



**SUCCESSION IN WOMAN-TO-WOMAN MARRIAGES
UNDER CUSTOMARY LAW: A STUDY OF THE LOBEDU KINGDOM**

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by

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Declaration

I declare that *Succession in Woman-to-Woman Marriages under Customary Law: A Study of the Lobedu Kingdom* has not been previously submitted in whole or in part, and will not be submitted by me, for a degree at any other university.

I further declare that this is my own work in design and execution, and that all the materials cited in it have been duly acknowledged.

Kagiso A. Maphalle

13 March 2017

Abstract

This study looks into the ways in which official customary law addresses succession complexities and legitimacy in woman-to-woman marriages. The social, political, cultural and legal background against which these marriages are concluded show the history of succession in woman-to-woman marriages and the position of women and children. The thesis highlights provisions of customary succession laws legislators sought to redress through the Reform of Customary Law of Succession and Related Matters Act 11 of 2009 and the Recognition of Customary Marriages Act 120 of 1998, which affect widowed spouses and certain children in customary marriages.

The study uses literature review, case analysis and interviews to investigate the operation and legitimacy of woman-to-woman marriages, the benefits or harmful effects thereof, the background, context and history of the customary law of succession and acceptance of children in Bolobedu, and the application of living customary law. The study finds that woman-to-woman marriages are legitimate customary marriages under Lobedu customary law. It also finds that customary succession laws in such marriages have traces of patriarchy, although the community is under a matriarchal system of governance. It finds that the rule of male primogeniture is still applicable, and that women do not have a right to inherit from their deceased parents except at the discretion of the male heir. It finds that the acceptance of children in woman-to-woman marriages includes the performance of ceremonies symbolising the female husband's acceptance, and the child's use of her surname. It further finds that the application of official customary laws in Bolobedu is negligible, with the living customary law being the applicable law for all succession disputes. A further finding is the general lack of knowledge and understanding of succession rights under official customary laws by the community and their traditional leaders, who are aware only of provisions of the Lobedu living customary law which they readily provide.

The study concludes that the legislators, judiciary and policy makers' lack of knowledge and understanding of woman-to-woman marriages and its accompanying succession laws inhibits and limits the adequacy of official customary law to regulate succession complexities. Rural communities' perceptions of their rights and knowledge of customary laws of succession, the practicality of provisions of official customary laws of succession, and their relatability to lived realities of rural communities further add to the inadequacy of official customary law.

Key words: Succession, customary law, customary marriage, Bolobedu, woman-to-woman

Dedication

To Rivoningo, Mmino and Khamimamba – My Light, My Music and My Gratitude.

My dearest mother, Khamotso – for being the strength that has kept me going.

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To God my Father, the author and finisher of my faith. Thank you for the gift of life. Thank you for purpose, vision and intellectual ability. You are my sustenance, my surety and my peace.

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Dear Kagiso, You have done it. You have mastered the law. On to the next one.

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List of Abbreviations

CONTRALESA	Congress of Traditional Leaders in South Africa
DHA	Department of Home Affairs
RCLSA	Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009
RCMA	Recognition of Customary Marriages Act 120 of 1998

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CHAPTER 1: INTRODUCTION

This research studies the adequacy of the Reform of Customary Law of Succession and Regulation of Related Matters Act¹ (hereinafter referred to as the RCLSA) in regulating succession complexities in woman-to-woman marriages.

The RCLSA is aimed at protecting rights of women and children under customary law. The principle of male primogeniture² excluded women from succession and inheritance and was challenged in the case of *Bhe v Magistrate Khayelitsha*.³ The Constitutional Court in this case held that the exclusion of women and extra-marital children from inheriting in terms of this principle amounted to unfair discrimination contrary to Section 9(3) of the Constitution. The principle also violated women's right to dignity, contrary to Section 10.⁴ The Constitutional Court's invalidation of the principle of male primogeniture resulted in application challenges of customary succession laws. Although official customary law was developed to highlight this change, living customary law still perpetuates the principle. Chapter four discusses how this manifests in woman-to-woman marriage succession matters.

The RCLSA applies to the estate or part thereof of any person who is subject to customary law, who dies after its commencement on 20 September 2010, and whose estate does not devolve in terms of a will. The RCLSA also applies to the estate or part thereof of any person who is subject to customary law who died intestate after 27 April 1994.⁵

The purpose of the Act is to modify the customary law of intestate succession to provide for the devolution of certain property. Furthermore, its purpose is to clarify certain

¹ Act 11 of 2009.

² This was provided for by Section 23 of the Black Administration Act 38 of 1927, which provided for certain categories of property or assets that could not be distributed by means of a will. These kinds of property devolved on the death of a black person on the eldest son in accordance with the rule of male primogeniture.

³ 2004 (2) SA 544 (C).

⁴ In *Mthembu v Letsela and Another* 1997 (2) SA 936 (T), a widow challenged the custom of male-only inheritance, and sought a ruling against this practice. Her argument challenging male primogeniture was unsuccessful, and the custom of male-only inheritance was upheld. This decision caused problems because it upheld the primogeniture principle which was clearly discriminatory. (See Himonga C & Nhlapo T. *African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* (2014) Cape Town: Oxford University Press at 173.

⁵ Section 2(1) of the Act.

matters relating to the law of succession and amend certain laws, and to provide for matters connected therewith.⁶

The definitions of “descendant” and “spouse” in the Act are important for the purposes of this study. According to section 1 of the RCLSA, a ‘descendant’ is a person who is not a descendant in terms of the Intestate Succession Act 81 of 1987,⁷ but who, during the life time of the deceased, was accepted by the deceased person in accordance with customary law as his or her own child. A descendant is also a woman as referred to in Section 2(2) (b) or (c). Section 2(2)(b) of the RCLSA provides that a woman, other than the spouse of the deceased, with whom he had entered into a union in accordance with customary law for the purpose of providing children for his spouse’s house, must, if she survives him, be regarded as a descendant of the deceased. Section 2(2)(c) of the RCLSA provides that where a woman was married to another woman under customary law for the purposes of providing children for the deceased’s house, that other woman must, if she survives the deceased, be regarded as a descendant of the deceased. This type of relationship is referred to as the woman-to-woman marriage.⁸ A discussion into the law governing the customary law of marriage is necessary at this point to show the link between customary marriage and succession and the effect on woman-to-woman marriages.

The Recognition of Customary Marriages Act 120 of 1998 (hereinafter referred to as the RCMA) was promulgated to make provision for the recognition of customary marriages, to specify the requirements for a valid customary marriage, to regulate the registration of customary marriages, and to provide equal status and capacity to spouses in customary marriages. It also regulates the proprietary consequences of customary marriages and the capacity of spouses of such marriages.⁹

This Act brought about fundamental changes to the legal position of a customary marriage in South Africa. It ensures that a customary marriage is for all purposes in South African law recognised as a valid marriage. This is in keeping with the constitutional

⁶ Preamble of the Act

⁷ The Act was amended to include women and children in woman-to-woman marriages. It previously did not provide for this category of persons.

⁸ Oomen, B ‘Traditional woman-to-woman marriages and the Recognition of Customary Marriages Act’ (2000) 63(2) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 274–82 at 274. See also Himonga C & Nhlapo T. *African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* (2014) Cape Town: Oxford University Press at 179

⁹ The Preamble outlines the purpose of the Act.

obligation not only to recognise customary law but also to reform it in line with the provisions of the Constitution.¹⁰

The RCMA was promulgated to advance the rights of women under the customary law of marriage and succession.¹¹ This is because women in customary marriages were previously only recognised as spouses for limited purposes and thus could not inherit from their deceased spouse's estate.¹² The RCMA, in recognising customary marriages, changed this position, and spouses can now inherit from the deceased estate under relevant statutory laws governing succession. The Act aligned this system of law with the provisions of the Constitution and the international conventions that South Africa has ratified.¹³ It forms part of the many ways in which the reform of customary law in South Africa has taken place, alongside court decisions,¹⁴ in response to the constitutional values and human rights¹⁵ such as the right to equality¹⁶ and non-discrimination.¹⁷ The Act created an equitable marriage relationship between men and women, for example in matters of property.¹⁸ The position of women and children in woman-to-woman marriages prior to legislative reform will be given to highlight the important changes brought about by reform.

1.1 Woman-to-woman marriages prior to legislative reform

The RCLSA is a step forward in bringing reform to the area of customary law of succession. However, before one can speak of succession, the issue of the validity of the marriage must be addressed. This is because succession is dependent on the validity of the marriage. The

¹⁰ Section 15(3) (a) (i) of the Constitution of the Republic of South Africa, 1996 (the Constitution), which provides for the basis upon which marriages concluded under any tradition, or system of religious, personal or family law be recognised; Section 211(3), which provides that the courts must apply customary law where it is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

¹¹ *Himonga & Nhlapo* op cit note 8 at 92-4

¹² *Ibid* at 93

¹³ South Africa has ratified CEDAW, which stands for the Convention on the Elimination of All Forms of Discrimination against Women. Countries that ratify CEDAW agree to take concrete steps to improve the status of women and end discrimination and violence against women.

¹⁴ *Bhe v Magistrate Khayelitsha* 2004 (2) SA 544 (C) which challenged the principle of male primogeniture.

¹⁵ Chap 2 of the Constitution.

¹⁶ Section 9 of the Constitution provides for the right to equality.

¹⁷ Section 9(3) provides that the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

¹⁸ Section 6 of the RCMA

RCMA provides recognition for traditional marriages entered into and concluded in accordance with customary law.¹⁹ It defines customary law as the customs and usages traditionally observed among the indigenous African people of South Africa and which form part of the culture of those people.²⁰ In order to understand the changes brought about by the RCMA to customary marriages, one has to understand the nature of customary marriage. A customary marriage can be regarded as a contract or agreement between two families, which includes the payment of *lobolo*,²¹ permits polygamy and obligates all parties to perform specific duties.²² It is more than an agreement between two individuals, it is a union between two family groups, and it therefore endures until the formal dissolution by settlement of the *lobolo*.²³

The death of a spouse in a customary marriage does not automatically terminate the marriage because, in technical terms, a marriage is a union of two families, not two individuals. In order to make the bride wealth fully productive, the untimely death of a spouse gives rise to particular types of marriages such as woman-to-woman marriage.

In the conclusion of a customary marriage, the woman's childbearing potential was thought to be her most important attribute.²⁴ If she died, or proved to be barren, the loss of this asset could be compensated by institution of woman-to-woman marriage. Woman-to-woman marriages are customary marriages entered into between two women for purposes of providing children, preferably a male heir. It was a way of ensuring continuity of a house in the absence of sons through raising an heir to property or position. These marriages take place in the context where a childless woman will marry one or more other women to bear children for her, or a woman without a son will marry another woman to bear an heir to her husband's property. In this case, the wife bears children for her female husband either by an

¹⁹ Section 2 of the RCMA.

²⁰ Section 1 of the RCMA.

²¹ Section 1 of the RCMA defines this term as the property in cash or in kind, which a prospective husband or the head of his family undertakes to give to the head of the prospective wife's family in consideration of a customary marriage. It may also be known as bohali, xuma, lumalo, thaka, ikhazi, magadi, emabheka, or by any other name.

²² Himonga & Nhlapo op cit note 8 at 92 further noted that traditional marriages are more group orientated, encourage polygamy as an ideal, place emphasis on childbearing, and are very difficult to terminate.

²³ Bennett T W *A Sourcebook of African Customary Law for Southern Africa* (1991) Cape Town: Juta & Co Ltd at 410.

²⁴ *Ibid* at 419

appointed lover or by a suitor of her own choice. This is the relationship that provided the case study of this thesis.²⁵

According to Bennett,²⁶ woman-to-woman marriage may be undertaken by a childless widow in order to provide a son for her husband and an heir to the property. Among the South Sotho, Pedi, Zulu, and the Lobedu a widow who has no sons may use the cattle coming to her house from the marriage of a daughter in order to provide a son for her husband and an heir to his property.²⁷

Woman-to-woman marriages appear to be more frequent in the Lobedu, Pedi and Venda than in the other groups mentioned above.²⁸ For the Lobedu and Venda, a woman who has earned wealth from divining or trade may use the money to marry a wife in her own right. These were the two most prominent occupations in previous times that afforded women economic and political power within their communities. The children of such unions take the surname of the female husband. In both Lobedu and Pedi groups another variant of woman-to-woman marriage occurs. A woman has a right to a daughter from the house which was established with bride wealth obtained from her own marriage. If the woman has no son, and especially if her husband is deceased, she marries the girl for herself, using the bride wealth received from a daughter's marriage.²⁹ This relationship is central to Lobedu woman-to-woman marriages.

The descriptions above show that woman-to-woman marriages are primarily concluded to raise an heir, but may serve other purposes. An example of the latter is found in woman-to-woman marriages with the Lobedu queen. The Lobedu queen is sent wives by headmen and individuals of high birth who desire her favour.³⁰ Some of these women remain at the royal court, and others are sent as wives to men elsewhere in the kingdom. Some who are particularly favoured are placed as headmen of districts. Chapter four of this thesis shows how this takes place and which category of wives is given leadership positions. Marital ties centering on the Queen are spread throughout the kingdom and networks created by the

²⁵ Bennett op cit note 23 at 412

²⁶ Ibid

²⁷ Ibid

²⁸ Ibid

²⁹ Ibid

³⁰ Royal wives (batanoni) are of various kinds. Some are of royal blood, daughters of close relatives of the queen to whom they have been given as a token of homage (ho loba).

institution of the Queen's wives have important political connotations. This kind of arrangement is, however, unusual and is not found in the other Bantu-Speaking groups.³¹

1.2 Formal recognition of customary law

A broad overview of the history of the formal recognition of customary law in South Africa provides a crucial background for the laws discussed in this thesis, as it is against this background that these laws and their predecessors were produced.³² The colonial and apartheid era in South Africa will be discussed to give a brief outline of the history of official customary law as it relates to the social, historical and political background of woman-to-woman marriages. The history of customary law gives the impression that the government of yester-years was not able to determine completely the way in which rural people lived and evolved their systems to adapt to their circumstances. The recognition of customary law in the colonial era was not about recognising indigenous people as people with the capacity to make choices, with equal moral worth and to govern themselves. It was driven by the state's own objectives which could be secured using the indigenous systems and its people.³³

The Black Administration Act³⁴ (hereinafter referred to as the BAA) is one of the key pieces of legislation that emerged during the colonial era. It contributed to the perpetual minority of married women in its general policy of privileging the adult male members of the tribe. It prescribed the way estates of black people were to be administered; only men could inherit land, and movable property had to devolve according to black law and custom which was interpreted to mean the application of the rule of male primogeniture.³⁵ Women in customary marriages could not inherit from their spouses.³⁶ The continued application and effects on the succession rights of girl children by the principle of male primogeniture in Bolobedu are further discussed in this thesis.

The apartheid era in South Africa was the period between 1948 and 1990. This was the period in which many changes to legislation took place.

³¹ Bennett op cit note 23 at 412.

³² Himonga & Nhlapo op cit note 8 at 3.

³³ Ibid at 7

³⁴ 38 of 1927.

³⁵ Himonga & Nhlapo op cit note 8 at 168-72

³⁶ Section 23 of the BAA.

The Regulations for the Administration and Distribution of the Estates of Deceased Blacks, which governed the intestate succession of estates of black people and allowed for black people's marriages not ordinarily executed under common law to be executed, were passed in 1987.³⁷ Literature on the regulations suggests that these regulations primarily addressed polygamous marriages and distribution of black people's estates with little to no mention of the inclusion of woman-to-woman marriages or how this Act was applied in relation to them.³⁸

The apartheid era saw its end in the year 1994 when South Africa entered into democracy, and with this democracy came the Constitution,³⁹ which was declared to be the supreme law of the land. In the process of its conception there were debates about the protection of customary law under the Constitution and whether customary law was subjected to or independent of the Bill of Rights, more significantly the equality clause. Section 9(3)⁴⁰ of the Constitution provided the basis upon which legislation such as the RCLSA and the RCMA were founded and continues to be a guiding light in the reform of customary law. The formal recognition of customary law did not take into consideration all forms of customary marriages.⁴¹ It is acknowledged that both sections 2 and 3(1) (b) of the RCMA provide for the recognition of marriages entered into in accordance with customary law. However, the arguments outlined in this thesis show that despite the provisions of these two sections, the language of the Act is inclined to refer to male-female customary marriages to the exclusion of woman-to-woman marriages. Furthermore, the recognition from these sections in the context of woman-to-woman marriages is implied and not explicit.

This means that succession complexities found in woman-to-woman marriages were left out of the scope of customary law's development, and resulted in challenges between official customary law and its application in woman-to-woman marriages. When laws governing succession in customary law were developed, legislators did not have points of

³⁷ GN R200 of 1987

³⁸ Himonga & Nhlapo op cit note 8 at 34

³⁹ Constitution of the Republic of South Africa, 1996.

⁴⁰ The equality clause in the Constitution.

⁴¹ Sections 2 and 3(1) (b) both provide for the recognition of marriages entered into in accordance with customary law. The arguments outlined in this thesis show that despite the provisions of these two sections, the language of the Act excludes woman-to-woman marriages, and its recognition from the sections is implied and not explicit.

reference on how official customary law addresses succession complexities in woman-to-woman marriages. The resultant challenges are discussed below.

1.3 Problem statement

The RCLSA defines spouse as including a partner in a customary marriage in terms of Section 2 of the Recognition of Customary Marriages Act 120 of 1998. This section was aimed at ensuring that all persons who may be classified as spouses in terms of customary law were declared intestate heirs. According to Himonga and Nhlapo,⁴² these categories of persons are:

- A wife of a customary marriage;
- A woman who was brought into the house for the purposes of providing children for that house if she survives the deceased husband;
- A woman who was partner in a woman-to-woman marriage contracted under customary law if she survives her woman partner.

Himonga and Nhlapo have further noted that it is not clear whether women in woman-to-woman marriages are 'spouses' or 'descendants' for purposes of succession. There is a need for clarification of the position as the rules of succession applicable to them will differ depending on whether they are regarded as 'descendants' or 'spouses'.⁴³

The implementation of the RLCSA regarding the rights of spouses as heirs is dependent on the RCMA because succession is dependent on the existence of a valid customary marriage. Thus the determination of whether all wives (women) involved in woman-to-woman marriages will be recognised as spouses depends on whether the requirements of the RCMA were complied with. Where the existence of the marriage is challenged, succession cannot take place. The existence of woman-to-woman marriages is also important in determining the succession rights of children within such marriages and the rules of succession which will apply to them.

When viewing the provisions of the RCMA against the backdrop of the context in which woman-to-woman marriages occur, there are questions that arise. Are woman-to-

⁴² Section 1 of the RCLSA. See also Himonga & Nhlapo op cit note 8 at 178.

⁴³ Ibid at 181.

woman marriages concluded in terms of customary law? Do they satisfy the requirements of the RCMA?

Conclusion of woman-to-woman marriage bears the possibility of polygamy where the woman who marries is already party to an existing customary marriage which may also be potentially polygamous. The RCMA provides that a husband in a customary marriage, who wishes to enter into a customary marriage with another woman, must make an application to court to approve a written contract which will regulate the future matrimonial property system of his marriages. In the case of woman-to-woman marriages, it is a woman, not a man, who bears the intention of concluding a subsequent marriage. If the woman's husband is still alive and the subsequent marriage is a solution to barrenness or the lack of an heir, it is the first wife who initiates and concludes the marriage with the new wife.⁴⁴ This is despite the fact that the new wife will consummate the marriage with the husband.⁴⁵

Where the wife's husband is deceased, the woman marries the new wife to bear children for her household, especially an heir.⁴⁶ She will continue to marry other women into her homestead until an heir is born.⁴⁷ The widowed status of the woman raises questions on how the marriage contract will be drawn up in relation to the property and distribution of the estate of the deceased husband. It will be worthwhile to note the purpose that woman-to-woman marriages serve in legitimising the estate remaining within the control of the widow. The widow, in marrying the seed raiser, averts male members raising the issue of the absence of an heir to the inheritance. This leaves the estate in her control until such heir is born and raised.

The process of obtaining a contract to regulate the potentially polygamous marriage and implications of such marriages on issues of property and succession in customary law also raises questions. Woman-to-woman marriages are not conventional monogamous or polygamous marriages. They involve third parties who procreate with the wives. This is particular in the Lobedu Kingdom as such marriages are often concluded to raise an heir where there is no male child.⁴⁸ Woman-to-woman marriages, in different variations, are more

⁴⁴ Bennett op cit note 23 at 412

⁴⁵ Ibid; Oral interview, focused group discussion, female traditional leaders, Lewatle village, 18 January 2016

⁴⁶ Ibid

⁴⁷ Ibid

⁴⁸ Ibid

frequently found among the Lobedu than any other tribe in South Africa.⁴⁹ The different variations mean that the levels of complexities are increased, and there is a wider and varied application of the rules of succession.

The study further looks into the question of present day legitimacy of woman-to-woman marriages revolving around three issues: who supports woman-to-woman marriages, in what way they do so, and what does this mean for the legitimacy of the institution. This provides perspectives on what the living customary law pertaining to woman-to-woman marriages is. It is interesting to note who supports such marriages and their reasons for doing so. Woman-to-woman marriages are a good subject to illustrate the complexities that can be found in customary marriages, as there are evident questions that arise surrounding their formation and validity.

The thesis aims to ascertain whether official customary law addresses succession complexities in woman-to-woman marriages. This helps to assess the real position of women and children in such marriages, and help map a way forward in law reform in this area. It looks into specific sections of the RCMA and RCLSA.

1.4 Justification of study

There is a need to unravel succession complexities in woman-to-woman marriages and understand them from both a legal and social point of view. This is important for legislation aimed at regulating succession in woman-to-woman marriages and protecting women and children in such marriages. The results of this study assist in showing the gaps in legislation that need to be filled, and bring to light important factors that other studies have not been able to address. An example of this is the application of official customary law in such marriages, how it has been applied to address succession complexities, how effective it has been, what the suggested reasons for its failure in some areas are, and what can be done to ensure its future effectiveness. The study contributes towards literature and broadens understanding on woman-to-woman marriages.

Woman-to-woman marriages illustrate conflicts between the customary law of marriage and constitutional rights. Although the customary law system in Bolobedu is matriarchal, there is a preference for male heirs over females which raise gender equality succession issues. The findings help to assess the impact and progress of advancing women's

⁴⁹ Ibid

rights under customary succession. Lobedu people are under the leadership of the Modjadji Dynasty. The Dynasty is the only matriarchy in South Africa, and descent and relationship are determined through the female line. The literature that addresses acceptance of children in woman-to-woman marriages confirms only that children should be accepted by the female husband, but does not entail what the living customary law provides, or how it is applied when the issue of right to inheritance and legitimacy arises. The limited literature that addresses this aspect of succession in woman-to-woman marriages identifies a gap this study seeks to fill.⁵⁰ A further justification for this study is confirmed by Oomen, who notes that “a lack of researchers with in-depth local knowledge and an academic culture in which there is less and less time for thorough long-term field research further adds more to the problem”. This is the reason why the study included empirical research in order to determine the adequacy of official customary law to address succession complexities. The findings are important to determine to what extent official customary law is adequate to address succession complexities in woman-to-woman marriages.⁵¹

1.5 Scope of study

To understand succession in woman-to-woman marriages fully, the context in which it takes place and provisions of customary acceptance of children were investigated. This ensured that succession complexities found in such marriages were not considered in isolation in the analysis.

The researcher investigated aspects of woman-to-woman marriages that speak to succession only, such as the right of a woman and her children to inherit from the estate of her deceased female husband. Other complexities related to woman-to-woman marriages are acknowledged. Examples are the relationship between children born of these marriages with their biological fathers and their right to inherit from them, maintenance of these children by their biological fathers where their mother and her female husband are unable to, and the position of the male husband of the female husband in the situation where his wife marries another woman who brings children into the marriage. The relationship of the male husband with children born of woman-to-woman marriage and the relational position of the suitor who

⁵⁰ Oomen, B ‘Traditional woman-to-woman marriages and the Recognition of Customary Marriages Act’ (2000) 63(2) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 274–82 at 275

⁵¹ *Ibid.*

helps procreate with the wives are additional complexities. The study does not look into all these complexities as this would have been impractical and would have broadened the study beyond manageability.

Marriages between the Lobedu Queen and her wives were included, covering only the aspect of succession to inheritance and not status, except in situations where the relationship between the two was found to be intricately linked. Including succession to status would have broadened the study beyond manageability. It would have been impractical because the study was not focused only on royal marriages, but marriages of commoners as well. There are also different rules of succession applicable to succession to inheritance and succession to status.

The RCMA and RCLSA were enacted in response to human rights and constitutional imperatives. Therefore, a discussion on these two pieces of legislation cannot be made without making mention of or referencing human rights. However, the focus of this thesis is not about human rights imperatives, or whether or not the RCMA and RCLSA meet the standard of human rights imperatives. The focus is to look into the ways the legislation addresses complexities in woman-to-woman marriages. The references to human rights are made mainly to highlight the basis of the reform in customary marriage and succession laws, the intended purposes of the legislation to give effect to the protection of constitutional rights, and how such legislation impacts on and relates to the institution of woman-to-woman marriage.

1.6 Research objectives

The objectives were to look into the operation of the RCLSA in woman-to-woman marriage, and how it addresses succession complexities in such marriages. The study also looked into links between the RCMA and RCLSA in customary succession and how it impacts administration of succession matters in such marriages.

The research has the following objectives:

- a) to determine adequacy and effectiveness of official customary law in addressing succession complexities of woman-to-woman marriages;
- b) to establish the legitimacy of woman-to-woman marriages under customary law.

1.7 Research question

The two research questions are stated as follows:

- (a) Does official customary law address succession complexities in woman-to-woman marriages?
- (b) Are woman-to-woman marriages legitimate under customary law?

1.8 Literature review

This review concerns matters of property, succession and maintenance in woman-to-woman marriages. There is consensus among legal scholars such as Himonga, Nhlapo, Bennett, Mwambene, Maithufi, Deveaux and Kruuse that the RCMA is one of the statutes enacted to give protection to women who are married in terms of customary law. This is evidenced by the work that they have written in these fields of law. These scholars have made significant contributions towards addressing discrimination of women.⁵²

These aspects of customary law – inheritance, succession, and family law – conflict sharply with women’s individual equality⁵³ and property rights⁵⁴ as stipulated in the Constitution. It is yet to be seen to what extent the Act will continue to change these features of customary law in practice.⁵⁵

Traditional woman-to-woman marriages have been found to occur in other parts of Africa.⁵⁶ The marriages do not occur as often as commonly known and practiced customary marriages, but are considered as being normal in the communities which uphold them. There are several main issues of contention which woman-to-woman marriages found in the

⁵² See generally Bennett T W *Customary Law in South Africa* (2004) Cape Town: Juta & Co Ltd; Himonga C & Nhlapo T. *African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* (2014) Cape Town: Oxford University Press; Deveaux M ‘Liberal Constitutions and Traditional Cultures: the South African customary law debate’ (2003) 7(2) *Citizenship Studies* 161–180; Maithufi I P & Bekker J C ‘The Recognition of Customary Marriages Act of 1998 and its Impact on Family Law in South Africa’ (2002) *The Comparative and International Law Journal of Southern Africa* 35(2) 182–197; Mwambene L & Kruuse H ‘Unfulfilled Promises? The Implementation of the Recognition of Customary Marriages Act in South Africa’ (2015) *International Journal of Law, Policy and the Family* v29 n3: 237-259. See also *Bhe v Magistrate Khayelitsha* 2004 (2) SA 544 (C); *Mthembu v Letsela* 1997 (2) SA 936 (T).

⁵³ As provided for in Section 9 of the Constitution.

⁵⁴ As provided for in Section 25 of the Constitution.

⁵⁵ Deveaux M ‘Liberal Constitutions and Traditional Cultures: the South African customary law debate’ (2003) 7(2) *Citizenship Studies* 161–180 at 165.

⁵⁶ See Wairimu N N, O’Brien W E ‘Revisiting "Woman-Woman Marriage ": Notes on Gikuyu Women’ (2000) *NWSA Journal VOL. 12 No. 1 (SPRING)* 1-23 at 1. By region they are: 1) West Africa (mainly Nigeria) - Yoruba, Ekiti, Bunu, Akoko, Yagba, Nupe, Ibo, Ijaw, and Fon (or Dahomeans); 2) South Africa (especially the Transvaal) - Venda, Lobedu, Pedi, Hurutshe, Zulu, Sotho, Phalaborwa, Narene, Koni, and Tswana; 3) East Africa - Kuria, Iregi, Kenye, Suba, Simbiti, Ngoreme, Gusii, Kipsigis, Nandi, Kikuyu, and Luo; and 4) Sudan - Nuer, Dinka, and Shilluk. In addition, others have noted the practice among the Kalahari of West Africa and the Kamba of East Africa.

different African countries share with woman-to-woman marriages in the Lobedu community. These are centered on questions about the sexuality of the female husband, the reasons behind the adoption of the male gender and characteristics, paternity of children born from such marriages, definitions of marriage, access to land and property and availability of social and political power to women.⁵⁷ Although the thesis was not focused on the institution of woman-to-woman marriages in general and where they are found to exist in other African countries, the literature helped to provide the context in which to understand some of the issues and legal implications arising in woman -to -woman marriages in the Lobedu community. The findings of this thesis show why it is important for these issues to be understood in context and how the law relates to them, or is applied to resolve them. The discussion below on Oomen's and Mokotong's opposing views on woman-to-woman marriages shows how this is important for the successful application of succession laws.

The literature⁵⁸ about these marriages in South Africa confirms the reasons for their occurrence. The findings discussed in Sections 4.2 and 4.3 of this thesis endorse the literature.

Woman-to-woman marriages are concluded primarily to address issues of succession and inheritance, where a childless woman will marry another woman to bear children for her, to produce an heir to her deceased husband's property, or because of her position of power as a traditional healer or diviner.

The bride can come into her marital home with or without children. A bride who comes with a child is preferred because there is confirmation of her ability to conceive. The child which she brings into the marriage will be accepted as that of his/her mother's female husband and will take on her surname, and inherit from her estate upon death or divorce.⁵⁹ Oomen observes that literature that addresses this aspect confirms only that the child should be accepted by the female husband as her own, but does not entail what the customary law of

⁵⁷ Oboler R S 'Is the Female Husband a Man? Woman/Woman Marriage among the Nandi of Kenya', (1980) *Ethnology* 19:1 69-88 at 69-71; Cadigan J "Woman-to-Woman Marriage: Practices and Benefits in Sub-Saharan Africa' (1998) *Journal of Comparative Family Studies* 29, 89-98 at 91-95; Greene B 'The Institution of Woman-Marriage in Africa: A Cross-Cultural Analysis' (1998) *Ethnology* 37:4, 395-412 at 399-400. See also Amadiume I. (1987) *Male daughter, Female husbands: Gender and sex in an African society*. London: Atlantic Highlands, N.J. : Zed Books Cape Town

⁵⁸ Ibid

⁵⁹ Oomen Op cit note 50 at 275.

acceptance of children is, or how it is proved when the issues of right to inheritance and legitimacy arise.

There is limited literature on the application of the RCLSA in addressing succession complexities on the ground.⁶⁰ This leads to an inability to assess its effectiveness, and does not help in answering the research question of the study. Studies of women who marry women in South Africa are relatively few in number and generally dated, with few recent contributors.⁶¹ The literature on the Lobedu confirms the existence of woman-to-woman marriages and the basis upon which they are formed, but it is, however, not sufficient to answer the research question of this study. According to Oomen,⁶² there is limited case law on woman-to-woman marriages in South Africa from which to draw answers and lessons. This is related to the question of the relationship between the women and whether or not their marriage could be considered to be a same-sex marriage, and as such, these marriages have either been disposed of or have never reached the courts at all.

The apparent contradiction of the nature of woman-to-woman marriages with public policy and natural justice should have been good reasons for the courts to seek to ascertain whether such marriages were indeed same-sex marriages and against public policy, or were simply misunderstood. The court's involvement would probably have resulted in literature that would have changed the position of woman-to-woman marriages to what it is now. Furthermore, when looking into the history of succession for the Lobedu, it can be seen that the main focus in customary law matters was on the rules and processes governing succession to status as opposed to succession to inheritance. As such, these aspects of woman-to-woman marriages remained under-researched, resulting in limited literature in the area.

The changes that took place during the colonial era further shifted the focus on this aspect of the marriages. This is because the focus on customary law and customary marriages was on the recognition of customary marriages as valid marriages, as opposed to research being conducted on the administration of succession in woman-to-woman marriages or the institution of woman-to-woman marriage itself.⁶³ These marriages thus fell off the

⁶⁰ An example of this is the discussion into the operation of the RCLSA by Himonga & Nhlapho (2014) (Op cit note 4 at 176–185.)

⁶¹ Oomen Op cit note 50 at 281.

⁶² Ibid generally at 274–282.

⁶³ Ibid at 281

bandwagon of research, and particular interest with regard to customary marriages was given to:

- The payment of lobolo in customary marriages;
- Polygyny;
- Cross-cousin marriages being regarded as incestuous;
- The rule of male primogeniture.

The focus on these areas of customary law and marriage during the colonial era affected the institution of customary marriage as a whole throughout the country.

Judges and legal researchers rely strongly on textbooks about customary law marriages, which are largely written on the basis of case law. Case law, however, reflects only selected aspects of customary law, which date back to a time when customary law institutions such as woman-to-woman marriage went unreported. Bennett notes that in certain parts of the country such as KwaZulu-Natal, unions such as the levirate were not outlawed based on the repugnancy proviso, and this highlights the varied and ununiformed application of customary law.⁶⁴

The recent literature on intestate succession and inheritance by Himonga and Moore⁶⁵ is also relevant to this study. Himonga's and Moore's findings are important because of their discussions into recent empirical research by Mnisi,⁶⁶ Mbatha⁶⁷ and Butlender⁶⁸ on customary laws of succession. Their findings discuss the operation of the *Bhe*⁶⁹ rules of intestate succession and the legislation that was enacted flowing from the decision in that case, which is central to this thesis.⁷⁰

⁶⁴ Bennett Op cit note 23 at 410; Section 37(6) of the Natal and Zulu Codes.

⁶⁵ Himonga C & Moore E *Reform of Customary Marriage, Divorce and Succession in South Africa* (2015) Cape Town: Juta & Co Ltd.

⁶⁶ Mnisi S *The Interaction Between Living Customary Law(s) of Succession and South African State Law* (DPhil thesis in law, New College, Oxford, 2010)

⁶⁷ Mbatha L 'Reforming the Customary Law of Succession' (2002) *South African journal of Human Rights* v18 n2: 259-286

⁶⁸ Butlender et al *Women, Land and Customary Law* (2011)

⁶⁹ 2005 (1) BCLR 1 (CC)

⁷⁰ The Reform of the Customary Law of Succession and Related Matters Act (RCLSA) 11 of 2009, which came into operation on 20 September 2010.

Although the authors conducted their studies in different ethnic groups,⁷¹ which did not include the Lobedu community, their findings on the interactions between official and living customary law in succession matters is important for this thesis. They are important for this thesis for the following reasons. First, Mbatha's findings advocated for the recognition of a deceased person's dependants, especially women, who were previously not provided for in terms of official customary law.⁷² Mbatha's findings also showed the inadequacy of official customary law to sufficiently provide for succession and inheritance matters, with specific reference to family property.⁷³ Secondly, the contrast in findings of the three studies discussed and the findings of this study in relation to "Constitutionally compliant egalitarian inheritance practices in living customary law".⁷⁴ The three studies reviewed collectively, revealed that there are situations where both men and women have equal inheritance rights and thus comply with the *Bhe* rules. This is noted as being progressive in contrast to the findings of this study, which show non-compliance with the *Bhe* rules within Lobedu communities and continued preference of male heirs over female heirs. Thirdly, the definition of succession and inheritance. Succession is defined as the transfer of the status of the deceased to the heir, which includes the administration of family property, and inheritance as distribution of the deceased's property.⁷⁵

It was explained in section 1.5., that in determining the scope of this study with specific reference to marriages with the queen, it was decided that the study will only cover the aspect of succession to inheritance and not status. The exception to this would be where the relationship between the two was found to be inextricably linked. The discussion in section 4.8.3 on the types of property under the control of the queen confirms the succession definition by the authors, and further shows the ways in which the concept of family property in this study has led to the queen's widowed spouses and children not inheriting from her estate after her death.

Sections 4.3.2.1 and 4.8.2 confirms the inheritance definition, and also emphasise the process of nomination of heirs and preference of male heirs over female heirs.

⁷¹ The studies were conducted in Mpumalanga, Eastern Cape, Kwa-Zulu Natal and North West provinces.

⁷² Himonga & Moore op cit note 65 at 231.

⁷³ Ibid

⁷⁴ Ibid at 232

⁷⁵ Ibid at 233

The reasons given by community members to justify the preference of male heirs in Section 4.10.1 aligns with the minority judgement of Ngcobo J in the *Bhe* case.⁷⁶ Both the community members and Ngcobo J acknowledge that the application of official customary laws of succession in estates of rural community members would destroy the preservative nature of family property, which would result in injustices against vulnerable groups of people. Although contradictory to the decision in *Bhe*, the overall objective of Lobedu living customary succession laws is aimed at ensuring that the communal home is kept intact so that the orphaned, the elderly and minor children continue to have a home and access to care.

Mokotong's⁷⁷ description of woman-to-woman marriages in Bolobedu and its contradiction with this study's participants' responses highlights the need for further in-depth empirical research to be conducted before conclusions can be arrived at and legislation drafted. This is because each ethnic group in South Africa has its own customary law rules and definitions, despite similarities that may exist in certain marriage institutions. The type of marriage institution found in Pedi-speaking communities which Mokotong describes is similar to woman-to-woman marriages found in Bolobedu in the following respects:

- a) They are valid customary marriages in the areas where they are concluded.
- b) They are concluded in terms of customary law which includes payment of *lobola*, marriage celebration, and bride-integration ceremonies.
- c) They are concluded to address succession and inheritance matters within families.
- d) They are primarily concluded to provide a male heir and perpetuate lineage.
- e) Children are preferably fathered by an appointed suitor who is a close family member.
- f) The procreator has no rights over the children and their mother.
- g) No sexual relationship exists between the parties.
- h) The role of the wife is to produce children for continuity of the family name.
- i) They are not same-sex marriages as defined by the Civil Union Act.

However, it must be mentioned that the following significant differences exist between the two marriage institutions. The differences are explained as follows:

⁷⁶ Ibid at 235

⁷⁷ Mokotong op cit note 247 at 91.

- a) The woman who initiates a Lobedu woman-to-woman marriage is known and regarded as the female husband of the woman or women she marries and not their parent-in-law.
- b) The potential bride is the wife of the female husband and not her in-law.
- c) The children born of the marriage refer to the female husband as their father and not their grandmother.
- d) The endogamous relationship central to Lobedu woman-to-woman marriage is not central to *ngwetsi ya lapa* marriages.
- e) Lobedu woman-to-woman marriages are entered into to strengthen kinship ties and not for commercial purposes. Cattle- trading is not central to Lobedu communities, who rely predominantly on agriculture.⁷⁸
- f) Lobedu woman-to-woman marriages are concluded among community members and not just with the queen.
- g) Not all Modjadji queens had biological children as Mokotong argues. Queen Masalanabo II was sterile and her successor was born through a woman-to-woman marriage when she married her mother's second-ranking wife, Leakhale.⁷⁹
- h) Contrary to Mokotong's participants, all three categories of this study's participants confirmed that the woman who marries other women in Bolobedu is referred to as a female husband with no objection to being referred to as such.
- i) The women are married to the queen and not the queen's male royal council members as Mokotong suggests. This study suggests that these men may be part of the appointed group of procreators for the queen's wives, but the women are not married to the procreators. Mokotong's assessment of the intricate relationship that exists in this marriage institution has negative consequences for wives and children in terms of the RCLSA. This is because the assessment has the effect of invalidating the existence of a marriage between the women and the queen, which strips them of their inheritance rights in terms of the Act. This highlights the necessity for bringing to light the intricate and complex relationships that exist within Lobedu woman-to-

⁷⁸ Krige & Comaroff op cit note 153 at 148.

⁷⁹ Motshekga op cit note 146 at 151.

woman marriages and succession complexities that arise from them. This is important for protecting women and children's inheritance rights in such marriages because a misunderstanding can impact on them negatively. As discussed in Section 3.2.1, succession is dependent on existence of a valid marriage. Where such existence is challenged, inheritance rights cannot be enforced.

To sum up, the relevance of the literature discussed is that it addresses issues of women in customary marriages in the reform of the customary law of succession. These are the right to inherit from their deceased spouse, the right of inheritance of children born of such marriages, and recognition of these marriages. The review however highlights gaps in the literature regarding woman-to-woman marriages in South Africa which this study aims to fill. It draws on literature about woman-to-woman marriages found in other African countries to show the questions raised by this marriage institution. No major work has investigated the effectiveness of official customary law in addressing succession complexities in woman-to-woman marriages. Women and children in such institutions are caught up in a legal blind spot. The findings provide an understanding of the position of women on the ground, succession laws applicable, and the impact of reform on such marriages.

1.9 Theoretical framework

In contemporary South Africa, there are two systems of law governing woman-to-woman marriages. For the purposes of this study, we have state or official customary law in the form of the RCMA and RCLSA, and living customary law within Lobedu communities. The findings seek to show what this living law is in woman-to-woman marriage succession matters. The Constitution recognises both official and living customary law in succession-related matters.⁸⁰ Official customary law does not always reflect the reality of the situation on the ground as it is static in nature, while the fluid nature of living customary law allows it to progress and develop as and when changes take place.

In light of official and living customary law, this thesis adopts legal pluralism as its theoretical framework. The pluralism is in the form of two systems of law currently

⁸⁰ Sections 30, 31 and 39 of the Constitution

governing woman-to-woman marriages, which are the RCMA⁸¹ and the RCLSA,⁸² as state law or official customary law, and Lobedu living customary law.

Legal Pluralism is defined as the operation of more than one system of law in a given society.⁸³ Sally Engle Merry notes that every society is both legally and culturally plural irrespective of its colonial past.⁸⁴ This is true for South Africa because despite its colonial past, it has a diversity of cultures which are governed by customary legal systems which differ both in content and application. As discussed in the literature review above and elsewhere in the thesis, woman-to-woman marriages exist in some of the cultural groups found in South Africa. The discussion on woman-to-woman marriages discussed by Mokotong⁸⁵ and woman-to-woman marriages in Bolobedu confirm this proposition. Although the legislation discussed in this thesis is aimed at addressing the institution of woman-to-woman marriage in South Africa, how it is applied in the respective communities will often depend on the customary legal system in each respective community, and the provisions thereof.

Legal pluralism within a South African context reflects the realities and complexities of a diverse society and the impact it has on a legal system. Legal pluralism is apparent in the existence of state and non-state law. State law includes the official African customary law and living African customary law. Himonga and Nhlapo argue that living customary law forms part of state law through its recognition in Constitutional Court cases such as *Bhe*, *Gumede* and *Shilubana*.⁸⁶ They further note that living customary law originates from the community under consideration and not from the state.

In the years in which the concept of legal pluralism has been used in legal and social scientific writings, it has become a subject of emotionally loaded debates. The issue mostly addressed in these debates, and one distinguishing it from common discussions over concepts

⁸¹ Act 120 of 1998.

⁸² Act 11 of 2009.

⁸³ Griffiths J 'What is Legal Pluralism?' *Journal of Legal Pluralism* 1986, Vol 24: 1–55 at 1.

⁸⁴ Sally Engle Merry 'Legal Pluralism' (1988) *Law and Society Review* Vol. 22 Issue 5, 869-896 at 869

⁸⁵ See note 77

⁸⁶ Himonga & Nhlapo Op cit note 8 at 46.

of law, is whether or not one is prepared to admit the theoretical possibility of more than one legal order or mechanism within one socio-political space.⁸⁷

According to Von Benda-Beckmann, legal pluralism was initially introduced as a concept used to sensitise opinion about the existence of more than one system of law in operation, operating on a parallel, with one system at times mirroring the intentions of the other. The discussions relating to the concept of legal pluralism are now being increasingly dominated by debates over its conceptual validity.⁸⁸

A distinction between state legal pluralism, deep legal pluralism, weak legal pluralism and legal centralism is given, which includes an explanation into how these theories link with the South African legal system. These are discussed in the context of succession in woman-to-woman marriages, as it is the lens through which the research is looked into to determine the adequacy of the official customary law to recognise and regulate succession in woman-to-woman marriages.

According to Griffiths,⁸⁹ legal centralism is a theory in which law is exclusive of all other law and administered by the state. Law which emanates from institutions such as the church, family, voluntary associations and economic organisations, are, in terms of the legal centralism theory, subordinate to the law and the institutions of state in terms of hierarchy. According to this theory, law is a systematic, exclusive and unified legal order which can be viewed from the top downwards as a sovereign command or from the bottom upwards, “where more general layers of law derive their validity, until reaching the ultimate law.”⁹⁰ The various subordinate laws carry moral authority because of their position in the hierarchy and application in various communities, but the superiority of the sovereign law is a given.⁹¹ Griffiths’ concept of legal centralism is distinguished from legal positivism in that it recognises the existence of laws emanating from other institutions which are of a “moral nature”. His centralism theory acknowledges the moral authority of laws from such institutions, their application in communities and their link to state law.⁹² He however notes

⁸⁷ Franz von Benda-Beckmann ‘Who is Afraid of Legal Pluralism?’ *Journal of Legal Pluralism* 2002, Vol 47: 37–42 at 37.

⁸⁸ *Ibid*

⁸⁹ Griffiths *op cit* note 83 at 2-3

⁹⁰ *Ibid* at 3

⁹¹ *Ibid*

⁹² Griffiths *op cit* note 83 at 3

that laws based on morality are subordinate to state laws in terms of hierarchy.⁹³ This is different to the legal positivism theory which makes no considerations for morality.⁹⁴

The operation of the legal centralism theory in the South African context would, in the researcher's view, be near impossible, if not a purely futile exercise, and would also paint an inaccurate portrait of the reality of the legal system. South Africa is home to a multitude of cultures and traditions governed by systems of law foreign to and non-accommodative of the legal centralism theory. Legal pluralism in the weak sense, or state legal pluralism, is a theory pertaining to a situation in which not all law is state law; nor is it administered by a single set of state legal institutions. In this sense, a legal system is pluralistic when the sovereign implicitly commands different groups of law for different groups in the population. The groups concerned are defined in terms of ethnicity, religion, nationality and geographical area, and legal pluralism is justified as a technique of governance.⁹⁵ This theory is limited to the colonial and post-colonial situation. It is unlikely to be accepted in the current South African dispensation as it is discriminatory⁹⁶ in nature and contrary to the provisions of the Constitution. This theory reflects the rationale behind the Bantu Authorities Act⁹⁷ and its provisions.

The most distinguishing feature of state legal pluralism or legal pluralism in the weak sense is that recognition of other normative systems comes from the state. An example of this is seen in Section 211 of the Constitution, which provides in subsection three "that the courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law".

Deep legal pluralism can be regarded as the factual situation which reflects the realities of a society in which various legal systems are observed, some officially, others unofficially. In South Africa, the common law and customary law comprise of official legal

⁹³ Ibid

⁹⁴ Priel D 'Trouble for Legal Positivism' (2006) *Legal Theory*, Vol 12:3, 225-263 at 229. See also Christiano T, Sciaraffa S 'Legal Positivism and the Nature of Legal Obligation' (2003) *Law and Philosophy* Vol 22: 5, 487-512

⁹⁵ Griffiths op cit note 83 at 5.

⁹⁶ Section 9(3) of the Constitution.

⁹⁷ The Bantu Authorities Act 68 of 1951 which was to give authority to traditional tribal leaders within their traditional tribal homelands in South Africa. This legislation, succeeding the Native Affairs Act 23 of 1920 created the legal basis for self-determination of the various ethnic and linguistic tribes into traditional homeland reserve areas and established tribal, regional and territorial authorities. See also the Black Homeland Citizenship Act 26 of 1970

pluralism, while those two ‘official’ legal systems, together with all other ‘unofficial’ legal systems (for example, Hindu, Jewish, and Muslim law) embody ‘deep’ legal pluralism.⁹⁸ Deep legal pluralism recognises that multiple systems of law co-exist without being sourced from the same authority. Multiple systems govern people’s lives; communities are able to generate systems of law that govern their lives while at the same time being under the government of state laws.⁹⁹ In the South African context, recognition is given to other systems of law in addition to state law. These take the form of customary law, international law, and religious law, as provided for by the Constitution.¹⁰⁰

Pluralism is part of the fabric of legal systems in most, if not all, African countries. The traditional institutions and customary law that regulated ancient civilisations and societies of Africans have changed over the years.¹⁰¹ Customary rules have had to adapt over time because of significant changes brought about by colonial rule, then decolonisation. In addition to customary law, most African¹⁰² countries are now bound by provisions of their Constitutions, statutory law, and common law, as well as international and regional human rights treaties.

The South African Constitution enshrines the right to culture,¹⁰³ and obliges the courts to apply customary law where applicable. This is, however, subject to provisions of the Bill of Rights. This picture of customary law legal systems subordinated to constitutional and formal legal rules does not accurately portray the much more complex reality on the ground.¹⁰⁴ An example may be seen in one aspect which the study discovered in the field. It found that legislation regulating customary succession is not known, nor is it being utilised. The reality may be that customary law remains the ruling system of law, with adaptations to it influenced by changing times and the community’s perceived understanding of the law, and not what the legislation actually provides. The need for such adaptations with specific

⁹⁸ Rautenbach C ‘Deep Legal Pluralism in South Africa’ *Journal of Legal Pluralism* 60 2010 143–177 at 145.

⁹⁹ Himonga & Nhlapo op cit note 8 at 46–47.

¹⁰⁰ Sections 8, 9, 31, 39, and 211 of the Constitution.

¹⁰¹ See generally Seymour S M *Native Law in South Africa* (1970) Cape Town: Juta & Co Ltd.

¹⁰² Ghana, Kenya and South Africa.

¹⁰³ The South African Constitution provides for this in Section 31(1) and Section 211(3).

¹⁰⁴ Tracy E Higgins, Jeanmarrie Fenrich & Zion Tanzer, ‘Gender Equality and Customary Marriage: Bargaining in the Shadow of Post-Apartheid Legal Pluralism’ (2007) 30 *Fordham International Law Journal* 1653–1708 at 1662.

reference to widows and inheritance is that it allows for the emotional and economic security of this category of persons which are considered to be vulnerable.¹⁰⁵

In addition to the legal pluralism theory, theories on feminism and the feminist movement made significant contributions to reform of customary law. In the South African context, this is seen in the contributions made towards legislative and judicial reform of customary marriage and succession laws by women's rights organisations, from the drafting of the Constitution to present day.¹⁰⁶ Feminism is defined as "an organized movement which promotes equality for men and women in political, economic and social spheres".¹⁰⁷ Feminists believe that women are oppressed based on their sex and dominant ideology of patriarchy.¹⁰⁸ It is the view of feminists that ridding society of patriarchy will result in liberation for women.¹⁰⁹ Particularly relevant to the subject matter of this study, is that through the feminism discourse, the prior existence of women's access to social and political power in African communities has been brought to light.¹¹⁰ Mokgoro notes that women have made and continue to make contributions towards family property, which official customary law did not sufficiently document or provide for.¹¹¹ The debate on women's rights also exposed the construction of gender and social structures within communities,¹¹² and further challenged the notion that only male-female marriage relationships existed in African communities. Chapter four shows how flexible gender systems existed in Bolobedu which made male roles open to certain categories of women through practices such as woman-to-

¹⁰⁵ Evans R 'Working with legal pluralism: Widowhood, property inheritance, and poverty alleviation in urban Senegal' (2015) *Gender and Development* Vol. 23 Issue 1, 77-94 at 79-80

¹⁰⁶ See Preamble of Women's Charter at www.sahistory.org.za › *History of Women's struggle in South Africa*, accessed 30 August 2016; Articles 1-12 of The Women's Charter for Effective Equality at www.anc.org.za/content/womens-charter-effective-equality accessed 30 August 2016; Annexure E of South African Law Commission Project 90 "The Harmonisation of the Common Law and the Indigenous Law Report on Customary Marriages" August 1998 at 164. Women's Organisations submitted written responses on the proposed legislation.

¹⁰⁷ Fiss O M 'What is Feminism?' (1994) *Arizona State Law Journal* Vol 26: 2, 413- 428 at 413

¹⁰⁸ Steyn M 'Restructuring feminism in South Africa' (1998) *Women's Studies International Forum*, Vol. 21: 1, 41-52 at 42-44

¹⁰⁹ Harnois C E 'Sociological Research on Feminism and the Women's Movement: Ideology, Identity, and Practice' (October 2012) *Sociology Compass* 6(10) 823-832 at 824.

¹¹⁰ Mokgoro Y 'The Customary Law Question in the South African Constitution' (1997) *Saint Louis University Law Journal* Vol 41: 4, 1279-1290 at 1282

¹¹¹ Ibid

¹¹² Greene B 'The Institution of Woman-Marriage in Africa: A Cross-Cultural Analysis' (1998) *Ethnology* 37:4, 395-412 at 395

woman marriages. These institutions placed women in a more favourable position for the acquisition of wealth and formal political power and authority, such as in the case of the Igbo people of Nigeria.¹¹³

In the uncertainty of the period of transition between the years 1990 and 1996 when the Constitution was in the drafting process, customary law, the role of traditional leaders, and women's rights were hotly-contested issues. The debates, according to Himonga and Nhlapo, were mainly between traditional leaders and women's rights activists. The traditional leaders were of the opinion that the equality clause would result in the likely eradication of large parts of customary law, while women's rights activists were concerned that if customary law was not subjected to the provisions of Section 9(3), women living under customary law, especially rural women, would continue to be subjected to patriarchy in the name of customary law. This would deny them their right to equality on the basis of sex and gender, which have a direct impact on their right to inheritance, maintenance and succession.¹¹⁴

Women's rights activists succeeded in their appeal for gender equality to extend to women living under customary law. The Constitution provides in Section 39(2) for the interpretation of legislation and development of customary law in a manner which is consistent with the provisions of the Bill of Rights.¹¹⁵ The researcher is of the view that the feminist movement contributed significantly towards the reform of customary law. By feeding into the negotiation process of the draft Constitution, the feminist movement through the Women's Coalition altered the power dynamics within the country, and the course of law.¹¹⁶ In their insistence on the integration of the right to equality for women living under customary law, they helped pave the way for legislation such as the RCLSA and RCMA to be enacted, affording women living under customary law rights and protection they otherwise would not have enjoyed. Although legislation is not at present able to address all the issues and complexities that women and their children face in customary marriages fully, it is a step in the right direction towards empowering women.

¹¹³ See Amadiume at note 301

¹¹⁴ Himonga & Nhlapo Op cit note 8 at 17.

¹¹⁵ Ibid at 18–19.

¹¹⁶ Steyn op cit note 108 at 43

Customary law and customary institutions constitute comprehensive legal systems that continue to regulate the entire spectrum of activities of people's lives from birth to death. Customary law also continues to govern family relations, traditional authority, property rights, and succession. Since customary law, which is also referred to as indigenous law, has been accorded a new status in the constitutional democracy, the legislature and courts have increasingly attempted to incorporate indigenous law into the South African legal system.

While the South African Law Reform Commission has accomplished much in harmonising indigenous law and common law, many of its attempts have resulted in legislation that facilitates unification of the legal system by adapting indigenous law to western values.¹¹⁷ In some instances, adaptation has led to a distorted law which is far removed from living customary law.¹¹⁸ A pertinent example of where customary law has been adapted to western values is the RCMA. What state institutions determine to be customary law is not always an accurate representation of customary law observed by the population concerned at the grassroots level. There comes a point when official customary law ceases to represent living customary law; it is transformed to the point where it is alien to the people whose customary law it allegedly represents.¹¹⁹ Furthermore, woman-to-woman marriages in South Africa are misunderstood as evidenced by comments about them in the Commission's report.¹²⁰ This unfortunately has negative consequences for women and children in such marriages.¹²¹

While challenges about its application persist, according to Himonga,

¹¹⁷ See generally Prinsloo W M 'Pluralism or unification in family law in South Africa' (November 1990) *The Comparative and International Law Journal of Southern Africa*, 23(3) 324–336; Griffiths op cit note 45; Van Niekerk 'Legal pluralism' in Bekker et al (eds) *Introduction to legal pluralism in South Africa* (2006) Durban, LexisNexis Butterworths.; Some of the provisions of the RCMA are criticised for not being a true reflection of the nature of customary marriages. The Act is said to have copied the laws governing civil marriages onto customary marriages through the Act.

¹¹⁸ See Recommendations 8,10, 28, 29 of the South African Law Commission Project 90 "The Harmonisation of the Common Law and the Indigenous Law Report on Customary Marriages" August 1998 which informed the provisions of the RCMA. Chapter 3 discusses in detail the challenges of implementing this legislation and its impact on the institution of woman-to-woman marriage. See also note 46 on literature discussing the challenges on the implementation of the RCMA

¹¹⁹ Woodman G R 'A survey of customary laws in Africa in search of lessons for the future' in in J Fenrich, P Galizzi & T Higgins (eds) *The Future of Customary Law* (2011) Cape Town: Cambridge University Press 1-30 at 22

¹²⁰ See para 3.1.10 of South African Law Commission Project 90 "The Harmonisation of the Common Law and the Indigenous Law Report on Customary Marriages" August 1998, page 30

¹²¹ Ibid

living customary law is likely to assume, if not maintain, a prominent position in the South African legal system, and continue to regulate the lives of the majority of South Africans. Living customary law has the potential to live on, because of its adaptability to change without losing its character. This is in contrast to official customary law contained in statutes, which is unresponsive to change.¹²²

This is the lens through which the researcher conducted the research – the existence of different legal systems in operation affecting the adequacy of the official customary law in recognising and regulating succession in woman-to-woman customary marriages.

1.10 Research methodology

The study combined desktop research with semi-structured interviews and focus group discussions. Semi-structured interviews assisted in answering questions related to formation, recognition, and legitimacy of woman-to-woman marriages, and subsequent application of customary succession laws. The desktop research assisted in analysing the legal framework and court decisions. This method could not be applied to the exclusion of the empirical research method. A desktop research method is required to analyse the legal framework and court decisions, while it would not provide answers about the actual application of customary succession laws. This was obtained through empirical research, where the qualitative method was applied. Ascertainment of the adequacy of the RCLSA to address succession complexities in woman-to-woman marriages also required empirical research. Data collected reflected the adequacy or inadequacy of the RCLSA and provided insight into what can be done to improve the situation.

The ultimate number of individual interviews conducted was determined by the fact that only widowed spouses could grant interviews. The restriction that participants' female husbands must be deceased was based on the fact that succession takes effect only after death. There are a significant number of women who had concluded woman-to-woman marriages within the community who could not be included because their female husbands were still alive. This resulted in the final number of individual interviews being eleven. Of the eleven interviews conducted, seven were with women who had concluded woman-to-woman marriages with the queen, and four were with women who had concluded woman-to-

¹²² Himonga C. 'The Future of Living Customary Law in African Legal Systems in the Twenty-First Century and Beyond with Special Reference to South Africa' in J Fenrich, P Galizzi & T Higgins (eds) *The Future of Customary Law* (2011) Cape Town: Cambridge University Press 31–57 at 32–34.

woman marriages among themselves. There were four focus groups with community members, two with male participants, and two with female participants, each consisting of eight to twelve members. A total of forty three participants participated in focus group discussions. The participants were all above the age of eighteen years.¹²³

1.10.1 Research sites

As already explained in the background, an in-depth examination of woman-to-woman marriages which exist in other areas in South Africa would not be feasible for purposes of this research. Accordingly, woman-to-woman marriage in the Lobedu Kingdom was used as a case study. Limpopo Province, particularly the Greater Letaba Municipality where the Lobedu people reside, was identified as the field of empirical research.

Pseudonyms will be used throughout the thesis to refer to the villages and names of persons to protect the identity of participants, and also prevent easy identification of the exact location where the research was conducted.

The words “Lobedu” and “Balobedu” will be used interchangeably to refer to the culture, traditions and laws, as well as the communities in which the research was conducted. This is because the former is the word used by scholars whereas the latter is the word the community members use to refer to themselves. The villages within the municipality are approximately 150 in number, and it would have been impractical to conduct research in all of them. Zizo¹²⁴ village was selected based on three reasons. First, on the assumption that the marriages are likely to occur in a rural rather than an urban setting. Secondly, the ethnic composition of the village was important because the study is on succession in woman-to-woman marriages of the Lobedu. Accordingly, a predominantly Selobedu speaking village was an influential factor. Thirdly, proximity of the village to the royal headquarters speaks to cultural influence and the probability of high prevalence of the practice. However, as a result of inclusion of woman-to-woman marriages concluded with the queen, individual interviews also took place at Lewatle¹²⁵ village. This village was not the research site from the very beginning because the study focused not only on royal marriages but also included marriages of community members. Selecting this village as the research site would have resulted in the

¹²³ Eighteen is the legal age of majority in South Africa, where a person can participate without needing parental consent, Children’s Act 38 of 2005.

¹²⁴ This is a pseudonym. It was used to protect the identity and location of participants.

¹²⁵ This is a pseudonym. It was used to protect the identity and location of participants.

exclusion of community members' marriages because the village is largely populated by the royal family.

The researcher is familiar with the geographical area of the study, and is fluent in the language spoken, and its varied local dialects. The researcher is Lobedu speaking and has family relations within the Lobedu community. The literature on aspects of insider/outsider status draws on writings about reflexivity in research settings. This refers to processes of looking inward and outward, where the researcher acknowledges the way in which the research process and outcomes are impacted on by her position. It has been argued that insider researchers reflect emotions in their interpretations of the data, and this is viewed as a weakness.¹²⁶ It is further argued to the contrary that reflexivity is part of the production of knowledge. Above all, researchers cannot avoid having an effect on the social setting that they study, and their own knowledge about the social world plays an important role in analysing the data.¹²⁷ However, an insider researcher should be alert at all times, remain objective, and suspend biases and beliefs.¹²⁸ The researcher mitigated the risks of being an insider researcher by remaining objective¹²⁹ and leveraged on the advantage of her position of language and access.

1.10.2 Stages of research and description of participants

The research was done over several stages. The first phase of research dealt with the theoretical and legal basis of the study. It involved a desk review and analysis of empirical works produced by other academics in the field of customary law of succession, tracing the background and reform of this field of law through their writings. The researcher relied on physical and online libraries of universities and bodies that work on customary law related issues.¹³⁰ This stage of research involved analysis of court decisions, and the analysis was aimed at looking at the reform of the customary law of succession and how its application has changed the position of women and children in customary marriages.

¹²⁶ Al-Mahkamre S S & Lewando-Hundt, G G 'Researching 'at Home' as an insider/outsider' (2008) 7(1) *Qualitative Social Work*, Sage 9–23 at 10.

¹²⁷ Ibid

¹²⁸ Ibid

¹²⁹ The researcher cross-checked the content and truthfulness of the information received from multiple parties, instead of assuming it to be true.

¹³⁰ Such as the South African Law Reform Commission and the Brand Van Zyl Law Library, and the African Studies Collection of the Main Library at the University of Cape Town.

The second phase of research involved interviews with three categories of participants. The first category of participants was widowed spouses who had concluded woman-to-woman marriages. The information gathered from this category of persons helped in confirming the existence and legitimacy of such marriages, and provided reasons why they are concluded, and the benefits or harmful effects that can be derived from the conclusion of such marriages. It also provided data on the living customary law of succession in Lobedu communities. The second category of persons is the traditional leaders, and this category of persons, being the custodians of Lobedu customary law, provided information on the context, history and background in which woman-to-woman marriages have been concluded among the Lobedu. They also provided data on what the law of succession applicable in such marriages is, how it applies, and the law of acceptance of children. The third category of persons is community members who did not contract woman-to-woman marriages. The information which was gathered from this category of persons helped to determine to some extent, through their views on succession in such marriages and their ideas on what the living customary law is.

1.10.3 Research methods

Data was obtained through individual interviews and focus-group discussions. Individual interviews were held with individuals who had personally concluded woman-to-woman marriages. This included women who had entered into woman-to-woman marriages with the Queen, and community members who had concluded woman-to-woman marriages among themselves. The decision to have individual interviews with this category of persons was taken to allow participants to be free to speak about their personal experiences without an audience, as it was anticipated that it might be a sensitive topic for some participants who might not feel comfortable in a crowd setting. Another distinct advantage of individual interviews is when the goal of the research is to gain an in-depth understanding of a person's opinions and experiences.¹³¹

The researcher sought to gain an in-depth understanding of the marriages and the complexities from participants' personal experiences. Individual interviews were semi-structured and an interview guideline was used. Open-ended questions were used, which offered the advantage of simplified data analysis through thematic organisation of questions

¹³¹ David L. Morgan *Focus Groups as Qualitative Research* (1988) London: Sage at 9.

and responses.¹³² The researcher had flexibility to determine when it was appropriate to explore certain subjects of discussion in greater depth and ask original questions which were not anticipated at the formulation of the interview guideline.¹³³

Focus group discussions were held with traditional leaders and community members separately. The decision to hold the two focus groups in different venues was to allow a free flow of information, because it was anticipated that community members might not be free to express their views in the presence of their traditional leaders, and vice versa. A focus group was needed in this research to help determine what the living customary law is and to gain a broader view on how the law of succession applies in woman-to-woman marriages.

In this study, focus groups were used as part of a multi-method investigation as they were conducted together with individual interviews. In multi-method uses, focus groups add to the data that is gathered through other qualitative methods, such as participant observation and individual interviews. In these combined uses of qualitative methods, the goal is to use each method so that it contributes something unique to the researcher's understanding of the phenomenon under study. This is relevant in this study because individual interviews addressed succession complexities from personal experiences, and focus group discussions brought supplementary information and broadened the researcher's understanding of the complexities. The combined information answers the research question in a comprehensive manner.

The vignette technique was used to conduct focus group discussions. The technique allows questions about concrete situations which concern hypothetical third parties, and has the effect of distancing the issues from the respondent and his or her own relationships with relatives. This seems to make the questions less personally threatening, which may be very important when sensitive features of relationships are being explored. It also has the effect of breaking away from limitations imposed by personal experience and circumstances.¹³⁴ This is particularly important in woman-to-woman marriages because of the sensitivity of the issue

¹³² Patton M *Qualitative Research and Evaluation Method: Integrating Theory and Practice* (2002) London: Sage at 343.

¹³³ *Ibid* at 347.

¹³⁴ Leighton S *Using a Vignette-based Questionnaire to Explore Adolescents' Understanding of Mental Health Issues* (2010) London: Sage at 234–235; Finch J 'The Vignette Technique in Survey Research' (1987) 21 *Sociology* 105–114.

of succession and family contestations that may be involved. The vignette technique provided an abstract way of addressing sensitive issues.

The choice of number of participants in each focus group was based on manageability of the group, which also ensured a wealth of information on a representative scale from which answers could be drawn. The research participants were purposefully selected from within the community to ensure a wide range of age groups, education levels and gender variations for data validation. While the large majority of participants may be classified as not formally employed, a minority of them may be classified as low- to middle-income earners, with at least eight of the participants in focus group discussions being employed as teachers and principals of primary and high schools in the area. Some of the younger participants are university graduates employed in internship programs in government departments. This is not common in the villages as a large number of the youth is unemployed.¹³⁵

Category one participants (widowed spouses) were elderly, whereas category two and three participants (traditional leaders and community members) had a mixture of young, middle-aged and elderly participants. Individual interviews were done mainly with elderly participants because the study targeted widowed spouses. The group discussions had a diversity of age groups because information gathered had to encompass comprehensive views that were not age specific so that all the voices within the community would be heard. The diversity of age groups in discussions with traditional leaders showed that more young people are assuming traditional leadership positions and responsibilities.

The researcher had anticipated conducting four focus group discussions with the traditional leaders, two male and two female. However, only one focus group discussion with female traditional leaders took place at Lewatle village, as there were no female traditional leaders at Zizo village. The focus group discussions with community members and individual interviews took place at neutral venues such as schools, but mostly in backyards of participants who volunteered the use of their property. Neutrality of venue is important to ensure that participants feel relatively safe and comfortable to voice their opinions. . The venue has an impact on people's behaviour and their freedom to express certain views regarding a topic. The participants were not pressurised to provide information. Focus group discussions with traditional leaders took place at council halls at Zizo and Lewatle villages.

¹³⁵ Greater Letaba Municipality Annual Report accessed January 2016 from www.greaterletaba.gov.za

1.10.4 Research design and ethical considerations

Ethical clearance was obtained from the Research Ethics Office of the Faculty of Law at the University of Cape Town. The Ethics Office also approved the interview guide for both the individual interviews and focused group discussions. The researcher's desire to understand succession in woman-to-woman marriages under Lobedu customary law was explained to participants, together with time commitments and measures to protect their identities as research participants. The potential impact of the research on laws and policies and how these might affect future developments in the law were explained. The concepts of succession, the law, and the Constitution were explained to interviewees without formal education to ensure that they participated on fairly even levels of understanding with the educated participants.

Many of the participants expressed irritation at the overly "formal" consent process and refused to sign the consent sheet as they were afraid that they may be putting their signatures on a document that might implicate them in a financial scam. The consent process was therefore managed on a case-by case-basis dependent on factors that affected participants' levels of co-operation. These factors include the emotional state, age, literacy levels, and the environment. There were several challenges encountered which will be discussed towards the conclusion of this chapter.

The researcher spent a week in the villages prior to the start of the interviews in order to get a feel of the area and the social and political dynamics at play. This time was spent assisting at a vegetable market where she was able to identify potential participants. The snowballing method was used from there onwards, and the researcher personally conducted all interviews in Selobedu and English in accordance with participants' preferences. The interview guide was used to ask questions with minor deviations, which depended on the direction in which the interview was going.

1.10.5 Collection of data

The collection of non-oral data included copying of legislation, law reports, articles and papers written on topics related to customary succession laws, books, and decided cases. This information assisted arguments and accounts of the legal, historical, political, and social background of succession in woman-to-woman marriages, which is discussed in chapters two and three. All interviews were conducted with a battery-powered audio recorder. None of the participants refused to be recorded. The participants' choice of venue reflected their varying

time schedules, occupations and concerns with privacy. In addition to audio-recording, notes were taken on a notepad.

1.10.6 Understanding the data collected

The stages involved in data analysis were a tedious affair, and took longer than initially anticipated. The researcher, however, enjoyed this process, as frustrations of analysis later led to a deeper insight into the data collected. The researcher personally transcribed all interviews, and in the process of transcription striking aspects of the data were highlighted for discussion. Initially, the researcher had planned on using the NVivo software¹³⁶ to assist with organisation of the data and to generate codes, but limited mastery of the software led to the decision to analyse the data manually. This was done through the data being categorised into recurring themes for the three categories of participants. The data was broadly grouped under demographics; process and conclusion of woman-to-woman marriages; succession and inheritance; acceptance of children; knowledge of rights and experience of the law; and the future of woman-to-woman marriages. Data from individual interviews was analysed separately from vignette responses. The responses were contrasted and analysed under each recurring theme.

1.10.7 Limitations and challenges of the study

The most obvious limitation of this study was limited literature on woman-to-woman marriages in South Africa and application of the RCLSA and RCMA in such marriages. There was also no evidence of case law on the subject, from which commentaries would have been written and formed the basis of literature review. This would have helped to lay a foundation for understanding the research problem. Much of the literature is dated, and in many instances has at most a paragraph or two about woman-to-woman marriages. The researcher was not able to find any literature on the application of the RCLSA and RCMA in woman-to-woman marriages and how legislation was applied in relation to complexities found in such marriages. The question whether such marriages are same-sex marriages as provided for by the Civil Union Act also posed a challenge to deeper understanding of application of the law in such marriages.

¹³⁶ NVivo is a qualitative data analysis software package produced by QSR International. It is useful for in depth analysis of data through its thematic, graphical and cross-referencing tools.

Another limitation was the chosen method of data collection. Arguably, where issues of succession and inheritance are concerned, which are linked to a royal house, it is anticipated that a level of secrecy and protection of the institution will prevail. This is shown in the contradictory responses offered by individual participants and traditional leaders, which will be discussed in chapter four. Community members' loyalty towards the royal house also resulted in the researcher needing to gain the trust of participants and assuring them of their confidentiality. The week spent at the vegetable market was hugely beneficial in addressing this challenge. A further limitation of the study is that it was only focused on widowed spouses who had concluded such marriages. This meant that existing and recently concluded woman-to-woman marriages were excluded from the study together with the information which would have shown how woman-to-woman marriages function in contemporary times.

1.10.8 Obtaining the boarding pass

The researcher experienced challenges obtaining a letter of consent from the Modjadji Royal Council. This was due to unavailability of the person in charge of the Office of the Regent to issue the letter, or the increased court roll of the tribal court. The researcher, however, used this time to get acquainted with the community and to map a plan of how potential participants were going to be approached.

1.10.9 No time, not interested

The biggest functional challenge was difficulty securing participants to take part in community members' focused group discussions. This happened for one of two reasons, the first being time constraints and schedules, as the study was conducted during the month of December, which is filled with festivities such as weddings and rites of passage celebrations. Many of the discussions had to be rescheduled for a suitable time. The second reason was the reluctance and lack of interest by young community members to take part in the research. They promptly told the researcher to go and find old people to have the discussion with.

1.10.10 Share the money

The researcher was asked who would be tending to their pots and children when they sat down for the interview, and the researcher should at least buy “cool drink”¹³⁷ because it was hot. The younger members of the community wanted to know if there were employment opportunities for them if they participated in the research. It was believed that the researcher had been given money to fund the research which she was keeping to herself.

1.10.11 The uncomfortable ones

Some individual participants were uncomfortable with questions relating to their marriage experiences, and administration of inheritance and succession. This was particularly evident with women who had concluded woman-to-woman marriages with the queen. When asked about the reason for their discomfort, their response was the fear of what would happen should the royal family find out about the truth in their responses. This would result in a negative impact on the reputation of the royal family. It was only after trust had been established that answers to questions were given, although not without the caution that there should be no repercussions after the researcher had left. One of the participants refused to answer the questions and referred the researcher to the royal family as she did not want to get into trouble.

1.11 Outline of the study

This study is divided into five chapters. Chapter two is the historical chapter and discusses the social, cultural and political history of woman-to-woman marriages in Bolobedu. It traces the position of women and children in woman-to-woman marriages before the RCLSA and RCMA came into effect. The chapter looks into processes that led to the enactment of the RCLSA and RCMA and the impact this has had on the status of women and children in customary marriages. This chapter further looks into the reform of customary law of marriage and succession.

Chapter three is the legal framework chapter. It critically analyses provisions of the RCLSA and the RCMA and looks into the position of woman-to-woman marriages under the law of customary marriage and succession.

¹³⁷ A general term used in the area to refer to Coca Cola, Fanta, and other beverages in the area.

Chapter four analyses the data collected from the field of study. It reports on the findings and discusses whether the intentions of the legislation have been fulfilled. It also discusses whether the RCLSA and RCMA adequately regulate the complexities of succession in woman-to-woman marriages.

Chapter five concludes the study. It makes recommendations on the findings and challenges that chapters' two to four addressed.

1.12 Summation of chapter

This chapter gave an introduction to the study and outlined the basis upon which it was founded by giving a description of the nature and context of woman-to-woman marriages. It further explored literature on succession in woman-to-woman marriages, the arguments and ideas of authors in the field of customary law succession and its links to the findings of this study which includes the theoretical aspects to which it is confined. It provided the methodology used to arrive at the findings, and the scope of the study and its limitations. The chapter provided the ground work upon which the next chapters will build upon, and the methodology of how the research was conducted in light of the findings discussed in chapter four.

In conclusion, the interaction of living customary law with official customary law within rural communities informs the theoretical framework of this study and its method of assessing the ways in which official customary law has sought to address succession complexities in woman-to-woman marriages. This method combines literature review with case analysis and empirical research. To understand the findings, it is necessary for the next chapter to explain the social, political and historical background of succession in woman-to-woman marriages in Bolobedu. This explanation will set the stage for chapter three's assessment of how this area of the law is acknowledged in South Africa's legal system and chapter four's assessment of the findings.

CHAPTER 2: THE HISTORICAL, SOCIAL AND POLITICAL OVERVIEW OF SUCCESSION IN WOMAN-TO-WOMAN MARRIAGES

2.1 Introduction

This chapter provides a historical, social and political overview of succession in woman-to-woman marriages of the Lobedu, and traces the literature before the RCLSA and the RCMA came into existence. It looks into what the position of women and children in succession was before these pieces of legislation came into effect, and the processes that led to their enactment. The chapter traces the reform of customary law of succession, and assesses what impact this has had on the lives of women and children in woman-to-woman marriages.

The chapter looks into historical periods in South Africa, which, through the developments that took place within them, had an impact on succession in woman-to-woman marriages. These are the periods of pre-colonialism, colonialism, apartheid, the transitional period that led to democracy, and the period of democracy in South Africa. The background this chapter provides shows the context within which the mentioned legislation is discussed, and paints a picture of the continuing challenges in the field of customary law of succession with particular reference to woman-to-woman marriages. The history this chapter provides can never be a complete story and record of the events that has transpired in the social and political context of succession in customary law that add to the complexities that will be highlighted. An example of this is that the government and legislation of the past did not have the ability to determine completely the ways in which rural people lived and sufficiently or effectively showcase and provide for it.¹³⁸ The chapter relies on existing academic literature.

2.2 Lobedu marriage and the Pre-colonial Period

The historical, social and political backgrounds of the Lobedu show the reasons for the development of the institution of woman-to-woman marriage and its rules of succession. In this section, we briefly outline the history of the Lobedu people; who they are, where they come from, their social and political structures and how these are specifically linked to

¹³⁸ Himonga C & Nhlapo T. *African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* (2014) Cape Town: Oxford University Press at 3–4.

woman-to-woman marriages. The history shows the importance these marriages have for the Lobedu. The outline explains administration of succession for the Lobedu and how it takes place. It questions the existence of such administration, and what effect, if any, it has on women and children in woman-to-woman marriages.

The pre-colonial period shows the Lobedu on a journey from present-day Zimbabwe to South Africa,¹³⁹ to the place which is now known as Bolobedu or “Ga-Modjadji”.¹⁴⁰ The move from Zimbabwe to South Africa happened under mysterious circumstances, and resulted in the change in leadership from male to female rulers.¹⁴¹ The first female ruler for the Lobedu ascended the throne in approximately 1800.¹⁴² The Modjadji queens were known and feared for their ability not only to make rain, but also to withhold it. It is for this reason that the Lobedu became famous, and chiefs from far and wide would make their way to the kingdom to pay their respects even though from a military point of view, the Lobedu’s strength was insignificant.¹⁴³ The transition from male to female rulers for the Lobedu shows that succession matters were primarily focused on succession to status as opposed to succession to inheritance. The divine nature of the queenship can be cited as the reason for this, and attached to succession to status for the Lobedu are the following points of interest that explain the authors’ focus on this aspect.

First, the identity of the queen. The queen is not easily accessible to many, and thus her identity was a mystery. This is said to be the inspiration for Haggard’s novel, *She*.¹⁴⁴ Secondly, intrigue surrounding the rain-making beads and charms, rain-making rituals and the queen’s ability to control the clouds either to withhold or bring rain. This is said to be the reason chiefs from far and wide came to pay homage to the queen by giving her their daughters in marriage. Thirdly, the python dance by maidens during rain-making rituals and its similarities to the Venda *domba*¹⁴⁵ dance is interesting for ethnographical studies seeking to determine cultural similarities between the Lobedu and Venda people. Lastly, female

¹³⁹ Prinsloo W M ‘Queenship of the Lobedu of Modjadji’ (2005) 22(4) *Tydskrif vir die Suid-Afrikaanse Reg* 814–820 at 814’

¹⁴⁰ The term generally used to describe the area and villages under the Modjadji leadership’

¹⁴¹ Prinsloo op cit note 139 at 814

¹⁴² Ibid at 815

¹⁴³ Ibid at 815-16

¹⁴⁴ Haggard H Rider *She: A History of Adventure* 1887; 2010 Indo-European Publishing.

¹⁴⁵ *Domba* is a ritual dance performed by young Venda females. It is often referred to as the ‘python dance’ because the movements resemble that of a large snake.

leadership was established by the father–daughter relationship between King Mugodo and his daughter Maselegwane.¹⁴⁶ The history surrounding how this took place is significant for understanding how it came about for the Lobedu to be ruled by a queen. It is this transition to female leadership that resulted in the future existence of woman-to-woman marriages with the queen. The literature on Lobedu succession rules is focused on processes that led to the next queen being chosen, and very little attention is given to inheritance matters which are not linked to the throne. The literature on what follows after the death of a queen is focused on how the rightful heir was selected when there were disputes. If more attention had been given to this area, it would have been part of the literature this study used to trace how official customary law addressed succession complexities in woman-to-woman marriages in the past in contrast to present-day provisions.¹⁴⁷

The queen is traditionally not allowed to get married to a man.¹⁴⁸ She marries other women who give birth to children for her.¹⁴⁹ These women become wives of the queen in three different ways: daughters given to the queen by chiefs from other kingdoms as homage, daughters given to the queen by chiefs within the Lobedu kingdom to show their loyalty,¹⁵⁰ and daughters from within the royal family.¹⁵¹ Woman-to-woman marriages for the Lobedu have important social and political functions for the queen. Politically they strengthen in that they solidify her reign throughout the kingdom, and her alliances with other nations. Socially they are structured in a manner that perpetuates the practice of endogamy central to Lobedu marriages and social structures.¹⁵² As Krige and Comaroff note, the importance of endogamy in Lobedu marriage is the automatic renewal of marriage alliances for generations.¹⁵³

The brother-sister relationship is central to Lobedu marriage. The brother-sister relationship is central to woman-to-woman marriage, because of the right a sister has to a

¹⁴⁶ Motshekga M K *The Mudjadji Dynasty: The Principles of Female Leadership in African Cosmology* (2010) Kara Books at 150.

¹⁴⁷ Prinsloo op cit note 139 at 816.

¹⁴⁸ The reason for this is that should she get married to a man, this results in the queenship being passed on to his family instead of staying within the Modjadji family.

¹⁴⁹ They procreate with an appointed suitor or a man of their choice. The children born of these marriages belong to the queen.

¹⁵⁰ Prinsloo op cit note 139 at 817.

¹⁵¹ These are based on the brother-sister relationship central to the structure of Lobedu marriage.

¹⁵² Prinsloo op cit note 139 817

¹⁵³ Krige E J & Comaroff J L *Essays on African Marriage in Southern Africa* (1981) Cape Town: Juta & Co Ltd at 9

daughter from the house her brother established with her bride price.¹⁵⁴ This means that where the sister is in need for reasons ranging from her inability to conceive to her not having a male child, she has the right to a daughter from her brother's house who married a wife using the cattle that was given as her bride price. This in effect gives existence to the institution of woman-to-woman marriages. For the Lobedu, woman-to-woman marriages are entered into through the brother-sister relationship for whatever purpose requires serving. This strengthens the alliance within the families.¹⁵⁵

Woman-to-woman marriages carry significant political weight for the queen.¹⁵⁶ This is because they create unity through the alliances with other kingdoms forged by her marriages to their daughters, and with her male relatives within the kingdom who give their daughters to the queen to pledge their loyalty. The continuity of alliances is made possible by the brother-sister relationship and cross-cousin marriages over generations, which renew the bonds and continue the links between the queen and her subjects, and the queen and other kingdoms.¹⁵⁷

The social system, political structures, and alliance system of the Lobedu highlight that before colonisation in South Africa, rural communities were primarily under the rule of traditional leaders.¹⁵⁸ Traditional leaders played important and significant roles in the social and political structure. Rural communities were governed by intricate social laws, traditional courts of law, religion, marriage systems, and political systems. There was a collective consciousness and way of life that manifested itself in the alliances forged and the maintenance of social and political structures through marriage.¹⁵⁹

2.3 The Colonial Period

2.3.1 Lobedu marriage and social change

The colonial period is significant for the impact it had on Lobedu marriage systems. This period brought about changes through factors such as Christianity, economy, ideology and

¹⁵⁴ Ibid at 7

¹⁵⁵ Ibid at 8

¹⁵⁶ Ibid

¹⁵⁷ Ibid

¹⁵⁸ Devenish G. 'South Africa from Pre-colonial Times to Democracy: A Constitutional and Jurisprudential Odyssey' *Journal of South African Law* (2005) 3 547–571 at 547–549.

¹⁵⁹ Ibid

administration.¹⁶⁰ This period can perhaps also be seen as the beginning of legal pluralism challenges within Lobedu communities. This is due to fundamental differences that continue to exist between customary and western systems of marriage. The basic features of marriage in the Lobedu community will be outlined to show the implications of the changes brought about by colonialism to the institution of woman-to-woman marriages.

In the past, Lobedu people relied predominantly on agriculture, unlike other African societies such as the Zulu and Xhosa who owned large herds of cattle.¹⁶¹ They, however, shared similarities with other African societies with institutions of polygyny, lobolo, levirate and sororate unions. The cattle they owned were tied up in marriage exchanges which linked families in ongoing marriage alliances. Marriage had an important economic dimension in that cattle could be given to a relative in exchange for a promise of marriage to a daughter who might still be young or not yet born. This has significantly reduced after the introduction of migrant labour through colonialism. It is mostly used by the elderly to enter into woman-to-woman marriages in order to raise an heir. This is because money is obtained through the alternative means of migrant labour, which brought the transition to a money-based economy.

Lobedu marriage contracts extend rights and obligations not only between husband and wife, but to members of the extended family. The establishment of homes through marriage institutions such as the levirate, sororate and woman-to-woman marriages ensured the care of wives and children, widows, orphans, the aged and handicapped.¹⁶²

The religious system of the Lobedu supports brother-sister relationships and resulting woman-to-woman marriage and the moral value attached to a girl going to “cook” for her father’s sister.¹⁶³ A girl child is often named after her father’s sister and will succeed her as the family priestess after her death, performing the same ancestral and religious functions.¹⁶⁴ The first contact the Lobedu had with colonialism was through the arrival of missionaries and later World War 2. Krige¹⁶⁵ notes that the Lobedu systems of marriage have been attacked on three main fronts since the arrival of missionaries. These are ideological, administrative, and

¹⁶⁰ Krige & Comaroff op cit note 153 at 148.

¹⁶¹ Ibid

¹⁶² Ibid at 150.

¹⁶³ A girl going to “cook” for her father’s sister is known as “*Mmalolatelo*” which means she who followed.

¹⁶⁴ Krige & Comaroff op cit note 153 at 150.

¹⁶⁵ Ibid

economic. The administrative and economic factors are closely linked, an example of which is shown in the imposition of poll taxes.¹⁶⁶ Limitations of access to land undermined the agricultural production system on which the stability of Lobedu marriages rested.¹⁶⁷ These changes have had a continuous effect on the prevalence of woman-to-woman marriages. Chapter four discusses these changes and their impact in more detail from an empirical research perspective.

2.3.2 Lobedu marriage and changes in ideology

The Lobedu first made contact with white settlers towards the end of the 19th century. This contact was as a result of Khashane Mamatlepa's¹⁶⁸ invitation to the Berlin Missionary Society to send missionaries to Bolobedu. Khashane is said to have been converted and baptised in the Moravian Church during his stay outside Bolobedu. In 1881, the missionaries arrived and established a missionary school in the area led by headman Kgapane. They named the place Medingen, and to this day the mission exists within a village with the same name.¹⁶⁹ Khashane's efforts to convert people to the Lutheran church caused conflicts between him and the dynasty, and the queen in 1884 ordered an attack on the Christian community.¹⁷⁰

The arrival of the missionaries brought along Christianity and Christian teachings about marriage that were opposed to polygyny, levirate and sororate unions and woman-to-woman marriages.¹⁷¹ Christianity posed a threat to the character of Lobedu marriage institutions by putting emphasis on a marriage being an agreement between two individuals as opposed to two families. It required newly-weds to establish their own home which discouraged the extended family, opposed the payment of the bride price which had the effect of severing the ties a sister has to the house her brother establishes with her bride price, and also regarded cross-cousin marriages as incest.¹⁷² These teachings undermined the brother-

¹⁶⁶ This was an amount payable by men from above the age of 18.

¹⁶⁷ Krige & Comaroff op cit note 153at 150.

¹⁶⁸ Khashane was the heir to his father's throne and his father had blood ties with the queen.

¹⁶⁹ Motshekga op cit note 146 at 173

¹⁷⁰ Ibid.

¹⁷¹ Ibid at 151.

¹⁷² Ibid

sister relationship and the marriage institutions it gave effect to, thus having a direct impact on the institution of woman-to-woman marriages.

Opposition to polygyny and payment of bride price impacted on an important function served by woman-to-woman marriages, which is the legitimisation of children. Payment of bride price legitimises children born of a marriage and their rights to inheritance. The Lobedu provide for this by saying that “*ngwana ke wa dikgomo*”, meaning that a child belongs to he who has paid the bride price. Christianity also brought education which resulted in delayed marriages because of school attendance, which required material needs such as clothes and school fees. These required monetary payment, which resulted in more people becoming migrant labourers and applying themselves to other money-making activities as opposed to being focused on the family life and agriculture.¹⁷³

2.3.3 Lobedu marriage and economic changes

Migrant labour was one of the first economic activities to affect the Lobedu system of marriage.¹⁷⁴ The first European farmers appeared on the borders of Bolobedu at the end of the 19th century. They settled, established farms and grew mangoes, oranges and maize in the area previously known as Duiwelskloof.¹⁷⁵ The unprecedented period of drought and starvation¹⁷⁶ of this period contributed to the increase of migrant labourers. The queen sent out warriors to drive out the white settlers. The Native Commissioner of the Zoutpansberg’s mission to rescue the white settlers led to the queen’s warriors to withdraw. The Native Commissioner demanded payment of taxes the queen had previously refused to pay.¹⁷⁷ The imposition of the poll tax payable by men over the age of 18 years meant that more and more men left their homes to find work.¹⁷⁸

There are, however, certain characteristics of the Lobedu family life that had a counteracting impact on the effects of migrant labour on the community. In the Lobedu culture, most marriage partners were arranged by the parents, which meant that marriage and

¹⁷³ Ibid

¹⁷⁴ Krige & Comaroff op cit note 153 at 150-51

¹⁷⁵ It has since been renamed Modjadjiskloof.

¹⁷⁶ The period 1936–1938 when Krige’s study was conducted in the area of Bolobedu.

¹⁷⁷ Motshekga op cit note 146 at 174.

¹⁷⁸ The money earned went towards the payment of the poll-tax.

family life continued even in the absence of one of the parties. Where a son refused to marry a woman selected for him by his parents, his mother would marry her for herself.¹⁷⁹

The position of women in society and their decision-making roles within their families, together with the seclusion ritual of the queen kept the kingdom free from Western contact for a significant period of time.¹⁸⁰ The teaching and guiding roles of women within families meant that they taught and guided children on custom and tradition. They passed these on orally in folktales and stories around the fire. This served to cushion the traditional Lobedu system of marriage from the dislocating effects of migrant labour on marriage and family life before World War 2.¹⁸¹

The end of World War 2 brought along significant changes for the Lobedu. These came in the form of an influx in population from other areas into the area predominantly occupied by the Lobedu.¹⁸² This resulted in large scale agricultural schemes of tropical fruits and vegetables. The Lowveld area where the Lobedu reside is rich in agricultural¹⁸³ and mineral wealth,¹⁸⁴ and the economic activities that emerged in the area gave rise to more shortages of land for cultivation and increased migrant labour.

The increase in population and economic revolution in the area changed the economic basis of Lobedu marriage life from subsistence farming to reliance on wages and bought food. The traditionalist wife was no longer providing food for her family through the cultivation of her fields, but was instead providing through the sale of home-brewed beer and working in the farms.¹⁸⁵ This is consistent with accounts of employment by participants. These developments had far-reaching consequences for Lobedu marriages and family life, because shortages in land meant that traditional marriage institutions were no longer on the rise. The close-knit kinship ties within families were disrupted by migrant labour because

¹⁷⁹Krige & Comaroff op cit note 153 at 152.

¹⁸⁰ Ibid

¹⁸¹ The war began in 1939 and ended in 1945.

¹⁸² The Lowveld area of the Limpopo province.

¹⁸³ There are a large number of citrus farms and the tomato exporter ZZ2 is found in the Bolobedu area.

¹⁸⁴ The Phalaborwa Mining Company was founded during this time. It is a copper mine.

¹⁸⁵ Krige & Comaroff op cit note 153 at 154.

both men and women went to work in the fields where they entered into relationships and had children with people from other places.¹⁸⁶

Cross-cousin marriages started declining, resulting in a decrease in woman-to-woman marriages. The decline in cross-cousin marriages gave rise to a large number of extra-marital births by schoolgirls, who in the case of Christians would not agree to enter into woman-to-woman marriages to legitimise their children.¹⁸⁷ The father of the child would, in many instances, not be in a position to marry the girl. This meant that in the absence of the woman-to-woman marriage, the child would be raised in the girl's parental home.¹⁸⁸ The Lobedu traditional systems of marriage did, however, despite these significant changes that had an effect on marriage and family life, hold their own and continue to exist.¹⁸⁹ This may partly be due to the existence of the queenship and continued preservation of the brother-sister relationship, cross-cousin marriages, and woman-to-woman marriages.¹⁹⁰

The quest to remake African families into monogamous and nuclear structures began in the early 19th century with the presence of missionaries in Africa. This introduced the concept of individualism into the African family context, which led to the invention of customs and traditions that further relegated the position of women, limiting them to the confines of the homelands. African chiefs and elders, together with colonial officials, were of the opinion that women did not belong in the towns. The situation in Lobedu communities serves as an example of one of the probable explanations as to why many African women remained in the homelands tilling the land, taking care of the home and raising children.¹⁹¹

When looking at the history of customary law from colonial times, one can make the informed assumption that woman-to-woman marriages, like polygamous marriages, were not recognised as valid marriages. This is because their nature, when viewed from a Western

¹⁸⁶ Ibid at 155.

¹⁸⁷ Ibid at 156.

¹⁸⁸ The father may be a teenager himself, or be from a family that the girl's daughter refuses to have marital ties with.

¹⁸⁹ Krige & Comaroff op cit note 153 at 157.

¹⁹⁰ Queen Khesetoane Modjadji III is recorded as having had 43 wives, and Queen Mmakoma Modjadji IV also married wives who were participants in this research. Both queens ruled during the period discussed here.

¹⁹¹ Akyeampong E & Fofack H. 'The Contribution of African Women to Economic Growth and Development in the Pre-Colonial and Colonial Periods: Historical Perspectives and Policy Implications' (2014) *Taylor and Francis Journal*, 29(1) 42–73 at 45.

perspective, made them *contra bonos mores*¹⁹² and against public policy. However, most importantly, the impact was great in the context of woman-to-woman marriages because of the changes that took place in Lobedu marriage and family life.

2.4 Lobedu marriage and the apartheid era

The policy of indirect rule initiated by the British in the colonial era became more formalised and entrenched in legislation under the National Party government in South Africa. The reasons for the retention of the indirect rule were the National Party's commitment to investing minimal cost and effort into the governance of traditional communities, and ensuring maximum control over labour and land resources.¹⁹³

2.4.1 Lobedu marriage and land dispossession

A series of natural disasters during the end of the 19th century opened the door for the establishment of the Transvaal Republic. Under apartheid rule, the Modjadji Dynasty lost significant areas of land and land rights. Annexure A of the Natives Land Act of 1913 incorporated the Mudjadji (also spelt Modjadji) Location which had been demarcated in 1892.¹⁹⁴ The Act authorised the appointment of a chief and headman over a tribe, and Queen Mokohe Modjadji was appointed as chieftainess according to this law. Motshekga notes that this Act “effectively dispossessed the Lobedu of their land”.¹⁹⁵ The Act was followed closely by the Black Administration Act which in section 5 provided that the Governor-General could define, alter boundaries, divide and constitute tribes, and order the removal of tribes as necessary for the good government of natives, whenever he deemed it in the general public interest. Public interests in this piece of legislation meant the interests of the white community.¹⁹⁶ The Black Administration Act contributed to the minority status of married women, by providing in section 11(3) (b) that a married woman under customary law was under the authority of her husband, and giving adult male members of a family the privileged right to inheritance. This is known as the principle of male primogeniture. At this point, it is

¹⁹² Against public policy or the moral welfare of society.

¹⁹³ Oomen B, *Chiefs in South Africa: Law, Power and Culture in Post-Apartheid Era* (2005) UKZN Press at 41. See also Himonga & Nhlapo op cit note 8 at 14

¹⁹⁴ Motshekga op cit note 146 at 176.

¹⁹⁵ Ibid at 177.

¹⁹⁶ Ibid

interesting to note that Lobedu laws of succession do not provide for women's inheritance rights. This begs the question whether this has always been the case from historical times, because there are notable influences of the Black Administration Act on the living customary law of succession. The lack of women's inheritance rights and the rule of male primogeniture explain the reason for the conclusion of woman-to-woman marriages among community members. It is argued that since women could not inherit, a son had to be provided in families, thus making the conclusion of woman-to-woman marriages necessary during this period.

Dispossession of land particularly affected the Lobedu, who relied primarily on agriculture to sustain their families. Loss of land often meant loss of ability to feed a family. This affected traditional succession practices in two ways. Firstly, it affected the value of property to be inherited, and the ability of an heir to take care of the deceased's dependants. Secondly, it affected woman-to-woman marriages by reducing the number of wealthy women who could marry other women and be able to provide for them. Land dispossession in communities that depended primarily on agriculture had the effect of inducing changes which affected social marriage structures. One of the requirements to be met by a woman intending to marry another woman is wealth, which is expected to have reduced significantly after land dispossession.

2.4.2 Changes in administration and legislative provisions

There were legislative and administrative changes during the apartheid era¹⁹⁷ which affected the Lobedu community. An example of this is the establishment of Native Commissioner's courts¹⁹⁸ which were set up to settle civil disputes of black people.¹⁹⁹ These courts are referred to here to show the changes in the administration of black people's affairs by persons who were "specially versed in native law",²⁰⁰ and yet the manner in which certain matters of black people were dealt with suggests the contrary. The presiding officers were given the discretion to apply either common law or customary law as deemed fit by their

¹⁹⁷ 1948-1991

¹⁹⁸ These were established under the Native Administration Act 38 of 1927

¹⁹⁹ Bennett op cit note 23 at 80

²⁰⁰ Ibid

assessment of the circumstances.²⁰¹ Native Commissioners' Courts were later discarded and their functions assigned to magistrates' courts. This included the functions to hear criminal matters. Section 11 of the Black Administration Act was repealed and re-enacted as section 54A (1) of the Magistrates' Courts Act. This section was later repealed and replaced by section 1 of the Law of Evidence Amendment Act, which permitted courts to take judicial notice of customary law principles readily ascertainable and apply them where applicable. It further provided for the proof, as a fact, of customary law principles that were not readily ascertainable, and a repugnancy clause.²⁰² Although the Law of Evidence Amendment Act permitted courts to take judicial notice of customary law principles, two challenges potentially affected succession matters in woman-to-woman marriages. Firstly, the provision that the principles must be readily ascertainable or proof must be provided where they were not readily ascertainable. Considering the succession complexities this study highlights, one can anticipate the challenge of explaining, for example, the rules of acceptance of children by female husbands to a magistrate who is not knowledgeable on the subject and has an inherent bias towards them. Secondly, the repugnancy provision ruled out woman-to-woman marriages on the basis that they would be against public policy. The magistrate would approach the matter from a western perspective and view woman-to-woman marriages as same sex marriages. A combination of the two challenges leads to the assumption that, if succession matters arising from such marriages succeeded in reaching the courts, they would have possibly been dismissed. It is necessary to note at this point that although customary marriages were not recognised as valid marriages due to their potentially polygamous nature, there is case law which shows that the courts did give effect to the consequences of customary marriages to some extent, for example in the area of the law of delict.²⁰³

²⁰¹ Ibid

²⁰² Himonga & Nhlapo op cit note 138 at 16.

²⁰³ See *Zulu v Minister of Justice* 1956 (2) SA 128 (N); *Dlikilili v Federated Insurance Co Ltd* 1983 (2) SA 275 (C) and *Msomi NO v Nzuzu and another* 1983 (3) SA 939 (D). These cases dealt with claims of loss of support by widows of customary unions. They are discussed in *Dlamini* (1984) 101 SALJ 34-9; Kerr (1984) 101 SALJ 224-7 and Kerr (1956) 73 SALJ 402-8. The existence of the marriage still had to be proved by a certificate issued by a commissioner. This is a technical requirement that frustrated many claims. The decision in *Mokwena v Laub* 1943 (2) PH K64 (W) shows how the non-recognition of customary marriages due to their polygamous nature resulted in women and children in such cases not having any claims for loss of support.

The Regulations for the Administration and Distribution of the Estates of Deceased Blacks²⁰⁴ was passed in the year 1987. These regulations governed the intestate succession of estates of black people that was not covered by the Black Administration Act, and generally allowed for black people whose marriages would not ordinarily have been executed under common law to be so executed. These regulations were enacted to determine which system of law; either customary law or common law regulated the distribution and administration of intestate estates of black people. The type of marriage contracted by the deceased was used as the criteria to indicate which legal system was applicable.²⁰⁵

Woman-to-woman marriages were not considered a type of marriage that could be concluded under customary law in terms of this legislation and during the time of its implementation. This sheds light on the reasons why there is very little evidence on the manner in which the distribution and administration of inheritance takes place in such marriages as far as the intestate estates of black people are concerned. If the legislation had provided for woman-to-woman marriages, there would be case law from which to analyse and draw lessons on how succession was administered, and what the succession disputes were which arose from such marriages.

The Marriage and Matrimonial Property Law Amendment Act²⁰⁶ was passed the following year. This Act ended the concept of discarded wives. The Act did so by prohibiting a person already married by customary rites from contracting another civil marriage by civil rites. When a man contracted a civil marriage with another woman during the existence of a customary marriage, this had the effect of dissolving the existing customary marriage. The partner of the customary marriage became what was known as a discarded spouse and she and her children did not have any rights to the estate of the husband. The widow of the civil marriage was regarded to have greater rights in respect of the estate of the deceased spouse, and the customary marriage was deemed to not have been in existence at the time of the death of the spouse.²⁰⁷

This legislation did not provide for woman-to-woman marriages and the administration of succession. This is because same-sex marriages were considered to be

²⁰⁴ GN R200 of 1987.

²⁰⁵ Himonga & Nhlapo op cit note 138 at 169.

²⁰⁶ Act 3 of 1988.

²⁰⁷ Himonga & Nhlapo op cit note 138 at 169

against public policy, meaning that women could not contract such marriages even under civil law. Thus, the concept of discarded wives was limited only to male-female marriages and did not extend to woman-to-woman marriages. This had the effect of leaving customary law to dictate what should happen, particularly the living customary law applicable in the area. This resulted in unfortunate situations where widowed spouses and their children received no inheritance in the case of woman-to-woman marriages with the queen,²⁰⁸ and the rule of male primogeniture applying in woman-to-woman marriages within the community. Chapter four discusses this in more detail and highlights the possible harm to women and children in woman-to-woman marriages.

2.5 Lobedu marriage and the transitional period in South Africa

The years 1990 to 1996 are often referred to as a transitional period in South Africa, because of the many changes that took place, and the transition the country made from apartheid to democracy. Women's rights issues were at the forefront of the debate during this time,²⁰⁹ the key issue being the protection of customary law within the Constitution and whether it should be subject to or be independent of the Bill of Rights. The debate was primarily between traditional leaders and women's rights activists.

Kaganas and Murray, in the researcher's opinion, rightfully note that the stance by traditional leaders was from a genuine fear of disempowerment and authority which they possess in their respective traditional communities.²¹⁰ Mokgoro confirms this position by noting that institutions such as traditional courts are cherished by traditional leaders who possess power because of their existence.²¹¹ These are possibly some of the reasons why the Traditional Courts Bill²¹² was opposed by women's rights organisations because of how it would affect the lives of women in rural areas.²¹³ The Bill was opposed because of the

²⁰⁸ More information on this will be discussed in chapter 4.

²⁰⁹ Himonga & Nhlapo op cit note 138 at 17.

²¹⁰ Kaganas F, Murray C 'The contest between culture and gender equality under South Africa's interim Constitution' (1996) *Journal of Law and Society* 21:4, 409-433 at 410

²¹¹ Mokgoro op cit note 403 at 1283

²¹² B1-2012

²¹³ Williams J, Klusener J 'The Traditional Courts Bill: A Woman's Perspective' (2013) *South African Journal on Human Rights*, Vol 29:2 , 276-293 at 276

potentially negative effect it would have on the lives of women in the rural areas.²¹⁴ The participation of women in traditional courts was one of the issues raised by women's organisations against this Bill. They argued that although the Bill provides for the appointment of presiding officers in traditional courts²¹⁵, it was anticipated that female presiding officers would be a minority because of the male line of succession which traditional leadership follows under customary law.²¹⁶ This argument is supported and confirmed by this study's findings on the participation of women in traditional courts in Bolobedu, discussed in section 4.10 of this thesis.

The Multiparty Negotiating Forum in the year 1993 provided the interim Constitution, and presented a way forward for customary law. It provided in section 181(1) that traditional leaders could continue to function in their roles and to exercise power in terms of their customary law. The interim Constitution also provided for the right to language and culture, and further provided for the role of traditional leaders and the application of customary law, subject to the rights in the Constitution and legislation.²¹⁷ This middle-way was an attempt by the Multiparty Negotiating forum to balance the demands of both sides of the debate. In 1996, the Constitution of South Africa, 1996 was passed, and it provided key provisions that had an impact on the position of customary law. Section 9(3), section 15(3), section 30, section 31(1), section 39(2) and chapter 12 combined provide for the rights to equality, recognition of marriages concluded under tradition, participation in cultural life and belonging to a cultural community, institution of traditional leadership and development of customary law. These provisions impact woman-to-woman marriages in two ways. Firstly, the constitutional recognition of customary law and marriages concluded under customary law provided the platform for the recognition of woman-to-woman marriages as valid marriages under customary law. Secondly, the opportunity was granted for succession matters in such marriages to be investigated to see whether inheritance rights of widowed spouses and children in woman-to-woman marriages are sufficiently protected. Through legislation pursuant to these provisions, such as the RCMA and RCLSA discussed later in

²¹⁴ Ibid at 279

²¹⁵ Section 4(1)

²¹⁶ Ibid note 208

²¹⁷ Section 31

2.5.2, it is shown how constitutional recognition of customary law during this period affects succession in woman-to-woman marriages.

Constitutional recognition of customary law led to reform in the judicial and legislative recognition of customary marriages and practices. This was particularly with regard to laws which affected the rights of women and children under customary law. The ways in which reform took place and its impact on succession in woman-to-woman marriages is discussed below.

2.5.1 Judicial reform

Constitutional recognition of customary law led to a pluralistic legal system in South Africa, comprised of common law and customary law. South African courts were now under obligation to interpret and develop any provision of customary law, including the law of succession, in line with the Bill of Rights. These provisions attracted disputes in which the customary law of succession was in conflict with the provisions of the Bill of Rights, and at the forefront of these provisions regarding women's inheritance rights was the principle of male primogeniture. This led to judicial reform of the customary law of succession through decided cases.

The most important case which challenged the principle of male primogeniture was the case of *Bhe v Magistrate Khayelitsha*.²¹⁸ At the time when this case was heard, the South African Law Reform Commission had already made certain proposals relating to customary laws of succession. The proposals included the recognition of wives of persons who died intestate, to whom they had been married under customary law, to be regarded as heirs on the same basis as wives of civil marriages. The children of such marriages, irrespective of birth status, sex and age, also had to be regarded on an equal footing as children born from civil marriages.

The Intestate Succession Act²¹⁹ had to be amended to include a spouse or spouses to a customary marriage and all children as intestate heirs, and the Maintenance of Surviving Spouses Act²²⁰ also had to be amended to extend the meaning of the term "spouse" to mean a

²¹⁸ 2004 (2) SA 544 (C); 2004 (1) BCLR 27 (C).

²¹⁹ Act 81 of 1987.

²²⁰ Act 27 of 1990.

spouse in a customary marriage.²²¹ The court in the case of *Bhe* declared the provisions of the Black Administration Act²²² which dealt with the principle of male primogeniture to be unconstitutional and invalid.

In discussing the rule of male primogeniture, Ngcobo J states that the “system is designed to ensure that the dependents of the deceased always have a home and resources for their maintenance to prevent homelessness”.²²³ Participants’ responses in the discussion of male primogeniture in chapter four are notably aligned to this. The discussion highlights the reasons for the continued application of this rule in Bolobedu.

The following are some of the major reasons given for the conclusion of woman-to-woman marriages by the Lobedu, which are linked to the rule of male primogeniture:

- To raise an heir to the property, or
- To have a male child where only female children had been born of the marriage.

The male primogeniture rule is linked to woman-to-woman marriages because it directly has an impact on inheritance rights of girl children. The research conducted in Bolobedu shows evidence of the rule’s existence in Lobedu succession. Chapter four discusses this in detail to show how this takes place and the justifications thereof.

Woman-to-woman marriages were concluded during this era.²²⁴ Judicial and legislative reform declared the male primogeniture rule to be unconstitutional. This impacts on the regulation of woman-to-woman marriages because all children born from woman-to-woman marriages, regardless of their gender, have equal rights to inherit from the estate. It remains to be seen how these changes have manifested in practice, and whether, in reality, the position of women and children in such marriages has improved.

2.5.2 Recognition of customary marriages and reform of succession

The RCMA²²⁵ came into operation on 15 November 2000. This legislation made significant changes to customary law, while at the same time making efforts at attempting to preserve

²²¹ Section 4

²²² Section 23 and regulations framed under section 23(10) of the Act.

²²³ Supra note 218 para 173

²²⁴ Queen Mokope Modjadji IV had four wives and her reign was during the period 1982–2001; Oomen op cit note 50 at 276.

²²⁵ Act 120 of 1998.

some of its aspects. Many of these changes were related to patriarchy and the status of women and children in customary marriages. The Act effected changes by recognising the equal status of the spouses, making changes to the matrimonial property system, and introducing court-granted divorces.²²⁶ It further attempted to improve the administrative governance of customary marriages by providing for the registration requirement.²²⁷

This piece of legislation is important for several reasons. The failure to recognise customary marriages in the common law courts had negative impacts on women and children. The limited recognition of spouses married in terms of customary law affected the duty of support aspect of customary marriages. Children born from customary marriages were considered to be illegitimate due to the status of their parent's marriages, and if the man married another woman in a civil marriage, it had the effect of dissolving the customary marriage, discarding the wife and her children.²²⁸ Thus the Act gave some measure of recognition to marriages concluded under customary law, which covers woman-to-woman marriages from the implied in sections 2 and 3(1) (b).

The RCLSA²²⁹ came into operation on 20 September 2010. The Act applies to the estate or part of the estate of any person who is subject to customary law, who dies after the date of its commencement, and whose estate does not devolve in terms of a will. The purpose of the Act is to modify the customary law of succession to provide for the devolution of certain property in terms of the law of intestate succession, to clarify certain matters relating to the law of succession and the law of property in relation to persons subject to customary law, and to amend certain laws in this regard.²³⁰

The Act in its preamble notes the inadequate protection granted by the customary law of succession to a widow and certain children of a customary marriage, whose husband or father died intestate. It further notes the changed social circumstances which make it difficult for the customary law of succession to provide adequately for the welfare of family members.²³¹ This Act is important for this study because it introduced succession

²²⁶ Sections 6, 7 and 8.

²²⁷ Himonga & Nhlapo op cit note 138 at 91.

²²⁸ Himonga & Nhlapo op cit note 138 at 169

²²⁹ Act 11 of 2009.

²³⁰ Himonga & Nhlapo op cit note 138 at 176–177.

²³¹ Ibid at 177–178.

complexities in woman-to-woman marriages. It provides inheritance rights for spouses and children in such marriages, bringing woman-to-woman marriages to legal prominence. It provided the platform to assess the adequacy of official customary law to address succession complexities in woman-to-woman marriages. The most significant development in the reform of the customary law of succession, which is central to this research, is the right of inheritance of a spouse in a woman-to-woman marriage and the right of inheritance of children born from woman-to-woman marriages. The provision of the right to inheritance by this Act is a huge and positive step in the recognition of woman-to-woman marriages, and the regulation of succession in such marriages. This is because, as Bennett noted, such marriages “were roundly condemned”.²³²

In addition to the national legislation, South Africa has ratified international conventions that relate to the rights of women and children. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is one of the key international conventions that were aimed at promoting the rights of women, and ensuring that human rights were a reality for all women, especially those living in rural communities. South Africa ratified this convention, the result of which then placed an obligation on the legislation relating to the rights of women in the country to adhere to the provisions of the treaty. The combined provisions of articles 1, 2, 3 and 5 of CEDAW require ratifying states to put in place legislation that prevents discrimination women, equal status of men and women, the development and advancement of women, and the exercise of human rights.

The African Charter on Human and People’s Rights provides in Article 18(3) that the state shall ensure the elimination of discrimination against women and also ensure the protection of the rights of the woman and child as stipulated in international conventions and declarations. Article 21 of the African Charter’s Protocol on Women’s rights specifically provides for widow’s inheritance rights and girl children’s rights to inherit from their deceased parent’s estates. Subsections 1 and 2 jointly provide that widows shall have rights to equitable shares in the estate of their deceased husbands, the right to continue living in the matrimonial home, and both men and women have the right to equitable shares in their deceased parents’ estates.

South Africa is a party to both the African Charter and CEDAW, and as such had an obligation to comply with its requirements. The provisions of these two treaties not only led

²³² Bennett T W *Customary Law in South Africa* (2004) Cape Town: Juta & Co Ltd at 190

to, but influenced, the enactment of legislation that promotes and protects the rights of women and children, especially those in the rural areas. As previously mentioned, women's rights activists played a crucial role in the advancement of women's rights in South Africa. This was largely seen during the transition from apartheid to democracy. In the efforts to transform global policies in the area of human rights so that they better incorporate and respond to women's lives, demonstrations were made to show that women's issues had been neglected over a long period of time.²³³ According to the feminist perspective, societies had ignored women's experiences and views, or these experiences had simply been trivialised.²³⁴ When human rights were examined from the point of view of women's lives, important questions came up, such as the impact of narrow definitions of human rights on women's lives. It also became important to question why the many degrading life experiences of women were not understood as human rights.²³⁵

Women's human rights were violated in a variety of ways, and much of the creativity of the women's rights movement was aimed at addressing racial discrimination, socio-economic rights, degradations and violations that were a threat to human dignity, and security of person. Much of the abuse suffered by women was part of a socio-economic and cultural web that entrapped them, maintained by patriarchal interests, ideology and institutions. The importance of control over women was seen in the intensity of resistance to laws and social changes that put control of women's lives in their own hands. Women's voices had been missing from the decision-making arena for a long time. Human rights instruments and conventions provided avenues for challenging the systematic abuse of women, making the government accountable for the implementation of laws against them.²³⁶

The life experiences of the majority of black women in South Africa showed that oppression for them rested at the intersection between race, class and gender. Patriarchy and traditional norms relegated women to inferior positions in the society and family. The historic denial of civil and political rights to black people, coupled with the historic oppression of

²³³ Mabandla B 'Women in South Africa and the Constitution-Making Process' in J Peters & A Wolper (eds). *Women's Rights, Human Rights: International Feminist Perspectives* (1995) London: Routledge at 68

²³⁴ Ibid at 68-9

²³⁵ Bunch C 'Transforming Human Rights from a Feminist Perspective' in J Peters & A Wolper (eds) *Women's Rights, Human Rights: International Feminist Perspectives* (1995) London: Routledge at 11-12.

²³⁶ Ibid at 13-17.

women on the basis of gender, led to women occupying this inferior position, as Mabandla²³⁷ notes. The struggle for the advancement of women's rights in South Africa has been an on-going process, and the changes in legislation are aimed at yielding meaningful and enduring results for women throughout the country.

As noted from the given history, the customary law of succession is inextricably linked to the customary law of marriage. Succession is dependent on the validity of a marriage. The history of customary law recognition in South Africa impacted on the validity of customary marriages. The status of spouses in customary marriages, together with their inheritance rights, was thus affected. The historical events pertaining to customary law succession impacted on the existence of adequate legislative provisions to address succession complexities in woman-to-woman marriages. The importance of the link between validity of a customary marriage is highlighted by both the RCMA and RCLSA. In both pieces of legislation, the provision that marriages must be entered into in accordance with customary law speaks to the validity requirement that must be fulfilled before succession can take place. The reform of legislation often relies on precedence. This is derived from court cases where past provisions of legislation were challenged, and these are used to determine in which direction reform should take place. Legislators draw lessons from the way the legislation was applied to resolve the matter at hand, and the gaps to be filled are then identified.²³⁸

However, the history provided in this chapter shows the events that led to current legislation's inability firstly to provide sufficiently for the nature of customary marriages, and secondly, to note succession complexities that exist in such marriages. The historical recognition of customary law has directly impacted on the adequacy of official customary law to address succession complexities in woman-to-woman marriages. This led to legislative provisions which do not adequately provide for woman-to-woman marriages. Chapter three discusses the legal framework in detail to reveal these gaps. Customary law enjoys recognition and protection by the Constitution, but none of its provisions, practices or traditions may be in conflict with the provisions of the Constitution.

The reform of the customary law of succession continues to this day, with the legislation that has been put in place to regulate the application of customary law succession.

²³⁷ Mabandla Op cit note 233at 67–71.

²³⁸ Legal precedence is used to identify how the courts interpreted and applied legislation and gaps identified during this process are noted for future amendments.

The historical reform of customary law succession notes the positive changes in literature, however insufficient in certain areas, and the potential positive impact it has on succession in woman-to-woman marriages. One of the major positive provisions of legislation is that it affords widowed spouses and children born from woman-to-woman marriages inheritance rights, equal status, equality of participation and inclusion, and protection from any form of discrimination which has led to their disempowerment. They now have access to institutions which can assist them in enforcing their inheritance rights, and educate the communities they come from on why changes in customary succession must take place.

Institutions such as the Commission for Gender Equality, the South African Human Rights Commission, and the Commission for the Protection and Promotion of Cultural, Religious and Linguistic Communities were established to promote and protect these rights according to their specific mandates. For the purposes of this study, the Commission for Gender Equality is the relevant institution to be involved in woman-to-woman marriage succession disputes, and as such, no further discussions will be made into the other institutions mentioned. There are two reasons for this. Firstly, the reasons for the conclusion of woman-to-woman marriages reflect a preference for male heirs, which raises equality issues. Secondly, the continued application of the male primogeniture rule in succession matters emphasises discrimination against girl children on the basis of gender. It is therefore anticipated that the Commission would act as *amicus curiae* in succession disputes arising from woman-to-woman marriages on this basis. The Commission's mandate also sets it apart as the relevant institution to provide education and awareness to the Lobedu community on gender equality in customary succession. Its recommendations on legislation affecting the status and rights of women further possesses the potential to positively impact on the lives of widowed spouses and children in woman-to-woman marriages.

The Commission is important in the context of succession in woman-to-woman marriages. It provides an avenue for protection, promotion and enforcement of inheritance rights by widowed spouses and children. More importantly, its education and advocacy initiatives contribute positively towards rural communities' awareness of developments in the law. Access to knowledge affords people with the opportunity to seek interventions where necessary. Judicial and legislative developments in the customary law of succession are important for the institution of woman-to-woman marriage. It is through these developments

that widowed spouses and children are afforded inheritance rights,²³⁹ and a right of recourse where such rights are violated or seen to be violated. This is an important milestone because they are no longer side-lined and in the shadows. This provided the platform to assess the adequacy of official customary law to address succession complexities in woman-to-woman marriages.

2.6 Lobedu marriage and the period of democracy

As indicated previously at the beginning of the chapter, the focus on succession in the Lobedu marriage and the rules governing it has for a long time been on succession to status as opposed to succession to inheritance. Such was the trend in the era of democracy in South Africa especially after the untimely passing of the last reigning queen at the age of 27.²⁴⁰ The dispute was centered on the late queen's relationship with a commoner who had also fathered her daughter. The paternity of the late queen's daughter, who was to ascend the throne after her mother's death, raised eligibility issues. This is because the rules provide that the queen's biological children should be fathered by a close male relative, in keeping with the cross-cousin marriages and brother-sister relationship central to Lobedu marriage. Perhaps of particular importance in the context of this discussion may be the fact that the late queen had not married any wives herself.²⁴¹ However, woman-to-woman marriages continued to exist in Bolobedu within the communities.

In her research into the BaPedi²⁴² of Ga-Sekhukhune,²⁴³ Oomen²⁴⁴ showed the existence of woman-to-woman marriages at Mamone.²⁴⁵ Her findings not only confirm their existence in some traditional communities, but also shed some light on the nature of the marriage relationship and the roles that each spouse plays within the marriage. The female husband was told during the hearing that when she married a wife, she was no longer a woman but a man. The children born of that marriage were hers, and the duty to maintain

²³⁹ Section 2(2) (c) of the RCLSA.

²⁴⁰ Queen Makobo Modjadji VI passed away after a short illness.

²⁴¹ Her level of education and modern way of living are given as some of the reasons for this.

²⁴² A term generally used to refer to the Sepedi speaking people of South Africa.

²⁴³ A term used to refer to the villages under the leadership of Kgoshi Sekhukhune of the Pedi people.

²⁴⁴ Oomen op cit note 50 at 274.

²⁴⁵ A village in the Ga-Sekhukhune area of the Limpopo province.

both the children and their mother was hers as the “female husband”.²⁴⁶ Oomen makes mention of woman-to-woman marriages which Mokotong²⁴⁷ criticises. It is agreed that Oomen “stumbled upon” this marriage. However, the encounter Oomen had with the two women, however flawed her description may appear, has contributed to the very limited literature on woman-to-woman marriages. Both Mokotong and Oomen confirm that same-sex marriages and woman-to-woman marriages are two different marriage institutions based on two different legal rationales.

The literature brought light to the existence of such marriages under customary law, the marriage relationship that exists and the duty of maintenance. The researcher disagrees with Mokotong’s analysis that Mrs Matjageng²⁴⁸ is referred to as *makgolo* (which means grandmother) because of her position within the marriage. It is alternatively submitted that she is referred to in this manner because of her age. If Mokotong’s analysis is correct, it has a bearing on Mrs Matjageng’s duty to support and maintain the wife, and how the RCLSA would apply in the marriage. This is because if the woman is not Mrs Matjageng’s wife, then who is her spouse, and against whose estate will she enforce hers and her children’s inheritance rights at the passing of Mrs Matjageng? Furthermore, the *kgoro*’s response to Mrs Matjageng’s attempted divorce confirms her position as female husband within the marriage. One of the *kgoro*’s men is quoted as saying:

“This woman is just like a man. And if a man is the one who wants a divorce, he must leave the house and take only his jacket with him (*monna o tsea baki fela*). This woman is a father to those children so she must keep on maintaining them.”²⁴⁹

This confirms this study’s finding that although the female husband is a woman and has no sexual relationship with the wife, her being referred to as “husband” speaks to her duties towards the wife and children and her position within their lives.

²⁴⁶ Oomen op cit note 50 at 275.

²⁴⁷ Mokotong M ‘A Study of Complex and Unfamiliar Customary Marriage outside of the Recognition of Customary Marriages Amendment Bill: A Distortion of a Traditional Customary Marriage’ (2013) 27(2) *Speculum Juris* 78–97 at 86.

²⁴⁸ Mrs Matjageng entered into a woman-to-woman marriage known as *ngwetsi ya lapa* in Pedi speaking groups. She had brought a grievance against her wife before the *kgoro* for resolution.

²⁴⁹ Oomen op cit note 50 at 275.

It is noted that Oomen's study was conducted outside of Bolobedu in an area which functions under a different system of customary law. Her findings, however, provide some insight into the nature of the marriage relationship between spouses in a woman-to-woman marriage. This is specifically relating to inheritance, which is the subject matter of this thesis. The case brought before the court involved the maintenance of a spouse where the female husband expressed displeasure at the behaviour of her wife and threatened divorce. The court in its response confirmed that the duty to maintain the wife and children was that of the "female husband". This makes the right of inheritance for both the widowed spouse and her children all the more important. This is because in her lifetime, the "female husband" has a duty to maintain her spouse and children, and as such, in her absence, such obligation continues to exist as it would in other types of marriage under customary law. This is fundamental to the right of inheritance by widowed spouses and their children, and to what the rules of succession should provide with regard to such marriages.

The findings of Mokotong and Oomen are related to the period of democracy because they have implications related specifically to this period going forward. This is because it is during this period that literature and empirical studies on woman-to-woman marriages were conducted, in light of constitutional provisions on gender discrimination, same sex marriages, customary succession and inheritance. Their findings are important for the debate on the recognition of woman-to-woman marriages under customary law, and same sex marriages under customary law. The authors' findings show the fundamental differences in the legal rationales the two institutions of marriage are based on, the complex nature of woman-to-woman marriages and marriage relationship between spouses, and the adequacy of legislation to sufficiently provide for and protect parties in this type of marriage institutions.

2.7 Conclusion

The discussion into the historical, social and political review of succession in woman marriages in this chapter traces the reform of customary marriage and succession from pre-colonial times to the present day. It shows the context in which such marriages are concluded by giving a history of the Lobedu and their social structures. The chapter discusses the centrality of endogamy in Lobedu marriage, and shows how social changes impacted on the institution of woman-to-woman marriages. The chapter further discusses how colonialism and the arrival of Christian missionaries introduced legal pluralism challenges in Lobedu communities, and how this has contributed to the current legislation's adequacy to address

succession complexities in woman-to-woman marriages. Migration to urban areas for employment and interactions with different cultures affected Lobedu marriage, particularly woman-to-woman marriages. Legal pluralism challenges emerged related to this because alternative ways of doing things were introduced within the Lobedu community.

It is evident from the discussion in this chapter that the reform of the customary law of succession has had an impact over significant areas of the lives of women and children living under customary law. This particularly relates to judicial and legislative reform which has brought the institution of woman-to-woman marriage to legal prominence. Constitutional recognition of customary law has had a ripple effect that has resulted in the provision of inheritance rights for widowed spouses and children in woman-to-woman marriages. These developments have been important because they have been the areas in which women and children have suffered oppression and discrimination in the past. The reform of customary marriage and succession provided the platform for this study to assess the adequacy of official customary law to address succession complexities in woman-to-woman marriages. Chapter three analyses the legal framework enacted after this process of reform, and looks into its provisions to determine adequacy.

CHAPTER 3: WOMAN-TO-WOMAN MARRIAGES IN THE CONTEXT OF THE RECOGNITION OF CUSTOMARY MARRIAGES ACT 120 OF 1998 AND THE REFORM OF THE CUSTOMARY LAW OF SUCCESSION AND RELATED MATTERS ACT 11 OF 2009

3.1 Introduction

This chapter is a critical analysis of the provisions of the RCMA and the RCLSA. The analysis will specifically look into the provisions directly applicable and impacting on succession in woman-to-woman marriages. The analysis this chapter provides shows the legal position of widowed spouses and children in woman-to-woman marriages and their rights to inheritance.

The preceding chapter gave the background to the promulgation of the legislation that is discussed in this chapter. It is against this background that the provisions of the legislation will be analysed, looking into the way it addresses or is limited in addressing the complexities in woman-to-woman marriages.

3.2 The Recognition of Customary Marriages Act

The RCMA came into operation in the year 2000. In the years after this piece of legislation was enacted, a significant volume of literature was written about its content, the practicality of its application and implications thereof, and, more significantly for the purposes of this research, the lack of express inclusion of woman-to-woman marriages in the provisions of the Act.²⁵⁰

3.2.1 Legal requirements for a valid customary marriage

It was previously not uncommon in traditional communities for a marriage to be arranged between a young man and woman by their respective families, without their knowledge. Two families would agree to a marriage between their children, the *lobolo* to be paid, and the date

²⁵⁰ See generally Maithufi I P & Bekker J C 'The Recognition of Customary Marriages Act of 1998 and its Impact on Family Law in South Africa' (2002) *The Comparative and International Law Journal of Southern Africa* 35(2) 182–197; Horn J G & Janse van Rensburg A M 'Practical Implications of the Recognition of Customary Marriages' (2002) *Journal for Juridical Science* 27(1) 54–69; Rumbidzai E 'Review of the Recognition of Customary Marriages Act 120 of 1998'. *Taylor and Francis Journal* 23 (2009) 23(82) 51–57.

of transfer of the bride so that she might be welcomed into her new family.²⁵¹ The individual participants of the research across all age groups and periods of marriage, confirmed this to have been the actual situation that they encountered during the time that they entered into marriages with their female husbands.²⁵² This has significantly changed over the years, more significantly in the era of democracy. The RCMA cemented the changes by providing in its requirements for the conclusion of a valid customary marriage the requirement of consent.²⁵³

This provision has indeed shifted the position from what it previously was. When asked whether or not they had consented to entering the marriages, the majority of participants' responses were that "I did what my parents told me to do"; "I respected my parents' wishes"; and "There was no consent in our days like you youngsters have these days. In our time, you did what your parents told you to do without arguing".²⁵⁴ Particularly of interest to the requirement of consent are the responses given by two of the individual participants, who, when asked what had motivated them to enter their marriages, said that "My father used to beat my mother, saying that she was the one refusing for me to go. So I went so that he would stop beating my mother".²⁵⁵ Maithufi and Bekker,²⁵⁶ in considering the provision that customary marriage must be entered into and celebrated in accordance with customary law, note that this requirement implies that negotiations preceding the celebration of the marriage are regarded as requirements for its validity. These negotiations take place between the prospective spouses' families, and in some cases, when one of the spouses is still a minor. This was also seen in the case of marriages with the Queen, where some of the marriages were negotiated while the women were still minors.

On this basis, it is submitted that the consent requirement brought by the Act was a positive step in giving women a voice to have a say in the decisions and situations that impact on their lives, and put an end to women entering into woman-to-woman marriages out of duty or fear of abuse. A risk exists which threatens this progressive provision. There is a

²⁵¹ Horn J G & Janse van Rensburg A M 'Practical Implications of the Recognition of Customary Marriages' (2002) *Journal for Juridical Science* 27(1) 54–69 at 58.

²⁵² Oral interview, Individual participant, Lewatle village, 19 December 2015.

²⁵³ Section 3(1) (a) (ii).

²⁵⁴ Oral interview, individual participant, Lewatle village, 21 December 2015.

²⁵⁵ Oral interview, individual participant, Zizo village, 28 December 2015.

²⁵⁶ Maithufi I P & Bekker J C 'The Recognition of Customary Marriages Act of 1998 and its Impact on Family Law in South Africa' (2002) *The Comparative and International Law Journal of Southern Africa* 35(2) 182–197 at 185.

possibility that women may continue to be coerced into entering marriages without their consent, and when questioned, the parents may argue that their actions are justified by the coercion being part of a marriage entered into in accordance with customary law practices. This is because as noted by Himonga and Moore, the RCMA did not necessarily change the requirements for a valid customary marriage. Section 3 of the Act requires parties to celebrate the marriage in accordance with customary law. These celebrations often begin at the point which the marriages are discussed or agreed upon by the elders. As evidenced by participants' responses, these are conversations which do not always include the participation of the brides.²⁵⁷ The consent requirement has however invalidated child marriage and child betrothal.

As already stated, there is significant literature on the practical applications and limitations of the RCMA in customary marriages. One of the arguments is that the legislation is not a true reflection of the institution of customary marriages. This argument arises from the observation of the lack of explicit inclusion of the requirement of *lobola* for the valid conclusion of customary marriages.²⁵⁸ Implicit inclusion is found in the provision of the RCMA stating that marriage must be concluded in accordance with customary law. Himonga and Moore²⁵⁹ discuss the silent provisions of *lobola* in the RCMA, and state that court decisions have confirmed the payment of *lobola* to be one of the core requirements for the conclusion of customary marriages. Thus, the payment of *lobola* is significant in confirming the existence of the marriage. In the case of woman-to-woman marriages, it further serves the purpose of validating the marriage as a separate marriage and not the continuation of an existing marriage, such as the levirate and sororate unions.²⁶⁰ It is acknowledged that although these marriages are concluded for lineage continuation purposes, the payment of *lobola* in woman-to-woman marriage has significance for determining whether the widowed spouse will be treated as a spouse or a descendant in terms of the RCLSA. This determination directly affects the proportion of inheritance that the widowed spouse receives.

There was majority consensus among participants that *lobola* was not only a requirement, but was also essential for the conclusion of the woman-to-woman marriage. The

²⁵⁷ Himonga C & Moore E *Reform of Customary Marriage, Divorce and Succession in South Africa* (2015) Cape Town: Juta & Co Ltd at 53

²⁵⁸ Himonga & Nhlapo op cit note 138 at 91.

²⁵⁹ Himonga & Moore op cit note 257 at 63-8

²⁶⁰ Bennett op cit note 23 at 411.

payment of *lobolo* is important for two reasons; it validates and confirms the existence of the marriage, and it secures the legitimacy of the children born in the marriage and their inheritance rights.²⁶¹

This assertion is confirmed by Nwoko's discussion of woman-to-woman marriages in the Igbo people of South-East Nigeria, who are also known to practise woman-to-woman marriages.²⁶² In his discussion, he argues that "the woman who paid the bride price became the 'sociological' husband of the woman, and thus the 'sociological' father of any resulting offspring. The children belonged to her lineage and not their biological father's lineage".²⁶³ Therefore, in light of the important function of *lobolo* in the conclusion of woman-to-woman marriages and inheritance rights, it is argued that Himonga and Moore are correct in saying that section 3(1) (b) of the Act should be interpreted to include *lobolo* as a requirement for a valid marriage.²⁶⁴

The explicit provision of consent and implied provision of payment of *lobolo* for the valid conclusion of customary marriages in the RCMA is important for the topic of this study for two main reasons. Firstly, the consent requirement is a positive milestone because it ensures that women enter into such marriages voluntarily and not under duress as shown by the findings. The participants of this research entered into their marriages before the RCMA, so this statement is made on the basis of anticipating that women who will enter such marriages after the RCMA will be in a better position. Secondly, payment of *lobolo* gives effect to inheritance rights for both the widowed spouse and children in woman-to-woman marriages. It further has the effect of interpreting widowed spouses as spouses and not descendants in terms of the RCLSA. The interpretation is significant for the share the widowed spouse will receive from the estate.

3.2.2 The registration of customary marriages

Section 4 of the RCMA provides for the registration of customary marriages. For the purposes of this study, this section will be discussed to show possible challenges widowed spouses in woman-to-woman marriages might encounter when trying to register their

²⁶¹ Oral interview, Focused group discussion, Male community members, Zizo village, 10 January 2016.

²⁶² Nwoko K C 'Female husbands in Igbo land: South-East Nigeria' (2012) 5(1) *Journal of Pan African Studies* 69–82 at 78.

²⁶³ Ibid

²⁶⁴ Himonga & Moore op cit note 257 at 68.

marriages. Section 4 provides that spouses to a customary marriage have the duty to register their marriages. However, non-registration of the customary marriage does not affect its validity. Section 4(4)(a) provides that a registering officer, if satisfied that the spouses have concluded a valid customary marriage, must register the marriage by recording the identity of the spouses, the date the marriage was concluded, any *lobola* agreed to, and any other particulars prescribed. Himonga and Moore discuss the challenges faced by spouses trying to register their marriages at the Department of Home Affairs (hereinafter referred to as DHA).²⁶⁵ The discussion notes how the processes followed and documents required for registration show that provisions of the RCMA were not complied with, and civil marriages were registered instead of customary marriages.²⁶⁶ Considering the misconceptions surrounding the nature of woman-to-woman marriages, and the confusion among officials at the DHA about the kinds of marriages to be registered, it is envisaged that two things are likely to happen:

- a) The registering officer, owing to lack of knowledge of the nature and existence of woman-to-woman marriages, may refuse to register the marriage, being of the opinion that it is not a valid customary marriage
- b) The registering officer may suggest that the spouses register a civil union in accordance with the provisions of the Civil Union Act,²⁶⁷ perceiving the woman-to-woman marriage to be a same-sex marriage. A civil union is the civil marriage equivalent of spouses of the same sex, which can thus be understood to exclude polygamy.

In addition to envisaged registration challenges discussed above, there is a resulting contradiction in the Act that places a duty on the spouses to register their customary marriages, when in fact non-registration does not affect the validity of the marriages.²⁶⁸ This renders the provision ineffective, and as Maithufi and Bekker have noted, this part of the Act will remain paper law for a long time to come.²⁶⁹ Himonga's and Moore's discussion on the challenges relating to the registration of customary marriages under the RCMA confirms this

²⁶⁵ Ibid at 111–128.

²⁶⁶ Ibid at 113.

²⁶⁷ Act 17 of 2006.

²⁶⁸ Himonga & Nhlapo op cit note 138 at 105.

²⁶⁹ Maithufi & Bekker op cit note 256 196–197.

observation.²⁷⁰ The fact that the majority of participants did not know about this provision stands to support what has been said by the aforementioned authors. This section is important for the effect it has on enforcing inheritance rights because succession is often dependent on providing proof of the existence of a marriage.²⁷¹

There are also practical concerns to consider when addressing the issue of registration of customary marriages, which largely concerns the officers tasked with registering the marriages. Section 4(2) states that either spouse may apply to have his or her marriage registered. However, it has been found in practice that officers require that both spouses be present.²⁷² The DHA has issued a manual,²⁷³ a circular,²⁷⁴ and the Recognition of Customary Marriages Amendment Bill, 2009²⁷⁵ that have made it significantly difficult for women in rural communities to register their customary marriages. This is seen specifically in the case of widows who wish to register their customary marriages in order to claim for benefits.²⁷⁶

A significantly ironic truth about the registration of customary marriages is the circumstances in which registration practically takes place. It has been shown that registration takes place when one of the spouses passes away, where the family has vested interests in denying the existence of a customary marriage of the deceased to someone. This is most especially related to inheritance.²⁷⁷

Court decisions in cases where the existence of a customary marriage was an issue of contention have shown how the registration of a customary marriage, which results in a marriage certificate which can be produced as proof, was the basis upon which the validity of the marriage sought to be proved by the courts.²⁷⁸ The failure to produce proof of the marriage, which is granted upon registration, has led to courts dismissing the case. This was

²⁷⁰ Himonga & Moore op cit note 257 at 111–128.

²⁷¹ Ibid at 128.

²⁷² Ibid at 249-50.

²⁷³ Department of Home Affairs Manual BI 1699 (November 2000).

²⁷⁴ Department of Home Affairs ‘Circular No. 53’ (20 November 2000).

²⁷⁵ GN 416 GG32198 of 8 May 2009.

²⁷⁶ De Souza M ‘When non-registration becomes non-recognition : Examining the law and practice of customary marriage registration in South Africa’ *Acta Juridica*, (2013): 239-272 at 245-46

²⁷⁷ Kovacks R J, Ndashe S & Williams J ‘Twelve Years Later: How the Recognition of Customary Marriages Act of 1998 is Failing Women in South Africa’ 2013 *Acta Juridica* 273–291 at 278.

²⁷⁸ *Baadjies v Matubela* 2002 (3) SA 427 (W); *Road Accident Fund v Mongalonkabinde* 2003 (3) SA 119 (SCA).

seen in the case of *Road Accident Fund v Mongalonkabinde*²⁷⁹ where it was held that a marriage certificate remains ‘conclusive proof’ of a customary marriage.²⁸⁰

The geographical location and socio-economic status of women in woman-to-woman marriages will result in this requirement not being fulfilled for the following reasons:

- Lack of knowledge about the legislation;
- Non-education of rights relating to customary marriages;
- Lack of access to relevant government institutions;
- Unfamiliarity of registration of customary marriages to the institution of customary marriage;
- The perception that the woman wants to sell or take over the property of the female husband;
- The misconception that they are entering a civil marriage in terms of the Civil Union Act.

The successful implementation of the RCMA in registering customary marriages is important for succession in woman-to-woman marriages because it will ensure the protection of inheritance rights of widowed spouses and children where proof of the existence of the marriage will be required. The researcher therefore agrees with Himonga and Moore’s appeal to the DHA to “open their doors to researchers to explore registration practices”.²⁸¹ The findings from these explorations will provide evidence-based information that will assist in amending this section in order to ensure successful implementation.

3.2.3 Equal status of spouses in customary marriages

Section 6 of the RCMA provides for the equal status of spouses in customary marriages. This provision is seen as the legislator’s efforts to uphold the Constitutional provisions of equality between men and women.²⁸² This was specifically important for women in customary marriages because of the history of discriminatory provisions of official customary law

²⁷⁹ 2003 (3) SA 119 (SCA).

²⁸⁰ De Souza op cit note 276 at 246.

²⁸¹ Himonga & Moore op cit note 257 at 128.

²⁸² Section 9 of the Constitution.

against women.²⁸³ The legislator was, however, unsuccessful in resolving all the tensions between constitutional and customary law. Perhaps an oversight on the part of the legislator, the Act uses the term “polygamy”, which is gender neutral for the practice of allowing a person to have multiple partners;²⁸⁴ but the use of the words “husband” and “wife” show that the Act provides for polygamous marriages between men and women, where a man marries more than one wife. This does not make provision for other types of marriages found under customary law such as the woman-to-woman marriage, where a woman marries one or more women.

The issue of woman-to-woman marriages was overlooked by legislators in the discussions preceding the adoption of the Act.²⁸⁵ This is because despite the fact that questions regarding these marriages and how the proposed legislation would address them came up during the workshops, it appears that no effort was made to ensure that they are included in the legislation. The South African Law Commission’s report on Customary Marriages makes mention of woman-to-woman marriages in a discussion about the registration of customary marriages.²⁸⁶ The report refers to woman-to-woman marriages as marriages which are “strictly speaking” not common, do not constitute new marriages, are not accompanied by typical marriage ceremonies and payment of *lobolo*.²⁸⁷ These comments were in response to questions raised at a workshop in the Northern Province.²⁸⁸ This is the same province where the empirical research of this study was conducted. The discussion of the findings in Chapter four show that responses to the questions raised at the workshop were inaccurate in their description of the institution of woman-to-woman marriage, except on the issue of prevalence. Paragraph 3.1.11 of the report, however mentions that customary law nuances would have to be given attention, and that marriage certificates should reflect the addition of new persons to an existing marriage.²⁸⁹ The researcher agrees with this

²⁸³ The perpetual minority of women; Rule of male primogeniture; Marital power in customary marriages.

²⁸⁴ As defined by the Oxford English Dictionary, available at <http://oxforddictionaries.com/definition/english/polygamy>, accessed 28 April 2016.

²⁸⁵ Oomen op cit note 50 at 277.

²⁸⁶ South African Law Commission Project 90 “The Harmonisation of the Common Law and the Indigenous Law Report on Customary Marriages” August 1998, page 30 para 3.1.10, http://salawreform.justice.gov.za/reports/r_pj90_cstm_1998aug.pdf, accessed 30 May 2016

²⁸⁷ Ibid

²⁸⁸ Now renamed Limpopo Province

²⁸⁹ Ibid at 31

recommendation, because it would assist in situations of women who enter into woman-to-woman marriages while being parties to existing customary marriages. The recommendation will simplify the complex relationships which exist in such marriages. Its successful implementation will however still be dependent on the recognition of woman-to-woman marriages as valid marriages under customary law.

The Commission's report made recommendations for women in customary marriages to have the same contractual and legal capacity as men.²⁹⁰ This recommendation gave rise to section 6 of the Act which provides for the equal status of wives in customary marriages, and their capacity to contract and litigate in addition to any rights that they may have at customary law.²⁹¹ This shows that the position of customary wives has been strengthened. This section explicitly states that they are equal to their husbands. As Oomen²⁹² noted, this, then, begs the question as to whether the Act grants wives who have married female husbands these same rights, the answer to which is dependent on whether the Act also recognises this type of marriage. The discussion on section 3(1) (b) of the RCMA earlier in the chapter shows how the courts' interpretation of this section implies that payment of *lobolo* is essential in determining the validity of customary marriages. In the context of woman-to-woman marriages, payment of *lobolo* is important because it signifies the existence of a separate marriage from the one(s) the female husband may already be party to, and it legitimises the children born of the marriage and thus affords them inheritance rights. Therefore, it is on this basis that the researcher argues that the Act implicitly recognises woman-to-woman marriages as valid customary marriages. This means that spouses in woman-to-woman marriages have equal status and capacity to contract and litigate in their own right.

The following discussion attempts to show the reasons why the RCMA fails to recognise woman-to-woman marriages explicitly in its provisions. The ongoing debate about the recognition of homosexual marriages under customary law provides some context and reasons into why the legislator failed to expressly recognise woman-to-woman marriages in the Act. As Oomen notes, the adoption of the Constitution in 1994 led to debates on the justifiability of the exclusion of homosexuals from marriage.²⁹³ This argument is based on the

²⁹⁰ Para 6.2.2.24 at page 101

²⁹¹ Section 6 of the RCMA.

²⁹² Oomen op cit note 50 at 278.

²⁹³ Ibid at 280.

equality clause, which prohibits discrimination on the basis of sexual orientation, as provided for in Section 9(3) of the Constitution.²⁹⁴

It has been explained throughout the thesis that same-sex marriages and woman-to-woman marriages are not one and the same institution. Same-sex marriages take place between persons who wish to consolidate their love on the basis of their homosexuality; while woman-to-woman marriages are more concerned with procreation, protection and perpetuation of lineage, inheritance and wealth redistribution.²⁹⁵ Admittedly, some level of affection exists between spouses in woman-to-woman marriages, but this affection is not sexual in nature. Participants' responses on this matter confirm this position, which is discussed in more detail in chapter four.

The parallel that exists between the two institutions of marriage is that the partners find a degree of security and socio-economic benefit for themselves and their children in the recognition of their marriages.²⁹⁶ This, however, does not take away the fact that the recognition of the two marriage institutions is on different legal rationales. The argument for the recognition of same-sex marriages was based on the abovementioned Section 9(3) of the Constitution, a battle which was ultimately won through the promulgation of the Civil Union Act²⁹⁷ in 2006. The defence for the recognition of woman-to-woman marriages is based on the basis of right to culture, and the right not to be discriminated against on the basis of culture, which is provided for in Section 9(3). Woman-to-woman marriages are a cultural practice, and as a result Section 31 combined with Section 211(3) provides the constitutional basis for the recognition of woman-to-woman marriages.²⁹⁸

Oomen concedes, as with many other authors, giving possible reasons why the woman-to-woman marriages issue was not dealt with explicitly. She notes that while the ideals behind the recognition of customary law in post-apartheid South Africa seem to be entrenched in the provisions of the Constitution, the method of ascertainment of practices and their validity remains the same as it was from pre-colonial to apartheid South Africa.²⁹⁹ She

²⁹⁴ Section 9(3) provides that persons may not be discriminated against on the basis of their sexual orientation.

²⁹⁵ Oomen op cit note 50 at 280.

²⁹⁶ Ibid

²⁹⁷ Act 17 of 2006.

²⁹⁸ Constitution Act 108 of 1996.

²⁹⁹ Oomen op cit note 50 at 281.

notes that it is because of the reliance by judges and legal researchers on textbooks about customary law. These are largely based on case law, which reflects only certain aspects of customary law as a result of the influence and impact of colonialism on customary law institutions.³⁰⁰ The discussion in chapter two confirms this position, and shows the reasons that led to the institution of woman-to-woman marriages being side-lined.

3.2.4 Proprietary consequences of customary marriages

Section 7(6) of the RCMA provides that a husband in a customary marriage who wishes to enter into a subsequent customary marriage with another woman must make an application to court to approve a written contract that will regulate the future matrimonial property of his marriages. In the context of woman-to-woman marriages, this provision presents impracticality problems in the following regard:

- a) In the case of woman-to-woman marriages, it is the woman who bears the intention of concluding a subsequent customary marriage. The wording of this section shows the influence of common law ideologies and perceptions of gender. This is because although this section provides for the potentially polygamous nature of customary marriages, it provides for it in the context of male-female polygamous customary marriages. Amadiume,³⁰¹ writing about the practice of woman-to-woman marriage in the Igbo land of South-East Nigeria, highlights the changes in marriage practice and gender relations brought about by colonialism in traditional communities. She notes how “in the traditional society, a flexible gender system meant that male roles were open to certain categories of women through practices such as male daughters and female husbands. These institutions placed women in a more favourable position for the acquisition of wealth and formal political power and authority”.³⁰²

She further notes that:

“Under colonialism, these indigenous institutions, condemned by the churches as pagan and anti-Christian, were abandoned or reinterpreted to the detriment of women. Indigenous customary laws associated with the institution of woman-to-woman marriages became

³⁰⁰ Ibid

³⁰¹ Amadiume I. (1987) *Male daughter, Female husbands: Gender and sex in an African society*. London: Atlantic Highlands, N.J. : Zed Books Cape Town at 123.

³⁰² Ibid

confused as a result of their reinterpretation according to canon law and Christian morality.”³⁰³

The woman-to-woman marriages referred to may have taken place in a different country, but the fundamental principles and reasons for their conclusion are not only related, but are similar in many instances.³⁰⁴ The concept of gender ideologies and perceptions as mentioned by Amadiume is important and confirmed by the Modjadji Royal Council members in the focus group discussion. In explaining the existence of woman-to-woman marriages under the Lobedu customary law, a former teacher and academic serving on the council said:

“The concept of gender as understood from the Western perspective does not apply in the Lobedu customary law and concept of marriage. Marriages did not take place between men and women only; women were also allowed to marry other women. The central issue of consideration in approving a marriage for the Lobedu is the ability of the person intending to marry, to provide for the potential wife and the children she will bear. Where a woman was wealthy and intended to marry another woman to bear children for her, such marriages were allowed.”³⁰⁵

- b) The woman-to-woman marriage at times takes place in a situation where a widow marries another woman to bear children for her deceased husband in the event where she herself was barren, or where she had had only girl children and wished for a male heir to the property. This raises the question of how the contract that this section requires should be drawn up, and how it would relate to the distribution of the property and estate of the widow’s deceased husband. It is worthwhile to note that the conclusion of this woman-to-woman marriage legitimises the estate’s remaining in the control of the widow, as guardian and caretaker until the heir is born and has come of age. This was the consensus among the groups of participants of the field work conducted. When asked whether the conclusion of the woman-to-woman marriage legitimises the widow being in control of the estate, all participants agreed on the

³⁰³ Ibid

³⁰⁴ Oomen op cit note 50 at 279.

³⁰⁵ Oral interview, focused group discussion, male council members, Lewatle village, 16 January 2016. See also section 2.3.2 discussion on Lobedu marriage and changes in ideology.

matter, further providing that the marriage not only legitimises, but protects, the position of the widow in relation to the property.³⁰⁶

3.3 The Reform of the Customary Law of Succession and Related Matters Act

The RCLSA is the legislation that makes specific reference to woman-to-woman marriages under customary law. This it does through the sections of the Act discussed below.

3.3.1 Definitions

Section 1 of the Act provides the definition of a descendant as being a person who is a descendant in terms of the Intestate Succession Act³⁰⁷, and includes:

- a) “[A] person who is not a descendant in terms of the Intestate Succession Act, but who, during the lifetime of the deceased person, was accepted by the deceased person in accordance with customary law as his or her own child; and
- b) [A] woman referred to in section 2(2)(b) or (c)”.

The provision contained in paragraph (a) of this Act is what led to the inclusion of the investigation into what is the customary law of acceptance of children under the Balobedu customary law.

This was an important aspect of the research as it impacts on the right to inheritance of children born from woman-to-woman marriages. The legislation, not having set out expressly what the requirements were for proving whether or not the acceptance by the deceased person took place, left the determination to the living customary law of the people concerned. The data collected from individual interviews and focused group discussions held with widowed spouses of woman-to-woman marriages at research sites, together with the Traditional leaders and community members, yielded the following answers:

- a) The three categories of participants agreed on the concept that *ngwana ke wa dikgomo*, meaning that according to the Lobedu living customary law, the paternity of a child is determined by he who paid the bride price, not the biological father. This also includes children born from adulterine relationships. When asked the question “Who does the child belong to, where a married woman had an adulterous relationship and had a child?” the

³⁰⁶ Oral interview, focused group discussion, male community members, Zizo village, 17 January 2016.

³⁰⁷ Act 81 of 1987.

unanimous response was that the child belonged to the one who paid the bride price.³⁰⁸ The interesting response from the focus-group discussion held with the male members of the Modjadji Royal Council was that:

“[A] man is not allowed to come here and say that a child has been conceived and he is not the father. That in our culture is an insult. Where were you when another man had an opportunity to plough your field? You paid the bride price for your wife; therefore every child that is born into your home is yours and will be raised as such. That child will have the same rights to your estate as the children you biologically fathered. The child will also use your surname.”³⁰⁹

In considering the nature and context of how children are born and fathered in woman-to-woman marriages, this living customary law provision is not only commendable, but applauded for its comprehensive and farsighted inclusion and protection of children. It not only provides for, but protects, the right of inheritance of the child to the female husband who paid his/her mother's bride price.

b) The three categories of participants further agreed that the use of the surname of the female husband by the child proves acceptance of the child by the female husband as her own. This then cements the child's right to inheritance.

c) In both the cases of the woman-to-woman marriages with the Queen and those outside .the royal family, the birth rituals performed for the child by the female husband and elders of the family serves as further proof of acceptance of the child. The birth rituals are performed by a traditional healer, and the naming of the child is among the rituals.

The processes explained above show the manner in which Lobedu living customary law has sought to address the issue of the proof of acceptance of a child by the deceased. This assists to implement provisions of Section 1 about the deceased having accepted the children during his/her lifetime. As seen from the explanation, such determinations are valid and confirmed in terms of Lobedu living customary law.

The next relevant definition in section 1 is that of traditional leader. Section 1 of the Act defines a traditional leader as a traditional leader as defined in the Traditional Leadership

³⁰⁸ Oral interview, focused group discussions, male and female traditional leaders Zizo and Lewatle villages, 16-18 January 2016

³⁰⁹ Oral interview, focused group discussion, male traditional leaders , Lewatle village, 17 January 2016

and Governance Framework Act.³¹⁰ In this Act, traditional leaders include a queen as found in the Modjadji dynasty. Bekker and Koyana note that the Act³¹¹ does not deal with succession to traditional leadership positions, but Section 6 of the Act provides for the disposition of property held by a traditional leader in an official capacity.³¹² It provides that “nothing in this Act should be construed as amending any rule of customary law which regulates the disposal of the property which a traditional leader who has died held in his or her official capacity on behalf of a traditional community as defined in the Traditional Leadership and Governance Framework Act”.³¹³

3.3.2 Determination of “spouse” or “descendant”

Section 2(2)(c) of the Act makes the provision that where the deceased is a woman who was married to another woman under customary law for the purposes of providing children for the deceased’s house, that other woman must, if she survives the deceased, be regarded as a descendant of the deceased. This provision takes us back to the issue of the importance of the recognition of customary marriages. The reason is that if, from the provisions of Sections 2 and 3 of the RCMA, the manner in which woman-to-woman marriages are concluded and celebrated validates them as customary marriages, that means that the spouses to such marriages should be regarded as intestate heirs of their deceased spouse’s estate and not as descendants like their children.

It is therefore not clear whether spouses of woman-to-woman marriages are intestate heirs of their deceased spouse’s estates, or descendants. The clarity is important because it determines which rules of succession apply, and what the inheritance value of the spouse will be. In the application of the Intestate Succession Act, a spouse inherits a child’s portion or an amount that does not exceed the fixed amount as set out in the *Government Gazette*, where the deceased is survived by a spouse or spouses, as well as descendants.³¹⁴ The amount is currently fixed at R250 000. In relation to the ambiguity regarding whether spouses in woman-to-woman marriages should be regarded as “spouses” or “descendants”, Rautenbach

³¹⁰ Act 41 of 2004.

³¹¹ The Reform of Customary Law of Succession and Related Matters Act 11 of 2009

³¹² Bekker J C, Koyana D S. ‘The judicial and legislative reform of the customary law of succession. ‘ *De Jure* (2012) Vol 45 no3: 568–584 at 575.

³¹³ Ibid

³¹⁴ Section 2(2)(a) of the RCLSA.

and Meyer note that the Masters of the High Court decided to interpret the contradiction in the provisions of Sections 2(2) (b) and (c) to mean that women in these sections are spouses and not as descendants to ensure that the women are placed in the best possible situation.³¹⁵

3.3.3 Types of Property and enforcement of inheritance rights

The provision in section 6 of the RCLSA is particularly important for woman-to-woman marriages entered into with the Queen, because of the findings of interviews with individual participants who had concluded marriages with the Queen. The research into these marriages was limited to succession to inheritance, unless it was found that the link between succession to status and succession to property were intertwined. When asked whether, upon the death of their respective female husbands, they and their children had inherited any property from the estate, the answer was a resounding no. This can be explained by the provisions of this section, and the provisions of living customary law that regulate the disposal of property which the traditional leader, the Queen, held in her official capacity.

The focused group discussion with the Modjadji Royal Council revealed the following categories of property which are held by the Queen in her official capacity:

- a) *Mabu* – The land, which includes the entirety of the Modjadji kingdom in as far as it expands, and also includes sacred trees such as the cycad trees and their nursery,³¹⁶ and the sacred forest.³¹⁷
- b) *Tshelete ya sechaba* – The funds that the traditional community pays as taxes and levies for land occupation, businesses, and homage to the Queen.
- c) *Dithokgola* – The traditional ornaments, musical instruments, and other secrets used to make rain as per the tradition of the Lobedu.

Bekker and Koyana note an important aspect of this section that impacts on the right of inheritance of women married to the queen. They note that succession to status and

³¹⁵ Rautenbach C & Meyer M M ‘Lost in Translation: Is a Spouse a Spouse or a Descendant (or Both) in terms of the Reform of Customary Law of Succession and Regulation of Related Matters Act?: Aantekeninge’ *Tydskrif vir die Suid-Afrikaanse Reg* 1 (2012) 149–160 at 159.

³¹⁶ *Encephalartos transvenosus*, See South African National Biodiversity Institute at <http://www.sanbi.org>.

³¹⁷ The 560ha Modjadji Cycad Reserve is a unique rain forest that remains unspoiled. Some of the cycads reach heights of 13m and bear cones that weigh a hefty 34kg. Game such as blue wildebeest, impala, waterbuck, nyala and bushbuck can be spotted, and some 170 species of birds are recorded. See <http://www.golimpopo.com/modjadji-cycad-forest>.

succession to property are intertwined in the case of traditional leaders.³¹⁸ They confirm that it is unlikely that the property of a traditional leader would be “turned into money and shared among common law heirs, including the wives of the deceased”.³¹⁹ The findings confirm this position, as both the participants and the Royal Council confirmed that neither the wives nor their children inherited from the female husband, the Queen. The Act provides for the disposal of the property to take place in terms of customary law; the nature of the property in question cannot under customary law be distributed; therefore, the absence of inheritance is justified by the provisions of customary law. This leaves the widow in a compromised position, without a right of recourse, which then ultimately means that widowed spouses and children’s inheritance rights are not enforceable. The following assists to explain this position:

- The land cannot be disposed of in terms of the Intestate Succession Act,³²⁰ but through the rules of customary law which provide that it must be passed on to the person next in line to ascend the throne. This makes land indisposable and distributable to the widows and their children after the death of the female husband. Bekker and Koyana confirm this, although speaking in the context of a male chief. The land will pass on to whoever is next in line to ascend the throne.³²¹
- The monetary property that the Queen held in her official capacity does not belong to her and her estate, which her wives and children can claim and thereby enforce their right to inheritance. The money is communal in nature and belongs to the traditional community and she is, because of her position, the caretaker.
- The *dithokgola* cannot under any circumstances be distributed as their existence and value is linked to the culture and divinity upon which the dynasty is based. No person can lay claim to them, as the determination of who will be the next caretaker and where they are kept is a closely guarded secret.
- An equally important matter to consider is that the Act implies that a traditional leader is an individual whose property passes on to the heirs after his or her death. Bekker and Koyana note that that is wishful thinking, and state that succession to status and

³¹⁸ Bekker & Koyana op cit note 313 at 575.

³¹⁹ Ibid

³²⁰ Act 81 of 1987.

³²¹ Bekker & Koyana op cit note 313 at 576.

succession to property are intertwined.³²² The fieldwork conducted confirmed this point of view, in that none of the widows and their children had in fact inherited from their female husband, for reasons set out above.

- The home of the traditional leader is, as Bekker and Koyana note, a socio-political unit. It is not only where the traditional leader and her wives and children live, but also the *kgoro* where matters are heard, and traditional rain-making dances and rituals are performed. It is the seat, root and centre of the traditional leadership. This results in it not having any monetary value, and it therefore cannot be sold and the proceeds thereof distributed among the descendants.³²³
- When a traditional leader dies, the succession to status and property may be delayed, at times by many years, until the determination of who is to ascend the throne is made. This is currently the case in the Modjadji dynasty, where the last reigning Queen Makobo Modjadji passed away in 2005, leaving behind a minor daughter who is supposed to be the next in line. A regent has been put in place until she has reached the age of maturity; however, like all succession to status matters, there are always disputes relating to the legitimacy of the appointed successor.³²⁴

In sum, the explanation given above shows the rare moments when provisions of both official and living customary law align regarding succession matters under customary law. The discussion shows how succession to status and succession to property in royal marriages are intertwined, and how this impacts on inheritance rights for widows and their children. The fact that no inheritance took place can be viewed as a violation of section 9(3) of the Constitution and non-adherence with the applicable legislation. However, the explanation given above shows how the type of property in question makes it difficult for inheritance to take place.

3.4 Conclusion

This chapter discussed and analysed the provisions of the RCMA and the RCLSA in relation to woman-to-woman marriages. The RCMA provides for the recognition of customary

³²² Ibid

³²³ Ibid

³²⁴ Ibid at 577.

marriages, the legal requirements for the validity of customary marriages, the equal status of spouses, and the proprietary consequences of customary marriages.

Chapters one, two and four³²⁵ re-affirm the complexities that are found in woman-to-woman marriages. In the analysis and discussion of the provisions of the RCMA, it has been shown that these complexities are challenging to address because of the lack of adequate provisions in the legislation that is supposed to regulate them.

The recognition of woman-to-woman marriages poses a challenge because although they are customary marriages, they are different from the commonly known form of customary marriages between a man and a woman. The fact that the marriages are between two women makes them more complex. In analysing the provisions of both the RCMA and RCLSA, the following observations were made:

- The Acts have imported many of their concepts from the individualistic way in which civil marriages are concluded and regulated. This has made them to not be a true reflection of how customary marriages are practiced, making the provisions impracticable.
- The RCMA fails to expressly provide for the recognition and status of woman-to-woman marriages, leaving the status of these marriages to be uncertain, and their recognition to be implied from what Section 3(1) provides about “customary marriages to be entered into and celebrated in terms of customary law”. This leaves the determination of the status of these marriages in the hands of the courts. However, the ironical situation is that the socio-economic status of these women makes access to these courts a rumour. This results in the Act being paper law and not having a real impact on the lives of women living under customary law.
- The limited research and knowledge surrounding the nature and concept of woman-to-woman marriages under customary law adds to the misconception that they are marriages as provided for by the Civil Union Act,³²⁶ on the simple basis that they are marriages between two women. The mention of “woman-to-woman marriages” automatically translates to same-sex marriages, but the latter has been proven to be incorrect.

³²⁵ See sections : 1.3, 1.4 (chapter 1), 2.2, 2.3 (chapter 2) and 4.11, 4.12 , 4.13 (chapter 4)

³²⁶ Act 17 of 2006.

- The fact that succession under customary law does not take on the individualistic approach makes it more challenging to apply common law concepts of inheritance to customary estates. This is submitted as one of the reason why the legislation is unable to adequately address the succession complexities found in woman-to-woman marriages.
- There have been progressive changes in the customary law of succession and the rights of women. This is shown in the male primogeniture rule being declared unconstitutional.³²⁷ The field work conducted, however, showed that the practice is still very relevant and continues to be in practise in customary marriages, especially woman-to-woman marriages. The registration of customary marriages proves to be a burden for women who attempt to register their marriages after the death of a spouse in order to access benefits. Women who have attempted to do so have not been successful because amongst other challenges identified, the officials tasked with registering customary marriages at the Department of Home Affairs refused to register the marriages in the absence of the other spouse.
- The problems relating to the RCMA and RCLSA and woman-to-woman marriages are two-fold; the first relates to the way the legislation is written, and the other relates to the implementation of the legislation.

The next chapter discusses the findings of the study in detail. Participants' responses are used to show the ways in which official customary law addresses, or fails to address, succession complexities in woman-to-woman marriages.

³²⁷ *Bhe v Magistrate Khayelitsha* 2004 (2) SA 544 (C); 2004 (1) BCLR 27 (C).

CHAPTER 4: THE LIVING CUSTOMARY LAW OF WOMAN-TO-WOMAN MARRIAGES IN PRESENT DAY BOLOBEDU

4.1 Introduction

This chapter presents findings from individual interviews held with widowed spouses of woman-to-woman marriages, and focused group discussions held with community members and traditional leaders.³²⁸ The chapter presents lived experiences of widowed spouses from which information relating to conclusion of woman-to-woman marriages and requirements for conclusion of such marriages can be gathered. The information obtained from focused group discussions helps to confirm issues that arose from individual interviews, and provide the context and living customary law upon which these marriages are based.

The arguments presented in this chapter continue on the argument path on which previous chapters have been set in addressing the social, political and legal background of woman-to-woman marriages. This chapter will address recurring themes from data analysis. The findings from the analysis will help respond to the research question and objectives.

Inheritance issues have long been at the centre of debate and contestations.³²⁹ The rules relating to succession and inheritance within communities cannot be understood outside of the context in which they take place. The research question and aims of the thesis, although fundamentally based on the law and its provisions, cannot be answered satisfactorily without taking into consideration who the women who conclude woman-to-woman marriages are, where they live, and what their socio-economic status is; the political landscape that impacts on their decision-making; and, most importantly, their knowledge of law and experiences that they have had with it.

The similarities and differences between the two types of woman-to-woman marriages found at Bolobedu will be discussed within the context in which they take place. The discussion will show the ways in which official customary law has succeeded or failed in addressing succession complexities found in woman-to-woman marriages.

³²⁸ The interviews and focused group discussions took place between December 2015 and January 2016.

³²⁹ Biblical references to inheritance in Numbers 27:2 and Genesis 27 were made by participants in interviews.

4.2 Women who conclude woman-to-woman marriages

It is important to note that the findings discussed in this chapter confirm much of the literature on woman-to-woman marriages. The findings, however, give more detailed information and shed light on the intricate and complex relations between the spouses and their families, together with the men who procreate with the spouses. The data highlights the general succession laws and differences in application in the two categories of woman-to-woman marriages discussed in this chapter. Marriages with the queen present increased levels of complexities in comparison with marriages concluded among community members. The chapter discusses the data against the backdrop of the literature and the theoretical basis of the study. The use of past tense in describing some of the practices is not intended to suggest that all the attitudes and practices referred to in this chapter have ceased to exist. It is used to indicate that practices that make up woman-to-woman marriages no longer exist as a whole as a result of changes that have taken place.

Two categories of widowed spouses were interviewed. These were community members who entered into woman-to-woman marriages among themselves, and women who entered into woman-to-woman marriages with the queen. There are similarities between these marriages, particularly regarding the nature of the marriages and the marriage relationship that exists between spouses. There are, however, distinct differences owing to the royal nature of marriages concluded with the queen and political implications of such marriages. As such, the complexities that arise from such marriages and administration of inheritance take place in a different manner and under different rules.

One of the distinct similarities is demographic characteristics. Participants were more or less within the same age group, which ranged from ages 50 to 68. This means that their marriages were concluded when they were roughly 15 years old. This estimation is based on participants' explanations and is consistent with the age group of young girls' marriages after initiation ceremonies are held for them. The participants requested their identity books to be brought out so their ages could be recorded during the interviews.³³⁰ Their marriages were concluded almost immediately after initiation ceremonies had been held for them, which they

³³⁰ Participants requested their identity books to be brought out because they could not say from the top of their heads when they were born. They referred to a period of famine or the birth of a child. However, their ages were determined using their identity books.

referred to in response to the question whether they remembered when they had entered into their marriages. The participants share ethnicity as they are all Selobedu speaking, and relatively have the same levels of education. Their literacy levels are somewhat similar in that they did not attend school, and could neither read nor write. Participants' economic occupations similarly range from the sale of home-brewed beer, to working on other people's farms and as packers and cleaners in local shops which they referred to as "cafés".

One of the demographic differences between participants was their social status. Women who concluded woman-to-woman marriages with the queen were of royal descent and had blood ties to the royal family. This is the reason why some of them had worked as chiefs or headwomen of villages and in the council offices.

The religious affiliations of both categories of women ranged from Christian in the attendance of mainstream churches such as the Lutheran Church and Dutch Reformed Church,³³¹ while others attended the Zion Christian Church (ZCC). Some of them were not affiliated to any church and practised African culture through the performance of rituals. Participants who were affiliated to the mentioned churches were not divorced from practising African culture. They slaughtered animals and held traditional ceremonies during the month of September when the royal family held their annual *Thokgola*. They also consulted the services of traditional healers after the birth of a child and regularly appeased the ancestors by slaughtering animals and brewing traditional beer. The location, language and educational level of participants are generally homogeneous. The distinct variables are royalty and age range. These two variables do not affect the validity of the data because the information provided by the participants showed a relatively similar understanding and knowledge of woman-to-woman marriages.

4.3 Nature and conclusion of woman-to-woman marriages

4.3.1 The centrality of consanguinity

From the onset, discussions with the participants revealed characteristics of marriages that appear to be founded on culture and tradition. Primarily, it was explained that no gender roles formed part of the institution of marriage because women are allowed to marry other women.

³³¹ Chapter two discusses the arrival of missionaries from these churches in Bolobedu.

It was, however, made clear that men are not allowed to marry other men. This position can be explained by the cultural logic of childbearing in customary marriages, which places an obligation on a bride to perpetuate her husband's lineage by giving birth to children. The flexible gender roles in Bolobedu make it possible for a woman to fulfil this obligation by entering into a woman-to-woman marriage when issues of barrenness or lack of a male heir arise.

The main requirement for approval of a marriage taking place was ability of the potential suitor to provide financially for the family. Whether this potential suitor was male or female was not a matter of importance. Marriages are entered into to strengthen kinship ties and address issues of paternity and succession, and one of the distinct features is that very rarely would such marriages be entered into with a stranger. This custom is known as endogamy.

The spouses have relational ties to each other's families through a prior marriage, or a paternal aunt. Concluding a woman -to- woman marriage is a family decision, taken after much deliberation by the elders. A potential bride is nominated based on the strength of the family ties to the female husband and her potential ability to be a good wife who will adhere to the family rules and traditions.

The study found that woman-to-woman marriages still occur, but in a limited way. The reasons for their decreased occurrence will be discussed later in section 4.12. Wealth is an important requirement. A person of wealth is entitled to marry because he/she will be able to provide for the spouse and children. In this context, requirements mean what is considered to be important for the conclusion of woman-to-woman marriages.

4.3.2 Forms and context of woman-to-woman marriages

Widowed spouses gave descriptions of the context and forms of woman-to-woman marriages. Their marriages were concluded within either context or took the form of one or more of the following:

- “*Dikgomo di boela shakeng*”, which means that cows must be returned to the kraal from which they came, with a bride born from the woman whose bride price was paid for with them. This means that where cows were used to pay the bride price for A,

and A cannot have children, A is allowed to marry a wife born from the woman who was married by the cows that were received from her marriage.

- Woman-to-woman marriages took place in situations where issues of witchcraft were being addressed. Customary marriages are about the consolidation of families and their relationship and not about individuals.³³² If a young woman gets pregnant by a man whose family is known for or suspected of witchcraft, her family will not agree to her getting married into that family. The family arranges for her aunt to pay her bride price and she becomes her wife. By so doing, they avert relations with that family while at the same time providing for paternity of the child, ensuring that the child is not born out of wedlock.
- When a married woman cannot have children the first solution is for her family to send a maiden to come and bear children for her. This is what is referred to as “*hlatswadirope*”. This means that by becoming her wife, the maiden is “washing clean” the thighs of the woman who could not bear children in her marital home.

4.3.2.1 Woman-to-woman marriages concluded among community members

Woman-to-woman marriages entered into by participants paint a picture of a time gone by, when rules of culture and tradition were the order of the day. This is because they gave descriptions of how woman-to-woman marriages were concluded in the past. There are changes in how the marriages are concluded in present times, the key change being that the potential bride’s consent is sought and a discussion held when the marriage is initiated. This is different from when the participants’ marriages were concluded, because their consent was not sought, nor was a discussion held. The process of conclusion of these marriages rested largely on strengthening of kinship ties. This was based on the justification that family traditions, culture and ways of life are kept intact as the bride will not only share the same interests as her aunt, but will also be of good nature and seek to uphold family traditions.

Participants said that reasons why such marriages were possible among the Lobedu was because young women who were born from such marriages, or grew up being aware that such marriages take place, were more likely to be inclined to enter such marriages themselves because they had an understanding of how they work. The argument is that ordinarily, a

³³² Bennett T W *Customary Law in South Africa* (2004) Cape Town: Juta & Co Ltd. at 199.

woman who is not from Bolobedu is unlikely to agree to such a marriage as it may not form part of her culture, and she is therefore not prepared with regard to the concept of such a marriage. Women given to the queen as wives are the exception to this argument. This is because some were not of Lobedu descent. Such marriages are further explored in section 4.3.2.2.

There are different circumstances in which woman-to-woman marriages are concluded. Woman-to-woman marriages take place when a powerful traditional healer accumulates a considerable amount of wealth and wishes to marry another woman. The woman takes over her duties as a wife to her husband. This type of marriage takes place in situations where a female husband's divinity obligations no longer allow her to have sexual relations with her husband, and she thus marries another woman to provide for the sexual needs of her husband. Furthermore, this applies where a female husband is aged and has reached menopause while her husband is still sexually active. She marries another woman to take over the sexual needs of her husband and in both situations, the woman bears children for her female husband, and they belong to her house. It is important to note that although this setup is similar to what happens in polygamous situations in most African communities, where the first wife initiates the marriage of the second wife, there is one distinct difference that distinguishes woman-to-woman marriages. The difference is that the male husband of the female husband in woman-to-woman marriages is not considered to be the husband of the woman married by his wife, even though they may have sexual relations and have children together. In woman-to-woman marriages, the woman initiates the marriage and marries the woman for herself. This means that the female husband is both a wife and a husband in this particular setup.

A woman who does not have children enters into a woman-to-woman marriage to provide children for her household. If her husband is still alive, he is the nominated person to procreate with the wife to produce children for the female husband's household. Woman-to-woman marriages are also entered into where a woman does not have a male child. The female husband marries a woman to bear a male child who will be an heir to the property. In their explanation of why the absence of a son was a sufficient reason to warrant woman-to-woman marriages the royal council's response was that:

woman-to-woman marriages are entered into to address issues of succession and inheritance. Inheritance becomes an issue when there are no male children. In the Lobedu culture the male child is the heir, the girl does not inherit.³³³

Where a woman is aged and left alone in her home because her children have married, she marries a woman to take care of her and do the chores that age no longer allow her to do such as fetching water, cleaning the yard, doing the laundry and cooking. This is what is commonly referred to as “*ngwetsi ya lapa*”, meaning “bride of the family”. The woman is allowed to have sexual relations with a suitor of her own choice, although it is often preferred that this should be with a close relative of the family. The children she bears belong to her female husband’s household.

4.3.2.2 Woman-to-woman marriages concluded with the queen

It is important to state from the beginning that the widowed spouses who participated in this research are widows of previous queens who have passed away. They were married to different queens, but are all considered to be wives of the queen because when one queen passes away, her successor takes over all her duties. This means that they also become wives of the next queen. They have the choice to leave after the death of a queen, but many have chosen to stay because they have built homes and established community relations. Woman-to-woman marriages entered into with the queen are generational marriages from the perspective of the queenship, and are commonly centred on two concepts. These are “*hlatswadirope*” which means “to wash the thighs clean”, and is applicable in the context where a woman gets married to the queen to wash the thighs of her paternal aunt or sister who is already married to the queen but is unable to have children. This woman, by giving birth to children on behalf of her aunt or sister, washes her aunt or sister’s “dirty” thighs that could not bear children for the queen.

The second concept of “*Mmamolatelo*”, which means “she who has followed”, refers to a situation where a woman “follows” her aunt or sister and marries into the same family her aunt or sister is married into. This takes place especially with a niece and her paternal

³³³ Oral interview, focused group discussion, male traditional leaders, Lewatle village, 16 January 2016.

aunt. The paternal aunt would get married to the queen and years later, her niece “follows” her and also gets married to the queen. The quotation below explains how this would happen:

“They sent people to my house, and they brought some money with them. They did not say that it was for my *magadi*, they said it was Christmas money. They did not pay *magadi* for me, they said that since my *Rakgadi*,³³⁴ my father’s sister, was married and cows were paid for her... and it was those cows that were used to pay for my mother’s *magadi*. They said I’m repaying for it. That is the reason I was married to the queen. My aunt was married here, by Queen Modjadji. They paid two cows for her *magadi*, and those two cows paid for my mother’s *magadi*. So I became *Mmamolatelo* because I followed my aunt.”³³⁵

Marriages entered into with the queen are with close relatives who are families that form part of the clan of the royal dynasty. These are daughters from the Modjadji, the Mampeule, the Molokoane, and the Mathekga families,³³⁶ and it is from these families that maidens are given as wives as a sign of loyalty and allegiance to the dynasty and its continued existence.

The traditional leaders of the respective villages under the leadership of the queen also send their daughters to be wives of the queen. This is done to show loyalty and ensure the political rule of the queen, and that the dynasty is ruled under one vision and with no political unrests. It was explained that when a traditional leader of a village has given a daughter to be a royal wife, it is unlikely that he would turn against the queen. This is because his behaviour affects the levels of comfort his daughter enjoys within her marriage and the treatment she receives.

4.4 The role players and process of conclusion

The process of concluding woman-to-woman marriages involves key role players who are members of the family. Elders of the family of the woman intending to marry a wife discuss the situation, and the discussion is either prompted by the potential female husband’s suggestion to marry another woman for the reasons stated by her, or the family itself suggest it after having observed that there are no children or no male children. The family enquires

³³⁴ Paternal aunt.

³³⁵ Individual interview , Lewatle village, 22 December 2015

³³⁶ These families are the direct descendants of the biological brothers of the queens of Bolobedu. This is in line with the endogamous (brother-sister) relationship central to Lobedu marriage; op cit note 88 at 152.

from the female husband if there is anyone in particular that she has in mind, or whether they should make a suggestion. The nomination of the potential bride is based on the ability of the female husband to have a peaceful relationship with her and a level of fondness shared between them. Bennett notes that domestic discord often arises from people who are unhappy about their match.³³⁷

A delegation is sent to the potential bride's family to request her hand in marriage. This is similar to what will take place in *lobola* negotiations when a man asks for a woman's hand in marriage. The families discuss the type of marriage to be entered into, and agree on the number of cattle to be paid as the bride price. After the negotiations are finalised, the bride is transferred to the home of her female husband, where she lives. The family's involvement in the process is crucial for the validity of the marriage and the success of the marriage relationship.

4.4.1 Bridal consent and participation

Participants grew up in a time when consent as it is commonly known in present times did not exist. When a marriage was negotiated, it was an agreement between the two families, and whatever they agreed on bound the potential bride. The potential bride would be notified of the agreements that had taken place between the two families, and of her new marital status. The elders would sit her down, and advise her on her behaviour, manners, and attitude when she reached her in-law's place. She was told of the type of marriage that she had entered into, and rules governing such marriages such as relations with men outside of her marriage and how to conduct herself. The following quotation supports this analysis, which is what the large majority of participants, responded with when asked what the motivation had been for them to enter such marriages, and whether they had consented to them:

“It was my parents. We were not allowed to say no. We were told as children what was going to happen, and as a child you had to obey your parents' instructions.”³³⁸

Two of the participants who were married to the queen said that they had at first refused to go ahead with the marriage, but ended up giving in because their fathers would physically abuse

³³⁷ Bennett op cit note 332 at 200.

³³⁸ Individual interview, Lewatle village, 26 December 2015

their mothers saying that they were the reason that their daughters had refused to go ahead with the marriages.

This means that women had not ordinarily agreed to enter such marriages, but were placed in situations that resulted in them agreeing to avoid continuance of events such as their mothers being physically abused.

4.5 The marriage relationship

The marriage relationship between the two women is that of husband and wife, except that they do not have any sexual relations. The female husband has the duty to provide for the wife financially, provide a home for her to live in, food, and every other duty a male husband would be expected to perform for his wife. The wife has the duty to bear children for her female husband, to cook, clean, and do laundry for her, and afford her the same level of respect and reverence that she would a male husband.

The wife must inform her female husband of the person with whom she is having a relationship with if a suitor has not been appointed for her. She must also let her female husband know when she suspects pregnancy so that the elders may be notified.

4.6 The marriage experience

4.6.1 Social and political status

Woman-to-woman marriages benefit female husbands who do not have children because it removes the social scorn of being called a “*moopa*”, or barren woman. The woman she marries bears children for her household, making her a mother and redeeming her status in society and in her marriage. The children are legitimised by the marriage, which is in line with the saying “*ngwana ke wa dikgomo*”. The female husband without a male child benefits by having the estate of her late husband within her control as the custodian of the property until such time as the heir is of age. This protects her status within the family, and solidifies her ability to bear an heir to her husband’s property. The marriage also serves as a sign of loyalty towards her marital home because the inheritance is kept within the family, as opposed to its being seen to “leave” the family if she were to opt to enter a new marriage herself and take on a new surname. The surviving spouse has access to the land and the property for use, and can continue staying on the property. She is allowed to farm on the land

but cannot sell portions of it. The property is changed into the names of the heir at the tribal council offices, and she pays the communal taxes and levies on his behalf where the heir is still a minor.

Marriage is regarded as a high achievement for a woman in Bolobedu, the absence of which is looked down upon with scorn. The elderly women and men in the group discussions spoke very harshly of young women having children out of wedlock in recent times, and those cohabiting with men who had not paid their bride price.

A young woman who has attained marital status through a woman-to-woman marriage acquires the respect accorded to every married woman within the community. Wives of female husbands are given the same level of respect as women married to men. This social status affords wives the opportunity to be members of married women's community groups and take part in married women's activities. They are referred to as "*Mogatsa wa mokete*" meaning so-and-so's wife. The manner in which this was explained showed that people who were referred to in this manner are regarded highly. The queens' wives receive social recognition within communities because they are known as wives of the queen. This elevates their social status and affords them benefits when attending social gatherings such as weddings and traditional ceremonies. Children equally benefit and are commonly referred to as "*ba ka mosata*" which means those of royal blood. This gives them influence over many things in the community, particularly male children, who are not short of people wanting to be their friends, or potential girlfriends to gain favour with the royal family.

Woman-to-woman marriages are politically important for communities because when a woman from a certain village is given as a wife to the queen, she acts as the spokesperson for that village. This means that whenever there are issues from that village that require the queen's attention, she will be the person to approach. She is known as "*Mmakhona*" which means "its mother", and this is because she takes care of the issues of that village like a mother would.

4.6.2 Economic benefits and maintenance

Lobedu customary law generally dictates that the head of the home is the provider. This can be in the form of a male or female husband, whichever applies in a given situation, and this is

in line with what literature provides on the roles and responsibilities within customary marriages.³³⁹ Where the female husband is a pensioner, it is said that:

“She must come back from receiving her pension money with a bag of maize on her head and a live chicken under her arm.”³⁴⁰

Woman-to-woman marriage affords financial benefits and maintenance to the wife of the female husband. This takes care of the needs of the wife, who, although in a peculiar type of marriage relationship with her female husband, still benefits in the same way as her peers in male-female marriages. This is found to be the case with woman-to-woman marriages among community members. A different situation regarding maintenance of wives of the queen, however, exists, which is discussed below in section 4.8.

4.6.3 Hardships endured in the marriage

The queens’ widowed spouses spoke of hardship during their marriages. This hardship is related to issues of maintenance for both them and their children. In response to whether they had experienced any negative treatment, the majority said in more or less the same words:

“You know what; we have not been treated well at all. You may go and ask the other wives and they will tell you the same thing. We have suffered, and up to this day we are staying here because we have built houses here. Otherwise we would have left. We have not enjoyed anything; we do not know the support from our husband the queen. When it comes to marriage we don’t even look married. There is no prestige to it. The only time we are acknowledged is when we go out to other villages because people know that we are wives of the queen. We have not been treated well, especially being supported financially and with food. We are even going to our graves. We are here because we respected our parents’ wishes. We did not go to school, against our wishes. Other women are being supported by their husbands, but we are here.”³⁴¹

³³⁹ Phillips A (ed) *Survey of African Marriage and Family Life* (1953) New York: Oxford University Press at 17.

³⁴⁰ Oral interview, focused group discussion, female traditional leaders, Lewatle village, 18 January 2016.

³⁴¹ Individual interview, Zizo village, 31 December 2016 .

Woman-to-woman marriages among community members did not present hardships specifically related to maintenance. The participants spoke of quarrels and differences typically present among family members.

It may be observed that there is a contradiction between how woman-to-woman marriages are perceived by the community, and the actual experiences of the spouses. This is with regard to the discussion in 4.6.1 and 4.6.3. The contradictions are justified by the concept of perception versus reality, which is applicable in any given situation. The manner in which third parties perceive or understand woman-to-woman marriages and the actual experiences of the spouses is different. The community accords respect on the basis of marital status, irrespective of the gender of the spouse. The participants' responses are made with reference to their lived experiences, which they perceive in a negative light in some respects even though there are acknowledgements of other benefits within the same marriage as shown in 4.6.2.

4.7 Children born of woman-to-woman marriages

4.7.1 Paternity of children

Paternity of children born of woman-to-woman marriages is determined by the family in question, depending on their preferences and tradition. It is preferred that the father is a member of the family the female husband has married into to ensure that children belong to the same bloodline. This ensures that elders do not encounter challenges performing birth rites unique to their family, as it is believed that ancestors know their own. These birth rites are an important and necessary part of the child's life. They welcome the child and cement the child's right to inherit. The birth rites are performed by a traditional healer appointed by the family and include the naming ceremony of the child who is given a name received from the ancestors through the traditional healer. The child uses the surname of the female husband, and is considered to be the legitimate child of the female husband. This process cements the child's right to inherit from the female husband, and to enjoy all the benefits of maintenance and care by the female husband.

4.7.2 Fining of persons responsible for impregnating queens' wives

Persons responsible for impregnating queens' wives are fined amounts varying from R30, 00 to R60, 00. Once the wife suspects that she is pregnant, she speaks to an elder, who notifies the queen. The elder enquires about the father, and a delegation is sent to his family and he is

fined the relevant sum of money. The royal council and the widowed spouses had different responses about persons who are brought in to procreate with wives of the queen. The difference is that widowed spouses said their children were fathered by persons they had entered into relationships with who had not been selected for them by the royal family. The royal council's position was that there are persons from within the royal family who are tasked with procreating with the wives. These were members of the four families that comprised the clan that is the Modjadji dynasty.³⁴² This difference in views can be explained by the practicality of imposing a nominated procreator onto the women. This explains the option of fining the men with whom the women procreate.

It was said that:

“The person who fathers children with a royal wife is fined because he has sown seeds in a field that does not belong to him.”³⁴³

It is interesting that these men are fined, considering that these marriages cannot produce children except through the presence of these men. The purpose of the fine is not clearly explained, except to say that the men pay for picking fruit from the queen's garden. Payment of the fine is an acknowledgement on the man's part that he knows that the wife is not his and neither is the child born his to claim.

Fines are paid only by persons who are not members of the royal family. Where the person who has impregnated the queen's wife is a member of the royal family, such person is not charged a fine. The men who impregnate women in the community who have entered into woman-to-woman marriages are not charged a fine even where they are not from within the family. It is known, as a matter of principle, that the children belong to the house of the female husband and use her surname. The men who father the children are referred to as “*mokgoti*” or “*motsegishane*” which means friend and “the one with whom I laugh”. These men may be known to be the fathers of the children but none have been known to lay claim to these children as their own. The same terms are used to refer to men who impregnate the queen's wives to show that the person is not the husband. The position of men who father children with women in woman-to-woman marriages raises many questions on account of

³⁴² These are the Modjadji, Mathekga, Molokoane and Mampeule families.

³⁴³ Focused group discussion, male royal council, Lewatle village, 16 January 2016.

contradictions between living customary law and statutory family law provisions. This is with respect to the duty of maintenance and rights of custody. These issues are noted as worthy of analysis and clarification. They however require extensive research which could not be included as part of this thesis as it would have increased the scope of research beyond manageability.

4.8 Death and inheritance

4.8.1 The mourning period

After the death of a female husband, wives enter into a mourning period just as wives of a male husband would after his death. They are secluded from the public for the duration of the week preceding the funeral. They wear mourning clothes for a duration as determined by the family. Participants advised that this is normally for a period of up to one year, although it can vary depending on the directive given by the traditional healer. A cleansing ceremony is performed by a traditional healer for the widows, and they shave off their hair to signify the end of the mourning period.

The mourning clothes are burnt, a sacrificial beast is slaughtered, and traditional beer is brewed for the community to share. It is at this point that the heir to the deceased's property will be announced and the deceased's clothes will be shared among family members. The mourning period for wives of the queen follows the same sequence, except that the sharing of property does not take place. The reasons thereof are discussed below in section 4.8.3.

4.8.2 Division of the estate and nomination of heirs

Division of the estate is sometimes found to not take place as official customary law provides. A small number of estates are reported to the Master of the High Court because the division of the estate is left to family elders. Participants explained that division of the estate takes place in the form of the first-born son taking ownership of the property, and in other families, it is the last-born male son, especially if he is still a minor when the death takes place. In this case, it is done so that there will be sufficient resources for bringing up the child and that the child would continue to have a home. This is the rule of ultimogeniture which entitles the youngest son of the deceased to be the heir. This is an exception to the male primogeniture rule that applies in woman-to-woman marriage succession matters. The

property normally includes the communal home, farming land, livestock, and money that belonged to the deceased.

The rule of ultimogeniture is usually dealt with within the privacy of the family, without external interference. However, a recent case in Botswana which dealt with this rule in a scenario that is likely to occur in the context of woman-to-woman marriages has shown how more succession matters are being decided in court.³⁴⁴ Although the dispute in the case does not arise from a woman-to-woman marriage, in addition to the understanding of inheritance under customary law gained from *Bhe*,³⁴⁵ it is particularly interesting to this study. This is because of the similarities it has to woman-to-woman marriages entered into to produce a male heir and the legal pluralism challenges in resolving the succession dispute.³⁴⁶ The litigants are five women and a man who both considered themselves rightful heirs to a piece of land. The courts' considerations of ascertainment of customary law provisions, the influence of the Constitution on customary law, and the application of the Botswana Constitution in customary law succession matters are likely to be the same issues a South African court would be faced with in resolving a succession dispute between female children and their minor brother in woman-to-woman marriages. Issues of gender equality under customary law and protection of minors would be interesting contentions to deal with within a pluralistic system. In such matters, it would be worthy to note which one the court upholds and rules in favour of. Furthermore, it is anticipated that discussions into family property and protection of vulnerable groups as seen in the case of *Bhe* are likely to come up again.³⁴⁷

The girl child's right to inherit was investigated. Responses received communicated that this right is not catered for because it is expected that she will get married and enjoy the benefits of her marital home. Once she is married, she loses her right of inheritance from her parents and gains inheritance rights in the home of her husband. The argument is that she cannot benefit twice, from both her parents and her husband. It was not explained how

³⁴⁴ Rautenbach C 'A Family Home, Five Sisters and the Rule of Ultimogeniture: Comparing Notes on Judicial Approaches to Customary Law in South Africa and Botswana' (2016) 16 *African Human Rights Law Journal* 145–174 discussing *Ramantele v Mmusi* [2013] BWCA 1.

³⁴⁵ 2005 (1) BCLR 1 (CC)

³⁴⁶ As discussed in chapter one, this happens when there are only girl children within a family.

³⁴⁷ Himonga & Moore op cit note 257 at 235

exactly she inherits from her husband's home, except to say that she would be in control of the property within her marital home and must not look back at what is in her parental home.

Where a girl child is not married, the discretion lies in the heir whether to share the property with his sisters. Women are not allowed to demand or enforce a right to inherit, and it is not only commonly known, but accepted as well. This means that a girl child's right to inherit from the estate lies totally in the discretion of the heir. This quotation from the group discussions supports this position:

“In our culture girls do not inherit from their father's house. They get married and it is at their husband's house that they will inherit. A girl whose marriage fails and she comes back home cannot try and inherit. It is not her father's fault that her marriage failed. Girls must get married and stay in their new homes. If a girl does not get married, that is not a reason for her to demand an inheritance. Unless her brother, who is the heir, for whatever reason decides to give her a share of the inheritance, she cannot force him to. All the girls here are raised to know this. You can stop any one of them on the street, they will tell you this.”³⁴⁸

The reality of whether the woman actually inherits from her husband's home and how inheritance takes place does not appear to be a matter of concern. What is clear from the responses is that girl children do not have a right to inherit.

Interviews with widowed spouses and the traditional leaders both confirm that no division of estate takes place after the death of a queen, and that inheritance as the law provides is a foreign concept for these marriages. This raises the question whether marriages with the queen are simply political gestures not intended to carry rights and obligations typically found in marriage. If true, this would explain why the queen only assumes financial responsibility for her biological children. The traditional leaders explained the types of property under the control of the queen, and how the provisions of the law relating to inheritance and the distribution of the estate cannot be implemented in the woman-to-woman marriage. These are outlined below.

4.8.3 Types of property under the queens' control

There are four types of property belonging to the Queen. These are:

³⁴⁸ Focused group discussion, male community members, Zizo village, 10 January 2016.

- a) Property belonging to the queen and the community, such as the soil, mountains, rivers. This property can neither be distributed nor inherited. The next queen will be tasked with taking care of it.
- b) Property belonging to the queen and the royal family such as the royal artefacts, and rain-making utensils. This property cannot be distributed as it must remain known only to a select few.
- c) Property belonging personally to the queen and her biological children. It is only the queen's biological children who have a right to inherit this property. This includes the queen's money, which can be in the form of physical cash in bank accounts or in the form of businesses, cars, houses and clothes, and any other gifts given to the queen during her reign in her personal capacity.
- d) Property belonging to the queen that can be passed on only to the next queen and no one else, such as the throne.

Discussions held with traditional leaders revealed that the concept of distribution of inheritance in the royal family does not exist. It has never taken place and it is not expected to take place. This explains why none of the queens' wives and their children had inherited from the estate after they had passed on. One of the wives is quoted as saying:

“We did not get anything. Did the other wives tell you that they got something? We did not get anything. Our children did not get anything as well. Division of the estate? We do not know about those things. We did not see it happening. It did not happen for us and our children.”³⁴⁹

Wives of the queen appear to have made no efforts to enforce theirs and their children's inheritance rights after the death of the queens they were married to. One of the participant's responses, whose position was echoed by other wives, said:

“We know nothing about it. What happens with the livestock, money, property or anything like [that] is none of our business. Life goes on as usual. We are not even allowed to ask about it. If discussions about inheritance took place, we were not involved in them.”³⁵⁰

³⁴⁹ Individual interview, Zizo village, 29 December 2015

³⁵⁰ Individual interview, Lewatle village, 27 December 2015.

It appears that they resigned themselves to the position of non-inheritance. The biological children of the queen are fathered by a nominated member of the royal family who is not publicly known. The Lobedu succession law generally states that the father of a queen is not known. However, current succession disputes and appointment of commissions to investigate these disputes have forced the question of paternity into the open.³⁵¹ The late Queen Makobo Modjadji's daughter's claim to the throne is being challenged on the basis of her paternity.

4.9 Woman-to-woman marriage and perceptions of the law

This section discusses communities' perceptions of the law, their knowledge of the legal provisions and how it relates to their lives. The section incorporates responses from participants and their experiences with the law to relatively assess to what extent succession laws have positively impacted on the lives of women in Lobedu communities.

4.9.1 Communities' perceptions of the law

Participants' knowledge of rights is basic and often based on what has been explained to them by others. This takes the form of discussions on community radio stations, their children and grandchildren explaining to them what they learnt at school, and sharing of information by community members gained from other sources or from their own understanding of human rights and the law. When asked what they understood about rights, one of the participants said:

“I hear about the Constitution and democracy being talked about on the radio and television. What does an old woman like me know about rights? What can we say about these things? Do we even know what they mean? I think it means I do what I want or what makes me happy.”³⁵²

This was a view shared by the other participants.

A minority of participants understood that having rights meant that people were not allowed to treat you unfairly and that they should respect your property. One of the participants is quoted as saying:

³⁵¹ Motshekga op cit note 146 at 164.

³⁵² Individual interview. Lewatle village, 23 December 2015

“My child these things are difficult. What can I say? I think it is because when someone speaks to you the way they want, and you refuse because you have rights. Also, when I am in my home you cannot come and tell me things that I do not agree with because I have rights.”³⁵³

Participants are not aware of the official laws governing customary succession and inheritance. They are knowledgeable about what their customs provide should take place and always seek the intervention of the traditional leaders when a dispute arises. The wives of the queen had an experience of the law through a magistrate who had attempted to put them on the list of pensioners so that they would get the monthly allowance, although they had not reached the retirement age. Although this experience of the law was not about the official customary law of succession and inheritance, it was linked to it in that the magistrate’s efforts to help them get the grant were because he had witnessed their suffering which was due to a lack of maintenance by their female husband. The wives thought they were receiving the help because it is what official customary law provided.

As explained by some of the participants:

“There was once a man from Ga-Jericho village³⁵⁴ who was a magistrate at Kgapane³⁵⁵ who tried to help us get a grant even though we had not yet reached the retirement age. He wanted to do it for all the queen’s wives so that it would help support us. It was not a success at all. Even headmen’s wives are better than us because they get something. We the wives of the queen receive nothing.”³⁵⁶

When asked which laws are applied in the resolution of the disputes, the royal council members did not mention the official customary laws. They requested copies of both the RCLSA and RCMA from the researcher, saying that they would like to look at them and their provisions. This suggests that they are not aware of the provisions of the legislation and the impact it has on succession and inheritance for the Lobedu. It was said that the living customary law of the land is applied in resolving the disputes that are brought before them,

³⁵³ Individual interview, Zizo village, 28 December 2015.

³⁵⁴ This is a pseudonym for a village in the Bolobedu area. It was used to protect the identity of the magistrate who attempted to assist the wives of the queen

³⁵⁵ The magistrates’ court is located at this township.

³⁵⁶ Individual interview, Lewatle village, 19 December 2015.

which they referred to as “*molao wa setso sa Balobedu*”. It means “customary law of the Lobedu people”. They said that it is not only known, but understood, respected and rarely challenged by the community.

There are problems in the implementation of succession laws in communities because of the individualistic nature, approach and provisions of official customary laws. The position of one of the council members regarding the official customary law provisions in terms of succession and inheritance is more enlightened in comparison with his fellow council members. He said that:

“Customary marriages are not individualistic, and family preservation is paramount. It is never about you as a single person on your own. It is about the collective. Traditionally, there is never a crisis with the issue of inheritance because the family understands what needs to happen. When the provisions of the law, however, come in, it individualises the process, destroying the family structure and arrangement. It says that only certain people must inherit, who might not have the best interests of the minors left behind at heart. The money will be gone, the property sold, and children left homeless and without a guardian.”³⁵⁷

In his explanation, he further says:

“There are two conditions for democracy to thrive in any country. The first is literacy; the level of literacy of the community members. The second is economic power. Wherever you see democracy thriving, the people are not only educated, but economically empowered as well. In South Africa we are currently battling the imposition of democracy into the lives of people who are not only largely illiterate, but are also poor and living in communities filled with abject poverty. This is why the implementation of laws remains moving at a snail’s pace. The levels of understanding in relation to the concepts of human rights and the law often reach people as second, third or even fourth hand information, riddled with misunderstanding, misconception and a total lack of understanding of the purpose which it aims to serve.”³⁵⁸

It is argued that this member held insightful views because of his level of education, previous employment, and exposure to the field of law and politics. It is therefore not surprising that his opinions particularly had a broader understanding of customary succession matters.

³⁵⁷ Focused group discussion, male traditional leaders, Lewatle village, 16 January 2016.

³⁵⁸ Ibid

In the light of the education and literacy levels of the participants of this study, it is easy to understand why the provisions of official customary law are not understood in terms of the purpose, intention and negative treatment of women and children that they seek to correct. The basic understanding of the concept of human rights which informs the provisions of the official customary law is not understood by the community, and is often received from secondary sources such as second-hand information from other people based on their understanding of the law. This may contain biases, misinterpretations and misconceptions that are projected onto the listener.

The result is a negative attitude that serves as an obstacle to the proper implementation of the law and its perceived compatibility with living customary law. Council members are able to have an enlightened view of democracy and its relation to education levels within a community because they are largely educated and employed as teachers and principals at secondary schools and higher education institutions. This is why their view of the concepts is more detailed as compared to individual participants and community members.

Another contributing factor to the limited understanding of the concept of rights by participants is the wrongful use of rights discourse by youth to justify wrongful behaviour. Discussions with community members revealed the view that this misuse is the reason for high numbers of teenage pregnancies and decreasing number of marriages. Older participants of discussions lamented about how rights took away corporal punishment in schools, which has, according to them led to high levels of disrespect by learners towards both parents and teachers. Students are reportedly assaulting teachers at school and their parents at home, knowing that should they fight back, they will report them to the police for assault. The younger participants were indifferent to the discussion, only continuously repeating that they had rights but were not concerned with what that actually meant.

4.10 The role of traditional leadership in conflict resolution

The executive council at Lewatle village serves as the court of appeal when villagers are not satisfied with verdicts given from their local traditional courts. Traditional leadership plays an important role in dispute resolution, and verdicts given are accepted, respected and adhered to. It is important to note that the tribal courts hear woman-to-woman inheritance disputes even though they do not have jurisdiction in terms of the Act. In the context of living

customary law, all the *kgoros* within villages and at Lewatle village exercise jurisdiction over woman-to-woman marriage inheritance matters.

When asked about the role that traditional leaders played in resolving conflicts that arise from their marriages, the majority of the queen's wives had similar responses, saying:

“When things got difficult we could go to Christopher [who plays a significant role in the dispute resolution process].³⁵⁹ You send a message to him through the elders, to say I have a problem with one, two, three and I need assistance. Even now we tell him about the things happening.”³⁶⁰

4.10.1 Patriarchal influences in decision-making

The representation and role of women in executive councils was seen to be minimal. Female members of the royal council confirmed this observation when asked about their role in the adjudication of matters. They said that they were involved and consulted upon and their advice sought only when a matter involving women is brought before the “*kgoro*”.³⁶¹ An example of such matters is where there are disputes between co-wives of a husband (male or female), misconduct that has taken place during female initiation or burial ceremonies or ill-treatment of a female farm worker during harvest time. The verdict given will comprise of this advice, in order to ensure that women's circumstances are not unnecessarily negated by a verdict that does not consider how they are affected by the circumstances as women. This is, however, at the discretion of the executive council, and there seems to be no way to confirm that such advice was incorporated into the decision, unless in a situation where the parties seek further relief. There does not appear to be any consequence for the advice being ignored by the men of the *kgoro*, as many of the decisions appear to be widely accepted by the community.

The role of women in decision-making is limited to this advisory capacity. They are not allowed to be present during proceedings of the *kgoro*, unless they are parties to the matter. This reveals patriarchal influences within a matriarchal society. One would expect that in a legal system headed by a woman, women would be at the forefront of adjudicating

³⁵⁹ This is a pseudonym. It was used to protect the identity of the person discussed as his role makes it easy for him to be identified.

³⁶⁰ Individual interviews, Lewatle village, 19-27 December 2015.

³⁶¹ A word meaning the traditional court.

matters and be seen to be active in decision-making processes. However, it is observed and confirmed by participants' responses to succession matters that it is largely men and patriarchal views that are being perpetuated both in the provisions and implementation of living customary law.

The rule that girl children do not inherit is a clear example. If more women were actively involved in the dispute resolution process, it is assumed that it would result in better understanding towards non-marriage and failed marriages. Room for exceptions would be made to provide for such situations and sympathy shown instead of the women being left out. The assumption is based on women understanding the struggles, possibly having personally experienced them.

This suggests that on the face of it, the Lobedu are a matriarchal society because a woman is at the head of their leadership system. However, the findings suggest that in practice they function under a patriarchal system of law that is largely led, taught and perpetuated by men. The majority of villages are headed by men, with women not sufficiently represented within councils. Male members of the royal council had more to share about woman-to-woman marriages and complexities found in them than their female counterparts. They gave more detailed responses in comparison to their female counterparts. There were instances where the female council members did not have responses, the reason being that they are not involved in the adjudication of succession matters by the council known as the executive. In support of this observation, Motshekga notes that Queen Khesetoane Modjadji III co-reigned with Mugodo II, who had been appointed as her seed bearer. He was Chief Councillor and Chairperson of the royal council.³⁶² This means that he, together with the royal council at the time adjudicated over matters as the current council with an all-male executive council. The rule that the queen cannot be seen in public for her protection means that she did not participate in such proceedings.³⁶³ This places men and their views on succession at the forefront of decision-making processes.

Patriarchal influences are also present in some of the reasons for the conclusion of woman-to-woman marriages. One of the reasons for the conclusion of such marriages is provision of a male heir. This shows the preservative nature of woman-to-woman marriages towards lineage. Participants did not appear to express interest in having a female heir to their

³⁶² Motshekga op cit note 146 at 152.

³⁶³ Ibid at 140–146.

property. One of the group participants expressed the view that female heirs present a problem for succession matters within families because should they get married, they move to their husband's home. This means that women do not remain in their parental home after marriage and they are thus unable to take care of the property and any matters relating to it. A female inheriting the property is a challenge because what she owns will be transferred to her husband's home after marriage, resulting in a loss for her family. This view was supported by other participants.

A male heir is preferred because should he get married, he brings his wife into the home, and children use his surname. The property is kept within the family even when the male heir's son inherits it in future. Male heirs also have the responsibility of taking care of the home and its inhabitants, meaning that the elderly and orphaned will be taken care of. The discussion in section 1.8 on recent literature by Himonga & Moore³⁶⁴ aligns with this position of participants and their justification for preferring male heirs over female heirs. This is especially important regarding the objective of inheritance under customary law and succession from the perspective of communities. It further confirms some of the concerns raised by Ngcobo J in the case of *Bhe* regarding how the uniform application of customary succession laws without taking into consideration the family context poses the risk of disenfranchising the very people the law sought to protect.³⁶⁵ This shows the challenges families encounter when addressing succession matters. Although sympathetic to the situation of women not inheriting, the community members' suggested solution is not that women should be heirs, but rather that they should be allowed to at least have a share in the property.

The exception to the preference of a male heir applies in the royal marriages. This is because of the transition to female leadership that started in 1800. Queen Masalanabo Modjadji II in 1850 took her mother's second ranking wife to be her wife after it became clear that she was sterile. A daughter born from that marriage, Queen Khesetoane Modjadji III, succeeded to the throne.³⁶⁶ All the rain queens except Queen Masalanabo Modjadji II had biological children of their own who succeeded them. The royal family chose their fathers in

³⁶⁴ Himonga & Moore op cit note 257 at 228-235

³⁶⁵ Ibid at 235

³⁶⁶ Motshekga op cit note 146 at 151.

secret, and these unions were based on endogamous relationships. The practice of endogamy was derived from their Mwanamutapa forebears.³⁶⁷

In sum, the explanation above shows some contradictions within the Lobedu community, such as adherence to the male primogeniture rule and the search for male heirs in a female dynasty. Furthermore, the Lobedu appear to be matriarchal at a symbolic level, but not at a structural level. This is especially the case in marriage structures.

4.11 Complexities arising from woman-to-woman marriages, legislative inadequacies and enforcement challenges

This section discusses succession complexities found in woman-to-woman marriages. It links the inherent complexities found in woman-to-woman marriages with provisions of the law which are not adequate to address such complexities. This is done to show the areas of amendment or further development, and the challenges which arise when legislative provisions do not consider the nature of marriage institutions and intricate relations that exist within them. The section also discusses challenges in enforcing the legislation, and the direct impact that this has on the institution of woman-to-woman marriage.

4.11.1 Non-individualistic nature of marriages

The findings confirm that woman-to-woman marriages are non-individualistic in nature.³⁶⁸ It is never the single intention and decision of a female husband to marry another woman. The process begins with a discussion by the family, and their involvement and approval of the marriage and potential bride. The potential bride and person nominated to procreate with her are central and key to the validity of the marriage and inheritance. The findings are synonymous in responses regarding the validation of the marriage through the family's involvement and approval. If a woman in her individual capacity attempts to or decides to conclude a woman-to-woman marriage, the marriage relationship is null and void. This position is also confirmed by the traditional council. The nomination of the person to procreate with the woman also takes place during the contraction of the marriage. The explanation for this process is that a woman who attempts to conclude the marriage without

³⁶⁷ Ibid at 153.

³⁶⁸ In the Igbo culture of Nigeria, an elderly woman may single-handedly make the decision to marry another woman. However, she will still notify her family of her intentions. .See Amadiume I. (1987) *Male daughter, Female husbands: Gender and sex in an African society*. London: Atlantic Highlands, N.J. : Zed Books Cape Town at 120-27.

consulting the family elders suggests that she is no longer interested in maintaining relations with the family as she does not seek their blessing.³⁶⁹

This shows that although the parties may consent to get married to each other as section 3(1) (a) (ii) of the RCMA provides, the marriage will be regarded as invalid by the families. The potential bride and her relationship to the female husband are also important for the validity of the marriage. It is unlikely that a female husband chooses someone who is not closely related to her.

The explanation above shows succession complexities the RCMA fails to address, owing to the individualistic nature of customary marriage in its provision, and how the estate must devolve and inheritance issues addressed. The RCMA recognises the family group-orientated nature of customary marriage, in so far as it is left for customary law to define what constitutes a valid customary marriage. However, its provisions are still largely individualistic although it recognises polygamous marriages. Another example of how the RCMA fosters individualistic marriages is that it does not consider the role of the family in the conclusion of polygamous marriages.

The wording of section 7(6) provides for the procedure a man intending to marry another wife must follow. It does not accommodate the context of woman-to-woman marriages where it is a woman who intends to marry, nor the role the family plays in the conclusion of the marriage. It has not taken cognisance of other customary marriages such as woman-to-woman marriages and how succession takes place in such marriages. The concept of ante-nuptial contracts is foreign to customary marriages. The limited knowledge of them may result in complications within families. The fact that the first marriage has to be dissolved may be interpreted as divorce and the husband's attempt to abandon his first wife.

Furthermore, provisions of the RCLSA are also inclined to individualism, in that they do not recognise the potentially polygamous nature of woman-to-woman marriages. Moreover, they provide only for the right of inheritance of the surviving spouse where in reality there may be more than one, as seen from the findings. The absence of correlation between these two pieces of legislation has a negative impact on succession in woman-to-woman marriages.

The confirmation of a procreator by the family has been shown to be of importance. This is because if the procreator is someone other than the person nominated by the family,

³⁶⁹ Focused group discussion, male traditional council members, Lewatle village, 16 January 2016

the woman is seen to have started other relations outside of the family, making the child born of the relationship ineligible for inheritance. However, this contradicts the “*ngwana ke wa dikgomo*” saying. If this saying remains true and is applicable in all marriages, then it should be of no consequence who the father of the child is, because in effect, according to Lobedu customary law, a child belongs to the one who paid his mother’s bride price. This means that even when he/she is fathered by someone other than the nominated candidate, his/her eligibility to inheritance should not be contested or made void. This echoes customary practices of various tribes which often base the right to inheritance on the legitimacy of the child which is defined by the payment of *lobolo*.

The discussion on woman-to-woman marriages shows that no distribution of inheritance takes place. A nominated heir receives the entire estate uncontested. The siblings to the heir, both male and female, understand the heir’s position and do not contest it. The heir is known as siblings are raised within a family, and as such it is not a new thing when inheritance takes place. It is to the heir’s discretion to give a portion or portions of estate to his siblings, specifically his female siblings.

4.11.2 Limited access to information

Limited access to information about possibilities and avenues to challenge exclusion from inheritance by people living in rural areas is highlighted by the findings. These areas are far from courts of law, which lead to their isolation from court decisions that could potentially affect the development of their living customary law in line with provisions of the Constitution. Rural communities must be made aware of legal provisions and be exposed to how these are continuously being challenged or applied in court cases. They should know about court judgements and the potential they have to change their lives. Armed with this information, they would attempt to seek justice should they find themselves in similar situations.

This view is informed by participants’ responses about whether they think that provisions of the RCLSA potentially change the situation of women and children in woman-to-woman marriages for the better. Some of the widowed spouses said that had these laws been in effect at the time of their spouses’ death, and they had been aware of them, there is a possibility that things may have been different for them. This shows that although reform in customary succession has the potential to effect change, limited access to information limits people’s options and possibilities for change.

4.11.3 Continued application of male primogeniture rule

The rule of male primogeniture has been declared unconstitutional in the customary law of succession.³⁷⁰ However, this decision together with the RCLSA remain unknown to the majority of the people whose lives it has the potential to affect, making it difficult for it to be challenged, which allows the rule to continue to exist. The effect thereof is that women, who in terms of official customary law have the right to inherit and not be discriminated against on the basis of their gender, do not enjoy the benefit of this right. The concepts of women empowerment and gender equality is not a reality in the lives of such women.

The data shows that there is no concept of competing rights because girl children know their place in the family line of inheritance and do not contest the position. Girl children are expected to marry and inherit from their husbands. Whether or not they indeed inherit or how this actually takes place does not appear to be a matter of concern. The common response was that “she must go and see what happens there. The bottom line is, here the girl child does not inherit. She will go and see to the things of her husband’s house”.³⁷¹

The situation of children born to the queen is slightly different. The queen has two groups of children. These are biological children who are fathered by a close cousin, and children from woman-to-woman marriages. The discussion with the male traditional leaders provided types of properties under the control of the queen. In the discussion about estate distribution after the death of a queen, an important point regarding inheritance was made. It was shown that there is property belonging to a queen and her biological children, which can be inherited only by these biological children. This includes property, clothes, money and businesses the queen personally owned. These are inherited by the queen’s biological children irrespective of their gender. The only aspect of the queen that her male children would be exempt from in this respect would be the throne, which will go to a daughter. This follows succession laws that will not be discussed further for the purposes of this study.

From this information, a distinction is drawn between children born from woman-to-woman marriages with the queen and her biological children. Although her wives’ children are accepted as her own, they have no access to or right to inherit from their father.

The rule of male primogeniture is still in practise under the Lobedu customary law of inheritance. Women do not have an enforceable right of inheritance to the estate of their

³⁷⁰ *Bhe V Magistrate Khayelitsha* 2004 (2) SA 544 (C); 2004 (1) BCLR 27 (C).

³⁷¹ Focused group discussion, female community members, Zizo village, 10 January 2016.

deceased parent. They are expected to get married, and their right of inheritance is transferred to their husband's estate. The manner in which the inheritance at the husband's home actually takes place or whether it actually takes place at all does not appear to be a matter of concern for the participants.

However, if the picture painted by the findings is anything to go by, it is clear that even at her husband's home, the woman does not inherit. This is because as soon as a death has taken place, an heir takes over the property. However, there are situations where women inherit despite the primogeniture rule. Two examples were given. The first related to situations where all the children in a family are female even after woman-to-woman marriages are concluded. The second related to male-female marriages where the widow inherits the property. The full extent of these possibilities is not explored by the research for two reasons. The first is that potential participants for interviews live outside of the geographical scope of the study, and secondly, inheritance by widows in male-female marriages does not fall within the scope of the study.

In certain circumstances where the heir is a minor, the widowed spouse assumes control of the property. In these situations the woman is only a caretaker on behalf of the heir and has not inherited the estate. It is said that women cannot inherit twice, from their parents and their husband. When asked about the situation where a woman was never married, the response was that it is a failure on her part, and it does not affect the rules of succession and inheritance.

The concepts of inheritance and distribution of estates seems to be a foreign concept in woman-to-woman marriages. When viewed specifically from the living customary law perspective, inheritance is not seen to take place in the manner provided by official customary law. This affects the implementation process, which shows gaps between how things are done in reality within the communities, and how they are expected to be done in terms of the official customary law. This is legal pluralism in action.

4.11.4 Implementing official customary law

Although official law provides that a spouse to a woman-to-woman marriage must inherit from her deceased female husband's estate, the findings show that this does not happen under living customary law. This cannot be blamed entirely on living customary law, as at times the property in question does not allow for easy application of the laws. The types of properties belonging to the queen serve as an example together with the rules governing them which

make it nearly impossible for the estate to be distributed equally among heirs. If the property belonging to both the queen and community such as land were to be distributed equally among her children, what would this mean for the families living on the land and paying taxes on such land? The same applies to the royal compound, which according to tradition cannot be sold as it houses the royal artefacts and rainmaking charms.

4.11.5 Procreators and maintenance of wives

Third parties exist within woman-to-woman marriages in the form of men who are brought into the marriages for procreation. This is one of the complexities of these marriages because linked to this is the duty to maintain and support the woman and her children. In many instances these men are parties to other marriages which are potentially polygamous. In marriages concluded with the queen, the children belong to her and use her surname, but the duty of maintenance and support lies with the man who fathers them. There are contradictory views on this from participants. The queen's wives all unanimously said that they had been maintained financially by the men who fathered their children and not the queen. This position is different from community members' woman-to-woman marriages which did not present hardships related to maintenance.

The executive council had contradictory responses about the maintenance of the queen's wives. At first it was said that it is the queen, and it later said that it is the men who procreate with them. In justifying this second response they said the men have been given benefits of "entering the house" with the women, and they must, in showing gratitude, maintain the women on behalf of the queen. This position is confirmed by the widowed spouses, who unanimously stated that the homes they live in and their daily maintenance is their own responsibility, assisted by the men who fathered their children. The discussion with female council members confirms this position, and adds that men enter the setup fully aware of the responsibilities that come with it. This clearly shows that marriages with the queen are an exception to the provision that the head of the family is the provider. Female council members explained that the wife maintains herself and her children with the assistance of her family or the man who fathers her children. An interesting exception is that wives who never have children remain at the head kraal and continue to be maintained by the queen until their

death.³⁷² They control the gifts brought to the queen by visitors and members of the community.

4.11.6 Wife duties and removal from head kraal

Royal wives have categories and ranks which determine their access to the queen and responsibilities and duties towards her. There are two categories of royal wives, wives who are given to the queen by their fathers to declare loyalty to the dynasty such as those from Ga-Matshwi,³⁷³ Ga-Tshwale (a village near Mooketsi),³⁷⁴ and Botlokwa.³⁷⁵ They perform all household duties excluding those personally related to the queen. An example of this is washing the queen's clothes, cooking her food, or entering the house where she sleeps. These duties are performed only by wives who are closely related to the queen.

The second category includes wives who are members of the royal family. This category of wives is the most trusted and personally interacts with the queen. This is done to avoid the poisoning of the queen and to ensure her safety.

Once a royal wife starts having children; she is no longer allowed to take part in anything personally related to the queen. The explanation for this is that the queen can only be served by women who are still virgins. This prevents “*meriti*” or “*makgoma*”. In Selobedu, this means impure shadows and spirits. These spirits are said to be transmitted through sexual interactions, and it is believed that these spirits and shadows will affect the queen and her leadership abilities. This suggests that pregnancy is regarded as evidence of sexual interaction. This is because wives who do not have children are not prevented from interacting with the queen and entering the house she sleeps in. After a royal wife has her first child, she is given a space of land within the royal kraal area where she lives with her children. Wives who never give birth to children are allowed to continue staying in the main kraal, and continue being maintained by the queen. In most customary marriages, barrenness is normally a ground for divorce. Given the importance of children in the institution of woman-to-woman marriages, it was puzzling to find that wives who never have children

³⁷² Focus group discussion, female council members, Lewatle village, 18 January 2016.

³⁷³ A village in the Bolobedu area.

³⁷⁴ An area falling under the Mopani District in the Limpopo Province.

³⁷⁵ An area falling in the Molemole District of the Limpopo Province. The language spoken in the area is known as Setlokwa. The dialect is similar to that of the Selobedu language.

receive better treatment than those who have children. It is assumed that this paradox is linked to the divinity aspect of the queenship. Responses to questions on this matter were at most dismissive, and the only explanation given was that the wife without children received better treatment because they are being comforted. The true answer may have been made clearer if there was a queen on the throne. The lack thereof thus presented a methodological limitation. Further research is therefore necessary to fully understand this aspect of the woman-to-woman marriages of the queen.

The wives perform these duties because the queen cannot personally cook for herself, wash her clothes, collect firewood and decorate the walls and the homestead with cow dung and soil. These services are essential because the palace is a hive of activity because of visitors. When visitors arrive they are to be welcomed and given refreshments prepared by the wives. Only specific people are allowed to enter the houses of the queen known as “*Mmalekhalo*” or “*Ntolerole*”. The link that these duties have with woman-to-woman marriages is that the marriages are based on a duty of service to the queen. The queen marries women who perform them on her behalf, giving rise to the existence of woman-to-woman marriages. This is supported by what the participants said in response to the question about the importance of such marriages, saying that “the importance is that we cooked for the queen. We grew up being told that we were going to cook for the queen, and that is why we got married to her”.³⁷⁶

4.12 The future of woman-to-woman marriages

The most significant cultural practices of the Lobedu are rainmaking, sustaining relationships between the living and the deceased, harvest festivals dedicated to royal ancestors, and initiation schools.³⁷⁷ What these practices have in common is that they are in different ways performed in allegiance to the royal family. Their educational content is about spiritual traditions, indigenous knowledge systems, loyalty to the queen and authority, respect for elders and responsibilities of adulthood.³⁷⁸ In the past, the initiation schools were sometimes the only educational forum women attended, after which they got married. This can be explained as the reason why most woman-to-woman marriages were concluded during these

³⁷⁶ Individual interviews, Lewatle village, 19-27 December 2015.

³⁷⁷ Motshekga op cit note 146 at 160–164.

³⁷⁸ Ibid

times. Women in the past did not have the same levels of exposure to education as women today have, and as such their choices were limited.

The future of woman-to-woman marriages and their existence in the Selobedu culture remains uncertain. One cannot say for sure that these marriages will not continue to exist, but they have been on the decrease. This is true for woman-to-woman marriages in the royal family as well, as the last queen to have married wives was Queen Mmakoma Modjadji IV.³⁷⁹ The last reigning Queen Makobo Modjadji VI,³⁸⁰ who passed away in 2005, did not marry any wives. When asked for further information on this, Queen Makobo's level of education was cited as one of the reasons why she did not continue the practice of marrying wives.³⁸¹ One of the changes affecting the prevalence of woman-to-woman marriages is the fact that communities are no longer under traditional leadership only. This means that although traditional leadership continues to exist and relations between communities continue to be forged, they no longer take place under the same circumstances they did in the past. An example of this is that chiefs from surrounding areas are no longer bringing their daughters to be wives as homage to the queen. Literature shows how chiefs from as far as Lesotho, KwaZulu-Natal and Mozambique would bring their daughters and sisters to the queen to seek favour for her rainmaking abilities.³⁸²

The changes in social perceptions of marriage and respect for the institution of marriage in general, are some of the factors that have contributed to the current state of affairs. These changes were noted by Phillips as far back as 1953, when he noted that marriageable girls are more likely to assert their will and choice of husband than in former times.³⁸³ This observation shows that these changes have been taking place over time within rural communities. Very few people are getting married, and people no longer perceive marriage with the same level of respect and reverence as was the case in the past. The other contributing factors are democracy and human rights. The current democratic dispensation is slowly but surely bringing in a wave of change that is changing people's perceptions and

³⁷⁹ Queen Mmakoma Modjadji IV ruled from 1905 to 1980.

³⁸⁰ Queen Makobo Modjadji VI ruled from 2003 to 2005.

³⁸¹ Queen Makobo was the only Rain Queen to receive formal education, and was seen to be too modern for the role of Queen.

³⁸² Motshekga op cit note 146 at 165.

³⁸³ Phillips op cit note 339 at xvii.

views on certain cultural practices such as woman-to-woman marriages. This view is derived from the participants' responses that the younger generation is not adhering to rites of passage such as initiation. Many of the participants were of the view that it was the late queen's level of education that resulted in her not concluding woman-to-woman marriages in the same way as her predecessors. This is likely to influence the view of young women within the community who have a higher exposure to human rights discourse and discussions than their elders. This can be obtained from their peers, interaction with other cultures, or their school curriculum.

When asked about the future of woman-to-woman marriages and whether they are likely to continue taking place, the participants responded by saying that it is unlikely that this type of marriage will continue to exist because young people will not agree to enter into them. It cannot, however, be said that woman-to-woman marriages will not be concluded in the future. The change in political landscape has also contributed to the decreased existence of woman-to-woman marriages. As described above and in the previous chapters, some of the marriages with the queen came into existence when daughters were given to the queen as a pledge of loyalty. These daughters would serve as ambassadors for the villages from which they came, and would also ensure the solid political rule of the queen under the same vision. Although the levels of loyalty towards the royal family are still relatively high, the change in political landscape has meant that people are no longer living only under the rule of traditional leadership but also of democratic governance. Some of the members of the council are councillors affiliated to certain political parties and elected by the community to take care of their community needs and access to local government services. There has also been news of communities within Bolobedu who have requested to elect their own leader and move away from a leader imposed on them by customary succession rules.³⁸⁴

The elderly participants (aged 40 and above) said that women now have a right to refuse to enter into marriages that in their view are not beneficial, and parents no longer exercise the same levels of authority over their children as they did in the past. They gave this as the reason why the younger generation is more inclined to make decisions that they previously were not at liberty to make. The majority of individual participants said that given

³⁸⁴ There were reports in the *Hlokwa La Tsela Current Affairs Show* on Thobela FM in 2015 about Botshabelo and Jokong villages.

the chance to start over, they too would refuse to enter woman-to-woman marriages, and the younger participants (aged 18 to 40) of the group discussions said they would consider such a marriage only if there was a guarantee that the female husband would take care of all their financial needs.

There has been a rapid decline in consciousness and respect towards culture, custom and traditions as people now have alternative ways of doing things and do not necessarily have to conform only to cultural practices. An example of this is how many parents are opting to circumcise their sons at hospitals instead of initiation schools, and the decreasing number of girls who go for female initiation.³⁸⁵ Although loyalty to traditional leadership and belief in culture are said to be the cornerstone of the Lobedu, the participants were of the view that there are changes taking place and issues of culture and tradition are in crisis because of western teachings. Marriage practices have also changed because of religion, cross-cultural marriages and the increasing number of young people getting access to higher education. Many people are opting for civil marriages as opposed to customary marriages and traditional wedding ceremonies.³⁸⁶ Tradition is increasingly losing its hold over communities, particularly because people are spending increased periods away from the villages for employment purposes.³⁸⁷

The awareness of rights and access to opportunities by young women has also meant that more women are getting educated and having options about what kind of life they want to live, where and with whom. These developments are increasingly resulting in respect for the African woman's freedom of choice.³⁸⁸ The younger female participants in the focused group discussions who had gone to tertiary institutions and travelled outside the area of Bolobedu had a more clearly articulated view of the concept of human rights even though the understanding was basic. The changes taking place have meant that women are no longer restricted to one geographical area, which opens their eyes to other ways of doing things. This increases the possibility of financial independence, decreasing their dependency levels and the need to get married to have provision made for expenses from a husband or female

³⁸⁵ Focused group discussion, male community members, Zizo village, 10 January 2016.

³⁸⁶ Focused group discussion, female community members, Lewatle village, 17 January 2016.

³⁸⁷ Phillips op cit note 339 at xviii.

³⁸⁸ Ibid at xvii.

husband. This shows that there are changes taking place within the community, at however slow a pace, which are affecting the prominence of past practices and ways of doing things.

The majority of individual participants responded by saying that they had entered into these marriages at times even when it was not their wish to do so because they were doing it out of respect for their parents and the decision that had been made the other family. The type of family structure that children have been raised in in recent years and the levels of respect for authority in the form of parents is not what it used to be. It was said that

“Children nowadays will never agree to such marriages because they are not raised how we were raised.”³⁸⁹

The rise in cross-cultural marriages has also meant that there has been a mix in family traditions and customs, with the Selobedu customary law no longer being the single rule of law in some families. This results in certain practices falling away due to their not being accepted or no longer being followed by the parties concerned. The group discussion with council members revealed that there were cross-cultural marriages with the Pedi and Tsonga tribes and villages which are largely dominated by these tribes. There are also a few villages that are led by a Pedi- or Tsonga-speaking traditional leader. These are descendants of communities bordering the area of Bolobedu who migrated to Bolobedu for safety and were appointed headmen in those areas.³⁹⁰

4.13 The intersection between theory and practice

The findings discussed in this chapter reveal the practical implications of legal pluralism in society. They further show how the dynamics within rural communities present challenges for the application of official customary laws in areas of succession. The challenges are brought about by official customary laws’ inability to address sufficiently the practical realities of life on the ground. For the most part, provisions of official customary succession

³⁸⁹ Individual interview, Zizo village, 28 December 2015.

³⁹⁰ Motshekga op cit note 146 at 166–168.

laws are not observed within the area of the study. Woodman notes that there are many reasons and motives for the observance of laws.³⁹¹

An assumption can be drawn from the data that some of the reasons are that the laws are not known and understood, which would have allowed them to be applied in succession matters. Where a contradiction in provision arose, it would have presented an opportunity for adaptation. The other reason may be the patriarchal influences present in Lobedu succession laws. Applying the provisions of official customary law may not be in the interest of those tasked with enforcing observance of the law. This is because the status quo may be changed, resulting in the living customary law being adapted to reflect these developments. In light of the patriarchal influences present and the executive council comprising of men only, resistance to these laws is anticipated.

The theoretical framework upon which this study is based explains the recognition of living customary law by official customary law, and the co-existence of the two systems of law. The study provides practical examples of this by showing the relationship between the RCMA and RCLSA and the living customary law of the Lobedu in woman-to-woman marriages. Section 3 of the RCMA provides for the validity of customary marriages entered into in accordance with customary law, and the data correlates with this by providing the context, process and requirements for the conclusion of woman-to-woman marriages in Bolobedu.

The RCLSA provides for the inheritance rights of spouses and children born from woman-to-woman marriages. Although the RCLSA provides for these rights, the data has shown that there are complexities found in such marriages which make the enforcement of such rights challenging. It is living customary law that is applied in the resolution of such matters, and not official customary law. This shows the tensions between the two systems of law and reveals the challenges of legal pluralism within communities. It appears that the challenge of conflict and choice of laws that riddled customary law in the past continues to this day.³⁹² Complexities found in woman-to-woman marriages show how the question of which law should apply will continue to come up in legal pluralism discussions. Where

³⁹¹ Woodman G R 'Legal Pluralism in Africa: The Implications of State Recognition of Customary Laws Illustrated from the Field of Land Law' 2011 *Acta Juridica* 35–58 at 37.

³⁹² Choice of law rules was prescribed by the Black Administration Act 38 of 1927.

neither system of law sufficiently addresses these challenges, the need arises for further reform and amendments to be made.

The objectives of the study are to determine the adequacy and effectiveness of official customary law in addressing succession complexities of woman-to-woman marriages. Furthermore, the study seeks to establish the legitimacy of marriages entered into in terms of the woman-to-woman custom under customary law. The findings in response to the research question of the study emphasise a number of shortcomings on the part of official customary law's adequacy to address succession complexities in woman-to-woman marriages.

The data shows that official customary law seeks to recognise customary marriages entered into in accordance with customary law. Although this is a good development for customary marriages, woman-to-woman marriages are still not sufficiently provided for. This is because the RCMA does not expressly recognise woman-to-woman marriages, nor do its provisions consider the complexities found in such marriages. It has focused mainly on regulating polygamous marriages and the rights of women within such marriages.³⁹³ It does not sufficiently provide for the rights of women in other types of customary marriages such as the woman-to-woman marriage. This results in women and children in such marriages first having to go through the validity checkpoints of marriage before they can attempt to enforce their inheritance rights. Although this is a prerequisite for a spouse in any system of law in succession matters, the peculiar nature of these marriages mean that spouses are likely to experience increased challenges. This is likely to prove challenging for them owing to a number of reasons. First is the confusion of woman-to-woman marriages with same sex marriages as provided for by the Civil Union Act.³⁹⁴

In addition to this, the limited knowledge about the marriages and the intricate web of relationships within them is likely to result in increased challenges, with officials seeking to ascertain the validity of the marriage. Rautenbach and Meyer have noted how Masters of the High Court are likely to encounter interpretation challenges of the terms 'spouse' and 'descendant' when trying to apply the RCLSA's provisions.³⁹⁵ Secondly, if the challenges

³⁹³ Sections 6 and 7.

³⁹⁴ Act 17 of 2006.

³⁹⁵ Rautenbach & Meyer op cit note 315 at 158–159.

relating to the registration of customary marriages is anything to go by, it is anticipated that widowed spouses and their children will encounter the same if not more challenges.³⁹⁶ The RCLSA in its provisions attempts to give effect to and protect the inheritance rights of widowed spouses and children born from woman-to-woman marriages.³⁹⁷ It does this by expressly recognising and providing for these rights, but also has shortcomings that affect the enforcement of such rights.

The first shortcoming that the data revealed is the individualistic approach to succession that the RCLSA has adopted.³⁹⁸ This presents a challenge because as seen from the data, succession in woman-to-woman marriages is not individualistic. This presents application challenges in succession matters which may have the effect of prejudicing the same people it sought to protect.³⁹⁹ The next shortcoming is that it does not clearly distinguish whether a spouse is a 'spouse' or 'descendant' for purposes of succession. The data shows that in woman-to-woman marriages concluded with the queen, the wives and children fall into neither category. Marriages concluded among community members appear to treat widowed spouses as descendants who have a right to care and maintenance because the heir inherits the property. In the event of the heir being a minor, the widowed spouse acts as a caretaker of the property until the heir is of age.

The determination of acceptance of children by the female husband is another shortcoming of the RCLSA. This is left to be determined on a case-by-case basis which will ultimately affect the enforcement of inheritance rights by the children concerned, especially where significant property is at stake. The determination is anticipated to require empirical research or statements from witnesses, processes which take time to conclude. Interested parties may seek to compromise this process by providing false information, or dragging it out in the formal courts. Where the acceptance of children in a specific case is deemed not to fit the requirements of adoption according to common law, there is a risk of these children

³⁹⁶ Himonga & Moore p cit note 257 at 111–113.

³⁹⁷ Sections 2(2) (b) and (c).

³⁹⁸ Succession in terms of this Act follows the provisions of the Intestate Succession Act 81 of 1987 which has been criticised for transplanting common law provisions into customary law.

³⁹⁹ An example is where the family home is sold and the monies shared. This may result in elders and minors being left without a home.

losing their inheritance rights. This is likely to take place where provisions of customary law on adoption of children are not considered.

The intricate and complicated web of relationships within woman-to-woman marriages is not sufficiently addressed by official customary law. The data reveals the potentially polygamous nature of woman-to-woman marriages, the existence of male-female and female-female marriages within one household concurrently, the existence of third parties brought in to procreate, and the complexities related to this aspect. The web of relationships potentially affects the enforcement of inheritance rights, women's right to inheritance within woman-to-woman marriages, and the types of properties concerned. Providing for inheritance rights in the absence of considering these complexities and how the right can be enforced in light of them shows how official customary law does not address succession complexities in woman-to-woman marriages.

The data has confirmed the legitimacy of woman-to-woman marriages under customary law. It has done so by confirming the existence and purpose of such marriages, the requirements for their validity, the parties involved in the process of conclusion and the applicable succession rules. The aspect of woman-to-woman marriages that show the relative failure of the RCLSA to meet its objective to protect the constitutional rights of women is seen in the lack of provision for women's inheritance rights under Lobedu customary law. Despite the legislative and judicial developments that have taken place in this area of the law, not much seems to have taken place to adapt living customary law succession provisions in line with the Constitution. There are many reasons that can be given for this, the first and most dominant one being limited knowledge and understanding of official customary law succession provisions.

The discussion notes that where customary law provisions are discussed within the scope of the Bill of Rights, more often than not they will be found wanting. This is confirmed by the data which has revealed that the legislation which is intended to guard against the violation of section 9(3) of the Constitution is violated by Lobedu succession laws that do not provide for women's right to inheritance. This is discrimination on the basis of gender, which is linked to the rule of male primogeniture. Furthermore, the rule is still being applied in

succession matters despite its invalidation by the Constitutional Court.⁴⁰⁰ The data sufficiently answers the research question and objectives of the study. Succession complexities found in woman-to-woman marriages confirm Woodman's observation about legal pluralism challenges that officials face when reforming customary laws.⁴⁰¹ The challenges are due to the great differences in content, character, principles and rules of application between the coexisting systems of law.⁴⁰² The concluding chapter will provide recommendations on the areas of improvement highlighted by the study. The recommendations are aimed at ensuring that official customary law addresses succession complexities found in woman-to-woman marriages.

⁴⁰⁰ *Bhe v Magistrate Khayelitsha* 2005 (1) SA 580 (CC).

⁴⁰¹ Woodman op cit note 391 at 37.

⁴⁰² Ibid

CHAPTER 5: CONCLUSIONS

5.1 Introduction

The reform of the customary law of marriage and succession in South Africa has taken place over a long period of time. The path it has taken was influenced by a number of factors. The most important of these factors for the purposes of this thesis is the promotion and protection of the rights of women and children in customary marriages. This led firstly, to the recognition of customary marriages, which allowed the platform for woman-to-woman marriages to be brought to legal prominence. Secondly, the provision of inheritance rights for widowed spouses and children born of woman-to-woman marriages afforded the opportunity to investigate whether such provisions are adequate to address succession complexities in such marriages.

Transition and change are not easy processes, particularly regarding concepts that are often rooted in sentiments. In many rural communities, the subject of inheritance is a highly emotive one. It is a practice that has existed for many years, rooted in the continuation of lineage and maintenance of family structures. Unfortunately, as good as some of the intentions behind customary rules of inheritance were, they often left women and girl children in vulnerable positions. It is often argued by elders within rural communities that the necessity for rules such as male primogeniture was to ensure that dependants are taken care of. This is because the heir inherits the entire estate, which includes both the properties and responsibilities of the deceased.

In traditional family setups that are immune from all life experiences, this would perhaps have worked out perfectly. Women and girl children would enjoy care and protection from the heir, and there might arguably be no cause for concern. However, as the history of customary marriage and succession has shown, there is a need to protect and promote inheritance rights of women and children in customary marriages. There is also the important need of ensuring that the laws in place sufficiently provide for the successful enforcement of such rights, and address the complexities arising from complex intricate marriage relationships that exist within such marriages.

African customary law in South Africa has had an antagonistic history with the concept of legal pluralism. In the geographical area of the study, this concept was introduced

by colonialism and the arrival of Christian missionaries. The combined impacts of both colonialism and Christianity induced ripple effects within Lobedu social structures of marriage that can still be observed in present times. The overall argument about the impact of colonialism and customary law acknowledges how colonialists regarded many customary marriage practices as contrary to public policy. This affected marriage institutions such as the woman-to-woman marriage, owing to a lack of understanding of the nature and context in which they take place. The result was that when reform processes took place, such marriages were left behind and this affected the progress of legislative provisions for such marriages.

In South Africa, much has been done to change the status of widowed spouses in customary marriages. The changes that have taken place and continue to take place have resulted in legislative provisions for inheritance rights. In the context of woman-to-woman marriages, it appears that much more is required to take place before it can be said that such provisions are adequate and enforceable. It is against this background that this study explored the question whether official customary law is adequate to address succession complexities in woman-to-woman marriages. In order to answer this question sufficiently, the study determined the adequacy and effectiveness of official customary law to address succession complexities in woman-to-woman marriages. The study also sought to determine the legitimacy of woman-to-woman marriages under customary law. The study used an empirical approach which provided evidence-based support for its theoretical framework and literature review. A summary of the study which includes policy reform and legislative recommendations is provided.

5.2 Summary of chapters

The first chapter of this thesis introduced the subject matter and gave the background and context within which woman-to-woman marriages take place. The chapter outlined the succession complexities that exist in woman-to-woman marriages owing to the intricate relationships between the spouses and men who procreate with them. The theory of legal pluralism was explained to contextualise the study, as well as the methodology employed to reach the findings. The significance of legal pluralism in this study is that it emphasises the challenges that exist within communities in present times because of the observance of more than one system of law. In this study, they take the form of official customary law which provides for inheritance rights in the RCLSA, the RCMA which regulates customary

marriages and living customary which is applied in succession matters within Lobedu communities. The chapter also includes narrations of the living customary law regulating the conclusion of woman-to-woman marriages. The chapter provided the foundations upon which the thesis is built. This provides insight into the history of succession in Lobedu woman-to-woman marriages, how the provisions of both the RCLSA and RCMA impact succession in such marriages, and the findings of the study.

Chapter two traced the historical, social and political background of succession in woman-to-woman marriages. This was done to show the processes that led to current legislation's inadequacy to address succession complexities in woman-to-woman marriages. It reviewed the literature on the social and political structure of marriage in Lobedu communities to establish the centrality of endogamy to Lobedu marriage. The literature explains the historical impact of the periods of pre-colonialism to democracy on woman-to-woman marriages and how the events that transpired during these periods contributed to the current status of widowed spouses and children in woman-to-woman marriages.

Chapter three looked into the legal framework that governs customary marriage and succession in South Africa. It looked into provisions of the RCMA and RCLSA that are directly applicable to and impact succession in woman-to-woman marriages. The analysis shows the practical position of women and children in such marriages and sheds light on potential challenges they are likely to face in the attempt to enforce inheritance rights. The chapter shows the ways in which provisions of both the RCMA and RCLSA address succession in woman-to-woman marriages. It notes areas of improvement in the position of women and children, and areas of possible reform and amendments. The chapter found that the wording in certain provisions, lack of explicit inclusion, technical provisions of processes to be followed, and experiences with institutions tasked with implementing the legislation lead to impracticalities of enforcing inheritance rights.

Chapter four analysed the findings to answer the research question of the study. It used individual interviews and focused group discussions to determine the nature and conclusion of woman-to-woman marriages, the context in which such marriages are concluded, the rules of succession applicable in such marriages, and acceptance of children. Interviews and focused group discussions were also used to show the lived experiences of widowed spouses and children in such marriages, the role of traditional leaders and the living

customary law applicable. The chapter scrutinised the opinions of widowed spouses, traditional leaders and community members.

The chapter confirmed much of the literature on woman-to-woman marriages. However, the findings provided detailed information that detailed succession complexities found in such marriages. Although the two categories of spouses had concluded woman-to-woman marriages and had similarities, there are differences owing to the royal nature of the one category of spouses, and the political implications thereof. Two of the key findings of the study which are linked to each other are particularly important. Firstly, the study found that the rule of male primogeniture is applicable in Lobedu succession. This is confirmed by responses from all three categories of the study who unanimously said that girl children do not have a right to inherit under Lobedu succession laws. The exception to this lies in the discretion of the male heir, who may decide to give a share of the property to his sisters. Secondly, the study found that succession to status is inextricably linked to succession to inheritance.

Although only one category of participants had concluded marriages with the queen, succession to status in the other category manifests itself in the heir inheriting the position of the deceased within the family. In marriages with the queen, her successor inherits the throne together with properties attached to it. In community members' marriages, the heir takes over the status of the deceased within the family and the duties attached to this position. The chapter concludes by explaining succession complexities in woman-to-woman marriages, patriarchal influences in succession matters and discusses the ways in which the findings respond to the research question of the study.

5.3 Findings on the research questions

The first analysis of the research question looked at the relationship between the RCMA and RCLSA and how it impacts succession in woman-to-woman marriages. The study found that the link between the two pieces of legislation in the context of succession in woman-to-woman marriages is not only inextricable, but important for the enforcement of inheritance rights. This is because succession is dependent on validity of marriage. The RCMA does not explicitly provide for the recognition of woman-to-woman marriages as valid marriages under customary law. Implicit recognition is found in courts' interpretation of section 3(1)(b)

of the Act, which the study uses to argue that woman-to-woman marriages are valid customary marriages.

The second analysis of the research question envisaged to determine two things. The first was the adequacy of official customary law to address succession complexities in woman-to-woman marriages. The historical, political and cultural background of Lobedu marriage and succession showed the social marriage structures and relationships central to Lobedu marriage. This was then followed by an explanation about the impact of the periods from pre-colonialism post-democratic South Africa and their contribution to legislative provisions regulating succession in woman-to-woman marriages. The history of reform in customary marriage and succession was outlined to show the events that led to improvements in the lives of women and children in woman-to-woman marriages, and inadequate legislative provisions regulating succession in such marriages. The findings show the ways in which official customary law is inadequate to address succession complexities in such marriages, including the continued application of the male primogeniture rule in succession matters, and women's lack of inheritance rights. The findings also show that it is living customary law that is applied in succession matters. Furthermore, the findings on the continued application of the male primogeniture rule in Bolobedu show the failure by both the RCMA and RCLSA to achieve their objectives of protecting constitutional rights.

The last analysis of the research question looked into the legitimacy of woman-to-woman marriages under customary law. It found that woman-to-woman marriages have been concluded among the Lobedu for a long time. This is as a result of three things; (a) women are allowed to marry other women in Bolobedu, (b) marriages are contracted with the queen, and (c) there is perpetuation of lineage and preference for male heirs. The processes of concluding woman-to-woman marriages are similar to processes of concluding male-female customary marriages, which the RCMA recognises.

5.4 Recommendations

The findings and conclusions derived from this thesis require legislative intervention in two ways. Firstly, explicit recognition of woman-to-woman marriages as valid customary marriages under the RCMA, and amendments to the wording of certain sections so that they relate to the context of woman-to-woman marriages. This includes re-defining the term

‘woman-to-woman marriage’ with a suitable African term that clearly distinguishes these marriages from same-sex marriages. This will assist in demystifying misconceptions surrounding this marriage institution, and stop it from being used to confirm the existence of same-sex marriages under customary law. The discussion in Section 3.2.3 emphasises the fundamental differences between the two types of marriages.

Secondly, there should be amendments to provisions of the RCLSA to enable it to address succession complexities in woman-to-woman marriages sufficiently. This will help determine what should be done to address succession disputes arising from such complexities, and how the Act should be interpreted and applied.

Amendments to the legislation are proposed as a solution in order to provide fully for all marriages under customary law, their legal requirements, proprietary consequences, and rights to inheritance and succession. The Recognition of Customary Marriages Act Amendment Bill of 2009’s provision in Section 2 has the potential to perpetuate the misconception that woman-to-woman marriages are same-sex marriages as provided for by the Civil Union Act. Instead of more efforts being made to include other types of marriages under customary law into the Act, the Bill’s provisions will give effect to the challenges spouses of woman-to-woman marriages may encounter in trying to register their marriages, as discussed in Section 3.2.2. In addition to this, it is recommended that the duty of support and maintenance of children born of woman-to-woman marriages with the queen be dealt with as a matter of urgency in the reform of the law relating to the maintenance of children. This will prevent the children from falling between the unfavourable position of the absence of an obligation on the part of the queen and a discretionary duty of their biological fathers. It is suggested that child support be claimed upon proof of paternity, irrespective of the marriage institution of the mother.

Thirdly, the evidence from the findings indicates that the Lobedu community requires education on provisions of official customary laws in relation to marriage and succession under customary law. This is informed by participants’ responses regarding official customary succession laws. The category of participants that requires urgent intervention in this regard is the traditional leaders. This is because traditional leaders adjudicate over disputes within their communities, and from what the findings show, the verdicts do not include constitutional, legislative and judicial changes that have taken place, especially in the

area of customary marriage and succession. The development of Lobedu living customary law in line with provisions of the Constitution can commence with this category of persons, through whose verdicts the information can be disseminated throughout the communities under their leadership. The problem requires a commitment by government to engage with all the relevant stakeholders concerned with and affected by the legislation. This includes traditional leaders, NGOs, civil society, chapter nine institutions, and government departments dealing with the rights of women and children. Women living under and married in terms of customary law should be engaged with and taught so that they are made aware about the legislation. This will ensure that there is a real impact on the lives of women. As Mokgoro rightly noted, “South Africans are only as litigious as they are rights-conscious”.⁴⁰³

The fourth recommendation of the study appeals for more research to be conducted in the area of customary law. The findings of empirical studies in the field will be the evidence upon which amendments to legislation can be petitioned. Furthermore, they will contribute towards the body of literature upon which future researchers will base their studies. As argued in section 2.2, if more attention had been given to succession to inheritance in Lobedu woman-to-woman marriages, the findings would have been the literature legislators relied on when drafting both the RCMA and RCLSA. The researcher would have also used it for this study to determine the adequacy of official customary law to address succession complexities.

In conclusion, South Africa has made progress in advancing the rights of women and children in woman-to-woman marriages. However, women’s levels of education, participation in the formal economy, knowledge of the law and access to justice remain some of the major challenges which prohibit full enjoyment of rights and legislative protection for them. It is anticipated that this research and many others to follow will positively contribute towards changing the reality of the lives of these women. The formal recognition of woman-to-woman marriages under customary law will be one of the major ways to ensure the proper effectiveness and implementation of the RCLSA.

⁴⁰³ Mokgoro Y ‘The Customary Law Question in the South African Constitution’ (1997) *Saint Louis University Law Journal* Vol 41: 4, 1279-1290 at 1288

6. Bibliography

6.1 Books

Amadiume I. *Male Daughter, Female Husbands: Gender and Sex in an African Society* (1987) London; Atlantic Highlands; Cape Town: Zed Books.

Bennett T W *A Sourcebook of African Customary Law for Southern Africa* (1991) Cape Town: Juta & Co Ltd.

Bennett T W *Customary Law in South Africa* (2004) Cape Town: Juta & Co Ltd.

Bennett T W. *Human Rights and African Customary Law* (1995) Cape Town: Juta & Co Ltd.

Bekker et al (eds) *Introduction to legal pluralism in South Africa* (2006) Durban, LexisNexis Butterworths.

Bunch C 'Transforming Human Rights from a Feminist Perspective' in J Peters & A Wolper (eds) *Women's Rights, Human Rights: International Feminist Perspectives* (1995) London: Routledge.

Haggard H Rider *She: A History of Adventure* 1887; 2010 Indo-European Publishing.

Himonga C. 'The Future of Living Customary Law in African Legal Systems in the Twenty-First Century and Beyond with Special Reference to South Africa' in J Fenrich, P Galizzi & T Higgins (eds) *The Future of Customary Law* (2011) Cape Town: Cambridge University Press 31–35.

Himonga C & Moore E *Reform of Customary Marriage, Divorce and Succession in South Africa* (2015) Cape Town: Juta & Co Ltd.

Himonga C & Nhlapo T. *African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* (2014) Cape Town: Oxford University Press.

Krige E J Krige, J D *The Realm of a Rain Queen: A Study of the Pattern of Lovedu Society*, International African Institute, London: Oxford University Press, 1943/1978.

Krige E J & Comaroff J L *Essays on African Marriage in Southern Africa* (1981) Cape Town: Juta & Co Ltd.

- Leighton S *Using a Vignette-based Questionnaire to Explore Adolescents' Understanding of Mental Health Issues* (2010) London: Sage.
- Mabandla B 'Women in South Africa and the Constitution-Making Process' in J Peters & A Wolper (eds). *Women's Rights, Human Rights: International Feminist Perspectives* (1995) London: Routledge.
- Morgan David L. *Focus Groups as Qualitative Research* (1988) London: Sage.
- Motshekga M K *The Mudjadji Dynasty: The Principles of Female Leadership in African Cosmology* (2010) Kara Books.
- Nhlapo T 'African Customary Law in the Interim Constitution' in S. Liebenberg (ed) *The Constitution of South Africa from a Gender Perspective* (1995) Cape Town: Community Law Centre, University of the Western Cape.
- Oomen B *Chiefs in South Africa: Law, Power and Culture in Post-Apartheid Era* (2005) UKZN Press.
- Oomen B *Tradition on the Move: Chiefs, Democracy and Change in Rural South Africa* (2000) Amsterdam: Netherlands Institute for Southern Africa.
- Patton M *Qualitative Research and Evaluation Method: Integrating Theory and Practice* (2002) London: Sage.
- Phillips A (ed) *Survey of African Marriage and Family Life* (1953) New York: Oxford University Press.
- Seymour S M *Native Law in South Africa* (1970) Cape Town: Juta & Co Ltd.
- Spencer L, Ritchie J & O'Connor W 'Analysis: Practices, Principles And Processes' in J Ritchie & J Lewis (eds) *Qualitative Research Practice: A Guide for Social Science Students and Research* (2003) London: Sage 200–218.

6.2 Articles

- Abrahams N, Jewkes R, Martin L J, Mathews S, Lombard C & Vetten L ‘Mortality of women from intimate partner violence in South Africa: A national epidemiological study’ (2009) 24 (4) *Journal of Violence and Victims*, 546–556.
- Akyeampong E & Fofack H. ‘The Contribution of African Women to Economic Growth and Development in the Pre-Colonial and Colonial Periods: Historical Perspectives and Policy Implications’ (2014) *Taylor and Francis Journal*, 29(1).
- Al-Mahkamre S S & Lewando-Hundt, G G ‘Researching ‘at Home’ as an insider/outsider’ (2008) 7(1) *Qualitative Social Work* 9–23 Sage.
- Bekker J C & Koyana D S ‘The judicial and legislative reform of the customary law of succession’ (2012) *De Jure* 45(3).
- Bronstein V ‘Confronting custom in the New South African State: An Analysis of the Recognition of Customary Marriages Act 120 of 1998’ (2000) 16 *South African Journal on Human Rights* 558.
- Budlender D, Chobokoane N & Simelane S ‘Marriage Patterns in South Africa: Methodological and Substantive Issues’ (2004) *Southern African Journal of Demography* 9(1).
- Cadigan J ‘Woman-to-Woman Marriage: Practices and Benefits in Sub-Saharan Africa’ (1998) *Journal of Comparative Family Studies* 29, 89-98
- De Souza M, ‘When non-registration becomes non-recognition : examining the law and practice of customary marriage registration in South Africa’ *Acta Juridica*, (2013): 239-272
- Deveaux M ‘Liberal Constitutions and Traditional Cultures: the South African customary law debate’ (2003) 7(2) *Citizenship Studies* 161–180.
- Devenish G. ‘South Africa from Pre-colonial Times to Democracy: A Constitutional and Jurisprudential Odyssey’ *Journal of South African Law* (2005) 3.
- Evans R ‘Working with legal pluralism: Widowhood, property inheritance, and poverty alleviation in urban Senegal’ (2015) *Gender and Development* Vol. 23 Issue 1,77-94
- Finch J ‘The Vignette Technique in Survey Research’ (1987) 21 *Sociology* 105–114.

- Fiss O M 'What is Feminism?' (1994) *Arizona State Law Journal* Vol 26: 2, 413- 428
- Greene B 'The Institution of Woman-Marriage in Africa: A Cross-Cultural Analysis' (1998) *Ethnology* 37:4, 395-412
- Griffiths J 'What is Legal Pluralism?' *Journal of Legal Pluralism* 24 1986.
- Harnois C E 'Sociological Research on Feminism and the Women's Movement: Ideology, Identity, and Practice' (October 2012) *Sociology Compass* 6(10).
- Higgins T E , Fenrich J & Tanzer Z. 'Gender Equality and Customary Marriage: Bargaining in the Shadow of Post-Apartheid Legal Pluralism' (2007) 30 *Fordham International Law Journal* 1653.
- Himonga C 'The Advancement of African Women's Rights in the First Decade of Democracy in South Africa: The Reform of Customary Law in Marriage and Succession' 2005 *Acta Juridica*, 82–107.
- Horn J G & Janse van Rensburg A M 'Practical Implications of the Recognition of Customary Marriages' (2002) *Journal for Juridical Science* 27(1).
- Hosegood et al 'Dispensing with Marriage: Marital and Partnership Trends in Rural KwaZulu-Natal, South Africa 2000-2006' (2009) 20 *Demographic Research* 279.
- Kaganas F, Murray C 'The contest between culture and gender equality under South Africa's interim Constitution' (1996) *Journal of Law and Society* 21:4, 409-433
- Kovacks R J, Ndashe S & Williams J 'Twelve Years Later: How the Recognition of Customary Marriages Act of 1998 is Failing Women in South Africa' 2013 *Acta Juridica* 273–291.
- Krige E 'Asymmetrical Matrilateral Cross-cousin Marriage: The Lovedu Case' (1975) 34(4) *Journal of African Studies* 231–258.
- Krige E 'Descent and descent in Lovedu Social structure' (1985) 44(1) *Journal of African Studies* 1–45.
- Maithufi I P & Bekker J C 'The Recognition of Customary Marriages Act of 1998 and its Impact on Family Law in South Africa' (2002) *The Comparative and International Law Journal of Southern Africa* 35(2) 182–197.

- Mamashela M 'New families, new property, new laws: The practical effects of the Recognition of Customary Marriages Act' (2004) 20 *South African Journal on Human Rights* 616.
- Mbatha L 'Reflection on the Rights Created by the Recognition of Customary Marriages Act' 2005 *Agenda* 42–47.
- Mokgoro Y 'The Customary Law Question in the South African Constitution' (1997) *Saint Louis University Law Journal* Vol 41: 4, 1279-1290
- Mokotong M 'A Study of Complex and Unfamiliar Customary Marriage outside of the Recognition of Customary Marriages Amendment Bill: A Distortion of a Traditional Customary Marriage' (2013) 27(2) *Speculum Juris* 78–97.
- Nwoko K C 'Female husbands in Igbo land: South-East Nigeria' (2012) 5(1) *Journal of Pan African Studies* 69–82.
- Oboler R S 'Is the Female Husband a Man? Woman/Woman Marriage among the Nandi of Kenya', (1980) *Ethnology* 19:1 69-88
- Oomen, B 'Traditional woman-to-woman marriages and the Recognition of Customary Marriages Act' (2000) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 63(2).
- Prinsloo W M 'Queenship of the Lobedu of Modjadji' (2005) 22(4) *Tydskrif vir die Suid-Afrikaanse Reg* 814–820.
- Prinsloo W M 'Pluralism or unification in family law in South Africa' (November 1990) *The Comparative and International Law Journal of Southern Africa*, 23(3) 324–336.
- Rautenbach C 'A Family Home, Five Sisters and the Rule of Ultimogeniture: Comparing Notes on Judicial Approaches to Customary Law in South Africa and Botswana' (2016) 16 *African Human Rights Law Journal* 145–174.
- Rautenbach C 'Deep Legal Pluralism in South Africa' *Journal of Legal Pluralism* 60 2010
- Rautenbach C & Meyer M M. 'Lost in Translation: Is a Spouse a Spouse or a Descendant (or Both) in terms of the Reform of Customary Law of Succession and Regulation of Related Matters Act?: Aantekeninge' *Tydskrif vir die Suid-Afrikaanse Reg* 1 (2012).
- Rumbidzai E 'Review of the Recognition of Customary Marriages Act 120 of 1998'. *Agenda* 23 (2009).

- Sally Engle Merry 'Legal Pluralism' (1988) *Law and Society Review* Vol. 22 Issue 5, 869-896
- Shope J H 'Lobola is Here to Stay: Rural Black Women and the Contradictory Meanings of Lobolo in Post-apartheid South Africa' (2006) 20(68) *Agenda* 64–72.
- Steyn M 'Restructuring feminism in South Africa' (1998) *Women's Studies International Forum*, Vol. 21: 1, 41–52
- Van De Meide W 'Gender Equality v. Right to Culture – Debunking the Perceived Conflicts Preventing the Reform of the Marital Property Regime of the Official Version of Customary Law' (1999) 116 *South African Law Journal* 100–112.
- Von Benda-Beckmann F 'Who is Afraid of Legal Pluralism?' *Journal of Legal Pluralism* 47 2002.
- Weeks S M 'Securing Women's Property Inheritance in the Context of Plurality: Negotiations of Law and Authority in Mbuzini Customary Courts and beyond' 2011 *Acta Juridica* 140–174.
- Williams J, Klusener J 'The Traditional Courts Bill: A Woman's Perspective' (2013) *South African Journal on Human Rights*, Vol 29:2, 276-293
- Woodman G R 'Legal Pluralism in Africa: The Implications of State Recognition of Customary Laws Illustrated from the Field of Land Law' 2011 *Acta Juridica* 35–58.

6.3 Papers

Posel D & Rudwick S Working Paper No. 60 *Marriage and iLobolo [Bridewealth] in Contemporary Zulu Society* University of KwaZulu-Natal (2011).

6.4 Legislation

Code of Zulu Law Act 16 of 1985

Bantu Authorities Act 68 of 1951

Bantu Homelands Citizenship Act 26 of 1970

Black Administration Act 38 of 1927

Children's Act 38 of 2005

Civil Union Act 17 of 2006

Constitution of the Republic of South Africa, 1996

Law of Evidence Amendment Act 45 of 1988

Natal Code of Zulu Law Proclamation R151 of 1987

Recognition of Customary Marriages Act 120 of 1998

Recognition of Customary Marriages Act Amendment Bill of 2009

Reform of Customary Law of Succession and Related Matters Act 11 of 2009

6.5 Conventions

African Charter on Human and People's Rights.

Convention for the Elimination of all forms of Discrimination against Women (CEDAW).

International Covenant on Economic, Social and Cultural Rights (ICESCR).

6.6 Websites

<https://en.oxforddictionaries.com/definition/english/polygamy>

www.golimpopo.com/modjadji-cycad-forest

www.greaterletaba.gov.za

www.saflii.org

www.sabinet.co.za

www.sanbi.org

www.statssa.gov.za

6.7 Reports

Himonga C *Stewart Report on the Review of Gender and Law Programmes in Zimbabwe and Mozambique* (unpublished) (2002) 26.

South African Law Reform Commission Project 90 Report *Harmonisation of the Common Law and the Indigenous Law Report on Customary Marriages* (August 1998).

6.8 Cases

Baadjies v Matubela 2002 (3) SA 427 (W)

Bhe v Magistrate Khayelitsha 2004 (2) SA 544 (C)

Mpengula v Mgqwayi 1919 NHC 65

Mthembu v Letsela & Another 1997 (2) SA 936 (T)

Nbono v Manoxoweni (1891) 6 EDC 62

Ramantele v Mmusi [2013] BWCA 1

Road Accident Fund v Mongalonkabinde 2003 (3) SA 119 (SCA)

6.9 Manuals

Department of Home Affairs Manual BI 1699 (November 2000)

Department of Home Affairs 'Circular No. 53' (20 November 2000)