

# Comment on the Single Marriage Statute: Implications for Customary Marriages, Polygynous Marriages and Life Partnerships

F Osman

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## Author

Fatima Osman

## Affiliation

University of Cape Town  
South Africa

Email Fatima.Osman@uct.ac.za

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## Abstract

The South African Law Reform Commission has proposed a single marriage statute to reconcile the several enactments regulating marriage in South Africa. This comment argues that the Bill should include old customary marriages in its definition of a customary marriage and is underinclusive in its recognition of polygyny with a religious or cultural basis and not the more general practice of polygamy. Furthermore, the requirement of cohabitation for the recognition of a life partnership is onerous and may exclude vulnerable parties from protection. While the Bill is commended for requiring a husband to obtain the consent of existing wives before he concludes a further marriage, the note recommends that the Bill give meaning to the notion of consent. Finally, the Bill must address existing issues within the *Recognition of Customary Marriages Act* 120 of 1998 which have invalidated a range of customary marriages too often at the expense of women.

## Keywords

Single Marriage Statute; customary marriage; polygyny; life partnership.

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## 1 Introduction

South Africa has a plethora of legislation regulating marriage in the country, namely the *Marriage Act*,<sup>1</sup> the *Civil Union Act*<sup>2</sup> and the *Recognition of Customary Marriages Act* (RCMA).<sup>3</sup> In addition, Parliament previously considered a further two additional enactments, namely the Muslim Marriages Bill<sup>4</sup> and the Domestic Partnership Bill<sup>5</sup> to recognise and regulate Muslim marriages and the relationships between unmarried partners. The result of these various enactments was the creation of a hierarchy and inequity in South African marriage law with, unsurprisingly, civil marriages at the pinnacle thereof.<sup>6</sup> The inequitable treatment of marriages and intimate relationships spurred the consideration of a single marriage statute to comprehensively regulate all marriages and intimate relationships in a uniform manner.

This note considers some of the legal implications of the proposed bill for the recognition of old customary marriages, polygynous marriages and life partnerships. It goes on to examine in particular the requirement of obtaining the first wife's consent for a polygynous marriage and existing uncertainties in the RCMA which have been left unaddressed. But first the note provides some background to the proposed Bill to contextualise the provisions and subsequent discussion thereof.

## 2 Context of the Single Marriage Statute

The South African Law Reform Commission (SALRC) released an Issue Paper<sup>7</sup> in 2019 and a Discussion Paper<sup>8</sup> in early January 2020 to canvass views on a single marriage statute. In the Discussion Paper, the SALRC proposed two possible Bills, namely the Protected Relationships Bill<sup>9</sup> and the Recognition and Registration of Marriages and Life Partnerships Bill.<sup>10</sup>

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\* Fatima Osman. B Bus Sci LLB LLM PhD (UCT). Senior lecturer at the University of Cape Town, South Africa. Email: Fatima.Osman@uct.ac.za. ORCID: <http://orcid.org/0000-0002-1357-7840>.

<sup>1</sup> *Marriage Act* 25 of 1961.

<sup>2</sup> *Civil Union Act* 17 of 2006.

<sup>3</sup> *Recognition of Customary Marriages Act* 120 of 1998 (the RCMA).

<sup>4</sup> Draft Muslim Marriages Bill, 2011 (Gen N 37 in GG 33946 of 21 January 2011).

<sup>5</sup> Draft Domestic Partnership Bill, 2008 (Gen N 36 in GG 30663 of 14 January 2008).

<sup>6</sup> For a discussion of the inequitable treatment between marriages and marriage-like relationships in South Africa, see Osman 2020 *IJLPF* and Bonthuys 2016 *Oñati Socio-Legal Series*.

<sup>7</sup> SALRC *Issue Paper* 35.

<sup>8</sup> SALRC *Discussion Paper* 152.

<sup>9</sup> SALRC *Discussion Paper* 152 Annexure B1, 135-152.

<sup>10</sup> SALRC *Discussion Paper* 152 Annexure B2, 153-171.

Substantively, the two bills are the same and regulate relationships in the same manner. What differs is the terminology of whether a marriage should be referred to as a "protected relationship" or a "marriage / life partnership". This note does not examine this technical debate around the language employed but notes that this may be a contested issue.<sup>11</sup>

The SALRC has adopted the position that the legal consequences of protected relationships should be determined by other investigations (such as investigations into the review of the law of maintenance and matrimonial property) and other legislation (such as the *Divorce Act*,<sup>12</sup> and the *Maintenance of Surviving Spouses Act*<sup>13</sup>) and not the Bill itself.<sup>14</sup> Accordingly, the Bill does not regulate a highly contested issue such as the proprietary consequences of a customary marriage with the refrain that it will be dealt with elsewhere. However, law reform cannot be implemented – or evaluated – in silos. The effectiveness of the single marriage statute depends very much on the rights afforded to parties and the regulation of the consequences of these relationships. Thus, much of the evaluation of the Bill will depend on forthcoming law reform.

Finally, the reference to a single marriage statute is a misnomer. The Bill repeals several sections of the RCMA which relate to marriages by minors, the prohibition on marriage based on consanguinity and the registration of marriages,<sup>15</sup> but the greater part of the RCMA continues in operation. Accordingly, the RCMA continues to regulate customary marriages and must be read in conjunction with the Bill, which seems to perpetuate existing issues that people have with the RCMA. The note makes certain comments in respect of these aspects.

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<sup>11</sup> For the sake of convenience, comments are made in respect of the Recognition and Registration of Marriages and Life Partnerships Bill, but they apply *mutatis mutandis* to the Protected Relationships Bill.

<sup>12</sup> *Divorce Act* 70 of 1979.

<sup>13</sup> *Maintenance of Surviving Spouses Act* 27 of 1990.

<sup>14</sup> SALRC *Discussion Paper* 152 21. The position reflects the current legal position to a certain degree. For instance, while the *Marriage Act* 25 of 1961 and *Civil Union Act* 17 of 2006 recognise marriages and civil unions, the consequences of these relationships are regulated in the *Divorce Act* 70 of 1979, the *Maintenance of Surviving Spouses Act* 27 of 1990 and the *Matrimonial Property Act* 88 of 1984. Furthermore, the legislature is concurrently considering the Recognition of Customary Marriages Amendment Bill [B12-2019] to reconcile the proprietary consequences of customary marriages. For a discussion of this Bill, see Osman 2020 SALJ.

<sup>15</sup> The Bill repeals ss 3(3), 3(4), 3(5) and 4 of the RCMA. This is in contrast to the repeal of the *Marriage Act* 25 of 1961 and the *Civil Union Act* 17 of 2006 in their entirety.

### 3 The recognition of "old marriages"

The RCMA recognises a marriage "which is a valid marriage at customary law and existing at the commencement of this Act" as a valid marriage.<sup>16</sup> These marriages, referred to as "old marriages", are recognised as valid and afforded the protection of the RCMA. The Bill does not repeal the recognition of these marriages and thus the recognition should be carried through into the new enactment. The Bill's recognition of old marriages, however, is ambiguous – an old marriage is not recognised as a customary marriage but may be recognised in the general definition of a marriage or a life partnership. The Bill defines a "customary marriage" as a marriage entered into in terms of the RCMA. This does not capture customary marriages concluded before the RCMA came into operation, as these old marriages are not concluded in terms of the RCMA but are merely recognised therein. For the sake of consistency with the RCMA, the definition of a customary marriage should be amended to read "a marriage entered into or recognised" in terms of the RCMA.

As intimated above, old marriages may find recognition in the general definition of a "marriage or life partnership". The Bill defines a marriage or life partnership as:

- (aa) any subsisting marriage concluded in terms of the Marriage Act, 1961 (Act No. 25 of 1961), old order marriage legislation or any other prior legislation before the commencement of this Act; any subsisting union or marriage concluded in terms of the Civil Union Act, 2006 (Act No. 17 of 2006) before the commencement of this Act; and any subsisting customary marriage concluded in terms of the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998);
- (bb) any subsisting monogamous or polygynous marriage or relationship concluded or entered into in terms of the tenets of any religion or culture before or after the commencement of this Act; or
- (cc) any life partnership, where the parties cohabit and have assumed permanent responsibility for supporting each other.<sup>17</sup>

Accordingly, old marriages could potentially be recognised in terms of clauses (xvi)(aa) and (bb). Clause (xvi)(aa) would capture old marriages concluded in terms of old order marriage legislation, whereas clause

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<sup>16</sup> Section 2(1) of the RCMA. Also see s 2(3) of the RCMA, which provides: If a person is a spouse in more than one customary marriage, all valid customary marriages entered into before the commencement of this Act are for all purposes recognised as marriages.

<sup>17</sup> Clause (xvi) of the Recognition and Registration of Marriages and Life Partnerships Bill.

(xvi)(bb) would encapsulate more generally marriages entered into in terms of religion or culture before the commencement of the Act.

Despite this possible recognition, the Bill does not clarify the lingering uncertainty as to the status of old marriages which may be valid at customary law but are invalidated in terms of civil law. Prior to 1988, if a man in a customary marriage concluded a civil marriage with another woman, the civil marriage automatically nullified the customary marriage.<sup>18</sup> Furthermore, if a man in a civil marriage concluded a customary marriage, the customary marriage was null and void.<sup>19</sup> Bonthuys and Pieterse<sup>20</sup> explain that while the customary marriages were invalidated in civil law, they were most likely still valid at customary law and recognised by the community as in existence if the customary law requirements for the marriage were satisfied. However, historically the recognition of these customary marriages, which entailed the co-existence of a customary and civil law marriage, was problematic given the strictly monogamous nature of civil law marriages.<sup>21</sup> It is thus unclear whether the Bill would recognise these old marriages or for the sake of certainty and continuity require that the marriage be subsisting in civil law.

#### 4 The recognition of polygynous relationships

The Bill recognises polygynous relationships, which is noteworthy because of the gendered nature of the practice and the religious or cultural basis required for its recognition. A marriage or life partnership is defined as:

- (bb) any subsisting monogamous or polygynous marriage or relationship concluded or entered into in terms of the tenets of any religion or culture before or after the commencement of this Act; or<sup>22</sup>

Polygyny is the gendered practice of a husband having more than one wife rather than the gender-neutral practice of polygamy, of a partner having more than one spouse. The gendered nature of the practice is underscored

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<sup>18</sup> *Nkambula v Linda* 1951 1 SA 377 (A); Mamashela and Carnelley 2011 *Agenda* 114; Bakker and Heaton 2012 *TSAR* 591-592. Post 1988, s 1 of the *Marriage and Matrimonial Property Law Amendment Act* 3 of 1988 provided that a man in an existing customary law union was not competent to conclude a civil marriage with another woman. Any civil marriage contracted in contravention was void; see *Murabi v Murabi* 2014 2 All SA 644 (SCA); *Thembisile v Thembisile* 2012 2 SA 209 (T); Bonthuys and Sibanda 2003 *SALJ* 787; Dlamini 1989 *TSAR* 411-412.

<sup>19</sup> Bonthuys and Pieterse 2000 *THRHR* 620.

<sup>20</sup> Bonthuys and Pieterse 2000 *THRHR* 621-622.

<sup>21</sup> Bonthuys and Pieterse 2000 *THRHR* 623.

<sup>22</sup> Clause (xvi) (bb) of the Recognition and Registration of Marriages and Life Partnerships Bill.

in the definition of a "polygynous or potentially polygynous marriage or life partnership" as "a relationship in which a male party may, during the subsistence of the relationship, be in a relationship with a female person or female persons".<sup>23</sup> It is carried through in clause 6(4) of the Bill which requires the male party in a relationship to obtain the consent of the female party/ies in the relationship if he wishes to conclude a further relationship.<sup>24</sup>

The recognition of the gendered practice of polygyny opens the Bill to a constitutional challenge of discrimination based on gender as men – and not women – may have more than one spouse. The SALRC has not provided a reason for the discrimination but it aligns with traditional understandings of customary law and religion; it is the male partner who may have more than one spouse and not the female partner.<sup>25</sup> This accords with the Bill's position that polygynous relationships must have a religious or cultural basis to be recognised as a "marriage or life partnership".<sup>26</sup> Polygynous relationships or marriages with no religious or cultural basis are not recognised in terms of the Bill.

This position is problematic because at a fundamental level it re-enforces a religious bias in which polygynous relationships are considered immoral and thus not protected. It privileges religious understandings of marriage (such as polygynous relationships with a cultural or religious basis) over others (polygynous relationships without a religious or cultural basis) perpetuating inequality between various intimate relationships.

Furthermore, the recognition of polygyny which accords with religious and cultural beliefs is at odds with the lived reality. The nuclear family is no longer the norm<sup>27</sup> and polygynous life partnerships which are not religiously or culturally based occur frequently in South African contemporary society.<sup>28</sup> For example, during the early twentieth century "man-to-man marriages" surfaced at mining compounds.<sup>29</sup> Older men, married to women in rural

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<sup>23</sup> This contrasts with ss 2(3) and 2(4) of the RCMA which describes the gender neutral practice of a spouse being in more than one marriage.

<sup>24</sup> This requirement of obtaining consent for a further polygynous marriage is discussed in more detail in the section below. S 7(6) of the RCMA similarly requires a husband who wishes to enter into a further customary marriage with another woman to apply to court to approve a written contract regulating the matrimonial property system of the marriages.

<sup>25</sup> In the Islamic faith, men – and not women – may take more than one spouse.

<sup>26</sup> This echoes the SALRC position in 2006; SALRC *Report on Domestic Partnerships* 383. For a critique of this position see Mochela and Smith 2020 *TSAR* 696.

<sup>27</sup> *Paixao v Road Accident Fund* 2012 6 SA 377 (SCA) paras 31-33.

<sup>28</sup> *Jacobs v Road Accident Fund* 2019 2 SA 275 (GP) para 20.

<sup>29</sup> Nkosi 2007 *IJARS* 207.

areas, entered into "marriages" with younger men in mining areas.<sup>30</sup> These younger men often performed domesticated duties and had intimate relationships with the older men.<sup>31</sup> While the literature may refer to these relationships as marriages, it is doubtful whether they had a cultural basis or were recognised in customary law as marriages. Rather they appeared to emerge in response to the socio-economic conditions of the time. The restrictive provisions of the Bill mean that these aforementioned relationships would not be recognised polygynous relationships entitled to protection. The nature and length of the relationship and the dependence of the parties would all be irrelevant. As the relationship did not have a religious or cultural basis – and furthermore was between men – it would not qualify as a polygynous relationship in terms of the Bill.

Finally, requiring a religious or cultural basis for the recognition of polygyny conflicts with recent jurisprudence in which courts have extended rights to parties in a polygynous relationship without a religious or cultural basis.<sup>32</sup> For example, the court in *Jacobs v Road Accident Fund* recently extended the dependents' action for loss of support to a female heterosexual life partner when her partner, who was in an existing civil marriage, died. The result of the Bill is that while parties in such relationships may have a dependents' action for loss of support, they would not be recognised in terms of the Bill as having a marriage/life partnership with the corresponding status and rights this entails. While the Bill does not regulate ancillary matters such as maintenance, the negation of a person's status as a partner in a marriage/life partnership has an inevitable knock-on effect on parties' rights thereto. For example, the Bill proposes an amendment to the definition of a "survivor" in the *Maintenance of Surviving Spouses Act* to include "or the partner of such person in a relationship in terms of the Recognition and Registration of Marriages and Life Partnership Act". Thus, the non-recognition of a party's relationship as a marriage/life partnership in terms of the Bill means that the party would not be considered a survivor in terms of the *Maintenance Act* and would thus be precluded from claiming maintenance from the deceased partner's estate. The exclusion of these relationships from the protection of the Bill thus requires careful consideration and justification.

It should be noted that polygynous marriages/relationships without a religious or cultural basis may possibly be recognised as life partnerships

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<sup>30</sup> Bonthuys 2008 *Sexualities* 731.

<sup>31</sup> Bonthuys 2008 *Sexualities* 731.

<sup>32</sup> *Jacobs v Road Accident Fund* 2019 2 SA 275 (GP). For a critique of the case, see Scott 2019 *TSAR* 798 and Smith 2020 *TSAR* 576.

where the parties cohabit and have assumed a permanent responsibility of support.<sup>33</sup> This is discussed in more detail in the following section.

## 5 The recognition of life partnerships

As mentioned previously, the Bill defines a life partnership as one where the parties cohabit and have assumed a permanent responsibility of support for each other. While it is heartening to see at long last the recognition of unmarried partners, the definition of a life partnership bears greater scrutiny.

It is apparent from the definition that the Bill requires cohabitation between the parties for the recognition of a life partnership. Requiring cohabitation is problematic because for the majority of South Africans, intimate relationships do not coincide with sharing a household or the behavioural and spatial patterns typically found in monogamous Western marriages, namely cohabitation.<sup>34</sup> The continuing migrant labour system means that many people may be members of multiple households, sharing long-term sexual, emotional and economic relationships while not necessarily living together in the same household on a permanent basis or for a greater period of time.<sup>35</sup> Take for example a man who leaves the rural area in search of work and enters into a relationship with a woman where he works. Commuting between the rural and urban areas, he may or may not cohabit with the woman, share a household and have children with her. In other cases, men may leave unmarried partners in the rural areas who they may support and sporadically see but not cohabit with for any significant period of time. This occurs frequently in various permutations in practice, but without cohabitation the women's relationships would not be recognised as life partnerships in terms of the Bill.

The Bill appears to ignore the plight of non-cohabitants who find themselves in this vulnerable position. There is no acknowledgment that a shared household may not be as important in African societies as in Western society<sup>36</sup> and that requiring cohabitation for the recognition of a life partnership may exclude many families. It is thus recommended that

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<sup>33</sup> Clause (xvi)(cc) of the Recognition and Registration of Marriages and Life Partnerships Bill.

<sup>34</sup> Bonthuys 2018 *PELJ* 3.

<sup>35</sup> Bonthuys 2018 *PELJ* 6. Also see Budlender and Lund 2011 *Dev Change* 925 for a discussion of African households.

<sup>36</sup> Bonthuys 2018 *PELJ* 6. Literature from the United Kingdom also recognises the problem of equating partnership and co-residence as there is an increasing recognition that not living with a partner does not mean not having a partner. See Roseneil 2006 *Sociological Research Online*.



cohabitation should be a factor used by courts to determine whether parties have assumed a reciprocal responsibility of support for each other but should not be a requirement for the recognition of a life partnership as in the current version of the Bill.

Finally, it is not clear from the Bill whether a party may have a life partnership in addition to a valid marriage; that is, whether parties may have a polygynous relationship consisting of a valid marriage in terms of clause (xvi)(aa) and a life partnership in terms of clause (xvi)(cc). The Bill does not make clear whether polygynous relationships must be recognised in terms of clause (xvi)(cc) or whether there can be polygyny across the definitions of a marriage or life partnership. As mentioned in the previous section, this leaves the door open for polygynous relationships without a religious or cultural basis to be recognised as life partnerships. If this is the case, then what immediately becomes apparent is that there are different requirements for polygynous relationships with a cultural/religious basis and those without. Those without a cultural/religious basis must satisfy the additional requirements of cohabitation and the assumption of a permanent responsibility of support. The distinction and additional requirements may be challenged for discrimination based on religion and culture. It may be especially problematic given the fact that many individuals may not cohabit despite being in long-term relationships.

#### **4 Consent to a further polygynous marriage/life partnership**

The Bill codifies the Constitutional Court decision of *MM v MN*<sup>37</sup> to require a male party in a subsisting marriage or life partnership who wishes to enter into a further marriage or life partnership to notify and obtain the consent of all the female parties in the prescribed form to the further relationship:

The male party to a subsisting polygynous marriage or life partnership who wishes to enter into a further marriage or life partnership must notify all the female parties to their subsisting relationship in the prescribed form of his intention to enter into a further relationship to obtain the consent of all the female parties who must indicate their consent in the prescribed form, before he may enter into such a further relationship; provided that if he enters into a further relationship without the consent of all the female parties to the subsisting polygynous relationship, that further relationship entered into will be void; and provided further that the registering officer must enquire into the

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<sup>37</sup> *MM v MN* 2013 4 SA 415 (CC).

existence of such consent having been sought and granted when the further relationship is registered.<sup>38</sup>

It appears that the reference to "prescribed form" in the section means that there is a specified manner in which parties must be informed of the forthcoming marriage and indicate their consent thereto.<sup>39</sup> The Bill does not clarify what the prescribed form is, and it appears that the Bill envisages that the regulations contemplated in clause 14 of the Bill will set out the details thereto. The regulations/Bill need to be clear in this regard and it would be unreasonable to expect litigants to go to court for clarity on what suffices to meet this requirement.

In particular, the regulations/Bill should clarify whether consent would have to be in writing or if verbal consent would suffice, whether prospective consent would be required or if ratification would be possible, and whether consent could be obtained in terms of customary law and could therefore differ from community to community. For example, amongst the Vatsonga a husband would request – orally – consent from his first wife to marry a second wife.<sup>40</sup> The elders in the family would be informed of the first wife's decision and would ascertain whether she had consented, persuade her to consent or advise the husband not to proceed with the second marriage.<sup>41</sup> Family involvement provides a verification process to ensure that consent was given but may also subject the wife to coercion to consent.<sup>42</sup>

In prescribing the process for obtaining consent, it must be borne in mind that an onerous and overly formalistic process is likely to be ignored and amount to paper law. In this regard, early research revealed that the section 7(6) court approved contracts required by the RCMA to regulate the proprietary consequences of polygynous customary marriages were hardly ever concluded.<sup>43</sup> It is thus recommended that the Bill/regulations do not prescribe the form and manner of informing and obtaining consent but simply require that the parties freely and voluntarily consent thereto. In the event that the regulations/Bill prescribes the process for obtaining consent,

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<sup>38</sup> Clause 6(4) of the Recognition and Registration of Marriages and Life Partnerships Bill. For the reasons discussed earlier, the section should be re-drafted to be gender neutral.

<sup>39</sup> If it was meant that there is a prescribed physical form which must be used to notify parties and obtain their consent, then the wording "on the prescribed form" should be used.

<sup>40</sup> Affidavit of MW Mhlaba in *MM v MN* 2013 4 SA 415 (CC) para 24.

<sup>41</sup> Affidavit of MW Mhlaba in *MM v MN* 2013 4 SA 415 (CC) para 26.

<sup>42</sup> In reality all decisions are subject to social influences and pressures and individuals are constantly navigating these influences in decision-making.

<sup>43</sup> Women's Legal Centre *Recognition of Customary Marriages* 18 fn. 45.

verbal consent should suffice, as it accords more closely with current customary law practice.

In addition, the Bill confers on courts the discretion to make an order that is just in the event that a marriage is declared void for want of consent:

In an application on the ground of want of compliance with this section, a court may make such order with regard to the division of the relationship property of the parties to the marriage or life partnership as it may deem just.<sup>44</sup>

Previously, parties in such invalidated marriages had no rights or protection. The conferral on courts to grant an order that is just and equitable is thus a welcomed amendment as it offers potential recourse for "spouses" in these invalidated marriages.

## 5 Existing problems with the RCMA

As mentioned previously, under the Bill the RCMA continues to govern significant aspects of customary marriages. However, the last several years have revealed gaps and shortcomings in the RCMA which the Bill has not addressed.

The RCMA prohibits the mixing of civil and customary marriages. That is, an individual cannot conclude a civil marriage with one woman and a customary marriage with another woman.<sup>45</sup> According to current case law, the purported second "marriage" is void.<sup>46</sup> The difficulty is that men frequently contract these second marriages in practice, with the second "wife" genuinely believing her marriage to be valid. Bonthuys and Pieterse thus describe the creation of the rigid dichotomy between civil and customary marriages as unrealistic and one that more often than not punishes the woman for her husband's transgression of the law.<sup>47</sup> The Bill offers no recourse to individuals in these invalidated marriages despite the fact that the second "wife" may have "married" in good faith and could not have reasonably been expected to know about the existing marriage.<sup>48</sup> It would be useful for the courts in such circumstances to have a discretion to

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<sup>44</sup> Clause 6(5) of the Recognition and Registration of Marriages and Life Partnerships Bill.

<sup>45</sup> Section 3(2) as read with 10(4) of the RCMA.

<sup>46</sup> *Mrapukana v Master of the High Court* 2008 JOL 22875 (C), where a civil marriage between the parties was declared void because the husband was in a subsisting customary law marriage with another woman.

<sup>47</sup> Bonthuys and Pieterse 2000 *THRHR* 624.

<sup>48</sup> For a discussion of the precarious position of these discarded spouses, see Osman 2020 *JLPPF* 279-281.

make an order that is just and equitable, as they have when marriages are invalidated due to a lack of consent from the existing spouse(s).

A further problem is section 8 of the RCMA requires a customary marriage to be dissolved by an order of court, even where the marriage is not registered or accompanied by a civil marriage. Most individuals nonetheless negotiate their divorces privately between their families, or separate without obtaining divorces.<sup>49</sup> These customarily negotiated divorces/separations are not recognised in civil law with the result that the customary marriage persists and invalidates any subsequent marriage concluded by the parties with third parties. The requirement for a court order of divorce thus functions as a trap for unsophisticated individuals unaware of the law. A provision allowing courts to recognise a customarily negotiated divorce or at the very least conferring on courts a discretion to make an order that is just and equitable may ameliorate some of the hardship.

Finally, section 10 of the RCMA allows parties married according to customary law to conclude a civil marriage with each other. The section which allows for a change of marriage system has created a number of uncertainties such as does the new civil marriage terminate the customary marriage, and at what point can an antenuptial contract be concluded?<sup>50</sup> While the SALRC may argue that the question as to the proprietary consequences of the marriage is to be dealt with elsewhere, the issue of the status of the marriages and whether the civil and customary marriage co-exist or the civil marriage terminates the customary marriage falls squarely within the ambit of this investigation. It is likely that these existing uncertainties in the RCMA regarding the status of marriages were simply overlooked and should be addressed in the Bill.

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<sup>49</sup> Himonga and Moore *Reform of Customary Marriage* 69; Mamashela and Carnelley 2011 *Agenda* 112, 118; Maithufi 1992 *THRHR* 628, 630.

<sup>50</sup> The issue was raised in 2017 when former President Jacob Zuma's daughter made headlines when she claimed half of her soon to be ex-husband's multimillion rand estate despite the couple having entered into a valid antenuptial contract. She claimed that the couple's customary marriage was in community of property and that they could not enter into an antenuptial contract after the conclusion of the customary marriage but before their civil marriage to change the proprietary consequences of the marriage. See Citizen Reporter 2017 <https://citizen.co.za/lifestyle/1396615/zumas-daughter-unhappy-divorce-settlement-wants-half-hubbys-estate/>. Furthermore, Mrs Winnie Madikezela-Mandela raised the issue of the co-existence of a customary and civil marriage and the process for the dissolution of the marriages in respect of the pre-RCMA position; *Mandela v Executors Estate Late Nelson Rolihlahla Mandela* 2018 4 SA 86 (SCA). For a discussion of these questions, see Nkosi 2019 *SAPL* 1-2; Osman 2019 *PELJ*; Bakker "Conversion of an SA Customary Marriage to a Civil Marriage" 67-78.

Most academic opinion on the matter, supported by previous recommendations of the SALRC and the historical position<sup>51</sup> on dual marriages prior to the RCMA, posits that the civil marriage terminates the customary marriage, as opposed to the marriage continuing in two different forms.<sup>52</sup> While this re-enforces the subordinate position of customary law marriages of the past, it promotes legal certainty and continuity.<sup>53</sup> It is suggested that the Bill clarifies that the civil marriage terminates the customary marriage and parties are able to conclude an ante nuptial contract any time before the conclusion of the civil marriage.

## 6 Conclusion

The Bill is an ambitious first endeavour by the SALRC to reconcile South Africa's existing marriage laws. This note highlights certain issues with the Bill's recognition of old marriages, polygynous marriages and life partnerships. The recognition of the gendered practice of polygyny rather than polygamy may be challenged on a constitutional basis as unjustifiably discriminatory based on gender. This discrimination is exacerbated by tying the recognition of polygynous marriages to religion and culture and requiring cohabitation for the recognition of a life partnership. This favours religious understandings of marriage and displays a blatant disregard of how South African families are formed and of the individuals in these relationships who require protection.

Generally, the lack of substance in the Bill – despite the SALRC's position that this will be regulated elsewhere – is problematic. For example, while the Bill requires a husband in a marriage to obtain the consent of his existing wives before he enters into a further marriage, it does not specify the form of the consent or what would suffice for this requirement. While flexible drafting is undoubtedly needed when dealing with customary law matters, there must be some indication of how the requirement will be implemented so that litigants do not have to litigate for clarity. Finally, the Bill must address issues with the RCMA that relate to the existence and status of a customary marriage. These issues fall squarely within the SALRC's mandate and cannot be perpetuated at the expense of individuals in customary marriages.

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<sup>51</sup> Bonthuys and Pieterse 2000 *THRHR* 618.

<sup>52</sup> Bennett *Sourcebook of African Customary Law* 238; Maithufi and Moloji 2002 *TSAR* 602; Osman 2019 *PELJ*; Cronje and Heaton *South African Family Law* 236-237.

<sup>53</sup> Bennett *Sourcebook of African Customary Law* 237-238.

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### List of Abbreviations

Dev Change	Development and Change
IJARS	International Journal of African Renaissance Studies
IJLPF	International Journal of Law, Policy and the Family
PELJ	Potchefstroom Electronic Law Journal
RCMA	Recognition of Customary Marriages Act 120 of 1998
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
SALJ	South African Law Journal
SALRC	South African Law Reform Commission
SAPL	Southern African Public Law