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BACKGROUND

In March 2001, the Women's Rights Project of the Legal Resources Centre (LRC) of South Africa, with the financial assistance of the Canadian Bar Association, organised a workshop in Windhoek, Namibia to discuss the rights of women in Southern Africa under customary law. The workshop was attended by academics, legal practitioners and representatives from various non-governmental organisations from Southern African countries and Canada.

One of the primary objectives was to begin a dialogue among participants in an attempt to combine efforts and work towards the consistent development of customary law in the region. The workshop afforded an opportunity for participants to explore their own case studies as well as other specific examples that highlighted the challenges they face in their work on customary law and women's rights issues.

As part of efforts to meet the objective identified at the Windhoek workshop, a pilot project was initiated involving an analysis and comparison of the rights of women in South Africa and Lesotho under customary law. This project has provided an opportunity and forum for activists, academics and practitioners working in the field of customary law and women and development to learn from each other and to use their expertise to ensure that the rights of women in Southern Africa develop in a manner that is consistent with their needs within the continent.

The comparative analysis was conducted by the LRC and the Community Legal Assistance and Resources Centre (CLRAC) in Lesotho. It examined the similarities and differences in Lesotho's and South Africa's customary law systems, prioritised the areas of law to be targeted, and identified strategies that would ensure that customary law is practised in a non-discriminatory manner. The year-long collaborative process yielded a number of research papers and other documentation, which will be discussed in Part II of this publication.

The comparative study was presented at a workshop in Lesotho in May 2003, which was attended by numerous stakeholders in the country, including top government officials from various departments (including the Ministry of Justice, Human Rights, Law and Constitutional Affairs), the First Lady, lawyers, representatives from the Law Reform Commission, the United Nations, women's organisations and other non-governmental organisations. The aim of the workshop was to identify the needs of women and devise strategies to ensure that the issue of women's equality is adequately addressed. Issues such as the struggle for legal recognition of customary marriages, the minority status of women, the law of succession and the protection of women were among the areas targeted for reform. Participants made various recommendations and devised a work-plan, which called for additional research, the codification of customary law in Lesotho, and lobbying and advocacy strategies for change.

It is hoped that this pilot project will be duplicated in other countries in the sub-region over the next three to five years in an attempt to ensure that participating countries in

Southern Africa guide the development of customary law in a non-discriminatory manner. Namibia and Zambia have been identified as the partners in the next phase of the project, and a workshop with the theme Women's Rights in African Customary Law was held in Lusaka, Zambia in March 2004.

Part I of this publication provides an overview of customary law in the sub-region, and Part II contains the detailed analysis and comparison of the current situation in South Africa and Lesotho *vis-a-vis* customary law and women. It is anticipated that as the project expands and workshops are conducted in additional Southern African countries, they will be added to Part II of this publication.

PART I: AN OVERVIEW OF WOMEN'S RIGHTS IN AFRICAN CUSTOMARY LAW

The majority of Southern African countries have signed and ratified international instruments such as the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), as well as regional instruments such as the African Charter on Human and Peoples' Rights that seek to eliminate discrimination against women. Many also have constitutions that pronounce equality amongst all citizens. However, many of these countries' general practice and interpretation of customary and traditional laws infringe on women's rights and legal status, in direct contrast to their obligations as outlined in the international and regional instruments. These societies are struggling to give effect to the guarantee of equality enshrined in their various constitutions and international and regional treaties, while at the same time respecting the customary laws and practices prevalent and accepted amongst their citizens.

The laws on marriage, divorce, succession and inheritance in most African countries are made up of a mixture of customary, religious and state law. While the exact nature of the laws differ from country to country, the impact on women is very similar. Women are disadvantaged because of traditional and patriarchal beliefs and attitudes, ignorance of their rights and a lack of power to assert their rights.

The following discussion of the context in countries in Southern Africa illustrates that despite governments' efforts to make significant changes to improve the legal status of women, the patriarchal nature of the state itself often plays a key role in perpetuating the negative effects of customary practices and beliefs. Furthermore, the institutionalisation of customary laws and practices and the strong societal perceptions that support them continue to hamper governments' initiatives.

The International and Regional Context

International Human Rights Instruments: Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

CEDAW was adopted in 1979 by the UN General Assembly, and has often been described as an international bill of rights for women. It defines what constitutes discrimination against women and sets up an agenda for national action to end such discrimination. Since its adoption, women's and human rights organisations have successfully used it as a tool in their efforts to promote the advancement of women.

Article 1 of the Convention defines discrimination against women as:

"...any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."¹

By ratifying the Convention, States commit themselves to undertaking a series of measures to end discrimination against women in all forms, including:²

- The incorporation of the principle of equality of men and women in their legal system, the abolishment of all discriminatory laws and the adoption of appropriate laws prohibiting discrimination against women;
- The establishment of tribunals and other public institutions to ensure the effective protection of women against discrimination; and
- The elimination of all acts of discrimination against women by persons, organisations or enterprises.

The Convention provides the basis for realising equality between women and men through ensuring women's equal access to, and equal opportunities in, political and public life – including the right to vote and to stand for election – as well as education, health and employment. States parties agree to take all appropriate measures, including legislation and temporary special measures, so that women can enjoy their human rights and fundamental freedoms.

¹ United Nations. 1981, September 3. *Convention on the Elimination of All Forms of Discrimination Against Women* [Hereinafter CEDAW], Article 1. [Online].

Available: <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm> [2004, January 22].

² What follows is based on the text of CEDAW. The full text of CEDAW can be found at the following site: Text of the Convention on the Elimination of All Forms of Discrimination Against Women, [Hereinafter CEDAW Text], [Online].

Available: <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm> [2004, January 22].

Moreover, the Convention is the only human rights treaty that affirms the reproductive rights of women and targets culture and tradition as influential forces that shape gender roles and family relations. It affirms women's right to acquire, change or retain their nationality and the nationality of their children. States parties also agree to take appropriate measures against all forms of traffic in women and exploitation of women.

The aim of the Convention, as laid down in the preamble, is to reaffirm faith in the equal rights and dignity of men and women and the principle of non-discrimination. It seeks to do this through changing the traditional roles of men and women in society and in the family.

The following outlines some of the central provisions of CEDAW:

- Article 1 provides that state parties shall grant women equal rights with men in the enjoyment of human rights and fundamental freedoms.
- Article 5(a) provides that “state parties shall take all appropriate measures to modify the social and cultural patterns of conduct of men and women, achieving the elimination of prejudices suffered by women under both customary law and common law, including all other practices which are based on the idea of inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.
- Article 15 guarantees equality before the law and equal protection of the law, which indicates that both men and women have the same legal status and equal opportunities to exercise their legal rights and capacities.
- Article 16 prohibits discrimination against women in respect of all matters concerning marriage and family relations in general. Implicitly, then, women and men must have the same rights in deciding all matters which concern their marriage, such as family planning and matters relating to the children and so on. This eliminates the concept of a ‘head of the family’, which reaffirms inequality between men and women and results in discrimination on the basis of sex.

Countries that have ratified the Convention are legally bound to put its provisions into practice. They are also committed to submit national reports, at least once every four years, on measures they have taken to comply with their treaty obligations.

At present, most Southern and East African countries - with the exception of Swaziland – have ratified CEDAW:³

Country	Date of Ratification to CEDAW
Botswana	13 August 1996
Lesotho	22 August 1995
Malawi	12 March 1987
Mozambique	16 April 1997
Namibia	23 November 1992
South Africa	15 December 1995
Uganda	22 July 1985
United Republic of Tanzania	20 August 1985
Zambia	21 June 1985
Zimbabwe	13 May 1991

On 22 December 2000, the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women (Op-CEDAW) entered into force. Op-CEDAW creates access to justice for women at the international level by allowing women who have been denied access to justice within their countries to have their claims reviewed by a committee of independent experts that monitors compliance with CEDAW. At present, Op-CEDAW has been signed by Lesotho (6 September 2000), Malawi (7 September 2000), and Namibia (19 May 2000). Of these, only Namibia has ratified OP-CEDAW (on 26 May 2000).⁴

³ CEDAW Text, *supra* note 2.

⁴ *Signatures to and Ratifications Of the Optional Protocol*, [Online] (2004, January 9), [On-line]. Available: <http://www.un.org/womenwatch/daw/cedaw/sigop.htm> [2004, January 22].

Regional Human Rights Instruments: African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights was adopted by the Organisation of African Unity at a meeting in Nairobi on 27 June 1981 and came into force in 1986.⁵ The African Charter is unique in that it covers economic, social and cultural rights as well as civil and political rights. Moreover, Part II of the African Charter calls for the establishment of the African Commission on Human and Peoples' Rights to ensure the protection of people's rights throughout the African continent.

The African Charter reinforces the status of CEDAW as a legal framework governing the situation of women in Southern Africa. It contains several provisions that proclaim the general rights to non-discrimination⁶ and equality before the law,⁷ most notably Articles 2 and 3:

Article 2

Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

Article 3

1. Every individual shall be equal before the law.
2. Every individual shall be entitled to equal protection of the law.

In addition, Article 18 of the African Charter explicitly deals with women's rights. Subsection 3 states:

The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.

Difficulties arise, however, when the protection afforded by the relevant international treaties conflict with customary laws and practices. Accordingly, support has been expressed by several academics for an additional protocol that might be conducive to greater protection for women⁸.

⁵ What follows is based on the text of the African Charter on Human and Peoples' Rights [hereinafter African Charter]. The full text can be found at the following site:

http://www.diplomacy.edu/AfricanCharter/acharter_intro.asp [2004, February 9].

⁶ African Charter, *supra* note 5, Articles 2, 19 and 28.

⁷ African Charter, *supra* note 5, Articles 3, 5, 19 and 26.

⁸ *AFLA Quarterly*, July-September 1996, [On-line].

Available: <http://www.afla.unimaas.nl/en/pubs/AFLA%20Quarterly3a96.htm> [2004, February 20].

The African Charter has become the most widely accepted regional convention, as it has been ratified by 53 African states, including all countries in Southern Africa:⁹

Country	Date of Ratification/Accession
Botswana	17 July 1986
Lesotho	10 February 1992
Malawi	17 November 1989
Mozambique	22 February 1989
Namibia	30 July 1992
South Africa	9 July 1996
Uganda	10 May 1986
United Republic of Tanzania	18 February 1984
Zambia	10 January 1984
Zimbabwe	30 May 1986

Like CEDAW, the African Charter provides for an enforcement body to ensure compliance with its provisions. Part II of the African Charter elaborates on the measures to safeguard the rights articulated in Part I. More specifically, Article 55 calls for the creation of the African Commission on Human and Peoples' Rights to receive individual complaints. The remainder of Part II sets down the structure and functions of the Commission in detail and indicates the applicable principles by which the Commission should secure the protection of human rights in Africa.

⁹ List of countries which have signed, ratified/adhered to the African Charter on Human and Peoples' Rights (as a August 2003), [On-line]. Available: www.achpr.org/Status_Ratifications-Charter_19aug03.pdf [2004, February 10].

Country Overviews

The following brief overviews provide information regarding the system of government and the legal framework guiding the development of women's rights in customary law in each of the countries in Southern Africa. South Africa and Lesotho have been omitted from Part I, as a detailed analysis of the situation for women in those countries follows in Part II.

Botswana

Botswana's system of government is a parliamentary democracy, with an executive consisting of a President (who is both chief of state and head of government) and a Cabinet, a popularly elected National Assembly and an advisory House of Chiefs in the legislature.¹⁰ Botswana is one of the few African countries with a multi-party constitutional democracy.¹¹ The Constitution of 1966 contains a code of fundamental human rights (including the right to equality) enforced by the courts.

Botswana has a well-developed dual legal system, comprising both customary law and general law (a mixture of civil and common law). The High Court has general civil and criminal jurisdiction, with a Court of Appeal and Magistrates' Courts in administrative districts. Chiefs and other leaders preside over customary, traditional courts, though all persons have the right to request that their case be considered under the formal British-based legal system.¹²

Under both systems of law, women receive unequal treatment regarding issues such as legal status and capacity, property rights, inheritance, maintenance, and custody and guardianship of children.¹³ In the past 10 years, however, Botswana amended its statutes in an attempt to remove their gender biases.¹⁴ For example, the Citizenship Act was amended to remove certain discriminatory provisions,¹⁵ and the Deeds Registry (Amendment) Act was amended in 1996 to allow women married in community of property the right to have immovable property registered in their names.

¹⁰ A draft of any National Assembly bill of tribal concern must be referred to the House of Chiefs for advisory opinion.

¹¹ Available: http://members.africa-adventure.org/1_english/info/botswana/destin/country/botswana.html [2004, February 10].

¹² PolitInfo US: Country Information on Botswana (Profile) (2003, June)[On-line]. Available: http://us.politinfo.com/Information/Country_Profiles/country_profile_004.html [2004, February 10].

¹³ Zita Mokomane. (2001, July). Laws Affecting Unmarried and Married Women in Botswana: A Theoretical Review. [On-line].

However, the Botswana High Court ruled in December of 2000 that customary marriages must be dissolved by virtue of legal grounds based on customary law. Letshwiti Tutwane, Mmegi. (2000, December 4).

Botswana High Court leaves traditional marriages to customary courts, *Afrol News*, [Online].

Available: www.ined.fr/rencontres/colloques/coll_abidjan/publis/word/session8/mokomane.doc [2004, February 5].

Available: http://www.afrol.com/News/bot006_trad_marriage.htm [2004, January 22].

¹⁴ Women's Human and Legal Rights (1999). *South African Research and Development Centre* [Online].

Available: http://www.sardc.net/widsaa/sgm/1999/sgm_ch5.html [2004, January 22].

¹⁵ Sections 4(1) and 5 (1) of the Citizenship Act of 1982, which prohibited Botswana women from passing on their Botswana citizenship to their children if the children's father was not a Botswana citizen, were repealed as a result of the decision of the court of Appeal in the case of *Attorney General of Botswana v. Unity Dow*, certified judgment of the Court of Appeal Civil Appeal, No. 4/91, Botswana, 1992, which upheld the High Court decision in the case of *Unity Dow v. Attorney General of Botswana*, Misca, 124/1990 to the effect that the two sections were discriminatory on the basis of gender and therefore contravened the Botswana Constitution. What must be noted, however, is that Sections 4 (1) and 5(1) of the Citizenship Act No. 8 of 1998 apply only to persons who were born after the commencement of the Act.

Malawi

The Government of Malawi has been a multi-party democracy since 1994, with an elected President, who is both chief of state and head of the government, and a Vice-President. Malawi's legislative branch consists of a unicameral National Assembly. Malawi's judicial system, based on the English model, is made up of magisterial lower courts, a High Court, and a Supreme Court of Appeal.¹⁶

Malawi's 1995 Constitution guarantees equal rights for women and men in its Bill of Rights. The key provision is Section 24, entitled "Rights of Women"¹⁷ which states:

1. Women have the right to full and equal protection by the law, and have the right not to be discriminated against on the basis of their gender or marital status...
2. Any law that discriminates against women on the basis of gender or marital status shall be invalid and legislation shall be passed to eliminate customs and practices that discriminate against women., particularly practices such as...
 - c. deprivation of property, including property obtained by inheritance.

Despite these guarantees, there are several pieces of legislation that are inconsistent with the new Constitution.¹⁸ In the area of land rights, although legislation pertaining to the acquisition of freehold land does not discriminate between the sexes,¹⁹ the Land Act does not provide guidelines on how men or women may inherit land in case of the death of a spouse or close relative. Women and men have *de jure* access and control to land, yet due to the biases of those responsible for the administration of land the *de facto* position is that women do not enjoy equal access to land, neither do they have control and ownership over it.²⁰

¹⁶ PolitInfo US: Country Information on Malawi (Profile) (2003, October) [On-line]. Available: http://us.politinfo.com/Information/Country_Profiles/country_profile_192.html [2004, February 10].

¹⁷ The Republic of Malawi (Constitution) Act, 1994, Chapter IV: Human Rights, Section 24(1) and (2) [Online]. Available: http://www.sas.upenn.edu/African_Studies/Govern_Political/mlwi_const.html [2004, January 22].

¹⁸ For example, the Wills and Inheritance Act applies only to the property of a deceased man. It is silent on property owned by a woman, based on the assumption that women did not (and also could not) own property. Hazwell Kanjaye. (2000, June 9). Malawi Women: New Gender Policy Improves The Status Of Women [Online].

Available: http://www2.womensnet.org.za/beijing5/news1/show.cfm?news1_id=83 [2004, January 22].

¹⁹ South African Regional Poverty Network (SARPN): 2.3.4 *Gender and Land in Malawi* [Online]. Available: <http://www.sarpn.org.za/EventPapers/june2002/hiv/papers/mbaya/> [2003, December 5].

²⁰ Malawi has recently adopted a New Land Policy that will form the basis of the New Land Act that will be enacted in the near future. The Act will aim to address some of the present challenges highlighted above, although cultural and traditional attitudes are likely to overshadow the new law, as has been the case with the inheritance law. For a discussion of the land policy and proposed Act, see: Naomi Ngwira. Women's Property and Inheritance Rights and the Land Reform Process in Malawi. *South African Regional Poverty Network (SARPN)* [Online].

Mozambique

Mozambique has a multi-party democratic government, with a President and Council of Ministers in the executive, a National Assembly and municipal assemblies in the legislative, and a Supreme Court, provincial, district, and municipal courts in the judiciary.

The Constitution of Mozambique, enacted in 1990, enshrines equal rights for men and women and prohibits gender discrimination.²¹

Perhaps the greatest legislative reform was the Land Law Act, passed in 1997. The Act is one of the most gender-friendly in the region, aiming to protect land usage rights for small-scale farmers, who make up over 99 percent of agriculture and are the mainstay of the economy.²² The new law was a major breakthrough, as it combines formal and customary law while simultaneously ensuring that the formal law prevails over customary law in the event of a contradiction between the two. Not only does it recognise written documents in land usage cases, but it also recognises customary tenure systems and the rights of people who had occupied land for over 10 years in good faith, to cultivate it legally. Moreover, although land continues to belong to the state, written evidence for the right to use it is no longer necessary. In terms of women's right to land ownership and usage, the current Land Law Act, contains a clause entitling women to property rights.²³

Another major victory for women's rights came on 16 December 2003, when the Mozambican Parliament passed a new Family Law, which, for the first time, legally recognises customary marriages and informal unions between men and women.²⁴ As a result, women who have lived with their partners for more than a year are entitled to inherit the property of their partners.

The effectiveness of these progressive Acts in according protection for women depends in large part upon their implementation. Formal law remains inaccessible to women, and under customary law women have secondary rights.

Available: <http://www.sarpn.org.za/documents/d0000585/index.php> [2004, January 22].

²¹ Constitution of Mozambique (Approved and enacted in November 1990), Articles 67 and 69 [On-line].

Available: <http://confinder.richmond.edu/MOZ.htm#II-Chapter%20II> [2004, February 10].

²² Mozambique: Women Struggle for land rights despite new law, *IRIN Web Special on land reform in Southern Africa*. [On-line].

Available: <http://www.irinnews.org/webspecials/landreformsa/Mozambique.asp> [2003, December 9].

²³ IRIN Web Special on land reform in Southern Africa; Mozambique: Women Struggle for land rights despite new law. Website: <http://www.irinnews.org/webspecials/landreformsa/Mozambique.asp>

²⁴ Leonard Maveneka. (2004, January 8). Mozambique's Family Law Passes! *Oxfam America*. [On-line]. Available: <http://www.oxfamamerica.org/advocacy/art6728.html> [2004, February 5].

Namibia

The Republic of Namibia attained its independence in 1990 and was established as a sovereign, secular, democratic and unitary State.²⁵ The executive powers of Namibia are vested with the President (the elected head of State and government) and the Cabinet. The legislature consists of the National Assembly and the National Council and the judiciary consists of the Supreme Court, the High Court and the Lower Courts, all of which are independent and subject only to the Constitution and the law. No member of the Cabinet or the legislature or any other person can interfere with Judges or Judicial Officers in the exercise of their judicial functions. The judicial structure in Namibia parallels that of South Africa. In 1919, Roman-Dutch law was declared the common law of the territory and remains so to the present.²⁶

The Namibian Constitution²⁷ struggles to reconcile its gender equality provisions with other constitutional provisions recognising the validity of customary law and the power of traditional authorities. For example, Article 10 guarantees equality and freedom from discrimination, Article 14 advances the principle of equality and non-discrimination in marriage and Article 95 encourages the Namibian government to enact “legislation to ensure equality of opportunity for women, to enable them to participate fully in all spheres of Namibian society [and]... the Government shall ensure the implementation of the principle of non-discrimination in remuneration of men and women...”²⁸ However, Article 4(3)(b) deems customary marriages to be recognised as marriages, and Article 66 generally affirms the validity of customary and common laws that do not conflict with the Constitution.

In addition, the passage of the Married Persons Equality Act²⁹ in 1996 marked a milestone in the struggle of Namibian women to obtain equality with their husbands before the law. The Act abolishes the marital power that made the husband the head of the household and provides for women married in community of property to have equal access to bank loans and ownership of property.³⁰

²⁵ NamibWeb.com, The On-line Guide to Our Government [On-line].

Available: <http://www.namibweb.com/gov.htm> [2004, February 10].

²⁶ PolitInfo US: Country Information on Namibia (Profile) [2003, April], [On-line].

Available: http://us.politinfo.com/Information/Country_Profiles/country_profile_175.html [2004, February 10].

²⁷ The Constitution of the Republic of Namibia (adopted on: February 1990) [On-line]. [Hereinafter Namibian Constitution].

Available: http://www.oefre.unibe.ch/law/icl/wa00000_.html, [2004, February 12].

²⁸ Namibian Constitution, *supra* note 27, Article 95(a).

²⁹ No. 1 of 1996.

³⁰ Women’s Human and Legal Rights, *supra* note 14.

Tanzania

In the United Republic of Tanzania, the Parliament (National Assembly) is vested by the Constitution with complete sovereign power. The President is the head of state and head of the government. He appoints a Vice-President and also presides over the Cabinet, which comprises a Prime Minister and other ministers appointed from among the members of the National Assembly.³¹

Tanzania has a five-level judiciary combining the jurisdictions of tribal, Islamic, and British common law. Appeal is from the primary courts through the district courts, resident magistrate courts, to the High Courts, and Court of Appeals. Judges are appointed by the Chief Justice, except those in the Court of Appeals and the High Court who are appointed by the President.³²

Customary laws and traditions often prevent women from owning and land and other property, and gender-based discrimination continues to be sanctioned in customary law. For example, customary law completely prohibits widows from inheriting land from their deceased husbands, even when the land is marital property, and subjects the widows to being inherited by men from her husband's family.

Comprehensive constitutional review is yet to take place in Tanzania, but there are ongoing efforts by the government to support women's legal empowerment. The Marriage Law Act of 1971 is currently under review to eliminate any discriminatory provisions within it. Moreover, as part of its commitment to advance the rights of women, the Tanzanian Government passed the Land Law Act of 1999 and the Village Land Act of 1999, both of which provide women with equal rights regarding ownership of land.³³ Section 161 of the Land Act further presumes spousal co-ownership. These new land laws contain the most provisions on women's equal land rights of all the East African countries, and Tanzania is the only country in East Africa with a presumption of co-occupancy in its legislation.³⁴

³¹ LawAfrica.com, The Tanzanian Constitution (2000) [On-line].

Available: <http://www.lawafrica.com/Government/tanzania/constitution.asp> [2004, February 10].

³² The Zanzibari court system parallels the legal system of the union, and all cases tried in Zanzibari courts, except for those involving constitutional issues and Islamic law, can be appealed to the Court of Appeals of the union. PolitInfo US: Country Information on Tanzania (Profile) (2003, November), [On-line].

Available: http://us.politinfo.com/Information/Country_Profiles/country_profile_075.html [2004, February 10].

³³ Newsletter of the Commonwealth Secretariat's Gender and Youth Affairs Division, (2002, February). [On-line].

Available: <http://www.thecommonwealth.org/gender/pdf/newsletter02.pdf> [2003, December 9].

³⁴ Rosemary Okello, Men's Property: Why East African Women have No Land Rights, The East African (2003, March) [On-line].

Available: <http://www.caledonia.org.uk/land/okello.htm> [2004, February 10].

However, married women whose unions have not been legalised under customary, Hindu, Muslim, Christian or civil marriage laws of the land are even more vulnerable when they are separated from their spouses either by divorce or death. The commercialisation of dowry contributes to the treatment of women as men's property that cannot own property in their own right.

Uganda

Uganda is a Republic, with an executive President, Vice-President, Prime Minister and Cabinet, and legislative responsibility vested in the elected Parliament. The judiciary operates as an independent branch of government and consists of magistrate's courts, High Courts, Courts of Appeals, and the Supreme Court.³⁵

The 1995 Constitution of Uganda prohibits gender-based discrimination³⁶ and allows for affirmative action programmes that attempt to redress past discrimination of marginalised groups, including women.³⁷ In terms of marriage, Article 31, entitled “Rights of the Family” grants equal rights during marriage and at its dissolution, as well protection to widows and widowers to inherit the property of their deceased spouses and to parental rights over their children.³⁸

Unlike in Tanzania, the Ugandan Constitution contains a provision expressly dealing with women, proclaiming their right to equal treatment and opportunity, mandating State protection of women’s rights and forbidding the application of customary laws that discriminate against women.³⁹ In addition, Article 26 implicitly recognises women’s equal right to acquire land and housing.

That said, however, the Ugandan government has not enforced the anti-discrimination laws effectively in matters of locally or culturally accepted discrimination against women. Many customary laws discriminate against women in the areas of adoption, marriage, divorce, and inheritance. In most areas, women cannot not own or inherit property; neither can they retain custody of their children under local customary law. Divorce law requires women to meet stricter evidentiary standards than are required for men in order to prove adultery.⁴⁰ Polygamy is legal under both customary and Islamic law, and a wife lacks legal status to prevent her husband from marrying another woman. In some ethnic groups, men can also ‘inherit’ the widows of their deceased brothers.⁴¹

³⁵ PolitInfo US: Country Information on Uganda (Profile) (2003, December) [On-line]. Available: http://us.politinfo.com/Information/Country_Profiles/country_profile_097.html [2004, February 10].

³⁶ Constitution of the Republic of Uganda, 1995 [Hereinafter Constitution of Uganda], Article 21(1) and (2).

³⁷ Constitution of Uganda, *supra* note 36, Article 32 and Article 33(5).

³⁸ Constitution of Uganda, *supra* note 36, Article 31(1) and (2).

³⁹ Constitution of Uganda, *supra* note 36, Article 33(1)-(6).

⁴⁰ The current Act only allows women to divorce on two grounds – desertion and adultery – yet men have to prove only adultery to obtain divorce. The Law Society of Uganda is currently launching a constitutional challenge to the Act, claiming that it should be nullified on the ground that it perpetuates gender inequality in contravention of the constitution.

See International Bar Association, LegalBrief Africa, Issue No 048, October 6, 2003 [Online]: Available: <http://www.legalbriefafrica.co.za/newsletters/LBAfricaUSA048.html> [January 30, 2004].

⁴¹ At the time of writing, Uganda is attempting to pass the Domestic Relations Act, with the aim of consolidating all family related laws (namely marriage, divorce, separation, and property rights) into one statute. This law will regulate relations in marriage and the family. It is crucial in determining the legal status of women and men in the family and enhancing family stability. It will provide for the different types of marriages, marital rights and duties, dissolution of a marriage, rights of parties on dissolution of

The new Land Act of 1998 attempted to remedy some of these problems by converting customary ownership of land into formal ownership through the creation of written deeds and prohibiting the application of customary laws that deny women lawful access to ownership, occupancy or use of land. The Act has achieved great strides for Ugandan women by legislating customary law with a specific statement that women have a right to access, own and manage land. It also guarantees women the protection of their interest in land and the consent of the female spouse before any transaction can be taken on land that is used by the family for subsistence.⁴²

Unfortunately, however, the spousal co-ownership clause, which would have made it mandatory for women to own land by registering jointly with their husbands, was omitted from the final draft of the Act. Moreover, by changing the meaning of the word 'ownership' to mean 'individual ownership', rather than 'ownership under customary tenure', the Act removed the elders' controlling role over land sales and vested it with the individual man. Men automatically assumed this role because of the presumption that women did not own land. They have now become outright individual owners of land. Therefore, women have lost ownership, and are now doubly disadvantaged by the higher incidences of divorce, and the fact that wives rarely inherit.⁴³ Inheritance rights have been given recognition in Ugandan civil law, but these laws do not include equal inheritance rights for widows and their application is still quite limited.⁴⁴

marriage and any other connected purposes. For a full discussion of the Act, see:
<http://www.uwonet.org/Networking.html>.

⁴² Jean Njeri Kumau, Economic Commission for Africa: Assessment Report on Women's Legal and Human Rights (January 1999), [On-line].

Available:

http://www.uneca.org/eca_resources/cdroms/status_of_african_women/fulltext/h_rights/h_rights.PDF
[2003, December 9].

⁴³ Judy Adoko, Protecting Women's Rights to Land, *Oxfam* (July 2000) [Online].

Available: http://www.oxfam.org.uk/what_we_do/issues/gender/links/0700protect.htm [2004, January 30].

⁴⁴ Okello, *supra* note 34.

Zambia

Zambia is a Republic, subscribing to a system of Parliamentary sovereignty. Its executive consists of a President (chief of state and head of government) and Cabinet, its legislature a unicameral National Assembly and its judiciary a Supreme Court, followed by the Court of Appeal, the High Court, magistrate's court, and local courts.⁴⁵

Zambia has a dual legal system, one statutory and the other traditional or customary. However customary law is regarded as a source of law only upon sovereign recognition, which can be overruled by received law.⁴⁶

Zambia promulgated an amended Constitution in 1996 that recognises “the equal worth of men and women in their right to participate and freely determine and build a political, economic and social system of their own choice”⁴⁷ While Article 23(3) includes gender as a basis for discrimination, Article 23(4)(c) exempts discrimination in customary, family and personal laws.

Women continue to experience discriminatory treatment in the patrilineal customary law system. According to the customary law of the Lozi tribe of the western province of Zambia, for example, rights are both age and gender specific, such that certain rights are accorded only to the male gender, thereby enabling them to maintain control over their spouses and female kin.⁴⁸

Zambia’s statutory laws often conflict with its customary laws,⁴⁹ although the Zambian government has enacted legislation to remedy this and integrate the various customary laws. The Interstate Succession Act (1989) is one such statute, although it is problematic in that it only recognises spouses, children, parents and dependants as appropriate beneficiaries. The Act covers deceased persons whose estates would ordinarily be administered through customary law. It provides, for example, for the distribution of an estate of a polygamous marriage that was contracted under the customary law in Zambia, to be divided equally between the surviving spouses and children of the marriage.

⁴⁵ PolitInfo US: Country Information on Zambia (Profile) (2003, May) [On-line]. Available: http://us.politinfo.com/Information/Country_Profiles/country_profile_042.html. [2004, February 10].

⁴⁶ Leya Mtonga, Gender Equality in Family Law: Marriage, Divorce, Inheritance and Property Rights Under Civil and Customary Law, A Practical Zambian Perspective. Received law embraces Statutory Law as enacted in Zambia, as well as other statutes and judicial decisions applicable in the UK and Commonwealth countries.

⁴⁷ Constitution of Zambia (Amendment) Act, No. 18 of 1996 [Hereinafter Constitution of Zambia], Preamble.

⁴⁸ The family of a woman’s late husband is given custody of the children and decides whether the deceased husband’s brother will take the surviving spouse to be his wife. In terms of property sharing under customary law, however, the courts in Zambia may be inclined to follow the recent court decision in *Chibwe v. Chibwe* 2001/SCZ/17 (SCZ JUDGMENT NO. 2 OF 2000) entitling the wife in an Ushi customary marriage to 50% share of the family property upon divorce, as per Ushi customary law.

⁴⁹ For example, Section 138 of the Zambian Penal code criminalizes sexual intercourse with any female under the age of 16 years whereas customary law puts the maturity age at puberty. As a result, if a girl attains puberty before she turns 16 years old, she will be treated as an adult and can get married.

Zimbabwe

Zimbabwe's Parliamentary system of government consists of a President (who is head of state and head of government) and Cabinet, along with a House of Assembly. The judiciary is headed by the Chief Justice of the Supreme Court, followed by the Court of Appeal and local and customary courts.⁵⁰

In 1996, the Constitution of Zimbabwe was amended to provide protection to women.⁵¹ Importantly, however, customary law and personal law matters are shielded from the guarantee of freedom from discrimination through Section 23(3)(a) and (b) which exempt laws that discriminate in the areas of family law, marriage, divorce, inheritance and customary law from the anti-discrimination guarantee. This constitutional exemption also applies to customary marriages.⁵² The courts have used these exemptions to elevate customary law above constitutional scrutiny.⁵³

One of the most contentious issues in Zimbabwean law concerns inheritance rights. Zimbabwe amended its inheritance laws in 1997, such that an heir must distribute the property of the deceased in consultation with other beneficiaries.⁵⁴ The amendments also establish equity between boys and girls.⁵⁵ Moreover, the new Administration of Deceased Estates Amendment Act⁵⁶ gives Zimbabwean women in customary law marriages, whether registered or not, the right to inherit from their deceased husbands.

⁵⁰ PolitInfo US: Country Information on Zimbabwe (Profile) (2003, November) [On-line]. Available: http://us.politinfo.com/Information/Country_Profiles/country_profile_179.html [2004, February 11].

⁵¹ Constitution of Zimbabwe, Section 11, which guarantees fundamental rights and freedoms to all individuals regardless of "race, tribe, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest...".

⁵² In *Chapeyana v. Matende*, 1999(1) ZLR 534 (H) the court proclaimed that customary law is recognized as a separate system by the Constitution, and in the recent case of *Gwatidzo v. Masukusa* 2000 (2) ZLR 410 (HC) the High Court confirmed that the law of adultery must not be used by women for the purpose of validating a civil marriage against a customary marriage, or vice versa. On a positive note, though, the Supreme Court of Zimbabwe passed a landmark judgment (Judgment 109/2000) pertaining to the distribution of property upon the separation of spouses in a customary union, awarding the woman a 50% share of the matrimonial property under the civil concept of Tacit Universal Partnership. "Inheritance and Property Rights of women in Zimbabwe" by Obert Chingamo, Zimbabwe Human Rights Association (ZimRights)

⁵³ This occurred in the landmark case of *Magaya v. Magaya* 1999 (1) ZLR 100 (S), wherein the of the Supreme Court of Zimbabwe unanimously upheld the customary law of primogeniture and stated that women should not be able to inherit land "because of the consideration in the African society which, amongst other factors, was to the effect that women were not able to look after their original family (of birth) because of their commitment to the new family (through marriage)"

⁵⁴ Women's Human and Legal Rights, *supra* note 14.

⁵⁵ Kumau, *supra* note 42.

⁵⁶ Act 6 of 1997.

Concluding Remarks

It is evident from the above discussion that most countries in the region have or are in the process of amending their statutes to ensure equality and non-discrimination under the law. A real and critical challenge remains in that even where laws providing for gender equality have been put in place, mechanisms for enforcement of these laws are either weak or non-existent. As a result, a significant gap between paper rights and real rights remains for many women throughout Southern Africa.

In attempts to redress this situation, women's NGOs have taken a more active role than governments in providing programmes for legal literacy and support for women to benefit from the countries' constitutional and statutory provisions, as well as the guarantees provided for in the international and regional treaties and conventions. These efforts have seen the simplification, repackaging, translation and dissemination of CEDAW and national laws for the benefit of the ordinary woman as well as sensitising policy- and law-makers.⁵⁷

A need has been expressed by women in the region that the Southern African Development Community (SADC) should establish the human rights tribunal provided for under article 16 of the SADC Treaty to deal with violations of women's rights. They have also challenged the SADC to adopt legally binding instruments and protocols and to encourage member states to incorporate them into their constitutions and legislation.⁵⁸

⁵⁷ Women's Human and Legal Rights, *supra* note 14.

⁵⁸ Women's Human and Legal Rights, *supra* note 14.

PART II: DETAILED COUNTRY ANALYSES

Introduction

This section provides a critical evaluation of the application and interpretation of the customary law systems and practices in South Africa and Lesotho in relation to women's rights. It outlines the legal context of women's rights in South Africa and Lesotho through an overview of the relevant national legislation, customary law, international law (particularly CEDAW), and selected case law dealing with the interpretation of customary law and related issues from both countries. In so doing, it prioritises the areas of law to be targeted for intervention by non-governmental organisations and others advocating for change to ensure the non-discriminatory application of customary law.

As previously stated, an analysis of the situation in additional regions of Southern African will be added to Part II of this publication as the project expands, beginning with Namibia and Zambia.

1. SOUTH AFRICA

Using South Africa's progressive and enabling constitutional and legislative framework, the courts have been actively scrutinising customary laws for compliance with the Constitution. Yet customary law – a system of law premised on principles of patriarchy – remains entrenched as a separate legal regime, one that often countenances practices that conflict with constitutional guarantees of fundamental human rights. Although many of the rights enshrined in the Constitution that have been articulated in the many pieces of legislation that have been promulgated since 1994 have been translated into reality, poor enforcement mechanisms continue to hinder the implementation of even progressive law reforms. Socio-economic and cultural factors also affect women's ability and confidence to pursue legal avenues. These include women's lack of access to legal advice or representation, economic dependence on a partner, and a lack of awareness of the law, amongst other factors.

It is therefore essential that the effective implementation of existing progressive legislation become a priority. Also key is the development of customary law within a constitutional framework in order to ensure equal protection for women.

i. Constitutional Human Rights Provisions

As the supreme law of the land, the Constitution of the Republic of South Africa sets the benchmark for all levels and branches of government by requiring that their statutes and executive measures create a legal environment conducive to ensuring the realisation of women's rights.⁵⁹ All laws in force prior to the enactment of the Constitution, including customary law, continue to be applicable unless they are amended or repealed by the legislature or are inconsistent with the Constitution.⁶⁰

The High Courts, Supreme Court of Appeal and the Constitutional Court also have the power to enquire into the constitutional validity of any law, including customary law.⁶¹ When interpreting and developing customary law, South African courts must ensure compliance with the principles set forth in the Bill of Rights⁶² and in international law,⁶³ thereby ensuring that both legislation and customary law are developed in accordance with the principles of gender equality. Furthermore, the Constitution mandates the application of customary law "when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law",⁶⁴ as well as allowing for the possibility of asserting "any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill [of Rights]."⁶⁵

The equality provision of the Constitution prohibits both state and private discrimination on the basis of, *inter alia*, race, gender, sex, marital status, pregnancy, sexual orientation, culture, language, ethnic or social origin, or birth.⁶⁶ Section 36 states that discrimination is sanctioned only in instances where there is a justifiable reason "in an open and democratic society based on human dignity, equality and freedom",⁶⁷ and lists a series of factors to be used in determining whether the particular right may be limited. Furthermore, the Constitution extends equal protection under the law to all people,⁶⁸ and imbues the state with a positive duty to ensure equality and to prevent discrimination through proper legislative and executive mandates.⁶⁹

With these foundational tenets in the Constitution, the Constitutional Court of South Africa has acknowledged that the Constitution serves to protect the equal rights of women. In *Brink v. Kitshoff*,⁷⁰ the Constitutional Court stated that the Constitution's

⁵⁹ Constitution of the Republic of South Africa No. 108 of 1996, [Hereinafter SA Constitution], Sec. 8 (1).

⁶⁰ SA Constitution, *supra* note 59, Schedule 6, Item 2(1).

⁶¹ SA Constitution, *supra* note 59, Sec. 172(1).

⁶² SA Constitution, *supra* note 59, Sec. 39 (2).

⁶³ SA Constitution, *supra* note 59, Sec. 233: "When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law".

⁶⁴ SA Constitution, *supra* note 59, Sec. 211(3).

⁶⁵ SA Constitution, *supra* note 59, Sec. 39 (3).

⁶⁶ SA Constitution, *supra* note 59, Sec. 9 (3).

⁶⁷ SA Constitution, *supra* note 59, Sec. 36.

⁶⁸ SA Constitution, *supra* note 59, Sec. 9.

⁶⁹ SA Constitution, *supra* note 59, Sec. 9(2), (4).

⁷⁰ 1996 BCLR 752 (CC), 768 G-H, 769 A-D.

inclusive equality clause was meant to attack and remedy past systemic discrimination. The court acknowledged sexist practices and beliefs in all aspects of South African society and stated that the Constitution's non-discrimination clause serves to improve the lives of groups that have historically suffered racism and sexism.⁷¹ The court also recognised the need to examine the context where discrimination may occur: "[t]his commands enquiry into the actual social and economic conditions of groups and individuals to ascertain whether the impugned law or action violates the right to equality."⁷² This kind of contextual research enables the court to determine whether a piece of legislation disproportionately affects a protected class of people, thereby furthering litigation in favour of women.

In addition to guaranteeing women's equality, the Constitution also allows individuals to celebrate and practice cultural customs and traditions, with the important qualification that a person who chooses to exercise this right must do so in a manner that does not contravene the Bill of Rights.⁷³ Further, the Constitution prohibits anyone who chooses to participate in a cultural group to deny others the right to enjoy these same cultural practices or to do so in a way that is inconsistent with the Bill of Rights.⁷⁴

Although the Constitution allows the choice and practice of customary law, it does not allow customary law to override any of the basic fundamental rights to equality that all women living under customary law should enjoy as South African citizens. As such, the Constitution has limited the extent to which customary law is able to adversely affect women's ability to fully exercise and enjoy their legal rights.

⁷¹ C. Albertyn, J. Fedler and B. A. Goldblatt. Gender, *The Law of South Africa*, Vol. 10, Part 2, citing *Brink v. Kitshoff*. 1996 BCLR 752 (CC), 768 G-H, 769 A-D.

⁷² *Ibid*, at 143.

⁷³ SA Constitution, *supra* note 59, Sec. 30.

⁷⁴ SA Constitution, *supra* note 59, Sec. 31.

ii. International Human Rights Conventions

South Africa has acceded to and ratified a number of international conventions that help promote the status of women in the domestic and international sphere. On 29 January 1993, South Africa acceded to the Convention on the Political Rights of Women of 1953, the Convention on the Nationality of Married Women of 1957, and the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages of 1962.⁷⁵ The most important and far reaching of the conventions that South Africa has signed is CEDAW, which it signed in 1993 and ratified in December 1995.⁷⁶

As previously noted, the South African Constitution mandates that a court “must consider international law” when interpreting rights guaranteed under the Constitution.⁷⁷ Accordingly, the equality guarantees in these international treaties should act as interpretive aids for the South African legislature and judiciary in developing and applying laws pertaining to women.

⁷⁵ “Customary Law & Women’s Rights: A Comparative Study Between Lesotho & South Africa” [Hereinafter Comparative Study]. This is a joint report by the Legal Resources Centre of South Africa and CLRAC of Lesotho. The objective of this report was to examine the ways in which customary law affects women’s rights in Lesotho and South Africa and to use the report for further impact litigation on women’s rights in both countries.

⁷⁶ CEDAW came into effect in South Africa on January 15, 1996.

⁷⁷ SA Constitution, *supra* note 59, Sec. 39(1)(b).

iii. Legal Capacity of Women

Under traditional customary law in South Africa, a woman remained under the guardianship of male members of her family until her marriage, upon which time this duty fell upon her husband. This rendered women invisible in the legal system and severely limited their rights as citizens. The Age of Majority Act of 1972⁷⁸ now confers majority status on all persons who reach the age of 21, and under the Recognition of Customary Marriages Act (RCMA),⁷⁹ all women in customary marriages have equal capacity with their husbands “subject to the matrimonial property system governing the marriage, full status and capacity, including the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any rights that she might have under customary law.”⁸⁰ This, in addition to the repeal of Act 16 of 1985 and Proc R151 of 1987 in the KwaZulu-Natal Codes and Section 21 of the Transkei Marriage Act of 1978, which had provided that wives fell under the marital power of their husbands, removes some of the limitations imposed upon women.

⁷⁸ No. 57 of 1972, Sec. 1.

⁷⁹ No. 120 of 1998 [Hereinafter RCMA].

⁸⁰ RCMA, *supra* note 79, Sec. 6.

iv. Marriage

The RCMA represents South Africa's attempt to rid customary law of its discriminatory features and to extend full legal recognition to marriages entered into in accordance with customary law or traditional rites. It attempts to do so by bringing women and children into the protective realm of the Constitution and by identifying the rights and duties of spouses in contracting a marital union in accordance with customary laws. Although the Act has advanced the rights of women and liberated them from a formalised legal status of perpetual minority, it is not without flaws and its uneven application has hampered its effectiveness.

Under South African customary law, marriage requires the consent of the families of both the man and the woman (in addition to their own consent), who will then negotiate and transfer the *lobolo*,⁸¹ or bride wealth. In an important judgment, the court in *Mabena v. Letsoalo*⁸² held that “[c]ustomary law does recognise that a woman may act as head of a family in certain circumstances.”⁸³ More specifically, the court found that the consent of the bride's mother as the head of the family could serve as the requisite permission needed by the bride's guardian and that a mother who is a guardian of the bride in the absence of the father, could negotiate a *lobolo*. By so doing, the court recognised that “customary law is, as any system of law should be, in a state of continuous development”⁸⁴ and must evolve in such a way so as to comply with the ‘spirit, purport and objects’ of the Constitution. This judgment therefore recognises the court's role in developing customary law in a way that advances women's rights.

The RCMA also gives full recognition to all existing customary marriages that comply with customary law.⁸⁵ As Bennett explains, “[t]his long-awaited provision sought not only to remove the anomalies caused by refusal to countenance potentially polygynous unions as proper marriages but also to comply with the constitutional guarantees of culture and equal treatment.”⁸⁶ The Act's extension of full legal recognition to marriages entered into in accordance with customary law improves the position of women married into and children born of marriages conducted under traditional rites.⁸⁷

Section 3 of the Act sets out the requirements for the validity of customary marriages entered into after November 2000⁸⁸. Under the RCMA a marriage is valid if both parties

⁸¹ Defined in Section 1, as “the property in cash or in kind... which a prospective husband or the head of his family undertakes to give to the head of the prospective wife's family in consideration of a customary marriage”, RCMA, *supra* note 79, Sec. 1.

⁸² 1998 (2) SA 1068 [Hereinafter *Mabena*].

⁸³ *Mabena*, *supra* note 82 at 1074.

⁸⁴ *Mabena*, *supra* note 82 at 1074.

⁸⁵ RCMA, *supra* note 79, Sec. 2(1).

⁸⁶ T. W. Bennett, *Human Rights and African Customary Law*, Cape Town: Juda & Co., 1999 [Hereinafter Bennett] at 195.

⁸⁷ Deputy Minister for Justice and Constitutional Development Ms. Cheryl Gillwald (MP). Address to Workshop on Customary Marriages, (2002, June 21) [On-line]. Available: <http://www.doj.gov.za/speech/21june2002.htm>, [2003, December 4].

⁸⁸ Although the Act contains no provision on nullity, presumably failure to comply with any of the mandatory requirements for the conclusion of a customary marriage will void the union.

are 18-years of age or older, if they both consent to the marriage and if it is finalised according to customary law.⁸⁹ Although the consent of the parents of the prospective husband is no longer necessary, if one of the prospective spouses is a minor, i.e. is under the age of 18, both his or her parents (or, if the spouse has no parents, his or her legal guardian) must consent to the marriage.⁹⁰ Moreover, the spouses' relative capacity to marry each other, due to their relationship by blood or affinity, is determined by customary law.⁹¹

The RCMA further provides for the registration of customary marriages. It strongly encourages parties to register their marriages – within 12 months for marriages entered into before the Act's November 2000 commencement date and within 3 months for marriages entered into after the commencement of the Act⁹² - although failure to register the marriage does not nullify the union.⁹³ To encourage registration, the Act empowers traditional leaders to participate in the proof and registration of customary marriages.⁹⁴

That said, however, in the recently decided case of *Baadjies v. Matubela*,⁹⁵ the court denied the applicant's claim for maintenance and a contribution towards costs pending the dissolution of her customary marriage to the respondent on the grounds that the applicant did not satisfy the court that a valid customary marriage had taken place. The court explained that where there is a dispute about whether or not the marriage had been entered into, a certificate or registration of a customary marriage issued in terms of the RCMA would be *prima facie* proof of the existence of the customary marriage. Alternatively, the spouse can make application to the court, under Section 4(7)(a) of the Act, for an order that the customary marriage be registered. In the *Matubela* case, the applicant failed to take either of these actions.

Importantly, while *lobolo* is still recognised in the South African legal system, it is not a prerequisite for a marriage to be considered valid, as it is in Lesotho.⁹⁶ In other words, the payment or non-payment of *lobolo* has no effect on the validity of the marriage, nor does it influence the spouses' relationship or their rights to children. At registration, however, the details of the *lobolo* agreed will be noted on the marriage certificate. Parties wishing to enforce payment of *lobolo* may not resort to the usual customary methods and must instead seek their remedies in court. Furthermore, the Act allows courts to take into account any provision or arrangement for support made under customary law when making maintenance orders.⁹⁷

⁸⁹ RCMA, *supra* note 79, Sec. 3(1).

⁹⁰ RCMA, *supra* note 79, Sec. (3)(3)(a). Note that by stipulating that 18 be the age of majority for both men and women, the Act adheres to the age laid down in both s.28(3) of the Constitution and Article 1 of the UN Convention on the Rights of the Child for determining when childhood ends.

⁹¹ RCMA, *supra* note 79, Sec. 3(6).

⁹² RCMA, *supra* note 79, Sec. 4(3)(a), (b).

⁹³ RCMA, *supra* note 79, Sec. 4(9).

⁹⁴ RCMA, *supra* note 79, Sec. 11(1)(a)(iii).

⁹⁵ 2002 (3) SA 427 [Hereinafter *Matubela*].

⁹⁶ Payment of *lobolo* is a requirement for a Basotho customary marriage, such that a part-payment of the required bride-price renders the marriage invalid.

⁹⁷ RCMA, *supra* note 79, Sec. 8(4)(e).

It has been argued, however, that the RCMA's silence on the issue of *lobolo* may have detrimental effects on the position of women, as often the husband's family denies that there ever was a customary marriage if *lobolo* was not paid in full. As such, it may have been more appropriate for the Act to state explicitly that *lobolo* is not a requirement for a valid customary marriage.

The RCMA also states that a husband and wife who are already in a *de facto* monogamous customary marriage may convert their union to a civil or Christian marriage under the auspices of the Marriage Act of 1961 as long as they are not in another customary union. Once they do so, they cannot enter into any other type of marriage.⁹⁸

Regarding polygamy, the RCMA provides for the right to enter into multiple marriages under customary law.⁹⁹ It recognises such marriages as consummated before the Act and also those that will be entered into after the Act, as long as they are in accordance with the statute's specific provisions regulating polygamy. A husband who would like to enter into another customary marriage must now apply to the court to approve a written contract that will regulate his marital property system among all his marriages,¹⁰⁰ and all persons having an interest in the matter, most notably the existing and future wives, must be joined in the proceedings.¹⁰¹ In making its decision, the court will scrutinise the application for polygamy and consider the circumstances of the family groups affected by the new marriage in order to ensure the equitable distribution of wealth and assets to all wives. The court will either grant an order, subject to whatever conditions it deems just, or refuse to grant an order, if it feels that the interests of any of the parties cannot be properly safeguarded.¹⁰²

⁹⁸ RCMA, *supra* note 79, Sec 10(4).

⁹⁹ RCMA, *supra* note 79, Sec. 2(3).

¹⁰⁰ RCMA, *supra* note 79, Sec. 7(6) (7). If the man fails to follow this procedure and does not go to High Court, the status of a subsequent wife upon dissolution of the marriage is unclear from the Act.

¹⁰¹ RCMA, *supra* note 79, Sec. 7(8).

¹⁰² RCMA, *supra* note 79, Sec. 7(7)(b).

v. Divorce

To dissolve a customary marriage under current South African law, the spouses must submit an application to the court stating that the marriage has deteriorated to the point where “there is no reasonable prospect of the restoration of a normal marriage relationship between them.”¹⁰³ By stating that a customary marriage can only be dissolved by a court, the RCMA seeks to ensure that women cannot be prevented from suing for divorce and enables the court to protect wives and children through the application of the rules on the equitable division of marital estates, post-divorce maintenance, custody and guardianship.¹⁰⁴

Customary divorces are subject to the same orders as civil divorces. In fashioning an appropriate divorce order, the court will consider the interests of all children involved, in accordance with Section 6 of the Divorce Act¹⁰⁵. Traditional leaders and others who are recognised as divorce mediators under customary law may aid in the mediation process according to customary law before a divorce action is commenced in a family court.¹⁰⁶

¹⁰³ RCMA, *supra* note 79, Sec. 8(1), (2).

¹⁰⁴ Bennett, *supra* note 86, at 202.

¹⁰⁵ No. 70 of 1979.

¹⁰⁶ RCMA, *supra* note 79, Sec. 8(5).

vi. Maintenance

For customary marriages that end in divorce, the RCMA states that a court must take into account provisions or arrangements made under customary law in determining the maintenance order.¹⁰⁷ There are several problems with this provision. First, it may conflict with the common law and constitutional principle¹⁰⁸ that “the best interests of the child” is the determining factor. Second, having regard to “the best interests of the child” does not preclude the consideration of payment of *lobolo* when determining the amount of maintenance to be paid. To interpret the provision in such a way could impact adversely on the well being of the child or wife, since in most cases *lobolo* is paid to the wife’s family or guardian and therefore does not increase her own income or her ability to provide proper care for the children.¹⁰⁹

In granting a post-divorce maintenance order, a court will consider each spouse’s financial capabilities, the duration of the marriage, the couple’s standard of living and any other factors the court deems just.¹¹⁰

In addition, provisions of the Maintenance Act¹¹¹ allow for the enforcement of maintenance orders. If there is a continuous default on payments, the woman must make an application to the maintenance court. The court can issue a warrant of execution on the property of the non-paying father or garnish his earnings. Employers who do not comply with the order must pay the amount owing by the employee.¹¹² The Act further provides a statutory duty, in combination with a common law duty, to support children (even those borne out of wedlock).¹¹³

In the case of *Bannatyne v. Bannatyne and another*,¹¹⁴ the Constitutional Court acknowledged the gendered nature of the maintenance system and the essential role of maintenance payments in relieving the additional financial burdens that are placed on women following marital breakdown, thereby promoting gender equality.¹¹⁵ The Court found that systemic failures render the remedies in the Maintenance Act ineffective:

The respondent appears to have utilized the system to stall his maintenance obligations through the machinery of the Act. It appears from the evidence of the [Commission for Gender Equality] CGE that this happens frequently in the maintenance courts. The hardships experienced by maintenance complainants need to be addressed and the proper

¹⁰⁷ RCMA, *supra* note 79, Sec. 8(e).

¹⁰⁸ See SA Constitution, *supra* note 59, Sec. 28(2).

¹⁰⁹ Prakashnee Govender. *The Status of Women Married in Terms of African Customary Law: A study of women’s experiences in the Eastern Cape and Western Cape Provinces*. Austrian Development Cooperation, 2000.

¹¹⁰ RCMA, *supra* note 79, Sec. 7(2).

¹¹¹ No. 99 of 1998 [Hereinafter Maintenance Act].

¹¹² Maintenance Act, *supra* note 111, Sec. 29(4).

¹¹³ Maintenance Act, *supra* note 111, Sec. 15(3)(iii).

¹¹⁴ CCT 18/02 [Hereinafter *Bannatyne*].

¹¹⁵ *Bannatyne*, *supra* note 114 at paras. 29 and 30.

implementation of the provisions of the Act is a matter that calls for the urgent attention of the Department of Justice.

The Court therefore held that in the *Bannatyne* case, the applicant's plight constituted good and sufficient circumstances for the grant of a committal order by the High Court against the respondent for his failure to maintain their two children.¹¹⁶

¹¹⁶ SA Constitutional Court Digest, Press Summary, *Constitutional Law Direct*. [On-line]. Available: http://www.constitutionallaw.co.za/alert/digest/PS_Bannatyne2.htm. [2004, February 13].

vii. Proprietary Rights

The South African Constitution provides, in its Bill of Rights, that no person should be deprived of property unless it is promulgated under a law of general application.¹¹⁷ In addition, the Restitution of Land Rights Act¹¹⁸ defines “right in land” to include “a customary law interest.”¹¹⁹ In terms of women’s rights to land, the RCMA allows women married under customary law to acquire and dispose of property under a marital property regime in an equal capacity with their husbands.

Customary marriages that occur after the commencement of the Act, where neither party is a part of another customary union, automatically fall under a community of property regime, unless a pre-nuptial agreement calls for another property system.¹²⁰ The application of the principle of community of property protects a wife from being deprived of an equitable share of the estate, particularly in the large number of cases where her contributions to the marriage have not been economic, but have focused on household and childcare responsibilities. Thus the RCMA bestows upon the wife in a customary marriage equal rights with that of her husband and, subject to the matrimonial property system governing the marriage, full status and capacity. This includes the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that she might have in terms of customary law.

Marriages entered into prior to the coming into force of the RCMA, however, continue to be regulated by customary law, under which the out of community of property regime governs.¹²¹ Under this system, women’s perpetual minority status meant that their husbands controlled the joint marital estate and the right to dispose of property. This represents a setback for the promotion of women’s rights and seems to contradict the guarantee in Section 6 of equal proprietary capacity. Furthermore, by allowing discrimination on the basis of sex and gender, the provision is potentially unconstitutional and fails to comply with South Africa’s obligations under CEDAW. Importantly, however, the Act does provide that a couple married prior to the Act’s enactment may apply to the court to change the governing system and, if the court is satisfied that there are proper reasons and that third parties will not be unduly prejudiced by the change, the order will be granted.¹²²

The recently Cabinet-approved Communal Land Rights Bill, currently before the Parliament of South Africa, envisages transferring effective land ownership and the administration of communal land to traditional councils, which will be dominated by traditional leaders (un-elected chiefs). The proposed bill has been met with fierce opposition from several NGOs and other activists, who argue that rather than promoting household sustainability for rural poor women, it would increase their vulnerability and

¹¹⁷ SA Constitution, *supra* note 59, Sec. 25(1).

¹¹⁸ Act 22 of 1994 [Hereinafter RLRA].

¹¹⁹ RLRA, *supra* note 118, Sec. 1.

¹²⁰ RCMA, *supra* note 79, Sec. 7(2).

¹²¹ RCMA, *supra* note 79, Sec. 7(1).

¹²² RCMA, *supra* note 79, Sec. 4(a).

perpetuate their subject status, as traditional leaders would continue to exclude women from acquiring land.¹²³ Although the bill allows new order rights to be conferred upon women, it does not contain an anti-discrimination provision for the allocation and administration of land. Furthermore, women are not given a choice as to who will administer their rights on their behalf; instead it will have to be done according to customary law. The bill therefore represents a leap backwards for women, as they will remain powerless and voiceless in relation to the acquisition and administration of communal land.¹²⁴

¹²³ Sharda Naidoo. Land Bill Against Interests of Women, (2003, November 17), [On-line]. Available: <http://allafrica.com/stories/200311170730.html> [2003, December 9].

¹²⁴ Aninka Classens and Sizani Ngubane, lecture entitled “Access to land” at Women’s Legal Centre Conference entitled “Advancing Women’s Rights”, (2003 October 30).

viii. Succession and Inheritance

Until very recently, a deceased's property devolved onto the male heir, as per the customary law rule of primogeniture. The leading case in this area of customary law was *Mthembu v. Letsela and another*,¹²⁵ wherein the Supreme Court of Appeal upheld the decision of the Transvaal Provincial Division denying the appellant's application for an order declaring the customary rule of primogeniture invalid on the ground of being inconsistent with the Constitution.

According to the customary law rule of male primogenitary succession, African women are generally excluded from intestate succession. The eldest son of the family head is his heir, and failing him, the eldest son's eldest male descendant. If the family head dies leaving no male issue, his father succeeds. In this case, because the appellant – the deceased's only issue – was female, she did not qualify as heir to the deceased's estate. The court explained that the daughter was illegitimate, since the appellant and the deceased never entered into a customary union, and as such she was not a victim of gender discrimination because any illegitimate child of the deceased would have been disinherited, regardless of gender. In the circumstances, the court ruled that the daughter belonged to the mother's family in terms of customary law, and it was their responsibility to provide for her.

As to whether or not the rule is inconsistent with the guarantee of equality in the Constitution, the court concurred with the lower court's ruling that the differentiation between male and female issue does not constitute unfair discrimination in light of the concomitant duty of the male heir to provide sustenance, maintenance and shelter. "It follows that even if this rule is prima facie discriminatory on grounds of sex or gender and the presumption contained in s. 8(4) [of the interim Constitution] comes into operation, this presumption has been refuted by the concomitant duty of support."¹²⁶ By stating that a woman's right to acquire familial property is premised on whether or not she is being maintained, the court mistakenly ties the right to succession to a woman's maintenance status, rather than viewing the two rights as separate and distinct.¹²⁷

¹²⁵ 2000 (3) SA 867 [Hereinafter *Mthembu*].

¹²⁶ *Mthembu*, *supra* note 125 at 877, citing Le Roux J. in 1997 (2) SA 936 (T) at 945-946.

¹²⁷ The Appeal Court further held that s. 35(3) of the interim Constitution, which states that courts must interpret, apply and develop the common law and customary law according to the spirit, purport and object of the Constitution, does not apply in this case, since the deceased died before the interim Constitution came into effect and the provision does not operate retroactively.

Fortunately, in the recently decided groundbreaking case of *N. Bhe and others v. The Magistrate, Khayelitsha and others*,¹²⁸ the High Court refused to follow the *Mthembu* reasoning and instead declared the law of primogeniture unconstitutional. As a result, certain provisions of the Black Administration Act were proclaimed discriminatory on the ground of gender and therefore invalid. At issue in the *Bhe* case was whether two African daughters, whose parents were not civilly married but were married according to African customary law, were entitled to inherit *ab intestatio* upon the death of their father. The applicants submitted that the primogeniture system of succession is unconstitutional, as it irrationally differentiates in violation of the right to equality in Section 9(1) and the prohibition of discrimination in Section 9(3) of the Constitution. More specifically, the applicants submitted that this system of customary law unfairly discriminates on grounds of gender and sex (between male and female descendants), age and birth (between the eldest descendent and all others), social origin (between legitimate and illegitimate descendants) and race (between African descendants and all others).

In his detailed review of the application of customary law, Ngwenya J. noted that despite the fact that Section 11(1) of the Black Administration Act enjoins the court to apply African customary law that is not repugnant to public policy or natural justice, customary law is intermittently applied by the courts. Ngwenya J. further explained that “[t]he basic premise in our current constitutional regime is to test any law, be it common law, statute or African Customary Law against the values enshrined in the Constitution.”¹²⁹

Testing the principle of primogeniture against the constitutional guarantee of equality, he found that the only reason why the two applicants could not inherit from their father’s estate was because they were Black and women. “This, in my judgment, is per se discrimination on grounds of race and gender. It is prima facie unfair and therefore offends against the provisions of s.9(1) and (3) of the Constitution. This court is therefore bound to declare such law *unconstitutional and invalid*.”¹³⁰ While stating that it is for Parliament to decide whether to repeal the entire Black Administration Act,¹³¹ the judge did declare its offending sections (namely s.23(10)(a)(c) and (e)) and those of the Intestate Succession Act¹³² to be unconstitutional and held that until the legislature corrects these legislative defects, Section 1 of the Intestate Succession Act governs the distribution of intestate Black Estates.

It appears that the *Bhe* ruling has set a precedent, as the High Court of South Africa (Transvaal Provincial Division) recently followed the declaration in *Bhe* that “African females, irrespective of age or social status, are entitled to inherit from their parents’ intestate estate like any male person.”¹³³ In the case of *Charlotte Shibi v. Mantabeni Freddy Sithole, Jerry Sithole, Minister of Justice and Constitutional Development*,¹³⁴ the

¹²⁸ Case No. 9489/02 (High Court of South Africa, Cape of Good Hope Provincial Division) [Hereinafter *Bhe*].

¹²⁹ *Bhe*, *supra* note 128.

¹³⁰ *Bhe*, *supra* note 128.

¹³¹ No. 38 of 1927.

¹³² No. 81 of 1987.

¹³³ *Bhe*, *supra* note 128.

¹³⁴ Case Number 7292/01 [Hereinafter *Shibi*].

customary law of primogeniture served to preclude the plaintiff (who was the sole surviving sibling of the deceased) from inheriting *ab intestatio* from her deceased brother purely because she was a Black woman. The court echoed the ruling in *Bhe* and declared the plaintiff the sole heir of her brother's intestate estate.

These twin decisions declaring the customary law of primogeniture unconstitutional clearly represent a major victory in the struggle for women's equality rights in the area of inheritance and succession, and it is hoped that the legislature will amend the discriminatory sections of the legislation expeditiously.

2. LESOTHO

The past few decades in Lesotho have seen rapid changes to the roles and responsibilities of women, with more and more women becoming the *de facto* household head and principal breadwinner. Yet Lesotho's legal system – comprising customary law and statutory law – remains out of touch with reality and out of step with the international conventions that Lesotho has ratified. This is evident from the exemption in the non-discrimination clause of Lesotho's Constitution for persons subject to customary law and from its reservation to CEDAW.

The following summary indicates that women's perpetual minority status under customary law has negatively impacted upon their rights in numerous areas of law, including marriage, divorce, maintenance, proprietary, succession and inheritance. To improve the lives of women, additional research and the codification of the customary law of Lesotho are urgently needed, as is educational and lobbying campaigns that call for the immediate change to the legal status of women in the country.

i. Constitutional Human Rights Provisions

Lesotho is a constitutional monarchy, which adheres to the doctrine of constitutional supremacy.¹³⁵ Like South Africa's Constitution, the 1993 Constitution of Lesotho states that customary law, common law and statutory law must be consistent with the Constitution; otherwise they are invalid to the extent of such inconsistency.

Freedom from discrimination is enshrined in Section 18 of Lesotho's Constitution. In particular, Section 18(3) includes sex as a prohibited ground of discrimination.¹³⁶ However, the section goes on to state that the principles of freedom from discrimination do not apply to personal law matters (including adoption, marriage, divorce, burial, and devolution of property on death)¹³⁷ or to "any other law to the extent that the law makes provisions for the application of customary law of Lesotho with respect to any matter in the case of persons who, under that law, are subject to that law."¹³⁸

Thus unlike the South African Constitution, which prohibits any customary law practice from interfering with the enjoyment of rights guaranteed under the Bill of Rights by others, the non-discrimination clause of the Lesotho Constitution does not apply to those persons subject to customary law. This is so despite the guarantees of fundamental human rights and freedoms to all persons, regardless of sex or status in Section 4 and "the right to equality before the law and the equal protection of the law" in Section 19. By exempting customary law that discriminates against women from the guarantee of freedom from discrimination, Lesotho's Constitution is itself discriminatory and incompatible with articles 2 (paragraph 1), 3, 23 and 26 of CEDAW.

¹³⁵ Comparative Study, *supra* note 75, at 1.

¹³⁶ Lesotho Constitution 1993 [Hereinafter Lesotho Constitution], Sec. 18 (3).

¹³⁷ Lesotho Constitution, *supra* note 136, Sec. 18 (4)(b).

¹³⁸ Lesotho Constitution, *supra* note 136, Sec. 18 (4)(c).

ii. International Human Rights Conventions

Lesotho has ratified most of the international human rights instruments dealing with women's rights, including the United Nations Charter (1945), the Universal Declaration of Human Rights (1948), the International Covenant on Economic, Social and Cultural Rights (1966), the International Covenant on Civil and Political Rights (1966), the African Charter on Human and People's Rights, and CEDAW (1979).¹³⁹ Lesotho is, therefore, under an obligation to abide by international standards, principles and guidelines as outlined in such instruments and its laws should be reflective of these.

Although all the human rights instruments to which Lesotho is a signatory advocate for equality between men and women and prohibit discrimination on the basis of sex, of utmost importance is CEDAW, which Lesotho ratified on 22nd August 1995. Lesotho has, however, failed to ensure that its laws comply with its obligations under CEDAW and has indicated its intention to continue to recognise the existing customary law and its principles by making the following reservation to CEDAW:

...The Lesotho government's ratification is subject to the understanding that none of its obligations under the Convention especially in Article 2(e) shall be treated as extending to the affairs of religious denominations.

Furthermore, the Lesotho government declares that it shall not take any legislative measures under the Convention where those measures would be incompatible with the Constitution of Lesotho.

By exempting customary law practices from its obligations to comply with the provisions of the Convention, this reservation has the effect of violating human rights principles as laid down by various international law instruments. More specifically, the reservation is incompatible with the object and purpose of CEDAW as a whole, thereby contravening the 1969 Convention on the Law of Treaties, which invalidates such kinds of reservations.¹⁴⁰ Furthermore, as noted earlier, the Constitution of Lesotho allows discrimination against women under customary law at Section 18(4)(c). Thus women remain disadvantaged despite international law principles, guidelines and standards as laid down in international instruments to which Lesotho is a party.

¹³⁹ Comparative Study, *supra* note 75, at 4.

¹⁴⁰ Refer to Article by Acheampong, K.A., "Lesotho's Ratification of CEDAW", *Lesotho Law Journal*, 1993, vol. 9, no. 1, p. 79.

iii. Legal Capacity of Women

Women's legal status under customary law is that of a perpetual minor, as she is under the control and power of a male guardian in almost every stage of her life. The patriarchal nature of Basotho society is such that an unmarried woman is under the control and guardianship of her father, irrespective of her age. This control and guardianship is then transferred to her husband at marriage. Upon the death of her husband, she automatically comes under the guardianship of the eldest son born of her marriage (as he is the legal heir to his deceased father's estate and therefore inherits all the duties and responsibilities of his late father) or from any of the houses of her husband (since a Basotho customary marriage is potentially polygamous in nature).¹⁴¹

As a result, a woman has no *locus standi in judicio*.¹⁴² Under both the common and customary law, marriage in community of property bestows upon the husband marital power over the person and property of the wife. The husband becomes the head of the family, and the wife suffers several legal limitations. For example, she cannot enter into binding legal contracts, sue or be sued unassisted by her husband, own or alienate property, open bank accounts, obtain loans or apply for passports without the permission of her husband.¹⁴³ The husband also has the final say in matters concerning the person and property of his wife, dictating such things as what she should wear, with whom she can associate and whether or not she can seek employment.

There are, however, certain exceptions to this rule. For example, a Basotho court may order the dissolution of a Basotho customary marriage on the application of either of the parties to the marriage. Furthermore, the Chieftanship Act¹⁴⁴ provides that the widow of a deceased chief, who either has no children or whose children are minors, becomes a chief in his place and is not treated as a minor.¹⁴⁵

Nevertheless, the overall minority status of women not only represents unequal treatment before the law, it also constitutes discrimination on the basis of sex, which contravenes articles 3 and 26 of CEDAW as well as the Constitution of Lesotho.

¹⁴¹ Comparative Study, *supra* note 75, at 6.

¹⁴² Unlike women in South Africa, who can access the courts in all cases, even when they are part of a customary marriage.

¹⁴³ Comparative Study, *supra* note 75, at 7.

¹⁴⁴ No. 22 of 1968, Section 10, as amended by Act No. 3 of 1993.

¹⁴⁵ Comparative Study, *supra* note 75, at 7.

iv. Marriage

Unlike South Africa, Lesotho does not have a customary marriage registration system or a codified statute regulating the formation of customary marriage.¹⁴⁶ There are three essential requirements of a valid Basotho marriage.¹⁴⁷

- 1) Agreement between the parties intending to marry;
- 2) Agreement between the parents, or those *in loco parentis*, as to the quantum of *bohali*¹⁴⁸ and;
- 3) Full or part payment of *bohali* exchanged between the man's and woman's families.

According to Basotho custom, marriage could be entered into either regularly (where the parents of the intending spouses meet for the man's parents to ask for the woman's hand in marriage) or irregularly (where the boy abducts the girl to marry her).¹⁴⁹

Basotho customary marriages are potentially polygamous; a man may enter into other marriages after consultation with his other wives, depending on the needs of the family in general. Each woman in a polygamous marriage keeps her own property in her own house.¹⁵⁰

Finally, children borne out of an unrecognised marriage or wedlock are considered illegitimate and are consequently denied family property accumulated during a customary marriage that was either not consented to by the parents of the spouses or that did not fully meet the customary requirements such as *bohali*.¹⁵¹

¹⁴⁶ Lesotho is currently considering passing the Married Persons Equality Bill, which is intended to remove the difficulties caused by the husband's marital power. The recommendations of the Law Reform Commission have received support in several forums, yet the legislation has not progressed passed the Bill stage. If passed, the Bill would bring great changes to both customary and civil law marriages.

¹⁴⁷ Comparative Study, *supra* note 75, at 10.

¹⁴⁸ Cattle given in marriage.

¹⁴⁹ Maqutu, W.C.M. (1992) *Contemporary Family Law of Lesotho*. N.U.L. Roma, Lesotho, at 72-75.

¹⁵⁰ Comparative Study, *supra* note 75, at 12.

¹⁵¹ Lawrence Keketso, Report on the Customary Law and Women's Rights Workshop in Lesotho, (2003, May 22-23).

v. Divorce

A divorce can be achieved either through judicial channels as per the Laws of Lerotholi¹⁵² or through extra-judicial means. However, divorce in Basotho custom rarely occurs, as the families usually intervene and impose peace upon the parties.¹⁵³

A judicial dissolution may be granted by Basotho courts on the application of either spouse, if there is an irretrievable breakdown of marriage grounded on the willful desertion of either spouse, the husband's persistent cruelty to his wife and/or any other cause recognised by Basotho law and custom. Section 34(5) states that the court, in granting the dissolution of marriage, should make an order regarding the retention of *bohali* and an order as to the custody of the children.¹⁵⁴ Thus the Lesotho divorce process revolves around the return of *bohali*, unlike in South Africa where *lobolo* is not mentioned in the RCMA as a requirement for the dissolution of a marriage.

An extra-judicial dissolution of marriage occurs through meetings with the spouses' extended families. A determination is made as to which spouse is the 'guilty' one, with the objective of reaching an agreement regarding the retention of the *bohali* and custody of the children. If the wife is found guilty, her family returns the cattle to the husband's family. If the husband is guilty, he cannot have his *bohali* back. Following this determination, the wife returns to her maiden home and falls under the guardianship of her father.¹⁵⁵

Since a woman is a minor under customary law, the father is the legal guardian of all the children borne of the marriage.¹⁵⁶ As a result, the father is awarded custody of the children.

¹⁵² No. 61 of 1938 [Hereinafter Laws of Lerotholi], Sec. 34(4).

¹⁵³ Comparative Study, *supra* note 75, at 14.

¹⁵⁴ Laws of Lerotholi, *supra* note 152, Sec. 34(5).

¹⁵⁵ Comparative Study, *supra* note 75, at 14.

¹⁵⁶ Comparative Study, *supra* note 75, at 14.

vi. Maintenance

In a customary law marriage, all property is vested in the husband as the head of the family, although he is obliged to administer the property for the benefit and in the interests of his family and to maintain and provide basic needs (such as food, clothing, accommodation, etc.). If the husband neglects his maintenance obligations, his wife can only turn to her extended family (normally her husband's family) for maintenance. An unmarried woman falls under the guardianship of her father or family guardian until her marriage or death. If she has a child while unmarried, the child becomes part of her maternal grandparent's family and is regarded as its mother's sibling.¹⁵⁷

When a customary marriage is dissolved, the wife loses her possessions and returns to her maiden home, whereby she automatically falls under the guardianship of her father or brother, as her brother is the heir not only to his father's estate but also to his responsibilities.¹⁵⁸

Basotho courts do not have jurisdiction over maintenance cases because customarily such claims were dealt with by the extended family. Maintenance is a civil claim that is resolved by the magistrate courts in accordance with the Deserted Wives and Children's Proclamation,¹⁵⁹ which states that a woman is allowed to appear before the court on her own behalf. Like the South African Maintenance Act, the Proclamation provides maintenance for women and children within or outside of marriage.¹⁶⁰

¹⁵⁷ Letuka, P., et. al., (1997) *Maintenance in Lesotho*, op cit., at 13.

¹⁵⁸ Comparative Study, *supra* note 75, at 17.

¹⁵⁹ Act of 1959 as amended in 1971 and 1977.

¹⁶⁰ Comparative Study, *supra* note 75, at 19.

vii. Proprietary Rights

Due to their perpetual minority status, women in Lesotho cannot be allocated land, inherit it or make decisions about its cultivation, management and use. Women also have no rights to dispose of property, save for personal belongings (excluding immovable property). Women generally only have the right to occupy and use land, rights which are not properly secured under the law.¹⁶¹

Unlike in South Africa, where customary marriages consummated after the enactment of the RCMA are automatically under a community of property regime similar to civil marriages, there is no community of property regime for customary marriages in Lesotho. As previously stated, a woman married under Basotho law marries into her husband's family.¹⁶² The husband then becomes the legal guardian of his wife and children, who are regarded as minors. The husband, as the head of the family, is the sole administrator of the household. As such, women in Lesotho cannot acquire property on their own behalf – all property rights are vested in their husbands.

These inequalities are also reflected in Lesotho's statutory laws. For example, the Deeds Registry Act 1997 empowers the Registrar to refuse to register a deed in respect of removable property in favour of a married woman whose rights are governed by Basotho law and custom, where such registration would be in conflict with that law.¹⁶³ Moreover, the Land Act of 1979 remains discriminatory against women, despite a 1992 amendment that gives a widow the same rights as a deceased husband as, in the event of her remarriage, the land does not form part of community property and instead passes to the male heir upon her death.¹⁶⁴

¹⁶¹ Keketso, *supra* note 151.

¹⁶² Maqutu, *supra* note 149.

¹⁶³ Qhobela Cyprian Selebalo. Lesotho's Land Tenure Reform: Paying Special Attention to Women's Access to Land Rights, (2001, March) [On-line]. Available: www.dse.de/zell/access-to-land/dateien/selebalo.pdf [2003, December 9].

¹⁶⁴ Selebalo, *supra* note 163.

viii. Succession and Inheritance

In accordance with the Laws of Lerotholi, the order of succession under the customary law of Lesotho depends on one's birth.¹⁶⁵ The heir is the first son born of the first marriage of the deceased, and if there is no male child in the first house, then the heir will be the first son in the second house, or the next house respectively. The heir, however, must share the property he inherits from his father's estate with his younger brothers.¹⁶⁶ The heir must also consult with the widow when administering the estate.

A female child cannot succeed to her deceased father's estate or inherit any of the property from his estate, unless the deceased leaves written instructions allotting property to his daughter.¹⁶⁷ The allotment would still have to be done in such a way that the eldest son is not deprived of his greater part of his father's estate.

Section 11(2) of the Law of Lerotholi states that a widow can be the heir only where there is no son in any of her husband's houses or if the heir is still a minor.¹⁶⁸ In exercising her rights upon the property, the widow must consult with her legal guardians, namely the brothers and male relatives of her deceased husband.¹⁶⁹ As previously stated, due to her perpetual minority status, a widow's rights are limited to the occupation and use of the land and property; she cannot dispose of such property at will. Upon her death, the right passes to the first-born son. In that regard, customary law also discriminates against other male siblings.¹⁷⁰

Furthermore, women do not succeed to the king or chief in Lesotho, except in very few exceptional circumstances, for example, where the heir is still a minor or where there is no son in any of the deceased chief's "houses".¹⁷¹

¹⁶⁵ Laws of Lerotholi, *supra* note 152, Sec. 11(1).

¹⁶⁶ Maqutu, *supra* note 149, at 169.

¹⁶⁷ Laws of Lerotholi, *supra* note 152, Sec. 14.

¹⁶⁸ Laws of Lerotholi, *supra* note 152, Sec. 11(2).

¹⁶⁹ This was the case in *Khatala v. Khatala*, 1963-1966 HCTLR 97, where the heir (the deceased's son by his first marriage) sued the widow (the heir's stepmother) for transferring R300 from the deceased's account to her own banking account. The court ruled that the widow erred by not consulting with the heir in dealing with the deceased's estate.

¹⁷⁰ Selebalo, *supra* note 163.

¹⁷¹ Comparative Study, *supra* note 75, at 23.