

**PROJECT 90**  
**THE HARMONISATION OF THE**  
**COMMON LAW AND**  
**THE**  
**INDIGENOUS LAW**

**REPORT ON**  
**CUSTOMARY MARRIAGES**

**SOUTH AFRICAN LAW COMMISSION**

**PROJECT 90**

**THE HARMONISATION OF THE COMMON LAW AND THE  
INDIGENOUS LAW**

**REPORT  
ON  
CUSTOMARY MARRIAGES**

**August 1998**



**TO DR AM OMAR, MP, MINISTER OF JUSTICE**

I am honoured to submit to you in terms of section 7(1) of the *South African Law Commission Act, 1973* (Act 19 of 1973), for your consideration the Commission's Report on Customary Marriages.

**I MAHOMED**

**CHAIRPERSON: SA LAW COMMISSION**

**AUGUST 1998**



## INTRODUCTION

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

The members of the Commission are -

The Honourable Mr Justice I Mahomed (Chairperson)

The Honourable Mr Justice PJJ Olivier (Vice-Chairperson)

The Honourable Madam Justice JY Mokgoro

Professor RT Nhlapo

Adv JJ Gauntlett SC

Ms Z Seedat

Mr P Mojapelo

The Secretary is Mr W Henegan. The Commission's offices are on the 12th floor, Corner of Andries and Schoeman Streets, Pretoria. Correspondence should be addressed to:

The Secretary

South African Law Commission

Private Bag X668

PRETORIA

0001

Telephone: (012) 322-6440

Telefax: (012) 320-0936

E-mail: [lawcom@salawcom.org.za](mailto:lawcom@salawcom.org.za)

Internet site: <http://www.law.wits.ac.za/salc/salc.html>

The project leader responsible for this project is Professor RT Nhlapo.

## ACKNOWLEDGEMENT OF ASSISTANCE

The Commission gratefully acknowledges the financial grant from the *Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ)* which enabled the Commission to conduct research, to prepare documents for discussion, to consult countrywide on its recommendations, and to print this report.

## SUMMARY OF RECOMMENDATIONS

### **The following recommendations are made in this Report:**

1. In order to remove the anomalies created by many years of discrimination, customary marriages, both existing and future unions, must now be fully recognized. To do so will comply with ss 9, 15, 30 and 31 of the Constitution, provisions which suggest that the same effect should be given to African cultural institutions as to those of the western tradition. (See par 3.1.13)
2. Parties should be allowed, in the case of a 'dual marriage', namely, a marriage celebrated by both customary and civil rites, to make an express declaration as to which law should regulate their marriage. (See par 3.3.5)
3. Conversion from a customary marriage to a civil marriage, but not vice versa, should be allowed. This right should be based not on the alleged superiority of any one marriage form, but rather on the practical consideration that movement from a more open-ended and facilitative arrangement to a stricter and more highly-regulated regime makes better sense than the reverse would do. It can be reasonably assumed that the parties consciously intended, for reasons of their own, to submit themselves to the stricter rules. (See par 3.3.6)
4. In order to define customary marriage it is recommended that legislative provision be made for a minimum set of essential requirements, chief amongst which should be the consent of the prospective spouses. In most cases the 'customary' nature of a marriage may be inferred from the inclusion of certain typical practices, such as a lobolo agreement, a traditional wedding ceremony or the involvement of the spouses' families. Since these practices differ among the various systems of customary law in South Africa, however, it is recommended that any legislative provision should be flexible enough to allow for groups to marry according to their own customary laws. (See par 4.1.13)

5. Registering officers should be required to explain to prospective spouses the difference between customary and civil marriage (namely, the different consequences and implications), and then endorse the fact that the couple heard and understood the explanation on the marriage certificate. (See par 4.1.14)
6. It is recommended that the main requirement for a valid customary marriage should be the consent of the spouses and that registering officers should be required to determine the fact of a spouse's consent. (See par 4.2.15)
7. The giving of lobolo should not be prohibited nor should any restrictions be imposed on the amount payable. (See par 4.3.2.8)
8. Lobolo should not be deemed essential for the validity of customary marriages. If parties wish to give lobolo, they should be free to do so, but payment or non-payment should have no effect on the spouses' relationship or on their rights to any children born of the marriage. (See par 4.3.3.14)
9. Because the giving of lobolo will have no effect on the validity of marriage, an agreement to pay may only be enforced by the usual judicial processes. Courts granting divorces should have jurisdiction to order return of lobolo subject to the deductions permitted in customary law. (See par 4.3.3.16)
10. Traditional wedding ceremonies and the handing over of the bride should not be considered essential for the conclusion of a valid customary marriage. Together with lobolo, however, these institutions will serve to identify a union as one celebrated according to African rites. (See par 4.4.10)
11. Customary marriages should be registered to ensure that marital status is made more certain and easier to prove. (See par 4.5.17)
12. Although registration should be compulsory, no obvious penalty exists to induce

compliance. To rule that unregistered unions are void would work great hardship for the spouses and would deprive many existing unions of potential validity. Hence, where a marriage has not been registered, the parties should be permitted to allege other forms of proof of its existence. (See par 4.5.18)

13. To encourage more people to register their marriages, the traditional authorities should be constituted registering officers. (See par 4.5.19)
14. To ensure that prospective spouses are mature enough to formulate a proper consent to marry and to remedy uncertainty in customary law about marriageable age, a minimum age of 18 for marrying should be fixed for all persons in the country. Underage children should nevertheless be permitted to contract a marriage on terms prescribed in the Marriage Act. (See par 5.1.19)
15. To bring customary law into line with the Constitution and the United Nations Convention on the Rights of the Child, a parent's power to consent to marriage must be exercised only in the child's best interests. It would follow that guardians may not unreasonably prevent their wards' marriages and that the consent of a guardian should be deemed necessary to remedy deficiencies in the judgment of minors. Marriages of children below age, where such consent was not supplied, should be voidable at the instance of the spouse or the guardians concerned. (See par 5.2.18)
16. Existing statutory and customary-law rules regulating the consent of absent or incompetent guardians should be applicable to marriages by customary law. (See par 5.2.19)
17. To avoid unfair discrimination on the ground of gender, parental consent should be deemed to include the consent of both the father and mother of an underage child. (See par 5.2.20)
18. The spouses' relative capacity to marry one another should continue to be governed by

customary law. (See par 5.3.6)

19. Customary marriages should continue to be potentially polygynous. This recommendation is made for several reasons, the most important of which are the difficulty of enforcing a prohibition and the fact that polygyny appears to be obsolescent. (See par 6.1.25)
20. Women should be deemed to have contractual capacity, *locus standi* and proprietary capacity (and in consequence delictual capacity) on a par with men. It is therefore recommended that section 11(3)(b) of the Black Administration Act be repealed. (See par 6.2.2.24)
21. In addition, to cure many years of uncertainty, clear provision should be made that the Age of Majority Act applies to persons subject to customary law. (See par 6.2.2.25)
22. In compliance with South Africa's obligations under the Convention on the Elimination of All Forms of Discrimination Against Women and the Constitution, legislation should be passed to provide that spouses have equal capacities and powers of decision-making. Such legislation will entail the repeal of sections 22 and 27(3) in the KwaZulu/Natal Codes and section 39 of the Transkei Marriage Act. (See par 6.2.2.26)
23. While the age of majority legislation (referred to in par 21 above) can free people to engage in commercial and other dealings with the world at large, it cannot protect their acquisitions from other members of their own family. It is therefore recommended that individual proprietary capacity now be placed beyond doubt. A clear legislative statement is needed that everyone be deemed capable of owning property with the result that full ownership in individual acquisitions will be recognized. (See par 6.3.1.16)
24. Remedies in the KwaZulu/Natal Codes for restraining or deposing a person who mismanages a family estate should be made available to all members of the family and these remedies should be applicable nationwide. (See par 6.3.2.6)
25. Spouses should have the power to enter into an antenuptial contract to vary the automatic

property consequences of marriage. (See par 6.3.3.4)

26. The spouses of customary marriages should be deemed to be married in community of property, subject to their freedom to alter this regime by antenuptial contract and subject to the current statutory rules permitting courts to order an equitable distribution of their estates on divorce. (See par 6.3.4.22)
27. Provision should be made for allowing the spouses to alter their property system after new legislation on customary marriages comes into force. (See par 6.3.4.23)
28. Because the private regulation of divorce in customary law places women and children at risk, it is recommended that all marriages may be terminated only by decree of a competent court. Once this principle is accepted, courts will have the power to ensure that wives and children are given necessary procedural protections and the power to apply appropriate rules on division of marital estates, post-divorce maintenance and custody and guardianship. (See par 7.1.20)
29. The current situation that magistrates' courts and the courts of traditional leaders have jurisdiction over customary divorces (and Black Divorce Courts have jurisdiction over divorces sought by Africans married by civil or Christian rites) should be ended as soon as possible. All divorce actions and actions about other family-law issues referred to in this Report should be processed by the family courts. (See par 7.1.21)
30. Before a divorce action is instituted in the family courts, traditional authorities should be entitled to attempt a reconciliation of the spouses. (See par 7.1.22)
31. Only one ground of divorce should be available: irretrievable breakdown of the marriage. In exercising their discretion under this principle, courts should take into account pre-divorce conciliation procedures available in customary law and appropriate cultural norms governing marital behaviour. They should not, however, favour husbands at the expense of wives. (See par 7.2.8)

32. Either spouse should be competent to apply for divorce. If a spouse is unable to prosecute the action unaided, the court should appoint a curator ad litem. Progressive reforms made to the common-law divorce procedure, such as the appointment of family advocates, should be extended to customary marriages. (See par 7.3.11)
33. In spite of numerous problems of enforcement, maintenance should in principle be available to the spouses and children of customary marriage, both *stante matrimonio* and on divorce. (See par 7.4.11)
34. In accordance with s 28(3) of the Constitution and the United Nations Convention on the Rights of the Child, the child's best interests should govern all aspects of custody, guardianship and access to children. Because the best interests principle has no specific content, the courts may take into account relevant cultural expectations when deciding a child's future. (See par 7.5.15)
35. To ensure the principle of equal treatment, mothers should have fully recognized rights to their children. (See par 7.5.16)
36. If marriage must comply with certain predetermined criteria, a concept of nullity is by implication introduced to customary law. While there is no need to specify grounds for nullity, courts adjudicating on the validity of marriage should be empowered to issue orders dealing with distribution of the partners' estates, custody and guardianship of children and return of lobolo. (See par 8.1.5)

<b>CONTENTS</b>	<b>PAGE</b>
Introduction	-iii-
Acknowledgement of assistance	-vi-
Summary of recommendations	-vii-
Bibliography	-xvii-
Mode of citation of major anthropology texts	-xvii-
Bibliography	-xviii-

## **CHAPTER 1**

### **INTRODUCTION**

1.1	Origin of the investigation	-1-
1.2	The Issue Paper and responses to it	-2-
1.3	The Discussion Paper and responses to it	-3-
1.4	Written comments: an overview	-4-
1.5	Workshops and meetings: an overview	-5-
1.6	Conclusion	-6-

## **CHAPTER 2**

### **BACKGROUND DISCUSSION: CUSTOMARY MARRIAGE, LAW REFORM AND THE CONSTITUTION**

2.1	The grounds of reform	-8-
2.2	Customary law: the `official' and `living' versions	-18-
2.3	Customary law and the Constitution	-22-

## **CHAPTER 3**

### **RECOGNITION OF CUSTOMARY MARRIAGES**

3.1	Principles of recognition	-27-
	A. Problem analysis	-27-
	B. Evaluation	-29-
	C. Recommendation	-31-
3.2	The problem of `dual marriages`	-32-
	A. Problem analysis	-32-
	B. Evaluation	-33-
3.3	Converting a marriage from one form to another	-38-
	A. Problem analysis	-38-
	B. Evaluation	-38-

C. Recommendation	-39-
<b>CHAPTER 4</b>	
<b>ESSENTIALS OF CUSTOMARY MARRIAGE</b>	<b>-40-</b>
4.1 The definition of customary marriage	-40-
A. Problem analysis	-40-
B. Evaluation	-41-
C. Recommendation	-43-
4.2 Consent of the spouses	-44-
A. Problem analysis	-44-
B. Evaluation	-46-
C. Recommendation	-48-
4.3 Lobolo	-49-
4.3.1 The meaning and function of lobolo	-49-
4.3.2. Prohibition and control of lobolo	-53-
A. Problem analysis	-53-
B. Evaluation	-54-
C. Recommendation	-56-
4.3.3 Should lobolo be an essential requirement for customary marriage?	-56-
A. Problem analysis	-56-
B. Evaluation	-58-
C. Recommendation	-61-
4.4 The wedding ceremony and handing over of the bride	-61-
A. Problem analysis	-61-
B. Evaluation	-62-
C. Recommendation	-64-
4.5 Formalities and registration	-64-
A. Problem analysis	-64-
B. Evaluation	-66-
C. Recommendation	-70-
<b>CHAPTER 5</b>	
<b>CAPACITY AND MINIMUM AGE</b>	<b>-71-</b>
5.1 Capacity and minimum age	-71-
A. Problem analysis	-71-
B. Evaluation	-73-
C. Recommendation	-76-
5.2 Parental consent	-76-
A. Problem analysis	-76-
B. Evaluation	-78-
C. Recommendation	-81-
5.3 Relative capacity: prohibited degrees and preferred marriages	-82-

A.	Problem analysis	-82-
B.	Evaluation	-83-
C.	Recommendation	-83-

## **CHAPTER 6**

### **CONSEQUENCES OF MARRIAGE -84-**

6.1	Polygyny	-84-
A.	Problem analysis	-84-
B.	Evaluation	-86-
C.	Recommendation	-92-
6.2	Personal relations of the spouses	-92-
6.2.1	Patriarchy and equal treatment	-92-
6.2.2	Improving the status of women	-95-
A.	Problem analysis	-95-
B.	Evaluation	-98-
C.	Recommendation	-102-
6.3	Proprietary relations during marriage	-102-
6.3.1	The customary law on property: personal, house and family estates	-102-
A.	Problem analysis	-102-
B.	Evaluation	-106-
C.	Recommendation	-108-
6.3.2	Management of marital estates	-109-
A.	Problem analysis	-109-
B.	Evaluation	-109-
C.	Recommendation	-110-
6.3.3	Antenuptial contracts	-111-
A.	Problem analysis	-111-
B.	Recommendation	-111-
6.3.4	Property consequences	-112-
A.	Problem analysis	-112-
B.	Evaluation	-113-
C.	Recommendation	-119-

## **CHAPTER 7**

### **DIVORCE -120-**

7.1	The need for judicial regulation of divorce	-120-
A.	Problem analysis	-120-
D.	Evaluation	-122-
C.	Recommendation	-126-

7.2	Grounds for divorce	-126-
	A. Problem analysis	-126-
	B. Evaluation	-128-
	C. Recommendation	-129-
7.3	The procedure	-129-
	A. Problem analysis	-129-
	B. Evaluation	-130-
	C. Recommendation	-133-
7.4	Maintenance	-133-
	A. Problem analysis	-133-
	B. Evaluation	-134-
	C. Recommendation	-137-
7.5	Custody and guardianship of children	-137-
	A. Problem analysis	-137-
	B. Evaluation	-139-
	C. Recommendation	-141-
	<b>CHAPTER 8</b>	<b>-142-</b>
	<b>NULLITY</b>	<b>-142-</b>
	A. Problem analysis	-142-
	B. Evaluation	-142-
	C. Recommendation	-143-
	<b>ANNEXURE A: RECOGNITION OF CUSTOMARY MARRIAGES BILL</b>	<b>-144-</b>
	<b>ANNEXURE B: CUSTOMARY MARRIAGES BILL</b> <b>(As contained in Discussion Paper 74)</b>	<b>-153-</b>
	<b>ANNEXURE C: LIST OF RESPONDENTS TO THE DISCUSSION PAPER</b>	<b>-160-</b>
	<b>ANNEXURE D: LIST OF WORKSHOPS AND MEETINGS ON THE</b> <b>DISCUSSION PAPER</b>	<b>-162-</b>
	<b>ANNEXURE E: LIST OF RESPONDENTS TO THE ISSUE PAPER</b> <b>(INCLUDING WORKSHOPS)</b>	<b>-163-</b>

## **BIBLIOGRAPHY**

### **MODE OF CITATION OF MAJOR ANTHROPOLOGY TEXTS**

#### **Ashton**

H Ashton *The Basuto* (1952)

#### **Coertze**

R D Coertze *Die Familie-, Erf-enOpvolgingsreg van die Bafokeng van Rustenburg* (1971)

#### **Duncan**

P Duncan *Sotho Laws and Customs* (1960)

#### **Hammond-Tooke**

W D Hammond-Tooke *Bhaca Society* (1962)

#### **Holleman**

J F Holleman *Shona Customary Law* (1952)

#### **Hunter**

M Hunter *Reaction to Conquest* 2ed (1961)

#### **Krige**

E J Krige *The Social System of the Zulus* (1936)

#### **Krige & Krige**

E J Krige & J D Krige *The Realm of a Rain Queen: a study of the pattern of Lovedu society* (1943)

#### **Kuper** *The Swazi*

H Kuper *The Swazi; a South African Kingdom* 2ed (1986)

#### **Marwick**

B A Marwick *The Swazi* (1966)

#### **Mönnig**

H O Mönnig *The Pedi* (1967)

#### **Schapera Handbook**

I Schapera *A Handbook of Tswana Law and Custom* 2ed (1955)

#### **Schapera Land Tenure**

I Schapera *Native Land Tenure in the Bechuanaland Protectorate* (1943)

## **BIBLIOGRAPHY**

- Abel R L (ed) *The Politics of Informal Justice* 2v (1982) New York Academic Press
- Adam H (ed) *South Africa: Sociological Perspectives* (1971) OUP
- Allott A N *The Limits of Law* (1980) Butterworths London
- Allott AN & G Woodman (eds) *People's Law and State Law* (The Bellagio Papers) (1985) Foris Publications Dordrecht
- Alston P (ed) *The Best Interests of the Child; reconciling culture and human rights* (1994) Clarendon
- Argyle J & E Preston-Whyte (ed) *Social System and Tradition in Southern Africa* (1978) OUP Cape Town
- Armstrong A K (ed) *Women and Law in Southern Africa* (1987) Zimbabwe Publishing House Harare
- Armstrong AK & R T Nhlapo *Law and the other Sex; the legal position of women in Swaziland* (1985) Univ of Swaziland Kwaluseni
- Armstrong AK *Struggling over Scarce Resources: women and maintenance in Southern Africa* (1992) University of Zimbabwe Harare
- Ashton H *The Basuto* (1952) OUP
- Bates F (ed) *Child and the Law* 2v (1976) Oceana Publications Inc Dobbs Ferry
- Becker H & M O Hinz *Marriage and Customary Law in Namibia* (1995) Namibia Papers Working Document No 30 Centre for Applied Social Sciences Windhoek
- Bekker J C *Seymour's Customary Law in Southern Africa* 5ed (1989) Juta Cape Town
- Benn S I & G F Gaus (eds) *Public and Private in Social Life* (1983) Croom Helm London, St Martin's Press New York
- Bennett T W *The Application of Customary Law in Southern Africa* (1985) Juta & Co Cape Town
- Bennett T W *A Sourcebook of African Customary Law for Southern Africa* (1991) Juta & Co Cape Town
- Bennett T W *Human Rights and African Customary Law* (1995) Juta & Co Cape Town

- Boberg P Q R *The Law of Persons and the Family* (1977) Juta & Co Cape Town
- Brookes E *History of Native Policy in South Africa from 1830 to the Present Day* (1924) Nasionale Pers Cape Town
- Burman S B & J Barry *Divorce and Deprivation in South Africa* (1984) Second Carnegie Inquiry into Poverty and Development in Southern Africa Paper No 87 Cape Town
- Burman SB & P Reynolds (eds) *Growing up in a Divided Society; the contexts of childhood in South Africa* (1986) Ravan Press Johannesburg
- Chanock M L *Law, Custom and Social Order, the colonial experience in Malawi and Zambia* (1985) CUP
- Chigwedere A *Lobola - the Pros and Cons* (1982) Books for Africa Harare
- Coertze R D *Die Familie-, Erf- en Opvolgingsreg van die Bafokeng van Rustenburg* (1971) SABRA Pretoria
- Coker G B A *Family Property among the Yorubas* (1958) Sweet & Maxwell London
- Colson E & M Gluckman (eds) *Seven Tribes of Central Africa* (1961) Manchester UP
- Comaroff J L (ed) *The Meaning of Marriage Payments* (1980) Academic Press London and New York
- Cotran E & N N Rubin (eds) *Readings in African Law 2v* (1970) Africana Publishing Corp New York
- Dlamini C R M A *Juridical Analysis and Critical Evaluation of Ilobolo in a Changing Zulu Society* (1983) unpublished LLD Thesis Univ of Zululand
- Duncan P *Sotho Laws and Customs* (1960) OUP Cape Town
- Durand J F F *Swartman, Stad en Toekoms* (1970) Tafelberg Uitgewers Kaapstad
- Eekelaar J M *Family Law and Social Policy* (1978) Weidenfeld & Nicolson London
- Eekelaar J M & E Clive *Custody After Divorce* (1977) Centre for Socio-Legal Studies Oxford
- Eekelaar J M & S N Katz *The Resolution of Family Conflict, comparative legal perspectives* (1984) Butterworth & Co Toronto
- Eekelaar J M & S N Katz *Marriage and Cohabitation in Contemporary Societies* 1980

Butterworth & Co Toronto

Eekelaar J M & M Maclean *Maintenance After Divorce* (1985) Clarendon Press Oxford; OUP New York

Eekelaar J M & P Sarcevic (eds) *Parenthood in Modern Society, legal and social issues for the twenty-first century* (1993) Martinus Nijhoff Dordrecht

Elias T O *The Nature of African Customary Law* (1956) Manchester UP

Fortes M & E E Evans-Pritchard (eds) *African Political Systems* (1940) OUP

Fortes M & S Patterson (eds) *Studies in African Social Anthropology* (1975) Academic Press London

Freeman M D A *The Rights and Wrongs of Children* (1983) Frances Pinter London

Freeman M D A & C M Lyon *Cohabitation without Marriage: an essay in law and social policy* (1983) Gower Guildford

Freeman M D A (ed) *State, the Law and the Family: critical perspectives* (1984) Tavistock and Sweet & Maxwell London and New York

Glendon M A *State, Law and Family: family law in transition in the United States and Western Europe* (1977) North Holland Oxford

Glendon M A *The New Family and the New Property* (1981) Butterworths Toronto

Glendon M A *The Transformation of Family Law: state, law and family in the United States and Western Europe* (1989) Univ of Chicago Press

Gluckman M (ed) *Ideas and Procedures in African Customary Law* (1969) OUP

Goldstein et al J *Beyond the Best Interests of the Child* (1973) The Free Press New York

Goode W J *World Revolution and Family Patterns* (1963) Free Press New York

Gray K J *Reallocation of Property on Divorce* (1977) Professional Books Abingdon

Hahlo H R *The South African Law of Husband and Wife* 5ed (1985) Juta & Co Cape Town

Hammond-Tooke W D *Bhaca Society: a people of the Transkeian uplands, South Africa* (1962) OUP

Hammond-Tooke W D (ed) *The Bantu-speaking Peoples of Southern Africa* 2ed (1974) Routledge & Kegan Paul London

Hamnett I *Chieftainship and Legitimacy; an anthropological study of executive law in Lesotho* (1975) Routledge & Kegan Paul London

Hastings A *Christian Marriage in Africa* (1973) Hollen Street Press London

Hirschon R (ed) *Women and Property/Women as Property* (1984) Croom Helm London

Holleman J F *Shona Customary Law* (1952) OUP Cape Town

Howard R E *Human Rights in Commonwealth Africa* (1986) Rowman & Littlefield Totowa

Hunter M *Reaction to Conquest* 2ed (1961) OUP

Junod H A *The Life of a South African Tribe* 2v (1912) Attinger Neuchatel

*International Documents on Children* (ed) G Van Bueren (1993) Dordrecht Martinus Nijhof Publishers

Kapferer B (ed) *Transaction and Meaning; directions in the anthropology of exchange and symbolic behaviour* (1976) Institute for the Study of Human Issues Philadelphia

Kasunmu A B & R W James *Alienation of Family Property in Southern Nigeria* (1966) Caxton Press (West Africa) Ltd Ibadan

Koyana D S *Customary Law in a Changing Society* (1980) Juta & Co Cape Town

Krige E J & J L Comaroff *Essays on African Marriage in Southern Africa* (1981) Juta & Co Cape Town

Krige E J & J D Krige *The Realm of a Rain Queen: a study of the pattern of Lovedu society* (1943) OUP

Krige E J *The Social System of the Zulus* (1936) Longmans Green London

Kuper A *Wives for Cattle; bridewealth and marriage in Southern Africa* (1982) Routledge & Kegan Paul London

Kuper A *Anthropology and Anthropologists; the modern British school* rev ed (1983) Routledge & Kegan Paul London

Kuper A *Wives for Cattle; bridewealth and marriage in Southern Africa* (1982) Routledge &

Kegan Paul London

Kuper A *South Africa and the Anthropologist* (1987) Routledge & Kegan Paul London

Kuper H *The Swazi; a South African Kingdom* 2ed (1986) Holt, Rinehardt & Winston New York

Letsoalo E M *Land Reform in South Africa: a black perspective* (1987) Skotaville Publishers Johannesburg

Lloyd P C *Yoruba Land Law* (1962) OUP London

Lye W F & C Murray *Transformations on the Highveld: the Tswana and Southern Sotho* (1980) David Philip Cape Town

Mair L *Marriage* (1971) Penguin Harmondsworth

Mann K & R Roberts *Law in Colonial Africa* (1991) Heinemann Portsmouth NH, James Currey London

Maqutu W C M *Contemporary Family Law of Lesotho* (1992) Univ of Lesotho Roma

Marwick B A *The Swazi* (1966) Frank Cass & Co London

Mathewson (1959) 10 *J Racial Affairs* 72

May J *Zimbabwean Women in Customary and Colonial Law* (1983) Mambo Press Gweru

Mayer P *Townsmen or Tribesmen* 1971 OUP Cape Town

Mayer P (ed) *Black Villagers in an Industrial Society* (1980) OUP Cape Town

Meulders-Klein M T & J Eekelaar *Family, State and Individual Economic Security* (1988) 2v Story-Scientia Brussels

Mitchell J *Woman's Estate* (1971) C Nicholls & Co Manchester

Moller V & G J Welch *Polygamy and Well-being among Zulu Migrants* (1987) Univ of Natal Durban

Mönnig H O *The Pedi* (1967) Van Schaik Pretoria

Morse B W & G R Woodman (eds) *Indigenous Law and the State* (1987) Foris Publications Dordrecht

Murch M *Justice and Welfare in Divorce* (1980) Sweet & Maxwell London

Murray C *Families Divided; the impact of migrant labour in Lesotho* (1981) CUP, Ravan Press Johannesburg

Nhlapo R T *Marriage and Divorce in Swazi Law and Custom* (1992) Websters Mbabane

O'Donovan K *Sexual Divisions in Law* (1985) Weidenfeld & Nicolson London

Obi S N C *Modern Family Law in Southern Nigeria* (1966) Sweet & Maxwell London

Olivier N J et al *Die Privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes* 3ed (1989) Butterworths Durban

Palmer R & N Parsons (eds) *The Roots of Rural Poverty in Central and Southern Africa* (1977) Heinemann London

Pauw B A *The Second Generation; a study of the family among urbanized Bantu in East London* (1973) OUP Cape Town

Pendleton W C *Katutura: a place where we do not stay* (1974) San Diego State Univ Press

Phillips A & H F Morris *Marriage Laws in Africa* 1971 OUP London

Phillips A (ed) *Survey of African Marriage and Family Life* (1953) OUP

Poulter S M *Family Law and Litigation in Basotho Society* (1976) Clarendon Oxford

Poulter S M *Legal Dualism in Lesotho: a study of the choice of law question in family matters* (1979) Morija Sesuto Book Depot Morija

Radcliffe-Brown A R & D Forde (eds) *African Systems of Kinship and Marriage* (1950) OUP London

Raum O F & E J De Jager *Transition and Change in a Rural Community* (1972) Fort Hare UP Alice

Reader D H *Zulu Tribe in Transition - the Makhanya of Southern Natal* (1966) Manchester UP

Reader D H *The Black Man's Portion; history, demography and living conditions in the native locations of East London, Cape Province* (1961) OUP Cape Town

Reuter A *Native Marriages in South Africa, according to law and custom* (1963) Aschendorffsche Verlagsbuchhandlung Münster

Roberts S *Botswana I: Tswana Family Law* (Restatement of African Law: 5) (1972) Sweet & Maxwell London

Roberts S (ed) *Law and the Family in Africa* (1977) Mouton The Hague

Rowbotham S *Women, Resistance and Revolution* (1972) Chaucer Press Suffolk

Rwezaura B A *Traditionalism and Law Reform in Africa* (1983) Europa-Institut der Universität des Saarlandes

Rwezaura B A *Parting the Long Grass: revealing and reconceptualising the African family* (1995) WLSA Trust Harare

Sachs A *Protecting Human Rights in a New South Africa* (1990) OUP Cape Town

Sanders A J G M (ed) *The Internal Conflict of Laws in South Africa* ( )

Schapera I *Migrant Labour and Tribal Life: a study of conditions in the Bechuanaland Protectorate* (1947) OUP

Schapera I *A Handbook of Tswana Law and Custom* 2ed (1955) OUP

Schapera I (ed) *The Bantu-speaking Tribes of South Africa* (1956) Maskew Miller Cape Town

Schapera I *Native Land Tenure in the Bechuanaland Protectorate* (1943) Lovedale Press Alice

Schapera I *Married Life in an African Tribe* (1966) Evanston NW University Press

Sheddick V G J *Land Tenure in Basutoland* (1954) HMSO London

Shropshire D W T - *Primitive Marriage and European Law: a South African investigation* (1976) Frank Cass London

Simons H J *African Women; their legal status in South Africa* (1968) C Hurst London

Sinclair J D (assisted by J Heaton) *The Law of Marriage* vol 1 (1996) Juta & Co

Smart C *The Ties that Bind: law, marriage and the reproduction of patriarchal relations* (1984) Routledge & Kegan Paul London

Soga J H *The Ama-Xosa: life and customs* (1931) Lovedale Press Alice

Steyn A F et al (eds) *Marriage and Family Life in South Africa: research priorities* (1987) HSRC Pretoria

Terray E *Marxism and 'Primitive' Societies* (1969) (trans M Klopper) 1972 Modern Reader New York

Van Tromp J *Xhosa Law of Persons: a treatise on the legal principles of family relations among the Ama Xhosa* (1947) Juta & Co Cape Town

Van Warmelo N J & W M D Phophi *Venda Law* (1948-1967) Government Printer Pretoria

Verryn T D (ed) *Church and Marriage in Modern Africa* (1975) Ecumenical Research Unit Greenkloof RSA

Vilakazi A *Zulu Transformations; a study of the dynamics of social change* (1962) Univ of Natal Pietermaritzburg

Webster D *Family and Household in KwaDapha, KwaZulu* (1987) Paper presented at Conference of SA Anthropologists Univ of Cape Town

Weinrich A K H *African Marriage in Zimbabwe and the Impact of Christianity* (1980) Mambo Press Gweru

Weitzman L J *The Divorce Revolution: the unexpected social and economic consequences for women and children in America* (1985) Free Press New York

Welsh D *The Roots of Segregation: native policy in colonial Natal 1845-1910* 2ed (1973) OUP Cape Town

Wilson M & A Mafeje *Langa: a study of social groups in an African township* (1963) OUP Cape Town

Wilson M & M E E Mills *Keiskammahoek Rural Survey* vol4 (1952) Shuter & Shooter Pietermaritzburg

Women and Law in Southern Africa *The Legal Situation of Women in Southern Africa* (vol 2)

Women and Law in Southern Africa *Uncovering Reality: excavating women's rights in African family law* ( ) Working Paper No 7 (undated) WLSA Harare

Women and Law in Southern Africa, Stewart (ed) *Inheritance in Zimbabwe* (1992) Working Paper No 5 WLSA Harare

## CHAPTER 1

### INTRODUCTION

#### 1.1 Origin of the investigation

1.1.1 In 1986 the Commission published a report on its investigation into the marriages and customary unions of Black persons (Project 51). Two Bills were recommended in the report. The first resulted in the Marriage and Matrimonial Property Law Amendment Act 3 of 1988. The second Bill dealt with the customary marriages of Black persons. With regard to this Bill the Commission recommended that further consultations with the leadership of the TBVC states and the self-governing states should take place. After a series of high-level meetings the proposal that the so-called customary union be recognized as a valid marriage was endorsed: however, on 10 April 1992 the Minister ordered that the implementation of the Bill be suspended until the constitutional position of the TBVC states and the self-governing territories was clarified.

1.1.2 The matter was subsequently referred to the newly-formed Project Committee on the Harmonisation of the Common Law and the Indigenous Law, whose term of office lapsed together with that of the Commission.

1.1.3 The new Commission, at a meeting on 23 and 24 February 1996, approved the reconstitution of the Project Committee<sup>1</sup> and the ranking proposed by the outgoing committee, which had identified the law of marriage and divorce as a priority area. The new Project Committee had its first meeting on 7 June 1996 at which it decided to revive the issue of customary marriage. To this end the committee developed an issue paper which set out the nature of the problems in respect of customary marriages and a range of proposals for addressing these problems. The main proposal was that full recognition should be granted to customary marriages, in confirmation of the position adopted by the Commission in its 1986 report. An allied

---

1 Which consists of the following members:  
Professor TR Nhlapo (Chairperson); Madame Justice JY Mokgoro; Professors TW Bennett & CRM Dhlamini; Ms L Baqwa; and Advocate F Bosman.

aim of the Issue Paper was to seize the opportunity offered by recognition of customary marriages to improve the position of women and children within these marriages.

## **1.2 The Issue Paper and Responses to it**

1.2.1 The Issue Paper on customary marriages was published on 31 August 1996, with 31 October 1996 set as the closing date for comments. This date was very quickly compromised as various interested parties requested extensions. A process of countrywide workshops<sup>2</sup> to explain and discuss the paper, set in motion by the Deputy Minister, also contributed to the decision to keep the closing date flexible. The deadline ultimately shifted to 30 April 1997.

1.2.2 In the new Commission's working methodology, an Issue Paper represents the first public announcement of an investigation. It aims to set out the Commission's view of the perceived problem, and the possible solutions, and it invites comment on the Commission's approach. It thus tries to involve the public at the very beginning of an investigation in the hope that feedback will help the Commission to settle preliminary issues, such as those relating to the scope of the project and the approach. Experience has shown that most respondents do not make the distinction between preliminary matters and matters of substance. It thus becomes necessary to sift carefully through the responses to separate those that are relevant to the purposes of the Issue Paper and those substantial recommendations which properly belong to the next stage in the process: the Discussion Paper.

1.2.3 37 written responses to Issue Paper 3 were received.<sup>3</sup> They came from a variety of sources and many were stimulated by the workshops on the Issue Paper, which were conducted in different parts of the country. The scale of the response has made it impossible to include all replies. Hence, in the interests of brevity, especially when most people agreed with proposals made by the Commission in the Issue Paper, only replies raising pertinent new issues will be mentioned. These are dealt with in the relevant section of the body of the Discussion Paper,

---

2 See annexure E.

3 See annexure E.

rather than separately.

### **1.3 The Discussion Paper and Responses to it**

1.3.1 The Discussion Paper on Customary Marriages was published on 29 August 1997 with 19 January 1998 set as the closing date for comments. As a result of requests from the public, and in order to accommodate additional workshops on the document, the closing date was shifted to 28 February 1998. Written responses, initially slow, began to increase in volume, especially after the publicity generated by the workshops.

1.3.2 By the time of the preparation of this report, 27 written responses had been received.<sup>4</sup> This number does not include those responses to the Issue Paper, which had covered matters of substance relevant to the Discussion Paper. Again the responses represented a wide range of opinions from individuals, government departments, non-governmental organizations and the business sector. Following the style adopted in preparing the Discussion Paper, the responses in this report are considered in the body of the text under the relevant section and not separately, although an overview of both the written comments and the workshop discussions is given below so that the whole consultation process can be viewed in perspective.

1.3.3 In addition to the written responses the Project Committee benefited greatly from the workshops that were conducted around the country between November 1997 and February 1998. In all, thirteen one-day workshops were held,<sup>5</sup> one in each province, plus four national ones in Pretoria which targeted the legal profession, organized labour, traditional leaders and religious leaders, as focus groups. A pre-Christmas round-table discussion in Bisho organized by the Law Faculty of the University of Fort Hare yielded useful criticism of the draft Bill.

---

4 See annexure C.

5 See annexure D.

## 1.4 Written comments: an overview

1.4.1 The written responses to the Discussion Paper (as well as those directed at the Issue Paper) indicated overwhelming support for recognition of customary marriages as valid marriages for all purposes in law. There was also a fair amount consensus over such matters as the fixing of a set of essential requirements and minimum ages, registration and the issue of marriage certificates and addressing long-standing concerns over the capacity of women within customary marriages (especially their proprietary capacity).

1.4.2 This is not to say that no voices were raised in fundamental objection to the whole project. There were, and many of them were motivated by a belief that the new South Africa required a uniform marriage law. It was felt that maintenance of duality in marriage systems was divisive and somewhat 'racist'.<sup>6</sup> Such a view was expressed by the **Gender Research Project** of the Centre for Applied Legal Studies (CALS) at the University of the Witwatersrand. The **Commission for Gender Equality**, too, criticized what it called a 'piecemeal' approach which failed to take advantage of the chance to deal holistically with Islamic marriages, Jewish personal law, cohabitation and customary law. The common strand in these criticisms is the view that a uniform marriage law would promote national unity. It is not clear, however, whether the submissions contemplated a unitary marriage with a single compulsory set of consequences (but with various optional forms of entry) or simply an omnibus marriage statute accommodating, in different chapters, the various types of marriage. The Commission's response to both versions of the criticism is given in the next chapter.

1.4.3 Criticism of a different kind came from respondents who felt that the proposals contained in Discussion Paper 74 were too 'western' and 'Eurocentric'. It was interesting, in view of the previous paragraph, that this group of respondents was united in its insistence that duality of marriage laws should be maintained. Support for this viewpoint came from the **House of Traditional Leaders (Eastern Cape)**, the **House of Traditional Leaders (Northern**

---

6 Typical of this view is a statement by the **Women's Lobby**: 'It is regrettable that the Law Commission believes South Africa is still at the stage where we are unable to amalgamate under one unifying system with optional provisions. In our view the Bill perpetuates racial divisions'.

Province), the **Bisho Round Table**, the **Organized Labour Workshop**, the **Religious Leaders' Workshop**, the **Traditional Leaders' Workshop**, the **Northern Province Workshop** and the **Eastern Cape Workshop**.

1.4.4 Several strands can be discerned in the argument. The first, exemplified by the **House of Traditional Leaders (Eastern Cape)**, is found in a call for any reforms in marriage law to use African values as the starting point, encouraging 'cultural borrowing' from western values only when those values are not repugnant to African norms and when their incorporation improves the quality of life of indigenous people. Secondly, in more concrete terms, the concern is that the Commission's proposals on spousal and parental consent, on marital power, property and ante-nuptial contracts are concepts alien to African culture and to customary law. This goes hand in hand with an argument, by the **Bisho Round Table Discussion** for instance, which sees these proposals as so radical that what is created is no longer a customary marriage but a new South African 'statutory marriage', which needs only to be extended to civil marriages to qualify as the country's uniform code.<sup>7</sup>

1.4.5 There was surprisingly little divergence of opinion about the Commission's reluctance to prohibit polygyny by law: many respondents, however, supported some form of state regulation of the practice. The same was true of lobolo. The vast majority of respondents indicated that it should be an optional cultural attribute of the marriage with no legal effect on either the children of the marriage or the validity of the marriage.

## **1.5 Workshops and meetings: an overview**

1.5.1 The workshops were conducted under the auspices of the Gender and Children Directorate of the Department of Justice as a joint venture with the Law Commission. They were organized and run through the provincial Gender Units of the Department as information-dissemination and information-gathering exercises. The Department took the opportunity to

---

<sup>7</sup> For supporters of this viewpoint, the merit of such a code would lie in its being based loosely on African values but catering for everybody. The pure customary marriage would remain outside this scheme and would be recognised as a parallel system.

unveil and explain its draft Gender Policy Considerations and the Project Committee did the same with its Discussion Paper on Customary Marriages. Although a bias in favour of women's NGOs and Departmental employees was evident in many of the gatherings, an attempt was made to invite a significant number of men and rural people.

1.5.2 The trend set by the written responses was confirmed by the workshops: there was general agreement that recognition of customary marriages was long overdue; that these marriages should be registered; that they should be governed by rules relating to consent and minimum age; that the reality of polygyny should be acknowledged; that the legal capacity of women should be improved; that lobolo should be optional and that divorces should be granted only by courts of law. The disagreements, too, tended to follow the same pattern as the letters. Thus, against a general consensus on non-prohibition of polygyny were ranged some voices of dissent (notably the **Northern Cape Workshop** and the **North West Workshop**). Similarly, the emerging consensus on making lobolo optional was strongly challenged by some who felt that it was an essential element in the validity of a customary marriage (the **KwaZulu-Natal Workshop** and the national **Traditional Leaders' Workshop**).

1.5.3 Of the remaining issues - mostly matters of detail - opinion was divided on implementation: who should be the registering officers? should they have a role in counselling intending spouses? whose consent should be relevant in the formation of marriage? should conversion from one marriage form to another be allowed? On the question of consequences, too, opinion was divided over such issues as whether a husband should obtain the consent of his wife (or wives) before he marries again; whether traditional courts should grant divorces or merely exercise conciliation functions. The most contested questions included the kind of property regime appropriate for a customary marriage.

## **1.6 Conclusion**

1.6.1 The Commission emerged from the consultation experiences convinced that its initial premise - that customary marriages should now be recognized as a matter of urgency - had been vindicated. It also became clear during the process that there was a tension between

different interpretations of the effect of the new Constitution on marriage and other personal laws. The different expectations arising from these interpretations ultimately resolved themselves into a tug-of-war between those who would claim a constitutionally-protected cultural right to lead their domestic lives according to a relatively familiar customary law and those who believe that any reform initiative must now give due consideration to the Bill of Rights and to South Africa's international obligations. The Commission proceeded on the principle that its proposals stand a chance of success only if they reflect the concerns of both.

## CHAPTER 2

### BACKGROUND DISCUSSION: CUSTOMARY MARRIAGE, LAW REFORM AND THE CONSTITUTION

#### 2.1 The Grounds of Reform

2.1.1 In accordance with its title - 'the Harmonisation of Common Law and Indigenous Law' - the Project Committee began its task with the aim of creating a uniform code of marriage law that would be applicable to all South Africans. It felt that, because marriage is an institution common to all cultures, all marriages no matter what their particular forms would exhibit certain broad similarities.

2.1.2 As responses to the Issue and Discussion papers were to show, this aim struck a ready chord with several individuals and organizations.<sup>1</sup> Participants at a discussion group sponsored by the **Law Faculty of the University of Fort Hare** in Bisho, for instance, used an image that seemed especially appropriate: 'a house with many doors'. In other words, there should be one marriage 'house' with a set of minimum requirements and consequences that could be entered into through as many cultural and religious 'doors' as the Muslim, Hindu, Jewish, African and other communities might wish.

2.1.3 Experiences of colonialism, segregation and apartheid in South Africa, however, have predisposed us to stress the differences between the civil marriage, on the one hand, and other cultural and religious forms of marriage, on the other. One consequence of this thinking was to maintain an undue distinction between customary and common law: marriages by African rites were subject to customary law and civil unions were generally subject to the common law. Another consequence was the privileged position enjoyed by civil unions. State policy was based on an understanding that only a 'voluntary union for life of one man and one woman to the

---

1 Inter alia, the **Commission on Gender Equality**, the **Women's Lobby** and the **Gender Research Project (CALs)**.

exclusion of all others' was a true marriage.<sup>2</sup> Because customary marriages were potentially polygynous, they could not be classed as true marriages.

2.1.4 Recognition of the cultural differences underlying this division would perhaps have been unobjectionable, if difference had implied equal treatment. But, in South Africa, the general policy of legal dualism was part and parcel of apartheid: one advanced law applicable to whites and a 'poor' law applicable to Blacks. Thus, for most Africans the enforcement of customary law implied the oppressive regime of the Department of Native Affairs and the Native Administration Act.

2.1.5 South Africa's new Constitution provided the opportunity to make a break with the past. As soon as the Interim Constitution was enacted, the government sent a clear message to the country that discrimination would no longer be tolerated. This message must be repeated in any future marriage code, since legislation has an important educative and standard-setting function for any society in transition. A state dedicated to the equal treatment of all individuals, whatever their race, gender, or social origin, should in principle have one marriage law. Equality will bring not only a new respect for the African legal tradition but also an improvement in the position of women and children, two groups previously disadvantaged by the old regime.

2.1.6 Aside from the constitutional principle of equal treatment, the goal of forging a single marriage law had other, more technical reasons. Apartheid policies had led to a proliferation of legislation on family law. When Transkei, Ciskei, Bophuthatswana and Venda acquired 'independence' from South Africa, the new entities used their legislative autonomy to enact far-reaching reforms of domestic law: a Marriage Act in Transkei,<sup>3</sup> a Succession Act in Bophuthatswana<sup>4</sup> and various decrees governing recognition of marriage and marital relationships

---

2 The classic formulation in *Hyde v Hyde & Another* (1866) LR 1 PD 130 was accepted into South African law by *Seedat's Executors v The Master (Natal)* 1917 AD 302 and repeated in *Ismail* 1983 (1) SA 1006 (A). See Dlamini (1985) 102 *SALJ* 701 at 708.

3 21 of 1978. Sections 42 to 50 (inclusive) of this Act were repealed by s 3 of the Justice Laws Rationalisation Act 18 of 1996, as read with Schedule II.

4 3 of 1982, as amended by the Intestate Succession Law Amendment Act 13 of 1990. This has been repealed by s 3 of the Justice Laws Rationalisation Act 18 of 1996, as read with Schedule II.

in Ciskei.<sup>5</sup> These enactments presumably applied to marriages of people domiciled in the TBVC states.

2.1.7 Under the National States Constitution Act,<sup>6</sup> homelands with only partial independence could also legislate on marriage in the areas for which they were established. KwaZulu, for instance, used its power to promulgate a fresh version of the Code of Zulu Law, in which several changes were effected to matrimonial law and the status of women.<sup>7</sup> Other homelands passed legislation on various aspects of family law and succession.<sup>8</sup> It was obscure when and to whom the latter category of laws should apply.<sup>9</sup>

2.1.8 As marriage laws proliferated, so too did the conflicts between them. Not surprisingly, confusion resulted. Hence, action was immediately taken under the Interim Constitution to rescind the apartheid statutes that had fragmented South Africa<sup>10</sup> and licensed its 'burgeoning and volatile lawmaking bodies'.<sup>11</sup> Legislation already passed by the former national homelands and TBVC states, however, was expressly preserved until repealed.<sup>12</sup> In 1996 most, but not all of these laws were then repealed by the Justice Laws Rationalisation Act.<sup>13</sup>

---

5 The Customary Law Amendment Decree 23 of 1991 and the Matrimonial Property Decree 7 of 1992. The latter decree was repealed by s 3 of the Justice Laws Rationalisation Act 18 of 1996, as read with Schedule II.

6 Section 3, as read with the First Schedule, of Act 21 of 1971.

7 Act 16 of 1985 (Z). In Natal, Zulu law is contained in a similar Code, differing only in detail from the KwaZulu version. The current version of the Code was promulgated in Proc R151 of 1987.

8 All of which have been repealed by the Justice Laws Rationalisation Act 18 of 1996.

9 Private international law (and the concept of domicile) might have been relevant to decide this question, but the National States Constitution Act implied that laws passed by the national states were enforceable only against 'citizens', as defined in s 3 of the National States Citizenship Act 26 of 1970.

10 Schedule 7 of the Constitution of the Republic of South Africa Act 200 of 1993.

11 See Bekker in Sanders *The Internal Conflict of Laws in South Africa* 38 and the hypothetical examples given by Sinclair *The Law of Marriage* 208 fn 7.

12 Section 229 of the Interim Constitution and Schedule 6(2) of the 1996 Constitution.

13 Notwithstanding this Act, Schedule 6(2) of the 1996 Constitution explicitly subjects all these laws to the Constitution and the Bill of Rights. See Mqoke (1995) 112 *SALJ* 343, for instance, on the complex question of the constitutional validity of various provisions in the Transkei Marriage Act.

2.1.9 In spite of these efforts to unravel the legal tangles of the past, various problems remain unsolved. One lingering uncertainty is whether still valid laws, such as portions of the Transkei Marriage Act and the KwaZulu/Natal Codes, are subordinate to national legislation (particularly the Marriage and Matrimonial Property Law Amendment Act).<sup>14</sup> Another uncertainty is when individuals should be deemed subject to customary or common law. (This, of course, is a chronic problem that is always present when a country recognizes two or more systems of personal law; but in South Africa the problem has become unduly complex.)<sup>15</sup> In short, the result of South Africa's experiments with legal pluralism has been confusion and uncertainty.

2.1.10 The Commission felt that marriage is an area where citizens should be in a position to know what their rights and duties are.<sup>16</sup> A single code of law would go part of the way to meeting this requirement.

2.1.11 The Commission was forced, however, to abandon its initial objective. No matter how sound the arguments in favour of a unified marriage law, a measure of dualism was inevitable. As will become apparent below, compromise on the issue of unification was not simply a matter of expediency. On the one hand, cultural pluralism is guaranteed by ss 30 and 31 of the Bill of Rights and, on the other, we need to eradicate former prejudices against African cultural institutions.

2.1.12 When the Commission looked to the north of our borders, it found that the cause of legal unification had lost impetus and had been abandoned. When African states gained their independence, proposals to create a single code of laws to be administered by one body of courts<sup>17</sup> had generated much political debate.<sup>18</sup> As in South Africa, it was hoped that, if differences were

---

14 3 of 1 988. Other South African laws, such as the Divorce Act 70 of 1979 and the Matrimonial Property Act 88 of 1984, were extended to the entire 'national territory' by s 2 of the Justice Laws Rationalisation Act 18 of 1996. See Sinclair (n11) 129-31.

15 And such complexity would infringe the fundamental right to certain and intelligible laws. See Van der Vyver (1982) 15 *CILSA* 312-14.

16 A point made by **T S B Jali** in commenting on the Issue Paper.

17 This principle was adopted prior to independence, at a 1953 conference of judicial advisers at Makerere College in Uganda. See Brooke (1954) 6 *J Afr Admin* 69ff and Allott (1965) 14 *ICLQ* 366.

18 To A topic on which **R W Skosana** made several useful observations.

eradicated, standards in the administration of justice would be improved and national unity would be promoted<sup>19</sup> and, as in South Africa, the demand for unity was a reaction against the racism of the colonial past.<sup>20</sup>

2.1.13 Ideals were soon to be compromised.<sup>21</sup> Plans to unify substantive laws foundered on the dilemma of which law to take as the basis for a new regime: the received European law or an indigenous system? Nearly all the independence movements insisted on a better deal for African customary law:<sup>22</sup> it was a national heritage, something to be protected and cultivated. But, if customary law was to be adopted, which particular system of the potentially many customary laws recognized in the state should be elevated to the privileged position of the new code?

2.1.14 Although plans for full-scale unification were generally discarded, there were some exceptions. Ivory Coast, for instance, all but abolished customary law in favour of a new code of civil law.<sup>23</sup> So, too, did the former imperial government of Ethiopia.<sup>24</sup> As might be expected, the approach in the anglophone countries was not nearly as radical. True to the common-law tradition, these states contented themselves with piecemeal legislation on specific topics. Several acts were produced on succession,<sup>25</sup> but the approach to reform of marriage and divorce was more tentative.

2.1.15 The reform process began in 1961 in Ghana,<sup>26</sup> where a new divorce law was

---

19 Cotran (1963) 1 *J Mod Afr Studies* 214.

20 See Spalding et al (1970) 2 *Zambia LJ* 85-98.

21 Spalding op cit 79ff and Opoku (1976) 9 *Verfassung und Recht* 65. Most of the new governments eventually had to settle for unification of the courts, but even here concessions had to be made to pluralism, since no African state could afford to dispense with the courts run by traditional leaders.

22 Elias *Nature of African Customary Law* Preface. See, too, Women and Law in Southern Africa (WLSA) *Uncovering Reality* 11, citing Rwezaura and Chanock 1991 *AJ* 53-4.

23 By Law No 64-375 (on marriage) and Law No 64-376 (on divorce and judicial separation).

24 See David (1962-3) 37 *Tulane LR* 187.

25 For example, the Wills and Inheritance Act 25 of 1967 (Malawi), Law of Succession Act 1972 (Kenya) and Intestate Succession Act 91 of 1989 (Zambia).

26 When the government published a White Paper on Marriage Divorce and Inheritance No 3/61.

eventually promulgated.<sup>27</sup> The legislative initiative then faltered.<sup>28</sup> Seven years later, Kenya set up a commission on marriage and divorce. Here, too, the Commission's recommendations had little success.<sup>29</sup> The work of the Kenyan Commission was not wasted, however, since its Report provided a foundation for the 1971 Tanzanian Law of Marriage Act.<sup>30</sup>

2.1.16 This enactment, the most thorough-going reform of marriage law in the common-law jurisdictions of Africa, integrated customary, Islamic and common-law rules on marriage and family law into a single code. The Act allowed two kinds of marriage - polygamous (Islamic or customary) and monogamous<sup>31</sup> - both having broadly the same consequences (which were derived from English law). For example, spouses were deemed to have separate estates during marriage, and, on separation or divorce, the courts were given a qualified discretion to distribute the assets acquired during the marriage by joint effort.<sup>32</sup> Divorce was permitted only on the irreparable breakdown of a marriage.<sup>33</sup>

2.1.17 In 1978, inspired partly by the Tanzanian experiment, Transkei also attempted an integrated code of marriage law. Its Marriage Act,<sup>34</sup> however, did not go as far as the Tanzanian law in creating a uniform legal regime. While most of the consequences of marriage, notably

---

27 The Matrimonial Causes Act 367 of 1971 introduced the irretrievable breakdown principle and an informal conciliation procedure.

28 The Ghanaian White Paper proved influential in a Ugandan commission on marriage, divorce and the status of women, but the only substantive change made to Ugandan law was a Customary Marriage (Registration) Decree 16 of 1973, which required registration of all marriages and certain minimum requirements for customary unions.

29 See Bennett & Peart 1983 *AJ* 154-5.

30 5 of 1971. For commentary see Read (1972) 16 *JAL* 19.

31 Section 10(1).

32 Read op cit 32. Section 56 introduced various improvements to the status of women, whereby wives were given full capacity to hold and dispose of property, make contracts and sue and be sued in contract or delict.

33 Read op cit 33.

34 21 of 1978. For general commentary, see Bekker *Seymour's Customary Law in Southern Africa* 255-62 and Van Loggerenberg 1981 *Obiter* 1.

marital property,<sup>35</sup> status of wives,<sup>36</sup> divorce<sup>37</sup> and custody and guardianship of children,<sup>38</sup> were common to both customary and civil marriages, in other areas, such as essential requirements,<sup>39</sup> the two types of marriage preserved their separate identities. The most dramatic innovation was to make all marriages, whether civil, Christian or customary, potentially polygynous.<sup>40</sup>

2.1.18 Legal anthropologists had an obvious interest in these reforms. The results of their studies sent the well-meaning legislators a discouraging message. Regardless how desirable the political and social goals of legal unification may be, reforms will become paper law if they do not fall into a receptive community.<sup>41</sup> Research on the legislative programmes in Africa is in no sense comprehensive or complete, but from available evidence it seems clear that customary law still governs people's everyday lives (and, of course, it is still regularly applied by traditional authorities).<sup>42</sup>

2.1.19 Law-givers should perhaps have expected a somewhat disappointing outcome, because it is well known that family law is an area notoriously resistant to outside interference.<sup>43</sup> Many case studies have shown that reforms are acted upon only when the intended beneficiaries are educated and capable of asserting their legal rights. In fact, far from welcoming the intervention of legislators, oppressed people are usually resigned to putting up with the burdens they know and have learned to cope with.<sup>44</sup>

---

35 Section 39(1) provided that all marriages, whether customary or civil, were out of community of property.

36 According to s 37 women were invariably deemed to be under the guardianship of their husbands.

37 Section 43, as read with s 48, provided the same grounds for divorce for both types of marriage.

38 Section 45 provided that these issues were to be regulated by the common law.

39 Chapters 2 and 3.

40 Section 3.

41 On the Tanzanian Law of Marriage Act, for instance, see Rwezaura (1983-4) 1/2 *Zimbabwe LR* 85 and Rwezaura & Wanitzek (1988) 2 *Int J Law & Family* 20.

42 Which, according to Welsh et al in *Armstrong Women and Law in Southern Africa* 105ff, was what happened in Mozambique. Other commentators have observed that laws available to ameliorate the status of women were simply ineffective, because they were operating in a culture that was impervious to legal reform. See Nhlapo in *Armstrong* op cit 51 and *May Zimbabwean Women* chs 12 and 13.

43 See Bennett 1991 *AJ* 32 and, particularly, Allott *The Limits of Law* 196-202.

44 See Cheater (1989) 16 *Zambezia* 105, for example.

2.1.20 A sub-discipline of anthropology, legal pluralism,<sup>45</sup> has repeatedly shown that, whatever the dictates of state law, any authentic, 'living' customary regime will by definition persist. We can therefore count on legislation being reliably applied only by authorities under direct state supervision. In areas where the influence of the state is weak, customary institutions will continue to flourish in the way they always have.<sup>46</sup> And, of course, traditional laws will not be readily abandoned by those, such as senior males, who stand to lose their positions of privilege and authority.

2.1.21 The limits inherent in what the law can do to uplift and protect vulnerable parties in marriage suggested to the Commission that it would be inadvisable to ignore customary institutions. Thus, for instance, even if lobolo and polygyny seemed contrary to the ideal of spousal equality, they are so deeply rooted in the African consciousness that it would be impossible to enforce any prohibition.

2.1.22 Conversely, of course, the respect now due to the African legal tradition demands serious consideration of customary law. Criticisms have been made, especially by traditional leaders,<sup>47</sup> and by the discussion group sponsored by the **Law Faculty of the University of Fort Hare** at Bisho that the Commission gave the common law a superior role in its Discussion Paper.<sup>48</sup> This superiority, however, is more apparent than real. The phrase 'common law' was indeed used frequently in the Commission's preparatory documents, but it was 'common law' in the widest sense, which included both Roman-Dutch law and legislation.

---

45 For background on the body of research that has come to be called 'legal pluralism', see Griffiths (1986) 24 *J Legal Pluralism* 1, Merry (1988) 22 *Law & Soc R* 869 and the collection of papers in Allott & Woodman *People's Law and State Law*.

46 Griffiths op cit 3 therefore refutes the idea that 'law is ... the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions'. The contributors to Morse & Woodman *Indigenous Law and the State* document the widespread dualism of this nature.

47 Notably the **House of Traditional Leaders (Eastern Cape)**, which felt that 'harmonization' should not entail forcing customary law into a western mould. Instead, 'harmonization' should mean borrowing western institutions compatible with African culture.

48 Members of the discussion group felt that the Commission had proposed not unification but a take-over, namely, a new South African 'statutory marriage'. (The **Department of Land Affairs** also felt that customary marriage should be recognized *parallel* to and not as part of civil marriage.) In order to counteract the tendency to give common law a leading role, the discussion group said that the consequences of marriage should not stray too far from the expectations of the parties.

2.1.23 Extending the scope of statutory reforms to customary marriage should imply no particular preference for the western over the African cultural tradition. These statutes attempted to correct serious legal and social problems that had been allowed to develop under the Roman-Dutch regime (which itself was, and still is, in need of adjustment to comply with the Bill of Rights).<sup>49</sup> For no particularly good reason, the reforms were not applied to customary marriages, even though Africans were experiencing the same social problems.

2.1.24 It must be appreciated that no single legal system can offer the perfect model for reform, because 'family law is everywhere in turmoil, in a state of flux and conceptual disarray'.<sup>50</sup> Thus, instead of brooding over the somewhat abstract debate about unification of laws or the cultural provenance of new rules, the Commission took as its point of departure the need to solve common social problems. People from all communities, whatever their personal law or the type of marriage they have contracted, experience spousal violence, they dispute about custody of children and they seek to claim financial support. Our search should be for an effective means of remedying these problems, means that will offend neither the aim of unification nor that of cultural pluralism.

2.1.25 In summary, the proposals set out below reflect the Commission's purpose to establish a set of minimum requirements for contracting a valid marriage and uniform consequences for all marriages, while allowing certain distinctively African traditions to continue. Some of these proposals had to be modified between publishing the Discussion Paper and this Report, as thinking on the subject of unification in the Project Committee itself shifted. That change should occur was inevitable.

2.1.26 For a start, further research and discussion with members of the public indicated at least three different interpretations of the concept of unification. For some it meant no more than one statute on marriage containing a special chapter on customary law. For others it meant

---

49 The **Gender Research Project (CALs)** in its response to the Issue Paper, for instance, said that common law cannot be taken as the standard against which to judge customary law. See the list in Glendon *Transformation of Family Law* 307 of major problems still awaiting solution in western legal systems.

50 Sinclair (n11).

a set of minimum requirements for all unions that could then be celebrated according to a variety of religious or cultural rites. For others still, it implied a uniform set of consequences applicable to all marriages.

2.1.27           The Commission finally arrived at a decision that, no matter how worthy the cause of unifying marriage law (in the second and third senses above), a single code would entail the assimilation and possible loss of customary law. In addition, maintaining a degree at least of cultural pluralism was overwhelmingly supported by the public.

2.1.28           The Commission's decision to retain a distinctly customary form of marriage should not, however, imply that the ideal of unification has been permanently abandoned. We recognize that our work is the first step in a process of reform. (The Commission was conscious of the fact that its recommendations might influence subsequent work on other, as yet unrecognized unions, especially Islamic, Hindu and other religious forms of marriage.) Through experience and further study, understanding of the problems will deepen, and the cause of legal unity may be pursued in future legislation.

2.1.29           The Commission was acutely aware of the urgency with which reform was needed. Wrongs of the past had to be righted. Customary marriages deserved immediate recognition and the position of women and children required urgent attention. It was considered undesirable in principle to delay these reforms while work proceeded on other allied marriage issues.

2.1.30           In drawing up its proposals the Commission obviously deferred to the overriding requirements of the Bill of Rights and to South Africa's obligations to implement the international human rights conventions it has ratified. As it happens, the foundations for much of this work had already been laid. Through scholarly research, judicial decisions<sup>51</sup> and the Law Commission's *Report on Marriages and Customary Unions of Black Persons* (1985), many useful recommendations have been made on how to bring customary marriage law into line with human rights.

---

51           Especially decisions not to apply customary law where it was incompatible with natural justice or public policy (a proviso currently contained in s 1(1) of the Law of Evidence Amendment Act 45 of 1988).

2.1.31 A further invaluable source of ideas has been the observations of the concerned groups and individuals who responded to the Issue and Discussion Papers published in 1996 and 1997. These suggestions have been most welcome, not only for indicating the attitudes and requirements of the public but also for giving much-needed information on the current state of customary law.

## 2.2 Customary Law: the 'official' and 'living' versions

2.2.1 In its work with customary law, the Commission ran into an immediate problem: how to decide whether customary rules are valid and authentic. Custom has commendable qualities. The greatest is its 'dynamism reflected in the spirit of tolerance, dialogue, and consultation which bear out custom as a process whereby claims and disputes are negotiated'.<sup>52</sup> Unfortunately, this same quality becomes a weakness when customary law is required to conform to the system and certainty of a predominantly western legal culture.

2.2.2 Customs vary from community to community.<sup>53</sup> They are imprecise, flexible and liable to constant and subtle change. Not only is the law diverse and volatile but it also exists in at least two versions. The version usually relied upon by courts and other state organs is a so-called 'official' law. This collection of rules has been called into question by modern scholarship on the grounds that it is tainted by apartheid, out of date and a distortion of genuine community practice. In consequence, a distinction is now generally drawn between 'official' and 'living' law, the latter denoting law actually observed by African communities.<sup>54</sup>

2.2.3 In other parts of Africa empirical studies of the laws being administered in higher and lower courts have highlighted differences between these two versions. One would expect judges in the higher courts to be more sensitive to individual rights, but, ironically, they are hesitant to depart from the strictly patriarchal, 'traditional' version of customary law in the official

---

52 WLSA (n22) 8.

53 See Molokomme in Women and Law in Southern Africa (WLSA) *The Legal Situation of Women in Southern Africa* 13, for example, regarding the capacity of women in Botswana.

54 Sanders (1987) 20 *CILSA* 405ff.

code.<sup>55</sup> Instead, women are more likely to receive a sympathetic hearing in chiefly courts, notwithstanding the fact that these tribunals are controlled by traditional rulers.<sup>56</sup> The explanation is not necessarily that traditional courts are deliberately trying to advance the cause of women. Rather, it seems that the vagueness and flexibility of custom allows them to respond more directly to shifts in local attitudes and practice than the higher courts.

2.2.4 This divergence in the laws (and the judicial attitudes to them) is inevitable, given the coexistence of two different legal traditions. The 'official' version of customary law has its origin in the colonial administration's attempt to eliminate the uncertainties of custom by reducing it to writing. The Natal Code of Zulu Law<sup>57</sup> was an early example of this initiative. By the end of the nineteenth century, when judgments handed down by the Native High Court in Natal and the Native Appeal Court in Transkei were reported, judicial precedents were yielding new sources of written law.<sup>58</sup> These formal sources were continually being supplemented by the work of anthropologists and legal writers.

2.2.5 Although the state's demand for known and certain rules has been amply supplied, critical jurisprudence has revealed that much of the work done during the colonial and apartheid eras was directed by, or at least disposed towards, the interests of the state.<sup>59</sup> The legitimacy of former systems of justice depended on customary law being cast as a tradition, a regime derived from an autonomous, pre-colonial African society. Thus, the 'official' version of customary law described less what people previously did (or were actually doing) and more what the government

---

55 See, for example, the findings of Women and Law in Southern Africa (WLSA) Stewart (ed) *Inheritance in Zimbabwe*. And, for a specific study, see *Maagwi Kimito v Gibeno Werema* CA Civ App 20/84 (unreported), which is discussed by Bakari (1991) 3 *Afr J Int & Comp L* 549ff.

56 See Armstrong et al (1993) 7 *Int J of Law & Family* 328, and the studies by Ndulo (1985) 18 *CILSA* 90, Coldham (1990) 34 *JAL* 67. Cf Griffiths (1984) 22 *J Legal Pluralism* 1 regarding traditional courts in Botswana.

57 The first version was promulgated in 1878. It has been revised several times, in 1891, 1932, 1967 and 1987. Any customary law in conflict with the Code is superseded: *Molife* 1934 NAC (N&T) 33 and *Ndhlovu v Molife* 1936 NAC (N&T) 33.

58 The Native Appeal Court, established by the Black Administration Act 38 of 1927, functioned as successor to the Natal and Transkei courts. Decisions of the NAC continued to be reported until shortly before it was abolished by Act 34 of 1986.

59 Kuper *Anthropology and Anthropologists* 99ff. Cf Gluckman in Fortes & Patterson *Studies in African Social Anthropology* 21ff.

and its chiefly rulers thought they ought to be doing. As several historians of customary law have said, it is an 'invented tradition'.<sup>60</sup>

2.2.6 The ideological slant of the 'official' version is evident not only in its content but also in its form. Authors of customary law have cast it in the language of western law. Women, for instance, have been described as 'minors' under the 'guardianship' of their husbands and fathers or they were said to be subject to 'marital power'. Less obvious than these linguistic distortions, but equally misleading, was the certainty and precision given to customary law.<sup>61</sup> The basis of any custom is an accepted social practice, which means that the rules are continually, though often imperceptibly, changing. Through devices of *stare decisis*, codification and restatement, however, customary law was fixed until formally changed by the law-maker.<sup>62</sup>

2.2.7 Vital questions in any inquiry into customary law, therefore, will be whether the rules were derived from the 'invented African tradition', whether they were deformed in the process of fitting them into a western legal mould and, most important, whether they now lag behind social practice. In principle, only the rules grounded on contemporary social practice should be deemed valid.

2.2.8 Notwithstanding its shortcomings, the 'official' version cannot be dismissed out of hand. In the first place, a genuine system of custom can never be immediately accessible to those who are not living in the communities concerned. Only a participant observer, such as an anthropologist, has direct access to customary law; outsiders must always rely on second-hand accounts.<sup>63</sup> In the second place, precedents of the former Black Appeal Courts can yield valuable

---

60 A concept introduced to the study of law in Africa by Chanock *Law, Custom and Social Order*. The adjective 'invented' is meant to warn us that writers were creating a past that did not in fact exist. See further, on South Africa, Burman (1979) 12 *Verfassung und Recht* 129 and Gordon (1989) 2 *J Historical Sociology* 41.

61 Bennett *Application of Customary Law in Southern Africa* 23. Thus, as Chanock wrote in (n60) chs 10 and 11, the subtle and fluctuating obligations of African marriage were refashioned into rights and duties that brought it into line with a western legal discourse.

62 See the discussion by Hamnett *Chieftainship and Legitimacy* 10-13 of qualities that typify 'customary' law.

63 Traditional rulers are different. Because their courts are not socially removed from the cases being adjudicated, they are more likely to be aware of changes occurring in the law.

lessons on how to reconcile two legal traditions. These decisions can be instructive, for example, in showing whether customary law conformed to fundamental human rights, and, if it did not, showing what adjustments could be made.

2.2.9 In the third place, much of the `official' version will persist for the simple reason that we have no other, more reliable account of customary law. It is true that litigants are not bound by rules from this source. They are free to allege a better version by calling proof of a new or more authentic custom.<sup>64</sup> But, if a party doing so does not meet the standards required for proving custom,<sup>65</sup> then the `official' version will prevail for want of better evidence.<sup>66</sup>

2.2.10 Many people felt that, before engaging in this Project, the Law Commission should have mounted a nation-wide survey of customary law in order to establish which customs are still observed and which serve the interests of the African community. Attractive as this proposition seemed, it was, for reasons both theoretical and practical, not feasible.

2.2.11 Any written statement of customary law would represent the rules at a particular time. Unless regularly updated, such statements inevitably fall behind social practice, becoming new `official' versions of the law. Moreover, no matter how sensitively compiled, a statement always runs the risk of reflecting current policies and biases (and may thus be later criticized for distorting social practice).

2.2.12 More prosaic objections to restating customary law concern time and cost. Such projects are probably easier to undertake in countries with small populations and relatively uniform systems of customary law. (The restatement project in Botswana, for instance, was

---

64 Either under a proviso to s 1(1) of the Law of Evidence Amendment Act, that customary law may be applied only if it `can be ascertained readily and with sufficient certainty', or under s 1(2), which states that `[t]he provisions of subsection (1) shall not preclude any party from adducing evidence of the substance of a legal rule contemplated in that subsection which is in issue at the proceedings concerned ....'

65 For which, see *Mazibuko* 1930 NAC (N&T) 143, *Ex parte Minister of Native Affairs: in re Yako v Beyi* 1948 (1) SA 388 (A) at 394-5 and *Masanya v Seleka Tribal Authority & Another* 1981 (1) SA 522 (T) at 524.

66 See, for example, *Ruzane v Paradzai* 1991 (1) ZLR 273 (SC) at 278.

completed by a single person in only four years.)<sup>67</sup> Given the diversity of South Africa's systems of customary law, however, restatement would be an immense task.

2.2.13 Even if resources were available, it would be a mistake to assume that the restatement would be a final and definitive account of all systems of customary law in South Africa. What legal status would the restatement enjoy? Should it be preferred to the writings of anthropologists? How would it relate to existing precedent and codified law? Would its existence preclude parties from leading evidence of new rules to the contrary?

## 2.3 Customary Law and the Constitution

2.3.1 The development of a customary marriage law will obviously have to comply with South Africa's new Constitution.<sup>68</sup> Although the Constitution has no provisions specifically aimed at marriage,<sup>69</sup> the various rights and freedoms enshrined in the Bill of Rights, such as freedom of association and the freedom to pursue a religion or culture of choice,<sup>70</sup> provide the foundations of a basic family law.

2.3.2 Of special relevance in this regard are the principles of equality and non-discrimination. Section 9(1) of the Constitution declares that 'Every person shall have the right to equality before the law and to equal protection of the law', and s 9(2) provides that 'No person shall be unfairly discriminated against, directly or indirectly' on grounds, inter alia, of gender, sex or age. Many aspects of customary law - which generally endorses the patriarchal traditions of Africa - could now be in conflict with these provisions.

2.3.3 Marriage is also regulated by existing public policy and various international conventions. The most important treaties are the 1981 Convention on Elimination of Discrimination against Women (CEDAW), the 1990 United Nations Convention on the Rights

---

67 Schapera produced his *Handbook of Tswana Law and Custom* between 1934 and 1938.

68 Constitution of the Republic of South Africa 1996.

69 See Sinclair (n11) 71 esp fn 176.

70 Sections 18,15, 30 and 31, respectively.

of the Child and the 1962 Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages. Because South Africa has ratified these conventions, it now has international obligations to adjust its domestic law accordingly.

2.3.4 Customary law received little attention during the drafting of South Africa's interim and final Constitutions.<sup>71</sup> In the final Constitution, however, it was given express mention in s 211(3), which declares that the courts must apply customary law 'when that law is applicable', but subject to any legislation specifically dealing with it and also subject to the Constitution.<sup>72</sup>

2.3.5 A literal interpretation of s 211(3) suggests that any rule of customary law in conflict with the Bill of Rights must automatically give way to the latter. Testing the constitutional validity of rules of private law, however, involves a more flexible approach. Three inquiries are necessary: when is the Constitution applicable to private relationships; do circumstances warrant limitation of fundamental rights; and how are the abstract and generalized terms of these rights to be construed in a South African context? In answering these questions, a measure of discretion is introduced into what would otherwise be an entirely mechanical process.

2.3.6 The first question is whether the Bill of Rights should apply horizontally (ie to relationships of citizens amongst one another) or whether it should be applicable only vertically (ie to relationships between citizens and the state). The drafters of the final Constitution seem to have opted for horizontal application by providing in s 8(2) that a provision in the Bill of Rights will bind natural persons 'if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right'.<sup>73</sup>

---

71 This oversight is apparent in s 8(3), which enjoins the courts to develop only *common* law to give effect to or to limit the fundamental rights.

72 As **Professor A J Kerr (Rhodes University)** pointed out, however, under 1(1) of the Law of Evidence Amendment Act 45 of 1988 the courts were formerly obliged to apply and take judicial notice of customary law.

73 Section 8(1) provides that the Bill of Rights applies 'to all law, and binds the legislature, the executive, the judiciary and all organs of state'.

2.3.7 The word 'applicable' in this clause could be interpreted in such a way that the fundamental rights should be deemed to apply only when organs of state were involved. Such a reading would, however, defeat a clear intention. A sensible approach to a provision as ambiguous as this would be to follow jurisprudence abroad,<sup>74</sup> where constitutional norms have been extended from their traditional sphere of vertical operation only by way of exception. Courts have had to consider the nature of the right concerned and the offending rule - matters already provided for in s 8(2) - together with social context.<sup>75</sup>

2.3.8 This more circumspect approach to horizontality requires both a policy decision on the extent to which the state should intervene in domestic relations and a legal assessment of how constitutional rights should relate to one another. The right to equal treatment, for instance, must be weighed against the right to culture.<sup>76</sup> Implicit in this balancing of interests is the further inquiry of limitation: whether one right may limit application of another or whether a rule of private law may limit a constitutional right.

2.3.9 In this regard, the clauses allowing freedom to pursue a culture of choice, namely ss 30 and 31 of the Constitution, contain express limitation provisos to the effect that they are subject to the Bill of Rights. Hence, an argument of culture alone may not limit application of the right to non-discrimination. If recognition of customary law is to be something more than an empty gesture towards the African cultural tradition, however, application of the Bill of Rights must be construed in such a way that a set of western values does not become dominant,<sup>77</sup> merely

---

74 In particular those in the United States, Canada and Germany, since the laws of these countries have exerted a considerable influence on the formation of our Constitution.

75 The leading South African case, *Du Plessis & others v De Klerk & another* 1996 (5) BCLR 658 (CC), also rejected a uniform doctrine of horizontality, although in the context of the 1993 Interim Constitution. See too *Mthembu v Letsela & another* 1997 (2) SA 936 (T), which considered the extent to which customary law actually prejudices women and children.

76 Adv D Singh contended that, where two provisions of the Constitution conflict, the one which provides the greater positive benefit [presumably to the individual] should prevail. This argument is in line with Kaganas & Murray (1994) 21 *J Law & Society* 415-17 and 424-5, who looked to the general tenor of the Constitution, and concluded that it favoured an individual right to non-discrimination rather than a group right to culture.

77 Although, as the **Legal Resources Centre (Durban)** pointed out, it is not strictly speaking *customary law* that is protected, but culture, language and religion. Bennett *Human Rights and African Customary Law* chs 1 and 2 explores the relationship of culture to customary law in the context of the 1993 Interim Constitution.

by reason of the fact that the customary rule is different.

2.3.10 We have a forbidding precedent from the colonial era of customary law being all but eliminated in the cause of western moral standards. In the former Transvaal, while the government was prepared to apply laws and customs of the African population,<sup>78</sup> it deemed polygyny and lobolo 'uncivilized'.<sup>79</sup> As a result, the courts 'bastardised almost the entire Native population ... deprived practically every Native father of guardianship or other rights to his children [and] ... destroyed any equitable claim in property'.<sup>80</sup>

2.3.11 No one in South Africa today would wish this fate on customary law. At the same time, the state cannot abdicate its responsibility to protect its citizens and to improve their lot in life. In deciding which aspects of customary law are to be deemed unconstitutional, obvious targets would be rules of the 'official' version that owe little to an authentic African tradition or to contemporary social practice. In so far as they fall foul of the Bill of Rights, they must be deemed invalid. Moreover, where no settled rule can be distilled from social practice or where rules are vague and contradictory, constitutional norms must fill what is in essence a gap in the law.<sup>81</sup>

2.3.12 Finally, when considering application of the Bill of Rights, the Commission was conscious that a balance had to be struck between an over-zealous, interfering state and domestic privacy. In a society of many cultures and religions, the freedom to pursue a culture or belief of choice in the home must be respected, and the dominant ideology must be one of tolerance. Indeed, most plural societies generally refrain from expressing a common morality. They confine themselves 'to defining the current outer limits of permissible diversity ... while leaving maximum room for choice and ... individual liberty'.<sup>82</sup>

---

78 Provided, according to s 2 of Law 4 of 1885, that they were compatible with 'general principles of civilization'.

79 *R v Mboko* 1910 TPD 445 at 447 and *Kaba v Ntela* 1910 TPD 964 at 969, respectively.

80 Stubbs P, reported in (1929) 1 NAC (N&T) 1. See too *Meesadoosa v Links* 1915 TPD 357 at 361.

81 In German law this is known as the *Drittwirkung* of constitutional principles to private law. See Bennett (n77) 38-40.

82 Glendon (n49) 14.



## CHAPTER 3

### RECOGNITION OF CUSTOMARY MARRIAGES

#### 3.1 Principles of recognition

##### A. Problem analysis

3.1.1 Recognition of customary marriages in South Africa is still governed by legislation passed sixty years ago: the Black Administration Act.<sup>1</sup> This Act drew a careful distinction between 'marriages' and 'customary unions',<sup>2</sup> giving the latter full recognition only for purposes of litigation in courts of traditional leaders. Although certain statutes were later to treat customary unions as valid marriages for purposes of the statute in question,<sup>3</sup> we have the peculiar position in South Africa that, so far as the common law is concerned, customary unions are not recognized.<sup>4</sup>

3.1.2 The anomalies that flow from this situation were exposed in dependants' actions for damages caused by the death of a breadwinner.<sup>5</sup> If a suit had been initiated in a court established under the Black Administration Act,<sup>6</sup> the claim might succeed, because the marriage

---

1 38 of 1927.

2 Section 35 of the Black Administration Act 38 of 1927, as amended by s 9 of the Black Administration (Amendment) Act 9 of 1929, provided that: "'Customary union" means the association of a man and a woman in a conjugal relationship according to Black law and custom, where neither the man nor the woman is party to a subsisting marriage; "marriage" means the union of one man with one woman in accordance with any law for the time being in force in any Province governing marriages, but does not include any union contracted under Black law and custom' or any union under the provisions of the Natal and KwaZulu Codes.'

3 Section 5(6) of the Maintenance Act 23 of 1963, s 1 of the Compensation for Occupational Injuries and Diseases Act 130 of 1993, s 1 of the Income Tax Act 58 of 1962, s 21(13) of the Insolvency Act 24 of 1936 and s 27 of the Child Care Act 74 of 1983. See further Sinclair *The Law of Marriage* 252-5.

4 By special legislative amendments they were recognized in KwaZulu/Natal (by s 36 of the Codes) and in Transkei (by ss 1 and 2 of the Marriage Act 21 of 1978).

5 See Kerr (1956) 73 SALJ 402-8.

6 Namely, the commissioners' courts or one of their courts of appeal. These courts were abolished by Act 34 of 1986.

was fully recognized in that tribunal.<sup>7</sup> Actions brought in the ordinary courts, however, were bound to fail.<sup>8</sup> In 1963, the patent absurdity and injustice of this situation provoked legislative intervention. Customary unions were recognized for claiming 'damages for loss of support from any person who unlawfully causes the death of the other partner'.<sup>9</sup>

3.1.3 Another consequence of the refusal to recognize customary unions was the overriding effect given to civil marriages. A person married by customary law could nullify his or her union simply by marrying again in a church or civil registry.<sup>10</sup> Husbands in particular<sup>11</sup> had an easy method of ridding themselves of their wives without having to go through a regular divorce procedure.<sup>12</sup> Conversely, the logic of the principle that a customary marriage was not a true marriage meant that, if a spouse of a civil union purported to marry another person by customary rites, the second union would be null and void.<sup>13</sup> The union would not be bigamous, however, since customary marriages were not recognized as marriages under the criminal law.<sup>14</sup>

3.1.4 In 1985 the Law Commission recommended full recognition for customary marriages.<sup>15</sup> Partial reform followed three years later when legislation was passed to provide that civil marriages could no longer supersede existing customary unions.<sup>16</sup>

---

7 *Kanyile v Mbeje* 1939 NAC (N&T) 25 and *Zitulele v Mangquza* 1950 NAC 249 (S).

8 See *Mokwena v Laub* 1943 (2) PH K64 (W) and *Santam v Fondo* 1960 (2) SA 467 (A) at 470-4.

9 Section 31 of the Black Laws Amendment Act 76 of 1963. Even so, the marriage had to be proved by 'a certificate issued by a commissioner', a technical requirement that frustrated many otherwise unassailable claims. See Dlamini (1984) 101 SALJ 34-9 and Kerr (1984) 101 SALJ 224-7.

10 *Nkambula v Linda* 1951 (1) SA 377 (A). See Peart (1983) 16 CILSA 40-1.

11 Although wives, too, could automatically terminate their customary unions by this method: *Njombani v Tshali* 1952 NAC 62 (S).

12 Because the 'discarded' wife was put at risk, the legislature intervened, in s 22(7) of the Black Administration Act 38 of 1927, to protect 'the material rights of any partner' of a subsisting customary union.

13 *Gwalata* 1932 NAC (N&T) 51, *Ntseki* 1933 NAC (C&O) 61, *Xalisa* 1942 NAC (C&O) 103, *Zulu v Mcube* 1952 NAC 225 (NE), *Sogoni v Jacisa* 1970 BAC 76 (S) and *Qitini v Qadu* 1981 AC 42 (S).

14 *Zonyane v Rex* 1912 EDL 361.

15 *Report on Marriages and Customary Unions of Black Persons* (1985) para 11.2.

16 Section 1 of Act 3 of 1988, amending s 22 of the Black Administration Act.

## B. Evaluation

3.1.5 That customary marriages should be given full recognition is a principle now governed by the Bill of Rights. Section 15(3)(a) of the Constitution authorizes Parliament to promulgate legislation recognizing 'marriages concluded under any tradition, or a system of ... personal or family law'. In *Ryland v Edros*,<sup>17</sup> a case concerned with recognition of Muslim marriages,<sup>18</sup> the court noted the spirit of tolerance on which the Constitution was based. Tolerance would suggest that our legal system permit religious and cultural diversity, a proposition which has explicit support in ss 30 and 31 of the Constitution itself, for these clauses allow individuals and groups the freedom to participate in and pursue the culture of their choice.

3.1.6 Although the wording of s 15 is permissive ('This section *does not prevent* legislation recognising ...'), it could be argued that the government has a constitutional *duty* to recognize customary marriages. *Ryland v Edros*, for instance, said that non-recognition of Muslim marriages would violate the right to equality between cultural or religious groups. In addition, it could be argued that implicit in the state's duty to allow free pursuit of culture is a further duty to recognize institutions basic to the culture concerned.<sup>19</sup>

3.1.7 It was evident from responses to the Issue and Discussion Papers that recognition of customary marriages was overwhelmingly supported.<sup>20</sup> Hence, in light of both legal principle and public opinion, the Commission felt that customary marriages should be legally recognized. It would follow that couples who celebrate their marriage according to customary rites will create a union as valid as that celebrated in a Church or civil registry.

3.1.8 Simple as this proposal is, the Commission discovered that its implementation

---

17 1997 (1) BCLR 77 (C).

18 Which have suffered even worse discrimination in South African law than customary marriages.

19 Bennett *Human Rights and African Customary Law* 114.

20 The **Gender Research Project (CAL)**, however, said that the Commission was proposing recognition of customary marriages at the wrong time, because most Africans considered customary marriages inferior. It felt that not only would a single marriage law unify a divided country but that the current dual system confuses spouses (since men tend to want customary unions and women civil unions).

would not be straightforward. The first problem to be encountered was one that frequently arises when legal status is to be improved: should the reform be only prospective in its effect? The **Department of Land Affairs and W du Plessis and C Rautenbach (Potchefstroom University)**<sup>21</sup> argued that, if legislation recognizing customary marriages were to apply only to existing unions, wives and children would not benefit from the enhanced status associated with a fully recognized marriage.<sup>22</sup>

3.1.9 Reasonable as the argument seems, it cannot be accepted without qualification. Later in this Report the Commission will recommend that all customary marriages be registered. If recognition were to be retrospective in effect, the spouses of existing *unregistered* unions would be given a privileged position over the spouses of future unions who failed to comply with the registration requirement. This problem can be solved if another recommendation by the Commission is adopted: that no sanction be attached to non-registration. Otherwise, the only equitable solution would be to require spouses of existing marriages to have their unions registered if they wish to benefit from the provisions of the new marriage laws.

3.1.10 A second problem was noted by a Law Commission **Workshop (in the Northern Province)**: what types of union should be recognized, in view of the fact that customary law has various marital associations, including so-called 'ghost marriages', 'woman-to-woman marriages', *ukuvusa* and *ukungena* unions? Strictly speaking, these unions - none of which is now common - do not constitute new marriages, for they are not accompanied by typical marriage ceremonies nor is lobolo paid. They function rather to prolong an existing marriage where one of the spouses has died (as in the 'ghost marriages' and *ukungena* unions) or is unable to bear children (as in the *ukuvusa* unions).

3.1.11 Nevertheless, practical problems will arise because of the Commission's recommendation that all marriages be registered. The **Workshop** above asked whether the

---

21 Who said that proprietary rights already acquired should continue to be protected, although spouses should be allowed to change to the new property system.

22 The **Council of SA Banks**, however, said that a sufficient period of time should be allowed to enable institutions to change their standard form contracts and procedures.

marital associations it mentioned would require registration. The answer would seem to be that, if no new marriage is created, registration will be unnecessary. Nevertheless, if a new spouse becomes party to an existing union, some formal recognition of that fact seems advisable. In this regard, attention would have to be paid to the nuances of customary law. Where the new partner is a permanent addition to a household (as in the case of *ukungena* unions) the registration certificate would have to be amended to reflect that fact, whereas a temporary arrangement (as in the case of *ukuvusa* unions) would not call for a special act of state recognition.

3.1.12 A third problem arose from an objection by the **Commission on Gender Equality and Advs M Masipa, F Kathree and B Spilg (Society of Advocates of SA, Wits Division)** that the Commission had not considered informal (or 'de facto') unions. While these associations are becoming increasingly common and while the Commission appreciated that marriage should ideally be viewed in the fullest social context,<sup>23</sup> its terms of reference restricted the scope of its inquiry to socially and legally recognized marriages. (This limitation was perhaps prudent; de facto unions raise such extensive problems that they can only be considered separately.)<sup>24</sup>

## C. Recommendation

**3.1.13 In order to remove the anomalies created by many years of discrimination, customary marriages, both existing and future unions, must now be fully recognized. To do so will comply with ss 9, 15, 30 and 31 of the Constitution, provisions which suggest that the same effect should be given to African cultural institutions as to those of the western tradition.**

## 3.2 The Problem of 'Dual Marriages'

---

23 The **Commission on Gender Equality** felt that this was an important issue because women's improved status might result in fewer men being prepared to marry. The **Commission** also said that the Law Commission should have conducted its review within a far broader framework to include Muslim and Jewish marriages (and of course de facto unions).

24 The problem of distinguishing de facto unions from customary marriages is considered below in par 4.1.8 *et seq.*

## A. Problem analysis

3.2.1 Once customary marriages have full recognition, the statutory amendment passed in 1988 to prevent civil marriages from automatically terminating customary unions will become redundant.<sup>25</sup> As our law now stands, spouses of an existing customary marriage may remarry one another by civil rites, provided that the man is not already partner to a customary union with another woman.<sup>26</sup> The converse situation - where the partner to a subsisting civil marriage contracts a customary-law marriage with a person other than the spouse of the civil union - is still governed by the common law. Since civil marriages are strictly monogamous, the second union (which earlier courts described as an 'immoral contract')<sup>27</sup> is deemed null and void.<sup>28</sup>

3.2.2 If all marriages were to produce the same legal consequences, the form of a union would be irrelevant to deciding what law governed its effects.<sup>29</sup> According to the proposals made below, however, a cardinal difference will continue to distinguish customary from civil or Christian marriages: the husband's entitlement under customary law to take more wives.<sup>30</sup>

3.2.3 If the spouses celebrate their marriage according to only one form, this difference will cause no legal problems, but, if the same spouses marry according to two rites, complications

---

25 Section 1 of Act 3 of 1988. The Law Commission's Report on *Marriages and Customary Unions of Black Persons* para 11.2.7 proposed this amendment to the common law.

26 Because the 1988 amending legislation was not retrospective, discarded spouses of customary marriages that had been dissolved before 2 December 1988 continue to receive the dubious protection of s 22(7) of the Black Administration Act, namely, a civil or Christian marriage does not disturb their material rights.

27 See *Moshesh v Matee* 4 NAC 78 (1920) and *Sogayise v Mpahleni* 1931 NAC (C&O) 13.

28 *Zulu v Mcube* 1952 NAC 225 (NE), *Sogoni v Jacisa* 1970 BAC 76 (S) and *Qitini v Qadu* 1981 AC 42 (S). But the union is not bigamous, because customary marriages were not recognized as full marriages: *Zonyane v Rex* 1912 EDL 361.

29 A point made by the **Law Association of Zambia**.

30 Other differences will also remain, notably the spouses' relationships with third parties, but these cannot be resolved by legislation. The husband's obligation to his father-in-law under a lobolo agreement is one difference and another is the husband's customary right to sue his wife's lover for damages for adultery. *Mdodana & another v Nokulele* 2 NAC 138 (1911) and *Mtshengu v Mawengu* 1954 NAC 172 (S) held that, in cases of civil marriage, common law applies to cases of abduction or enticement on the understanding that these actions arise out of an interference with conjugal rights established by the marriage. Cf Poulter *Legal Dualism in Lesotho* 64-5.

are bound to occur. So-called 'dual marriages' are in fact quite common,<sup>31</sup> and many variations on the theme are possible. A couple may celebrate a traditional wedding and then, on the same day, they may have it blessed in Church or celebrated again in a civil registry office. The rites may be reversed: a civil marriage may be followed by an African ceremony. The lapse of time between these rites may be days or years.

3.2.4 What is more, the acts by which the parties purport to marry may vary. A lobolo agreement is usually negotiated before a civil or Christian ceremony.<sup>32</sup> Or the parties might combine a lobolo agreement, a traditional wedding ceremony and the Christian rite. **Professor A J Kerr (Rhodes University)** said that, in these circumstances, the Christian rite is a *blessing*, not a marriage,<sup>33</sup> because the Churches are not prepared to give the sacrament of marriage to a potentially polygynous union.

3.2.5 In all these situations, an awkward question then arises: which rite should be given precedence in order to determine the legal consequences of the spouses' marriage? This question becomes even more difficult to answer when it is appreciated how hard it is to define exactly what is meant by 'customary marriage' for purposes of reform legislation.

## **B. Evaluation**

3.2.6 Until recently, the answer to the problem of dual marriage in South Africa was to allow a union by civil rites an overriding effect.<sup>34</sup> This view was prompted in part by the superior position enjoyed by Christian marriage and in part by the understanding that it operated as an

---

31 A point confirmed by **W du Plessis and C Rautenbach (Potchefstroom University)**. See further Prinsloo et al 1997 *De Jure* 314.

32 See, for example, Raum & De Jager *Transition and Change in a Rural Community* 55ff and Koyana *Customary Law in a Changing Society* 27ff.

33 **Professor Kerr** said that he knew of no Christian Church that would allow a person to go through a Christian marriage ceremony if that person claimed to be entering (or to have entered) a potentially polygynous marriage at the same time. He also pointed out that the result of a lobolo agreement and a Christian ceremony was not two *marriages*, but two rites confirming the same union.

34 Which spouses might have intended, because Christian marriage offered women important secular benefits, notably of course monogamy: Phillips *Marriage Laws in Africa* 29.

indication of the spouses' orientation towards western culture.<sup>35</sup>

3.2.7 We are not bound to continue this approach. Both the customary and the civil marriages could be treated as equally valid, as is the case in Lesotho<sup>36</sup> and Swaziland,<sup>37</sup> but the result of according equal status has been legal confusion.<sup>38</sup> What law determines the spouses' rights and duties?<sup>39</sup> One scholar<sup>40</sup> urges a utopian merger of the two legal regimes, but this is easier said than done, since not all consequences of the marriages can be reconciled, in particular questions of monogamy and polygyny.<sup>41</sup>

3.2.8 Under the Transkei Marriage Act, husbands of civil or Christian marriages could validly contract additional customary marriages.<sup>42</sup> (The effect of the second union was to convert the legal status of the wife married by civil or Christian rites from common to customary law.)<sup>43</sup> Nevertheless, the possibility of validly contracting two different types of marriage was carefully regulated by the Act. In the first place, because a civil marriage did not automatically terminate

---

35 Hence, the form of the marriage subjected the spouses and their children to common law. *Cole* (1898) 1 NLR 15 (supported in *Asiata v Goncallo* (1900) 1 NLR 41) held that, if people married in Church, it would be sufficient to show that ... the marriage contract and all the consequences flowing therefrom should be regulated exclusively by [common] law'.

36 *Majara v Majara & others* CIV/APN/138 of 1989 (unreported), for instance, held that a Christian marriage contracted after a valid and subsisting customary marriage was null and void. See Rugege (1991) 7 *Lesotho LJ* 73 for commentary.

37 In *Dube v R* 1970-76 SLR 93, a man who had married in South Africa by civil rites subsequently married another woman in Swaziland under customary law. He was convicted of bigamy. In *Ex parte Ginindza & another* 1979-81 SLR 361, a man who had married by civil rites during a customary marriage managed to have the civil marriage declared void (so that he could remarry his second wife under customary law). See Nhlapo *Marriage and Divorce in Swazi Law and Custom* 29ff, who considers the cases in Swaziland since the decisions in *R v Mabuza & another* 1979-81 SLR 8 and *Dladla v Dlamini* 1977-78 SLR 15 established the equal status of customary and civil marriages.

38 Bennett *Application of Customary Law in Southern Africa* 198-9.

39 See Maqutu (1983) 16 *CILSA* 378 and *Contemporary Family Law of Lesotho* 44ff.

40 Poulter (n30) 34ff.

41 Nhlapo (n37) 36.

42 Act 21 of 1978. To placate established Churches, s 9 of the Act allowed ministers of religion the right to refuse to solemnize marriages which did not conform to their religious tenets.

43 Section 38. Hence, if a man became party to more than one marriage, irrespective of whether one of the marriages was a civil one, the status of his wives and children was to be regulated by customary law.

a customary union,<sup>44</sup> any rights acquired during the subsistence of customary marriage were specially protected.<sup>45</sup> In the second place, to avoid creating intractable problems about joint estates in polygynous marriage the husband's right to remarry was conditional upon his first union being out of community of property.<sup>46</sup>

3.2.9 The Commission acknowledged the impossibility of enforcing both common- and customary-law regimes simultaneously. It follows that, if parties marry under two rites, one form of marriage has to be given precedence. This approach does not necessarily, of course, reflect popular understanding nor was it endorsed by all the Respondents to the Discussion Paper, such as the **Department of Justice**, the **Rural Women's Movement** and participants at the discussion group hosted by the **Law Faculty of the University of Fort Hare** at Bisho.<sup>47</sup> But, once it is accepted that marriages will not produce the same set of legal consequences, dual marriage becomes unworkable and a decision must then be made as to whether customary- or common-law consequences will ensue.

3.2.10 The changes of status and the legal complexity of the Transkeian legislation on this question do not recommend that approach. The existing rule under South African law (ie that the civil form should prevail) could, of course, be retained, partly to extend greater protection to women and partly for the sake of certainty and continuity. **Adv N Cassim** supported this proposal, suggesting that registration certificates should be endorsed to show that a couple had contracted their marriage by civil rites.<sup>48</sup> The converse solution (put forward by the **House of Traditional Leaders in the Eastern Cape**) was to deem performance of traditional rituals - regardless of a later civil ceremony - conclusive proof of a customary marriage. Both of these options, however, seem arbitrary.

---

44 Section 1 of the Act, which contained definitions, made it clear that all marriages were on an equal footing.

45 By s 3(2).

46 Section 3. And subsequent customary unions were out of community.

47 The latter group regarded the Commission's initial proposal to discourage dual marriages as authoritarian and unworkable, since the two forms serve people's strongly felt needs to be married under two systems. The group felt that legal regulation of marriage should reflect people's interests, not a sense of legal order.

48 **Organised Labour** seems also to have supported this approach on the basis of a solution employed in Botswana.

3.2.11 Other solutions are feasible. The later (or possibly the earlier) marriage could be declared the principal union for purposes of determining legal consequences, but this approach, too, seems arbitrary. The **House of Traditional Leaders (Northern Province)** and the **Department of Justice** suggested leaving the choice to the spouses.<sup>49</sup> This appears the most attractive solution, because it gives full effect to spousal consent and the freedom to marry, both of which are fundamental principles of human rights law.

3.2.12 Unfortunately, allowing the spouses to decide the consequences of their marriage was not free of problems. The **Gender Research Project (CALs)**, for instance, noted that the question of what law to apply to the consequences of marriage usually arises when the spouses quarrel or when one dies or disappears. Evidence of the couple's decision may then be difficult to obtain (and the testimony of relatives is inevitably tainted by self-interest).

3.2.13 The optimum solution to this difficulty, and one supported strongly by **Professor Kerr**, would be to require the spouses to state expressly in advance of the marriage ceremony whether their union was to be customary or civil.<sup>50</sup> This decision could then be recorded in the registration or marriage certificate. Whether the average couple would be in a position to make such a far-reaching decision, however, is debatable. The **Gender Research Project (CALs)** suggested training marriage officers so that they could counsel parties in making the appropriate choice.<sup>51</sup> The Commission therefore worked on an assumption that few people would make an express statement of intent.

3.2.14 In the absence of any clear statement of intention, the courts would be obliged to infer an intent from the couple's marital relationship, which would entail consideration of their general cultural orientation and lifestyle. The discussion group hosted by the **Law Faculty of the**

---

49 Which was the effect of the judgment in *Mabitle v Mochema* 1971-3 LLR 271. This position was endorsed by the **House of Traditional Leaders (Eastern Cape)**.

50 **Professor Kerr** said that the Marriage Act should make it obligatory for marriage officers to ask a couple at any time within a month before the marriage ceremony whether they agree to enter into a marriage under the Act. If they do agree, the ceremony may take place, and registration of the union under the Act would be proof of the spouses' decision to enter into a monogamous marriage.

51 And if traditional leaders are to be used as marriage officers, the **Research Project** suggested that they should be authorized to perform civil as well as customary marriages.

**University of Fort Hare** at Bisho supported a flexible (or facilitative) approach, but it considered a lifestyle test meaningless in practice. How is a predominant lifestyle to be inferred from those who are attached to both a notionally western culture and to their village communities? It felt that, in spite of the appearance of a civil marriage, the expectations of all the parties involved - including the spouses' families - will usually indicate that a civil marriage was grafted onto a traditionally run household.<sup>52</sup>

3.2.15 The Commission finally decided, after much debate, to accept that people have a right to marry in ways that reflect their allegiances to various cultural traditions, even though this leads to difficult legal dilemmas, and that in practice they will continue to do so. The Commission was also mindful of the need to assign an appropriate legal regime to the marriage without assuming any one marriage form to be superior to the other.

3.2.16 Furthermore, it became clear that the issue of the conversion of a marriage from one form to another was closely linked to the question of dual marriages. Accordingly, the Commission decided to make recommendations that take both problems into account.

---

52 The **Women's Lobby** also alluded to the difficulty of determining cultural orientation in these circumstances. Couples who have a foot in each cultural camp, so to speak, might be unable themselves to describe their own cultural leanings. Possibly for this reason the **Lobby** felt that, once married in customary law, a couple should not be allowed to enter into another form of marriage.

### **3.3 Converting a Marriage from one Form to Another**

#### **A. Problem analysis**

3.3.1 If cultural and religious diversity is to be permitted in South Africa's marriage law and if maximum content is to be given to the spouses' freedom to marry, the question arises whether they should be allowed to convert one form of marriage into another. The Tanzanian Law of Marriage Act is a rare example of special provision being made for this eventuality. Spouses in that country could change customary or Islamic marriages into Christian unions by joint declaration in court. Christian marriages were given a privileged position, for marriages celebrated in Church could not be converted while the parties continued to profess the Christian faith. In its Issue Paper the Law Commission made a proposal that a similar option be introduced to South Africa: spouses should be permitted to convert their marriage, provided that the conversion did no injury to the interests of third parties.

#### **B. Evaluation**

3.3.2 The **Organised Labour Workshop** supported the Commission's proposal and so too did participants at the discussion group hosted by the **Law Faculty of the University of Fort Hare** at Bisho. The latter group felt, however, that only conversion from customary to civil marriage should be allowed, with no possibility of reversing this choice.

3.3.3 **Professor Kerr**, on the other hand, questioned the viability of conversion. He noted both the difficulty of determining who would qualify as an interested third party and the complexity of effecting consequential changes to the matrimonial property regime. Wives may also find themselves in an invidious position: they may be forced to agree to change from a monogamous to a polygynous form of marriage under threat of their relationship breaking down.

3.3.4 The Commission noted these arguments together with the fact that we have no indication of how the Tanzanian procedure works in practice (or how often it is invoked). The Commission accordingly resolved to make the following recommendations on both the issues of

conversion and of dual marriages.

### **C. Recommendation**

**3.3.5 Parties should be allowed, in the case of a dual marriage, to make an express declaration as to which legal regime should regulate their marriage.**

**3.3.6 Conversion from a customary marriage to a civil marriage, but not vice versa, should be allowed. This right should be based not on the alleged superiority of any one marriage form, but rather on the practical consideration that movement from a more open-ended and facilitative arrangement to a stricter and more highly-regulated regime makes better sense than the reverse would do. It can be reasonably assumed that the parties consciously intended, for reasons of their own, to submit themselves to the stricter rules.**

## CHAPTER 4

### ESSENTIALS OF CUSTOMARY MARRIAGE

#### 4.1 The Definition of Customary Marriage

##### A. Problem analysis

4.1.1 Marriage in pre-colonial Africa, in common with marriage in other pre-industrial societies, had certain typical features that distinguished it from marriage in the modern world. First, customary marriage was a matter of family, rather than individual concern.<sup>1</sup> This feature can be attributed to the basic functions of African marriage: to propagate families, provide domestic labour and establish political and economic alliances.

4.1.2 Secondly, African marriages were private arrangements needing no intervention by an outside authority to be deemed valid.<sup>2</sup> The two families had considerable freedom to agree on terms and conditions that would suit their own needs and the exigencies of the particular situation. Thirdly, African marriage was processual in the sense that it had no precise moment of beginning or end. Instead, the spouses' relationship matured and strengthened over years, gaining definition with the birth of children and payment of bridewealth. Death of a spouse did not necessarily terminate the union, since the families could arrange its continuation through levirate or sororate unions.<sup>3</sup>

4.1.3 The flexibility and ambiguity of customary marriage would not have been regarded

---

1 Cf the western concept of marriage: Women and Law in Southern Africa (WLSA) *Uncovering Reality* 5. For useful anthropological accounts of customary marriage in southern Africa, see: Mönning 193-4, Holleman 128-45, Van Tromp 40ff, Schapera *Handbook* 130-8, Hammond-Tooke *Bhaca Society* 102-5, Reader 174-84 and Whooley in Verryn *Church and Marriage in Modern Africa* 245ff.

2 Molokomme in Women and Law in Southern Africa (WLSA) *The Legal Situation of Women in Southern Africa* 14-15, for instance, found that in Botswana a marriage would be deemed to exist if the families were in agreement and lobolo had been transferred.

3 See generally Phillips *Survey of African Marriage and Family Life* xi-xvii.

as a problem in the close-knit communities of the past. Where people knew one another, proof of marriage was a simple matter. A union could be verified by referring to the evidence of go-betweens and family elders and the public rituals of negotiation and consummation. In modern society, however, married couples are more mobile and families and communities are less involved in their relationship. In these circumstances it is more difficult to establish the existence of a customary marriage and, as the **National Human Rights Trust** said, there are more occasions when marital status has to be precisely fixed.<sup>4</sup>

## **B. Evaluation**

4.1.4 Once it is accepted that marriage is relevant not only to the parties and their immediate community but also to society at large, then the marriage relationship must be defined for more general purposes. Hence, although all groups in South Africa should have the freedom to pursue the dictates of their culture or religion, certainty must now be brought to marital status.

4.1.5 Inevitably, the state is involved in defining what is meant by customary marriage. It is therefore bound to impose certain minimum requirements for deciding what will constitute a valid union. As will be apparent below, the Commission had no difficulty in recommending that the spouses' consent should be the sole requirement for determining a customary marriage and that features typical of customary marriages - lobolo, wedding rituals and parental approval - should be optional. Thereafter, however, certain problems became apparent

4.1.6 The first problem - raised indirectly by the **Women's Lobby** - was one of terminology. The **Lobby** said that the terms 'civil' and 'Christian' marriage should not be used interchangeably, because a Christian marriage is a religious form of marriage which constitutionally has no greater recognition than Muslim, Jewish or Hindu unions. The Commission agreed. It felt that, because we were working towards a single type of *state approved* marriage, the formerly privileged status enjoyed by the civil or Christian unions will disappear.

---

4 Such as claiming insurance benefits and city council housing.

4.1.7 State approved marriages presuppose a set of minimum requirements. Provided that these requirements are fulfilled, the form of the union could be civil, Christian, customary, Muslim, Hindu, etc. Such a fundamental change in the law should perhaps be reflected in a new term that would describe the basic type of marriage. But, without a broader basis of public support, the Commission drew back at the prospect of coining a new term.

4.1.8 The **House of Traditional Leaders in the Eastern Cape** then raised the problem of how a customary marriage was to be distinguished from any other type of union.<sup>5</sup> If consent is the only requirement for marriage, what would make a particular union 'customary'? Although a purely consensual union would be a valid marriage, how should it be characterized as civil, Christian or customary?

4.1.9 This problem could be solved if the spouses themselves were obliged expressly to declare the nature of their union. In practice, however, it would be difficult to decide when and to whom this declaration should be made. (Moreover, declarations coming from interested parties are always suspect.) Alternatively, the nature of a marriage could be inferred from typically African features, such as the existence of a lobolo agreement, a wedding ritual or parental approval, but who would make this inference and when?

4.1.10 The answer might be to require the officer registering the union to decide whether it was a customary marriage (and to note that finding on the registration certificate), but even this is not a perfect solution. In the first place, the duty could be unduly burdensome, since registering officers would be expected to draw conclusions from ambiguous and complex factual situations.

4.1.11 In the second place, the possibility exists that spouses may never encounter a registering officer. The Commission will later be recommending that, even if a customary marriage is not registered, it should still be deemed valid.<sup>6</sup> Purely consensual, culturally indeterminate unions may therefore come about. Would the husband of such a union be entitled

---

5 The issue was also referred to by the **Legal Profession Workshop**, which felt that 'customary marriage' needs to be defined in the Bill to make it clear that religious marriages are not included.

6 See par 4.5.18 below.

to take additional wives or would he be bound to remain monogamous?

4.1.12 Another problem arose from the relationship between informal (or `de facto') unions and purely consensual marriages. If the presumption in favour of marriage is invoked, parties to a cohabitation might find themselves *deemed* to be married.<sup>7</sup> In this case, how should the nature of their union be determined?

### **C. Recommendation**

**4.1.13 In order to define customary marriage it is recommended that legislative provision be made for a minimum set of essential requirements, chief amongst which should be the consent of the prospective spouses. In most cases the 'customary' nature of a marriage may be inferred from the inclusion of certain typical practices, such as a lobolo agreement, a traditional wedding ceremony or the involvement of the spouses' families. But since these differ among the various systems of customary law in South Africa, it is accordingly recommended that any legislative provision adopted should display a flexibility that allows for groups to marry according to their own customary laws.**

**4.1.14 Registering officers should be required to explain to prospective spouses the difference between the two forms of marriage (namely, the different consequences and implications), and then endorse the fact that the couple heard and understood the explanation on the marriage certificate.**

---

<sup>7</sup> Under the common law, cohabitation and repute create a rebuttable presumption in favour of marriage (although not for purposes of proving marriage in divorce actions): Sinclair *The Law of Marriage* 365.

## 4.2 Consent of the Spouses

### A. Problem analysis

4.2.1 In all modern legal systems, the most basic requirement for determining marriage is derived from the individual's freedom to decide when and whom to marry. Spousal consent is therefore the central requirement of marriage.

4.2.2 This principle has its origin in eighteenth-century Europe, where marriage came to be considered a consensual union ratified by the Church or state. Colonial courts introduced this idea to Africa. They held that, in so far as a customary marriage was to be recognized, it depended for its validity on the consent of the main parties, namely, the bride, the groom and the bride's guardian.<sup>8</sup>

4.2.3 Under pre-colonial customary law, however, where marriage was an agreement between kin groups rather than individuals, consent of the spouses would strictly speaking have been unnecessary. Girls might have been promised as brides, possibly even before they were born.<sup>9</sup> Further, where a kinship system favoured sororal polygyny, a young girl might automatically have followed the path of her older married sister, if the latter were to die young or prove barren.<sup>10</sup> In short, a woman's marital destiny could be determined by lineage politics, kinship amity or simply the need to recoup lobolo that her guardian had already paid over to contract other marriages.<sup>11</sup>

4.2.4 To suggest that a bride's consent was irrelevant in customary law, however, would

---

8 Thus *Zimande v Sibeko* 1948 NAC 21 (C) at 23 held that a marriage procured without the volition of one of the parties was 'repugnant to our civilized conscience'. See, too, *Zulu v Mdhletshe* 1952 NAC 203 (NE) and *Mngomezulu v Lukele* 1953 NAC 143 (NE).

9 Matthews (1940) 13 *Africa* 19ff.

10 Schapera *Handbook* 155. See further Kuper in Radcliffe-Brown & Forde *African Systems of Kinship* 99 and Marwick 136ff.

11 As Ashton 63 noted, the following demand could be put: 'Cousin (paternal uncle's child) marry me, [in order] that the cattle return to the kraal'.

oversimplify the issue. Forced marriage could never have been common, since the ideal union was the culmination of a youthful romance, sealed by a lobolo contract.<sup>12</sup> Hence, the approved way of negotiating marriage assumed a period of courtship by the prospective spouses. Once they had decided to marry, the boy was supposed to secure his father's approval, and then the girl's family could be approached.<sup>13</sup> When the terms and conditions of lobolo had been settled, the families would be regarded as bound by an affinitio agreement, which would be ratified by delivery of one or two beasts as earnest.<sup>14</sup>

4.2.5 Underlying this so-called 'regular' form of marriage was a general awareness that unhappy matches led to domestic conflict. The elaborate rituals of courtship, the lengthy marriage negotiations and the wedding ceremony itself gave the bride-to-be many opportunities to voice her doubts and objections.<sup>15</sup> Besides, young people had socially approved methods for getting their own way. If a girl's guardian were unreasonable in insisting on a particular union, she could appeal to her uncles or she could elope to her chosen lover.<sup>16</sup> A determined suitor, on the other hand, could 'abduct' his bride (with or without the connivance of her father).<sup>17</sup>

4.2.6 Although consent was highly relevant in customary law, women were still expected to be obedient and to make the best of their circumstances.<sup>18</sup> Thus, by modern standards, it would not be easy to judge whether marriage was voluntarily contracted, since a bride's acquiescence could well mask reluctance or outright refusal. Customs that sanctioned mock abduction as a

---

12 Cf Nhlapo in WLSA (n2) 109-10, Nhlapo *Marriage and Divorce in Swazi Law and Custom* 47 and Burman in Hirschon *Women and Property/Women as Property* 120.

13 See Reader 179-84 and, further, Mönnig 130ff, Raum & De Jager *Transition and Change in a Rural Community* 43, Schapera *Handbook* 129, Holleman 99ff and Krige *Zulu* 126-8.

14 Customary law took no cognizance of a private engagement between a boy and girl, because they had no authority to negotiate marriage. Only an affinitio agreement between the guardians of the prospective spouses had legal consequence.

15 See *Simelane v Sugazie* 1935 NAC (N&T) 45.

16 As a last resort, she might even ask a traditional ruler to intervene. See Schapera *Handbook* 129, Simons *African Women* 102-3 and the account given by the court in *Nomatusi v Nompetu* 3 NAC 165 (1915).

17 See Van Tromp 63ff, Ashton 65 and Hunter 187-8 and 531-2. This preliminary to marriage was a way of forcing the girl's father to give his consent, avoiding the expense of a wedding, hastening matters where the girl was pregnant or persuading her to marry. Mock abduction is still popular: Manona in Mayer *Black Villagers in an Industrial Society* 189-93 and Whooley in Verryn (n1) 295ff.

18 Simons 1958 *AJ* 328-9.

prelude to marriage, and others, such as the requirement that women should pretend indifference to suitors or that they should ritually 'weep' on the wedding day, further obscured the reality of their consent.<sup>19</sup>

4.2.7 Colonial governments paid little attention to these social nuances. They immediately took action to ban forced marriage.<sup>20</sup> In Natal and the Transkeian Territories, forced marriages were made criminal offences,<sup>21</sup> and, where no specific legislation was passed, the courts refused to give effect to such unions on policy grounds.<sup>22</sup> Child betrothals, too, were declared to be contrary to public policy and unenforceable,<sup>23</sup> although in this case, if the deficiency of consent were later cured, the union could become a valid marriage.<sup>24</sup>

## B. Evaluation

4.2.8 Today, no one is likely to dispute the requirement that spouses freely consent to their marriage. This principle rests on the freedom to marry, which is well established in international human rights law,<sup>25</sup> public policy<sup>26</sup> and over a century of precedent and legislation

---

19 See Matthews (n9) 7ff and Nhlapo (n12) 53-6. Moreover, a duty to be modest on all occasions discouraged women from displaying great enthusiasm for a suitor. See Wilson in Krige & Comaroff *Essays on African Marriage in Southern Africa* 136.

20 See Peart 1982 *AJ* 110-12. The courts were more than suspicious of mock abduction, since technically it could amount to kidnapping. See Labuschagne (1988) 13 *TRW* 33ff, *Mkupeni v Nomungunya* 1936 NAC (C&O) 77 and s 101 of the KwaZulu/Natal Codes.

21 Sections 30 of Procs 110 and 112 of 1897 and s 29 of Proc 140 of 1885 for Transkei and s 116(1)(b) of the KwaZulu/Natal Codes.

22 *Mbanga v Sikolake* 1939 NAC (C&O) 31, *Gidja v Yingwane* 1944 NAC (N&T) 4, *Gebeleiseni v Sakumani* 1947 NAC (C&O) 105 and *Zimande v Sibeko* 1948 NAC 21 (C) at 23.

23 *Sibeko v Malaza* 1938 NAC (N&T) 117 and *Butelezi v Ndhlela* 1938 NAC (N&T) 175.

24 When the person concerned reached a marriageable age. Until then, on the basis of the *pari delicto* rule, anything paid over in consequence of the agreement could not be recovered: *Zulu v Mdhletshe* 1952 NAC 203 (NE), *Mngomezulu v Lukele* 1953 NAC 143 (NE).

25 See art 16(2) of the Universal Declaration of Human Rights, art 23(3) of the Covenant on Civil and Political Rights, art 10(1) of the Covenant on Economic, Social and Cultural Rights, art 1 of the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages and art 16(1)(b) of the Convention on Elimination of Discrimination against Women (CEDAW).

26 See, for example, *Barclays Bank DC&O NO v Anderson* 1959 (2) SA 478 (T).

in South Africa.<sup>27</sup>

4.2.9 Now it is more important to consider the implications of insisting on spousal consent as a minimum requirement for all marriages. The first, and the most obvious implication, would be to deem any involuntary union a nullity. Whether any further sanction should be imposed is doubtful. Although the **Office on the Status of Women (Northern Province)** suggested that marriages arranged for persons under 21 should be constituted criminal offences, wider support for this proposal seems unlikely.

4.2.10 The second implication would be to consider the most appropriate means of ensuring that the spouses give a properly informed consent. Colonial courts and legislatures, for instance, paid no attention to the age at which individuals could be expected to formulate a mature opinion. Ages fixed under the Marriage Act<sup>28</sup> were assumed to apply only to civil or Christian unions.<sup>29</sup> This issue will be considered in detail below.<sup>30</sup>

4.2.11 The third implication is how to determine whether the spouses genuinely consented to their union. Several respondents to the Issue and Discussion Papers dealt with this issue. The **Gender Research Project (CALs)**, for example, said that the process of negotiating marriage demands no more than that a woman acknowledge she knows the man who is proposing. Her consent is then inferred. To overcome this problem the **Gender Research Project** (and **Dr H M de Vetta**) suggested that marriage officers (or officials registering marriages) should include in the marriage formula questions about each party's free consent.

4.2.12 Participants in the Law Commission's **Provincial Workshops** dwelt on a somewhat different problem: the non-consenting groom. They discussed what could be called

---

27 Moreover, none of the respondents to the Issue Paper challenged the principle that an individual should be free to marry the spouse of his or her choice, or, conversely, should be allowed to refuse an unwanted union.

28 Section 26 of Act 25 of 1961.

29 See, for example, Law Commission *Investigation into the Advancement of the Age of Majority* para 11.1.

30 See par 5.1.14 *et seq.*

'acceptable coercion', ie, cases where an individual's consent is either deemed irrelevant or is inferred from the fact of that person's compliance with custom. In the Northern Province, for example, it was stressed that a traditional ruler or his son may have to marry the wife chosen for him by the community; if he refused, he would have to abdicate.

4.2.13           The **Northern Province Workshop** agreed that it would be futile to try to ensure 'pure unfettered' consent by legislation, because there are too many reasons why people act or refrain from acting. This point is taken. Even in common law, what constitutes duress sufficient to invalidate consent is still not settled.<sup>31</sup> The Commission felt that legislation would be most effective in fixing a specific age at which individuals may be presumed mature enough to decide their marital destiny.<sup>32</sup> Although there was no harm in requiring marriage or registering officers to establish consent, such a requirement was less likely to be effective on its own.

4.2.14           A final implication of requiring consent, one adverted to by the **National Legal Profession Workshop**, was deciding when final consent should be established. If we bear in mind that the marriage negotiations may take several weeks (if not months), then we may have to ask when a potential spouse could withdraw consent and whether consent should refer to all the rituals entailed in the marriage process. The answer to these questions seems to be that, if the marriage is formally registered, the most convenient time for settling the issue of consent would be at the date of registration.

## C.     **Recommendation**

4.2.15           **It is recommended that the main requirement for a valid customary marriage should be the consent of the spouses and that registering officers be required to determine the fact of a spouse's consent.**

## 4.3     **Lobolo**

---

31     Under the common law, only a reasonably held fear of force (or threat of force) of such a degree as to vitiate consent suffices. (According to Sinclair (n7) 359, the test is both subjective and objective.) *Metus reverentialis*, the fear of offending a parent or superior, which would be particularly apposite to the situation of African women, is not enough.

32     See below in Chapter 5.

### 4.3.1 The meaning and function of lobolo

4.3.1.1 The giving of property by a husband or his guardian to the wife's family is probably the most important element of a customary marriage. The Commission had considerable difficulty in finding a word suitable to express this institution. It was reluctant to use terms, such as *lobolo*, *bogadi*, *bohali*, *munywalo* and *ikhazi*, partly because they carried particular connotations and partly because selection of one of them would give the impression of favouring a particular African language. The Commission therefore adopted the English word 'bridewealth', a term commonly used in scholarly literature.

4.3.1.2 Many members of the public objected to 'bridewealth'. **Dr A M S Majeke (University of Fort Hare)** said that it could not do conceptual justice to the institution of 'lobola'. 'Bridewealth' signifies a transfer of wealth, whereas 'lobola is a blood contract, a mandatory and imperative sine qua non condition for any marriage in indigenous African communities'. The Commission was eventually persuaded to abandon 'bridewealth'. From the other options available - brideprice, marriage goods, marriage price, etc - the word 'lobolo' seemed the best. While not a perfect rendering of isiZulu, isiXhosa, siSwati, isiNdebele or any other Nguni language 'lobolo' has the merit of being firmly established in the lingua franca of southern Africa (as far afield as Namibia and Zambia).<sup>33</sup>

4.3.1.3 Although lobolo was synonymous with marriage in all the South African systems of customary law, colonial administrations frowned upon the practice, which they thought represented the purchase of a wife.<sup>34</sup> On this understanding, attempts were made to ban lobolo.<sup>35</sup> The idea that wives were being bought in this crude commercial sense has now been exposed as a fallacy,<sup>36</sup> and in general twentieth-century anthropology has encouraged a much more positive

---

33 Both the Nguni and the Sotho/Tswana groups of languages have varying usages, depending on whether the singular or the plural form is used - eg, bogadi/magadi; ilobolo/amalobolo.

34 See Chigwedere *Lobola - the Pros and Cons* and Dlamini *Juridical Analysis of Ilobolo* 90-3.

35 As, for example, under s 24 of Law 3 of 1876 of the Transvaal. See *Kaba v Ntela* 1910 TPD 964 at 967.

36 Since the wife is not treated as a slave or chattel: Dlamini (n34) 169. See further Murray & Lye *Transformations on the Highveld* 112ff, Hunter 192 and Simons (n16) 88.

interpretation of lobolo.<sup>37</sup> Admittedly, marxist theory contended that it was a mechanism whereby seniors could preserve their dominance over juniors and women,<sup>38</sup> but anthropologists of the functionalist school showed that lobolo was no more than a consideration for a wife's reproductive potential.<sup>39</sup> As such, it was a quid pro quo that compensated the wife's family for loss of a daughter.<sup>40</sup>

4.3.1.4 According to this more sympathetic view, lobolo worked to stabilize marriage<sup>41</sup> and to protect wives,<sup>42</sup> a view supported by the rule that husbands who mistreated their wives were to be penalized when claiming return of lobolo on divorce. Some writers have gone so far as to say that lobolo was 'the Bantu woman's charter of liberty'<sup>43</sup> and that it benefited women by providing a public measure of their worth.<sup>44</sup>

4.3.1.5 Functionalism also stressed the ritual significance of lobolo by showing how it bound families and their relations to the ancestors,<sup>45</sup> a view shared by the **Rural Women's Movement** and the Law Commission's **Workshop in the Western Region**. Indeed, **R W Skosana** said in response to the Issue Paper that abolishing lobolo would be an assault on African religion. This religious dimension is apparent in the practice of segregating property used for marriage from ordinary trade goods. Thus, in some communities, lobolo livestock are withdrawn

---

37 An account of the functions of lobolo is given by Dlamini 1984 *De Jure* 150-5.

38 See Terray *Marxism and 'Primitive' Societies* 163ff and Meillassoux (1960) 4 *Cahiers d'Etudes Africaines* 38ff.

39 Holleman 148-9 and Evans-Pritchard (1947) 6 *Afr Studies* 187. This interpretation was endorsed by the principle that parental rights should be determined by full payment of lobolo. See Reuter *Native Marriages in South Africa* 218-22, Mathewson (1959) 10 *J Racial Affairs* 72, Jeffreys (1951) 10 *African Studies* 145ff and Brandel (1958) 17 *Afr Studies* 34ff.

40 Preston-Whyte in Hammond-Tooke *The Bantu-speaking Peoples of Southern Africa* 187-8.

41 Namely, high levels of lobolo discouraged divorce: Gluckman in Radcliffe-Brown & Forde (n10) 182ff. This hypothesis (which is further examined below) was later revised in light of research indicating that high marriage payments depended on the stability of marriage, rather than the other way round: Gluckman *Ideas and Procedures in African Customary Law* 62-3. Nevertheless, the arguments seem inconclusive: Simons (n16) 95 and Dlamini (n34) 171.

42 The 1883 Cape Commission *Report on Native Laws and Customs* 70.

43 Soga *Ama-Xosa* 274-5.

44 See Dlamini (n37) 151-2, Hunter 190 and Chinyenze (1983-4) 1-2 *Zimbabwe LR* 241.

45 Krige (1939) 12 *Africa* 403, Van Tromp 49 and Dlamini (n34) 191.

from the general economy into a closed system of marital transactions.<sup>46</sup>

4.3.1.6               The problem with all these functionalist arguments is deciding how to measure the 'success' or viability of a social practice. As **Dr H M de Vetta** pointed out, 'some good things can be found in virtually any bad system. And even then, their goodness may, more often than not, be simply a matter of viewpoint or even of wishful thinking.' This observation is especially relevant when lobolo is considered in historical context. No matter how beneficial the institution may have been in the past, changes in the broader social and economic system have inevitably affected its contemporary practice.<sup>47</sup>

4.3.1.7               In reaction to the introduction of a capitalist economy, for instance, the cattle and other goods formerly reserved for marriage transactions acquired a new value, measurable against cash and consumer goods. Livestock lost its special symbolic quality,<sup>48</sup> and alien imports, because of their rarity and cost, were assimilated to the category of marriage goods. Nearly everyone now gives cash or a combination of cash and livestock as lobolo.

4.3.1.8               With changes in the composition of lobolo came changes in function.<sup>49</sup> No doubt people at first resisted commercialization of the institution, but the general economy had an irrevocable influence. Hence, the amounts paid in lobolo increased enormously.<sup>50</sup> People say that the bride's family must be compensated for their expenditure on her education.<sup>51</sup> It is probably true that a feeling of reciprocity was inherent lobolo - that it should be used by the bride's family to buy gifts and to host the wedding<sup>52</sup> - but families had a strong temptation to profiteer. The danger of this tendency was to encourage men, who cannot afford the sums asked, to enter

---

46       See Sansom in Kapferer *Transaction and Meaning* 143ff.

47       Mathewson (n39) 72-6 and Holleman (1960) 11 *J Racial Affairs* 106-9.

48       Simons (n16) 95. See, too, Lugg (1945) 4 *Afr Studies* 26-7.

49       See generally Dlamini (n34) 179-81, (n37) 150ff and (1985) 18 *CILSA* 365.

50       This trend was matched, although overshadowed, by a tendency for the cost of pre-marriage gifts and wedding festivities to rise too.

51       See Brandel (n39) 34.

52       Which was pointed out by **Judge S S Ngcobo**.

into informal unions, which in turn undermined the entire institution of marriage (and rendered offspring illegitimate).<sup>53</sup>

4.3.1.9                Moreover, people charge lobolo for their daughters simply because they themselves had to pay it for their own marriages, and, of course, to settle inherited marriage debts.<sup>54</sup> Guardians have a plausible reason for satisfying their immediate economic needs and husbands can justify their refusal to pay maintenance for wives and children on breakup of marriage.<sup>55</sup> The property received by the bride's parents, especially when it is cash rather than cattle, is no longer being kept as financial security for the divorced or widowed wife. Instead, it is being spent on day-to-day living expenses.<sup>56</sup>

4.3.1.10              The **Gender Research Project (CALs)**, for example, found that most of the cash is used by parents to pay for the education of other siblings or to improve their households by acquiring new furniture. Lobolo is therefore not available to support a wife and her children if the marriage breaks down.<sup>57</sup> Thus, while people interviewed by the **Gender Project** were aware that lobolo could be returned, none of them had actually seen this happening.

4.3.1.11              In communities that are desperately poor, lobolo seems a profligate practice.<sup>58</sup> Nevertheless, research by the **Gender Research Project (CALs)** confirmed that needy families still feel obliged to persist in the practice. No actual transfer of property need take place, which seems to suggest that lobolo is important primarily to give a sense of validity to the marriage and to incorporate parents and kin groups into marriage negotiations.<sup>59</sup>

---

53        Hlophe (1984) 17 *CILSA* 168-70 and Dlamini (n37) 158.

54        Hlophe op cit 169.

55        Burman & Berger (1988) 4 *SAJHR* 340.

56        Cf Dlamini (n49) 362.

57        In any event, to say that lobolo gave women financial or social security was misleading, since the property accrued to a wife's guardian, not to the woman herself.

58        Although it still functions to redistribute wealth from the more economically active junior generation to the senior generation: Murray (1977) 21 *JAL* 80 and (1976) 35 *Afr Studies* 99ff. See further Murray & Lye (n36) 114, Koyana *Customary Law in a Changing Society* 2ff and Brandel (n39) 34ff.

59        And most respondents, such as those at the Law Commission's **Workshop (Western Region)**, felt that parents ought to play a part in the process of marriage.

4.3.1.12 These views were confirmed by the **Department of Welfare and Population Development**, which said that lobolo still gives a sense of linking the married couple to the ancestors of their families and legitimating children.<sup>60</sup> What is more, through the laborious process of exchanges needed to arrange the terms and conditions, lobolo binds cross-tribal marriages. Similarly, through the two families' slow process of negotiation, lobolo safeguards against impulsive behaviour. The **Department** therefore felt that the institution warranted a significant role in the validation of marriage.

#### 4.3.2 Prohibition and control of lobolo

##### A. Problem analysis

4.3.2.1 Lobolo currently enjoys a specially protected status in South African law. Unlike other customary institutions, the courts may not declare it contrary to natural justice or public policy.<sup>61</sup> This dispensation, which dates from the 1927 Black Administration Act,<sup>62</sup> gave effect to the more tolerant views put forward by functionalist anthropology. Now it could be said to reflect the constitutional guarantee of freedom of culture.

4.3.2.2 None the less, it is commonly argued today that lobolo leads to the subordination of women.<sup>63</sup> Thus paying lobolo is said to be tantamount to buying wives (a charge reminiscent of colonial times).<sup>64</sup> That lobolo seems to function as the purchase price for a wife

---

60 The **Rural Women's Movement** contested this point. It felt that lobolo has little to do with a child's legitimacy, since a stronger determinant of this issue would be the general treatment of the family unit by both sets of parents and society at large. If a marriage is approved and if the spouses' relationship is harmonious, many parents will forgo lobolo but still consider the children legitimate.

61 Section 1(1) of the Law of Evidence Amendment Act 45 of 1988 provides that: '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).'

62 Section 11(1) of Act 38 of 1927.

63 See Chinyenze (n44) 229.

64 See *Mesadoosa v Links* 1915 TPD 357 at 359.

is largely due to its commercialization.<sup>65</sup> **Dr H M de Vetta**, for instance, said that it should be regarded as a sale rather than a 'token of appreciation' when parties haggled over the amount or when the amount to be paid was fixed in advance. Similarly, **Adv J Y de Koker** noted that, although the original purpose of lobolo was not to humiliate, denigrate or objectify women, it now serves to strengthen the authoritative position of husbands.<sup>66</sup>

4.3.2.3 In view of the many objections to lobolo, should the state now intervene to prohibit or at least control the practice?

## **B. Evaluation**

4.3.2.4 Paying lobolo does not directly involve discrimination against women, in such a way as would constitute an infringement of s 9 of the Constitution. After all men have to pay, not women. Hence, any contention of direct discrimination would fail. An argument of *indirect* discrimination (which is prohibited by s 9(3) of the Constitution) is also unlikely to succeed. Indirect discrimination suggests that, although a practice appears gender-blind, the way in which it operated over time worked to the detriment of women.<sup>67</sup> Again, however, it would be impossible to demonstrate that payment of lobolo was the condition precedent to the unfavourable treatment of wives, especially in view of the substantial literature claiming that lobolo functions to benefit women.

4.3.2.5 Instead, it seems that the current objections to lobolo go to matters of symbolism and interpretation. As **R W Skosana** remarked, when a husband gives his wife a ring, is he buying her? Lobolo has a concrete effect on women's rights and freedoms only in the way that it may bind them to unwanted marriages. If a wife seeks a divorce, her family is theoretically

---

65 Mathewson (n39) 75. Commercialization of lobolo is widely deplored, as noted by the Law Commission's **Workshop (Eastern Cape)**; but it is impossible to control the manner in which people will perceive and manipulate such institutions to their immediate advantage.

66 And, because lobolo and parental rights are linked, a father may retain his children, even if they would be better off with their mother.

67 See Albertyn & Kentridge (1994) 10 *SAJHR* 164-7. The inquiry accordingly shifts from a specific act of prejudice to the long-term effect of a practice upon women as a group.

obliged to return lobolo, and, rather than do so, they may force her to put up with an unhappy relationship.<sup>68</sup> The objection of undue pressure cannot be remedied by legislation, however. Women have the freedom to end their marriages when they wish, and the law cannot control all economic and social circumstances that might compel them to remain married.<sup>69</sup>

4.3.2.6 In summary, opinion on the value of lobolo in modern society seems to be divided. Women interviewed by the **Gender Research Project (CALs)**, for instance, could not agree on the effect that lobolo had on their status. Some claimed that it dignified them; others said that they were disgraced by being treated in the same way as property. We must also appreciate that, notwithstanding economic and social abuses, few people would want to see lobolo abolished. (Only the **Rural Women's Movement** and **S S Nkosi** suggested restricting the amount.)

4.3.2.7 Lobolo is a remarkably durable institution that has strong appeal as a symbol of African cultural identity.

‘Lobola ... is the framework that people use to express and to bring about complicated changes in terms of relationships and deep changes in terms of emotional realities, values, attitudes and concepts. It is also the language that the ancestors understand and bless.’<sup>70</sup>

Several studies indicate that people remain deeply attached to the practice whatever its drawbacks.<sup>71</sup> This is a situation where the legislator would be advised to refrain from interfering. Any attempt at regulation would be almost impossible to enforce. Past efforts to prohibit the giving of lobolo or to restrict the amount payable proved easy to circumvent.<sup>72</sup> it was simply paid

---

68 Armstrong et al (1993) 17 *Int J of Law & Family* 340.

69 Thus Welch & Sachs (1987) 15 *Int J Sociology of Law* 390 recommended education and persuasion as the appropriate methods of combatting the negative aspects of lobolo.

70 Whooley in Verryn (n1) 313. See too Dlamini (n34) 198.

71 Durand Swartman, *Stad en Toekoms* 39 established that 95 per cent of the people they questioned were in favour of retaining lobolo, and, in their brief survey in KwaZulu/Natal, the **National Human Rights Trust** established that more than 80 per cent of the men and women questioned were of the same view. See further Dlamini (n49) 363, Chigwedere (n34) 52ff, Brandel (n39) 49 and De Haas (1987) 46 *Afr Studies* 41-2.

72 See Welch & Sachs (n69) 388 and Uzodike (1990) 2 *Afr J Int & Comp L* 290. Under s 61(1) of the KwaZulu/Natal Codes, however, the amount of lobolo is limited to ten head for the daughter of a

in forms other than cattle or cash and pre-marriage gifts were deliberately inflated.<sup>73</sup>

## C. Recommendation

**4.3.2.8 The giving of lobolo should not be prohibited nor should any restrictions be imposed on the amount payable.**

**4.3.3 Should lobolo be an essential requirement for customary marriage?**

### A. Problem analysis

4.3.3.1 Certain traditional leaders who responded to the Discussion Paper (the **Houses of Traditional Leaders in the Northern Province and Eastern Cape**) together with the Law Commission's **Workshop in Mpumalanga** felt that lobolo should be treated as an essential requirement for the validity of customary marriages.<sup>74</sup> They reflect the view of most Africans, that marriage and lobolo are inseparable.

4.3.3.2 Nevertheless, actual *payment* of lobolo is seldom considered essential to the validity of marriage. Sotho-Tswana law may regard delivery of lobolo as the crux of a marriage, but other systems do not.<sup>75</sup> Besides, in practice, payment is often deferred and in appropriate circumstances it may even be waived.

4.3.3.3 Because of these ambiguities, the 'official' version of customary law never finally decided whether lobolo should be deemed an essential ingredient of marriage. The courts' decisions were contradictory. On the one hand, certain judgments held that lobolo was 'the rock

---

commoner and fifteen head for the daughter of a headman, the son, brother or uncle of a chief. No limit is specified for marriage to chiefs' daughters.

73 Dlamini (n34) 232.

74 Other important traditional ceremonies were *ubulawu* (the negotiations), the delivery of the bride (*ukwendisa*) and the ceremony of the spear.

75 Notably the Nguni legal systems, which regard transfer of the bride as more important. See Kuper *Wives for Cattle* 127.

on which the customary marriage is founded<sup>76</sup> and that 'there can be no marriage if there are no dowry cattle in the kraal of the woman's father'.<sup>77</sup> Other judgments treated lobolo as an ancillary (and optional) contract.<sup>78</sup>

4.3.3.4 Even in cases where lobolo was considered essential, the courts did not specify whether the goods had to be physically delivered or whether a mere agreement sufficed. In practice, it proved impossible to insist on delivery, for the husband's ability to pay had to be taken into account (together with the ever-escalating cost of lobolo relative to average income). Hence, in Transkei, the courts did not require actual delivery of the full amount of lobolo,<sup>79</sup> and the Natal and KwaZulu Codes state that neither payment nor agreement is essential to marriage.<sup>80</sup>

4.3.3.5 In any event, transfer of property is an equivocal act,<sup>81</sup> since mere payment of cash or livestock may signify not only an instalment of lobolo but also a pre-marriage gift or damages for seduction. The social context of a payment can, of course, clear up any uncertainty. Thus goods handed over prior to cohabitation can usually be assumed to be lobolo,<sup>82</sup> but, if cohabitation preceded delivery, the context itself offers no clue as to the purpose of payment.<sup>83</sup>

## **B. Evaluation**

4.3.3.6 In the circumstances, it seems sensible to regard the legal effect of giving

---

76 Mbanga v Sikolake 1939 NAC (C&O) 31 and Bekker *Seymour's Customary Law in Southern Africa* 151.

77 Sipoxo & another v Rwexwana 4 NAC 205 (1919) at 206.

78 Blaine P 1927 NAC (N&T) 4. See, too, Jeffreys (n39) 150ff and Comaroff *Meaning of Marriage Payments* 17-18.

79 Maxayi v Tukani 1 NAC 99 (1905) and *Ntobole a/b Ceza v Mzanywa & another* 3 NAC 190 (1914).

80 Section 38(1). See *Dhlamini* 1967 BAC 7 (NE). **Adv N Cassim**, however, claimed that mere agreement on lobolo is not enough; there must be physical delivery of the entire amount.

81 If the parties had no common intention in giving and receiving property, the purpose of a payment becomes uncertain, especially since livestock can function both as marriage goods and as commercial commodities.

82 *Matholo v Moquena* 1946 NAC (C&O) 17 and *Nyembe v Mafu* 1979 AC 186 (NE).

83 The attitude of the woman's guardian is then all important: did he receive the consideration as lobolo or seduction damages? See *Mpanza v Qonono* 1978 AC 136 (C) and *Jama v Sikosana* 1972 BAC 21 (S).

lobolo as a form of evidence, albeit weighty evidence, of the parties' intention to contract a customary form of marriage. It will, in other words, mark the cultural attributes of a marriage.<sup>84</sup> By implication, payment of lobolo should be optional, analogous to the solemnization of marriages by religious rites.<sup>85</sup> As the Law Commission's **Workshop in the Central Region** suggested, the practice may still continue to perform a social function of indicating a husband's appreciation.

4.3.3.7 This approach to lobolo is already implicit in the courts' judgments.<sup>86</sup> It is endorsed both by the KwaZulu and Natal Codes<sup>87</sup> and by a general reluctance in customary law to call the status of a union into doubt when payment is not forthcoming. Most important, this proposal was supported by many respondents to the Discussion Paper: the **Department of Justice**, the Law Commission's **Provincial Workshops**, the **Office on the Status of Women (Northern Province)**, the **Women's Lobby**, the **Commission on Gender Equality**, the **Law Association of Zambia** and the **House of Traditional Leaders (Free State)**.

4.3.3.8 If lobolo is not necessary to the formation of a customary marriage, then non-payment will have no effect on the rights of the spouses towards one another or their children (a proposal made by certain respondents to the Issue and Discussion Papers).<sup>88</sup> While the Commission had sympathy with a view put forward by the **National Legal Profession Workshop**, that breaking the link between lobolo and rights to children may be too drastic,<sup>89</sup> it felt that the human rights issues involved superseded any argument to the contrary.

---

84 As was suggested by the **Gender Research Project (CALs)**. The **Gender Project's** view that lobolo cannot be optional if it determines the nature of a marriage can be answered by noting that lobolo is only *one* indication that a union is customary.

85 This echoes an early view in s 84(b) of the 1883 Cape Commission on *Native Laws and Customs* that lobolo be treated as a contractual accessory to marriage.

86 Simons (n18) 327-8. Moreover, for civil or Christian marriages, lobolo has never been considered essential to the validity of the union. See *Tobiea v Mohatla* 1949 NAC 91 (S), *Ntsimango* 1949 NAC 143 (S) and *Ntabeni v Mlobeli & another* 1949 NAC 158 (S).

87 See s 38(1).

88 The Law Commission's **Workshop (Southern Region)**, **Adv N Cassim**, the **Women's Lobby**, the **House of Traditional Leaders (Free State)** and **A M Moleko**. The **Rural Women's Movement**, too, felt that the need to agree on lobolo should not be allowed to inhibit the spouses' marriage.

89 The **Legal Profession Workshop** felt that the best interests of the child could well be interpreted to support lobolo and the environment of acceptance by two families it creates for children.

4.3.3.9 **Dr H M de Vetta** raised the difficult question whether legislation affecting lobolo should apply retrospectively. In general, of course, statutes are deemed to apply prospectively, so as not to upset acquired rights. Special circumstances, such as a possible violation of the Bill of Rights, on the other hand, might demand retrospective application. In the case of rights already acquired to children by payment of lobolo, customary law will have to give way to the overriding principle that the child's best interests are the paramount consideration.

4.3.3.10 A proposal that lobolo should not affect the spouses' rights inter se or rights to their children has direct implications for enforcement of the agreement. Customary law did not normally allow an action in court to compel delivery of lobolo.<sup>90</sup> The main long-term inducement to pay was the threat of losing parental rights to any children born of the marriage. A child's fate can no longer depend on payment or non-payment of lobolo, however, since the child's interests are now of paramount importance.<sup>91</sup>

4.3.3.11 An alternative enforcement mechanism was the practice of *ukutheleka* (the Xhosa term), whereby the wife's guardian could put pressure on the husband to pay by 'impounding' the wife, sometimes with her children.<sup>92</sup> If it was apparent that the husband had the means, but still did not pay, action could then be taken to dissolve the marriage.<sup>93</sup> This practice, too, must fall away, since it obviously does not accord with the spouses' right to an undisturbed marital consortium.<sup>94</sup>

4.3.3.12 Although customary means of ensuring payment of lobolo are no longer permissible, enforcement methods used for ordinary contractual debts are still available (as noted

---

90 A husband's neglect to pay might mean that he was dissatisfied with his wife or that he simply lacked the means. If the father-in-law were allowed to bring an action, an otherwise happy union might be disrupted.

91 See par 7.5.15 below.

92 If the wife's guardian were to institute an action for lobolo, the husband could raise the failure to invoke the custom of *ukutheleka* as a defence: *Skweyiya v Sixakwe* 1941 NAC (C&O) 126, *Tonya v Matomane* 1949 NAC 138 (S) and *Menzi v Matiwane* 1964 NAC 58 (S).

93 *Zenzile v Roto* 1 NAC 223 (1909).

94 Or the right in s 18 of the Constitution to freedom of association.

by the **House of Traditional Leaders (Free State)**.<sup>95</sup> A suit for enforcement should nevertheless be subject to the conditions and circumstances relevant in customary law. Moreover, according to customary principles, the court granting a divorce would usually make an order about lobolo. **S S Nkosi** therefore proposed that divorce courts should have the power to order return of lobolo (less the usual deductions customary law allowed the wife's guardian).

4.3.3.13 A further question was whether divorce decrees should now operate to end any lobolo agreement attached to the marriage.<sup>96</sup> (The answer to this question has implications, as the **Gender Research Project (CALs)** pointed out, for joining the recipient of lobolo as a party to divorce proceedings.) Because lobolo and marriage are now separate issues, however, it would seem preferable to require the husband to institute a specific suit for return of lobolo if he wishes to reclaim it.

---

95 The courts have already held that, if the parties agreed to pay a specific amount or if the amount was fixed in accordance with a conventional scale, the wife's guardian may sue for payment: *Ngalimkulu v Mndayi* 1947 NAC (C&O) 65 and *Mavuma v Mbebe* 1948 NAC (C&O) 16. Under s 66(1) the KwaZulu/Natal Codes a court action is also permitted.

96 **Professor A J Kerr's** question in this regard was answered by the Law Commission's report on *Marriages and Customary Unions of Black Persons* para 11.8.9. In practice, however, where lobolo was immediately spent on receipt, the courts may find, as the **National Human Rights Trust** pointed out, that compulsory return of lobolo on divorce is not possible. In any event, **Adv N Cassim** felt that lobolo should not be returned to the husband (depending on the length of duration of the marriage).

## **C. Recommendation**

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

**4.3.3.15 The existence of a lobolo agreement may be used to determine whether a union should be considered a customary marriage.**

**4.3.3.16 Because the giving of lobolo will have no effect on the validity of marriage, it may be enforced only by the usual judicial processes. Courts granting divorces should have jurisdiction to order return of lobolo subject to the deductions permitted in customary law.**

## **4.4 The Wedding Ceremony and Handing Over the Bride**

### **A. Problem analysis**

4.4.1 Courts in both South Africa and other parts of Africa have long grappled with the problem of how to define a customary marriage. Payment of lobolo could, of course, distinguish marriage from mere cohabitation, but as we have seen payment might be deferred or the reason for handing over livestock might be ambiguous. To cure the uncertainty of these situations, courts would then ask whether the bride had been transferred to her future husband's home or whether the relevant wedding rituals had been observed.

4.4.2 According to all the systems of customary law in South Africa, marriage is patri- or virilocal, which means that a bride has physically to leave her natal family and go to live with

her husband (either at his own or his father's homestead).<sup>97</sup> This occasion would normally be accompanied by the performance a traditional wedding ceremony. In fact, some degree of ritual attends marriage in any culture,<sup>98</sup> for ritual has the general function of separating the socially significant from the mundane.

4.4.3 In certain South African communities, a particular ritual may be decisive in distinguishing marriage from mere cohabitation. With the Swazi, for instance, the ritual is *kugcobisa libovu* (smearing of red ochre on the bride's face),<sup>99</sup> with the Sotho it is *tllhabiso* (the slaughtering of an ox)<sup>100</sup> and with the Xhosa it is *ukutyis' amasi* (drinking sour milk).<sup>101</sup>

4.4.4 In order to define a customary marriage should the transfer of the bride and/or the observance of a traditional African wedding ceremony be considered essential to the creation of a valid union?

## **B. Evaluation**

4.4.5 As the Commission proposed above, the most fundamental requirement of a valid marriage should be the consent of the spouses.<sup>102</sup> Consent, however, is an abstract factor that normally has to be inferred from concrete acts.

4.4.6 Initially the courts attached great significance to a bride moving from one homestead to another, since this was an obvious physical act from which consent to marriage

---

97 With Nguni peoples especially, this is one of the principal determinants of marriage: Preston-Whyte in Hammond-Tooke (n40) 179 and Ngubane in Krige & Comaroff (n19).

98 See Tiersma (1988) 9 *J Legal History* 15-17 generally, and Krige and Ngubane in Krige & Comaroff (n19) 185 and 84, respectively.

99 Nhlapo in WLSA (n2) 113 and Nhlapo (n12) 44ff.

100 Poulter *Family Law and Litigation in Basotho Society* 118-22, Murray *Families Divided* 121-2 and Maqutu *Contemporary Family Law of Lesotho* 76. Cf *Lebenya v Mosola* 1947 NAC (C&O) 58.

101 Van Tromp 77-9 and Manona in Mayer (n17) 189.

102 Their competence to formulate a proper consent belongs to the issue of capacity, and so too does the requirement of their guardians' consent. These topics are dealt with in Chapter 5 below.

could be inferred. But, as a requirement essential to the creation of a valid union, it could not be enforced in all cases and the courts soon had to admit many exceptions.<sup>103</sup> Amongst the Tswana, for example, a wife goes to live with her husband only after lobolo has been paid and she has given birth to a child.<sup>104</sup> In cases of mock abduction, the woman is already at her husband's homestead when the lobolo negotiations start.<sup>105</sup> More important is the fact that exigencies of employment or accommodation may prevent the parties from complying with the rule of virilocality.

4.4.7 The courts experienced similar problems when they tried to insist on the performance of certain wedding rituals. Customary law always tends to be flexible and pragmatic.<sup>106</sup> Ceremonies may be abbreviated as circumstances dictate, and, especially in urban areas, they may be ignored altogether. Even within a close-knit community, opinions may vary on how essential a ritual is and how it should be performed. Finally, many people have discarded traditional ceremonies or have combined them with western and Christian rituals.<sup>107</sup>

4.4.8 For these reasons, the courts were compelled to treat customary rituals as optional, no matter how deeply rooted they were in tradition.<sup>108</sup> Ceremony came to be regarded as 'the religious element of the proceedings', of no more importance than 'prayer, music, singing or a wedding reception in a European marriage'.<sup>109</sup>

---

103 See *Mothombeni v Matlou* 1945 NAC (N&T) 123, *Ntabenkomo v Jente & another* 1946 NAC (C&O) 59 and *Sefolokele v Thekiso* 1951 NAC 25 (C).

104 See Matthews (n9) 21-3 and Schapera *Handbook* 134ff.

105 *Dlomo v Mahodi* 1946 NAC (C&O) 61 and *Ngcongolo v Parkes* 1953 NAC 103 (S) had to overcome these particular difficulties by allowing what they called 'constructive' delivery.

106 So, for example, the ceremony might be simplified or abridged, because the man was marrying for a second time (Schapera *Married Life in an African Tribe* 71), by reason of poverty (Schapera op cit 72 and Van Tromp 57-8) or because pregnancy or an elopement called for a quick marriage (Marwick 121). See further Nhlapo (n12) 65-6.

107 For example, a wedding ring may now be used in place of the traditional gall bladder of a slaughtered beast: Ashton 68. And, for many, a church ceremony has become essential: Ashton 70-1, Schapera (n106) 65ff and Pauw *The Second Generation; a Study of the Family among Urbanised Bantu in East London* 94.

108 *Ntenze v Ntsolo* 1930 NAC (C&O) 30, *Sila & another v Masuku* 1937 NAC (N&T) 121 and *Sibiya v Mtembu* 1946 NAC (N&T) 90.

109 *Sila's case* supra at 123. See further Simons (n18) 322-5.

4.4.9 The Commission therefore concluded (and its view was supported by the **Northern Province Office on the Status of Women**) that neither transfer of the bride nor compliance with a particular ceremony should have any effect on the validity of a marriage.<sup>110</sup> Like lobolo, these elements of marriage must be considered discretionary, the equivalent of celebrating a union in a church, mosque or synagogue. It does not follow that ceremonies and transfer have no significance at all, however, because in combination with lobolo they will help to establish whether a marriage should be deemed 'customary'.<sup>111</sup>

## C. Recommendation

**4.4.10 Traditional wedding ceremonies and the handing over of the bride should be considered optional. Together with lobolo, however, these institutions will serve to identify a union as one celebrated according to African rites.**

## 4.5 Formalities and Registration

### A. Problem analysis

4.5.1 The difficulty of defining marriage with any precision in customary law suggests that the validity of a couple's relationship may well be open to doubt. (Disputes are most likely to arise when an inheritance is in question.) A critical factor, therefore, is whether the spouses' union should be given a greater degree of certainty by being formally solemnized before state authorities and then registered.

4.5.2 In 1985, the Law Commission proposed the following as essential elements of

---

110 *Ngcongolo v Parkes* 1953 NAC 103 (S).

111 See par 4.4.1 *et seq* above. **Adv N Cassim** gave broad support for payment of lobolo and handing over of the bride as essential requirements. She added that competence of parties at customary law to marry one another, consent of the parties and of their legal guardians if either was below the age of 21.

customary marriage:

- (a) competence of the parties at customary law to marry one another;
- (b) consent of the husband, the wife and legal guardian of either of them if they were below the age of 21; and
- (c) solemnization by a marriage officer and registration.<sup>112</sup>

These proposals were broadly in line with existing statutory regimes in KwaZulu/Natal<sup>113</sup> and Transkei.<sup>114</sup>

4.5.3 Outside KwaZulu/Natal and Transkei, however, South Africa has never insisted on formal solemnization of customary marriages.<sup>115</sup> Instead, an optional registration procedure was made available to allow the parties to obtain official proof of their union.<sup>116</sup> Under the current law, therefore, registration is merely compellable at the instance of the husband, the wife or the wife's guardian.<sup>117</sup> Failure to register does not affect the validity of a customary marriage. Rather, a certificate of registration provides prima facie evidence of the union,<sup>118</sup> and those who did not register their marriages may advance other forms proof (assisted by the courts' presumption in favour of marriage).

## **B. Evaluation**

---

112 *Marriages and Customary Unions of Black Persons 194.*

113 Section 38(1) of the Codes. Certain differences are apparent, however. The Codes stipulate a declaration in public by the intended wife to an official witness at the celebration of the union that the union is of her own free will and consent. Section 45 requires registration of marriages within a month of celebration.

114 Section 31 of the Marriage Act 21 of 1978 provided that ceremonies and procedures (if any) 'shall be in accordance with the customary law applicable to the male party', and that each party (or, if under the age of 21, his or her guardian) consents. Sections 33 and 34 also require registration of the union.

115 At the time of annexation, an attempt was made in the Transkeian territories (by Procs 110 and 112 of 1879 and 140 of 1885) to encourage people to register their marriages by providing that, if they did so, the registered union would have the same effect as a civil marriage. This measure was abandoned by Proc 142 of 1910.

116 See generally on the question of registration Janisch (1941) 15 *Bantu Studies* 11, Lewin (1941) 15 *Bantu Studies* 23, Shropshire *Primitive Marriage* ch 3 and Simons (n18) 340-1.

117 Regs 7 and 16 of GN R1970 of 25 October 1968, promulgated under s 22bis of the Black Administration Act 38 of 1927.

118 Regulation 8(4). Conversely, under s 45(3) of the KwaZulu/Natal Codes and ss 33 and 34 of the Transkei Marriage Act 21 of 1978, registration is conclusive evidence of marriage.

4.5.4 Historically, the requirement that marriage be officially solemnized indicated the involvement of central authorities in what had previously been a private arrangement.<sup>119</sup> The main purpose of demanding that all marriages comply with formalities laid down by the Church or state was to bring certainty to status, but observance of certain formalities had the additional function of ensuring that spouses did in fact consent.

4.5.5 In most legal systems, solemnization according to prescribed formalities and registration went hand-in-hand.<sup>120</sup> Once spouses had had their union solemnized, it would immediately be registered in a central marriage registry. Both the spouses and the state would then have readily ascertainable proof of the existence of a valid union.

4.5.6 In its Issue Paper the Commission noted a persistently low level of compliance with the registration requirement and a considerable body of evidence showing that the imposition of any formal requirement on customary marriages has had the effect of depriving existing unions of whatever limited validity they might otherwise have enjoyed. Accordingly, the Commission argued that registration of a marriage should not be compulsory. To allow registration at the instance of one of the parties would sensibly acknowledge 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. The Commission therefore recommended retention of the existing law. A certificate of registration 'shall on its mere production in any court or in any other proceedings be *prima facie* proof of its contents'.<sup>121</sup>

4.5.7 From this proposal, it followed that, if spouses did not have their marriage registered, they could prove its existence by other means. The **Gender Research Project (CALs)** would support this position on the ground that cohabitation and general repute are useful

---

119 And, at the same time, the juridification of religious or customary rituals: Glendon *State, Law and Family* 51.

120 Thus, in English law (the system inherited by South Africa), marriages are registered after solemnization in a general public registry of birth, marriages and deaths: Glendon *op cit* 52-4.

121 Regulation 8(4).

criteria for proving marriage. The **National Legal Profession Workshop** and a Law Commission **Workshop in KwaZulu/Natal** added that the current presumption that cohabitants may be deemed married would assist in establishing the existence of a valid union.

4.5.8 The time has come, however, to rethink the recommendations on solemnization and registration. An astonishing number of the respondents to the Issue and Discussion Papers were in favour of registration, if not a full ceremony of solemnization.<sup>122</sup> The **Registrar of Deeds** went so far as to say that even marriages contracted before the proposed Act should be registered to ensure proof of the marital status of parties to documents registered in Deeds Offices.

4.5.9 Research findings of the **Gender Research Project (CALs)** indicated that women in particular want their marriages to be registered under the civil law so that they can secure full legal protection. The **National Human Rights Trust**, too, felt that a marriage certificate would give greater security to marriage relationships by setting boundaries with intrinsic (legal) merit.

4.5.10 A further important consideration is South Africa's duty to fulfil international treaty obligations. In the interests of bringing certainty to marital status, the Convention on Elimination of Discrimination against Women (CEDAW), the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages<sup>123</sup> and the African Charter on the Rights and Welfare of the Child (which South Africa is also considering ratifying) require, inter alia, that signatories shall make registration of all marriages in an official registry compulsory.

4.5.11 If registration is now to be made compulsory, the Law Commission's **Provincial Workshops** asked what type of customary unions would have to be registered. If there is no actual wedding, as in the case of *ukungena* and *ukuvusa* unions, should the parties seek registration? The **Workshops'** point is that registration assumes both a wedding ceremony and

---

122 The Law Commission's **Provincial Workshops** (especially in the **Eastern Cape**), the **Department of Justice, J Borias, R W Skosana, A M Moleko**, the **House of Traditional Leaders (Eastern Cape)**, the **Commission on Gender Equality, Council of SA Banks** and the **Legal Profession**. The **Rural Women's Movement** considered a massive and countrywide education campaign necessary to stress that customary marriage had changed and would now offer the same rights as civil marriage.

123 Articles 16(2) and 3, respectively.

a living bride and groom (who can be asked whether they consented). The answer to this problem is to treat these unions as continuations of existing marriages (not as new marriages). If need be, the introduction of a new spouse may be endorsed on to the registration certificate.

4.5.12 Another problem to arise from insisting on registration is the strong likelihood that state-imposed formalities will not be observed.<sup>124</sup> People who regard family approval and lobolo as the critical elements of a valid union would see no point in having any additional formalities; nor can we expect the cooperation of people in rural areas if registering officers are located only in towns. Various respondents had suggestions for encouraging compliance with the law. The **National Religious Leaders** and **Organised Labour Workshops** recommended extending an existing practice in KwaZulu/Natal - that *lobolo* be certified - to registration. The **Religious Leaders** suggested the creation of a central registry with computer facilities.

4.5.13 **Organised Labour** suggested that the bureaucracy be tightened up so that the registration network would become wide, accessible and efficient. To make the administrative framework of registration more accessible the Commission had already recommended that traditional authorities be constituted registering officers. This proposal received warm support from the public.<sup>125</sup> As for the problem that urban areas and certain rural areas lacked traditional rulers, the **Traditional Leaders**, the **Legal Profession Workshop** and **House of Traditional Leaders (Eastern Cape)** felt that traditional representatives in the townships should be established and employed to register marriages.<sup>126</sup>

4.5.14 If solemnization and registration were made obligatory, what penalties would be

---

124 As observed by **Prof J C Bekker** in his response to the Issue Paper and Simons (n18) 341.

125 **T S B Jali**, the **Department of Justice**, the **Law Commission Workshops (Central and Western Regions)**, the **Gender Research Project (CALs)**, **Department of Land Affairs Workshop held at Wonder Waters Conference (assisted by Gender Research Project CALs)**, the **Rural Women's Movement**, **Dr H M de Vetta**, **Adv N Cassim** and, of course, the **Traditional Leaders**. The latter felt that, instead of criticizing the shortcomings of traditional authorities, they should be strengthened to perform the task by training and appropriate infrastructural support.

126 Participants at the discussion sponsored by the **University of Fort Hare** at Bisho and the **Organised Labour Workshop** suggested in addition that official witnesses or the chief's envoys be used as registrars. They noted, however, that not all marital unions take the form of a wedding ceremony at which these officials might participate.

imposed for failure to comply? Although some penalty is clearly necessary, the law should not be allowed to degenerate into meaningless technicality. (We already have the unhappy precedent of the requirement of certification in claims for damages for death of a breadwinner being exploited in order to nullify perfectly valid customary marriages.)<sup>127</sup> Invalidity of a union is an obvious answer, but invalidity could have unduly harsh results, especially for widows who may later seek to lodge claims against deceased estates.<sup>128</sup> What is more, this penalty would have the effect of depriving many customary unions (which hover on the verge of being or becoming full marriages) of whatever limited validity they might otherwise enjoy.<sup>129</sup> The only other possible sanction is a criminal punishment, but fines seem pointless where there is no victim other than the perpetrator of the offence.<sup>130</sup>

4.5.15 Respondents were generally sympathetic to the Commission's dilemma about finding an appropriate sanction. A Law Commission **Workshop in KwaZulu/Natal** and the **Gender Research Project (CALs)** felt that unregistered customary marriages could be treated as valid unions if they were linked to the more general issue of recognizing de facto unions.<sup>131</sup> While there is obvious merit in this proposal, legal recognition of informal unions fell outside the Commission's brief, and it would be a pity to delay the cause of customary marriage in order to investigate this complex problem.

4.5.16 Participants at the discussion hosted by **the University of Fort Hare** at Bisho also appreciated the Commission's reluctance to penalize non-registration. They noted, however, that continuing to regard unregistered unions as valid would result in an obvious inconsistency. None

---

127 **W du Plessis and C Rautenbach (Potchefstroom University)** noted that s 31 of the Black Laws Amendment Act 76 of 1963 must also be amended to bring it into line with the proposed Bill.

128 Cf the Zimbabwe case, *Zimnat Insurance Co Ltd v Chawanda* 1991 (2) SA 825 (ZSC), where the court held that the wife of a customary marriage would claim damages for the death of her spouse, even though her union had not been registered as required under statute. See case note by Francis & Freemantle (1992) 109 *SALJ* 197. Ghana, on the other hand, has an uncompromising attitude: s 15 of the Customary Marriage and Divorce (Registration Act) 1985 requires a registered marriage before a spouse can claim any benefits under the Intestate Succession Law.

129 See Parker (1987) 1 *Int J L & Family* 133ff.

130 Supported by **W du Plessis and C Rautenbach (Potchefstroom University)**.

131 And if the presumption in favour of marriage (see n7 above) were invoked.

the less, to deem unregistered marriages as invalid would also result in an inconsistency, for a mere cohabitation would then have better legal status than an unregistered marriage.

**C. Recommendation**

**4.5.17 Customary marriages should be registered to ensure that marital status is made more certain and easier to prove.**

**4.5.18 Although registration should be compulsory, no obvious penalty exists to induce compliance. To rule that unregistered unions are void would work great hardship for the spouses and would deprive many existing unions of potential validity. Hence, where a marriage has not been registered, the parties should be permitted to allege other forms of proof of its existence.**

**4.5.19 To encourage more people to register their marriages, the traditional authorities should be constituted registering officers.**

## CHAPTER 5

### CAPACITY AND MINIMUM AGE

#### 5.1 Capacity and Minimum Age

##### A. Problem analysis

5.1.1 Because customary law emphasized family rather than individual interests in marriage, the families would be entitled to arrange the marriages of their offspring. If the head of a family could choose whichever boy or girl seemed most suitable for a good match, it followed that there could be no fixed rules prescribing the age or capacities of the prospective spouses, because the rules would have derogated from parental power.<sup>1</sup>

5.1.2 Nevertheless, because one of the main purposes of marrying was to bear children, a minimum requirement was that the couple were over the age of puberty. Attainment of puberty varies from person to person, and, in societies where age cannot be fixed precisely, the usual practice was simply to wait until spouses were physically mature.<sup>2</sup>

5.1.3 In the case of a prospective husband, full adult capacity was linked to an ability to discharge the responsibilities for a new family unit. This ability was only achieved over a period of time, and it depended on an accumulation of factors, notably physical and intellectual maturity and a degree of economic self-sufficiency.

5.1.4 In many cultures, the transition from child- to adulthood was more exactly marked by an initiation ceremony.<sup>3</sup> Today attitudes to initiation vary. In some cases the tradition has

---

1 In any event, rules governing capacity are imposed when the state or Church begins to take an interest in marriages: Reuter *Native Marriages in South Africa* 105-10.

2 Holleman 72, Van Tromp 35-6, Van Warmelo & Phophi 159, Krige *Zulu* 103, Roberts 23, Campbell (1970) 3 *CILSA* 216-17.

3 With some peoples, notably the Zulu, Pedi and Tswana, initiation ceremonies were assimilated to service in military regiments. Hence, it was only after completion of this duty that recruits were permitted to

lapsed,<sup>4</sup> in others it has been transformed into a requirement that young men go to work in the mines or cities.<sup>5</sup>

5.1.5 The pragmatic approach of customary law to capacity suggests that, although the spouses had to be generally capable of sustaining a marital relationship, the most basic requirement was probably puberty.<sup>6</sup> Unfortunately, such pragmatism allows the unscrupulous guardian to manipulate children to his own advantage. Because status is so uncertain, he can deny a ward the rights and powers that come with majority.<sup>7</sup>

5.1.6 Women especially are at risk. They were never deemed fully adult in the legal sense, hence they always had to obtain their guardians' consent in order to marry. As a result, no matter how old or responsible a woman might be, the guardian could postpone her marriage indefinitely for his own mercenary purposes.

5.1.7 Interference of this kind obviously contravenes an individual's freedom to marry when and whom she chooses, but the issues are not so clear cut. While, on the one hand, it is the spouses' consent that is of the essence of a valid marriage, on the other, parents have a legitimate interest in ensuring that underage children make a sensible match. The question, therefore, is when parents should be entitled to override their children's wishes.

---

marry. See Krige *Zulu* 106-17, Schapera *Handbook* 104-17, Roberts 24 and Mönning 119ff esp 124.

4 Mayer in De Jager *Man: Anthropological essays presented to O F Raum* 7ff. Nevertheless, as Wilson & Mafeje *Langa* and Pauw *Second Generation* 88-9 show, even in urban settings, initiation ceremonies may persist.

5 McAllister in Mayer *Black Villagers in an Industrial Society* 243 and Hammond-Tooke *Bhaca Society* 82.

6 Olivier et al *Die Privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes* 9 and Van Warmelo & Phophi 159.

7 Thus facilitating child marriage or denying children the right to marry or to acquire their own property. See Uzodike (1990) 4 *Int J Law & Family* 88.

## **B. Evaluation**

5.1.8 Issues of consent, capacity and age are all closely linked. To ensure that future spouses are capable of formulating a proper consent to marry and to prevent guardians from exploiting their children, setting a minimum age for marriage becomes a necessary step towards securing individual human rights.<sup>8</sup>

5.1.9 Although parental control of marriage is a sensitive issue in African communities, since any attempt to regulate the spouses' age or capacity to marry inevitably diminishes the parents' powers, the vast majority of the respondents to the Issue and Discussion Papers accepted the principle of fixing a minimum age.<sup>9</sup> The **House of Traditional Leaders (Eastern Cape)** was one of the few exceptions. It felt that no minimum age should be stipulated, but that, in the case of arranged marriages, the children should be old enough to appreciate the consequences of their acts.

5.1.10 That a minimum age should be prescribed for marriage is already established in international human rights law. The Convention on Elimination of All Forms of Discrimination against Women (CEDAW)<sup>10</sup> and the Convention on Consent to Marriage<sup>11</sup> both require states parties to take legislative action to specify a uniform minimum age. But these treaties do not stipulate what the age should be.

5.1.11 It was on the question of an appropriate age that the Commission encountered the greatest measure of disagreement amongst members of the public.<sup>12</sup> People were understandably at odds over when precisely an individual could be deemed sufficiently mature to undertake the

---

8 And should be seen as linked with the state's policy, under s 29(1) of the Constitution, that all children be given an education.

9 As the **Law Association of Zambia** said, if underage children were allowed to marry, abuse of parental powers would continue unchecked.

10 Article 16(2).

11 Article 2.

12 The **Legal Profession Workshop** felt that we should be concerned with the protection of children rather than with fixing an age of maturity.

serious responsibilities of married life.<sup>13</sup>

5.1.12 Various options exist. In the first place, the existing rules in the Marriage Act on minimum age could simply be extended to cover customary marriages. The Act lays down ages of 18 for men and 15 for women.<sup>14</sup> **Adv N Cassim** supported this option and so, too, did the **House of Traditional Leaders (Free State)**.<sup>15</sup>

5.1.13 The different ages prescribed for men and women under the Marriage Act assume, of course, that boys and girls will physically mature at different rates. If procreation is seen as the exclusive purpose of marriage, then this distinction could perhaps be maintained. But marriage today involves much more than procreation (in particular spousal companionship and economic cooperation).<sup>16</sup> When seen in this light, the age distinction in the Marriage Act could be regarded as unfair discrimination between the sexes.<sup>17</sup>

5.1.14 To avoid discrimination, an overwhelming majority of respondents urged a single age for men and women.<sup>18</sup> The Commission endorsed this view, but the question still remained: what should the minimum age be? According to the Age of Majority Act,<sup>19</sup> full adult capacity is

---

13 Although the Law Commission's **Provincial Workshops**, for instance, supported setting a minimum age, opinions varied from 14 years, 18 for both (**Northern Province, KwaZulu/Natal, Eastern Cape and Mpumalanga**), 18 and 15 (**North Western Province**), 21 and 18 to 21 for both (**Mpumalanga**) and 21 for both spouses (**Northern Cape**).

14 Section 26 of the Marriage Act 25 of 1961. The Law Commission's **Workshop (Western Region)** supported this rule. A snap survey by the **National Human Rights Trust**, however, indicated that 80 per cent of the men and women questioned felt that the marriageable ages of both boys and girls should be increased - a view shared by the Law Commission's **Workshop (Central Region)**.

15 With the caveat that when South Africa ratified the African Charter on Children's rights, a uniform age of 18 should be adopted for everyone. **S G Abrahams** recommended an age of 16 for women and 18 for men and the **House of Traditional Leaders (Northern Province)** recommended 18 and 21, respectively.

16 Women and Law in Southern Africa (WLSA) *Uncovering Reality* 20.

17 Under s 9(3) of the Constitution.

18 These included **Professor J C Bekker**, the **Department of Land Affairs**, the **Gender Research Project (CALs)**, the **National Coalition for Gay & Lesbian Equality**, the **National Human Rights Trust** and the **Commission on Gender Equality**.

19 57 of 1972.

attained at 21, and there was some support for this rule.<sup>20</sup> Most respondents, however, came out in favour of the age of 18.<sup>21</sup>

5.1.15 Accepting the age of 18 would have the advantage of bringing South Africa into line with the rules of international human rights law. The United Nations Convention on the Rights of the Child,<sup>22</sup> the Constitution<sup>23</sup> and the African Charter on the Rights and Welfare of the Child<sup>24</sup> all specify 18 as the age for determining the transition from child- to adulthood.

5.1.16 Respondents to the Issue and Discussion Papers had other, more material arguments for adopting this age. The **Department of Land Affairs** said that land reform policies operate on the understanding that only people over 18 qualify for grants. The **National Coalition for Gay & Lesbian Equality**<sup>25</sup> and **Dr H M de Vetta** expressed a more general view that women's education and employment opportunities would be seriously harmed if they could be married before reaching 18.

5.1.17 In the circumstances, the Commission accepted that the minimum age for determining capacity to marry should be fixed at 18 for both men and women.

---

20 From the **Office on the Status of Women (Northern Province)**, which noted that, if this age were adopted, there would be no need to bother about parental consent. Amongst the **Traditional Leaders** opinion ranged from the age of 18 to 21, although most favoured 18.

21 The **Gender Research Project (CALs)**, **W du Plessis and C Rautenbach (Potchefstroom University)**, the **Department of Welfare and Population Development**, **A J Louw**, the **Department of Land Affairs (Workshop held at Wonder Waters assisted by Gender Research Project CALs)**, the **Legal Profession Workshop**, the **Women's Lobby** and **Organised Labour**.

22 Article 1. Principle II of the United Nations Recommendation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages of 1965, however, proposes 15 (cited in G van Bueren (ed) *International Documents on Children* (1993) Martinus Nijhof 91).

23 Section 28(3). This rule was endorsed by the Law Commission's **Workshop (Eastern Cape)** and the **Women's Lobby**.

24 Article 21 provides that: 'Child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be eighteen years and make registration of all marriages in an official registry compulsory.' South Africa's ratification of the latter Charter is at present under consideration.

25 The **Coalition** questioned whether consent at 15, even if supplemented by parental approval, would constitute informed consent.

5.1.18 Nevertheless, if the freedom to marry is to be fully realized in our law, then a boy or girl who is under age should still be entitled to contract a marriage in the appropriate circumstances. The rules in the Marriage Act, which are designed to regulate such situations, could conveniently be extended to customary marriages.<sup>26</sup> Prospective spouses would need to obtain the written permission of the Minister of Home Affairs, together with their guardians' consent.

## C. Recommendation

**5.1.19 To ensure that prospective spouses are mature enough to formulate a proper consent to marry and to remedy the uncertainty in customary law, a minimum age of 18 for marrying should be fixed for all persons in the country. Underage children should nevertheless be permitted to contract a marriage on terms prescribed in the Marriage Act.**

## 5.2 Parental Consent

### A. Problem analysis

5.2.1 A father's power to control his children's marriages is synonymous with the African cultural tradition. This principle was encoded in the 'official' version of customary law, which provides that the consent of a guardian, especially the bride's guardian, is an essential element of all customary marriages.<sup>27</sup>

5.2.2 The bride's guardian, however, is well placed to abuse his power. Because he is the person who requests and receives lobolo, he may seriously obstruct his ward's freedom to marry. He could prevent a union by refusing her suitor's offer of lobolo or he could make unreasonable demands. Alternatively, he could encourage marriage with a suitor of his own choice by accepting whatever lobolo the man offered. The daughter was not completely helpless,

---

26 Section 26 of Act 25 of 1961. The **Gender Research Project (CALs)**, however, felt that extending this Act to customary marriages smacks of 'westernizing' customary marriage.

27 See s 38(1) of the KwaZulu/Natal Codes. See, too, Bekker *Seymour's Customary Law in Southern* 106.

of course. She could ask senior males in her family to intercede on her behalf, but she had no formal method of compelling her guardian to give consent to her marriage no matter how unreasonable or avaricious his motives for withholding it.<sup>28</sup>

5.2.3 As we have seen above, international human rights law regards the consent of the spouses as of the essence of marriage. A parent's power to intervene in marriage has accordingly been restricted to assisting underage children make the correct decisions. This reduction of powers is evident in the evolution of western systems of family law, where the function of parental control over marriage changed from parents negotiating marriage on behalf of a child to parents approving and ratifying a match already made.<sup>29</sup>

5.2.4 The 'official' version of customary law, however, did not treat the family head's control over marriage in a way that would have protected vulnerable wards.<sup>30</sup> In the case of men, provided that a prospective husband was over the age of puberty, his father's consent was unnecessary.<sup>31</sup> Conversely, in the case of women, regardless of the individual bride's age or actual capacity, her guardian's consent was always deemed essential.<sup>32</sup>

5.2.5 Some of the failings of the 'official' version were corrected in KwaZulu/Natal<sup>33</sup> and Transkei.<sup>34</sup> Major women in both provinces may contract their own marriages. Moreover, in KwaZulu/Natal a guardian may not unreasonably withhold consent, since 'district officers' may

---

28 Cf Phillips & Morris *Marriage Laws in Africa* 102-3.

29 Glendon State, *Law and Family* 24-5. The conception of guardianship correspondingly changed, so that it now operates for the benefit of the ward rather than for the benefit of the guardian and family.

30 Unlike the modern common-law rule in South Africa which deems a guardian's approval necessary only to cure defects in the judgment of minors. Law Commission *Advancement of the Age of Majority* para 3.1.

31 Except for KwaZulu/Natal, where his consent is required under s 38(1)(b) of the Codes.

32 *Gcina v Ntengo* 1935 NAC (C&O) 21 and *Dlomo v Mahodi* 1946 NAC (C&O) 61.

33 Although without prejudice to the rights of any person normally entitled to lobolo: s 38(2) and (3) of the Codes.

34 Section 38(1)(a)(ii) of the Transkei Marriage Act 21 of 1978.

administratively investigate any complaint and authorize marriages they think suitable.<sup>35</sup> Elsewhere in South Africa, however, a woman's only method of avoiding the requirement of parental consent is to enter a civil marriage.<sup>36</sup>

## **B. Evaluation**

5.2.6 Under the Constitution<sup>37</sup> and the United Nations Convention on the Rights of the Child,<sup>38</sup> all powers associated with guardianship must now be conceived in the child's interests. It follows that the exercise and extent of a guardian's power to decide the marriages of his children must be read subject to this limitation.

5.2.7 Such an understanding of the proper role of guardians is, in any event, consonant with the ideal in customary law, where the need to obtain parental approval was supposed to be aimed at ensuring favourable circumstances for a new marriage. Once the spouses' match had been accepted, they could look forward to the support and protection of their families. Several members of the public confirmed this view.

5.2.8 In its Discussion Paper, the Commission recommended that minor children should still look to their guardians for approval of a proposed marriage.<sup>39</sup> When children attained the age of consent,<sup>40</sup> however, it was proposed that parents may neither insist on a particular spouse nor

---

35 Section 38(1)(a) of the Codes. Under s 39 the district officer may make an appropriate order regarding the amount of lobolo payable.

36 But then, presumably, only if she had attained the age of majority under the Age of Majority Act 57 of 1972.

37 Section 28(2).

38 Article 3(1).

39 A principle supported by all the respondents who addressed this question in the Issue Paper. Research by the **Gender Research Project (CALs)** revealed that in practice familial consent could always be provided. Hence, where parents refused to represent their children in lobolo negotiations, a substitute was found from other members of the extended family. Their suggestion that mechanisms for the substitution of consent by other family members, where parents unreasonably withheld consent, is a sensible one that could be met by allowing consent to be given by a parent or 'other appropriate guardian'.

40 In addition, it should be noted that, under s 7 of the Age of Majority Act 57 of 1972, because a person becomes a major on marriage, widows, widowers and divorcees do not require consent to remarry, even if they are under the age of 21.

prevent a marriage which the ward was determined to contract.<sup>41</sup> In consequence, women in particular would be entitled to contract marriage without their guardians' support.<sup>42</sup>

5.2.9 These proposals met with considerable public opposition. Although the **Department of Justice** and the Law Commission's **Provincial Workshops** accepted the spouses' consent as a minimum requirement for marriage, they said that parents and families (especially the bride's family) could not be excluded from the formation of a marriage if it was to be considered truly 'customary'.<sup>43</sup> This argument was endorsed by the **House of Traditional Leaders (Eastern Cape)** and by the national **Traditional Leaders Workshop**, who stressed that the process of obtaining parental consent performs the vital social function of providing a supportive context for new marriages.

5.2.10 The **Gender Research Project (CALs)** agreed with these views. It said that the key role played by guardians reflected a conviction that parents and kin groups had to be included in marriage negotiations if the ultimate union was to be fully valid. Indeed, allowing guardians such power had the positive social function of embedding marriages in the broader social network of two families. Thus the **Rural Women's Movement** said that 'marrying a family is protective of a woman'.

5.2.11 In this regard, the **Traditional Leaders Workshop** observed that the Discussion Paper had unduly restricted the issue of parental consent by talking only of the prospective spouses' parents. In fact, senior kinsmen are normally involved in marriage, and in customary law their approval would also be considered necessary.<sup>44</sup> What is more, if marriage of a traditional leader were contemplated, the consent of the whole nation would be required.

---

41 To do so would be contrary to the freedom to marry. See art 16 of the Universal Declaration of Human Rights.

42 One of the major reasons why guardians withhold consent - payment of lobolo - will become irrelevant if lobolo is not essential to the validity of the union.

43 The question posed by a Law Commission **Workshop** in **KwaZulu/Natal** - whether families do not also have legitimate interests to be protected - is met by the principle that a *child's* interests are deemed to be of paramount importance.

44 The **Traditional Leaders** added a further dimension to this issue by noting that traditionally the *ancestors'* approval was also required.

5.2.12 Sympathetic though the Commission was to these views, it felt that it could not maintain the customary rules of parental (or familial) consent for all marriages. To do so would risk constitutional review on the ground of an infringement of human rights. To some extent respondents' objections may be met if a common-law rule is adopted. Minor children below 21 still require their parents' approval if they wish to conclude a fully valid marriage. Although the absence of this approval is not a fatal defect, the union will be voidable at the instance of an aggrieved guardian.<sup>45</sup>

5.2.13 The Commission also recommended extending certain other statutory rules about parental consent to customary marriages. For instance, if a child's guardian were unobtainable or incapable, the child could make application (in the first instance) to the commissioner of child welfare.<sup>46</sup> If a parent unreasonably withheld consent, the child could apply to court for leave to marry.<sup>47</sup>

5.2.14 The **Organized Labour Workshop** and the **House of Traditional Leaders (Eastern Cape)** felt that the importation of statutory and common-law rules was unwarranted. It was argued that customary procedures for designating a guardian where a child's father was absent or incapable should not be excluded. This proposal has considerable merit, for there are useful mechanisms in customary law to ensure that no dependant is left without the protection of a guardian.

5.2.15 According to customary law the senior male members of a family would be entitled to supply consent to a child's marriage. Whether they should be allowed exclusive powers, however, is questionable. The constitutional principle prohibiting discrimination on grounds of sex or gender would imply that mothers (and if necessary senior kinswomen) may also function

---

45 Or at the instance of an underage spouse, as suggested by **J Heaton**. A Law Commission **Workshop in KwaZulu/Natal** suggested that a marriage should not be voidable at the instance of a fraudulent minor who had lied about his or her age or about having the guardian's consent.

46 Section 25(1) of the Marriage Act 25 of 1961.

47 Section 25(1) and (4) of the Marriage Act. The **National Human Rights Trust** noted that, if the applicant wished to contract a customary marriage, the court would need a further power to determine any lobolo payable.

as guardians.<sup>48</sup> In addition, the Guardianship Act,<sup>49</sup> which gives both spouses equal powers and rights over minor children, suggests that not only fathers but also mothers have the power to give or withhold consent to a ward's marriage.<sup>50</sup>

5.2.16 A consequence of allowing mothers to supply the consent necessary for their children's customary marriages would be to allow them to arrange lobolo. Under the KwaZulu/Natal Codes,<sup>51</sup> de jure emancipated women already have this power.<sup>52</sup>

5.2.17 Finally, a Law Commission **Workshop in KwaZulu/Natal** observed that, if both parents may consent, a deadlock-breaking mechanism should be made available to cater for situations where the parents cannot agree. The most appropriate solution to this problem would be to allow interested parties to appeal to a court (whether a family or traditional court).

### C. Recommendation

**5.2.18 To bring customary law into line with the Constitution and the United Nations Convention on the Rights of the Child, a parent's power to consent to marriage must be exercised only in the child's best interests. It would follow that guardians may not unreasonably prevent their wards' marriages and that the consent of a guardian should be deemed necessary to remedy deficiencies in the judgment of minors. Marriages of children below age, where such consent was not supplied, should be voidable at the instance of a**

---

48 The **House of Traditional Leaders (Eastern Cape)**, however, felt that the argument of unfair discrimination in the Discussion Paper was uncalled for and misplaced.

49 192 of 1993. This Act was evidently intended to supersede customary law, since s 1(1) provides that: 'Notwithstanding anything to the contrary contained *in any law* or the common law ....'

50 Section 1(2) of the Guardianship Act already provides that each parent is independently entitled to exercise any right or power associated with guardianship, except in matters regarding consent to marriage, when the consent of both parents is required unless a competent court orders otherwise.

51 Section 59.

52 According to the Zimbabwe decision in *Katekwe v Muchabaiwa* 1984 (2) ZLR 112 (S), women may gain considerable powers to arrange marriage once they are deemed majors. Dumbutshena CJ found that, when a woman attained the age of 18 years, she was completely emancipated. Thus he held (at 127) that a father no longer had an independent legal entitlement to demand lobolo when his daughter married. Cf Ncube (1983-4) 1 & 2 *Zimbabwe LR* 217ff.

spouse or the guardians concerned.

**5.2.19 Existing statutory and customary-law rules regulating the consent of absent or incompetent guardians should be applicable to marriages by customary law.**

**5.2.20 To avoid unfair discrimination on the ground of gender, parental consent should be deemed to include the consent of both the father and mother of an underage child.**

### **5.3 Relative Capacity: prohibited degrees and preferred marriages**

#### **A. Problem analysis**

5.3.1 Common and customary law both agree on the prohibition against marriage between ascendants and descendants of the same patriline. The common law would also agree with the extension of this rule by most Nguni peoples to marriage with persons related through any of the four grandparents.<sup>53</sup>

5.3.2 The Sotho-Tswana regime, on the other hand, does not so strictly distinguish affinal relatives from relatives by blood. While the prohibition against marriage between men and women related in the direct line of descent remains,<sup>54</sup> any relative on the father's or the mother's side is marriageable. Certain unions, typically between cross-cousins, are positively encouraged.<sup>55</sup>

5.3.3 In the rules governing the spouses' relative capacity to marry, it is apparent that

---

53 Van Tromp 36, Krige *Zulu* 156 and Hunter 184-6. Levirate and sororate unions are by implication not permitted: Van Tromp 37. Cf s 37 of the KwaZulu/Natal Codes.

54 And marriage is prohibited between a man and his aunts, nieces, stepdaughters, step-sisters and their daughters: Mönnig 194, Matthews (1940) 13 *Africa* 9-12, Campbell (n2) 218, Poulter *Family Law and Litigation in Basotho Society* 74-5, Schapera *Handbook* 125-7 and Coertze 211-19.

55 See further on the Tswana law Schapera *Handbook* 127-8, Roberts 25-6 and Lye & Murray *Transformations on the Highveld* 115ff (for both the Sotho and Tswana). See Van Warmelo & Phophi Part I 8-61 on the Venda and Krige & Krige 142-4 on the Lovedu.

not only are there differences between the common and customary law but there are also differences between systems of customary law. Can these different conceptions about permitted and prohibited marriage partners be accommodated in a unified code of marriage law?

## **B. Evaluation**

5.3.4 Although relative capacity is a morally charged issue involving incest taboos,<sup>56</sup> we have no evidence that rules on this topic have been the source of any social or legal problems.<sup>57</sup> Respondents to both the Issue and Discussion Papers were noticeably silent on the matter.

5.3.5 Given the sensitive nature of forbidden and preferred marriages, however, the Commission felt that relative capacity should continue to be determined by the cultural or religious nature of a marriage chosen by the spouses.<sup>58</sup> Thus spouses who choose to celebrate their union according to customary rites would be bound to observe customary rules prohibiting marriage between certain kinfolk.

## **C. Recommendation**

**5.3.6 The spouses' relative capacity to marry one another should continue to be governed by customary law.**

# **CHAPTER 6**

## **CONSEQUENCES OF MARRIAGE**

---

56 Not only is marriage between persons related within the prohibited degrees forbidden but usually also sexual intercourse: *Mhlanga v Msibi* 1930 NAC (N&T) 80 at 82, *Nyawo* 1936 NAC (N&T) 12 and *Mountain v Mandla* 1946 NAC (C&O) 38.

57 In any case, where family ties have weakened, as in urban areas, rules tend to be less rigorously enforced. Doubtless the spread of Christianity has also affected traditional African conceptions of forbidden and preferred relations. See Wilson & Mafeje (n4) 76, Mair in Phillips *Survey of African Marriage and Family Life* 12-13 and Pauw (n4) 113-4 and 125-6.

58 This is an area in which it would seem appropriate to invoke the freedom to pursue a culture or religion of choice under ss 30 and 31 of the Constitution.

## 6.1 Polygyny

### A. Problem analysis

6.1.1 Under customary law a man may marry as many wives as he wishes. Because wives were a source of wealth and status, polygyny was said to be the goal of all men.<sup>1</sup> Yet, even in the past, polygyny was unlikely to have been a common practice.<sup>2</sup> Today it lingers as a potential rather than a reality, since very few men can now afford more than one wife.<sup>3</sup> A form of de facto polygyny is more usual, whereby migrant workers marry a wife in the rural areas and later informally cohabit with a second woman in the city.<sup>4</sup>

6.1.2 None the less, the freedom to have more than one wife has long been condemned, and heated debate on the issue persists, as was indicated by the fact that nearly all replies to the Issue and Discussion Papers dealt with this topic.<sup>5</sup> Predictably, very few women were in favour of polygyny.<sup>6</sup> From a snap survey in Empangeni, for example, the **National Human Rights Trust** reported that 80 per cent of women were against polygyny and 70 per cent of men were for.

6.1.3 Those in support of polygyny claim that it performs valuable social functions.<sup>7</sup> A woman who might otherwise remain unmarried may be legally absorbed into a domestic unit, and a man who might be tempted to commit adultery (and risk the breakdown of his marriage) may

---

1 Marwick 38.

2 Wilson in Krige & Comaroff *Essays on African marriage* 133-4 and 138-9.

3 See Moller & Welch *Polygamy and Well-being* 60. Cf Armstrong et al (1993) 7 *Int J Law & Family* 338.

4 In fact, most of the criticisms from women's groups target this particular practice and highlight the plight of the rural wife. It is also worth remembering that the precarious position of the first wife was due, not so much to polygyny, but rather to the non-recognition of customary marriage.

5 Although there is every reason to believe that polygyny is obsolescent and that in time it will disappear. See Women and Law in Southern Africa (WLSA) *Uncovering Reality* 25.

6 **Adv J Y de Koker**, the **Women's Lobby** and the **Rural Women's Movement**, for example, were against.

7 **Professor C R M Dlamini** put forward several substantial arguments in his response to the Issue Paper and in 1991 *AJ* 77-9.

instead contract another valid union.<sup>8</sup>

6.1.4 In assessing whether polygyny is a positive or negative force in society, **Professor C R M Dlamini (University of Zululand)** compared divorce. Although everyone recognizes that divorce works considerable hardship on women, it is considered, for no obvious reason, as a lesser evil than polygyny. **Professor Dlamini** argued that any supposed wrongfulness in polygyny should be deemed to be vitiated by consent: if a woman is prepared to waive what may be a constitutional right in her own interest, why should she not be free to do so?<sup>9</sup> **Judge S S Ngcobo** also felt that the fact that polygyny is *practised* unconstitutionally cannot make the institution itself unconstitutional.<sup>10</sup>

6.1.5 Although many of the current opponents of polygyny repeated the moral and religious objections of the past,<sup>11</sup> today the main charge is purely secular: that polygyny infringes the constitutional prohibition on discrimination against women.<sup>12</sup> Discrimination, of course, implies that women suffer material prejudice, and, in this regard, respondents could offer many examples.

6.1.6 Thus, polygyny is said to be used as a justification for abandoning older women who are past child-bearing age. (In monogamous marriages, of course, these women would be protected by divorce laws.)<sup>13</sup> Men who marry more than one wife usually support only the last-married wife (or the women and children they happen to be living with). While subsequent unions redounded to the benefit of the first wife (who gained in status and extra hands to do domestic

---

8 See Dlamini (1989) 22 *CILSA* 342-3 and (n7) 77-9. This point was also made by **Mrs I Kumalo (Pierre Odendaal en Kie)**.

9 Thus he argues that the Constitution should protect, not take away existing rights (ie, the right to contract polygynous marriages) and that the state should not decide for individuals the relationships they may form.

10 He suggested upgrading the status of women rather than banning polygyny.

11 And amongst **Religious Leaders** feelings on the issue are still strong. On the one hand, polygyny was considered unconstitutional, on the other, it was recognized as part of customary marriage and impossible to ban effectively.

12 This also emerges from the work of the International Committee on the Elimination of Discrimination Against Women (CEDAW), set up under art 17. See Kaganas & Murray 1991 *AJ* 126. See, more generally, Simons *African Women* ch 8 and Dlamini (n8) 330.

13 *WLSA* (n5) 27-8.

chores), the junior wives had less status, more work and their children fewer entitlements to property on inheritance.<sup>14</sup> The **Department of Land Affairs Workshop held at Wonder Waters (assisted by Gender Research Project CALS)** said that polygyny had a critical impact on land reform programmes.

## **B. Evaluation**

6.1.7 The claim that polygyny infringes the constitutional prohibition on discrimination against women implies two different arguments: that men have a right which women lack and that a conjugal relationship structured on one husband and several wives inevitably results in prejudice to women.

6.1.8 If men have a right that women do not, application of a principle of non-discrimination could require either abolishing the male right or allowing women to take more than one husband. The former of these alternatives will be explored below. The latter - which was put forward in 'tit-for-tat' style by certain of the Law Commission's **Provincial Workshops**<sup>15</sup> and the **Office on the Status of Women (Northern Province)** - enjoys little serious support. As the **Legal Profession Workshop** said, polyandry is not accepted in any of the cultural or religious traditions of South Africa and to introduce it as a solution to objections against polygyny appears contrived.<sup>16</sup>

6.1.9 The argument that polygyny must inevitably harm women is a more complex issue. It is no doubt true that having several wives gives men an unwarranted sense of status and a greater opportunity for sexual gratification. It is also true that women in compound families are more likely to be thrown into competition, and therefore conflict, over resources.<sup>17</sup> But polygyny

---

14 WLSA (n5) 24.

15 At **Mpumalanga**, the **Northern Cape** and the **North West Province**.

16 At the Law Commission's **Workshop** in the **Northern Province**, participants agreed that the right of polyandry was an 'invented culture'. But the **Workshop** felt that so many of the Commission's proposals (for instance, on registration, locus standi and contractual capacity) were invented that one more would scarcely matter.

17 As indicated by the **Gender Research Project (CALC)** and WLSA (n5) 26.

on its own is not the cause of female subordination nor is it directly responsible for abuses suffered by women.<sup>18</sup> Rather, it is one factor contributing to the patriarchal nature of a society.

6.1.10 Deciding whether a legal rule or institution constitutes infringement of the constitutional right to equal treatment very often leads to a balancing of interests, a process that entails consideration of broader social, political and economic issues. In this regard, the argument that polygyny prejudices women must be weighed against certain respondents' claims that the institution performs valuable social functions.<sup>19</sup> Investigation of the social effects of legal institutions, however, should be adopted only with caution. In deciding whether polygyny constitutes *unfair* discrimination, for example, we need to be careful that we are not drawn into an examination of its manifest and latent social functions, since this is likely to be a complex and inconclusive inquiry.

6.1.11 We must appreciate that, strictly speaking, only the first wife of a customary marriage suffers direct prejudice, since she is the person who may be compelled to submit to subsequent unions against her will. A later wife (or wives) has a choice in the matter, and even the first wife can protect herself by insisting on a civil marriage.

6.1.12 None the less, many people questioned how real a woman's choice is, because her freedom must be evaluated in terms of the alternatives available to her. Given current socio-economic conditions, women can gain access to resources (especially to land) only through their attachment and submission to men.<sup>20</sup> There seems to be no legal answer to this problem. Economic and social pressures undoubtedly drive women into less than perfect marriages, but the law cannot be expected to control these pressures. The best that can be done is to ensure that spouses consent to marriage.

6.1.13 Whatever the merits of arguments and excuses for polygyny, overall public sentiment was that it should no longer be supported. Some of the respondents (**Law Association**

---

18 The same is true of lobolo. Cf Becker & Hinz *Marriage and Customary Law in Namibia* 118-19.

19 **Professor C R M Dlamini** and **Mrs I Kumalo (Pierre Odendaal en Kie)**.

20 Armstrong et al (n3) 336-7.

of **Zambia** and the Law Commission's **Workshops at Mpumalanga, the Northern Cape and the North West**) suggested banning the institution outright. Most people, however, thought that a prohibition would be inadvisable. Not only would it would impossible to enforce, but men would also be encouraged to engage in informal unions,<sup>21</sup> which offer women and children no legal protection at all.

6.1.14 Hence the majority of the respondents (notably the **Houses of Traditional Leaders** in the **Free State** and the **Eastern Cape**) were in favour either of allowing the practice to die out of its own accord or of assisting to phase it out (the **Women's Lobby**<sup>22</sup> and **Dr H M de Vetta**). The latter proposal, of course, implies some form of state intervention.<sup>23</sup> The problem then arose of finding an appropriate (ie an effective) form of intervention.<sup>24</sup>

6.1.15 Exacting some type of proprietary penalty was one suggestion. The **Commission on Gender Equality**, for instance, proposed dividing the husband's estate equally between the wives on dissolution of marriage.<sup>25</sup> The Law Commission's **Provincial Workshops** and the **Gender Research Project (CALs)** suggested a serial division of the estates. The **Legal Profession Workshop**, on the other hand, recommended a more active sanction: that husbands should be required to support their families and that wives should be given adequate proprietary protection. Complementing this proposal, the **House of Traditional Leaders (Eastern Cape)** stressed that polygynists should respect cultural practices, which would mean treating each household fairly and entering into more marriages only if all the households could be fully

---

21 Kaganas & Murray (n12) 133. According to Becker & Hinz (n18) 63, this is happening in Namibia.

22 Which suggested that polygyny be phased out over five years for new marriages and over fifty years for existing marriages.

23 In this regard, the **Department of Land Affairs Workshop held at Wonder Waters Conference (assisted by Gender Research Project CALs)** suggested making polygyny a matter for provincial government.

24 Although **Judge Albie Sachs**, for instance, had serious doubts about recognizing polygyny, he did not think that the state should intervene directly to penalize or prohibit existing marriages. The Law Commission's **Provincial Workshops** offered a novel idea: rather than penalize the man, consider penalties for the wife who unreasonably withholds her consent. After all, she was aware that she entered a potentially polygynous marriage.

25 The **Commission** felt that if polygyny were allowed to continue women and children should be legislatively protected.

maintained.

6.1.16 Another type of legal intervention, put forward by **Adv N Cassim, J Heaton** and supported by the **Gender Research Project (CALs)** and the **Department of Justice**, was to register only a man's first marriage.<sup>26</sup> Any proposal that the state should not register polygynous unions, however, seems unwise, because it would result in the creation of a new set of 'limping' marriages, similar to the 'discarded families' created under section 22(7) of the Black Administration Act. As a similar colonial experiment in the Transkeian territories showed, the intended beneficiaries of such legislation (women) are the ones who ultimately suffer.<sup>27</sup> A suggestion was made by the **Department of Justice** that special legal protections should be offered to wives who knowingly (or presumably unknowingly) entered polygynous unions, but this would amount to visiting no sanction at all on polygynous marriage.

6.1.17 Instead, it seems preferable to allow the gradual process of disuse to take its course.<sup>28</sup> In the interim, a compromise with the principle of non-discrimination was suggested in the Issue Paper: that the consent of the first wife of a potentially polygynous marriage be obtained before the husband is entitled to contract a subsequent union.<sup>29</sup> The Commission suggested this rule because it corresponds to the principles of customary law: if a man wants to marry again, he should at least consult his senior wife.<sup>30</sup> (Subsequently we were informed by the **Gender Research Project (CALs)**<sup>31</sup> that the traditional ideal of consultation is no longer part of the 'living law'.)

6.1.18 The Commission's suggestion was supported by the **Legal Profession Workshop**,

---

26 Some added a qualifier that *existing* polygynous marriages should be registered and that the rule of non-registration should be applied only to future unions.

27 Simons 1958 AJ 339.

28 The **House of Traditional Leaders (Eastern Cape)** supported this recommendation.

29 This idea was derived from the 1968 Kenyan commission on marriage. For comment see Read (1969) 5 *East African LJ* 116.

30 See Wanda (1988) 27 *J Legal Pluralism* 130, who discusses the elevation of this practice to a legal duty in three unreported cases from Malawi.

31 Whose research findings were supported by the Women in Law in Southern Africa Project.

the Law Commission's **Workshops in the Western Region and Eastern Cape** and **A M Moleko**. Other respondents objected. The **Department of Justice** observed that in practice the husband's duty to consult is treated as no more than a formality,<sup>32</sup> and in any case, as the **Gender Research Project (CALs)** said, women in secure marriage relationships would be most unlikely to withhold their consent. (**Professor C R M Dlamini** pointed out that the first wife risked at best marital discord and at worst divorce.) The **Gender Project** added that wives are seldom in a position to give a properly informed consent, since men often misrepresent their true marital status and women are heavily influenced by their precarious economic position.

6.1.19 The Commission accepts the common point of these objections: that legislating a right for the first wife might create 'paper law'. What is more, it would be difficult to formulate a suitable penalty if a husband were to contract the second marriage notwithstanding his first wife's refusal to approve it. To declare the second marriage invalid would constitute such a grave departure from customary law that few people would pay any attention to the penalty.

6.1.20 It should be noted that, if several other recommendations made in this Report are adopted, the position of the wife in a customary marriage will be stronger than before. Formal recognition of her equal proprietary, contractual and decision-making capacity and locus standi, the confirmation of her majority status and the removal of the marital power over her, should all conduce to the improvement of her bargaining position on major family issues. Education and economic empowerment above all else are the true emancipators, and where they exist they are infinitely more potent protections against practices such as polygyny than potentially unenforceable state laws.

6.1.21 One final point needs to be made. The public debate over polygyny invariably ignores or underplays the crisp constitutional issue, which is not about the intensity of public feeling for or against but rather involves an objective assessment of the practice. Is it discriminatory? If so, is it *unfairly* discriminatory? Even so, does it find protection under the limitation clause,<sup>33</sup> or the

---

32 A point confirmed by the **Gender Research Project (CALs)**, which said that the first wife's right is interpreted as a right to be *informed* that her husband intends taking an additional wife.

33 Section 36(1).

clauses on religion<sup>34</sup> or culture<sup>35</sup> or any other provision in the Constitution ? The answers to some of these questions may have to await a ruling by the courts, especially the Constitutional Court.

6.1.22 Judging from the emerging constitutional jurisprudence on issues of culture, customary law and religion, the courts are not prepared to strike down a customary practice merely because it is controversial or is under attack from various interest groups. These recent judgments<sup>36</sup> suggest that it is now unsafe to assume that a kind of hegemonic western orthodoxy will prevail over African customs which do not fit comfortably within the dominant cultural frame. More seems to be needed; namely, that the custom in question must, on a cold, objective assessment, fail all the tests set out in the Constitution.

6.1.23 In these circumstances it would be dangerous to assume (without further investigation) that any customary practice, such as polygyny, initiation or the levirate (to name a few of the more topical ones) are ‘obviously’ unconstitutional. And it would be unwise in the extreme to pre-empt possible rulings on these issues by the hasty prohibition of polygyny in customary law, when the same issue may weigh heavily in debates about religious marriages, which are themselves soon due for recognition.

6.1.24 A not insignificant factor in this debate is the question of appearances. Currently there is considerable controversy in South Africa over other emerging family forms such as same-

---

34 Section 15(3).

35 Sections 30, 31.

36 See **Ryland v Edros 1997 (2) SA 690 (C)** where Farlam J, in the Cape Provincial Division, held that the Constitution had introduced such a basic change in the values of South Africa that a contract based on an unrecognised Islamic marriage could no longer be considered invalid solely for the reason that potentially polygynous marriages are not recognised in South African law; **Mthembu v Letsela and Another 1997 (2) SA 936 (T)** where Le Roux J, held that the rule of male primogeniture in the customary law of succession does discriminate between persons on the grounds of sex or gender but not unfairly since the heir had an obligation to support the widow and other dependants of the deceased; **Nyanisile Bangindawo and Others v The Head of the Nyanda Regional Authority and Another HC (TK) Case No 2185/95** where Madlanga J dismissed an application based on the unconstitutionality of the Regional Authority Courts Act 13 of 1982 (TK), seeking to have a conviction and sentence of a Regional Authority Court in Transkei set aside. The judgment is particularly instructive in the parts where Madlanga J dismisses arguments that these courts are unconstitutional because ‘the presiding officers are not legally trained’ and because they follow a ‘truncated procedure’ which is unlike that followed in the magistrates’ courts. The learned judge opines that this is like “comparing apples and potatoes” and does not assist the court at all.

sex relationships and cohabitation. These raise complex issues of a legal and moral kind which are far from resolved. To rush in with an irrevocable ban on the one peculiarly African mode of constituting a family, while entertaining public debate on these other forms runs the risk of sending the wrong message to a large part of the South African population.

## **C. Recommendation**

**6.1.25 Customary marriages should continue to be potentially polygynous. This recommendation is made for several reasons, the most important of which are the difficulty of enforcing a prohibition and the fact that polygyny appears to be obsolescent.**

## **6.2 Personal Relations of the Spouses**

### **6.2.1 Patriarchy and equal treatment**

6.2.1.1 Traditionally, senior African men enjoyed a generous authority that is usually captured in the term 'patriarchy'. This is a vague concept, but it generally denotes the totality of rights and powers that men are entitled to exercise over their wives and daughters. Formerly, women subject to the common law suffered under a similar patriarchal tradition,<sup>37</sup> but over the years the South African legislature introduced a series of acts designed to upgrade the status of women.<sup>38</sup> True to the pattern of such reforms, no attention was paid to customary marriages.<sup>39</sup> Spousal relations in these unions, therefore, continued to be governed by customary law.

---

37 In this regard, **Professor J C Bekker** argues that female oppression is widespread in all societies and that customary law should not on its own be held accountable.

38 The Matrimonial Affairs Act 37 of 1953, the Divorce Act 70 of 1979 and the Matrimonial Property Act 88 of 1984.

39 The strict segregation of marriage law was finally bridged in the 1985 Law Commission report on *Marriages and Customary Unions of Black Persons*, where it was recommended (in para 11.4ff) that the consequences of customary marriages should be amended in various significant ways to bring them into line with civil marriage.

6.2.1.2 In a traditional system of customary law, a man's position as head of a family would have entailed weighty responsibilities to care for those under his control. As customary law was translated into an 'official' version, however, these responsibilities were played down. Greater emphasis was placed on a man's powers and the corresponding incapacities suffered by his subordinates.<sup>40</sup> 'Official' customary law now represents some of the worst features of the 'invented tradition'.

6.2.1.3 Unfortunately, the 'living law' is no better condition, since it is both nebulous and contradictory.<sup>41</sup> This situation could perhaps have been expected, for marriage generates various vague expectations and responsibilities of a social or moral nature which are not readily amenable to legal regulation.<sup>42</sup> In consequence, it is far from clear what the rules of contemporary customary law are. None the less, popularly held views on gender roles are influencing people's views about what the law ought to be.<sup>43</sup> These views are in turn drawn from the patriarchal traditions of African culture, which husbands take as a broad justification for their entitlements.

6.2.1.4 Men's claims are usually linked to payment of lobolo, for they argue that if they paid lobolo they should have full power over their wives.<sup>44</sup> In Zambia, for example, people say that, because a husband paid lobolo, he should be entitled to any income derived from his wife's full-time employment. Formerly, she would have worked in the fields for her husband; by going out to work, she deprives him of this service. He therefore takes her wages as compensation.<sup>45</sup>

---

40 Hence men were simply deemed 'owners' of property rather than trustees or administrators. Cf the call by **Organised Labour** for a clear distinction between administration and ownership.

41 We also suffer from having very little current empirical information. The anthropological accounts given in Van Tromp 97-109, Mönnig 216-17, Holleman 202-11, Clerc (1938) 12 *Bantu Studies* 94ff, Poulter *Family Law and Litigation in Basotho Society* 167ff and Campbell (1970) 3 *CILSA* 328-31 are all dated.

42 In the case of civil marriages, too, most of the duties between spouses are merely hortatory: Sinclair *The Law of Marriage* 423.

43 Thus Nhlapo in *Women and Law in Southern Africa (WLSA) The Legal Situation of Women in Southern Africa* 99 says that Swazi tradition dictates that women be obedient, submissive and humble and compliant to their proper roles as child-bearers, food-producers and household managers.

44 A point made by **Adv J Y de Koker**. See, too, Molokomme and Seeiso et al in *WLSA* (n43) 16 and 52, respectively.

45 Himonga et al in *WLSA* (n43) 156-7.

6.2.1.5 On the same understanding, husbands may claim the right to chastise their wives and to demand sexual favours at will, or the power to make decisions in matters such as adopting birth-control measures, buying and selling the family house, educating children and allowing wives to go out to work.<sup>46</sup> Although in practice a wife may exercise considerable powers of her own, it is generally supposed that her husband is head of the family with no more than a moral duty to consult his wife on matters of major importance.<sup>47</sup>

6.2.1.6 The widely held assumption that all the claims made by men are endorsed by the law is in many cases groundless. With the exception of marital rape,<sup>48</sup> none of the issues mentioned above has been properly tested in court and many of them were never contemplated in the past. It follows that contemporary male views about their legal powers have no real foundation in 'tradition', especially since women have long since outgrown the social and economic constraints that used to be imposed on them.

6.2.1.7 The customary law governing spousal relations is in such an uncertain state that legislative intervention is invited. Reform is needed to bring the law into line with socio-economic changes in South African society and to give effect to the principle of equal treatment in s 9 of the Constitution<sup>49</sup> and the Convention on the Elimination of Discrimination against Women (CEDAW).<sup>50</sup>

## 6.2.2 Improving the status of women

---

46 See, for example, Seeiso et al in WLSA (n43) 65.

47 Molokomme in WLSA (n43) 15. Hence, Adinkrah (1990-91) 30/31 *J Legal Pluralism* 16 says that the claim that women had an inherent right to influence all major decisions in the family is pure rhetoric.

48 See *S v Ncanywa* 1992 (2) SA 182 (Ck) and *S v Ncanywa* 1993 (2) SA 567 (CkA). Section 5 of the Prevention of Family Violence Act 133 of 1993 outlawed marital rape, however, and s 1(2) makes the Act applicable to customary marriages and cohabitations.

49 This would be a situation where horizontal application of constitutional rights should be encouraged, for customary law often lacks specific rules of its own.

50 Article 5(a) of the Convention provides that states parties are obliged: 'To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on stereotyped roles for men and women.' See also art 16(1)(c)-(g), which deals specifically with spousal relations.

## A. Problem analysis

6.2.2.1 Before any attempt is made to create a more equitable marital relationship, the general legal status of women must be upgraded. According to the 'official' version of customary law, women (especially the wives of customary marriages) have no capacity to hold and dispose of property, contract and sue or be sued in court.

6.2.2.2 Deprivation of capacity rested on a belief that women were not versed in the ways of the world. It followed that they needed the help of a male guardian when dealing with people outside the family. By drawing an analogy with children,<sup>51</sup> the courts have tended to assimilate African women to the status of minors in common law.<sup>52</sup> Full capacity is regarded as a senior male preserve.

6.2.2.3 Women are not allowed to bring legal actions in their own names. If they were to do so, a hallowed principle of customary law would be destroyed,<sup>53</sup> one that goes 'to the very root of Native custom'.<sup>54</sup> Women are supposed to be ignorant of the forensic arts and thus in need of someone to argue their cases for them. Here the common-law institution of minority seems to have influenced customary law. A woman cannot (formally at least) be denied her action; she merely requires assistance to bring it.<sup>55</sup> If her guardian does not appear in court with her, a curator ad litem will be appointed.<sup>56</sup>

6.2.2.4 Women also lack contractual capacity.<sup>57</sup> If we are to judge from the surprising

---

51 Molokomme in WLSA (n43) 13.

52 Which was hardly surprising, given the status of women under Roman-Dutch common law before the reforms of the Matrimonial Affairs Act 37 of 1953. See Clark in Visser *Essays on the History of Law* 188-9.

53 *Kutuka v Bunyonyo* 4 NAC 302 (1920).

54 *Mashinini* 1947 NAC (N&T) 25.

55 *Ngcamu v Majozi* 1959 NAC 74 (NE). Cf *Zondi v Southern Insurance Association Ltd* 1964 (3) SA 446 (N).

56 *Cele & another v Cele* 1957 NAC 144 (NE), *Ndlala v Makinana* 1963 BAC 18 (S) and *Phakathi v Phakathi & another* 1966 BAC 48 (NE).

57 *Ndhlovu* 1954 NAC 59 (NE).

dearth of cases on this topic, however, their lack of power has occasioned no particular social or legal problems. The few judgments available seem to indicate that women have again been treated like minors at common law.<sup>58</sup>

6.2.2.5 The most serious female incapacity is proprietary. Although women throughout Africa have always played a vital part in food-production, they are usually denied control over land and livestock (the means of producing food). From the general principle that women are subordinate to men, the courts then extrapolated a rule that women have no capacity to hold or deal with property. Women were like 'minors' subject to 'guardianship'.<sup>59</sup>

6.2.2.6 Having arrived at this conclusion, the courts could have construed female incapacity to deal with property in the same protective manner as a minor's incapacity under common law.<sup>60</sup> But African women were given no such benefits. In fact, the meaning of proprietary incapacity in customary law is uncertain. It could denote absence of a *power* to acquire property, the *freedom* to use and dispose of it, the *right* to vindicate it or all three. The courts have never specified which.<sup>61</sup>

6.2.2.7 In 1943, legislation was introduced to amend the customary law governing contractual capacity and locus standi. Section 11(3) was inserted into the Black Administration Act to give all those subject to customary law the capacity to conclude common-law contracts and the locus standi to sue or be sued for debts arising out of the common law. This section provided that:

'The capacity of a Black person to enter into any transaction or to enforce or defend his rights in any court of law shall, subject to any statutory provision affecting any such capacity of a Black, be determined as if he were a European ....'

---

58 As, for example, in *Zwane v Dhlamini* 1938 NAC (N&T) 278.

59 Conversely, the courts never questioned the capacity of independent men: Chanock (1991) 32 *J Afr History* 80-1.

60 A boy or girl over the age of seven can acquire ownership of property if this improves his or her position. Guardians have the power to administer their wards' estates, but they are obliged to act bona fide in the minor's best interests.

61 Bennett *Human Rights and African Customary Law* 87.

6.2.2.8 In 1985, by the insertion of s 11A, the Black Administration Act was again amended to give women the power to acquire the then newly enacted statutory rights in African townships (especially 99-year leaseholds created under Act 90 of 1985). This amendment, however, had no effect on women's general contractual or proprietary capacity.

6.2.2.9 Generally speaking, s 11(3) did not change capacity for contracts and debts governed by *customary law*.<sup>62</sup> Furthermore, because the main clause of the section refers to 'a transaction', it implies that capacities associated with delicts and property were excluded (although on occasion the courts held that claims relating to property should be governed by the common law, and so locus standi was determined by the same system).<sup>63</sup>

6.2.2.10 Any powers given to women in the main part of s 11, were largely nullified by a proviso in s 11(3)(b), which provided that:

'a Black woman (excluding a Black woman who permanently resides in the province of Natal) who is a partner in a customary union and who is living with her husband, shall be deemed to be a minor and her husband shall be deemed to be her guardian.'

This provision was a distortion typical of the 'official' version of customary law. The common-law concepts of minority and guardianship could not capture the actual nuances of female status, and, even when s 11(3)(b) was promulgated, it did not reflect the social reality that many married women were living independent lives.

6.2.2.11 Quite apart from the unwarranted legal burdens it imposed on women, s 11(3)(b) has been the source of much confusion, for it depended on a woman being married by customary law and 'living with' her husband, two qualifications that were ambiguous and difficult to apply. In the first place, customary marriages could not be defined with precision. In the second place, the meaning of the phrase 'living with' was obscure. (The courts refused to interpret it literally.)<sup>64</sup>

---

62 Under s 11(3)(a).

63 *Maqula* 1950 NAC 202 (S), *Nhlanhla v Mokweno* 1952 NAC 286 (NE) and *Kunene* 1953 NAC 163 (NE).

64 *Tofu v Mntwini* 1945 NAC (C&O) 83 at 84.

6.2.2.12 Finally, it was not clear whether customary or common law had to be used to identify the woman's guardian.<sup>65</sup>

## **B. Evaluation**

6.2.2.13 It is obvious from the above that the customary law governing female capacity is in urgent need of reform. The easiest issue to begin with is s 11(3)(b) of the Black Administration. No one has argued for its retention. To the contrary, the call has come from many quarters, particularly the **Rural Women's Movement** and the **Centre for Applied Legal Studies (Wits)**, to have it repealed. The section has already been abolished in KwaZulu,<sup>66</sup> where wives of customary marriages now enjoy a common-law contractual capacity and locus standi. There can be no argument in favour of this anomaly of the past.

6.2.2.14 The capacities of women could be further enhanced by a ruling that the Age of Majority Act applies to persons subject to customary law.<sup>67</sup> Several respondents to the Issue Paper, namely the **Women's Lobby**, **Professor J C Bekker** and the **Gender Research Project (CALs)** called for a wider application of this Act. Because majority status empowers generally, women over the age of 21 would automatically acquire full capacity as emancipated adults on a par with men.

6.2.2.15 It has long been a moot point whether the Act overrides customary law.<sup>68</sup> (Similar doubts about the effect of age of majority legislation have arisen in other African countries.)<sup>69</sup> In

---

65 Kerr (1965) 82 *SALJ* 487 and (1973) 90 *SALJ* 4.

66 By s 119 of the KwaZulu Code (Act 13 of 1984).

67 57 of 1972. A recommendation to this effect was made in clause 14(3) of the draft bill appended to the Law Commission's Report on *Marriages and Customary Unions of Black Persons*.

68 In *Mnyandu* 1974 BAC 459 (C), *Mpanza v Qonono* 1978 AC 136 (C) at 139 and *Khumalo v Dladla* 1981 AC 95 (NE), the courts appear to have thought that it did. Besides, all statutes supersede the common law and later statutes repeal earlier ones. See Bekker (1975) 38 *THRHR* 394. But the legislature gave no indication of intending the Age of Majority Act to replace customary law or to repeal s 11(3) of the Black Administration Act (the earlier enactment).

69 Molokomme and Nhlapo in WLSA (n43) 14 and 131, respectively. The one exception is Zimbabwe, for which see Stewart et al in WLSA (n43) 170 and Armstrong (1988-9) 27 *J Family L* 344-6.

order to dispel uncertainty, Natal and KwaZulu had to pass special amendments to the Codes to provide that the Age of Majority Act had supervening force.<sup>70</sup> Reform of spousal relationships now provides a suitable occasion for recommending that the lead taken in that Province be followed nationwide.

6.2.2.16 The **Council of SA Banks** has urged that all contractual undertakings entered into under existing laws should continue to be governed by those laws until the contracts come to their conclusion or are renegotiated. This request (which aims at ensuring legal certainty) would accord with general legislative principles and is therefore supported by the Commission.

6.2.2.17 Application of the Age of Majority Act to women married by customary law will still not have the effect of empowering women *under* the age 21. Hence, a more general reform seems to be required. Article 15(2) of CEDAW, which is directly relevant to proprietary and contractual capacity and locus standi, obliges South Africa as a party to the Convention to:

'accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.'

6.2.2.18 Provision should therefore be made that men and women will henceforth enjoy the same legal capacities. Once this has been done, the way is clear for establishing equality within the marital relationship, in particular, equal powers of decision-making over birth control, the rearing of children and the purchase and alienation of family property.<sup>71</sup>

6.2.2.19 This proposal attracted general approval from the public. It was opposed mainly by the **House of Traditional Leaders (Eastern Cape)**,<sup>72</sup> which felt that the husband, as a link

---

70 Section 14 of the Codes.

71 The problem of spousal violence is already catered for by the Prevention of Family Violence Act 133 of 1993. **DM Hlajoane** noted a further issue of equality to be attended to. Spouses in customary marriages do not qualify for a deceased spouse's share of pension benefits on divorce, because the Divorce Amendment Act 1989 applies only to civil marriages.

72 Its arguments that CEDAW is eurocentric and a violation of the constitutional rights of the African people is met by the specific limitation imposed on cultural rights in ss 30 and 31 of the Constitution.

to the ancestors, should be formal spokesperson and head of the family. Nevertheless, as an exception to customary principles, the **House** supported a wife's contractual capacity<sup>73</sup> and locus standi.<sup>74</sup> In a telling aside, however, it said that there was no need to legislate about spousal equality, since in practice it already exists.

6.2.2.20 After South Africa had signed CEDAW, the old common-law rule that husbands had marital power over their wives was abolished, first for non-Africans, who married after the commencement of the Matrimonial Property Act,<sup>75</sup> and then for Africans, who married by civil rites after the commencement of the Marriage and Matrimonial Property Law Amendment Act.<sup>76</sup> Abolition was made retrospective by s 29 of the General Law Fourth Amendment Act.<sup>77</sup>

6.2.2.21 In spite of these amendments, it is still not clear whether the further common-law principle that the husband is head of the family, and thus has overriding powers of decision-making for all issues common to the marital consortium, was also repealed.<sup>78</sup> The Commission felt that, whatever the state of the common law, all wives, regardless of the form of marriage, should now have powers and rights equal to those of their husbands.<sup>79</sup>

6.2.2.22 The Commission appreciates that these recommendations involve a substantial break with the African patriarchal tradition. However, as the **Gender Research Project (CALs)** and the **Rural Women's Movement** said, if particular married couples feel happier with that tradition, they are still free to structure their relationships accordingly. But the general principle

---

73 Provided the wife earned a separate income and contracted in consultation with the husband.

74 Provided women were sued only as income earners on matters unconnected with tradition.

75 Act 88 of 1984.

76 Act 3 of 1988.

77 Act 132 of 1993.

78 This principle was included in s 13 of the Matrimonial Property Act 88 of 1984, and it is questionable whether it was repealed by the General Law Fourth Amendment Act 132 of 1993. See Sinclair (n42) 132-3.

79 The **Department of Land Affairs Workshop held at Wonder Waters Conference (assisted by Gender Research Project CALs)** noted, however, that notwithstanding full contractual capacity and equal participation in decision-making, a woman's ability to acquire credit will be limited if the consent of both spouses is needed in transactions affecting joint property.

should remain that wives are no longer legally bound to accept their husbands as family heads and sole decision-makers.

6.2.2.23 From these recommendations it follows that the sections in the KwaZulu/Natal Codes<sup>80</sup> and the Transkei Marriage Act,<sup>81</sup> that husbands have marital power over their wives, must be repealed.<sup>82</sup> Moreover, the **Legal Resources Centre (Durban)** pointed out that, in order to ensure clear protection of women's rights, s 22 of the KwaZulu/Natal Codes should also be repealed.<sup>83</sup>

### **C. Recommendation**

**6.2.2.24 Women should be deemed to have contractual capacity, locus standi and proprietary capacity (and in consequence delictual capacity) on a par with men. It is therefore recommended that section 11(3)(b) of the Black Administration Act be repealed.**

**6.2.2.25 In addition, to cure many years of uncertainty, clear provision should be made that the Age of Majority Act applies to persons subject to customary law.**

**6.2.2.26 In compliance with South Africa's obligations under CEDAW and the Constitution, legislation should be passed to provide that spouses have equal capacities and powers of decision-making. Such legislation will entail the repeal of sections 22 and 27(3) in the KwaZulu/Natal Codes and section 39 of the Transkei Marriage Act.**

### **6.3 Proprietary Relations during Marriage**

---

80 Section 27(3). This section contains a proviso that, if the spouses were married by civil or Christian rites, they may exclude marital power by antenuptial contract. In the normal course, s 27(3) would be overruled by Act 132 of 1993, but for no good reason the Codes are usually assumed to be immune from national legislation on family law.

81 Section 39 provides that marital power may not even be excluded by antenuptial contract.

82 Consistent with its general stance on the position of women in the family, the **House of Traditional Leaders (Eastern Cape)** opposed abolition of the marital power and s 39 of Transkei Marriage Act.

83 This section provides 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.'

### 6.3.1 The customary law on property: personal, house and family estates

#### A. Problem analysis

6.3.1.1 Control of property is the key to social empowerment,<sup>84</sup> and, had married women acquired clear rights and powers over property, their overall position would have been much improved. Unfortunately, property relations happen to be one of the least explored areas of customary law.<sup>85</sup> Aside from empirical research in the Cape,<sup>86</sup> we have little direct information on the 'living law'.<sup>87</sup> While it is quite likely that many women, especially those who are single, widowed or divorced, independently work for and hold property, the vagueness of customary law allows men to invoke patriarchal tradition to their own advantage.<sup>88</sup>

6.3.1.2 It is the absence of information that may account for the **Traditional Leaders' Workshop** reaction to the Issue and Discussion Papers. They could see nothing offensive in customary law, since they totally rejected a claim in the Issue Paper that women do not own property. Evidently, a custom is emerging whereby some traditional courts in KwaZulu/Natal award the house to a wife (and children) on divorce and order the husband to leave. The **Traditional Leaders** in fact called for more research, saying that differences between laws were

---

84 Hirschon *Women and Property/Women as Property* 1, Howard *Human Rights in Commonwealth Africa* 199 and Armstrong et al (n3) 343.

85 Not only did the courts shy away from judicial law-making but, as **Professor J C Bekker** says, this aspect of female status has been interpreted in such a way as to inflict severe disadvantages on women. See, too, Becker & Hinz (n18) 77.

86 By Professor S B Burman and associates. Notable monographs are Burman & Barry *Divorce and Deprivation in South Africa* (1984) Second Carnegie Inquiry Paper 87, Burman (1987) 1 *Int J Law & Family* 206 and Burman & Berger (1988) 4 *SAJHR* 194 and 334.

87 In other parts of Southern Africa, however, early anthropological accounts are gradually being supplemented by more up-to-date fieldwork. See WLSA's research, notably vol II *The Legal Situation of Women in Southern Africa*. Contributors to this volume confirm general observations made in this Report.

88 Molokomme in WLSA (n43) 16, for instance, says that there is no specialized matrimonial property regime in Botswana; much depends on the whim of the husband. Interesting fieldwork conducted in northern Namibia by Becker & Hinz (n18) confirms patriarchal dominance, although one might have expected matrilineal kinship and uxorilocal residence to yield greater female powers.

apparent and that legislative change should not be supported for its own sake.<sup>89</sup>

6.3.1.3 It is quite understandable why customary law should be so vague on questions of property. Before colonization, there would have been little need for an elaborate code of rules, because people had a relative abundance of food and land, and the economy was geared mainly to subsistence. An individual's responsibility to support dependants was given far greater emphasis.<sup>90</sup> It was inevitable, then, that customary law would have few rules specifying rights to property.

6.3.1.4 The rules that entered the 'official' code were predicated upon polygynous households and the need in such circumstances to keep estates strictly separate.<sup>91</sup> On marriage, each wife established a house that, according to the date of marriage, was ranked in relation to the other houses.<sup>92</sup> Within the family, rights to an item of property were determined by the position of the person acquiring and having regular control over it and the use to which the item would be put.

6.3.1.5 The courts therefore drew two distinctions, one between personal property and goods attracting wider family interests and the other between property in each house and a general family estate.<sup>93</sup> Things of an intimate nature, which served only the interests of the holder, such as wearing apparel, tools and weapons, were deemed to be personal, and could therefore be used and disposed of without reference to anyone else.<sup>94</sup> On a similar basis, gifts given by a husband to his wife became her own property,<sup>95</sup> and so too did the livestock given to ensure her spiritual

---

89 A view that would be shared, to some extent, by the **Organised Labour Workshop**, which called for an identification of flaws in the system justifying interference (but with the aim of ensuring parity).

90 Bennett (1997) 9 *Afr J of Int and Comp L* 91-2.

91 So that, on the death of the family head, the heir to each house would inherit a separate estate.

92 See *Maganu* 1938 NAC (N&T) 14 and *Sijila v Masumba* 1940 NAC (C&O) 42. Sections 68 and 69 of the Codes establish the hierarchy of houses in KwaZulu/Natal.

93 See s 1(1) of the KwaZulu/Natal Codes, *Sijila's* case supra at 44-7 and *Zulu* 1955 NAC 107 (NE).

94 So far as the wife is concerned, this rule is supported in *Yimba* 1940 NAC (N&T) 35, *R v Njokweni* 1946 NPD 400, *Xakaxa v Mkize* 1947 NAC (N&T) 85, *Mpungose v Shandu* 1956 NAC 180 (NE) and *Dhlamini* 1967 BAC 7 (NE).

95 *Monelo v Nole* 1 NAC 102 (1906) and *Mpafa v Sindiwe* 4 NAC 268 (1919).

protection.<sup>96</sup> Productive property, on the other hand, especially large livestock, attracted family interests.<sup>97</sup> This property was generally not subsumed under the personal category.

6.3.1.6 The status of the person acquiring property also helped to determine whether it should be treated as house or family estate. Anything obtained by or through a member of a house accrued automatically to the house concerned. Traditional items in this category were the lobolo given for a daughter's marriage, the damages paid for her seduction and the acquisitions of children.<sup>98</sup> Today, a significant source of house property is a wife's earnings, since whatever a woman earns after marriage is deemed to belong to her husband.<sup>99</sup>

6.3.1.7 Apart from property accruing automatically to a house, a family head could make specific allotments.<sup>100</sup> An important item in this regard, especially in rural areas, would be the agricultural fields allotted to wives by the head of the household.<sup>101</sup> Family dependants, and women in particular, generally had no right to demand land from the traditional authorities.<sup>102</sup> Their access to land was indirect, derived from a duty incumbent on heads of households to

---

96 The rule was not invariable, however. Section 78 of the KwaZulu/Natal Codes regards the *mbeka* beast given by the Zulu, an important gift symbolizing the woman's family and their ancestors, as house property. With the Xhosa, on the other hand, although there was some conflict in the courts about a similar institution (the *ubulunga* beast), the balance of authority favoured the husband as owner. See *Rarabe* 1937 NAC (C&O) 229 at 232, *Kilasi v Matshaka* 1944 NAC (C&O) 99 and *Zilwa v Gagela* 1954 NAC 101 (S). For further comments see Olivier *Die Privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes* 159-61 and Koyana *Customary Law in a Changing Society* 55-9.

97 This finds expression in a legal presumption that 'ownership in all cattle within the kraal vests in the kraalhead' until the contrary is proved: *Cili* 1935 NAC (N&T) 32 at 33.

98 *Mfazwe v Modikayi* 1939 NAC (C&O) 18 at 22 and *Mofokeng* 1948 NAC (C&O) 20.

99 This view originated in the Transkei from the decision in *Sixakwe v Nonjoli* 1 NAC 11 (1896). See too *Fanekiso v Sikade* 5 NAC 178 (1925) at 180 and *Mpantsha v Ngolonkulu & another* 1952 NAC 40 (S). Similar rulings emanated from the Transvaal: *Mkwanazi* 1945 NAC (N&T) 112 at 114. Only two cases were prepared to make an exception. In *Majomboyi & another v Nobeqwa* 2 NAC 63 (1911) and *Logose v Yekiwe* 4 NAC 105 (1919), the courts held that the earnings of a wife living apart from her husband did not accrue to him. The position in KwaZulu/Natal is governed by ss 13, 19, 20 and 78 of the Codes, which are discussed in *Masuku v Kunene* 1940 NAC (N&T) 79.

100 See the definition of 'house property' in s 1(1) of the KwaZulu/Natal Codes, *Fanekiso v Sikade* 5 NAC 178 (1925) and *Mguguli* 1966 BAC 53 (S).

101 See *Soni* 1951 NAC 366 (NE) at 368 and *Dodo v Sebasaba* 1945 NAC (C&O) 62.

102 Although there is ample evidence from various parts of southern Africa to show that independent women are in fact being allowed to hold land on their own account. See, for example, Schapera *Native Land Tenure in the Bechuanaland Protectorate* 150, Letsoalo *Land Reform in South Africa* 20 and Sheddick *Land Tenure in Basutoland* 164.

provide them with the means of support. Thus every wife, on marriage, would be entitled one or more plots of land on which to grow food for herself and her children.<sup>103</sup>

6.3.1.8 All the assets in a house estate fell under the husband's overall control, to be administered for the common good.<sup>104</sup> In the first instance, therefore, a family head had to maintain the wife and children in the house concerned.<sup>105</sup> But he could also call upon house property to settle his own lobolo debt and any damages due for wrongs committed by members of the house.<sup>106</sup> Thereafter, he was free to use house property to satisfy his personal wants and needs.<sup>107</sup>

6.3.1.9 Any unallotted property, together with the family head's earnings, accrued to the family estate. A family head could obviously use this property in his discretion for his own needs, but his duty to support dependants would in practice take precedence. The major difference between family and house property, therefore, lay in a rule that the head of the family could not divert house property from one house to another without obtaining prior approval of the wife in the house affected.<sup>108</sup> Otherwise, when the family head died, his main heir inherited the family estate and the heirs of each house inherited the estate within that house.

6.3.1.10 The customary principle that acquisitions accrue to a house has serious implications

---

103 Dependent widows, mothers and possibly even divorcées or adult unmarried daughters would also be entitled to claim a plot. See Kuper *African Aristocracy* 149, Schapera *Handbook* 202 and *Native Land Tenure* op cit 46 and 81-2, Mönnig 153, Wilson & Mills *Keiskammahoeke Rural Survey* vol4 10 and Duncan 87 and 90-1.

104 Hunter 121-2 and ss 19 and 20 of the KwaZulu/Natal Codes.

105 *Tonose* 1936 NAC (C&O) 103, *Phalane v Lekoane* 1939 NAC (N&T) 132, *Sijila v Masumba* 1940 NAC (C&O) 42 and *Mbekushe v Dumiso* 1941 NAC (C&O) 57. This duty would traditionally include providing lobolo for the oldest son of the house (*Rubushe v Jiyane* 1952 NAC 69 (S)) and *Cheche v Nondabula* 1962 NAC 23 (S)) and furnishing a daughter's trousseau (Bekker *Seymour's Customary Law in Southern Africa* 75 and 147).

106 See generally Bekker op cit 74-7 and Olivier (n96) 151ff.

107 See *Sitole* 1945 NAC (N&T) 50 and *Ngcobo* 1946 NAC (N&T) 14.

108 Together with the eldest son if he were old enough: *Fanekiso v Sikade* 5 NAC 178 (1925). Transfer of property from one house to another creates an obligation for the recipient household to repay the debt: *Sijila v Masumba* 1940 NAC (C&O) 42 at 45, *Mbuli* 1939 NAC (N&T) 85 and ss 20 and 21 of the KwaZulu/Natal Codes.

for modern working women, because it gives family heads an almost unmitigated control over their wives' income. Occasional rights that women traditionally enjoyed to livestock of ritual significance are irrelevant in modern economic contexts.

## **B. Evaluation**

6.3.1.11 Nothing has been done in South Africa to adjust customary law to changes in the economic relationships of family members.<sup>109</sup> The courts were reluctant to interfere with the privileges of patriarchy, which they saw as the basis of a 'valuable asset in Native Law', namely, communal support.<sup>110</sup> This timid attitude to law-making, however, has resulted in a code of obsolete rules. All the provisions regulating control of property in polygynous households, for instance, have no bearing on the requirements of modern marriages, which are nearly all monogamous.<sup>111</sup>

6.3.1.12 On occasion, the courts applied the common-law age of majority to Africans, thereby allowing individuals certain powers over property. In the former Transkeian Territories,<sup>112</sup> for example, where special provision was made for all persons over the age of 21 to become majors, it was held in two cases that the age of majority introduced 'individual ownership of property as opposed to family ownership'.<sup>113</sup> Unfortunately, it is debatable whether these decisions were correct. Granting majority clearly gives individuals the *power* to hold property, but it does not necessarily give *rights* (opposable against the head of the family).<sup>114</sup> In other words, the law of persons cannot cure the deficiencies of the law of property.

---

109 As Simons (n12) 195 says, a traditional rule - that women practising as diviners, herbalists and midwives kept whatever they earned - could have been developed by the courts to include wages and earnings, but in South Africa creative judicial law-making of this nature did not occur. Cf Himonga et al in WLSA (n43) 158 regarding Zambia.

110 *Mfazwe v Modikayi* 1939 NAC (C&O) 18. See too *Mlanjeni v Macala* 1947 NAC (C&O) 1-2 and *Ngqulunga* 1947 NAC (N&T) 84.

111 See Murray *Families Divided* 116-18.

112 Section 39 of Procs 110 and 112 of 1879 and s 38 of Proc 140 of 1885.

113 *Ndema* 1936 NAC (C&O) 15 and *Mlanjeni v Macala* 1947 NAC (C&O) 1.

114 Cf s 14 of the KwaZulu/Natal Codes, as read with the definition of 'family property' in s 1(1). See, too, *Dhlamini* 1960 NAC 49 (NE).

6.3.1.13 While most respondents to the Discussion Paper, such as **Organised Labour**, seemed to accept that gender equality should determine proprietary capacity and more generally proprietary relations of the spouses, the **House of Traditional Leaders (Eastern Cape)** felt that the notion of individual ownership offended the communal ethic of customary law. The House charged the Commission with forcing customary law into conformity with western values. This objection is taken (especially the **House's** accusation that the Commission was imposing a new kind of repugnancy clause), but to allow customary law to persist in its present form is to ignore social realities and to invite constitutional review on the ground of gender discrimination.

6.3.1.14 The Commission therefore considers that an individual's full ownership in his or her acquisitions should now be formally recognized. Implementing this recommendation will involve consequential changes to the existing rules on the delictual liability of family heads, because control of property and liability in delict are intimately connected.<sup>115</sup> But such changes should be attended to by the courts (as happened in the past) rather than the legislature.

6.3.1.15 Finally, note was taken of the **Gender Research Project's (CALs)** concern, which was shared by many women, that organs of state should show no gender bias when responding to claims put by individuals, families and communities for return of land. Gender equity in the allocation of land is a matter of special significance in South Africa,<sup>116</sup> but it is an issue that cannot be considered in a law on marriage. It involves the powers of traditional leaders and therefore falls to be considered in a different context.<sup>117</sup>

## C. Recommendation

**6.3.1.16 While age of majority legislation can free people to engage in commercial and**

---

115 Bennett in Sanders *Southern Africa in Need of Law Reform* 18ff.

116 Marcus (1990) 6 *SAJHR* 179-80. Article 14(2) of CEDAW obliges states parties to ensure that rural women have the right to equal treatment in land matters and agrarian reform.

117 Similarly, **Professor A J Kerr's** point - that a rule deeming everyone capable of owning property and giving full ownership over individual acquisitions would involve consequential alteration to the rules on the liability of family heads for delicts committed by family members - is a matter to be dealt with in the law of delict.

**other dealings with the world at large, it cannot protect their acquisitions from other members of their own family. It is therefore recommended that individual proprietary capacity now be placed beyond doubt. A clear legislative statement is needed that everyone be deemed capable of owning property with the result that full ownership in individual acquisitions will be recognized.**

### **6.3.2 Management of marital estates**

#### **A. Problem analysis**

6.3.2.1 Linked to the paucity of rules on property in customary law is an absence of rules designed to regulate management of family estates. It was (and still is) assumed that heads of households have an almost complete discretion in their control of family and house property. (This power complements their authority to represent the family in dealings with third parties.) The main limitation on a family head's management of house and family estates was a general duty to maintain dependants, which would in practice be enforceable only through complaints to family elders.

#### **B. Evaluation**

6.3.2.2 Problems related to an over-generous power of management can arise in two situations. In the first, if a family head were to dissipate assets through negligence or incompetence, family members would have few formal mechanisms to restrain him. His wife's ultimate remedies would be desertion or, as a last resort, divorce.

6.3.2.3 The KwaZulu/Natal Codes introduced provisions to regulate this situation. A minor may initiate an 'administrative enquiry' through a district officer or traditional ruler to obtain an order that the family head desist from using the minor's income 'unreasonably'.<sup>118</sup> Alternatively, any interested person may have a family head suspended if he was handling family property 'foolishly or prodigally', a right which is similar to applying for a common-law declaration of prodigality.<sup>119</sup>

6.3.2.4 The KwaZulu/Natal remedies need to be generalized in the sense that any family member should be entitled to restrain the actions of the person with control over property in which

---

118 Section 19.

119 Section 30(1). Under s 30(2) a complaint may be made to a district officer and an administrative inquiry may then be held.

that member has an interest. Although the existing measures of divorce or suspension from office are too drastic,<sup>120</sup> they will probably become less important when family members are given ownership in their own acquisitions. Aggrieved individuals will then be entitled to bring proprietary actions to prevent the family head from disposing of their assets.<sup>121</sup>

6.3.2.5 In the second situation, if the family head were absent or otherwise unable to discharge his duties, his wife had no automatic authority to deal with property. It is true that she might be installed as an 'eye' or 'keeper' of the household to attend to day-to-day disbursements in her husband's absence,<sup>122</sup> but if no such arrangement had been made, the wife would be subject to one of her husband's senior agnates.<sup>123</sup> Once wives are given equal powers of decision-making equal to those of their husbands, problems of authority to manage the marital estate in the case of absent or incompetent husbands will, however, be solved.

## C. Recommendation

**6.3.2.6 Remedies in the KwaZulu/Natal Codes for restraining or deposing a person who mismanages a family estate should be made available to all members of the family and these remedies should be applicable nationwide.**

## 6.3.3 Antenuptial contracts

---

120 Similarly, in Ghanaian customary law, the only remedy that members of the family formerly had against the head of a family was to have him removed from office: *Abude & others v Onane & others* (1946) 12 WACA 102 at 104. Section 1 of the Head of the Family Accountability Law of 1985 tempered the law, however, by providing that a family head was accountable to the family and that he could be required to file an inventory of property. See Daniels (1987) 31 JAL 103ff and Kludze (1987) 31 JAL 107ff.

121 Although family members are always protected by the *personal* right to claim support, *real* rights give better protection to the individual and take account of the disintegration of the bonds of kinship.

122 *Cebekulu v Sitole* 1944 NAC (N&T) 48. If necessary, according to *Mpahlwa v Mcwaba* 4 NAC 302 (1919), she could sue for return of property.

123 In any event, she would not be permitted to dispose of valuable assets, such as cattle, without first consulting one of her husband's senior male relatives: *Qolo v Ntshini* 1950 NAC 234 (S).

**A. Problem analysis**

6.3.3.1 It has always been assumed, without any particular reason, that only partners to civil or Christian marriages could conclude antenuptial contracts. Although the **House of Traditional Leaders (Eastern Cape)** said that this institution was foreign to customary law, Africans like everyone else in South Africa have freedom to contract. The spouses of customary marriages should therefore be entitled to enter into an antenuptial contract.<sup>124</sup>

6.3.3.2 This freedom must, of course, be exercised within the permissible bounds of the Bill of Rights. Hence the **Gender Research Project (CALs)** pointed out that antenuptial contracts would be subject to judicial review if they contained clauses discriminating on grounds of gender.

6.3.3.3 **W du Plessis and C Rautenbach (Potchefstroom University)** pointed out that certain difficulties regarding antenuptial contracts will occur in the case of polygynous marriages. When a husband concludes a contract with his second wife, should he obtain the consent of his first wife? Should the second wife have sight of the first wife's contract? The Commission felt that these were issues of detail that would best be solved by the courts.

**B. Recommendation**

6.3.3.4 **Spouses should have the power to enter into an antenuptial contract to vary the automatic property consequences of marriage.**

---

124 In practice, of course, the observation by the **Gender Research Project (CALs)** is correct: that antenuptial contracts (which originated in affluent societies to protect the assets of wealthy men) will do little to benefit the poor.

### 6.3.4 Property consequences

#### A. Problem analysis

6.3.4.1 In former times, an individual's economic welfare would have depended on the support of kinfolk and to a lesser extent on neighbours and traditional rulers. Women, in particular, were always dependent on men for support. Today, however, most people are responsible for their own livelihoods<sup>125</sup> (although rising unemployment has forced increasing numbers to seek social welfare benefits from the state).<sup>126</sup>

6.3.4.2 Problems in the spouses' proprietary relations usually surface on divorce. During marriage, both partners work jointly to support the family, but if the marriage breaks down the remnant family faces a drastic fall in income relative to its needs, which remain at a fairly high level. The burden of satisfying these needs then falls on the least qualified and most poorly paid spouse: the former wife.<sup>127</sup>

6.3.4.3 Because customary law is still based on the understanding that an individual's primary source of support is the extended family, the maintenance of wives and children is of little consequence.<sup>128</sup> Both in law and common perception, women are supposed to rely on men, who therefore carry the full responsibility for supporting them. Reality, however, seldom corresponds to the law or popular belief.<sup>129</sup>

6.3.4.4 Poverty and the attenuation of family ties have made women and children economic burdens to their families. Hence, on the break-up of marriage, women are likely to find themselves at a serious disadvantage. While their employment opportunities are far worse than

---

125 See Glendon and Sen in Meulders-Klein & Eekelaar *Family, State and Individual Economic Security* vol 13 ff and 70ff, respectively, and Land in Freeman *State, the Law and the Family* 25.

126 The welfare system in South Africa, however, is still so basic that it does not nearly meet the needs of the indigent. See Burman & Barry (n86) 10 and Burman & Berger (n86) 197.

127 See Davis et al (1983) 13 *Family L* 217ff.

128 To this end, lobolo was seen as provision of security for the wife if she had to return to her natal family.

129 See generally Armstrong *Struggling over Scarce Resources* 43-4.

men's and their pay lower, gender roles dictate that mothers must raise children, while husbands retain guardianship (with its attendant benefits).<sup>130</sup> Women therefore find that, unaided, they must support not only themselves but also their offspring.<sup>131</sup>

## **B. Evaluation**

6.3.4.5 When confronted with a similar problem, western legal systems reacted in two ways: by extending the husband's liability to maintain his wife and children beyond the termination of marriage and by giving the wife a share of the matrimonial estate. The former solution was prospective, working on an assumption that the spouses had a perpetual duty to maintain one another.<sup>132</sup> The latter solution was retrospective, founded on proprietary rights established automatically (or by contract) at the time of marriage.

6.3.4.6 Far-reaching changes are necessary to the present regime of customary law to make some provision for the financial needs of wives and children.<sup>133</sup> As was indicated above, according to the 'official' version, women generally lack proprietary capacity and there are few rules that would be appropriate to regulating contemporary divorce problems.<sup>134</sup> Instead, by assigning a wife's earnings to the category of house property (which is deemed to belong to the husband), this version of customary law in effect deprived wives of almost all property.

6.3.4.7 It is quite possible that the 'living' customary law is already evolving towards

---

130 What is more, as Burman & Barry (n86) 6-8 show, African women in South Africa felt the effects of apartheid most keenly.

131 Problems which are exacerbated by shortage of accommodation and child-care centres. See further Burman (1987) 1 *Int J L & Family* 210-11.

132 See Gray *Reallocation of Property* 282. This solution is examined below in Chapter 7 in the context of divorce.

133 In Zimbabwe, for example s 7(1) of the Matrimonial Causes Act 33 of 1985 gave courts granting a divorce the power to order division of a matrimonial estate, paying due regard to such matters as the contributions made 'by looking after the home and caring for the family' (s 7(3)(e)). Under s 16 these reforms were extended to customary marriages. See Ncube in Armstrong *Women and Law in Southern Africa* 9 and 12ff, Stewart et al in WLSA (n43) 176 and Armstrong (1988-9) 27 *J Family L* 346-7. See Rwezaura (1988) 2 *Int J Law & Family* 11-12 and 16-18 for reforms in Tanzania.

134 Ncube and Nhlapo in Armstrong (n133) 11 and 45, respectively.

remedying the financial problems of divorced women. Research conducted by the Women and Law in Southern Africa Project into property consequences of divorce in Zambia,<sup>135</sup> for example, indicated that, while customary law did not endorse the idea of maintenance, certain lower courts in urban areas were ordering husbands to pay lump sums of 'compensation' on divorce. The purpose of these orders was partly to protect women who had been divorced without good cause and partly to compensate them for services they had rendered during marriage.

6.3.4.8 The first step towards creating a fairer proprietary regime in marriage would be to give wives full proprietary capacity. Once women can acquire property on their own account, the way is open to deciding a matrimonial proprietary regime. This is a complex subject even in the common law, which now permits at least four different possibilities.<sup>136</sup>

6.3.4.9 In practice the nature of the property system is of little account during an harmonious marriage, since problems tend to emerge only when the union is dissolved. Hence, the Commission's main goal was to ensure an equitable distribution of assets on breakup of the marriage.<sup>137</sup> Most respondents, in particular the Law Commission's **Workshops (Central Region, Eastern Cape and Southern Region)** and the **Rural Women's Movement**, supported this aim. Only the **House of Traditional Leaders (Eastern Cape)** found no need for an equitable distribution, on the ground that property belonged to the entire family in perpetuity.

6.3.4.10 The Commission felt that it was immaterial whether estates were held separately or in community during marriage, provided that the economically weaker spouse was suitably protected on divorce. Statutory procedures for ensuring this protection are already available for civil marriages, namely, an automatic accrual regime,<sup>138</sup> forfeiture of benefits,<sup>139</sup> recognition of

---

135 Himonga et al in WLSA (n4) 151ff. See further Himonga in Armstrong (n133) 56ff and Mabula (1988-9) 27 *J Family L* 332-3.

136 With many more variations by way of antenuptial contract. See Hahlo *The South African Law of Husband and Wife* 154-5.

137 This principle is inherent in the customary notion that the two families' interests should be fairly balanced, taking into account, as **Professor A J Kerr** noted, the relative fault of the spouses.

138 Under ss 2 and 3 of the Matrimonial Property Act 88 of 1984.

139 Under s 9 of the Divorce Act 70 of 1979.

the wife's contribution as homemaker and child-rearer<sup>140</sup> and consideration of future benefits (such as pensions and retirement annuities).<sup>141</sup>

6.3.4.11 In the case of African marriages, the tendency in the past was to assume that spouses would be more likely to accept a separation of estates.<sup>142</sup> And, as **R W Skosana** said, if polygyny is accepted, separate estates would be the regime most compatible with a compound household. **Judge S S Ngcobo**, too, felt that polygyny would be inconsistent with community of property. The Commission therefore recommended in the Issue Paper that customary marriages be deemed to be out of community (unless the parties chose otherwise by an antenuptial contract).<sup>143</sup>

6.3.4.12 The Commission was quite unprepared for the strength of opposition to its proposal. Both the **National Human Rights Trust** and the **Gender Research Project (CALs)** objected to a suggestion in the Issue Paper that Africans were culturally predisposed to having separate estates. The **House of Traditional Leaders (Eastern Cape)** said that holding property out of community contradicted the communal ethic of customary law. Participants at the **Department of Land Affairs Workshop at Wonder Waters Conference (assisted by Gender Research Project CALs)**<sup>144</sup> felt that holding separate estate could be destructive of marriage as an institution, for it would signal a shift in values and responsibilities (especially for men). It said that customary values favour community of property, since every family member is entitled to support from the common estate.

---

140 The **Gender Research Project (CALs)** called for due cognizance to be taken of this factor.

141 Under ss 7(4) and 7(a) of the Divorce Act 70 of 1979.

142 Section 22(6) of the Black Administration Act 38 of 1927, therefore, deemed Africans who contracted civil or Christian marriages to be married out of community. See Olivier (n96) 246 and the Report of the Law Commission on *Marriages and Customary Unions of Black Persons* para 10.2.7. The same rule was adopted by s 39(1) of the Transkeian Marriage Act 21 of 1978 and the Tanzania Law of Marriage Act (for which see Read (n29) 32).

143 The **Registrar of Deeds** felt that in this case, where immovable property had been acquired by the wife but registered in the name of her husband, provision should be made to allow transfer into the wife's name.

144 Some participants, however, felt that a regime out of community could be an effective way of protecting women's property from abusive husbands.

6.3.4.13 The Law Commission's **Provincial Workshops** throughout the country, the **Rural Women's Movement**, the **Commission on Gender Equality**, the **Gender Research Project (CALs)**, the **Women's Lobby**, the **Legal Profession Workshop** and the **Department of Land Affairs**<sup>145</sup> were agreed that the automatic property regime should be in community. In the circumstances, the Commission felt that it had to bow to opinion and recommend instead that community of property be the automatic proprietary regime.

6.3.4.14 At this point, it should perhaps be noted that, since 2 December 1988, all civil and Christian marriages between Africans (or between an African man and a woman of another racial group) are automatically in community of property and profit and loss.<sup>146</sup> For those who are already married out of community, a court granting a divorce has a measure of discretion to distribute property equitably.<sup>147</sup>

6.3.4.15 If the spouses are to be deemed to be married in community, then obvious problems will arise in the case of polygynous marriages. Several respondents to the Discussion Paper had solutions to offer. The **Legal Profession Workshop** felt that only the first marriage could be in community; subsequent unions would have to be out of community.<sup>148</sup> The **Rural Women's Movement** proposed a serial division of the joint estate as the husband took additional

---

145 Which felt that, because most women do not work and have no property of their own when they marry, the out of community regime could condemn them to permanent poverty.

146 Section 1(e) of the Marriage and Matrimonial Property Law Amendment Act 3 of 1988 (which repealed s 22(6) of the Black Administration Act 38 of 1927). Section 2 provides that marriage by antenuptial contract produces separation of estates, subject to an accrual regime, unless the latter is expressly excluded. In addition, both spouses have equal, concurrent powers to administer the joint estate: s 11 of the Marriage and Matrimonial Property Law Amendment Act 3 of 1988.

147 The courts' power arose from an amendment to s 7 of the Divorce Act 70 of 1979 (by s 36 of the Matrimonial Property Act 88 of 1984), a power that was expressly extended to African civil marriages by s 2 of the Marriage and Matrimonial Property Law Amendment Act 3 of 1988. The reform legislation did not, however, repeal s 22(7) of the Black Administration Act, which preserves the material rights of the so-called 'discarded' wife, ie, the woman whose customary marriage had been nullified by her husband's subsequent civil marriage to another woman. Section 7(5)(a) of the Divorce Act was amended (by s 2(b) of the Marriage and Matrimonial Property Law Amendment Act 3 of 1988) to include as one of the factors the courts are required to take into account in determining the extent of assets to be transferred 'any obligation that the husband may have under s 22(7) of the Black Administration Act'. As Sinclair (n42) 232 says, this section obliges a court dissolving a civil marriage to take account of s 22(7) rights when deciding the *extent* of any assets to be transferred to the wife of the civil marriage.

148 The rationale for this approach was that only the first wife may have had expectations of monogamy. Subsequent wives would be aware of the type of union they were contracting.

wives. The Law Commission's **Workshops** held in the **Eastern Cape** and **Gauteng** (and some focus groups) also supported the idea of serial division of property. For instance, A would marry B in community. When he married C, A and B's property would be divided into equal shares. A would then have to use his share to start up an estate with C, and so on.<sup>149</sup>

6.3.4.16 The **Registrar of Deeds**, on the other hand, said that not more than one marriage in community of property could feasibly exist at a time. To hold otherwise would cause difficulties for land registration and the administration of estates. **W du Plessis and C Rautenbach** suggested that, in line with customary ideas of property relations, each spouse's 'personal' property should be treated as out of community, and 'house' property (including the house itself) should go to the relevant spouse (and her children) on dissolution of the marriage.

6.3.4.17 The Commission was unable to assess the viability of these options. The prospect of each spouse in a compound family holding property jointly poses novel legal issues.<sup>150</sup> It is possible that, along the lines of the Transkei Marriage Act,<sup>151</sup> the husband's right to remarry should be conditional upon his first union being out of community of property.<sup>152</sup> Other solutions to the problem are possible and further time is necessary to consider them.

6.3.4.18 A critical question relating to any reform of proprietary regimes is whether the legislation should operate prospectively or whether it should include the estates of spouses already married under the old regime. (As indicated by the **Council of SA Banks**, third parties in particular will be affected.) Sinclair<sup>153</sup> and the **Gender Research Project (CALs)** argue that the constitutional guarantee of equality requires women and men to have equal access to marital

---

149 **W du Plessis and C Rautenbach** took a similar approach to 'family' property. Thus, if A who is already married to B wants to marry C, the family property would have to be divided between A and B. If A marries a third wife D, the family property would have to be divided amongst A, B and C, because all the spouses would have contributed to this estate.

150 **Judge S S Ngcobo** pointed out, for instance, that in order to take account of an accrual regime all wives would have to be joined as parties to a divorce action.

151 21 of 1978.

152 Section 3. Subsequent customary unions were out of community.

153 Sinclair (n42) 143ff.

property, and to suggest that women be denied this right on the basis of their ethnicity and the date on which they married would be unconstitutional.

6.3.4.19 Sinclair reasons as follows: Parliament changed the former common-law regime by the Matrimonial Property Act of 1984, because it regarded that regime as unsatisfactory and unfair to women. Courts were therefore given a discretion when distributing marital estates to avoid the inequity (that is especially likely to arise in cases of separation of estates) of one spouse leaving the marriage empty-handed. Sinclair says that to condemn spouses married before 1984 to an admittedly unfair regime on the ground of the date of their marriage is unsound as a constitutional principle for differentiating between people in identical circumstances.<sup>154</sup>

6.3.4.20 The Commission was persuaded by the argument that prospective law reform might constitute unfair discrimination against the spouses of earlier marriages. On the other hand, it was also concerned about upsetting rights already acquired under existing marriages. It therefore requested special comment from the public.

6.3.4.21 Those who responded to this request were fairly evenly divided. The **House of Traditional Leaders (Free State)**, **Dr H M de Vetta**, **Adv N Cassim**, the **Gender Research Project (CALIS)**,<sup>155</sup> the **Women's Lobby**<sup>156</sup> and the **National Coalition for Gay & Lesbian Equality** were in favour of property laws operating retrospectively. The **Law Association of Zambia**, the **Houses of Traditional Leaders (in the Northern Province and Eastern Cape)**, **W du Plessis and C Rautenbach**, **A J Louw** and **S G Abrahams** were against. Several of the latter, however, said that, within a specified period of time, spouses should be permitted to register a change of property regime under the new law if they wished.

---

154 Sinclair (n42) 144. See also her discussion of the Law Commission proposals in its *Report on Review of the Law of Divorce* Project 12 of 1990.

155 Which said, however, that the legislation should be retrospective only if the property regime were in community.

156 Which suggested that the courts should decide on disputed issues affecting already acquired rights. The **Lobby**, however, felt that various subsections of s 7 in the Draft Bill attached to the Discussion Paper, namely, subsections (1), (2), (4) and (5), should be retrospective.

**C. Recommendation**

**6.3.4.22** The spouses of customary marriages should be deemed to be married in community of property, subject to their freedom to alter this regime by antenuptial contract and subject to the current statutory rules permitting courts to order an equitable distribution of their estates on divorce.

**6.3.4.23** Provision should be made for allowing the spouses to alter their property system after new legislation on customary marriages comes into force.

## CHAPTER 7

### DIVORCE

#### 7.1 The Need for Judicial Regulation of Divorce

##### A. Problem analysis

7.1.1 In theory it is not easy to terminate customary marriages,<sup>1</sup> and some people go as far as saying that they are indissoluble.<sup>2</sup> If this claim were true, we would have no reason to concern ourselves with the legal regulation of divorce.<sup>3</sup> Hence, the proposition needs to be carefully examined.

7.1.2 A reason commonly given for the durability of customary marriages is the stabilizing effect of lobolo.<sup>4</sup> Whether the wife's guardian retained all or only some of the marriage goods was determined by the spouses' discharge of their marital duties. A part at least of the lobolo would have to be returned if the wife misbehaved<sup>5</sup> (or if she had failed to give birth to any children);<sup>6</sup> if the husband misbehaved, he would lose any claim that he might have had.

---

1 Although, of course, spouses frequently separate for shorter or longer periods of time. See Raum & De Jager *Transition and Change in a Rural Community* 79-80, Van Tromp 151, Marwick 133, Schapera *Handbook* 159, Nhlapo in *Women and Law in Southern Africa (WLSA) The Legal Situation of Women in Southern Africa* 116 and *Marriage and Divorce in Swazi Law and Custom* 77-8, Ashton 85-7, Maqutu *Contemporary Family Law of Lesotho* 127 and Mönnig 334.

2 Many people say that divorce rarely happens in African communities. **Dr A M S Majeke (University of Fort Hare)**, for instance, said that customary law has no true conception of divorce, since the ties of marriage are regarded as eternal. While this may have been true in the past, it is unlikely to be true today.

3 Some works avoid using the term 'divorce' in the context of customary law in favour of a culturally neutral term like 'dissolution'. See Cotran & Rubin *Readings in African Law* vol 2 209. Dissolution is too broad, however, since in common law marriage is dissolved by death, whereas in customary law a union may be prolonged through levirate or sororate unions. Hence, the term divorce is used in this Report.

4 See Chapter 4 par 4.3.1.4 above. The major work on this point was by Gluckman (1953) 53 *Man* 141.

5 See, for example, *Ncose v Nandile* 4 NAC 197 (1920) and *Shabangu v Masilela* 1939 NAC (N&T) 86.

6 The general rule is that the wife's guardian is entitled to retain a specified number of cattle for every child born of the union: *Nkuna v Kazamula* 1941 NAC (N&T) 128 and *Manjezi v Sirunu* 1950 NAC 252 (S). In *Mekoa v Masemola* 1939 NAC (N&T) 61 the court went so far as to say that this was an expression

7.1.3 Given changes in the nature and function of lobolo, these rules seem purely theoretical.<sup>7</sup> As lobolo goods have become assimilated to the general economy, they have tended to be consumed for day-to-day subsistence; and, if lobolo is not available for return, there is no point in an aggrieved husband suing for it. Thus the prospect of the wife's guardian forfeiting lobolo is no more than an empty threat.

7.1.4 A second reason for saying that divorce is rare in African communities is because marriage involves not only the individual spouses but also their families. On the face of it, the more interests involved the more difficult it would be to terminate an association. The breakdown of the extended family, however, and the gradual trend to individualizing marriage relationships would suggest that families are no longer playing a stabilizing role.

7.1.5 In fact, the stability of customary marriages must be a matter of conjecture, for we have very little statistical information on the divorce rate.<sup>8</sup> (Because unions may be dissolved privately, data would in any case be difficult to come by.) Even if an empirical study were undertaken, however, it would be almost impossible to pronounce definite findings, given the problems of determining when or whether a customary marriage exists.<sup>9</sup>

7.1.6 Conversely, we have every reason to believe that customary marriages are as unstable as their common-law counterparts. Labour migrancy, the legacies of influx control and forced removals, together with the acute shortage of urban housing, are all factors that conduce to the breakdown of marriage.<sup>10</sup> Burman cites figures to show that 68,2 per cent of all African children born in 1988/9 were born outside any form of marriage (in part because of the high rate of marriage breakup) and that over 50 per cent of African marriages in Cape Town ended in at

---

of natural justice.

7 In fact, the general hypothesis that payment of lobolo discouraged divorce was never uncritically accepted. See Mitchell in Southall *Social Change in Modern Africa* 316ff and Mair *Marriage* 189-91.

8 Cf Weinrich *African Marriage in Zimbabwe and the Impact of Christianity* 160ff, Hunter 212 and Mönning 334.

9 See Comaroff & Roberts (1977) 21 *JAL* 113-14.

10 See Burman (1987) 1 *Int J L & Family* 210.

least de facto divorce.<sup>11</sup>

7.1.7 If the breakdown of marriage is now a common social problem, then it requires some regulation. There are other, more cogent reasons for requiring legal intervention. In the first place, the customary divorce process was a private affair that could be arranged by the spouses and their families on terms they chose. Recourse to a court or third party was necessary only if agreement were impossible.<sup>12</sup> In the second place, questions of maintenance, distribution of the matrimonial estate and rights to children were of little account.<sup>13</sup> An equitable settlement of lobolo was the central issue. It was assumed that wives would return to their own families and that children would either remain with their fathers or (exceptionally) move to their maternal families.<sup>14</sup>

7.1.8 In earlier times, these arrangements would probably not have caused women and children any undue distress. Through changes in family structure, however, divorces under customary law may now work to the serious disadvantage of vulnerable parties. Because of the fragmentation of the extended family, not to mention the heavier burdens of educating and supporting children, the wife is unlikely to be welcomed back to her natal family. With no help forthcoming from their guardians, women have had to shoulder the full responsibility of supporting themselves and their children.

## **B. Evaluation**

7.1.9 The courts did little to improve on the existing rules in customary. On the understanding that dissolution of marriage is a private affair, they disclaimed any general authority to issue divorce decrees.<sup>15</sup> They were prepared to hear cases only if it was clear that one party

---

11 Burman (1991) 7 *SAJHR* 215.

12 Under common law, although a marriage may be dissolved inter vivos only by decree of a court, the parties may privately negotiate certain issues, such as division of the marital estate, maintenance and child custody.

13 See Phillips & Morris *Marriage Laws in Africa* 126.

14 Depending, of course, upon payment of lobolo.

15 *Duba v Nkosi* 1948 NAC 7 (NE) and *Saulos v Sebeko & another* 1947 NAC (N&T) 25.

was determined on divorce and that his or her intention had already been clearly expressed to the other party (a rule that led to inordinate technicality in the pleadings).<sup>16</sup>

7.1.10 The courts' refusal to become involved in customary divorces worked to the obvious disadvantage of wives. Because a wife's guardian could theoretically lose the lobolo, she could not expect his disinterested support if she wanted to end her marriage. Because a wife was not allowed to pursue a divorce action unaided, however, she would be forced to put up with her marriage, no matter how odious the relationship with her husband had become.

7.1.11 The position in KwaZulu/Natal is different, since it is implicit in the Codes that dissolution of marriage may not be arranged without reference to a court.<sup>17</sup> The Transkei Marriage Act, on the other hand, provided only that courts *may* grant divorce decrees, with the implication that extra-judicial divorce is still permissible.<sup>18</sup>

7.1.12 The principle seems clear: courts need to become engaged in divorce proceedings in part to protect the interests of women and children<sup>19</sup> and in part to represent the state's more general concern in marriage. If, as is proposed in this Report, the state should determine the formation of a valid union, then it should in addition decide when and on what terms a marriage may be ended.

7.1.13 Constitutional support now exists for judicial involvement in divorce. Section 34 of the Bill of Rights gives everyone 'the right to have any dispute that can be resolved by the application of law decided ... before a court or, where appropriate, another independent and impartial tribunal or forum'. It follows that courts may no longer refuse to entertain a suit by

---

16 If a husband sued only for dissolution, his petition would be dismissed, because the courts did not consider that they had an essential role to play in dissolving marriages: *Maseko v Mhlongo* 1953 NAC 40 (C). Conversely, if the husband sued only for return of lobolo, the case would also be dismissed for disclosing no cause of action: *Nyembe v Zwane* 1946 NAC (N&T) 26 and *Matlala v Tompa* 1951 NAC 404 (NE).

17 *Mlaba v Myeni* 1942 NAC (N&T) 6. It follows that, if the court does not consider the plaintiff's grounds for suit sufficient, it may refuse the divorce. See, for example, *Nyaka & another v Nyaka* 1947 NAC (N&T) 16.

18 Section 48 of Act 21 of 1978, as read with s 37.

19 See Rwezaura (1983-4) 1/2 *Zimbabwe LR* 91-2 for Tanzania.

either spouse for dissolution of a customary marriage.

7.1.14 Only the **House of Traditional Leaders (Eastern Cape)** was against the proposal that divorces be judicially processed. It remained true to the customary conception of marriage in the sense that, if families negotiated the union, they should have the power to arrange its dissolution.<sup>20</sup> (The **House** said that the families could refer the matter to a traditional ruler - who would attempt a reconciliation - when they could not agree.) Otherwise, the **House** conceded the courts' power of intervention only in cases of 'dual' marriage, where the union would have elements of both customary and state law.

7.1.15 Other respondents who dealt with this issue, such as the **Law Association of Zambia** and the **Department of Justice**, were in favour of judicially regulated divorce. They, however, raised a more practical concern: the typical divorce action is costly and the courts processing divorce actions are usually inaccessible to litigants.

7.1.16 The Commission took this point and noted in addition that the existing law on divorce jurisdiction is far from satisfactory. According to a long-accepted rule in South Africa, only the High Court may dissolve civil marriages. Through a legislative oversight, however, magistrates' courts have jurisdiction to hear customary divorces.<sup>21</sup> There is no principled reason for an exception to the general rule.<sup>22</sup> Admittedly, the costs of proceeding in magistrates' courts are lower than those in the High Court (which retains concurrent jurisdiction), but to maintain these distinctions of the apartheid era smacks of unequal treatment.

7.1.17 When the long-awaited family courts<sup>23</sup> become fully operational, these courts

---

20 However, since marriage will be registered, a private divorce should also be endorsed on the marriage register.

21 As **Judge S S Ngcobo** pointed out, this situation persists despite s 46 of the Magistrates' Courts Act 32 of 1944.

22 Nor is there any reason why Africans married by civil or Christian rites may prosecute their divorces in the Black Divorce Courts, which were established by s 10 of Act 9 of 1929.

23 Established under the Magistrates' Courts Amendment Act 120 of 1993, which is designed to replace the special Black Divorce Courts with family courts that will have jurisdiction to adjudicate divorces for all communities in South Africa.

should obviously process all divorce actions. But allowing these courts jurisdiction over customary marriages will not solve the problem of accessibility. Rural litigants are at an obvious disadvantage: they will be forced to travel considerable distances to often distant urban centres. A proposal was therefore made that courts of traditional rulers be given concurrent jurisdiction over customary divorces. As the Law Commission's **Provincial Workshops** and **Advs M Masipa, F Kathree and B Spilg (Society of Advocates of SA, Wits Division)** pointed out, traditional courts provide a ready-made service for ordinary South Africans who lacked the means to litigate in higher courts.

7.1.18 As it happens, the Black Administration Act already gives traditional authorities power to hear customary divorce actions, although implicitly rather than expressly.<sup>24</sup> The Commission felt, however, that traditional courts will not be suitably equipped to adjudicate on the complex legal issues that will arise if the recommendations in this Report about the property and other consequences of marriage are adopted. The Commission also felt that it had no mandate to make proposals on the judicial powers of traditional rulers, a topic that was being considered in a separate inquiry.

7.1.19 Nevertheless, the Commission supported a proposal from the Law Commission **Workshops** in the **Western** and **Central Regions** that traditional courts should act as intermediaries in the divorce process. The **Workshops** said that, according to tradition, breakdown of a marriage would first be discussed by the families; if they could find no solution, the matter would be referred to a traditional leader for adjudication. A prime goal throughout this process would have been reconciliation of the spouses.

7.1.20 The Commission therefore agreed with **R W Skosana**,<sup>25</sup> who suggested that traditional authorities be encouraged to mediate between the parties, and where possible to reconcile them. Only if it becomes apparent that a marriage has irretrievably broken down, should the parties approach the family courts.

---

24 In the proviso to s 12(1) of Act 38 of 1927, jurisdiction over civil unions is excluded. It follows that the courts do have power to dissolve customary marriages.

25 Who as a magistrate presented a substantial number of workshops on the Issue Paper.

## **C. Recommendation**

**7.1.21** Because the private regulation of divorce in customary law places women and children at risk, it is recommended that all marriages should be terminated only by decree of a competent court. Once this principle is accepted, courts will have the power to ensure that wives and children are given necessary procedural protections and the power to apply appropriate rules on division of marital estates, post-divorce maintenance and custody and guardianship.

**7.1.22** The current situation that magistrates' courts and the courts of traditional leaders have jurisdiction over customary divorces (and Black Divorce Courts have jurisdiction over divorces sought by Africans married by civil or Christian rites) should be ended as soon as possible. All divorce actions and actions about other family-law issues referred to in this Report should be processed by the family courts.

**7.1.23** Before a divorce action is instituted in the family courts, traditional authorities should be entitled to attempt a reconciliation of the spouses.

## **7.2 Grounds for Divorce**

### **A. Problem analysis**

**7.2.1** Customary law had no 'grounds for divorce' in the sense of conditions to be proved to the satisfaction of a court before a divorce order may be granted.<sup>26</sup> Nevertheless, acceptable *reasons* for divorce were important. Refund of lobolo was a probable issue and refund depended partly on the fault of the spouses.<sup>27</sup>

---

26 Grounds of divorce in this technical sense become necessary only 'where a divorce requires the formal sanction of judicial authorities': Mair (n7) 182. Thus s 48 of the KwaZulu/Natal Codes specified grounds for divorce and so, too, did ss 43 and 48 of the Transkei Marriage Act 21 of 1978.

27 If the parties could not agree on the amount to be returned, they had to appeal to a third party, and, in a public forum, they would have to have convincing arguments to show that one party acted in a blameworthy fashion.

7.2.2 In principle, then, either spouse's serious failure to perform marital duties would provide good cause for ending a marriage.<sup>28</sup> In reality, husbands enjoyed a privileged position. On the one hand, they needed no specific reason to divorce (although an arbitrary action would result in loss of lobolo),<sup>29</sup> and, on the other, if they sought a reason, they had a wider range available than wives.<sup>30</sup> For instance, because child-bearing was seen as a wife's primary duty, a woman who failed to produce children could be blamed for obstructing the purpose of marriage.<sup>31</sup>

7.2.3 By contrast, because a wife had to convince her guardian to support her case, she had to have an especially good reason to end the marriage. A complaint about the husband's extra-marital affairs, for example, would seldom be considered sufficient. (Sexual misconduct by women, however, was always deemed serious).<sup>32</sup> In essence, a wife's best arguments for leaving her husband were that he did not support her or had exceeded his powers of chastisement.

7.2.4 If the recommendation is accepted that marriage should be removed from the exclusive control of the spouses' families and that all divorces be judicially regulated, divorce may no longer be privately negotiated on any terms the parties think fit. It follows that the courts may grant divorces only on acceptable grounds.

## **B. Evaluation**

7.2.5 Divorce should now be available on a single ground: that a marriage has irretrievably broken down. While this ground is normally associated with Divorce Act,<sup>33</sup> it is closer in spirit to customary law, where termination of marriage has always been based on a frank

---

28 See Roberts 50, Campbell (1970) 3 *CILSA* 334-7 and Nhlapo *Marriage and Divorce in Swazi Law and Custom* 79ff.

29 *Kos v Lephaila* 1945 NAC (C&O) 4 and Mair (n7) 187-8.

30 See Molokomme in WLSA (n1) 20 for Botswana

31 And, because determination of family size is the prerogative of men, wives have no right to abortion. See Sinclair *The Law of Marriage* 106 and the sources she cites in fn 280.

32 Which is indicated by the rule that only a husband has an action for damages for adultery. If he pursued this action, however, he would be deemed to have condoned his wife's behaviour, with the result that he could no longer claim divorce: *Tetani v Mnukwa* 1 NAC 38 (1900).

33 Sections 3 and 4 of Act 70 of 1979.

acceptance of the fact that the parties can no longer maintain their relationship.

7.2.6 The concept of marriage breakdown is a broad principle entailing a generous measure of judicial discretion. The courts should be encouraged to use this discretion to accommodate the parties' cultural orientation. They can do this both in the substantive sense of using cultural standards to decide what would constitute unacceptable behaviour and in the procedural sense of integrating customary conciliation procedures into the divorce process.<sup>34</sup> If the spouses are free to approach a traditional leader to effect a reconciliation, they can preserve a typical feature of the customary procedures.

7.2.7 Discretion must none the less be exercised in accordance with the constitutional principle of equal treatment. This principle would imply that the courts guard against the traditional customary-law bias in favour of husbands.

---

34 This is the position in Tanzania. See Read (1972) 16 *JAL* 34.

## C. Recommendation

**7.2.8 Only one ground of divorce should be available: irretrievable breakdown of the marriage. In exercising their discretion under this principle, courts should take into account pre-divorce conciliation procedures available in customary law and appropriate cultural norms governing marital behaviour. They should not, however, favour husbands at the expense of wives.**

## 7.3 The Procedure

### A. Problem analysis

7.3.1 Two problems arise in this context. The first is a problem inherent in any system of law that permits private divorce: how to decide when a marriage has been terminated. The answer to this problem has (almost universally) been to reverse the events that created the marriage. Hence, a divorce in customary law would be signified by the wife leaving the husband and her guardian returning lobolo.<sup>35</sup>

7.3.2 On its own, however, a wife's act of desertion<sup>36</sup> (or the spouses' living apart)<sup>37</sup> is equivocal, for it does not necessarily imply an irretrievable breakdown of the marriage. To cure these ambiguities, the courts insisted on a clear manifestation of an intent to end the marriage.<sup>38</sup> Return of lobolo<sup>39</sup> or observance of a conventional divorce procedure, such as the husband

---

35 See Kuper *The Swazi* 19, Schapera *Handbook* 161-2 and Van Warmelo & Phophi 453, 519 and 531.

36 Wives customarily return to their families for short periods to give birth to children or to incite further payment of lobolo. Thus, neither desertion by the wife (*Ponya v Sitate* 1944 NAC (C&O) 13) nor a husband's eviction of his wife (*Ngcongolo v Parkies* 1953 NAC 103 (S)) amounts to divorce.

37 Unless for a very long time: *Speelman* 1944 NAC (N&T) 53 and *Mhlanga v Hleta & another* 1944 NAC (N&T) 40. *Didi v Maxwele* 4 NAC 198 (1921) held that this inference is not to be lightly drawn.

38 As signified by a prior invocation of the *phuthuma* custom, for example. See *Nkonzo v Jim* 1951 NAC 341 (S), *Zondela v Mpayi* 1952 NAC 92 (S) and *Gova v Gushu* 1953 NAC 261 (S).

39 *Nkabinde v Mlangeni & another* 1942 NAC (N&T) 89 and *Kosane v Molotya* 1945 NAC (N&T) 70. Conversely, where lobolo had already been refunded, *Novungwana v Zabo* 1957 NAC 114 (S) held that the marriage had been ipso facto dissolved.

escorting his wife back to her family and reporting the matter to a headman,<sup>40</sup> was accepted as a typical indication of this intent.

7.3.3 The second problem is how to ensure adequate protection of the weaker parties in a divorce action. According to the 'official' version of customary law, only the husband and the wife's guardian could terminate the marriage.<sup>41</sup> Following the logic of the system, because wives do not receive the lobolo necessary to create the union, they could not tender its return.<sup>42</sup>

## B. Evaluation

7.3.4 Once all divorces must be processed by the courts, the problem of fixing the termination of a marriage will fall away. The second problem remains. Because courts control the divorce procedure, they might have been expected to advance the cause of vulnerable parties when developing the 'official' version of customary law; but as it happened they did very little. Instead, by trying to remain true to African traditions, the courts gave unwarranted rights and powers to husbands and the guardians of wives.

7.3.5 The fate of a wife depended on whether her husband and guardian could agree on what to do about lobolo. On the one hand, a woman's guardian could end the marriage simply by tendering its return.<sup>43</sup> The wife's presence in court was only necessary when the custody of children was in issue; she would then be required to give evidence.<sup>44</sup> On the other hand, if the guardian wanted to avoid returning lobolo - which he might well have spent - he could refuse to

---

40 *Bobotyane v Jack* 1944 NAC (C&O) 9 at 11, *Mshweshwe* 1946 NAC (C&O) 9 and *Jack v Zenani* 1962 NAC 40 (S). Similarly, if a wife decided to leave her husband, *Mxonya v Moyeni* 1940 NAC (C&O) 87 held that she should report her intention to a headman.

41 As *Mnyandu v Dludla* 1978 AC 64 (NE) held, the wife's guardian was a full party to the action. He did not appear in court merely to cure his ward's procedural incapacity.

42 *Sweleni v Moni* 1944 NAC (C&O) 31, *Mokgatle* 1946 NAC (N&T) 82 and *Nhlabati v Lushaba* 1958 NAC 18 (NE).

43 Less any deductions to which he would be entitled. See *Mendziwe v Lubalule* 3 NAC 170 (1913) and *Mayile v Makawula* 1953 NAC 262 (S).

44 See *Sibiya v Mbata* 1942 NAC (N&T) 71 and *Nkabinde v Mlangeni & another* 1942 NAC (N&T) 89.

prosecute the divorce action on her behalf.<sup>45</sup>

7.3.6 Certain early decisions in the Transkeian courts allowed wives to bring divorce actions unassisted<sup>46</sup> and even to return lobolo on their own account.<sup>47</sup> After 1927, however, this progressive approach was reversed. Albeit reluctantly, the Native Appeal Court held that wives were not parties to divorce actions<sup>48</sup> and that they lacked the power to end their marriages.<sup>49</sup>

7.3.7 The courts nevertheless accepted two principles: that a wife could not be compelled to abide by her marriage and that her guardian could not end his ward's marriage without her consent.<sup>50</sup> If a guardian refused to assist in bringing an action, the court would appoint a curator ad litem.<sup>51</sup> Only in KwaZulu/Natal has any advance been made on this position. The Codes have specified that, along with her guardian,<sup>52</sup> the wife is a full party to a divorce action.<sup>53</sup>

7.3.8 Reform of customary law is clearly necessary. The common-law divorce regime, however, is not necessarily a model to which reform should aspire. In the first place, a noticeable tendency in western legal systems has been to delegalize the divorce process,<sup>54</sup> which is the very problem we are seeking to cure in customary law. In the second place, when matters do come to court, the accent on win-or-lose solutions and adversarial proceedings usually works to the

---

45 Although the courts have held that a wife's refusal to return to her husband was tantamount to dissolution of the marriage: *Manamela v Kekana* 1944 NAC (N&T) 35 and *Kabi v Punge* 1956 NAC 7 (S) at 12.

46 *Noklam v Qanda* 4 NAC 202 (1920) and *Qeya v Latyabuka* 4 NAC 203 (1920).

47 *Noenjini v Nteta* 2 NAC 106 (1911).

48 *Nqambi* 1939 NAC (C&O) 57 at 59 and *Phiri v Nkosi* 1941 NAC (N&T) 94-5 and 97-8. Simons *African Women* 129-35 gives a critical commentary of the latter case.

49 *Mpilo v Tshabalala* 1948 NAC 24 (C) and *Mpantsha v Ngolonkulu & another* 1952 NAC 40 (S).

50 *Marawu v Mzima* 3 NAC 171 (1915) and *Jubele v Sobijase* 5 NAC 56 (1924).

51 In which case the guardian had to be joined as co-defendant with the husband in the divorce action. Conversely, if he was prepared to assist her, *Mokgatle* 1946 NAC (N&T) 82 and *Nhlabati v Lushaba* 1958 NAC 18 (C) at 20 held that he and his ward had to be joined as co-plaintiffs.

52 Section 51.

53 Section 48(1).

54 See Weitzman *Divorce Revolution* 1-51 for a history of divorce law.

disadvantage of women and children and may frustrate harmonious post-divorce relations.<sup>55</sup>

7.3.9           Proposals have been made in other contexts to remedy these shortcomings by involving social welfare agencies,<sup>56</sup> providing legal aid,<sup>57</sup> instituting a family advocate to represent children<sup>58</sup> and setting up specialized family tribunals.<sup>59</sup> For various reasons most of these remedies have not been fully implemented in South Africa. When they are eventually realized, they should be extended to all divorces, whether the marriages involved are customary, civil or Christian.

7.3.10           A particular feature of reforms in the common law was the institution of mediation or conciliation proceedings prior to adjudication.<sup>60</sup> Although an innovation for common law, this practice has always been part of the customary divorce process. People traditionally prefer to settle their domestic disputes within the family and where possible to achieve a reconciliation.<sup>61</sup> Hence, the statutory conciliation procedures now available in South Africa may confidently be extended to customary divorces.<sup>62</sup>

---

55       Schäfer 1983 *AJ* 193 and Burman (1990) 107 *SALJ* 251.

56       Cf Law Commission *Report on the Law of Divorce* RP57 of 1978 paras 8.9.3 and 18.7.

57       Cf Burman 1983 *AJ* 174-5.

58       Under s 4 of the Mediation in Certain Divorce Matters Act 24 of 1987.

59       Under s 1 of the Magistrates' Courts Amendment Act 120 of 1993.

60       Section 4(3) Divorce Act 70 of 1979.

61       Section 50 of the KwaZulu/Natal Codes goes as far as obliging the recipient of lobolo to 'attempt to reconcile the partners'. If he fails, 'the wife may institute proceedings for a divorce in a magistrate's court'.

62       Mediation or conciliation is now a feature of divorce legislation in other African jurisdictions: s 9 of the Ghanaian Matrimonial Causes Act No 367 of 1971 and s 106(2) of the Tanzania Law of Marriage Act 5 of 1971. See the study by Rwezaura in Abel *Politics of Informal Justice* vol 2 65 and Rwezaura & Wanitzek (1988) 2 *Int J Law & Family* 20-1 of the Tanzanian procedure.

## C. Recommendation

**7.3.11 Either spouse should be competent to apply for divorce. If a spouse is unable to prosecute the action unaided, the court should appoint a curator ad litem. Progressive reforms made to the common-law divorce procedure, such as the appointment of family advocates, should be extended to customary marriages.**

## 7.4 Maintenance

### A. Problem analysis

7.4.1 In customary law, because the purpose of divorce was to end all connection between the parties, there was no system of maintenance. Wives were supposed to be absorbed into their guardians' households and children normally remained with their fathers. Through force of circumstances, however, most wives now find that they can no longer rely on the traditional family support networks. They must bring up children of the marriage unaided.

7.4.2 Despite the absence of any system of maintenance in customary law, a father generally had to pay a beast (*isondhlo* in Xhosa) to the person who had raised his child.<sup>63</sup> While this practice superficially resembled maintenance, it was not the same, because *isondhlo* was not a full reimbursement for past expenditure nor was it a contribution to future costs.<sup>64</sup> The courts, however, confused *isondhlo* with maintenance, sometimes inadvertently<sup>65</sup> and sometimes deliberately in order to update customary law to meet modern conditions.<sup>66</sup> These efforts in

---

63 When demanding custody of a child (whether legitimate or illegitimate). See Van Tromp 139-42, Duncan 8-9, Armstrong *Struggling over Scarce Resources* 34-5 and Schapera *Handbook* 166 and 172.

64 *Cele* 1947 NAC (N&T) 2 at 3. See too *Mbata v Zungu* 1949 NAC 72 (NE) and *Sibanda v Sitole* 1951 NAC 347 (NE). Significantly, any right to payment of *isondhlo* does not vest in the child. *Isondhlo* is also a concrete token of the transfer of parental rights to the donor: *Gatyelwa v Ntsebeza* 1940 NAC (C&O) 89.

65 *Mafanya v Maqizana* 3 NAC 158 (1914) and *Mtetwa v Nkala* 1937 NAC (N&T) 157.

66 *Hlengwa v Maphumulo* 1972 BAC 58 (NE). A similar development has occurred in Zimbabwe, where Stewart et al in WLSA (n1) 190 note that *chiredzwa* (a rearing fee) can no longer be distinguished from maintenance.

judicial law-making have been unhelpful, because it is now uncertain whether a person claiming custody of a child has to pay *isondhlo* or maintenance or both.<sup>67</sup>

7.4.3 At the same time, the courts amended customary law to the extent that they held a father liable to support his children. The relationship of customary law to the common law and statutory systems of maintenance was unfortunately far from clear. It could be argued that the statutory<sup>68</sup> and common-law rights to maintenance simply superseded customary law.<sup>69</sup> Shortly before they were abolished, for instance, the Black Appeal Courts were applying the common law to maintenance claims, although without examining the reasons for doing so.<sup>70</sup> A *spouse's* right to support from his or her partner after divorce, however, remained obscure.

7.4.4 The KwaZulu/Natal Codes simply cut through this legal tangle by empowering courts granting decrees of divorce to order at the least the maintenance of minor children as might be 'just and expedient'.<sup>71</sup>

## B. Evaluation

7.4.5 The time has obviously come to put the law of maintenance (for both spouses and children) on a sounder legal footing. Respondents who specifically dealt with this issue, namely,

---

67 See Whelpton 1993 TSAR 574. Elsewhere in southern Africa, Armstrong (n63) 55 says that the different laws on maintenance are blending, although in case of conflict between customary and statute (or common law), the latter tends to prevail.

68 Various provincial enactments passed about the turn of the century to protect deserted wives and children created substantive rights to maintenance. In 1943 these enactments were incorporated into s 10*bis* of the Black Administration Act 38 of 1927. This section was later repealed by the Maintenance Act, 'except in so far as it may impose any liability upon any person to maintain any other person'. Roman-Dutch law and the provincial enactments then provided substantive rights and s 4(1) of the Maintenance Act 23 of 1963 a statutory machinery for enforcing them against any person 'legally liable'. Although the Maintenance Act did not provide substantive rights, s 5(6) was amended by Act 2 of 1991 to provide that a man would be deemed to be the husband of any woman he had married by customary law.

69 Through the rule that all common and customary law must be read subject to applicable legislation or through application of the repugnancy proviso under s 1(1) of the Law of Evidence Amendment Act 45 of 1988.

70 See *Gcumisa* 1981 AC 1 (NE), *Lekwakwe v Diale* 1979 AC 299 (C), *Muru* 1980 AC 39 (S) and *Ngcobo v Nene* 1982 AC 342 (NE) at 348.

71 Section 53.

**Adv N Cassim**<sup>72</sup> and **R W Skosana**, supported this proposal. The **House of Traditional Leaders (Eastern Cape)** was opposed on the ground that all issues of maintenance, custody and access should be settled by the parties privately, and the **Gender Research Project (CALS)** questioned whether the courts should interfere with existing cultural support systems.

7.4.6 In 1985, the Law Commission<sup>73</sup> sought to clear up confusion in the law of maintenance by recommending that the common law should be applied, 'provided that any provision that has been made at customary law for the support of another [ie payment of *isondhlo*] should be taken into account in determining the extent of the duty to support'.<sup>74</sup> The Commission then recommended a statutory provision modelled closely on s 7 of the Divorce Act.<sup>75</sup> This section would have allowed courts to make orders of spousal maintenance<sup>76</sup> or to confirm the spouses' private agreements.

7.4.7 The present Law Commission endorses this proposal, although no action was taken on it at the time. It does so with full knowledge that the system of post-divorce maintenance is inefficient and difficult to enforce.<sup>77</sup> The system is inefficient in the sense that maintenance orders require an investigation of the circumstances of each party. The result is an increase in litigation, which is potentially a hindrance to the realization of rights.<sup>78</sup>

7.4.8 In addition, the degree of compliance with orders eventually obtained is notoriously low.<sup>79</sup> Husbands frequently default, and not necessarily because they are unwilling to pay: a husband may well remarry or contract an informal union, which puts him in a position

---

72 Who felt that, if the wife had to return to her family, the husband must pay maintenance for her provided they had lived together for more than five years.

73 *Marriages and Customary Unions of Black Persons* para 11.5.1.

74 And see clause 9(5) of the Bill appended to the Report.

75 70 of 1979.

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

77 See generally O'Donovan (1982) 45 *MLR* 424, Smart *The Ties that Bind* 166 and, for example, Van Houtte & De Vocht (1981-2) 16 *Law & Soc R* 321ff.

78 For women in particular. See Ncube in Armstrong *Women and Law in Southern Africa* 26.

79 See Burman & Berger (1988) 4 *SAJHR* 339-41 for a survey in Cape Town.

where he cannot afford to discharge maintenance obligations towards two partners. **Professor J C Bekker** pointed out that African men would simply not cooperate, and it must be admitted that giving a former wife a right to maintenance is a radical break with customary law.<sup>80</sup>

7.4.9 To improve compliance with support obligations under common law the Maintenance Act was amended<sup>81</sup> to make criminal prosecutions and garnishee orders available.<sup>82</sup> But these remedies are difficult to procure, and, of course, they are useless where men are unemployed.<sup>83</sup>

7.4.10 In their efforts to ensure provision for the weaker parties in divorce actions, many western countries have partially or wholly abandoned the maintenance system in favour of a more equitable distribution of the marital estate.<sup>84</sup> They could afford to do so, because this approach works best in affluent societies where the spouses have more property to share.<sup>85</sup> The change also made sense in that particular economic environment. Women were starting to attain a greater degree of financial security through better job opportunities and equal pay policies. In these circumstances, it was unnecessary to continue the husband's duty to maintain his wife.

7.4.11 While the economic situation in South Africa differs considerably from that in developed countries, the strategies employed there are not closed to us. Adopting a more imaginative approach to distribution of the spouses' estates on divorce, however, would not preclude the maintenance system. Whatever the difficulties of securing compliance, the Commission felt that maintenance orders should in principle be available to the spouses and children of customary marriages. Although the sums awarded may be very low, they will probably

---

80 Armstrong (n63) 47.

81 By Act 2 of 1991.

82 Section 11 of the Maintenance Act 23 of 1963.

83 Burman (n10) 215 and 221-2 and Burman & Berger (n79) 205. The overall problem of enforcement is compounded by procedural delays in the maintenance courts and bureaucratic inefficiency. See Burman & Barry *Divorce and Deprivation in South Africa* 19-21 and Burman & Berger (n79) 350-1.

84 See Sinclair (n31) 149-50.

85 See Gray *Reallocation of Property* 290.

be a relatively large proportion of a divorcee's income.<sup>86</sup>

### **C. Recommendation**

**7.4.12 In spite of numerous problems of enforcement, maintenance should in principle be available to the spouses and children of customary marriage, both *stante matrimonio* and on divorce.**

## **7.5 Custody and Guardianship of Children**

### **A. Problem analysis**

7.5.1 The custody and guardianship of children on divorce raises the problem of whose interests to promote: the families', the father's, the mother's or the child's?

7.5.2 According to customary law, once a husband had fulfilled his obligations under the lobolo agreement, he and his family had full rights to any children borne to the wife. (Mothers had no legal rights to their children.) Because marriage was a private matter, however, the families could agree to vary this rule,<sup>87</sup> and, because marriage was only gradually established as lobolo payments were made, parental rights tended to be uncertain.<sup>88</sup>

7.5.3 In the common law, on the other hand, the courts (as upper guardian of all minors) assumed an overriding protective jurisdiction over children.<sup>89</sup> When a child's parents separated and disputes about custody arose, the courts could intervene to safeguard the child's interests. In this way, the principle was developed that the child's welfare should be of paramount importance.

---

86 Burman (n10) 220.

87 This flexibility is apparent in Holleman 296-7, 306-7 and 314. See further Simons (n48) ch 21, Schapera *Handbook* 161 and Van Warmelo & Phophi Part 3 589ff. Private settlements, of course, leave the way open to exploitation of the weaker parties: Freeman *Rights and the Wrongs of Children* 198-9.

88 See Murray (1976) 35 *Afr Studies* 104-5.

89 Which complemented a shift in emphasis in the common law from the parents' rights to their children to the parents' responsibility to protect children. Alston *The Best Interests of the Child* 5.

7.5.4 While customary law favoured the interests of a child's family, this tendency should not be taken to imply that the child's interests were ignored. To the contrary, the welfare principle also existed in customary law, but in a form that conceived of those interests as being best safeguarded by preserving the child's ties to the resources of its patriline.<sup>90</sup>

7.5.5 The courts applied the welfare principle to customary marriages, although it was not altogether clear whether the child's welfare was made part of the 'official' version<sup>91</sup> or whether customary law was simply excluded in favour of common law on the ground of public policy.<sup>92</sup> In either event, it is now firmly established that to decide questions of custody the child's best interests prevail.<sup>93</sup>

7.5.6 By selecting custody as the area in which to implement the child's best interests, the courts imported a common-law distinction between rights of custody and guardianship. For no good reason, traditional customary rules about lobolo continued to decide issues of guardianship.<sup>94</sup>

7.5.7 The courts also worked on an assumption implicit in customary law that fathers, as natural guardians, had full parental rights during the subsistence of marriage,<sup>95</sup> and on divorce these rights persisted. This assumption meant that anyone alleging it would be in a child's best

---

90 See Nhlapo in Eekelaar & Sarcevic *Parenthood in Modern Society, legal and social issues for the twenty-first century* 47, Rwezaura in Alston op cit 90-1 and 100. See, too, Armstrong et al (1995) 3 *Int J of Children's Rights* 335-6, esp 349.

91 As in *Mkize* 1951 NAC 336 (NE) and *Msiza & another v Msiza* 1980 AC 185 (C) at 191.

92 As in *Mbuli v Mehloakulu* 1961 NAC 68 (S).

93 In common law custody refers to the day-to-day control of the child and guardianship administration of the child's property: Hahlo *The South African Law of Husband and Wife* 394-6. Under common law any benefits that might accrue to the parents are largely affective, but under customary law the economic benefits could be substantial, for the guardian is entitled to a daughter's lobolo. See *Nkabinde v Mlangeni & another* 1942 NAC (N&T) 89 at 91 and *Mokoena v Mofokeng* 1945 NAC (C&O) 89.

94 See, for example, *Radoyi v Ncetezo* 2 NAC 174 (1911) and *Matsupelele v Nombakuse* 1937 NAC (C&O) 163.

95 *Mokoena v Mofokeng* 1945 NAC (C&O) 89, *Kabe & another v Inganga* 1954 NAC 220 (C) and s 27(1) of the KwaZulu/Natal Codes. This approach was, of course, consonant with Roman-Dutch law, which assumed that the father was natural guardian of children born in wedlock and the mother natural guardian of illegitimate children.

interests to remain in its mother's custody had to prove that the father was not a fit and proper person.<sup>96</sup>

7.5.8 Conversely, a mother was generally allowed custody until the child was old enough to fend for itself.<sup>97</sup> Thus, although the courts did not fix a specific age, a child would normally stay with its mother until it was about seven. Then it would be transferred to the father.<sup>98</sup> This practice was not due to recognition of the mother's right to her child, however. Rather it was due to an assumption that mothers were best suited to look after young children.<sup>99</sup>

## B. Evaluation

7.5.9 Whatever principle is applied to decide custody and guardianship, economic considerations usually dictate who will actually bring up a child.<sup>100</sup> In Africa, the material prospects of children are nearly always better if the children remain with their fathers.<sup>101</sup> Even when the courts have awarded custody to the mother, she may be forced to send the child to its grandparents or to other relatives in a rural area.<sup>102</sup>

---

96 *Gumede* 1955 NAC 85 (NE) and *Mahlangu v Nhlapo* 1968 BAC 35 (C). In Zimbabwe, the courts regularly assumed it to be in the child's interests to allow the father custody, because he would determine the child's marriage: *Maboreke* in *Armstrong* (n78) 143.

97 *Mkize* 1951 NAC 336 (NE), *Muru* 1980 AC 39 (S) and *Motloung v Mokaka & another* 1980 AC 159 (C). Customary and common Law are similar on this point.

98 *Maruping* 1947 NAC (N&T) 129.

99 In the case of young children, therefore, if the father wanted custody, he bore the onus of proving that the mother was not a fit and proper person (*Maruping's case* supra) or that the conditions in which the mother lived were likely to cause the child physical or moral harm (*Mohapi v Masha* 1939 NAC (N&T) 154).

100 As *Armstrong* in *Alston* (n89) 151ff notes, a child's best interests in the context of Zimbabwe are reduced to ensuring that the child has basic education and food. Cf *Kamchedzera* (1991) 5 *Int J Law & Family* 243.

101 Because whoever has custody is normally obliged to educate the child. Since women are in a worse financial position than men, they can seldom offer their children the same benefits as the fathers. *Rwezaura* and *Banda* in *Alston* (n89) 108 and 196, respectively, note that, although women may be entitled to custody, it is pointless for them to claim it, if they cannot at the same time obtain maintenance.

102 See *Izzard* (1985) 11 *JSAS* 258 regarding Botswana and *Murray Families Divided* 110-12 regarding Lesotho.

7.5.10 None the less, existing case law, s 28(2) of the Constitution and the United Nations Convention on the Rights of the Child<sup>103</sup> provide weighty authority for extending the best interests principle to cover all aspects of custody, guardianship and access to children. This proposal was supported by all the respondents to have addressed the matter, namely, the **Women's Lobby** and the Law Commission's **Workshop (Western Region)**. **Mr R W Skosana** simply recommended applying the common law to custody and access.<sup>104</sup>

7.5.11 The child's best interests principle has no specific content. (Based on its wording in relative terms, its function is mainly to rank conflicting claims and rules.)<sup>105</sup> This indeterminacy gave the courts a fairly broad discretion to implement whatever views were current on proper child-rearing.<sup>106</sup> By the same token, it has the advantage of allowing them to take into account the parties' cultural orientation.<sup>107</sup>

7.5.12 A final issue associated with parental rights is gender equality. In the `official' version of customary law, although mothers were allowed custody, they had no rights equivalent to those of the father. Following the strict logic of this system, a woman could have no rights, because she was not a party to the marriage.<sup>108</sup> Hence, if lobolo had not been paid, the children went to the wife's guardian, not to the wife.

7.5.13 The KwaZulu/Natal Codes introduced a considerable improvement on this position, by allowing the wife to be awarded sole guardianship of her children on divorce.<sup>109</sup> In

---

103 Article 3(1).

104 The **Gender Research Project (CALs)** added that the access demanded by mothers when the spouses are living apart should also be decided on the child's on best interests. The question of violence against women should be relevant to questions of access.

105 Alston (n89) 15-16.

106 See Eekelaar (1986) 6 *Oxford J Legal Studies* 170 and King (1987) 17 *Family L* 186.

107 See Alston and Parker in Alston (n89) 19-20 and 39, respectively.

108 It was held in *Nkosi v Dhlamini* 1955 NAC 27 (C) that the mother had no locus standi in custody suits, since the action was brought by her guardian. All the courts required was the wife's presence during the custody action: *Mbenyane v Hlatshwayo* 1953 NAC 284 (NE), *Ngakane v Maalaphi* 1955 NAC 123 (C) and *Mpete & another v Boikanyo* 1962 NAC 3 (C).

109 Sections 27(5).

1985 the Law Commission<sup>110</sup> proposed formal recognition of a mother's parental right to her children.

7.5.14 Clearly, in view of the prohibition on gender discrimination in s 9 of the Constitution and in view of the Guardianship Act,<sup>111</sup> both spouses should now have equal rights and powers over minor children. Most respondents to the Issue Paper - the **Rural Women's Movement**, the **Women's Lobby**, the Law Commission's **Workshop (Southern Region)** and **Adv J Y de Koker** - endorsed this recommendation.<sup>112</sup>

### **C. Recommendation**

7.5.15 In accordance with s 28(3) of the Constitution and the United Nations Convention on the Rights of the Child, the child's best interests should govern all aspects of custody, guardianship and access to children. Because the best interests principle has no specific content, the courts may take into account relevant cultural expectations when deciding a child's future.

7.5.16 To ensure the principle of equal treatment, mothers should have fully recognized rights to their children.

## **CHAPTER 8**

### **NULLITY**

#### **A. Problem analysis**

---

110 Paragraph 11.6.1 of *Marriage and Customary Unions* and clause 9(6), as read with clause 14(1)(c) of the bill attached.

111 192 of 1993. From the wording of s 1(1) the statute seems clearly to be applicable to customary law.

112 J Heaton added that neither parent alone has sole power to nominate a guardian.

8.1.1 If individuals fail to comply with the requirements for creating a valid marriage, the common law deems their purported union a nullity.<sup>1</sup> This sanction is seemingly non-existent in customary law.<sup>2</sup>

8.1.2 If we are to insist on certain requirements being fulfilled in order to create a marriage, however, situations will inevitably arise where the validity of a union comes into question. Because this Report has recommended making consent the critical element of marriage, any vitiation of consent (by fraud, duress, mental instability, lack of age, etc) would entitle an interested party to ask for a declaration of nullity.

## **B. Evaluation**

8.1.3 The concept of nullity was adopted into the marriage laws of many African countries and it was included in the KwaZulu/Natal Codes.<sup>3</sup> We are not bound to follow suit, in the sense that we need make no specific provision for grounds of nullity, because the grounds are already implicit in the requirements for marriage. The courts will therefore have the power to declare a union invalid at the suit of a concerned party.

8.1.4 Writers elsewhere in Africa have more generally questioned the wisdom of introducing a nullity concept.<sup>4</sup> While divorce decrees operate prospectively (from the time that they are granted), nullity decrees declare that the union is terminated retroactively (because there never was a marriage). It follows that, if no marriage existed, a court may not order a property

---

1 Historically, the concept of nullity was due in part to the canon-law prohibition on divorce and in part to the imposition of essential requirements for marriage. See Roberts *Law and the Family in Africa* 241ff.

2 If the relevant requirements for marriage were not present (which is difficult to conceive, given the processual nature of customary unions) the marriage would probably be dissolved in the ordinary way.

3 Section 49 of the KwaZulu/Natal Codes provides that a declaration of nullity may be requested on various grounds, including insanity and impotence. Section 49 of the Transkei Marriage Act 21 of 1978 also provides that any party to a customary marriage may apply for a declaration of nullity on grounds that a party was insane at the time of marriage, the woman was already married by customary or civil rites or 'any other ground which shall, in accordance with the customary law which applied to the consummation of such customary marriage, be sufficient for a declaration of nullity'.

4 See Pauwels in Roberts (n1) 231 at 237.

settlement or maintenance.<sup>5</sup> This concern was echoed by **Advs M Masipa, F Kathree and B Spilg (Society of Advocates of SA, Wits Division)**, who said that, when the Commission created a category of potentially invalid customary marriages, it neglected to make provision for children and the spouses' property.<sup>6</sup>

8.1.5 This objection may be met by giving the courts power to effect an equitable settlement between partners to an invalid union, notably a power to order return of lobolo<sup>7</sup> and to make provision for matters of custody and guardianship.<sup>8</sup> The **House of Traditional Leaders (Eastern Cape)** endorsed this proposal, adding that all courts (including traditional courts) should be empowered to grant nullity decrees.

## C. Recommendation

**8.1.6 If marriage must comply with certain predetermined criteria, a concept of nullity is by implication introduced to customary law. While there is no need to specify grounds for nullity, courts adjudicating on the validity of marriage should be empowered to issue orders dealing with distribution of the partners' estates, custody and guardianship of children and return of lobolo.**

---

5 And formerly, of course, children would have been deemed illegitimate.

6 Cf s 6 of the Children's Status Act 82 of 1987.

7 Including any increase, which, together with orders for the refund of expenses incurred in connection with the union, is provided for under s 55 of the KwaZulu/Natal Codes.

8 These matters were governed by s 50 of the Transkei Marriage Act 21 of 1978.

## RECOGNITION OF CUSTOMARY MARRIAGES

### BILL

**To make provision for the recognition of customary marriages; to specify the requirements for a valid customary marriage; to regulate the registration of customary marriages; to regulate the proprietary consequences of customary marriages and the contractual capacity of spouses of such marriages and their competency to litigate; to regulate the dissolution of customary marriages; to provide for the making of regulations; to repeal certain provisions of certain laws; and to provide for matters connected therewith.**

**BE IT ENACTED** by the Parliament of the Republic of South Africa, as follows:—

#### Definitions

1. In this Act, unless the context otherwise indicates—
  - (i) "court" means a division of the High Court of South Africa or a family court established under the Magistrates' Courts Amendment Act, 1993 (Act No. 120 of 1993) or any other law;
  - (ii) "customary law" means the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples;
  - (iii) "customary marriage" means a marriage entered into in accordance with customary law;
  - (iv) "lobolo" means 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;

- (v) "Minister" means the Minister of Home Affairs;
- (vi) "registering officer" means any person appointed by the Minister as registering officer for purposes of this Act;
- (vii) "prescribed" means prescribed by regulations;
- (viii) "regulations" means regulations made under section 11;
- (ix) "this Act" includes regulations.

### **Recognition of customary marriages**

2. (1) A customary marriage existing at the commencement of this Act is for all purposes recognised as a marriage.

(2) A customary marriage entered into after the commencement of this Act, which complies with the requirements of this Act, is for all purposes recognised as a marriage.

(3) If a person is a spouse in more than one customary marriage, all such marriages entered into before the commencement of this Act are for all purposes recognised as marriages and all such customary marriages entered into after the commencement of this Act, which comply with the provisions of this Act, are for all purposes recognised as marriages.

### **Requirements for validity of customary marriages**

3. (1) For a customary marriage to be valid—

- (a) the prospective spouses —
  - (i) must both be above the age of 18 years; and
  - (ii) must both consent to be married to each other under customary law; and
- (b) the marriage must be entered into and celebrated in accordance with customary law.

(2) Save as provided in section 10(1), no spouse in a customary marriage shall be competent to enter into a marriage under the Marriage Act, 1961 (Act No. 25 of 1961) during the subsistence of such customary marriage.

(3) If either of the prospective spouses is a minor, both his or her parents, or if he or she has no parents then his or her legal guardian, must also consent to the marriage:

Provided that section 25 of the Marriage Act, 1961 (Act No. 25 of 1961), regulates the granting of consent by a commissioner of child welfare or a judge to a minor to enter into a customary marriage.

(4) (a) Notwithstanding subsection (1)(a)(i), the Minister or any officer in the public service authorised thereto by him or her, may grant written permission to a person under the age of 18 years to enter into a customary marriage if the Minister or the said officer considers such marriage desirable and in the interests of the parties in question: Provided that such permission shall not relieve the parties to the proposed marriage from the obligation to comply with all the other requirements prescribed by law.

(b) If a person under the age of 18 years has entered into a customary marriage without the written permission of the Minister or officer contemplated in paragraph (a), the Minister or the said officer may, if he or she considers the marriage to be desirable and in the interests of the parties in question, and if the marriage was in every other respect in accordance with the provisions of this Act, declare the marriage in writing to be a valid customary marriage.

(5) Subject to subsection (3) section 24A of the Marriage Act, 1961, applies to the customary marriage of a minor entered into without the consent of a parent, guardian, commissioner of child welfare or a judge, as the case may be.

(6) The rules of customary law shall determine the validity of a customary marriage between persons related to each other by blood or affinity.

### **Registration of customary marriages**

4. (1) The spouses of a customary marriage must within a reasonable time after conclusion of the marriage cause the marriage to be registered by a registering officer.

(2) (a) A registering officer must, if satisfied that the spouses concluded a valid customary marriage, register the marriage by noting the identity of the spouses, the date of the marriage, any *lobolo* agreed to and any other particulars prescribed by the regulations.

(b) The registering officer must issue to the spouses a certificate of registration, bearing the prescribed particulars.

(3) If a registering officer is not satisfied that a valid customary marriage was entered into by the spouses, he or she must refuse to register the marriage.

(4) (a) If for any reason a customary marriage entered into before or after the commencement of this Act was not registered, any person having an interest in the matter may require a registering officer to enquire into the existence of the marriage.

(b) If the officer is satisfied that a valid customary marriage exists, he or she must register it and issue a certificate of registration thereof.

(5) A court may upon application made to that court and upon investigation instituted by that court order -

(a) the registration of any customary marriage entered into before or after the commencement of this Act; and

(b) the cancellation or rectification of any registration of a customary marriage effected by a registering officer.

(6) A certificate of registration of a customary marriage issued under this section or any other law providing for the registration of customary marriages constitutes *prima facie* proof of the existence of the customary marriage and of the particulars contained in the certificate.

(7) Failure to register a customary marriage does not affect the validity of that marriage.

### **Determination of age of minor**

5. Whenever the age of a person who allegedly is a minor is uncertain or is in dispute, and such person's age is relevant for purposes of this Act, a registering officer, a commissioner of child welfare or a court may determine the said person's age and issue a certificate in regard thereto, which shall constitute proof of such person's age.

### **Equal status of spouses**

6. The wife in a customary marriage will in all respects have a status equal to that of her husband.

### **Proprietary consequences of customary marriages and contractual capacity of spouses**

7. (1) The proprietary consequences of a customary marriage entered into before the commencement of this Act must continue to be governed by customary law.

(2) A customary marriage entered into after the commencement of this Act in which a spouse is not a partner in any other existing customary marriage brings about community of property and of profit and loss between the spouses, unless these consequences are specifically excluded by the spouses in an antenuptial contract which regulates the matrimonial property system of their marriage.

(3) Chapter III and sections 18 , 19 and 20 of Chapter IV of the Matrimonial Property Act, 1984 (Act No 88 of 1984), apply in respect of any customary marriage which is in community of property as contemplated in subsection (2).

(4) A person who is a spouse in a customary marriage entered into before the commencement of this Act may apply to a court jointly with that person's spouse or spouses for leave to change the matrimonial property system which applies to their marriage and the court may, if satisfied that -

(a) there are sound reasons for the proposed change;

(b) sufficient written notice of the proposed change has been given to all creditors of the spouses for amounts exceeding R500 or such amount as may be determined by the Minister of Justice by notice in the *Gazette*.

(c) no other person will be prejudiced by the proposed change,

order that the matrimonial property system applicable to such marriage or marriages will no longer apply and authorise the parties to such marriage or marriages to enter into a written contract in terms of which the future matrimonial property system of their marriage or marriages would be regulated on the conditions determined by the court.

(5) (a) A spouse in an existing customary marriage who wishes to enter into a further customary marriage with another person must make an application to the court—

- (i) to suspend the matrimonial property system which is applicable to the existing marriage or marriages;
- (ii) to effect a division of the matrimonial property of the spouses in such marriage or marriages; and
- (iii) to approve a written contract which would regulate the future matrimonial property dispensation of all the spouses in all customary marriages in which the applicant is or

would be a partner.

(b) All persons having an interest in the matter, and in particular all the existing spouses of the applicant and the prospective spouse, must be joined in the proceedings.

(c) When deciding whether to grant an application under paragraph (a), the court must take into account all the circumstances of the family groups to be affected by its order to effect an equitable distribution of property.

(d) The court may grant the application subject to the conditions it may deem fit with regard to the division of the assets of the parties or the terms of the written contract or it may refuse the application if in its opinion prejudice would result to a wife of an existing marriage or to minor children which could not be satisfactorily rectified or avoided by means of the proposed property arrangement.

(6) (a) Whenever a court approves a contract for the regulation of the matrimonial property system of spouses as contemplated in subsection (4) or (5), the registrar or clerk of the court, as the case may be, must furnish each spouse with a certified copy of such contract and must cause a certified copy of such contract to be sent to the registrar of deeds of the area in which the court is situated.

(b) The said registrar of deeds must upon receipt of such certified copy register in the deeds registry the matrimonial property system of the spouses as reflected in the contract.

### **Dissolution of customary marriages**

8. (1) The dissolution of an existing customary marriage must be effected by a decree of divorce or nullity given by the court.

(2) A court may dissolve a customary marriage on the ground of the irretrievable breakdown of the marriage.

(3) Section 6 of the Divorce Act, 1979 (Act No. 70 of 1979), applies to the dissolution of a customary marriage.

(4) A court which hears an action to dissolve a customary marriage may—  
(a) appoint any suitably qualified person to assist a spouse who is unable to conduct the proceedings in person or to afford the services of a legal representative; and

(b) order the joinder in the proceedings of any person who has a sufficient interest in the matter.

(5) The Mediation in Certain Divorce Matters Act, 1987 (Act No. 24 of 1987), applies to the dissolution of a customary marriage.

(6) The procedure for the dissolution of a customary marriage must be regulated by the rules of the court hearing the matter.

- (7) A court granting a decree for the dissolution of a customary marriage—
- (a) has the powers contemplated in sections 7, 8, 9 and 10 of the Divorce Act, 1979, and section 24(1) of the Matrimonial Property Act, 1984;
  - (b) may make an order with regard to the custody or guardianship of any minor child of the marriage; and
  - (c) may, when making an order for the payment of maintenance, take into account any payment made in accordance with customary law.

### **Age of Majority**

9. Notwithstanding the rules of customary law, the age of majority of any person is determined in accordance with the Age of Majority Act, 1972 (Act No. 57 of 1972), or an order of a court made under that Act.

### **Change of marriage system**

10. (1) A man and a woman between whom a customary marriage subsists are competent to contract a marriage with each other under the Marriage Act, 1961, if neither of them is a partner in a subsisting customary marriage with any other person.

- (2) If a marriage is contracted as contemplated in subsection (1)—
- (a) the customary marriage between the spouses is deemed to have been dissolved when the spouses conclude the marriage under the Marriage Act, 1961; and
  - (b) the matrimonial property system of the marriage must be regulated by a matrimonial property contract entered into by the spouses and attested by a notary; failing such contract the marriage must be in community of property and the provisions of Chapter III

and sections 18, 19 and 20 of Chapter IV of the Matrimonial Property Act, 1984, must apply to the marriage.

(3) Despite subsection (1), no spouse of a marriage entered into under the Marriage Act, 1961, shall during the subsistence of such marriage be competent to enter into any other marriage.

### **Regulations**

- 11.** The Minister may make regulations—
- (a) prescribing the requirements which must be complied with and the information which must be furnished to a registering officer in respect of the registration of a customary marriage;
  - (b) prescribing the manner in which a registering officer must satisfy himself or herself as to the existence or the validity of a customary marriage;
  - (c) prescribing the issuing and the form of certificates of registration of customary marriages; and
  - (d) generally, with regard to any matter that the Minister considers necessary or expedient to provide for or prescribe so as to bring about the effective registration of customary marriages.

### **Repeal of laws**

**12.** (1) The laws mentioned in the Schedule are hereby repealed to the extent set out in the third column of the Schedule.

### **Short title and commencement**

**13.** This Act is called the Recognition of Customary Marriages Act, 1998, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

**SCHEDULE**

**REPEAL OF LAWS**

**(SECTION 12)**

<b>NO. AND YEAR OF LAW</b>	<b>SHORT TITLE</b>	<b>EXTENT OF REPEAL</b>
Act No. 38 of 1927	Black Administration Act, 1927	Sections 11(3)(b), 22(1) to (5) and 22 <i>bis</i>
Act No. 21 of 1978	Transkei Marriage Act, 1978 (Transkei)	Sections 3, 29, 37, 38 and 39
Act No. 16 of 1985	KwaZulu Act on the Code of Zulu Law, 1985	Sections 22 and 27(3)
Proclamation No. R151 of 1987	Natal Code of Zulu Law, 1987	Section 27(3)

**CUSTOMARY MARRIAGES BILL (As contained in Discussion Paper 74)**

**GENERAL EXPLANATORY NOTE:**

[            ]        **Words in bold type in square brackets indicate omissions from existing enactments.**

\_\_\_\_\_        **Words underlined with a solid line indicate insertions in existing enactments.**

**BILL**

**To make provision for the recognition of customary marriages entered into before or after the commencement of this Act as valid marriages for all purposes in law; to specify the requirements for contracting valid customary marriages; to regulate the registration of customary marriages; to regulate the legal consequences of customary marriages; to provide for dissolution of customary marriages; to specify the application of the Age of Majority Act, 1972; to amend the Black Administration Act, 1927, the Codes of Zulu Law in KwaZulu/Natal, 1985 and 1987, and the Transkei Marriage Act, 1978, in order to enhance the capacity of women; and to provide for matters connected therewith.**

**BE IT ENACTED** by the Parliament of the Republic of South Africa, as follows:-

**Definitions**

1. In this Act, unless the context otherwise indicates-

- (i) "court" means a family court established under the 1993 Magistrates' Courts Amendment Act 120 of 1993 and includes any competent division of the High

Court of South Africa;

- (ii) "guardian" means the person specified in the Guardianship Act 192 of 1993, and failing any such guardian the person who would be considered guardian in customary law;
- (iii) "registering officer" means any person or traditional authority appointed under section 2 of the Black Administration Act 38 of 1927 or the magistrate, or additional or assistant magistrate, of a district or area.

### **Recognition of customary marriages**

2. A customary marriage entered into before or after the commencement of this Act shall be recognized as a valid marriage for all purposes in law.

### **Requirements for contracting valid customary marriages**

- 3. (1) The requirements for a valid customary marriage are the following:
  - (a) the prospective male spouse must be over the age of 18 and the female spouse must be over the age of 15 and both parties must consent to the marriage;
  - (b) if the prospective male spouse is under the age of 18 or the prospective female spouse is under the age of 15, such person must comply with the provisions of section 26 of the Marriage Act 25 of 1961 to obtain consent to enter into the marriage;
  - (c) if a prospective male spouse is above the age of 18 or a prospective female spouse is above the age of 15, but is still a minor, that person must obtain the consent of his or her guardian to enter into the marriage;
- (2) The prohibition of marriage between persons on account of their relationship by blood or affinity will be decided by the systems of law to which they are usually subject.

### **ALTERNATIVE DRAFT OF CLAUSE 3**

- 3.** (1) The requirements for a valid customary marriage are the following:
- (a) the prospective spouses must be over the age of 18 and must consent to the marriage;
  - (b) if a prospective spouse is under the age of 18, such person must comply with the provisions of section 26 of the Marriage Act 25 of 1961 to obtain consent to enter into the marriage;
  - (c) if a prospective spouse is above the age of 18, but is still a minor, that person must obtain the consent of his or her guardian to enter into the marriage;
- (2) The prohibition of marriage between persons on account of their relationship by blood or affinity will be decided by the systems of law to which they are usually subject.

#### **Relationship of customary marriage and marriage by civil or Christian rites**

- 4.** (1) No person already married by civil or Christian rites may enter a valid customary marriage with the existing spouse or with another person.
- (2) Where spouses have simultaneously celebrated their marriage both by civil or Christian rites and by customary rites, the consequences of such marriage shall be determined according to the law which the spouses have expressly agreed should apply; failing such agreement, a court may take into account the following factors to determine which law prevails:
- (a) the spouses' cultural orientation as indicated by their mode of life and other relevant factors; and
  - (b) those rites and customs which predominate in the spouses' marriage.
- (3) A person who is already a spouse in a customary marriage (whether it is potentially or actually polygynous) may not subsequently marry an additional spouse by civil or Christian rites during the existence of the customary marriage.

### **Registration of customary marriages**

5. (1) Within a reasonable time of celebrating their customary marriage spouses must have their marriage registered under this section.

(2) A certificate of registration obtained under the Regulations contained in GN R1970 of 25 October 1968 constitutes prima facie proof of a customary marriage.

(3) If no certificate of registration exists or if the facts attested to by the certificate appear inaccurate, an interested person may request that a court, whether a family court or any other court, investigate the existence of a customary marriage and make an appropriate order.

(4) If the court finds that the marriage does exist, it must order confirmation of the certificate of registration or that the marriage be registered immediately.

(5) For purposes of this Act, all traditional authorities appointed under sections 2(7) and (8) of the Black Administration Act 38 of 1927 shall be competent to register customary marriages in accordance with the Regulations contained in GN R1970 of 25 October 1968.

### **The customary marriages of minors**

6. (1) A prospective minor spouse who has no guardian or whose guardian is unable to give consent or unreasonably withholds consent may none the less conclude a valid customary marriage by complying with section 25 of the Marriage Act 25 of 1961.

(2) If it is doubtful whether a person is a minor, a registering officer or any competent court or commissioner of child welfare may determine that person's age.

(3) The court or commissioner of child welfare which approves a minor's marriage under this section may order payment of a reasonable sum of bridewealth in accordance with the system of customary law applicable to the marriage.

(4) A court may declare a customary marriage invalid on the ground that either of the spouses was a minor. An application for such an order may be brought by -

(a) either of the spouses to the marriage before he or she attains majority or within a reasonable time thereafter; or

(b) the guardian of a minor spouse provided that he or she takes action before the spouse attains majority and within a reasonable time of becoming

aware of the existence of the marriage.

(5) A court granting an order under subsection (4) has the same powers that it would have under section 8(5) of this Act.

### **Legal consequences of customary marriages**

7. (1) A wife of a customary marriage will have the same legal powers as her husband, and for all purposes the spouses will have equal powers of decision-making.

(2) All property that a spouse brings into the marriage and all property that a spouse subsequently acquires will be deemed to be that spouse's personal property.

(3) A customary marriage will not create a community of property or of profit and loss.

(4) A spouse is liable to contribute to necessities for the joint household *pro rata* according to his or her financial means. Any spouse who contributed more in respect of necessities than he or she was liable to contribute under this section has a right of recourse against the other spouse.

(5) The spouses may enter into an antenuptial contract to vary subsections (2), (3) and (4) of this section. Such antenuptial contracts will be subject to the provisions of section 21 of the Matrimonial Property, 1984 (Act No. 88 of 1984).

(6) This section will apply to all customary marriages whether they were entered into before or after the commencement of this Act.

### **ALTERNATIVE DRAFT OF CLAUSE 7(6)**

7. (6) This section will apply to all customary marriages entered into after the commencement of this Act.

### **Dissolution of customary marriages**

- 8.** (1) A customary marriage will subsist until it is dissolved by the decree of a court as defined in this Act.
- (2) For purposes of this section a court may -
- (a) appoint a suitably qualified person to represent spouses who appear unable to conduct the proceedings themselves; and
  - (b) order that polygynous wives be joined as parties to the action.
- (3) The provisions of the Mediation in Certain Divorce Matters Act, 1987 (Act No. 24 of 1987) will apply to customary marriages.
- (4) A divorce may be obtained upon the irretrievable breakdown of a customary marriage, if a court is satisfied that the spouses have no reasonable prospect of the restoring a normal marriage relationship.
- (5) A court ordering dissolution of a customary marriage has -
- (a) the same powers under sections 6, 7, 8 and 9 of the Divorce Act 70 of 1979 as it would have had over a civil or Christian marriage;
  - (b) the power to order return of bridewealth according to the system of customary law applicable to the marriage, provided that the person who received bridewealth is joined in the action; and
  - (c) when ordering maintenance, the power to take into account any payment made under customary law.

### **Application and repeal of laws**

- 9.** The Age of Majority Act 57 of 1972 will apply to all persons subject to customary law.
- 10.** (1) Section 11 of the Black Administration Act 38 of 1927, is hereby amended by the deletion of paragraph (b) of subsection 3.
- (2) Section 22 of the Black Administration Act 38 of 1927, is hereby amended by the deletion of subsections (1) to (5) inclusive.

11. (1) Section 27 of the Codes of Zulu Law in KwaZulu/Natal, Act 16 of 1985, is hereby amended by the deletion of subsection (3).  
(2) Section 27 of Proclamation R151 of 1987, is hereby amended by the deletion of subsection (3).
  
12. Sections 37 and 39 of the Transkei Marriage Act 21 of 1978, are hereby repealed.

**Short title and commencement**

13. This Act shall be called the Customary Marriages Act, 19.., and shall come into operation on a date fixed by the President by proclamation in the *Gazette*.

## LIST OF RESPONDENTS TO THE DISCUSSION PAPER

### Judiciary

1. Judge Albie Sachs, Constitutional Court;

### Law Societies

2. AJ Louw, Administration Committee, General Council of the Bar;
3. Johannesburg Bar Council (Advocate M Masipa, F Kathree and B Splig - majority report. Advocate N Cassim - minority report);
4. Law Society of Zambia;

### Women's Organisations

5. Gender Research Project, Centre for Applied Legal Studies, University of the Witwatersrand;
6. The Women's Lobby;
7. Commission for Gender Equality;
8. Rural Women's Movement;

### Government Departments

9. Department of Home Affairs;
10. Department of Welfare and Population Development;
11. Department of Land Affairs;
12. Department of Justice;
13. Department of Justice, Regional Office, Northern Cape Province;
14. Registrar of Deeds;
15. Office on the Status of Women, Northern Province;
16. Department of Corporate Services, Gauteng Province;

### Non-governmental Organisations

17. National Coalition for Gay and Lesbian Equality;
18. Legal Resources Centre, Durban;

### Business

19. Council of South African Bank

### **Individuals**

20. Mr Seth Abrahams, Yeoville;
21. Professor AJ Kerr, Faculty of Law, Rhodes University;
22. Dr HM De Vetta, Psychologist, Boordfontein;
23. Mr SS Nkosi, Faculty of Law, Vista University;
24. MD Hlajoane, Employee Benefits, Old Mutual;
25. Ms W du Plessis and Ms C Rautenbach, University of Potchefstroom;
26. Pastor MJ Sebake, Jouberton;

### **Religious Organisations**

27. Hugh Wetmore, The Evangelical Alliance of South Africa ( TEASA);

### **Traditional Leaders**

28. House of Traditional Leaders, Northern Province;
29. House of Traditional Leaders, Eastern Cape;
30. House of Traditional Leaders, Free State.

## LIST OF WORKSHOPS AND MEETINGS ON THE DISCUSSION PAPER

### Information Workshops (Provincial)

1. North-West Province, Mmabatho (28-11-97)
2. Northern Cape, Upington (8-12-97)
3. KwaZulu-Natal, Durban (28-1-98)
4. Northern Province, Lebowakgomo (2-2- 98)
5. Free State, Bloemfontein (4-2-98)
6. Eastern Cape, Bisho (6-2-98)
7. Mpumalanga, Nelspruit (12-2-98)
8. Gauteng, Soweto (13-2-98)
9. Western Cape, Cape Town (16-2-98)

### Information Workshops (National)

10. Legal Profession, Pretoria (18-2-98)
11. Organised Labour, Pretoria (19-2-98)
12. Traditional Leaders, Pretoria (20-2-98)
13. Religious Leaders, Pretoria (23-2-98)

### Further Meetings and Briefings

14. Department of Land Affairs Workshop on Customary Marriages, Pretoria (27-11-97)
15. House of Traditional Leaders, Lebowakgomo, Northern Province (11-12-97)
16. Round Table Discussion, University of Fort Hare, Bisho (12-12-97)
17. Community Meeting, Laudium (17-4-98)
18. National Women's Resources Centre meeting, Durban (30-5-98)
19. Malibongwe Women's Organisation, Centurion (6-5-98)

## ANNEXURE E

### LIST OF RESPONDENTS TO THE ISSUE PAPER (INCLUDING WORKSHOPS)

#### Judiciary

1. Judge SS Ngcobo of the Cape of Good Hope Provincial Division of the High Court;

#### Magistracy

2. JJ Boshoff, Acting Magistrate Nelspruit;
3. Mr CPM Meyer, Additional Magistrate, Grahamstown;
4. Mr J Scherman, Magistrate, Pretoria North, District Wonderboom;
5. Mr Besana Skosana, Magistrate, Johannesburg (Convenor of 35 workshops in Gauteng involving 1 185 people)

#### Law Societies

6. Attorney MJH Anderson on behalf of the Law Society of the Cape of Good Hope;
7. Attorney TSB Jali, of the firm Cox Yeats, who was requested by the Natal Law Society to submit a comment;
8. Attorney AM Moleko, of the firm AM Moleko & Co, who was requested by the Natal Law Society to submit a comment;

#### Attorneys

9. Attorney Iris Khumalo, of the firm Pierre Odendaal & Kie;

#### Bar Societies

10. Advocate KK Mthiyane, SC, on the behalf of the Society of Advocates of Natal;

#### Individuals

11. Professor JC Bekker, formerly of Vista University;
12. Joshua Borias, Dobsonville;
13. Advocate Jeanne de Koker, Department of Private Law, Faculty of Law, Vista University (Bloemfontein Campus);
14. Professor CRM Dhlamini, Rector and Vice-Chancellor, University of Zululand;
15. Marsha Freeman, University of Minnesota, International Women's Rights Action Watch;
16. Professor J Heaton, Department of Private Law, University of South Africa;
17. Professor AJ Kerr, Professor Emeritus of Law and Honorary Research Fellow, Rhodes University;
18. Dr AMS Majeke, Department of African and Comparative Law, Faculty of Law, University of Fort Hare;

19. Mr Sam Moremi, Waterkloof Ridge;
20. NMS, Venda;
21. Advocate D Singh, Department of Private Law, University of Durban-Westville;
22. Robert William Skosana, Mamelodi West;
23. Tania van Rooyen, Walkerville;
24. Shelly Booysen, Umtentweni;
25. Thomas Mohope, Johannesburg;

### **Religious Organisations**

26. The Zion Christian Church;

### **Women's Organisations**

27. Ms Beth Goldblatt, Ms Likhapha Mbatha, & Lisa Fishbayn on behalf of the Gender Research Project, Centre for Applied Legal Studies (University of the Witwatersrand);
28. Ms Likhapha Mbatha & Ms Lisa Fishbayn on behalf of the Rural Women's Movement;
29. Zandile Malinga on behalf of Hlomelikusasa (Rural Women's Organisation);
30. Babette Kabak & Doris Ravenhill on behalf of the Women's Lobby;
31. Mrs M Koornhof, on behalf of Afrikaanse Christelike Vrouevereniging;
32. Umhlangano Womama Basemakhaya Omayelana Nesithembu;

### **Traditional leaders**

33. Khosi TJ Ramovha, Thohoyandou;

### **Human Rights Organisations**

34. Mrs Romola Rapiti on behalf of the National Human Rights Trust;

### **Provincial Governments**

35. Ms D Nkwanyana, Principal State Law Adviser, Gauteng Provincial Government;

### **Local authorities**

36. DR ND Tshibangu, Health Services Department, City Council of Pretoria;

### **Business Sector**

37. The Association of Trust Companies of South Africa;
38. Mr Stuart Grobler, General Manager, Council of South African Banks reporting on the views of "one of the major Banks";

**Workshops**

39. Workshop on Customary Law: Western Region
40. Workshop on Customary Law: Southern Region
41. Workshop on Customary Law: Central Region
42. Workshop on Customary Law: Eastern Cape