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# *South Africa's System of Dispute Resolution Forums: The Role of the Family and the State in Customary Marriage Dissolution*

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*The Recognition of Customary Marriages Act has been a welcome legislative effort to remedy the vulnerabilities experienced by women in the dissolution of their customary marriages. Through an analysis of research findings, this article contributes to the debate about the achievement of the Act's objectives. We argue that the Act is falling short in fulfilling its objectives, owing to the shortcomings within South Africa's system of customary and state dispute resolution forums. Our findings demonstrate that both customary and state dispute resolution forums were under-utilised by couples who experienced the dissolution of their customary marriages. The lack of financial resources, information and power has arguably limited women's access to state courts upon marital breakdown. Moreover, research participants did not perceive traditional courts as appropriate forums for the resolution of certain customary marriage disputes. We argue that these shortcomings prevent the Act's application to customary marriage breakdowns. Furthermore, given that the Act is applied in divorce proceedings in state courts to ensure equitable outcomes upon marriage dissolution, the article questions whether state support is provided to couples at too late a point in their marital breakdown. By addressing the above-mentioned shortcomings and providing state support to couples at an earlier point in marital breakdown, the objectives of the Act stand a better chance of being achieved.*

## **Introduction**

The 1996 Constitution<sup>1</sup> gave legal force to 'state'<sup>2</sup> and African customary law,<sup>3</sup> making South Africa a legal pluralist state.<sup>4</sup> Consequently, the country also has a pluralist system of dispute resolution forums, comprising both state and customary forums of dispute resolution. This

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1 Constitution of the Republic of South Africa, 1996.

2 For the purposes of this article, 'state' law refers to common law and statutory law based on South Africa's English and Roman Dutch legal roots. See F. du Bois, 'Sources of Law: Overview and Constitution', in F. du Bois (ed.), *Wille's Principles of South African Law*, 9th edition (Cape Town, Juta and Co., 2007), pp. 33–113.

3 G.J. van Niekerk, 'Legal Pluralism', in C. Rautenbach, J.C. Bekker and N.M.I. Goolam (eds), *Introduction to Legal Pluralism* (Cape Town, Juta and Co., 2010), p. 3.

4 T.W. Bennett, 'Concepts and Theory', in *Customary Law in South Africa* (Cape Town, Juta and Co., 2004), pp. 1–33.

article focuses on how black women, in the post-apartheid legal context, navigate this system of dispute resolution forums in disputes relating to the dissolution of customary marriages.

'Black' South African women have historically been positioned 'outside the law'.<sup>5</sup> That is, they were subordinated by, and denied protection from, customary and state support systems in the apartheid and colonial legal contexts. The Recognition of Customary Marriages Act (RCMA)<sup>6</sup> represents a welcome legislative effort to remedy this historical subordination in relation to customary marriages. The Act provided full legal recognition to customary marriages and aimed to ensure gender equality within, and upon the dissolution of, customary marriages.<sup>7</sup> However, it has been argued that the RCMA is a mere 'paper tiger', owing to high litigation costs in state courts,<sup>8</sup> the lack of awareness about the Act in rural areas,<sup>9</sup> and the unequal power relations between spouses, which prevent women from negotiating for the application of the RCMA to the dissolution of their customary marriages.<sup>10</sup> This article aims to contribute to the above socio-legal debate by discussing some of the findings of a research project undertaken by the National Research Foundation Chair in Customary Law.<sup>11</sup> Although still under way, the study has examined the impact that the RCMA has had on those living under customary law. The findings are drawn from data collected from predominantly rural-based black South African women who either married under customary law or experienced the dissolution of their customary marriages after 2000. Both sets of respondents were presented with vignettes which explored their perceptions on aspects of customary marriage and dispute resolution. In discussing the married participants' vignette responses, we demonstrate that they held normative perceptions of how the system of dispute resolution forums should be navigated when dealing with marital conflict and breakdown in customary marriages. Furthermore, we discuss the experiences of those who underwent the dissolution of their customary marriages, in order to highlight how this system was used in practice when their marriages broke down. These findings highlight some of the shortcomings of South Africa's pluralist system of dispute resolution forums. These shortcomings relate to the fact that both customary and state dispute resolution forums appear to be under-utilised by couples upon marital breakdown. Due to these shortcomings, equitable outcomes are not being achieved upon the dissolution of all customary marriages. The findings underline the persistence of patriarchy and the continued vulnerability of many women upon the termination of their customary marriages. The article poses intricate questions about the relative success of the state's attempt to ensure gender equality upon the dissolution of customary marriage in the new pluralist legal system.

### *Customary Marriages and Divorces*

Section one of the RCMA defined a customary marriage as one that is concluded in accordance with customary law.<sup>12</sup> The Act defined customary law as the 'usages and customs traditionally observed among the indigenous African peoples of South Africa', which 'forms part of the culture of those peoples'. The open-ended character of this definition embodies an acknowledgement of

5 T. Nhlapo, 'African Customary Law in the Interim Constitution', in S. Liebenberg (ed), *The Constitution of South Africa from a Gender Perspective* (Cape Town, The Community Law Centre, University of the Western Cape, 1995), p. 162.

6 120 of 1998.

7 L. Mbatha, 'Reflection on the Rights Created by the Recognition of Customary Marriages Act', *Agenda Special Focus: Gender, Culture and Rights* (2005), pp. 42–7, available at <http://winafrica.org/wp-content/uploads/2011/11/Recognition-Customary-Marriages-Act-in-South-Africa1.pdf>, retrieved 21 January 2016.

8 C. Himonga, 'The Advancement of African Women's Rights in the First Decade of Democracy in South Africa: The Reform of Customary Law in Marriage and Succession', *Acta Juridica*, 82 (2005), pp. 82–109.

9 M. Mamashela and T. Xaba, 'The Practical Implications and Effects of the Recognition of Customary Marriages Act No. 120 of 1998', *Research Report No. 59* (2003) available at <http://sds.ukzn.ac.za/files/rr59.pdf>, retrieved 8 April 2013.

10 *Ibid.*

11 At the University of Cape Town.

12 There is no single system of customary law, but rather as many variants as there are ethnic groups in South Africa.

the 'living' nature of customary law.<sup>13</sup> The living nature of customary law is reflected in its ever-evolving character. Customary law, as practised in the everyday lives of its adherents, adapts to the changes in circumstances and beliefs of the people it applies to.<sup>14</sup> Section three of the RCMA specified requirements that need to be adhered to, post-2000, in order for a customary marriage to be considered legally valid by the state. The marriage needs to be negotiated or celebrated in accordance with customary law,<sup>15</sup> the prospective spouses may not be within the prohibited degree of relationship, and both must consent to the marriage and be above the age of 18. The necessary consent, as prescribed by the RCMA, must be obtained should a prospective spouse be below the marriageable age. According to the Constitutional Court,<sup>16</sup> the consent of the first wife is required when a husband seeks to enter into a second customary marriage. Additionally, a contract that regulates the future matrimonial property relations of the spouses must be approved by a High Court before a valid polygamous customary marriage is concluded in terms of the RCMA. While section four of the RCMA requires every customary marriage to be registered with the Department of Home Affairs, non-registration does not affect the validity of the marriage.<sup>17</sup>

Like many African states at the end of the 20th century, South Africa formalised rather than abolished the role of customary authorities in the new democratic dispensation.<sup>18</sup> This is reflected in the RCMA procedures regarding the mediation of customary marriage disputes.<sup>19</sup> The RCMA removed the jurisdiction of headmen and chiefs' courts to dissolve customary marriages, and has accorded this jurisdiction solely to high and regional state courts. However, these customary dispute resolution forums are recognised by the RCMA as having jurisdiction to mediate customary marriage disputes.

Customary communities and the state may perceive marital status, and the practices or procedures which regulate it, differently. For instance, without following the RCMA procedures, a couple may consider themselves divorced once they have unilaterally, in consultation with their families or with the assistance of another customary dispute resolution forum, decided to end the marriage. However, the couple would still be regarded by the state as married because the marriage was not terminated in accordance with the RCMA procedures.

Recent research on marriage has pointed towards the divergence that can exist between the RCMA regulations and people's practices. Budlender *et al.*<sup>20</sup> and Hosegood *et al.*<sup>21</sup> found low divorce rates among black South Africans in three ex-homeland areas of South Africa. Budlender *et al.*<sup>22</sup> found that, of the 3,000 rural women surveyed, only 79 reported being separated, abandoned or formally divorced (in accordance with the RCMA procedures). Yet when asked

13 C. Himonga, 'The Future of Living Customary Law in African Legal Systems in the 21st Century and Beyond, with Special Reference to South Africa', in J. Fenrich, P. Galizzi and T. Higgins (eds), *The Future of Customary Law* (Cape Town, Cambridge University Press, 2011), pp. 31–57.

14 *Ibid.*, p. 36.

15 This could include the negotiation or transfer of *lobolo*. However, this is not specified by the Act. See L. Mbatha, N. Moosa and E. Bonthuys, 'Culture and Religion', in E. Bonthuys and C. Alberytn (eds), *Gender, Law and Justice* (Cape Town, Juta and Co., 2007), pp. 158–94.

16 *Mayelane v Ngwenyama and Minister for Home Affairs* (2013) (8) BCLR 918 (CC). This case decided the above matter in relation to Tsonga customary law. Whether or not the decision of the court applies to the customary laws of all ethnic groups is debatable. See C. Himonga and A. Pope, 'Mayelane v Ngwenyama and Minister for Home Affairs: A Reflection on Wider Implications', *Acta Juridica: Marriage, Land and Custom* (2013), pp. 318–38.

17 Mbatha, 'Reflection on the Rights Created', p. 42.

18 B. Oomen, 'The Patchwork Democracy: Boundary Politics after 1994', in *Chiefs in South Africa: Law, Power and Culture in the Post-Apartheid Era* (Oxford, James Currey, 2005), pp. 37–86.

19 See section 8 of the RCMA.

20 D. Budlender, S. Mgweba, K. Motsepe and L. Williams, *Women, Land and Customary Law* (Johannesburg, Community Agency for Social Enquiry, 2011).

21 V. Hosegood, N. McGrath and T. Moultrie, 'Dispensing with Marriage: Marital and Partnership Trends in Rural KwaZulu-Natal, South Africa 2000–2006', *Demographic Research*, 20 (2009), pp. 279–312.

22 Budlender *et al.*, *Women, Land and Customary Law*, p. 79.

to list all the homestead members, excluding those who had not been home in the last two years, Budlender *et al.*<sup>23</sup> found that an additional 110 reportedly married women listed neither a partner nor a husband. It was argued that this group 'do not seem to be firmly in a marriage'.<sup>24</sup> This may represent a group of women who have had a marital dispute, sought support from a dispute resolution forum, but did not formally divorce in accordance with the RCMA procedures.

The 2011 census indicated that 525,792 black South Africans were divorced or separated.<sup>25</sup> In light of the above, these official records may overlook the prevalence of marital breakdown among black South Africans, which arises following marital conflict. As will be elaborated upon below, it has been argued that the practical challenges of dissolving marriages have prevented individuals from pursuing formal divorces through state courts post-2000. Instead, many marriages are dissolved informally within families.<sup>26</sup> It is also argued that divorce may be under-reported, particularly among individuals whose families and faiths do not permit divorce.<sup>27</sup> Exploring the perceptions of the utility of different dispute resolution forums is an important aspect of assisting individuals in troubled marriages.

Rural customary-law wives are generally more economically disadvantaged in comparison to their male spouses and women in civil marriages.<sup>28</sup> This economic vulnerability is not due solely to being married under customary law. Rather, such women have been made economically vulnerable by their historically entrenched, poor socio-economic positions, which have constrained their ability to develop access to resources and gain more power in the market place. During the colonial and apartheid periods, this economic vulnerability was made worse in the event of marital breakdown due to the Black Administration Act (BAA).<sup>29</sup> The provisions of the BAA have also shaped how women are positioned in the post-apartheid context, in their ability to negotiate marital disputes and gain access to state courts. The following section will discuss how the BAA prejudiced women in the event of marital breakdown. The article will then provide an overview of how the RCMA has aimed to ensure that such economic vulnerability is avoided and equitable outcomes achieved in conflicts associated with the dissolution of customary marriages in the post-apartheid legal context. Legal scholars have highlighted problems with both customary and state forums of dispute resolution. These will be discussed briefly before we elaborate upon the research methodology and findings.

## Legal Protection and Marital Breakdown: Colonial, Apartheid and Post-apartheid Periods

The colonial authorities introduced the BAA in 1927, and it remained in force during the Apartheid period.<sup>30</sup> It was claimed that the Act provided a more consistent approach to the regulation of customary marriages.<sup>31</sup> However, several of its provisions rendered women economically vulnerable in the event of marital breakdown.<sup>32</sup>

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*

<sup>25</sup> Authors' own calculations based on the 2011 census data.

<sup>26</sup> Hosegood *et al.*, 'Dispensing with Marriage'. M. Mamashela, 'New Families, New Property, New Laws: The Practical Effects of the Recognition of Customary Marriages Act', *South African Journal on Human Rights*, 20 (2004), pp. 616–41. S. Burman, 'Marriage Break-up in South Africa: Holding Want at Bay?', *International Journal of Law, Policy and the Family*, 1, 2 (1987), pp. 206–47.

<sup>27</sup> Hosegood *et al.*, 'Dispensing with Marriage', p. 289.

<sup>28</sup> Mbatha *et al.*, 'Culture and Religion'.

<sup>29</sup> 38 of 1927.

<sup>30</sup> M. Deveaux, 'Liberal Constitutions and Traditional Cultures: The South African Customary Law Debate', *Citizenship Studies* 7, 2 (2003), pp. 161–80.

<sup>31</sup> *Ibid.*

<sup>32</sup> In KwaZulu-Natal, the Natal Code of Zulu Law and the KwaZulu Act on the Code of Zulu Law played a similar role. The discussion in this article is, however, limited to the BAA.

First, the BAA drew a distinction between 'civil marriages' and 'customary unions'.<sup>33</sup> While the former were recognised, regulated and protected under common law, the latter were not.<sup>34</sup> As customary unions lacked full legal recognition, the prior or subsequent entry into a civil marriage automatically nullified a customary union.<sup>35</sup> Given that customary unions could be nullified in the above-mentioned way, scholars have argued that there was a greater incidence of desertion by customary-union husbands than formal divorces during this period.<sup>36</sup> This left customary union wives with little control over how their marriages ended.<sup>37</sup> Furthermore, owing to the subordinate legal status accorded to customary unions, aggrieved women could not, upon the nullification or dissolution of their unions, claim financial support from their husbands through common-law maintenance and support remedies.<sup>38</sup>

Secondly, in addition to denying women the right to own property in their own names,<sup>39</sup> the BAA accorded customary-union husbands absolute ownership of household property, which was defined as including the personal earnings of their wives.<sup>40</sup> This property legally accrued to customary-union husbands in the event of the dissolution or nullification of the customary union. Thus women who experienced the breakdown of their marriages could be denied a share of the matrimonial property, thereby placing them at risk of increased economic hardship.

Lastly, the BAA rendered women perpetual minors under the guardianship of either their male relatives or husbands.<sup>41</sup> The status of perpetual minority accorded to married women limited their independent access to state courts, as they could not litigate without the consent of their legal guardians.<sup>42</sup> This increased their vulnerability to poverty upon the dissolution of their marriages, as they were limited in their ability to use state courts to claim remedies, which existed under customary law, against their husbands.<sup>43</sup>

Customary-law wives had access to customary dispute resolution forums, which they could use to raise grievances about their marital relationships.<sup>44</sup> These included ward, headmen and chief's courts. Custom dictated that women be represented by a male relative when raising grievances within these forums.<sup>45</sup> Rural women were arguably limited in their ability to access these forums, as the availability of a male representative was not always guaranteed, owing to many men working away from their rural homes as a result of the migrant labour system.

The new democratic dispensation brought with it intensified critiques against the BAA customary marriage laws on the basis that they conflicted with the constitutional value of gender equality.<sup>46</sup> The RCMA was enacted in 1998 (and came into force in 2000) to address these issues.<sup>47</sup> It is important to note that the aforementioned colonial and apartheid laws shaped the inequalities between customary marriage spouses.<sup>48</sup> Furthermore, it was this statutory system and the consequent embedded inequalities that formed the basis upon which women have entered the legal, post-apartheid RCMA era as 'equal rights' holders. On paper, the RCMA

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33 Mamashela and Xaba, *Research Report No. 59*, p. 15.

34 *Ibid.*

35 *Ibid.*

36 Burman, 'Marriage Break-up in South Africa'.

37 Mamashela and Xaba, *Research Report No. 59*, p. 16.

38 Mbatha *et al.*, 'Culture and Religion'.

39 Section 11 (3) of the BAA.

40 Mamashela and Xaba, *Research Report No. 59*, p. 16.

41 *Ibid.*

42 Mbatha *et al.*, 'Culture and Religion'.

43 *Ibid.*

44 T.E. Higgins, F. Fenrich and Z. Tanzer, 'Gender Equality and Customary Marriage: Bargaining in the Shadow of Post-Apartheid Legal Pluralism', *Fordham International Law Journal Special Report*, 30 (2006–2007), pp. 1653–1708.

45 *Ibid.*

46 Mbatha *et al.*, 'Culture and Religion'.

47 *Ibid.*

48 Nhlapo, 'African Customary Law in the Interim Constitution', pp. 160–3.

safeguarded women's rights and aimed to prevent their exposure to economic hardship upon the breakdown of customary marriages.<sup>49</sup> It did so in four ways.<sup>50</sup>

First, full legal recognition was accorded to all customary marriages concluded before and after the promulgation of the RCMA. This has protected the sanctity of customary marriages and made common-law maintenance and support remedies available to customary-marriage spouses upon divorce.<sup>51</sup> Secondly, customary marriages became subject to common-law matrimonial property regimes.<sup>52</sup> By default, all customary marriages are now in community of property unless an anti-nuptial contract is concluded.<sup>53</sup> This means that all property acquired before and after entry into a customary marriage forms part of a single joint matrimonial estate, which spouses co-own in equal undivided shares.<sup>54</sup> Customary-marriage wives have a legal entitlement to half of this joint matrimonial estate in the event of a divorce.<sup>55</sup> Thirdly, the RCMA abolished the perpetual minority status of women, thus giving them full legal capacity to acquire property and litigate in their own names.<sup>56</sup> Lastly, as mentioned above, only state courts are now permitted to grant decrees of divorce for customary marriages. Thus the state judicial system bears the responsibility of ensuring that equitable outcomes relating to the dissolution of customary marriages are achieved.<sup>57</sup>

However, the idea of a 'gender equal divorce' is complicated by the communal nature of certain assets under customary law.<sup>58</sup> Land and family homes are considered to be managed by a 'steward' for the benefit of the family collective, and are not conventionally divided upon the termination of a customary marriage.<sup>59</sup> Thus the authors recognise that the 'division of matrimonial property' is an ill-fitting concept in the customary-law divorce context. It is argued that 'equitable' outcomes in customary divorces should be aimed at securing the livelihoods of customary-law wives and dependent children rather than focusing on issues of equal treatment. This might include giving the ex-wife the 'right' to use land or housing for as long as is needed by her and the dependent children. This could safeguard their immediate physical and subsistence needs. Furthermore, the provision of spousal and child maintenance has to be considered in an economic context that is fluid and uncertain. The transfer of cattle or other forms of subsistence (like food supplies) could act as a replacement for monetary maintenance in the absence of paid employment. Maintenance orders could also, where applicable, be linked to and taken from state grants.

Importantly, it is through the court-mediated divorce procedures of the RCMA that the state offers support to married couples in the dissolution of their customary marriages. This support and assistance is only available once couples have approached the state judicial system for a decree of divorce.

## Legal Pluralism and Dispute Resolution Forums

Because of South Africa's pluralist system of dispute resolution forums, customary-marriage spouses are able to approach customary and state dispute resolution forums for assistance with

49 C.S. van der Waal, 'Formal and Informal Dispute Resolution in the Limpopo Province, South Africa', *Anthropology Southern Africa*, 27, 3–4 (2004), p. 113.

50 For a more detailed account, see Himonga, 'The Advancement of African Women's Rights', pp. 82–109.

51 *Ibid.*

52 *Ibid.*

53 *Ibid.*

54 F. du Bois, 'Marriage', in du Bois (ed.), *Wille's Principles*, p. 268.

55 *Ibid.*

56 Mamashela and Xaba, *Research Report No. 59*, p. 19.

57 Mbatha *et al.*, 'Culture and Religion'.

58 The RCMA has been criticised for not fully taking this issue into account in designating all customary marriages as being, by default, in community of property. See Mbatha, 'Reflection on the Rights Created', p. 45.

59 *Ibid.*

disputes relating to the dissolution of their customary marriages.<sup>60</sup> In the context of unequal power relationships, it is arguably beneficial for rural women to have multiple dispute resolution forums from which support could be sought in the event of marital breakdown and conflict. The system of dispute resolution forums can be navigated to ensure equitable outcomes in disputes relating to the dissolution of customary marriages. When one forum fails to provide equitable outcomes, another forum could (hypothetically) be approached, thereby reducing the risk of such disputes having prejudicial outcomes for the women involved.<sup>61</sup>

Research conducted in South Africa<sup>62</sup> and Botswana<sup>63</sup> has shown that people living in legal pluralist contexts navigate between different forums of dispute resolution. Furthermore, it has been found that there is a normative sequence in which people utilise customary and state dispute resolution forums when seeking assistance with disputes.

In a legal pluralist context similar to South Africa, Griffiths<sup>64</sup> investigated how women in rural areas of Botswana pursued claims relating to compensation for pregnancy and financial maintenance against their male partners. She found that women first predominantly navigated a hierarchy of customary dispute resolution forums to pursue their claims.<sup>65</sup> Claims were usually initiated within family dispute resolution forums. However, the failure to obtain a satisfactory outcome in one customary dispute resolution forum prompted the claim's transferral to other customary dispute resolution forums higher up in the hierarchy.<sup>66</sup> The factors discussed below were found to contribute to unsatisfactory outcomes being produced in customary dispute resolution forums.<sup>67</sup> These forums depended upon the voluntary participation of the claimant, the male partner and their families. Unwillingness on the part of any party to participate in these processes hampered the finalisation of claims within customary forums. Furthermore, the finalisation of claims could be a lengthy process, as family members were often geographically dispersed owing to the migrant labour system. Lastly, customary dispute resolution forums emphasised consensus and reconciliation and, except at the level of chiefs' courts, did not have the power to enforce any decisions regarding financial compensation. These factors also sometimes prompted women to transfer their cases to state courts, as judicial processes did not require the participation of family members. Moreover, some women perceived that state courts had more power to enforce orders of maintenance or compensation against their male partners.

Higgins *et al.*<sup>68</sup> and Van der Waal<sup>69</sup> found that a similar approach was used in South African customary marriage disputes. The majority of disputes relating to customary marriages were first dealt with within the family and, failing resolution, were then transferred to other customary dispute resolution forums.<sup>70</sup> It was also found that when disputes were not resolved within these forums, they would sometimes be transferred to state courts.<sup>71</sup>

It has frequently been argued that there are problems with both state and customary dispute resolution forums in South Africa. Higgins *et al.*<sup>72</sup> noted that, although customary dispute resolution forums were frequently used to resolve disputes relating to the breakdown of

60 Higgins *et al.*, 'Gender Equality and Customary Marriage', p. 1681.

61 A. Griffiths, 'Pregnancy and Marriage: The World of Negotiation and Dispute', in *In the Shadow of Marriage: Gender and Justice in an African Community* (Chicago, University of Chicago Press, 1997), p. 121.

62 Higgins *et al.*, 'Gender Equality and Customary Marriage', pp. 1653–1708. Van der Waal, 'Formal and Informal Dispute Resolution', pp. 111–21.

63 A. Griffiths, 'Support for Women with Dependent Children under the Customary System of the Bakwena and the Roman–Dutch Common and Statutory Law of Botswana', *Journal of Legal Pluralism*, 22 (1984), pp. 1–15.

64 *Ibid.*

65 *Ibid.*, p. 6.

66 *Ibid.*, p. 3.

67 *Ibid.*, pp. 7–11.

68 Higgins *et al.*, 'Gender Equality and Customary Marriage', pp. 1653–1708.

69 Van der Waal, 'Formal and Informal Dispute Resolution', pp. 113–19.

70 Higgins *et al.*, 'Gender Equality and Customary Marriage', p. 1702. Van der Waal, 'Formal and Informal Dispute Resolution', p. 113–19.

71 *Ibid.*

72 Higgins *et al.*, 'Gender Equality and Customary Marriage', p. 1700.



customary marriages, they could undermine the power of women. For instance, women were generally not permitted to speak or represent themselves in such forums.<sup>73</sup>

Research has shown that, despite the RCMA regulations, few customary marriages have been dissolved in state courts.<sup>74</sup> Rather than an absence of marital breakdown, this may indicate problems with access to state courts and the application of the RCMA.<sup>75</sup> Banda<sup>76</sup> highlighted the structural constraints that have limited Southern African women in their ability to access state courts in order to exercise their human rights. She argued that such constraints have rendered only customary dispute resolution forums available to most women.<sup>77</sup>

Various structural constraints have similarly been found to limit rural South African women in their ability to access support from state courts in the dissolution of their customary marriages. Consequently, these constraints arguably hamper the effectiveness of the RCMA in achieving its objectives. Such structural constraints include a lack of awareness about the RCMA and the rights that it confers on customary-marriage spouses,<sup>78</sup> unaffordable litigation costs in state courts,<sup>79</sup> and unequal power relations between spouses, which prevent women from negotiating for the application of the RCMA to the dissolution of their marriages.<sup>80</sup> In relation to the last constraint, Mamashela and Xaba<sup>81</sup> found that many husbands deserted their wives rather than formally divorcing them in accordance with the RCMA procedures. Women were argued to have little control over the dissolution of their marriages, as such practices were usually initiated by their husbands. Therefore, the authors contended that these desertion practices prevented the application of the RCMA to the dissolution of many customary marriages.<sup>82</sup>

## Methodology

This research project was undertaken by the National Research Foundation Chair in Customary Law in collaboration with the National Movement of Rural Women (NMRW). A qualitative research design was chosen in order to understand and evaluate how the RCMA was perceived and experienced by those living under customary law. The study was conducted in six South African provinces, namely: Eastern Cape, Kwazulu-Natal, Mpumalanga, Limpopo, North West and Gauteng. The first five of these provinces were selected on the basis that they contained settled, rural communities living under customary law. Gauteng was selected on the basis that it contained peri-urban areas, which represented an intersection of both rural and urban communities.

### *Sampling*

A sample for the study could not be drawn from official statistics or court records, and so a sampling frame was created.<sup>83</sup> The NMRW organised discussion groups in Limpopo, North West, KwaZulu-Natal and Mpumalanga. Management committees, ward councillors and traditional leaders were informed of these events and were asked to invite their communities to attend the discussions. A sampling frame was generated by creating a list of all discussion group attendees. Information regarding their sex, date of birth and marital status was recorded.

<sup>73</sup> *Ibid.*

<sup>74</sup> Mamashela and Xaba, *Research Report No. 59*, p. 22.

<sup>75</sup> *Ibid.*

<sup>76</sup> F. Banda, 'Women, Law and Human Rights in Southern Africa', *Journal of South African Studies*, 32, 1 (2006), pp. 13–27.

<sup>77</sup> *Ibid.*

<sup>78</sup> Mamashela, 'New Families, New Property, New Laws', p. 638.

<sup>79</sup> Himonga, 'The Advancement of African Women's Rights', p. 105.

<sup>80</sup> Mamashela and Xaba, *Research Report No. 59*, p. 22.

<sup>81</sup> *Ibid.*

<sup>82</sup> *Ibid.*

<sup>83</sup> There was no way of calculating the total number of people using the customary system each year; it proved impossible to identify and locate individuals from records in the chief's and magistrate's courts.

Given that this study aimed to evaluate the impact of the RCMA, which came into effect in 2000, respondents were selected on the basis that they had been married or experienced the dissolution of their customary marriages after 2000. In the Eastern Cape and Gauteng, where the NMRW was not present, snowball methods of sampling were adopted.

### *Sample Characteristics*

This article draws upon the findings from interviews with 39 married and 17 'divorced'<sup>84</sup> respondents. The majority of both the married and divorced respondents were women, between the ages of 30 and 50.<sup>85</sup> There were five married men and one male divorcee in the sample. In the combined sample of 56 participants, seven had partial primary schooling, 24 had partial secondary schooling, 14 had completed secondary school and 11 had some tertiary diploma. Furthermore, two-thirds of the married respondents and just over half of the divorced respondents were employed. These respondents were concentrated in low-skilled, low-income occupations in the formal and informal sectors.

In comparison with the sample of Budlender *et al.*,<sup>86</sup> ours constitutes a fairly well-educated, employed sample of (mainly) rural women. Overall, our sample is more financially secure and better educated than a representative sample of rural women, and may present the experiences of women who may have more options and understanding of the reformed laws and better access to different support systems.<sup>87</sup>

### *Data Collection*

Fieldworkers, who were fluent in both English and the first languages of the respondents, carried out the data collection for this study. Preceding data collection, workshops were held with the fieldworkers to train them in semi-structured interview techniques and the RCMA marriage and divorce provisions. Moreover, an experienced academic member of the research team explained key issues, such as the various matrimonial property regimes, to the fieldworkers.

With the use of interview guides, the fieldworkers collected data through initial and follow-up semi-structured interviews with the research participants. These interviews were conducted in the first languages of the respondents,<sup>88</sup> electronically recorded and then translated and transcribed into English. The initial semi-structured interviews aimed to gain an insight into how the married and divorced respondents experienced the entry into their customary marriages. The respondents were asked about their experiences in relation to the negotiation and transfer of *lobolo* (bride wealth) and the marriage registration procedures. The semi-structured interviews conducted with the divorcees also sought to understand their experiences of customary marriage dissolution. Both the married and divorced respondents were presented with six written vignettes. These vignettes contained scenarios about fictitious characters that faced conflicts associated with their customary-marriage relationships. In

84 Although all experienced the dissolution of their customary marriages, not all of the 'divorcees' were legally divorced in accordance with the RCMA procedures. These respondents identified themselves as divorced, and have thus been referred to as such.

85 Additional data collection with male respondents currently under way has not been included here. This article focuses on women's experience, as they have historically been 'outside the law' through being disadvantaged through both customary and statutory support systems. See Nhlapo, 'African Customary Law in the Interim Constitution', p. 162.

86 Of the 3,000 women surveyed, 77 per cent of the respondents in customary marriages had less than partial or completed secondary school. Furthermore, two-thirds of this sub-sample was unemployed. However, one-quarter of these women were not looking for employment, because they were pensioners who received a pension from the state.

87 While considering the findings, readers should bear in mind the type of sample achieved in this study. We wanted to draw on a heterogeneous sample in order to get an understanding of the diversity of experiences and perceptions of the utility of different dispute resolution forums.

88 The interview guides and vignettes were written in English. However, the fieldworkers translated each question and explained key terms to the respondents in their home languages.

responding to the vignettes, the respondents were required to advise the vignette characters on what the right course of action would be in each situation. Thus the vignettes investigated the perceptions and not the practices of the respondents.

Face-to-face follow-up interviews were conducted with five of the married respondents from the Eastern Cape. These interviews aimed to gain more insight into the respondents' perceptions on various dispute resolution forums and how they were to be utilised in marital conflict. Telephone follow-up interviews were conducted with 19 married and 12 divorced respondents from other provinces. These interviews were used to elaborate upon issues, in particular the type of marriage stated on the respondents' marriage certificates and their motivations for selecting a particular type of marriage. The involvement of the traditional leaders in customary-marriage dispute resolution did not arise automatically in many of the initial face-to-face interviews. The researchers wanted to make sure that this was due to the perceptions and practices of the respondents rather than the design of the interview guides. Therefore, the respondents were also questioned about the role of traditional leaders in their communities as well as in their personal marriage and/or divorce experiences.

### *Analytical Strategy*

All of the authors took part in the data analysis and engaged in the comparison of their coding, categorisation and theorisation of the data. Data analysis involved the creation of a coding framework, which organised the data according to various themes.

In relation to the analysis of the vignettes, initial codes were created in the coding framework to reflect what the respondents perceived would be the 'right thing to do' in each vignette situation. Only three of the six vignettes provided for the exploration of perceptions regarding various dispute resolution forums. It is these three vignettes which are discussed in this article. For each of these three vignettes, codes were created to reflect the range of dispute resolution forums that the respondents perceived should be turned to in each vignette scenario. For instance, in the division of matrimonial property vignette, codes for 'the family', 'traditional leaders', 'state courts', 'police', 'FAMSA'<sup>89</sup> and 'home affairs' were created to reflect the dispute resolution forums which the respondents perceived should be turned to for support by the female vignette character. This organised and compressed the data to facilitate a vignette-based approach to the analysis. Following this, more specific concepts were derived from the initial codes. For example, concepts such as 'powers of compulsion' and 'powers of protection' were derived to explain why respondents perceived that such forums should be turned to in the division of matrimonial property vignette. The respondents reflected similar perceptions about state courts in the custody and maintenance of children vignette. Thus a comparative analysis was undertaken between these two vignettes to create an overarching theme: 'state courts and litigation'.

In the last of these three vignettes, the respondents expressed perceptions about the family as a dispute resolution forum. The data from this vignette were coded in the aforementioned way, but also supplemented with data from the face-to-face follow-up interviews. This provided more clarity on the 'accessibility of family as a dispute resolution forum' and the 'family's reconciliatory role in dispute resolution'. These concepts formed another overarching category: 'family and reconciliation'.

Based on this analysis, the authors distinguished normative perceptions about the sequence in which dispute resolution forums should be approached in marital conflict and breakdown.

At times during the analysis it seemed as though some information had got lost in translation. For instance, terms like 'son-in-law' appeared in the English transcripts. These terms are not

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89 Families South Africa (FAMSA) is an NGO which, among other services, provides divorce counselling and mediation services to under- and unserved communities in South Africa. See Families South Africa (2010) available at <http://mzansiitsolutions.co.za/famsaorg/?q=node/48>, retrieved 2 February 2014.

conventionally used to describe relationships under African customary law. Therefore it was unclear whether these terms were used by the respondents or by the interpreters to clarify the meaning of participants' responses.<sup>90</sup> We also became aware of instances where a translator may not have translated a piece of spoken Xhosa into English in the same way as another translator might have done. This was especially important with regards to the participants' use of verbs (for example 'should do' versus 'did'), which were critical to understanding the meaning of an issue. Further discussions were held with the fieldworkers about the importance of translating questions and answers in ways that did not distort the meaning of the information. As the researchers who analysed the data did not speak the languages of the participants, several follow-up checks were requested to obtain the exact wording of some responses. In the light of the above, we concede that our representations of the participants' experiences may not be enough for full 'knowing'. We have endeavoured through collaboration, triangulation and several reviews to limit our 'outsider' role in the analysis process.

### *Findings*

The following sections contain a discussion of the research findings. The first of these sections elaborates upon the married respondents' responses to the three vignettes. This discussion is supplemented with findings from the face-to-face follow-up interviews. These findings offer insights into the respondents' perceptions about how the system of dispute resolution forums should be used in marital conflict and customary-marriage breakdown. A brief discussion on other, less commonly mentioned, dispute resolution forums is also provided. The second section discusses the experiences of the divorced respondents. These findings highlight how the system of dispute resolution forums was used in practice when marital breakdown in customary marriages occurred. The third section briefly outlines the findings, from the telephone follow-up interviews, regarding the role of traditional leaders in their communities in general and in relation to customary marriages in particular.

## **Perceptions Regarding Forums for Marital Dispute Resolution**

### *Family as a Forum of Dispute Resolution: An Emphasis on Reconciliation*

During their initial interviews, the married respondents were presented with a vignette which explored their perceptions regarding the importance of lobolo when entering into a customary marriage. Some 33 out of the 39 married respondents perceived that *lobolo* should be negotiated and transferred in customary marriages. These findings indicate normative beliefs about the importance of *lobolo* in customary marriage. One of the functions of *lobolo* is of particular relevance to the arguments made here.

The negotiation and transfer of *lobolo* was perceived to facilitate the recognition of the customary marriage by the respective families. This point was elaborated upon in the follow-up interviews, as in the following observation: 'in our family, if a person hasn't paid *lobolo* they're not considered to be the son-in-law of the family and the daughter isn't taken as a daughter-in-law of the other family'.

Furthermore, respondents expressed the view that, in being recognised as a spouse within a customary marriage, one was entitled to seek help from the family in marital conflict, as, for example, in the following quote: 'I have the right to go there to complain if I feel it's beyond my control. I have a right to go home and complain'. Thus the respondents perceived the family as a dispute resolution forum that could be approached for assistance in turbulent times of marriage. The above quote also indicates the stage at which respondents perceived it to be appropriate to approach family for support in marital conflict: that is, when the conflict

90 Despite the uncertainty about the source of these terms, they have been retained in the reported findings to clarify certain ideas.

moves beyond the 'control' of the aggrieved spouse or spouses and cannot be resolved by the married couple. This was elaborated upon during the follow-up interviews. One respondent noted: 'if we have conflicts or problems that we cannot discuss as a couple, then I go back home to my uncle or my dad and I tell them about the problems I am facing back home'. This finding supports the research of Griffiths<sup>91</sup> and Higgins *et al.*,<sup>92</sup> who found that families were often the first source of support sought in conflict between spouses.

The family was also perceived as having the task of reconciling a couple who had turned to them for assistance with a marital dispute. In commenting on what happens when the family is approached for support, a female respondent commented: 'my dad would call his family. They would sit down and see if they can save this marriage'. This focus on the 'restoration of the marriage' mirrors Griffiths's<sup>93</sup> findings on the role of the family in dispute resolution in rural areas of Botswana.

The perceptions highlighted above were held by many of the respondents. Arguably, the findings could therefore indicate normative agreement about who should be turned to first when couples cannot resolve marital problems. Furthermore, the findings highlight the normative role that families are perceived to play in marital dispute resolution.

The perceived role of family in marital disputes seemed to be dependent upon the negotiation and transfer of *lobolo*. Where these have not taken place and the marriage is not recognised by the respective families, respondents said that assistance with marital disputes was sought from outside the family. For example, one respondent noted that: 'the family members don't give help because they will not recognise him as their son-in-law so the couple will go and find help from other people who aren't part of the family'.

### *State Courts as a Forum of Dispute Resolution: Moving Beyond the Point of Reconciliation*

Two vignettes, which centred on conflicts associated with the dissolution of customary marriages, were presented to the married respondents during their initial interviews.

The first of these vignettes concerned the division of matrimonial property upon the dissolution of a customary marriage. The vignette was about a couple who had married under customary law and in community of property. The husband wanted to leave the marriage but not share his property with his wife upon doing so. The second vignette concerned the matter of child custody and maintenance after a divorce had been granted by a state court for a customary marriage in which *lobolo* had been transferred. The conflict in the vignette was based upon the husband wanting custody of the couple's children, even though the court had awarded custody to the mother. The respondents were told that the husband had decided to cease the provision of child maintenance until the mother gave him custody of the children.

In both vignettes, the respondents were asked to advise the female vignette characters what they should do in their respective situations. The majority of respondents (30 out of 39 in both vignettes) perceived that the female vignette characters should approach the state judicial system for assistance in the resolution of these disputes. None of the respondents, when responding to either vignette, perceived that family or other customary dispute resolution forums should be turned to for assistance in these disputes.

In response to the vignette discussed in the previous section, family involvement in marital dispute resolution was emphasised by the respondents as being important. Why was the same emphasis lacking in the responses to these two vignettes? The respondents perceived the family to have a reconciliatory role in the resolution of marital disputes. In presenting the respondents with conflicts relating to customary-marriage dissolution, the respondents might have perceived

91 Griffiths, 'Support for Women with Dependent Children'.

92 Higgins *et al.*, 'Gender Equality and Customary Marriage'.

93 Griffiths, 'Support for Women with Dependent Children', p. 12.

the marital disputes in the two vignettes as already being beyond the point of reconciliation, and thus beyond the point of familial assistance. In the first vignette, the male character had already decided to get out of his customary marriage. In the second vignette, divorce had already occurred. These findings could point to an implicit normative agreement among respondents about the point at which familial support in marital disputes should end. Familial support in marital disputes should cease when the dispute in question has progressed beyond the point of reconciliation between the spouses. These findings could also be indicative of normative perceptions about when support from state courts in marital disputes should begin to be sought.

Why did the married respondents perceive that the state courts should be turned to for assistance by the female vignette characters in their respective disputes? It will be argued that respondents perceived that, should the disputes be resolved between themselves, unequal power relations between the spouses could negatively impact on the outcome of their disputes. In seeking assistance from state courts, some respondents perceived that the female vignette characters would be protected from inequitable outcomes in the disputes, as caused by these unequal power relations.

In responding to each of the divorce-related vignettes, many of the respondents reflected the perception that the male characters had spousal or parental responsibilities that they were obliged to fulfil. In the child custody and maintenance vignette, it was expressed that the husband was responsible for financially maintaining his children, regardless of whose custody they were in after the termination of the customary marriage. For instance, one respondent commented that: 'the father has to maintain his children ... they're his. No one else will maintain them, even if they are not in his custody'. In the division of matrimonial property vignette, many respondents expressed the view that, in marrying in community of property, a binding obligation was placed upon both spouses to share their property in the event of a divorce: 'once you are in community of property, you are committing and tying yourself'.

Furthermore, the perception was implicitly reflected by some of the respondents that there could be unequal power relations between the spouses in the vignettes. It was perceived that these power relations could negatively influence the outcomes of the disputes, should the female characters attempt to enforce their spouses' obligations by themselves. For instance, in the division of matrimonial property vignette, a respondent commented that, if she were in the same position, she would prefer her husband to take his property without the division thereof:

if it were for me, I would let him take his things and I can have what is mine. The reason why I am saying this [is because] I don't want to be suffering. And the reason is being him; because he has made his decision and I am not going to change it.

This quote illustrates the unequal power relations that are perceived to exist between spouses in such conflicts. A wife's attempt to enforce the performance of her husband's legal obligations on her own was perceived by the respondent as being in vain. The respondent reflected that this pursuit would probably result in conflict with the husband and distress on the part of the wife, while not bringing about any change to the situation, because the husband's decision on the matter would still be enforced. Many respondents expressed the view that the female vignette characters should approach state courts for assistance with their disputes, as they were perceived to be powerful enough to enforce the performance of the above-mentioned obligations against uncooperative spouses. Respondents perceived this as a way of reducing interpersonal adversarialism between the spouses and preventing unequal power relations from influencing the outcome of the disputes.

#### *Additional Forums of Dispute Resolution*

The perceptions discussed in the previous section were held by the majority of the married respondents. It is worth noting, for the purposes of later discussion, that some respondents

perceived that other forums should be approached for assistance with the resolution of the disputes in the two divorce-related vignettes.

A respondent noted in a follow-up interview that churchgoers usually approached members of their church communities for help with their marital disputes before seeking assistance from their families. Additionally, some respondents thought that community leaders could help with marital conflict and breakdown. For instance, one respondent narrated a story about a couple who, after failing to achieve reconciliation through their families, turned to a local ward counsellor for assistance with their dispute:

Both families intervened but they were not able to resolve the issues because it became apparent that the wife's family was taking her side and the husband's family was taking his side. So no consensus was reached and the problem was not solved. There was no way forward so they went to the ward counsellor in order to have a way forward.

The above-mentioned dispute resolution forums were perceived to play a reconciliatory role. Given the emphasis on reconciliation by most of the respondents, these forums may be approached before state courts when the family fails to reconcile a couple in their marital dispute.

In the division of matrimonial property vignette, a respondent reflected the perception that the female vignette character would be assisted by FAMSAs. Additionally, some respondents reflected the view that the female vignette character could turn to other agents of the state, like the police or the Department of Home Affairs for support. This bears similarities with research conducted by Van der Waal,<sup>95</sup> who found that residents of rural areas in Limpopo province occasionally approached the police for assistance with various conflicts. Some respondents expressed the perception that the Department of Home Affairs would divide the property for the vignette couple, or at least advise the female vignette character on what to do in her situation. These institutions could have been perceived as 'enforcers' of state law which, like state courts, were equipped to compel people to abide by state laws relating to the division of matrimonial property.

### **Practices Relating to the Exit from Customary Marriages**

All except one of the 17 divorcees first approached their families for support when their marital conflicts could not be resolved by the married couple. These practices matched the normative perceptions held by the married respondents. However, none of the women was able to achieve reconciliation with her spouse within the family dispute resolution forum. Despite the widespread perception that state courts should be approached for support when reconciliation through the family fails, only three out of the 17 customary marriages were dissolved in state courts. Two of the respondents self-initiated these divorce proceedings, while the other was served divorce papers by her husband. Despite being accorded jurisdiction to mediate customary-marriage disputes by the RCMA, only two women approached traditional leaders in the breakdown of their customary marriages. These respondents did not do so to seek assistance with the mediation of their marital conflicts, but to inform them of the circumstances under which their customary marriages had broken down.

The remaining 14 women, who failed to achieve reconciliation through their families and who did not turn to state courts for assistance, informally separated from their husbands. Furthermore, due to a number of factors, they were left in economically vulnerable positions upon such separation. First, although small amounts of assets were involved and many women were married in community of property, an equitable distribution of matrimonial property had not taken place in the majority of these cases. The matrimonial property was often retained

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<sup>95</sup> Van der Waal, 'Formal and Informal Dispute Resolution', p. 119.

by the husbands upon separation, while their wives left with only their personal possessions. In these cases, it was reported that the husbands were the sole decision makers regarding the property that their wives could retain after the breakdown of the marriage. Secondly, 14 out of the 17 divorcees remained the primary care-givers to the marital children after separation. Most of these women did not receive child maintenance or other forms of financial support from their spouses. In the few cases where child maintenance was paid, payments were often irregular and insufficient. This left the respondents without means of support for their children for extended periods of time.

## The Role of Traditional Leaders

Traditional leaders played a role in the conclusion of the majority of the married and divorced respondents' customary marriages. This was not the case in urban areas and when civil or 'church' weddings were concluded. In some cases, the traditional leader was informed by the families concerned that *lobolo* had been transferred. The transfer of *lobolo* was often recorded by the traditional leader, who then furnished the families with a letter confirming the negotiation and transfer of *lobolo*. In one case, the traditional leader registered the customary marriage at the Department of Home Affairs on behalf of the couple concerned.

In relation to the resolution of marital disputes, it was found that, although traditional leaders could have been approached by many of the divorcees, this was not done for various reasons. A number of respondents told us that they did not seek assistance from traditional leaders in the breakdown of their marriages because, at the time, they thought that their families would be able to facilitate reconciliation. In other cases, the unwillingness of their husbands to involve a traditional leader prevented the divorcees from approaching one for support with their marital disputes. In only one instance was a traditional leader involved in the dissolution of a customary marriage, by helping enforce a court order regarding the division of matrimonial property.

When asked about the role of traditional leaders in their communities, many married and divorced respondents emphasised their responsibility for maintaining order and solving socio-economic problems. Furthermore, some of the research participants reported that traditional leaders intervened in disputes when people were unable to reach a resolution on their own. However, a few of the respondents reflected the belief that intervention by a traditional leader in marital disputes was warranted only when the disputes were grave in nature and could not be resolved by the families concerned.

## The Shortcomings within South Africa's System of Dispute Resolution Forums

The divorcees' experiences of marital breakdown were of concern. The family was not only the primary, but also often the sole forum of dispute resolution that was approached for assistance in marital conflicts. There could be many instances in which the family collective is able to reconcile couples and restore their marriages. However, the experiences of the divorcees highlight what happens when resolution through the family fails. Most of the women did not go on to obtain support from other customary or state dispute resolution forums. Consequently, the majority of the divorcees were left to negotiate with their husbands the terms upon which their marriages ended. This exposed them to the operation of unequal power relations and left them in economically prejudicial positions upon the breakdown of their customary marriages. These experiences fly in the face of the RCMA. The findings indicate that the experiences of powerlessness and vulnerability upon marital breakdown have not disappeared with the introduction of the RCMA, and that the effects of historically 'outside the law' have not yet been fully eradicated. Furthermore, the findings highlight that there are shortcomings within South Africa's system of dispute resolution forums which have contributed to women being



placed in vulnerable positions upon the breakdown of their customary marriages. In comparing the perceptions of the married respondents with the experiences of the divorcees, some of these shortcomings become more apparent.

While the married respondents perceived that state courts should be approached for assistance when reconciliation through the family fails, this was not done in practice by the majority of the divorcees. As previously discussed, there is a large body of research that has argued that structural constraints prevent rural women from accessing state dispute resolution forums for support in the dissolution of their marriages.<sup>96</sup> In attempting to understand why state courts were not turned to for assistance by the divorcees when familial reconciliation failed, it would not be unreasonable to suggest that they may have experienced such constraints. For instance, they may have lacked information about the RCMA and the rights that it conferred to them. Or they may not have been aware of the consequences of the matrimonial property regimes that applied to their marriages. Furthermore, they may have experienced geographical or financial constraints that limited their access to the state courts to initiate divorce proceedings. By limiting access to state courts, these structural constraints are shortcomings within the system of dispute resolution forums, as they hinder the achievement of equitable outcomes in customary-marriage dissolution.

Secondly, traditional leaders were not approached for assistance in marital breakdown, as is authorised by the RCMA. Furthermore, in relation to the vignette data, the married respondents did not reflect the perception that traditional leaders should be turned to for assistance in conflicts associated with the dissolution of customary marriages. In the light of the follow-up interview data, it may have been that the conflicts in question were not perceived to be grave enough to warrant assistance from traditional leaders. Alternatively, the respondents may have perceived the state as being better equipped to resolve the conflict in question. If this is the case, then the research by Griffiths<sup>97</sup> could shed light on why this is so. She argued that some women in Botswana transferred their claims to state courts, as they were perceived to be more powerful than customary forums in enforcing orders for maintenance and compensation against the men in question.<sup>98</sup> Additional research is required to clarify these perceptions. None the less, this issue could point towards another shortcoming within the system of dispute resolution forums, in that there is an available forum that is not being used – nor is it perceived that it should be used – in marital conflict and breakdown.

Other than through the application of the RCMA in divorce proceedings, no additional support is provided by the state to married couples who experience marital breakdown. Given that few couples accessed state courts in the dissolution of their customary marriages, another possible shortcoming within the system of dispute resolution forums is that the state may be providing support to couples at too late a point in marital breakdown. Could the state do more to ensure that women are not placed in economically prejudicial positions in the dissolution of their customary marriages? There are various courses of action that could be taken to remedy the shortcomings that have been identified. Two of these are discussed below.

First, steps could be taken by the state to address the aforementioned structural constraints. It has been argued that people may lack awareness of the RCMA, the matrimonial property regimes that apply to their customary marriages, and the consequences of these for divorce.<sup>99</sup> Some of the married respondents perceived that Home Affairs and the South African Police Service could be turned to for assistance with the resolution of marital conflicts associated with marital breakdown. Although these perceptions indicate a certain amount of institutional

96 Banda, 'Women, Law and Human Rights in Southern Africa'. Himonga, 'The Advancement of African Women's Rights'. Mamashela and Xaba, *Research Report No. 59*. Higgins *et al.*, 'Gender Equality and Customary Marriage'.

97 Griffiths, 'Support for Women with Dependent Children'.

98 *Ibid.*

99 Mamashela and Xaba, *Research Report No. 59*.

confusion, the state could empower Home Affairs and the Police Service to provide people with more information about the RCMA and how to access the state judicial system for support upon marital breakdown. As traditional leaders seem to play a role in the conclusion of customary marriages, they too could be empowered to provide such information to couples who approach them in the process of entering into their marriages.

It has been argued that the costs of litigation prevent many women from turning to state courts for assistance in the dissolution of their customary marriages.<sup>100</sup> The Department of Justice and Constitutional Development has aimed to increase access to justice in relation to civil matters, through introducing voluntary mediation services in magistrates' and high courts that can be used prior to ordinary trial proceedings.<sup>101</sup> The mediation rules for magistrates' courts, which came into force in December 2014,<sup>102</sup> have stipulated that the parties to the mediation are responsible for the mediation costs. The government has attempted to regulate the costs of mediation by placing limits on the fees payable to mediators.<sup>103</sup> Depending on their level of training, mediators can charge up to R6,000 for a single day of mediation, and a maximum of R1,800 for the provision of a mediator's report.<sup>104</sup> These fees may be considered 'nominal' in comparison to those of ordinary legal proceedings. In 2014, however, 37 per cent of the population, the majority of whom were black South Africans, had a per capita monthly income of R544 or less, and could not meet their basic nutritional requirements while also paying for non-food items.<sup>105</sup> In this context of widespread poverty, many may still not be able to afford mediation services in the dissolution of their customary marriages. To remedy this, court-based mediation could arguably be covered or subsidised by the state to ensure that more people are able to enter into mediation and have their disputes resolved in this manner.<sup>106</sup> It must be noted that the mediation rules would provide assistance to couples only when they approach the state judicial system for assistance in the dissolution of their customary marriages. Again, one could argue that this form of support is still not provided early enough in the marital breakdown process. This leads to the second course of action that could be adopted to address the above-mentioned shortcomings in the country's system of dispute resolution forums.

The state could provide additional mechanisms of support to married couples at an earlier stage in marital breakdown. These could include counselling or mediation services. It could also involve aiding the expansion and capacity of existing services provided by non-governmental organisations and organisations such as FAMSA, which aim to provide support to married couples prior to the dissolution of their marriages. Additionally, traditional leaders could be empowered to bring couples into contact with these types of organisations in order to provide women with the support they require to have their voices heard and rights protected.

100 Himonga, 'The Advancement of African Women's Rights', p. 105.

101 South African Association of Mediators, *Media Statement: July 2013*, available at <http://saam.org.za/wp-content/uploads/2015/09/SAAM-Media-Statement-July-2013.pdf>, retrieved 16 November 2015.

102 Department of Justice and Constitutional Development, 'Amendment of Rules Regulating the Conduct of the Proceedings of the Magistrates Courts of South Africa', *Government Notice No. 37,448, 18 March 2014*, available at [http://www.justice.gov.za/legislation/notices/2014/2014-03-18-gg37448\\_rg10151\\_gon183-rules-mc.pdf](http://www.justice.gov.za/legislation/notices/2014/2014-03-18-gg37448_rg10151_gon183-rules-mc.pdf), retrieved 12 June 2014. The mediation rules, as applying to the High Court, have not yet been finalised; see J. Joubert, 'Mediation Rules Finally Signed by Minister of Justice but Require Judicial Activism', available at <http://www.jacques-joubert.co.za/media/docs/Judicial%20Activism%20-%20By%20Jacques%20Joubert.pdf>, retrieved 12 June 2014.

103 Department of Justice and Constitutional Development, 'Fees Payable to Mediators, Qualifications, Standards and Levels of Mediators', *Government Notice No. 38,163*, 31 October 2014, available at [http://www.gov.za/sites/www.gov.za/files/38163\\_gon854.pdf](http://www.gov.za/sites/www.gov.za/files/38163_gon854.pdf), retrieved 27 January 2016.

104 *Ibid.*

105 Statistics South Africa, 'Methodological Report on Rebasing of National Poverty Lines and Development of Provincial Poverty Lines: Technical Report', *Report No. 03-10-11* (2015), available at <http://beta2.statssa.gov.za/publications/Report-03-10-11/Report-03-10-11.pdf>, retrieved 27 January 2016.

106 This argument was also made by the Law Society of South Africa during the initial drafting of the Mediation Rules: see Law Society of South Africa, 'Comments by the Law Society of South Africa (LSSA) on the Proposed Mediation Rules', unpublished document, Pretoria, 2011.

## Conclusion

This article has highlighted the fact that South Africa has a system of dispute resolution forums that are available to those who experience marital conflict and breakdown in customary marriage. The authors have argued that there are shortcomings within this system. Structural constraints arguably limit customary-marriage spouses from seeking judicial support in the dissolution of their customary marriages. These constraints also limit the application of the RCMA to customary-marriage breakdowns. Additionally, some customary forums of dispute resolution appear to be under-utilised by couples undergoing marital breakdown. These shortcomings have contributed to some rural women being placed in economically prejudicial positions upon the dissolution of their customary marriages, and have hampered the effectiveness of the RCMA in ensuring gender equitable outcomes upon the dissolution of customary marriages.

The article has also discussed ways in which these shortcomings could be addressed. It is by no means suggested that they are the only solution to these shortcomings. It must be noted that these solutions would require immense financial and administrative resources from the state. However, these costs need to be weighed against the need to ensure that equitable outcomes are enjoyed by those who experience the dissolution of their customary marriages.

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