CHAPTER EIGHT

CUSTOMARY LAW MARRIAGE IN NIGERIA AND SOUTH AFRICA

Marriage is the destiny traditionally offered to women by society, it is still true that most women are married, or have been, or plan to be, or suffer from not being.

Simone de Beauvoir – The Second Sex[1]

8.1 INTRODUCTION

This chapter considers customary law marriages in Nigeria and South Africa. Customary law marriage has a very strong impact on the rights and status of women in both Nigeria and South Africa as the vast majority of women in both countries are married under customary law. In this chapter the nature and forms of customary law marriage in Nigeria and South Africa are discussed.

In the previous chapters the international status of the legal norms are first examined, before discussing the position of law in Nigeria and South Africa. However, this chapter would not follow the usual pattern of first discussing the position of law at international

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[1] Edited and translated by Parshley (1976) 445.

level. This is so because discussion of marriage in this chapter is limited to African customary law marriages.

Dowry and *lobolo* as an integral part of a customary law marriage are discussed. The high premium placed on children in customary law marriage is also highlighted. The issue of polygamy as an incidence of customary law is discussed coupled with the system of widow inheritance, levirate and sororate.

A customary marriage is a relationship that concerns not only the husband and wife, but also the family groups to which they belonged before marriage. This flows from the fact that the primary reason for marriage under customary law is to produce children. The consummation of a customary marriage brings into being reciprocal rights and obligations between the spouses for which their respective family groups are collectively responsible. The wife's family group, primarily represented by her guardian, implicitly holds itself responsible to the husband's group for the sufficient fulfilment by the wife of her main functions, which are the bearing and rearing of children and the proper keeping of a home for effecting this purpose. The husband's family group, represented in the first place by the husband and after his death by his heir, gives the implied undertaking that the wife will be so kept and treated as to enable her reasonably and adequately to keep a home and rear children.[2]

Although the relationship between husband and wife is important, the wife is united to the husband's family group. After his death she continues to be a wife of his family home until the customary law has been dissolved in a manner valid under customary law. The relationship between husband and wife is not terminated by the death of the husband; the wife may either enter a levirate relationship with a male relative of the deceased husband, or subject to good behaviour continue to live with the husband's family.

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2 *Sweleni v Moni* 1944 NAC (C&O) 31, *Fuzile v Ntloko* 1944 NAC (C&O) 2; *Madyibi v Ngwa* 1944 NAC (C&O) 36; *Sila v Masuku* 1937 NAAC (T&N) 121; Duncan 34, 41; Poulter (1976) 63-200

8.2 CUSTOMARY MARRIAGE IN NIGERIA

8.2.1 Status of customary marriage in Nigeria

In Nigeria, there are two main marital regimes - statutory marriage and customary law marriages. Statutory marriage is a monogamous type of marriage and the laws, which govern the celebration validity and incidents of monogamous marriage (referred to as statutory marriage) are found mainly in the Marriage Act[3] Matrimonial Causes Act[4] and the Common law. Customary law marriage in Nigeria, may further be divided into two – African traditional marriage and Islamic marriage. These two types of marriages are grouped together as one. However, in this chapter, only African traditional marriage is discussed.

The legal status of women, especially that of the vast majority of women who are married under customary law, is determined by the marital regime. Almost all marriages in Nigeria are contracted under customary law. Even people who are married under the Marriage Act[5] perform one form of customary marriage or the other. Statutory marriages are seen as enhancing social status, giving the women who are married under the Act some form of false security that they are legally married and that their husbands cannot take other wives as this will amount to bigamy, which is criminalised in Nigeria.[6] However, the reality is that men who are married under statutory law do contract subsequent marriages, even though they are fully aware that such action amounts to bigamy.

It is on record that to date in Nigeria, only one case of bigamy has been prosecuted, in 1963.[7] Since then, nobody has been prosecuted for the offence of bigamy in Nigeria.

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3 Cap 218 LFN 1990.

4 Cap 220 LFN 1990.

5 Cap 218 LFN 1990.

6 S. 47 Marriage Act Cap 218 LFN 1990.

7 *R v Princewell* (1963) 2 All NLR 31.

This has led some people to say that the offence of bigamy as it exists on the Nigerian statute book is dead and should therefore be expunged.[8]

The controversy whether customary marriages are valid marriages is examined. During the colonial period, the colonialists did not accept customary marriages as legal marriages. This is due to the fact that customary marriages are potentially polygamous. During the colonial era, the British devised the "repugnancy rule" to test all customary law. "Repugnancy rule" is a rule developed by the colonialist to test customary law against the English law. Those rules of customary law that fail the repugnancy test were declared void as being repugnant to equity, good conscience and natural justice, and are therefore considered to be unenforceable. One is tempted to ask whose equity, whose good conscience and whose natural justice.

8.2.2 Payment of dowry

Dowry may be described as the consideration at which a marriage is bought. One of the main attributes for a customary marriage is the payment of a dowry. Dowry is such an integral part of customary marriage in Nigeria, thus Kasunmu and Salacuse stated that[9]:

> One of the most distinctive features of Nigerian customary marriage is the requirement that a payment of some sort be made by the boy or his family to the girl's family in order to establish a valid marriage. The authors are unaware of any system of Nigerian customary law, which does not have such a requirement.

Although the payment of dowry as a legal essential of a valid customary marriage is widespread in Nigeria, there is some evidence that in a few communities, no payment of dowry is necessary for the validity of a customary marriage. For example, Begho says of marriage according to Itsekiri customary law.

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8 See *e.g.* Justice Ibidapo Obe (1981) 127.

9 Kasunmu & Salacuse (1966) 77.

> Payment of dowry was and is still unknown. The legality of the marriage is in the ceremony called '*La emo tsi*', which is done in the presence of witnesses. It is the form that gives it legality and differentiates it from concubinage.[10]

Similarly, Talbot notes that the Munshi pay no dowry, but the first child is given instead to the wife's father; while the rest of the children belong to the husband as usual.[11] Thomas also recorded that no dowry is payable in money in Ugo in the eastern border of the Edo State, and presents such as kola, coconuts and yams only are made.[12] Among the Pastoral Fulani, Stenning states that no bride-wealth changes hands at any stage of their main form of marriage,[13] while among the Yorubas, there is a legally recognised form of marriage in which no dowry is paid, and the only legal requirement is the mutual consents of the parties.

The amount of the dowry payable is not fixed except in the Eastern parts of the country where the government has intervened by legislation[14] to fix the amount payable as bride price. Government intervention was necessary because of the exorbitant amount of money usually paid as bride price. In most parts of the Eastern Nigeria, the amount payable as dowry will depend on the educational level of the lady. The more educated the lady is the more the dowry.

In the Yoruba speaking area, dowry when payable is usually a token and is paid to show that the bridegroom family consents to the marriage. The dowry is usually given to the

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10 Begho (1971) 30; Contrast with Lloyd, who says such payments are made by the Itsekiris, but they are small, See also ury & Lloyd (1970) 190.

11 Talbot (1962) For a similar statement about the Munshi (Tiv) See Meek (1925) 210 "among the Munshi a man may marry a virgin without making any payments, but he thereby forfeits his claim on their children".

12 Thomas (1914) 49.

13 Stenning (1965) 386.

14 Limitation of Dowry Laws, Laws of Eastern Nigeria, 1963, S. 3 of the Act limits the amount payable as bridewealth to N60 about R4.

wife. The full amount remains repayable in event of a divorce. It is the responsibility of the wife to repay the dowry.[15]

In most parts of Nigeria, a woman cannot remarries unless the dowry is fully refunded. In *Edet v Essien*,[16] a man paid dowry for a woman when she was a child. Later she married another man who had also paid dowry for her, and bore three children for him, one of whom died. The first husband whose dowry had not been refunded was granted custody of her two surviving children by the Customary Court in accordance with Ibibio customary law. On appeal this decision was reversed on the ground that it was repugnant to natural justice, equity and good conscience that a man should be entitled to the child of another, simply because the dowry he had paid on its mother had not been refunded to him.

An outstanding example of a customary law system of marriage in which no payment is made by, or on behalf of the man to the family of the woman, is "marriage by exchange", practiced by many groups in the Northern States of Nigeria. No transfer of wealth is necessary in this form of marriage as practiced by the Tivs, to make it binding. This is a form of marriage where parties exchange daughters. For example A can give out his daughter to marry the son of B on the understanding that B would give out his daughter in marriage to A's son.

Among some communities, marriage by capture is also recognised. In a marriage by capture the prospective bridegroom or his family makes no payment to the bride or her family. Indeed, in many areas, inability or refusal to pay dowry is the only reason why this form of marriage becomes necessary.

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15 In Ghana and South Africa in the event of a divorce, the whole dowry is not refundable. The amount of dowry to be refunded depends on the length of the marriage and whether there are any offspring. In South Africa the sex of the children also determines the amount to be refunded. The more female children a woman has, the less the portion of the dowry to be refunded.

16 *Edet v Essien* (1932) 11 NLR 47.

Dowry as an essential requirement of customary marriage was reiterated in the case of *Nsirim v Nsirim*[17] where the Court of Appeal held that for there to be a customary marriage, there must be payment of dowry or bride price, which is a gift, or payment. It may be in money, natural produce or any other kind of property. This must be paid on account of a marriage of a female person and it must be for a marriage, which is intended or has taken place.[18]

Marriage by payment of dowry is therefore the normal mode of contracting a marriage according to customary law in Nigeria.

8.2.3 Child marriages

Although the girl child is not one of the aspects of gender equality compared extensively in this work, it is pertinent to comment on child marriages in Nigeria. People in Nigeria especially the Muslim North practice child marriages. In Nigeria, a child is defined is anybody below the age of 18 years.[19] The Marriage Act[20] stipulates 18 years as the minimum age for marriage but provides for exception where the consent of the parents is obtained.[21] A number of international instruments have outlawed child marriages.[22]

Child marriage is a common traditional practice in Africa, but is decreasing due to the fact that more and more people are becoming aware of the damaging health, social and psychological implications of this practice.

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17 *Nsirim v Nsirim* (1995) 9 NWLR (Pt 418) 144 CA.

18 *Ibid.* 147.

19 Children and Young Persons Act

20 Cap 218 LFN 1990.

21 S. 24 Cap 218 LFN 1990.

22 See *e.g.* African Charter on the Rights and Welfare of the Child. A minimum age of 18 has been prescribed; the Draft Protocol to the ACHPR on the Rights of women also recommend 18 years as the minimum age before marriage may be entered into.

In Northern Nigeria, the end of childhood for girls coincides with the onset of puberty. Girls in this part of Nigeria are expected to marry as soon as they reach puberty, which is often as early as age 10. Several reasons are adduced for this practice in Nigeria.[23] These reasons range from the desire to avoid dishonour to the family as virginity can only be guaranteed between ages eight – ten years; economic gains resulting from bride price payments; and the need to reduce the burden on parents as it means "one mouth less to feed".

Generally, a girl could not decide whom and when to marry. This is done for her and only in "unusual conditions" did she have a say on her needs. In most cases, the man is at least twenty years older and already married with two or more wives. While the bride price negotiations went on (sometimes this could take years) the girls is literally raised in the husband's house. In one case a 12-year-old girl that was married off to a man of sixty. The small girl kept returning to her parents' house, and they kept sending her back. The elderly husband wounded her in the legs with a poison arrow. The two legs had to be amputated and the small girl later died from her wound.[24]

Many government officials, who are supposed to remedy these ills, often participate in perpetuating the ills. In 1986 the Minister of Trade and Industries married a sixteen-year-old girl in a marriage that was televised on national television.[25]

Contrary to girls marrying young, boys marry late, as "they must provide each wife with lodging of her own, separate from other wives".[26] While men are admonished to marry to fulfill their sexual urge, the sexual needs of women on the other hand are not discussed. On getting married, the lives of these young girls change abruptly. Prior to marriage, they are relatively free, going on errands and hawking wares for their mothers. As married women, regardless of their age, they are confined to their homes and further

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23 Callaway *op. cit*

24 Omorogbe *op cit*. 89.

25 Dr. Bunu Sheriff Musa Minister of Trade and Industries in Babangida's Administration.

26 Unequal Rights *op. cit* 30.

restricted by the prohibition against receiving visitors (particularly males) other than children and certain relatives and other women. If they had to go out, it has to be at night and in the company of older women.

It is being suggested that child marriages and betrothal should be prohibited in Nigeria. Nigeria should also ratify the African Charter on the Rights and Welfare of the Child. Parents should be educated on the importance of sending their children (irrespective of sex) to schools.

8.2.4 Polygamy and equality of women

Polygamy is undoubtedly a heated subject. Polygamy is one of the incidences of customary marriages. Basden, writing on polygamy among the Igbos after more than thirty-five years of sojourn in Igboland, says:[27]

> Polygamy is a subject that is honeycombed with pitfalls; a slippery path even to the wary. Anything written is open to criticism, because its problems, complications and ramifications are so manifold. With the exercise of extreme caution, one is still liable to misjudge, or to fail to discern the true aspects of this widely spread and deeply rooted institution.

Burton, the nineteenth century peripatetic digester of continents, was equally categorical in voicing the trepidation he felt on being confronted with the necessity of writing on polygamy among the Mormons in America. He says:[28]

> I approach the subject with a feeling of despair, so conflicting are opinions concerning it, and so difficult is it to neutralise in Europe the customs of Asia, Africa, and America, or to reconcile the habits of the 19th century AD with those of 1900 BC.

The apprehension expressed by these male writers is intensified for the female writer on polygamy, for she must always bear in mind the male conviction.

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27 Basden (1966) 228.

28 Burton (1861) 98.

There is an importunate temptation to omit the topic entirely, but so vital is it to any assessment of the position of women in traditional as well as modern Nigeria, that failure to expose it to the searchlight of enlightened discussion would detract from the value of any ultimate conclusion.

In Nigeria, however, polygamy exists where a person is married to more than one spouse at the same time having the legal right to be so married. A Nigerian man has such a right when he is married under Customary or Islamic law. Where a man is married under the Nigerian Marriage Act, and he purports to marry another wife, whether under the Statute or not, he commits the offence of bigamy.[29] In other words, under the Nigerian law, a married person who has no legal right to marry another spouse, and who does so, is a bigamist, and not a polygamist.

The position is the same under English law. Bromley says: [30]

> English law regards a marriage as polygamous if it is possible for either party to take another spouse during its subsistence whether he does so or not.

In Nigeria, to date only one case of bigamy has been prosecuted.[31] The offence of bigamy in Nigeria is a dead law and must be expunged from the statute books. All marriages in Nigeria are potentially polygamous, even people that contacted statutory marriages take other wives with impunity, without the fear of being prosecuted. A woman who takes her husband to Court for bigamy will be regarded as being "selfish". Society does not regard the taking of another wife as a crime irrespective of the matrimonial regime.

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29 Criminal Code Cap 77 LFN 1990 S. 370. The term "bigamy" in Nigeria applies where the first marriage is contracted under the statute, irrespective of whether the subsequent marriage is under the statutory law or under the customary law.

30 Bromley 1976 *op. cit.* 55; *R v Sagoo* (1975) 2 All E.R. 926 at 929 CA. where it was stated that a marriage which is to be the foundation for a prosecution for bigamy must be a monogamous one: See also *R v Sarwan Singh* (1962) All ER 612.

31 *R v Princewell* (1963) 2 All NLR 31

Statutory marriages are contracted as a form of status symbol and not as an intention to have a monogamous marriage. Nearly nine persons out of ten in Nigeria are bigamists. This is so because, despite the strict provisions of the law, the society accepts plurality of wives. The doctrine of *desuetudo* will continue to keep the criminal law of bigamy and the provisions of sections 47 and 48 Marriage Act[32] in the statute books as dead letters.[33]

The practice of polygamy by the old patriarchs of the Bible is too well known to need reiteration and mention need only be made of Abraham,[34] Jacob,[35]David and Solomon as outstanding examples.

From the foregoing examples of the prevalence of polygamy, it is obvious that it was not confined to Africa. Why then has polygamy been regarded as almost synonymous with African marriage: Although polygamy has been practised widely in some countries and more conservatively in other, it is in Africa that polygamy is found at its height, both in points of incidence and intensity.

Statutory marriage has taken the pride of place among sophisticated and enlightened Nigerians.[36] The incidence of polygamy is decreasing in Nigeria especially in urban centres.

A variety of reasons have been advanced as tending to make polygamy a necessary, desirable and preferable system of marriage, and it is necessary to examine some of the determinants of polygamy in order to see how far they still exist in modern society. The factors conducive to polygamy can be summarised under three main causes:

Men's desire for numerous wives;

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32 Cap 218 LFN 1990.

33 Ibidapo Obe (Justice) *op. cit.* 128.

34 Book of Samuel Chapter 10 verses 7-12.

35 Book of Genesis Chapter 16 verses 2 and 25.

36 *Ibid.*

The unequal numbers of men and women in a society and
The need to provide for widows under the levirate and analogous systems.

The motives controlling a man's desire to multiply his wives are many, and one or more may prevail in inducing him to found a harem. Thus, he may be actuated by:

a desire for numerous progeny;
a desire for enhanced economic and social status;
the need to cater for periodical continence
the attraction which female youth and beauty exercise upon men
a taste for sexual variety.

In the traditional African society children are highly valued, and are regarded as the fundamental component of an economically secure household.[37] Economic production activities are labour intensive, and the larger the family unit, the greater are the possibilities of wealth and social prestige. The first responsibility of a wife was therefore to produce children. If a marriage did not result in children who grow to maturity, the women was held responsible, mercilessly teased by other women[38] and sometimes divorced.

Barrenness is regarded as a great curse and misfortune, and many cults and forms of magic are designed to secure fertility of the women or to cure barrenness.[39] Among most ethnic communities in Nigeria, marriage has no real meaning without progeny. Lander recounts the plight of the old wife of the Fulani Governor who, married for thirty years still had no children. She begged him piteously for medicine to "promote and assist her accouchement".[40]

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37 Krige (1936) 1-23.

38 Uka op cit 35-38, a childless woman stands the risks of being disgraced by other women and ridiculed by co-wives in a polygamous household.

39 Naddel *op. cit.* 154.

40 Lander & Lander (1965) 98.

This desire for children, "particularly boys, the labour force and inheritors of his herd,"[41] among the Fulani, (a tribe in Northern Nigeria) has not changed in its effects on the status of women. Stenning.[42] in 1952 –1953 found evidence to show that:

> During the course of her marital history unduly lengthy intervals between birth of her children may bring divorce upon her … Male sterility which in fact may be the cause of such intervals is not recognised by Pastoral Fulani men and may result in the divorce of a woman by her husband

Failure to produce children, or male children specifically is a common reason for additional wives, and among various peoples polygamy is practised or permitted only when the first wife is barren or has no male offspring.[43] This of course implies, and demonstrates the widely held belief, especially in Africa, that the wife is responsible for the failure to propagate, and also for the failure to produce male children. These beliefs have no scientific basis, and it has been conclusively proved that sterility is not the prerogative of women. Men are equally prone to infertility.[44]

As a result of ignorance of the biological facts, compounded by male egoism and arrogance, childless women continue to suffer in Nigeria as well as in other African societies. Numerous writers provide evidence of the cruel treatment meted out to Nigerian women because of their infertility.[45]

It is significant that no taint is attached to the barren men in Nigeria. In fact the term barren is reserved for women, and wherever, it becomes necessary to mention the man's

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41 See Stenning (1971) 105.

42 *Ibid.* 106.

43 Westermarck op cit. 76, Genesis, Chapter 16; Abraham's wife Sarah bore him no children, so she gave him Hagar, her handmaiden to be his wife; See also Thurnegsen (1936), sterility of the wife is a justification for polygamy among the ancient Irish.

44 Gellhorn (1988); Ludovici (1965) 47.

45 Leighton *et.al.* (1963) 47-48, Ward *op.cit.* 30.

infertility, the less emotive word "sterile" is used. The barren man does not exist in Nigeria, as one male writer discovered:

> A man's own infertility is characteristically, not believed to enter into the question. Male sterility is not recognised; there must be a woman, somewhere, by whom a man can have children. Social institutions support this; a man may acquire a family through the clandestine adulterous relations of his wife.[46]

If a wife who has no children refuses to engage in an adulterous relationship in order to produce children for her husband, at his or his relative's bequest, she may be divorced and replaced with a more compliant wife.[47] This allegedly occurred in the case of *Ogbogu v Ogbogu*[48] a divorce case heard in the Onitsha High Court in 1971. The parties are married in 1961, and for six years of the marriage the wife had no children. The wife alleged that the husband suggested that "she tried elsewhere in the matter of her having a child, which base suggestion she refused". As a result, he refused to have sex with her for four years, and also refused to eat food cooked by her. He purported to "marry" another woman who got three issues for him. Perhaps the second woman was more amenable to his "base suggestion".

The wife who accepts such suggestions, or makes efforts to cure her sterility is not free from jeopardy. In the first instance, especially if failure follows her efforts, she may be accused of adultery. In the second instance she may be accused of practising witchcraft or juju. For example, in *Obi v Obi*[49] the husband accused the wife of practising juju, but the wife claimed that the juju was given to her to "cool her womb", and to cure her barrenness.

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46 Stenning *op. cit.* 111, See also Ross *op. cit.* 270 – potency is confounded with fertility and if a man is potent he assumes that he is fertile, Ekundare (1974) 36.

47 Ross *op.cit.* 270, Henderson *op.cit.* 214.

48 *Ogbogu v Ogbogu* (1972) Suit No 0/8D/71 unreported Onitsha High Court 13 April 1972.

49 *Obi v Obi* (1975) Suit No 0/8D/74 unreported Onitsha High Court 26 September 1975; See also *Nnoli v Nnoli* (1969) Suit No 0/3D/69 (unreported) Onitsha High Court.

The alleged sterility of women has led to innumerable divorces and the separation of spouses, and is a contributing cause of prostitution. Nadel traced among the Nupes (a tribe in Northern Nigeria), an ideological association between female sterility and sexual licence:

> As the barren woman fails by the common standard of marriage and womanhood, she is also exempted from the standards of common morality. Adultery and unchastely count less in her than in other women. And Although the stigma of immorality would still attach to the unchaste barren woman (she would still be called a 'worthless woman'), it would be, as it are, overshadowed by and fused with the other paramount stigma of barrenness itself.[50]

One wonders how many of these wives are truly barren, or are simply victims of custom or their biological plight. For example, a woman in traditional society was completely ostracised during her menstrual periods,[51] and intercourse during menstruation continues to be totally unacceptable to the large majority of people,[52] yet some rare cases of sterility are cured by the discovery that the particular women are fertile only during menstruation.

In many cases of customary law systems, protracted sterility of the wife may be a ground for a divorce and there are cases where divorce was granted because of the wife's sterility.[53]

Men may conceal their barrenness by the biological facts that enable them to claim other men's children as their own. Women, however, are unable to do so. Paradoxically, a woman's ability to bear children, which places her in an advantageous position in some respects, acts as a handicap in others. For example, it is possible for every mother to know her own child, but because of this advantage she suffers the disadvantage of being

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50 Nadel *op. cit.* 154; Stenning *op. cit.* 107.

51 Green (1976) 176-177.

52 There is even a traditional taboo that having sex during the menstrual period could result in giving birth to albino.

53 See *Oluwasola v Gina Adewole* (1959) Grade B Customary Court Ilesha Case No UBD 272/59 and *Akande v Apero* (1962) Grade B Customary Court Egba Odeda Civil Record Book No 12 11.

unable to fabricate claims to maternity. She has to prove her fecundity by parturition. Evidence of her maternity endures for a number of months, and culminates in the actual delivery of a child from within her own womb. On the other hand, the participation of a man in the production of a child is momentary, and, in conformity with social norms, is never an overt act. A man, in most cases is unable to prove his paternity of a child, but because of this, he can make spurious claims to paternity and shift the burden of proof to whoever disputes his paternity, a difficult and sometimes impossible task.

Another misconception entertained about women is inherent in the myth that they are solely responsible for female births, and that if a man who has only female children finds the right woman, he will automatically get male children. Geneticists and physiologists have established facts to the contrary.[54]

The desire for many children is rendered ineffectual by the high mortality rates in tropical Africa and many wives are necessary to produce the large number of children required in a primitive economy. There is abundant evidence however to show that while polygamy increases the number of children generally, it does not do the same for the women involved. The relationship between polygamy and fertility shows that polygamy result in fewer children born especially per each woman in polygamous marriages.

In traditional African society, polygamy was correlated with prestige and wealth. Wealth was exhibited not by possession of land or other property, but by family size. Numerous wives and children acting in turn as producers of further wealth. "Women and slaves constitute the wealth of an African", is a well-known statement.[55] In the traditional Yoruba society, a man's status is not usually judged by his wealth in land or house property. As a rule, it is only by showing that he has many wives that he can convince his neighbours that he is somebody.[56] Among kings and chiefs the matter is much the

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54 Ellis *op cit.* 7-9, Green 1976 25-29, Davis 1973, Weitx 1977, Carter (1972) 13-39.

55 Kingsley *op cit.* 438.

56 Ward (1937) 29.

same, "title is not a criterion of status or respect from subjects, but the size of the harem nearly always is".

Generally, the possession of many wives and children was the status symbol of wealth and social prestige. The wives, especially the first one, shared the prestige to some extent. To be the one and only wife is humiliating. It is a poor indication that her husband is a poor man She would rather be the mistress controlling a number of other women than is a person of no importance. She has more honour and respect from the community, freedom from loneliness and domestic helpers at her beck and call.[57]

Wives and children are not only symbols of prestige, indicative of wealth, but they are also a fruitful source of economic gain, as they are invariably the creators of wealth. With a few exceptions, for example, the Fulani in the North and a few riverine communities who traditionally engaged in fishing, most traditional Nigerian societies are based on a farming economy. Before 1939, there was virtually no manufacturing industry in Nigeria. Cotton was partially processed, and cigarettes are manufactured at Ibadan, but there was very little else.[58] Many communities depended heavily on the labour of women and children on the farms. For example, the Igbos traditionally engaged in farming and women performed most of the farm work.[59] "Native Agriculturists" says Basden, depend almost entirely on their wives and families for manual labour; the peasant farmer would be sadly crippled without his wage less staff of workers.[60] The Yoruba women generally did very little farm work, the wives of farmers usually carried the farm product to the market, a valuable contribution which enabled their husbands to make a profit in cases where none would have been made, if they had to depend on paid labour, a scarce commodity in a subsistence economy where land was freely available to everyone.

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57 *Ibid.*

58 Hodder (1973) 183.

59 Ross *op. cit.* 270; Green *op cit.* 27.

60 Basden *op. cit.* 238; See Meek *op cit.* 233, for a similar statement about some Northern Tribes.

The need for many wives as a source of labour is considerably reduced in modern Nigeria, even in the rural areas. Agriculture is becoming increasingly mechanised, and the subsistence sector of the economy is to a large extent eroded by changes in technique of production.[61] The economic participation of women has shifted from agriculture to trade, and to a lesser extent, to occupations requiring education and skill.[62]

The cyclical situation occurs, wherein numerous wives who do not possess adequate qualifications for procuring employment in the urban areas can be source of embarrassment to an urban dweller of meagre income. But women with the required qualifications, who can contribute effectively to the economic prosperity of a marriage will not usually tolerate polygamy; they would refuse to marry or remain with a polygamist of inadequate means, and tend to marry men of higher social and economic status than their own. Many Nigerian women today marry for lucre, not love. Not only is the educated woman unlikely to choose an economically inferior marriage partner, but she can more easily manipulate the marriage relationship, and can more effectively exert pressure to prevent her husband from marrying further wives than an uneducated wife. The cycle is completed by the fact that men who can afford to maintain many wives, show a reluctance to engage in polygamy, since monogamy to a large extent has replaced polygamy as an indication of social prestige.

The need for men to cater for periodical continence has been cited as one of the reasons why men indulge in polygamy. Many traditional societies forbids women from having sexual intercourse during periods of menstruation, pregnancy and lactation, which might last from two to five years in the latter case. A woman who is menstruating was usually ostracised and various social and other taboos are imposed in most African, as well as other societies.[63] In Nigeria, menstruating women are prohibited from cooking for their husbands in many societies. Similarly, it was the practice in Nigeria to prolong the post-partum period to several years during which time marital sexual intercourse was

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61 Okigbo (1975) 417.

62 Lucas (1970) 486.

63 Burton (1942) 120.

forbidden. Men are not debarred from sexual intercourse during the post-partum periods of a wife. It has been argued that polygamy thus provides a husband with a socially acceptable way of fulfilling his sexual needs during these periods of prolonged female continence following pregnancy, and during lactation.[64]

This argument is not very persuasive, unless the husband has a relatively large number of wives, or some of the wives are past the childbearing age. This is obvious from the fact that, since contraception was not usually practised, and women are anxious to get as many children as possible,[65] invariably all the wives would be at various stages of pregnancy and lactation at the same time. The polygamous husband would therefore be nearly in the same position as a monogamous husband. For example, Forde[66] says that among the Yako, a man is induced to take a second wife, normally a previously unmarried girl within two months of his first wife's pregnancy, since sexual intercourse with the wife is forbidden within two year. This assertion ignores the fact that the second wife could herself become pregnant within a month (or less) of the commencement of sexual relations, and thus be similarly disqualified to have sexual intercourse with the husband.

It is submitted that periodical continence of women was never a valid reason for polygamy. An examination of polygamous families supports this submission. Siblings of different mothers in a polygamous family usually have corresponding ages in many cases, signifying that their mothers are all pregnant at the same time.

Another reason usually advanced in favour of polygamy is the unequal numbers of men and women in a society. It is generally believed that there are more women in the world, and if every man should marry one woman each, there would be a lot of excess women who would not find husbands. Strictly speaking, the unequal numbers of men and

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64 Hillman (1975) 123; Mullins (1965) 243, Gwynn (1933) 77; a Missionary is reported to have said that "A blow must be struck at polygamy and that blow must be struck with a feeding bottle".

65 This is due to high infant mortality in the olden days.

66 Forde (1964) 77.

women in a society do not provide a reason for polygamy, since men do not contract multiple marriages for philanthropic reasons. The hypothesis is that a surplus of females makes polygamy feasible. Thus Basden[67] says, "in order for polygamy to exist at all there must be more women than men". But Westermarch provides numerous examples of societies with a surplus of men, which nonetheless practise polygamy to a considerable extent.[68] The 1991 census of Nigeria affirmed that there are more men than women in Nigeria, yet polygamy continues to thrive in Nigeria.

The need to provide for widow under the levirate and other analogous systems has also been cited as another reason, which contributes to the high incidence of polygamy. In many African systems of law, a man inherited the wives of certain deceased relatives. Similarly, among some communities, a traditional ruler, for example, the King inherited the surviving wives of his predecessor in office, regardless of his previous marital status.[69] Refusal was considered a serious breach of familial obligations or tribal political tradition, and considerable pressures would be exerted on an individual to secure compliance. Such laws obviously encourage polygamy, and in traditional society, the so-called "widow inheritance" was a popular method of acquiring multiple wives. This is also seen as a form of traditional insurance provision for the widow.

In modern Nigerian society, however, such marriages are becoming increasingly rare, and a breach of the law in this respect earns no censure. Frequently a young widow remarries to a non-member of her deceased husband's family. Older widows are now being maintained by their adult children.

Polygamy is however decreasing in Nigeria. Of all aspects of traditional family life, the decline of polygamy particularly in the urban areas is one of the most likely casualties of social changes.

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67 Basden *op. cit.* 238.

68 Westermarck *op. cit.* 52-55 and 64.

69 See *e.g.* Sagay (1974) 12 *Nigerian Bar Journal* Vol. XII 1974.

8.3 CUSTOMARY MARRIAGE IN SOUTH AFRICA

Blacks in South Africa have an option of either marrying by customary law or by civil rites. Customary law was not recognized as a legal marriage in most parts of South Africa, except in the former KwaZulu Code.[70] It is not even referred to as a marriage, but it is referred to as a "customary union" which gives the impression that it is not a proper marriage. In KwaZulu Natal, the Code of Zulu law recognised customary special courts created for blacks and also accepted customary marriages and gave effect to all the consequences that flow from it. The Supreme Court of South Africa has been reluctant to recognise a customary marriage as a legal marriage, thus a customary marriage has had a dubious existence: "twilight between a recognised marriage and an illicit cohabitation".[71] When the indigenous law was recognised, special Courts for blacks are created and granted discretion to apply indigenous law. The Supreme Court was not granted a similar discretion. In issues relating to indigenous law, the Supreme Court only has jurisdiction if there is a legislative provision to that effect. The Supreme Court held that a customary widow could not bring an action to exercise her right to claim for loss of support as a result of the wrongful and culpable killing of her husband.[72]

Another reason for the reluctance of the Supreme Court to recognise customary marriages is that a customary marriage competes with a civil marriage. If the parties are married under customary law and the man later decided to marry another woman by civil rites, the prior existing customary marriage was in the past automatically dissolved by the subsequent marriage.[73] This had the effect of rendering the children born of the first marriage illegitimate and the wife was also discarded without any rights.

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70 Dlamini (1983) 18.

71 Van Loren Van Themaat *op.cit.* 16.

72 *Mayeki v Shield Insurance Co Ltd* 1975 (1) SA 370 (C).

73 *Kumalo v Kumalo* 1954 NAC (S)

The main reason for the reluctance of the Supreme Court to recognise a customary marriage as a legal marriage is that it is potentially polygamous,[74] because a man is entitled to have more than one wife at the same time. Polygamy has been contended to conflict with state policy, which represents white views on what is acceptable behaviour.[75] The Courts have wrongly evaluated customary marriages in terms of civil marriage and have imposed white values on the black community. When the Courts declared customary marriage to be invalid, they overlooked the fact that the position of the woman whose status they purport to enhance is worse off than before, because she is left without a remedy.[76]

Customary law marriage is now recognised in South Africa. The Recognition of Customary Marriage Act[77] now puts customary marriages on the same footing as civil marriages.[78] The Act makes provision for the recognition of customary marriages,[79] specifies the requirements for a valid customary marriage,[80] regulates registration of customary marriages,[81] and provides for equal status and capacity of spouses in customary marriages.[82] The Act also regulates the proprietary consequences of customary marriages and the capacity of spouses. The Act regulates the dissolution of customary marriages.[83]

Section 2 of the Act recognises customary marriages as valid marriages. Section 3 stipulates the requirements for the validity of customary marriages. For a customary marriage to be valid:

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74 *Seedat's Executor's v The Master (Natal)* 1917 AD 302.

75 Kerr (198) 4 *SALJ* 445 at 447

76 Murray & Kaganas (1991) *AJ* 122.

77 120 of 1998.

78 See generally Bonthuys & Pieterse (2000) 63 *THRHR* 616.

79 S. 2(1) Act 120 of 1998.

80 S. 2 Act 120 of 1998.

81 S. 4 Act 120 of 1998.

82 S. 6 Act 120 of 1998.

83 S. 8 Act 120 of 1998.

Both parties to the marriage must both be above 18 years; and both parties to the marriage must consent to the marriage.

The marriage must be negotiated and entered into or celebrated in accordance with customary law.

No spouse of a customary marriage can enter into a marriage under the Marriage Act[84] during the subsistence of the customary marriage. The parties may however marry each other under the Marriage Act provided that neither of them is a spouse in a subsisting customary law marriage with any other person.[85]

The Act also provides that despite the rules of customary law, the age of majority of any person is determined in accordance with the Age of Majority Act.[86] The effect of this is that all parties to a customary marriage will be deemed to be of full age. The perpetual minority of women no longer hold sway in customary marriages.

Section 4 of the Recognition of Customary Marriages Act provides for registration of customary marriages. Persons married before the commencement of the Act are enjoined to register their customary marriages within 12 months after the commencement of the Act or within such longer period as the Minister may from time to time prescribe by notice in the Gazette.[87] Customary marriages entered into after the commencement of this Act, must be registered within a period of three months after the conclusion of the marriage or within such longer period as the Minister may from time to time prescribe by notice in the Gazette. A certificate of registration of customary marriage constitutes *prima facie* proof of the existence of the customary marriage and of the particulars

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84 Act 25 of 1961.

85 S. 10 Act 25 of 1961.

86 Act 57 of 1972.

87 S.4(3)(a) Act 120 of 1998.

contained in the certificate.[88] However, failure to register a customary marriage does not affect the validity of a customary marriage.[89]

Section 6 of the Recognition of Customary Marriages Act confers equal status and capacity to spouses of customary marriage. A wife in a customary marriage has, on the basis of equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity, including the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate. All these rights are in addition to any rights and powers that she might have at customary law.[90] This section ensures equality between men and women as enshrined in the Constitution.[91] In the past the husband in a customary marriage was the administrator of the family's assets. This meant that all assets are registered in the man's name. Children of customary marriages contracted after the commencement of the Act would be able to inherit property from their father and mother.

According to West[92] the Recognition of Customary Marriages Act would have effect on the inheritance of the oldest son of a customary marriage. In the past the oldest son inherited everything. However, the oldest son – assuming the marriage was entered into after the Act came into force and is in community of property, can only inherit the 50 per cent of the estate that belonged to his father. The balance will go to the mother. If the oldest son's father entered into a further customary marriage, the elder son cannot inherit anything that was allocated to the first or second wife in terms of the contract. The Act would no doubt affect the rule of primogeniture, which is the accepted mode of inheritance under customary law.

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88 S. 4(8) Act 120 of 1998.

89 S. 4(9) Act 120 of 1998.

90 S. 6 Act 120 of 1998.

91 S. 9 Constitution of the Republic of South Africa, Act 108 of 1996.

92 Senior Lecturer at the Justice College.

Another commendable aspect of the Act is that the payment of *lobolo* is not essential to the validity of a customary marriage, payment of *lobolo* is not expressly forbidden by the Act, but payment of *lobolo* is now an optional accessory to marriage. The implication of this is that even where *lobolo* has not been paid, the parties could still be considered as married. Cases such as *Mthembu v Letsela*[93] may be decided differently in future.

The Recognition of Customary Marriages Act[94] also provides for divorce. In the past, divorce was a very difficult option as the woman's family would have to return the *lobolo* and this in most cases may have been spent. Divorce in customary marriages would now be granted by regular courts. This is a major departure from the practice under customary law. Under customary law, the families comes together to create the marriage, the family would also be the only ones who could end the union. Divorces are very rare in customary law. It is very difficult to end the marriage because the family groups around both parties have a vested interest in keeping them together.

The wife's family may be in a very difficult situation as they would be required to return all or part of the *lobolo* paid at the time of the marriage. This payment may have been spent and the family may not have the funds or assets available to refund the *lobolo*, resulting in an ongoing debt obligation, which might well devolve on to future generations. Because the *lobolo* has to be refunded in case of divorce, considerable pressure is brought to bear on the wife to continue the marriage no matter how far it might have disintegrated. This however, does not mean that customary marriages have not been dissolved in the past, but rather that divorce occurred rarely and negotiations are often difficult.

Under the Recognition of Customary Marriages Act, customary marriages will be ended in the courts,[95] which have been given the same powers held by an ordinary court under

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93 *Mthembu v Letsela and Anor* (No 1) 1997 (2) SA 936 (T).

94 Act 120 of 1998.

95 Section 8 Act 120 of 1998.

the Divorce Act. This includes property settlements, guardianship of children division of the estate, alimony and child support.

The Act has been described as paper law[96] as it is difficult to balance culture with fundamental rights. While some of the provisions of the Act are commendable, some are not so good. The Act falls short of prohibiting marriage of minors. Minors are still permitted to marry under certain circumstances. South Africa has ratified the African Charter on the Rights and Welfare of the Child. This Charter stipulates that the age on first marriage should be 18 years. The Charter does not provide for any exception in this regard. South African law should be amended to bring it in line with the provisions of this Charter. The Act has also been described as the proverbial "curate's egg" – good in parts and not so good in others.[97] The Act is definitely a step in the right direction.

It should be noted that the Recognition of Customary Marriages Act, which was assented to on 20 November 1998, was proclaimed into law on 15 November 2000 as required by the Act. The provisions of the Act are ambitious. It is however, not possible to assess the effectiveness of the Act in bringing customary law marriages in harmony with other forms of marriages, as the Act took effect only recently.

8.3.1 Payment of lobolo

Lobolo, bogadi, munywalo, ikhazi are some of the name given to bride wealth under customary law in South Africa. They all mean the same thing. However in this chapter the word *lobolo* would be used throughout. *Lobolo* describes a man's obligation to pay cattle, horses, hoes, money or other property to the father or guardian of the intended bride or wife in consideration of their marriage.[98] The cattle actually handed over in payment are called *amabeka* in Zulu and *ikhazi* in Xhosa. The Tswana-Sotho word for *lobolo* is *bogadi* and the Venda word is *thakha*.

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96 Singh (1999) 314.

97 Singh *op. cit.*

98 Simons (1968) 87.

It has been suggested that 'bride wealth' cannot conceptually do justice to '*lobolo*', since the former word signifies a transfer of wealth, whereas '*lobolo* is a blood contract, a mandatory and imperative *sin qua non* condition for any marriage in indigenous African communities'.[99] *Lobolo* figures prominently in all customary marriages. The custom of *lobolo* is extremely tenacious and has survived the many great changes in African life. Men of all classes – peasants, factory workers, domestic servants, lawyers, clergymen, teachers and doctors commonly accept and pay *lobolo* irrespective of the form of marriage.[100]

The practice of *lobolo* is synonymous with marriage in all the systems of customary law in South Africa; it was frowned upon by colonial administrations, because giving bride wealth was thought to represent the purchase price for a wife. Some governments in the past attempted to ban the practice.

Lobolo has long been a subject of controversy among students of African customary law.[101] Olivier[102] summarises *lobolo* as follows:

> It serves to legalise the marriage, to legitimate the children born of the woman, to act as a form of compensation in a general sense, to place the responsibility upon her father to support her if it should become necessary, to stabilise the marriage, and to ensure proper treatment of the wife by the husband and his family.

It is clear, however, that the primary function of the *lobolo* is to transfer the reproductive capacity of the woman to the family of her husband; in other words there is a direct correlation between the transfer of the *lobolo* and the reproductive potential of the woman.

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99 Majeke quoted in the South African Law Commission Discussion Paper *op. cit.*

100 Simons *op. cit.* 87.

101 Prinsloo *et al* (1997) 30 *De Jure* 99; Currie (1994) 152.

102 Olivier *et al* (1995) 33; See also Dlamini (1985) *CILSA* 361-364.

Lobolo also binds families and their relations to the ancestors[103] and is therefore of such religious and ritual significance that an attempt to abolish *lobolo* "would be an assault on African religion"[104] The primary function of *lobolo* remains the transfer of the reproductive potential of the wife to the husband's family.[105]

The raging controversy is whether *lobolo* is an essential requirement of a customary marriage. The South African Law Commission recently considered the question whether *lobolo* should be an essential requirement for a customary marriage or not.[106] The Law Commission found that although it is the view of most Africans that marriage and *lobolo* are inseparable, the actual payment thereof is seldom considered essential for the validity of customary marriage, and payment is often deferred, and may even be waived.[107] The Law Commission report states that because of the ambiguities in the "official" version of customary law it is not finally decided whether *lobolo* is an essential requirement of the customary marriage. The report cited the case of *Blaine P*[108] as an authority for an instance where *lobolo* was treated as an ancillary and optional contract. There is however an overwhelming case law authorities to support the view that there can be no valid customary marriage without an agreement that *lobolo* will be delivered.[109]

As long as the *lobolo* requirement has not been met, or the woman has not fulfilled the expectation of bearing children for the lineage of the husband, the marriage is regarded as "incomplete" and the status of the children is uncertain.[110] The "incompleteness" however, does not affect the validity of the marriage, as the marriage is concluded with

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103 Majeke (1995) SALJ 359; SALC (1998) 50;

104 Skosana quoted by SALC (1998) 50

105 Bekker (1989) 150; Prinsloo *et al* op. cit. 99; Dhlamini (1991) *Acta Juridica* 78.

106 SALC (1998) 56-60.

107 SALC (1998) 56.

108 *Blaine P* 1927 NAC (N&T) 4.

109 Olivier (1989) 54; *Mpakanyiswa v Ntshangase* 1897 1 NAC 17, *Mlungisi v Dlayedwa* 1 NAC 44; *Moima v Moima* 1936 NAC (N&T) 15; *Linda v Shoba* 1059 NAC (N-r) 22; *Mpanza v Qonono* 1978 AC (C) 136

110 Olivier *et al* (1998) 39.

the expectation that the requirements will be met.[111] When the husband or his family refuses to deliver the *lobolo* as agreed, it could bring about the annulment of the marriage, and in some communities the children then become members of the mother's family. Hence the sayings "the cattle bear the children", and "the cattle are where the children are not".[112]

In the case of *Mthembu v Letsela* [113] the father of the deceased husband stated that the payment of *lobolo* was not completed before his son died and therefore there was no customary marriage. The Court seemed to adopt this contention by stating that the daughter of the deceased was illegitimate and therefore cannot inherit from the deceased.

The giving of *lobolo* by the bridegroom's father or by the bridegroom to the bride's guardian is the major essential of the customary marriage. Such phrases as "there can be no customary marriage if there are no cattle with the girl's guardian' are essentially correct statements of customary law.[114] The number of cattle is immaterial so long as some have been delivered and accepted as *lobolo*. This is so for all tribes.[115]

As a rule the cattle are delivered to the bride's guardian, but customary law recognises tender and delivery by 'description', 'nomination or 'word of mouth'. At times, instead of physical delivery, delivery may take place in a manner similar to *constitutum possessorium*. The person tendering the cattle, will state the number thereof, the description, and where they are being kept if the bride's guardian trusts him he will accept the former's word, though usually his messengers are sent to inspect the stock. The cattle will be sent for in due course, but are deemed to have been tendered and

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111 *Ibid.*

112 Olivier *et al* (1995) 40.

113 *Supra.*

114 *Lutoli v Dyubele* 1940 NAC (C&O) 78.

115 *Gcina v Ntengo* Supra, *Dlomo v Mahodi* 1946 NAC (C&O) 61, *Sila v Masuku* 1937 NAAC (T&N) 121.

delivered when so nominated and described; the ownership in the *lobolo* passes, whatever the manner of delivery, upon the consummation of the customary marriage.[116]

An exception to the rule that an actual installment of *lobolo* is essential to the consummation of the customary marriage is found in *Pondo* and Zulu law, according to which a customary marriage is complete if the bride's guardian allows her to go to the family home of the bridegroom as his wife, even if no cattle have been delivered or described; it is essential, however, that the customary marriage ceremonies shall have been observed. *Lobolo* is still payable under the circumstances, but a demand can only be made after the consummation of the marriage.[117]

Among the Zulu, the handing over of a widow or divorcee consummates her customary marriage, provided some *lobolo* has been promised for her; the absence of a ceremony is of little account, and with her guardian's consent the furnishing of *lobolo* may be deferred.[118] According to *Pedi* law, delivery of the bulk of the *lobolo* may be deferred, provided the usual marriage ceremony is observed and there has been a token delivery, usually consisting of a beast.[119]

8.3.1.1 Functions of lobolo

There is the general belief that *lobolo* amount to the purchase of a woman. Feminists believe that *lobolo* conduces to the inferior status of women. They also see the institution of *lobolo* as a transaction of purchase and sale. There are divergent opinions concerning the exact significance and function of *lobolo*. It is accepted today that *lobolo* transaction is not one of purchase and sale because the husband cannot 'sell' his wife, as she is not a chattel that can be traded. The husband's rights and powers in relations to his wife are

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116 Krige 130; Schapera 242; Van Warmelo 107; *Robo v Madlebe* Supra.

117 *Maxayi v Tukani* 1 NAC 99

118 *Simelane v Sugazie* 1935 NAC (T&N) 45; *Zulu v Mkwanuyana* 1936 NAC (T&N) 1

119 *Moima v Moima* 1936 NAC (N&T) 15.

not at all like those which buyers acquire over the things they buy.[120] He does not 'own' his wife in any sense. He cannot destroy her, sell or lease her to another person. He cannot 'repudiate' the marriage and recover the *lobolo* because of her 'latent defects'.[121] He is legally obliged to maintain her and fulfill the other duties that a husband owes to his wife. He is liable to lose her and forfeit his claim to a return of the *lobolo* if he ill-treats or neglects her. A *lobolo* transaction is simply *sui generis*.

The Commission for gender equality rejected the practice of *lobolo* to the extent that it is used to commodify women based on the perceived value of a woman.[122]

The ideas that bride wealth buys wives have now been exposed as a fallacy,[123] and, in general, twentieth-century anthropology has encouraged a much more positive interpretation of the institution.[124] Marxist theory contends that bride wealth is a mechanism whereby seniors can preserve their dominance over juniors and women,[125] anthropologist of the functionalist school have shown that bride wealth is no more than a consideration for a wife's reproductive potential.[126] It is a *quid pro quo* that compensates the wife's family for the loss of a daughter.[127]

According to the more tolerant perspective, bride wealth works to stabilise marriage[128] and to protect wives,[129] a view that is supported by the rule that husbands who mistreat

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120 Simons *op. cit.* 88.

121 *Ibid.*

122 See "Recognition of Customary Marriages Bill" Submission to the Justice Portfolio Committee, 22 September, 1998.

123 Simons *op.cit.* 88.

124 Dlamini (1984) 27 *De* Jure 150-5.

125 Terray (1972) 163

126 Reuter *Native Marriages in*South *Africa* 218-22; Mathewson (1959) 10 *Journal of Racial Affairs* 72, Brander (1958) African Studies 34; Jeffreys (1951) 10 *African Studies* 145.

127 Preston-Whyte (1974) 187.

128 See Gluckman (1969) 62-3; Simons *op.cit.* 95.

129 The 1883 Cape Commission Report on Native Laws and Customs 70.

their wives ought to be penalised when claiming return of bride wealth on divorce. Some writers have gone so far as to say that bride wealth is 'the Bantu woman's Charter of liberty'[130] and that it benefits women by providing a public measure of their worth.[131] Functionalism has also stressed the ritual significance of bride wealth by showing how it binds families and their relations to the ancestors.[132] In the past, the ritual significance of bride wealth is apparent in the practice of segregating property used for marriage from ordinary trade goods. Thus, in some communities, the livestock given as bride wealth are withdrawn from the general economy into a closed system of marital transactions.[133]

Van Tromp is of the opinion that *lobolo* is a kind of compensation.[134] Krapf states that the term compensation should not be viewed only in an economic or commercial light, for it also has a religious, magic, a social and a legal aspect. Schapera states that the main function of bogadi is to transfer the reproductive power of a woman from her own family into that of her husband.[135]

Traditionally, it is believed that *lobolo* prevents young people from marrying at too early an age, protects the virtue of young girls, safeguards them against prostitution, ensures good treatment and care of the women, gives a wife a legal claim on her father to asylum, maintenance and protection if her husband and his people fail her, and discourages divorce.[136]

Lobolo has changed from the traditional livestock to cash.[137] In response to the profound influences of capitalism, cattle and the other goods formerly reserved for marriage

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130 Soga (1931) 274-5.

131 Dlamini (1983) 151-2, Hunter 190; Chinyenze (1983-4) 1-2 ZLR 241.

132 Krige (1939) 12 Africa 403; Van Tromp 49 Dlamini (n37) 191.

133 Samsom (1976) 143.

134 Schapera *op. cit.* 138.

135 Schapera *op. cit.*

136 Simons *op. cit.* 88.

137 Mathewson 72-6; Holleman (1960) 11 *J Racial Affairs* 106-9.

transactions have acquired a new value, measurable against cash and consumer goods. Livestock have lost their special symbolic qualities;[138] nearly everyone now gives cash or a combination of cash and livestock as bride wealth.[139] The change composition of bride wealth has also affected its functions.[140] The amounts of bride wealth have increased enormously.[141] Some people are of the opinion that the bride's family must be compensated for their expenditure on her education[142] but the bride's family always tends to profiteer from their girl's marriage. The danger of high bride wealth is that it encourages men, who cannot afford the sums asked, to enter into informal unions, which in turn undermine the entire institution of marriage and render offspring illegitimate.[143] People charge bride wealth for their daughters simply because hey themselves had to pay it for their own marriages and, also to settle inherited marriage debts.[144] The property received by the bride's parents, especially when it is cash rather than cattle, is no longer being kept as financial security for the divorced or widowed wife. Instead, it is being spent on day-to-day living expenses.[145]

The Gender Research Project (Centre For Applied Legal Studies), for example, found that most of the cash collected as bride wealth, is used by parent to pay for the education of other siblings or to improve their households by acquiring new furniture. Bride wealth is therefore no longer available to support a wife and her children if the marriage breaks down.[146]

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138 Simons 95; Lugg (1945) 4 *African Studies* 26-7183.

139 SALC Discussion Paper 74 at 48.

140 Dlamini (1985) 18 *CILSA* 365.

141 Pre marriage gifts and wedding festivities are usually not modest

142 Brandel 34.

143 Hlhope (1984) 17 *CILSA* 168-70; Dlamini (1985) 18 *CILSA* 365. See also *Mthembu v Letsela* (*Supra*).

144 Hlhope *op. cit.* 169.

145 Burman & Berger (1988) 4 *SAJHR* 340.

146 It is misleading to say that bridewealth gave women financial or social security, since the *lobolo* accrued to a wife's guardian, not to the woman herself.

In communities that are desperately poor, bride wealth seems a profligate practice.[147] Needy families still feel obliged to enter into bride wealth agreements. Although it is found that no actual transfer of property may take place, which seems to suggest that bride wealth is important primarily to give a sense of validity to the marriage and to incorporate parents and kin groups into marriage negotiation.[148]

There is a new objection to the customary practice of bride wealth and that is the fact that some people are of the opinion that bride wealth leads to subordination of women. A common charge is that, because of commercialisation, it functions as the purchase price for women.[149] Thereby demeaning their status.[150]

According to the research conducted by the Gender Research Project (CALS) women are not agreed on the effect that bride wealth had on their status. Some women claimed that it dignified them, while other said that being treated in the same way as property disgraced them.

8.3.1.2 Lobola and discrimination against women

Bride wealth does not directly discriminates against women contrary to section 9 of the Constitution[151] since men have to pay[152] The practice of bride wealth also does not amount to indirect discrimination. Indirect discrimination suggests, that, although a practice appear gender-blind, the way in which it operated over time worked to the detriment of women.[153] According to the South African Law Commission, it would be impossible to

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147 See Murray (1977) 21 *JAL* 80; (1976) 53 *African Studies* 99; Koyana, 2; Brandel *op. cit.* 34.

148 Most people interviewed by the Law Commission are of the view that parents ought to play a part in the process of marriage.

149 See Mathewson *op.cit.* 75.

150 See Chinyenze *op. cit.* 229.

151 Constitution of the Republic of South Africa, Act 108 of 1996.

152 Any argument under S. 9 of the Constitution of direct discrimination would fail.

153 Albertyn & Kentridge (1994) 10 *SAJHR* 164-7.

demonstrate that the payment of bride wealth was the condition precedent to the unfavourable treatment of wives, especially in view of the substantial literature claiming that bride wealth function to benefit women.[154]

Bride wealth has effect on individual rights and freedoms as it can bind women to unwanted marriages. If a wife seeks a divorce, her family is usually obliged to return bride wealth, and, rather than do so, they may force her to put up with an unhappy relationship.[155] It should be noted that the objection of undue pressure could not be remedied by legislation. Women have the freedom to end their marriages when they wish, and the law cannot control all economic and social circumstances that might compel or persuade them to remain married.[156]

The question whether *lobolo* should be prohibited or controlled was discussed in the Law Commission's report. It was found that, although the opinion is divided on the value of *lobolo* in modern society, and notwithstanding economic and social abuses, few people wanted to see *lobolo* abolished. People remain deeply attached to the practice despite its drawbacks.[157] *Lobolo* is a remarkably durable practice that has strong appeal as a symbol of African cultural identity.[158] The Rural Women's Movement felt that bride wealth signifies respect for the spouses' ancestors and that it dignifies the wife.[159]

Another important consideration is the difficulty of enforcing laws that seek to ban bride wealth or to restrict the amount payable. In the past, these prohibitions proved easy to

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154 SALC Discussion Paper 74 at 50.

155 Armstrong *et al* (1993) 17 *Int J of Law & Family* 340.

156 Welch & Sachs (1987) 15 *Int J Sociology of Law* 390.

157 SALC NO. 74 53-56; Dlamini (1985) 363; Hlope (1984) 26 *CILSA* 170.

158 According to Whooley in Verryn 313 "*Lobolo* ... is the framework that people use to express and to bring about complicated changes in terms of relationships and deep changes in terms of emotional realities, values, attitudes and concepts. It is also the language that the ancestors understand and bless.

159 This view was support at the Law Commission Workshop in Western Region.

circumvent:[160] bride wealth could be paid in forms other than cattle or cash and premarriage gifts could be deliberately inflated.[161]

The controversy whether *lobolo* is required for the validity of a customary marriage has now been settled. The Recognition of Customary Marriages Act[162] sets out conditions for the validity of a customary marriage entered into after the commencement of the Act. Sections 3(1) of the Act provides as follows:

> For a customary marriage entered into after the commencement of Act to be valid:
>
> (a) the prospective spouses
>
> (i) must be above the age of 18 years; and
>
> (ii) must both consent to be married to each other under customary law; and
>
> (b) the marriage must be negotiated and entered into or celebrated in accordance with customary law.

It would therefore be safe to conclude that payment of *lobolo* is no longer necessary for the validity of a customary marriage.

8.3.1.3 Lobolo and virginity test

This writer observed a practice, which is connected with the payment of *lobolo*. This is the practice of virginity test. This practice is especially prevalent in KwaZulu Natal province. Virginity test is a practice whereby girls between the ages of 9 and 16 are tested in order to confirm whether they are virgins or not. Parents are interested in

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160 Welch & Sachs 388; Uzodike (1990) 2 *Afr.J Int & Comp* L 290. Under s. 61(1) of the KwaZulu/Natal Codes, the amount of bridewealth is limited to ten head of cattle for the daughter of a commoner and fifteen head of cattle for the daughter of a headman, the son, brother or uncle of a chief. No limit is specified for marriage to chiefs' daughters.

161 Dlamini (1985) 232.

162 Act 120 of 1998.

preserving the virginity of their female children until they are married. The reason for this is that girls that are virgins attract more *lobolo* than girls that are not. In a documentary on virginity test aired on ETV, the woman that was performing the virginity test stated that she was a virgin when she got married and that her guardian collected 13 head of cattle for her *lobolo* and that it is essential that girls should remain virgins until they are married in order to enhance the value of *lobolo* they would attract on marriage.

Girls that are tested and found not to be virgins brought shame to their parents. Their parents are expected to pay a fine of one cow to the local chief and in addition to this, the whole community knows that they are not virgin and therefore would not attract as much *lobolo* as girls that are would.

The practice of virginity test is unconstitutional for the following reasons:

- The virginity test breaches the Constitutional provision of equality as it is done only on girls and not on boys. Girls are encouraged to remain virgins until they are married. Boys are not so encouraged.

- The test violates the right of the girls to privacy and physical integrity.

- The test poses a danger to the girls' health. The woman performing the test puts on one pair of gloves, which is used to examine all the girls. This exposes the girls to a lot of health risks, as it is possible to transmit one form of disease or another from one girl to another.

- The test also violates the right not to be subjected to inhuman or degrading practice. The test clearly violates the girl's rights to dignity as it portrays them as immoral and thereby depriving them of walking about with their dignity intact.

- The virginity test also exposed the girls to the risk of HIV/AIDS infections. This is due to the prevalent of people with HIV/AIDS who are told by the native doctors *(Sangoma)* that their HIV/AIDS would be cured if they sleep with virgins. Such people are on the look out for girls, that are confirmed to be virgins. Such virgins are often hunted down and raped. This practice of sleeping with virgins in the hope that it is a cure for HIV/AIDS explains the reason why so many toddlers and infants are raped.

Virginity test is a practice, which flows from the institution of *lobolo.* Virginity test should be discouraged and the public should be educated that sleeping with virgins or very old grannies and babies are not cures for HIV/AIDS.

8.3.1.4 Reasons for the persistence of lobolo

Men and women cannot easily free themselves from the network of kinship claims; inherited debts and recurring obligations attached to the *lobolo* institution. It is because of this entanglement, as much as its legal significance in customary marriage, that *lobolo* has persisted beyond its span of useful life. A man needs his daughter's *lobolo* to meet the cost of her wedding, to assist a son to marry, or to pay an old *lobolo* debt. A new *lobolo* agreement can start a fresh chain of reactions to bind the coming generation.

Despite argument to the contrary, the payment of *lobolo* is necessary to validate a tribal marriage. No wife can feel secure in her marital status, no father has assured rights in his children, until he has handed over *lobolo* for her. But the attachment to the custom goes far beyond the bounds of legal obligation. The parties to most civil marriages pay or receive *lobolo* although it is not essential to the validity of their marriages.[163] Women

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[163] See Prinsloo *et al* (1997) where it was found that *lobolo* was given or negotiated in respect of all customary marriages, in 96% of double marriages, and in 90% of the civil marriages of respondents interviewed.

generally are staunch supporters, so much so that a working wife has been known to pay her own *lobolo* on her husband's behalf out of her earnings.

Conventional reasons are given for adhering to the practice of *lobolo*. People say that a *lobolo* compensates parents for the cost of raising and educating their daughter and for the loss of her services; discourages a man from ill-treating his wife, prevent a wife from deserting her husband, and therefore deters them from dissolving their marriage; obliges a woman's family to give her shelter and support in case of need; provides a form of social security; and constitutes an important part of the African 'heritage'.

Some people believe that *lobolo* marriages are more binding than civil or church marriages. But there is no evidence to support the contention. This is so because even in civil and church marriages where the parties are Black persons, *lobolo* is also paid. It ought to have as much stabilising effect on them as it is supposed to have on customary marriages. In fact, it has failed in both to stop the process of disintegration. *Lobolo* itself is indeed an important cause of breakdown.

Lobolo has lost its former positive functions. It is not now an efficient method of establishing the validity of marriage, or a mechanism for controlling the distribution of women. The practice of *lobolo* has suffered most from the decline of the joint family system and the emergence of the nuclear family unit of husband, wife and children. Marriage is more of an individual relationship than it was in the traditional society. Girls are no longer easily bullied into marrying a man whom they do not favour. Kinship ties have been loosened. Men find their own *lobolo*, instead of obtaining it from their fathers or relatives, and are therefore less responsive to family pressures. Customary law has not adjusted to these changes. *Lobolo* still enables a man to exercise much power over his daughter's marriage and domestic life. The discord between the law and social reality is a major source of the unfavourable qualities acquired by the custom in the contemporary society.[164]

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[164] Simons *op. cit.* 95.

8.3.2 Child marriages in South Africa

The incidence of child marriages in South Africa is low. However, it was discovered that child marriages exist in rural areas. Betrothals of infants and children of immature age are void *ab initio* as being contrary to public policy. The boy and girl may acquiesce to the prior arrangement made for them by their parents, and agree to marry when they reach puberty. This will validate the initial betrothal.[165] An engagement made without consulting a young man, and later ratified by him is validated by the subsequent act of ratification.[166]

The Recognition of Customary Marriages Act allows parties who are under 18 years to marry provided that both parents of such minors or their legal guardian consent to the marriage.[167] The Minister of Home Affairs or any officer in the public service may also give written permission to minors to marry if the Minister or the said officer considers such marriage desirable and in the interests of the minors.[168] Where permission is given to minors to get married, they must still comply with all the other requirements.[169]

It is submitted that child marriages should not be permitted under any circumstances. South Africa has ratified the African Charter on the Rights and Welfare of the Child. The Charter prohibits child marriage and the betrothal of girls and boys.[170] State parties to the Charter are enjoined to take effective action including legislation which shall specify the minimum age of marriage to be eighteen years and make registration of all marriages in an official registry compulsory.

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165 Schapera 128-30; Van Warmelo op. cit 35, 53,57, 59 *Mngomezulu v Lukele* 1953 NAC (N-E) 143

166 *Mlakalaka v Bese* 1936 NAC (C&O) 22

167 S. 3(3)(a).

168 S. 3(4)(a).

169 S.3(4)(b).

170 Article 21(2) African Charter on the Rights and Welfare of the Child.

8.3.3 Polygamy

The traditional law of the Black people of South Africa provides for polygamous marriages. A man is legally allowed to have more than one wife.[171] Each wife in a polygamous marriage occupies a particular status or position relative to the other wives in the household, and constitutes, with her children, a separate proprietary unit within the family.

Polygamy is on the decline, because of the influence of religion, the western value system, economic considerations, and urbanisation, among other reasons. The traditional marriage exhibits a more communal, concrete and ceremonial character than the western-type marriage.

8.3.3.1 Ranking and status of wives

All black tribes allow polygamy, nor is there any limit imposed by law as to the number of wives a man may marry. This is, however, regulated by a man's desires and his ability to pay *lobolo* for, and maintain, a further wife.

According to early writer, the wealthy often had wives 'thrust' upon them owing to their affluent circumstances; to refuse a proffer of marriage made by a girl's people was to insult them.[172] Among the Black community in South Africa, there are two systems of polygamy. The simple system and the complex or house system.[173]

Under the simple system, a man has one main or great wife, being the first woman he marries; all subsequent wives are subordinate or subsidiary to her, and each successive

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171 See KwaZulu Law on the Code of Zulu Law 16 of 1985 and the Natal Code of Zulu Law Proc R151 of 1987.

172 *Macleans Compendium* 45-6.

173 Seymour *op. cit.* 126.

wife is immediately subordinate to her predecessor. The control and ownership of all property vests in the family head. Upon his death, ownership and control vests in the eldest son of the great wife; the minor wives and their sons have no rights in the estate, beyond their rights of maintenance, and, in the case of sons, of *lobolo* for their first wives. Under this system, the wives have little, if any, say in the administration of the property, as they are themselves regarded as assets; upon the death of their husband they come under the guardianship of his heir, who literally takes his place. The family head, or his heir, has the burden of providing for the whole family.

The family head exercises a lot of restraint in the management of the estate, for Black law looks upon him as "father" of the family, rather than an "owner" of the estate. It is a joint communal possession containing, in some instances, ancestral property in which the senior males of the family head's family are indirectly interested. Although the family head is the legal owner of the estate, his ownership is burdened with what might be called personal rights of various types, or which maintenance and *habitatio* are two of the chief, subject to mutual corresponding duties on the part of the members of the family.[174]

The practice of the simple system of polygamy is not common in South Africa, except among the *Tsonga* of the Transvaal. It is not all *Tsonga* that practice the simple system, it is only those who have adhered to the original *Tsonga* laws. The Zulu has influenced most Tsongas and they now practice the complex system.

8.3 3.2 The complex system of polygamy

A house is defined in the Black Administration Act 38 of 1927 as 'the family and property, rights and status, which commence with, attach to, and arise out of, the customary union of each Black woman" this definition is applied by the Court only to customary marriages in those tribes which practice the complex system of polygamy.

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[174] Seymour *op.cit.* 68.

Under the complex system, among the *Nguni* tribes, a polygamist has two main wives, and in some tribes he may have three; any further wives he may marry are subordinate wives. Generally each wife creates a house and the whole constitutes the family head's family, and is subject to his guardianship and control.

A man's first-married wife is his great wife, and she and her family become the entity known as the great house. This house holds the highest rank in the family home.[175] The second-married wife is invariably the right hand wife, and she and her family constitute the right hand house, which is an entity distinct from the great house, except for the fact that both houses are under the control of the family head. They might almost be regarded as separate families, but since their interests are not so distinct, it is sufficiently accurate to describe them as having separate rights and identities.

The *Pondo* do not use the term right hand wife or house; they call the first wife the great wife and her house the great house, but the second-married wife is called the second wife and her house the second house. In dealing with this tribe, however, the Appeal Court usually refers to the second wife or house as the right hand wife or house, because her position is virtually the same as that held by the right hand wife in the other Cape *Nguni* tribes.[176]

The third wife is the *Qadi* (rafter, support) to the great house; she creates a house having its own separate rights and identity. It is sustained by its own resources, but is directly subordinate to the great house; the practical effect of this subordination is observable chiefly in matters of succession.[177] The fourth wife is the *Qadi* to the right hand house, with similar results.[178] The fifty wife is also a *Qadi* to the great house, (like the third

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175 *Tyoba v Vuta* 6 NAC 42; *Bokileni v Bokileni* 6 NAC 43; *Ngcongolo v Ngcongolo* 1930 NAC (C&O) 13; *Rasmeni v Rasmeni* 1935 NAC (C&O) 70; *Matilose v Matilose* 1929 NAC (C&O) 12; *Dinwayo v Dinwayo* 1929 NAC (C&O) 13; *Dlunge v Dlunge* 1937 NAC (C&O) 176

176 *Mdontsane v Mdontsane* 1939 NAC (C&O) 155.

177 *Dlunge v Dlunge* supra.

178 *Dlunge v Dlunge* supra.

wife), but while having separate rights and identity is subordinate in position to the first *Qadi* to the great house. The sixth is further *Qadi* to the right hand house, and so on.[179]

Each wife thus falls automatically into either the great or the right hand section. The general rule is that her rank depends upon the chronological order in which she has been married; generally, it is not competent for a commoner to nominate or alter the precedence of rank of any of his wives.[180]

There are exceptions to this general rule. For example; the giving to a wife of a rank at variance to the normal order is permitted if it does not have the effect of altering the status of any wife previously married, provided that a public announcement of the former's rank is made at the time of her marriage. Thus where the *lobolo* of the third-married wife has been paid out of the property of the right hand house, or for some other good reason, she may be publicly declared to be *Qadi* to the right hand house at the time of her marriage. If no such public appointment is made, she is *Qadi* to the great house.[181] If a *Qadi* wife has been divorced before bearing a male child, another wife may be married in her place.[182] Among the *Pondo*, where a Qadi wife has died after bearing children, including a son, it is not competent for the family head to marry another woman in her place.[183]

According to *Thembu* law, where, before she has borne male issue, a family head's great wife, being his only wife, has died or where her customary marriage has been dissolved, and the family head thereafter marries another woman, the latter automatically becomes the great wife in place of the deceased woman, nor may she be nominated to any other rank, for example, to the rank of right hand wife.[184]

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179 *Dlunge v Dlunge supra.* There cannot be a *qadi* to a *qadi* (*Mangala* 1932 NAC (C&O) 39).

180 *Mdontsane v Mdontsane supra.*

181 *Simama v Mjiba* 2 NAC 126.; *Mgundlwa v Paliso* 4 NAC 378; *Kondile v Hula* 1934 NAC (C&O) 1

182 *Gcanga v Gcanga* 1949 NAC (S) 137.

183 *Nogaga v Madkizela* 1962 NAC (S) 55.

184 *Namba v Namba* 1956 NAC (S) 35.

the great wife in place of the deceased woman, nor may she be nominated to any other rank, for example, to the rank of right hand wife.[184]

Among the *Xhosa*, a family head may have a third main wife call the left hand wife, and her house stands at the head of a third section of houses; the left hand, which is never created before the right hand section, is regarded as support to the great house section in the event of there being no heirs in the great house.[185]

According to Section 38 Transkei Marriage Act,[186] the status and rights of wives and children are defined as follows: 'Whenever any male person becomes a party to more than one marriage, irrespective of whether anyone of his marriages is a civil marriage:

- The status of every wife of such person;
- The status of every child born of any such marriage; and
- The legal rights (including the right to succession) of every such wife or child

- Be determined in accordance with the customary law applicable to the marriage concerned and a civil marriage contracted by such person shall for that purpose be deemed to be a customary marriage which is subject to the customary law applicable to such male person or; if he is not subject to customary law, to the customary law applicable to the female party to such civil marriage or, if neither party to such civil marriage is subject to customary law, to the customary law applicable in the area in which the parties are or are ordinarily resident.

The provision of the above Act is similar to the position in the Cape *Nguni* tribes.

Men of the *Tswana*, *Sotho*, *Venda* and Tonga tribes do not group their houses into sections but adopt a linear method of ranking their co-wives. The first wife married is generally the chief wife, and other wives rank in the order of their marriages. This

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184 *Namba v Namba* 1956 NAC (S) 35.

185 Soga *op. cit.* 54.

186 Act 21 of 1978.

general rule is subject to tribal variations. The wife married with *lobolo* provided by the father of the husband, the latter's cross cousin, or the girl to whom he was first betrothed, may take precedence over all other wives irrespective of the order of marriage. The ranking system may be intricate, as among the Venda.

No two wives are of equal rank in the polygamous household. The position that each wife occupies in the family hierarchy determines her status and that of her children. The eldest son of the chief wife is the general heir. When his father dies he inherits the property of the great house and of heirless houses affiliated to it, succeeds to his father'' position and becomes the head of the joint family. The eldest son in the senior house of the right hand, left hand or *qadi* section, as the case may be, similarly inherits the property of his own house and its heirless affiliated houses. A Zulu polygamist who wished to benefit a favourite wife or son may create an *ikohlo* section and install her in its senior house, which ranks next in importance to the chief wife.

In the ranking of wives, there is little room for the man to manoeuvre. A woman usually knows before her marriage what rank she will occupy in her husband's household. He cannot arbitrarily change the status of his wives, their houses and children. The arrangement discouraged intrigue, dispute and rivalry between wives and sons.[187]

8.3.3.3 The sororate or the seedraiser

The sororate, and the allied practice of marrying a 'seedraiser' or 'substitute' to replace a deceased wife, constitute another category of preferential marriages in which a bride's feelings are likely to be subordinated to her family's interests. In a polygamous society a man is free to marry a wife's sister or other close relative, to satisfy his desires, strengthen his ties with her family, or to provide his wife with a companion. The substitute or seed raiser wife (*Tswana*: *sehatlo*; *Xhosa*: *isisu)* takes the place of a barren wife or a wife who died without issue.

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[187] Simons *op. cit.* 84.

The general rule is that when a woman has died without issue shortly after her marriage, her husband may claim a substitute or a refund of part of the *lobolo*, which he paid for her.[188] Complications may arise if she died during childbirth, or if her husband caused her death, or if the divining bones disclose that a member of his family killed her by witchcraft. In some tribes the husband is liable to forfeit his claim in such cases. When the circumstances are normal, the deceased wife's family will try to provide a substitute, both to maintain the family connection and to avoid having to refund cattle settled as *lobolo*. The husband then paid a reduced *lobolo* for the substitute wife.[189]

In the case of *Nthole v Lebata,*[190] the deceased wife's father had three other daughters, agreed 18, 15, and 13 years respectively. He offered the bereaved husband the choice of the two younger girls. The husband rejected them and asked for the eldest daughter. Her father demanded a full *lobolo* for her, but the husband did not accept her and married another girl. In an action to claim the refund of the *lobolo* paid on the deceased wife, the assessors stated that 'the father of the girl has no right to refuse with another daughter if there is one,' but that the suitor had no right to demand a particular girl.[191] One assessor added that the practice of *Sehantlo* is almost extinct among the Transkeian *Sotho.*[192]

If the sororate wife consents to the match of her own free will, and her guardian accepts or waives a *lobolo* for her, a valid customary marriage will result. The Court will not order a man to deliver an immature or unwilling girl, even though she may have been pledged, to a plaintiff who demands her as a substitute. The promise to give her in

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188 *Mgabadeli v Mciteki* (1903) 1 NAC 69; *Jumba v Dubulukwele* (1906) 1 NAC 119; *Masondo v Shoba* 1936 NAC (N&T) 39. Transkeian Proclamation 189 of 1922 abolished *ukukhetha*, the right of a husband to claim a refund of *lobolo* because his wife has died.

189 *Xolikati & Another v Mbela* (1913) 3 NAC 60.

190 *Ciliza v Ciliza* 1942 NAC (C&O) 125

191 Simon *op. cit.* 86.

192 *Ibid.*

marriage is contrary to public policy and natural justice, for full freedom of choice in marriage 'is the prerogative of all women of whatever colour or race.[193]

Under the Zulu custom, if a man died unmarried, his family might under the *ukwusa* custom (to raise up) display similar devotion and sense of piety by using cattle from his estate to *lobolo* a wife and raise an heir in his name. It is permissible for an impotent man to resort to an analogous device to obtain an heir. The Court found in *Ciliza v Ciliza*[194]that a Zulu with four daughters and no son had become impotent. He married a young bride and announced at the wedding ceremony that his brother's son would beget a son from her on his, the reputed husband's behalf. The Court ruled that he had acted in accordance with an established tribal custom and that it was not contrary to public policy or natural justice.

8.3.3.4 Reasons for the practice of polygamy

Many reasons have been advanced for the continued existence of polygamy. Polygamy serves a different purpose in peasant communities in Africa. It distinguishes the powerful and the successful from the commonality. It is also a means of cementing political authority and strengthening the elite. Men would offer their daughters in marriage to chiefs and other persons of high rank to demonstrate loyalty and win their favour. But the joint family rested on a solid material basis from which it derived its strength.[195]

Men derived many benefits from plurality of wives, besides the satisfaction they may derive from sexual variety; they commanded a larger supply of workers than that available to a man with one wife. Wage earning was rare in the subsistence economy, where all adults had access to the land. Every household had to rely on the labour of its own members. Women are the chief producers of foodstuffs and domestic utensils. They

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193 *Gidja v v Yingwane* 1944 NAC (N&T) 4 at 6, *Mathe v Kekana* 1934 NAC (N&T) 59.

194 *Ciliza v Ciliza* 1956 NAC 127 (NE).

195 Simons *op. cit* 48.

did most of the work in the fields and at home. The more wives a man had, the larger was the area his family could cultivate, and the greater was the surplus available for paying tribute to the chief or for providing dependants and guests with food and beer. Polygamy was correlated with rank and wealth. The more wives a man had, the more generous he could afford to be, and the words of a man wit many wives carried weight in the tribal council.

Polygamy in the traditional society had the great merit of enabling all women to marry and have children. Tribalism provided no wage-earning occupations or gainful employment of any kind outside the domestic group, except to a few specialists. No woman, and for that matter, no man, could live independently of a family. The choice for a woman lay between marriage and lifelong dependence on a father, brother or other male kinsman. Since there are more marriageable women than men – because the women married at an earlier age and lived longer – the adoption of monogamy would have left some women in a state of permanent spinsterhood, for which condition the tribal society contained no arrangements.[196]

An abundance of land, the subsistence economy, a self-sufficient joint family organisation and polygamy are strands in the texture of the peasants' society. White settlers, by taking some of their land and crowding them into an area too small to accommodate their expanding population, disrupted their economy, forced the men into the labour market, and in so doing destroyed the material foundations of the joint family. The possession of many wives is no longer a source of wealth or a symbol of high rank and status.

By means of polygamy and the associated practices of the levitate (*ukungena*) and sororate (*isisu*), every girl, widow and divorcee had a reasonable certainty of entering into a fully sanctioned marital union and of bearing legitimate children throughout their reproductive years. The sharing of a husband may not have seemed too great a price to

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[196] Simons *op. cit.* 52.

pay for the advantage of being a wife and mother in a society where other careers are not open to women. The co-wives also benefited from the companionship and security that a large establishment provided. Co-wives shared the burden of work and of bearing children. A form of family planning operated in tribes whose customs prohibited intercourse during the period of lactation, which might extend over two or more years. Such birth controls would have been less effective if the man had been limited to one wife. A major gain from polygamy was that it preserved women from the excessive childbearing, which has harassed working class wives in monogamous communities.[197]

A first wife rarely opposed her husband's decision and often urged him, to take a second wife. In the traditional African society, it is a matter of pride to wives that they belong to a large establishment; they have rank among themselves, and they prize very highly the privileges attached to their positions.[198]

8.4 A COMPARISON CUSTOMARY LAW MARRIAGE IN NIGERIA AND SOUTH AFRICA

African customary marriages exist in both Nigeria and South Africa. The common features of customary marriages can also be found in both jurisdictions. Polygamy is also common. Multiplicity of marriages also occurs in both societies.

The payment of bride wealth is a common practice in both jurisdictions. Dowry is a token sum in most parts of Nigeria, except in the Eastern part of Nigeria, where dowry is very high. lobola however is very high in South Africa. In Nigeria, there has been statutory intervention [199] to reduce bride price, but in practice this law is being infringed with impunity without any consequences. The attempts to limit bride wealth though

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197 *Ibid.*

198 Simons *op. cit.* 55.

199 See *e.g.* Limitation of Dowry Laws, Laws of Eastern Nigeria (1963), See particularly S. 3 limiting bridewealth to sixty Naira; Western Nigerian Marriage Divorce and Custody of children Adoptive Bye-Laws Order 1958, WRLN 456 of 1958.

generally welcomed continued to be flouted. There is difficulty in enforcing them since the settlement of bridewealth is a private concern of the families involved.

Bridewealth or *lobolo* is also practised in South Africa. The amount of *lobolo* is very high. *Lobolo* in South Africa takes the form of cattle, sheep, goats and money. Money is becoming more common.

In both jurisdictions, it is not completely settled whether the payment of bridewealth is a condition precedent to a valid customary marriage. In Nigeria, there are some customary marriages, that are valid without the payment of bridewealth. Amongst the Yoruba of South-western Nigeria, the marital gifts comprising of clothing, foodstuff and drinks are more important than the actual bridewealth. However, bride wealth where payable is usually a token sum.

Most people in South Africa regard the payment of bride wealth as essential to customary marriage. The South African Law Commission has however found that the payment of *lobolo* is not essential to the validity of a customary marriage.[200] The Recognition of Customary Act[201] does not make payment of *lobolo* essential to the validity of a customary marriage.

In both jurisdictions, bride wealth is always refundable by the woman or her family in case of divorce. While in eastern Nigeria, statute has stipulated the maximum amount repayable on divorce. The bride wealth refundable must not exceed the maximum amount prescribed by the statute. Among the Yorubas however, the full amount of the dowry is repayable irrespective of the length of the marriage or the number of children procreated during the marriage.

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[200] Compare the findings in Prinsloo *et al* op. cit. and South African Law Commission Discussion Paper 74.

[201] Act 120 of 1998.

In South Africa, the customary law allows the family of the woman to keep part of the *lobolo* in case of divorce. The part of the *lobolo* to be returned will depend on the length of the marriage and the number of children. Where the woman has given birth to female children the part of the *lobolo* to be refunded will be much lower because of the expected *lobolo* to be paid on the girls when marrying. The *lobolo* so paid will go to the girls' father.

It is suggested that dowry or *lobolo* should not be returnable on divorce.

The practice of sororate (that is a practice whereby one woman is substituted for another) in case of death or inability of the wife to procreate is not common in Nigeria. In fact it is presently extinct, although research showed that it was previously practiced in eastern Nigeria. This practice is however common in South Africa. It is the practice amongst most tribes in South Africa for the father of the wife to provide another girl (in most cases the sister of the wife), where the wife dies prematurely or where the wife is unable to procreate.

In both jurisdictions, the death of the husband does not terminate a customary law marriage the death of the wife however, terminates a customary marriage. Levirate practice and wife inheritance, occur in both jurisdictions. This is a practice whereby a woman is made to marry another male relative of her deceased husband. Most women accept to marry their deceased husbands' male relative because of poverty. Where a woman chooses not to marry her deceased husband's male relative, she has to refund the dowry.

The customary law of both jurisdictions did not provide for minimum age on first marriage. Child marriages occur in both jurisdictions. In South Africa, however, the Recognition of Customary Marriages Act[202] now makes provision for a minimum age of 18 years on first marriage, subject to some exceptions. The consent of both parties to a

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[202] Act 120 of 1998.

customary marriage is now compulsory. This is commendable, as this would stop the practice of forcing girls to marry people they do not want to marry or forcing them to marry men much older then them, a common practice in Northern Nigeria.

In Nigeria there is presently no law stipulating the minimum age on first marriage for customary marriages and the minimum age varies from community to community. However, child marriages are not common in Southern Nigeria, where the level of education is much higher. However, in Northern Nigeria, child marriages are more prevalent. The main cause of this is that Islam the religion of the vast majority of the people of Northern Nigeria sanctions child marriages.[203] Nigeria is yet to ratify the African Charter on the Rights and Welfare of the Child. The Charter provides that the minimum age on first marriage should be 18 years. It is being proposed that Nigeria should ratify the Charter and also enact a law to criminalise child marriages. Parents should be educated on the dangers of child marriages, particularly the health implications. The need and advantages of educating children of both sexes should be stressed.

In both jurisdictions customary marriages are contracted mainly for the reproductive capacities of the women. Inability to have children usually result in divorce or the taking of additional wives.

In Nigeria, customary law marriages enjoy equal recognition with statutory marriages. Customary marriages are neither inferior nor superior to statutory marriages. Persons who are married under customary law in Nigeria cannot contract statutory marriage with other persons while the customary marriage is still subsisting.

In South Africa, prior to the enactment of the Recognition of Customary Marriages Act, customary law marriages are regarded as inferior to civil marriages. Persons married under customary law may contract civil marriages with other parties. Such subsequent marriages would not be regarded as constituting bigamy.

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[203] See the section on child marriages above.

Under the South African customary law, damages are payable where a girl is impregnated before marriage. In most parts of Nigeria no damages is payable. The man is however encouraged to marry the girl he has impregnated. Where however, he refuses, nothing is done to the man.

Among the Igbos, of Eastern Nigeria, any children borne by an unmarried woman belong to the girls' family. In South Africa, children borne by an unmarried woman also belong to her family. She is regarded as illegitimate and cannot share in the father's estate,[204] hence the saying "the children are where the cattle is not".

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[204] *Mthembu v Letsela supra.*