"CONSENT TO MINORS' CUSTOMARY MARRIAGES PERPETUATES ABUSE TOWARDS AFRICAN GIRLS AND WOMEN IN SOUTH AFRICA".

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SUBMITTED TO THE UNIVERSITY OF CAPE TOWN

In fulfilment of the requirements for the Degree of Master's in Public Law (LLM)

Faculty of Law

UNIVERSITY OF CAPE TOWN

13 February 2023

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In the Department of Public Law

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ABSTRACT

That in terms of South African law, a minor under the age of 18 years, may enter into a valid and legally binding civil or customary marriage if they obtain consent from their parent or guardian, but only if said marriage is found to be "*in the best interests of the child*". That, furthermore, this legally permissible minimum age of marriage differs for boys and girls, where the marriageable age of a minor girl has been reduced to 15 years old, while a boy remains at 18 years old. That, while significant in the overall considerations of discrimination, this research did not examine this age difference in detail. That parental consent to minors' marriages applies to minor civil and customary marriages, regulated by the Marriage Act[1] and Recognition of Customary Marriages Act[2] respectively. That this consent provision also applies to customary marriages is made clear by sections 3*(1)(a)* and *(b)* of the latter Act. That this dissertation hypothesises that the provisions that allow a parent or guardian to consent to a marriage entered into by their child, under the respective marriageable ages of 15 and 18 years, have a disproportionately negative impact on black African minor brides who obtain such consent for a customary marriage specifically. That this parental consent usurps section 12(2)(a) of the Children's Act 38 of 2005 of South Africa, which says that a child below the minimum age set by law may not be given out in engagement or marriage. That section 12(2)(b)[3] explicitly requires consent to be given out in marriage from a child spouse *above* the minimum age set for marriage, which is thus between the ages of 15 and 18 years for minor girls, and above 18 years for both minor boys and girls. That this section is important and provides irrefutable legal protection to girl children engaged and/or married between ages 15 and 18 years *de jure*, but not *de facto*, especially not for minor girl brides within the context of an African customary marriage. That, additionally, being that this section, enacts the requirement of consent to marry from minors *above* the minimum age set for marriage, it falls outside the scope of this research in relation to the boy spouse, whose minimum age of marriage remains set at 18 years, because the argument is that marriage below the age of 18 years should not be permissible, with or without the consent of the minor in question.

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1 Marriage Act 25 of 1961.

2 Recognition of Customary Marriages Act 120 of 1998.

3 Children's Act 38 of 2005.

That this research further demonstrates that in practice, the legislation that empowers a parent or guardian to consent to their minor child's customary marriage simply legalises a child marriage, which is in contravention of South Africa's international law obligations and conflicts with other domestic legislation that made 18 years the minimum permissible age of marriage, for girls and boys. That international and regional instruments include the International Convention on the Rights of the Child, the African Children's Charter, the African Women's Protocol, and the SADC Gender Protocol. That these all seek to advance the rights of children, while judiciously balancing the recognition of other rights such as culture and religion and eliminating harmful practices related to those. That the argument in this dissertation is that while enabling a parent or guardian to consent to the marriage of a child under the minimum age to marry as set by law, could be justified in some contexts, or be interpreted as a measure introduced to protect minors, the customary law setting, debatably renders African girl children particularly vulnerable to the harms associated with child marriage and/ or the interrelated traditional practices, such as *ukuthwala*. That this dissertation examines the patriarchal foundation of customary law and marriage, questioning whether the parental consent provisions that apply to the customary marriages of girl children, unfairly discriminate against African girls on the grounds of sex and race. That the conclusion reached is that the parental consent provisions do constitute indirect unfair discrimination in terms of section 9(3) of the Constitution of the Republic of South Africa, 1996, on the grounds of race and gender, and that the limitation of the right is not justifiable in terms of its section 36 limitation clause. That the marriage regime researched is limited to heterosexual marriage.

ACKNOWLEDGEMENTS

To:

God, you have embedded in me, core issues that move me to serve, all centred around justice and African women. I honour them and I thank you for the clarity. My ancestors: my God appointed angels, who stand around me, walk with me and help me journey through life, including this part of it; *ngiyabonga*. Onami, you are my joy, strength and little, but grand guardian, who I am blessed to call *son*. Thank you for the days and nights you let me work and for the nights you said "*no mommie, mommie tired, go sleep*!" We did it my little heart. I hope that you one day embark on an academic journey that brings you great joy and fulfilment, and that no matter how difficult, you stay true to that which truly calls you. My family, for unconditional love, and a renewed sense of who we are to and in each other's lives. Mom, for your unshakeable belief in me, from the late-night studying snacks in high school, to your support at this level of my academic pursuits, I am grateful. My best friend Alinane, *chibebi changu*, of course you're here! You are my biggest cheerleader and confidante; the one who always sees the best in me and encouraged me to "*pace myself and just keep writing*", especially when I felt like giving up; thank you. To the one that God decided to use at the eleventh hour, I thank you for obliging Camren.

To the ones who touched my life in different ways over the years while this research gripped me: Steph, I can even hear you pushing and cheering, Chimzo, for the practical and sane support over the years, Mzi for your sincere words of support and Yush for praying with and for me. Andy, you, and your genius brain gave me much needed, last-minute insight, sanity and above all, hope. To my ever, calm, but stern supervisor Pierre de Vos, thank you for sharing your knowledge and for your guidance, especially when it was hard to hear. Above all, thank you for not giving up on me over the years. Patricia Phillips, your role at UCT far exceeds what you do behind your desk! Thank you, especially for that "*so what*" conversation we had. And so, I finished years later, with some losses and many more gains, and "*so what*" right? I finished!

I thank everyone I may not have mentioned by name, for you all know what you mean to me, and I can only hope that I hold a little space in your lives too, that uplifts you and challenges you to be your best version, always. Ngiyabonga kini lonke. And to myself, "*I'm proud of you mamma. This journey truly tested your mettle, yet here you stand.*"

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INTRODUCTION

1. BACKGROUND TO THE RESEARCH:

South African law recognises three types of marriages; namely civil marriage, governed by the Marriage Act,[4] customary marriage, now recognised and regulated by the Recognition of African Customary Marriages Act[5] (henceforth referred to as the "RCMA") and civil unions governed by the Civil Union Act.[6] The Department of Home Affairs in South Africa is responsible for the solemnization and registration of all, except customary marriages, which do not require solemnization. These marriages must be registered with the Department of Home Affairs, which may be done at a Magistrate's Court or on the day of the union where a marriage certificate is signed by the parties in the presence of a marriage officer. Furthermore, a civil marriage must be "conducted in the presence of two witnesses at a church, in a public office or private house with open doors and in the case of a serious illness, in a hospital".[7] According to the Marriage Act,[8] other requirements of a valid civil marriage are that both parties must be above the legal age of marriage. Finally, both parties who intend to marry must consent to the marriage, the union must be monogamous and neither party ought to already be married.[9] In the formalisation of customary marriages, the RCMA adopted the latter requirements of minimum age and consent to marry, in addition to the requirement that the marriage must "be negotiated and entered into or celebrated in accordance with customary law".[10] Although the minimum permissible legal age of marriage is 18 years, and consent to the marriage is required from each spouse intending to marry, the marriage of spouses below the age of 18 years is permissible, provided that parental consent to said marriage is obtained. Both section 3 of the RCMA and section 26(I) of the Marriage Act[11] make provision for this parental consent, with the latter stating, "no boy

[4] Supra note 1.
[5] Supra note 2.
[6] Civil Union Act 17 of 2006.
[7] Department of Home Affairs - Marriage Certificates (dha.gov.za).
[8] Supra note 1 at s 24, "(1) No marriage officer shall solemnize a marriage between parties of whom one or both are minors unless the consent to the party or parties which is legally required for the purpose of contracting the marriage has been granted and furnished to him in writing".
[9] Supra note 2 at s 3(1)(b), "The definitions section 1 of the RCMA, defines customary law as "the customs and usages of traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples".
[10] Ibid.
[11] Supra note 1.

under the age of eighteen years and no girl under the age of sixteen years (now fifteen years), shall be capable of contracting a valid marriage except with the written permission of the Minister, which he may grant in any particular case in which he considers such marriage desirable, provided that such permission shall not relieve the parties to the proposed marriage from the obligation to comply with all other requirements prescribed by law. Provided further that such permission shall not be necessary if by reason of any such other requirement, the consent of a judge or court having jurisdiction in the matter is necessary and has been granted".[12]

The complexity in this is that on one hand, the law stipulates that consent from one or both parties entering a marriage, is a strict requirement for a valid legal marriage. Furthermore, that no person under the age of 18 years can get married.[13] However, provision is then made for both these requirements to be circumvented, by making it possible for parties to enter a marriage even if under the age of 18 years, and to have, what is argued in this dissertation to be someone else grant consent to enter such marriage on their behalf *de facto*. Regarding the *de jure* position of consent, according to section 12(2)(b) of the Children's Act,[14] "a child *above* that minimum age may not be given out in marriage or engagement without his or her consent". *De jure*, this indeed means that minor girls aged between 15 and 18 years are required to give their own consent to the marriage, *in addition to* any parental consent to the marriage that may be given. However, the first fundamental question raised in this regard, is whether children aged 15, 16, and 17 years have the legal capacity to understand consent and/ or the implications of giving such consent in relation to their own marriage. Secondly, while section 12(2)(b)[15] exists, supported by section 305,[16] which criminalises failure to comply with it, this research argues that should consent to marry be sought from the minor girl aged between 15-18 years, she does not have the capacity to comprehend the consent required from her, nor would her refusal to consent, be sufficient to sway the decision of a parent who has consented to said marriage. Furthermore, this research reveals later that in the event that a parent or guardian acts in breach of sections 12(2)(b) and 305[17] and said minor girl or another party acting on her

[12] Marriage Act supra note 1 at s 26(1).
[13] Supra notes 1 and 2, at ss 25 and 3, respectively.
[14] Children's Act supra note 3.
[15] Ibid.
[16] Ibid.
[17] Ibid.

behalf, be interested to criminalise the parent or guardian in breach, *de facto* legal protection is not likely to occur. The latter view that because of the foundation and practice of African customary law and marriage, and other factors affecting African women and girls in relation to marriage, a minor black African girl aged between 15 and 18 years is protected by this consent requirement only *de jure*, but not *de facto*, Similarly, as recourse is available according to section 305,[18] the pursuit of justice in relation to this, is far-to-reach for young African girls and women.

Lastly, if by law, 18 years of age is given as the legally accepted minimum age where one has the capacity to enter into a valid and binding marriage, why is there an age difference between boys and girls? The view adopted by this dissertation is that although consent to a minor's marriage is required from the minor bride aged between 15 and 18 years and/ or the parents of the marrying minors, and that it is permissible by law, a marriage concluded in this manner constitutes a child marriage, albeit one that is consented to by the child's parent and others with the authority to do so by law. Should this version of a child marriage, therefore, be acceptable, merely because the child's parents have consented to it? Or because consent was granted by a minor girl child aged between 15 and 18 years, and whose capacity to consent or understand the implications of such consent can be questioned? Or should child marriage remain prohibited for minors below the age of 18 years, even when a parent or guardian does not object to the marriage of said minor child? While these questions are important, they are not the focus of this dissertation but may offer an interesting contribution to further studies in this regard.

The scope of this study is limited to examining how the consent provisions mentioned above, impact minor African brides, once they are parties to a customary marriage, in light of prevailing customary practices. In so doing, this dissertation will look beyond the formal legal rules that permit minors' marriages, to further probe their impact on African girl children living specifically under a customary law regime. It will then proceed to argue that the identified impact of the relevant consent provisions, disproportionately harms and unfairly discriminates against such African girl children.

[18] Ibid.

2. OUTLINE OF THE DISSERTATION PROBLEM:

"Women are disproportionately affected by violence due to several factors such as historical inequality, discriminatory structural conditions, and patriarchal dominance systems that have normalised women's subjugation".[19] This dissertation examines marriages concluded by minors, as one of the main contexts under which several forms of this violence manifests, through some traditional and/ or cultural practices. In South Africa, a minor under the age of 18 years, previously 21 years, according to the Age of Majority Act,[20] may enter into a valid and legally binding civil or customary marriage if they obtain consent from their parent or guardian. Read with the Marriage Act,[21] section 3(3)(a) of the RCMA says, "if either of the prospective spouses is a minor, both his or her parents, or if he or she has no parents, his or her legal guardian, must consent to the marriage" and section 3(3)(b) says, "if the consent of the parent or legal guardian cannot be obtained, section 25 of the Marriage Act, 1961, applies".[22] This means that in the event that consent to the minor's marriage cannot be obtained from the minor's parent or guardian, without their outright refusal, consent may then be obtained from a Commissioner of Child Welfare, within their jurisdiction, if said marriage is found to be "*in the best interests of the child*". According to section 25(4),[23] the refusal of a Commissioner of Child Welfare and the minor's parent or guardian may be appealed in the Supreme Court of South Africa, if deemed to be unreasonable. If this application is successful, consent to marry may be granted by a High Court judge. Furthermore, 'consent from the Minister of Home Affairs may be obtained and is concurrently required only when a minor girl who is under the age of 15 years and a minor boy who is under the age of 18 years, seek to marry. This Ministerial consent may be obtained retrospectively too, as long as all other requirements to enter into a valid marriage have been met and the marriage is not found by the Minister, to be *contra to the best interests of the child'*.[24]

As mentioned previously, lowering the minimum age of marriage from 18 to 15 years for girls, while maintaining it at 18 years for boys, can arguably be seen as specifically

[19] P Mubaiwa '*Human Rights, Modernity and Culture: Understanding the position of Lobola as a form of VAW and the current human rights normative standards and discourse on VAW*', Doctoral Thesis, University of Cape Town (2021). Available http://hdl.handle.net/11427/36695.
[20] Age of Majority Act 57 of 1972 at s 1.
[21] Marriage Act supra note 1 at ss 24-7.
[22] Ibid at ss 3(4)-(6).
[23] Ibid.
[24] Ibid at s 26.

discriminating against minor girls on the grounds of gender in the consent to minor marriage - a point that will be expounded on later. An additional complexity is that sex with a minor under the age of 16 years constitutes statutory rape in South Africa. "In July 2015, the Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 5 of 2015[3] was enacted (the Sexual Offences Act), decriminalising underage consensual sexual activity (including penetrative sex) among adolescent peers aged 12 - 15. Additionally, the amended law decriminalises consensual sexual activity between older adolescents (above the age of consent for sex, i.e., 16 - 17-year-olds) and younger adolescents (below the age of consent for sex, i.e., 12 - 15-year-olds), provided that there is no more than a 2-year age gap between them. These changes in the law do not affect the age of consent to sex, which remains at 16 years old".[25] This means that where a parent does consent to the marriage of a minor girl aged 15 years, and her spouse is older than her, by more than the legally permissible 2-year age gap, the sexual relations resulting from the minor marriage, would be in breach of this Amendment Act[26] and may be subject to criminal prosecution. Thus, consent to minor marriage is argued to not only legally condone a child marriage but also potentially permit a criminalised sexual encounter between minors with an age gap of over 2 years between them, as well as statutory rape, should the minor bride be aged 15 years or younger. The latter group, however, is not under examination in this thesis. This is a point for further research.

"Child marriage remains a problem in Southern Africa due to a variety of factors. These include poverty; gender inequity; tradition; insecurity, especially in times of conflict, limited education, and lack of adequate legal frameworks in Member States, most of which are inconsistent. In at least five countries in the Southern African Development Community (SADC), almost 40% of children are married before they are 18 years of age".[27] The research statement is that 'allowing a parent or guardian to consent to minor customary marriage, perpetuates abuse towards black African women and girls in South Africa'. This is due mainly to the historical position of women, existence of certain patriarchal customary practices that continue to marginalise them, and current levels of poverty and inequality in South Africa, which will be shown later to also affect women disproportionately.

[25] Z Essack, 1,2,3 MSocSci (Research Psychol), PhD; J Toohey, 1,3 LLM (Medical Law), "*Unpacking the 2-year age-gap provision in relation to the decriminalisation of underage consensual sex in South Africa*", November 2018, Vol. 11, No. 2 SAJBL, p 85.
[26] Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 5 of 2015[3].
[27] MODEL-LAW-ON-ERADICATING-CHILD-MARRIAGE-AND-PROTECTING-CHILDREN-ALREADY-IN-MARRIAGE.pdf (girlsnotbrides.org) Accessed: 09 November 2022.

Furthermore, it will later be explained how a current disconnect exists between official and living customary law and how South Africa's socioeconomic factors exacerbate the position of African women and children in the country. With over 16 million Black South Africans who live under traditional authority within former homelands,[28] "the precise number of people who live according to customary law is difficult to estimate as people have a choice of legal system to regulate different life transitions, such as marriage and death. Over half a million people are recorded as being married under customary law".[29] As such, this dissertation is not quantitative in nature, but is qualitative, with data relying on the predominance of customary practice among most black people living in South Africa.

Fundamentally, three key points underpin the challenges raised against parental consent to minors' marriages. The first of these is that it legitimizes child marriage. Child marriage otherwise outlawed by the international and regional instruments to which South Africa is a party, such as "article 21 of the African Children's Charter, article 6 the African Women's Protocol, and article 8 of the SADC Gender Protocol".[30] International treaties related to the protection of children's rights date as far back as 1923, where the League of Nations[31] commenced efforts to create a declaration on the rights of the child, which was expanded on and developed by the United Nations in 1959. Then "in 1989, the Member States announced the creation of the International Convention on the Rights of the Child, which has been signed by 193 states. In May 2000, the United Nations General Assembly adopted and opened for signature two protocols to the International Convention on the Rights of the Child concerning the sale of children, child prostitution and child pornography, as well as the involvement of children in armed conflict. These protocols entered into force on 18 January 2002. On 19 December 2011, the UN General Assembly adopted the Third Optional Protocol to this Convention, establishing an individual complaints procedure for violations of children's rights. This Optional Protocol was accepted unanimously by the

[28] J Butler, RI Robert, & J Adams, '*The Black Homelands of South Africa: The Political and Economic Development of Bophuthtswana and Kwa-Zulu*' (1977) Berkeley: University of California Press. http://ark.cdlib.org/ark:/13030/ft0489n6d5/ Date accessed: 14 February 2022.
[29] II Maithufi, & JJ Bekker (2002) 'The Recognition of Customary Marriages Act of 1998 and its impact on family law in South Africa', *Comparative and International Law Journal of Southern Africa, 35(2),* 182-197. Taken from sections 6 and 9 of the Recognition Act of 120 of 1998. They also mention that "Unfortunately, there are considerable methodological problems with recording marital status in South Africa. The problems are largely a result of the wide diversity in marriage forms, cultures, religions, and languages but also in the way in which marriage data is captured. As Budlender et al. (2004) demonstrate, the discrepancy derives from the fact that census and survey data reflect perceptions of marriage, while administrative data generally record the legal system. Many customary marriages are not registered and therefore don't appear in administrative records".
[30] Ibid.
[31] The League of Nations | UN GENEVA, accessed on 21 August 2022, "Known as the "predecessor of the United Nations", the League of Nations (1920 – 1946) was an intergovernmental organization with the aim "to promote international cooperation and to achieve international peace and security".

United Nations Human Rights Council on 17 June 2011".[32] All of these prescribe the minimum permissible age of marriage as 18 years, for both boys and girls.

Although by law, the minor's own consent to their marriage is required, the second contestation against parental consent to minor marriage is that it denies the minor spouse aged below 18 years, the opportunity to consent to or to decline the marriage *de facto*. While the above-listed instruments such as Article 8(2) of the SADC Gender Protocol, specifically require that, "legislation on marriage shall ensure that, every marriage takes place with the free and full consent of both parties", according to South African law,[33] a minor between the ages of 7 years and 18 years, has limited capacity to conclude a contract and requires the assistance of their parent or guardian. Furthermore, section 12 of the Children's Act[34] then says that consent is required from a child *above* the minimum age of marriage set by law, being 15 years for girls and 18 years for boys respectively. Additionally, section 25 of the Marriage Act[35] and section 3 of the RCMA permit such minor marriage if the parents of that minor consent to it. Notably, the minor's own consent is explicitly required by law, prior to or in conjunction with the parental consent being given. However, in practice, the argument is that a minor marriage may occur even if only their parent or guardian provides consent. Parental consent to minor marriage, can thus also lead to, or be deemed to be forced marriage *de facto*. Thirdly, that parental consent thrusts black minor girls into a patriarchal system of law, perpetuating their abuse and that of African women at large. This is because, as abovementioned, the foundation and governance of customary marriages are influenced by patriarchy, poverty, and some customary practices that negatively impact girls.

Before the Constitution[36] was adopted, African women in customary marriages carried minority status and were subject to the authority of their male spouses. This mainly impacted property ownership, children's rights, capacity to contract, and importantly for the purpose of this dissertation, equal status with their spouses in marriage. Nhlapo writes, "African women in customary marriage have never enjoyed the rights enjoyed by other citizens. Customary marriage allowed and entrenched a forfeiture of their rights attaching to

[32] Children's Rights and International Protection - Humanium. Accessed: 20 January 2023.
[33] Children's Act supra note 3 at s 12(2) read with the Common Law.
[34] Ibid at s 12(2)(b).
[35] Supra note 1.
[36] The Constitution of the Republic of South Africa, 1996.

citizenship".[37] Nhlapo continues to say, "clearly the need for corrective legislation is long overdue. South Africa's obligation under the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) made it imperative to implement immediate corrective legislation, to rectify the capacity of women".[38] Laudably, marriage law has evolved over the years in South Africa to eliminate the unequal treatment of men and women in marriage relationships. It will later be shown how corrective legislation and court judgments contributed to these changes and how these have amended - at least in a formal sense - customary practices that violated the rights to equality and non-discrimination enjoyed by all women. The RCMA is one such piece of legislation, enacted to provide legal recognition to customary marriages and afford legal protection for spouses in such relationships as "the overriding object of the Recognition of Customary Marriages Act (1998) is to ameliorate the inconsistencies in South African family law which relegated women to second class citizens or even worse, to women with no status at all".[39]

Furthermore, although this status of married women as minors has now been abolished through the court's development of customary law in accordance with section 39(2) of the Constitution[40] (see, for example, *Mayelane v Ngwenyama and Another*[41]) this dissertation will show that even "as the Constitutional Court developed significant women's rights jurisprudence, it became increasingly clear that African women [still] laboured under a generally subordinate legal status".[42] The difference between the *de jure* position and the *de facto* position of women in heterosexual relationships and particularly in customary marriages thus looms large in the analysis provided in this dissertation. While the historic position of subjugation and marginality of African women speaks to broader concerns, this dissertation focuses more narrowly on the provisions that allow parents to give consent for their minor child to enter into a marriage, with an even narrower focus still, on the way these provisions impact on black African minor girls, who enter into customary marriages. These provisions cannot be judged on their face but should be judged on their impact on

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[37] S Samuel '*Women Married in Customary Law: No Longer Permanent Minors. Agenda: Empowering Women for Gender Equity'*, (40), 23-31. doi:10.2307/4066014.
[38] Ibid.
[39] Ibid.
[40] Section 39 of the Constitution of the Republic of South Africa, 1996 says, "when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights".
[41] *Mayelane v Ngwenyama and Another (CCT 57/12) [2013] ZACC 14; 2013 (4) SA 415 (CC); 2013 (8) BCLR 918 (CC) (30 May 2013), at para. 26 – taken from Gumede v President of Republic of South Africa and Others [2008] ZACC 23; 2009 (3) SA 152 (CC); 2009 (3) BCLR 243 (CC).*
[42] PE Andrews "'*Big Love'? The Recognition of Customary Marriages in South Africa*". Washington and Lee law review 64.4 (2007): 1483–. Print. At page 1486. Taken from Simons, H. J. *African Women: Their Legal Status in South Africa*. London: C. Hurst & Co, 1968, p. 271-77.

African girl children. Notable here is that patriarchy[43] underpins customary law norms, and potentially renders women living under customary law vulnerable. Additionally, poverty and the added vulnerability of age and gender, enhanced by South Africa's current socioeconomic climate, further disadvantages minor African girls.

Section 3(3) of the RCMA does not explicitly limit parental consent to black minor girls. However, how it is implemented, depending on the abovementioned circumstances, is what causes the negative impact on minor African girls specifically. Consequently, despite the constitutional development of customary law rules and the adoption of the RCMA, minor girls are, as will be shown in this research, still negatively impacted by the provisions allowing parents to grant consent for their minor child's marriage. At the fore, patriarchy is consistently embedded in customary law, and the formal rules that now provide protection for women, focus on a version of customary law that is written and stagnant, and not one that evolves within the lived practices of communities. This is of particular concern when the living customary law differs from the customary law which has been developed by our courts, to bring customary law rules in line with the spirit, purport, and object of the Bill of Rights.

This dissertation will later illustrate, that the impact of parental consent to marriage, on minor African girls, is not merely negative, but that it amounts to unfair discrimination on the grounds of race and gender, according to section 9 of the Constitution.[44] This argument is made on the underlying premise that, the constitutional imperative to promote human rights such as dignity and equality, has raised a tension between the recognition of African customary law, and the protection of individual rights, including the right not to be discriminated against. To put it another way, by recognizing African customary law to nurture the diversity of the people of South Africa, and to restore dignity and equality previously denied to its practitioners, the Constitution[45] has also compromised the protection of the individual rights of the same people, mainly the women. Expressly, by allowing this consent to minor marriage, South African law has not prohibited child

[43] MK Chiweshe '*Wives at the Market Place: Commercialisation of Lobola and Commodification of Women's bodies in Zimbabwe. The Oriental Anthropologist*' (2016). Taken from (Chakona, 2012), defining patriarchy as, "a gendered power system: a network of social, political and economic relationships through which men dominate and control female labour, reproduction and sexuality as well as define women's status, privileges and rights in a society".
[44] Supra note 36.
[45] Ibid.

marriage; it has simply shifted the responsibility to parents of minor children, to determine whether such marriages should occur. The Children's Act[46] of South Africa, states that the High Court is the upper guardian of all children, but the legal rules that allow parents to consent to the minor marriage of their children, can be argued to have created a loophole relegating this High Court's responsibility to protect children. Does this not bypass and undermine the protection created for children by the Act[47] and by the supreme law of the land, the Constitution?[48]

3. SIGNIFICANCE OF THE RESEARCH:

While gender discrimination and patriarchal control of women is a society-wide problem, it is also a consistent theme within living African customary law and can be traced to key moments in the history of South Africa such as colonization, apartheid, and constitutionalism. The argument, that parental consent to minors' marriages exposes minor girls to maltreatment within a system of marriage that adversely favours males, is based on the notion that the advancement of civil law and official customary law has left living customary law behind, as mentioned briefly above. Yet, when measuring the advancement of customary law as a whole, the inclusion of living customary law is presumed. Himonga, for instance, stresses the changing nature of living customary law as distinct from the 'ossification and stagnation' of official customary law. She writes, "living customary law represents the unwritten practices observed and invested with binding authority, by the people whose customary law is under consideration. The test of validity of its rules and norms is its acceptance by people who live in the system, rather than the command of a sovereign or pronouncement of a legislator".[49]

Consequently, theoretical analysis shows that the requirements of a customary marriage ought to be viewed through the lens of living customary law and should not be based on assumptions that may be applicable to civil law marriages. If this is done, it will become clearer that the marriage of a minor girl to a minor boy, or older man within customary law

[46] Children's Act supra note 3.
[47] Ibid.
[48] Supra note 36 at s 28.
[49] C Himonga '*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 Galizi and TE Higgins (eds), '*The Future of African Customary Law*' (Cambridge, Cambridge University Press, 2001), at pages 34-35.

rules, should not be permissible, even with the contested parental consent having been granted. This is arguably the significance of this study, as it would contribute greatly to the advancements of the rights of women and children in South Africa, with influence on the rest of the region. The broader problem is concisely summarised by Mamphela who states, "African women pass through the control of different men throughout their lifetime. It is a control that stretches from the cradle to the grave. This system, which has been further reinforced by the legal provisions of successive white governments, confers the status of perpetual minor upon African women".[50] Thus, even if it is to merely prolong a minor girl's entry into this system of patriarchal control of African women, parental consent to minor marriage according to section 3 of the RCMA must be reviewed.

Furthermore, this dissertation will demonstrate that there is a gap between legislative interpretation and court application of customary law, on the one hand, and the way in which communities practice their customs, on the other. Thus, while the Constitution "brought about a radical change to the status of customary law, it [has largely] had no immediate effect on the system of courts applying that law. Magistrates' courts and the High Courts continue to operate primarily in terms of the common law. Only one concession is allowed for the cultural orientation of African litigants, the courts may take judicial notice of customary law, provided that it is sufficiently certain and readily ascertainable".[51] If not, it must be proved by calling expert testimony".[52] Consequently, there is some recognition that living customary law is currently dealt with differently in our courts, which are permitted to take judicial notice of testimony from expert practitioners of customary law.

However, what will be illustrated later in this dissertation, is that living customary law is not readily accessible or ascertainable to the courts, and even when it is, the problem remains that court judgments developing customary law may not be applied by communities who live in accordance with the customary law rules. Section 211(3) of the Constitution does state that "the courts must apply customary law when that law is applicable, subject to the

[50] R Mamphela *'The dynamics of gender politics in the hostels of Cape Town: another legacy of the South African migrant labour system'*. Journal of Southern African Studies 15, no. 3 (1989): 393-414. Taken from "My Husband Has to Stop Beating Me and I Shouldn't Go to the Police": Family Meetings, Patriarchal Bargains, and Marital Violence in the Eastern Cape Province, South Africa - Elena Moore, 2020 (uct.ac.za).
[51] The Law of Evidence Amendment Act 45 of 1988 at s 1(1).
[52] H Corder, V Federico '*The Quest for Constitutionalism: South Africa since 1994*', SALJ, 133, No.3, published online 1 September 2016 https://journals.co.za/doi/pdf/10.10520/EJC-614f1fdd4. Date accessed 14 February 2022.

Constitution and any legislation that specifically deals with customary law".[53] This is not problematic *per se*, the problem is "often that the version of customary law that is subjected to constitutional review is official customary law and the cases lack genuine empirical evidence of living customary law".[54] Thus, despite numerous efforts to interpret, understand and apply living customary law within the courts and legislation, the existing gap between it and official customary law, gives rise to an increased risk of marginalization of African minor girls, in a system that preserves patriarchy and the minority status of women, as will be illustrated below.

4. SUMMARY OF THE RESEARCH ARGUMENT:

As aforesaid, several factors contribute towards the continued marginalization of women in South Africa, particularly within an African marriage system marred by women's submission to the male authority of their respective husbands, fathers, and traditional chiefs. Of African marriage, Mamphela[55] summarises, "the very fact of marrying into a family is at the basis of bringing the woman into a system of control that ensures the perpetuation of patriarchal family relations".[56] Rice argues similarly, that "male authority is a reality in a married woman's daily life".[57] The main African customs that contribute to this and that will be discussed in detail within this dissertation, include *ukuthwala,*[58] *lobola*[59] in the context of poverty in South Africa, polygamy[60] and submission to overall male authority within the household and community, such as the chief.[61] Supported by all these factors, this research reasserts that allowing parents to give consent to their minor children's customary marriage

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[53] Supra note 36.
[54] C Himonga & E Moore '*Living customary law and families in South Africa. Children, Families and the State' (2018)* Juta, at p 61.
[55] Supra note 50.
[56] E Moore 'My Husband Has to Stop Beating Me and I Shouldn't Go to the Police': Family Meetings, Patriarchal Bargains, and Marital Violence in the Eastern Cape Province, South Africa. Violence Against Women, (2020) 26(6–7), 675–696. "My Husband Has to Stop Beating Me and I Shouldn't Go to the Police": Family Meetings, Patriarchal Bargains, and Marital Violence in the Eastern Cape Province, South Africa - Elena Moore, 2020 (uct.ac.za)
[57] K Rice '*Ukuthwala in Rural South Africa: Abduction Marriage as a Site of Negotiation about Gender, Rights and Generational Authority Among the Xhosa*', (2014) Journal of Southern African Studies, 40:2, 381-399, DOI: 10.1080/03057070.2014.896720. Taken from Liebenberg A., '*Dealing with Relations of Inequality: Married Women in a Transkei Village*', African Studies, 56, 2, 1997, p. 350. See Aguilar M.I., '*The Politics of Age and Gerontocracy in Africa. Ukuthwala in Rural South Africa*' at p 385.
[58] *Ukuthwala*: is a marriage custom where a young man (or his representatives) takes a young woman by surprise and force in order to take her to his place, thereafter he goes to her family to propose marriage to them.
[59] *Lobola*: sometimes referred to as lobolo, bogadi, lumalo, magadi, bohali, xuma, ikhazi, thaka, emabheka or other name commonly used in practice, means that a prospective husband or the head of his family on his behalf, gifts to the head of the prospective wife's family, property in cash or kind, in negotiations of a customary marriage. This word usually denotes the gifts themselves or the hand-over process of the gifts from the family of the husband to that of the wife. *Ukulobola*: the verb of '*lobola*', the act of practicing the custom described
[60] Polygamy: is interchangeably used with 'polygyny' and means that a man has more than one wife,
[61] *Chief*: is a word commonly used during the apartheid era to describe a person recognised as a leader and that we now refer to as a 'traditional leader'. Traditional leader: means any person who, according to customary or other law holds a position of power in a traditional ruling hierarchy.

thrusts them into this system from an earlier age, perpetuating and elongating their maltreatment.

This assertion will first be demonstrated by a historical outline of African customary law and its evolution in chapter 2. Subsequently, chapter 3 will detail the most prevalent African customs related to marriage that still exist today, while illustrating how they impact African minor girls and women within the customary marriage. Chapter 4 will continue to expound on other factors, whose prevalence and depth will be shown to be unique to South Africa, and thus negatively impacting African girls and women in customary marriages disproportionally, compared to women of other races, who also do not subscribe to customary law and marriage. Taking these already mentioned factors of poverty, patriarchy, and the operation of certain customary practices into context, the research will then show that they provide the framework for legal rules, such as the RCMA, to apply and that they consequently influence their application and efficacy. With that said, a section 9(3)[62] analysis will be conducted, to show that African minor brides are indirectly discriminated against, on the grounds of race and gender by section 3(3) of the RCMA. A dilemma that non-black African minors do not have to contend with. The recommendation that this dissertation concludes with, is that parental consent to minors' customary marriages must be prohibited, without exception.

5. LIMITATIONS TO THE RESEARCH:

While this dissertation is not about the exact customary law rules on consent to minors' marriages in various communities, or how these change as part of living customary law, the research focuses on that, whatever these rules are, they may not be the same as the customary rules recognised by the courts and the legislature. As such, conducting ethnographic research may have proven useful to simply outline the differences between the rules on parental consent to minors' marriages and how they differ between various African cultures and legislative understanding and recognition. Additionally, the voices of women who married customarily, before or after the age of 18 years, would have been vital to provide first-hand accounts of the system that governs their unions today. Thus, arguably,

[62] Supra note 36.

the main limitation encountered by this study was not conducting ethnographic research, attributable to resource limitations, namely time and finance. Nevertheless, due to the very nature of the male authority and power dynamics described within living customary law communities, it would have presumably been difficult, albeit not impossible, to speak to the women in these customary marriages. COVID-19 pandemic placed an additional obstacle to field research. However, it is contended that online research with available data is sufficient and justifiable for the dissertation topic at hand, given that quite extensive data already exists online relating to specific components of customary law and marriage, including the analysis of the RCMA.

CHAPTER 2

AFRICAN CUSTOMARY LAW IN SOUTH AFRICA: FOUNDATION AND EVOLUTION

"Culture *does not make people, people make culture*"[63]

- Chimamanda Ngozi Adichie

1. AN INTRODUCTION TO AFRICAN CUSTOMARY LAW:

African people, including South Africans, have largely been governed by African customary law, which existed long before the historical period that saw its recognition, interpretation, and modification. Today, the Constitutional dispensation recognises one's right to practice a culture of their choice in sections 30 and 31. Section 30[64] says, "Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights". In addition, and with similar limitation, section 31(l) says, "Persons belonging to a Cultural, religious, or linguistic community may not be denied the right, with other members of that community, (a) to enjoy their culture, practice their religion and use their language; and (h) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society. (2) The rights in subsection (1) may not be exercised in a manner inconsistent

[63] C Ngozi '*We should all be feminists*', TEDxEuston: https://www.youtube.com/watch?v=hg3umXU_qWc&vl=en.
[64] Constitution supra note 36.

with any provision of the Bill of Rights".[65] The significance of this constitutional recognition of cultural rights and their exercise contributes towards official customary law, which is contrasted with living customary law.

African "customary law derives from social practices that the community concerned accepts as obligatory"[66] as opposed to legislation or common law, which is made by Parliament or by judges. In African customary law, several rites and norms become law over time due to their practice and acceptance. As such, communities that have lived according to these rites and norms governing different areas of customary law, accepting them as law to which they are bound, have over time also created and accepted customary practices observed during customary marriage. The case of *Bhé and Others v Khayelitsha Magistrate and Others,*[67] endorsing a view first expressed by the Constitutional court in *Alexkor Ltd and Another v Richtersveld Community and Others,*[68] said, "indigenous law is not a fixed body of formally classified and easily ascertainable rules. By its very nature, it evolves as the people who live by its norms change their patterns of life".[69]

Different groups of African people were governed by varying rules under customary law, which is dynamic in nature and evolving with the practices, customs, and traditions of those people. "When the process of colonizing South Africa began, all the customary laws of the region were unwritten, a situation that allowed for considerable local diversity. Variation in the content and application of law however was antithetical to the aims of colonial justice, which considered uniformity a primary goal".[70] Due to this colonial interference with existing cultural principles and practices, today a "characteristic feature of the South African legal system, as well as that of most countries which came under colonial British rule, is the dualism between customary law on the one hand and Roman-Dutch/ British law on the other".[71] This introduction of foreign legal systems and principles introduced laws that have now been codified into legislation, textbooks court precedents and are practiced by the courts, referred to as official customary law. "This system of law also referred to as lawyers'

[65] Ibid.
[66] TW Bennett "*Customary Law in South Africa*" Ed. 1 (2004) Juta and Company (Pty) Ltd, at p 1.
[67] *Bhé and Others v Khayelitsha Magistrate and Others* (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR (1) (CC) (15 October 2014), at para 81.
[68] *Alexkor Ltd and Another v Richtersveld Community and Others* [2003] ZACC 18; 2003 (12) BCLR 1301 (CC) at para 52.
[69] Ibid.
[70] ZN Jobodwana '*Customary courts and human rights: Comparative African perspectives*' (2000) South African Public Law Review, *15*(26-49).
[71] Ibid.

customary law or state customary law, is the law applied by the courts and other state institutions. It has its sources in codes of customary law, legislation, court precedents, academic texts, and other written materials sanctioned by the state as its sources. Because of its ossification, official customary law may not represent the customary law of the people whose customary law it purports to be".[72] Respectively, this official customary system of law did not evolve with the changing practices of communities who practice it, and it became stagnant and detached from living customary law.

African customary law also continues to vary in practice across different cultural groups in South Africa, it is, therefore, important to note that, marriage and the customary laws that regulate it, will differ from culture to culture; as will those of other areas of law. While the various Constitutional Court judgments in which it developed customary law recognised the living nature of customary law, it is not clear that the Court had sufficiently considered the impact that this might have on the way customary law rules are applied in specific communities, and on how this might limit the reach of Constitutional Court judgments on the living customary law practiced in some communities.

2. AFRICAN CUSTOMARY MARRIAGE:

Despite the above-mentioned variances between the different customary practices among the several groups of African people in South Africa, this section will outline the most accepted customary practices observed, in the conclusion or governance of living customary marriages. As such, marriage according to customary law as practiced originally by African people had very distinctive characteristics, some of which were abolished and others kept after the infiltration of Roman-Dutch and English Law during colonisation as well as the Constitution.[73] Some of the more basic and common assumptions informing African customary marriage though are that once *lobola* is paid and a celebration according to that specific culture is had, the woman may leave her home for that of her husband. As Koyana points out, generally, "the legal institutions of African people are more communal in

[72] C Himonga (2011) '*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 African Customary Law* (pp. 31-57). Cambridge: Cambridge University Press. doi:10.1017/CBO9780511844294.003. Also referring to, R Gordon, Woodman '*How State Courts Create Customary Law in Ghana and Nigeria in Indigenous Law and the State*' 181–220 (Gordon R. Woodman ed., Foris Pubns USA 1988). See, e.g., Natal Code of Zulu Law Proclamation of 1987 and the KwaZulu Act on the Code of Zulu Law 16 of 1985. 16 See, e.g., Black Administration Act 38 of 1927 (S. Afr.) (repealed).

[73] Supra note 36.

character, as compared with the individualist and capitalist institutions of Western societies. Secondly, they are more concrete, whereas the law of modern Western societies is more abstract in its character and better systematized".[74] Koyana also states that "legal institutions of Africans have a more sacral character, as against the purely secular character of the law of modern Western societies. Failure to comply with tradition is thought to bring punishment from the ancestral spirits".[75] For the purposes of this dissertation, it is important to have a basic understanding of the most important and most recognised of these practices, outlined briefly below.

2.1. Ukulobola:

Ukulobola, the verb of *lobola,* is a custom that generally sees a young man give livestock, usually cattle to the father of the young woman he intends to marry. It "is culturally depicted as a unifying element between the bride and groom's families and also serves as a token of appreciation for the wife to be (Baloyi, 2016)".[76] Thus, its historical intent can be understood to offer the family of the bride a gift, in thanksgiving for raising her well and a symbol of unity between both families. However, without ignoring the transactional element of it, regardless of its noble intention, suffice to say that lobola is also the representation of a "contract between the father and the intending husband of his daughter, by which the father promises his consent to the marriage of his daughter and to protect her, in case of necessity, either during or after such marriage and by which in return he obtains from the husband valuable consideration, partly for such consent and partly as a guarantee by the husband of his good conduct towards his daughter as a wife".[77]

"The South African cultural practice of Lobola involves cattle or monetary reciprocity as an attestation of veneration for the wife-to-be. This is also meant to seal a covenant between the bride and groom's families, thus, fulfilling cultural obligations that come to grips with marriage in the South African context. Common elements now include the sending of a delegation, slaughtering of a beast, negotiation and/ or actual exchange of agreed lobola, a celebration of the union, and the physical handover of the bride from her home to her new family home that of her husband, to complete the process of formal registration of that

[74] DS Koyana '*Customary Law in A Changing Society*'. Ed. 1. (1980) Juta & Co, Ltd.
[75] Ibid.
[76] ME Montle '*Conceptualising Lobola as A Perpetuator of Gender-based Violence in South Africa Through Intsika. E-Bangi*' 2020;17(7):160-8.
[77] Ibid at p 3.

marriage".[78] Actual transfer of the livestock from the family of the young man to the woman's family must occur, to symbolize the completion of the *lobola* process and celebration. Some case law however disputes this and states, "the payment of dowry cattle by word of mouth or by description constitutes sufficient delivery to pass ownership to the payee".[79] The notion of transfer of ownership, of the woman whose *lobola* has been paid for, will later be linked in this research to her consequential abuse, mainly by her husband who notionally *takes ownership* of her. There seems to be a strand of intricacy in the delineation of *lobola* as men tend to use it as a "facilitator of the oppression and abuse of women in marriages" (Chirese & Chirese 2010: 216)".[80]

The custom of *lobola* is one of the most common aspects of concluding a marriage and arguably the most important practice across the different African cultures. It is so widespread and accepted that even today, African people who subscribe to Western culture and civil law, commence their marriage proceedings with it, before completing other requisite steps such as registration. Whereas these same African people that Koyana refers to as "'Westernized Blacks', such as teachers, clerks, doctors, and lawyers have wittingly or unwittingly discarded completely the majority of customs and are never heard to be involved with *ukuthwala, ukuthombisa, ukubusa, ukutheleka or ukungena*".[81] In fact, "the South African legislature, in the Black Administration Act 38 of 1927, especially laid down that it [*lobola*] should not be declared contrary to the principles of public policy and natural justice, thereby acknowledging that it is a permanent fact in the way of life of the people".[82] Further research could be done to investigate the reason why *lobola*, out of all other marriage-related African customs, is still common among black Africans belonging to different classes, especially those that practice it and thereafter register a civil marriage too. The key question could be, 'to what extent are the experiences of African tradition different for black South Africans according to their class'?

Remarkably too, "according to the Native Laws and Customs Commission of 1883, the practice of *lobola* is not peculiar to African society, with traces of it appearing among the

[78] T Nhlapho '*Customary Law Marriages*', (2018) at https://www.youtube.com/watch?v=ALHFGj9h1rk. Nhlapho expressed that the notion of 'delivery of a bride' from her home to that of her new husband, has evolved from physical delivery to the accepted forms, including a couple living together as husband and wife.
[79] Ibid, at p 9: taken from '*Tshayuse Moyeni v Magadan Nkuhlu*' 18 (1946) NAC (C & O) 2, a case that came from the Kentani District.
[80] Supra note 76.
[81] DS Koyana '*Customary Law in A Changing Society*'. Ed. 1. (1980) Juta & Co, Ltd at p 3.
[82] Ibid.

Hebrews, Greeks of Homer, Germans and some remnants today still found in Norway" although the aim does not appear to be the same.[83] Nevertheless, despite the abovementioned original intention behind observing the tradition of *lobola*, today, living customary law seems to exhibit a significant change in this motivation and process. It now gives the impression that the entire custom is but a mere financial transaction where the husband-to-be 'purchases' his wife-to-be. The Convention on the Elimination of Discrimination against Women (hereafter CEDAW) "Committee in the past few years has unreservedly called *lobola* a practice that should be regarded as aggravating discrimination against women and thus should be considered a harmful traditional and cultural practice. However, in its subsequent reports to some countries during the same period, there is no mention of *lobola* as a form of violence against women or a call for the respective states to take action to eliminate the practice".[84]

Despite the noble intentions of *lobola*, it is understood in contemporary South Africa as having shifted from honorary to transactional, as attested by "participants [who] stated that some families used the virginity status of the girl and her educational attainment in order to determine the amount of payment for *lobola".*[85] In other words, calculation of the *lobola* amount, may now be based on the value of what the parents of the bride are deemed to have invested into pivotal points of her upbringing, such as her education level attained, whose total the family of the groom then has the option to provide in cash or livestock at an agreed rate. This argument is made even stronger by the development and existence of the '*Lobola* Calculation Application or App'[86] which provides users the ability to calculate the worth of a woman based on predetermined factors such as her age, virginity and highest level of education attained. Thus, despite its noble intent, like what will be described of *ukuthwala* below, supported by Chiweshe,[87] "*lobola* is now arguably thought to be objectifying women further and indirectly subjecting them to higher risks of being abused by their spouses who, after paying *lobola,* view them merely as paid for possessions". Even where intent remains of noble culturally embedded unification of families, symbolic of thanksgiving towards the family of the bride, a celebration of the union and now a legal

[83] Ibid at p 4.
[84] United Nations Human Rights Council, 'Resolution Adopted by the Human Rights Council, Strengthening Efforts to Prevent and Eliminate Child, Early and Forced Marriage: Challenges, Achievements, Best Practices and Implementation Gaps (A/HRC/RES/24/23)', 2013
[85] Msweli S.N., "I-lobola in Contemporary South Africa: Perspectives and Experiences of Young People", 2020, UKZN, p. I, taken from: Msweli_Snenhlanhla_Nompumelelo_2020.pdf (ukzn.ac.za).
[86] Lobola Calculator at http://www.lobolo.co.za/.
[87] Supra op cit note 43 at p 4.

requirement for the recognition and registration of marriage in South Africa, it "is critical to discuss how the nuances of human rights, historical, socio-cultural and political discourses align with a woman's right to be free from violence, particularly looking at the practice of *lobola*".[88] This discourse will be expanded on later in the dissertation, to show a causal link between the contemporary understanding, and perceptions of *lobola*, and the abuse of women within marriage.

2.2. *Ukuthwala:*

One of the most recognised and contested forms of customary marriage in the new South African constitutional dispensation, is *ukuthwala*. "In its original form, *ukuthwala* was one of the 'irregular' forms of marriage, observed predominantly by the Nguni-speaking groups (however, there is documented evidence of its existence among Sotho-speaking communities, as well as among the Venda and Tsonga peoples)".[89] The practice has been vividly described by Koyana and Bekker as follows:

> "the intending bridegroom, with one or two friends, will waylay the intended bride in the neighbourhood of her home, quite late in the day, towards sunset or at early dusk, and they will "forcibly" take her to the young man's home. Sometimes, the girl is caught unawares, but in many instances, she is "caught" according to plan and agreement. In either case, she will put up a show of resistance to suggest to onlookers that it is all against her will when, in fact, it is hardly ever so".[90]

Referred to as 'abduction marriage' on occasion, the comeuppance of *ukuthwala* is thus noted as being one with noble intent, but bearing resultant consequences such as forced marriage, kidnapping, rape, and assault, which have been ruled against in the *Jezile v S and Others.*[91] The ruling makes it possible for "a victim of *ukuthwala* [to] apply for a protection order under the Domestic Violence Act [116 of 1998] against family members involved".[92] While this is a significant and commendable legal milestone, it does not prevent the

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[88] P Mubaiwa '*Human Rights, Modernity and Culture: Understanding the position of Lobola as a form of VAW and the current human rights normative standards and discourse on VAW*', 2021 Doctoral Thesis, University of Cape Town: http://hdl.handle.net/11427/36695.
[89] DS Koyana and JC Bekker 'The Indomitable *ukuthwala* custom' 2007 De Jure at p 139-144.
[90] Ibid.

[91] *Jezile v S and Others* (A 127/2014) [2015] ZAWCHC 31; 2015 (2) SACR 452 (WCC); 2016 (2) SA 62 (WCC); [2015] 3 All SA 201 (WCC) (23 March 2015).
[92] CN Himonga and E Moore '*Reform of Customary Marriage, Divorce and Succession in South Africa: Living Customary Law and Social Realities*' Claremont, Cape Town: Juta & Company, Limited, 2015. Print. Page 77. Taken from ProQuest Ebook Central, http://ebookcentral.proquest.com/lib/uoct/detail.action?docID=6483208.

continuation of this practice within living customary law but seeks out the already criminalised components within it. The state did not rule against *ukuthwala* as a practice, but on its resultant impact, which is what this dissertation is examining. This is another demonstration of the delicate and complex relationship between constitutional recognition of cultural practices while ensuring that they do not violate individual rights protected in the Bill of Rights, namely one's right to a cultural practice of their choice according to section 30.[93] The South African Law Reform Commission recommended in 2015, that the Prohibition of Forced Marriage and Regulation of Related Matters Bill (Prohibition Bill) be enacted. The "basic premise of the Prohibition Bill is to make forced marriages and child marriages an offence; thus, protecting both women and children subjected to *ukuthwala* leading to these marriages".[94] What remains to be seen is the implementation and access to justice in relation to this.

In the instance that a victim of any of the crimes associated with the custom wanted to seek justice as ruled by *Jezile,*[95] the dissertation will outline several factors below such as poverty, minority status, physical restrictions from legal institutions, and a lack of information and access to the law, that make it near impossible for these young women to enforce this protective measure. The main risk that this custom poses to minor African brides, is the practical application of their legally mandated requirement of consent. Should her consent be presumed, based on the aforementioned noble plan that *ukuthwala* could be planned by the spouses, if it is not later proven or confirmed, during the *lobola* negotiations, for example, her parents can technically still consent to the marriage to proceed. Parental consent to minor marriage, in this instance, would thus cement the notion of forced marriage and constitutes an evident foundational abuse of the African minor girl, whose marriage commenced with an abduction.

3. HISTORY AND EVOLUTION OF AFRICAN CUSTOMARY LAW AND MARRIAGE:

The evolution of African customary law and marriage throughout this period is relevant because it depicts the practice of African custom, as close to its original state as possible,

[93] Constitution supra note 36.
[94] L Mwambene and RH Mgidlana 'Should South Africa Criminalise Ukuthwala Leading to Forced Marriages and Child Marriages?' PER / PELJ 2021(24) - DOI http://dx.doi.org/10.17159/1727- 3781/2021/v24i0a942.
[95] Supra note 91.

and as determined by the African people themselves. Its evolution will be mapped across the key periods of colonisation, apartheid, and the Constitution of the Republic of South Africa, 1996.[96]

3.1. Colonisation (Roman-Dutch and English Law):

"Colonisation as a global phenomenon is generally recognised as a period where Europeans carried out mass invasions across the African continent on a quest for natural and human resources while imposing their authority and political control over the territories and the people who lived in them. In the struggle to implement their cultural and moral legitimacy, with the view of obtaining control and "civilizing" the indigenous people they found in the African countries that they invaded, they typically did not recognize any existing local traditions or leaders. Thus, "colonisers implemented their authority by means of physical and legal coercion. Moreover, notions of difference prevailed as stereotypes that found their expression in culture and in law. In other words, colonisers believed in the superiority of their own culture and were disrespectful of local values. It is these cultural attitudes that were channelled into law".[97] Ultimately, during colonisation, African customary law and its practitioners were not well-known or respected.

Principally, "the recognition of customary law was not about recognizing the indigenous people as people with the capacity to make choices, with creative abilities and with equal moral worth, including the right to govern themselves".[98] Instead, this process may be described as a mere process to gain control over the indigenous people and their systems. The main challenges that hindered and thwarted accurate interpretation of customary law were language, a continued superior view of civil and common law over customary law, and a lack of existing written authority on customary law. Put differently, there was a deliberate undermining of the laws of indigenous people throughout colonialism, which in turn had a subversive influence on African practices and laws, including those of African marriage. Subsequently, as was done for other areas of law that the colonisers in South Africa had an interest in, such as property and contracts, they attempted to standardize marriage law. Of course, the British considered their model of marriage as the one to emulate, and to which all subjects should ideally conform.

[96] Supra note 36.
[97] C Himonga '*African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives*' (2014) at paras 1-3.
[98] Ibid.

Interestingly, however, in South Africa, things were further complicated by the fact that when the British arrived, the Dutch had already colonized the country and imposed Roman Dutch Law. The British law on marriage was mainly informed by the values of Christianity brought by the missionaries to South Africa. These core principles around their beliefs and laws on marriage were monogamy, registration of the union to the state, and a great focus on the two parties getting married, rather than on the extended family. "Whereas in African customary law, marriage was and still is centred very much on the entire family and not the two parties getting married to each other".[99] For instance, while consent to marriage is now required from the individuals getting married, it is not required in isolation of family consent and participation in the union.

African marriages originally did not have the distinct requirement of registering the marriage with any state as the process of *ukulobola* sufficed to complete the marriage ceremony. As long as this *lobola* process incorporated some exchange of bride price, consent from the parties getting married, the consent of their families as well as a celebration of the union, the marriage was for all intents and purposes final and binding on the couple. The main point of contention between Christian and customary law, which civil law has now resolved somewhat and will be discussed later, is the principle of polygamy.

3.2 Apartheid:

As stated above, this is another momentous period that also greatly impacted Africans in South Africa, and reshaped the laws that governed their lives, including the area of marriage. Noteworthy, "during the apartheid era, the 1948 decision by the Appellate Division (now the Supreme Court of Appeal) in *Ex Parte Minister of Native Affairs: In re Yako v Beyi* provided a standard approach to customary law. The court ruled that no presumption was to exist in favour of applying either common law or customary law, but courts should apply the law that was most applicable to the parties and the circumstances of the case".[100] The view of many authors, such as Himonga,[101] is that the state of customary law during this period did not vary much from during colonisation, and in fact further denigrated the recognition of African cultural law with Roman-Dutch Law, operating as the main and recognised form of

[99] Ibid.
[100] Z Essack supra note 25 p 85 at para 1.4.2.
[101] Supra at 97.

law. Furthermore, the individuals to whom customary law applied did not have the choice of which culture to conform and whether it should be applied to their case. The principle as determined in this case meant that the courts had the discretion to decide not only whether customary law applied to the individual in court, but also which kind of customary law it should be.

The Apartheid period was generally more focused on laws around the ownership of land, as it was marred by an emphasis to dispossess African people of their land, as well as ensuring that they were moved to the homelands as determined for them by the state. "As the Constitutional Court observed in *Tongoane:*[102]

> "The forced removals of African people from the land, which they occupied to the limited amount of land reserved for them by the apartheid state, resulted in the majority of African people being dispossessed of their land. It also left a majority of them without legally secure tenure in land".[103] In the same case, paying particular attention to the Black Authorities Act,[104] Chief Justice Ngcobo stated:
>
> > "The Black Authorities Act gave the State President the authority to establish 'with due regard to native law and custom' tribal authorities for African 'tribes' as the basic unit of administration. Under Apartheid, these steps were a necessary prelude to the assignment of African people to ethnically based homelands. According to this plan, there would be no African people in South Africa, as all would assume citizenship of one or other of the newly created homelands".[105]

What this means for our current discussion, is that the Apartheid period was characterized mainly by land tenure issues, because the Apartheid state was extremely engrossed in the plan to dispossess African people of their land, as well as ensuring that they were permanently removed from South Africa. Therefore, African customary marriage laws were not directly impacted except where property inheritance in a customary marriage or death

[102] *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* (CCT100/09) [2010] ZACC 10; 2010 (6) SA 214 (CC); 2010 (8) BCLR 741 (CC) (11 May 2010).
[103] Ibid.
[104] Bantu Authorities Act, 68 of 1951.
[105] Ibid.

of a spouse in such marriage was an issue. This is because "the Regulations for the Administration and Distribution of the Estates of Deceased Blacks were also passed in 1987. These regulations governed the intestate succession of the estates of black people not covered by the BAA and generally allowed for black people whose marriages would not ordinarily have been executed under the common law to be so executed. Significantly, also, the Marriage and Matrimonial Property Law Amendment Act ended the phenomenon of discarded wives".[106] What this was, is a wife who believed that she was married according to civil law, to her husband, who was however already married to another wife by customary law. The law would thus not recognise her as a wife, and she would be 'discarded'. Such a scenario was caused by "non-recognition of a customary marriage [and] resulted in Blacks in the past concluding marriages according to civil rites without an understanding of the basic tenets of such a marriage".[107] This historical period not only disregarded customary marriages that black people continued to conclude, but it added some level of confusion regarding its integration with civil law and

that time.

3.3 The Constitution of the Republic of South Africa, 1996:[108]

This period marked a turning point in the country and had a significant impact on the law as previously understood, by introducing a piece of legislation with superior authority over all other laws and to which they must all comply. The Constitution of the Republic of South Africa, 1996 is the supreme law of the land, with a Bill of Rights whose purpose is to protect the social, cultural, economic, political, and civil rights of all people in South Africa. It "was drawn up by the Parliament elected in 1994 in the first non-racial elections and approved by the Constitutional Court (CC) on 4 December 1996. It was signed into law by President Nelson Mandela on 10 December 1996 at Sharpeville, Vereeniging. This came two years after the first democratic election (1994) of the President of the Republic of South Africa".[109]

[106] Ibid.
[107] CRM Dlamini '*Recognition of a customary marriage*', (1982), De Rebus, December, https://journals.co.za/doi/pdf/10.10520/AJA02500329_3710 Accessed January 30, 2022.
[108] Supra note 36.
[109] South African History Online, '*The Constitution of South Africa*', (2014) at http://www.sahistory.org.za/article/constitution-republic-south-africa-1996. Date accessed: 07 April 2020.

Largely, "before the constitutional era, customary marriages were not afforded recognition as valid marriages and were considered 'to be repugnant to principles of public policy and natural justice or *contra bonos mores*'. Interestingly, "when the South African Law Commission's Project Committee on Customary Law was reconstituted in 1996, it identified the customary law of marriage and divorce as a priority, in order 'to remove the anomalies created by the many years of discrimination' these marriages were subjected to by the colonial and apartheid states".[110] This means that the historical periods discussed, had effects that have been perceived and experienced as discriminatory against African customary law and marriage. Hence, the new constitutional order brought about a recognition of our diversity, which is an important feature of our constitutional democracy and a decisive break from the past. "The Constitution, in recognizing marriages by cultural traditions provided respectability, hope and salvation to many women and the vulnerable members of our society".[111] So, while this period was pivotal to the beginning of recognizing African customary law and marriage, this research asserts that it is also the point at which customary law started to fragment from the living practised version to a more codified official version. The significance of this fragmentation will be discussed below.

As a result of the Constitution of the Republic of South Africa, 1996 with a Bill of Rights that "enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality, and freedom",[112] what this bold declaration represents for this study is a reminder that "everyone has the right to participate in the cultural life of their choice".[113] This right, like all others, must be practiced in a manner that is not inconsistent with the Bill of Rights. Likewise, "the principle of the supremacy of national constitutions ensures that in legal interpretation, national human rights guarantee take precedence over any other laws of customary rules".[114] Customary law is recognised in section 30 of the Constitution,[115] which reads, "everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner

[110] C Himonga '*Reform of Customary Marriage, Divorce and Succession in South Africa: Living Customary Law and Social Realities*, Juta & Company, Limited, 2015. *ProQuest Ebook Central*, http://ebookcentral.proquest.com/lib/uoct/detail.action?docID=6483208.Created from uoct on 2021-08-07 14:56:20.
[111] *Southon vs. Moropane [2012] ZAGPJH 146*). Taken from Monareng K. N. '*Concubines: The Legal Implications of Cohabitation and Customary Marriages on South African Black Women*'. New Voices Publishing Services. Ed 1. (2014), at p 50.
[112] Constitution supra note 36.
[113] Ibid s 30.
[114] Ibid s11.
[115] Ibid.

inconsistent with any provision of the Bill of Rights".[116] Additionally, section 31 of the Constitution[117] also protects cultural, religious, and linguistic communities[118] and together with section 30 above and the general repugnancy clause, again highlights that no one right in the Bill of Rights may be exercised in any manner that violates the rights of another, or is inconsistent with the Bill of Rights. As mentioned previously, sections 211[119] and 212[120] of the Constitution[121] are also pivotal to the recognition of customary law.

Of significant relevance to this dissertation, to develop customary law and to effect protection of one of the main areas of customary law, marriage, the Recognition of Customary Marriages Act[122] was enacted and came into operation on 15 November 2000, governing marriages that were entered into before and after 15 November 2000. Prior to the enactment of the RCMA, as illustrated through the different historical periods mentioned, "customary marriages did not enjoy the same legal status as civil marriages" and were governed by the Black Administration Act[123] where mainly, women were regarded as minors regardless of their age. This position has since been challenged and watered down in the *Mayelane*[124] judgment, even before the promulgation of the RCMA, which legally gives women equal rights to their husbands. In terms of the RCMA, wives no longer need permission from their husbands to enter into contracts. Wives are now also required to consent if they are entering into a marriage as well as to the termination of their marriage"[125].

4. CONCLUSION:

[116] Ibid s 30.
[117] Ibid.
[118] Ibid: s 31(1) "Persons belonging to a cultural, religious, or linguistic community may not be denied the right, with other members of that community – (a) to enjoy their culture, practice their religion and use their language; and (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society. S31 (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights".
[119] Recognition (1) The institution, status, and role of traditional leadership, according to customary law, are recognised, subject to the Constitution. (2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs. (3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.
[120] Role of traditional leaders (I) National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities. (2) To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law- (a) national or provincial legislation may provide for the establishment of houses of traditional leaders; and (b) national legislation may establish a council of traditional leaders.
[121] Ibid.
[122] Recognition Act supra note 2.
[123] Black Administration Act 38 of 1927.
[124] *Mayelane* supra note 41 para 16.
[125] T Nhlapo '*Customary Marriage: Missteps Threaten the Constitutional Ideal of Common Citizenship'*. (2021) Journal of Southern African Studies, 47, no. 2: 273-289, at p 52.

As illustrated in this chapter, African customary law and marriage underwent significant evolution during the specific periods of colonisation, apartheid, and the introduction of the Constitution of the Republic of South Africa, 1996.[126] To respect the equality, dignity, and freedom of all people in South Africa, as warranted by the new constitutional dispensation, the position of African cultural rights was recognised as deserving of equal status to common and civil law. Consequently, the status of women within marriage was equated to that of their male spouses, with distinction based on gender. However, what this dissertation seeks to show is that, due to patriarchy, socio-economic factors, poverty, and the dominance of certain practices in customary marriage, this position of African women in marriage has not changed *de facto* in living customary law. This leads to the contention that parental consent to minors' marriages exposes minor girls, especially to a system of law and marriage that, at its roots, undermines the position of women. Thus, although official customary law has amended this position to ensure equality between the spouses in a marriage, it will be demonstrated later, that the experiences of African women on the ground within communities that practice customary law display otherwise.

CHAPTER 3

CURRENT STATUS OF AFRICAN CUSTOMARY MARRIAGE IN SOUTH AFRICA: COMMONLY PRACTICED CUSTOMARY NORMS

1. INTRODUCTION:

Chapter two of this thesis introduced African customary law and explained its evolution, specifically that of customary marriage over the years and through definitive historical moments, which have been of immense legal significance in South Africa; namely colonisation, apartheid, and the Constitution.[127] It also presented the patriarchal foundation to several customary beliefs, practices, and norms that were, and arguably still are symbolic of the conclusion of African customary marriages within the different groups of African people. Of noteworthy mention, and a point of departure for this chapter regarding this evolution is the role of the Constitution of the Republic of South Africa, 1996on African

[126] Constitution supra note 36.
[127] Ibid.

culture. In its fundamental undertaking to embrace our diversity and ensure human dignity, equality, and freedom of all people in the country, one of the rights recognised in the Constitution's Bill of Rights is that "everyone has the right to participate in the cultural life of their choice",[128] provided it is not inconsistent with the Bill of Rights. Furthermore, the state, "in order to give effect to a right in the Bill, must apply, or if necessary, develop, the common law to the extent that legislation does not give effect to that right".[129] Consequently, African customary law as an area of law deserving constitutional regard and recognition, saw the introduction of several pieces of legislation to formalize specific areas of laws and practices within it, such as marriage.

About the foundation of African customary law and marriage, Ndulo notes that, "customary law has great impact in the area of personal law in regard to matters such as marriage, inheritance and traditional authority, and because it developed in an era dominated by patriarchy, some of its norms conflict with human rights norms guaranteeing equality between men and women".[130] What this chapter will explore, is the current legislative and judicial strides to develop customary law in accordance with the Constitution, while ensuring the historically denied respect of women's rights, also guaranteed by the Constitution. Section 39(2) of the Constitution[131] requires that customary law be developed in accordance with the spirit, purport, and object of the Bill of Rights. In light of this, according to "the *Carmichele* case, when a customary law rule deviates from the spirit, purport and object of the Bill of Rights, courts have an obligation to develop it so as to remove such deviation". [132] Development of customary law may occur officially, by way of changing an existing law, however such changes may not be observed or respected by communities applying living customary law.

Certain customary practices, such as *ukuthwala* explained above, gain legitimacy to exist or continue in existence, primarily because they are recognised as culture, even if potentially prejudicial to African women and girls. In other words, as outlined in the research problem

[128] Ibid at s 30.
[129] Ibid s 8(3)(*a*).
[130] M Ndulo '*African Customary Law, Customs and Women's Rights*', part of Indiana Journal of Global Legal Studies, (2011), Vol.18(1), p. 87 available at: http://go.galegroup.com.ezproxy.uct.ac.za/ps/i.do?ty=as&v=2.1&u=unict&it=DIourl&s=RELEVANCE&p=AONE&qt=SN~1080-0727~~VO~18~~SP~87~~IU~1&lm=DA~120110000&sw=w
[131] Supra note 36.
[132] NM Ngema '*The enforcement of the payment of lobolo and its impact on children's rights in South Africa*'. PER [online]. (2013), vol.16, n.1 [cited 2021-12-24], pp.00-00. Available from: http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1727-37812013000100013&lng=en&nrm=iso>. ISSN 1727-3781. Date accessed: 4 September 2021.

section, the fact that section 3 of the RCMA allows for consent to minors' marriages, is problematic on two main fronts. First, the RCMA is a piece of legislation, thus categorised as official customary law, whose application in practice is questionable. Second, in terms of section 3(3)(1)(b) of the RCMA, in addition to the minimum age of 18 years and consent of the marrying parties, another requirement for a valid customary marriage is that "the marriage must be negotiated and entered into or celebrated in accordance with customary law".[133] The latter clause gives weight to a generalised living customary law and makes it possible for any tribe in the country to rightfully justify any of its existing marriage practices and customs, even the ones argued in this research as being harmful to the African women and girls within their communities. The courts may, of course, hold that any such practices are unconstitutional or that they be developed in terms of s 39(2).[134] However, this chapter will illustrate a resultant ongoing conflict between women's rights and living African cultural rights and community, as well as the obstacles hindering the law reform task to emancipate African women, particularly within uncodified or informal customary practice and marriage.

2. COMPARING OFFICIAL TO LIVING AFRICAN CUSTOMARY LAW AND THE IMPACT ON CUSTOMARY MARRIAGE:

2.1. Official Customary Law:

Briefly outlined earlier in this dissertation, official customary law can be defined as "law carried out in courts in accordance with statutes such as the Recognition of Customary Marriages Act of 1998".[135] Typically, sources of official customary law are codes of customary law and other legislation, court precedents and textbooks".[136] Development of customary law within the courts however, often results in stagnant codified law, which leaves behind the fluid, relevant and evolving laws, to which those communities are actually bound. In other words, there is a known and well-researched disconnect between official customary law and living customary law, whose negative impact on minor consent to

[133] Section 1 of the RCMA defines customary law as, "the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples".
[134] Constitution supra note 36.
[135] C Forster-Towne & PR Nqambaza '*Official customary law and the disruption of patriarchal power: The case of Msinga*', edited by K. Morgan, On Africa IOA, (2013), at https://m.polity.org.za/article/official-customary-law-and-the-disruption-of-patriarchal-power-the-case-of-msinga-2013-09-26 Taken from E. Curran, & E. Bonthuys, '*Customary Law and Domestic Violence in rural South African communities*', Centre for the Study of Violence and Reconciliation, October (2004), http://csvr.org.za. Date accessed: 10 July 2021.
[136] C Himonga, T Nhlapo, IP Maithufi, S Mnisi, L Weeks, D Mofokeng, D Ndima, '*African Customary Law in South Africa: Post – Apartheid and Living Law Perspectives*'. Ed 1. Oxford University Press Southern Africa (Pty) Ltd 2014, p 33.

customary marriages, will later be demonstrated. In *Shilubana and Others vs. Nwamitwa*[137] the Court highlighted, "the content of customary law must be determined with reference to both the history and the usage of the community concerned. "Living" customary law on the other hand, is not always easy to establish and it may sometimes not be possible to determine a new position with clarity. Interestingly too, the RCMA defines customary law as "the customs and usages observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples".[138] Therefore, even the RCMA as an instrument classifiable under official customary law, defines living customary law as the generally observed or already accepted practices of customary law in South Africa, allowing for more dominance of living customary law practices.

Although, "where there is a dispute over the law of a community, parties should strive to place evidence of the present practice of that community before the courts, and courts have a duty to examine the law in the context of a community and to acknowledge developments if they have occurred".[139] The courts thus afford due respect and consideration to community members and the customary laws that are relevant and practical to them. Question is, how often do practitioners of living customary law get to know of this, or attend court to place this evidence, when the main hindrances to this applying in practice, are a lack of knowledge of this very possibility, a further lack of access to the courts, as well as an inability to communicate in the languages of the court or messaging being lost in translation, when utilising a translator.

2.2. Living Customary Law:

Living customary law, also briefly mentioned above, is the area of customary law characterized by unwritten customs practiced and accepted as law by the people of that culture. As previously noted, due to there being "no single or uniform system of customary law that applies to all indigenous communities in South Africa, when reference is made to African customary law in this dissertation, the term will thus be adopted in the singular, because "all indigenous communities in South Africa share major features of patrilineal

[137] *Shilubana and Others v Nwamitwa* (CCT 03/07) [2008] ZACC 9; 2008 (9) BCLR 914 (CC); 2009 (2) SA 66 (CC) (4 June 2008).
[138] Recognition Act supra note 2.
[139] *Alexkor Ltd and Another v Richtersveld Community and Others* [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) (*Richtersveld*) at para 51.

societies with the exception of the Balobedu community". [140] Additionally, it was quoted in *Bhe,*[141] referring to the court in, *Richtersveld*[142], that "indigenous law is not a fixed body of formally classified and easily ascertainable rules. By its very nature it evolves as the people who live by its norms change their patterns of life. It has throughout history evolved and developed to meet the changing needs of the community".[143] Therefore, even as research was conducted herein, to determine the existence and prevalence of any particular living customary practice, it was done with the understanding that it continues to evolve and will not be applied in an identical manner between the different African clans in the country. Reliance is thus placed on general African customs and traditions that are observed during the formation, conclusion, and governance of customary marriage.

Concerning the acceptance of traditional practices and the relational dynamics of people who practice living African customary law, the book '*African Customary Law in South Africa – Post Apartheid and Living Law Perspectives*'[144] cites Jobodwana, who says, "customary law never rested on the will of the sovereign or supreme legislature for its validity, but rather on its acceptance by the community whose affairs it regulated. Acceptance means or implies that customs must conform with actual patterns of behaviour"'.[145] Thus, if for example, the customs of a particular community advocate, even indirectly, for any practices that marginalise women and children of that community, as long as they receive acceptance, they will continue to exist and infiltrate the customary marriages of that community too.

This notion of acceptance of living customary law by the community that practices it, poses some complexity. It presupposes that the practice of certain lived traditions, symbolises voluntarily acceptance by their practitioners, as they both continue to evolve in tandem. Furthermore, because of the subtleties and nuances of social gender dynamics, ageism, and domination of male authority in these communities, the word community *per se* could be challenged as only including recognised traditional leaders, males and older males and women, as the people who largely have a voice or vote in any matters that require such

[140] L Mofokeng, C Himonga, T Nhlapo & IP Maithufi 'African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives', Oxford University Press (2014) Southern Africa.
[141] *Bhe and Others v Khayelitsha Magistrate and Others* (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (15 October 2004).
[142] *Alexkor* supra note 68.
[143] Supra note 141, taken from paragraphs 42, 52 and 53 respectively.
[144] MK Musgrave, C Himonga & T Nhlapo, (2016) [Review of *African Customary Law in South Africa. Post-Apartheid and Living Law Perspectives*]. *International Journal of the Commons*, *10*(2), 1205–1207. https://www.jstor.org/stable/26522905
[145] Ibid.

community acceptance, while possibly guarding that which benefits them. "Historians and anthropologists have long observed tensions within hierarchies of age and gender in Southern Africa. Some of these scholars have shown how wage labour and colonialism significantly affected structures of status and authority, often by mobilising essentialised and inflexible notions of African 'tradition' in ways that continue to have powerful ramifications for African social life. Historians, for example, have persuasively shown how colonial administrators mobilised African patriarchy to control women and youth".[146] Also, there exists the possibility that many people within any African community, may accept a social custom or practice through force or coercion from traditional leaders for instance, or anyone in that community deemed to have some form of authority or leadership; usually male.

So, although this kind of acceptance of practices and customs as law, would still be deemed to be valid despite the possible existence of coercion, it presents a good example of undisclosed and chronic dynamics of generational power, control and authority that are at the root of most African cultures. This also indicates that perhaps not all instances of consent or agreement to a particular custom, norm or practice by the people bound by it, particularly those deemed to have less power or authority, such as younger women and children, are indeed of free volition. Nevertheless, this research will not explore instances of this coercion further, as it does not directly relate to the subject at hand, albeit very important to understand and bear in mind.

2.3. The Gap Between Official and Living Customary Law:

In this subsection, this research advances the argument that the South African Constitutional Court's recognition of customary law, means that an overlap between official and living customary law now exists. "Even before the constitutional recognition of customary law, the Appellate Division in *Sigcau v Sigcau* pointed out that Pondo law and custom is mostly a body of unwritten law, and that even the rules that have been recorded in reports or cases are merely opinions and statements of 'what someone at some time said

[146] PE Andrews supra op cit note 42. Also taken from: B Carton '*Blood from your Children: The Colonial Origins of Generational Conflict in South Africa',* (Charlottesville, University of Virginia Press, 2000); B. Carton, '*The New Generation ... Jeer at Me, Saying We Are All Equal Now: Impotent African Patriarchs, Unruly African Sons in Colonial South Africa*', in M.I. Aguilar (ed.), '*The Politics of Age and Gerontocracy in Africa: Ethnographies of the Past & Memories of the Present'* (Trenton, NJ, Africa World Press, 1998); M. McKittrick. '*The "Burden" of Young Men: Generational Conflict and Property Rights in Ovamboland*', African Economic History, 24 (1996), pp. 115 –29; Jeater D., '*Marriage, Perversion and Power: The Construction of Moral Discourse in Southern Rhodesia*', 1894–1930 (Oxford, Clarendon Press, 1993); T. Ranger, '*The Invention of Tradition in Colonial Africa*', in Hobsbawm E. and Ranger T., The Invention of Tradition (Cambridge, Cambridge University Press, 1983).

the custom was'. The only way a court could determine what the customary rule entailed was to 'hear evidence as to that custom from those best qualified to give it and to decide the dispute in accordance with such evidence as appears in the circumstances to be most probably correct'".[147] This means that customary law that is developed by the courts is principally a recording of living customary law, which remains fluid within the communities that practice it, thus creating potentially differing sights of a particular customary rule from the living customary law and that which would have now become official law. "To put it differently, when a court develops customary law through precedent, it creates a written rule of customary law but one which is changeable as the circumstances change or when a new precedent-setting judgment is delivered".[148]

As discussed in chapter 2 above, regarding the evolution of customary law and stated by Rice, "African culture has experienced rapid change since the colonial invasion. Contemporary African culture is a mixture of traditional elements and alien features. Local African culture was marginalised for many years by white South Africans, who find their cultural roots in Western countries. Western cultures tend to be more individualistic and focused on individual achievements and personal interests, whereas African cultures are collectivistic, group-oriented, and concerned with the welfare of their community".[149] So, based on the comeuppance of official customary law, as opposed to the foundation of living customary law, the research will explore the resultant hypothesis it makes of inequality against African women in a customary marriage, resulting from the variances between, and slight overlap of official and living customary law. Moreover, how this affects minor African girls entering the same marital regime.

The *Bhé* case[150] highlighted that "the difficulty lies not so much in the acceptance of the notion of 'living' customary law, as distinct from 'official' customary law, but in determining its content and testing it, as the court should, against the provisions of the Bill of Rights".[151]

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[147] C Rautenbach, '*Case Law as an Authoritative Source of Customary Law: Piecemeal Recording of (Living) Customary Law?*' *PER / PELJ* 2019(22) - DOI http://dx.doi.org/10.17159/1727-3781/2019/v22i0a7591 at para 1, taken from *Sigcau v Sigcau* **1944 AD 76**.
[148] Ibid para 3.
[149] Ibid para 2.
[150] *Bhe* supra note 141 para 109.
[151] Ibid taken from AJ Kerr '*Role of the courts in developing customary law*' 1999 *Obiter* 41, 49-50, where in this regard, Kerr asks ". . . is there a sufficient basis for the declaration by a court of a new legal rule to be applied in all future cases if a few learned authors state that a divergence from an existing rule has been observed in a few instances in practice, and the only evidence on the point before the court is that of one of the parties to the case who is, even though sincere and not dissembling in any way, by virtue of being a party to the case vitally interested in the outcome? With respect, I suggest that it is not sufficient."

What this case points to, is that the problem is not the deliberate exclusion of living customary law, or that it remains distinct from official customary law. Rather, the problem is that it is difficult to obtain its latest evolved version and to test its application within the communities practicing it. "The conundrum created by ever-changing customary rules and the inflexibility of a written rule illustrates the problem the courts are faced with. A written rule cannot easily be changed. It is certain, but it does not allow for transformation in accordance with societal changes. On the other hand, flexible, unwritten customary rules relinquish certainty but keep up with contemporary changes in society".[152] Using male primogeniture as an example to illustrate this point, being an African custom confronted and abolished by this court,[153] it has been found to still be in existence on the ground, "whether there are other structural processes which hinder women's access to and movement of their land, or whether they remain restricted by emerging practices and discourses which mask themselves as change but seek to maintain patriarchal power".[154] This statement speaks to other possibilities why the negative effects of some abolished African customs, still find authority and traction to exist in living practice, even after official reform. That is if living African customary practices that are contrary to the scope and ambit of the Constitution, and subsequently developed as official customary law, why do they or their negative effects on women continue to thrive in practice?

Rautenbach's[155] analysis of the Botswana *Ramantele*[156] case dealing with *ultimogeniture*[157] highlighted a possible answer to this question stating, "there might nevertheless be circumstances justifying the discrimination, such as 'family cohesion, certainty of succession, support of the widow and provision of a home of last resort to indigent family members' which would render the rule unobjectionable".[158] None of these circumstances were

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[152] C Rautenbach "*Family home, five sisters and the rule of ultimogeniture: comparing notes on judicial approached to customary law in South Africa and Botswana*". *African Human Rights Law Journal, 16(1) (2016),* 145-174.
[153] *Mayelane* supra note 41, "The Valoyi community within the Vatsonga ethnic group had developed the rule to include female children. This Court recognised and upheld the developed customary law rule and held that a daughter could succeed her father and become a chief. The rule did not apply to the whole Vatsonga group but to that particular community".
[154] SB Rascher, "*Researching the Indigenous Law of Marriage in South Africa: An Anthropological Perspective*." Suid-Afrikaanse tydskrif vir etnologie = South African journal of ethnology 19.2 (1996): 46–. Print. Accessed from uoct on 2021-08-07 15:11:29.
[155] Supra note 147.
[156] *Ramantele v Mmusi* [2013] BWCA 1 *(Ramantele* case). Two judgments were delivered, one by Lesetedi JA with Kirby JP, Twum JA, Foxcroft JA and Legwaila JA concurring. This judgment will be referred to as the *Ramantele* case (main judgment). The other judgment was a separate but concurring judgment by Kirby JP. This judgment will be referred to as the *Ramantele* case (separate judgment). Taken from Rautenbach, Christa. (2016). A family home, five sisters and the rule of ultimogeniture: Comparing notes on judicial approaches to customary law in South Africa and Botswana. *African Human Rights Law Journal*, *16*(1), 145-174. https://dx.doi.org/10.17159/1996-2096/2016/v16n1a7.
[157] Ibid. "In terms of this rule [ultimogeniture], the last-born son of a deceased is qualified to inherit the homestead of the family to the exclusion of all other siblings, male and female".
[158] Ibid.

however proven in this case. In addition to primogeniture and/ or ultimogeniture in this instance, another example is regarding the minority status of women in customary law. As discussed above, this position of women was abolished by the Court in *Mayelane*[159] and further research into the impact of legislation such as the RCMA,[160] is required to establish whether such practices continue within living customary law. Similarly, *ukuthwala*, as discussed above, has also been ruled as inexcusable for the crimes of rape, human trafficking, and assault, however, is shown to continue to exist in practice. It brings to question whether patriarchal power is deliberately maintained within African custom or whether other systemic challenges hinder change, such as the previously mentioned disconnect between living and official customary law.

What the above means for this dissertation is that, regardless of the reason, there is an acknowledgement that patriarchal authority persists within communities where living customary law rules pertaining to marriage are applied. This provides fertile ground for the continued marginalisation and maltreatment of African women. The judiciary has an important role to play to ensure the application of equality provisions. Legislation and the Constitutional Court decisions mentioned above and to be discussed in more detail below, continue to develop customary law to curb this, and to afford women equal status and worth to the men in their lives, such as their husbands. However, these creditable strides are not fully translating to efficient change in practice. "A judgment such as the one of the Court of Appeal of Botswana had the potential to enhance the development of human rights, especially the rights to equality of women who have been excluded from succession in many traditional communities, as illustrated by this case. Edith and her sisters, although they had been the matrons of their parents' homestead for many years, could easily have been denied the right to remain there after the death of their last surviving parent because of a rule that favours a descendent that no longer resided on the property".[161] While the Appeal Court did not rule against the women in this family automatically, in line with the customary rule of ultimogeniture, it was still silent on a ruling specifying how the property should thus be distributed. The matter was referred back to the customary courts, where the formal litigation process commenced, and appealed because it had ruled in favour of ultimogeniture. Despite this being a Botswana judgment, which South African jurisprudence

[159] *Mayelane* supra note 41.
[160] Supra note 2 at s 6.
[161] Supra note 152.

refers to, and vice versa, it intrinsically supports the argument that parental consent to minors' marriages exposes minor African girls to a system that nurtures this continued submission of women and denial of certain rights such as equality, freedom, and dignity.

Considering this, the research now moves to engage the RCMA in relation to this parental consent to minors' customary marriages and show how it exposes minor African girls to abuse within customary marriage; despite the existence of section 12(2) of the Children's Act.[162]

3. RCMA REQUIREMENTS FOR A VALID CUSTOMARY MARRIAGE IN SOUTH AFRICA:

Having explored the complex relationship between living customary law and official customary law in relation to marriage, this section now analyses the requirements of a valid customary marriage in South Africa, from both sides, specifically age, consent, and parental consent to customary marriage. Additionally, it will explore the ways specific customary law rules, regulating living customary marriages in South Africa, have been impacted by the RCMA and how they consequently impact African women and minor girls in customary marriages.

3.1. RCMA Consent as it relates to Living Customary Marriage:

An analysis of consent will be conducted in this sub-section, namely how it is understood within the parameters of a living customary marriage, how it evolved in tandem with official customary law and marriage as a whole and importantly, how the consent to a minor customary marriage affects numerous rights of African children. Several customary beliefs and practices still exist within living customary law that enable or condone minors' marriages and will be detailed below. Underlying these, are certain fundamental beliefs about women in living African customary law and marriage, which continue to thrive and enforce the marginalization and abuse of the women and children of the communities practicing it.

[162] Children's Act supra note 3.

As the *Green Paper on Marriage*[163] points out, customary law "covers all matters regulating personal and family life including matters relating to children (such as care, contact, maintenance, guardianship, and initiation); marriage and the consequences of marriage (rights and responsibilities of spouses during and after the marriage); succession (who has a right to inherit and the administration of estates); land tenure and traditional leaders (who regulate family matters and disputes)".[164] This means that the system of customary law is all-encompassing to serve and govern the communities that practice it. "Although the Act [RCMA] provides for the registration of customary marriages, it is not compulsory for the marriage to be registered. In other words, failure to register a customary marriage does not affect its validity".[165] These marriages are still valid and recognised, even if not registered according to the RCMA. The latter is a mere formality not previously recognised by the people whose marriages the RCMA seeks to regulate. As Nhlapo noted, "until the enactment of the RCMA, customary marriage was a 'private matter in which the state played no role nor indeed did any other outside authority'. Nhlapo further observes that 'the validity of the union depended not on the intervention of any third party, but on the agreement reached by the families involved'".[166] Consequently, the overall influence of the RCMA on practitioners of living customary law is debatable because, like in this example of the recognition of a customary marriage, even without registration, it is possible for practitioners of living customary to conclude processes such as marriage according to their own norms, without registering them according to the RCMA, but still exist within a legally recognised and valid union.

To be discussed later in this chapter is that the Marriage Act,[167] RCMA, and Children's Act[168] do make allowance for the marrying parties to consent to the marriage before entering it. However, what will be presented, especially within minors' marriages, is that this does not always happen *de facto* due to some prevailing customary practices. Thus, to further allow parents to consent to their minor children's marriages, also within the

[163] "The *Green Paper on Marriages in South Africa* was approved by Cabinet in April 2021 for public consultation and gazetted for public comments on 4 May 2021 with public comments invited until 30 June 2021. This *Green Paper* aims to develop a new *Single Marriage Bill* and will align the country's marriage regime with the constitutional principle of equality". Taken from:
Green Paper on Marriages in South Africa: Comments invited (www.gov.za)
[164] Ibid.
[165] Ibid.
[166] T Nhlapo '*Customary Marriage: Missteps Threaten the Constitutional Ideal of Common Citizenship*'. (2021) Journal of Southern African Studies 47, no. 2 (2021): 273-289 at p 54.
[167] Supra note 1.
[168] Supra note 3.

prevailing circumstances explained prior, is found to perpetuate a system that does not afford women full citizenship. What this speaks to, is that "when a woman is considered a legal minor or otherwise lacks legal capacity under customary and/or statutory law, it becomes less important to seek her consent in the context of an impending marriage. As a result, families can coerce or force women and girls into marriages, sometimes with much older men".[169] In fact, according to some communities that practice living customary law, the consent of one of the spouses, particularly the woman is not necessary to the extent of invalidating a marriage. That while it may be sought in some cultures, commonly, "living customary law treats marriage as an agreement between families, to be negotiated by the elders and sealed by the transfer of *lobolo"*.[170] However, the RCMA and Children's Act[171] introduced the notion of consent, as such, a marriage with consent only from the bride's representatives no longer qualifies as a valid one according to official customary law. The risk of continued marriages conducted without this consent and/or reference to the RCMA, however, prevails within living customary law. "Similarly, under living customary law, individuals are considered marriageable when they have been initiated, as this marks the transition to adulthood".[172] The dichotomy in this example is that a minor boy aged 15 and considered to be a minor below the legal age of marriage may be sent for initiation by his

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[169]JE Bond "*Culture, dissent, and the state: the example of Commonwealth African marriage law*". Yale Human Rights and Development Law Journal, vol,14, 2011, p 1+. Academic OneFile, http://link.galegroup.com.ezproxy.uct.ac.za/apps/doc/A263250563/AONE?u=unict&sid=AONE&xid=1a3b7dd8. Accessed 13 June 2019, For sources quoted within the reference. Taken from Fitnat Naa-Adjeley Adjetey, '*Reclaiming the African Woman's Individuality: The Struggle Between Women's Reproductive Autonomy and African Society and Culture*', 44 AM. U. L. REV. 1351, 1355 (1995) ("Marriage symbolized the uniting of two families and bolstered the prestige and security of families."). Also taken from CHRISTOPHER AMHERST BYUMA ZIGIRA, RELIGION, CULTURE AND GENDER: A STUDY OF WOMEN'S SEARCH FOR GENDER EQUALITY IN SWAZILAND 79 (2003) ("A man could marry a young girl without her consent through arranged marriage, kwendzisa, which only required mutual agreement of the two families rather than the two persons concerned."); MERCY SIAME ET AL., BEYOND INEQUALITIES: WOMEN IN ZAMBIA 35 (1998) ("In customary marriage law, consent between the parties does not include the consent of the bride-to-be."); Karine Belair, Unearthing the Customary Law Foundations of "Forced Marriages" During Sierra Leone's Civil War: The Possible Impact of International Criminal Law on Customary Marriage and Women's Rights in Post-Conflict Sierra Leone, 15 COLUM. J. GENDER & L. 551, 568 (2006) ("While the consent of the wife's family is necessary for a valid marriage, that of the wife is not. Customary marriage often takes place when girls are very young…. "). Some countries limit women's ability to enter into contracts and otherwise treat women as legal minors. See, e.g., U.N. Comm. On the Elimination of Discrimination Against Women, Combined Fifth and Sixth Periodic Reports of States Parties: Kenya, [paragraph][paragraph] 101, 165, CEDAW/C/KEN/6 (Oct. 16, 2006) ("Women who are single must obtain their father's consent to obtain passports whereas those who are married must obtain their husband's consent … That is not extended to men in the same situation."). In Lesotho, the law recognizes a woman's legal capacity if she is over twenty-one years of age and unmarried or if she is a widow. LETUKA ET AL., supra note 36, at 20. See SARAH C. MVUDUDU ET AL., LOBOLA: ITS IMPLICATIONS FOR WOMEN'S REPRODUCTIVE RIGHTS IN BOTSWANA, LESOTHO, MALAWI, MOZAMBIQUE, SWAZILAND, ZAMBIA AND ZIMBABWE 27 (2002) ("It is also open to abuse by those who stand to benefit from receiving lobola where young girls may be forced into early marriages and marriages to older men."). See Margot Lovett, On Power and Powerlessness: Marriage and Political Metaphor in Colonial Western Tanzania, 27 INT'L J. AFR. HIST. STUD. 273, 289 (1994) ("Pressure [to marry] was brought to bear on them not only from their own families but from the wider community as well.").

[170] C Himonga and E Moore supra note 54 at p 63. Take from Himonga C & Moore E (2015) Reform of Customary Marriage, Divorce and Succession in South Africa: Living Customary Law and Social Realities. Cape Town: Juta and Co. P.13; See also: D Budlender, N Chobokoane & S Simelane (2004) Marriage patterns in South Africa: Methodological and substantive issues. Southern African Journal of Demography, 9(1): 1-25.

[171] Supra note 3.

[172] Ibid.

family and return as a "man" because of this rite of passage and thus deemed marriageable by his culture. Yet, since the introduction of the RCMA, read with the Marriage Act,[173] the minimum age of customary marriage is now set at 18 years for [said] boys.

"Patriarchy validates gender inequality through the promotion of cultural practices, norms and beliefs, which often undermine women and their rights. Customary marriages serve as a validation of patriarchy which disadvantages women by placing women in an inferior position. It, therefore, promotes inequality between women and men which results in social restriction, lack of financial freedom and lack of or limited access to education by women (Kruger, Fisher, & Wright, 2014)".[174] This is argued to be the *de facto* position of women, which limits their agency but is not the legal position. Bennett supports this by outlining that the idea of children enjoying individual rights is "fundamentally at odds with the African legal tradition, where the emphasis lies on duties rather than rights".[175] Consequently, even in the instance that children are forced into customary marriage, there would be little to no realisation of any rights violations because the practices that are discussed in this paper are deemed to be a normal part of customary practice within marriage as was described in the instance of *ukuthwala*.

Many customary law scholars agree that "the age of majority can no longer be defined in terms of the customary concept of adulthood, as this position sanctions child marriages which, is contrary to the Children's Act".[176] In some instances, the role of the male figure of authority in the bride's life goes as far as committing to marry her off to a particular man or family without her knowledge, let alone her consent. A typical process of this nature would involve the male figures of both households, that of the bride and that of the groom, ironically including the groom, to negotiate and often exchange lobola then 'hand-over' the bride once formalities have been completed or once the bride comes of 'age' in accordance with that culture. Of course, this coming of age will vary between different cultures and tribes, which alone poses the risk of further abuse to children who are married off too young and far below the legal age of 18 years. It is however beyond the scope of this

[173] Act 25 of 1961 supra note 1.
[174] L Gwatimba, NR Raselekoane, AO Nwafor, "Customary Marriages and Gender Equality: Zimbabwean and South African Perspectives", Adonis & Abbey Publishers, 2021, at p.43.
[175] Mamphela supra note 50 at p 296.
[176] T Nhlapo, C Himonga, IP Maithufi, S Mnisi-Weeks, L Mofokeng & D Ndima (2014) supra note 136, supported by the Children's Act 38 of 2005.

dissertation to investigate the acceptable ages of marriage within different African cultures in South Africa but makes for an interesting question for further research.

3.2. RCMA Consent as it relates to Official Customary Marriage:

As aforementioned, the Recognition of Customary Marriages Act[177] (RCMA), was enacted *inter alia* to give legal recognition to African customary marriages, introducing mainly procedural rules governing their registration, which was not previously possible. The RCMA must be read in tandem with the actual customary law rules, to see how the former might affect the latter. Additionally, this piece of legislation enforces substantive rights and duties that flow from entering such marriages, like the equal status and capacity of spouses. In the first instance, both the Marriage Act[178] and RCMA require that the parties getting married provide their own consent to get married and that for this consent to be valid, they must not be younger than 18 years of age. This is to avoid child marriages and by law, to ensure that the consent granted, is from one with the capacity to provide such consent, that which a minor aged between 7 and 18 years is presumed by law to possess with limitation. If not followed, these general rules can nullify the legal validity of a marriage.

The exception to these general rules of age and consent to marry is what this dissertation is investigating in relation to a customary marriage, namely that minors under the age of 18 years, and thus without full legal capacity to give their own consent to marry, can still get married provided their parents or guardians consent to this. Therefore, section "3(1) of the RCMA may be grouped into two categories. The first is primarily legislative, in the sense that the Act stipulates conditions of age and consent that were not necessarily present in living customary law. The second category, however, simply codifies whatever African traditions and customs happen to be applicable to the couple's marriage".[179] The issue of age and consent is the only part legislated on, while on the other hand, customary marital practices are said to be recognized in 'whatever form' they come. Common elements do exist and include the sending of a delegation, slaughtering of a beast, negotiation and/ or actual exchange of agreed lobola, celebration of the union and the physical handover of the bride from her home to her new family home. But "the Act does not state any style of

[177] RCMA supra note 2.
[178] Marriage Act supra note 1.
[179] C Himonga, T Nhlapo, IP Maithufi et al. supra note 136, at pp 198-9.

celebration of customary marriage, nor does it specify the process of the handing over of the bride (*makoti*) to the bridegroom's family".[180]

However, this blanket codification of customary laws may be problematic because some versions of living customary law may prod parents to consent to marriage of their children when not *in the best interests of the child*. Again, highlighting the continued dissonance between official and living customary law, with the former definitively pronouncing on specific requirements to a valid legal marriage, while the latter grants some leeway to determining such according to respective living customary law rules. Motivated by this latter point, current African customs that govern or otherwise heavily affect customary marriage, will be analysed below, to show how many continue to negatively affect women in customary marriages. Interestingly too, the implications of marriages that are concluded without regard to the RCMA will also be discussed.

4. LIVING AFRICAN CUSTOMARY BELIEFS AND PRACTICES THAT MAY FACILITATE ABUSE OF AFRICAN WOMEN AND CHILDREN: CONTRASTED TO THE ROLE OF THE RCMA

4.1. Role of the RCMA:

This RCMA[181] "represents a belated but welcome and ambitious legislative effort to remedy the historical humiliation and exclusion meted out on spouses in marriages which were entered into in accordance with the law and culture of the indigenous African people of this country".[182] However, despite the existence of the RCMA, several customary marriages are conducted without regard or application to it. Furthermore, many customary practices relating to the abuse and marginalization of African women, still exist in practice even though they violate the Constitution[183] and the RCMA in varying degrees. Due to the abovementioned divide between living and official customary law, fertile ground exists for the continued existence of some living customary principles that challenge the sanctity of women's rights in customary marriage. The RCMA does not deal with the content of these principles underpinning customary marriage, such as *lobola* and *ukuthwala inter alia*. Rather,

[180] K Masutha '*The modern customary marriage – can the handing over of a bride be waived?*', 2021, taken from The modern customary marriage – can the handing over of a bride be waived? - De Rebus, accessed 05 September 2023.
[181] Supra note 2.
[182] *Mayelane* supra note 41 at para 16.
[183] Supra note 36.

as mentioned previously, it merely stipulates as a procedural requirement that, "the marriage must be negotiated and entered into or celebrated in accordance with customary law".[184] Attributable to the diverse and fluid nature of African customs among different tribes, this is perhaps a reasonable generalisation. Nevertheless, it only serves to widen the scope for varying interpretations of different customs, for instance constituting '*in accordance with customary law*'.

It has already been researched and suggested that "the discrimination of women is rooted in inequality, male domination, poverty, aggression, misogyny and entrenched customs and myths".[185] This means that some living customary law practices and attitudes are not only prejudicial to women but may also negatively influence the consensual assistance that parents give to the marriages of their minors, resulting in outcomes that may not be in *the best interest* of the girl child specifically. South African legislature has made strides to take on the complex task of eradicating said customs, in order to align and comply with international statutes such as the Beijing Declaration and locally, the Constitution,[186] by recognising living African customary law on one hand, while delicately balancing that with ensuring that it is not contra to the Constitution.[187] However, it is mostly the consequences of customary practices, not the practice itself, that violate the rights of women. Thus, the customs themselves remain in place and pose a continued threat to the freedom, dignity, and equality of these women, without detection by official customary law or the courts, because they lie under the guise of 'culture', which the law does recognise.

4.2. Examples of African customary beliefs and practices perpetuating abuse of African women and children:

4.2.1. *Minority status of women:*

As mentioned previously, the minority status of women was abolished in the *Mayelane*[188] case, and enforced prior through the promulgation of the RCMA, however, "the authority structure reproduced by individual actors is based on relationships hierarchically ordered through the social division by gender and age. Male authority is a reality in a married

[184] RCMA supra note 2 at s 3(1)(b).
[185] R Mamphela supra note 50.
[186] Supra note 36.
[187] Ibid.
[188] Supra note 41.

woman's daily life".[189] This means that because of an already existing system that reinforces the submission of women, to male and seniority authority, this minority position that determines women's participation in the marriages they contract, including their ability to purchase or sell immovable property, enter into contracts and make guardianship decisions related to their children; is *de facto* still in force for some women.

4.2.2. Primogeniture:

Another prior mentioned African custom that has been abolished in *Bhe vs Another,*[190] but still in existence within some African communities, is that of primogeniture. "The customary law of succession in South Africa [was] based on the principle of primogeniture. The primogeniture rule is the right, by customary law, of the eldest child to inherit the entire estate, to the exclusion of female children and younger children. Women and younger children are excluded from the succession of estates purely on the basis of gender and birth order".[191] The rights of women to own, possess and dispose of their own land was restored by the Constitution of the Republic of South Africa, 1996 and is also reflected in the RCMA. However, within the communities that practice living customary law, this practice still exists and is commonly referred to as 'the family home'. This means that when a parent dies, usually intestate, for instance, any immovable property they left behind is given to any male siblings or relatives in the family, by all in the family, including the females. This male heir is then required to own, possess, and control the household on behalf of all surviving relatives with an interest in it, hence the name 'family home'. The name aims to ensure even the heir understands that he is entrusted with the property and other immovable property, on behalf of the family.

Like the original customary practice, the intent is understood to have been that "[w]hen the head of the family dies his heir takes his position as head of the family and becomes owner of all the deceased's property, movable and immovable; he becomes liable for the debts of the deceased and assumes the deceased's position as guardian of the women and minor sons in the family. He is obliged to support and maintain them, if necessary, from his own

[189] K Rice supra note 57 at p 385.
[190] Supra note 141.
[191] AJ Kerr '*Customary Law of Immovable Property and Succession*', (1990), p 99. Taken from *M and Another v M and Another (*63462/12) [2014] ZAGPPHC 1026 (10 December 2014).

resources, and not to expel them from his home. Kerr, *op cit* at 100-108".[192] Despite the original intent of this custom, coupled with legislative reform that have now afforded women and men the same legal rights to own property, a recent study, "revealed the resilience of living customary law in the administration of estates, particularly in respect of homes situated in rural areas. In this regard, living customary law has evolved to allow women and daughters greater rights to property but it still displays patriarchal overtones as males are considered the true owners of homes".[193]

4.2.3. Lobola: the risks

Lobola, as defined in the first chapter and commonly understood to be bride-priced exchanged between the families of spouses that are getting into a customary marriage, is understood to be of noble intent and a beautiful celebratory process too, during the negotiations of a customary union. However, "bride-price has varying impacts in richer and poorer localities, and difficulties created by bride-price are particularly an issue of poverty as, in poor communities, people struggle for wealth. Thus, families may depend critically on the receipt of bride-price. Interviews [conducted in this referenced source] suggested that people may be turned against each other due to the struggle to survive and to compete for scant resources. For example, parents may have no choice and feel forced (often against their wishes) to refuse to take separated daughters back, purely because they cannot repay the cows and goats given, and they would otherwise be placed in extreme difficulties with the other family and the community. The daughter is then forced to pay an often-bitter price in terms of being forced back into an abusive marriage, frequently facing severe repercussions from her husband, or becoming destitute".[194] This link between poverty, lobola, and the perpetuated vulnerability and abuse of African women and minor brides in customary marriages will be discussed in detail below. *Lobola* itself is not what I contest, but what it represents as a financial reprieve for many families living in poverty in South Africa today and the resultant risk of young girls and women being commoditised.

4.2.4. Ukuganisela:

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[192] *Mthembu v Letsela and Another* (71/98) [2000] ZASCA 181; [2000] 3 All SA 219 (A) (30 May 2000) (saflii.org).
[193] F Osman '*The Administration of Customary Law Estates Post the Enactment of the Reform of Customary Law of Succession Act: a Case Study from Rural Eastern Cape, South Africa'*. Faculty of Law, 2019. Print.
[194] M Ndulo '*African Customary Law, Customs and Women's Rights*', part of Indiana Journal of Global Legal Studies, 2011, Vol.18(1), p.87 available at: http://go.galegroup.com.ezproxy.uct.ac.za/ps/i.do?ty=as&v=2.1&u=unict&it=DIourl&s=RELEVANCE&p=AONE&qt=SN~1080-0727~~VO~18~~SP~87~~IU~1&lm=DA~120110000&sw=w, at p558.

Within living customary law, at least in some communities, consent in marriage is not always required. For instance, "[in] South Africa, forced child marriage is [still] practised by the Zulu and the Bapedi. In Zulu it is called "***ukuganisela***" and in Sepedi it is called "***go thiba difate***". These concepts appear to be culturally acceptable because in customary marriages the family groups of the prospective parties (to their marriage) give consent to their daughters' marriages to men without necessarily informing them".[195] This means that, even with consent stipulated as a requirement for a valid legal marriage, *ukuganisela* is an example of a customary marriage that is conducted without any regard to this requirement, nor to the RCMA itself, which also enlists consent as a requirement to a valid marriage. The RCMA can thus be said to not provide enough protection to African girl children in three main respects, namely, it is not always applied by the communities practicing customary law. Secondly, even where the RCMA requirement to minor consent is acknowledged according to section 3, parents can use long-standing customs such as *ukuganisela* to argue that they have, in compliance with the RCMA, consented to a minor marriage on their behalf. Furthermore, a custom such as *ukuganisela* can be used to meet the requirement of the RCMA[196] to show that has been "negotiated and entered into or celebrated in accordance with customary law." In this instance, consent can be legitimately circumvented according to this custom, while the parents rely on section 3 of the RCMA to consent on behalf of the minor as a requirement of the RCMA. Lastly, although the Children's Act[197] requires consent to marry, from a minor above the minimum age of marriage, being between 15 and 18 years for this research, *ukuganisela* and similar practices, show that in practice, for most traditional African communities, minor's own consent to marry is not always important nor required, for what that community deems to be a valid marriage to occur. Thus, a valid customary marriage can still be conducted without reference to the RCMA altogether. In other words, forced marriages can be said to be permissible through the guise of traditions like this. Notwithstanding legislation such as the Children's Act[198] explicitly stating that minor consent to marry is required, some customary practices disqualify minors from giving consent to their own marriages. This means that, in practice, the fate of minor African girls rests largely on their parents and/ or guardians who can consent on their behalf.

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[195] Ibid.
[196] Supra note 2 at s 3(1)(*b*).
[197] Children's Act supra note 3 at s 12(2)(b).
[198] Ibid.

4.2.5. Ukungena:

Although not directly related to the issue of minor consent to a customary marriage, this custom provides further evidence that the notion of consent, coming from an African bride, is compromised by virtue of most African practices that found a customary marriage. *Ukungena*, for instance, also referred to as 'wife inheritance' is another contentious longstanding African tradition, which saw the wife of a deceased spouse being automatically married off or inherited to the deceased's brother or other male relative, if he has no brothers. "The practice aims to provide means and support for the widow and her children in the absence of the husband".[199] However, despite the intent, coupled with the risks associated with the legal sanctity of women in these marriages, "this traditional practice is becoming risky in the face of AIDS because it involves sex. One partner could be infected with HIV, and this has major implications for the spread of the disease. For example, if the late husband's cause of death was AIDS-related, the wife inheritor is at risk of contracting HIV if the couple engages in unprotected sex. He could also infect his wife. In a case where the brother inheriting the widow is already infected, he can pass HIV on to the widow if she was not infected or re-infect her if she is already infected. Wife inheritance, therefore, exposes both the widow and the brother-in-law to HIV infection".[200]

This custom supports the contention of this dissertation, that African women and minor girls are exposed to abuse and risk, such as HIV in this instance, merely because they subscribe to customary marriage, which still functions on the fundamentals of customary practices such as *ukungena*. However, because this impact is related more to health and not the law, it suffices to highlight one as of the risks of a marriage rite that does not value women's consent, but this dissertation did not expound on the medical risks any further. Interestingly too, polygamy "includes levirate and sororate unions, although the RCMA is silent about this. As it has been a cultural practice, it is still practised by some communities. If the inheriting of the deceased's spouse is conducted according to the custom of that community, and the widower or widow and the deceased spouse's relatives' consent, then that marriage is a valid marriage under the RCMA".[201] Its prevalence is difficult to measure in number, however it is a custom that appears to be common as Maluleke adds, "at the

[199] B Ligomeka "*Malawi fights 'wife inheritance*"', Sister Namibia, Jan-May 2003, Vol. 15(1-2), p 38(1): https://www.thefreelibrary.com/Malawi+fights+%27wife+inheritance%27.-a0108149080.
[200] Ibid.
[201] MJ Maluleke '*Culture, tradition, custom, law and gender equality*.' (2012) Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad 15.1, at p 12-13.

International Alliance of Women's 35th Congress held in South Africa in December 2010, women from KwaZulu Natal and the Eastern Cape reported that widows are forced to marry the brother or any male relative of the deceased husband".[202]

Although in the communities where this is practised, the widow's consent is not required for the marriage to the deceased's male relative, she allegedly does have a choice of which brother she wants to be married off to, should more than one exist in the family. An option that is far from praiseworthy by this dissertation considering the underlying custom and impact on the women bound by it, but one noted nonetheless, particularly for its significance in the recognition and respect of a woman's consent, in some form. Generally, however, "if any woman refused to proceed with this custom, she was banished from the community, dispossessed of their assets, inheritance and forfeit custody of their children".[203] Moreover, recently, after extensive public consultation was conducted through the *Green Paper,*[204] formal legal recognition of this tradition was advocated for, because of its apparent prevalence in some communities. "Traditional leaders submitted that the Recognition of Customary Marriages Act does not recognise the cultural practice of "*ukungena"* (once a woman marries into a particular family, she is married into that family for life)".[205] This shows that there is some requirement for the RCMA to recognise specific customary practices related to marriage as opposed to the current broad acceptance as provided for in section 3 (1)(b), that "the marriage must be negotiated and entered into or celebrated in accordance with customary law".[206]

4.2.6. Polygamy:

Polygamy is the practice of a man marrying more than one wife and it is legally recognised according to African customary law, both official and living. The RCMA governs both monogamous and polygamous marriages, therefore the issue of minor consent is dealt with in the same manner. According to the RCMA,[207] "a husband in a customary marriage who wishes to enter into a further customary marriage with another woman after the

[202] Ibid at p 13.
[203] AJ Kerr supra note 151, taken from C Himonga '*The advancement of African women's rights in the first decade of democracy in South Africa: The reform of the customary law of marriage and succession',* (2005) Acta Juridica, at 106.
[204] Supra note 163.
[205] Ibid at p 20.
[206] RCMA supra note 2 at s 3(1)(*b*). Where customary law itself is broadly defined in the preamble of the RCMA as "the customs and usages observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples".
[207] Ibid at s 7(6).

commencement of [this] Act must make an application to the court to approve a written contract, which will regulate the future matrimonial property system of his marriages".[208] The RCMA does not explicitly make mention of the requirement of consent from the first wife, prior to the finalization of any subsequent marriages. Also, it is silent on the consequences of a breach of its section 7 (6), where a spouse proceeds with a subsequent marriage without applying to the court. [This] absence of a requirement for the first wife to consent to her husband's subsequent marriage in the Recognition Act[209] raises previously highlighted concerns. Because customary law is historically discriminatory in nature, particularly when it comes to women, and has shown in the application of existing customs that the consent of women in relation to their marriages is generally not highly esteemed, it is imperative for courts to take this into account when dealing with customary law cases".[210] For this reason, the case of *Mayelane v Ngwenyama (Mayelane),*[211] is pivotal, as it ruled that the consent of the first wife was indeed required for her husband's subsequent marriage(s). "The Constitutional Court (the Court) in this case held that the consent of the first wife in a polygamous marriage is a requirement for a subsequent marriage of her husband to be valid, even though the Recognition Act is silent on the issue".[212] This is a commendable legal stride, especially as the role of the court in the development of customary law cannot be undermined. In this case, it can be further believed that the court bridged some part of this perpetually highlighted inconsistency between living and official customary law.

Despite the ruling of the *Mayelane* case,[213] the patriarchal belief that a husband is his wife's guardian continues to reappear and is exercised in decisions regarding children, property, inheritance etc. among many different African tribes.[214] A consideration perhaps still open for further research, is the likelihood that an African husband will seek his first wife's permission before entering another marriage. Additionally, due to the hierarchal dynamics within the setting of a customary marriage, although required by law, would the first wife have any power to contest a marriage without her consent, or to refuse her consent;

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[208] Ibid.
[209] Ibid.
[210] Ibid, take from *Gumede (born Shange) v President of the Republic of South Africa* 2009 (3) SA 152 (CC), para 21, para 34, stating: "Only women in a customary marriage are subject to these unequal proprietary consequences."

[211] *Mayelane* supra note 41.

[212] Ibid.
[213] Ibid.
[214] Ibid.

should it be requested. If she does refuse her consent and her husband proceeds with the subsequent marriage, the law currently does not prescribe any repercussion for a husband who proceeds with a subsequent marriage without the consent of the first wife. According to *Mayelane,*[215] though, such marriage would be deemed invalid. Thus, if the wife does know her rights and has adequate power within the marriage to enforce them and challenge the validity of the marriage, either during his lifetime or when he dies with a resultant dispute over the deceased estate. The law is still not very accessible or affordable and many polygamous marriages remain unregistered.

Interestingly, again the recent *Green Paper*[216] also uncovered that "traditional leaders [therefore] emphasised that they should be able to issue marriage certificates and highlighted the need to explore practical ways of recording marriages, such as keeping affidavits with *izinduna* (traditional councils)".[217] This raises a huge concern in relation to the research problem because if the Government enables this, it would arguably be handing significant power back to the gatekeepers of patriarchy, further segmenting official and living customary law. Specifically, it would make it even more difficult to ascertain whether valid consent was obtained from the first wife to this polygamous marriage. In line with the same considerations, this study avers that a minor bride's ability to give or refuse consent would be further compromised, because of previously described sociocultural dynamics and limited capacity. Thus, polygamy may be argued to in fact introduce an added burden of spousal consent for any subsequent marriages.

As Himonga points out section 7 of the RCMA procedure involves the courts and bureaucratic red tape, which raises questions about its practical implementation:

> "This procedure may well deter people from entering into polygamous marriages in the first place and thereby protect the property interests, at least, of the existing wife, but it is not difficult to see how impractical and unaffordable it makes the new law for most people. For example, every time a man marries a new wife, he and his wives, who have to be joined to the proceedings, must go through the complex and expensive high court proceedings or family court, as the case may be, to process

[215] Ibid.
[216] Supra note 163.
[217] Ibid at p 21.

> their matrimonial property contract applications, contending with consequent transportation costs. In fact, the *Green Paper on Marriages*[218] in South Africa simply said, "sometimes marriages are not registered because the DHA is far". And whether or not many people are likely to know or understand these highly complicated legal procedures is another matter. Should this not be the case, however, people will simply carry on marrying as they have always done as though the Act did not exist. Thus, while the Act represents theoretical victories for women in marriage, it may mean little or nothing to their lived experience".[219]

Poverty as a contributing factor to the continued abuse and marginalisation of African women will be detailed in the following chapter and will support this statement by Himonga. Considering these examples and previously discussed restrictions faced by African women, it is inconceivable that women in similar customary settings, let alone minor girls, are able or enabled to consent to a customary marriage. The conclusion reached in this research is that the generalized notion of consent from both spouses of a heterosexual marriage, as one of the requirements for a valid customary marriage, is flawed, because of the underlying existence of inequality between men and women according to living customary law in South Africa; a prevailing inequity that official customary law seems to ignore or is still ill-equipped to manage.

5. CONCLUSION:

"Child marriage remains a problem in Southern Africa due to a variety of factors. These include poverty; gender inequity; tradition; insecurity, especially in times of conflict, limited education and lack of adequate legal frameworks in Member States, most of which are inconsistent".[220] Despite the Constitutional guarantee of equality between the spouses of a customary marriage, also expressed through the RCMA, the overall patriarchal context of living customary law highlights the difficulty of expecting legislation to change the actual practised customs of a community with its own traditions, gender roles and norms

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[218] Ibid.
[219] C Himonga '*The advancement of African women's rights in the first decade of democracy in South Africa: The reform of the customary law of marriage and succession*' (2005) *Acta Juridica* 82, at 106.
[220] Explanatory Notes On The Model Law On Eradicating Child Marriage And Protecting Children Already In Marriage. Taken from: MODEL-LAW-ON-ERADICATING-CHILD-MARRIAGE-AND-PROTECTING-CHILDREN-ALREADY-IN-MARRIAGE.pdf (girlsnotbrides.org), 11/11/2022, at p.2.

underlined by this patrilineal set-up. Essentially, minors' consent to marriage is difficult to enforce *de facto* and to give legal authority to the parents of minors to consent to their marriages, adds further opportunity for exploitation of existing living customary norms, that may not already require specific minor consent to their own marriages.

In conclusion therefore, this dissertation advances the view that some cultural practices discussed in this chapter condone a child marriage and pose grave violation to the right to equality of black African minor girls who mainly live within the communities that practice them. The reasoning and foundational intent of these customary practices may have been virtuous, however due to the change in times, increased levels of poverty and rampant abuse of women, the unswerving patriarchal theme in these customs inadvertently exposes young African girls and women to continued exploitation and violence. As has been shown, under the umbrella of culture, practices such as *ukuthwala, ukuganisela, ukungena,* and *lobola*, do not allow or at least advocate for consent to minor African customary marriages to protect the *best interests of the child*; but rather seem to promote the interests of the adult consenting on the minor's behalf; even if indirectly. In the next chapter, this consent to minors' marriages and its violation of the right to equality will be explored further, specifically the protection against non-discrimination on the grounds of race and gender.

CHAPTER 4
PARENTAL CONSENT TO MINORS' CUSTOMARY MARRIAGES AND THE RIGHT TO EQUALITY

"There can be no doubt that the guarantee of equality lies at the very heart of the Constitution. It permeates and defines the very ethos upon which the Constitution is premised".[221]

1. INTRODUCTION:

Chapter 3 of this dissertation examined parental consent to minor customary marriage, in accordance with section 3 of the RCMA. The chapter showed how the application of this provision is affected by the living customary practices, that today, mainly govern African

[221] *Fraser v Children's Court, Pretoria North, and Others*, 1997 (2) SA 261 (CC); 1997 (2) BCLR 153 (CC) at para 20: taken from Bhé supra at note 2 above.

customary marriage. Chapter 4 now assesses the resultant negative impact that this provision has on minor African girls who do marry customarily with their parents' consent. Specifically, a constitutional test of validity will be conducted against section 3 of the RCMA, in light of its indirect impact on minor African brides, while delicately balancing the role of customary practices and other circumstances such as poverty, patriarchy and socioeconomics in South Africa.

As highlighted by the Constitutional Court in *Fraser,*[222] "[t]he South African Constitution is doubtlessly a victory for women in its explicit guarantees of non-discrimination on the basis of gender, sex, pregnancy, marital status, the right to be free from both public and private violence, and the right to bodily and psychological integrity. Yet, despite the triumph of equality and the constitutional level in South Africa, marriage is often the site of women's legal, social, and sexual subordination, as well as vulnerability to domestic violence and HIV/ AIDS, all of which are exacerbated by poverty". African customary marriage is a specific example of one such site and as discussed in the previous chapter, is one that adversely affects mainly black African women, as would the accompanying patriarchal, abusive, and disadvantageous customs still in practice on the ground. To conduct a test of constitutional validity on section 3(3)(a) and (b) of the RCMA, the limiting measure or provision, against the equality clause.[223] The chapter will begin by examining equality itself.

2. EQUALITY:

In its simplest form, equality means that all human beings are to be subject to the same laws, to be treated equitably by the law and that no individual be privileged over the discrimination of another because of age, gender, race, disability, nationality, or other such characteristics. The global recognition of the right to equality as set by article 7 of the Universal Declaration of Human Rights (UDHR) states: "all are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination".[224] In assent to this and the other global charters to

[222] Ibid.
[223] Constitution supra note 36 at s 9.
[224] Universal Declaration of Human Rights, Universal Declaration of Human Rights | United Nations. Date accessed 12 December 2021.

which South Africa is a signatory, the Constitution of South Africa,[225] like most of the world's national constitutions, guaranteed equality before the law in section 9 of the Bill of Rights; known as the 'Equality Clause'. It is important to note a distinction between formal and substantive equality. "Formal equality means sameness of treatment: the law must treat individuals in like circumstances alike. Substantive equality requires the law to ensure equality of outcome and is prepared to tolerate disparity in treatment to achieve this goal".[226] The former type of equality does not consider socioeconomic disparities between individuals, while the latter examines these conditions to determine an equal outcome, ensuring that "the Constitution's commitment to equality is being upheld".[227]

The South African Constitution[228] contains five subsections related to equality in section 9:

> "The first provides for the principle of equality before the law and confers the right to equal protection and benefit of the law. The second deals with affirmative action. The third contains a prohibition of unfair discrimination on certain grounds (the 'listed grounds'). The fourth extends the prohibition of unfair discrimination to the horizontal level and requires enactment of national legislation to prohibit unfair discrimination at this level. The final subsection presumes state or private discrimination on the listed grounds to be unfair".[229]

Accordingly, in terms of section 9(1) of the Constitution,[230] "everyone is equal before the law and has the right to equal protection and benefit of the law". Section 9(2) is applicable when the legislative provision under review seeks to give effect to restorative social justice measures or commonly referred to affirmative action measures. Section 9(3) prohibits discrimination on listed grounds and says, "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". Section 9(4) then extends the horizontal application of the prohibition of unfair discrimination based on section 9(3) grounds and

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[225] Supra note 36.
[226] I Currie & J De Waal '*The Bill of Rights Handbook*', (2005) Juta, 5th Edition at p 233. Supported by T Loenen '*The Equality Clause in the South African Constitution: Some Remarks from a Comparative Perspective*' (1997) 13 SAJHR 410, 405.
[227] Ibid.
[228] Supra note 36.
[229] Supra note 226 at p 215.
[230] Supra note 36.

affirms that "national legislation must be enacted to prevent or prohibit unfair discrimination". Lastly, section 9(5) says "discrimination on one or more of the grounds listed in subsection (3) is unfair, unless it is established that the discrimination is fair". This dissertation relies on section 9(3), advancing the claim that allowing parents or guardians to consent to minor customary marriage violates the prohibition against unfair discrimination, on the grounds of race and gender contained in this section. However, before proceeding with the respective section 9 stages of enquiry to illustrate this, discrimination will be elaborated on, to separate it from mere differentiation, which is not uncommon in law.

2.1. Differentiation or Discrimination:

"In general, discrimination is understood to exist when a superficial characteristic that is unrelated to an individual's actual or potential skills is used in order to restrict individuals' access to the available economic, political, and social opportunities for advancement".[231] Often though, particularly in the case of government, differentiating between people is necessary to cater to their separate and specific needs, namely substantive equality. However, discrimination is when the differentiation between people affects or is based on the foundational equal worth of all people, and it causes unfair advantage or deprivation of basic rights for one person or group of persons, over another. This challenges each person's inherent right to human dignity, a right intrinsically connected to equality.

In South Africa, human dignity is at the heart of non-discrimination, as discrimination makes it difficult for individuals to make meaningful life choices and decisions. Fagan reiterates,

> "in no legal system does human dignity play a greater role than in the South African one. The South African Constitution accords everyone 'the right to have their dignity respected and protected'. It also recognizes human dignity as one of three values (the others being equality and freedom) upon which the Republic of South Africa was founded and which the South African Bill of Rights affirms".[232]

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[231] D Shepherd '*Post-apartheid trends in gender discrimination in South Africa: Analysis through decomposition techniques'*, (2008), Stellenbosch, University of Stellenbosch. Retrieved October 5: 2011.Taken from D'Amico, 1987: 310.

[232] A Fagan '*Human dignity in South African law*', (2014), in M Düwell, J Braarvig, R Brownsword, & D Mieth, (Eds.), *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (pp. 401-406). Cambridge: Cambridge University Press. doi:10.1017/CBO9780511979033.048

This is to discourage a lack of recognition of equal worth or actual deprivation of peoples' benefits or ability to make life choices; symbolically condemning some people to second-class citizen status and stripping away the dignity of those discriminated against. In addition to this, due to the history of the country, South African law particularly bears the added responsibility of ensuring the equality and dignity of those who are historically marginalised, to re-establish this idea of equal worth. "The many manifestations of inequality inherited from the past means that the constitutional commitment to equality cannot simply be understood as a commitment to formal equality".[233] According to the Constitutional Court in the matter of *Prinsloo,*[234]

> "given the history of this country, we are of the view that 'discrimination' has acquired a particular pejorative meaning relating to the unequal treatment of people based on attributes and characteristics attaching to them. We are emerging from a period of our history during which the humanity of the majority of the inhabitants of this country was denied. They were treated as not having inherent worth; as objects whose identities could be arbitrarily defined by those in power, rather than as persons of infinite worth. In short, they were denied recognition of their inherent dignity".

So, in addition to the prior mentioned factors affecting the guarantee of African women's right to equality and non-discrimination, it is also on the premise of their historically inferior position in South Africa, that this dissertation asserts African women have yet to escape this inferior position of unequal treatment and its lingering impact. The continued practice of certain African laws and marriage norms, coupled with poverty, harbour, and further embed inequality between the men and women in customary marriages. To then have a legal provision that allows parents of minors to consent to this institution of marriage, on their behalf, debatably predisposes black African minor girls specifically, to conditions that further foster inequality and the marginalisation of women. Consequently, this chapter will demonstrate that not only does inequality exist against black African minor girls and women in customary marriages, but it constitutes indirect, unfair, and unjustifiable discrimination against them.

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[233] I Currie et al supra note 226 at p 232.
[234] *Prinsloo v Van der Linde and Another* (CCT4/96) [1997] ZACC 5; 1997 (6) BCLR 759; 1997 (3) SA 1012 (18 April 1997) at para 31.

The research will now move to test parental consent against the Equality Clause, after first unpacking the most common customary practices that underpin the foundation and rules of living customary marriage. This serves to reinforce that parental consent according to section 3 of the RCMA is not discriminatory *per se*, however, due to these customary practices, factors already mentioned and, others to be detailed below affecting its application, have become problematic by impact, to the point of indirectly discriminating against minor black African brides. Important to re-emphasise at this stage, that according to the RCMA read with the Marriage Act,[235] this parental consent to minor marriage does ensure formal equality, as it is not limited to minors entering a customary marriage only, but includes all minors, also those marrying according to civil law.

3. MINOR CONSENT AS A REQUIREMENT FOR A VALID CUSTOMARY MARRIAGE: IMPACT ON EQUALITY

To determine whether the consent provisions unfairly discriminate against African girl children, it is important to assess the matter holistically and to consider the specific customs, beliefs, traditions, norms, and other significant factors (discussed earlier in this dissertation) that may influence the way in which the consent provisions impact on African girl children. It is important to remain mindful of the role of the Constitution of the Republic of South Africa, 1996[236] in the development of African customary law, the impact of poverty on some customary practices, and the effects of the historic position of black African women's rights in customary law and marriage. The gendered context and social setting within which these customary practices exist, as well as the effect of patriarchal attitudes towards women and children, and respect for older people, also have immense influence. Due to the interconnectivity of these factors to be discussed in detail below, this research seeks to uncover that the result, is the existence, or perhaps perpetuation of unfair and unjustifiable discrimination against black African women within customary marriages. This will be supported by a test of the constitutional validity of this consent provision against section 9(3).[237] Again, it is not for this dissertation to interrogate the intention behind any of these African customs, but to merely highlight how their existence and evolution over time impact the sanctity of customary marriages and the rights of the

[235] Supra note 1 at s 25.
[236] Supra note 36.
[237] Ibid.

women and children within them. Specifically, that consent to minor marriage thrusts black African minor girls into pre-existing abuse and vulnerability as averred.

3.1. AFRICAN CUSTOMARY MARRIAGE FACTORS THAT IMPACT BLACK AFRICAN WOMEN DIFFERENTLY TO MEN AND NON-BLACK AFRICAN WOMEN, MAKING THEM MORE PRONE TO ABUSE WITHIN THE MARRIAGE:

3.1.1. Existence of an ongoing conundrum between official customary law and living customary law practices.

As discussed in the previous chapter, two versions of African customary law exist in South Africa, namely "codified customary law, also referred to as official customary law, comprises what was an oppressive form of customary law developed by colonial and apartheid states which exists in codes and precedents",[238] contrasted with living customary law, which is the living norms and practices that regulate the everyday lives of the people who live according to customary law. It is argued that much of the customary law applied by the courts, legislators, and practitioners is the official version and that prior to 1994, was obtained from precedent and texts. As such "is of dubious validity"[239] and is not updated, recent nor an accurate representative account of living customary law. So, when the "courts apply customary law, when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law" as directed,[240] it is official customary law that is being applied, lacking empirical evidence of its living version. However, as mentioned prior, several factors hinder authoritative practitioners of customary law from accessing the law and courts, to make a valuable contribution to the caselaw affected by living customary practice. Therefore, the courts mainly develop a customary law that is stagnant and detached from the one practiced in living customary law. Conversely, some of this court and legislative development of customary law, such as in the example of the *Jezile*[241] case, is not always applied within the communities practicing it.

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[238] C Himonga and E Moore supra note 54.
[239] Ibid.
[240] Supra note 36 at s 211(3).
[241] Supra note 91.

The *Green Paper on Marriages in South Africa*[242] confirms this fact with concern, noting "*Ukuthwala*" (the practice of abducting young girls and forcing them into marriage, often without the consent of their parents) is still practiced in certain parts of the country, particularly under circumstances where the parties do not have sufficient finances to initiate "*ilobolo*" and decide to elope".[243] Interestingly, literature describes three different types of *ukuthwala*, with the first one called *ukugcagca,*[244] above described as a colluded abduction, by both parties, implying some level of consent given by the woman in the arrangement too. "Mwambene and Sloth-Nielsen have thus argued for a 'benign' accommodation of this type of *ukuthwala*, but on condition that the requirement of consent of the bride is met, and that she colludes in or is aware of the mock abduction".[245] "The second type of *ukuthwala*, termed *kobulawu*, is where both the woman's and the husband's families agree on the union, but the woman remains unaware of the agreement".[246] While in this instance, consent would evidently not be obtained from the woman and/ or bride-to-be, "it has been observed that 'the first and second types seem to underpin the traditional practice where the family and community play an integral part in ensuring the well-being of the female' and that both could therefore be accommodated. This view is of-course arguable, however, it is raised to illustrate this widely accepted practice of ukuthwala, which finds many noble justifications at the foregoing of the woman's consent to it, and the pursuant customary marriage. "More important to note, however, is that although the captured woman has the choice to stay or leave after the abduction, she is usually forced to marry the abductor to save face and uphold her family's reputation".[247] The third type of *ukuthwala* is where neither the girl nor her family has prior knowledge of the impending *ukuthwala*".[248]

Thus, regardless of the intention behind or type of *ukuthwala* in question, what the persistent existence of *ukuthwala* reiterates for this dissertation, is that although a living customary practice or its effects are barred within official customary law, the experiences of

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[242] Supra note 163 at p 20.
[243] Ibid at p 20.
[244] L Mwambene "*Hmong 'marriage by capture' in the United States of America and ukuthwala in South Africa: unfolding discussions*", Comparative and International Law Journal of Southern Africa 2020-01-01 53(3): 1-25, https://journals.co.za/doi/full/10.25159/2522-3062/5981, accessed 12.11.2022. Also taken from Mkhuseli Jokani, 'A Criminal Response to the Harmful Practice of Ukuthwala' (no date, PowerPoint presentation) <sapsac.co.za › docs › 5. M Jokani.pptx>accessed 20 September 2020.
[245] Ibid. Taken from L Mwambene and Julia Sloth-Nielsen, '*Benign Accommodation? Ukuthwala, "Forced Marriage"* and the South African Children's Act' (2011) 11 African Human Rights LJ 3 at 1–22.
[246] Ibid. Taken from: [see, for example], the cases of *Dyongo v Nani*2 (NAC 114 (1911)) and *Zamana v Bilitane*2 (NAC 114 (1911)), where the respective girls' family members suggested that the girls be twala'd as a preliminary to the marriage proposed by the suitor.
[247] Ibid. Taken from Jennifer Ann Yang, 'Marriage by Capture in the Hmong Culture: The Legal Issue of Cultural Rights and Women's Rights' (2004) Law and Society Review at the University of California 39–52 at 42.
[248] Ibid. Taken from: Philip Stevens, '*General Principles and Specific Offences*' (2016) South African Journal of Criminal Justice173 at 177. Also from: Debbie Budlender, '*Women, Marriage and Land: Findings from a Three Site Survey*' (2013) Acta Juridica28–48 at 30.

some communities who live according to customary law, do not always align with such changes in the law. Second, that consent to minors' marriages according to section 3 of the RCMA, creates an opportunity for certain customs, such as *ukuthwala*, to continue to thrive under the guise of, or as a legitimately recognized form of cultural marriage within that community. In other words, should an interested party object to a minor's marriage based on it commencing through abduction, the minor's parents may proceed and confirm their consent to this marriage regardless, provided they recognize ukuthwala as a part of their culture, and can somehow show that proceeding with the marriage is *in the best interests of the minor*. Section 7 of the Children's Act[249] provides some guiding factors to consider in the determination of '*the best interests of a minor'* standard whenever a provision of the Act requires it. Arguably, because of its wide acceptance as a cultural practice forming the foundation of a customary marriage, *ukuthwala* can in principle be justified according to section 3(1)(b) of the RCMA, that the marriage was "negotiated and entered into or celebrated in accordance with customary law". Even though the effects of it, if *Jezile*[250] is relied on, can be challenged.

Thirdly, as previously mentioned, African customary marriage applies mainly to black Africans, as such, this example of *ukuthwala* where only African women and girls are abducted, illustrates the disproportionate impact of some living customs related to marriage, towards black African women and girls, and not towards non-black African women and minor girls, who do not subscribe to African culture.

3.1.2. Poverty levels in South Africa: making for misuse of perhaps nobly founded customary practices such as lobola, and it becomes an incentive to 'sell off minor girls' for financial and another material gain, at the expense of the minor African girl in question.

To provide some context on the drastic levels of poverty researched by May, "in per capita terms South Africa is an upper-middle-income country, but most South African households experience outright poverty or vulnerability to being poor. In addition, the distribution of income and wealth in South Africa is among the most unequal in the world, and many households still have unsatisfactory access to clean water, energy, health care, and education. About 18 million people live in the poorest 40% of households and are thus

[249] Supra note 3.
[250] Supra note 91.

classified as poor, and 10 million people live in the poorest 20% of households and are thus classified as ultra-poor. Most of the poor live in rural areas: 45% of the population is rural, but the rural areas contain 72% of those members of the total population who are poor".[251] May continues, "the poverty rate (the proportion of people falling below the poverty line) for rural areas is 71%. Poverty is not confined to any one race group, but is concentrated among blacks, particularly Africans: 61% of Africans and 38% of Coloureds are poor, compared with 5% of Indians and 1% of Whites. Three children in five live in poor households, and many children are exposed to public and domestic violence, malnutrition, and inconsistent parenting and schooling. Women are more likely to be poor than men: the poverty rate among female-headed households is 60%, compared with 31% for male-headed households".[252] From this, in summary, we can see that in South Africa, poverty is disproportionately black and female, a fact that adds to the foundation of heightened vulnerability of black African women and girls in the country.

Furthermore, "within race, inequality especially among the African and white population groups is substantial. Inequality amongst African households accounts for between 29% and 49% of overall inequality, depending on the measure chosen. This is borne out by the high Gini coefficient amongst African households of 0,54".[253] These levels of poverty and inequality in South Africa, contrasted with the strength of the Constitution,[254] which ironically seeks to redress this, are indeed unique and cannot be ignored in an assessment of the underlying factors that perpetuate the vulnerable disposition of black African people in the country, mainly women and children. The foundational understanding is therefore that poverty in South Africa is largely black and female, and research supports that "when experiencing acute poverty, families – and sometimes girls themselves – see marriage as a way to reduce family costs and gain financial security. This idea is reinforced by patriarchal norms that devalue and commodify girls".[255]

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[251] J May '*Poverty and Inequality in South Africa*', [Presentation by the Centre for Social and Development Studies, University of Natal", at https://s3.amazonaws.com/academia.edu.documents/31219257/presentation.pdf?AWSAccessKeyId=AKIAIWOWYYGZ2Y53UL3A&Expires=1555594261&Signature=7v1mReBDrh3vAzWonst2tBcHRdI%3D&response-content-disposition=inline%3B%20filename%3DPoverty_and_inequality_in_South_Africa.pdf

[252] Ibid.

[253] Ibid. "For the purposes of this analysis, "poor" is defined as the poorest 40% of households and as "ultra-poor" the poorest 20% of households in terms of consumption expenditure. For comparison, the international "rule-of-thumb' measure of 1US$ per day is also shown. **Table 1: Alternative Poverty Lines Poverty Line Measure % of Households classified as Poor "Poor": Poorest 40% (R352.53 per month per adult equivalent) 50% Ultra-Poor: Poorest 20% (R193.77 per month per adult equivalent) 27% 1$ per day 21%".**

[254] Supra note 36.

[255] https://www.girlsnotbrides.org/about-child-marriage/why-child-marriage-happens/.Date accessed 14 May 2021.

To provide an indication of the reality of minors' marriages in the country, accessed in 2019, statistics reveal through the 2021 *Green Paper*,[256] public comment feedback that "in 2017, 1 452 (56,1%) of registered customary marriages were from KwaZulu-Natal, followed by Limpopo with 535 (20,7%). The other seven provinces had less than 7% each. In 2017, 8 (0,3%) bridegrooms and 77 (3,0%) brides were younger than 18 years".[257] The latter statistic indicates yet another important matter that this dissertation does not research further, namely, the question of the average age of the grooms that marry most of these minor brides aged 18 years and younger. The figures represent a disproportionate number between boys and girls who marry at the age of 18 years or under, with more minor girls than boys represented, which suggests that many of these minor girls are being married off to older men. Nevertheless, on polygamous marriages, "as of September 2019, 342 809 customary marriages were registered on the NPR. The majority of these marriages, 333 387, were registered with one spouse and 8 410 were registered with two spouses. Marriages registered with three to nine spouses range from 814 to two. Only one was registered with 10 spouses".[258]

As prior indicated, these early marriages in the context of dire poverty, may be associated with that these minor brides and their families see marriage as a form of financial reprieve and security. Without engaging the veracity of any such possible reasoning, based on this supporting research, therefore, this dissertation maintains that the power given to parents of minors, to consent to their marriages, especially customary marriages that affect the most poverty-stricken black African females, needs to be reviewed. While parents are entrusted to grant this consent to the minor's marriage only if it is *in the best interests of the child*, is poverty alleviation a good enough reason? Said differently, if a spouse identified for a minor African girl is not poor and can provide access to basic housing, food, security, and education for her, could such marriage be deemed to be *in the best interests* of the minor bride? The answer to this could arguably be "yes", by supporters of child marriage, but this dissertation's response is 'no', because first the responsibility to provide all these needs to

[256] Supra note 163.
[257] Ibid at p 39. Taken from Statistical Release P0307, Marriages and Divorces 2017, p 1, Available at http://www.statssa.gov.za/publications/P0307/P03072017.pdf accessed on 18 December 2019.
[258] Ibid at p 40.

the child, rests on the child's parents or legal guardians according to section 18(2) of the Children's Act.[259]

Secondly, although the same Act[260] and section 18(3)(c)(1), also gives parents and guardians of children the right to consent to their marriage, research shows that the current ramifications of a minor girl being in a customary marriage far outweigh any financial security, real or perceived. "Girls are disproportionately vulnerable due to prescribed gender and cultural norms, income inequality, gender-based violence (GBV) and their biological make up (Concept Note on Adolescent Girls & Young Women, 2016)".[261] Again, non-black African minors are at less risk of minor consent to marriage affecting them as harshly because as the statistics show, they already suffer fewer effects of poverty merely based on their race and the foundation of the marriages they would be entering, are not riddled with as many patriarchal foundations as that of customary law.

Moreover, poverty is shown to affect African women indirectly, for instance, through the high rates of unemployment, the vulnerability of men has been found to drive them to seek to hold onto power domination by abusing their wives within the marriage. In interviews conducted by Boonzaier, "it became clear that men's notions of successful masculinity were linked to their abilities to become or remain economic providers for the family. Some men, as a result of not being able to take up this notion of successful masculinity, described feeling powerless. These feelings of powerlessness may have been employed as justifications for violence, with one expressing that, 'because of where my life was going and, my career, my personal life, I became overstressed I think with all the situations that I ended up giving it to her".[262] The perpetuation of abuse in customary marriage is evidence of the evolution of the patriarchal foundation of abuse, directly or indirectly nurturing the dominance of African men over their female spouses. An appreciation of the law does exist in most of these communities, for instance, that assault is a criminal offence therefore one cannot assault their spouse or anyone for that matter. However, prevailing beliefs on the authority of men in customary marriages and the subservience of the women in the same union, coupled with customary law being *a law unto itself*, rather, that some of these beliefs exist within the gap

[259] Supra note 3.
[260] Ibid.
[261] *National Formative Study on Child Marriage / Republic of Namibia, Ministry of Gender Equality, Poverty Eradication and Social Welfare.* Windhoek, Namibia: Ministry of Gender Equality, Poverty Eradication and Social Welfare, 2020. Print.
[262] Boonzaier F., '*Woman Abuse in South Africa: A Brief Contextual Analysis. Feminism & Psychology",* (2015), *15*(1), 99–103. https://doi.org/10.1177/0959353505049711. Date accessed 13 February 2022.

between living and official customary marriage, it seems to excuse or outweigh non-compliance with the law in some instances. Sideris[263] "provides an example of the ways in which a local headman deals with conflicts that arise when women transgress their expected submission: 'the community does not accept the violence. What is acceptable is that a woman must submit. Nowadays there are laws. Before there were indunas and they put him at the *ibandla* (court). If he is wrong, they penalise him. You cannot beat your wife for anything. After you have undergone certain stages of 'disciplining' and they don't work, then you can beat her'".[264]

A further consequence and thought-provoking interconnectivity of poverty and patriarchy is that "the ways in which women have to navigate the patriarchal state through their engagement with the police and the courts have indicated many problems with women's access to justice such as high cost and/or limited travel to courts and police stations, slow response times from police, few support services for abused women if they need to leave home, and high rates of poverty resulting in women struggling to pay for basic necessities if they need to relocate".[265] The extent and impact of poverty on black African women in South Africa is dire, and parental consent to the marriage of minor African girl children, cannot be viewed in isolation from it. It is important to highlight again, however, that this dissertation did not extend to exploring these, and other dynamics of parental consent to minors' non-heterosexual marriages or partnerships.

3.1.3. The nuclear family structure of African families and the consequential effects of marriage for minor African girls.

The organisation, 'Girls not Brides' writes, "child marriage is a complex issue. It is rooted in gender inequality and the belief that girls and women are inferior to boys and men. It is made worse by poverty, lack of education, harmful social norms and practices, and insecurity".[266] Negative consequences experienced by minor African brides in a nuclear family setting include shortened education prospects to tend to their new family, sexual

[263] T Sideris "*You have to change and you don't know how*!" What it means to be a man in a rural area of South Africa. *African Studies*, (2004) 63, 29-49. Taken from Moore, E. (2020). "My Husband Has to Stop Beating Me and I Shouldn't Go to the Police": Family Meetings, Patriarchal Bargains, and Marital Violence in the Eastern Cape Province, South Africa. Violence Against Women, 26(6–7), 675–696. "My Husband Has to Stop Beating Me and I Shouldn't Go to the Police": Family Meetings, Patriarchal Bargains, and Marital Violence in the Eastern Cape Province, South Africa - Elena Moore, 2020 (uct.ac.za)
[264] Ibid.
[265] E Moore supra note 56.
[266] Ibid.

assault through forced marriage consummation, and greater exposure to HIV/AIDS and death due to early childbirth. What this article fundamentally speaks to is how the nuclear structure of African families disadvantages young girls more than it does boys. Violation of the right to equality on the grounds of gender is what comes to the fore. However, because of the differential treatment of young girls, specifically brides within these family dynamics, more of their rights are violated due to a reduced lack of access to education, sexual assault, and increased exposure to HIV through their usually older spouses. Kalinde, a 23-year-old young woman at the time of research conducted by Human Rights Watch, was married at age 15 years to a man 7 years her senior. She adds that she agreed to the marriage due to poverty within her family. Additionally, she confirms that her husband also physically assaults her and in relation to HIV exposure, Kalinde says, "when my husband comes back from other women and wants sex, I just accept because he is my husband. We do not use condoms because he already infected me with HIV".[267] Notably, despite the nature of the marriage she describes, which further supports previously mentioned conditions of this type of marriage, the young woman interviewed does indicate that she gave her own consent to the marriage; albeit motivated by poverty.

Linking other violations that young women like Kalinde experience, the right to equality, "together with the notions of dignity and freedom, influences the interpretation and application of every other right protected in the bill".[268] In light of this, section 12 of the Constitution,[269] protecting the freedom and security of the person, is another right that could be said to be violated indirectly. This right protects one from "all forms of *violence* from either public or private sources and the right to bodily and psychological integrity, including the right to make decisions concerning reproduction". Correspondingly, "the belief that HIV/AIDS can be cured as a result of having sex with a virgin has been identified as a possible factor in the rape of babies and children in South Africa"[270] and an aggregator placing minor African girls in vulnerable positions, that are not experienced as widely as

[267] Human Rights Watch, '*I've Never Experienced Happiness: Child Marriage in Malawi*', (2014), obtained from https://www.hrw.org/report/2014/03/06/ive-never-experienced-happiness/child-marriage-malawi. Date accessed: 4 September 2021.
[268] TP Van Reenen '*Equality, discrimination and affirmative action: an analysis of section 9 of the Constitution of the Republic of South Africa*." SA Publiekreg= SA Public Law 12.1 (1997): 151-165. Elaborating further on Section 39(1)(a) enjoins courts, tribunals or fora interpreting the bill to 'promote the values that underlie an open and democratic society based on human dignity, equality and freedom'. And that legal measures which curtail any right in the bill must in terms of s 36(1) be, inter alia, 'justifiable in an open and democratic society based on human dignity, equality and freedom'.
[269] Constitution supra note 36.
[270] S Leclerc-Madlala '*On the virgin cleansing myth: gendered bodies, AIDS and ethnomedicine*'. Afr J AIDS Res. 2002;1(2):87-95. doi: 10.2989/16085906.2002.9626548. PMID: 25871812.

boys in similar unions, or by minor girls who do not subscribe to customary law and marriage. However, this dissertation is limited to the gross violation that this consent has on the right to equality specifically, and it is on this basis that a test of constitutionality will be conducted against parental consent to minors' marriages.

Due to some of the negative impacts of the poverty levels described above, and not to stigmatise the poor, a study and report conducted by Observatory for Children and Youth Rights (Observatory) for UNICEF and UNFPA in Albania, in support of the Ministry of Health and Social Protection during October 2017 - June 2018, supports that it is globally recognised that,

> "Child marriage places child spouses – and in particular, married girls – at risk of domestic violence, sexual abuse and rape, and denial of access to education. The practice has lifelong impacts on physical and mental health and wellbeing that stretch into adulthood, contributes towards higher rates of infant and maternal mortality, and serves to perpetuate gender inequality, poverty, and social exclusion".[271]

It can thus be argued that allowing parents of minors to consent to their early customary marriages, regardless of their intention, has an overall negative impact on the social, physical, and mental well-being, as well as the educational and consequent economic prospects of the minor girls in question, compared to the boys and men of the same marriages and minor girls who do not conform to customary law, namely non- black Africans. In summary, the various research abovementioned supports that poverty, in South Africa, coupled with the impact of a nuclear African family and the overall disconnect between living and official customary law, are all negatively skewed towards black African women and girls. As practitioners of customary law, contrasted with non-black minor girls who are not subject to customary law and marriage, this further supports the research hypothesis and highlights the discriminatory impact of allowing parents of these minors to consent to their early marriages. The grounds for discrimination are race and gender. Now, the constitutionality test will be conducted to establish the veracity of this claim.

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[271] UNICEF and UNFPA Albania, "*Child marriage Knowledge, Attitudes, and Perceptions among affected communities in Albania*", taken from Child_marriage_report_2018.pdf (unicef.org), p 10. Date accessed: 12 October, 2023.

4. ANALYSIS ACCORDING TO SECTION 9 OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996

In the instance where the constitutionality of a legislative provision is being attacked for limiting a constitutionally protected right, direct reliance on section 7[272] is required, because, as it reads, "the Bill of Rights is the cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality, and freedom". As such, the Constitution is supreme and superior to any legislation under review, thus "legislation can only be invalidated by invoking the Constitution itself".[273] Furthermore, the Promotion of Equality and Prevention of Unfair Discrimination Act[274] (PEPUDA) is not applicable as the current matter investigates the constitutional validity of a legislative provision, namely section 3 of the RCMA, that allows parents to consent to the customary marriage of an African girl child. PEPUDA is applicable only "in cases where a litigant alleges that discrimination has occurred on the basis of conduct by a public official, organ of state or private individual or institution".[275] This Act was passed to fulfil section 9(4) of the Constitution[276] and to affirm horizontal fulfilment of the application of section 9[277] as a whole. It is thus not applicable to the provision under analysis in this dissertation, because the provision is from a piece of legislation, whose validity may directly invoke section 9 of the Constitution. Secondly, section 9(1) is not applicable as it deals with differentiation and not discrimination, which this dissertation is arguing. Lastly, as the provision under review, does not directly seek to implement a restorative measure, section 9(2) will also not be applicable. The Constitution[278] will thus be invoked directly and it will be argued that section 3 of the RCMA which allows parents to consent to the customary law marriage, of a girl child younger than 18 years, unfairly discriminates against African girl children in contravention of section 9(3) of the Constitution.[279]

4.1. SECTION 9(3): UNFAIR DISCRIMINATION

[272] Constitution supra note 36.
[273] *Harksen v Lane NO and Others* (CCT9/97) [1997] ZACC 12; 1997 (11) BCLR 1489; 1998 (1) SA 300 (7 October 1997), para. 89 taken from *Prinsloo v Van der Linde and Another* [1997] ZACC 5; 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC).
[274] Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.
[275] P. De Vos, D. Brand, & W. Freedman, '*South African Constitutional Law in Context*', (2014) Cape Town: Oxford University Press. Print
[276] Supra note 36.
[277] Ibid.
[278] Ibid.
[279] Ibid.

At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society, in which all human beings will be accorded equal dignity and respect, regardless of their membership of particular groups".[280] The guarantee to equality thus protects individuals from discrimination based on one of section 9(3) listed grounds, or analogous grounds, that impair their human dignity. This however does not mean differentiation between different people, will not occur. In light of this, section 9(3), which is relied on, prohibits discrimination and not mere differentiation, which can be direct or indirect. "Indirect discrimination occurs when apparently neutral policies are applied in such a way that they adversely affect a disproportionate number of members of a specific group. And it may be adopted in good faith and nevertheless have a detrimental effect on a disproportionate number of a particular group".[281] Generally, legislation often differentiates between individuals and groups, but not all such differentiations will amount to discrimination as understood in section 9(3). The South African Constitutional Court has confirmed this, explaining in the following terms,

> "What is meant by a guarantee of equality? It cannot mean that the law must treat everyone equally. The Criminal Code imposes punishments on persons convicted of criminal offences; no similar burdens are imposed on the innocent. Education Acts require children to attend school; no similar obligation is imposed on adults. Manufacturers of food and drugs are subject to more stringent regulations than manufacturers of automobile parts. The legal profession is regulated differently from the accounting profession. The Wills Act prescribes a different distribution of the property of a person who dies leaving a will from that of a person who dies leaving no will. The Income Tax Act imposes a higher rate of tax on those with high incomes than on those with low incomes. Indeed, every statute or regulation employs classifications of one kind or another for the imposition of burdens or the grant of benefits. Laws never provide the same treatment for everyone".[282]

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[280] Ibid.
[281] Van Reenen, Tobias P. '*Equality, discrimination and affirmative action: an analysis of section 9 of the Constitution of the Republic of South Africa*', SA Publiekreg SA Public Law 12.1 (1997): 151-165. Taken from Davis 'Equality and equal protection' in Van Wyk et al (n 10) at p 209.
[282] *Prinsloo* supra note 234. Taken from Hogg *Constitutional Law of Canada* 3 ed (Carswell, Ontario 1992) at para 52.6(b).

Moreover, the court in *Prinsloo*[283] reiterated that "it is impossible to harmoniously and efficiently govern the affairs of a modern country like South Africa, without differentiating classifications of people, resulting in different treatment or impact".[284] Thus, to first determine whether unfair discrimination exists, guidance is taken from the Court in *Harksen vs. Lane NO*,[285] which provides the stages to an inquiry into the section 9 equality clause, asking mainly:

> "(a) Does the challenged law or conduct differentiate between people or categories of people? If the differentiation complained of bears no rational connection to a legitimate governmental purpose, which is proffered to validate it, then the provision in question violates the provisions of section 8(1) of the interim Constitution. If there is such a rational connection, then it becomes necessary to proceed to the provisions of section 8(2) to determine whether, despite such rationality, the differentiation nonetheless amounts to unfair discrimination. The determination as to whether differentiation amounts to unfair discrimination under section 8(2) requires a two-stage analysis. Firstly, the question arises whether the differentiation amounts to "discrimination" and, if it does, whether, secondly, it amounts to "unfair discrimination". It is as well to keep these two stages of the enquiry separate. That there can be instances of discrimination, which do not amount to unfair discrimination is evident from the fact that even in cases of discrimination on the grounds specified in section 8(2), which by virtue of section 8(4) are presumed to constitute unfair discrimination, it is possible to rebut the presumption and establish that the discrimination is not unfair.[286]

> "Section 8(2) contemplates two categories of discrimination. The first is differentiation on one (or more) of the fourteen grounds specified in the subsection (a "specified ground"). The second is differentiation on a ground not specified in subsection (2) but analogous to such ground (for convenience hereinafter called an "unspecified" ground)".[287] The former warrants an automatic presumption of unfairness or unfair discrimination according to the Constitution of the Republic of

[283] Ibid.
[284] Ibid at para. 43.
[285] *Harksen vs. Lane* supra note 273 at p 235.
[286] Ibid at paras 44-45 (Taken from Hugo at 1997 (6) BCLR 708 (CC)).
[287] Ibid at para 46.

> South Africa, 1996, whereas the latter does not. "There will be discrimination on an unspecified ground if it is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparably serious manner".[288]

To apply the section 9(3) two-leg test, first, it must be determined whether section 3 of the RCMA, the impugned provision, "discriminates" against minor black African brides within a customary marriage, either directly or indirectly, on any of the 16 grounds listed in section 9(3), or on grounds analogous to those. If discrimination does exist, on any of the listed grounds alleged, then the provision will be presumed to discriminate unfairly, and thereafter a section 36 test for reasonableness and justification of the discrimination will be concluded. If discrimination is alleged, but on other grounds other than those listed in section 9 (3), its unfairness can be motivated by various factors, including the position of a complainant in society and the nature of the provision, and the purpose sought to be achieved by it. In *Hugo,*[289] for example, the purpose of the Presidential Act was to benefit three groups of prisoners, namely, disabled prisoners, young people, and mothers of young children, as an act of mercy. "The fact that all these groups were regarded as being particularly vulnerable in our society, and that in the case of the disabled and the young mothers, they belonged to groups who had been victims of discrimination in the past, weighed with the Court in concluding that the discrimination was not unfair".[290] Similar factors will be included, albeit not solely relied upon in this dissertation.

4.2. DISCRIMINATION: IS IT FAIR OR UNFAIR?

Having outlined how to conduct the test for unfair discrimination in the previous section, the dissertation now proceeds to conduct the unfairness inquiry to determine or rebut the presumption of unfair discrimination as hypothesized.

Parental consent to minor marriage is not limited to African customary marriage as governed by the RCMA but also includes civil marriages according to ss24-5 of the Marriage

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[288] Ibid.
[289] Ibid.
[290] Ibid taken from [1997] ZACC 4; 1997 (6) BCLR 708 (CC), at para 47.

Act.[291] So, on the face of it, the provisions allowing for parental consent to minor customary marriage, do not differentiate between the gender, age, and race of the minor nor the type of marriage entered into. Thus, the provisions in question do not directly discriminate against black African minor girls. Additionally, the requirement for parental consent, in both the RCMA and Marriage Act,[292] read together, does not prescribe any differential treatment between boys and girls, but does differentiate the minimum acceptable age of marriage, namely 18 years for a boy, and 16 years for a girl. Based on this differentiation, the disparity in age between a minor boy and girl, could *in se* be cause to invoke constitutional assessment, based on gender discrimination. The age-old presumption that 'girls mature faster than boys',[293] seems to have made its way to official law, where girls who are younger in the age of birth than boys, both seeking to marry, have a decreased minimum age requirement, based on the presumption of their maturity beyond actual age. This "discriminatory age for marriage of girls and boys, justified on the ground that, physiologically and psychologically, a girl matures earlier than a boy" was refuted in the Zimbabwean case of *Mudzuru*[294] as an averment without scientific basis, further backed by the international law position that it is people of the age of 18 years or older that are considered to have the physiological and psychological capacity to consent freely and fully to a marriage.

However, while this observation is beyond the scope of this dissertation, it is pivotal to the argument, because it illustrates subtle but impactful sociocultural nuances, that exist in the lives of minor girls who are bound to living customary law compared to those who are not. Essentially, according to some cultures, despite how the law legally defines a child as one below the age of 18 years, "puberty emergence signals the termination of childhood".[295] Therefore, minor girls who are not bound by living customary beliefs, practices, and their consequent impact, will be less vulnerable and unlikely to deal with the added burdens that

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[291] Supra note 1.
[292] Ibid.
[293] *National Formative Study on Child Marriage / Republic of Namibia, Ministry of Gender Equality, Poverty Eradication and Social Welfare*. Windhoek, Namibia: Ministry of Gender Equality, Poverty Eradication and Social Welfare, 2020. Print. An example of this presumed maturity of girls, is based on a traditional practice known as "Eengoma: This is a traditional practice common in the Ohangwena region. It is an initiation ceremony where young girls who have started menstruation are engaged in a traditional wedding. At this ceremony, men can pick their future brides and they put a mark on them. After this ceremony, girls are declared ready for marriage and when they fall pregnant it is acceptable to the community. In the olden days, the ceremony used to be done for women who are ready for marriage, but nowadays, parents are sending young girls to avoid shame and disgrace if their children fall pregnant. Although this practice is decreasing, some parents still believe it is important and they send their children to Angola where the practice is still widely practiced".
[294] *Mudzuru & Another v Minister of Justice, Legal and Parliamentary Affairs* (CCZ 12/ 15).
[295] J Diala '*The Child in a Child; Child Marriage and Lost Identity in Southern Africa*," Pravni Vjesnik (Journal of Law, Social Sciences and Humanities) 35, no. 1 (2019): 53-76. Taken from: Macleod, C., '*Teenage Pregnancy and the Construction of Adolescence: Scientific Literature in South Africa, Childhood*', Vol. 10, No. 4, 2003, pp. 419-437, pp. 421.

present themselves in the consideration, formation, and duration of customary marriages. This point supports the argument of discrimination against black African minor girls, albeit specific to the marriage of an 18-year-old boy and a 15-year-old girl. Furthermore, it is the impact of the s3 of the RCMA parental consent to minor marriage that this dissertation challenges, without further differentiation of the minors' ages.

It can also be argued that the purpose of this impugned provision, is to enable people a little younger to marry and allow their parents some protection and oversight on the marriage. In other words, it could be the minor themself who wants to get married prior to attaining the age of 15 years for girls, and 18 years for boys, therefore this section would grant a parent the opportunity to refuse or condone the marriage. If condoned by consent, the parent is afforded the opportunity to facilitate the process with the other family, as opposed to the minors eloping for example. Additionally, it may be argued that this parental consent is legally necessary to meet the minimum requirements to marry as stipulated in section 3 of the RCMA. Namely, the prescribed requirements to conclude a valid customary marriage, as aforementioned, are a minimum age of 18 years, as well as consent and negotiation and celebration according to customary law. Therefore, by allowing parental consent to marry, the requirement of age would be met by the adult parent, and consequently, consent be granted for the minor's marriage, satisfying both legal age and consent requirements. The counterargument is that the intention of the legislature was to ensure the age of majority of the marrying party as well as consent, indicating their full capacity and own choice to marry. Hence, having a parent practically fulfil both the age and consent requirements, leaves scope for uncertainty regarding the intended spouse's own consent, or a lack thereof, as well as the risk of forced marriage.

Section 12(2) of the Children's Act says,
"A child – (a) below the minimum age set by law for a valid marriage may not be given out in marriage or engagement; and (b) above that minimum age may not be given out in marriage or engagement without his or her consent".[296] Furthermore, failure to comply with this section 12(2)[297] is a criminal offense punishable by law, according to section 305 of the

[296] Children's Act supra note 3.
[297] Ibid.

Act.[298] The intention of the legislature, particularly with subsection (b) was to give minors above the minimum age set by law, above 18 years for boys and between 15-18 years for girls, the opportunity to consent to their own marriage. Because this research is arguing that the marriage of minors below the age of 18 years must be prohibited fully, to address s12(2)(b),[299] only girls aged between 15-18 years will be discussed, and not boys above 18 years nor girls under 15 years, as the latter 2 categories fall outside of the scope of consideration. The assertion made in this research is that this section only protects these minor girls aged between 15-18 years *de jure* and not *de facto*, based on the reasons above mentioned and to be tested constitutionally below. Namely, the position of women and children and the patriarchal power dynamics within living customary law and marriage. "Harmful cultural practices, socio-economic factors, and gender inequalities are the main drivers of child marriages globally as evidenced by several studies on child marriages. A study by Mann, Quigley, and Fischer (2015) asserts that child marriages are driven by a desire to seize an opportunity, to escape bad living conditions, to meet basic needs, to enhance one's own or one's parents' status in the community, to secure an economic benefit or to remain within the peer group".[300]

Therefore, due to all prior mentioned factors that impact the status of black African children and women in customary law and marriage, such as specific living customary practices, patriarchy, poverty, and South Africa's current socioeconomic conditions that do not favour African women, it is affirmed that the detrimental effects this parental consent has on black African women and minor girls in marriage, far outweigh any valid reasons in favour of such parental consent. Furthermore, due to the historical position of African women, where patriarchy, power dynamics, male authority, and their submission to the men in their lives, the likelihood that parental consent to the minor marriage is in the best interests of the child is questionable. It is difficult to motivate for '*the best interests*' of a minor black African girl within the current customary marriage structure, due to the factors described as part of her experience within a customary marriage, such as reduced education prospects, caring for her husband and his extended family, childbearing at an early age, forced sex or abduction because of *ukuthwala* for instance. Any interest in a minor African

[298] Ibid.
[299] Ibid.
[300] *National Formative Study on Child Marriage / Republic of Namibia, Ministry of Gender Equality, Poverty Eradication and Social Welfare.* Windhoek, Namibia: Ministry of Gender Equality, Poverty Eradication and Social Welfare, 2020. Print.

girl marrying earlier would arguably be financial for her perhaps, but mainly her family. This would be motivated mostly by the *lobola* her family would receive, to cushion the blow of South Africa's current poverty and inequality levels that affect mostly black Africans as explained earlier.

The concern related to indirect discrimination cases is with the impact of certain requirements, conditions, or practices, and specifically, whether these will result in unequal outcomes because they disproportionately affect a group defined in terms of a listed or analogous ground. Thus, in *City Council of Pretoria v Walker,*[301] the Constitutional Court pointed out that it was necessary to include indirect discrimination in the ambit of section 9(3) to ensure that we focus on the "consequences rather than the form of conduct".[302] Thus, it is not disputed that discrimination posed by section 3 of the RCMA, may not be direct discrimination based on sex or gender as the section is neutral and applies to both minor girls and boys for all intents and purposes. But this dissertation asserts that it is indirect discrimination because the rule, read with living customary law and in the context of patriarchy and economic vulnerability, impacts disproportionately on African girl children. Regarding indirect discrimination on the ground of race specifically, the argument is that the consent provision impacts differently on black women because of the customs they subscribe to, that young girls bound by civil marriage are not likely to experience, and if so, not to the extent encountered by black minor girls. As such, it is the impact of this consent that this study argues constitutes indirect discrimination against black minor girls, on the grounds of race and gender, albeit indirectly.

4.3. IF DISCRIMINATION IS CONFIRMED TO BE UNFAIR, THE NEXT STEP IS TO ASSESS IF IT IS REASONABLE AND JUSTIFIABLE ACCORDING TO S36[303] LIMITATION CLAUSE:

The two stages of the Bill of Rights in this regard are the determination of whether the provision in question, namely s3 of the RCMA is discriminatory, which has been completed

[301] *City Council of Pretoria v Walker* (CCT8/97) [1998] ZACC 1; 1998 (2) SA 363; 1998 (3) BCLR 257 (17 February 1998), at para 31.
[302] Ibid.
[303] Constitution supra note 36.

above. Now, a section 36[304] analysis will be conducted to determine whether such discrimination alleged, is reasonable and justifiable.

Section 36 limitation of rights clause reads,

> (l)"The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom, taking into account all relevant factors, including— (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose. (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights".

The two-stage approach to the limitation of rights exercise first requires an answer to the question, of whether the provision in question infringes rights protected by any of the substantive Bill of Rights clauses. The second, is whether the infringement is justifiable. This two-stage approach was set out in more detail by the Constitutional court in *Ex Parte Minister of Safety and Security and Others: In Re S v Walters and Another,*[305]

> "First, there is the threshold enquiry aimed at determining whether or not the enactment in question constitutes a limitation on one or other guaranteed right. This entails examining (a) the content and scope of the relevant protected right(s) and (b) the meaning and effect of the impugned enactment to see whether there is any limitation of (a) by (b). Subsections (1) and (2) of s 39 of the Constitution give guidance as to the interpretation of both the rights and the enactment, essentially requiring them to be interpreted so as to promote the value system of an open and democratic society based on human dignity, equality, and freedom. If upon such analysis no limitation is found, that is the end of the matter. The constitutional challenge is dismissed there and then. If there is indeed a limitation, however, the

[304] Ibid.
[305] *S v Walters and Another* (CCT28/01) [2002] ZACC 6; 2002 (4) SA 613; 2002 (7) BCLR 663 (21 May 2002) paras 26–7.

> second stage ensues. This is ordinarily called the limitations exercise. In essence, this requires a weighing-up of the nature and importance of the right(s) that are limited together with the extent of the limitation as against the importance and purpose of the limiting enactment".[306]

Regarding the threshold inquiry, the Constitutional court jurisprudence shows that the Court has wavered between conducting a thorough analysis to determine (a) the content and scope of the right in question, before considering whether and to what extent the limiting measure infringes such content. The alternative approach is to determine hypothetically[307] and notionally[308] that a right has indeed been limited, then proceed to the second part of the query to determine the meaning and effect of the impugned enactment to see whether there is a limitation. Furthermore, to undertake the determination of the content and scope of the right in question, a few considerations must be made. According to section 39 of the Constitution, held in *Walters,*[309] "when interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality, and freedom". Certain values in this regard play a greater role in the interpretation of specific rights than in others and the rights must be interpreted contextually[310]. So, the questions to be asked for this dissertation are first, what is the content and scope of the right to equality and non-discrimination, and to what extent does consent to minor customary marriage infringe this right for minor African girls.

4.3.1. *Law of general application*:

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[306] Ibid.

[307] Ibid. Taken from *Mistry v Interim National Medical and Dental Council and Others* (CCT13/97) [1998] ZACC 10; 1998 (4) SA 1127; 1998 (7) BCLR 880 (29 May 1998) para 28, Sachs J found the periodic inspection of health professionals' business premises would have 'entailed only the most minimal and easily justifiable invasions of privacy, if they had qualified as invasions of privacy at all' (our emphasis). This approach was followed by Ngcobo J in *S v P and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae* (CCT31/01) [2002] ZACC 22; 2002 (6) SA 642; 2002 (11) BCLR 1117 (9 October 2002) paras 28–9. Ngcobo J held: '…even if the right to privacy is implicated, [h]aving regard to the legitimate State interest in proscribing prostitution and brothel-keeping, viewed against the scope of the limitation on the right of the prostitute and brothel-keeper to earn a living, I conclude that if there be a limitation of the right to privacy, the limitation is justified'. See *Woolman and Botha (*2013) 34.4, fn1. See *South African Broadcasting Corporation Limited v. National Director of Public Prosecutions and Others* (CCT58/06) [2006] ZACC 15; 2007 (1) SA 523 (CC); 2007 (2) BCLR 167 (CC); [2006] JOL 18339 (CC) (21 September 2006).

[308] Ibid. Taken from *Beinash and Another v Ernst & Young and Others* (CCT12/98) [1998] ZACC 19; 1999 (2) SA 91; 1999 (2) BCLR 125 (2 December 1998).

[309] Supra at 305.

[310] Supra note 305. Taken from As Woolman and Botha note: 'For each right there are specific values that can be said to have led to its constitutionalisation.' As a result, the 'specific values that animate each right' will play particular roles in interpreting those rights. See Woolman and Botha (2013) 34.17. Also taken from *Bernstein and Others v Bester NO and Others* (CCT23/95) [1996] ZACC 2; 1996 (4) BCLR 449; 1996 (2) SA 751 (27 March 1996) para 79, where Ackermann J noted in the context of the right to privacy: **T**he two-stage approach requires, as the first step, a definition of the scope of the relevant right. At this stage already … it is necessary to recognize that the content of the right is crystallized by mutual limitation. Its scope is already delimited by the rights of the community as a whole (including its members).

The Constitutional Court in *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others,*[311] held:

> "It is an important principle of the rule of law that rules be stated in a clear and accessible manner. It is because of this principle that section 36 requires that limitations of rights may be justifiable only if they are authorised by a law of general application".[312]

If the limiting measure cannot be identified as something that constitutes a law of general application, it is always unconstitutional. To determine whether the measure constitutes a law of general application, "the limiting measure must be in terms of something the Court recognises as law"[313] as opposed to a decision made by a corporation for example. Legislation, common law, and customary law are included as being recognised as laws of general application. Therefore, as the limiting measure of consent to minor customary marriage in this dissertation, is taken from the RCMA[314], it can on this first part of the enquiry be considered as something, a piece of legislation, that the Court does recognise as law. It is therefore a law of general application and can proceed in the assessment of justifiableness according to section 36. In her dissenting judgment in the case of *Hugo*[315]*,* to determine the correlation of 'prescribed by law', which aids in understanding the content of a law of general application, Mokgoro added the requirements of 'precision and accessibility', to what must constitute an assessment of what is prescribed by law. Taking these added requirements into consideration, consent to minors' marriages as legislated in the RCMA can be said to exhibit all traits accepted to reflect the minimal requirements of this first part of the enquiry, namely, precision, accessibility, and general application. As such, I proceed to ascertain if the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom.

4.3.2. Reasonable and justifiable assessment:

[311](CCT35/99) [2000] ZACC 8; 2000 (3) SA 936; 2000 (8) BCLR 837 (7 June 2000) para 47.
[312] Ibid.
[313] *Alexkor* supra at 68 above. With emphasis that "The Court has not yet considered the relationship that must exist between the law and the limiting measure, and more specifically what the phrase 'in terms of' means".
[314] Supra note 2 at s 3.
[315] Supra note 286.

The Constitutional Court approach in *S v Makwanyane,*[316] departed from the *Oakes*[317] criteria under the interim Constitution of the Republic of South Africa 200 of 1993, by undertaking this assessment through a more global and singular manner. Asking mainly, whether the limiting measure serves a legitimate purpose in line with section 39, and if so, whether a rational connection exists between said purpose and the limitation; questions which also appeared in *Oakes.*[318] In other words, what purpose does the consent to minors' customary marriages serve and is there a relationship between this purpose and the limitation it poses to the equality right of minor African brides in these marriages? The former consideration includes an analysis of the nature of the right and the latter, the rational connection between the limitation and its purpose. Loosely construed, both these questions can be understood as what sections 36 1(b) and 36 1(d) require. Further to this, section 36 requires an enquiry into the existence of means that are less restrictive than the limitation, to achieving the desired end. Once this has been determined, then the balancing of the right and limitation, as well as their overall proportionality must be determined, to conclude whether the limitation can be said to be reasonable and justifiable. If so, the limitation is constitutionally valid and upheld, and if not, the limitation is unconstitutional and invalid.

4.4. **APPLYING THE SECTION 36 TEST**:

4.4.1. The purpose and importance of the limiting right:

For this part of the inquiry, the dissertation will elaborate on the broader purpose of the Recognition of Customary Marriages Act (RCMA),[319] as well as the specific provision in question, namely the requirement of consent to minors' marriages in section 3 of the RCMA. The aim of this latter limiting measure must be shown to meet a legitimate constitutional purpose. Thereafter, the importance of the purpose of this limiting measure, in an open and democratic society will be explored. In the broader analysis of the purpose of the RCMA, it can immediately be shown from its preamble, that it does seek to fulfill a legitimate constitutional purpose, chiefly, "to make provision for the recognition of customary marriages" and regulate all other matters connected to this, such as:

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[316] *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995).
[317] *R v Oakes* [1986] 1 SCR 103.
[318] Ibid.
[319] Supra note 2.

> "to specify the requirements for a valid customary marriage; to regulate the registration of customary marriages; to provide for the equal status and capacity of spouses in customary marriages; to regulate the proprietary consequences of customary marriages and the capacity of spouses of such marriages; to regulate the dissolution of customary marriages; to provide for the making of resolutions; to repeal certain provisions of certain laws; and to provide for matters connected therewith".

As previously mentioned, the purpose of the RCMA, originates from the direct execution of sections 30 and 31 of the Constitution,[320] to enforce everyone's right to recognise, practice, and participate in the cultural right of their choice, as long as it is not done in a manner that is inconsistent to any provision of the Bill of Rights. Specifically, however, the purpose of regulating the requirements for a valid marriage, within which the consent to minor customary marriage is provided, can be said to be in the direct accomplishment of the right to equality. Mainly, to ensure equal recognition of customary marriages to civil marriages, as well as to enforce equal recognition and status of the spouses of customary marriages to those of civil marriages. The importance of this latter purpose is because "African law and custom have always had [a] patriarchal bias, the colonial period saw it exaggerated and entrenched through a distortion of custom and practice which, in many cases, had been either relatively egalitarian or mitigated by checks and balances in favour of women and the young. Enthroning the male head of the household as the only true person in law, sole holder of family property and civic status, rendered wives, children, and unmarried sons and daughters invisible in a social and legal sense".[321] This supports the averment that this patriarchal bias is still in force in the practice of living customary law, infiltrating customary marriage.

Regulating the affairs of African customary law and marriage may also be deemed to reflect the concurrent purpose of protecting minors entering into customary marriages. What is meant by this is, as "customary law has great impact in the area of personal law in regard to

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[320] Supra note 36.
[321] T Nhlapho quoted in *Bhe and Others v Khayelitsha Magistrate and Others* (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (15 October 2004), at para. 89.

matters such as marriage, inheritance, and traditional authority",[322] the foundation of African customary marriage is based on these same patriarchal principles, some of which, while ruled against in official customary law, still thrive in the practice of living customary law, upon which customary marriage is governed. Hence, it was imperative to develop legislation that enforced the specific rights around the recognition and practice of African custom, as enshrined in the Constitution,[323] and to regulate connected matters, such as customary marriage and the rights of women within it. In *Makwanyane,*[324] the court considered this issue of purpose, but of the death penalty, to achieve retribution, prevention, and deterrence. In relation to this, it found that "to be consistent with the value of ubuntu ours should be a society that "wishes to prevent crime … [not] to kill criminals simply to get even with them".[325] Therefore, while the purpose of the limiting right was understood, it was found not to be justifiable nor reasonable to warrant a violation of the right to life. In this dissertation, having shown the purpose and importance of the RCMA in general and specifically, consent to minor customary marriage to rights espoused in the Constitution, the relationship between the purpose and the means to achieve it will be analysed.

4.4.2. Relationship between the purpose and means to achieve it:

The purpose of this stage of enquiry is to assess whether there is a rational relationship and connection between the means chosen and the accepted purpose of the limiting measure described above. So, is there a rational connection between the consent to minor customary marriage and the protection of minor spouses intended by section 3 of the RCMA?

It can be argued that consent to the customary marriage of a minor, which is granted by the parent or guardian of the minor on their behalf, does bear a rational connection to the protection of minors as well as fulfilment of the requirements of age and consent to ensure a valid customary marriage according to the RCMA. In other words, an adult with the presumed capacity to assess any benefits of their minor child entering a marriage while

[322] N Muna '*African Customary Law, customs and women's rights*', (2011) Indiana Journal of Global Studies, vol. 18 no.1, p 87+. Academic OneFile, http://link.galegroup.com.ezproxy.uct.ac.za/apps/doc/A268604345/AONE?u=unict&sid=AONE&xid=fc3b2b2d. Accessed 15 July 2019.
[323] Supra note 36 at ss 30-31.
[324] Supra note 316.
[325] Ibid.

reasoning on the best interests of their minor child, as well as to duly providing consent to their marriage, is not *de facto* out of the ordinary. However, the argument is that the nature of customary marriage, explained above, mainly the role and position of African women and minors within them, and the patriarchal foundation upon which these marriages lay, in contrast to civil marriage, reverse any well-intended purpose and indirectly expose minor African girls especially, to perpetuated marginalisation and abuse in these marriages. Taking from *S v Bhulwana and S v Gwadiso*, [326] where "there appears to be no logical connection between the fact proved (possession of 115 g) and the fact presumed (dealing)".[327] The argument in this dissertation is that the fact proven, being minor consent to the current practice and status of customary marriage and the fact presumed, that this consent protects and is in the best interests of a minor African bride, do not bear a rational connection for the stipulated reasons. As such, consent to a minor's customary marriage poses an unreasonable and unjustifiable breach of the right to equality for minor black African girls.

The factors that influence living customary practice and marriage, are fundamentally entrenched in the beliefs and customs of the communities that practice them. It is for the legislators to first focus on bridging the divide between official and living customary laws, for the reasons advanced in the previous chapter, rather than to mirror this requirement of consent to minor civil and customary marriages. The impact of the latter governed marriages, on minor African girls, does not justify the means. More so, when it comes to the limiting of certain rights, some are said to be more important than others such as "the Court noted in *National Coalition for Gay and Lesbian Equality* that '[a]lthough section 36(1) does not expressly mention the importance of the right, this is a factor which must of necessity be taken into account in any proportionality evaluation'".[328] The right to equality, along with dignity and freedom, is of utmost importance to the existence of the Constitution and the founding of its values. *Bhe and Others vs. Khayelitsha Magistrate and Others*[329] highlights,

> "The rights violated are important rights, particularly in the South African context. The rights to equality and dignity are of the most valuable of rights in any open and

[326] Supra note 71. Taken from (CCT12/95, CCT11/95) [1995] ZACC 11; 1996 (1) SA 388; 1995 (12) BCLR 1579 (29 November 1995) para 24.
[327] Ibid.
[328] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* (CCT10/99) [1999] ZACC 17; 2000 (2) SA 1; 2000 (1) BCLR 39 (2 December 1999).
[329] Supra note 141.

> democratic state. They assume special importance in South Africa because of our past history of inequality and hurtful discrimination on grounds that include race and gender".[330]

Taking this into consideration, the proportion and magnitude of harm that this consent to minor customary marriage poses directly to and to the core of the right to equality of black girls is severe. Specifically, against the protection against non-discrimination on the grounds of gender and race, taking into consideration of the historical position of African women and children in general. By enabling parents and guardians' power to consent to the marriage of these minors, it predisposes them to abuse and vulnerability in the forms described throughout this chapter; albeit indirectly. It can be argued that the abuse is in fact systematised by the law, entrenching power in the hands of those that already hold it in these communities. As such, the legislative provision allowing for this consent to minor marriage violates the Constitution of the Republic of South Africa, 1996 by limiting the right to equality as entrenched in the Bill of Rights. This limitation is deemed not to be justifiable according to this section 36[331] analysis.

4.4.3. Threshold: The content and scope of the right

This part of the inquiry is generally complex, and fact-specific and normally turns to the breadth and nature of the limiting measure, as highlighted in *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae).*[332] As mentioned above, the guiding section 39 of the Constitution of the Republic of South Africa, 1996 requires that "when interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society, based on human dignity, equality, and freedom". In addition to the direct mention of equality, based on prior explanation of the history of South Africa, and that the right to equality is founded mainly within the respect and restoration of the right to human dignity, particularly to people previously denied this right, the scope of this right is narrow. Contextual interpretation of this right to equality, also suggests that its content is fundamental to the core values, purpose, and existence of the Constitution of the Republic of South Africa, 1996.

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[330] Ibid. Taken from (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (15 October 2004) para 71.
[331] Constitution supra note 36.
[332] *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae* (CCT31/01) [2002] ZACC 22; 2002 (6) SA 642; 2002 (11) BCLR 1117 (9 October 2002).

However, as highlighted in *Bernstein and Others v Bester NO and Others*[333] "the truism that no right is to be considered absolute, implies that from the outset of interpretation, each right is always already limited by every other right accruing to another citizen".[334] As such, the right to equality is not absolute. A distinction must be made between rights written in unqualified terms allowing broad interpretation, from those that contain internal modifiers that may restrict certain practices from its protection. An example to this is the right to one's freedom of expression, which explicitly excludes certain forms of conduct from its protection in section 16(2).[335] Also, to be considered, are rights that enumerate or restrict themselves further, because this too may restrict their scope and content. By further specifying protection against non-discrimination on the specific grounds listed in section 9(3),[336] the right to equality is explicit on the grounds of discrimination that warrant the automatic presumption of unfairness, thus narrowing its interpretation.

Moving to the assessment of the nature of the relationship between consent to minor marriage and the right to equality, arguably the RCMA was *inter alia* enacted to give spouses of customary marriages equal status with those of civil marriages and unions. This includes affording the marriages themselves equal measure and recognition according to the law, including the standardisation of the requirements to enter such valid marriage. As such, consent to conclude a marriage is one of the requirements for civil marriage according to the Marriage Act[337] as it is for customary marriages according to the RCMA. In addition to this requirement, the spouses intending to marry must have reached the legally permissible age of marriage, which is 18 years for boys and 15 years for girls. To therefore protect minors, who wish to get married prior to attaining this age, parents and guardians of these minors are tasked with the responsibility of ensuring that the proposed marriage is in their best interest. On the good faith presumption of this, consent that is granted by a parent or guardian of a minor who wishes to marry is accepted as valid and constituting ample fulfilment of both requirements to marry, namely consent and age. The RCMA therefore

[333] Supra note 310.
[334] Ibid.
[335] Constitution supra note 36 at s 16(2) The right in subsection (1) does not extend to- (a) propaganda for war; (b) incitement of imminent violence; or
(c) advocacy of hatred that is based on race, ethnicity, gender, or religion, and that constitutes incitement to cause harm.
[336] Ibid.
[337] Supra note 1 at ss 25-26.

broadly seeks to ensure equality of spouses in customary marriage, as afforded to those in civil marriage.

Furthermore, section 3(a) and (b) of the RCMA can also be said to have been enacted for the protection of minors, ensuring that an adult has oversight over their impending nuptials and related issues like matrimonial property considerations. However, based on the grounds and other factors to be detailed below, such as poverty levels in the country, the assertion is that the impact of this consent to a customary marriage on a minor black African girl outweighs any benefits and exacerbates gender-based violence and other abuse towards this minor bride, something that is not *de facto* experienced by a minor bride entering into a civil marriage. Yet again, consent to minor marriage is not *de facto* restricted to African minors, rather than the effects of being in a customary marriage, for the aforementioned reasons, are experienced predominantly by black African minor girls, as opposed to non-black male spouses, the discrimination can be said to be indirect. This results in the infringement alleged by the hypothesis of this thesis, albeit indirectly. It is through the impact of these unions and not because the consent is limited only to black African minor brides.

City Council of Pretoria vs. Walker[338] said, "the inclusion of both direct and indirect discrimination within the ambit of the prohibition imposed by section 8(2) evinces a concern for the consequences rather than the form of conduct. It recognises that conduct which may appear to be neutral and non-discriminatory may nonetheless result in discrimination, and if it does, that it falls within the purview of section 8(2)".[339] In other words, consent to minor customary marriage indirectly breaches the right to equality of minor African girls, because of its impact on them, influenced by factors that are unique to customary marriage and not directly by the consent to their customary marriages.

According to *Jordan*[340], the analysis must then proceed to assess the extent of this alleged infringement. *In casu*, as the indirect discrimination is presumed to be unfair, moving into a section 36 analysis to determine whether it is in terms of a law of general application, reasonable and justifiable.

[338] *City Council of Pretoria v Walker* (CCT8/97) [1998] ZACC 1; 1998 (2) SA 363; 1998 (3) BCLR 257 (17 February 1998).
[339] Ibid.
[340] Supra note 332.

4.4.4. *Justification Test*

At this stage of inquiry, where a determination has been made that the consent to minors' customary marriages causes unfair, indirect discrimination to black minor African girls, proceeding to establish whether this limitation is justifiable according to section 36 of the Constitution of the Republic of South Africa, 1996. If, after a thorough analysis, this limitation is justified, it would have passed the constitutionality test. In other words, consent to minor customary marriage, while causing indirect unfair discrimination, would be deemed to be justifiable, and no less restrictive measures are identifiable to replace it. If, on the other hand, the limitation is determined to be unreasonable and unjustifiable, it would have failed the test, and thus be unconstitutional and invalid. This would then require that the relevant constitutional remedy be enforced. At this stage of enquiry, two separate assessments will be conducted, namely is the limitation 'in terms of a law of general application' and 'is it reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom'.[341]

5. CONCLUSION

In conclusion, having established that against the outlined tests, the provision allowing for consent to minor marriage unfairly discriminates against black African minor brides on the grounds of sex and gender, the question to ask is,

'How can the law ensure that minors are protected against entering into a customary marriage altogether, until they choose to upon reaching the age of majority, with the capacity to understand the implications of their own decision?'

"The *Convention on the Rights of the Child*[36] stipulates that the best interests of the child shall be a primary consideration in all actions concerning the child. South Africa is compelled to implement the principle of safeguarding the best interests of the child because it is a signatory to the convention. South Africa has gone a further step in promoting the best interest of the child by incorporating the principle in section 28 of the *Constitution,* which provides that "a child's best interests are of paramount importance in every matter

[341] Constitution supra note 36 at s 39.

concerning the child".[342] In relation to marriage, the recent *Green Paper on Marriages* in South Africa[343] received public opinion which confirmed that "the Children's Act 38 of 2005 has already legislated 18 years as the age of majority. [Additionally] South Africa has also signed the SADC Protocol on Gender and Development, which states that 'no person under the age of 18 shall marry unless otherwise specified by law, which takes into account the best interests and welfare of the child.' During the ministerial dialogues, all stakeholders discouraged the marriage of minors and recommended that, as a matter of principle, laws that permit child marriage should be repealed without exception. Therefore, the legal capacity for entering into a marriage contract will be 18 years. Given the vulnerability of children, criminal sanctions shall be visited upon those who facilitate child marriages and those who marry children".

The *Single Marriage Bill* "also proposes the complete removal of child marriages in our future marriage regime".[344] Also, very encouraging feedback on the *Green Paper*[345] is that "other stakeholders only emphasised the importance of consent between the parties who are getting married. Despite these differences, stakeholders were unanimous that children should not be permitted to enter marriages irrespective of parental consent. Legal reform in this regard was called for".[346] While this is commendable, a few immediate concerns arise, such as the repercussions of marriages for minors under the age of 18 years. Will they be criminalised? Furthermore, what are the timelines expected for the completion of this law reform, particularly as the words 'future regime' are used? This implies a measure that will not be in the short term. In that case, what are the implications of a drawn-out process for children currently in customary marriages or those that will have concluded new marriages before the law reform is complete. Also, there is no way to tell at present what this new Bill intends in terms of its applicability. In other words, should marriages of children under the age of 18 years be criminalised for the adult spouse or parent consenting to it and will it have retrospective application and criminalise marriages concluded prior to its existence? What is also not clear is whether the proposed *Marriage Bill* will invalidate consent to all minors' marriages.

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[342] Constitution supra note 36 at s 28(2).
[343] Supra at 163 at p 54.
[344] Ibid.
[345] Ibid.
[346] Ibid at p 26.

This dissertation has thus far revealed that a key underlying issue is, "the insistence of Western countries upon a universal implementation of women's rights in all regions of the world, without attending to the religious [and cultural] convictions of many individuals in other countries or cultures can be counterproductive".[347] This means that for the issue at hand, South African legislature cannot simply put 'ruler to law' and seek to blindly apply the requirements of a valid civil marriage, to that of a customary marriage, because of the disparaging effects on minor girls present in the latter, that do not exist in the former. The experiences of minor brides entering a customary marriage by far put their educational, health, personal, and other well-being in jeopardy. As such, their marriages must be treated with a unique set of conditions, if they cannot altogether be banned. The impact that early customary marriages have on minor black African girls concluding them, requires a higher standard of governance from the South African legislature, based only on the history of this country, coupled with the outlined effects on minor girls. Imperative to highlight that overall, "the prohibition on unfair discrimination in the [interim] Constitution seeks not only to avoid discrimination against people who are members of disadvantaged groups. It seeks more than that. At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership to particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution, should not be forgotten or overlooked".[348]

An interim option that some may argue is too restrictive, is that all minors should simply not be permitted to marry before attaining the age of 18 years. While the prevailing circumstances faced by black women in customary marriage would not vanish, as adults with better capacity to reason and consent to their own marriages, the black women in these marriages would fare better in the understanding of their rights and responsibilities within the marriage than minors can. This would afford them the ability to fight for their rights and grant them a higher chance of being educated and financially independent enough to leave the marriage should they need to. Also, to not fall into the trap of potentially discriminating

[347] YS Kaplan '*A Father's Consent to the Marriage of his Minor Daughter: Feminism and Multiculturalism in Jewish Law*'. *Southern California review of Law and Social Justice* 18 (2009): p. 396.
[348] *President of the Republic of South Africa and Another v Hugo* (CCT11/96) [1997] ZACC 4; 1997 (6) BCLR 708; 1997 (4) SA 1 (18 April 1997 at para 41.

against one group, while trying to protect the interests of another, it would be contended that the ban on minors' marriages, must apply to all minors and not just black Africans. Although, even in the instance that an interim solution posed, does limit the ban of minors' marriages to customary marriages only, on a balance and proportionality assessment of any perception of discrimination against minor girls, who are not black or African, nor practitioners of customary law, this could be justifiable. It would require a process to balance competing goods and to assess whether the means would have met the desired end, to restore equality previously and continuously denied to black African minor girls. The question to ask here would be, does the limiting measure serve a constitutionally accepted purpose? In other words, does any alleged violation caused on the rights of non-black African minor girls, serve a section 9(2) equality restorative measure? This is a question from further research by fellow legal professionals and scholars, to assess the potential impact of this on minors who enter non-customary marriages before attaining the age of eighteen. Furthermore, literature may already exist from other scholars relating to the positive and negative impacts of minor civil or other non-customary unions, thus aiding in examining the recommendation to ban all marriages for minors under the age of eighteen. This dissertation nevertheless narrowed its lenses to the experiences of black African minor girls in African customary marriages.

"It is important to note, although African traditional marriage practices are becoming obsolete, these practices are not always experienced as disruptive in the African communities that have institutionalised them within socially-accepted patterns of marriage. It is the authors' opinion that these practices promote social cohesion and unity and are not discriminatory, oppressive and dehumanizing".[349] Therefore, any proposed changes to the current practices of African custom, which extend to customary marriage would require extensive consultation with the African people who practice them. This would not only ensure alignment in the assessment of the impact of this consent on the minor customary marriage but also collaboratively come up with relevant and practical solutions. However, for now, the Constitution of South Africa[350] does reign supreme, and no rights may be exercised in a manner that is inconsistent with human rights and the Bill of Rights.

[349] Bekker J. C. & Buchner-Eveleigh M. J C., '*The legal character of ancillary customary marriages*', (2017) *De Jure (Pretoria)* [online], vol.50, n.1 [cited 2019-07-15], pp.80-96. Available from: http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S2225-71602017000100006&lng=en&nrm=iso>. ISSN 2225-7160. http://dx.doi.org/10.17159/2225-7160/2017/v50n1a5.
[350] Supra note 36.

Therefore, according to the assessment undertaken in this chapter, it is reiterated that the consent to allow minor black African girls to enter into customary marriage is unconstitutional and invalid. Furthermore, I recommend that the infringing provisions that allow for this consent to minors' customary marriages, therefore, be expunged.

BIBLIOGRAPHY

Primary Sources:

Constitution

Constitution of the Republic of South Africa, 1996.

Statutes

Age of Majority Act 57 of 1972.

Bantu Authorities Act, 68 of 1951.

Black Administration Act 38 of 1927.

Children's Act 38 of 2005.

Civil Union Act 17 of 2006.

Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 5 of 2015[3].

Marriage Act 25 of 1961.

Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

Recognition of Customary Marriages Act 120 of 1998.

South African Green Paper on Marriages _ Public Consultation Version _ April 2021.

The Law of Evidence Amendment Act 45 of 1988.

Green Papers:

"*The Green Paper on Marriages in South Africa*" was approved by Cabinet in April 2021 for public consultation and gazetted for public comments on 4 May 2021 with public comments invited until 30 June 2021. Available: Green Paper on Marriages in South Africa: Comments invited (www.gov.za)

Caselaw

South African:

Alexkor Ltd and Another v Richtersveld Community and Others (CCT19/03) [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) (14 October 2003).

Beinash and Another v Ernst & Young and Others (CCT12/98) [1998] ZACC 19; 1999 (2) SA 91; 1999 (2) BCLR 125 (2 December 1998).

Bernstein and Others v Bester NO and Others (CCT23/95) [1996] ZACC 2; 1996 (4) BCLR 449; 1996 (2) SA 751 (27 March 1996).

Bhe and Others v Khayelitsha Magistrate and Others (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (15 October 2004).

City Council of Pretoria v Walker (CCT8/97) [1998] ZACC 1; 1998 (2) SA 363; 1998 (3).

Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others CCT35/99) [2000] ZACC 8; 2000 (3) SA 936; 2000 (8) BCLR 837 (7 June 2000).

Fraser v Children's Court Pretoria North and Others (CCT31/96) [1997] ZACC 1; 1997 (2) SA 261 (CC); 1997 (2) BCLR 153 (CC) (5 February 1997).

Gumede (born Shange) v President of the Republic of South Africa and Others (CCT 50/08). [2008] ZACC 23; 2009 (3) BCLR 243 (CC); 2009 (3) SA 152 (CC) (8 December 2008).

Harksen v Lane NO and Others (CCT9/97) [1997] ZACC 12; 1997 (11) BCLR 1489; 1998 (1) SA 300 (7 October 1997).

Jezile v S and Others (A 127/2014) [2015] ZAWCHC 31; 2015 (2) SACR 452 (WCC); 2016 (2) SA 62 (WCC); [2015] 3 All SA 201 (WCC) (23 March 2015).

Mistry v Interim National Medical and Dental Council and Others (CCT13/97) [1998] ZACC 10; 1998 (4) SA 1127; 1998 (7) BCLR 880 (29 May 1998).

Mayelane v Ngwenyama and Another (CCT 57/12) [2013] ZACC 14; 2013 (4) SA 415 (CC); 2013 (8) BCLR 918 (CC) (30 May 2013).

Mmutle v Thinda and Another (20949/2007) [2008] ZAGPHC 352 (23 July 2008).

M and Another v M and Another (63462/12) [2014] ZAGPPHC 1026 (10 December 2014).

Mthembu v Letsela and Another (71/98) [2000] ZASCA 181; [2000] 3 All SA 219 (A) (30 May 2000) (saflii.org).

National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others (CCT10/99) [1999] ZACC 17; 2000 (2) SA 1; 2000 (1) BCLR 39 (2 December 1999).

President of the Republic of South Africa and Another v Hugo (CCT11/96) [1997] ZACC 4; 1997 (6) BCLR 708; 1997 (4) SA 1 (18 April 1997)

Prinsloo v Van der Linde and Another (CCT 4 of 1996) [1997] ZACC 5 (18 April 1997).

*Shilubana and Others v Nwamitwa (*CCT 03/07) [2008] ZACC 9; 2008 (9) BCLR 914 (CC*); 2009 (2) SA 66 (CC) (4 June 2008).* 2008.

Southon vs. Moropane [2012] ZAGPJH 146.

S v Bhulwana and S v Gwadiso (CCT12/95, CCT11/95) [1995] ZACC 11; 1996 (1) SA 388; 1995 (12) BCLR 1579 (29 November 1995).

S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae (CCT31/01) [2002] ZACC 22; 2002 (6) SA 642; 2002 (11) BCLR 1117 (9 October 2002).

S v Makwanyane and Another (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995).

*S v Walters and Another (*CCT28/01) [2002] ZACC 6; 2002 (4) SA 613; 2002 (7) BCLR 663 (21 May 2002) paras 26–7.

Tongoane and Others v National Minister for Agriculture and Land Affairs and Others (CCT100/09) [2010] ZACC 10; 2010 (6) SA 214 (CC); 2010 (8) BCLR 741 (CC) (11 May 2010).

'Tshayuse Moyeni v Magadan Nkuhlu' 18 (1946) NAC (C & O) 2.

City Council of Pretoria v Walker (CCT8/97) [1998] ZACC 1; 1998 (2) SA 363; 1998 (3) BCLR 257 (17 February 1998)

Foreign:

Mudzuru & Another v Minister of Justice, Legal and Parliamentary Affairs (CCZ 12/ 15).

Ramantele v Mmusi [2013] BWCA 1. Taken from Rautenbach, Christa. (2016). A family home, five sisters and the rule of ultimogeniture: Comparing notes on judicial approaches to customary la in South Africa and Botswana. African Human Rights Law Journal, 16(1), 145-174. Available: https://dx.doi.org/10.17159/1996-2096/2016/v16n1a7

R v Oakes [1986] 1 SCR 103 (Supreme Court of Canada).

Secondary Sources (Books, Journals)

Bekker J. C. & Buchner-Eveleigh M. J C., '*The legal character of ancillary customary marriages*', (2017) *De Jure (Pretoria)* [online], vol.50, n.1 [cited 2019-07-15], pp.80-96. Available from: http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S2225-71602017000100006&lng=en&nrm=iso>. ISSN 2225 7160. http://dx.doi.org/10.17159/2225-7160/2017/v50n1a5.

Bennett T. W., "*Customary Law in South Africa*" Ed. 1 (2004) Juta and Company (Pty) Ltd.

Bond J. E., "Culture, dissent, and the state: the example of Commonwealth African marriage law", (2011), vol 14, Yale Human Rights and Development Law Journal.

Boonzaier F., '*Woman Abuse in South Africa: A Brief Contextual Analysis. Feminism & Psychology",* (2015), *15*(1), 99–103. https://doi.org/10.1177/0959353505049711. Date accessed 13 February 2022.

Budlender D., '*Women, Marriage and Land: Findings from a Three Site Survey*' (2013) Acta Juridica28–48 at 30.

Carton B., '*Blood from your Children: The Colonial Origins of Generational Conflict in South Africa',* (Charlottesville, University of Virginia Press, 2000).

Carton B., '*The New Generation ... Jeer at Me, Saying We Are All Equal Now: Impotent African Patriarchs, Unruly African Sons in Colonial South Africa*', in M.I. Aguilar (ed.), '*The Politics of Age and Gerontocracy in Africa: Ethnographies of the Past & Memories of the Present*' (Trenton, NJ, Africa World Press, 1998).

Chiweshe M. K., '*Wives at the Market Place: Commercialisation of Lobola and Commodification of Women's bodies in Zimbabwe. The Oriental Anthropologist*' (2016).

Corder H., Federico V., '*The Quest for Constitutionalism: South Africa since 1994*', SALJ, 133, No.3, published online 1 September 2016: https://journals.co.za/doi/pdf/10.10520/EJC-614f1fdd4.

Currie I., & De Waal J., '*The Bill of Rights Handbook*', (2005) Juta, 5th Edition at p 233. Supported by Loenen T., '*The Equality Clause in the South African Constitution: Some Remarks from a Comparative Perspective*' (1997) 13 SAJHR 410, 405.

De Vos, P. D. & Freedman, W. '*South African Constitutional Law in Context*'. *(2014)* Cape Town: Oxford University Press.

Diala J., '*The Child in a Child; Child Marriage and Lost Identity in Southern Africa*," Pravni Vjesnik (Journal of Law, Social Sciences and Humanities) 35, no. 1 (2019): 53-76. Quoted from: Macleod, C., '*Teenage Pregnancy and the Construction of Adolescence: Scientific Literature in South Africa, Childhood*', Vol. 10, No. 4, 2003.

Essack Z., 1,2,3 MSocSci (Research Psychol), PhD; Toohey J., 1,3 LLM (Medical Law), "Unpacking the 2-year age-gap provision in relation to the decriminalisation of underage consensual sex in South Africa", November 2018, Vol. 11, No. 2 SAJBL.

Equality before the law. *(*2021). Available: https://en.wikipedia.org/w/index.php?title=Equality_before_the_law&oldid=1032360181 [Jul 17, 2021].

Fagan A., '*Human dignity in South African law*', (2014), in Düwell M., Braarvig J., Brownsword R., & Mieth D., (Eds.), *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (pp. 401-406). Cambridge: Cambridge University Press. doi:10.1017/CBO9780511979033.048.

Gwatimba L., Raselekoane N.R., Nwafor A.O., "Customary Marriages and Gender Equality: Zimbabwean and South African Perspectives", Adonis & Abbey Publishers, 2021, at p.43.

Higgins, T.E., Fenrich, J. & Tanzer, Z., '*Gender equality and customary marriage: bargaining in the shadow of post-apartheid legal pluralism. Fordham International Law Journal'. (2007)* 30(6):1653.

Himonga C., '*African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives*' (2014).

Himonga, C. '*The advancement of African women's rights in the first decade of democracy in South Africa: the reform of the customary law of marriage and succession*'. (2005) *Acta Juridica (Cape Town).* 2005(1):82-107.

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*n *in The Future of African Customary Law.* Cambridge University Press', (2011) 31-57. 10.1017/CBO9780511844294.003.

Himonga, C. '*Reflection on Bhe v Magistrate Khayelitsha: In honour of Emeritus Justice Ngcobo of the Constitutional Court of South Africa*.' (2017) *Southern African Public Law.* 32(1&2):1-18. DOI:10.25159/2522-6800/3570 Available: http://hdl.handle.net/10520/EJC-1033c285bb.

Himonga C.N. & Moore E., '*Living customary law and families in South Africa. Children, Families and the State' (2018)* Juta.

Himonga, C.N. & Moore, E. '*Reform of customary marriage, divorce and succession in South Africa: living customary law and social realities' (2015),* Claremont, Cape Town: Juta & Company, Limited.

Himonga, C.N., Nhlapo, R.T., Maithufi, I.P., Weeks, S.M., Mofokeng, L.L. & Ndima, D.D. '*African customary law in South Africa: post-apartheid and living law perspectives: private law',* (2014) Cape Town, South Africa: Oxford University Press Southern Africa.

Hogg *Constitutional Law of Canada* 3 ed (Carswell, Ontario 1992).

Hove, K. & Sloth-Nielsen, J. '*Mudzuru & Another v The Minister of Justice, Legal and Parliamentary Affairs & 2 Others: a review*. *African Human Rights Law Journal',* (2016) 16(2):554-568. Available: http://hdl.handle.net/10520/EJC-4b1f40653.

Human Rights Watch Washington, D C. '*Human Rights Watch Submission to the Committee on the Rights of the Child Concerning Malawi*' (2016) [press release]. *AllAfrica.Com* Nov 21,
Available: https://search.proquest.com/docview/1842046678.

Indiana University, Bloomington School of Law. Indiana journal of global legal studies. Available: https://heinonline.org/HOL/Index?index=journals/ijgls&collection=journals.

Jeater D., '*Marriage, Perversion and Power: The Construction of Moral Discourse in Southern Rhodesia*', 1894–1930 (Oxford, Clarendon Press, 1993).

JC Bekker & IP Maithufi. '*The recognition of the Customary Marriages Act of 1998 and its impact on family law in South Africa*. *The Comparative and International Law Journal of Southern Africa', (2002)* 35(2):182-197. Available: https://www.jstor.org/stable/23252206.

Jobodwana, Z.N. Customary courts and human rights: Comparative African perspectives', (2000) *South African Public Law Review.* 15(26-49).

Kaplan, Y.S. '*A father's consent to the marriage of his minor daughter: feminism and multiculturalism in Jewish law*. *Southern California Review of Law and Social Justice'.* (2009) 18(2):393.

Kerr, A.J. '*The customary law of immovable property and of succession',* (1990) 3rd Ed. Grahamstown: Grocott & Sherry.

Kerr, A.J. '*Role of the courts in developing customary law*' (1999) 20 *Obiter* 41 at 49-50.

Koyana, D.S. & Bekker, J.C. '*The indomitable ukuthwala custom*', (2007) *De Jure.* 40:139.

Koyana, D.S. '*Customary law in a changing society', (1980)* Cape Town [c.a.] Juta.

Leclerc-Madlala, S. '*On the virgin cleansing myth: gendered bodies, AIDS and ethnomedicine. African Journal of AIDS Research: AJAR'.* (2002) 1(2):87-95. DOI:10.2989/16085906.2002.9626548
Available: http://www.tandfonline.com/doi/abs/10.2989/16085906.2002.9626548.

Ligomeka B., "*Malawi fights 'wife inheritance*"', Sister Namibia, Jan-May 2003, Vol. 15(1-2), p 38(1): https://www.thefreelibrary.com/Malawi+fights+%27wife+inheritance%27.-a0108149080.Mabasa, D. '*Ukuthwala: is it all culturally relative? Feature*'. (2015) *De Rebus.* (555): 28-30. Available: http://hdl.handle.net/10520/EJC173518.

Maithufi, I.P. & B. '*The recognition of the 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.

Maluleke, M.J. '*Culture, tradition, custom, law and gender equality*', (2012). *Potchefstroom Electronic Law Journal.* 15(1):2-22. DOI:10.4314pelj.v15i1.1.
Available: http://hdl.handle.net/10520/EJC119241.

Mamphela R., "The dynamics of gender politics in the hostels of Cape Town: another legacy of the South African migrant labour system." Journal of Southern African Studies 15, no. 3 (1989).

May J., '*Poverty and Inequality in South Africa*' [Presentation by the Centre for Social and Development Studies, University of Natal" (2000), at https://s3.amazonaws.com/academia.edu.documents/31219257/presentation.pdf?AWSAccessKeyId=AKIAIWOWYYGZ2Y53UL3A&Expires=1555594261&Signature=7v1mReBDrh3vAzWonst2tBcHRdI%3D&response-content disposition=inline%3B%20filename%3DPoverty_and_inequality_in_South_Africa.pdf

McKittrick M. '*The "Burden" of Young Men: Generational Conflict and Property Rights in Ovamboland*', African Economic History, 24 (1996), pp. 115 –29.

Monareng, K.N. '*Concubines: the legal implications of co-habitation and customary marriages on South African black women'* (2014) Cape Town, South Africa: New Voices Publishing.

Montle ME. "Conceptualising Lobola as A Perpetuator of Gender-based Violence in South Africa Through Intsika. E-Bangi". 2020;17(7):160-8.

Moore, E. 2020. "*My Husband Has to Stop Beating Me and I Shouldn't Go to the Police": Family Meetings, Patriarchal Bargains, and Marital Violence in the Eastern Cape Province, South Africa. Violence Against Women.* 26(6-7):675-696. DOI:10.1177/1077801219840440
Available: https://journals.sagepub.com/doi/full/10.1177/1077801219840440

Msuya, N.H. '*The analysis of child marriage and third-party consent in the case of Rebeca Z. Gyumi v Attorney General Miscellaneous Civil Case no 5 of 2016 Tanzania High Court at Dar es Salaam'*, (2019), *De Jure.* 52(1):295-315. DOI:10.17159/2225-7160/2019/v52a18 Available: https://hdl.handle.net/10520/EJC-17a61be1d4

Mtshali, V. 'Forced child marriage practiced under the pretext of customary marriage in South Africa. *Child Abuse Research in South Africa',* (2014), 15(2):51-61. Available: http://hdl.handle.net/10520/EJC161326

Mubaiwa P., "Human Rights, Modernity and Culture: Understanding the position of Lobola as a form of VAW and the current human rights normative standards and discourse on VAW", Doctoral Thesis, University of Cape Town (2021). Available at http://hdl.handle.net/11427/36695

Muna N., '*African Customary Law, customs and women's rights*', (2011) Indiana Journal of Global Studies, vol. 18 no.1, p 87+. Academic OneFile, http://link.galegroup.com.ezproxy.uct.ac.za/apps/doc/A268604345/AONE?u=unict&sid=AONE&xid=fc3b2b2d. Accessed 15 July 2019.

Musgrave, M.K. '*African Customary Law in South Africa. Post-Apartheid and Living Law Perspectives'* by C. Himonga and T. Nhlapo, T., (eds.). 2015. Cape Town: Oxford University Press Southern Africa. *International Journal of the Commons.* 10(2):1205-1207. DOI:10.18352/ijc.746.
Available: https://explore.openaire.eu/search/publication?articleId=doajarticles::322c62bb5235284b4310d66fd9d4bf68

Mwambene L. and Sloth-Nielsen J., '*Benign Accommodation? Ukuthwala, "Forced Marriage" and the South African Children's Act*' (2011) 11 African Human Rights LJ 3 at 1–22.

Mwambene, L. "*Hmong 'marriage by capture' in the United States of America and ukuthwala in South Africa : unfolding discussions*", Comparative and International Law Journal of Southern Africa 2020-01-01 53(3): 1-25, https://journals.co.za/doi/full/10.25159/2522-3062/5981, accessed 12.11.2022. Also taken from Mkhuseli Jokani, 'A Criminal Response to the Harmful Practice of Ukuthwala' (no date, PowerPoint presentation) <sapsac.co.za › docs › 5. M Jokani.pptx>accessed 20 September 2020.

Mwambene, L. '*Recent legal responses to child marriage in Southern Africa: The case of Zimbabwe, South Africa and Malawi',* Centre of Human Rights, Faculty of Law, University of Pretoria.

Mwambene, L. '*The essence vindicated? Courts and customary marriages in South Africa*', (2017), *African Human Rights Law Journal; African Human Rights Law Journal.* 17(1):35-54. DOI:10.17159/1996-2096/2017/v17n1a2.

National Formative Study on Child Marriage / Republic of Namibia, Ministry of Gender Equality, Poverty Eradication and Social Welfare. Windhoek, Namibia: Ministry of Gender Equality, Poverty Eradication and Social Welfare, 2020. Print.

Ndulo, M. '*African Customary Law, Customs, and Women's Rights'*, (2011), *Indiana Journal of Global Legal Studies.* 18(1):87-120. DOI:10.2979/indjglolegstu.18.1.87 Available: http://www.jstor.org/stable/10.2979/indjglolegstu.18.1.87.

Ngema, N.M. '*The enforcement of the payment of lobolo and its impact on children's rights in South Africa'*, (2013), *Potchefstroom Electronic Law Journal.* 16(1):405-425. DOI:10.4314/pelj.v16i1.12 Available: http://gateway.proquest.com/openurl?url_ver=Z39.88-2004&res_dat=xri:bsc:&rft_dat=xri:bsc:rec:iibp:00438322.

Nhlapo, T. '*Customary Marriage: Missteps Threaten the Constitutional Ideal of Common Citizenship'*, (2021), *Journal of Southern African Studies.* 47(2):273-289. DOI:10.1080/03057070.2021.1880750 Available: http://www-tandfonline-com.ezproxy.uct.ac.za/doi/abs/10.1080/03057070.2021.1880750.

Ntuli, H.S. '*Conflict between traditional cultural practices for women and South African Government Laws'*, (2019). *Gender & Behaviour.* 17(1):12710-12728.

Official customary law and the disruption of patriarchal power: The case of Msinga. Available: https://www.polity.org.za/article/official-customary-law-and-the-disruption-of-patriarchal-power-the-case-of-msinga-2013-09-26.

Osman, F. '*The Administration of Customary Law Estates Post the Enactment of the Reform of Customary Law of Succession Act: a Case Study from Rural Eastern Cape, South Africa'*. Faculty of Law, University of Cape Town, 2019. Print.

Osman, F. '*The Consequences of the Statutory Regulation of Customary Law: An Examination of the South African Customary Law of Succession and Marriage*', (2019). *Potchefstroom Electronic Law Journal.* 22(1):1-24. DOI:10.17159/1727-3781/2019/v22i0a7592 Available: https://explore.openaire.eu/search/publication?articleId=doajarticles::9c5084bc2b9e184d601cca88e8ba625b.

Parliament of South Africa. Available: https://www.parliament.gov.za/how-law-made.

Phooko, M.R. & Nyathi, M. '*The revival of the SADC Tribunal by South African courts: a contextual analysis of the decision of the Constitutional Court of South Africa*', (2019), *De Jure.* 52(1):415-432. DOI:10.17159/2225-7160/2019/v52a21 Available: https://hdl.handle.net/10520/EJC-1ac32eadee.

Radebe, K. '*The question of custom in the onus to prove customary marriage*', (2016), *Agenda (Durban).* 30(1):139-145. DOI:10.1080/10130950.2016.1190226 Available: http://www.tandfonline.com/doi/abs/10.1080/10130950.2016.1190226.

Ramphele, M. 'The dynamics of gender politics in the hostels of Cape Town: another legacy of the South African migrant labour system' (1989), *Journal of Southern African Studies.* 15(3):393-414. DOI:10.1080/03057078908708208. Available: http://www.tandfonline.com/doi/abs/10.1080/03057078908708208.

Ranger T., '*The Invention of Tradition in Colonial Africa*', in E. Hobsbawm and T. Ranger, The Invention of Tradition (Cambridge, Cambridge University Press, 1983).

Rascher, S.B. '*Researching the indigenous law of marriage in South Africa: an anthropological perspective*', (1996), *Suid-Afrikaanse Tydskrif Vir Etnologie = South African Journal of Ethnology.* 19(2):46. Available: https://search.proquest.com/docview/1683797709.

Rautenbach C "*Case Law as an Authoritative Source of Customary Law: Piecemeal Recording of (Living) Customary Law?*" *PER / PELJ* 2019(22) - DOI http://dx.doi.org/10.17159/1727-3781/2019/v22i0a7591.

Rautenbach, C., "*Family home, five sisters and the rule of ultimogeniture: comparing notes on judicial approached to customary law in South Africa and Botswana*". *African Human Rights Law Journal (2016),16(1),* 145-174.

Rautenbach, C., Du Plessis, W. & Pienaar, G. '*Is Primogeniture Extinct Like the Dodo, or is there any Prospect of it Rising from the Ashes'? Comments on the Evolution of Customary*

Succession Laws in South Africa', (2006), *South African Journal on Human Rights.* 22(1):99-118. DOI:10.1080/19962126.2006.11864883.

Rice, K. '*Ukuthwala in Rural South Africa: Abduction Marriage as a Site of Negotiation about Gender, Rights and Generational Authority Among the Xhosa*', (2014), *Journal of Southern African Studies.* 40(2):381-399. DOI:10.1080/03057070.2014.896720. Available: http://www.tandfonline.com/doi/abs/10.1080/03057070.2014.896720.

Samuel, S. '*Women Married in Customary Law: No Longer Permanent Minors. Agenda: Empowering Women for Gender Equity,* (1999), (40):23-31. DOI:10.2307/4066014. Available: http://www.jstor.org.ezproxy.uct.ac.za/stable/4066014.

Saper, C.B. '*Academic Publishing, Part III: How to Write a Research Paper (So That It Will Be Accepted) in a High-Quality Journal. Annals of Neurology'.* (2014), 77(1):8-12. DOI:10.1002/ana.24317. Available: http://onlinelibrary.wiley.com/doi/10.1002/ana.24317/full.

Shepherd, D.L. '*Post-Apartheid Trends in Gender Discrimination in South Africa: Analysis through Decomposition Techniques',* *(2008).* Available: http://econpapers.repec.org/paper/szawpaper/wpapers54.htm.

Sibanda, S. & Lombard, A. '*Challenges faced by social workers working in child protection services in implementing the children's act 38 of 2005. Social Work'. (2015),* 51(3):332-353. DOI:10.15270/51-3-452 Available: https://search.proquest.com/docview/1811309627.

Sideris T. "*You have to change and you don't know how*!" What it means to be a man in a rural area of South Africa. *African Studies*, (2004) 63, 29-49.

Simons, H.J. '*African women: their legal status in South Africa', (1968)* London: C. Hurst & Co.

Sloth-Nielsen, Julia, & Hove, Kuda. '*Mudzuru & Another v The Minister of Justice, Legal and Parliamentary Affairs & 2 Others: A review*', (2016), African Human Rights Law Journal, 16(2), 554-568. Available: https://dx.doi.org/10.17159/1996-2096/2016/v16n2a11.

Stevens P., '*General Principles and Specific Offences*' (2016) South African Journal of Criminal Justice 173 at 177.

The RefWorks Team, '*Quick Start Guide'. (2019)* RefWorks Team.

Turabian, K.L. '*A Manual for Writers of Research Papers, Theses, and Dissertations', (2013)* 8th ed. Chicago: University of Chicago Press.
Available: https://play.google.com/store/books/details?id=fqkgAgAAQBAJ.

Van Reenen, T.P. '*Equality, discrimination and affirmative action: an analysis of section 9 of the Constituzas wation of the Republic of South Africa*', (1997), *SA Publiekreg.* 12(1):151-165.
Available: http://hdl.handle.net/10520/AJA02586568_794.

Yang J.A., '*Marriage by Capture in the Hmong Culture: The Legal Issue of Cultural Rights and Women's Rights*' (2004) Law and Society Review at the University of California.

Zembe, Y.Z., Townsend, L., Thorson, A. & Ekström, A.M., "*Money talks, bullshit walks" interrogating notions of consumption and survival sex among young women engaging in transactional sex in post-apartheid South Africa: a qualitative enquiry. Globalization and Health. (2013),* 9(1):28. DOI:10.1186/1744-8603-9-28.
Available: https://www.ncbi.nlm.nih.gov/pubmed/23866170.

Other: (Online Articles, Mobile Applications and Videos)

C Ngozi. "*We should all be feminists*", TEDxEuston:
https://www.youtube.com/watch?v=hg3umXU_qWc&vl=en

Department of Home Affairs - Marriage Certificates (dha.gov.za)

Dlamini C.R.M., 'Recognition of a customary marriage', (1982), De Rebus, December, https://journals.co.za/doi/pdf/10.10520/AJA02500329_3710 Accessed January 30, 2022.

Forster-Towne C., & Nqambaza P. R., '*Official customary law and the disruption of patriarchal power: The case of Msinga*', edited by K. Morgan, On Africa IOA, (2013), at https://m.polity.org.za/article/official-customary-law-and-the-disruption-of-patriarchal-power-the-case-of-msinga-2013-09-26 Taken from E. Curran, & E. Bonthuys, '*Customary Law and Domestic Violence in rural South African communities*', Centre for the Study of Violence and Reconciliation, October (2004), http://csvr.org.za

Girls Not Brides: Explanatory Notes on The Model Law on Eradicating Child Marriage and Protecting Children Already in Marriage. Taken from: MODEL-LAW-ON-

ERADICATING-CHILD-MARRIAGE-AND-PROTECTING-CHILDREN-ALREADY-IN-MARRIAGE.pdf (girlsnotbrides.org)

Girls Not Brides, "Why Child Marriage Happens": Why it happens - Girls Not Brides

Human Rights Watch, 'I've Never Experienced Happiness: Child Marriage in Malawi", (2014), obtained from https://www.hrw.org/report/2014/03/06/ive-never-experienced-happiness/child-marriage-malawi

Lobola Calculator. Available: http://www.lobolo.co.za/

Masutha K., "*The modern customary marriage – can the handing over of a bride be waived?*", 2021, taken from The modern customary marriage – can the handing over of a bride be waived? - De Rebus, accessed 05 September 2023.

Msweli S.N., "I-lobola in Contemporary South Africa: Perspectives and Experiences of Young People", 2020, UKZN, p. I, taken from: Msweli_Snenhlanhla_Nompumelelo_2020.pdf (ukzn.ac.za)

Nhlapho T, "*Customary Law Marriages"*: https://www.youtube.com/watch?v=ALHFGj9h1rk

Rihan O., Children's Rights and International Protection - Humanium

Statistical Release P0307, *Marriages and Divorces* 2017, p 1, Available: http://www.statssa.gov.za/publications/P0307/P03072017.pdf

South African History Online, '*The Constitution of South Africa*', (2014) at http://www.sahistory.org.za/article/constitution-republic-south-africa-1996. Date accessed: 07 April 2020.

The League of Nations: The League of Nations | UN GENEVA

UNICEF and UNFPA Albania, "*Child marriage Knowledge, Attitudes, and Perceptions among affected communities in Albania*", taken from Child_marriage_report_2018.pdf (unicef.org), p 10. Date accessed: 12 October, 2023.

Universal Declaration of Human Rights, Universal Declaration of Human Rights | United Nations. Date accessed 12 December 2021

United Nations Human Rights Council, '*Resolution Adopted by the Human Rights Council, Strengthening Efforts to Prevent and Eliminate Child, Early and Forced Marriage: Challenges, Achievements, Best Practices and Implementation Gaps* (A/HRC/RES/24/23)', 2013.