (2003) *Stell LR* 262–264. Also see the discussion at 5.3.6.1. Doubts have been raised as to whether the full implications of this section were considered. Mqeke (1999) *Obiter* 61 – 64.

151 2009 (3) BCLR 243 (CC) (hereafter *Gumede*).

152 In all monogamous customary marriages, whether concluded before or after the commencement of the Act, the capacity to enter into contracts and to litigate of both spouses is limited by the Matrimonial Property Act 88 of 1984 where the marriage is in community of property.

153 Paragraph 52 of *Gumede*.

154 Paragraph 56. Also see Bekker and Van Niekerk (2009) *SAPR/PL* 206–222. The court in *Gumede* also declared s 20 of both KwaZulu-Natal Codes on Zulu Law unconstitutional. S 20 provides that the family head is the owner of and has control over all family property in the family home. S 22 of the Natal Code, which provides that the inmates of a kraal are in respect of all family matters under the control of and owe obedience to the family head, was also declared unconstitutional.

155 2016 (6) SA 210 (LT).

156 Paragraph 46.

the Constitutional Court[157] on 30 November 2017.[158] The Constitutional Court suspended the declaration of constitutional invalidity for a period of 24 months to afford Parliament an opportunity to correct the defect giving rise to such invalidity.[159] If Parliament fails to address the defect, the regime ordered by the court will continue to apply after the period of suspension.[160] Wives and husbands will have joint and equal ownership and other rights to, and joint and equal rights of management and control over, marital property. The order does not invalidate a winding up of a deceased estate that has been finalised or the transfer of marital property that has been effected.[161] However this does not apply to any transfer of marital property where, at the time of transfer, the transferee was aware[162] that the property was subject to a legal challenge on the same grounds as in this case.[163] Any interested person may approach the court for a variation of the order in the event that she or he suffers harm not foreseen in the judgment.[164]

In African communities, there is traditionally a deeply embedded patriarchal way of living. Irrespective of laws and judgments, patriarchal values will continue to influence these communities but not in the same way as it did in the past. The status of women in these communities has changed dramatically. As a result of economic and social circumstances, a large number of women have assumed responsibilities and powers previously reserved for males.[165]

5.3.6 *Proprietary consequences*

5.3.6.1 Marriages concluded before the commencement of the Act

Section 7(1) of the Recognition of Customary Marriages Act provides that the patrimonial consequences of customary marriages which were concluded before the commencement of the Act are still governed by customary law.[166] As explained above,[167] section 7(1) was, until recently, only applicable to polygynous customary marriages, which implied that such a marriage is neither in nor out of community of property.[168]

Traditionally, with respect to polygynous customary marriages, the position is as follows: The husband has to establish separate houses with their separate house property. He is the family head of all the houses regardless of which form of ranking system applies to the particular family group. He is also in control of all house property and family property of his household. House property is primarily used for the benefit of the house to which it belongs. The family

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157 *Ramuhovhi v President of the Republic of South Africa* 2013 (4) BCLR 431 (CC).
158 Paragraph 71.
159 Paragraph 71.
160 Paragraph 71.
161 Paragraph 71.
162 The court referred to its decision in *Bhe v Magistrate, Khayelitsha* 2005 (1) BCLR 1 (CC) where it was stated that it will be just and equitable to limit the retrospectivity of the order so that the declaration of invalidity does not apply to any completed transfer to an heir who is *bona fide* in the sense of not being aware that the constitutional validity of the provision in question was being challenged. It is fair and just that all transfer of ownership obtained by an heir who was on notice ought not to be exempted. See *Ramuhovhi v President of the Republic of South Africa* 2018 (2) BCLR 217 (CC) para 59.
163 *Ramuhovhi v President of the Republic of South Africa* 2017 ZACC para 71.
164 Paragraph 71.
165 Bekker and Van Niekerk (2009) *SAPR/PL* 212.
166 Section 7(1) of the Recognition of Customary Marriages Act.
167 See 5.3.5.
168 Bekker (1989) 71.

head must administer family property to the collective advantage of the family.[169] The family head has a duty to keep the estates of the various houses in his family home separate and to settle disputes relating thereto.[170]

However, the Constitutional Court in the 2017 case of *Ramuhovhi v President of the Republic of South Africa* ordered that wives and husbands will have joint and equal ownership and other rights to, and joint and equal rights of management and control over marital property which will be exercised as follows: (i) in respect of house property, by the husband and the wife of the house concerned, jointly and in the best interests of the family unit constituted by the house concerned; and (ii) in respect of all family property, by the husband and all the wives, jointly and in the best interests of the whole family constituted by the various houses.[171] Each spouse retains exclusive rights to her or his personal property.[172] The order does not invalidate a winding up of a deceased estate that has been finalised or the transfer of marital property that has been effected.[173] However this does not apply to any transfer of marital property where, at the time of transfer, the transferee was aware[174] that the property was subject to a legal challenge on the same grounds as in this case.[175] Any interested person may approach the court for a variation of the order in the event that she or he suffers harm not foreseen in the judgment.[176] With respect to a monogamous customary marriage, there was a single undivided economic unit under the control and almost complete discretion of the husband as head of the family. This means that whatever is in the household belongs to the family pool, irrespective of the manner in which the property was acquired by the individual members. The head of the household is required to administer the matrimonial estate for the common good of the family.[177] The main limitation on his management is a general duty to maintain dependants. Thereafter he can use the property to settle his own *lobolo* debt and any damages due for wrongs committed by members of the house. Then he is free to use the assets to satisfy his personal wants and needs. He has a moral duty to consult his wife on matters of major importance. Section 6, which purports to provide equality, is in effect useless when the patrimonial consequences of the marriage are subject to customary law.[178] In *Gumede v President of the Republic of South Africa*, section 7(1) was declared unconstitutional as far as it relates to monogamous customary marriages. All monogamous customary marriages entered into before the Act came into operation are, as from 8 December 2008 (the date of the judgment), in community of property and of profit and loss between the spouses. The court order has no bearing on customary marriages which had been terminated by death or by divorce before the date of the judgment.[179] Section 7(2) was also declared

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169 Bekker (1989) 71; Mqeke (1999) *Obiter* 63–64; *Sijila v Masumba* 1940 NAC (C&O) 42; *Mpungose v Mpungose* 1946 BAC (N&T) 37. Heaton and Kruger (2015) 222 – 223. See ch 6 on Law of Property for a discussion of the difference between family property, house property and personal property and the rights and duties of the family head relating to each category.

170 See Olivier *et al* (1995) 60–61 for a discussion of the family head's right of control and disposal.

171 *Ramuhovhi v President of the Republic of South Africa* 2017 ZACC para 71.

172 Paragraph 71.

173 Paragraph 71.

174 See explanation in footnote 168 in 5.3.5 above.

175 *Ramuhovhi v President of the Republic of South Africa* 2017 ZACC para 71.

176 Paragraph 71. See paras 52–65 of the judgment for more insight into the court's order, especially the issue of retrospectivity.

177 Mqeke (1999) *Obiter* 63. In *Mpungose v Mpungose* 1946 BAC (N&T) 37–40, the court said the following: ". . . native social system regards the family as a whole and all members of the family participate in its possessions. The head of the family is virtually a trustee or director of the possessions of the family and not, as in common law, the owner."

178 Pienaar (2003) *Stell LR* 269; Jansen (2002) *TRW* 118–122; Akinnusi (2000) *TRW* 147–148 and Mqeke (1999) *Obiter* 61–64.

179 Paragraph 52 of *Gumede*.

unconstitutional insofar as it distinguishes between a customary marriage entered into before and after the commencement of the Act. The words "entered into after the commencement of the Act" where therefore declared unconstitutional. The patrimonial consequences of monogamous customary marriages entered into before and after the commencement of the Act, are now the same.[180]

Spouses in a customary marriage entered into before the commencement of the Act may apply to a court jointly for leave to change their matrimonial property system. If the husband is a spouse in more than one customary marriage, all persons with a sufficient interest in the matter, and particularly the applicant's existing spouses, must be joined in the proceedings.[181] The court will grant the application only if (i) there are sound reasons for the proposed change, (ii) sufficient written notice of the proposed change has been given to all creditors of the spouses for amounts exceeding R500 or such amount as may be determined by the Minister of Justice by notice in the *Gazette*, and (iii) no other person will be prejudiced by the change. Parties are authorised to enter into a written contract in terms of which the future matrimonial property system of their marriage or marriages will be regulated on conditions determined by the court.[182] It is suggested that few, if any, marriages will be changed in this way as doing so would be expensive. It will also be difficult for wives in a polygynous marriage to convince their spouses to relinquish sole control of the matrimonial assets.[183]

With respect to the position in the former Transkei, the Supreme Court of Appeal, in *Holomisa v Holomisa*[184] held that a civil marriage concluded in 1995 between the appellant and the respondent was a marriage out of community of property. This was in terms of section 39(1) of the Transkei Marriage Act which was in operation within the territory of the former Transkei.

5.3.6.2 Marriages concluded after the commencement of the Act

5.3.6.2.1 A monogamous customary marriage

If a customary marriage (before or after commencement of the Act) is concluded and a spouse is not a party to any other existing customary marriage, the marriage is in community of property and of profit and loss between the spouses, except if such consequences are specifically excluded by the spouses in an ante-nuptial contract.[185] This implies a drastic departure from customary law regarding the patrimonial regime of a customary marriage.[186] Chapter 3 and sections 18, 19, 20 and 24 of Chapter 4 of the Matrimonial Property Act[187] apply to customary marriages in community of property. For civil and customary marriages in community of property the rules which govern the following are exactly the same: joint control of the communal estate, litigation by or against a spouse, compensation for non-patrimonial damages paid or recovered by a spouse, delictual liability of spouses and statutory protective measures that spouses can apply against each other.[188]

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180 The position as set out in 5.3.6.2.1 is also applicable to these marriages.

181 Section 7(4) of the Recognition of Customary Marriages Act.

182 According to Van Schalkwyk (2003) *De Jure* 307, spouses who had concluded polygynous marriages before the commencement of the Act can only change their matrimonial property system to a complete separation of property.

183 Jansen (2002) *TRW* 121. Also see *Ramuhovhi v President of the Republic of South Africa* para 42.

184 [2017] ZASCA 64 (29 May 2017).

185 Section 7(2) of the Recognition of Customary Marriages Act; see s 10(2). Also see 5.3.6.1.

186 Some writers doubt the wisdom of the provision that a customary marriage should be in community of property; see Mqeke (1999) *Obiter* 64.

187 88 of 1984.

188 Sections 7(3) and 10(3) of the Recognition of Customary Marriages Act.

Section 21 is applicable when spouses, having been married after the commencement of the Act, wish to change their matrimonial property system.[189]

5.3.6.2.2 A polygynous customary marriage

A husband[190] in an existing customary marriage, who wishes to conclude a further customary marriage with another woman after the commencement of the Act, has to apply to the court to have a written contract approved which will regulate the future matrimonial property system of his marriages.[191] The court must, in the case of an existing marriage in community of property or out of community of property but subject to the accrual system, terminate the matrimonial property system and effect a division of the matrimonial property. In doing so, the court must ensure a fair division, taking into account all relevant circumstances of the family groups which would be affected if the application is granted. The court has the discretion to allow further amendments to the terms of the contract and grant the order subject to conditions as the court may deem just, or refuse the application if the interests of the parties would not be sufficiently protected by means of the proposed contract.[192]

All persons having a sufficient interest in the matter (especially the applicant's existing spouse or spouses and his prospective spouse) must be joined in the proceedings.[193] If the court grants the application, the registrar or the clerk of the court must furnish each spouse with the court order including a certified copy of the contract and the same must be sent to each registrar of deeds of the area in which the court is situated.[194]

The Act is silent about the consequences if there is no approved contract in terms of section 7(6) of the Act. However, in light of the prejudice to the second wife, the Supreme Court of Appeal, in *Ngwenyama v Mayelane,*[195] found that section 7(6) of the Act is not a validity requirement for a further customary marriage and found the second marriage to be a valid customary marriage. According to the Supreme Court of Appeal, if the husband has failed to make the application to court in terms of section 7(6) of the Act, the applicable regime is one of out of community of property and of profit and loss.[196] The matter went to the Constitutional Court (*MM v MN*[197]) and although the SCA judgment regarding section 7(6) not being a validity requirement for a further customary marriage was confirmed, the second marriage was found to be invalid, based on the fact that the first wife was not informed about the second marriage.[198] The Constitutional Court held that the Xitsonga customary law had to be developed to require the permission of the first wife to a consecutive marriage concluded by her husband.[199] The order regarding the development of Xitsonga customary law in this respect operates prospectively[200] (hence from the date of judgment[201]).

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189 Section 7(5) of the Recognition of Customary Marriages Act. For a discussion of the options available to marital parties, see Heaton and Kruger (2015) 221– 226; Van Schalkwyk (2000) *THRHR* 490; Van Schalkwyk (2003) *De Jure* 307–308. Also see Heaton and Kruger (2015) 227–228 for a discussion of the patrimonial consequences of the customary marriage of a minor who did not have the required assistance to get married.

190 See Bekker and Koyana (2014) *THRHR* 31–32 regarding polygyny and equality.

191 Section 7(6) of the Recognition of Customary Marriages Act.

192 Section 7(7).

193 Section 7(8).

194 Section 7(9).

195 2012 (4) SA 527 (SCA). Also cited as *MN v MM*.

196 Paragraph 38. Also see *Ramuhovhi v President of the Republic of South Africa* 2018 (2) BCLR 217 (CC) paras 31, 35.

197 2013 4 SA 415 (CC) para 89.

198 See para 87.

199 Paragraph 89.

200 Paragraph 89.

201 30 May 2013.

The consequences of the final judgment, specifically referring to the matrimonial property system(s) applicable to such marriages, are however not without difficulties.[202] The possibility of declaring such a "marriage" a putative marriage should be considered.[203]

It would appear from section 7(6) of the Act that only one matrimonial property system is applicable for all marriages[204] (provided that the section 7(6) application was done). It would further appear that the only possible option then is total division of assets. This does not cause many practical problems, but is very unfair towards wives who do not have the opportunity of building up their own estates. In a divorce action, however, the court has the power to make an equitable order that it deems just.[205]

5.3.7 *Dissolution of customary marriages through divorce*

Section 8 contains the provisions for the dissolution of a customary marriage. These are precisely the same for marriages that were concluded before and after the commencement of the Recognition of Customary Marriages Act.

5.3.7.1 Grounds and reasons (justifications) for divorce

According to the Act, the only ground for granting an order for divorce is the irretrievable breakdown of the customary marriage.[206] The court may grant an order for divorce if it is satisfied that the marriage relationship between the parties has reached such a state of disintegration that there is no reasonable prospect of a normal marriage relationship between them.[207] While some might regard the use of irretrievable breakdown as simply being a superimposition of a civil ground of divorce on a customary marriage, this is not necessarily so. The irretrievable marriage breakdown concept has always resembled the ground for divorce in customary law. The position at traditional customary law was that a customary marriage could be dissolved only if it had totally broken down.[208] The grounds for divorce that were enumerated in the Code of Zulu Law, for example, were in conflict with the true spirit of customary law. The use in the Act of irretrievable breakdown as a ground is therefore not inappropriate. The circumstances which traditionally were seen as good reasons or justifications[209] for divorce in customary law, should still play a role when determining whether the marriage has irretrievably broken down. Olivier *et al*[210] mentions the following "grounds" on behalf of the husband: Adultery by the wife – not a single act but persistent transgressions. A single act of incest is sufficient. If the wife falls pregnant and refuses to divulge the name of the party responsible and makes it impossible for her husband to claim damages; premarital pregnancy not caused by the husband and of which he had no knowledge at the conclusion of the marriage; absconding by the wife under certain circumstances and her subsequent refusal to return to him when requested to do so by him

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202 For a discussion of the matrimonial property system(s) the contract can provide for see Heaton and Kruger (2015) 224–226. Also see Müller-Van der Westhuizen (2014) *LitNet Akademies* 155–168 and the authorities cited there.

203 Monareng (2007) *Agenda* 124–128. If the Domestic Partnerships Bill of 2008 (*GG* 30663 of 14 January 2008) is promulgated, it can benefit people in a permanent domestic partnership. Also see Müller-Van der Westhuizen (2014) *LitNet Akademies* 155–168.

204 The Act uses the singular form.

205 For a comprehensive discussion, see Heaton and Kruger (2015) 223–226 and the authorities cited there. Also see 5.3.7 below.

206 Section 8(1) of the Recognition of Customary Marriages Act.

207 Section 8(2).

208 For a discussion, see Bekker (1976) *CILSA* 346; Whelpton and Vorster (2001) *SA Journal for Ethnology* 56–61.

209 See Himonga and Nhlapo (eds) (2014) 149–150 for a brief discussion of the use of the words "grounds of divorce" in customary law.

210 Olivier *et al* (1998) paras 54 and 55.

(when he *phuthumas* her) and any behaviour on the part of the wife that amounts to the clear and unequivocal repudiation of the marriage. On behalf of the wife, the following are examples of good reasons for divorce in customary law: serious assault and physical ill-treatment by the husband; when the husband accuses the wife of witchcraft; when the husband drives his wife away and his subsequent failure to fetch (*phuthuma*) her; when the husband abandons his wife for a long time and when the husband is impotent and the wife was ignorant of the impotence before the marriage. These reasons are not a *numerus clausus.*

5.3.7.2 Jurisdiction

The Act provides that a divorce order dissolving a customary marriage can be obtained only from a high court, a family court or a divorce court.[211] This is a radical amendment of customary law. However, the Act clearly states that the provisions of section 8 may not be construed as limiting the role recognised in customary law of any person, including any traditional leader, in the mediation of any dispute (which arises prior to the dissolution of a customary marriage) according to customary law.[212]

In the past, the dissolution of a customary marriage was, with the exception of KwaZulu-Natal, an extra-judicial matter, and the State was not involved. In terms of customary law, the customary marriage was dissolved by way of agreement between the parties involved in the original marriage agreement (the prospective wife's father or guardian and the prospective bridegroom) and the return of the *lobolo* or at least one head of cattle as a symbol of the dissolution.[213]

5.3.7.3 Consequences of divorce

5.3.7.3.1 The interests of children

The Mediation in Certain Divorce Matters Act[214] and section 6 of the Divorce Act[215] are applicable to the dissolution of a customary marriage.[216] These laws deal with the interests and welfare of the children of the spouses at divorce and equate the position of children born of customary marriages with those born of civil marriages.[217] The Mediation in Certain Divorce Matters Act deals with the appointment of family advocates as well as family counsellors who assist family advocates in providing advice with regard to custody and control of minor children. The Act authorises the court to make an order regarding guardianship, custody, access and maintenance of any minor child of the marriage.[218]

In terms of customary law, the father's right to the custody and guardianship of his children was absolute and could not be taken from him. In a customary law context, it is more appropriate to say that the children belong to the family group of the father. The court, as the upper guardian of all minors, has however (long before the commencement of the Recognition of Customary Marriages Act) modified customary law in this respect by emphasising that the best interests of the children are decisive.[219] In determining the best interest of the child, the

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211 Section 8(1) read with s 1 of the Recognition of Customary Marriages Act.
212 Section 8(5).
213 Bekker (1989) 198; Olivier *et al* (1998) 67–85; *Thembisile v Thembisile* 2002 (2) SA 209 (T).
214 24 of 1987.
215 70 of 1979.
216 Section 8(3) of the Recognition of Customary Marriages Act.
217 Van Schalkwyk (2003) *De Jure* 309.
218 Also see "Maintenance" (5.3.7.3.4).
219 Section 28(2) of the Constitution; *Hlophe v Mahlalela* 1998 (1) SA 449 (T); also see Bekker (1989) 217, 227; Devenish (1998) 371; Vorster, Dlamini-Ndandwe and Molapo (2001) *SA Journal of Ethnology* 62–66; Jansen and Ellis (1999) *TRW* 47–49.

court should take African cultural values and belief systems into account, for example the link with their ancestors. An award of custody to the mother is interpreted as breaking the child's link with the family group of the father (to which the child "belongs"). It is submitted that children's interests will be best served by granting joint custody to both parents, unless there are specific reasons for not doing so.[220] The new Children's Act[221] favours the idea of awarding joint custody.[222]

5.3.7.3.2 *Patrimonial consequences*

When granting a decree for the dissolution of a customary marriage, the court has the powers contemplated in sections 7, 8, 9 and 10 of the Divorce Act and section 24(1) of the Matrimonial Property Act.[223] These are concerned with the question of the redistribution of assets and benefits of the marriage. In the case of a husband who is a spouse in more than one customary marriage, the court must take into account all the relevant factors, including any contract, agreement or order made in terms of section 7(4), (5), (6) or (7) and must make any equitable order that the court considers just.[224] In general, the court's competencies are the same as when a civil marriage is dissolved: To incorporate a settlement agreement into the divorce order, to grant a post-divorce maintenance order for the benefit of a spouse, to redistribute assets if the marriage is subject to a total separation of property, to order the forfeiture of matrimonial benefits, and to make an order as to costs. At a later stage the court may also rescind, vary or suspend a maintenance order or an order regarding the parties' children. The pension interests of the spouses are also deemed to form part of their assets.

As to the court's competence to order a redistribution of assets in a customary marriage, there are several interpretation-related difficulties.[225] Section 7(3) of the Divorce Act limits the court's redistribution power to marriages subject to complete separation of assets and is therefore also applicable to customary marriages. There is no agreement among writers as to whether this redistribution power can also apply to customary marriages concluded before the commencement of this Act. This question currently relates only to polygynous marriages. Some are of the opinion that such marriages are not subject to complete separation of assets as required in section 7(3) of the Act.[226] Others hold that the patrimonial consequences of such a marriage in effect amount to a complete separation of property and that the court therefore does have a redistribution power in such marriages. The latter viewpoint provides the fairest result. Additional support for the correctness of this viewpoint is probably the fact that at the dissolution of the marriage, the woman was not, according to customary law, entitled to take any of the family or house property with her, but only her personal belongings, when returning to her father's or guardian's family home.[227]

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220 Bekker (2008) *Obiter* 395, 403–404; Bekker and Van Zyl (2002) *Obiter* 116–117, 123.

221 38 of 2005.

222 Bekker and Boonzaaier (2007) *De Jure* 287.

223 Section 8(4)(*a*) of the Recognition of Customary Marriages Act.

224 Section 8(4); also see Vorster, Dlamini-Ndandwe and Molapo (2001) *SA Journal of Ethnology* 62–66; Heaton and Kruger (2015) 229–230.

225 See Heaton and Kruger (2015) 229–232 and the sources cited there for a comprehensive discussion.

226 In terms of *Gumede v President of the Republic of South Africa* 2009 (3) BCLR 243 (CC), all monogamous customary marriages concluded before the commencement of the Act are, as from 8 December 2008 (the date of the judgment), in community of property and of profit and loss between the spouses. Van Schalkwyk (2000) *THRHR* 496; Bonthuys (2001) *THRHR* 211; Jansen (2002) *TRW* 123.

227 South African Law Commission *Project 90: Report on customary marriages* (1998) 122; Jansen (2002) *TRW* 122; Singh (1999) *De Jure* 315.

Contrary to the position in regard to civil marriages,[228] the court's redistribution powers in regard to customary marriages is, in terms of section 8(4)(*a*), not limited to marriages concluded before the commencement of the Recognition of Customary Marriages Act and is therefore also applicable to marriages subject to complete separation of assets concluded after the commencement of the Act. This amounts to an inequality before the law and unequal protection and benefit of the law, which violates section 9(1) of the Constitution of the Republic of South Africa.[229] The differentiation may also amount to unfair discrimination based on the ground of race[230] as it is unclear whether people who are not African ("black") may enter into a customary marriage: If customary marriages are restricted to African people the racial discrimination would be direct but even if customary marriages are open to all races, there would still be indirect discrimination because customary marriages would remain largely the preserve of African people.[231]

Regarding the question of whether the provisions of section 7(7) and (8) of the Divorce Act (concerning the pension interests of the spouses) apply to customary marriages concluded before the commencement of the Act, there is a similar lack of agreement. Some[232] consider it doubtful whether these provisions apply to marriages subject to customary law, while others[233] see no reason why they should not apply. The fact that it may be strange to customary law is not sufficient reason for excluding such from the provisions.

There are also writers who maintain that forfeiture of benefits cannot be applicable to customary marriages concluded before the commencement of the Act, while another writer is of the opinion that neither the wording of section 8(4)(*a*) of the Recognition of Customary Marriages Act, nor that of section 9 of the Divorce Act suggests that.[234]

Section 8(4)(*b*) provides that where a man is a spouse in more than one customary marriage, the court must take into account all relevant factors, including any contract, agreement or order in terms of subsections 7(4), (5), (6) or (7) and must give any equitable order it deems just. Subsections 7(4)–(7) are concerned with the post-marital amendments of the spouses' matrimonial property regime where the husband had concluded a further customary marriage. Any orders in that regard are therefore relevant. When dissolving an individual marriage which is part of a polygynous marriage, the court can therefore redistribute the assets as the court deems just.[235]

5.3.7.3.3 *Return of* lobolo

In traditional customary law the dissolution of the marriage did have an effect on the return of *lobolo*. According to Olivier *et al*,[236] the following were the most important considerations:

(a) the number of children born of the marriage;

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228 In the case of civil marriages of all persons, except Africans, the redistribution competence is limited to marriages concluded before the commencement of the Matrimonial Property Act 88 of 1984 and in the case of civil marriages between Africans; it is limited to marriages concluded before the commencement of the Marriages and Matrimonial Property Law Amendment Act 3 of 1988.

229 Constitution of the Republic of South Africa, 1996. Heaton and Kruger (2015) 141–143.

230 Section 9(3) of the Constitution of the Republic of South Africa, 1996.

231 See Heaton and Kruger (2015) 141–143 for a discussion on the constitutionality of the prerequisites in s 7(3).

232 Van Schalkwyk (2000) *THRHR* 496.

233 Heaton and Kruger (2015) 231.

234 See above.

235 Nor is the court's competence to order a redistribution limited by the requirements of s 7(4) of the Divorce Act that the spouse applying for redistribution, should have contributed to the maintenance or increase of the other spouse's estate as in the case of redistribution in terms of s 8(4)(*a*) of the Recognition of Customary Marriages Act, see Heaton and Kruger (2015) 231.

236 Olivier *et al* (1998) 83–85.

(b) the amount of *lobolo* already delivered (as well as that which is still outstanding); and

(c) which party was primarily responsible for the breakdown of the marriage.

If the break-down was solely the fault of the man, he forfeited the *lobolo*. If the woman was the only one to blame, the *lobolo* had to be returned, except for the *lobolo* that could be retained in terms of the customary rules. If both were blameworthy an attempt was made to reach a settlement. As indicated above, the customary marriage was dissolved, according to customary law, by agreement between the parties involved in the original marriage agreement (the woman's father or guardian and the bridegroom). This agreement, coupled with the return of the *lobolo* (or at least one head of cattle), were regarded as symbolising the dissolution.[237] As long as the *lobolo* had not been returned, the marriage was not yet regarded as completely dissolved and the parties could still be reconciled.[238] In terms of the Act, the dissolution of a customary marriage is a judicial matter and it is not a requirement that the *lobolo* be returned. Among the Zulu, in particular, the return of *lobolo* is not seen as a requirement. The reason is that after payment of *lobolo*, the bride has to procure gifts and furniture for her parents-in-law and for the marriage. In doing so, she uses the money that came by way of *lobolo*, resulting in her father being left with nothing. Requiring the father to return *lobolo* where he has none amounts to punishing him for the indiscretion of the daughter. The approach in the Act is therefore supported.[239]

In *Thembisile v Thembisile*,[240] the court regarded the return of the *lobolo* as a necessary requirement for the dissolution of the customary marriage. This case, however, dealt with the dissolution of a customary marriage before the commencement of the Act.

Lobolo does not relate to the spouses' matrimonial property as the *lobolo* agreement is between the prospective husband and the father of the prospective bride. If the return of the *lobolo* is in dispute, the father has to be joined in the divorce proceedings.[241] It is important to note that the jurisdiction of divorce courts is limited to the granting of divorces and these courts therefore cannot decide about the return of *lobolo*. The High Court, however, has inherent jurisdiction to decide such claims.[242]

5.3.7.3.4 Maintenance

According to traditional indigenous law, the woman returned to her father's family home upon the dissolution of the marriage. Being the holder of the *lobolo*, he maintained her, and she again became a daughter in the house. The reason behind the dissolution of the marriage was to sever all ties between the spouses and there was no maintenance system between the erstwhile spouses. According to the Recognition of Customary Marriages Act, section 7(1) and (2) of the Divorce Act applies also to customary marriages. These provisions empower the court to grant a maintenance order against a spouse for the benefit of the other spouse. In granting an order for the payment of maintenance, the court has to take into account any provision or arrangement made in terms of customary law.[243] The delivery of *lobolo* to the woman's father is probably a factor that could be considered, which could undermine the woman's position.[244] In the case of a

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237 Bekker (1989) 198; Olivier *et al* (1998) 67–85.
238 See Jansen (2003) *TRW* 130–131 and the sources cited there.
239 Dlamini (1983) LLD thesis 488; also see Whelpton and Vorster (2001) *SA Journal for Ethnology* 56–61.
240 2002 (2) SA 209 (T) para 28; also see Bennett (1991) 269–270.
241 See 5.3.7.4.
242 Maithufi and Bekker (2002) *CILSA* 187.
243 Section 8(4)(*e*) of the Recognition of Customary Marriages Act.
244 Pienaar (2003) *Stell LR* 267.

maintenance order, especially with regard to children, the fact that the father had paid *isondlo*[245] to the person maintaining the child has to be taken into account.[246]

This right to claim maintenance from the other spouse is a radical change to customary law and many of the problems encountered in the maintenance court can be ascribed to it.[247]

5.3.7.4 Joinder

The court can order that anyone who has a sufficient interest in the matter be joined in the divorce proceedings.[248] This probably includes the husband's other wives as well as the woman's father as *lobolo* holder.[249]

5.3.7.5 Interim legal assistance

In *Baadjies v Matubela*,[250] it was confirmed that Rule 43 of the Uniform Rules of Court is applicable to spouses in a customary marriage, pending their divorce. Anyone of the spouses may therefore apply for maintenance *pendente lite*, a contribution to costs and interim custody of or access to a child. In *Baadjies*, however, the existence of a customary marriage could not be proved, and the application was refused.

5.3.8 *Dissolution of customary marriages by death*

The position in traditional customary law (with the exception of KwaZulu-Natal)[251] is that, at the death of any of the spouses, the marriage agreement between the two family groups continues to exist.[252] It is expected of the widow to remain with the family group of her late husband and to be available for the procreation of children for the deceased by means of the *ukungena*[253] custom. Should the wife die first, her house continues to exist, and her husband may take a seed-raiser or *seantlo*[254] to raise children for the house of the deceased (or infertile) wife. Any child born after the death of a spouse is regarded as offspring of the deceased spouse.[255] Amongst the Nguni, the husband marries a "seed raiser" and a new *lobolo* agreement is concluded. At the marriage ceremonies an announcement is made regarding the specific house for which this wife is to be a seedraiser. Amongst the Tswana and other groups, a sister of the deceased (or infertile) wife is provided as a *seantlo* by her family to bear children for the household of the deceased wife. No additional *lobolo* is paid for the *seantlo* and it is not a new marriage as with the seed

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245 Also known as *dikotlo* (Setswana). The payment of one or two beasts to a person who has raised a child by a parent who seeks to acquire custody of the child. Himonga and Nhlapo (eds) (2014) 154.

246 See Maithufi (2000) *THRHR* 515 for additional factors to be taken into account.

247 See Jansen (2002) *TRW* 122–123 and the authorities cited; Jansen and Ellis (1999) *TRW* 47–49.

248 Section 8(4)(*c*). Recognition of Customary Marriages Act.

249 Jansen and Ellis (1999) *TRW* 54–55; Maithufi and Moloi (2002) *TSAR* 609–610; Maithufi and Bekker (2002) *CILSA* 194–195.

250 2002 (3) SA 427 (W).

251 Section 36(1) of the Codes of Zulu Law provides that the death of anyone of the spouses terminates the customary marriage.

252 See Himonga and Nhlapo (eds) (2014) 153. However, according to Bekker and Boonzaaier, this idea is dying out. See (2007) *De Jure* 285.

253 Or "levirate". Also known as *kungena* and *kenela*. The practice where a man's widow cohabits with one of his brothers or some other nominated male relative, for the purposes of raising an heir. Himonga and Nhlapo (eds) (2014) 153.

254 Or "sororate". Also known as *inhlanti*. The practice of, when the wife is infertile, a younger sister or half-sister of the wife marries the husband and bears children on her sister's behalf. Himonga and Nhlapo (eds) (2014) 149, 151.

255 Jansen (2002) *TRW* 124; Olivier *et al* (1998) 188–193.

raiser.[256] The Reform of the Customary Law of Succession and Regulation of Related Matters Act[257] gives acknowledgment to the seed raiser and *seantlo,* but not to the *ukungena* custom.[258]

The fact that the Recognition of Customary Marriages Act contains no ruling as to the dissolution of customary marriages by death is regarded as a serious shortcoming. This failure presumably provides recognition for the above and similar levirate and surrogate customs.[259] These institutions are becoming less and less prevalent.[260]

5.3.9 *Woman-to-woman marriages*

A traditional woman-to-woman marriage[261] is where a woman marries one or more other women because of her powerful position and riches or because she is childless. Although this custom occurs all over Africa, it does not occur frequently, and little is known about it. It has been reported in ten groups in South Africa.[262] All the customary rituals, such as the payment of *lobolo*, are followed and this type of marriage is considered as normal in these communities. A near blood relative of the female husband will act as genitor and the children are for all purposes regarded as her children. Most authors have emphasised the fact that woman-to-woman marriages are not homosexual in nature,[263] but within the traditional context should be seen as a relationship between two families, aimed at the procreation of an heir and the distribution of property.[264] There are two main motivations for this type of marriage:[265] The first is the situation in which a woman is past the child-bearing age and marries another woman who either already has children or will have them during the marriage, and they will be considered to be the offspring of the female husband. The second situation is when a woman has independently gained wealth or power, for instance as a political leader or a traditional healer. O' Brien states that "in some societies, if women are expected to symbolise power, they must be conceptualised as male, or at least not take the subordinate status of wife."[266]

5.3.10 *Evaluation*

The customary marriage is generally seen as based on African values. These values accentuate social solidarity. The Recognition of Customary Marriages Act not only makes provision for the recognition of customary marriages that have been concluded before and after the commencement of the Act, but has also brought about radical changes in respect of such marriages.[267] There had previously been a tendency to emphasise the differences between civil and customary marriages,[268] but these differences have decreased considerably. The only remaining difference is that a civil marriage is inherently monogamous, while a customary marriage is potentially

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256 Olivier *et al* (1998) 34–35.
257 11 of 2009.
258 See ss 1, 2(1)(*b*), 3(1) and (2).
259 Heaton and Kruger (2015) 233.
260 Olivier *et al* (1998) 34. Also see Bekker and Koyana (2014) *THRHR* 32–34 regarding cognate unions and the inferior position of women in this regard.
261 Or "women-marriages." See Oomen (2000) *THRHR* 274.
262 It occurs mainly amongst the Venda.
263 For a discussion on same-sex partnerships in indigenous African societies, see Nkosi (2007) *International Journal of African Renaissance studies* 2 (2) 205–207.
264 Oomen (2000) *THRHR* 274–277, 280; Bekker (1989) 147.
265 Oomen (2000) *THRHR* 276 and the authorities cited there.
266 See Oomen (2000) *THRHR* 276.
267 Dlamini (1983) LLD thesis 383.
268 *Bronn v Frits Bronn's Executors* (1860) 3 Searle 313; *Guma v Guma* 4 BAC (1919) 220.

polygynous.[269] However, the critical question is whether all the changes to customary marriages are effective or whether they will only be paper law. In order to be effective, drastic educational initiatives will have to be launched.[270] The reason for this uncertainty is that family law is generally considered to be intertwined with the emotions of people and is therefore more opposed to change.[271]

Section 15(3) of the Constitution provides for legislation that recognises marriages concluded in terms of any tradition or system of religious, personal or family law. The Recognition of Customary Marriages Act falls within the ambit of section 15(3). This section also provides that such legislation has to be consistent with the rights entrenched in section 15 and other provisions of the Constitution (for example the Bill of Rights).

In the discussion of the *lobolo* custom above,[272] reference was made to the different viewpoints it engendered. Some considered that it enhanced the dignity of the wife, while others held that it unfairly discriminated against women, infringed the woman's right to dignity and augmented the husband's authority over his wife. There are also divergent views regarding polygyny: on the one hand it is seen as enhancing male domination, while on the other hand there are benefits for the wife, such as the division of labour and an increased opportunity for women to be economically active.[273]

Although the practice of polygyny is still a relatively widespread phenomenon among elderly people particularly in rural areas, it may be becoming obsolete among the younger generation.[274] Even though the *Gumede* decision, which declared section 7(1) and relevant parts of section 7(2) of the Act invalid, was welcomed, the unintended result was an unequal position between women in monogamous customary marriages and especially women in "old" polygynous customary marriages for many years. However, the situation was addressed in the 2017 Constitutional Court case of *Ramuhovhi*. The judgments regarding the patrimonial consequences in respect of "old" polygynous customary marriages (*Ramuhovhi*) as well as "new" polygynous customary marriages (*MM*), seemed to have lifted the status of women in such marriages. However, some practical problems might still be encountered.

5.4 Adoption practices

Adoptions under common law are recognised in the Children's Act,[275] however the Act makes no reference to adoptions under customary law. Despite this, customary law adoptions have been recognised in a number of cases. In *ML v KG*,[276] the court recognised an adoption under customary law that had occurred after the commencement of the Children's Act for the purpose of a claim for loss of support.

However, some might argue against the existence of adoption in customary law[277] or contend that it is not recognised by all the various cultural groups in South Africa.[278] Despite this, it

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269 Dlamini (1985) *CILSA* 701. Also see Mwambene (2014) 20 *PER/PELJ* 1–33 for a detailed discussion of what she regards the future of polygyny to be in Africa.

270 Mqeke (1999) *Obiter* 64.

271 Allott "Reforming the law in Africa – aims, difficulties and techniques" in Sanders (ed) (1981) 228–229.

272 See 5.3.3.4.

273 See Van Schalkwyk (2003) *De Jure* 293; Pienaar (2003) *Stell LR* 265.

274 Bekker and Boonzaaier (2007) *De Jure* 285–286.

275 38 of 2005. The whole of the Children's Act, including Chs 15 and 16, respectively dealing with adoptions and inter-country adoptions, took effect on 1 April 2010. Also see Bosman-Sadie, Corrie and Swanepoel (2013) ix; Van der Walt (2014) *Obiter* 448.

276 [2013] ZAGPJHC 87 (8 April 2013).

277 See, e.g., Bennett (1995) 107.

278 For example, the Zulu and Swazi groups. See ch 9 on Law of Succession and Inheritance.

seems that different forms of adoption practices indeed exist in customary law today. These include a relative or friend adopting a child; the natural father of a child born out of wedlock adopting the child and having the child affiliated to his family group; a male adopting his deceased brother's child; a female adopting her deceased sister's child; a childless couple adopting an orphaned child, and so-called "step-parent adoption".[279] The latter is also known as *oe gapa le namane*[280] in Sepedi/Setswana/Sesotho.[281] This type of adoption involves the groom marrying the bride and simultaneously adopting the child(ren) born from previous relationship(s).[282] *Lobola* is delivered for both the mother and her child(ren), and the child(ren) is/are affiliated to the husband's family.[283]

"Customary law adoption" refers to a process with legal consequences that are similar to those of adoption in terms of common law.[284] As such, it entails the adopted child becoming a child of the adoptive parent(s) or family for all intents and purposes,[285] and the adoptive parent(s) assuming responsibility for the maintenance of the adopted child.[286]

The requirements for a customary law adoption generally appear to be as follows:[287] The families of the adopted child and the adoptive parent(s) must agree[288] and due publicity must be given to the adoption. Publicity occurs in the form of a small ceremony.[289] The adoption is usually reported[290] to the traditional leader[291] to indicate that the child has been formally transferred from the family giving the child to the family of the adoptive parent(s). Unlike the position under common law, a court order is not required for a customary law adoption, nor is an assessment by a social worker. By contrast, adoptions under common law (hence, adoptions under statute) are regulated by Chapter 15 of the Children's Act and require a court order.[292] All guardians of the child must consent to the adoption.[293] Consent from the adopted child him/herself is also required where the child is aged 10 years or older, or if below 10 years of age, where the child is of an adequate age, maturity and stage of development to understand the implication of such consent.[294] The Children's Act also provides for an adoption social worker to make an assessment to determine whether a child is adoptable.[295]

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279 See Mokotong (2015) *THRHR* 347 and the authority cited therein for this non-exhaustive list.
280 Loosely translated as "you lead it with its calf." *ML v KG* [2013] ZAGPJHC 87 (8 April 2013) para 11.
281 Or *stiefoueraanneming* in Afrikaans. See Mokotong (2015) *THRHR* 344. He also lists variations in other languages.
282 See Mokotong (2015) *THRHR* 347–348.
283 Mokotong (2015) *THRHR* 348. In *ML v KG*, the court explained that *oe gapa le namane* was specifically aimed at recognising the importance of the bond between a mother and her new-born child, and the need for a child to be with its mother in early childhood. *ML v KG* [2013] ZAGPJHC 87 (8 April 2013) para 14.
284 See Maithufi 2001 *De Jure* 391.
285 Maithufi 2001 *De Jure* 392. Compare s 242(3) of the Children's Act.
286 Maithufi 2001 *De Jure* 392. Compare s 242(2)(*a*) of the Children's Act.
287 *Maswanganye v Baloyi* 2015 JOL 34005 (GP) paras 12–13. Also see *inter alia Metiso v Padongelukfonds* 2001 (3) SA 1142 (T) 1147; Maithufi 2001 *De Jure* 391-392; Olivier *et al* (1995) 154; Olivier, Olivier and Olivier (1989) 462.
288 Expert evidence led in *Metiso v Padongelukfonds* 2001 (3) SA 1142 (T) 1147 suggested that in terms of customary law it is the paternal family of a child who must decide whether such child should be adopted. Bekker states that it is "the relatives both of the family head giving the child and of the adoptive parent" that must be called to the meeting at which the adoption takes place. See Bekker (1989) 236.
289 *Maswanganye v Baloyi* para 13.
290 Even where the customary law adoption was not reported, the adoption would still be valid if due publicity was given to the process and there was agreement between the families. *Maswanganye v Baloyi* para 12.
291 Or his or her representative. *Maswanganye v Baloyi* para 12.
292 Section 228 of the Children's Act.
293 Bosman-Sadie, Corrie and Swanepoel (2013) 329.
294 Section 233(1)(*c*) of the Children's Act.
295 Section 230(2).

The difference in the requirements for customary law adoptions as opposed to those under statute must be seen against the backdrop of the different values underpinning the issue of adoptions within the two legal systems. For example, African children "belong" to a group or extended family, whilst in a Western setting, children are members of a nuclear family with only the biological parents serving as their guardians and custodians.[296]

A few judgments have dealt with the issue of customary law adoptions for the purpose of allowing a maintenance or loss of support claim.

In *Metiso v Padongelukfonds*,[297] two minor children had allegedly been customarily adopted by their father's brother (their uncle) after their father's death.[298] The children's mother left the community shortly after the father's funeral and made no contact with her children, nor did she show any interest in them. The plaintiff testified that the children were transferred into the care of their uncle by means of a formal ceremony and that the uncle subsequently assumed responsibility for maintaining the children. The uncle later died in a car accident and an action for damages for loss of support with respect to the children was instituted against the Road Accident Fund.[299] The court had to decide whether it could allow the claim on the basis that a valid adoption took place. One of the objections raised against the validity of the adoption was that the biological mother and her family had not been informed of the children's adoption. The court found in favour of the children on the ground that even if the adoption were found to be invalid under customary law, the deceased uncle still had a maintenance duty, due to his undertaking to maintain the children.[300] After considering expert evidence, the court also noted that the mother and her family seemed to have no *locus standi* to "interfere" in the adoption.[301] The Road Accident Fund was consequently held liable for the children's loss of support.[302]

In *Thibela v Minister van Wet en Orde*[303] the plaintiff instituted an action for damages for loss of support against the then Minister of Law and Order after the police had killed her husband.[304] The plaintiff and the deceased were married under customary law. The deceased had agreed to pay an amount of R600 as *lobola*[305] for the plaintiff and her minor son from her previous relationship.[306] She also sued on behalf of this son.[307] During the plaintiff's pregnancy, the biological father paid for certain clothes of the mother as well as the hospital costs. The biological father then "disappeared from the scene", but he did offer to pay maintenance at some stage. At the recommendation of the deceased, the mother declined the biological father's offer to pay maintenance.[308] The court found that the child had in essence become the child of the deceased, which implied that he had a duty to maintain the plaintiff's son.[309]

In *ML v KG*,[310] the applicant relied on a customary law adoption[311] as grounds for an application for an interim maintenance claim for her minor children not born of the respondent, pending

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296 Bekker 2008 *Obiter* 396.
297 2001 (3) SA 1142 (T) (hereafter *Metiso*).
298 *Metiso* 1146.
299 *Metiso* 1143.
300 Heaton (2010) *Annual Survey of South African Law* 453; *Metiso* 1150.
301 *Metiso* 1149.
302 Heaton (2010) *Annual Survey of South African Law* 453; *Metiso* 1150.
303 1995 (3) SA 147 (T) (hereafter *Thibela*).
304 Mokotong 2015 *THRHR* 347–348; *Thibela* 148.
305 Or *bogadi*, as the plaintiff belonged to the Pedi community. See *Thibela* 150; Mokotong 2015 *THRHR* 348.
306 *Thibela* 149. Although not specifically referred to, *oe gapa le namane* was clearly addressed in this case. Also see Mokotong 2015 *THRHR* 347.
307 Mokotong 2015 *THRHR* 348; *Thibela* 148.
308 *Thibela* 149.
309 *Thibela* 150; Mokotong 2015 *THRHR* 348.
310 [2013] ZAGPJHC 87 (8 April 2013) (hereafter *ML v KG*).
311 The applicant relied specifically on *oe gapa le namane*. See *ML v KG* 9.

a divorce action.[312] The court stated that it was common cause that the child had been disclosed to the respondent, moved to the respondent's home and the respondent maintained the child in various respects.[313] The court further argued that ". . . *oe gapa le namane* is *assumed*,[314] for a child under the age of 14, unless it is expressly excluded".[315] The court concluded that the applicant had placed sufficient facts before it to find in the interim that the respondent was liable for the maintenance of the minor child born from the mother's previous relationship.[316]

In a final example, that of *Maneli v Maneli*,[317] the applicant sought maintenance for the minor child that she and the respondent had allegedly adopted in terms of Xhosa customary law before the breakdown of their marriage.[318] The applicant approached the maintenance court for a maintenance enquiry and an order in terms of the Maintenance Act[319] determining the amount of maintenance that the respondent was to contribute in respect of the child.[320] The maintenance court developed the common law to hold that a man who adopted a child under customary law had a legal duty to maintain the child.[321] The matter was subsequently referred to the High Court to determine whether the maintenance court's finding was correct.[322] The High Court confirmed the maintenance court's finding.[323] The High Court stated that the Xhosa customary law of adoption was not "in conflict with the Bill of Rights or section 18(1)(*a*) of the Child Care Act[324] and sections 23 and 25 of the Children's Act".[325] The court also ordered the director-general of the Department of Home Affairs in terms of "section 2 of the Births and Deaths Registration Act"[326] to register the child as the parties' adopted child.[327]

The facts in the *Metiso* case clearly show that the mother abandoned the children. Abandoned children are adoptable in terms of the Children's Act,[328] and the consent of a parent who abandons a child is not needed.[329] Apart from circumstances of abandonment and certain other, listed circumstances,[330] however, both parents' consent is generally required.[331] Therefore, merely "informing" one of the spouses is not acceptable when children are adopted under common law. In the *Metiso* case, the court's conclusion regarding the notification of the biological mother and her family might prove to be problematic in future.

In contrast to the facts in the *Metiso* case, where the mother showed no interest in her children, the biological father in the *Thibela* case seems to have shown some interest in his child. Nevertheless, the biological father still had no say in the adoption of the child into another family. The Children's Act requires the consent of both parents for the adoption of their children, regardless of the parents' marital status.[332]

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312 Mokotong 2015 *THRHR* 350; *ML v KG* paras 2, 3, 9.
313 *ML v KG* para 20.
314 Own emphasis.
315 *ML v KG* para 16.
316 Paragraphs 20–21.
317 2010 (7) BCLR 703 (GSJ) (hereafter *Maneli*).
318 *Maneli* paras 2–8.
319 99 of 1998.
320 Heaton (2010) *Annual Survey of South African Law* 453.
321 See Heaton (2010) *Annual Survey of South African Law* 455–456 for critique relating to the development of common law in this regard. *Maneli* case para 1.
322 *Maneli* para 1.
323 Heaton (2010) *Annual Survey of South African Law* 453.
324 74 of 1983.
325 *Maneli* para 19.
326 51 of 1992; *Maneli* para 45.
327 Heaton (2010) *Annual Survey of South African Law* 454–455; *Maneli* para 45.
328 Section 230(3)(*c*) of the Children's Act.
329 Section 236(1)(*b*).
330 Section 236.
331 Section 233(1)(*a*).
332 Section 233(1)(*a*).

The view that a customary law adoption is assumed in certain circumstances, as held by the court in *ML v KG*, seems to contradict other judgments. In the *Thibela* case, for example, it was evident from the facts that the man had agreed to adopt the woman's child born from a previous relationship by having agreed to pay *lobola* for both of them. In *Maswanganye v Baloyi*,[333] the court indicated that careful consideration is needed when deciding on a matter of adoption outside the statutory framework and that adoption "should not easily be inferred."[334]

The judgment in the *Maneli* case is problematic for various reasons, such as the fact that no mention was made of the requirements of a Xhosa customary law adoption or whether the parties had adhered to such requirements.[335] The judgment further creates a broader scope than other judgments dealing with customary law adoptions, where a mere parental duty of maintenance[336] was created.[337]

5.5 Civil marriages and civil unions

Section 10(4) of the Recognition of Customary Marriages Act provides that no spouse in a civil marriage is competent to enter into any other marriage. Section 8(2) of the Civil Union Act[338] provides that a person in a civil union may not conclude a civil marriage or a customary marriage. Section 8(3) of the Civil Union Act provides that a party to a customary marriage "may not register a civil union". As there is no express reference to competence in this section, the nature of the invalidity of a civil union which is concluded in contravention of this section is not clear.[339] Furthermore, because of the prescription in section 13(2)[340] of the Civil Union Act, the rule that a civil marriage which is concluded in contravention of sections 3(2) and 10(1) of the Recognition of Customary Marriages Act is void, cannot simply be applied to a civil union which is concluded during the subsistence of a customary marriage.[341] It is however submitted that not only are customary marriages concluded contrary to section 10(4) of the Recognition of Customary Marriages Act, void, but that customary marriages that is concluded during the subsistence of a civil union are also void.[342]

Section 3(2) of the Recognition of Customary Marriages Act provides that no spouse in a customary marriage is competent to conclude a civil marriage during the subsistence of the customary marriage. They may, however, enter into a civil marriage with each other as long as neither is a spouse in a subsisting marriage with another person.[343] As registration is not a requirement for the validity of the customary marriage, it is possible that, should a customary marriage not be registered, the marriage officer concluding the civil marriage between one spouse and another person may not be aware of the existence of the prior customary marriage. Taking into account the express prohibition in the Act, a subsequent civil marriage, in contravention of these provisions, will be void. The same will happen when the husband who, as a party to more than one

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333 2015 JOL 34005 (GP).
334 *Maswanganye v Baloyi* 2015 JOL 34005 (GP) para 16.
335 Also see Schäfer (2011) 310. Heaton (2010) *Annual Survey of South African Law* 456.
336 Which could in turn give rise to a breadwinner's action. See Schäfer (2011) 310.
337 Schäfer (2011) 310.
338 17 of 2006.
339 Heaton and Kruger (2015) 236.
340 Section 13(2) of the Civil Union Act determines that "with the exception of the Marriage Act and the Customary Marriages Act, any reference to marriage in any other law, including the common law, includes, with such changes as may be required by the context, a civil union; and husband, wife or spouse in any other law, including the common law, includes a civil union partner".
341 Heaton and Kruger (2015) 236.
342 Heaton and Kruger (2015) 235.
343 Section 10(1) of the Recognition of Customary Marriages Act; Maithufi (2000) *THRHR* 509.

customary marriage, concludes a civil marriage with one of his customary law wives.[344] Section 10(2) provides that should the two spouses in a customary marriage later also conclude a civil marriage with each other, the marriage will be in community of property and of profit and loss unless an ante-nuptial contract excludes these consequences.

Unfortunately, the Act is silent about the consequences of converting a customary marriage into a civil marriage. There is still no clarity whether the former customary marriage still subsists and whether the two parties are to be regarded as simultaneously married according to two legal systems. The most acceptable view is that the customary marriage is terminated on the date that the civil marriage is concluded, but that the termination is not retrospective. According to this view, customary law rules are applicable to a customary marriage and its consequences until the civil marriage is concluded and thereafter the rules applicable to civil marriages apply.[345]

The aim of sections 13(2) and 10(1) is to avoid the situation which existed in the past. A distinction should be made between the different time periods.

Position before 2 December 1988[346]

Generally, before 2 December 1988, the spouses in a customary marriage could enter into a civil marriage with each other or with anybody else. The result was an automatic dissolution of the customary marriage.[347]

In the past, legislation attempted to provide some protection for the other spouse (the so-called "discarded spouse") to the prior customary marriage. Section 22(1) of the Black Administration Act[348] provided that:

> No male Black shall, during the subsistence of any customary union between him and any woman, contract a marriage with any other woman unless he first declared upon oath, before the magistrate or commissioner of the district in which he is domiciled, the name of every such first-mentioned woman; the name of every child of any such customary union; the nature and amount of the movable property (if any) allotted by him to each such woman or House under Black custom; and such other information relating to any such union as the said official shall require.

The effect of the above declaration was merely to provide proof of any allotment of property but the husband was not required to endow anything to his customary law wife/wives or houses.[349] If the husband omitted to make the declaration, it did not affect the validity of the civil marriage.[350] In terms of section 22(6), these civil marriages were automatically out of community of property. Due to the very desperate situation of customary spouses, section 22 was amended by the Marriage and Matrimonial Property Law Amendment Act 3 of 1988. This Act commenced on 2 December 1988.

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344 Bonthuys and Pieterse (2000) *THRHR* 622.

345 See Heaton and Kruger (2015) 236–237.

346 The date the Marriage and Matrimonial Property Law Amendment Act 3 of 1988 commenced.

347 *Nkambula v Linda* 1951 (1) SA 377 (A). Also see Jansen (2003) *TRW* 120–132.

348 38 of 1927.

349 Olivier *et al* (1998) 106. S 22(7) also provided some protection.

350 Bennett (1991) 439–440; Jansen (2003) *TRW* 122. In terms of s 22(5) of the Black Administration Act, it was an offence to either enter into a civil marriage without making the declaration or to make a false declaration. In terms of s 22(6), these marriages were automatically out of community of property. If the husband was not also a party in a customary marriage with any other woman, the parties could jointly make a declaration within one month prior to the marriage, before a magistrate, Commissioner or marriage officer that they desired to be married in community of property and of profit and loss. In terms of s 22(7), the civil marriage, concluded during the subsistence of a customary marriage between the husband and another woman not being the partner, had no effect on the material rights of any partner to the customary marriage or a child born of it, and the widow from such a civil marriage and the children from the same did not have greater rights to the estate of the deceased spouse than she or they would have had if the said (civil) marriage had been a customary marriage.

Position between 2 December 1988 and 15 November 2000

The amended section 22(1) and (2) read as follows:

(1) A man and a woman between whom a customary union subsists are competent to contract a marriage with each other if the man is not also a partner in a subsisting customary union with another woman.

(2) Subject to subsection (1) no person who is a partner in a customary union shall be competent to contract a marriage during the subsistence of that union.

Subsection 22(6) has been repealed and all civil marriages concluded since 2 December 1988 are in community of property and profit and loss, except if an ante-nuptial contract was entered into to regulate the matrimonial property.[351]

The intention of the legislature was to provide more protection for the wife in the customary marriage. Contrary to the position before 2 December 1988, a customary marriage is not automatically terminated by the subsequent civil marriage (concluded in contravention of section 22).[352] To regard the civil marriage as not necessarily invalid would be untenable. The possibility of declaring the second marriage a putative marriage should be considered.[353]

In the 2011 case of *Netshituka v Netshituka*,[354] the Supreme Court of Appeal held that because the deceased husband reconciled with his "previously deserted" wives, the customary marriages with them were revived after the termination of his civil marriage in 1984 and therefore that a later civil marriage concluded by him in 1997, was null and void.[355]

In the 2014 case of *Murabi v Murabi*,[356] the Supreme Court of Appeal again held that a civil marriage concluded between the deceased and the first respondent in 1995 was invalid, due to the fact that the deceased was already a party to a customary marriage with the applicant which was concluded in 1979. Although the deceased also concluded a customary marriage with the first respondent in 1975, the marriage could not be converted into a civil marriage due to the deceased being a party in another customary marriage (with the applicant) as well.

Position since 15 November 2000

Section 22(1)–(5) was repealed by the Recognition of Customary Marriages Act and replaced with similar provisions in sections 3(2), 10(1) and 10(4).[357]

Theoretically this means that the previous problems which resulted from multiple marriages, including a civil marriage, are something of the past. In practice, however, this is not the case; *Thembisile v Thembisile*[358] serves to illustrate this point. The position was further complicated by the decision in *Nontobeko Virginia Gaza v Road Accident Fund.*[359] The court ordered that any claimant who was a spouse of a customary marriage where her spouse was, at the time of his death, also a spouse to a civil marriage, be compensated by the Road Accident Fund. Customary

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351 Section 22(6) of the Black Administration Act provided that a civil marriage between Africans was automatically out of community of property. If the husband was not also a party to an existing customary marriage with another wife, the parties could, within one month before the conclusion of the marriage, jointly make a declaration before a magistrate, Commissioner or marriage officer that they desired to be married in community of property and profit and loss. The redetermination of s 22(7) is in essence the same as before 2 December 1988.

352 The person was, however, subjected to a penalty for transgressing the provisions of the Act. See Dlamini (1989) *TSAR* 411; Jansen (2003) *TRW* 123–128.

353 Jansen (2003) *TRW* 123–128.

354 2011 (5) SA 453 (SCA) paras 7–15.

355 For critique against the judgment, see Bakker and Heaton (2012) *TSAR* 589–593.

356 [2014] ZASCA 49.

357 In terms of the Repeal of the Black Administration Act and Amendment of Certain Laws Act 28 of 2005.

358 2002 (2) SA 209 (T). See Jansen (2003) *TRW* 123–128 for a discussion of the various views and options available to a court under such circumstances.

359 Durban and Coast Local Division (unreported) Case number 314/04.

marriages are still contracted during the subsistence of a civil marriage and a civil marriage during the existence of a valid customary marriage. Maithufi and Bekker submit that polygamy in these marriages should be legalised to avoid the harsh results for the woman in the invalid marriage. This clearly demands the urgent attention of the legislator.[360]

360 Maithufi and Bekker (2009) *Obiter* 171.

6

Law of Property

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6.1 Characteristics of customary law property rights

Traditional customary law granted rights, including rights to property, to family or agnatic groups with the members sharing in the groups' rights to property.[1] This is the case, both with regard to movables and immovable property, especially land, set out in more detail at 6.4 below. Under colonial influence, heads of families, who were normally married males, were perceived to be the only persons with full legal capacity in terms of customary law.[2] This does not, however, imply that other members of the family could not acquire rights to property. Customary law protected, and still protects, the rights of individuals through their families. Thus, an individual in customary law is deemed to have acquired or to acquire a right through his or her family head. The right is usually protected in the same manner.[3] The co-operation of the family members represented by the family head is of the utmost importance in the acquisition and disposal of property rights.[4]

In African traditional communities, the emphasis usually falls on the family group or household, as an individual person has status and functions within the group context.[5]

It is not difficult to understand why the position described above existed and to some extent, still exists today. As the family head was perceived by colonial administrators to be the only person with full legal capacity, he was responsible for the contracts concluded by members of his family and the delicts they committed. He was, thus, for all intents and purposes, the guardian of all the members of his family and controlled and administered whatever was acquired by such members.[6]

Bekker describes this position as follows:[7]

> In original customary law, both in theory and in practice, a family head was in control of the family home and its property. An unemancipated individual could not own anything individually, and whatever he might have acquired vested in the family head. Yet, as has been shown, the property of the family home was not owned outright by the family head, but was held in communal ownership by the family as a unit, under his administration and control.

Accordingly, customary law property rights were generally characterised by a family or household approach and were usually male-dominated, although individuals were accommodated and protected within a family context. The commencement of the Constitution with a Bill of Rights, coupled with the Traditional Leadership and Governance Framework Act[8] and the land reform programme, elaborated on in more detail below, have contributed to important developments impacting on the customary law of property generally and land tenure in particular.

6.2 Rights relating to property

Customary law recognises the right of ownership and other limited real rights to property, though not necessarily identical to or in the same format as understood under common law or

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1 Bennett (2004) 374; Braude (2017) *Stell LR* 68.
2 Bekker (1989) 69; Bennett and Murray "Traditional leaders" in Woolman *et al* (eds) (2009) 26–8. They underline that conquest, colonialism and apartheid changed traditional concepts and approaches to property and land in general dramatically. Also see Himonga and Nhlapo (eds) (2014) 187.
3 Chenitz and Richardson "Taking stock of the risks associated with the individualisation of land rights" in Mostert, Verstappen and Zevenbergen (eds) *Land law and governance: African perspectives on land tenure and title* (2017) 113.
4 Bekker (1989) 82.
5 Sinclair (1996) 162; Himonga and Nhlapo (eds) (2014) 187–188.
6 Bekker (1989) 71–76; Bennett (2004) 328–329; Himonga and Nhlapo (eds) (2014) 187.
7 Bekker (1989) 82.
8 41 of 2003.

Western-style property approaches.[9] It is critical that the nature and content of these rights must be understood within the framework of family relationships, which is in the context of marriage, family and succession.[10] Consequently, customary law recognises the following categories of property: family property, house property and personal property.

6.2.1 *Family property*

Family property is property that has not been allotted to any houses, or that does not automatically accrue to a specific house.[11] This property is controlled by the head of the family, although he is not the "owner" of the property in the Western common-law sense, since the family members share in the property. Family property includes property which the family head inherited from his mother's house, property acquired by the family head by his own efforts and labour, and land allotted by the traditional authority to the family group but which has not been allocated to a particular house.[12]

The distinction between family and house property was more pronounced under the traditional marriage dispensation, before the Recognition of Customary Marriages Act[13] commenced in 2000. The distinction has, however, remained important within polygynous family set-ups.

6.2.2 *House property*

House property has been defined as "[t]he property which accrues to a specific house, consisting of a wife and her children and has to be used for the benefit of that house".[14]

This property belongs to a house in that it automatically accrues to it in terms of customary law or when it has been allotted by a family head to a house.[15] In polygynous family constructs, property is specifically allocated to a particular house within the family set-up. Property that has not specifically been allocated to a particular house remains family property. A variety of things fall within this ambit, invariably the result of allocations, donations and delicts. House property includes earnings of the members of the house, livestock allocated to the house and its increase, property given to a wife at her marriage, *lobolo* received for daughters of the house on their marriage, compensation received in respect of delicts committed against members of the house (including compensation received in respect of seduction and adultery claims), agricultural products produced by the wife on her fields, and other products produced by the members of the house.[16]

House property is to be used for the benefit of the house to which it belongs.[17] If it is used for the benefit of another house, an inter-house debt (*ethula*) is created.[18] Where inner-house debts resulted, it had to have been due to a transfer of property that was necessary or reasonable in the

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9 Mostert and Pope (eds) (2010) 108–109 underline that conventional common law property terminology does not do justice to the actual meaning of property rights and interests in a customary law context. In this regard terminology has to be understood within the right context. Also see Pienaar (2014) 461.

10 In terms of customary law, whenever a marriage is concluded, a house is created. The house is regarded as consisting of a wife, her children as well as property brought into such house at marriage or allotted to the house and property acquired by the members of the house during the marriage. Thus, the term "house" indicates the property of the wife and children of the marriage. Also see Mofokeng (2009) 78; Himonga and Nhlapo (eds) (2014) 129.

11 See Bekker (1989) 72; Olivier *et al* (1995) 50; Himonga and Nhlapo (eds) (2014) 129.

12 See Bekker (1989) 72; Olivier *et al* (1995) 49–50; Bennett (2004) 258–259.

13 120 of 1998.

14 Bennett (2004) 256.

15 Himonga and Nhlapo (eds) (2014) 129 refer to this kind of property as "general property", being property acquired by members of a house. These authors only distinguish between general and family property.

16 Bekker (1989) 135.

17 *Mhlongo v Mhlongo* 1919 AD 470; *Sijila v Masumba* 1940 NAC (C&O) 42; Bennett (2004) 256–258.

18 Bekker (1989) 140.

circumstances.[19] If property was transferred in a frivolous or unjust manner the house that has been prejudiced has an immediate right of action against the family head to restore the *status quo*.

Despite being house property, the family head still retains control over it. In his use and control of house property, the family head has to consult the wife as well as the oldest son of such house.[20] Any interest that a family member has in the house and its property is a collective, rather than a personal, one.[21] As a result of modernisation and urbanisation, new types of property have been acquired, notably houses held in terms of customary or statutory law, which are regarded as house property.[22] The children and the wife of the house established by the marriage have a special interest in or rights to such property. Under traditional customary law when a marriage was dissolved, their rights or interests were normally not terminated, as they continued to reside in such house. That was also the case when the husband died, as the widow acquired control of the property and after her death, this control passed to one of her children.[23] It is this property, commonly known as a house, over which children of the marriage acquire a special interest. In the normal course of events, the property is often used by the youngest son of the marriage,[24] and, in the event that one of his sisters is unmarried or is divorced and returns home, such sister and her children, if she has any, reside in such house. This is, in effect, the adaptation of rules of customary law to suit the changing needs of society.[25] The property is to be found in both rural and urban areas.[26]

However, since the commencement of the Recognition of Customary Marriages Act and the Reform of Customary Law of Succession and Regulation of Related Matters Act,[27] proprietary consequences of marriages and dissolution of marriages have changed. See in that respect the relevant chapters dealing with marriage and succession respectively.

6.2.3 *Personal property*

This is property that belongs to a person who has acquired it, although it may be under the control of the family head. Such property is usually regarded as house property, that is, as part of the property of the house to which the individual belongs. This was the case in original customary law and, nowadays, this property serves the needs of a specific individual.[28] Personal property usually consists of clothing and other items of a personal nature (such as a walking stick, snuff box or necklace).

The individual who has acquired the property in his or her personal capacity has the power to use and dispose of it as he or she pleases. In his or her use of the property, however, customary law prescribes that the family head has to be consulted. This is a moral rather than a legal obligation.

With regard to certain types of property, women and customary law wives have absolute control. In this regard, the thing acquired remains the personal property of the particular individual and cannot be taken away, not even after divorce.[29] These include the *ngquthu* beast and its progeny and the *ubulunga* or *umendisa* beast, set out in more detail below.

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19 Mofokeng (2009) 80.
20 *Mlangeni v Macal* 1947 NAC (C&O) 1; *Maganu v Maganu* 1938 NAC (N&T) 37.
21 See e.g. *Mthembu v Letsela* 1998 (2) SA 675 (T).
22 Strydom (1985) 35.
23 Watney (1992) LLD thesis 63.
24 Bekker and De Kock (1992) *CILSA* 366; Watney (1992) LLD thesis 60.
25 See Watney (1992) LLD thesis; Siegel (2015) *SAJHR* 358.
26 See Bekker (1989) 81.
27 11 of 2009.
28 Strydom (1985) 8; Olivier *et al* (1995) 50; Bennett (2004) 259.
29 *Mpungose v Zulu* 1981 AC 50 (NE). Also see Mofokeng (2009) 81.

6.3 Acquisition of customary law rights to property

Property rights in customary law may be acquired in various ways. Well-known methods of acquiring property in customary law are by means of allotment, succession and through certain customary law transactions relating to marriage.[30] In light of the importance of land and its integral place in customary law and culture,[31] the acquisition of land by way of allotment and the developments in this area of law are set out separately, at 6.4. In this regard, the acquisition of movable property is set out forthwith.

Apart from succession and certain transactions relating to marriage, ownership of property may also be acquired by original means (appropriation of ownerless things, manufacture, cultivation and administrative allotment)[32] and by derivative means (transfer of property on purchase or exchange of things).[33]

6.3.1 *Allocation of property other than land*

Any kind of property may be allotted to a person in terms of customary law. A well-known example is the allocation of property by the family head to his children and wife or wives. Property given to a wife is allotted to her house. The property thus allotted becomes what is known as house property, set out above. Although, in theory, the wife does not obtain control over such property, it belongs to her house and the property cannot be used without her consent or authorisation. Thus, for all practical purposes, she is the owner of this property. Children too, may be allotted property in terms of customary law.[34] Traditionally, only livestock could be allotted, but today, any kind of property can be given to children. This custom is known as *gotswaisa* among the Batswana.[35] Schapera[36] explains the position as follows:

> Daughters may be given cattle in the same way as sons, but this is not often done. More usually daughters, if they receive anything at all, will be given goats, with whose offspring cattle may afterwards be purchased for them. But, among the Ngwato and Kgatla, a woman on marriage commonly receives from her father, if he can afford it, one or more *heifers* as *ketéétso* or *serotwana*. She may subsequently be given other cattle of her own by her husband; and she also receives one beast from the *bogadi* paid for her daughter. An unmarried woman who is a concubine may likewise be presented with cattle by her lover.

This custom is found among all African communities of South Africa.[37]

6.3.2 *Inheritance*

Traditionally, it was generally accepted that the principle of male primogeniture, then applicable to succession in customary law, applied equally to the inheritance of property.[38] This principle implied that the oldest surviving male relative of the deceased succeeded the deceased and inherited all his property. Such successor also became liable for the debts of the deceased, irrespective of how much he inherited.[39]

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30 Myburgh (1985) 89–90; Himonga and Nhlapo (eds) (2014) 97–99.
31 See Pienaar (2014) 50–51.
32 Van der Walt and Pienaar (2016) ch 8.
33 Van der Walt and Pienaar (2016) ch 9.
34 Bekker (1989) 77–80.
35 Olivier *et al* (1995) 52.
36 Schapera (1955) 216.
37 Koyana (1980) 80.
38 *Mthembu v Letsela* 1997 (2) SA 936 (T); *Bhe v Magistrate, Khayelitsha* 2005 (1) BCLR 1 (CC). Also see discussion in ch 9.
39 Bekker (1989) 300; Bennett (2004) 334.

Such successor or heir was also responsible for the maintenance of the widow(s) and children of the deceased.[40] These rights and responsibilities have been described as follows:

> The heir steps into the shoes of his predecessor and inherits all the latter's rights and liabilities past, present and potential, in respect of the family and property of the house of which he is the heir.[41]

Although this might have been the position in original customary law, the current position holds that, subsequent to the death of a person, the distribution of his or her property is determined at a family group meeting specifically called for this purpose. The oldest surviving male (usually the oldest son of the deceased) plays a significant role in determining the portions to be inherited by the other heirs. Any kind of property may be acquired by means of inheritance in terms of customary law.

During his or her lifetime, a person may also indicate that a specific property which belongs to him or her will be obtained by another person after his or her death. The property so indicated is regarded as a donation.[42] Ownership of such property will be acquired only upon the death of the person making the donation. Before the owner's death, the person to whom the donation will be made acquires only a special interest in such property and the owner is not obliged to transfer it to him or her.[43]

Following the commencement of the Constitution, the rules of male primogeniture have been declared unconstitutional.[44] Presently, these matters are dealt with in the Reform of Customary Law of Succession and Regulation of Related Matters Act, discussed in detail below.[45]

6.3.3 *Marriage*

In customary law property and marriages are inter-linked.[46] This means that marriage generally provides access to property, both in relation to movable and immovable property. In this regard, the inter-connectedness emerges at various points in time: before the marriage is concluded as forming part of the marriage negotiations; during the existence of the marriage with regard to proprietary regimes; and after a marriage had been terminated, either by divorce or death. Entering into a polygynous marriage, especially after the commencement of the Recognition of Customary Marriages Act, also has particular proprietary requirements and consequences for parties involved.

Marriage in African tradition in South Africa is characterised by the transfer of goods between the families of the prospective spouses. The most important transaction that precedes a marriage is the *lobolo* contract.[47] This transaction involves an agreement for the transfer of goods by the prospective husband represented by his family head to the family head of the prospective wife. Ownership of such goods passes to the wife's family head once the marriage is concluded.

Lobolo is defined in the Recognition of Customary Marriages Act[48] as follows:

> the property in cash or in kind, whether known as *ilobolo*, *bogadi*, *bohali*, *xuma*, *lumalo*, *thaka*, *magadi*, *emabheka* or by any other name, which a prospective husband or the head of his family undertakes to give the head of the prospective wife's family in consideration of a customary marriage.

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40 Himonga and Nhlapo (eds) (2014) 162–163.
41 Bekker (1989) 297. Also see Coertze (1988) 240–241.
42 Olivier *et al* (1995) 75.
43 Schapera (1955) 230; Himonga and Nhlapo (eds) (2014) 167.
44 *Bhe v Magistrate, Khayelitsha* 2005 (1) BCLR 1 (CC); Himonga and Nhlapo (eds) (2014) 179–182.
45 See ch 9.
46 Budlender "Women, marriage and land: findings from a three-site survey" in Claassens and Smythe (eds) (2013) 32. Also see the discussion of "marriage" in ch 5.
47 Mofokeng (2009) 44–45; Himonga and Nhlapo (eds) (2014) 97–98.
48 Section 1 of the Recognition of Customary Marriages Act.

From the definition, it appears that *lobolo* is given only in respect of customary marriages. However, in practice, this is often also the position with regard to civil marriages. Traditionally, *lobolo* is given to the woman's family head, but, upon consummation of the marriage, it becomes the property of the house to which she belonged before marriage. Thus, ownership of *lobolo* is acquired by the house and is regarded as house property.[49] Schapera mentions that a woman may be given cattle by her father on marriage. This kind of gift is known as *ketéétso* or *serotwana.* A woman may also be given a head of cattle from the *bogadi* of her daughter.[50] These kinds of gifts are connected with marriage and are intended to be the personal property of the woman to whom they have been given, as explained above.

The *inkomo yobisi* and *ubulunga* cattle are also associated with marriage. Among the Zulu, at the time of the marriage ceremony, the wife's father may give her a head of cattle known as *inkomo yobisi*. This is intended to provide sustenance for her and her children.[51] She may also be given another head of cattle known as *ubulunga* by her father and other family members.[52] Another gift associated with marriage is the *ngquthu* head of cattle. This is given to a woman when her daughter gets married or is seduced. It is defined as:

> A beast which is payable by the husband or seducer as the case may be, to a woman or to the house to which she belongs, upon the entrance into a customary marriage or civil marriage or the seduction of her daughter.[53]

Traditionally, gifts associated with marriage consisted of livestock in the form of cattle, sheep, horses or goats. At present, they may be of various kinds. They may be given in the form of money, furniture, motor vehicles and even houses, depending on the wealth of the families involved. Upon marriage, goods may also be donated to the husband by his family and family friends.

The commencement of the Recognition of Customary Marriages Act has also resulted in particular proprietary consequences connected to customary marriages, which are dealt with in more detail in the chapter dealing with marriage law.[54] While the customary marriage is in existence, section 6 of the Recognition of Customary Marriages Act provides that:

> A wife in a customary marriage has, on the basis of equality with her husband and subject to the property system governing the marriage, full status and capacity, including the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that she might have at customary law.

Unfortunately, the impact of section 6 of the Recognition of Customary Marriages Act was somewhat negated by section 7(1) of the same Act, by providing that the proprietary consequences of persons who entered into customary marriages before the commencement of the Act in 2000 were still governed by customary law. Although women had certain rights in relation to property in general and land in particular, the equal status in marriages in relation to property was not realised in practice. The dominance of men and the role of patriarchy in this regard were perpetuated in the formulation of section 7(1).[55] This issue with respect to monogamous marriages has since been addressed in the *Gumede* case, discussed in more detail in the chapter dealing with marriage law.[56] As it was found to be unconstitutional, section 7(1) of the Act was

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49 See e.g. Bekker (1989) 72; Olivier *et al* (1995) 49.
50 Schapera (1955) 230.
51 Olivier *et al* (1995) 58.
52 Koyana (1980) 40–58.
53 Section 1 of the KwaZulu-Natal Codes (Act 16 of 1985 and Proc R151 of 1987). Also see Mofokeng (2009) 80–81.
54 See ch 5.
55 *Gumede v The President of the Republic of South Africa* 2009 (3) SA 152 (CC) para 17. Also see Himonga and Nhlapo (eds) (2014) 128.
56 See ch 5.

repealed, thereby removing the divide regarding proprietary consequences of persons married before and after the commencement of the Act.

Concluding a polygynous marriage has further proprietary consequences for both the existing (first) wife and the woman with whom a further marriage is concluded. While section 7(6) of the Recognition of Customary Marriages Act provides that a contract which sets out the future proprietary regime has to be concluded before a polygynous marriage is entered into, the consequences of non-compliance were unclear. After protracted litigation it was decided in *Mayelane v Ngwenyama*[57] that in this particular case, due to the Tsonga customary requirements, the consent of the first wife had to have been secured before the second marriage could have been concluded lawfully. Therefore the second marriage was found to be invalid. Himonga and Pope[58] explain that the judgment has serious implications for the competing rights of women with regard to their access to different resources gained through marriage, including proprietary resources. By requiring the first wife's consent for the second marriage to be valid, her rights to the material and other resources of the marriage were protected. However, the second wife was clearly disadvantaged as her marriage was invalidated and her proprietary and other interests left unprotected. This result is disconcerting as the second wife has no control over (a) the registration of the first customary marriage; and (b) the conclusion of the required contract. Accordingly, there is no reliable way a woman who considers entering into a customary law marriage can inform herself about the existence or not of a customary marriage. This and other issues connected herewith are explored further in the chapter dealing with marriages.[59]

Following the termination of a customary marriage proprietary consequences again emerge, coupled with succession and the law of inheritance. See for more detail the chapters dealing with marriage and law of succession respectively.

As marriages have the potential to provide access to property for parties involved, as explained, it also means that less access is achieved when fewer marriages are concluded. Recent research indicates that overall, fewer African women are concluding marriages than ever before.[60] Underlying this phenomenon are various considerations, including social changes, changes in attitudes to marriage, financial constraints to conclude valid customary marriages (for example, full bridewealth) and subsistence grants that remove the necessity to get married in order to provide for dependants. Consequently, other ways to generally gain access to property and land in particular have to be explored.[61] See in this regard also the discussion at 6.4.4.5.

6.3.4 *Other methods of acquiring property*

Other methods of acquiring property are by appropriation (*occupatio*), manufacture (*specificatio*), cultivation and breeding, which are original methods of acquisition of property.[62] Another method is by means of transfer (*traditio*), which is classified as derivative.[63]

Property, more particularly cattle and other forms of livestock, may also be acquired through a custom known as *sisa, mafisa* or *nqoma*. The KwaZulu-Natal Codes define this custom as follows:

> A custom whereby cattle or other livestock are deposited by their owner with some other person on the understanding that such person shall enjoy the use of them, but that the ownership shall remain with and increase accrue to the depositor.[64]

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57 CCT 57/12 [2013] ZACC 14; 2013 (4) SA 415 (CC).
58 Himonga and Popo "*Mayelane v Ngwenyama and Minister for Home Affairs*: a reflection on wider implications" in Claassens and Smythe (eds) (2013) 318.
59 See ch 5.
60 See especially Posel and Rudwick "Changing patterns of marriage and co-habitation in South Africa" in Claassens and Smythe (eds) (2013) 169.
61 Budlender "Women, marriage and land: findings from a three-site survey" in Claassens and Smythe (eds) (2013) 28.
62 See Van der Walt and Pienaar (2016) ch 8.
63 Van der Walt and Pienaar (2016) ch 9.
64 Section 1 of Act 16 of 1985 and Proc R151 of 1987.

The holder of this livestock is entitled to the use thereof. Ownership of such livestock is not in any way transferred, and the livestock should be returned on expiration of the contract. Although not common, where the owner is satisfied with the manner in which the cattle were kept (herded), he may donate a head of cattle to the herdsman.[65] Schapera[66] explains this as follows:

> Poor men may obtain cattle by acting as herdsmen for some wealthier fellow tribesman. In return for their services they are paid a heifer (termed *kgomo ya madisa* from *go disa,* to herd), which with its offspring then belongs to them. This method of obtaining cattle is practised on a fairly large scale under the *mafias* custom . . .

6.4 Land

6.4.1 *Introduction*

Land tenure encapsulates rights in relation to land, involving *inter alia*, the acquisition, exercise and loss of property rights. To that end, land, as object of property rights and an integral component in customary way of life, is dealt with here in particular. In this regard two contexts emerge: traditional customary land tenure on the one hand and the vesting of rights in land belonging to other persons (registered owners) by individuals or families who invariably live in accordance with customary law, on the other. While the first context relates to traditional customary land tenure, usually referred to as communal land tenure,[67] the second context does not, strictly speaking, relate to communal land, but usually impacts on land in commercial agricultural areas. However, as the latter context invariably resonates with persons who live in accordance with customary law, some discussion of this context is also warranted here. Both these contexts have undergone reform and adjustment following the commencement of the Constitution and an all-encompassing land reform programme.

Before the various tenure reforms are explored in more detail below, a brief historical background to communal land in South Africa is provided. In this regard the various legislative measures as well as the different forms of tenure and the complexities connected there with, are alluded to. In light of the historical background, traditional customary tenure and its specific characteristics and mechanics are furthermore discussed. Due to the commencement of the Constitution in general and the land reform programme in particular, various tenure reforms have also been embarked upon, while some other reforms are still in the pipeline. Recent developments within this arena are accordingly set out at 6.4.4.3. Interestingly, despite statutory land measures being promulgated to effect tenure reform, important reform has occurred outside these measures as well. Consequently, "spontaneous" reform, initiated under the Constitution itself, is also alluded to. Furthermore, in light of the fact that persons living in accordance with customary law invariably reside and work on land belonging to someone else, thereby vesting rights in land, references to the Extension of Security of Tenure Act[68] and the Land Reform (Labour Tenants) Act[69] are also included here.

6.4.2 *Historical background*

6.4.2.1 Constituting traditional areas

Much of the complexities and concerns linked to land in general and communal land in particular have historical roots, invariably connected to the racially-based approach to land and

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65 Himonga and Nhlapo (eds) (2014) 194–195.
66 Schapera (1955) 217.
67 Though "communal" is also often equated to "traditional" customary tenure, Cousins points out that it is not always accurate due to the many socio-economic and other colonial influences that had changed the inherent traditional element thereof – see Cousins "Potential pitfalls of 'communal' land tenure reform experience in Africa and implications for South Africa" (2009) 1.
68 62 of 1997 (hereafter the ESTA).
69 3 of 1996.

concomitant allocation of land and rights in land. This process started a long time ago.[70] Before the founding of the Union of South Africa in 1910, each of the colonies and republics had assigned an extent of land to African persons as "locations". The Native Affairs Commission (1903–1905) accepted territorial segregation and recommended that the land be delimited and reserved by law for African occupation. This formed the basis of the Natives Land Act[71] that commenced on 19 June 1913. While the basic approach to land was also influenced by race before 1913, the commencement of the Natives Land Act formalised a systematic racially-based approach to land on a national scale, for the first time. The land reserved by this Act for the exclusive occupation and ownership of African persons is listed in a Schedule to the Act and became known as scheduled areas.

The scheduled areas were, however, inadequate. After prolonged debate, the Native Trust and Land Act[72] was enacted, providing for land bordering on the scheduled areas to be made available in addition to the scheduled areas. These newly added areas were referred to as "released areas". The scheduled and released areas were used to comprise the ultimate size of the African areas, which, according to the two Acts, formed approximately 13,7% of the total land area of the country. These areas eventually became "homelands" (or "national states")[73] and "self-governing territories".[74] While ten areas overall were identified, they were not once-off, clear-cut geographical areas, as land was continuously added and taken away. For example, in the Eastern Cape, the Herchel and Glen Grey districts were taken from Ciskei and added to Transkei. Bophuthatswana, on the other hand, consisted of various portions of land scattered over a vast area. In many instances, land was purchased without ever being incorporated into any homeland. Remnants of these former homelands and territories are found in present-day South Africa in all of the provinces except in the Northern Cape, Western Cape and Gauteng. For purposes of granting security of tenure, these "traditional areas" are generally defined as communal land, elaborated on in more detail below.

6.4.2.2 Complexity: Different land control forms and legislative measures

Not only were the above portions of land scattered all over South Africa, but the areas were furthermore occupied not in terms of a single land tenure system, but in terms of various land control forms, regulated by diverse legislative measures.[75] To that end the complexity factor increased dramatically. Accordingly, after the commencement of the Constitution, the pressing need to re-think and reform tenure of land in these areas not only embodied basic human rights – fairness, equality and dignity, but also considerations of rationalisation and simplification. Inevitably, a simpler, less complex land control system had to emerge as well.

Overall, similar measures applied in the areas acquired by the South African Development Trust and the self-governing territories, with a distinction between legislative measures pertaining to townships and rural areas.[76] Communal tenure,[77] individual tenure and tenure of trust settlements were the main tenure systems. In some areas in the Eastern Cape interesting permutations of freehold title, held and exercised within a family context, furthermore

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70 See generally Pienaar (2014) ch 3; Himonga and Nhlapo (eds) (2014) 8–20.
71 27 of 1913. Later renamed the Black Land Act.
72 18 of 1936. Later renamed the Development Trust and Land Act.
73 These areas gained independence with own anthems and national symbols and comprised of Transkei, Bophuthatswana, Venda and Ciskei – for more detail see Pienaar (2014) 113–124.
74 These areas were not independent, national states, but had some measure of self-reliance and legislative and other authority and comprised of KwaZulu, KwaNdebele, Gazankulu, QwaQwa, Lebowa and KaNgwane. The underlying idea was that these areas would eventually also gain their independence.
75 See Pienaar (2014) 142–154 for an exposition of land control forms and corresponding legislative measures.
76 Pienaar (2014) 142–148.
77 Discussed in more detail at 6.4.3.

prevailed.[78] Within these broad tenure systems, the following land control forms may be distinguished for purposes of our discussion:[79]

(a) Permission to occupy: This is the statutory form of what was perceived to be communal tenure.[80] Permission to occupy refers to the right to use (unsurveyed) land against payment of an annual rent subject to certain conditions. This entitled the holder to occupy a residential and/or arable site. It was issued by the functionary concerned or the magistrate of the area who had wide discretionary powers. Consultation with tribal authorities was advisable, but not compulsory. The right to occupy could be transferred, leased or subdivided with the permission of the functionary concerned.

(b) Quitrent: A quitrent right is a real right that was registrable if the land, in relation to which it was granted, was surveyed.[81] This right empowered the quitrenter to occupy the land against payment of a fixed rent. The state/grantor still remained the owner of the land. Transfer could occur only with the permission of the relevant official or by way of inheritance according to a prescribed table of succession until the latter was repealed. The land could be utilised as security for a loan, and the right was subject to suspension and cancellation.

(c) Deeds of grant with regard to "ownership units": These deeds related to towns within the self-governing territories and South African Development Trust Land. The deeds were issued by the relevant township authorities. As the rights related to surveyed land were registered, deeds of grant constituted strong limited real rights. They were alienable, inheritable and could be burdened with limited real rights. On South African Development Trust Land they could also be converted into ownership by opening and formalising a township register.

(d) Variety of permits: A variety of permits relating mainly to towns within the self-governing territories and land held in trust by the South African Development Trust prevailed.[82] Permits included the following: lodgers', building and trading permits.

The diverse set of tenure and land control forms did not originate from one single legislative measure. Instead, the grid of measures resulted from various statutes and sub-ordinate legislation, the most important being:

(e) Black Administration Act:[83] This Act consolidated pre-Union and several Union laws on the separate administration of African persons. Although section 25 of the Act was repealed in 1991,[84] secondary provisions enacted under section 25 remained intact. In relation to land, these secondary provisions include, amongst others, Proclamation R188 of 1969[85] and Proclamation R293 of 1962.[86] Since 1991 and the homeland era, the Act has been repealed piece by piece so that only bits and pieces would have remained intact until the end of

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78 Freehold was granted to particular families in the mid-nineteenth century in relation to certain pockets of land in the Eastern Cape. Since then the property-holding structure has been held together by kinship ties and is safeguarded by a family custodian, a representative selected to manage, maintain and defend family property on behalf of family members. While the land control form is in theory thus "individual tenure", it is in reality and in practice exercised in a family-context – see for a detailed discussion Kingwill "An inconvenient truth: land title in social context – A South African perspective" in Mostert, Verstappen and Zevenbergen (eds) (2017) *Land law and governance: African perspectives on land tenure and title* 65–112.

79 For more information, see Van der Merwe and Pienaar "Land reform in South Africa" in Jackson and Wilde (eds) (1997) 342–349.

80 Regulated by Proc R188 of 1969.

81 Regulated by Proc R188 of 1969.

82 Regulated by Proc R293 of 1962.

83 38 of 1927.

84 By way of the Abolition of Racially Based Land Measures Act 108 of 1991.

85 Dealing with permission to occupy.

86 Relating to townships.

December 2012.[87] In the Schedule of the Communal Draft Tenure Bill, published in July 2017, set out in more detail below, it is indicated that the remaining sections (6, 7 and 8) of the Black Administration Act are to be repealed when the Communal Tenure Act commences.

(f) Proclamations: In terms of section 25 of the Black Administration Act, the erstwhile president had virtually unlimited powers to legislate in respect of African persons and so-called "black areas" by proclamation. Regulations could, likewise, be made in terms of section 48 of the Development Trust and Land Act.[88] The Abolition of Racially Based Land Measures Act[89] provided that those regulations remain in force until repealed under section 87 of that Act or by a competent authority. In terms of section 87(4), the president could repeal or amend these proclamations and government notices until 31 December 1994. The president has exercised this power in a few cases only. Therefore, the proclamations for the most part remain in force, although evidence suggests that many are no longer applied.

(g) Former homeland laws: Some former homeland laws still apply. Some such laws substituted national legislation that was in force at the time of their enactment, and some repealed or amended the proclamations and regulations referred to above. Apart from determining their current legal status, it is difficult to find the laws. They were originally supposed to have been lodged with the high court having jurisdiction in the area. Research has revealed that the high courts' collections are not complete. They will, in due course, be repealed.

(h) Assigned or delegated laws: All of the above-mentioned legislative measures functioned within a substantial legal framework relating to spatial planning, survey, deeds registries and land use management. When the new political dispensation commenced in 1994, some, probably most, of these laws were assigned or delegated to the then newly established provinces. Laws that were delegated pose no problems, as the delegations can, where necessary, be withdrawn. Laws assigned to the provinces fall within the sphere of their competence, and provisions in respect of which provinces have legislative competence can be repealed by those provinces only. Although provinces do not have legislative competence in respect of land matters since these are a national legislative item, these laws do not deal with land matters only. Therefore, the rather un-coordinated approach to land matters continued for some time, following the 1994 political dispensation. With regard to land use, spatial planning and development for example, the Spatial Planning and Land Use Management Act[90] (SPLUMA) aims to bring all land-related planning and management issues under one overarching measure. While this Act has a clear transformative thrust that would also impact on access to land and tenure security, transitional provisions[91] mean that the full effect of SPLUMA will not be experienced immediately. To that end some degree of diversity may still continue for some time, also having an impact on traditional areas.

Accordingly, the conclusion may be reached that a diverse system of land control measures, differing from area to area and disparate in relation to content, scope and impact, was operative when a constitutional dispensation dawned in April 1994. While important developments have occurred following the implementation of the land reform programme specifically, as explored in more detail below, a degree of diversity and complexity has remained and will in all probability continue for some time yet.

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87 The initial date was set as 31 December 2010. This was amended in the Repeal of the Black Administration Act and Amendment of Certain Laws Amendment Act 20 of 2012.
88 18 of 1936.
89 108 of 1991.
90 16 of 2013.
91 Section 60.

6.4.3 *Traditional customary law tenure*

6.4.3.1 Introduction

Traditional customary law tenure is very difficult to classify and typify when approached from a Western or common law tradition.[92] That is the case because the contexts differ vastly and the basic approach to land and rights in land are generally contrasting. Having regard to these basic points of departure, the Western terminology is still often used to describe or categorise these rights and interests, yet they will never reproduce or convey the exact content of customary law rights and interests perfectly. To that end, the following passages from *Alexkor Ltd v Richtersveld Community*[93] remain pertinent:

> [50] The nature and content of the rights that the Richtersveld community held in the subject land prior to its annexation must be determined by reference to indigenous law. That is the law which governed its land rights. Those rights cannot be determined by reference to common law . . .
>
> [51] While in the past indigenous law was seen through the common law lens, it must now be seen to be *an integral part of our law*. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by references not to the common law, but to the Constitution.

Illustrating the contrasting points of departure is the fact that within the traditional customary property law context rights are generally nested and overlapping and invariably exercised by different persons at different levels and points in time.[94] While the general approach to land and land rights is often typified as being communal as opposed to individual (for example, in Western communities), it is also true that an individual dimension does exist in customary property law. Yet, given that two dimensions emerge overall – communal and individual – traditional customary property law is usually linked with communal land tenure. The latter is defined in terms of its inclusive nature and ideally exhibits the following features:[95]

(a) Land rights are embedded in a range of social relationships, including household and kinship networks and various forms of community membership;

(b) land rights are inclusive rather than exclusive in nature;

(c) access to land is guaranteed by norms and values embodied in the community's land ethic;

(d) the relevant rights are derived from accepted membership of a social unit, usually acquired by birth, affiliation, allegiance and transactions;

(e) social, political and resource-use boundaries are clear but flexible and adaptable;

(f) the balance of power between gender, competing communities, rights-holders, land administration authorities and traditional communities are flexible; and

(g) the inherent flexibility and negotiability of land tenure rights embodies potential of ever-changing and adapting to new needs and demands.

Under the 2017 Communal Land Tenure Bill[96] "communal land" means land contemplated in clause 4, (discussed in more detail below),[97] owned, occupied or used by members of a community subject to shared rules or norms and customs of that community and includes land owned by the State but used by communities as communal land. As land rights are linked with

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92 Mostert and Pope (eds) (2010) 107–108.

93 2004 (5) SA 460 (CC) paras 50–51. Emphasis added.

94 Claassens "Women, customary law and discrimination: the impact of the Communal Land Rights Act" in Murray and O'Sullivan (eds) (2005) 43; Pienaar "Customary Law and communal property in South Africa: challenges and opportunities" in Xu (ed) (forthcoming 2018).

95 See Cousins (2005) *Stell LR* 500–501.

96 Communal Land Tenure Bill of 2017, published in GG 40965 of 7 July 2017. As of 8 October 2018, the Bill had not been transformed into a statute.

97 See 6.4.4.3.3 below.

community and belonging, "community" is an essential component in landholding. While being difficult to define due to, *inter alia*, fluctuation of members and culturally-specific characteristics, the legislature has defined it to mean the following for purposes of the Communal Land Tenure Bill of 2017, namely a group of persons whose rights to land were derived from shared rules determining access to land held in common by such group regardless of its ethnic, tribal, religious or racial identity and includes a traditional community.[98] Section 2 of the Traditional Leadership and Governance Framework Act[99] provides for the recognition of traditional communities when that community is subject to a system of traditional leadership of that particular community's customs[100] and if the community observes a system of customary law. In this light, a community could also include a family or household.

Communal land intrinsically has two dimensions, alluded to above: the communal dimension in relation to the community as a whole and the individual dimension in relation to individuals (or families) within the community. Some rights are thus linked to the community as a whole, whereas other rights are devolved to individuals or families and households. The communal territory consists of:

(a) portions for residential purposes;

(b) portions for cultivation; and

(c) the remaining area, reserved for grazing and for extending the agricultural and residential portions.

Accordingly, integral to traditional customary land rights are (a) the basic features listed above, of which embeddedness is arguably the most prominent feature; (b) the element of community; and (c) the two dimensions encapsulating an individual and communal dimension. Accordingly, customary property law generally and communal tenure specifically, is a complex, multi-dimensional system.[101] The actual mechanics of customary land tenure and what it entails, as well as how it functions, will be discussed below.

6.4.3.2 Communal land tenure in practice

In principle, residential and arable land must be allotted to every household. Land is allocated by the traditional authority to family heads, who, in turn, allocate it to the constituent family houses. The Communal Land Rights Act,[102] discussed in more detail at 6.4.4.2, would have affected the allotment of land considerably had it not been found to be unconstitutional and therefore never enacted. The Communal Land Tenure Bill of 2017 set out in more detail below, likewise aims to adjust allotment processes and landholding structures.

However, in practice under traditional customary law, because most land had already been allotted, the ruler was invariably required to do no more than approve or oversee a transfer between existing land holders.[103] The land thus allotted became the property of such households, which households had exclusive rights.[104] This meant that these rights could be abandoned or lost, depending on the circumstances. These rights could also be transferred, either by way of

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98 A similar definition, excluding the phrase "regardless of its ethnic, tribal, religious or racial identity and includes a traditional community" is employed in s 1 of the Restitution of Land Rights Act 22 of 1994 which explains what a community entails for purposes of the restitution programme.

99 41 of 2003.

100 Not all traditional communities have identical customs regarding leadership roles. Some communities have kings and queens and others have paramount chiefs only.

101 Siegel (2015) SAJHR 357–378; Wicomb "Securing Women's Customary Rights in Land: The Fallacy of Institutional Recognition" in Claassens and Smythe (eds) (2013) 49–72; Pienaar "Customary Law and communal property in South Africa: challenges and opportunities" in Xu (ed) (forthcoming 2018).

102 11 of 2004 (hereafter the CLARA).

103 Bennett and Murray "Traditional leaders" in Woolman *et al* (eds) (2009) 26-57–26-58.

104 Bennett (2004) 390–399.

sale or by bequest.[105] As mentioned, land for residential purposes as well as arable land for cultivation or garden plots, was usually allotted.

As constitutional head of the community, the traditional leader is responsible for the control of the land. For example, he oversees the allocation of land, settles conflicts between subordinate communities and admits or excludes strangers.[106] Ordinarily, his control means that he allocates a certain area – usually not sharply defined – as communal land for legal communities next in status, for example the wards among the Tswana.[107] The head of the subordinate legal community has control over the communal land allocated to the legal community concerned.[108] The traditional leader can deprive a member of the community of land allocated to the latter as residential or arable land if it is to the advantage of the community or if he himself, as an organ of the community, needs it.[109] The exact scope of a traditional leader's role will possibly differ in detail from community to community. As alluded to above, in an attempt to understand and explain customary communal land as a legal phenomenon, academics and authors have opted for Western-style or civil-law terminology. The exact role of the traditional leader has especially been difficult to pinpoint within this context. Accordingly, terms such as "ownership", "vest" and "trust" have been employed in this regard. In some sources, it is stated that the traditional leader is the owner of the land and can do with it as he pleases.[110] Similar to this point of view is the statement that "the land is vested in the chief, in trust for his people". Unfortunately, these terms do not really convey the true meaning of the elements or complexities involved. Bennett suggests that concepts such as "interest", "power" and "right" are more useful for understanding customary tenure.[111] He furthermore underlines that rights-holders and authorities are bound by powerful obligations and responsibilities within this system of complementary interests held simultaneously.[112]

The communal land occupied by or allotted to a particular community is demarcated by various natural objects, and not by boundary beacons. Natural things such as rivers, dongas, stones, trees and anthills serve as suitable objects to indicate the limits of the communal land. While flexible boundaries are also a strength of communal tenure and one of its outstanding features, it can give rise to disputes and pose particular challenges for official deeds and recording systems.

The traditional allotment of land to male family heads has brought the debate concerning women's rights in property, in general and in relation to land in particular, to the fore. However, among the African people of South Africa, married women have always been allotted land, as part of house property, to cultivate and for residential purposes. The general principle is whatever land has been allotted to her husband belongs to her house and has to be used exclusively for the benefit of such house. Schapera[113] described this position as follows:

> No matter how many fields a man has, he must set aside at least one for the special use of his wife. This field will be inherited after her death by her own children. Her husband, if he then marries again, must find another field for his new wife, although she may at first be allowed to cultivate that of her predecessor. So, too, in a polygamous household every wife is entitled to her own field. A field set aside for the use of a wife is known among the Kgatla as *tshimo yha lapa* ('house' field) and among the Ngwato as *tshimo ya mosadi*

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105 Bennett (2004) 399–409.
106 Myburgh and Prinsloo (1985) 38–39.
107 Schapera (1955) 154.
108 See generally Bennett and Murray "Traditional leaders" in Woolman *et al* (eds) (2009) 26–56–58.
109 Myburgh and Prinsloo (1985) 41–42. See, however, 6.4.4.4 where the impact of the Interim Protection of Informal Land Rights Act 31 of 1996 is set out briefly.
110 See Kerr's discussion of this interpretation in Kerr (1990) 36–37.
111 Bennett " 'Official' vs 'living' customary law: Dilemmas of description and recognition" in Claassens and Cousins (eds) (2008) 146–147.
112 Bennett " 'Official' vs 'living' customary law: Dilemmas of description and recognition" in Claassens and Cousins (eds) (2008) 150.
113 Schapera *A handbook of Tswana law and custom* (1955) 202.

(the wife's field). Its crops belong to the woman to whom it is allocated; and neither they nor the field itself may be used by anyone else without her permission. Many men of rank and wealth also have one or more *masimo a kgotla* (Kgatla) or *masimo a monna* (Ngwato), common household fields, as distinguished from the fields set aside for a wife's private use.

Nowadays, for a variety of reasons, land is increasingly allocated to unmarried and divorced women as well.[114] Although these allocations are usually in relation to women as heads of households, the extent of these new developments appears to differ from community to community.[115] Although women have always had access to land, they now also have complete control of the land allotted in the same way as men. It can thus be argued that at least formally, especially after the commencement of the Constitution, the discrimination that existed in this respect has been terminated. However, in reality, women still face many problems relating to property, especially in rural areas.[116]

As regards unmarried major women, section 9 of the Recognition of Customary Marriages Act becomes relevant. As it states beyond doubt that "[d]espite the rules of customary law, the age of majority of any person is determined in accordance with the Age of Majority Act, 1972 (Act No 57 of 1972)", it may be argued that unmarried women have the same rights in relation to communal land.

While some developments had occurred within the arenas of marriage and succession, thereby impacting on property and land generally, specific tenure reform endeavours have also been embarked upon post-Constitution. These developments, aimed at customary land rights in particular, are explored in more detail below.

6.4.4 *Land reform*

6.4.4.1 Introduction

The overall land reform programme consists broadly of three inter-connected sub-land reform programmes, namely (a) redistribution and broadening access to land;[117] (b) tenure reform and improving security of tenure;[118] and (c) restitution,[119] aimed at restoring the loss of land and rights in land.[120] While the restitution programme may also impact on communal land in that lost land may be restored,[121] it is especially the tenure reform programme that impacts on communal land and customary land rights in particular. The main aim of the tenure reform programme, as provided for under section 25(6) of the Constitution read with section 25(9), is to ensure that legally insecure rights are made more secure and to provide redress in cases where this aim cannot be achieved.

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114 Claassens and Ngubane "Communal Land Rights Act" in Claassens and Cousins (eds) *Land, power and custom: Controversies generated by South Africa's Communal Land Rights Act* (2008) at 154. Also see generally Budlender "Women, marriage and land: findings of a three-site survey in Claassens and Smythe (eds) (2013) 28–48.

115 Cousins "Characterising 'communal' tenure: Nested systems and flexible boundaries" in Claassens and Cousins (eds) *Land, power and custom: Controversies generated by South Africa's Communal Land Rights Act* (2008) 120.

116 Claassens and Ngubane "Communal Land Rights Act" in Claassens and Cousins (eds) *Land, power and custom: Controversies generated by South Africa's Communal Land Rights Act* (2008) 156–157.

117 Section 25(5) of the Constitution.

118 Section 25(6).

119 Section 25(7).

120 See Pienaar (2014) – ch 7: redistribution, ch 8: tenure reform and ch 9: restitution.

121 Section 2 of the Restitution of Land Rights Act 22 of 1994 provides that communities or parts of communities may also lodge land claims where land or rights in land were lost as a result of racially discriminatory laws or practice. Where such land claims have been successful, land is usually restored on condition that a communal property association, a juristic person, is formed. Essentially that means that the legal basis of land holding had been adjusted once the claim was successful and that "traditional" customary tenure is not relevant any more. See, for an example of a successful community land claim, Pienaar (2017) *PER/PELJ* 1–31.

Moving away from a permits-based approach towards a rights-based approach was already envisaged in the White Paper on South African Land Policy.[122] Also incorporated in the White Paper were the points of departure that tenure security had to be linked with choice and preferences of rights-holders and that *de facto* rights had to be recognised.[123] The land tenure rights available to the people living in communal land areas are largely based on customary law or on insecure permits granted under laws that were applied exclusively to Africans. Apart from the fact that numerous legislative measures gave rise to these diverse kinds of rights, as set out in 6.4.2.2 above, the kind of rights that emerged did not encompass real or limited real rights with concomitant force. The holders of such rights could generally not use them to enter the financial market, for example, as security for loans in order to farm or develop the land. In addition to the consideration of accessing financial resources, tenure security would also promote protection against eviction, recognise *de facto* rights and incorporate and promote gender equality. Essentially, the tenure reform programme seeks to reverse the historical legacy of colonialism and apartheid by strengthening the land tenure rights of the people living in, amongst other, communal land areas, giving these land tenure rights the full protection of the law. In cases where the securitisation of rights was not possible, equitable redress was provided for.[124]

In this light, various developments occurred post-1994.[125] Altering the basis of land ownership in line with constitutional imperatives of equality and dignity, while still encapsulating the communal spirit, communal property associations were introduced as new juristic constructs under the Communal Property Associations Act.[126] This mechanism enabled communities to hold land on a new legal basis. In *Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority*[127] the Constitutional Court found this Act to be:[128]

> a visionary piece of legislation passed to restore the dignity of traditional communities. It also serves the purpose of transforming customary law practices. For example, in some traditional communities where communal land is held and controlled by a traditional leader, women are excluded from the allocation of land for individual occupation and use. This practice is inconsistent with the equality clause in the Bill of Rights which prohibits discrimination based on, among other grounds, gender and marital status. This inconsistency necessitates the development of customary law as mandated by section 39(2) of the Constitution. . . . Customary law remains in force to the extent that it is in line with the Constitution and Acts of parliament dealing with matters to which customary law applies. Under the Act unmarried women who are members of traditional communities enjoy rights equal to those held by men when it comes to access to communal property, and management of the affairs of an association.

The CLARA was drafted specifically to embody the aims of tenure reform focused in relation to communal land. Most of this land is registered in the name of the state or is held in trust, either by the Minister of Rural Development and Land Reform or the Ingonyama Trust in KwaZulu-Natal.[129] This Act was found to be unconstitutional, as elaborated on in more detail below.

In 2009 the Department of Land Affairs was restructured and has since functioned as the Department of Rural Development and Land Reform. In this regard, greater synergy between

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122 April 1997.

123 *White Paper* vi.

124 Section 12 of the Communal Land Rights Act 11 of 2004.

125 However, some developments already occurred before the commencement of the Constitution, e.g. the commencement of the Abolition of Racially Based Land Measures Act 108 of 1991 and the Upgrading of Land Tenure Rights Act 112 of 1991. The latter already provided for some measure of tenure reform before the land reform programme was embarked upon fully.

126 28 of 1996.

127 2015 (6) SA 32 (CC).

128 Paragraph 31.

129 In KwaZulu-Natal communal land amounting to about 2,7 million hectares vests in the Ingonyama Trust and is administered by it under the KwaZulu-Natal Ingonyama Trust Act 3 KZ of 1994. The Ingonyama Trust is to remain in place pending the transfer of all land contemplated in s 3 of the Act to the respective communities by the Trust Board. The scope of the Act is set out in s 2.

rural development and land reform, both impacting in particular on traditional areas and communal land, was envisaged. Since the unconstitutionality finding of the CLARA in 2010, the Green Paper on Land Reform was published in September 2011. Conditions in the former homelands and self-governing territories have also featured rather prominently in the National Development Plan of 2012, leading to the publication of the Communal Land Tenure Policy in 2014. In this context, greater focus on rural areas comprising traditional areas and communal land, including legislative measures and overarching policy, was envisaged. The latest development in this arena is the publication of the Communal Land Tenure Bill on 7 July 2017.

6.4.4.2 Communal Land Rights Act

6.4.4.2.1 Purpose

Since the CLARA was found to be unconstitutional in 2010, a draft Communal Land Tenure Bill was published, as explained above. Given that the latter Bill had not been finalised and as the finding against CLARA was linked to procedural and not substantive findings, some discussion of CLARA remains warranted. However, while relevant, the discussions of both the CLARA and the 2017 Bill remain brief for purposes of this chapter.

As mentioned, promoting security of tenure was the main aim of the CLARA. The idea was that security of tenure could be achieved in two ways: (a) by embarking on a process in which insecure "old order rights" were replaced, transformed or substituted by "new order rights"; and (b) registration of these rights. An "old order" right was defined as any of the formal or informal, registered or unregistered rights referred to in the above expositions resulting from pre-constitutional legislative measures and recognised by law, including customary law, practice or usage.[130] Although the Act provided that such an insecure right "[was] legally secured in terms of section 4", the securitisation process did not take place automatically. Instead, "new order rights" would come into play only once the procedure set out in the Act had been completed. A "new order right" was a tenure right or other right in communal land or other land which had been confirmed, converted, conferred or validated by the Minister of Rural Development and Land Reform.[131]

6.4.4.2.2 Measures to achieve objectives

The CLARA contained elaborate provisions to achieve its objectives, mainly in regard to:

- the transfer and registration of communal land (Chapter 3);
- the provision of comparable redress where tenure cannot be legally secured (Chapter 4);
- the conduct of land rights enquiries (Chapter 5);
- the content, making and registration of community rules (Chapter 6);
- land administration committees (Chapter 7);
- Land rights board (Chapter 8); and
- Ingonyama Trust Land in KwaZulu-Natal (Chapter 9).

6.4.4.2.3 Constitutional challenge

Various authors have been critical about certain aspects of the CLARA, even before it had officially passed through Parliament.[132] In summary, the main representations deal with the

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130 Section 1 of the Communal Land Rights Act 11 of 2004.
131 Section 1.
132 Mostert and Pienaar "Formalisation of South African communal land title and its impact on development" in Cooke (ed) (2005) 320–321; Cousins "Characterising 'communal' tenure: nested systems and flexible boundaries" in Claassens and Cousins (eds) (2008) 15–28; Smith "An overview of the Communal Land Rights Act 11 of 2004" in Claassens and Cousins (eds) (2008) 67–69; Pienaar (2004) *THRHR* 244–263.

questionability of supporting and propagating a land titling scheme linked with registration, as set out in the Act, complaints that the term "community" is vague, that the Act does not acknowledge and reflect the "nested" system of land rights inherent in traditional customary communities, that employing traditional councils to act as land administration committees will entrench patriarchy and existing power relations, that the nature and content of "new order rights" are not clearly defined, and that the Minister has wide-ranging powers in determining the outcome of "old order rights" without criteria guiding the Minister in the exercise of these discretions and powers.

In light of these objections and criticisms, a formal constitutional challenge was lodged by four communities in October 2008 in the Northern Gauteng High Court, resulting in an unconstitutionality finding.[133] As required, the case was referred to the Constitutional Court. At the hearing, the Minister of Rural Development and Land Reform indicated that the CLARA stood to be repealed in its entirety and that an in-depth investigation into the constitutionality thereof was unnecessary. However, on 11 May 2010, the Constitutional Court handed down a judgment in *Tongoane v The National Minister of Agriculture and Land Affairs*[134] per Ngcobo CJ in which the order of the High Court was confirmed.[135] As the Act was found to be unconstitutional due to its incorrect tagging (referring to the legislative process)[136] and in light of the Minister's statement that the Act was to be repealed in any event, the Constitutional Court refrained from an analysis of substantial issues, some of which were raised in the High Court proceedings. Concerns that the approach followed in the Act and the institutions and bodies employed in securing title were problematic and in direct conflict with the constitutional ideals of equality and tenure security were thus not dealt with.

Being an Act that also impacted on provincial matters, more particularly on customary-law issues, the CLARA ought to have followed the procedure set out in section 76 of the Constitution. Instead, it was tagged as a section 75 Act and, therefore, its passage through Parliament was incorrect. On this basis alone, the Act was found to be unconstitutional.[137]

6.4.4.3 Reformative measures

6.4.4.3.1 *Green Paper on Land Reform*

When the CLARA was declared unconstitutional, the Minister of Rural Development and Land Reform announced that an overarching policy dealing with communal land in particular would be drafted speedily. Preceding the Communal Land Tenure Policy in 2014 was the Green Paper on Land Reform in September 2011. The Green Paper announced that land was a national asset and that the current land tenure system had to be "fundamentally reviewed".[138]

The vision for land reform was fourfold, namely, (a) to re-configure a single, coherent four-tier system of land tenure to ensure that everyone, but especially rural blacks, have reasonable access to land with secure rights; (b) clearly defined property rights, sustained by a fair and accountable land governance system; (c) secure forms of long-term land tenure for resident "non-citizens" engaged in appropriate investments which enhance food sovereignty and livelihood security; and (d) effective land use planning and regulatory systems.

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133 *Tongoane v The National Minister of Agriculture and Land Affairs* [2010] JOL 25446 (GNP).
134 [2010] JOL 25446 (GNP).
135 *Tongoane v the Minister of Agriculture and Land Affairs* 2010 JDR 0539 (CC). (In the meantime, the Department of Land Affairs and Agriculture has been restructured and is now referred to as the Department of Rural Development and Land Reform.)
136 See paras 45–97.
137 See paras 111–112.
138 *Green Paper on Land Reform* (2011) 1.

Underlying land reform were the following principles: (a) de-racialising the rural economy; (b) democratic and equitable land allocation and use across race, gender and class; and (c) a sustained production discipline for food security. In line with the Comprehensive Rural Development Programme, the emphasis was clearly on rural areas, in particular where agriculture occurs. The "single four-tier land tenure system" was set out as follows:[139]

- state and public land: leasehold;
- privately owned land: freehold, with limited extent;
- land owned by foreigners: freehold, but precarious tenure, with obligations and conditions to comply with; and
- communally owned land: communal tenure, with institutionalised use rights.

While identifying communal land as a category forming part of the four-tier system, the Green Paper did not discuss communal land further. In fact, communal land was specifically excluded from the ambit of the Paper. The reason for excluding communal land was that it was too important and too complex, thereby necessitating a separate policy focused on communal land only. To that end, the Communal Land Tenure Policy was finally published in 2014.

6.4.4.3.2 *Communal Land Tenure Policy*

The underlying aim of the Communal Land Tenure Policy of 2014 is to "both secure land rights for those living in communal areas as well as engender the transformation of land governance institutions to embrace the principles of democracy and equity."[140] The transfer of ownership of land from the Minister of Rural Development and Land Reform to traditional councils, is linked to the above. Overall, distinctions are drawn between land located inside and outside of former Bantustan areas (national states and self-governing territories). For purposes of the Policy, land located outside former Bantustan areas are "communal land" because the land was transferred to a community under the redistribution or restitution programmes, usually by way of a communal property association.

Interestingly, despite the principled idea to transfer land in ownership from the Minister, in whose name it is still registered, to councils, the Policy continued to endorse the state's "ultimate power to make decisions about land rights and land use in communal areas". This theme resonates throughout the Policy.

The Policy employs two "wagon-wheel figures" to depict the vesting of title and the concomitant rights and duties for relevant role players within communal areas. The two figures are distinctive in that one figure relates to "conventional traditional communal areas that observe customary laws" relating to land located within the boundaries of former Bantustan areas, whereas the other figure is designed for "non-traditional communal areas", essentially dealing with land located outside former Bantustan areas. In each instance, the outer boundary of the relevant communal area will be demarcated, and corresponding title will be vested in a particular governance structure. With respect to former Bantustan areas, traditional councils will be the governance structure, whereas communal property associations or trusts will fulfil this role in areas outside former Bantustans.[141] In former Bantustan areas, traditional councils or traditional authorities are supposed to be vested with the responsibility of administering the land and land-related resources on behalf of households.[142]

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139 *Green Paper on Land Reform* (2011) 6.
140 *Communal Land Tenure Policy* (2014) 27.
141 These areas include land that was awarded to communities after 1994 by way of either the redistribution or restitution land reform programmes.
142 *Communal Land Tenure Policy* (2014) 20.

6.4.4.3.3 *Communal Land Tenure Bill of 2017*

In light of CLARA being found to be unconstitutional, and the successive policy developments in 2011 and 2014 respectively, a new legislative measure dealing with communal land was imminent. In July 2017, the Communal Land Tenure Bill was finally published for comment. As explained, the Bill has not been finalised at the time of writing and therefore only a brief discussion of the main tenets and the most important aspects of the Bill follows.

Objectives of the Bill

The objectives are set out in clause 2 of the Bill, namely to provide for:

(a) legally secure tenure in relation to communal land by:
  (i) converting legally insecure land tenure rights held by a community member or a community that occupies communal land, into ownership;
  (ii) transferring ownership of land acquired by the state to communities to enable access to land, on an equitable basis;
  (iii) granting to community members the right to use, as individual members or as a community, land owned by the State;
  (iv) regulating the administration of communal land; and
  (v) promoting and fulfilling social, economic, environmental and sustainable development on communal land;
(b) awarding of comparable redress in instances where legally secure land tenure cannot be provided;
(c) acquisition of more land to be used as communal land;
(d) choice on the administration of communal land by communities;
(e) protection of communal land against unfair acts of disposal;
(f) performance of municipal functions on communal land; and
(g) mechanisms for resolving disputes emanating from the administration of this Act.

Main tenets of the Bill

The Bill sets out the pertinent principles of communal land regulation, has application in certain areas of the country only, provides for a specific process by which tenure rights are secured, and provides for various bodies and institutions that are instrumental in the process of securitisation. Each of these will be dealt with briefly.

The principles in terms of which communal land is regulated entail the following:[143]

(a) recognising and respecting;
  (i) all legitimate land rights and persons who hold such rights;
  (ii) the right of communities to choose institutions or entities that administer land on their behalf; and
  (iii) the right of communities to democratically control their commonly owned land and the responsibility to account for such control;
(b) balancing the interests of the state, communities and members of communities;
(c) providing access to justice and redress where land rights are in dispute;
(d) promoting the rule of law, good governance, accountability and equality between men and women; and
(e) promoting economic growth, poverty eradication, investment and development in communal land areas.

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143 Clause 3 of the Communal Land Tenure Bill of 2017.

Being aimed at communal land and communal tenure,[144] the Bill applies to essentially three categories of land, namely "traditional" communal areas comprising communal land which is vested in the state, or which at any time vested in any of the former self-governing territories or national states,[145] or in the South African Development Trust; land awarded by way of the land reform programme, namely restored land under section 25(7) of the Constitution or redistributed land under section 25(5) of the Constitution; and land in respect of which the Minister has, by notice in the *Gazette*, determined that this Act applies.

The Bill is thus more encompassing in that it is not only focused on "traditional" communal areas under traditional leadership constructs, but also applies to land resulting from the all-encompassing land reform programme, as well as (additional) land identified by the Minister.

The main mechanisms of securing rights involve the transfer of ownership and the granting of use rights to relevant communities, households and individuals. In many instances, communities already live on the relevant land and utilise it, but the land itself is held in trust by the Minister. To that end, the land has to be transferred to the community[146] and before that can occur, a general plan has to be prepared and approved.[147] This also entails surveying all land to which the Bill will eventually apply. Before the actual transfer of rights can occur, various land administration and land use planning pre-requisites thus have to be complied with. This can be a very time-consuming process. Once ownership is transferred to the community, the community members have to decide on the nature of rights to be conferred on community members in respect of subdivided portions of communal land.[148] Such subdivided portions are to be used for residential, business and other relevant purposes. In this regard, the community has a choice regarding ownership, lease, rights of use or any other right recognised in law. Whereas the land is registered in the name of the relevant community, individual portions are registered in the names of the relevant community members.[149] Ownership can also be granted conditionally to individual members of the community. Although disposal of land is possible, some precautions are set out in the Bill in that disposal can only occur where the majority of community members (60%) agreed to the act of disposal.[150] Land can also be reserved to the state for its use.[151]

The Bill provides for various constructs, institutions and bodies involved in the regulation and administration of communal land. The community, as owner of the land, is a juristic person and therefore must have rules that govern its activities and decisions.[152] This means that communities have to develop and register rules that are clear, certain and understood by the community. Communities have the right to choose the relevant entity that assists in administering the land.[153] These entities can be a traditional council, a communal property association or any other entity approved by the Minister. Once the community has decided on the particular administrative entity, the functions of the entity apply as provided for in clause 29 of the Bill. The Bill furthermore provides for a households' forum[154] and the possibility of a board or boards[155] to be established by the Minister. It seems as if the hierarchy is the following: community members all form part of the relevant community who determine the specific entity to administer the land on their behalf. Apart from this administration entity, household forums are also constructed

144 Clause 4 of the Communal Land Tenure Bill of 2017.
145 So-called "Bantustan areas" – see the exposition at 6.4.2.2 above.
146 Clause 5 of the Communal Land Tenure Bill of 2017.
147 Clause 9.
148 Clause 11.
149 Clause 12.
150 Clause 13.
151 Clause 6.
152 Clauses 25–27.
153 Clause 28 of the Communal Land Tenure Bill of 2017.
154 Clauses 32–35.
155 Clauses 36–40.

that act as a middle person between the community and the entity chosen to administer the land. The underlying reason is to provide for immediate accountability on a regular basis as the entire community cannot convene on a permanent basis. The various boards appointed by the Minister are there to advise the Minister on the administration and implementation of the Bill. The Department, on the other hand, is there to provide administrative and financial support. Dispute resolution measures are also provided for.

The Bill is to follow the section 76 procedure, so as not to be found unconstitutional again. At this stage, it is difficult to predict whether the Bill will be successful in achieving its objectives. It is a complex process that involves various entities, at various levels. Important prerequisites furthermore have to be in place for the Bill to function successfully. It is thus a time-consuming and expensive process that requires massive human and financial recourses. Apart from these concerns, it is imperative that the Bill is aligned with other land reform-related measures, for example, the 2017 amendment of the Communal Property Associations Act, and that the Bill complies with all constitutional imperatives. With respect to the latter, substantive issues linked to equality, dignity and administrative justice are especially pertinent. It is furthermore imperative that traditional leadership constructs endorse and support the envisaged mechanisms provided for in the Bill so as to promote effective and constitutionally sound administration and regulation in communal areas.

6.4.4.4 Holding measure: Interim Protection of Informal Land Rights Act[156]

Following the CLARA being found to be unconstitutional, and in light of the pending new Communal Land Tenure Act, of which the finalisation can still take some time, the *lacuna* in the regulation and administration of communal land need to be addressed. It is in this light that the Interim Protection of Informal Land Rights Act enters into the picture. This holding measure, initially promulgated to protect informal land rights for the duration of the tenure reform programme only, is now and has been for some time the overarching legislative measure dealing with land rights in communal areas. Protection entails that no person may be deprived of these rights without his or her consent.[157] Land rights held communally may be deprived in accordance with the customs of the particular community only.[158] The Act defines an "informal right"[159] to include the use of, occupation of or access to land in terms of five categories of sources, namely:

(a) any tribal, customary or indigenous law or practice of a tribe;

(b) the custom, usage or administrative practice in a particular area or community;

(c) the rights or interests in land of a beneficiary under a trust arrangement in terms of which the trustee is a body or functionary established under an Act of Parliament;

(d) beneficial occupation[160] of land for a continuous period of not less than five years prior to 31 December 1997; and

(e) the use or occupation of any erf as if the person is the holder of Schedule 1[161] or 2[162] rights under the Upgrading of Land Tenure Rights Act,[163] although that person is not formally recorded as such in a land rights register.

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156 31 of 1996.
157 Section 2(1) of the Interim Protection of Informal Land Rights Act.
158 Section 2(3).
159 Section 1(1)(iii).
160 "Beneficial occupation" entails the occupation of land by a person openly, as if that person is the owner, without force and without permission of the registered land owners – s 1(*c*).
161 Constituting leasehold, quitrent and deeds of grant.
162 Schedule 2 rights include permission for the occupation of any irrigation or residential allotment; permission to occupy and rights of occupation.
163 112 of 1991.

Therefore, the Interim Protection of Informal Land Rights Act[164] is not only the overarching measure dealing with customary rights and interests, but it has also amended customary powers of traditional leaders, especially those relating to expropriation and confiscation. That is the case because these rights and interests may now only be lost or taken away after consent or a resolution had been acquired.

6.4.4.5 "Spontaneous" tenure reform under auspices of the Constitution

Some developments in relation to access to land by women have been alluded to above. Interestingly, research published by Budlender[165] with regard to three particular areas in KwaZulu-Natal, the Eastern Cape and the North-West[166] has shown convincingly that land rights reform, including traditional and communal areas, has occurred outside any statutory measures. In this context women have gained greater access to land and more secure tenure by purely relying on the Constitution itself and not on any of the land reform measures promulgated under section 25 specifically. These "spontaneous" legal reforms, initiated by the Constitution and its basic ethos, have impacted on specific communities, thereby also exhibiting potential to change communities at large and general approaches to and concepts of property and land.

6.4.4.6 Conclusion

Despite having a constitutionally embedded land reform programme that is aimed at the promotion of greater access to land and tenure security, legislative measures promulgated to achieve these specific objectives have not been very successful to date. Instead, the CLARA was declared unconstitutional and relevant policy and legislative measures dealing with communal land in particular took years to be drafted and published. Where measures were published, critical disconnects between policy documents, legislative measures and case law emerged. Accordingly, land held in communal tenure is still under diverse land control forms, depending on the location of the land and the particular relevant legislative measures. In this regard the tenure can be traditional communal, amended communal (by way of legislative interventions), individual or trust tenure.

Where communal land is concerned, it is extremely challenging to meet constitutional imperatives to secure tenure on the one hand, while simultaneously preserving the distinguishing characteristics of customary property law, on the other. This challenge is compounded because matters located in section 25 of the Constitution, the property clause, are also inextricably linked to other fundamental rights in the Bill of Rights, including the right to dignity, the right to family life and the right to housing.

6.4.5 *Other statutory land rights*

6.4.5.1 Introduction

As explained, the second context involves rights in relation to land belonging to other persons (registered owners), but vested in, or exercised by persons who invariably live in accordance with customary law. The land in question here is usually commercial farm land and the persons involved are occupiers, usually farm workers and labour tenants.

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164 31 of 1996.

165 Budlender "Women, marriage and land: findings from a three-site survey" in Claassens and Smythe (eds) (2013) 28–48.

166 Msinga in KwaZulu-Natal with regard to a Zulu community; Keiskamahoek in the Eastern Cape with regard to a Xhosa community, and Ramatlabana in the North-West with regard to a Tswana community.

6.4.5.2 Extension of Security of Tenure Act (ESTA)

The aim of this Act is twofold: to ensure interim and long-term tenure security for persons who qualify as "occupiers" for purposes of the ESTA.[167] An occupier is a person who has consent or another right in law to occupy land belonging to the registered owner.[168] Consent may be actual or tacit consent and in some instances presumptions also assist in establishing consent.[169] Interim tenure security is provided in that occupiers may not be evicted, except under provisions of the Act[170] and only after strict compliance has been shown.[171] Eviction orders are furthermore only granted when they are just and equitable in the relevant circumstances, as considered by the court. Long-term tenure security is possible under section 4 of the Act that provides for "on-the-farm" and "off-the-farm" developments. It is known that occupiers are very often farmworkers, which mean that the two options entail respectively, a development on the relevant farm or a coordinated effort between land owners and the local authority for the establishment of an agri-village. Despite having measures in place to effect both interim and long-term security of tenure, the Act has not been very successful in achieving these objectives. To that end, hardly any agri-villages have been established and illegal evictions, thereby avoiding the whole of the ESTA, have continued unabated.[172]

Apart from providing land rights as explained above, the Act is also instrumental in the acquisition and exercise of other rights linked to tenure. Depending on the circumstances, occupiers may also bury their deceased on the land in question if it is in line with their cultural beliefs and religion[173] and if an established practice to that effect exists.[174] Occupiers are furthermore also entitled to the right to family life in accordance with their cultural background,[175] balanced with the rights and interests of the land owner.[176]

6.4.5.3 Land Reform (Labour Tenants) Act

In certain areas of South Africa, most notably in KwaZulu-Natal and Mpumalanga, tenants have been in occupation of parcels of land for two generations at least and have been using the land for cropping, grazing and housing.[177] In exchange for these occupational and use rights, the family or individual has been providing services to the land owner. The result of such an agreement qualifies a person for the protections and benefits incorporated in the Land Reform (Labour Tenants) Act.

Tenure security is provided for in that labour tenants who meet the requirements may only be evicted in accordance with the Act.[178] Apart from these protective measures, labour tenants are also empowered to apply for rights in land under Chapter 3 of the Act. To that end, the labour tenant may lodge a claim for the parcel of land he or she (and respective families) have been utilising for at least two generations, or any other parcel of land also belonging to the land owner.[179] Other relevant rights that would enable the effective utilisation of the land, for example corresponding servitudes are also connected to the right in land. Once the process has been

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167 See in general Pienaar (2014) 301–302.
168 Section 1 of the ESTA.
169 Pienaar (2014) 301.
170 Section 10 or 11 of the ESTA, depending on when the occupier started his or her occupation.
171 Section 9 sets out the procedural requirements. To that end all eviction orders are suspended while the orders are reviewed automatically by the Land Claims Court under s 19(3) of the Act.
172 See in general Pienaar (2014) 361.
173 Section 6(2) of the ESTA.
174 Section 6(2)(*d*A). *Nhlabathi v Fick* 2003 (2) All SA 323 (LCC). Also see Pienaar (2014) 418–423.
175 Section 6(2)(*d*).
176 *Hattingh v Juta* 2013 (3) SA 275 (CC).
177 Section 1 of the Land Reform (Labour Tenants) Act.
178 Pienaar (2014) 308–320.
179 Sections 16 and 17 of the Land Reform (Labour Tenants) Act.

completed, the former labour tenant becomes a land owner in his or her own capacity. To that end, both tenure security and redistribution have occurred.

On 28 February 2017, the Economic Freedom Fighters (EFF) leader, Julius Malema, called for the amendment of section 25 of the Constitution to allow land expropriation without compensation. The Constitutional Review Committee received the mandate to review section 25. The committee invited public submissions and received almost 150 000 written submissions. Only about 60 000 of the submissions were in favour of an amendment of the Constitution. The rest of the submissions indicated that there is no need for an amendment because section 25 is broad enough to allow for expropriation of land without compensation. During September 2018, public submissions were allowed. On 6 December 2018, parliament voted in favour of amending section 25 of the Constitution to allow for land expropriation without compensation by March 2019, before the mandate of the current parliament expires.

7

Law of Contract

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7.1 Introduction

The earlier sources of customary law were predominantly non-legal, such as the writings of early travellers, and anthropological and ethnological scholars. The extraction of legal norms from these sources by lawyers and judges was difficult and led to many misconceptions about their content. The customary law of contract is no exception.[1] Van Niekerk[2] points out that –

> [t]he prevailing perception is that by analogy with the Roman concept, customary law knows only real contracts, and strict liability accordingly ensues only where one party has in fact partially or completely fulfilled his obligation.

Van Niekerk's research reveals that this perception is probably incorrect.[3] She points out that Roman and customary law share the characteristic of orality; hence the objective characteristic of contracts in both legal systems.[4] However, in both legal systems, the words had to be concretised to create contractual liability. In the case of Roman contracts, the words uttered had to be in a specific form aimed at securing proof that the contract had been concluded.[5] Unlike Roman law, customary law contracts did not have to be moulded into a specific form, but the words also had to be concretised. This could happen in various ways, such as performance or part of performance in terms of the contract or, importantly, any other way, such as the making of a gift.[6] Thus, the perception that only real contracts were known in customary law seems to be false. For example, the trading of cattle between the Khoi ("Hottentots") and the Dutch settlers was regarded as binding by the Khoi only if an exchange of gifts took place. Another example is the marriage contract, which could be regarded as validly concluded only upon payment of bridewealth. Today, the payment of *lobolo* by the husband's family to the wife's family signifies the ratification of the verbal agreement of marriage between two parties.[7] As explained by Van Niekerk:[8]

> Although there were no formalities as regards the actual communication of the intentions of the parties and although no form or ceremony was required for a contract to be regarded as valid, contracts in African law were nonetheless not completely without form. There were certain ritualistic behavioural and linguistic requirements that had to be observed … The physical activity that accompanied the verbal agreement was the manifestation that agreement had subjectively been reached. In Tswana law, this process is described as '*go tshitsinya*', which literally means 'to introduce'. Contracting parties had to be present when *consensus* was reached. . . .[T]he object of the contract had to be physically pointed out *and* described. Because the whole process of reaching consensus and concluding a contract was concretised, it was much easier to determine the real will of the parties.

Thus, in traditional communities, the emphasis is on "specific behavioural conventions" to concretise a verbal contract.[9] These conventions provided form, created legal certainty, gave rise to contractual liability, and were regarded as manifestations of the intention of the parties.[10]

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1 Van Niekerk (2011) *De Jure* 364–365.
2 (2011) *De Jure* 367.
3 (2011) *De Jure* 364–380. Also see the discussion of the various viewpoints by Van Schalkwyk (2006) 59–61.
4 Van Niekerk (2011) *De Jure* 368 refers to Table IV of the Twelve Tables (the earliest attempt by the Romans to create a code of laws) which states: "When a person makes bond and conveyance, according as he specified with his tongue, so shall be the law."
5 Van Niekerk (2011) *De Jure* 368–369. The Roman contract was thus enforceable in accordance with its wording even if it did not reflect the intention of the parties or did not reflect social realities. Also see note 44 (at 373) for examples.
6 See Van Niekerk (2011) *De Jure* 370–371, and also the examples she provides.
7 Van Niekerk (2011) *De Jure* 371–372. Also see ch 5.
8 Van Niekerk (2011) *De Jure* 375.
9 Van Niekerk (2011) *De Jure* 380.
10 Van Niekerk (2011) *De Jure* 380.

There is no consensus between scholars if contractual consequences can arise out of a mere promise and concepts such as expectations and hopes are unknown in customary law.[11]

From the contract arises the liability to perform in accordance with the agreement. There are recognised legal means of taking action for non-fulfilment of the contract. These general principles will not be dealt with here.[12] It is more important to focus on the parties to a contract, specific contracts and *quasi*-contracts.[13]

7.2 Parties to a contract

7.2.1 *The family*

The family head usually concludes contracts on behalf of, and in the interests of, his family. He is expected to consult with the adult members of his family. He is liable for the fulfilment of the obligations under contracts entered into by him, or by a member of his family with his consent.[14] Although individual family members are allowed to initiate agreements among the Swazi, they have to first consult certain categories of relatives such as paternal aunts and, of course, the head of a household or homestead. The extent of and consultation with other family members depends on the nature of the contract in question. For example, contracts involving the exchange of small stock or grain may not require the same level of consultation as for the exchange of cattle.[15]

7.2.2 *Representation*

The available sources are not unanimous as to whether representation is known in customary law. De Clercq *et al*[16] maintain that the Mathenjiva (Zulu) do not recognise representation, while Coetzee *et al*[17] are of the opinion that representation often occurs among the Tswana. The latter group of authors refers to the conclusion of a marriage as a well-known example of representation. Whelpton[18] is of the opinion that representation as known in Western legal systems is not known to the Bakwena ba Mogopa (the Tswana people).

One would probably be able to make out a case that the keeper and intermediary[19] are examples of representation. Where a family head is temporarily absent from the household and nominates a non-relative as keeper, the family head would be bound as principal by the contracts of his keeper, even if he was not present at the conclusion of the contracts. If a relative (usually the successor) acts as keeper, it would not amount to representation. A relative who acts as keeper is in fact a member of the agnatic group,[20] and, like the family head, acts only as its mouthpiece. A relative acting as intermediary during marriage negotiations would probably also not constitute representation for the same reason. Where a non-relative acts as an intermediary, for example in *lobolo* negotiations, claims for additional *lobolo* and claims arising from

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11 Whelpton (2006) Anthropology Southern Africa 144, 147 argues that a mere promise cannot lead to liability but Schapera (1965) 142 maintains that a mere promise is indeed enforceable in indigenous law. He refers to a case where a husband promised his wife not to engage in polygyny. When he broke his promise, she could claim damages for breach of promise. Also see, Van Schalkwyk (2006) 57.

12 For a general discussion, see Whelpton (2006) Anthropology Southern Africa 143; Van Schalkwyk (2006) 57–58.

13 Also see the discussion of Bekker "Law of contract" in Joubert, Faris and Church (eds) *LAWSA* vol 32 (2009) paras 230–261.

14 Prinsloo and Vorster "Parties" in Centre for Indigenous Law (ed) (1990) 21.

15 Whelpton (2001) 14.

16 De Clercq *et al* (1985) 96.

17 Coetzee *et al* (1985) 145.

18 Whelpton (1991) 121.

19 Olivier *et al* (1989) 552–554.

20 Meaning descent by the male line of ancestors.

seduction, the agreement is binding on the principal, even if he was not present.[21] However, the question is whether this phenomenon refers to mandate rather than to representation.

7.2.3 *Other forms of substitution of parties*

Traditionally, agreements were entered into between agnatic groups rather than individuals.[22] This implies that the need to substitute an individual in a contractual relationship did not arise. More-over, the fact that contractual liability stems from agreement followed by performance on the part of one party, makes the substitution of a party difficult without first terminating the existing contract.[23] Delegation, where the obligations of one of the parties in a contractual relationship are transferred to a third party, is not known in customary law.[24] Cession, in terms of which the obligatory rights of one of the parties to a contract are transferred to a third party, is also not known in customary law.[25]

Whether pledge is known is doubtful since a debt does not become prescribed in customary law. There is thus no need to give security for a debt. Pledge, in terms of which property is handed over to another as security for the fulfilment of a contractual obligation, is generally not known among the African peoples.[26] However, it is reported that some groups do know pledge.[27] Whelpton[28] suggests that further research is necessary and that the placement of the property in the possession of another may serve as proof of the existence of a debt between the parties rather than as security for the debt.

Suretyship refers to a contract between the surety and debtor in terms of which the surety agrees to accept liability for the proper performance of the debtor's duties in terms of a contract between the latter and his creditor. Since a debt does not become prescribed in customary law, it is doubtful whether there is a need for suretyship. It is reported not to be known,[29] although some writers indicate that it is known without giving sufficient detail to support their viewpoints.[30]

7.3 Specific contracts

The question has been asked whether it is practical or even necessary to classify customary law contracts into specific categories, given the fact that they (a) do not represent a closed number and (b) do not depend on form but on the concretisation of the verbal agreement.[31] The categorisation of customary law contracts into different types or groups is a result of Western legal culture's approach to the law. Western legal culture is unified in the systemic reliance on legal constructs, whilst traditional cultures do not necessarily follow the same approach. However,

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21 In this regard, the Swazi say *sitfunywa asibulawa* (a representative cannot be punished), implying that a representative does not become involved in any right or obligation under the contract (Whelpton (2001) 12).
22 Myburgh (1985) 91.
23 Whelpton (1991) 126–128.
24 Whelpton (1991) 128–129; Prinsloo and Vorster "Parties" in Centre for Indigenous Law (ed) (1990) 24.
25 Prinsloo and Vorster "Parties" in Centre for Indigenous Law (ed) (1990) 23; Whelpton (1991) 129–131; also see Olivier *et al* (1989) 576–577.
26 Prinsloo and Vorster "Parties" in Centre for Indigenous Law (ed) (1990) 25; Whelpton (1991) 131–135.
27 See Coetzee *et al* (1985) 150; Olivier *et al* (1989) 551; Pauw (1985) 130.
28 Whelpton (1991) 133–134.
29 Whelpton (1991) 135–137; Prinsloo and Vorster "Parties" in Centre for Indigenous Law (ed) (1990) 24–25; according to Whelpton (2001) 13, in this regard, the Swazi say *utigwaze ngesakhe sikhaili* (you stabbed yourself with your own spear).
30 See Olivier *et al* (1989) 552; Whitfield (1948) 489–490; for East Africa, see Lyall (1986) *Journal of African Law* 118.
31 Van Schalkwyk (2006) 64.

classification is a method that might help us to understand the intricacies of a legal system unknown to many lawyers.

It is also important to remember that a customary law contract is a social construct. It has to be examined in the context of traditional social life.[32] The categorisation of the various types of customary contracts below is performed in terms of our western understanding of contracts, whilst they should more properly be viewed in the context of the traditional values of the various communities. Also, the categories represent only a few examples of typical customary law obligations, and many more exist in living customary law.

7.3.1 *Gifts*

A gift, as a contract, is a unilateral contract, but a multilateral legal act. A contract is unilateral when only one party undertakes the duty to perform. In customary law, the giving and receiving of gifts can stem from various motives, for example to perpetuate kinship or friendship ties, to pay respect or to show gratitude. Subject to the general principles of the customary law of succession and the patrimonial ties within the household and between the constituent houses, a family head is free to transfer property from the general estate to any individual by means of a gift. Such donations between members of the same household are not based on contract in terms of the customary notion of a family sharing rights and duties, and of a family being represented by its head. Nowadays, a person having full contractual capacity can donate his or her personal property to a non-relative.[33]

Some people distinguish between conditional and unconditional gifts. A conditional gift is one that is made subject to one or other stipulation. Tswana people, for example, distinguish between an unconditional gift (*mpho*), where ownership of the gift is immediately transferred to the recipient, and a conditional gift (*tshwaisô* or *setshwaêlô*), where ownership of the gift is transferred to the recipient only at a later stage, for example after the death of the donor.[34]

The giving and receiving of gifts clearly illustrate the nature of real contracts typical of customary law. The mere agreement to give something to another establishes a debt, but no contractual liability. Consequently, the donee cannot institute an action against the donor for delivery. Delivery of the gift makes the agreement a contract and at the same time satisfies the obligation to perform in terms of the agreement. Moreover, the donor cannot reclaim the gift, since what is delivered is what was owed. In this regard, the Tswana say *seyakgosing ga se boe* (what has been given out cannot be returned); in other words, a gift remains a gift.[35]

Although a gift entails no agreement to reciprocate, it is customary among many peoples to give a return gift. A gift is often given as a greeting or as a sign of goodwill, and failure to give something in return may be regarded as a form of disrespect.[36]

Although Schapera[37] states that any form of property may be given freely, this is not the position with regard to property of a religious nature among many peoples. Such property is often subject to various taboos of a ritual nature. Immovable property can also not be freely donated.[38]

7.3.2 *Loans for use and loans for consumption*

A distinction can be made between loans for use and loans for consumption. In the case of a loan for use, ownership of the property involved remains with the owner and the borrower acquires

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32 Van Schalkwyk (2006) 66.
33 Van Niekerk "Gift" in Centre for Indigenous Law (ed) (1990) 38.
34 Van Niekerk "Gift" in Centre for Indigenous Law (ed) (1990) 37; Schapera (1955) 239–240.
35 Van Niekerk "Gift" in Centre for Indigenous Law (ed) (1990) 37.
36 Van Niekerk "Gift" in Centre for Indigenous Law (ed) (1990) 37.
37 Van Niekerk "Gift" in Centre for Indigenous Law (ed) (1990) 240.
38 Van Niekerk "Gift" in Centre for Indigenous Law (ed) (1990) 38–39.

the right to use the property. In the case of a loan for consumption, ownership of the property is transferred on delivery to the borrower to consume the property and ownership of the specific property cannot be returned.

A loan[39] for use entails a contract in terms of which one party hands over something to another gratuitously for the latter to use, after which the specific thing is returned to the lender. A loan for use is gratuitous since the lender receives nothing in return for lending out his or her property to another. If the lender is to receive any remuneration from the borrower, the contract would no longer be one of loan, but rather one of lease.[40]

Where there is no explicit agreement regarding when the thing should be returned to the lender, the borrower may use it for the purpose for which it was lent for as long as it is necessary. This implies, for example, that the lender cannot demand the return of a field once the borrower has started ploughing. In such a case, the field can be returned only after the borrower has harvested the crop.[41] Where a borrower is unable to return a borrowed article without having a valid excuse, he/she may be required to return another item of equivalent value.[42]

Where a thing borrowed is known to be defective, for example where a sick animal is borrowed, the borrower has no action against the lender should the animal die while in his possession. The lender likewise has no action against the borrower, although the borrower is expected to report the destruction or damage to the lender as soon as possible.[43]

The borrower must generally exercise the care of an owner over the thing lent to him. Where it is agreed that damage to, or destruction of, the thing will be for the borrower's account, the latter will be liable in terms of the agreement. The borrower will also be liable if he was negligent in his care of the property. However, if the damage or destruction was caused by some or other accident, the two parties will negotiate the matter. If the owner is not satisfied with the explanation of the borrower, he will, for example, not take the meat and skin of the animal he has lent to the borrower to show his anger.[44]

Items such as household utensils and cattle are the objects of a great deal of borrowing and lending. Things of a religious nature, for example, the medicine bag or the bones of a diviner, or a man's weapons cannot be lent.

A loan for consumption entails the delivery of some fungible[45] thing by one party to another who must return to the lender a thing of the same kind, quantity and of similar quality. To constitute a contract of loan, the borrower must return an equivalent thing to what he has received. If it is agreed that it is not to be repaid, the transaction is not a loan.[46]

7.3.3 *Exchange*

A contract of exchange[47] comprises an agreement in terms of which the parties undertake to deliver to each other a thing or things with the purpose of transferring ownership of the property

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39 The Swazi call this type of contract *kweboleka*. In general, the Siswati term for loan is *kusitana*, which is also used to indicate the bilateral nature of the contract. The Tswana term for loan is *kadimo* (noun) and *go adima* (verb).

40 Van Blerk "Loan" in Centre for Indigenous Law (ed) (1990) 69.

41 Van Blerk "Loan" in Centre for Indigenous Law (ed) (1990) 69–70.

42 Van Blerk "Loan" in Centre for Indigenous Law (ed) (1990) 72.

43 Van Blerk "Loan" in Centre for Indigenous Law (ed) (1990) 70–71.

44 Van Blerk "Loan" in Centre for Indigenous Law (ed) (1990) 71–72.

45 A "fungible" is something that can be measured, counted or weighed.

46 Van Blerk "Loan" in Centre for Indigenous Law (ed) (1990) 69.

47 The Siswati term for exchange is *kuntjintjiselana*; the reciprocal verb indicates a reciprocal obligation to deliver goods. The Tswana refer to exchange as *kananyô* (noun) or *ananya* (verb).

so exchanged. An example of a contract of exchange is where X gives a heifer[48] to Z in exchange for five of Z's sheep.[49] The features of this type of contract include an agreement as well as performance and counter-performance. Both performances comprise the delivery of a thing or things with the intention to transfer ownership. Where any one of these elements is lacking, there is no contract of exchange.[50]

For an exchange agreement to be valid, the parties must agree on the things to be exchanged. The property to be exchanged must be adequately specified, albeit in general terms, in the agreement. Where livestock is involved, the parties must at least agree on the type, sex and gender of the animals. If there is a mistake about a material element, for example that goats instead of sheep should be delivered, there is no agreement. Where agreement was influenced by misrepresentation or a threat of some sort, the contract is then voidable at the choice of the prejudiced or threatened party. The agreement must be lawful. Parties are therefore not allowed to exchange a field or residential site for livestock, since land is controlled by the local authorities and the parties are not free to exchange it at will.[51]

The exchange of money for goods (the sales agreement) was not initially known in customary law but since traditional communities have begun to interact with western culture it has become a well-known practice to pay for goods.[52]

In a contract of exchange, the transfer of ownership of the property involved is implied. Parties must therefore be the owners of the property to be exchanged. Ownership of property passes on delivery.[53] Simultaneous delivery of property to be exchanged is implied, unless the parties have agreed otherwise.[54] Proper delivery requires either physical delivery or pointing out of the property with the intention to transfer ownership. Mere description of the property is not sufficient to constitute proper delivery. Before actual delivery, but after pointing out of the property, the risk remains with the owner, whereafter the property is in the same position as *sisa* cattle.[55] Should the animal die before actual delivery, the owner must replace it, and where the property is otherwise damaged, the owner has to substitute it. Any increase before actual delivery accrue to the debtor that is the party who has to deliver. After actual delivery, any risk is borne by the new owner. Property is exchanged *voetstoots*, which is without any guarantee against latent defects.[56]

When a party fails or refuses to perform in terms of the agreement when he or she is liable to do so, that is after the other party has performed, the creditor has the option to insist on specific performance or to rescind the contract. On rescission, the debtor has to return the property he or she has received in terms of the agreement while the creditor is not entitled to any damages against the debtor for breach of contract.[57] Where the debtor delivers the property but the creditor refuses to accept it because it is unsuitable, for example due to inferior quality, the creditor is often required to accept what is offered. In this regard, the Tswana say *molato o lefya ka ntlha ya lomao* (a debt is paid on the point of a needle) and again: *lemme le gaisa lefifi* (an ugly thing is better than darkness).[58]

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48 A young cow which has not yet given birth to a calf.
49 Prinsloo (1988) *CILSA* 212.
50 Prinsloo "Exchange" in Centre for Indigenous Law (ed) (1990) 30–31.
51 Prinsloo "Exchange" in Centre for Indigenous Law (ed) (1990) 31–32.
52 Van Schalkwyk (2006) 125.
53 Prinsloo "Exchange" in Centre for Indigenous Law (ed) (1990) 32; in this regard, the Tswana say *sa kananyo se amoganwa diatleng* (property exchanged must change hands).
54 Prinsloo "Exchange" in Centre for Indigenous Law (ed) (1990) 32.
55 See 5.4.4.
56 Prinsloo "Exchange" in Centre for Indigenous Law (ed) (1990) 30–31.
57 Prinsloo "Exchange" in Centre for Indigenous Law (ed) (1990) 33–35.
58 Schapera (1955) 243.

7.3.4 *Farming out* [59]

Farming out involves a contract in terms of which an owner places some of his/her animals, usually cattle, in the care and control of another for an indefinite period. The understanding is that the keeper will enjoy the use of the animals, but the ownership will remain with, and increase will accrue to, the owner. This contract is restricted to animals, and where other property is involved, it would constitute a loan rather than *sisa*.[60] Any number of livestock can be farmed out in this way.

In section 1(1) of the Codes of Zulu Law,[61] *sisa* is defined as "a custom whereby cattle or other livestock are deposited by their owner with some other person on the understanding that such person shall enjoy the use of them, but that the ownership shall remain with and increase accrue to the depositor".

The objectives of the *sisa* contract include assistance to needy relatives and other members of the local community who have no animals and in this way acquire the use of the livestock; access to pasturage not otherwise accessible to the owner; insurance against total loss of livestock from disease or other disasters which may be encountered by an owner, should he keep all his animals in one cattle kraal; facilitation of the task of caring for the animals by the owner; and disguise of the full extent of the owner's herd from envious people who, because of their envy, may turn to witchcraft to harm the owner.[62]

The owner remains the owner of the livestock and its increase. The keeper is entitled to the use of the animals and their products apart from their increase. Wool is not, however, regarded as a product to which the keeper is entitled. The idea that an owner retains ownership is firmly rooted in the value system of the people so that if the keeper has incurred debts, the *sisa* cattle cannot be attached to satisfy those debts. *Sisa* animals can be seized from the keeper to satisfy the debts of their owner and the keeper has no claim that the animals be replaced. The Tswana say: *modisa wa di kgomo tsa mafisa o gama olebile kgorong* (the keeper of the *mafisa* cattle milks while looking at the gate).[63]

The *sisa* contract is usually not for a specified time. It must, however, last long enough for the keeper to have the use of the animals. The usual form is that no specific agreement is made about the duration of the contract and it is then implied that it will last for a reasonable time. The possibility of an express and specific agreement as to the period is not excluded, since there is no rule to exclude such an agreement.[64]

In terms of the *sisa* contract, the duties of the owner[65] include visiting the *sisa* livestock from time to time to show his interest to outsiders, to earmark the progeny and to take possession of natural products such as wool. Neglecting to do this does not deprive him of his ownership, but might make it difficult to prove his right to the animals, should this be disputed. He must compensate the keeper for expenses incurred for dipping and grazing, but he is not compelled to compensate the keeper for the herding of the animals. After return of the animals, he is expected to compensate the keeper only if compensation has been agreed upon or promised. It is customary, though not compulsory, for the owner to compensate the keeper. The compensation is usually based on the increase, and is, in many instances, a heifer.[66]

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59 This contract is variously known among the different African groups. The terms *sisa* (Zulu) and *mafisa* (Tswana and Northern Sotho) are mostly used. Other terms include *ngoma* (Xhosa) and *fuyisa* (Tsonga).

60 See, in general, Olivier *et al* (1989) 567–576; also see Nathan "Farming out (*mafisa*)" in Centre for Indigenous Law (ed) (1990) 61–68.

61 Natal Code of Zulu Law; KwaZulu Act on the Code of Zulu Law.

62 See Olivier *et al* (1989) 568; Schapera (1955) 246.

63 Nathan "Farming out (*mafisa*)" in Centre for Indigenous Law (ed) (1990) 64.

64 Schapera (1955) 246.

65 See Olivier *et al* (1989) 574–576.

66 See Nathan "Farming out (*mafisa*)" in Centre for Indigenous Law (ed) (1990) 67; Olivier *et al* (1989) 574; Schapera (1955) 247.

In terms of the *sisa* contract, the powers of the keeper[67] are, among other things, that he can uphold his possession against the owner and all others, that he is entitled to the products of the animals, except the increase and the wool (that is, that he has full use and benefit of the stock, that he can use their milk, plough with them and use them for transport purposes), and that he is entitled to compensation for expenses incurred for dipping and grazing, but not for the wages of the herders.

The duties of the keeper[68] entail the use of the animals with the same care as if they were his own. Should some of the animals be lost or die owing to his negligence, he must replace them. He is liable for ordinary negligence only. He is expected to use the animals only for the purpose for which they were handed over to him. He may not, for example, slaughter or sell the animals.[69] He is responsible to the owner for the well-being of the animals. He must allow the owner to inspect and earmark the animals. He must report any losses to the owner immediately. If he neglects to do this, he must replace the losses, unless witnesses can prove natural death or theft. Should an animal die, he is expected to send the hide to the owner to enable him to identify the dead animal as his own.[70] He must give an account of the animals and their increase. On termination of the contract, he has to return the animals with their increase to their owner within a reasonable period after they have been demanded or the contract has been terminated.

The keeper can terminate the contract at any time, but he should give the owner proper notice of his intentions. As a matter of courtesy, it is common practice for the keeper to give the owner reasonable notice. The owner may, however, at will terminate the contract prematurely without incurring any liability, especially if he has good reason for such action, that is where the keeper is not taking proper care of the cattle.[71]

Originally, the parties to the contract were agnatic groups, but today the parties may also be individuals. A modern form of the *sisa* contract occurs where a person is employed in an urban area and buys cattle with his income. These cattle are then farmed out to a kinsman or other person in the rural areas.

From the literature and case law, it appears that farming out can be done between houses belonging to the same household.[72] However, if we consider the objectives of the *sisa* contract, it is clear that a contract between houses cannot fulfil these objectives. In addition, these houses have the same head representing them, with the result that the head of the household is in actual fact contracting with himself.

The *sisa* contract is a special contract in customary law.[73] It is not a contract of loan, for it is to the advantage of the owner (the one farming out). A loan is to the advantage of the borrower only, while the lender does not benefit from it. The *sisa* contract is also not a form of bailment, since the keeper does not undertake the safe-keeping for no return. It is also not a contract of letting and hiring, except perhaps where payment is agreed upon. The keeper cannot claim his expenses for herding the animals from the owner, nor does he pay the owner for the enjoyment of the animals.

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67 See Nathan "Farming out (*mafisa*)" in Centre for Indigenous Law (ed) (1990) 63; Olivier *et al* (1989) 573.
68 See Nathan "Farming out (*mafisa*)" in Centre for Indigenous Law (ed) (1990) 64–66; Olivier *et al* (1989) 570–574.
69 Nathan "Farming out (*mafisa*)" in Centre for Indigenous Law (ed) (1990) 63.
70 Nathan "Farming out (*mafisa*)" in Centre for Indigenous Law (ed) (1990) at 64–65; also see Olivier *et al* (1989) 550–571.
71 Nathan "Farming out (*mafisa*)" in Centre for Indigenous Law (ed) (1990) 67–68.
72 See Olivier *et al* (1989) 569–570.
73 See Nathan "Farming out (*mafisa*)" in Centre for Indigenous Law (ed) (1990) 62.

7.3.5 *Service*

Various forms of service can be distinguished, ranging from employment to independent service.[74] Employment entails the rendering of services under the supervision of another, whereas in the case of independent service, no supervision is required.

Employment can involve ordinary domestic work, the herding of animals, assisting in building and agricultural activities such as mixing the building clay, planting, weeding, bird-scaring and harvesting. The parties have to agree as to the nature and extent of the labour required as well as the remuneration. The agreement regarding the work can be specific or in general terms, while the payment usually entails the customary rates unless otherwise stipulated. The work is done under the general supervision of the employer. The employee is expected to take reasonable care about the way the work is done. However, no damages can be claimed should the employee perform the work in a negligent way.[75]

The employer has to pay the employee for the work. Payment was formerly in kind, while money is nowadays also used to pay for work. Payment is due on proper completion of the work. Most work was paid for at a customary rate, for example a heifer for clearing a field. Should the employee fail to complete the work, or to do it satisfactorily, no payment is due.[76]

A contract of employment is terminated on proper completion of the work and proper payment for the work in terms of the agreement. Once the work has commenced, the parties may also mutually agree to terminate the contract and agree on the consequences of such termination. Should an employee fail to complete the work or to do it properly, he has no claim to be rewarded for the work done.[77]

Independent service is well known and may take the form of, amongst others, the digging of a well, the building or roofing of a traditional house and the services of traditional healers. The latter services can be regarded as professional services. A feature of independent service is that it is done without the supervision of the employer. Independent service is usually not of a continuous nature.[78]

For a contract of independent service to be valid, the parties must agree as to the nature and extent of the work and whether the customary payment applies. The performance of the worker usually consists of the independent rendering of the agreed-upon service in a proper manner. The work should meet the ordinary requirements for satisfactory completion. The performance of the employer entails proper payment once the service has been properly rendered. Among some groups, customary rates apply, although the parties are free to enter into a specific agreement regarding the payment. Payment is usually due on completion of the work, unless the parties have expressly agreed otherwise. Where completion of the work becomes impossible, the question of fault has a bearing on the consequences. Where the worker is at fault, payment for the work is usually forfeited. If the employer is at fault, he is expected to pay for the work in full, although the work has not been completed. Where neither party is at fault, a *pro rata* payment for the work done is usually expected.[79]

A special form of independent service concerns the services of traditional healers, comprising herbalists, diviners, prophets and ritual specialists. Their services may include the treatment of

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74 See generally Olivier *et al* (1989) 549–551; Schapera (1955) 250–256; Vorster "Employment" in Centre for Indigenous Law (ed) (1990) 40–44; Vorster (1990) *SA Journal of Ethnology* 149–158; Vorster "Independent service" in Centre for Indigenous Law (ed) (1990) 45–60; Whelpton (1991) 181–194.

75 Vorster "Employment" in Centre for Indigenous Law (ed) (1990) 42; Vorster (1990) *SA Journal of Ethnology* 152–154.

76 Vorster "Employment" in Centre for Indigenous Law (ed) (1990) 42.

77 Vorster "Employment" in Centre for Indigenous Law (ed) (1990) 42–43.

78 Vorster "Independent service" in Centre for Indigenous Law (ed) (1990) 45.

79 Vorster "Employment" in Centre for Indigenous Law (ed) (1990) 46–47.

illness, the performance of a ritual, the protection of people and property against harm, and the treatment of people and property to affect fertility and prosperity.[80]

This type of contract usually entails an implicit agreement regarding the service required and the payment therefor. The parties usually agree in general terms about the work, while the customary fees apply. Once the customary fee for treatment or the required protection has been paid, the traditional healer is contractually bound to render the service to the best of his/her ability. In the case of illness, it is customary that the final payment is only due once a cure has been effected. The contract is usually terminated once the treatment is successful and payment is delivered.[81] The services of traditional healers in KwaZulu-Natal are partly regulated by provisions of the Codes of Zulu Law.[82]

7.4 Quasi-contracts

A quasi-contract is a phenomenon of law that does not satisfy all the requirements of a contract. In the case of quasi-contracts, liability arises from performance without agreement based on enrichment or *negotiorum gestio*. Among the Zulu, *ukwethula* is an example of enrichment and *isondlo* of *negotiorum gestio*.[83]

7.4.1 Ukwenzelela

The *ukwenzelela* custom is described in terms of a debt between houses of the same household or a father's provision of the marriage goods for the first wife of each of his sons.[84] This relationship of debt is based on specific arrangements with a family and it is doubtful whether it is quasi-contractual in nature. However, where one party is enriched at the cost of another, the party so enriched may be expected to return the property.[85]

7.4.2 Isondlo

Customary law makes provision for the payment of compensation (Zulu-Xhosa: *isondlo*; Tswana: *kotlo*) to a person for the care of a child who is not a member of his group. In rare cases, *isondlo* is payable in respect of the care of adults, for example, mentally deficient persons. The usual fee for maintenance in this sense is one animal.

The duty to pay *isondlo* may arise from an express agreement, in which case it is contractual. The duty can also arise from the circumstances of each case, for example from *negotiorum gestio*, and is thus quasi-contractual.[86]

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80 Vorster "Employment" in Centre for Indigenous Law (ed) (1990) 53. The position of traditional healers is nowadays regulated in terms of legislation. The Traditional Health Practitioners Act 22 of 2007 commenced on 1 May 2014. The Act makes provision for the establishment of an Interim Health Practitioners Council of South Africa. In 2011, the Regulations relating to the Appointment of Members of the Interim Traditional Health Practitioners Council of South Africa (GN R685 in *GG* 34546 of 22 August 2011) was published, and in 2015, the Traditional Health Practitioners Regulations (GN R1052 in *GG* 39358 of 3 November 2015) was added to the legal framework for traditional healers. It makes provision for the registration of traditional healers. According to our knowledge, not one has been registered in terms of the legislation. For a general discussion, also see Van Schalkwyk (2006) 141– 145; Rautenbach (2007) *Obiter* 518–536; (2011) *THRHR* 28–46.

81 Vorster "Employment" in Centre for Indigenous Law (ed) (1990) 54–57.

82 Sections 83–90 of the respective Codes.

83 Myburgh (1985) 92; Whelpton (1991) 76–77.

84 See Olivier *et al* (1989) 555–556.

85 See Whelpton (1991) 78–79.

86 Van Niekerk "Maintenance" in Centre for Indigenous Law (ed) (1990) 99–100.

7.4.3 *Other obligations*

Ukufakwa

The *ukufakwa* is an obligation based on performance which does not arise from a contract or quasi-contract.

In *Nobumba v Mfecane*,[87] the court described this obligation as follows:

> . . . *ukufakwa* applies where contributions are made in connection with the ceremonies connected with those of puberty (*ntonjane*) or marriage or other circumstances of women in which the contributor is *fakwaed* or put into the *lobolo* of the woman.

This means that a relative of a female's father is thus "put into" the marriage goods and becomes entitled to the marriage goods as if he contributed towards the female's puberty ceremonies, her wedding expenses or any other expenses to which the father usually has to contribute.[88]

In *Thomas v Ntantiso*,[89] the assessors were unanimous that the *ukufakwa* custom is not applicable to a cash loan to settle shop debts. However, an express agreement to pay such a loan from the *lobolo* of his daughter is enforceable as an ordinary contract.

In *Nkethleni v Mlanjeni*,[90] the court stated that *ukufakwa* is a well-known contract and recognised by the courts. It requires similar proof to other contracts in similar circumstances.[91]

In *Titi v Titi*,[92] the assessors advised the court that should a man have a claim on the *lobolo* of a certain female under the *ukufakwa* custom and the female dies before her marriage, he has a claim on the *lobolo* of the next sister and so forth, until the last sister.

From the above, it appears that occasionally, in order to settle a debt, a debtor designates damages or the *lobolo* expected to be received for a female. This means that the creditor agrees to wait for the settlement of his debt until the damages or the *lobolo* for the female is paid. The female's guardian receives the damages or *lobolo* and is obliged to settle the debt out of it. This designation is apparently analogous to constructive delivery. Performance is achieved by means of this designation.

Unlike the position of third parties, the position of the creditor has not yet been argued in court. It seems as if *ukufakwa* is not a contract, but rather a form of performance. By means of designation, the creditor becomes co-owner of the *lobolo* if and when it is delivered. He is not in an ordinary creditor-debtor relationship: he is "put in" as participant in the debt to the degree to which he has contributed. If no *lobolo* is received, he receives nothing, despite his contribution, since he also shares in the "nothing" received.

Marriage contract

The negotiations between the bride and bridegroom's families preceding their customary marriage, followed by the payment of *lobolo*, and the marriage ceremonies, are all elements of the marriage contract. The dissolution of the marriage has an effect on the return of *lobolo* – see discussion at chapter 5.

7.5 Dispute settlement

Disputes that stemmed from customary law contracts were mostly settled outside the mainstream courts through traditional dispute settlement mechanisms such as negotiation, mediation and reconciliation.[93] The primary aim of these mechanisms is to restore social harmony in the

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87 2 NAC (1911) 104.
88 Olivier *et al* (1989) 557.
89 1945 NAC (C&O) 38.
90 4 NAC (1920) 368.
91 Vorster and Whelpton (1998) 31.
92 4 NAC (1920) 369.
93 See Van Schalkwyk (2006) 68–70.

community. With the focus on the community and the values of *ubuntu*,[94] the contracting parties have a moral obligation to reach a settlement as amicably and quickly as possible. As explained by Van Schalkwyk:[95]

> With indigenous courts, settling underlying social problems in the community, the courts endeavour to reconcile disputing parties within the community's social harmony. Individuals are persuaded to accept the community's *boni mores* – the standards of social behaviour and conformity (with the emphasis on extra-legal diverse traits such as friendliness and generosity). Contractual disputes, in addition to the legal issues, have further cultural, social and, to a lesser extent, psychological dimensions. Social tensions are relieved or diffused and the prevailing community moral code is applied and upheld.

Although disputes were generally resolved on community level, it is possible for parties to take their disputes to mainstream courts. There is nothing that prevents them from doing so. However, in order to rely on the principles of customary law, a litigant needs to allege the following:[96]

- that there is a community ("tribal") connection between the litigants;
- which particular system of customary law is applicable; and
- what the relevant customary law principles are.

If the litigants failed to raise any one of these issues, customary law is not applicable, and a presiding officer cannot find that customary law is applicable in a dispute involving contractual liability.[97] According to the judge:[98]

> It is clear that indigenous law in cases of sale can only apply between black people in circumstances where the principles of indigenous law provide for the sale of the thing sold.
>
> It would be wrong to adjudicate upon a mater [sic] of a sale, which is not governed by indigenous law, according to the principles of indigenous law, merely because the parties are both black people. It would be wrong if common-law principles, not known to indigenous law were agreed upon by the parties to regard the agreement as regulated by indigenous law. In indigenous law and before contact was made with the Western way of living there was no provision for payment in money. It was therefore difficult to distinguish an agreement of barter from one of sale. The law of contract was not sophisticated or highly developed.
>
> Principles differ from tribe to tribe. Section 1 of [the Law of Evidence Amendment] Act 45 of 1988 requires of a litigant who wishes to have an action determined according to indigenous law to prove that indigenous law is applicable in the case. Unless judicial notice can be taken of the principles thereof it is for the litigant to allege and prove those principles. If it fails to establish that, the common law applies.

There was a further reason why the High Court found the Magistrate Court's finding that customary law applied, questionable. The fact that the respondent's pleadings equated the "voetstoots" sale of the tractor in question to the sale of a cow to fit it into the framework of customary law, was an indication to the High Court that common law applied and not customary law, because the "voetstoots" concept does not form part of customary law.[99]

It is thus imperative that litigants who prefer their contractual disputes to be settled in a mainstream court ensure that their pleadings mention the fact that customary law should be applied to the dispute.[100]

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94 See ch 2 for a discussion of *ubuntu*.
95 Van Schalkwyk (2006) 69.
96 *Maisela v Kgolane* [2000] 1 All SA 658 (T) 663–664. These questions are factual questions which can be admitted or denied by the other party in the pleadings.
97 *Maisela v Kgolane* [2000] 1 All SA 658 (T) 664.
98 *Maisela v Kgolane* [2000] 1 All SA 658 (T) 663. Footnotes omitted.
99 *Maisela v Kgolane* [2000] 1 All SA 658 (T) 664.
100 Also see discussion of "conflict of laws" in ch 3.

8

Law of Delict

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8.1 Introduction

The customary law of delict, actionable by individuals, gives redress for the violation of any right representing material value, and can be acquired by a family head. This implies redress for damage to property, as well as for injury to a woman insofar as a family head's rights in her have been violated.[1] Thus, the customary law of delict originally comprised various sexual wrongs, certain instances of the carrying-off of brides-to-be, damage to property, limited instances of defamation, the death of a breadwinner, murder, and theft. These delicts will be discussed later. In various instances, the scope of customary wrongs has been widened by legislation and judicial decisions. With respect to legislation, the KwaZulu Law on the Code of Zulu Law[2] and the Natal Code of Zulu Law[3] extended the scope of some delicts in KwaZulu-Natal,[4] and the South African legislature has provided by statute for the dependants' claim for maintenance at the death of a breadwinner.[5] It is important to note, as a point of departure, that the customary law of delict is not stagnant, but is in a dynamic process of adaptation and change. Cultural rights are protected by sections 30 and 31 of the Constitution[6] (the Bill of Rights), to which a primary status is ascribed in the constitutional dispensation. However, the Bill of Rights[7] is in some respects potentially incompatible with the customary law of delict. The custom of virginity testing may, for example, potentially violate a girl's right to equality, dignity, security of her body, as well as the girl child's best interests having paramount importance, in terms of sections 9, 10, 12 and 28 of the Constitution, respectively. This custom is regulated by section 12 of the Children's Act,[8] which prohibits virginity testing of children under the age of 16 years, and provides that consent and counselling are required if the child is older than 16 years, that the testing must be performed in the prescribed manner, that consent is required before the results are disclosed, and that the child's body may not be marked.[9]

It presupposes that certain adaptations and even profound changes should in principle be made to the customary law of delict. Consequently, there is a duty on courts to develop customary law in terms of section 39(2) of the Constitution.[10] In this regard, the customary-law concept of *ubuntu* may, where applicable, be used as a guideline to achieve the adaptations and to justify them.[11]

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1 Bekker (1989) 342.
2 16 of 1985.
3 Proclamation R151 of 1987.
4 According to traditional customary law, assault and personal injuries do not give rise to delictual liability, but constitute crimes. However, in KwaZulu-Natal, a delictual action for immaterial damages on account of assault could be instituted. See Bekker "Law of delict" in Joubert, Faris and Church (eds) *LAWSA* vol 32 (2009) para 138.
5 In terms of s 31 of the Black Laws Amendment Act 76 of 1963. See Bekker "Law of delict" in Joubert, Faris and Church (eds) *LAWSA* vol 32 (2009) para 138.
6 The Constitution of the Republic of South Africa, 1996 (hereafter the Constitution).
7 Chapter 2 of the Constitution.
8 38 of 2005.
9 Also see Bennett, Mills and Munnick (2010) *TSAR* 254–270. Amongst others, the authors stated that organisers of virginity testing events may face charges of rape, statutory rape and sexual violation in terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. In addition, a suit in delict may also follow (*inter alia*, as a result of the transmission of sexually transmitted diseases and *iniuria*). Certain forms of virginity testing are also prohibited by a number of international instruments, including the United Nations Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women, and the African Charter on the Rights and Welfare of the Child.
10 See Kerr (1999) *Obiter* 41–51; Knoetze and Olivier (2005) *Obiter* 126–132.
11 De Kock and Labuschagne (1999) *THRHR* 114–120. Also see Bennett (2011) *PER/PELJ* 30–61, specifically 44.

In studying customary law, it must continuously be borne in mind that there is no clear distinction, as is the case in most Western legal systems, between criminal and private law sanctions and procedures.[12] Added to that, the general elements and principles for delictual, as well as criminal, liability have not clearly crystallised in customary law to the same extent as in the common law. In terms of the common law, a delict is defined as "the act of a person that in a wrongful and culpable way causes harm to another".[13] Five elements must be met before a person can be held delictually liable in our common law, namely: (a) an act; (b) wrongfulness; (c) fault; (d) harm; and (e) causation. If any one or more of these elements are lacking, in terms of the common law, there is no delict and consequently no liability.

8.2 Accessory liability of the family head

It is a generally accepted rule of customary law that the family head has accessory liability for delicts committed by unemancipated inmates of his family home. This does not mean that the family head is solely liable, but that he may be sued with the alleged wrongdoer; hence Bekker's description of accessory liability as "co-liability".[14] Bekker points out that it may be assumed that nowadays women can also be regarded as family heads.[15] The reasons are threefold: firstly, in terms of section 9 of the Constitution, nobody may unfairly discriminate against anyone on the basis of, *inter alia*, sex and gender. Secondly, in terms of section 6 of the Recognition of Customary Marriages Act,[16] the wife has an equal status to her husband and bears full status and capacities. Thirdly, in terms of the Traditional Leadership and Governance Framework Act,[17] women may be appointed as queens, senior traditional leaders and headwomen, and may thus hold positions of status.

Traditionally, the accessory liability of the family head for delicts committed by family home inmates seemed to be based on group liability and the fact that ownership of the traditional medium of payment, namely cattle and other farm animals, vested in the group. Group liability is a phenomenon found in all rudimentary communities. With the passage of time, it usually makes place for individual liability. Moreover, insofar as individual ownership and proprietary capacity are recognised, also in traditional communities, it casts into doubt the nexus between proprietary capacity and delictual liability.

This raises the question as to why a family head should be held accountable for the delicts committed by his family home inmates. The matter is further complicated by the provisions of sections 6 and 9 of the Recognition of Customary Marriages Act. In terms of section 6 of the Act, spouses to a customary marriage have been afforded equal status and capacity, which includes the capacity to acquire assets and to dispose of them, to conclude contracts, to litigate and to be delictually liable. Section 9 of the Act lays down that the age of majority must be determined in accordance with South African legislation. In this regard, section 17 of the Children's Act[18] determines that a child, whether male or female, becomes a major upon reaching the age of 18. This means that, in principle, residents of the family home over the age of majority should have individual proprietary capacity and should consequently be individually delictually liable.[19]

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12 Labuschagne and Van den Heever (1991) *Obiter* 80–95.
13 Neethling and Potgieter (2010) 4.
14 Bekker "Law of delict" in Joubert, Faris and Church (eds) *LAWSA* vol 32 (2009) para 201.
15 Para 139.
16 120 of 1998.
17 41 of 2003. See ch 10, where the Traditional and Khoi-San Leadership Bill, 2015 is discussed. If enacted, it will repeal and replace the Traditional Leadership and Governance Framework Act.
18 This section came into operation on 15 July 2007.
19 See Bennett (1991) 350–357; Bennett (2004) 325–327 and the cases cited there as examples of the potential tension between proprietary capacity on the one hand, and delictual liability of the family head on the other.

There is a point of view that the family head is liable not because he holds the property, but because he exercises, or is supposed to exercise, control and maintain discipline over those who live with him.[20] In this respect, the following principles, based on case law, purport to determine a family head's accessory liability in customary law:[21]

(a) Applicable only to customary law delicts

Family head liability is applicable only to delicts recognised in terms of customary law. Should the case be heard by the Magistrate's Court, it may take judicial notice of the custom concerned, in terms of section 1(1) of the Law of Evidence Amendment Act.[22] This does not preclude the parties to use expert evidence to prove the existence of a particular custom.[23]

(b) The deciding factor is family headship and not relationship

The family head is responsible for delicts committed by family home inmates, irrespective of his relationship with them. Hence, they might not necessarily be blood family members. A family head may absolve himself from liability by disinheriting an inmate (for example, a son) or by driving him away. If the person who committed the wrongful act established his own family home before he committed the delict, the liability of the family head usually falls away.

(c) The wrongdoer must be a resident of the family home

The family head will be liable for wrongful acts committed by residents of the family home. This would imply that a family head bears no liability for wrongful acts committed by mere visitors. Moreover, he will not be liable if the wrongful act was committed when an erstwhile inmate who set up his own family home, commits the act away from the family home. This raises the question regarding the family head's liability for wrongful acts committed by migrant inmates of the family home who work away from home, but periodically return home. Bekker points out that a family head is not liable for delicts committed by those who are employed elsewhere on a permanent full-time basis. However, if a family home resident commits a delict while temporarily absent from the family home and living elsewhere, the family head retains liability.[24] When a resident works away from home (for example a miner migrant worker), but periodically returns home and has the intention to return home, the family head will arguably be liable only if the wrongful act was committed at the family home. It is submitted that one should thus distinguish between the erstwhile resident who has left the family home to work away from home permanently, and those migrant workers who come home periodically with the intention not to settle away from the family home.

(d) Effect of marital status

In some communities, the family head is liable only for delicts committed by unmarried family home inmates and in others also for delicts committed by married inmates.

(e) Effect of age

Firstly, young children who do not have the capacity to distinguish between right and wrong cannot be delictually liable. It is explained by the maxim that they "do not have eyes to see".[25] Bekker points out that despite conflicting decisions, a family should in such circumstances not be held liable.[26] Secondly, although the case law is not unanimous, it would appear that, in view

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20 See Bennett (1991) 350–357 and Bennett (2004) 325–327 for a detailed discussion.
21 See Bekker "Law of delict" in Joubert, Faris and Church (eds) *LAWSA* vol 32 (2009) paras 201 *et seq* for a detailed discussion of the general principles and relevant, often conflicting, case law.
22 45 of 1988.
23 See s 1(2) of the Law of Evidence Amendment Act.
24 Bekker "Law of delict" in Joubert, Faris and Church (eds) *LAWSA* vol 32 (2009) para 202.
25 Bennett (1991) 341, quoting Van Tromp (1947) 1–7.
26 Bekker "Law of delict" in Joubert, Faris and Church (eds) *LAWSA* vol 32 (2009) para 202.

of the fact that the courts, amongst others, base liability of the family head on the assumption that he exercises control over family inmates, the age of the inmate has no effect on the family head's liability. This is, of course, in conflict with the provisions of sections 6 and 9 of the Recognition of Customary Marriages Act, as explained earlier. Consequently, Bekker submits that in present circumstances, all major inmates of a family home should be liable for wrongful acts committed by them.[27]

(f) Effect of a Western-style civil marriage

The fact that a family head is married by civil (common law) rules does not mean that he can escape family head liability. If he generally still follows a traditional way of life, he may be held liable as family head despite his civil marriage. This can be explained with reference to the court's discretion to apply either customary or common law, taking into account various factors, including the lifestyle of the parties, the type of marriage concluded and their cultural orientation.

(g) The family head must have been aware that the person who committed the delict was in his family home

This question has not been expressly decided by the courts, although there are decisions from which it may clearly be inferred that the family head will be held liable only for delicts committed by persons of whose presence in his family home he was aware.

8.3 Sexual delicts

Sexual delicts can only be properly understood against the background of the subordinate position a woman occupies in customary law and the fact that her sexual integrity and childbearing capacity belong to a male person.[28] Although well-known in customary law, the continued recognition of the sexual delicts, such as the defloration of a virgin, can be questioned in view of the equality status conferred upon both genders in terms of section 9 of the Constitution.[29] Moreover, in terms of section 6 of the Recognition of Customary Marriages Act, spouses in a customary marriage have equal status, including delictual liability and capacity to litigate. The question thus arises as to whether, in terms of the equality principle, an unmarried woman over the age of majority can sue her alleged wrongdoer for defloration, or whether a wife can institute a claim against a female wrongdoer for committing adultery with the claimant's husband.[30] Insofar as courts have a discretion to apply either customary law or common law in terms of section 1(1) of the Law of Evidence Amendment Act, the opportunity exists for an unmarried woman to sue the wrongdoer for defloration.[31]

The most important sexual delicts are considered below.

8.3.1 *Defloration of an unmarried girl*

8.3.1.1 Occurrence and nature[32]

Unlike common law actions for seduction, which have a territorial operation, the customary action for defloration operates personally. In other words, it applies only in respect of persons

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27 Bekker "Law of delict" in Joubert, Faris and Church (eds) *LAWSA* vol 32 (2009) para 202.
28 Namely her father, guardian, holder of *lobolo* or her husband.
29 See Bohler-Müller (2000) *Codicillus* 2–6; Bohler-Müller (2001) *Obiter* 142–152 for a discussion of the constitutionality of the continued recognition of seduction as customary delict.
30 See the discussion of adultery as a customary delict in 8.3.4.
31 See, in this regard, the important decision of the Appeal Court in *Ex parte Minister of Native Affairs: In re Yako v Beyi* 1948 (1) SA 388 (A).
32 See Bekker "Law of delict" in Joubert, Faris and Church (eds) *LAWSA* vol 32 (2009) para 142 for a detailed discussion and the case law cited there.

subject to the customary system concerned. Defloration as such does not give rise to a delictual claim in all communities.[33] As a result of the influence of the common law, it is also presumed in customary law that an unmarried woman, who is not a widow or divorcee, is a virgin. In customary law, the virgin concept has a physical meaning, with the result that a virgin who has been raped may also be a victim of defloration. The delictual act is therefore not about enticement. Mere *metsha* (sexual intercourse without penetration) is not sufficient. In certain communities, a delict is found in cases which could simply be called sexual intercourse with an unmarried girl, as not only the person who has sexual intercourse with a girl for the first time, but also the second person who does it for the first time, can be held delictually liable.

8.3.1.2 Procedure and proof[34]

In earlier customary law, it was not customary for the girl to report her defloration, as periodic investigations by the women of the family home were carried out. These investigations revealed whether the girls had been deflowered or not. Later the custom arose that the girl reported sexual intercourse to her mother or to another female member of the family. Thereafter, she was examined for recent defloration. If it appeared that she had been in fact deflowered, she was expected to reveal the identity of the person responsible to her family head. Accordingly, representatives were sent to the family home of the alleged culprit, where he was publicly accused of the defloration of the girl and compensation was claimed. This accusation is analogous to what is known in the common law as *litis contestatio*. If the wrongdoer admitted liability, arrangements were made for the delivery of the customary fine, whereafter the claim was settled. Where liability was denied, the matter was referred to either the chief's or magistrate's court.

As sexual intercourse normally takes place in private, the courts are often confronted by the girl's evidence only against that of the man. It was previously required for the girl's evidence to be corroborated, such as the production of an exhibit. In *Mayer v Williams*,[35] the Appeal Court held that insofar as the common law is concerned, corroboration is no longer required in sexual cases, but that the cautionary rule as applied in criminal cases is adequate. The latter rule has in the meantime also been rejected by the Supreme Court of Appeal in *S v Jackson*[36] as discriminatory and irrational. The effect on customary law is that if, on a preponderance of probabilities, it appears from the evidence that the girl has been deflowered, the defendant can be held liable even if there is no corroborating evidence.

8.3.1.3 Calculation of compensation[37]

Bekker points out that a distinction should be made between (a) the seduction beast,[38] for the defloration of the girl; and (b) the virginity beast, payable when a virgin gets married or the initial intercourse is followed by a marriage. In several cases, the payment of the seduction beast was considered a form of "punishment", whereas the virginity beast is considered a form of compensation payable to the mother of the girl for keeping her virginity intact.

Note that in terms of the common law, a girl who is a major has capacity to claim for damages, including a loss of income.

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33 See Labuschagne (1983) *TSAR* 7.
34 See Bekker "Law of delict" in Joubert, Faris and Church (eds) *LAWSA* vol 32 (2009) paras 144–145 and the cases cited there.
35 1981 (3) SA 348 (A).
36 1998 (1) SACR 470 (SCA).
37 See Bekker "Law of delict" in Joubert, Faris and Church (eds) *LAWSA* vol 32 (2009) para 147.
38 The word "beast" in this context generally refers to cattle.

8.3.2 *The common law action for seduction*[39]

The common law defines seduction as "the extra-marital defloration of a girl with her consent". Two requirements must be met before a common-law claim for seduction will succeed, namely (a) physical defloration of the girl must have occurred, and (b) the defloration must have occurred as a result of the man's seductive conduct.[40]

The common law action for seduction, which is primarily aimed at compensating the girl for the impairment of her physical integrity, and the customary law action for defloration, does not automatically exclude each other. A major girl is free to institute an action in terms of the common law. If her father or guardian has already successfully instituted a claim in terms of customary law, the amount/cattle awarded to him is taken into account in determining the amount awarded to the girl. However, if the girl has already instituted a successful claim in terms of the common law, her father or guardian may not thereafter institute an action in terms of customary law. In customary law a fixed amount, namely one beast, is usually awarded in determining compensation for seduction, the same is not done in terms of common law. The following factors may be taken into account in calculating such amount: (a) the age of the plaintiff; (b) her circumstances in life; (c) the measure of resistance she offered; (d) the methods applied by the defendant to overcome her resistance; (e) whether the seduction took place when an offer of marriage was made; and (f) whether the plaintiff has been rendered pregnant by the defendant.

The moral level, and in fact the whole personality, of the girl, are relevant in calculating the amount of compensation payable.

8.3.3 *Impregnation of an unmarried girl*[41]

Although defloration of a virgin and the impregnation of an unmarried girl are often indicated as a single delict, it is, for the following reasons, desirable to deal with them as separate delicts: (a) impregnation of an unmarried girl other than defloration of a virgin traditionally constitutes a delict in all communities; (b) defloration is a requirement which, by its very nature, is non-recurrent, while the delict of impregnation of an unmarried girl may occur in the case of a girl who is not a virgin and may occur more than once; (c) sexual penetration is a requirement for defloration, while pregnancy may also take place without it such as with *metsha*; and (d) if defloration is claimed and it later appears that the girl has also been impregnated, a further, that is separate, claim, may be instituted.

8.3.3.1 Occurrence

Impregnation of an unmarried girl constitutes a delictual claim in all communities. In some communities, a claim may also be instituted for second or third pregnancies.

8.3.3.2 Claimant[42]

As this action is based on the damage suffered by the girl's guardian as a result of the reduction in her *lobolo* value, the person who is entitled to *lobolo* for the girl is the plaintiff. If the girl is impregnated by a third person before the marriage is concluded and her husband is not aware of it at the time of entering into the marriage, he may institute an action for compensation.

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39 See Bekker "Law of delict" in Joubert, Faris and Church (eds) *LAWSA* vol 32 (2009) para 191.
40 Neethling and Potgieter (2010) 326–328.
41 See Bekker "Law of delict" in Joubert, Faris and Church (eds) *LAWSA* vol 32 (2009) para 149.
42 See para 151.

8.3.3.3 Procedure and proof[43]

As soon as the girl realises that she is pregnant, it is her duty to report this fact without delay to her father or guardian. Such a report to the father or guardian of the girl is normally done through her mother or another female inhabitant of the family home. If the girl does not report it immediately, her father or guardian does not lose his action, but a satisfactory explanation by the girl will be required. Delays will usually prejudice the claimant's case.

It is customary for the girl to be examined by the women of the family home to make sure that she is indeed pregnant. If it appears that she is in fact pregnant, she is sent, together with the delegates of her father or guardian, to the family home of the alleged offender, to "show her stomach". On this occasion, compensation for the impregnation of an unmarried girl is formally claimed. At this stage the alleged offender may –

(a) admit his responsibility for the pregnancy. In such a case, arrangements for payment will follow his admission;

(b) admit sexual intercourse, but deny that he is responsible for the pregnancy. In such a case, the baby's birth will be awaited, where after he or she will be taken to the offender's family home to check the resemblance between the baby and the alleged offender; or

(c) deny intercourse completely. In the latter case, again the baby's birth will be awaited and once born, the baby will be taken to the alleged offender's family home to determine whether the baby looks like him.

If either no payment is made, or paternity is denied, the matter will be left to the court for decision. Generally, if intercourse has been proven or admitted, the girl's reliable evidence is preferred above that of the man.

8.3.3.4 Quantum[44]

The amount payable as compensation for the impregnation of an unmarried girl differs from community to community. If the daughter of a chief or other person belonging to the chiefly family is impregnated, a higher amount is usually payable. In those communities where a claim is made for a second or further pregnancy of the girl, the amount is, as a rule, less than the amount claimed for the first pregnancy.

8.3.4 *Adultery*[45]

8.3.4.1 Occurrence

The customary law delict of adultery differs in various respects from the concept in South African common law. In the common law, it was defined as "voluntary sexual intercourse between a married person and someone other than his or her spouse".[46] However, in *DE v RH*,[47] the Constitutional Court held, with regard to the common law, that "the act of adultery by a third party lacks wrongfulness for purposes of a delictual claim of *contumelia* and loss of *consortium*; it is not reasonable to attach delictual liability to it".[48] The court referred to undertakings of fidelity, *ho lauwa* (SeSotho), *go laiwa* (SeTswana) and *ukuyalwa* (Nguni), and solemn vows, and stated that these are no guarantee that adultery will not take place in a marriage. As a result, the common law delict of adultery does not form part of South African law anymore.

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43 See Bekker "Law of delict" in Joubert, Faris and Church (eds) *LAWSA* vol 32 (2009) para 150.
44 See paras 154–155.
45 See paras 157–167 for a detailed discussion of the delict of adultery and applicable case law.
46 Neethling and Potgieter (2010) 351.
47 2015 (5) SA 83 (CC).
48 See para 63.

In customary law, adultery can, contrary to the South African common law, in the first place only be committed with the wife, not the husband of a customary marriage. Thus, only the husband has a claim for compensation on the ground of adultery. The claim is against the man who had intercourse with the claimant's wife, not against the wife herself. In the second place, customary law also recognises forms of adultery which are not known in present-day South African law, namely sexual intercourse with a widow by a man other than her *ukungena* partner, appointed by the family as her consort after the death of her husband.

8.3.4.2 Procedure and proof[49]

As soon as a woman's adultery is known to her husband, he must, according to traditional procedural requirements, send messengers to the family home of the alleged offender, where the adultery must be reported, and the customary compensation claimed. It is important to note that other than in the case of defloration or impregnation of an unmarried girl, a woman is customarily not obliged to tell her husband of her adultery or to inform him that she is pregnant as a result of the adultery. The husband is supposed to discover it himself. The wife's omission to report the pregnancy to her husband accordingly does not influence his action. Should the wife be pregnant, it must also be reported to the alleged offender's home and in certain communities she must proceed to "show her stomach". Omission to report to the alleged offenders may lead to the plaintiff's claim being rejected, unless he provides good reasons for the delay. Where the wife leaves her husband's family home to live with another man and adultery is committed while she no longer lives in her husband's family home, there is apparently no obligation on her husband to institute action immediately.

Should the defendant admit to the adultery, arrangements are made for payment of compensation. If he denies it, the next step is to institute an action for adultery. In traditional customary law, a great deal of value is attached to concrete evidence, such as a "catch" or an article seized from the defendant. The seizure, which may be accompanied by moderate violence, may consist of a *ntlonze* (an exhibit) taken from the alleged offender, such as a stick or a jacket. If the wife, in addition to the catch and the *ntlonze* taken from the man, also admits adultery, it is regarded as sufficient evidence against the offender. A catch does not necessarily mean that the offender and the woman must have been caught in the act of adultery. It includes any action that shows an intimacy between them, for example: the husband meets two other men while they quarrel about the question of whose girlfriend the woman is; or he catches his wife while she and another woman quarrel about the husband of the other woman.

8.3.4.3 Grounds of justification and condonation[50]

From the case law, it appears that the following constitute grounds of justification against a claim of adultery:

(a) Collusion and connivance

Where a husband leaves his wife with her family so that she could become pregnant there and he would accordingly be able to catch somebody in the act in order to claim cattle, his conduct would amount to connivance. Where a husband arranges with his wife to lure another man to their house for intercourse so that he may be trapped by the husband, it amounts to collusion. In such a case, the claimant may lose his claim for adultery.

(b) The plaintiff and his wife were never married

As customary marriages are often not registered, problems may arise around the fact whether there was indeed a marriage relationship between the plaintiff and his wife. If the existence of a marriage is denied in the pleadings, there is an onus on the plaintiff to prove

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49 See Bekker "Law of delict" in Joubert, Faris and Church (eds) *LAWSA* vol 32 (2009) paras 158–161.

50 See para 161 for a discussion of the applicable "defences" against the claim.

that he was in fact married. On the one hand, section 4 of the Recognition of Customary Act requires that a customary marriage must be registered, but on the other, provides that the marriage will not be invalid if registration did not occur.

(c) The marriage had already been dissolved at the time of the alleged adultery.

(d) The marriage had been dissolved before the institution of an action on the ground of adultery.

(e) A valid marriage existed between the defendant and the woman concerned.

(f) Absence of *dolus* (intention) on behalf of the defendant.

(g) The defendant *bona fide* contracted a marriage with the woman.

8.3.4.4 Quantum[51]

Each deed of adultery gives rise to a claim for compensation. It does not necessarily follow that each separate deed of sexual intercourse constitutes a separate claim of adultery. An action for adultery covers all the deeds of sexual intercourse preceded by a report to the family home of the adulterer. The usual compensation in Xhosa-speaking communities is as a general rule three head of cattle for adultery and five head of cattle if the adultery results in impregnation. With other communities the compensation is determined by the courts. The amount may be increased where there are aggravating circumstances, for example when the defendant infects the woman with a venereal disease; in the case of continuous adultery; or where the woman is of royal blood.[52] The amount may be reduced if the woman is of loose morals and the plaintiff knew about it when he married her; or if the man neglects his wife by leaving her at her father's family home without taking steps to get her back and she consequently commits adultery there. The fact that the woman is past her child-bearing age does not affect the scope of the claim for adultery.[53]

8.3.5 *Sexual intercourse with, and impregnation of, a woman in an* ukungena *relationship*[54]

Sexual intercourse followed by pregnancy of a woman in an *ukungena* relationship by a person other than her *ukungena* consort or relative does establish a delictual claim for compensation. The *ukungena* consort must have lived with the woman at the time of the adultery. He will also have to point out that there was a valid *ukungena* relationship between them, which means that he will have to prove that the customary ceremonies and formalities have been carried out. The *ukungena* consort institutes the claim on behalf of the house concerned, and not in his personal capacity.

8.3.6 *Sexual intercourse with, and impregnation of, widows and divorced women*[55]

As a marriage in customary law is essentially a relationship between family groups, it follows that the death of the woman or the man does not necessarily give rise to the dissolution of the relationship. From this, the question arises whether sexual intercourse with, and impregnation of, a widow gives rise to delictual liability. From the case law, it appears that with certain communities there is no delictual action in this regard. With others, a claim may be instituted if a widow returns to the family home of her father or guardian. In the latter case, her father or guardian has

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51 See Bekker "Law of delict" in Joubert, Faris and Church (eds) *LAWSA* vol 32 (2009) para 165.
52 Bekker (1989) 366.
53 See Bekker (1989) 366–367 and the cases cited there.
54 See Bekker "Law of delict" in Joubert, Faris and Church (eds) *LAWSA* vol 32 (2009) paras 168–169. For a discussion of *ukungena*, see Bekker and Buchner-Eveleigh (2017) *De Jure* 92.
55 See Bekker "Law of delict" in Joubert, Faris and Church (eds) *LAWSA* vol 32 (2009) paras 170–171.

a claim, as she is once more regarded as an unmarried daughter of his family home. Should the marriage be dissolved, she once more becomes a daughter in her father's or guardian's family home and the general rules applicable to sexual intercourse with and impregnation of unmarried women apply.

8.4 *Ukuthwala* as delict[56]

The *ukuthwala* custom[57] comprises the removal of the girl from her family home to the home of the man's father for marriage negotiations to commence.[58] This practice must be distinguished from abduction, which constitutes a crime.

The traditional and essential features of *ukuthwala* are as follows:[59]

- the woman must be of marriageable (child-bearing) age;
- both parties must consent; [60]
- a mock abduction of the woman at dusk must be arranged. She should resist for the sake of modesty (even though she agreed to the arrangement);
- the woman must be smuggled into the man's homestead. The women of the man's family must defend the woman's person and reputation. The father of the man must be informed of the presence of the woman within his homestead and told of his son's wishes to marry the woman;
- sexual intercourse is prohibited, and is, whether with or without consent, punishable and requires the payment of a fine or *bopha* to the woman's father; and
- a letter must be sent by the man's family to the woman's homestead on the day of the mock abduction or the following morning to notify the family that she was with the man – this signals the man's family's wish to embark on marriage negotiations.

In addition, the woman's parents' consent is required, without which the woman must be returned with payment of damages as a result of unsuccessful *ukuthwala*. However, if the proposal is accepted, the woman must return home for regular *lobola* negotiations.[61]

A number of circumstances may exist under which *ukuthwala* may occur, as follows:

- the woman objects to an arranged marriage and decides to marry a third party;
- the woman's family objects to her marrying the man of her choice;
- the man cannot afford and secure a marriage by means of the payment of *lobola*; or
- where time is important, e.g. where the woman is pregnant.[62]

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56 See Bekker "Law of delict" in Joubert, Faris and Church (eds) *LAWSA* vol 32 (2009) paras 180–181. *Ukuthwala* is sometimes referred to as *chobediso* (Prinsloo and Ovens (2015) *Acta Criminologica* 169).

57 See Labuschagne and Schoeman (1988) *TRW* 33–45. Also see Mwambene and Sloth-Nielsen (2011) *AHRLJ* 1–22.

58 See Prinsloo and Ovens (2015) *Acta Criminologica* 173, with reference to Nhlapo's expert testimony in *S v Jezile* 2016 (2) SA 62 (WCC), and paras 73–74 of said case.

59 See Prinsloo and Ovens (2015) *Acta Criminologica* 172, with reference to Nhlapo's expert testimony in *S v Jezile* 2016 (2) SA 62 (WCC), as well as para 72 of said case. Also see Phooko (2016) *Without Prejudice* 8–9.

60 If the woman was unaware, she can consent after the fact. If she does not agree, her father may institute a civil claim against the guardian of the man.

61 See Prinsloo and Ovens (2015) *Acta Criminologica* 172, with reference to Nhlapo's expert testimony in *S v Jezile* 2016 (2) SA 62 (WCC), and para 73 of said case.

62 See Prinsloo and Ovens (2015) *Acta Criminologica* 173, with reference to Nhlapo's expert testimony in *S v Jezile* 2016 (2) SA 62 (WCC), and para 73 of said case. Also see South African Law Reform Commission *Project 138: Revised Discussion Paper 132* (2015) 7–8.

Ukuthwala gives rise to delictual liability in only some communities. With yet other communities, *ukuthwala* constitute a delict only under certain circumstances, namely if (a) a marriage offer is not made; (b) the young man's family is not in a position to pay the required *lobolo*; or (c) the girl's father or guardian does not consent to the marriage with the man concerned. In the latter case, a delict is committed and a compensation beast (the *bhopa* beast) is payable to the father or guardian of the girl.[63] A seduction beast, in addition to the *lobolo* cattle or *thwala* beast, as the case may be, is payable by a man who seduces a *twhala*ed girl.[64]

It must be noted that traditional (consensual) *ukuthwala* must be distinguished from certain current harmful practices, which may, in certain instances, even lead to human trafficking. *Ukuthwala* could (a) take place with the (implicit) consent of the female and collusion between the parties, (b) be planned by the families concerned (with the female initially being unaware thereof, but consenting thereto prior to the *ukuthwala* act taking place), or (c) take place against the will of the female (in which event the young man may be held criminally liable).[65] The customary law practice did not allow the young man to have sexual intercourse with the *thwala*ed girl. Distorted *ukuthwala* practices may lead to criminal prosecutions in terms of the common law, the Criminal Law (Sexual Offences and Related Matters) Amendment Act,[66] the Children's Act,[67] and the Prevention and Combating of Trafficking in Persons Act,[68] as well as delictual damages resulting from the operation of section 12(1)[69] of the Children's Act,[70] and possibly also the Recognition of Customary Marriages Act.[71] The following international conventions and protocols ratified by the South African Government are also relevant: the Universal Declaration of Human Rights; UN Convention on the Elimination of All Forms of Discrimination Against Women; UN Protocol to Prevent, Suppress and Punish Trafficking In Persons, Especially Women and Children; Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa; UN Convention on the Rights of the Child; African Charter on the Rights and Welfare of the Child; Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography; and Addis Ababa Declaration on Ending Child Marriage in Africa.[72]

In *S v Jezile*,[73] the court found that *ukuthwala* is no defence to rape, human trafficking, and assault with the intent to do grievous bodily harm. The court invited a number of state

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63 See Van der Watt and Ovens (2012) *CARSA* 12, and Mwambene and Sloth-Nielsen (2011) *AHRLJ* 4.

64 Mwambene and Sloth-Nielsen (2011) *AHRLJ* 5.

65 See Van der Watt and Ovens (2012) *CARSA* 12, with reference to a number of other authors, as well as Mwambene and Sloth-Nielsen (2011) *AHRLJ* 6–8 (on page 8 the authors stated that the right to bodily integrity and freedom and security of the person, as well as the right to make choices, are violated). Also see *S v Jezile* 2016 (2) SA 62 (WCC), as discussed in Prinsloo and Ovens (2015) *Acta Criminologica* 169–181. For further critique of *ukuthwala*, see Mabasa (2015) *De Rebus* 28–30.

66 32 of 2007. Also see Prinsloo and Ovens (2015) *Acta Criminologica* 174–175 for a discussion of specific sections of said Act.

67 Also see Prinsloo and Ovens (2015) *Acta Criminologica* 174 for a discussion of specific sections of said Act.

68 7 of 2013. Also see Prinsloo and Ovens (2015) *Acta Criminologica* 175 for a discussion of specific sections of said Act.

69 This section protects children from social, cultural and religious practices harmful to their well-being. Section 12(2), which deals with forced marriages, is not directly relevant to *ukuthwala* (see Mwambene and Sloth-Nielsen (2011) *AHRLJ* 1720).

70 See Van der Watt and Ovens (2012) *CARSA* 21. Also see Mwambene and Sloth-Nielsen (2011) *AHRLJ* 2, 17–18, 21.

71 Also see Prinsloo and Ovens (2015) *Acta Criminologica* 174 for a discussion of specific sections of said Act.

72 See Prinsloo and Ovens (2015) *Acta Criminologica* 176–178.

73 2016 (2) SA 62 (WCC). Also see Mabasa (2015) *De Rebus* 28-30, South African Law Reform Commission *Project 138: Revised Discussion Paper 132* 17.

institutions, organisations and experts on the practice of *ukuthwala* in customary law to assist it as *amici curiae*.[74] The court examined the relevant provisions of the Constitution; the Children's Act; Prevention and Combating of Trafficking in Persons Act;[75] Recognition of Customary Marriages Act; Promotion of Equality and the Prevention of Unfair Discrimination Act;[76] Universal Declaration of Human Rights; UN Convention on the Elimination of all Forms of Discrimination Against Women; UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (supplementing the UN Convention against Transnational Organised Crime); Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa; UN Convention on the Rights of the Child; African Charter on the Rights and Welfare of the Child; Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography; and the Addis Ababa Declaration on Ending Child Marriage in Africa.[77] The court relied heavily on the expertise of Professor Nhlapo, who chaired the advisory committee assisting the South African Law Reform Commission in their *ukuthwala* investigation.[78] Nhlapo stated that "there are instances where circumstances do not readily permit of the regular method of pursuing a customary marriage". He describes *ukuthwala* as follows: "the process of *ukuthwala* is not a marriage in itself, but, properly understood, is the method instigated by willing lovers to initiate marriage negotiations by their respective families" and "a self-directed form of betrothal by a man and woman to each other, subject to parental approval, and is a collusive strategy of the couple to counter the influence of extreme parental authority and to give effect to the will of the young lovers".[79]

The South African Law Reform Commission published a revised discussion paper on Project 138 – The Practice of *Ukuthwala* in October 2015, and invited comments. Amongst others, the Paper examines the relevant obligations under international law and relevant provisions in South African Law. The SALRC supported the enactment of legislation and the paper also includes a Draft Prohibition of Forced Marriages and Child Marriages Bill.[80]

8.5 Defamation[81]

Outside KwaZulu-Natal, the recognition of defamation as a delict in customary law is very limited. Apparently under the influence of the courts in the former Ciskei and Transkei in the Eastern Cape, only claims relating to accusations of witchcraft were actionable as delicts. It is uncertain whether only this form of conduct constitutes defamation in customary law as practised today amongst approximately 800 traditional communities in South Africa. Hoctor stated that the customary law crime of defamation is largely equivalent to common law defamation.[82] It is, however, interesting to note that the Constitutional Court explored the utilisation of *ubuntu* to

74 The National House of Traditional Leaders (which also produced a White Paper on the practice and submitted same to Parliament), Woman's Legal Centre Trust, Centre for Child Law, Commission for Gender Equality, Rural Women's Movement, Masimanyane Women's Support Centre, and the Commission for the Promotion of the Cultural, Religious and Linguistic Communities offered its assistance to the Constitutional Court (see paras 54–55, 71).

75 Which, at the time of the court case, had not yet commenced (para 64).

76 4 of 2000.

77 Paras 57–69.

78 South African Law Reform Commission *Project 138: Revised Discussion Paper 132* (2015).

79 Paras 73–74.

80 To date (1 October 2018), this Bill has not been introduced in Parliament and there are no indications as to what its current status is.

81 See Bekker "Law of delict" in Joubert, Faris and Church (eds) *LAWSA* vol 32 (2009) paras 183–186.

82 Hoctor (2006) *Fundamina* 179 fn 103, as discussed in Hoctor (2013) *Obiter* 125–135, 127.

emphasise restorative justice in a defamation case, where the Roman Dutch *amende honorable* (an apology) was preferred in a minority judgment above an order sounding in money.[83]

8.6 Delicts regarding property[84]

8.6.1 *Damage to property*

As a general rule, damage to property gives rise to a delictual claim.[85] The rule in customary law is that if an animal has been killed by an individual, the dead animal must be replaced with another animal. In such a case, the carcass of the dead animal belongs to the perpetrator. It is customary for the owner of a dead animal to be notified. If the specific person responsible for the death of the animal is a suspect, the matter must be reported to the suspect's family home and also to the headman, who must inspect the dead animal. During the inspection, the owner must confront the suspect and explain to him why he is suspected, and he must claim from him that the animal be replaced. Thereafter, the carcass is placed at the disposal of the alleged perpetrator.

Bekker notes that amongst the majority of communities, the general principle is that a person is liable to pay compensation for damage caused by arson, or where a person negligently omitted to put out a fire. Damage to crops must be compensated.

8.6.2 *Damages caused by animals*

As a general rule, the owner of animals is responsible for damages done by them in places where they should not be.[86] That is why it is expected that animals that are dependent on grazing, such as cattle and sheep, must be herded to avoid damages to lands, gardens and living quarters. The owner of an animal that has been killed or injured by an animal belonging to another person is entitled to compensation. An owner is expected to control his animals. If, for example, an animal shows vicious propensities, the owner is expected to take proper precautions. If the animal has not previously shown any vicious propensities, damage caused by it is regarded as a mere accident, and no damages are payable. If an animal is killed or injured by a domestic animal such as a dog, the owner is liable, irrespective of whether it had previous vicious propensities.

Damage caused to homesteads by animals must be compensated by the owner. Animals which cause injury to individuals are killed. However, it is uncertain whether damages may be claimed in all cases.

8.6.3 *Theft*[87]

In traditional customary law, theft, and especially stock theft, was seen in a serious light and gave rise to delictual and criminal liability.[88] The so-called "spoor law" was included in Cape

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83 See the judgment written by Mokgoro J in *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) (note that this case did not deal with customary law). Also see Bennett (2011) *PER/PELJ* 44, Hoctor (2013) *Obiter* 133–134, and Himonga, Taylor and Pope (2013) *PER/PELJ* 370–427, specifically 400–402. Also see Van Niekerk (2013) *Fundamina* 397–412.

84 See Bekker "Law of delict" in Joubert, Faris and Church (eds) *LAWSA* vol 32 (2009) paras 174–180 and the cases and examples of liability cited there. Bekker distinguishes between the following two forms of causation of damage: (a) damage caused by animals; and (b) damage caused by individuals. In the case of the former, he further distinguishes between (a) damage to cultivated land; (b) damage to homesteads; (c) damage caused to animals; and (d) injury to people. In the case of damage caused by individuals, he distinguishes between (a) damage to animals; (b) damage caused by arson; and (c) damage to crops.

85 See Labuschagne and Van den Heever (1997) *TRW* 133–147.

86 See Labuschagne and Maritz (1977) *De Jure* 363–375.

87 See Bekker "Law of delict" in Joubert, Faris and Church (eds) *LAWSA* vol 32 (2009) para 187 and the cases cited there.

88 Labuschagne and Van den Heever (1991) *CILSA* 352–364.

Province, Natal and Transkeian Territories legislation.[89] The (national) Stock Theft Act 57 of 1959 was later promulgated, and repealed the Cape and Natal Acts dealing with the spoor law.[90] In accordance with the spoor law, the head of a homestead was held civilly liable if the tracks of lost or stolen livestock were traced to the homestead concerned or its immediate surroundings.[91] The head could avoid liability by either giving a satisfactory explanation for the livestock, or assisting in searching for the livestock. The term "spoor" did not have a limited interpretation, and could also include meat found at a homestead. In the event that the spoor did not point to a specific homestead, all the heads in the vicinity of the spoor were held jointly liable (in a civil sense). Criminal liability only resulted from the false laying of a spoor. Bennett and Jacobs stated that the spoor law is probably still in force, but, with regard to criminal liability (as opposed to civil liability) may not be able to withstand constitutional scrutiny, as it reverses the onus of proof, and imposes collective liability in certain instances.[92]

In the case of theft of other goods, the offender is liable for twice the value of the stolen goods only. This illustrates the value attached to cattle and other livestock.

8.7 Assault and causation of death

In customary law, assault (bodily injury) and causation of death of another are in most communities primarily seen as crimes and thus not actionable as delicts. Since considered as crimes, only the traditional leader could institute a claim, and the fine was payable to him. The latter would usually award some of the money to the injured party.[93]

8.7.1 *Assault*

Outside KwaZulu-Natal, a delictual claim for damages for assault may be instituted only in terms of the common law. Thus, patrimonial and immaterial damages for assault can be claimed in terms of the common law.[94]

Ukutheleka is a customary law method used by a wife's maiden relatives to protect her against her abusive husband. Her maiden family would keep her with them, until the husband has, during a visit in person to his wife's maiden home (*ukuphuthuma*):

(a) assured them that he would desist from further abuse;

(b) undertaken to treat her with dignity in future;

(c) with his family, accounted for abusive conduct to her family;

(d) apologised profusely and unreservedly;

(e) paid the fine imposed by her family as part of the deal of their acceptance of the apology; and

(f) committed himself to the terms and conditions of his wife's return to him.[95]

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89 Amongst others, the Cattle Removal Act 14 of 1870 (Cape) and later the Cattle Stealing Act 1 of 1889 (Cape), Act 1 of 1899 (Natal), the Stock Theft Act 25 of 1977 (Transkei) and the 1883 Transkeian Penal Code.

90 It did not specifically repeal the abovementioned Transkeian legislation. The customary spoor law was also not specifically repealed.

91 Bennett and Jacobs (2012) *SACJ* 214.

92 Bennett and Jacobs (2012) *SACJ* 213–234.

93 See Labuschagne and Van den Heever (1995) *CILSA* 422–430.

94 See Bekker "Law of delict" in Joubert, Faris and Church (eds) *LAWSA* vol 32 (2009) para 190.

95 See Ndima (2017) *Obiter* 15–33, specifically at 31, with reference to Konyana "The resilience of the repugnancy clause in the customary law of South Africa" in Osode and Glover (2010) 491.

8.7.2 *Culpable causation of the death of a breadwinner*[96]

In traditional customary law, the unlawful negligent causation of death of another person did not give rise to delictual liability. Cases of homicide were instead referred to the senior traditional leader for the imposition of punishment, for example, in the form of a fine. This led to severe hardship for a spouse of a customary marriage where the person's spouse was unlawfully killed, resulting in loss of maintenance.[97] However, since 1963, section 31 of the Black Laws Amendment Act provides for a claim by a widow of a customary marriage for loss of means of subsistence where the death of the breadwinner was unlawfully caused by another. Section 31 requires compliance with various requirements, such as the production of a certificate issued by a commissioner (now a magistrate),[98] stating the name of the partner or partners (in the case of a polygamous marriage) with whom the deceased was married in terms of customary law at the time of his death. The purpose of section 31 is twofold: (a) to provide the widow/s of a customary marriage with a remedy for maintenance identical to that available to a widow of a common law marriage; and (b) to prevent the defendant having to pay more damages in a particular case than is payable according to the common law.[99] In respect of (a) above, the certificate issued by the magistrate serves as conclusive proof of the existence of the customary marriage/s to the widow/s, the name/s of which is/are mentioned therein. In respect of (b) above, in cases where the deceased was survived by more than one spouse (the names of which would appear on the certificate referred to above), the deceased estate would not be held liable for more than would be the case had the deceased been survived by one spouse only.[100] Section 31 led to various interpretational problems and subsequent case law, relating, *inter alia*, to the production of the certificate.[101] Most, but not all,[102] of the uncertainties regarding the certificate were resolved in the case of *Hlela v Commercial Union Assurance Co of SA Ltd*.[103]

Arguably, the promulgation of the Recognition of Customary Marriages Act, which legalises customary marriages concluded in terms of the Act, and recognises those which were valid in terms of custom before the commencement of the Act, made section 31 redundant. Maithufi and Bekker point out that its repeal was obviously overlooked when the Recognition of Customary Marriages Act was enacted.[104] Since customary marriages are fully recognised in terms of the Recognition of Customary Marriages Act, a widow of a customary marriage should in principle have a claim for compensation also in terms of the latter. However, insofar as section 31 has not been repealed by the Legislature, it is still relevant. In *Road Accident Fund v Mongalo*,[105] it was confirmed that section 4 of the Recognition of Customary Marriages Act had not replaced section 31 of the Black Laws Amendment Act as the mechanism to institute the dependant's claim.[106] Hence, Bekker comes to the conclusion that in the case of claims arising from customary marriages, section 31 applies, and in the case of common-law marriages, common law applies.[107]

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96 See Bekker "Law of delict" in Joubert, Faris and Church (eds) *LAWSA* vol 32 (2009) paras 193–200 for a detailed exposition of the history, requirements for and consequences of s 31 of the Black Laws Amendment Act. Also see Maithufi and Bekker (2009) *Obiter* 164–174.

97 Maithufi and Bekker (2003) *Obiter* 440 443; Pienaar (2006) *Stell LR* 318–319.

98 Since the commencement of the Special Courts for Blacks Abolition Act 34 of 1986.

99 *Pasela v Rondalia Versekeringskorporasie van SA Bpk* 1967 (1) SA 339 (W).

100 Section 31(5) of the Black Laws Amendment Act. Pienaar (2006) *Stell LR* 324 identifies the following two additional objectives of the Act, namely (a) to limit the time and costs involved; and (b) to indemnify the state and functionaries from claims that might arise later.

101 See Bekker "Law of delict" in Joubert, Faris and Church (eds) *LAWSA* vol 32 (2009) para 200 for a detailed discussion of the questions raised by s 31 and the courts' response thereto.

102 See Bekker "Law of delict" in Joubert, Faris and Church (eds) *LAWSA* vol 32 (2009) para 200.

103 1990 (2) SA 503 (N).

104 Maithufi and Bekker (2009) *Obiter* 171.

105 2003 (1) All SA 72 (SCA).

106 See Pienaar (2006) *Stell LR* 325.

107 Bekker "Law of delict" in Joubert, Faris and Church (eds) *LAWSA* vol 32 (2009) para 200.

One advantage to the spouse/s of a claim in terms of section 31 of the Black Laws Amendment Act is the provision that the certificate issued by the magistrate serves as conclusive proof of the existence of the marriage/s. In terms of section 4(1) of the Recognition of Customary Marriages Act, spouses to a customary marriage have the duty to ensure that their marriage is registered. However, section 4(9) provides that non-registration does not invalidate a marriage. Thus, a spouse to a customary marriage concluded after the promulgation of the Act on 15 November 2000 might not necessarily have a certificate of registration, and might consequently have difficulty in proving the existence of the marriage.

Moreover, Maithufi and Bekker contend that section 31 also accommodates claims of spouses to marriages concluded before the enactment of the Recognition of Customary Marriages Act, but not recognised by the Act, or customary marriages not registered within the prescribed period allowed for by the Act.[108] In conclusion, the authors recommend that due to the above-mentioned uncertainties, law reform in this area is of paramount importance.

It must also be noted that historically, in certain communities, compensation was payable for homicide (whether or not the victim was a breadwinner). Among the Basotho, homicide was seen as a customary civil wrong, and punishable by requiring compensation (10 cattle for a male or female adult, or four or five for a child, or another figure set by the court). No compensation was payable upon the killing of a kinsman (as the giver and recipient were the same legal entity). Compensation was calibrated according to the degree of culpability and the so-called value of the victim. Amongst the Zulus, a fine or compensation could suffice for unpremeditated killings. With regard to the Xhosas, a heavy fine was payable for murder. Other models of reparation included the giving of cattle to enable a male member of the family of the victim to marry a wife, the giving of a daughter as procreator, and the delivery of a token number of cattle/stock to the deceased's kin "to dry the tears". The BaTlokwa practiced the death penalty, which was accompanied by a fine to the chief, and the Ndebele prescribed the death penalty, or in certain circumstances, a fine or corporal punishment.[109]

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108 Maithufi and Bekker (2009) *Obiter* 173.
109 Nhlapo (2017) *AHRLJ* 1–34, especially 12–16, 26.

9

Law of Succession and Inheritance

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9.1 Introduction

The law of succession (and inheritance) forms part of private law and generally includes those rules which determine what must be done with a deceased's property (or estate as it is called in legal terms) after his or her death. In layman's terms, the law of succession in South Africa keeps itself busy with what should happen to a person's estate after his or her death. The South African law of succession is a dual legal system consisting of two branches, the common law of succession and the customary law of succession.

In the common law of succession, inheritance concerns mainly the division of the assets of a deceased among his or her heirs. The division of property can take place in terms of the provisions of a will (or testament) – testate inheritance – or according to the rules of common law where no will exists – intestate inheritance.[1]

Customary law of succession, however, is generally according to the rules of customary law and is therefore intestate. Furthermore, the customary law of succession is concerned not merely with the inheritance of property but also with succession to the status of the deceased.

The terms "succession" and "inheritance" are often used in the literature to describe the process by which a deceased's estate must be distributed amongst his or her beneficiaries. Strictly speaking in customary law there is a difference between these two concepts. Succession means the transfer of rights, duties, powers and privileges normally associated with one's status, whilst inheritance means the transfer of property rights only.

In the case of customary law of succession, the emphasis is, strictly speaking, not on the division of property but on the continuation of status positions. The successor steps into the place of the deceased and gains control over the property and people over which the deceased had control.[2] Furthermore, the successor succeeds not only to the assets of the estate but also to its liabilities. Should the liabilities exceed the assets, the successor in customary law succeeds to these as well. One of the main objects of the traditional customary marriage is the continuation of the family lineage of the husband as family head.[3] In the case of the common law of succession, the liabilities of the deceased are first set off against the assets, and the balance is divided between the heirs. Should the liabilities exceed the assets, the heirs inherit nothing. There is no succession to the status of the deceased or anybody else.

Originally (in customary law) the death of a family head had a significant effect on control of the members of the family group and its property. The family head was succeeded by a general successor but at the same time there was also succession to the position as head of his various houses. A distinction was thus made between a general successor and a successor in each house. The death of other members of the family had no effect on the control of the group and its property. There was thus no question of succession in status to their positions on their death.

It is often assumed that customary law knows only succession and that there is no division of property.[4] Recent research shows this assumption to be incorrect.[5] There is also the notion that wills (or testate inheritance) were not known in customary law of succession and inheritance. However, it was accepted that a family head could make certain allocations of property to houses and individuals and that his deathbed wishes should be respected.[6] These remarks serve

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1 See, e.g. Olivier *et al* (1989) 435; the common law of inheritance has been largely codified by the Intestate Succession Act 81 of 1987 and the Wills Act 7 of 1953. Also see Rautenbach and Du Plessis "Law of succession" in Joubert, Faris and Church (eds) *LAWSA* vol 32(2009) paras 204–229.

2 Bekker (1989) 70.

3 Bekker and De Kock (1992) *CILSA* 368.

4 See Myburgh (1985) 94–95; Olivier *et al* (1989) 436.

5 See, e.g., Boonzaaier (1990) 483–489; Coertze (1987) 240–241; De Clercq (1975) 405–408; Hartman (1978) 437–441; Jacobs (1974) 276–279.

6 Olivier *et al* (1989) 436; Rautenbach and Du Plessis "Law of succession" in Joubert, Faris and Church (eds) *LAWSA* vol 32 (2009) paras 224–225.

to indicate that the notion of wills may well have been known to customary law, albeit not in the common law sense.

A number of empirical studies show that there is a difference between the "official" and "living" version of customary law. This is also evident in the law of succession and inheritance. It is almost impossible to discuss the "official" and "living" versions of customary law in this book and, therefore, the focus will be on the "official" version of the customary law of succession and inheritance.[7]

In chapter 6, a distinction is made between general, house and personal property. This distinction is important, since the death of a family head brings the division of general and house property into play, while the death of other members of the group concerns mostly the division of their personal property.

Over the years, the customary laws of succession and inheritance have been subject to considerable judicial and legislative change. Some of these changes resulted in the abolishment of the customary law of succession to a large extent. Also, the rules pertaining to the administration of African estates underwent far-reaching changes and these changes will be discussed in brief. Another important aspect pertains to the right of a family member to bury his or her deceased family members. This aspect has led to many conflicts between family members of a deceased which had to be resolved in the South African courts and will be discussed hereafter.

9.2 Customary law of succession

Although the customary law of succession has been abolished to a large extent, knowledge of the general principles is necessary to understand the current legal position of an African deceased and his or her successors.

9.2.1 *General principles*

The customary law of succession deals with the issue of continuation of status and control of people and property. Although there are differences between the various African groups,[8] the following may be identified as general principles:[9]

(a) Succession to status positions takes place only when a family head dies. There is no question of succession where the family head is still alive. The death of other members of the family does not give rise to succession to their statuses.[10]

(b) A distinction is made between general succession (that is, succession to the general status of the deceased) and special succession (that is succession to the position of head of the various houses of the deceased).[11]

(c) Succession to status is limited largely to males, especially those of the patrilineage[12] and as a general principle a man cannot be succeeded by a woman.

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7 See, e.g., Bennett (2004) 337–345 for a discussion of the differences between the "official" and "living" versions of the customary law of succession and inheritance. To determine the "living" version of customary law of succession in a relevant community expert evidence will have to be led regarding the existing of such a custom or law according to the principles set out in *Van Breda v Jacobs* 1921 AD 330.

8 See ch 2 for a discussion of the various African groups in South Africa.

9 See Rautenbach and Du Plessis "Law of succession" in Joubert, Faris and Church (eds) *LAWSA* vol 32 (2009) para 204.

10 An exception is pre-death dispositions. See 9.3.2.

11 Bekker (1989) 273; Rautenbach and Du Plessis "Law of succession" in Joubert, Faris and Church (eds) *LAWSA* vol 32 (2009) para 204.

12 Bekker (1989) 273; Olivier *et al* (1989) 436.

(d) Succession follows the rule of male primogeniture,[13] which means that a man is succeeded by his first-born son in a particular house.

(e) Succession is a duty that cannot be relinquished or ceded. A son has to take up all the responsibilities associated with the status position to which he succeeded. The general successor in particular has the duty to care for all members of the family[14] and to perform rituals on behalf of the family to maintain the blessing and goodwill of the family ancestors.[15]

(f) Male descendants enjoy preference over male ascendants; male ascendants in turn enjoy preference over collateral male relatives, in other words, relatives in the lateral line.[16]

(g) A successor could, on good grounds, be removed from the line of succession (often portrayed as the successor being "disinherited").[17] Such a step had serious consequences since the person so affected was ousted not only from the financial and emotional support of the family but also from the spiritual bond with the family ancestors. In most cases such ousting was limited to the individual and not to his descendants as well.

(h) Originally, the successor succeeded to the status of the deceased in respect of his control over people and the assets and liabilities of the family, which is universal succession. Presently the position is not uniform. In KwaZulu-Natal a successor is only liable for debts in respect of the estate and only to the extent of the assets to which he succeeds. Outside KwaZulu-Natal a successor succeeds to the assets and debts of the deceased. Among the Pondo, the successor is not liable for the delicts committed by the deceased.[18]

9.2.2 *General order of succession*

The order of succession takes particular account of the following three principles, namely succession on death, primogeniture and succession by males in the male line of descent. Succession in a monogamous and succession in a polygynous household are distinguished. A monogamous house has one wife, whereas a polygynous household has several wives and houses.

9.2.2.1 Succession in a monogamous household

The order of succession is briefly as follows:[19] when a male dies, his eldest son, or, if he is deceased, his eldest son inherits. If the eldest son died without male descendants, the second son or his male descendants succeed, in their order of birth. Should the deceased die without male descendants, the deceased's father succeeds. Should the deceased survive all his male descendants and his father, he is succeeded by his eldest brother or his eldest brother's male descendants according to the order of the houses. In this manner all the brothers of the deceased and their male descendants are considered with regard to succession. Should the deceased's father or the deceased's brothers have no male descendants to succeed, the grandfather of the deceased or one

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13 Bekker (1989) 273; Koyana (1980) 80; Olivier *et al* (1989) 437. The rule of primogeniture was unsuccessfully contested in the high court of South Africa: see *Mthembu v Letsela* 2000 (3) SA 867 (SCA) and successfully contested in the Constitutional Court of South Africa in the *Bhe* case. Also see Rautenbach (2005) Jul/Sept *AFLA Quarterly* 30–33.

14 This rule was accepted as not discriminatory against women in *Mthembu v Letsela*.

15 See e.g. Bekker (1989) 297–303; Olivier *et al* (1989) 484–497; Rautenbach and Du Plessis "Law of succession" in Joubert, Faris and Church (eds) *LAWSA* vol 32 (2009) para 233.

16 "Descendants" refers to your own children, "ascendants" are predecessors and ancestors, while collateral relatives are relatives in the lateral line, such as brothers and sisters.

17 See e.g. Bekker (1989) 303–306; Olivier *et al* (1989) 474–483; Rautenbach and Du Plessis "Law of succession" in Joubert, Faris and Church (eds) *LAWSA* vol 32 (2009) para 232.

18 Rautenbach and Du Plessis "Law of succession" in Joubert, Faris and Church (eds) *LAWSA* vol 32 (2009) para 233.

19 See Bekker (1989) 274–275; Olivier *et al* (1989) 438–440; Rautenbach and Du Plessis "Law of succession" in Joubert, Faris and Church (eds) *LAWSA* vol 32 (2009) paras 205–206.

of his male descendants according to seniority succeeds to his status position. In the same manner, the deceased's great-grandfather and his male descendants are considered.

Where there are no male descendants to succeed, which is highly unlikely given the cultural practices of substitution of spouses, the traditional leader of the deceased's traditional authority succeeds to this estate.

9.2.2.2 Succession in a polygynous household

A distinction is made between those groups who divide the household into sections[20] and those who do not.[21] In all cases, the eldest son in each house succeeds in that particular house.[22] If he is deceased, his male descendants are firstly considered and thereafter his younger brothers and their descendants. Should a particular house have no male descendant, a successor is obtained from the house next in rank.

Among groups where the household is divided into sections, an attempt is first made to obtain a successor from the houses affiliated to the main house within a section before going to the next section for a successor. In other words, if there is no male within a particular section who can succeed, the senior male successor in the section next in rank succeeds in the section without a successor.

9.2.2.3 Order of succession among male children

It sometimes happens that a deceased has no son in a particular house and that, during his lifetime, he transferred a younger son as successor from one of his senior houses to that house. Where a deceased leaves no legitimate sons but does have an illegitimate son or a son from a supporting marriage,[23] such a son can succeed under certain circumstances. Despite considerable variations among the different groups, the order of rank of sons with regard to succession can, in order of precedence, be summarised as follows:[24]

(a) A legitimate son fathered by the deceased himself.

(b) A married man's illegitimate son with an unmarried or divorced woman for whom *isondlo* (maintenance) has been paid.

(c) Sons born out of an *ukungena* relationship.[25]

(d) Adopted children or children born from an adulterous relationship with the wife, unless the latter have been repudiated, according to the chronological order in which they became attached to the late husband's family. An adopted child is, however, excluded by a legitimate child. The Zulu and Swazi groups do not recognise adoption.

(e) Sons of a wife of the deceased who are not born from an *ukungena* relationship.

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20 The household amongst the Zulu, Xhosa and Ndebele-speaking people are usually divided into two or three sections.

21 The Sotho-speaking (Tswana, South Sotho and Northern Sotho), the Swazi, Tsonga and Venda do not divide the household into sections, although the wives (or houses) are ranked.

22 See Bekker (1989) 275–279; Olivier *et al* (1989) 440–450; Rautenbach and Du Plessis "Law of succession" in Joubert, Faris and Church (eds) *LAWSA* vol 32 (2009) paras 206–207.

23 Supporting marriages include the raising of children by a substitute wife should a wife die without a son or where a wife is barren. Children can also be raised by one of the deceased's wives in the name of the deceased in terms of the *ukungena* custom. See further Vorster (1993) *TSAR* 552–560.

24 See Bekker (1989) 242–246, 283–296; Olivier *et al* (1989) 462–561.

25 The children begotten through a widow are referred to as the *ukungena* custom. It is based on the principle that the death of a family head does not terminate the marriage relationship between the widow and her husband's family.

(f) A premarital son of an unmarried woman or the extramarital son of a divorced woman for which no *isondlo* has been paid. This is an example of succession through a woman since such children are regarded to belong to the family of their mother and not to the family of the deceased. Such a son can succeed through his mother only if the deceased has no other male relatives.

Bhe v Magistrate, Khayelitsha[26] extends the Intestate Succession Act[27] to all persons in South Africa, including those adhering to a system of customary law. As a result of such extension, no distinction will in future be made between legitimate and illegitimate children or between men and women.

9.2.3 *General and special succession*

General succession is concerned with control over the household and property of the general estate. Special succession is concerned with control over the constituent houses of a household and house property. There are as many house successors as there are houses in a household. However, houses differ in rank. The successor to the main house is in most cases at the same time also the general successor. Where the household is divided into sections, the successor to the main house of the main section (*indlunkulu*, among the Nguni groups) is at the same time also the general successor. In the case of the Tswana and Pedi, the youngest son inherits the household.[28]

There may be one deceased but several successors. This situation can be explained as follows: although succession deals with status and concomitant powers of control over people and property, each house successor succeeds to all the powers of the deceased in respect of the members and property of the house. Each house successor acquires control over the members of the house concerned and the house property and this control is exercised in consultation with the adult members of the house. After the death of the family head, each house forms a potentially independent unit from which a new household may eventually emerge. The general successor, however, obtains overall control over all the houses and, to a certain extent, maintains the original unity of people and property.

In due course the original household develops into various independent households, with the overall control of the general successor as a binding factor of what now forms a family group. At the same time, the senior members of the family group form a family council which, to a greater or lesser degree, exercises control over the constituent households and houses. Such a family council can, for example, discipline a family head should he waste the general property or neglect his duties towards his family.

9.2.4 *Powers and duties of the successor*

Succession was originally of a universal nature. This means that the successor acquired benefits and duties.[29] When a family head died, his powers and duties passed to the general successor and to the house successors in more or less direct proportion to the rank of each house. Each house successor acquired a considerable measure of autonomy over the affairs of his house. His duties, among others, included care and support for the members of the house, ensuring that debts were paid and collected and provision of the marriage goods for sons and the wedding outfits of daughters.

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26 2005 (1) SA 580 (CC) – hereinafter in this chapter referred to as the *Bhe* case. See the discussion at 9.4.6 and 9.5.
27 81 of 1987. In this chapter, "this Act" refers to the Intestate Succession Act, unless indicated otherwise.
28 See 9.3.4.
29 See Bekker (1989) 297–303; Olivier *et al* (1989) 484–497; Rautenbach and Du Plessis "Law of succession" in Joubert, Faris and Church (eds) *LAWSA* vol 32 (2009) para 214.

The general successor's powers and duties with regard to the house to which he succeeded were the same as those of the other house successors. As general successor, he acted in the place of the deceased family head and acquired control over the general property. He had the same powers and duties as his predecessor, although his authority over the various houses was less than that of his predecessor. He was therefore responsible for the general debts of the household and could also collect outstanding debts. As general successor, he was responsible for performing family rituals on behalf of family members. To this end he relied on the property of the general estate.

The financial powers and duties of a successor have been changed by statute in KwaZulu-Natal. The current position in KwaZulu-Natal is briefly as follows:[30] the successor is generally liable only for debts equivalent to the assets of the estate. The successor is, however, fully liable for *lobolo* debts contracted with another house to establish its own house (i.e. inter-house loans).

A successor's liability for his predecessor's debts in areas outside KwaZulu-Natal is probably that he is still liable for the debts, even if there are not enough assets. In addition, he is also liable for any *lobolo* debts, which implies universal succession.[31]

A successor is also liable for the delicts of the deceased. This liability is, however, limited to cases where the action was instituted before the death of the deceased or where the deceased accepted liability during his lifetime. In such a case the successor's liability is limited to the extent of the estate.[32] In this connection the Mpondo of the Eastern Cape Province are an exception in the sense that the successor is not responsible for the delicts of his predecessor.[33]

9.3 Inheritance of property

9.3.1 *Introduction*

It is often assumed that only a few males acquired control over property to the exclusion of the other male and all female members of the family. Research reveals a more complex picture regarding the division of the various categories of property.[34] In this regard, the distinction between general, house and personal property should be kept in mind.[35] General and house property were not usually divided after the death of a family head, although the successor (general and house) and a senior brother of the deceased may make allocations from such property to specific members of the family. The formal division of property usually takes place during a ritual signifying the end of the mourning period.

9.3.2 *Dispositions of property*

It has been stated above that succession to status occurs only on the death of a family head. Furthermore, the order of succession followed fairly clear principles. Despite these principles, a family head could, during his lifetime, make certain allotments from general property which

30 Section 81(8) of the KwaZulu Act on the Code of Zulu Law 16 of 1985 and the Natal Code of Zulu Law Proc R151 of 1987 in *GG* 10966 of 9 October 1987 (hereinafter the "Codes of Zulu Law").

31 Rautenbach and Du Plessis "Law of succession" in Joubert, Faris and Church (eds) *LAWSA* vol 32 (2009) para 214.

32 Bekker (1989) 302.

33 Rautenbach and Du Plessis "Law of succession" in Joubert, Faris and Church (eds) *LAWSA* vol 32 (2009) para 214.

34 See Boonzaaier (1990) 519–539; Coertze (1987) 249–254; De Clercq (1975) 428–434; Hartman (1978) 467–484; Jacobs (1974) 289–291.

35 See ch 6.

would remain valid after his death. Ways in which a family head could allot property include the following:[36]

(a) Allotment of property to a specific house or son. Such allotment is accompanied by certain formalities and need not occur only once.

(b) Linking of daughters to sons in a house as a means of providing for the marriage goods of these sons. The marriage goods received for a daughter are then used as marriage goods for the wife of her linked brother. This method of providing for the marriage goods of sons is found mainly among the Sotho groups.

These methods have a definite influence on the customary rules of inheritance. For this reason such a disposition must be accompanied by particular formalities and must be done in consultation with the wider family group.

A family head, and apparently also other members of the group, can dispose of personal property by means of a customary will. This must be done in a formal manner in the presence of senior members of the family, also including, where possible, the general successor and other children. Among the people who should be present are a senior brother, sometimes a sister and, among some, also the local ward head.[37]

Another well-known means of disposing of property is the so-called deathbed wish of a person.[38] In such circumstances certain people must be present. A deathbed wish is not often disputed, provided it follows the general principles of inheritance. Nowadays such wishes are often recorded in writing, taking the form of a last will.

9.3.3 *Division of personal property*

Personal possessions may include clothes and various personal items such as pipes, tobacco bags, walking sticks, watches and jewellery and other ornaments of a personal nature. Some of the clothes of a deceased are usually put in the coffin. The principles of division of such property vary significantly among the various African-speaking groups. The basic rule among the Bafokeng is that at least half of the property should go to the deceased's *malome* (maternal uncle) while the rest are divided among close relatives.[39]

Personal property of unmarried persons usually reverts back to their parents and is often divided among their children, if any, and their brothers and sisters.[40] Personal property of a married woman is usually divided among her children, daughters in particular, and her sisters.[41]

The division of property usually takes place at the end of the mourning period. After the mourning period, a senior member of the family oversees the division of property between family members. Such division cannot be disputed in court. If a family member is dissatisfied, he or she can approach the senior members of the family to consider the discontent.

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36 See Olivier *et al* (1989) 454–455; Rautenbach and Du Plessis "Law of succession" in Joubert, Faris and Church (eds) *LAWSA* vol 32 (2009) para 211.

37 See Boonzaaier (1990) 489–491; Coertze (1987) 245; De Clercq (1975) 409–410; Hartman (1978) 439.

38 See Boonzaaier (1990) 491–498; Coertze (1987) 247–249; De Clercq (1975) 442–445; Hartman (1978) 442–449; Jacobs (1974) 288–289; Olivier *et al* (1989) 450–453; Rautenbach and Du Plessis "Law of succession" in Joubert, Faris and Church (eds) *LAWSA* vol 32 (2009) para 211.

39 Coertze (1987) 249–250; also see De Clercq (1975) 432–433; Jacobs (1974) 289.

40 See Boonzaaier (1990) 535–539; Coertze (1987) 250–252; De Clercq (1975) 445–448; Hartman (1978) 482–484; Jacobs (1974) 289.

41 See Boonzaaier (1990) 531–535; Coertze (1987) 252–253; De Clercq (1975) 448–452; Hartman (1978) 479–481; Jacobs (1974) 290–291; Rautenbach and Du Plessis "Law of succession" in Joubert, Faris and Church (eds) *LAWSA* vol 32 (2009) para 210.

9.3.4 *Division of general and house property*

It is generally assumed that general property and house property are not divided and that such property is inherited by the general and house successors respectively.[42] Research reveals a more complex picture.[43] The following is a summary of the main principles.

General property may include agricultural implements such as tractors, ploughs and wagons, and other property such as motor vehicles, investments and money. Such property was to be used during the lifetime of the deceased to the benefit of all the members of the household. This basic principle continues to apply after the death of the family head. Property should be used for his funeral and to settle any debts there may be. The balance should be used to maintain the various units of the household and especially the wives and dependent children of the deceased. Depending on the size of the estate, it is possible for the general successor to divide some of the property first among the house successors and then among the other sons.[44]

House property usually includes the house and the land on which it is erected, fields allocated to the wife for cultivation, animals, furniture and cooking utensils, and occasionally also monetary savings of the wife. Such property is used to maintain the wife and her children after her husband's death. Depending on the size of the house estate, the house successor may sometimes divide the property after his mother's death among his brothers and sisters. However, it is customary in some communities for the youngest brother to receive the house with furniture and cooking utensils as well as any fields for cultivation. This is referred to in the literature as "ultimogeniture".[45]

9.4 Statutory and judicial amendments: historical overview

Although the customary law of succession and inheritance remained for the most part uncodified, some codification and changes have been brought about by means of legislation.[46] The most important codifications were:

(a) Section 23 of the Black Administration Act;[47]

(b) Regulations for the Administration and Distribution of Estates of Deceased Blacks (Government Notice R200 of 1987);[48]

(c) The Codes of Zulu Law;[49] and

(d) Land Regulations.[50]

Although most of the legislative provisions have been amended considerably by the *Bhe* case[51] and other legislation,[52] it is important to know what implications the legislation and judicial

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42 See Bekker (1989) 373–374; Olivier *et al* (1989) 435.

43 See Boonzaaier (1990) 521–531; De Clercq (1975) 430–432; Hartman (1978) 468–478; Jacobs (1974) 303–305; Watney (1992) 15–24.

44 See Boonzaaier (1990) 521–525.

45 Watney (1992) 17 deals with this phenomenon as a form of succession rather than inheritance; also see Boonzaaier (1990) 530–531; Coertze (1987) 267; De Beer (1986) Phil thesis UP 336.

46 Also see Rautenbach and Du Plessis "Law of succession" in Joubert, Faris and Church (eds) *LAWSA* vol 32 (2009) paras 222–226.

47 38 of 1927. Also see 9.4.1. In this chapter, "the Act" refers to the Black Administration Act unless indicated otherwise.

48 See 9.4.2.

49 See 9.4.3.

50 See 9.4.4.

51 See 9.4.6.

52 See 9.5.

decisions had on the customary law of succession and inheritance.[53] The Codes of Zulu Law, for example, have not yet been repealed.

9.4.1 *Section 23 of the Black Administration Act*

Section 23 of the Black Administration Act commenced on 1 January 1929 and it was intended to provide unified rules to determine which law of succession is to be applied; the customary or common law of succession. It did not apply in KwaZulu-Natal because the Codes of Zulu law applied there. Section 23 was found to be unconstitutional and invalid by the *Bhe* case and finally repealed on 12 April 2006 by the Repeal of the Black Administration Act and Amendment of Certain Laws Act 28 of 2005 but in essence it provided as follows:

(a) Section 23(1) provided that "[a]ll movable property belonging to a Black [African] and allotted by him or accruing under Black law or custom to any woman with whom he lived in a customary union, or to any house, will upon his death devolve and be administered under Black law and custom." The reason for this rule was the fact that all household property usually belonged to the family head and had to be kept in the family for the common good of the rest of the family members. However, the South African Law Reform Commission[54] was of the opinion that the social circumstances of people living under a system of customary law have changed so dramatically that this provision served no purpose anymore and that it had to be repealed.

(b) Section 23(2) provided that "[a]ll land in a tribal settlement held in individual tenure upon quitrent conditions[55] by a black will devolve upon his death upon one male person to be determined in accordance with tables of succession to be prescribed under section 23(10)." The South African Law Reform Commission[56] pointed out that quitrent land has been upgraded to full ownership in terms of the Upgrading of Land Tenure Rights Act 112 of 1991 thereby making its existence redundant in the context of succession.

(c) Section 23(3) provided that "[a]ll other property of whatsoever kind belonging to a black may be devised by will". This section was necessary in light of the previous two provisions limiting an African's freedom of testation. Repealing the two previous subsections would make this provision uncalled for and it was also recommended that it be repealed.

The remaining subsections of section 23 included the following:

(a) Section 23(5) and (6) made provision for the adjudication of disputes arising out of the administration of any estate of a deceased African.

(b) Section 25(7) to (9) excluded the jurisdiction of the Master of the High Court with regard to the administration of the estate of a deceased African. Section 25(7)(*a*) that specifically excluded the powers of the Master regarding "the estate of any Black who has died leaving no valid will" was declared unconstitutional by the Constitutional Court in *Moseneke v The Master*.[57]

(c) Section 23(10) and (11) empowered the Governor-General to make regulations and dealt with deceased estates of Africans reported to the Master before the commencement of the Act.

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53 For a detailed discussion of the statutory amendments to the law of succession and inheritance before 2001, see Rautenbach (2001) 259–267.

54 South African Law Reform Commission *Project 90: Report on the customary law of succession* (2004) 63.

55 Meaning that the owner of land held under a quitrent title does not have full ownership of the land but only the right to loan the property from the government for a certain period of time and against payment of a certain amount of money.

56 South African Law Reform Commission *Project 90: Report on the customary law of succession* (2004) 64.

57 See 9.4.5.

On 15 October 2004, section 23 was declared unconstitutional and invalid by the Constitutional Court in the *Bhe* case. This judgment had far-reaching implications and will be discussed here-after.

9.4.2 *Regulations for the Administration and Distribution of the Estates of Deceased Blacks (GN R200 of 1987)*[58]

Government Notice R200 of 1987 was issued in terms of the repealed section 23(10) of the Black Administration Act. Government Notice R200 gave legislative recognition to the rule of male primogeniture and described how the estate of a deceased African had to devolve if section 23 of the Black Administration Act was not applicable and if the deceased did not dispose of his estate by means of a valid will. In the absence of a valid will, the property had to devolve according to the rules laid down in regulation 2 which could be summarised as follows:

(a) If the deceased was resident outside South Africa, the personal law of his or her land of origin was applicable.[59]

(b) If the deceased was the holder of a letter of exemption issued in terms of section 31 of the Black Administration Act,[60] his or her property had to devolve according to the common law of succession.

(c) If the deceased concluded only a common law marriage, his or her estate had to devolve in terms of the common law of succession.[61]

(d) The Minister was empowered to make an equitable distribution if he or she was of opinion that the partial or full application of customary law to the devolution of the estate would result in inequitable or inappropriate circumstances.[62]

(e) The customary law of succession had to apply to all cases that did not fall in the classes already described above, for example, if the deceased was not married.[63]

In *Zondi v President of the Republic of South Africa*,[64] the court declared regulation 2 to be unconstitutional to the extent that it distinguishes, for the purpose of intestate succession, between the estate of an African who was a partner in a section 22(6) marriage (marriage out of community of property) on the one hand and the estate of an African who was a partner in a marriage in community or property or a marriage under an ante-nuptial contract on the other hand. The case is a decision of the Natal Provincial Division and is therefore not binding on the other provinces.

However, the Constitutional Court in the *Bhe* case declared regulation 2 to be unconstitutional and invalid.[65] This means that all property (irrespective whether it is house property or quitrent and) may be disposed of by means of a will from 15 October 2004 and that the Intestate Succession Act[66] will be applied to all estates irrespective of the race or gender of a deceased.

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58 *GG* 10601 of 6 February 1987 (hereafter referred to as GN R200 of 1987). These regulations were amended by the Amendment of the Regulations for the Administration and Distribution of Estates in *GG* 24120 dated 3 December 2002 (hereafter referred to as GN R1501 of 2002).

59 The magistrate had to forward all his or movable assets (less claims against the estate) to the relevant officer of the district where the deceased was ordinarily resident – reg 2(*a*).

60 The repealed s 31 of the Black Administration Act granted the president the power to exempt any African from the operation of customary law under such conditions as he may seem fit.

61 Regulation 2(*c*).

62 Regulation 2(*d*).

63 Regulation 2(*e*).

64 2000 (2) SA 49 (N).

65 See 9.4.6.

66 81 of 1987.

9.4.3 *Codes of Zulu Law*

In KwaZulu-Natal, the customary succession rules have been codified in the so-called "Codes of Zulu law". The Codes of Zulu law consist of the KwaZulu Act on the Code of Zulu Law[67] and the Natal Code of Zulu Law.[68] The application of these two Acts are territorial and their provisions are generally applied to all African people living in KwaZulu-Natal, irrespective of the fact that such a person might belong to another ethnic group than the Zulus.

The application of the two Codes is not without problems. The KwaZulu Act on the Code of Zulu Law refers to the partly repealed Black Administration Act as the principal Act. Section 23 of the latter Act was repealed on 12 April 2006 by the Repeal of the Black Administration Act and Amendment of Certain Laws Act.[69] It might, therefore, be necessary to apply the rules of statutory interpretation to interpret each and every provision in the KwaZulu Act on the Code of Zulu Law that still refers to the principal Act (the Black Administration Act) in order to determine the correct legal position.

It is also important to point out that customary law falls under the functional area of concurrent national and provincial legislative competence and that both the national and provincial legislature may legislate on areas of customary law.[70] The repealed section 23 of the Black Administration Act is an example of national legislation dealing with customary law of succession whilst Chapters 10 of the two Codes of Zulu law (dealing with succession) are examples of provincial legislation dealing with the same.

The two Codes are regarded as remnants of an apartheid South Africa and their repeal have been advocated by some academic scholars.[71] Both Codes stand to be repealed by section 53(1) of the KwaZulu-Natal Traditional Leadership and Governance Act[72] but to date the date of the repeal has not been published.

9.4.4 *Inheritance of land*

Immovable property (or land belonging to a specific African group) devolved in accordance with prescribed tables of succession. It is impossible to deal with all the permutations and complexities of the regulations dealing with the inheritance of land within the scope of one chapter. A few remarks should suffice the reader that the type of land and its locality may be inextricably interwoven with the rules of succession to land and improvements on it. The position can generally be summarised as follows:

(a) Proclamation 142 of 1910 (Black Marriages and Estates):[73] This proclamation deals with succession to land held under quitrent title in the former Transkei. It has been assigned to the Eastern Cape in terms of Proclamation 111 of 1994.[74] The fate of this proclamation hinges on the fact that quitrent land in the former Transkei has not been upgraded yet to full ownership in terms of the Upgrading of Land Tenure Act.[75] Also, the commencement of

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67 16 of 1985. In terms of Proc 107 of 17 June 1994 in *GG* 15813 of 17 June 1994, the Act has been assigned to the Province of KwaZulu-Natal. Succession is regulated in Ch 10 of the Act.
68 Proclamation R151 of 1987 in *GG* 10966 of 9 October 1987. In terms of Proc R166 of 1994 in *GG* 16049 of 31 October 1994, this Code has been assigned to the Province of KwaZulu-Natal.
69 28 of 2005.
70 See Sch 4 (part A) of the Constitution.
71 Bennett and Pillay (2003) *SAJHR* 217–238.
72 5 of 2005.
73 Published on 8 November 1910.
74 Published in *GG* 15813 of 17 June 1994.
75 112 of 1991.

the Communal Land Rights Act[76] that upgrades the remaining quitrent land in the former Transkei to full ownership will make Proclamation 142 of 1910 redundant.

(b) Proclamation R188 of 1969 (Black Areas Land Regulations):[77] This proclamation was promulgated in terms of section 23(10) of the Black Administration Act and applied to the devolution of quitrent land outside the former Transkei. Quitrent land did not devolve according to the ordinary rules of testate or intestate succession but according to specific tables of succession,[78] which corresponded more or less to the customary law of succession. Regulation 35 of Proclamation R188 of 1969 precluded the transfer of quitrent land to women except in the circumstances specifically provided for in the regulations. If there were no beneficiaries to inherit the land the Minister could, in his discretion, authorise the transfer of the quitrent land to a female member or her descendants. The official could cause the land to be sold and the proceeds to be divided between the female members and their descendants. If a male beneficiary was found, the customary wife of the deceased (in a monogamous relationship) and his main wife (in a polygynous relationship), received a right to usufruct.[79] This right terminated upon remarriage of the wife. Proclamation R188 of 1969 also applied in rural areas. In the former Venda these regulations applied until 1990 before they were replaced by the Venda Land Affairs Proclamation 45 of 1990.[80] In the rest of South Africa, these regulations applied until the repeal of the Black Administration Act – the extent of the repeal of the regulations is, however, is still uncertain as these regulations were assigned to the provinces.[81] Although the succession rules may have been repealed, deceased estates may still include quitrent land that has to be dealt with in intestate estates – especially if no will has been drawn up.

(c) Government Notice R1036 of 1968 (Regulations Governing the Control and Supervision of an Urban Bantu Residential Area and Relevant Matters):[82] In urban areas, people were granted site permits, certificates of occupation and residential permits in terms of this regulation. These permits lapsed automatically on a holder's death and the local authority could re-allocate the property – the heir usually had preference. These rights could be upgraded to leasehold and full ownership. Although Government Notice R1036 of 1968 had been repealed by the Conversion of Certain Rights into Leasehold Act 81 of 1988, it is still applicable to people who hold such permits.[83]

(d) Proclamation R293 of 1969 (Regulations for the Administration and Control of Townships in Black Areas):[84] This regulation applied in rural-urban areas under the control of the former South African Development Trust. People acquired ownership units, deeds of grant and certificates of occupation. In the former self-governing territories (Lebowa, QwaQwa, KwaZulu, Kangwane, KwaNdebele and Gazankulu), Proclamation R293 of 1969 also applied. The same arguments raised in (b) above regarding the applicability of proclamations assigned to the provinces will apply here.

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76 11 of 2004.
77 Published in *GG* 1154 of 11 July 1969.
78 See Annexure 24, Proc R188 of 1969.
79 Usufruct means that the property rights belong to the owner but that the right to use, enjoy and take fruits from the property belong to someone else, in this particular case the customary wife of the deceased.
80 Which was, in turn, partially repealed by the Communal Land Rights Act.
81 It is uncertain whether national legislation could repeal assigned provincial legislation.
82 Published in *GG* 2096 of 14 June 1968.
83 Section 11 of the Act.
84 *GG* 373 RG 140 of 16 November 1962 as amended by the Amendment of the Regulations for the Administration and Control of Townships in Black Areas in *GG* 8933 RG 153 dated 14 October 1983 (hereafter referred to as Proc R153 of 1983).

Other immovable property, such as that owned by a person in terms of the common law, was inherited in accordance with the principles of the common law. Furthermore, in light of the recent changes to the customary law of succession, the repeal of most of the statutory provisions dealing with the devolution of customary land and the upgrading of quitrent land and other rights regarding land to full ownership may lead to the application of the common law of succession to such property in future.

9.4.5 *Winding-up and administration of estates*

Before 6 December 2000, the winding-up and administration of estates in South Africa could be divided broadly into two categories. The Magistrate had jurisdiction over the *intestate* estate of an African who ordinarily resided within his or her jurisdiction[85] whilst the Master had jurisdiction over all other deceased estates, including the *testate* estate of an African.[86]

The powers of the Master regarding the administration of the intestate estate of an African were expressly excluded in terms of section 23(7)(*a*) of the Black Administration Act and section 4(1A) of the Administration of Estates Act.[87] The power to administer intestate Black estates was confined to a magistrate in terms of regulation 3(1) of Government Notice R200 of 1987.

The constitutionality of section 23(7)(*a*) and regulation 3(1) was successfully contested in the Constitutional Court in *Moseneke v The Master of the High Court*.[88] The court found that section 23(7)(*a*) and regulation 3(1) impose differentiation on the grounds of race, ethnic origin and colour and as such constitute unfair discrimination as envisaged in terms of section 9 of the Constitution and, furthermore, that the limitations posed by the relevant legislative provisions were not "reasonable and justifiable in an open and democratic society based on equality, freedom and dignity". Accordingly, it was held that both provisions were inconsistent with the provisions of the Constitution and thus invalid. However, in order to reach a just and equitable order, the court held as follows:

(a) Section 23(7)(*a*) of the Black Administration Act is invalid with immediate effect, i.e. 6 December 2000.

(b) The *status quo* with regard to estates already completed in terms of section 23(7)(*a*) of the Black Administration Act and regulation 3(1) of Government Notice R200 of 1987 should be upheld.

(c) The declaration of invalidity in respect of regulation 3(1) of Government Notice R200 of 1987 is suspended for two years.

Beneficiaries of an intestate estate, which are not governed by the principles of customary law, had a choice to report the estate to a Master or a magistrate.

The order of the Constitutional Court in *Moseneke v The Master*[89] brought considerable changes to the winding-up and administration of intestate estates of Africans that devolve in terms of the common law. The Administration of Estates Amendment Act[90] and Government Notice R1501 of 2002 came into operation on 5 December 2002. The Administration of Estates

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85 Also see Olivier *et al* (1989) paras 245–247.
86 However, house property and quitrent land were excluded from testamentary disposition; see s 23(9) of the Black Administration Act.
87 66 of 1965.
88 2001 (2) SA 18 (CC). For a detailed discussion of the facts and findings of the case, see the previous edition of this publication 117–118 and also Rautenbach (2004) *THRHR* 219–226.
89 See 9.4.2.
90 47 of 2002.

Act[91] made provision for service points where officials of the Department of Justice and Constitutional Development could exercise functions on behalf of and under the direction of the Master. The power to appoint Master's representatives under section 18(3) of the Administration of Estates Act in deceased estates below R50 000 was delegated to the incumbent of a designated post at the service post by the Master. However, customary estates still had to be administered under the supervision of magistrates in terms of regulation 3(1) of Government Notice R200.

The order of the Constitutional Court in the *Bhe* case altered the position even further.[92] Estates that formerly fell under section 23 of the Black Administration Act and regulation 3(1) of Government Notice R200 must now be supervised by the Master. Magistrates will no longer have the responsibility to supervise and administer customary estates.[93] Estates that are currently being administered under section 23 must be completed as if section 23 has not been declared invalid. In future, all the so-called section 18(3) estates will be dealt with at the service points irrespective of the race of the deceased.

To facilitate a uniform process, Justice College has compiled a manual which should be followed at every service point.[94] For practical reasons, the manual proposes that estates in respect of persons who died before 27 April 1994 and which have not been reported to the Master yet, should be reported to the Master. If a person died on or after 27 April 1994, the deceased estate must be administered under the supervision of the Master. At this time, it is probably too soon to comment on the Master's ability to cope with the new demands and on whether the extra workload would hamper the effective and speedy winding-up of estates.

9.4.6 Bhe v Magistrate, Khayelitsha *2005 (1) BCLR 1 (CC*)

This case has far-reaching implications for the existing customary succession and inheritance laws. The Constitutional Court[95] heard three cases concurrently, since they were all concerned with the customary law of intestate succession. In the first case, Ms Bhe applied on behalf of her two minor daughters for an order declaring the rule of primogeniture unconstitutional in order to enable her two minor daughters to inherit from their father's intestate estate. In terms of the rule of primogeniture, the property had to devolve on the father of the deceased. The latter indicated that he intended to sell the property of the deceased in order to pay the funeral expenses incurred as a result of the deceased's death.

In the second case, Ms Shibi approached the court for a similar order after being barred from inheriting from her deceased brother's intestate estate. The deceased was unmarried and had no dependants. In terms of the rule of primogeniture her brother's two cousins shared the estate of the deceased.

The third case is an application for direct access to the Constitutional Court brought jointly by the South African Human Rights Commission[96] and the Women's Legal Centre Trust, who has established the Women's Legal Centre to conduct public interest litigation to advance the rights

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91 Section 2A of the Administration of Estates Act.
92 See 9.4.6.
93 The court ordered that all new estates have to be administered in terms of the Administration of Estates Act but allows the possibility that the Constitutional Court may be approached if serious administrative or practical problems occur – see para 132.
94 Meyer, Rudolph and Cronjé (2004).
95 The Constitutional Court of South Africa is the highest court with regard to constitutional matters.
96 The South African Human Rights Commission is a State institution established in terms of s 181(1)(*b*) read with ss 184, 185 and 186 of the Constitution.

of women.[97] Both organisations brought the application for direct access in their own est,[98]on behalf of someone else,[99] as well as in the public interest.[100] They also attacked the constitutional validity of the rule of primogeniture in the interest of women and children in general.

The Constitutional Court distinguished two main issues, namely the constitutional validity of section 23 of the Black Administration Act and the constitutionality of the rule of primogeniture. The court found that section 23 of the Black Administration Act contravenes sections 9(3), 10 and 28 of the 1996 Constitution and that the discrimination was not justifiable in terms of section 36 of the 1996 Constitution. The court then evaluated the constitutionality of the rule of male primogeniture, which forms the basis of the customary law of succession and inheritance. From the onset, the court recognised that the context in which the rule of primogeniture operated has changed and said:[101]

> Modern urban communities and families are structured and organised differently and no longer purely along traditional lines. The customary law rules of succession simply determine succession to the deceased's estate without the accompanying social implications which they traditionally had. Nuclear families have largely replaced traditional extended families. The heir does not necessarily live together with the whole extended family which would include the spouse of the deceased as well as other dependants and descendants. He often simply acquires the estate without assuming, or even being in a position to assume, any of the deceased's responsibilities.

Within this "new" setting, the practice to succeed the assets of a deceased to the eldest male heir does not necessarily correspond with an enforceable responsibility to support and maintain the family of the deceased. The order of the court had to reflect the changed circumstances and, although it is ordinarily desirable to leave it to the legislature to bring customary law in line with the Constitution, the court had the responsibility to provide relief to parties who sought it.

The court emphasised that the basis of the constitutional challenge to the rule of primogeniture is that it precludes a widow from inheriting as an intestate heir from her deceased husband, a daughter from inheriting from her deceased father, a younger son from inheriting from his deceased father and an extra-marital child from inheriting from his natural deceased father. These exclusions are, first, based on gender and thus a violation of equality;[102] secondly, an infringement of women's right to dignity;[103] and thirdly, against the rights of children.[104] According to the court, the customary heir's duty to support cannot serve as justification for the limitation that the rule imposes on the rights of women and children.[105] As a result, the court had to find that the rule of primogeniture, in its current application to customary law of succession, is unconstitutional and invalid.

This finding of the court had far-reaching implications for the existing customary law of intestate succession and it was necessary to give an order which could provide interim relief until the South African legislature is able to provide a lasting solution. As such, the court ordered that

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97 The Women's Legal Centre Trust is a non-governmental organisation which was established to "advance women's rights by conducting constitutional litigation and advocacy on gender issues". The particulars of the Women's Legal Centre Trust can be found at *http://www.wlce.co.za*.

98 In terms of s 38(*a*) of the Constitution.

99 In terms of s 38(*c*).

100 In terms of s 38(*d*).

101 Paragraph 80 of the *Bhe* case.

102 Section 9(3) of the Constitution.

103 Section 10.

104 Section 28.

105 The limitation that the rule imposes had to be reasonable and justifiable in an open and democratic society based on the values of equality, human dignity and freedom. See paras 95–97 of the *Bhe* case.

estates that would previously have devolved according to the customary law of intestate succession must now devolve according to the rules provided for in the Intestate Succession Act,[106] which applies to the intestate estates of the rest of the South African population. In order to protect partners in polygamous customary marriages,[107] the court expanded the Intestate Succession Act to all the spouses and children (irrespective of their gender) of a deceased.[108] In order to facilitate this, the court made the following order:

> (a) A child's share in relation to the intestate estate of the deceased, shall be calculated by dividing the monetary value of the estate by a number equal to the number of the children of the deceased who have either survived or predeceased such deceased person but are survived by their descendants, plus the number of spouses who have survived such deceased;
>
> (b) Each surviving spouse shall inherit a child's share of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed from time to time by the Minister for Justice and Constitutional Development by notice in the *Gazette*, whichever is the greater; and
>
> (c) Notwithstanding the provisions of subparagraph (b) above, where the assets in the estate are not sufficient to provide each spouse with the amount fixed by the Minister, the estate shall be equally divided between the surviving spouses.

The ruling of the *Bhe* case leaves a number of questions unanswered. Nothing is said, for example, about supporting unions, such as *ukungena* relationships. The court's judgment was, however, a temporary remedy until legislation is promulgated. In 2009, the Reform of Customary Law of Succession and Regulations of Related Matters Act[109] was enacted. It came into operation on 20 September 2010 and has important implications for the customary and common law of succession which will be discussed in the next paragraph.

9.5 Recent legal reform

9.5.1 *Introduction*

The customary law of succession and inheritance has been a contentious issue since the new human rights dispensation in South Africa. The South African Law Reform Commission (formerly the South African Law Commission) embarked on a project of legal reform aiming, amongst others, at the harmonisation of the common and customary law. In this regard, the South African Law Reform Commission published the *Report on the harmonisation of the Common Law and Indigenous Law: Conflicts of Laws* (Project 90) in September 1999, and, in 2008, the *Report on the Customary Law of Succession* (Project 90).[110]

The customary law of succession and inheritance is complex and varies among the different African groups. The official version of customary law of succession seems to conflate the idea of succession to status and inheritance of property, while the living customary laws do give ample evidence of distribution of property to individuals. However, the fact that a customary estate has to provide for the well-being and care of all the members of the family during their lifetimes, including members still to be born, as a result of cultural institutions providing for

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106 This Act regulates intestate succession to estates other than those that use to be regulated in terms of customary law.

107 Although polygyny is generally unlawful in South Africa, the Recognition of Customary Marriages Act recognises the validity of polygamous customary marriages. In terms of the Act, a "customary marriage" is one concluded in terms of customary law and "customary law", in turn, is defined as "the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples" – see s 1.

108 However, the court emphasised that it made no pronouncement on the constitutional validity of polygynous unions – see para 124.

109 11 of 2009.

110 Also see Rautenbach (2001) 279–287; Rautenbach and Du Plessis (2003) *De Jure* 20–31 for a discussion of some of the proposals of the Commission.

substitution, should also be accounted for. Moreover, the general and house successors may be called upon at any time to perform certain rituals, which often include the slaughtering of animals and which have to be bought, on behalf of family members to impact their and the group's continued well-being. For this reason, division of an estate into equal shares between the beneficiaries may not be regarded as fair and may well jeopardise the harmonious relationships between family members.

Nevertheless, as a result of the *Bhe* case and the proposals of the South African Law Reform Commission, the Reform of Customary Law of Succession and Regulation of Related Matters Bill[111] were published in 2008.[112] The Bill was finally transformed into an Act entitled the Reform of Customary Law of Succession and Regulations of Related Matters Act. The Act commenced on 20 September 2010 and as it now stands, it has important implications for the customary law of succession and it is important to consider its provisions.[113]

9.5.2 *Reform of Customary Law of Succession and Regulations of Related Matters Act*[114]

(a) ***Purpose of the Act*:** The long title of the Act states the main purpose of the Act as to modify the devolution of intestate property in relation to persons subject to customary law. The preamble of the Act elaborates further on the purpose of the Act, and reiterates that widows and certain children need protection under the customary law of succession. Furthermore, social circumstances have changed, and the customary law of succession does not provide adequate protection for the welfare of family members.

(b) ***Application of the Act*:** Section 2(1) of the Act reaffirms that the Intestate Succession Act will be applicable to all intestate estates, irrespective of the fact that a person is subject to customary law.

(c) ***Definitions*:** Section 1 of the Act redefines various customary law and traditional common law concepts, for example:

- "Customary law" is defined as "the customs and practices observed among the indigenous African people of South Africa which form part of the culture of those people". The term "indigenous" is contentious and it is not always certain who qualifies as indigenous and who not.[115]
- "Descendant" is defined as "a person who is a descendant in terms of the Intestate Succession Act, and includes – a person who is not a descendant in terms of the Intestate Succession Act but who, during the lifetime of the deceased person, was accepted by the deceased person in accordance with customary law as his or her own child; and (b) a woman referred to in section 2(2)(*b*) or (*c*)". In terms of this provision, the following category of persons will be regarded as descendants in terms of the Act:
  - a person who is a descendant in terms of the Intestate Succession Act;[116]

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111 B10–2008.

112 See GN 309 of 2008 in *GG* 30815 of 25 February 2008.

113 This section relies heavily on the authors exposé of the Act in Rautenbach and Du Plessis "Law of succession" in Joubert, Faris and Church (eds) *LAWSA* vol 32 (2009) para 226.

114 See Rautenbach "Mixing South African common law and customary law of intestate succession: 'Potjiekos' in the making" in Örücü (ed) (2010) 222–240 for a discussion of some of the features of the Act and the mix between customary and common law principles.

115 See the discussion in ch 2.

116 The Intestate Succession Act does not define "descendant", but the common-law understanding of descendant is that descendants include the blood relations in the descending line. However, the Act does make provision for an extension of the concept to adopted children who are regarded as the descendants of the adoptive parents in s 1 of the Act.

  - a person who was accepted by the deceased as his or her own child in terms of customary law;
  - a woman from a substitute marriage;[117]
  - a woman from a woman to woman marriage.[118]
- "House" is defined to include "the family, property, rights and status which arise out of the customary marriage of a woman".
- "Spouse" is defined to include "a partner in a customary in a customary marriage that is recognised in terms of section 2 of the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998)".
- "Traditional leader" is defined to mean "a traditional leader as defined in section 1 of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003)".
- "Will" is defined to mean "a will to which the provisions of the Wills Act, 1953 (Act No. 7 of 1953), apply".

(d) ***Interpretation*:** Section 3 of the Act introduces special rules of interpretation for certain provisions of the Intestate Succession Act. These rules include:

- In terms of section 3(1) of the Act a wider meaning must be given to the term "spouse" as referred to in section 1 of the Intestate Succession Act when dealing with customary marriages to include all the "spouses" of the deceased as defined in terms of section 1 of the Reform of Customary Law of Succession and Regulations of Related Matters Act.
- In terms of section 3(2) of the Act, the words "the estate shall be divided equally between such spouses" must be added to section 1(1)(c) of the Intestate Succession Act to make provision for the situation where the intestate estate is not sufficient to provide each spouse of the deceased with the amount fixed by the Minister.
- In terms of section 3(3) of the Act, the following paragraph (f) must be added to section 1(4) of the Intestate Succession Act when determining a child's portion in terms of the Intestate Succession Act: "a child's portion, in relation to the intestate estate of the deceased, shall be calculated by dividing the monetary value of the estate by a number equal to the number of children of the deceased who have either survived the deceased or have died before the deceased but are survived by their descendants, plus the number of spouses and women referred to in paragraphs (a), (b) and (c) of section 2(2) of the Reform of Customary Law of Succession and Regulation of Related Matters Act, 2008."

(e) ***Freedom of testation*:** Section 4(1) of the Act introduces the concept of freedom of testation, a concept fairly peculiar to the customary law of succession, by giving women living under customary law the right to dispose of property allotted to her and house property by means of a will. Similarly, section 4(2) recognises a person's freedom to make testamentary provisions regarding his assets. Section 2 of the Act also makes it clear that a customary law estate can be devolved in terms of a will.

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117 A substitute marriage consists of a marriage between the deceased and another woman in accordance with customary law for the purpose of providing children on behalf of his wife.

118 A woman to woman marriage consists of a marriage between a deceased woman and another woman under customary law for the purpose of providing children for the deceased woman's house.

Can a testator revive the rule of male primogeniture by exercising his or her right to freedom of testation?[119]

The law as it stands is anything but clear. Under the common law a testator is free to divide his estate between his or her beneficiaries as he or she pleases. This freedom is however not borderless and a few common and statutory law limitations do exist. There are no statutory limitations that would prevent a testator living under a system of customary law to revive the rule of male primogeniture, but the common law limitation that prevents a testator from making bequests against public policy might come to its rescue. However, there seems to be nothing preventing a testator from applying his freedom of testation to indirectly revive the rule of male primogeniture through a testamentary provision. Typically, such a provision would be considered by a family head who wishes to retain the customary law property within the family living under a system of customary law. Such a clause may read as follows:[120]

> "I bequeath my property to my eldest son. If he predeceases me, repudiates the benefit or otherwise cannot receive the benefit, the property must pass to my second son. If my second son also predeceases me, repudiates the benefit or otherwise cannot receive the benefit, the property must pass to my third son (and so on). If I die without any child in the male line, my property must pass to my father and if he predeceases me, repudiates the benefit or otherwise cannot receive the benefit, the property must pass to the male descendants of my father related to him in the male line in descending order until one is found which will exclude all other surviving descendants from inheritance."

(f) ***Descendants in relation to women*:** In addition to the extended meaning given to descendants in terms of section 1 of the Act, section 4(2) extends the meaning even further in relation to the will or intestate estate of a woman. In her case the terms "children" in her will or "descendant" in the Intestate Succession Act have to be interpreted to include the following categories:

- "[Any child] born of a union between the husband of such a woman and another woman entered into in accordance with customary law for the purpose of providing children for the first-mentioned woman's house."[121]
- "[Any child] born to a woman to whom the first-mentioned woman was married under customary law for the purpose of providing children for the first-mentioned woman's house."[122]

A problem of definition:

The use of the terms "spouse" and "descendant" is confusing.[123] The legislature adapted the meaning of typically Roman-Dutch concepts to provide for special circumstances prevalent in customary law only. The common law understanding of the word "descendant" usually means blood relations in the descending line (for example children, grandchildren or great-grandchildren) and not everyone provided for by the deceased, whilst "spouse" normally refers to the wife of a deceased and not to a surrogate wife (substitute wife) or a seed-raiser wife (woman involved in a woman-to-woman marriage). To regard the latter two categories as both spouses and descendants could also lead to absurd results, especially when the so-called "child's portion"[124] must be calculated. A child's portion is normally calculated by dividing the estate by the number of surviving children and spouses of a deceased. In terms of the Customary Law of Succession and Regulation of Related Matters Act surrogate and seed-raiser wives are regarded as spouses and descendants. Does this mean that they should be regarded as such for the purpose of calculating the child's portion, thus resulting in them receiving a double portion in the estate whilst other spouses do not? This is obviously an oversight in the Act which should be rectified.

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119 This question was dealt with by Rautenbach (2014) *Acta Juridica* 132–159.
120 See Rautenbach (2014) *Acta Juridica* 149.
121 Section 4(2)(*a*) of the Reform of Customary Law of Succession and Regulation of Related Matters Act.
122 Section 4(2)(*b*).
123 For a discussion of this issue, see Rautenbach and Meyer (2012) *TSAR* 149–160.
124 The calculation of the child's portion is described in s 1(4)(*f*) of the Intestate Succession Act.

(g) ***Disputes*:** In the case of disputes regarding the status of persons, the nature and content of assets or devolution of family property, section 5 of the Act lays down that the Master of the High Court has jurisdiction to resolve these disputes. This section is in accordance with the jurisdiction of the Master in connection with the administration of estates. However, when dealing with customary estates, the dispute may be referred to a magistrate to make an enquiry into the matter in order to provide the Master with a recommendation. When making a determination, both the Master and the magistrate must have due regard to the best interest of the family members and the equality of spouses.

(h) ***Property of a traditional leader*:** Property held by a traditional leader in his official capacity in terms of the Traditional Leadership and Governance Framework Act 41 of 2003 is excluded from his estate by section 6 of the Act. This is a special provision to make sure that the provisions of the Intestate Succession Act would not interfere with the devolution of property held by a deceased traditional leader in his official capacity.

(i) ***Property rights*:** The purpose of section 7 of the Act is to protect spouses involved in certain customary marriages. Until 2 December 1988 a man involved in a customary marriage, could enter into a civil marriage with another woman, thereby dissolving his customary marriage. Section 7(1) is meant to protect the rights of those "discarded" customary law wives by providing that the proprietary rights of customary spouses and children will not be affected by a civil marriage, if the latter was entered into on or after 1 January 1929 but before 2 December 1988. Section 7(2) also affords equal rights in the deceased estate to the spouses and children of both the civil and customary marriages.

(j) ***Amendment of laws*:** If and when the Act comes into operation, it will amend the following Acts mainly to make provisions for the devolution of estates where the deceased was involved in a polygynous marriage:[125] the Administration of Estates Act; the Intestate Succession Act; and the Maintenance of Surviving Spouses Act 27 of 1990.

In assessing the Act, a few points come to mind. The Act claims to be a modification of the Intestate Succession Act which deals with intestate succession. However, the common law division between testate and intestate succession is not always kept in mind. For example, section 4 gives freedom of testation to females regarding house property and also extends the meaning of children referred to in the will of a female to include more than just her biological children. The Act is silent on its retroactivity and will thus apply only to estates where the deceased died after the commencement of the Act. Also, the Act will apply only to intestate customary estates and will alter the character of the customary law of succession by "replacing" it in essence with the Intestate Succession Act. Not only is the customary law of succession influenced by common-law principles but also the common law of succession will be influenced by customary law principles. This development may nevertheless be regarded as a healthy shift in the direction harmonising of the laws of South Africa.

Another aspect comes to mind. According to customary law, the eldest male "steps in the shoes of the deceased" and has certain duties that the deceased had, for example, the duty to support some of his family members. The inheritance that he receives is intended to help him in doing so. To date the question of what will happen to his concomitant duty to support others if he does not receive his inheritance has not been sufficiently addressed by the legislature. The question remains whether the dependants would be able to compel him to support them on the basis of his customary duty, or whether they would have a common law claim for maintenance against the estate of the deceased.

Furthermore, what happens to the private property of women; does the Act apply *ipso facto* to their estates as well? And what happens to the distinction between house and family property; is

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125 Section 8 read with the Sch to the Traditional Leadership and Governance Framework Act.

the devolution of this property also going to fall under the Intestate Succession Act? A number of questions remain which needs to be addressed by the legislature and the courts.

9.6 Burial rights

9.6.1 *Introduction*

The "right to bury" a deceased family member is a highly contentious issue; an issue that was exacerbated by the promulgation of the Extension of Security of Tenure Act,[126] as well as by the courts' apparent inability to agree on a suitable and just application of this "right".[127]

The confusion of the courts are fuelled by the fact that one may distinguish between two possible arguments, the one relating to *where* the deceased may be buried (on the property of another)[128] and the other to *who* may bury the deceased or *who* would be regarded competent to bury the deceased (the customary claim or right to bury a deceased as a last token of respect or an expression of the will of the deceased).

The first argument addresses rights in the constitutional or legislative sense, in that the actual recognisable rights of individuals are highlighted; these rights cannot be dealt with without studying the common law rights relating to burial (if any) or visitation. The rights or claims to *visit* the graves of one's deceased family members (the *iter ad supulcrum*) had been recognised before the time of De Groot and Voet. These rights are subject to the consent of the owner of the land on which the grave is situated and principles of reasonableness. This common law right was recognised in the ESTA per section 6(3) and yet again the claim to the right had been limited, taking into account the principles of reasonableness.[129] This inclusion can be regarded as a legislative recognition of the *iter ad supulcrum*.

9.6.2 *Right to bury a deceased family member: question of where*

The aspect that needs to be addressed is the other "rights" enunciated in the ESTA and which changed the "rights-landscape" forever, with the introduction of *the right to bury* one's deceased family members on the property of another (albeit with some restrictions). As early as 2000 the courts braced themselves for the first hearing relating to the interpretation of the controversial

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126 62 of 1997 (hereafter the ESTA).

127 A few of the judgments since 2008 include: *NT v MT* [2018] JOL 39794 (T); *Nxumalo v Mavundla* [2017] JOL 39576 (KZD); *Mjuza / Kamile v Ntshibilili* [2017] JOL 37144 (ECB); *Wellem v Silwana* [2016] JOL 35804 (WCC); *Ramonare v Molly's Funeral Parlour* [2015] JOL 33858 (FB); *Sithole v Majeke* [2011] JOL 27944 (GSJ); *Noqayi v Skeme* [2014] JOL 31838 (ECM); *Selomo v Doman* [2014] JOL 31582 (LCC); *Matau v Longrops 5 (Pty) Ltd* [2011] JOL 27380 (LCC); *Majola v Mortimer* [2010] JOL 25455 (LCC); *Thwala v Greyling* [2010] JOL 25381 (LCC); *Ntlonze v Diko* [2009] JOL 23266 (Tk); *Sikita (born Mayiji) v Tiki* [2009] JOL 23243 (Ck); *Njokweni v Luthuli Ranches CC* [2008] JOL 22383 (LCC); *Njokweni v Luthuli Ranches CC* [2008] JOL 22383 (LCC); *Sokani v Sokani* [2008] JOL 22085 (Ck); *Fanti v Boto* [2008] JOL 21238 (C); *Yona v Rakotsoane* [2008] JOL 21069 (O). Also see Rautenbach and Du Plessis "Law of succession" in Joubert, Faris and Church (eds) *LAWSA* vol 32(2009) para 221; Pienaar and Mostert (2005) *SALJ* 633–660; Pelser and Rautenbach (2012) *Litnet Akademies* 134–175.

128 As is regulated and made possible by the ESTA.

129 Section 6(2) states clearly that "[w]ithout prejudice to the generality of the provisions of section 5 [which guarantees freedom of religion, belief and opinion] and subsection (1) [which guarantees the right to bury a deceased family member on the land on which he or she resides], and balanced with the rights of the owner or person in charge, an occupier shall have the right – . . . (d) to family life in accordance with the culture of that family; section 6(4) further states that the occupier has the right to 'visit and maintain his or her family graves on land which belong to another person', provided that such visitation is subject to 'any reasonable condition imposed by the owner or person in charge of such land' in order to safeguard the property". For an interpretation of these rights, see Janse van Rensburg (2002) *Obiter* 175–185.

section 5 (read with section 6(4)).[130] In this instance the Land Claims Court had decided in *Serole v Pienaar*[131] that one cannot lay claim to the right to bury one's deceased family members on the land of another, for that would be tantamount to granting servitude over the property without his consent of the owner thereof.[132] The court further affirmed that the right to establish a grave:

> is . . . not the kind of right which the Legislature intended to grant to occupiers under [ESTA] . . . [and that the granting of] . . .[s]uch a right could constitute a significant inroad into the owner.[133]

The court warned that, despite the fact that freedom of religion was in fact recognised in the Act, one cannot interpret it to bestow more rights on the occupier than the rights that the owner of the property had in fact consented to.

This judgment was quoted with authority in *Bührmann v Nkosi*[134] by the Transvaal Provincial division. Du Plessis J stated clearly that when the contextual meanings of "use" and "residence" are taken into account, "the right to reside on land and to use the land in connection with such residence does not ordinarily include the right to bury the dead on that land".

In a separate but concurring judgment Satchwell J found no authority that supported the view that an individual (such as the owner of the land) is obligated to perform a positive act to promote the religious practices and beliefs of another (such as the occupier or resident), and added that the resident's freedom of religion cannot be "exercised in a manner which permanently deprives the appellant of his right of ownership over [a] portion of his land".[135]

Ngoepe JP, in a controversial dissenting judgment found that:

> the right to freedom and belief cannot . . . be interpreted merely enabling the holder [of the right] to choose a particular kind of religion . . . [but it] entitles the holder of the right to actually manifest it; to put it into practice.[136]

Both *Serole* and *Bührmann* were confirmed by the Supreme Court of Appeal in *Nkosi v Bührmann*[137] and the court unequivocally found that the right to freedom of religion (in terms of section 5), read with the right to "use" the land (in terms of section 6(1)) cannot be construed to include the right to bury a deceased member of the occupier's family on land without the consent of the owner.[138]

In recent decisions the courts considered whether an established practice exists before a person could be buried on the land of another. Section 6(2)(*d*A) of the ESTA was inserted in 2001 to provide that an occupier has the right to "bury a deceased member of his or her family who, at the time of that person's death, was residing on the land on which the occupier is residing, in accordance with their religion or cultural belief, if an established practice in respect of the land

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130 Section 5 of the ESTA reads: "Subject to limitations which are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, an occupier, an owner and a person in charge shall have the right to—(a) human dignity; (b) freedom and security of the person; (c) privacy; (d) freedom of religion, belief and opinion and of expression; (e) freedom of association; and (f) freedom of movement, with due regard to the objects of the Constitution and this Act." Section 6(4) reads: "*Any person shall have the right to visit and maintain his or her family graves on land which belongs to another person*, subject to any reasonable condition imposed by the owner or person in charge of such land in order to safeguard life or property or to prevent the undue disruption of work on the land." Emphasis added.

131 2000 (1) SA 328 (LCC) (hereafter *Serole*).

132 Janse van Rensburg (2002) *Obiter* 180.

133 Paragraph 16 of *Serole*.

134 2000 (1) SA 1145 (T).

135 1157A–B.

136 1160E–G.

137 2002 (1) SA 372 (SCA).

138 Paragraphs 49–50.

exists." In *Gate Development Ltd v Mahlangu*,[139] the court stated that if a graveyard exists it can be deduced that an established practice exists. The practice needs not to be exercised regularly.[140]

9.6.3 *Right to bury a deceased family member: question of whom*

The question of *who* may bury a deceased that is who chose the final resting may place of the deceased in the absence of clear instruction of the deceased, is sometimes controversial. This issue is further complicated by the fact that the courts did not always follow a similar approach in dealing with the burial rights. The notorious nature of the issue had prompted the South African Law Reform Commission, in its Issue Paper 12 of 1998, to state that the problem of the right to bury a deceased should be resolved.[141]

> The point of departure for determining who has the right to arrange the burial of a deceased, is the wishes of the deceased himself. . . . Thus, directions in the deceased's will concerning the disposal of his mortal remains, if lawful and possible, have to be carried out.[142]

In the absence of such an agreement or instruction in a will,[143] the court is faced with the problem alluded to by the South African Law Reform Commission. Mokotong[144] states that in the absence of instructions to the contrary, the duty to bury the deceased lay with the heirs of the deceased. He further avers that the right to bury the deceased is coupled with the right to choose a final resting place.

Some courts took customary practices, as is the case with the Pedi, the competency to bury the deceased rests with the male agnatic members of the family[145]) into account, while others had decided the issue with reference to the common law (Voet 11 7 7).[146] The Transvaal courts had, however, focused on the principles of fairness. The problem had become more and more contentious and the South African Law Reform Commission had intimated in its Issue Paper 12 of 1998 that the problem of the "right" to bury a deceased should be resolved.

In *Finlay v Kutoane*[147] Flemming DJP stated that the court needs to distinguish between (a) the right to ignore the wishes of the deceased regarding burial (or even less the right of others to bury the deceased), (b) the right to burial in the sense of the lawfulness of such an undertaking (Voet 11 7 7), and (c) the duty to bury a dead man (which may coincide precisely with the right to bury). It may happen that there is a difference of opinion as to who may bury a

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139 LCC 103/08 decided 4 March 2009.

140 Paragraph 13.

141 Despite its apparent urgency the South African Law Reform Commission had not addressed the issue regarding the right to bury a deceased in its proposals on intestate succession.

142 Knoetze (2001) *Obiter* 206.

143 The will of the deceased is the first point of reference to decide who has the right to bury the deceased. See *Mjuza / Kamile v Ntshibilili* [2017] JOL 37144 (ECB).

144 Mokotong (2001) *THRHR* 298.

145 Prinsloo (1991) *TSAR* 666.

146 This last possible solution is problematic for it is common cause that the heir in customary law is not the same person as the heir under the common law. See Prinsloo (1991) *TSAR* 669. Also see *Ntlonze v Diko* [2009] JOL 23266 (Tk), where the court stated that the husband is the intestate heir of the deceased (at para 17). The respondents were the brother and mother of the deceased (although there was some dispute in this regard). They alleged that the applicant maltreated the deceased. There was evidence that the applicant (husband) tried to take his wife to a specialist when she became ill at the house of her family but that her family refused that he took her to a specialist in Port Shepstone (para 5). The court did not further deal with the factual disputes but due to the urgency of the matter decided the matter on the basis of the law. The court found in favour of the heir to decide on the burial place of the deceased, in this case the husband. He also ordered that the respondents may attend the funeral but that they are interdicted from interfering in the preparations of the funeral (at para 1). Also see *Goniwe v Mawinde* [2007] JOL 20854 (SE), where the dispute was between a nephew of the deceased and her son. The court ordered the son, as the heir, to bury his mother.

147 1993 (4) SA 675 (W) 679I.

deceased, and in such a case, where one has to contend with competing interests, the learned judge stated, one should answer the question with reference to "what the community regards to be proper and fair".[148] The search for fairness could per implication mean an application of the customary claim of the heir or the family of the heir, or in other instances, it may entail the claim of the widow to lay the deceased to rest.

Contrary to the Flemming judgment, the court in *Human v Human*[149] focused on the strict application of the rule in Voet and completely ignored the competing interests of the parties. In this case the deceased had left verbal instructions, and the court did not give effect to such instructions because of the highly pragmatic interpretation of the hearsay rule. The court had decided that the heirs in terms of his (the deceased's) last will and testament had the right and duty to bury him. According to Flemming DPJ,[150] Voet cannot be regarded as an authority on how the South African legal system should cope with cases unknown to him. The duty to bury a deceased is based on a need to formulate legal rules in dealing with that need, the need itself and the views of society, which reflects those views.

The courts were confronted with several cases where the wishes of a deceased were in dispute. The disputes mainly arise where the deceased does not express his burial wish in writing as was stated by the court in *Sokani v Sokani*.[151] In *Yona v Rakotsoane*,[152] for example, the applicant, a widower, disputed the claims of the mother and brother of the deceased regarding the deceased's burial. The widower was the sole heir of the deceased's estate. However, the deceased wrote a note expressing her wish that she should be buried at her home town, Philippolis.[153] The applicant based his right to bury the deceased on "his marriage to her; his status as her sole heir; his status as the father and natural guardian of her children; his economic position as the sole breadwinner of the family unit; his view that Bloemfontein was her permanent place of residence and his view that she had not expressed any genuine wish to be buried at any place other than Bloemfontein."[154] The court stated that the "burial principle makes it abundantly clear that the privilege or the right of the surviving spouse to bury his or her deceased spouse is subordinate to the written direction of the deceased spouse concerning all the matters pertaining to the final disposal of the corpse,"[155] Even though in this case the mother and brother took the corpse to Philippolis in a clandestine manner the court still found that they had the right to bury the deceased based on the mother's "unselfish and sympathetic willingness . . . to respect the last wish of her daughter." The court found that "(t)he considerations of justice, fairness and equity strongly militate against the idea of allowing the applicant to reclaim his lost privilege, call it a right if you will, at the expense of the respondents."[156]

The courts in the Eastern Cape based their decisions, for the large part, on Voet in cases of competing interests regarding the right to bury. In *Tseolo v Maqutu*[157] the court addressed the contradicting claim of the mother of a deceased and the widow of the deceased (married to him in community of property). It found that the wishes of the widow should prevail, as it is her right and duty to bury her husband where she pleased (based on their marital status), and, contributing to their finding, the court stated that the cost implications bound to the mother's claim moved it

148 *Finlay v Kutoane* 1993 (4) SA 675 (W) 679I–680A.
149 1975 (2) SA 251 (E).
150 *Finlay v Kutoane* 1993 (4) SA 675 (W) 681H–I.
151 [2008] JOL 22085 (Ck) para 12.
152 [2008] JOL 21069 (O).
153 Paragraph 11.
154 Paragraph 29.
155 Paragraph 30.
156 Paragraph 34.
157 1976 (2) 418 (Tk).

to find in favour of the widow.[158] In another decision, the court in *Mankahla v Matiwane*,[159] found that where the heirs were minors, the court as upper guardian of children could decide where the deceased was to be buried. *In casu*, the court decided that the deceased be buried in the hometown of his two minor children. In *Gabavana v Mbete*[160] the court found that considering that the applicant was not an heir in the will, he did not have a claim to the burial of the deceased, and that the existence of a will serves as an indication of the wishes of the testator. Had no will existed, the issue would have been more complicated. In *Mjuza / Kamile v Ntshibilili*[161] the court listed the relevant principles (conveniently summarised in the *Gabavana* case) as follows:

(a) If someone is appointed in a will by the deceased, then that person is entitled and obliged to attend to his burial and that person is entitled to give effect to his wishes.

(b) The deceased person can appoint somebody to attend to his burial in his will or in any other document or verbally, formally or informally, and in all these instances effect should be given thereto in so far as it is otherwise legally possible and permissible.

(c) A deceased can, in the third instance, die intestate, but can appoint someone to attend to his burial in a document or verbally.

(d) In the absence of a testamentary direction, the duty of and the corresponding right to see to the burial of the deceased is that of the heirs. The heirs appointed as heirs in the will of a deceased.

(e) The aforementioned principle that heirs (appointed as heirs), in the absence of any provision in the will as to the burial of the deceased are entitled and obliged to attend to the burial of the deceased applies in my view similarly and equally to intestate heirs of a deceased. That would mean that, in the absence of any indication by a deceased as to his burial arrangements, the intestate heirs would be in the same position as testate heirs. I can see no reason why the position should be different in the case of intestate heirs.

(f) It also follows that persons obliged and entitled to see to the burial arrangements are entitled to arrange where and when the deceased is to be buried.

In *Trollip v Du Plessis*,[162] the court held that fairness is decisive and that a claim could not be evaluated according to the mathematical proportions of heirship. The court further looked at the expenses incurred, the religion of the deceased and the wishes of the rest of the family whose views differed from the applicant's into account in order to determine what would be regarded fair. In the same year as in *Trollip*'s case, the Transvaal Provincial Division seemed to deviate from the fairness principle. In *Thembisile v Thembisile*,[163] the dispute to bury the deceased arose between the wives of the deceased. The deceased married his first wife in 1979 according to customary law and the second wife according to civil law 1996 and allegedly again according to customary law in 1999. The court found that there was no evidence that the first marriage was dissolved and found that the second marriage (the civil marriage) was a nullity. The finding of the court is contrary to the view that the second marriage would be voidable at the choice of the wife married according to civil rights.[164] The court found without reference to fairness that the first

158 The court relied on Voet 11 7 13 in this regard, namely that if the testator's wishes go beyond a just scale of expenditure (in other words taking into account the standard of living of the deceased) or are impractical, these wished can be ignored. *Tseola v Mequtu* 1976 (2) 418 (Tk) 421F–G. In *Khumalo v Khumalo* 1984 (2) SA 229 (D), the court supported the customary claim of the deceased's son to bury the deceased and it based its decision on "fairly well settled law".

159 1989 (2) SA 920 (Ck).

160 [2000] 3 All SA 561 (Tk). See Mokotong (2001) *THRHR* 299.

161 [2017] JOL 37144 (ECB) para 7.

162 2002 (2) SA 242 (W).

163 2002 (2) SA 209 (T).

164 A similar outcome was reached in *NT v MT* [2018] JOL 39794 (T) where the court held that the second civil law wife bears the onus to prove that the first customary law marriage has been dissolved. If the second wife cannot prove this, her marriage will be null and void and she would not have a right to bury the deceased.

applicant and the eldest son have the strongest right to bury the deceased. In other cases where two or more wives claim the right to bury the deceased, it sometimes happens that both of them produce "valid" marriage certificates.[165] The courts then mostly have to decide the matter based on the facts or on the basis of who the heirs would be.

Where disputes such as these arise, it seems that the courts will order that the costs be borne by the deceased's estate, rather than the applicants.[166] However, there is no hard and fast rule. In other cases the courts have ruled in favour of the successful party,[167] and in at least three judgments involving burial disputes, the courts have held that each party should pay its own costs, irrespective of who had been victorious among them.[168] In *Nxumalo v Mavundla,*[169] however, the Durban and Coast High Court held that it should deviate from the general rule that the unsuccessful party should bear the costs where the applicant failed to investigate the existence of a will conferring a right to bury on the respondent.

The validity of a customary marriage is sometimes challenged to deny a husband or wife the right to bury the deceased. In *Fanti v Boto,*[170] a person alleging to be the husband approached the court to claim his wife's body for burial in the Eastern Cape. The mother of the deceased denied that a customary marriage existed and stated that her daughter should be buried in Hermanus where she lived. In *Noqayi v Skeme*[171] the court held that the wishes of the deceased were the paramount consideration to determine where a deceased should be buried, regardless of the fact that the family of deceased alleged that the customary marriage between the deceased and the respondent was invalid because it did not comply with the requirements of a customary marriage.

Since the *Bhe* case,[172] the courts have relied more strongly on the argument of possible discrimination against the widow or widower of the deceased *vis-à-vis* his or her possible intestate heirs. In *Mahala v Nkombombini*[173] the court found in favour of the customary widow of the deceased even though the mother of the deceased supported by three sons from other alliances applied to bury the deceased. The court decided that fairness and equity dictates that the widow and her children should decide where the deceased should be buried despite the expenses incurred by the mother-in-law.[174]

9.6.4 *Conclusion*

The right or competency to bury a deceased remains a highly contentious issue and either Parliament or the courts (by means of unanimous decisions) should perhaps take the lead to address the difficulties surrounding this issue. On the other hand, there might not be only one solution to fit all circumstances as the court stated in *Ndlovu v Ramocoela:*[175]

> Now that I have reviewed the principle through juristic writings and case law, it is clear to me that in deciding disputes of this nature a judge has to be guided by a number of factors such as the rules of the general

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165 See in this regard *Tshatela v Qendwana* [2001] JOL 76722 (Tk); *Sokani v Sokani* [2008] JOL 22085 (Ck); *Sikita (born Mayiji) v Tiki* [2009] JOL 23243 (Ck).

166 See, e.g., *Sikita (born Magiji) v Tiki* [2009] JOL 23243 (CK) paras 36–42.

167 *Erasmus v Grunow* 1980 (2) SA 793 (O); *Letsiele Stores (Pty) Ltdv Roets* 1959 (4) SA 579 (T); *Smit v Maqabe* 1985 (3) SA 974 (T).

168 See *Sekeleni v Sekeleni* 1986 (2) SA (Tk); *Mnyama v Gxalaba* 1990 (1) SA 650 (C); and *Mabulu v Thys* 1993 (4) SA 701 (SECLD).

169 [2017] JOL 39576 (KZD) 7.

170 2008 (5) SA 405 (C). Also see *Manona v Alice Funeral Parlour* [2002] JOL 9717 (Ck).

171 [2014] JOL 31838 (ECM).

172 See 9.4.6.

173 2006 (5) SA 524 (SE).

174 530F–531A.

175 [2003] JOL 10737 (O). Also see the court's exposition on how the courts should interpret the express wishes of a deceased person regarding his or her burial – pages 14–20 of the case.

> burial principle, the convictions of society, the public morality, the public policy, and a sense of what is right and equitable in the interest of justice according to the circumstances of each particular case. The list of factors is not exhaustive.

The approach by some courts to apply the principle of fairness seems to lead to more acceptable outcomes to the issues in question and should therefore be encouraged.

10

Traditional Leadership and Governance

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10.1 Introduction

The constitutional recognition of the institution of traditional leadership[1] brought the interplay between modern constitutionalism (democracy as a form of government) and traditional government to the fore. Sachs[2] is of the opinion that there is no inherent conflict between the traditional and democratic forms of government, provided each operates in its own sphere.

The objectives of this chapter are first, to determine the scope and features of the institution of traditional leadership in the South African context, and second, to explore its constitution, role and functions in present-day South Africa.[3]

10.2 Features of modern and traditional government

Modern constitutionalism accepts the Constitution of a country as the supreme law.[4] The Constitution binds and directs all organs of state. The institutional pillars of good government are the rule of law and the separation of the powers of the state: legislative, executive and judicial. The rule of law implies government in accordance with well-defined and known rules which are provided in broad terms in the Constitution.[5]

In contrast, traditional government is not based on the idea of the separation of legislative, executive and judicial powers. The legitimacy of the people in positions of power and their actions were not subject to, and were not assessed by, the rule of law. The traditional ruler's reign was directed by flexible traditional norms, based on legal, social and religious ideas regarding good government. These norms were adaptable to changing circumstances, without a specific legislative process necessary to bring about changes. Moreover, rulers were not elected by the people, but acquired their positions mainly on kinship grounds (being a member of a particular (ruling, royal) family).[6]

10.3 Notion of "tradition"

Traditional government is grounded in the belief that the power of rule was from time immemorial informed and maintained by the ancestors. Legitimacy to rule was thus based on "sacred" traditions.[7]

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1 Section 211(1) of the Constitution of the Republic of South Africa, 1996 (hereafter the Constitution).

2 Sachs (1992) 77–78.

3 For a detailed discussion on the position of traditional leadership and institutions before the Traditional Leadership and Governance Framework Amendment Act 23 of 2009 discussed from 10.7.8 onwards, see Olivier and Williams "Traditional leadership and institutions" in Joubert, Faris and Church (eds) *LAWSA* vol 32 (2009) paras 13–43. For a discussion on traditional leadership and governance in Africa, see Ndlela, Green and Reddy (2010) *Africa Insight* 1–18.

4 For the position under the Namibian Constitution, see Hinz in d'Engelbronner-Kolff *et al* (eds) (1998) 11.

5 Sections 1, 2, 7 and 8 of the Constitution. Also see Hinz in d'Engelbronner-Kolff *et al* (eds) (1998) 1; Bennett "The constitutional base of traditional rulers in South Africa" in d'Engelbronner-Kolff *et al* (eds) (1998) 14.

6 Hinz in d'Engelbronner-Kolff *et al* (eds) (1998) 1; Bennett "The constitutional base of traditional rulers in South Africa" in d'Engelbronner-Kolff *et al* (eds) (1998) 14; Myburgh (1985) 50–62; Prinsloo (1983) 37–45; Vorster (1996) *SA Journal of Ethnology* 77.

7 Hinz in d'Engelbronner-Kolff *et al* (eds) (1998) 4; Also see Bekker (1989) 11: "During the existence of the pre-colonial sovereign Black 'states', customary law was an established system of immemorial rules which had evolved from the way of life and natural wants of the people, the general context of which was a matter of common knowledge, coupled with precedents applying to special cases, which were retained in the memories of the chief and his councillors, their sons and their sons' sons, until forgotten, or until they become part of the immemorial rules".

This idea of long history gave rise to the (erroneous) perception of traditional government being static, non-progressive and incapable of development. However, recent studies of traditional governance in Africa indicate that all "tradition" is a specific construction at a specific time for specific purposes, implying that many traditions were "invented". They were mostly products of codification; petrifaction, coercion and colonial rule; missionary activity and post-colonial state formation.[8] According to Hinz,[9] it is not so much the time at which a particular issue at hand had emerged, but rather whether the issue can be understood as "part of our tradition". Tradition, again, is what the community is owing to its ancestors. Therefore, "traditional is legitimate because, and to the extent that, it can be traced back to the ancestors who made the life of the people of today possible. Traditional authority is legitimate because, and to the extent that, it can be related to the same tradition rooted in the ancestors".[10] This implies that the test for tradition and custom in terms of customary law cannot be the same as the test applied in common law for a custom to be legally binding and enforceable.[11]

10.4 Transformation of the institution of traditional leadership

10.4.1 *Pre-colonial phase*

The pre-colonial relationship between traditional authorities and their followers is often portrayed as a dynamic process of mediation between rulers and followers.[12] In pre-colonial times, various forms of government existed, ranging from empires to tribal states. Power was hierarchical and consultative. The head of the empire or tribal state was at the apex of the power hierarchy with subordinate leaders, commonly referred to as "ward heads". At grassroots level, there were heads of patriarchal households.[13] Decisions were taken in consultation with various councils at different levels.[14]

10.4.2 *Traditional government under colonial influence*

Under the onslaught of colonialism and capitalism, the relationship between traditional rulers and their followers was seriously undermined. The colonial policy of indirect rule transformed traditional rulers into government functionaries. Their positions were from then on guaranteed by the colonial state and were no longer dependent on the support of their followers.[15]

In South Africa, indirect rule was implemented nationally in 1927 with the Black Administration Act[16] transforming traditional authorities and traditional courts into government institutions. Traditional institutions of government were subjected to statutory rules which introduced a legislative and administrative superstructure over traditional structures. Traditional rulers were recognised and appointed by the colonial government and their positions were no longer determined in accordance with indigenous laws and procedures. The jurisdiction of traditional courts was curtailed and subjected to appeal to, and revision by, specially created commissioners

8 Van Dijk and Van Rouveroy van Nieuwaal in Van Rouveroy van Nieuwaal and Van Dijk (eds) (1999) 1–3.
9 Van Dijk and Van Rouveroy van Nieuwaal in Van Rouveroy van Nieuwaal and Van Dijk (eds) (1999) 7.
10 Hinz in d'Engelbronner-Kolff *et al* (eds) (1998) 7.
11 For the position of custom in common law, see *Van Breda v Jacobs* 1921 AD 330.
12 Bennett (1995) 67–68.
13 Bennett (1995) 66; Myburgh (1985) 15–17.
14 Myburgh (1985) 101–112; Prinsloo (1983) 51. Also see Iya (2014) *SAPL* 267–268 for the characteristics of pre-colonial African leadership.
15 Bennett (1995) 68. Also see Iya (2014) *SAPL* 268.
16 38 of 1927. Also see Iya (2014) *SAPL* 268–269.

'courts (established in terms of the Black Administration Act).[17] Traditional ward governmental structures were not officially recognised.[18]

10.4.3 *Democratic government*

Bennett's[19] view is that all the conflicts and inconsistencies that beset traditional leadership under colonialism and apartheid[20] have been transferred to the new democratic dispensation in South Africa. In terms of section 211(1) of the Constitution, the institution, status and role of traditional leadership are recognised, subject to the Constitution. This is a conspicuous anomaly,[21] since democracy implies periodic and popular elections, while traditional leadership is inherited. Election was never a criterion for assuming the office of traditional ruler. Moreover, the recognition of the institution of traditional leadership seemed to be in conflict with the non-discrimination clause of the Constitution,[22] because the office used to be mainly reserved for men only. According to the Traditional Leadership and Governance Framework Act,[23] there is no prohibition on females being recognised as traditional leaders, and, in addition, specific provision is made for the recognition of queens and headwomen.[24] The first step in the filling of a traditional leadership position is the identification of the successor (new traditional leader) by the royal family of the traditional community concerned, with due regard to the applicable customary law.[25] In *Shilubana v Nwamitwa*,[26] the Constitutional Court acknowledged that a female may also be recognised as a traditional leader in cases where the customary law of the community concerned provides for the identification of a female as the new traditional leader.

10.5 Traditional leadership under the South African Constitution

10.5.1 *Institution of traditional leadership*

In section 211(1), the Constitution[27] refers specifically to the "institution, status and role of traditional leadership, according to customary law". The various concepts and phrases in this

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17 Sections 12 and 20 of the Black Administration Act; Also see ch 11.

18 Also see Rautenbach in Steytler (ed) "Decentralisation and Constitutionalism in Africa" (2019 forthcoming) para 1.

19 Bennett (1995) 70.

20 For a discussion of what transpired during the apartheid era, see Iya (2014) *SAPL* 269–270, 274–275. Also see Rautenbach in Fombad and Steytler (eds) (2019 forthcoming) para 1, specifically note 28.

21 Bennett (1995) 71–73.

22 Section 9(3).

23 41 of 2003.

24 Section 8(*a*) and (*c*) of the Act.

25 Section 9(1)(*a*) of the Act (kingships and queenships), s 10A(1)(*a*) (principal traditional leadership), s 11(1)(*a*) (senior traditional leadership and headmanship).

26 2009 (2) SA 66 (CC). For a commentary on this judgment, see Bekker and Boonzaaier (2008) *CILSA* 449–462, Williams and Klusener (2013) *SAJHR* 279, Mireku (2010) *AHRLJ* 515–523 (where the author states as follows on page 522 (footnotes omitted): "It is submitted that the *Shilubana* decision is not only revolutionary but, more importantly, a quintessentially transformational judgment celebrating gender equality in chieftaincy succession disputes. *Shilubana*is also welcomed because it is consistent with the grand transformative agenda of the Constitution, the equality jurisprudence progressively developed by the Constitutional Court since its inception as well as international law obligations in respect of women that South Africa has undertaken after its transition from apartheid in 1994". Also see Phooko (2016) *Without Prejudice* 8–9.

27 Bennett (1995) 66 notes that the colonial tendency to refer to all African leaders as "chiefs" obscured the diversity of rulers that actually existed in Southern Africa. Also see Rautenbach in Fombad and Steytler (eds) (2019 forthcoming) para 2.

section are not defined in the Constitution, so that their meaning has to be established from other sources.

The *Concise Oxford Dictionary* describes "institution" as "established law, custom or practice". In the social sciences generally, and anthropology in particular, reference to social institution implies forms of standardised activities linked to a set of complex and interdependent norms and roles.[28] These activities are underpinned by values and ideas of the people recognising the relevant institution. Against this background, we may describe traditional leadership in terms of standardised and persisting activities concerning the exercise of public authority over people to ensure orderly co-existence. The people exercising power hold status positions at various levels. With regard to traditional leadership, at least three status positions can be distinguished, namely rulers and leaders, councillors and followers (subjects, citizens). Each of these positions has distinctive powers, duties and functions.

In pre-colonial times, the institution of traditional leadership encompassed at least the following aspects:

- status positions (ruler, ruling family, councillors, ward heads, citizens);
- procedures (for instance to identify leaders, to make and enforce decisions at different levels, to acquire membership);
- scope of authority (national, local); and
- values, norms, practices and rules (for instance with regard to consultation, and participation in decision-making processes).

The above indicates that the institution of traditional leadership is much wider than the notion of traditional leaders. The latter is but one element of the institution. In the South African context, the institution would include, among others, the identification of, and processes of legitimising the ruler; the system of, and conditions for, consultation; and the functions of the various domains and levels of authority (legislative, executive and judicial; community and local level).

The Constitution qualifies the recognition of the institution of traditional leadership in two important respects. The recognition must be in accordance with customary law and is subject to the Constitution. Again, customary law is not defined in the Constitution. Section 211(2) makes reference to a system of customary law, including amendments to, or repeal of, legislation and customs. This seems to indicate a version of customary law as it has been transformed over time by legislation and court decisions. This would imply that the institution of traditional leadership according to customary law would also include the provisions of the Traditional Leadership and Governance Framework Act[29] and the National House of Traditional Leaders Act.[30]

The recognition of the institution of traditional leadership is also subject to the Constitution as a whole, and thus also to the provisions of the Bill of Rights contained in Chapter 2 of the Constitution. In this regard, the following sections of the Constitution are implied:

(a) section 8(1), which makes the Bill of Rights applicable to all law, including customary law, and which binds all organs of state, including traditional authorities;

(b) section 9, which forbids unfair discrimination by the state and private persons on various grounds, including race, gender, disability, culture and birth;[31]

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28 Seymour-Smith (1986) "institution"; Also see Coertze and Coertze (1996) "instelling".

29 41 of 2003.

30 10 of 1997. The National House of Traditional Leaders Act 22 of 2009 commenced on 27 January 2010, and replaced the National House of Traditional Leaders Act 10 of 1997.

31 With regard to traditional leadership, the following customary practices may be deemed to be contrary to s 9 of the Constitution: primogeniture (firstborn) and exclusion from office on grounds of disability and illegitimacy (birth). The succession to office on grounds of gender (males only) is no longer at issue – see the discussion of *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC) above.

(c) section 39(2), which binds courts in their development of customary law to the promotion of the "spirit, purport and objects of the Bill of Rights";[32]

(d) section 39(3), which recognises the existence of other rights or freedoms, recognised by, among others, customary law, to the extent that they are consistent with the Bill of Rights;

(e) sections 40 and 41, which provide for co-operative government at all levels of government, in particular also between municipalities and traditional authorities on local level;

(f) section 151, which limits the local sphere of government to municipalities;

(g) section 212, which allows for the possible enactment of national legislation to make provision "for a role for traditional leadership as an institution at local level on matters affecting local communities"; and

(h) Schedule 4 (Part A), which determines functional areas in respect of which both the National Parliament and the Provincial Legislatures are competent to enact legislation, and lists "cultural matters", "indigenous law and customary law, subject to Chapter 12 of the Constitution", and "traditional leadership, subject to Chapter 12 of the Constitution" as such matters.

10.5.2 *Traditional leadership and issues of discrimination*

The institution of traditional leadership among the indigenous people of South Africa is embedded in a social system of patriarchy.[33] This used to imply that the position of traditional leadership was limited to male members of the family; in fact it was limited to the oldest son of the principal wife. In this regard the position of the successor used to be determined by the following factors: the status of the principal wife; gender (male); firstborn son (principle of primogeniture in respect of males);[34] and physical ability. At the time of succession, the successor is perceived to represent the most senior living link with the ancestral world of the ruling family.[35]

This system of succession by males only is regarded as being in conflict with the constitutional requirement of non-discrimination on the grounds of gender.[36] In the past, it was only among the Lovedu of the Limpopo Province that a woman could become leader of the traditional community, and where men were excluded from this position (however, males could hold the position of ward heads). Among all the other groups, women are according to customary law nowadays allowed to act as regents if a successor is under-aged or not able to succeed immediately.

Female succession to traditional leadership is no longer an issue. In terms of section 2(3) of the Traditional Leadership and Governance Framework Act,[37] a traditional community must transform and adapt customary law and customs relevant to the application of this Act in order to comply with the relevant principles contained in the Bill of Rights in the Constitution, in particular by:

(a) preventing unfair discrimination;

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32 See *Mayelane v Ngwenyama* 2013 (4) SA 415 (CC), where the Constitutional Court had to deal with the manner in which the content of a customary law rule or norm should be ascertained and/or developed to give effect to the Bill of Rights.

33 There is no generally accepted or rigorous definition of patriarchy and there is some confusion about the domestic and public aspects of male dominance in societies characterised as patriarchal. In the South African context, societies vary from strong male dominance to strong influence of females in public affairs. The Venda and Swazi are examples of the latter.

34 See Ndima (2017) *CILSA* 84–108 for a discussion on male primogeniture.

35 See Vorster (1999) *Obiter* 3.

36 Section 9(2) of the Constitution.

37 41 of 2003.

(b) promoting equality; and

(c) seeking to progressively advance gender representation in the succession to traditional leadership positions.

As indicated above, the Traditional Leadership and Governance Framework Act does not prohibit the recognition of females as traditional leaders, and a typical example of the gender parity approach in the Act is the explicit references to queens and headwomen.[38] In *Shilubana v Nwamitwa*,[39] the Constitutional Court held, without reference to section 2(3), that traditional communities may develop customary law in accordance with norms and values of the Constitution, and that females may be recognised as traditional leaders.[40]

10.6 Historical authority system

10.6.1 *Introduction*

The discussion in this section gives a brief overview of the manner in which authority systems used to operate in the absence of, and sometimes in non-compliance with, binding statutory provisions. To a significant extent, characteristics and elements of the historical authority systems have been changed (and in some instances replaced by new norms) on account of the contents and impact of the new constitutional order and post-1994 national and provincial legislation and related administrative practices; see in this regard the discussion in10.7.8 regarding the current situation.

Among the South-Eastern Bantu-speaking people, political and judicial authority is not clearly differentiated. The term "authority system" is therefore preferred. The characteristic indigenous authority system of the South-Eastern Bantu was retained in most rural areas in South Africa to the present day in spite of the process of cultural change to which these people have been subjected, and regardless of the fact that they had been under the legislative and administrative control of colonial and post-colonial authorities for many years. The survival of the indigenous system seems all the more remarkable when it is taken into consideration that only a limited segment of it was statutorily recognised by the colonial and post-colonial governments.

The indigenous authority system is characterised by a political and administrative component. It consists of a central decision-making community government (the traditional leader-in-council) which delegates some of its powers and functions to the heads of smaller administrative units. These smaller units are known by different names and are demarcated in different ways. We refer to them as wards. Among the Nguni and Tsonga groups, the territorial principle dominates the demarcation of wards while in the case of the Sotho-Tswana, kinship is the dominant factor.

10.6.2 *Historical central community authority* (*traditional community leader-in-council*)

10.6.2.1 Traditional leader

Attaining a position of authority

In general, the basic pattern of succession to traditional leadership is very similar among the different South-Eastern Bantu-speaking peoples.

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38 Section 8(*a*) and (*c*) of the Traditional Leadership and Governance Framework Act.

39 2009 (2) SA 66 (CC). For a commentary on this judgment, see Bekker and Boonzaaier (2008) *CILSA* 449–462, Williams and Klusener (2013) *SAJHR* 279, Mireku (2010) *AHRLJ* 515–523.

40 Also see s 3(3)(*b*) of the Traditional Leadership and Governance Framework Act providing that at least a third of the members of a traditional council must be women. In addition, see Claassens in Mostert and Bennett (eds) (2012) 174–209, specifically 197–199.

The head of the community is normally the most senior male member of the ruling lineage. His position as the central authority figure in the community is determined by his ranking in the line of descent within the ruling lineage, and is passed on to his successor in accordance with the rules of succession observed by the community concerned. These rules prescribe that the traditional leader's successor should be the oldest son (Tsonga: *mudyandzhaka*) of his principal wife (Tsonga: *nsati lonkulu*).Thus, the chieftainship is born (Tsonga: *vuhosi byo velekeriwa*; North Ndebele: *bukgosi buatalelwa*).The seniority principle is certainly a primary consideration, and is usually decisive; but the successor is nevertheless subject to thorough deliberation and consultation among the senior members of the ruling lineage, who are responsible for designating the effective successor.[41]

In almost every case, the essential condition for the succession to the traditional leadership is that the potential successor should have been born to a particular woman, namely the principal wife – the wife or mother of the community (Tsonga: *nsati wa tiko*; Xhosa: *inkosikazi*; Pedi: *mohumagadi*; North Ndebele: *nositjhaba/masetshaba/mohumagdi*).The traditional leader's principal wife is designated in a special way. It is customary for a traditional leader to marry the daughter of another traditional leader. However, this is not an absolute requirement. If such a marriage is not possible, a woman belonging to one of the senior lines of descent within the community may be selected as principal wife. As is the case with traditional leadership itself, the duty and responsibility of selecting the ideal successor rests with the senior members of the traditional leader's lineage (the royal family).Normally they will not nominate a particular woman, but will merely indicate the specific lineage, or the particular ruling house, to which the traditional leader should look for his principal wife. Even then, his choice is subject to the final approval of the senior members of his own lineage. In some communities, the traditional leader's lineage (the royal family) is duty-bound to provide the marriage goods for his bride, on behalf of the community as a whole. In others, the only condition is that the marriage goods should be provided by the community.[42] Hartman and Kriel[43] report that the principal wife does not attain her status on account of the order in which she was married, but rather because she was designated by the royal family to bear the successor to the traditional leadership.

Another point that applies is that the deathbed wish of a deceased traditional leader should be taken into account. In this regard, the Tsonga have a proverb which emphasises the principle: "*Rito ra mufi a ri tluriwi* – the wish of a deceased is not opposed". From different case studies among different Tsonga communities it seems that deathbed wishes are usually honoured.[44]

Adulthood is regarded as a prerequisite for the traditional leadership. As adulthood is attained by marriage, it is a requirement that the rightful heir to the throne be married before he may succeed. Among certain communities, the principal wife may be married by the successor to be only after the death of his father (the current traditional leader)while, among others, the rightful heir to the throne has the right to marry his principal wife while his father (the traditional leader) is still alive.[45] Junod[46] refers to an alternative practice among the Tsonga whereby a traditional leader who lives to be very old and does not wish to delay the marriage of his son and heir, can himself pay the *lobolo* and acquire, for his son, the official wife who will be considered as being "the wife of the country". He adds that it seems to be an exceptional occurrence.

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41 Hartman (1991) 154; Coertze (1987) 68; Breytenbach (1971) 74; Jacobs (1974) 62; De Beer (1986) 77–78.
42 Hartman (1991) 188–189; Boonzaaier (1980) 62; Boonzaaier (1990) 507; Coertze (1987) 68; Breytenbach (1971) 74; Jacobs (1974) 63; Mönnig *The Pedi* (1967) 256; De Beer (1986) 78.
43 Hartman and Kriel (1989) *SA Journal of Ethnology* 117–125.
44 Boonzaaier (1980) 66–67.
45 Boonzaaier (1980) 67; Breytenbach (1971) 750; De Beer (1986) 79.
46 Junod (1913) 370.

Replacement and regency

Should the principal wife be barren or bear only daughters, a supplementary wife (Tsonga: *nhlantswa*; *mupfula rhumbu*) may be requested in accordance with the sororate. This practice ensures that the traditional leader will have a male successor (Tsonga: *mudyandzhaka*) and that this successor will be born in the principal house as the supplementary wife is affiliated to the principal house. The *nhlantswa/mupfula rhumbu* bears the successor on behalf of the barren principal wife. It is normally not possible for the oldest son of the second wife to succeed as she was not designated by the royal family as the principal wife. Neither were the marriage goods delivered for her provided by the community.[47]

Should it happen that neither the principal wife nor the supplementary wife (*nhlantswa*) give birth to a boy, the traditional leadership will go to the oldest son of the late traditional leader's second wife in the ranking of women. Normally, the ranking of wives is determined by the order in which they were married. When a supplementary wife is married, this ranking is disturbed, since the supplementary wife is always ranked directly after the wife for whom she was married. Hence, all other women will then shift one position lower in the order of ranking.[48]

Should the successor die before his father (the traditional leader), the status as traditional leader will eventually go to the oldest son of the late successor, provided the royal family approves this son's mother as principal wife. If the successor dies without any male descendants with his principal wife, two options remain. The first option is to procreate a son with his principal wife in accordance with the levirate practice.[49] It is a prime requisite that the procreator be the younger brother of the deceased successor or a close patrilineal relative of the deceased or his father (the deceased traditional leader).The alternative is to designate the younger brother of the late successor as the new successor. According to spokespersons, the latter option should be exercised as this son was fathered by the deceased traditional leader and as such, he will be of "purer" descent than the son procreated in accordance with the levirate practice.[50]

The argument mostly advanced against the succession of women is that, where a woman marries, the traditional title will divest from the right royal family and vest in foreign hands, as a result bringing with it foreign rule and that women should, in the first place, bear children who will succeed in the place of their father. The customary belief is that when a man delivers *lobolo* and marries a woman, her procreative being is transferred to her husband's community.

When a traditional leader dies and his rightful heir does not comply with the adulthood requirement regarding succession, a regent will be appointed. A regent normally acts as traditional leader until the successor fulfils all the requirements for the traditional leadership. The regent is appointed by the family council of the royal family. Normally the younger brother of the late traditional leader is appointed as a regent. Before he may be appointed as regent, he must comply with all the requirements for the traditional leadership. If the late traditional leader has no brother who can act as a regent, one of the half-brothers of the rightful heir to the throne will normally be appointed as regent. As stated above, women are now also allowed to act as regents if a successor is under-aged or not able to succeed immediately.

Performance of functions

Although the position of traditional leader is due to his descent (the fact that he is of high-ranking birth), his ability to maintain that position depends on how well he performs his functions and carry out his obligations. If he fails to fulfil his roles (powers, functions and duties), he

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47 Hartman and Kriel (1989) *SA Journal of Ethnology* 118.
48 Boonzaaier (1980) 62.
49 Maluleke defines the term as follows: "Levirate unions occur when the deceased's surviving male relative inherits the widow of the deceased" – Maluleke (2012) *PER/PELJ* 2–22.
50 Hartman and Kriel (1989) *SA Journal of Ethnology* 118.

will lose authority and prestige in the eyes of the community concerned. With the exception of the judicial duties, a number of the erstwhile functions of the traditional community leaders have diminished. This phenomenon may be partially ascribed, on the one hand, to the influence of missionaries, and, on the other hand, to the fact that, in terms of legislation and administrative practices, provincial and local government officials have taken over many of the particular functions formerly fulfilled by the traditional leaders.

10.6.2.2 Bodies advising the traditional leader

The traditional leader performs his duties with the guidance of several advisory bodies, whose advice he must respect. He is obliged to consult his various advisers on all matters relating to community affairs. In the process, the ruling family has to ensure that he meets this obligation. They are entitled to criticise his actions. There are essentially four advisory bodies which the traditional leader has to consult in the execution of his duties and performance of his functions: the private (family) council, the traditional council (community council), the community court (judicial council), and the community assembly (public council).[51]

(a) Private (family) council

Composition

The private council is no formal body, which implies that it has no formal composition. The number of members varies in accordance with the traditional leader's wishes, depending on the nature of the advice he requires. The most important members are the traditional leader's father's brothers (and in the case of the Tswana also his mother's brother – i.e. *malome*), his own brothers, and a number of trusted confidants whose knowledge and experience of community affairs justify their appointment to his council. The council always meets in secret, and the members are summoned to meetings by the traditional leader himself.

Although the council as a whole is the advisory body, the traditional leader may consult separately with individual members in order to seek their confidential advice. It is common practice for a traditional leader to seek the advice of his mother (Tsonga and Tswana) or father's sister (Tsonga and Venda).[52] Among the Nguni (Xhosa and Zulu), women are apparently not consulted.[53]

Functions

The private council may be described as the body that rules from behind the scenes. In essence, it may be regarded as the policy-making body within the community. It concerns itself with all matters relating to the political and judicial organisation of the community. The traditional leader may not take any decision affecting the community without consulting this council. The council discusses any new community rules which are contemplated, the appointment and dismissal of ward heads and other community officials, the utilisation of land for specific purposes, and other similar matters.[54]

(b) Traditional council (community council)

This council is more correctly a community council. However, in current parlance it is referred to as the traditional council of a community.

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51 Boonzaaier (1980) 60.
52 Hartman (1991) 193; Coertze (1987) 69–70.
53 Jacobs (1974) 68; Breytenbach (1971) 76.
54 Hartman (1991) 193; Coertze (1987) 70; Boonzaaier (1980) 111–112; Jacobs (1974) 68; Breytenbach (1971) 76.

Composition

The traditional council is a closed council with a formal composition. All ward heads are automatically entitled to seats on this council, as are all the members of the family council on the grounds that they represent the ruling family. Each ward head attending the council meetings is entitled to bring with him at least one of his own ward councillors. If a ward head cannot attend a meeting of the council, at least two of his own ward councillors have to represent him at the meeting. With the approval of the council, the traditional leader may co-opt additional members on account of their special insight into community affairs. They are usually drawn from the traditional leader's own private councillors, or those who served his predecessor in that capacity.[55]

Functions

Important community matters must be laid before the traditional council. In most cases, the private (family) council will already have formed an opinion on the matter in hand. When it is discussed in the traditional council, these members have the task of convincing the council as a whole that this opinion is the correct one. The traditional council, however, is not restricted to discussing matters laid before it by the private (family) council. Before the opening of a council session, any member may notify the chairman of a proposal, complaint or problem relating to community administration, which he wishes the council to discuss. A wide variety of matters may be discussed by the council in this manner. The most important of these relate to the actions of the traditional leader, new community rules, the levying of taxes,[56] land utilisation, the control of cattle, the appointment and dismissal of ward heads, the administration of justice, and matters concerning the general administration of the community.[57]

(c) Community court (judicial council)

Composition

The court of the traditional leader is closely related to the person and status of the traditional leader and to those of his family. It is the traditional leader who is primarily bound to fulfil judicial duties. The senior members of his patrilineage are co-responsible. In addition to these seniors, there are, however, a number of other people who bear some responsibility. In theory, all adult men of the community are members of the community court (judicial council), but not everyone can always be present at the same time. The judicial duties fall mainly on those who live near the royal village and on the elderly men and others who have some knowledge of the indigenous law. These men are appointed for this purpose and must therefore be present.

The community court (judicial council) of the traditional leader meets in the dwelling complex of the traditional leader. Today, every community has a courtroom in the community offices.

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55 Hartman (1991) 194; Coertze (1987) 70; Boonzaaier (1980) 114; Breytenbach (1971) 75; Jacobs (1974) 69–70.

56 It has emerged that certain traditional leaders still extort tribal levies. The payment of annual and special levies is enforced by only granting letters from the tribal authority or traditional council confirming the person concerned as a known and *bona fide* member to paying community members. Such letters are required for, among others, applications for child support grants, pensions, identity documents and bank accounts. It is important to note that Limpopo is the only province that allows the levying of traditional council taxes (s 25 of the Limpopo Traditional Leadership and Institutions Act 6 of 2005). See Claassens (2011) 35 *SA Crime Quarterly* 11–16 and Claassens (2011) *SAJHR* 522–545 (where the author specifically states neither the Constitution, nor other national legislation, empowers traditional councils to levy taxes, possibly resulting in s 25 of the Limpopo Act being unconstitutional).

57 Hartman (1991) 194; Boonzaaier (1980) 115–121; Jacobs (1974) 70; Breytenbach (1971) 76; Coertze (1987) 70–71.

Functions

In former times, the court of the traditional leader was the highest court of appeal in any rural community. The traditional leader is the presiding officer and, by virtue of his position as traditional leader, is competent to pass sentences in accordance with the findings of the court council. Although this court is known as the traditional leader's court, it is in fact the court of the community. At present, it is also the only traditional community court which enjoys statutory recognition, and which has judicial authority in both civil and criminal (limited) matters.[58]

(d) Community assembly (public council)

Composition

In former times the community assembly (public council) (Tswana: *pitso*; Xhosa: *intlanganiso yakomkhulu*) played a more prominent role than today. All the adult men in the community are entitled to attend community assemblies.

Functions

The community assembly (public council) is summoned only when the traditional council (community council) wishes to make a public announcement concerning its decisions. Community rules, the levying of taxes, land utilisation, the control of cattle, the appointment and dismissal of ward heads, the administration of justice, and the moving of the community are examples of such announcements. Normally the announcement is followed by some discussion, after which the decision is accepted unanimously. The traditional leader's authority and the fact that he is supported by his traditional council (community council) were usually sufficient motivation for the community to accept it.[59]

Boonzaaier[60] mentions that the traditional council (community council) can also fulfil a judicial function when an exile, with the support of a ward head and at least three of his (the ward head's) councillors, appeals to the traditional leader to retract his writ of expulsion. The correct procedure is for the traditional leader to call a meeting of the community assembly and to explain the reasons for the writ of expulsion for their final decision. The expulsion of a member of a community would nowadays probably be unconstitutional.

10.7 Recognition and functions of traditional leaders

10.7.1 *Government intervention – indirect rule*

Traditional authorities passed through a long phase of colonial and post-colonial government intervention. The point of departure was that traditional leaders and authorities had to be recognised officially and that statutory powers and functions should be assigned to them. This is generally referred to as the era of indirect rule, whereby the central government exerted its authority through the medium of the local traditional leaders. It was not confined to South Africa. It was a characteristic of European (particularly British) rule in Africa.[61]

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58 Hartman (1991) 195, 212–215; De Beer (1986) 161–168; Coertze (1987) 71; 102–105; Boonzaaier (1980) 202–210; Breytenbach (1971) 77; Jacobs (1974) 71–72.
59 Coertze (1987) 71; Jacobs (1974) 72; De Beer (1986) 95; Boonzaaier (1980) 121–123.
60 Boonzaaier (1980) 123–124.
61 See Mair (1965) 107–120.

10.7.2 *Black Administration Act*

In South Africa, indirect rule was implemented nationally in 1927 when, in terms of the Black Administration Act,[62] a comprehensive system of native administration was created. The main features were:

(a) the institution of the Governor-General (subsequently replaced by the President) as supreme chief of all Bantu-speaking groups with all the powers which a traditional leader holds under indigenous law;[63]

(b) granting the President edictal legislative powers in respect of Bantu-speaking communities.[64] These powers were exercised by proclamation that was held to be similar to parliamentary legislation.[65] Chief Commissioners, Native Affairs Commissioners and other officials were appointed to administer, and to exercise control over, Africans;[66]

(c) special commissioners' courts were established to adjudicate in disputes between Africans, and chiefs were granted limited civil and criminal jurisdiction in respect of Africans;[67] and

(d) last, but not least, traditional leaders were appointed by the Governor-General (subsequently replaced by the President).[68] Although he generally had to have regard to customary rules of succession, he was not bound by it.[69]

10.7.3 *Powers, functions and duties*

The powers, functions and duties of "chiefs and headmen" prescribed by the 1957 Proclamation[70] included the following:

(a) to further the interests of the community;

(b) to develop and improve the territory;

(c) to maintain law and order in the territory; and

(d) to further the exercise of all acts and regulations in his area in respect of:
- public health;
- tax;
- registration of births and deaths;
- prevention of animal diseases; and
- land use and land administration.

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62 The remaining sections of this Act, insofar as they deal with traditional authorities and the regulations promulgated in relation to traditional authorities, were repealed by the Repeal of the Black Administration Act and Amendment of Certain Laws Act 28 of 2005. However, the commencement date of the Repeal Act has been postponed a number of times, most recently by the Repeal of the Black Administration Act and Amendment of Certain Laws Amendment Act 20 of 2012, on account of the fact that new legislation dealing with traditional courts has not been enacted (see 10.7.10). The result is that the sections in the Black Administration Act 38 of 1927 that deal with the civil and criminal jurisdiction of traditional courts (as well as all similar legislation enacted by the four former TBVC states (Transkei, Bophuthatswana, Venda and Ciskei) and the six former self-governing territories) remain in place.

63 Section 1 of the Black Administration Act.

64 Section 25.

65 *R v Maharaj* 1950 (3) SA 187 (A).

66 Section 2 of the Black Administration Act.

67 Sections 10, 12 and 20.

68 Section 1.

69 *Buthelezi v Minister of Bantu Administration and Development* 1961 (3) SA 256 (N) confirmed in *Buthelezi v Minister of Bantu Administration and Development* 1961 (4) SA 835 (A).

70 Regulations Prescribing the Duties, Powers, Privileges and Conditions of Service of Chiefs and Headmen – Proc 110 of 1957 published in *GG* 5854 of 18 April 1957.

10.7.4 *Apartheid era*

The apartheid government took the matter a step further. It made traditional authorities the foundation stones of its policy of ethnic homelands.

The Black Authorities Act[71] granted recognition to indigenous organs of authority. The Act made provision for self-government at local, regional and territorial level. It also dealt with the adaptation of indigenous authorities to the demands of modern administration.

A traditional authority was composed of the traditional leader and a number of council members. The council members could be nominated by the traditional leader or they could be elected, to the degree that the local indigenous law made provision for this. In addition, regional and territorial authorities were established.

According to section 4, the powers, functions and duties of a traditional authority included the following:

(a) managing the affairs of the traditional community ("tribe");

(b) assistance and guidance to the traditional leader in the exercise of his duties; and

(c) in general, exercising powers and performing activities and duties which are within the Governor-General's (subsequently replaced by the President) direction and fall within the scope of the traditional community ("tribal") management or powers that the Governor-General (subsequently replaced by the President) could grant.

> The words "tribe", "tribal" or "tribalism" are regarded by some scholars as derogative in meaning and should not be used.[72] Although they are still used in some literature, statutes and judgments, the concept "traditional community" is to be preferred. Section 1 read with section 2 of the Traditional Leadership and Governance Framework Act 41 of 2003 defines a "traditional community" as one that is recognised as one. It will be recognised as such when the community is subject to a system of traditional leadership in terms of the customs of such community and if it observes a system of customary law. Though the Act also uses the term "tribe" on a number of occasions, it is only done in the context of former statutory recognition of "tribes" and "tribal authorities". For example, section 28(3) reads as follows: "Any 'tribe' that, immediately before the commencement of this Act, had been established and was still recognised as such, is deemed to be a traditional community . . .".

10.7.5 *Homeland phase*

The next phase was the homeland phase,[73] when most homeland governments passed their own laws on traditional leaders and authorities.[74] They took their cue from the Black Authorities Act, but nevertheless put an individual stamp on homeland traditional authorities. All in all, it left the 1996 national and provincial governments with a variety of statutorily recognised traditional organs of authority, based on the pre-1994 legislation, which continued to exist during the life of

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71 68 of 1951. Also see De Souza (2014) *SA Crime Quarterly* 42.

72 See Wiley (2013) 1–2.

73 In respect of the six homelands which did not opt for so-called independence, the empowering statutory framework was provided by the Bantu Homelands Constitution Act 21 of 1971 (subsequently renamed as the National States Constitution Act 21 of 1971, and finally as the Self-governing Territories Constitution Act 21 of 1971). The four TBVC states (Transkei, Bophuthatswana, Venda and Ciskei) had full legislative powers.

74 Transkeian Authorities Act 4 of 1965; Ciskei Administrative Authorities Act 37 of 1984; Bophuthatswana Traditional Authorities Act 23 of 1978; Qwaqwa Administration Authorities Act 6 of 1983; KwaZulu Amakhosi and Iziphakanyiswa Act 9 of 1990; KwaZulu Act on the Payment of Salaries, Allowances and other Privileges to the Ingonyama, Act 6 of 1993; Kwandebele Traditional Authorities Act 2 of 1994; and Venda Traditional Leaders Proclamation, 1991 (Proc 29 of 1991).

the interim Constitution of the Republic of South Africa[75] (27 April 1994–3 February 1997),[76] and after the commencement of the Constitution.[77]

10.7.6 *Constitutional recognition*

The hallmark of the current phase is the constitutional recognition of traditional leaders and authorities. Section 211 of the (final 1996) Constitution[78] recognises traditional leaders as follows:

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

Section 212 envisaged a role for traditional leaders as follows:

> (1) National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities.
>
> (2) To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law –
>
> (*a*) national or provincial legislation may provide for the establishment of houses of traditional leaders; and
>
> (*b*) national legislation may establish a council of traditional leaders.

Both sections are vague and couched in general terms. This led the Constitutional Court, in certifying the Constitution, to say:

> The Constitution cannot be constitutionally faulted for leaving the complicated, varied and ever-developing specifics of how such leadership should function in the wider democratic society, and how customary law should develop and be interpreted to future social evolution, legislative deliberation and constitutional interpretation.[79]

10.7.7 *White Paper on Traditional Leadership and Governance*

In 2003, the then Department of Provincial and Local Government published a White Paper[80] that set out the framework that would inform legislation intended to:

(a) define the place and role of the institution within the new system of democratic governance;[81]

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75 Act 200 of 1993.

76 Section 229 of the interim Constitution.

77 Item 2 of Sch 6 to the (final, 1996) Constitution, which provides for the continuation of old-order (pre-27 April 1994) legislation and legislation enacted during the interim period, subject to any amendment or repeal, and consistency with the Constitution.

78 See Ch 11 of the interim Constitution. Also see Rautenbach in Fombad and Steytler (eds) (2019 forthcoming) para 2.

79 *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa* 1997 (2) SA 97 (CC) para 197.

80 The White Paper on Traditional Leadership and Governance (2003) published as GN 2336 in *GG* 25438 of 10 September 2003. Also see Rautenbach in Fombad and Steytler (eds) (2019 forthcoming) para 3.

81 See Mathonsi and Sithole (2017) *African Journal of Public Affairs* 35–46, where the authors highlight incompatibilities between traditional leadership systems and the modern liberal democratic system in South Africa, especially in respect of governance, and advocate the harmonisation of the two. Also see Rautenbach in Fombad and Steytler (eds) (2019 forthcoming) para 4, where the author discusses *Dalindyebo v S* 2016 (1) SACR 329 (SCA). The conduct of King Dalindyebo, as the principal leader of the AbaThembu traditional community, towards the community was found to be unjustifiable in terms of the Constitution, even though he stated that he acted in the community's best interests.

(b) transform the institution in accordance with constitutional imperatives; and

(c) restore the integrity and legitimacy of the institution of traditional leadership in accordance with customary law and practices.[82]

10.7.8 *Traditional Leadership and Governance Framework Act*[83]

The White Paper on Traditional Leadership and Governance culminated in the Traditional Leadership and Governance Framework Act in 2003 (which commenced on 24 September 2004). It provides a framework, as well as norms and standards on traditional leadership and governance.[84] It informs and guides more detailed legislation developed by provinces with regard to traditional leadership and governance and other related matters.[85] The Act was extensively amended in 2009 by the Traditional Leadership and Governance Framework Amendment Act (which commenced on 25 January 2010).[86]

The following is an outline of the Act. The statutory recognition and framework do not coincide in all respects with the traditional institutions as described above. Yet the point of departure is still the "customary institution or structure" defined in section 1 of the Act as "those institutions or structures established in terms of customary law".

Moreover, the objectives of the Act, as stated in the Preamble to the Act, are:

(a) to set out a national framework and norms and standards that will define the place and role of traditional leadership within the new system of democratic governance;

(b) to transform the institution in line with constitutional imperatives; and

(c) to restore the integrity and legitimacy of the institution of traditional leadership in line with customary law and practices.[87]

The Act requires provincial legislation to be enacted. As indicated above, such provincial legislation may not be in conflict with the provisions of the (national) Act, but must contain province-specific arrangements.[88]

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82 White Paper on Traditional Leadership and Governance 11.

83 41 of 2003 (hereafter 'the Act').

84 See Matlala (2014) *SA Crime Quarterly* 32, where the author states that the Act deems "tribes" that existed prior to the commencement of the Act as the "present-day traditional communities", and tribal authorities established by the Bantu Authorities Act 1951 and recognised as such prior to said date, as traditional councils (if they met the new composition requirements set out in the Act).

85 Section 2(2)(*b*) of the Act. See, for example, the Eastern Cape Traditional Leadership and Governance Act 1 of 2017. The Repeal of Local Government and Traditional Affairs Laws Act (Eastern Cape) 6 of 2016 repealed obsolete and old order legislation dealing with local government and traditional affairs in the Eastern Cape, including, but not limited to, sections of the Black Administration Act 38 of 1927, Transkeian Authorities Act 68 of 1951, and the whole of the Black Authorities Act 68 of 1951, Customary Law Amendment Decree (Ciskei) Act 23 of 1991 and a number of Ordinances and Proclamations.

86 23 of 2009 (hereafter the Amendment Act). Chapter 6 of the Act came into operation on 1 February 2010. This chapter deals primarily with Dispute and Claim Resolution.

87 See Iya (2014) *SAPL* 206–281 for a discussion of the traditionalist view of the recognition of traditional leadership, the modernist view (the abolition of the institution of traditional leadership), and the pragmatic middle course, with a specific focus on the need for innovative ideas by the youth.

88 See the KwaZulu-Natal Traditional Leadership and Governance Act 5 of 2005, the Eastern Cape Traditional Leadership and Governance Act 1 of 2017, the Gauteng Traditional Leadership and Governance Act 4 of 2010, the Mpumalanga Traditional Leadership and Governance Act 3 of 2005, the North West Traditional Leadership and Governance Act 2 of 2005, the Free State Traditional Leadership and Governance Act 8 of 2005, the Northern Cape Traditional Leadership, Governance and Houses of Traditional Leaders Act 2 of 2007, and the Limpopo Traditional Leadership and Institutions Act 6 of 2005. Also see 10.7.8.11 for provincial legislation dealing with the provincial houses of traditional leaders, and for a discussion of the statutory provisions relating to local houses of traditional leaders.

The Traditional Leadership and Governance Framework Amendment Bill[89] is still under consideration in Parliament. If enacted, it will extend the time-frames in which king- and queenship councils and traditional councils must be established and community authorities must be disestablished. It will also align the term of office of entities referred to as traditional authorities, traditional councils and king- and queenship councils with the term of the National House of Traditional Leaders. It needs to be noted that the Act (including all its amendments)will be repealed by the Traditional and Khoi-San Leadership Bill,[90] if it is enacted (see discussion below).[91]

10.7.8.1 Traditional communities[92]

A community may be recognised as a traditional community if it:

(a) is subject to a system of traditional leadership in terms of that community's customs; and

(b) observes a system of customary law.

The recognition is to be done by the Premier of a province in accordance with provincial legislation and after consultation with the provincial house of traditional leaders, the community concerned and the king or queen, if any, under whose authority that community would fall.

A radical innovation is that the community must transform and adapt the relevant customary law and customs in order to comply with the relevant provisions contained in the Bill of Rights, especially by:[93]

(a) preventing unfair discrimination;

(b) promoting equality; and

(c) seeking to progressively advance gender representation in the succession to traditional leadership positions.

10.7.8.2 Recognition of king- and queenships[94]

A group of traditional communities may be recognised as a king- or queenship. The group must in terms of provincial legislation be recognised as being a king- or queenship; each constituent community must have a recognised traditional council and each senior traditional leader concerned must be recognised in terms of provincial legislation. One of the senior traditional leaders who has a higher status than the others must be recognised as king or queen by those traditional communities; the group must regard themselves as a distinct group, and it must have a system of traditional leadership at a king- or queenship level. It must, lastly, have a proven history of recognition as king- or queenship with a recognised senior traditional leader of higher status as a king or queen in terms of the applicable customary law of succession.

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89 [B8–2015].

90 [B23B–2015].

91 See discussion at 10.7.12.

92 Section 2(1) of the Traditional Leadership and Governance Framework Act, No. 41 of 2003; The Eastern Cape Traditional Leadership and Governance Act 1 of 2017 states that there are three requirements before a community may be recognised as a traditional community, namely that it must have a system of traditional leadership at a senior traditional leadership level, it must observe a system of customary law, and must consist of five or more administrative areas (s 4(1)). See *Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority* 2015 (6) SA 32 (CC) for rights of traditional communities with regard to land, and the role of "chiefs" (traditional leaders). Also see Mnwana (2014) *SA Crime Quarterly* 21–29; and Wicomb (2014) *SA Crime Quarterly* 57–64).

93 Section 2(3) of the Act.

94 Section 2A.

This would appear to be an acknowledgment of a *de facto* position. If the criteria are met, the recognition would follow. The recognition is to be done by the President in consultation with the Minister, the Premier concerned, the Provincial and National Houses of Traditional Leaders and the senior traditional leaders concerned.

10.7.8.3 Recognition of principal traditional communities[95]

The Act, as amended, introduces a new concept, namely principal traditional communities, with three levels, namely:

(a) traditional communities;

(b) principal traditional communities; and

(c) king- and queenships.

The criteria for establishing principal traditional communities are the same as those for king- and queenships, except that the institution is referred to as principal traditional communities having principal traditional leaders. Its purpose is to cater for those traditional communities that are grouped together, but in respect of which the status of the most senior traditional leader is less than that of a king- or queenship.

10.7.8.4 Establishment and recognition of traditional councils[96]

A council is to be established for each of the three levels of traditional communities (traditional communities, king-/queenships, and principal traditional councils). The first is a traditional council in respect of a traditional community. Again the principles and guidelines must be embodied in provincial legislation. The membership of a traditional council is specific in that at least a third must be women and overall the members must comprise:

(a) Traditional leaders and members of the traditional community selected by the senior traditional leader concerned who is an *ex officio* member and chairperson of the traditional council, for a term of five years aligned with the term of office of the National House of Traditional Leaders, in terms of that community's customs, taking into account the need for overall compliance with the number of women; and

(b) Other members of the traditional community who are democratically elected for a term of five years aligned with the term of office of the National House of Traditional Leaders and who must constitute 40% of the members of the traditional council.

If an insufficient number of women are available, the Premier may determine a lower threshold for that particular council. The act of recognition is entrusted to the Premier of the province concerned.

A tribal authority that was established and recognised immediately prior to the commencement of the national Act (24 September 2004), is deemed to be a traditional council as contemplated in section 3 from that date.[97] Such deemed traditional council had to comply with the

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95 Section 2B of the Traditional Leadership and Governance Framework Act, No. 41 of 2003.

96 Section 3. The Eastern Cape Traditional Leadership and Governance Act 1 of 2017 sets out the requirements in s 6, term of office of members and oath of office in s 7, functions in s 8, designation of chairperson in s 9, disqualification of members in s 10, vacation of seats and the filling of vacancies in s 11, meetings and minutes in ss 12 and 13, and staff in s 14. Sch 3 contains the oath, and Sch 4 the affirmation. The (Eastern Cape) Regulations for the Establishment of Traditional Councils were published in 2008 (PN 48 of 2008 (*PG* 2012 of 10 November 2008)) and amended in 2014 (PN 52 of 2014 (*PG* 3292 of 13 October 2014)). Also see the Free State Provincial and Local Houses of Traditional Leaders Act 7 of 2017, s 31 and Sch 3. For a discussion on the legal status of traditional councils in the North West province, see De Souza (2014) *SA Crime Quarterly* 41–56.

97 Section 28(4) of the Act.

reconstitution requirements as set out in section 3(2) within a period of seven years (not later than 23 September 2011).[98]

Section 4B of the Act also provides for the establishment of traditional sub-councils. This may be done where a traditional community occupies two or more geographical areas within a province. A sub-council may in that event be established for that section of the community which is resident outside the area in which the great place is located.[99] The traditional sub-council is part of the main traditional council,[100] and similar arrangements as regards its constitution and composition apply as determined in the case of traditional councils.[101] A traditional sub-council performs the functions delegated to it by the related main traditional council.[102]

10.7.8.5 Establishment and recognition of king-and queenship councils[103]

In this case, the establishment of a council is entrusted to the President. Once more, at least a third of the members must be women, provided that if an insufficient number are available, the Minister may determine a lower threshold. There are elaborate provisions about the composition and membership of these councils, but the essence is that the membership comprises:

(a) 60% of traditional leaders, including the king or queen who is *ex officio* member and chairperson, and members of the traditional community selected by the king or queen terms of the community's customs, taking into account the overall compliance of the requirement that at least a third must be women; and

(b) 40% of the members elected democratically, by an electoral college[104] consisting of all traditional leaders who fall under the king- or queenship.

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98 In *Mogale v Maakane* [2011] ZANWHC 17 (31 March 2011) had to determine what the governing body of the tribe was. The court held that the traditional council is a permanent institution, and that its existence cannot be terminated by a member of that institution. In addition, a traditional leader cannot dismiss members of the Traditional Council – membership of the traditional council only terminates where the term of office of five years expires, on the death of a member, or where a member is or becomes disqualified to hold office as a member (s 8 of the North West Traditional Leadership and Governance Act, No. 2 of 2005. The court also found that the institution of the "tribal" council is deemed to be a traditional council, and that the members of the former "tribal" authority by operation of law are members of the traditional council. Gender and democratic transformation of the membership of the traditional council must be done within seven years of the commencement of the Traditional Leadership and Governance Framework Act 41 of 2003 (23 September 2011). Also see De Souza (2014) *SA Crime Quarterly* 42–56, where the requirements for reconstitution are set out, the problems associated with the process in the North West province are discussed, and uncertainty arising from tensions in the legislation is examined). The 2009 amendments to the Act validated contracts which traditional councils (consisting of former members of "tribal" authorities) have made, but do not deal with the validation of an unauthorised act performed by the Premier (and is consequently not retrospective as regards the Premier's unauthorised acts). As a side note, see *Bengwenyama-ya-Maswazi Community v Genorah Resources (Pty) Ltd* 2015 (1) SA 219 (SCA), *Bengwenyama-ya-Maswazi Community v Minister of Mineral Resources* 2015 (1) SA 197 (SCA), and *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (3) BCLR 229 (CC) where the rights of traditional councils ("tribal councils") regarding land and mineral resources, as well as representation of communities, were discussed. Also see Badenhorst and Olivier (2011) *De Jure* 126–148; Badenhorst, Olivier and Williams (2012) *TSAR* 106–129; and Olivier, Williams and Badenhorst (2017) *PER* 1–34 for discussions on these cases.)

99 Section 4B(1)(*a*) of the Traditional Leadership and Governance Framework Act, No. 41 of 2003.

100 Section 4B(2).

101 Section 4B(3).

102 Section 4B(6).

103 Section 3A.

104 Also see s 84 of the Eastern Cape Traditional Leadership and Governance Act 1 of 2017.

10.7.8.6 Establishment and recognition of principal traditional councils[105]

The establishment and recognition of these councils are almost identical to those of king- and queenship councils. The outstanding feature of each one is that 60% are selected by the principal traditional leader and 40% are elected democratically, and the requirement that at least a third must be females.

10.7.8.7 Functions of traditional councils

Section 4 of the Act lists 12 functions of traditional councils. Six of these functions enjoin the councils to contribute towards, participate in and promote development in one form or another. Most of the functions are aimed at supporting municipalities and other government organs. Only two are inherent functions, namely:

(a) administering the affairs of the traditional community in accordance with custom and tradition;[106] and

(b) performing the functions conferred by customary law, customs and statutory law consistent with the Constitution.[107]

Provincial legislation must regulate the performance of functions by a traditional council by at least requiring it to keep proper records, have its financial statements audited, disclose the receipt of gifts, and adhere to the code of conduct.

Section 20 provides a framework for the optional allocation of roles and additional functions to traditional councils and traditional leaders by national and provincial spheres of government. See in this regard, 10.7.8.12 below.

10.7.8.8 Functions of king- and queenship councils[108]

The functions of king- and queenship councils were enacted, for the first time, in 2009, as follows:

(a) administering the affairs of the king- or queenship in accordance with customs and tradition;

(b) assisting, supporting and guiding senior traditional leaders and traditional councils falling within the jurisdiction of the king- or queenship concerned in the performance of their functions;

(c) assisting the king or queen in performing customary functions in relation to the recognition of senior traditional leaders, where applicable;

(d) mediating in disputes between senior traditional leaderships falling within the jurisdiction of the king- or queenship;

(e) promoting unity between traditional communities falling under the jurisdiction of the king- or queenship; and

(f) assisting the king or queen in performing his or her roles and functions conferred upon him or her by the President in terms of the regulations issued under section 9(5).

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105 Section 3B of the Traditional Leadership and Governance Framework Act, No. 41 of 2003. The Eastern Cape Traditional Leadership and Governance Act 1 of 2017 sets out the membership requirements of traditional councils in s 16, and its functions in s 17.

106 Section 4(1)(*a*) of the Act.

107 Section 4(1)(l). For court cases dealing with traditional councils, see *Pilane v Pilane* 2013 (4) BCLR 431 (CC). Also see Monye (2014) *SAPL* 323–342 and Matlala (2014) *SA Crime Quarterly* 31–40 for a discussion of the case), as well as *The Traditional Authority of the Bapo Ba Mogale Community v Kenoshi* [2010] ZAGPPHC 72 (29 July 2010).

108 Section 4(1) of the Act.

10.7.8.9 Functions of principal traditional councils[109]

The functions are the same as those of king- or queenship councils discussed at 10.7.8.8 above.

10.7.8.10 Recognition of traditional leadership positions[110]

There are four leadership positions, namely:

(a) king- or queenship;
(b) principal traditional leadership;
(c) senior traditional leadership;[111]
(d) headmanship;[112]
(e) regents;[113]
(f) acting traditional leaders;[114] and
(g) deputy traditional leaders.[115]

Without exception, the royal family[116] must identify the person who qualifies in terms of customary law and custom for recognition in the case of (a), (b), (c), (d) and (e) above, and for appointment in the case of (f) and (g) above.

The royal family is defined in section 1 as:

> . . . the core customary institution or structure consisting of immediate relatives of the ruling family within a traditional community, who have been identified in terms of custom, and includes, where applicable, other family members who are close relatives of the ruling family.

The actual recognition of kings and queens are done by the President and in the case of principal and senior traditional leaders, headmen, headwomen and regents,[117] by the Premier of the

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109 Section 4C of the Traditional Leadership and Governance Framework Act, No. 41 of 2003.
110 Section 8. Also see Eastern Cape Traditional Leadership and Governance Act 1 of 2017, ss 21–28.
111 See *Baleni v Baleni* [2012] ZAECMHC 19 (20 December 2012), where the Eastern Cape High Court (Mthatha) had to decide on the validity of the appointment of senior traditional leadership of the Amadiba Traditional Council in Mbizana. *Mgombane Royal Council v Kekana* [2013] ZAGPPHC 70 (1 March 2013) also dealt with the validity of the recognition of a senior traditional leader (Kgosi). The case, however, did not deal in detail with the recognition, as condonation was not granted for the late application.
112 See *Dudumayo v Dalasile* [2011] ZAEMCHC 8 (26 May 2011) where the Eastern Cape High Court (Mthatha) had to make an order regarding the recognition of the Inkosana of the ama-Tshomane Tribe and the entitlement to be the headman of Maphuzi Administrative Area 15A (specifically compliance with s 18 of the Eastern Cape Traditional Leadership and Governance Act 4 of 2005, since repealed by the Eastern Cape Traditional Leadership and Governance Act 1 of 2017, read with ss 21, 22 and 25 of the Traditional Leadership and Governance Framework Act 41 of 2003. Also see *Maeteletja v Maeteletja* [2013] ZAGPPHC 155 (12 June 2013) where the North Gauteng High Court had to decide on the validity of the appointment of a headman. The rule of male primogeniture was also at issue in this case. In *Premier, Eastern Cape v Ntamo* 2015 (6) SA 400 (ECB), the Eastern Cape Local Division of the High Court (Bisho) had to decide whether the royal family and the MEC complied with s 18 of the Eastern Cape Traditional Leadership and Governance Act 4 of 2005 (since repealed by the Eastern Cape Traditional Leadership and Governance Act 1 of 2017). The court found that in terms of s 18, the royal family has, with due regard to applicable customary law, to identify a person who qualifies in terms of customary law to assume the position in question. In this instance, the "applicable customary law" required the community to elect the headman. In addition, a person who "qualifies in terms of customary law" is an individual elected by the community.
113 Section 13 of the Traditional Leadership and Governance Framework Act, No. 41 of 2003.
114 Section 14.
115 Section 15.
116 Also see Eastern Cape Traditional Leadership and Governance Act 1 of 2017, s 29, for the roles and functions of the royal family.
117 In terms of s 1 of the KwaZulu-Natal Traditional Leadership and Governance Act 5 of 2005, a regent is also referred to as an *Ibambabukhosi*. In *Mngomezulu v The Premier of the Province of KwaZulu-Natal*

(*continued*)

relevant province,[118] while an acting traditional leader is appointed by what is termed an appropriate authority (by means of the issuance of a certificate of appointment).[119] A queen, king or principal traditional leader, senior traditional leader, headman or headwoman may appoint a deputy to act in his or her stead.[120] This appointment (by means of the issuance of a certificate of appointment by an appropriate authority) may be made when any one of them:[121]

(a) becomes a full-time member of a municipal council;[122]

(b) is elected as a member of a provincial legislature;

(c) is elected as a member of the National Assembly;

(d) is appointed as a permanent delegate in the National Council of Provinces; or

(e) is elected to, or appointed in, a full-time position in any house of traditional leaders.

The remuneration of traditional leaders is regulated by the Remuneration of Public Office Bearers Act,[123] which states in section 5(2) that traditional leaders may not be paid two incomes when simultaneously holding two public offices.[124]

[2011] ZAKZPHC 52 (17 November 2011), the court dealt with the recognition of an *Ibambabukhosi* in terms of the KwaZulu-Natal Act and found that there was a *lacuna* in the KwaZulu-Natal Act. The facts of the case can be summarised as follows: the Inkosi passed away, and a dispute regarding his successor was referred to the National Commission of Traditional Leadership Disputes and Claims in 2007. A determination by the Commission was still outstanding at the date of judgment. One of the contestants for the position of *Inkosi* was, at the time of the High Court case, still a minor. The court stated that in terms of s 30(4) of the KwaZulu-Natal Act, an *Ibambabukhosi* must carry out functions on behalf of an *Inkosi* until such time as the *Inkosi* can assume office. An *Ibambabukhosi* cannot carry out the duties of office on behalf of an *Inkosi* if such *Inkosi's* right to assume office is in dispute.

118 Sections 9(4)(*b*), 10A(*b*), 11(1)(*b*) and 13(1)(*b*) of the Act. See *Leboho v Premier of Limpopo Province* [2011] ZAGPPHC 22 (28 January 2011), where the court had to consider the validity of the recognition of a chief or *Kgoshi*. The judgment sets out the options available to the Premier where there is an allegation that the identification of a person as a *Kgoshi* was not in accordance with customary law, customs or processes, namely to refer the matter to the Provincial House of Traditional Leaders for recommendations or refer the matter to the royal family (as a result, the Premier may not resolve the dispute on his or her own) (p 38 of the judgment).

119 Section 14(2)(*a*) of the Act.

120 Section 15(1).

121 Section 15(1).

122 See Mathenjwa and Makama (2016) *Law, Democracy & Development* 200–214, where the author revisits the participation of traditional leaders in municipal councils. Also see Rautenbach in Fombad and Steytler (eds) (2019 forthcoming) para 4. Note that the Free State Municipality Standard Rules and Orders (PN 158 of 2016 (*PG* 48 of 22 July 2016) also apply to traditional leaders participating in the proceedings of a municipal council and its committees in terms of s 81 of the Local Government: Municipal Structures Act 117 of 1998 (reg 1.4.2). The KwaZulu-Natal Regulations on the Participation and Role of Traditional Leaders in Municipal Councils and Municipalities, 2015 (PN 146 of 2015, *PG* 1511 of 2 October 2015) provides, *inter alia*, for the role of traditional leaders in a municipality (reg 3), and the relationship between municipalities and traditional leaders (reg 4), and determines which steps must be followed if a traditional leader breaches or does not comply with the code of conduct contained in Sch 1 to the Local Government: Municipal Systems Act 32 of 2000 (reg 5).

123 20 of 1998.

124 *Madzhadzhi v President of the Republic of South Africa* [2010] ZASCA 57 (1 April 2010). Also see *Mbhashe Traditional Leaders in Municipal Council v Mbhashe Local Municipality* [2013] ZAECMHC 27 (26 September 2013) where the court found that, when considering s 81 of the Local Government: Municipal Structures Act 117 of 1998 and s 5 of the Remuneration of Public Office Bearers Act 20 of 1998, "remuneration" and "allowance" cannot be used to describe "out of pocket" expenses. Also see Eastern Cape Traditional Leadership and Governance Act 1 of 2017, s 37 (allowances for members of traditional councils), and 39–47 (financial matters); Free State Provincial and Local Houses of Traditional Leaders Act 7 of 2017, s 20 (salaries and allowances payable to members of the Houses and status of members).

10.7.8.11 Houses of traditional leaders

In terms of the Constitution, national or provincial legislation may provide for the establishment of houses of traditional leaders and national legislation may establish a council of traditional leaders.[125]

Section 16(1) of the Act provides for national, provincial and local houses of traditional leaders. The Act has added local houses of traditional leaders.[126] Furthermore, the National House of Traditional Leaders Act[127] provides for the establishment and functions of the National House of Traditional Leaders. The National Council of Traditional Leaders (subsequently renamed as the National House of Traditional Leaders) was established on 18 April 1997.

National House of Traditional Leaders

The House consists of three senior traditional leaders elected by each provincial house. If there are an insufficient number of senior traditional leaders in a provincial house, it may elect headmen or headwomen. Where a provincial house has not been established, the following scenarios are foreseen:

(a) There may be **more than three** traditional councils performing functions of a local house. In that event, the chairpersons of the councils must from among themselves elect three representatives to the House.

(b) There may be **only three or less** traditional councils performing functions of a local house. In such event, the chairpersons of the traditional councils are *ex officio* members of the House.

(c) There may be **one or more** local houses, in which event the senior traditional leaders in the province must from among themselves elect three representatives to the House.

At least a third of the members must be women. If there are an insufficient number of women, the Minister must, after consultation with the Premier concerned, determine a lesser threshold.[128]

The powers and duties of the House include the following: In terms of section 11(1) it must

> (a) . . .cooperate with the provincial houses of traditional leaders, to promote –
>
> (i) the role of traditional leadership within a democratic constitutional dispensation;
>
> (ii) nation building;
>
> (iii) peace, stability and cohesiveness of communities;
>
> (iv) the preservation of the moral fibre and regeneration of society;
>
> (v) the preservation of the culture and traditions of communities;
>
> (vi) socio-economic development and service delivery;
>
> (vii) the social well-being and welfare of communities; and
>
> (viii) the transformation and adaptation of customary law and custom in order to comply with the provisions of the Bill of Rights in the Constitution, in particular by –
>
> (aa) preventing unfair discrimination;
>
> (bb) promoting equality; and

continued

125 Section 212(2)(*a*) of the Act. Also see s 86 of the Eastern Cape Traditional Leadership and Governance Act 1 of 2017, which provides for immunities and privileges of members of houses of traditional leaders (as well as the Free State Provincial and Local Houses of Traditional Leaders Act 7 of 2017, s 29).

126 Section 17.

127 22 of 2009. In *Maakane v Premier of the North-West Province* [2011] ZANWHC 29 (23 June 2011), the court stated in para [19] that s 25 of the Act did not extend the term of office of Traditional Councils, but recognised the members of the National House of Traditional Leaders who were elected in terms of the repealed Act to remain until the expiry of the five-year term (2012).

128 National House of Traditional Leaders Act 22 of 2009, ss 3 and 4.

(cc) seeking to progressively advance gender representation in the succession to traditional leadership positions; and

(b) to enhance co-operation between the House and the various provincial houses with a view to addressing matters of common interest.

In addition, in terms of section 11(2), the National House of Traditional Leaders –

(a) must consider Parliamentary Bills referred to it by the Secretary to Parliament in terms of section 18 of the Framework Act [Traditional Leadership and Governance Framework Act 41 of 2003];

(b) may advise the national government and make recommendations relating to any of the following:
  (i) Matters relating to policy and legislation regarding traditional leadership;
  (ii) the role of traditional leaders;
  (iii) customary law; and
  (iv) the customs of communities observing a system of customary law;

(c) may investigate and make available information on traditional leadership, traditional communities, customary law and customs;

(d) must, at the request of a member of National Cabinet, advise him or her in connection with any matter referred to in this section;

(e) must be consulted on national government development programmes that affect traditional communities;

(f) must complement and support the work of government at national level;

(g) must form cooperative relations and partnerships with government at national level in development and service delivery;

(h) may participate in international and national programmes geared towards the development of rural communities;

(i) may participate in national initiatives meant to monitor, review and evaluate government programmes in rural communities; and

(j) must perform tasks as may be determined by a member of the national Cabinet or as may be provided for in national legislation.

Provincial houses of traditional leaders

The Constitution[129] makes provision for the optional establishment of provincial houses of traditional leaders by means of national or provincial legislation. So far, eight provincial houses of traditional leaders have been established in terms of the following provincial legislation:

- Eastern Cape Traditional Leadership and Governance Act 1 of 2017;[130]
- Free State Provincial and Local Houses of Traditional Leaders Act;[131]
- Gauteng: Traditional Leadership and Governance Act;[132]
- KwaZulu-Natal Traditional Leadership and Governance Act;[133]

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129 Section 212(2)(*a*) of the Constitution.

130 Which repealed the Eastern Cape House of Traditional Leaders Act 1 of 1995. See specifically ss 66–83. The relationship arrangements regarding houses are set out in ss 89–92. Also see the Regulations on the Election of Members of the Eastern Cape Houses of Traditional Leaders (PN 174 of 2017, *PG* 3905 of 29 August 2017); Free State Provincial and Local Houses of Traditional Leaders Act 7 of 2017, ss 23–28; Rules Regulating the Election of Members of the Provincial House of Traditional Leaders in the Northern Cape Province (GN 83 of 2017, *PG* 2118 of 4 August 2017). The North West Provincial Languages Act 1 of 2015 applies, among others, to the North West Provincial House of Traditional Leaders (s 3) and governs the use of provincial official languages in proceedings of the Provincial House (s 5).

131 7 of 2017, which, among others, repealed the Free State: House of Traditional Leaders Act 6 of 1994.

132 4 of 2010.

- Mpumalanga: Mpumalanga Provincial House and Local Houses of Traditional Leaders Act;[134]
- Limpopo: Limpopo Traditional Houses of Traditional Leaders Act;[135]
- North West Houses of Traditional Leaders Act;[136] and
- Northern Cape: Northern Cape Traditional Leadership, Governance and Houses of Traditional Leaders Act.[137]

The composition of the houses of traditional leaders differs from province to province.

The powers, functions and duties of the various provincial houses differ in detail. The Eastern Cape legislation is a representative example of what the provincial houses must do. The powers, functions and duties of the Eastern Cape House of Traditional Leaders are as follows –[138]

(1) The Provincial House has the roles, powers and functions conferred upon it by this Act and any other law.

(2) The functions of the Provincial House are –

(a) to work with the National House of Traditional Leaders, to promote –

(i) the role of traditional leadership within a democratic constitutional dispensation;

(ii) nation building;

(iii) peace, stability and cohesiveness of communities;

(iv) the preservation of the moral fibre and regeneration of society;

(v) the preservation of the culture and traditions of communities;

(vi) socio-economic development and service delivery; and

(vii) the social well-being and welfare of communities; and

(b) to enhance co-operation between the Provincial House and various local houses with a view to address matters of common interest.

(3) The Provincial House –

(a) must consider Bills referred to it by the Speaker of the Provincial Legislature;

(b) may advise the Provincial Government and make recommendations relating but not limited to the following –

(i) matters relating to policy and legislation impacting on traditional leadership;

(ii) the role of traditional leaders;

(iii) customary law; and

(iv) the customs of communities observing systems of customary law;

(c) may investigate and make available information on traditional leadership, traditional communities, customary law and customs;

(d) must at the request of a member of the Provincial Executive Council, advise him or her in connection with any matter referred to in this section;

(e) must complement and support the work of the Provincial Government;

(f) must form cooperative relations and partnership with all spheres of government in the development of communities and the provision of services to communities;

continued

133 5 of 2005, which replaced the KwaZulu-Natal: KwaZulu-Natal Act on the House of Traditional Leaders Act 7 of 1994.

134 6 of 2005.

135 5 of 2005.

136 3 of 2009, which replaced the North West: House of Traditional Leaders for the Province of the North West Act 12 of 1994.

137 2 of 2007.

138 Eastern Cape Traditional Leadership and Governance Act 1 of 2017, s 75.

(g) may participate in any national and provincial programmes geared towards the development of rural communities;

(h) may participate in the provincial initiatives meant to monitor, review and evaluate government programmes in rural communities; and

(i) must perform tasks as may be determined by a member of the Provincial Executive Council, or as may be provided for in national or provincial legislation.

(4) The Provincial House must provide for mechanisms to maintain oversight of –

(a) local houses; and

(b) traditional councils.

Local houses of traditional leaders

The Traditional Leadership and Governance Framework Act[139] makes provision for the compulsory establishment of local houses of traditional leaders within municipal districts in accordance with provincial legislation. In the areas of jurisdiction of some district municipalities or metropolitan municipalities there may be more than one senior traditional leader. In such areas, local houses of traditional leaders must be established.

The number of members of a local house may not be less than five and not more than ten, and kings, queens and principal traditional leaders may not be elected as members. Where there are more than 35 traditional councils within an area, the Minister may determine a higher number of not more than 20. The members must be elected by an electoral college consisting of all the kings, queens, principal traditional leaders or their representatives residing within the district or metropolitan municipality.[140]

The functions of a local house are as follows:[141]

(a) to advise the district municipality or metropolitan municipality in question on –

(i) matters pertaining to customary law, customs, traditional leadership and the traditional communities within the district municipality or metropolitan municipality;

(ii) the development of planning frameworks that impact on traditional communities; or

(iii) the development of by-laws that impact on traditional communities;

(b) to participate in local programmes that have the development of rural communities as an object; or

(c) to participate in local initiatives that are aimed at monitoring, reviewing or evaluating government programmes in rural communities.

In the event that a local house of traditional leaders cannot be established in accordance with section 17(1)–(2) of the Act, the functions of a local house are performed by the traditional council within the district municipality or metropolitan municipality concerned.[142] The Act compels Provincial Legislatures to enact a framework providing for the relationship between local houses and the provincial house concerned.[143]

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139 41 of 2003, s 17(1)(*a*). Also see Eastern Cape Traditional Leadership and Governance Act 1 of 2017, ss 48–65; Free State Provincial and Local Houses of Traditional Leaders Act 7 of 2017, ss 9–15.

140 Traditional Leadership and Governance Framework Act 41 of 2003, s 17(2)(*a*)–(*b*). According to s 17(2)(*c*), the electoral college "must seek to elect a sufficient number of women to make the local house of traditional leaders representative of the traditional leaders within the area of jurisdiction in question".

141 Section 17(3) of the Act.

142 Section 17(4).

143 Section 17(5).

10.7.8.12 Roles and functions of traditional leaders

The point of departure for the Act was that "in the rural areas the institution of traditional leadership can play a key role in supporting government to improve the quality of life of the people".[144]

Traditional leaders more often than not act in consultation with their councils. They do, however, have roles and functions in their capacity as rulers of their communities. The Act[145] recognises this by providing that a traditional leader performs the functions provided for in terms of customary law and customs of the community concerned, and in applicable legislation. On account of their interaction with modern government institutions, it is not possible to allocate carte blanche roles and functions of government to them.

In addition to the prescribed functions of traditional councils (section 4 of the Act – see 10.7.8.7) and of traditional leaders (section 19),[146] section 20 of the Act provides a framework for the optional allocation of roles and additional functions to traditional councils and traditional leaders by national and provincial spheres of government.

Section 20 of the Act contains guiding principles for the allocation of roles and functions. It enables the national government and provincial governments to, through legislative or other measures, provide roles and functions for traditional councils or traditional leaders in respect of 15 areas, such as agriculture, health, and welfare, the management of natural resources, economic development and tourism.[147] There are some procedural directives that must be complied with. The roles and functions must be allocated with concurrence of the Minister or Member of the Provincial Executive Committee concerned. The allocation must, moreover, go hand-in-hand with means to perform the role or function concerned, most importantly resources (which would include financial resources).[148] When an organ of state in the national or provincial sphere considers allocating a role or function for traditional councils or leaders, it must strive to ensure that the allocation of such a role or function is accompanied by resources and that appropriate measures for accounting for such resources are put in place. In addition, the organ of state must monitor the implementation of the function concerned, as well as ensure that the implementation is consistent with the Constitution and that the function is being performed.

Any allocation in accordance with section 20 of the Act would entail an extensive investigation into the capacity of a traditional leader and/or the council, the applicable legislation and the question whether it would promote the ideals of cooperative governance, integrated development planning, development and service delivery.[149] By January 2018, no such allocation has been made by any organ of state in the national sphere of government. The implementation of this section would also require significant training and continuing support to traditional leaders and traditional councils on account of the fact that the majority of traditional leaders and councils are currently not sufficiently equipped to fulfil the roles and functions listed in section 20.

Some traditional leaders have raised concerns regarding their functions, as they are of the opinion that the government has reduced their roles to the preservation of cultural heritage.[150] On the other hand, the Act has also been criticised by community members for providing exaggerated

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144 See the White Paper on Traditional Leadership and Governance 5. Also see Eastern Cape Traditional Leadership and Governance Act 1 of 2017, ss 30–34.

145 Traditional Leadership and Governance Framework Act 41 of 2003, s 19.

146 Also see *Umndeni (Clan) of Amantungwa v MEC for Housing and Traditional Affairs KwaZulu-Natal* [2011] 2 All SA 548 (SCA).

147 Traditional Leadership and Governance Framework Act 41 of 2003, s 20(1).

148 Section 20(2) of the Act. Also see s 87 of the Eastern Cape Traditional Leadership and Governance Act 1 of 2017, dealing with support by provincial government to houses of traditional leaders (and also see the Free State Provincial and Local Houses of Traditional Leaders Act 7 of 2017, s 22).

149 Traditional Leadership and Governance Framework Act 41 of 2003, s 20(2)(*a*)–(*g*).

150 Phago and Netswera (2011) *Journal of Public Administration* 1023–1038.

powers to traditional leaders, prejudicing women, and reinforcing apartheid-created traditional community area boundaries (specifically in the former homelands), as well as the fact that members complaining about disputes relating to "chiefly distortions of customary law" must be taken up in forums that are not impartial as they are dominated by traditional leaders.[151]

The establishment of partnerships between municipalities and all categories of traditional councils, as well as entering into service delivery agreements, is dealt with in section 5 ("Partnerships between district and local municipalities and king- and queenship councils, principal traditional councils and traditional councils").[152] National government and all provincial governments must promote such partnerships through legislative or other measures.[153] Every partnership must be "based on the principles of mutual respect and recognition of the status and roles of the respective parties" and "guided by and based on the principles of cooperative governance".[154] Service delivery agreements may be concluded between a traditional council and a municipality in accordance with the Local Government: Municipal Systems Act[155] and any other applicable legislation.[156]

10.7.8.13 Dispute and claim resolution and Commission on Traditional Leadership Disputes and Claims[157]

The Traditional Leadership and Governance Framework Act creates four steps for the resolution of disputes and claims concerning customary law, customs, other customary institutions or a matter arising from the implementation of the Act, in the following sequence:[158]

(a) members of the community and traditional leaders internally and in accordance with customs;

(b) the provincial house of traditional leaders in accordance with its internal rules and procedures;

(c) the Premier of the province, who must consult the parties to the dispute and claim and the provincial house of traditional leaders concerned; and, finally

(d) the Commission on Traditional Leadership Disputes and Claims (the Commission).

10.7.8.14 Commission

The Commission was established in terms of section 22 of the Act. By its nature there are extensive rules about the membership and functioning of the Commission.

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151 Similar criticisms have been levied against the Communal Land Rights Act 11 of 2004, which was found to be unconstitutional in the Constitutional Court case of *Tongoane v Minister of Agriculture and Land Affairs* 2010 (6) SA 214 (CC). Also see Gasa (2011) 35 *SA Crime Quarterly* 23–29; Weeks and Claassens (2011) *Stell LR* 834–837. Also see the discussion of traditional courts at ch 11. Further critique includes that indigenous accountability mechanisms are undermined, customary entitlements are overridden, and there are inconsistencies with the Bill of Rights. See Claassens in Mostert and Bennett (eds) (2012) 174–209, and Claassens (2011) *SAJHR* 536.

152 Eastern Cape Traditional Leadership and Governance Act 1 of 2017, s 19.

153 Traditional Leadership and Governance Framework Act 41 of 2003, s 5(1)–(2).

154 Section 5(3)(*a*)–(*b*).

155 32 of 2000.

156 Traditional Leadership and Governance Framework Act 41 of 2003, s 5(4).

157 Chapter 6.

158 Section 21.

Membership of Commission[159]

The Minister must appoint a chairperson and not more than four persons who are knowledgeable regarding customary law, customs and the institution of traditional leadership.[160]

Functions of the Commission[161]

The Commission has authority to investigate and make recommendations on several matters, for example on:[162]

(i) a case where there is doubt as to whether a kingship[163] or, principal traditional leadership, senior traditional leadership or headmanship was established in accordance with customary law and customs;
(ii) a case where there is doubt as to whether a principal traditional leadership, senior traditional leadership or headmanship was established in accordance with customary law and customs;
(iii) a traditional leadership position where the title or right of the incumbent is contested;
(iv) claims by communities to be recognised as kingships, queenships, principal traditional communities, traditional communities, or headmanships;
(v) the legitimacy of the establishment or disestablishment of 'tribes' or headmanships;
(vi) disputes resulting from the determination of traditional authority boundaries as a result of merging or division of 'tribes';
(viii) all traditional leadership claims and disputes dating from 1 September 1927 to the coming into operation of provincial legislation dealing with traditional leadership and governance matters; and
(ix) gender-related disputes relating to traditional leadership positions arising after 27 April 1994.

When considering a dispute or claim, the Commission must consider and apply customary law and the customs of the relevant traditional community as they applied when the events occurred that gave rise to the dispute or claim.[164] It is further required that the Commission must, in respect of a:[165]

(a) king- or queenship, be guided by the criteria as determined in sections 2A(1) and 9(1);[166] and
(b) principal traditional leadership, senior traditional leadership or headmanship, be guided by the customary law and customs and criteria relevant to the establishment of a principal traditional leadership, senior traditional leadership or headmanship, as the case may be.

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159 Section 23.
160 See Peires (2014) *SA Crime Quarterly* 7–20, where the author, as one of the commissioners, states that the Commission imposed its own preferences in the name of custom in certain instances, namely where the kingships that were called into question, dated back to the pre-colonial period or where colonial intervention was absent (i.e. the case of Western Mpondoland and the Transvaal Ndebele).
161 Traditional Leadership and Governance Framework Act 41 of 2003, s 25.
162 Section 25(2)(*a*).
163 See *Mamone v Commission of Traditional Leadership Dispute and Claims* (260/13) [2014] ZASCA 30 (28 March 2014), where the court had to decide whether the Commission ignored relevant information placed before it when it made a decision regarding kingship. In *Matiwane v President of the Republic* [2014] 2 All SA 419 (ECM) (12 December 2013), the court made a distinction between the original Act (where the Commission had the power to determine whether a kingship existed and who should be the incumbent) and the amended Act (where the Commission may only provide advice, and President makes the final determination) (see para [13]). Also see *Ramokoka v Ramokoka* (264/13) [2013] ZANWHC 38 (22 March 2013).
164 Traditional Leadership and Governance Framework Act 41 of 2003, s 25(3)(*a*). Also see *BapediMarota-Mamone v Commission on Traditional Leadership Disputes and Claims* [2014] ZACC 36, where the Commission was required to establish the relevant customary law as it was when the events that gave rise to the dispute regarding the rightful king, occurred, and apply same.
165 Traditional Leadership and Governance Framework Act 41 of 2003, s 25(3)(*b*).
166 See 10.7.8.2.

Where the Commission investigates disputes resulting from the determination of traditional council boundaries and the merging or division of traditional communities (referred to as "tribes" in section 25(3)(*c*)), it must, before making a recommendation in terms of section 26, consult with the Municipal Demarcation Board established by section 2 of the Local Government: Municipal Demarcation Act[167] in cases where the traditional council boundaries straddle municipal and/or provincial boundaries.[168]

Furthermore, the Commission:[169]

(a) may delegate any function (excluding a matter related to king- or queenships) to a provincial committee (section 26A of the Act); and

(b) must coordinate and advise on the work of said provincial committees.

The Commission may adopt rules for the conduct of its business, as well as that of the provincial committees.[170] Provincial legislatures must enact provincial legislation that provides for a mechanism to deal with disputes and claims related to traditional leadership in the province concerned. However, such a provincial mechanism may not deal with matters which are dealt with by the national Commission (and its provincial committees) in accordance with section 25 of the Act.[171]

Recommendations of the Commission[172]

In terms of the Traditional Leadership and Governance Framework Act,[173] a recommendation of the Commission is taken with the support of at least two-thirds of its members. Furthermore, a recommendation of the Commission must, within two weeks of the recommendation having been made, be conveyed to:[174]

(a) the President and the Minister where the position of a king or queen is affected by such a recommendation; or

(b) the relevant provincial government and any other relevant functionary to which the recommendation of the Commission applies in accordance with applicable provincial legislation in so far as the consideration of the recommendation does not deal with the recognition or removal of a king or queen.

The President or the other relevant functionary, as the case may be, to whom the recommendation has been conveyed must, within a period of 60 days, make a decision.[175] If the President or the relevant functionary takes a decision that differs from the recommendation conveyed to him or her, the President or the relevant functionary, as the case may be, must provide written reasons for such decision.[176]

Committees of the Commission

Provincial committees of the National Commission are established in terms of section 26A of the Act.[177] The number of members is determined by the Premier after consultation with the Minister and the Commission. They are appointed by the Premier after consultation with the

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167 27 of 1998.
168 Traditional Leadership and Governance Framework Act 41 of 2003, s 25(3)(*c*).
169 Section 25(6).
170 Section 25(8).
171 Section 25(9).
172 Section 26.
173 Section 26(1).
174 Section 26(2).
175 Section 26(3).
176 Section 26(4).
177 Traditional Leadership and Governance Framework Act 41 of 2003. Also see Eastern Cape Traditional Leadership and Governance Act 1 of 2017, ss 35–36.

National Minister responsible for traditional matters and the Commission by notice in the *Provincial Gazette*, for a period not exceeding five years.[178] The committee members of the Commission must have the same knowledge as the members of the Commission, namely regarding customary law, customs and the institution of traditional leadership.[179] At provincial level, a committee has the same functions as the Commission.

Each provincial committee must be chaired by a member of the Commission designated by the Minister responsible for traditional affairs after consultation with the Premier concerned and the Commission, provided that a member of the Commission may chair more than one committee.[180] A provincial committee may make final recommendations on all matters delegated to it, but where the committee is of the view that exceptional circumstances exist, it may refer the matter to the Commission for advice.[181]

10.7.9 *Code of conduct*

The Act provides a binding and enforceable national code of conduct for every traditional leader and traditional council,[182] which may be supplemented by provincial legislation.[183] Such provincial legislation, if enacted, must at least provide for mechanisms to deal with any breach of the code of conduct; fines and other penalties for such a breach (but excluding the removal of a traditional leader); and an acting appointment during the period for which a traditional leader is suspended (if the provincial legislation concerned provides for such a penalty).[184]

10.7.10 *Other legislation*

A number of other pieces of legislation vest a number of powers, functions and duties in traditional leaders, including, but not limited to, the following:

- In terms of the 2015 amendments[185] to the Disaster Management Act,[186] the Minister responsible for the implementation of said Act must establish a National Disaster Management Advisory Forum consisting of, among others, representatives of other disaster management role players designated by him or her, which may include traditional leaders as recommended by the National House of Traditional Leaders.[187] The national disaster management framework must, *inter alia*, facilitate the involvement of traditional leaders in disaster management.[188]

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178 Traditional Leadership and Governance Framework Act 41 of 2003, s 26A(2)(*a*).
179 Section 26A(2)(*c*).
180 Section 26A(3).
181 Section 26A(6) of the Act.
182 Section 27(1) read with the Sch to the Act.
183 See Eastern Cape Traditional Leadership and Governance Act 1 of 2017, s 38 and Sch 1 (code of conduct for traditional leaders and traditional councils), and Sch 2 (code of conduct for members of houses, traditional leaders, principal traditional councils and traditional councils), as well as the Free State Provincial and Local Houses of Traditional Leaders Act 7 of 2017, Sch 1 (code of conduct of members of houses).
184 Traditional Leadership and Governance Framework Act 41 of 2003, s 27(3).
185 Disaster Management Amendment Act 16 of 2015.
186 57 of 2002.
187 Section 5(1)(e)(vi). Also see s 37(1)(e)(v) which states that the MEC responsible for disaster management in a province may establish a provincial disaster management advisory forum consisting of, among others, representatives of other disaster management role players in the province designated by the MEC, which may include a traditional leader recommended by the Provincial House of Traditional Leaders. Section 51(1)(d)(iv) provides for municipal disaster management advisory forums. The executive mayor or mayor may designate one traditional leader elected from the traditional council(s) in a municipality recognised by the Premier as a representative of disaster management role players in the municipality.
188 Section 7(2)(f)(i). Also see Nkabane and Nzimakwe (2017) *African Journal of Public Affairs* 25–40, dealing with the need for scientific, as well as indigenous knowledge in disaster risk reduction.

- The Eastern Cape Customary Male Initiation Practice Act[189] obliges traditional leadership to take primary responsibility for male initiation within their areas of jurisdiction, in partnership with provincial government and other stakeholders.[190] Traditional leaders must be involved in the district initiation forum, local initiation fora, and the provincial initiation working committee.[191] Various roles, functions and duties are prescribed for traditional leaders in the Act.[192]
- The Limpopo Business Registration Regulations, 2015,[193] made under the Limpopo Business Registration Act,[194] provide for recommendations from local authorities.[195]
- The KwaZulu-Natal Land Administration and Immovable Asset Management Act[196] provides in section 7 for the disposal and transfer of provincial state land, free of charge, by agreement, to a municipality or the KwaZulu-Natal Royal Household Trust.[197] If the KwaZulu-Natal provincial state land concerned, or a portion thereof, is occupied by a traditional community, such community must first be consulted.

10.7.11 *Traditional Courts Bill, 2017 [B1–2017]*

The Traditional Courts Bill[198] (replacing the 2012 version of the Bill) was at the time of updating this chapter, still under consideration by the National Assembly.[199] It aims to provide a uniform legislative framework for the structure and functioning of traditional courts in line with constitutional imperatives and values. Clause 5 provides that a traditional leader, or person delegated by the traditional leader, must convene the court.

10.7.12 *Traditional and Khoi-San Leadership Bill, 2015 [B23–2015]*

The Draft Traditional Affairs Bill, 2013[200] aimed, among other things, to provide for the recognition of traditional and Khoi-San communities and leadership positions. This Bill was replaced by the Traditional and Khoi-San Leadership Bill, 2015.[201]

The Traditional and Khoi-San Leadership Bill, 2015 was at the time of updating this chapter, under consideration by the National Council of Provinces.[202] If enacted, it will repeal the Traditional Leadership and Governance Framework Act 41 of 2003 and the National House of Traditional Leaders Act 22 of 2009.

As is clear from its title, the Bill also deals with the Khoi-San, which is defined in clause 1 as "any person who lives in accordance with the customs and customary law of the Cape Khoi,

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189 5 of 2016.
190 Section 2(2).
191 Sections 8, 10 and 12.
192 See specifically s 16.
193 GN 99 of 2015 (*PG* 2492 of 2 April 2015).
194 5 of 2003.
195 For example, "Traditional Authority & Municipality", when application is made for a business registration certificate (Form 1), and the transfer thereof (Form 5).
196 2 of 2014.
197 Section 7.
198 [B1–2017].
199 As on 30 October 2018. See ch 11 for a detailed discussion of the Bill.
200 See Kohn (2014) *SAPL* 343–367 for a discussion of the Bill, with a specific focus on cl 25. Also see Rautenbach in Fombad and Steytler (eds) (2019 forthcoming) para 3.6 for a discussion of the Bill, including some critique.
201 [B23–2015].
202 As on 30 October 2018. The Select Committee on Cooperative Governance and Traditional Affairs invited interested people and stakeholders to submit written comments on the Bill which had to be submitted before/on 19 September 2018.

Griqua, Koranna, Nama or San people, or any subgrouping thereof, and is consequentially a member of a particular Khoi-San community as contemplated in section 5".The provisions of the Bill, if enacted, will not preclude members of traditional or Khoi-San communities from addressing their leaders by customary designations.[203] Traditional and Khoi-San leaders may acknowledge or recognise seniority levels among themselves in accordance with customs.[204] Clause 1(5) states that "[t]he provisions of this Act relating to the recognition of a traditional or Khoi-San community or leader shall not be construed as bestowing upon such a community or leader any special indigenous, first nation or any other similar status".

Clause 2 sets out guiding principles and provides that leadership structures must transform and adapt customary law and customs relevant to the Bill to comply with the relevant Bill of Rights principles, particularly by preventing unfair discrimination, promoting equality and seeking to progressively advance gender representation in succession to leadership positions.

Clause 3 sets out the circumstances under which traditional communities that are grouped together may be recognised as a king- or queenship. Traditional communities must apply to the President for recognition as a king- or queenship. The clause also sets out when a community may be recognised as a traditional community. Such community must apply to the Premier concerned. It also deals with the recognition of headman- or headwomanships, and applications to the Premier in this regard.

Clause 4 deals with the withdrawal of recognition of the structures set out in clause 3.

Clause 5 provides for the recognition of Khoi-San communities and branches (requirements and application procedures), and clause 6 with the withdrawal of recognition of such communities.

Clause 7 deals with the recognition of traditional leadership positions, namely king or queens, principal traditional leaders, senior traditional leaders, and headmen or -women, as well as Khoi-San leadership positions, namely senior Khoi-San leaders and branch heads (requirements and application procedures, as well as resignations).

Clause 8 deals with the recognition of kings, queens, principal traditional leaders, senior traditional leaders, headmen and headwomen, and clause 9 with the withdrawal of such recognition.

Clause 10 provides for the recognition of senior Khoi-San leaders and branch heads, and clause 11 with the withdrawal of such recognition.

Clause 12 deals with the recognition of regents, clause 13 with the recognition of acting traditional and Khoi-San leaders, and clause 14 with the recognition of deputy traditional and Khoi-San leaders.

Clause 15 deals with the functions and resources of traditional and Khoi-San leaders. King- and queenship councils, principal traditional councils and traditional councils must be established in terms of clause 16, and if enacted, traditional sub-councils in terms of clause 17, and Khoi-San councils in terms of clause 18.

Clause 19 sets out the functions of king- or queenship councils and principal traditional councils, and clause 20 the functions of traditional councils, traditional sub-councils, Khoi-San councils and branches. The election of members of traditional councils, traditional sub-councils and Khoi-San councils, and the filling of vacancies, will be regulated by clause 21, if enacted.

Clause 22 deals with the administration of king- or queenship councils, principal traditional councils, traditional councils, traditional sub-councils, and Khoi-San councils, and clause 23 with support to these structures.

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203 The Traditional and Khoi-San Leadership Bill, 2015, cl 1(2).
204 Clause 1(3).

Clause 24 empowers certain structures to enter into partnerships and agreements. If enacted, clause 25 will empower national or provincial government departments to allocate roles in respect of any functional area of such departments to certain officially recognised traditional structures, provided that this may not include decision-making powers.

Chapter 3[205] provides for a National House of Traditional and Khoi-San Leaders, provincial houses of traditional and Khoi-San leaders and local houses of traditional and Khoi-San leaders.

Clause 51, if enacted, will establish the Commission of Khoi-San Matters (which will be regulated by Chapter 4.[206]

Chapter 5 contains the general provisions, including disputes, regulations, delegations, monitoring, and transitional arrangements.

10.8 Conclusion

The preceding discussion is not all-encompassing. The provinces may promulgate their own legislation, which may not deviate from the principles set out in the Traditional Leadership and Governance Framework Act. Some of the main features of the Traditional Leadership and Governance Framework Act (which may be repealed if the Traditional and Khoi-San Leadership Bill, 2015 is enacted) are:

(a) The use of new terminology to depict traditional institutions. The new terminology is not merely politically correct designations and descriptions of traditional institutions. Terms such as king, traditional leader and headman are meant to reflect the traditional position and status of these offices.

(b) The traditional institutions are restructured to align them with the democratic constitutional order, including, among others, compliance with the constitutionally enshrined human rights framework.

(c) The determination of functions of traditional leaders and traditional councils, also as regards the provision of support to especially local government.

(d) The optional assignment of additional roles and functions to traditional leaders and traditional councils by the national or provincial spheres of government.[207] In view of the fact that the traditional leaders and councils are not a sphere of government, they have a limited number of inherent or constitutionally based functions. The Act, however, provides that traditional leaders and traditional councils may carry out roles and perform functions in support of the three spheres of government. National and provincial government[208] may allocate national and provincial roles and functions to traditional leaders and traditional councils. This goes hand-in-hand with the fact that traditional leaders and traditional councils are organs of state as defined in section 239 of the Constitution,[209] and other organs of state are therefore obliged to seek their co-operation. The principles of co-operative government as determined in Chapter 3 of the Constitution apply to such co-operation.

(e) The establishment of partnerships between municipalities and traditional councils and entering into service delivery agreements in terms of a statutory obligation on national government and all provincial governments to promote such partnerships.

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205 The Traditional and Khoi-San Leadership Bill, 2015, cl 26–50.

206 Clauses 51–58.

207 For a discussion on the powers and functions of the Ingonyama Trust *vis-à-vis* a recognised traditional community ("tribe") or traditional council ("traditional authority"), see *Ingonyama Trust v Radebe* [2012] 2 All SA 212 (KZP).

208 Also see George and Binza (2011) *Journal of Public Administration* 947–962 and Thornhill and Selepe (2010) *Journal of Public Administration* 162–174.

209 Bekker (2003) *Speculum Juris* 121–124.

(f) The establishment of a national Commission on Traditional Leadership Disputes and Claims (and provincial committees), as well as provincial mechanisms to deal with matters which fall outside the jurisdiction of the national Commission.

(g) The recognition of principal traditional leadership as a new category of leadership position.

(h) The emphasis on customary law by means of various references to customary law and customs.

The Act was dictated by constitutional, political and socio-economic considerations within the context of the realisation that the supportive co-operation of traditional leaders and traditional councils with the three spheres of government is a requirement for the development of South Africa's traditional communities.

11

Traditional Courts and other Dispute Resolution Mechanisms

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11.1 Introduction

Before colonialism, traditional communities were governed in accordance with the customary law of the various communities under the leadership of their traditional leaders. The chief, as the executive, legislative and judicial head of the community, performed a number of functions, including the maintenance of law and order. Together with his or her councillors, they ensured the maintenance or restoration of social solidarity among community members. Disputes were dealt with within the community on various levels before it reached the chief's court (the traditional court), if at all, to finally resolve the matter.[1] The traditional court operated on an inquisitorial and reconciliatory basis with the sole purpose to restore the imbalance in the community caused by the wrongful conduct of one or more of the community members.[2] Justice was the collective responsibility of everyone in the community and was realised when reconciliation was reached between the wrongdoer and the aggrieved party.[3]

Both the colonial and post-colonial governments saw the advantages of traditional justice and the various structures of dispute settlements being retained, although it has been developed (and also distorted) quite considerably over the years. From 1652 to 1805, the Dutch government was confronted with the existence of indigenous people on Cape soil whose customs and usages were totally different from those to which it was accustomed. At first, no account was taken of these customs and usages because they were seen as "uncivilised".

It was only after the second British occupation, in 1806, that customary or indigenous law received some form of recognition. The British followed a policy of non-interference with the customs and usages of indigenous people, provided that these customs and usages were not repugnant to public policy and the principles of natural justice. During this time the various territories (the two British colonies consisting of the former Cape and Natal, the two Boer Republics consisting of the former Transvaal and Orange Free State, and the various indigenous kingdoms, among others, the Zulu and Basotho) regulated the application of customary law by means of their own legislation. In 1927, the various territorial laws were finally consolidated in the controversial Black Administration Act,[4] which consolidated the mass of diverse colonial legislation governing the recognition and application of indigenous law, including traditional courts in existence in the rural areas. Although subject to severe criticism, large portions of this Act, including the section dealing with customary courts, are still in operation. In addition to the court structures developed by the Black Administration Act, regional legislation in the former homelands also established regional traditional courts.[5]

Over the years, other unofficial administrative and legal institutions have been instituted and developed in urban areas to administer some or other form of justice between inhabitants of the former townships. The popularity and successes of these institutions varied quite considerably, but they remain a force to be reckoned with when the administration of justice between African communities is discussed.[6]

Nowadays, the administration of justice within traditional communities remains multi-layered, complex and flexible, varying from area to area and the type of law applicable in a given situation.

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1 Rakate (1997) *CILSA* 179–182. For a discussion of the customary court structures as alternative dispute resolution mechanisms, see Rautenbach "Traditional courts as alternative dispute resolution (ADR) – mechanisms in South Africa" in Dietrich (ed) (2014) 288–329.

2 Rautenbach (2005) *SAJHR* 332.

3 Rakate (1997) *CILSA* 181–182.

4 38 of 1927.

5 See the discussion at 11.3.1.4.

6 A discussion of the historical development falls outside the scope of this book. For more information, see Olivier *et al* (1989) 580–609; Bekker (1989) 1–40; Bekker "Court structure and procedure" in Joubert, Faris and Church (eds) *LAWSA* vol 32 (2009) paras 244–245; Bennett (2004) 135–141.

There are different categories of traditional courts depending on one's views on the scope and application of customary law in a mixed pluralistic legal system such as South Africa. The most prevalent distinction is between formal (official) and informal (unofficial) traditional courts. The official ones are those established in terms of legislation,[7] while the unofficial ones are those operating within the cadre of living customary law.[8] Within these formal and informal structures are various levels or structures for dispensing justice in some or other form.

This chapter deals firstly with the constitutional status of traditional courts in general and then focuses more specifically on the institution of official traditional courts, their jurisdiction, their powers and procedures. Secondly, the situation pertaining to unofficial traditional courts and other court-like structures is explained briefly. Thirdly, since traditional courts are not the only ones applying customary law, the imperative to apply customary law in some of the ordinary courts, is also briefly examined.

Finally, this chapter concludes with the steps the government have taken to rationalise the traditional court system in South Africa, most notably the Traditional Courts Bill[9] which has not been transformed into legislation yet.

11.2 The constitutional status of traditional courts

Is a traditional court a "court of law", in other words, as part of the hierarchy of courts in the judicial system as set out in section 166 of the Constitution?[10] In terms of section 166 the courts are:

(a) the Constitutional Court;

(b) the Supreme Court of Appeal;

(c) the High Courts, including any high court of appeal that may be established by an act of Parliament to hear appeals from High Courts;

(d) the Magistrates' Courts; and

(e) *any other court established or recognised in terms of an Act of Parliament*, including any court of a status similar to either the High Courts or the Magistrates' courts.

The expression "traditional courts" is absent from the list of courts specified in section 166 of the Constitution, but as official traditional courts are established by an act of parliament, namely in terms of the Black Administration Act, and they thus remain intact. Their continued post-constitutional existence is furthermore guaranteed by the recognition of traditional leadership by section 211(1) and (2) of the Constitution, which stipulates:

> (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.

Traditional courts are also by implication recognised because they are part of the institution of traditional leadership. Furthermore, sections 12 and 20 that confer civil and criminal jurisdiction

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7 See the discussion at 11.3.1.

8 See the discussion at 11.3.2.

9 See the discussion at 11.5.

10 The main arguments against the contention that they are courts of law are: there is no separation of powers since the traditional leader fulfils both an executive and judicial function; the traditional leader does not have to have legal training; and the courts are not courts of record. South African Law Commission *Project 90: Discussion Paper 82* (1999) 13–15.

upon traditional leaders remain intact post 1994 in terms of item 2 of Schedule 6 of the Constitution, which stipulates:

> (1) All law that was in force when the new Constitution took effect, continues in force, subject to –
>
> (*a*) any amendment or repeal; and
>
> (*b*) consistency with the new Constitution.
>
> (2) Old order legislation that continues in force in terms of sub-item (1) –
>
> (*a*) does not have a wider application, territorially or otherwise, than it had before the previous Constitution took effect unless subsequently amended to have a wider application; and
>
> (*b*) continues to be administered by the authorities that administered it when the new Constitution took effect, subject to the new Constitution.

Additionally, in *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of South Africa, 1996*,[11] the Constitutional Court held that the words "any other court established or recognised in terms of an Act of Parliament" in section 166(*e*) read with section 16(1) of Schedule 6,[12] are broad enough to include traditional courts which were established in terms of the Black Administration Act and declared:[13]

> Traditional courts functioning according to indigenous law are not entrenched beyond the reach of legislation. NT 166 does indeed provide for their recognition. Subsection (e) refers to 'any other court established or recognized by an Act of Parliament'. This would cover approximately 1 500 traditional courts recognised in terms of the Black Administration Act 38 of 1927. The qualification 'which may include any court of a status similar to either the High Courts or the Magistrates' Courts' can best be read as permitting the establishment of courts at the same level as these two sets of courts. It does not, as the objectors contended, provide for a closed list. This interpretation is supported by NT 170, which says that '[m]agistrates' courts and all other courts may decide any matter determined by an Act of Parliament'– it does not say magistrates' courts or all other courts of a similar status. More directly, NT sch 6 s 16(1) says that '[e]very court, including courts of traditional leaders . . . continues to function'. In our view, therefore, NT 166 does not preclude the establishment or continuation of traditional courts.[14]

The phrase "continues to function and to exercise jurisdiction in terms of legislation applicable to it" clearly indicates that those traditional courts established in terms of legislation, thus the official ones, are the ones who continue to exist in the new constitutional dispensation. The continued existence of official traditional courts as part and parcel of the legal system of South Africa is thus constitutionally endorsed, but it is evident that their continued existence is subject to legislative interference consistent with constitutional provisions, most notably those contained in the Bill of Rights.

The constitutional status of unofficial traditional courts or court-like structures in rural areas is more problematic. In many rural traditional communities the practice is to take the complaint or claim to the relevant families to resolve. If the matter cannot be resolved on a family level, it is taken to the ward head, sub-ward head or headman (depending on the custom of a particular community) to be disposed of. Only if a resolve on this level is not possible, the matter is taken on appeal to the chief's court (the official traditional court). The lower structures are not officially

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11 1996 (4) SA 744 (CC).

12 "Every court, *including courts of traditional leaders*, existing when the new Constitution took effect, continues to function and to exercise jurisdiction in terms of the legislation applicable to it, and anyone holding office as a judicial officer continues to hold office in terms of the legislation applicable to that office, subject to – (a) any amendment or repeal of that legislation; and (b) consistency with the new Constitution." Emphasis added.

13 *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of South Africa*, 1996 1996 (4) SA 744 (CC) para 199. Footnotes omitted.

14 NT refers to the new text of the final Constitution. In *Mhlekwa v Head of the Western Tembuland Regional Authority; Feni v Head of the Western Tembuland Regional Authority* 2000 (9) BCLR 979 (Tk) 999 the court held that this quote is not authority for the view that traditional courts may continue to exist despite their inconsistency with the provisions of the Constitution. They remain subject to the latter.

recognised in terms of legislation and, although the South African Law Commission[15] recommended that, at least, the headman's court be recognised as an official traditional court with provision to appeal from the headman's court to a chief's court, its recommendation was not taken up in the legislative reforms.[16] Nevertheless, a constitutional argument can be made in favour of the continued existence and acceptance of these unofficial structures. Although they are not legally recognised, they form part and parcel of the cultural life of the community which are protected in terms of sections 30 (the right to participate in the cultural life of one's choice) and 31 (the right to enjoy one's culture with other members of the community) of the Constitution.

11.3 Legal framework for traditional courts

The legal framework for traditional courts consists of a patchwork of national and regional legislation, including written and living customary law. National legislation relevant to traditional courts includes the Constitution of the Republic of South Africa, 1996; the Black Administration Act 38 of 1927; the Regulations (for Criminal Appeals) R45 of 1961;[17] and Chief's and Headmen's Civil Courts Rules R2082 of 1967.[18]

Regional legislation includes, among others, the Bophuthatswana Traditional Courts Act 29 of 1979 (Bop);[19] the Chiefs' Courts Act (Tk) 6 of 1983;[20] the Administrative Authorities Act (Ck) 37 of 1984;[21] the KwaNdebele Traditional Hearings of Civil and Criminal Cases by the Lingwenyama, Amakhosi, Amakhosana and Linduna Act 8 of 1984 (KwaNdebele);[22] the KwaZulu Act on the Code of Zulu Law 16 of 1985[23] and the Natal Code of Zulu Law of 1987(KZN);[24] the KwaZulu Amakhosi and Iziphakanyiswa Act 9 of 1990 (KZN); the QwaQwa Administration Authorities Act 6 of 1983 (FS); Transkei Authorities Act 4 of 1965 (Tk); Venda Traditional Leaders Administration Proclamation 29 of 1991; and the Regional Authorities Courts Act 13 of 1982 (Tk).

Most of the regional statutes have been assigned to the various provinces in which the territories they applied are now included and most of them stand to be repealed if and when the Traditional Courts Bill is adopted.

Finally, the customary rules ("living law") of the various communities are also relevant. These rules are in general not widely publicised and it would be difficult if not impossible for an

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15 South African Law Commission *Project 90: Customary law* (2003) 5–6.

16 See discussion at 11.5.

17 GN R45 published in *Extraordinary GG* 6609 of 13 January 1961.

18 GN R2082 published in *Extraordinary GG* 1929 of 29 December 1967.

19 In terms of Proc 111 published in *GG* 15813 of 17 June 1994 (hereafter Proc 111 of 17 June 1914), the administration of this Act has been assigned to the North West Province.

20 In terms of Proc 111 of 17 June 1994, the administration of this Act has been assigned to the Eastern Cape Province.

21 In terms of Proc 111 of 17 June 1994, the administration of this Act has also been assigned to the Eastern Cape Province.

22 The administration of this Act has been assigned to the Mpumalanga Province, but it was repealed by the Mpumalanga General Laws Repeal and Application Act 13 of 1998. Although the act came into operation on 1 August 2005, the list of Acts repealed does not include the KwaNdebele Traditional Hearings of Civil and Criminal Cases by the Lingwenyama, Amakhosi, Amakhosana and Linduna Act 8 of 1984, and it thus seems to still be in operation.

23 In terms of Proclamation 107 of 17 June 1994 in *GG* 15813 of 17 June 1994 the Act has been assigned to the Province of KwaZulu-Natal.

24 Contained in Proclamation R151 of 1987 in *GG* 10966 of 9 October 1987. In terms of R166 of 1994 in *GG* 16049 of 31 October 1994 this code has been assigned to the Province of KwaZulu-Natal. Both Codes stand to be repealed by s 53(1) of the KwaZulu-Natal Traditional Leadership and Governance Act 5 of 2005, but the date of the repeal has not yet been published.

outsider to know what they entail. However, many traditional communities are realising the importance of the preservation of one's customs for future generations through documentation thereof, and it is envisaged that more and more written accounts of those rules and customs applicable to their traditional justice systems will come to light.

11.3.1 *Official traditional courts*

11.3.1.1 Criminal traditional courts

(a) Enabling law

Africans are subject to the same ordinary criminal courts and are tried in the same way for offences committed by them in those courts.[25] They are, however, also subject to the jurisdiction of traditional courts and may even be tried twice; in the traditional court and the ordinary court, for the same offence.

Section 20 of the Black Administration Act does not refer to a traditional court as a court as such, but confers powers on chiefs, headmen and chiefs' deputies to try certain offences or crimes committed within their geographical areas. They are nevertheless referred to as courts.

(b) Powers of chiefs, headmen and chiefs' deputies to try certain offences

Appointment

Section 20(1) and (4) regulate the appointment of traditional leaders to try certain offences. It provides as follows:

> (1) The Minister may –
>
> (*a*) by writing under his hand confer upon any Black chief or headman jurisdiction to try and to punish any Black who has committed, in the area under the control of the chief or headman concerned –
>
> (i) any offence at common law or under Black law and custom other than an offence referred to in the Third Schedule to this Act; and
>
> (ii) any statutory offence other than an offence referred to in the Third Schedule to this Act, specified by the Minister:
>
> Provided that if any such offence has been committed by two or more persons any of whom is not a Black, or in relation to a person who is not a Black or property belonging to any person who is not a Black other than property, movable or immovable, held in trust for a Black tribe or a community or aggregation of Blacks or a Black, such offence may not be tried by a Black chief or headman;
>
> (*b*) at the request of any chief upon whom jurisdiction has been conferred in terms of paragraph (*a*), by writing under his hand confer upon a deputy of such chief jurisdiction to try and to punish any Black who has committed, in the area under the control of such chief, any offence which may be tried by such chief.
>
> (4) The Minister may at any time revoke the jurisdiction conferred upon a chief, headman or chief's deputy under any provision of this Act before or after the commencement of the Black Administration Amendment Act, 1955.

25 Also see the discussion at 11.4.

Procedure

Section 20(2) describes the procedure to be followed in the traditional courts. It stipulates:

> The procedure at any trial by a chief, headman or chief's deputy under this section, the punishment, the manner of execution of any sentence imposed and subject to the provisions of paragraph (*b*)of subsection (1) of section *nine* of the Black Authorities Act, 1951 (Act 68 of 1951), the appropriation of fines shall, save in so far as the Minister may prescribe otherwise by regulation made under subsection (9), be in accordance with Black law and custom: Provided that in the exercise of the jurisdiction conferred upon him or her under subsection (1) a chief, headman or chief's deputy may not inflict any punishment involving death, mutilation, grievous bodily harm or imprisonment or impose a fine in excess of R100 or two head of large stock or ten head of small stock or impose corporal punishment. . . .

Default

Section 20(5) describes the consequences of failure to comply with the sentence imposed by a traditional leader. It reads:

> (*a*) If a Black chief, headman or chief's deputy fails to recover from a person any fine imposed upon him in terms of subsection (2), or any portion of such fine, he may arrest such person or cause him to be arrested by his messengers, and shall within 48 hours after his arrest bring or cause him to be brought before the magistrates' court which has jurisdiction in the district in which the trial took place.
>
> (*b*) A magistrate before whom any person is brought under paragraph (*a*) may, upon being satisfied that the fine was duly and lawfully imposed and is still unpaid either wholly or in part, order such person to pay the fine or the unpaid portion thereof forthwith and, if such person fails to comply forthwith with such order, sentence him to imprisonment for a period not exceeding three months.
>
> (*c*) The magistrate shall issue in respect of any person sentenced to imprisonment in terms of this subsection a warrant for his detention in a prison.

Appeal

Section 20(6) allows for the appeal against the conviction of a traditional leader, by stipulating:

> Any person who has been convicted by a Black chief, headman or chief's deputy under this section may in the manner and within the period prescribed by regulation made under subsection (9), appeal against his conviction and against any sentence which may have been imposed upon him, to the magistrate's court which has jurisdiction in the district in which the trial in question took place. . . .

Regulations made in terms of section 20(9) were published in 1961 and are known as the Regulations (for Criminal Appeals) R45 of 1961. Section 20 read with the Regulations provides an additional framework within which official criminal traditional courts operate.

(c) Jurisdiction

Section 20(1) deals with the important question of jurisdiction of the criminal traditional courts based on the person, the territory, the type of offence and type of sentence imposed.

***Jurisdiction in respect of person*:** The court has jurisdiction to try and to punish only Africans ("any Black"). Section 35 of the Black Administration Act defines a black person as "any person who is a member of any aboriginal race or tribe in Africa". If, for example, a white person commits an offence in a rural area, the relevant traditional authorities would have no jurisdiction to mediate or try such a case. The limitation of access to a court on the grounds of racial factors could be seen as an infringement of the constitutional guarantee of equal treatment before the law and should be reconsidered.[26]

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26 Constitution, s 9.

***Jurisdiction in respect of territory*:** The court may only hear cases in their areas of jurisdiction, in other words, "in the area under the control of such chief". In addition to this requirement, it is also important that the presiding officer be appointed by the relevant minister to try and to punish offenders within his or her area of jurisdiction. Currently, there is no possibility for a member of the traditional community to "opt out" or demand to be transferred to a Magistrate's court to be tried.

***Jurisdiction in respect of offences*:**[27] The court may try and may punish any offence at common law, customary law or statutory law with the specific exclusion of the following offences: treason; *crimen laesae majestatis*; public violence; sedition; murder; culpable homicide; rape; robbery; assault with intent to do grievous bodily harm; assault with intent to commit murder, rape or robbery; indecent assault; arson; bigamy; *crimen injuria*; abortion; abduction; stock theft; sodomy; bestiality; corruption in terms of the Prevention and Combating of Corrupt Activities Act 12 of 2004; breaking or entering any premises with intent to commit an offence; receiving any stolen property knowing that it has been stolen; fraud; forgery or uttering a forged document knowing it to be forged; illicit possession of or dealing in any precious metals or precious stones; conveyance, possession or supply of habit-forming drugs or intoxicating liquor; coinage; perjury; witchcraft; faction fighting; manstealing; incest; extortion; defeating or obstructing the course of justice; any conspiracy, incitement or attempt to commit any of the mentioned offences.

***Jurisdiction in respect of sentence*:** The court may not inflict any punishment involving death, mutilation, grievous bodily harm or imprisonment or impose a fine in excess of R100 or two head of large stock or ten head of small stock or impose corporal punishment.

The exclusion of certain offences and sentences from the jurisdiction of traditional courts is not always respected by the traditional leaders. For example, the widely publicised case[28] against King Dalindyebo of the Themba community in the Eastern Cape reveals that he, among others, has imposed a fine of R1 200 on one of his subjects who allowed his goats to wander into the king's land. When the offender defaulted on paying the full amount, the king had his wife and children kidnapped and his four rondavels[29] burnt down. In addition, the defaulter was exiled from the community. In another incident, he fined another member of the community six cows for committing the offence of murder. The offender's plea that he was already convicted and sentenced in a Magistrate's Court was ignored and when he refused to pay the fine, his homestead was burnt down. In another case, four boys were assaulted for allegedly committing rape, housebreaking and theft. One of the boys died as a result of the severe beatings.[30] The king received a 15-year sentence for ten crimes that he committed, ranging from arson, culpable homicide and kidnapping, to defeating the ends of justice and assault with the intent to do grievous bodily harm. He has appealed against his sentence and the case against him has not yet reached a final conclusion.

(d) Execution of judgments

Section 20(2) makes provision for the execution of judgments in accordance with the recognised customs and laws of the community. A traditional leader or headman or a deputy who fails to recover a fine from a person convicted by him may arrest the convicted person and have him brought before the magistrate of the district within 48 hours of such arrest.[31] The magistrate may then order such a person to pay the fine imposed by the traditional leader, failing which payment he may sentence him or her to a term of imprisonment for a period not exceeding three months.[32]

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27 Schedule 3 of the Black Administration Act 38 of 1927 contains a list of offences.
28 Evans (2013) *Mail & Guardian*.
29 Traditional round shaped homes made of mud and thatched roofs.
30 For a discussion of the facts of the case, see Weeks (2012) *OUCLJ* 133–136.
31 Section 20(5)(*a*) of the Black Administration Act.
32 Section 20(5)(*b*).

In the latter event, he must issue a warrant for detention of the person in a prison.[33] Hence it will be noted that while the enforcement of judgments and orders continues to be in accordance with the recognised customs and laws of each of the many communities, the actual machinery for such enforcement is borrowed from that applicable in the Magistrates' Courts Act.[34]

11.3.1.2 Civil traditional courts

(a) Enabling law

Section 12 of the Black Administration Act does not create civil courts in the strict sense, but confers the power to settle civil disputes between members of his or her community. They are also nevertheless referred to as courts.

(b) Settlement of civil disputes by Black chiefs, headmen and chiefs' deputies

Appointment

Section 12(1) and (2) regulates the appointment of traditional leaders with authority to settle disputes between Africans. It reads:

> (1) The Minister may —
>
> (*a*) authorize any Black chief or headman recognized or appointed under subsection (7) or (8) of section *two* to hear and determine civil claims arising out of Black law and custom brought before him by Blacks against Blacks resident within his area of jurisdiction;
>
> (*b*) at the request of any chief upon whom jurisdiction has been conferred in terms of paragraph (*a*), authorize a deputy of such chief to hear and determine civil claims arising out of Black law and custom brought before him by Blacks against Blacks resident within such chief's area of jurisdiction:
>
> Provided that a Black chief, headman or chief's deputy shall not under this section or any other law have power to determine any question of nullity, divorce or separation arising out of a marriage.
>
> (2) The Minister may at any time revoke the authority granted to a chief, headman or chief's deputy under subsection (1).

Execution

Section 12(3) regulates the procedure for execution of judgments and stipulates:

> A judgment given by such chief, headman or chief's deputy shall be executed in accordance with the procedure prescribed by regulation under subsection (6).

Appeal

Section 12(4) prescribes the procedure where a party to a civil suit wants to appeal against the judgment of a traditional court. It reads:

> Any party to a suit in which a Black chief, headman or chief's deputy has given judgment may appeal therefrom to any magistrate's court which would have had jurisdiction had the proceedings in the first instance been instituted in a magistrate's court, and if the appellant has noted his appeal in the manner and within the period prescribed by regulation under subsection (6), the execution of the judgment shall be suspended until the appeal has been decided (if it was prosecuted at the time and in the manner so prescribed) or until the expiration of the last-mentioned period if the appeal was not prosecuted within that period, or until the appeal has been withdrawn or has lapsed: Provided that no such appeal shall lie in any case where the claim or the value of the matter in dispute is less than R10, unless the court to which the appellant proposes to appeal, has certified after summary enquiry that the issue involves an important principle of law. . . .

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33 Section 20(5)(*c*) of the Black Administration Act, No. 38 of 1927.
34 32 of 1944.

Regulations

Section 12(6) empowers the Minister to make regulations prescribing the procedure to be followed in the execution of judgments and appeals. Regulations made in terms of section 12(6) were published in 1967 and are known as the Chief's and Headmen's Civil Courts Rules R2082 of 1967.[35] The regulations prescribe the practice and procedure to be followed in the civil traditional court. As of 30 October 2018, they had not been repealed.

(c) Jurisdiction

If a traditional court tries a case without jurisdiction having been conferred on him or her by the relevant Minister, the judgment of the court is void.[36] The minister may, at any time, revoke the authority of a traditional leader to try civil disputes.[37] The minister may also, at the request of a traditional leader, authorise a deputy of that leader to exercise judicial powers for the settlement of disputes of this nature.[38] Section 12(1) of the Black Administration Act deals with the question of jurisdiction of the civil traditional courts based on the person, the territory, the type of claim and type of judgment which may be handed down.

***Jurisdiction in respect of person*:** Similar to the criminal jurisdiction of the court, it may hear and determine civil claims only between Africans ("Blacks"). If, for example, a white person seduces an African girl in a rural area, the relevant traditional authorities would have no jurisdiction to mediate or try such a case.

***Jurisdiction in respect of territory*:** The jurisdiction of traditional courts is strictly territorial, and they may adjudicate upon a matter only if the defendant is resident in its area of jurisdiction.[39] There is no possibility for a member of the traditional community to "opt out" or to demand a transferal to a Magistrate's court to hear the case.

***Jurisdiction in respect of claims*:** Traditional courts may determine disputes involving customary law ("Black law and custom") only.[40] If the matter involves common law claims, action should be instituted in the Magistrate's Court or in the High Court depending on the nature and the value of the claim. The court has no power to determine any question of nullity, divorce or separation arising out of a marriage. Customary marriages must now be dissolved by a competent court, which does not include a traditional leader's court.[41] However, a traditional leader may, in accordance with customary law, mediate in any dispute or matter arising prior to the dissolution of a customary marriage by a court.[42] The object of the aforementioned provision is meant to be the recognition of the role played by traditional leaders in any event. The South African Law Commission refers to this role as follows:[43]

> Although an innovation for common law, this practice [mediation] has always been part of the customary divorce process. People traditionally prefer to settle their domestic disputes within the family and where possible to achieve a reconciliation.

***Jurisdiction in respect of judgment*:** The judgment of the court shall be in accordance with customary law. The question arises as to whether a traditional court may give a punishment for

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35 GN R2082 published in *Extraordinary GG* 1929 of 29 December 1967.
36 *Nkosi v Zwane* 1952 NAC 110 (NE).
37 Section 12(1)(*b*) of the Black Administration Act.
38 Proviso to s 12(1).
39 *Zulu v Mbata*1937 NAC (N&T) 6; *Monete v Setshuba* 1948 NAC (C&O) 22.
40 Black Administration Act, s 12. Note that the section refers to "Black law and custom".
41 Recognition of Customary Marriages Act, s 8. In the past, customary marriages outside KwaZulu-Natal and the former Transkei were dissolved extra-judicially, while traditional leaders, and especially ward heads, also played a mediatory role in family disputes.
42 Recognition of Customary Marriages Act, s 8(5).
43 South African Law Commission *Project 90: Discussion Paper 93* (2000) 132.

contempt of court. Section 8 of the Natal Code of Zulu Law[44] provides that a traditional court in KwaZulu-Natal may impose a fine not exceeding R50 upon any person guilty of contempt of court. Apart from this, any traditional court has inherent jurisdiction to punish for contempt committed in an open court. In *R v Vass*,[45] it was held that the traditional court could punish an offender for contempt of court even if the latter was not resident in the traditional leader's area of jurisdiction.

(d) Execution of judgments

The judgments of the court are binding on the parties and will be given effect by the highest courts of South Africa.[46] The judgment must be executed in accordance with the recognised customs and laws of the community.[47] If the judgment cannot be honoured, the judgment creditor may apply to the clerk of the court for the enforcement of the judgment, in which event the enforcement will be the same as that prescribed for the enforcement of judgments of Magistrates' Courts.[48] The traditional leader must prepare, or cause to be prepared, a written record of the proceedings[49] and register it with the clerk of the Magistrate's Court.[50]

11.3.1.3 Procedure and evidence in civil and criminal traditional courts

(a) General

Since the passing of the Black Administration Act and its regulations, the procedure to be observed in connection with the hearing of both civil and criminal matters in the traditional courts has always been in accordance with the laws and customs of the traditional community in question.

At the level of the unofficial courts, the procedure in connection with the notification of the date of trial and the execution of judgment is still in accordance with the pre-colonial procedure of using *imisilayenkundla*[51] (court messengers). In the official courts,[52] messengers of the traditional council (former tribal authorities) are issued with subpoenas to be given to defendants or accused persons. However, it is impossible to know whether these procedures are still the same without conducting empirical research.

Since early times, traditional courts have not made a clear distinction between civil and criminal matters when hearing cases, but deal with all aspects of a case in the same proceedings by the simple expedient of imposing on the defendant a fine which incorporates the compensation considered to be due to the plaintiff. The only distinction which seems to be limited to the Cape Nguni was in regard to the onus of proof in criminal matters when there were very strong

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44 Proclamation R151 of 1987 and s 8 of the KwaZulu Act on the Code of Zulu Law 16 of 1985.
45 1945 GWLD 34.
46 *Mdumane v Mtshakule* 1948 NAC (C&O) 28 (Bizana).
47 Chief's and Headmen's Civil Courts Rules R2082 of 1967, rule 1(1).
48 Rule 8.
49 Rule 6.
50 Rule 7.
51 *Umsila* literally means a tail. In the Eastern Cape, court messengers used to carry a tiger's tail (*umsilawengwe*) as a badge of authority when they went to inform a defendant about the date of trial. It would seem that what Africans thought to be a tiger was, in fact, a cheetah. See in this connection Mqeke (1982) *Speculum Juris* 50.
52 In South African Law Commission *Project 90: Customary law* (2003) 43, there is a proposal for these courts to be empowered to punish for contempt of court any person who without lawful excuse disobeys an order given by a customary court or by any of its members during a sitting of the court or who wilfully disturbs the peace or order of the proceedings in the court.

grounds of suspicion against the accused.[53] For example, if, during a house-to-house search for a stolen animal, some meat was found concealed within the premises of the accused, the onus would be on him to explain that the meat was not from the missing animal. In the vernacular, it will be said that the accused must *gqithisaumkhondo*, that is, explain the spoor.[54]

(b) Lodgement procedure[55]

The initiation of legal proceedings in civil and criminal matters differs somewhat. In civil matters, as soon as a civil wrong has been committed, the plaintiff, accompanied by his or her kin group, proceeds to the homestead of the wrongdoer to report the matter and open negotiations. This would invariably be the case in seduction and pregnancy matters. A litigant's failure to comply with the recognised customary procedure renders his or her evidence suspect.[56] The conclusion of the negotiation stage is seen as being an equivalent of *litis contestatio* (close of proceedings).[57] If the negotiations do not produce an acceptable outcome, the plaintiff proceeds at once to institute his or her claim in the next level court, usually the ward court, and from there, the court of the headman or that of the responsible senior traditional leader. At the level of the official courts, the procedure would be slightly different, as a traditional leader usually summonses before the court any person who is a defendant in an action or is required to give evidence. The traditional leader can compel the attendance of the defendant and witnesses.

Crimes are regarded as being committed against the traditional leader in his or her capacity as head of the community even if a crime was committed against another member of the community. If a fine is imposed, it should be paid to the traditional leader and he may give a portion of the fine to a person who has been injured by the crime, but is under no obligation to do so.[58] If a crime has been committed, the injured party or any other member of the community may report it to the responsible person who will arrange for the case to be heard in the traditional court. In general, the procedure to obtain the presence of an accused differs from community to community but they are generally summoned in some or other way to appear before the presiding officer of the traditional court. Many courts have regular court messengers, but normally any available man or men can be called upon to summon offenders or witnesses as required by the court.[59]

(c) Trial proceedings in civil and criminal matters

General features of the traditional procedure in both civil and criminal matters in accordance with customary law are as follows:

- The court procedure is court-centred and the court and the members in attendance take a leading role in conducting the trial. The primary aim of the traditional procedure is to obtain reconciliation between the parties, hence the use of arbitration.
- The trial takes place in an open court and is informal. This means that there is less emphasis on the mechanical rules of exclusion. Both parties must be present. The features of the

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53 See Brownlee "Notes by the Gaika Commissioner" GH8/23 19 March 1863. This was a draft of an ordinance to amend and declare the law relating to "natives". These are handwritten notes which are kept at the Government Archives in Cape Town. They are quoted in full by Mqeke (2003) 26. The use of the term "native" is nowadays regarded as offensive.

54 See Kerr (1990) 82. The author states that the phrase "spoor law" came into being because most of the cases in the 19th century concerned stolen stock. In Kerr's own words, even in such cases, however, it is not necessary to find evidence of the "spoor". In the sense of the imprint of a hoof, "other satisfactory evidence, whether of previous presence of an animal or of other goods, will suffice . . . ".

55 For a detailed discussion, see Bekker (1989) 12, 19–22.

56 See *Bilitani v Kwini* 1962 NAC (S) 8.

57 See Mqeke (2003) 116.

58 Schapera (ed) (1959) 208.

59 Schapera (ed) (1959) 213.

traditional court procedure described above are prominent in the proposed Bill.[64] The latter goes further and promotes full participation of all interested parties without discrimination on grounds of race, sex or gender.

- Legal representation is prohibited. A litigant may, however, be assisted by relatives. Again, it would seem that this tradition would be continued in the future if the proposed Traditional Courts Bill becomes law.
- Proceedings are conducted orally in the language most widely spoken in the area of the court's jurisdiction.

The ordinary courts are reluctant to interfere with the customary procedures followed in the traditional courts.[60] It is only when the traditional court has ignored the procedures prescribed by statute that the court proceedings would be set aside.[61] The Chief's and Headmen's Civil Courts Rules, prescribe the procedures to be followed in conducting civil trials. They can be summarised as follows:

- Rule 1 confirms that the procedure in connection with civil trials shall be in accordance with customary law.
- Rule 2 deals with the hearing of the case and the entry of judgment in the absence of parties. Firstly, if the defendant fails to appear at the time and place fixed for the hearing, the court may, upon the request of the plaintiff, deliver judgment in favour of the plaintiff. Secondly, if the plaintiff fails to appear at the time and place fixed for the hearing, the court may, upon the request of the defendant, dismiss the plaintiff's claim. Any party to an action in which default judgment was given may within two months after he or she became aware of the judgment apply to the court to rescind such judgment, and if the court gives such an order, it would be possible to re-open the case.
- Rule 3 makes provision for the situation where it is necessary to adjourn a case. The court may adjourn the hearing under any circumstances which may be required. However, if the court shall unreasonably delay the hearing or refuse to adjudicate the matter, any of the parties may approach the Magistrate's Court to either make a compulsory order for the traditional court to hear the case, or to try the matter in the Magistrate's Court if it would be in the interest of justice to do so.
- Rule 4 prevents a traditional leader from adjudicating a matter in which he or she has a personal interest.
- Rule 5 prohibits legal representation of any of the parties appearing in the traditional court. This prohibition seems to be in conflict with section 35 of the Constitution which confirms that everyone has a right to a fair trial which includes the right to be represented by a legal representative. Nevertheless, there are various arguments in favour of their exclusion from the traditional court procedures, for example: the traditional leaders are not normally legally trained; legal representation is costly and most litigants cannot afford them; the cases tried in the customary courts are generally uncomplicated cases which do not necessitate complicated legal arguments; lawyers are notorious for delaying cases which could have been disposed of very quickly and effectively; and preferred lawyers may not be able to speak the language of the court which would involve the services of an interpreter.[62]
- Rule 6 requires the court to keep written records of the proceedings containing, among others, the following:[63]
  - the name of the plaintiff;

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60 *Makapan v Khope* 1923 AD 551 561.
61 *Masenya v Seleka Tribal Authority* 1981 (1) SA 522 (T).
62 Koyana and Bekker (1998) 11; South African Law Commission *Project 90: Customary law* (2003) 22–23.
63 Chief's and Headmen's Civil Courts Rules R2082 of 1967, rule 6.

- the name of the defendant;
- the particulars of the claim;
- the particulars of the defence; and
- the judgment and the date of judgment.

- Rule 7 obliges the traditional court to deliver or post the original of the written record to the magistrate's office in the area where the defendant resides to be registered.[64] If this is not done within two months, the judgment shall lapse.
- Rule 8 deals with the procedure in connection with the execution of the court's judgment. In terms of this rule, a traditional court may either enforce the judgment in accordance with customary law or the successful party may institute proceedings in the Magistrate's Court.
- Rules 9–12 prescribe the appeal procedure from the traditional court to the Magistrate's Court having jurisdiction.
- Rule 13 deals with the issue of cost which is either in accordance with customary law or in terms of the cost structure provided in rule 13(2).

(d) Evidence

***General*:** Evidence in traditional courts is given orally. These courts may also receive documentary evidence. It is not compulsory to take an oath and, as such, no perjury is punishable. However, it has been observed that in practice, witnesses are required to take an oath in the manner that it is done in ordinary courts.

***Expert evidence*:** In the Eastern Cape,[65] the well-known case of *ityalalamawele* (a case of twins) provides precedent regarding the extent to which the Xhosas made use of opinion evidence in intricate cases on some obscure points of law where no precedent could be found. It seems that one has to be an old sage of repute before one can be regarded as an expert. Again, in disputed paternity cases, opinion evidence relating to the degree of physical resemblance of the child to the alleged father was admitted.

***Real evidence*:** Real evidence, as well as evidence of an eyewitness, is very important. In *Maquta v Sancizi*,[66] it was held that the custom of taking *intlonze* (exhibit in the nature of an article belonging to the wrongdoer from the scene of the crime) was not confined to adultery cases only and the *intlonze* could be taken by force from any wrongdoer. In *Maquta*'s case, the owner took a thief's blanket as *intlonze* when he found the latter stealing from his garden.

***Circumstantial evidence*:** In adultery cases, the court would receive evidence of a "catch".[67] The former Native Appeal Court later modified the rule relating to a "catch" by holding that "proof of a catch" which has no connection with any alleged act of intercourse merely shows intimacy between the wife and the alleged adulterer and as such may be accepted as evidence *aliunde* in support of her testimony.[68]

***Merits of traditional courts procedure and evidence*:** This is a contentious topic, but the advantages and disadvantages may be stated briefly as follows:

***Advantages*:** Generally speaking, the traditional system is admirably suited to the needs of African disputes, particularly family disputes. There is no time limit; therefore, the cases are thoroughly discussed. The procedure is simple and singularly free from those technicalities so dear to South African civil- or criminal-law procedure. The substance of a case rather than the

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64 Rule 6 read with rule 7.
65 See, e.g., Soga (1932) 42.
66 1936 NAC (C&O) 86.
67 "Catch" refers to situations where a defendant was found in sexually compromising circumstances with the plaintiff's wife. Also see examples given in Bekker (1989) 371.
68 *Myataza v Macasa* 1952 NAC (S) 28.

form in which it is presented is important, whereas a litigant under the common-law system may lose a perfectly good case by adopting the wrong procedure. The fact that verdicts are usually unanimous and conciliatory is gratifying to the community. It makes for order and peace.

***Disadvantages*:** In criminal cases, and to a lesser extent in civil cases, too much is attributed to supernatural elements such as witchcraft and "smelling out", for example a woman who has difficulty in giving birth may be believed to have committed adultery. The admissibility of hearsay evidence can decidedly cause a miscarriage of justice. Furthermore, traditional procedure causes much time to be wasted on trivialities. The fact that witnesses often speak out of turn results in the facts becoming distorted and confused. These disadvantages must not be overemphasised as they seldom give rise to serious wrongs.

11.3.1.4 Regional authority courts

Regional authority courts were special courts established for the nine regional authorities of the former Transkei.[69] The nine regional authorities included the Quakeni, Nyandeni, Tembuland, Western Tembuland, Gcaleka, Fingoland, Emboland, Maluti and the Umzimkulu regions. There was one regional authority court for each of the nine regions.

In terms of the Regional Authority Courts Act the regional authority courts had concurrent jurisdiction with Magistrates' Courts in civil and criminal cases within its regional authority area and enjoyed the same powers and functions as that of the Magistrate's Court. Each court was presided over by the head of the regional authority and in his or her absence someone else may be appointed to exercise judicial powers during this time.[70]

The Regional Authority Courts no longer exist. Shortly after the judgment of *Mhlekwa v Head of Western-Tambuland Regional Authority*; *Feni v Head of Western Tambuland Regional Authority*[71] the Minister of Justice and Constitutional Development, in whose portfolio all courts at that time fell, directed that the courts be discontinued. Moreover, in the post-1994 constitutional dispensation the regional authorities fell by the wayside. The Transkei Authorities Act[72] that brought the regional authorities into being was repealed in terms of Schedule 2 of the Traditional Leadership and Governance Act (Eastern Cape).[73]

The constitutionality of these courts was attacked in two cases; *Bangindawo v Head of the Regional Authority*[74] and *Mhlekwa v Head of the Western Tembuland Regional Authority; Feni v Head of the Western Tembuland Regional Authority*.[75] The judgments did not touch upon "ordinary" traditional courts, but the judgments are relevant for a number of reasons.

(a) ***The independence of the presiding officers*:**[76] The applicants contended that the presiding officers of the regional authority courts lacked independence because they fulfilled judicial, legislative and executive functions as traditional leaders in terms the Transkei Authorities Act.[77] The court did not agree that a lack of separation of powers or the fact that presiding

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69 In terms of s 2 of the Regional Authority Courts Act 13 of 1982 (Tk). Section 2(1) provided as follows: "From the date of commencement of this Act there shall be established in every region a court to be known as the Regional Authority Court, which shall have jurisdiction in the area for which a regional authority has been established." Also see the discussion by Okpaluba (2003) *Journal for Juridical Science* 138–141.

70 Regional Authority Courts Act, s 2(2).

71 2000 (9) BCLR 979 (Tk).

72 4 of 1965.

73 4 of 2005.

74 1998 (3) BCLR 314 (Tk).

75 2000 (9) BCLR 979 (Tk).

76 *Mhlekwa v Head of the Western Tembuland Regional Authority; Feni v Head of the Western Tembuland Regional Authority* 2000 (9) BCLR 979 (Tk) 1019–1020.

77 4 of 1965.

officers did not have legal qualifications influenced the independence of the traditional authority courts. However, the court did come to the conclusion that the appointment of presiding officers in the regional authority courts infringed upon section 35(3)(*c*)[78] of the Constitution to the extent that it did not reflect the constitutional value of independence as contemplated in section 165(2)[79] of the Constitution.[80]

(b) ***The right to a fair trial*:** The court found section 7 of the Regional Authority Court Act, which prevented legal representation, to be inconsistent with section 35(3)(*f*) and (*g*), and thus unconstitutional.[81]

(c) ***Unequal justice*:**[82] The court found that the differentiation in the treatment of accused persons within similar circumstances amounted to unfair discrimination; the differentiation was the result of the absence in the Regional Authority Courts Act of any provision determining when and in what circumstances an accused person was to be tried by a regional authority court rather than a Magistrate's Court. The fact that a complainant chose the forum, in which an accused should be tried, boils down to an unequal treatment for which there was no justification in terms of section 16 of the Constitution. The court found this to be unconstitutional.

It is important to note that the court limited its findings to the constitutionality of certain provisions of the Regional Authority Courts Act in so far as it relates to criminal proceedings and not to civil proceedings.

11.3.2 *Informal dispute-settlement forums*

11.3.2.1 Courts of ward heads

In terms of sections 12 and 20 of the Black Administration Act, criminal and civil jurisdiction may be conferred only on traditional leaders (including headmen) where there are no traditional leaders. The courts of ward heads within a community are therefore not officially recognised. In rural (community) areas, they are courts of first instance. Unfortunately, no figures are available,[83] but a large number of cases are heard in these courts – more than in the official courts of traditional leaders (including headmen). The ward heads owe their position to the fact that every communal area is divided into wards under the control of a local ward head. The ward head is formally appointed by the traditional leader or merely recognised because the position is invariably hereditary.[84]

Among the Tswana, the ward head is assisted by the *lekgotla* (an informal group of advisors, consisting of his senior relatives and heads of other family groups in the ward). The ward head is entrusted with the administration of justice in his area of jurisdiction. In practice, he presides over a court, but is always assisted by members of the *lekgotla*. He must refer more serious cases to the traditional leader's court. In civil matters, a party that is not satisfied with the decision of the ward court may take the matter on appeal to the traditional leader's court.

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78 This provision stipulates: "Every accused person has a right to a fair trial, which includes the right to a public trial before an ordinary court".

79 This provision stipulates: "The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour of prejudice".

80 *Mhlekwa v Head of the Western Tembuland Regional Authority: Feni v Head of the Western Tembuland Regional Authority* 2000 (9) BCLR 979 (Tk) 1011–1018.

81 Both provisions entrench the right of an accused to be represented by a legal practitioner of his or her own choice or at state expense in appropriate circumstances.

82 *Mhlekwa v Head of the Western Tembuland Regional Authority; Feni v Head of the Western Tembuland Regional Authority* 2000 (9) BCLR 979 (Tk) 1020–1022.

83 It is estimated that 12 000 of these courts are operating in the areas of traditional authorities.

84 Schapera "Political institutions" in Schapera (ed) (1959) 185.

The ward head usually hears cases involving disputes between ward members only. He has neither criminal jurisdiction, nor powers to levy a fine or impose corporal or other forms of punishment, apart from a fine for contempt of his court. All criminal cases will, however, be investigated by the ward head and his council before being referred to the traditional leader's court.

The jurisdiction of the ward head is limited to the persons living within his ward. Where a dispute arises between members of different wards, it is customary for such a case to be heard by the ward head of the defendant.

11.3.2.2 *Makgotla* ("community courts")[85]

To understand this topic, one must know that over the years, townships – some formal, some informal – sprang up on the periphery of former white towns and cities. The people were in dire need of having domestic disputes settled and of combating crime. The official courts did not meet their needs. It was, and still is, laborious and expensive to institute action in the official courts, and police protection became increasingly inadequate. The communities responded by creating informal courts, called *makgotla*.[86] The term "community court" is currently used when referring to these structures. They apply a mixture of indigenous customary, common and self-made law.

These "courts" are still in existence. They are unfortunately not well-documented. On the one hand, they are notoriously unstructured and given to arbitrary, sometimes criminal, shenanigans. On the other hand, they resemble the courts of traditional leaders. The procedure is informal. Their aim is to reconcile the parties with each other and with the community at large.

They do not distinguish terminologically between civil and criminal law. A young man who has raped or seduced a woman may, for example, be ordered to be whipped and to pay compensation to the woman's father. Corporal punishment is indeed their main sanction. It amounted to assault. It is difficult to evaluate these courts. They do seem to meet a need, but they are so unstructured and undisciplined that it is difficult to justify their existence. Yet there is a strong support from various quarters for their recognition. The South African Law Commission, among others, recommended that they be recognised and supported by law.[87]

11.3.2.3 People's courts[88]

Another system, the so-called people's courts, sprang up around 1985. Whereas the *makgotla* purported to be an extension of the official courts and police, the people's courts were set up as alternative structures. They were politically motivated – constituting a type of alternative political structure in the townships.

Whereas the *makgotla* did not distinguish between civil and criminal matters, the people's courts also brought politics into the game. They organised protest marches, detained and punished opponents and virtually "whipped in" people to toe the line. They attempted to perform government functions at the level of wards in townships.

The latest information is that even in post-apartheid South Africa, the people's courts continue to operate, although not linked to any political movement. The *makgotla* seem to play second fiddle in the orchestra. There have been calls to recognise and structure these courts in the name

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85 See generally Ndaki "What is to be said for *makgotla*?" in Sanders (ed) (1981) 185–200; South African Law Commission *Project 94: Discussion Paper 87* (1999) 35; and Nel (2001) *CILSA* 87–108.

86 This word is derived from the Sotho word (*le)kgotla* which has various meanings. It may mean "meeting", "court", "the place of meeting", or "court session". It may also refer to the people at such meetings and the court advisers.

87 South African Law Commission *Project 94: Discussion Paper 87* (1999) iv.

88 See Van Niekerk "People's courts and people's justice in South Africa – new developments justice" in Scharf and Nina (eds) (2001) 39; Van Niekerk (1994) *De Jure* 28–29.

of community courts. This seems to be a good idea as it is quite unlikely that under present circumstances the formal justice system will ever satisfy the needs of millions of people inhabiting vast sprawling informal townships all over the country.

11.4 The application of customary law in ordinary courts of South Africa

11.4.1 *Introduction*

A logical way of describing legal pluralism as it manifests itself in the South African legal system is to deal with the courts that may apply it. The point of departure is section 211(3) of the Constitution which provides that:

> The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

The question of the constitutionality of indigenous law, thus its application subject to the Constitution, is dealt with in chapters 2 and 3. The phrase "any legislation that specifically deals with customary law" primarily refers to a variety of laws dealing with customary law, such as the Recognition of Customary Marriages Act.

There is thus a constitutional mandate on ordinary courts to apply customary law when it is applicable. The applicability question has been dealt with in chapters 2 and 3 and the discussion that follows deals only briefly with the question of application in mainstream courts.

11.4.2 *Small Claims Courts*

The Hoexter Commission[89] recommended that small claims courts be established to relieve the pressure on the Magistrates' Courts. They are meant to obviate the high cost of lawyers; delays in bringing cases before the courts; the psychological barriers many litigants experience when appearing in formal tribunals; and barriers caused by poverty, ignorance and feelings of alienation. The Commission recommended that small claims courts should operate in an informal manner, that they should attempt to reconcile the litigating parties and that the presiding officials should play a more active inquisitorial role. These are also the characteristics of traditional authority courts.

These courts were established by the Small Claims Courts Act.[90] Their jurisdiction is restricted to the hearing of small claims not exceeding an amount determined by the Minister of Justice and Constitutional Development from time to time.[91] Certain matters are specifically excluded from their jurisdiction:[92] the dissolution of customary-law marriages, actions for damages for seduction and breach of promise to marry. All such claims must be heard in Magistrates' Courts, with the consequent disadvantages of higher costs and more formalities.

Advocates, attorneys or magistrates act as commissioners presiding over these courts.[93] Except in the case of minors or other persons lacking *locus standi*, legal representation is not permitted.[94] The general rules of evidence are not applicable.[95] Questioning of witnesses may be on an inquisitorial basis.[96] In terms of the inquisitorial procedure, the court takes an active part in the proceedings before the court. This is similar to the indigenous court procedure.

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89 Commission of enquiry into the structure and functioning of the courts (1983).
90 61 of 1984.
91 Section 15.
92 Section 16.
93 Section 9.
94 Section 7(2).
95 Section 26(1).
96 Section 26(3).

In view of the fact that any court may take judicial notice of customary law,[97] small courts would be entitled to adjudicate in disputes arising from customary law.

11.4.3 *Magistrates' Courts*

As court of first instance

As court of first instance, a magistrate may, within the limits of his or her jurisdiction, hear any civil dispute arising from customary law. The application of customary law in a Magistrate's Court was, however, regulated by section 1 of the Law of Evidence Amendment Act.[98] This provision has not been repealed yet and regulates the application of customary law as follows:

- any court may take judicial notice of customary law insofar as it can be ascertained readily and with sufficient certainty;
- the relevant rule of customary law must, however, not be opposed to the principles of public policy and natural justice;
- the custom of *lobolo* or *bogadi* or any similar custom may not be declared repugnant to the principles of public policy and natural justice;
- any party may adduce evidence of the substance of a rule of customary law which is in issue at the proceedings concerned;
- where the parties do not belong to the same community and have not agreed on the system of law to be applied, the court must apply the law in operation at the place where the defendant resides, his/her place of business or where he/she is employed; and
- where two or more systems of law are in operation in an area outside a community area, the court must apply the law of the community to which the defendant or respondent belongs.

This provision is in fact now redundant because in terms of section 211(3) of the Constitution:

- the courts must apply customary law:
- when that law is applicable;
- subject to the Constitution; and
- subject to any law that specifically deals with customary law.

The fact that Magistrates' Courts are thus granted jurisdiction to apply customary law does not mean that the ordinary limitations or their jurisdiction do not apply. They are so-called "creatures of statute". They can only exercise jurisdiction specifically conferred on them. They may therefore not make custody awards in accordance with customary law because jurisdiction in custody disputes has not been conferred on them.[99] Custody disputes must be heard in the High Court. Similarly, if the amount of a claim exceeds the magistrate's jurisdiction, the claim must be prosecuted in the High Court.

As court of appeal in civil matters of traditional courts

Any party to a suit in which a traditional leader has given judgment may appeal to the Magistrates' Court which would have had jurisdiction, had the proceedings in the first instance been instituted in the latter court.

Section 12(4) of the Act which deals with this matter goes on to provide that no appeal shall lie where the value of the claim or the subject matter in dispute before the traditional leader is less than R10, unless the magistrate has, after summary inquiry, certified that an important principle of law is involved. This limitation was instituted to prevent frivolous litigation. On the

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97 Section 1 of the Law of Evidence Amendment Act 45 of 1988.
98 45 of 1988.
99 *Sati v Kitsile* 1998 (3) SA 602 (EC).

one hand, the amount of R10 is, in terms of the present value of money, ridiculously low. On the other hand, limitation by any amount is out of sync with the nature and purpose of courts of traditional leaders. Their aim is more often than not to reconcile conflicting parties – to settle disputes. The value of the claim is not the predominant factor.

The Magistrate's Court may confirm, alter or set aside the judgment after hearing such evidence as may be tendered by the parties to the dispute, or as may be deemed desirable by the court. A confirmation, alteration, or setting aside of a judgment is deemed to be a judgment of the Magistrate's Court for the purposes of execution of the judgment. The traditional leader must furnish his reasons for judgment either in person or by deputy. The traditional leader's reason becomes part of the record. If the traditional leader fails to furnish reasons the magistrate may order him to do so and may, in his discretion, dispense with reasons.[100]

In *Zwane v Myeni*,[101] it was held that on appeal the court considers a specific claim in the lower court, a judgment based on that claim, the traditional leader's reason for the judgment, and the evidence recorded *de novo* by the court of appeal. A fresh judgment must be given on the abovementioned. The court cannot change the cause of action, but supplies what is lacking in the lower court – namely by recording of the evidence.

As court of appeal in criminal matters of traditional courts

Section 20(6) of the Act provides that any person who has been convicted by a traditional leader may appeal against the conviction or sentence to the court of the magistrate in whose area the trial had taken place.[102]

In hearing the appeal, the magistrate must hear and record such available evidence as may be relevant to the question at hand. He may thereupon confirm, set aside or vary the conviction and sentence, or else give such judgment as he thinks the traditional leader should have given in the first instance.

Procedure on appeal against traditional court orders or convictions

The rules provide that any person who wishes to appeal (known as appellant) must, within 30 days from the date of pronouncement of the judgment, in person give notice of appeal to the traditional leader who delivered the judgment, to the respondent or complainant and to the clerk of the Magistrate's Court.[103]

The appeal must be conducted and tried as if it were a criminal trial *de novo*, except that the appellant is not called upon to plead to the charge. In giving judgment, the court does not convict or acquit the appellant. It either confirms or quashes or varies the conviction and sentence, as it may think just. If the appellant fails to appear, the court may either postpone the hearing or dismiss the appeal.

11.4.4 *Family Courts*

In terms of the Administration Amendment Act[104] (amending the Black Administration Act), provision was made for the establishment of divorce courts for civil marriages contracted by Africans, by means of proclamation by the President. They obviously did not apply indigenous law. It was held that they may not even adjudicate on the disposal of *lobolo* on dissolution of a civil marriage because it was not a question arising from an action for divorce.[105]

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100 Regulations 10(1)(*d*) and 11 of GN R2082 of 1967.
101 1937 NAC (N&T) 73.
102 Criminal Procedure Act 51 of 1977, s 309A.
103 Regulation 2 of the Regulations for Criminal Appeals GN 45 of 1961.
104 9 of 1929.
105 *Mtiyane v Mtiyane* 1952 NAC (NE) 229.

The Magistrates' Courts Act[106] has since been amended by the Magistrates' Courts Amendment Act[107] to enable the Minister of Justice to establish family divisions of the civil court[108] and to establish a family court for a family division.

Again, they would not *ipso facto* apply customary law. They do, however, have jurisdiction in suits for a decree of divorce in a customary marriage.[109] As the marriages concerned are "marriages concluded in accordance with customary law", the courts would, subject to the provisions of the Act, have to apply customary law where appropriate.[110] Issues such as the following will from time to time have to be resolved:

(a) the very existence of a customary marriage. Although certain requirements are laid down in section 3 of the Act, "the marriage must be negotiated and entered into or celebrated in accordance with customary law";

(b) in dividing assets, a distinction will have to be drawn between family property and house property;

(c) in awarding custody of children, their place in an extended family may have to be taken into account. In communities of European origin, the notion prevails that children must be with both or one of their biological parents. On the contrary, in African communities:

> [parent-child] relationships are characterised by the 'movement' of children within or without a kinship group to be 'placed', temporarily or permanently, with someone other than the biological parent. Sometimes such movement entails a physical change of residence, often it is notional, as in the case of child's ritual attachment to a god-parent or 'allocation' to a different branch of the family. These movements are widespread and institutionalised in many societies and the parent-child relationships they create can aptly be described as social parenthood.[111]

(d) in traditional communities, the best interest of a child refers also to ancestral bondage.[112]

11.4.5 *High Courts*

The High Court has inherent jurisdiction to try any civil or criminal matter. In the application of customary law, it is also limited by section 211(3) of the Constitution.

11.4.6 *Constitutional Court*

It is hardly necessary to say that the Constitutional Court is entitled to apply customary law. It will, as time goes by, no doubt play an important role in deciding what aspects of customary law are unconstitutional.

In cases arising from the Recognition of Customary Marriages Act it will have to apply customary law. If in a divorce case the father of the bride is cited and an appropriate collateral claim for the return of *lobolo* is instituted, the High Court would naturally have jurisdiction.

11.5 Legal reform

In 1996, the South African Law Commission established a committee to perform a project (Project 90) entitled "The harmonisation of the common and customary law". In 1997 traditional courts were also placed on the agenda of the commission and a discussion paper dealing with the

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106 32 of 1944.
107 120 of 1993.
108 Section 2(*a*).
109 Section 8 read with the definition of "court" in s 1(*i*) of the Recognition of Customary Marriages Act.
110 Section 3(1)(*b*).
111 Nhlapo "Biological and social parenthood in African perspective: The movement of children in Swazi family law" in Eekelaar and Sarcevic (eds) (1993) 35–36.
112 Vorster (2001) *SA Journal of Ethnology* 53.

main issues was published in 1999.[113] Finally, in 2003, a report was published.[114] The report contained a draft Bill for the regulation of customary courts (renamed traditional courts in the final Bill) which was presented to the Minister for Justice and Constitutional Development in 2002. The draft Bill was never introduced in parliament, and in 2009 the Department of Justice and Constitutional Development issued a policy document titled "Policy Framework on the Traditional Justice System under the Constitution",[115] which culminated in the final Bill. The Bill is currently being debated in parliament and it is envisaged that it will become law in the near future.

Himonga and Manjoo[116] discuss two factors which, according to them, resulted in the "slow birth of a regulatory framework for traditional courts". First, the fact that the reform processes were duplicated for no apparent reason between the South African Law Commission and the Department of Justice and Constitutional Development led to unnecessary delays and secondly, the process of public participation took a considerable amount of time to conclude. Be that as it may, the processes were completed in 2009, but the Bill still has to be transformed into law and there is no indication of when that is going to happen.

As already explained, the Bill replaces the provisions of the Black Administration Act dealing with formal traditional courts. The objects of the Bill, as set out in clause 2, are, first of all, to confirm the values of a traditional justice system (restorative justice and reconciliation) and, secondly, to align traditional courts with the Constitution. Additional objects include the need to create a uniform legislative framework for traditional authority courts and to enhance the "effectiveness, efficiency and integrity of the traditional justice system". In accordance with contemporary legislation and international instruments, the Bill also contains a provision dedicated to "guiding principles" which should apply in the application of the Bill. The overarching theme of the guiding principles is the promotion of African values based on restorative justice and reconciliation but within the framework of constitutional guarantees and freedoms.

Clause 4 of the Bill provides for the designation of traditional leaders as presiding officers of traditional courts for certain areas, and also requires the Director-General of Justice and Constitutional Development to keep a register of all the designated officers. The Director-General also has the power to revoke or suspend their designation under certain circumstances. A new addition to the current situation is the fact that it requires from the designated officers to attend prescribed training programmes and courses. The effect of the attendance requirement is ambiguous. The mere attendance of a programme or course cannot guarantee the acquisition of the necessary skills required from a traditional leader presiding in a traditional court.

Clauses 5 and 6 deal with the civil and criminal jurisdiction of traditional courts respectively. Civil jurisdiction is granted only with regard to disputes arising out of customary law and certain disputes are excluded from the jurisdiction of the court, such as constitutional matters, divorce matters, the custody and guardianship of children, the interpretation of wills, claims above a certain amount which has yet to be determined, and property issues. Criminal jurisdiction is limited to only certain offences committed (as listed in the schedule to the Bill) in the jurisdictional area of the traditional court and limited to certain sanctions and orders in terms of clause 10. The procedure to be followed in the court is in terms of customary law, but the Bill introduces the two principles of natural justice into the procedure, namely *audi alteram partem* (hear both sides) and *nemo iudex in propria causa* (impartiality of the judge).[117]

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113 South African Law Commission *Project 90: Discussion Paper 82* (1999).

114 South African Law Reform Commission *Project 90: Customary law* (2003).

115 The Framework is accessible at *https://www.gov.za/documents/policy-framework-traditional-justice-system-under-constitution*.

116 Himonga and Manjoo (2009) *Malawi Law Journal* 163–171.

117 Bill, clause 9.

Clause 11 prescribed the procedures to be followed if someone fails to comply with the sanction of a traditional court. The sanction of a traditional court has the effect of a civil judgment of a Magistrate's Court and is enforceable by execution in that Magistrate's Court. The Magistrate's Court remains thus the final forum of execution of the orders of the traditional courts.

The possibility of an appeal to a Magistrate's Court is retained in clause 13. This route is available to a convicted offender or an aggrieved party in a civil case. The Magistrate's Court may confirm the order of the traditional court, amend or replace it, or dismiss it. In addition, clause 14 makes provision for review proceedings to a Magistrate's Court on the following grounds: the traditional court acted *ultra vires*; without jurisdiction; with gross irregularities regarding the proceedings; or with personal interest, bias or malice. Weeks[118] is of the opinion that all judgments of the traditional courts should be appealable to the Magistrates' Courts but recommends that dedicated officers be installed to deal with customary law concerns. As with the training of traditional leaders, these officers must receive instruction on how to deal with customary law issues, especially with living customary law. In other words, the integration of ordinary and traditional courts must be based on a mutual understanding of both systems.

The Bill has not received entirely favourable reviews. Although the intention of the Bill is to resolve existing problems with the traditional courts, to bring them in line with the Constitution, and to facilitate the links between them and ordinary courts, some scholars disagree that these objects have been realised. Weeks[127] has at least five concerns regarding the Bill, namely, the consultation-process did not include ordinary people, including women and the youth, in rural areas; the Bill does not recognise lower-level or unofficial traditional courts; the wide powers of the traditional courts pertaining to sanctions increases the scope for abuse, excludes legal representation; people do not have an option to choose whether or not they want to fall under a particular traditional leader's authority, neither do they have the choice to opt out of the jurisdiction of the traditional court; and, finally, the Bill provides only lip service to gender equality and does not afford substantive equality to the female members of a traditional community.

The first bone of contention for Holomisa[119] is the fact that the Bill centralises power in the traditional leaders while traditional justice systems are based on layered authority. Additionally, he is of the opinion that government should leave the traditional courts as they are, to evolve and adapt to changing circumstances in their own time and in their own way. He also does not agree with the accusations of gender discrimination voiced by some. According to him these critics do not understand customary law or the functioning of the courts, and he concludes with a sweeping statement by saying that the critics of the traditional system are not up to date with the changes in customary law, "[t]hey are content with rehashing colonial drivel, which presumes that African culture is inferior to western culture".[120]

Another scholar is particularly critical of the Bill and compares it with pre-constitutional legislation which impaired the dignity of Africans.[121] His arguments echo other criticisms of the Bill's failure to recognise the multi-layered levels of the traditional justice systems, including the important links between these layers. He finds the affirmation of authority on the grounds of jurisdictional boundaries especially problematic and contrary to customary law values, and declares:[122]

> Some of the provisions of the TCB [Bill] will suffocate the dynamism of those communities defined as 'traditional communities', and will impose cultural hegemony at the expense of peaceful coexistence. This may amount to cultural chauvinism.

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118 Weeks (2011) 35 *SA Crime Quarterly* 5–8
119 Holomisa (2011) 35 *SA Crime Quarterly* 18–20.
120 Holomisa (2011) 35 *SA Crime Quarterly* 20.
121 Gasa (2011) 35 *SA Crime Quarterly* 24–25.
122 Gasa (2011) 35 *SA Crime Quarterly* 24–25.

The fact that such communities are not homogeneous, according to him, justifies the inclusion of a clause enabling people to opt out and choose their own forum for justice.[123]

Another author defends the institution of traditional courts and argues that the youth in South Africa should be made aware of the fact that traditional courts have been around for a long time and that they should accept the fact that they are constitutionally recognised.[124]

11.6 Conclusion

Despite suffering from the making of such legislative inroads, traditional justice systems have proven to be surprisingly resilient against Western influences. Nevertheless, the ties between the ordinary and the traditional judicial systems are unmistakably there, albeit on the lower level of Magistrates' Courts. Although empirical research needs to be done to determine the true position of traditional courts in rural areas, there seems to be a wide gap between law and practice.[125]

Traditional leaders are unwittingly therapeutic agents – therapeutic jurisprudence is a concept developed in American literature.[126] They attempt, at least theoretically, to foster therapeutic outcomes for the transgressors who come before them – and strive towards restoring the well-being of the community. The Traditional Courts Bill strives to infuse values such as *ubuntu* with contemporary ideas of restorative justice and therapeutic jurisprudence, though it does not refer to the latter explicitly. These concepts differ in name, but they have one thing in common; they call for a more holistic approach that promotes the well-being of all individuals and communities touched by injustice.[127] However, after decades of confusion in relation to the traditional justice system, one would have hoped that the Bill would finally have brought clarity and the approval of all. Judged from the divergent opinions of a number of African scholars intimately familiar with customary law and traditional courts, it appears as if the achievement of clarity and approval remains a forlorn ideal.

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123 Gasa (2011) 35 *SA Crime Quarterly* 25.

124 Bogopa 2007 *Acta Criminologica* 153.

125 The discord between theory and practice becomes apparent in the studies done by anthropologists. See Van der Waal (2004) *Anthropology Southern Africa* 111–121.

126 For a discussion of the concept, see Rautenbach (2005) *SAJHR* 323–335.

127 Rautenbach (2015) 275–304 explores the idea that there are links between *ubuntu*, therapeutic jurisprudence and restorative justice in a scholarly article published in 2015.

Part 3

Personal, Religious and Family Law Systems in South Africa (Hindu, Jewish and Muslim Personal Law)

12

Hindu Personal Law

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12.1 Introduction

Hindu law is based on Hinduism, the oldest and most varied of all the great religions of the world.[1] Despite being an ancient legal system, Hindu law has survived over the years and has remained one of the major legal systems of the world.[2]

Hindu law is holistic in nature. Like customary law, it can be classed as a culture-specific form of law. Its richness of detail is based on the inter-linking elements of human life. With such inter-linking of religion, social and moral rules, ethics, justice and the principles of law, Hindu law can favourably be compared to some of the oldest systems of law known to the world, such as Roman and Egyptian law.

Like any other legal system in which law subtly and constantly develops and changes with the changes in society, Hindu law is not precisely what it had been in the past.

In the discussion that follows, the reference to Hindu law and its application refers mainly to its application in India, where approximately 83% of the population follow Hindu law.[3] Hindu law applies to Hindus in some matters only. Questions regarding succession, marriage and religious usages and institutions are decided according to classic Hindu law except insofar such law has been altered by legislation.[4] The altering of classic Hindu law by means of legislation probably also leads to the phenomenon where one finds "living" and "official" versions of Hindu law in India.[5] This chapter focuses mainly on Hindu family law and succession.[6]

Who is a Hindu?

Prior to codification in India, a large number of persons qualified as Hindus, but nowadays mainly three categories exist, namely a Hindu by birth, a Hindu by conversion, and anyone who is not a Muslim, Christian, Parsi or Jew and who is not governed by any other law.[7] To date the question "who is a Hindu" has not come to the fore in South African courts and it is generally a matter of self-identification.

The Hindu worldview is based on the Hindu concept of God. The *Rig Veda* speaks of one God, which is omnipresent, omnipotent and omniscient. This God permeates nature in its entirety. God may also be worshipped through the media of many forms which may be designated as *devas* (gods), such as *Varuna* (the god of the waters) or *Indra* (the god of the atmosphere). The *Rig Veda* states that God is one, but wise people see Him in many forms. This accounts for the pluralism in the Hindu concept of God. As a sequel to this, the omnipresent God is present in all beings; therefore, all life is sacred. The *Bhagavad Gita* states:

> Sages see with an equal eye, a learned and humble Brahmin, cow, and elephant or even a dog or an outcaste.[8]

In Hinduism, the four purposes or objectives of life are *Dharma*, *Artha*, *Karma* and *Moksha*. The root of the word *Dharma* is *dhar*, which means to maintain, to keep, to preserve, and to hold. In this context, law is a branch of *Dharma*, which includes the duties and rules of conduct enjoined

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1 Gandhi (2008) 1.
2 Menski (2008) 3.
3 This would be around 800 million people.
4 Desai (2010) 92.
5 See ch 2 where the phenomenon of "living" and "official" South African customary law is discussed.
6 Other aspects of Hindu law, such as the law of persons and the position of children were dealt with in the previous edition in ch 14.
7 Jhabvala (1999) 12–13; Desai (2010) 94–98. Also see s 2 of the Hindu Marriage Act 25 of 1955; Nagpal (2008) 1–16.
8 Bhagavad Gita ch 5 verse 18. Commenting on this verse, Radhakrishnan (1989) 181 states: "The Eternal is the same in all, in animals, as in men, in learned Brahmins as in despised outcasts, the light of Brahman dwells in all bodies and is not affected by the differences in the bodies it illumines".

by God on the Hindu community to guide all Hindus towards the ultimate goal, namely salvation. It is a comprehensive concept that refers to acceptable conduct under various circumstances and incorporates, for example, morality, truth, non-violence, justice, love and religious duties.

Artha refers to the acquisition of wealth and material possessions by legitimate means. These acquisitions are to be made in accordance with the broad principles of *Dharma*. Wealth should not be obtained by, for example, deception, pretence, robbery, injustice and falsehood. Wealth should also not be hoarded.

The third objective, *Karma*, relates to the totality of one's physical pleasures and desires. These desires should be satisfied during the stage of life called *Grihastha Ashram* (householders).

Moksha means liberation or salvation. Disease, old age and death are the causes of physical unhappiness. Jealousy and attachment are the sources of mental unhappiness. Injustice and tyranny are social ills. The release from the above is the fourth objective of life. It refers to the release of all kinds of suffering. When a person transcends the cycle of life and death, he or she attains salvation (*moksha*).[9]

Karma and reincarnation: The concept of *Karma* (actions or deeds) is significant in Hinduism.[10] Karma entails the law of cause and effect; as you sow so shall you reap. In the effect, this means what one is now a result of one's past. What one will be in the future is the result of one's past but modified in the present. The Hindu law of *Karma* is not fatalistic. Each human being has control over his or her destiny. Evil deeds will reap pain and misery and conversely good deeds will reap happiness and contentment.

This law found the basis of motivating people to do good and to abstain from evil. It is therefore the basis of morality.

According to the *Vedas*, a human being's soul is immortal. However, the body of the soul is mortal. Upon death, the soul enters another body and hence the soul is reborn. With reference to the soul, the *Bhagvad Gita* declares: "As a man casts out worn out garments, and takes others that are new, even so, the embodied one, casts off worn out bodies and passes onto others anew".[11]

Here the embodied one is the soul. In this way, the cycle of birth and death continues until, of course, a person attains salvation (*moksha*); that is when he is liberated by transcending both life and death. The form in which the soul is reborn depends on one's *Karma*, which could be either good or bad.

Hindus perform various religious ceremonies, hence the worship of specific deities. Mention is made of three popular deities, namely *Laksmi* (the goddess of wealth and prosperity), *Ganesha* (the remover of all obstacles) and *Saraswathi* (the goddess of knowledge and learning). The various deities represent one omnipresent God.

12.2 Sources of Hindu law

12.2.1 *Introduction*

Hindu law is one of the oldest personal-law systems in the world and originated in India. According to Hindu literature, its law is approximately 6 000 years old. The oldest, and most important, sources of Hindu law are the *Vedas*. They are known as the divine sources and thus primary in nature and known as the *Sruti* (that which have been heard). All other scriptures or sources are secondary in nature and are known as *Smritis* (what is recollected and remembered).[12]

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9 See further Prabhavananda (1979) 62.
10 Sen (1984) 1–3.
11 Ch 2 verse 22.
12 Desai (2010) 4–46, 99–108; Kesari and Kesari (1998) 12–24; Jhabvala (1999) 2–9; Mofokeng (2009) 16–17; Prabhavananda (1979) 25–30.

12.2.2 Vedas (Srutis*) – the primary sources*

The *Vedas* stems from the Vedic period (approximately 4000–1000 BC). They are divine in their origin and make a claim that they are even more divine in character that other sources such as the Koran and the Bible which owe their authority to delivery of the sacred message through a messenger from God. This means that Vedic knowledge existed even before the creation of mankind and the authority of the *Vedas* does not depend upon anything external.[13] They are the oldest and most important scriptures and are regarded as the source and bedrock of Hindu civilisation. The *Vedas* teach the knowledge of God and lay down work as a means to that knowledge. Work and knowledge are thus the two subjects of the four parts of the *Vedas*, which are in turn subdivided into the knowledge portion (*Samhitas, Brahmanas and Aranyakas*) and the work portion known as the *Upanisads*.

The divisions of the *Vedas* may be summarised as follows in the table below.[14]

Rk-Veda	Work		*Samhitas*
			Brahmanas
			Aranyakas
	Knowledge	—	*Upanisads*
Sama-Ved	Work		*Samhitas*
			Brahmanas
			Aranyakas
	Knowledge	—	*Upanisads*
Yajur-Ved	Work		*Samhitas*
			Brahmanas
			Aranyakas
	Knowledge	—	*Upanisads*
Atharva-Ved	Work		*Samhitas*
			Brahmanas
			Aranyakas
	Knowledge	—	*Upanisads*

***Samhitas*:** The *Samhitas* are collections of mantras (hymns) which sing the praises of one or more of the Hindu gods. It is important to distinguish between Hindu gods (*devas*) and God. God is a supreme being which was not created, whilst the gods, although supernatural, belong among creatures, for example the rain-god, Indra, is sung of as a god clad in golden armour who is very strong and descends to the earth where he lives and eats with his adherents and fights their enemies.[15]

***Brahmanas*:** In contrast to the *Samhitas*, the *Brahmanas* are concerned with everyday practical things and set out the various religious rites and rituals to be performed by Hindus.[16] The *Brahmanas* distinguish between public and domestic rites. Public rites will include the rituals performed for specific events or at different times of the year and domestic rites are performed in the privacy of one's home. These duties must be performed unselfishly and without expecting any reward, because they purify the heart.

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13 Prabhavananda (1979) 30–31.
14 Prabhavananda (1979) 31; Prakash (1985) 57.
15 Prabhavananda (1979) 31.
16 Prabhavananda (1979) 31; Prakash (1985) 57.

***Aranyakas*:**[17] Like the *Brahmanas* they deal with rites and ceremonies, but they accept that not in rites and ceremonies, but in the truths they stand for, lies their real importance. In other words, the outward appearances of rites and rituals are less important than inner realities, thus coming closer to *Upanisads*.

***Upanishads*:** *Upanishads* make up the knowledge portion of the *Vedas*. The word *Upanishad* has a variety of meanings.[18] Firstly, it literally means "sitting near devotedly" and denotes the faithful scholar learning from his spiritual master. Secondly, it also means secret teaching and, thirdly, it means the knowledge of God. Since each *Veda* ends with *Upanishads*, they are also called *Vedanta*, meaning the *anta* or end of the *Vedas*. Although there might have existed much more, only 108 *Upanishads* remain today, and only 16 were recognised by Samskara as authentic and authoritative.[19] It is not known who wrote them or when they were written. In general, the *Upanishads* provide a philosophical explanation of the *Vedas* and are generally in the form of dialogues. They overlap greatly and often do not have a logical beginning and end.

12.2.3 *The secondary sources*

Although the *Vedas* are the primary, ultimate and basic scriptures of Hinduism, they are not the only writings held sacred by the Hindus.[20] In order to make the difficult and abstract readings of the *Vedas* more accessible a large body of writings developed alongside them. In contrast to the Vedas which are regarded as "direct from God" these writings are man-made, and thus only secondary to the *Vedas*. The secondary sources are divided into *Epics*, *Smritis Puramas* and *Tantras*.

***Epics*:** The best known *Epics* are the *Ramayana* (the life of Rama)[21] and the *Mahabharata* (the life of the descendants of King Bharata).[22] Together they provide a narrative of the history of India and Hinduism.

The *Mahabharata* contains the *Bhagvad Gita*. It is the crest jewel of Hindu thought and one of the greatest religious classics of humankind. The *Bhagvad Gita* is a handbook of 700 verses containing spiritual truths, religious codes of conduct and moral values that lead to salvation. It was composed centuries after the *Upanishads* and it discusses the human being's worldly duties. The *Bhagvad Gita* also upholds the supremacy of human duties and the avoidance of evil activities that are contrary to the atonement of salvation. It is nowadays regarded as the Bible of India.[23]

***Smritis*:** *Smritis* literally means "that which was remembered" and is regarded as the most important source of law, although it consists of religious, moral, social and legal duties.[24] The *Smritis* are the interpretations of the *Vedas* by the sages and prescribed the duties (*dharma*) of each good Hindu.[25] They were composed at different periods of time and under different rulers and are recognised as authoritative statements of law. *Smritis* should not be confused with *Epics* although both deal with historical events. *Smritis* are formulated to "fix remembrance, for practical use, the spiritual laws and precepts stated or implied in the *Vedas*",[26] while *Epics* describe historical events in India.

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17 Prabhavananda (1979) 37.
18 Prabhavananda (1979) 39.
19 Prabhavananda (1979) 39–40.
20 Prabhavananda (1979) 39–40.
21 This is regarded as the first poetical work of the author Valmik as the first Indian poet. See Prabhavananda (1979) 81–87.
22 The author of this source was Vyasa. See Prabhavananda *Spiritual heritage of India* (1979) 87–94.
23 Prabhavananda (1979) 79, 95–133.
24 Nagpal (2008) 30–33.
25 Desai (2010) 4; Prabhavananda (1979) 79, 134–135.
26 Prabhavananda (1979) 79.

The rules laid down in the *Smritis* can be divided into three categories.[27] First, is *Achar* which is closely related to morality. Second is *Vyavahar*, which signifies the rules the state applied for the administration of justice and, third is, *Prayashchit*, which provided the penalty for the commission of the wrong.

A well-known *Smriti* scripture is the Code of Manu (called the *Manusmriti*)[28] which contains a recording of civil laws and social obligations which must be followed to attain the highest spiritual development.[29] According to the orthodox view, Manu was the first man. Legend has it that Brahma gave him a code of laws which described the duties and principles required by God to obtain salvation.[30] Some of the criticism raised against Manu is that he supported the caste system. Hence, he supports the superiority and exclusivity of the so-called *Brahman* class. Furthermore, his code discriminated against women, but this should be seen in the historical context of the times.

***Puranas*:** The word "*purana*" literally means ancient and has been applied to certain Hindu scriptures to denote contemporary interpretations of out-dated customs and usages prescribed by the *Vedas*.[31] Eighteen *Puranas* exist; six are devoted to *Visnu*, six to *Brahma* and six to *Vyasa*. *Visnu*, *Brahma* and *Vyasa* are three divinities who are known as the Trinity of the Hindus and embody the one true God of the Hindus. The *Puranas* popularised the abstract teachings of the *Upanisads* by means of stories concerning saints, sages and kings.[32] After the *Bhagvad Gita,* the *Bhagavatam purana* is regarded by Hindus as the most authoritative of their scriptures.[33]

***Tantras*:** The *Tantras* are described as the "scriptures by means of which knowledge is spread in order to save humanity from ignorance".[34] They are also known as *Agamas* (revelations in conformity with the *Vedas*). Their authorship is unknown, although legend has it that Siva uttered them to the Divine Mother, *Sakti*.[35] The original *Tantras* can be divided into three main groups according to the deity chosen, namely: *Visnu*, *Siva* or *Sakti*. Thus there are the *Visnu Agamas*, *Siva Agamas* or *Sakti Agamas.* In turn, each *Tantra* can be broadly divided into three parts. Firstly, there is *sadhana*, which includes spiritual practices and ritualistic forms of worship. Secondly, *siddhi* includes attainment from such practices and, lastly, philosophical teachings.[36]

12.2.4 *Other sources*

Commentaries and digests (*Nibhandas*): Various commentaries and digests followed the *Smritis*.[37] They were written by Hindu lawyers to modify and supplement the *Smritis*.[38] The commentaries are devoted to one particular *Smriti* and are intended to explain its text.[39] On the other hand, the digests purport to embrace the whole of the *Smritis* or a particular branch thereof.[40]

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27 Nagpal (2008) 31–32.
28 Also referred to as the *Corpus Juris* of ancient India. See Desai (2010) 27.
29 Prabhavananda (1979) 134; Misra and Kumar (2003) 19–21.
30 Prabhavananda (1979) 135.
31 Prabhavananda (1979) 135–136; Nagpal (2008) 33.
32 Prabhavananda (1979) 137.
33 Prabhavananda (1979) 80.
34 Prabhavananda (1979) 143.
35 Prabhavananda (1979) 144.
36 Prabhavananda (1979) 144–146.
37 Kesari and Kesari (1996) 16.
38 See Lingat (1973) 107–111; Srinivasan vol I (1969) 54–55.
39 For example, the *Manusmriti* has been subjected to numerous commentaries such as those of Medhatithi, Govindraja and Kulluka. Lingat (1973) 111–115.
40 For example, the most ancient digest is the *Kalpataru*, composed by Laksmidhara. See Lingat (1973) 115–122.

The Commentaries and *Nibhandas* (digests) supplemented rules in the *Smritis*, using their own reasoning and incorporating the relevant customs. Situations where these sources have played a role are, for example, where the *Smritis*:

(a) did not cover every aspect of the law;

(b) did not give sufficient detail on specific aspects of the law; and

(c) contained conflicting opinions.

Custom (*Sadachar*):[41] Custom is one of the most important sources of Hindu law. Where a conflict exists between a custom and the text of the *Smritis*, the authority of the *Vedas* will override the text.[42] Although the *Vedas* and the *Smritis* are said to contain divine revelation, they also incorporate many of the customs of their times. The process of legal development, through the digests and commentaries, further incorporates existing custom. These sources of law therefore gave to custom its formal shape. For a Hindu custom to be regarded as legally valid, it must be remembered that custom is a question of fact which must be proven. The legal requirements of a custom are that it must be:[43]

(a) ancient or long-standing;[44]

(b) continuous;

(c) certain;

(d) uniform;

(c) reasonable;

(d) moral or ethical; and

(f) in accordance with public policy.

Customs are divided into four categories, namely:

- **Community or group customs:** Customs based on issues of security, food, health and climate apply to the members of a specific community or caste.
- **Local or territorial customs:** The local or territorial custom that binds all persons within the specific geographical area.
- **Family customs:** The customs that have binding force on a family. Customs of families have been recognised in Hindu law but, they are outweighed by written law.
- **Institutional customs:** The customs of religious organisations.

Modern sources of law:[45] The modern sources of Hindu law include equity and justice, precedent, legislation and codes. Many of the *Smritikars* (writers of the *Smritis*) wrote about the need to apply *Yukti* (reason or equity) and *Nyaya* (natural equity and justice) in a decision. *Yukti* and *Nyaya* are used not merely to fill the gaps that exist in sacred law, but to overrule sacred law where such law is unreasonable, against good conscience, not contrary to the *Vedas* and in accordance with the traditions of the time.[46]

The main source of Hindu law in India today is legislation. The Indian Constitution has had a great impact on Hindu law, as well as the Hindu Code of 1955 which is a compilation of various statutes concerning various aspects of Hindu law.

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41 Nagpal (2008) 37–43.
42 Jhabvala (1999) 6–9.
43 Nagpal (2008) 37–43.
44 Mitter (1989) 40.
45 Kesari and Kesari (1998) 24–28; Jhabvala (1999) 4–9.
46 Bühler (1886) 31.

As far as precedent is concerned, the principle of *stare decisis* is applied in India and the decisions of the Supreme Court are binding on all lower courts.

The more conservative sectors of the Hindu population believe that legislation cannot be used to adapt Hindu law. On the other hand, the progressive sectors clamoured for reform to certain areas of Hindu law by way of legislation. As a result, Hindu law in India has been codified to a large extent. Today Hindu law in India consists mainly of legislation, for example the Hindu Women's Right to Property Act,[47] Hindu Marriage Act,[48] and the Hindu Succession Act.[49] The present-day Codes in India include the Indian Penal Code; the Criminal Procedure Code; and the Civil Procedure Code.

12.2.5 *Conclusion*

Considering the fact that law is a division of *Dharma*,[50] the stages of legal sources may be divided into two periods, namely:[51]

(a) the *Vedic* period or the pre-Sutra period: During this period the emphasis was on the practice of *dharma*. Although the *Srutis* were regarded as the primary sources, they did not contain much which could be regarded as law.

(b) the *Dharmashastras* (literally meaning the teacher of *Dharma* and includes the *Vedas*, the *Smritis* and the *Puranas*), which can be subdivided into the *Smriti* period, the *Sutra* period, and the post-*Smriti* period.

However, another school of thought is that positive law is man-made and thus distinct from *Dharma*.[52] *Dharma* and law may be intertwined but they are separate and separable; thus all the sources are not sources of law and the other way round. According to this approach, the sources of Hindu law may be listed as follows: (a) legislation; (b) *Dharmashastras* (*Vedas*, the *Smritis* and the *Puranas*); (c) custom (*Sadachar*); (d) commentaries and digests; (e) precedents (case law); and (f) principles of justice, equity and good conscience.

The sources of Hindu law are subject to the Constitution of India as confirmed in the Supreme Court of India case, *N Adithayam v Travancore Devaswom Board*:[53]

> Any custom or usage irrespective of even any proof of their existence in pre-constitutional days cannot be countenanced as a source of law to claim any rights when it is found to violate human rights, dignity, social equality and the specific mandate of the Constitution.

Another important aspect, as pointed out by Nagpal[54] is to remember that the *Dharmashastras* are ancient sources which have not kept up with modern changes. Therefore, the same interpretation and construction as at their time of origin cannot be given to them; they must be interpreted in light of modern changes and demands.

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47 18 of 1937.
48 25 of 1955.
49 30 of 1956.
50 Nagpal (2008) 23.
51 Desai (2010) 8–88.
52 Nagpal (2008) 23.
53 AIR 2002 SC 3536 para 18.
54 Nagpal (2008) 34.

Schools of law[55]

As a result of different approaches to and methods of interpretation of the commentaries and digests, two main schools of law developed. These are the *Mitakshara* and *Dayabhaga* (or *Bengal*) law schools. The former is considered the more conservative and applies in the whole of India, except Bengal and Assam. The *Dayabhaga* is applied in Bengal and Assam. The chief differences between the two schools relate to the law of succession and the joint family system.

The *Mitakshara* School is based on Vijnaneshwara's commentary on the digest called the *Mitakshara* and the *Dayabhaga* School is based on the commentary of Jimutavahana on the digest called the *Dayabhaga*.

The *Mitakshara* school may be subdivided into four schools, namely the *Benares*, *Mithila*, *Maharastha* (or *Bombay/Mumbai*) and *Dravida* (or *Madras*) schools. Except for the *Maharastha* school, the differences between the various *Mitakshara* schools are slight and relate mainly to the laws of succession and adoption. In India, the differences between the two schools were abolished to a great extent by the codification of Hindu law.

12.3 Hindu family law in South Africa

12.3.1 *A brief historical context*

Hinduism has developed gradually over a long period in South Africa. The Hindu community first came to South Africa more than 200 years ago. They have integrated socially into South African life, but the majority of its members maintain their customs and usages. While their initial recruitment had been for labour in the sugar plantations in the Colony of Natal, Indian labour was later distributed to other areas such as the railways, dockyards, coal mines and municipal services. Under former laws in the Colony of Natal, these immigrants and their descendants were referred to as "immigrant Indians".[56] The economic successes of the so-called "immigrant Indians" prompted the entry of so-called "passenger Indians" into South Africa.[57] The social statuses of immigrant Indians and passenger Indians were quite different.

Social structure of Hindu society:[58] According to the *Vedas*, Hindu society is divided into classes, depending on the profession or occupation of persons. A purely logical classification of society according to the division of labour, however, degenerated into the practice of caste, where one's position in life was determined by birth. There was a distinct interval between the revelation of the *Vedas* and the composition of the *Smritis*. It is believed that the fortification of the so-called caste system took place during this period. Historically, Hindu society, particularly in India, was divided into the following four classes or *varnas*, namely:[59] (a) *Brahmins* – priests and religious teachers; (b) *Kshatriyas* – kings, rulers and warriors; (c) *Vaisyas* – merchants, traders and professional persons; and (d) *Sudras* – servants. Another category of persons referred to as "untouchables", carried out the most menial tasks; they were completely outside the caste system. Mahatma Gandhi referred to them as *Harijans* or "children of God". He urged compassion towards them.[60]

continued

55 Desai (2010) 57–61.
56 Section 118 of the Indian Immigration Law, which provided as follows: "The words 'Indian Immigrant' shall mean and include all Indians introduced from India to Natal under the provisions of the Laws regulating such introduction and those descendants of such Indians who may be resident in Natal".
57 They were immigrants who came to South Africa as businessmen and not to work on the sugar plantations.
58 Sen (1984) 7–10.
59 Desai (2010) 91; Lingat (1973) 29–31; Nanda "Hinduism and human rights" in Nanda and Sinha (eds) (1996) 240–241; Reitsma and Kleinpenning (1991) 318–320; Gandhi (2008) 8–9.
60 Vedalankar (1991) 147.

However, discrimination against them is still prevalent in India today, although it is outlawed. It is still perpetuated by many politicians for political purposes to capture votes. Reform movements such as the *Arya Samaj* movement have generally argued strongly against the division of society into castes. One of the purposes of the Hindu Code in India is indeed intended to achieve is the removal of caste as a factor in determining the law applicable to a Hindu family. The caste system has been abolished in India by the Caste Disabilities Removal Act,[61] but it is still practised by Hindus by means of custom.[62]

Immigrant Indians were allowed to register their marriages in the Colony of Natal in terms of the Indian Immigration Law 25 of 1891,[63] and its predecessor[64] but the passenger Indians could not register their marriages in terms of this law. Their marriages were judged in terms of the general laws of that time and because they were potentially polygynous, they were regarded as *contra bonos mores* and thus invalid.

The Indian Immigration Law made provision for the governance of the immigrant Indians within the Colony irrespective of the religious affiliations of the people. It also regulated marriages and divorces between those Indians.[65] For example, it provided for the transformation of a monogamous Indian marriage into a legally recognised marriage by mere registration of the marriage.[66] The Act did not apply to passenger Indians and if, for some or other reason, a marriage between passenger Indians was erroneously registered in terms of this Act, such a marriage was *ab initio* null and void.[67] The unfair result of legislation such as this was that the immigrant Indians could validate their religious marriages by means of registration but any other Indian

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61 21 of 1850.

62 Misra and Kumar (2009) 98.

63 This Act was a territorial act that applied to the Colony of Natal only. It was repealed on 1 January 1964 by the Indians Laws Amendment Act 68 of 1963. The former Act made provision for the recognition of Indian marriages registered during two periods. The first period was (all marriages registered) between 16 June 1874 and 14 June 1891. In this regard, s 2 read as follows: "All marriages between Indians which have been registered by the Protector of Indian Immigrants in Natal between the 16th day of June, 1874, and the 14th day of June, 1890, inclusive, save and except as to any cases where either of the parties to such marriage has since re-married in this Colony, and save also and except as to any cases where any such registration has been cancelled during the said period, shall be and the same are hereby declared valid, so far as this Colony is concerned, and such registration shall hereafter be accepted by all courts, civil or criminal, within this Colony as conclusive evidence of the fact of the marriages to which the same refers". Section 3 dealt with the marriages between Indians arriving in the Colony of Natal between 15 June 1890 and 8 September 1891. These marriages were to be recognised if they were documented in the Emigration Lists for this particular period, except if the parties to such a "listed" marriage had remarried.

64 Its predecessor was the Law to Amend Coolie Law Consolidation Law 12 of 1872. Ss 13 and 14 required from the former Protector of Immigrants to keep a register of all Indian women in the Colony of Natal. It was also necessary to indicate whether such a woman was single, married or a concubine. An immigrant Indian was compelled to inform the Protector of his marriage in order to have the marriage registered. The registration certificate was *prima facie* evidence in any court that the marriage existed.

65 Sections 61–89.

66 Section 68. The Law to Amend Coolie Law Consolidation Law allowed for the registration of polygynous Indian marriages. These marriages continued to be valid in terms of s 65 of the Indian Immigration Law, but s 66 of the same Act disallowed the future registration of polygynous marriages.

67 *Rampatha v Chundervathee* 1957 (4) SA 483 (N). In this case, the plaintiff was an Indian man who married the defendant, an Indian woman, according to the tenets of the Hindu religion in 1946. They had their marriage registered in terms of the Indian Immigration Law. As a result of the defendant's adultery, the applicant applied for a divorce in the Magistrate's Court, the forum for Indian divorces at that time. The defendant objected to the jurisdiction of the Magistrate's Court on the ground that she was not an immigrant Indian. The applicant withdrew his action and instituted the present action in the former Supreme Court of Natal. The court held that the Indian Immigration Law did not apply to a marriage where one of the parties was a descendant of a passenger Indian. As a result, the registration of the marriage between the applicant and the defendant was invalid and the marriage a nullity. A similar conclusion was reached in *Dhanapalan v Panjalay* 1959 (1) SA 622 (N).

could not. The marriages of the others had to be judged in accordance with the general laws of South Africa at the given time. Public opinion dictated that potentially polygynous marriages could not be recognised as valid in South Africa, regardless of where the marriage was concluded and despite the fact that polygyny was recognised by the *lex loci celebrationis*.[68]

As a result of historical migration patterns, the largest concentration of Hindus is in KwaZulu-Natal. There are quite a number of Hindu temples and monasteries in South Africa. The Hindu population in South Africa is less than 2% of the total population of South Africa[69] and this can largely be attributed to the influx of Indian immigrants from the early 1860s.[70]

The Hindu community in South Africa is a conglomerate of all the various schools of Hindu law.[71] It would be difficult to determine to what extent Hinduism is still practiced in South Africa without doing empirical research.[72] Diesel and Maxwell[73] point out that the relative isolation that the apartheid system imposed on the Indian community might have been one of the factors that preserved Hindu custom and usage among Indians.[74]

Despite being followed by many Hindus, Hindu personal law is not a recognised legal system in South Africa.[75] There are, however, a few examples of where the South African courts came to the assistance of litigants who experienced difficulties as a result of the application of South African law. Some of these examples will be discussed in this chapter.[76]

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68 The *locus classicus* in this regard is *Seedat's Executors v The Master* 1917 AD 302. In this case, the deceased married his first wife while domiciled in India according to Muslim rites. He then moved to the former Natal where he obtained a certificate of domicile. While still domiciled in Natal he visited India where he married a second wife, also in accordance with Muslim rites. The court held that a foreign polygynous marriage will not be recognised as valid in South Africa on the grounds of morality and Christian religion. A different viewpoint was taken in the former Federal Supreme Court of Southern Rhodesia in *Estate Mehta v Acting Master, High Court* 1958 (4) SA 252 (FC). In this case, the deceased married his wife (at a time when he was still domiciled in the former Bombay) in 1913 or 1914. At that time, the laws of Bombay allowed polygyny, but the deceased's marriage remained monogamous till his death in the former Southern Rhodesia in 1950. The main question was whether or not his wife could be recognised as his surviving spouse in terms of the Death Duties Act 11 of 1947 that exempted a surviving spouse from succession duty. The court rejected the viewpoint that had been adopted in *Seedat* and found that is not contrary to the policy of the law of Southern Rhodesia to recognise polygynous marriages for certain purposes; in this case, for the purpose of succession. In *Ramalutchmie v Estate Ramiah* (1909) 30 NLR 137 149, although the facts of the case dealt with the unworthiness of a woman (involved in an adulterous relationship with the deceased) to inherit, the court also voiced its dissatisfaction with the polygynous relationships of Indians.

69 Figures provided electronically by Statistics South Africa on 24 February 2000. It is unlikely that this number has increased drastically since then.

70 For 2018, Statistics South Africa estimated the mid-year population at 57,73 million people. See *http://www.statssa.gov.za/?p=11341* (accessed 31 October 2018). The statistics regarding religion were provided by Norah Maake from Statistics South Africa on 9 April 2013.

71 Oosthuizen "Major religions" in Pachai (ed) (1979) 521.

72 For more information, see Oosthuizen "Major religions" in Pachai (ed) (1979) 520–529.

73 Diesel and Maxwell (1993) 82.

74 Other Hindu scholars such as attorney Hassim Seedat (interviewed on 13 August 1996 in Durban) share their viewpoint. Various Hindu temples and organisations are living proof of a religion that is alive and well in South Africa. One of the largest Hindu temples was built in 1885 and is located in Umgeni Road in Durban. Diesel and Maxwell (1993) 19.

75 For a discussion of the practical implications of non-recognition to Hindu women, see Cordier and Rautenbach (2009) *Obiter* 585.

76 In *Ratanee v Maharaj* 1950 (2) SA 538 (D); *M v M* 1991 (4) SA 587 (D) and *Maharaj v Amichund* 1952 (4) SA 594 (N), the parties concluded marriages according to Hindu custom and usage in all three cases the court held that an agreement to register the marriage in terms of the common law is binding upon the parties. It appears from the facts of the cases that the Hindu community lives according to Hindu custom and usage. Also see *Ex parte Singh* 1956 (4) SA 730 (N); *Sanicharee v Madho* 1956 (2) SA 94 (N); *Angelai v Padayachee* 1948 (4) SA 718 (N); *Chetty v Tamil Protective Association* 1951 (3) SA 34 (N); *Ex parte Naidoo* 1951 (3) SA 797 (N); *M v M* 1991 (4) SA 587 (D); *Logee v Minister of Interior* 1951 (2) SA 595 (T); *Singh v Ramparsad* 2007 (3) SA 445 (D); and *Govender v Ragavayah* [2008] JOL 22653 (D).

12.3.2 *Hindu family law in South Africa*

Hindu family law in South Africa is in a position similar to that of both Muslim and Jewish law. All these legal systems are currently unrecognised, and the implication is that marriages concluded in terms of Hindu law are not recognised as valid marriages due to their non-compliance with the Marriage Act[77] and their potentially polygamous nature. In practice, a Hindu couple who wishes to marry concludes two marriages, namely one according to Hindu rites and the other in terms of the common law.[78] Heaton refers to this practice as having "dual validity".[79]

If the parties do not comply with the requirements of the Marriage Act, their marriage is invalid and the wife (or husband) will not be recognised as a legal wife (or husband). The implications of non-recognition are similar to those of unrecognised Muslim marriages.[80]

On the other hand, if they do comply with the requirements of the Marriage Act, the implication is, firstly, that the common law would apply to their marriage, and secondly, that their estates would be distributed in terms of the South African law of intestate succession.[81]

The courts have declared, in some cases, that a Hindu marriage is a putative marriage.[82] However, in order to be declared a putative marriage, it must be proved that one or both of the parties acted in good faith. Although the marriage is void, the children from such a marriage have the same status as children born from a civil marriage.[83] The prohibition of Hindu marriages also applies to Hindu marriages concluded outside South Africa. Due to its polygamous nature, such a marriage is not (yet) recognised as a valid marriage in South Africa.[84]

The non-recognition of unregistered Hindu marriages in South Africa may have dire consequences for Hindu spouses, especially the wife.[85] An example is *Singh v Ramparsad*,[86] where the High Court had to deal with the validity of a Hindu marriage concluded according to the Vedic tradition.

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77 25 of 1961.

78 In *Ratanee v Maharaj* 1950 (2) SA 538 (D) 595C, the husband conceded that registration of a Hindu marriage in South Africa was important to women, since it rendered the children legitimate and provided security for the wife. Also see *Angelai v Padayachee* 1948 (4) SA 718 (N).

79 Heaton (2008) *Stell LR* 453.

80 See 14.2.1 for the position regarding Muslim marriages. Also see, *S v Vengetsamy* 1972 (4) SA 351 (D) where the court found that the validity of a Hindu marriage, which was not registered in terms of the common law, was not required to implement the common law rule that the spouse of an accused is not a compellable witness for the prosecution.

81 That will be the position if they died without a valid will. With regard to Hindu marriages concluded outside South Africa and the Law of Evidence Amendment Act 45 of 1988, the position is similar to that of Muslim marriages.

82 *Ex parte Soobiah: In re Estate Pillay* 1948 (1) SA 873 (N).

83 At 883.

84 For example, in *Logee v Minister of Interior* 1951 (2) SA 595 (T), the court held that a second wife of a Hindu immigrant is not his "wife" as envisaged in terms of s 5(2)(*b*) of the Immigrants' Regulation Act 22 of 1913 and as a result permission for her to enter South Africa was refused.

85 For an exposition of the practical implications of non-recognition, see Cordier and Rautenbach (2009) *Obiter* 585–606.

86 2007 (3) SA 445 (D).

***Singh v Ramparsad*:** The parties married in 1987, and agreed not to have their marriage registered in terms of the Marriage Act.[87] As a result, the marriage is not regarded as a valid marriage in terms of South African law. As a result of the breakdown of their marriage, the parties separated in 2000 and have led separate lives ever since. In terms of Hindu law, the wife could not divorce her husband and she approached the court for an order declaring, *inter alia*, that their marriage is a valid marriage in terms of the Marriage Act and consequently that she is entitled to seek a divorce in terms of the Divorce Act.[88] She argued that the non-recognition of their marriage violated her right to equality and dignity in terms of the Constitution. The court evaluated the relevant provisions of the Constitution and the Marriage Act and came to the conclusion that the Marriage Act makes provision for secular and religious marriages and that it does not violate the rights of the wife (the applicant). The fact that the parties nonetheless opted not to register their marriage which consequently led to the non-recognition of their marriage does not lead to inequality or infringement of dignity. Consequently, the court refused to declare the Marriage Act and the Divorce Act unconstitutional or to recognise the validity of the Hindu marriage.

The fact that the Hindu marriage is not recognised as a valid marriage does not mean that the courts are shy to afford relief to aggrieved litigants. In *Govender v Ragavayah*,[89] the High Court held that although a Hindu marriage is not regarded as a valid marriage in terms of South African law, it can be given some recognition for certain purposes. In this particular case the court held that a surviving partner to a monogamous Hindu marriage is also a spouse in terms of the Intestate Succession Act.[90] She could thus inherit intestate from her deceased husband, despite the fact that the marriage was not regarded as a valid one in terms of South African law.

12.4 Hindu family law

12.4.1 *Marriages*

A Hindu marriage is a *Samskara* (religious sacrament).[91] It is the last of the Ten Sacraments and is regarded as a divine unification of souls. This public joining together of man and woman as husband and wife is accomplished by the solemnisation of customary rites and ceremonies by both parties. A Hindu marriage is also regarded as a civil contract, which takes the form of a gift (namely the bride). An important part of the marriage ceremony is what is referred to as a *kanyadaan*. Such *kanyadaan* fulfils the requirements of a gift under Hindu law.[92]

According to Hindu custom, betrothal (*sagai*) precedes the actual ceremony of marriage.[93] Although it is not a necessary part of the nuptial rite, it is a promise to give a girl in marriage and is called *vaagdaan*.[94] This is distinguished from the actual giving away of the bride. Legally it is a revocable promise of marriage. However, in Hindu custom, cancelling a betrothal without good reason is generally not considered proper behaviour.

A subsequent marriage to another person (in defiance of an earlier betrothal) is valid. However, where such a breach has occurred, the "innocent" party may institute a claim for damages in respect of expenses incurred. In addition, where jewels and other gifts have been presented to either party, these would have to be returned on grounds of justice and good conscience. Where

87 25 of 1961.
88 70 of 1979.
89 [2009] 1 All SA 371 (D).
90 81 of 1987.
91 Mitter (1989) 195; *Singh v Ramparsad* 2007 (3) SA 445 (D).
92 Mishra (1994) 127.
93 Sen (1999) 291–292; Mishra (1994) 120.
94 Beri (1989) 7.

a relevant gift has perished, the value thereof may be claimed. But, where the plaintiff bridegroom dies before legalisation of the suit, his representative may only recover the actual expenses incurred during the betrothal.

The parents of the prospective bride and bridegroom, with the consent of their children, often arrange marriages. In some instances, parents persuade their children into consenting. A Hindu priest chooses a propitious date for the wedding ceremony, which is selected according to the Hindu calendar.

Monogamy is the approved Hindu norm, though polygyny does exist.[95] In India, however, monogamy is now a statutory requirement for a valid marriage in terms of the Hindu Marriage Act.[96] This Act also substantially modified the institution of marriage as recognised by ancient Hindu law and has brought about radical changes to the law of marriage.[97]

12.4.1.1 Prohibited relationships in marriage

At one time, Hindus prohibited marriages within the same *gotra*,[98] *pravara*[99] or *sapinda*.[100] These marriages were forbidden for the following reasons:[101]

(a) physical degeneracy that could result from marriages between close relatives; and

(b) moral degeneracy and its consequent evil effects on a society built on the edifice of a joint family system.

Inter-caste[102] and inter-religious marriages were also prohibited, although marriages between males of a higher caste and females of a lower caste were allowed.[103] Under modern Hindu law, *gotra* or *pravara* marriages, including inter-caste marriages, are valid. However, *sapindas* up to a certain degree are still prohibited to marry, and a Hindu cannot marry a non-Hindu under Hindu law.[104]

Today, marriage impediments in India on account of relationship are based on two grounds, namely *sapinda* relationship and degrees of prohibited relationship.

***Sapinda* relationship:**[105] For purposes of marriage, a *sapinda* relationship extends up to the fifth maternal ancestor and up to the seventh paternal ancestor. In determining the *sapinda* relationship, the line must be traced from the person concerned, and such a person must be counted as the first person. However, in terms of the Hindu Marriage Act[106] that applies in India, the prohibition extends up to the third maternal and the fifth paternal ancestor.

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95 Monogamy means one husband and one wife. Polygamy means more than one spouse regardless of whether it is more than one wife or husband. There are two forms of polygamy, namely polyandry meaning one wife and numerous husbands, and polygyny meaning one husband and numerous wives. Mofokeng (2009) 20.

96 25 of 1955.

97 See Jhabvala (1999) 139–163; Kesari and Kesari (1998) 39.

98 *Gotra* means "family" or "class". Hindus believe that they are all descendants of sages. All those who trace their descent from the same sage have a common *gotra*. Persons belong to the same *gotra* if they are descendants in the male line of one of the ancient sages after whose name the *gotra* is designated.

99 The three lineal male ancestors of the founder of the *gotra* are referred to as *pravara.*

100 *Sapindas* are relatives who have particles of the body of the same ancestor. *Sapindas* include the blood relatives of a common ancestor. Also see Jhabvala (1999) 139; Mishra (1994) 49–55.

101 Also see Kesari and Kesari (1998) 34.

102 Jhabvala (1999) 138–139.

103 Jhabvala (1999) 139.

104 In India, a Hindu can conclude a civil marriage with a non-Hindu in terms of the Special Marriage Act 43 of 1954.

105 Jhabvala (1999) 143–145.

106 25 of 1955. See Kesari and Kesari (1998) 39.

Two persons are said to be *sapindas* of each other if one is a lineal descendant of the other within the limits of the *sapinda* relationship described above, or if they have a common lineal ascendant that is within the limits of the *sapinda* relationship described above.

The *sapinda* relationship includes: (a) full- and half-blood relatives; (b) legitimate and extra-marital blood relatives; and (c) adopted relatives.

Degrees of prohibited relationship:[107] Two persons are said to be within the degree of prohibited relationship if: (a) one is a lineal ascendant of the other; (b) one was the wife or husband of the lineal ascendant or descendant of the other; (c) one was the wife of the brother or the father's brother's wife or grandmother's brother's wife; or (d) the two are brother and sister, uncle and niece, aunt and nephew, or children of a brother or sister, or children of two brothers or two sisters.

The prohibited relationship also includes: (a) full- and half-blood relatives; (b) legitimate and extra-marital blood relatives; and (c) adopted relatives.

In India, marriage laws are influenced by diverse customs. Hence, there are exceptions to the established prohibited degrees of marriage. However, while a well-recognised custom requires no proof, a family custom set up by a party has to be proved by the said party. Generally, a custom derogating from the general rules of law is strictly construed.

12.4.1.2 Requirements for a valid marriage

Ancient Hindu law prescribed three conditions for a valid marriage. First, the parties had to be from the same caste. If the parties did not belong to the same caste, the marriage was invalid, unless sanctioned by custom. This requirement lost its force in India after the commencement of the Hindu Marriage Validity Act.[108] Secondly, the parties should not be *sapindas*, except where custom permits such a marriage. The third requirement relates to the performance of proper marriage ceremonies. In general, there were two marriage ceremonies, namely:[109]

(a) *vivah homa* (invocation before the sacred fire); and

(b) *saptapadi* (bride and bridegroom take seven steps around the sacred fire).

The parties may deviate from these two marriage ceremonies, if it is allowed in terms of custom.

In terms of classic Hindu law, a Hindu male could marry any number of wives. However, in terms of the Bombay Prevention of Hindu Bigamous Marriages Act,[110] polygyny between Hindus is prohibited. Parties may enter into a marriage only if they are sane. Classic Hindu law did not prohibit marriages between minors.

In India today, the minimum age set by the Hindu Marriage Act[111] is 18 years for females and 21 years for males. Section 5 of this Act lists the following five requirements for a valid marriage between two Hindus: (a) monogamy; (b) mental capacity; (c) age; (d) beyond the prohibited degrees; and (e) beyond *sapinda* relationship.[112]

In order for the marriage to be valid, the relevant marriage ceremonies must be performed. The status of a husband and wife is constituted by the performance of the marriage rites, either prescribed by the marriage texts and/or by customs. Where the marriage partners are of different castes or sub-castes, the customary ceremonies of either will be valid. Modern Hindu law thus prescribes three requirements for a valid marriage, namely: adult consent, the ceremonies and civil registration.

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107 Jhabvala (1999) 145–146.
108 38 of 1949.
109 Kesari and Kesari (1998) 35.
110 25 of 1946.
111 25 of 1955.
112 For a detailed analysis of these requirements, see Kesari and Kesari (1998) 41–49.

Examples of marriage ceremonies:

***Kanyadaan*:** Refers to the "gift of a maiden".[113] Certain persons are considered competent to perform this sacred ceremony. In Hindu law, it is generally the duty of the father to give away his daughter in marriage.[114] According to the *Mitakshara* school, this duty is to be performed in the following order: first the father, then the paternal grandfather, the brother, paternal relatives of the girl in order of propinquity (*sakulyas*), and lastly the mother. In many communities today, both parents perform this duty.

***Panigrahana*:** The bridegroom, taking hold of the bride's hand, walks around the sacred fire, and the bridal couple utter *Vedic* chants of benediction.[115]

***Shilarohana* (treading on a stone):** The rock is a symbol of steadfastness. Both the bride and bridegroom place their feet on a piece of rock and pray that their marriage will weather the storms of life.

***Saptapadi*:** The bridal couple, with a knot tied between one of their garments, takes seven steps around the sacred fire. A prayer (*mantra*) accompanies each step. The marriage is complete and irrevocable as soon as the seventh step is taken.[116]

***Thali*:** A sacred yellow thread (*Thali*) is tied around the neck of the bride. For marriages in certain communities, particularly in the south of India, the tying of the *Thali* is imperative. In these instances, the ceremonies of *kanyadaan* and *saptapadi* are omitted.[117] The tying of the *Thali* is uncommon in the north of India. The performance of marriage ceremonies is mandatory for the validity of a marriage within the particular community. The non-observance of essential ceremonies cannot be overlooked by applying the doctrine *factum valet quod fieri non debuit*, unless there is proof that these ceremonies are not required in terms of the relevant custom. The said proof should indicate that a custom has been continuous and uniformly observed for a long time and has acquired the force of law.

An example of Hindu marriage vows followed in South Africa reads as follows:[118]

> With God as guide, let us take,
> the first step to nourish each other,
> the second step to grow together in strength,
> the third step to preserve our wealth,
> the fourth step to share our joys and sorrows,
> the fifth step to care for our children,
> the sixth step to be together forever,
> the seventh step to remain lifelong friends'
> perfect halves to make a perfect whole.

12.4.1.3 Forms of marriage[119]

Classic Hindu law recognised eight forms of marriage. The first four forms were approved forms and the last four were unapproved, namely:

(a) ***Brahma*:** When the father or guardian of the bride gives the bride in marriage without receiving any compensation from the bridegroom, the marriage is referred to as *Brahma*. The bride is dressed in costly garments and decked in jewellery and is given to the bridegroom by her father. The bride is not a contracting party, but rather the subject of a gift. The distinguishing feature of this form of marriage is that the parents of the bride do not

113 Beri (1989) 20.
114 Sharma (1993) 20.
115 Sharma (1993) 92.
116 Beri (1989) 23; Mishra (1994) 132.
117 These do not constitute an essential part of the ceremony in most South Indian communities. See Beri (1989) 26.
118 The vows are prescribed by the Ramakrishna Centre of South Africa. They are a free translation of the "*saptapadi*" or seven steps/vows included in the Hindu marriage ceremony.
119 Jhabvala (1999) 137–138.

receive any compensation for their daughter. The bridegroom's family who goes seeking a bride for their son chooses the bride. The bridegroom is one who is learned in the *Vedas*.

(b) ***Daiva*:** The father of the bride presents his daughter as a gift. She is presented to a person who officiated as a priest at a sacrifice performed by the bride's father *in lieu* of the *dakshina* payable to the priest. It is the second form of marriage in order of merit and was considered to be inferior to the *Brahma*.

(c) ***Arsha*:** The father of the bride gives away his daughter, after receiving a cow and a bull or two such pairs of animals from the bridegroom. The cattle constitute a price for the bride and this gives the marriage a degree of inferiority. This form of marriage indicates the pastoral state of earlier Hindu society. Although this was an approved form of marriage, the acceptance of the animals was contrary to the meaning of *kanyadaan* (this refers to the gift of a daughter).

(d) ***Prajapatya*:** This form of marriage entails giving a daughter as a gift to the bridegroom, but the bride's father has gone in search of a bridegroom for his daughter. It is similar to the *Brahma* form of marriage, except that it is not necessary for the bridegroom to be a bachelor.

(e) ***Asura*:** If the father of a bride receives compensation from the bridegroom, the marriage is referred to as *Asura*. In this form, the bridegroom gives as much wealth as he can afford to the bride's father and her paternal family. Such consideration is called *sulk* or bride price. This form of marriage is sometimes regarded as the sale of the daughter. Hindu texts have prohibited such agreements as it is opposed to the Hindu concept of morality. The giving of small gifts to the bride or to her mother does not render the marriage an *Asura* marriage.

(f) ***Gandharva*:** This form is based solely on the consent of the bride and bridegroom and is referred to as "a love marriage". This form is regarded as unapproved because it lacks the religious ceremonies and rituals.

(g) ***Rakshasa*:** This form involved the seizure of a maiden by force from her home in times of war. The consent of the girl and her family were irrelevant and rape or the abduction of the girl usually preceded this form of marriage. The relatives of the girl were usually killed or wounded by the bridegroom during battle. This form has been condemned and is referred to by author as a "relic of a barbarous age".

(h) ***Paishacha*:** This form of marriage is that which takes place when a man has committed the crime of ravishing a girl when she was asleep or intoxicated. In such a case, the man was obliged to marry the girl. This has been regarded as the most reprehensible form of marriage and has been condemned in the Institutes.

Only two forms of marriage are recognised in India today, namely *Brahma* (approved form) and *Asura* (unapproved form).

12.4.1.4 Consequences of a marriage: status and maintenance

A marriage confers the status of husband and wife on the parties. It gives rise to certain rights and duties between the spouses, as well as against third parties, and confers the status of legitimacy on the children of the marriage. The wife follows the domicile of her husband. The husband has the obligation to maintain and support his wife, minor sons and unmarried daughters. This is a personal obligation and does not depend on the possession of property.

In Hindu law, the duty of maintenance is not merely a legal obligation but also a moral one,[120] based on the principles of natural justice. The right and duty of maintenance is based on the concept of a joint family system and the dictates of natural justice supported by the theory of co-ownership. This duty to maintain others arises from the personal relationship between the

120 Gupte (1970) 135.

parties, independently of the possession of the property and in other cases on the possession of the property. Three situations can be distinguished, namely personal liability, liability of a manager and liability of an heir.[121]

Personal liability

A Hindu male has a personal obligation to support his wife, aged parents and minor children. His obligation towards his wife arises from the status of marriage. The obligation towards the aged parents is based on the parent-child relationship. Ancient Hindu law restricted this obligation to sons. Also, "parent" did not include step-parents. However, statutory provision in India now provides that both sons and daughters have an obligation to support parents who are unable to support themselves. A stepmother is also included under the definition of "parent". Extra-marital sons have a claim for maintenance from the natural father.

Hindu texts do not mention maintenance for extra-marital daughters, but in terms of the Hindu Adoptions and Maintenance Act,[122] a daughter is entitled to maintenance from both her parents. This right to be maintained terminates on majority or marriage (whichever is sooner).

A widow's right to maintenance stems from her membership of the deceased husband's family. In general, a Hindu husband is not entitled to include a provision stipulating that his wife be excluded from receiving maintenance. A widow of a coparcener has a claim for maintenance against a husband's family provided she leads a chaste and virtuous life. Where the widow of a coparcener sues for maintenance after partition, she can only enforce her rights against those surviving coparceners who have taken her husband's share (effectively a lesser right). The widow, as a mother, is entitled to maintenance from her son, and even more so where the son has received his father's share. Where a widow leads an immoral lifestyle, her maintenance may be discontinued. In Hindu law, if a widowed daughter-in-law is destitute, her father-in-law has a moral obligation to maintain her out of his separate property. This obligation arises from the affinity between his daughter-in-law and himself. The position of women with respect to succession was improved by the commencement of the Hindu Women's Right to Property Act.[123] The Act did not affect a woman's right to maintenance. A widow may be reluctant to live in the family home of her late husband. In Hindu law, she may be permitted to move out and still retain her claim for maintenance, provided she does not leave for the purpose of leading a disreputable lifestyle. Sometimes, a deceased husband sets out conditions in his will, to the effect that his widow's right to maintenance depends on her residing in the family home. In the event that her husband's family cannot support a widow for any reason whatsoever, there is a moral obligation on a father to support his widowed daughter.[124] He may also provide for her maintenance out of his separate property in the event of his death. A widowed daughter would generally have a right of maintenance against her father if her attempts to obtain maintenance from her husband's family have failed.

A widow's claim for maintenance is determined according to the specific circumstances of the case. The maintenance should be such an amount as will enable her to live consistently with the same degree of comfort and luxury as she reasonably had in her husband's house. The factors influencing the amount of maintenance include the: (a) value of the estate; (b) position and status of the deceased husband and his widow; (c) reasonable wants of the widow; (d) past relations between the deceased husband and his widow; and (e) *stridhan* of the widow.[125]

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121 Kesari and Kesari (1998) 142–158.
122 78 of 1956.
123 18 of 1937.
124 The High Court of Calcutta stated that after her father's death, such a widowed daughter acquires a legal right to be maintained by his heirs out of his estate. See *Mokhada v Nundo Lall* (1901) Cal 278 288. The Madras High Court has held that a widowed daughter who is without means and whose husband's family is unable to support her is entitled to be maintained by her step-mother out of her father's estate. See *Ambu Bai Ammal v Sani Bai Ammal* (1941) Mad 13.
125 Except if it is of a personal nature, such as clothes and jewels.

In India, if the amount received as maintenance is inadequate, the court may order a more equitable amount. A court of law may also vary the amount of maintenance originally agreed upon, depending on the circumstances and the extent of change in circumstances.

In Hindu law, a woman forfeits her right to maintenance by remarriage. However, if the heirs of her husband have settled her claim to maintenance by granting her a specified sum of money or a specific property, they may not reclaim it from her.

Hindu law permits a wife to claim maintenance and a separate residence under certain circumstances, for example, when her husband permits his mistress to live in the matrimonial home, when cruelty and ill-treatment could endanger her safety, when she has been asked to leave the matrimonial home, when her husband has deserted the common household, when her husband suffers from a virulent disease (for example leprosy), when her husband continuously neglects her and for any other justifiable reason.

Liability of a manager

The obligation of a manager is dependent on possession of the coparcenary property. He is under a legal obligation to maintain the male members of the family, their wives and their children. On the death of the male members, he is responsible for maintaining the widow and children of the deceased.

Liability of an heir

The liabilities of an heir depend on possession of inherited property. An heir is under a legal obligation to maintain those persons to whom the deceased was morally and legally obliged to maintain, out of the estate he had inherited.

In India, many of these provisions have been incorporated in the Hindu Married Women's Right to Separate Maintenance and Residence Act.[126] This Act was repealed by the Hindu Adoptions and Maintenance Act.[127] However, the wife will not be entitled to the above maintenance if she leaves the matrimonial home without a valid reason or for the purpose of leading an immoral lifestyle.

12.4.2 *Joint family, coparcenary and property*[128]

The concepts of joint family and coparcenary are extremely important in Hindu family law, property and succession. The *Mitakshara* and *Dayabhaga* schools differ in respect of the law of the joint family, and for purposes of this discussion, the *Mitakshara* school of law will be discussed.

12.4.2.1 Joint family and joint property

The concept of the joint family is a distinctive feature of Hindu society.[129] There is a presumption that a Hindu family is a joint family. Anyone who alleges that the family is not joint, has to prove this fact. A joint family consists of men and women. The men include the male descendants of the common male ancestor up to the third degree[130] and the women include the wives of the male descendants and the unmarried daughters born into the family.[131]

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126 37 of 1946.
127 78 of 1956.
128 Jhabvala (1999) 17–54.
129 For a detailed discussion, see Misra and Kumar (2009) 701–789.
130 It includes the living sons, son's sons (grandsons) and son's son's sons (great-grandsons) of the father of the joint family. An adopted son is treated as if he is the natural son of the father. All these male members of the joint family are referred to as the coparceners. Srinivasan vol I (1969) 737.
131 A daughter ceases to be a member of the joint family on her marriage and becomes a member of her husband's joint family.

Joint family membership may only be acquired by birth or marriage into the family. Upon the death or marriage into another joint family of a member of the particular joint family, the membership of that particular member ceases to exist. Membership of the joint family therefore depends on marriage into the joint family or the principle of survivorship.[132]

A joint family can therefore have an indefinite number of members. The death of the common ancestors does not terminate the joint family. Although the joint family is recognised as an institution of Hindu society, it is not recognised as a legal person in the eyes of the law and it must be distinguished from other legal persons, such as companies and institutions.

12.4.2.2 Coparcenary

Although it is not a prerequisite, the joint family normally possesses joint family property.[133] Some of the members of the joint family are entitled to a share in the joint property and the other members are entitled to maintenance only. The members of the joint family who are entitled to a share in the joint family property are referred to as the coparceners of the joint family.

All the coparceners in the joint family form a body that is referred to as a coparcenary. The coparcenary is a restricted body of persons within a joint family and consists of some of the male members of the joint family, namely the male descendants of the common ancestor up to the third degree.[134] A coparcenary is created by law and not by agreement. The coparcenary has a community of interest and possession of the joint family property. The most senior male member of the family is referred to as the "last holder". The coparcenary is restricted to the "last holder" and his three male lineal descendants.

The figure below illustrates how the coparceners are identified.

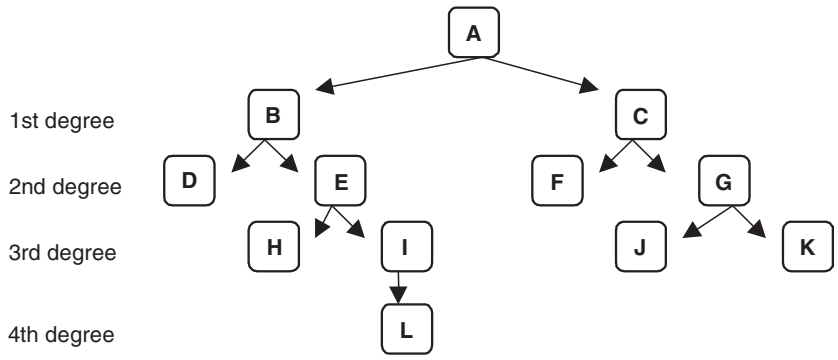


Figure 12.1

A to K are the coparceners. They are all within three degrees from their common ancestor, A. Together, they form a body of coparceners referred to as the coparcenary. Upon the death of A, L will automatically become a coparcener, because he will be within three degrees from his common ancestor, which is B. The joint family property continues to devolve upon the living

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132 Even with the consent of all the joint family members, no outsider may be admitted to the joint family. See Jhabvala (1999) 19.

133 Also referred to as coparcenary property. It consists of ancestral property (property acquired through unobstructed devolution of the joint property) and the fruits thereof, property jointly acquired (for example, joint funds, joint labour and joint business), voluntary shedding of separate property into the joint property or income from other estates.

134 Such persons are the sons, grandsons, and great-grandsons of the common ancestor. Although a female may be a member of the joint family, she is not permitted to be a coparcener. See Chadha (1982) 129.

coparceners through the principle of survivorship until one or more of the coparceners claim partition of the joint family property.

> Survivorship and partition are discussed at 12.5.2.

Although it is only the members of the coparcenary who share in the joint property, all the members of the joint family have some advantages, for example they all share a common meal, they have use and enjoyment of the joint property and they all worship the same God. It is impossible to determine the share of a coparcener while the joint family is still in existence. Their share can only be determined upon partition of the joint family.

12.4.2.3 Coparceners and the *karta* (manager)[135]

Property belonging to a joint family is managed by a *karta* (manager). Generally, the *karta* is the most senior male coparcener. In certain instances, age or infirmity has not prevented a senior coparcener from occupying the above position. Hindu law allows a junior coparcener to occupy the position of *karta* if there are no objections from other coparceners. More than one manager may be appointed if there is a need for such an arrangement. There are divergent views with respect to a female member being appointed as *karta*. The progressive view is that there should be no reason why a woman cannot occupy the position indicated above.

The coparceners are entitled to maintenance paid out of joint family property and have the right to occupy the position of *karta* if the position is vacant and other members approve. They further have the right to enforce partition and are entitled to an increase in their interest in the joint property by way of survivorship.

The coparcenary is a separate legal entity with legal personality upon whose behalf the manager of the coparcenary may perform legal acts.[136] The coparceners will be bound by the manager's alienation of joint property under certain circumstances, for example:

(a) legal necessity;

(b) benefit of the estate; and

(c) legitimate act of management.

The coparceners may challenge certain alienations, for example alienation made without legal necessity.

12.4.2.4 Separate property[137]

Coparcener*s* and other members of a joint family may have separate property that does not form part of the joint family property. The separate property of a male consists of all the property that does not qualify as joint family property, for example gifts, gains as a result of learning, grants from the state, property obtained through obstructed inheritance, self-acquired property, property obtained at partition and joint family property of which he is the only surviving male coparcener. He may exercise complete control over such property. Hence, he may sell, bequeath or donate such property.[138]

In Hindu law, a female may obtain property in various ways, for example by inheritance from another female or even a male, maintenance paid to her, by partition of the joint property, gifts and own earnings. Depending on the source from which the various properties were obtained,

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135 Desai (2010) 323–332; Jhabvala (1999) 41–48.
136 Jhabvala (1999) 22–23.
137 Jhabvala (1999) 30–34.
138 Derrett (1963) 372–375; Srinivasan vol III (1969) 1949–2836.

the property in the estate of a female may be divided into property of which the female has absolute ownership, namely *stridhan*, and property of which she has limited ownership, namely the limited woman's estate. A female has absolute ownership regarding her *stridhan* and she may deal with it as she pleases. With regard to the limited woman's estate, however, the woman is the owner of the property for as long as she lives, but although she has full and exclusive ownership of the property during that time, her ownership is restricted in all other respects. She may not, for example, sell the property, nor give it away or bequeath it in a will. Upon her death, her ownership comes to an end. The property then returns to where it came from and devolves upon the beneficiaries of the person from whom she inherited it originally.[139]

> The devolution of separate property occurs through the rules of succession discussed at 12.5.3.

12.4.2.5 Stridhan (*female property*)[140]

12.4.2.5.1 *General*

In Hindu law, a female may obtain property in various ways, for example by inheritance, maintenance, partition, gifts and earnings. Depending on the source from which the property is obtained, her status and the school a woman belongs to, the property in the estate of a female may be divided into property of which she has absolute ownership, namely *stridhan*, and property in which she has limited ownership, namely the limited woman's estate.

Stridhan literally means "women's property". In general, *stridhan* includes all the property a female obtains by savings, bequests, purchases, maintenance, income from the limited woman's estate, gifts, earnings and claims. Property which a female inherits from another male or female, and shares allotted to her upon partition of the joint family property, are not *stridhan* and a different set of rules apply regarding these things.

The following categories are generally accepted as property belonging to the bride:

(a) any gifts made over the nuptial fire, namely those gifts made during the wedding ceremony – *adhyagni*;

(b) any gifts made at the bridal procession, that is, when the bride is led in procession from the residence of her parents to her husband's house – *adhyavihanikam*;

(c) gifts given by her friends and relatives at the time of her marriage as a token of love – *pritidhan*;

(d) gifts given by her parents and their relatives before, on or after marriage – *saudayika*;[141]

(e) gifts given by strangers;

(f) assets purchased by a woman with her earnings;

(g) gifts made to a woman by her husband and his family before, during and after marriage;

(h) marriage fee or *sulka*;[142]

(i) purchases made from money given as maintenance;

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139 Derrett (1963) 395–405; Derrett (1957) 232; Srinivasan vol II (1969) 1674–1704, Srinivasan vol III (1969) 2713–2836.

140 The meaning of *stridhana* differs as the different opinions of each school demand. Literally it means "woman's estate". What follows is a summary of the position in *Mitakshara* law, except where indicated otherwise. For further information, see Derrett (1957) 232–237; Jhabvala (1999) 96–100; Kesari and Kesari (1998) 356–363.

141 Mitter (1989) 631.

142 This has been described as a special gift to the bride to induce her to go cheerfully to the home of her husband and his family.

(j) property given in lieu of maintenance;

(k) gifts made by a husband to his wife on the occasion of his taking another wife – *Adhivedinika*; and

(l) income from the husband's estate (where the woman is a widow).

According to the *Mitakshara* school, *stridhan* is property a woman has absolute control over. She has complete freedom to dispose of the *stridhan* as she pleases. However, her husband has a personal right to it in circumstances of extreme urgency, for example in the case of illness, famine or imprisonment. Where the husband has had no option but to use her property in an urgent situation, he has a moral duty to replace it if and when he is in a position to do so. However, her property cannot be taken or attached by creditors who have an action against him.

The *Dayabhaga* school divided *stridhan* into *saudayika* and non-*saudayika.* Non-*saudayika* covers two categories of gifts, namely those given by strangers and money earned by the wife by mechanical means, for example payment she generated for spinning and weaving. The husband has control over the above, even in the absence of urgent circumstances. But this control does not extend to other members of his family.

12.4.2.5.2 *Dowry*

Modern-day dowry, particularly in India, has corrupted the ancient Hindu custom of *stridhan.* A father's gift to his daughter which constitutes *stridhan* was not intended to be given in consideration of the marriage, but was in fact a form of pre-mortem inheritance from her parents before their death, intended purely for her use and control. Also, in terms of customary Hindu law, the bridegroom as the prospective son-in-law was given a gift. Quite often, this would be clothing – in other words, a simple, practical gift.

However, an abuse of custom led to a dowry arrangement, which in certain instances became a major problem for the prospective bride's family. The prospective bridegroom's family demands a dowry, which could be an amount of money or specific gifts, for marrying the prospective bride. Effectively, this is a type of groom price. Such an arrangement is a stark travesty of Hindu customary law.

The abuse of this system has increased in India. The Dowry Prohibition Act[143] was enacted in order to curb the abuse of the dowry system in India.[144] In terms of the Act, it is an offence to take or demand dowry from the parents or guardian of a bride or bridegroom. However, as a result of the absence of a proper and effective enforcement agency, the Act has been a great failure to date.

> The property of females devolves in accordance with specific rules different from those of males. See discussion at 12.5.3.3.2.

12.4.3 Divorce[145]

12.4.3.1 *General*

It is a well-established principle of Hindu law that the marital relationship should be safeguarded as much as possible, and that the dissolution of a marriage should be allowed only on substantial

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143 28 of 1961.

144 Beri (1989) 576.

145 For a detailed discussion of the classic and modern rules of divorce, see Kesari and Kesari (1998) 94–141; Mofokeng (2009) 133–135; Desai (2010) 819, 825–826, 882–979; Kohli vols 1 and 2 (2000).

grounds.[146] Socially, the dissolution of marriages was frowned upon. In fact, Hindu parents in India still regard the dissolution of the marriage of a daughter as a family stigma, particularly if these parents have other unmarried daughters.

Does Hindu law permit divorce?[147]

The dominant view among scholars[148] is that classical Hindu law did not allow divorce, except where it was practised as custom in certain communities which were regarded as uncivilised by the Hindu elite. The modern grounds for divorce, such as a change of religion or loss of caste, adultery, cruelty, leprosy and desertion, did not provide grounds for divorce in classical Hindu law.[149] Menski, however, holds a different view. He points out that "there is much evidence of the long-established existence of various ancient customary forms among Hindus".[150] According to him, customary Hindu divorces are well known and have always been practised, especially among the lower classes and castes.[151] There is a contradiction between classical Hindu law as found in the Hindu scriptures and Hindu customary law as practised in the social sphere. In an attempt to resolve the apparent contradiction, Menski's analysis of ancient Hindu sources leads him to the conclusion that the aversion to divorce that existed during the ancient period was essentially idealistic and not a reflection of the true position. While the texts suggest that the concept of divorce did not exist, there are ample examples of divorce-like actions between traditional Hindus which illustrate that divorce was indeed possible during earlier times.[152]

Another leading Hindu scholar, Diwan,[153] claims that the Hindu scriptural texts did not recognise divorce, but he acknowledges that this did not prevent married couples from obtaining divorces in terms of custom. Very few formalities were needed to obtain a divorce, and in some communities it could be obtained by mutual consent or even purchased.

South African case law seems to hold the view that Hindu divorce is not permitted. In *Sing v Ramparsad*,[154] Patel J declared:

> *Akhand Saubhagyavati Bhave* (May you always be the one whose husband is alive, may you remain safe from the curse of widowhood). This is the blessing a Hindu bride who marries according to the North-Indian tradition receives as soon as the Hindu nuptial ceremony is complete. *According to Hinduism, marriage is a sacred relationship, a divine covenant and a sacrament.* No provision is made in the scriptures for its dissolution on personal grounds. This is so irrespective of whether the parties are married according to the two broad traditions extant amongst the descendants of those who came from the north of India, namely the Sanathan tradition or the Vedic or Vaidik tradition. No evidence was led as to the customs extant in the South of India. In my view, despite there being differences in ceremonies, it can be accepted that divorce is not sanctioned even if a Hindu marriage is entered into according to Dravidian ritual or ceremony.

12.4.3.2 Grounds for divorce

The appearance of Mahatma Gandhi in the struggle for independence from British rule gave rise to what may be called "The Women's Movement in India".[155] Women participated in the struggle for political freedom and, increasingly emphasised the equality of women. One of the major

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146 The ancient sources indicate that divorce was not recognised, except where allowed by custom. See Jhabvala (1999) 155; *Singh v Ramparsad* 2007 (3) SA 445 (D).
147 This section is based almost verbatim on Rautenbach (2014) 371–375.
148 Kesari and Kesari (1998) 30–31; Jhabvala (1999) 136–137; Mishra (1994) 127.
149 Desai (2010) 653.
150 Menski (2008) 427.
151 Menski *Hindu Law* 430.
152 Menski *Hindu Law* 431–8.
153 Diwan, Paras 'Divorce Structure of the Hindu Marriage Act, 1955 and Special Marriages Act, 1954' in V Bagga (ed) *Studies in the Hindu Marriage and the Special Marriage Acts* (NM Tripathi 1978) 15, 15.
154 2007 (3) SA 445 (D) paras 1 and 2.
155 Beri (1989) 10.

demands of women was that the right of divorce be made available to Hindu women statutorily under specific circumstances. A climate was created for comprehensive changes in the Hindu law of marriage. Despite furtive resistance from orthodox sectors of Hindu society, the Hindu Marriage Act[156] was passed and came into effect on 1 May 1955. Although this Act does not favour divorce, it makes provision for 15 grounds of divorce, 11 of which are available to both spouses and four to the wives only.[157] The following 11 grounds of divorce are available to either spouse:

(a) adultery;[158]
(b) cruelty;[159]
(c) desertion;[160]
(d) conversion;[161]
(e) leprosy;[162]
(f) venereal disease;
(g) renouncing the world;[163]
(h) presumption of death;[164]
(i) insanity;[165]
(j) decree of judicial separation;[166] and
(k) decree of restitution of conjugal rights.[167]

The following four grounds of divorce are only available to the wife:

(a) bigamy;[168]
(b) rape, sodomy or bestiality;
(c) decree of maintenance against husband where the wife was living apart;[169] and
(d) repudiation of the marriage.[170]

In South Africa, it is impossible for a Hindu couple to obtain a divorce if their marriage is not recognised in terms of South African law. This was confirmed in 2007 in *Singh v Ramparsad*,[171] where the court declined to recognise the validity of a Hindu marriage in order to allow the wife to obtain a divorce in terms of the Divorce Act 70 of 1979.

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156 25 of 1955.
157 A summary of the grounds for divorce follow hereafter. For a detailed discussion, see Jhabvala (1999) 155–163; Kesari and Kesari (1998) 98.
158 Voluntary sexual intercourse with another person other than his or her spouse.
159 Cruelty includes physical or mental cruelty.
160 The desertion must have been for a period of not less than two years immediately preceding the petition for a divorce.
161 When one of the spouses converts to another religion.
162 One of the spouses must be suffering from a virulent and incurable form of leprosy.
163 When one of the spouses enters a religious order.
164 When one of the spouses has not been heard of for a period of seven years, it is presumed that such a person is dead.
165 When one of the spouses has been incurably of unsound mind.
166 When a decree for judicial separation has been given and the parties have not resumed cohabitation for a period of one year since the passing of the decree.
167 When a decree of restitution of conjugal rights between the spouses has been ignored for a period of at least one year since the passing of the decree.
168 This ground of divorce is in accordance with the laws that prohibit polygyny between Hindus in India.
169 Provided that since the passing of the decree, cohabitation has not resumed for a period of at least one year.
170 Where the marriage was solemnised before the wife had reached the age of 15, she may decide to repudiate the marriage after she reaches the age of 15.
171 2007 (3) SA 445 (D). For a discussion of the case, see Heaton (2008) *Stell LR* 452.

***Singh v Ramparsad*:**[172]

In this case, the plaintiff (Singh) and the first defendant (Ramparsad) were married in terms of the Vedic tradition, a branch of Hinduism. Both the plaintiff and the first defendant knew that their religion did not allow for the dissolution of their marriage, and that their marriage was not recognised in terms of the Marriage Act.[173] Due to irreconcilable differences, the parties decided to separate in December 2000. The plaintiff approached the High Court to obtain a divorce in terms of the Divorce Act.[174] Seeing that her marriage was invalid for want of compliance with the provisions of the Marriage Act, in particular section 11(3),[175] she also challenged the constitutionality of this provision and applied for an order declaring the Hindu marriage to be legally valid.[176] In the alternative she claimed that the term "marriage" as used in the Divorce Act includes religious Hindu marriages. She was thus entitled to seek a decree of divorce in terms of the Divorce Act.[177] The court, however, could not be convinced that the non-recognition of the applicant's marriage infringed her constitutional rights and refused to declare the relevant provisions of the Marriage Act or the Divorce Act unconstitutional.[178]

The court refused to grant her a decree of divorce because that would lead to an entanglement in doctrinal issues.[179] The doctrine of non-entanglement is a well-known principle of South African law. This doctrine requires the courts to adopt a position of strict neutrality towards theological questions.[180] The court came to the conclusion that if it granted the applicant a divorce in circumstances where she elected to practise a faith that did not approve of divorce, it would entangle itself in theological issues that might cause offence to members of the Hindu community.[181] In addition, the court found that a secular pronouncement of divorce by a court would not in any way absolve the applicant from her religious vows, especially if she professed to be a devout Hindu.[182]

Although the decision has been criticised on certain grounds, the general consensus is that the final judgment was correct.[183] If a Hindu couple decides not to validate their marriage in terms of either the Marriage Act or the Civil Union Act, their marriage is invalid in terms of South African law and they cannot avail themselves of the legal protection, rights and remedies available to couples whose marriages have been legally validated.

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172 This section is largely based on Rautenbach (2014) 371.

173 25 of 1961.

174 70 of 1979.

175 Section 11 of the Marriage Act stipulates:

> (1) A marriage may be solemnized by a marriage officer only.
>
> (2) Any marriage officer who purports to solemnize a marriage which he is not authorized under this Act to solemnize or which to his knowledge is legally prohibited, and any person not being a marriage officer who purports to solemnize a marriage, shall be guilty of an offence and liable on conviction to a fine not exceeding four hundred rand or, in default of payment, to imprisonment for a period not exceeding twelve months, or to both such fine and such imprisonment.
>
> (3) Nothing in subsection (2) contained shall apply to any marriage ceremony solemnized in accordance with the rites or formularies of any religion, if such ceremony does not purport to effect a valid marriage.

176 In essence, the applicant argued that the non-recognition of a Hindu marriage violated her right to equality and dignity in terms of the Constitution: see paras 12–18.

177 Para 5.

178 Para 53.

179 Paras 50–53.

180 See *Singh v Ramparsad* 2007 (3) SA 445 (D) para 50 and the cases referred to. Also see *Ryland v Edros* 1997 (2) SA 690 (C) 703E; *Taylor v Kurtstag* [2004] 4 All SA 317 (W) para 39.

181 Paras 50–51.

182 Para 52.

183 Heaton (2008) *Stell LR* 455–464. She points out that the Marriage Act, contrary to what the court stated, does not allow for the appointment of a marriage officer of any religious faith but only a closed category (Christian, Muslim, Jewish or Indian). She is also uncomfortable with the court's comparisons between customary marriages and Hindu marriages.

12.4.3.3 Custody of children on divorce or judicial separation[184]

The general rule in Hindu law is that the court will refuse to give custody of the minor children to the guilty party, be it the husband or the wife. However, exceptions are made in favour of the father. For example, a father who proves that he has discontinued his unfavourable behaviour will be afforded custody of the children. If he lives a respectable life and has always treated his children with kindness, the court, while placing minor daughters in the custody of their mother, may order the minor sons to remain with their father.

In making an order for custody, the courts in India take into account various factors such as the welfare of the child, the wishes of the parents, the wishes of the child and the age and sex of the child. Similar factors are taken into consideration regarding access to a child by one of or both the parents.

12.5 Law of succession

12.5.1 *General*

The Hindu law of succession recognises two modes of devolution of property, namely survivorship (for joint property) and succession (for separate property and *stridhan*).[185]

Under *Dyabhaga* law, only one mode of devolution is recognised, namely succession. The difference between the *Dyabhaga* and *Mitakshara* schools is largely due to the schools' different viewpoints regarding ownership of property. Only the rules of succession under classic *Mitakshara* law will be discussed, except where indicated otherwise.

In India today, there is a uniform and comprehensive system of succession and the differences between the two schools mentioned above are mostly of academic importance.

12.5.2 *Survivorship and partition (joint property)*

The devolution of joint family property occurs through the concepts of survivorship and partition.[186] These concepts can be explained with reference to Figure 12.2.

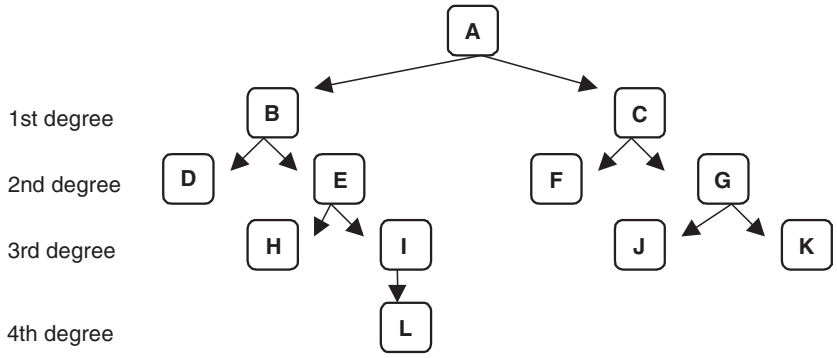


Figure 12.2

184 Jhabvala (1999) 171–172.

185 For a detailed discussion of the principles applicable to both survivorship and succession, see Derrett (1957) 210–266; Derrett (1963) 244–443; Derrett (1970) 225–286; Srinivasan (1969); Pathak (1986) 212–219. For a detailed discussion of the classic and modern Hindu law of succession, see Desai (2010) 109–437, 1067–1236; Das (2007).

186 See discussion of the joint family and property at 12.4.2.1.

12.5.2.1 Survivorship

A to K are the coparceners. They form the coparcenary. With the death of A, L will automatically become a coparcener through the concept of survivorship.[187] This means that he obtains a share in the joint family property upon his birth. However, if he dies, his share ceases to exist, and it accrues to the other living coparceners of the joint family in equal shares. This continuation of the joint family property upon the living coparceners is referred to as devolution by survivorship.[188] The joint family property continues to devolve upon the living coparceners until one or more of the coparceners claims partition of the joint family property.[189]

The joint property is divided into unobstructed and obstructed heritage.[190] If, with the death of a coparcener, he leaves one or more descendants up to the third degree, the devolution of the share of the deceased is unobstructed.[191] The descendant acquires an undivided share in the joint property upon his birth, and because the right to a share in such property is not obstructed by the existence of other coparceners, it is referred to as unobstructed heritage.[192] If the coparcener dies and there are no other living coparceners upon whom the joint property may devolve, the devolution is referred to as obstructed heritage.[193] In the case of obstructed heritage, the property devolves upon the other beneficiaries of the deceased according to the rules of succession.[194]

It is impossible to determine the share of a coparcener while the joint family is still in existence. His share may be determined only upon partition of the joint family.

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187 Membership of the coparcenary is confined to the male descendants of the common ancestor, A, up to the third degree. Therefore, X will be included as a coparcener.

188 In India, the Hindu Women's Right to Property Act 18 of 1937 has made a serious inroad into the rule of survivorship. S 3(2) of the Act lays down that the share of a coparcener devolves upon his widow upon his death. Although his wife may claim partition, she does not acquire the status of a coparcener and the share she obtains is declared to be a limited woman's estate. After her death, the limited woman's estate must devolve upon the male descendants of the deceased, who receive it as ancestral property. Under *Dyabhaga* law, on the other hand, the concept of survivorship is unknown, and the joint property devolves according to the rules of succession. See Jhabvala (1999) 11.

189 Since it is clear that the *coparcener's* share in the joint property does not fall into the estate of a deceased coparcener, it is evident why a coparcener may not dispose of his share by means of a will. It is also clear why the share in the joint property may not devolve upon other beneficiaries through the rules of intestate succession.

190 See Sen (1984) 127–128 and Kesari and Kesari (1998) 212–214 for a discussion of the difference between unobstructed and obstructed heritage. The difference is of no importance in the *Dyabhaga* school of inheritance.

191 Upon the birth of the coparceners they acquire an undivided share in the joint property. Property acquired by unobstructed heritage is referred to as ancestral property. Jhabvala (1999) 27–32; Sen (1984) 127.

192 For example, if X inherits property from his father, and a son is born to him, the son becomes a coparcener with X from the moment of his birth. The existence of X is no obstruction for the son to acquiring an interest in the joint property. Jhabvala (1999) 23.

193 The right to the property accrues to the beneficiary upon the death of the last owner (without leaving any male descendants), and not upon the birth of the beneficiary as in the case of unobstructed heritage. For example, if A inherits property from his brother and afterwards has a son, the property is obstructed in the hands of A and his son does not acquire any rights to it during A's lifetime. After A's death, it will devolve according to the rules of succession. Jhabvala (1999) 23–24.

194 If the testator made a will, it will devolve according to the will, and if he died without a will it will devolve according to the rules of intestate succession. According to the *Dyabhaga* school, all heritages are obstructed. They do not recognise the principle of survivorship and all property devolves through the rules of succession. See Jhabvala (1999) 24.

12.5.2.2 Partition

The joint family and coparcenary continue to exist until one or more of the coparceners claims partition.[195]

> Partition is the "intentional severance of coparcenary property" by the coparceners of the joint family.[196]

An actual division of the joint property is not necessary and it is enough if the shares of the coparceners are clearly defined.[197] Participation in the joint family is always voluntary and one or more coparceners of the joint family are free to claim participation if he or they so wish.[198] If a partition takes place, the joint property must be divided between all the coparceners of the joint family. Each coparcener may then start with a new joint family of which he is the common male ancestor or father.

> The Hindu Women's Right to Property Act[199] has changed the position of women in India. The share of male coparceners in *Mitakshara* law devolves, upon their deaths, on their widows.

Upon partition, the share of a coparcener is not determined by the number of members of the coparcenary, but the number of coparceners in the joint family. In Figure 12.1, A is the common male ancestor. He and B to K (11 of them) are the coparceners of the joint family. They all have an equal share in the coparcenary. L is excluded – he falls outside the three degrees cut off.

If one or more of the coparceners were to die or to claim partition, the following situations may, for example, arise:[200]

(a) if A dies, he will lose his undivided share of the joint property and it will accrue onto the undivided shares of his sons, B, C and D.

(b) if A claims partition, his sons B, C and D will each take $^1/_4$ of the joint property upon partition, and they will continue with their groups with them as common ancestors of their respective coparcenaries;

(d) if C dies and the coparcenary consists of his three sons (E, F and G) and D only, E, F and G will each take $^1/_6$ and D $^1/_2$ of the joint property upon partition; or

(e) if C, D, H, I and J die and the coparcenary consists of E, F and G, E, F and G will each receive $^1/_3$ of the joint property upon partition.

The female members of the joint family are entitled to maintenance only and they have no right to claim partition of the joint family property. The right to be maintained by the joint family arises upon the marriage of a female to a coparcener or the birth of a family member and ceases upon the death of the same particular female or member. It is referred to as maintenance by survivorship.

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195 Until partition is claimed, the share of a coparcener in the joint family property is a fluctuating one. It increases upon the death of a coparcener and diminishes upon the birth of another coparcener.

196 Jhabvala (1999) 63.

197 Jhabvala (1999) 64.

198 Under *Dyabhaga* law, it is not possible to claim partition if the common male ancestor, namely the father, is still alive. See Derrett (1963) 345–349; Markby (1906) 45.

199 Act 18 of 1937.

200 The share of each coparcener may be determined only upon partition. Before then, the share of each coparcener fluctuates depending on the birth or death of the coparceners in the joint family. For example, if the coparcenary consists of A, B, C and D, they each have, in principle, $^1/_4$ of the joint property. If B dies subsequently without male descendants, the shares of A, C and D will increase to $^1/_3$ each. Upon the birth of H, the shares of A, C and D will decrease to $^1/_4$ each and H will also receive a share of $^1/_4$, and so on.

12.5.3 *Succession (separate property)*[201]

12.5.3.1 General

The separate estate of a Hindu may devolve after his death by means of the provisions in a will or, if he did not make a will, by means of the rules of intestate succession. A distinction must further be drawn between succession to a male and succession to a female.

12.5.3.2 Freedom of testation

A Hindu testator is competent to make a will.[202] Although wills were unknown in classic Hindu law, the practice of disposing of separate property by means of a will developed under English influence. Although in general, no formalities are required in Hindu law to make a legal will, section 63 of the Indian Succession Act[203] prescribes formalities which must be complied with in the drafting of wills in India. Under *Dyabhaga* law, the father is the owner of the joint property and therefore he has, in general, unlimited freedom of testation regarding the joint family property and his separate property. The coparcener members of the joint family may also dispose of their share in the joint property by means of a will.[204] However, if the testator belongs to the *Mitakshara* school, a distinction must be drawn between the position of males and females. The male members of the joint family have limited freedom of testation regarding the joint family property. They may not dispose of the joint family property or their share in the joint family property by means of a will. A sole surviving coparcener may, however, bequeath the joint family property by means of a will. However, coparceners are free to dispose of their separate property by means of a will.[205]

In principle, a female has freedom of testation regarding her *stridhan* and she may dispose of it by means of a will. However, she has no competence to bequeath the joint family property, *stridhan* she inherited from another female or property she inherited from a male.

Except for these general restrictions on a testator's freedom, a Hindu testator may not bequeath his entire estate by will in order to defeat the claim of his wife and others for maintenance.

12.5.3.3 Intestate succession

The manager of the joint family property must pay the funeral expenses of the deceased. It is regarded as a "legal necessity", in other words those expenses which the joint property is responsible for. Furthermore, the beneficiaries must pay the debts of the deceased in accordance with the share that they inherited from the separate estate of the deceased.[206] Payments out of the estate of the deceased consist mainly of the payment of legacies, where legacies have been instituted, the shares of the beneficiaries, and lastly, if none of the first two categories exists, the estate devolves upon the king if the deceased died without any beneficiaries. The king, at present, is the state.

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201 The rules of succession in Hindu law are complex. In India, the rules of succession were simplified to a great extent by the Hindu Succession Act 30 of 1956.

202 Derrett (1963) 443–492; Derrett (1957) 260–264; Jhabvala (1999) 109–118.

203 Act 39 of 1925.

204 Derrett (1963) 443–492; Derrett (1957) 260–264; Jhabvala (1999) 109–118.

205 In India, the position was changed by the Hindu Succession Act 30 of 1956. The share of the coparcener in the joint property is deemed to be property that is capable of being disposed of by a will. Jhabvala (1999) 223.

206 Neither the estate of the deceased nor the beneficiaries are personally responsible for the debts of the deceased. Jhabvala (1999) 83. See Srinivasan vol III (1969) 2306.

In order for succession to take place, the following ground rules must be fulfilled:

(a) the testator must be dead. If the deceased is a missing person, his estate may be distributed according to his will or, if he died intestate, according to the rules of intestate succession;[207]

(b) the beneficiary must be alive at the death of the testator. Where two or more persons are competent to inherit from each other and it is not certain who died first, it shall be presumed that the younger survived the elder. The rights of the unborn children are dealt with by using a concept similar to the *nasciturus* fiction used in South African law. Hence, a child conceived before the death of the testator who is born alive, has the right to inherit from the deceased as if he was alive at the death of the testator; and[208]

(c) the beneficiary must be competent to inherit.

The classic Hindu law of succession recognises six impediments that exclude men and women from succession; with the exception of a lunatic or an idiot, all other impediments have been removed by the Hindu Inheritance (Removal of Disabilities) Act[209] in India. The latter has been repealed by the Hindu Succession Act. The impediments discussed here are also applicable to partition of the joint property. The six forms of impediment are:[210]

(a) *unchastity in females*: A female who is unchaste at the time of her husband's death may not inherit from him, unless the unchastity was with the involvement and consent of her husband. The rule applies only to a widow and not to other females. According to *Dyabhaga* law, the prohibitions apply to all female beneficiaries. Under both *Mitakshara* and *Dyabhaga* law, unchaste females may inherit from other females;

(b) *difference of religion and loss of caste*: These impediments were abolished by the legislature in India. See the Caste Disabilities Removal Act;[211]

(c) *entrance into religious order*: A Hindu who enters into a religious order and withdraws himself from earthly affairs detaches himself from his family and is excluded from inheriting from his relatives and *vice versa*;

(d) *congenital physical and mental illnesses/disabilities*: For example, impotence, blindness, deafness, dumbness, loss of any limb or organ, lunacy, idiocy and leprosy. In India, the position was changed by legislation. According to section 2 of the Hindu Inheritance (Removal of Disabilities) Act,[212] the only impediments were congenital lunacy or idiocy. A Statute of 1939 removed all disqualifications by reason of disease, deformity, physical or mental defects. Section 28 of the Hindu Succession Act[213] rectified the position further and nowadays congenital lunacy or idiocy is no longer an impediment to succession in India;

(e) *homicide*: A murderer is disqualified to inherit from the person whom he murdered. He is regarded as non-existent for the purpose of inheritance and his descendants may therefore not substitute him;

(f) *remarriage of the widow of the deceased*: Upon the remarriage of a widow, she forfeits the interest she took from her husband's estate and it devolves upon his heirs as if she were dead. This impediment was abolished by the Hindu Succession Act; and

(g) *existence of male descendants of the common male ancestor up to the third generation*: If the common ancestor dies without sons, grandsons or great-grandsons, the joint property will succeed to the intestate beneficiaries of the deceased. The situation is also referred to as obstructed heritage.

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207 Derrett (1963) 369.
208 Derrett (1963) 32–33, 407; Jhabvala (1999) 126–130.
209 Act 12 of 1928.
210 Sen (1984) 172; Jhabvala (1999) 131–133; Pathak (1986) 226–227; Srinivasan vol III (1969) 1954–1957.
211 Act 21 of 1850.
212 Act 12 of 1928.
213 Act 30 of 1956.

12.5.3.3.1 *Property of a male*[214]

Coparcener*s* and other male members of a joint family may have separate property that does not form part of the joint family property. Upon the death of the male he may bequeath it by means of a will and, if he failed to make a will, it will succeed upon his intestate beneficiaries according to a special set of rules.

The separate property of a male consists of all the property which does not qualify as joint family property, for example property obtained through obstructed inheritance, self-acquired property (which may be obtained with the help of the joint family property or other members of the joint family, such as gifts from friends, property obtained at partition) and joint family property of which he is the only surviving male coparcener.[215]

The rules of succession under *Mitakshara* law are influenced by a few general principles. In the first place the closer relative excludes the more remote relative. For example, if a deceased is survived by his son and son's son, the former would exclude the latter from inheritance. In the second place, the doctrine of representation applies only to a limited extent. It applies only to the male descendants of the deceased up to four degrees. Succession between these descendants occurs *per capita*, but if there is more than one grandson and great-grandson, they inherit *per stirpes*. Inheritance *per capita* is the rule and inheritance *per stirpes* is the exception, while the latter applies only in the case of the grandsons and great-grandsons.[216]

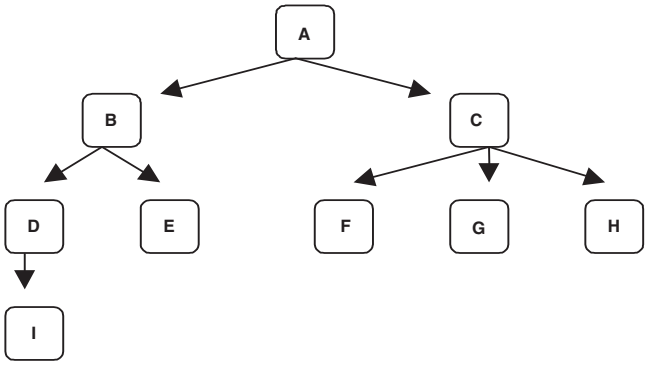


Figure 12.3

The following situations may occur:

(a) his sons B and C survive A: B and C inherit *per capita* and thus $^1/_2$ each. D to I are excluded from inheritance by B and C;

(b) his son B, grandsons D, E, F, G and H survive A. His son C is predeceased: B inherits $^1/_2$ *per capita* and F, G and H inherit $^1/_6$ each *per stirpes*. D, E and I are excluded from inheritance by B;

(c) his grandsons D to H survive A. His sons B and C are predeceased: D and E inherit $^1/_4$ each *per stirpes* and F to H inherit $^1/_6$ each *per stirpes*. I is excluded from inheritance by D; or

(d) his grandsons E to H survive A. His sons B and C and grandson D are predeceased: I represents the rights of D and inherits $^1/_4$ and E inherits $^1/_4$. F to H inherit $^1/_6$ each *per stirpes*.

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214 Derrett (1963) 372–375; Srinivasan vol III (1969) 1949–2836.
215 See Jhabvala (1999) 33–34 for further examples of separate property.
216 Pathak (1986) 215.

Classes of beneficiaries and order of succession

There are three classes of beneficiaries, namely *sapindas*,[217] *samanodakas*[218] and *bandhus*.[219] The estate of the deceased will succeed to the classes in hierarchical order. The existence of beneficiaries in the first order will exclude the second and third class. If there are no beneficiaries in the first class, the estate will succeed to the second class and so on. If there are no beneficiaries in the first three classes, the estate of the deceased will devolve upon the state.[220]

The classification into three classes of beneficiaries was abolished in India by the Hindu Succession Act and the beneficiaries are divided into four classes, namely class I beneficiaries, class II beneficiaries, agnates and cognates.[221] In India, the distribution of the property of a male who died intestate occurs according to the rules laid down in the Hindu Succession Act.

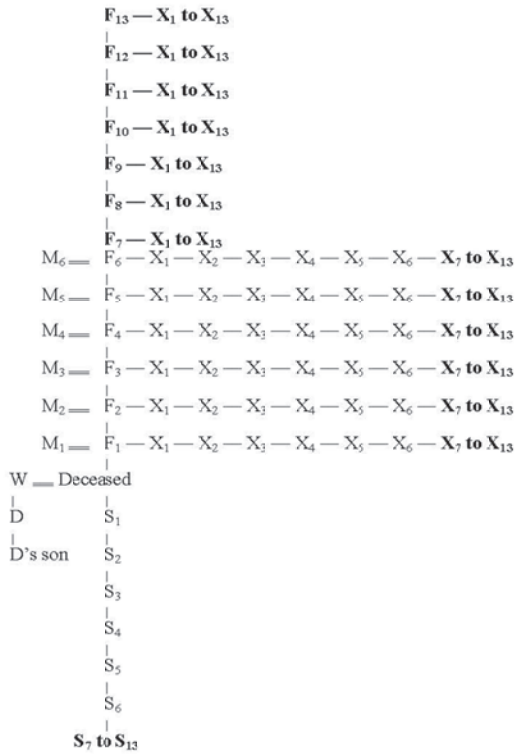


Figure 12.4 Table of beneficiaries according to *Mitakshara* law[222]

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217 The word *sapindas* originates from the offering of *pindas* (small ball-like things made of kneaded rice or flour) to the dead funerals. A Hindu is required to offer *pindas* to his paternal ancestors up to the sixth degree. Gradually the word *sapindas* came to include, for the purpose of succession, seven degrees of *agnatic* relatives (including the deceased). The term *sapindas* is divided further into *sagotra sapindas* and *bhinnagotra sapindas*. The first refers to all agnates connected to the deceased through males only and the latter refers to cognates that are connected to the deceased through one or more female. Pathak (1986) 216–217.

218 Also referred to as *amanodakas*.

219 Also referred to as *bhinnagotra sapindas*. See Jhabvala (1999) 222–223.

220 In India, the distribution of the property of a male who died intestate occurs according to the rules laid down in the Hindu Succession Act 30 of 1956.

221 See Jhabvala (1999) 222–223.

222 In order to explain the various classes of beneficiaries, the table in Desai (2010) 133 will be used.

(a) *Sapindas*:[223] The *sapindas* consist of the deceased's:

(aa) six male descendants in the male lineage within six degrees, namely the son up to the son's son's son's son's son's son (S1 to S6);

(bb) six male ascendants in the male lineage within six degrees and their wives, namely his father up to the father's father's father's father's father's father's father and their wives (F1 to F6);

(cc) Six male descendants in the collateral male lineage within six degrees and their male ascendants within six degrees, namely:

- brother to brother's brother's brother's brother's brother's son (X1 to X6 in the line of F1);
- paternal uncle to paternal uncle's paternal uncle's paternal uncle's paternal uncle's paternal uncle's son (X1 to X6 in the line of F2);
- paternal grand uncle to paternal grand uncle's paternal grand uncle's paternal grand uncle's paternal grand uncle's paternal grand uncle's son (X1 to X6 in the line of F3);
- paternal grand-grand uncle to paternal grand-grand uncle's paternal grand-grand uncle's paternal grand-grand uncle's paternal grand-grand uncle's paternal grand-grand uncle's son (X1 to X6 in the line of F4);
- paternal grand-grand-grand uncle to paternal grand-grand-grand uncle's paternal grand-grand-grand uncle's paternal grand-grand-grand uncle's paternal grand-grand-grand uncle's paternal grand-grand-grand uncle's son (X1 to X6 in the line of F5); and
- paternal grand-grand-grand-grand uncle to paternal grand-grand-grand-grand uncle's paternal grand-grand-grand-grand uncle's paternal grand-grand-grand-grand uncle's paternal grand-grand-grand-grand uncle's paternal grand-grand-grand-grand uncle's son (X1 to X6 in the line of F6).

Although there are various viewpoints regarding the position of the *sapindas*, their general position may be summarised as follows:[224]

(i) *The sons, son's son*[225] *and the son's son's son*[226] *of the deceased*:[227] The property of the deceased succeeds *per stirpes* to his legitimate sons,[228] son's sons and son's son's sons.

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223 See Srinivasan vol III (1969) 1967; Pathak (1986) 216.
224 See Pathak (1986) 219; Srinivasan vol III (1969) 1982.
225 The grandson.
226 The great-grandson.
227 In India, the Hindu Women's Rights to Property Act 18 of 1937 has afforded the widow of the deceased, the predeceased son's widow, and the predeceased son's predeceased son's widow the same share as a son.
228 Adopted sons are included as natural sons of the deceased. Illegitimate sons may not inherit, but are entitled to maintenance. Srinivasan vol III (1969) 1984–1986.

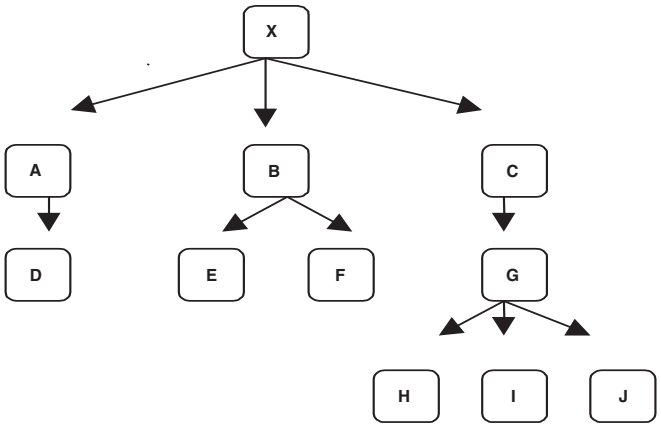


Figure 12.5

X dies, leaving A (his son), D, E and F (his grandsons) and H, I and J (his great-grandsons). B, C, and G are predeceased. X's estate will be divided into three equal parts, namely:[229]

- A inherits $^1/_3$ of X's estate for himself and D;[230]
- E and F share $^1/_3$ and each receive $^1/_6$ of X's estate; and[231]
- H, I and J share $^1/_3$ and each receive $^1/_9$ of X's estate;[232]

(ii) *the wife (wives) of the deceased*: If there are no sons, grandsons or great-grandsons of the deceased, the wife (wives) of the deceased inherit all the property of the deceased jointly;[233]

(iii) *the daughter(s) of the deceased*:[234] If there are no beneficiaries in the categories (i) to (ii), they inherit the estate of the deceased jointly in the following order: unmarried daughters, married daughters who are not provided for, and married daughters;[235]

(iv) *daughter's son of the deceased*: Although he is a *bandhu* and not a *sapindas*, he inherits from the deceased if there are no beneficiaries in the categories (i) to (iii). If he inherits from the deceased, he takes the estate of the deceased as full owner and, upon his death, the estate succeeds to his beneficiaries and not the beneficiaries of the deceased. If there is more than one daughter's son, they inherit *per capita*.

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229 This is a division *per stirpes*. To effect a division *per capita* would be to divide it into six equal parts and to give to each beneficiary $^1/_6$. Jhabvala (1999) 129–130.

230 The property becomes ancestral property in the hands of A, and D has a right to a share through survivorship.

231 They receive the share of B of $^1/_3$ through representation.

232 They receive the share of C of $^1/_3$ through representation.

233 The right of a widow in the estate of the deceased is limited and is referred to as a limited woman's estate. Upon her death, the property succeeds to the next intestate beneficiary of the deceased.

234 Illegitimate daughters are excluded from inheritance from the natural father.

235 The daughter of the deceased takes the estate of the deceased also as a limited woman's estate. Upon her death, the estate succeeds to the next intestate beneficiary of the deceased and not to that of the daughter.

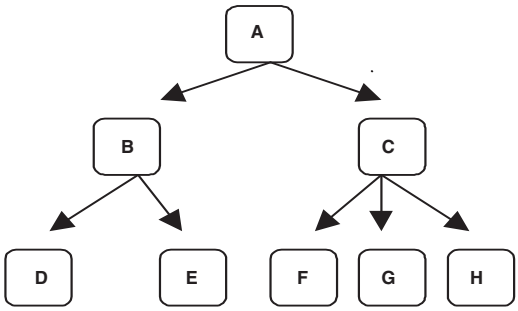


Figure 12.6

B and C are the daughters of A. B has two sons, namely D and E. C has three sons, namely F, G and H. Upon A's death, he is survived by D, E, F, G and H. A's estate will be divided into five shares and they will each receive $^{1}/_{5}$ thereof.

(v) *mother of the deceased*: The mother is preferred to the father of the deceased and she receives the estate of the deceased as a limited woman's estate if there are no other beneficiaries in the categories (i) to (iv).[236] Upon her death, the estate of the deceased succeeds upon the intestate beneficiaries of the deceased and not that of the mother. Upon the remarriage of the mother, she is considered dead and the estate of the deceased will succeed to the next intestate beneficiaries of the deceased;

(vi) *the father of the deceased*: He inherits the entire estate from the deceased if there are no beneficiaries in the categories (i) to (v) to inherit;

(vii) *the brother(s) of the deceased*: Three positions may be distinguished, namely:

- full brother(s) of the deceased:[237] He/they inherits/inherit from the deceased if there are no beneficiaries from the categories (i) to (vi);
- consanguine brother(s) of the deceased:[238] He/they inherits/inherit from the deceased if there are no beneficiaries from the categories (i) to (vi) or full brother(s); or
- uterine brother(s):[239] He/they is/are excluded from inheritance from the deceased;

(viii) *the brother's son(s) of the deceased*: If there are no beneficiaries in the categories (i) to (vii), they will inherit *per capita*. Full brothers exclude half-brothers from inheritance;

(ix) *the brother's son's son(s) of the deceased*: If there are no beneficiaries in the categories (i) to (viii), they will inherit *per capita*. Full brothers exclude half-brothers from inheritance;

(x) *the father's mother of the deceased*: She inherits before the father's father of the deceased if there are no beneficiaries in the categories (i) to (ix);

(xi) *the father's father of the deceased*: He inherits if there are no beneficiaries in the categories (i) to (x);

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236 Under *Maharashtra* law, the father is preferred above the mother. See Srinivasan vol III (1969) 1991.
237 Brother(s) with the same mother and father as the deceased.
238 Half-brother(s) by the father of the deceased.
239 Half-brother(s) by the mother of the deceased.

(xii) *the three descendants of the father's father of the deceased, namely the father's father's son, father's father's son's son and the father's father's son's son's son*: They inherit if there are no beneficiaries in the categories (i) to (xi); and

(xiii) *no beneficiaries in the categories* (i) *to* (xii): The estate of the deceased will succeed to the next categories of beneficiaries in the following order: father's father's mother, father's father's father, father's paternal uncle, father's paternal uncle's son, father's paternal uncle's son's son, brother's son's son's son and the uncle's son's son's son.[240]

(b) *Samanodakas*:[241] The *samanodakas* include all the agnates of the deceased from the seventh to the 13th degree. They inherit from the deceased if he has no *sapindas* to inherit his estate after his death. The nearer line excludes the more distant, and preference is given to full blood over half blood;

(c) *Bandhus*:[242] Upon the non-existence of *sapindas* and *samanodakas*, the estate of the deceased devolves upon the *bandhus*. In general, the *bandhus* may be divided into three main classes, namely:[243]

(aa) *Atma bandhus*: The father's sister's son, mother's sister's son and the mother's brother's son;

(bb) *Pitri bandhus*: The father's father's sister's son, father's mother's sister's son and the father's mother's brother's son; and

(cc) *Matri bandhus*: The mother's father's sister's son, mother's mother's sister's son and the mother's mother's brother's son.

The general principles regarding the position of the *bandhus* may be summarised as follows:[244]

(i) the nearest relative (ancestor or descendant) excludes the more distant relative;

(ii) the ancestors and descendants of the deceased are preferred to the descendants of his paternal and maternal ancestors;

(iii) if the *bandhus* are equal in degree, the *bandhu* who confers greater spiritual benefit upon the deceased is preferred;

(iv) if the test of religious efficacy fails, the *bandhus* through the father are preferred to the *bandhus* through the mother;

(v) the *bandhus* between whom and the common ancestor no female intervenes will be preferred to the *bandhus* between whom and the common ancestor a female intervenes; and

(vi) full-blood is preferred to half-blood.

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240 In India, the Hindu Law of Inheritance (Amendment) Act 2 of 1929 placed the son's daughter, daughter's daughter, sister, sister's son and half-sister's son before the paternal uncle and they inherit therefore after the father's father.

241 Srinivasan vol III (1969) 2022; Pathak (1986) 217.

242 See Srinivasan vol III (1969) 2022; Pathak (1986) 217–218.

243 Although the sister's son is a *bandhu*, he inherits together with the *sagotra sapindas*.

244 Taking the number of beneficiaries in the first and second class into consideration, it is highly unlikely that the *bandhus* would inherit from the deceased.

12.5.3.3.2 *Property of a female*[245]

In Hindu law, a female may obtain property in various ways, for example by inheritance from another female or even a male, by maintenance afforded to her, by partition of the joint property, gifts and own earnings. Depending on its source,[246] the property in the estate of a female may be divided into property of which the female has absolute ownership, namely *stridhan*, and property of which she has limited ownership, namely the limited woman's estate.

Stridhan:[247]

As far as succession is concerned, a female has, in principle, unlimited freedom of testation regarding her *stridhan* and may bequeath it by gift *inter vivos* or *mortis causa* by a will to whomever she pleases. If she dies intestate, the *stridhan* will devolve upon her intestate beneficiaries. The rules regarding intestate succession to *stridhan* differ from the rules of succession to a male, which have already been discussed. The rules differ substantially depending on the status of the female, the source of the *stridhan* and the school the female belongs to.

Under *Mitakshara* law, the *stridhan* of an unmarried female devolves upon the following relatives in chronological order:

(a) her uterine brother;
(b) her mother;
(c) her father;
(d) her father's beneficiaries in order of propinquity; and
(e) her mother's beneficiaries in order of propinquity.

The *stridhan* of a married female may be divided into *sulka*, which is a "gratuity for which a girl is given in marriage", and other kinds of *stridhan*. The *sulka* of a married female devolves upon the following relatives in chronological order:

(a) her full brother(s);
(b) her mother;
(c) her father; and
(d) her father's beneficiaries in order of propinquity.

What is interesting is that the children of the deceased are excluded from inheriting her *sulka*.

The *stridhan* of a married female succeeds upon the following relatives of the female in chronological order:

(a) her unmarried daughter(s);
(b) her married daughter(s) who is/are not provided for or childless;
(c) the rest of her married daughters;
(d) her daughter's daughter;
(e) her daughter's son;
(f) her son;
(g) her son's son;
(h) her husband; and
(i) her husband's beneficiaries in order of propinquity.

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245 Derrett (1963) 395–405; Derrett (1957) 232; Srinivasan vol II (1969) 1674–1704, vol III (1969) 2713–2836.
246 Other factors, such as the status (married or unmarried) of the female and the school (*Mitakshara* or *Dyabhaga*) she belongs to, must also be taken into consideration.
247 The meaning of *stridhana* differs according to the different opinions of each school. Literally it means "woman's estate". What follows is a summary of the position in *Mitakshara* law. For further information, see Derrett (1957) 232–237; Jhabvala (1999) 96–100; Srinivasan vol II (1969) 1674–1703.

Limited woman's estate[248]

When a man inherits property from another man or woman, he becomes the full owner of that property. However, if a woman inherits property from a man or *stridhan* from another woman, she receives only a limited woman's estate.

The effect of the limited woman's estate is that the woman is the owner of the property for as long as she lives, but although she has full and exclusive ownership of the property during that time, her ownership is restricted in all other respects. For example, she may not sell the property, give it away or bequeath it in a will. Upon her death, her ownership comes to an end and the property reverts to where it came from and devolves upon the beneficiaries of the person from whom she inherited it originally. Shares allotted to a woman upon partition of the joint property are not her *stridhan* and fall in the same category as property she inherited from a woman.

Upon the death of the female, the property she inherited from a male or female does not fall into her estate, but devolves upon other beneficiaries. In the case of property she inherited from a male, the property devolves upon the next beneficiaries of the male from whom she inherited it.

12.5.3.4 Distinction between the Hindu and the South African laws of succession

As has already been stated, the law of South Africa does not recognise the Hindu law of succession. If a Hindu dies, his or her estate will devolve according to the South African law of succession. The latter differs from the Hindu law of succession in material respects. The most obvious of these differences may be summarised as follows:

(a) under Hindu law, the questions that arise upon the death of the testator depend largely on the Hindu's viewpoints on ownership of property and more specifically the joint property of the family. Under *Mitakshara* law, the ownership of the joint property vests in the joint family as a community and not in the individual members of the joint family. Therefore, if a family breaks up, be it due to the death of the father or any member of the joint family or upon partition, there is no transfer of ownership to any beneficiaries because the deceased had no ownership that could be passed on. This concept of ownership is unknown to the common law of South Africa. The joint family system shows a resemblance to the concept of family property in existence in the African customary law. Communal land belongs to the tribe as a whole, but the chief has the right to allot land to individual members of the tribe. Family property belongs to the family as a whole, but succeeds to the eldest son in the family at the death of the family head;

(b) under Hindu law, the beneficiaries of the deceased are liable to pay the debts of the estate to the extent of their benefit. However, under South African law, the debts of the deceased must be paid out of the estate of the deceased before the estate of the deceased is distributed among his beneficiaries;

(c) in principle the Hindu testator has freedom of testation regarding his separate property, but regarding the joint family property, his freedom is limited and he may not bequeath his share in the joint property to someone else. In South African law, the testator in principle has unlimited freedom of testation and no distinction is drawn between joint and separate property as in Hindu law;

(d) the doctrine of representation in Hindu law applies only to the son, grandson and great-grandson of a deceased. However, in South African law, representation occurs when a beneficiary is predeceased, unworthy to inherit or has repudiated the benefit; and

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248 Derrett (1957) 237–247; Derrett "The rights of inheritance of women: Another opinion of a Hindu lawyer of the early nineteenth century" in Derrett (ed) vol I (1977) 340–386; Derrett "The testamentary capacity of a sole surviving coparcener and the rights of widows" in Derrett (ed) vol IV (1977) 242–245; Srinivasan vol III (1969) 2713–2836. The female's limited estate has been abolished in India by the Hindu Succession Act 30 of 1956. Also see Derrett (1963) 424–442, 459–461; Jhabvala (1999) 223.

(e) the rules of Hindu intestate succession differ substantially from the rules of South African intestate succession. The Hindu law of succession draws a distinction between the property of men and women whilst similar rules apply to the estates of men and women in South Africa.

The outcome of the South African Law Reform Commission's investigation into the recognition of Muslim marriages might have important consequences for Hindus in South Africa. If South Africa recognises Muslim personal law, it would open the door for Hindus to claim the same recognition for Hindu law. However, until such recognition is given, the rules of Hindu law of succession can be applied to the estate of a deceased Hindu only if the will of such a Hindu provided for the application of such rules. It is therefore recommended that a Hindu who wishes to bequeath his or her estate according to the Hindu law of succession should do either one of the following:

(a) he or she should make a general clause in a will requiring that the estate must be distributed in terms of the Hindu law of succession; or

(b) he or she should create a trust *mortis causa*, which must be administered in terms of the Hindu law of succession.

A general clause in a will or a trust *mortis causa* could solve some of the problems created by the non-recognition of the Hindu law of succession. It is recommended that the particular school in terms of which the division must be done, be explicitly mentioned to prevent any uncertainties. There is, however, another situation that is more problematic. Due to the non-recognition of Hindu marriages in South Africa, the surviving spouse of a deceased Hindu is not recognised as a legal spouse. Hindus should therefore refrain from using only the words "wife", "husband" or "spouse" in their wills. Interpretation of these words might lead to the exclusion of spouses married in terms of Hindu law only. It is, therefore, recommended that the name of a spouse should be referred to explicitly in the text of the will, for example "to my wife, Deep-Shika, I leave my house".

12.5 Status of women in Hindu law

According to the *Vedas*, men and women were equal in status. After the Vedic era, however, the interpretation of Hindu law, particularly by orthodox sectors of the Hindu society, resulted in inequality of the sexes and the oppression of women.[249] A network of traditional Hindu family laws that dates back many centuries gives males an inordinate amount of power within the family. This has a detrimental effect on the status of women. Women were seen as members of a group (or family) with no identity, personality or rights.[250] It is also believed that it was expected of widows to burn themselves alive on the funeral pyre of their dead husbands.[251] A woman falls under the constant guardianship of a man, namely her father, husband, son or brother-in-law.[252]

From childhood, the girl child is not as privileged as the boy child. For example, in *Mitakshara* law, a son becomes a coparcener on birth, but not a daughter. Certain sectors of Hindu society regard the girl child as a financial burden, their reasoning being that the parents spend money on a girl's upbringing, educate her and pay a dowry on her marriage, but eventually, she is part of the family she marries into. Hence, she is sometimes referred to as *paraya dhan* – "somebody else's wealth".

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249 Gill (1986) 9; Nanda "Hinduism and human rights" in Nanda and Sinha (eds) (1996) 242; Sugirtharajah "Hinduism" in Holm and Bowker (eds) (1998) 59–60.

250 Gill (1986) 9–10.

251 Gill (1986) 23–24. Fortunately, in countries such as India, the position of Hindu women has been improved to a great extent by means of legislation.

252 Steele (1986) 81.

The equality of status and opportunity and the dignity of the individual are included in the preamble to the Indian Constitution. Undoubtedly, there are many situations where traditional Hindu law will have to keep pace with the above principles. The caste system still persists. Women, the functioning heads of households, are effectively marginalised in the family unit by customary Hindu laws. The notion of ownership of women by their husbands and the resultant inferior status of women still exists, although this is contradictory to the teachings of the *Vedas*. In a landmark decision in 1999, the *Hariharan* decision,[253] the Supreme Court of India affirmed that a Hindu mother is an equal guardian of her legitimate children. This decision will provide significant relief to women in India, who, in abusive marriages, are afraid to leave for fear of losing access to their children. It is hoped that the 1999 Indian Supreme Court decision, granting women equal status in the guardianship of their legitimate children, will pave the way to enhancing the position of women in Hindu law.

253 *Githa Hariharan & Anor v Reserve Bank of India & Anor Writ Petition* [1999] ICHRL 15 (17 February 1999).

13

Jewish Personal Law

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13.1 General background[1]

The religion of the Jewish people is Judaism, which is seen as the origin and basis of all the world's ethical, monotheistic religious civilisations, such as Christianity and Islam. The Jews are not a race, since in their four millennia, converts of all races have joined. However, Judaism does confer a nationhood that spiritually and legally binds all Jews (including converts) together into the Jewish people, regardless of whether they are in the Holy Land promised by the Almighty to the founding patriarchs (Abraham, Isaac and Jacob and their descendants) or scattered in exile throughout the countries of the diaspora.

Judaism is a set of beliefs and principles, coupled with a legal system that applies those beliefs and principles to all situations. Jewish law puts Judaism's faith and philosophy into action, providing a method for living in accordance with its ideas, and for helping to attain its goals. Thus, all its laws and rituals are educational devices for the moulding of the individual's nature and personality in the divine ethical image, thereby contributing to the well ordering of society as a whole. In other words, Judaism is *kabbalat malchut shamayim* (acknowledgement of the sovereignty of God) and *kabbalat mitzvot* (acceptance of the commandments ordained by God).

God gives meaning to life and the world. The universe is not seen as a product of chance or fate, but as something purposely brought into existence by the Creator to provide the one thing He did not have: an arena in which the physical and the spiritual would be forced to co-exist and, hopefully, co-operate. A human being is a unique paradox of an eternal divine soul invested in a mortal animal body. Instead of the two being in constant conflict, the challenge Judaism uniquely poses is to use its philosophies, laws and customs to add a dimension of spiritual meaning and validity to the inescapable physical functions, thereby forging a working partnership between them to produce a totally integrated, balanced person.

This necessitates having a body of behavioural guidelines for all aspects of life, resulting in many sections of law and practice covering areas with which secular, and most other religious legal systems, do not deal at all.[2] For this reason, Judaism is usually called not just by the narrower term of a religion, but a way of life.

> The Hebrew name for Jewish law and custom is "Halacha", which means "the way to go". By the same token, sin is "Chayt", which is any thought, speech or action that is contrary to Judaism's values, and prevents one from progressing towards its goals. Repentance is called "Teshuva", meaning a remorseful return to Jewish faith and observance. At Mount Sinai more than 2 000 years ago, through Moses and the Jewish people, the Creator revealed to all mankind His ethical will, of which the Ten Commandments are merely the table of contents or chapter headings.

In order to prepare Jews for their mission to convey the message of ethical monotheism to the rest of the human race, they were given a wide-ranging detailed programme of 613 commandments.[3] The 613 commandments (248 dos and 365 don'ts) fall into two categories, those "between man and God", and those "between man and his fellowman". Due to of our varying natures and moods, God must be served out of both love and fear,[4] for love makes us want to please Him by fulfilling His will, while fear restrains us from rebelling and transgressing. On the other hand, the *dictum* "Thou shalt love thy fellowman as thyself",[5] meaning treat him or her as

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1 For more information, see Elon (ed) (1975) 1–46. Also see the previous edition, ch 13 at 13.1

2 For example dietary laws, marital relations, giving charity, interpersonal relationships, prayer, and observance of the Sabbath and holy days.

3 Covering all classes of individuals and the nation as a whole, no more than about 80-odd applying to any one person.

4 For example, Deut 6:4, 2, 24; 10:12, 20.

5 Leviticus 19:18.

you yourself would like to be treated, is regarded as the basic tenet underlying those commandments dealing with relations between people. God's commandments are based on justice, tempered by kindness and mercy. Justice includes: (a) distributive justice (fair dealing between human being and human being); (b) public justice (the community defines and enforces the duties and protects the rights of individuals and groups); and (c) integrity of personal character.

The Jewish nation's task is to encourage all others to adopt at least an irreducible minimum of seven basic principles of human decency in the name of One God ("the seven Noachide Commandments"), namely: (a) do not worship idols; (b) do not curse God; (c) do not commit adultery; (d) do not eat flesh from a living animal; (e) do not steal; (f) do not murder; and (g) establish courts of justice. Judaism teaches that upholding these seven principles entitles a non-Jew to a share in the world to come, just like Jews who fulfil the far more numerous commandments binding upon them. This clearly demonstrates that Judaism is not exclusive and does not threaten a terrible fate for those who do not embrace it. This is also the main reason why Judaism does not proselytise. Although Judaism is not a missionary religion, it is open to anyone who wishes to embrace its beliefs and practices sincerely.

Proclaiming that all people are God's children and can approach him directly, Judaism sees no need for a sacrament or for a priestly intermediary. Thus, the rabbi is seen as an ordinary human with extensive, advanced training in *Torah* scholarship. He is learned in Jewish law, answering questions and resolving disputes, in addition to being a preacher, teacher, advisor and counsellor. He is supposed to set an example by his life of faith and piety, *Torah* study, and moral integrity. He is not a priest who can administer sacraments or grant absolution. In fact, there is nothing a rabbi can do that a Jew cannot do for himself, if he has the knowledge and skills.

Judaism is seen as a rational, logical and moral way of life. The religion demands righteous living, stressing deed even more than faith. It is not enough for a Jew to believe in God and His *Torah*. Those beliefs must foster goodness and holiness through observance of His commandments.

According to Judaism, everyone is important. Each person is purposely brought into this life by the Creator in order to accomplish specific tasks regarding developing and refining oneself, and improving and elevating the world. Each person is unique and irreplaceable. This gives rise to a healthy blend of humility and self-esteem.

Freedom of choice is fundamental to Judaism's view of the human being. Without it, there would be no point to God issuing commandments, rewarding virtue or punishing evil. The *Torah* states that human beings are created in the spiritual image of God, meaning that a divine spirit dwells in every individual. Thus, human beings are born pure, predisposed to do good. Sin is the result of abusing the freedom of choice that each individual has. Each person can determine the moral quality of his or her life. People can therefore be held responsible, and must accept the consequences of their choices. Genuine lack of choice in wrongdoing, whether because of incapacity or coercion, constitutes a major or total mitigation of culpability in Jewish law.

Although life is seen as something good that should be enjoyed, the spiritual dimension of human beings should be stronger than the physical and they should be the masters and not the slaves of their natural instincts and desires. Unbridled enjoyment is undesirable in many ways and necessary limitations and good training in self-discipline are imposed by meticulous observance of *Kashrut* laws,[6] the family purity laws (regarding marital relations) and the occasional fast days.

As long as it is accomplished legally and ethically, there is no restriction on the accumulation and enjoyment of wealth. But with wealth must come the acknowledgement that its source is God's blessing and a consequent strong sense of obligation to support causes He considers

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6 The Jewish diet of kosher food and drinks.

worthy, and to give or lend to people in need. In Judaism, far more emphasis is placed on action than belief. Faith in God and His *Torah* and knowing that we are ultimately accountable to Him are obviously the underlying motivations for proper behaviour. However, the deed is the main thing.

Since Creation, every seventh day is Sabbath (or Shabbos). The Sabbath is a symbol of the covenant between God and Israel.[7] It is the highlight of the entire week and a source of blessing for all its days. The social significance of the Sabbath is that it gives freedom to everybody – everyone has the right to rest after six days of work. The workweek emphasises the dignity of labour, while the rest on the seventh day establishes the dignity of the person. To ensure that Sabbath is not just "a day off", but "a day of rest", much legislation was introduced. There are 39 principle categories of prohibited activities from which innumerable corollaries and specific applications flow. All these activities reflect man's creative abilities in the physical realms, which can lead to the delusion that man is self-sufficient and independent. Sabbath, which means cessation from such activities, re-enthrones God as the true Creator, upon Whom we are totally dependent for all we are, all we have, and all we can do.

Jewish religious authorities recognise the role that Christianity and Islam played in the spread of monotheistic ethical religion among peoples who were previously pagan polytheists. Despite the fact that Christianity and Islam have many similarities to Judaism, major theological differences between all three exist, which makes them mutually exclusive. For example, although Jesus was a Jew, Judaism could not accept him as the *Mashiach* (Messiah), nor Muhammad as the foremost prophet of the one God, nor that the Gospels or the *Qur'an* supersede the Bible.

13.2 Movements in Judaism

Besides traditional historic Judaism, which in modern times is called Orthodox Judaism, the 19th and 20th centuries saw the emergence of three deviationist movements, namely Reform, Conservative and Reconstructionist.[8] All the movements share the fundamental teachings of Judaism, the consciousness of mission, and the purity of faith.

Orthodox Judaism

Orthodox Judaism rests entirely on the unequivocal belief that on Mount Sinai God revealed the *Torah* to the Jewish people through Moses, which contained His ethical wisdom and will distilled into laws to guide every aspect of life. The written *Torah* is primarily the five books of Moses. The oral *Torah*, which was also conveyed to Moses on Mount Sinai contains explanations, interpretations and extensions of the written *Torah*, as well as the authoritative method of further explaining, interpreting and extending. The words of the Bible are not *Torah* unless seen through the prism of the oral *Torah*, without which the written *Torah* is impossible to understand correctly. For example, the Ten Commandments contain a prohibition against killing, which refers only to murder of an innocent person and not self-defence or capital punishment, and a prohibition against stealing, which refers only to kidnapping and not to stealing of goods or money that are covered elsewhere. Furthermore, the *Lex Talionis* ("an eye for an eye", and so forth) means financial compensation and not mutilation. *Torah* law consists of eternal immutable principles in evolving forms. Such "changes" must develop only by acknowledged pious scholars consistently applying those eternal, constant principles to newly arising situations, circumstances and technologies.

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7 Exodus 31:16–17.

8 See in this regard Brasch (1969) 1–21, 28–58; Katz (1977) 69–72, 99–131; Moore vol II (1927) 1–9, 79–111, 180–197.

Reform Judaism

Reform Judaism does not believe in the divine revelation of *Torah* at Mount Sinai, but rather a "Progressive Revelation" throughout the ages that is more akin to inspiration. Consequently, it does not accept the binding authority of the Bible and the *Talmud*, nor the rabbinic authority and *Halacha* (Jewish law) that flow from them. The logic is that if it is all man-made, it can all be man-changed by its members in accordance with their wishes and the philosophical and moral milieu of the moment. Religion is made relevant to the modern generation. Reform Judaism recognises human elements in the early religious writings and states that it should be interpreted in the light of the limitations of the time in which it was written. Customs should be upheld only if they fulfil a religious purpose.

Conservative Judaism

Conservative Judaism developed as a middle road between orthodox and Reform Judaism. Jewish law is still seen as of divine origin and many of the Orthodox customs are still observed. They believe, however, that ancient tradition should be adapted to modern times by development and modifications. These changes should be introduced slowly and in moderation. The aim is to conserve as much as possible of the tradition. Conservative Judaism was originally intended to protect traditional Judaism against the ravages of Reform. However, even though it is promoted as a "middle road" between Orthodox and Reform Judaism, it is in fact theologically identical to Reform in rejecting divine authorship of *Torah*, and therefore the binding authority of *Halacha*. It does urge retention of more of the traditional observances than Reform, although not as God's will and law, but only as the Jewish people's survival mechanisms.

Reconstructionist

The Reconstructionists view Judaism as an evolving and dynamic religious civilisation, composed of all the elements that make up the life of people. Its aim is to promote a positive ideology for all Jews to meet and work together and thereby to reconstruct the Jewish religious civilisation. The belief in God is interpreted in the light of not only the Jewish experience but also the experience of human beings in general. The Reconstructionists discard any notion of God as a supernatural being.

13.3 Sources of Jewish law[9]

Jewish law is based on various main sources, namely the Bible[10] and the *Talmud*, *Midrash* and successive updated codifications of Jewish law. The *Mishna* was the first codification of the laws of the written and oral *Torahs* that Moses received on Mount Sinai. Scholars (*Tana'im*) meticulously studied, developed and transmitted it orally from generation to generation. It embodies case law disputes, legal traditions, customs, definitions, usages, enactments and decrees. It is so concise in style that it often seems largely incomprehensible, and had to be expounded by the sages of the *Gemara* (*Amora'im*). The *Gemara* is an analytic discussion and extension of the *Mishna* that identifies the underlying principles and viewpoints in its disputes and often decides between them.

The *Mishna* (mostly in Hebrew) and the *Gemara* (mostly in Aramaic) together comprise the *Talmud*. The *Mishna* plus the *Gemara* of the *Yeshivot* (academies of advanced *Torah* study) in the land of Israel is known as the *Jerusalem Talmud*, while *Mishna* together with the *Gemara* of

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9 For more information, see Elon (ed) (1975) 49–146; Brasch (1969) 1–2. The two fundamental sources of Judaism are the *Torah* (Bible – Old Testament of the Christian Bible) and the *Talmud*. Katz (1960) 10–18; Van Nes (1933) 15–53; Herzog vol I (1965) 2–40.

10 The five books of Moses – *Torah of Moses* or *Pentateuch* – plus the 19 books of the Jewish holy scriptures, which are often referred to by non-Jews as the "Old Testament".

the Babylonian *Yeshivot* is called the *Babylonian Talmud*. The latter is more authoritative because it was properly edited and sealed (in the year 500 CE).

The *Talmud* is a vast, wide-ranging work containing millions of words in many huge folio volumes. It contains Judaism's theological and philosophical beliefs, historical traditions, moral views and rules of life. Some 2 000 sages contributed to the *Talmud* over 20 centuries and it was accepted as authoritative by the entire Jewish community. It is very concisely and even cryptically worded with the discussions touching on many different subjects, based on association of ideas. All this makes the *Talmud* very difficult to understand. It is imperative to study it in the light of the recognised authoritative ancient, medieval and modern commentaries.

From 500–1050 CE, the heads of the two major Babylonian *Yeshivot* were called *Ge'onim* (plural of *Ga'on*). They led the interpretation of the *Talmud* and functioned as decision makers. Their advice was sought worldwide and their replies (*Responsa*) constitute the next major source of Jewish law.

All subsequent generations of Talmudic scholars have written *responsa* on every subject of *Halacha*. Periodically, various compendia and codes of Jewish law have been published, each taking into account the *responsa* written by recognised leading *Torah* scholars since the last one. The first such major Codes are known as the *Riff*, the *Rambam* and the *Tur*.

Rabbi Joseph Caro published the *Shulchan Aruch* in 1565. It arranged all laws and customs regulating Jewish life since the destruction of the Temple and the Exile, such as daily Sabbath and festival observances, kosher dietary laws, rules of marriage and divorce, personal status, charity, mourning and civil and criminal jurisprudence. Although the organisational layout of the *Shulchan Aruch* remains the basis for all later codes, Jewish law was certainly not frozen in the 16th century. A tremendous amount of Halachic literature has appeared since then and the dynamic process of developing and applying Jewish law to contemporary situations and problems continues to this day.

13.4 Jewish law in South Africa[11]

13.4.1 *General*

Jews have been involved in the settlement of the Cape since colonisation.[12] Although the Jewish community has integrated into the general life of South Africa, they have maintained their own religion and culture.[13] Studies conducted during 1978 show that the largest concentration of Jews in South Africa was situated in Gauteng and its surrounding areas. There are a few synagogues in a north-eastern suburb of Johannesburg, and the South African *Beth Din* and the Federation of Synagogues are located in Yeoville. Jews can also be found in Cape Town, Durban, Pretoria, Port Elizabeth, Bloemfontein and East London.[14] In 1984, Hellig[15] wrote:

> Jewish religious expression, in its varied manifestations, is alive and well in South Africa, Johannesburg presenting the most obvious outer manifestation of Jewishness, since it has by far the largest concentration of Jews in the Republic.

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11 For a discussion of other branches of Jewish personal law, such as the law of persons, see the previous edition, ch 13 at 13.6.

12 For an overview of Jewish settlement in the Cape, see SA Jewish Board of Deputies, Cape "A short history" accessible at *http://www.capebod.org.za/cape-town-jewish-history/a-short-history* (accessed 1 August 2014.

13 Saron and Hotz (ed) (1955) xi–xii.

14 Hellig "Religious expression" in Arkin (ed) (1984) 95–96. For a discussion of Jewish history in South Africa from 1870–1955, see Saron and Hotz (eds) (1955) 1.

15 Hellig "Religious expression" in Arkin (ed) (1984) 95.

The 2001 census shows that the Jewish population in South Africa consists of 75 555 people.[16] Their main body of representation is the South African Jewish Board of Deputies. There are not many South African cases dealing with disputes between Jewish parties.[17] One of the reasons that may be advanced for this phenomenon is the prohibition Jewish law places on litigation in Gentile courts. The reason is to preserve Jewish judicial autonomy.[18] Another reason is existence of the *Beth Din* where the disputes between members of the Jewish community are generally resolved, and finally the concept of *dina d'malkhuta dina* probably prevents Jews from seeking resolution of their disputes outside the South African legal system.

13.4.2 Beth Din (*Jewish Ecclesiastical Court*)[19]

The Jewish court system was a three-tier system consisting of the great *Sanhedrin*, lesser *Sanhedrin* and the *Beth Din* (Rabbinical Court). The great *Sanhedrin* consisted of 71 Rabbis and took, among many other roles, the role of the Supreme Court. It was not an appeals court in the true sense and generally dealt with matters such as the crowning of the King, authorising wars to expand the country's borders, expanding holy sites, and the appointment of lesser courts. The lesser *Sanhedrin* of 23 judges was established in each city and they had the power to try capital cases. The *Beth Din* was an ordinary tribunal consisting of three judges (or Rabbis) with the power to adjudicate monetary and family issues.

The *Beth Din* is nowadays the only ecclesiastical body that has authority in Jewish life. It rules on questions of Jewish law, and arbitrates disputes in accordance with *Halacha*, or mediates compromise settlements. It usually also administers matters of personal status (such as marriage, divorce and conversion) and supervises production of kosher food. There are many *Beth Din*s around the world, even in South Africa.[20]

The case of *Taylor v Kurtstag*[21] is a good example of how the *Beth Din* operates in a South African context. The Court had to deal with the contention of the applicant that the *cherem* (excommunication order) issued by the *Beth Din* violated his religious rights and was thus unconstitutional. Malan J found that Jewish law is a legal system which "provides a system of substantive and procedural law for the resolution of disputes of all types" such as commercial transactions, marriage and divorce, and also the obligations of parents towards their children.[22] Jewish law also provides for the establishment of a *Beth Din* which "may be formed on a permanent basis by a community or on an *ad hoc* and temporary basis by agreement between litigants when a dispute arises".[23] The South African *Beth Din* was established by the Jewish community in the 20th century and has been dealing with disputes between Jewish community members since then. The *Beth Din* has no power to enforce judgments or awards made by it;[24]

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16 See the official website of the World Jewish Congress accessible at *http://www.worldjewishcongress.org/en/about/communities/ZA*.

17 The available court cases dealing with Jews or Jewish law in some or other respects are: *Amar v Amar* 1999 (3) SA 604 (W); *Levy v Levy* 1991 (3) SA 614 (A); *Raik v Raik* 1993 (2) SA 617 (W); *Berkowitz v Berkowitz* 1956 (3) SA 522 (SR); *Standard Bank of South Africa Ltd v Betts Brown* 1958 (3) SA 713 (N); *Aronson v Estate Hart* 1950 (1) SA 539 (A); *In re Denton's Estate* 1951 (4) SA 582 (N); *Ex parte Administrators Estate Sandler* 1976 (4) SA 930 (C); *Commercial Union Assurance Co of SA Ltd v Mirkin* 1989 (2) SA 584 (C); *Ex parte Robinson* 1953 (2) SA 430 (C); *Martens v Martens* 1952 (3) SA 771 (W); *Eilon v Eilon* 1965 (1) SA 703 (A); *C v Commissioner of Child Welfare Wynberg* 1970 (2) SA 76 (C); *Dreyer v Lyte-Mason* 1948 (2) SA 245 (W); *Taylor v Kurtstag* 2005 (1) SA 362 (W).

18 Elon (ed) (1975) 20–21; Elon vol I (1994) 13–18.

19 For more information, see Quint and Hecht vol 1 (1980) 7, 39–74; *Amar v Amar* 1999 (3) SA 604 (W) 605.

20 For more information, see *http://www.uos.co.za/uos/default.aspx*.

21 2005 (7) BCLR 705 (W).

22 Paragraph 31.

23 Paragraph 30.

24 Paragraphs 32–33.

however, since the applicant was a practising member of the Orthodox Jewish community of Johannesburg, "he is required to comply fully with the dictates of Jewish society and the mandate of Jewish law and ethics".[25] In addition, he is "required to observe community standards and ethics" and one such obligation includes "submission to the jurisdiction of the *Beth Din*" and compliance with the *cherem* issued by it.[26]

In other words, if an adherent to a religion voluntarily practices a religion in association with others, he or she is also bound by the reasonable and justifiable precepts of that religion. In the *Taylor* case, the applicant was obliged to accept the jurisdiction of the *Beth Din* and the consequences of the *cherem*. The *cherem* did not prevent the applicant from exercising his religious associational rights but only limited them. This limitation, according to Malan J, was reasonable and justifiable in the circumstances,[27]

> because a failure to do so will have the result that the Jewish faith and community will not be able to protect the integrity of Jewish law and custom in this case by ensuring conformity therewith. Moreover, it will be offensive to observant Orthodox Jews to be forced to associate with a person seen by them as deliberately and provocatively flouting Jewish law, custom and authority.

Furthermore, the court agreed that the *Beth Din* is not a court of law but a religious tribunal that is subject to review in terms of South African common law, but did not agree with the contention of the applicant that the imposition of the *cherem* was unfair.[28] Malan J reviewed the actions of the *Beth Din* and came to the conclusion that its decision to impose the *cherem* was fair under the circumstances.[29]

13.4.3 *Dina d'malkhuta dina*

The concept of *dina d'malkhuta dina* in Jewish law means that the law of the land is applicable to all Jews living in it. This means that if there were a conflict between Jewish law and the law of the land, the latter would prevail.[30] The rule, however, applies only to matters of law and not to matters of ritual.[31] It is sometimes difficult to determine whether a rule is a rule of law or a rule of religion. For example, a man and woman have to conclude a valid Jewish marriage in terms of certain Jewish rituals. The deliverance and acceptance of a *get* can dissolve the marriage. The Jewish community, however, accepts that the marriage must also be concluded in terms of the requirements of the law of land. Therefore, the practice has developed to conclude a Jewish marriage in terms of the law of the land, as well as in terms of Jewish law. Similarly, both the law of the land and Jewish law can dissolve the marriage.

There is nothing in South African law which prohibits Jews from resolving their disputes in their ecclesiastical tribunals (the *Beth Din*). However, the findings of such tribunals are only binding *inter partes*, and dissatisfied parties would be unable to approach the South African courts to enforce the findings of the *Beth Din*.[32]

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25 Paragraph 35.
26 Paragraph 35.
27 Paragraph 58.
28 Paragraph 42.
29 Paragraphs 60–64.
30 Grunfeld (1987) 17; Elon vol I (1994) 64–74; Katz (1960) LLD thesis UP 19–20; Shilo (1978) *Jewish Law Annual* 146–148.
31 Katz (1960) LLD thesis UP 19.
32 Katz (1960) 20; confirmed in *Taylor v Kurtstag* 2005 (7) BCLR 705 (W).

13.5 Jewish family law[33]

13.5.1 *Marriage*

Right at the beginning of the *Torah*, the "first fly in the ointment of creation" is seen to be human loneliness.[34] Judaism thus recognises the deep-felt need for human companionship. The primary form of relationship that is sanctioned in Jewish tradition is that of marriage.

A leading halakhist in the 14th century, Rabbi Jacob Ben Asher (the Tur), begins his description of the marital laws with the following blessing: "Blessed be God who desires the welfare of His creatures and who, knowing that it is not good for man to be alone, made him a helpmeet".[35]

The purpose of marriage in Judaism is thus seen to involve companionship in the context of commitment to another individual. Marriage is also seen as important for the completion of a person and their happiness: it is said that "whoever lives without a wife lives without well-being".[36] The third purpose of marriage mentioned by the *Tur* is procreation and, finally, marriage provides the main forum for the legitimate expression of sexuality in Jewish tradition without which a person spends their days "in thoughts of sin".[37]

This paragraph shall describe some of the legal facets of the Jewish institution of marriage and the attitude of Judaism towards other forms of intimate relationships. As with the law of persons, the "gender revolution" is causing a re-evaluation in many quarters of some of the traditional Jewish laws relating to marriage. These challenges come particularly from the feminist movement which seeks to remove the patriarchal elements in marriage, and the homosexual and lesbian movement which seeks to remove the heterosexist elements of Jewish marriage. This chapter will thus situate the discussion of marriage within these broad changes that are occurring within the tradition.

13.5.1.1 Forms and formalities of marriages

Marriage in Jewish tradition consists of two separate parts: *kiddushin* (betrothal) and *nissuin* (completion of marriage). There are three ways of effecting *kiddushin*: through money, a deed or cohabitation.[38] Effecting *kiddushin* through money involves the bridegroom transferring to his bride, in front of two competent witnesses, money or property – usually a ring – to a certain specified value and making a declaration to the following effect: "You are consecrated to me by this ring according to the law of Moses and Israel". Effecting *kiddushin* through a deed involves the transfer of a deed to the bride (who must accept it) in front of two competent witnesses, in which the bridegroom expresses his intention to be betrothed to the bride with the above-mentioned declaration. *Kiddushin* may also be effected through the above-mentioned declaration being made in front of two competent witnesses followed by sexual intercourse between the bridegroom and his wife. Practically, the last two methods of *kiddushin* have become obsolete, and most betrothals today take place through the transfer of property.[39]

Kiddushin involves an act of acquisition in which a man sets a woman aside for himself alone.[40] It brings into being a form of personal tie between husband and wife which can be dissolved only on death or divorce. She is regarded as exclusively his. *Kiddushin* does not, however, bring into effect the mutual rights and duties between husband and wife and, in

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33 For a discussion of the Jewish law of persons, see the previous edition, ch 13 at 13.6.
34 Greenberg (2004) 50.
35 Tur Even Haezer para 1. Also see Genesis 2:18.
36 Tur Even Haezer para 1.
37 Kiddushin 29b.
38 Kiddushin 2a.
39 *Encyclopaedia Judaica* (2005) under "Marriage".
40 Biale (1995) 48.

particular, cohabitation between them are prohibited at this point. The husband is also not liable for paying maintenance for his wife until *nissuin* is complete. Recognising the inherently unequal notion whereby a man "acquires a woman" and the problems of rooting marriage in the notion of acquisition, some Jewish reformers suggest that a more equal Jewish legal notion is required. Rachel Adler has, for instance, proposed substituting the idea of a "covenant of love and partnership" for traditional *kiddushin*.[41] This finds Jewish legal confirmation for the marriage bond in the law relating to the formation of a partnership which is an equal bond between two parties. The latter notion is being developed and used by individual couples, but is yet to be more widely accepted.

The *nissuin* involves the bride being brought to the bridegroom under the *huppah* (wedding canopy), where, in front of two competent witnesses, they are married. Where the betrothal merely sets aside the couple for each other, the *nissuin* brings into effect full mutual rights and duties between the parties.

In a traditional Jewish marriage ceremony today, both *kiddushin* and *nissuin* are performed in one ceremony. The *kiddushin* takes place with the exchange of rings (in rigid Orthodoxy, only the husband places a ring on the bride's finger). The groom is then required to give a marriage document (the *ketubbah*) to the bride. This document essentially details the obligations of the husband to the wife and her obligations towards him. It was instituted largely for purposes of protecting the woman and making divorce conditional upon payment of a large sum mentioned in the *ketubbah*. This was designed to deter divorce.[42] After the *ketubbah* is read out, the *nissuin* takes place and seven blessings are said (or sung) to the bride and groom. At the end of the ceremony, a glass is broken to remind the parties of the destruction of the Jewish temple. This is often interpreted today to mean that one's happiness cannot be complete until all those who are suffering and marginalised are also able to share in one's joy. There is usually a reception after the marriage at which there is plenty of food, drink and dancing to celebrate the joyfulness of the marriage.

13.5.1.2 Polygyny

The *Torah* and *Talmud* allow a man to have more than one wife, though a woman may have only one husband.[43] A man may have as many wives as he wishes, as long as he performs his marital and sexual obligations towards them. It was thought that this would prevent a man from having more than four wives. However, polygyny was generally not favoured in Jewish society, and this eventually culminated in the famous ruling attributed to Rabbi Gershom Me'or Hagolah that a man is forbidden from marrying two wives.[44] This ruling was, however, accepted only by Ashkenazic Jews who lived mainly in Northern Europe and Russia) and not by Sephardic Jews, who lived mainly in the Muslim countries of North Africa and parts of Southern Europe. It is also not absolute, and in extreme cases where a man is bound to a woman that he cannot live with or divorce, the ban may be lifted so that the man may marry a second wife. This exception is not, however, available to a woman, unless her husband divorces her or he dies, since, unlike polygyny, the *Halacha* never permitted polyandry.[45]

13.5.1.3 Consequences of marriage

Marriage brings into being certain rights and duties between spouses. In pre-modern times, these obligations were specified as follows: a husband had ten obligations toward his wife (or her

41 Adler (1998) 169–208.
42 Biale (1995) 80.
43 Horowitz (1953) 256.
44 Horowitz (1953) 50.
45 Meaning one wife and more than one husband. Horowitz (1973) 52.

descendants) and four rights in respect of her. Essentially, the duty of the husband was as bread-winner, provider and protector. In return, the wife was expected to bear children and look after the home. Nowadays, the obligations of the husband are as follows:

(a) to provide his wife with sustenance or maintenance;

(b) to supply his wife with clothing and lodging;

(c) to have sexual intercourse with his wife and to satisfy her sexually;

(d) to provide the *ketubbah* (the sum fixed for the wife by law);

(e) to procure medical attention and care during his wife's illnesses;

(f) to ransom his wife if she is taken captive;

(g) to provide suitable burial upon his wife's death;

(h) to provide for her support after his death and ensure her right to live in his house as long as she remains a widow;

(i) to provide for the support of the daughters of the marriage from his estate after his death, until they become betrothed or reach the age of maturity; and

(j) to ensure that the sons of their marriage inherit their mother's *ketubbah*, in addition to their rightful portion of the estate of their father shared with his sons by other wives.

The husband's rights are those entitling him:

(a) the benefit of his wife's handiwork she performs at home;

(b) his wife's chance gains or finds;

(c) the usufruct of his wife's property; and

(d) to inherit his wife's estate.[46]

These rights and duties both derive from the law and not from mere agreement between the parties: "a man, by marrying a woman, becomes obligated to her in ten matters and acquires rights against her in four matters, even if they have not been taken down in writing".[47]

Given the advent of equality between the sexes, this traditional conception of marriage rights and obligations has been challenged. Reform Judaism, for example, involves the assumption of mutual obligations of the couple towards one another and the writing of a marriage document (a *ketubbah*) that embodies these equal obligations.[48]

Sexual intercourse is an important part of marriage in Judaism. Men are obligated to satisfy their wives sexually in marriage.[49] This is called the obligation of *onah*: there must be physical intimacy, appropriate surroundings and regularity.[50] The enjoyment of sexual intercourse is not regarded as solely for purposes of procreation in Jewish tradition.[51] However, having children is an important commandment that married couples are required to fulfil: the very first commandment addressed to Adam and Eve was to "be fruitful and multiply and fill the Earth and have

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46 This is taken from the *Encyclopaedia Judaica* (2005) "Husband and wife". The traditional sources are Mishneh Torah (Ishut) 12:1–4; Shulchan Arukh (Even Ha'Ezer) 69:1–3.

47 Yad, Ishut 12:5; Sh Ar, EH 69:1.

48 Central Conference for American Rabbis (2005) 237.

49 See Feldman (1974) 60.

50 Nachmanides on Exodus 21:11. The Talmud allows the frequency of sexual relations to vary with the demands of a man's profession: people of "independent means" are required to have sex once a day, labourers must have sex twice a week, and sailors only have to have sex with their wives once every six months (Ketubot 61b). In these prescriptions, if we understand them less literally, it becomes evident that the Talmud indicates sensitivity to people's individual circumstances as to when they are required to have sex.

51 Biale (1995) 136 and Feldman (1974) 65.

dominion over it".[52] These differing aspects of sexuality have led to differing attitudes towards contraception in Jewish society: in general, even within many sects of Orthodox Judaism, contraception is today permitted to couples.

One of the advanced features of Jewish law is the prohibition on marital rape, a relatively recent development in Western societies: "a man is forbidden to compel his wife to the *mitzvah* of *onah*".[53] This is confirmed by later authorities like Maimonides who prohibits intercourse against the wife's will, "but rather let him do it with her consent and in mutual arousal and joy".[54]

According to Orthodox Judaism, there is one major restriction on sexual intercourse during marriage and this is that sex between husband and wife is forbidden during a woman's menstruation. In biblical times, this was regarded as being a seven-day period, but later *Halacha* regards a woman as impure for up to fourteen days. Thereafter, a woman is required to attend a ritual bath (*mikveh*) before sexual intercourse is once again permitted.

Menstruation was regarded as a period of impurity, and the laws relating to *niddah* seem to have been designed to keep women away from the Temple and sacred objects. These laws were also probably related to taboos common not only to Jewish society, but also in the ancient Near East on having contact with menstruating women.[55] Menstruation was not understood properly and the flow of blood was related to impurity.[56] Although some have tried to give the *niddah* period creative meanings (for example, by trying to show the value of a period of abstinence in a marriage), this concept is, in general, regarded by progressive Jews as outdated and these laws are not observed in conservative and reform marriages.

13.5.1.4 Levirate marriage

The brother of a deceased man who was married and died without having children is obliged to marry the widow of his brother and have children with her. This is known as a levirate marriage (*yibbum*), and was designed to ensure the continuance of the name of the deceased person to the next generation. Should the brother not wish to marry the deceased's wife, he is required to perform the ceremony of *Halitza*: she takes off his shoe and spits on the ground and makes a declaration that this is what should be done to the person who does not want to build up his brother's house. If the brother ignored the ritual of *Halitza* and thus did not release her from the obligation to marry him, the woman could be placed in the position of an *agunah* (chained woman).[57] This situation can arise but, in general, in more modern Jewish communities, the notion of the levirate marriage is of little import and provides an interesting insight into ancient Jewish society and its customs.

13.5.1.5 Concubinage

A concubine is a woman who dedicates herself to a particular man outside of marriage without *kiddushin* or a *ketubbah*.[58] There is a division among *halachic* authorities as to whether a man may take a concubine or not. In more recent times, the taking of a concubine has generally been regarded as prohibited. A concubine is not entitled to the pecuniary rights of marriage, such as maintenance, nor is a concubine required to obtain a *get* should she wish to marry another man. This relationship is severed by mutual consent.

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52 Genesis 1:28.
53 Eruvin 100b.
54 Mishneh Torah, Hilkhot Ishut 15:17.
55 Biale (1995) 147.
56 Blood is a source of impurity in Jewish tradition and kosher meat, e.g., has to be drained of as much blood as possible.
57 *Encylopaedia Judaica* (2005) "Levirate marriage".
58 Sanhedrin 21a.

13.5.1.6 Sexuality outside the marriage

Biblical law did not restrict a man from having sexual relations with an unmarried woman outside of marriage. The *Talmud* tried to restrict this freedom and communities censured such actions, but the offence was of a lesser magnitude than a sexual transgression. An unmarried woman may also have sexual relations with one or more men without violating any explicit sexual prohibition. Sexual relations among unmarried persons outside of marriage are not considered to be adulterous and a child born of such relations is not regarded as illegitimate. Since there is no specific transgression involved in sexual relations outside of marriage, the rabbis have tried to combat this in two main ways. Firstly, by ruling that, in general, it is presumed that if people cohabit they do so for purposes of getting married. Secondly, the rabbis prohibited men and women from spending time together in privacy when they were not married.[59]

13.5.1.7 Same-sex relationships and same-sex marriage

The foregoing discussion has focused upon traditional sources that generally assume that loving relationships occur between members of the opposite sex. There seems to be no consideration of same-sex relationships. In modern times, same-sex relationships are often recognised by the state and in some countries same-sex marriages are solemnised. What then are the views of Jewish tradition concerning same-sex relationships? Traditionally, when dealing with the subject of male homosexuality, Orthodox sources begin with the prohibition in Leviticus that reads: "and with a male you shall not lie down in the manner of lying with a woman".[60] The argument is that male homosexual relations are condemned by this verse and thus Jewish tradition cannot recognise same-sex relationships or same-sex marriage.

This line of reasoning is heavily contested today within Reform and Conservative Judaism, and even within Orthodoxy people are questioning whether in fact the verse in Leviticus sought to prohibit same-sex relationships.[61] There are several approaches, only two of which are mentioned here. Some argue that the verse only prohibits a particular form of homosexual sexual expression, namely anal sex.[62] Others argue that the verse in Leviticus is in fact a prohibition against degrading forms of sexual intercourse between men that involve violence and humiliation (through a close reading of the verse in light of history and other Jewish sources).[63] It is interesting to note that lesbianism is not mentioned in the written *Torah* at all. If relationships between members of the same sex were meant to be prohibited, this is a strange omission. In the *Talmud*, lesbianism is regarded as a minor sexual transgression and later authorities in the Middle Ages also prohibited lesbianism.[64]

It is clear that the approach towards homosexuality adopted by the ancient sources, for example, never recognised the existence of a distinct sexual orientation: the idea was that a person had gay sex as a deviant form of heterosexual desire. In the last 100 years, however, scientific investigation of human sexuality has revealed the existence of a "sexual orientation": a fixed aspect of the self (whether as a result of genetic or environmental factors) that determines to whom individuals are attracted and with whom they seek intimate relationships. Conservatively, five percent of the human species have a gay sexual orientation which is inseparable from other aspects of that individual's make-up. When recognising that in fact there is such a thing as a sexual orientation whereby some people are predominantly gay and some "straight", this opens

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59 Biale (1995) 191–192.
60 Leviticus 18:22.
61 See, e.g., the excellent discussion of this verse in Greenberg (2004).
62 Greenberg (2004) 80 concerning the Talmudic prohibition.
63 Greenberg (2004) 192–214.
64 See Biale (1995) 192–197.

up the possibility that the whole discussion on homosexuality in ancient sources was based upon incorrect empirical premises. This opens up a range of *halachic* possibilities, including, for example, that the *halachic* prohibitions apply only to those who are heterosexual but not to those who are homosexual.

As a result of reasoning such as this, there is a greater acceptance of same-sex relationship within Jewish society. The Reform movement now accepts that there is no prohibition on homosexuality. It no longer allows for any discrimination on grounds of sexual orientation and ordains gay rabbis. It now also allows rabbis to conduct same-sex marriages and to officially bless same-sex relationships. The Conservative movement is currently in a state of flux relating to the full and equal recognition of same-sex relationships and this issue is even receiving anxious consideration within liberal streams of Orthodoxy. This is an issue which is at the cutting edge of discussion in Jewish law and further developments in this area are likely, given the intensity of debate within Jewish society on this issue.

13.5.1.8 Prohibited marriages and legitimacy

Judaism forbids incest and thus any marriages between familial relations. This prohibition extends to a man's aunts, sisters-in-law, stepsisters, mother-in-law, step-daughters, daughters of a sister-in-law, daughters-in-law and granddaughters. Judaism also forbids a marriage between a man and a married woman. Any children born of an incestuous or adulterous sexual union are regarded as illegitimate (*mamzer*). It is important to stress that a child born from a man and woman outside of wedlock is not regarded as illegitimate in Jewish tradition.

Being a *mamzer* has one major legal impact upon a child and that is that he or she is not allowed to marry any Jew who is legitimate. A *mamzer* may only marry another *mamzer* or a convert.[65] Many have commented on the unfairness of punishing the children of an incestuous or adulterous union rather than the parents. Reform Judaism, for example, has thus abandoned the concept of the *mamzer* and considers all Jewish children marriageable with one another provided that they are not related to each other.[66]

Jews are not permitted to marry non-Jews. Such marriages are not regarded as binding and entail no legal consequences. No maintenance rights come into being, nor do any inheritance rights follow. However, children born of such marriages are not illegitimate; rather, they are considered as having been born out of wedlock. A non-Jew may convert to Judaism, in which case a valid marriage can be entered into after the conversion.

13.5.1.9 Parental obligations towards children

In traditional Jewish law, legal obligations of maintenance towards children rest upon the father.[67] These obligations exist irrespective of whether the child was born out of wedlock or not. These obligations include the following:

(a) providing for all the child's needs;

(b) educating the child; and

(c) ensuring that the child learns a profession.

The standard of maintenance for a child is according to their needs and not according to the financial status of the father.[68] Initially, the obligation of maintenance only existed until the child was six years old. However, a recent rabbinic ruling has increased this until 15 years.[69]

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65 Deuteronomy 23:3 and Shulchan Arukh EH 4:22–24.
66 Central Conference of American Rabbis (2005) 225.
67 See Schaffer (1983) Fall *Journal of Halacha and Contemporary Society* 36.
68 Shulchan Arukh EH 73:6.

The rules relating to custody focus on parental duty and the best interests of the child. It was thought that both boys and girls below the age of six should be in the custody of the mother. Above the age of six, boys should be placed in the custody of their father and girls in the custody of their mother.[70] These rules may be varied if they are not in the best interests of the child.[71] In Jewish law, the rules relating to custody are independent of those relating to maintenance: the fact that a child is with the mother does not relieve the father of his obligation to maintain the child. Both parents have rights of access to their child/children, though these may be curtailed if harmful to the child/children.

In respect of guardianship, the default position is that the father has guardianship over his minor children. A mother generally does not have legal standing over her children unless specifically appointed by a Jewish court. In general, these matters are today regulated by secular courts outside of Israel. In Israel, the Jewish law often applies but has been modified to provide for equality between men and women: both parents are now regarded as being natural guardians of their children.

In respect of a child's duties to his or her parents, a child is commanded to "honour your father and your mother".[72] The obligations implied by this commandment were enumerated by later authorities: they involve not sitting in the place of a parent, providing food and drink, clothing and shoes and assisting the parent where necessary.

The obligations of parents towards their child/children in Jewish law have led to an important case in South African law that upholds the rights of Jewish tribunals to use traditional methods of sanction in the Jewish community to enforce a maintenance order. In *Taylor v Kurtstag*,[73] – already touched upon above – Mr and Mrs Taylor agreed as part of their divorce settlement to submit to the jurisdiction of the Johannesburg *Beth Din* (the Orthodox Jewish Ecclesiastical Court in South Africa) in order to determine disputes relating to financial, maintenance and custody issues. Mr Taylor failed to comply with the provisions of a court order and the *Beth Din* made a determination that he was required to pay maintenance in the amount of R6 000 per month as well as R250 000 for arrear maintenance. When Mr Taylor defaulted on paying these amounts, the *Beth Din*, after a series of intervening events, eventually issued a *cherem* against him. A *cherem* is an order by the *Beth Din* which seeks to ensure that the recalcitrant person complies with the ruling of a *Beth Din* through adopting "shunning measures" against the person in question (it is often referred to as an order of excommunication). In this case, the order was to deprive Mr Taylor of his right to belong to an Orthodox Jewish congregation, prevent him from being counted as part of a prayer quorum, prevent him from exercising certain honours in Jewish communal life, prevent him from having a Jewish burial or being buried in a Jewish cemetery and disqualify him as a witness in Jewish matters before the *Beth Din*. Mr Taylor then challenged this ruling, seeking to prevent the *Beth Din* from imposing the *cherem* upon him or publishing it anywhere in the community. His main ground for doing so involved challenging the constitutionality of the actions of the *Beth Din* as infringements of his freedom of religion and dignity. The case raised important questions concerning the power of a *Beth Din* to enforce its orders and the limits of such a power in a secular state.

In a High Court judgment, Malan J found that the actions of the *Beth Din* were not unconstitutional. The rights of Mr Taylor were infringed given that there were certain restrictions imposed on his religious freedom and his personality rights through the communal shunning. However, the learned judge found that the power to issue a *cherem* was an important matter as it provided

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69 *Encyclopaedia Judaica* (2005) "Parent and Child".
70 Schaffer (1983) Fall *Journal of Halacha and Contemporary Society* 37. Also see Broyde (1999) Spring *Journal of Halacha and Contemporary Society* 28.
71 Rema EH 82:7.
72 Exodus 20:12.
73 2005 (1) SA 362 (W).

the only way in which the *Beth Din* could enforce its rulings. "Freedom of religion also involves the autonomy in setting guidelines for the admission of members and their discipline".[74] This meant that the religious rights (in particular, section 31(1) of the Constitution) of members of the Orthodox Jewish community were also implicated in their seeking through the practice of *cherem* to protect the integrity of Jewish law and custom and ensure compliance therewith. The right to freedom of association (section 18 of the Constitution) of such members would also be infringed by forcing them to associate with Mr Taylor who was deliberately contravening an order of the *Beth Din* (and thus Jewish law). A margin of discretion had to be allowed to the *Beth Din* to impose the terms of the *cherem* it deemed appropriate (as this was a matter of Jewish and not secular law) and the terms of the order were not so harsh such that the court should intervene. Consequently, Malan J upheld the right of the *Beth Din* to impose the *cherem* in question and dismissed the application.

This is an important case for several reasons. First, in the context of the current chapter, it shows the seriousness with which the *Beth Din* dealt with a case of a father defaulting on paying maintenance for his children after divorcing their mother. This indicates the importance of an obligation to pay maintenance in Jewish law and that breaching it is seen to breach a central norm in the Jewish community. In light of the serious problem in South Africa of large numbers of maintenance defaulters, the *Beth Din*'s approach is an important moral statement that this is unacceptable in the Jewish community. Secondly, the case recognises effectively that there are several legal systems operating in South Africa. Whilst the orders of any such court do not have the force of secular state behind them, the courts will uphold the right of religious (and other) courts to enforce their orders through their own means where these do not unjustifiably infringe constitutional rights. Finally, the case also upholds the view that the orders of a religious court are reviewable and, in a suitable case, can be interfered with where they violate constitutional rights. The court effectively engaged in a proportionality enquiry, balancing the nature and extent of the limitation of the rights of Mr Taylor in this case against the religious rights of members of the Orthodox Jewish Community to have orders of the *Beth Din* enforced. The technical approach of the judge may be questioned[75] and fuller reasoning has been desirable: nevertheless, it is clear that the power of religious (and other) courts is circumscribed by the rights in the Constitution and in an appropriate case, these orders may be overturned. This is of great importance given that the exercising of religious power can at times serve to insulate communities from the effects of the Constitution and, in some cases, to perpetuate arbitrary discrimination against such groups as women and homosexuals.

13.5.1.10 Adoption

In general, Jewish law did not know the institution of adoption. The relationship between parents and children was established through natural birth. Jewish law, however, devised means of establishing consequences similar to adoption through legal means. This could be achieved in the following ways. The adopter could be appointed as a guardian of the child with exclusive authority to care for the child's welfare and education and by entrusting the administration of the child's property to the adopter. Natural parents, however, continue to be liable for maintenance of the child to the extent that the needs of the child are not met by the adoptive parent. Intestate succession would also only provide natural parents with rights to inherit from the child. This would have to be dealt with through the testamentary disposition of property.[76]

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74 Paragraph 56.

75 It is debatable whether the analysis should have been conducted under s 36(1) or at the first stage of the constitutional enquiry in that it involved balancing competing rights.

76 *Encyclopaedia Judaica* (2005) "Adoption".

13.5.2 *Divorce*

13.5.2.1 Grounds for divorce and the *get* (letter of divorce)

Jewish law, as it has developed, allows for divorce. However, there is no systematic or detailed legislation in the written *Torah* concerning divorce. While divorce is allowed, it is not encouraged or taken lightly. It is stated that "when a man divorces his first wife even the altar sheds tears".[77] Priests are forbidden to marry divorcees.[78] The marriage document (*ketubbah*) also provides a deterrent to divorce, as it requires the husband to pay a considerable amount of money to the divorcee.

What are the grounds for divorce? The *Talmud* contains a fascinating debate concerning what would constitute adequate grounds for divorce.[79] One school of thought (the school of *Shammai*) holds that the wife must have committed a sexual transgression and only this would be adequate grounds for divorce. Another school of thought (that of Hillel) holds that a man may divorce his wife for any reason through which she is distasteful to him – "even if she has merely spoiled his food". A final school of thought (that of *Akiva*) is even more permissive and allows divorce simply if he finds another woman more beautiful than his wife, as long as "she finds no favour in his eyes". The actual law was decided in favour of the house of Hillel and thus the grounds for divorce are open-ended in Jewish law: they are subjective and thus a matter for individual discretion and judgment.

There are numerous consequences to a divorce: the parties are free to remarry, and the wife is entitled to a return of her property. The wife is also entitled to payment of the sum of money mentioned in the *ketubbah* except where she, for example, forfeits this as a result of adultery. Divorce also terminates a husband's duty to maintain his wife, though, for charitable reasons, tradition suggests that he should continue to maintain her above the level of those who are generally poor.[80]

The *Talmudic* rabbis developed a procedure by which a divorce was to be effected: a valid divorce required the man to hand the woman a bill of divorce which is known as a *get*. Divorce generally requires a detailed and technical procedure to be performed, suggesting the societal disapproval of divorce. Initially, a man could divorce his wife by handing her this document and there was no requirement that she consent to this divorce. However, in the Middle Ages, Rabbi Gershom issued a major *halachic* ruling which prohibited a man from divorcing his wife without her consent: in other words, he must give her the *get* and she must consent to receiving it.

It may be thought that this ruling placed a woman on an equal footing with a man as it gave her the power to refuse a *get* and thus prevent her husband from remarrying. However, it is important to understand that he still retains greater power than she does in the divorce proceedings. The reason for this relates to the fact that polygyny is only prohibited by a medieval rabbinic proclamation rather than by *Talmudic* law: such a proclamation only entails that the community would shun a person who violated it but lacks any further legal force. This means that a man may still marry another woman without committing adultery or creating illegitimate children. In the case of a woman, however, she cannot remarry without committing adultery or creating illegitimate children. An illegitimate child generally cannot marry another Jew and is stigmatised within Jewish society. Consequently, a woman who is refused a *get* by her husband is in a very serious position and is effectively barred from remarrying, whereas if a husband is refused a *get*, he can still remarry without drastic consequences.

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77 Gittin 90a.
78 Leviticus 21:14.
79 Gittin 90a–b.
80 *Encyclopaedia Judaica* (2005) "Divorce".

This situation has led to major inequity, as a husband could thereby effectively prevent a wife from remarrying for purposes of revenge or blackmail. The situation arises as a result of the fact that in Jewish law, Jewish tribunals do not grant divorces: a divorce occurs through a man issuing his wife a *get* and her receiving it. In such circumstances, there is usually an attempt by the court to mediate the dispute so as to encourage the husband to grant the *get*. Should this not succeed, the *Halacha* lists certain limited circumstances in which Jewish tribunals could compel a husband to give a *get*, namely:

(a) when the husband suffers from physical ailments that cannot be endured by the wife;

(b) where the husband violates or neglects his marital obligations to his wife (maintenance and sexual obligations); and

(c) when there is sexual incompatibility between husband and wife.[81]

The *Halachic* validity of a get given under compulsion is dubious given the requirement that a *get* must be given willingly.[82] Moreover, the trouble is that, in many cases, the man does not succumb to compulsion. In Israel, for example, some men have been jailed for failing to give a *get* and yet they still refuse to do so.

To get or not to get a *get*, that is the question[83]

The attempt to ensure that a woman is able to gain a *get* has led to the intervention of the secular states in several countries, and in South Africa, section 5A of the Divorce Act[84] allows the South African courts to prevent a Jewish husband from gaining a secular divorce without also providing a woman with a religious divorce.[85] This is meant to ensure that a woman will automatically be granted a *get* if a secular divorce is granted. This, of course, can also lead to inequity if the man refuses to grant a religious divorce, which then prevents a secular divorce as well. As a result, the section provides judges with discretion to make any order that they find just. In *Amar v Amar*,[86] Goldstein J ordered a husband to pay a set monthly amount of maintenance until he gives his wife a *get*.

As can be seen from this analysis, the traditional law relating to divorce is strongly based upon patriarchal assumptions: the man generally gives the woman a *get* whereas she is effectively passive in the process.[87] More egalitarian branches of Judaism will not accept these inequalities and are concerned that both parties are placed on equal terms in marriage and divorce.

As such, Reform Judaism, for example, has moved away from the traditional laws and no longer considered divorce a religious matter, rather a civil one. Reform Judaism uses the *Talmudic* principle of *dina d'malkhuta dina* (see 13.4.3). Traditionally, this principle had been applied to business transactions and not personal matters such as marriage or divorce. However, the Reform community has used this principle as a method of remedying the inequities of the religious system of divorce. Thus, Reform congregations regard civil divorce as completely dissolving the marriage.[88]

The alternative approach which is followed by more traditional branches of Judaism leads to a woman having to remain married to a hated husband against her will or be abandoned by her

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81 See, e.g., Ketubbot 77a.

82 See, e.g., the article by Rabbi Gartner (1985 Spring *Journal of Halacha and Contemporary Society* 118–119. The article is an example of religious writing that embodies a telling lack of legal imagination and proceeds to justify a very grave injustice.

83 Based on the amusing title of the article written by Blackbeard (1994) *THRHR* 641.

84 70 of 1979.

85 For an account of the history of this law and what gave rise to it, see Harris (1999) Summer *Justice* 32–37.

86 1999 (3) SA 604 (W).

87 See Hellig (2000) *Jewish Affairs* 38–44.

88 See Marmur (2000) Winter *Justice* 20–22 and Central Conference of American Rabbis (2005) 244–245.

husband and never be able to remarry. "Her fate is not in her hands because she can only be a passive recipient of a divorce, never its initiator".[89] This leads to a further major problem: what is termed the *Agunah* or "chained woman".

13.5.2.2 *Agunah* (chained woman)

The *agunah* is a woman "whose marriage is in fact ended or suspended, but who legally remains a married woman, unable to remarry".[90] There are a range of circumstances in which a woman can become an *agunah*, the most common of which are described below: first, in a situation where a husband deserts his wife and disappears; secondly, where the husband dies but there is no valid testimony concerning his death; thirdly, where the marriage is untenable but the husband refuses to divorce his wife despite threats and punitive measures adopted by the religious courts, and finally, where the marriage is untenable but the husband is legally incompetent to grant a divorce (usually on grounds of insanity).

In these circumstances, a woman is unable to acquire a *get* as the husband cannot or will not give her a *get*. As such, a woman cannot remarry. If she does, she is regarded as committing adultery. Any children that are born of the later union are regarded as illegitimate children (*mamzerim*). As such, they are not permitted to marry another Jew.

The *agunah* problem also shows that there is no presumption of death in Jewish tradition. Death has to be established through the direct testimony of witnesses. This is not always possible and can thus lead to many women remaining chained to their dead husbands.

The Conservative movement in America has attempted to deal with the problem of the *agunah* through a number of technical legal solutions. One idea was for the couple to agree in the marriage document (*ketubbah*) to the authority of a Jewish court to dissolve a marriage in certain instances. Another method of solving this problem has been for the couple to enter into an antenuptial agreement (this could be placed in the *ketubbah*) whereby the marriage rests upon a condition that certain circumstances exist: for example, the husband being present or that he supports his wife. Where these circumstances no longer exist, the marriage is automatically dissolved. These suggestions have, unfortunately, generally not been adopted by Orthodox Judaism.

13.6 Jewish law of succession

13.6.1 *General*

The Jewish law of succession or inheritance prescribes the rules of succession that must be applied after the death of a Jew. The primary purpose of the rules is to preserve the basic unit of Jewish life, namely the family.[91] The basic source for the classic Jewish law of succession can be found in the book of Numbers 27:8–10, which read as follows:

> Say to the Israelites, If a man dies and leaves no son, turn his inheritance over to his daughter. If he has no daughter, give his inheritance to his brothers. If he has no brothers, give his inheritance to his father's brothers. If his father had no brothers, give his inheritance to the nearest relative in his clan, that he may possess it. This is to be a legal requirement for the Israelites, as the Lord commanded Moses.

Polygyny, although an exception, is prevalent in certain Jewish communities. The rules of succession are the same, regardless of whether the testator was involved in a monogamous or polygamous relationship.[92]

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89 Biale (1995) 69.
90 Biale (1995) 102.
91 Meiselman (1978) 88.
92 Except for the position of the sons of a deceased wife involved in a polygamous relationship. The first-born son is in a more favourable position than the other sons.

A Jewish testator's freedom of testation was restricted, and the concept of wills was unknown in Jewish law. It was, however, possible for a testator to dispose of his or her property during his or her lifetime by means of a contract. There were three different forms of contract that can be used, namely:[93]

(a) *Mattenat bari* (gift by a healthy person);

(b) *Mattenat shekhiv me-ra* (gift by a critically ill person);[94] and

(c) *Mezavveh mehamat mitah* (gift in contemplation of death).[95]

A husband could not make provisions to exclude a wife's or a daughter's right to be maintained by the estate. If the testator died without a valid will, his estate devolved upon his intestate beneficiaries according to the set rules.[96]

In order for succession to take place, the following ground rules had to be fulfilled:

(a) the testator must be dead;[97]

(b) the beneficiary must be alive upon the death of the testator;[98] and

(c) the beneficiary must be competent to inherit.[99]

The drawing up of wills developed later in Jewish law,[100] and testator nowadays has the right to dispose of his entire estate by means of a will.

The answer to the question whether the rule, *dina d'malkhuta dina*, also applies to the Jewish law of succession is uncertain. The general viewpoint is that the answer must be in the negative.[101] The classic law of succession, which is national in character, must therefore be applied to all Jews, regardless of where they live. Although this is true, one has to remember that the classic law of succession has been altered in various countries by means of legislation.

13.6.2 *Rules of Jewish law of intestate succession*

13.6.2.1 Order of payment

An estate devolves upon the beneficiaries after the debts of the deceased have been paid. The deceased's estate does not devolve upon the surviving wife and daughters. Their position may be compared to the position of preferential creditors. They have a lien on the property of the deceased upon his death. Payment out of the estate of the deceased will therefore take place in the following order:[102]

(a) funeral costs to bury the deceased;

(b) administration costs to administer the estate;

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93 Meiselman (1978) 87.

94 Also see Grunfeld (1987) 47.

95 This may be compared to a *donatio mortis causa* in South African law. See Van der Merwe, Rowland and Cronjé (1990) 586; De Waal and Schoeman-Malan (2008) 218; Rautenbach (1994) LLM thesis NWU 59–60.

96 See 13.6.3.

97 In some circumstances, a presumption of death, similar to the situation in South Africa, might be enough to accept that the testator has died. Where relatives have died together, the rule is that the "persons who were certain heirs took to the exclusion of those who were doubtful heirs". For examples of the application of this rule, see Horowitz (1973) 379.

98 Representation of a predeceased beneficiary is not possible. Horowitz (1973) 379.

99 In order to be competent to inherit, a beneficiary must be a blood relative of the deceased in the descending or ascending male line. Horowitz (1973) 381.

100 Horowitz (1973) 402.

101 Grunfeld (1987) 17.

102 Chigier (1985) *Jewish Law Annual* 49.

(c) maintenance towards the surviving wife;
(d) maintenance towards the unmarried daughters;
(e) other creditors, including the payment of the wife's *ketubbah*;
(f) descendants; and
(g) rest of the relatives.

13.6.2.2 Impediments to inheritance

Contrary to most other religious legal systems, the conduct of a beneficiary does not have an effect on his or her right to inherit. Conversion to another religion also has no effect on the beneficiary's right to inherit.[103]

13.6.2.3 Grounds for qualification as a beneficiary

(a) *Blood relatives through the male line*: A beneficiary's right to inherit is always traced through the paternal side, firstly descending and then ascending.[104]

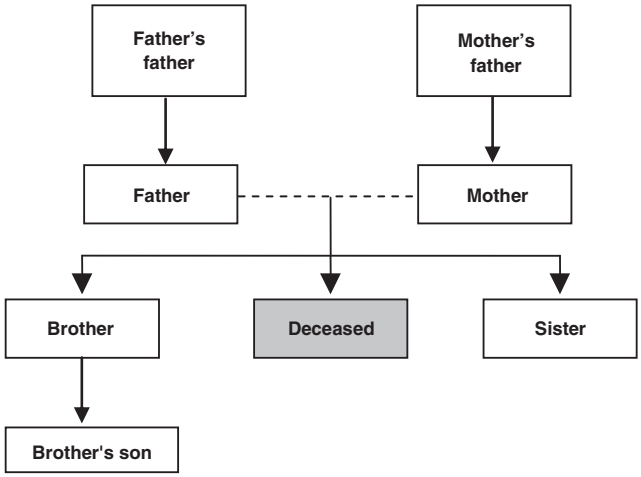


Figure 13.1

Only the father of the deceased will inherit. The mother of the deceased and her relatives do not inherit.[105] The brother of the deceased cannot be traced in the descending or ascending paternal line, and is therefore excluded from inheritance if there are relatives in the descending or ascending paternal line.

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103 In *Aronson v Estate Hart* 1959 (2) SA 539 (A), the court held that a condition in a will providing for a forfeiture of all benefits bequeathed to such beneficiary if he or she should marry a person not born in the Jewish faith, or should forsake the Jewish faith is not against public policy, and is therefore valid. Horowitz (1973) 383 points out that Jewish tribunals withheld these inheritances in later years in order to discourage conversion to other religions. If the converter returned to the Jewish faith, his or her inheritance was restored. If, however, the converter died an apostate, his or her estate would devolve upon his or her beneficiaries. Also see Elman (1958) 79.

104 Shilo "Succession" in Elon (ed) (1975) 446. The result is that members of the mother's family are not regarded as blood relatives. She does not inherit from her children, nor do her brothers or other relatives. Horowitz (1973) 381; Elman (1958) 78; Grunfeld (1987) 10–11.

105 Horowitz (1973) 381.

(b) *Males are preferred to females*: Males exclude females in the same degree. Therefore, upon the death of the deceased, his sons inherit the entire estate in equal shares.[106]

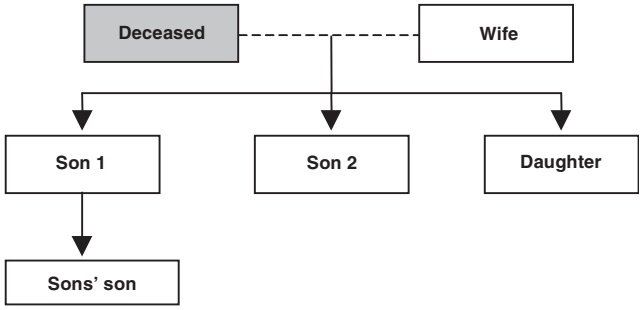


Figure 13.2

Son 1 and Son 2 of the deceased inherit the whole of the estate in equal shares. The wife and the daughter have a lien for maintenance against the estate.[107]

(c) *Representation*: A deceased's descendants represent a predeceased beneficiary.[108] The implication of such a rule is that a granddaughter may be in the position to inherit her father's inheritance, while on the other hand, the daughter of a deceased is excluded from the inheritance.

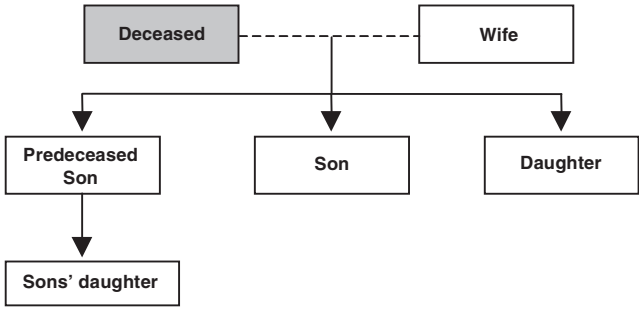


Figure 13.3

The beneficiaries of the deceased are his son and his son's daughter. The wife and daughter have a lien for maintenance against the estate. The son's daughter represents her father, who is predeceased. If, however, a daughter and a son survive the predeceased son, the son would exclude his sister and would inherit his father's portion from the deceased's estate.[109]

(d) *Extra-marital children*: There is no distinction between the legitimate and extra-marital children of a deceased. They inherit the same.[110]

(e) *Posthumous children*: A child who has already been conceived at the death of his father inherits the same as living children. The only requirement is that the child must have been born alive.[111]

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106 Elman (1958) 78–79; Shilo "Succession" in Elon (ed) (1975) 446; Grunfeld (1987) 10.
107 Horowitz (1973) 382.
108 Shilo "Succession" in Elon (ed) (1975) 446–447.
109 Horowitz (1973) 382; Elman (1958) 79.
110 For exceptions to the rule, see Horowitz (1973) 382; Elman (1958) 79; Shilo "Succession" in Elon (ed) (1975) 446.
111 Horowitz (1973) 382–383. This situation may be compared to the *nasciturus* fiction in South African law.

(f) *The nearer degree excludes the more distant*: The implication of this rule is that the son of a deceased would exclude his grandfather, a father would exclude the brother of the deceased and the brother would exclude the grandfather.[112]

(g) *Full blood and half-blood*: Under conditions of polygyny or successive marriages, children are equal to one another if they have the same father. It is irrelevant whether they were born of different mothers or if they are the children of a concubine. The rules of succession apply to them in the same way as to their full blood brothers and sisters.

13.6.2.4 Classes of beneficiaries and order of succession

The beneficiaries and their order of succession may be summarised as follows:[113]

(a) the sons of the deceased and their descendants if they are predeceased;

(b) if there are no beneficiaries from the first category, the daughters of the deceased and their descendants if they are predeceased;

(c) if there are no beneficiaries from the first two categories, the father of the deceased;

(d) if there are no beneficiaries from the first three categories, the brothers of the deceased and their descendants if they are predeceased;

(e) if there are no beneficiaries from the first four categories, the sisters of the deceased and their descendants if they are predeceased;

(f) if there are no beneficiaries from the first five categories, the grandfather (father's father) of the deceased;

(g) if there are no beneficiaries from the first six categories, the uncles (father's brothers) of the deceased and their descendants if they are predeceased;

(h) if there are no beneficiaries from the first seven categories, the aunts (father's sisters) of the deceased and their descendants if they are predeceased;

(i) if there are no beneficiaries from the first eight categories, the great-grandfather (father's father's father) of the deceased;

(j) if there are no beneficiaries from the first nine categories, the brothers of the great-grandfather's (father's father's father) of the deceased and their descendants, and so on; and

(k) if the deceased died without any relatives, the estate devolves upon the state.

13.6.2.5 Double portion of the firstborn son

In terms of Deuteronomy 21:15–17, the firstborn son of a father inherits a double portion. This rule of primogeniture applies only to the firstborn son of a father and not to the firstborn son of a mother. If a man marries more than one wife, his firstborn son will thus be the first son of his first wife. It is irrelevant whether the firstborn son is extra-marital or not. However, the rule does not apply if the firstborn son is posthumous or one of twins. His descendants represent a firstborn son. The double portion of the firstborn son is calculated as if he constitutes two beneficiaries. The following situations may occur:[114]

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112 Elman (1958) 78; Shilo "Succession" in Elon (ed) (1975) 446.

113 Epstein (1927) 123.

114 Elman (1958) 79; Shilo "Succession" in Elon (ed) (1975) 447; Schereschewsky "Firstborn" in Elon (ed) (1975) 434.

(a) *Living sons and no posthumous son or sons survive the testator*:

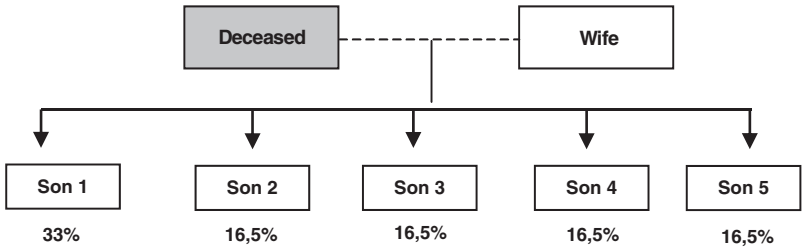


Figure 13.4

The estate of the deceased is divided into six equal portions. Son 1 (the firstborn son) inherits $^{2}/_{6}$ ($^{1}/_{3}$). Sons 2, 3, 4 and 5 inherit $^{1}/_{6}$ each.

(b) *The testator is survived by living sons, predeceased sons and no posthumous son*:

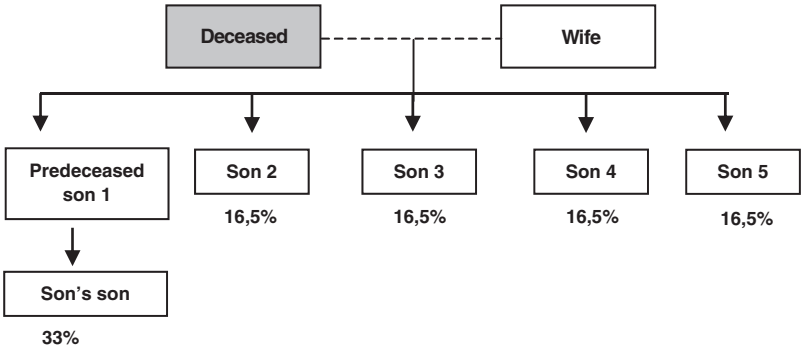


Figure 13.5

The estate of the deceased is divided into six equal portions. The predeceased son's son represents his firstborn father and inherits a double share, therefore $^{2}/_{6}$ (or $^{1}/_{3}$) of the estate. Son 2, Son 3, Son 4, and Son 5 each inherit $^{1}/_{6}$ of the estate.[115]

(c) *Living sons and posthumous son survive the testator*: The extra share of the firstborn is calculated upon the death of the testator. In the case of a posthumous son, this share is not affected – his share of primogeniture is fixed. The extra share is set aside for the firstborn son and the residue of the estate is divided between the firstborn son and other sons, including the posthumous son.

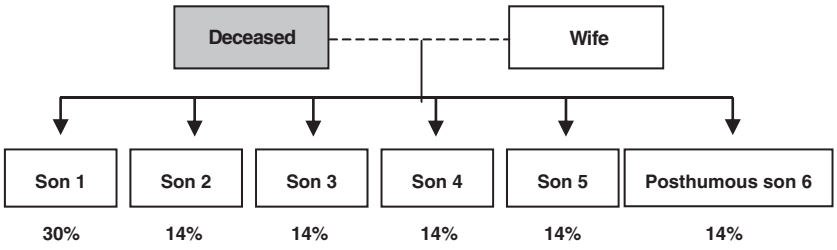


Figure 13.6

115 Horowitz (1973) 384–385.

The estate of the deceased is divided into six equal shares. The six equal shares consist of the shares of the sons, excluding the posthumous son, but including the double share of the firstborn son. His share of $^{1}/_{6}$ is set aside as his share of primogeniture. The rest of $^{5}/_{6}$ is then divided between all the brothers (Son 1 to Son 6). Son 1 inherits $^{11}/_{36}$ ($^{1}/_{6} + {}^{5}/_{36}$), son 2, 3, 4, 5 and 6 each inherit $^{5}/_{36}$.

13.6.3 *Position of women*

In general the legal position of women and men are equal in Jewish law. Genesis 1:27 reads as follows:

> So God created human beings in his own image. In the image of God he created them; male and female he created them.[116]

Genesis 1:27 is supplemented by other verses such as Exodus 21:1, which reads: "These are the laws you are to set before *them*."[117]

The word "them" has been interpreted to include both men and women. In spite of the Biblical references that afford men and women equality in terms of Jewish law, the sources reveal that a woman's position is far from equal to that of a man.[118] The discriminatory rules were introduced either in favour of or against women. For example, the disqualification of women as witnesses was initially introduced to protect women. On the other hand, the rule that permits men to have more than one wife and women only one husband was against women. Other discriminations against women were introduced in terms of the law of succession.

The property of a married woman may consist of three main categories, namely:[119]

(a) ***M'lug*:** This is private property that belongs to the wife.[120] At first, she had full freedom to dispose of her own property and to deal with it without her husband's consent. However, various restrictions were developed due to the fact that a husband is the sole heir to a woman's estate, and the husband was afforded a right to usufruct on the property of his wife.[121] Property in this category includes property the wife obtained before her marriage, dowry (*nedunyah*)[122] that has not been recorded in the *ketubbah*, wedding gifts from the husband (not recorded in the *ketubbah*), property acquired through inheritance after the marriage, damages recovered from a third party (excluding the husband);

(b) ***Côn Barzel* (guaranteed property):** This is property that the wife has brought into the marriage or that the husband has set aside for his wife. The husband has accepted responsibility for the amount reflected in the *ketubbah* and he is responsible for its full monetary value, regardless of whether he loses it or not. Property in this category includes the *nedunyah* that has been recorded in the *ketubbah*; and [123]

(c) **Personal property:** This is property of the wife over which the husband has no control or in which he has no interest. Property in this category includes gifts from the husband during

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116 Own emphasis.
117 Own emphasis.
118 Cohn (1984) 167–177.
119 Katz (1960) 121–123, 126–127. The respective proprietary rights of the spouses could be varied by means of a contract between the parties.
120 Epstein (1927) 107.
121 Epstein (1927) 108–120.
122 It is customary for the father of a bride to give dowry to his daughter at her marriage. In later writings, the word used for dowry is *nedunyah*. See Epstein (1927) 89.
123 The husband is responsible for the full monetary value of the dowry valuated in the *ketubbah*. He is entitled to any profit accruing to such property. Katz (1960) 122, 136–137.

marriage,[124] gifts from third parties with the condition that her husband must have no rights on the property and that she can do as she pleases with the gift, damages paid by the husband.[125]

It is the duty of a Jewish wife to do certain handiwork.[126] The proceeds of her handiwork belong to her husband. An exception to this rule is if the wife excuses her husband from maintaining her. In such a case, she would be entitled to keep the proceeds of her handiwork. A woman who earns an income in the labour force is also entitled to keep the income she earns. However, any property found by a woman belongs to her husband.[127]

In terms of the classic law of succession, the husband inherited the whole of his wife's estate when she dies.[128] Due to the unjust results of this rule, the position was changed during later years.[129] One of the first changes was where the wife died leaving sons and a husband. In such a case, the sons of the deceased mother were entitled to receive the value of their mother's *ketubbah* from their father's estate after he died.[130] Other changes followed. In some communities, the sons of the deceased wife, or her relatives from her father's side, shared her *nedunyah*[131] with her husband.[132] In other communities the *nedunyah* had to be returned to the sons of the deceased mother, or to her relatives from her father's side.[133] A predeceased husband was not represented by his beneficiaries. In such a case, the widow's estate would devolve upon her beneficiaries who are traced through her father's family.[134]

The wife's estate consists of the private property of the widow. It may be property that she acquired by way of gifts, bequests and *res nullius* she has found. However, any income she derives from labour or handiwork belongs to the beneficiaries who are supposed to support her.[135]

Notwithstanding her important role in the family,[136] the wife of a testator does not inherit from her husband, nor does she inherit from her sons.[137] Widows are, however, maintained by the estate of the testator.[138] A lien is created against the estate in favour of the widow of the deceased. A portion of the estate that is sufficient to support the widow of the deceased until her

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124 She may, however, not dispose of the gifts during their marriage, and upon her death her husband inherits them. Katz (1960) 125.

125 Katz (1960) 107, 125.

126 For example, baking, washing, cooking, attending children, cleaning and spinning wool.

127 Katz (1960) 97–105.

128 Elman (1958) 81; Elon vol II (1994) 573; Chigier (1985) *Jewish Law Annual* 45; Cohn (1984) 173; Shilo "Succession" in Elon (ed) (1975) 447; Berkovits (1990) 23.

129 The argument was that the father of a bride provides for the bulk of a wife's estate and therefore it would be more just if her estate is to be returned to her father's family. See Horowitz (1973) 387; Shilo "Succession" in Elon (ed) (1975) 447.

130 Elman (1958) 81–82. Also see Shilo "Succession" in Elon (ed) (1975) 448; Bulka (1986) 24–25.

131 *Nedunyha* refers to the grant (dowry) that a father makes towards his daughter's marriage. The grant was considered to be a gift to his daughter. During their marriage the husband was allowed to use it, but upon the dissolution of the marriage he had to return it. It is customary to refer to the *nedunyah* in the *ketubbah* deed. Chigier (1985) *Jewish Law Annual* 48–49; Schereschewsky "Dowry" in Elon (ed) (1975) 390–391.

132 Chigier (1985) *Jewish Law Annual* 45; Shilo "Succession" in Elon (ed) (1975) 448.

133 Chigier (1985) *Jewish Law Annual* 45; Shilo "Succession" in Elon (ed) (1975) 448. This rule was enacted to prevent the half-brothers of the sons of a deceased wife involved in a polygamous relationship to share in the property of their mother. See Elon vol II (1994) 576.

134 Elman (1958) 82.

135 Horowitz (1973) 391.

136 The focus of traditional Jewish life is the family, with the woman as the creator and guardian of the home. It is the primary task of a mother to teach the principles of Jewish law to her children. See Meiselman (1978) 16–17.

137 Shilo "Succession" in Elon (ed) (1975) 446, 448; Elon vol II (1994) 573; Cohn (1984) 173; Epstein (1927) 175; Genesis 15:3.

138 Shilo "Succession" in Elon (ed) (1975) 449; Elon vol II (1994) 573.

death is set aside for her maintenance. The surviving wife has the option between a lump-sum settlement and continuing support from the estate of the deceased. Her right to be maintained by the estate of the deceased ceases when she chooses payment of the lump sum, or when she remarries.[139] Only after a widow's needs have been satisfied, will the remainder of his estate devolve according to the rules of succession.[140]

In addition to maintenance, the widow enjoys another right, namely the right to her *ketubbah*. A widow's right to maintenance and her right to *ketubbah* upon the death of her husband do not run concurrently. A claim for *ketubbah* cancels a widow's right to claim maintenance from her husband's estate. However, a claim for maintenance does not cancel her claim for *ketubbah*.[141] There seems to be a difference of opinion as to whether a widow has the option to choose between maintenance and *ketubbah*. The position varies according to the custom of each community.[142]

A testator may leave his entire estate to his wife. It is, however, such a deeply rooted principle that a widow should not inherit, that the will was to be interpreted that the widow must take the estate as executor to administer the estate on behalf of the beneficiaries. If the intention of the testator clearly indicates that she should be a beneficiary and not the executor of the estate, she would lose her claim to her *ketubbah*.[143]

In addition to a right to maintenance and *ketubbah*, a widow also has the right of occupation of the family home.[144] Her right to occupy the family home is independent of her claim to maintenance or *ketubbah*. She may even claim the home from a third party to whom it was sold by the other beneficiaries of the deceased.[145]

The mother of the deceased is excluded as a beneficiary. She does not inherit from her deceased son. The father of the deceased, however, inherits from the latter if he dies without any descendants. It seems, therefore, that the mother's position is unequal to that of her male counterpart.

Succession in Jewish law is based historically on the idea of tribal ownership of land. Heirs are, therefore, those who must take the place of the deceased in the tribe. Since daughters had no "tribal personality", they did not inherit from a deceased. Before marriage, their fathers owned them, and, after marriage, their husbands owned them.[146] During Biblical times, the position of daughters changed somewhat. As already stated, daughters of a deceased inherited only if a deceased had no surviving sons.[147] They were, however, also entitled to be maintained by the estate of the deceased until they reach maturity or marry, upon which date they receive a lump sum from the estate.[148] Married daughters receive no maintenance from the estate of the deceased.[149]

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139 Meiselman (1978) 84. The surviving wife has the right to sell property from the estate and to claim property from certain third parties. See Horowitz (1973) 390–391.

140 Meiselman (1978) 84; Horowitz (1973) 379, 389–392.

141 Cohn (1984) 173.

142 Chigier (1985) *Jewish Law Annual* 50.

143 Cohn (1984) 174.

144 That is the house where she and her husband lived together. Chigier (1985) *Jewish Law Annual* 51; Meiselman (1978) 84, 88.

145 Chigier (1985) *Jewish Law Annual* 51.

146 Epstein (1927) 121, 175.

147 Also see Goitein (1980) *Jewish Law Annual* 76; Cohn (1984) 173; Shilo "Succession" in Elon (ed) (1975) 450; Elon vol II (1994) 574–575; Meiselman (1978) 88; Epstein (1927) 121; Numbers 27:8.

148 The daughters receive a "lien" on the property of the deceased together with the widow. Meiselman (1978) 84, 88.

149 Meiselman (1978) 90; Horowitz (1973) 392; Elman (1958) 83; Cohn (1984) 174; Shilo "Succession" in Elon (ed) (1975) 450.

The unmarried daughters of the deceased are also entitled to *nedunyah* estimated in accordance with their status and the wealth of their deceased father. If the exact amount to be paid cannot be determined, it is fixed at $^{1}/_{10}$ of the estate of the deceased. The *nedunyah* of the daughters must be paid before the shares of the rest of the beneficiaries are determined.[150]

As may initially appear, the effect of treating the wife and daughters as preferential creditors of the estate is more favourable to them. Although they do not share equally as beneficiaries in a very large estate, they do benefit if an estate is very small. In such a case, the wife and daughters are provided for and the sons are the ones who have to go out to earn a living. It is assumed that a daughter must be supported, but that a son is in a better position to support himself. Furthermore, the daughters are considered to be creditors rather than beneficiaries of the estate. Their support is guaranteed before the estate is dissolved between the creditors and other beneficiaries of the estate.[151]

The sisters of the deceased are beneficiaries if there are no beneficiaries from the first four categories, namely the sons, daughters, father and brothers of the deceased. The granddaughter can be either the daughter of a son or the daughter of a daughter of the deceased. If she is a daughter of a son, she inherits by means of representation if her father is predeceased. If she is a daughter of a daughter, she inherits by means of representation if her mother is deceased. The grandmother of the deceased is excluded from inheritance. On the other hand, the grandfather of the deceased inherits from the deceased if there are no beneficiaries from the first five categories, namely the sons, daughters, father, brothers or sisters. It seems, therefore, that the position of sisters, daughters of a son and grandmothers are unequal to those of their male counterparts.

13.6.4 *Distinction between the Jewish and the South African laws of succession*

The South African law does not recognise the Jewish law of succession. If a South African Jew dies, the deceased estate will devolve in terms of the South African law of succession. The South African law of succession differs substantially from the Jewish law of succession. The major points of difference may be summarised as follows:

(a) In South Africa, there has been a long debate regarding the ownership of the estate of the deceased after his or her death.[152] The Jewish law of succession has no such problems. In Jewish law, the ownership vests in the beneficiary. Upon the death of the testator, the ownership terminates immediately and passes automatically to the beneficiaries through the operation of law. There is no intervention of an executor as in South African law. The implication in the Jewish law of succession is that the beneficiaries do not have the option to adiate or repudiate their inheritance. The reason for this is that in Jewish law, a person cannot waive something that already belongs to him or her. In South African law, the beneficiaries always have the choice to adiate or repudiate their inheritance.

(b) Another difference between the Jewish and South African law of succession is the order of payment. In terms of the Jewish law of succession, the maintenance claims of a surviving wife and unmarried daughters have preference over the claim of the creditors. In terms of South African law, the claims of the creditors must be met before the estate can be distributed among the beneficiaries.

(c) Finally, the rules of Jewish intestate succession differ from the rules of South African intestate succession.

The proposals of the South African Law Reform Commission could also affect the future recognition of other legal systems, such as Jewish law. Until Jewish law is recognised, it is

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150 Meiselman (1978) 90–92.
151 Meiselman (1978) 90–93.
152 Meiselman (1978) 90–92.

recommended that Jews who wish their estates to devolve in terms of the Jewish law of succession, should do either of the following:

(a) include a general clause requesting Jewish law to be applied to the estate of the deceased; and

(b) create a trust *mortis causa* that must be administered in terms of the Jewish law of succession.

The surviving spouse is in a position similar to that of the surviving spouse married in terms of Muslim law or Hindu law. In practice, Jews conclude a civil marriage and a Jewish marriage. The result is that the common law of South Africa applies to such a marriage. If they conclude only a Jewish marriage, the marriage will be invalid and the spouses not recognised as legal spouses. Therefore, it is recommended that the names of the spouses should be included in the text of the will. Use of the words "husband", "wife" and "spouse" only may cause serious problems for a surviving spouse.

13.7 Legal position of women in Jewish law

In a number of respects, the legal position of women is inferior to that of men in highly rigid forms of Orthodox Judaism. This paragraph examines the legal disabilities of women within the sphere of worship that have historically pertained to women within these forms of Judaism.[153] The chapter on marriage will investigate problems relating to the status of women in this sphere.[154]

In Jewish law in general, men are given control over the public domain, and women are kept within the private domain.[155] Women are incompetent to act as witnesses in Jewish tribunals and regarded as incapable of holding religious leadership positions. Women are exempt from all positive commandments which are time-bound: these commandments include, for example, praying three times a day or dwelling in a booth during the feast of Tabernacles.[156] It has been argued that this exemption was designed to free women from burdens that would prevent them from performing their domestic chores.[157] This exemption of women has an impact on the definition of a prayer community (*minyan*) in the prevailing rigid form of Orthodox tradition: a prayer community is defined as comprising 10 adult men. Women are excluded from this definition, and, even if present, will not count to make up such a community. As a result, women play no official role in leading the services and are placed behind a separation barrier (*mehitza*) where they have no role in the prevailing rigid Orthodoxy. They also do not participate in reading the *Torah* and are not called up to say the blessings over the *Torah*.[158]

These disabilities faced by women can all be explained against the background that the development of much of Jewish law took place at a time when women were not equal to men in legal status. Since that has changed in most places in the world, so too must Jewish tradition if it is to give expression to its deepest principles of treating all individuals with respect. Famously, Hillel, one of the great sages, stated that "the essence of the *Torah* is to abide by the principle: whatever is hateful unto you do not do unto others". The rest he said was commentary.[159] If this is so, then a deep principle such as this mitigates against the clear-cut inequality and insult contained in many of the practices discussed above.

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153 Also see Katz (1960) LLD thesis UP 1.
154 See 13.8.
155 Berman "The status of women in Halakhic Judaism" in Koltun (ed) (1976) 114–128.
156 Babylonian Talmud Kiddushin 33b.
157 Biale (1995) 13.
158 Babylonian Megillah 23a.
159 Babylonian Shabbat 31a.

As a result, there have been a number of responses to the position of women in Jewish communities. Those who remain Orthodox but are disturbed by this inequality attempt to exploit all the possibilities that lie within the existing law to remedy this position. Some Orthodox congregations, for example, keep women and men separate but allow women to read from the *Torah* and lead portions of the prayer services.[160] In this system, however, women still do not count in a *minyan* and are not able to play a fully equal role with men in services.

Conservative, Reconstructionist and Reform Judaism have generally adopted a more strongly egalitarian approach. Most of these congregations have removed the separation between men and women, and these movements now ordain female rabbis and allow women to play a completely equal role in the public life of their communities.

More thorough-going feminists are not content with legal equality, but argue that Judaism has itself developed based upon a male construction of reality. They argue that the history of the Jewish people has been told as if women were not a part of it. In order to fully include women within Judaism, there is a need to fundamentally reconceptualise Judaism in such a way that fully recognises the equality of men and women. This will have theological ramifications for the concept of God within Jewish tradition, the interpretation of the *Torah* and the understanding of what it means to be a Jewish person.[161]

There are thus a range of responses to the historical inequality of women within Jewish tradition. Jewish law is currently in a state of development in this regard and it is fair to say that it is likely that the "gender revolution" will eventually have a major impact on Judaism.

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160 The first such prayer group began in Jerusalem in 2002 and is known as *Shirah Hadasha* ("new song"). Similar groups have now begun in the United States. See Greenberg (2004) 258.

161 Plaskow (1990) 3. See the fascinating article by Hellig (2000) *Jewish Affairs* 38–44.

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Muslim Personal Law

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14.1 Introduction

This chapter deals with the manner in which Muslim personal law is addressed in South Africa. Muslim personal law is a private law system comprising Muslim family law and Muslim inheritance, which are underpinned by the tenets of Islamic law.

> Islamic law (or *Shari'ah*)[1] is one of the major non-Western legal systems of the modern world. It is by no means a single unified system of law, and may be compared with English common law because it also consists of a set of common principles and sources. However, the interpretation and application of these principles and sources differ from country to country and person to person.[2]

Muslim family law encompasses Muslim marriage and divorce, including parental rights and responsibilities relating to minor children born of a Muslim marriage.[3] Muslim inheritance refers to the regulation of a deceased person's estate according to Islamic law.[4]

> The sources of Islamic law may be divided into two main categories, namely, primary and secondary sources. The two primary sources of Islamic law are the *Qur'ān* and the *Sunnah*. The secondary sources are *ijmā* and *qiyās*. In addition, there are several subsidiary sources of Islamic law.[5]
>
> ***Qur'ān:*** Most Muslims regard the *Qur'ān* as the final word of Allah and thus divine law in contrast to man-made law. As such, they consider the *Qur'ān* as the most important source of law. It contains specific rulings on matters such as marriage, divorce and inheritance, the larger part of the *Qur'ān* relating to broad and general principles on most major topics of Islamic law.
>
> ***Sunnah:*** The *Sunnah* refers to the teachings, sayings and practices of the Prophet Muhammad. Literally speaking, it means a manner of acting, a rule of conduct or a mode of life. The *Sunnah* may be consulted to reiterate or corroborate a *Qur'ānic* rule; to explain *Qur'ānic* text; or to determine a matter for which the *Qur'ān* does not supply an answer.
>
> ***Ijmā:*** When a number of persons who are learned in Islamic law[6] reach consensus on a legal question, their opinion is binding and enforceable in law. *Ijmā* (consensus) literally means "getting together" and signifies the unanimous convergence of the views of reputable jurists (*fuqaha*, singular *fāqih*) of a given era on any point of law, hence consensus. If one cannot find a ruling either in the *Qur'ān* or from the *Sunnah* pertaining to a particular issue, then one turns to the third source, the general consensus or *ijmā* among Muslim scholars/jurists, in search of a legal rule applicable to the situation. *Ijmā* may not be in conflict with the *Qur'ān* or *Sunnah*.

continued

1 *Shari'ah* literally means "the right path to follow". See Rautenbach (2001) 22.
2 Buskens (1999) 32; Edge (ed) (1966) xv; El Alami and Hinchcliffe (1996); Rautenbach (2001) 21.
3 See discussion at 14.9 of the previous edition, where the law of persons is discussed. Also see Pearl and Menski (1998) 29; Moosa (1998) *SALJ* 479; Amien (2014) 192–218, 192.
4 See discussion at 14.4.
5 See discussion by Rautenbach (2001) 24–25 and the sources she refers to.
6 They include reputable jurists (*fuqaha*, singular *fāqih*).

Qiyās: If all three of the abovementioned sources fail to provide a solution to a particular legal problem, jurists must strive, through reasoning and deep study, to derive an appropriate rule by analogy and logical inference. Such resort to reasoning is known as *qiyās*, and the jurist is called a *mujtahid*. A *mujtahid* is a person capable of exertion or initiative in thought about the law.[7]

Other sources: Other modern sources that developed over the years include custom,[8] court decisions,[9] and legislation.[10]

The chapter commences with a consideration of the legal status of Muslim personal law in South Africa with reference to case law and legislation, foregrounded by some historical context. The first part of the chapter focuses on Muslim family law and the second part concentrates on Muslim inheritance.

14.2 Muslim family law in South Africa

14.2.1 *Historical context*

Muslims entered South Africa during the colonial and apartheid eras in the 17th and 18th centuries. They were initially brought into the country as slaves, political exiles and prisoners from various parts of South East Asia.[11] Thereafter, they were imported as indentured labourers from India.[12] Until the late 20th century, Muslims also came to South Africa as traders and migrant workers from India, Pakistan and various parts of Africa.[13] Today, the Muslim population comprises 1,9% of a total population of 54 432 000.[14] They are concentrated in four of the country's nine provinces; namely, the Western Cape, Eastern Cape, Kwazulu-Natal and Gauteng. The majority of Muslims in South Africa follow the *Sunni* tradition.[15]

Islam has **two main legal traditions** of which *Sunni* is one and *Shi'i* the other. Within the *Sunni* tradition, there are four main legal schools of thought (*madhāhib*) namely, *Hanafī*, *Shāfi'ī*, *Māliki* and *Hanbali*. Within the *Shi'i* tradition, the main legal school of thought (*madhhab*) is *Ja'fari*, followed by among others, the *Zaydi* and *Ismai'iliyah* schools of thought. In South Africa, the majority of Muslims adhere to the *Hanafī* school of thought and are primarily situated in Gauteng, Kwazulu-Natal and the Eastern Cape. Followers of the *Shāfi'ī* school of thought are located mainly within the Western Cape. To a lesser extent, there are also followers of the *Sunni Māliki* and *Shi'i Ja'fari* schools of thought.[16]

Muslim family law is regulated in South Africa by the *ulamā*, which comprise established bodies of Muslim theologians who decide how Islamic law should be interpreted and applied

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7 On the concept of *ijtihād*, see further Goolam (2006) *Michigan State Law Review* 1444–1467.
8 The validity of custom depends on the *ijma* and will only be recognised if there is consensus about its validity.
9 Though court decisions are not an official source of Islamic law, they have had an impact on the development of Islamic law.
10 Legislation was not a source in classic Islamic law. In some countries, legislation has been promulgated to regulate certain aspects of Islamic law. For example, in India, the Muslim Personal Law (*Shariat*) Application Act 26 of 1937, the Dissolution of Muslim Marriages Act 8 of 1939 and the Mussalman Wakf Validating Acts 6 of 1913 were promulgated to regulate aspects of Islamic law.
11 Moosa (1998) *Stell LR* 199.
12 Moosa (1996) *Yearbook of Islamic and Middle Eastern Law* 131.
13 Moosa (1996) *Yearbook of Islamic and Middle Eastern Law* 131; S-H Hacq Nadvi, "Towards the Recognition of Islamic Personal Law" in Sanders (ed) (1990) 15.
14 *General Household Survey 2015*, Statistics South Africa, 7, 27–28. Available online at *http://www.statssa.gov.za/publications/P0318/P03182015.pdf* (accessed 28 September 2018).
15 Moosa (1996) *Yearbook of Islamic and Middle Eastern Law* 131.
16 Moosa (1996) *Yearbook of Islamic and Middle Eastern Law* 131 and 143.

within the South African Muslim communities. The *ulamā* set up *jamiats* throughout South Africa to administer the application of Muslim family law, especially in those provinces where Muslims are predominantly situated. For instance, the Muslim Judicial Council[17] is based in the Western Cape, the *Jamiatul Ulama*[18] in Gauteng and KwaZulu-Natal and the *Majlisul Ulama*[19] in the Eastern Cape. In 1994, the United Ulama Council of South Africa (UUCSA) was created as an umbrella structure to bring together the main Muslim theological formations in South Africa.[20] The *jamiats* operate as quasi-judicial bodies, which adjudicate Muslim-related disputes including family law.[21] Since Muslim family law operates within the non-state sphere in South Africa, the decisions of the *jamiats* are legally unenforceable. However, "they carry substantial moral weight with members of the [South African Muslim] communities" and are accordingly usually followed within those communities.[22]

In particular, due to the potentially polygynous nature of Muslim marriages, the South African colonial and apartheid era courts refused to afford legal recognition to Muslim marriages. The judiciary at that time adopted the view that only marriages that adhered to Christian norms were worthy of legal recognition.[23] For instance, in 1860, the Cape Supreme Court in *Bronn v Frits Bronn's Executors*[24] held:

> [M]arriage is a condition Divine in its institution . . . and it is only by the development of Christianity that the sacred and mysterious union has been clearly revealed to mankind, and has enjoined a strict observance of its requirements, and one of the first of these requirements is, amongst all Christian nations that polygamy is unlawful, and that marriage is only good when contracted with a man who is not already married to another woman . . . I trust that in a short time . . . the sacred institution of marriage will be brought by some well devised law within the reach of the people of this Colony who have not yet embraced the greater blessings which they would obtain by Christian marriage, by which I mean of course to one wife, which, among the heathen ought to be sanctioned and encouraged by law . . . If what [the Mohammedans] call marriage is not what we call marriage, in its essential requirements, but what the jurisprudence of even Christian Rome under the Emperors, up to the time of Leo the Philosopher, would call a recognised concubinage — we cannot, because of the ambiguity of the expression, make that marriage which is a wholly different relation.

The above judicial attitude to Muslim marriages was confirmed several years later, in 1917, by the Appellate Division in *Seedat's Executors v The Master (Natal)*,[25] when the court found that:

> Polygamy vitally affects the nature of the most important relationship into which human beings can enter. It is reprobated by the majority of civilized peoples, on grounds of morality and religion, and the courts of a country which forbids it are not justified in recognising a polygamous union as a valid marriage.

The colonial era rule entrenching the illegality of Muslim marriages was re-confirmed in 1983 by the apartheid-era Appellate Division in *Ismail v Ismail*[26] where Trengove JA stated:

> I have come to the conclusion that we would not be justified in deviating from the long line of decisions in which our courts have consistently refused, on grounds of public policy, to recognise, or to give effect to the consequences of, polygamous unions contracted in South Africa, statutory exceptions apart. The concept of marriage as a monogamous union is firmly entrenched in our society and the recognition of polygamy would, undoubtedly, tend to prejudice or undermine the status of marriage as we know it . . . [T]he [Muslim] customs and the [Muslim marriage] contract . . . are contrary to public policy and are, consequently, unenforceable. They may equally well be regarded as being *contra bonos mores*.

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17 See *https://mjc.org.za/* (accessed 3 October 2018).
18 See *https://jamiat.org.za/*; *https://www.thejamiat.co.za/* (accessed 3 October 2018).
19 See *http://www.themajlis.info/majlisul-ulama* (accessed 3 October 2018).
20 UUCSA website: *http://www.muslim.co.za/organisations/uucsa* (accessed 28 September 2018).
21 Cachalia (1993) *THRHR* 396, 398. Moosa (1996) *Yearbook of Islamic and Middle Eastern Law* 134.
22 Amien (2006) *Human Rights Quarterly* 731–732.
23 Amien (2006) *Human Rights Quarterly* 733.
24 (1860) 3 Searle 313 318, 320– 321.
25 1917 AD 302 307– 308.
26 1983 (1) SA 1006 (AD) 1024D– F.

The effect of the above judgments reinforced the common law definition of marriage in South Africa as "the union of one man and one woman to the exclusion while it lasts of all others".[27] Therefore only *de jure* monogamous and heterosexual marriages were considered valid and lawful.

Non-recognition of Muslim marriages negatively affects women and men in Muslim marriages as well as children born of Muslim marriages. For example, when parties to civil marriages divorce, the judiciary exercises "automatic court oversight" over any children born of those marriages to ensure that their best interests are protected. In contrast, no automatic court oversight applies in respect of children born of Muslim marriages when the latter dissolves through Muslim divorce.[28]

Furthermore, parties married by Muslim rites are unable to access all civil law benefits that parties in civil marriages are able to enjoy, such as being able to share in each other's matrimonial estates.[29]

Spouses in Muslim marriages are unable to enforce Islamic law rights and obligations arising from the Muslim marriage.[30] For instance, in *Ismail v Ismail*[31] referred to above, the parties had been married to each other and divorced from each other by Muslim rites. The ex-wife approached the civil court and asked the Court to enforce the terms and customs arising from her Muslim marriage contract. Under Islamic law, a Muslim marriage is considered a contract.[32] On the basis of her Muslim marriage contract, the ex-wife claimed payment of arrears spousal maintenance (*nafaqah*) for a period of two years and 10 months of the Muslim marriage, spousal *nafaqah* for the three-month waiting period (*iddah*)[33] following a Muslim divorce, delivery of her deferred dowry (*mahr*)[34] and delivery of or payment of the value of two sets of gold jewellery that her ex-husband had given to her and on her request had kept for safe-keeping.[35] Not only did the Court not recognise the parties' Muslim marriage as a legally valid marriage due to its potentially polygynous nature, it also refused to recognise any customs and contract arising from the Muslim marriage as enforceable.[36] Consequently, the Court refused to grant the first three of the ex-wife's claims because those arose directly from the Muslim contract of marriage.[37] The Court only granted her claim for the gold jewellery as those were found to have arisen from a contract of deposit that was not considered to be associated with the Muslim marriage contract.[38]

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27 *Seedat's Executors v The Master (Natal)* 1917 AD 302, 309; *Kader v Kader* 1972 (3) SA 203 (RAD) 206H; *Ismail v Ismail* 1983 (1) SA 1006 (AD) 1019H.

28 *Women's Legal Centre Trust v President of the Republic of South Africa* [2018] ZAWCHC 109 (31 August 2018) para 60.

29 Amien (2006) *Human Rights Quarterly* 734.

30 Amien (2006) *Human Rights Quarterly* 735.

31 1983 (1) SA 1006 (AD) 1024D–F.

32 Fyzee (1949) 87.

33 *Iddah* is the waiting period that a woman is expected to observe following the dissolution of her marriage by divorce or death. In the case of divorce, the period is three months and in the case of death, it is four months and 10 days. If the ex-wife or widow is pregnant, the *iddah* extends until the birth of the child. During *iddah*, a woman is expected to be house-bound, she is not permitted to engage in a romantic relationship with another man and she may not re-marry during this period. *Qur'ān* 33:49, 2:228, 2:234, 65:4, 65:1. Ibn Rushd (1996) 54– 55, 106, 115– 116; Sabiq (undated) 196.

34 *Mahr* is anything of value permitted by Islamic law that is agreed upon between the parties and constitutes a term of the Muslim marriage contract. It is given to the wife by the husband and forms part of her estate. *Qur'ān* 4:4; Schacht (1964) 167; Doi (1984) 158– 166.

35 *Ismail v Ismail* 1983 (1) SA 1006 (AD) 1017A– D.

36 At 1024D– E, 1025B, D, G.

37 At 1027C.

38 At 1026H, 1027A– C.

After the democratic elections in 1994, the South African judiciary adopted a vastly different approach to Muslim marriages, based on the constitutional values of equality, dignity and freedom.[39] The post-1994 judgments are discussed in the next section.

14.2.2 *Muslim family law in a democratic South Africa*

From 1997 to date, there has been a litany of cases in which the South African judiciary has come to the aid of Muslim women who were negatively affected by the non-recognition of their Muslim marriages. At the same time, the post-1994 courts have not been willing to give wholesale legal recognition to Muslim marriages on the basis that such recognition is best left to the legislature to undertake.[40] The main cases that have dealt with the effects of non-recognition of Muslim marriages thus far include: *Ryland v Edros*,[41] *Arendse v Arendse*,[42] *Amod v Multilateral Motor Vehicle Accidents Fund*,[43] *Khan v Khan*,[44] *Cassim v Cassim*,[45] *Jamalodien v Moola*,[46] *Mahomed v Mahomed*,[47] *Hoosein v Dangor*,[48] *Daniels v Campbell*,[49] *Hassam v Jacobs*,[50] *Moosa v Harnaker*[51] and *Women's Legal Centre Trust v President of the Republic of South Africa*.[52] In most of the aforementioned cases, the parties had been married to each other by Muslim rites only. The cases and their implications for Muslim marriages are discussed below.[53]

14.2.2.1 Recognition of a Muslim marriage contract

In terms of Islamic law, marriage is a civil contract between a man and a woman. The contract is considered integral to the marriage and outlines the rights and responsibilities between the parties.[54] The marriage contract must comply with certain formalities, such as offer and acceptance, legal capacity of the parties, two competent witnesses (*Sunni* law), and the absence of marriage impediments.[55]

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39 Section 7(1) of the Constitution.
40 For example, *Amod v Multilateral Motor Vehicle Accidents Fund* 1999 (4) SA 1319 (SCA) para 28.
41 1997 (2) SA 690 (C).
42 2013 (3) SA 347 (WCC).
43 1999 (4) SA 1319 (SCA).
44 2005 (2) SA 272 (T).
45 (TPD) (Unreported case number 3954/06 delivered on 15 December 2006).
46 (NPD) (Unreported case number 1835/06).
47 [2009] JOL 23733 (ECP).
48 [2010] 2 All SA 55 (WCC).
49 2004 (5) SA 331 (CC).
50 *Hassam v Jacobs* [2008] 4 All SA 350 (C) and *Hassam v Jacobs* 2009 (5) SA 572 (CC).
51 2017 (6) SA 425 (WCC).
52 [2018] ZAWCHC 109 (31 August 2018).
53 These cases are also discussed in: Amien in Fielder and Topidi (eds) (2016) 53–77; Amien (2015) 118–126; Amien in Eekelaar and George (eds) (2014) 26–44; Amien (2006) *Human Rights Quarterly* 729–754; Amien and Leatt (2014) *Maryland Journal of International Law* 501–547; Church (1997) *THRHR* 292–295; Denson, Mukheibir and Carnelly (2018) *Obiter* 152–172; Heaton in *Bill of Rights Compendium* (2006); Maithufi (1997) *THRHR* 695–699; Moosa (1999) *De Rebus* 32–37; Moosa (1998) *SALJ* (1998) 479–492; Pienaar (2006) *Stell LR* 314–332; Sloth-Nielsen and Van Heerden (2003) *International Journal of Law, Policy and the Family* 121–146; Rautenbach (2004) *PER/PELJ* 1–34; Rautenbach (2003) *Koers* 121–152. Also see ch 13 of this publication, and the previous edition where some of these cases were summarised in ch 4, at 4.4.2.
54 Hidayatullah and Hidayatullah (1999) 223; Kader (1998) 25; Mofokeng (2009) 140–142; Feroz (1959) 27. A detailed discussion of Muslim marriage law is available in the previous edition of this book in ch 14, at 14.10.
55 See Feroz (1959) 3–37 for a discussion of the requirements and impediments of a marriage. Impediments include: (a) a man may not marry more than four wives; (b) a man may not marry a non-Muslim woman; (c) blood relationships that prevent a man from marrying certain blood relatives; (d) a man may not marry certain females related to him by marriage; and (e) a man is forbidden to marry his foster relations; and (f) a woman may not marry during the *idda* period.

Subsequent to the *Ismail* case, the issue regarding the validity of a Muslim marriage contract arose again during the post-apartheid era in the case of *Ryland v Edros*. In this case, the parties had been married to each other in a *de facto* monogamous Muslim marriage.[56] They had lived in the Western Cape and had both adhered to the *Shāfi'ī madhhab*, which as mentioned previously, is predominant in the Western Cape Province.[57] The ex-husband had terminated the marriage through *talāq*.[58] During the course of the matter, the ex-wife claimed enforcement of the terms of the Muslim marriage contract, which she argued included spousal *nafaqah*,[59] a consolatory gift on the basis that her ex-husband had unjustifiably terminated their marriage (*mut'ah*) and an equitable share in the growth of his estate.[60] The Cape High Court (as it then was) decided that the position postulated in the apartheid era *Ismail* case was no longer applicable within a constitutional ethos of a democratic South Africa.[61] The court held that in the *Ismail* case, the presumed views of only one section of South Africa's plural society had been taken into account,[62] which is contrary to the multicultural nature of South Africa.[63] The court found this to be:

> quite inimical to all the values of the new South Africa for one group to impose its values on another and that the courts should only brand a contract as offensive to public policy if it is offensive to those values which are shared by the community at large, by all right-thinking people in the community and not only by one section of it.[64]

The court therefore redefined the concept of public policy in South Africa to make it consistent with the underlying constitutional values of "equality, . . . tolerance of diversity and the recognition of the plural nature of [South Africa]."[65] Accordingly, the court found that a Muslim marriage contract is not contrary to public policy and that proven terms and customs arising from the contract could be enforceable.[66] The court emphasised that its decision was in respect of *de facto* monogamous Muslim marriages only.[67]

The court accepted that the Muslim marriage contract in this case was governed by the rules of the *Shāfi'ī* school of thought as practiced within the Western Cape Muslim community.[68] On the basis of evidence placed before it, the court granted the ex-wife's claim for spousal *nafaqah* and a consolatory gift.[69] The ex-wife's claim for spousal *nafaqah* was subjected to extinctive prescription, hence she was only permitted to be paid maintenance for the three-month *iddah* period and the last three years of the marriage (not the full duration of the marriage as she had initially claimed).[70] Since the ex-wife could not provide evidence to demonstrate that a practice had existed within the Western Cape *Shāfi'ī* community for a wife to share equitably in the growth of her husband's estate, she was also not successful in her claim for an equitable share in the growth of her ex-husband's estate.[71]

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56 *Ryland v Edros* 1997 (2) SA 690 (C) at 696B– C.
57 At 698H– I; 701C– D.
58 At 701F– G. There are various forms of Muslim divorce available to men and women who are married to each other by Muslim rites. See discussion at 14.3.
59 Islamic law places a unilateral obligation on men to provide reasonable maintenance for their wives during the subsistence of the marriage and during the *iddah* period. *Qur'ān* 4:34. Ibn Rushd (1996) 63, 114.
60 *Ryland v Edros* 1997 (2) SA 690 (C) at 696F– J.
61 At 711B– C.
62 At 707G– I.
63 Heaton (2006) 3C– 20; Rautenbach (2004) *PER/PELJ* 8–9; Rautenbach (2003) *Koers* 138.
64 *Ryland v Edros* 1997 (2) SA 690 (C) 707F–H.
65 At 708I–J; 709A–B.
66 At 710D–E.
67 At 709C–F.
68 At 711E–F.
69 At 718I–J.
70 At 714E–H.
71 At 717B–D, G–I; 719.

Subsequent to *Ryland v Edros*, aspects of a Muslim marriage contract such as *mahr* and the husband's Islamic law duty of spousal support surfaced in several cases, notably in *Arendse v Arendse*, *Amod v Multilateral Motor Vehicle Accidents Fund*, *Cassim v Cassim*, *Jamalodien v Moola*, *Mahomed v Mahomed* and *Hoosein v Dangor*. These cases are discussed in greater detail in the following sections.

14.2.2.2 Quasi-recognition of *mahr*

The significance of *mahr*, which is a vital component of the Muslim marriage contract, was identified in the case of *Arendse v Arendse*. In this case, the ex-wife, an unemployed single mother who was diagnosed with a bipolar mood disorder, sought to review and set aside an eviction order obtained by her ex-husband in the Goodwood Magistrate's Court in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE).[72] The ex-wife also sought a declaration that the eviction order infringed her section 26 constitutional right to have access to adequate housing.[73]

The parties had been married to each other by Muslim rites and the *mahr* agreed to was a house in favour of the ex-wife. The parties also registered a marriage in community of property in terms of the Marriage Act.[74] Thereafter, the parties purchased their first property. The ex-wife had paid the deposit on that house and the ex-husband had undertaken to pay the mortgage instalments.[75] The parties subsequently obtained a civil divorce. According to the divorce order, the ex-wife was among others, awarded custody of the three children and the ex-husband's undivided share in the first property was to be transferred to the ex-wife, after which she would be responsible for further mortgage payments on the house.[76] About a year later, the ex-husband purchased a second property, which was registered in his name. However, he continued to live on the first property with his ex-wife and their three children while they looked for a purchaser for the first property. The ex-wife alleged that the intention had been that the second property would become her *mahr*; an allegation denied by her ex-husband. A few months later, the parties obtained a Muslim divorce even though the ex-husband continued living on the first property with his ex-wife and their three children.[77] When the first property was sold, the parties and their three children moved onto the second property where the ex-wife and the children occupied the front section of the property and the ex-husband lived in a separate building at the back of the property.[78] Several years later, the ex-wife approached the Muslim Judicial Council (MJC) for assistance in obtaining her *mahr*. The MJC issued a letter confirming that the *mahr* was a house and that the ex-husband had not delivered the *mahr* to his ex-wife.[79] Not too long after, the ex-husband issued eviction proceedings against his ex-wife on the basis that she had been allowed to stay on his premises provided that she paid rent as well as other expenses, which the ex-husband alleged she had failed to do.[80] The ex-husband thus withdrew his consent for his ex-wife to continue living on the second property, at which point, in his view, she had become an unlawful occupant.[81] The ex-wife denied that there had been any rental agreement between

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72 Act 19 of 1998. *Arendse v Arendse* 2013 (3) SA 347 (WCC) paras 1 and 8.
73 *Arendse v Arendse* 2013 (3) SA 347 (WCC) para 1.
74 Paragraph 9.
75 Paragraph 10.
76 Paragraph 11.
77 Paragraph 13.
78 Paragraph 14.
79 Paragraph 15.
80 Paragraph 16.
81 Paragraph 16, 23.

them.[82] About two years later, the ex-husband married a second time and his second wife moved in with him at the back of the second property.[83]

In reviewing the eviction order of the Magistrate's Court, the Western Cape High Court considered sections 4(6) and 4(7) of the PIE. Section 4(6) provides:

> If an unlawful occupier has occupied the land in question for less than six months at the time when the proceedings are initiated, the Court may grant an order for eviction if it is of the opinion that it is just and equitable to do so after considering all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women.

Section 4(7) reads:

> If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a Court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.

The High Court concluded that the Magistrate had failed to consider the rights and needs of the marginalised groups identified in sections 4(6) and 4(7) of PIE, notably the rights and needs of the children, especially their best interests, and the fact that the ex-wife was a disabled woman who headed the household; all of whom would have been rendered homeless as a result of the eviction order.[84] In particular, the court found that the Magistrate had not considered whether suitable alternative accommodation had been made available to them.[85] Of significance is the fact that the court regarded the issue of the *mahr,* comprising a house, as a relevant circumstance in determining whether or not it was just and equitable to evict the applicant and the three children. The court did not accept that the *mahr* issue had been settled.[86] In light of the aforementioned factors, the court held that it was not just and equitable for the order to have been granted and accordingly set it aside. The court also declared that the eviction order infringed the applicant's constitutional right to have access to adequate housing as enunciated in section 26 of the Constitution.[87]

Apart from the recognition and enforceability of a Muslim marriage contract and the quasi-recognition of *mahr* as indicated in the *Rylands* and *Arendse* cases discussed above, the South African judiciary has also recognised the husband's Islamic law duty of support. Through this recognition, the courts in the cases discussed next have brought Muslim spouses, especially wives, within the ambit of specific legislation, which has enabled Muslim wives to enforce their rights to spousal maintenance.

14.2.2.3 Recognition of Islamic law duty of support

In the case of *Amod v Multilateral Motor Vehicle Accidents Fund*,[88] a Muslim widow had claimed compensation from the Multilateral Motor Vehicle Accidents Fund (MMVAF) for loss of spousal support as a result of her husband having died in a motor vehicle accident that was caused by the negligent and unlawful driving of a third party. Prior to the death of the deceased, the deceased and his widow had been married to each other in a *de facto* monogamous Muslim

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82 Paragraph 19.
83 Paragraph 26.
84 *Arendse v Arendse* 2013 (3) SA 347 (WCC) at paras 36–37, 41–42.
85 Paragraph 36.
86 Paragraph 44.
87 Paragraph s 49–50.
88 The High Court case was reported as *Amod v Multilateral Motor Vehicle Accidents Fund* 1997 (12) BCLR 1716 (D), and the Supreme Court of Appeal case was reported as *Amod v Multilateral Motor Vehicle Accidents Fund* 1999 (4) SA 1319 (SCA).

marriage through which two children were born. The widow based her claim on the Multilateral Motor Vehicle Accidents Funds Act,[89] which entitled a surviving spouse and/or any other dependant of the deceased in respect of whom the deceased had had a legal duty to support, to be compensated for the loss of the deceased's duty of support.[90] Although the MMVAF compensated the children born of the marriage, it denied the widow's claim on the basis that her Muslim marriage had not been legally valid, thus the MMVAF argued that the deceased's unilateral Muslim obligation to *nafaqah* his wife while he was alive could not be considered legally valid.[91] Accordingly, the MMVAF took the view that the Muslim widow could not be treated as a surviving spouse for the purpose of the MMVAF Act.[92]

The matter was first adjudicated in the Durban and Coast Local Division of the High Court (as it then was).[93] The High Court considered itself bound by the *Ismail* decision and found that the Muslim marriage between the widow and the deceased had not been legally valid.[94] Consequently, the High Court held that no legal duty of support had existed between the parties and that the MMVAF was not legally liable to compensate the widow.[95]

The widow appealed the High Court decision to the Supreme Court of Appeal (SCA).[96] The SCA considered the following three requirements that underpin the common law dependant's action, upon which the MMVAF Act had been based: a) the deceased must have had a duty to support the surviving spouse; b) the duty must be legally enforceable; and c) the surviving spouse's right to the support must be worthy of legal protection.[97] The SCA noted that when assessing the third requirement namely, whether or not the duty of support is worthy of legal protection, the *boni mores* or legal convictions of South African society must be considered. To this end, the SCA observed:[98]

> The insistence that the [Islamic] duty of support [of a Muslim husband in favour of his Muslim wife] . . . is not worthy of protection can only be justified on the basis that the only duty of support which the law will protect in such circumstances is a duty flowing from a marriage solemnized and recognized by one faith or philosophy to the exclusion of others. This is an untenable basis for the determination of the *boni mores* of society. It is inconsistent with the new ethos of tolerance, pluralism and religious freedom which . . . is substantially different from the ethos which informed the determination of the *boni mores* of the community when the cases which decided that 'potentially polygamous' marriages which did not accord with the assumptions of the culturally and politically dominant establishment of the time did not deserve the protection of the law for the purposes of the dependant's action . . . To the extent to which [the] dicta [in the *Ismail* case] are inconsistent with the approach I have articulated in this judgment, I must express my respectful disagreement with them.

In finding that the *boni mores* of South Africa must be consistent with the constitutional spirit of "tolerance, pluralism and religious freedom", the SCA departed from its predecessor's view as expounded in the *Ismail* case relating to customs and contracts associated with a Muslim marriage. The SCA did not focus its attention on whether or not Muslim marriages *per se* are legally

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89 93 of 1989.
90 *Amod v Multilateral Motor Vehicle Accidents Fund* 1997 (12) BCLR 1716 (D) 1719E; 1999 (4) SA 1319 (SCA) paras 3, 10.
91 *Amod v Multilateral Motor Vehicle Accidents Fund* 1997 (12) BCLR 1716 (D) 1719F. Also see Pienaar (2006) *Stell LR* 314, 321.
92 *Amod v Multilateral Motor Vehicle Accidents Fund* 1997 (12) BCLR 1716 (D) 1719F.
93 *Amod v Multilateral Motor Vehicle Accidents Fund* 1997 (12) BCLR 1716 (D).
94 *Amod v Multilateral Motor Vehicle Accidents Fund* 1997 (12) BCLR 1716 (D) 1720C, 1726E.
95 *Amod v Multilateral Motor Vehicle Accidents Fund* 1997 (12) BCLR 1716 (D) 1726F, 1727A.
96 *Amod v Multilateral Motor Vehicle Accidents Fund* 1999 (4) SA 1319 (SCA).
97 *Amod v Multilateral Motor Vehicle Accidents Fund* 1999 (4) SA 1319 (SCA) para 12. The SCA adopted the approach that had been introduced by *Santam Bpk v Henery* 1999 (3) SA 421 (SCA) 427H–J, 429C–D, 430D–I.
98 *Amod v Multilateral Motor Vehicle Accidents Fund* 1999 (4) SA 1319 (SCA) para 12 paras 20–21, 29.

valid. Instead, the SCA concentrated on whether or not the Muslim marriage gave rise to a duty of support that was worthy of legal recognition.[99]

After applying the aforementioned three requirements for the common law dependant's action, the SCA found that the Muslim marriage between the widow and the deceased had been contracted according to a major religion; it had involved a public ceremony comprising special formalities; and the Muslim marriage had given rise to burdensome obligations between the parties.[100] The SCA accordingly found that the husband's unilateral duty of support, which emanated from the Muslim marriage contract, was worthy of legal recognition for the purpose of the dependant's action and was legally enforceable.[101] The MMVAF was thus ordered to compensate the widow for her loss of support as a result of the death of her husband.[102] As in the *Ryland* case, the SCA in *Amod* highlighted the fact that its decision was applicable only to *de facto* monogamous Muslim marriages.[103]

However, several years later, in the case of *Khan v Khan*,[104] a husband's Islamic law duty of support was also found to be worthy of legal protection in the context of a *de facto* polygynous Muslim marriage. The *Khan* matter dealt with an appeal against the Nelspruit Magistrate's Court, which awarded a maintenance order against a Muslim husband in favour of his Muslim wife while the parties were married to each other in a *de facto* polygynous Muslim marriage.[105] The maintenance award was appealed by the husband to the Transvaal High Court (as it then was). The High Court had to determine whether or not the Maintenance Act[106] applies to parties in a *de facto* polygynous Muslim marriage. Section 2(1) of the Maintenance Act makes the legislation applicable to any person who has a legal duty to maintain another person.[107] In considering whether or not a husband in a *de facto* polygynous Muslim marriage has a legal duty to support his polygynous wife,[108] the High Court observed:[109]

> The common-law duty of support is a flexible concept that has been developed and extended over time by our Courts to cover a wide range of relationships such as grandparents *vis-à-vis* grandchildren, and vice versa, children to their parents, brothers and sisters to each other, divorcees towards each other, same-sex partnerships and most recently extending the duty of support of an illegitimate child to its paternal grandparents . . .
>
> The purpose of family law in general is to protect vulnerable family members and to ensure fairness in disputes that arise at the end of relationships. Polygamous marriages are a type of family and should be protected by family law. Polygamous marriages are accepted by the tenets of a major faith, ie Islam, and the marriage between the appellant and the respondent was concluded in accordance with the tenets of such major faith . . .
>
> Public policy considerations in interpreting legislation have changed with the advent of the Constitution . . .
>
> Our Courts have come to the assistance of spouses in polygamous marriages in the past. In this regard common-law wives married in accordance with black customary law were assisted pertaining to maintenance, inheritance and third party claims . . . .

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99 Rautenbach (2003) *Koers* 144; Pienaar (2006) *Stell LR* 322; Rautenbach (2003) *Fundamina* 14.

100 *Amod v Multilateral Motor Vehicle Accidents Fund* 1999 (4) SA 1319 (SCA) paras 20, 25. Also see Pienaar (2006) *Stell LR* 320.

101 *Amod v Multilateral Motor Vehicle Accidents Fund* 1999 (4) SA 1319 (SCA) paras 14, 15, 20, 25. Rautenbach (2003) *Fundamina* 14.

102 Paragraph 32.

103 Paragraph 24. Heaton (2006) 3C–21. Pienaar (2006) *Stell LR* 329.

104 2005 (2) SA 272 (T) (*Khan*).

105 *Khan* para 4.

106 99 of 1998.

107 Section 2(1) of the Maintenance Act reads: "The provisions of this Act shall apply in respect of the legal duty of any person to maintain any other person, irrespective of the nature of the relationship between those persons giving rise to that duty."

108 *Khan* para 2.

109 *Khan* paras 10–11. Sources omitted.

> That being the case, the argument that it is *contra bonos mores* to grant a Muslim wife, married in accordance with Islamic rites, maintenance where the marriage is not monogamous, can no longer hold water. It will be blatant discrimination to grant, in the one instance, a Muslim wife in a monogamous Muslim marriage a right to maintenance, but to deny a Muslim wife married in terms of the same Islamic rites (which are inherently polygamous) and who has the same faith and beliefs as the one in the monogamous marriage, a right to maintenance.
>
> In any event, the purpose of the [Maintenance] Act would be frustrated rather than furthered if partners to a polygamous marriage were to be excluded from the protection the Act offers, just because the legal form of their relationship is not consistent with the Marriage Act.

The High Court therefore held that parties to a *de facto* polygynous Muslim marriage are entitled to maintenance in accordance with the Maintenance Act.[110]

About a year later, in the case of *Cassim v Cassim*,[111] the decision in *Khan* was extended to parties in *de facto* monogamous Muslim marriages when the Wynberg Magistrate's Court granted a monogamous Muslim wife's claim for spousal maintenance under the Maintenance Act.

Interim maintenance in terms of Rule 43(1) of the Uniform Rules of Court has also been recognised in the cases of *Jamalodeen v Moola*,[112] *Mahomed v Mahomed* and *Hoosain v Dangor*[113] in favour of women who had been married to their spouses in *de facto* monogamous Muslim marriages. Rule 43(1) reads:

> This rule shall apply whenever a spouse seeks relief from the court in respect of one or more of the following matters:
>
> (a) Maintenance *pendente lite*;
>
> (b) a contribution towards the costs of a pending matrimonial action;
>
> (c) interim custody of any child;
>
> (d) interim access to any child.

The difference in facts among the three aforementioned cases was that in *Jamalodeen* and *Hoosain*, the parties had been divorced from each other by Muslim rites, while in *Mahomed*, the parties disputed whether or not they were divorced under Islamic law.[114] The wife in *Mahomed* claimed that the Muslim marriage still subsisted at the time that the matter was heard, but the husband argued that a valid Muslim divorce had been effected.[115] However, the Eastern Cape Provincial Division of the High Court (as it then was) decided that it was not necessary for the purpose of the *Mahomed* judgment to determine the status of the Muslim divorce.[116] In each of the cases, the wives had instituted an action to recognise their Muslim marriages as valid under the Marriage Act[117] and to dissolve their marriages in accordance with the provisions of the Divorce Act.[118] When parties institute a civil divorce in the High Court, Rule 43(1) enables them to apply for interim relief including maintenance *pendente lite* as indicated above. On the basis of Rule 43(1), the wives in all three of the judgments had claimed, among others, interim spousal maintenance[119] and the wife in *Mahomed* had additionally sought interim maintenance for the minor child born of the marriage.[120]

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110 Paragraph 11.
111 (TPD) (Unreported case number 3954/06 delivered on 15 December 2006). Referred to and discussed by Revelas J in *Mahomed v Mahomed* [2009] JOL 23733 (ECP) paras 7–8.
112 Referred to and discussed by Revelas J in *Mahomed v Mahomed* [2009] JOL 23733 (ECP) para 9.
113 [2010] 2 All SA 55 (WCC).
114 *Mahomed* para 1, 9; *Hoosain* para 1.
115 *Mahomed* para 2.
116 Paragraph 2.
117 25 of 1961.
118 70 of 1979. *Mahomed* paras 1, 3, 9; *Hoosain* para 2.
119 *Mahomed* paras 1, 9; *Hoosain* para 1.
120 *Mahomed* para 1.

The High Court in *Mahomed* noted that "[t]he issue for determination . . . [was] whether the present proceedings constitute a *pending matrimonial action*."[121] In deciding this issue, the court observed:[122]

> [I]n our courts an increasing tendency has developed to enforce maintenance and other rights to spouses married in terms of Islamic law, even though both the courts and the Legislature do not legally recognise an Islamic marriage (*nikah*) as *a marriage* in terms of the Marriage Act.

The High Court in *Mahomed* found that the "pending divorce action brings the situation within the ambit of *matrimonial matters* and a *matrimonial action* as envisaged in Rule 43."[123] In particular, the Western Cape High Court in *Hoosain* held that a wife married by Muslim rites is a "spouse" for the purpose of Rule 43(1).[124] Accordingly, the courts in the aforementioned three matters granted each wife's claims for interim maintenance.[125] Moreover, in *Jamalodeen*, the Natal Provincial Division of the High Court (as it then was) ordered the interim spousal maintenance to be payable beyond the *iddah* period, pending the finalisation of the divorce action.[126]

Recognition of Muslim spouses for legislative purposes was also granted in the context of succession, specifically in the cases of *Daniels v Campbell*, *Hassam v Jacobs* and *Moosa v Harnaker*. These cases are considered in the next section.

14.2.2.4 Recognition of a Muslim spouse in the case of succession

In the cases of *Daniels v Campbell* and *Hassam v Jacobs*, the applicants were widows who had been married to their deceased husbands by Muslim rites only. In both cases, their husbands had died intestate and the applicants had lodged claims with the Master of the High Court to be recognised as beneficiaries of their husbands' intestate estates under the Intestate Succession Act[127] and the Maintenance of Surviving Spouses Act.[128] The main difference between the two cases was that in *Daniels*, the Muslim widow had been in a *de facto* monogamous Muslim marriage while in *Hassam*, the applicant had been the first wife in a *de facto* polygynous Muslim marriage. In both cases, the Master had not accepted the widows as spouses or surviving spouses for the purpose of the legislation and on that basis denied their claims.

In *Daniels*, the Constitutional Court disagreed with the Master's view, and found that the words "spouse" and "survivor" as contained in the legislation included parties to a *de facto* monogamous Muslim marriage within their ordinary meaning.[129] The court reasoned:[130]

> [The] exclusion [of the words] as was effected in the past did not flow from courts giving the word "spouse" its ordinary meaning. Rather, it emanated from a linguistically strained use of the word flowing from a culturally and racially hegemonic appropriation of it. Such interpretation owed more to the artifice of prejudice than to the dictates of the English language. Both in intent and impact the restricted interpretation was discriminatory, expressly exalting a particular concept of marriage, flowing initially from a particular world-view, as the ideal against which Muslim marriages were measured and found to be wanting. Discriminatory interpretations deeply injurious to those negatively affected were in the conditions of the time widely accepted in the courts. They are no longer sustainable in the light of our Constitution . . . . [Instead,] the constitutional values of equality, tolerance and respect for diversity point strongly in favour of giving the word 'spouse' a broad and inclusive construction, the more so when it corresponds with the ordinary meaning of the word.

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121 Paragraph 4.
122 Paragraph 5.
123 *Hoosain* para 10. Emphasis added.
124 Paragraph 28.
125 Paragraph 13.
126 Referred to by Revelas J in *Mahomed v Mahomed* [2009] JOL 23733 (ECP) para 9.
127 81 of 1987.
128 27 of 1990.
129 *Daniels* paras 19, 21–22, 40.
130 Paragraphs 19–21.

> The issue is not whether to impose some degree of strain on the language in order to achieve a constitutionally acceptable result. It is whether to remove the strain imposed by past discriminatory interpretations in favour of its ordinary meaning.

In coming to its decision, the court observed that the exclusion of Muslim spouses from the ordinary interpretation of "spouse" was historically linked to a pattern of discrimination against those who did not conform to "a particular concept of marriage".[131] The court noted that the achievement of substantive equality between women and men requires "a broad[er] and [more] inclusive" interpretation of the word "spouse".[132] The court pointed out that the main purpose of the legislation was to protect a "vulnerable" section of the South African population; namely, widows.[133] The Court thus found that to exclude monogamous Muslim widows from the benefit of the legislation would negate the very purpose of the legislation.[134]

Similarly, in *Hassam v Jacobs*, the Constitutional Court observed that an exclusion of polygynous Muslim widows from the impugned legislation would defeat the aim of the legislation to afford protection to "vulnerable" groups as well as the constitutional goal of substantive equality.[135] The court extended protection to polygynous Muslim widows by bringing them also within the ambit of the legislation. The Court agreed with the court *a quo*; namely, the Cape High Court (as it then was) that the exclusion of Muslim polygynous widows from the Intestate Succession Act and the Maintenance of Surviving Spouses Act was unconstitutional because it infringed their human dignity and unfairly discriminated against them on the grounds of gender, marital status and religion, which could not be justified.[136] The Constitutional Court accordingly confirmed a declaratory order of the High Court that the relevant legislation must be read in to include Muslim polygynous spouses.[137] The Constitutional Court found that through a reading in of the Intestate Succession Act, each polygynous widow would inherit a child's share of the deceased's estate. In the absence of children born of the polygynous Muslim marriages, each polygynous spouse would share equally in the deceased's estate.[138]

More recently, section 2C(1) of the Wills Act[139] was challenged in the Western Cape High Court on the basis that it excluded a Muslim spouse from being treated as a "surviving spouse of the testator". In the case of *Moosa v Harnaker,*[140] the deceased had been in polygynous Muslim marriages with his first and second wives. Nine children were born of the two marriages.[141] During the course of the marriages, the deceased and his first wife registered a civil marriage under the Marriage Act to enable the deceased to qualify for a home loan.[142] Subsequently, the deceased purchased immovable property, which was registered in his and his first wife's names. The immovable property became the family home in which the deceased, both his wives and some of their children lived.[143] When the deceased died, he left a will in which he had directed that his estate should devolve according to Islamic law. In accordance with the terms of the deceased's will, the MJC issued a certificate which allocated specific shares to each of his wives, sons and daughters.[144] The deceased's children decided to renounce their benefits in

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131 Paragraph 19.
132 *Daniels* paras 21, 22, 40.
133 Paragraph 22.
134 Paragraph 23.
135 *Hassam* paras 35, 37–38.
136 Paragraphs 9, 16, 30–34, 42.
137 Paragraphs 53, 57.
138 Paragraph 20.
139 7 of 1953.
140 2017 (6) SA 425 (WCC).
141 *Moosa v Harnaker* paras 3–4.
142 Paragraphs 5–6.
143 Paragraph 6.
144 Paragraph 7.

terms of section 2C(1) of the Wills Act in favour of the deceased's estate being shared equally between the deceased's two wives.[145] Section 2C(1) provides:

> If any descendant of a testator, excluding a minor or a mentally ill descendant, who, together with the surviving spouse of the testator, is entitled to a benefit in terms of a will renounces his right to receive such benefit, such benefit shall vest in the surviving spouse.

Although the Master of the High Court accepted the above proposal, the Registrar of Deeds was only willing to register a transfer of the deceased's half of the family home into the first wife's name on the basis that as a lawful wife, only she qualified as a surviving spouse for the purpose of the Wills Act.[146] In respect of the benefits that had been revoked by the deceased's children, the Registrar invoked section 2C(2) of the Wills Act, which reads:

> If a descendant of the testator, whether as a member of a class or otherwise, would have been entitled to a benefit in terms of the provisions of a will if he had been alive at the time of death of the testator, or had not been disqualified from inheriting, or had not after the testator's death renounced his right to receive such a benefit, the descendants of that descendant shall, subject to the provisions of subsection (1), *per stirpes* be entitled to the benefit, unless the context of the will otherwise indicates.

On the basis of section 2C(2), the Registrar took the view that the renounced benefits should vest in the descendants of the children born to the deceased and his second wife.[147]

The High Court found that the drafters of the Wills Act most likely had not intended for section 2C(1) to include polygynous spouses.[148] The court accordingly found that the exclusion of Muslim wives from the ambit of the Wills Act unfairly discriminated against them on the grounds of religion and marital status and that such discrimination could not be justified.[149] As a remedy, the court ordered a reading-in to the Wills Act, which includes a spouse in a monogamous and polygynous Muslim marriage within the definition of surviving spouse.[150]

14.2.2.5 Calling for the recognition and regulation of Muslim marriages

While the judicial intervention in each of the cases discussed thus far has certainly been helpful in providing relief to spouses in Muslim marriages, the relief has been *ad hoc* and casuistic. This is why in the most recent case involving Muslim marriages, a consolidated application comprising three matters was launched in the Western Cape High Court in 2018 in which the applicants asked for wholesale legal recognition and regulation of Muslim marriages. The three matters are the *Women's Legal Centre Trust v President of the Republic of South Africa* (*WLCT*), *Faro v Bingham* (*Faro*) and *Esau v Esau* (*Esau*).[151]

Some of the primary claims among the aforementioned matters overlapped. For instance, in the *WLCT* and *Esau* matters, the applicant (Women's Legal Centre) and plaintiff (Esau) respectively sought a declaration by the High Court that the South African state had failed to prepare and initiate draft legislation to recognise and regulate Muslim marriages, thereby failing in their duties under section 7(2) of the Constitution to protect, promote and fulfil the rights in the Bill of Rights.[152] In particular, the constitutional rights affected include sections 9 (equality), 10 (dignity), 15 and 31 (freedom of religion), 28 (best interests of the child) and 34 (access to courts).[153] The WLCT and Esau both asked the High Court for an order directing the South African state to

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145 Paragraph 8.
146 *Moosa v Harnaker* paras 9–11.
147 Paragraph 12.
148 Paragraphs 23–24.
149 Paragraphs 29–30, 33, 35.
150 Paragraph 37.
151 *Women's Legal Centre Trust v President of the Republic of South Africa, Faro v Bingham, Esau v Esau* [2018] ZAWCHC 109 (31 August 2018).
152 Paragraphs 33, 47.
153 Paragraphs 33, 47.

prepare, initiate, enact and bring into operation legislation recognising and regulating Muslim marriages within a period of 12 to 18 months from the date of judgment.[154] Alternatively, the WLCT asked that the Marriage Act, Divorce Act and Recognition of Customary Marriages Act[155] be declared inconsistent with the constitutional rights listed above.[156]

Other overlapping claims were formulated either in the alternative or as primary claims. For example, the WLCT (in *WLCT*) and Faro (in *Faro*) asked that Muslim marriages be declared valid under the Marriage Act and/or that the common law definition of marriage be widened to include Muslim marriages.[157] The latter claims were postulated as alternative claims by the WLCT but as primary claims by Faro. Similarly, the WLCT (asking in the alternative) and the applicant (Esau) in the *Esau* matter (asking as a second primary claim), sought to have Muslim marriages declared valid for the purpose of the Divorce Act.[158] Moreover (in the alternative), Esau claimed a declaration of validity of a *de facto* monogamous Muslim marriage for the purposes of the Matrimonial Property Act[159] and the common law duty of support at divorce.[160]

In addition, the WLCT claimed interim relief pending the enactment of legislation to recognise and regulate Muslim marriages by enabling a reading-in to the Recognition of Customary Marriages Act to afford recognition to and regulation of Muslim marriages.[161] As an alternative to the requested reading-in, the WLCT asked that the declaration of invalidity in respect of the Marriage Act, Divorce Act and Recognition of Customary Marriages Act be suspended for 12 months to afford Parliament an opportunity to correct the constitutional defects, failing which the declaration of invalidity should take effect and the reading-in to the Recognition of Customary Marriages Act should take place.[162] The WLCT also claimed an order declaring that the *pro forma* marriage contract drafted by the MJC is contrary to public policy and should be rendered unenforceable at law.[163]

Furthermore, Faro sought a declaration of unconstitutionality in respect of the failure by the Minister of Justice and Constitutional Development to implement policies and procedures in accordance with the Promotion of Administrative Justice Act[164] to regulate how enquiries into the validity of Muslim marriages should be undertaken by the Master when spouses claim benefits under the Intestate Succession Act and Maintenance of Surviving Spouses Act. Faro requested that the declaration be suspended for 18 months to enable the Minister to put into place the required policies and procedures.[165] The claim for a declaration of unconstitutionality emanated from the first part of the *Faro* matter that had been determined by the Western Cape High Court per Rogers J in 2013.[166] The second part of the *Faro* matter involved a claim for constitutional relief (as discussed above), which was considered in the consolidated application

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154 Paragraphs 33, 48. The WLC requested a period of 12 months while Esau asked for 18 months for the legislation to be enacted.
155 120 of 1998.
156 *Women's Legal Centre Trust v President of the Republic of South Africa, Faro v Bingham, Esau v Esau* [2018] ZAWCHC 109 (31 August 2018) para 35.
157 Paragraphs 38, 41.
158 Paragraphs 38, 48.
159 88 of 1984.
160 *Women's Legal Centre Trust v President of the Republic of South Africa, Faro v Bingham, Esau v Esau* [2018] ZAWCHC 109 (31 August 2018) para 48.
161 Paragraph 36.
162 Paragraph 37.
163 Paragraph 39.
164 3 of 2000.
165 *Women's Legal Centre Trust v President of the Republic of South Africa, Faro v Bingham, Esau v Esau* [2018] ZAWCHC 109 (31 August 2018) para 42.
166 Paragraph 44.

before the Western Cape High Court in 2018. In the review application (first part of the *Faro* matter), Faro sought to set aside a decision of the Master of the High Court, which excluded her from benefiting as a spouse under the Intestate Succession Act and the Maintenance of Surviving Spouses Act.[167] There had been a dispute regarding whether or not she had still been married by Muslim rites to the deceased at the time of the latter's death. The Master had dismissed Faro's claim that she had still been married to the deceased when he died and instead relied on the MJC's view that the parties had not been married at the time of the deceased's death.[168] After assessing the expert evidence placed before the High Court, Rogers J held that the Muslim marriage between the parties had subsisted at the time that the deceased had died and accordingly set aside the Master's decision. Faro was therefore recognised as a surviving spouse for the purposes of the Intestate Succession Act and Maintenance of Surviving Spouses Act.[169] Hence, Faro claimed that the Minister be ordered to realise policies and procedures in the Master's office to assist it in determining the validity of Muslim marriages for the purpose of assessing claim benefits in terms of the Intestate Succession Act and the Maintenance of Surviving Spouses Act.

In assessing the above claims in the consolidated application, the Western Cape High Court accepted that by failing to enact legislation to recognise and regulate Muslim marriages, the South African state had failed to fulfil its obligations as contained in section 7(2) of the Constitution.[170] More specifically, the High Court found that a lack of recognition of Muslim marriages infringes the right to dignity of Muslim women.[171] The court also found that Muslim wives are unfairly discriminated against compared to civil and customary wives as well as Muslim men on the grounds of religion, marital status and gender and that such unfair discrimination cannot be justified.[172] The Court held that due to the non-recognition of Muslim marriages, Muslim wives are denied access to courts when a man obtains a Muslim divorce through *talāq* and the wife is unable to access a court for division of the matrimonial property.[173] The court also observed that children born of Muslim marriages do not enjoy the same level of protection as children born of civil and customary marriages. When parties to the latter marriages undergo a process of divorce, the court assumes an "automatic oversight role" to ensure that the best interests of the children born of those marriages are protected.[174] In contrast, children born of Muslim marriages that dissolve through Muslim divorce are not provided with any 'automatic' court supervision to ensure that their best interests are protected.[175] Therefore, the court held that the lack of recognition of Muslim marriages infringes on the right of a child to have his or her best interests protected.[176]

The Western Cape High Court also found that the only reasonable manner for the South African state to fulfil its section 7(2) duties "is through the enactment of legislation" to recognise and regulate Muslim marriages.[177] The court observed that such legislation would not undermine freedom of religion.[178] The court accordingly ordered the President, Cabinet and Parliament to prepare, initiate, introduce, enact and bring into operation legislation to recognise and

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167 *Women's Legal Centre Trust v President of the Republic of South Africa, Faro v Bingham, Esau v Esau* [2018] ZAWCHC 109 (31 August 2018) para 41.
168 Paragraph 44.
169 Paragraph 45.
170 Paragraphs 178–181, 252.
171 Paragraph 136.
172 Paragraphs 124, 126, 135.
173 Paragraph 137.
174 Paragraph 138.
175 Paragraph 139.
176 Paragraph 140.
177 Paragraph 181.
178 Paragraphs 184–185.

regulate Muslim marriages within 24 months of the date of the order.[179] The court left it up to Parliament to decide what form the legislation should take – either to amend the common law through legislative reform or by the enactment of legislation to recognise and regulate Muslim marriages and/or religious marriages.[180] The latter option means that Parliament could either enact the Muslim Marriages Bill,[181] which purports to comprehensively recognise and regulate the specific features of Muslim marriages and divorce, or Parliament could enact omnibus legislation[182] to afford recognition to all religious marriages without necessarily regulating their specific features.[183] In the event that the South African state fails to enact legislation within the stipulated time period, the court ordered that interim relief should be applied until the legislation is enacted. The interim relief offered by the court is for Muslim marriages that are in existence at the time that the interim relief takes effect, to be dissolved through the provisions of the Divorce Act.[184] In the case of a polygynous marriage, the court directed that when applying the interim relief, all relevant factors such as a marriage contract must be taken into account and an equitable and just order must be made.[185] The claims relating to the MJC's *pro forma* marriage contract and the implementation of administrative policies and procedures in the Master's office were refused.[186]

14.3 Muslim divorce

14.3.1 *Introduction*

A controversial aspect of Muslim personal law is the dissolution of a Muslim marriage.[187] There exists a common perception among both Muslims and others that the right to divorce rests solely in the hands of the husband, which is often executed capriciously and to the wife's detriment. The purpose of this section is not necessarily to dispel this perception but to cast some light on the extent to which this may be true. In terms of the Islamic law[188] of divorce in general, and the *Hanafī* school of law in particular, divorce at the behest of the husband is common and easy while, to the contrary, divorce initiated by the wife is uncommon and difficult. This does not

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179 Paragraph 252. The order was granted by the Western Cape High Court on 31 August 2018.

180 *Women's Legal Centre Trust v President of the Republic of South Africa, Faro v Bingham, Esau v Esau* [2018] ZAWCHC 109 (31 August 2018) para 185.

181 See *https://www.gov.za/sites/default/files/33946_gen37.pdf* (accessed 7 October 2018). The Muslim Marriages Bill was drafted by the South African Law Reform Commission and submitted to the Minister of Justice and Constitutional Development in 2003. Seven years later, an amended form was approved by Cabinet. However, to date, it has not yet been enacted.

182 It appears an attempt is being made by the South African state to draft a single Marriages Bill to bring all marriages within the parameters of one omnibus legislation. See Amien (6 June 2018) *The Daily Maverick*, available online at *https://www.dailymaverick.co.za/author/waheeda-amien/#.Wxd3d6m-nq0* (accessed 7 October 2018). The editor of this book, Christa Rautenbach, has been appointed to the advisory committee of the South African Law Reform Commission tasked to investigate this in Project 144.

183 For a discussion about the benefits and harms of recognition versus regulation of Muslim marriages, see Amien in Maclean and Eekelaar (eds) (2013) 107–123; Amien (2010) *International Journal of Law, Policy and the Family* 361–396; Amien and Leatt (2014) *Maryland Journal of International Law* 501–547.

184 *Women's Legal Centre Trust v President of the Republic of South Africa, Faro v Bingham, Esau v Esau* [2018] ZAWCHC 109 (31 August 2018) para 252.

185 Paragraph 252.

186 Paragraph 252.

187 For an insightful discussion on divorce, see Gabru (2004) *PER/PELJ*. Also see Mofokeng (2009) 151–162. For a detailed discussion on the legal implications of the Islamic law of divorce in general and in a South African context, see Moosa in Heaton (ed) (2014) 281–354.

188 The focus in this section is placed on the four *Sunni* schools (*madhhabs* or versions) of Islamic law, namely, *Hanafī, Māliki*, *Shafi'i* and *Hanbali*, and not on the differences of opinion between their founding jurists (*Imāms* Abu Hanifa, Malik, Shafi'i and Hanbal, respectively) who developed these rules.

mean that Islam encourages divorce or treats it as commendable. Instead, it can partly be attributed to the fact that although there are many areas of congruence with the divorce provisions in its primary sources, namely, the *Qur'ān* and *Sunnah* of Prophet Muhammad and those contained in its later codification, Islamic law, the latter is often at variance with the primary sources. Nonetheless, not all contentious and gender-insensitive divorce-related provisions can historically be attributed to Islamic law. Some provisions, for example, the mandatory waiting period (*iddah*) which is only expected to be observed by a wife, emanate directly from the primary sources of Islam and are therefore divinely attributed. Furthermore, although a practice like the instant or triple divorce (*talāq*) was not approved of by the Prophet, it is an innovation that has unfortunately become entrenched as part of Islamic law and is currently still in practice in many parts of the Muslim world including South Africa. Ultimately, it remains a basic principle of Islamic law that it is better to terminate a marriage that has broken down irretrievably.

As in many other matters, Islam adopts a moderate, balanced approach to divorce.[189] It does not prohibit divorce, nor does it encourage it without good reason. The Prophet Muhammad stated that of all permitted things, the most detestable in the eyes of God [Allah] is divorce, and also that divorce ". . . is an act which shakes the throne of God".[190] Nonetheless, Islam recognises the non-permanence of human relationships and permits divorce at the behest of both men and women when the continuance of a marriage becomes impossible.

The *Qur'ān* states: "But if they disagree (and must part), Allah will provide abundance for all from His all-reaching bounty: for Allah is He that careth for all and is Wise".[191] In this sense, Islam recognises divorce as a necessary and sometimes inevitable social evil.[192] In fact, Allah commands the Prophet Muhammad himself, in the *Qur'ān*,[193] to grant his multiple wives the *freedom of choice* to either maintain or to sever their ties of marriage with him:

> O Prophet! Say to thy Consorts: If it be that ye desire the life of this World, and its glitter - then come! I will provide for your enjoyment and set you free in a handsome manner . . . But if ye seek Allah and His Messenger, and the Home of the Hereafter, verily Allah has prepared for the well-doers amongst you a great reward.

The practical example set by the Prophet, whose first marriage was to a divorcee, also goes a long way towards assuaging the stigma usually attached to divorced women and supports remarriage for divorcees. Women are, furthermore, encouraged by Allah to respect themselves and place more reliance on Him for their sustenance rather than to continue to stay in a marriage merely for the sake of the financial security that it may offer.

Chapter 65 of the *Qur'ān*, although titled "*At-Talāq* (Divorce)", only deals with one of the many aspects of divorce, namely, the waiting period (*iddah*) of women. However, as will be elaborated on below, in doing so, it sheds light on and clarifies in detail other important verses dealing with the length of the *iddah* which are only cursorily referred to in other *Qur'ānic* chapters, for example, chapter 2 (*Al-Baqarah* (The Cow)):

> When ye divorce women, and they fulfil the term of their (*'Iddat*), either take them back on equitable terms or set them free on equitable terms; but do not take them back to injure them, (or) to take undue advantage; if any one does that; He wrongs his own soul. Do not treat Allah's Signs as a jest, but solemnly rehearse Allah's favours on you, and the fact that He sent down to you the Book and Wisdom, for your instruction. And fear Allah, and know that Allah is well acquainted with all things.[194]

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189 Doi (1989) 83 and 94.

190 'Abdal' Aṭī (1977) 220.

191 Chapter 4 v 130. The *Qur'ānic* references in this section refer to the translation by Ali *The holy Qur'ān (text, translation and commentary)* (1946), unless otherwise indicated. The first number in the citation refers to the number of the chapter (*surah*) and the second number indicates the verse (*ayat*).

192 Cheshire (1945) *LQR* 352.

193 Chapter 33 vs 28–29.

194 Chapter 2 v 231.

Chapter 4 of the *Qur'ān*, titled "*An-Nisa* (Women)", is another important chapter dealing with divorce. These chapters and their verses on divorce provide clear guidance on *how* (the most correct way) to effect a divorce so that it conforms with a spirit of justice and has potential for reconciliation between spouses. For example, the *Qur'ān* gives guidance on the number of times a divorce should be pronounced, and which wisely points to "staggering" the *talāq* rather than to the pronouncing of the requisite number (three *talāqs*) in one go (instant or triple divorce) which would effect a final separation between a couple. This requirement, would of course apply equally to a wife pronouncing the *talāq* if the right to do so (delegated divorce) was incorporated in her marriage contract:

> A divorce is only permissible *twice*: *after that*, the parties should either hold together on equitable terms, or *separate with kindness*.[195]

While the requirement that the number of pronouncements of divorce is limited to three, is based on this particular *Qur'ānic* verse, the verse clearly says that "a divorce is only permissible twice". The third *talāq* is therefore not expressly mentioned in the verse but is deemed to be implied in the phrase that parties "after that … separate with kindness". There are some forms of Islamic divorce which, like a secular divorce, end a marriage immediately and with finality. However, quite unlike a secular divorce, an Islamic divorce, while it may become effective from the moment it is pronounced, is not necessarily finalised at that stage. The marriage may remain intact and valid in all respects if parties reconcile, or it may terminate at a later stage. This process, and the practical application of the "three pronouncements" requirement, are briefly explained as follows: The *talāq al-sunna* is a form of divorce that can be deemed to be the most correct method of divorcing. What essentially happens in this instance is that the husband pronounces *talāq* only once and thereafter the couple reconcile. Sometime in the future (whether, for example, ten days or ten years later), the husband pronounces a second *talāq* and again the couple reconcile. The husband then pronounces a third *talāq*. This third and final pronouncement, and again regardless of the passage of time, results in an irrevocable divorce and therefore the couple can no longer reconcile. Given the "severity" or "finality" of the divorce and the seriousness with which divorce ought to be treated, re-marrying each other thereafter, although possible, is made very difficult for the couple. Thus when(ever) a *talāq* is pronounced, whether it is a first, second or third *talāq*, *the pronouncement(s)* themselves always *remain effective*. The parties may reconcile without remarrying each other (since their marriage may at the same time also remain intact) after one or two pronouncements but not after a third pronouncement when the divorce is final (irrevocable). However, the practical application of the "three pronouncements" requirement is not as simple as it appears in the illustration above since it also depends on the context of the form (revocable or irrevocable) of divorce used, the number of occasions on which a divorce can be effected, the number of pronouncements to be made on each occasion of divorce, and whether or not the waiting period (*iddah*) has expired. This is further complicated by the intricacies involved in the varied methods of divorce and the differences of opinion in the various schools of Islamic law.

The above *Qur'ānic* verses also detail the most appropriate *behaviour* of parties, especially of husbands (who have the automatic advantage of the unilateral right to divorce) towards wives, during and after the process of divorce. Equity, kindness, decency and dignity are refrains that are repeatedly emphasised in these verses.

A Muslim marriage contract is dissolved on the death of a spouse or through divorce at the initiative of either the husband or wife during their lifetime. Islamic law allows for various forms of dissolution of a marriage, that is, at the initiative of the husband or the wife, by mutual agreement or by judicial process. What must, however, be clarified at the outset, and which to a large extent is responsible for the common perception referred to above, is that divorce as a

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195 Chapter 2 v 229 (emphasis added).

process is provided to the spouses in different and unequal forms. While a wife may therefore have equal access to divorce, the (unilateral) right to divorce is also not equal.

In summary:

The most common forms of divorce that are practiced throughout the Muslim world today include *talāq*, *tafwid-al-talāq*, *faskh*, *khul'a* and *mubar'a*. *Talāq*, *tafwid-al- talāq, khul'a* and *mubar'a* are extra-judicial forms of Muslim divorce. This means that parties do not require the consent of a third party (such as an *imām*) for the divorce to be valid. *Talāq* is the right of a husband to unilaterally repudiate his wife. When the husband issues *talāq*, he must pay any deferred *mahr* that is owing to the wife. A husband has three *talāqs* available to him in respect of one marriage. When he utters *talāq* once, the wife enters the *iddah* period. If the parties do not reconcile during the *iddah* period, the marriage is irrevocably terminated. If the parties wish to reconcile after the *iddah* period has expired, they must marry each other again. If the parties reconcile prior to the expiration of the *iddah* period, the *talāq* is revoked and the marriage remains intact. However, if the husband utters *talāq* thrice, revocation of the *talāq* is no longer possible after a third pronunciation of *talāq*. This means that the marriage is irrevocably terminated with the pronunciation of the third *talāq*, after which the wife must observe *iddah*. Should the parties wish to reconcile after the husband has uttered a third *talāq*, the wife must first perform *hilala*. This means that she must marry another man, consummate the marriage with that man and then that subsequent marriage must terminate through divorce or the death of the subsequent husband. A husband may also conditionally or unconditionally delegate the *talāq* to his wife (*tafwid-al- talāq*). The wife may further institute divorce at her own initiative through *khul'a* by returning her *mahr*. In South Africa, the *ulama* requires the husband's consent regarding the amount to be returned in order for the *khul'a* to be valid. The parties may also mutually agree to terminate their marriage through *mubar'a*. The fifth form of divorce, namely *faskh*, is a judicial mechanism whereby either party (husband or wife) may apply to a third party (for example, an *imām*) to dissolve the marriage on an Islamically permissible ground. Since the *talāq* is readily available to men, it is usually women who try to rely on *faskh* to be released from their Muslim marriage.

14.3.2 *Talāq*

Talāq, archaically translated in English as "repudiation", literally means to "set free" in Arabic. It is the most common of the divorce procedures and its requirements and legal implications impact generally on all the other forms of divorce. The distinction between the revocable and irrevocable divorce is briefly outlined in this section while these forms of divorce are discussed in more detail later.

Islamic law defines *talāq* as "the dissolution of a valid marriage contract forthwith or at a later date by the husband, his agent, or his wife duly authorised by him to do so, using the word *talāq*, a derivative or a synonym thereof".[196] This definition includes all the conditions for the dissolution to be valid, binding and effective, namely, a valid marriage contract, with a sane, adult husband who pronounces the *talāq* and the oral, written or gesture formula used.[197] The phrase "forthwith or at a later date" refers to an instantaneous (irrevocable) and a consequential (revocable) divorce, respectively.[198]

There are no fixed formalities in classical *Sunni* law prescribing the manner in which the *talāq* is to be pronounced. There is no requirement to have witnesses and the wife need not even be present or indeed informed. The *talāq* may be oral or in writing and any words may be used. The consent of the wife is not required and the pronouncement or declaration of *talāq* is extra-judicial and entirely at the discretion of the husband. A *talāq* is furthermore not subject to any

196 Nasir (2009) 120.
197 Nasir (2009) 120–125.
198 Rahman vol 1 (1978) 309–311.

external check.[199] The primary sources of Islam, in contrast, encourage divorce when necessary (for good reason) through a mutual process rather than a single act; emphasise equitable, informed and witnessed separation; and strongly advocate reconciliation. Modern personal law legislators have therefore attempted to curb what is regarded as the indiscriminate power of the husband "to the extent that . . . no divorce shall be effective, or even allowed, outside the court".[200]

The *Qur'ān* imposes a waiting period (*iddah*) on women whose *consummated* marriage has been terminated by the occurrence of two events: divorce or death of their husbands. The *iddah* plays an important role in divorce proceedings and is mentioned a number of times in the *Qur'ān* . For example:

> O Prophet! When ye do divorce women, divorce them at their prescribed periods, and count (accurately), their prescribed periods: And fear Allah your Lord: and turn them not out of their houses, nor shall they (themselves) leave, except in case they are guilty of some open lewdness, those are limits set by Allah: and any who transgresses the limits of Allah, does verily wrong his (own) soul: thou knowest not if perchance Allah will bring about thereafter some new situation.[201]

Iddah starts after the first "divorce" is pronounced. This means that in the case of a revocable (as opposed to irrevocable) divorce, the woman is still the legal wife of the husband as the *talāq* becomes effective only upon completion of this waiting period by the wife. For women, *iddah* constitutes a temporary prohibition to remarry until the expiry of this period. *Iddah* has a three-fold purpose, namely, it provides time to:

- effect reconciliation between the spouses in the case of revocable divorces;
- determine whether the wife is pregnant in order to determine paternity of the child; and
- mourn the loss of her husband in the case of the widow, and the loss of her marriage in the case of the divorcee.

In two forms of *talāq*, namely the *talāq al-hasan* and the *talāq al-bid'a* (instant divorce), the waiting period is only observed after the marriage is irrevocably dissolved and defeats one of its primary purposes, namely, reconciliation. The length of this waiting period varies in relation to a woman's menstrual status. The revocable divorce becomes effective once the wife has completed three successive menstrual cycles[202] or, if she was pregnant, upon termination of the pregnancy. The *Qur'ān* states that "for those who carry life in their wombs their period is until they deliver their burdens".[203] Of course, this has the implication that if a widow or divorcee is in an advanced stage of pregnancy and the birth of her child occurs very shortly after she is widowed or divorced, that her waiting period terminates the moment she gives birth. While this period is linked to and will have a further detrimental impact on the already limited period of maintenance that a woman as a divorcee or widow is personally entitled to, on the plus side, she will technically be free to remarry and will still be entitled to compensation until the end of the nursing period of her child, etc. The *iddah* of a wife who has not yet begun to menstruate, does not menstruate, has reached menopause or has irregular periods, is three lunar months.[204]

In all the instances mentioned above, the divorce can be revoked at any time prior to completion of the waiting period and no remarriage between the spouses is necessary. However, once the waiting period has been completed and even without the pronouncement of a second or third divorce, the divorce will be final and irrevocable. If the marriage has not been consummated,

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199 Ahmad (1984) 28–30; Esposito (2001) 29–30.
200 Nasir (2009) 117 and Nasir (2002) 106.
201 Chapter 65 v 1.
202 In terms of the *Qur'ān*, ch 2 v 228.
203 Chapter 65 v 4.
204 Chapter 65 v 4. Also see El Alami and Hinchcliffe (1996) 23. Note that the Islamic calendar is based on lunar months.

there is no need to serve the waiting period and in this instance the divorce is always irrevocable regardless of the number of pronouncements.[205]

Divorce, it appears, ought to be pronounced while the wife is not menstruating in order for it to be a valid divorce. Although the timing of a divorce is deemed important, there does not seem to be any direct indication in the *Qur'ān* that a man cannot divorce his wife while she is menstruating. Indeed, this is often exactly what happens in the cases of an instant (triple) divorce and a judicial divorce (*faskh*). However, given that one of the ways in which the parties can reconcile during *iddah* is to be sexually intimate, one of the reasons for this requirement is that in terms of *Qur'ānic* injunction, spouses are not allowed to have sexual intercourse with each other while the wife is menstruating as menstruation, apart from being a physical impurity, is considered to be an illness. In this regard, the *Qur'ān,*[206] addressing the Prophet Muhammad, declares:

> They ask thee concerning women's courses. Say: They are a hurt and a pollution: So keep away from women in their courses, and do not approach them until they are clean.

In a bid to reconcile the parties, two arbiters, one representing each spouse, must be appointed. Again, in this regard, the *Qur'ān*[207] clearly provides as follows:

> If ye fear a breach between them twain, appoint (two) arbiters, one from his family, and the other from hers; if they wish for peace, Allah will cause their reconciliation.

Informal mediation (*tawassut*) and formal arbitration (*tahkim*) are alternative methods of dispute resolution. In terms of the *Qur'ān,*[208] mediation, rather than formal arbitration, before the dissolution of a marriage is compulsory and therefore plays an important role in the Islamic law of divorce. Mediators attempt to reconcile disputants through compromise and parties normally choose mediation because they wish to maintain their relationship with each other. Sometimes, however, mediation results in the termination of a relationship, for example, when parties are assisted in accepting the inevitability of a divorce. The *Qur'ān* calls for two witnesses to the divorce to facilitate proof thereof.[209] Given that this requirement is not always complied with in practice, mediation also, albeit indirectly, ensures that the wife will have knowledge of the impending divorce prior to it actually happening.

Divorces may be divided into revocable and irrevocable divorces. An irrevocable (*ba'in*) divorce dissolves the marriage with immediate effect and leaves no room for the husband to change

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205 *Qur'ān*, ch 33 v 49; Doi (1989) 85.

206 Chapter 2 v 222. The physical experience of the discomfort which accompanies (heavy) bleeding and menstrual cramps is hereby acknowledged. This does not, however, affect her mental abilities.

207 Chapter 4 v 35.

208 The following verses are also often cited in support of mediation: "But if ye cannot– and of a surety ye cannot– then fear the Fire whose fuel is men and stones,– which is prepared for those who reject Faith" (*Qur'ān*, ch 2 v 224); "O ye who believe! Obey Allah, and obey the Messenger, and those charged with authority among you. If ye differ in anything among yourselves, refer it to Allah and His Messenger, if ye do believe in Allah and the Last Day: That is best, and most suitable for final determination" (*Qur'ān*, ch 4 v 59); "In most of their secret talks there is no good: But if one exhorts to a deed of charity or justice or conciliation between men, (Secrecy is permissible): To him who does this, seeking the good pleasure of Allah, We shall soon give a reward of the highest (value)" (*Qur'ān*, ch 4 v 114); "If two parties among the Believers fall into a quarrel, make ye peace between them: but if one of them transgresses beyond bounds against the other, then fight ye (all) against the one that transgresses until it complies with the command of Allah; but if it complies, then make peace between them with justice, and be fair: for Allah loves those who are fair (and just) . . . The Believers are but a single Brotherhood: So make peace and reconciliation between your two (contending) brothers; and fear Allah, that ye may receive Mercy" (*Qur'ān*, ch 49 v 9–10).

209 "Thus when they fulfil their term appointed, either take them back on equitable terms or part with them on equitable terms; and take for witness two persons from among you, endued with justice, and establish the evidence (as) before Allah. Such is the admonition given to him who believes in Allah and the Last Day. And for those who fear Allah, He (ever) prepares a way out" (*Qur'ān*, ch 65 v 2). Also see Pearl (1987) 102.

his mind.[210] The marital relationship is deemed to be over and any intercourse will be regarded as adultery (*zina*). Children born as a result of such intercourse are deemed illegitimate unless determined otherwise.[211] A revocable (*raj'i*) *talāq* is one that does not immediately dissolve the marriage in that it does not become effective until the end of the waiting period (*iddah*). The woman is therefore still the legal wife of the husband in this case.[212] She may not remarry until the expiry of this period. However, as polygyny is allowed in Islam, her husband may marry another woman.

A divorce has certain legal implications on inheritance, maintenance,[213] dower and remarriage. As regards inheritance, the spouses may inherit from each other if their divorce is revocable[214], but not if it is an irrevocable[215] divorce, except in one instance.[216] If either spouse dies during the *iddah*, following upon a revocable divorce, each may inherit from the other. The husband is obliged to provide maintenance (*nafaqa*) during the *iddah* as the divorce is theoretically still revocable. *Nafaqa* covers maintenance generally owed by a man to his dependants. In the case of his wife, it is often deemed to cover food, clothing and lodging. The duty to maintain lasts until the expiration of the *iddah*. In the case of a pregnant wife, it lasts until the birth of the child or the end of the nursing period. A divorced wife may breastfeed (by analogy, presumably bottle-feed) her baby for up to two years or employ a wet-nurse to do so if she is unable to. During this period, the father must maintain and house both the child and mother.[217]

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210 Ahmad (1984) 83. There are also "degrees" of irrevocability in that some irrevocable divorces are of a major degree or more final (*kubra*) (e.g. *talāq al-hasan*) than others of a minor degree or lesser finality (*sughra*).

211 Islamic law does, however, make allowances for the father to either acknowledge the child as his own or that parentage may be established through evidence, for example, through paternity tests or the witnessing of the birth by a midwife. See Nasir (2002) 145 and 150.

212 Ahmad (1984) 82.

213 Recent cases highlighting successful applications for relief in terms of Rule 43 of the Uniform Rules of Court brought by Muslim women who were divorced by their husbands through *talāq*, include: *TM v ZJ* 2016 (1) SA 71 (KZD) and *YO v ZW* [2018] ZAWCHC 61 (25 May 2018).

214 In *Faro v Bingham* [2013] ZAWCHC) 159 (25 October 2013), the High Court held that the Muslim marriage between the deceased (who had died intestate) and his wife (whom he had issued with a revocable *talāq* prior to his death) still subsisted at the time of his demise. Hence, his wife was deemed to be his spouse for purposes of the Intestate Succession Act 81 of 1987 and the Maintenance of Surviving Spouses Act 27 of 1990. Although related to testate succession rather than divorce, in *Moosa v Minister of Justice and Correctional Services* 2018 (10) BCLR 1280 (CC), the Constitutional Court, in a unanimous judgment handed down on 29 June 2018, held that the wife in a polygynous Muslim marriage be treated as a "surviving spouse" for the purposes of section 2C(1) of the Wills Act 7 of 1953 and therefore allowed to inherit from her deceased's husband's will.

215 For an article dealing with intestate succession against the background of the complex Islamic legal aspects of *faskh* and *talāq* as forms of divorce, see Moosa and Abduroaf (2014) *Acta Juridica*. In *Hassam v Jacobs* [2008] 4 All SA 350 (C), a *faskh*, which is an irrevocable form of judicial divorce, was treated as revocable. This allowed the wife to be treated as an heir in terms of the Islamic law of inheritance and therefore to be able to inherit from the deceased estate of her former husband. The article offers a new perspective on this ground-breaking High Court case and concludes that the case is a harbinger of the potential misapplication of the Islamic law pertaining to *faskh*.

216 This involves a "death illness". Also see Esposito (2001) 35.

217 "The mothers shall give suck to their offspring for two whole years, if the father desires to complete the term. But he shall bear the cost of their food and clothing on equitable terms. No soul shall have a burden laid on it greater than it can bear. No mother shall be treated unfairly on account of her child. Nor father on account of his child, an heir shall be chargeable in the same way. If they both decide on weaning, by mutual consent, and after due consultation, there is no blame on them. If ye decide on a foster-mother for your offspring, there is no blame on you, provided ye pay (the mother) what ye offered, on equitable terms. But fear Allah and know that Allah sees well what ye do" (*Qur'ān*, ch 2 v 233). "Let the women live (in '*iddat*) in the same style as ye live, according to your means: Annoy them not, so as to restrict them. And if they carry (life in their wombs), then spend (your substance) on them until they deliver their burden: and if they suckle

(*continued*)

The waiting period of a widow is four months and ten days and her maintenance is thus deemed to be limited to this period.[218] Given that only divorcees and widows are obliged to observe the *iddah*, it is not surprising that the different *Qur'ānic* applications of *iddah* in the treatment of a widow and divorcee are often blurred to the detriment of the widow especially in maintenance matters. As far as an irrevocable divorce is concerned, the schools of law have divergent opinions as to what maintenance rights, if any, the wife is entitled to. The whole question as to whether maintenance should be extended to the period beyond *iddah* (post-divorce) is also subject to interpretation.[219]

Divorce is discouraged through strong deterrents. Dower (*mahr*)[220] is one such deterrent. It is considered a form of security and a precautionary measure against the husband's arbitrary power of divorce. While there are variations in the schools of law, dower is a sum of money or other property which becomes payable by the husband to the wife as a result of marriage. A dower may be prompt (paid at the time of marriage or on demand) or deferred (payable on dissolution of marriage by death or divorce). Once a divorce is final and the marriage had been consummated, the husband has to immediately settle in full any unpaid portion of the wife's dower. If the marriage was not consummated, the wife is only entitled to half of the specified dower, and if no amount was specified, she is entitled to a gift.

As a further deterrent, former spouses are prevented from becoming reconciled once their divorce becomes final and irrevocable. The opportunity to reconcile during *iddah* must be taken seriously as once it passes; the divorce becomes final and permanent. Before a man can be reconciled with his former wife, and if she is willing to reconcile with him, she must undergo a very trying process known as *halala* (intervening marriage). This means that she must first marry someone else, consummate this other marriage and then either be granted a divorce from this other person or wait until he dies. If she is granted a divorce or he dies, she has thereafter still to undergo another waiting period.[221] This process highlights that the latter marriage should be *bona fide* and not one of mere convenience.[222]

An exception does, however, exist. The *ahsan* mode of *talāq* (detailed in the next section) makes allowances for reconciliation by allowing remarriage to take place between the same

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your (offspring), give them their recompense: and take mutual counsel together, according to what is just and reasonable. And if ye find yourselves in difficulties, let another woman suckle (the child) on the (father's) behalf" (*Qur'ān*, ch 65 v 6). Also see text to note 110 for the translation of *Qur'ān*, ch 65 v 1. See Moosa (2013) *IJLSE* 27–41.

218 "If any of you die and leave widows behind, they shall wait concerning themselves four months and ten days: When they have fulfilled their term, there is no blame on you if they dispose of themselves in a just and reasonable manner. And Allah is well acquainted with what ye do" (*Qur'ān*, ch 2 v 234).

219 For a detailed analysis of post-divorce or continued (long-term) maintenance of the divorcee, see Moosa and Karbanee (2004) *Law, Democracy and Development* 267–88, where it is contended that there is enough scope in the primary sources (*Qur'ān* and *Sunna*) in support of such maintenance.

220 "And give the women (on marriage) their dower as a free gift; but if they, of their own good pleasure, remit any part of it to you, Take it and enjoy it with right good cheer" (*Qur'ān*, ch 4 v 4); "But if ye decide to take one wife in place of another, even if ye had given the latter a whole treasure for dower, Take not the least bit of it back: Would ye take it by slander and manifest wrong?" (*Qur'ān*, ch 4 v 20); "And if ye divorce them before consummation, but after the fixation of a dower for them, then the half of the dower (Is due to them), unless they remit it or (the man's half) is remitted by him in whose hands is the marriage tie; and the remission (of the man's half) is the nearest to righteousness. And do not forget Liberality between yourselves. For Allah sees well all that ye do" (*Qur'ān*, ch 2 v 237).

221 "So if a husband divorces his wife (irrevocably), He cannot, after that, re-marry her until after she has married another husband and He has divorced her. In that case there is no blame on either of them if they re-unite, provided they feel that they can keep the limits ordained by Allah. Such are the limits ordained by Allah, which He makes plain to those who understand" (*Qur'ān*, ch 2 v 230). Also see Rahman vol 1 (1978) 319.

222 Ali and Ahmad (1983) 74; Doi (1989) 92–93.

spouses after an irrevocable divorce without the need to undergo the process of *halala*. That is why it is called an irrevocable divorce of a minor degree (*sughra*). The reason for *halala* not being necessary is that divorce was either only pronounced once or at the most twice. While the purpose of *halala* is to remarry one's former spouse, and although its merit lies in highlighting the gravity of divorce, there is also *Qur'ānic* support for the fact that former spouses may remarry each other after the waiting period has elapsed and without the wife having to go through the process of *halala*. The *Qur'ān*[223] states:

> When ye divorce women, and they fulfil the term of their (Iddat), do not prevent them from marrying their (former) husbands, if they mutually agree on equitable terms. This instruction is for all amongst you, who believe in Allah and the Last Day. That is (the course Making for) most virtue and purity amongst you and Allah knows, and ye know not.

14.3.3 Forms of divorce

There are various forms of divorce, namely:

(a) **Divorce by the husband:** There are three forms of dissolution used by the husband. Two of these, *ila*[224] (where the husband takes a vow to abstain from sexual intercourse with his wife) and *zihar*[225] (where the husband compares his wife in a derogatory manner to a female relative within a prohibited degree), although both still valid, are rarely used today or treated as obsolete. *Talāq* is therefore the only form which still remains practically relevant. A *talāq* may be effected in one of a number of forms, some being more meritorious than others. These in turn are generally grouped into two methods and followed by *Sunni* Muslims. One method is recommended by the primary sources and is known as *talāq al-sunna* (divorce according to the rules laid down in the traditions of Muhammad). The second method, known as the *talāq al-bid'a* (innovated divorce not according to the rules laid down by prophetic tradition), is not recommended and although it has long been the subject of much controversy, is nonetheless valid.[226] The *talāq al-bid'a* is commonly known as the "three-in-one", "triple" or instant divorce. *Talāq al-sunna* is further divided into two kinds, namely, *talāq al-ahsan* ("most proper") and *talāq al-hasan* ("proper"). The latter essentially varies from the former in the number of pronouncements of *talāq*. Both are approved methods of repudiation, accepted by all schools, and both forms allow for revocation.

(b) **Divorce by the wife:** The *talāq al-tafwid* or delegated divorce, although under-utilised due to a lack of awareness, is a very effective tool (even more so than the *khula*, as explained

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223 Chapter 2 v 232.

224 "For those who take an oath for abstention from their wives, a waiting for four months is ordained; if then they return, Allah is Oft-forgiving, Most Merciful. But if their intention is firm for divorce, Allah heareth and knoweth all things" (*Qur'ān*, ch 2 v 226–7).

225 "Allah has not made for any man two hearts in his (one) body: nor has He made your wives whom ye divorce by Zihar your mothers: nor has He made your adopted sons your sons. Such is (only) your (manner of) speech by your mouths. But Allah tells (you) the Truth, and He shows the (right) Way" (*Qur'ān*, ch 33 v 4); "Allah has indeed heard (and accepted) the statement of the woman who pleads with thee concerning her husband and carries her complaint (in prayer) to Allah: and Allah (always) hears the arguments between both sides among you: for Allah hears and sees (all things). If any men among you divorce their wives by Zihar (calling them mothers), they cannot be their mothers: None can be their mothers except those who gave them birth. And in fact they use words (both) iniquitous and false: but truly Allah is one that blots out (sins), and forgives (again and again). But those who divorce their wives by Zihar, then wish to go back on the words they uttered,– (It is ordained that such a one) should free a slave before they touch each other: Thus are ye admonished to perform: and Allah is well-acquainted with (all) that ye do. And if any has not (the wherewithal), he should fast for two months consecutively before they touch each other. But if any is unable to do so, he should feed sixty indigent ones, this, that ye may show your faith in Allah and His Messenger. Those are limits (set by) Allah. For those who reject (Him), there is a grievous Penalty" (*Qur'ān*, ch 58 v 1–4).

226 Nasir (2009) 126.

below) at the disposal of a wife trapped in an unhappy marriage. The parties can agree to include in their contract of marriage that the wife has a right to *talāq*. Without therefore depriving the husband of his inalienable right to *talāq*, it allows the wife (who has acquired the right to *talāq*) to terminate her marriage in order to obtain her freedom expeditiously and without the intervention of any court and furthermore without having to relinquish her right to claim the full dower.[227] Support for it is found in both the *Qur'ān*[228] and *Sunnah*.[229] The same process followed by the husband would apply equally to a wife who issues or pronounces a *talāq*.

(c) **Divorce by mutual agreement of the spouses:** This form of divorce includes *khula* (literally meaning "to take off one's dress" and refers to a metaphoric description of the spouses serving as garments to one another)[230] and *mubara'a* (mutual discharge). While there are variations in the four schools of law, *khula* is applicable where the aversion or disinclination is on the side of the wife. It is therefore concluded by an offer (from the wife) to "ransom" herself by, for example, paying her husband an agreed, reasonable sum of money for her "freedom" or release from the marriage and the acceptance thereof (by the husband).[231] The wife usually does not have to give a reason for wanting such a divorce. In *mubara'a*, the aversion is mutual and both parties decide to bring the marriage to an end.[232] The husband, however, is the one who makes the initial offer of a mutually agreed divorce. He may not take back his offer before the wife has given him an answer. If the wife accepts the offer, the divorce is effective immediately. If the wife, however, initiates this process, she may take back her offer at any time prior to acceptance by the husband.

(d) **Judicial divorce (*tafriq*):**[233] Islamic law also allows for divorce by judicial intervention where a court arbitrates and pronounces a divorce. The husband or wife can bring a suit for a judicial order of separation. The two methods of judicial dissolution of a marriage are *li'an* and *faskh*. *Li'an* (mutual imprecation) is generally classified under this category although it is not strictly speaking a judicial termination of the marriage. This divorce is invoked where, although there is no formal evidence of adultery, the husband accuses his wife of having committed adultery. He may for this reason, for example, also deny paternity of a child born of her. The husband (and in her turn, the wife who refutes it) will be asked to swear an oath as to what he or she believes to be the truth.[234] *Faskh*, as a form of divorce, although available to both spouses, is usually only utilised by women since men have the (unilateral) right to *talāq*. It is the only way that a wife can obtain an irrevocable[235] divorce (as understood in secular law) without her husband's consent and participation and is allowed by all the schools although the schools differ in their opinions on both the grounds

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227 Rahman vol 1 (1978) 339–352.

228 *Qur'ān*, ch 33 v 28. See note 102.

229 Ahmad (1984) 184–185; Rahman vol 1 (1978) 340.

230 "[Y]our wives. They are your garments and ye are their garments" (*Qur'ān*, ch 2 v 187).

231 El Alami and Hinchcliffe (1996) 27.

232 El Alami and Hinchcliffe (1996) 27; Rahman vol 1 (1978) 552.

233 Nasir (2002) 106 and 119 uses the more modern Arabic term "*tafriq*" (literally meaning separation) to indicate divorce by judicial intervention. This type of dissolution has its basis in the *Qur'ān*, ch 4 v 35 (see note 116 above) and the *Sunnah*.

234 "And for those who launch a charge against their spouses, and have (in support) no evidence but their own,– their solitary evidence (can be received) if they bear witness four times (with an oath) by Allah that they are solemnly telling the truth; And the fifth (oath) (should be) that they solemnly invoke the curse of Allah on themselves if they tell a lie. But it would avert the punishment from the wife, if she bears witness four times (with an oath) By Allah, that (her husband) is telling a lie; And the fifth (oath) should be that she solemnly invokes the wrath of Allah on herself if (her accuser) is telling the truth. If it were not for Allah's grace and mercy on you, and that Allah is Oft-Returning, full of Wisdom – (Ye would be ruined indeed)" (*Qur'ān*, ch 24 v 6–10).

235 See fn 124.

(complaints) of dissolution as well as the procedure to be followed. In this case the wife usually has a valid reason (or complaint) for seeking a divorce. The wife may, for example, apply for *faskh* on the following grounds:[236]

- injury or discord between the wife and husband;
- failure of the husband to provide maintenance;
- physical and mental defect on the husband's part; or
- husband's prolonged absence *sine causa* (desertion) or his imprisonment.

The effect of such a court-decided divorce is that once granted by a court for any of the above reasons, then the wife does not have to make any payment to the husband nor does she have to forfeit or reimburse her dower (*mahr*).

What may cause some confusion is that *faskh* has also been translated to mean "annulment" and therefore to denote the formal judicial rescission of an Islamic marriage. An annulled marriage is one that, in certain circumstances, is held to be null and void *ab initio* (deemed not to have taken place at all) or one that started out as valid but later became invalid. This would typically be the case where it is discovered that the spouses are close blood relations who were not allowed to marry each other in the first place or where either of the spouses later renounces Islam (apostasy). In these cases, the marriage is automatically annulled and therefore there is no question of a divorce. The judicial annulment merely serves to legally confirm the non-existence of the marriage.[237]

14.3.4 *Some comments*

There are various modes of revocable or irrevocable *talāq*, some being more meritorious than others, and yet other modes that are considered not to be of much importance today and therefore simply treated as virtually non-existent.

The least meritorious form of *talāq* is the controversial *talāq al-bid'a* or instant divorce. This mode of *talāq* dissolves the marriage immediately and irrevocably. Since the primary sources of Islam frown upon this form of divorce and most countries[238] have outlawed it, it is not uncommon for people to dismiss this form as no longer applicable. However, even though there is very little that can be considered "proper" about this form of divorce, it is still practised and recognised by the layman and indeed certain religious authorities as a valid Islamic law form of divorce and often exercised to the detriment of Muslim women.

Talāq is the unilateral and exclusive right of the husband. While he may delegate the power to pronounce the *talāq* to some other person (an agent), or indeed the wife, divorce at the latter's initiative is particularly difficult. While knowledge on the part of women of the various forms of divorce at their disposal can certainly be used to their advantage, practical realities indicate otherwise. The delegated divorce (*talāq al-tafwid*), for example, is under-utilised. Many Muslims, especially women, are not aware of this possibility and it is not used in popular local contracts. What is more, in some countries where a stipulation to this effect is automatically incorporated in a marriage contract, it is not uncommon for this particular clause to be deleted at the inception of the marriage, to the detriment of the wife.

While it is true that certain forms of divorce, such as *khula*, can be initiated by women, it is equally true that in most of these instances, women literally need the co-operation of men and must have the financial means to effectively do so. The *talāq* of the wife (by the husband) ultimately remains the basis of a Muslim divorce. It is therefore contended that the notion of a

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236 For a detailed discussion of these and other grounds, see Nasir (2002) 120–133.

237 See Nasir (2002) 133 and Nasir (2009) 108.

238 The practice of triple *talāq* was recently declared to be unconstitutional by the Indian Supreme Court. See BBC News (22 August 2017) accessible at *https://www.bbc.com/news/world-asia-india-41008802*.

husband's unilateral right to divorce goes contrary to the real and ethical spirit of equality, evident in the Islamic law of marriage and divorce. Islam must be viewed in a historical and decontextualised context. From the viewpoint of normative Islam (an Islam relevant for all times to come), women and men are essentially equal, despite biological and other differences.

This contention is further supported by the fact that state legal systems have sought to exercise some, if not much, control over the Islamic law of divorce and its consequences, and further that the trend for reforms in Islamic law have been towards reducing the ease and facility with which the process of *talāq* has been customarily practised, whilst women's rights to divorce have been both strengthened and expanded in various countries.

In South Africa, Islamic marriages are in the process of being recognised through proposed legislation. Two key objectives of the 2010 Muslim Marriages Bill (MMB),[239] which has yet to be adopted by Parliament, are to regulate the termination of Muslim marriages[240] and the consequences flowing from such termination[241] according to the broad guidelines of Islamic law. The proposed legislation, rather than (further) reforming divorce laws, accords with Islamic law as it is currently understood and implemented in practice in the Muslim world while at the same time attempting to remain true to the Constitution of South Africa. The MMB seeks to ensure knowledge of the divorce on the part of the wife and finalisation of the process of divorce. Whether or not the judiciary will succeed in encouraging the legislature to enact the proposed legislation, it is ultimately not the role of the judiciary to pronounce on the formal recognition or dissolution[242] of Muslim marriages.

14.3.5 *Conclusion*

The fundamentals and some of the complexities of the Islamic law of divorce have been highlighted. Women's rights are, however, diminished by interpretations of the *Sunni* schools of law, which are sometimes at variance with the spirit of equality inherent in Islam. Positive innovations in this field in certain Muslim countries have benefited women. It should be borne in mind that the overall spirit of the Islamic law of divorce emphasises both equity and decent behaviour. In disputes such as divorce, Muslims often resort to using the alternative mechanisms as a first step to dispute resolution. In a bid to focus on reconciliation rather than separating spouses, more emphasis therefore needs to be placed on formal or informal arbitration or mediation before the divorce and before recourse to adjudication in the courts is sought.

14.4 Muslim inheritance (*mirāth*)[243]

Muslim inheritance is another component of Muslim personal law. It encompasses the body of Islamic law that regulates what must happen to the estate of a Muslim person after his or her death.[244] As mentioned at the beginning of this chapter, most Muslims in South Africa follow

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239 The Muslim Marriages Bill of 2010 is an amended version of the 2003 Muslim Marriages Bill. It is the latest published version and was published for public comment in January 2011: General Notice 37 GG 33946 of 21 January 2011. The 2010 MMB is available at *http://www.gov.za/sites/www.gov.za/files/33946_gen37.pdf* (accessed 21 July 2018).

240 Clause 9.

241 Clauses 10 and 11.

242 In a letter to the editor of the South African attorneys' journal, *De Rebus*, dated 27 November 2015, the acting judge in the case of *S v S* (GJ) (unreported case 2014/05928 of 26 September 2014), in clarifying an error that arose in the transcription of the order, verifies the following as far as the dissolution of a Muslim marriage is concerned: "[t]he order given in court did not dissolve an Islamic marriage and does not serve as a precedent for such relief in the High Court." See Andrews (27 November 2015) accessible at *http://www.derebus.org.za/letters-to-the-editor-4/*.

243 For a discussion about Muslim inheritance in South Africa, see Amien (2014) *Acta Juridica* 192–218; Rautenbach (2001) 179–185.

244 Jung (1990) i; Brugman (1984) *Recht van de Islam* 4–14; Jansen (1987) 78; Rautenbach (2001) 15–50. Also see Mundy in Al-Azmeh (ed) (1988) 1–123. The relevant verses of the *Qur'ān* dealing with inheritance include, *inter alia*, ch 4, v 11–12, and 176.

the *Sunni* legal tradition. It is therefore the *Sunni* law of inheritance that will inform the discussion on Muslim inheritance in this chapter.

Islamic law enables a deceased person to die testate and intestate. Muslims may devolve up to one-third of their estates through a will.[245] Devolution of the remaining two-thirds, however, is prescribed by the *Qur'ān* and *Sunnah*. The *Qur'ān* and *Sunnah* are both primary sources of Islamic law.[246] While the *Qur'ān* is deemed to be the written word of God, the *Sunnah* (contained in book form called *ahadīth*) refers to the sayings and practices of Prophet Muhammad.[247]

14.4.1 *Sunni law of intestate succession*

14.4.1.1 Basic principles

The basic principles relating to the *Sunni* law of intestate succession can be summarised as follows:[248]

(a) Before any of the deceased's heirs can inherit from his or her estate, the deceased's funeral expenses and the deceased's creditors must first be paid from the deceased's estate.

(b) There are three main instances that would disqualify an heir from inheriting under *Sunni* law; namely, murder of the deceased by the heir; if the heir or deceased is not Muslim; and/or apostasy.[249]

(c) Should the heirs be eligible to inherit, the following rules are applicable:

(aa) The primary heirs of the deceased may not be excluded from inheritance. They consist of the deceased's parents, surviving spouse(s) and children. The primary heirs are referred to as the first *parentela*.[250]

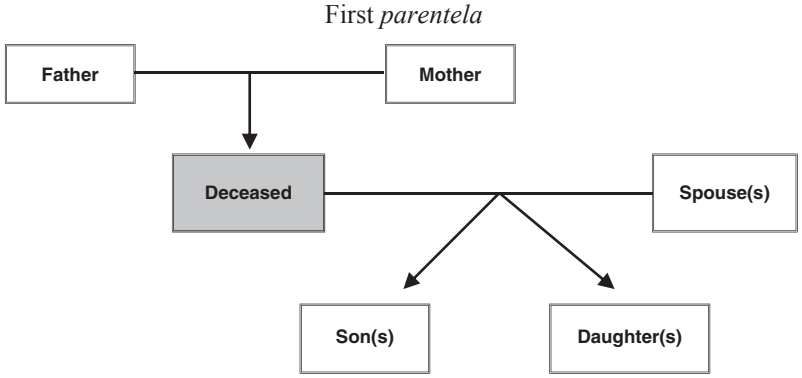


Figure 14.1

245 Anderson (1971) *ICLQ* 11; Coulson (1971) 235; Omar (1988) 7–8; Zaid (1986) 9; Jansen (1987) 78; Abdur Rahman (1980) 256–258; Layish (1975) 279; Markby (1906) 2; Pearl (1987) 142–144, 148; Sherif (1985) 122. For the requirements of a valid will in Islam, see 'Abdal-Haqq, Bewley and Thomson (1995) 26; Markby (1906) 116–117; Roberts (1990) 61–62.

246 Ali (2000) 19–23. Esposito and DeLong-Bas (2001) 3, 5. Bulbulia (1985) *CILSA* 234.

247 Ali (2000) 19–23. Esposito and DeLong-Bas (2001) 3, 5. Bulbulia (1985) *CILSA* 234.

248 Omar (1988) 31–33. The illustrations in this paragraph are also based on the illustrations given by Omar (1988) and Rautenbach (2001) 32–35.

249 'Abd al 'AṭīAṭī (1977) 255–256; Schacht (1964) 170; Coulson (1971) 193–194; Roberts (1990) 66–67; Pearl (1987) 169.

250 Corbett, Hofmeyr and Kahn (2001) 564 describes *parentela* as an "order of succession". It refers to a specific parental group together with its descendants. The deceased and his or her descendants form the first *parentela*. The second *parentela* consists of the deceased and his or her parents with their descendants. The deceased and his grandparents with their descendants form the third *parentela*.

(bb) Based on the principle that the nearer exclude the more remote, there is no representation of a predeceased beneficiary.

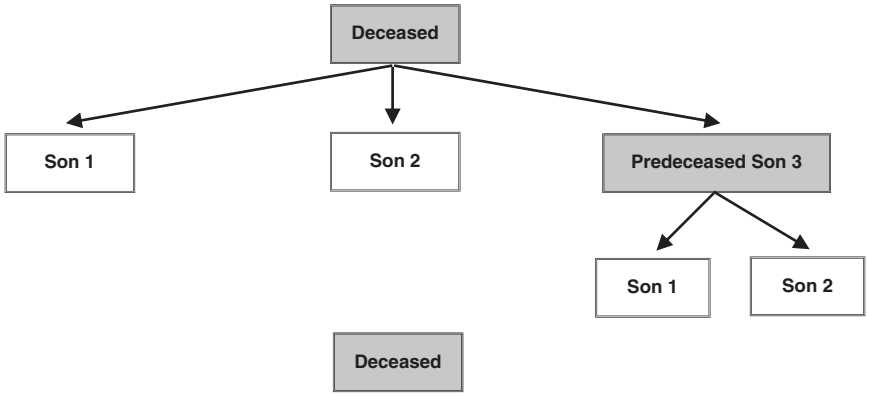


Figure 14.2

Son 1 and Son 2 inherit the estate of the deceased in equal shares. The sons of the predeceased Son 3 do not represent their father and they inherit nothing.

(cc) Full blood relatives exclude half blood relatives when they are equal in degree.

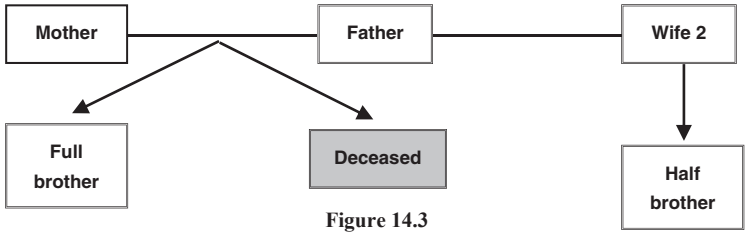


Figure 14.3

The full brother of the deceased would exclude the half-brother of the deceased from inheritance.

(dd) In general, a woman inherits half of what her male counterpart inherits.[251]

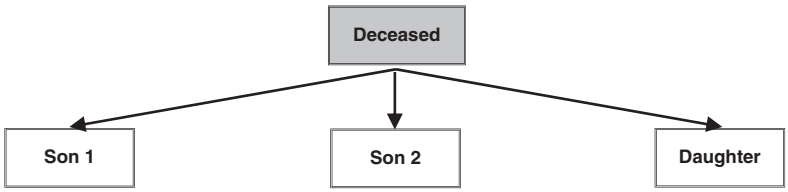


Figure 14.4

In this example, Son 1 would inherit $^{2}/_{5}$, Son 2 would inherit $^{2}/_{5}$ and the daughter would inherit $^{1}/_{5}$ of the estate of the deceased.

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251 *Qur'ān* Chapter 4 Verse 11 reads: "Allah commands you in respect of your children's inheritance. To the male a share equal to that of two females. If only daughters, two or more, their share is two-thirds. Of the inheritance, if only one her share is a half."

(ee) In general, beneficiaries nearer in degree exclude those more remote.

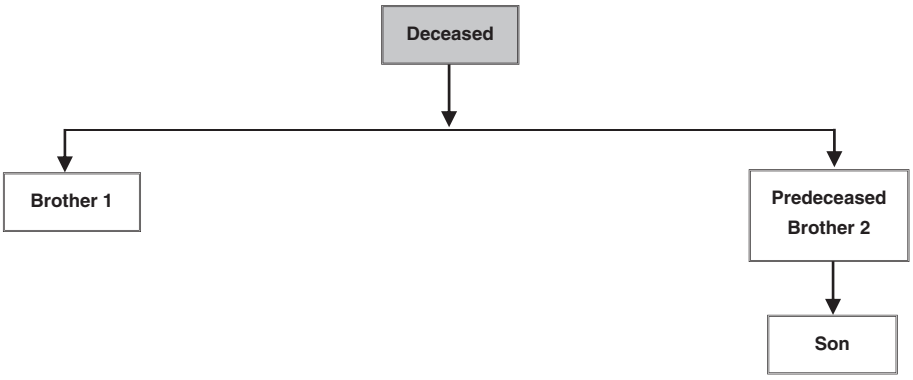


Figure 14.5

Brother 1 is nearer in degree to the deceased and therefore excludes the son of the deceased's predeceased Brother 2.

14.4.1.2 Classes of heirs

There are three classes of heirs, namely:[252]

(a) *Sharers*: are those who are entitled to a fixed share of the inheritance;[253]

(b) *Residuaries*: are those who receive no fixed share but succeed to the residue after the claims of the sharers are satisfied. If there are no sharers, the residuaries will succeed to the whole estate; and

(c) *Distant kindred*: are those blood relations who are neither sharers nor residuaries. If there are no sharers or residuaries, the estate will be divided among the distant kindred who are entitled to the estate.

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252 Omar (1988) 29. The main difference between the *Sunni* and *Shia* law schools is as follows: the *Sunni* distinguishes between the agnates and cognates. The result is an unequal position between males and females and a complex set of rules of succession. On the other hand, the *Shia* does not make the same distinction and the agnate and cognate inherit equally. The result is an equal position between males and females and lesser complex rules of succession. For the position in *Shia* law, see 'Abd al 'AṭīAṭī (1977) 263–267; Coulson (1971) 108; Jung (1990) 60.

253 *Surah Al-Nisa* (chapter 4), v 7 states:
It is prescribed that when death approaches any of you,
If you leave any property, that you make a bequest to
Parents and next of kin according to equity,
This is a duty on those who fear Allah.

14.4.1.2.1 *Sharers*[254]

Sharers (also referred to as *Qur'ānic* heirs) are those heirs who are entitled to a fixed share of the inheritance and whose specific shares should be given after payment of funeral expenses, debts and legacies. Under pre-Islamic customary law, certain *Qur'ānic* sharers such as females and cognates were not entitled to succeed. Instead, the nearest male agnate inherited the entire estate of the deceased, descendants were preferred over ascendants, and ascendants were preferred over collaterals. There are 12 *Qur'ānic* sharers, namely:[255]

(a) *Husband*: he inherits half where there are no children of a son how-low-so-ever, and a quarter if there are.

(b) *Wife*: she inherits a quarter where there are no children of a son how-low-so-ever, and one-eighth if there are. Two or more wives collectively inherit a quarter or one-eighth, which is divided equally among them.

(c) *Father*: he inherits one-sixth where there is a child or child of a son how-low-so-ever. He inherits as a residuary where there is no child or child of a son how-low-so-ever. He inherits both as a sharer and a residuary where there are only daughters or son's daughters how-low-so-ever.

(d) *Mother*: she inherits one-sixth where there is a child or child of a son how-low-so-ever or where there are two or more brothers or sisters, whether full blood (having the same mother and father), consanguine (having the same father but different mothers) or uterine (having the same mother but different fathers). She inherits one-third where no child or child of a son how-low-so-ever exists, and no more than one brother or sister; but where there is a wife or husband and the father, only one-third of what remains after deducting the wife's or husband's share.

(e) *Grandfather*: he is excluded by the father and a nearer paternal grandfather. Where there are no full or consanguine brothers or sisters, he inherits one-sixth as a sharer with a son or son's son how-low-so-ever. He inherits the same as a sharer and co-residuary with the daughter and the daughter of a son how-low-so-ever. He inherits as a residuary where no other heirs exist.

(f) *Grandmother*: whether paternal or maternal, the grandmother is excluded by the mother. In the absence of other exclusions, she inherits one-sixth.

(g) *Daughter*: she inherits half where there is no son. Two or more daughters will share two-thirds of the estate. If there is a son (or sons), the daughter (or daughters) become a co-residuary – receiving half a son's share, after deduction of the share of the other sharers.

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254 Abd al 'AṭīAṭī (1977) 259; Pearl (1987) 149–166; Omar (1988) 29. *Qur'ān* Chapter 4 v 11 reads:

> Allah commands you in respect of your children's inheritance
> To the male a share equal to that of two females,
> If only daughters, two or more, their share is two-thirds
> Of the inheritance, if only one her share is a half.
> For parents, a sixth share of the inheritance to each
> If the deceased left children, if no children and the
> Parents are the only heirs the mother receives a third,
> If the deceased left brothers or sisters the mother
> Receives a sixth. In all cases, distribution takes place
> After the payment of legacies and debts.
> You know not whether your parents or your children
> Are nearest to you in benefit.
> These are the prescribed shares ordained by Allah
> And Allah is All-Knowing, All-Wise.

255 Under *Shia* law, there are only nine sharers, namely the husband, wife, mother, father, uterine brother, daughter, full sister, consanguine sister and uterine sister. See Jung (1990) 61.

(h) *Son's daughter*: she inherits in the following four cases:
  (aa) where she is alone, she inherits half of the estate;
  (bb) where there are two or more than two daughters, they share two-thirds of the estate equally;
  (cc) where there is a daughter of the deceased she receives half the estate, and the deceased's son's daughter receives one-sixth; and
  (dd) where there is a grandson, the deceased's son's daughters become residuaries and the residue of the estate is divided among them in terms of the rule that the male receives twice that of a female. The son's daughter does not inherit where the deceased had two or more daughters or a son.

(i) *Full sister*: she inherits only where there is no son how-low-so-ever or where there is no father how-high-so-ever. She inherits in the following four cases:
  (aa) if only one sister exists, she receives half the estate;
  (bb) if there are two or more, they share two-thirds;
  (cc) where the deceased left a brother, the full sister becomes a residuary and the rule that the male receives twice that of a female is applicable; and
  (dd) where the deceased left a daughter or son's daughter, the full sister receives the residue after the daughter/son's daughter receive their shares.

(j) *Consanguine sister*: she does not inherit in the presence of a son or grandson of the deceased and in the presence of the deceased's father. The rules governing inheritance by a consanguine sister are similar to those governing the full sister;

(k) *Uterine sister*: she inherits in the following two cases:
  (aa) where the deceased's issue is also deceased, and no father or grandfather exists, the uterine sister receives one-sixth of the estate; and
  (bb) where there are two or more uterine brothers or sisters, they share one-third equally.

(l) *Uterine brother*: he is excluded as a sharer or residuary by any descendant or any male ascendant. Otherwise, he receives one-sixth on his own or shares one-third with brother/s or sister/s.

14.4.1.2.2 ***Residuaries***[256]

After the sharers have been allotted their shares, the residuaries inherit the balance or residue of the estate. There are three types of residuaries, namely, residuaries in their own right, residuaries through another and residuaries with another. There are three general rules in respect of residuaries. These are:

(a) nearer in degree excludes the more remote;

(b) where they are of equal degree, strength of blood tie becomes the criterion; and

(c) distribution takes place in accordance with the *per capita* principle.

Residuaries in their own right: Residuaries in their own right are all the male relatives of the deceased. There are four categories of such relatives in the following order of priority:

(a) the son and the son's son how-low-so-ever;

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256 Also referred to as agnatic heirs. Their shares are described in the *Qur'ān*. See 'Abd al 'AṭīAṭī (1977) 261. However, it may not be entirely correct to refer to this category of beneficiaries as agnatic heirs, since women are also included in some respects as residuaries. For further details, see Jung (1990) 16–25; Omar (1988) 29, 59–66; Hidayatullah and Hidayatullah (1990) 54–63.

(b) the male ascendants of the deceased, that is the father and paternal grandfather (father's father) how-high-so-ever;

(c) the descendants of the father of the deceased, that is full or consanguine brothers and their sons how-low-so-ever; and

(d) the descendants of paternal grandfathers how-high-so-ever.

Category (a) excludes category (b) and so on. Within the same category, the nearer excludes the more distant. If relatives are equal in category and nearness, the stronger relative takes precedence for example, a full sister would precede a uterine half-blood sister. If relatives are equal in all respects, they receive equal shares.

Residuaries through another: Residuaries through another are all female sharers who require a male residuary to share with. They are:

(a) the daughter (with the son);

(b) the son's daughter (with the son's son);

(c) the full sister (with the full brother); and

(d) the consanguine sister (with the consanguine brother).

Residuaries with another: Residuaries with another consists of two females, a full sister and a consanguine sister.

14.4.1.2.3 *Distant kindred (dhawi ul-arham)*[257]

Distant kindred are those relatives who are neither sharers nor residuaries. Literally, *dhawi ul- arham* means "relatives by virtue of the womb". They inherit when there are no sharers or residuaries.[258] They are divided into four categories, in the following order of priority:[259]

(a) descendants of the deceased through a female link (for example, children of the deceased's daughter);

(b) ascendants of the deceased through a female link (for example, the mother's father);

(c) descendants of the deceased's parents; and

(d) descendants of the deceased's grandparents.

14.4.2 *Distinction between Muslim and South African laws of inheritance*

South African law does not recognise Muslim inheritance laws. If a Muslim dies in South Africa, his or her estate will devolve according to the South African law of succession. The South African law of succession differs from Muslim inheritance laws in material respects. These differences may be summarised as follows:[260]

(a) Muslim inheritance laws do not distinguish between real and personal property, movable and immovable property and joint and separate property. In terms of South African law, it

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257 A detailed discussion of the different categories and manner of succession falls outside the scope of this book. For further information, see 'Abd al 'AṭīAṭī (1977) 261–263; Hidayatullah and Hidayatullah (1999) 63–80; Omar (1988) 29; Jung (1990) 42–59.

258 It is important to remember that the nearest relative to the deceased excludes the more distant relative, and if the relatives are equal according to their category, the stronger relative will exclude the weaker relative. If they are equally strong, they will inherit collectively. See Jung (1990) 42; Markby (1906) 132–134.

259 See Jung (1990) 41–42.

260 Rautenbach (2001) 43–45.

is necessary to distinguish between these concepts, since the transfer of property differs depending on the nature of the property.

(b) The testator under Islamic law has limited freedom of testation in that he or she may only bequeath one third of his or her estate by means of a will. The rest of his or her estate must devolve according to the rules of Muslim intestate succession. In South Africa, the testator has, in principle, unlimited freedom of testation.

(c) Under Muslim inheritance laws, ascendants inherit alongside descendants, while in the South African law of intestate succession, the existence of descendants exclude intestate succession to ascendants.

(d) There is no right of representation in Muslim inheritance laws. A beneficiary must be alive at the death of the testator to inherit from him or her. In South African law, representation takes place if a beneficiary is predeceased, unworthy to inherit, or if he or she repudiates the bequest.[261]

(e) In the South African law of intestate succession, an adopted child has the same rights as the natural children of the adoptive parents. Therefore, an adoptive child has the right to inherit from the adoptive parents as if he or she was their natural child. On the other hand, Islamic law does not recognise adopted children as natural children of the adoptive parents and they will therefore not inherit as the natural children of the Muslim testator.

(f) The rules of intestate succession under Islamic law differ substantially from the South African rules of intestate succession.

In light of the fact that Muslim personal law is not legally recognised in South Africa, Muslim inheritance laws can only be applied to the estate of a deceased Muslim if they are contained in the will of such a person. A Muslim testator may therefore utilise the South African principle of freedom of testation to ensure that his or her estate devolves according to the Muslim laws of inheritance. A Muslim who wants his or her estate to devolve according to Islamic law could make a will with a general clause, which may read as follows:[262]

> I hereby bequeath my whole estate to my heirs to be determined at the time of my death in accordance with, and in the proportions specified by the Islamic law of succession. A certificate furnished by an expert in that law, or a qualified Muslim theologian, setting forth my heirs and their respective shares according to the Islamic law of succession, shall be final and binding.

It is highly unlikely that the office of the Master of the High Court will not accept such a clause as binding if the will complies with all the formalities of a valid will. As illustrated in *Moosa v Harnaker*,[263] discussed earlier in this chapter, the certificate of a qualified Muslim theologian, usually an *imām*, must be attached to the original will or to the final liquidation and distribution account of the deceased estate to indicate how the will must be distributed between the beneficiaries.[264]

A testator could also use the devolution of one-third of his or her estate through a will to try and equalise the position of his or her heirs. For example, a husband may bequeath up to one-third of his estate to his non-Muslim wife provided it does not exceed the *Qur'ānic* shares of his Muslim wife or wives.[265] However, a testator cannot make provision for a *Qur'ānic* heir from the one-third portion of his or her estate that devolves via a will.[266]

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261 See, however, *Moosa v Harnaker* 2017 (6) SA 425 (WCC) where the court extended statutory representation in terms of section 2C(1) of the Wills Act to polygynous Muslim marriages.

262 Omar (1988) 11.

263 2017 (6) SA 425 (WCC).

264 Telephonic interview between the editor and the Office of the Master of the High Court on 5 August 2000. In *Fakroodeen v Fakroodeen* 1972 (1) SA 178 (D), the duty to determine the rightful beneficiaries was in the hands of the appointed executors of the deceased estate.

265 'Abdal-Haqq, Bewley and Thomson (1995) 25.

266 Omar (1988) 7; Markby (1906) 2.

A second method to ensure that one's estate devolves according to Islamic law is to create a trust *mortis causa* or *inter vivos*. The Muslim testator could bequeath his or her estate to a trust to be administered by the trustees according to Islamic law. The relevant clauses of the will could read as follows:[267]

> I direct that after my death the whole of my estate shall be paid over or transferred to my Trustee in trust who shall hold such inheritance subject to the following conditions;
>
> (1) The income of the trust shall after payment of necessary expenses be divided among my said heirs determined at the time of my death in accordance with and in the proportions prescribed by the Islamic Law of Succession.
>
> (2) The corpus of the trust shall on termination be divided among my said heirs in the said proportions.
>
> (3) In the event of any heir dying before the date of termination of the trust, the share of income and capital due to such deceased heir ("the deceased") shall be divided among the heirs of the deceased according to and in the proportions prescribed by the Islamic Law of Succession.

A trust may ensure that the estate of a deceased eventually succeeds to the beneficiaries according to Muslim inheritance laws. However, the creation of such a trust with the exclusive intention to ensure distribution between beneficiaries according to the laws of Muslim inheritance would be a costly and time-consuming exercise.

Another situation that Muslim testators in South Africa should be cautious about is the legal position of their spouses.[268] As noted previously, non-recognition of Muslim marriages in South Africa means that the surviving spouse of a Muslim marriage is not treated as a legal spouse for all purposes. He or she may therefore not inherit if only referred to as "spouse", "wife" or "husband" in the text of the will.[269] Until Muslim marriages are afforded legal recognition, it is recommended that a Muslim testator includes an additional clause to his or her will that reads as follows:[270]

> I hereby give, devise and bequeath my entire estate and effects to my heirs to be determined at the time of my death in accordance with, and in the proportions prescribed by the Islamic Law of Succession. Provided that the word 'heirs' shall include . . . my wife Gadija [or husband Muhammad], …

Such a clause would ensure that the surviving spouse is not excluded from inheriting.[271]

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267 Omar (1988) 23.
268 Rautenbach (2001) 46.
269 However, in this regard, see further the cases of *Hassam v Jacobs* [2008] 4 All SA 350 (C) and *Hassam v Jacobs* 2009 (5) SA 572 (CC), which are briefly discussed in ch 4.
270 Omar (1988) 25.
271 Rautenbach (2001) 46.

Bibliography

'Abdal'Afî *The family structure in Islam* (1977)
'Abdal-Haqq, Bewley and Thomson *The Islamic will* (1995)
Abdur Rahman *Institutes of Mussalman law* (1980)
Adler *Engendering Judaism: An inclusive theology and ethics* (1998)
Ahmad bin Mohamed *Sources and development of Muslim law* (1965)
Ahmad *The Muslim law of divorce* (1984)
Akinnusi "The consequences of customary marriages in South Africa: Would the Recognition of Customary Marriages Act make any difference?" (2000) *TRW*
Albertyn and Goldblatt "Equality" in Chaskalson *et al* (eds) *Constitutional law of South Africa* (2008 looseleaf)
Ali "Inheritance among Indian Muslims" in Gangrade (ed) *Social legislation in India* vol 2 (1978)
Ali and Ahmad *Divorce in Mohammedan law: The law of "triple divorce"* (1983)
Ali *Gender and human rights in Islam and international law. Equal before Allah, unequal before man?* (2000)
Allott "Aboriginal rights and wrongs: The Mabo land case" (1993) *Law and Justice*
Allott "Reforming the law in Africa – aims, difficulties and techniques" in Sanders (ed) *Southern Africa in need of law reform* (1981)
Allott "The people as law-makers: Custom, practice, and public opinion as sources of law in Africa and England" (1977) *J Afr L*
Allott "What is to be done with African customary law?" (1984) *J Afr L*
Allott and Cotran (eds) *Integration of customary law in modern legal systems in Africa* (1971)
Amien "A South African case study for the recognition and regulation of Muslim family law in a minority Muslim secular context" (2010) *International Journal of Law, Policy and the Family*
Amien "*Arendse v Arendse and Others and Isaacs v Isaacs and Another*" (2015) *Journal of Comparative Law in Africa*
Amien "Comparative Perspectives: South Africa" in Dingemans *et al* (eds) *The protections for religious rights: law and practice* (2013)
Amien "Government should enact the Muslim Marriages Bill as soon as possible" (6 June 2018) *The Daily Maverick* accessible at *https://www.dailymaverick.co.za/author/waheeda-amien/#.Wxd3d6m-nq0*
Amien "Overcoming the conflict between the right to religious freedom and women's rights to equality – a South African case study of Muslim marriages" (2006) *Human Rights Quarterly*
Amien "South African women's legal experiences of Muslim personal law" in Topidi and Fielder (eds) *Religion as Empowerment. Global legal perspectives* (2016)

Amien "The gendered benefits and costs of legal pluralism for Muslim family law in South Africa" in Maclean and Eekelaar (eds) *Managing family justice in diverse societies* (2013)
Amien "The recognition of religious and customary marriages and non-marital domestic partnerships in South Africa" in Eekelaar and George (eds) *Routledge handbook of family law and policy* (2014)
Amien "The viability for women's rights of incorporating Islamic inheritance laws into the South Africa legal system" (2014) *Acta Juridica*
Amien and Leatt "Legislating religious freedom: An example of Muslim marriages in South Africa' (2014) *Maryland Journal of International Law*
Amin *Islamic law in the contemporary world: Introduction, glossary and bibliography* (1985)
Anderson "Modern trends in Islam: legal reform and modernisation in the Middle East" (1971) *ICLQ*
Andrews (27 November 2015) "Muslim marriage order *S v S* explained" accessible at *http://www.derebus.org.za/letters-to-the-editor-4/*
Badenhorst and Olivier "Host communities and competing applications for prospecting rights in terms of the Mineral and Petroleum Resources Development Act 28 of 2002" (2011) *De Jure*
Badenhorst, Olivier and Williams "The final judgment" (2012) *TSAR*
Badran *Feminism in Islam: Secular and religious convergences* (2009)
Bakker "The validity of a customary marriage under the Recognition of Customary Marriages Act 120 of 1998 with reference to sections 3(1)(*b*) and 7(6): Part 1" (2016) *THRHR*
Bakker "The validity of a customary marriage under the Recognition of Customary Marriages Act 120 of 1998 with reference to sections 3(1)(*b*) and 7(6): Part 2" (2016) *THRHR*
Bakker and Heaton "The co-existence of customary and civil marriages under the Black Administration Act 38 of 1927 and the Recognition of Customary Marriages Act 120 of 1998 – The Supreme Court of Appeal introduces polygyny into some civil marriages: *Netshituka v Netshituka*2011 (5) SA 453 (SCA)" (2012) *TSAR*
Banerjee "The philosophy of Swami Vivekananda and the ideology of the Indian state" (2012) *Supreme Court Cases Journal*
Barrie "*uBuntu ungamntu ngabanye bantu*: The recognition of minority rights in the South African Constitution" (2000) *TSAR*
BBC News (22 August 2017) "Triple *talaq*: Indian court bans Islamic instant divorce" accessible at *https://www.bbc.com/news/world-asia-india-41008802*
Bekker *Seymour's customary law in Southern Africa* (1989)
Bekker "Commentary on the impact of the Children's Act on selected aspects of the custody and care of African children in South Africa" (2008) *Obiter*
Bekker "Court structure and procedure" in Joubert, Faris and Church (eds) *LAWSA* vol 32 (2009)
Bekker "Grounds of divorce in African customary marriages in Natal" (1976) *CILSA*
Bekker "How compatible is customary law with human rights? Some preliminary observations" (1994) *THRHR*
Bekker "Is emancipation of Bantu women in Natal still necessary?" (1975) *THRHR*
Bekker "Law of contract" in Joubert, Faris and Church (eds) *LAWSA* vol 32 (2009)
Bekker "Law of delict" in Joubert, Faris and Church (eds) *LAWSA* vol 32 (2009)
Bekker "Proof of existence of a customary marriage – *Fanti v Boto* 2008 5 SA 405 (C)" (2009) *THRHR*
Bekker "Requirements for the validity of a customary marriage: *Mabuza v Mbatha*" (2004) *THRHR*
Bekker "Traditional leaders as organs of state" (2003) *Speculum Juris*
Bekker and Boonzaaier "How equal is equal? A legal-anthropological note on the status of African women in South Africa" (2007) *De Jure*
Bekker and Boonzaaier "Succession of women to traditional leadership: Judgment in *Shilubana v Nwamitwa* based on questionable premises" (2008) *CILSA*

Bekker and Buchner-Eveleigh "The legal character of ancillary customary marriages" (2017) *De Jure*
Bekker and De Kock "Adaptation of the customary law of succession to changing needs" (1992) *CILSA*
Bekker and Koyana "The indomitable *ukuthwala* custom" (2007) *De Jure*
Bekker and Koyana "The legislative reconstruction of the customary law of marriage" (2014) *THRHR*
Bekker and Maithufi "The dichotomy between 'official' and 'non-official' customary law" (1992) *TRW*
Bekker and Van der Merwe "Indigenous legal systems and sentencing: *S v Maluleke* 2008 (1) SACR 49 (T)" (2009) *De Jure*
Bekker and Van der Merwe "Proof and ascertainment of the customary law" (2011) *SAPL*
Bekker and Van Niekerk "*Gumede v President of the Republic of South Africa*: Harmonisation, or the creation of new marriage laws" (2009) *SAPL*
Bekker and Van Schalkwyk "All African women may at last own property; particularly land" (2005) *De Jure*
Bekker and Van Zyl "Custody of black children on divorce" (2002) *Obiter*
Bekker and West "The validity of 'further' customary marriages: A new legal conundrum – MZG and BM" (2012) *THRHR*
Bekker *et al* (eds) *Introduction to legal pluralism in South Africa Part 1: Customary law* (2002)
Bekker *Seymour's customary law in Southern Africa* (1989)
Bekker, Labuschagne and Boonzaaier "African burial practices at the cross-roads: Observations on the right to bury" (2004) *De Jure*
Bennet *The application of customary law in Southern Africa: The conflict of personal laws* (1985)
Bennett *A sourcebook for customary law in Southern Africa* (1995)
Bennett "'Official' v 'living' customary law: dilemmas of description and recognition" in Claassens and Cousins (eds) *Land, power and custom* (2008)
Bennett "Conflict of law: The application of customary law and the common law in Zimbabwe" (1981) *ICLQ*
Bennett "Conflict of laws in South Africa: cases involving customary law" (1980) *THRHR*
Bennett "Re-introducing African customary law to the South African legal system" (2009) *Am J Comp L*
Bennett "The application of common law and customary law in commissioners' courts" (1979) *SALJ*
Bennett "The compatibility of African customary law and human rights" (1991) *Acta Juridica*
Bennett "The constitutional base of traditional rulers in South Africa" in d'Engelbronner-Kolff *et al* (eds) *Traditional authority and democracy in Southern Africa* (1998)
Bennett "Ubuntu: an African equity" (2011)14/4 *PER/PELJ* accessible at *https://journals.assaf.org.za/index.php/per/article/view/2583*
Bennett *A sourcebook of African customary law for Southern Africa* (1991)
Bennett and Jacobs "The spoor law: An anachronism or constitutional misfit?" (2012) *SACJ*
Bennett and Murray "Traditional leaders" in Woolman *et al* (eds) *Constitutional law in South Africa* (2009 looseleaf)
Bennett and Pillay "The Natal and KwaZulu Codes: The case for repeal" (2003) *SAJHR*
Bennett and Vermeulen "Codification of customary law" (1980) *J Afr L*
Bennett *Customary law in South Africa* (2004)
Bennett *Human rights and African customary law under the South African Constitution* (1995) & (1999 Reprint)
Bennett, Mills and Munnick "Virginity testing: a crime, a delict or a genuine cultural tradition?" (2010) *TSAR*
Beri *Law of marriage and divorce in India* (1989)

Berkovits *Jewish women in time and Torah* (1990)
Berman "The status of women in Halakhic Judaism" in Koltun (ed) *The Jewish woman: New perspectives* (1976)
Berman *Law and revolution* (1983)
Biale *Women and Jewish law: The essential texts, their history, and their relevance for today* (1995)
Bilchitz "Law of Marriage" in Bekker, Rautenbach and Goolam (eds) *Introduction to legal pluralism in South Africa* (2006)
Black, Esmaeili and Hosen *Modern perspectives on Islamic law* (2013)
Blackbeard "To get – or not to get a *get*?" (1994) *THRHR*
Boberg *The law of persons and the family* (1977)
Bogopa "A critique on traditional courts, community courts and conflict management" (2007) *Acta Criminologica*
Bohler-Müller "Cultural practices and social justice in a constitutional dispensation: Some (more) thoughts on gender equality in South Africa" (2001) *Obiter*
Bohler-Müller "Of victims and virgins: seduction law in South Africa" (2000) *Codicillus*
Bonthuys "Labours of love: Child custody and the division of matrimonial property at divorce" (2001) *THRHR*
Bonthuys and Pieterse "Still unclear: The validity of certain marriages in terms of the Recognition of Customary Marriages Act" (2000) *THRHR*
Boonzaaier *Die familie-, erf- en opvolgingsreg van die Nkuna met verwysing na ander aspekte van die privaatreg* (1990) PhD Thesis University of Pretoria
Boonzaaier *Die inheemse bestuurstelsel en hofsisteem van die Nkuna van Ritavi met verwysing na hulle herkoms* (1980) MA Thesis University of Pretoria
Bosman-Sadie, Corrie and Swanepoel *A Practical Approach to the Children's Act* (2013)
Brasch *The Judaic heritage: Its teachings, philosophy, and symbols* (1969)
Braude "A 'uniform procedure' for all expropriation? Customary property rights and the 2015 Expropriation Bill" (2017) *Stell LR*
Breytenbach *Die familiereg van die Usuthu-Zulu van Nongoma* (1971) MA dissertation University of Pretoria
Brookes *The history of native policy in South Africa from 1830 to the present day* (1927)
Brownlee "Notes by the Gaika commissioner" GH8/23 19 March 1863
Broyde "Child custody in Jewish law: A conceptual analysis" (1999) Spring *Journal of Halacha and Contemporary Society*
Brugman "Het Mohammedaanse erfrecht" (1984) *Recht van de Islam*
Brugman *De betekenis van het Mohammedaanse recht in het hedendaagse Egypte* (1960)
Bruwer *Die Bantoe van Suid-Afrika* (1956)
Budlender "Women, marriage and land: findings from a three-site survey" in Claassens and Smythe (eds) *Marriage, land and custom: Essays on law and social change in South Africa* (2013)
Bühler *The laws of Manu* (1886)
Bulbulia "The ethical foundations and distinctive features of Islamic law" (1985) *CILSA*
Bulka *Jewish marriage* (1986)
Burman and Schärf "Creating people's justice: Street committees and people's courts in a South African city" (1990) *Law and Society Review*
Burns *Administrative law under the 1996 Constitution* (1998)
Burton *The sources of Islamic law: Islamic theories of abrogation* (1990)
Buskens *Islamitisch recht en familiebetrekkingen in Marokko* (1999)
Cachalia "Citizenship, Muslim family law and a future South African constitution: a preliminary enquiry"(1996) *THRHR*
Cachalia *The future of Muslim family law in South Africa* (1991)

Cape of Good Hope *The report and proceedings with appendices of the government commission on Native laws and customs (1881–1883)* [G4–83] (1968 reprint)
Carey Miller and Pope *Land title in South Africa* (2000)
Central Conference for American Rabbis *Rabbi's manual* (2005)
Centre for Indigenous Law (ed) *Indigenous contract in Bophuthatswana* (1990)
Chadha *Hindu law* (1982)
Chanock *Law, custom and social order: The colonial experience in Malawi and Zambia* (1985)
Cheshire "The international validity of divorces" (1945) *LQR*
Chiba (ed) *Asian indigenous law: In interaction with received law* (1986)
Chigier "The widow's rights in Jewish law and Israeli law" (1985) *Jewish Law Annual*
Church "'Lobolo': A critical evaluation" in Sanders (ed) *Southern Africa in need of law reform* (1981)
Church "The convergence of the western legal system and the indigenous African legal system in South Africa with reference to legal development in the last five years" (1999) *Fundamina*
Church "The dichotomy of marriage revisited: A note on *Ryland v Edros*" (1997) *THRHR*
Claassens "Contested power and apartheid tribal boundaries: The implications of 'living customary law' for indigenous accountability mechanisms" in Mostert and Bennett (eds) *Pluralism and development: Studies in access to property in Africa* (2012)
Claassens "Resurgence of tribal levies – Double taxation for the rural poor" (2011) 35 *SA Crime Quarterly*
Claassens "The resurgence of tribal taxes in the context of recent traditional leadership laws in South Africa" (2011) *SAJHR*
Claassens "Women, customary law and discrimination: the impact of the Communal Land Rights Act" in Murray and O'Sullivan (eds) *Advancing women's rights: The first decade of democracy* (2005)
Claassens and Cousins (eds) *Land, power and custom* (2008)
Claassens and Mnisi "Rural women redefining land rights in the context of living customary law" (2009) *SAJHR*
Claassens and Ngubane "Communal Land Rights Act" in Claassens and Cousins (eds) *Land, power and custom: Controversies generated by South Africa's Communal Land Rights Act* (2008)
Clapham *Human rights in the private sphere* (1993)
Clouser *The myth of religious neutrality: An essay on the hidden role of religious belief in theories* (2005)
Coertze and Coertze *Verklarende woordeboek vir antropologie en argeologie* (1996)
Coertze *Bafokeng family law and law of succession* (1987)
Coertze *Inleiding tot die algemene volkekunde* (1977)
Coetzee *et al Privaatreg van ses Tswanastamme in die Republiek van Bophuthatswana* (1985)
Cohn *Human rights in Jewish law* (1984)
Corbett, Hofmeyr and Kahn *The law of succession in South Africa* (2001)
Cordier and Rautenbach "Hindoe-eggenote, weet jy wat jou regsposisie in die Suid-Afrikaansereg is?" (2009) *Obiter*
Cornell "A call for a nuanced constitutional jurisprudence: *Ubuntu*, dignity, and reconciliation" (2004) *SAPL*
Cornell and Muvangua *Law in the* ubuntu *of South Africa* (2009)
Coulson *A history of Islamic law* (1964)
Coulson *Succession in the Muslim family* (1971)
Cousins "'Embeddedness' versus titling: African land tenure systems and the potential impacts of the Communal Land Rights Act 11 of 2004" (2005) *Stell LR*
Cousins "Characterising 'communal' tenure: nested systems and flexible boundaries" in Claassens and Cousins (eds) *Land, power and custom: Controversies generated by South Africa's Communal Land Rights Act* (2008)

Cousins "Potential and pitfalls of 'communal' land tenure reform: Experience in Africa and implications for South Africa" – paper delivered at the *World Bank Conference on land governance in support of the MDGs: Responding to new challenges* (2009) accessible at *siteresources.worldbank.org/INTIE/Resources/B_Cousins.doc*
Cronjé and Heaton *Die Suid-Afrikaansefamiliereg* (2004)
Currie and De Waal *The Bill of Rights handbook* (2013)
d'Engelbronner-Kolff*et al* (eds)*Traditional authority and democracy in Southern Africa* (1998)
Das *Universal's handbook on Hindu succession: Property rights of women and daughters* (2007)
David and Brierley *Major legal systems in the world today* (1985)
De Beer *Groepsgebondenheid in die familie-, opvolgings- en erfreg van die Noord-Ndebele* (1986) D Phil Thesis University of Pretoria
De Clercq *Die familie-, erf- en opvolgingsreg van die abakwaMzimela, met verwysing na prosesregtelike aspekte* (1975) D Phil Thesis University of Pretoria
De Clerq *et al Report on the indigenous law of the Mathenjiva tribe of the Ingwavuma district in KwaZulu* (1985)
De Groot *Van't regt des oorlogs en vredes* (1705)
De Kock "Customary marriages – opening the door to abuse: Civil law" (2007) *Without Prejudice*
De Kock and Labuschagne "*Ubuntu* as conceptual directive in realising a culture of effective human rights" (1999) *THRHR*
De Koker "Proving the existence of an African customary marriage" (2001) *TSAR*
De la Harpe *et al Zulu* (1998)
De Souza "Justice and legitimacy hindered by uncertainty: The legal status of traditional councils in North West Province" (2014) *SA Crime Quarterly*
De Waal and Schoeman-Malan *Erfreg* (2008)
Denson, Mukheibir and Carnelly "The bastardization of Islamic law by the South African Courts" (2018) *Obiter*
Derrett "The rights of inheritance of women: Another opinion of a Hindu lawyer of the early nineteenth century" in Derrett (ed) *Essays in classical and modern Hindu law* vol I (1977)
Derrett "The testamentary capacity of a sole surviving *coparcener* and the rights of widows" in Derrett (ed) *Essays in classical and modern Hindu law* vol IV (1977)
Derrett *A critique of modern Hindu law* (1970)
Derrett *Hindu law: Past and present* (1957)
Derrett *Introduction to modern Hindu law* (1963)
Desai *Mulla's principles of Hindu law* (2010)
Devenish "The new Constitution and the interpretation of statutes – some preliminary ideas and explanatory thoughts" (1997) *HRCLJ*
Devenish *A commentary on the South African Bill of Rights* (1998)
Devenish *Interpretation of statutes* (1992)
Diesel and Maxwell *Hinduism in Natal: A brief guide* (1993)
Dlamini "Should *ilobolo* be abolished?" (1985) *CILSA*
Dlamini "The modern legal significance of *ilobolo* in Zulu society" (1984) *De Jure*
Dlamini "The new marriage legislation affecting blacks in South Africa" (1989) *TSAR*
Dlamini *A juridical analysis and critical evaluation of* ilobolo *in a changing Zulu society* (1983) LLD Thesis University of Zululand
Dlamini *Proof beyond a reasonable doubt* (1998) LLD Thesis University of Zululand
Dlamini *The significance of* lobolo *in Zulu law* (1984)
Doi *Shariah: The Islamic law* (1984)
Doi *Women in Shariah* (1989)
Domingo "Muslim personal law in South Africa: 'Until two legal systems do us part or meet?'" (2011) *Obiter*

Donaldson "The Shia doctrine of the Imamate" (1931) *The Muslim World*
Dorff and Rosett *A living tree: The roots and growth of Jewish law* (1988)
Du Plessis "Afrika en Rome: Regsgeskiedenis by die kruispad" (1992) *De Jure*
Du Plessis "Afrika-reg en godsdiens" in De Kock and Labuschagne (eds) *Festschrift JC Bekker* (1995)
Du Plessis "Just legal institutions in an optimally just South Africa under the 1996 Constitution" (1998) *Stell LR*
Edge (ed) *Islamic law and legal theory* (1996)
Edwards *The history of South African law. An outline* (1996)
Eekelaar (ed) *Parenthood in modern society: Legal and social issues for the twenty-first century* (1993)
Ehrlich *"Fundamental principles of the sociology of law* (1936)
El Alami and Hinchcliffe *Islamic marriage and divorce laws of the Arab world* (1996)
Elman *An introduction to Jewish law* (1958)
Elon (ed) *The principles of Jewish law* (1975)
Elon *Jewish law* vol I (1994)
Elon *Jewish law* vol II (1994)
Epstein *The Jewish marriage contract: A study in the status of the women in Jewish law* (1927)
Esposito with DeLong-Bas *Women in Muslim family law* (2001)
Evans (ed) *Light on the natural law* (1965)
Evans "Dalindyebo the 'tyrant': The court case against the king" *Mail & Guardian* accessible at *http://mg.co.za/article/2013-07-17-dalindyebo-the-tyrant-the-case-against-the-king*
Ewing (ed) *Shari'at and ambiguity in South Asian Islam* (1988)
Feldman *Marital relations, birth control and abortion in Jewish law* (1974)
Feroz *The law of marriage and divorce in Muslim countries* (1959) LLM Thesis Institute of Islamic Studies McGill University
Forsyth "*Ius inter gentes*: Section 11(2) of the Black Administration Act 1927" (1979) *SALJ*
Forsyth *Private international law* (2012)
Freedman "Islamic marriages, the duty to support and the application of the Bill of Rights: *Amod v Multilateral Motor Vehicle Accident Fund* 1997 (12) BCLR 1716 (D)" (1998) *THRHR*
Fyzee *Outlines of Muhammadan law* (1949)
Gabru "Dilemma of Muslim women regarding divorce in South Africa" (2004)7/2 *PER/PELJ* accessible at *https://journals.assaf.org.za/index.php/per/article/view/2849*
Gandhi *Hindu law* (2008)
Gangrade (ed) *Social legislation in India* vol 2 (1978)
Gartner "Problems of a forced get" (1985) Spring *Journal of Halacha and Contemporary Society*
Gasa "The Traditional Courts Bill: A silent coup?" (2011) 35 *SA Crime Quarterly*
George and Binza "The role of traditional leadership in promoting governance and development in rural South Africa: A case study of the Mgwalana Traditional Authority" (2011) *Journal of Public Administration*
Ghanem *Outlines of Islamic jurisprudence* (1981)
Gill *Hindu women's right to property in India* (1986)
Goitein "The interplay of Jewish and Islamic laws" (1980) *Jewish Law Annual*
Goldberg *Mourning in Halacha* (1991)
Goolam "Constitutional interpretation of the 'best interests' principle in South Africa in relation to custody" in Eekelaar and Nhlapo (eds) *The changing family: Family forms and family law* (1998)
Goolam "Gender equality in Islamic family law: dispelling common misconceptions and misunderstandings"(2001) *Stell LR*

Goolam "*Ijtihad* and its significance for Islamic legal interpretation" (2006) *Michigan State LawReview*
Goolam "The potentially polygamous saga: when will it end?" (2000) *THRHR*
Goolam and Rautenbach "The legal status of a Muslim wife under the law of succession: Is she still a whore in terms of South African law?" (2004) *Stell LR*
Goolam *The position of females in the Islamic (Sunni) law of inheritance* (1994) MCL dissertation International Islamic University Malaysia
Greenberg *Wrestling with God and men: Homosexuality in Jewish tradition* (2004)
Griffiths "Legal pluralism in Botswana" (1998) *Journal of Legal Pluralism*
Griffiths "What is legal pluralism?" (1986) *Journal of Legal Pluralism*
Grunfeld *The Jewish law of inheritance: Problems and solutions in making a Jewish will* (1987)
Gupte *Hindu law of adoption, maintenance, minority and guardianship* (1970)
Gyekye *African cultural values: An introduction* (1996)
HacqNadvi "Towards the recognition of Islamic personal law" in Sanders (ed) *The internal conflict of laws in South Africa* (1990)
Hahlo and Kahn *The South African legal system* (1968)
Hallaq "Non-analogical arguments in Sunni juridical Qiyâs" (1989) *Arabica*
Hallaq *The origins and evolution of Islamic law* (2005)
Hammond-Tooke *The roots of black South Africa* (1993)
Hamnett *Chieftainship and legitimacy: An anthropological study of law in Lesotho* (1977)
Harries *The law and customs of the Bapedi and cognate tribes of the Transvaal* (1929)
Harris "Assisting the Agunah – the South African experience" (1999) Summer *Justice*
Harris *Legal philosophies* (1997)
Hartman and Kriel "Opvolging in status by die Tsonga van Mhala, Gazankulu" (1989) *SA Journal of Ethnology*
Hartman *Aspects of Tsonga law* (1991)
Hartman *Die samehang in die privaatreg van die Changana-Tsonga van Mhala, met verwysing na die administratiefregtelike en prosesregtelike funksionering* (1978) DPhil Thesis University of Pretoria
Hasan *The doctrine of ijmâ in Islam* (1978)
Hawkes *The fourth pillar of sustainability: Culture's essential role in public planning* (2001)
Heaton "Family law and the Bill of Rights" in *Bill of Rights Compendium* (2006)
Heaton "Family Law" (2010) *Annual Survey of South African Law*
Heaton "The Marriage Act 25 of 1961, the Divorce Act 70 of 1979, and the Dissolution of a Hindu Marriage" 2008 *Stell LR*
Heaton *Cronje and Heaton's South African family law* (2010)
Heaton and Kruger *South African family law* (2015)
Hellig "Religious expression" in Arkin (ed) *South African Jewry: A contemporary survey* (1984)
Hellig "The feminist challenge to Halakhah" (2000) *Jewish Affairs*
Hellig "The Jewish community in South Africa" in Prozesky and De Grunchy (eds) *Living faiths in South Africa* (1995)
Hellig "The study of Judaism in Africa" in Platvoet, Cox and Olupona (eds) *The study of religions in Africa: Past, present and prospects* (1996)
Herzog *The main institutions of Jewish law* vol I (1965)
Hidayatullah and Hidayatullah *Mulla's principles of Mahomedan law* (1999)
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" (2001) *Int'l J Children's Rts*
Himonga "The Constitutional Court of Justice Moseneke and the decolonisation of law in South Africa: Revisiting the relationship between indigenous law and common law" (2017) *Acta Juridica*

Himonga and Bosch "The application of African customary law under the Constitution of South Africa" (2000) *SALJ*
Himonga and Diallo "Decolonisation and teaching law in Africa with special reference to living customary law" (2017) 20 *PER*/*PELJ* accessible at *https://journals.assaf.org.za/index.php/per/article/view/3267*
Himonga and Manjoo "The challenges of formalisation, regulation, and reform of traditional courts in South Africa" (2009) *Malawi Law Journal*
Himonga and Moore *Reform of customary marriage, divorce and succession in South Africa: Living customary law and social Realities* (2015)
Himonga and Nhlapo (eds) *African customary law in South Africa – post-apartheid living law perspectives* (2014)
Himonga and Pope "*Mayelane v Ngwenyama and Minister for Home Affairs*: a reflection on wider implications" in Claassens and Smythe (eds) *Marriage, land and custom: Essays on law and social change in South Africa* (2013)
Himonga, Taylor and Pope "Reflections on judicial views of *ubuntu*" (2013)16/5 *PER/PELJ* accessible at *https://journals.assaf.org.za/index.php/per/article/view/2437*
Hinz "The 'traditional' of traditional government: Traditional versus democracy-based legitimacy" in d'Engelbronner-Kolff *et al* (eds) *Traditional authority and democracy in Southern Africa* (1998)
Hinz "The Ascertainment of customary law" (2012) *Onati Socio-Legal Series*
Hinz and Joas *Customary law in Namibia: Development and perspective* (1995)
Hoctor "Comparing criminal law rules: A role for customary law concepts?" (2006) *Fundamina*
Hoctor "The crime of defamation – still defensible in a modern constitutional democracy?" (2013) *Obiter*
Holm and Bowker (eds) *Women in religion* (1998)
Holomisa "Balancing law and tradition" (2011) 35 *SA Crime Quarterly*
Hooker *Legal pluralism. An introduction to colonial and neo-colonial laws* (1975)
Horn and Janse van Rensburg "Non-recognition?: *Lobolo* as a requirement for a valid customary marriage" (2002) *TRW*
Horowitz *The spirit of Jewish law* (1973)
Hund "Customary law is what people say it is – HLA Hart's contribution to legal anthropology" (1998) *ARSP*
Hund and Kotu-Rammopo "Justice in a South African township: The sociology of *makgotla*" (1983) *CILSA*
Hunter *Reaction to conquest* (1936)
IbnRushd *The distinguished jurist's primer. A translation of Bidayat Al-Mujtahid* (transl Imran Ahsan Khan Nyazee) (1996)
Iqbal *The reconstruction of religious thought in Islam* (1981)
Iya "Challenges and prospects for traditional leadership in Africa: Towards innovative ideas to enhance African values among the youth in South Africa"(2014) *SAPL*
Jacobs *Die judisiële stelsel en die familie-, erf- en opvolgingsreg van die imiDushane* (1974) PhD Thesis University of Pretoria
Janse van Rensburg "Access to ancestral burial sites – recent decisions" (2002) *Obiter*
Jansen "Multiple marriages, burial rights and the role of *lobolo* at the dissolution of the marriage" (2003) *TRW*
Jansen "The Recognition of Customary Marriages Act: Many women still left out in the cold" (2002) *TRW*
Jansen and Ellis "The South African common law and *lobolo:* Another perspective" (1999) *TRW*
Jansen *Inleiding tot de Islam* (1987)
Jeppe *Bophuthatswana: Land tenure and development* (1980)
Jhabvala *Principles of Hindu law* (1999)
Jung *The Muslim law of inheritance* (1990)

Junod *The life of a South African tribe* (1913)
Juynboll *Handleiding tot de kennis van de Mohammedaanse wet* (1925)
Kader *Muslim law of marriage and succession in India: A critique with a plea for optional civil code* (1998)
Kamali "Maqasid Al-Shari'ah: The objectives of Islamic law" (1998) *Newsletter of the Association of Muslim Lawyers and the Islamic Foundation's Legal Studies Unit*
Kamali "Source, nature and objectives of Shari'a" (1989) *Islamic Quarterly*
Kamali *Principles of Islamic jurisprudence* (2003)
Kameri-Mbote, Odote and Nyamu-Musembi *Ours by right: Law, politics and realities of community property in Kenya* (2013)
Kane, Oloka-Onyango and Tejan-Cole "Reassessing customary law systems as a vehicle for providing equitable access to justice for the poor" (2005) *New Frontiers of Social Policy*
Karimakwenda "Today it would be called rape: a historical and contextual examination of forced marriage and violence in the Eastern Cape" in Claassens and Smythe (eds) *Marriage, land and custom: Essays on law and social change in South Africa* (2013)
Kathree "Convention on the elimination of all forms of discrimination against women" (1995) *SALJHR*
Katz *A comparative study of the legal status of the married women in Jewish law and South African law* (1960) LLD Thesis University of Pretoria
Katz *Jewish ideas and concepts* (1977)
Kerr "Back to the problems of a hundred or more years ago: Public policy concerning contracts relating to marriages that are potentially or actually polygamous" (1984) *SALJ*
Kerr "Customary family law" (2005) *Family Law Service*
Kerr "Role of courts in developing customary law" (1999) *Obiter*
Kerr "The application of native law in the Supreme Court" (1957) *SALJ*
Kerr *The native law of succession in South Africa with special reference to the Nguni tribes of the Ciskeian and Transkeian Territories and Natal* (1961)
Kesari and Kesari *Modern Hindu law* (1998)
Kingwill "An inconvenient truth: land title in social context – A South African perspective" in Mostert, Verstappen and Zevenbergen (eds) *Land law and governance: African perspectives on land tenure and title* (2017)
Knoetze "Burial rights: *Gabavana v Mbete*[2000] 3 All SA 561 (Tk)" (2001) *Obiter*
Knoetze "The modern significance of *lobolo*" (2000) *TSAR*
Knoetze and Olivier "To develop or not to develop the customary law: that is the question in *Bhe*" (2005) *Obiter*
Kohli *Hinduism and divorce: From* dharmasastras *to statutory law* vols 1 and 2 (2000)
Kohn "The failure of an arranged marriage: The traditional leadership/democracy amalgamation made worse by the draft Traditional Affairs Bill" (2014) *SAPL*
Koltun (ed) *The Jewish woman* (1976)
Konyana "The resilience of the repugnancy clause in the customary law of South Africa" in Osode and Glover (eds) *Law and transformative justice in post-apartheid South Africa* (2010)
Koyana and Bekker *The judicial process in the customary courts of Southern Africa* (1998)
Koyana *Customary law in a changing society* (1980)
Krige *The social systems of the Zulus* (1936)
Kruger and Oosthuizen "Looking behind the mask of confusion: towards a better understanding of human trafficking" (2011) *CARSA*
Kruger and Oosthuizen "South Africa – Safe haven for human traffickers? Employing the arsenal of existing law to combat human trafficking" (2012)15/1 *PER/PELJ* accessible at *https://journals.assaf.org.za/index.php/per/article/view/2466*
Kumari "Place of women and child in guardianship" in Sarkar and Sivaramayya (eds) *Women and law: Contemporary problems* (1996)

Labuschagne "Regsakkulturasie, *lobolo*-funksies en die oorsprong van die huwelik" (1991) *THRHR*
Labuschagne "Regspluralisme, regsakkulturasie en ontmaagding in die inheemse reg" (1983) *TSAR*
Labuschagne and Maritz "Aanspreeklikheid vir skade veroorsaak deur diere in die Bantoe-reg" (1977) *De Jure*
Labuschagne and Schoeman "Die inheemse *ukuthwala*-gebruik, wederregtelikheidsbewussyn en strafregtelike aanspreeklikheid weens ontvoering" (1988) *TRW*
Labuschagne and Van den Heever "Aanspreeklikheid vir saakbeskadiging in die inheemse reg" (1997) *TRW*
Labuschagne and Van den Heever "Die oorsprong van en die onderskeid tussen die fenomene misdaad en delik in primigene regstelsels" (1991) *Obiter*
Labuschagne and Van den Heever "Liability arising from the killing of a fellow human being in South African indigenous law" (1995) *CILSA*
Labuschagne and Van den Heever "Theft in rudimentary legal systems: do universal characteristics exist?" (1991) *CILSA*
Lamm *The Jewish way in death and mourning* (1969)
Larif "Islam in South Africa" accessible at *http://www.themodernreligion.com/convert/southafrica.html*
Layish *Women and Islamic law in a non-Muslim State* (1975)
Leiter "Legal formalism and legal realism: What is the issue?" (2010) *Legal Theory*
Lemmer and Olivier "The South African Constitution as a post-colonial document: A long walk to freedom" (2000) *De Jure*
Levitas *Ethnology: An introduction to the peoples and cultures of Southern Africa* (1983)
Lewin "The conflict of tribal laws" (1944) *SALJ*
Lingat *The classical law of India* (1973)
Lyall "Traditional contracts in German East Africa: The transition from pre-capitalist forms" (1986) *Journal of African Law*
Mabasa "*Ukuthwala*: Is it all culturally relative?" (2015) *De Rebus*
Mahadevan *Outlines of Hinduism* (1999)
Mahida "History of Muslims in South Africa: A chronology" accessible at *http://www.sahistory.org.za/pages/library-resouces/online%20books/history-muslims/1600s.htm*
Mahmood *Family law reform in the Muslim world* (1972)
Mair *The study of South Africa* (1965)
Maithufi "*Metiso v Road Accident Fund* case no 44588/2000 (T) Adoption according to customary law – *Kewana v Santam Insurance Co Ltd* 1993 4 SA 771 (Tk) followed" (2001) *De Jure*
Maithufi "Possible recognition of polygamous marriages" (1997) *THRHR*
Maithufi "The Recognition of Customary Marriages Act of 1998: A commentary" (2000) *THRHR*
Maithufi and Bekker "Maintenance duties of Black spouses married by customary law in the new dispensation" (2003) *Obiter*
Maithufi and Bekker "The existence and proof of customary marriages for purposes of Road Accident Fund claims" (2009) *Obiter*
Maithufi and Bekker "The Recognition of Customary Marriages Act and its impact on family law in South Africa" (2002) *CILSA*
Maithufi and Moloi "The current status of customary marriages" (2002) *TSAR*
Makgompi "The need for community courts and their role in South Africa" (2000) *Codicillus*
Malekian *The concept of Islamic international criminal law* (1994)
Maluleke "Culture, tradition, custom, law and gender equality" (2012)15/1 *PER/PELJ* accessible at *https://journals.assaf.org.za/index.php/per/article/view/2454*

Markby *An introduction to Hindu and Mahommedan law* (1906)
Marmur "Secular justice and religious law" (2000) Winter *Justice*
Mathenjwa and Makama "Revisiting the participation of traditional leaders in municipal councils in South Africa*"* (2016) *Law, Democracy & Development*
Matlala " 'We want the bread, not the crumbs': Challenging traditional authority in the platinum belt" (2014) *SA Crime Quarterly*
Matshidze *et al* "Human rights violations: Probing the cultural practice of *ukuthwala* in KwaZulu-Natal province, South Africa" (2017) *Gender & Behaviour*
Mayer *Islam and human rights: Tradition and politics* (1999)
Mbatha "Reforming the customary law of succession" (2002) *SAJHR*
Mbiti *African religions and philosophy* (1990)
Mbodla "Customary law in search of development" (1999) *TSAR*
Meiselman *Jewish woman in Jewish law* (1978)
Mellema *Een interpretatie van de Islaam* (1958)
Menski *Comparative law in a global context: The legal systems of Asia and Africa* (2006)
Menski *Hindu law: Beyond tradition and modernity* (2008)
Merry "Legal pluralism" (1970) *ICLQ*
Merryman *The civil law tradition: An introduction to the legal systems of Western Europe and Latin America* (1985)
Meyer, Rudolph and Cronjé *Policy and procedure manual: Administration of intestate deceased estates at service points* (2004)
Mireku "Customary law and the promotion of gender equality: An appraisal of the *Shilubana* decision" (2010) *AHRLJ*
Mir-Hosseini "The construction of gender in Islamic legal thought and strategies for reform" (2003) *Journal of Women in the Middle East and the Islamic World*
Mishra *Ancient Hindu marriage law and practice* (1994)
Misra *Mayne's Treatise on Hindu law and usage* (2003)
Misra and Kumar *Mayne's Hindu law and usage* (2009)
Mitter *The position of women in Hindu law* (1989)
Mnisi-Weeks and Claassens "Tensions between vernacular values that prioritise basic needs and state versions of customary law that contradict them" (2011) *Stell LR*
Mnwana "Mining, accountability and the law in the Bakgatla-ba-Kgafela Traditional Authority Area" (2014) *SA Crime Quarterly*
Mnyongani "Duties of a lawyer in a multicultural society: A customary law perspective?" (2012) *Stell LR*
Mofokeng "The *lobolo* agreement as the 'silent' prerequisite for the validity of a customary marriage in terms of the Recognition of Customary Marriages Act" (2005) *THRHR*
Mofokeng *Legal pluralism in South Africa: Aspects of African customary law, Muslim and Hindu family law* (2009)
Mokgoro "*Ubuntu* and the law in South Africa" (1998) 1/1 *PER/PELJ* accessible at *https://journals.assaf.org.za/index.php/per/article/view/2897*
Mokotong "In lieu of burial instructions: A legal exposition" (2001) *THRHR*
Mokotong "*Oegapa le namane* customary law parenting (step-parent adoption from an African perspective) *ML v KG*" (2015) *THRHR*
Monareng "Black women, are you aware that you are concubines?: The legal implications of South African family law" (2007) *Agenda*
Mönnig *The Pedi* (1967)
Monye "Freedom of expression and traditional communities: Who can speak and when?"(2014) *SAPL*
Moore *Judaïsme* vol II (1927)
Moore *Law as process: An anthropological approach* (2000)

Moosa "An overview of post-divorce support for Muslim children in the context of South African law, Islamic law and the proposed 2010 Muslim Marriages Bill" (2013) *IJLSE*
Moosa "Muslim divorce and the 1996 Divorce Amendment Act. The cart before the horse?" (1999) *De Rebus*
Moosa "Muslim personal law affecting children: Diversity, practice and implications for a new Children's Code for South Africa (1998) *SALJ*
Moosa "Prospects for Muslim law in South Africa: A history and recent developments" (1996) *Yearbook of Islamic and Middle Eastern Law*
Moosa "The dissolution of a Muslim marriage by divorce" in Heaton (ed) *The law of divorce and dissolution of life partnerships in South Africa* (2014)
Moosa "The interim and final Constitutions and Muslim personal law: Implications for South African Muslim women" (1998) *Stell LR*
Moosa and Abduroaf "*Faskh* (divorce) and intestate succession in Islamic and South African law: impact of the watershed judgment in *Hassam v Jacobs* and the Muslim Marriages Bill" (2014) *Acta Juridica*
Moosa and Karbanee "An exploration of *mata'a* maintenance in anticipation of the recognition of Muslim marriages in South Africa: (Re)-opening a veritable Pandora's Box?" (2004) *Law, Democracy and Development*
Moosa "The dissolution of a Muslim marriage by divorce" in Heaton (ed) *The law of divorce and dissolution of life partnerships in South Africa* (2014)
Mostert and Bennett (eds) *Pluralism and development: Studies in access to property in Africa* (2012)
Mostert and Pienaar "Formalisation of South African communal land title and its impact on development" in Cooke (ed) *Modern studies in property law* (2005)
Mostert and Pope (eds) *Beginsels van die sakereg in Suid-Afrika* (2010)
Motala "The draft bill on the recognition of Muslim marriages: An unwise, improvident and questionable constitutional exercise" (2004) *CILSA*
Mqeke "The rainbow jurisprudence and the institution of marriage with emphasis on the Recognition of Customary Marriages Act 120 of 1998" (1999) *Obiter*
Mqeke "Traditional and modern law of procedure and evidence of the Cape Nguni – a re-appraisal" (1982) *Speculum Juris*
Mqeke *Customary law and the new millennium* (2003)
Mukheibir "*Ubuntu* and the *amende honorable* – a marriage between African values and medieval canon law" (2007) *Obiter*
Mulla *Principles of Hindu law* (1952)
Muller *Vyfhonderd jaar Suid-Afrikaanse geskiedenis* (1990)
Müller-Van der Westhuizen "Die onsekerhede aangaande die toepaslike huweliksgoedere-bedeling(s) in poligame gewoonteregtelike huwelike by nie-nakoming van artikel 7(6) van die Wet op Erkenning van Gebruiklike Huwelike: *Ngwenyama v Mayelane* 2012 4 SA 527 (HHA)" (2014) *LitNet Akademies*
Müller-van der Westhuizen and Nhlapo "Practical challenges relating to the supervision of small estates" (2016) *Journal for Juridical Science*
Mundy "The family, inheritance, and Islam: A re-examination of the sociology of *Fara'id* law" in Al-Azmeh (ed) *Islamic law: Social and historical context* (1988)
Mwambene "What is the future of polygyny (polygamy) in Africa (2014) 20 *PER/PELJ* accessible at *https://journals.assaf.org.za/index.php/per/article/view/1357*
Mwambene and Sloth-Nielsen "Benign accommodation? *Ukuthwala*, 'forced marriage' and the South African Children's Act" (2011) *AHRLJ*
Myburgh (ed) *Indigenous criminal law in Bophuthatswana* (1980)
Myburgh and Prinsloo *Indigenous public law in KwaNdebele* (1985)
Myburgh *Die inheemse staat in Suider-Afrika* (1985)
Myburgh *Papers on indigenous law in Southern Africa* (1985)

Nagpal *Modern Hindu law* (2008)
Nanda "Hinduism and human rights" in Nanda and Sinha (eds) *Hindu law and legal theory* (1996)
Nanda and Sinha (eds) *Hindu law and legal theory* (1996)
Nasir *The Islamic law of personal status* (2002)
Nasir *The status of women under Islamic law* (2009)
Nathan "Farming out (*mafisa*)" in Centre for Indigenous Law (ed) *Indigenous contract in Bophuthatswana* (1990)
Native Laws and Customs Commission *Government commission on native laws and customs* (1881)
Ndaki "What is to be said for *makgotla*?" in Sanders (ed) *Southern Africa in need of law reform* (1981)
Ndima "*The shape and content of post-apartheid African law: academic scholars in conversation*" (2017) *Obiter*
Ndlela, Green and Reddy "Traditional leadership and governance in Africa" (2010) *Africa Insight*
Ndulo "*Widows under Zambian customary law and the response of the courts*" (1995) *CILSA*
Neethling and Potgieter *Neethling-Potgieter-Visser Law of delict* (2010)
Nel "Community courts: official recognition and criminal jurisdiction – a comparative analysis" (2001) *CILSA*
Nezami Talesh "Modern law and judiciary reform in Iran – an Islamic society" in Chiba (ed) *Asian indigenous law: In interaction with received law* (1986)
Nhlapo "Homicide in traditional African societies: Customary law and the question of accountability" (2017) *AHRLJ*
Nhlapo "Biological and social parenthood in African perspective: The movement of children in Swazi family law" in Eekelaar and Sarcevic (eds) *Parenthood in modern society: Legal and social issues for the twenty-first century* (1993)
Nikhilananda *Hinduism: Its meaning for the liberation of the spirit* (2008)
Nkabane and Nzimakwe "Transcending the divide between indigenous and scientific knowledge in disaster risk reduction" (2017) *African Journal of Public Affairs*
Nkosi "Indigenous African marriage and same-sex partnerships: Conflicts and controversies" (2007) *International Journal of African Renaissance Studies*
Okpaluba "Institutional independence and the constitutionality of legislation establishing lower courts and tribunals: Part I" (2003) *Journal for Juridical Science*
Olivier and Williams "Traditional leadership and institutions" in Joubert, Faris and Church (eds) *LAWSA* vol 32 (2009)
Olivier *et al Die privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes* (1989)
Olivier *et al Indigenous law* (1995)
Olivier *et al Inheemsereg* (1998)
Olivier, Williams and Badenhorst "Competing preferent community prospecting rights: A nonchalant custodian?"(2017) 20 *PER/PELJ* accessible at *https://journals.assaf.org.za/index.php/per/article/view/1213*
Omar *The Islamic law of succession and its application in South Africa* (1988)
Oomen "Traditional woman-to-woman marriages and the Recognition of Customary Marriages Act" (2000) *THRHR*
Oosthuizen "Major religions" in Pachai (ed) *South Africa's Indians* (1979)
Pachai (ed) *South Africa's Indians: The evolution of a minority* (1979)
Pathak *Hindu law and its constitutional aspects* (1986)
Pauw *Die persone-, sake- en immateriële goedere-, kontrakte- en deliktereg van die imiDushane (amaXhosa) en amaBhele (amaFengu) van Ciskei* (1985)
Pearl *A textbook on Muslim personal law* (1987)
Pearl and Menski *Muslim family law* (1998)

Peires "History versus customary law: Commission on Traditional Leadership: Disputes and claims" (2014) *SA Crime Quarterly*
Pelser and Rautenbach "Begrafnisregte in the konteks van die Afrika-gewoontereg en die rol van die testamentopsteller" (2012) *Litnet Akademies*
Phago and Netswera "The role of traditional leadership in a developmental state: The case of Greater Sekhukhune District Municipality of South Africa" (2011) *Journal of Public Administration*
Phooko "Not in my name, not in my culture: customary/human rights" (2016) *Without Prejudice*
Pienaar "African customary wives in South Africa: Is there spousal equality after the commencement of the Recognition of Customary Marriages Act?" (2003) *Stell LR*
Pienaar "Customary law and communal property in South Africa: Challenges and opportunities" in Xu (ed) *Legal Strategies for the Development and Protection of Communal Property* (2018)
Pienaar "Duty to support and the dependant's claim: The struggle of women married in terms of customary and Muslim law" (2006) *Stell LR*
Pienaar "Security of communal land tenure by registration of individualised title – is the Communal Land Rights Bill of 2003 the final solution?" (2004) *THRHR*
Pienaar "The battle of the Bakgatla-Ba-Kgafela community: Access to and control of communal land" (2017) 20 *PER/PELJ* 1–31 accessible at *https://journals.assaf.org.za/index.php/per/article/view/1444*
Pienaar and Mostert "The balance between burial rights and landownership in South Africa: Issues of content, nature and constitutionality" (2005) *SALJ*
Pienaar *Land reform* (2014)
Pieterse "It's a 'black thing': Upholding culture and customary law in a society founded on non-racialism" (2001) *SAJHR*
Pieterse "The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: Final nail in the customary law coffin?" (2000) *SALJ*
Plaskow *Standing again at Sinai: Judaism from a feminist perspective* (1990)
Platvoet, Cox and Olupona (eds) *The study of religions: Past, present and prospects* (1996)
Posel and Rudwick "Changing patterns of marriage and co-habitation in South Africa" in Claassens and Smythe (eds) *Marriage, land and custom: Essays on law and social change in South Africa* (2013)
Posner "Legal formalism, legal realism, and the interpretation of statutes and the Constitution" (1986-7) *Case W Res L Rev*
Poulter *Legal dualism in Lesotho* (1979)
Prabhavananda *The spiritual heritage of India* (1979)
Praeg "An answer to the question: What is [*ubuntu*]?" (2008) *S Afr J Philos*
Prakash *Spiritual teachings of Hinduism* (1985)
Prinsloo "Bevoegdheid om 'n oorledene te begrawe" (1991) *TSAR*
Prinsloo "Exchange" in Centre for Indigenous Law (ed) *Indigenous contract in Bophuthatswana* (1990)
Prinsloo "Indigenous contract of exchange in Bophuthatswana" (1988) *CILSA*
Prinsloo *Inheemse publiekreg in Lebowa* (1983)
Prinsloo "Omskepping van inheemse huwelik in 'n gemeenregtelike huwelik" (1986) *TSAR*
Prinsloo "Regspluralisme" (1994) *TSAR*
Prinsloo and Ovens "*Ukuthwala* as an aberrant traditional practice: the *State versus Nvumeleni Jezile* 2014 WCD" (2015) *Acta Criminologica*
Prinsloo and Vorster "Parties" in Centre for Indigenous Law (ed) *Indigenous contract in Bophuthatswana* (1990)
Prinsloo, Van Niekerk and Vorster "Current research on *lobolo* by means of a questionnaire" (1997) *De Jure*

Prinsloo, Van Niekerk and Vorster "Perceptions of the law regarding, and attitudes towards, *lobolo* in Mamelodi and Atteridgeville" (1998) *De Jure*
Prozesky and De Grunchy (eds) *Living faiths in South Africa* (1995)
Quint and Hecht *Jewish jurisprudence* vol 1 (1980)
Radhakrishnan *The Bhagavad Gita* (1989)
Rahman *A code of Muslim personal law* vol 1 (1978)
Rakate "The status of traditional courts under the final Constitution" (1997) *CILSA*
Rakover (ed) *Jewish law and current legal problems* (1984)
Rautenbach "'Work in progress': Some comments on the status of religious legal systems in relation to the Bill of Rights" (2003) *Fundamina*
Rautenbach "A commentary on the application of the Bill of Rights to customary law" (1999) *Obiter*
Rautenbach "A few comments on the (possible) revival of the customary law rule of male primogeniture: can the common-law principle of freedom of testation come to its rescue?" (2014) *Acta Juridica*
Rautenbach "Deep legal pluralism in South Africa: Judicial accommodation of non-state law in South Africa" (2010) *Journal of Legal Pluralism*
Rautenbach "Gender equality and religious family laws in South Africa" (2003) *Queensland Law and Justice Journal*
Rautenbach "Mapping traditional leadership and authority in post-apartheid South Africa: Decentralisation and constitutionalism in traditional governance" in Fombad and Steytler (eds) *Decentralisation and Constitutionalism in Africa* (2019 forthcoming)
Rautenbach "Indian succession laws with special reference to the position of females: A model for South Africa?" (2008) *CILSA*
Rautenbach "Institutionalisation of African traditional medicine in South Africa: Healing powers of the law?" (2011) *THRHR*
Rautenbach "Exploring the contribution of *ubuntu* in constitutional adjudication – Towards the indigenization of constitutionalism in South Africa?" in Fombad (ed) *Constitutional adjudication in Africa* (2017)
Rautenbach "Islamic marriages in South Africa: *Quo vadimus*?"(2003) *Koers*
Rautenbach "Legal reform of traditional courts in South Africa: Exploring the links between *ubuntu*, restorative justice and therapeutic jurisprudence" (2015) *Journal of International and Comparative Law*
Rautenbach "Male primogeniture unconstitutional: A legal victory for African women in South Africa" (2005) Jul/Sept *AFLA Quarterly*
Rautenbach "Mixing South African common law and customary law of intestate succession: 'potjiekos' in the making?" in Örücü (ed) *Mixed Legal Systems at New Frontiers* (2010)
Rautenbach "Muslim marriages in SA" (2006) *Griffin's View on International and Comparative Law*
Rautenbach "Muslim personal law and the meaning of 'law' in the South African and Indian constitutions" (1999) 2/2 *PER/PELJ* accessible at *https://journals.assaf.org.za/index.php/per/article/view/2895*
Rautenbach "Oral law in litigation in South Africa: An evidential nightmare? (2017) 20 *PER/PELJ* accessible at *https://journals.assaf.org.za/index.php/per/article/view/3268*
Rautenbach "Review on a new legislative framework for traditional healers in South Africa" (2007) *Obiter*
Rautenbach "Some comments on the current (and future) status of Muslim personal law in South Africa" (2003) 6/2 *PER/PELJ* accessible at*https://journals.assaf.org.za/index.php/per/article/view/2852*
Rautenbach "The administration of black estates: Life before and after 5 December 2002" (2004) *THRHR*

Rautenbach "The contribution of the courts in the integration of Muslim law into the mixed fabric of South African law" in Mattar, Palmer and Koppel (eds) *Mixed Legal Systems, East and West* (2015)
Rautenbach "The dissolution of a Hindu Marriage by divorce" in Heaton (ed) *The law of divorce and dissolution of life partnerships in South Africa* (2014)
Rautenbach "The modern-day impact of cultural and religious diversity: 'Managing family justice in diverse societies'" (2014) 17/1 *PER/PELJ* accessible at *https://journals.assaf.org.za/index.php/per/article/view/2257*
Rautenbach "The recognition of Muslim marriages in South Africa: The past, present and future" in Rutten S (ed) (2000) *Recht van de Islam*
Rautenbach "Therapeutic jurisprudence in the customary courts of South Africa: Traditional authority courts as therapeutic agents?" (2005) *SAJHR*
Rautenbach "Traditional courts as alternative dispute resolution (ADR) – mechanisms in South Africa" in Dietrich (ed) *The status quo of mediation in Europe and overseas: Options for countries in transition* (2014)
Rautenbach "Exploring the contribution of *ubuntu* in constitutional adjudication – towards the indigenization of constitutionalism in South Africa" in Fombad (ed) *Constitutional adjudication in Africa* (2017)
Rautenbach and Du Plessis "African customary marriages in South Africa and the intricacies of a mixed legal system: Judicial (in)*novatio* or *confusio*?" 2012 *McGill Law Journal*
Rautenbach and Du Plessis "Law of succession and inheritance" in Joubert, Faris and Church (eds) *LAWSA* vol 32 (2009)
Rautenbach and Du Plessis "South African Law Commission's proposals for customary law of succession: Retrogression or progression" (2003) *De Jure*
Rautenbach and Meyer "Lost in translation: Is a spouse a spouse or a descendant (or both) in terms of the Reform of Customary Law of Succession and Regulation of Related Matters Act?" (2012) *TSAR*
Rautenbach *Die* pactum successorium *in die Suid-Afrikaanse reg* (1994) LLM dissertation North West University
Rautenbach *The legal position of South African women under the law of succession* (2001) Unpublished LLD Thesis North-West University
Rautenbach, Jansen van Rensburg and Pienaar "Culture (and religion) in constitutional adjudication" (2003) 6/1 *PER/PELJ* accessible at *https://journals.assaf.org.za/index.php/per/article/view/2857*
Reddi "Cultural marriage practices and domestic violence against women: Tears or triumph for women in South Africa and India?" (2007) *Obiter*
Reitsma and Kleinpenning *The third world in perspective* (1991)
Riga "Islamic law and modernity: Conflict and evolution" (1991) *Am J Juris*
Roberts *The social laws of the Qurân* (1990)
Robinson, Fergus and Gordon *An introduction to European legal history* (1985)
Roff "Whence cometh the law? Dog saliva in Kelantan 1937" in Ewing (ed) Shari'at *and ambiguity in South Asian Islam* (1988)
Rushd *The distinguished jurist's primer: Bidâyat al-Mujtahid*vol II (1996)
Ryan "The traditional concept of natural law: An interpretation" in Evans (ed) *Light on the natural law* (1965)
SA Jewish Board of Deputies, Cape "A short history" accessible at *http://www.capebod.org.za/cape-town-jewish-history/a-short-history*
Sabiq *Fiqh Us-Sunnah: Doctrine of Sunnah of the Holy Prophet* (undated)
Sachs *Advancing human rights in South Africa* (1992)
Saksena *The Hindu Marriage Act, 1955* (1964)
Sanders (ed) *Southern Africa in need of law reform* (1981)
Sanders "How customary is African customary law?" (1987) *CILSA*

Sanders *The internal conflict of laws in South Africa* (1990)
Sarkar and Sivaramayya (eds) *Women and law* (1996)
Saron and Hotz (eds) *The Jews in South Africa: A history* (1955)
Schacht *An introduction to Islamic law* (1964)
Schäfer *Child Law in South Africa: Domestic and international perspectives* (2011)
Schaffer "Child custody: *Halacha* and the secular approach" (1983) Fall *Journal of Halacha and Contemporary Society*
Schapera (ed) *The Bantu-speaking tribes of South Africa* (1959)
Schapera "Contracts in Tswana case law" (1965) *Journal of African Law*
Schapera "Political institutions" in Schapera (ed) *The Bantu-speaking tribes of South Africa* (1959)
Schapera *A handbook of Tswana law and custom* (1955)
Schärf and Nina (eds) *The other law: Non-state ordering in South Africa* (2001)
Schärf and Nina "Introduction: The other law" in Schärf and Nina (eds) *The other law: non-state ordering in South Africa* (2001)
Schärf *People's courts: The sociology of township justice* (1990) Unpublished report
Schereschewsky "Dowry" in Elon (ed) *The principles of Jewish law* (1975)
Schereschewsky "Firstborn" in Elon (ed) *The principles of Jewish law* (1975)
Schimmel *Islam: An introduction* (1992)
Schwartz *Judaism and vegetarianism* (2001)
Sen *General principles of Hindu jurisprudence* (1984)
Senart *Caste in India: The facts and the system* (1927)
Seymour-Smith *Macmillan dictionary of anthropology* (1986)
S-H Hacq Nadvi "Towards the recognition of Islamic personal law" in Sanders (ed) *The internal conflict of laws in South Africa* (1990)
Shaheen Sardar Ali *Gender and human rights in Islam and international law: Equal before Allah, unequal before man?* (2000)
Sharma *Marriage in ancient India* (1993)
Sherif *A guide to the contents of the Qur'an* (1985)
Shilo "Maimonides on '*dinade-malhutadina*' (The law of the state is law)" (1978) *Jewish Law Annual*
Shilo "Succession" in Elon (ed) *The principles of Jewish law* (1975)
Siegel "Thinking the boundaries of customary law in South Africa" (2015) *SAJHR*
Sinclair *The law of marriage* (1996)
Singh "The refusal to recognise same-sex marriages – a Pandora's Box of inequalities" (1999) *De Jure*
Skelton and Batley "Restorative justice: A contemporary South African review" (2008) *Acta Criminologia*
Skolnik and Berenbaum (eds) *Encyclopaedia Judaica* (2005)
Sloth-Nielsen and Van Heerden "The constitutional family: Developments in South African family law jurisprudence under the 1996 Constitution" (2003) *International Journal of Law, Policy and the Family*
Smith "An overview of the Communal Land Rights Act 11 of 2004" in Claassens and Cousins (eds) *Land, power and custom: Controversies generated by South Africa's Communal Land Rights Act* (2008)
Soga *The AmaXosa: Life and customs* (1932)
Sooklal "The Hindu diaspora. Challenge of the South African context" in Platvoet, Cox and Olupona (eds) *The study of religions in Africa: Past, present and prospects* (1996)
South African Law Commission *Project 90: Issue paper 4 on the harmonisation of the common law and the indigenous law (the application of customary law: conflict of personal laws)* (1996)

South African Law Commission *Project 59: Discussion paper 101 on Islamic marriages and related matters* (2001)
South African Law Commission *Project 59: Issue paper 15 on Islamic marriages and related matters* (2000)
South African Law Commission *Project 76: Working paper 45 on Jewish divorces* (1992)
South African Law Commission *Project 90: Discussion paper 74 on the harmonisation of the common law and the indigenous law: Customary marriages* (1997)
South African Law Commission *Project 90*: *Discussion paper 76 on the harmonisation of the common law and the indigenous law (conflicts of law)* (1998)
South African Law Commission *Project 90: Discussion paper 82 on traditional courts and the judicial function of traditional leaders* (1999)
South African Law Commission *Project 90*: *Discussion paper 93 on the customary law of succession* (2000)
South African Law Commission *Project 90*: *Discussion paper 95 on customary law (administration of estates)* (2000)
South African Law Commission *Project 90: Harmonisation of the common law and indigenous law: Report on customary marriages* (1998)
South African Law Commission *Project 90*: *Issue paper 12 on harmonisation of the common law and indigenous law (draft issue paper on succession)* (1998)
South African Law Commission *Project 90: Issue paper 3 on the harmonisation of the common law and the indigenous law (customary marriages)* (1996)
South African Law Commission *Project 90*: *The harmonisation of the common law and the indigenous law: Report on conflicts of law* (1999)
South African Law Commission *Project 94: Discussion paper 87 on community dispute resolution structures* (1999)
South African Law Commission *Project 94: Issue paper 8 on alternative dispute resolution* (1997)
South African Law Reform Commission *Project 138: Revised discussion paper on the practice of* ukuthwala (2015)
South African Law Reform Commission *Project 59: Report on Islamic marriages and related matters* (2003)
South African Law Reform Commission *Project 90: Customary law: Report on traditional courts and the judicial function of traditional leaders* (2003)
South African Law Reform Commission *Project 90*: *Report on customary law of succession* (2004)
SouthAfrica.info reporter "Recognition for Islamic marriages" accessible at *http://www.southafrica.info/women/islamicmarriages.htm*
Srinivasan *Principles of Hindu law* vol I (1969)
Srinivasan *Principles of Hindu law* vol II (1969)
Srinivasan *Principles of Hindu law* vol III (1969)
Steele *The Hindu castes: Their law, religion and customs* (1986)
Strydom *Die sake-, kontrakte- en deliktereg van die Suid-Sotho van Qwaqwa* (1985)
Sugirtharajah "Hinduism" in Holm and Bowker (eds) *Women in religion* (1998)
Taiwo "Repugnancy clause and its impact on customary law: Comparing the South African and Nigerian positions – some lessons for Nigeria" (2009) *TRW*
Tamanaha "The folly of 'social scientific' concept of legal pluralism" (1993) *J Law & Soc*
Tamanaha "Understanding legal pluralism: Past to present, local to global" (2008) *Sydney Law Review*
Thomas, Van der Merwe and Stoop *Historical foundations of South African private law* (2000)
Thornhill and Selepe "The role of the Royal Bafokeng administration in the promotion of municipal service delivery" (2010) *Journal of Public Administration*
Tyabji *Muslim law: The personal law of Muslims in India and Pakistan* (1968)

UCT "Decolonising UCT" (2015) *Year in Review*
Van Blerk "Loan" in Centre for Indigenous Law (ed) *Indigenous contract in Bophuthatswana* (1990)
Van der Merwe and Pienaar "Land reform in South Africa" in Jackson and Wilde (eds) *The Reform of property law* (1997)
Van der Merwe, Rowland and Cronjé *Die Suid-Afrikaanse erfreg* (1990)
Van der Vyver "Multi-tiered marriages in South Africa" in Nichols (ed) *Marriage and divorce in a multicultural context: Multi-tiered marriage and the boundaries of civil law and religion* (2012)
Van der Waal "Formal and informal dispute resolution in the Limpopo Province, South Africa" (2004) *Anthropology Southern Africa*
Van der Walt "The history of the law of adoption in South Africa" (2014) *Obiter*
Van der Walt and Pienaar *Introduction to property law* (2016)
Van der Walt and Pienaar *Introduction to the law of property* (2009)
Van der Watt and Ovens "Contextualizing the practice of *ukuthwala* within South Africa" (2012) *CARSA*
Van Dijk and Van Rouveroy van Nieuwaal "Introduction: The domestication of chieftaincy: The imposed and the imagined" in Van Rouveroy van Nieuwaal and Van Dijk (eds) *African chieftaincy in a new socio-political landscape* (1999)
Van Doorne "Situational analysis: Its potential and limitations for anthropological research and social change in Africa" (1981) *Cahiers d' Etudes Africaines*
Van Nes *Het Jodendom: Een boek voor Joden en Christenen* (1933)
Van Niekerk "*Amende honorable* and *ubuntu*: an intersection of *res bonietaequi* in African and Roman-Dutch jurisprudence?" (2013) *Fundamina*
Van Niekerk "Gift" in Centre for Indigenous Law (ed) *Indigenous contract in Bophuthatswana* (1990)
Van Niekerk "Indigenous law, public policy and narrative on the courts" (2000) *THRHR*
Van Niekerk "Maintenance" in Centre for Indigenous Law (ed) *Indigenous contract in Bophuthatswana* (1991)
Van Niekerk "Orality in African customary law – and Roman law of contract: A comparative perspective" (2011) *De Jure*
Van Niekerk "People's courts and people's justice in South Africa – new developments in community dispute resolution" (1994) *De Jure*
Van Niekerk "People's courts and people's justice in South Africa – new developments in justice" in Scharf and Nina (eds) *The other law: Non-state ordering in South Africa* (2001)
Van Niekerk "Succession, living indigenous law and *ubuntu* in the Constitutional Court" (2005) *Obiter*
Van Rouveroy van Nieuwaal and Van Dijk (eds) *African chieftaincy in a new socio-political landscape* (1999)
Van Schalkwyk "Kommentaar op die Wet op Erkenning van Gebruiklike Huwelike 120 van 1998" (2000) *THRHR*
Van Schalkwyk "Law reform and the recognition of human rights within the South African family law with specific reference to the Recognition of Customary Marriages Act 120 of 1998 and Islamic marriages" (2003) *De Jure*
Van Schalkwyk *The indigenous law of contract with particular reference to the Swazi in the Kingdom of Swaziland* (2006) LLD Thesis UNISA
Van Tromp *Xhosa law of persons* (1947) LLD Thesis University of Stellenbosch
Van Zyl *Geskiedenis van die Romeins-Hollandse reg* (1983)
Van Zyl and Van der Vyver *Inleiding tot die regswetenskap* (1982)
Vedalankar *Essential teachings of Hinduism* (1991)

Venter "The protection of cultural, linguistic and religious rights: The framework provided by the Constitution of the Republic of South Africa, 1996" (1998) *SAPL*
Vestdijk-Van der Hoeven *Religieus recht en minderheden* (1991)
Vorster "Dienslewering: 'n vergelykende perspektief met verwysing na die inheemse Tswanareg en die Suid-Afrikaanse gemene reg" (1990) *SA Journal of Ethnology*
Vorster "Employment" in Centre for Indigenous Law (ed) *Indigenous contract in Bophuthatswana* (1990)
Vorster "Independent service" in Centre for Indigenous Law (ed) *Indigenous contract in Bophuthatswana* (1990)
Vorster "Indigenous knowledge and customary law in South Africa" (2001) *SA Journal of Ethnology*
Vorster "Substitusie in die inheemse reg" (1993) *TSAR*
Vorster "Tradisionele leierskap in Suid-Afrika" (1996) *SA Journal of Ethnology*
Vorster "Traditional leadership in South Africa, marriages and succession" (1999) *Obiter*
Vorster and De Beer "Is huweliksgoed 'n essensiële regsvereiste vir 'n geldige inheemse egtelike verbintenis?" (1988) *SA Journal of Ethnology*
Vorster and Whelpton *Indigenous law*: *Only study guide for LIL* (1998)
Vorster *et al Urbanites' perceptions of* lobolo*: Mamelodi and Atteridgeville* (2000)
Vorster, Dlamini-Ndandwe and Molapo "Consequences of the dissolution of customary marriages" (2001) *SA Journal of Ethnology*
Wade "The influence of religion upon law" in Rakover (ed) *Jewish law and current legal problems* (1984)
Watney *Beginsels van die opvolgingsreg van die Bapedi van Sekwati en noord-Sothosprekendes in Voslosrus* (1992) Unpublished LLD Thesis Rand Afrikaans University
Weeks "Beyond the Traditional Courts Bill: Regulating customary courts in line with living customary law and the Constitution" (2011) 35 *SA Crime Quarterly*
Weeks "Regulating vernacular dispute resolution forums: controversy concerning the process, substance and implications of South Africa's Traditional Courts Bill" (2012) *OUCLJ*
Weeks "The Traditional Courts Bill: Controversy around process, substance and implications" (2011) 35 *SA Crime Quarterly*
Weeks and Claassens "Tensions between vernacular values that prioritise basic needs and state versions of customary law that contradict them – 'We love these fields that feed us, but not at the expense of a person'" (2011) *Stell LR*
Weeramantry *Islamic jurisprudence: An international perspective* (1988)
Wensinck "The importance of tradition for the study of Islam" (1921) *The Muslim World*
Whelpton "The indigenous contract as legal phenomenon" (2006) *Anthropology Southern Africa*
Whelpton *Die Inheemse kontraktereg van die Bakwena Ba Mogopa van Hebron in die Odi I Distrik van Bophuthatswana* (1991) LLD Thesis UNISA
Whelpton *The indigenous Swazi law of contract* (2001)
Whelpton and Vorster "Dissolution of customary marriages" (2001) *SA Journal of Ethnology*
Whiteford and Friedl *The human portrait: Introduction to cultural anthropology* (1992)
Whitfield *South African native law* (1948)
Wicomb "Securing women's customary rights in land: The fallacy of institutional recognition" in Claassens and Smythe (eds) *Marriage, Land and Custom* (2013)
Wicomb "Using Rule 7(1) to test the authority of a chief to litigate on behalf of his people" (2014) *SA Crime Quarterly*
Williams and Klusener "The Traditional Courts Bill: A woman's perspective" (2013) *SAJHR*
Winerib "Legal formalism on the immanent rationality of law" (1988) *Yale LJ*
Woodman "Ideological combat and social observation: Recent debate about legal pluralism" (1998) *Journal of Legal Pluralism*

Woodman "Unification or continuing pluralism in family law in Anglophone Africa: Past experience, present realities and future possibilities" (1988) *Lesotho Law Journal*
World Commission for Culture and Development *Our creative diversity* (1998)
Yassin "Development of plural structure of law in Egypt: A Sunni-Islamic society" in Chiba (ed) *Asian indigenous law: In interaction with received law* (1986)
Zaid *The Islamic law of bequest* (1986)

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