A Study of Complex and Unfamiliar Customary Marriage Outside the Recognition of Customary Marriages Amendment Bill*:
Distortion of a Traditional Customary Marriage

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1. INTRODUCTION

1.1 Brief background, objectives and parameters of the research

The African concept of *go nyalela mosadi lapa* in Sepedi or *u malela musadzi muta* in Tshivenda is one of the various forms of customary marital associations¹ and finds expression in the day-to-day cultural practices, rituals and traditions of African Black people.² Basic information on the concept of *go nyalela mosadi lapa* may be gleaned mostly from ethnographic, sociological and anthropological academic commentaries.³ There has been very little analysis of this dynamic institution in the South African legal field despite its great relevance to subjects like marriage and family law.⁴ Consequently, it is the authors’ effort to deconstruct and demystify this institution, and bring it to enhance familiarity and understanding in the legal profession.

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¹ Draft Recognition of Customary Marriages Amendment Bill of 2009 (“RCMA Amendment Bill”).
² Customary law has a variety of cultural marriage institutions, including the so-called surrogate/sororate marriage (*se ya ntlo* in Sepedi or *ukuvusa* in isiZulu), levirate marriage (*ukungena* in isiZulu) - this marriage is mandated by the Bible in Deuteronomy 25:5-6 & 9-10 and conventional customary marriage (monogamous and polygamous marriages) as recognized in terms of the Recognition of Customary Marriages Act 120 of 1998.
³ Bennett TW *Customary Law in South Africa* (2004) 198 – 199 noted that this type of marriage is commonly practice amongst the Pedi, Venda, Lovedu and Zulu societies in South Africa.
⁴ This institution was not given much serious study until it was published within anthropological community in the 1930s by Krige “Note on the Phalaborwa and their morula complex” 1937 *Bantu Studies* 357.
A very large body of existing and related literature dealing with the concept of go nyalela mosadi lapa is mostly confined to interpretation by non-African writers. This has presented a challenge in finding reliable information on this marriage practice; as accurate translation that captures the true meaning of go nyalela mosadi lapa was burdened with misunderstanding and distortion. Generally, this marriage practice has been carelessly and erroneously described or translated into an English language as referring to a “woman marriage or marriage involving a female husband or woman-to-woman marriage”. These translated terms are confusing as they imply and advance a notion that there is lesbianism within the marriage practice of go nyalela mosadi lapa. In other words, that customary law tolerates or accommodates same-sex marriages in the form of go nyalela mosadi lapa marriages. These terms provide a legitimate niche for what would be called in postmodern parlance “same sex marriage”.


8 Zabus “Of female husbands and boarding school girls: gender bending in Unoma Azuah’s fiction” 2008 RESEARCH IN AFRICAN LITERATURES 93 96.
It is our contention that the cultural circumstances of this concept were not sufficiently explored or understood, hence the translated English phrase fails to reflect the true perception or understanding and identities of the African concept of *go nyalela mosadi lapa*. For that reason, the key argument advanced in this paper flows from a linguistic perspective. *Go nyalela mosadi lapa* was forced into the concept of same-sex marriage, instead of being translated into equivalent English terms that denote the actual customary marriage that it is. This approach clearly distorts and impedes the recognition and development of this institution. Important differences between *go nyalela mosadi lapa* and woman-to-woman marriage have been observed. It is not clear why *go nyalela mosadi lapa* marriage practice was given the English terms and semantic value that it now bears.

This paper will illustrate how a poor and unfortunate translation of *go nyalela mosadi lapa* marriage practice has changed its original meaning and content to a lie and effected its incorrect and misunderstood modern interpretation. This paper also seeks to deconstruct the institution of *go nyalela mosadi lapa* as a legitimate form of customary marriage with a view to distinguishing it from the practice of woman-to-woman marriage or same-sex marriage. In other words, there is *go nyalela mosadi lapa* which is a legal traditional form of customary marriage on the one hand woman-to-woman marriage on the other. The former has got nothing to do whatsoever with the latter. In addition, this paper aims to record the true African version of this marriage practice and rehabilitate misunderstanding and misrepresentation of this institution. In criticising and rejecting the notion of woman-to-woman marriage as *go nyalela mosadi lapa* we do not in any way suggest that there is no existence of the real practice of woman-to-woman marriages in modern days practised by African tribes living according to customary law.\(^\text{10}\)

Furthermore, this paper will examine *go nyalela mosadi lapa* marriage within the South African legal framework. In particular, it will focus on the Recognition of Customary Marriages Act (“RCMA”),\(^\text{11}\) a statute that purports to regulate customary marriages. Sadly, the RCMA appears badly equipped to allow for the accommodation of a range of customary marriages. The Act was

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simply equated with civil marriage. It retains and reinforces a single homogeneous cultural version of customary marriage at the expense of other wide ranging forms of customary marriage. The RCMA gives legal recognition to customary marriages conducted according to indigenous law involving heterosexual couples (this includes both monogamous as well as polygamous marriages), but does not include other forms of marriages which are recognised by African societies under customary law. It makes no express provision for either woman-to-woman marriage or go nyalela mosadi lapa, or several other various forms of customary marriage practices in African societies. The status of these marriages remains unaddressed in the RCMA thus raising the question of whether the non-listing of various customary marriages accommodates all different African marriage practices.

The authors argue that for the reasons that other forms of customary marriage practices manifest different and unique features from the recognised conventional customary marriage in terms of the RCMA, there is thus no leeway to interpret the Act in this fashion. Secondly, it is suggested that the limitation of the Act to only one form of customary marriage infringes on the rights of the parties that have entered and concluded other forms of customary marriages and exclude such parties and children born from such marriages from the benefits our Constitution bestows. The Act poses a threat to the right and welfare of these women and children because it is unaccomodating for failing to be precise in listing all range of marriage practices in African societies, in particular go nyalela mosadi lapa marriage practice.

While same-sex marriages have gained legal recognition in fulfilment of the constitutional dispensation preventing unfair sexual and gender discrimination, go nyalela mosadi lapa as a traditional customary marriage is phasing into legal oblivion. Its rightful space in the RCMA is being subsumed in the institution of same-sex marriage through mistranslation. The Draft

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14 e.g. surrogate and levirate marriages.
16 same-sex marriages were legalized by way of Civil Union Act 17 of 2006. The legislation was adopted as a direct result of the case of Minister of Home Affairs v Fourie 2006 1 SA 542 (CC).
Recognition of Customary Marriages Amendment Bill, 2009 (“RCMA Bill”)

is now proposing the permission to convert and register customarily concluded marriages as civil unions or civil partnerships under the Civil Union Act. There is no attempt in the RCMA Bill to introduce and give legal recognition to go nyalela mosadi lapa as the traditional form of customary marriage. To the extent that the proposed inclusion of same-sex marriages provision in the RCMA Bill is intended to accommodate go nyalela mosadi lapa, this paper submits that such inclusion is based on purely incorrect premises. Its effect will be distortion of go nyalela mosadi lapa as an equivalent of same-sex marriage. Therefore, this article argues that the recognition of go nyalela mosadi lapa is long overdue but not in the current guise of same-sex marriage. The RCMA Bill objectives should be the recognition of all forms of legitimate customary marriages. Same-sex marriage or woman-to-woman marriage is already recognised under the Civil Union Act.

1.2 Methodology - Data collection, procedure and techniques

The authors’ analysis is based on an empirical research carried out in 2012 amongst the Pedi people living in Limpopo Province. Interviews of people who had broad knowledge and practices of this marriage were used to effect data collection, particularly women married in accordance with this marriage practice, ministers of religion as they were confronted with requests to register these marriages and the elderly people as we know that they were the teachers of the clan - they conveyed African cultures and practices to the young generation. We made use of open–ended questions in these interviews. Open-ended questions are recommended in a qualitative approach type of acquiring information. They are more narrative orientation and allow a natural or relaxed setting or environment. They do not confine the interviewee. They enable him/her to give as much information as possible. Most importantly, these interviews do not contain secondary interpretations of the cultural concept of go nyalela mosadi lapa but the narratives of Africans themselves. Before embarking on the study of the distortion of this marriage practice, it is important to have some preliminary knowledge on the nature of the institution of go nyalela mosadi lapa.

2. UNDERSTANDING THE CONCEPT OF GO NYALELA MOSADI LAPA

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18 Civil Union Act 17 of 2006.
2.1 Definition, purpose and conclusion of *go nyalela mosadi lapa*

*Go nyalela mosadi lapa* is one of the oldest forms of traditional customary marriage. From its inception, this marriage has never been a popular form of traditional marriage. It emanates as a result of peculiar circumstances which makes it a special kind of marriage and therefore requires specific appreciation. This marriage is used as an intervention to save or revive a family name facing extinction. In its untainted customary law, *go nyalela mosadi lapa* is resorted to where there is no one within a family/kraal to carry and continue with a family name in the form of procreating and raising offspring. Various factors may be at play which contributes to the absence of biological family member to carry the family name. These factors may include but not limited to:

- Death of the family head survived by the wife only; or
- Death of the family head survived by wife and married daughters only; or
- Childless woman with no brothers or sisters; or
- Purely childless or barren woman or couple.

*Go nyalela mosadi lapa* can thus be defined as a traditional form of marriage in which a woman is married into a family (*lapa/house/kraal*) to revive and continue with the family name of her newly parent-in-law. It must be pointed out that this form of marriage does not result in the bride becoming a couple to a parent-in-law or becoming someone’s wife. In this form of traditional marriage, upon the consent of the prospective bride to become *mosadi wa lapa*, the prospective parent-in-law pays *lobola/magadi* for the prospective bride. Thus the marriage is then celebrated and concluded between the bride’s family and her parent-in-law. Upon the conclusion of the marriage, the bride becomes the daughter-in-law of her newly parent-in-law. The conclusion of this marriage follows practically the procedure as in the case of a valid conventional customary marriage.

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21 Bonhuys “Race and Gender in the Civil Union Act” (2007) *SAJHR* 526 533; Bonhuys “Possibilities Foreclosed: The Civil Union Act and Lesbian and Gay Identity in Southern Africa Sexualities” [http://sex.sagepub.com/content/11/6/726](http://sex.sagepub.com/content/11/6/726) (last accessed 15-11-2012) makes mention of a widow marrying another woman in instances where her husband died without leaving offspring.
24 The absence of intercourse was confirmed by Smith Oboler 1980 *ETHNOLOGY JOURNAL* 69 88; Bonhuys “Possibilities Foreclosed: The Civil Union Act and Lesbian and Gay Identity in Southern Africa Sexualities” [http://sex.sagepub.com/content/11/6/726](http://sex.sagepub.com/content/11/6/726) (last accessed 15-11-2012); Zabus 2008 *RESEARCH IN AFRICAN LITERATURES* 93 95.
marriage. All various requirements for conclusion of a valid customary marriage, e.g. consent of the bride, negotiation with her family, payment of magadi (ilobolo), exchange of gifts, transfer of the bride and celebration of the wedding are also observed. But the bride does not become the wife of or become a couple to her parent-in-law. Go nyalela mosadi lapa is not a marriage between one woman and another. The fact that the parent-in-law is a woman and magadi (ilobolo) and other customary dues are paid by her is of no consequence. No sexual relationship ever arises from this form of marriage between the bride and her parent-in-law. The moment sexual relationship arises from this marriage, it ceases to be go nyalela mosadi lapa” and becomes some form of non-traditional customary marriage.

2.2.1 Customary role of the woman married for lapa/house/kraal

Customary law imposes a duty upon the woman married for lapa to ensure the continuation of the family name of her newly parent-in-law. If the woman already has children, in most cases women married for a house have children, her children automatically assume the surname of their newly family. It is these children who will continue and pursue the heritage of their newly family, if any. Their traditional or African names, if any, will resemble those of their newly family name. The woman and her children then become the direct descendants of their newly family or the parent-in-law. Contrary to earlier reports that the woman relinquished her parental rights over her children in favour of her parent-in-law, none of our studies has found any truth to this record.

Equally, customary law allows for a young woman who has attained the age of majority but does not yet have a child or children to be married for lapa. Her role will equally be to continue with the family name of her parent-in-law. However, there will be an expectation upon this woman at certain stage of her life to procreate children for her newly family. The sole reason of marrying her for lapa is to ensure that there is a continuity of the family name. Continuity without procreating children will not be achieved. In pursuing family continuity, a woman married for lapa should ideally be free to choose her own sexual partner. However, in practice, a suitable,

26 Krige 1974 JOURNAL OF THE INTERNATIONAL AFRICAN INSTITUTE 44
specially chosen male partner is normally suggested to the daughter-in-law. Bekker gives an account of such marriage process among Venda tribe. He wrote:

a Venda wife may, with her own property, furnish lobolo for and marry a woman who is regarded as her wife, but who is ngena’d by a select male consort; this consort is usually her own son or, if she has none of suitable age and status, her brother or other near relative of her father and mother, chosen as far as possible in order of seniority.\(^{28}\)

This partner has no rights of any kind in respect of the bride or the children. He has no parental rights or obligation to maintain the children and the bride. Customary law makes no provision for a male to conclude and celebrate this form of marriage. The moment males are allowed to conclude this form of marriage, there is greater risk that they may seek \textit{consortium omnis vitae}\(^{29}\) and therefore negate the essential purpose of this form of marriage. However, there may be instances where it can be shown that the male parent-in-law is impotent to even contemplate such possibility and therefore unjustifiable to prohibit the male species to marry a woman for \textit{lapa}. Just like any other marriage, \textit{go nyalela mosadi lapa} will face the prospect of being developed by the judiciary in accordance with the constitutional principles prohibiting, amongst others, unfair sexual and gender discrimination.\(^{30}\)

3. \textbf{LITERATURE ACCOUNT OF MARRYING A WOMAN FOR \textit{LAPA/HOUSE/KRAAL}}

A large volume of literature on the subject of \textit{go nyalela mosadi lapa} marriage custom exists but contains distorted information. As early as 1948, one researcher, Warmelo and Phophi revealed that in customary law a woman may also marry a woman.\(^{31}\) However, the learned authors did not reveal much on the purpose of this marriage. Instead they offered speculative reason why the family of a bride would agree to their daughter entering into this type of a customary marriage. They wrote: “In olden times […] the big consideration was to get hold of cattle. Since the girl could not choose her own husband, any place where the parents could get cattle would be a home

\(^{28}\) Bekker 147.

\(^{29}\) With reference to \textit{Best v Samuel Fox} 1952 ALL ER 394, consortium can be explained as companionship, love, affection, comfort, mutual services, sexual intercourse – all belong to a married state. Also see \textit{Grobelaar v Havenga} 1964 (3) SA 522 (N) 525; \textit{Peter v Minister of Law and Order} 1990 (4) SA 6 (E) 9F.

\(^{30}\) s 9(3) of the Constitution.

\(^{31}\) Oomen 2000 \textit{THRHR} 274-275.
This account of the so-called woman-to-woman marriage reduces *go nyalela mosadi lapa* marriage to some form of commercial marriage. It has no regard to the true nature of the marriage and exposes the bride as an object for commercial gain by her natural parents. Indeed, it defies logic why customary law would use marriage as a form of amassing wealth. It only reinforces stereotype that regard *ilobolo* as bridewealth.\(^{33}\) Be that as it may, the most prominent reporting of the existence of this traditional form of marriage was revealed in 2000 by Oomen.\(^{34}\) It must be emphasised that the learned author became aware of the existence of this form of marriage not through research on the subject but by accidentally stumbling upon it while conducting other field research. Therefore it should come as no surprise when she relied only on one case involving, according to her, “Mrs Matjageng and her wife” residing in Mamone in the Sekhukhune area.\(^{35}\) She wrote:

On August 4, two women and their respective families appeared at a meeting of the royal family. Mrs Matsageng told the men present that she had married a younger woman and had paid the full magadi (bridewealth) of two goats. It was a marriage for the lapa, the homestead: the old woman was childless and had no brothers. Through this marriage the younger woman’s children would become hers and thus carry on the family name. But the relationship had turned sour. The female husband complained that her wife had insulted her by calling her ‘barren’. The young wife, in turn, lamented that the old lady did not pay the children school fees.”\(^{36}\) Added Oomen: “The female husband (called mmakgolo - grandmother) was severely reprimanded\(^{37}\)

Oomen’s entire account of this traditional form of marriage is what Linda Smith termed “traveller’s tales”.\(^{38}\) Travellers’ tales is simply what Western researchers and intellectuals assume to know all that is possible to know of indigenous people, on the basis of their brief encounters with some of those indigenous people.\(^{39}\) This is not far from the truth as Oomen’s description of this traditional form of marriage is riddled with impossibilities. Oomen correctly called Mrs Matjageng - a grandmother (*makgolo*). The same grandmother is then referred to as a female husband. This is done to show that the young woman was her wife. Oomen’s description

\(^{32}\) *ibid.*  
\(^{34}\)Oomen 2000 *THRHR* 274.  
\(^{35}\) *ibid*  
\(^{36}\)Oomen 2000 *THRHR* 274-275.  
\(^{37}\) *ibid.*  
\(^{39}\) Linda Tuhiwai Smith 1.
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fails to understand and appreciate the importance of calling Mrs Matjageng a grandmother. By calling her grandmother, the community entails that the old woman is by no means an equivalent of a spouse or a partner to a young woman. Instead the young woman becomes the old lady’s daughter or granddaugther-in-law. However, as Linda Smith pointed out, “indigenous people have often allowed their histories to be told and have then become outsiders as they hear their stories being told”. This is exactly what transpired in Oomen’s description of this type of marriage. The young woman and her parent-in-law, Mrs Matjageng, are referred to as wife and female husband respectively or a couple. This misconception is also entrenched in section 3(1) of the Reform of Customary Law of Succession and Regulation of Related Matters Act. This section has created a certain group of women to qualify as spouses for purposes of intestate succession. Section 2(2)(c) read together with section 3(1) of the Act adopts an inclusive conception of the term “spouse” for the purposes of intestate succession by providing that any: “women who was married to another woman under customary law for the purpose of providing children for the deceased [woman’s] house, . . . , if she survives the deceased, [must] be registered as a descendant of the deceased.”

Supplementary, Oomen regarded the young woman’s children as Mrs Matjageng’s children. This should not be misinterpreted to mean that Mrs Matjageng becomes the father of the aforesaid children. Nowhere would customary law ever allow the children to call any woman or Mrs Matjageng in this case their father. The children become Mrs Matjageng’s grandchildren. Furthermore, the children cannot call Mrs Matjageng their mother because that is not the truth. Mrs Matjageng is their grandmother and nothing more, nothing less. Imperfect as it is, Oomen’s description of go nyalela mosadi lapa makes it explicit that this form of marriage is different from same-sex marriage. Indeed, her article acknowledged this fact by emphatically stating that go nyalela mosadi lapa and same-sex marriage are two totally different marriage institutions.

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40 Linda Tuhiwai Smith 33.
42 see Huber “Woman marriage in some East African Societies” 1969 ANTHROPOS 745 746, who dismisses the notion of referring to parent-in-law as female husband.
43 Oomen 2000 THRHR 280.
4. EXPLOITATION OF GO NYALELA MOSADI LAPA MARRIAGE

4.1 “Care-giver”
With passage of time go nyalela mosadi lapa was exploited and started being used as care-giver to/by elderly couples living alone due to marriage or death of their daughters and/or sons. It must be emphasised that this is an exploitation of go nyalela mosadi lapa marriage as the intention here is clearly to provide some form of adult care giver to the elderly parents. This exploitation of go nyalela mosadi lapa marriage is rejected at the outset as it is has no cultural or traditional basis for its existence and amounts to oppression of the poor. If the elderly couples require care, they are at liberty to move to centres providing care for the elderly. No single woman should be married in the name of go nyalela mosadi lapa marriage only to find herself being married to care for the elderly.

4.2 Wealthy women marrying other women for purpose of household labour
Go nyalela mosadi lapa practice was furthermore unlawfully abused by wealthy women as a strategy to further their social and economic positions in society. Krige described woman marriage as a “flexible institution that can be utilised in a number of different ways to meet a number of different situations.” For example, a wealthy woman or a woman occupying a position of power would advance her position by marrying another woman in the name of go nyalela mosadi lapa to provide household labour. It is the authors’ contention that this is another form of abuse of go nyalela mosadi lapa, which is contrary to the rule or practice of this marriage.

5. DISTINGUISHING GO NYALELA MOSADI LAPA FROM OTHER RANGE OF CUSTOMARY MARRIAGES

5.1 Surrogate marriage
An institution of customary marriage that needs to be set apart from go nyalela mosadi lapa is that of surrogacy marriage practice. Surrogate marriage is a type of marriage where a married woman is infertile or dies young and her family substitutes a female relative to bear children for

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46 Cadigan 1998 JOURNAL OF COMPARATIVE FAMILY STUDIES 98.
the husband.\(^47\) In this case the children will belong to the husband and her infertile/deceased wife. The surrogate mother has no parental rights whatsoever over the children. The bride, in the case of go nyalela mosadi lapa practice does not relinquish control, guardianship or any parental rights over her existing or future children. The children remain the bride’s children and attain the status of the childless woman’s or parent-in-law’s grandchildren.

### 5.2 Ancestral wives

A clear account of woman-to-woman marriage is reported to be in existence in the shadow world of traditional healers affectionately known as sangomas. Shadow world in the sense that the healing practices of sangomas has proved to be beyond the comprehension of modern science. Its knowledge is acquired not only by training, but is bestowed by ancestors. Ancestral believe is paramount to the existence and success of the profession of sangomas as healing and resolving of mysterious issues is guided by the revelation received from ancestors. One may add, in this shadow world, forefathers are not considered dead when buried but are laid to rest/sleep. In sleep, one is capable of waking-up and communicating with descendants. This background is essential to usher the account of woman-to-woman marriage as revealed by Nkabinde, a trained journalist, qualified sangoma and now an author.\(^48\) Nkabinde’s account, as it would appear in the subsequent discussion, is chosen solely because her research account is relied upon by proponents of same-sex marriages in customary law as providing evidence of the existence of woman-to-woman marriages. Having completed the training to become a sangoma, Nkabinde reveals that her male ancestor, Nkunzi, instructed her to marry a wife. She wrote in parts:

\[
\text{That night he came to me in the form of a dream and he told me, 'you don’t have to stay with that woman or have sex with her. You just have to take the powers that she is giving you before she dies.'}
\]

\[
\text{And I said, ‘if it is like that, I will do what you say but don’t say I should marry her.}\]

Continued Nkabinde:

\(^48\) Nkabinde *Black bull, ancestors and me: My life as a lesbian sangoma* (2008). The author was a leading researcher in same-sex sangomas and authored a chapter on this research - see Nkabinde “‘This has happened since ancient times …it’s something that you are born with’: Ancestral wives amongst same-sex sangomas in South Africa” in Morgan and Wieringa *Tommy Boys, Lesbian Men and Ancestral Wives: Female Same Sex Practices in Africa* (2005) 231.
\(^49\) *ibid.*
After a few days I went back to the old woman’s house and talked to her […] Nkunzi had appeared in her dreams and told her that he wanted her as a wife and she must leave her powers with me. She told me, ‘there are things I have to leave with you.’ She had to perform another ceremony […] So that day I took her as an ancestral wife.\(^\text{50}\)

Later Nkabinde wrote: “When she passed away, her family called me and I went with them and buried her. We did a ceremony and a cleansing and I collected some more of her things, including some traditional cloths”.\(^\text{51}\)

Apart from mentioning that she took the old woman as her ancestral wife, nowhere does Nkabinde mention any conclusion of a customary marriage which is accompanied by payment of ilobolo. It appears that marriage process never occurred between the respective parties. Reliance on this form of arrangement in support of contention for existence of woman-to-woman marriage has no basis. Nothing above shows the existence of marriage between two women, though Nkabinde does provide other accounts of female sangomas engaged in woman-to-woman relationship. It must be said that those relationships have all the hallmarks of same-sex relationship. In describing one of those relationships, Nkabinde wrote: “After leaving training [to become a sangoma], Sindi lived the life of a lesbian. She has a relationship with a woman called Vumidlozi and she also has an ancestral wife for her male ancestor, Masango. She told me” (emphasis added).\(^\text{52}\) If there was any suspicion that even Nkabinde herself was involved in a same-sex relationship, such doubt is erased in one of her chapters when she wrote: “When my trainer and my elders saw me at sangoma ceremonies with my girlfriends and heard about my relationships with women, they were not happy”.\(^\text{53}\) As mentioned, the purpose here is not to dismiss the existence of woman-to-woman marriages among African tribes living according to customary law but to point out that where such marriages exist, there is no discernible difference with same-sex marriages as defined by the Civil Union Act. To equate this type of marriage/relationships with traditional marriage of go nyalela mosadi lapa threatens its correct continued existence and is an alteration of customary law.

5.3 Wives of Queen Modjadji

\(^{\text{50}}\) ibid.  
\(^{\text{52}}\) Nkabinde 86.  
\(^{\text{53}}\) Nkabinde 121.
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Literature is replete with accounts of the custom of Balobedu in which whoever is anointed as Queen Modjadji or popularly referred to as the “Rain Queen”, due to her ancestral superpowers to shower the land with rain, would marry numerous women for her empire.\(^{54}\) While Krige\(^{55}\) is greatly credited with giving accounts of the so-called “wives of Modjadji”, she omitted to unravel the rationale for this unusual course of action, in particular that there have been biological offspring conceived by the Rain Queen at all times. Indeed, the custom of Balobedu would dictate to the reigning Queen Modjadji to ensure that she leaves a biological heir to her throne. At the heart of Queen Modjadji’s kingship lies a traditional council or an advisory body with male figures committed to serve the Rain Queen. Due to poverty and lack of economic means to generate their own wealth, these male figures in the traditional council looked upon Queen Modjadji to provide for their sustenance within her empire. This included paying *magadi* for them. Queen Modjadji would not *willy nilly* pay *ilobolo* for a wife without establishing a need within her empire. Indeed an existence of a bachelor within her traditional council would necessitate Queen Modjadji to marry a wife or wives for him. It is commonly thought that the wife is married by Queen Modjadji and regarded as such, but in reality the wife will be given to a male member of traditional council in need of a wife. In that way, Queen Modjadji was able to expand her empire with wives serving as her servants but more importantly creating sustainable families for her traditional council. Also tribal leaders would give potential wives to Queen Modjadji as a way of strengthening their relationship. In all, various ways existed for Queen Modjadji to acquire and marry female figures as “her wives”. The main responsibility of the wives was to serve the needs of Queen Modjadji’s empire. In recent times, this ancient custom by Queen Modjadji has fallen into disuse as many women prefer to have their own chosen husbands instead of being seen as perpetual subjects in the empire of Queen Modjadi. In addition, lack of economic opportunities makes the practice unsustainable as Queen Modjadji would have been required to cater for the needs of her wives.

6. PREVALENCE OF THE TRADITIONAL MARRIAGE OF *GO NYALELA MOSADI LAPA*

\(^{54}\) Krige 1974 *JOURNAL OF THE INTERNATIONAL AFRICAN INSTITUTE* 11.
\(^{55}\) *ibid.*
As stated above, from its origin, marriage for *lapa*/*house*/*kraal* has never been a popular form of marriage. It has always been a marriage resorted to by few members of the tribal community. Notwithstanding this, empirical evidence shows that this form of marriage is still concluded and celebrated among some African tribes. In the rural areas of Limpopo Province, in an area known as Mahlatjane in Mafefe, under the tribal leadership of Headman/ *Ntona* Mampa, there are four existing families emanating directly from *go nyalela mosadi lapa* practice, as reflected below:

<table>
<thead>
<tr>
<th>Name &amp; (Maiden Surname)</th>
<th>Marital Surname</th>
<th>Children born</th>
</tr>
</thead>
<tbody>
<tr>
<td>Morongwe (Mphofela)</td>
<td>Thobejane</td>
<td>6 (six)</td>
</tr>
<tr>
<td>Matseno (Mokoka)</td>
<td>Seimela</td>
<td>3 (three)</td>
</tr>
<tr>
<td>Moshiane (Mampa)</td>
<td>Mashitoa</td>
<td>3 (three)</td>
</tr>
<tr>
<td>Mmapulane (Makoti)</td>
<td>Thobejane</td>
<td>2 (two)</td>
</tr>
</tbody>
</table>

In an area known as Tswaing village, Ga-Masemola, Limpopo Province, there are numerous families emanating directly from this type of marriage. However, we were only able to interview three families, as reflected below:

<table>
<thead>
<tr>
<th>Name &amp; (Maiden Surname)</th>
<th>Marital Surname</th>
<th>Children born</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mongatane (Nchabeleng)</td>
<td>Serepo</td>
<td>3 (three)</td>
</tr>
<tr>
<td>Rosina (Nchabeleng)</td>
<td>Tsetsewa</td>
<td>4 (four)</td>
</tr>
<tr>
<td>Marobatane (Mokhalapa)</td>
<td>Nchabeleng</td>
<td>3 (three)</td>
</tr>
</tbody>
</table>

In the urban areas of Gauteng Province, in a township known as Daveyton, there is one existing family emanating directly from marriage for *lapa* as reflected below:

<table>
<thead>
<tr>
<th>Name &amp; (Maiden Surname)</th>
<th>Marital Surname</th>
<th>Children born</th>
</tr>
</thead>
<tbody>
<tr>
<td>Oliccah (Mmapholo)</td>
<td>Serepo</td>
<td>3 (three)</td>
</tr>
</tbody>
</table>

It is clear from the above that this marriage practice is still practised, albeit on a minor scale. Therefore a law that is practical, effective and protects the rights of women who are married in terms of this customary marriage should and need to be developed.

7. **DISTORTION IN TRANSLATION**

As previously stated, the literature has failed to appreciate the nature of this institution and has described or translated it into English as *woman-to-woman* marriage. In the process of
translation, the translated term must convey both the surface and deep structure of the concept, thus making the source and the target versions equivalent different languages.\textsuperscript{56} However, this was, unfortunately, not the case in the translation of go nyalela mosadi lapa when translated into English. The translation lost the original meaning of go nyalela mosadi lapa and did not even approximate the original phenomenon of go nyalela mosadi lapa. It directly contradicts and distorts the true African version of this practice.

The question is: what does the marriage practice of go nyalela mosadi lapa have in common with a same-sex marriage that makes it so essential to be translated as such? Our interviews with women married in accordance with this customary marriage and their in-laws confirmed to us that the practice of go nyalela mosadi lapa and woman-to-woman marriage are completely two different concepts. In addition, imperfect as it is, Oomen’s description of go nyalela mosadi lapa makes it explicit that this form of marriage is different from same-sex marriage. As already mentioned, her article acknowledged this fact by emphatically stating that go nyalela mosadi lapa and same-sex marriage are two totally different marriage institutions.\textsuperscript{57} The absence of conjugal rights in go nyalela mosadi lapa was also confirmed by Smith Oboler,\textsuperscript{58} Bonthuys\textsuperscript{59} and Zabus.\textsuperscript{60} The true nature of same-sex marriage is to be found in the fact that it creates consortium omnis vitae.\textsuperscript{61} In other words, same-sex marriage is contracted in response to the sexual emotions or attractions of the parties involved. Go nyalela mosadi lapa lacks this foundational function. It is simply an instrument for preservation and extension of the family and can therefore not be equated to a woman-to-woman marriage.\textsuperscript{62} The purpose of go nyalela mosadi lapa practice is purely to provide an heir for the continuity of the family name of the childless couple or woman or parent-in-law; whereas same-sex marriage is entered into not purely for reasons of

\textsuperscript{56} Bishop Will \textit{The marriage translation and the contexts of common life: From the pacs to Benjamin and beyond} (2005) 59 65 70.
\textsuperscript{57} Oomen 2000 \textit{THRHR} 280.
\textsuperscript{58} Smith Oboler 1980 \textit{ETHNOLOGY JOURNAL} 69 88.
\textsuperscript{60} Zabus 2008 \textit{RESEARCH IN AFRICAN LITERATURES} 93 95.
\textsuperscript{61} \textit{National Coalition for Gay and Lesbian Equality v Minister of Home Affairs} 200 2 SA 1 (CC); \textit{Satchwell v President of the Republic of South Africa and another} 2002 6 SA 1 (CC); \textit{Du Toit v Minister of Welfare and Population Development} 2003 2 SA 198 (CC); \textit{J v Director General, Department of Home Affairs} 2003 5 SA 621 (CC); \textit{Gory v Kolver NO} 2007 4 SA 97 (CC).
\textsuperscript{62} Nwoko 2012 \textit{JOURNAL OF PAN AFRICAN STUDIES} 69 82.
childbearing. In our research we could not find any aspects of similarities or affinity between the two institutions that warranted the translation, other than that they are both types of union.

Denise O’Brein writes that the term “female husband” refers to a woman who takes the legal and social roles of husband and father by marrying another woman according to the approved rules and ceremonies of her society. 63 We observed that the in-laws (in particular the childless women) we interviewed took serious objection/offence to their description as “female husband”. According to them this is not an appropriate term to use in their description. Upon conclusion of the marriage, the bride (ngwetši ya lapa) is referred to as the daughter-in-law of the childless couple/childless woman and she (the bride) refers to the childless couple or childless woman as parents/mother-in-law. The bride’s children refer to the childless couple/childless woman as grandmother (koko/mmakgolo). The childless couple or childless woman becomes the legal bride’s existing or future children’s grand-parents/grandmother. Contrary to the widespread notion that the childless woman takes over control of the bride’s children, the bride does not relinquish control, guardianship or any parental rights over her existing or future children. To the contrary, the children remain the bride’s children and attain the status of the childless woman’s grandchildren. Another interesting party involved is the children’s biological father. Although, in practice, a suitable, specially chosen male partner is normally suggested to the daughter-in-law, 64 the bride will select a lover of her own choice as there are no cultural rules in respect of whom the bride should bear children with. This lover has no rights or responsibilities of any kind to the bride or her children. 65

8. THE LEGAL FRAMEWORK
8.1 Purpose of the RCMA
From its origin, the RCMA is not without controversy as it was promulgated not purely to accord legislative recognition to the customary laws observed among traditional African peoples but as

64 Bekker 147.
the response to constitutional values and human rights ushered by new constitutional
dispensation, giving right to equality and abolishing discrimination, in particular the perceived
inherent gender discrimination posed by customary laws.\(^66\) The end result as it now appears is
the Act which is not particularily aimed at recognition of all forms of customary marriage;
otherwise how does one explain the obvious omission of traditional *go nyalela mosadi lapa* with
the resurgent subsuming of traditional customary marriages under same-sex marriage. Non-
legislative recognition of *go nyalela mosadi lapa* has left emotional scars in the lives of women
married under this practice.

The RCMA has left them destitute and without recourse in pursuit of enhancing its outlook as
constitutionally progressive legislation. The RCMA should, as Moseneke DCJ put it, “represents
a belated but welcome and ambitious legislative effort to remedy the historical humiliation and
exclusion meted out to spouses in marriages which were entered into in accordance with the law
and culture of the indigenous African people of this country”.\(^67\) This major objective of the
RCMA has now been hijacked by the equation of same-sex marriages with *go nyalela mosadi
lapa* in the RCMA Amendment Bill.

### 8.2 Effect of same-sex marriage provision in the RCMA Amendment Bill

In 2009, the Minister of Home Affairs published the Recognition of Customary Marriages
Amendment Bill (the “RCMA Bill”). Among its stated purpose, the Bill was intended to insert
certain definitions; to revise procedures relating to registration of customary marriages; and to
align the provisions of the RCMA with other legislation.\(^68\) Included in the newly inserted
definitions is the indirect introduction of same-sex marriage through its schematic legislative
recognition conferred by the Civil Union Act. The relevant sections of the RCMA Bill provide thus:

\[(2) \text{Save as provided in section 10 (1), no spouse in a customary marriage shall be competent to enter}
\text{into a marriage under the Civil Union Act or Marriage Act during the subsistence of such customary}
\text{marriage.}\] \(^69\)

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\(^{67}\) *Gumede v President of the Republic of South Africa & Others* 2009 3 SA 152 (CC) para 16.

\(^{68}\) A Preamble to the RCMA Amendment Bill, 2009.

\(^{69}\) Section 2 of the RCMA Bill seeking to amend section 3 of the RCMA.
“9 (1) A man and a woman between whom a customary marriage subsists are competent to contract a marriage with each other under the Civil Union Act or Marriage Act if neither of them is a spouse in a subsisting customary marriage with any other person.”

The effect of this legislation is the creation of the incorrect assumption that same-sex marriage or woman-to-woman marriage is equated to *go nyalela mosadi lapa*. This false theory results in the notion that there is only one legally acceptable form of customary marriage in South Africa. Meaning that, regardless of whether other African women have entered into different customary marriages (e.g. *go nyalela mosadi lapa*), they are expected to comply with the RCMA Bill. In other words, should an African woman who is married in terms of *go nyalela mosadi lapa* practice decide to register her marriage, she would legally be forced to register her marriage as a union or partnership in term of the RCMA Bill. It is contended that this approach does not provide the correct accommodation and legal recognition of *go nyalela mosadi lapa*, protection for women married under this marriage and children born from it. The authors are of the view that the cultural circumstances of this type of marriage were not sufficiently explored or understood prior to the decision of equating this marriage with same-sex marriage was reached by the legislature.

9 CONCLUSION

In South Africa only a fraction of the true customary law forms part of official state law. The trends of distorting African cultural practices, norms and values are persisting and endorsed by the legislature. The RCMA Amendment Bill has depicted the marriage practice of *go nyalela mosadi lapa* completely out of the African cultural context and fosters cultural distortion within our nation. If the legal system is to deal effectively with portraying the correct nature of this marriage practice, the legislature has the responsibility to research more intensively about the subject of this type of marriage so as to depict it accurately.

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70 Section 9 of the RCMA Bill seeking to amend section 10 of the RCMA.
71 The conventional customary marriage as recognised in the RCMA.
This paper has shown that the RCMA Bill is in need of amendment and that the applicability of *go nyalela mosadi lapa* will depend on whether or not these amendments are made. The deficiencies suggest that the registration of this marriage might not be recorded legitimacy as well as status change of surname. It is submitted that in view of the legal uncertainty that currently exists and the need that exists for legal reform, it is imperative for the state through the legislature to provide a sensitive and meaningful legislative framework within which *go nyalela mosadi lapa* is correctly accommodated. This will provide a clear and reliable basis for the application of the law.

South Africa is a signatory to the United Nation’s Convention on the Elimination of All Forms of Discrimination Against Women which is commonly referred to as CEDAW,\(^{74}\) the SADC Protocol on Gender and Development\(^ {75}\) and the Optional Protocol to the African Charter on the Rights of Woman in Africa.\(^ {76}\) All these instruments call upon government to eliminate discrimination against women, and marriage is one of the areas where discrimination is pervasive. The non-recognition of *go nyalela mosadi lapa* discriminates against women married under this practice. By signing these instruments, South Africa made a commitment to better the lives of women married in terms of *go nyalela mosadi lapa*. And by reforming marriage laws to specifically recognise *go nyalela mosadi lapa* and to provide a framework for registration of these marriages, South Africa would have taken the right direction in fulfilling some of the commitments made on promotion and protection of women’s rights.

\(^{74}\) An International Bill of Rights for Women - adopted in 1979 by the United Nations General Assembly and came into force on 3 September 1981.

\(^{75}\) The protocol emerged out of the SADC Declaration on Gender and Development which had been signed in 1997 and it is more binding than the Declaration.

\(^{76}\) The Protocol on the Rights of Women in Africa is a protocol to the African Charter on Human and Peoples’ Rights (ACHPR) and it was adopted on the 11th of July 2003.