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PROJECT 90

HARMONISATION OF THE COMMON LAW AND THE INDIGENOUS LAW (Customary Marriages)

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INTRODUCTION

The South African Law Commission was established by the South African Law Commission Act, 1973 (Act 19 of 1973).

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PREFACE

This issue paper (which reflects information gathered up to the end of June 1996) was prepared to elicit responses and, together with those responses, to serve as a basis for the Commission's deliberations. The views, conclusions and recommendations contained herein should not, at this stage, be regarded as the Commission's final views. The issue paper is published in full so as to provide persons and bodies wishing to comment or make suggestions for the reform of this particular branch of the law with sufficient background information to enable them to place substantiated submissions before the Commission.

The Commission will assume that respondents agree to the Commission quoting from or referring to comments and attributing comments to respondents, unless representations are marked confidential. Respondents should be aware that the Commission may have to release information contained in representations under the Constitution of the Republic of South Africa, Act 200 of 1993.

Respondents are requested to submit written comments, representations or requests to the Commission by 31 October 1996 at the address appearing on the previous page.

The project leader responsible for this project is Prof R T Nhlapo and the researcher, who may be contacted for further information, is Mr P A van Wyk.

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CHAPTER 1

ORIGIN OF THE INVESTIGATION AND INTRODUCTION

1. The Commission undertook an investigation into the marriages and customary unions of Black Persons (Project 51), on which it reported in 1986. Two Bills were recommended. The first resulted in the Marriage and Matrimonial Property Law Amendment Act 3 of 1988. The second Bill dealt with the customary unions of Black persons. In this regard the Commission recommended that further consultations should take place with leaders of the TBVC states and the self-governing territories. After a series of high level meetings the proposal that the customary union be recognised as a valid marriage was endorsed: however, on 10 April 1992 the Minister indicated that the implementation of the Bill should be kept in abeyance until there was greater clarity concerning the constitutional position of the TBVC states and the self - governing territories.

The matter was subsequently referred to the newly-formed Project Committee on the Harmonisation of the Common Law and the Indigenous Law.

2. At its meeting of 23 and 24 February 1996 the new Commission approved the reconstitution of the Project Committee and the ranking proposed by the outgoing committee which had identified the law of marriage and divorce as a priority area.

CHAPTER 2

THE PROBLEM

Marriage is an institution common to all peoples, yet, because apartheid predisposed South Africans to think in terms of cultural difference rather than similarity, we have more than one system of marriage law. Recognition of cultural difference in this way would have been unobjectionable, had separateness implied equal treatment, but South African law has always favoured civil and Christian marriage on the understanding that only a 'voluntary union for life of one man and one woman to the exclusion of all others' is a true marriage. Customary marriages are potentially polygynous, and in consequence they have consistently been denied full recognition.

One of the consequences of this bias has been the neglect of customary law. No attempt has been made to keep it in step with changing social and legal conditions. Tainted by apartheid, and exposed by modern scholarship to be a distortion of genuine community practice, the so-called 'official code' of customary law is now seriously out of keeping with current social norms and the Bill of Rights.

The new Constitution presents an opportunity to rethink legal dualism and the prejudices of the past. A state dedicated to the eradication of apartheid and to the equal treatment of all individuals, whatever their race, gender or social origin, should in principle have one marriage law. Hence we need to consider how real and significant the differences between common and customary law are and whether a programme can be devised to harmonize South African legal traditions into a uniform code of marriage law.

The significance of long-established cultural practices, however, cannot be completely ignored. Sections 30 and 31 of the Constitution entitle both individuals and groups to practise and participate in the cultural life of their choice, which would include the right to live by customary law. Thus, while some rules should apply to all marriages, in certain areas spouses should be free to follow their cultural preferences.

The proposals below were based on consideration of common social problems, fundamental human rights and recommendations made by courts, scholars and the South African Law Commission.[1] People everywhere, whatever marriage they may have contracted, experience similar domestic problems, whether spousal violence, disputes over child custody or financial support. Instead of attempting to construct new laws in abstract, it seems more sensible to fashion rules aimed at resolving the problems typical of all marriages.

These rules must take account of the Bill of Rights, which in some instances will override both customary and common law. The most important constitutional norm is the requirement of equal treatment, which will frequently be in conflict with the patriarchal principles pervading much of customary law. Although it is as yet undecided when customary law or the equality clause should prevail, if customary rules are generalized or if they are vague and contradictory, the norm of non-discrimination will inevitably give direction to the formation of more appropriate rules.

In addition to those Constitutional provisions directly applicable to marriage - s15 (3) -the topic is also regulated by norms contained in various international conventions, all of which have a bearing on the future development of South African law. Of particular importance are the 1981 Convention on Elimination of Discrimination against Women (CEDAW) and the 1990 UN Convention on the Rights of the Child, both of which have been acceded to by South Africa.

This issue paper has also been guided by certain judicial decisions not to apply customary law where it was incompatible with natural justice or public policy[2] and the South African Law Commission's 1985 *Report on Marriages and Customary Unions of Black Persons* (Project No 10), which made recommendations to bring customary marriages into line with modern legal standards. In several respects, therefore, the foundation has already been laid for reform of marriage law.

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1 Including reforms instituted by the Natal and KwaZulu Codes, Proclamation R151 of 1987 and Act 16 of 1985 (Z), respectively, and the Transkei Marriage Act 21 of 1978.

2 E.g. *Gidja v Yingwane* 1944 NAC (N&T) 4; *Linda v Shoka* 1959 NAC 22 (NE). See also section 1(1) of the Law of Evidence Amendment Act 45 of 1988.

CHAPTER 3

IDENTIFYING THE ISSUES

I RECOGNITION AND FORMATION OF MARRIAGE

(1) Recognized forms of marriage

A marriage law common to everyone in the country should seek to correct the prejudices of the past by recognizing whatever union is clearly accepted by the established cultural systems of South Africa. It follows that customary marriage must be given full recognition.[3]

Parties would normally be free to establish whether their marriage is customary, civil or Christian at the time the union is contracted, but there is no reason why the spouses should be permanently bound by their choice. Provided no injury is done to the interests of third parties, spouses could make a joint declaration to change the nature of their marriage before a judge or magistrate.

(2) Polygyny

Although customary marriages should be recognized on the basis of the constitutional right to culture, it is necessary to distinguish areas where human rights prevail. A perennially controversial issue in this regard is a husband's right to take more than one wife. While very few men are in fact polygynists, the polygynous potential of customary marriage has for many years been the main obstacle to its recognition, and it is still questionable whether polygyny should be tolerated in view of the constitutional commitment to gender equality.

The concern that polygyny tends to lower the status of women in a symbolic sense at least, is widespread. None the less, an outright ban on polygyny would be inadvisable, for it would be extraordinarily difficult to enforce. Moreover, there is some evidence that in a patriarchal world, where there is no economic, social or political equality between men and women, it is the

institution of marriage itself (whether monogamous or polygynous) which disadvantages women. On balance, the case does not seem to be conclusively made that a bilateral arrangement between one man and one woman is the only valid and morally defensible method of constituting a family in a multicultural society. It does not follow, however, that men should continue to enjoy an unrestricted freedom to contract additional marriages to the detriment of their existing wives. The right of a first wife to object to any subsequent union contemplated by her spouse may have to be recognised.

(3) Consent of the spouses

No one today is likely to dispute the principle that validity of marriage depends upon the free consent of the spouses. Ideally, even in customary law, spouses were not forced to marry against their will, for it was appreciated that an unhappy marriage would eventually erupt into domestic conflict with repercussions for the entire family. In any event, the courts have always refused to uphold forced marriage, a rule that is endorsed by most international human rights documents.[4]

A related question - whether a spouse, especially a woman, can contract a marriage without her guardian's support - has not been squarely addressed in South Africa, in part because prospective spouses can conclude a civil/Christian marriage if they cannot persuade an obdurate guardian to approve a customary marriage. Nevertheless, the principle remains that persons of marriageable age should be entitled to marry, the views of their guardians being relevant only if such persons are minors.

(4) Minimum age

Customary law prescribed no specific age for acquiring the capacity to marry (or indeed the end of childhood). In order to marry prospective spouses simply had to be physically and intellectually capable of sustaining the relationship. In practice, therefore, the difference between customary- and common-law views on what constitutes a marriageable age is

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3 See para 11.2 of the Law Commission's 1985 *Report*.
4 Such as art 16(1)(*b*) of CEDAW.

negligible.

18 was chosen as the age at which childhood ends for purposes of enjoying constitutional rights,[5] and, to contract a civil marriage, fixed ages of 18 for men and 15 for women have been laid down by statute.[6] There should be no objection to stipulating these as minimum ages for all marriages, whether customary or civil.

(5) Parental consent

While a trend worldwide has been away from parents negotiating marriages for their children to merely ratifying matches already made, the power to control marriage (especially the power of the bride's father) remains synonymous with African tradition. Because of its cultural significance, the need for parental consent cannot be lightly disregarded.

But tradition should not be retained for its own sake. The purpose for securing parental permission - to establish favourable circumstances for a new marriage so that the spouses will be assured maximum support and protection - is still valid. Thus it seems desirable that under-age children should look to their guardians for approval of a proposed marriage; absence of consent should render the marriage voidable at the instance of an aggrieved guardian. Once a child has attained the age of 21, however, parents may neither insist on a ward marrying a particular spouse nor prevent a child from marrying the person of his or her choice.

(6) Formalities

For various reasons, prospective spouses have seldom observed formalities imposed by statute, especially the requirement for registration. Given this persistently low level of compliance and evidence that imposition of formal requirements has the effect of depriving existing marriages of whatever limited validity they might otherwise have enjoyed, it seems expedient to retain the current law.

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5 Section 28(3), which is in line with art 1 of the UN Convention on the Rights of the Child.

6 Section 26 of the Marriage Act 25 of 1961.

Accordingly, registration of a marriage should not be compulsory. To allow registration at the instance of one of the parties[7] sensibly acknowledges the fact that this formality has no intrinsic merit: it is a pragmatic means of proving marriage if and when the spouses find it necessary to do so. Hence, a certificate of registration 'shall on its mere production in any court or in any other proceedings be *prima facie* proof of its contents'.[8] Persons who never registered their marriage may advance other forms proof, such as payment of bridewealth or performance of culturally or religiously prescribed rites.

(7) Bridewealth

Bridewealth is critical to all customary forms of marriage. Despite the contention that it demeans the status of women, there can be no question of banning bridewealth,[9] in part because of the important role it plays in maintaining the African cultural tradition and in part because of the difficulty of enforcing a prohibition.

It can be questioned, however, whether payment or non-payment of bridewealth should affect the validity of marriage, influence the spouses' marital obligations or determine rights to children. Even in customary law, payment of bridewealth is often deferred and the status of a marriage is seldom placed in doubt through failure to pay timeously. One approach would be to make bridewealth optional, analogous to the celebration of a marriage by religious rites. Such an approach would underwrite the law in KwaZulu/Natal[10] and would support the courts' ruling that bridewealth is not essential for civil or Christian unions.

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7 Under Regulations 7 and 16 of GN R1907 25 October 1968, promulgated in terms of s 22*bis* of the Black Administration Act 38 of 1927.

8 Regulation 8(4). Conversely, under s 45 of the Natal and KwaZulu Codes (Proclamation R151 of 1987 and Act 16 of 1985 (Z), respectively) and ss 33 and 34 of the Transkei Marriage Act 21 of 1978, registration is both conclusive evidence of and essential to the validity for marriage.

9 Note that under s 1(1) of the Law of Evidence Amendment Act 45 of 1988 `it shall not be lawful for any court to declare that the custom of lobola or bogadi or other similar custom is repugnant to [public policy or natural justice]'.

10 See s 38(1) of the Codes, Proclamation R151 of 1987 and Act 16 of 1985 (Z).

II. CONSEQUENCES OF MARRIAGE

(1) Rights, duties and powers of the spouses

Traditionally, senior African men enjoyed a generous range of rights and powers over women and juniors, an authority that is generally denoted by the term ‘patriarchy’. This is a vague concept, but men take it as justification for claiming disparate and ill-defined rights to chastise wives and demand sexual favours at will, to decide whether to adopt birth control measures, whether to buy or alienate a family home, how to educate children, whether wives may work, etc.

Originally, a family head's position would have entailed full responsibility to care for those under his control; but in the development of the ‘official’ version of customary law emphasis was placed on the incapacities suffered by his subordinates. Many of these incapacities have never been precisely defined and some are clearly distortions of customary law. Section 11(3)(*b*) of the Black Administration Act,[11] for instance, which provides that wives of customary marriages are deemed ‘minors’ and their husbands ‘guardians’, employs common-law concepts that cannot capture the actual nuances of marital relationships under customary law.

Popular assumptions about male status and the ‘official code’ of customary law need to be re-examined. In the first place, women now play social and economic roles that have long since outgrown the restrictions of customary law. There is no reason to think that the ‘traditional’ regime enjoys universal acceptance, for most of the issues arising in contemporary spousal relations were never contemplated in the past and none has been properly tested in court.[12]

In the second place, legal developments must now be guided by constitutional norms. South Africa is committed to the principle of non-discrimination both by its own Bill of Rights and by its accession to CEDAW. These obligations suggest that a new code of marriage law

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11 38 of 1927.

12 With the exception of marital rape: s 5 of the Prevention of Family Violence Act 133 of 1993 outlawed marital rape and was specifically extended by s 1(2) to customary marriages and cohabitations.

should seek to right the balance in the husband-wife relationship. On such questions as birth control, guardianship of children and the purchase and alienation of family property, consideration should be given to according wives decision-making powers on a par with husbands.[13]

(2) Relations with children

Patriarchy has also been taken as the basis for a broad range of rights and powers asserted by family heads over their children. Thus, in all dealings with the outside world, children have to be represented by a guardian; they have neither legal capacity nor any clearly defined legal rights. This conception of guardianship would be tolerable if it operated to protect children from the consequences of youthful inexperience, but in customary law the function of a guardian is to promote the interests of the family as a whole. Customary law has few rules to protect family members from his inept or unreasonable conduct.

This understanding of guardianship is no longer in keeping with social practice or international and constitutional norms. Socially, there has been a shift in generational authority from seniors to juniors, a phenomenon that is especially noticeable in senior males' loss of economic power. Normatively, there has been a shift in favour of the child's interests at the expense of the guardian's or family's, a principle that was entrenched in s 28(2) of the Constitution.[14] Thus it is proposed that the powers of family heads should now be circumscribed by the principle that the interests of children are always of paramount importance and that all people, regardless of age, should have full and secure rights to whatever property they acquire.

Much could be done to advance the cause of children's rights if a decision were made to apply the Age of Majority Act to persons subject to customary law.[15] Because majority status empowers generally, this ruling on its own could be sufficient to remedy the most serious

13 Most of these issues could be dealt with by applying the rule in s 29 of the General Law Fourth Amendment Act 132 of 1993 that husbands no longer have marital power over their wives.

14 What is more, s 9(3) of the Constitution prohibits discrimination on the ground of age.

15 57 of 1972. A recommendation to this effect was made in clause 14(3) of the draft bill appended to the South African Law Commission's *Report*.

incapacities currently suffered by women and children. Persons over the age of 21 will automatically be able to acquire and dispose of property, enter contracts, sue in court and act as emancipated adults on a par with senior men.

(3) Proprietary relations of the spouses

Other than a general principle that husbands own and manage the matrimonial estate, customary law has no clear provisions on the spouses' proprietary relations. Through two rules, however, wives can find themselves seriously disadvantaged on dissolution of marriage. First, because a wife is deemed not to have full proprietary capacity, anything she acquires becomes her husband's property. Hence, when her marriage ends, the wife is liable to forfeit all acquisitions to her husband or his family. Secondly, because it is assumed that a divorcée or widow will be supported by her own family, husbands have no duty to pay post-divorce maintenance.

The first step towards resolving the wife's predicament (and towards creating a fairer matrimonial proprietary regime) would be to give women the proprietary capacity enjoyed by men. The current understanding of female capacity is far from clear. According to the 'official' version of customary law, only senior males have full powers. Although women have recognized rights to specific items of a ritual nature, their capacity to acquire, control and dispose of the wages, salaries and consumer goods associated with a market economy has not been decided. Section 9 of the Constitution can no doubt be construed in conjunction with other fundamental rights[16] to give women the right to protect whatever property customary law allows them to hold. But more is necessary: a directive that women have *full* capacity in respect of all types of property.

Once it has been established that women have proprietary capacity, the way is open to deciding the modalities of a matrimonial proprietary regime. In the case of African marriages (even those contracted according to civil or Christian rites), the tendency has been to presume

16 Section 25(1) of the Constitution provides that `No one may be deprived of property except in terms of law of general application', but the remaining subsections make it clear that this provision was intended only to protect citizens in their relations with the state.

that spouses would be culturally predisposed to favour separate estates.[17] There appears to be no harm in retaining this rule, provided that the economically weaker spouse has the power to bind the other's estate for household necessaries and provided that a joint estate may be equitably distributed on divorce.

The spouses should, in any event, be free to enter into antenuptial contracts in which they can decide for themselves the property consequences of their marriage. At present, antenuptial contracts are assumed, for no good reason, to be possible only in the context of civil or Christian marriages.

III DIVORCE

(1) Breakdown of the marriage and procedure

At present, customary marriages may be terminated extra-judicially. In the interests of protecting vulnerable parties, especially wives and children, this position must be changed by a requirement that all divorces be duly processed by the courts.

In principle, a single system of family courts should administer a common code of divorce law. As far as grounds of divorce are concerned, irretrievable breakdown should be deemed the sole ground for dissolving a marriage, a rule that would accommodate particular cultural views as to what constitutes an untenable relationship.

Although under customary law wives may not of their own accord end their marriages, the constitutional principle of non-discrimination would imply that women should have *locus standi* to sue for their own divorces and for related matters, such as maintenance and custody.[18] This principle complements an existing rule that a woman may not be forced into a marriage against her will: just as she is free to refuse to contract a marriage, a woman should be free to end a union when she wishes.

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17 Imposed by s 22(6) of the Black Administration Act 38 of 1927. This rule was also adopted by s 39(1) of the Transkeian Marriage Act 21 of 1978.

18 This would follow from ss 9 and 34 of the Constitution.

(2) Division of property

Customary law had no notion of a joint marital estate. All property vested in the husband with the result that, when a marriage ended, the wife salvaged only her few personal possessions.

On dissolution of marriage, the major concern of customary law was to find an equitable balance of the two families' interests through return or retention of bridewealth. The same idea of fair distribution could by analogy provide a basis for apportioning the spouses' assets on divorce. Courts would be required to take into account the length of marriage and the spouses' contributions (whether material or by provision of services) to the estate. These principles are consonant with the common law, which, via the accrual system,[19] forfeiture of benefits and straightforward equity,[20] allows the courts a generous discretion to make whatever order seems just.

(3) Maintenance

Customary law had no concept of post-marital maintenance, since the purpose of divorce was to put an end to the spouses' relationship and that of their families. Wives were expected to return to their guardians, who took over the responsibility for maintaining them. Today, however, women have no guarantee of support from their natal families and they are often left to raise minor children alone.

The courts are already prepared to hold a father liable to support his children, but, in spite of a recommendation by the Law Commission,[21] they have not yet changed the position regarding spousal maintenance. Courts must therefore be empowered, along the lines of s 7 of the Divorce Act,[22] to order either spouse to pay maintenance in appropriate circumstances.

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19 Under ch 1 of the Matrimonial Property Act 88 of 1984.

20 Under s 7(3)-(6) of the Divorce Act 70 of 1979.

21 In clause 9(9) of the Bill appended to the Working Paper.

22 70 of 1979.

(4) Custody and guardianship

Under customary law, while payment of bridewealth theoretically determines guardianship of children, the rule is seldom strictly applied and rights may always be waived to enable the most capable family to rear a child.

The courts have long held that custody is to be determined by the interests of the child, a principle that has been extended to customary law. Not much has been said of the possibility that the principle exists in customary law as well, albeit in a form that conceives of those interests as being best safeguarded by not alienating the child from the resources of its patriline. In any event, the principle of the best interests of the child - which is in accordance with both international[23] and constitutional[24] norms - should now direct all aspects of the law regarding children, including guardianship and custody.

Strictly speaking, a mother had no right to her children in customary law, because they fell under the control of her guardian. Clearly, in view of the constitutional norm of non-discrimination, recommendations to change customary law,[25] reforms in KwaZulu/Natal[26] and under the Guardianship Act,[27] both spouses should now have equal rights and powers over minor children.

CHAPTER 4

THE WAY AHEAD

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23 Namely, arts 3 and 18 of the UN Convention on the Rights of the Child.

24 Section 28(2) of the Constitution.

25 By para 11.6 of the Law Commission's *Report*.

26 Section 27(2) of the Natal and KwaZulu Codes, Proclamation R151 of 1987 and Act 16 of 1985 (Z), respectively, has already provided that an unmarried woman may be legal guardian of her minor child, and s 27(5) allows women to be appointed sole guardians on divorce.

27 192 of 1993. And from the wording of s 1(1) the statute seems to be applicable to customary law.

(1) It is suggested that the issues and options outlined above ought to be debated thoroughly before any particular direction is embarked upon. Based on the outcome of such discussions legislation in respect of customary marriages will be proposed. The comments of all parties who feel that they have an interest in this topic or may be affected by the type of measures discussed in this paper are therefore of vital importance to the Commission. All respondents are invited to indicate their preferences in respect of the options examined and to indicate whether there are other issues and/or options that must be explored. **All affected individuals, organisations and institutions that are likely to be affected by possible legislation should participate in this debate.**

(2) To facilitate a focused debate, respondents are requested to formulate concise submissions with the following questions in mind:

* is there a need for a common marriage law for all South Africans, or should customary marriages be dealt with in separate legislation?

* are certain customary marriage practices, including bridewealth and polygyny, incompatible with the Constitution and the Bill of Rights and, if so, in what specific ways?

* are there any issues that the paper has not addressed and if so, what are they?

(3) The Commission has accorded this investigation one of the highest priority ratings and it is regarded as a matter of urgency. **Interested parties are accordingly requested to consider this paper and to respond before 31 October 1996.**