

# Living Customary Law and Families in South Africa

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The 1996 Constitution gave legal force to both “state”<sup>i</sup> and customary law, making South Africa a legal pluralist state<sup>ii</sup>.<sup>1</sup> Customary law is derived from social practices that the community accepts as obligatory.<sup>2</sup> While many South Africans live according to customary law, the law (or norms) regulating the lives of people will vary across communities, ethnicities and provinces. The precise number of people who live according to customary law is difficult to estimate as people have a choice of legal system to regulate different life transitions, such as marriage and death. At the very least, there are more than 16 million Black South Africans who live in the former homelands under traditional authority who will have some parts of their personal lives regulated by customary law. Over half a million people<sup>iii</sup> are recorded as being married under customary law.<sup>3</sup>

This essay examines aspects of customary law affecting children and families in South Africa, and considers the following questions:

- What is customary law and how does it intersect with other legal systems?
- How are family rights and responsibilities towards children determined?
- What are customary marriages, and how does the system of customary marriage affect children?
- How does customary law deal with the custody of children on dissolution of marriage?
- How do land rights operate under customary law?
- How does customary law deal with succession and what does this mean for children’s right to inherit?
- What are the options for dispute resolution?
- Why are customary forums sometimes preferred in cases of domestic violence?
- What are some of the inherent challenges with living customary law?

## Customary law

Customary law is defined in section 1 of the Recognition of Customary Marriages Act (hereafter referred to as RCMA) as the “usages and customs traditionally observed among the indigenous African peoples of South Africa”, which “forms part of the culture of those peoples”. In understanding customary law, an important distinction needs to be drawn between codified customary law and living customary law. Codified customary law, also referred to as official customary law, comprises what was an oppressive form of customary law developed by colonial and apartheid states which exists in codes and precedents. It has been argued that much of the customary law in the courts before 1994 was drawn from texts or precedents and is therefore of dubious validity.<sup>4</sup> Living customary law, on the other hand, exists in the system of living norms that regulate the everyday lives of people who live according to customary law. This system of law is dynamic, evolving and context-specific as it adapts to changes in the beliefs and circumstances of the people it applies to.<sup>5</sup>

The recognition and application of customary law rests on the right to culture.<sup>6</sup> Historically Black South Africans were positioned “outside of the law”,<sup>7</sup> which means they were subordinated by, and denied protection from, customary and state support systems in the apartheid and colonial contexts.

All forms of discrimination are prohibited under the Constitution. Therefore, the South African Law Commission’s Project Committee on Customary Law in 1996 identified the need to ensure that customary marriages be recognised and comply with constitutional rights, especially the rights guaranteeing equality and non-discrimination, as well as the rights of the child. The RCMA came into force in 2000 and was the first major reform in customary law.

Customary law is subject to constitutional review and therefore aspects can be declared unconstitutional if they

i For the purposes of this essay, “state” law refers to common law and statutory law based on South Africa’s English and Roman Dutch legal roots. However, it is necessary to bear in mind that, in South Africa, living customary law is part of state law in the sense that it is recognised by, for instance, the courts.

ii This means that there are two or more legal orders operating within the state

iii Unfortunately, there are considerable methodological problems with recording marital status in South Africa. The problems are largely a result of the wide diversity in marriage forms, cultures, religions and languages but also in the way in which marriage data is captured. As Budlender et al. (2004) demonstrate, the discrepancy derives from the fact that census and survey data reflect perceptions of marriage, while administrative data generally record the legal system. Many customary marriages are not registered and therefore don’t appear in administrative records.

contravene fundamental rights. The Constitution, under section 211 (3) states that “the courts must apply customary law, when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.” Whilst this itself is not problematic, often the version of customary law that is subjected to constitutional review is official customary law and the cases lack genuine empirical evidence of living customary law.

Customary law is mostly unwritten. The rules of customary law are flexible and change in response to changes in the socio-economic environment, and are therefore rooted in the contemporary rather than the past. There is no group of dedicated people tasked with making rules or with the authority and power to define norms of customary law. It is recognised that the definition and content of living customary law is a contested issue often along gendered lines and in the absence of a single, identifiable person or group who can define it in a given community, the ascertainment of customary law is difficult.<sup>8</sup> The rules are generated by the community living by that law.

Customary law covers all matters regulating personal and family life including matters relating to children (such as care, contact, maintenance, guardianship and initiation); marriage and the consequences of marriage (rights and responsibilities of spouses during and after the marriage); succession (who has a right to inherit and the administration of estates); land tenure and traditional leaders (who regulate family matters and disputes).

### Family rights and responsibilities towards children

Like state law, customary law considers survival at birth a minimum condition for regarding the child a legal person. But unlike state law, customary law does not give children special treatment, with specific individual entitlements outside the welfare of the family as a whole.<sup>9</sup> Bennett outlines how the idea of children enjoying individual rights is fundamentally at odds with the African legal tradition, where the emphasis lies on duties rather than rights.<sup>10</sup> Whereas Western systems of law emphasise the individual and the nuclear family, customary law tends to prioritise a child’s development under the protection of its patrilineal or matrilineal family.

In customary law, a biological father does not have automatic rights and responsibilities to his children.<sup>11</sup> Rather, a father’s right to his biological children is linked to marriage, and the question of a child’s family affiliation depends on *lobolo* (bridewealth). If *lobolo* was agreed (with

either immediate or partial transfer), the child belongs to the father’s family. If it was not, the child belongs to the mother’s family. In this way the nuclear family is not the principal social unit.<sup>iv</sup> However, in *Hlope v Mahlalela*,<sup>12</sup> the court disapproved of the role of *lobolo* in determining parental responsibilities and rights, and gave preference to the best interests of the child principle enshrined in the Constitution.

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There are also mechanisms for acquiring patrilineal affiliation outside of marriage, and this is particularly relevant in the context of low and declining marriage rates. Section 21 (1) of the Children’s Act provides that the biological father of a child born out of wedlock can acquire full parental rights and responsibilities in respect of his child if he “pays damages (*inhlawulo*) in terms of customary law.”<sup>13</sup> The amount or scale of damages differs across ethnicities and communities. In the past, once *inhlawulo*<sup>v</sup> was paid, a father could not be held liable to pay past maintenance under common law.<sup>14</sup> It is unclear how this defence is used by fathers in the current context. Further research is needed to examine how such payments interact with the state maintenance system and whether they contribute to low maintenance compliance. Research suggests that until a child’s father completes *inhlawulo*, he may not be recognised as the legitimate father of a child, especially by the child’s mother’s family, and he may be restricted from visiting and spending time with his child at the mother’s family homestead.<sup>15</sup> However, the living customary law on the payment of damages is complex, and changing<sup>16</sup> and the limited evidence of the practice and its impact on paternal involvement is mixed. According to customary law, the biological father of a child born out of wedlock may, in addition to paying damages, pay a fine called *isondlo* which entitles him to the custody of – or access to – his child.<sup>17</sup>

Both parents and grandparents have a duty to support children. In 2012 the High Court, interpreting the common law, declared that grandparents and siblings had a “duty of support” to a child but uncles and aunts had no such duty.<sup>18</sup> This interpretation would be in line with living customary

iv This section presents the customary law as understood from academic literature and the decisions of the courts.

v *Inhlawulo* is a cultural practice whereby payment, usually offered in the form of cattle or money, is tendered by the father to the woman’s family for impregnating her outside of marriage. *Inhlawulo* (often referred to as payment of damages) is essentially an acknowledgment of paternity.

law under which grandparents and siblings have a duty of support. Where it differs with customary law is in relation to uncles and aunts, as according to living customary law it is expected that uncles and aunts would also carry such a duty. Unfortunately there is no research evidence or case law to support this.

Amongst families living according to customary law, the practice of moving children from one family to another or to extended kin is common. In the event of a parent being unable to care for a child, the relatives of the child would look after the child. Adoption does not occur in customary law and it has been argued that any attempt to equate customary care arrangements with adoption or fostering should be resisted.<sup>19</sup> There are many reasons for this: the notion of the state regulating family care arrangements contradicts the presumption that a child belongs to everyone in the wider family, not just parents; and such intervention prevents the freedom of families to arrange their own affairs. In addition, it is practically impossible to regulate care arrangements for 19.5 million children, when many of them move during the course of their childhood, when 4.1 million do not live with either of their biological parents at any one time, and where families need to organise care strategies to suit the needs of the child and of the broader family.

### Customary marriages

The requirements for a valid customary marriage include the payment of *lobolo* and the integration of the wife into the husband's family. These requirements are understood as part of living customary law. In some cases, full or partial payment of *lobolo* is a prerequisite for concluding a valid marriage, while in other cases the agreement for the payment is sufficient. Spouses have a duty to register a customary marriage with the Department of Home Affairs (and either spouse can do so) but the failure to register a marriage does not affect its validity.<sup>20</sup>

The question of when – and how – a person can marry differs under living and official customary law. Living customary law treats marriage as an agreement between families, to be negotiated by the elders and sealed by the transfer of *lobolo*.<sup>21</sup> But the RCMA brings the consent of both prospective spouses into prominence. Similarly, under living customary law individuals are considered marriageable when they have been initiated, as this marks the transition to adulthood. However, the RCMA sets the minimum age of marriage at 18 (subject to a few exceptions). Research indicates that a parallel system of marriage for minors still exists whereby children can marry in accordance with

customary law and then register their marriages in terms of the RCMA after attaining majority. Many customary law scholars agree that the age of majority can no longer be defined in terms of the customary concept of adulthood,<sup>22</sup> as this position sanctions child marriages which, is contrary to the Children's Act<sup>23</sup>.

### *Ukuthwala*

In some parts of the country, a customary marriage called *ukuthwala* is undertaken. Legal scholars have defined *ukuthwala* as “a culturally-legitimated abduction of a woman whereby, preliminary to a customary marriage, a young man will forcibly take a girl to his home”.<sup>24</sup> Concerns about a recent resurgence and distortion of this practice prompted the South African Law Reform Commission to investigate. It was found that *ukuthwala* was being practised in destructive ways that, for example, enabled older men to violate young girls. Recent literature focuses on how the current practice of *ukuthwala* is linked to poverty, gender-based violence and criminality.<sup>25</sup> Yet some scholars argue that the practice, at least in parts of the Eastern Cape, has deep roots with violent forms of *ukuthwala* dating back to the 1800s.<sup>26</sup>

The *Jezile* case of 2014 was the first *ukuthwala*-based conviction in the Western Cape. It centred on the abduction of a 14-year-old girl from her home in the Eastern Cape following the negotiating and payment of *lobolo* of R8,000 to her family.<sup>27</sup> The girl was forced to travel with the defendant to Cape Town where she was held against her will, raped and physically attacked by the defendant. The defendant, Jezile, appealed the 22-year sentence for rape, assault and trafficking by arguing that the lower court had not given his culturally-based motivations sufficient consideration and that the practices should have been understood within the framework of *ukuthwala* and customary marriage.

Mwambene and Sloth-Nielsen argue that forced marriage fails the constitutional compatibility test on a number of grounds, including freedom and security of the person (section 12), the right to dignity (section 9), and the best interests of the child (section 28 (2)). However, they also argue that *ukuthwala* is not necessarily/always equivalent to “forced marriage”, although it could lead to this if the negotiations are concluded without the consent of the girl. They therefore advocate against blanket criminalisation, and recommend that the positive attributes of the practice are recognised. Whilst the RCMA guidelines clearly outline the requirements for a valid customary marriage (including the consent of the bride), little is known about the living customary law on this matter and the ways in which *ukuthwala* is practiced. Jezile

received a 22-year sentence for rape, assault and trafficking, as the judgement read “it cannot be countenanced that the practices associated with the aberrant form of *ukuthwala* could secure protection under our law.”<sup>28</sup>

### Dissolution of marriage and child custody

Customary marriages can be terminated both inside and outside of the courts, but only state courts have the jurisdiction to award a divorce, as well as to determine how consequential matters such as the redistribution of matrimonial property, and custody and maintenance of children are dealt with. It is important to note that the official number of divorces may overlook a wider prevalence of marital breakdown.<sup>29</sup> There are many challenges in obtaining a divorce, notably, barriers to litigation by women and traditional customs that allow men to take additional wives. In practice, many marriages are dissolved informally between families rather than through the court system and the parties therefore do not enjoy the benefits of the protection provided by the RCMA.<sup>30</sup> Despite the challenges posed by informal dissolution, there are at least two important changes in living customary law that are relevant to children. First, the evidence indicates that living customary law has adapted in such a way that it facilitates and encourages children to participate in decisions regarding custody arrangements. Second, it seems that there is agreement that maintenance disputes should be resolved by the state court, as suggested in Case 5 below.

### Custody

Qualitative research that examined custody orders from a regional court following the dissolution of customary marriages found that custody was contested in nine of the 28 cases.<sup>31</sup> Despite the low number of divorce cases found

in the courts, the findings reveal that fathers are seeking involvement and contesting custody. Moreover, in 15 of the 19 uncontested cases, the parents had joint custody with specific detailed care plans.<sup>32</sup> In other words, both mothers and fathers were involved and seeking support from the court to safeguard their relationship with their child. The findings also showed that the family advocate prepared reports and recommendations in eight of these cases and therefore some (but not all) of these matters were not left to be decided by the families.

The mother was awarded custody in six of the nine contested cases on the basis that the courts were protecting the child from abuse, prioritising caring connections and penalising the failure of a father to maintain contact. In one case, for example, the court held that the father-child relationship was not strong, as the father had had only limited contact with the four-year-old boy (twice in a three-year period) and the court believed that joint custody was not appropriate due to parental conflict. It has been noted by the South African Law Commission that because “the best interests principle has no specific content, the courts may take into account relevant cultural expectations when deciding a child’s future”.<sup>33</sup> Yet in these cases it was unclear whether the courts had considered customary norms in determining custody and the child’s best interests.<sup>34</sup>

### Maintenance

The courts have acquired the power to make maintenance payments under section 8 (4) of the RCMA. However, in practice, maintenance is often not paid and the financial responsibility for children, in many cases, is left to mothers and maternal kin.<sup>35</sup> In Case 5, Kagiso initially attempts to resolve a dispute about child maintenance at a family meeting by

#### Case 5: Seeking maintenance<sup>36</sup>

Kagiso was married for four years and had two children when she eventually left her husband because she could no longer tolerate his infidelity. In doing so, Kagiso described the challenge she had to face during the family meeting: “Yes, I told his mother that I wanted to leave, but she does not approve . . . but I told her I am still young and cannot continue to be in a marriage where my husband is cheating on me”.

Kagiso’s husband’s mother, held a position of power through both lineage and seniority and demanded that Kagiso remain in the marriage and overlook her son’s misbehaviour. But Kagiso was employed, albeit as a

low-paid farm worker, and was able to support herself financially after leaving the marriage.

Kagiso then fought to obtain maintenance for her children using the state courts and explained how she sought a garnishee order by visiting her former husband’s employer: “I went to his place of work to try and speak to him. I wanted him to sign papers that would enable him to start paying maintenance fees for his children.” While Kagiso lived in a rural village with few opportunities to improve her income, her ex-husband worked in the city and earned substantially more than her. Kagiso managed to secure maintenance payments for her children.

drawing on living customary law, but later draws on statutory law to ensure that her husband pays maintenance.

### Customary access to land

Land tenure is one of the most controversial topics in customary law and research on women's access to land within customary law. However, recent studies have reported changes in land rights of single women living in communal areas in South Africa.<sup>37</sup> This is relevant to children, as children are disproportionately cared for by women in rural homesteads located in the former homelands. A recent survey of women in three provinces (KwaZulu-Natal, Eastern Cape and the North West) indicated that women had greater access to land than in the past,<sup>38</sup> and that unmarried and widowed women's access to land had increased noticeably post-apartheid. With the decline of marriage, it was reported that it has become easier for women with children to be given a site. It was even stated that "a woman having children was the motive behind her family wanting her to get her own

site because they consider her to be troublesome."<sup>39</sup> These changes have taken place in the context of severe poverty, unemployment and increasing reliance on social grants in the former homelands. The changes were not shaped by legal reform but rather by local negotiations between women and land authorities where, it is argued, "the symbolic victory of equality and democracy during the 1994 transition changed the balance of power."<sup>40</sup>

However, the locally negotiated practices and processes of change that have been achieved through customary law with regard to residential sites are in danger of being jeopardised by a range of new laws that Parliament has enacted since 2003. This legislation includes the Traditional Leadership and Governance Framework Act of 2003 (the Framework Act), the Communal Land Rights Act of 2004 and the Traditional Courts Bill of 2012. In particular, the Traditional Courts Bill (Case 6) has raised concern as it may centralise power in traditional leaders and undermine the multi-vocal processes of negotiation underway in communities.<sup>41</sup>

#### Case 6: An examination of the Traditional Courts Bill

Zita Hansungule

In January 2017, the Traditional Courts Bill<sup>42</sup> was tabled in Parliament for consideration by the Portfolio Committee on Justice and Correctional Services. The aim of the Bill is to provide a uniform legislative framework to align the structure and functioning of traditional courts with the principles and values set out of the Constitution.<sup>43</sup>

This is not the first time that a bill regulating the traditional courts system has been tabled in Parliament. Two previous versions of the Bill were tabled in 2008<sup>44</sup> and 2012<sup>45</sup> respectively. Both versions were rejected by civil society groups and academics for not representing the interests of the people that would be directly affected by their implementation.<sup>46</sup> It has been noted that the 2017 version of the bill "makes a valiant attempt at resolving"<sup>47</sup> the flaws identified in the 2008 and 2012 versions, but significant shortcomings remain. This brief highlights provisions in the Bill that have potential implications on children and families.

#### The Traditional Courts Bill [B1-2017]

The Bill recognises the voluntary and consensual nature of customary law by providing for an "opt-out" mechanism in clause 4 (3). The clause provides a party to a dispute with the option to "elect not to have his or her dispute heard and determined"<sup>48</sup> by a traditional court or to appear

before a traditional court. It is noted that this aligns with a restorative rather than punitive approach to justice as it promotes people's rights to access justice and participate in a chosen cultural life.<sup>49</sup> There are two main areas of criticism that have been levelled against the clause. The first, which originates from proponents of the courts' independence, is concerned with the need to preserve the status and autonomy of the traditional court system. The second is concerned that the clause does not do enough to ensure that those affected by the Bill – particularly women and children – are actually able to opt out. For example, the Bill does not place a duty on clerks of traditional courts to inform parties of the opt-out clause; and nor are there remedies for parties who have been denied or faced barriers in their attempts to opt out.<sup>50</sup> A further criticism is the failure of the clause to set an age from which a child can exercise the right to opt-out.<sup>51</sup>

From a child rights perspective, it is disappointing that the Bill fails to align with systems established to protect and promote children's rights in the Children's Act 38 of 2005, the Child Justice Act 75 of 2008 and the Sexual Offences Act 23 of 1957.<sup>52</sup> No reference is made to how traditional courts will use the principles, systems and mechanisms developed in these laws to advance and protect the interests of children involved in proceedings before traditional courts.

The Bill includes protections against various forms of discrimination by promoting the participation and representation of women in traditional courts; ensuring that proceedings in traditional courts observe and respect the rights contained in the Bill of Rights; and setting out – in schedule 1 – prohibited conduct that infringes on the dignity, equality and freedoms of persons.<sup>53</sup> It is however not clear how these protections will be implemented particularly in the context of “deeply entrenched patriarchal socio-cultural rules and practices prevailing in many traditional communities”.<sup>54</sup> Furthermore, schedule 1 identifies a limited list of vulnerable groups that should not be discriminated against, yet discrimination on the basis of age, gender, nationality or ethnicity are not included; including them would be an affirmation of the constitutional protection that these often vulnerable groups are entitled to receive without discrimination.<sup>55</sup>

Further protections in the Bill include the way in which sanctions imposed by traditional courts are aligned to restorative justice principles and practices as opposed to being punitive in nature.<sup>56</sup> Yet the Bill does not explicitly exclude sanctions such as corporal punishment, banishment or cruel, inhumane and degrading treatment.<sup>57</sup>

#### A regression following Parliamentary consultations

The Portfolio Committee consulted on the 2017 version of the Bill in March 2018. In a disappointing turn of events the committee pushed back against the improvements made to the Bill and against the submissions made to

improve the Bill further.<sup>58</sup> They instructed the Department of Justice and Correctional Services to effect changes to the Bill. On 21 August 2018, the department presented draft amendments, based on the committee’s instructions, to the committee for consideration. These seem to erode the gains made by the 2017 Bill in the following ways:

- Clauses on the opt-out mechanism have been removed – meaning that parties to disputes cannot chose to opt out from the traditional courts system at all.
- Clauses promoting and protecting the fair representation of women have been removed.
- Schedule 1 (prohibiting conduct that infringes on the dignity, equality and freedoms of persons) has been deleted in its entirety.<sup>59</sup>

These changes ignore gains made in the last 10 years to improve the Bill, and to better align it with the Constitution in order to protect the best interests of women and children. These changes are, at the time of writing, not yet final because the Portfolio Committee has not voted on and passed the draft amendments. As the Bill continues to go through the Parliamentary process it is hoped that these proposed amendments are critically evaluated in light of the need for the Bill to be constitutionally compliant. Once the Portfolio Committee passes the Bill, it will be debated and passed in the National Assembly and then referred to the National Council of Provinces where there will be further opportunities for public submissions and amendments to the Bill.

## Customary systems of succession

Another area of customary law that impacts directly on children and families is the customary law of succession which outlines how an estate is administered and divided after the death of an individual. Recent reform of customary law by the Constitutional Court and legislature abolished the male primogeniture rule.<sup>vi</sup> It also removed all forms of discrimination against female or extra-marital children’s right to inherit from their parent’s estate.<sup>60</sup> This is a critical development in strengthening the rights of children to inherit directly upon the death of a parent.

However, this does not mean that such changes are practised on the ground and it is impossible to specify the living customary law on this matter across the country. Nonetheless, we can draw on a few examples to highlight

some of the issues. A recent study found norms of equality within living customary law regulating matters of intestate succession in some parts of the country.<sup>61</sup> There is widespread support for the right of children to inherit regardless of their age, sex or birth status. Moreover, the study found cases in which widows (who may have care of their young children) inherited in their own right.<sup>62</sup> It has become increasingly common for parents to direct that a particular daughter should take over responsibility for the family home on their death.<sup>63</sup> However, there is still evidence to suggest that succession practices sometimes deny a right of inheritance to legitimate heirs, most specifically widows, daughters, younger sons and extra-marital children. In particular, the concept of family property is used to exclude women as in Case 7.

vi Where the oldest male child has the right to succeed to the estate of an ancestor to the exclusion of younger siblings, both male and female, as well as other relatives.

### Case 7: A shared inheritance<sup>64</sup>

My dad had about 100 goats, 90 sheep and 40 cows. He said that I [the oldest male child] should look after them after his death. He had two other children after me. The inheritance is not mine. It's mine to look after. An inheritance is the umbrella of the home according to us as the Thembu. So we get surprised when the government says that we have to divide the inheritance and then they intervene. When my mother has a problem or isn't well, we sell a cow or a sheep from the kraal [to help her], when one of us has a problem it's necessary for us to go to the kraal and we all agree together: I have to call all of them, my sisters, even if they're married and we sit together and I explain to them that this is what I'm thinking about.

### Dispute resolution

South Africa's pluralist legal system extends to dispute resolution forums. When a dispute arises, people living according to customary law can approach customary and/or state law forums for assistance. All courts in the country have jurisdiction to hear marriage and succession matters arising under customary law, although some matters may be assigned to specific courts such as the divorce courts. Since the enactment of the RCMA, traditional courts (such as the chiefs' and headmen's courts) no longer have jurisdiction to hear matters on customary marriages, including divorce, and their jurisdiction is limited to mediation before divorce.

Research evidence indicates that there is a normative sequence in which people use customary and state dispute resolution forums when seeking assistance with disputes. The majority of disputes relating to customary marriages are first dealt with within the family and, failing resolution, are then transferred to other customary dispute resolution forums.<sup>65</sup> When disputes are not resolved within these forums, they are sometimes transferred to state courts. The advantage of taking the dispute to family members or a traditional leader is that there is normative agreement about the family being the appropriate forum for resolving the problem. The family is also accessible. There is also evidence to suggest that women, as customary wives in family meetings, draw on new legislation and new rights to contest the content of the rules that should be followed.<sup>66</sup> In such instances, women in particular, are drawing on two different sources of social order (custom and the state), both of which are seen as legitimate. The availability of new rules, norms and values make it possible for wives to

draw on wider resources to get their position accepted and still legitimate it at family meetings.

Many individuals (including traditional leaders) believed the state courts to be the appropriate dispute resolution forum for particular grievances such as child maintenance, divorce and intestate succession matters.<sup>67</sup> Recent research indicates that some women transferred their claims directly to state courts, as they were perceived to be more powerful than customary forums in enforcing orders for maintenance and compensation against men.<sup>68</sup> An "opt-out" clause was introduced into the Traditional Courts Bill in order to formalise the right to choose which legal system to follow for dispute resolution, but this has subsequently been removed from the Bill, undermining that right of choice (see Case 6).

One of the advantages of having parallel legal systems is that they provide individuals with greater choice as to which rules they will invoke and abide by. It is arguably beneficial for vulnerable family members to be able to seek support from multiple dispute resolution forums in the event of conflict. And in cases where one forum fails to provide equitable outcomes, another forum could (hypothetically) be approached, thereby reducing the risk of such disputes having prejudicial outcomes for vulnerable individuals, as outlined in Case 5 above.<sup>69</sup>

### Domestic violence

In the matter of domestic violence, however, many people prefer to use traditional dispute resolution forums (such as family meetings) rather than the state legal system as it is considered a private matter.<sup>70</sup> However, women's experience of trying to seek help with domestic violence draws our attention to the powerful disciplinary influence of social norms and beliefs in regulating responses to abuse. Involving the police and using the Domestic Violence Act is sometimes considered unacceptable and disloyal – and police interference is seen as a violation of culturally correct procedures.<sup>71</sup> Failure to report domestic violence and violence against children is a serious concern, and these tensions point to the difficulties in reconciling social norms and statutory law.

### Inherent challenges

There are several inherent challenges with living customary law. Given the evolving and dynamic nature of the law, ascertaining it and applying it in the courts is challenging. Furthermore, there are significant shortcomings with the ways in which the legislature recognised customary laws by simply, in some cases, adopting civil law concepts. In this way, the

legislature, whilst operating within a legal pluralist society, does not recognise the true nature of living customary law. For example, the RCMA did not recognise the concept of family property when dealing with matters of succession and/or marital property. Therefore, children and spouses are unsure what property forms a part of the deceased's estate or marital property in matters of succession or divorce respectively. In a recent study, many men and women held the belief that a husband's property belongs to his family and that the concept of community of property in the RCMA does not apply to customary marriage.<sup>72</sup> With so few customary marriages obtaining a legal divorce, it is difficult to know how the courts address this contestation between family and individual property.

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*Adoption does not occur in customary law. The relatives would look after the child.*

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Another impediment to the implementation of the RCMA is that people need to know how to navigate the new laws and they need to know how different institutions (such as the Department of Home Affairs, traditional leaders, the courts, families and the church) can support them by implementing the new laws. Related to this issue is the fact that in practice there are marked socio-economic differences between men and women in customary marriages, with Black South African women having lower levels of educational attainment, employment and income than their spouses. The way women and children experience customary law will depend largely on their own agency, their material constraints, their family relations and the practices in their communities. Differences in educational attainment, income and employment will position men and husbands in a stronger bargaining position with better access to legal knowledge and power, and potentially greater influence to determine which legal system to invoke in matters of dispute.

If the changes in the laws are aligned with beliefs and practices on the ground, they will be more successful, so long as they are also in line with relevant human rights principles

and values. For example, the right to freedom of culture or religion may not be exercised in a manner inconsistent with any provision of the Bill of Rights, which prevents parents and communities from "privatising" harmful practices, such as corporal punishment.<sup>73</sup> On the other hand, the Children's Act has recognised cultural practices and provides that the biological father of a child born out of wedlock acquires full parental rights and responsibilities in respect of his child if he "pays damages (*inhlawulo*) in terms of customary law".<sup>74</sup>

## Conclusion

The reform of customary marriage sought to harmonise the constitutional rights to culture and equality in a manner that took context into account and enhanced women's choices.<sup>75</sup> However, poor Black rural women married under customary law (and their children) continue to be excluded from the protections embedded in statutory law. The areas that women and children are particularly vulnerable include the protection of children from forced early marriage, the inheritance rights of extra-marital partners, girls who have not reached maturity and women married to men who have concluded polygamous marriages, or the financial consequences for women and children following marital dissolution.

Under the Constitution most forms of discrimination, including discrimination based on sex and age, are prohibited. The reform of customary law in the fields of marriage and succession went some way towards improving the legal rights of women and children. However, this is only the first step in regulating the lives of women and children who live according to customary law. The next step is ensuring effective implementation of these reforms, as recent research indicates that the new laws are not being implemented consistently or effectively.<sup>76</sup> The main reason for this is that many people do not know about the new laws. This includes court officials, traditional leaders, the Department of Home Affairs and ordinary citizens. Moreover, awareness of the laws in their own right is not enough. The laws governing parental rights and responsibilities, marriage, divorce and succession are complex, and people must understand them in order to be able to know what opportunities and choices are available to them.

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