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THE ENFORCEMENT OF THE PAYMENT OF *LOBOLO* AND ITS IMPACT ON CHILDREN'S RIGHTS IN SOUTH AFRICA

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1 Introduction

The *Recognition of Customary Marriages Act*¹ defines the custom of *lobolo* as:

Property in cash or in kind, whether known as *lobolo*, *bogadi*, *bohali*, *xuma*, *lumalo*, *thaka*, *magadi*, *amabheka* or by any other name, which a prospective husband or the head of his family undertakes to give to the head of the prospective wife's family in consideration of a customary marriage.²

Various communities in South Africa practise the custom of *lobolo*, which people give different names, is shown above. These communities may be divided into two groups, those practicing *theleka* and those that do not. This article will focus on those communities that practise *theleka*.³ In the communities practising *theleka* the amount of *lobolo* is not fixed and the father or guardian of the wife may from time to time *theleka* the wife (her married daughter) and demand one to three head of cattle from his son-in-law.⁴ The wife and her children, if there are any, may be held by their maternal grandfather until the payment of *lobolo* has been met.⁵

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¹ Section 1(4) *Recognition of Customary Marriages Act* 120 of 1998.

² Section 1(4) *Recognition of Customary Marriages Act* 120 of 1998.

³ The custom of *theleka* takes place when a wife visits her home and after the expiry of the normal visiting time she continues to stay at her home and does not return to her husband's home. Her husband then sends messengers to fetch her and they are informed of why she is being held. *Theleka* is the withholding of a wife by her father or guardian from her husband to coerce him to pay the outstanding *lobolo*. *Theleka* can also be practised when the husband has ill-treated his wife, especially by seriously assaulting her. The father of the wife may demand a beast that serves as damages if the husband has ill-treated his wife. The beast paid may be in excess of the *lobolo* originally specified. See Koyana *Customary* 12-16.

⁴ Rautenbach, Bekker and Goolam *Introduction to Legal Pluralism* 57.

⁵ Rautenbach, Bekker and Goolam *Introduction to Legal Pluralism* 57.

The practice of *theleka* has an effect on the custody of the child and the relationship of spouses in a customary marriage. The writer draws this conclusion because the wife and her children are held by her guardian or father until the completion of the payment of *lobolo*. The custom of *theleka*, which serves as a way of enforcing *lobolo* amongst Xhosa communities, seems to be in conflict with the best interest of the child as entrenched in the *Constitution*.⁶ This is because the court has to consider various factors before granting an application⁷ and it would be unjust if the best interest of the child were to be determined by the payment or non-payment of a certain number of cattle. The South African Law Commission⁸ recommended that

Lobolo should not be deemed essential for the validity of customary marriages. If parties wish to give *lobolo*, they should be free to do so, but payment or non-payment will have no effect on the spouses' relationship or on their rights to any children born of the marriage.⁹

If this recommendation were to be taken seriously, then the continuation of *theleka* custom may be considered unconstitutional. Unfortunately there is no judgment in South Africa since 1994 that has ruled on this issue. This first section of this article will discuss the enforcement of *lobolo*. The second section, dealing with custody in customary marriages, will also draw certain inferences. The third section will analyse the notion of the best interests of the child again draw certain inferences. The fourth section analyses and answers two questions, namely: does the custom of *theleka* constitute abduction? Does the custom of *theleka* constitute family violence? And it makes recommendations based on the discussion and analysis about what should be done about *theleka* custom.

The following section discusses the enforcement of *lobolo* in customary law.

2 The enforcement of *lobolo* in customary law

The manner of enforcing *lobolo* agreements in customary law varies among different cultural groups or tribes in South Africa. Some communities have a fixed amount of

⁶ *Constitution of the Republic of South Africa*, 1996 (hereafter "the Constitution").

⁷ *McCall v McCall* 1994 3 SA 201 (C).

⁸ SALRC *Harmonisation of the Common Law* ch 4.

⁹ SALRC *Harmonisation of the Common Law* ch para 4.3.3.14 at 61.

lobolo. The *lobolo* can be fixed either by agreement between the parties or by the accepted custom in that tribe. In tribes that have a fixed amount of *lobolo*, the delivery of *lobolo* has to take place before the celebration of the marriage.¹⁰

It is also worth noting that some communities have no fixed amount of *lobolo* cattle to be delivered, the marriage depending on the delivery of a reasonable number of cattle.¹¹ The court has discretion to decide what constitutes a reasonable number of *lobolo* cattle or amount of money, having regard to what average *lobolo* has been established in the community concerned, and bearing in mind the social standing of the woman.¹² Among various *Xhosa* communities, the amount of *lobolo* payable is not limited to a specific amount and constitutes a bond of goodwill between the families of the bride and the bridegroom for the entire life of the bride and even after her death. The prospective bridegroom would be expected to give up one, two or three head of cattle each time his father-in-law turned to him for help.¹³ Therefore, it is inconceivable that the bridegroom would refuse to give him the cattle if he was in a position to help. Moreover, there is the influence of tradition as well as the religious sanction.¹⁴ There is a belief among traditionalists as well as non-traditionalists that a woman for whom *lobolo* was not delivered will not have children.¹⁵ This does not mean that *lobolo* buys the reproductive capacity of a woman, but that the ancestors will not allow her to procreate.¹⁶ The South African Law Commission¹⁷ has noted that the payment of *lobolo*

is the framework that people use to express and to bring about complicated changes in terms of relationships and deep changes in terms of emotional realities, values, attitudes and concepts. It is also the language that the ancestors understand and bless.

¹⁰ Dlamini *Juridical Analysis* 322.

¹¹ Dlamini *Juridical Analysis* 322.

¹² Bekker *Seymour's Customary Law* 163.

¹³ Dlamini *Juridical Analysis* 322.

¹⁴ Malinowski *Crime and Custom* 52.

¹⁵ Malinowski *Crime and Custom* 52.

¹⁶ Dlamini *Juridical Analysis* 322.

¹⁷ SALRC *Harmonisation of the Common Law* ch 4.

This shows that people who adhere to the custom of *lobolo* view it as a significant custom that connects them with their ancestral spirits. Failure to pay it might therefore bring bad luck and the bridegroom may encounter difficulties if he resists the payment of *lobolo*. These views on *lobolo* are affirmed by the observation that *lobolo* is widely practised by most black South Africans, who are not prepared to abandon it despite the difficulties it gives rise to.

If the wife's father or guardian demands a reasonable amount of *lobolo*, the bridegroom has an obligation to comply with those demands.¹⁸ The failure to comply therewith entitles the father or guardian of the wife to *theleka* her until the demand has been met. This means that the wife, together with her children, can be taken back to the wife's family group and held under *theleka* until her husband complies with the demand for the payment of *lobolo*.¹⁹ The wife's father or guardian usually resorts to *theleka* rather than a court action for the enforcement of *lobolo*, and if the wife's father were to institute a court action without resorting to *theleka*, his son-in-law could raise the omission to *theleka* as a defense.²⁰

South African courts have already ruled that the wife's father or guardian should not be entitled to resort to customary law methods for the enforcement of *lobolo* in relation to civil or Christian marriages.²¹ This shows that the guardianship of children born of a civil marriage is governed by common law.²² It is relevant to consider the civil law position in regard to this issue. This point is made here because the payment of *lobolo* is not essential to the validity of a civil or Christian marriage. In the case of *Cheche v Nondabula*²³ the parties were *Hlubis*. The father of the

¹⁸ Bekker *Seymour's Customary Law* 163; Olivier *et al Indigenous Law* 28; Soga *The ama-Xosa* 263 et seq; *Skweyiya v Sixakwe* 1941 NAC (C&O) 126; *Ngxabalaza v Njovane* 1939 NAC (C&O) 96.

¹⁹ Bekker *Seymour's Customary Law* 164; see also the following cases cited by Bekker, namely: *Mkhohlwa v Mangaliso* 1 NAC 202; *Tiyeka v Feja* 4 NAC 343; *Baleni v Sidlo* 4 NAC 344; *Ntlekwini v Maqokolo* 4 NAC 345.

²⁰ *Mkhohlwa v Mangaliso* 1 NAC 202 (1908); *Menzi v Matiwane* 1964 NAC 58 (S); *Monghayelana v Msongelwa* 3 NAC 292 (1913); *Skweyiya v Sixakwe* 1941 NAC (C&O) 126.

²¹ *Cheche v Nondabula* 1962 NAC 23 (S) 28; *Menzi v Matiwane* 1964 NAC 58 (S); *Monghayelana v Msongelwa* 3 NAC 292 (1913); *Skweyiya v Sixakwe* 1941 NAC (C&O) 126; Peart *Consideration of Certain Aspects of Customary Law* 56.

²² *Mbuli v Mehlokhulu* 1961 BAC (S) 66; *Msomi v Msomi* 1968 BAC (N-E) 29; *Mvunyiswa v Mayile* 1964 BAC (S) 25.

²³ *Cheche v Nondabula* 1962 NAC 23 (S).

bridegroom (the defendant) was involved in the negotiations that preceded his son's marriage. The defendant paid to the plaintiff eight head of cattle and the equivalent of three others in cash as *lobolo*. The plaintiff sued, among other things, for the payment of fourteen head of cattle and one horse as the balance of *lobolo*. It was a custom amongst the *Hlubis* to have a fixed amount of *lobolo* of twenty-five head of cattle and one horse. The defendant pleaded that he had agreed to pay only twelve head of cattle, but the court rejected his evidence and treated the case as one in which there was a marriage without an express *lobolo* agreement. The court held that the payment of *lobolo* is not essential to the validity of a civil or Christian marriage. When it is paid in a civil marriage the *lobolo* contract is ancillary to the marriage contract and must be subject to a special agreement and cannot be implied. The court held further that the custom of *theleka* is not consistent with Roman-Dutch law of marriages.

In a similar case of *Gomani v Baqwa*²⁴ the plaintiff sued for the return of *lobolo* paid by him to the defendant whose daughter he married according to civil rites. In this case it was alleged that the woman had committed adultery and deserted the plaintiff and thereafter cohabited with *Luswazi*. This marriage was dissolved by the court of the chief magistrate on the ground that the wife committed adultery. The magistrate held that the dissolution of a Christian marriage has nothing to do with the question of the return of *lobolo*.

The following section deals with custody in customary law and how it is regulated.

3 Custody in customary law

Custody is defined by Bekker as:

the capacity of a person to have actual physical "possession" of the minor, to live with him or her, to take care of him or her and to assist him or her in his or her daily life.²⁵

²⁴ *Gomani v Baqwa* 3 NAC 71 (1917).

²⁵ Bekker and Van Zyl 2002 *Obiter* 128.

In communities practicing *theleka* the wife and her children are held by the guardian or father of the wife until the payment of *lobolo* is made. This practice has an impact on the custody of the children because the father of the wife gains the possession of her daughter together with her children and lives with them until the payment of further *lobolo* has been made. To put it differently, the parents-in-law of the husband take custody of his children.

In customary law, the parental rights are determined by the payment of *lobolo*.²⁶ If the husband has complied with his duty to pay *lobolo*, he and his family group have full parental rights to the children had by the wife during the existence of the marriage. Customary law places more emphasis on deciding to which family a child is linked. This is aptly summed up in *Madyibi v Nguva*²⁷ as follows:

By nature the progeny of a woman accrue to her father's group and are members of his group and tribe for religious and political purposes ... these rights and duties are transferred by Native law to another group only on contraction of a valid customary union whereby the woman's group receives *lobolo* from the other group and transfers the natural right to the woman's productive powers and her progeny to the group providing *lobolo*.

However, our courts are in favour of giving effect to the principle of the best interest of the child whenever the custody of the child is under dispute.²⁸

In the case of *Hlophe v Mahlalela*,²⁹ the court applied the principle of the best interest of the child when the father of a minor child was seeking custody of his child based on the fact that he had partially paid *lobolo*. The court was afforded the opportunity to consider the award to a father of the custody of his minor children after the death of his wife. The spouses had been married under *Swazi* customary law and the payment of *lobolo* had not yet been settled at the time of death of the

²⁶ Bennett *Customary Law* 285.

²⁷ *Madyibi v Nguva* 4 NAC 40 as quoted by Bekker 2008 *Obiter* 403.

²⁸ *Mkhize* 1951 NAC 336 (NE). There is a great deal of literature on the best interests of the child, but it has not been argued that the principle of the best interest ought to be extended even during the application of *theleka* custom. See Bennett 1999 *Obiter* 145; Knoetze 1999 *Obiter* 207-214; Labuschagne 2000 *CILSA* 333-336; Maithufi "Best Interests of the Child" 137-149.

²⁹ *Hlophe v Mahlalela* 1998 1 SA 449 (TPD).

wife. Van den Heever AJ held that notwithstanding any general customary law position regarding the custody of children, the basic principles of customary law regulating child custody had been excluded in favour of the common law.³⁰ This meant that the principle of best interest of the child took precedence over the basic principles regulating custody in customary law.³¹ This case shows that issues relating to the custody of a minor cannot be determined by the mere delivery or non-delivery of *lobolo*.

The custom of *theleka* has an impact on the custody of children held in terms of that custom because the children so held might be prevented from attending a school they are used to, or even the quality of the education they receive might be affected. In the light of the constitutional protection of the right to education, it becomes obvious that *theleka* carries grave implications. The right to education is protected in the *Constitution*³² and is a universally recognised right. The *United Nations Declaration of Human Rights* proclaims that "education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms".³³ Parents are vested with the prior right to choose the kind of education to be given to their children.³⁴ A similar provision is contained in the *International Covenant on Economic, Social and Cultural Rights*. This Covenant recognises the right to education and provides that education should be purposive and "directed to the full development of the human personality and the sense of dignity".³⁵ It is submitted here that the right of the child to human dignity and other rights enshrined in the latter international human rights instruments would be violated if he or she were to be prevented from attending school just because of the incomplete payment of *lobolo* for the mother.

The following section analyses the concept of the best interests of the child.

³⁰ *Hlophe v Mahlalela* 1998 1 SA 449 (TPD) 458F-G.

³¹ *Hlophe v Mahlalela* 1998 1 SA 449 (TPD) 458G-459C.

³² Section 29 of the *Constitution*.

³³ Article 26 *United Nations Universal Declaration of Human Rights* (1948).

³⁴ Article 26(3) *United Nations Universal Declaration of Human Rights* (1948).

³⁵ Article 13(1) *International Covenant on Economic, Social and Cultural Rights* (1966).

4 The best interests and wishes of the child

The *Convention on the Rights of the Child*³⁶ stipulates that the best interests of the child shall be a primary consideration in all actions concerning the child. South Africa is compelled to implement the principle of safeguarding best interests of the child because it is a signatory to the convention. South Africa has gone a further step in promoting the best interest of the child by incorporating the principle in section 28 of the *Constitution*, which provides that "a child's best interests are of paramount importance in every matter concerning the child". It has been noted that it is not an easy exercise to determine the best interest of the child. Further, the question is exacerbated by the fact that the issue has not been given exhaustive treatment in South African, foreign or international jurisprudence.³⁷ Furthermore, the wording does not prescribe the range of factors that must be considered in determining what constitutes the child's best interests.³⁸ The imprecision that surrounds the concept has led one of the commentators to declare that it is indeterminate and working with it is similar to exercising "Solomonic judgment."³⁹ The other difficulty about the principle is that "what is best for a specific child or children cannot be determined with absolute certainty".⁴⁰ This is aptly summed up in the Constitutional court judgment in *S v M*.⁴¹ There Sachs J acknowledged the indeterminacy of the notion of "the best interest of the child" and stated that it provides little guidance to those given the task of applying it. The learned Justice held that:

... it is necessary that the standard should be flexible as individual circumstances will determine which factors secure the best interests of a particular child. Furthermore, the list of factors competing for the core of best interests is almost endless and will depend on a particular factual situation.⁴²

Bennett observed that "according to the conventional wisdom in the 1930s, 1940s and 1950s, customary law had no particular concern with the welfare of children.

³⁶ Article 3(1) *United Nations Convention on the Rights of the Child* (1989).

³⁷ *Minister of Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC).

³⁸ Kaime *African Charter* 110.

³⁹ Mnookin 1975 *LCP* 226.

⁴⁰ Mahlobogwane 2010 *Obiter* 233; Heaton 1990 *THRHR* 96-97.

⁴¹ *S v M* 2008 1 SA 232 (CC) para 24.

⁴² *S v M* 2008 1 SA 232 (CC) para 24.

Instead its emphasis lay on deciding to which family a child should be affiliated".⁴³ It is a pity that even today the best interests of the child and the wishes of the child are not taken into consideration by those communities that practice the custom of *theleka* as a way of enforcing *lobolo* agreements.

The failure to consider the best interests of the child and the wishes of the child conflicts with the provisions of the *Convention on the Rights of the Child*, which emphasises the significance of considering the opinion of a child when determining his or her best interests. The Convention stipulates that:

1 States parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2 For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.⁴⁴

Similarly, the *European Convention on the Exercise of Children's Rights*⁴⁵ stipulates that a child:

Considered by internal law as having sufficient understanding shall in judicial proceedings affecting him be granted and be entitled to request the following rights:

- a) To receive all the relevant information;
- b) To be consulted and express his or her own views;
- c) To be informed of the possible consequences of compliance with these views and the possible consequences of any decision.

⁴³ Bennett 1999 *Obiter* 146.

⁴⁴ Articles 12(1) and (2) *United Nations Convention on the Rights of the Child* (1989). The provisions of the latter article have been incorporated in s 10 of the *Children's Act* 38 of 2005, which provides that: "every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has a right to participate in an appropriate way and views expressed by the child must be given due consideration". In a similar vein, section 31 deals with major decisions involving the child and stipulates that: (i)(a) Before a person holding parental responsibilities and rights in respect of a child takes any decision contemplated in paragraph (b), that person must give due consideration to any views and wishes expressed by the child, bearing in mind the child's age, maturity and stage of development.

⁴⁵ Article 3 *European Convention on the Exercise of Children's Rights* (1996) (South Africa is a signatory of the Convention).

The *African Charter on the Rights and Welfare of the Child*⁴⁶ also protects the best interests of the child⁴⁷ in similar terms to those provided by the *United Nations Convention on the Rights of the Child*. It provides that the views of the child have to be taken into consideration in matters affecting the child as follows:

In all judicial or administrative proceedings affecting a child who is capable of communicating his or her own views, [an] opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law.⁴⁸

The provisions of the latter international and regional human rights instruments lead to an inference that the custom of *theleka* conflicts with them. The consideration of the child's opinion in matters affecting him or her is of crucial importance because it enables the court to be acquainted with the child's needs, problems and aspirations, the kind of relationship he has with each parent, and the child's personality.⁴⁹ In order for the opinion of a child to be considered, his or her age⁵⁰ and maturity⁵¹ have to be considered too.

The following section discusses whether *theleka* custom constitutes abduction or not.

⁴⁶ Adopted in Addis Ababa, Ethiopia on 11 July 1990 and entered into force on 29 November 1999.

⁴⁷ Article 4(1) *African Charter on the Rights and Welfare of the Child* (1990).

⁴⁸ Article 4(2) 4(1) *African Charter on the Rights and Welfare of the Child* (1990); see also a 19(1) which provides that "... no child shall be separated from his parents against his will, except when a judicial authority determines in accordance with the appropriate law, that such separation is in the best interest of the child".

⁴⁹ Grossman and Scherman 2005 *Fam L Q* 557.

⁵⁰ *Greenshields v Wyllie* 1989 4 SA 898 (W); *Oppel v Oppel* 1973 3 SA 675 (T); *Mathews v Mathews* 1983 4 SA 136 (SE). In these cases the courts were inclined to consider the age of the child rather than the maturity.

⁵¹ *McCall v McCall* 1994 3 SA 201 (C); *Martens v Martens* 1991 4 SA 287 (TPD); *Meyer v Gerber* 1999 3 SA 550 (O). In these cases the courts decided to consider the maturity of the child rather than the age.

5 Does *theleka* constitute abduction?

Snyman defines abduction as:

[a] person, either male or female, commits abduction if he or she unlawfully and intentionally removes an unmarried minor, who may likewise be either male or female, from the control of his or her parents or guardian and without the consent of such parents or guardian, intending that he or she or somebody else may marry or have sexual intercourse with the minor.⁵²

The *theleka* custom does not constitute abduction, because the action of the father or guardian of the wife to resort to *theleka* custom as a way of enforcing *lobolo* is not unlawful and it is permitted in those communities practising it. The intention of a person practicing *theleka* custom is to enforce *lobolo* agreement and not to marry or have sexual intercourse with the minor. Therefore, the argument that *theleka* custom constitutes abduction is not persuasive. It is submitted here that *theleka* custom does not constitute abduction.

The following section will discuss whether the custom of *theleka* constitutes family violence or not.

6 Does *theleka* constitute family violence?

The following acts are recognised as domestic violence in the *Domestic Violence Act*:⁵³ physical abuse; sexual abuse; emotional, verbal and psychological abuse; economic abuse; intimidation; harassment; stalking; damage to property; entry into complainant's residence without consent, where the parties do not share the same residence; any other controlling or abusive behaviour towards a complainant, where such conduct harms, or may cause imminent harm to, the safety, health or wellbeing of the complainant.

⁵² Snyman *Criminal Law* 403.

⁵³ Section 1(viii) *Domestic Violence Act* 116 of 1998 (hereafter "the *Domestic Violence Act*").

In the light of this definition the challenge is that some husbands believe that they are entitled to chastise or assault their wives physically because they paid *lobolo* for them.⁵⁴ Assault is a form of physical abuse that constitutes family violence.⁵⁵ The belief that it is permissible to assault or chastise women is exacerbated by a change in the practices regarding the payment of *lobolo*: nowadays grooms usually pay *lobolo* from their own pockets, rather than having their families pay *lobolo* for their first wives.⁵⁶ This tendency has led to the limitation of the groom's family's ability and willingness to intervene in the marriage and to end family violence.⁵⁷ Curran and Bonthuys⁵⁸ have aptly argued that the vulnerability of women to family violence has increased, as follows:

Because *lobolo* is paid to wives' fathers and is often spent shortly after being received, wives' families may be reluctant to allow them to return home when they suffer domestic violence because of their inability to return the *lobolo* to the husband. Thus women's own families may collude with violent husbands to trap them in abusive marriages.⁵⁹

On the other hand, *theleka* custom serves as a way of stopping family violence. It is practiced when the husband has ill-treated his wife, especially by seriously assaulting her. The father or guardian of the wife may request a beast as damages from his son-in-law if the latter has assaulted his wife. The beast paid may be in excess of the *lobolo* originally specified. This purpose of *theleka* custom is good, because it reduces instances of family violence by demanding that the wrongdoer (the husband) has to pay damages if he has assaulted his wife.

It is noted that, despite its advantages, the custom has weaknesses. This is because the payment of one beast or two as damages for assaulting a wife might not be too difficult a fine for rich men. Thus a rich man could assault his wife repeatedly knowing that he will be able to afford to pay damages. This eventually might expose

⁵⁴ Bennett *Customary Law* 251.

⁵⁵ See also s 1(xvi) of the *Domestic Violence Act*.

⁵⁶ Bennett *Customary Law* 228, 230.

⁵⁷ Curran and Bonthuys 2005 *SAJHR* 616-617.

⁵⁸ Curran and Bonthuys 2005 *SAJHR* 616-617.

⁵⁹ Curran and Bonthuys 2005 *SAJHR* 616-617.

rural women to family violence despite the practice of *theleka* custom, which is otherwise designed to protect them.

The chastisement of a wife by her husband is a family matter that is generally regarded as a private matter and is not meant for the eyes and ears of outsiders, and communities disapprove of women who resort to public forums to deal with domestic violence.⁶⁰ A wife would therefore approach a traditional court only as a last resort. This is exacerbated by the fact that the *Domestic Violence Act*, which aims to provide speedy, effective and accessible relief to various complainants,⁶¹ seems to be an unfulfilled dream to rural women. This is because it can be enforced only by Magistrate Courts and Family Courts⁶² and traditional courts have no authority to issue protection orders. This poses problems because there are approximately 1500 traditional courts operating in South Africa.⁶³ It is argued that rural women under the jurisdiction of these traditional authorities might be limited by linguistic and economic reasons from accessing Magistrates' Courts and Family Courts. This weakness is a matter of serious concern "if one considers the fact that almost 32 per cent of South Africa's traditional communities of about 35 million people live in the rural areas and therefore fall under the authority of traditional authorities".⁶⁴ As a result, it is submitted that there is a need to extend the authority to impose protection orders to traditional courts. At the same time it is also submitted that the custom of *theleka* does not constitute family violence.

The following section discusses what should be done about *theleka* custom in order for it to accord with the *Constitution*. As will be seen, it will be argued that the *theleka* custom ought to be developed.

⁶⁰ Lempert 2003 *Agenda* 89-100.

⁶¹ See the preamble of the *Domestic Violence Act*.

⁶² See the definition of a court in s 1 of the *Domestic Violence Act*.

⁶³ Bennett *Customary Law* 141; clause 16(1) of Schedule 6 of the Constitution.

⁶⁴ Rautenbach 2005 *SAJHR* 334.

7 Development of *theleka* custom

It is noted that the *Constitution*⁶⁵ protects the right to culture in numerous provisions which refer to the cultural diversity of the South African population. The preamble to the *Constitution*, for instance, clearly refers to the diversity of the South African population. The *Constitution*⁶⁶ prohibits unfair discrimination on the grounds *inter alia* of culture. In addition the *Constitution*⁶⁷ provides for the protection and the promotion of the rights of traditional, religious, cultural and linguistic communities. It also provides for the establishment of a Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities⁶⁸ and chapter 12 deals with the recognition and role of traditional leaders. It is crucial to note that all of the constitutional provisions dealing with the promotion and protection of the right to culture and religion are subject to the values that underlie the *Constitution*. In order for the latter rights to have meaning and true protection there is a necessity to start by developing a customary rule in accordance with the *Constitution* whenever possible, and to use abolition only as a last resort.

Section 39 of the *Constitution* provides that:

- 1 When interpreting the Bill of Rights, a court, tribunal or forum-
 - (a) Must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
 - (b) Must consider international law; and
 - (c) May consider foreign law
- 2 When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and object of the Bill of Rights.
- 3 The Bill of Rights does not deny the existence of any other right and freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

⁶⁵ Sections 30, 31, 211 and 212 of the *Constitution*.

⁶⁶ Section 9(3) of the *Constitution*.

⁶⁷ Sections 15, 30 and 31 of the *Constitution*.

⁶⁸ Sections 185 and 186 of the *Constitution*.

The court's obligation as provided in the above section is emphasized in the case of *Carmichele v Minister of Safety and Security*,⁶⁹ where the Constitutional Court held that:

The obligation of courts to develop common law in the context of the section 39 objectives is not purely discretionary. On the contrary, it is implicit in section 39(2) read with section 173 that where the common law as it stands is deficient in promoting the section 39(2) objectives, the courts are under a general obligation to develop it appropriately.

The *Carmichele* case applies equally to the development of customary law. When a customary law rule deviates from the spirit, purport and object of the Bill of Rights, courts have an obligation to develop it so as to remove such deviation.⁷⁰ The development of customary law is important because "once a rule is struck down, that is the end of that particular rule, yet there may be many people who observe the rule".⁷¹ *Theleka* custom is still practised in some communities⁷² and it serves a twofold purpose, namely the enforcement of *lobolo* and the prevention of violence directed against married females.

Despite the good intentions underlying the *theleka* custom, it violates the best interests of the child because the voice of the child is not heard when the child is held under *theleka*, particularly in that it may interfere with the educational rights of the child.

8 Conclusion

As has been argued above, the rights of a child are still severely affected and not taken into consideration in those communities that practice the custom of *theleka*. It is submitted in this article that the custom of *theleka* as it is practised at present

⁶⁹ *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) para 39.

⁷⁰ *Bhe v Magistrate, Khayelitsha; Shibi v Sithole; SA Human Rights Commission v President of RSA* 2005 1 BCLR 1 (CC) para 215.

⁷¹ *Bhe v Magistrate, Khayelitsha; Shibi v Sithole; SA Human Rights Commission v President of RSA* 2005 1 BCLR 1 (CC) para 215.

⁷² Rautenbach, Bekker and Goolam *Introduction to Legal Pluralism* 57.

impacts on the custody of children and clashes with the provisions of the *United Nations Convention on the Rights of the Child*,⁷³ the *African Charter on the Rights and Welfare of the Child*,⁷⁴ the *European Convention on the Exercise of Children's Rights*⁷⁵ and the *Constitution* of South Africa.⁷⁶ This conclusion is made here because the best interests of a child and the opinion of the child are not taken into consideration when practicing *theleka* custom, while the international instruments mentioned above emphasise that the views of a child have to be considered in matters affecting him or her. It is submitted that *theleka* custom needs to be developed to consider the opinion and wishes of the child in order for it to be in line with the *Constitution*. This article has drawn an inference that *theleka* custom neither constitutes abduction nor family violence and that the practice should be allowed to continue.

⁷³ Article 12(1) and (2) *United Nations Convention on the Rights of the Child* (1989).

⁷⁴ Articles 4(2) and 19(1) *African Charter on the Rights and Welfare of the Child* (1990) (South Africa is a signatory).

⁷⁵ Article 3 *European Convention on the Exercise of Children's Rights* (1996).

⁷⁶ Section 28(2) of the *Constitution*.

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List of abbreviations

CILSA	Comparative and International Law Journal of Southern Africa
Fam L Q	Family Law Quarterly
LCP	Law and Contemporary Problems
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SALRC	South African Law Reform Commission
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg / Journal for Contemporary Roman-Dutch Law