The recognition of the Customary Marriages Act of 1998 and its impact on family law in South Africa

IP Maithufi*
Professor: Department of Private Law
University of Pretoria

&

JC Bekker**
Emeritus Professor and part-time lecturer: Department of Private Law
University of Pretoria

Abstract

This article is an overview of the most important provisions of the Recognition of Customary Marriages Act of 1998 which came into operation on 15 November 2000. This Act is one of the most important pieces of legislation dealing with family law since the adoption of the present constitutional dispensation. Before the passing of this Act, the only form of marriage recognised by South African law was a civil marriage which was defined as a voluntary union of one man and one woman to the exclusion of all others while it lasts. Customary marriages were recognised for certain defined purposes by express legislative enactments.

Although legal pluralism in the field of marriage law still exists in South Africa, this Act represents a bold attempt on the part of the legislature to place customary marriages on the same footing as civil marriages. The Act lays down the requirements for the validity of customary marriages, the proprietary consequences of such marriages, the legal status and capacity of the spouses to these marriages as well as the manner and grounds for the dissolution of customary marriages.

The most important effect of this legislation is that it changes the whole field of family law in that customary marriages are accorded the same protection as civil marriages by the South African legal system.
INTRODUCTION
The Recognition of Customary Marriages Act 120 of 1998, which came into operation on 15 November 2000, changed the law of marriage in South Africa fundamentally. Before this enactment, customary marriages were for all intents and purposes not recognised by the South African legal system as they were polygamous or potentially polygamous. Consequently, these marriages were held to be contrary to public policy and the principles of natural justice.

Consequences flowing from these marriages could also not be enforced as this, too, was regarded as contrary to public policy and natural justice. The spouses to these marriages were regarded as unmarried, and any one of them could, during the subsistence of the marriage, contract a civil marriage with another person which had the effect of dissolving the previously subsisting marriage. As the spouses were considered unmarried, the husband was not regarded as the legal guardian of children born during the marriage who were, for the purposes of the common law, regarded as illegitimate. Where one of the spouses who was supporting the other was wrongfully killed, the dependant spouse could not succeed in an action for loss of support or maintenance, as it was held that the spouses did not owe each other a legally enforceable duty of support.

Not only customary marriages were treated in this manner. All marital relationships which were not regarded as 'the legally recognised voluntary union for life in common of one man and one woman, to the exclusion of all others while it lasts' suffered a similar fate. Consequently, any marital relationship which was potentially polygamous was not recognised as valid nor could its consequences be enforced. This was the position until the Interim Constitution 200 of 1993 came into operation on 27 April 1994.

The refusal to recognise polygamous marriages as valid implied that the resulting families were afforded no legal protection despite several international instruments specifically providing that a family should be afforded such legal protection. These international instruments do not specify the type of marriage required to bring about a family worthy of protection by the law. It is for member states to determine the type or form required by considering the circumstances prevailing in the relevant countries.

As a result of the dual system of law in South Africa, two categories of family law existed and still exist. The first is the so-called 'common law family law'

---

1. Nkambula v Linda 1951 1 SA 377 (A).
4. Samente v Minister of Police 1978 4 SA 632 (E).
5. Mokwena v Laub 1943 WLD 63.
which is based on a civil marriage. The common law applies to the conse-
quences and personal relationships between the spouses and the children of
common law marriages. The second is the customary law family which is based
on a customary marriage. Initially, customary law as modified by legislation
applied to this relationship. The Recognition of Customary Marriages Act of
1998 is intended to change the law applicable to these marriages. Previously,
where principles applicable to customary and civil marriages were in conflict,
the principles applicable to the latter prevailed, as customary law was
regarded as a system of secondary or subsidiary application. However, in
certain legislatively defined circumstances, customary marriages were
recognised as valid and their consequences could be enforced provided that
they were not against public policy or the principles of natural justice.¹⁹

It came as no surprise when immediately after the adoption of the Interim
Constitution of 1993,¹⁰ South African courts deviated from a long list of cases
refusing to grant recognition to polygamous or potentially polygamous
marriages, or to enforce the consequences of such marriages.¹¹ The adoption
of this dispensation set the stage for the enactment of a measure that could
ultimately give recognition to customary marriages, monogamous or polyga-
provides as follows with regard to the possible recognition of unrecognised
marital relationships:

15(3)(a)This section does not prevent legislation recognising —
   (i) marriages concluded under any tradition, or a system of religious, per-
       sonal or family law; or
   (ii) systems of personal and family law under any tradition, or adhered to by
       persons professing a particular religion.

(b) Recognition in terms of paragraph (a) must be consistent with this section
and the other provisions of the Constitution.

The legislature is thus empowered by the Constitution to adopt measures
aimed at recognising previously unrecognised marital relationships. This
recognition must be consistent with the Constitution, and in particular the Bill
of Rights.

Although the Constitution does not address marriage, the various rights and
freedoms enshrined in the Bill of Rights — such as freedom of association and
freedom to pursue a religion and culture of choice¹² — provide a foundation
for the envisaged family law in South Africa.¹³ The Constitution further
provides for equality before the law and equal protection by the law, as well
as protection against direct or indirect unfair discrimination based on race,

¹⁹See, inter alia, 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
27 of 1936 and s 24 of the Child Care Act 74 of 1983.

¹¹Ryland v Edros n 7 above.
¹²Sections 18, 15, 30 and 31.
gender, sex, age or social origin. The cumulative effect of these constitutional provisions is that legal protection must be accorded to families resulting from any type of marriage that complies with the Constitution.

THE RECOGNITION OF CUSTOMARY MARRIAGES ACT OF 1998

As the title of this Act indicates, its purpose is to recognise customary marriages for all purposes of the South African legal system. The Act grants recognition to customary marriages which are valid at customary law and existing at the time of its commencement, as well as those contracted after 15 November 2000 (date of commencement of the Act) and which comply with the requirements prescribed by the Act.

Only persons who are not married by civil rites are allowed to contract customary marriages. Similarly, a person who is married by custom is prohibited from contracting a civil marriage with another person during the subsistence of the customary marriage. Persons married by custom may, however, contract a civil marriage with each other.

The requirements for a valid customary marriage are that the prospective spouses must
- be above the age of 18 years;
- consent to be married to each other under customary law; and
- the marriage must be negotiated and entered into or celebrated in accordance with customary law.

Where the prospective spouse is under the age of majority (21 years), the consent of both his or her parents or legal guardian is required. Permission in writing may also be granted by the Minister of Home Affairs if he or she considers the marriage desirable and in the interests of the parties in the case where one of the parties is under the age of eighteen. This permission does not relieve the parties from the obligation to comply with the other requirements prescribed by the Act. The prohibition of a customary marriage between persons on account of their relationship by blood or affinity is determined by customary law.

The requirement that the marriage must be negotiated and entered into, or celebrated in accordance with customary law, implies that negotiations preceding the celebration of a marriage are regarded as requirements for its validity. Such negotiations take place between the families of the prospective spouses, and may even commence when the prospective spouses, or one of them, is still a minor. It would appear that these types of betrothal (or

---

14 Section 9(2) and (3).
15 Sections 2(2) and 3 of Act 120 of 1998.
16 Section 3(2) read with s 10(4) of the Act.
17 Section 3(1) (a) and (b).
18 Section 3(3)(a) read with s 9 of Act 120 of 1998.
19 Section 3(4)(a).
20 Section 3(4)(b).
21 Section 3(6).
engagement) are regarded as valid by the Act provided that the prospective spouses give their consent when they reach the required age. Furthermore, it would also appear that an engagement preceded by ukuthwala (mock abduction) is sanctioned provided that the parties consent and are of the required age.22

Preferred marriages are also sanctioned by the Act, as relationship by blood is determined by customary law. Among certain African communities in South Africa, notably the Sotho-Tswana, marriage between cross-cousins is encouraged. In its report on customary marriages, the South African Law Commission commented as follows with regard to this type of marriage:

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 parties. Thus spouses who choose to celebrate their union according to customary rites would be bound to observe customary rules prohibiting marriage between certain kinfolk.23

Is lobolo, bogadi, bobali, munywalo, tbaka or ikbazi a requirement?
The custom of lobolo is statutorily protected as courts are precluded from declaring it against public policy or the principles of natural justice.24 The Recognition of Customary Marriages Act of 1998 defines lobolo as:

[P]roperty in cash or in kind,... 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.25

Although the Act does not expressly provide that lobolo is a requirement for the validity of a customary marriage, one of the requirements set is that 'the marriage must be negotiated and entered into or celebrated in accordance with customary law'.26 This means that the family heads of the prospective spouses are at liberty to enter into negotiations relating to the lobolo required for the marriage. An agreement on amount and delivery of the required lobolo is usually reached during negotiations preceding the conclusion of a customary marriage.

With regard to this requirement, the South African Law Commission recommended that:

(a) If parties wish to give lobolo, they should be free to do so;
(b) lobolo should not be regarded as a requirement for the validity of a customary marriage and the payment or non-payment thereof should have no effect on the relationship of the spouses or their rights to any children born of the marriage;
(c) the lobolo agreement may be used in the determination of the existence of a customary marriage; and

22See South African Law Commission n 13 above at 45; Zulu v Mdletshe 1952 NAC 203 (NE), Mngomezulu v Lukele 1953 NAC 143 (NE).
23Id at 38.
24Section 11(1) of Act 38 of 1927 — presently s 1 of the Law of Evidence.
25Section 1 Amendment Act 45 of 1988.
26Section 3(1)(b) of Act 120 of 1998.
(d) the lobolo agreement may be enforced by judicial process and that courts granting divorces should have jurisdiction to order the return of lobolo subject to the deductions permitted in customary law.\textsuperscript{27}

It is thus envisaged that courts granted jurisdiction to dissolve customary marriages should also determine whether the lobolo furnished in anticipation of the marriage is returnable or not. These courts as indicated by the Act are, the High Court, a family court and a divorce court established in terms of section 10 of the Administration Act of 1929.\textsuperscript{28} The jurisdiction of divorce courts is presently limited to granting divorces. They would therefore not be able to adjudicate on the return or otherwise of the lobolo. The jurisdiction of these courts will therefore need to be extended to include such claims. The High Court has inherent jurisdiction to entertain such claims.

Although lobolo is not expressly recognised as a requirement, it is difficult to imagine a customary marriage without a lobolo agreement. Lobolo is so inextricably bound up with marriage amongst African societies, that its existence is regarded as proof that a customary marriage has been contracted. In the case of a civil marriage, the agreement is regarded as proof of a serious intention on the part of the prospective spouses to marry each other. In fact, it signifies an engagement in the case of a civil marriage amongst the African population in South Africa. Thus, although not essential for the validity of a marriage, it is a fact that proves that the relationship between the parties is or was a customary marriage and not a mere cohabitation. The return of lobolo allows less clearly defined deductions under customary law. However, an agreement to return lobolo, is a significant indication of an intention on the part of the spouses that their customary marriage has been dissolved, or a factor indicating irretrievable breakdown of the civil marriage.

Our courts were previously reluctant to enforce the lobolo agreement if it was entered into in anticipation of a customary marriage. The reason for this is stated by Bekker as follows:

This was because the customary marriage, not having being celebrated before a marriage officer, and being dissoluble extra-judicially, was not recognised by the law of the Colony as a marriage, but was merely an illicit relationship; any contract made in pursuance or in consideration of, or any right based on, such a relationship was therefore unenforceable. The parties to these customary marriage were treated in all respects as if they were single persons, as indeed they were in law.\textsuperscript{29}

When the lobolo agreement was entered into in consideration of a civil marriage, however, courts gave effect to it. In this case the agreement was regarded as a contract sui generis originating in custom.

THE CONSEQUENCES OF CUSTOMARY MARRIAGES

Proprietary consequences

\textit{The position before 15 November 2000}

\textsuperscript{27}Note 13 above.
\textsuperscript{28}Section 1 of Act 120 of 1998.
\textsuperscript{29}Seymour's customary law in Southern Africa (1989) 2.
Before the coming into operation of the Recognition of Customary Marriages Act of 1998, a customary marriage was deemed to have created a 'house'. A 'house' is defined in the Black Administration Act of 1927 as:

... the family and property, rights and status, which commence with, attach to, and arise out of the customary marriage of each Black woman.\(^{30}\)

Therefore, a married woman and her children, together with property allocated or accruing to her in terms of custom, constituted a 'house'. Her husband had considerable freedom in the administration and use of this property. In his use of 'house' property, he was bound to consult with his wife and could not use the property to the detriment of the 'house' to which it belonged. Where 'house' property of a particular 'house' had to be used for the benefit of another 'house', the property had to be restored as one 'house' was not supposed to be enriched at the expense of another.\(^{31}\)

The position after 15 November 2000

The Act draws a distinction between customary marriages contracted before and after 15 November 2000. Proprietary consequences of customary marriages contracted before the coming into operation of the Act are still governed by customary law\(^{32}\) and are still deemed to have created 'houses' as described above.

Proprietary consequences of customary marriages contracted after the coming into operation of the Act are governed by section 7(2), (3) and (5) of the Act. With regard to these marriages, a distinction is made between monogamous and polygamous marriages.

Monogamous marriages

A monogamous customary marriage is regarded as being in community of property and of profit and loss between the spouses. These consequences may be specifically excluded by the spouses in an antenuptial contract which regulates the matrimonial property system governing their marriage. The consequences of monogamous customary marriages are thus the same as those of civil marriages concluded without an antenuptial contract.

The Matrimonial Property Act of 1984\(^{33}\) applies to monogamous customary marriages. The Act provides that chapter III and sections 18, 19, 20 and 24 of the Matrimonial Property Act of 1984,\(^{34}\) apply to any customary marriage

\(^{30}\)Section 35 of Act 38 of 1927.


\(^{32}\)Section 7(1).

\(^{33}\)Act 88 of 1984.

\(^{34}\)Section 18 provides that any amount recovered as damages by a spouse of a marriage in community of property by reason of a delict committed against him or her, does not fall into the joint estate but becomes his or her separate property, and that such spouse may recover from his or her spouse damages, other than damages for patrimonial loss, in respect of bodily injuries suffered by him or her and attributable either wholly or in part to the fault of his or her spouse. Section 19 deals with liability for delicts committed by a spouse of a marriage in community of property. Whenever such a spouse is liable for the payment of damages, including damages for non-patrimonial loss by reason of a delict committed by him or her, or
Recognition of the Customary Marriages Act of 1998

which is in community of property, ie a monogamous marriage.\textsuperscript{35}

Section 21 of the Matrimonial Property Act of 1984\textsuperscript{36} also applies to a customary marriage entered into after the commencement of the Act in which the husband does not have more than one spouse.\textsuperscript{37}

The Act further makes provision for spouses of customary marriages contracted before 15 November 2000 to change the matrimonial property regime of their marriage. Spouses to these marriages may jointly apply to court for leave to change their matrimonial property system and the change may be ordered if the court is satisfied that:

- there are sound reasons for the proposed change;
- 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 \textit{Gazette}; and
- no other person will be prejudiced by the change.\textsuperscript{38}

The court granting the order will then authorise the parties to the marriage to enter into a written agreement in terms of which the future matrimonial property system of their marriage or marriages will be regulated on conditions determined by the court.

\textbf{Polygamous marriages}

These marriages are regarded as being out of community of property and of profit and loss. The spouses may, however, make use of the provisions of section 7(4) to change the matrimonial property system applicable to their marriage. The court may thus on application by the spouses order the change of the matrimonial property system and authorise the spouses to enter into a written contract that will regulate their future matrimonial property system.

When a contribution is recoverable from a spouse under the Apportionment of Damages Act of 1956 (Act 34 of 1956), such damages or contribution and any costs awarded are recoverable from the separate property, if any, of that spouse and only in so far as he or she has no separate property, from the joint estate. An adjustment is to be made where such contribution, damages or costs have been recovered from the joint estate in favour of the other spouse or his or her estate. Section 20 provides for the division of the joint estate on application by a spouse if the court is satisfied that the interest of that spouse in the joint estate is being or will probably be seriously prejudiced by the conduct or proposed conduct of the other spouse and that other persons will not be prejudiced thereby. The court may order that the existing community of property be replaced by another matrimonial property system. Section 24 provides for the distribution of property upon dissolution of a marriage for want of consent of a parent or guardian. In such a case the court is empowered to make such order as it may deem just with regard to the division of the matrimonial property of the spouses. Chapter III of the Act deals with the equal powers of spouses married in community of property, the power of the spouse to perform juristic acts with regard to the joint estate with the written or oral consent of the other spouse, the withholding and suspension of powers of a spouse and litigation by or against spouses.

\textsuperscript{35}Section 7(3) of the Act.

\textsuperscript{36}Section 21 provides for change of the matrimonial property system. Spouses, whether married before or after 15 November 2000, may jointly apply to a court for leave to change their matrimonial property system.

\textsuperscript{37}Section 7(5) of Act 120 of 1998.

\textsuperscript{38}Section 7(4) (i)-(iii).
the parties having a sufficient interest in the matter and, in particular, the applicant's existing spouse or spouses, have to be joined in the proceedings. 39

LEGALISATION OF POLYGAMY

Polygamy is allowed in respect of customary marriages only. A husband who is a spouse to a civil marriage is not allowed to marry another woman by customary rites during the subsistence of this marriage. 40 A husband who is a spouse to a monogamous customary marriage may, however, contract another customary marriage with another woman or other women. Such husband must apply to court to approve a proposed contract which will regulate the future matrimonial property system of his marriages. 41 The applicant must join all persons having a sufficient interest, including his existing spouse or spouses and his prospective spouse, in these proceedings. In considering such an application, the court must, in the case of a marriage in community of property or which is subject to the accrual system, terminate the matrimonial property system applicable to the marriage and effect a division of the matrimonial property. The court must also ensure an equitable distribution of property having account to all the relevant circumstances of the family groups which would be affected if the application is granted. 42

The court may allow further amendments to the terms of the proposed written contract, grant the order subject to any condition it deems fit or refuse the application if in its opinion the interests of any of the parties would not be sufficiently safeguarded by means of the proposed contract. 43

CHANGE OF MARRIAGE SYSTEM

A monogamous customary marriage may be converted into a civil marriage in terms of the Marriage Act. 44 This is possible in respect of a man and a woman between whom a customary marriage subsists. 45 When such marriage is converted, it becomes a marriage in community of property and of profit and loss unless these consequences are excluded by antenuptial contract. 46 A husband to a civil marriage is prohibited from contracting another marriage, whether civil or customary, with another woman. 47 Spouses to a civil marriage may also not convert their marriage into a customary marriage unless their civil marriage is dissolved.

39Section 7(4) of Act 120 of 1998.
40Section 10(4) of Act 120 of 1998.
41Section 7(6) of Act 120 of 1998.
42Section 7(7)(a).
43Section 7(7)(b).
45Section 10(1) of Act 120 of 1998.
46Section 10(2) and (3).
47Section 10(4).
STATUS AND CAPACITY OF SPOUSES AND CHILDREN
In terms of the Act, a wife in a customary marriage has full status and capacity subject to the matrimonial property system governing her marriage. She thus has capacity to acquire and dispose of assets, as well as the capacity to contract and to litigate in addition to any rights and powers that she may have at customary law.48 Her age of majority, and that of her children, are determined by the Age of Majority Act of 1972.49

DISSOLUTION OF CUSTOMARY MARRIAGES
Before the coming into operation of the Recognition of Customary Marriages Act of 1998 customary marriages could be dissolved extra-judicially. Any act on the part of a spouse which had the effect of an unequivocal repudiation of the marital relationship, accompanied by the restoration of lobolo or negotiations involving its possible return, was regarded as a good cause for the dissolution of a customary marriage.50

The Recognition of Customary Marriages Act of 1998 now provides that irretrievable breakdown is the only ground for divorce. Furthermore, dissolution may be effected only by a court by a decree of divorce.51 A decree of divorce may only be granted if the court is satisfied that the marriage relationship between the parties has reached such a state of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship.52

In terms of customary law, codified and uncodified, customary marriages could be dissolved by reason of certain acts which could be interpreted as indicating unequivocal repudiation. These acts included, *inter alia*, adultery, desertion, gross cruelty or ill-treatment and accusations of witchcraft. Adultery by the husband was not a ground for dissolution unless he persisted in an adulterous relationship to the extent that he discarded his wife.

Adultery by the wife was regarded as a good cause for the dissolution of a customary marriage if her conduct amounted to a repudiation by her of the marriage, or offended accepted norms of sexual morality. Pregnancy before marriage by another man which was not disclosed to the husband before consummation of the marriage, was also regarded as good cause if the husband reacted on it upon discovery.53 Desertion by the wife, coupled with failed attempts by the husband to *phuthuma* (fetch) her, was also regarded as a ground for the dissolution of a customary marriage indicating an intention on the wife's part unequivocally to repudiate the marriage.54 When the wife was grossly ill-treated by her husband, she had the right to leave him and to

---

48Section 6 of Act 120 of 1998.
49Section 9 of Act 120 of 1998.
50See JC Bekker *Seymour's customary law in Southern Africa* at 173.
51Section 8(1) of Act 120 of 1998.
52Section 8(2).
53Bekker n 50 above at 177.
54Olivier n 31 at 71.
refuse to return. This was also regarded as unequivocal repudiation. Accusations of witchcraft sufficed as unequivocal repudiation of a customary marriage. In African communities, an accusation of witchcraft is regarded as the most serious offence entitling the innocent party to dissolve the marriage.

The Natal and KwaZulu Codes of Zulu Law also provide for grounds for the dissolution of customary marriages. Here, even before the implementation of the Recognition of Customary Marriages Act of 1998, the dissolution of a customary marriage could only be affected by a court order. 55

These provisions have not been repealed by the Recognition of Customary Marriages Act of 1998. It is not clear why this has not been done, unless it was assumed that the provisions concerned have been repealed by implication. In terms of item 24(3) of Schedule 6 of the 1996 Constitution, all laws remain in force until repealed or declared unconstitutional.

It cannot without more ado be assumed that the provisions of the Act supersede those of the Code. The Code contained in Proc R151 of 1987 for the former province of Natal, that is excluding the former KwaZulu homeland, was enacted by the State President by virtue of the powers vested in under section 24 of the Black Administration Act. In R v Alexander 56 it was held that as Parliament had delegated its powers of amendment to the Governor-General (now State President), the validity of a proclamation made under this section could not be attacked on the ground that it was ultra vires.

In Bhengu v Bhengu, 57 the court discussed the effect of conflicting provisions in the Black Administration Act and the then Natal Code. The question whether in the case of conflict the Code or the Act should prevail, is indeed a matter of some difficulty. Broome in the Bhengu case summarised the position as follows:

But before the provisions of Section 24(1) of Act 38 of 1927 which, in effect, reenact the Code and place it on the same footing as the other provisions of the Act, I should have been inclined to regard the matter as one of implied repeal seeing that (the Act) is quite general in character and intended to apply to all Natives. But the fact that the Code in its present form is subsequent to the Act creates another difficulty. 58

One may infer from Broome's remarks that if a subsequent Act of parliament is in conflict with the Code, the Act should prevail. The conclusion is that the two legislative bodies have concurrent legislative powers. In the result, the essentials of a customary marriage as contained in the Natal Code are still applicable, except in so far as they are incompatible with the provisions of the Recognition of Customary Marriages Act of 1998. It is submitted that in regard to dissolution of customary marriages, the Code is incompatible with the Act. All dissolutions would therefore be governed by the Act.

561940 NPD 375.
571949 4 SA 22 (N) 25.
58Id at 26.
The reasoning as to the validity of the KwaZulu Act on the Code of Zulu Law is different, but the outcome is essentially the same. The KwaZulu Act remains in force by virtue of clause 2 of Schedule 6 of the Republic of South Africa Constitution Act in terms of which all law that was in force when the new Constitution took effect, continues in force, subject to any amendment or repeal. It is submitted that the amendment may be by implication. In so far as the Code as enacted by the KwaZulu legislature contains provisions that are in conflict with the Recognition of Customary Marriages Act, the latter Act prevails.

The Recognition of Customary Marriages Act of 1998 does not provide that traditional grounds for dissolution known in both codified and uncodified customary law are regarded as factors indicating irretrievable breakdown of a customary marriage. Be that as it may, it is submitted that courts will be prepared to take them into consideration in the determination of irretrievable breakdown of the marriage.

**Effect of divorce on proprietary consequences and maintenance of spouses**

The court may, in granting a decree of divorce in respect of a customary marriage, and in the absence of a written agreement between the parties, make an order with regard to the division of the assets of the parties or the payment of maintenance by the one party to the other.59

In the case of a customary marriage out of community of property, the court may, in the absence of an agreement between the parties and on application by one of them, order that such assets, or such part of the assets of the other party as it may deem just be transferred to the other.60 This order may be made if the court is satisfied that it is just and equitable by reason of the fact that the party seeking it contributed directly or indirectly to the increase of the estate of the other party.61

The Recognition of Customary Marriages Act of 1998 further provides that in the determination of the patrimonial benefits to which the parties to any divorce action may be entitled, the pension interest of a party is deemed to be part of his or her assets.62 Thus, where a husband who is married to more than one wife divorces more than one of them, he may have more than one ex-wife who receives a benefit. This may lead to a situation where a husband may himself receive no pension benefit as the pension will only be sufficient to be divided between his ex-wives.63

The court may also make an order for the forfeiture of patrimonial benefits. This may be made if, having regard to the duration of the marriage, the

---

59 Section 7(1) and (2) of the Divorce Act 70 of 1979 read with s 8(4) of Act 120 of 1998.
60 Section 7(3) of Act 70 of 1979 read with s 8(4) of Act 120 of 1998.
61 Section 7(4) of Act 70 of 1979 read with s 8(4) of Act 120 of 1998.
62 Section 8(4) of Act 120 of 1998 read with s 7(7) of Act 70 of 1979.
63 See ss 7(7) and (8) of Act 120 of 1998.
circumstances which gave rise to the breakdown of the marriage, and any substantial misconduct on the part of either of the parties, the court is satisfied that if the order is not made, the one party will be unduly benefited in relation to the other.64

Maintenance, custody or guardianship of children
The court may make an order with regard to the custody or guardianship of any minor child of the marriage in addition to any power that it has with regard to the safeguarding of the interests of dependant and minor children as provided for by the Divorce Act of 1979.65 In the same manner, an order with regard to the maintenance of a minor or dependant child may be made. If in its opinion, it may be in the best interests of a child to do so, the court may grant to either parent the sole guardianship or the sole custody of a minor child and may order that upon the death of the parent, a person or the surviving parent will acquire the guardianship either with or to the exclusion of the surviving parent.66

A provision or arrangement made in accordance with customary law may be taken into account by the court in the determination of maintenance for a child of a customary marriage.67

JOINING PERSONS WITH SUFFICIENT INTERESTS IN THE DIVORCE PROCEEDINGS
A customary marriage not only brings about a relationship between the spouses, but also a relationship between the respective families of the spouses. That is why traditionally a customary marriage was not dissolved by the death of any of the spouses. On the death of the husband, the wife remained a wife of her late husband's family and was 'expected to continue to give effect to one of the main objects of matrimony, namely, the procreation of children... [S]he will be induced to accept as a consort one of her husband's male relatives. She cannot be compelled'.68 On the death of a wife too, she may be replaced by another woman acceptable to both family groups.69

Customary marriages are preceded by negotiations between the families of the prospective spouses. These negotiations are about the determination of the lobolo to be provided, the status of children brought into the marriage by the prospective wife, the payment of damages as a result of seduction or pregnancy, and other matters connected to the conclusion of a marriage at customary law.70

64Section 7(4) of Act 120 of 1998 read with s 9 of Act 70 of 1979.
65Section 7(4) of Act 120 of 1998 read with s 6 of Act 70 of 1979.
66Section 6 of Act 70 of 1979 read with s 8(3) of Act 120 of 1998.
67Section 8(4) of Act 120 of 1998.
68Bekker n 50 above at 286.
69Id at 281.
70See Mabena v Letsoalo 1998 2 SA 1067 (T); Thibela v Minister van Wet en Orde 1995 2 SA 147 (T); s 3(1)(b) of Act 120 of 1998.
Thus, persons involved in these negotiations, it is submitted, are to be regarded as having a sufficient interest in the divorce proceedings, and should thus be joined as parties to these proceedings in appropriate circumstances. In particular, the person who received the lobolo or his representative should be joined in divorce proceedings so that if an order for the return of lobolo is made, he will be bound by the order. In the case of a polygamous marriage, the other spouses who may not be parties to the divorce action, may also have a sufficient interest in the proceedings. Further, grandparents may, for instance, have an interest in the custody of children.

CONCLUSION

Laws similar in content, context and effect to the Recognition of Customary Marriages Act, aimed at the recognition of polygamous or potentially polygamous marriages are not new to the African continent. On independence, many African states were faced with a plurality of conflicting legal systems in the field of family law. Faced with this predicament, some decided to abolish one system of law and to impose the received law as a law of general application. Other countries, like Tanzania, were very cautious in their approach, and enacted a measure that was aimed at recognising, on an equal basis, all types of existing marital relationships. Thus the requirements, consequences, registration and dissolution of all recognised marriages are contained in a single legislative enactment. South Africa decided to maintain the dual system of law in this respect by recognising customary marriages as valid in the same manner as civil marriages.

The dawn of democracy in South Africa obliged the legislature to adopt measures aimed at outlawing discrimination based on race, gender, sex and culture. The protection of fundamental human rights as embodied in the Bill of Rights is of paramount importance as these right were previously not afforded protection. To achieve this in the field of family law, the Recognition of Customary Marriages Act of 1998 was enacted. As in the case of other African countries faced with similar problems, it took some time before the Act was adopted.

Reform in the field of family law is a difficult, but not an impossible, process. Hiemstra in his opening address at one of the conferences held to discuss law reform in the field of family law, remarked:

In modern Africa, there is a particularly strong need for law reform. Pre-colonial heritage, colonial rule and politics of independence have left the new African states with a complicated and disorganised mass of legal norms, indeed with a plurality of legal systems and concomitant choice of law dilemmas. Moreover, much of the imported general or common law on the one hand, and the

---

71 See s 7(4)(b) of Act 120 of 1998.
72 See Hlophe v Mabalela 1998 1 SA 449.
74 Read n 73 above; Bennet & Peart 'The dualism of marriage laws in Africa' 1983 Acta Juridica 145.
indigenous African law, on the other, has become outdated in the light of modern social demands.  

The above is an outline of the contents of the Act. We have deliberately refrained from commenting on specific provisions so as to present the Act as a whole. In conclusion we must say that we have serious reservations about the legal technical detail and the wisdom of some of the provisions. A complete critique is not possible within the confines of this article. It is sufficient to mention some of the most blatant incongruities.

A 'customary marriage' is defined as a marriage concluded in accordance with customary law.

'Customary law' is defined in section 1(ii) of the Act as the 'customs and usages traditionally observed among the indigenous African peoples of South Africa.' Heretofore customary law applied on a personal basis in respects of blacks as defined in various laws. It is not clear whether the legislature now wants to cast its net wider to include the Namas, Bushmen and Griquas. They do observe traditional customs and usages and identify themselves as indigenous or tribal. Especially if lobolo is no longer a criterium for the validity of a customary marriage, they may raise a strong argument that their marital unions are customary marriages.

In international conventions, such as the Indigenous and Tribal Peoples Convention of 1989, the term 'indigenous peoples' refers to groups (mainly minorities) who seek to protect their rights. South African blacks do not fall into this category. Namas, Bushmen and Griquas would probably qualify for minority status as indigenous people.

'lobolo' is defined in section 1(iv), but is not even mentioned as a requirement for the validity of a customary marriage. It is in fact a feature that characterises a customary marriage. We have argued that lobolo may be read into the requirement that in terms of section 3(1)(b) the marriage must be negotiated and entered into or celebrated in accordance with customary law. The argument is sound, but it will have to be proved in court that lobolo is part and parcel of the negotiation process. Fortunately, on the other hand, lobolo has virtually been enshrined by section 1 of the Law of Evidence Amendment Act 45 of 1988, in terms of which it may not be declared contrary to public policy and natural justice.

The fact that all customary marriages, including those in existence when the Act came into operation, must be registered will probably be paper law for a long time to come. Admittedly, the minister may extend the period within which to register, but registration is mainly not part of the process.

---

75 'Opening address' In Sanders Southern Africa in need of law reform (1981) 1, 2.
76 In regard to the latter see Oomen 'Traditional woman-to-woman marriages and the recognition of Customary Marriages Act' 2000 THRHR 274–282.
77 See, inter alia, s 35 of the Black Administration Act 38 of 1927.
78 Section 3(a).
Registration has, by the way, been possible since 1968\(^7\) but nobody, we repeat nobody, availed him or herself of the opportunity. We are not aware of any programme to bring the present necessity for registration to the notice of the public.

The compulsory forensic dissolution of customary marriages is equally dubious. The point is that all customary marriages now remain in force until dissolved by a court of law. It must be borne in mind that on the one hand the conclusion of a customary marriage is a process rather than an event. It might be difficult to determine when it must formally be dissolved. On the other hand, many couples presumably married by customary law live in a kind of marriage limbo. As a result of industrialisation and lack of adequate family accommodation, many marriages have disintegrated. Technically, many men and women may be said to be married, while *de facto* they live like unmarried people. If they are forced to divorce, it might create insoluble legal conundrums. One or the other may argue that they are married or unmarried to suit his or her needs. As it is, common law divorces are a multi-million Rand industry. If all Africans who find themselves in this grey area of married-unmarried have to resort to legal action, lawyers will rejoice. Children grow up in this vast shadow of legitimate-illegitimate. Their legal status will also have to be sorted out. In short, the Act fails to take social realities into account.

Last, but not least, the Act in effect abolishes customary marriages. These marriages stand on three legs: *lobolo*, polygamy and the communal nature of African family life. By imposing the common law consequences of marriage upon customary marriages, the entire fabric of the communal (extended) family system is destroyed. One may ask why a couple should marry by customary law at all if in the end the consequences are no different from those of a common law marriage. Do people who are married by customary law understand what it is all about? Can they visualise the consequences? Can they utilise the sophisticated and probably expensive ways of changing their marital property regime? Which recalls Allott’s statement that:

> Social change is desirable; law can be a potent tool in aiding that change. But it is a precision tool, and one which like the carpenter’s chisel, is easily blunted in unskilled hands.\(^8\)

\(^7\)GN R1970 of 5 October 1968.

\(^8\)Reforming the law in Africa — aims, difficulties and techniques' in Sanders n 75 above at 228, 229. See also Mqeke ‘The "rainbow jurisprudence" and the institution of marriage with emphasis on the recognition of Customary Marriages Act 120 of 1998’ 1999 *Obiter* 52.