



African Feminism and the Recognition of Cohabitation Under Customary Law

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Abstract

Cohabitation is the co-residence of two persons, as if they are husband and wife, with or without children. The phenomenon, which is becoming increasingly common is, however, not recognised as a valid family form in African customary law. The result is that many Black women in these unofficial relationships are without legal protection, particularly with respect to property rights and the rights to equality, human dignity and freedom. This article argues that the concept of African feminism presents possibilities for policy-makers to bridge the gap between women's rights and the prescripts of tradition. Furthermore, it offers solutions for closing gaps in the law that have been created by contentious issues in the legal requirements for a valid marriage, such as payment of bride wealth and the waiver of some marriage rites.

Keywords: African customary law; cohabitation; equality; feminism; marriage; South Africa

Résumé

Le concubinage est la cohabitation de deux personnes, comme si elle étaient mari et femme, avec ou sans enfants. Ce phénomène, qui devient de plus en plus courant, n'est cependant pas reconnu dans le droit coutumier africain, comme une forme familiale acceptable. Il en résulte que de nombreuses femmes noires engagées dans ces relations non officielles sont sans protection juridique, notamment en ce qui concerne les droits à la propriété et à l'égalité, à la dignité humaine et à la liberté. Cet article soutient que le

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concept de féminisme africain présente des possibilités qui permettent aux décideurs politiques de combler le fossé entre les droits de la femme et les prescriptions de la tradition. En outre, il propose des solutions aux lacunes de la loi créées par des questions controversées sur les conditions de validité juridique d'un mariage, telles que le paiement de la dot et la dérogation à certains rites de mariage.

Mots-clés : droit coutumier africain ; cohabitation ; égalité ; féminisme ; mariage ; Afrique du Sud

Introduction

How does the non-statutory regulation of cohabitation in South Africa affect the rights of Black women under African customary law? Cohabitation is generally regarded as the co-residence of two parties in a marriage-like relationship, with or without children (Odimegwu *et al.* 2018:111). It shares social dynamics with marriage, such as emotional dependence, a common household, shared financial responsibilities and child-rearing. It also resembles a universal or permanent life partnership, which is an express or implied agreement between two people to live together in a permanent relationship without entering into marriage.¹ However, unlike a permanent life partnership, cohabitation does not always involve an agreement to live together permanently. The rapid pace of socioeconomic change induces many Africans to share accommodation, financial expenses and the burden of raising children without a formal marriage ceremony under statutory law or customary law (De Wet and Gumbo 2016:2653). Literature shows that cohabitation may be undertaken as a choice in anticipation of marriage or even as an alternative to it (Posel and Rudwick 2014:282), with varying internal and external motivating factors (Odimegwu *et al.* 2018:119). The internal factors include a desire to be closer together, a sign of emotional commitment and a means of 'trailing' the relationship to gauge the parties' compatibility for marriage. The external factors include the increasingly high cost of accommodation in cities and the need to reduce the financial responsibilities of children's upbringing.

Furthermore, people sometimes find themselves in cohabitation relationships due to a lack of knowledge, which manifests either as a presumption of marriage or half-measured compliance with marriage laws. As shown in the *Sengadi v Tsambo* [2018] ZAGPJHC 666; [2019] 1 All SA 569 case,² the long-standing nature of a relationship often leads partners into believing that they are legally married. In this instance, the court stated that cohabitation for an extended period of time creates a presumption that

a valid marriage exists between the parties. In any case, the power dynamics of social relationships contribute to why some women find themselves in cohabitation relationships. For example, under customary law it is up to a man to initiate a marriage. The first step is usually to conduct investigations into the suitability of the parties for marriage. The second step is to send delegates to his intended bride's family to negotiate the bride wealth, which is commonly referred to as *lobola*. Where the investigations produce negative results or the families fail to reach an agreement on *lobola*, the parties may resort to cohabitation (Diala 2019). Given cultural constraints, therefore, it is incorrect to assume that women have the full right to exercise a choice to get married. As a historically disadvantaged group with strained socioeconomic agency (Bannister 2016:6), women enter relationships with limited bargaining power because they are often financially dependent on their partners. Essentially, their choice is between cohabiting with a partner who provides for their basic needs or leaving the relationship on account of their partner's refusal to marry them and protect their legal rights. These multifaceted problems motivated this article.

The article is founded on a two-fold argument. First, cohabitation exposes Black women to human rights violations because it is not acceptable under indigenous African laws. Second, there is a need for a shift of emphasis from the traditional customary versus state law dichotomy to a focus on substantive issues of equality and fairness in legal policies relating to cohabitation. Even though cohabitation is not acceptable under indigenous African laws, customary law is a recognised source of law in South Africa. It stands parallel with other sources of law, such as legislation and the colonially imposed common law. For example, section 15(3) of the 1996 Constitution of South Africa provides that legislation may be enacted to recognise traditional and religious marriages and systems of family or personal law under any tradition or religion. Section 30 of the Constitution grants cultural rights by affirming that everyone has the right 'to participate in the cultural life of their choice', subject to the Constitution. Section 211(3) demands that 'the courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.' The phrase 'subject to ...' indicates primarily the supremacy of the Constitution and, secondarily, the coexistence of different normative orders in the Republic. This has implications for cohabitation and the protection of women's rights.

Since cohabitation is not recognised in customary law, the practice exposes Black women to various violations of their human rights. These violations include the denial of their rights to maintenance and property

inheritance, as well as their lack of social legitimacy, as noted in the case of *Sengadi v Tsambo*. Many demeaning customary law marriage practices are yet to be reconciled with constitutional values of equality, human dignity and freedom. Some notable examples are mock abductions of the bride (*Ukuthwala*) as seen in *Jezile v S* 2015 (2) SACR 452 (WCC); the demand for women to feign indifference to suitors; and the mandatory handover of the bride to the groom's family as a validating sign of marriage, as seen in *Mabuza v Mbatha* (1939/01) [2002] ZAWCHC 11. In addition, the crucial right to citizenship, which we discuss later, is also threatened by customary law's exclusion of cohabitation from its recognised forms of family life. This issue is evident in the court's finding in *Sengadi v Tsambo* regarding the correct interpretation of the requirement for a valid marriage in section 3(1) (b) of the Recognition of Customary Marriages Act 120 of 1998 (RCMA). The court's finding in *Sengadi* is at the heart of a socio-legal tension—that is, a presumption of marriage in cohabiting couples, which goes against most societal practices in African communities.

Given that the non-recognition of cohabitation in African customary law is demeaning and discriminatory to women, African feminism stands to blaze the trail in transforming the law to overcome gender biases in traditional societies. Still an emerging field, African feminism aims at the emancipation of Black women from historical issues that undermine their rights to equality and human dignity (Mekgwe 2006:16). In private law, it rejects the traditional customary law versus state law dichotomy, focusing instead on substantive fairness in the cultural issues that affect women. African feminism thus emphasises female autonomy. However, it does not deny traditional or customary values. Indeed, it accommodates foundational values of customary law, such as the importance of children, reasonable family involvement in marriage negotiations and the kinship ties that underpin marriage. As Steady explained, African feminism emphasises 'female autonomy and co-operation; nature over culture; the centrality of children, multiple mothering and kinship' (Steady 1981:21). In this sense, African feminism distinguishes itself from Western ideas of feminism by focusing on the peculiarities of the African situation. For example, it rejects the sharp gender binary that marks Anglo-American feminism, such as separatism from men and universalist views of human rights. Thus, it 'questions (some) features of traditional African cultures without denigrating them, understanding that these might be viewed differently by different classes of woman' (Mekgwe 2006:16). This culturally relativist approach to human rights is useful for understanding the rights of cohabiting women under African customary law.

African feminism is valuable to the discourse on cohabitation because it realises that the rights of African women deserve a movement that speaks solely to their context. It recognises that many Black women are not only women but also developing world citizens (Mekgwe 2006:18). By so doing, it encompasses the racial, gender and cultural oppressions faced by African people. While questioning oppressive traditional practices and institutions, the African woman must not forget that she lacks access to decent housing, clean water, education and land tenure (Emecheta 1982:116–117). African feminism thus centralises gender as an ‘organising principle of life’, emphasising the role of power in social relations and how the exercise of this power influences gender issues (Ige 2014:106). This feature enables certain aspects of traditional practices to be questioned without necessarily discarding them. In intimate relationships such as cohabitation, for example, African feminism may be used to highlight how the gendered nature of power precludes women from enjoying their full citizenship rights.

The Position of Cohabiting Women Under Customary Law

It should be noted upfront that customary law is one of the sources of law in South Africa, alongside common law, legislation, international law and judicial precedents. All these sources are subject to the Constitution. Section 2 of the Constitution states that any laws and conduct that are inconsistent with the Constitution are invalid. Customary law has also been firmly recognised by judicial precedents. For example, in *Alexkor Ltd and Another v Richtersveld Community and Others* 2003 (12) BCLR 1301 (CC), the court stated:

While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common-law, but to the Constitution (para 51).

Many judicial decisions, such as *Motsoatsoa v Roro and Another* [2011] 2 All SA 324 (GSJ), *Shilubana and Others v Nwamitwa* 2008 (9) BCLR 914 (CC) and *Bhe and Others v Khayelitsha Magistrate and Others* (CCT 49/03) [2004] ZACC 17, explore various aspects of customary law marriages. For example, *Motsoatsoa v Roro* concerned an application for posthumously registering a customary marriage. The applicant and the deceased had co-resided for four years prior to the death of the deceased. The parents of the applicant and the deceased had entered into an agreement that the handover of the bride would not happen until the full payment of *lobola* was made. Since this did not happen, the bride was not handed over, implying that the marriage was

not properly concluded at the time the applicant's partner died. However, at the time of death, *lobola* negotiations had already advanced and part of the sum had been accepted. The court referred to an article authored by Bekker and Maithufi (2002) in finding against the application. It ruled that the conclusion of a customary law marriage consists of a series of events that ought to be fulfilled entirely. Accordingly, the court found that the handover of the bride cements a customary law marriage and thus sets it apart from cohabitation (*Motsoatsoa* para 20). This judgment illustrates an openness to recognise cohabitation, as shown in the discussion below.

Analysis of Sengadi v Tsambo (40344/2018) [2018] ZAGPJHC 666

The RCMA came into effect on 15 November 2000 and brought about some certainty regarding the recognition of monogamous and polygamous marriages concluded in terms of African customs. It defines a customary marriage as 'a marriage concluded in accordance with customary law', whereas customary law is defined as the 'customs and usages traditionally observed among the indigenous African peoples of South Africa and which forms part of the culture of those peoples' (Rautenbach 2018:84, RCMA sec 1). Section 3(1) of the RCMA provides for the requirements of a customary marriage as follows:

For a customary marriage to be entered into after the commencement of this Act to be valid –

(a) the prospective spouses –

(i) must both be above the age of 18 years; and

(ii) must both consent to be married to each other under customary law; and

(b) the marriage must be negotiated and entered into or celebrated in accordance with customary law.

Before we analyse the case in question, we describe the stages of marriage in African customary law as given effect by the RCMA. The process of marriage in African customary law involves three main stages: betrothal, negotiation and integration (Sibisi 2020: 96). The idea that the conclusion of a customary marriage consists of a series of events is laid out clearly in *Sila v Masuku* 1937 NAC (N&T) 121. The court stated that the process of marriage is gradual. It includes, inter alia, a change in the woman's status from maiden to wife, her departure from her family's ancestral group and her introduction to a new ancestral group (Rautenbach 2018:90).

The process starts with betrothal, which is also known as *go beeletša* or *go kgopela sego sa meetse* in Bapedi culture. Here, the families are acquainted and the intention to marry is made clear to the bride's family. The second

phase is the negotiation of the *lobola*. This step is not expressly stated as a requirement in the RCMA but it is a requirement in the customary law of many communities. The third phase is when the bride leaves her family home to be introduced to her husband's family and ancestors. Cohabitation may occur at any time between these phases. The requirement in section 3(1)(b) of the RCMA is twofold, containing elements of both negotiation and celebration. As will be noted later, this requirement is the basis of the contention in the case of *Sengadi v Tsambo* and the subsequent appeal in *Tsambo v Sengadi*.

In the South Gauteng High Court sitting at Johannesburg, the applicant in this dispute sought to be declared the customary law wife of the deceased and to be granted the permission to bury him. The applicant and the deceased had cohabited for three years prior to their customary law marriage on 28 February 2016. The applicant claimed that on the day of the negotiation of the *lobola*, part of the money agreed upon by the families was paid and the balance was to be paid in two instalments. On the same day, a marriage celebration took place between their families in which the couple wore matching attire for the occasion. After this, the applicant and the deceased continued with their co-residence. All of this, according to the applicant, was done in compliance with section 3(1) of the RCMA. The respondent based his contestation of the above claims on the fact that the applicant was never handed over to the deceased's family as a bride. He referred to this handover (*go gorosiwa*) as a crucial part of concluding a customary law marriage in the Setswana culture. According to the respondent, their custom requires *go gorosiwa* to be done, during which a lamb or goat would be slaughtered and the newlyweds would be smeared with the animal's bile to signify their union. The animal would then be consumed by the families in a subsequent celebration. Mokgoathleng J considered these competing claims against the facts of the case.

Firstly, Mokgoathleng J discussed an article by Sipho Nkosi (2020), which argued that the handover of a bride may be formal or symbolic. In the article, Nkosi explained that symbolic handover usually takes the form of the father or guardian of the bride slaughtering an animal, which is exactly what the respondent explained in his contention (Nkosi 2020: 68). On the basis of this discussion, Mokgoathleng J found that there was a tacit waiver of the *go gorosiwa* custom because of the symbolic handover of the bride (*Sengadi* para 19). The respondent retained the traditional view of marriage celebrations. However, the respondent failed to consider that the deceased, a well-known and sought-after entertainer, was equally subject to the customary laws of his community.

Secondly, Mokgoathheng J found that the respondent was incorrect in saying that a customary law marriage does not come into existence if handing over is not done, even if the requirements of section 3(1) of the RCMA had been complied with. This is because 'customary law is dynamic and adaptive' (*Sengadi* para 22). However, Mokgoathheng J again relied on the opinion of Nkosi, in which he stated that section 3(1)(b) of the RCMA is open to many interpretations as different communities practise the custom of handing over a bride differently. Also, in discussing *MMN v MFM and Minister of Home Affairs* (474/11) 2012, the judge stated that the legislature does not prescribe hard and fast rules in section 3(1)(b) of the RCMA. In this way, it defers to people's current customary law practices, also generally referred to as living law (Ozoemena 2015:978). According to the court, these requirements are met when customary law celebrations are conducted in accordance with the applicable customs. Tswana customs are applicable in this case and they require *go gorosiwa* to be done. Thus, a purposive approach to section 3(1)(b) of the RCMA is intended to allow families and custodians of customary law to decide what celebrating and/or entering into a customary marriage entails for them specifically. While we agree with the court's finding in this regard we disagree with its reasoning, because the court finds that a symbolic handover was done but goes on to rely on Nkosi's explanation of symbolic handing over that does not correlate with what happened on the day of the supposed marriage.

Upon appeal, Molemela JA agreed with the decision of the High Court that a presumption of marriage took place because the bride's family did not object to the parties cohabiting and failed to claim a fine from the groom's family (*Tsambo v Sengadi* (244/19) [2020] ZASCA 46 at para 27). Essentially, the Supreme Court of Appeal (SCA), by affirming long stay in cohabitation as a presumption of marriage, gives effect to the foundational values in the Constitution on the right to equality, dignity and freedom. The SCA acknowledged the role of the respondent's mother in accepting the *lobola* on behalf of the family and that by so doing there was consent by the families on the fulfilment of the requirements for a valid customary marriage, as shown in the case of *Mabuza v Mbatha*. In other words, the SCA gave expression to the evolving nature of customary law and its customs and traditions to include symbolic handover. It is our argument that an opportunity exists currently to accommodate cohabitation as a form of family relationship in South Africa.

Cohabitation and bridal integration

Sibisi (2020:90) presents two schools of thought on the place of cohabitation in the judicial determination of bridal integration and validity of a customary law marriage. One view argues that integrating the bride into the groom's family is variable. Thus, the couple or the families may waive it. The other view argues that integrating the bride into the groom's family is an indispensable requirement. For this view, cohabitation is a sign of integration. These conflicting schools of thought indicate the uncertainties that surround the conclusion of customary marriages, which the court addressed in *Mbungela v Mkabi* [2019] ZASCA 134. Here, the court stated that courts must be aware of the flexible nature of customary law and the role it plays in people's lives. Section 3(1)(b) of the RCMA typifies this flexibility of customary law because it essentially gives families and custodians discretion to determine what satisfies the requirements of negotiation and celebration in their respective cultures.

The conclusion of a customary law marriage is not a one-off event, as it involves a series of preliminary steps. The essentials of these steps are *lobola* and the integration of the bride. The school of thought that insists on the indispensable character of bride integration agrees that *lobola* fulfils the 'negotiation' part of section 3(1) of the RCMA. But it also argues that *lobola* on its own cannot conclude a customary marriage (Sibisi 2020:96). For example, in Bapedi culture, the families exchange gifts, slaughter an animal, *phasa badimo*,³ counsel the bride and give her a new name. Thereafter, they share a feast. These are all means to one end: integrating the bride. This is followed by co-residence. As Bekker observed, 'it is not the essential requirements that can be waived but rather the rituals associated with the essential requirements' (Sibisi 2020:97). This seems to imply that Pedi families may agree to waive *phasa badimo* and the slaughtering of an animal.

Arguably, there is no one requirement in section 3(1)(b) of the RCMA that outweighs another (*Mkabe v Minister of Home Affairs* [2016] ZAGPPHC 460). Since they are all equally important, none of them can be waived. Himonga and Moore conducted a study in which married participants emphasised how important it is to conclude a customary marriage with *lobola* (Himonga and Moore 2005, cited in Bakker 2018:6). The participants believed that in the absence of a *lobola* agreement, the relationship would amount to cohabitation. From their views, we can infer that the same holds in respect of the other requirements. Failure to integrate a bride into the groom's family would mean that the third requirement of celebration was not met; the intended marriage would not come into existence and the parties would remain cohabitants rather than married partners.

In the foregoing context, the SCA judgment in *Tsambo* followed a similar approach to *Mabuza*. The gist of the *Mabuza* judgment is that handing over and/or integration of a bride is the last step in concluding a customary marriage. This step may contain a series of events. In *Tsambo v Sengadi*, before he died the deceased was in the vicinity of the negotiation and subsequently appeared in formal attire for celebration accompanied by specific forms of greetings which signified the integration of the bride into the family. The substance of integration as a vital step in the conclusion of customary marriage therefore was deemed to have taken place in the present case. That society and customary law have evolved are evidenced in *Tsambo v Sengadi*, where both families supported the couple in consummating their customary marriage through negotiation, celebration and consequent cohabitation.

Implications of the statutory non-recognition of cohabitation

In precolonial African societies, families used to produce wealth together through farm parties, hunting groups and iron works (Diala 2018:102). This group production of wealth made it easy for marriage formalities to be completed. In any case, *lobola* was paid with livestock and farm produce that was produced jointly by the family (Diala 2020). When European colonialism arrived, it displaced this communal production of wealth with work in mineral resource mines, service in colonial armed forces and work in the colonial civil service, known as ‘white collar jobs’. The resultant industrialisation/urbanisation and independent income caused rural–urban migration and diffused the close-knit nature of the extended family. Today, many Africans live in cities far away from their relatives in towns and villages. Inevitably, urbanisation brought problems, such as the high cost of accommodation, school fees and other expenses that affect women and children. Unsurprisingly, to overcome these problems, many Black women found themselves in cohabitation relationships.

Scholars describe this relationship as ‘the co-residence of unmarried partners, who live like husband and wife with or without children’ (Odimegwu *et al.* 2018:112). Nevondwe and Odeku add that cohabitation can be identified by means of three main elements: intimacy, factual cohabitation and a measure of stability and/or durability (Nevondwe and Odeku 2004:775). Even though cohabitation and marriage share some structural similarities, the former is heavily frowned upon in traditional African societies.

The South African Law Reform Commission (SALRC) acknowledged the problematic nature of cohabitation during its consultations for the

adoption of a single marriage statute and its review of matrimonial property laws. Citing an academic source, Revised Issue Paper 34 of the SALRC stated: ‘The lack of a statutory remedy to claim a share of partnership property outside of valid marriages is a problem with significant gendered consequences, potentially leading to the social and economic vulnerability of women (and often children) when intimate relationships end’ (Bonthuys 2017:263). Although the general opinion from the SALRC’s consultations is for the legal protection of partners in domestic partnerships, the problem is the extent to which the cohabiting couples qualify for protection. In this respect, policy-makers classify cohabitation as unregistered domestic partnerships.

In its 2006 Report on Domestic Partnerships, the SALRC considered various factors that are relevant for determining whether the parties concerned are in an unregistered partnership (South African Law Reform Commission 2006: Project 118). These include the duration and nature of the cohabitation relationship, the nature and extent of the parties’ public profession of their relationship, the degree of their financial dependence or interdependence and their arrangements for financial support for themselves and children of the relationship. Other factors include their ownership, use and acquisition of property, their degree of mutual commitment to a shared life, the manner in which they care for and support children born of their partnership, how they perform household duties and how third parties, including their families, perceive the seriousness of their relationship. Ultimately, the SALRC appears willing to recognise relationships as life partnerships ‘where the parties cohabit and have assumed permanent responsibility for supporting each other’ (South African Law Reform Commission 2019: Project 144). It remains to be seen if this willingness will translate into statutory action by the legislature. While we do not argue for the state to impose on traditional perceptions of cohabitation, it will be interesting to see whether, if ever, these legislative changes would affect the socioeconomic power dynamics between cohabitants.

The statutory non-recognition of cohabitation is not exclusive to South Africa. In Ghana, for example, negative perceptions regarding cohabitation have the potential to seriously impact the dignity of women. Obeng-Hinneh and Kpoor conducted a study to document the experiences of cohabitants in Ghana (Obeng-Hinneh and Kpoor 2021:1). They concluded that cohabitants face two-pronged pressure, from their families and religious institutions, especially churches. In rural communities, female cohabitants are ostracised from culturally significant events. In fact, some of them are called *kwasiabou*, which means ‘fool’. The same happens in churches where

cohabitants are not allowed to occupy leadership positions, lead worship in the church or participate in holy communion (Obeng-Hinne and Kpoor 2021:9). Christian cohabitants are also precluded from performing naming ceremonies for their children born out of wedlock. This ceremony is usually conducted by the church pastors, who assume the role of family head and name new-born babies while simultaneously 'presenting' them to God. The exclusion of cohabitants from naming ceremonies and other religious, cultural and communal activities negates the rights of women to equality, freedom and human dignity, which the African Charter on the Rights of Women promotes. It also contravenes other international instruments, such as the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

Other than their derogatory treatment in society, cohabiting women are also at risk of unprotected property rights. Section 25(1) of the South African Constitution protects persons from the deprivation of property. It further prohibits laws from permitting the arbitrary deprivation thereof. The purpose of this provision is to protect people's moral and legal rights to secure enough property to lead dignified lives (Currie and De Waal 2013:533). Women usually suffer a deprivation of property when a cohabitation relationship ends. This deprivation is because women often enter cohabitation relationships with limited bargaining power in terms of social and financial status. Accordingly, their shared household is usually provided by the male partner. As a non-owner cohabitant, women often lose their access to and occupation of the household in the event of the death of their partner (Bannister 2016:4). In this manner, we see that the lack of recognition of cohabitation in customary law increases women's vulnerability.

Another right that remains at risk for cohabiting women is the right to social security. For our purposes, social security may be regarded as a form of assurance of decent livelihood through economic sustenance (Currie and De Waal 2013:600). In rural communities, the most common form of sustenance and livelihood is owning or having access to crops and livestock. If a cohabitation relationship ends, the woman will more often than not be divested of her access to these properties. Certain other problems arise in the case where the relationship ends as a result of the man's death. In the context of a valid customary marriage, the wife is entitled to send a delegate to the *lekgotla* of her community to request a burial plot at the community gravesite. If the custodians of customary law in that particular community do not accept (or recognise) the validity of the relationship, the woman will forfeit that entitlement along with other burial rights. The minimal

protection afforded to cohabiting women overlaps with their unequal status in the hierarchy of customary family laws. As a result, they continue to experience property insecurity that can be cured only by a transformation of laws and social attitudes towards cohabitation.

African Feminism as Transformation

The previous section examined the socio-legal impact of cohabitation on women and how the interpretation of the statutory requirements for a valid customary law marriage affects the legal status of couples. In this section, we highlight the relevance of African feminism in improving the lot of women regardless of their chosen family formation.

Firstly, we need to appreciate the uniqueness of African feminist jurisprudence. There is an obvious relationship between Western and African feminist movements, because both aim at enhancing the status of women. However, African feminism is unique because the struggle against gender oppression is coupled with other forms of oppression in Africa, such as racism, slavery and poverty (Guy-Sheftall 2003:31). As noted above, African feminism is distinct in its rejection of an anti-men position. Instead, it seeks men as allies in developing social spaces that are free from oppression (Guy-Sheftall 2003:32).

Secondly, the full benefit of rights can be enjoyed only by those who hold full citizenship. Section 3 of the South African Constitution guarantees all citizens the equal entitlement to rights, privileges and benefits of their citizenship. However, the extent to which Black women enjoy this guarantee is questionable. This is investigated below by contrasting the rights afforded in the public sphere with how these rights are exercised in the private sphere.

Thirdly, the jurisprudence of African feminism is sufficiently full-bodied to provide a platform for cohabitation to be redefined in line with the needs of African women. In what follows, we investigate this possibility through four paradigms: recognition of the centrality of family life; the preservation of female-friendly traditional institutions; exposition of subtle forms of cultural oppression; and the forging of new possibilities for African women.

Transforming citizenship and the private sphere

African feminism has two prerogatives: the emancipation of women and the liberation of all African people from the shackles of socioeconomic, political and cultural oppression (Chidammodzi 1994:45). These various oppressions

are suffered by men as well, which is why African feminists reject an anti-male stance. However, Chidammodzi finds it unfathomable that men are capable of critically and objectively analysing the institution of customary law, because they benefit directly from its patriarchal nature (Chidammodzi 1994:45). For example, the nature of the male primogeniture rule is such that marriage is a prerequisite to the use and enjoyment of property. In a rural context, girl children have to be born in wedlock to enjoy access to their father's property or have to get married in order to have access to their husband's property. Either way, marriage has remained central to customary family law. In resisting cultural patriarchy, African feminism exposes the root of African gender relations in order to criticise its abuses (Arndt 2002:32). This criticism exists within four elements.

First, co-operation with men is encouraged and motherhood coupled with the centrality of family life is affirmed. Second, patriarchal oppression is approached differently because the aim is not to eradicate traditional institutions. Rather, African feminists want to preserve those institutions that are favourable to women and transform those that are not. The exception here is that if a traditional institution is so severely oppressive that its transformation cannot be imagined, then its abolition would become imperative. Third, African feminism does not isolate gender relations from other mechanisms of oppression, such as classism, racism, colonialism, capitalism and dictatorship. Lastly, the end goal is to forge new ways of being for African women, in order to overcome their oppression (Arndt 2002:32). This is undertaken through a philosophical lens that is informed by their unique history, including the challenges of their present condition and the opportunities of their future.

There are three principles of African feminism that are concerned not only with the interests of women but also general social ills. These are holism, collectivity and situationality (Cruz 2015:26). Two of them are relevant to this paper. Holism looks at different social domains as pieces of a puzzle that make up a greater whole, instead of isolated fragments. Its integrated approach necessitates the consideration of domains other than gender and takes us back to the perception that African feminism is a movement against all social ills (Cruz 2015:26). The holistic African reality is made up of multiple issues, such as gender oppression, armed conflict, famine, racism and colonialism. All these issues will overlap at some point. For example, a Black woman who is discriminated against on the basis of her sex/race may be deprived of property rights on the grounds of tradition or raped by rebels during an armed conflict because of toxic masculinity.

Furthermore, we must consider variances between the public and private spheres that African feminism tries to harmonise. Certain customary law institutions limit women's empowerment to the public sphere while discounting their agency in the private sphere (Cruz 2015:27). This means that we cannot look only at Black women's access to education or right to equal pay to conclude that the feminist movement has achieved its mandate. The extent of women's freedom and equality in domestic relationships is equally important. The 'collectivity' principle refers to the 'corporate' character of indigenous groups. Cruz defines indigenous organisations as 'a large and formal structure with an identifiable leadership unit' (Cruz 2015:23). Cultural groups can be thought of as organisations because they have identifiable leadership units in the form of chiefs, headmen and other custodians of customary law. Their structure is formalised through constitutional protection in sections 211 and 212. Section 211(1) of the Constitution recognises the role, status and institution of traditional leadership. Section 212(2) goes further to stipulate these roles as, *inter alia*, dealing with matters that relate to customary law and the customs of communities that observe customary law. African feminism can be used as a lens to reimagine masculinist interpretations of cultural groups that are fuelled by and provide fuel for patriarchy.

Traditionally, debates around citizenship have been gender-blind in defining the concept around race and social class. As mentioned above, African and Western feminism have different priorities. For example, when the United States of America experienced a second wave of feminism in the 1970s, one of the demands of the day was the right to sexual pleasure (Richardson 2000:259). Contrastingly, the 1970s in South Africa were riddled with concerns over the Bantu Homelands Citizenship Act (National States Citizenship Act) 26 of 1970. This legislation stripped Black people of their citizenship and rendered them aliens in economically vibrant urban areas. Following South Africa's constitutional dispensation, this legislation was invalidated. Section 3 of the 1996 Constitution provides that:

- (1) There is a common South African citizenship.
- (2) All citizens are -
 - (a) equally entitled to the rights, privileges and benefits of citizenship; and
 - (b) equally subject to the duties and responsibilities of citizenship.

A narrow conception of citizenship limits it to a 'formal juridical membership within a nation state' (Gouws 2005:26). However, widely construed, citizenship includes the free and equal enjoyment of rights and a corresponding duty to fulfil citizenship responsibilities. This broad

perception of citizenship corresponds with Lister's definition of citizenship as 'a status bestowed on those who are full members of a community; all who possess the status are equal with respect to the rights and duties with which the status is endowed' (Lister 1997:29). Seen this way, African feminism invites a reassessment of the gender debate by drawing attention to the relationship between citizenship and gender (Richardson 2000:255). This relationship presents a discursive challenge because it requires a close reading between the lines to strip bare the language of the 'gender industry' in Africa (Lewis 2006:82). There is a perception that the ideal citizen is a man and that women have to negotiate their citizenship in society. It is imbedded in patriarchal structures; which Pereira refers to as 'malestreaming' (Pereira 2002). Economic, social and legal institutions in Africa were designed with men in mind and so require deconstruction in order to achieve genuine gender justice. The *Bhe* case, for example, indicates that the customary law of succession exclusively benefitted males. The issue is how societal structures and perceptions can be deconstructed to achieve gender justice.

One way to transform 'heteropatriarchal' normative systems is the art of negotiation, also known as nego-feminism (Arndt 2002:32). This implies that African feminists bypass or overcome certain oppressive customs by negotiating and reaching compromises with patriarchal institutions. This approach was not viable in the past because negotiations were somewhat non-egalitarian, as they depended on the comparable social power of the participants (Chanock 1989:80). Instead of a real societal transformation, public discourses resulted in a notional codification of negotiated rights. Yet, nothing changed in women's homes and communities. This dilemma is articulated excellently by Moolman (Lewis 2006:82):

While our Constitution is regarded as one of the most progressive in the world, [we] question the extent to which women are able to realise the rights enshrined therein. The passing of a number of progressive laws and the amendment of certain pieces of legislation, theoretically implies the improvement of women's positions in society – yet the reality is that the majority of women continue to face marginalisation and discrimination in their homes and communities.

Citizenship was based on a formal conception of equality and a negation of subjective circumstances. When South Africa transitioned to a democracy in the 1990s, there was a great demand for human rights reform, especially the rights of women who live under customary law. The rights discourse of that era framed citizenship within the rights that people could claim from the state. So, law reform brought a much-needed change in the policies and legislation that surrounded liberties, such as reproductive rights, a

greater scrutiny of violence against women and the inclusion of women in the workplace. Regrettably, this created a false sense of universalism in the concept of citizenship, which treated individuals as disembodied and ungendered (Gouws 2005:4). For example, if women were afforded more protection in the workplace, they were considered equal to men and therefore regarded as full citizens.

Due to South Africa's non-egalitarian past, it was easy for women's claim of full citizenship to be interpreted through their enjoyment of equal rights with men. African feminism insists that Black women can lay full claim to citizenship only if their femininity, their developing world status and the cultural oppressions that they face are considered and/or remedied. For them to become gendered and embodied citizens, the structures in traditional communities that perpetuate the void between formal and substantive equality need to be removed (Ige 2014:106). As an example, it might be thought that a woman having access to a homestead places her on an equal footing with her male counterpart. However, the institution of customary law ignores the truly substantive fact that men are entitled to ownership whereas women are limited to right of use. In the context of cohabitation, African women are not full citizens unless their co-residence relationships are afforded substantively equal entitlements to property and ownership rights.

Citizenship exists as a status or as a practice. As a status, individuals are bestowed rights as a means of enjoying agency. Nevertheless, it is through practice that the full potential of citizenship is measured. Alternatively, citizenship as status may be considered in the same way as the relationship between the state and the individual, whereas citizenship in practice refers to the praxis of rights between private individuals (Gouws 2005:3). If a balance between the two is not achieved, the exclusionary force of citizenship will come into play. For Black women to experience full citizenship, the 'malestream' separation of the public and private sphere needs to be deconstructed, given that there is a definite link between women's citizenship rights and their position in the private sphere (Lister 1997:42).

As far as cohabitation is concerned, there is a sense in which citizenship may be regarded as 'the main inclusionary emancipatory discourse of the left' (Gouws 2005:22). Here, the left refers to two aspects. Firstly, it represents those members of society who suffer unjustified inequalities. Secondly, it embodies an egalitarian movement in favour of the marginalised. Black women in cohabitation relationships are the left and it is necessary for citizenship to be redefined in such a way that these women become emancipated and participate fully in both the public and the private spheres.

African feminism and the public–private dichotomy

In 2001, a World Bank report revealed that the extension of equality rights to women had improved significantly in Africa (World Bank 2001). Seemingly, more and more women had more and more rights. But the report also noted that this extension was yet to be experienced in women's private social contexts. The rights and duties characteristic of full citizenship do not only concern the relationship between the state and individuals (vertical relationship), they also flow in the relationship between individuals themselves (horizontal relationship). For our purposes, the former refers to the 'public sphere' (relationship between the state and women), whereas the latter refers to 'private sphere' relationships of cohabitation. The public–vertical relationship places a duty on the state to protect and respect the rights of women, whereas the private–horizontal relationship places a duty on people to respect the rights of women in cohabitation relationships. Put differently, section 8(1) and (2) of the Constitution binds all law and organs of state to the application of the Bill of Rights. It also holds all natural and juristic persons to the same standard. Section 9(3) and (4) encapsulates the vertical and horizontal flow of rights by prohibiting the state and private individuals from unfairly discriminating against anyone, whether directly or indirectly, on arbitrary or otherwise grounds. The issue is how effective these provisions are.

Social inequality in traditional communities is rooted in many factors. Of these factors, discrimination in the private sphere constitutes most of the social and economic disadvantages suffered by many African women (Bannister 2016:1). African feminism offers a much-needed theoretical framework within which the realisation of rights in the private sphere can be linked to an overall eradication of systemic inequality. In this respect, the enforcement of women's socioeconomic rights is a potential tool through which policy-makers could tackle inequalities in customary family law. This assertion is justified by the communal nature of traditional societies. As is commonly acknowledged, traditional African societies access their socioeconomic rights through their family units (Bannister 2016:13). For example, the socioeconomic right to property is embodied in land and livestock, which constitute historical forms of family-generated wealth. Historically, the ownership of such property was limited to males. Females enjoyed the benefits of these types of property through their social relationship with a male, that is, by being a wife, sister, aunt or daughter.

Some scholars argue that the purpose of public law is 'to restrain state institutions from interfering in the private sphere' (Bannister 2016:40). However, law is the foundational fabric of regulation in any society. Its

primary purpose is the promotion of human welfare. Accordingly, it also ought to play a role in regulating private affairs. As is self-evident in social fields of normative behaviour, the nature of rules influences the manner in which people behave. Thus, it makes no sense to ignore the benefit of infusing private relations with constitutional values. Such infusion would result in relational dynamics that inform an interpretation of family law rules in a way that protects the rights of women. In any case, the state is already regulating most aspects of private life, such as succession, domestic abuse and corporal punishment. This is the context in which we should perceive the state's indifference towards women's legal protection in cohabitation relationships.

Typically, traditional distributions of wealth recognise men as the primary owners of property in a relationship. Also, customary law regards marriage as the only valid basis of family formation. In so doing, it treats cohabitation as an outlier and reinforces the marginalisation of a Black woman who chooses to live with a man without being formally married to him. Thus, customary laws shape the social relationships of women. How these laws are applied to cohabitation illustrates the relationship between rights in the public and private spheres.

For example, in the public sphere, sections 25 and 26 of the Constitution grant women property and housing rights.⁴ Yet, there is no way of protecting these rights during and at the dissolution of a codependent cohabitation relationship. This is because men are the only recognised owners of landed property under the customary law rule of male primogeniture. This rule obviously negates the property rights that women may claim from the state. African feminism requires us, in this instance, to enquire into the relational dynamics between the parties. It encourages an interpretation of the law that goes beyond the formal divide between the private and public spheres (Bannister 2016:40). The example above reveals the gender-blind nature of rights, which abstracts them from the real-life context of the private sphere. So, how does the man's customary law privilege directly affect the woman's socioeconomic situation?

Arguably, a transformative view of women's emancipation should advocate for justice instead of rights. Indeed, this is what African feminism seeks to achieve. Justice is a broad concept, which entails an understanding of how certain norms, institutions or groups block individuals and groups from claiming their citizenship. Contrastingly, the notion of rights has the tendency to create the effect of nominal access (Lewis 2006:83). This means that access is given to marginalised groups only in name. A liberal perspective of justice requires the discourse around citizenship to account for women's

lack of rights in the private sphere, since the rights in the public sphere are insufficient to remedy gaps in basic freedoms in the private sphere (Gouws 2005:3), in this case, cohabitation.

Towards the recognition of cohabitation

The relationship between customary law and state laws in South Africa is a legacy of colonialism. Since colonialism ended, state laws, especially constitutional values, have been moulding customary laws into universalist images of colonially transplanted European laws, from which state laws emerged (Diala 2019). Significantly, this moulding process merely continues the extralegal changes that have been occurring in African normative fields since Europeans landed on the continent.

For example, Chanock argues that the colonial period in Africa contributed immensely to the transformation of customary law (Chanock 1989:76). Anxious to maintain social control and further their economic interests, colonial administrators endorsed male power in their colonies, thus placing male community elders in positions that exacerbated their relational social status. As a commentator noted, 'the colonial judiciary, in complicity with (African) elders ..., redesigned most of what is today presented as customary law so as to increase male authority and control over women and children and compensate for the loss of their political and social power to the colonial state' (Ncube 1993). In some cases, African elders simply assumed powers that they never wielded prior to European colonialism. This enabled them to assert control over women and family property and sowed the seeds for the unequal power relations that disadvantage women in cohabitation today.

Administrative processes also played a role in the transformation of indigenous behaviour. For example, the formal documentation of marriages became part of pseudo-requirements for the validity of marriages in extralegal elements of the colonial governance structure, such as the church (Chanock 1989:82). A way forward in protecting cohabiting women requires a two-stage process.

Firstly, the patriarchy that overwhelms customary family law must be broken down, along with the laws that are blatantly biased against women. This is the deconstructive stage. Secondly, the application of customary laws must be aligned to their foundational values in order to encompass the needs and experiences of women. This is the reconstructive stage (Mangwira 2004:8). A good place to start this alignment process is those customs that exude sexist and discriminatory features. Sexist customs are based on the different treatment of men and women in a way that actively 'others'

women. The race and class oppressions faced by Black women stem largely from South Africa's colonial and apartheid past. Therefore, the biggest contribution that African feminism could make to deconstructing cultural biases against women would be to start with deconstructing colonialism, the system that escalated the extent of patriarchy in African cultures and communities. Put differently, instead of a haphazard and 'Band-Aid' recognition of cohabitation, we propose gradual steps to decolonise African and cultural spaces to be more accommodating of the needs and rights of women in cohabitation relationships. Two things have already been made clear: that African feminism seeks to harmonise traditional institutions with the rights of women and that institutions of traditional leadership are an entrenched part of our constitutional dispensation.

The possibility for change is evident in some cultural communities, such as the Bapedi village of Madibaneng in Limpopo Province, where marriage is no longer a requirement for the allocation of residential and agricultural land by the *lekgotla*. This signifies a potential for change, where single and cohabiting persons have the opportunity to claim the rights available to their married counterparts. The *lekgotla* may again protect women where cohabitation relationships end as a result of death. Whereas a cohabiting partner might not be allowed to formally request a burial plot for their deceased partner, members of the *lekgotla* are in a position to facilitate communication between the family of the deceased and the cohabiting partner. In this way, the cohabiting partner may become part of some of the burial rituals, such as *go hloboga* (seeing the deceased one last time before burial) and *go kota moriri* (post-burial shaving of hair to signify mourning).

Currently, women need to be married to enjoy the benefits of property owned by their partners. This situation implies that the choice to get married is not made freely. Rather, it is based on the need for economic survival through access to property. Ultimately, most African customs reflect the overwhelming male power that customary law supports (Mangwira 2004:9). The custodians of customary law are largely male and have been so despite radical changes in social conditions. So, in practice, customary law was designed to suit the male experience, which places a higher premium on male kinship privilege than the agentic choices of women. In this sense, customary law calls into question the relationship between choice and kinship.

Kinship refers to family ties and the continuation of a lineage and is thus central to African teachings. However, kinship depends on women because of their physical capability to bear children, as well as their gender-assigned role of rearing children. One of the objectives of African feminism is to arrive at a point where women have the right to free choice. This includes

the choice to vote, to work, to engage in sexual intercourse and the choice to abort. However, the choice to cohabit has not been brought to the fore as strongly as the rest of the other issues. To transform cohabitation in African customary law, we first have to acknowledge that Black women have the choice of marriage or otherwise and have the choice to develop sexual and family relations out of wedlock (Mangwira 2004:45). The rationale for this freedom of choice is that women's bodies are the primary sites of their sociocultural oppression. The fact that their bodies are designed to fulfil the needs of their husband to build a family and carry on the male bloodline is precisely part of the reason why cohabitation by women is discouraged. This then brings us to the point that to transform cohabitation, the female body must first be liberated (Pucherova 2019:118).

Even though Richardson and Robson advocate lesbian feminism, they offer ideas that could be useful for the objectives of African feminism. Richardson speaks of 'balancing the claims of different communities with constructing new common purposes' (Richardson 2000:261). Robson identifies women as outlaws who, instead of seeking rights within the law, should rather forge their own approach to the law (Richardson 2000:264). In the context of transforming cohabitation, black African women can be thought of as a community within their respective communities. Their claims ought to be balanced with those of the overall community, to construct strategies where women's interests are not sacrificed for the sake of 'marriage normativity'. These strategies should be adopted with Robson's argument in mind to reflect our position that the law and society are malestream. Women are indeed cultural minorities, and their new reality depends on invoking African feminism to forge a new approach to customary family law rules. This means that we cannot completely rely on the current system of customary law to emancipate women, because 'the master's tools will never dismantle the master's house' (Lorde 1984:110).

Conclusion

Customary family law finds itself in a dilemmatic tug of war. On the one hand, the courts presume that marriage exists where the parties cohabit. On the other hand, the principles of customary law demand the couple's compliance with certain formalities before a marriage can be said to be concluded. Many of these formalities directly exclude cohabitation. This situation breeds uncertainty regarding what constitutes a valid customary law marriage. With this uncertainty, African women may spend years in a relationship, labouring under the misconception that the law recognises their relationship when, in fact they are mere cohabitants. This situation

strips them of the financial protection of property rights if the relationship comes to an end. We have argued that the non-recognition of women's property rights in fringes on their full citizenship status.

The status of citizenship plays out in the public and the private sphere, being constituted by the relationship between the state and its citizens and the relationship between private individuals, respectively. Women are citizens in the public sense because the Constitution grants them rights to equality, human dignity, property and freedom of bodily integrity. However, in their private interactions they are not equal to men. Rather, they experience property insecurity due to the non-recognition of cohabitation in South Africa's legal framework. Indeed, women are barely free to choose whether to cohabit or not and their human dignity suffers constant and severe violations. Over the years, the art of ego-less negotiation, which is represented as nego-feminism, has yielded only nominal access to rights, leaving the substantive position of African women unchanged (Arndt 2002:32). This failure warrants a move away from rights assertion to justice enforcement.

The current model of customary family law privileges form over function. This is why such great emphasis is placed on marriage and there is little consideration of the fact that cohabitation relationships also perform the same function as marriage. Family formation is at the very heart of our traditional communities because it ensures the continuation of lineages. However, if we persist with this model of form over function, we will be ignoring the fact that even cohabitation relationships foster the continuation of lineages because partners can procreate either way. In not recognising the property rights of cohabiting women, their interests and those of their children fall short of protection merely because their parents did not subscribe to the norm of formal marriage. Accordingly, we offer African feminism as a means to combat discriminatory cultural attitudes to cohabitation. It is useful because of its values-rights-justice praxis.

The starting point of our argument for the legislative recognition of cohabitation is indigenous values. Constitutional values as well as African feminist values of human dignity, equality, care and kinship should inform policy interpretation of women's rights. A justice-based approach to values of bodily integrity, property and adequate housing justifies the recognition of cohabitation as a legitimate union with proprietary consequences. A good platform for this recognition is the proposed single marriage statute. Our recommendation aims at bridging the gap between cohabiting women's enjoyment of rights in the public and private spheres.

Finally, it is clear that South Africa needs a gender-conscious interpretation of sections 8 and 39(2) of the Constitution. Section 8 is the cornerstone of bridging the gap between the public and private spheres, since it commits both the state and individuals to respect and protect human rights. Section 39(2) enjoins the development of customary law in line with the spirit and object of the Bill of Rights. Other than the explicitly mentioned values of human dignity, freedom and equality, our Constitution is also informed by values of care, egalitarianism and justice (Bannister 2016:43). The concept of African feminism is rooted in these values. Free of gender binarity, it focuses on the advancement of women and men alike, striving to afford them equal protection and opportunity in the private and public spheres (Bannister 2016:44). It also emphasises kinship and communal values. The values of the Constitution and African feminism can drive our societies towards better protection of women in cohabitation relationships. If embraced, we will find that such women are driven by the same desires that drive the rest of us, namely: to establish kinship in a stable home with a partner and children and to be treated equally, kindly and respectfully as human beings with dignity.

Notes

1. In *Bwanya v Master of the High Court, Cape Town and Others* [2021] ZACC 51; 2022 (4) BCLR 410 (CC); 2022 (3) SA 250 (CC) (decided on 31 December 2021), the Constitutional Court of South Africa found that permanent life partnerships are a legitimate family structure that deserves respect and legal protection.
2. *Tsambo v Sengadi* (244/19) [2020] ZASCA 46, Para 22.
3. *Badimo* is the Pedi, Sotho and Tswana word for ancestors. *Go phasa* refers to the act of communicating with one's ancestors to give thanks, acknowledgement, introduce new members of the family such as babies and brides, or to ask for blessings. The process of *go phasa* typically requires snuff and alcohol spirits.
4. Section 25 provides that no one may be deprived of property unless it is by way of a law of general application and further prohibits an arbitrary deprivation of property. Section 26 grants the right to have access to housing and prohibits evictions from being effected without a court order.

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