

Customary Law and Domestic Violence in Rural South African Communities

by

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1. Introduction

South Africa is a party to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),¹ which requires states to eliminate gender discrimination. Although CEDAW does not contain an article dealing with domestic violence, two General Recommendations specifically address this issue.² The recently formulated Protocol to the African Charter on the Rights of Women in Africa³ enjoins States Parties to "modify the social and cultural patterns of conduct of women and men...with a view to achieving the elimination of harmful cultural and traditional practices..."⁴ and contains several references to the obligation to eradicate violence against women.⁵ Although the Protocol has not yet been signed by South Africa, it can serve as evidence of the intention of African states to eliminate domestic violence. The South African Bill of Rights protects women's rights to

gender equality and to bodily and psychological integrity.⁶ Therefore, it can be argued that South Africa has both international and constitutional obligations to eradicate violence against women and to create effective legal mechanisms to protect women who experience domestic violence.

These obligations are acknowledged in the preamble of the Domestic Violence Act,⁷ which aims to provide speedy, effective and accessible legal relief to a very wide range of complainants. Despite general praise for the contents of the Act,⁸ there is one crucial area which has not yet been researched. This relates to the usefulness of legislation in protecting rural women and women who live under customary law from domestic violence.

The Domestic Violence Act can only be enforced in Magistrates' Courts or Family Courts.⁹ There is no provision for traditional courts to issue protection orders. Yet there are currently approximately 1 500 customary courts operating in South Africa.¹⁰ Socio-cultural, practical, linguistic and economic reasons may limit the abilities of many rural women to access the Magistrates' Courts, while Family Courts function only in the urban areas. In 2002 Statistics South Africa estimated that approximately 15.5 million South Africans, representing 36% of the total population, live in tribal villages in the rural areas. A majority of these people are women.¹¹ In addition to people living in rural areas, African people in semi-rural and urban areas may also adhere to the tenets of African customary law to a greater or lesser extent. Given the large number of people who are subject to customary law, therefore, research on the legal response to domestic violence would be incomplete if it ignored access to justice in rural areas and under customary law. The need to research these issues is strengthened by article 14(1) of CEDAW which enjoins States Parties to 'take into account the particular problems faced by rural women' and 'to ensure the application of the provisions of the Convention to women in rural areas.'

At the moment there is no comprehensive study which evaluates the ability of customary law to respond to domestic violence against women. The reason is that customary law lacks specific rules dealing with domestic violence. In this respect it is no different from other legal systems, including the South African civil law, which, until very recently, perceived domestic violence as a 'private' issue between spouses which did not merit legal intervention.¹² The aim of this study is therefore to survey the rules of customary law¹³ in order to identify those which may protect women from domestic violence and those which could increase women's vulnerability or limit their ability to resist. The ultimate purpose is for the conclusions generated by this study to be used to formulate questions which will be put to rural women living under customary law in interviews conducted by the Centre for the Study of Violence and Reconciliation. This research could be used to argue for the extension of jurisdiction in terms of the Domestic Violence Act to courts or other structures administering customary law. It could also provide insights into the extent of and reasons for domestic violence in rural areas and thus assist in extending protection against domestic violence to rural women.

A concern which is closely related to domestic violence, is the incidence of HIV/AIDS amongst rural women. Studies indicate that female victims of domestic violence incur a greater risk of contracting sexually transmitted diseases including HIV/AIDS because they cannot often negotiate safe sexual practices with their partners.¹⁴ Although this does not

form part of the direct focus of this study it should be kept in mind, especially since the consequences of AIDS extend to children and elderly relatives who depend on the care of these rural women.

The first part of this review will deal with various rules of customary law. Since the family forms the context of domestic violence we will focus particularly on the law relating to marriage and divorce. However, the rules relating to land tenure and succession which limit women's ability to resist or escape from domestic violence will also be covered. Because the status of customary law as 'law' may be contested and because of the changing nature of customs, the section on customary rules will be preceded by a short discussion of the problems and issues in this regard. We show that, although there are many rules of official customary law which render women vulnerable to domestic violence or which prevent them from escaping abusive relationships, there are also rules which protect women. We also show that the practices of contemporary customary law are often more accommodating to women's needs than the official customary law. The second part of the review will deal with women's positions within structures in which customary rules are interpreted, developed and enforced.

1.1 The incidence of domestic violence against rural women and women who live under customary law

We have been unable to find any statistics on the incidence of domestic violence specifically in rural areas or amongst people who practise customary law. Unfortunately, there is no reason to believe that it would be less of a problem than in other sectors of society.¹⁵ Already in 1990 Nhlapo expressed concern at the high levels of domestic violence in neighbouring Swaziland where people are generally subject to customary law. This was not limited to married couples, but also occurred when people cohabited or had a child together.¹⁶

In fact, the precarious social and economic circumstances under which rural women live may contribute to their vulnerability to domestic violence and limit their ability to escape it. Budlender shows that the rate of illiteracy is higher in rural than in urban areas, and that the gender gap between the literacy rates of men and women is also greater in rural than in urban areas.¹⁷ Rural women are more likely to give birth outside of medical facilities and to have to collect fuel and water than are urban women.¹⁸ They therefore lack access to the infrastructure and facilities provided in urban and semi-urban areas. This infrastructure includes access to courts and access to shelters and other services provided by NGO's assisting victims of domestic violence.¹⁹ Because women in rural areas usually do not own their homes, they are unable to protect themselves by having abusive spouses evicted and there is evidence that police are reluctant to evict male perpetrators of violence from homes which they own.²⁰

It is well known that large numbers of African husbands leave rural areas to work in cities, allowing wives to assume responsibility for rural households. Because of the shortage of paid employment in rural areas, these wives are generally dependent on remittances from husbands and other family members who live in cities.²¹ In some families remittances are not sent to women, but to male relatives, like elder sons, some of whom spend the money on entertainment, leaving women and young children destitute.²² Since women need

economic resources to escape from abusive relationships, rural women's extreme poverty will generally render them more vulnerable to domestic violence.

Women who lack other economic resources may sometimes resort to commercial prostitution, or to informal sexual relationships with several 'boyfriends' in exchange for financial support. One survey indicates that many people believe that these women should not be able to use legal strategies to escape from domestic violence.²³ These beliefs were higher in African communities and equally prevalent amongst women and men.²⁴ It is therefore likely that women experiencing violence in such relationships will themselves not feel entitled to use legal strategies to escape violence.

2. Rules of Customary Law

2.1 'Official' versus 'living' customary law

Any discussion of the rules of customary law must start off by pointing out the difficulties and limitations inherent in the idea of customary law itself. The main source of information about indigenous African law before colonisation comes from oral tradition, thereby making it difficult to trace.²⁵ Bennett describes oral legal tradition as distinctive in that it is 'at one and the same time, both young and old.'²⁶ He says that custom, although legitimised by age, is always 'up to date, because, ancient though it may seem, no custom is ever older than the memory of the oldest living person.'²⁷ This means that systems of oral customs 'have the remarkable ability to allow forgotten rules to sink into oblivion, while simultaneously accepting new rules to take their place...'²⁸

In addition to its link with both contemporary and ancient practice, Bennett describes customary law as being 'porous and malleable.' This means that rules can overlap and contradict one another, without detracting from their legitimacy as customary law. In fact, customary rules 'are probably better described as repertoires, from which the discerning judge may select whichever rule best suits the needs of the case.'²⁹

Upon being classified as 'law' by colonial officials, much of the fluidity and openness which characterised customary dispute resolution was lost. The bulk of the official code on customary law was recorded by anthropologists during the late nineteenth and early twentieth century. Their fieldwork used rudimentary techniques, while their records were permeated by their prejudices. Contemporary legal scholars caution that one should be suspicious of written evidence of pre-colonial custom because it was recorded by colonial officials and academics who lacked understanding of the practices and customs they were recording.³⁰

The already corrupted version of tradition described by anthropologists was further distorted by application in the colonial legal system, which reduced a system designed to settle disputes by taking a multiplicity of factors into account, to rigid legal rules.³¹ Magistrates, Commissioners and lawyers interpreted customary 'rules' in accordance with technical concepts, derived from the English and Roman Dutch common law. The contents of customary rules were therefore misinterpreted and replaced by civil law rules.³² Even more important, colonial rulers disregarded, replaced or reformulated certain aspects of

customary law which they did not understand or regarded as 'immoral.' For instance, the so called 'repugnancy clause' which permits civil courts to apply customary law only when it is not 'opposed to the principles of public policy and natural justice' still exists.³³

The distortion of customary law has led to a distinction between 'official customary law' which is applied in courts, 'academic customary law,' which comprises descriptions of customary law in text books and 'autonomic' or 'living' customary law, which is fluid and reflects the actual practices of traditional communities.³⁴ It is possible to record the living customary law in writing, with the result that good academic customary law should also reflect the actual practices of customary communities. However, it should be kept in mind that local variations on general rules are always possible. This study will necessarily draw primarily on official and academic customary law. One of the central challenges for the empirical research is to determine the extent to which the living customary law accords with academic and official customary law. It may well be that the practices of traditional communities provide better and wider remedies for women who suffer domestic violence than those recorded in the text books. Moreover, it may be found that official rules of customary law have become outdated and have been replaced by more gender sensitive rules in communities.

2.2 The status of women in 'official' customary law

While pre-colonial African societies were patriarchal in the sense that women's interests were considered to be subordinate to those of families and larger kin groups,³⁵ it is difficult to assess women's status in these societies with absolute certainty. In the first place, the social and economic conditions which prevailed when official customary law was first recorded were vastly different from capitalism, rapid urbanisation and the replacement of the extended customary family by nuclear, woman-headed and even child-headed families, which form the current context of women's lives. As a result, customary rules may not have had the same detrimental effects in pre-colonial societies as they do now. For example Nhlapo writes that

in the context of a subsistence economy the very rules that appeared designed for the subjection of women often operated to ensure their security. The economic priorities underlying the pre-eminence of marriage and large families produced practices which worked in part to ensure that no woman was left without someone directly responsible for her maintenance.³⁶

A second issue relates to the process of recording official customary rules. The anthropologists conducting the fieldwork consulted male elders and traditional leaders because they presumed that these were the only people who controlled important information.³⁷ This approach led to the exclusion of women's views on African culture and to official customary rules which favoured older men.

Customary law took on a particularly authoritative and patriarchal cast because it was the product of negotiation between colonial and customary elites. It was in the interests of traditional leaders to provide an account of indigenous law which emphasized the privileges of senior men whose power was under threat not only from colonial encroachments but also from increased opportunities for

youth and women to achieve independence from tribal structures through migrancy and wage labour.³⁸

For these reasons Bennett argues that codified versions of customary law are 'perversions of women's pre-colonial status' which fail to reflect current social practice. He relies on empirical studies that have shown that women were more likely to receive a sympathetic hearing by traditional leaders during colonial and apartheid times because these leaders responded more flexibly to shifts in local attitudes and practice than higher courts who relied upon the codified versions of customary law.³⁹

We have indicated above that living customary law contains many contradictory rules and principles which enable it to be more flexible than civil law. This is because living customary law is the product of cultural contestations within traditional societies. Early anthropologists assumed that traditional societies were homogeneous, harmonious and free from disagreement. They disregarded the process whereby various interest groups would debate and lobby for different versions of custom to better suit their needs and interests.⁴⁰ In contemporary customary societies, particularly in urban and semi-rural areas where people still adhere to certain customary norms, the likelihood of conflicting customary norms increase.⁴¹ In particular, women are more likely to point to changing social circumstances in order to argue that ancient customs are no longer relevant. Examples of such challenges can be found in court cases in which women have disputed the customary rules of succession which favour men⁴² and the rules which determine that *lobolo* should be paid to the fathers, and not to the mothers of brides.⁴³ The likelihood that official customary rules around domestic violence may have been successfully challenged by women in rural communities is something which should, therefore be investigated.

A further issue relates to the ways in which women manipulate the relationship between customary law and civil law. Research in South Africa and in neighbouring countries indicates that African women very rarely live exclusively in terms of either 'traditional' or 'modern' identities. Bronstein cites a study of rural women living in the small village of Phokeng who had worked in the cities for large parts of their lives. The women were shown to have multiple perceptions of their identities, either 'as Christians, as Bafokeng, as Tswana, as women, as mothers, wives...'⁴⁴ Bronstein therefore argues that⁴⁵

although culture is integral to the lived reality of people's lives, it does not possess or own its subjects. People have multi-faceted identities and we all function in a wide range of situations in which different segments of South African society are implicated.

These interchangeable 'traditional' and 'modern' identities are also reflected in women's legal strategies. Armstrong shows how parents in Zimbabwean Community Courts strategically use both 'customary' and 'western' arguments to obtain custody of their children.⁴⁶ In a detailed analysis of disputes brought before community forums and civil courts in Botswana, Griffiths indicates that courts and litigants use both systems of legal rules interchangeably and pragmatically. Whether women used the civil or the customary mechanisms to claim property or maintenance on divorce, or whether they refrained from pursuing any claims, depended on a practical assessment of their positions in the

community and the kinds of networks and resources to which they had access.⁴⁷ The empirical study would therefore need to establish whether women who live in rural areas under customary law have ever used the Domestic Violence Act to protect themselves and under which circumstances this was done. Factors relating to the likelihood of obtaining effective relief in the traditional courts will be addressed in paragraph 3.2 below.

2.3 Customary law of marriage

2.3.1 Formation of Marriage

Bennett lists five features which distinguished and marked a customary marriage:⁴⁸

polygyny was not only tolerated but even approved; the validity of the union depended on the payment of lobolo; the relationship was between two families rather than two individuals; the union was achieved gradually over time, not immediately with the performance of a particular ceremony; and marriage was a private affair requiring no intervention by civil or religious authorities to give it the stamp of validity.

The Recognition of Customary Marriages Act⁴⁹ has, on the one hand, afforded existing customary marriages, including polygynous marriages, full legal recognition. On the other hand, it has set out the requirements for the validity of future customary marriages and these differ somewhat from the 'official' customary law rules. In this section we propose, therefore, to first set out the customary rules which could impact on domestic violence and then to indicate the extent to which they seem to have been altered by the Act.

According to custom, a marriage can be concluded by way of the *ukuthwala* custom – or 'stealing the bride.' This is predominantly practised among the Xhosa speaking tribes. It is considered part of the marriage negotiations in some groups but can also be likened to a practice of elopement or robbery of the bride. In this practice the groom and his friends would carry the bride off to his family home. The negotiations for *lobolo* between the families of the bride and the groom would then follow the abduction, rather than preceding them.⁵⁰ If the families cannot come to an agreement, the girl will return to her home, while the family of the man will be liable for damages in the form of one head of cattle. Generally this custom is carried out with the knowledge and consent of the girl or her family and is even sometimes preferred for its romantic connotations or because it saves the families from organising and paying for a large traditional wedding.⁵¹ However, it could also occur against the will of the bride, exposing her to rape by her 'husband' and to actual or threatened violence in order to keep her in the marriage.⁵² The Recognition of Customary Marriages Act requires that both parties consent to their marriage⁵³ and the *ukuthwala* marriage could therefore no longer be used to overcome the bride's lack of consent.

Central to the official rules regarding the formation of a customary marriage is the payment of *lobolo*⁵⁴ by the husband's family to the family of the bride. Traditionally families negotiate for the *lobolo* which should be paid in cattle and other livestock. Ideally the father of the groom, often assisted by relatives, would pay the *lobolo* for his son's first marriage, while a man would raise the *lobolo* for his own subsequent marriages. In some groups the

amount of *lobolo* is fixed, while in others the families would negotiate an amount. It was generally not necessary for all the *lobolo* to be paid in a lump sum. Instead, it would be paid off in instalments, often over many years. *Lobolo* cattle would not generally be sold or given away, but the cattle received for a sister's marriage could be used to provide *lobolo* when her brothers married.⁵⁵ *Lobolo* is said to have several functions. It 'compensates' the wife's family for raising and educating her, it transfers her reproductive capacity to her husband's family, and it protects wives, since husbands who ill-treat their wives may forfeit *lobolo* and in-laws will be inclined to treat a woman for whom they had paid *lobolo* well.⁵⁶

Like other customary institutions, the payment of *lobolo* has changed radically since the time when 'official' rules were recorded. Nowadays *lobolo* is generally paid in cash rather than cattle. This means that the *lobolo* is not retained by the wife's family, but often spent to meet economic needs. Moreover, there has been a steady 'inflation' in the amounts paid for *lobolo*, so that it has become difficult for some people to marry, resulting, in turn, in an increase in cohabitation.⁵⁷ A further trend is for grooms themselves, rather than their families, to pay *lobolo* for their marriages.⁵⁸

These changed practices around *lobolo* potentially increase women's vulnerability to domestic violence and decrease their ability to resist or flee abusive situations. Because men, rather than their families pay *lobolo* and because payment is in cash, men sometimes 'justify' their rights to abuse wives by claiming that they 'paid' for them.⁵⁹ The decreased involvement in the payment of *lobolo* by the husband's family also limits their ability and willingness to intervene in the marriage to stop domestic violence. Because *lobolo* is paid to wives' fathers and is often spent shortly after being received, wives' families may be reluctant to allow them return home when they suffer domestic violence because of their inability to return the *lobolo* to the husband. Thus women's own families may collude with violent husbands to trap them in abusive marriages.⁶⁰

An illustration of these dangers for wives can be found in the facts of *S v Mvamvu*.⁶¹ A woman who had been married to a man in a customary marriage for four years left her husband because of marital problems and returned to live in her brother's home. She assumed that the marriage had ended, but the husband was convinced that, because *lobolo* had not been returned, the marriage still existed. In an attempt to get his 'wife' to return to his home he kidnapped and raped her on two occasions and despite the existence of a domestic violence interdict against him. The Supreme Court of Appeal held that the court a quo was entitled to depart from the mandatory minimum life sentence for rape on the grounds that:⁶²

it would appear at the time of the offence that the couple were indeed in all probability still formally married under customary law. It is clear from his evidence that at the time of the incidents the accused honestly (albeit entirely misguidedly) believed that he had some "right" to conjugal benefits.

If people believe that men are entitled to abuse their wives because of the payment of *lobolo*, wives will tend to accept domestic violence and traditional courts will not assist them unless their families can return the *lobolo*.

The payment of *lobolo* is not a specific requirement for the formation of a customary marriage under the Recognition of Customary Marriages Act. However, the Act determines that a customary marriage 'must be negotiated and entered into or celebrated in accordance with customary law.'⁶³ Bennett interprets this to mean that the payment or negotiation of *lobolo* 'is now a contractual accessory to marriage,'⁶⁴ but the issue has not yet been decided in court. In any event, it seems that the *lobolo* is generally accepted in African society and that its payment will continue whether or not it is regarded as a prerequisite for a valid customary marriage.⁶⁵

2.3.2 Status of Spouses

If *lobolo* has been paid, a customary wife is absorbed into her husband's family and generally has to live with them.⁶⁶ When they experienced difficulties in their marriages, wives were expected to appeal to their husband's family before approaching their own male family members. Only as a last resort were women entitled to approach traditional leaders to resolve marital problems.⁶⁷ This has two consequences for domestic violence. The first is that, despite their obligation to protect the wife to maintain good relations with her family, members of the husband's family would generally be more sympathetic to him than to his wife. This is borne out by Artz's research about rural women who complained to their in-laws about domestic violence. She found that⁶⁸

[t]he majority of the women interviewed stated that they were accused of being "bad wives and mothers", "difficult and troublesome people" and were sent back home to "sort things out". Women were met with more sympathetic, but similar responses from their own families.

Women who refuse to conform to traditional expectations of submissiveness may face accusations of witchcraft by their husbands' relatives and even by husbands themselves.⁶⁹ The result of criminalising charges of witchcraft has been to remove customary mechanisms for dealing with people who are accused of being witches. This has led to an increase in vigilantism where communities attempt to punish 'witches' without the procedural and other safeguards which were traditionally available.⁷⁰ Women who are accused of witchcraft may, therefore, suffer domestic violence from their husbands' families.

'Traditional' ways of dealing with matrimonial problems, including domestic violence, determines that women should obtain help from 'private' sources, like their own and their husband's families, rather than to bring the issue to 'public' attention by approaching the traditional leader. Many women would share their families' reluctance to expose issues of domestic violence to the public gaze, and this would decrease their chances of obtaining outside assistance. The private nature of women's customary remedies against domestic violence means that women largely have to rely on the goodwill of family members.⁷¹ This will also influence African women's reliance on non-customary forms of combating domestic violence like going to shelters and using the Domestic Violence Act. Communities disapprove of women who resort to these public forms of dealing with domestic violence, since they not only expose problems which are supposed to remain in the private domain of the family, but they also imply that their families are unable or

unwilling to deal with these problems.⁷² These attitudes are shared by police, social workers and nurses who are supposed to assist victims of domestic violence. Makofane studied responses by professionals in the Northern Province, which is mostly rural and thus relatively 'traditional,' and found that they were unwilling to assist women. Instead, they suggested that women look for help to their families or headmen.⁷³

This links with the customary effect of marriage on the status of husbands and wives respectively. While the status of men increased as a result of marriage, women were seen as simply exchanging the control of their fathers for control by their husbands. This was confirmed by official customary rules which regarded a married woman as being 'under the marital power' of her husband, and thus in a state of perpetual legal minority.⁷⁴ The legal effects of wives' low status was a loss of capacity to contract and to litigate, impacting in turn on their ability to acquire and administer assets. Olivier et al describe the position of the husband as follows:⁷⁵

he exercises authority over his wife (wives) and children; his position is comparable to that of the paterfamilias of Roman law, except that he does not have the *ius vitae et necisque*... His wife (wives) and children owe him obedience and loyalty, and must respect his authority; he has moderate powers of punishment. He must treat his wives with consideration and respect, and must be scrupulously fair and impartial in his relationship with them...

The customary powers of punishment over wives and children would no doubt extend to what would be considered domestic violence under the Domestic Violence Act, which includes physical, verbal, economic and psychological abuse as well as 'any other controlling or abusive behaviour.'⁷⁶ There are academic references to the fact that men justify the use of domestic violence by reference to their customary rights of chastisement.⁷⁷ At the same time women who internalise customary expectations of submissiveness and obedience are less likely to complain of domestic violence.

Section 6 of the Recognition of Customary Marriages Act determines that:

A wife in a customary marriage has, on the basis of equality with her husband, and 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 and powers that she might have at customary law.

Bennett contends that the effect of section 6 is to abolish the position of the husband as head of the household 'because it speaks of the spouses having equal status.'⁷⁸ However desirable this position, courts may interpret it differently. In the first place, section 6 does not mention equal status, but merely that the wife has 'full status.' Thus the position of the husband as the head of the household may survive. Moreover, the Act does not mention the husband's rights to chastisement. It would therefore be useful to determine whether customary communities, and particularly women, believe that husbands have such rights.

2.3.3 *Proprietary consequences of customary marriages*

According to official customary law, in monogamous marriages⁷⁹ all marital property, apart from purely personal items like clothing, belonged to the husband, who had sole capacity to perform juridical acts in respect of this property. This included money earned by the wife from work done outside the home.⁸⁰ Unless a woman could return to her family or find shelter elsewhere, the fact that she owned no property meant that she did not have the economic resources to leave an abusive husband.

The Recognition of Customary Marriages Act determines that, unless spouses conclude an ante-nuptial contract to exclude this effect, marriages concluded after the operation of the Act would be in community of property.⁸¹ Since people in rural areas will generally not have the resources or legal knowledge to approach an attorney to conclude an ante-nuptial contract, they will generally be married in community of property. Abused wives would therefore have a claim to half of the communal estate and their economic positions would be greatly enhanced. In addition, the fact that they now have full legal status in terms of section 6 of the Act, increases their independence and therefore their ability to escape from abusive marriages. Empirical research could usefully enquire whether people are aware of and understand these provisions of the Act and whether women married under the new dispensation act accordingly. Unfortunately this provision does not generally apply to existing customary marriages which were concluded before the commencement of the Act.⁸² In these marriages, customary law determines their proprietary consequences, thus leaving wives without assets.

2.3.4 *Divorce*

The husband's right to moderate chastisement as discussed above is counterbalanced by another customary law rule which could protect women from more severe forms of physical assault. A wife who has been severely mistreated by her husband is entitled to return to her father's home (subject always to her father's willingness to accept and support her). If the husband wishes his wife to return, he will have to negotiate with his father-in-law and may have to pay compensation for his misbehaviour in the custom known as *phuthuma*.⁸³ If the husband does not ask for his wife's return, or if she is unwilling to return, her father may initiate a divorce on the basis of her husband's mistreatment.⁸⁴ The husband will then forfeit some of the *lobolo* cattle to compensate for his behaviour.⁸⁵ This should protect wives by providing an incentive for husbands to refrain from domestic violence. However, violence only provides the wife with a justification for leaving in cases in which the violence is so severe that it 'makes cohabitation dangerous or impossible.'⁸⁶

Whether the assault is of a sufficiently serious nature to enable a wife to return to her family will be judged, in the first instance, by members of her family. If they are not convinced of her claim, they will attempt to persuade her to return to her husband. An important factor in the wife's ability to remain with her family is whether they can afford to return some of the *lobolo* cattle to the husband, should a divorce ensue. Even where the husband has been guilty of mistreating the wife, he does not necessarily lose all the *lobolo* and the wife's father may have to return some cattle. For this reason, although fathers should assist their daughters to divorce abusive husbands, they do not always do so.⁸⁷

In a study of divorcing women in Zimbabwe, Banda found that:⁸⁸

Those women who were in employment or self supporting were less likely to stay in unsatisfactory marriages than those without independent means.

Very poor families may not have the resources to accommodate or help victims of domestic abuse.⁸⁹ Because the wife is not entitled to any assets, apart from personal property, at the time of divorce she will have no independent means to survive. Given the general economic stagnation in rural areas and the consequent inability of women to find paid employment, many women will have to remain in abusive marriages for economic reasons. The fact that customary law makes no provision for spousal or child⁹⁰ maintenance after divorce⁹¹ means that abusive husbands will also not be obliged to provide economic support to their ex-wives.

Women who suffer abuse at the hands of their husbands could also be discouraged from leaving the marriage by the customary rules relating to the custody of their children. Although very young children are allowed to remain with their mothers, the general rule is that, if the father has paid *lobolo*, children live with his family after divorce.⁹² A woman who is reluctant to leave her children with her husband's family could choose rather to continue to suffer violence at the hands of her husband. The practical application of the customary rules relating to custody are, however, dependent on the ability to provide for children. Even where women have legal rights, it would be pointless to claim custody of their children if they are unable to support them.⁹³ Despite the official customary rule relating to child maintenance, South African courts have held husbands liable to maintain their children from customary marriages after divorce.⁹⁴ However, the evidence indicates that the rate of default is very high amongst men who do not see the need to pay maintenance in addition to the *lobolo* paid in respect of their marriages.⁹⁵

According to the Recognition of Customary Marriages Act, customary divorces should henceforth be handled by High Courts or Family Courts and the rules which apply to civil divorces will apply also to dissolution of customary marriages. The only ground for divorce is now irretrievable breakdown of the marriage.⁹⁶ Customary rules like the wife's right to divorce based on serious maltreatment seem to have been eclipsed by the Act.⁹⁷

The fact that the Family Advocate must now also report about the best interests of the children of customary marriages⁹⁸ may also alleviate women's fears about the future custody of their children. However, it is not yet certain whether civil or customary standards relating to the best interests of children will apply when courts consider custody. There is a strong argument that the best interests of African children should be interpreted in accordance with customary or 'traditional' perceptions of children's wellbeing.⁹⁹

The economic pressure to remain in an abusive marriage could possibly be alleviated by the court's ability to make orders for the redistribution of spousal assets and spousal maintenance in terms of the Act.¹⁰⁰ What remains unclear, however, is the extent to which High Courts and Family Courts will be involved in decisions about the return of *lobolo* upon divorce. No provision in the Recognition of Customary Marriages Act specifically enables courts to make such orders. However, section 8(4)(e) allows a court which makes

an order for spousal maintenance to 'take into account any provision or arrangement made in accordance with customary law' while section 8(4)(c) allows the court to order that 'any person who in the court's opinion has a sufficient interest in the matter be joined in the proceedings.'¹⁰¹ Section 8(5) determines that:

Nothing in this section may be construed as limiting the role, recognised in customary law, of any person, including any traditional leader, in the mediation, in accordance with customary law, of any dispute or matter arising prior to the dissolution of a customary marriage by a court.

No cases have yet been reported on the meaning of these sections, but they create the impression that issues of *lobolo* must be settled between the families of the bride and the groom. If they cannot agree, traditional courts may be approached to solve the matter. Alternatively, a woman's family may be joined in terms of section 8(5) and the court may be asked to make a ruling about the return of *lobolo*. When a decision has been made, the courts will take the amount of *lobolo* cattle into account in deciding on spousal maintenance. This will not, of course, assist victims of domestic violence to leave their marriages, because the *lobolo* is paid to their families, while they themselves may be in need of maintenance. Even though the father of the wife may have retained all the *lobolo*, this does not mean that she is not in need of maintenance or that she will be able to enforce her claims for maintenance against her father. Empirical research could investigate whether people living under customary law approach the civil courts to end their marriages or whether marriages are still dissolved between the families of the spouses as dictated by customary law. If the latter is the situation, then researchers should establish whether the customary rules relating to the return of *lobolo*, payment of maintenance and custody of children are observed in these 'private customary divorces.'

2.4 Unmarried women

2.4.1 *Virginity testing*

In South Africa,¹⁰² especially in the province of KwaZulu Natal there has been a recent revival of the traditional practice of virginity testing, which had mostly died out before. In the past virginity testing served purposes related to customary marriage. There is evidence that traditionally, a higher value was placed on virgin brides, as reflected in the increased amount of *lobolo* paid for such marriages.¹⁰³ In addition, customary law awarded damages for seduction to the father of a virgin who had been seduced.¹⁰⁴ Currently, supporters of the revival of virginity testing claim various benefits, including the reduction of HIV/AIDS and teenage pregnancy and the detection and prevention of child sexual abuse.¹⁰⁵ The latter is important for the purpose of this study, since sexual abuse of girl children would qualify as domestic violence if perpetrated by a person sharing the same home.

Contradicting the arguments in favour of virginity testing, opponents of the practice argue that fear of detection of loss of virginity may be used to control girls' sexual activity, while leaving boys free to engage in premarital sex. In this way sexual double standards are endorsed and women are burdened with the sole responsibility for controlling sexual behaviour.¹⁰⁶ Moreover, given the currency of beliefs that sex with virgins would cure or protect against venereal diseases, including AIDS, public identification as a virgin may

increase the risk of sexual abuse and infection of girls, including by family members.¹⁰⁷ The claim that virginity testing will expose sexual abuse can moreover be countered by the observation that girls may become reluctant to report sexual assaults for fear of it becoming known that they are no longer virgins. The unintended consequences of virginity testing, including the increased vulnerability of girls to sexual assault, may be therefore be the opposite of what was aimed for.

2.4.2 Cohabitants

We have indicated above that the increase in the amounts claimed for *lobolo* has meant that many people may not be able to afford to get married.¹⁰⁸ Other factors have also contributed to the increased incidence of cohabitation and the concomitant decline in marriage. These include declining community pressure to marry, the practise of male migrant workers to cohabit with women in cities, while wives remain in rural areas and women's need for economic support which may force them to cohabit with men who are not prepared to marry them.¹⁰⁹

Women who cohabit without marriage may be more vulnerable to domestic violence or, at least, lack some of the resources which are available to married women. In the first place, they do not have the status of daughters-in-law which would enable them to call upon husbands' families to intervene in their relationships. Secondly, the threat of losing *lobolo* when a marriage breaks down due to his physical violence would not deter a male cohabitant from domestic violence. Moreover, a man would not have his violent tendencies curbed by the prospect of having to explain them to his father in law and other family members of his female partner. A further factor is that a cohabitant cannot under current law acquire rights to share in the assets generated by her partner or to maintenance as would be the case under the Recognition of Customary Marriages Act. The economic pressure to remain in abusive relationships is therefore stronger where women lack other resources.

One of the factors which could alleviate single women's poverty and thus reduce their need to enter into and remain in abusive relationships is access to land. Under official customary law traditional leaders could allocate communal land to specific people for purposes of cultivation, building homes and grazing. Generally land was allocated to married men on the premise that they had responsibility to support other family members and thus, by allocating the land to them, their families were also provided for.¹¹⁰ However, unmarried women who support families, either because they are divorced or have never been married, should also have access to communal land.¹¹¹ Section 4(3) of the Communal Land Rights Act¹¹² has rectified this position:

A woman is entitled to the same legally secure tenure, rights in or to land and benefits from land as is a man, and no law, community or other rule, practice or usage may discriminate against any person on the ground of the gender of such person.

Another development brought about by the Act is the provision in section 22(3) and (4) that at least a third of the members of land administration committees must be female, while one member must specifically represent the interests of vulnerable groups, including women. Despite the fact that this would increase women's voices in the forums which deal with land

distribution, there is a concern that it may be interpreted to limit women's participation to one third only and thus to justify women's minority representation in these structures.¹¹³

Research conducted in Limpopo Province, North West Province, Mpumalanga and the Western Cape has found that although there are a range of issues blocking women's access to land 'the heart of the dilemma lies in the low self-esteem of many rural women.'¹¹⁴

Women are described as 'timid' and 'unwilling to challenge' male authority.¹¹⁵ Research has also found that 'men and male leaders use obstructive behaviour – including domestic violence - to resist women's attempt to participate in land reform.'¹¹⁶ A question for empirical research is, therefore, whether women and men in rural communities are aware of the provisions of section 4(3) and whether women in the land administration committees are challenging customary rules which confine the allocation of land to males.

Finally, there are studies which raise the possibility that female cohabitants who experience domestic violence may suffer discrimination from police and other people who are supposed to assist them. Abused women interviewed by Makofane in the mostly rural Northern Province indicated that social workers and nurses refused to assist them because they were unmarried.¹¹⁷ One woman said:¹¹⁸

The nurse said that since I was not married to my partner, there was nothing she could do to stop the abuse. Her attitude was negative. She told her colleagues that I was a fool to stay with a man I was not married to.

2.4.3 Widows

Bennett characterises customary rules of succession as 'intestate, universal and onerous.'¹¹⁹ Customary law distinguishes between family property (generally consisting of livestock and land) and personal property (like clothing and tools), which can be inherited by women. Broadly the principles relating to family property are that when the head of a family dies, he generally does not leave a will. Instead, family members will gather and, in accordance with certain rules, appoint an heir to succeed him. The heir succeeds not only to the assets, but also to the debts and customary duties to maintain family members. According to official rules of customary law the oldest son or another close male relative is preferred as the heir to the family head.¹²⁰ Official customary rules therefore mean that daughters and widows do not inherit family property. Instead, the oldest son would inherit and would be bound to support his female relatives. Widows are provided for, but only if they remain in the homestead of the deceased husband.¹²¹

The reason behind this system of inheritance was the idea that the family property would not belong to the heir in his individual capacity, but that he would administer it in order to care for needy family members and to fund important family functions such as burials and the provision of *lobolo*. Unfortunately the customary rules have been distorted by the colonial legal system which has interpreted the rights of the heir as individual rights to property and has refused to enforce the duties of the heir to support other family members. The result is a system whereby certain individuals are favoured above other family members who may be left destitute.¹²²

The effects of official customary law are firstly to render widows vulnerable to violence and secondly, to deprive female family members of access to family property, thereby denying them an economic opportunity to escape from abusive relationships. For instance, there have been instances where heirs have claimed property which widows have amassed during their marriages to the deceased and have maltreated widows in an effort to evict them from the family homestead.¹²³ This ill-treatment could also consist of physical violence.

The case of *Bhe v Magistrate Khayelitsha*¹²⁴ illustrates the dilemma facing African women as a result of the official customary law of succession. In this case a man had lived together with a woman for twelve years and they had two children, both girls. Together they acquired land in Cape Town where they lived. When the man died, his father laid claim to the property. When the woman refused to give it up, the father and other relatives of the deceased repeatedly threatened her with violence and tried to evict her from the property.¹²⁵ The woman claimed that she held the property on behalf of her children, who were the heirs of their father. She said that because he had never been able to afford *lobolo* for her, she had never married the deceased. The father of the deceased argued that *lobolo* had been paid and that therefore he was entitled to the custody of the eldest child who was nine years old. He therefore wanted the child to move to a remote rural part of the country to live with him.¹²⁶ In addition, he argued that as the closest male relative of the deceased, he was entitled to the property, which he would use to defray funeral expenses. Official customary law therefore would have deprived a widow of both the property and of custody of her child.

This case was subsequently heard before the Constitutional Court which declared the customary rules of succession unconstitutional in *Bhe v Magistrate Khayelitsha; Shibi v Sithole*.¹²⁷ It held that the rules which excluded women from being appointed as heirs discriminated on the grounds of sex and gender, violated women's dignity and discriminated against female and extra-marital children.¹²⁸ The majority emphasised the failure of official customary law to develop to take account of changing social conditions and the hardship which this caused for women and children.¹²⁹ Until such time as the customary inheritance laws are changed by Parliament, the court ordered that the Intestate Succession Act¹³⁰ be applied to African people as it does to all other South Africans who die without leaving wills. This judgment is very new and research on its dissemination and application in the rural areas will be essential.

Studies indicate that many African people are dissatisfied with the effects of the official customary rules of succession and that families sometimes award the family property to the widow so that she may administer it to maintain herself and her children.¹³¹ Mbatha also cites evidence of traditional courts which have allowed destitute female family members to use family property rather than allocating it to the heir.¹³² If, therefore, the living customary law is applied rather than the official version, male family members would know that widows are entitled to family property and widows would be protected from violence by the courts. In addition, female family members in abusive relationships would have access to family economic resources and could exercise the choice to leave their partners.

The position of customary widows in relation to land will be strengthened in future by

section 4(2) of the Communal Land Rights Act which determines that customary rights to land held by married men are also held by their spouses 'jointly in undivided shares irrespective of the matrimonial property regime applicable to such marriage.' However, it is not yet clear whether marriage in this section includes a customary marriage and what the effect of the provision would be upon the death of the husband. The best interpretation for widows would be that they have a legally enforceable right to remain on the land after the death of their husbands which can be asserted against heirs.

Ukungena or the levirate union is a custom which can be used when a man dies without a male heir. The widow will then be required to choose another husband from amongst the deceased man's younger brothers in order to bear male children for the deceased's house. This custom would also provide for the maintenance of the widow and preserve the relationship between the families that was initiated in the original marriage.¹³³ The practice of ukungena could potentially force women into unwanted marriages and possibly expose them to domestic violence. However, according to Bennett¹³⁴

the practice is rare, and there is every reason to believe that it is obsolescent. Widows, who want a permanent association with one of their deceased husband's kinsmen, generally prefer to contract a new marriage.

3. Enforcing Customary Law

3.1 Structures of authority in customary communities

In this section we examine the institution of traditional leadership. This is necessary because traditional leaders are integral to the existing customary dispute resolution mechanisms. Their attitudes towards women's problems will influence the ways in which they deal with complaints of domestic violence.

In order to provide background for an understanding of traditional leadership structures, it is necessary to make certain generalisations, keeping in mind that structures and names could differ in specific African groups. In general then, Bennett identifies three levels of customary authority, namely chiefs, ward heads and family heads.¹³⁵ Chiefs are at the top of the power hierarchy.¹³⁶ The next level down are the 'headmen' or ward heads who are usually the leaders of influential families and control specific areas of land. Family heads ('kraalheads') are next in the hierarchy.¹³⁷ All these levels of leadership should be exercised to benefit the wider group, rather than the individual who occupies the position. Traditionally a leader's office was inherited by his eldest son and in the case of polygynous marriages it would be the eldest son of the principal wife. Because of the principle of patrilineal succession, women were not allowed to hold ruling positions, but they could serve as regents for chiefs who were too young to rule.

As with other customary structures, the institution of traditional leadership has been distorted by colonial and apartheid governments. In particular, colonial governments invented the 'council system' of local government whereby colonial governors appointed people to govern together with the chiefs. This became the model for local government in rural areas and was nationalised with the passing of the Native Affairs Act¹³⁸ in 1920.¹³⁹ The creation of the Department of Native Affairs meant that control over succession to

traditional authority was transferred to the apartheid government, which generally appointed members of the ruling families who would not oppose apartheid policy. This process considerably eroded the respect which people felt for traditional leaders, at the same time as it decreased the incentives for traditional leaders to act in the interests of their subjects.¹⁴⁰

During the transformation to a new democracy there were calls for the complete abolition of traditional leadership. However, traditional leadership remains an influential force in contemporary South African communities as recognised by chapter 12 of the Constitution.¹⁴¹ The status of traditional leadership has recently been affirmed by the passing of the Traditional Leadership and Governance Framework Act.¹⁴² Although the Act does not specifically indicate that succession to traditional leadership should henceforth be gender neutral, section 2(3) indicates that:

a traditional community must transform and adapt customary law and customs relevant to the application of this Act so as to comply with the relevant principles contained in the Bill of Rights in the Constitution, in particular by-

- (a) preventing unfair discrimination;
- (b) promoting equality; and
- (c) seeking to progressively advance gender representation in the succession to traditional leadership positions.

In addition, at least one third of the members of a traditional council should be women.¹⁴³

Despite the large percentage of South Africans living in traditional communities, literature and research on how communities view traditional leadership in South Africa is scarce. Thornton conducted a survey of local opinion about the value of chieftainship, municipal government and national government, which revealed that there a 'surprisingly high level of support for the institution of chiefship in general.'¹⁴⁴ The study also found that men tend to support the chiefship to a greater extent than women.¹⁴⁵ With regard to discrimination against women only 25% of those questioned responded to the question 'does the chief discriminate against women?' Of those who responded, 65% of men and 65% of women said that the chief did not discriminate against women.¹⁴⁶

Oomen's research was conducted in Sekhukhune, one of the poorest areas of South Africa.¹⁴⁷ She examined the levels of and reasons for support for traditional leaders in three communities in the Northern Province. Her findings suggest that people's support of traditional leaders is pragmatic, based on the abilities of traditional leaders to meet their needs. Her research also indicates that people may support and use both traditional and civil law structures, depending on their needs.¹⁴⁸ Women who suffer domestic violence may, therefore approach either customary or civil law structures. In Oomen's study 42% of the women felt that traditional leaders discriminated against women, as compared with only 28% of men. However, the majority of people did not perceive the traditional leaders to discriminate against women.¹⁴⁹

Interesting for the purpose of this study are the occasional comments about the

effectiveness of traditional leaders in responding to domestic violence. Although some women indicated that traditional leaders and traditional courts supported them when they experienced violence at the hands of their husbands, others indicated that these institutions did not invariably assist women.¹⁵⁰

3.2 Customary court structures in which women may pursue domestic violence claims

Traditionally customary law was applied by traditional leaders, but also informally by families, for instance when they decided about succession to the family headship or agreed to resolve matrimonial disputes. The colonial and apartheid governments intervened in the structures dispensing customary law by creating a system of separate courts for African people.¹⁵¹ In 1927 the Native Administration Act determined that, in addition to the courts of chiefs or headmen, customary law would also be administered by Commissioners' Courts and from these courts appeals would lie to the Native Appeal Courts. In addition, the Black Divorce Courts could dissolve civil (not customary) marriages between Africans. The standard of justice dispensed in the Commissioners' and Native Appeal Courts, mostly by white civil servants who had no knowledge of customary law or the living traditions of African people, was severely criticised. By 1998 all of these specialised courts, except for the Chiefs' Courts had been abolished.¹⁵²

Chiefs' Courts were retained because it was believed that they attracted a measure of popular support. In addition, other traditional courts dispensing customary justice exist which are not acknowledged, nor regulated by statute. Within communities, there can also be courts of sub-ward heads and courts of ward heads, in addition to family councils.¹⁵³ The South African Law Commission puts forward 3 arguments as to why all of these traditional courts continue to form an important part of the administration of justice in rural South Africa.¹⁵⁴ First, customary law is the law of the majority of African people and the traditional courts are seen as guardians of the African cultural heritage. Secondly, these courts continue to be 'useful and desirable mechanism for the speedy resolution of disputes given their nature as an easily accessible, inexpensive (virtually free), simple system of justice.'¹⁵⁵ The third argument is that while there are problems with the customary legal system, customary law is inherently adaptable, enabling it to meet changing social norms and needs.¹⁵⁶ These reasons are supported by Oomen's research which found that traditional courts were widely supported in African communities, despite the fact that a large majority of her respondents had never taken cases to these courts and many people had never attended their proceedings. The reasons for this support largely echo those cited by the Law Commission.¹⁵⁷

Customary courts resemble mediation facilities. They are generally more concerned with finding solutions that will restore peace and harmony to the community than their adversarial counterparts.¹⁵⁸ Ward heads are responsible for civil cases and after investigation of a criminal matter refer it to the chief or headman's court. In most civil cases the plaintiff or her family first tries to reach a settlement with the family of the defendant.¹⁵⁹ If this is not possible, the plaintiff's family will report the issue to the ward head who will set a date for the hearing. From the courts of ward heads, dissatisfied parties may then 'appeal' to the courts of chiefs. Issues of domestic violence would generally first be raised with the family of the husband if the parties are married to one another. If the woman

returns to her own family, or where she is not married, the issue will be debated in a family council.

The jurisdiction of Chiefs' Courts is governed by the Black Administration Act of 1927, but it should be noted that these courts regularly exceed their jurisdiction. The civil jurisdiction of Chiefs' Courts is limited to cases arising out of customary law. The jurisdiction is unlimited in terms of monetary value but courts are not allowed to hear cases relating to nullity, divorce or separation arising out of a civil marriage.¹⁶⁰ The Recognition of Customary Marriages Act determines that customary marriages will now also be dissolved in High Courts or Family Courts. However, traditional courts may still decide on issues relating to *lobolo*. The criminal jurisdiction of the Chief's Courts excludes offences which involve murder, culpable homicide, rape, assault with intent to do grievous bodily harm, indecent assault, abduction.¹⁶¹ These courts would therefore not be able to dispense criminal justice for serious forms of domestic violence.

3.2.1 Women and Customary Courts

In an assessment of the accessibility of customary courts, the Law Commission noted that:¹⁶²

Traditional courts exist in almost every area of jurisdiction of a traditional leader (chief or headman) which means that virtually every village has a court within reach of most inhabitants. People do not have to travel long distances to magistrate's courts at district headquarters. The courts are also accessible in terms of social distance. Since the presiding chief and his councillors who constitute the court are not very different in terms of social status, wealth or education, disputants do not feel as intimidated by the chief's court as they would in a western-type court.

Despite their geographical closeness, the social proximity of traditional courts may be more applicable to men than to women. Traditionally women do not hold positions as traditional leaders, ward heads or family heads and they would therefore not form part of the customary court system as set out above.¹⁶³ In addition, women were only permitted to attend court meetings when they were party to a case. Women and children could not initiate complaints on their own behalf, but needed the intervention of senior male family members to do so.¹⁶⁴ These rules mean that traditionally, a woman who wanted to pursue issues of domestic violence in a traditional court would be surrounded by men, including family members of the perpetrator. As would be the case in all other male-dominated courts, such circumstances may undermine women's confidence and their ability to state their cases, while also decreasing the chances of their claims of domestic violence being understood and taken sufficiently seriously. The gender composition of customary courts and whether female members of the community attend sessions is therefore something which should be investigated empirically.

There are indications that in some areas the traditional situation has improved. A 1998 study of customary courts conducted by Koyana and Bekker concluded that in the areas where women hold office as chiefs, they play an important role in the customary judicial process.¹⁶⁵ The authors cite around 17 instances where women hold the position of chief in

the former Transkei.¹⁶⁶ They assert that¹⁶⁷

in the customary courts and the judicial process thereof the millions of black women of South Africa are faring very well. Far from bearing the hardships of non-recognition and being confined "to the kitchen" as was the case in old customary law, the women are wielding enormous power in the rural areas. One need only attend a meeting of a tribal authority whose chief is a female, or of an administrative area whose headman is a female.

Unfortunately, it appears as if the authors' optimistic conclusions may be confined to the area of the Transkei, or at least, to areas where women hold positions as headmen or chiefs. Furthermore, the cases contained in the body of their study do not specifically deal with domestic violence and several do not at face value demonstrate a sensitivity to women's problems. Although the inclusion of women in some customary courts is undoubtedly a necessary and welcome change which should lead to the development of customary rules which benefit women, there are questions about the extent and pace of these changes.

3.3. Other court structures

We have pointed out above¹⁶⁸ that African women may choose strategically to use different legal systems and legal forums in which to pursue justice. This means that they may also attempt to have customary law applied in Magistrates' Courts and Community Courts.

Magistrates' courts are courts of first instance for applications under the Domestic Violence Act. Magistrates' Courts may also hear customary disputes as courts of first instance or as courts of appeal.¹⁶⁹ The benefits of these courts is that magistrates would generally not be related to or have a social relationship with the perpetrators of domestic violence, while some magistrates may have received training in dealing with domestic violence. However, there are factors which mitigate against the use of these courts, such as linguistic problems, difficulty in understanding the procedures, the travelling distance to reach courts and the fact that magistrates generally have not received training in customary law and may apply official or academic instead of living customary law.

Another alternative is *makgotla*, otherwise known as 'community courts,' which were formed in some African townships to meet the needs of these communities with regard to domestic disputes and crime. The *makgotla* apply both customary and common law, and some new 'self-made' law.¹⁷⁰ Procedurally they resemble the informality of traditional courts and aim to reconcile the parties. Another informal and relatively recent set of courts are known as 'people's courts' and they came into existence in the African townships in the mid 1980s.¹⁷¹ They were more politically oriented than the *makgotla* and played a part in African communities' resistance to apartheid. People's courts continue to operate in post apartheid South Africa and some feel that they should be recognised and formalised.¹⁷² In rural areas and areas where other traditional courts operate, the need for *makgotla* and people's courts would be less than in cities, so that one would not expect to find these structures in rural areas. If these courts exist, however, it would be necessary to investigate their treatment of domestic violence and, in particular, whether women are encouraged to relinquish their complaints of in order to ensure 'community harmony.'

4. Conclusion

In a discussion of women's responses to customary law, Armstrong poses the following question:¹⁷³

if the lives of most women are governed by the unofficial, customary law rather than the official, state law, how can the "law" be used to improve their (our) position? Is there any way of using the customary law? Or do we simply say that we will rely on the state law, reform it, and try to encourage women to use that state law?

The question is particularly pertinent in relation to domestic violence where most of the women in South Africa may not benefit from the progressive provisions of the Domestic Violence Act and the state resources spent on ensuring its effective implementation.

The answers which Armstrong provides to her own question could perhaps be equally applied in this context.¹⁷⁴ First, women should reclaim the discourses of custom, pointing out and criticising the gendered and political interests which they serve. In this way customary rules can be reformulated to take account of women's interests. Secondly, women and men living under customary law can be informed of their rights and duties relating to domestic violence by using the discourses of custom and tradition, rather than those of civil law. Finally, women can use customary institutions like the family and traditional courts to enforce their customary rights, which have been reinterpreted in favour of gender equality.

Notes:

¹ Adopted 18 December 1979, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46 (1980).

² See Committee on the Elimination of Discrimination Against Women *General Recommendation 12, Violence Against Women* adopted 3 March 1989 U.N. Doc. A/44/38 (1990); Committee on the Elimination of Discrimination Against Women *General Recommendation 19, Violence Against Women* adopted 30 January 1992 U.N. Doc. A/47/38 (1993).

³ Organisation of African Unity *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, 2nd Ordinary Session of the Assembly of the Union, 11 July 2003, source 2004 *IHRR* 892.

⁴ Article 2(2).

⁵ See article 3(4), 4(2), 5(d).

⁶ Constitution of South Africa Act 108 of 1996 sections 9(2), 9(3), 12(2).

⁷ Act 116 of 1998.

⁸ See for instance Lillian Artz 'Better safe than sorry: Magistrates' views of the Domestic Violence Act' 204 *SA Crime Quarterly* 1; Lillian Artz 'Policing the Domestic Violence Act: Teething troubles or system failure' 2001 (47) *Agenda* 4. The implementation of the act and particularly the role of the police and Magistrates' Courts have been subjected to criticism. However, these issues will not be canvassed in this study.

⁹ See the definition of 'court' in s 1.

¹⁰ TW Bennett *Customary Law in South Africa* (2004) 141.

¹¹ Debbie Budlender *Women and Men in South Africa: Five Years On* (2002) Statistics South Africa figure 3.

¹² The 1998 Act was preceded by the Prevention of Family Violence Act 133 of 1993 which was enacted shortly before the 1994 democratic elections. This Act was seen as an attempt by the apartheid government to win women's votes and it was criticised for its narrow scope and procedural defects. See Elsje Bonthuys 'The Solution? Project 100 – Domestic Violence' 1997 (114) *South African Law Journal* 371 372 and authorities cited there.

¹³ Different systems of customary law apply to different groups of people in South Africa and the application and interpretation of these various systems will also vary across locales. Nonetheless, there are also broad similarities, especially in the areas of marriage and inheritance, which form the subject of this study. We will therefore survey customary rules generally, rather than focussing on specific rules in particular groups.

¹⁴ Bernedette Muthien 'Strategic interventions: Intersections between gender-based violence and HIV/AIDS' 2004 (59) *Agenda* 93 96; Kristin Dunkle, Rachel Jewkes, Heather Brown, James McIntyre, Glenda Gray, Sioban Harlow *Gender Based Violence and HIV Infection Among Pregnant Women in Soweto* (2003) Gender and health Group, Medical Research Council.

¹⁵ In 1999 research by the Medical Research Council estimated that 26.8% of women in the Eastern Cape, 28.4% in Mpumalanga and 19.1% in the Northern Province had been physically abused. When emotional and financial abuse was included, the figures escalated to 51.4%, 50% and 39.6% respectively. R Jewkes, L Penn-Kekana, J Levin, M Ratsaka, M Schriber *'He must give me money, he mustn't beat me' Violence Against Women in Three South African Provinces* (1999) Medical Research Council.

¹⁶ RT Nhlapo 'The legal situation of women in Swaziland and some thoughts on research' in Julie Stewart & Alice Armstrong (eds) *The Legal Situation of Women in Southern Africa: Women and Law in Southern Africa Volume II* (1990) 97 129.

¹⁷ *Women and Men* figure 19.

¹⁸ *Ibid* figures 12, 15, 20.

¹⁹ Lillian Artz 'Shelter in the southern Cape: Gender violence undermines development' 1999 (42) *Agenda* 55.

²⁰ Artz 1999 (42) *Agenda* 56, 57.

²¹ Bennett *Customary Law in South Africa* 185. Budlender *Women and Men* figure 6 also indicates that many African spouses remain married, but do not live together.

²² Artz 1999 (42) *Agenda* 58, 59.

²³ Janet Maia Wojcicki 'An acceptance of violence against sex workers and women who exchange sex for money: Survey results from Gauteng province and implications for HIV prevention' 2001 (April) *Aids Bulletin* 8.

²⁴ *Ibid* 9, 10.

²⁵ GJ van Niekerk 'Legal pluralism' in JC Bekker, JMT Labuschagne & LP Vorster (eds) *Introduction to Legal Pluralism in South Africa: Part 1 Customary Law* (2002) 3 8.

²⁶ *Bennett Customary Law in South Africa* 2.

²⁷ Bennett *ibid*.

²⁸ Bennet *ibid*.

²⁹ Bennett *ibid*.

³⁰ Iain Currie 'The future of customary law: Lessons from the *lobolo* debate' 1994 *Acta Juridica* 146 160-161; Martin Chanock 'Neither customary nor legal: African customary law in an era of family law reform' 1989 *International Journal of Law & the Family* 72 78-81; Marius Pieterse "'Traditional" African jurisprudence' in Christopher Roederer & Darrel Moellendorf (eds) *Jurisprudence* (2004) 438 441.

³¹ Currie 1994 *Acta Juridica* 161-163.

³² See for instance the distortion of customary rules and concepts relating to the 'custody' of children at divorce in Elsje Bonthuys and Natasha Erlank 'The interaction between civil and customary family law rules: Implications for African women' 2004 *Journal of South African Law* 59 68-72.

³³ Law of Evidence Amendment Act 45 of 1988 s 1(1).

³⁴ AJGM Sanders 'How customary is customary law?' 1987 *Comparative & International Law Journal of Southern Africa* 405.

³⁵ Bennett 'The compatibility of African customary law and human rights' 1991 *Acta Juridica* 18; TR Nhlapo 'The African family and women's rights: Friends or foes?' 1991 *Acta Juridica* 135 137-138.

³⁶ Nhlapo 1991 *Acta Juridica* 144.

³⁷ TW Bennett *Human Rights and Customary Law under the South African Constitution* (1995) 84.

³⁸ Lisa Fishbayn, Beth Goldblatt, Lihkhapha Mbatha 'The harmonisation of customary and civil law marriage in South Africa' paper delivered at the 9th World Conference of the International Society of Family Law, Durban, 28-31 July 1997. See also Chanock 1989 *International Journal of Law & the Family* 78.

³⁹ Bennett *Human Rights and African Customary Law* 85.

⁴⁰ Chanock 1989 *International Journal of Law & the Family* 78; Victoria Bronstein 'Reconceptualizing the customary law debate in South Africa' 1998 (14) *South African Journal on Human Rights* 388 395.

⁴¹ Anthony Costa 'The myth of customary law' 1998 (14) *South African Journal on Human Rights* 525 532.

⁴² *Mthembu v Letsela* 1997 (2) SA 936 (T) and 1998 (2) SA 675 (T); *Bhe v Magistrate Khayalitsha* 2004 (1) BCLR 27 (C) 27. This rule will be discussed in paragraph 2.4.5 below.

⁴³ *Mabena v Letsoalo* 1998 (2) SA 1068 (T). This rule will be discussed in paragraph 2.3.1 below.

⁴⁴ Bronstein 1998 *South African Journal on Human Rights* 394 citing B Bozzoli assisted by M Nkotsoe *Women of Phokeng: Consciousness, Life Strategy and Migrancy in South Africa 1900-1983* (1991).

⁴⁵ Bronstein 1998 *South African Journal on Human Rights* 394.

⁴⁶ Alice Armstrong 'School and sadza: Custody and the best interests of the child in Zimbabwe' 1994 *International Journal of Law & the Family* 151 162-167.

⁴⁷ Anne MO Griffiths *In the Shadow of Marriage: Gender and Justice in an African Community* (1997) 118-122.

⁴⁸ *Customary Law in South Africa* 188.

⁴⁹ Act 120 of 1998. The Act came into operation in November 2000.

⁵⁰ JMT Labuschagne & JA Van den Heever 'Law of delict' in Bekker et al *Introduction to Legal Pluralism* 89-99.

⁵¹ NJJ Olivier, JC Bekker, NJJ Oliver (Jnr), WH Olivier *Indigenous Law*, Law of South Africa Volume 32 (1994) par 10; Bennett *Customary Law in South Africa* 200, 212-213.

⁵² Bennett *Customary Law in South Africa* 200-201.

⁵³ Section 3(1)(a).

⁵⁴ It is known by many other names such as bogadi, bohali, xuma, lumalo, thaka, magadi, emabheka, but the term *lobolo* is most frequently used.

⁵⁵ Olivier et al *Indigenous Law* par 10-12.

⁵⁶ Bennett *Customary Law in South Africa* 221, 224, 226.

⁵⁷ Ibid 223, 225, 234.

⁵⁸ Ibid 228, 230.

⁵⁹ Ibid 235, 250.

⁶⁰ Fishbayn et al 'The harmonisation of customary and civil law marriage in South Africa' 9.

⁶¹ Unreported Supreme Court of Appeal judgement case no 350/2003 delivered on 29 September 2004.

⁶² Paragraph 16.

⁶³ Section 3(1)(b).

⁶⁴ *Customary Law in South Africa* 236.

⁶⁵ Even though it is not necessary, the majority of African people who conclude civil marriages continue to pay *lobolo*.

⁶⁶ Bennett *Customary Law in South Africa* 213.

⁶⁷ Ibid 250.

⁶⁸ 1999 (42) *Agenda* 58.

⁶⁹ Fareda Banda 'Custody and the best interests of the child: Another view from Zimbabwe'

1994 (8) *International Journal of Law & the Family* 191 167; Hallie Ludsin 'Cultural denial: What South Africa's treatment of witchcraft says for the future of its customary law' 2003 (21) *Berkeley Journal of International Law* 62 80. It should be noted that persistent accusations of witchcraft by husbands provide wives with grounds for divorce. See Olivier et al *Indigenous Law* par 55.

⁷⁰ Ludsin 2003 *Berkeley Journal of International Law* 87-88.

⁷¹ Bennett *Customary Law in South Africa* 250.

⁷² Lora Bex Lempert 'Shelters: For abused women, or abusive men? As aids to survival, or as rehabilitation sites?' 2003 (57) *Agenda* 89 93-95.

⁷³ Daisy Makofane 'Process evaluation of the victim empowerment programme for abused women in the Northern Province' 2001 (14) *Acta Criminologica* 90 95; MDM Makofane 'Reporting of wife physical abuse to the police in the Northern Province' 2000 (13) *Acta Criminologica* 57 61.

⁷⁴ Bennett *Customary Law in South Africa* 249.

⁷⁵ *Indigenous Law* par 45.

⁷⁶ Definition of 'domestic violence' in s 1 of the Act.

⁷⁷ Bennett *Customary Law in South Africa* 251; Nhlapo 'The legal situation of women in Swaziland' 129.

⁷⁸ *Customary Law in South Africa* 253.

⁷⁹ In polygynous marriages the property of the various 'houses' was separated, but the same principle in relation to the control of the property applied.

⁸⁰ Bennett *Customary Law in South Africa* 254-255 argues that traditionally, 'living' law allowed wives ownership of property which they accumulated in their work outside the home. However, official versions of customary law failed to take this into account.

⁸¹ Section 7(2). In this system the spouses own all assets and liabilities acquired both before and after the marriage in equal, undivided shares.

⁸² These spouses may apply for an order to change their matrimonial property regime in terms of s 7(4), but rural couples are unlikely to know about this provision or to be able to afford legal assistance.

⁸³ Bennett *Customary Law in South Africa* 272, 272. The civil courts do not, however, necessarily recognise this custom. See *Ngake v Mahahle* 1984 (2) SA 216 (O).

⁸⁴ The grounds upon which wives can legitimately divorce their husbands in customary law are fewer than those available for men. See generally Olivier et al *Indigenous Law* par 55.

⁸⁵ Bennett *Customary Law in South Africa* 278; Olivier et al *Indigenous Law* par 55.

⁸⁶ Olivier et al *Indigenous Law* par 55.

⁸⁷ Bennett *Customary Law in South Africa* 272.

⁸⁸ Banda 1994 *International Journal of Law and the Family* 194.

⁸⁹ Artz 1999 (42) *Agenda* 58.

⁹⁰ The reason for this is that children generally remain with their fathers' families. It is therefore not considered necessary for fathers to pay maintenance. However, this is also the case where young children remain with mothers after divorce. In that case, the maintenance obligation rests on the family of the child's mother.

⁹¹ Bennett *Customary Law in South Africa* 282, 283.

⁹² Olivier et al *Indigenous Law* par 59; Bennett *Customary Law in South Africa* 279, 285, 287. For a discussion of the modified application of this rule in the courts administering customary law, see Bonthuys and Erlank 2004 *JSAL* 68-72.

⁹³ Bennett *Customary Law in South Africa* 290; Banda 1994 *International Journal of Law and the Family* 196; Alice Armstrong 'School and sadza: Custody and the best interests of the child in Zimbabwe' 1994 (8) *International Journal of Law and the Family* 151 165.

⁹⁴ Bennett *Customary Law in South Africa* 316-318.

⁹⁵ Martin Channock 'Law, state and culture: Thinking about "customary law" after Apartheid' 1991 *Acta Juridica* 52 64.

⁹⁶ Section 8(1) and 8(2).

⁹⁷ It is not clear whether customary grounds for divorce will be taken as indications that African marriages have broken down irretrievably.

⁹⁸ Recognition of Customary Marriages Act s 8(3).

⁹⁹ See generally Armstrong 1994 *International Journal of Law and the Family*; TW Bennett 'The best interests of the child in an African context' 1999 *Obiter* 145.

¹⁰⁰ Section 8(4)(a). For existing customary marriages concluded before the advent of the Act, which are out of community of property, the most important provision relates to the

possibility of redistribution of marital assets to allow wives to share in their husbands' estates. However, whether redistribution orders will be available in customary marriages has not yet been decided.

¹⁰¹ Bennett *Customary Law in South Africa* 233 argues that this constitutes an 'indirect' authorisation to order the return of *lobolo*.

¹⁰² There is also evidence of the practice in other African countries like Uganda, Swaziland and Zimbabwe. See Suzanne Leclerc-Madlala 'Protecting girlhood? Virginitv revivals in the era of AIDS' 2003 (56) *Agenda* 16 17, 18.

¹⁰³ Bennett *Customary Law in South Africa* 227 notes that a special beast was paid, in addition to *lobolo*, where the bride was a virgin.

¹⁰⁴ Bennett *Customary Law in South Africa* 310, 312.

¹⁰⁵ Leclerc-Madlala 2003 *Agenda* 20; Charles Sylvester Rankhotha 'Do traditional values entrench male supremacy?' 2004 (59) *Agenda* 80 85.

¹⁰⁶ Rankhotha 2004 *Agenda* 87.

¹⁰⁷ Leclerc-Madlala 2003 *Agenda* 21, 22.

¹⁰⁸ Paragraph 2.3.1.

¹⁰⁹ See Beth Goldblatt 'Regulating domestic partnerships – A necessary step in the development of South African family law' 2003 (120) *South African Law Journal* 610 613-615.

¹¹⁰ Bennett *Customary Law in South Africa* 381-391.

¹¹¹ *Ibid* 392.

¹¹² 11 of 2004.

¹¹³ For criticism on the Bill which preceded the Act see Women's Legal Centre *Submissions on: Communal Land Rights Bill Before the Land Affaris Portfolio Committee* (2003).

¹¹⁴ Catherine Cross and Donna Hornby 'Opportunities and Obstacles to Women's Land Access in South Africa' Research report for the Promoting Women's Access to Land Programme (2002) 25 <http://www.nlc.co.za/pubs2003/womenlandaccess/wlatoc.htm> accessed on 25 October 2004.

¹¹⁵ *Ibid* 25.

¹¹⁶ Cross and Hornby 25.

¹¹⁷ 2001 *Acta Criminologica* 93, 94.

¹¹⁸ As quoted by Mokofane 2001 *Acta Criminologica* 94.

¹¹⁹ *Customary Law in South Africa* 334.

¹²⁰ Ibid 335.

¹²¹ Ibid 347.

¹²² Likhapha Mbatha 'Reforming the customary law of succession' 2002 (18) *South African Journal on Human Rights* 259 263-265.

¹²³ Bennett *Customary Law in South Africa* 357.

¹²⁴ 2004 (1) BCLR 27 (C).

¹²⁵ These important facts are omitted from the judgement, but can be seen from the pleadings in the case.

¹²⁶ It should be remembered that he would then be entitled to the *lobolo* for the girl once she married.

¹²⁷ Unreported Constitutional Court judgement CCT 49/04.

¹²⁸ Paragraphs 91-93.

¹²⁹ Paragraphs 83-90.

¹³⁰ 81 of 1987.

¹³¹ Bennett *Customary Law in South Africa* 344; Mbatha 2002 *South African Journal on Human Rights* 271-272.

¹³² 2002 *South African Journal on Human Rights* 273.

¹³³ Bennett *Customary Law in South Africa* 345.

¹³⁴ *Customary Law in South Africa* 347.

¹³⁵ Bennett *Customary Law in South Africa* 102

¹³⁶ Ibid.

¹³⁷ Ibid.

¹³⁸ Act 23 of 1920.

¹³⁹ Bennet *Customary Law in South Africa* 108.

¹⁴⁰ See generally Bennet *Customary Law in South Africa* 106-111.

¹⁴¹ Sections 211, 212.

¹⁴² Act 41 of 2003.

¹⁴³ Traditional Leadership and Governance Framework Act s 3(2)(b).

¹⁴⁴ Robert Thornton "'Traditional Authority' and Governance in the Emjindini Royal Swazi Chiefdom, Barberton, Mpumalanga: An Empirical Study' 2002 Unpublished Draft Department of Social Anthropology, School of Social Science, University of the Witwatersrand 26.

¹⁴⁵ Thornton (2002) 19. See however, Oomen's study below at 25 which found that a slightly higher percentage of women supported traditional leaders than men.

¹⁴⁶ Thornton (2002) table 10.

¹⁴⁷ Barbara Oomen 'Walking in the middle of the road: People's perceptions on the legitimacy of traditional authority in Sekhukhune, South Africa' Paper read at the research seminar 'Popular perspectives on traditional authority in South Africa' at the African Studies Centre, Leiden, 17 January 2002, 3.

¹⁴⁸ Oomen (2002) 4.

¹⁴⁹ Oomen (2002) 25.

¹⁵⁰ Oomen (2002) 23, 26.

¹⁵¹ LP Vorster 'The institution of traditional leadership' in Bekker et al *Introduction to Legal Pluralism in South Africa* 127 136.

¹⁵² The Special Courts for Blacks Abolition Act 34 of 1986 abolished Commissioners' Courts and Native Appeal Courts and the Divorce Courts Amendment Act 65 of 1997 abolished the Special Divorce Courts.

¹⁵³ Bennett *Customary Law in South Africa* 142.

¹⁵⁴ South African Law Commission Discussion Paper 82 *Traditional Courts and the*

Judicial Function of Traditional Leaders Project 90 (1999) 2-3.

¹⁵⁵ Ibid 1.

¹⁵⁶ Ibid 2-3.

¹⁵⁷ Oomen (2002) 7, 31.

¹⁵⁸ Pieterse 'Traditional African jurisprudence' 451.

¹⁵⁹ RB Mqoke & LP Vorster 'Procedure and evidence' in Bekker et al *Introduction to Legal Pluralism in South Africa* 157 159.

¹⁶⁰ Koyana & Bekker 'The courts' 143-144.

¹⁶¹ Black Administration Act schedule 3.

¹⁶² Discussion Paper Traditional Courts and the Judicial Function of Traditional Leaders 2.

¹⁶³ Bennett Customary Law in South Africa 121.

¹⁶⁴ I Schapera *A Handbook of Tswana Law and Custom* (1970) 284, 288; Bennett Customary Law in South Africa 166. DS Koyana & JC Bekker *The Judicial Process in the Customary Courts of Southern Africa* (1998) 256 indicate that women could sometimes attend court sessions as witnesses or close relatives of the parties, but that in these cases, they would not sit far away from the men and refrain from active participation in the proceedings.

¹⁶⁵ Koyana & Bekker *The Judicial Process in the Customary Courts of Southern Africa* 257.

¹⁶⁶ Ibid 259.

¹⁶⁷ Ibid 262.

¹⁶⁸ Paragraphs 2.2 and 3.1.

¹⁶⁹ See Bennett *Customary Law in South Africa* 147-149 and Koyana & Bekker 'The courts' 148-150 for problems and issues in this regard. Like other civil courts applying customary law, Magistrates' Courts are subject to the provisions of s 1 of the Law of Evidence Amendment Act. These will not be discussed in this study, because they are not directly relevant to domestic violence.

¹⁷⁰ Koyana & Bekker 'The courts' 151.

¹⁷¹ Koyana & Bekker 'The courts' 152.

¹⁷² Ibid. The South African Law Commission *Report on Traditional Courts and the Judicial Function of Traditional Leaders* Project 90 (2003) 4-9 does not recommend the inclusion of *makgotla* or people's courts in the system of customary courts which it proposes.

¹⁷³ Alice Armstrong 'Rethinking customary law in Southern Africa: What relevance for action' *Women and Law in Southern Africa Research Project Newsletter* 1995 (7) 5.

¹⁷⁴ Ibid.