REFORM OF CUSTOMARY MARRIAGE,
DIVORCE AND SUCCESSION IN
SOUTH AFRICA

Living Customary Law and Social Realities

Summary Research Report

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1. Introduction

In this report we discuss the findings of our research on the operation of the Recognition of Customary Marriages Act 120 of 1998 (RCMA) and the rules of succession developed by the Constitutional Court in Bhe v Magistrate, Khayelitsha (the Bhe rules). We also make recommendations on how to improve the implementation of these two laws (hereafter referred to as the new laws).

1.1 Aims and methodology of the study

The study sought to explore how the new laws were being implemented through the eyes of individuals living according to customary law, a range of state institutions, including the courts and the Department of Home Affairs, and traditional leaders. The aim was to unearth both compliance with and dissonance from the RCMA and the Bhe rules. The ultimate goal of the research was to investigate whether and to what extent the new laws of marriage and succession are protecting the rights of the people for whom they were intended, and to offer recommendations for meeting any challenges identified.

Under the new constitutional dispensation, legal reform in the areas of customary marriage and succession created new regulations for the personal lives of many individuals in South Africa. Although a number of studies have investigated the success of the laws regulating marriage, divorce and succession, they have very seldom provided a holistic account of the implementation of the new laws in the different areas of marriage, divorce and succession, and from the perspective of the different social actors involved. The report highlights several significant issues that require immediate attention in order to improve the implementation of the laws.

The research was conducted under the auspices of the DST/NRF Chair in Customary Law, Indigenous Values and Human Rights (the Chair) at the University of Cape Town by the following researchers: Chuma Himonga, who led the study and also holds the Chair; Elena Moore of the Department of Sociology at the University of Cape Town; and the National Movement of Rural Women under the directorship of Likhapha Mbatha.

The study is one of the Chair’s major projects and is in its second phase of research. The study began in 2011. It soon became clear that understanding the social reality of customary law would require not only a combination of legal and sociological input but, most importantly, input from the communities and individuals living according to customary law. Therefore an interdisciplinary research project was initiated involving the fields of customary law, legal pluralism and sociology. Himonga, Moore and the National Movement of Rural Women conducted 20 months of fieldwork in six provinces.

The methodology employed in the study is discussed in detail in chapter 2 of the book Reform of Customary Marriage, Divorce and Succession in South Africa.

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1 2005 (1) SA 580 (CC).
1.2 The background and features of the new laws

Until apartheid was dismantled in 1994, the South African legal system was characterised by dualism in the laws governing the institution of marriage and the administration and devolution of estates. This legal system was fashioned to discriminate between black South Africans and other racial groups in these areas of law. Generally, official customary law, most of which comprised an oppressive form of customary law developed by the colonial and apartheid states as the backbone of segregation policies, applied to black people, while common law applied to other racial groups.

Moreover, the customary law of marriage was regarded as inferior to common law, as state law hardly recognised customary unions, unlike marriages entered into in accordance with the Marriage Act 25 of 1961, which were fully recognised. A similar situation prevailed in the field of succession where customary law generally applied, save for the limited application of the common law to the estates of black people in terms of relevant conflict-of-law rules. This differentiation also applied to the administration of estates: the estates of black people were administered by magistrates’ courts while the estates of members of other racial groups were administered by the Master of the High Court.

The new constitutional dispensation was irreconcilable with all forms of discrimination in the legal system. The inclusion of the Bill of Rights in the interim Constitution (Act 200 of 1993) and the final Constitution of 1996 brought racial and gender discrimination in law under severe scrutiny. Section 9(1) of the final Constitution states that ‘Everyone is equal before the law and has the right to equal protection and benefit of the law’, while s 9(3) declares that the state may not unfairly discriminate directly or indirectly against anyone on several grounds, including race, gender, sex, age and status. The Bill of Rights also guarantees a number of rights for children, and includes the principle that the best interests of the child are the paramount consideration in all matters concerning the child. South Africa has also ratified international treaties that prohibit gender discrimination and the marriage of children. With these national and international regimes of rights, an era of legal reform began in the fields of customary marriage and succession. Parliament enacted the Recognition of Customary Marriages Act (RCMA) in 1998. This Act eradicated the principles under the Black Administration Act\(^2\) and other forms of official customary law\(^3\) pertaining to the legal status of customary marriages. The RCMA also improved women’s access to the financial resources of a marriage, and provided for adjudication of matrimonial disputes by superior courts and regional courts only.

Specifically, the RCMA addresses the following aspects: the requirements for a valid marriage; the registration of marriages; polygynous marriages; the equal status of spouses; the proprietary consequences of marriage and

\(^2\) Act 38 of 1927 (now substantially repealed).
\(^3\) Such as, for example, the legal principles of customary marriages that are contained in precedents and the Natal Code of Zulu Law Proc R151 of 1987.
divorce; the intervention of superior courts and regional courts, in divorce processes rather than divorce proceedings in traditional courts or in terms of private arrangements within the spouses’ family; and the rights and obligations of spouses with regard to their children. Significantly, with regard to proprietary consequences, the Act extends the matrimonial property regimes of civil marriages entered into in terms of the Marriage Act of 1961 to customary marriages as well. Therefore a monogamous marriage has as its default matrimonial proprietary regime a marriage in community of property and of profit and loss, unless this regime is excluded by an antenuptial contract, while the accrual system also seems implicated where the marriage is out of community of property. The proprietary regimes of polygynous marriages are subjected to intense regulation with a view to protecting the interests of the co-wives.

In the field of customary succession, the alignment of customary law with constitutional rights resulted from changes introduced by the Constitutional Court in 2004, when it abolished the infamous principle of male primogeniture in official customary law on the ground that it was discriminatory and contrary to the Constitution. The Constitutional Court extended the application of the Intestate Succession Act of 1987 to estates previously regulated by customary law, with modifications aimed at accommodating polygynous marriages. The main feature of this Act for present purposes is provision for surviving spouses and children as priority heirs to the exclusion of other relatives of the deceased, who inherit only if the deceased is not survived by priority heirs. The Constitutional Court decision also introduced a uniform system of administration of estates for all estates under the control of the Master of the High Court. Previously, estates of black South Africans were administered separately under the inferior system managed by magistrates’ courts.

The Bhe rules were to remain in operation until Parliament enacted legislation to regulate customary succession. In 2010, Parliament enacted the anticipated legislation, the Reform of the Customary Law of Succession and Regulation of Related Matters Act of 2009, which provides for heirs to intestate estates and the distribution of these estates. The Act came into force on 20 September 2010. From that date, the rules technically ceased to exist. The 2009 Act has simply reproduced the Bhe rules, especially in its application of the Intestate Succession Act. For this reason the research findings on the operation of the Bhe system of intestate succession rules in this report are relevant as indicators of how certain aspects of the 2009 Act will operate in practice.

In sum, the roots of the enactment of the RCMA and the Bhe rules lie in the birth in 1994 of a new constitutional order with an expansive Bill of Rights. Apart from the recognition of customary marriages, the alignment of customary law to constitutional principles, especially the principles of equality and non-discrimination, is a significant motivation for the reform of the laws regulating customary marriages and succession by the legislature and the courts. The new rules incorporated a large number of common-law principles.
This report details how these new laws are being implemented, indicating the areas of both compliance and non-compliance. In this way, the report reveals the extent to which the state protects the lives of people living according to customary law, and considers how well the principles in the Constitution are being upheld. Our findings indicate that for various reasons these laws are not being implemented consistently or effectively. The reasons are discussed in the following sections. We also make recommendations for improving the implementation of the laws.

1.3 The argument of the report
The main argument of this report is that the state is responsible not only for ensuring principles of gender equality in the areas of marriage, divorce and succession, but, most importantly, it is responsible for supporting people’s access to material resources. As Mnisi Weeks has observed, while it may have been appropriate for earlier advocacy to demand legal rights, the continuation of the same demand is now overlooking other significant issues. The rhetoric of rights and the provision of rights do not guarantee that vulnerable spouses and family members who want to access a share in marital property, for example, can do so. Furthermore, the law may provide rights, but if the state does not assist individuals in claiming the right, it is an empty right. The acquisition of legal rights may over-simplify complex power relations and may create the impression that the state has done enough to overcome power differences. The fact that women now have the right to institute divorce proceedings and claim matrimonial property has not stopped the informal regulation and dissolution of customary marriages. This is not always because dependent spouses are unaware of their rights, although this may be true in some cases; rather, it is because the law and the institutions that administer it treat the women and men involved as opponents, without considering the wider economic and social context in which the relationship exists. The regulation of customary law matters should therefore become more responsive to the ‘real’ situation of people’s lives. We argue that the recommendations we make in this report are necessary to improve people’s access to resources and to more secure livelihoods, not only to improve their access to legal or equality rights.

2. Overarching findings
The major overarching findings and recommendations about the implementation of the new laws will be discussed in this section. Thereafter we discuss in more detail the compliance with and dissonance from the new laws for the various topics investigated, and we offer recommendations to deal with the challenges identified.

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4 Mnisi Weeks ‘‘Take your rights then and sleep outside, on the street’’: Rights, fora, and the significance of rural South African women’s choices’ (2012) 29 Wisconsin International Law Journal 288.
5 Mnisi Weeks (n 4) 290.
2.1 Knowledge of the laws

In every area of our investigation, participants clearly demonstrated a lack of knowledge about the legal system, legal and state institutions, and legal concepts and principles.

In many cases, the participants did not know that they had a choice of how they could register their marriage — ie according to which legal system — and they demonstrated how unaware they were of the differences between or the consequences of registering a marriage according to civil law or customary law. This lack of knowledge led to confusion about registering a marriage with traditional leaders and the Department of Home Affairs (DHA), and the belief that the DHA is for the registration of civil marriages only. Some of these problems were identified in earlier research carried out shortly after the commencement of the RCMA. Fifteen years after the passing of the Act, these problems are still prevalent. This demonstrates the systemic nature of the state’s failure to reform customary marriage.

In other cases, participants were unable to differentiate between the marital property regimes they could choose from and were therefore unaware of the different consequences flowing from such regimes if a marriage is dissolved. There are significant consequences of such gaps in the understanding of legal processes. For instance, women receiving divorce summonses would sign ‘papers’ without understanding the legal consequences of their actions. In another instance, a wife who had been deserted and who no longer knew where her husband was did not know that she could still institute divorce proceedings.

The problem of lack of knowledge of the law can be solved if the state continues to offer broad education to the public regarding the changes in the law and the specific attributes of the RCMA and the law governing succession. A good practice is the display of posters on the changes to the law of succession brought about by Bhe at the entrances of some of the premises of the Masters of the High Court. Our findings show that members of the public turn to different state institutions, seeking information about their rights. The state could therefore offer this information at a range of state institutions.

2.2 Ill-conceived definitions of customary law events

The study found that the RCMA and the Bhe rules have inadequately addressed how civil law remedies they have incorporated apply to customary law. Concepts such as ‘in community of property’, ‘antenuptial contracts’, ‘joint estate’, ‘accrual system’, ‘inheritance’, ‘matrimonial home’, and so on impose definitions on customary law events and matters that are ill-conceived.6 For example, the civil law concept of inheritance takes precedence over ‘need’ as the primary determinant of benefit from family property under customary law. Moreover, community of property makes little sense in a

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context where the majority of the intended beneficiaries live in poverty.

Needless to say, this property system is impossible to apply in a polygynous marriage because it entails that each spouse obtains an undivided and indivisible half-share in all property acquired and all liabilities incurred by either spouse.

The consequence of inadequate attention by the RCMA and the Bhe rules to how civil remedies apply to customary law is evident from the questions that individuals had concerning, for example, marital property regimes. Participants in our research were unsure of who had a claim to a matrimonial home, particularly where the home originally belonged to the husband's family through inheritance. Thus, what this and other studies\(^7\) show is that it is not sufficient for the state to simply add civil law concepts or remedies to the realm of customary law without radically altering the meanings and practices embedded in this system of law. In order to rectify this problem, the RCMA and the succession rules should be amended and should draw upon other mechanisms found in customary law on the ground. However, this solution requires further research to identify the precise and appropriate mechanisms for this purpose.\(^8\)

2.3 Parallel formal and informal legal processes dealing with customary matters

The study found that parallel state and informal systems of regulation of customary marriages, divorce and succession are taking place. For example, there are non-designated RCMA officers (who are traditional leaders) registering marriages without taking their records to Home Affairs, thereby creating two systems of registration. Similarly, marriages continue to be dissolved informally, contrary to the provisions of the Act, in the same way as estates are administered by families outside the framework of the Bhe rules. The major problem is that the operation of these parallel systems is uncoordinated and unrecognised by the state. Not only does this cause confusion among different actors but, in some cases, the state leaves out local services and community-based solutions that would otherwise serve the needs of the people, particularly the needs of people in rural areas. For these reasons, we recommend that some aspects of these parallel systems be recognised and co-ordinated with the central state system. The power of the law and the implementation of the new laws may be enhanced by other local modes of access and by extending the law into other state institutions. For instance, the state could empower actors within the DHA and the South African Police Service to provide people with the correct information regarding the RCMA and its consequences. We will return to recommendations for the recognition of specific areas of parallel regulation in the various sub-headings in the next section.

\(^7\) Ibid.

\(^8\) The ongoing empirical studies by postgraduate students on various aspects of the RCMA and the Reform of Customary Law of Succession and the Regulation of Related Matters Act under the auspices of the Chair will contribute to this endeavour.
3. Findings on various topics

In this section we discuss the findings on the implementation of the new laws in the areas of contract of marriage, divorce, succession, and dispute resolution.

3.1 Contracting a customary marriage

The research on the contract of marriage focused on the requirements for a valid customary marriage entered into after the commencement of the Act, the registration of marriages, polygyny, and equality of spouses in marriage.

3.1.1 The core requirements for a valid marriage in the courts and in practice

The study found that the courts require the payment of lobolo and the integration of the wife into the husband’s family for the conclusion of a valid marriage. In some cases, part or full payment of lobolo is a prerequisite for concluding a valid marriage, while the agreement to pay is sufficient in other cases. These requirements for a marriage are the same as the requirements in living customary law. Thus, any interpretation of the provisions of the RCMA that excludes lobolo as a requirement for a valid marriage is out of sync with both the practice of the courts and living customary law. The study also found that both men and women attach a great deal of significance to lobolo. This finding supports existing research evidence. The centrality of lobolo in the negotiation process is connected to its multifaceted significance, some of which has human rights connotations, especially for women who view lobolo as a mark of respect.

The view that actual payment is required for the validity of the marriage contributes to the processual nature of the marriage, which in turn creates some disadvantages and challenges for the parties to the marriage. Some of these disadvantages are gendered and affect women more greatly. This is particularly problematic when proof of a valid marriage is required. It is also problematic in light of the escalating amounts of lobolo, which some men are not able to pay for long periods of time. In order to minimise these problems we argue that an agreement for the payment of lobolo is sufficient for the conclusion of a valid marriage. A mere agreement to pay lobolo should therefore be recognised as a development of customary law that accords with the spirit, purport and objectives of the Bill of Rights (s 39(2) of the Constitution). However, this argument is premised on the understanding that the parties and their families are free to determine the terms of the agreement and that these terms must be observed.

There is also evidence of a second core requirement of marriage, namely, the integration of the wife into the family of her husband.

The noted regularised core requirements for a valid marriage arguably represent living customary law. It is therefore acceptable for the courts to

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9 Shope ‘“Lobolo is here to stay”: Rural black women and the contradictory meanings of lobolo in post-apartheid South Africa’ (2006) 20 Agenda 64–72.
confirm this repertoire of norms by developing customary law as provided for in s 39(2) of the Constitution.

3.1.2 Lobolo as symbolic capital

This study confirms existing research on the significance of lobolo as a source of symbolic capital connected to ‘grounded’ notions of women’s right to dignity and respect as perceived by some women who adhere to the practice.\(^\text{10}\) Although black women are not a homogeneous group with identical views about lobolo, this study has shown that there is a distinct group of women whose voices were not heard by the South African Law Commission and human rights lobbyists, who advocated the exclusion of lobolo from the marriage requirement provisions of the RCMA.\(^\text{11}\) This finding points to the importance of the proper representation and participation of everyone in customary law reform processes that affect them, especially women who are ‘at the centre of the struggle surrounding the definition and use of tradition’.\(^\text{12}\)

3.1.3 Vulnerable position of minors in marriages

The study found a view that favoured a parallel system of marriage for minors. According to this view, minors could marry in accordance with customary law and could register their marriages in terms of the RCMA after attaining majority. Clearly this view is not only contrary to the Act, which does not envisage a parallel system of marriage, but it sanctions child marriages, which contravene other laws in the country, such as s 3 of the RCMA and the Children’s Act.\(^\text{13}\)

3.1.4 The good and bad practices of the courts

The study found both good and bad practices adopted by the courts in their interpretation of the provisions of the law on the requirements for a valid marriage. The first practice concerns the consent of the parties to the marriage required by the RCMA. The study found that the courts make two assumptions when applying this requirement, both of which may not reflect the reality. The first assumption is that the consent of the family to the marriage implies the consent of the parties. The second is that the participation of the parties in the negotiation of the marriage implies their consent to their marriage.\(^\text{14}\) However, the first assumption overlooks the dual nature of consent to a customary marriage in which both the prospective spouses and their respective families must give their separate consents. With regard to the second assumption, this study found that parties to the marriage do not generally participate in the negotiation of lobolo, one of the critical processes leading to

\(^{\text{10}}\) Shope (n 9).


\(^{\text{12}}\) Shope (n 9) at 65.

\(^{\text{13}}\) Act 38 of 2005. It should be noted that this Act also applies to the children born in customary marriages.

\(^{\text{14}}\) See Justice College Customary Marriages Bench Book (February 2004) 3–16.
the agreement to conclude a customary marriage. There is therefore no sound basis for these assumptions. This leads to the recommendation that the state must pay attention to the question of consent of the parties to the marriage to ensure that vulnerable members of families, including children, are protected from forced marriages.

Secondly, there is evidence from the findings that the ghosts of the common law and official customary law continue to creep into the adjudication of post-RCMA disputes. For example, in some post-RCMA cases the courts employed the technique of precedent in exactly the same way as they would do in hearing a case under the common law, to which that doctrine belongs. In other cases, the courts relied on precedent from pre-RCMA marriage, thereby importing pre-constitutional dispensation official customary law into the RCMA domain. The courts need to be alert to the ways in which their practices are not complying with the RCMA. They must also be aware that customary marriage processes and rituals differ from one ethnic group to another. In these circumstances, the courts cannot always simply take one case and apply it as precedent in another case.15 Thirdly, in some cases, the courts disregarded Western influences on the marriage process as ‘smaller parts of the ceremonies’. The courts should take cognisance of the fact that customary law evolves and that the process of its evolution may be influenced by other cultures. The courts should also be encouraged to learn from other courts that recognise the idea of the evolution of customary law. In this respect, the study found that some courts have relied on the evolving nature of living customary law to determine the requirements of a valid customary law marriage within the context of changing social and economic conditions, such as those due to urbanisation.

Finally, the study found exemplary decisions that the courts should emulate. One of these is Southon v Moropane,16 which concerns the attention the judge paid to the details of the case in determining the validity of a customary marriage. Other examples are the Constitutional Court decisions in Gumede v President of the Republic of South Africa17 and Mayelane v Ngwenyama,18 which support the principle of equality in customary marriages. These exemplary cases should be used as ‘good law’.

3.1.5 The role of the family in the contract of marriage

It is evident from both the court decisions reviewed and the practices of people on the ground that meeting the requirements of a customary marriage under the RCMA involves not just the prospective parties to the marriage but their families as well. The involvement of the families is central to the negotiation of the marriage, particularly with regard to lobolo and the handing over of the wife to her husband’s family. The predominance of the family and  

16 Case No 14295/10 [2012] ZAGPJHC 146 (18 July 2012).
17 2009 (3) BCLR 243 (CC); 2009 (3) SA 152 (CC).
18 2010 (4) SA 286 (GNP).
the greater role played by it in marriage negotiation than by the parties to the marriage is also evident from cases in which neither of the prospective spouses took part in the negotiation of their marriages, leaving the whole process to their families or elders. From the perspective of the role of the family as found by this study, the suggestion in existing research that the parties to a marriage can change the requirements for a marriage cannot be supported. However, we argue that customary law should be developed in accordance with s 39(2) of the Constitution to permit parties who wish to be involved in the negotiation of their marriages, especially with regard to lobolo, to do so, and thereby to exercise their right to fully consent to their marriage as required by the RCMA. Arguably, the issue of consent evokes the constitutional right to dignity to which parties to a marriage are entitled. The centrality of lobolo to the marriage also raises its significance to the proof of the existence of the marriage. Yet, the prospective parties to the marriage — to whom it would be left to prove the existence of the marriage in certain instances, especially for inheritance purposes — are excluded from the negotiation process that determines both the actual payment and the amount to be paid. This aspect of living customary law exacerbates the uncertainty associated with the existence of a customary marriage. In most cases, this is to the disadvantage of women as widows or as claimants of the material resources of the marriage upon divorce. The living customary law concerned must therefore be developed to facilitate proof of the existence of a marriage.

3.1.6 The role of traditional leaders in marriage negotiation
The study found that traditional leaders were not involved in the negotiation of marriages, but in most cases they were informed after the negotiations had taken place. In a few cases, the chief played the role of a witness to the negotiations and the conclusion thereof through the registration or physical inspection of lobolo cattle for the parties to the marriage who drove the lobolo cattle to the chief’s kraal for this purpose. These roles make traditional leaders potential sources of evidence in matters concerning the proof of the existence of a marriage in the event that the validity of a marriage that they were informed about or witnessed is disputed. Our argument is that traditional leaders may play a positive role in some aspects of the implementation of the RCMA.

3.1.7 Broader strategies for proving the existence of customary marriages
The findings of this study on the way marriages are negotiated in practice, particularly with regard to the involvement of the family, suggest that the Department of Justice (through the Bench Book) should direct the courts to pay particular attention to the involvement of the families of the parties in

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issues concerning proof of a valid marriage. Furthermore, if the courts took account of the public nature of the marriage, they could call upon a wider range of witnesses to validate the existence of the marriage.

3.1.8 A mixed bag of normative repertoires

Finally, the study found that, in a society characterised by cultural and legal pluralism such as South Africa, there is always the possibility of the interaction of the various cultures and different norms whereby people mix the various cultures and legal norms in their intercourses. In this respect, some people combined elements of traditional culture and religion, Christianity and western culture, and state rules and procedures in the conclusion of their marriages. Thus, the normative repertoires regulating marriages at ground-level may be something other than what state legal policy envisages or anticipates. Therefore research into, and monitoring of, how people conduct their marriages is imperative if the state is to realise the objectives of its customary marriage laws. The state should promote rather than hinder such research in any way.

3.2 Registration of a customary marriage

The study found a number of issues concerning the registration of marriages that require attention to improve the system of registration of marriages. A discussion of these issues and recommendations for improvement follow.

3.2.1 Confusion over different types of marriage

There is considerable confusion among married couples and some DHA officials about the differences between customary marriages and civil marriages and about the registration process and the legal regulation of both marriages. Most importantly, registering a marriage with the DHA is strongly associated with civil marriages, and civil marriages are thought to provide better legal protection. The findings make a case for questioning whether DHA officials are prioritising the registration of civil marriages at the expense of customary marriage registrations.

The findings also show that officers registering marriages do not distinguish between registering a customary marriage and registering a civil marriage. If the same officer is registering both types of marriage, the possibility of confusion is likely to remain. We suggest that there needs to be a greater distinction made between the two registration processes. There should be separate systems of registration, and separate registers for customary marriages and civil marriages. This would avoid confusion for users and staff.

The study also found, albeit only from the perspective of the public, that officers registering customary marriages are unaware of the requirements for registering a customary marriage. We did not get access to the DHA, so we were unable to verify this finding from the perspective of the officers who are registering marriages. However, it is clear that customary marriages are not being registered properly. The registration of customary marriages (and civil marriages) requires staff who are skilled in registering customary marriages,
and who understand the requirements for registering a customary marriage, as opposed to registering a civil marriage.

We recommend, therefore, that the state should train registering officers working within these two systems to be able to identify and register the correct marriage. We also recommend that the DHA should grant full access to researchers to review the processes involved in registering customary marriages.

3.2.2 The roles of traditional leaders and family members

Our research has uncovered the pivotal role that traditional leaders (non-designated RCMA officers) play in creating systems of ‘registration’ to provide protection for mainly female spouses in customary marriages. This encouraging finding leads us to recommend that traditional leaders and their role in the registration of marriages should be recognised. Their operations will, however, need to be co-ordinated with the central system of registration. The RCMA does not expressly state who can be designated as a registering officer. Given that traditional leaders and churches are playing a role in registering customary marriages, it would be beneficial to build on this. While we could encourage more people into the central state system, it is unlikely, based on our findings, that this system could cater for the needs of all people living under customary law.

The findings also show that traditional leaders do not generally witness the conclusion of a marriage. In most cases, these leaders are informed of a marriage later, but they are not witnesses to its conclusion. Therefore we recommend that traditional leaders should not be required by the DHA to be witnesses to the conclusion of a valid marriage for registration purposes. Furthermore, to expect traditional leaders to accompany members of the public to a government institution to register a marriage amounts to over-regulation. This clogs the system and forces people to incur undue expenses. It is sufficient for members of the family to be present because they are the people directly involved in the conclusion of a customary marriage. Members of the family can be required to be present to testify to the existence of a marriage. In this way what is happening in practice would accord with the official registration system.

Since not all participants obtained lobolo letters at the point when a valid marriage came into existence, lobolo letters should not be required by the officials to register the marriage. Requiring individuals to produce a lobolo letter at the time of the marriage registration amounts to creating requirements for marriage that do not exist on the ground. These requirements act as a deterrent to registering a customary marriage. It should be sufficient to have a declaration by the negotiators, in the presence of an official, outlining the lobolo situation. The declaration should be an agreement of some kind as to how the lobolo is being handled, ie what was agreed at the negotiations, not a declaration that lobolo has been paid. A declaration by the family members should be sufficient and can act as an agreement as to how the lobolo is being handled.
3.2.3 Registration and the processual nature of customary marriage

The findings demonstrate that, although a customary marriage is generally conceptualised as a process, there is agreement that at a specific point in time, the marriage could be registered, as it is recognised as valid by the parties, the families and others in the community. The findings suggest that, in some cases, this point is reached when (a) lobolo has been agreed upon, and (b) the wife has been transferred to the husband’s family. For others, the point is reached when (a) full lobolo has been paid, and (b) the wife has been transferred. Some people link registration of a marriage with the transfer of lobolo. Given the important role that lobolo plays, and the fact that it can be paid over a long time, a strict time requirement for the registration of a marriage is problematic. Some people are unable to meet this time requirement. Currently there is no penalty if a marriage is not registered within three months of it coming into effect. It is unclear what is achieved by insisting that registration occurs within three months. The findings show that this requirement is unrealistic as some people link registration with the complete transfer of lobolo and are therefore unable to meet this time requirement. We recommend that Parliament reconsiders the time for registration and introduce an amendment to the RCMA that makes the registration period open-ended. We argue that there are more important things in the marriage process than mere registration, and creating additional barriers to registration defeats the objective of the requirement.

3.2.4 Requirement of consent of both parties to register

There is still a discrepancy between the requirement in the Act for the consent of both parties to register a customary marriage and the requirements of the DHA. There is also a discrepancy between the Act, the DHA website, and the Bench Book regarding who can register the marriage. We recommend that one spouse should be able to register the marriage. Registration does not determine whether the marriage is valid or not. It is merely a statement that ‘something’ took place; it is not irrefutable proof of the existence of a valid marriage. The individuals involved can still bring evidence to argue that certain requirements for a valid marriage were not met.

3.2.5 Registering pre-RCMA marriages

It appears that pre-RCMA marriage certificates are not recognised by some organisations, including insurance companies. We argue that pre-RCMA marriages that were registered according to the systems then existing (eg the Transkei or KwaZulu-Natal Codes) and that have certificates of marriage must be accepted. The parties holding these certificates should not be punished retrospectively. At a more general level, the findings show that proving the existence of a valid marriage to insurance companies is problematic.

3.3 Regulating polygynous marriages

Two issues arise with regard to the regulation of polygynous marriages. These are the registration of the marriages at the DHA and the contract for the regulation of the proprietary consequences of the marriage.
3.3.1 Registration
The registration of polygynous marriages is in line with what people on the ground regard as the proper way of organising and arranging affairs between a husband and his wives in a polygynous marriage. The research participants believed that the state should be involved in regulating these affairs and there was widespread consensus that polygynous marriages should be registered. However, our findings, in line with existing research evidence, demonstrate that husbands are not registering polygynous marriages. More specifically, we found that the first wife played a key role in the registration process.

The South African Law Commission failed to consider what implications this might have for implementation of the RCMA. In particular, it failed to consider the challenge of obtaining the first wife’s consent and the impact that this would have on the entitlements of the second and subsequent wives. Based on our findings, more serious consideration should be given to the role of the first wife, as this has significant consequences. The findings demonstrated that in some cases a first wife is responsible for finding a second wife for the husband. In this case should she also be responsible for ensuring the registration of the second marriage? The answer to this question requires further investigation as it raises complex issues about the rights of the wives (the first and subsequent wives).

3.3.2 The contract to regulate matrimonial property
The study has shown that the registration procedures for spouses in polygynous marriages have had little impact. Included in these procedures are the requirements of s 7(6), which compel the husband to obtain a High Court-approved contract to regulate the property of the polygynous marriage. Very few of these contracts have been registered.

The issues concerning the process in s 7(6) suggest that this process should not be removed from the court altogether. Instead, because some of the practices on the ground already regulate polygynous marriages in ways that support the RCMA, the process should be opened up to extra-judicial regulation. For example, a person wanting to marry polygynously could marry at the DHA, and the registering officer could be responsible for ensuring that the contract is entered into at that point. At the time of the registration of the marriage, the registering official could be made responsible for ensuring that the parties actually meet to discuss and enter into a contract. The agreement could be recorded in the certificate and could be made an appendix of the registration records.

In the case of contracts obtained through the court procedures, currently the husband is solely responsible for bringing an application to the court for the registration of a contract. The wives only have the right to be joined to the application. This approach places too much power in the hands of the party who has nothing to lose if the contract is not concluded, and fails to serve the needs of the vulnerable — in this case, the women. We therefore recommend that the law should be changed to allow either of the wives (the existing wife
3.4 Equality in marriage

The protection of the constitutional principle of gender equality in marital relationships is a key objective of the RCMA. Three key findings regarding gender equality in marriage are worthy of note. First, married individuals do not sign an antenuptial contract, with the result that nearly all marriages under customary law are now concluded in community of property and of profit and loss by default. However, the parties do not have detailed discussions about their matrimonial property regimes.

This scenario is attributable to the prospective couples’ lack of awareness of the different marital property regimes available when entering into a marriage, and the absence of appropriate support services to assist them in this regard. In some cases, spouses who register their marriages receive information about proprietary regimes from DHA officials, but this information is not sufficient for them to make informed decisions about their choice of property regimes or to take appropriate steps to claim their rights when necessary. These challenges potentially disadvantage many women if they divorce or when a partner dies, and thus weaken the constitutional protections intended to benefit women with regard to their property rights.

Secondly, while both legislation and court decisions have sought to secure gender equality in marriage, personal status and the proprietary consequences of marriage, in practice, this ideal is still a remote prospect.

Thirdly, perceptions on gender equality are mixed. While some participants support gender equality, others do not. The latter view particularly reflects the durability of views that deny wives any control or role in decision-making, thereby allowing husbands to maintain exclusive power in the regulation of family affairs.

These findings, particularly the first and second, underscore the need for mechanisms to make the public more aware of the nature of the customary law marriage regime introduced by the RCMA, in order to enable individuals to claim their gender rights guaranteed by the Constitution. There is also a need to provide support services to assist people wanting to enter into customary marriages to make informed decisions about the type of matrimonial property regime they should enter into. It is no use for the government to create highly technical and complex systems of marriage with regard, especially, to matrimonial property, and to expect that poor people, with hardly any formal education, can navigate these legal regimes to their benefit.

3.5 The dissolution of a customary marriage

The dissolution of a customary marriage occurs first at the local level, between individuals and families. This follows the pattern before the adoption of the RCMA, whereby divorce occurred by way of agreement between the
families of the spouses. Following the process of dealing with the breakdown at the local level, some parties will take the dispute to court. At both local and state level, the findings demonstrate the consequences of not implementing the RCMA in a way that can resolve the dissolution of marriage in line with the objectives of the RCMA. The findings show that the parties face several barriers in getting to the courts, while our investigation of the court files shows that the courts do not always apply the correct legal principles when granting divorce orders to individuals who reach the court. While we outline how the courts can overcome the shortcomings in their implementation of the RCMA, we also suggest that the state should turn to other local level institutions to assist with disseminating information and assisting the courts with implementing the RCMA. Our findings on the dissolution of marriages outside and inside the courts follow.

3.5.1 Outside the courts
Despite the 15 years that have passed since the enactment of the RCMA, people continue not to formally dissolve their marriages through the court system. Interestingly, these findings confirm research evidence from the late 1980s and the early 2000s, and suggest a continuation of the informal regulation of marital dissolution over three decades. The findings demonstrate that people seek assistance and support in a variety of places, depending on the specific aspects of their dispute. Some people are ‘satisfied’ with informal regulation. However, most of the legal reforms introduced by the RCMA to ensure greater gender equality and access to material resources are useful only if the parties dissolve their marriage in a court. If married couples continue to informally regulate the dissolution of their marriage, they will not benefit from the legal rules regulating the consequences of the dissolution of the marriage. The study found that people ignore the definite link between the divorce and its consequences. They view the divorce as a family matter, while they regard the financial consequences of the divorce as an area that falls properly within the purview of the courts.

The state is responsible for ensuring that both spouses in a marital dissolution case have an equal opportunity to access marital resources, but the research findings show that most female divorcees did not receive a share of the matrimonial property, suggesting that the new law does not meet the needs of divorced women.

The research also found that there is a considerable lack of knowledge about the concepts introduced by the RCMA, such as those relating to the matrimonial property systems. These findings show that knowledge and awareness of, and agreement with, the new laws have not filtered down to the ground, and have not been accepted by all participants. Regarding the latter, in some cases, traditional leaders are of the view that traditional dispute resolu-

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20 Mbatha et al ‘Culture and religion’ in Bonthuys & Albertyn (eds) Gender, Law and Justice (2007) 183

tion forums should be used. However, these practices do not uphold the principles of the RCMA, and further training is essential to inform traditional leaders about the new laws.

We recommend that the state should empower or capacitate other state institutions or agents (such as the police and the DHA) to assist with information regarding the RCMA. These support systems would need to be integrated into the state divorce procedures for the courts to be more effective. This recommendation is not intended to downplay the importance of the courts or the law, but to improve the administration and operation of the law through other arenas at the local level.

Finally, the research found that there is consonance between the principles of the RCMA and living customary law in two major respects. The first is that living customary law has adapted in such a way that it embraces the voice of the child in custody matters. The second is that turning to the court to resolve maintenance disputes is regarded as the proper way to handle such disputes.

3.5.2  Inside the courts

In the significant cases, such as Gumede, there is some scrutiny by the judge of the circumstances of the case. Moseneke J explained that ‘the court must examine all the circumstances relevant to the customary marriage and in particular the manner in which the property was acquired, controlled and used by the parties’. In such cases, the full discussion of the issues and reasons for the judgment are also available to the parties without them having to incur further costs. This is not the case in the majority of the case files that we examined, in which there was very little discussion of, or justification or direction for, the specific orders on record. Parties requiring the entire proceedings of the court in their case must have the record transcribed at their own cost, thereby increasing the cost of litigation.

In addition, in some cases the courts did not issue appropriate remedies or apply the correct matrimonial property systems to the matters before them. The court ought to be the place for the correct enforcement of the RCMA. The problem of not ensuring that the principles of the RCMA are upheld is exacerbated when the matter is not defended. Since our general findings show that people do not always link legal procedures with the protection of their own interests, we recommend a different method of adjudicating undefended family matters. Instead of the courts taking an umpire role, they must ‘descend into the arena’ and play a more investigative role, ie ask themselves what is in the best interests of the person who is not defending the case. In this way, the justice system will ensure greater protection for vulnerable members of the family.

Furthermore, how the parties carry out the ‘division of the estate’ is not currently being supervised and this creates a certain degree of doubt about whether the RCMA is protecting, in a practical way, spouses whose marriages have failed. Courts must be more proactive in assisting the parties with the liquidation of their estates.
In *Gumede v President of the Republic of South Africa*, Moseneke J wrote that the purposes of the RCMA included regulating the proprietary consequences of marriages and their dissolution *under judicial supervision*. This case can be viewed as good customary law. Judges and lawyers should, accordingly, scrutinise and debate the evidence and the facts of the case, and effectively supervise the termination of a marriage and its consequences, indicating what the courts take into account in making their awards regarding these consequences, to the benefit of all parties involved.

Needless to say, the approach adopted by the courts to regulating the matrimonial property regime is often lacking in sensitivity about the social and educational backgrounds of the litigants appearing before them and the complexity of the new laws. The state is responsible for allocating the appropriate division of the matrimonial property benefits of the marriage and for upholding the constitutional principle of equal treatment of women (or the dependent spouse).

A further problem was observed in several cases where litigants relied on customary law to justify their claim to an uneven share of the matrimonial property. This suggests that legal representatives are not assisting with the implementation of the RCMA by ensuring that the correct law is applied. The problem also suggests that the lawyers involved in the cases are unaware of the parties’ entitlements under the RCMA. We therefore suggest that there exists a great need for not only public information but also, and most importantly, for the legal training of all persons involved in the implementation of the RCMA — for example, judges, lawyers, members of the public — in the principles and intricacies of this Act. Where such training is being offered, for example, by Justice College, the curriculum must be reconsidered to take into account the issues identified by this study. We also emphasise the need to update the *Bench Book*, which is apparently being utilised by some courts as a guide to the implementation of the RCMA.

The study also found cases in which maintenance issues in divorce proceedings were referred to the maintenance magistrates’ courts. This practice is problematic for several reasons: (a) The settlement of issues connected to the consequences of the dissolution of the marriage should be seen as a package and dealt with at the same time. Expecting the parties to return to a court for maintenance is unreasonable. (b) Maintenance issues are intrinsically connected with the division of the assets and the custody order or access arrangements. (c) It is understood that the supporting evidence required to assess maintenance may be onerous to obtain, but we argue that this supporting evidence is necessary for assessing the division and distribution of the

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22 2009 (3) SA 152 (CC) para 42.
23 Research evidence dating from the early 1980s warns us of the problems associated with directing people to pursue maintenance claims in such courts. Burman (n 20) at 215 reported that the interviewees in her study found that this process could require at least two further days off work and was frequently both frustrating and fruitless. In addition, the research found that, unless a lawyer was employed, an unsympathetic maintenance officer can prevent all but the most determined from pursuing their applications.
matrimonial estate. Therefore, although the pro rata contribution can be very
time-consuming (if done properly) this should be built into the ‘investigation’
when assessing divorce proceedings and their consequences. (d) It is too
onerous (both costly and time-consuming) for the custodian parent, who is
often the mother, to have to return to a separate court, on a separate date, and
obtain the information. Thus, the process of obtaining maintenance separate
from a divorce order may disadvantage women more severely than men.

In short, the proceedings for divorce must culminate in a comprehensive
order covering all aspects of custody, property and maintenance. The coupling
of these matters will allow for compliance with the overall aims of the
RCMA.

With regard to custody of children, the study found that the customary law
stipulating that children belong to the husband once the father has paid lobolo
is not the norm and is not living law (in so far as this principle applies to the
custody of the child) in the cases we investigated for this research. This
finding occurred both in the formal and informal regulation of custody
arrangements following the dissolution of a customary marriage. According to
the Law Commission, ‘the courts may take into account relevant cultural
expectations when deciding a child’s future’.24 We did not find any evidence
that fathers are custodians, but we did find that a large number of cases
involved custody disputes. In fact, the vast majority of divorce cases reviewed
were contested, which demonstrates the need for third-party involvement.
While the family advocate was involved in some cases, he or she was not
involved in all (only 17 out of 28). In terms of s 4(1) of the Mediation in
Certain Divorce Matters Act 24 of 1987, the family advocate is supposed to
investigate the family situation and supply a report and recommendations for
custody based on that situation. However, how customary norms and laws are
used by the courts to determine what is in the best interests of the child is
unclear.

The reports of the family advocate are intended to assist the court in that
determination. However, the reports we examined in the court files contained
scant detail and presented only information on the living arrangements of the
children and the income and expenditure of both parents. We also could not
determine how the family advocate considers relevant cultural expectations
when making recommendations regarding a child’s future. More details are
required to provide a better understanding of how the family advocate assists
in the determination of the best interests of the child, particularly in customary
law matters, where affiliation to paternal kin is seen as very significant.

Therefore, we recommend that the investigation of the family advocate
should go beyond logistical and material factors concerning the custody of the
child to include factors that may affect the child’s custody under customary
law, which the court may in turn incorporate or pre-empt in determining the
best interests of the child.

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24 South African Law Commission (Project 90: The Harmonisation of the Common Law
3.6 Intestate succession

The study found both positive and negative practices about the administration and distribution of estates in cases of intestate succession. While Bhe is no longer enforced, the rules of the Reform of the Customary Law of Succession and Regulation of Related Matters Act of 2009 are framed in a similar way, and the discussion of the shortcomings of the Bhe rules may assist with better implementation of the new Act.

3.6.1 Positive findings

Several positive findings on practices in the Master’s Offices and in the communities on the ground affirm the implementation of the Bhe rules, as well as the enhancement of the aims of the rules. The Master’s offices, including the service points at the magistrates’ courts, now administer estates of black persons, thereby attaining one of the major goals of the Bhe decision. Our findings also confirmed the existence of procedures for the administration of large and small estates. The procedure for the latter recognises the reality of widespread poverty in rural areas where most black people who are subject to the Bhe rules live. The findings furthermore show that the Master’s office is appointing the correct people (e.g., the beneficiaries of the estate or their guardians or care-givers in the case of beneficiaries who are minors) as administrators of estates. This practice promotes the implementation of the new rules although it does not guarantee their application to the benefit of the beneficiaries in practice, as this may depend on other factors.

In the light of the widespread ignorance of law and legal procedures noted in this report, people’s recourse to the Master may be attributed to the publicity this office has given to the Bhe rules in the form of information posters in public spaces in some of the Master’s offices. This is a good practice which the Master’s office should be encouraged to continue and which other state institutions responsible for the application of the new laws should emulate.

The study also found that family members conduct the administration of estates in a way that reflects the aims of the Bhe rules, even though the actual administration of the estate takes place outside the framework of the Bhe rules. For example, there is some support for all children inheriting equally, regardless of sex, age or birth status, contrary to the principle of male primogeniture abolished by Bhe. Similarly, in specific areas of the country, for example, in some parts of the Eastern Cape, widows inherit the umzi even when adult sons are present (often with the active support of the husband’s relatives). These practices demonstrate developments on the ground that acknowledge the new law. We recommend that these good practices be widely publicised throughout the country, in order to stimulate and inspire the development of a Constitution-aligned living customary law from the ground. Such a development would reduce, if not remove, the dependence on state institutions for the implementation of egalitarian principles and values in the area of succession.
3.6.2 Negative findings

Notwithstanding the positive findings above, there are major shortcomings in addressing cases of intestate succession in black estates under the Bhe rules.

First, how some estates are distributed in practice beyond the letter of appointment of the administrator is not addressed in the state’s current procedures for the administration of estates. We recommend that the Master should have oversight of the administration of the estate beyond the point of appointment of the administrator, to ensure that the family does not deviate from the Bhe rules at any point in the process of the administration of the estate.

Secondly, there is considerable delay in the transmission of records from service points (magistrates) to the Master’s office for purposes of review. During this time, there is the risk that the person who receives the letter of authority at the service point could distribute the property as he or she sees fit without regard to the Bhe rules. There is, therefore, a need to shorten this period; court returns should be made every month, and the returns should be examined by relevant officials upon receipt.

Thirdly, the practice of requiring production of the deceased’s marriage certificate for purposes of administering his or her estate plays a gate-keeping role that cannot be justified by the law. This is because the absence of a marriage certificate does not indicate that a valid marriage does not exist; the RCMA does not require registration of the marriage to validate the marriage. Though innovative and useful, the alternative practices used to prove the existence of a marriage in the absence of marriage certificate, such as lobolo letters or family meetings called to confirm the existence of the marriage, are not foolproof either. Their objectivity cannot be guaranteed, and they can therefore not be relied upon to safeguard the interests of beneficiaries to the estate when the existence of the marriage is disputed. We therefore recommend that the referral of disputed marriages to the courts by the Master for the purpose of determining their validity should be actively promoted, and the courts must be equipped to deal with these matters expeditiously. As some parties whose marriage disputes are referred to the courts do not go back to the Master’s office to complete the administration of the estate, the courts to which these disputes have been referred must proactively assist the parties to go back to the Master’s office to complete the process of administration of the estate.

Fourthly, the Bhe rules do not recognise the right of dependent parents or relatives other than members of the nuclear family of the deceased to support from the estate. Our findings show that not placing parents or other deserving family members among priority beneficiaries to the estate is too narrow an approach to support the acceptance of Bhe by those for whose benefit it is intended. The aged parents are often ‘dependants’ and they could be as badly off as the surviving spouse and children. This narrow concept of family and heirs is in practice not consonant with the needs of the wider family. There is therefore a need to consider this issue seriously in the application of the succession rules under any law to the estates of black people who still subscribe to the notion of the extended family.
Fifthly, there is no official verification of the evaluation of estates. The findings show evidence of the under-valuing of estates. This process undermines the jurisdiction of the Master’s office in administering estates. The problem is aggravated by the absence of oversight by the Master for the administration of estates under a letter of authority beyond the grant of this letter mentioned above. The Master and his or her officials responsible for administering estates should, therefore, be made aware of this problem, and they should ask questions about how property is evaluated in specific cases.

Finally, the majority of estates administered outside the official enclave of the Master’s office by the family do not comply with the new rules. There is widespread ignorance concerning the Bhe rules among participants, as well as a lack of capacity to mobilise legal rules and procedures. As a result the ghosts of customary practices of succession linger. We therefore suggest that decentralising the process of administration would ease the burden on the family members who administer and distribute the deceased estate. In this respect, we recommend that traditional leaders be trained and used to ensure that the estate is administered according to the Bhe rules. If traditional leaders are given the right to issue letters of authority and the state provides training for these leaders (to ensure that they appoint the correct heir), this could speed up the process and make it easier for people to administer their estates within structures with which they identify in local settings. It would also reduce the possibility of the holder of the letter of authority abusing his or her powers and distributing the estate as he or she pleases, away from the eye of the Master or magistrate. The traditional leader would be right there to ensure that the appointee follows the rules of distribution. However, families should continue to have the right to have the letter of authority issued by the service point or the Master’s office if he or she wishes.

Furthermore, in order to ensure that the proposed system operates efficiently, we recommend the establishment of appropriate monitoring mechanisms. We also recommend the use of pilot projects with selected traditional leaders to implement the decentralised system for a number of years before launching the system nationally.

In conjunction with the proposed decentralisation of the estate administration process, the state should embark on an active public training and awareness campaign to highlight the relevant changes in the customary law of succession.

3.7 Dispute resolution forums

Much has already been said about dispute resolution in the courts with regard to the dissolution of marriages. It is therefore not necessary to go into great detail about this aspect of dispute resolution here. This section focuses on the combined effect of the challenges connected to the fact that few family disputes are resolved in the courts, on the one hand, and the ineffectiveness of informal dispute resolution forums, on the other.

3.7.1 The challenge of family disputes not being resolved in the courts

As already stated, the informal regulation of marriage dissolution has continued, and challenges the aims and objectives of the RCMA. Our research found
that the parties use multiple forums to resolve family disputes. Most of the disputes were taken to the family, and resort to the courts was less common. More specifically, women approached their husbands to resolve their disputes in the first instance, but in most cases the disputes were not resolved at this level as men were not inclined to assist with the resolution sought, whereupon women turned to the families of the couple. For various reasons, including the unequal power relations between wives, husbands, and husbands’ families within the patrilineal family structure, families were generally not effective in resolving couples’ disputes either. This leads to the conclusion that many parties to marriages are not supported by their families or the state in resolving their family disputes. It is also important to point out that while the majority of male and female participants in the research (and just under half of the traditional leaders) believe and agree that women should turn to the state when the husband does not apply the correct marital property regime, given that the couple were married in community of property, none of the participants turned to the court to resolve their own disputes. There is, therefore, a paradoxical discrepancy between practices and perceptions.

We have argued elsewhere that state support is required for assistance in marital conflicts related to the dissolution of customary marriages. The perception was expressed by participants in the research that, because of unequal power relations that were perceived to exist between husbands and wives, individuals would not be able to obtain equitable outcomes to these disputes on their own. On the other hand, state courts were perceived as powerful due to their ability to enforce, against uncooperative spouses, the performance of their spousal and parental obligations. Courts were also perceived ‘to be able to provide a forum for dispute resolution which protects individuals from highly adversarial and prejudicial conflicts with their family members’. Thus, state courts were perceived as having the capacity to neutralise power imbalances within the family.

We have also argued that the reasons for the discrepancy between these perceptions and what the parties did in practice include the structural or access barriers faced by rural women in particular in bringing matters to court. These barriers may be the lack of information about the RCMA and the rights it creates under the different matrimonial property regimes, financial con-
30 Reform of Customary Marriage, Divorce and Succession in SA

Constraints, and geographical challenges in relation to the location of the courts with the relevant jurisdiction.

For the foregoing reasons, we recommend that the state takes an active role in ensuring that dispute resolution mechanisms prescribed by the RCMA actually work in order to support family members in their conflict management. The steps to be taken should include eliminating the structural and access barriers as stated above. The state should also take steps to remove the structural barriers by providing appropriate public education and information dissemination concerning the RCMA and the procedures necessary to claim the rights it confers on married couples, as well as by providing court services in areas where people live. This could include mobile court facilities.

3.7.2 Informal mediation of family disputes

With regard to the mediation of disputes before the dissolution of the marriage, our study found that neither the traditional leaders nor the married parties’ families provide effective dispute resolution mechanisms for marriages in trouble. Arguably, the state cannot create a family law regime based on the RCMA in which it does not support the parties in resolving their disputes, whether during the marriage or at the time of the dissolution of the marriage. Given that the state, through the judicial system and the RCMA, provides support to couples who dissolve their customary marriages when they turn to state courts for assistance, we question whether the state has provided support to such couples at too late a stage in the breakdown of their marriage. The mediation of disputes at the informal level needs to be strengthened. Since neither the families nor traditional leaders are able to play this role, the state should establish mediation forums or agents that are perceived to be independent and impartial for disputing parties to use. The RCMA’s provision on this is, in our view, broad enough, and provides for the mediation of disputes whether or not there is a formal process in progress. The provision states that nothing in the section providing for the dissolution of marriage in a court ‘may be construed as limiting the role, recognised in customary law, of any person, including any traditional leader, in the mediation, in accordance with customary law, of any dispute or matter arising prior to the dissolution of a customary marriage by a court.’

Thus, any community member who is recognised by a given community as playing a role in mediating family disputes in accordance with its customary law can perform the role of a mediator in family disputes envisaged by the RCMA. Community members with potential to mediate disputes could therefore be identified and capacitated to do this work through relevant training and sensitisation concerning issues of gender equality in the management of marital and succession disputes in the community.

4. Conclusion

In 1998 the state introduced the RCMA, which came into operation in 2000. This legislation was aimed at both the recognition of customary marriages and

30 Section 8(5) of the Act.
the reform of customary law in order to ensure gender equality and to protect the rights of the child in customary marriages. This lofty initiative was followed by another monumental attempt to reform the customary law of succession by judicial intervention, resulting in the application of a modified version of the Intestate Succession Act of 1987 (common law) to estates previously governed by customary law. The findings in this study raise a wide range of issues in relation to the operation of the reformed laws of marriage and succession. The insights gained into the way in which both individuals and communities regulate their lives reflect in some cases the principles of the new law. In other instances the study has shown how individuals and communities are responding to changes in the law. In this respect it is important to bear in mind how practices on the ground relate to each other. The findings improve our understanding of how law reform affects communities, how effective it is, and, equally importantly, how it can be improved to benefit the people for whom it was intended. In addition to revealing the challenges connected to the various topics investigated, the report has revealed some of the more systemic problems that need to be considered when thinking about how best to protect the rights of the people that the RCMA and the Bhe rules seek to protect. Four of these may be mentioned.

First, people need to know about the new laws. They need to understand the rights and choices that the new laws offer them when regulating aspects of their lives. The findings show that there are varying degrees of lack of knowledge regarding the content of the new laws amongst individuals, the Department of Home Affairs, court officials and traditional leaders. Awareness of the new laws is not sufficient on its own. If individuals do not understand the content of the new laws, and the corresponding opportunities, choices or rights they offer, they will not be able to implement them effectively and derive the intended benefits from them. Moreover, the new laws are complex and it is not surprising that the study found that the majority of the participants did not know about or understand or use them.

Secondly, people need to be able to navigate the new laws and know how the different institutions can support them in implementing the laws governing marriage, divorce and matters of intestate succession. There are multiple institutions involved in regulating the personal relationships and lives of individuals living according to customary law. The courts, the DHA, traditional leaders, families and the church all play a role in assisting individuals with implementing different aspects of the new laws, but it is not always clear which institution is responsible for dealing with the various matters under consideration. More specifically, the responsibilities of the different institutions sometimes overlap. Therefore, it is not surprising that there is a great deal of ‘institutional confusion’. Needless to say, there are also very practical considerations that have to be taken into account to ensure that individuals can access the different institutions.

Thirdly, individuals need to accept the legitimacy of the new laws, ie individuals need to agree with the concepts and principles that the new laws espouse. The implementation of the new laws will be more effective if the
changes introduced are aligned with the practices (living customary law) of the people on the ground, provided that they are reconcilable with relevant human rights principles and values. In this regard, it is important to recognise that some norms that reflect the aims of the new laws exist on the ground, and attention needs to be paid to this fact. We argue that these norms should be recognised as they offer more effective protection of people’s rights on the ground, and in a context with which people are comfortable. The findings show that there are problems with imposing new structures and concepts through these new laws, and there may be unintended consequences.

Finally, the matters listed above are intertwined and need to be dealt with holistically in order to improve the implementation of the new laws.