

FORMAL RECOGNITION OF CUSTOMARY LAW – AN ANALYSIS OF THE SOUTH AFRICAN EXPERIENCE IN PASSING LEGISLATION RECOGNISING CUSTOMARY MARRIAGES

The focus of my input today is on the difficulties that the state encounters in trying to incorporate African customary law into the formal legal system. While the recognition of the right to culture necessitates that this incorporation takes place, the practical component of giving effect to customary is a tricky act which constantly requires the juggling of different interests. This is particularly so when dealing with customary law rules which discriminate directly against women and which conflict with the constitutional right to equal treatment and equality before the law.

What I plan to do during the course of this session, is look at the provisions of South Africa's Recognition of Customary Marriages Act, and to highlight how the South African legislature has performed this juggling act and more specifically, how successful its been in balancing the right to culture and the right to equality.

HISTORICAL BACKGROUND:

Prior to 1994, South African history was characterized by a system of institutionalized discrimination which permeated every sphere of South African society. Indigenous African customary law also fell prey to the Apartheid system which created a dual legal system and only recognized customary law insofar as it was used to perpetuate discrimination. The customary law recognized by the Apartheid state was wrenched from its communal roots and codified and changed to such an extent that it became little more than an "invented tradition".¹

The first piece of legislation to recognize customary law was the Native Administration Act of 1927 which limited the application of customary law to disputes between parties who were black.² These matters were heard in Native Commissioners Courts and Headmen's Courts which, according to the Black Administration Act, could not apply customary law where it was against public policy or natural justice. In 1986, the Native Commissioners Courts were abolished and the Magistrates Courts took on their function.

In 1988, an Act³ was passed which made it possible for courts to apply customary law if and

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I Currie "Indigenous Law" in Chaskalson et al *Constitutional Law of South Africa* (1999) at page 36-1

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C Himonga and C Bosch "The Application of African Customary Law under the Constitution of South Africa: Problems solved or just beginning?" () 117 SALJ 308

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The Law of Evidence Amendment Act 45 of 1988

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where the court decided that customary law was the applicable legal system⁴ and where the customary law rule was easily ascertainable. The discretion of the court to apply customary law was again subject to the proviso⁵ that customary law could not be applied where it was contrary to public policy or natural justice. According to Himonga and Bosch⁶ the notion of ‘public policy’ was used by a minority, dominant white population to entrench and impose their value system. An example of this is the way in which courts then dealt with the recognition of customary marriages. In the Appellate Division case of *Ismail v Ismail*⁷ the court found that it could not recognize customary union because it entailed the recognition of polygamy which was contrary to public policy.

The effect of the “public policy” proviso was to subjugate customary law and to ensure that it always remained subordinate to civil law.

THE CONSTITUTION AND CUSTOMARY LAW

With the advent of constitutionalism in South Africa, came a new recognition of and respect for customary law. The Interim Constitution, through various references in the Bill of Rights⁸ and the body of the constitution⁹ gave formal recognition to African Customary Law. The elevation in status of African Customary Law was illustrated in the Constitutional Court case of *S v Makwanyane*¹⁰ where the court recognized the African concept of ‘*ubuntu*’ as a constitutional value. Sachs J stated in *Makwanyane* that:

The secure and progressive development of our legal system demands that it draw the best from all the streams of justice on our country....it means giving long overdue recognition to African law and legal thinking as a source

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Opcit note 2 at page 07

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In section 1(1) of the Law of Evidence Amendment Act

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Opcit note 2 at 308

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1983(1) SA 1006 (A)

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Section 31

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Section 181(1)

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1995 (3) 391 (CC)

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of legal ideas, values and practice.

However, in the Interim Constitution, as well as the Final Constitution, the recognition of African Customary Law is subject to the provisions of the Constitution.

For instance, section 30 of the Final Constitution protects the right to participate in the cultural life of your choice. However this section contains an internal qualification that, in doing so, you may not exercise these rights in a manner which is inconsistent with the Bill of Rights. Section 31(1) of the Final Constitution sets out the group right to enjoy culture, religion and language and participate in cultural activities and it protects the right to form, join and maintain cultural, religious and linguistic associations. However section 32(2) repeats that qualification that the rights in section 31(1) may not be exercised in a manner inconsistent with any provisions of the Bill of Rights.

In the context of marriages under African Customary Law, section 15 recognises the right to freedom of conscience, thought and belief. Section 15(3)(a) states that:

This section does not prevent legislation recognizing:

- I. *marriages concluded under any tradition, or a system of religious, personal or family law;*

or

- II. *systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.*

However, section 15(3)(b) states that recognition in terms of section 15(3)(a) must be consistent with the Constitution.

Section 211(3) of the Final Constitution states 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.

This section places a duty on courts to apply customary (even where there is a conflict of laws), but still leaves the court with a discretion as to whether customary law is applicable in a particular case. This section again contains the qualification that customary law is subject to the Constitution.

The various constitutional rights that protect the right to culture or which, directly or indirectly recognize African Customary Law as a body of law are all qualified to the extent that the rights and recognition are subject to the Bill of Rights and the Constitution.

The relationship between the constitution and the customary law is particularly relevant to a

discussion on the customary law of marriage in light of the inherently patriarchal nature of customary law which, according to the South African Law Commission:¹¹

...is the product of a culture that was, and to a great extent still is, patriarchal: senior males enjoy full rights and powers at the expense of junior males and all women.

RECOGNITION OF CUSTOMARY MARRIAGES ACT

This is the legal framework within which the Recognition of Customary Marriages Act of 1999 was passed by the South African parliament. The Act was passed and assented to in 1998 but only came into effect in November 2000. The Act aims, not only to recognize and celebrate African Customary Law, but also to protect women by regularizing customary marriages¹² and bringing them into the mainstream legal system. In balancing the recognition of customary law with the protection of women who marry under customary law, the provisions of the Act illustrate the difficulties that arise from the recognition of Customary Law as a body of law.

The greatest innovation of the Act, which indicates a clear break from the past is its definition of customary law as:

...the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples;

The ‘customary law’ that is being recognized by the Act is not the customary law that was codified by the Apartheid state and that was distorted and convoluted to meet the ends of the Apartheid state. Instead it recognizes the law and custom that is practiced on a daily basis.

“VALID CUSTOMARY MARRIAGES”

The Act recognizes marriages concluded before the Act was passed are provided they are “valid marriages at customary law” and existed at the time of commencement of the Act.¹³ This means that only the rules of customary law would determine whether a customary marriage is valid or not.

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Discussion Paper on “Customary Law: Succession” dated August 2000 at page 7.

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See V Bronstein “Confronting Custom in the New SA State: An Analysis of the Recognition of Customary Marriages Act” in *SAJHR* 2000 Vol 16 Part 3 at page 558

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Section 2(1)

With regard to marriages entered into after the commencement of the Act, in order to be recognized, certain requirements set out in the Act have to be met¹⁴. to show that her marriage is valid and therefore capable of being recognized. The requirements include:

#both parties are over the age of 18;

#both parties consent to be married to each other

The Act also contains a further requirement that “the marriage must be negotiated and entered into or celebrated in accordance with customary law”¹⁵. This requirement retains the customary law rules of marriage and stops shot of codifying customary law of marriage.

In its Discussion Paper, the Law Commission recommended that the legislation recognizing customary marriages contain minimum requirements for marriage. According to the Discussion Paper¹⁶, this serves to bring certainty to the customary law of marriage and, more importantly, it serves to secure the fundamental right to choose your spouse. This is the reason behind the imposed requirements relating to age and consent.

LOBOLA / BRIDEWEALTH

It is important that the Act does not expressly require the payment of *lobola* or bridewealth as a prerequisite for a valid customary marriage. However, depending on the custom in question, the payment of bridewealth could still be a requirement, in terms of customary, for a valid marriage. During the process of drafting of the Act, there was plenty of debate around the constitutionality of the institution of bridewealth.

According to the South African Law Commission’s Discussion paper on customary marriages¹⁷, there is ambivalence around the purpose and effect of bridewealth. While certain people saw it as degrading to women because it in effect amounted to a husband buying his wife, other people saw it as signifying respect for the spouses ancestors and claimed that it “dignifies the wife”¹⁸. The Law

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set out in section 3 of the Act

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Section 3(1)(b)

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At page 33

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Titled “the Harmonisation of the Common Law and the Indigenous Law”, Discussion Paper 74, August 1997

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Supra at page 38

Commission reached the conclusion that bridewealth was widely viewed as a symbol of African cultural identity and, as an institution, enjoyed considerable support. In light of this the Law Commission found that any prohibition or ban on the payment of bridewealth would be practically impossible to enforce.

However, the fact that bridewealth is not dealt with under the Act does not mean that the practice of paying bridewealth is free from constitutional scrutiny. As a customary law rule, the payment of bridewealth is still subject to the Bill of Rights and the equality clause in particular. In fact there are certain aspects of the payment of bridewealth which have already been developed. In the South African case of Mabena v Letsoalo¹⁹ the court held that it was not repugnant to the customary law of marriage to develop the rule, in keeping with the spirit, purport and object of the Constitution, that a woman who is the head of the family could negotiate and receive lobola, and consent to the marriage of her daughter.

“REGISTRATION OF CUSTOMARY MARRIAGES”

The Act provides for the registration of customary marriages and places a statutory duty on parties to a marriage to have it registered.²⁰ According to the Law Commission, the purpose of registration is to assist with proving the marriage (the certificate of registration serves as prima facie proof of the customary marriage).

The question then arises as to what happens on failure to register a customary marriage?

As a point of departure the Act expressly states that failure to register does not affect the validity of a marriage.²¹ Neither the Act, nor the existing regulations passed under the Act create a statutory offence for failure to register the marriage. However, section 11(4) of the Act does empower the Minister of Justice to pass regulations stating that the contravention of a provision of the Act is an offence, which can carry the penalty of a fine or imprisonment for a period not exceeding one year.

POLYGAMY

The Act recognizes the customary law rule that a man may marry as many wives as he wishes. According to section 2(3) of the Act, if a person has entered into more than one customary law marriage, all valid marriages entered into before the commencement of the Act, are recognized. The Act similarly recognizes all customary marriages entered into after the commencement of the Act,

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1998 (2) SA 1068 (T)

²⁰
Section 4(1)

²¹
Section 4(9)

which comply with the provisions of the Act.²² This is a major departure from the previous legal position in terms of which, because customary marriages are potentially polygamous, they were deemed to be against public policy and were therefore not recognized under the formal law. According to the Law Commission's discussion paper, one of the main reasons for recognizing polygyny, despite protest from women's organizations, was due to the impossibility of enforcing prohibition and due to the fact that wives (with the exception of the first wife) consent to the polygamous marriage.

The Law Commission stated in its Discussion Paper:

*None the less, many people question how real a woman's choice is, because her freedom must be evaluated in terms of the alternatives available; given current socio-economic conditions, women can gain access to resources (especially to land) only through their attachment and submission to men. Economic and social pressures undoubtedly drive women into less than perfect marriages, but these pressures cannot be legally controlled. The best the law can do is to ensure that spouses consent to marriage.*²³

The Law Commission goes further and warns against a ban on polygyny because firstly, it would be impossible to prevent men from taking on additional wives, and secondly, it would result in men entering into informal unions which are even more prejudicial than regulated polygamous marriages.

This resulted in the notion that, instead of prohibiting polygyny, the state should regulate the institution so as to afford maximum protection to women involved in these marriages.

The concrete manifestations of this notion are the sections of the Act which state that:

- a) Where a man in a customary marriage wishes to enter into a further customary marriage with another woman, he must make application to the High Court for approval of a written contract which regulates the future matrimonial property systems of his marriages²⁴. The Act states that all parties, including present and prospective spouses must be joined in the application.
- b) Parties who are married under customary may, marry each other civilly.
- c) A spouse who is married civilly, cannot, during the subsistence of that marriage, enter into

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Section 2(4)

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At page 52

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Section 7(6)

any other marriage.

The institution of polygyny has also been regulated with regard to divorce and the proprietary consequences of marriage.

PROPRIETARY CONSEQUENCES OF CUSTOMARY MARRIAGES

The proprietary consequences of marriage was one of the biggest bones of contention during the drafting of the Act. Women's groups lobbied that all customary marriages should automatically be in community of property²⁵ unless specifically excluded by an ante-nuptial contract. The result of this kind of pressure was that the Law Commission recommended that marriages entered into after the commencement of the Act be automatically in community of property. This recommendation was reflected in the Act²⁶ and amounted to a radical departure from the customary law rule that marriages are subject to marital power in terms of which the power to acquire and dispose of assets vests in the husband.²⁷

The biggest and most damning flaw of the Act lies in its treatment of women in customary marriages entered into before the commencement of the Act.

According to section 6:

A wife in a customary marriage has, on the basis of equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity...

The full import of the words "subject to the matrimonial property regime" lies in the reading of section 6 with section 7(1) of the Act which states that the proprietary consequences of marriages entered into before the commencement of the Act are still governed by customary law. This is problematic for two reasons:

.A woman's attainment of full status and capacity is made subject to the matrimonial property regime and customary law, because it is vague and unclear on the rules with regard to matrimonial

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See Bronstein opcit note 12 at page 565

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Section 7(2)

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J C Bekker *Seymour's Customary Law in Southern Africa* 5th Edition (1989) p141

property systems, allows the control of the marital estate to vest in the husband.

.Bronstein quotes the SA Law Commission which states in its Report on Customary Marriages that:

*Unfortunately, property relations happen to be one of the least explored areas of customary law. Aside from empirical research in the Cape, we have little direct information on the living law...the vagueness of customary law allow men to invoke patriarchal tradition to their own advantage.*²⁸

According to the Law Commission's Discussion Paper, it was problematic to extend the rule that customary marriages were automatically in community of property to marriages entered into before the commencement of the Act because that would have had the effect of making existing polygamous marriages automatically in community of property. The result of this would be far-reaching and make the legal position of existing spouses very difficult to determine.

The result of this fear are the inclusion of sections 6 and 7(1) into the Act which greatly prejudice women in customary marriages entered into before the commencement of the Act and erodes their constitutional right to equal treatment and equality before the law.

The question is then how to deal with the tension between these provisions of the Act and the constitutional right to equality. Bronstein²⁹ suggests that the key to resolving this is to utilise the provisions of the constitution³⁰ which empower the courts to develop customary law in order to give effect to a constitutional right. This can best be done by exploiting the vagueness and uncertainty of customary law by focussing on the living customary law that the Act recognises and then developing that customary law rule in order to empower women in customary marriages to own and dispose of their assets.

DIVORCE

Prior to the commencement of the Act, customary marriages were terminated outside of the formal legal system. Divorce was a private matter that was arranged by the spouses and their families on any terms that they deemed appropriate. The terms of dissolution usually did not account for maintenance (whether spousal or child maintenance), distribution of the marital estate and the rights

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V Bronstein opcit note 12 at page 568

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Opcit note 12 at page 569

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See sections 8(3)(a) and 39(2) of the Constitution

of children. Most importantly, under customary law, a woman who was not aided by her guardian was unable to pursue a divorce. Furthermore, there are no specific grounds for divorce under customary law.

The Act introduces the civil law ground of “irretrievable breakdown” as a ground for dissolution of a customary marriage act³¹. The Law Commission recommends that irretrievable breakdown is the appropriate grounds for dissolution because it is capable of accommodating different cultural perspectives as to whether there is sufficient reason to divorce or not. The Act further builds on the “irretrievable breakdown” test by stating that a court may make a finding of irretrievable breakdown if it is satisfied that the marriage has reached such a state of disintegration that there is no reasonable prospect of restoring a normal relationship between the parties.³²

The Act also makes certain legislation that regulate civil marriages applicable to customary marriages. For example, the Act makes the Mediation in Certain Divorce Matters Act³³ applicable to customary law. This Act makes provision for the intervention of a Family Advocate in divorce cases where the interests of minor children are at stake. The Act also makes section 6 of the Divorce Act³⁴ applicable to customary marriages. This section focuses on safeguarding the interests of dependent and minor children in divorce proceedings. These provisions will affect the kinds of orders the courts make in relation to custody of or access to minor children.

The Act³⁵ states that, in granting a divorce order, the court has the powers contemplated in section 7, 8, 9 and 10 of the Divorce Act. Section 7(1) empowers the courts to make orders for spousal maintenance. Under section 7(3), even where the parties are married out of community of property, the court may order that assets of the one party be transferred to the other. Under section 9 of the Divorce Act, the court can order forfeiture of benefits where the break-down of the marriage is as a result of substantial misconduct on the part of one of the parties.

The Act also specifically deals with divorce in the context of polygamous marriages. In the case where a man has entered into more than one customary marriage, the court must take into account any agreement or contract which regulates the marriages. The court must also make an equitable

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Section 8(1)

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Section 8(2)

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Act 24 of 1987

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No 70 of 1979

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In section 8(4)(a)

order which it deems just.³⁶ Furthermore, the court can order that any other person who has sufficient interest in the matter be joined in the proceedings³⁷.

In addition to dealing with the specifics of marriage, this Act also touches on the broader socio-economic aspects in women's lives. Whereas, under the Apartheid state's version of official customary law (codified in the Black Administration Act) decreed that women married under customary law could not own or dispose of assets, the Act³⁸ decrees that women in customary marriages have full status and capacity to acquire assets and dispose of them, to enter into contracts and to litigate. Whereas women married under customary law were previously deemed to be perpetual minors, the Act states³⁹ that, despite customary law rules, the age of majority of any person is determined in accordance with the SA Age of Majority Act⁴⁰.

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Section 8(4)(b)

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Section 8(4)(c)

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In section 6

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In section 9

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Act 57 of 1972