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# **THE EFFECTS AND HUMAN RIGHTS IMPLICATIONS OF THE DISSOLUTION OF A SWAZI CUSTOMARY LAW MARRIAGE**

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University of Pretoria

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## **Dedication**

I dedicate this paper to my loving parents Mr Gabriel and Mrs Grace Mkhabela. My beautiful daughter Busisa Ginindza completes and inspires me in every aspect and I am very grateful to have all of you.



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## **Acknowledgment**

I wish to acknowledge the Father, the Son and the Holy Spirit for their continued protection, care, guidance and everlasting love over my life.

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I wish to also pass my gratitude to the Centre for Human Rights for giving me the opportunity to be part of this great learning experience at the University of Pretoria and to be part of the LLM in Multidisciplinary Human Rights programme.



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## **List of Abbreviations**

CRC	UN Convention on the Rights of the Child
CESCR	Committee on Economic, Social and Cultural Rights
ACHPR	African Charter on Human and Peoples' Rights
AU	Constitutive Act of the African Union (AU)
ICESCR	International Covenant on Economic, Social and Cultural Rights)
ICCPR	International Covenant on Civil and Political Rights
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
HRC	Human Rights Committee

## Glossary Names

<i>Bandlancane</i>	Members of the Inner Counsel in the Royal Kraal or Chiefdom
<i>Inhlanti</i>	She is the Sororate. It is the younger sister of the wife who marries her senior sister's husband after she dies or where she is not able to bear children.
<i>Insulamnyembeti</i>	A cow given to the mother of the bride during the delivery of the <i>lobola</i> which signifies the wiping of her tears for bearing and raising the bride.
<i>Kumekeza</i>	Wailing of the bride inside the cattle byre during her wedding day, before she is smeared with the red ochre, in a Swazi Customary Law marriage.
<i>Kungena</i>	It is the levirate relationship, where the brother of the deceased husband marries his brother's widow
<i>Libovu</i>	Red ochre
<i>Liphehla</i>	It is lard or animal fat
<i>Lobola</i>	It is the bride price, traditionally paid with cattle.
<i>Lugege</i>	The beast that is slaughtered to mark the agreement and conclusion of the <i>lobola</i> between the groom and bride's families
<i>Umsasane</i>	The vagina of the goat

## 0.1 Background

The Kingdom of Swaziland came into existence during the *Mfecane* war that saw the birth of African societies in the Southern part of Africa during the nineteenth century.<sup>1</sup> The Dlamini clan consolidated over the other divided clans and formed the present Swazi nation which is the Swazi State.

Since its formation in the nineteenth century it has undergone through three evolutionary stages of development which is the feudal relations stage, the colonial phase around 1881 when it was declared the British Protectorate and the post-colonial era in 1968 when Swaziland gained its independence.<sup>2</sup>

The present Swazi society inherited principles which were developed and classified as Swazi Law and Custom when passing through the three stages of evolution, from the following sources;

- (i) The original African society which lived up to the introduction of colonialism.
- (ii) The influence that came with the Boers from Transvaal.
- (iii) The British Colonial administration.<sup>3</sup>

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<sup>1</sup> Davies RHD et al, *Kingdom of Swaziland; A Profile*, 1985, London, Zed Book

<sup>2</sup> Swaziland Annual Report for 1915, Crown Printers, 1936

<sup>3</sup> Her Majesty's Stationery Office, *Swaziland- Report for the Year 1961*, London: Crown Printers

## **0.2 The Origin of Swazi Law and Custom**

Swazi Law and Custom can be traced to the traditional African family system as a custodian of culture, customs and morals of the Swazi society. The Swazis lived in groupings of different clans, underpinned by an agricultural economy.

Custom determined the procedure by which their lives were lived, roles were clearly prescribed and their economic social and political practices embraced a measure of care for individuals affected by the contingencies of life.<sup>4</sup> The wealth of the family or within the clan together with the supply in food or cattle nourished all its members and therefore marriage was very central in their lives as it contributed to the lifestyle of the families.

## **0.3 The Different Forms of Marriages in Swaziland**

There are two forms of marriages that are recognised in the Kingdom of Swaziland. There is the Swazi customary law marriage and the civil rites marriage. Our Courts hold the view that the status both marriages is the same.<sup>5</sup> Although in practice the scales are not equal between the spouses in a Swazi customary law as the husband yields too much power.

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<sup>4</sup> Davies RHD et al, *Kingdom of Swaziland; A Profile*, 1985, London, Zed Book

<sup>5</sup> Nathan CJ in R v Fakudze & Another 1970 – 1976 SLR 422 at 423



A marriage in terms of Swazi customary law is not dissolved where the parties subsequently contract a civil rites marriage.<sup>6</sup> This means that the two marriage contracts are not mutually destructive as they can stand side by side.

There are a number of ceremonies that are performed during the Swazi customary law marriage although the legally significant and essential part is when the bride is anointed or smeared with red ochre known in the Siswati vernacular language as *libovu*.

This part of the marriage is performed outside the cattle byre, just below the main hut in the groom's homestead.<sup>7</sup> The marriage is still valid even if the woman is not smeared with red ochre at the designated area. The same position holds even where the bride price or *lobola* is not paid for her. This signifies that the important

The marital power in a Swazi customary law marriage is governed by Swazi law and custom.<sup>8</sup> The husband marital power confers him with power consisting of three elements namely;

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<sup>6</sup> Smith JA in *Dladla v Dlamini* 1977 -1978 SLR 15 at 16

<sup>7</sup> Cohen J in *R v Timothy Mabuza* 1979 – 1981 SLR 8 at 9

<sup>8</sup> Section 24 of the Marriage Act, 1964

- (i) The husband power as head of the family.
- (ii) The husband power over the person of the wife.
- (iii) The husband power over his wife's' property<sup>9</sup>.

In terms of a Swazi customary law marriage it can be dissolved on the ground of adultery, witchcraft and a subsequent marriage to another man by the woman.<sup>10</sup> On the other hand there are only two grounds for divorce at the instance of either spouse, namely; adultery and malicious desertion. Although in South Africa the grounds for divorce are extended to include irretrievable breakdown of marriage.<sup>11</sup>

The death of one spouse does not dissolve a marriage contracted in terms of Swazi customary law. This is because the contract of marriage is between the families of the spouses, and the death of one spouse introduces a new phase in the relationship.<sup>12</sup>

#### **0.4 Comparative Study**

Nigeria has been identified and selected as a country that will give a good understanding of my research work. The reason for my selection was that Nigeria is an African country which is also rich with its cultures and traditional beliefs. Although it is far from Swaziland and in the western part of the continent, it elaborated an almost similar approach to that is applicable in Swaziland.

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<sup>9</sup> *Nolwazi Mndzebele v Patricia Mndzebele (nee Msibi)*, Swaziland Supreme civil case no.13/2014 at page 5

<sup>10</sup> Thandabantu Nhlapho, *Marriage and Divorce in Swazi Law and Custom*, Websters print, Mbabane Swaziland, 1992, page 75

<sup>11</sup> The Divorce Act

<sup>12</sup> *Patricia Mndzebele v Nolwazi Mndzebele & 13 Others* [2014] SZHC 52

Also, most of the laws that I make reference to, for example, African Charters, Protocols and Declarations are applicable to both countries. Nigeria also, due to its many tribal states, is a good country to refer to as it will also outline or bring out the many forms of customary law marriages, which enables me to understand and identify the loopholes that are visible in our own customary law marriages.

### **0.5 Motivation of Study**

The source of my interest for this topic arose after representing a respondent wherein he was being interdicted from interfering with the funeral arrangements and attending the burial of the widow whom he had married in terms of Swazi Law and Custom after the death of her first husband by the family of the late first husband. After the death of her first husband she contracted a marriage in terms of Swazi Law and Custom with the Respondent. The Applicant in Court alleged that the death of the first husband did not terminate the marriage in terms of Swazi Law and Custom between them. The High Court held in Applicant's favour that death does not bring to the end the marriage relationship.

Subsequently the Respondent was not allowed to even attend the funeral of the woman he had married and stayed with as "husband" and "wife". It is from that that I grew the interest to research and discover more on this area of the law. I discovered the need to align the Swazi customary law

marriage with the civil rites marriage especially to protect and safeguard the rights of women.

The grounds for dissolving a Swazi customary law marriage favour the husband to institute the procedures for dissolution of the marriage. For instance a man is not considered to have committed adultery when married in terms of Swazi customary law. In fact the man is allowed to marry as many wives as he can afford and keep girlfriends.

The African Charter places an emphasis on African tradition and this is expressed in the preamble and in the form in which many of the rights and duties are articulated.<sup>13</sup> The preamble states that the virtues of African historical tradition and the values of African civilization should inspire and characterize their reflection on the concept of human and peoples' rights.<sup>14</sup> On the other hand, the Maputo Protocol<sup>15</sup> provides that men and women shall have the same rights in instituting divorce and dissolution proceedings.<sup>16</sup>

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<sup>13</sup> African Charter on Human and Peoples' Rights (1981/1986), Preamble

<sup>14</sup> African Charter Bennett TW, *Application of Customary Law in Southern Africa; The Conflict of Personal Laws*, 1985, Juta & Co

<sup>15</sup> Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003/2005)

<sup>16</sup> Article 7 (b) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003/2005)

The United Nations General Assembly adopted the Convention on the Elimination of Discrimination against Women (CEDAW) on the 18<sup>th</sup> December 1979 and it entered into force on the 3<sup>rd</sup> September 1981 to which Swaziland has ratified as well. This Convention seeks to do away with discrimination against women which impairs their enjoyment of human rights and fundamental freedoms in the cultural and any other field.<sup>17</sup>

## **0.6 Preliminary Literature**

I undertook a literature survey and it enabled me demarcate the problems surrounding the Swazi customary law marriage. A marriage in terms of Swazi Law and Custom is characterized by the smearing of red ochre upon the bride. What is very significant with the red ochre is that once it is smeared it is not removed easily as it is only smeared once upon a woman during her lifetime.

According to His Majesty King Mswati III who is the King and Ingwenyama of the Kingdom of Swaziland and a custodian of Swazi Law and Custom, there is no divorce in a marriage in terms of Swazi Law and Custom. Writers such as Nhlapho<sup>18</sup>, states that Swazi customary law marriages are capable of termination.

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<sup>17</sup> Article 1 of the African Charter (1981/1986)

<sup>18</sup> Nhlapho T, *Marriage and Divorce in Swazi Law and Custom*, 1992, Websters, Mbabane, at page 100

On the other hand Hilda Kuper<sup>19</sup>, another writer states that divorce is very rare in the Swazi society as a marriage in terms of Swazi Law and Custom establishes a link between the two families. Another writer Marwick<sup>20</sup>, on the other hand states that divorce is extremely difficult to obtain among the Swazis as the people have an almost illimitable capacity for compromise.

The Courts and in particular the Supreme Court in the latest case of *Sam Hlawe and Beatrice Seyama*<sup>21</sup> held that divorce does not exist in a marriage in terms of Swazi Law and Custom. The Court went further to admonish two scholars who wrote on the subject of the dissolution of the Swazi Customary Law marriage. With the country having adopted its Constitution<sup>22</sup> and this area of the law has to be viewed in light of its provisions in the Bill of Rights.

## **0.7 Statement of the Problem**

Women in Swaziland do not have the same equal rights or occupy the same status as men in the society mainly because they are subordinate in respect of both the traditional and civil marriages. The women are regarded and treated as legal minors and they can only attain majority status where they contract a civil marriage with ante nuptial contract.

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<sup>19</sup> Kuper H, *The Swazi; A South African Kingdom*, 1986, 2<sup>nd</sup> Edition, Holt Rinehardt & Winston, New York

<sup>20</sup> Marwick B.A. *The Swazi*, 1966, Frank Cass and Co, London

<sup>21</sup> *Samuel Myeni Hlawe v Beatrice Tholakele Seyama and Two Others* (56/2016) [2017] SZSC 41 (09October, 2017)

<sup>22</sup> Act, 2005

What is even worse is that in divorce matters the ground of adultery is only raised against women as in terms of customary law marriage men are allowed to practice polygamy while on the other hand women cannot.

Therefore the main questions are;

- (i) How can women married in terms of Swazi customary law be afforded the equal rights as men in dissolving the marriage?
- (ii) What can be done to align the Swazi customary law with the civil rites marriage?
- (iii) How the rights of spouses in a Swazi Customary Law marriage can be brought to the positions which are anticipated in regional and global human rights to which Swaziland has ratified.
- (iv) Does the death of one spouse dissolves or brings to an end a Swazi customary Law marriage?
- (v) What is the role that is played by the respective families in a Swazi customary law marriage and whether this form of marriage is in line with the international and regional instruments to which Swaziland acceded or ratified?

The right to equality between men and women is guaranteed in the provisions of the Maputo Protocol<sup>23</sup> which the country acceded to on the 5<sup>th</sup> October 2012, and the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic Social and Cultural Rights (ICESCR), which the country acceded to on the 26<sup>th</sup> March 2004. Yet Swaziland is still embedded on patriarchy which promotes the inequality in marriage and thus placing the women in vulnerable position on the strength of customary law.

## **0.8 Research Methodology**

The research method will be a desktop research and will include literature review, and comparative legal analysis in particular statutes, treaties, case law etc. Reliance will be made to both primary and secondary materials.

## **0.9 Overview of Chapters**

The Preliminary chapter will provide a brief background of the origins of Swazi Law and Custom and the different forms of marriages in Swaziland. This section provides a historical background and insight to the discussion on Swazi customary law and its dissolution, although there is no divorce per se in such marriage. There will also be the statement of the problem,

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<sup>23</sup> Protocol on the Rights of Women



research objectives and questions, the literature review and the research methodology.

Chapter one gives an overview of what is Swazi Customary Law and focuses specifically on Swazi Law and Custom marriage. Chapter two focuses on the civil marriages which are also recognised and legally acceptable in Swaziland legal system.

Chapter three deal with the effects and human rights implications of the dissolution of a customary law marriage in Swaziland. Chapter four provides the comparative analysis of the dissolution of a customary law marriage in Swaziland and in Nigeria.

Lastly chapter five focuses on the findings, it is where I have made recommendations on how the Swazi customary law can be improved.

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## **Chapter One – Marriage in terms of Swazi Law and Custom**

### **1. Swaziland Legal System**

This paper will be looking at the marriage in terms of Swazi law and custom and the effects and human rights implications of its dissolution. Swaziland operates a dual legal system. There is the Roman Dutch Common Law which is the received foreign law into Swaziland through the General Law and Administration Proclamation<sup>24</sup>, which provided that Roman – Dutch Common Law, save in so far as the same has been heretofore or may from time to time hereafter be modified by statute, shall be law in Swaziland.

The Act provides that save and except in so far as the same have been repealed or amended the statutes in force in the Transvaal on the fifteen day of October 1904, and the statutory regulations thereunder shall mutatis mutandis, and as far as they may be applicable, be in force in Swaziland<sup>25</sup>.

There is also customary law which is peculiar to the ethnic Swazi people, which consist of the traditional practices and customs of the Swazi culture since birth of the Swazi State.<sup>26</sup> The customary law is classified further by the principles of patriarchy, which places the men in an elevated status than women in the Swazi society.

This paper will look at the human rights aspect and effects of the marriage and dissolution of a Swazi customary law marriage. By virtue of the dual legal system it means that marriage can be contracted in two ways. There is

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<sup>24</sup> No. 4 of 1907

<sup>25</sup> Section 3 of The General Law and Administration Proclamation No. 4 of 1907

<sup>26</sup> Nhlapho T, Proprietary Consequences of Marriage in Swaziland: Law versus Culture and the effect on Women's Rights, University of Swaziland, No. 86/0410 at page 3

the civil rites 'marriage which is governed by the Marriage Act<sup>27</sup>, which includes the church wedding. On the other hand there is also Swazi customary law marriage which is in accordance with Swazi law and Custom.

A marriage in terms of Swazi Law and Custom also takes place posthumously after the death of the bride or groom. As long as there is an agreement between the families, it also happened in Mankayane in the Manzini district of Swaziland that Bonakele Magagula who was 25 years old married her late husband in death. This happened after her father ordered the family of the groom to marry her daughter as she was killed with a hammer by his boyfriend Thabo Khoza who later hanged himself.<sup>28</sup>

### 1.1 Swazi Customary Law marriage

Swazi customary law marriage establishes a relationship between the two families<sup>29</sup>. It is characterised by six factors namely;

- (i) It is group oriented.
- (ii) It emphasizes the patrilineal descent of children.
- (iii) It involves the payment of *lobola*.<sup>30</sup>
- (iv) It recognises polygamy as ideal.
- (v) It put great emphasis on child – bearing.
- (vi) It is very difficult to terminate<sup>31</sup> as His Majesty King Mswati III has made a pronouncement that there is no divorce in terms of Swazi Law and Custom.

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<sup>27</sup> No. 47 of 1964

<sup>28</sup> Dlamini J, *Times of Swaziland; Father orders posthumous teka ceremony, 17 August 2017 at page 2,*

<sup>29</sup> Malan JS, *Swazi Culture (1985) African Institute of South Africa, at page 39*

<sup>30</sup> Lobolo means cattle or their equivalent in money, which the bridegroom agrees to deliver to the father of the bride for ratifying the matrimonial contract. (Fannin JMA Judicial Commissioner, *Preliminary Notes on Principles of Swazi Customary Law, Lozitha, 12<sup>th</sup> December 1967 at page 13*)

<sup>31</sup> Swazi (Central) Law Panel, Meetings held at Lozitha 26<sup>th</sup> to 29<sup>th</sup> May 1964 at page 6

### 1.1.1 Definition of a marriage in terms of Swazi Law and Custom

A valid Swazi customary law marriage comes to being when a woman who has reached puberty stage is smeared with red ochre by members of a man's family during the ceremony with the intention of making her the wife of the man. Further, negotiations of *lobola* by the man or his family to the brides' family should be or will be subsequently completed by both the contracting parties to their satisfaction.<sup>32</sup>

Consequently the anointing of the bride with red ochre confers on the husband exclusively the rights to his wife's sexuality. The children born therefore receive and use their fathers' surname.<sup>33</sup>

## 1.2 Different types of marriages in terms of Swazi customary Law

### 1.2.1 Love Marriage

This marriage comes after courtship between the man and the girl. The man proposes to the girl who accepts the proposal and thereafter they establish a love relationship.<sup>34</sup> Thereafter the man would assign a delegation to ask from the girl father her hand in marriage.

When the girls' family accept that their daughter should be married to the man family *lobola* is then negotiated at this stage. However, in the event the *lobola* negotiations fail or where the girl father has another man whom he

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<sup>32</sup>Nhlapho, T. Marriage and Divorce in Swazi Law and Custom, (1992) Websters, Mbabane, Swaziland 76

<sup>33</sup> PJ Derman; *Stock and Aristocracy: The Political Implications of Swazi Marriage*, African Studies Volume 36 (1997) Issue 2, pages 119

<sup>34</sup> Nhlapho T, *Marriage and Divorce in Swazi Law and Custom*, 1992, Websters, Mbabane, Swaziland, at page 75

intends that his daughter should marry the matter will end there.<sup>35</sup> Although a girl may decide to 'steal' herself and visit the man homestead. The man's family would immediately marry the girl by smearing her with red ochre<sup>36</sup>. In strengthening the relationship the man's family would offer *lobola* to her family.

### 1.2.2 Preferential Marriage

A marriage of a man to a girl who bears the same clan name as the husband's maternal or paternal grandmother or grandfather<sup>37</sup> confers high status to her. A girl who bears a clan name of the paternal grandmother is said to revive the house of his maternal and reunites the generations. Such a wife will assume seniority in a polygamous marriage.

### 1.2.3 Arranged Marriage

These marriages are arranged for political, social and economic advantage. Arranged marriages or *kwendzisa*<sup>38</sup> is usually practised by the aristocracy and the commoners in Swaziland<sup>39</sup>. Arranged marriages are at either party's instance. The *kwendzisa* marriage is where a girl who is not yet of a marriageable age is promised in marriage to a man<sup>40</sup>.

The young girls are betrothed during the early stages of their lives and sometimes even before they are born. The father without cattle and girl children would approach another man and knock on his *umncadvo* which is a

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<sup>35</sup> Simelane, *Informative discussion of the ways that a Swazi marriage may be established*, 1986, at page 10 to 24, University of Swaziland, Kwaluseni

<sup>36</sup> Kuper H, *The Swazi; A South African Kingdom*, 1963, New York: Holt at page 18

<sup>37</sup> (n above)

<sup>38</sup> Swazi (Central) Law Panel, Meetings held at Lozitha 26<sup>th</sup> to 29<sup>th</sup> May 1964 at page 8

<sup>39</sup> Derman PJ, *Stock and Aristocracy; The Political Implication of Swazi Marriage*, African Studies, Vol.36 1977 no.2 at page 123

<sup>40</sup> (n above)



cover for the penis. He would ask to be given one or two cattle on the strength that he will give him a girl to marry in the future<sup>41</sup>.

The importance of procreation promotes the sororate or *inhlanti* custom marriages and the levirate *kungena* marriages. The sororate or *inhlanti* marriage is adopted where the younger sister of the wife or bride is required to take her place where the elder sister is unable to bear children. The levirate or *kungena* marriage takes place where the husband dies and his relative takes over the deceased wife and she will bear children for her late husband<sup>42</sup>. It's also a Swazi custom which enables the raising of children where the husband is impotent as the brother to the husband sleeps with his wife only for the purpose of impregnating her.

#### 1.2.4 Private Marriage

It involves the circumstances where the girl or woman is smeared with red ochre without her permission or that of her parents and in some cases even without the consent of the man.

The woman is invited for a sleep over at the mans' home and during the early hours of the morning the girl or woman is given a loin skirt which covers the lower part of her body and a spear which she holds with her right hand and is taken to the cattle by for a ceremony of *kumekeza* or wailing.

Sometimes this happens without the knowledge of the man. Thereafter she is smeared with red ochre later in the morning of the same day. Messengers are then sent to the girl or woman family to report that their daughter has

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<sup>41</sup> (n above)

<sup>42</sup> Nhlapho T, *Marriage and Divorce in Swazi Law and Custom*, 1992, Websters, Mbabane, Swaziland, at page 76

been married. They take with them the ceremonial piece of meat which is the *umsasane* (vagina of the goat) to give to the brides' family as proof that marriage took place<sup>43</sup>.

### 1.2.5 Polygamous Marriages

According to Swazi customary law man can marry as many wives as he can provide for economically and emotionally. The Marriage Act<sup>44</sup> recognises customary law marriage, although it does not allow any person already married under the Act to enter into another nuptial ceremony during the subsistence of another.<sup>45</sup>

Polygamous marriage is still practised and mainly by members of the Royal family, chiefs, and mostly the senior Swazi men in Swaziland. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa<sup>46</sup> guarantees the rights of men and women to enjoy equal rights and to be regarded as equal partners in marriage. In the following chapters the Paper will discuss Article 6(c) together with Article 8 (f) of the Protocol.

## 1.3 Capacity to enter into a Swazi Customary Law Marriage

The capacity to marry comes together with puberty. Marriages involving girls below puberty stage are usually those who are betrothed. There is no age that is fixed or stated at which one is legally capable of entering into a Swazi customary Law. Our courts<sup>47</sup> even held that marriage with a 15 year old girl was not repugnant to natural justice and morality as it is not the age

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<sup>43</sup> Swazi (Central) Law Panel, Meetings held at Lozitha 26<sup>th</sup> to 29<sup>th</sup> May 1964 at page 11

<sup>43</sup> Universal Declaration on Human Rights, 1948

<sup>44</sup> No. 47 of 1964

<sup>45</sup> Section 7(1) of the Marriage Act No.47 of 1964

<sup>46</sup> Adopted in Maputo, Mozambique on the 11<sup>th</sup> July 2003 and entered into force on the 25<sup>th</sup> November 2005

<sup>47</sup> His Lordship Justice Cohen

of a female but her mental and physical capacities which should be of relevant consideration<sup>48</sup>.

#### 1.4 The Important Essentials of a Swazi Customary Law marriage

Different scholars and writers had differing views on the topic. According to Fannin<sup>49</sup> in order to constitute a valid Swazi marriage the bride must be smeared with red ochre and the lobolo be delivered or paid in full alternatively guarantees must be made and lastly the *insulamnyembeti* and *lugege* beast must be delivered and the latter must be slaughtered.

However, Hilda Kuper<sup>50</sup> said the essentials of Swazi customary law marriage are mainly two; which is the consent of the parents of the bride and groom and the slaughtering of the *lugege* beast. Lastly, Rubin<sup>51</sup> states that the essentials are that the bride and groom must be of full capacity, the consent must be obtained from everyone, the bride must be smeared with red ochre and lastly dowry or *lobolo* must be delivered or paid including the delivery of the *insulamnyembeti* and slaughtering of the *lugege* beast.

In examining the essentials seriatim;

(a) Smearing of the red ochre

This is the essential part of a Swazi customary law and with its absence, there is no marriage existing. The smearing of red ochre is the most significant part of a Swazi marriage. Once the bride has been anointed with red ochre the marriage is

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<sup>48</sup> *Rex v Mhlabane* SLR 1977 – 78 at page 188

<sup>49</sup> Fannin JMA, *Preliminary Notes on Principles of Swazi Customary Law*, 1967, Lozitha (unpublished mimeo) at page 6

<sup>50</sup> Kuper H, *An African Aristocracy; Rank among the Swazi*, 1947, London, OUP at page 98

<sup>51</sup> Rubin N, *The Swazi Law of Succession: A Restatement*, 1964, Journal of African Law, 9 at page 90

complete. The ceremony involves smearing the face and body of the bride with red ochre, which is a type of clay mixed with fat.

This process has been confirmed in decided high court cases. In *R v Jabulane Fanyana Fakudze*<sup>52</sup> the court approved the rule contained in the Report of the Swazi Law Panel<sup>53</sup> that there are a number of ceremonies performed at the wedding, but the legally significant one is the anointing of the bride with red ochre. The court held that unless and until that is done, she is not regarded as having been married.

The red ochre is said to be equivalent to a wedding ring as it is infinitely binding. This ceremony is performed once in a lifetime of a woman. When she is smeared by one family she can never again be smeared by another family. If the woman has to contract a second customary marriage with another man the smearing has to be done with lard (*liphehla*) or Vaseline.<sup>54</sup>

The smearing of red ochre can be done without the consent of the bride or her family and even worse without the knowledge and consent of the groom.<sup>55</sup>

(b) *Lugege* beast

Its delivery signifies the conclusion of the agreement between the bride and the groom families and that both are allowed to proceed and enter into the marriage. It signifies that the parents of the bride are satisfied with the groom's family negotiations and they accept them.

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<sup>52</sup> and Another 1970-76 SLR 422

<sup>53</sup> Views of a Special Swazi Law Panel, established in May 1964, under the Chairmanship of Mr Rubin, at page 10

<sup>54</sup> Nhlapho T, *Proprietary Consequences of Marriage in Swaziland: Law versus Culture on Women's Rights*, University of Swaziland, No.86/0410 at page 4

<sup>55</sup> Malan JS, *Swazi Culture*, 1985, African Institute of South Africa at page 39

(c) *Lobola* cattle

The marriage becomes valid after the bride is smeared with red ochre even if lobola has not been paid.<sup>56</sup> The payment of *lobolo* is not a *conditio sine qua non* for a marriage in terms of Swazi customary law. *Lobolo* is a sign of appreciation to the bride family. Where the groom does not have cattle he enters into an agreement with the bride family where the payment of *lobola* is deferred. It may also happen that the children born out of the marriage will pay the *lobola* on behalf of their father. The daughters' *lobola* can be used to pay their mothers' *lobola*.<sup>57</sup>

(d) Consent

The consent that is important is of the father of the bride or the head representing the bride family and without it there can be no valid marriage in terms of Swazi law and custom. The consent of the bride and groom is secondary as this marriage is between the two families. Even where the bride is smeared with red ochre without her consent once her family accept her marriage, that marriage is ratified.<sup>58</sup>

Therefore the consent of the bride is not a condition for the validity of a Swazi customary law marriage. The groom may not be present or worse be consulted by his family members before marrying a groom for him. The groom consent is also not essential in a Swazi customary

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<sup>56</sup> Held in ;The *King v Fakudze and Another* SLR 1970 - 76 at page 42

*Dladla v Dlamini* SLR 1977 - 78 at page 15

*Rex v Mhlabane* SLR 1977 – 78 at page 188

*Rex v Timothy Mabuza and Another* SLR 1979 -81 at page 8

<sup>57</sup> Swazi (Central) Law Panel, Meetings held at Lozitha 26<sup>th</sup> to 29<sup>th</sup> May 1964 at page 10

<sup>58</sup> Nhlapho T, *Marriage and Divorce in Swazi Law and Custom*, 1992, Websters Mbabane

law marriage, for instance a woman can get married to a groom after his death.<sup>59</sup>

The fact that Swaziland is a patriarchal society the interest of the family is designed to favour the men and that is a form of inequality in the Swazi customary system. The Universal Declaration on Human Rights<sup>60</sup>, The International Covenant on Civil and Political Rights,<sup>61</sup> and The International Covenant on Economic Social and Cultural Rights,<sup>62</sup> all deemed sex as a ground for non-discrimination. Article 23(4)<sup>63</sup> imposed upon State parties to take steps to ensure equality of rights and responsibilities of spouses as to marriage and its dissolution.

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<sup>59</sup> (n Swazi, Lozitha Meetings)

<sup>60</sup> UDHR, 1948

<sup>61</sup> ICCPR, 1966

<sup>62</sup> ICESCR, 1966

<sup>63</sup> of the ICCPR

## **Chapter Two – Marriage in terms of Civil Rites**

### **2.0 Background**

The Marriage Act is applicable to all marriages solemnised after the enactment of the Act excluding marriages in terms of Swazi law and custom. When contracting a civil or Christian marriage there are formalities that have to be observed as prescribed in the Marriage Act.<sup>64</sup> A marriage will not be valid unless banns are published at least three months before the solemnisation of the marriage or alternatively a special licence issued and signed by the district Commissioner.

#### **2.1.1 The ceremony: religious.**

Any marriage officer who is a minister of religion or a person holding a responsible position in any religious denomination or community shall perform the marriage ceremony in accordance with the formula in use in the congregation to which he belongs.<sup>65</sup>

#### **2.1.2 The ceremony: civil.**

In a case of a marriage officer who is not a minister of religion or who does not hold a responsible position in a religious denomination or community shall therefore solemnize a marriage in the following manner;<sup>66</sup>

- (a) He should put the following question separately to the bride and bridegroom. "*Do you (name of bride or bridegroom) solemnly declare*

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<sup>64</sup> Number 47 of 1964, at Parts III and Parts IV

<sup>65</sup> Section 19 of the Marriage Act, No. 47 of 1964

<sup>66</sup> Section 20 of the Marriage Act, No. 47 of 1964

*that you know of no legal impediment to your marriage to (name of bridegroom or bride) here present?"*

- (b) After he receives an affirmative answer to the question put to the bride and bridegroom, the marriage officer shall request the bridegroom and bride separately to repeat after him the following words ;

*"I (name of bridegroom or bride) call upon all persons here present to witness that I take (name of bride or bridegroom) to be my lawfully wedded (husband or wife)."*

- (c) Where the parties are to use a wedding ring the marriage officer shall instruct the bridegroom to place the ring upon the wedding finger of the bride and shall thereafter instruct the parties to join their right hands. The marriage officer shall then repeat the following words;

*"I declare that A. B. and C. D. here present are in the eyes of the civil law joined together in matrimony".*

## **2.2 Capacity to Marry**

### **2.2.1 The Age**

The Act prescribes that boys below the age of 18 years old and girls below 16 years old respectively cannot marry. However, minors who are below 21 years old but above the ages of 18 years and 16 years old respectively cannot marry without the consent of their parents or guardians.

Under customary law the wife is not granted or conferred with the majority status however, the Act dispenses with the requirement of a legal guardian's



consent in a marriage where the woman is below the age of 21 years and on the other hand had been previously married in terms of Swazi customary law.

It is also interesting that the Act grants the mother of the minor legal guardianship where the father is not present in terms of consenting to the marriage. In terms of Swazi customary law it is the senior uncles that are considered as the legal guardians of the minor in marriages and not the mothers

The majority status is conferred upon a person who has been married as a divorcee, widower and widow do not revert to the guardianship of his or her guardian on termination of the marriage.<sup>67</sup>

### **2.2.2 Persons of unsound mind**

People who have been certified or adjudicated to be of unsound mind by a competent authority are not allowed to get married in terms of the Act.<sup>68</sup>

### **2.2.3 Widows and widowers**

The Act provide that widows and widowers with minor children cannot contract a new marriage where there are minor children from the previous marriage except for a marriage in terms of Swazi customary law, until compliance with the provisions of section 89 of the Administration of Estates Act.<sup>69</sup>

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<sup>67</sup> Section 3(2) of the Marriage Act , 1964

<sup>68</sup> Section 4 of the Marriage Act, 1964

<sup>69</sup> The Administration of Estates Act Number 28 of 1902

#### **2.2.4 Relationship within the prohibited degrees**

Persons who are related within the prohibited degrees of consanguinity or affinity are not allowed to marry each other.<sup>70</sup> The prohibited degree by consanguinity is where the parties are related to the common ancestor in the first degree.<sup>71</sup> Any marriage contracted between them is null and void. This provision is similar to the common law provision.

#### **2.2.5 Persons of the same sex**

Marriage by its definition is a union between a man and a woman and it follows that people of the same sex cannot contract a valid marriage.<sup>72</sup> This is also applicable where one of the spouses has undergone a sex change operation and for purposes of marriage he will still be a member of the sex of his or her birth, and not the sex of his choice.

#### **2.2.6 Persons already married**

People who are already legally married may not marry in terms of civil rites.<sup>73</sup> The Act does not allow a person that during the subsistence of a previous marriage whether contracted in terms of Swazi customary law to purport to enter into a marriage in terms of civil rites and such marriage will be bigamous.

A couple which is married in terms of Swazi customary law is not prevented from marrying each other in terms of civil rites marriage. It is only a person who purports to marry another person while married in terms of the Act

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<sup>70</sup> Section 6 (1) of the Marriage Act, 1964

<sup>71</sup> (n above)

<sup>72</sup> w 1976 (2) SA 308 (W) and Corbett [1970] 2 All ER 83

<sup>73</sup> Section 7 (1) of the Marriage Act, 1964

other than the lawful spouse of the first marriage, that he will be deemed to have committed the offence of bigamy.

This provision places Swazi customary law marriages at par with civil and Christian marriages, by avoiding the provision that operates in South Africa which provides that a civil marriage automatically supersedes the prior customary law marriage. This provision only refers to marriages contracted in terms of Swazi law and custom and does not refer to any marriage contracted in terms of any other system of customary law, which basically mean that those will not fall under this provision and they will not be protected.<sup>74</sup>

### **2.3 Marriage between African and Non-Africans**

The Act<sup>75</sup> is silent on marriages between Africans and non-Africans. Although the Act provides for the consequences of such marriages that the common law will be applicable and it will be excluded where both parties are Africans.<sup>76</sup>

### **2.4 The Consequences of the Marriage**

The consequence of a marriage contracted in terms of the Marriage Act is that it may be dissolved by the death of one of the spouses or by both of the spouses. It may also be dissolved through a decree of divorce which will dissolve the marriage by the issuance of a court order by a Court with competent jurisdiction.

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<sup>74</sup> Rubin, *The Swazi Law of Succession: A Restatement* (1965) 9 JAL 60

<sup>75</sup> The Marriage Act, Number 47 of 1964

<sup>76</sup> Section 24 and 25 of the Marriage Act, 1964

The marriage consequences in terms of the Act are according to common law and varied by law from time to time, except where the parties are Africans and in that case subject to section 25 of the Marriage Act the marital power of the husbands shall be governed by Swazi customary law.

The parties to a marriage who are Africans the consequence of their marriage will be governed by the customary law applicable to them unless they state before the solemnization of their marriage that the consequences of their marriage shall be governed by common law.<sup>77</sup>

## **2.5 The Position of the Marital Power Post the Constitutional Era**

The position of the marital power has been subjected to some change. In the decided case of *Nombuyiselo Sihlongonyane v Mholi Joseph Sihlongonyane*,<sup>78</sup> the applicant Nombuyiselo a teacher by profession and the respondent her husband was a pastor in a local church. They were married to each other in terms of civil rites in community of property and the marriage was still subsisting. Their marriage consequences were governed by the common law.

The court in this matter was called upon to determine whether the provisions of section 20 and 28 of the Constitution of the Kingdom of Swaziland should be applicable or the old position as per the common law remains to be applied in the country. The provisions of section 20 of the Constitution provides as follows;

*"All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect*

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<sup>77</sup> Section 25 (1) of the Marriage Act, 1964

<sup>78</sup> *Nombuyiselo Sihlongonyane v Mholi Joseph Sihlongonyane* (470/2013) [2013] SZHC 144 (18 July 2013)

*and shall enjoy equal protection of the law.<sup>79</sup> For the avoidance of any doubt, a person shall not be discriminated against on the grounds of gender....<sup>80</sup>For the purposes of this section, "discriminate" means to give different treatment to different persons attributable only or mainly to their respective descriptions by gender...<sup>81</sup>*

The provisions of section 28 on the other hand provides as follows;

*"Women have the right to equal treatment with men and that right shall include equal opportunities in political, economic and social activities."<sup>82</sup>*

The court held that;

*"Marital power unlawfully and arbitrarily subordinates the wife to the power of her husband and is therefore unfair and serves no rational purpose. Marital power is unfair discrimination based on sex or gender inasmuch as it adversely affects women who have contracted a specific type of marriage but does not affect the men in that marriage in the same way, e.g. the inability to sue or be sued in their own name. In some jurisdictions the marital power has been specifically abolished."*

The court cited case law from other jurisdictions and some international instruments and covenants, including the United Nations Human Rights Committee General comment number 28 on the Equality between men and women (2000), and it concluded as follows in paragraph [30]:

*"We have no doubt that section 20 of the Constitution read together with section 28 gives full effect to our own desires and ethos as a nation and also to these international instruments and jurisprudence. It is also plain to us that the marital power of the common law insofar as it prevents married women from suing and being sued without the*

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<sup>79</sup>Section 20 (1) of the Constitution Act, 2005

<sup>80</sup> Section 20 (2) of the Constitution Act, 2005

<sup>81</sup> Section 20 (3) of the Constitution Act, 2005

<sup>82</sup> Section 28 (1) of the Constitution Act, 2005

*assistance of their husbands is clearly inconsistent with the provisions of our Constitution. The Constitution being the Supreme Law of the land, these tenets of the common law must perforce give way to it”.*

The court therefore, held that the common law position or concept of marital power only as it prevents married women from suing and being sued without the assistance of their husband was declared inconsistent with section 20 and 28 of the Constitution of Swaziland, with effect from the 25<sup>th</sup> March 2013, when this application was brought to court. The period was not with effect from the adoption of the Constitution in 2005 to safeguard havoc and confusion to earlier litigated matters after the adoption of the Constitution.

Therefore all married women in Swaziland possess the right to sue and be sued in their own names without being assisted by their husband. These are positive strides in as far as guaranteeing women’s rights is concerned.

## **2.6 The Dissolution of the Civil and Christian Marriage**

The grounds for divorce in civil and Christian marriages are governed by the common law as they are based on the Roman Dutch – Law, and only recognise two grounds of divorce, namely; malicious desertion and adultery. The Plaintiff who can either be the wife or husband must prove that the defendant committed one or both of these grounds and that he or she did not condone the Defendant actions.

Therefore it can be said that the action for divorce in Swaziland is based on fault. Yet the position in South Africa was modified by statute and the main

one being the Divorce Act,<sup>83</sup> which replaced fault with failure, the matrimonial offence with irretrievable marriage breakdown, as a main ground for divorce. Now they have irretrievable marriage breakdown and mental illness or continuous unconsciousness of one of the spouses as grounds for divorce in South Africa. It is observed that the former far outranks the latter.<sup>84</sup>

It can be submitted that the divorce laws in the kingdom of Swaziland are totally outmoded and out dated in their content and underlying principles. This is an area of the law that needs to be reformed to conform with the modern day principles and international jurisprudence.

Even the courts are crippled such that they cannot ignore the current laws and implement the foreign and international laws which are clearly inconsonant with the laws operating in the kingdom but consonant with modern day jurisprudence on the aspect of divorce, as that will amount to legislation by judicial decree.

The legislature has to remedy this area of the law of divorce as the current laws are out-dated, archaic and out of touch with the modern Swazi jurisprudence on matrimonial matters. Because tying together a couple with a marriage that has irretrievably broken down is a potent recipe for collusion and domestic violence.

In circumstances of collusion there is perjury and dishonest elements and it means that married couples who are good citizens are driven to commit

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<sup>83</sup> The Divorce Act , Number 70 of 1979 (South Africa)

<sup>84</sup> Hahlo HR, *The South African Law of Husband and Wife*, 1985, 5<sup>th</sup> Edition, Juta & Co, Cape Town at page 330

criminal activities just to escape an untenable marriage. The South African court in the case of *Kuhn v Karp*<sup>85</sup>, said;

*"The upholding of the marriage state is only one of the several objects of public policy...where a marriage has been wrecked beyond hope of salvage, the argument of public policy loses much of its force...To keep the parties tied to one another in the bonds of a marriage which has become a sham is obviously conducive to immorality and more prejudicial to the public interest than a dissolution of the marriage bond."*

The extent of the difficulty in obtaining divorce under the laws in Swaziland is promoting the less formal partnerships like cohabitation which is also incompatible with Swazi public policy and jurisprudence. Writers such as Hahlo HR<sup>86</sup> are of the view that in dissolving a marriage by divorce, based on the reason that it has irretrievably broken down, the court does not kill a live marriage, as it certifies that the marriage is dead.<sup>87</sup>

## **2.7 Double Marriages / Dual Marriages**

The Marriage Act allows for a person already married in terms of Swazi Law and Custom to contract a second marriage in terms of civil rites and remarry one another in terms of the Act. The second marriage must be in terms of the Marriage Act. It only prohibits a case where the spouse of the customary law marriage decides to contract a civil rites marriage with another person other than her spouse.

The provisions of section 7 of the Marriage Act are as follows;

*"No person already legally married may marry in terms of this Act during the subsistence of the marriage, irrespective of whether that previous marriage was in accordance with Swazi law and custom or*

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<sup>85</sup> 1948 (4) SA 825 (T) at 827-828

<sup>86</sup> Hahlo HR, *The South African Law of Husband and Wife*, 1985, 5<sup>th</sup> Edition, Juta & Co, Cape Town, page 331

<sup>87</sup> (n above)



*civil rites and any person who purports to enter into such a marriage shall be deemed to have committed the offence of bigamy: Provided that nothing contained in this section shall prevent parties married in accordance with Swazi law or custom or other rites from re-marrying one another in terms of this Act.<sup>88</sup>*

*No person married in terms of this Act shall, during the subsistence of the marriage, purport to contract a legally recognized ceremony of marriage with any person other than the lawful spouse of the first-named person.<sup>89</sup>”*

The Marriage Act does not provide for a situation where the parties are already marriage under the Act and where they want to remarry each other in terms of Swazi customary law or other rites. This is because it seems the legislature wanted that to be the case, as it would have expressly done so if it wanted that to be the position.

That is why when a couple which is married in terms of civil rites marriage enters into a marriage in terms of Swazi customary law, the subsequent ceremony cannot be regarded as a ceremony in terms of Section 7 of the Marriage Act. The latter ceremony would be of no legal effect or consequence just as the case where the lobola ceremony follows a marriage contracted in terms of civil rites under the Marriage Act.

A marriage under the Marriage Act is monogamous yet under Swazi customary law is potentially polygamous which means that a man married to one woman is entitled during the subsistence of that marriage to marry other women in terms of Swazi customary law. Therefore the consequences of the two marriages are different and separate. It is on these bases that a

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<sup>88</sup> Section 7(1) of the Marriage Act, 1964

<sup>89</sup> Section 7(2) of the Marriage Act, 1964

couple cannot be said to be married under the Marriage Act and under Swazi customary law at the same time.

Writers, such as Nhlapho refers to monogamy and marital fidelity as basic consequences of a civil and Christian marriage. The reverse situation cannot take place either where a husband or man with several wives can be married with several wives can be married to all of them under Swazi customary law and be married to one of them under both systems. This cannot happen under section 7 of the Marriage Act.

The most logical thing to happen would be where a couple which is married under Swazi customary law would remarry each other in terms of the Marriage Act. In such a case the parties should be taken as though they intended to change the law regime which governs their marriage. As this provision is not applicable to a man who is already married to more than one wife as the couple who remarries each other under the Marriage Act converts their marriage into a monogamous marriage which is governed in terms of civil rites.

### **2.7.1 The Effects of Contracting another Form of Marriage after the Swazi Law and Custom Marriage**

The effects that the second marriage will have on the Swazi customary law marriage according to the decided case of *Dladla v Dlamini*,<sup>90</sup> is that the customary law marriage is not extinguished as it continues to exist alongside the civil rites and or Christian marriage. In that case it was a claim

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<sup>90</sup> 1977 SLR 15

for damages for adultery on the basis of the Swazi customary law marriage which the parties contracted earlier.

What is confusing is that the Marriage Act is silent on what happens to the first marriage where it is in terms of Swazi customary law, when they remarry each other by civil rites under the Act. There is no provision that in a dual marriage the marriage in terms of Swazi customary law is dissolved. The Swazi customary law marriage remains valid and there is no provision for its dissolution when it is followed by a civil rites marriage.

Where there is conflict between the marriage in terms of Swazi customary law and the civil rites marriage in respect of its consequences in the decided case of *Khoza v Malambe*,<sup>91</sup> it was held that, the laws of the land applicable to a civil rites marriage prevails over the customary law marriage.

This judgment of the court received criticism by writers such as Nhlapho,<sup>92</sup> who was of the view that the court in this case was to decide a matter of a civil rites marriage as opposed to a dual marriage. The existing authority in this subject is that the Swazi customary law and the civil rites marriage are both equal to each other and they exist alongside each other. There are no provisions of the law which places either form of the marriage above the other and there are no guidelines to be followed in cases of conflict between the consequences of one with the other.

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<sup>91</sup> 1976 SLR 380

<sup>92</sup> Nhlapho RT, *Marriage and Divorce in Swazi Law and Custom*, 1992, Websters Mbabane

It is on those basis that writers such as TW Bennet<sup>93</sup> agree that the tendency in Southern Africa especially with reference to decided case of *Dladla v Dlamini*<sup>94</sup> in Swaziland which is in favour of the civil rites marriage as inherently superior to the customary marriage. The writer is of the view that the time has arrived to resolve conflicts on a sounder basis than the arbitrary preference for one type of marriage

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<sup>93</sup> Bennet TW, *Application of Customary Law in Southern Africa, Juta & Co, Cape Town, 1985* at page 206

<sup>94</sup> 1977 SLR 15

## Chapter Three - The Dissolution of the Swazi Customary Law

### 3.0 Divorce in terms of Swazi Customary Law

Swazi law and custom is still not codified and in this Chapter will be focussing on the dissolution of the Swazi customary law marriage. It can be mentioned that Swazi law and custom is evolving and not static, it is fluid and it also changes, although the doctrine of *stare decisis* imposes rigidity on the system.<sup>95</sup>

According to His Majesty King Mswati III, there is no divorce under a Swazi customary law marriage.<sup>96</sup> The same view is shared by writers such as Nhlapho and Armstrong who also observed that a Swazi customary law cannot be dissolved at all, even though some sections of people are of the view that it may be dissolved.<sup>97</sup>

Writers have mixed views in respect of whether there is divorce in Swaziland. According to Nhlapho Thandabantu<sup>98</sup>, in his book he states that Swazi law and custom marriages are capable of termination. He goes further to explain that the rules and procedures involved in the formation and dissolution of the marriage in terms of Swazi law and custom highlights the crucial fact that Swazi marriage is communal and is not an individual affair.<sup>99</sup>

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<sup>95</sup> Bennet TW, *Application of Customary Law in Southern Africa*, Juta & Co, Cape Town, 1985 at page 32

<sup>96</sup> Dlamini Welcome, *Times of Swaziland*, *No divorce in Swazi marriages – King*, available at [www.times.co.sz/news/90312-no-divorce-swazi-marriages-king](http://www.times.co.sz/news/90312-no-divorce-swazi-marriages-king) – html (accessed on 17 June 2017)

<sup>97</sup> Armstrong AK et al, *Law and the other Sex; The Legal Position of Women in Swaziland*, 1985, University of Swaziland, Kwaluseni

<sup>98</sup> Nhlapho T, *Marriage and Divorce in Swazi Law and Custom*, 1992, Websters Print, Mbabane, at page 100

<sup>99</sup> (n above)

The work of Hilda Kuper<sup>100</sup>, the writer states that divorce is very rare in the Swazi society and a marriage in terms of Swazi Law and Custom establishes a link between the families as opposed to the couple.

Marwick<sup>101</sup>, on the other hand expresses that divorce is extremely difficult to obtain among the Swazis and it is very difficult to separate from a wife. His reason is that Swazi people have an almost illimitable capacity for compromise. Therefore it will only be in the most difficult cases accompanied by grievous cause of a complaint that divorce will be allowed. This same view is also contained in the work of Fannin J<sup>102</sup>, who was the Judicial Commissioner of Swaziland. This is supported by the fact that marriage under Swazi law and custom is a creation of a relationship and bond between the two families of the spouses.

According to the proceedings of the Swazi (Central) Law Panel<sup>103</sup>, chaired by Rubin of the School of Oriental and African Studies at the University of London, termination of a marriage contracted in Swazi Law and Custom by divorce may take place extra judicially. This means that it can only take place after the consultation of the family council or *lusendvo* with the father of the wife.<sup>104</sup>

Before the conclusion of the agreement the wife is returned to the homestead of her father and negotiations are made towards reconciling the parties and if that fails then the agreement for the dissolution of the marriage and the issue of the cattle paid as *lobola* takes place.

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<sup>100</sup> Kuper H, *The Swazi; A South African Kingdom*, 1986, 2<sup>nd</sup> Edition, Holt Rinehardt & Winston, New York

<sup>101</sup> Marwick B.A. *The Swazi*, 1966, Frank Cass and Co, London

<sup>102</sup> Fannin J.M.A. *Preliminary Notes on Principles of Swazi Customary Law*, dated 12 December 1967, Lozitha (Unreported Mimeo)

<sup>103</sup> Meetings held at Lozitha from 26 to 29 May 1964 under the Chairmanship of Mr Rubin at page 21 of the Report

<sup>104</sup> (n above)

In the past there was no room for divorce even in cases where the woman has been found to have committed adultery or practised witchcraft. In such cases the woman has to be taken to her parental homestead where they have to admonish her to desist from that unlawful conduct. Her family would then pay a fine to the husband family in a form of beasts.<sup>105</sup>

The Supreme Court of Swaziland faced with the similar question in the recently decided case of *Samuel Myeni Hlawe v Beatrice Tholakele Seyama*<sup>106</sup> pointed out that the procedure to dissolve a customary law marriage in Swaziland is not clear one. Of significance is that it does not dissolve as a result of adultery committed by the wife. The family of the wife and the husband must hold a meeting which must be chaired by the Royal Kraal and there must be evidence that the two families failed to reconcile.

The Court held that the Swazi customary marital bond is very difficult to break. It pointed out that the main characteristic of the marriage is the smearing of the red ochre, which is only smeared once during the lifetime of a woman. The court was of the view that "dissolution" of a Swazi customary law marriage is misleading when considering the fact that red ochre cannot be easily washed off.

The Court went on to state that deregistration of the marriage is not similar or an equivalent substitute of washing off the red ochre as the smeared red ochre is not washed off. The Court held that the principles governing Swazi customary law marriage do not envisage or encourage divorce as the objective of marriage is perpetuity. It held that the dissolution proceedings

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<sup>105</sup> Swazi (Central) Law Panel, Note 11 at page 21

<sup>106</sup> *and Two Others* (56/2016) [2017] SZSC 41 (09October, 2017)

must be informed by the fact that divorce is culturally unSwazi and only permitted as a last resort after everything has failed to hold the marriage in place.

The judgment of the Supreme Court is contrary to the provisions of the Constitution of Swaziland Act, 2005 and in particular equality between women and men.<sup>107</sup> The application of the provisions of the Constitution by the Courts is not discretionary but mandatory. The Constitution was adopted a year later after the country acceded to the Convention on the Elimination of All Forms of Discrimination against Women<sup>108</sup> on the 26<sup>th</sup> March 2004. On the same date the country also acceded to the United Nations ICCPR<sup>109</sup>, ICESCR<sup>110</sup>, and the CAT<sup>111</sup> which all recognise and protect the fundamental human rights of both men and women.

It can also be inferred that the provisions of the Constitution of Swaziland pertaining to non-discrimination and equality between men and women were implementing the measures towards domesticating the provisions of the Conventions. It can be viewed as Swaziland commitment in ensuring the principles of equality and non – discrimination which are promoted by the Conventions.

However, the Court in this case decided the matter to the exclusion and non- involvement of the custodians of Swazi Law and Custom and worse of it all did not consider the provisions of the Constitution and Conventions to which Swaziland acceded and ratified.

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<sup>107</sup> Section 20 of the Constitution Act, 2005

<sup>108</sup> CEDAW

<sup>109</sup> International Covenant on Civil and Political Rights

<sup>110</sup> International Covenant on Economic, Social and Cultural Rights

<sup>111</sup> The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment



### **3.1 Grounds for dissolution of a Swazi Customary Law Marriage**

It is agreed that adultery and witchcraft are grounds for divorce at the instance of the husband (but not of the wife) in terms of Swazi law and custom. On the other hand neglect of duty, desertion and or gross ill treatment by a husband appears to be the only grounds available to a wife to end a customary marriage.<sup>112</sup>

#### **3.1.1 Adultery**

In terms of Swazi customary law adultery, refusal to tender conjugal rights, and the death of one spouse are not grounds for terminating the marriage. The husband is only considered to have committed the act of adultery when he has a sexual relationship with a woman who is already married to another man. However, the husband is not considered to be in adulterous relationship when he has sexual relations with several women apart from the women whom he married through Swazi law and custom.

In the case of adultery that has been committed by the wife, her family is fined two cattle as a fine. However, if the wife is staying with the adulterer the husband will have to order her wife to restore his conjugal rights failing which it will be viewed that her conduct amounts to desertion. Her father will then have to pay two beasts to the husband family for *kusula emacansi* which is cleansing the sleeping mats.

#### **3.1.2 Maltreatment**

On the other hand maltreatment can be a ground for the dissolution of a Swazi customary law marriage. In the decided case of *Malambe and Another*

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<sup>112</sup> Nhlapho T, Marriage and Divorce in Swazi Law and Custom, 1992, Websters Mbabane at page 77

*v Khoza*<sup>113</sup>, Nathan CJ held that it was a principle of Swazi Law and custom that where a husband maltreats the wife she is allowed to leave him and will not be able to claim the cattle which he paid as *lobola* for her. The court made reference to the work of the Swazi (Central) Law Panel which held meetings in May 1964 at Lozitha. Mr Rubin of the School of Oriental and African Studies at the University of London was the chairperson together with members of the Swazi Court of Appeal, Higher Court of Appeal and other people. The court held that the Report was authoritative.<sup>114</sup>

### **3.1.3 Failure to render conjugal rights**

It is common practice that the failure by the wife to render conjugal rights to her husband does not terminate the marriage in terms of Swazi customary law. The following reasons are considered reasonable for the wife to refuse sexual intercourse with her husband;

- (a) When the wife is in her menstrual cycle.
- (b) When the wife is in the advanced stages of pregnancy.
- (c) When the wife has just given birth to a child within a period of not more than six months.
- (d) When the wife is sick or ill resulting in her not feeling well.
- (e) When the wife is observing a period of mourning after death in her parental homestead or in her marital homestead.

In the event the wife refuses to afford the husband his conjugal rights without just reason, the common practice is for the husband to take another wife without terminating the marriage.

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<sup>113</sup> SLR 1970 – 76 at page 377

<sup>114</sup> (n above)

### 3.1.4 Desertion

Desertion is one of the significant grounds for divorce in a marriage in terms of Swazi law and custom. In the case of *Siphiwe Magagula v Lindiwe Mabuza and Others*<sup>115</sup> the applicant had been married to the deceased before contracting another marriage with a different man. The second man died. She became the beneficiary.

Later the first husband died as well and she proceeded to lay a claim against the estate of the first husband. The court held that the first marriage was dissolved when she was married to the second husband. His Lordship M. C. B. Maphalala J. stated as follows:

*"...where the wife deserts her husband and marries another man during the lifetime of the husband, the marriage automatically comes to an end whether or not a family meeting is held; she cannot be said to be still legally married to the first husband."*

The High court of Swaziland decided further in the case of *Steven Gamedze v Jabu Dlamini and Others*<sup>116</sup>, where the Applicant had been married in terms of Swazi law and Custom to Jabu Gamedze (born Dlamini) the deceased. The marriage failed within a period of two years because the deceased could not bear children and consequent to that her husband abused her. As a result she left her matrimonial home and returned to her parental homestead.

The deceased deserted her husband for a period of about 23 years and nothing of significance was done by the two families to terminate their

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<sup>115</sup> 4577/08 [2008] SZHC 10

<sup>116</sup> 1053 / 13 [2013] SZHC 143

customary law marriage. Her father predeceased her and she was then survived by her aged mother and two siblings. Therefore at the time of her death she was lawfully married to the Applicant.

The husband claim was that despite living in separation for a period of 23 years with the deceased he possessed unfettered rights to make a decision of when, how and where the deceased was to be buried. The Respondent who was the deceased biological mother opposed that her daughter be buried at Applicants home as the deceased was subjected to severe humiliation during her lifetime at the hands of the Applicant.

The court<sup>117</sup> dismissed the application and reasoned as follows;

*"People, dead or alive are human beings. They have a name, reputation and dignity. They command and deserve to be treated humanely – with care, respect, compassion and deference. They should not be treated as chattels or mere possessions to be had and disposed of at will.*

*To hold that the applicant, who humiliated and grossly abused the deceased during her lifetime and forced her to live her marital home; has a right to bury her at her death, would be a travesity of the law and grave insult to the dignity and humanity of the deceased. It would be nothing but a dogmatic application of the law; a misapplication in fact.*

*In life, the deceased could not withstand the abuse by the applicant. She could not live with him. She removed herself from him. Now that she is dead, the law must not compel 'her to live with him'; just*

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<sup>117</sup> per Justice Mbutfo Mamba

*because her powers of resistance have been taken away from her by death”.*

It may be pointed out that this case was not enrolled and decided as a Constitutional matter although the reasoning of the court<sup>118</sup> was highly based on the human rights aspect, as it considered the aspects of the human rights dignity and fairness to form its judgment.

This decision of the court is also in line with the provision of Section 252 (2) and (3) of the Constitution<sup>119</sup> which provides that the principles of Swazi Customary Law are recognised and shall be applied and enforced as part of the law in Swaziland.<sup>120</sup> Although the provisions of subsection (2) will not apply in respect of a custom that is not consistent with the provision of the Constitution or statute, or repugnant to natural justice or morality or general principles of humanity.<sup>121</sup>

In terms of Swazi Law and Custom it is the prerogative of the man to decide the time, manner and place at which his wife will be buried. It is clear that the court in this matter did not follow the Swazi Law and Custom as it would have violated some of the principles mentioned under section 252 of the Constitution.

It is clear that Swaziland is a patriarchal society the interest of the family is designed to favour the men and that is a form of inequality in the Swazi customary system. The Universal Declaration on Human Rights<sup>122</sup>, The

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<sup>118</sup> Per Mbutfo Mamba J

<sup>119</sup> Act, 2005

<sup>120</sup> Section 252 (2) of the Constitution Act, 2005

<sup>121</sup> Section 252 (2) of the Constitution Act, 2005

<sup>122</sup> UDHR, 1948

International Covenant on Civil and Political Rights<sup>123</sup>, and The International Covenant on Economic Social and Cultural Rights<sup>124</sup>, all deemed sex as a ground for non-discrimination. Article 23(4)<sup>125</sup> imposed upon State parties to take steps to ensure equality of rights and responsibilities of spouses as to marriage and its dissolution.

### **3.1.5 The Death of One Spouse**

The death of one spouse does not bring an end to the marriage relationship in terms of Swazi law and custom. The surviving spouse may practice the *kungena* or levirate custom if she is the widow or the *inhlanti* or sororate custom in the case of the widower.<sup>126</sup>

In a marriage in terms of Swazi customary law the death of a spouse does not necessarily dissolve a marriage. The reason is based on the fact that the marriage contract is between the two families of the spouses and the death of one spouse only brings a new phase in the marriage relationship.<sup>127</sup>

This assertion is also upheld by the courts. In the case of *Patricia Cebisile Mndzebele (nee Mndzebele) v Nolwazi Mndzebele and Others*<sup>128</sup> the court held that death does not automatically dissolve or terminate the marriage in terms of Swazi customary law.

The court of appeal in the case of *Knox Mshumayeli Nxumalo v Nellie Siphwe Ndlovu and Others*<sup>129</sup> held that the death of one spouse does not

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<sup>123</sup> ICCPR, 1966

<sup>124</sup> ICESCR, 1966

<sup>125</sup> of the ICCPR

<sup>126</sup> (n above)

<sup>127</sup> (Nhlapho T, above)

<sup>128</sup> High Court of Swaziland, Case Number 828/2013

<sup>129</sup> Swaziland Court of Appeal Case Number 42/2010

automatically end the marriage and it is well accepted that a substitute husband may be provided which is known as the levirate or *kungena*.

In the appeal case of *Thembi Mhlanga v Alfred Mhlanga and Others*<sup>130</sup> the court pointed out further that it was settled law in Swaziland that a marriage in terms of Swazi customary law involves the two families and not only the two parties. The court stated that the chief of the area has to be informed of the marriage event if it is going to take place within his area, to enable him to send members of his Inner Counsel or *bandlanthane* to represent him. This serves to prove that the marriage has been solemnised and to ensure peace during the ceremony.<sup>131</sup>

In the case of *Appollo Thomas Mahlalela v Timothy Mathonsi*<sup>132</sup> the deceased was married in terms of Swazi Law and Custom to Petros Dingane Nhlebela who is also deceased. After the death of Petros the deceased reported his death to her family. The two families held various meetings which led to both agreeing that the deceased should not wear a mourning gown and also raised the issue that she was still young.

The deceased later got married to Timothy Mathonsi in terms of Swazi Law and Custom. He paid *lobola* to her family and they established their matrimonial home in the Hhohho region of Swaziland. The court was then called upon to determine which family had the right to bury the deceased, whether it was the family of the first husband or the family of the Respondent who married the deceased after the death of the first husband.

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<sup>130</sup> Swaziland Court of Appeal Case Number 16/2014

<sup>131</sup> (n above)

<sup>132</sup> (1800/2015) [2015] SZHC (14 December 2015)

The court had to determine as well whether marriage in Swazi Law and Custom terminates automatically at the death of the husband. The court held that death of one spouse does not dissolve a marriage contracted under Swazi customary law as it is a contract between the families of the spouses and not only between the individual spouses.

It held that a woman married in terms of Swazi customary law whose husband has died must be formally released by her in laws before she can remarry another person. The court stated that the evidence of such release must be established because if it is not, the family of the first husband will have the exclusive right to bury the deceased women as their daughter in law.

The court stated as a matter of principle that where a woman wants to be “released” from a marriage contracted in terms of Swazi Law and Custom following the death of her husband, she must ensure that the “release” is a product of an agreed process between the families.<sup>133</sup> Therefore it is trite law in Swaziland that the death of one spouse does not mean that the marriage in terms of Swazi customary law is dissolved as death of one partner does not bring it to an end.

### **3.2 The Constitutional Provisions of the Rights of Women in Swaziland**

Swaziland gained its independence from the British on the 6<sup>th</sup> September 1968 and was given the Westminster Constitution.<sup>134</sup> However, in 1973 the inherited Constitution was suspended and all powers vested in the King.<sup>135</sup>

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<sup>133</sup> (n above)

<sup>134</sup> The Constitution of Swaziland, 1968

<sup>135</sup> The King’s Proclamation to the Nation, 1973



For a period of about 30 years the country was operating with no Constitution until the adoption of the new Constitution<sup>136</sup> in 2005 which also contained a bill of rights. According to chapter III of the Constitution there is a provision bill of rights which is to protect and promote fundamental rights and freedoms, its section 20 provides as follows;

*"All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law."<sup>137</sup>*

*For the avoidance of any doubt, a person shall not be discriminated against on the grounds of gender, race, colour, ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion, age or disability."<sup>138</sup>*

*For the purposes of this section, "discriminate" means to give different treatment to different persons attributable only or mainly to their respective descriptions by **gender**<sup>139</sup>, race, colour, ethnic origin, birth, tribe, creed or religion, or social or economic standing, political opinion, age or disability."<sup>140</sup>*

This means that in terms of the Constitution which is the superior law of the land in Swaziland<sup>141</sup>, all people are equal before and under the law and there shall be no discrimination of a person on the ground of gender. There is also the provision on the rights and protection of the family under section 27 of the Constitution which provides as follows;

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<sup>136</sup> The Constitution of the Kingdom of Swaziland Act, 2005

<sup>137</sup> Section 20 (1) of the Constitution of the Kingdom of Swaziland Act, 2005

<sup>138</sup> (n above Section 20 (2))

<sup>139</sup> bold my emphasis

<sup>140</sup> (n above Section 20 (3))

<sup>141</sup> Section 2 of The Constitution Act, 2005

*"Men and women of marriageable age have a right to marry and found a family.<sup>142</sup> Marriage shall be entered into only with the free and full consent of the intending spouses.<sup>143</sup>The family is the natural and fundamental unit of society and is entitled to protection by the State."<sup>144</sup>*

It also provides on the rights of women as follows;

*"Women have the right to equal treatment with men and that right shall include equal opportunities in political, economic and social activities.*

*(2) Subject to the availability of resources, the Government shall provide facilities and opportunities necessary to enhance the welfare of women to enable them to realise their full potential and advancement.*

*(3) A woman shall not be compelled to undergo or uphold any custom to which she is in conscience opposed.*

### **3.3 Regional Provisions on Equal Rights in Marriage and at its Dissolution**

The fact that Swaziland is a patriarchal society the interest of the family is designed to favour the men and that is a form of inequality in the Swazi customary system. The Universal Declaration on Human Rights<sup>145</sup>, The International Covenant on Civil and Political Rights<sup>146</sup>, and The International Covenant on Economic Social and Cultural Rights<sup>147</sup>, all deemed sex as a ground for non-discrimination. Article 23(4)<sup>148</sup> imposed upon State parties

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<sup>142</sup> Section 27 (1) of the Constitution Act, 2005

<sup>143</sup> (n above Section 27 (2))

<sup>144</sup> (n above )

<sup>145</sup> UDHR, 1948

<sup>146</sup> ICCPR, 1966

<sup>147</sup> ICESCR, 1966

<sup>148</sup> of the ICCPR, 1966

to take steps to ensure equality of rights and responsibilities of spouses as to marriage and its dissolution.

The African Charter on Human and Peoples' Rights<sup>149</sup> guarantees the rights of men and women. It provides that every person shall be entitled to enjoy the rights and freedom guaranteed and recognised in the African Charter without distinction such as sex, national and social origin or birth.<sup>150</sup>

The Charter enjoins the state parties to ensure that discrimination against women is eliminated, and it has to protect the rights of women and children as stated in international conventions and declarations.<sup>151</sup>

The Maputo Protocol aimed at boosting the African Charter in the women's rights. Article 6 (c) makes provision that state parties must ensure the enjoyment of equal rights by the men and women. They have to be regarded as equal partners in the marriage. Therefore state parties must guarantee monogamous marriage as the preferred one in their national laws.

This article is contradicting with article 8 (f) of the same protocol, where it also state that the state parties are not enjoined to pass laws against polygamy. Thus it can be said that the human rights instrument does not prohibit polygamy equivocally. This article needs to be amended to abolish polygamy in a very clear language. Swaziland is deeply entrenched in the cultural practice of polygamy from the head of state to the ordinary men on the street.

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<sup>149</sup> Adopted on the 27<sup>th</sup> June 1981 and entered into force on 21 October 1986

<sup>150</sup> Article 2 of the African Charter on Human and Peoples' Rights (1981/1986)

<sup>151</sup> Article 18 (3) of the African Charter on Human and Peoples' Rights (1981/1986)

As the African Charter main aim was to guarantee the rights of both the men and women. The Maputo Protocol was meant to supplement the African Charter main aim of protecting the women rights. In terms of Article 6 (c) of the Protocol the State parties are called to ensure that both the men and women enjoy equal rights and further that they are regarded as equal partners in marriage.

State Parties should enact national legislation which will guarantee that monogamous marriage is encouraged as the preferred form of marriage and on the same hand the rights of women in marriage and those in polygamous marriage be protected and promoted.<sup>152</sup>

In the context of this Paper the provisions of this Article are that the same rights and principles governing the dissolution of a marriage in terms of Swazi Law and Custom should be applicable to both the husband and the wife. Therefore legislation must be put in place which will promote monogamous marriage ideal and on the same breath promote and protect the rights of women in polygamous marriage. The provisions of the Protocol seems to be in conflict as on one hand it fails to recognise polygamous marriage and on the other supports it.

It can be added that the levirate and sororate marriages in terms of Swazi Law and Custom and the practice of polygamy by the men proves beyond reasonable doubt the depth of the gender inequality, discrimination and the prejudices against the women in Swaziland. Further, Article 8 (f) of the Protocol on the Rights of Women provides as follows;

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<sup>152</sup> Article 6 (c) of the Protocol on the Rights of Women (2003/2005) also referred to as the Maputo Protocol

*“Women and men are equal before the law and shall have the right to equal protection and benefit of the law. States parties shall take all appropriate measures to ensure...reform of existing discriminatory laws and practises in order to promote and protect the rights of women.”<sup>153</sup>*

This provision is in direct contradiction with Article 6 (c) in that state parties are called upon to make laws which reform the existing discriminatory laws and practices to ensure that the rights of women are protected and promoted. Yet in terms of Article 8 (f) the state parties are called upon to make national laws or legislations against polygamy in a very ambiguous language, as monogamous marriages are encouraged and preferred as the form of marriage.

This undermines the rights of women to equality. It may be submitted that Swaziland would not have agreed at the African Union to have the provisions of Article 6 (c) to abolish polygamous marriages as it is embraced by its Swazi laws and customs

### **3.4 International Human Rights Law on Equality between Men and Women**

The General Assembly of the United Nations adopted The Universal Declaration<sup>154</sup>, which guarantees the rights of all people and covers economic, social, cultural, civil and political rights. It guarantees everyone to

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<sup>153</sup> Article 8 (f) of the Protocol on the Rights of Women (2003/2005)

<sup>154</sup> of Human Rights (UDHR), on the 10<sup>th</sup> December 1948

all rights and freedoms in the Declaration without distinction to sex, national or social origin.<sup>155</sup>

However, there is inequality between the spouses in a marriage in terms of Swazi law and custom as it has been shown that the husband can divorce his wife on the ground of adultery and witchcraft yet on the other hand as polygamous marriages are allowed, the wife cannot divorce her husband on the ground of adultery. It can be said that such discrimination is not supported by Article 2 and 16 of the Declaration.

In terms of Article 16 of the Declaration men and women are entitled to equal rights as to marriage, during the course of the marriage and at its dissolution.<sup>156</sup> It even provides further that marriage shall be entered into with the full and free consent of the parties or spouses.<sup>157</sup>

The Convention on the Elimination of All Forms of Discrimination against Women,<sup>158</sup> in its Article 16 reaffirms that state parties must take all appropriate measures to eliminate discrimination against women in matters dealing with marriage and should ensure equality between women and men in specifying the same rights to enter into a marriage.<sup>159</sup> It guarantees the same right between the parties to choose a spouse and enter into marriage with their full and free consent.<sup>160</sup> The same rights and responsibilities between men and women must apply during marriage and at its dissolution.

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<sup>155</sup> The Universal Declaration on Human Rights, 1948

<sup>156</sup> Article 16 (1) of the UDHR, 1948

<sup>157</sup> Article 16 (2) of the UDHR, 1948

<sup>158</sup> Adopted by the General Assembly on 18 December 1979 and came into force on 3 September 1981

<sup>159</sup> Article 16 (a) of the Convention on the Elimination of Discrimination Against Women, adopted in 1979 by the UN General Assembly

<sup>160</sup> Article 16(b) of CEDAW, 1979

The International Covenant on Civil and Political Rights<sup>161</sup> and the International Covenant on Economic, Social and Cultural Rights<sup>162</sup> both adopted the UDHR approach that sex should not be used as a ground for discrimination. According to article 23 (4) of the ICCPR state parties are enjoined to take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage and at its dissolution.

### **3.5 Polygamous marriages in Swaziland against International Treaties**

This form of marriage is practised in the country and it goes against the women's rights to equality with men. In terms of the General Recommendation number 21<sup>163</sup> at paragraph 14 prohibited and discouraged the practice of polygamy as it contravenes the rights of women to equality with men resulting in serious financial and emotional stress to her and this form of marriage needs to be prohibited and discouraged.

The general recommendations of CEDAW are not binding in law but are considered persuasive interpretations of the articles.<sup>164</sup> The Committee was concerned that in states parties where their Constitutions guarantee the equality rights of women to men but allow polygamous marriages in terms of customary law just like in Swaziland, violates the constitutional rights of women and further contravenes Article 5 (a). This Article enjoins state parties to take appropriate measures to modify cultural patterns of both men and women<sup>165</sup> in order to eliminate the of prejudices of that custom

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<sup>161</sup> (ICCPR, 1966)

<sup>162</sup> (ICESCR, 1966)

<sup>163</sup> Adopted by the Committee on the Elimination of Discrimination against Women during the Third Session (1994); On Equality in Marriage and Family Relations

<sup>164</sup> Benedek W et al, Human Rights of Women; International Instruments and African Experiences, 2002, London, page 13

<sup>165</sup> General Recommendation 21; Equality in Marriage and Family Relations, 1994

which is grounded on the thinking of inferiority and superiority of either of the sexes.<sup>166</sup>

### **3.6 Polygamous marriages in Swaziland and the Constitution Act**

Polygamy is defined as the maintaining of conjugal relationships by more than two persons. The result of such relations is to form a single matrimonial or family entity with the spouses and this is regarded as a polygamous marriage.<sup>167</sup> In Swaziland the Constitution guarantees the rights of women in its section 20 and 28 however, the Swazi law and custom does not comply with the provisions of the Convention.

This view is also expounded in the Indian case of *Itwari v Asghar*<sup>168</sup> where the Indian High court held that;

*"...the importing of a second wife into the household ordinarily means a stinging insult to the first ...and is automatically degraded by society. All this is likely to prey upon her mind and health if she is compelled to live with her husband under the altered circumstances."*

In paragraph 16 the Committee notes that the right to choose a spouse and enter into a marriage freely is very paramount in a women's life. The Committee notes that some state reports disclose that in some countries custom allow for payment or preferment and such should be ended.

The United Nations on the status of Women during its first meeting in 1947 agreed to work for the freedom of choice, dignity of the wife, monogamy

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<sup>166</sup> Article 5 (a) of the Convention on the Elimination of all Forms of Discrimination against Women, 1981

<sup>167</sup> Law Reform Commission of Canada, 1985 at page 13

<sup>168</sup> Allahabad High Court (1960:paragraph 15)



and for the equal rights to the dissolution of the marriage. The Women Convention in its preamble states that change in the traditional role of women in society and in the family is very important in order to realize the full equality between the sexes.

The Human Rights Committee in its general comment number 28 on the Equality of Rights between Men and Women it noted that polygamy violates the dignity of women and is inadmissible discrimination against women and it has to be abolished where it continues to be practised.<sup>169</sup>

Although the Swazi customary law and its culture deserve to be protected, such matters have to be handled in the light of human rights standards. Customs and practices which tend to be repugnant to human rights standards should not find space in modern times.<sup>170</sup>

It can also be pointed out that it is good to preserve traditional customs and practices for the future generation for the purpose of cultural identity but it must only the customs which recognise human rights irrespective of sex that should be encouraged. As accordingly culture, captures the living aspirations of the people and assist them to confront the challenges they face and not the relic imported from the past and imposed on the present.<sup>171</sup>

The ground of dissolving a Swazi customary law marriage based on the ground of adultery and its applicability to women alone subjugates women to men, as it is clear that it is not applicable to men as they are allowed to

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<sup>169</sup> General Comment No. 28; Equality of Rights between men and women (Article 3), 29 March 2000 paragraph 24, Adopted by the Human Rights Committee under Article 40 paragraph 4 of the ICCPR.

<sup>170</sup> Tibatemwa – Erikubinza, *Multiple Partnering; Gender Relations and Violence by Women in Uganda*, East Africa Journal Peace Human Rights, 2008

<sup>171</sup> Fanon, *The Wretched of the Earth*, New York; Grove Press 2004, page 211

have multiple sexual relationships with other women apart from the wife. The men are only barred from having sexual relationships with women who are already married with other men. Yet the women cannot have a relationship with other men apart from the husband.

## **Chapter Four**

### **4.0 The Comparative Analysis of the Dissolution of a Customary Law Marriage in Nigeria and in Swaziland**

A Swazi customary Law marriage cannot be dissolved or terminated by the death of one spouse, as the death of one of the parties ushers a new phase in the marriage relationship. Yet on the other hand a marriage in terms of the civil rites, which is contracted in terms of the Marriage Act, may be dissolved by the death of one spouse or by a decree of divorce by a competent court of jurisdiction on the ground of either adultery or malicious desertion.

In terms of Swazi Law and Custom after the death of the wife the husband may be given a younger sister or relative by the wife's family who will be referred to as the *inhlanti* or sororate. In the case where the surviving spouse is the wife, the family council will select a male member of the family to cohabit with her, which is referred to as the *kungena* or levirate relationship.

#### **4.1 Does the Death of one Partner dissolve a Customary Law Marriage in Nigeria?**

In such a case the wife has alternatives to either re – marry and have the bride price paid to her family refunded, or return to her parents homestead. She can also continue to stay at her matrimonial home and marry to her brother in law or son from born from another woman.

## **4.2 Divorce in Swaziland**

It is arrived at as a result of an agreement that has been reached between the two families of the wife and the husband with the involvement of the father of the bride. Therefore divorce in terms of the Custom may take place extra – judicially, although it may also be issued by the Swazi Courts<sup>172</sup> which will issue the orders in terms of the dissolution and also decide on the issue of *lobola*.

Under the Marriage Act divorce cannot come about as a result of an agreement by the parties and their relatives. However, it is only a court with competent jurisdiction which is either the Magistrates Court in a situation where both of the parties to the marriage are Swazis, or the High Court where the parties or one of them is not a Swazi.

In contrast the Swazi Courts are not competent and do not have jurisdiction to dissolve a marriage which was contracted in terms of the Marriage Act. The Swazi Courts can only determine matters relating to the return or disposal of the *lobola* which was paid in respect of the civil rites marriage.<sup>173</sup>

### **4.2.1 The grounds for Divorce**

#### **4.2.1.1 Adultery**

As earlier on stated, adultery can only be committed by a wife in terms of the Swazi Law and Custom marriage, adultery is a ground for divorce which is only at the instance of the husband in terms of Swazi Law and Custom marriage. The husband is also at liberty not

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<sup>172</sup> Established in terms of the Swazi Courts Act , No. 80 of 1950

<sup>173</sup> Section 9(b) of the Swazi Courts Act, 1950

to dissolve the marriage on the ground of adultery and the adulterine children born to the wife belong to the husband.

Although in terms of civil rites marriage this ground of divorce is available to both the wife and husband. The marriage in terms of civil rites is monogamous and both parties are precluded from engaging in sexual intercourse with other people apart from the lawful spouse.

#### **4.2.1.2 Malicious desertion**

This ground of dissolution to both the Swazi Law and Custom marriage and the Marriage in terms of the Act is applicable. The only difference between these two types of marriages is that in terms of Swazi Law and Custom, the wife is the only person who can desert her marital home. For a wife to be able to leave her marital home it will have to be for work purposes or because of an illness that her family has opted to monitor. In both occasions, permission from the husband and the in-laws will have to be sort.

#### **4.2.1.3 Assault on the wife**

In terms of Swazi Law and Custom, repeated assault on the wife by the husband may result on her return to her parental home and eventually leading to the dissolution of the marriage. This is because the act of assault is viewed as an act of ill-treatment and such is not allowed under Swazi Law and Custom. Yet such conduct does not form a solid ground for divorce in terms of the marriage by the Act or civil rites.

#### **4.2.1.4 Witchcraft**

Where it is alleged that the wife practises witchcraft, it can be a ground for divorce at the instance of the husband under Swazi Law and Custom. Under the Marriage Act and civil rites marriage there is no witchcraft and hence no such ground exists.

#### **4.2.1.5 Refusal to render conjugal rights**

The dissolution of the marriage in terms of Swazi Law and Custom may be instituted at the instance of the husband. This may happen where the wife refuses to render conjugal rights to the husband without just cause.

This is also a ground for dissolution of a marriage under the Marriage Act and civil rites.

### **4.3 Marriage in Swazi Law and Custom**

On the aspect of the formation and characteristics of the marriage in terms of Swazi law and custom is that it is family oriented and it is about creating and keeping strong bonds between the two families of the groom and spouse. As the process involves negotiations between the families, yet the marriage in terms of civil rites is based on the parties entering into the marriage, with the exclusion of all others.

### **4.4. Marriage in Nigeria**

In Nigeria both the civil and customary law marriages are recognized. In terms of the decided case of *Hyde v Hyde*<sup>174</sup> the monogamous marriage in

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<sup>174</sup> LR 1P &D (1866) 130

Nigeria is the same as that in England, as it is voluntary and for life between one man and a woman to the exclusion of all others.<sup>175</sup>

In terms of the Act<sup>176</sup> a marriage cannot be valid where either of the parties when contracting same had been married under customary law to another person other than the person to whom they are marrying under the Act.<sup>177</sup> Therefore such marriage will be null and void if both parties wrongfully and knowingly contract same.<sup>178</sup>

#### **4.4.1 The Dissolution of a Customary Law Marriage in Nigeria**

The dissolution of a marriage will come about after the existence of a customary law marriage wherein the parties to same should have possessed the capacity to marry each other and the payment of dowry should have taken place. In the decided case of *Agbeja v Agbeja*<sup>179</sup> the court held that there must be a ceremony of marriage wherein the bride is handed over to the man's family in order to constitute a valid customary law marriage.

As the customary law marriage falls under a number of native laws and customs of the various tribes in Nigeria, the Matrimonial Causes Act recognizes the customary marriage under the law,<sup>180</sup> yet it is classified as being polygamous<sup>181</sup> including the customary law under Islamic law<sup>182</sup>. It is also very important to note at this stage that that the civil rites marriage in Nigeria<sup>183</sup> is not above or superior to the customary law marriage.

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<sup>175</sup> Lord Penzance, (n above)

<sup>176</sup> 2004

<sup>177</sup> Section 33 (1) of the Marriage Act, 2004

<sup>178</sup> Section 33 (2) of the Marriage Act, 2004

<sup>179</sup> 3 NWLR (1985) 11

<sup>180</sup> Section 35 of the Matrimonial Causes Act, 2004

<sup>181</sup> Nwogugu E I, *Family Law in Nigeria*, 3<sup>rd</sup> Edition, 1999, Claverianum Press, Ibadan at page 73

<sup>182</sup> Ikechukwu D U, *Guide to Matrimonial Proceedings*, 2012, 2<sup>nd</sup> Edition Claverianum Press Ibadan at page 2

<sup>183</sup> Referred to as Statutory Marriage

There are two parts of customary laws in Nigeria, in one hand; there is the Islamic and on the other hand, the non-Islamic. The Islamic customary law is practiced in the Northern part of Nigeria by the followers of the Muslim faith, what is important is that the Islamic law is codified in the Sharia law, on the other hand; the non-Islamic customary laws are not codified as the laws vary from one community to the other as a result, the customary law rules pertaining to the subject of the dissolution of a customary law marriage are not codified.

#### **4.4.2 Grounds for divorce under Customary Law in the Nigerian Legal System**

The rules are not strict for the party that wants to come out of a customary law marriage. The divorce comes after the failure of the marriage and this is when the parties to the marriage are no longer able to continue with the marriage. There are many factors can be said to be considered to be moral causes for dissolving a customary law marriages. It can be adultery by the wife, her loose character; and the wife being sterile, or the husband being impotent.<sup>184</sup> In some parts of the states in such as Delta, Edo, Oyo and Ogun States, they codified their customary law marriage.<sup>185</sup>

#### **4.5 The Codified Grounds for Dissolution of a Customary Law Marriage**

They state that marrying minors in terms of betrothal while under the marriageable age can be a ground for divorce, to refuse to consummate a marriage can be a ground for divorce. They also state that a condition that

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<sup>184</sup> WRLR, Local Government Law, 1958 Local Government Law, Cap 78, Laws of Oyo State, Nigeria

<sup>185</sup> Divorce and Custody of Children, Aduba 1958



affects the fertility of a woman, if brought about by her habits can also be a ground for divorce under customary law marriages.

#### **4.5.1 Non- judicial divorce**

There are two ways of obtaining a non-judicial divorce in Nigeria. The first one is that there can be an agreement between the parties which includes the families and parents where the parties are young. The courts also observed same in the case of *Okpanum v Okpanu*.<sup>186</sup> This usually happens where the attempt to reconcile them by their respective families fails,<sup>187</sup> and thereafter a mutual agreement to bring the marriage to an end is entered and reached by the families. This means that the repayment of the bride price must be agreed upon or determined by the customary court where such agreement by the parties fails.

The second way of obtaining a non – judicial divorce in terms of the customary law happens where the husband drives the wife out of the matrimonial home and demands the refund of bride price or in a case where the wife who suffers maltreatment in the hands of her husband that she might run back to her parents with the intention to end the marriage.

It is important to note that whatever way it occurs,<sup>188</sup> the dissolution under customary law in Nigeria is achieved by the refund of bride price as it was stated in the case of *Nwangwa v Ubani*.<sup>189</sup> In both instances when obtaining

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<sup>186</sup> ECSLR (1972) 561

<sup>187</sup> *Okpakap v Okor & Anor Suit No, LD/634 1969 (unreported/ High Court, Lagos 22 May, 1970)*

<sup>188</sup> Section 8 of the Declaration of the BIU Native Marriage Law and Custom Order 1964

<sup>189</sup> 10 NWLR (1997) page 559 at part 526

the non-judicial divorce the circumstances and time at which the divorce was granted will not be available.<sup>190</sup>

#### **4.5.2 Judicial divorce**

It is only takes place when the families have failed to reconcile the parties.<sup>191</sup> In the Nigerian decided case of *Okpakap v Okor and Another*<sup>192</sup> it was held that the jurisdiction in the judicial separation of customary law marriage only lies with the customary courts and magistrate courts. In such instances the records of the evidence of the divorce are available.<sup>193</sup> However, where the courts may refuse to grant the divorce the parties usually run back to the non-judicial approach to dissolve the customary law marriage.

#### **4.6 When is Customary Law Marriage Dissolved in Nigeria?**

The court in the of appeal case of *Ezeaku v Okonkwo*,<sup>194</sup> in which case the deceased was an advocate and had married to the defendant under customary law. However, he separated from the defendant and married the plaintiff and thereafter deposed to an affidavit that the latter was his only wife. Upon his death the court of appeal had to determine whether a marriage in terms of customary law can be dissolved through an affidavit on whether such affidavit weigh much force in law.

The court held that a marriage under customary law cannot be dissolved by wishful thinking and or assertion. It requires a high degree of certainty as it

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<sup>190</sup> Nwogugu et al, Family Law in Nigeria, Heineman Educational Books, 2006, Enugu at page 155

<sup>191</sup> Adesanya, Laws of Matrimonial Cause, 1973, Ibadan University Press at page 39

<sup>192</sup> LD/634 1969 High Court of Lagos, 22 May 1970.

<sup>193</sup> Ramsey et al, Society for Promoting Christian Knowledge; Putting asunder a divorce law for contemporary society, 1988, London

<sup>194</sup> All FWLR (2012) 654 at page 129

pointed out that staying with a man and bearing children for him does not make one a wife in terms of customary or native law and that is why in the same vein a woman cannot be said to have divorced a husband whom she is married to in terms of custom by merely leaving him and staying with another man and later bear children for. Such a marriage can only be dissolved through a court order or by mutual consent subject to the refund of the dowry.<sup>195</sup>

The father of the bride or the people whom under customary law are entitled to receive the bride price are liable to pay the refund to the husband. When relying on what the position has been stated in case law, it was held in the Nigerian decided case of *The Registrar of Marriages v Igbinomwnhia*,<sup>196</sup> that customary law marriage is considered to be dissolved once the bride price is returned and its refund payment is made to the husband. The court held that before this takes place the marriage is considered to be continuing.

In the decided case of *Edet v Essien*<sup>197</sup> it was stated that in terms of the customary law marriage any adulterous children born from a woman before the return of the bride price are considered to be the children belonging to the husband.

The courts went on to state in the case of *Eze v Omeke*<sup>198</sup> that where the customary law marriage has been dissolved by the order of the customary court, it is only after the payment of the refund of the bride price or the dowry that will actually put an end to the marriage. Therefore, the customary courts may issue an order dissolving the customary law marriage but such an order to dissolve the marriage becomes effective by the subsequent refund of the dowry or bride price.

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<sup>195</sup> (n above).

<sup>196</sup> Unreported High Court Case No: B/16M/72, Benin, 5 August 1972

<sup>197</sup> [1972] II NLR 47

<sup>198</sup> [1977] I ANSLR 136

#### **4.6.1 The Exception to the Rule of Paying the Refund**

- (i) The refund of the bride price becomes unnecessary in cases where the husband will renounce his right to claim the refund. Therefore in such a case the marriage will be dissolved by the husband renunciation.
- (ii) The wife may move an Application in court where the husband refuses to accept the bride price back and such may be paid to the court.
- (iii) Among the Igbo State where the husband is the one that divorces the wife such refund will take effect until the wife remarries.
- (iv) In the northern part of Nigeria under the Maliki Law the customary court may make an order to dissolve a customary law marriage without making the order relating to the refund, where the husband is the one who deserted the wife or ill-treats her or abuse her.

#### **4.7 Customary Law as a Socio – Economic Transaction in Nigeria**

The Supreme Court in the decided case of *Oyewunmi v Ogunesan*<sup>199</sup>, observed that the living law of the indigenous people in Nigeria regulates their lives and transactions. Therefore customary law mirrors the culture of the people and the control of their socio – economic transactions within them, including marriage. This is also applicable to customary divorce law and its grounds, procedure and relief attaching to it. Thus they also have to be aligned with the international best practices to conform with the human rights and freedoms to both genders.

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<sup>199</sup> (1990) 3 NWLR 187

It is observed that the prerequisites of a divorce in terms of the native law in Nigeria are prejudicial to the women. The main issue borders around the return of the bride price and the fact that it can be the husband that can send the wife away and also refuse to take the bride price as that can bind the woman as she cannot lawfully marry. Yet on the other hand the man can continue to marry as the law permits him to commit polygamy but polyandry is not allowed.

This is in direct violation of Article 16 (3) of the Convention for the Elimination of All Discrimination against Women<sup>200</sup>, which has been ratified by Nigeria. This provision seeks to award the same rights and responsibilities when the marriage is dissolved.

#### **4.8 The Comparative Analysis of the Bride-price between the Two Countries**

The aspect of the bride price is very crucial in the dissolution of a customary law in Nigeria yet in Swaziland it is not a factor in the dissolution of a Swazi customary law marriage. The bride price in Nigeria seems to be used as a tool of oppression against women as it equates them to chattels or possessions of men bought by way of marriage and returned on divorce with a refund.<sup>201</sup> The manner at which this practice is used in Nigeria relegates the women to some property of trade that can be bought and disposed at the will of the men.

This places the women in a vulnerable position as it puts the men in a position of power and control in respect of determining the reproductive aspect of his wife. This position will tend to subject the women to abuse at the hands of the men where she cannot leave the marriage because her

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<sup>200</sup> CEDAW, 1979

<sup>201</sup> Onokah M, *Family Law*, Spectrum Books, 2003 at page 174

family is not able to return the bride price to the husband. Therefore this custom is bad and dehumanizing and the gifts should not be claimed back at dissolution of the customary marriage.

#### **4.9 The Comparative Analysis on the Aspect of Early Marriages**

In terms of Swazi law and custom a girl may enter into a Swazi customary law marriage at puberty stage and the boy at 18 years old. The age is not fixed yet the Marriage Act prescribes that boys' below the age of 18 and girls below the age of 16 years old cannot marry. On the other hand in Nigeria the minimum age for entering to either a customary law marriage or in terms of the Act is 18 years old.

It can be pointed out that the Swazi customary law seems to be promoting child marriages. It can be defined that any marriage at which the girl is below the age of 18 years before she is psychologically, physically and physiologically ready to carry the responsibilities of marriage and child bearing is a child marriage. As the custom allows girls to enter into a marriage once they reach puberty stage.

This is also against article 6 (b) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women which place the minimum age of marriage at 18 years. The African Charter on the Rights and Welfare of the Child also state that child betrothal and marriage shall be prohibited and action taken as well to ensure that the minimum age of marriage is 18 years old.<sup>202</sup>

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<sup>202</sup> Article 21.2 of the African Charter on the Rights and Welfare of the Child (1990/1999) also referred to as the Children's Charter

The issue of the early marriage which seems to be promoted among the girls in Swaziland undermines the achievement of the eight millennium development goals which are aimed at reducing poverty. As early marriage tends to deprive the girls their right to education and it therefore overlaps to affect them and the society at large, which in turn hinders the social and economic development.

## **Chapter Five- Conclusion and Recommendations**

### **5.1 Findings**

#### **Customary Law Recognised through Legislation**

The Kings Proclamation<sup>203</sup> recognised Swazi Customary law in the legal system of Swaziland. The current Constitution<sup>204</sup> also recognises Swazi Law and Custom and further creates the traditional structures and systems of government. It provides for the operation of Swazi Law on condition of conformity to natural justice, morality or general principles of humanity.<sup>205</sup>

It is clear from the reading of this provision that Swazi Customary Law is not subject to the international treaties or standards. Therefore, the issues surrounding the inequality between men and women are embraced by the Swazi Law and Custom and I would recommend an amendment to this clause in the Constitution.

#### **The characteristics between the two marriages**

The smearing of the woman with red ochre is the single cardinal act that defines a Swazi customary marriage. Such marriage is also potentially polygamous and the wife is under the marital power of both her husband and his family.

On the other hand a civil marriage is dissolved by divorce or death of one of the spouses. In respect of divorce two grounds namely; adultery and desertion are applicable. Yet on the other hand Swazi customary law marriage applies the fault principle by identifying the person who is at fault in the cause for the failure of the marriage.

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<sup>203</sup> The Kings Proclamation (Amendments) Decree of 1987

<sup>204</sup> The Constitution Act, 2005

<sup>205</sup> Section 252 of the Constitution Act, 2005



## **5.2 RECOMMENDATIONS**

### **5.2.1 Establishment of the Legal Aid for Women**

There is also a need for the Swaziland government to establish a Legal Aid fund to the women in Swaziland as the vast majority of them live in poor rural areas and they don't have funds to litigate their cases against matters such as forced marriages or where they want to dissolve their customary law marriage.

Even in the cases of children who are being violated by their parents through betrothals they can be able to access justice through this Legal Aid as children depend on their parents for money. It is submitted that with the availability of the Legal Aid funds the young girls can have access to justice and ensure that their rights as enshrined in this Charter are not violated.

### **5.2.2 Codification of Swazi Law and Custom**

There must be codification of the Swazi Customary law which will include the laws on marriage and dissolution of the marriage in terms of Swazi Law and Custom. This will make ease of compulsion to enforce and ensure that the people are able to make an input in the laws.

### **5.2.3 Minimum Age for entering into a Marriage**

Further, Swaziland needs to amend its National Laws in particular the customary law aspect that places the issue of the age of entering into a Swazi Law and Custom to be at puberty stage for girls. This is because in terms of Article 21 of the African Charter on the Rights and Welfare of the Child, 1990 State Parties to this Charter to which Swaziland is a party, are enjoined to take all measures to eliminate harmful cultural practices affecting the welfare, dignity and development of the child.

## **5.2.4 Formal Training for the Judiciary**

### 5.2.4.1 Their Training

Swazi Customary Law is administered in the National Courts in which case the Court Presidents of these Courts need formal training to be acquainted to observe good judging standards especially for matters involving the dissolution of the Swazi Customary Law. This is also applicable where women seek the annulment of such a marriage on various grounds including lack of consent or being under the age of 18 at the time of contracting the marriage.

### 5.2.4.2 Their Appointment

There is also the need to amend the way of appointment of the National Court Presidents as most of them are Chiefs basically because they are viewed as custodians of Swazi Law and Custom. As adjudicators they need to have a legal background and especially in human rights law to appreciate the treaties and national legislation.

According to the Protocol to the African Charter on Human and Peoples' Rights of Women in Africa, 2003 State parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage.<sup>206</sup> Yet it is clear that this is not the case in a Swazi Customary Law marriage and even at its dissolution as the men are always regarded as superior.

Further, State parties are enjoined to enact appropriate national legislation guaranteeing that marriages shall not take place without the full and free consent of both parties.<sup>207</sup> The Universal Declaration of Human Rights, 1948

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<sup>206</sup> Article 6 of the Protocol to the African Charter on Human and Peoples' Rights of Women in Africa, 2003

<sup>207</sup> Article 6 (a) of the Protocol to the African Charter on Human and Peoples' Rights of Women in Africa, 2003

also buttresses the fact that marriage shall be entered into only with the free and full consent of the spouses.<sup>208</sup>

In terms of Article 16 (1) of the UN Convention on the Elimination of All Forms of Discrimination against Women<sup>209</sup> state parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations to ensure equality between women and men the similar right to enter into marriage, to choose a spouse and to enter into marriage with their free and full consent.<sup>210</sup>

Although it would be best that all marriages including the Swazi Customary Law marriage that it should be terminated through a decree by a competent Court instead of being determined by the family council of both spouses and traditional Courts.

### **5.2.5 Betrothal of Girls**

The betrothal of young girls and allowing them into early marriage does not only undermine the achievement of the eight millennium development goals and global targets aimed at reducing poverty worldwide. It also prevents social and economic development and promotes the high rate of child brides with the low level of education.

Consequently the girls are prone to experience early widowhood which has a negative impact on the economic status and domestic violence is promoted as the girls are more vulnerable. The African Charter on the Rights and

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<sup>208</sup> Article 16 (1) of the Universal Declaration of Human Rights, 1948

<sup>209</sup> CEDAW, 1979

<sup>210</sup> Article 16 (1) of the UN Convention on the Elimination of All Forms of Discrimination against Women, 1979

Welfare of the Child, 1990 child marriage and the betrothal of girls shall be prohibited and effective action which includes legislation specifying the minimum age of marriage to be at 18 years old.<sup>211</sup>

In terms of Article 18 (3) of the African Charter on Human and Peoples Rights, 1981 the State Parties are enjoined to ensure the elimination of discrimination against women and to ensure the protection of children in terms of the international conventions and declarations.<sup>212</sup>

A similar provision in terms of imploring State Parties to take legislative and administrative measures to protect the child while in the care of their parents and guardians is provided under Article 19 of the Convention on the Rights of the Child, 1989.<sup>213</sup> The SADC Protocol on Gender and Development, 2008 provides that legislation on marriage should ensure that persons under the age of 18 years shall not marry and that every marriage must take place with the free and full consent of both parties.<sup>214</sup>

### **5.2.6 Similar Rights at Dissolution of the Marriage**

Either of the spouses must be able to apply for divorce and the grounds for the dissolution of the Swazi Law and Custom marriage should be similar and applicable to both the bride and the groom.

The issue of the bride price or *lobola* cattle seems to be a tool used to oppress women as it tends to equate them to chattels and possessions. It can be observed that this practice relegates the women to a property of

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<sup>211</sup> Article 21 (2) of the African Charter on the Rights and Welfare of the Child, 1990

<sup>212</sup> Article 18(3) of the Banjul Charter on Human and Peoples' Rights, 1981

<sup>213</sup> Article 19 (1) and (2) of the Convention on the Rights of the Child, ( Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 and entered into force on 2 September 1999)

<sup>214</sup> Article 8 (2) (b) of the SADC Protocol on Gender and Development, 2008

trade that can be bought and disposed of and this place the women in a very vulnerable position even when the situation calls that they should come out of the marriage. It has been demonstrated that the man has control over the reproductive aspect of his wife. Thus the women can be subjected to abuse if they cannot leave the marriage on the ground that their family is not able to return the bride price. Therefore it is submitted that these gifts should not be claimed back at the dissolution of the marriage.

Looking at the international treaties the Universal Declaration of Human Rights<sup>215</sup> states that men and women of full marriageable age have the right to marry and found a family. The Declaration further entitles both the men and women to equal rights as to marriage, during marriage and at the dissolution of the marriage.<sup>216</sup>

Further, the regional treaties allude to this as the African Charter on Human and Peoples' Rights, 1981<sup>217</sup> enjoins States to ensure the elimination of any discrimination against women and also to ensure the protection of the rights of the woman and the child as stipulated in international Conventions and Declarations.<sup>218</sup>

## **Conclusion**

- ❖ The main requirement to constitute a valid customary should be the consent of both the bride and groom and the consent should not be required from the family members of the spouses. The legislator has to make the law setting the minimum age to be in line with the international standards to guarantee that the consent is an informed

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<sup>215</sup> General Assembly Resolution 217 A (III), 1948

<sup>216</sup> Article 16 (1) of the Universal Declaration of Human Rights, 1948

<sup>217</sup> Banjul Charter, 1981

<sup>218</sup> Article 18 (3) of the African (Banjul) Charter on Human and Peoples' Rights, 1981

one. The current position is that in terms of Swazi Law and Custom girls who have reached puberty stage are eligible to enter into a customary marriage.

- ❖ Further, all marriages including Swazi Law and Custom should be terminated through a decree of divorce by a Court of Law instead of the dissolution of a customary law marriage being decided exclusively by the family Council, traditional Courts and traditional structures only.
- ❖ Equality and fairness should also be applicable such that either the men or women must be able to apply for divorce and must be able to invoke similar grounds for the dissolution of the marriage which are similar and applicable to both parties.

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