

The legislative reconstruction of the customary law of marriage

JC Bekker

LLB LLD

Extraordinary Professor, University of Pretoria

DS Koyana

Blur LLB LLD

Visiting Professor, Rhodes University

OPSOMMING

Die wetgewende rekonstruksie van gewoonteregtelike huwelike

In hierdie artikel ondersoek die outeurs geselekteerde aspekte wat betrekking het op gewoonteregtelike huwelike. Hulle wys daarop dat daar heelwat ongerymdhede en leemtes is. Die Wet op Erkenning van Gebruiklike Huwelike het weliswaar die gemeenteregtelike en gewoonteregtelike huwelike op dieselfde grondslag geplaas, maar die implikasies van sommige bepalinge en samehangende aangeleenthede is nie in berekening gebring nie. Hulle stel die vraag of die Wet enigsins sy doel dien.

1 REASONS FOR ENQUIRY

In terms of the Recognition of Customary Marriages Act,¹ full legal recognition is granted to customary marriages entered into before and after the commencement of the Act.² Previously they were called customary unions, being “an association of a man and a woman in conjugal relationship according to black law and custom, where neither the man nor the woman is party to a subsisting marriage”.³ Bonthuys and Erlank explain⁴ that “the effect of the Act is both the recognition of customary marriages and the application of civil structures and some civil law rules to them”.

The Act has admittedly done a great deal to change earlier discriminatory practices and emphatically recognises all customary marriages as valid marriages for all purposes.⁵

On the other hand:

- (a) Women do not really have a free choice in that the Act provides that “the marriage must be negotiated and entered into or celebrated in terms of customary law”.⁶ This puts the groom and families (particularly the family head), and not the woman, in the role of negotiating the marriage and *lobolo*.

1 120 of 1998, hereafter “Recognition Act”.

2 The date of commencement was 15 November 2000 (Proc R66 of 2000, 1 November 2000).

3 S 35 of the Black Administration Act 38 of 1927.

4 Bonthuys and Erlank “The interaction between civil and customary family law rules: Implications for African women” 2004 *TSAR* 61.

5 S 2(1) of the Recognition Act.

6 S 3(1)(a)(ii).

- (b) A woman has no conclusive say in her husband's decision to enter into further customary marriages (the recent case law is discussed below).
- (c) *Lobolo*, although not mentioned as a requirement, is essential for the conclusion of the marriage as well as its dissolution. Nowadays it is paid in cash. The amount has increased enormously.⁷
- (d) The Act is complicated, and assumes that the parties know customary law as well as the civil law of marriage. The application of the Act is, moreover, highly technical. Mqoke⁸ argues that "unless the government embarks on a large scale education campaign explaining the complex provisions of the Act the changes will only amount to paper law".

We propose to show that these and other factors have brought about consequences that were not foreseen. It places both spouses in a precarious position. One may argue that any issues that might arise may be resolved in a court of law. This is poor comfort because courts are costly, not easily accessible, and not readily resorted to by Africans.⁹

Several academics have expressed misgivings about the Act.¹⁰ In one high court case after another, judges have tried to unravel uncertainties that have arisen. Certain provisions have been declared unconstitutional. Some are dealt with below.

2 EXISTING HOMELAND LAWS¹¹

There are in fact three additional laws recognising and regulating customary marriages, namely, the Transkei Marriage Act;¹² the KwaZulu Act on the Code of Zulu Law;¹³ and the Natal Code of Zulu Law.¹⁴ These three pieces of legislation, as is pointed out below, are in the process of being repealed, but for the sake of completeness we commence by briefly examining each of them. They are by no means irrelevant, because customary marriages concluded while they were and still are in force remain legally valid.

7 In its *Report on customary marriages* (1988) paras 4.3.1.7–4.3.1.12, the SA Law Reform Commission discusses in detail the change in composition and functions of *lobolo*.

8 "'The rainbow jurisprudence' and the institution of marriage with emphasis on the Customary Marriages Act 120 of 1998" 1999 *Obiter* 66.

9 According to a South African Attitudes survey, one in three South Africans believe the courts discriminate against poor black South Africans and only half of South Africans believe courts are working for them: *Times* 12 July 2013.

10 Among others, Bonthuys and Erlank "The interaction between civil and customary family law rules: Implications for African women" 2004 *TSAR* 29–77 and Horn and Van Rensburg "Practical implications of the recognition of customary marriages" 2002 *J for Juridical Science* 54–69; Pienaar "African customary wives in South Africa: Is there spousal equality after the Recognition of Customary Marriages Act?" 2003 *Stell LR* 256–272. Pienaar 269 expresses her views as follows: "The gap between customary marriages and civil marriages seems to grow smaller by the day. In the case of a monogamous customary marriage, there is hardly any difference between a civil and customary marriage: the available options in the matrimonial system governing the marriage are identical, the capacities of spouses are identical, the ground for divorce and the general consequences thereof are furthermore the same – if the marriage was contracted *after* the commencement of the Act."

11 Transkei was an independent homeland in terms of Act 15 of 1976 and KwaZulu-Natal a self-governing territory in terms of Proc R11 of 1977.

12 21 of 1978.

13 16 of 1986.

14 Proc R151 of 1987.

2.1 Transkei Marriage Act

The Transkei Marriage Act¹⁵ was a statute of the Transkei Parliament, which became a South African statute by virtue of the advent of the Constitution of the Republic of South Africa, 1996 and subsequent amendments by the South African legislature.¹⁶ The aim of the Transkei Marriage Act was to make a complete break with the past and give unqualified recognition to the customary law of marriage, making it equal in status to a civil marriage. It brought marriage law in line with black culture and tradition. The Act permitted polygyny;¹⁷ placed women married by civil rites (out of community of property) in terms of it on par with women married in terms of customary law; and placed them under the guardianship of their husbands.¹⁸ This was tantamount to a reversal of all previous pronouncements by the courts, in which the customary marriage and its rules had suffered non-recognition.¹⁹

In 1999 the South African Law Reform Commission recommended that customary marriages be given legal recognition to end the discrimination of centuries in respect of the potentially polygynous marriages which were recognised in the past.²⁰ In answer to the argument that polygyny contributes to the oppression of women (and is gender discrimination in conflict with the Bill of Rights) the Law Commission replied that polygyny is not the cause of female subordination and that a ban on polygyny would in any event be difficult to enforce.²¹

The Transkei Marriage Act has not been repealed, except for the following sections:

- Section 3 – male persons may contract certain marriages during the subsistence of certain previous marriages with other parties;
- section 29 – prohibition of customary marriages of persons under a certain age;
- section 37 – guardianship of married women;
- section 38 – status and rights of wives and children; and
- section 39 – marriage shall be out of community of property and profit and loss.²²

The remainder of the Act, or rather the whole of the Act, is to be repealed in terms of section 31 of the draft Marriage Amendment Bill, 2009.²³ Dealing with it in detail will take us too far afield. Nevertheless, we venture to say that the Transkei Marriage Act is probably only of territorial application in the area that constituted the Republic of the Transkei.²⁴ It may still pose insurmountable

15 21 of 1978.

16 S 2 of Schedule 6 of the Constitution of the Republic of South Africa, 1996 provides that all laws in force when it came into being remain in force until amended or repealed.

17 S 3(1).

18 This section came under attack as being in conflict with the Constitution in *Prior v Battle* 1999 2 SA 850 (Tk). The unconstitutionality was upheld in the case of civil marriages but not in respect of customary marriages.

19 As in *Sishuba v Sishuba* 1943 12 NAC CC-0 123; *Gomai v Baqwa* 1912–1917 NAC Records 71; and *Nkambula v Linda* 1951 1 SA 377 (A).

20 SA Law Reform Commission *Report on customary marriages* (1998) vii.

21 *Ibid.*

22 S 12 read with the Schedule to the Recognition Act.

23 Published in GN 149 of 2009.

24 See s 1(1) of the Transkei Constitution Act 15 of 1976.

problems, because the Transkei in which it applied and still applies is extinct, and the repeal can surely not apply retrospectively.

2 2 KwaZulu Act on the Code of Zulu Law

Customary marriages in the erstwhile KwaZulu are still largely regulated by the KwaZulu Act on the Code of Zulu Law.²⁵ Only sections 22 and 27(3) of the KwaZulu Act on the Code of Zulu Law have been repealed by section 12 of the Recognition Act. Section 22 provided that the inmates of a family home, irrespective of sex or age, are in respect of all family matters under the control of and owe obedience to the family head. Section 27(3) of the Act placed a married woman under the marital power of her husband, provided that the husband's marital power in a civil marriage out of community of property may be excluded by an ante-nuptial contract. The Natal Code of Zulu Law is dealt with below.

The KwaZulu Act on the Code applies only to citizens. These are citizens referred to in the National States Citizenship Act.²⁶ In terms of that Act black persons were willy-nilly citizens of KwaZulu if –

- (a) they were born in KwaZulu of parents of whom one or both were or are citizens of KwaZulu at the time of their birth; and
- (b) they were related to any member of the black population of KwaZulu or have identified themselves with any part of that population or are associated with the population by virtue of their cultural or racial background.²⁷

The National States Citizenship Act²⁸ was repealed in terms of Schedule 7 of the (Interim) Constitution of the Republic of South Africa,²⁹ read with section 242 of the Constitution of the Republic of South Africa, 1966.³⁰ Consequently, there no longer are KwaZulu citizens. Hence, we submit that chapter 7 of the KwaZulu Act,³¹ dealing in sections 35–37 with civil and customary marriages and cognate unions, is obsolete. Nevertheless, section 12 of the Recognition Act purports to repeal sections 22 and 27(3) of that Act.

We submit, however, that marriages concluded in terms of the Act after the repeal of the National States Citizenship Act will continue to be valid.

2 3 Natal Code of Zulu Law, 1987

The Natal Code of Zulu Law is a different kettle of fish. The State President has enacted this proclamation to be law for blacks in Natal by virtue of the powers vested in him by section 24 of the Black Administration Act.³² One may safely assume that it excludes the citizens envisaged in the KwaZulu Act on the Code of Zulu Law discussed above. But who then are the blacks in Natal? “Black” is defined in the Black Administration Act as any person, who is, or is generally

25 16 of 1985.

26 26 of 1970.

27 S 3.

28 26 of 1970.

29 200 of 1993.

30 Read with Schedule 7.

31 16 of 1989. The Act was assigned to the Kwa-Zulu-Natal Department of Environmental Affairs and Traditional Authorities by Proc 107 of 1994. It would clothe the KwaZulu-Natal legislature with powers in respect of the Act, but it clearly does not revive the application of the Act to citizens, because there are none.

32 38 of 1927.

accepted as, a member of any aboriginal race or tribe of Africa.³³ This was a colonial-apartheid categorisation of blacks, devoid of any practical significance, as the concepts of race and tribe are notoriously vague and Africa houses a vast number of different “peoples”. Secondly, under the present Constitution, the province of Natal no longer exists.

Even before the present Constitution, the application of the Code has given rise to doubt in *S v Kumbisa*.³⁴ Also, in *Mtshali v Gwala*³⁵ Holmes AJA said:

“In the light of sec 2 of the law [a former version of the Code] it would seem that the Code applies to all natives while and so long as they sojourn or are resident in Natal. But having regarded the varied nature of the provisions of the code, it may be that the foregoing applicability arises only in the absence of considerations to the contrary. It is by no means apparent to me what is meant by ‘Blacks in Natal’. Does it mean that the code applies to blacks who are resident or perhaps domiciled in Natal?”

We daresay that in the circumstances there is no valid law governing customary marriages in KwaZulu-Natal. In the meantime, the Act and the Proclamation have been repealed by section 53(1) of the KwaZulu-Natal Traditional Leadership and Governance Act,³⁶ from a date to be determined by the responsible member of the executive council. This has not yet been done.

2 4 Recognition of Customary Marriages Act

2 4 1 Introduction

The Transkei Marriage Act caused the integration of the two marriage systems. But the South African legislature followed another route. It created a new marriage system, incorporating the main elements of the existing common law marriage and included a few questionable references to customary law.

According to its long title, the Recognition Act, was meant to:

- (a) make provision for the recognition of customary marriages;
- (b) specify the requirements for a valid customary marriage;
- (c) regulate the registration of customary marriages;
- (d) regulate the proprietary consequences of customary marriages and the capacity of spouses of such marriages; and
- (e) regulate the dissolution of customary marriages.

2 4 2 Recognition of customary marriages

Section 2(1) of the Recognition Act provides that all marriages which are valid at customary law are recognised. A customary marriage is defined in section 1 of the Act as “a ‘marriage’ concluded in accordance with customary law”.

One may ask though: What is a customary marriage? Mönnig³⁷ defines it as follows:

“Marriage (*lenyalo*) among the Pedi is not an individual affair, legalising the relationship between a man and a woman, but a group concern, legalising a relationship between two groups of relatives. Primarily marriage is a legal act in which the relatives of the groom publicly transfer certain marriage goods (*magadi*)

33 S 35.

34 *S v Khumbisa* 1984 2SA 670 (N).

35 *Mtshali v Gwala* 1960 1 SA 597 (A) 599–600.

36 3 of 2005.

37 Mönnig *The Pedi* (1967) 129.

to the relatives of the bride. In return for this presentation the bride is publicly transferred by her relatives to the *bogadi* – the in-law’s place, or literally the place where the *magadi* comes from.”

There is more to both definitions, and the difference becomes apparent at second glance.

2 4 2 1 Definition of marriage

On the other hand, a common law marriage was defined in *Ismail v Ismail*³⁸ as “the legally recognised voluntary union for life of one man and one woman to the exclusion of all other while it lasts”.

This is still known as the common law definition of a civil marriage, but it is too narrow. It is not necessarily a life-long union, because provision is made for its dissolution. Moreover, it depicts marriage as a union between persons of the opposite sex, while the Civil Union Act³⁹ provides for marriages of persons of the same sex and the Recognition Act recognises polygamous marriages, polygyny meaning that a man is married to more than one woman at the same time. But apart from polygamous *vis-à-vis* monogamous common law marriages, a customary marriage is an entirely different social institution. We would rather use Mönnig’s definition as a yardstick.

In enacting the Recognition Act, the legislature failed to abolish customary marriages but it has projected common law features into it with regard to its requirements, patrimonial consequences and dissolution. There are, however, a number of features (discussed below) peculiar to customary marriages that will sooner or later have to be resolved.

Marriage customs are, of course, deeply embedded in the culture of blacks. One could write a book to show that customary and civil marriages are worlds apart. We have chosen a few anomalies that, we suggest, require a creative solution. They are (a) *lobolo*; (b) polygyny; (c) cognate unions; (d) patrimonial consequences; and (e) dissolution. We discuss these aspects below.

2 4 3 Lobolo

2 4 3 1 Introduction

In section 1 of the Recognition Act, *lobolo* is defined as

“the property in cash or in kind, whether known as *lobolo*, *bogadi*, *bohali*, *xuma*, *lumalo*, *thaka*, *ikhazi*, *magadi*, *emabheka* 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”.

But there are no further references to *lobolo* in the Act. This probably is because the legislature was incapable of formulating it as a requirement of a customary marriage. One might, however, infer that section 3(1)(b) of the Recognition Act makes it a requirement by providing that “the marriage must be negotiated and entered into or celebrated in accordance with customary law”.

It must be stated at the outset that the woman is not a party to the *lobolo* agreement. It is negotiated and concluded by her own and future husband’s parents or guardians. Anthropologists deny that this is tantamount to the sale of

38 1983 1 SA 1006 (A) 1019.

39 17 of 2006.

the woman.⁴⁰ We agree, but must point out that the social context in which the custom was practised has changed.

Marriage was traditionally not an individual affair, but a group concern, legalising the relationship between two groups of relatives. Nowadays, however, the parties have more freedom. As soon as a young man and woman have decided that they would like to marry, they will inform their parents. Some live together before they decide to get married.⁴¹ A customary marriage is traditionally a process, rather than an event, but the date of the receipt of *lobolo* nowadays becomes proof of the date of marriage for purposes of registration of the marriage.

Be that it as it may, *lobolo* is necessary to render the customary marriage legally effective.⁴² It gives to the family of the husband a right over the functions of the bride as mother, wife and child bearer. Black people thus say: “The cattle beget children, and the children are where the cattle are not.” This saying has another meaning. By applying this maxim, customary law holds that “no matter who the actual father of a child is, it belongs to the man who paid *lobolo* for its mother”.⁴³

It is also well known that by paying *lobolo* a man acquires the reproductive capacity of the woman. She becomes the “wife” of her husband’s family group even if her husband dies. Her reproductive powers belong to that group and any children born thereafter belong to that group.⁴⁴

Lobolo has endured. It is in fact a pervasive cultural element of marriage. In a study conducted by Prinsloo, Van Niekerk and Vorster,⁴⁵ the researchers found that in Mamelodi and Atteridgeville (townships in Tshwane), *lobolo* is still an important component of customary marriages. It is, however, not the *lobolo* of days gone by. Even in rural areas, in what may be termed traditional communities, it has turned into a cash transaction, naturally because cattle are no longer available. It has brought profound changes in its wake.

We summarise: *Lobolo* is no longer an arrangement between two family groups, but often an agreement between the husband to be and his fiancé’s father or at most a few family members. It is paid in cash, which in turn leads to couples living together for a lack of money to pay *lobolo*. The amount is not predictable. It may even depend upon the bargaining power of the girl’s father. The father of an educated girl, say one with a degree, wants more money, because it is said that he spent a lot of money to have her educated.

Lobolo still seems to fulfil an important psycho-social need. Thus, we conclude, *lobolo* is a requirement for a customary marriage. Most African couples

40 See, *inter alia*, Schapera *A handbook of Tswana law and custom* (1958) 132ff.

41 Mönnig *The Pedi* 129–131.

42 *Lobolo* is not prescribed as a requirement but most commentators confirm that it is a requirement. For instance, Jansen “Customary family law” in Rautenbach and Bekker *Introduction to legal pluralism* (2010), states that “[l]obolo . . . embodies and expresses the views and convictions of the African community in terms of the distinction between a real and binding marriage and an informal relationship”.

43 Seymour’s *Customary law in Southern Africa* (1987) 1501.

44 *Ibid.*

45 “Perception of the law regarding an attitude towards *lobolo* in Mamelodi and Atteridgeville (Part 1)” 1997 *De Jure* 314; and *idem* Part 2 1998 *De Jure* 72.

also pay *lobolo* in respect of a proposed civil marriage, but that has no legal consequences, except as being a private contract.⁴⁶

2 4 3 2 Recovery of outstanding *lobolo*

Lobolo is sometimes only partly paid. There are no hard and fast rules about recovery of the balance. An action for recovery is not resorted to without more ado, because it might lead to the father losing his rights to custody and guardianship of the children.

However, in the Transkei the recovery of outstanding *lobolo* by way of the custom of *ukutheleka*⁴⁷ is complicated from a human rights point of view. A father, among certain Cape communities, may put his married daughter in a “pound”, that is, separate her from her husband until such time as the son-in-law produced the *lobolo* cattle which he has to pay for her.⁴⁸

The custom of *theleka* is not universally practiced. It is found among communities such as the Pondo, Fingo, Nqgika and Gcaleka. The wife’s father may not impound her for an unbroken period until all the *lobolo* cattle have been paid where there was an agreement on the amount of *lobolo*.

Although the custom of *theleka* (impounding a wife by the father) is a recognised custom practiced by many communities, it would be most unwise to apply it in urban areas, obviously because the social circumstances and the status of the parties are quite different.⁴⁹ It is in fact doubtful whether this custom will survive constitutional scrutiny. It clearly relegates women to inferior positions *vis-à-vis* their husbands and society. Her father may be charged with abduction, but admittedly her co-operation may be raised as a defence.

More important is the fact that the children are disadvantaged. They would normally go with the mother, thus depriving them of the care and custody of their father. This would be in contravention of section 10 of the Children’s Act,⁵⁰ 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 consideration”.

Section 31(1) of the Children’s Act deals with major decisions involving the child and stipulates that:

“Before a person holding parental responsibilities and rights in respect of a child and 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.”

We submit that, in the circumstances, *theleka* customary enforcement of a *lobolo* debt, especially where children are involved, will be invalid. It is unlikely that children will be consulted as envisaged by the Children’s Act.

46 Bekker *Seymour’s Customary law in Southern Africa* (1989) 264 states that the courts held that *lobolo* in such event is ancillary to the civil marriage and therefore based on the principles of the common law.

47 See Koyana *Customary law in a changing society* (1980) 11–16.

48 *Ibid.*

49 In terms of s 10 of the Constitution of Republic of South Africa, 1966 “[e]veryone has inherent dignity and the right to have their dignity respected and protected”.

50 38 of 2005.

2 4 3 3 Conclusion regarding *lobolo*

We predict that sooner or later the custom will be subjected to constitutional scrutiny on the following grounds:

- (a) Although the wife takes no part in the negotiations, she must accept the outcome. We reiterate that it is not a sale of the woman, but to all intents and purposes she is a negotiable object. And when the deal is clinched she has particular obligations, such as a duty to put her reproductive capacity at the disposal of the husband's group.
- (b) She has no independent right to initiate proceedings for the dissolution of the marriage. A typical dissolution is closely linked to the return of the *lobolo* "paid" for her.
- (c) The *theleka* manner of recovering outstanding *lobolo* is unconstitutional.

Retention of the *lobolo* custom may be justified on the ground that in terms of section 30 of the Constitution, "everyone has the right to participate in the cultural life of their choice but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights". However, as shown above, some consequences of "*lobolo*" marriages reinforce the inequality of the women.

2 4 4 Polygyny

The Act leaves polygyny, even more so than *lobolo*, in a cloud of uncertainty. It is silent on polygyny. Our view is that, if it is challenged outright on the ground of its unequal treatment of women, it might be declared unconstitutional.

The custom has for many years virtually fallen into disuse, but persists albeit on a limited scale. The question whether it is intrinsically discriminatory, and hence unconstitutional, is debatable. But it is more important to know that nowadays such marriages are few and far between. Now and again one hears about a person with a large number of wives, but that is the exception – not the rule.

In these circumstances the SA Law Reform Commission recommended that customary marriages should continue to be potentially polygynous for several reasons, the most important of which are the difficulty of enforcing a prohibition and the fact that polygyny appears to be obsolescent. The Law Commission stated as follows:⁵¹

"In surveys undertaken in the preparations of the Law Commission's report on customary law one of the findings was that more women than men support abolition. But even among men, polygyny appears to have fallen out of favour, only two per cent of all the respondents indicated that they were partners in a polygynous union. In addition an average of 82.2 per cent of all those replying supported the abolition of polygyny. Social and economic conditions have changed to such an extent that polygyny is no longer regarded as a possibility."

The legislature has left a polygynous marriage as a choice for the husband in a customary marriage, by providing in section 7(6) of the Recognition Act that:

"A husband in a customary marriage who enters into a further customary marriage with another woman after the commencement of this Act must make an application to the court to approve a written contract which will regulate the future matrimonial property system of this marriage."

51 *Report on customary marriages* (1998) 92.

Thus, the legislature takes it for granted that the husband may practice polygyny. The Supreme Court of Appeal has recently held that failure to enter into a written contract does not render the polygynous marriage void.⁵² What we want to emphasise is that accepting polygynous marriages as self-evident casts the consequences of customary marriages which are in community of property and recognised as marriages for all purposes⁵³ in a perpetual state of unpredictability. The husband is not required to re-arrange the deckchairs and the existing wives must take it for granted. This is in conflict with our views on equality and devoid of any logic.

That men should make an application to court is expensive, as it involves attorneys and court expenses. Horn and Janse van Rensburg⁵⁴ argue that this implies that the applicant must have money for the application and future applications heard, or that the party would have to wait at least six months to get the application approved in one of the divorce courts. Before the court can decide on the matter, it has to terminate his existing matrimonial property system and the assets have to be divided amongst himself and his wife or wives.⁵⁵

If the constitutionality of polygyny is tested in a court it will be well-nigh impossible to ignore the provisions of international law regarding gender equality. In terms of section 39(1) of the Constitution of the Republic of South Africa, 1996, “[w]hen interpreting the bill of rights, a court, tribunal or forum – (b) must consider international law”. The latter’s principles about polygyny are aptly summarised by Higgins and Fenrich⁵⁶ as follows:

“With respect to polygamy, the African Protocol provides that legislation should guarantee that ‘monogamy is encouraged as the preferred form of marriage’ but in General recommendation Number 21: Equality in Marriage and Family Relations, the Committee on the Elimination of all forms of Discrimination Against Women (‘CEDAW Committee’) found that ‘polygamous marriage contravenes a woman’s right to equality with men, and can have such serious emotional and financial consequences for her and her dependents that such marriages ought to be discouraged and prohibited’. The CEDAW Committee further concluded that permitting such marriages under customary law violates the provision of the treaty.”

2 4 5 Cognate unions

2 4 5 1 Introduction

Apart from the normal customary marriages there are several cognate unions which may be regarded as devices for perpetuating the family.

The philosophy of African life and marriage may derive firm beliefs associated with the growing family. Mbiti⁵⁷ remarks that for African people, marriage is the

52 *Ngwenyama v Mayelane* 474/204 (2012) ZASCA 94 (1 June 2012).

53 S 2 of the Recognition Act.

54 “Practical implications of the recognition of customary marriages” 2002 *J of Juridical Science* 63–64.

55 S 7(7) of the Recognition Act.

56 “Customary law, gender equality, and the family: The promise and limits of choice paradigm” in Fenrich *et al The future of African customary law* (2011) 425–426. South Africa signed the Convention on the Elimination of Discrimination Against Women on 9 January 1993 and ratified it on 15 December 1995. The Protocol referred to is the Protocol to the African Charter on Human and Peoples’ Rights on the rights of Women in Africa (2003/2005). Art 6(c) of the Protocol reads as follows: “Monogamy is encouraged as the preferred form of marriage and the rights of women in marriage and family, including marital relationships are promoted and protected.”

57 *African religions and philosophy* (1969) 133.

focus of existence. Customary marriages and procreation go hand in hand; without procreation marriage is incomplete. Anthropologists are *ad idem* about this.⁵⁸

Even infertility or impotency is devastating. The husband will not be happy if he has no heir to step into his shoes. He will have failed to keep the name of his deceased father alive. Infertility on the part of the wife, or impotency on the part of the husband, was in some communities sufficient reason for divorce,⁵⁹ as long as the party was not aware of the state before marriage.

The practise of these customs has dwindled, but they are not extinct. We proceed to briefly describe three of them.

2 4 5 2 Seed-bearers

It is a generally recognised principle of customary law that the husband of a barren wife may marry a “seed-bearer” (usually her sister) for the purpose of raising an heir in the house of the barren wife. In some communities two or three head of cattle are payable for the “seed-bearer”, who has no status and is regarded as the “body” of the woman for whom she has to bear seed. The children born as a result of this substituted union will be regarded as the barren woman’s children. An impotent husband will arrange for a close relative to sleep with his wife and the issue will be considered as the husband’s own children.⁶⁰

2 4 5 3 *Ukuvusa* union

Another custom, practiced especially among the Zulu, is called the “*ukuvusa*” (to “wake up” the name of a deceased). Section 1(3)(t) of the Natal Code of Zulu Law⁶¹ defines “*ukuvusa*” as a form of vicarious union whereby the heir at law or other responsible person uses his own property or property belonging to the deceased to take a wife for the purpose of increasing or resurrecting the estate of such deceased person or to perpetuate his name and provide him with an heir. In *Tekeka v Gijana*⁶² the court said:

“The custom of *ukuvusa* is resorted to when a deceased person has left property, but no one to perpetuate his name, his natural heir (generally his full or half-brother) from natural affection, but more likely from superstitious fear, and in order to appease the spirits (*amadhlozi*) would, instead of appropriating the property altogether, take the deceased’s cattle and marry a wife who would be known as the deceased’s wife, and whose children would be known as his children so as to preserve his name from extinction.”

2 4 5 4 *Ukungena* union

Section 1(3)(f) of the Code of Zulu Law⁶³ defines “*ukungena*” as a union with a widow undertaken on behalf of her deceased husband by his full or half brother or other paternal male relative for the purpose of either raising an heir if there be none to inherit the property rights attaching to the widow’s hut or, if she has male issue, of increasing the nominal off-spring of the deceased.

58 See, among others, Schapera *Married life in an African tribe* (1939) 213ff.

59 Bekker *Seymour’s Customary law in Southern Africa* (1998) 192–193.

60 The KwaZulu Act on the Code of Zulu Law, Proc R151 of 1987.

61 *Tekeka v Gijana* 1902 NHC 13.

62 *Supra* fn 61.

63 KwaZulu Act on the Code of Zulu Law 6 of 1981.

Superficially speaking, these three aforementioned customs may seem to be quite harmless. However, they do relegate women to an inferior position. The women concerned are ostensibly willing role-players, but within the relevant social circumstances they are expected to oblige. We venture to say that if the validity of a particular custom is questioned, the court will find that the woman concerned had no real choice. When we spoke to a “family head” about this, he said that the woman does have a choice – of an eligible consort – but may not decline the role of child-bearer.

3 PATRIMONIAL CONSEQUENCES

All customary marriages are in community of property, unless the parties drafted an antenuptial contract.⁶⁴ In urban areas some own houses and many, of course, own some consumer goods. But the overall picture is that Black people consider property in a different light than most White people. The view is one of a typical family home belonging to the father and mother and the members of the household. It is the family home. Division on death or divorce makes no sense. We repeat: it is the family home, even in urban areas.

Secondly, there is also a typical rural traditional family home, consisting maybe of a cluster of houses in a polygynous marriage or, in the case of a monogamous marriage, one house and sometimes a house for grown-up children. These houses have no economic value – they are dwellings. It is ridiculous to regard them as being held in community of property. They are in a sense the same as communal land.

The third type of property, belong to one or more of a variety of family heads. We mention but six of them:

- (a) female-headed families;
- (b) grandparents and grandchildren;
- (c) cohabitees;
- (d) child-headed households;
- (e) husband and wife; and
- (f) a single unmarried parent.

Ownership and division of the joint estate are virtually meaningless. We suggest that there should be a division, or not, on the basis of it being family home property. The interests of the children and other persons living in the family home should be the overriding consideration.

4 REQUIREMENTS FOR VALIDITY OF A CUSTOMARY MARRIAGE

The requirements for the validity of a customary marriage are almost a replica of the requirements for the validity of a civil marriage, except for section 3(1)(b) which provides that “the marriage must be negotiated and entered into or celebrated in accordance with customary law”. This has from the outset given rise to problems, because in customary law there were no hard and fast rules about the

64 S 7(2) of the Recognition Act and *Gumede v President of the RSA* 2009 3 BCLR 243 (CC).

negotiation and celebration of customary marriages. According to Bekker and Rautenbach:⁶⁵

“Customary law is a non-specialised legal system. It is, for the most part, unwritten and does not always have clear-cut, immutable rules. Although customary law is generally known to members of a particular cultural group and enforceable between members of this group, its rules are not cast in stone. For example, the amount of *lobolo* is, for the most part, not fixed and is always negotiable between the relevant families. Customary law is therefore described as essentially non-specialised when compared with other more specialised Western legal systems.”

In *Mabuza v Mbatha*,⁶⁶ for instance, the issue was whether *ukumekeza* (a Swazi custom by which the bride is integrated with the family of the bridegroom) was a requirement for the validity of a customary marriage. Hlope J dismissed the contention, saying: “In my judgment, there is no doubt that *ukumekeza*, like so many other customs, has somehow evolved so much that it is probably practiced differently than it was centuries ago.”

Even so, people persist in producing this sort of evidence. Added to that, others produce similar kinds of “tribal usages” when the conclusion of a customary marriage is disputed. They are not devoid of substance; they deserve serious consideration, but to “find” proof of them in court poses a problem. Expert evidence is surely not available in every case.

However, the Regulations⁶⁷ promulgated in terms of section 11 of the Recognition Act provide guidelines. These guidelines are simply declarations by the husband, the wife, the traditional leader or his or her delegate, by the representatives of the parties who were present at the marriage, all stating that the marriage was in terms of customary law. Included are also three particulars: the date of the marriage, the place where it was concluded and particulars of the *lobolo* agreement.

If the marriage is disputed or entered into after the final date at which marriages were to be registered, the existence of the marriage would have to be resolved *de novo* by a court.⁶⁸

5 CONCLUSION

We have with reference to specific provisions commented on deficiencies and incongruities of the Recognition Act. We conclude with a brief discussion of some issues which emerged from our discussions and research.

It was necessary to reform the customary law of succession. The Constitution of the Republic of South Africa, 1996 prohibits gender discrimination.⁶⁹ It protects the right to culture.⁷⁰ Customary law must be applied subject to the Constitution (including the Bill of Rights).⁷¹ A lesser-known provision is that discrimination on the basis of gender is prohibited. So too are any practices, including traditional, customary or religious practices, which have a negative impact upon the dignity of women and undermine equality between men and

65 Rautenbach, Bekker and Goolman *Introduction to legal pluralism* (2010) 24.

66 2003 4 SA 218 (C).

67 Proc R1101 of 1 November 2000.

68 S 4(7) of the Recognition Act.

69 S 8(3).

70 S 30.

71 S 211(3).

women. Prior to the Recognition Act, customary marriages were not recognised as marriages but as “unions”, and their conclusion and consequences revolved around patriarchy – the rule of the family, including wives, by men.

The Recognition Act did bring about profound reform as follows:

- (a) The recognition of customary marriages as marriages on par with civil marriages.
- (b) Women are given the right to enter into the marriage of their own free will in that both prospective spouses must “consent to be married to each other by customary law”.
- (c) Women (as well as men) may claim a divorce on the ground of irretrievable breakdown of the marriage.
- (d) All marriages are in community of property, unless the parties enter into an antenuptial contract.
- (e) If the husband wants to enter into a further customary marriage he may only do so on the basis of a contract approved by a court on division of the property. (As explained above, the appeal court and the Constitutional Court has ruled that non-compliance does not render the marriage void.)
- (f) The Act expressly provides that
 “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, including the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that she might have at customary law”.⁷²

All this is laudable, but in our opinion the anomalies raised above will give rise to disputes in which women will inevitably play second fiddle. We emphasise four:

- (a) The marriage must be negotiated and entered into or celebrated in accordance with the customary law (section 3(1)(b)). This puts women foursquare back into the patriarchal family system. It is said that a customary marriage is a union between two families. The bride does not take part in the negotiations. As pointed out above, the negotiations are to arrive at an agreement between the bridegroom and his bride’s father about *lobolo*.

The real foundation of this transaction is, as put by Bekker:⁷³

“When the choice of a man’s future wife has been agreed upon (by husband’s family) his father (or he himself as the case may be) will either himself or three messengers propose marriage to her father. If the visit is acceptable to the father, an engagement will be arranged.”

- (b) Getting divorced on the irretrievable breakdown of the marriage is easier said than done. As shown above, the woman is virtually “married” to her husband’s family and freedom to obtain a divorce may be limited to her means to refund *lobolo*. Moreover, children that she bore ‘belong’ to her husband and his family.
- (c) It is surprising the Act does not deal with the application of the Transkei Marriage Act nor the Code of Zulu law. It is, after all, 23 years ago that the Recognition Act came into operation.

⁷² S 6.

⁷³ *Seymour’s Customary law in Southern Africa* (1989) 97.

Considering that the rules are now “cast in stone”, one may question the sense of customary marriages. The only remnant of a customary marriage is that it must be negotiated and concluded in terms of customary law. It is unfair though to make that the cornerstone of a valid customary marriage in that these rules may vary from case to case.

Regional or demographic information about the incidence of customary *vis-à-vis* civil marriages is not available, but it is common knowledge that, for educated Africans and those absorbed into the consumer society, civil marriages are preferable, albeit the persistent attitude that fathers of brides are entitled to *lobolo*.

All marriages are in any event at the cross-roads. Among others, cohabitants, the independence of women, limitation of pregnancies, and easy divorce have changed conceptions of marriage. We are disappointed that, in South Africa, this evolution has been overlooked in the creation of a new statutory marriage, akin to the civil marriage system. In this regard we wholeheartedly agree with Pieterse.⁷⁴

“If customary law is to die, it should be allowed a natural death. It should not be killed while it still has a role to play. Earlier, mention has been made of a disparity between rules of customary law and the way they manifest in reality. Abolishing social structures while they still fulfil important functions will not eradicate them, but will instead serve to widen the gap between law and reality. This should at all costs be avoided.”

74 “Killing it softly: Customary law in the new constitutional order” 2000 *De Jure* 35.