

**The “Inadequately Married”: Extending the putative marriage doctrine to assist
vulnerable parties in invalid customary marriages.**

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ABSTRACT

This thesis considers whether the putative marriage doctrine can be developed to assist parties that find themselves in invalid customary marriages. The thesis focuses on situations where a customary marriage is considered invalid in circumstances where a party does not meet specific legislative or customary requirements. In most instances, these women are left without protection and regulation of the proprietary consequences of the so-called marital estate. The research considers the putative marriage doctrine as a remedy to this challenge. The doctrine is utilised where one or both parties believe in good faith that their marriage is valid when, in fact, one or more of the material requirements for marriage have not been met. Currently, the judgment of *Zulu v Zulu* 2008 (4) SA 12 (D) impedes the doctrine's application in polygamous customary marriages and thus impedes its use by women who are found in invalid customary marriages.

The research carries out a comparative analysis of Californian and Namibian family law, in order to consider how other jurisdictions deal with similar situations. The thesis further proposes a framework to develop the putative marriage doctrine in a way that ensures the protection of customary wives in subsequent marriages that are declared invalid.

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CHAPTER 1: INTRODUCTION TO THESIS

1.1 DESCRIPTION AND CONTEXT OF RESEARCH

a) Introduction

The Recognition of Customary Marriages Act¹ (the RCMA) came into force twenty-three years ago to regulate customary marriages. However, over the years, commentators have identified weaknesses in the legislation that have had the undesirable effect of leaving women, in particular, without protection. The putative marriage doctrine is a remedy developed in the common law to correct the injustice that occurs when a marriage has been declared null and void, and one or both parties prove that they believed in good faith that their marriage was valid. Is it possible to use the putative marriage doctrine to grant protection to women whose alleged customary marriages are declared invalid due to a failure to meet the requirements of custom and/or legislation? This thesis attempts to answer this very question. Its aim is to consider the development of the putative marriage doctrine in order to improve the situation of women found in invalid customary marriages.

b) Background of customary marriages

Before the RCMA and the Constitution², customary marriages were not recognised under official colonial rule. In the case of *Ntame v Mbede*,³ the courts stated that “where Native custom comes into conflict with the common law or statutory law, the former must give way.”⁴ According to the Black Administration Act,⁵ customary unions were only applied in traditional leader’s courts and native commissioner’s courts. As customary marriages were polygamous or potentially polygamous, they were contrary to the law and public policy.⁶ The British regarded their form of marriage as the standard model and attempted to use it in African customary marriages.⁷ This

¹ Act 120 of 1998.

² Constitution of the Republic of South Africa, 1996.

³ 3 NAC 94 1912.

⁴ NS Peart “Section 11(1) of the Black Administration Act 38 of 1927: The application of the repugnancy clause” 1982 *Acta Juridica* 99 at 103.

⁵ Act 38 of 1927.

⁶ See *R v Mboko* 1910 TPD 445. In the case the court held that a marriage appears to be polygamous if it celebrated custom that allows polygamy. Regardless of whether it was actually polygamous, the marriage is thus invalid. See also *Ngqobela v Sithole* 1893 (10) SC 346.

⁷ TW Bennett *Customary Law in South Africa* (2004) 188.

model was based on the Christian Church's formulation that marriage was "a voluntary union between one man and one woman".⁸ Non-recognition of customary unions meant that the law left families unprotected, spouses had no right to claim support or inheritance, and their children were deemed "illegitimate".⁹ During apartheid in South Africa, where there was limited recognition of customary marriages, there was a strong distinction between civil and customary marriages.¹⁰ Civil marriages had a privileged position through the maintenance of this distinction, while customary marriages had limited legal recognition.¹¹ After a while, customary unions were recognised under the KwaZulu Act on the Code of Zulu Law¹² and the Transkei Marriage Act. Still, these Acts were only applicable in KwaZulu Natal and the former Transkei, respectively.¹³ As there were no legal consequences for customary marriages, a civil marriage could be concluded that dissolved the existing customary union.¹⁴ Customary law considered the wife as a minor under her husband's "guardianship", and she could not own personal property.¹⁵ The Code of Zulu Law and the Transkei Marriage Act codified marital power, giving the husband absolute ownership of his wife's personal and family property.¹⁶

The coming into force of the RCMA on 15 November 2000 meant that legal recognition was extended to customary marriages, which gained equal footing with civil marriages. One of the Act's main objectives was to improve women's position by introducing measures that brought

⁸ Bennett *Customary Law* 189.

⁹ M Herbst and W Du Plessis "Customary law v common law marriages: A hybrid approach in South Africa" (2008) 3 *Journal of Comparative Law* 105 at 106.

¹⁰ South African Law Commission Project 90: *Report on Customary Marriages* (1998) 9.

¹¹ South African Law Commission Project 90: *Report on Customary Marriages* (1998) 9.

¹² Act 6 of 1981.

¹³ RJ Kovacs, S Ndashe and J Williams "Twelve years later: how the Recognition of Customary Marriages Act of 1998 is failing women in South Africa" 2013 *Acta Juridica* 273 at 275.

¹⁴ P Bakker and J Heaton "The co-existence of customary and civil marriage under the Black Administration Act 38 of 1927 and the Recognition of Customary Marriages Act 120 of 1998 – the Supreme Court of Appeal introduces polygyny into some civil marriages *Netshituka v Netshituka* 2011 5 SA 453 (SCA)" 2012 *TSAR* 586. Section 22 of the Black Administration Act stated that "no male Native shall during the subsistence of any customary union between him and any woman, contract a marriage with any other woman unless he has first declared before the magistrate or native commissioner district in which he is domiciled". This meant that civil marriages and customary marriages could co-exist with the effect that the customary union would usually then be 'discarded'.

¹⁵ M Mamashela "New families, new property, new laws: The practical effects of the Recognition of Customary Marriages Act" (2004) 20 *SAJHR* 616 at 623.

¹⁶ Section 68 of the Code of Zulu Law, s 37 of the Transkei Marriage Act.

customary law in line with the Constitution.¹⁷ Section 15(3) of the Constitution not only authorised Parliament to pass legislation to recognise customary marriages but also placed a duty on the government to encourage cultural and religious diversity and to eradicate laws discriminating against customary marriages.¹⁸ The Act dealt particularly with the balance of the constitutional rights to culture with the right to equality and, in particular, gender equality.¹⁹ The Constitutional Court in *Alexkor v Richtersveld Community*²⁰ confirmed that customary law was an important component of South African law,²¹ and thus, the RCMA aims to recognise customary law marriages. Following these rights, s 6 of the RCMA states that a wife in a customary marriage has equal standing with her husband and can acquire assets and dispose of them.

c) Challenges in recognising customary marriages

Despite the RCMA's objective being to improve the position of women in customary marriages, some challenges remain.²² For instance, those women in marriages that do not meet the RCMA's validity requirements, or have not registered their marriage, find that it is difficult to prove their marriage and such marriage may even be declared invalid. Section 3(1)(b) of the RCMA states that the marriage must be negotiated and entered into or celebrated in accordance with customary law. This leaves it to the courts to determine whether the requirements of the particular custom in question have been met.²³ As different ethnic groups follow different customs, and because customary law has evolved, the evidentiary process of determining what customs must be adhered to has become a difficult and contested process.²⁴ Section 3(1)(b), which states that the parties must conclude their marriage according to customary rites, leaves room for manipulation.²⁵

¹⁷ Constitution of the Republic of South Africa, 1996.

¹⁸ Kovacs, Ndashe and Williams 2013 *Acta Juridica* 275.

¹⁹ Sections 30 and 31 of the Constitution speak to the right to participate and practice in cultural life, while s 9(3) states that no one can be unfairly discriminated against based on their gender.

²⁰ 2004 (5) SA 460 (CC).

²¹ SM Weeks "Constitutionally transforming South Africa by amalgamating customary and common law: Ramuhovhi, the proprietary consequences of marriage and land as property" (2021) 11 *Constitutional Court Review* 165 at 185.

²² Kovacs, Ndashe and Williams 2013 *Acta Juridica* 274.

²³ *Ibid* 282.

²⁴ *Ibid*.

²⁵ *Ibid*.

Scholars have argued that courts have adopted an overly formalistic approach to recognising customary marriages. This has meant that women lack protection where the required formalities of the custom have not been completed, even if the party/ies believed in good faith that the custom did not require a particular ritual, practice or format.²⁶ In most cases, African women and children are dependent on their partners and the men in their families for financial support.²⁷ When their unions have not met certain requirements or where there is a pre-existing civil marriage, these women often lose this support.²⁸

This instance is well illustrated in *Mayelane v Ngwenyama*.²⁹ In this case, the Constitutional Court held that a Tsonga customary marriage concluded without the permission of the first customary wife was invalid. The first wife, Ms Mayelane, instituted proceedings against Ms Ngwenyama in the High Court in which she sought an order declaring the customary marriage contracted between Ms Ngwenyama and her deceased husband null and void.³⁰ She argued that, based on ss 3(1)(b) and 7(6) of the RCMA, the second marriage was invalid.³¹ Section 7(6) requires that when a husband wishes to enter a subsequent marriage while his other customary marriages are still subsisting, he must apply to the court to finalise a contract that will regulate the matrimonial property system. The court heard evidence that Vatsonga custom requires that the first wife must have been consulted about the marriage. Given that the first wife did not know about the second marriage, it was argued that the marriage was invalid. The Constitutional Court developed the Tsonga customary law so that the first wife did not only have to be consulted, but she would have to give her consent to the second marriage. In the circumstances then, the Constitutional Court declared the second marriage invalid for want of knowledge of the first wife.³²

²⁶ L Mwambene and H Kruuse “Form over function? The practical application of the Recognition of Customary Marriages Act 1998 in South Africa” 2013 *Acta Juridica* 293 at 296.

²⁷ E Bonthuys “A duty of support for all South African unmarried intimate partners part 2: Developing customary and common law and circumventing the Volks judgment” (2018) 21 *PELJ* 2 at 3.

²⁸ E Bonthuys “A duty of support for all South African unmarried intimate partners part 1: The limits of the cohabitation and marriage based model” (2018) 21 *PELJ* 2 at 5.

²⁹ 2013 (4) SA 415 (CC).

³⁰ *Mayelane* para 4.

³¹ *Mayelane* para 5.

³² *Mayelane* para 87.

The major criticism of the judgment is the court's apparent failure to protect the competing interests of parties in polygynous marriages.³³ Section 7(6) of the RCMA protects the proprietary interest of existing wives as a court's endorsement is needed in order to enter into a subsequent marriage.³⁴ No mechanism exists to protect a subsequent wife if a customary husband does not comply with s 7(6). The court's decision amounted to a deprivation of protection for the second wife, and it is argued that the approach is shortsighted and failed to consider the implications of the decision for the second wife.³⁵ Women placed in similar circumstances, i.e. who are 'inadequately married', are in a precarious situation as they believe in good faith that their marriages are valid.³⁶ Subsequent wives placed in similar cases are rarely aware of other wives, as some men are said to intentionally hide their subsequent families from their first wives in situations where they know they will not consent.³⁷ As a result, the invalidation of their marriages appears unfair, given that such second 'wives' are excluded from partnership property or receiving maintenance due to the action (or inaction) of their 'putative' husband.³⁸ The judgment implies that it is unclear what legal recourse women in such situations have to protect themselves and their interests. In such situations, a legal remedy should be available to those women who *bona fide* believed that they were entering into a valid marriage despite failing to comply with the custom's formalities. While statutory legal reform is necessary, Mwambene and Kruuse suggest that the putative marriage doctrine may be employed as a 'stop-gap measure' to relieve women who receive no protection.³⁹ This thesis argues that the putative marriage doctrine can be utilised by the "inadequately married" to protect their proprietary rights.

³³C Himonga and A Pope "Mayelane v Ngwenyama and Minister for Home Affairs: A reflection on wider implications" 2013 *Acta Juridica* 318 at 331.

³⁴ E Bonthuys and C Albertyn (eds) *Gender, Law and Justice* (2007) 180.

³⁵ Himonga and Pope 2013 *Acta Juridica* 332.

³⁶ E Bonthuys "Exploring universal partnerships and putative marriages as tools for awarding partnership property in contemporary family law" (2016) 19 *PELJ* 2 at 15.

³⁷ KN Monareng and M Zounmenou "Black women, are you aware that you are concubines? The legal implications of South African family law" (2007) 21 *Agenda* 122 at 125.

³⁸ Bonthuys 2016 *PELJ* 15.

³⁹ Mwambene and Kruuse 2013 *Acta Juridica* 315. See also C Müller-Van der Westhuizen 'Family Law' in C Rautenbach (ed) *Introduction to Legal Pluralism 5 ed* (2018) 101, which states that the putative marriage doctrine should be considered where a polygamous customary marriage is concluded without the first wife's consent as a putative marriage should be considered.

d) History of the putative marriage doctrine

The putative marriage doctrine is a remedy designed to allow for some of the rights and privileges from a legal marriage to flow to parties in an invalid marriage who, in good faith, believed their marriage to be valid.⁴⁰ The doctrine is derived from Canon law as accepted into early English family law.⁴¹ The doctrine became popular in France, Spain and parts of the United States of America, including Louisiana, Illinois and Texas.⁴² The name ‘putative’ is taken from the Latin word *putativus*, meaning ‘deemed to be what it is not’.⁴³ In essence, if a marriage is solemnised in good faith by one or both parties but contains some legal impediment, the doctrine is utilised to protect the *bona fide* party or parties.⁴⁴

The effect of the doctrine is that a court is able impose some of the consequences of a valid marriage on the putative marriage. Most of the focus of the early cases on putative marriages was on ‘legitimising’ the children born from invalid marriages.⁴⁵ The common effect of the putative marriage doctrine was that the children became ‘legitimate’ and had the same rights of succession as children born out of valid marriages.⁴⁶

Early cases, such as *Bam v Bhabha*,⁴⁷ illustrate the doctrine’s presence in South African law. The parents were married under Mohammedan rites, and four children were born out of the marriage. The court had to deal with a mother’s claim for custody of one of the children. Given that the marriage was not registered,⁴⁸ the plaintiff argued that she was the natural guardian as the mother and, as such, the father had no rights to custody.⁴⁹ However, the judge – through the putative marriage doctrine – found that the father had the right of custody of his children. This is because

⁴⁰ CL Blakesley “Putative Marriage Doctrine” (1985) 60 *Tulane Law Review* 1 at 2.

⁴¹ Blakesley 1985 *Tulane Law Review* 6.

⁴² *Ibid* 7.

⁴³ *Ibid*.

⁴⁴ *Ibid*.

⁴⁵ Bonthuys 2016 *PELJ* 11. The occupation with the word ‘legitimacy’ historically was due to the fact that illegitimate children did not have a right to inheritance. Such children were disadvantaged in society and the father of an illegitimate child did have a legal duty of support. The position has since shifted and children born out of unmarried parents enjoy the same rights and status as legitimate children.

⁴⁶ RW Lee “Putative Marriage” (1954) *Butterworths SALR* 36 at 40.

⁴⁷ 1947 (4) SA 798 (AD).

⁴⁸ *Bam* at 802.

⁴⁹ *Ibid*.

the court could 'legitimate' the children through its order that the marriage was a putative one.⁵⁰ In the case of *Ex parte Azar*,⁵¹ where it was unclear if the marriage officer was qualified, the court held that the marriage was putative and the children were declared legitimate. The doctrine has also been utilised to claim part of the matrimonial property, as seen in the case of *Ex parte L*,⁵² where the court dealt with a marriage in which the Rabbi was not duly registered as a marriage officer. The court held that a putative marriage did exist, which legitimised the children and entitled the wife to half of the joint estate.⁵³

e) Weaknesses in the current implementation of the putative marriage doctrine

To evaluate its efficacy as a remedy for invalid customary marriages, we must evaluate its current application in South African law. In the only known case to deal with the putative marriage doctrine in the context of customary marriages, *Makholiso v Makholiso*,⁵⁴ the court dealt with a situation where the second marriage, being customary in nature, was alleged to have been concluded after a civil marriage in community of property. The applicants, who were the children of the deceased and his wife of the civil marriage, claimed that they were the sole intestate heirs to the exclusion of the children of the customary wife.⁵⁵ Pickering J highlighted that the deceased and his customary wife were *bona fide* in their belief that their customary union was valid as they had complied with the formalities, including the payment of lobola.⁵⁶

The court thus held the second customary marriage was a putative marriage, and the children of the marriage were 'legitimate' children for the purposes of inheritance.⁵⁷ The judgment's treatment

⁵⁰ *Bam* at 809.

⁵¹ 1932 OPD 107.

⁵² 1947 (3) SA 50 (C).

⁵³ *Ex parte L* at 61.

⁵⁴ 1997 (4) SA 509 (Tks). Although in *MM v MN* 2010 (4) SA 286 (GNP) the court suggested in an *obiter* at para 35 that if there were children of an invalid customary marriage would be protected under the putative marriage doctrine.

⁵⁵ *Makholiso* at 514D. As the respondents had no claim to the legal wife's estate, the court ordered that the intestate estate of the legal wife be liquidated prior to the estate of the deceased husband. The putative wife's children thus received a child's share of the deceased husband's estate.

⁵⁶ *Ibid.* In this case, both the legal wife and the putative wife were deceased. As such, the focus by Pickering J was the issue of the legitimacy of the respondents as heirs. As the case was decided prior to the RCMA, the judge focused primarily on how there was no matrimonial property regime for customary unions. Not much is said in relation to the customary wife as a putative wife except that the marriage was putative due to the good faith of the husband and the putative wife.

⁵⁷ *Makholiso* at 520B.

of the customary union in comparison to the civil marriage illustrates the discrimination that customary wives often face.⁵⁸ In the judgment, Pickering J stated that, at the time, the legal rights of women under customary law could not be reconciled with those of a wife in a civil marriage.⁵⁹ While the rights of those in customary unions have improved in various ways,⁶⁰ Bonthuys argues that the distinction between civil married women and customary wives remains discriminatory and leads to the legal neglect of customary wives.⁶¹

In the oft-cited KwaZulu-Natal division case of *Zulu v Zulu*,⁶² the applicant in an apparent civil marriage discovered after her husband's death that he was in a civil marriage with someone else.⁶³ She wished to claim a putative marriage because she entered the marriage *bona fide* and in community of property.⁶⁴ As both marriages were in community of property, the court held that it would be impossible to distribute the property equitably.⁶⁵ The court found that the nature of a marriage in community of property was that both spouses' assets are merged into one joint estate.⁶⁶ The nature of the in community property regime is that parties are co-owners in the undivided and indivisible half-share of their estate.⁶⁷ The effect of this is that during the marriage, their half-shares cannot be divided, and assets cannot be transferred.⁶⁸ Hence, the court held that – as the deceased was married in community of property to the first respondent – another matrimonial property regime could not have existed with the applicant.⁶⁹ This meant that the second 'wife' was left without a remedy.

⁵⁸ Section 9(3) of the Constitution protects against discrimination on the grounds of culture. The discrimination at issue exists between civil married women and customary wives.

⁵⁹ *Makholiso* at 518C.

⁶⁰ See *Gumede v the President of South Africa* 2009 (3) SA 152 (CC), *Ramuhovhi v the President of South Africa* 2018 (2) SA 1 (CC) and *Sithole v Sithole* (2020) JOL 47932 (FB).

⁶¹ Bonthuys 2018 *PELJ* 5.

⁶² 2008 (4) SA 12 (D). This case is important to this discussion because illustrates how courts apply the putative marriage doctrine when the first marriage is in community of property.

⁶³ *Zulu* at 14.

⁶⁴ *Ibid.*

⁶⁵ *Zulu* at 15.

⁶⁶ *Ex parte Menzies* 1993 (3) SA 799 (C).

⁶⁷ J Heaton (ed) *The Law of Divorce and Dissolution of Life Partnerships in South Africa* (2014) 62.

⁶⁸ Heaton *Law of Divorce* 62.

⁶⁹ *Zulu* at 16. The case makes no mention of *Makholiso v Makholiso*. This is probably due to the fact that *Makholiso* focused on inheritance whilst *Zulu* dealt with the redistribution of marital property.

Two cases after *Zulu v Zulu*, in the Free State Division and in the Gauteng Division, disagreed with the finding in the case. In *MS v Executor: Estate Late NS*,⁷⁰ the applicant, applied for her marriage to be declared putative and for the joint estate of the deceased to be divided as though the marriage was in community of property.⁷¹ The court declared that as a “surviving spouse”, she was entitled to a half-share of the estate. The court found that *Zulu*’s interpretation of the doctrine ignored the objective of the doctrine.⁷²

In *Kgosi v Kgosi*,⁷³ in an obiter commenting on *Zulu* and *MS*, the court suggested that constitutional principles called for an interpretation that protected the putative spouse, essentially agreeing with *MS*’s interpretation.⁷⁴ Although both cases dealt with the executorship and administration of the estates, they offer fresh precedent. On the other hand, this thesis will offer clarity on the reasoning to be employed in dealing with the application of the putative marriage doctrine, primarily where both spouses are living at the time of divorce/dissolution.

Given that most customary marriages are in community of property, and many are polygamous, an application of *Zulu* creates an impediment to its application in invalid customary marriages. The cases of *Gumede v the President of South Africa*⁷⁵ and *Ramuhovhi v the President of South Africa*⁷⁶, dealing with monogamous and polygamous marriages, respectively, establish that the default regime for customary marriages is in community of property.

Smith argues that the judgment of *Zulu* penalises the *bona fide* spouse and that the courts should have developed the doctrine to protect *bona fide* parties.⁷⁷ Picking up on both Smith and Bonthuys’ arguments, the customary context begs the following question: Is it possible to devise a way in

⁷⁰ 2021 (6) SA 483 (FS).

⁷¹ *MS* para 1.

⁷² para 18

⁷³ [2023] ZAGPPHC 955 (21 August 2023).

⁷⁴ *Kgosi* para 54.

⁷⁵ 2009 (3) SA 152 (CC).

⁷⁶ 2018 (2) SA 1 (CC).

⁷⁷ B Smith “Rethinking the Application of the Putative Spouse Doctrine in Matrimonial Property Law” (2010) 24 *International Journal of Law Policy and the Family* 2 at15.

which the husband's undivided half-share of his first marriage may be divided in order to benefit a *bona fide* 'spouse' in a putative second marriage? This thesis argues that there is a way.

This idea is confirmed by the South African Law Reform Commission's issue paper and discussion paper on aspects of Matrimonial Property Law.⁷⁸ It notes that the putative marriage doctrine has been used to protect parties unaware of certain impediments to their marriage but that there are certain challenges.⁷⁹ One challenge that it observes is that there is greater room for the invalidation of marriages under the RCMA due to the requirement of s 3(1)(b).⁸⁰ Given this context, my thesis explores how the putative marriage doctrine can be developed in order to assist vulnerable parties.

1.2 GOALS OF THE RESEARCH

In light of the context set out above, the thesis explores and recommends the possible codification of the doctrine in matrimonial property law. This will be weighed against the suggestion that it would be sufficient to allow the courts to develop the doctrine.

In the course of this investigation then, the thesis critically analyses the current legal position of women in invalid customary marriages who are left unprotected. It investigates the use of the putative marriage doctrine with a special focus on its application as a remedy for *bona fide* parties. It determines whether the doctrine should be developed and possibly legislated to protect invalid customary marriages. It then analyses the application of the putative marriage doctrine in comparative jurisdictions with a view to providing a solution in the South African context. Finally, it provides practical recommendations on how the doctrine may be developed to protect subsequent spouses' rights in invalid customary marriages.

1.3 METHODOLOGY OF RESEARCH

⁷⁸ South African Law Reform Commission Issue Paper 41: *Review of Aspects of Matrimonial Property Law* (2021).

⁷⁹ South African Law Reform Commission Issue Paper 41: *Review of Aspects of Matrimonial Property Law* (2021) 36.

⁸⁰ *Ibid.*

a) Desktop research

The method of research for this thesis will be desktop research with a focus on primary sources, including the Constitution, the Recognition of Customary Marriages Act,⁸¹ the Matrimonial Property Act,⁸² other matrimonial law legislation and case law. I will also consider legislation and case law from other jurisdictions. In addition, the research will draw from secondary sources such as journal articles and textbooks.

I analyse all sources using the doctrinal research method. Doctrinal legal research draws from the idea of precedent in that such research is the study of set legal principles and rules that have developed over time.⁸³ Doctrinal research systematically examines black letter law, identifies areas of difficulty, and develops possible reform.⁸⁴ Doctrinal research is most used in legal fraternities as it is considered as a systematic way of problem-solving and contributes to the development of the law.⁸⁵ The starting point of the doctrinal method is outlining what the law is.⁸⁶ After this, it considers whether or not the law's current legal position reflects societal values and meets the expectations of the law. Finally, it is determined whether there are weaknesses in the law and how it can be developed.⁸⁷

b) Comparative Analysis

This thesis also relies in part on a comparative method of research. Comparative legal research involves comparing two or more legal systems or legal families and specific aspects of such legal institutions.⁸⁸ Comparative legal research is important in that the process of contrasting and comparing allows one to observe differences and similarities in the application of law in specific contexts.⁸⁹ Such research allows a researcher to explore how other legal systems deal with a

⁸¹ Act 120 of 1998.

⁸² Act 88 of 1984.

⁸³ T Hutchinson and N Duncan "Defining and describing what we do: Doctrinal legal research" (2012) 17 *Deakin Law Review* 83 at 85.

⁸⁴ Hutchinson and Duncan 2012 *Deakin Law Review* 101.

⁸⁵ *Ibid* 103.

⁸⁶ G Davies "The relationship between empirical legal studies and doctrinal legal research" (2020) 13 *Erasmus Law Review* 3 at 8.

⁸⁷ Davies 2020 *Erasmus Law Review* 8.

⁸⁸ CM Fombad "Comparative research in contemporary African legal studies" (2018) 67 *Journal of Legal Education* 984 at 986.

⁸⁹ Fombad 2018 *JLE* 987.

problem compared to their legal system and draw lessons to formulate an effective system.⁹⁰ This thesis, in particular, explores how other systems, namely California and Namibia, have utilised the putative marriage doctrine to provide suggestions on how South African law can further develop it.

The rationale for these jurisdictions is fairly straightforward. Comparative research is vital in establishing whether other jurisdictions have been able to adapt the putative marriage doctrine to protect those who are “inadequately married” to a husband who is in a prior marriage in community of property. Although these jurisdictions have different systems of law, the similarities in both Californian and Namibian matrimonial law with South Africa allow for comparison. The rationale behind using the US state of California for comparison is that, like South Africa, canon law is one of the sources of their matrimonial law,⁹¹ specifically in implementing the putative marriage doctrine.⁹² The doctrine in both South Africa and California has its origins in English family law.⁹³ Early twelfth-century canon law held that despite the nullity of some marriages, the civil effect of a legal marriage flows to the parties who, in good faith, contracted a marriage.⁹⁴ However as the doctrine continued to develop in Californian law, Spanish and French influences took over, and the genesis of the doctrine is found in canon law.⁹⁵ Similarly, in South African law, the doctrine was derived from canon law, which later made its way into Roman-Dutch law and was then incorporated into South African law.⁹⁶ The similarity in the origins of the doctrine provides a foundation for comparative work of the application of the doctrine. Furthermore, California has a community property marital system that mirrors the South African in community of property

⁹⁰ *Ibid* 989.

⁹¹ LD Wardle and LC Nolan *Fundamental Principles of Family Law* (2002) 141. Common law marriages in America were founded in Canon Law until statute replaced this position.

⁹² Wardle and Nolan *Fundamental Principles of Family Law* 152. The putative marriage doctrine is applied in its purest form in California and Texas; thus, my thesis will focus on California.

⁹³ Blakesley 1985 *Tulane Law Review* 5.

⁹⁴ *Ibid*.

⁹⁵ *Ibid* 7.

⁹⁶ W Burge *Comparative Law of Marriage and Divorce* (1910) 113

matrimonial property regime.⁹⁷ The system recognises equal ownership of the estate between the two spouses, with each spouse owning an “equal one-half interest in community property.”⁹⁸

However, it is important to note some differences in the application of matrimonial law. In California, the equitable community property doctrine applies in that a court may distribute property in an equitable way for all parties, notwithstanding the parties’ intentions at the commencement of their marriage.⁹⁹ This differs from South African law in that California is an equity jurisdiction, where the authority for decisions made by the court is based on equity principles and not set law.¹⁰⁰ Although South Africa is not an equity jurisdiction, there is evidence that courts of equity existed in the early 18th century.¹⁰¹ Despite this distinct difference, the application of the principle of equity in California’s putative marriage doctrine provides valuable lessons for South African law. This state has developed a framework to distribute marital property under the putative marriage doctrine, even in cases where there was a prior legal spouse.¹⁰²

Similar to South Africa, Namibia’s common law is based on Roman-Dutch law.¹⁰³ These legal principles were incorporated into both South African and Namibian law by the colonial settlers who came to Southern Africa in the 1600s.¹⁰⁴ Roman-Dutch law was developed by South African courts and developed the Namibian common law, which was binding on courts until Namibia’s independence in 1990.¹⁰⁵ Furthermore, the courts of Namibia were an extension of the South African judiciary until their Constitution set up separate courts in 1990.¹⁰⁶ The two jurisdictions’ historical legal development is intertwined, creating adequate grounds for comparison.

⁹⁷CB Newcombe “The origin and civil law foundation of the community property system, why California adopted it, and why community property principles benefit women” (2011) 11 *University of Maryland Law Journal of Race, Religion, Gender & Class* 1 at 21

⁹⁸Newcombe 2011 *University of Maryland Law Journal of Race, Religion, Gender & Class* 4.

⁹⁹HY Chang “California Putative Spouses: The innocent, the guilty, and the law” (2015) 44 *Southwestern Law Review* 327 at 342.

¹⁰⁰Chang 2015 *Southwestern Law Review* 342.

¹⁰¹PJ Thomas “Did the Supreme Court of the Colony Cape of Good Hope have equity jurisdiction?” (2006) 21 *Fundamina* 251 at 253. Such courts disappeared and were replaced by Roman-Dutch law, which will be further discussed in Chapter 5.

¹⁰²Smith 2010 *International Journal of Law Policy and the Family* 6.

¹⁰³O Ruppel and K Ruppel-Schlichting *Environmental Law and Policy in Namibia* (2022) 42.

¹⁰⁴Ruppel and Ruppel-Schlichting *Namibia* 42.

¹⁰⁵*Ibid* 43. In Namibia, the default matrimonial property regime is in community of property.

¹⁰⁶*Ibid*.

Furthermore, Namibian case law makes constant reference to South African law and thus allows for perspective into how our law is applied in other jurisdictions.¹⁰⁷

1.4 OUTLINE OF THESIS

Chapter 2 briefly considers the development of customary marriages from pre-constitutional times until the RCMA. The chapter further fleshes out the concept of the “inadequately married” and discusses the problems emanating from the application of the RCMA. Chapter 3 is dedicated to the discussion of putative marriages and their current application in South African law. Chapter 4 provides arguments for and against the development of the putative marriage doctrine to assist vulnerable parties. Chapter 5 includes a comparative analysis and a set of solutions to dividing the undivided half-share. Finally, chapter 6 concludes the thesis by discussing recommendations and further research to assist the “inadequately married”.

a) Putative Marriage Terminology

Throughout the thesis, the terms “common spouse”, “legal spouse” and “putative spouse” will be used in the following way:

- “Common spouse” refers to the spouse who is married to both the legal spouse and the putative spouse, who in all cases is the husband.
- “Legal spouse” refers to the spouse who is legally married to the common spouse, who in all cases is the first wife.
- “Putative spouse” refers to the spouse whose marriage to the common spouse is declared invalid for failure to comply with a marriage requirement in custom and/or legislation but who, in good faith, believed they had entered into a valid marriage.

¹⁰⁷ To be discussed in chapter 5.

CHAPTER 2: THE RECOGNITION OF THE CUSTOMARY MARRIAGES ACT AND INVALID CUSTOMARY MARRIAGES

2.1 INTRODUCTION

The chapter discusses the history of customary marriages and introduces our research problem.

a) History of customary marriages

Prior to the coming of the white settlers, customary law was freely practised in Southern Africa.¹ The law was unwritten and passed down as oral tradition through generations.² In 1652 the Dutch East company settled in the Cape and Roman-Dutch law became the common law.³ After this, the British occupied the Cape in 1806 and ushered in colonial rule.⁴ Roman-Dutch Law was maintained as the basic law of the colony as it was considered civilized.⁵ Since the white administrators of the Cape Colony could not make sense of African customs, they largely imported their legal system and suppressed African customary law.⁶ In 1910 came the Unionisation of the Republic and with it the attempt to further subjugate black people. During the Union period, the British government attempted to legislate customary law in order to gain co-operation from black people.⁷ Traditional leaders lost their judicial power and were replaced by magistrates.⁸ This position later changed when separate court systems were set up and were governed by traditional leaders and native commissioners.⁹ However, their jurisdiction was limited to black people and customary law only affected black people. The colonial administration introduced the repugnancy clause, which prescribed that the enforcement of customary law could not be contrary to public

¹ NL Morudu and C Maimela “The indigenization of customary law: Creating an indigenous legal pluralism within the South African dispensation: Possible or not?” (2021) 54 *De Jure* 56.

² Morudu and Maimela 2021 *De Jure* 56.

³ TW Bennett *Customary Law in South Africa* (2004) 35.

⁴ C Himonga and T Nhlapo *African Customary Law in South Africa: Post- Apartheid and Living Law Perspectives* (2014) 4.

⁵ TW Bennett *Customary Law in South Africa* (2004) 35.

⁶ TG Ramatsekisa “Pre-Constitutional state of customary law in South Africa” (2008) 5 *US-China Law Review* 39 at 40.

⁷ Himonga and Nhlapo *African Customary Law* 5.

⁸ Bennett *Customary Law* 36.

⁹ *Ibid.*

policy or natural justice.¹⁰ Section 11(1) of the Black Administration Act 38 of 1927 stated that it would be the discretion of the Commissioners' Courts to apply Black law provided that such law was not opposed to the principles of public policy or natural justice.¹¹ In the case of *Ntame v Mbede*,¹² the courts stated that "where Native custom comes into conflict with the common law or statutory law, the former must give way."¹³ During the apartheid era, customary law was not recognised as law but it could be applied in court in exceptional circumstances.¹⁴ In the case of *Ex parte Minister of Native Affairs: In re Yako v Beyi*,¹⁵ customary law was recognised "only as a special and personal law that operated outside of but only as determined by the general law".¹⁶

The British regarded their form of marriage as the model and attempted to apply it to African customary marriages.¹⁷ This model was based on the Church's formulation that marriage was "a voluntary union between one man and one woman".¹⁸ In the case of *Mokwena v Laub*,¹⁹ a widow attempted to sue an employer for loss of support caused by the death of her husband. The court held that, as the marriage had been concluded under the customary law of a Basotho tribe which practised polygamy, it was not a valid marriage, and no duty of support existed.²⁰ Lobolo was also a condemned practice and was considered a payment for female labour and sexual favours.²¹

In the case of *Nkambula v Linda*,²² the court stated that a party to a civil marriage could not enter a marriage with a third party as that offended the conjugal rights of the first marriage. Christian

¹⁰ Himonga and Nhlapo *African Customary Law* 6. The repugnancy clause stated that customary law could not be applied if it was contrary to written law or against natural justice and morality.

¹¹ Act 38 of 1927.

¹² 3 NAC 94 1912.

¹³ NS Peart "Section 11(1) of the Black Administration Act 38 of 1927: The application of the repugnancy clause" 1982 *Acta Juridica* 99 at 103.

¹⁴ Himonga and Nhlapo *African Customary Law* 5.

¹⁵ 1948 (1) SA 388 A.

¹⁶ *Yako v Beyi* 397.

¹⁷ Bennett *Customary Law* 188. According to the Black Administration Act, customary unions were only applied in traditional leader's courts and native commissioner's courts.

¹⁸ *Ibid.*

¹⁹ 1943 WLD 63.

²⁰ 1943 WLD 63 at 65.

²¹ Bennett *Customary Law* 189.

²² 1951 (1) SA 377.

ideals heavily influenced family law, and therefore, ideals such as polygyny and bride wealth were perceived to be incompatible with Christian ideals.²³ As recently as 1983, the Appellate Division (as it then was) commented on polygamy in a Muslim marriage case (*Ismail v Ismail*).²⁴ Trengove J remarked that South Africa's concept of marriage was based on the idea of monogamy, and it would be prejudicial to recognise polygamous marriages.²⁵ Furthermore, a polygamous marriage is any marriage celebrated under the tenets that allow a husband to take more than one wife; thus, potentially polygamous marriages could not be recognised.²⁶ Although he identified that there had been statutory exceptions that had been made to accommodate polygamous unions,²⁷ on the grounds of public policy, the court could not recognise the marriage.²⁸ Trengove J stated that "it would be unwise to accord recognition to polygamous unions for the simple reason that all our marriage and family laws - and to some extent also our law of succession - are primarily designed for monogamous relationships".²⁹

With time, certain legislation began to give some recognition to African customary marriages.³⁰ Section 31 of the Black Laws Amendment Act³¹ allowed for a customary spouse to claim damages for loss of support at the death of a breadwinner, while s 5(6) of the Maintenance Act³² provided that a Black man was obligated to maintain his wife and children. Customary unions were recognised in a very limited capacity under the Transkei Marriage Act³³ and the KwaZulu Act on the Code of Zulu Law³⁴. However, these Acts were only applicable in KwaZulu Natal and the

²³ F Kaganas and C Murray "Law, women and the family: The question of polygyny in a new South Africa" 1991 *Acta Juridica* 116 at 119. Polygyny and lobolo were frowned on as they were thought to amount to slavery and bondage of African women. In the case of *Meesadoosa v Links* 1915 TPD 357 the court stated that a woman was in every respect the legal equal of a man and as such, the court found that the practice of polygyny contradicted this idea.

²⁴ 1983 (1) SA 1006 (A). Although the case dealt with Muslim marriages, it reflects the court's opinion on polygamous marriages.

²⁵ *Ibid* 1020.

²⁶ *Ibid*.

²⁷ The Insolvency Act 24 of 1936 and Income Tax Act 58 of 1962 make provisions for polygamous unions.

²⁸ *Ismail* 1024.

²⁹ *Ibid*.

³⁰ JY De Koker "Proving the existence of customary marriage" 2001 *TSAR* 257 at 261.

³¹ Act 76 of 1963.

³² Act 23 of 1963.

³³ Act 21 of 1978. The Act gave full recognition to customary marriages. Section 38 of the Act stated that when a man entered into more than one marriage, the marriages would be governed by customary law.

³⁴ Act 6 of 1981. This particular act made attempted to improve the position of African women in the Natal. The Act declared that women were no longer "perpetual minors" and attained majority at marriage or at the age of twenty-one.

former Transkei, respectively.³⁵ Despite these changes, codified customary law was particularly discriminatory to women as it gave men power and limited women's rights.³⁶

Non-recognition of customary unions meant that families were left unprotected by the law; spouses had no right to claim support or inheritance, and their children were deemed "illegitimate".³⁷ The effect of apartheid in South Africa was the strong distinction between civil and customary marriages.³⁸ Through the maintenance of this distinction, civil marriages had a privileged position, while customary marriages had limited legal recognition.³⁹

This privileged position was perpetuated by s 22 of the Black Administration Act, which did not impede Africans from entering into a civil marriage during the subsistence of a customary union.⁴⁰ The effect of this was that the prior customary union would be automatically dissolved, and the customary wife became known as the "discarded spouse".⁴¹ In the case of *Nkambula v Linda*,⁴² the court stated that, as common law did not regard a customary union as a marriage, it was not an obstacle to concluding a civil marriage.⁴³ This provided an opportunity for husbands to discard unwanted customary wives without consequence.⁴⁴ In most cases, the customary wife would stay on as a concubine despite not being legally recognised.⁴⁵ If a customary marriage was entered into

This effectively abolished s 11(3)(b) of the Black Administration Act. It must be noted however that the recognition of customary unions at this time was only in the Natal.

³⁵ Prior to these acts being passed, the Natal Colonial Administration prohibited African customary marriages as they felt they were against morality and justice.

³⁶ F Osman "The consequences of the statutory regulation of customary law: An examination of the South African customary law of succession and marriage" (2019) 22 *PELJ* 2 at 4. For instance, in a bid to address land shortages among black individuals, land could only be owned by husbands and sons. This was based on the customary rule of male primogeniture. The effect of this was a blow to women's rights and a placing of men above women.

³⁷ M Herbst and W Du Plessis "Customary law v common law marriages: A hybrid approach in South Africa" (2008) 3 *Journal of Comparative Law* 105 at 106.

³⁸ South African Law Commission Project 90: *Report on Customary Marriages* (1998) 9.

³⁹ South African Law Commission Project 90: *Report on Customary Marriages* (1998) 9.

⁴⁰ This section was later amended by s 1 of the Marriage and Matrimonial Property Law Amendment Act 3 of 1988 which prohibited entering into a civil marriage during the subsistence of a customary union.

⁴¹ M Buchner-Eveleigh "Netshituka v Netshituka 2011 (5) SA 453: Revival of customary marriage previously dissolved by subsequent civil marriage: Recent case law" (2012) 45 *De Jure* 596. The civil marriage was valid even though it was entered into *after* the customary marriage.

⁴² 1951 (1) SA 377 (A).

⁴³ *Ibid* 381H.

⁴⁴ Bennett *Customary Law* 190.

⁴⁵ E Bonthuys and M Pieterse "Still unclear: The validity of certain customary marriages in terms of the Recognition of Customary Marriages Act" (2000) 63 *THRHR* 616 at 619.

after the subsistence of a civil marriage, the customary union would automatically be void *ab initio*, and the protective measures of the Black Administration Act would not apply.⁴⁶ In light of these circumstances, it is clear that, before the Constitution, the application of customary law – as codified by the apartheid government – was particularly detrimental to women as there was very limited recognition or protection of their rights.

b) The Constitution and polygyny

The coming into force of the Constitution brought discrimination against customary law under inspection.⁴⁷ This meant that actions needed to be taken to remove former prejudices against African customary law and that it deserved recognition in South African Law.⁴⁸ Sections 15, 30 and 31 of the Constitution speak particularly to the right to cultural life and practice, and these sections recognise customary law's place and importance in South African law.⁴⁹ Section 211 of the Constitution recognises the role of traditional leadership and ensures that courts must apply customary law when it is applicable. Thus, legislation had to be developed that exemplified the objectives of the Constitution.

A project was set up in the South African Law Commission in 1996 to discuss problems in respect of customary marriages. The commission was tasked with the unification of customary law and common law into a code of marriage law.⁵⁰ In its *Report on Customary Marriages*, the South African Law Commission recommended a system of legal dualism and the full recognition of customary marriages.⁵¹ The report also tackled the debate about the relationship between constitutional principles and polygyny. The report collated the arguments levied against polygyny,

⁴⁶ Bonthuys and Pieterse 2000 *THRHR* 619.

⁴⁷ C Himonga and E Moore *Reform of Customary Marriage, Divorce and Succession in South Africa* (2015) 6.

⁴⁸ South African Law Commission Project 90: *Report on Customary Marriages* (1998) 9. It must also be noted that South Africa had ratified conventions like the Convention on the Elimination of All Forms of Discrimination against Women (ratified in September 1995) which calls for equality between men and women before the law.

⁴⁹ Section 15(1) of the Constitution states that everyone has the right to freedom of conscience, religion, thought, belief and opinion while ss 30 and 31 speak to the right to belong to a culture and participate in cultural life. Section 9(3) of the Constitution protects against discrimination based on ethnic or social origin and culture. Section 235 also provides for the right of self determination of any community sharing a common cultural and linguistic heritage. The RCMA gives effect to these rights by recognising African customary marriages.

⁵⁰ Bennett Customary Law 194.

⁵¹ Kaganas and Murray 1991 *Acta Juridica* 124.

which included the claim that polygyny is inconsistent with the constitutional right to equality.⁵² Second, the SALC reported that polygyny is said to create a male-centred family structure with the power centred on the man as the head of the family.⁵³ Further, it reported that the system was said to grant men an unjustified sense of status and placed women at odds over resources, making the practice economically repressive to women.⁵⁴ The Report thus noted that polygyny could be deemed to be in conflict with the ideals of gender equality as it awarded a privilege to men that women do not enjoy.

Notwithstanding these arguments, the SALC suggested that customary marriages were to be recognised as potentially polygynous.⁵⁵ The Commission argued that polygyny was not the only cause of the abuse of women and was rather a factor contributing to the patriarchy in African communities.⁵⁶ The Commission further discouraged the complete ban on polygyny based on the undesirable effect it would have on women. A complete prohibition would lead to the creation of informal unions, which would not offer women legal protection.⁵⁷ Due to the practical impossibility that comes with completely abolishing polygyny, the SALC recommended that customary marriages – even in their polygynous form – be recognised, and provided a draft bill for the legislature to consider.⁵⁸

The SALC report confirmed the earlier views of commentators Kaganas and Murray, who had argued even before the interim Constitution was in place that polygynous customary marriages had to be protected. They argued that reform of this nature would necessarily confer greater rights on women in such marriages and allow better protection of women.⁵⁹

⁵² Kaganas and Murray 1991 *Acta Juridica* 124. Polygyny is a system that only allows men to have multiple partners. The term is more widely used than the term polygamy due to the fact that in African customary law it is men who can have multiple wives. With the advent of the Constitution, the issue has moved from one of morality to one based on a violation of fundamental rights.

⁵³ *Ibid* 130.

⁵⁴ South African Law Commission Project 90: *Report on Customary Marriages* (1998) 9.

⁵⁵ *Ibid* 92.

⁵⁶ South African Law Commission Project 90: *Report on Customary Marriages* (1998) 86.

⁵⁷ *Ibid* 88. This thesis, adopting Kaganas and Murray's approach, recognises the disadvantage of polygyny for women as women are inherently unequal in such unions. However, recognition of polygynous unions is the lesser evil and allows legal remedies to be implemented to protect women. See Kaganas and Murray 1991 *Acta Juridica* 134.

⁵⁸ South African Law Commission Project 90: *Report on Customary Marriages* (1998) 144.

⁵⁹ Kaganas and Murray 1991 *Acta Juridica* 134.

c) The RCMA

In line with the recommendation of the SALC, the Recognition of Customary Marriages Act (RCMA) came into force in November 2000. The RCMA attempted to improve women's status in customary marriages.⁶⁰ This was given particular attention by abolishing women's perpetual minority status in customary law and giving them legal capacity.⁶¹ In line with this objective, the RCMA sought to provide recognition and protection for African customary marriages. Thus, s 2(3) of the RCMA states that customary marriages were valid for all legal purposes.⁶² Furthermore, s 6 of the RCMA promotes the right to equality as it declares that a wife is equal to her husband in relation to matrimonial property systems governing the marriage, the capacity to acquire assets and dispose of them, and all other rights she might have at customary law.⁶³

Despite the protections in the RCMA, there are weaknesses in the Act that have meant that certain parties to customary marriages are not adequately protected. In certain instances, the RCMA has proven to be simply an extension of civil marriages, and thus ill-fitting in the context of African customary marriages.⁶⁴ Most importantly, the consequence of uncertainty in the interpretation and application of ss 3(1)(b), 4 and 7(6) of the RCMA has led to litigation by parties who have needed legal protection.⁶⁵

i) The registration and validity dilemma: s 3(1)(b)

Section 3(1)(b) of the RCMA states that the marriage must be negotiated and entered or celebrated in accordance concluded with customary law. The purpose of the section is to allow for living customary law to be incorporated into the determination of validity as is relevant to each community.⁶⁶ The provision places a duty on courts to determine the content of particular

⁶⁰ Section 9(3) of the Constitution protects against unfair discrimination on the grounds of sex and gender. The Bill of Rights recognises the unequal status of women in society and aims to promote gender equality.

⁶¹ L Mwambene and H Kruuse "Unfulfilled Promises? The Implementation of the Recognition of Customary Marriages Act in South Africa" (2015) 29 *International Journal of Law, Policy and the Family* 237 at 238.

⁶² Section 2(3) of the RCMA.

⁶³ Section 6.

⁶⁴ C Himonga "Transforming customary law of marriage in South Africa and the challenges of its implementation with specific reference to matrimonial property" (2004) 32 *International Journal of Legal Information* 260 at 267.

⁶⁵ MP Bapela and PL Monyamane "The revolving door of requirements for validity of customary marriages in action *Mbungela v Mkabi* [2019] ZASCA 134" (2021) 42 *Obiter* 186 at 192.

⁶⁶ P Bakker "The validity of a customary marriage under the Recognition of Customary Marriages Act 120 of 1998 with reference to section 3(1)(b) and 7(6) Part 2" (2016) 79 *THRHR* 357.

customary law when such customs are not readily available.⁶⁷ The Law of Evidence Amendment Act⁶⁸ instructs courts to take judicial notice of indigenous law when it is ascertainable and certain. To protect the living and evolving nature of customary law, the RCMA does not codify the aspects of customary law that must be adhered to.⁶⁹

While this is in keeping with the living nature of customary law, there are challenges in its application. For example, De Souza has argued that the provision's lack of explicit requirements may increase the possibility of customary marriages being declared invalid.⁷⁰ This is because different ethnic groups follow different customs and because customary law has evolved, the evidentiary process of determining what customs must be adhered to has become contested.⁷¹ It is trite that the party who alleges that a marriage exists has to adduce evidence that the requirements have been met. However, this can be challenging⁷² where the applicant lacks knowledge of the legislation, has poor legal representation, and/or suffers from a lack of resources. The process is also exacerbated when a customary 'husband' or/and when their family refuse to corroborate or share evidence of the marriage customs. As a result, many women who require protection are left stranded.⁷³

Commentators have also argued that s 3(1)(b), which states that the parties must conclude their marriage according to customary rites, leaves room for manipulation.⁷⁴ For instance, in situations where both parties 'waive' a ceremony or process associated with a customary marriage

⁶⁷ N Dyani-Mhango "The consent of the first wife in a polygamous marriage as a requirement for the validity of her husband's subsequent marriage under South Africa's Recognition of Customary Marriages Act: *Mayelane v. Ngwenyama*" (2016) 60 *Journal of African Law* 156 at 158.

⁶⁸ Act 45 of 1988. As in *Mayelane*, the courts will call upon evidence to prove the validity of the claim of a custom. Such evidence should also include expert witnesses on customary law.

⁶⁹ M de Souza "When non-registration becomes non-registration: Examining the law and practice of customary marriage registration in South Africa" 2013 *Acta Juridica* 239 at 242.

⁷⁰ South African Law Reform Commission Issue Paper 41: *Review of Aspects of Matrimonial Property Law* (2021) 36.

⁷¹ South African Law Reform Commission Issue Paper 41: *Review of Aspects of Matrimonial Property Law* (2021) 36. See *Mayelane v Ngwenyama* 2013 (4) SA 415 (CC).

⁷² L Mwambene "The essence vindicated: Courts and customary marriages in South Africa" (2017) 17 *African Human Rights Law Journal* 35 at 40.

⁷³ RJ Kovacs, S Ndashe and J Williams "Twelve years later: How the Recognition of Customary Marriages Act of 1998 is failing women in South Africa" 2013 *Acta Juridica* 273.

⁷⁴ *Ibid.*

requirement, the husband or family may deny the marriage's existence on that basis.⁷⁵ As it is an evidentiary requirement that depends on a party proving the existence of a particular custom, one party may attempt to avoid obligations owed to the other party in terms of a valid customary marriage.⁷⁶ Case law has also indicated that, upon the death of a wealthy spouse (usually the husband), his family may deny the existence of the marriage in an attempt to exclude the alleged wife from succession rights.⁷⁷

Validity in relation to custom is even harder to ascertain in situations where the family stands to inherit from the marriage being declared invalid.⁷⁸ In the case of *ND v MM*,⁷⁹ the defendant (the customary husband) denied the existence of a customary marriage to the plaintiff on the grounds that there had been no integration of the bride. According to the eSwatini culture in order for the bride to be properly integrated, she must be smeared with red ochre, and the *lugege* and *insulamnyambeti* beast must be slaughtered as part of the integration process.⁸⁰ In the matter, the court ordered an absolution from the instance on the grounds that not enough evidence had been put forward to prove the plaintiff's (the customary wife) case.⁸¹ The judgment highlights the difficulties the court may face in determining the living customary law. As the RCMA does not clarify the necessary requirements, the courts are left with the difficult task of considering the

⁷⁵ In *Mkabe v Minister of Home Affairs* 2016 ZAGPPHC 460, despite the hand-over ceremony not being concluded, the plaintiff and the deceased were married and their families considered them married too. This was later appealed in *Mbungela v Mkabi* 2020 (1) SA 41 (SCA) where the courts stated that, in line with living customary law and the purport of the Constitution, the customary marriage was valid. Furthermore in the case of *Sengadi v Tsambo* 2018 JDR 2151 (GJ), the court found that a valid marriage existed between the applicant and the deceased as there had been a tacit waiver of the custom of the handing over of the bride. The use of the word waiver refers to the conduct of the two parties to which the court infers a "waiver" of certain prescribed formalities. The case was appealed in *Tsambo v Sengadi* 2020 46 (SCA). The courts dismissed the appeal and declared that a valid marriage had been concluded between the deceased and the respondent.

⁷⁶ *Muvhali v Lukhele* (21/34140) [2022] ZAGPJHC 402.

⁷⁷ See *Mabena v Letsoalo* 1998 (2) SA 1068 (T) where the deceased husband's father attempted to argue a customary marriage did not exist because the bride's father had not consented to it and *lobolo* was paid to the bride's mother. For a contemporary example of this trend, see *Phetla v Department of Home Affairs and others* [2023] ZAGPPHC 1931 where the deceased husband's mother alleged (unsuccessfully) that the customary marriage of approximately 8 years was not valid since the final portion of the *ilobola* agreement and the delivery of a living cow in anticipation of the celebrations did not occur.

⁷⁸ TA Manthwa "A re-interpretation of the families' participation in customary law of marriage" (2019) 82 *THRHR* 416 at 417. This is particularly relevant in the case of *ukuthwala* and the integration of the bride where the input of the families is integral to the processes.

⁷⁹ 2020 ZAGPJHC 113.

⁸⁰ para 19.

⁸¹ para 61.

evidence of customary marriages.⁸² The unfortunate outcome is that some customary marriages are declared invalid during the validation process, and women, in particular, are left without legal recourse

(ii) Section 4

Section 4(1) of the RCMA states that both parties to a customary marriage have a duty to ensure that their marriage is registered.⁸³ However, s 4(9) states that the lack of registration does not mean invalidation. Despite this reassurance, the reality on the ground is that different civil and private institutions require registration to confirm validity.⁸⁴ Another reality is that, despite the importance of registration, in many cases, spouses only consider registration at one spouse's death or at the marriage's dissolution.⁸⁵ At the same time, s 4(8) states that the marriage certificate is only *prima facie* proof of marriage; parties unable to produce a certificate struggle to prove the validity of their marriage.⁸⁶ In practice, it has been found that benefits such as pension benefits and maintenance have been withheld due to the lack of a registration certificate.⁸⁷

In most circumstances, although a wife can apply to court to have her marriage declared valid and/or registered, a customary 'husband's' refusal to corroborate or share evidence may leave her without protection.⁸⁸ This especially becomes a problem when a husband concludes two marriages without the knowledge of one or both women. Whatever marriage is registered is regarded as

⁸² A Manthwa "An appraisal of the hurdles with ascertaining the applicable customary law when determining conclusion of a customary marriage – ND v MM (18404/2018) (2020) ZAGPJHC 113 (12 May 2020)" (2022) 36 *Speculum Juris* 224 at 227. It must be noted that there has been inconsistency in the courts' use of s 3(1)(b) when dealing with the requirement of the integration of the bride. In *Mthethwa v Road Accident Fund* 2016 ZAGPPHC 893, the court declared that the formal transfer of the bride was a validity requirement. However, in *Mbungela v Mkabi* 2020 (1) SA 41 (SCA) the court declared that the handing over of the bride was not a key requirement to the valid conclusion of a marriage.

⁸³ Section 4(1) of the RCMA.

⁸⁴ De Souza 2013 *Acta Juridica* 242. In De Souza's study of women in Msinga, KwaZulu Natal, women in interviews stated that employers and government departments would require a marriage certificate as proof of their marital status.

⁸⁵ Mwambene and Kruuse 2015 *IJLPF* 251. Trying to prove the existence of the marriage in this circumstance is costly and in such instances the parties do not have access to resources or court in order to make such applications.

⁸⁶ De Souza 2013 *Acta Juridica* 243. Section 4(7) of the RCMA allows for the courts to declare a marriage valid after an application is made to court and after investigation. Such applications are costly and thus parties struggle to register their marriages.

⁸⁷ See *Baadjies v Matubela* 2002 (3) SA 427 (W). In this case the application for maintenance was refused as the court held that since the applicant did not produce a certificate of registration the validity of her marriage was questionable.

⁸⁸ Kovacs, Ndashe and Williams 2013 *Acta Juridica* 279.

‘superior’ as there is *prima facie* proof of its existence.⁸⁹ In such circumstances, the ‘other woman’ is not aware of the existence of a customary wife and has no way to ascertain this without a court application.⁹⁰ In the early 2000s Goldblatt’s research on cohabitation in South Africa revealed that many African men had a rural wife and an urban domestic partner.⁹¹ De Souza’s study of women in Msinga 10 years after Goldblatt revealed that this phenomenon is common when men move to the city for employment.⁹² In such situations, there are competing interests in terms of resources by both women especially at the death of the husband or at separation.⁹³ In cases where the husband dies, whichever wife can provide proof of registration usually succeeds in claiming his estate.⁹⁴ The section, practically, thus creates the unwanted consequence of leaving the other wife in this situation without protection.⁹⁵

iii) Section 7

Furthermore, the RCMA attempts to protect the proprietary rights of women in a polygamous context by requiring men wanting to enter into the second or subsequent marriage to apply to court in terms of s 7(6) to finalise the proprietary consequences of such subsequent marriage(s).⁹⁶ In the SALC’s report on customary marriages in 1998, it was identified that women lacked capacity in relation to proprietary interests and thus were deprived of property at the dissolution of customary marriages.⁹⁷ The SALC therefore made a recommendation that the court intervene and regulate the proprietary consequences of subsequent marriages.⁹⁸ The purpose of the procedure in s 7 is to

⁸⁹ De Souza 2013 *Acta Juridica* 246.

⁹⁰ *Ibid.*

⁹¹ B Goldblatt “Regulating domestic partnerships – a necessary step in the development of South African family law” (2003) 120 *SALJ* 610 at 622. The research focused on African and Coloured communities in areas in around Johannesburg and Cape Town.

⁹² De Souza 2013 *Acta Juridica* 246.

⁹³ Goldblatt 2003 *SALJ* 613.

⁹⁴ *Ibid.*

⁹⁵ P Bakker “The validity of a customary Marriage under the Recognition of Customary Marriages Act 120 of 1998 with reference to Sections 3(1)(b) and 7(6) Part 1” (2016) 79 *THRHR* 231 at 242. The alternatives that exist in this circumstance are costly and time-consuming. In most cases there is a lack of knowledge about the options available to women when they wish to register their customary marriage.

⁹⁶ Section 7(6) of the RCMA. This allows the court to regulate the future matrimonial property systems. Section 7(7) states that the court ensure equitable distribution of property and take into account all the relevant parties affected by the application.

⁹⁷ South African Law Commission Project 90: *Report on Customary Marriages* (1998) 113.

⁹⁸ South African Law Commission Project 90: *Report on Customary Marriages* (1998) 148. Section 7(6) was drafted to give effect to this recommendation.

ensure that the spouses' proprietary interests are protected through the court's involvement, including subsequent wives.⁹⁹ The court's role is thus to be an intermediary and enable the customary marriage's transition from being monogamous to being polygamous.¹⁰⁰ The challenge with the current legislation is that it attempts to regulate the marital property landscape of customary law through the lens of common law.¹⁰¹ In *Gumede v President of South Africa*,¹⁰² Moseneke DCJ stated that the dichotomy of 'in' and 'out' of community of property borrowed from the common law should not be superimposed onto customary marriages.¹⁰³

Notwithstanding, in most instances, very few men have approached the courts in terms of s 7(6).¹⁰⁴ Research has shown that there has been almost a wholesale ignorance of the provision in traditional communities.¹⁰⁵ This could potentially be due to the financial burden imposed by such applications.¹⁰⁶ The complexity and cost of such applications may have the undesirable effect of dissuading customary husbands from the procedure.¹⁰⁷ Practically looking at the group of people affected by the RCMA, illiteracy and poverty affect the successful application of the Act.¹⁰⁸ The result is that the regulation of polygamous marriages in relation to the proprietary rights of women is mainly left at the discretion of customary husbands who may choose not to comply with the section. The fact that only the polygynous husband – not any of his wives – can fulfil the provisions of s 7 is highly prejudicial.¹⁰⁹ In addition, there is no clear indication of any consequences for failing to bring the application; thus, this injustice goes unchecked.¹¹⁰ In the case of *Ngwenyama v Mayelane*,¹¹¹ the Supreme Court of Appeal stated that s 7(6) of the RCMA was not a peremptory

⁹⁹ Bakker 2016 *THRHR* 236.

¹⁰⁰ *Ibid.*

¹⁰¹ Bakker 2016 *THRHR* 236

¹⁰² 2009 (3) SA 152 (CC).

¹⁰³ *Ibid* para 43.

¹⁰⁴ Osman 2019 *PELJ* 6. A study by the Women's Legal Centre in 2010 showed that only three such contracts had been registered.

¹⁰⁵ T Nhlapo "Customary law in post apartheid South Africa: Constitutional confrontation in culture, gender and 'living law'" (2017) 33 *SAJHR* 1 at 12.

¹⁰⁶ JG Horn and AM Janse van Rensburg "Practical implications of the recognition of customary marriages" (2002) 27 *Journal for Juridical Science* 56 at 63.

¹⁰⁷ Dyani-Mhongo 2016 *Journal of African Law* 168.

¹⁰⁸ Himonga 2004 *International Journal of Legal Information* 267.

¹⁰⁹ De Souza 2013 *Acta Juridica* 254.

¹¹⁰ *Ibid* 7.

¹¹¹ 2012 (4) SA 527 (SCA).

provision; thus, non-compliance does not invalidate subsequent marriages.¹¹² The effect of non-compliance with the provision would simply be that the subsequent marriage would be out of community of property.¹¹³ The effect of this is that women's subsequent marriages are presumed to be in an out of community of property regime and thus have no proprietary benefit from such marriages.¹¹⁴ The purpose of the RCMA is to provide for the equal status and capacity of spouses in customary marriages.¹¹⁵ Considering the potentially polygamous nature of customary marriages, leaving subsequent wives out of proprietary interest does not uphold the purpose of the Act, especially given that her status is in the hands of the husband, who may or may not bring the application.

The protection offered by s 7(6) is thus largely superfluous, and the proprietary requirements of polygamous marriages leave women in a vulnerable position. The ambiguity in which the RCMA regulates the proprietary consequences of the wives in a polygamous marriage is disquieting. The practicality of implementing the system does not clarify numerous issues, including how the estate will be divided between the first wife and husband and whether a new estate is built with each new marriage.¹¹⁶

The practical effect of implementing the sections mentioned above highlights that the legislature's intended objectives have not been met fully.¹¹⁷ Ignorance of the law and the inaccessibility of the courts and legal services all likely impede the implementation of the provisions.¹¹⁸ The relationship dynamics and the power inequality in African relationships means that law is gendered in its

¹¹² *Ngwenyama* para 13. This was later confirmed in the CC where the court stated that the section did not deal with validity requirements but rather the applicable matrimonial property regime.

¹¹³ *Ngwenyama* para 34. Ponnann J stated that in the case the first marriage was out of community of property, the property system will continue. However, in the case that the first wife was married in community of property, the second marriage must be out of community property as two joint estates cannot co-exist.

¹¹⁴ Mwambene and Kruuse 2015 *International Journal of Law, Policy and The Family* 244.

¹¹⁵ Section 6 of the RCMA gives equal status to husbands and wives in customary marriages. However, the current matrimonial property system currently in place serves as a potential limitation for subsequent wives.

¹¹⁶ Horn and Janse van Rensburg 2002 *Journal for Juridical Science* 63.

¹¹⁷ M Mamashela "New Families, new property, new laws: The practical effects of the Recognition of Customary Marriages Act" (2004) 20 *SAJHR* 616 at 620.

¹¹⁸ Osman 2019 *PELJ* 6.

application.¹¹⁹ When the law is implemented, it is clear that it rarely affects men and women equally.¹²⁰ Cultural norms and practices come into play and thus affect how the law protects and serves women. Most importantly, the RCMA does not make provision for the consequences of a subsequent marriage that is concluded in breach of s 7; thus, uncertainty as to the matrimonial property exists.¹²¹ The discussion above illustrates that the provisions in the RCMA have the unwanted effect of isolating women and often leaving them without protection.

The need for a more gendered and Afro-centric approach to drafting and implementing law cannot be overstated. The call of this thesis is to discuss the potential for implementing the putative marriage doctrine to remedy the impact of the registration and validity provisions on African women.

d) The effect of Mayelane v Ngwenyama

The dilemma mentioned above is encapsulated best in the case of *Mayelane v Ngwenyama*.¹²² In this case, Ms Mayelane, the first wife, alleged that she concluded a marriage with the deceased and that the respondent, Ms Ngwenyama's marriage to the deceased was invalid.¹²³ Ms Mayelane's claim was based on the fact that her husband had not complied with s7(6) of the RCMA and that she had not granted consent to the subsequent marriage; thus, the marriage was void *ab initio*.¹²⁴ In the High Court, the court held that a subsequent marriage that did not comply with s 7(6) was void.¹²⁵ The court adopted an interpretation of s 7(6) that invalidated subsequent marriages that were not concluded following due court procedure.¹²⁶

¹¹⁹ Mamashela 2004 *SAJHR* 620. This is true of many marriage relationships – as the Constitutional Court recently highlighted in *EB (born S) v ER (born B) and Others; KG v Minister of Home Affairs and Others* [2023] ZACC 32 (10 October 2023), see para 121.

¹²⁰ Mamashela 2004 *SAJHR* 620.

¹²¹ Himonga 2004 *International Journal of Legal Information* 269.

¹²² 2013 (4) SA 415 (CC).

¹²³ *Ibid* para 4.

¹²⁴ *Ibid*.

¹²⁵ 2010 (4) All SA 211 (GNP).

¹²⁶ *Mayelane* in the High Court at para 24. The decision to invalidate the marriage is reflective of the response to polygamy in a system of law that is largely monogamous.

The respondent appealed the matter in *Ngwenyama v Mayelane* and the Supreme Court of Appeal took a different interpretation of s 7(6). The court held that the provision was not peremptory and thus could not have the effect of invalidating the second marriage.¹²⁷ This was based on the understanding that it could not have been the intention of the legislature to “effect such a change on the law of polygamy.”¹²⁸ The SCA dismissed the order declaring the appellant, Ms Ngwenyama’s marriage void *ab initio*.¹²⁹ Furthermore, the court ordered the Minister of Home Affairs to register Ms Mayelane’s marriage.

The matter was taken on appeal to the Constitutional Court in *Mayelane v Ngwenyama*. While the CC agreed with the SCA that s 7(6) was not a peremptory provision, the CC declared the subsequent marriage invalid on the basis of s 3(1)(b) of the RCMA. The CC focused on whether the RCMA prescribed the first wife’s consent as a requirement to validate subsequent marriages.¹³⁰ After answering this in the negative, the court went on to determine whether it was a requirement in Vatsonga custom for the first wife to consent to subsequent marriages.¹³¹ This was based on the s 3(1)(b) requirement that customary marriages must be concluded in line with customary law.¹³² The court called on further evidence from both parties in order to determine whether the requirement formed part of Vatsonga custom. On evaluating the evidence, the court stated that – although it was evident that the first wife needed to be notified of other marriages – there was no requirement for her consent.¹³³ The court, therefore found the second marriage invalid due to the lack of notification to the first wife. However, the court developed the customary law to require the first wife’s consent in future cases.¹³⁴

¹²⁷ 2012 (10) BCLR 1071 (SCA). This finding further confirms that s 7(6) is merely to regulate the proprietary consequences of polygynous marriages in an equitable function and thus does not offer any further assistance in ensuring that women’s proprietary rights are protected.

¹²⁸ *Ngwenyama* para 9. The Supreme Court judgment is hailed for its attempt to balance the rights of both wives in the circumstances.

¹²⁹ *Ngwenyama* para 28.

¹³⁰ *Mayelane* in the CC para 34.

¹³¹ *Mayelane* in the CC para 43.

¹³² Interestingly, although the averment was made in the applicant’s initial pleadings, the High Court and Supreme Court did not address the issue of consent of the first wife.

¹³³ *Mayelane* in the CC para 61.

¹³⁴ *Mayelane* in the CC para 87. Zondo J took a different approach to coming to the conclusion of the majority and focused on the evidence brought forward by the court a quo and stating there was no need to develop the Vatsonga customary law.

The judgment highlights the inadequacies of the RCMA and the danger it poses to subsequent wives. The balancing of rights between women in polygynous marriages includes competing interests for access to material resources within the marriage and even at its dissolution, which the court did not consider when it came to its decision.¹³⁵ The court's decision was criticised due to its inability to balance these interests.¹³⁶ While the court focused on protecting the first wife's equality, the second wife's equality was ignored. The premise of the criticism of the judgment is that the protection of one party's equality is undermined if it is not sensitive to the real conditions of discrimination that another party finds themselves in.¹³⁷ While requiring the first wife's consent to protect her rights and proprietary interests, it invalidates those of subsequent wives.¹³⁸ It must be borne in mind that the lack of consent in certain circumstances illustrates that both marriages may be secret to both wives.¹³⁹ What protection exists for *bona fide* subsequent wives? This judgment demonstrates that, in attempting to promote equality, the practical implication is that the protection of one wife may be detrimental to another.¹⁴⁰ The judgment exemplifies the 'second wife' dilemma. Women in subsequent marriages that fail to meet specific requirements, in this case the first wife's consent, are left without protection.

In the SCA, the Court stated that subsequent marriages concluded without court approval were automatically out of community of property.¹⁴¹ Thus, even though the SCA did not necessarily find the second wife's marriage was invalid for want of compliance with s (7)(6), she was still not entitled to any property in the marriage. The court did not attempt to investigate a solution to allow both wives to receive proprietary protection.¹⁴²

¹³⁵ C Himonga and A Pope "Mayelane v Ngwenyama and Minister for Home Affairs: A reflection on wider implications" 2013 *Acta Juridica* 318 at 332.

¹³⁶ *Ibid.*

¹³⁷ Kaganas and Murray 1991 *Acta Juridica* 125.

¹³⁸ Himonga and Pope 2013 *Acta Juridica* 332.

¹³⁹ Van Nierkerk 2013 *SAPL* 480.

¹⁴⁰ H Kruuse and J Sloth-Nielsen "Sailing between Scylla and Charybdis: *Mayelane v Ngwenyama*" (2017) 17 *PELJ* 1710 at 1724.

¹⁴¹ *Ngwenyama* para 38.

¹⁴² Bakker 2016 *THRHR* 237. The thesis will provide recommendations on how the property rights of all wives can be realised in polygamous marriages. See chapter 5.

In the case of *Palesa NO v Moleko*,¹⁴³ the effect of *Mayelane* is illustrated. The second applicant in the case, Ms Palesa, who was in a civil marriage with the deceased, applied for a declaratory order declaring her the executrix of the deceased's estate and an order for the return of motor vehicles in possession of both the respondents.¹⁴⁴ The first respondent, Ms Moleko (the customary marriage wife), alleged that she was in a customary relationship with the deceased from 1996 and that Ms Palesa was simply his lover.¹⁴⁵ The second respondent, Ms Mgomezulu (the cohabitation partner), alleged that she and the deceased had been cohabiting since 11 of July 2005 and that he paid *lobolo* for her on 3 April 2010.¹⁴⁶ As a result, Ms Mgomezulu believed that she was the deceased's wife according to customary law.¹⁴⁷

In order to determine whether the vehicles had to be returned, the court had to establish the validity of the customary unions alleged by the first respondent, Ms Moleko, and second respondent, Ms Mgomezulu, respectively. The court held that, as a civil marriage existed with the second applicant, the customary unions to the other respondents were of no legal consequence.¹⁴⁸ As there was a pre-existing civil marriage between the deceased and the second applicant, the marriages to both respondents were void *ab initio*. What is interesting in the case is the court's commentary on customary marriages in general. The court referred to *Mayelane* and stated that, in the context of customary unions, consent of the first wife was needed for subsequent marriages, and thus, the two other marriages would still be considered null and void.¹⁴⁹ The court stated that even if, for argument's sake, all three of the marriages had been customary marriages, the two respondents' wives would have had no claim to the estate of the deceased. This is because the first wife would not have consented to the subsequent marriages. Although the statements were made in *obiter*, the court paid no attention to the impact this would have potentially had on the proprietary interests of subsequent wives in a customary context and how it invalidated their rights.

¹⁴³ 2013 JOL 30594 (GSJ). The case was decided after *Mayelane v Ngwenyama*.

¹⁴⁴ *Palesa* para 1.2.

¹⁴⁵ *Palesa* para 14.2.1.

¹⁴⁶ *Palesa* para 19.1.

¹⁴⁷ *Palesa* para 29.3

¹⁴⁸ *Palesa* para 51.

¹⁴⁹ *Palesa* para 50.

At this point, it is important to note the two circumstances in which a subsequent customary wife's marriage could be invalidated. In the first instance, this could be in the case of *Mayelane*, where the first marriage and the subsequent invalidated marriage are both customary marriages. This could also occur, as in the case of *Palesa v Moloko*, where the first marriage is a civil marriage and the subsequent marriage is a customary union. This thesis argues that, in both instances, the putative marriage doctrine can be pleaded and applied to protect the women whose marriages were declared invalid.¹⁵⁰

The above discussion highlights how the RCMA fails to protect the interests of subsequent wives in polygamous marriages. The registration dilemma discussed above means that, in some instances, there is no way subsequent wives are able to inform themselves of already existing marriages.¹⁵¹ The RCMA's attempt at promoting equality has only succeeded in creating formal equality in at least polygamous marriages.¹⁵² Implementation of the legislation has highlighted a focus simply on the form of customary marriages and maintained the substantial inequality between men and women.¹⁵³ Although it was not the RCMA drafters' intentions, parties who have failed to comply with the legislative requirements have had their marriages judged as non-existent.¹⁵⁴

2.2 CONCLUSION

It is clear from the above discussion that, even after the promulgation of the RCMA, a large gap is still left in terms of its implementation and application. While the required remedy is legislative intervention, this thesis asks what remedy can bridge the gap for the "inadequately married"?¹⁵⁵

¹⁵⁰ From the facts it appears as if counsel for the first and second respondent in *Palesa* could have used this argument but did not do so.

¹⁵¹ Himonga and Pope 2013 *Acta Juridica* 333. Where the first marriage is not registered, a prospective subsequent wife may not know about it, and therefore is unlikely to enquire from the existing wife whether she has given her consent.

¹⁵² L Mwambene and H Kruuse "Form over function? The practical application of the Recognition of Customary Marriages Act 1998 in South Africa" 2013 *Acta Juridica* 292 at 294.

¹⁵³ Mwambene and Kruuse 2013 *Acta Juridica* 294.

¹⁵⁴ *Ibid* 310.

¹⁵⁵ The South African Law Reform Commission's Project 144 on Single Marriage Statute envisions a remedy for invalidated marriages at 157. Clause 6(5) of the Recognition and Registration of Marriages and Life Partnerships Bill

The putative marriage doctrine fits best as a remedy because it is not overly focused on form and rather on function by determining the intent and belief of *bona fide* parties.¹⁵⁶ In the South African Law Reform Commission's recent discussion on matrimonial property law, a recommendation was made that the doctrine should be extended to customary marriages.¹⁵⁷ The argument for this is that the numerous challenges with the validity of customary marriages leave women without protection.¹⁵⁸

The next chapter explores the putative marriage doctrine and its application in South African law.

stipulates that in the case where there is no consent from the first wife, an application can be made and the court may make a just order with regards to the division of the relationship property. However, the proposed bill does not stipulate how such division should happen even instance where the first marriage was in community of property.

¹⁵⁶ Mwambene and Kruuse 2013 *Acta Juridica* 316.

¹⁵⁷ South African Law Reform Commission Project 100E: Review of Aspects of Matrimonial Property Law (2023) 151.

¹⁵⁸ *Ibid.*

CHAPTER 3: THE PUTATIVE MARRIAGE DOCTRINE

3.1 INTRODUCTION

The chapter looks at the putative marriage doctrine's history. Furthermore, the chapter will discuss the current application of the doctrine and the issues for its application for invalid customary marriages.

a) The history of the putative marriage doctrine in South Africa

The putative marriage doctrine is a remedy that was developed to correct the injustice when a marriage was found to be null and void, and where one or both parties believed in good faith that their marriage was valid.¹ Such a marriage is void due to it not meeting certain legal requirements, but the putative spouse is, nevertheless, awarded similar benefits that would have flowed from a valid marriage.² The doctrine can be traced back to the early twelfth to fourteenth centuries in English law, where, in certain circumstances, the civil effects of a valid marriage were granted where the marriage had been declared null and void.³

In most jurisdictions (and the English jurisdiction in particular), the law held that if the parents of a child had entered into a marital union in which they believed in good faith had no legal impediments, the child should be considered legitimate.⁴ This happened especially in situations where the union was invalid due to the existence of a previous marriage.⁵ The doctrine became codified in English law in The Law Reform (Miscellaneous Provisions) Act 1949 and later in the Matrimonial Causes Act 1950, stating that:

“Where a decree of nullity is granted in respect of a voidable marriage, any child who would have been the legitimate child of the parties to the marriage, if it had been dissolved, instead of being annulled, at the date of the decree shall be deemed to be their legitimate child notwithstanding the annulment.”⁶

¹ CL Blakesley “Putative Marriage Doctrine” (1985) 60 *Tulane Law Review* 1 at 6.

² Blakesley 1985 *Tulane Law Review* 7. Such grounds included consanguinity or a pre-existing marriage.

³ Blakesley 1985 *Tulane Law Review* 8.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ RW Lee “Putative Marriage” (1954) *Butterworths SALR* 36 at 47.

The occupation with the word ‘legitimacy’ historically was because illegitimate children did not have a right to inheritance. Such children were disadvantaged in society, and the father of an illegitimate child did not have a legal duty of support. The position has since shifted, and children born to unmarried parents enjoy the same rights and status as children of unmarried parents.⁷

The doctrine, derived from English law, was later adopted into Roman-Dutch law and was used to grant relief in certain cases by recognising children of second bigamous marriages.⁸ Its incorporation into South African law came from Roman-Dutch Law.⁹ According to Voet, where a lawful obstacle exists within a marriage, there is a community of property between the putative spouses as long as they can prove they were *bona fide* in their claim.¹⁰ Burge, who writes on the law of marriage and divorce in Roman-Dutch law, sets out three circumstances that have to be met in order for a putative marriage to be declared. To begin with, one or both of the parties must be *bona fide*.¹¹ The marriage must have been duly solemnised, and finally, the marriage must have been considered to be lawful by the *bona fide* parties.¹² If a putative marriage was established, it would entitle the *bona fide* spouse(s) the right to property and render the children legitimate.¹³

The general theme in early cases was to declare the second marriage as putative due to the prohibition of bigamy.¹⁴ The earliest case to be found dealing with putative marriages appears to be *H v C*.¹⁵ This case marks the entry of the doctrine in South African law. In this matter, the plaintiff was married to the defendant while he was still married to his first wife. Although the Court was not convinced the husband’s claim (viz that he did not know that his first wife was alive), it believed that the plaintiff ‘wife’ to be was *bona fide*.¹⁶ Therefore, an order was granted

⁷ See Children’s Act 38 of 2005.

⁸ W Burge *Comparative Law of Marriage and Divorce* (1910) 113.

⁹ Early cases such as *H v C* 1929 TPD 992 and *Bam v Bhabha* 1947 (4) SA 798 (AD) refer to Roman-Dutch jurists such as Voet, Burge and van der Keesel.

¹⁰ J Voet *Commentary on Pandects: The Ceremony of Marriage* vol 4 Book 23.

¹¹ W Burge *Comparative Law of Marriage and Divorce* (1910) 83.

¹² Burge *Comparative Law* 83

¹³ *Ibid.*

¹⁴ Bonthuys 2016 *PELJ* 11.

¹⁵ 1929 TPD 992.

¹⁶ Lee 1954 *Butterworths SALR* 44.

declaring their minor child legitimate without prejudice to their rights. In *Potgieter v Bellingan*,¹⁷ the applicant was in a bigamous marriage with the defendant. In this matter, the Court considers how the putative marriage doctrine developed in Roman-Dutch Law. The Court references the Dutch jurist van der Keessel's *Theses Selectae*, which states that if the second spouse acts *bona fide* and is deceived by a bigamist, the children of such a union are legitimate.¹⁸ Thus, in the case of bigamy, the doctrine was used to legitimise children born from second marriages. In the matter, the Court declared the children of the marriage legitimate.¹⁹ In *Ex parte Azar*,²⁰ where it was unclear if the marriage officer was qualified, the Court held that the marriage was putative, and the children were declared legitimate.

The doctrine also began to be utilised to claim part of the matrimonial property, as seen in the case of *Ex parte L*.²¹ In this case, the court dealt with a marriage in which the Rabbi was not duly registered as a marriage officer. In the matter, the court considered the fact that there had been a marriage between the parties and a degree of cohabitation and repute, which supported the petitioner's claim that they thought their marriage was valid.²² In relation to the petitioner's prayer that the children of the marriage be declared legitimate, the Court granted the order relying on the precedent of *H v C* and *Ex parte Azar*. In relation to the petitioner's claim for partnership property, the Court used the rationale of *Mograbi v Mograbi*.²³ In the case of *Mograbi*, the marriage had been concluded before a Rabbi who was not a marriage officer and thus, the marriage was declared invalid.²⁴ The courts stated that as the parties believed that a valid marriage existed, they could be presumed to be in a universal partnership, and thus half of the estate should devolve to the wife.²⁵

¹⁷ 1940 EDL 264.

¹⁸ *Ibid* 267.

¹⁹ *Ibid* 269.

²⁰ 1932 OPD 107.

²¹ 1947 (3) SA 50 (C). See also *Arendse v Roode* 1989 (1) SA 763 (C) and *V (aka L) v de Wet* 1953 1 SA 612 (O) where the plaintiff attempted to claim half of the deceased's estate.

²² *Ex Parte L* 220.

²³ 1921 AD 274. Although bigamy was not the issue in the case of *Mograbi*, the court applied the rationale that a claim for the estate can be made when there was bona fide belief of the existence of a marriage was applied.

²⁴ *Mograbi* 276

²⁵ *Ibid*.

Therefore, the court declared that a community of property existed between the petitioner and the deceased husband, and she was thus entitled to a half-share of the estate.²⁶

The application of *Mograbi* in *Ex Parte L* illustrates that early case law interchangeably used the concepts of universal partnerships and putative marriages to grant relief.²⁷ However, in the relatively recent case of *Ramatshimbila v Phaswana*,²⁸ the court cleared up the position in law. The applicant in the matter claimed a putative marriage and an order that a partnership existed between the parties in equal shares in respect of businesses they both had.²⁹ The court stated that the two concepts were exclusive as they both had different requirements and legal consequences.³⁰ In the matter of *Bam v Bhabha*,³¹ (discussed in chapter 1) the judge – through the putative marriage doctrine – found that the father had the right of custody to his children. This is because the court could make the children ‘legitimate’ through its order that the marriage was a putative one.³²

Early South African case law refers to English case law in its application of the doctrine. Under English law, the presumption of cohabitation and repute was considered and thus, in cases where there was legal impediment, such presumption was seen as proof of the existence of a valid marriage. In the English case of *Aronegary v Vaigalie*,³³ although the second plaintiff (the widow) and the deceased had never legally registered their marriage, they lived together as man and wife. Furthermore, their friends and family knew them to be married.³⁴ In the case, the court stated that proof of cohabitation and repute were considered to be proof of a valid marriage unless there was sufficient evidence to prove otherwise.³⁵ In early South African case law, the courts paid particular attention to the degree of cohabitation and reputation as evidence of whether a valid putative

²⁶ *Ex Parte L* 225.

²⁷ Bonthuys 2016 *PELJ* 5. As evident in *Annabhay v Ramlall* 1960 3 SA 802 (D) that the courts tended to treat putative marriages and universal partnerships as equivalent concepts.

²⁸ 2014 ZASCA 117.

²⁹ *Ramatshimbila* para 2.

³⁰ *Ibid* para 8.

³¹ 1947 (4) SA 798 (AD).

³² *Ibid* 809.

³³ 6 AC 364 (HL).

³⁴ *Aronegary* 6.

³⁵ *Ibid*.

marriage existed.³⁶ For example, in the case of *Ex parte Azar*, the presumption was applied alongside the putative marriage doctrine to declare the children of the putative marriage legitimate.³⁷

In the only known case to deal with the putative marriage doctrine in the context of customary marriages, *Makholiso v Makholiso*,³⁸ the court dealt with a situation where the second marriage, being customary in nature, was alleged to have been concluded after a civil marriage in community of property. At the time of the hearing, the RCMA was not yet in force. The applicants, who were the children of the deceased and his wife of the civil marriage, claimed that they were the sole intestate heirs to the exclusion of the children of the customary wife.³⁹ Pickering J highlighted that the deceased and his 'customary wife' were *bona fide* in their belief that their customary union was valid as they had complied with the formalities, including the payment of lobola.⁴⁰

The court thus held the second customary marriage was a putative marriage, and the children of the marriage were legitimate children for the purposes of inheritance.⁴¹ The judgment's treatment of the customary union in comparison to the civil marriage illustrates the discrimination that customary wives faced prior to the RCMA, but that continues today.⁴² In the judgment, Pickering J stated that, at the time, the legal rights of women under customary law could not be reconciled with those of a wife in a civil marriage.⁴³ While the rights of those in customary unions have

³⁶ *Ex parte L*. See also *See Fitzgerald v Green* 1911 E.D 432.

³⁷ *Azar* 109.

³⁸ 1997 (4) SA 509 (TkS).

³⁹ *Makholiso* at 514D. As the respondents had no claim to the legal wife's estate, the court ordered that the intestate estate of the legal wife be liquidated prior to the estate of the deceased husband. The putative wife's children thus received a child's share of the deceased husband's estate.

⁴⁰ *Makholiso* at 514D. In the case, both the legal wife and the putative wife were deceased. As such, Pickering J focused on the issue of the legitimacy of the respondents as heirs. As the case was decided prior to the RCMA, the judge focused primarily on how there was no matrimonial property regime for customary unions. Not much is said in relation to the customary wife as a putative wife except that the marriage was putative due to the good faith of the husband and the putative wife.

⁴¹ *Makholiso* at 520B.

⁴² Section 9(3) of the Constitution protects against discrimination on the grounds of culture. The discrimination at issue exists between civil married women and customary wives.

⁴³ *Makholiso* at 518C.

improved in various ways,⁴⁴ Bonthuys argues that the distinction between civil married women and customary wives remains discriminatory and leads to the legal neglect of customary wives.⁴⁵

b) The history of the putative marriage doctrine in other jurisdictions

There are traces of the doctrine in French, Spanish and American law in the early 1880s.⁴⁶ The concept of nullity in French marriage law was extreme in that when a marriage was declared null and void, the decree applied retrospectively.⁴⁷ Article 201 of the French Civil Code states that spouses can accrue benefits in a marriage that has been declared void, which would produce the effects of a valid marriage where one or more of the spouses contracted it in good faith.⁴⁸ Furthermore, art 202 states that the impact of the putative marriage means that the children of the union are considered legitimate.⁴⁹

In Texan law (a state in the United States of America), the putative marriage doctrine entered through the Spanish influence in the 1840s.⁵⁰ The Old Spanish Code was known as the *Siete Partidas* and had effect in Mexico, present-day Louisiana, Texas and Florida.⁵¹ The *Las Siete Partidas* established that the putative spouse was entitled to all the privileges stemming from a legal marriage.⁵² Even after the Spanish civil law was abolished in Texas in 1840, Texan family law still contained the putative marriage doctrine.⁵³ In the 1975 case of *Davis v Davis*,⁵⁴ the doctrine formally became part of Texan law and stipulated that a putative spouse had the right to all the effects of a legal marriage in relation to property division.⁵⁵

⁴⁴ See *Gumede v the President of South Africa* 2009 (3) SA 152 (CC), *Ramuhovhi v the President of South Africa* 2018 (2) SA 1 (CC) and *Sithole v Sithole* 2021 (5) SA 34 (CC).

⁴⁵ E Bonthuys “Exploring Universal Partnerships and Putative Marriages as Tools for Awarding Partnership Property in Contemporary Family Law” (2016) 19 *PELJ* 5.

⁴⁶ France was one of the first countries to adopt the Canon Law concept.

⁴⁷ JD Fine “The Rights of Putative Spouses: Choice of Law Issues and Comparative Insights” (1983) 32 *The International and Comparative Law Quarterly* 708 at 709.

⁴⁸ Blakesley 1985 *Tulane Law Review*

⁴⁹ *Ibid.*

⁵⁰ Blakesley 1985 *Tulane Law Review* 10.

⁵¹ *Ibid.*

⁵² *Ibid* 11.

⁵³ *Ibid.*

⁵⁴ 521 S.W.2d 603 (Tex. 1975).

⁵⁵ Fine 1983 *The International and Comparative Law Quarterly* 722. The Texan application of the putative marriage doctrine deviates from the Spanish law influence in that the law does not expand the rights beyond property interests. Thus, a putative spouse cannot claim under succession rules for instance.

The application of the doctrine in the state of Louisiana has both French and Spanish origins.⁵⁶ Additionally, early case law in the state of Louisiana applied the putative marriage doctrine. In the case of *Patton v Cities of Philadelphia & New Orleans*,⁵⁷ the courts held that a woman who believed in good faith that she was legally married was entitled to the civil effects of that marriage.⁵⁸ In addition, art 117 of the Louisiana Civil Code states that a marriage declared null produces civil effects if at least one of the parties acted in good faith.⁵⁹ Similarly to the doctrine in French law, the focus is on the good faith element, and the civil effects of a putative marriage cease when good faith ends.⁶⁰

c) Current application in South African law

*i) Zulu v Zulu*⁶¹

The applicant in the case, Ms Molly Patricia Zulu, brought an application for a half-share in the estate of Thulani Cyril Zulu, who was deceased.⁶² She claimed that the two parties had been married in community of property with two children. However, a prior marriage existed between the deceased and the first respondent, Ms Thandiwe Phylis Zulu.⁶³ The first respondent submitted that the marriage to the applicant was null and void because the applicant was aware of the deceased's prior marriage to her.⁶⁴ The marriage between the applicant and the deceased was concluded in 1985, while the deceased's marriage to the first respondent was concluded in 1974.⁶⁵

As the marriage between the first respondent and the applicant was never dissolved, the court found that the second marriage was a bigamous one and, as such, was null and void. In the circumstances, the applicant claimed that a putative marriage existed, which entitled her to a half-

⁵⁶ *Ibid* 712. Unlike the doctrine in Texan law, in Louisiana the doctrine extends to social welfare benefits.

⁵⁷ 1 La. Ann. 98 (1846).

⁵⁸ Blakesley 1985 *Tulane Law Review* 9.

⁵⁹ Fine 1983 *The International and Comparative Law Quarterly* 712.

⁶⁰ Blakesley 1985 *Tulane Law Review* 10.

⁶¹ 2008 (4) SA 12 (D).

⁶² *Zulu* 1.

⁶³ *Zulu* 2

⁶⁴ *Zulu* 3.

⁶⁵ *Zulu* 2.

share of the deceased's estate.⁶⁶ She argued that she entered the marriage in good faith and denied the first respondent's assertion that she was aware of the prior marriage. She alleged that, prior to his death, there were rumours of him being in a previous marriage. However, when she confronted him, he denied them.⁶⁷ Furthermore, the applicant made contributions to the matrimonial home and made renovations on the property that she and the deceased stayed on.⁶⁸ The applicant claimed further that her and the deceased intended to create a universal partnership.⁶⁹

On the evidence, the court accepted that the applicant acted in good faith, and indeed, the marriage was putative. In his judgment, Hugo J highlighted that *Zulu* was the first case that dealt with the consequences of a putative marriage where there was an existing valid community of property regime.⁷⁰ He suggested that, although cases such as *Ex parte L* had allowed for the share of community of property in putative marriages, the existing marital property regime posed a problem to the application of the doctrine in this context. Hugo J was reluctant to grant the half-share due to the existence of the prior marriage in community of property.⁷¹

As mentioned above, when a marriage is concluded in community of property, all assets, save those expressly excluded, become part of the joint estate.⁷² This creates an undivided share for each spouse. It is on this basis that the court found that it could not divide the estate in a way that separates this undivided property.⁷³ The court stated that, as the joint estate of the first respondent and the deceased was not terminated, a new community of property with the applicant could not have existed.⁷⁴

On the claim that a universal partnership existed, the court had to first determine whether all the requirements of a universal partnership were present. The requirements are that each partner must

⁶⁶ *Ibid.*

⁶⁷ *Zulu* 3.

⁶⁸ *Zulu* 4.

⁶⁹ *Zulu* 2.

⁷⁰ *Zulu* 4.

⁷¹ J Heaton and H Kruger *South African Family Law* 4 ed 2015 57.

⁷² *Zulu* 4.

⁷³ *Ibid.*

⁷⁴ *Zulu* 5.

bring something into the partnership, it must be of the joint benefit of both parties, the object should be to make a profit, and the contract must be legitimate. The court held that, as the marriage between the applicant and the deceased was not lawful, a partnership could not have been created.⁷⁵ Furthermore, the deceased had not intended to enter into a universal partnership with the applicant, and thus, there was not consent.⁷⁶ However, the court stated that the applicant had a claim for damages as a result of being induced into entering a void marriage.⁷⁷ However, this claim would not allow her to claim a share in the other party's assets.

ii) Critique of Zulu

It must be noted that there are some problematic aspects to the decision in *Zulu*. To begin with, the reasoning of the court in the case creates a precedent for how the putative marriage doctrine will be applied in the case of bigamy.⁷⁸ Smith argues that the decision reached by the court is counter-productive to the purpose of the doctrine.⁷⁹ The aim of the doctrine is to mitigate the consequences of a void marriage for the innocent spouse.⁸⁰ Such mitigation occurs in two instances: that the children born of putative marriages are considered children of "married parents" and that the court order a division of assets that follows the usual patrimonial consequences of a valid marriage.⁸¹

In the judgment, although Hugo J declares that a putative marriage existed between the applicant and the deceased, he did not order any patrimonial consequences following akin to those arising from a valid marriage. The result negates the purpose of the doctrine and penalises the innocent spouse.⁸² Smith argues that the judgment is a radical departure from established legal principles that are entrenched in South African law.⁸³ Courts have a constitutional mandate to interpret and develop law, taking into account the interests of justice and the rights entrenched in the Bill of

⁷⁵ *Zulu* 6.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ B Smith "Rethinking the Application of the Putative Spouse Doctrine in Matrimonial Property Law" (2010) 24 *International Journal of Law Policy and Family* 1 at 12.

⁷⁹ Smith 2010 *International Journal of Law Policy and Family* 14.

⁸⁰ *Ibid* 13.

⁸¹ B Smith "The interplay between registered and unregistered domestic partnerships under the draft Domestic Partnerships Bill, 2008 and the potential role of the putative marriage doctrine" (2011) 128 *SALJ* 560 at 568.

⁸² Smith 2010 *International Journal of Law Policy and Family* 14.

⁸³ *Ibid.*

Rights.⁸⁴ As such, the court missed an opportunity to develop the law on putative marriage doctrine to allow protection for those in bigamous marriages. Smith identifies that the putative marriage doctrine needs to be developed to apply to bigamous and polygamous marriages.⁸⁵ Furthermore, Smith argues that the potential claim for damages would be futile on the part of the applicant due to the onerous requirement of proving liability.⁸⁶

Bonthuys identifies the potential harmful effect of not enforcing the doctrine beyond civil marriages.⁸⁷ While the case of *Zulu* deals with bigamous civil marriages, the possibility of a civil marriage co-existing with a customary marriage or co-existing customary marriages is higher and leaves more women without protection.⁸⁸ As seen in the the cases of *Gumede v President of South Africa*⁸⁹ and *Ramuhovhi v President of South Africa*,⁹⁰ all customary marriages are now by default in community of property.⁹¹ If the reasoning in *Zulu* is applied in the context of subsequent customary marriages, a first marriage in community of property would dismiss the opportunity for a party to any subsequent marriage to claim any patrimonial consequences as a result of a putative marriage.⁹² The challenge then is that subsequent marriages are left invalidated in such instances with no remedy to claim part of the assets results from the putative matrimonial property.⁹³ This means further that in situations where cohabitation agreements co-exist with customary marriages, parties to such relationships cannot rely on the putative marriage doctrine.⁹⁴ None of the cases declaring such customary marriages invalid have extended proprietary relief to women who have conducted themselves as a wife, sometimes for many years.⁹⁵

⁸⁴ *Ibid.*

⁸⁵ Smith 2011 *SALJ* 568.

⁸⁶ Smith 2010 *International Journal of Law Policy and Family* 14.

⁸⁷ E Bonthuys “Exploring universal partnerships and putative marriages as tools for awarding partnership property in contemporary family law” (2016) 19 *PELJ* 1 at 15.

⁸⁸ Bonthuys 2016 *PELJ* 15.

⁸⁹ 2009 (3) SA 152 (CC).

⁹⁰ 2018 (2) BCLR 217 (CC).

⁹¹ Bonthuys 2016 *PELJ* 15.

⁹² *Ibid.*

⁹³ This is due to the fact that the current application of the doctrine would not protect subsequent relationships when the property regime is in community of property.

⁹⁴ Bonthuys 2016 *PELJ* 15.

⁹⁵ Bonthuys 2016 *PELJ* 9.

Considering the pluralistic nature of South African law, *Zulu v Zulu* provided an opportunity for the courts to develop the common law not only in relation to civil marriages, but also to the interrelationship between civil marriages and customary marriages.⁹⁶ *Zulu v Zulu* thus presents a missed opportunity to develop the doctrine to offer protection to different unions within South African family law.

iii) A different approach under executorship and inheritance: MS v Executor: Estate Late NS⁹⁷ and Kgosi v Kgosi⁹⁸

Two recent cases, being *MS* and *Kgosi*, take a different stance in dealing with property division where there is a pre-existing marriage in community of property. In the case of *MS*, the applicant, who was the putative spouse, applied for her marriage to be declared putative and for the joint estate to be divided as though the marriage was in community of property.⁹⁹ The putative spouse and the deceased, who was the common spouse, were married for 36 years until his passing.¹⁰⁰ The putative spouse assumed that the deceased and the second respondent, who was the legal spouse, were divorced.¹⁰¹ The applicant learnt that this was not the case after she went to report her husband's death to the Master's office. As a result, she launched the court application.¹⁰²

The court stated that the deceased's marriage to the putative spouse was bigamous and, therefore, declared that the marriage was putative in nature.¹⁰³ The court commented on the reasoning in *Zulu*, stating that it went against the purpose of the putative marriage doctrine to penalise the innocent putative spouse.¹⁰⁴ In doing so, it stated that the intention of the doctrine was to protect *bona fide* spouses from the severe effects of a void marriage.¹⁰⁵ Thus, the court suggested that an interpretation that ignores this objective must be incorrect. The court stated that it would be

⁹⁶ Smith 2010 *International Journal of Law Policy and Family* 15.

⁹⁷ 2021 (6) SA 483 (FS).

⁹⁸ [2023] ZAGPPHC 955 (21 August 2023).

⁹⁹ *MS* para 1.

¹⁰⁰ *MS* para 3.

¹⁰¹ *MS* para 3.

¹⁰² *MS* para 4.

¹⁰³ *MS* para 14.

¹⁰⁴ *MS* para 16. The case references and agrees with Smith's article, "Rethinking the Application of the Putative Spouse in South African Matrimonial Property Law", which is discussed above and in chapter 4.

¹⁰⁵ *Ibid.*

“unjust, unfair and contrary to the interests of justice to deprive the applicant of the half-share to which she is certainly entitled”.¹⁰⁶ The court further suggested that the application of the doctrine should be in line with the Constitution and its values.¹⁰⁷ The court thus declared that the applicant was entitled to a half-share of the estate and ordered the executor to administer the deceased’s estate accordingly.¹⁰⁸

In *Kgosi v Kgosi*, the applicant and the first respondent were surviving spouses of the deceased ‘husband’. Both parties were unaware of the existence of one another until the death of the common spouse.¹⁰⁹ The applicant, who was the legal spouse, was married to the deceased in 1986, and the first respondent, being the putative spouse, married him in 2017.¹¹⁰ The first respondent sought an order declaring that her marriage was putative and that she was entitled to 25 per cent and one-third of the child’s share of the deceased’s estate.¹¹¹ The matter could not be decided upon due to a material dispute of fact that caused the case to be referred for oral evidence.¹¹² The dispute of fact concerned whether the first respondent knew that the deceased was still married to the applicant.¹¹³ However, the court commented on the *Zulu* and *MS* cases. The court agreed with the rationale of *MS*, stating that the Constitution called for an interpretation that protected the putative spouse.¹¹⁴

The two cases differ from *Zulu* in that they deal with the administering of an estate at the death of the common spouse. However, an argument can be made that the approach by *MS* can be applied where the instance is at dissolution. In the recent Constitutional case of *EB (born S) v ER (born B)*

¹⁰⁶ *MS* para 18.

¹⁰⁷ *Ibid.*

¹⁰⁸ *MS* para 20. It must be noted that the case does not discuss the legal spouse’s proprietary consequences and the effect that the order had on her right to the estate. It also does not state how the putative spouse’s share will be administered accordingly.

¹⁰⁹ *Kgosi* para 15.

¹¹⁰ *Kgosi* para 11.

¹¹¹ *Kgosi* para 17. Section 2 of The Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009 extends the application of the Intestate Succession Act 81 of 1987 to customary marriages. The surviving spouses inherit R250,000 or a child’s share, whichever one is greater. A child’s share is calculated by dividing the estate by the number of children of the deceased and the number of surviving spouses. It is unclear then why the first respondent is claiming 25 per cent and a third of the child’s share.

¹¹² *Kgosi* para 56.

¹¹³ *Kgosi* para 34.

¹¹⁴ *Kgosi* para 54.

and Others; KG v Minister of Home Affairs and Others,¹¹⁵ the Constitutional Court dealt with two applications dealing with non-availability of section 7(3) of the Matrimonial Property Act¹¹⁶ to certain contexts. The first matter (*EB*) dealt with section 7(3)'s non-application where a marriage was dissolved by death while the second matter (*KG*) concerned the absence of a redistribution remedy where the marriage was entered into on or after 1 November 1984.¹¹⁷ Although the two cases dealt with the application of the section in different circumstances, the court dealt with them as a consolidated matter and applied the same rationale for both cases in coming to its decision. Similarly, *Zulu, MS* and *Kgosi* deal with the application of the putative marriage doctrine where there is a prior marriage in community of property. Therefore, *MS* and *Kgosi* should be considered authority for determining the application of the doctrine using recent Constitutional Court jurisprudence. In any case, *MS* and *Kgosi* echo the sentiments of this thesis that the application of the putative marriage doctrine that ignores the proprietary rights of the putative spouse does not meet the standard of the Constitution. Based on this understanding, the thesis will discuss how the putative spouse's property rights can be recognised.

3.2 CONCLUSION

The chapter discussed the putative marriage doctrine and issues with its application. The following chapter will examine whether the doctrine should be developed and arguments for such an extension.

¹¹⁵ [2023] ZACC 32.

¹¹⁶ Act 88 of 1984.

¹¹⁷ *KG* para 1.

CHAPTER 4: SHOULD THE PUTATIVE MARRIAGE DOCTRINE BE EXTENDED TO CUSTOMARY MARRIAGES?

4.1 INTRODUCTION

Chapter 2 discusses the problem that invalid customary marriages face and suggests the putative marriage doctrine as a solution. As discussed in chapter 3, the current application of the doctrine does not provide protection to invalid customary marriages. The question that this chapter wishes to answer is whether there is a legal basis for the extension of the putative marriage doctrine by considering arguments for and against this basis and then extension. My hypothesis is that an extension will protect parties found in invalid customary marriages. As such, I begin by considering against such extension.

4.2 ARGUMENTS AGAINST THE DEVELOPMENT OF THE PUTATIVE MARRIAGE DOCTRINE IN THE CONTEXT OF CUSTOMARY MARRIAGES

a) *Judicial Precedent: Zulu v Zulu*

The principle of judicial precedent is derived from English law.¹ It is derived from the Latin maxim *stare decisis et non quieta movere*, which means “to stand by one’s decisions and not to disturb settled matters.”² The principle stipulates that courts are bound by the decisions of higher courts or courts of their level in the hierarchy of courts in similar matters.³ According to the principle, legal rulings and principles are authoritative and, therefore, binding.⁴ Furthermore, only the *ratio decidendi* is binding on other courts.⁵ The *ratio decidendi* is the reason for the decision or the

¹ G Devenish “The doctrine of precedent in South Africa” (2007) 28 *Obiter* 1 at 2.

² *Gcaba v Minister of Safety and Security and Others* 2010 (1) SA 238 (CC).

³ J Brickhill “Precedent and the Constitutional Court” (2010) 3 *Constitutional Court Review* 79 at 92. See also *True Motives 84 (Pty) Ltd v Mahdi* 2009 (4) SA 153 (SCA), *Camps Bay Ratepayers’ and Residents’ Association v Harrison* 2011 (4) SA 42 (CC) and *Turnbull-Jackson v Hibiscus Court Municipality* 2014 (6) SA 592 (CC).

⁴ Devenish 2007 *Obiter* 3.

⁵ *Ibid.*

principle behind the decision.⁶ When courts have equal status, they can only depart from an earlier decision when it is determined that the other court has erred in coming to a decision.⁷

According to Hahlo and Kahn, there is an important duty on judges to follow legal rulings made in previous decisions so as to maintain legal certainty, satisfy legal expectations and ensure equality.⁸ An important principle of South African law is uniformity, and the doctrine protects this.⁹ Another important principle is that all should be equal before the law; thus, litigants in a court of law should be treated equally.¹⁰ Diverting from precedent would mean individual litigants would feel unjustly treated if past reasoning is not used in cases with similar facts.¹¹ Furthermore, judicial precedent allows for efficiency and cuts judges' time considering the same issues.¹² Judicial precedent enables citizens to plan ahead with assurance of the legal consequences and protection the law offers.¹³ It also creates confidence in the judicial system and allows for reliability.¹⁴ A system that does not uphold the rules of precedent is a system that will be in chaos as there will be no legal certainty.¹⁵

Prior to the Constitution Seventh Amendment Act of 2012 and the Superior Courts Act 10 of 2013,¹⁶ the rules were reflective of the structure of the courts pre-Constitution.¹⁷ Historically, South Africa was divided into four colonies with separate legal systems, with the overarching body being the Privy Council (the equivalent to the Supreme Court of Appeal).¹⁸ Even after South Africa became a republic, the structure was somewhat preserved as the High Court was still referred to as "high courts", thus suggesting that the provincial divisions remained separate entities.¹⁹ The

⁶ HR Hahlo and E Kahn *The South African Legal System and its Background* (1968) 240.

⁷ Brickhill 2010 CCR 92.

⁸ Hahlo and Kahn *The South African Legal System* 214.

⁹ K O'Regan "Change vs certainty: Precedent under the Constitution" (2001) 14 *Advocate* 3.

¹⁰ O'Regan 2001 *Advocate* 31.

¹¹ Hahlo and Kahn *The South African Legal System* 214

¹² O'Regan 2001 *Advocate* 31.

¹³ Hahlo and Kahn *The South African Legal System* 214.

¹⁴ *Ibid.*

¹⁵ Hahlo and Kahn *The South African Legal System* 214.

¹⁶ Act 10 of 2013.

¹⁷ M Wallis "Whose decisis must we stare" (2018) 135 *SALJ* 1 at 3.

¹⁸ Wallis 2018 *SALJ* 3.

¹⁹ Wallis 2018 1 *SALJ* 5.

rules of precedent stated that a full court decision in that division or a division of concurrent jurisdiction binds a single judge in one division of the High Court.²⁰ However, a single judge in one division is not bound by the decision of a single judge in another division.²¹ High Courts were bound by the decisions of the Supreme Court of Appeal and the Constitutional Court in terms of the hierarchy of the courts.²²

After the Seventh Amendment and the Superior Courts Act, the high courts became the High Court of South Africa.²³ This indicated that a unitary court structure existed at the high-court level and did away with what was called the “fragmented court structure”.²⁴ As a result, there is now one High Court of South Africa with nine divisions.²⁵ Wallis argues (extra-curially) that the change in the court structure precipitates a change in the application of the rules of precedent. Considering the unification of the High Court into one, thus placing all divisions on equal footing, the question then becomes whether another high court can ignore the decision of a high court in another division.²⁶ A new approach to the application of precedent must exist where High Court divisions are bound by decisions of other High Court judges across all divisions. Under this new approach, a single judge will be bound to follow the decisions of other single judges of the High Court regardless of the division in which they were decided unless satisfied that they were clearly wrong.²⁷

In the case of *Zulu v Zulu*,²⁸ the Durban and Coast High Court held that the putative marriage doctrine could not allow courts to decide on proprietary consequences of the putative marriage in situations where the previous/valid marriage was in community of property.²⁹ *Zulu* sets out how courts must deal with the issue of proprietary consequences when there is a pre-existing marriage

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid* 5.

²⁴ *Ibid.*

²⁵ Sections 6(3)(a) and (b) of the Superior Courts Act.

²⁶ Wallis 2018 1 *SALJ* 5.

²⁷ Wallis 2018 1 *SALJ* 5.

²⁸ 2008 JOL 21484 (D).

²⁹ *Zulu* 4.

in community of property. As the Durban and Coast High Court is a local division; under the old rules of precedent, the judgment binds all Magistrates Courts and is of persuasive value to other high courts. However, under the new approach to precedent, as argued by Wallis, the decision of *Zulu v Zulu* is binding to all divisions of the High Court of South Africa. If a court wants to develop the putative marriage doctrine, it would mean ignoring the authority of the *ratio decidendi* of *Zulu*. As discussed above, judicial precedent is important in maintaining order and protecting certainty and thus, evading the precedent of *Zulu* offends this.

b) South African Law Reform Commission: The Single Marriage Statute Project

In 2013, the Minister of Home Affairs proposed an investigation for the development of a single marriage statute in South African law.³⁰ The issue paper was published in 2019, followed by a discussion paper was published in January 2021. The latter paper contained two proposed bills: the Protected Relationships Bill and the Recognition and Registration of Marriages and Life Partnerships Bill.³¹ One of the questions to be answered in this chapter is whether or not the proposed Single Marriage Statute, if passed in its current format, will protect invalid customary marriages and thus make the development of the doctrine unnecessary.

The proposed legislation aims to give effect to the principle of equality, especially in relation to polygynous marriages.³² The discussion paper emphasises the importance of the consent of the first wife for subsequent marriages to be recognised.³³ Section 6(4) of the proposed Protected Relationships Bill and the proposed Recognition and Registration of Marriages and Life Partnerships Bill states:

“The male party to a subsisting polygynous protected relationship who wishes to enter into a further protected relationship must notify all the female parties to their subsisting relationship in the prescribed form of his intention to enter into a further relationship to obtain the consent of all the female parties who must indicate their consent in the prescribed form, before he may enter into such a further relationship, provided that if he enters into a further relationship without the consent

³⁰ South African Law Reform Commission Project 144: *Single Marriage Statute* Discussion Paper 152 (2021) x.

³¹ *Ibid.*

³² *Ibid.*

³³ South African Law Reform Commission Project 144: *Single Marriage Statute* Discussion Paper 152 (2021) 49.

of all the female parties to the subsisting polygynous relationship, that further relationship entered into will be void; and provided further that the registering officer must enquire into the existence of such consent having been sought and granted when the further relationship is registered.”³⁴

The proposed bill thus codifies the Constitutional Court judgment of *Mayelane v Ngwenyama*, which requires that the first wife grant consent for any prospective marriages.³⁵ The proposed relationship, however, offers protection for parties whose relationship is considered invalid. Section 6(5) of the bill stipulates:

“In an application on the ground of want of compliance with this section, a court may make such order with regard to the division of the relationship property of the parties to the protected relationship as it may deem just.”³⁶

This means that in a situation where a marriage is declared invalid due to lack of consent, the parties’ proprietary interests will be considered and protected if the court deems it just to do so. If the putative marriage is developed, it will provide a similar protection as parties to invalid customary marriages will be protected. A developed putative marriage doctrine would become unnecessary as a law will be passed that protects the rights of women in invalid customary marriages in a similar way. The question to be answered by the next section is whether the protection offered by the proposed bill is adequate to protect the circumstances which parties find themselves in invalid customary marriages.

4.3 ARGUMENTS FOR THE DEVELOPMENT OF THE PUTATIVE MARRIAGE DOCTRINE IN THE CONTEXT OF CUSTOMARY MARRIAGES

a) Precedent and the Constitution

While protecting the principle of judicial precedent is critical, a more flexible approach to understanding the doctrine is important. *Stare decisis* is based on the assumption that previous

³⁴ *Ibid* 49.

³⁵ F Osman “Comment on the Single Marriage Statute: Implications for Customary Marriages, Polygynous Marriages and Life Partnerships” (2021) 24 *PELJ* 2 at 10.

³⁶ South African Law Reform Commission Project 144: *Single Marriage Statute* (2021) Discussion Paper 152 (2021) 49.

decisions should simply be followed without inspection.³⁷ This presumes that all previous decisions are correct and does not allow for critical analysis. In the case of *S v Ndhlovu*,³⁸ the court stated that the doctrine sometimes means that old established principles which may be wrong are blindly followed.³⁹ The question to be answered is whether we should continue to stick to precedent even when doing so would be an injustice.⁴⁰ Brickhill argues that there are situations that call for a departure from previous decisions and allow a more flexible approach to the doctrine.⁴¹

Earlier application of the doctrine of precedent in Roman-Dutch law recognises that precedent should not be blindly followed and supports a more flexible approach. As far back as 1917, the court recognised that it was not obliged to follow a previous decision if it was satisfied that it was not sound.⁴² While the court found that it was important to not lightly depart from judicial precedent, it was equally as crucial to not blindly follow precedent when there was some error.⁴³ In the 1900s, Dutch courts paid due attention to precedent and gave weight to previous decisions, but they held no obligatory authority.⁴⁴ Furthermore, in English law, the view was that precedent must be followed unless it would be absurd to do so.⁴⁵

Furthermore, it is important to note that an interpretation of precedent must reflect the impact of the Constitution on the operation of law.⁴⁶ The Constitution is meant to be a measuring stick for all settled areas of law. Where precedent falls short, such precedent should not be binding.⁴⁷ Section 39(2) of the Constitution states that the common law should be developed in line with the Bill of Rights. Courts should, therefore, be bound to decisions compatible with the Constitution's

³⁷F Osman "Comment on the Single Marriage Statute: Implications for customary marriages, polygynous marriages and life partnerships" (2021) 24 *PELJ* 2.

³⁸ 1979 (4) SA 208 (ZR) 215.

³⁹ Devenish 2007 *Obiter* 9.

⁴⁰ S Woolman & D Brand 'Is there a Constitution in this courtroom? Constitutional jurisdiction after *Afrox* and *Walters* (2003) 18 *SA Public Law* 37 at 57.

⁴¹ Brickhill 2010 *CCR* 88.

⁴² JG Kotze "Judicial precedent" (1917) 34 *SALJ* 280 at 288.

⁴³ Kotze 1917 *SALJ* 288.

⁴⁴ *Ibid.*

⁴⁵ *Ibid* 291.

⁴⁶ Devenish 2007 *Obiter* 11.

⁴⁷ Woolman and Brand 2003 *SA Public Law* 54.

principles and spirit.⁴⁸ In cases when such precedent is not reflective of the Bill of Rights, the courts should not be bound by it.⁴⁹ Thus, applying the Constitution to the principle of precedent will allow for a more flexible approach. In fact, the Constitution mandates a deviation from precedent in the case that the court is developing the law.⁵⁰

Based on decisions by the US Supreme Court, Rycroft lays out questions that a court could use in determining whether there should be a deviation from the doctrine of precedent.⁵¹ The questions are as follows:

- a) Has the rule proved to be intolerable simply by defying practical workability?
- b) Is the rule subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation?
- c) Have related principles of law so far developed as to have left the old rule no more than a remnant of abandoned doctrine?
- d) Have facts changed or come to be seen so differently as to have robbed the rule of significant application or justification?
- e) Is the most recent decision a collision with a prior, intrinsically sounder doctrine?
- f) Is the decision a direct obstacle to the realisation of important objectives embodied in other laws?⁵²

In our instance, the final question is relevant to our discussion. In analysing *Zulu*'s precedent, we must question whether the case poses an obstacle to realising important objectives, not only in another law, but in the supreme law being the Constitution. As discussed in chapter 3, commentators have criticised *Zulu* in that the court failed to recognise the constitutional principles of equality and dignity in the Bill of Rights.⁵³ The case's application of the putative marriage doctrine can be said to be discriminatory against parties whose marriages are invalidated by

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ Brickhill 2010 *CCR* 108.

⁵¹ A Rycroft "The doctrine of stare decisis in Constitutional Court Cases" (1995) 11 *SAJHR* 587.

⁵² *Ibid* 589–592.

⁵³ B Smith "Rethinking the Application of the Putative Spouse Doctrine in Matrimonial Property Law" (2010) 24 *International Journal of Law Policy and Family* 1 at 14.

protecting the first wife's proprietary rights and ignoring the proprietary rights of the *bona fide* putative spouse. Sticking to the precedent set in *Zulu* means that we answer Rycroft's final question positively. Principles such as equality and dignity, entrenched in the Constitution, are ignored by the reasoning in the case. It is arguable then that *Zulu* offends principles contained in the Constitution, and thus, a departure from its precedent is justified.

b) The rationale of MS v Executor: Estate Late NS⁵⁴ and the obiter of Kgosi v Kgosi⁵⁵

The two cases are discussed extensively in chapters 1 and 3, but the discussion here is for the purpose of illustrating that these discussions support the development of the putative marriage doctrine. In the case of *MS v Executor: Estate Late NS*, the court commented on the reasoning in *Zulu*, stating that it went against the "well-entrenched *raison d'être*" of the putative marriage doctrine due to the fact that it penalised the innocent spouse.⁵⁶ The court thus went against the decision in *Zulu* and declared that the applicant was entitled to a half-share of the estate and ordered the executor to administer the deceased's estate accordingly.⁵⁷ In *Kgosi v Kgosi*, the comment on *Zulu* was *obiter*. The court agreed with the rationale of *MS*, stating constitutional principles called for an interpretation that protected the putative spouse and supported *MS*'s deviation from the rationale of *Zulu*.⁵⁸

Furthermore, chapter 3 discusses recent Constitutional Court jurisprudence that supports the rationale that the three cases should not be dealt with differently despite the dissimilar contexts.⁵⁹ Notwithstanding, they provide strong reasoning for the development of the putative marriage doctrine. Both cases recognise that the putative marriage doctrine's application in relation to property division of the marital estate where there are three parties involved ignores important

⁵⁴ 2021 (6) SA 483 (FS).

⁵⁵ [2023] ZAGPPHC 955 (21 August 2023).

⁵⁶ *MS* para 16. The case references and agrees with Smith's article, "Rethinking the Application of the Putative Spouse in South African Matrimonial Property Law", which is discussed above and in chapter 4.

⁵⁷ *MS* para 20. It must be noted that the case does not discuss the legal spouse's proprietary consequences and the effect that the order had on her right to the estate. It also does not state how the putative spouse's share will be administered accordingly.

⁵⁸ *Kgosi* para 51.

⁵⁹ See *EB (born S) v ER (born B) and Others; KG v Minister of Home Affairs and Others* [2023] ZACC 32.

constitutional principles. Therefore, it is important that the doctrine be developed to reflect constitutional principles.

c) The Single Marriage Statute: Does it provide adequate protection?

The first aspect to be considered in answering this question is time. The investigation into the single-marriage statute began in 2013.⁶⁰ The Issue Paper was published in 2019, and the Discussion Paper in 2021. The SALRC's final paper on the statute, being its report, is still awaited at the date of writing. The discussion and investigation leading to the proposal of a single marriage statute has been ongoing for over ten years. Furthermore, the length of the law-making process must be considered when envisioning when the Single Marriage Statute will become law. According to the Parliamentary Monitoring Group, data analysed from 2006 to 2015 reflected that the average time Parliament takes to pass a law is 153 days.⁶¹ Furthermore, they recorded that the longest time to pass a bill was 2 812 days for the Immigration Amendment Bill of 2006.⁶² The unfortunate consequence is that no solution exists to remedy the situation in the near future.

In addition, it is trite that bills are not always passed as law. A good example is the draft Domestic Partnerships Bill,⁶³ which has been a bill since 2008 and has long been forgotten in the discussion of a potential Single Marriage Statute. In the time it will take for the single marriage statute to pass, what remedy exists in the interim to provide protection for those in invalid customary marriages? The putative marriage doctrine can be utilised in order to protect those who are found in invalid customary marriages.

As discussed above, the consent of the first wife is required for subsequent customary marriages to be valid.⁶⁴ The Single Marriage Statute Discussion Paper discusses the issue of consent concerning polygynous and stipulates that the consent of the first wife is required in order for

⁶⁰ South African Law Reform Commission Project 144: *Single Marriage Statute* Discussion Paper 152 (2021) 3.

⁶¹ Parliamentary Monitoring Group "How long does it take to pass and enact Bills?" <https://pmg.org.za/page/How%20long> (accessed 15 May 2023).

⁶² Parliamentary Monitoring Group "How long does it take to pass and enact Bills?" <https://pmg.org.za/page/How%20long> (accessed 15 May 2023).

⁶³ The Domestic Partnerships Bill, 2008.

⁶⁴ Although this was discussed in *Mayelane* and was in relation to a Tsonga marriage, this requirement will probably be required in all customary marriages.

subsequent marriages to be valid.⁶⁵ Section 6(5) of the proposed bill envisions relief for parties who do not receive the consent of subsisting wives.⁶⁶ However, it must be noted that the proposed bill only provides protection for invalid customary marriages when the issue is consent. Consent is not the only cause of invalid customary marriages, as evident in chapter 2, where I discuss other instances in which a marriage could be declared invalid.⁶⁷

A customary marriage can be declared invalid due to a lack of adherence to other customs or legislative requirements. In such instances, nothing in the potential Single Marriage Statute protects the parties in those invalid customary marriages. As a result, we can conclude that the Single Marriage Statute will not provide adequate protection for the problem of invalid customary marriages as its protection only extends to situations in which the issue is consent. In this regard, the extended putative marriage doctrine can be utilised to offer much-needed protection from proprietary consequences.

d) The section 39(2) mandate

Section 39(2) of the Constitution requires that when interpreting all legislation and developing common law and customary law, every court and tribunal must promote the spirit, purport and objects of the Bill of Rights.⁶⁸ The court's duty is to modernise and develop the common law to reflect the social makeup of society.⁶⁹ Section 39(2) is a revolutionary tool through which the Constitution aims to transform South African law.⁷⁰ The provision thus places an obligation on the court to promote the values of the Bill of Rights through the development of the common law.⁷¹ The court's development of the common law arises in two instances, namely when (1) a rule of common law is inconsistent with a constitutional provision and (2) when a rule of the common

⁶⁵ South African Law Reform Commission Project 144: *Single Marriage Statute* Discussion Paper 152 (2021) 49.

⁶⁶ *Ibid.*

⁶⁷ For instance, in the case of *ND v MM* (18404/2018) (2020) ZAGPJHC 113 (12 May 2020), the defendant denied the existence of a customary marriage on the basis that there had been no integration of the bride.

⁶⁸ Constitution of the Republic of South Africa, 1996.

⁶⁹ I Currie and J De Waal *The Bill of Rights Handbook* 6 ed (2013) 128.

⁷⁰ D Cornell and N Friedman "In defence of the Constitutional Court: Human rights and South African common law" (2011) 5 *Malawi Law Journal* 1 at 14.

⁷¹ Cornell and Friedman 2011 *Malawi Law Journal* 15.

law falls short of the spirit, purport and objects of the Bill of Rights.⁷² In the second instance, the common law should be developed to be in harmony with the Constitution.⁷³

The question then becomes whether the current application of the putative marriage doctrine in South Africa reflects the Bill of Rights values. Smith argues that the application of the doctrine that leaves a *bona fide* party without any relief due to an existing matrimonial property regime does not reflect constitutional values.⁷⁴ This application of the doctrine ignores the rights of the *bona fide* parties and leaves women outside the law's protection in the context of invalid customary marriages. An extension of the putative marriage doctrine is necessary in order to bring its application in line with the Bill of Rights.

4.4 CONCLUSION

After a discussion of arguments for and against, the chapter has concluded that the putative marriage doctrine must be extended. In the next chapter, the extension of the putative marriage doctrine will be discussed through a comparative analysis of law in the USA and Namibia and through an analogical look at South African law.

⁷² Currie and De Waal *Bill of Rights* 61.

⁷³ *Ibid.*

⁷⁴ Smith 2010 *International Journal Law Policy and the Family* 15.

CHAPTER 5: DIVIDING THE UNDIVIDED HALF SHARE

5.1 INTRODUCTION

The *Zulu v Zulu* decision stipulated that the putative wife's proprietary rights could not be protected due to the existence of the common spouse's "undivided half-share" in a preceding marriage.¹ In the context of my argument, then, the "undivided half-share" impedes the development of the putative marriage doctrine. However, in chapters 3 and 4, I considered the cases of *MS v Executor: Estate Late NS*² and *Kgosi v Kgosi*³ as providing a foundation for the development of the doctrine, notwithstanding the existence of the common spouse's "undivided half-share". In this chapter, I consider the nuts and bolts of how one might divide the so-called undivided half-share where the impediment is a previous marriage in community of property. The chapter begins with discussing the in community of property matrimonial property regime and the idea of the undivided half-share. The chapter will provide arguments for the division of the undivided half-share. Finally, the chapter offers four options to be considered when dividing the joint estate in a putative marriage context.

Comparatively, the chapter considers two jurisdictions: California and Namibia. California offers a basis for comparison as it has, similar to South African law, a default in community of property marital system.⁴ The Californian marital property system recognises equal ownership of the estate between the two spouses.⁵ Namibia's legal system incorporates Roman-Dutch law and, therefore, holds similarities to South African law.⁶

¹2008 (4) SA 12 (D) para 6.

² 2021 (6) SA 483 (FS).

³ [2023] ZAGPPHC 955 (21 August 2023).

⁴ B Smith "Rethinking the application of the putative spouse doctrine in South African Matrimonial Property Law" (2010) 24 *International Journal of Law, Policy and Family* 1 at 5.

⁵ CB Newcombe "The origin and civil law foundation of the community property system, why California adopted it, and why community property principles benefit women" (2011) 11 *University of Maryland Law Journal of Race, Religion, Gender & Class* 1 at 21. In Namibia, the default matrimonial property regime is in community of property.

⁶ MC Lockert "Transplanting and customizing legal systems: Lessons from Namibian legal History" (2014) 13 *Richmond Journal of Global Law & Business* 173 at 209. The justification for the use of these two jurisdictions is found in chapter 1.

a) In community of property: The undivided half-share

Before the Matrimonial Property Act⁷ (the MPA), the South African matrimonial property regime consisted of a common law default community of property and profit and loss, together with the choice to separate assets in terms of an antenuptial contract.⁸ In addition, the husband had marital power, which meant he had the power to buy, sell, pledge and burden the joint estate and his wife's separate property.⁹ Under the MPA, s 11 abolished marital power and created a system of equal administration of estates.¹⁰ Under the MPA, marriages can be in community of property, out of community of property with accrual, or out of community of property without accrual.¹¹ In community of property and profit and loss creates a universal economic partnership where the assets and liabilities of both spouses are merged in a joint estate.¹²

This community is a special type of co-ownership, which is “een vorm van gebonden mede eigendom” (one form of bonded co-ownership).¹³ In the case of *Ex parte Menzies*,¹⁴ the court confirmed that there is a “tied” co-ownership of the joint estate in which each spouse's share is not only “undivided but also indivisible”.¹⁵ The concept of the undivided half-share comes from the fact that the spouses' assets are considered “indissolubly tied up”.¹⁶ The spouses own the property in common in equal, undivided shares and have equal rights of possession and control.¹⁷ Regardless of the contribution made by either spouse, their shares are jointly and equally intertwined, making their respective shares indivisible.

The MPA defines the joint estate as the estate of a husband and wife married in community of property.¹⁸ The joint estate consists of all the property and rights that belonged to the spouses at

⁷ Act 88 of 1984.

⁸ HR Hahlo *The South African Law of Husband and Wife* 5 ed (1985) 153.

⁹ J Heaton and H Kruger *South African Family Law* 4 ed (2015) 62.

¹⁰ In customary law around the same time, the law had not yet transformed. Customary unions were given limited recognition in the Transkei Marriage Act 21 of 1978 and in the Code of Zulu Law Act 6 of 1981.

¹¹ Hahlo *Husband and Wife* 157.

¹² *Ibid* 158.

¹³ *Ibid*.

¹⁴ 1993 4 All SA 455 (C).

¹⁵ *Menzies* 466.

¹⁶ Hahlo *Husband and Wife* 159.

¹⁷ *Estate Sayle Appellant v Commissioner for Inland Revenue Respondent* 1945 AD 388.

¹⁸ Section 1 of Matrimonial Property Act.

the time of their marriage and that were acquired by either during the marriage.¹⁹ At the commencement of a marriage in community of property, the property of the spouses is brought automatically into the community.²⁰ In *Rabalao v Mogoje*,²¹ the court confirms that this transfer of ownership into the estate happens by operation of law, and the normal rules of transfer do not apply in relation to this property.²² This means that such “tied” co-ownership operates automatically through law. At dissolution of the marriage, the liabilities of the joint estate are settled, and the estate is distributed equally between the spouses.²³

The community of property may only be dissolved by death, divorce, a change in the matrimonial property system under s 21, or an order of division under s 20 of the MPA.²⁴ From literature and case law, it is said that once a marriage is established in community of property, the joint estate is almost impossible to divide. The question becomes why, in exceptional circumstances, the joint estate cannot be divided. In what follows, I argue that a division is possible and necessary when a putative marriage exists. I illustrate and discuss how the undivided half-share can be divided to achieve this. The next section presents both an analogical and comparative examples to illustrate that, in fact, the undivided half-share can be divided.

b) Section 20 of the Matrimonial Property Act

Section 20 of the Matrimonial Property Act stipulates that where one spouse’s conduct is prejudicial, the other spouse may apply to the court for the immediate division of the joint estate.²⁵ Such a spouse must prove that the other spouse’s conduct will severely prejudice their interests in the joint estate and that such an order will not prejudice any third parties.²⁶ If the court is satisfied that the spouse’s interest in the joint estate is or will be prejudiced, an order for immediate division can be made.²⁷ The court has the choice to divide the estate in equal shares by unequal shares or order a change in the matrimonial property regime.²⁸ In determining how to distribute the estate,

¹⁹ Hahlo *Husband and Wife* 161.

²⁰ *Menzies* 461.

²¹ [2020] ZALMPPHC 101.

²² *Rabalao* para 21.

²³ Heaton and Kruger *South African Family Law* 62.

²⁴ Hahlo *Husband and Wife* 173.

²⁵ Section 20 of the Matrimonial Property Act 88 of 1984.

²⁶ Heaton and Kruger *South African Family Law* 78.

²⁷ Hahlo *Husband and Wife* 173.

²⁸ *Ibid* 174.

factors considered include the assets which each spouse brought into the marriage, each spouse's debts at the commencement of the marriage, each spouse's contribution during the marriage, and a consideration of the prejudice suffered by the joint estate due the other spouse's conduct.²⁹

Section 20 provides an analogical ground for the argument that dividing an undivided half-share is indeed possible. Furthermore, s 20 is proof that the joint estate is not indestructible. In circumstances where one spouse's conduct has the power to prejudice another spouse's interest, the courts are able to divide the undivided half-share with a continuation of the marriage. This is due to the recognition of one spouse's rights and the protection of their proprietary interests. Why can such a division not occur to protect the putative spouse's rights and proprietary interests? If the courts may exercise power to implement such measures when protecting a spouse's interest during the subsistence of a marriage, similarly, such procedure can be applied to divide a joint estate equitably to protect putative spouses. How such distribution can occur equitably and protect the rights of all the parties involved will be discussed in chapter 6.

c) Californian doctrine and the equity principle

The Californian application of the putative marriage doctrine is built on the principle of equity. The doctrine is considered "the proverbial bridge" to the civil effects of a legal marriage for those who failed in their attempts to meet the requirements.³⁰ Using their powers in equity, the courts have implemented the putative marriage doctrine to protect those who, in good faith, attempted to comply with the formalities of a valid marriage but failed.³¹ The doctrine states that, regardless of how the community property is divided, such division must protect the rights of the common spouse, the legal spouse and the putative spouse. Under Californian law, the court recognises that, in exceptional circumstances, an undivided half-share can be divided in order to uphold equality.³² The doctrine has been extended to include a putative spouse's right to be considered as a "widow"

²⁹ Heaton and Kruger *South African Family Law* 78.

³⁰ HY Chang "California Putative Spouses: The Innocent, the Guilty and the Law" (2015) 44 *South Western Law Review* 327 at 328.

³¹ Chang 2015 *South Western Law Review* 328.

³² See *Estate of Vargas* 36 Cal. App. 3d 714 - Cal: Court of Appeal, 2nd Appellate Dist., 2nd Div. 1974 discussed below.

under her husband's insurance policy, a putative spouse's right to claim as a dependant under a wrongful death action, and a putative spouse's right to a share of the community property.³³

In the Californian case of *Coats v Coats*,³⁴ in discussing the rights of a putative wife, the court stated:

“To say that the woman in such case, even though she may be penniless and unable to earn a living, is to receive nothing, while the man with whom she lived and laboured in the belief that she was his wife, shall take and hold whatever he and she have acquired, would be contrary to the most elementary conceptions of fairness and justice.”³⁵

This statement recognises that a grave injustice is done when the putative marriage doctrine is applied in a way that protects the common spouse's proprietary rights and ignores those of the putative spouse. This thesis focuses on the issue of property division in the case where subsequent marriages are considered invalid. A look at how Californian case law deals with property division in the case of bigamy thus provides ideas on how the principle of substantive equality can be utilised to divide the undivided half-share.

In the case of the Californian case of *Estate of Vargas*,³⁶ the court employed the principle of equity to divide the property between the legal spouse and the putative spouse. Juan Vargas, the common spouse, lived a double life (reminiscent of the deceased in *Kgosi v Kgosi*³⁷) with two separate families until he died in 1969 due to a motor vehicle accident.³⁸ Mildred, the legal spouse, was married to Juan in 1929, and they lived together continuously in Los Angeles until Juan died in 1969.³⁹ She testified that from 1945 until his death, he never spent more than a week away from their home in Los Angeles, where they raised three children. Josephine (the putative spouse) testified that she married Juan in 1945, and they moved into a home in West Los Angeles, where they raised four children. Although he never spent his nights at home due to his “business”, he

³³ CL Blakesley “The Putative Marriage Doctrine” (1985) 60 *Tulane Law Review* 1 at 44. See *Estate of Krone* 83 Cal. App. 2d 766, 189 P. 2d 741 (1948), and *Ceja v Rudolph & Sletten, Inc*, 302 P.3d 211,218 (Cal. 2013).

³⁴ 118 P. 441, 443 (Cal. 1911).

³⁵ *Coats* 443.

³⁶ 36 Cal. App. 3d 714 - Cal: Court of Appeal, 2nd Appellate Dist., 2nd Div. 1974.

³⁷ [2023] ZAGPPHC 955 (21 August 2023). The case is discussed in chapters 1 and 3.

³⁸ *Vargas* 716.

³⁹ *Ibid*.

visited regularly and spent weekends with his children. Josephine knew of a prior marriage, but Juan had told her that he was divorced.

The court stated that Josephine was a putative spouse who, in good faith, believed that her marriage to Juan was valid. On the issue of property division, the court recognised that the rules of marital succession and marital property complicated the situation.⁴⁰ As a result, the court decided to divide the property according to equity principles, stating,

“Equity or chancery law has its origin in the necessity for exceptions to the application of rules of law in those cases where the law, by reason of its universality, would create injustice in the affairs of men.”⁴¹

The court found that both wives contributed in indefinable amounts to the accumulation of the community.⁴² The court thus “cut the Gordian knot” of competing claims and divided the estate equally between the two wives.⁴³ The court stated that the “innocent wives of practising bigamists are entitled to equal shares of property accumulated during the active phase of the bigamy”.⁴⁴

A similar stance was taken in *Sousa v Freitas*,⁴⁵ where the common spouse, Manuel de Sousa, died and bequeathed his estate to his putative spouse, Catherine Freitas.⁴⁶ Manuel Joaquin de Sousa was married on the island of Santa Maria to Maria de Sousa, who was the legal spouse. In 1915, he changed his name to Manuel S Freitas and moved to California. In 1916, he attempted to secure a divorce from Maria de Sousa, but the divorce was never finalised due to his name change and an incomplete address.⁴⁷ Due to this issue, the trial court found that the common spouse’s marriage to the putative spouse was invalid. The trial court also awarded a decree imposing a constructive trust as to the legal spouse’s marital interest on the properties of his estate against Catherine E Freitas.⁴⁸

⁴⁰ *Ibid* 719.

⁴¹ *Vargas* 718.

⁴² *Ibid* 719.

⁴³ *Ibid*.

⁴⁴ *Ibid*.

⁴⁵ 10 Cal. App. 3d 660 - Cal: Court of Appeal, 1st Appellate Dist., 2nd Div. 1970.

⁴⁶ *Sousa* 663.

⁴⁷ *Ibid*.

⁴⁸ *Ibid*.

However, from 1919 until he died in 1962, Manuel Freitas and Catherine E Freitas lived as a married couple. She believed, in good faith, that they were lawfully married.⁴⁹ The trial court found that the legal spouse's marriage was still valid as the divorce was never finalised.⁵⁰ The court further found that the marriage ceremony between the common spouse and the putative spouse was invalid. On appeal, the court had to consider a situation where the legal spouse asserted her community property interest over the same property in which the putative spouse had an interest.⁵¹ The court held that the putative spouse was in a joint enterprise with her spouse, contributing her services to the common enterprise. Therefore, upon the husband's death, the court found that only his half interest could be considered as community property, to which the rights of the legal spouse could attach.⁵² The court held that the putative spouse was entitled to one-half of the estate and that the legal spouse was entitled to one-half of the property of Manuel S Freitas.⁵³ The court referred to the judgment as an "equity decision" based on the facts put before it.⁵⁴

In the case of *Brown v Brown*,⁵⁵ Ralph Waldo Brown (the common spouse) and Regina Josephine Brown (the legal spouse) were married in 1916. Their marriage began to deteriorate, and in 1932, they separated and stopped living together.⁵⁶ After their separation, Ralph started a relationship with Charlotte and married her in 1939 after obtaining an *ex parte* Mexican divorce⁵⁷ from his legal spouse, Regina, in the same year. Regina brought an application for divorce demanding one-fourth of all the property in Ralph and Charlotte's joint names, one-fourth of most of the property standing in Charlotte's name, and alimony of \$400 per month.⁵⁸ The trial court found that the

⁴⁹ *Ibid* 664.

⁵⁰ *Ibid*.

⁵¹ *Ibid* 665.

⁵² *Ibid*.

⁵³ *Ibid*.

⁵⁴ *Ibid*.

⁵⁵ 274 Cal. App. 2d 178 Cal: Court of Appeal 1969.

⁵⁶ *Brown* 181.

⁵⁷ H Silverman "Effect of Mexican divorces in United States" (1955) 9 *Miami Law Quarterly* 186 at 187. A Mexican divorce was a divorce that was obtained in Mexico, which could be by mail or the appearance of one of the spouses. The Californian courts had declared Mexican divorces as unlawful due to the fact that they were *ex parte* applications that did not give the other party reasonable notice.

⁵⁸ *Ibid*. Alimony is monetary support one spouse is ordered to give to another during divorce or separation.

Mexican divorce was invalid, and thus, Ralph's subsequent marriage to Charlotte was also invalid.⁵⁹ The trial court stated that Regina was entitled to one-half of the community property.

On appeal, the court held that a putative marriage existed between Charlotte and Ralph and that Regina was estopped from making a community property claim to any of the property accumulated by Ralph and Charlotte during the period of their invalid marriage.⁶⁰ The evidence before the court was that in November 1940, Charlotte purchased a construction company with her own money, which she ran with Ralph as the general manager.⁶¹ In 1942, Charlotte dissolved the construction company and transferred its assets to a limited partnership between her and Ralph.⁶² In 1948, they formed a corporation and brought the limited partnership assets to the new corporation. Throughout 28 years of their invalid marriage, the two amassed numerous assets through their joint business ventures.

Furthermore, Regina knew that Ralph and Charlotte were living together as husband and wife and accumulating property for 28 years, but she stood by without any complaint.⁶³ Consequently, through her silence, Regina led Ralph and Charlotte to believe that their marriage was valid. The court found that this sense of security allowed them to build their joint estate to the extent that the court could no longer trace their separate property.⁶⁴ The court's use of the doctrine of estoppel in this case was premised on the foundation of "justice and good conscience".⁶⁵ The basis of Regina's estoppel was that her conduct had precluded her by law and equity from asserting her rights over the property against people who, in good faith, believed that they were in a valid marriage.⁶⁶ In the case, the court again utilised the principle of equity to protect the putative spouse's rights

⁵⁹ *Ibid.*

⁶⁰ *Brown* 191. The principle of estoppel, borrowed from English law, states that where a person, through his words or conduct, makes a representation to another person, and this second person believes the representation and acts on it only to be later prejudiced, the presenter may be estopped from relying on the truth. The misrepresentation will be treated as truth.

⁶¹ *Ibid* 183.

⁶² *Ibid* 184.

⁶³ *Ibid* 188. The court applied the doctrine of estoppel in this instance because the legal spouse's conduct had created the impression that their marriage was valid. The doctrine of estoppel in Californian law is similar to that of South African law. In South African law, the doctrine of estoppel can be utilised to prevent a party from asserting a legal right when, due to their conduct or representation, another party can be prejudiced.

⁶⁴ *Ibid.*

⁶⁵ *Ibid* 189.

⁶⁶ *Brown* 198. See *Estate of Vargas*.

iii) Application of the principle of equity in the South African jurisdiction

Given that equity was used in the Californian cases to get to an arguably fair outcome, an important question to ask is whether the principle of equity applies in South African law. Equity is the upholding of justice and fairness.⁶⁷ The system of equity was also adopted into American law, flowing from English law.⁶⁸ In order to understand equity, we must trace its origin in English law. In early English law, courts that applied equity (courts of equity) were also known as “courts of conscience”.⁶⁹ Equity was a distinct legal system of rules and doctrine which supplemented statute and common law.⁷⁰ In the early 12th century in England, certain private suits were brought before individual counsellors who would make a finding using conscience.⁷¹ In the early fifteenth century, separate courts were developed that applied equity.⁷²

Equity was considered a separate legal system with its own precedent and authority. Its jurisdiction included contract law, bankruptcy, guardianship of infants and relief against fraud and undue influence.⁷³ In the late 1990s, the principle of equity and common law began to fuse in English law. The conclusion was that the common law and equity worked together coherently, and no historical differentiation was needed.⁷⁴ The Law Commission Consultation Paper for England and Wales on Aggravated, Exemplary and Restitutionary Damages in 1997 established that equitable remedies run through common law remedies.⁷⁵ Furthermore, common law doctrines such as those of illegality or public policy mirror the “discretionary” defences in equity.⁷⁶ This gradually led to the falling away of the equity jurisdiction in England and Wales.

⁶⁷ PJ Thomas “Did the Supreme Court of the Colony Cape of Good Hope have equity jurisdiction?” (2006) 21 *Fundamina* 251 at 253.

⁶⁸ R von Moschzisker, “Equity Jurisdiction in the Federal Courts” (1927) 75 *University of Pennsylvania Law Review* 287. States like Pennsylvania and New Jersey applied the doctrine of equity in their law.

⁶⁹ Thomas 2006 *Fundamina* 253.

⁷⁰ *Ibid.*

⁷¹ *Ibid* 254.

⁷² *Ibid.*

⁷³ *Ibid* 255.

⁷⁴ A Burrows “We do this common law but that in equity” (2002) 22 *Oxford Journal of Legal Studies* 1 at 16.

⁷⁵ Burrows 2002 *Oxford Journal of Legal Studies* 14.

⁷⁶ *Ibid.*

A separate court of equity existed briefly from 1720 to 1736 in Pennsylvania.⁷⁷ However, there was much antagonism to the concept of equity jurisdiction. Equity was considered a residual hold on American law, which represented the Crown.⁷⁸ Scholars argued that the law of the monarchy had no place in democratic America.⁷⁹ As a result, s 16 of the Judiciary Act of 1789 stated that:

“Suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law.”⁸⁰

However, courts still applied equity, and in Pennsylvania, equitable remedies were upheld in common-law forms.⁸¹ In some states, such as Massachusetts, New Jersey and Maryland, the principle of equity ran alongside the common law.⁸² American federal courts continue to apply principles of equity. In the case of *Baker v Biddle*,⁸³ the federal court stated that where the right is only an equitable one and no remedy exists in settled law, the finding can be one of equity.⁸⁴ Relevant to this thesis, equity in California established a hybrid system that combines legal and equitable doctrine.⁸⁵

Although South African law does not apply the principle of equity currently, there is evidence that equity jurisdiction existed in the Supreme Court of the Colony of the Cape of Good Hope.⁸⁶ In over forty cases, judges and advocates referred to equity as a legal system.⁸⁷ In the case of *Carruthers v Van der Venter*,⁸⁸ Cloete J referred to the court as a “court of equity”.⁸⁹ In the case of *Mills and Sons v Trustee of Benjamin Bros*,⁹⁰ the judge referred to the court as a court of law

⁷⁷ Von Moschzisker 1927 *University of Pennsylvania Law Review* 289.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ Judiciary Act of 1789.

⁸¹ Von Moschzisker 1927 *University of Pennsylvania Law Review* 289.

⁸² *Ibid.*

⁸³ 1 Bald. 394, 405 (C. C. 1831).

⁸⁴ Von Moschzisker 1927 *University of Pennsylvania Law Review* 299.

⁸⁵ *Ibid* 298.

⁸⁶ Thomas 2006 *Fundamina* 259.

⁸⁷ *Ibid.*

⁸⁸ (1862) 4 Searle 96.

⁸⁹ *Ibid.*

⁹⁰ (1876) 6 Buchanan 115.

and a court of equity.⁹¹ However, the application of principles was limited and only applied in so far as they were consistent with Roman-Dutch law.⁹²

However, as early as 1876, a limitation was placed on equity development in South Africa, and South African courts were not considered “courts of conscience”.⁹³ What remains, however, is an understanding that equity is more than a legal system and is a recognition that following the law strictly may lead to injustice.⁹⁴ This ideology recognises that the courts should have the power to deviate from the law when it causes injustice.⁹⁵

How do we reconcile the principle of equity to apply it to South African law in the case of putative marriages? Although South Africa is not an equity jurisdiction, the principle of equity is more than just a legal system.⁹⁶ Equity realises that strict adherence to the law in certain instances may lead to injustice, and thus, deviation may be necessary to remedy such injustice. Equity in the South African context, through the Constitution, means developing the putative marriage doctrine to ensure the protection of the putative spouses. But, given the rule of law principles and the importance of the separation of powers, South African courts cannot unilaterally develop the doctrine out of their own idiosyncratic views of justice. Fortunately, s 173 of the Constitution states that the courts have inherent power to develop the common law considering the interests of justice.⁹⁷ Section 39 of the Constitution also requires that the court develops the common law in line with the Bill of Rights.⁹⁸ As a result, judges have a duty to develop law and keep the law in line with the principles of justice.⁹⁹ These principles are not general but generated from the Constitution and its values. I argue that courts are able to utilise this inherent power to ensure justice and fairness by developing the doctrine to allow for the division of the indivisible half-share.

⁹¹ (1876) 6 Buchanan 115.

⁹² Thomas 2006 *Fundamina* 259.

⁹³ *Ibid.*

⁹⁴ *Ibid* 262.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ Section 173 of the Constitution.

⁹⁸ Section 39 of the Constitution.

⁹⁹ W de Vos & R Kelbrick “Discretionary powers of the judge in South Africa” (2000) 63 *THRHR* 537 at 543.

d) Namibia: *Nakuumba v Ipinge*¹⁰⁰, *Konrad v Shanika*¹⁰¹ and their consideration of *Zulu v Zulu*.

Namibian case law offers a good comparative lens as their court decisions consider the South African case of *Zulu* when a putative marriage is alleged.¹⁰² Interestingly, the case of *Nakuumba* does not refer to the South African case of *MS v Executor: Estate Late NS*, which was decided a year before it.¹⁰³ Speculatively, this could be because *MS* dealt with executorship and the administration of the deceased's estate. In the case of *Nakuumba*, which was initially an action for eviction, the Supreme Court had to deal with a universal partnership against a pre-existing marriage in community of property.¹⁰⁴ In a previous decision dealing with the same parties, *MN v FN*,¹⁰⁵ the Supreme Court had found that a universal partnership existed between the common spouse and the putative spouse and ordered the division of the partnership property.¹⁰⁶ The appellant, Mr Nakuumba (the common spouse), appealed against this finding that (viz a universal partnership existed), given that the first respondent, Ms Ipinge (the legal spouse), was not joined to *MN v FN*.¹⁰⁷ Furthermore, the legal spouse stated that the universal partnership would be in conflict with the joint estate as her marriage to the common spouse was in community of property.¹⁰⁸

The appellant and the first respondent relied on the South African decision of *Zulu v Zulu* and the Namibian case of *S v S*¹⁰⁹ to support their arguments.¹¹⁰ In the case of *S v S*, the respondent (the putative spouse) claimed that a putative marriage existed between her and the respondent and claimed half of the joint estate. The court decided, in line with *Zulu*, that the existence of a prior marriage in community of property precludes another claim to the joint estate. Both the common

¹⁰⁰ 2022 NASC 3 (31 March 2022).

¹⁰¹ [2020] NAHCMD 259 (30 June 2020).

¹⁰² When the opposite party is denying the possibility of dividing the joint estate to benefit the putative spouse, they rely on the ratio of *Zulu*.

¹⁰³ *Konrad v Shanika* was decided a year before *MS v Executor: Estate Late NS*.

¹⁰⁴ Although the case dealt with a universal partnership, the High Court decision of *MN v FN* declared the union between Mr Nakuumba and Ms Nakuumba a putative marriage.

¹⁰⁵ 2019(4) NR 1176 (SC).

¹⁰⁶ *MN* para 112.

¹⁰⁷ *MN* para 20.

¹⁰⁸ *MN* para 21.

¹⁰⁹ 2011 (1) NR 144 (HC).

¹¹⁰ *S v S* para 35.

spouse and the legal spouse argued that *S* and *Zulu* should be applied to find that, despite Ms Nakuumba being a putative spouse, she could not claim a share of the estate.

However, the court found in *Nakuumba* that a universal partnership did, in fact, exist on novel, if not problematic, reasoning. The court stated that the law governing Mr Nakuumba's marriage permitted him at the time to enter into a universal partnership while married to the first respondent.¹¹¹ The universal partnership came into being in 1976 while the marital power in terms of the common law was still in effect in Namibia.¹¹² The court found that his marital power gave the husband a right to burden the joint estate without the wife's consent. Therefore, under this particular set of facts, the appellant could have concluded a universal partnership with the second respondent (putative spouse) that affected the proprietary rights of the first respondent (legal spouse) despite the fact they were married in community of property.

The importance of *Nakuumba* to this discussion is its treatment of *Zulu v Zulu*. It is clear that the court wished to protect Ms Nakuumba's rights as the putative wife. It stated that, although the circumstances were not against any established doctrine, "if it were, it would have been an appropriate case to depart from doctrine".¹¹³ In other words, if the court could not find a way to protect the putative wife through its finding regarding marital power, it would have found another way. The case heavily criticises *Zulu*'s stance, stating that it gave "succo[u]r to patriarchy".¹¹⁴ Furthermore, the court stated that it had a duty to adapt to the changing circumstances and protect vulnerable parties.¹¹⁵ In doing so, it recognised the importance of using a liberal and progressive approach when dealing with remedial measures such as universal partnerships.¹¹⁶

While protecting the rights of the putative spouse, there is a lingering concern that the *Nakuumba* court disregarded the rights of the legal spouse. To begin with, although both the High Court and Supreme Court judgments on the universal partnership were aware of a pre-existing marriage,

¹¹¹ *Nakuumba* para 44.

¹¹² *Ibid.*

¹¹³ *Nakuumba* para 73.

¹¹⁴ *Nakuumba* para 67.

¹¹⁵ *Nakuumba* para 69.

¹¹⁶ *Nakuumba* para 70.

neither court commented on the first wife's proprietary rights. Furthermore, the court offered no guidance on how the finding of a universal partnership and the marriage in the community of property would affect the joint estate. The high court judgment of *Ipinge v Nakuumba*,¹¹⁷ which declared the marriage between the common spouse and the legal spouse in community of property and ordered the division of the joint estate, was confirmed by the Supreme Court in *Nakuumba*.

The Namibian case of *Konrad v Shanika* arguably provides a better model for dealing with property division against the indivisible half-share.¹¹⁸ The applicant, Herman Konrad, the common spouse, brought the application for an order declaring his marriage to the putative spouse null and void.¹¹⁹ The defendant, Shanika Ndapanda, the putative spouse, brought a counter-application claiming that the marriage between her and the applicant was putative, which entitled her to a half-share of the applicant's estate or, in the alternative, a claim for maintenance.¹²⁰ The putative spouse argued that she was not aware that Konrad was married to anyone else and that she believed, in good faith, that their marriage was valid.¹²¹

The court found that the defendant, in good faith, believed that her marriage to the applicant was valid.¹²² The court had to determine whether the defendant was entitled to a half-share of the applicant's estate based on her averment that the putative marriage was in community of property.¹²³

In their argument, the applicant's counsel referenced *Zulu v Zulu*, arguing that an innocent party could only be entitled to property rights in circumstances where there was no community of property in the first (valid) marriage.¹²⁴ The applicant's counsel thus argued that the only remedy

¹¹⁷ 2020 NAHCMD 45 (11 February 2020).

¹¹⁸ The case was decided before *Nakuumba* and would have greatly assisted the court to coming to their decision if it had been referred to.

¹¹⁹ *Konrad* para 1.

¹²⁰ *Ibid* para 6.

¹²¹ *Ibid* para 13.

¹²² *Ibid* para 14.

¹²³ *Ibid* para 21.

¹²⁴ *Ibid* para 24. The judgment of *MS*, which counters *Zulu*, came a year after *Konrad*.

for the putative spouse was damages.¹²⁵ Despite this argument, the court held that the putative spouse's putative marriage was deemed to be in community of property, and thus, she was entitled to a claim in the applicant's estate.¹²⁶ The court further stated that *Zulu v Zulu* could not have "the last word" on putative marriage in Namibia.¹²⁷

In dealing with the applicant's claim for property rights, the court used its inherent power to grant a fair, reasonable and practicable order.¹²⁸ The court ordered that a property valuer would estimate the property that made up the estate. The property was to be divided into two halves; one half representing the applicant's (the common spouse's) share and the other the share of his legal spouse, Hilde Shapanga.¹²⁹ The half belonging to Mr Konrad was to be divided again, and the other half given to the putative spouse.¹³⁰ As discussed in the second section below, I argue that such division protects both the legal spouse and the putative spouse in the fairest way possible.

Comparatively, the application of the putative marriage doctrine in Namibia asks important questions. Why can one not divide the joint estate? Would an application of the putative marriage doctrine that does not protect the rights of the putative spouse be just and equitable?

The discussion above has established that the joint estate can and should be divided in order to protect the putative spouse. The next section provides four models that illustrate how such division may occur.

5.2 HOW TO DIVIDE THE UNDIVIDED HALF-SHARE

a) Option 1: Two separate community properties.

¹²⁵ *Ibid.* While the case does not refer to the specific type of damages, it can be concluded that the applicant's counsel was referring to damages resulting from inducement. See *Nakuumba* para 41. In the case, the court stated in para 45 that such a claim for delictual damages can be made against the joint estate of the legal spouse and the common spouse.

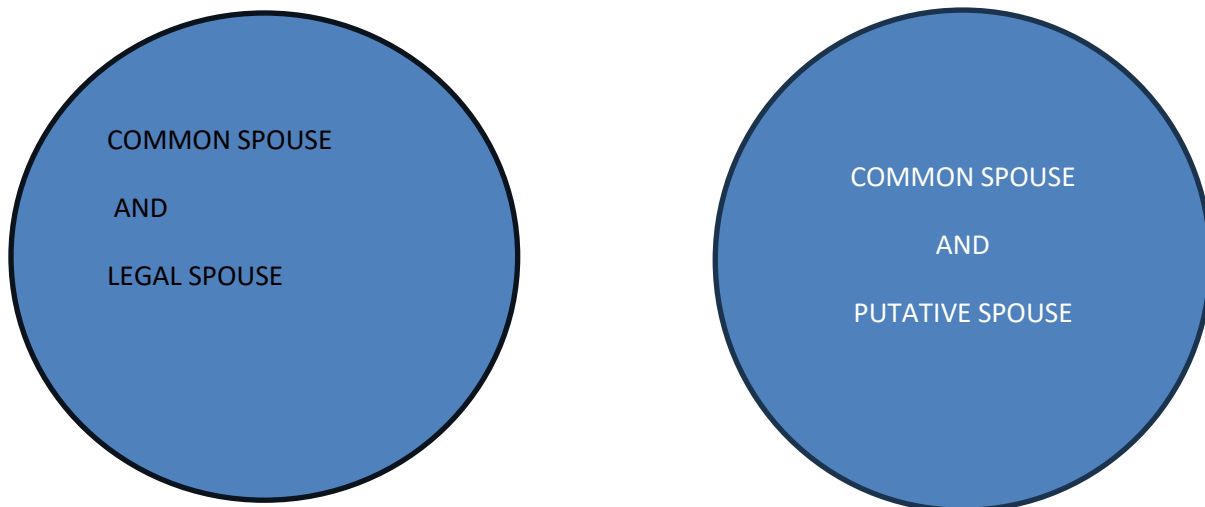
¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

¹²⁸ *Ibid.* Similar to South African law, Namibian courts have inherent power to regulate themselves.

¹²⁹ *Konrad* para 3.

¹³⁰ *Konrad* para 3.



In this model, formulated from Californian law, the common spouse and the putative spouse would create a separate community property that commences at the beginning of the invalid marriage and runs for the subsistence of the relationship. Under this model, each of the separate communities would consist of the property acquired during the terms of one of the respective marriages. The model works well under Californian law because its Code is clear that an in community property regime is not cumulative. In other words, the property of the previous marriage is not considered when the legal spouse and the common spouse live separately.¹³¹ Section 5118 of the California Civil Code states:

“The earnings and accumulations of a spouse and the minor children living with, or in the custody of, the spouse, while living separate and apart from the other spouse, are the separate property of the spouse.”¹³²

The legal and putative spouses would each receive their share of the community property accumulated during their respective marriages.¹³³ The determination of their shares will be made on the basis of when and how property was purchased or how much they contributed to the estate during their marriages.¹³⁴ Californian law recognises the need to separate the community property belonging to the common and legal spouses.

¹³¹ Blakesley 1985 *Tulane Law Review* 39.

¹³² Cal Civ Code section 5118.

¹³³ Blakesley 1985 *Tulane Law Review* 39.

¹³⁴ *Ibid.*

In the case of *Vallera v Vallera*,¹³⁵ the plaintiff, who was the putative spouse, brought an application for maintenance and a division of the community property. The trial court found that the marriage between the plaintiff and defendant was invalid because the defendant was still married to Ethel Vallera, effectively the legal spouse.¹³⁶ As a result, the court found that the plaintiff was not entitled to maintenance and a division of the community property as a legal spouse.¹³⁷ However, the court held that – as the putative spouse – she was entitled to a half-share in all the property acquired during the parties’ relationship between 1938 and 1940.¹³⁸

The purpose of this model is to ensure the protection of both the legal spouse and the putative spouse’s matrimonial property interests that neither party can interfere with. In the case of *Brown* discussed above, the legal spouse was estopped from a claim in the property amassed by the putative spouse and the common spouse during the subsistence of their putative marriage.¹³⁹ Similarly, in *Sousa*, at the common spouse’s death, the court held that the legal spouse was only entitled to a half interest in the property accumulated by the common spouse and the putative spouse.¹⁴⁰ The model honours each spouse’s interest and protects it by creating two separate community properties.

¹³⁵ 21 Cal. 2d 681 - Cal: Supreme Court 1943.

¹³⁶ *Vallera* 683.

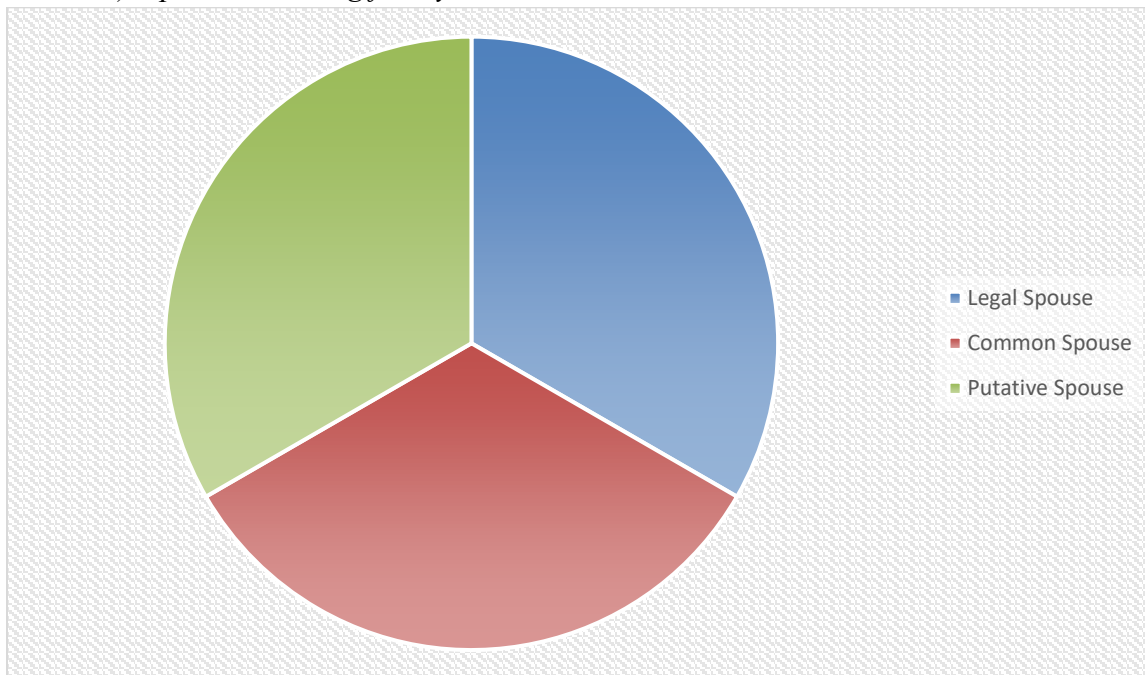
¹³⁷ *Ibid.*

¹³⁸ *Ibid.* It must be noted that on appeal, this judgment was reversed due to the finding that the putative spouse did not in – good faith – believe that the marriage existed. However, the trial court’s judgment is relevant in illustrating that a separate community property was created during the subsistence of the relationship between the common spouse and the putative spouse.

¹³⁹ *Brown* 191.

¹⁴⁰ *Sousa* 665.

ii) Option 2: One big family



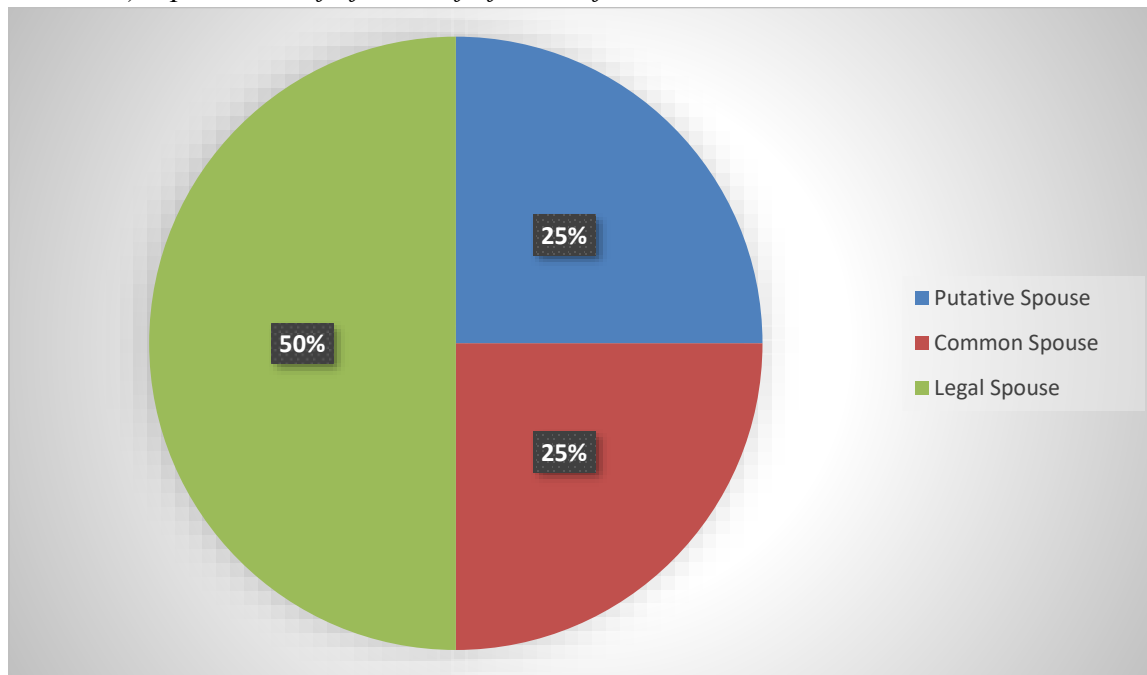
This option is briefly mentioned in Blakesley’s discussion on property division.¹⁴¹ Under this model, each of the three “spouses” is given a one-third share in the community property.¹⁴² This model is based on the argument that the legal spouse’s community property regime has continued along with that of the putative spouse despite the putative spouse’s marriage being invalid.¹⁴³ The legal spouse has an interest in the community property acquired by their common spouse during the simultaneous existence of the putative marriage and the legal marriage. Due to how intrinsically intertwined the putative and legal community properties are, it is arguable that the most equitable distribution would be to divide the community property equally amongst the three parties.

¹⁴¹ Blakesley 1986 *Tulane Law Review* 39.

¹⁴² *Ibid.*

¹⁴³ *Ibid* 38.

iii) Option 3: Half of the half of the half



This model is well formulated in the Namibian case of *Konrad v Shanika*.¹⁴⁴ As discussed above, the court divided one half representing the applicant's (the common spouse's) share and the other the share of his legal spouse, Hilde Shapanga.¹⁴⁵ The half belonging to Mr Konrad was to be divided again, and the other half given to the putative spouse.¹⁴⁶

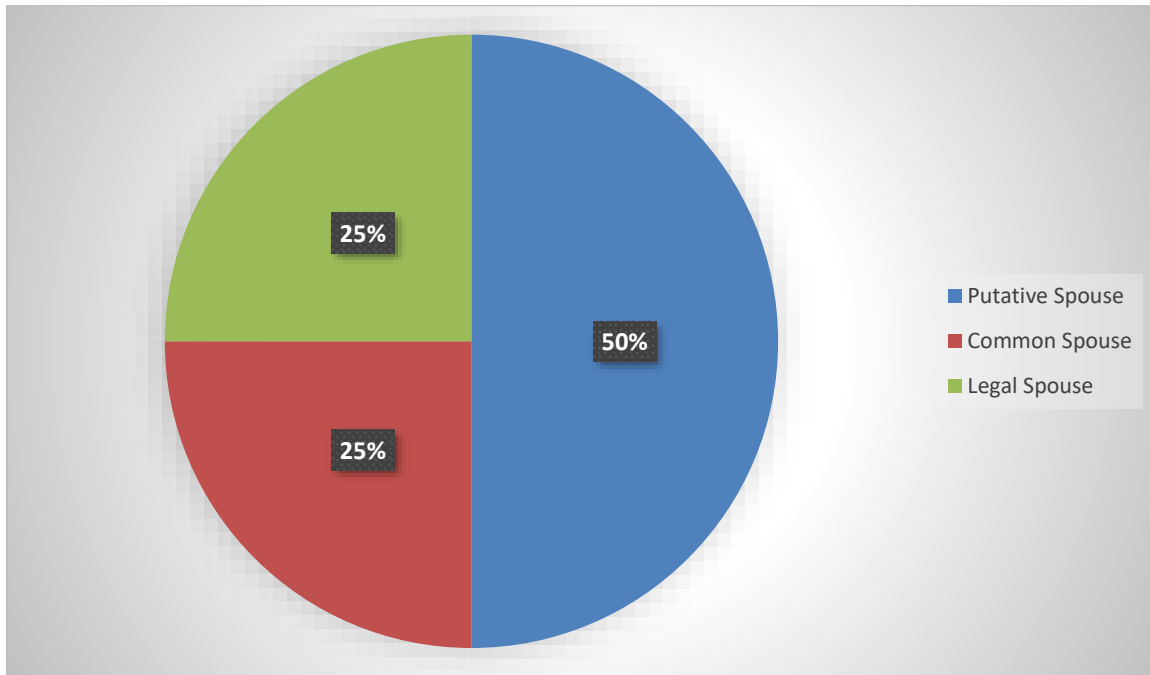
Borrowing from the Namibian example, this model appears to resolve the issue effectively. It does so by first dividing the community property between the legal spouse and the common spouse. After dividing the undivided half-share, the common spouse's share is then further divided between him and the putative spouse to give effect to her proprietary interest.

¹⁴⁴ [2020] NAHCMD 259 (30 June 2020).

¹⁴⁵ *Konrad* para 37.

¹⁴⁶ *Ibid.*

iv) Option 4: Exception to option 3



What happens in circumstances where the legal spouse's assertion of her proprietary consequences comes into conflict with the putative spouse's right over the property? The putative spouse's experience in this circumstance is summed up in the cases of *Sousa* and *Nakuumba*. The question to be answered is whether, in all situations, a legal spouse's proprietary right trumps that of the putative spouse.

In the Californian case of *Sousa v Freitas*, the common spouse and the legal spouse were married from 1908 to 1916, when he instituted the failed divorce proceedings.¹⁴⁷ The putative spouse lived with the common spouse from 1919 until his death in 1962 and carried out a joint enterprise such that all of the property of the estate was a result of the joint efforts of the two parties.¹⁴⁸ In this instance, the court held that the putative spouse was entitled to one-half of the estate while the legal spouse was entitled to half of the common spouse's estate.¹⁴⁹ The court suggested that

¹⁴⁷ *Sousa* 663.

¹⁴⁸ *Sousa* 664.

¹⁴⁹ *Ibid* 666.

“It seems obvious that one-half of the property in question belongs to the putative spouse. The other half belongs to the legal community (husband and legally recognised spouse) and should be distributed as any other community property under the same circumstances.”¹⁵⁰

The rationale behind this finding is that the putative spouse was in a joint enterprise with the common spouse, in which both parties contributed towards a joint estate.¹⁵¹ Due to this, only half of the common spouse’s share in the joint enterprise can become part of the legal community property that exists between him and the legal spouse.¹⁵² Therefore, it would be unjust in such circumstances to allow for property division that would give the legal spouse one-half of the estate and the putative spouse one-fourth.

This same rationale is seen in the Namibian case of *Nakuumba v Ipinge*.¹⁵³ In this case, the common spouse and the legal spouse had lived together as husband and wife for six years while his relationship with the putative spouse had subsisted for thirty-seven years.¹⁵⁴ The putative spouse had contributed to building the common spouse’s business enterprises, including retail outlets, farms and filling stations.¹⁵⁵ The putative spouse’s stance was that if the legal spouse had a claim, it was against the common spouse’s half-share of the estate.¹⁵⁶ In this case, the putative spouse claimed that a universal partnership existed between her and the common spouse to which she had spent all these years contributing. Granting the legal spouse a one-half-share in the community property would be prejudicial to her. Although the court ruled in favour of the putative spouse, declaring that she was entitled to a half-share of the partnership property because of the matrimonial property regime that existed at the time of the universal partnership, it recognised the importance of protecting the putative spouse’s proprietary rights.¹⁵⁷ The court stated that the facts of the case would have allowed for a deviation from the applicable law in order to recognise the proprietary rights of the putative spouse.¹⁵⁸ Thus, *Nakuumba* and *Sousa* recognise instances where

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*

¹⁵³ 2022 NASC 3 (31 March 2022).

¹⁵⁴ *Nakuumba* para 7.

¹⁵⁵ 2019 (4) NR 1178 (SC) para 33.

¹⁵⁶ *Nakuumba* para 38.

¹⁵⁷ *Nakuumba* para 44.

¹⁵⁸ *Nakuumba* para 73.

there is a need to give precedent to the putative spouse's proprietary rights over the legal spouse's established rights.

In order to protect the putative spouse's interest in certain circumstances, Californian law has used the principle of estoppel to impede a legal spouse from claiming against the estate that exists between the common spouse and the putative spouse. In the case of *Brown v Brown*,¹⁵⁹ which is discussed above, the legal spouse's community property claim to any of the property accumulated by the common spouse and the legal spouse during the period of their invalid marriage was estopped.¹⁶⁰ The court identified that the putative spouse had worked together with the common spouse for twenty-eight years to build their estate.¹⁶¹ Furthermore, the legal spouse was aware of this and chose not to assert her right, which disadvantaged the putative spouse.¹⁶²

In the case of *Union Bank Trust Co v Gordon*,¹⁶³ with a similar set of facts as *Brown* (the common spouse's decree for divorce was void), the court pointed out that the legal spouse at no point attempted to assert her right during the time that the common spouse and putative spouse were accumulating wealth.¹⁶⁴ The court stated that as the legal spouse had not contributed "money nor her industry nor prudence" to the community property, she could not claim an interest.¹⁶⁵ Estoppel was granted on the principle that "one who is silent when he ought to speak cannot speak when he ought to be silent."¹⁶⁶

Although estoppel has not been applied in this way in South African family law,¹⁶⁷ such scenarios may meet the requirements of estoppel in South Africa. The requirements are that there must be a

¹⁵⁹ 274 Cal. App. 2d 178 Cal: Court of Appeal 1969.

¹⁶⁰ *Ibid* 184.

¹⁶¹ *Ibid*.

¹⁶² *Ibid* 188.

¹⁶³ 116 Cal.App.2d 681 (1953).

¹⁶⁴ *United Bank Trust* 688.

¹⁶⁵ *United Bank Trust* 689.

¹⁶⁶ *United Bank Trust* 684.

¹⁶⁷ Heaton and Kruger *South African Family Law* 250. Estoppel in the family law context has been applied under life partnerships where the life partners have made a representation that they are married.

clear representation by word or by conduct, reliance on such representation, prejudice suffered as a result and that the granting of estoppel should be equitable.¹⁶⁸

It must be noted that Option 4 is given as an exception to Option 3. This means that in circumstances where it is equitable to do so, Option 4 can be applied.

b) Analysis

While all four models are innovative and provide a fresh look at property division, the following analysis focuses on what model would work best in the South African context.

i) Two separate community properties

While option 1 ensures a complete distinction between the putative spouse and the legal spouse and protects their proprietary consequences, how practical is it in the South African context? Community property states like California in the United States can apply this model because anything accumulated by the common spouse during physical separation is considered separate property. South African law does not recognise this rule. Regardless of physical separation, the community of property continues to exist. The undivided half-share does not become divided simply because the common spouse has decided that his marriage is over or has chosen to take on a putative spouse. The joint estate continues and can only be legally terminated by death, divorce, an order for immediate division and a change in the matrimonial property regime.¹⁶⁹

This makes the attempt to separate the putative spouse's community property and the legal spouse's community property impossible unless the legislature introduces a similar provision linking co-ownership to cohabitation. During the subsistence of the putative marriage, everything that the common spouse acquires with the putative spouse makes part of the community of property between him and the legal spouse. Option 1 ignores this overlap between the legal spouse's community of property and the putative spouse's community of property and thus undermines the legal spouse's interest that runs through the duration of the putative marriage.

¹⁶⁸ PJ Rabie and JC Sonnekus *The Law of Estoppel in South Africa* 2 ed (2000) 154.

¹⁶⁹ Hahlo *Husband and Wife* 173.

Furthermore, we must consider how option 1 would play out in the customary marriage context. This is because, in the customary marriage setting, physical separation often does not equate to legal separation. The current family structure in African customary marriages is heavily influenced by colonial and apartheid policies that changed the structure of marriages.¹⁷⁰ Migration by African men into urban areas in search of employment resulted in the breakdown of African families as they would start new families within urban areas.¹⁷¹ Whilst working in these urban areas, the customary husband settles down and cohabitates with a subsequent customary wife.¹⁷² In this instance, the customary husband still contributes financially to the rural family's household, even though they do not live there together permanently.¹⁷³ The consequence of this is that the rural wife (legal spouse) and the customary husband (common spouse), who share a long-term sexual and economic relationship, do not live together in the same household permanently.¹⁷⁴ The couple is still considered married and of the same household even though the customary husband works and lives elsewhere.¹⁷⁵ Mamashela refers to this situation as desertion. In her research, she recounts women explaining that their husbands work far away from home and cohabit with a "second wife".¹⁷⁶ The common spouse still maintains both households and conflict over property is common at separation from the putative spouse or the death of the common spouse.¹⁷⁷

How, then, would two separate community properties be established in the context of customary marriages? Due to the nature of customary marriages, no separate community of property would have been created, and therefore, option 1 would be impossible to implement. Furthermore, Option

¹⁷⁰ C Vosloo "Extreme apartheid: The South African system of migrant labour and its hostels" (2020) 34 *Image and Text* 1 at 3. Labour migration was a historical system used by the colonialists to receive cheap labour in the mines and in their households in the city. Such labour migration was used as a tool of oppression and led to the breakdown of African families through "oscillating migrancy".

¹⁷¹ M Mamashela "New families, new property, new laws: The practical effects of the Recognition of Customary Marriages Act" (2004) 20 *SAJHR* 616 at 636.

¹⁷² Mamashela 2004 *SAJHR* 634.

¹⁷³ B Goldblatt "Regulating domestic partnerships – a necessary step in the development of South African family law" (2003) 120 *SALJ* 610 at 613.

¹⁷⁴ E Bonthuys "A duty of support for all South African unmarried intimate partners part 1: The limits of the cohabitation and marriage-based models" (2018) 21 *PELJ* 1 at 6.

¹⁷⁵ *Ibid.*

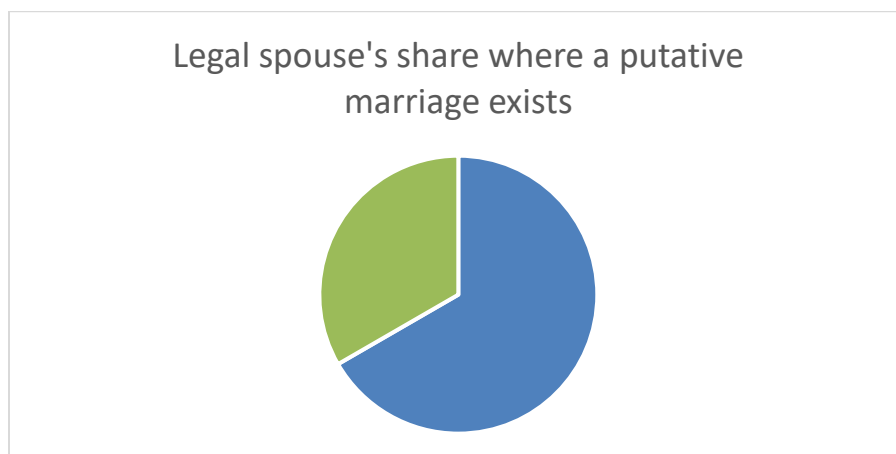
¹⁷⁶ Mamashela 2004 *SAJHR* 636. The research was carried out in the Midlands of Kwa-Zulu Natal with married women.

¹⁷⁷ Goldblatt 2003 *SALJ* 613.

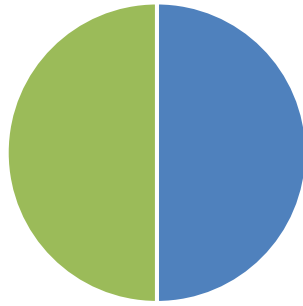
1 would be a disadvantage to the rural wife (legal spouse) as she would be excluded from the community property that the common spouse and the putative spouse have simply due to the lack of physical presence but also because of the nature of property ownership in the former Bantustans – ie property is not individually owned. Furthermore, the distribution of other benefits, such as pension benefits, would be complex if physical separation created separate community of property. Given these reasons, this makes option 1 an unfit model in the context of African customary marriages.

i) One big family

The option 2 model offers the most substantive version of equality. It seeks to recognise the rights of all the parties involved and protect their proprietary interests. It is also the easiest to implement as it simply takes dividing the community property into three. The question under this model is: Why should the legal spouse be disadvantaged due to the actions of their spouse in entering into a subsequent invalid marriage? But for the actions of the common spouse, the legal spouse would get half of the estate and not a third – as contemplated. This is illustrated in Figures 1 and 2 (in both diagrams the legal spouse's share is highlighted in green).



Legal spouse's share without the existence of a putative marriage



As illustrated above, Option 2 significantly undermines the legal spouse's proprietary interests. Arguably, she should not suffer prejudice due to the actions of the common spouse: Her marriage is valid and meets legal requirements. As a result, the law must protect her proprietary right to a full, undivided half-share. In the context of this paper, in most instances, the customary husband has concluded a second marriage without the consent of his first wife.¹⁷⁸ In such an instance, it appears that it would undermine the first wife's rights to take a portion of her share in the estate to benefit the putative spouse.¹⁷⁹

iii) Half of the half of the half and its exception.

After discussing the two above models, my preliminary finding is that Option 3, with the built-in qualification of option 4, provide the best solution in South African law. The model protects the rights of all spouses without undermining the proprietary rights of the legal spouse or the putative spouse. The merits of the model and how it can be implemented within South African law will be discussed in chapter 6.

¹⁷⁸ See *Mayelane v Ngwenyama* 2013 (8) BCLR 918 (CC).

¹⁷⁹ Depending on the circumstance, option 4 could apply in this situation. See *Nakuumba*, where the duration of the legal spouse's marriage to the common spouse was short-lived. Although she has a legally recognisable right, it cannot be applied in a way that prejudices the putative spouse.

5.3 CONCLUSION

This chapter has answered the important question of whether the undivided half-share may be divided. Through an analysis of Californian law and Namibian case law, the chapter provided three possible methods for property division in the putative marriage context (with a further qualification which could count as the fourth option). Furthermore, the chapter concluded with solutions viable for the South African context, which will be discussed in chapter 6.

CHAPTER 6: CONCLUDING REMARKS AND RECOMMENDATIONS

6.1 INTRODUCTION

I have argued in this thesis that the putative marriage doctrine in its current state cannot provide the necessary protection to good faith parties in invalid customary marriages. Chapter 2 laid out the problem and gave context to the “inadequately married”. The solution, the putative marriage doctrine, was discussed in chapter 3, and the challenges in its application were brought to light. In particular, this chapter highlighted that the courts’ protection – indeed preference – of the concept of the undivided half-share (as set out in *Zulu v Zulu*) has meant that parties to invalid customary marriages cannot rely on the doctrine to protect their proprietary rights. However, the chapter also indicated that the cases of *MS* and *Kgosi* provide some light – albeit in another context. Chapter 5 breaks down the concept of the undivided half-share and provided three options for property division that could apply in the case of a pre-existing customary marriage in community of property. Although option 1 and option 2 provided novel ideas, I suggested that option 3, together with option 4, provided the best solution in the South African context. In this concluding chapter, I look at the reasons for this choice, illustrate how it will be applied in South Africa, and consider the possibility of further research in this area.

6.2: *WHY IS OPTION 3 THE BEST*

To begin with, option 3 is the only method that protects the rights of the legal spouse, at least where the facts operationalising option 4 do not arise. As discussed in chapter 5, options 1 and 2 undermine the legal spouse’s rights as her proprietary rights are affected by the common spouse’s putative marriage. This is effectively dealt with in option 3 by first dividing the joint estate before recognising the proprietary rights of the putative spouse. Section 6 of the Recognition of Customary Marriages Act (RCMA)¹ states that a wife in a customary marriage has equal full status and capacity within the marriage. This means that her proprietary rights must be protected and not infringed upon by a third party. In the case of *Mayelane v Ngwenyama*, discussed at length in chapter 2, the court found that the first wife’s interest was important. In the Constitutional Court, the court remarked that, where subsequent customary marriages are entered into without the first

¹ Act 120 of 1998.

wife's consent, this first wife is unable to protect her interests, especially when they will affect their proprietary consequences.² The court stated that,

“without the knowledge or consent of the first wife, she is unable to consider or protect her own position. She cannot take an informed decision on her personal life, her sexual or reproductive health, or on the possibly adverse proprietary consequences of a subsequent customary marriage. Any notion of the first wife's equality with her husband would be completely undermined if he were able to introduce a new marriage partner to their domestic life without her consent.”

The court's decision to declare the second wife's marriage invalid protected the first wife's right to “the material and other resources of her marriage”.³ In many instances, the common spouse's decision to take on another spouse is made without consideration of the legal spouse. Research shows that in these instances, the common spouse deserts the legal spouse and cohabits with the putative spouse without divorcing the legal spouse.⁴ This places the legal spouse in a vulnerable position that does not allow her to assert her property rights due to the existence of the new relationship.⁵ This option of property division protects the legal spouse's rights and guards her interests.

The benefit of option 3 (which also deals with the criticism of the decision in *Mayelane*⁶) is that it offers protection to the putative spouse as well. As discussed in chapter 3, the criticism of *Zulu* was based on the fact that the decision protects the first wife's interest at the expense of the second or further wife. By refusing to apply the putative marriage doctrine in this context, the court failed to protect the *bona fide* spouse and defeated the very purpose of the doctrine.⁷ In most instances, the putative spouse has laboured in her relationship with the common spouse, believing she is his

² 2013 (4) SA 415 (CC) para 72.

³ *Ibid* 73.

⁴ M Mamashela “New Families, new property, new laws: The practical effects of the Recognition of Customary Marriages Act” (2004) 20 *SAJHR* 616 at 637.

⁵ *Ibid* 638.

⁶ See B Smith “Rethinking the application of the putative spouse doctrine in matrimonial property law” (2010) 24 *International Journal of Law Policy and Family* 1 and E Bonthuys “Exploring universal partnerships and putative marriages as tools for awarding partnership property in contemporary family law” (2016) 19 *PELJ* 12.

⁷ Bonthuys 2016 19 *PELJ* 12.

wife.⁸ As stated in the Californian case of *Coats v Coats*,⁹ it would be contrary to the “conceptions of justice and fairness” to ignore the putative spouse’s rights.¹⁰

The Namibian case of *Konrad* illustrates how the proprietary rights of the parties involved, both the putative and the legal spouse, can be upheld and protected under option 3. In this case, Parker AJ states that the distribution is “practical but just”¹¹ and that the putative spouse should not be punished for the actions of the common spouse.¹² Therefore, I recommend option 3 as the method for property division where there is an existing marriage in community of property.

I further recommend option 4 as an exception to option 3. Option 4 applies in circumstances where it would be unjust to allow the legal spouse to receive a half-share to the detriment of the putative spouse’s proprietary right. These are situations where the putative spouse has contributed immensely to the joint estate, and the legal spouse has not. Giving effect to the legal spouse’s property rights to half of the estate in such a circumstance would be unjust and unfair.

In the Namibian case of *Nakuumba v Ipinge*,¹³ discussed in chapter 5, it was apparent that the putative spouse had greatly contributed to the estate while the legal spouse had only done so for six years.¹⁴ The court held that the putative spouse was entitled to a half-share of the partnership property that existed between her and the common spouse.¹⁵ In the Californian case of *Sousa v Freitas*,¹⁶ the rationale behind granting the putative spouse a half-share is that she contributed towards a joint enterprise that existed between her and the common spouse.¹⁷ This does not mean that the legal spouse does not have a recognisable right and is hindered from claiming from the joint estate. In *Sousa*, the court held that only half of the common spouse’s share in the joint

⁸ See *Zulu v Zulu* 2008 (4) SA 12 (D).

⁹ 118 P. 441, 443 (Cal. 1911).

¹⁰ *Coats* 443.

¹¹ *Konrad* para 37.

¹² *Konrad* para 39.

¹³ 2022 NASC 3 (31 March 2022).

¹⁴ *Nakuumba* para 7.

¹⁵ *Nakuumba* para 73.

¹⁶ 10 Cal. App. 3d 660 - Cal: Court of Appeal, 1st Appellate Dist., 2nd Div. 1970.

¹⁷ *Sousa* 665.

enterprise could become part of the legal community property and be claimed by the legal spouse.¹⁸

In the circumstances, then, option 4 acts as a qualifier to option 3 in that it ensures that there is protection for all putative spouses in the complexity of their circumstances. While option 3 will be the method applied in standard situations, option 4 is available in instances where it is relevant.

6.3 RECOMMENDATIONS

a) Property division under the Half of the half of the half

Historically, as discussed in chapter 2, the putative marriage doctrine has been used by putative spouses to assert their property rights as seen in cases like *Ex parte L*¹⁹ and *Mograbi v Mograbi*.²⁰ However, as illustrated by *Zulu*, a pre-existing marriage in community of property hinders property division in favour of the putative spouse. Property division is a product of the declaration of a putative marriage doctrine, yet there is no precedent in South Africa to suggest how this could work in practice – apart from the finding in *MS*. As discussed and illustrated throughout the research, this impediment to property division is not justifiable and is contrary to the principles of justice. Option 3 provides a workable solution to this hindrance by realising the property rights of the putative spouse.

To begin with, the joint estate will be divided between the common spouse and the legal spouse. As discussed in chapter 4, s 20 of the MPA provides an example of how this can be done. Furthermore, the South African Law Reform Commission's (SALRC) Discussion Paper on Matrimonial Property Law provides insight into how property division may occur. In the distribution of universal partnership assets or in putative marriage claims where there is a pre-

¹⁸ *Ibid.*

¹⁹ 1947 (3) SA 50 (C).

²⁰ 1921 AD 274. As discussed in chapter 2, the case of *Mograbi* dealt with a universal partnership in which the petitioner was granted a half-share of the estate. Using this reasoning, in *Ex parte L*, the court declared that the consequence of the putative marriage doctrine was that the putative spouse was entitled to a half-share of the estate.

existing marriage in community of property, the Commission recommends that a division of the joint estate may occur akin to s 20 of the MPA.²¹

After the initial division of the estate, the putative spouse and the common spouse will divide the common spouse's share between the two of them. This division is illustrated by *Konrad v Shanika*, where the court divided the husband's share of the property between him and the putative spouse. While the SALRC make no reference to this case, it appears that it supports this position by recommending that,

“[f]ollowing upon the division of the joint estate or the calculation of the accrual, the successful claim for a share of partnership assets in terms of the universal partnership agreement or the putative marriage shall be satisfied from that portion of the marital estate of the spouse who is also a party to the universal partnership agreement or the putative marriage.”²²

My recommendation for the extension of the putative marriage doctrine is to allow for property division even when the pre-existing marriage was in community of property. Section 39 of the Constitution requires that courts develop the common law in line with the Bill of Rights.²³ Therefore, there is a constitutional mandate on the court to establish the law to ensure it protects vulnerable parties in line with the Bill of Rights. My discussion throughout this thesis has illustrated why the development of the doctrine would be in line with the Bill of Rights.

b) The codification of the putative marriage doctrine

Would vulnerable parties who wish to rely on the remedy benefit from the codification of the putative marriage doctrine? The putative marriage doctrine forms part of the common law and has its history in Roman-Dutch law. The South African legal system is a pluralistic system that incorporates legislation, common law, precedent, customary law and international law.²⁴ Although the doctrine is recognised and respected in common law, I recommend that it be codified.

²¹ South African Law Reform Commission *Project 100E: Review of Aspects of Matrimonial Property Law Discussion Paper 160* (2023) 159.

²² South African Law Reform Commission *Project 100E: Review of Aspects of Matrimonial Property Law Discussion Paper 160* (2023) 159.

²³ Constitution of the Republic of South Africa, 1996.

²⁴ W Tetley “Mixed Jurisdictions: Common Law vs Civil Law (Codified and Uncodified) (Part I)” (1999) 4 *Uniform Law Review* 591 at 604.

The putative marriage doctrine has the potential to assist a largely marginalised group of South Africans and thus should be codified to ensure that a larger range of people have knowledge of it and can rely on it. The codification of law allows for a wider range of the community to have access to it.²⁵ It further provides for clarity in instances where there is confusion and debate within case law and the academic fraternity.²⁶ As discussed in chapter 5, the cases of *Zulu* and *MS*, which are both authorities on the putative marriage doctrine, have differing views on the matter of property division in the case of a pre-existing marriage in community of property. These dissenting views provide room for uncertainty, which impacts the efficacy of the doctrine's use. The codification of the doctrine thus provides clarity and legal certainty.

The recent discussion paper by the SALRC recognises the importance of codification of the doctrine. It recognises that the legal profession and the general public would benefit from the codification as it would be easier to educate on the requirements and consequences of the doctrine.²⁷ It is likely – given the default property regime of the RCMA and the socio-economic circumstances of African women – that it is this group that is most affected. This group of people may not have access to the common law and an understanding of it that would allow them to rely on the remedy. The codification of the doctrine would mean that the doctrine is accessible to these women and thus can be utilised for their protection.

6.4 CONCLUDING REMARKS

This thesis has discussed the development of the putative marriage doctrine in order to assist vulnerable parties in invalid customary marriages. Subsequent customary wives or “inadequately married” women are left outside of the protection of the law when they do not meet the requirements of custom and/or legislation. Chapter 2 discussed the weaknesses of the RCMA and the case law, which creates an impasse for this vulnerable group. The unfortunate consequence of

²⁵LCB Gower “Here lies the common law: Rest in peace” (1967) 30 *Modern Law Review* 241 at 246.

²⁶ Gower 1967 *Modern Law Review* 247.

²⁷ South African Law Reform Commission *Project 100E: Review of Aspects of Matrimonial Property Law Discussion Paper 160* (2023) 151.

the protection of the first wife in *Mayelane* was the lack of protection for the “inadequately married” subsequent wife.

This thesis thus recommends that the application of the putative marriage doctrine to these contexts could provide a solution to the problem. As discussed in chapter 3, it is unclear whether the putative marriage doctrine protects the proprietary interests of putative spouses in circumstances where there is an existing marriage in a community of property given conflicting case law. An application that follows the *Zulu* precedent would defeat its potential use for subsequent putative customary wives. Therefore, I recommend the extension of the putative marriage doctrine.

In order to provide recommendations for development, I carried out a comparative analysis of Californian law and Namibian case law. Californian law provided valuable lessons through its use of the principle of equity. This principle pushes for the protection of vulnerable parties, even in circumstances when this would deviate from the existing law. Namibian case law provided novel solutions which gave a practical way in which the doctrine could be applied in order to protect putative spouses. Furthermore, its commentary on South African law allowed for reflection on the doctrine’s application in South African law. The conclusion of the analysis is the solution, “The Half of the Half of the Half”.

In conclusion, the putative marriage doctrine is a remedy that was developed to correct the injustice when a marriage was found to be null and void where one or both parties believed in good faith that their marriage was valid. This novel remedy could be used to protect subsequent customary wives who are left outside the protection of the law. My thesis recommends its extension in order to protect the “inadequately married” in invalid customary marriages.

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