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Protection of Women's Marital Property Rights upon the Dissolution of a Customary Marriage in South Africa: A View from Inside and Outside the Courts

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Protection of Women's Marital Property Rights upon the Dissolution of a Customary Marriage in South Africa: A View from Inside and Outside the Courts

Abstract

Based on an empirical study of marital dissolution, this paper examines the effectiveness of the Recognition of Customary Marriages Act 1998 and its enforcing institutions to provide the necessary protection of women's marital property rights when customary marriages end. Drawing on data from court (divorce) files and semi-structured interviews, the paper will examine the effectiveness of the new laws for individuals who seek to regulate marital dissolution through both judicial and extra judicial systems. In doing so, it examines how judicial and extrajudicial systems interact and co-exist. The findings show that both systems of regulation are failing to recognise women's right to an equitable distribution of the marital estate upon divorce. The paper demonstrates the weaknesses inherent in the judicial regulation of divorce combined with the consequences of the continued private regulation of marital dissolution. Resistance to an equal division of marital assets continues and a more dedicated and systematic effort is required to curb financial exploitation upon the dissolution of a customary marriage if the State wants women living under customary law to enjoy their human rights under the Constitution.

1. Introduction

'I married my husband in community of property. The house we are living in was my husband's inheritance from his family. I recently filed for divorce and my husband refuses to sell the house, stating that it is his inheritance. What can I do in that situation?'

'I would go to court, you've signed and you've agreed. They should help you in court because there's nothing you can say to him because you will end up fighting. But in court it's his signature [that matters].'

‘If you handle them [property disputes] in terms of customary law, believe me, you don’t have any problems because we [traditional leaders] understand. But if you want to apply that [new law], you take 50 per cent and that is when you get problems.’

The first quote, a concern expressed by a member of a discussion group held in a rural area in the South African province, Limpopo, expresses an uncertainty about whether the marital home, which the former husband was the heir of the family property where the couple had lived for over 15 years, was considered marital property at the time of a divorce. The two other quotes provide possible ways in which the participant can deal with the dispute by drawing on judicial or extrajudicial systems. As South Africa is a legal pluralist state, it has a system of regulation comprising both judicial and extrajudicial systems. In this case, it is unclear how customary forms of property are understood and dealt with by the judicial system and the Recognition of Customary Marriages Act 1998 did little to clarify the position of such family property (Mbatha, 2005: 45). The customary heir cannot be treated as the ‘owner’ of the property. This property belongs to the family and is for the use of everyone in need, not just the nuclear family of the deceased (Mbatha, 2005; Weeks, 2011). It is expected that other members of the paternal family may have a claim to this property and they may face problems in accessing their claim to this property if the property is divided amongst the marital couple.

This is just one practical example of how judicial and extrajudicial systems that co-exist will need to interact to resolve this specific problem. The Recognition of Customary Marriages Act 1998 (hereafter RCMA), recognises customary marriages and improves the position of African women. As Mamashela wrote, “the RCMA seeks to address the inherent inequality between spouses in customary marriages by bringing their personal and proprietary consequences into line with the Constitution” (2004: 632).

The RCMA permits customary forums of dispute resolution to mediate marital disputes but requires decrees of divorce to be granted by the court.¹ Thus, customary marriage spouses can utilise both judicial and extrajudicial systems when seeking assistance with disputes relating to the financial consequences of the dissolution of a marriage but they can only have their customary marriage dissolved at the court.² The two systems may offer different solutions and, in a

¹ Sections 8 (1) and (5).

² According to Section 1 of the 1998 Recognition of Customary Marriages Act, a ‘court’ means a High Court of South Africa, a family court established under any law or a Divorce Court established in terms of section 10 of the Administration Amendment Act, 1929 (Act 9

legal pluralist state, an individual can draw on the resolution which best suits their needs (Griffiths, 1997; Higgins *et al.*, 2007). With the many and often contradictory laws and authorities under which spouses from customary marriages regulate their financial lives (Weeks, 2011) following the dissolution of a customary marriage, this paper examines who issues the final judgement and makes the law in relation to the division of matrimonial property. How do judicial and extrajudicial systems support or challenge each other when deciding the financial consequences of marital dissolution and how do both systems protect women's marital property rights?

Based on an empirical study of the experience of marital dissolution, including a review of 30 divorce cases, this paper examines the financial consequences of the dissolution of marriage through both judicial and extrajudicial systems. We will begin by briefly outlining the legal and demographic context in which the dissolution of a customary marriage occurs. After that we will describe the research methods adopted for the study before presenting the findings of the financial consequences of marital dissolution as it is currently operating inside and outside the courts. The final section will discuss the challenges of regulating marital dissolution in a legal pluralist state by providing a clearer understanding of the shortcomings of judicial and extrajudicial regulation of the division of marital assets.

2. Dissolving Customary Marriages: The interrelationship between judicial and extrajudicial systems

The pre-1994 South African legal system was characterised by dualism in the laws governing the institution of marriage. It was permissible for all races to marry under common law.³ However, official customary law, most of which comprised an oppressive form of customary law developed by the colonial and apartheid states as the backbone of segregation policies, applied to the majority of marriages of black people. Moreover, the customary law of marriage occupied an inferior position to common law as state law hardly recognised the customary union in comparison to the marriage entered into in accordance with the Marriage Act 25 of 1961, which was fully recognised. As Nhlapo argued, 'Black' South African women have historically been positioned "outside the

of 1929). The introduction in 2010 of regional courts with family jurisdiction is acknowledged. The paper will use this definition (as amended) throughout.

³ For the purposes of this paper, common law denotes South African law of western origin, i.e. legislation, case law and Roman Dutch Law.

law” (1995: 162). The colonial authorities introduced the Black Administration Act (BAA) in 1927 and it remained in force during the apartheid period (Deveaux, 2003). Several of its provisions rendered women more economically vulnerable in the event of marital breakdown.⁴ Under the BAA, women were denied the right to acquire and own property in their own right. The BAA accorded customary union husbands absolute ownership of household property, which included the personal property and earnings of their wives (Bennett, 1991) -- this property legally accrued to customary union husbands in the event of the dissolution or nullification of the customary union. Moreover, under the BAA women were regarded as perpetual minors under the guardianship of either their male relatives or husbands. Access to courts was limited as women could not litigate without consent of or assistance by their legal guardians. This limited their ability to use state courts to claim remedies which existed under customary law, against their husbands.

The division of matrimonial property upon divorce in South Africa was protected with the introduction of the RCMA. The spouses of a customary marriage are deemed to be married in community of property, subject to their freedom to alter this by ante nuptial contract and subject to the current state rules permitting courts to order an equitable distribution of their estates upon divorce. Section 7(2) of the RMCA states:

‘(2) A customary marriage entered into after the commencement of this Act in which a spouse is not a partner in any other existing customary marriage (i.e. monogamous customary marriage), is a marriage in community of property and of profit and loss between the spouses, unless such consequences are specifically excluded by the spouses in an ante nuptial contract which regulates the matrimonial property system of their marriage.’

In essence, marrying in community of property is the automatic proprietary regime. These reforms have meant that, except for a few exceptions, both spouses married under customary law jointly own and have equal powers of administration over all property acquired before and during the marriage (Himonga, 2005; Nhlapo and Himonga, 2014).

The RCMA however provides for different proprietary consequences depending on when the customary marriage came into question. According to Section 7(1) of the 1998 Act, the rules governing the division of assets following the dissolution of a marriage differ for marriages which were concluded before the

⁴ In KwaZulu Natal, the Natal Code of Zulu Law and the KwaZulu Act on the Code of Zulu Law played a similar role. The discussion in this paper is, however, limited to the BAA.

commencement of the Act. In *Gumede v President of the Republic of South Africa*,⁵ the Constitutional Court changed the rules governing the division of assets when dissolving pre-recognition marriages after 2008. The Court ruled that s 7(1) and (2) of the RCMA were constitutionally invalid and it declared that customary marriages entered into before the commencement of the RCMA do not necessarily continue to be governed by customary law. Moseneke DCJ stated that ‘the effect of the order we are to make is that all customary marriages would become marriages in community of property.’⁶ Therefore the legal position of the property relations of parties who married before the Act adhere to the Act provided they are monogamous marriages. Polygamous marriages, which were entered into prior to the commencement of the Act, continue to be regulated by customary law.

The interrelationship between customary law and the RMCA under the new constitutional dispensation, particularly in the area of dissolution of a customary marriage, is an under-researched area. Higgins *et al.* (2007) argued that in recognising both the right to gender equality and to culture, the South African Constitution set up a potential conflict in the context of customary marriage. Weeks believes that this potential conflict leads to uncertainty as “the plurality of laws and authorities under which women live, means that the task of securing women’s rights is unpredictable” (2011: 156). She urged scholars to firstly understand the “complexity of relations between institutions” but also the ways in which women negotiate with different authorities and institutions. In what follows, we will present the complexity of relations between these institutions, particularly how they relate to the division of marital property, before we examine how women negotiate the different authorities and institutions.

One significant ‘complexity of relation’ between the institutions rests in the different understanding and definition of ‘property’. As Mbatha outlined, customary forms of property are classified into personal and family (2005: 45). Personal property could be understood to refer to property amassed by the individual or the married couple whereas family property refers to property placed under the administration of the heir through customary inheritance. Mbatha argued that family members who are not heirs may be further disadvantaged in accessing family property as the family property may now form part of the community of property of a marital couple (2005: 46). Additionally, it was argued that the failure of the RCMA to prevent this from happening is a gross oversight as the aim of RCMA was to guard against unfair enrichment of the customary heir and spouse. Furthermore, Mbatha (2005)

⁵ *Gumede (born Shange) v President of the Republic of South Africa* [2008] ZACC 23; 2009 (3) BCLR 243 (CC); 2009 (3) SA 152 (CC).

⁶ Para 51.

argued that reforming customary marriage was undertaken in a way that followed the provisions and protections enjoyed by civil marriages (under the Marriage Act 25 of 1961) without developing it in ways which were more innovative and specific to addressing substantive inequality. Mamashela echoed these concerns as she highlighted the inadequate conceptualisation of a matrimonial home (*ikhaya*) in The Matrimonial Property Act 88 of 1984, on which RCMA is modelled (2004: 633). She argued that the matrimonial home serves a number of important functions and given the diverse demands on and interest in an African home, the idea of its co-ownership by a married couple with a view to selling it at the end of a marriage may not be easy to actualise. Moreover, her study revealed that the ‘movable’ nature of property, in the form of wages, left it very difficult for deserted wives to access a share and the notion of community of property was an illusion rather than a reality (Mamashela, 2004).

A second significant ‘complexity of relation’ lies between the institutions of codified customary law and living customary law. Codified customary law, in relation to the financial consequences of the dissolution of a customary marriage, maintained that an individual’s source of support is the extended family. It was supposed that the maintenance of wives following the dissolution of a marriage was protected, as *lobola* was seen as provision of security for the wife if she had to return to her natal family (South African Law Report on Customary Marriages: 122). Living customary law, argued by Himonga (2011), evolves and is not monolithic. It recognises that norms and values may change over time, through contact with other cultures or socio-economic contexts. The fact that lobolo is mostly paid in cash nowadays (Shope, 2006; Posel and Rudwick, 2011) means that lobolo is a less predictable way of securing women’s financial position in marriage. Unfortunately there is little evidence of the living law regarding whether the extended family provide support for women following the dissolution of a customary marriage. Budlender *et al.* (2011) found that only 40 out of 79 divorced participants reported that they lived in their parents’ area following the breakdown of their marriage. The evidence does not indicate that all women or the vast majority of them return to their natal kin. The evidence both in the past (Burman, 1987; Mamashela, 2004) and more recently (Budlender *et al.* 2011) is that women experience financial hardship of marital dissolution most severely which may suggest that family networks cannot always be relied upon. While the evidence remains unsatisfying, it appears that the woman’s family is not always in a position to support her following the breakdown of a marriage.

A third significant ‘complexity of relation’ between the institutions is the inexplicit eradication of customary law in regulating the dissolution of customary marriages; the power to dissolve a customary marriage no longer

remains a private or a community affair. As stated above, a customary marriage may only be dissolved by a court by a decree of divorce (Section 8(1) of the RCMA). The role of the extrajudicial system, including families and traditional leaders has been replaced by the RCMA. The extrajudicial system has no authority and power relative to the judicial system and are, for example, unable to award a divorce, determine maintenance matters or forfeiture of benefits or award pension interests from one spouse to another (Bronstein, 2000: 560). The legislature decided to entrust the courts with the task of protecting the interests of women who exit a customary marriage, rather than leaving it to the private realm. However, courts are often the last place where individuals will seek recourse to resolve a marital dispute, due partly to the problems of access (Griffiths, 1997; Higgins *et al.*, 2006; van der Waal, 2004). The legislature may therefore have overlooked the challenges individuals encounter in accessing the Courts and may have overlooked possible ways of regulating marital property by drawing on the support of the extrajudicial system.

Overall, there is mixed research evidence in relation to how property is divided upon the dissolution of a marriage under customary law. On the one hand, there is evidence which supports the idea that a fair distribution of property on dissolution of a customary union was not foreign to indigenous African law in South Africa (Bennett, 1991: 277). In this respect, Van de Meide (1999) argued that in some instances, if the husband initiated the divorce for no good reason, the property would be divided between the spouses. Moreover, other research conducted into property consequences of divorce under customary law in Zambia found that lower courts in urban areas ordered husbands to pay lump sums to wives as compensation for their contribution to the matrimonial property, as well as giving them a share of other matrimonial property on divorce (Himonga, 1987). However there is more recent evidence in South Africa which demonstrates how women are deserted and unable to access marital property following the dissolution of a customary marriage (Burman, 1987; Mamshela, 2004). Burman (1987) examined this experience by drawing on data from court records, interviews and court observations. Her study conducted in the mid-80s occurred before the enactment of the RCMA, at a time when there was very poor state legal protection for individuals in customary marriages. Mamshela (2004) attempted to examine how, following the enactment of RCMA, marital property was divided between spouses on divorce but she was unable to locate 'detailed' divorce files involving people in customary marriages. Her study therefore outlined the experiences of women who were deserted by their husbands and failed to examine how the State divided marital property in divorce cases. When we consider the limited evidence provided by these studies, in light of the 'complexities of relations' between the institutions outline above, the questions remain regarding how

judicial and extrajudicial systems are regulating the redistribution of property upon the dissolution of marriage.

3. Marital Dissolution and Divorce in South Africa: What the numbers say?

The 2011 Census indicated that 525 792 black South Africans were officially separated or divorced. Budlender *et al.* (2004) warn us of the difficulties in obtaining ‘appropriate’ data on divorce in South Africa, as the legal and sociological views of what constitutes marital dissolution match in some cases, but not in all. It has been argued by different scholars in South Africa that there are significant practical challenges in dissolving marriages – including attendant payments between families (Hosegood *et al.*, 2009), barriers to litigation by women, (Burman, 1987) and traditional customs that allowed men to take additional wives (Hosegood *et al.*, 2009). These challenges have prevented individuals from pursuing formal divorces through state courts both before and after 2000, when the RCMA came into force. It has also been argued that many marriages are dissolved informally within families (Mamashela, 2004) and that these dissolutions are not registered. Since marital breakdown and marriage dissolution can be formal or informal, relying on the official number of divorced and separated black South Africans, based on administrative data such as court records, may overlook a wider prevalence of marital breakdown which may be better captured through survey data and other research methods.

This was found to be the case more recently, in a survey of 3 000 women, Budlender *et al.* (2011) found that very few women in the study reported that they were separated or had been deserted by their partner. In fact, the survey yielded responses from only 79 women who reported being divorced, separated or abandoned (approximately 2.6 percent) (Budlender *et al.* 2011). Yet the researchers noted that when an additional 110 women who reported that they were married were asked to list all the homestead members – excluding those who had not come home in the last two years – no husband or partner was listed. Budlender *et al.* argued that this group “do not seem to be firmly in a marriage” (2011: 78). This research evidence strengthens the concern that the number of divorced and effectively separated or abandoned women may be greater than is revealed by the administrative or survey data on marital status. Furthermore, Burman used the term ‘remnant families’ (1987: 207), defined as a family in which the ex-husband (by any system of law) has left, to describe families with differing legal entitlements of support following the breakdown of the marriage. It is for these reasons that a broader understanding of marital dissolution is both

required and adopted by the authors. The broader understanding of marital dissolution includes women who are separated, deserted and divorced.

A brief overview of the socio-economic context of black divorced individuals in South Africa, based on an analysis of survey data (the Community Survey data in 2007), demonstrate that divorcees are a particularly vulnerable group.⁷ Firstly, almost twice as many women as men are separated or divorced. Although separated and divorced women have the highest rates of employment of all African women over the age of 14 (relative to other marital status groups), the number of divorcees with no income is considerable. Almost one in seven men and women who are divorced (15 per cent) have no annual household income. This compares to 5.7 per cent of men and women in civil marriages and 7.3 per cent of men and women in customary marriages. When we look at these findings, we see that 35 per cent of divorcees, 25 per cent of men and women in customary marriages and 15 per cent of men and women in civil marriages live off less than R800 per month. These findings have important bearing on the financial consequences of the dissolution of a marriage. If almost twice as many women divorce, this degree of impoverishment will have particular gendered consequences.

4. Methodology

To obtain a picture of the financial consequences of the dissolution of a customary marriage, this paper analyses a subset of the data which comprises of the following three sets of data: 1) 30 divorce cases drawn from a Regional Court; 2) 21 semi-structured interviews with divorcees who self-identified as separated or divorced;⁸ and 3) 82 responses to a ‘division of asset’ vignette. A brief description of each data set follows.

A. Court Files

The research team reviewed the divorce records from regional courts in one of the sampled provinces.⁹ These courts were all established as regional courts in

⁷ Unfortunately the figures presented on divorce do not distinguish between those who obtained a divorce from a customary marriage or civil marriage.

⁸ Divorce and marriage dissolution can be formal or informal. Some people who consider themselves divorced are not considered divorced from the perspective of the State but may be considered divorced by members of their community. Therefore in recruiting a sample of ‘divorcees’, we included any individual who self-identified as a divorcee.

⁹ The name of the province is being withheld deliberately for ethical reasons.

2010.¹⁰ The court had records of divorce files from 2003. At the court, an officer, who was appointed to assist the researcher, pulled out all the records on customary marriages he could find for the years 2003 to 2009. These files were stored on the shelves and in cabinets according to the years in which the cases were filed. The researchers carried out a content analysis of 25 divorce files involving marriages which were concluded following the commencement of the Act and 5 divorces of customary marriages which were concluded before 2000 but were terminated following the Gumede ruling.

B. Interview Data

This paper also draws on semi-structured interviews with 21 participants who self-identified as separated or divorced. Participants in the selected sites were recruited to attend an information session regarding the ‘new laws’ and over 200 people attended the information sessions. The interview sample was drawn from this group. We also adopted snowballing methods of sampling whereby the researchers identified people in the community who met the sampling criteria and we snowballed from the first set of participants.

All interviews were conducted in the first language of the participant, which included Xhosa, Zulu, Sepedi and Tswana. The interview guide used during interviews contained four sections, of which those sections relevant to this article focus on the financial arrangements following the dissolution of the marriage. We asked open-ended, non-directive questions about these processes.

Both authors participated in carrying out the data analysis and engaged with the analysis stages by following the “conceptual scaffoldings” approach outlined by Spencer *et al.* (2003: 213). This method involves three overlapping stages. The first stage involved sorting and reducing the data by generating a set of codes. We used ‘division of matrimonial property’ as the initial broad analytic code; we coded all data relating to division of matrimonial property and from these codes derived more specifically into different structural codes based on the different outcomes of division. In the second stage of analysis the nuances and tensions within each category were analysed and incorporated into the analysis. The outcome of the division of the matrimonial property had two particular dimensions: firstly, whether the division was contested or uncontested and secondly, the system in which the dispute took place, either in the judicial or extrajudicial system.

¹⁰ The regional courts were established in terms of the Magistrates Courts Act 32 of 1944, as amended by the Jurisdiction of Regional Courts Amendment Act 31 of 2008.

C. Vignette Data

The majority of the participants in the study, including married individuals, divorcees, participants who had experienced an intestate succession case in their family, and traditional leaders, were presented with six identical written vignettes. Vignettes can be defined as stimuli, presented in the form of contextualised situations, to which respondents are asked to respond (Finch, 1987: 105). For the purpose of this paper, we have used the results of one of the vignettes that presented participants with scenarios about fictitious characters who had married in community of property and explained that the husband wanted to leave the marriage but refused to share the property. The conflict posed in the vignette stems from the differences between how judicial and extrajudicial systems regulate the financial aspects of the dissolution of a customary marriage. In responding to the vignettes, the participants were required to advise the vignette characters on what the right course of action would be in this situation. Thus, the vignettes investigated the perceptions and not the practices of the participants. Overall, 82 participants responded to this vignette. This sample included 16 traditional leaders, 14 divorcees, 39 married women, and 13 married men.

The responses were coded similarly to the interview data. In the analysis of the vignettes, ‘choice of support system’ was used as the initial broad analytical concept. Once the initial codes were created, more specific concepts were derived to explore the nuances within each code and the tensions between different codes. For example, for ‘state courts’, concepts such as ‘powers of compulsion’ and ‘powers of protection’ were created to explain the respondents’ perceptions about state courts and why they believed that such forums should be turned to in the vignette situation.¹¹

The findings will be presented by outlining 1) the division of matrimonial property following the dissolution of a customary marriage inside the court; 2) the division of marital property that takes place outside the court; and 3) normative agreement and disagreement regarding the just solution to a division of marital property problem based on a larger group of individuals including traditional leaders.

¹¹ For more details on the analysis of the vignette data, see (reference withdrawn).

5. Division of Matrimonial Property: A View from Inside the Courts

In reviewing the findings from inside the courts we will firstly examine whether the parties identified the correct property regime before we review whether the courts applied the correct property regime.

A. Uncontested Cases

In an analysis of the uncontested cases, despite the RCMA recognising women’s equal share in the property amassed during the marriage, these orders relegated women who married after 2000 to the ongoing system that allows husbands to retain the assets. The economic position of the woman in many cases has been disadvantaged. As presented in Table 1 below, the division of the property in 12 of the 30 divorce cases reviewed was not contested. The plaintiff was the husband in seven of these cases and the husbands’ claims in these cases specified the distribution of assets in the following ways: 1) division of the joint estate (four cases); and 2) each party to keep whatever was in his/her possession (three cases). The findings indicate that the plaintiff (husband) identified and pleaded the incorrect property regime in three cases. In all cases the plaintiffs were legally represented. The findings suggest that the lawyers involved in these cases may be unaware of the parties’ entitlements under the Act or they may think the court will not uphold the principles of the Act and they therefore advise their client accordingly.

Table 1: Description of the divorce files (n=25)

	Post-recognition marriages (n=25)	
Case	Contested (13)	Uncontested (12)
Plaintiff	Husband (8) Wife (5)	Husband (7) Wife (5)
Completed case	Complete (10) Incomplete (3)	Complete (9) Incomplete (3)

More importantly, the findings reveal that the courts are not always adhering to the principles of equality embedded in the RCMA. This occurs both explicitly and inexplicitly. In terms of the court order, in three out of the nine uncontested, completed divorce cases, the property order did not align with the provisions of the RCMA, as the estate was not divided and shared, but the parties left the marriage with their own possessions. Proper remedies are not issued by the courts and this is an explicit form of injustice and neglect, as well as an implicit

denial of access to the parties. The court ought to be the place for the real enforcement of the Act, but this does not happen as the judges are not always applying the proper matrimonial property system.

The study also found that the approach adopted by the courts to regulating the matrimonial property regime leads to uncertain outcomes. While the court grants orders for the division of the property, the vagueness of the framing of redistribution orders and the lack of adequate/appropriate involvement by the lawyers representing the parties, creates uncertainty for the parties. An order alone is not sufficient to guarantee the joint division of the estate.

The challenge involved in dividing the joint estate was highlighted in case 25. In this case, the female plaintiff, who was a teacher, returned to court three months after she obtained a divorce decree, to seek the appointment of a receiver. The Court ordered the division of the joint estate but the parties were unable to divide the joint estate. In the application, the nature of the relationship between the plaintiff and defendant was described as “so odd that any attempt at settling the division of the joint estate without the aid of a duly appointed liquidator would be fruitless in that they are not on speaking terms.” The appointment of the receiver outlined the series of tasks necessary to be undertaken to divide the estate. These tasks included collection of debts due to the joint estate, paying the liabilities of the joint estate, preparation of a final account between the parties, and division of the assets of the joint estate after payment of its liabilities in accordance with the account. How the parties carry out the ‘division of the estate’ is not currently being supervised. This highlights the inexplicit injustice being committed at the Court level and it places a certain degree of doubt about whether the new Act is protecting the vulnerable spouse in practice.

B. Contested Cases

As presented in Table 1 above, 13 of the divorce applications were contested on the basis of the financial division of the assets.¹² A further problem was observed in several cases whereby litigants were drawing on codified customary law to justify their claim to an uneven share of matrimonial property instead of the RCMA. This is problematic, as it means that legal representation is misleading the litigants and misrepresenting their claims. The majority of these applications were brought by the husband who sought an unequal division of the assets in his pleadings. For example, in case 17, the plaintiff alleged that the defendant wife was an alcoholic. The couple had been married for five years. The plaintiff

¹² In some of these cases, it is unclear whether the division of the movable and immovable items represent an ‘equal division of the joint estate.’

pleaded for a forfeiture of matrimonial benefits. The husband was employed as a teacher and the wife was a low-earning secretary. The couple had a 2-year-old child. The wife sought half of the husband's pension fund and the joint division of the estate. The court ordered the joint estate to be divided. It ruled that half of the plaintiff's pension interests be held by the fund and be paid to the defendant when such benefits become due and payable. While the outcome of the case demonstrates that the Courts have played a role in guarding against the traditional customary law bias in favour of husbands, the lack of appropriate legal advice by the lawyers representing the parties is weakening the implementation of the Act within the judicial system.

The study also found that some women were seeking specific orders relating to a share in the husband's pension (six cases) and spousal maintenance (three cases). Although the Courts are upholding the principles of RMCA in some of these cases the findings reveal other important gaps in how they are failing to advance and promote the implementation of the RCMA. Two important issues arise regarding the outcomes of spousal maintenance and pension applications. Firstly, the courts are not giving guidance to these intricate systems, as to why spousal maintenance would not be paid for a longer period or why access to a pension is delayed until the pension entitlements have accrued.

In case number 5, the couple had been married for four years and they had no children. The female defendant had sought spousal maintenance of R1 500 per month for 24 months. The court ordered the defendant to pay R500 for three months only. There was no information available regarding the parties' respective employment status and there was no explanation provided as to why spousal maintenance would not be paid for a longer period. The court files revealed that judges did not explain the reasons for their judgments, even in cases that *are* contested. There is no indication of what they are taking into account if they do not indicate clearly what matrimonial property they are awarding and why they are awarding it. This is very significant as there is uncertainty regarding what the estate comprises of and whether it includes access to spousal income.

In another divorce case involving a claim for pension entitlements, there was no guidance from the court as to why the payment of pension benefits could only be paid at a later date. In this case, the wife was the primary carer of a 4-year-old and the Court ordered the wife to obtain pension benefits from her husband's fund when such benefits became due and payable. While an endorsement is made on the pension fund at the time of divorce thus registering the interest of the divorced spouse, the ex-wife cannot cash in her claim to the pension

benefit.¹³ This seems to be an inappropriate remedy or source of income for a primary carer and ex-wife who would probably have less of a demand for it at some point in the future as (1) she herself may receive a government pension; (2) the children she is raising may become independent; and/or (3) another wife may have a claim to it as well.

C. Orders in post-2008 divorces cases

There were two court cases involving customary marriages which were concluded before 2000 and were dissolved after 2008, following the Gumedé ruling. In these two cases, the court files did not provide any evidence to suggest that the plaintiff or the court had investigated all the circumstances relevant to the customary marriage. This is the practice revealed in this study despite Moseneke DCJ¹⁴ urging the court to examine “all the circumstances relevant to the customary marriage and in particular the manner in which the property of the marriage has been acquired, controlled and used by the parties concerned.” In these cases, as mentioned previously, the court did not present clear definitions of ‘estate’ or ‘equal’ despite the plaintiff’s desire for more direction. In one of these cases (case 32), the couple had been married for 39 years. The wife was unemployed and the husband was self-employed as a taxi owner. The wife sought an equal share in the taxi business. She argued that she had supported the husband throughout his long spells of unemployment. She claimed she bought the taxi and other assets such as cattle, and that he chased her from the common home and she had to stay with her younger sister. The husband denied the allegations. The court ordered an equal division of the joint estate. The judgment by Moseneke J provides guidance only as far as saying that all customary marriages are ‘in community of property’, but it is unclear what constitutes property in this case and how the woman in this case managed to obtain a share in the business.

Overall the findings from inside the Courts demonstrate that the Courts are explicitly and implicitly negligent in how they are re-distributing marital assets upon the dissolution of a customary marriage. In some cases the Courts are not adhering to the principles in RCMA. Moreover, they are not providing adequate instruction regarding how a ‘joint estate’ should be divided or why they are awarding specific spousal maintenance or pension benefits. This is coupled with a failure to explain what the framing of redistribution requires. Given such remiss, it is unclear how women’s rights to marital property following the dissolution of a customary marriage are being promoted by the Courts.

¹³ For details, see s 37D of the Pension Funds Act 24 of 1956.

¹⁴ *Gumedé* (n 13) para 52.

6. Division of Matrimonial Property: A View from Outside the Courts

The findings presented here focus on women's experience of negotiating the different authorities and institutions involved in regulating the division of marital property. In only two out of 21 cases, the women retained the family home by drawing on the support of both the extrajudicial and the judicial system. In the first case, Martha¹⁵ was able to remain in occupation of the home with the support from the traditional leader and the Court:

'The chief said there's nothing to be shared, this place belongs to me therefore when one leaves it, it comes back to me. In our culture there's no sharing when a man leaves his wife, he just leaves alone and leaves everything to his wife. Your husband's properties are yours. My husband said that the court said we must share the property. I then asked him what does he want to leave behind. He [my husband] said we can't talk about the house but we can share other things. I said I would be happy if you can tell me what you want. He said he would write them down and when he's done he would come back and show me. When I opened the letter there was nothing about sharing, it only stated that he was selling the house. I wanted a lawyer. I got a lawyer and the lawyer said I mustn't worry about these things. I must stay in the house. He [the husband] never came back again.'

The support of the traditional leader encouraged Martha to remain in the family home in the immediate period following the breakdown of the marriage. However, Martha's husband still sought a claim in the home. In order to secure her long term position in the home she sought support by seeking and obtaining the intervention of a lawyer. The assistance she received from both extrajudicial and judicial sources ensured access to the home both in the short-term and long-term. This combination and interaction provided a more holistic mechanism of protection of her marital property rights.

In the second case, Violet also drew on extrajudicial and judicial sources, to assist her in claiming her right to remain in the family home in the immediate violent period following the breakdown of the marriage. After Violet obtained the support of the wider family network to stay in the home, she sought long term security from the Courts as she applied for a protection order against her former husband. Although Violet had not yet obtained a divorce, she remained

¹⁵ All major identifiers (names of individuals, specific locations) were removed from data. and pseudonyms are used.

living in the marital home and was able to support herself by renting out two or three rooms in the house.

The cases outlined above however are not typical. In the majority of cases women experienced the dissolution of their customary marriage through the extrajudicial system only where matrimonial property rights, granted under the RCMA, were not recognised. In 18 out of 21 cases, the husband retained the marital property and the wife ‘took her clothes’. The experiences reveal different reasons why women did not pursue a stake in the marital home. There were two main reasons for this finding. Firstly, women (and their families) continued to regard themselves as disempowered, they did not believe that they had a right to such property: “yes, I just came with my clothes. He is the one who was packing for me. I wasn’t working.”

There was also a strong belief that the marital home belonged to the husband. This finding resonates with existing research which argues that women in customary marriages still perceive themselves as minors and incapable of owning property (Mamashela, 2004). The wife did not question her husband’s authority. She did not feel or believe that she had contributed to the household by being a wife and she certainly did not believe she had a claim to the marital home. Mamashela (2004: 632) argued that movable assets are bought with the husband’s money and therefore ‘belong’ to him. She argued that aspects of co-ownership and co-management espoused in community of property are an illusion for most women who were married before 2000. This issue has now been clarified by the judgment awarded in Gumede and women who were married before 2000, who divorce after the Gumede ruling, are considered to be married in community of property.

Secondly, some women were aware of their right to marital property but were unwilling to exercise this right. In some cases divorcees expressed concern that sharing in the marital property would be considered inappropriate by the wider extended family. In particular, women whose marriages were of shorter duration were concerned about being referred to as ‘gold diggers’:

‘I left them (the property) with him. [Why?] There would have been problems. It was going to raise problems where his family says our child has worked hard now you are taking his things and going to your family (three-year marriage) so I just took my child and left.’

In several other cases, participants were concerned that seeking a claim in the marital property was not worth the fight. In one such case, Amanda, an employed administrative clerk from Johannesburg, explained how angry she felt about the unequal division of assets. Amanda explained that despite her

frustration with walking away ‘empty handed’, it was ‘less trouble’ to leave the marriage empty-handed than to fight for more:

‘I hate it. I'm angry and I've wasted my years for nothing since I got out with nothing that I acquired. I've worked but at the end of the day I just got out with nothing I only got out with my clothes you understand.’

In yet other cases, the wife walked away from the marital property as the need to separate from a violent husband was critical. In such situations, it was better to walk away and start afresh, even if it resulted in increased financial strain. In these cases, the women did not believe that they didn't deserve a stake in the matrimonial property. Instead they chose to walk away rather than encounter more challenges in dealing with the former husband or the former husband's family.

7. Perceptions regarding the Division of Matrimonial Property upon marital dissolution

In what follows, we will present the main findings from the responses to the vignette which dealt with the division of matrimonial property upon exit out of a customary marriage. We will outline the reasons put forward by men, women, divorcees and traditional leaders for either supporting or resisting the equal division of matrimonial property upon marital dissolution.

A. Support for the Equal Division of Matrimonial Property upon Marital Dissolution

The majority of the participants (59 out of 83) believed that a couple should share the marital assets upon the dissolution of the marriage. Just under half of the traditional leaders (n=7) believed that agreeing to get married in community of property placed a binding obligation on both spouses to share their property in the event of a divorce. In holding such opinions, the traditional leaders advised women to turn to the courts to resolve the matter posed in the vignette. In doing so, they demonstrated their awareness of a woman's right to an equal share of the marital property:

‘The law will not discard this [other] person on things that belong to her as well ... when you are breaking [up] your marriage the law demands that you share these things; you cannot do as you will, it is the law.’

Nine of the fourteen divorcees who answered the vignette believed that the female vignette character should turn to the court for assistance with this matter. This belief was held on the basis that the couple had (1) a valid marriage and (2) an agreement that the marriage was in community of property:

‘The marriage is lawful and it was in community so there’s no choice. Nolundi [vignette character] should take legal steps to force Moses [vignette character] to pay because he had had an agreement with her.’

All 13 male married participants who responded to this vignette unequivocally stated that the agreement is binding and should not be contested. There was widespread agreement among the male participants that the vignette character should go to court and that the court would force the husband to share the assets. Dealing with the matter in this manner would avoid further confrontation with her husband.

Three of the male participants believed that the agreement could, however, be broken if either party was responsible for breaking up the marriage – for example, if he or she had an extramarital affair and ‘left’ the marriage. In such cases, the guilty spouse was expected to ‘take their things and leave the house’.

It depends on the cause of the divorce. Who was wrong? If she is wrong, there’s no way she should get it because she’d probably misuse my property or my money. [What if the man was wrong?] No there’s no way, if the man was wrong he’d not solely get it. They would have to share the property.

In response to the vignette, the overwhelming majority of female married respondents (30 out of 39 respondents) reflected the perception that the female vignette characters should turn to the judicial system for support in the resolution of these disputes. Many respondents expressed the view that, in agreeing to marry in community of property, a binding obligation was placed upon both spouses to share their property in the event of a divorce: “Once you are in community of property, you are committing and tying yourself.”

Furthermore, the perception was implicitly reflected by some of the respondents that there could be more protection for the woman in the vignette if the matter were resolved in court rather than within the family. They expressed the view that one way in which the woman in the vignette could avoid the suffering and

conflict by trying to resolve this matter within the family, would be to turn to the judicial system for assistance and protection.

The findings highlight how the principles embedded in RCMA are accepted and are part of how different actors in the community perceive a just solution to the division of matrimonial property following the dissolution of a customary marriage. This finding encourages the advancement and implementation of the RCMA.

B. Resistance to the Redistribution of Matrimonial Property upon Marital Dissolution

There continues to be a significant level of resistance to the equal division of matrimonial property following the dissolution of a customary marriage and these beliefs are held by men, women, divorcees and traditional leaders. Nine out of 17 traditional leaders believed that the matters should be addressed by more traditional dispute resolution forums such as the family.

These traditional leaders also believed that the dispute had no basis for two reasons. Firstly, they did not regard the concept of community of property as part of customary marriages and, secondly, they did not regard divorce as something that happened within customary marriages. One traditional leader explained why this matter was not a matter for the court, as he rejected the idea of individual ownership or a wife's claim to marital assets:

‘So, in customary law, number one, there's no community of property because the relationship between husband and wife in customary marriage takes the understanding that everything is owned by the family. I work for my children. The wife is there as a custodian of our things together towards the children, and she can't take my stuff and take 50 per cent and go spend it with another man [if she leaves].’

The traditional leaders who expressed such beliefs argued that customary marriages are centred on the family home and children. In essence, the interests of the family and children take precedence over individual rights. Consequently neither men nor women had personal property rights. If either parent wants to leave the marriage, they do so, but are not entitled to remove assets from the children's home. These perceptions do not incorporate the legal principles of the RCMA, which were intended to improve the economic position of women upon dissolution of their customary marriages. One of the problems inherent in the responses of traditional leaders under consideration is the lack of reflection by

the traditional leaders about why some marriages may have to end. In a context of high levels of intimate partner violence (Abrahams *et al.*, 2009), not recognising the variety of reasons why a spouse may be forced to leave a marriage is not addressing the needs of certain members of the community.

Although there appears to be consensus among this group of traditional leaders that marital assets are built up for the children, the husband's claim to property, should he depart, is unclear. Five of the nine traditional leaders believe that marital assets belong to the husband only:

‘In terms of our Ndebele culture; if the relationship reaches a dead end, the woman gets nothing from the family assets. According to our culture, the woman leaves the marriage with nothing. The man takes all the assets.’

The belief that divorced women are not automatically entitled to a share in the matrimonial property is still held among some rural-based divorcees too. There were five participants who did not believe that the matter was best resolved by the court. Resonating with some of the perceptions held by the traditional leaders, three of the participants felt that the spouse who leaves the marriage should not receive any share in the marital property: ‘He must just leave the house his property behind and start afresh.’ This belief is held on the basis that the wife is still willing to remain in the marriage and should not be punished for the husband's desire to leave. A few divorcees argued that the wife is not entitled to any share in the marital property. Thulile, an unemployed divorcee with two children and a seventeen-year marriage, held the belief based on the idea that the wife did not contribute economically to the marital property:

‘When I leave, I cannot say I am taking all the things. I need to understand that I was not working; he was the one who was working so when he says we are not sharing them, I need to accept that he doesn't want me and he doesn't want me to take anything.’

It is unclear whether this perception is based on compliance with living customary law and normative agreement within her community or ignorance of the new laws. We cannot tell whether the participant's view would change if she knew that she was entitled to a share in the matrimonial property.

The perceptions of the participants equate to living customary law and tell us something about why living customary law will remain crucial despite the introduction of the RCMA. There were different reasons offered as to why women should leave a marriage with nothing. The duration of the marriage, problems with upsetting relationships with the extended family, and the

importance of economic contributions were the main reasons behind a participant's belief that a woman should not obtain a share of the assets.

8. Compliance, Dissonance and Challenges

The findings show that the final judgment in relation to the division of matrimonial property may be made by a range of actors involved in both the judicial and extrajudicial system. The findings reveal that both the judicial and the extrajudicial system support and prevent the advancement of women's rights to property following the dissolution of a customary marriage.

Contrary to what we may believe, the findings demonstrate that the Courts are failing to consistently recognise women's right to an equitable distribution of the marital estate upon divorce. It is unclear how and why the court contravened the principles contained in the RCMA in some cases thus further research is required to investigate this gap. Our study revealed that the failure to uphold the principles in RCMA is occurring both explicitly in terms of the Court order and inexplicitly, in terms of how the courts are too vague in the framing of redistribution orders. The legislature, through the enactment of RCMA, has brought cultural norms within the jurisdiction of the civil courts. However, the Courts, despite the plea from Moseneke J., have failed to interpret and provide guidance on how the two systems should interact. Thus, despite the emphasis placed on the role of the judiciary in the protection of women's rights in South Africa (Himonga, 2012), and unlike the studies in other jurisdictions which show that drawing on judicial systems can robustly serve the needs of women in human rights protections (Loper, 2012), our findings highlight the failings of the judicial system in this regard, particularly with respect to customary marriages.

The study also found that many individuals are still relying on extrajudicial systems to manage their marriage dissolution. In such cases, women's rights to matrimonial property are often overlooked. This practice may stem from the strong belief held by divorcees and traditional leaders that marital assets belong to the husband (and husband's family) only. In addition, there are widely held perceptions that the individual who leaves a marriage should not benefit financially as a result of leaving the marriage. These beliefs continue to support notions of family property held by men alone, to the economic detriment of women as wives and caregivers. Denying the prevalence of the dissolution of customary marriages, as some traditional leaders do, also supports the traditional ways of organising and regulating property. There are significant emotional and social issues relating to claiming matrimonial property, and women often prefer or need low-conflict dissolution. In addition, the under-evaluation of non-financial contributions together with wives' lack of knowledge of their

husband's income and assets disadvantage them at the time of marital breakdown.

Higgins *et al.* argued that the persistence of customary practices in the face of statutory and constitutional reforms together with the continuation of traditional institutions suggest that meaningful reform of customary marriage will depend on the support of traditional authorities (2007: 1708). While we agree that the role of traditional authorities is critical, we argue that the use of a combination of these authorities and judicial mechanisms may offer a more holistic and helpful approach. This was evident in the cases where some individuals drew on both judicial and extrajudicial support to claim their right to a share in matrimonial property. Drawing on both systems allowed the participants to overcome short term challenges to remaining in the family home and gave them a stronger position from which they could claim their rights to a share in the property through the judicial system.

The evidence to the vignette suggests that perceptions are changing and people have a critical distance from the custom they follow and that practices are continually being reassessed by those that live by them. What is important to note is that perceptions about how to resolve the redistribution of assets following marital dissolution has no single unified response, as people are not unified and uncritical of the custom. When a woman comes to court or contests the outcome of the divorce, the fight is between two different interest groups battling to retain power relations within their culture – a culture which is evolving in a manner that promises compliance with constitutional principles or imperatives embedded in the RCMA. This finding demonstrates that living customary law as it is currently practiced is evolving, as is observed in the cases where the division of the assets was disputed.

The paper argues that women's rights to matrimonial property are not protected exclusively in the official enclave. It has shown how the official enclave is failing in this regard. The paper has shown how extrajudicial systems are also supporting women's rights to matrimonial property although this is not always the case. Like other scholars have argued in the past (Griffiths, 1997; Higgins *et al.*, 2007; Weeks, 2011), we would argue that meaningful reform of customary marriage will depend on the support of all institutions within the judicial and extrajudicial system. Therefore, the authors urge the State to focus their attention to creating synergies between these institutions rather than prioritising an 'official' enclave.

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