

Form over function? The practical application of the Recognition of Customary

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‘We must begin to think of family policy in terms of the functions we want the family to perform and to leave behind our obsession with form’

(Martha Fineman ‘Masking dependency: the political role of family rhetoric’ (1995) 81 *Virginia Law Review* 2181 at 2203).

The Recognition of Customary Marriages Act 120 of 1998 is a major legislative measure for the development of customary marriages in line with the constitutional principle of equality, specifically for women. The article explores the interactions between this ideal in the Act with empirical observations and the latest judicial decisions concerning its application. It considers various examples of the lack of protection of women in relationships of a customary nature, and it concludes that both the state and courts favour a formal or definitional approach to customary marriage. In considering alternative approaches that could adequately protect vulnerable parties, two conclusions emerge: First, the article recommends a wholesale revision of the South African family law approach from a focus on form to dependency. Second (and as a short-term measure), the article advocates for the putative marriage doctrine to be applied in the customary marriage context to protect many women who are denied access to ‘customary marriage’ as a form, and as a result, all of the benefits that flow from such marriage.

I INTRODUCTION

The Recognition of Customary Marriages Act 120 of 1998 (hereafter ‘the Act’) was passed with the aim, *inter alia*, of providing for the equal status and capacity of spouses, specifically women.¹ The Act is therefore a major legislative measure for the development of customary marriages in line

* We would like to acknowledge financial assistance received from the University of the Western Cape Senate Research Funds to pursue this topic.

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¹ See preamble to the Act.

with the constitutional principles of equality.² In this article, we explore the interactions between this ideal in the Act with empirical observations and the latest judicial decisions concerning its application.³ In considering the (mis)application of the provisions of the Act by both the Department of Home Affairs⁴ and courts, we question, in the first part of this paper, whether this laudatory aim has been met. We look at the various examples of non-protection of women. For example, we note the refusal of Home Affairs' officials to register customary marriages where the husband is not present or is deceased, despite clear statutory provisions to the contrary. We also note a particularly formal approach taken by courts when determining the validity of a customary marriage, leading to harsh consequences.

In the second part of the paper we tentatively conclude that both the state and courts favour a formal or definitional approach to customary marriage, despite the Constitutional Court's explicit endorsement (if not practice) of the functional approach to family law in general. This formal approach considers only the definition of marriage, and whether parties meet this 'form' or 'definition' when determining rights and obligations flowing from a relationship. In the light of this conclusion, in the last part of the paper, we explore potential alternatives that could adequately protect women. In particular, we look at ways in which vulnerable parties can be protected notwithstanding the validity of their relationship as a 'marriage'. While we recommend a wholesale revision of our family law in general, we realise that this is a long-term project. In the meantime, we advocate for an alternative that could protect most women who are denied access to 'customary marriage' as a form, and as a result, all of the benefits that flow from such marriage.

II CHANGING THE CONTOURS OF THE DEBATE: FROM EQUALITY TO DEPENDENCY

There has been little question that the main focus in the customary marriages debate is the equality right, as contained in s 9 of the Constitu-

² C Himonga 'The advancement of African women's rights in the first decade of democracy in South Africa: the reform of the customary law of marriage and succession' 2005 *Acta Juridica* 82 at 84.

³ These empirical observations rely on the important socio-legal research conducted in 2003 and 2011 by researchers in Kwazulu-Natal and the Western Cape respectively. See M Mamashela and T Xaba 'The practical implications and effects of the Recognition of Customary Marriages Act No. 120 of 1998' Research Report No. 59 (2003) available at <http://sds.ukzn.ac.za/files/rr59.pdf>, accessed on 30 March 2012. See also, in general, Women's Legal Centre 'Recognition of Customary Marriages' (2011) available at http://www.wlce.co.za/morph_assets/themelets/explorer/relationship%20rights/general/Recognition%20of%20Customary%20Marriages.pdf, accessed on 3 November 2011.

⁴ The Department of Home Affairs is responsible for the implementation of the Act and thus we look at the particular conduct of its officials in relation to the Act. The Department of Home Affairs is hereinafter referred to as the 'state' for ease of reference.

tion of the Republic of South Africa, 1996.⁵ This is not surprising, given the issues that arise from a system that is largely built on patriarchy.⁶ However, as will be made clearer below, we believe that the focus on equality alone in the context of customary marriages has severe practical and theoretical limitations.⁷ One such limitation, as recognised by Kaganas and Murray, is that the equality argument can be (and, as we argue below, has been) used without ensuring that the remedy chosen is sensitive to the real conditions within which those who are discriminated against find themselves.⁸ We therefore focus on an approach that ‘draws our attention to the gap between theory and practice’⁹ and which rests on a realist position. Such realist position focuses on the effects of state and court action on the protection of vulnerable parties.¹⁰ It is our argument that the emphasis on equality in the preamble of the Act has led to a focus on the relationships between men and women within a customary marriage, without adequate attention to the basic structure of the institution of marriage itself as the only normative structure of an intimate

⁵ JC Bekker ‘How compatible is African customary law with human rights? Some preliminary observations’ (1994) 57 *THRHR* 441; TW Bennett ‘The equality clause and customary law’ (1994) 10 *SAJHR* 122; M Pieterse ‘The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: final nail in the customary law coffin?’ (2000) 117 *SALJ* 627; and AM Janse van Rensburg ‘Mthembu v Letsela: the non-decision’ (2001) 4 *PER* 1. Gender equality has also been the prime motivator for changes within the civil marriage regime. See in general KT Bartlett ‘Feminism and family law’ (1999) 33 *Family Law Quarterly* 475.

⁶ *Bhe and Others v Khayelitsha Magistrate* 2005 (1) SA 580 (CC) para 78; TW Bennett ‘Re-introducing African customary law to the South African legal system’ (2009) 52 *American Journal of Comparative Law* 1. See also the comments of the South African Law Reform Commission in (Project 90) *Report on the Traditional Courts and the Judicial Function of Traditional Leaders* (2003) at 10 and 14. Cf T Nhlapo ‘African customary law in the interim Constitution’ in S Liebenberg (ed) *The Constitution of South Africa from a Gender Perspective* (1995) 162 where he states that ‘[a]lthough African law and custom has always had [a] patriarchal bias, the colonial period saw it exaggerated and entrenched through a distortion of custom and practice which, in many cases, had been either relatively egalitarian or mitigated by checks and balances in favour of women and the young.’

⁷ See F Banda ‘Blazing a trail: the African Protocol on Women’s Rights comes into force’ (2006) 50 *Journal of African Law* 72 at 77 who comments on the problem of linking the use of the liberal model of equality based on ‘reversing the sexes and comparing’ in the context of customary marriages. For arguments on the limitations of equality arguments in same-sex marriages, see M Fineman ‘Masking dependency: the political role of family rhetoric’ (1995) 81 *Virginia Law Review* 2181 at 2202.

⁸ F Kaganas and C Murray ‘Law, women and the family: the question of polygyny in a new South Africa’ 1991 *Acta Juridica* 116 at 125.

⁹ M Chanock *The Making of South African Legal Culture 1902–1936: Fear, Favour and Prejudice* (2001) at 209.

¹⁰ Realists argue against formalistic, mechanical application of rigid rules regardless of their social consequences. Instead, they seek to understand legal rules in terms of their social consequences. See JW Singer ‘Legal realism at Yale’ as cited by E Engle ‘A primer on left legal theory: realism, Marxism, CLS and PoMo’ available at <http://www.social-sciences-and-humanities.com/PDF/primer-on-left-legal-theory.pdf>, accessed on 30 March 2012.

relationship worthy of recognition by the state.¹¹ In both state and court responses to the Act we find that the equality focus has led to narrow questions about the form of a customary marriage. Part of the problem is that it has been assumed that incorporating certain features of civil marriage into customary marriage will solve gender inequalities.¹² As a result, customary marriages have been ‘hybridised’¹³ and most reform to customary marriages has been aimed at reorganising expressly unequal gendered roles. For example, changes to customary marriage, including marital power,¹⁴ change in the age and nature of consent,¹⁵ and the requirement of a contract in a second marriage,¹⁶ have worked in favour

¹¹ Fineman (n 7) at 2192 notes that ‘the state . . . wields the symbolic power of this normative structure in order to justify a parsimonious distribution of economic and social subsidies to nontraditional families.’

¹² E Bonthuys ‘Reasonable accommodation as a mechanism to balance equality rights and rights to religion in family law’ (2010) 25 *SA Public Law* 666 at 678. Bonthuys gives examples, such as the legal equality of husbands and wives, community of property as the default matrimonial property regime and the grounds of divorce in the Act. For example, ch 3, and ss 18–20 and 24 of ch 4 of the Matrimonial Property Act 88 of 1984 apply in respect of any customary marriage that is now in community of property (s 7(3) of the Act).

¹³ M Herbst and W du Plessis ‘Customary law v Common law marriage: a hybrid approach in South Africa’ vol 12.1 *Electronic Journal of Comparative Law* (May 2008) available at <http://www.ejcl.org/121/art121-28.pdf>, accessed on 6 January 2012. Bonthuys (n 12) 678. D Koyana ‘Customary law needs urgent review’ *Daily Despatch* 27 January 2012, available at <http://www.dispatch.co.za/news/article/2774>, accessed on 5 March 2012. Prof Koyana states in this article that the “recognition of customary marriage” [in the Act] is a misnomer. It is really a conversion of customary marriage to English law and the common law of marriage.’ L Mwambene and J Sloth-Nielsen question whether the recognition of customary marriages is in fact an adaption or modification of the traditional customary marriages, leading to a ‘new form of customary marriage.’ See L Mwambene and J Sloth-Nielsen ‘Talking the talk and walking the walk: how can the development of customary law be understood?’ (2010) 28 *Law in Context* 27 at 31. See also RB Mqoke ‘The “rainbow jurisprudence” and the institution of marriage with emphasis on the Recognition of Customary Marriages Act 120 of 1998’ 1999 *Obiter* 52; and JC Bekker and G van Niekerk ‘Harmonisation, or the creation of new marriage laws in South Africa’ (2009) 24 *SA Public Law* 206 at 221. In the context of customary marriages outside of South Africa, specifically those of the Yoruba custom, Laymon suggests that ‘the imposition of Western legal principles often yields grotesque hybrids of “law” and “cultural meaning”.’ See Lona N Laymon ‘Valid-where-consummated: the intersection of customary marriages and formal adjudication’ (2001) 10 *Southern California Interdisciplinary Law Journal* 353 at 360.

¹⁴ Prior to the Act, customary marriages included the notion of tutelage – the placing of a married woman under the guardianship of her husband as a perpetual minor. See s 11(3) of the Black Administration Act 38 of 1927, which was replaced by s 6 of the Act. See also J Sinclair and J Heaton *The Law of Marriage* vol 1 (1996) 173 fn 479 and JC Bekker and N van Schalkwyk ‘All African women may at last own property: particularly land’ (2005) 38 *De Jure* 395 at 396.

¹⁵ The Act requires that parties be over 18 years (s 3(1)(a)). This accords with the African Protocol on Women’s Rights (art 6(b)). The consent of both the bridegroom and of the bride is necessary in terms of s 3(1)(a)(ii) of the Act. Again this accords with the African Protocol on Women’s Rights (art 6(a)). In older times, it was alleged that the bride’s consent in customary law was not necessary. This was changed by the courts: see AJ Kerr ‘Customary law’ in B Clark (ed) *Family Law Service* (2008) para G-33 and JG Horn and AM Janse van Rensburg ‘Practical implications of the recognition of customary marriages’ (2002) 27 *Journal for Juridical Science* 54 at 58.

¹⁶ Section 7(6) of the Act.

of a more formally equal regime. However, these changes have failed to question the focus on the form of marriage itself, and as a result, have failed to eradicate the essential hierarchy in the marriage relationship.¹⁷ For example, the Act requires a husband who wishes to be a party to a polygamous union to apply to court to approve a written contract, which will regulate the future matrimonial property system of his marriages.¹⁸ It is envisaged that the wife will be joined in the proceedings.¹⁹ Notwithstanding this requirement, it appears that only two or three contracts have been registered for polygamous marriages since the inception of the Act, despite the reality that there are many more polygamous marriages in South Africa.²⁰ The result of such non-compliance with form has led to uncertainty for women in the marriage(s), since it appears that the second marriage is void if parties are from the Tsonga community²¹ and elsewhere may be valid, despite lack of consent by the first wife or the fact that no provision was made for the marital property regimes.²² From the foregoing observations, it appears as if this lack of certainty is directly dependent on the (in)action of the 'husband'.²³ It seems to us then as if the

¹⁷ Fineman correctly notes that the issuance of a marriage certificate 'does not determine the conduct of any specific marriage, what it means to its participants, or how those participants will function within the relationship. The laws governing marriage leave the day-to-day implementation of marriage to the individuals.' See M Fineman 'Why marriage?' (2001–2002) 9 *Virginia Journal of Social Policy and the Law* 239 at 241.

¹⁸ Section 7(6) of the Act.

¹⁹ Section 7(8) of the Act. See C Himonga *Challenges of Implementing section 7(6) of the Recognition of Customary Marriages Act in South Africa* Unpublished paper presented at a University of Cape Town, Law, Race and Gender Research Unit seminar 'The Rights of Women Under Customary Law in Southern Africa: Reflecting on the Work of the Women and Law in Southern Africa (WLSA) Research' (August 2010).

²⁰ See Women's Legal Centre (n 3) at 18 fn 45. See also in general C Himonga 'Transforming customary law of marriage in South Africa and the challenges of its implementation with specific reference to matrimonial property' (2004) 32 *Int J of Legal Information* 260.

²¹ According to the Constitutional Court challenge heard on 30 May 2013, *Mayelane v Nguwenyama and Another* 2013 (4) SA 415 (CC) (30 May 2013) second marriages, in the Tsonga community, are void in the absence of the first wife's consent. This challenge was as a result of the SCA judgment of *Nguwenyama v Mayelane* 2012 (4) SA 527 (SCA) wherein the court found that the second marriage should be valid despite non-compliance with s 7(6). This judgment differed from the judgment in the court a quo (recorded as *MM v MN* 2010 (4) SA 286 (GNP)) which held that the second marriage had to be declared void for three reasons: (1) to find differently would render s 7(6) superfluous, which the legislature clearly did not intend; (2) s 7(6) reads that the husband 'must make application to the court', indicating that non-compliance will lead to voidness (ibid at para 25 with reference to *Minister of Environmental Affairs and Tourism v Pepper Bay Fishing (Pty) Ltd; Minister of Environmental Affairs and Tourism v Smith* 2004 (1) SA 308 (SCA) para 32); and (3) to find differently would be a gross infringement of the first or earlier spouses' fundamental rights. See also J Heaton *South African Family Law* 3 ed (2010) 224 (and the references cited therein).

²² The Act does not explicitly state voidness as a consequence of non-compliance with section 7(6), but is set out in peremptory language (viz. the husband *must* . . .).

²³ The result of such non-compliance has been characterised as 'the discarded-spouse' debate. The possible voidness of the second marriage, leading to the lack of protection of the second 'spouse' has been severely criticised. See, for example, the *obiter dicta* in *MG v BM* 2012 (2) SA 253 (GSJ) paras 23ff (and the references cited therein), IP Maithufi and GMB Moloi 'The

focus in the customary marriage debate has been on the internal inequities and injustices in male–female relations, but seen only through the prism of the institution of marriage.²⁴ In other words, these changes reflect the primacy of civil marriage as the normative family form,²⁵ which has tried to situate customary marriages in a formal system with ‘simple dichotomous terms such as married and unmarried’.²⁶ This problem appears to be epistemological, as indicated by Clark: it is ‘a problem of viewing the customary law as an objective reality, as a body of rules, rather than as an ongoing historical phenomenon’.²⁷ This has meant that, overwhelmingly, the state and courts have failed to come to the assistance of women in these relationships where they are unable to comply with ‘form’,²⁸ as seen primarily through the process of registration and validation of these marriages. This is extremely problematic given the generally-held view that factors such as poverty, unemployment, the legacy of labour migrancy and unequal gender relations have influenced the way in which family formation takes place in South Africa.²⁹

need for the protection of rights of partners to invalid marital relationships: a revisit of the “discarded spouse” debate’ (2005) 38 *De Jure* 144 and M Mamashela and M Carmelley ‘The Catch 22 situation of widows from polygamous marriages being discarded under customary law’ (2011) 25 *Agenda: Empowering Women for Gender Equity* 112. Interestingly, the Muslim Marriages Bill (which seeks to give recognition to Muslim marriages in South Africa, published for comment in January 2011), makes it a criminal offence where the husband fails to enter into a similar contract provision. In terms of s 8(11), the husband is liable to a fine not exceeding R20 000. While this approach certainly encourages husbands to enter into such contracts, the provisions of the Muslim Marriages Bill (if enacted as is) will apply only to those who ‘opt-in’ to the statutory regime (s 2(1)), rendering the protection potentially ineffective.

²⁴ For an analysis of shortcomings of this approach in the context of recognising Muslim marriages, see D Meyerson ‘Who’s in and who’s out? Inclusion and exclusion in the family law jurisprudence of the Constitutional Court of South Africa’ (2010) 3 *Constitutional Court Review* 295.

²⁵ See references in n 7 above. See also Bonthuys (n 12) at 678.

²⁶ Laymon (n 13) at 357.

²⁷ B Clark ‘History of the Roman–Dutch law of marriage from a socio-economic perspective’ in D Visser (ed) *Essays on the History of Law* (1989) 159 at 192.

²⁸ The statement here may be misleading, for in certain cases (as argued below) the courts have misinterpreted a requirement of customary marriage, for example, this is what both De Koker (n 62) and Janse van Rensburg (n 5) argue in relation to the ‘non-decision’ on the validity of the marriage in *Mthembu v Letsela* 2000 (3) SA 867 (SCA). Both authors argue that the *lobolo* did not have to be paid in full for the marriage to be valid.

²⁹ Clark (n 27) at 191. M Chanock ‘Neither customary nor legal: African customary law in an era of family law reform’ (1989) 3 *International Journal of Law, Policy and the Family* 72 at 82. Goldblatt posits that these factors affect predominately poor, black women (B Goldblatt ‘Regulating domestic partnerships – a necessary step in the development of South African family law’ (2003) 120 *SALJ* 610 at 616.) See Mamashela and Xaba (n 3); B Meyersfeld ‘If you can see, look: domestic partnerships and the law’ (2010) 3 *Constitutional Court Review* 271 at 282; and B Smith ‘The interplay between registered and unregistered domestic partnerships under the draft domestic partnerships bill, 2008 and the potential role of the putative marriage doctrine’ (2011) 128 *SALJ* 560 at 562 for their discussion of these factors in relation to the formation of domestic partnerships in South Africa.

In what follows, then, we consider this obsession with form in (1) the registration process; and (2) the validation of marriages through the courts.

III OBSESSION WITH FORM

(1) *The State: registration process*

While it may seem surprising, the state has been a relative latecomer in the registration of marriage. In both English and Roman-Dutch law, any control of marriage was in the hands of the church and canon law, not the state.³⁰ This situation changed with control turning from church to state. In South Africa, public registration of a kind was required for civil marriages since the early European settlement at the Cape of Good Hope.³¹ Contrasted with civil marriages, prior to the commencement of the Act, it was not necessary to register customary marriages, except in Kwa-Zulu Natal.³² While parties could register their marriages in the Transkei, it had no effect on the validity of the marriage.³³ One can understand the fact that registration was not vital under customary law in earlier times: family elders were usually always available to testify to the celebration of a marriage.³⁴ This meant that not many couples registered their marriages. In addition, as stated in *MG v BM*,³⁵ it was a 'notorious fact' that the registration of customary marriages prior to 1994 was almost non-existent due to the negative attitude towards customary law. Furthermore, in the context of control of property residing with the family head,³⁶ and the rejection of the private law property concept,³⁷ it would

³⁰ For example, public registration of English marriages was only required by the Act for the Better Prevention of Clandestine Marriages in 1753 (better known as Lord Hardewicke's Act). See MA Case 'Marriage licenses' (2005) 89 *Minnesota Law Review* 1758 at 1767.

³¹ HR Hahlo *Law of Husband and Wife* 5 ed (1985) 15ff. See also B van Heerden 'Marriage' in Joubert (ed) *Law of South Africa* vol 16 (1992) para 12, who gave the rationale for such registration: 'Marriage . . . confers on the parties a status of a public character'. See also *Holland v Holland* 1973 (1) SA 897 (T) 899F-H: 'marriage . . . is part of the *jus publicum* . . . [it] is thus of interest to the State. . . .'

³² Herbst and Du Plessis (n 13). See ss 44–50 of the KwaZulu-Natal Codes on Zulu Law.

³³ TW Bennett *Customary Law in South Africa* (2004) 218; *Kambule v The Master of the High Court* 2007 (4) All SA 898 (E). But cf *Kwitshane v Magalela* 1999 (4) SA 610 (Tk) and *Tshatela v Qendwana* [2001] JOL 7672 (Tk). Interestingly, the Transkei Legislative Assembly passed the Transkeian Customary Unions Registration Act 3 of 1971, which provided for compulsory registration (s 3). However, the Act never came into force. See DG Koyana *Customary Law in a Changing Society* (1980) 145.

³⁴ Bennett (n 33) at 217. T Nhlapo 'The Customary Marriages Act: background and rationale' in S Bah and S Rama (eds) *Towards Improving the Registration of Marriages and Divorces in South Africa: Proceedings from a National Workshop* (1999). Nhlapo states: '[t]raditionally people don't consider registration of their marriages to be a high priority.'

³⁵ *MG v BM* supra (n 23) para 10.

³⁶ Bennett (n 33) at 322 and 337.

³⁷ CRM Dlamini 'The role of customary law in meeting social needs' 1991 *Acta Juridica* 71 at 76 and Bennett (n 33) at 374ff. See also Kaganas and Murray (n 8) at 121 where they state that

appear that proof of the marriage was not integral for the purposes of specific benefits.³⁸

However, given various provisions of the Act³⁹ and the decisions in *Bhe*⁴⁰ and *Gumede*⁴¹ – where private law property concepts,⁴² civil law proprietary regimes, and the equal status between spouses impact directly on the customary union – one can well understand the need for evidence of customary law marriages.⁴³ This need for evidence in proving the customary marriage is made problematic in an urban context where there is usually no close-knit community to assist in issues of proof.⁴⁴

Given the increasing need for a ‘public character’ for customary marriage, together with the ‘hybridising’ of customary marriages, it is not surprising then that the Law Reform Commission’s (SALRC) Discussion Paper on customary marriages recommended that registration was necessary to provide proof of the marriage to third parties, as well as to determine the matrimonial property system.⁴⁵ This recommendation was made, no doubt, in the light of bureaucratic demands of proof to the array of benefits that are available to those in marriages (and civil unions) in South Africa.⁴⁶ It was also made in the light of South Africa’s obligations under the UN Convention on Elimination of All Forms of Discrimination against Women,⁴⁷ and the UN Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage.⁴⁸

To this end then, the Act requires that spouses in a customary marriage have a duty to ensure that their marriage is registered within three months

customary law was designed to meet the needs of a rural, pre-industrial and patriarchal society (further stating that such design is ill-equipped to deal with the reality of contemporary women’s lives).

³⁸ Similarly, Budlender et al posit that if earnings and property are limited (especially in the rural areas), it is unlikely that a rural couple would see the need to register their customary marriage. See D Budlender, N Chobokoane and S Simelane ‘Marriage patterns in South Africa: methodological and substantive issues’ (2004) 9 *Southern Africa Journal of Demography* 1 at 4.

³⁹ For example, ss 6 and 7(2) of the Act.

⁴⁰ *Bhe* supra (n 6).

⁴¹ *Gumede (born Shange) v President of the Republic of South Africa* 2009 (3) SA 152 (CC).

⁴² Cf the conclusion of Mamashela and Xaba (n 3) that ‘traditional societies neither men nor women had individual rights to property’.

⁴³ See Chanock who stated that an obvious consideration in thinking about the family unit was that ‘[c]ustomary law was not simply family law. It provided for a whole social order, regulating political authority, wrongs and injuries, land distribution, the ownership of property, the rights and capacities to exchange goods, and labour.’ M Chanock ‘Law, state and culture: thinking about “customary law” after apartheid’ 1991 *Acta Juridica* 52 at 68.

⁴⁴ Bennett (n 33) at 217–218.

⁴⁵ South African Law Reform Commission (SALRC) Discussion Paper 76 (Project 90) *The Harmonization of the Common Law and the Indigenous Law: Conflicts of Law* (1998) paras 4.5.6–8 and 4.5.18.

⁴⁶ For example, for record-keeping purposes, facilitating property transfers upon death etc.

⁴⁷ Article 16(2) of 1249 UNTS 13; adopted 18 December 1979; instrument of ratification deposited on 15 December 1995; entry into force 3 September 1981.

⁴⁸ Article 3 of 521 UNTS 231; adopted 10 December 1962; instrument of ratification deposited on 29 January 1993; entry into force 9 December 1964. See in general, Bennett (n 33) at 218–219.

of celebration thereof.⁴⁹ Where marriages were entered into before the commencement of the Act, spouses were given 12 months to have their unions registered.⁵⁰ Such period was last extended to 31 December 2010.⁵¹ Section 4(2) expressly states that either spouse may apply for the registration of his or her customary marriage, subject to compliance with the prescribed forms.⁵² In addition, s 4(7) provides that a court can also order the registration of a marriage. As in the case of Transkei customary marriages, s 4(9) states that failure to register a customary marriage *does not* affect the validity of that marriage. Despite registration not being a bar to validity, a spouse who is not in possession of a certificate of registration (and where the state refuses to register the marriage) has to approach a court for an order in this regard.⁵³

It is clear from the requirements of the Act that *either* of the spouses may register the marriage.⁵⁴ The problem in the context of this article is that most persons only seek to register the marriage where there is a dispute or where one (or both) spouses are deceased.⁵⁵ The Act makes provision for the latter situation by allowing for persons other than the spouses to enquire into the existence of the marriage, should they be able to show that they have sufficient interest in the matter.⁵⁶ This provision obviously allows for the marriage to be registered after the death of one or both of the spouses⁵⁷ once the registering officer is satisfied that a marriage exists or has existed between the spouses.

Despite registration not being essential to the validity of the marriage, the reality is that:

- (i) Spouses cannot access pension benefits, inherit property or divorce without a registration certificate.⁵⁸

⁴⁹ Section 4.

⁵⁰ Section 4(3)(a). It should be noted that the lack of such registration, as mentioned above, should not affect the marriage's validity.

⁵¹ In terms of GN 51 GG 32916 of 5 February 2010.

⁵² See Form A contained in GN R1101 GG 21700 of 1 November 2000 and amended by GN R359 GG 25023 of 14 March 2003.

⁵³ Section 4(7)(a). See *Baadjies v Matubela* 2002 (3) SA 427 (W) para 17 and *Mabuza v Mbatha* [2003] 1 All SA 706 (C).

⁵⁴ Section 4(2).

⁵⁵ See Women's Legal Centre (n 3) at 12. See also Mamashela and Xaba (n 3). It appears as if the majority of those in customary marriages did not register their marriages prior to the Act as well. The SALRC notes that any measures to encourage registration of marriage was abandoned from early on; see SALRC (n 45) at 71 fn 121. See Maithufi and Moloi (n 23) at 145. See also the factual scenario in *MG v BM* supra (n 23).

⁵⁶ Section 5. See M Meyer 'The Recognition of Customary Marriages Act, 1998' (2008) 14 *South African Deeds Journal* 9 who gives examples of who might qualify as a 'sufficiently interested person' under this provision.

⁵⁷ Heaton (n 21) at 208.

⁵⁸ Women's Legal Centre (n 3) at 12. See, for example, *Baadjies v Matubela* supra (n 53) where a woman could not obtain maintenance in terms of a Rule 43 application without a valid registration certificate.

- (ii) Regulations make the registration process a relatively cumbersome process⁵⁹ and imply additional requirements not expressly set out in the Act.⁶⁰
- (iii) Men (or if the man is deceased, his relatives) may resist registration so as to resist sharing of the marital property, or of the deceased estate, respectively.⁶¹
- (iv) Where there is no registration, proving the existence of the marriage by other means (the alternative to registration provided for in the Act) may be a formidable task.⁶²
- (v) Where the Department of Home Affairs refuses to register the marriage, parties often lack real access to courts to challenge such refusal,⁶³ given both their geographic location and financial constraints.⁶⁴

⁵⁹ Regulations require that identity books be presented, a requirement which is problematic given that many of those in the rural areas are without identity books. Spouses may also be illiterate or semi-literate which makes the completion of many forms difficult. See Budlender et al (n 38) at 4.

⁶⁰ For example, Form A requires that the terms of a *lobolo* agreement be set out despite no express requirement of *lobolo* in the Act. Also reg 2(1) provides spaces for both spouses to sign Form A, despite the statutory provision that either spouse can apply for registration. Finally, there have been indications (in the form of circulars) that the Department of Home Affairs requires both spouses to sign: see Manual B1 1699 and Circular 53 of 2000.

⁶¹ Budlender et al (n 38) at 4. The authors also posit that if earnings and property are limited (especially in the rural areas), the chances of a couple registering their customary marriage is limited. See also L Mbatha 'Recognising customary marriages' (1998) 3 *Gender Research Project Bulletin* 5 where, after interviewing women, she notes that non-registration often results from 'men playing delaying tactics by either failing to create time to register the marriage, blaming it on work, or by a general refusal to create time.' In the context of polygamous marriages, it may be that one of the surviving spouses may also deny the validity of a marriage so as to avoid sharing. This was the case in *MG v BM* supra (n 23) para 12, where the court opined that the first wife sought to contest the validity of the second marriage because of 'greed to exclude the applicant from the assets of the deceased'.

⁶² IP Maithufi 'The Recognition of Customary Marriages Act of 1998: a commentary' (2000) 63 *THRHR* 509 at 516. See also J de Koker 'Proving the existence of a customary law marriage' 2001 *TSAR* 257 discussing the various decisions in *Mthembu v Letsela* 1997 (2) SA 936 (T) before Le Roux J, *Mthembu v Letsela* 1998 (2) SA 675 (T) before Mynhardt J, and *Mthembu v Letsela* 2000 (3) SA 867 (SCA). See also Laymon (n 13) at 362 who makes the valid point that courts usually give more evidentiary weight to documents like marriage licences, prenuptial agreements, and written acknowledgments of a marriage than they give to witnesses' narration about the ceremonial process.

⁶³ As provided for in s 4(7), also ss 2(1) and 3(1) of the Act. Despite the lack of a link between the latter section, this view appears to be confirmed by the court in *Baadjies* (n 53), which found that the failure to prove registration of a customary marriage constituted a failure to prove the existence of the marriage. Similarly, where there is a marriage certificate, it seems that the court will be hesitant to find that the marriage is invalid. This was the case in *M v M* (20622/06) [2009] ZAGPPHC 109 (10 September 2009). Here the court held (at para 16) that '[i]n the face of the marriage certificate issued by the Department and the absence of acceptable evidence on the part of the defendant to rebut the marriage certificate . . . this court cannot even consider the defendant's version that a valid marriage didn't come into being and the plaintiff must therefore succeed with her action for divorce.'

⁶⁴ Women's Legal Centre (n 3) at 12. See also V Bronstein 'Confronting custom in the new South African state: an analysis of the Recognition of Customary Marriages Act 120 of 1998' (2000) 16 *SAJHR* 558.

From the foregoing section, therefore, the reality is that the registration process is integral in protecting women. This notwithstanding the fact that there is no express link between registration and validity of a marriage.⁶⁵

In considering the state's approach to the registration process, Banda's statement in 2006 is prescient. She stated then that '[i]t would be unfortunate if an instrument [viz registration] designed to be for the protection of women led to their legal disenfranchisement'.⁶⁶ This appears to be the case from reported legal interventions by the Women's Legal Centre Trust in Cape Town.⁶⁷ These case studies show numerous occasions when the Department of Home Affairs, which is responsible for registration, has refused to register customary marriages for spurious reasons, which, in turn, has led to the disenfranchisement of women.

These cases can be grouped into two subsets of scenarios, with both ultimately stemming from the misguided notion that both spouses must be present to register the marriage.⁶⁸ In the first subset, the state refused to register a marriage where the husband was still alive, because he refused to assist in the process. Such refusal was premised on resisting an action for divorce⁶⁹ or occurred in the context of abuse by the husband.⁷⁰ In the second subset, the state refused to register a marriage where the husband was deceased,⁷¹ despite statutory provisions allowing for this very situation. This practice goes against the explicit wording of the Act, which only requires one spouse to be present to apply for registration, and which contemplates the possibility of registration post-death of one of the parties.⁷² Finally, the state has been inconsistent in whether it will register a marriage entered into before the commencement of the Act, where such attempted registration takes place after the extension date of 31 December

⁶⁵ See Women's Legal Centre (n 3) at 12.

⁶⁶ Banda (n 7) at 76. The potential for disenfranchisement of women was predicted in the SALRC Report (n 6) at para 4.5.18 when it stated that '[t]o rule that unregistered unions are void would work great hardship for the spouses and would deprive many existing unions of potential validity. Hence, where a marriage has not been registered, the parties should be permitted to allege other forms of proof of its existence'.

⁶⁷ Women's Legal Centre (n 3) at 13.

⁶⁸ As implied by the requirements of Form A of the Act.

⁶⁹ Case reported as 'Dada', see Women's Legal Centre (n 3) at 13.

⁷⁰ Case reported as 'Mehlomakhulu', *ibid*.

⁷¹ Case reported as 'Ntlonze', *ibid*. This case accords with similar findings in KwaZulu-Natal by Mamashela and Xaba (n 3).

⁷² While it is beyond the scope of this paper, this practice seems deliberate in the sense that such practice simulates what is being proposed by the Draft Recognition of Customary Marriages Amendment Bill published for comment in 2009. In terms of this Bill, *inter alia*, both spouses must be present (clause 4(a) requires both spouses to make the application together). In addition, clause 4(c) deletes s 4(5)(a) of the Act, which allows a person with a sufficient interest to make application for registration of a marriage.

2010.⁷³ Where the state has refused, this has meant that women have had to go to court to prove the validity of their marriage, which has often translated into a ‘dead end’ for these women, given lack of real access to courts.⁷⁴

(2) *The courts: validity of marriages*

Before we embark on an account of the approach in which courts have (mis)applied the Act, some consideration needs to be given to prevailing *modus operandi* in which the Act has been applied. In considering the decisions of the courts, we note that in many cases women believed that they had concluded a valid customary marriage.⁷⁵ But later either the husband⁷⁶ or the relatives of the deceased husband, mainly interested in the deceased’s intestate estate,⁷⁷ ‘would come to court insisting that as the formalities had not been followed, the marriage was not valid’.⁷⁸ Our main concern, however, is with how the approach of the courts has

⁷³ See letter from Department of Home Affairs, quoted in *MG v BM* supra (n 23) para 8, as well as the case study ‘Lungile Nkosi’ cited in Women’s Legal Centre (n 3) at 14, where the state refused to register the marriage post-extension. However, a Department of Home Affairs Circular 27 of 2008 apparently instructed officials to continue registering marriages – at least before the last extension period – whether the marriages were concluded before or after the Act. See Women’s Legal Centre (n 3) *ibid*.

⁷⁴ See Bronstein (n 64) 562; Horn and Janse van Rensburg (n 15) at 63; Himonga (n 2) at 106; and IP Maithufi and JC Bekker ‘The existence and proof of customary marriages for purposes of Road Accident Fund claims’ (2009) 30 *Obiter* 164 at 173 regarding problems relating to access to courts. Mamashela and Xaba reported in 2003 (n 3) that the Department of Home Affairs would only register a marriage where the person who wanted to register the marriage brought the entire marriage party to their offices, including immediate family members of both families. Such an entourage necessitated the hiring of a minibus, an expense that fell outside of the means of the person wishing to register the marriage.

⁷⁵ See, for example, the cases of *Mthembu* supra (n 28); *Motsotsoa v Roro* [2011] 2 All SA 324 (GSJ); *Fanti v Boto* 2008 (5) SA 405 (C); and *Ndlovu v Mokoena* 2009 (5) SA 400 (GNP). See also Janse van Rensburg (n 5) at 57 and Women’s Legal Centre (n 3).

⁷⁶ For example, in *M v M* supra (n 63), the defendant, husband to the applicant, in challenging the division of the joint estate sought by the wife after divorce, alleged that there was no valid customary marriage because the requirement of full delivery of *lobolo* was not met by him.

⁷⁷ In *MG v BM* supra (n 23) the applicant (first wife to the deceased) challenged the validity of the marriage between the deceased and the first respondent (second wife to the deceased) because of the disagreement over the distribution of the deceased estate. See also *Motsotsoa* supra (n 75) (discussed later in this paper under *lobolo*), in which the right to inherit the deceased house was at risk. In addition, in *Matlala v Dlamini and Another* (35611/2008) [2010] ZAGPPHC 277 (3 June 2010), the applicant, the mother to the deceased, sought an order to declare that no valid marriage existed between the deceased and the first respondent and, more important to our discussion, the applicant also sought an order to the effect that the first respondent (wife to the deceased) should not be entitled to any benefits from the estate or pension funds of the deceased.

⁷⁸ Chanock (n 9) at 294. See also Justice College *Customary Marriages Bench Book* (2004) ch 3 at 11, where it was also noted that the validity of a marriage is only likely to be questioned where there is dispute over resources, available at <http://www.judicialeducation.org.za/files/userfiles/file/MagCourts/Customary%20Marriage%20Bench%20Book.pdf>, accessed on 20 April 2012.

pushed the Act towards, what Chanock⁷⁹ has called 'a definition of requirements and criteria of validity', which we argue protects no one, especially the vulnerable, but the institution of marriage itself.

The requirements for the validity of a customary marriage are provided under s 2(1)⁸⁰ and (2)⁸¹ of the Act. For customary marriages concluded after the Act, the requirements are age, consent, and that the marriage must be negotiated and entered into or celebrated in accordance with customary law.⁸² Age and consent, as provided under s 3(1)(a)(i) and (ii), are straight forward to determine and have thus far not attracted the attention of courts. Section 3(1)(b) of the Act, however, states that 'the marriage must be negotiated and entered into or celebrated in accordance with customary law', with no further guidance as to the essential requirements of custom.⁸³ For that reason, courts are left to decide what, in a given case, are the essential requirements of custom, which has led to a number of conflicting decisions.⁸⁴ These decisions are mainly based on customary requirements of *lobolo* and customary ceremonies (formal integration of a woman into her husband's family home),⁸⁵ which

⁷⁹ Chanock (n 9) at 332. See also Clark (n 27) at 192 in relation to the problem of fixed criteria in customary marriages.

⁸⁰ Section 2(1) provides that 'a marriage which is a valid marriage at customary law and existing at the commencement of this Act is for all purposes recognised as a marriage'. The requirements for the validity of marriages recognised under s 2(1) are therefore those that were recognised at customary law before the Act came into force, which include: consent of families; consent of both parties; *lobolo* and marriage ceremonies (see discussion by Bennett (n 33) at 194; and A Skelton and M Carnelley (eds) *Family Law in South Africa* (2010) 180.)

⁸¹ Section 2(2) of the Act provides that 'a customary marriage entered into after the commencement of this Act, which complies with the requirements of this Act, is for all purposes recognised as a marriage'.

⁸² The requirements of these marriages are provided under s 3(1) of the Act which provides for the following: (a) the prospective spouses (i) must both be above the age of 18 years; and (ii) must both consent to be married to each other under customary law; and (b) the marriage must be negotiated and entered into or celebrated in accordance with customary law.

⁸³ See also Mwambene and Sloth-Nielsen (n 13) at 30; Women's Legal Centre (n 3) at 8; and Herbst and Du Plessis (n 13) at 8. Thus, Justice College (n 78) has observed: 'the wording in this provision seems to capture the nature of customary marriage as a process rather than an event.' In addition, Justice College (ibid) observed what Comaroff and Roberts pointed out: that in Tswana culture there is no defining moment between one's status as married and single, and there are a variety of relations between Tswana men and women which may result in rights to support or alimony upon separation.

⁸⁴ For example, the cases of *Motsotsoa* supra (n 75), *Mthembu* supra (n 28), *Ndlovu* supra (n 75) and *Fanti* supra (n 75).

⁸⁵ The Act does not define what ceremonies need to take place, 'but leaves room for communities to develop or follow the ones always practiced' (recommendation by SALRC, as cited by Justice College (n 78) at 23. The SALRC, as cited by Justice College (n 78) at 24, reported that 'customary law always tends to be flexible and pragmatic. Ceremonies may be abbreviated as circumstances dictate, and especially in urban areas, they may be ignored altogether. Even within a close-knit community, opinions may vary on how essential a ritual is and how it should be performed (at 4.4.8). Thus, in *Mabena v Letsealo* 1998 (2) SA 1068 (T) (decided before the Act) for example, the court upheld a marriage that had been negotiated by the mother of the bride instead of the father or male guardian as required by custom. On the

Bennett,⁸⁶ among others,⁸⁷ has pointed out characterise a marriage as customary in nature.⁸⁸

Several authors have discussed issues of *lobolo* and customary ceremonies as requirements for determining the validity of a customary marriage, despite these not being specifically mentioned under s 3(1) of the Act.⁸⁹ It is therefore not necessary for us to repeat them. It is, however, important to underscore the fact that for purposes of our discussion, the focus is on how the courts' approach to the institutions of *lobolo* and customary ceremonies, as essential requirements to conclude a valid customary marriage, affects the protection of vulnerable parties.

(a) *Lobolo*

Lobolo has been defined as 'property in cash or kind . . . which a prospective husband or head of his family undertakes to give to the head of a prospective wife's family in consideration of a customary marriage'.⁹⁰ *Lobolo* could consist of cattle, other animals or cash, as agreed by the parties. There is no standard rule applicable in all communities on the amount, nature and payment of *lobolo* as a requirement for the validity of a customary marriage.⁹¹ Communities have different practices.⁹² Courts

importance of formal integration of a woman into the husband's family as a requirement (discussed below), see the cases of *Fanti* supra (n 75); *Ndhlovu* supra (n 75).

⁸⁶ TW Bennett 'Legal pluralism and the family in South Africa: lessons from customary law reform' (2011) 25 *Emory International Law Review* 1029 at 1046.

⁸⁷ Koyana (n 33) at 5 who has observed that *lobolo* custom is 'a thread through all Black nations of Southern Africa'. See also JC Bekker *Seymour's Customary Law in Southern Africa* (1989) 151 who has described *lobolo* as 'a rock on which the Africans' marriage is founded' and thus an essential feature of a customary marriage (by Koyana as well).

⁸⁸ Historically, s 11(1) of the Black Administration Act 38 of 1927 provided that a court could not find that the tradition of *lobolo* was against natural justice and public policy. After the Act, Dlamini, cited by LL Mofokeng 'The *lobola* agreement as the silent prerequisite for the validity of a customary marriage in terms of the Recognition of Customary Marriages Act' (2005) 68 *THRHR* 277 at 279, observed: 'Blacks in general are unable to regard a relationship as a marriage even if there can be compliance with all legal requirements if *lobolo* has not been delivered or an agreement for its delivery [has not been] concluded.' This observation can be supported by an unpublished study by Govender, which shows that 85 per cent of women interviewed indicated whole-hearted support for the system of *lobolo*. See P Govender *The Status of Women Married in terms of African Customary Law: A Study of Women's Experiences in the Eastern Cape and Western Cape Provinces* (2000) 29. These findings point to the fact that women are supportive of the *lobolo* institution when it comes to the validity of a customary marriage.

⁸⁹ See for example, Mafokeng (n 88) at 277; Women's Legal Centre (n 3).

⁹⁰ See s 1 of the Act. It should be however noted that, despite its definition in the Act, *lobolo* is not a requirement to conclude a valid customary marriage (s 3(1) of the Act). *Lobolo* has also been defined by Mafokeng (n 88) at 278 as 'an agreement between the family group of the prospective husband and the family group of the prospective wife that on or before the marriage ceremony, there would be the transfer of property from the family group of the husband to the family group of the wife in respect of the marriage' and by Seymour as cited by Koyana (n 33) at 5 as 'a rock on which the Africans' marriage is founded' and thus an essential feature of a customary marriage.

⁹¹ Koyana (n 33) at 5, and Bennett (n 33) at 225.

are therefore required to take into account these different practices and the facts presented before them in disputes pertaining to validity of customary marriage on the issue of *lobolo*.⁹³

Courts' decisions are contradictory as to whether partial or full payment of or mere agreement to pay *lobolo*, as prescribed by a particular custom or agreed by parties, is essential for the validity of a customary marriage. Some court decisions seem to suggest that mere negotiations on the issue of *lobolo* would suffice. A primary source for this suggestion is the Constitutional Court dictum in *Bhe and Other v Khayelitsha Magistrate*⁹⁴ where it was said that 'it is not a requirement that *lobolo* should be paid in full before a marriage is concluded. An "agreement" to pay *lobolo* is sufficient'. Similarly, in *Matlala v Dlamini and Another*⁹⁵ the court observed: 'I assume that an "agreement" between the families as to the amount of *lobolo* to be paid (where the *lobolo* consists of money) is a prerequisite for a valid customary marriage'.⁹⁶

A good example where a court concluded that mere agreement to *lobolo* suffices is the case of *Nthejane and Another v Road Accident Fund*,⁹⁷ in which the plaintiff, acting on behalf of her minor son Bongani, sued the defendant for damages arising out of the death of her deceased husband, the biological father of her son. The plaintiff was Sotho. The brief facts of this case were that the parties agreed to enter into *lobolo* negotiations. These negotiations took place and it was agreed that the deceased family would give 10 cows as *lobolo*. The parties also agreed that delivery of *lobolo* was to take place at a later stage. The defendant, however, contended that the plaintiff could not have entered into a customary union, as this *lobolo* had not been paid.⁹⁸ The issue for the court to decide was whether or not the plaintiff was married to the deceased in terms of a customary union.⁹⁹ The court observed that the '*lobolo* agreement' was acceptable to both families and that therefore the arrangement was in accordance with their

⁹² Thus, Bennett (n 33) at 225–228 observed that as a general rule, there is no uniformity regarding the size of *lobolo* and the manner in which it is determined. For example, among the Tsonga people, the size is determined by negotiation and agreement between the parties; among the Sotho and Venda people the size is determined by traditional custom, usually having a fixed amount; among the Tswanas, the size is determined unilaterally by the family of the groom; and among the Pondos and Xhosas, the size is dependent on circumstances, for example, that the father of the daughter may demand more *lobolo* after the birth of the child.

⁹³ See also Bennett (n 33) at 234; Herbst and Du Plessis (n 13) at 7.

⁹⁴ *Bhe* supra (n 6) para 5.

⁹⁵ *Matlala v Dlamini and Another* supra (n 77).

⁹⁶ Our emphasis.

⁹⁷ *Nthejane and Another v Road Accident Fund* (3183/2010) [2011] ZAFSHC 196 (1 December 2011).

⁹⁸ *Ibid* at para 8.

⁹⁹ *Ibid* at para 2.

customary practices.¹⁰⁰ From the foregoing decision it would appear that an agreement by parties that *lobolo* will be delivered suffices.¹⁰¹

Other courts' decisions seem to suggest that partial delivery of *lobolo* is necessary to hold that the marriage is valid.¹⁰² For example, in the case of *Matlala v Dlamini*¹⁰³ the applicant, the mother and the sole surviving parent of the deceased, sought an order for the court to declare that no valid customary marriage existed between the deceased and the first respondent (wife of the deceased). The effect of such an order was to exclude the first respondent from any benefits from the estate or the pension fund of the deceased. The Matlala and Dlamini families were respectively Pedi and Swati. The Dlamini family regarded the couple as lawfully married in accordance with their (Swati) customs because of the partial payment of *lobolo*.¹⁰⁴ As for the Matlala family, the applicant averred that in accordance with their (Pedi) customs, the couple was not lawfully married because the families agreed that the proposed marriage was to be regulated by the Pedi law, which requires full payment of *lobolo*. In holding that a valid marriage existed, the court stated: 'In the authorities that I have consulted, I could not find a relevant difference between baPedi and siSwati customs.'

In another case, *Mmutle v Thindwa*,¹⁰⁵ the applicant, the biological daughter of the deceased, instituted an action to have a customary union between her deceased father and the first respondent declared null and void. She stated that, according to Tswana custom, the requirement of full payment of *lobolo* was not met because the deceased, her father, only made part payment thereof. In dismissing the application and holding that the marriage was valid, the court held that part payment was sufficient and that the ceremonies and exchange of gifts do not have any legal consequences for the validity of a customary union or marriage. Similarly, in *J.B.M v G.K.M*,¹⁰⁶ the plaintiff sued the defendant for a divorce, division

¹⁰⁰ Ibid at para 9.

¹⁰¹ See also *MG v BM* supra (n 23) in which the court held that the marriage was valid based on the fact that the agreement of *lobolo* was met on 8 June 2000 (paras 5 and 12). In this case the applicant sought, among others, an order to have her customary marriage registered after the death of her deceased husband. The application was opposed by first respondent basing her argument on the fact that there was no *lobolo* negotiation between the applicant and the deceased families (para 6). The contrary is also true: absence of *lobolo* agreement will render the marriage void. Such was the decision in *Manona v Alice Parlour* [2002] JOL 9717 (Ck) (as cited by Women's Legal Centre (n 3) 9) where the applicant made an urgent application for an interdict preventing the second respondent from removing the body of the deceased daughter and burying it. The court held that no valid marriage existed because there was no agreement that *lobolo* would be paid

¹⁰² This is irrespective of the fact that full payment of *lobolo*, the requirement according to custom or as agreed by parties, was not met.

¹⁰³ Supra (n 77).

¹⁰⁴ See also *Fanti* supra (n 75) paras 19 and 20.

¹⁰⁵ *Mmutle v Thindwa* (20949/2007) [2008] ZAGPHC 352 (23 July 2008).

¹⁰⁶ *J.B.M v G.K.M* (20622/06) North Gauteng Division, High Court, April 2009.

of the joint estate and ancillary relief. The plaintiff and the defendant were from different tribal groups, which unfortunately were not mentioned in the court decision. In the particulars of claim the plaintiff alleged that a valid customary marriage existed, having complied with all customary requirements, including the fact that full payment (R2000.00) of *lobolo* was made by the defendant. The defendant denied that a valid marriage existed because the R2000.00 was only a deposit on the *lobolo* and a customary marriage would only come into being when the full balance of *lobolo* was paid.¹⁰⁷ The court, however, held that the marriage was valid, and that the plaintiff was entitled to succeed with her action for divorce.¹⁰⁸

In as much as the courts' decisions seem to illustrate that partial delivery of *lobolo* suffices to recognise a marriage as valid, there are some decisions that suggest that this would not always suffice and that full delivery of *lobolo* is required. In *Motsoatsoa v Roro and others*,¹⁰⁹ for example, the issue before the court was whether a valid marriage existed between the applicant and the deceased. The applicant's claim was that a valid marriage existed, basing her argument on the facts that *lobolo* negotiations had taken place, an amount of R18 000 had been agreed upon as *lobolo*, of which a part payment of R5 000 had been made. In holding that no valid marriage existed, the court observed that ' . . . the mere fact that *lobolo* was handed over to the applicant's family, significant as it is, is not conclusive proof of the existence of a valid customary marriage'.¹¹⁰ Similarly, in *Mithembu v Letsela* the court failed to recognise a marriage as valid despite evidence to the effect that part payment of *lobolo* was met.¹¹¹

From the foregoing discussion, we see that conflicting decisions have been reached by our courts in determining the validity of a customary marriage based on *lobolo*. Some courts' interpretation of s 3(1)(b) of the Act has directly challenged a woman's own perception of her marital status from married to unmarried, and in the process severely disadvantaged her, particularly from being a beneficiary to the deceased husband's estate.¹¹²

The conflicting court decisions as to whether full, partial or mere agreement on *lobolo* is a requirement or not to conclude a valid customary marriage demonstrates a lack of legal certainty, which attempts to protect the institution of marriage and not vulnerable parties.

¹⁰⁷ Ibid at para 7.

¹⁰⁸ Ibid at para 16.

¹⁰⁹ *Motsoatsoa* supra (n 75).

¹¹⁰ Ibid at para 18. See also *Ndhlovu* (n 75) to be discussed later under formal integration.

¹¹¹ See discussion of the case by Janse van Rensburg (n 5) at 9.

¹¹² See, for example, *Fanti* supra (n 75); *Mithembu* supra (n 28); *Motsoatsoa* supra (n 75).

(b) Formal integration of the bride

In discussing our courts' approach on the requirement of formal integration of a woman into her husband's family, *Fanti v Boto* is instructive. The court observed:

All authorities are in agreement that a valid customary marriage only comes about when the girl (in this case the deceased) has been formerly transferred or handed over to her husband or his family. Once that is done severance of ties between her and her family happens. Her acceptance by the groom's husband and her incorporation into his family is ordinarily accompanied by well known extensive ritual and ceremonies involving both families.¹¹³

However, just like with *lobolo*, all authorities do not seem to be in agreement. Court decisions are at odds as to whether formal integration of the bride is essential to the validity of a customary marriage or not. In *Mabuza v Mbatha*,¹¹⁴ where according to siSwati law, formal integration (*ukumekeza*) of the bride into her husband's family had not been met, the court held that this omission was not fatal and the marriage was recognised as valid.¹¹⁵ Similarly, in *Maluleke & Others v Minister of Home Affairs and Others*¹¹⁶ the court held that ' . . . although the parties also intended to celebrate the marriage by holding an *invume*, the fact that the celebration of their marriage in the form of *invume* did not occur does not, in my judgement, detract from that conclusion'.¹¹⁷ In both *Mabuza* and *Maluleke*, courts waived the requirement of formal integration and found that the marriages were valid. These two decisions then suggest that formal integration is no longer a valid customary marriage requirement.

Contrary to the approach adopted in *Mabuza* and *Maluleke*, in *Ndlovu v Mokoena, Department of Education and Department of Home Affairs*¹¹⁸ and *Motsoatsoa v Roro and the Department of Home Affairs* (discussed earlier under *lobolo*) the court held, respectively, that a customary marriage was invalid because the *ukumekeza* custom (formal delivery of the woman to the groom's family) had not been observed, and that it remained an essential requirement for the validity of a customary marriage. Similar

¹¹³ *Fanti* supra (n 75) at para 22.

¹¹⁴ *Mabuza v Mbatha* 2003 (4) SA 218 (C).

¹¹⁵ *Ibid* at paras 25 and 27.

¹¹⁶ *Maluleke and Others v Minister of Home Affairs and Others* [2008] JOL 21827 (W).

¹¹⁷ *Ibid* at para 16.

¹¹⁸ In *Ndlovu* supra (n 75), discussed briefly earlier, before the court there were two customary marriage certificates that were issued by the Department of Home Affairs, one presented by the applicant and the other one by the first respondent in the case. The first respondent's certificate (25 May 1991) predated that of the applicant (dated 25 May 1998). Both certificates were issued after the death of the deceased (2008) and by the same marriage officer. The court, however, found that there was no valid marriage due to non-fulfilment of the requirement of formal integration of the bride, despite the fact that there was a marriage certificate.

approaches are also seen in the cases of *Manona v Alice Funeral Parlour*¹¹⁹ where the court held that without formally handing over of the woman no valid marriage came into existence.

The contradictory approach taken by courts on the issue of formal integration of a bride potentially leaves women without legal protection or at least without legal certainty as to their position. It also leads us to Mwambene and Sloth-Nielsen's¹²⁰ question: 'have only some communities' customary laws changed – the siSwati in *Mabuza*'s scenario – to eliminate the requirement of formal delivery of a woman to her husband family?'¹²¹ How, and to what extent, does the courts' approach in a case like *Mabuza* protect women in other communities? How can legal certainty be promoted in the face of these contradictions?¹²²

IV ANALYSIS OF STATE AND COURT RESPONSES

It is clear that different responses to the need to comply with 'form' by both the state and courts have led to a lack of legal certainty.¹²³ The state and courts' responses show that, for the most part, a strict approach is taken to 'form'. In many cases, the failure of the parties to comply with a 'strict, black letter, definitional analysis' of the relationship has resulted in a finding that a valid marriage does not exist, and – as a result – no rights or obligations exist.¹²⁴ This prioritisation of form over function may, in part, be attributable to a legal culture, which has been described as conservative in jurisprudential outlook, where lawyers and judges are predisposed to interpret the law in a 'highly structured, technicist, literal and rule-bound' way.¹²⁵ In the light of such an observation, we are left wondering, precisely what lessons we can draw from this insight. What type of approach is likely to promote the protective nature of the family? We wonder whether the choices are quite that desolate; that is to say, is the protection of women's rights best achieved if the state and courts are given a wide discretion when dealing with the validity of a customary marriage?

¹¹⁹ *Manona v Alice Funeral Parlor* [2002] JOL 9717 (CK), as cited by Justice College (n 78) ch 3 at 25.

¹²⁰ Mwambene and Sloth-Nielsen (n 13) at 32.

¹²¹ *Ibid.*

¹²² *Ibid.*

¹²³ Mwambene and Sloth-Nielsen (*ibid.*) characterise the courts' response as 'a tendency to deal with customary law on a rather casuistic basis, with different results from time to time prevailing.'

¹²⁴ See Meyersfeld (n 29) at 276 who argues that the court has adopted the definitional approach in relation to cohabitation relationships. This overemphasis on form in relation to customary marriages has also been the concern of Chanock (n 43) and Van Rensburg (n 5).

¹²⁵ See K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *SAJHR* 146. For descriptions of the South African legal culture, in agreement with Klare, see P Langa 'Transformative constitutionalism' (2006) 17 *Stellenbosch Law Review* 351 and A van der Walt 'Legal history, legal culture and transformation in a constitutional democracy' (2006) 12 *Fundamina* 36.

We might echo it as a choice in ignoring formalities.¹²⁶ Reliance on judicial discretion and activism is certainly not a sufficient measure to protect women's rights.

In addition, both state and court decisions have shown that legislating requirements to conclude a customary marriage, coupled with contradictory courts' interpretation and official responses, frustrate the legal protection of women involved in these marriages. This is clearly not the objective of the Act, which states that it was passed in an effort to equalise the status of the spouses in the relationship.¹²⁷ How then should women, who believed that they were in a valid customary marriage, be protected?

V RECOMMENDATIONS

(1) *Adopting a functional approach to the relationship*

As intimated earlier, considering the function of these relationships seems to be a sensible solution, albeit one which has a much wider effect than on customary marriages alone. A possible problem with this suggestion in the context of customary marriages is that '... as a social fact, marriage and family are inseparable in African customary law.'¹²⁸ There is the possibility that, by relying on the function of the relationship, we somehow diminish the status of customary marriage. However, the same could be said of civil marriage in the Roman-Dutch law context, where family was defined in terms of the relationship that arose from the marriage.¹²⁹ In this context, while we should consider this reality, law – whether civil or customary – needs to adapt to the needs of a changing society. There is every reason to question the privileging of one type of family form, namely marriage, and to give secondary, or no status at all, to other family forms.¹³⁰

If we are to lose our obsession with form, the question that we need to ask is: do the relationships that are not recognised by the state and courts fulfil the same function as marriage?¹³¹ If the answer is in the affirmative,

¹²⁶ For example, *Mabena* supra (n 85) and *Mabuza* supra (n 53).

¹²⁷ See the preamble to the Act.

¹²⁸ T Nhlapo 'The African family and women: friends or foes?' 1991 *Acta Juridica* 135 at 136. See also Koyana (n 33) at 5.

¹²⁹ Nhlapo (n 127) at 135.

¹³⁰ See Kaganas and Murray (n 8) 116–117 where they question whether the privileging of marriage over other family forms is simply ethnocentric prejudice or whether there are justifications for denying recognition to certain family forms. It could also be argued that the functional approach does not really diminish marriage per se, but simply gets the state out of the 'marriage business' in so far as form is required.

¹³¹ The functional approach generally accepts that the family is the natural repository for inevitable dependency, and that the state's interest in marriage is to support a unit that will direct dependency away from the state. In other words, the supportive network that marriage creates bears the burden of dependency, without demanding public resources to do so. For a description (and a critique) of this view, see Fineman (n 11) at 2205 and 2214. See also, in general, J Millbank 'The role of "functional family" in same-sex family recognition trends' (2008) 20 *Child and Family Law Quarterly* 1.

then there is strong need to protect those people living in such a family relationship. This is the gist of the functional approach. While the functional approach to family law has, in the main, been called upon in relation to the debate on same-sex partnerships and cohabitation,¹³² there is good reason why we should question obsession with form in relation to customary marriages as well. As far back as 1991 Chanock did just this in relation to the debate on recognising the customary family unit, when he stated that ‘. . . defining a form of marriage is not really vital.’¹³³ Rather, he said, ‘we should concentrate on a family law system which embodies only those necessary protections to those vulnerable in family relationships, thereby abjuring cultural symbolism of any kind’.¹³⁴

In noting the inconsistent approach to form by the state and courts, an approach that focuses on function and dependency appears to be consistent with a true equality determination. We are asking for recognition that, even though a relationship does not comply with the ‘form’ of marriage, vulnerable parties in such a relationship should be protected. This protection follows if one accepts that such a relationship often plays the same social role as marriage and that the parties may provide support in the same way as married couples do. This approach accords with the protective rationale of family law, which requires that weaker parties should not be left impoverished ‘when long-term, mutually supportive, financially interdependent relationships end, whether or not they have formalised their relationships’.¹³⁵

While the Constitutional Court has appeared to endorse the functional view of the family, and endorsed the need to protect those vulnerable in family relationships,¹³⁶ the reality is that it has only been prepared to do so

¹³² See, for example, Millbank (n 130); N Polikoff ‘Law that values all families: beyond (straight and gay) marriage’ (2009) 22 *Journal of the American Academy of Matrimonial Lawyers* 85; and N Polikoff ‘Making marriage matter less: the ALI domestic partner principles are one step in the right direction’ (2004) *The University of Chicago Legal Forum* 354. On the local front, see Meyerson (n 24); Meyersfeld (n 29); as well as P de Vos ‘The “inevitability” of same-sex marriage in South Africa’s post-apartheid state’ (2007) 23 *SAJHR* 452. See the dissenting judgment of Sachs J in *Völs NO v Robinson* 2005 (5) BCLR 446 (CC) paras 163, 173 and 181. See also, in general, South African Law Reform Commission Discussion Paper 104 (Project 118) *Domestic Partnerships* (2003).

¹³³ Chanock (n 43) at 65.

¹³⁴ Chanock (n 43) at 68. See also Kaganas and Murray (n 8) 116–117.

¹³⁵ See Meyerson (n 24) at 295.

¹³⁶ See for instance *Daniels v Campbell NO* 2004 (5) SA 331 (CC) para 77 (per Moseneke J: ‘we must approach the issues in the present matter on the basis that family life as contemplated by the Constitution can be provided in different ways and that legal conceptions of the family and what constitutes family life should change as social practices and traditions change.’) See also the statement by Ackermann J in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) para 47 where he speaks about an ‘accelerating process of transformation [that] has taken place in family relationships as well as in societal and legal concepts regarding the family and what it comprises.’ See also the oft-repeated extra-curial statement of Albie Sachs (former Constitutional Court judge) in J Eekelaar and T Nhlapo (eds) *The Changing Family: Family Forms and Family Law* (1998) at xi: ‘[A]s far as family law is

by the yardstick of marriage.¹³⁷ The focus on equality, then, and attempt to ‘equalise’ customary marriage with civil marriage, has masked the real issue, being the obsession with marriage. For instance, the Constitutional Court has been accused of adopting a ‘constricted marriage model’¹³⁸ and ‘putting marriage on a pedestal’.¹³⁹

So, even if customary marriage remains as a cultural institution, there is good reason why the state and courts should come to the assistance of a party where dependency akin to that found in the traditional marriage relationship is found. In practical terms, this could mean that while a court would not ascribe the status of ‘marriage’ to the relationship, it could make a just and fair order to conclude the financial consequences when such a relationship dissolves. This would take us back to the ‘judicial discretion’ model originally proposed by the SALRC Commission in relation to unregistered domestic partnerships.¹⁴⁰ However, we would go one step further and advocate that this be the only recognised model, and leave ‘marriage’ per se to the private domain.¹⁴¹ Such a model would be applicable to *all* intimate relationships, then, not just customary marriages. If we are to reflect on s 31 of the Black Laws Amendment Act 76 of 1963 (where limited recognition was given to wives from customary marriages in actions dealing with the negligent causation of the death of the breadwinner) we see that the aim was to protect the woman and not the institution of marriage per se.

concerned, we in South Africa have it all. We have every kind of family: extended families, nuclear families, one-parent families, same-sex families. . . . Our families are suffused with history, as family law is suffused with history, culture, belief and personality.’

¹³⁷ The court has continually spoken about marriage in foundational terms – see, for example, *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) paras 30–31, 36–37 and 52 and *Vólk* supra (n 131). In both *Hassam v Jacobs NO* 2009 (5) SA 572 (CC) and *Daniels* supra (n 135), the court was willing to extend the protections of marriage to Muslim unions *not* because they were deemed to be functionally comparable to marriage, but because the court thought that these unions ‘deserved the “honorific” of marriage’ (see Meyerson (n 24) at 304).

¹³⁸ Meyerson (n 24) at 312.

¹³⁹ Meyersfeld (n 29) at 289.

¹⁴⁰ South African Law Reform Commission (Project 118) *Report on Domestic Partnerships* (2006) 366–367. Maithufi and Moloi (n 23) at 153 suggest that it would be preferable ‘if a single new measure can be enacted which regulates the solemnization, consequences and dissolution of all types or forms of recognized marriage in South Africa.’ While this suggestion will deal with the plethora of legislation and bills recognizing different types of relationships, it still places ‘marriage’ at its centre, and therefore potentially leaves women in intimate relationships out in the cold.

¹⁴¹ Cf the suggestion by Maithufi and Bekker (n 74) at 174–175 that ‘[t]he problems relating to proof of the existence of a customary marriage cannot be solved by bringing domestic partnerships within the ambit of the law.’ It is submitted that this suggestion relies on the continued reliance of marriage as the only recognised family form, as is evident in their consequent explanation: ‘A customary marriage is a marriage in its own right. By trying to resolve the lack of proof by applying to it the shenanigans of giving effect to “partnerships” would further confuse the issues.’

Critics may argue that the obvious problem with this ‘levelling down’ of all relationships in the context of customary law (at least in terms of state recognition), is that it ignores cultural value and meaning, which is protected by ss 15, 30 and 31 of the Constitution. As mentioned above, family and marriage in customary law are so closely interlinked, that recourse to function could potentially negate customary law. However, we do not think this is an insurmountable problem if one takes the approach that function will be ascribed to *all* relationships, not only customary unions. Particular religious or cultural communities will still be able to decide for themselves how to structure their institutions and give meaning to that institution.¹⁴² It simply means that the state will not play a part in building that meaning.

However given the way in which family law in South Africa has developed to date, turning to a functional approach appears to be a long-term project to be tackled not only in relation to all relationships, but also in the face of countless legislation and bills dealing with the recognition of different family forms.¹⁴³ In this regard, South Africa would do well to consider the work undertaken by the Canadian Law Reform Commission on family form and function,¹⁴⁴ which has been characterised as ‘the most comprehensive analysis . . . of the reasons to extend the reach of the law beyond marriage.’¹⁴⁵ This reform looks to recognise adult relationships characterised by emotional intimacy and economic interdependence – the very areas which can be shown by most women in the customary marriage decisions discussed so far.

(2) *Adopting the putative marriage doctrine*

If the functional approach implies a ‘bridge too far’ in the immediate future, it appears to us that the women in many of the relationships described above could have been protected if the principles of the putative marriage doctrine were applied.¹⁴⁶ The application of the doc-

¹⁴² This is in fact provided for in s 211(2) of the Constitution, in relation to traditional authorities at least. In this regard, the case of *Shilubana v Nuvamitwa* 2009 (2) SA 66 (CC) shows how the tribal authorities changed the custom of male-only chieftainship to bring it into line with the constitutional guarantee of equality.

¹⁴³ The recent SALRC discussion paper on the harmonisation of legislation in South Africa dealing with family law shows up the short-comings of different pieces of legislation dealing with relationships that often fulfill the same function in society, but have different consequences for the parties. See in general, the South African Law Reform Commission Discussion Paper 130 (Project 25) *Statutory Law Revision (Family Law and Marriage)* (2011).

¹⁴⁴ Law Commission of Canada *Beyond Conjugality: Recognising and Supporting Close and Personal Adult Relationships* (2001). See discussions of this report in N Polikoff ‘All families matter: what the law can do about it’ (2004) 25 *Women’s Rights Law Reporter* 205; and N Polikoff ‘Ending marriage as we know it’ (2003–2004) 32 *Hofstra Law Review* 201.

¹⁴⁵ Polikoff (2003–2004) (n 144) at 202.

¹⁴⁶ For a description of the origin of the doctrine, see Clark (n 27) at 167–168. In relation to customary marriages, see Janse van Rensburg (n 5) where she makes the suggestion that the

trine – as a stop-gap measure – seems an obvious solution, since (1) the doctrine is primarily concerned with equity; and (2) application of the doctrine would still allow for the recognition of customary practice, by bringing cultural evidence into court to establish whether the claimant *bona fide* believed that she had met the requirements of a customary marriage.¹⁴⁷

It is trite that the putative marriage doctrine operates where one or both of the parties *bona fide* believe that they entered into a lawful marriage, even if the marriage was *de facto* void due to non-compliance with an essential requirement.¹⁴⁸ The doctrine allows the court to consider the intention or *bona fides* of the parties in dealing with the patrimonial consequences of the partnership¹⁴⁹ and to order a division of assets accordingly. It also allows the court to declare the children of such relationship to be born of married parents.¹⁵⁰ The putative marriage doctrine would also allow for the *bona fide* spouse to inherit intestate.¹⁵¹ Indeed, a version of this doctrine was incorporated into official customary law in terms of reg 2 of the Regulations for the Administration and Distribution of Estates of Deceased Blacks,¹⁵² which provided in sub-s (d) that

[w]hen any deceased Black is survived by any partner –
 (iii) who was at the time of his death living with him as his putative spouse;
 . . . and the circumstances are such as in the opinion of the Minister to render the application of Black law and custom to the devolution of the whole, or some part, of his property inequitable . . . the Minister may direct that the said property . . . shall devolve *as if the (parties) . . . had been lawfully married* out of community of property, whether or not such was in fact the case . . . and as if the said person had been a European.¹⁵³

While this regulation is no longer in force,¹⁵⁴ there is no reason why a court could not invoke the doctrine in order to protect those in relation-

court in the *Mthembu* case could have found that the relationship in issue was a putative one. Smith (n 29) calls on the doctrine in the context of anticipated registered domestic partnerships under the Domestic Partnerships Bill, 2008.

¹⁴⁷ Laymon (n 13) at 376.

¹⁴⁸ Heaton (n 21) at 39–40.

¹⁴⁹ Here, in respect of the *bona fide* party, the court will give effect to either the default matrimonial property regime that would have applied to the marriage, or the intended matrimonial property regime of the couple.

¹⁵⁰ Cf *Mthembu* supra (n 28).

¹⁵¹ Sinclair and Heaton (n 14) 409; and Hahlo (n 31) 115–116. It should be noted that such an assertion has never been tested in court: see Smith (n 29) at 580.

¹⁵² GN R200 GG10601 of 6 February 1987, as amended by GN R1501GG 24120 of 3 December 2002.

¹⁵³ Our emphasis.

¹⁵⁴ The whole of GN R200 of 1987, as amended (n 150), was declared invalid in the *Bhe* supra (n 6) decision as per para 3 of the order set out in para 136 of the judgment. Such declaration of invalidity was not based on the application of the statutory version of the

ships that do not strictly comply with form. In this way, the court could have found that the woman in issue deserved protection, even if the court did not believe that one or more of the *essentialia* of the marriage had been met, including the payment of the full *lobolo* amount, or the formal integration of the bride.¹⁵⁵

It is not suggested that a court need follow the regulation's direction that the parties be deemed to be married out of community of property. Instead, the court should apply the doctrine as found in the common law, based on the parties' *bona fide* and intent in relation to the application of customary law to their marriage. The putative marriage doctrine could be very powerful in these circumstances since it focuses on intent and belief, and as such, could be judged in terms of whether the party believed she was entering into a customary marriage, rather than a civil marriage.¹⁵⁶ There is the concern that the doctrine could allow parties to assert an obligation based on 'ignorance of the law'. However, many successful putative marriage claims rely on some ignorance of the law.¹⁵⁷ In the context of parties in rural contexts, this is in fact the reality. Since the putative marriage doctrine is primarily concerned with equity, it would be short-sighted to deny a claimant relief based on ignorance. Furthermore, it is unlikely that this will be a real problem simply because of the threshold requirement that the belief is *bona fide* and related to a genuine system of customary law.¹⁵⁸

VI CONCLUSION

It is fairly clear that the application of the Act by both state and courts (as discussed above) has not led to the greater protection of women – especially in terms of recognising their marriage at the registration stage, and at the validity stage. Women have often been left out in the cold where requirements are not deemed to have been met, notwithstanding the long-term nature of their relationships.¹⁵⁹ This has been the case, even

common law to customary marriages, but rather on the male primogeniture rule, which applied in relation to matters of succession in customary settings.

¹⁵⁵ See Janse van Rensburg (n 5) at 12 who opines that the SCA could have considered the parties as putative spouses in terms of this regulation so as to keep with the principles of natural justice and equity, instead of an outcome that left the minor child of the union without an inheritance and without support.

¹⁵⁶ In this way, the court could still take cognisance of the customary law requirements.

¹⁵⁷ B Clark 'The law of marriage' in B Clark (ed) *Family Law Service* (2008) issue 24 para A-62. For example, *Ex Parte Soobiah: in re Est Pillay* 1948 (1) SA 873 (N) 881 (where the parties to a Hindu marriage failed to register their marriage where legislation required it), *M v M* 1962 (2) SA 114 (GW) 116 (where the parties were related to one another within the prohibited degrees of marriage), and *Ngubane v Ngubane* 1983 (2) SA 770 (T) (where one spouse's previous marriage had not been dissolved at the time of the subsequent marriage).

¹⁵⁸ Laymon (n 13) at 365.

¹⁵⁹ For example, in *Motsotsoa* supra (n 75), although the parties had lived together in the same house until the death of the deceased, their marriage was declared invalid due to so-called

in the face of obvious dependency and the relationship operating like a customary marriage. In a few cases, courts have been generous in their interpretation of customary law requirements for a customary marriage, either enforcing or negating customary law requirements and justifying this discretionary approach on 'developing customary law in accordance with the spirit, purport and ideals of the Bill of Rights'.¹⁶⁰ While the latter approach is laudable, the lack of a 'predictable pattern of adjudication' has its obvious shortcomings, especially with regard to the protection of women in situations where they are able to afford litigation on the issue.¹⁶¹ Women are then faced with contrary case decisions as to what the content of the customary requirements are for a valid marriage. The inconsistent outcomes by both state and courts then have the potential to create 'hybrid descriptions of customary practices that do not really exist in any culture'.¹⁶²

In many of the cases where women attempted to register their marriage or have such marriage recognised by the court, they believed in good faith that they were married according to customary rites.¹⁶³ In many of the cases they had been living together with the other party, bore children and shared conjugal relations.¹⁶⁴ It seems counterintuitive then to cut these women off with no rights whatsoever.

Our response to this dilemma has been twofold. We recognise that this response is dogged by the issue of real access to courts. This is a policy reform measure that needs to be seriously considered by the Department of Justice and Constitutional Development.¹⁶⁵ Ideally, South Africa should be looking towards a wholesale revision to family law in general, with emphasis on function and dependency. This wholesale revision will change the emphasis from the institution of marriage itself, to the nature of the supportive relationship itself. By doing so, vulnerable parties in the relationship are protected, as should be the case. This would, by its very nature, include those in customary-type settings. Realistically, we realise that this is a long-term project. Thus, in the meantime, following other legal commentators,¹⁶⁶ we suggest that the putative marriage doctrine should be applied where a customary marriage's validity is contested.

non-compliance with the requirement of formal integration. See also *Ndhlovu* supra (n 75) and *Fanti* supra (n 75).

¹⁶⁰ As was the case in *Mabena* supra (n 85) para 111. See also Janse van Rensburg (n 5) at 35.

¹⁶¹ Laymon (n 13) at 362–363.

¹⁶² *Ibid.*

¹⁶³ *Motsoatsoa* supra (n 75).

¹⁶⁴ *Ibid.*

¹⁶⁵ The issue of access to justice is simply too large to ignore, but too complex to discuss here. Access of a geographical, financial and educational form needs to be considered.

¹⁶⁶ Laymon (n 13); Janse van Rensburg (n 5); Smith (n 29).