

# The Proprietary Consequences of Customary Marriages: Challenges in the New Regime(s)?

F Osman\*

Online ISSN  
1727-3781

**P·E·R**

Pioneer in peer-reviewed,  
open access online law publications

## Author

Fatima Osman

## Affiliation

University of Cape Town,  
South Africa

## Email

Fatima.Osman@uct.ac.za

## Date Submitted

11 November 2022

## Date Revised

19 April 2024

## Date Accepted

19 April 2024

## Date Published

8 May 2024

## Editor

Prof C Rautenbach

## Journal Editor

Prof W Erlank

## How to cite this contribution

Osman F "The Proprietary Consequences of Customary Marriages: Challenges in the New Regime(s)?" *PER / PELJ* 2024(27) - DOI  
<http://dx.doi.org/10.17159/1727-3781/2024/v27i0a17238>

## Copyright



## DOI

<http://dx.doi.org/10.17159/1727-3781/2024/v27i0a17238>

## Abstract

The law governing marriage in South Africa is in transition. There are currently two proposals to reform the proprietary consequences of marriages in South Africa, namely a Marriage Bill [B43-2023], and a South African Law Reform Commission Discussion Paper to review aspects of matrimonial property law. This article assesses the effectiveness of the proposed reform in addressing the current regulatory challenges related to the proprietary consequences of customary marriages. It argues that the piecemeal jurisprudential development of the law has not been effectively reconciled, and this must be addressed in any future reform. However, the Marriage Bill proposed by the Department of Home Affairs is not an answer. The Bill ignores customary notions of property and creates several conceptual difficulties such as potentially leaving customary law marriages without a matrimonial proprietary regime. The South African Law Reform's Discussion Paper, which reviews aspects of matrimonial property law, holds great promise because it proposes a change in the default matrimonial proprietary system and the exclusion of family property from the marital estate. The proposals must be reconciled and informed by living customary law practices to deliver the much-anticipated law reform.

## Keywords

Customary marriage; proprietary consequences; Marriage Bill.

.....

## 1 Introduction

The law governing marriage in South Africa is in transition. In January 2021 the South African Law Reform Commission (SALRC), mandated by the Department of Home Affairs, released Discussion Paper 152, *Single Marriage Statute*, with proposals for a single marriage statute in South Africa to elicit responses for further deliberations thereon. The proposed legislation did not regulate the proprietary consequences of marriage on the basis that it would be dealt with through an investigation into matrimonial property law.<sup>1</sup> The limited scope of the investigation accorded with the mandate of the Department of Home Affairs, which includes, amongst other matters, the determination of the status (such as the marital status) of persons,<sup>2</sup> but not the laws pertaining to matrimonial property or customary marriages, which are administered by the Department of Justice and Constitutional Development (the Department of Justice).<sup>3</sup>

In June 2023 the SALRC, mandated by the Department of Justice, released Discussion Paper 160, *Review of Aspects of Matrimonial Law*, setting out preliminary proposals for regulating matrimonial property laws.<sup>4</sup> A month later, in July 2023, without the publication of the SALRC report on the *Single Marriage Statute*, the Department of Home Affairs released its Draft Marriage Bill, 2022, proposing a single marriage statute to regulate all marriages in South Africa and to regulate the proprietary consequences of marriage.<sup>5</sup>

The release of the Draft Marriage Bill without the preceding SALRC report into the matter raised eyebrows for several reasons. First, the result was that the state, through different departments, produced two vastly different proposals for reforming South African matrimonial law. The differences highlighted the problem of having law reform performed in silos, with state departments not speaking to each other. Secondly, it is questionable why the SALRC's report was not publicised after the investment of significant time, money, and resources into its production. Finally, the Draft Marriage Bill differed significantly from the initial proposals found in Discussion Paper

---

\* Fatima Osman B Bus Sci LLB LLM PhD (UCT). Associate Professor, Faculty of Law, University of Cape Town. Email: Fatima.Osman@uct.ac.za. ORCID: <https://orcid.org/0000-0002-1357-7840>.

<sup>1</sup> SALRC Project 144, *Discussion Paper 152*. This was preceded by an issue paper, being the SALRC Project 144, *Issue Paper 35*.

<sup>2</sup> DHA 2024 <https://www.dha.gov.za/index.php/about-us>.

<sup>3</sup> DoJ & CD 2024 [https://www.justice.gov.za/legislation/acts/acts\\_full.html](https://www.justice.gov.za/legislation/acts/acts_full.html).

<sup>4</sup> SALRC Project 100E, *Discussion Paper 160*.

<sup>5</sup> The purpose of the Bill is to rationalise the laws regarding marriage and to provide an overarching framework for the regulation of all marriages regardless of how they are entered into. The preamble notes the fragmented manner in which family law has developed and therefore proposes an umbrella statute to ensure the fair legislative regulation of marriages.

152. For example, the Draft Marriage Bill regulated the proprietary consequences of marriages, in conflict with the explanation that this would be investigated elsewhere, and did not recognise life partnerships, raising questions about what had precipitated the change in the approach.

The process culminated in the release of the Marriage Bill [B43-2023] (the Marriage Bill) in December 2023. This article critically evaluates the implications of the Marriage Bill and the SALRC's proposal on matrimonial property law reform for the proprietary consequences of customary marriages – as they represent two different approaches to the matter. To contextualise the discussion, the contribution first provides an overview of the current regulation of the proprietary consequences of customary marriages and the most pertinent issues associated therewith. It thereafter examines the Marriage Bill and the SALRC's proposal for matrimonial property law reform, as it relates to customary marriages.

## 2 Current legal framework

The regulation of the proprietary consequences of customary marriages is an ongoing contentious issue in South African law, which has resulted in two landmark Constitutional Court cases<sup>6</sup> and an Amendment Act (the *Recognition of Customary Marriages Amendment Act 1 of 2021*).<sup>7</sup> This section sets out the proprietary consequences before and after the Amendment Act, highlighting the issues encountered in the regimes.

### 2.1 Pre-Amendment Act

The *Recognition of Customary Marriages Act* (the RCMA or the Act) initially drew two distinctions regarding the regulation of the proprietary consequences of marriage. First, the Act distinguished between monogamous and polygamous customary marriages and then between marriages based on the date the marriage was concluded.<sup>8</sup>

The Act (before its amendment) provided that monogamous customary marriages concluded after the commencement of the Act (hereafter referred to as new marriages) were in community of property unless the parties provided otherwise in an antenuptial contract.<sup>9</sup> Customary law regulated monogamous customary marriages concluded before the commencement

---

<sup>6</sup> *Gumede v President of the Republic of South Africa* 2009 3 SA 152 (CC); *Ramuhovhi v President of the Republic of South Africa* 2018 2 SA 1 (CC).

<sup>7</sup> *Recognition of Customary Marriages Amendment Act 1 of 2021*. See Johnson 2023 *Acta Juridica* for a discussion of the Constitutional Court's impact on the proprietary rights of women in customary marriages.

<sup>8</sup> For a discussion of the impact of the *Recognition of Customary Marriages Act* 120 of 1998 (the RCMA), see Mamashela 2004 *SAJHR* 616-641.

<sup>9</sup> Section 7(2) of the RCMA.

of the Act (hereafter referred to as old marriages).<sup>10</sup> This distinction in the regulation of proprietary consequences based on the date the marriage was concluded was challenged in the case of *Gumede*. The Constitutional Court found the distinction to be unconstitutional, with the effect that all monogamous customary marriages, regardless of when they were concluded, were treated as marriages in community of property unless the parties had provided otherwise.<sup>11</sup>

Concerning old polygamous marriages (polygamous customary marriages concluded before the commencement of the Act), the Act provided that they would be regulated by customary law.<sup>12</sup> The constitutionality of this section was challenged in *Ramuhovhi*, where it was argued that the section discriminated on the basis of gender because it was accepted that customary law did not confer upon wives in polygamous customary marriages ownership rights to property.<sup>13</sup> The Constitutional Court confirmed the High Court's order of constitutional invalidity and, in addition, ordered that spouses have joint and equal ownership and other rights over marital property.<sup>14</sup> The Constitutional Court provided that, concerning family property,<sup>15</sup> the rights should be exercised by the husband and the wives jointly and in the best interest of the family unit.<sup>16</sup> In respect of house property,<sup>17</sup> the rights should be exercised by the husband and wife of the house concerned jointly and in the best interest of the family unit.<sup>18</sup> Finally, spouses retain exclusive rights with respect to their personal property that serves their individual interests.<sup>19</sup> It should be noted that the High Court order, which formed the basis of the Constitutional Court order, was based

---

<sup>10</sup> Section 7(1) of the RCMA.

<sup>11</sup> *Gumede v President of the Republic of South Africa* 2009 3 SA 152 (CC). For a discussion of the case see Bekker and Van Niekerk 2009 *SAPL* 206-222 and Himonga "Constitutional Rights of Women" 322-324.

<sup>12</sup> Section 7(1) of the RCMA. In the regulation of old customary marriages, the RCMA did not initially distinguish between monogamous and polygamous customary marriages. Both were regulated by s 7(1) of the Act.

<sup>13</sup> *Ramuhovhi v President of the Republic of South Africa* 2016 6 SA 210 (LT). For a critique of the High Court judgment see Osman and Himonga 2017 *J Legal Plur* 166-182.

<sup>14</sup> *Ramuhovhi v President of the Republic of South Africa* 2018 2 SA 1 (CC) para 71. For a discussion of the case see Kohn 2017 *SAJHR* 120-137 and Weeks 2021 *CCR* 1-41.

<sup>15</sup> This is generally understood to be property controlled by the family head of which he is not the owner and which other family members share in, not just the spouses; Pienaar "Law of Property" 120.

<sup>16</sup> *Ramuhovhi v President of the Republic of South Africa* 2018 2 SA 1 (CC) para 71.

<sup>17</sup> Property which is allotted or accrues to a specific house (which consists of a wife and her children) and is to be used for the benefit of that house; Bennett *Customary Law* 256.

<sup>18</sup> *Ramuhovhi v President of the Republic of South Africa* 2018 2 SA 1 (CC) para 71.

<sup>19</sup> *Ramuhovhi v President of the Republic of South Africa* 2018 2 SA 1 (CC) para 71.

on principles submitted by the Women's Legal Centre Trust without ascertaining the living customary law on the matter, a point I return to later.<sup>20</sup>

The proprietary consequences of new polygamous customary marriages (polygamous marriages concluded after the commencement of the Act) are meant to be regulated by a contract contemplated in section 7(6) of the RCMA. Section 7(6) of the RCMA states that a husband who wishes to conclude a further customary marriage must apply to a court to approve a written contract regulating the matrimonial property system of his marriages. If the existing marriage was in community of property, the court is empowered to terminate the matrimonial property system and ensure an equitable distribution of the property.<sup>21</sup> Furthermore, all persons having sufficient interest in the matter must be joined in the proceedings,<sup>22</sup> and the court may refuse the application if the interests of the parties may not be sufficiently safeguarded by the contract.<sup>23</sup> The Act does not set out the consequences of failing to conclude a contract regulating the proprietary consequences, but the Supreme Court of Appeal held that it would not invalidate the marriage.<sup>24</sup> The impact of the failure to conclude a contract, as contemplated in section 7(6) of the Act, would be on the proprietary consequences of the marriage. The matrimonial property regime of the first marriage would continue as is, whereas the second marriage would be out of community of property.<sup>25</sup>

## 2.2 Post-Amendment Act

In 2021 the legislature brought into force an Amendment Act to give effect to the jurisprudence discussed above, with the result that the proprietary consequences of customary marriages are currently governed as follows:

7 Proprietary consequences of customary marriages and contractual capacity of spouses

(1)

- (a) The proprietary consequences of a customary marriage in which a person is a spouse in more than one customary marriage, and which was entered into before the commencement of this Act, are that the spouses in such a marriage have joint and equal-
  - (i) ownership and other rights; and

<sup>20</sup> Women's Legal Centre Trust Heads of argument in *Ramuhovhi v President of the Republic of South Africa* 2018 2 SA 1 (CC). For a discussion of the Constitutional Court's approach to the ascertainment of customary law see Osman 2019 *J Legal Plur* 98-113.

<sup>21</sup> Section 7(7) of the RCMA.

<sup>22</sup> Section 7(8) of the RCMA.

<sup>23</sup> Section 7(7)(b)(iii) of the RCMA.

<sup>24</sup> *MN v MM* 2012 4 SA 527 (SCA). For a discussion of the case see Maithufi 2013 *THRHR* 688-696 and Van Niekerk 2013 *SAPL* 474-481.

<sup>25</sup> *Ramuhovhi v President of the Republic of South Africa* 2018 2 SA 1 (CC) paras 31 and 35.

- (ii) rights of management and control,  
over marital property.
  - (b) The rights contemplated in paragraph (a) must be exercised-
    - (i) in respect of all house property, by the husband and wife of the house concerned, jointly and in the best interests of the family unit constituted by the house concerned; and
    - (ii) in respect of all family property, by the husband and all the wives, jointly and in the best interests of the whole family constituted by the various houses.
  - (c) Each spouse retains exclusive rights over his or her personal property.
  - (d) For purposes of this subsection, "marital property", "house property", "family property" and "personal property" have the meaning ascribed to them in customary law.
- (2) A customary marriage in which a spouse is not a partner in any other existing customary marriage, is a marriage in community of property and of profit and loss between the spouses, unless such consequences are specifically excluded by the spouses in an antenuptial contract which regulates the matrimonial property system of their marriage.
- (3) ...
- (4) ...
- (5) ...
- (6) A husband in a customary marriage who wishes to enter into a further customary marriage with another woman after the commencement of this Act must make an application to the court to approve a written contract which will regulate the future matrimonial property system of his marriages.
- (7) When considering the application in terms of subsection 6-
- (a) the court must-
    - (i) in the case of a marriage which is in community of property or which is subject to the accrual system-
      - (aa) terminate the matrimonial property system which is applicable to the marriage; and
      - (bb) effect a division of the matrimonial property;
    - (ii) ensure an equitable distribution of the property; and
    - (iii) take into account all the relevant circumstances of the family groups which would be affected if the application is granted;
  - (b) the court may-
    - (i) allow further amendments to the terms of the contract;
    - (ii) grant the order subject to any condition it may deem just;  
or

- (iii) refuse the application if in its opinion the interests of any of the parties involved would not be sufficiently safeguarded by means of the proposed contract.
- (8) All persons having a sufficient interest in the matter, and in particular the applicant's existing spouse or spouses and his prospective spouse, must be joined in the proceedings instituted in terms of subsection (6).

It is apparent that the Amendment Act is a codification of existing jurisprudence on the proprietary consequences of customary marriages, but it falls short of comprehensively regulating the proprietary consequences of customary marriages.<sup>26</sup> For example, the Amendment Act codified the judgments in *Gumede* and *Ramuhovhi*, but it does not deal with the consequences of failing to conclude a contract as contemplated in section 7(6) of the RCMA, which was dealt with *obiter* in the *Mayelane* and *Ramuhovhi* cases. More importantly, the Amendment Act does not consider whether the piecemeal jurisprudence resulting from section 7 of the Act adequately regulates customary proprietary interests or whether wholesale change is required. For example, it appears that polygamous customary law marriages are regulated differently, depending on when marriages are concluded.<sup>27</sup> Women in old polygamous marriages enjoy joint and equal rights of ownership, management and control over marital property with their husbands, as provided for in section 7(1) of the Act. On the other hand, the proprietary consequences of new polygamous customary marriages are meant to be regulated by a contract contemplated in section 7(6) of the RCMA. Without such a contract the second wife is married out of community property with no rights to the marital property.<sup>28</sup> The result is a rather counterintuitive outcome in which spouses in old polygamous marriages have greater rights than spouses in new polygamous marriages, even though the RCMA was enacted to provide greater rights to women.<sup>29</sup>

Furthermore, and perhaps more importantly, the question of whether jurisprudence and now the Amendment Act adequately cater to customary interests requires an understanding of how customary entitlements to property, particularly land, may function.

Customary law ownership of land is characterised by multi-layered and nested notions of entitlements to property, with the effect that various family members may exercise an entitlement to a single property.<sup>30</sup> For example, while an individual like a father may administer property, "[t]he exercise of any right was always limited by obligations and counterbalanced by the

---

<sup>26</sup> For a critique of this see Osman 2020 SALJ 389-407.

<sup>27</sup> Osman 2020 SALJ 404.

<sup>28</sup> Upon divorce, however, the court has the power to grant an equitable order taking into account all relevant factors, s 8(4)(b) of the RCMA.

<sup>29</sup> Osman 2020 SALJ 404-405.

<sup>30</sup> Cousins "Characterising 'Communal' Tenure" 111.

rights and privileges of others."<sup>31</sup> Furthermore, there could be both individual and group entitlements in the land,<sup>32</sup> as complementary interests could be held simultaneously.<sup>33</sup> Therefore, defining entitlements to property such as land in terms of notions of in community of property (where spouses own the property jointly) and out of community (where spouses have separate estates) may be inappropriate, as that would confer exclusive rights of ownership on spouses to the property. It would overlook the possibility that there might be other family members with entitlements to the property, which entitlements might be erased when individual ownership rights were conferred upon spouses. Indeed, the High Court in *Ramuhovhi* may have been correct when discussing whether customary marriages could be described in terms of the notions of in community of property and out of community of property. It stated:<sup>34</sup>

All of this seems like an effort to put a square block into a round hole- trying to force foreign concepts of individual ownership and matrimonial property regimes onto a traditional system that operates on a basis of communal rights, subject to the welfare of the members of the family unit and administered by the family head.

The problem with the Amendment Act is that it ignores the fact that individual notions of ownership may not be appropriate in regulating customary forms of property. Rather, the Amendment Act provides that monogamous customary marriages are in community of property unless provided otherwise with no mention of how customary forms of property (such as house and family property) will be regulated in such marriages. The assumption appears to be that house and family property do not exist in monogamous customary marriages. However, this is conceptually incorrect. The existence of family property is not determined by whether the marriage is monogamous or polygamous; rather, it is a factual question of whether such property exists. Thus, it is more important to determine whether property functions as family property by being used to sustain family members and being administered by a custodian for future use, rather than the classification of the marriage.<sup>35</sup>

Unfortunately, the Amendment Act regulates the matrimonial proprietary regime on the basis of the type of marriage. It provides that a monogamous customary marriage creates a single joint estate owned by spouses to exclude other family members.<sup>36</sup> This is problematic because it belies the social reality, namely that there may exist property that functions as a family

---

<sup>31</sup> Cousins "Characterising 'Communal' Tenure" 111.

<sup>32</sup> Cross 1992 *SAJHR* 312.

<sup>33</sup> Cousins "Characterising 'Communal' Tenure" 111.

<sup>34</sup> *Ramuhovhi v President of the Republic of South Africa* 2016 6 SA 210 (LT) para 61.

<sup>35</sup> For a description of a "collective family house" see Bolt and Masha 2019 *SAJHR* 156.

<sup>36</sup> Section 7(2) of the RCMA.



property to which family members have an entitlement, even though the property is registered in the name of a spouse. For example, imagine a scenario in which an immovable property is registered under the name of Abongile. Abongile never lives in the house. Rather, his siblings live in the house, which is referred to as a collective family home. In divorce proceedings Abongile's wife claims half of the immovable property because the parties were married in community of property and the property forms part of the joint estate. This phenomenon of a family property's being registered in the name of a single person has surfaced in several cases in which parties dispute entitlements to the property based on its being a family property.<sup>37</sup> As monogamous customary marriages are in community of property, this means that women have joint ownership rights to family property – arguably a distortion under customary law – to the exclusion of other family members with rightful entitlements. The danger is that these claims are supported by law, which risks the erasure of family members' customary law entitlements to property.

It is noteworthy that the Act acknowledges the distinction between house and family property in the regulation of the consequences of polygamous marriages.<sup>38</sup> Unfortunately the Act does not suggest how such concepts are to be understood and states that the property must be understood as it is understood in customary law.<sup>39</sup> This may be viewed as laudable and a way for courts to understand these customary forms of property in accordance with living notions of customary law. However, the reference to customary law in statutes has not always proved successful. For example, the RCMA initially stated that the proprietary consequences of old customary marriages would be governed by customary law. The RCMA did not directly discriminate against women in these marriages, but the court in *Ramuhovhi* held that the provision discriminated against women because it accepted that customary law precluded women in polygamous marriages from property ownership, based on written authorities dating back to 1961.<sup>40</sup> The court was not presented with any contemporary developments or understanding of customary law that may have regulated the matter differently. Similarly, the risk here is that courts will accept historical and dated definitions of family and house property without understanding them in the contemporary socio-economic context. Thus, the acknowledgment of

---

<sup>37</sup> *Shai v Makena Family* 2013 JDR 0608 (GNP); *Khwashaba v Ratshitanga* (27632/14) [2016] ZAGPJHC 70 (29 February 2016); *Hadebe v Rambau* (2021/26962) [2022] ZAGPJHC 89 (21 February 2022); *Nedbank Limited v Molebaloa* (37780/2015) [2016] ZAGPPHC 863 (12 August 2016) and for a discussion of this case see Brits 2018 SA Merc LJ 348-367.

<sup>38</sup> Section 7(1)(b) of the RCMA.

<sup>39</sup> Section 7(1)(d) of the RCMA.

<sup>40</sup> *Ramuhovhi v President of the Republic of South Africa* 2016 6 SA 210 (LT) para 55.

the various forms of property without further elaboration may be insufficient.<sup>41</sup>

In summary, the current regulation of the matrimonial proprietary consequences of customary marriages does not adequately reflect customary law entitlements to property or reflect a comprehensive reconciliation of the jurisprudence on the matter. Thus, reform of this area of law is urgently needed. But law reform on the matter must be informed by customary law understandings of how family property functions today, the entitlements it confers, and how they are invoked. The failure to do so risks distortions of customary law, the erasure of people's rights<sup>42</sup> and the law's becoming paper law ignored by people in practice.<sup>43</sup>

While there is some contemporary research on the concept of family property,<sup>44</sup> a comprehensive investigation into the concept is required before it can be regulated. This exhortation for research into the concept should not be viewed as an academic shirking of the responsibility to propose solutions to identified problems. Rather, it is essential for the integrity of customary law. Regardless of how well-intentioned they are, proposals for law reform made without an understanding of practice risk doing more harm than good. For example, as mentioned earlier, the *Ramuhovhi* order was based on the Women's Legal Centre Trust's recommendation, not customary law practices. While the order conferred matrimonial property rights upon women, it did not consider whether this distorted customary law and erased the rights of other vulnerable family members, like parents or siblings, to the property. Accordingly, before there can be meaningful engagement with how family property should be regulated and we make recommendations that may prove influential in reform, there must be empirical research as to how customary concepts are experienced and negotiated in practice. This would ensure that the ensuing recommendations are well-informed, practical and likely to be implemented.

### 3 Marriage Bill, 2023

In July 2022 the Department of Home Affairs published the Draft Marriage Bill and invited comments up until 30th August 2022. In just under 8 weeks the Department of Home Affairs solicited public comments on a controversial bill that seeks to regulate and reform South African marriage law comprehensively. The process culminated in the Department of Home

---

<sup>41</sup> For a further discussion of the issue see Osman 2020 *SALJ* 397-402 and Osman 2023 *De Jure* 13-24.

<sup>42</sup> For a discussion of how property rights may be erased when poorly regulated see Osman 2020 *SALJ* 402-404.

<sup>43</sup> Himonga "Constitutional Rights of Women" 317.

<sup>44</sup> Himonga and Moore *Reform of Customary Marriage* 254-255 and Bolt and Masha 2019 *SAJHR* 147-168.

Affairs' release of Marriage Bill [B43-2023] in December 2023. The Marriage Bill proposes the complete repeal of the RCMA,<sup>45</sup> and this section examines the proposed regulation of the proprietary consequences of customary marriages.

### 3.1 *Monogamous marriages*

The Marriage Bill mandates the parties to choose their matrimonial proprietary regime and states that "[p]rior to solemnisation of a marriage, the prospective spouses must voluntarily choose the matrimonial property system that will apply to their marriage."<sup>46</sup> For civil marriages officiated by a marriage officer, the requirement to select a matrimonial property system may occur when signing the marriage register. However, this requirement may be difficult to implement with respect to customary marriages.

Customary marriages come into existence over a period of time, and it is generally difficult to identify the specific point at which a marriage is concluded.<sup>47</sup> The typical requirements for the conclusion of a customary law marriage that have emerged from jurisprudence are that the families of the spouses negotiate and agree to the marriage, the payment or agreement on lobolo, and the handing over of the bride.<sup>48</sup> Importantly, a marriage comes into existence once the requirements as agreed upon by the families are satisfied or waived, with no further state involvement.

It may be that the Bill envisages that customary spouses will select their matrimonial proprietary regime at the time of registration of the marriage. Under the RCMA, spouses are obliged to register their marriage,<sup>49</sup> but failure to do so does not invalidate the marriage.<sup>50</sup> In reality many marriages are not registered and parties frequently seek the registration of their marriage only at the time of the death of one of the spouses or at the dissolution of the marriage, when they require proof of its existence.<sup>51</sup>

---

<sup>45</sup> Schedule 2, clause 20 of the Marriage Bill [B43-2023] (the Marriage Bill).

<sup>46</sup> Clause 15(2) of the Marriage Bill.

<sup>47</sup> This is evinced by the plethora of case law in which parties dispute the existence of a customary marriage. For example, see *Mabuza v Mbatha* 2003 4 SA 218 (C); *Fanti v Boto* 2008 5 SA 405 (C); *Mbungela v Mkabi* 2020 1 SA 41 (SCA) and *Motsoatsoa v Roro* 2010 JDR 1392 (GSJ).

<sup>48</sup> *Mbungela v Mkabi* 2020 1 SA 41 (SCA); *Mrapukana v Master of the High Court* 2008 JOL 22875 (C) para 25. For a discussion of the requirements of a marriage see Osman and Barratt "Customary Marriages" 301-302; Himonga and Moore *Reform of Customary Marriage* 59 and the cases cited therein; Nkuna-Mavutane and Jamneck 2023 *PELJ* 1-30; Bapela and Monyamane 2021 *Obiter* 186-193; Radebe 2022 *De Jure* 77-86; Osman 2020 *Stell LR* 80-90 and Bakker 2022 *PELJ* 1-21.

<sup>49</sup> Section 4(1) of the RCMA.

<sup>50</sup> Section 4(9) of the RCMA; *Mrapukana v Master of the High Court* 2008 JOL 22875 (C) para 31.

<sup>51</sup> De Souza 2013 *Acta Juridica* 239.

The Bill provides for the registration of a customary marriage<sup>52</sup> in a manner very similar to that in the RCMA, but unlike the RCMA it does not explicitly state that the failure to register the marriage does not affect the validity of the marriage. This omission may suggest that registration is now a requirement for the conclusion of a customary marriage, but this is unlikely. Registration is not named as a requirement of marriage under Chapter 3, which sets out the requirements of marriage, and clause 13 provides for the extension of the period for the registration of a marriage<sup>53</sup> and for a third party with a sufficient and direct interest in the matter to apply to register the marriage.<sup>54</sup> This suggests that the registration of the marriage is not a requirement for a customary marriage as it may be registered at a later date or by a third party.

Accordingly, there is no point at which a state official can compel prospective spouses to select a matrimonial property system before the conclusion of the marriage. Parties may thus conclude a customary marriage without selecting their matrimonial proprietary regime, a possibility not provided for by the Bill. It raises the question: what are the consequences of parties failing to select a matrimonial proprietary regime?

Despite the peremptory language used in the clause, selecting a matrimonial property system does not appear to be a requirement for the conclusion of a marriage. Here the Supreme Court of Appeal's approach to section 7(6) of the RCMA is instructive. The Supreme Court in *MN v MM* held that section 7(6) of the RCMA aims to regulate the proprietary consequences of a marriage and not to invalidate an otherwise valid marriage that complies with the requirements set out elsewhere in the RCMA.<sup>55</sup> Similarly, clause 15 of the Marriage Bill (which sets out the proprietary consequences of marriage) is not linked to clauses 5 and 6, which set out the requirements for monogamous and polygamous marriages respectively, and should not be used to invalidate a marriage that complies with the requirements set out in the Bill.

It is more likely that in the common scenario of parties failing to select a matrimonial proprietary regime, the courts will extend the common law default matrimonial proprietary system of in community of property to customary marriages. But this lacunae in the Bill and ambiguity in consequences should be corrected before the Bill is enacted.

---

<sup>52</sup> Clause 13 of the Marriage Bill.

<sup>53</sup> Clause 13(5) of the Marriage Bill.

<sup>54</sup> Clause 13(7) of the Marriage Bill.

<sup>55</sup> *MN v MM* 2012 4 SA 527 (SCA) paras 22-23.

### 3.2 *New polygamous marriages*

With respect to new polygamous marriages, clause 6 of the Bill provides:

6. Requirements for polygamous marriage

- (2) A husband in a marriage who wishes to enter into a further marriage after the commencement of the Act must -
- (a) obtain written consent from his wife or, in the case where there is more than one wife, his wives, as the case may be: Provided that, in the case of a royal family, the consent must be in accordance with the customs and traditions of such family; and
  - (b) make an application to the court to approve a written contract which will regulate the future matrimonial property system of his marriages.

The section then duplicates the provisions of the RCMA to regulate the content of the contract which regulates the proprietary consequences of polygamous marriages.<sup>56</sup> Under the RCMA the failure to conclude a contract as contemplated does not invalidate the second marriage but may affect its proprietary consequences.<sup>57</sup> The Marriage Bill constitutes a significant change as the conclusion of the contract is now a requirement for marriage, and the failure to conclude the contract will render the marriage invalid.<sup>58</sup> This is an alarming change, given that there is scant evidence of such contracts being concluded in practice.<sup>59</sup> It may result in many marriages being declared invalid because of a lack of awareness of the statutory requirements or difficulty with compliance.

### 3.3 *Old polygamous marriages*

The proprietary consequences of old polygamous customary marriage are governed by clause 15(1) of the Bill, which provides that:

The proprietary consequences of a polygamous marriage entered into before the commencement of this Act, which was not registered in terms of the Recognition of Customary Marriages Act or any other law, and where the spouses do not intend to enter into further marriages, continue to be governed

<sup>56</sup> The provisions have been discussed previously.

<sup>57</sup> *MN v MM* 2012 4 SA 527 (SCA). The Supreme Court of Appeal held in obiter that the second marriage is likely to be out of community of property. For a case discussion, see Himonga and Pope 2013 *Acta Juridica* 318-338; Kruuse and Sloth-Nielsen 2014 *PELJ* 1709-1738 and Maithufi 2013 *De Jure* 1078-1088.

<sup>58</sup> In *MM v MN* 2013 4 SA 415 (CC) the Constitutional Court held that in future the consent of the first wife would be required for a subsequent customary marriage but did not specify the form of consent. The Bill specifies that written consent is required and this form of consent may prove difficult to obtain.

<sup>59</sup> The Department of Home Affairs has not released data on the number of contracts concluded in terms of 7(6) of the RCMA. In 2010 the Department indicated that about three contracts had been registered; Women's Legal Centre *Recognition of Customary Marriages* 18.

by law applicable to such marriage or the agreement concluded between the spouses.

This provision is a significant change from that in the RCMA (as amended), which, as discussed previously, distinguishes between various forms of customary property and different rights thereto. At first glance the proposed clause appears simpler, but its interpretation is unclear. The clause provides that the marriage will be "governed by the law applicable to such marriage or the agreement concluded between the spouses." In the absence of an agreement between the parties, which is likely to be the case, what law applies to such marriages? It cannot be the current provisions of the RCMA, as the Bill repeals the RCMA in its entirety.<sup>60</sup> And surely the applicable law cannot reference customary law. As discussed previously, before the amendment, section 7(1) of the RCMA provided that old polygamous customary marriages are governed by customary law. The Constitutional Court in *Ramuhovhi* found section 7(1) of the RCMA to be unconstitutional as it accepted that customary law conferred no rights to property upon women in polygamous marriages.<sup>61</sup> It would be illogical and arguably unconstitutional if clause 15(1) purported to re-enact section 7(1) of the RCMA by invoking customary law to regulate the proprietary consequences of old polygamous marriages. The question thus remains: what law governs the proprietary consequences of old customary marriages?

Furthermore, the clause applies where the marriage was not registered in terms of the RCMA or any other law and where the spouses do not intend to enter into further marriages. Regarding the first requirement, it is unclear why the Bill has linked the regulation of the proprietary consequences of marriage to its registration. There may be an assumption that if the marriage is registered, the parties would have concluded a contract contemplated in section 7(6) of the RCMA to regulate the proprietary consequences of the marriage, which renders statutory regulation unnecessary. This assumption may be based on the Department of Home Affairs' practice of refusing to register a polygamous marriage without a contract as required in terms of section 7(6) of the RCMA.<sup>62</sup> Accordingly, the intention of the clause may be to regulate the proprietary consequences of a marriage where parties have failed to register and regulate the proprietary consequences of a marriage themselves. If this is the intention, the clause should be re-drafted to reflect this clearly. As it stands, there is a chance that inconsistent practice at the Department of Home Affairs offices may result in state officials allowing the

---

<sup>60</sup> Schedule 2 of the Marriage Bill.

<sup>61</sup> *Ramuhovhi v President of the Republic of South Africa* 2018 2 SA 1 (CC) paras 31 and 43.

<sup>62</sup> In *Molokane v Williams* (2015/12381) [2023] ZAGPJHC 1210 (24 October 2023) it was reported that the registration of a customary marriage was not allowed without a court order issued in terms of s 7(6) of the RCMA.

registration of the marriage with no contract regulating the proprietary consequences of the marriage. The marriage, which would be registered but with no accompanying contract regulating the proprietary consequences of the marriage contract, would not be covered by clause 15(1) the Bill.

The second requirement in the clause is that parties "do not intend to enter into further marriages". How this requirement may be tested and/or applied, and its usefulness or relevance is unclear. The parties' intentions may vary; while parties may not intend to conclude a further marriage initially, this may change later. Or what if the parties intend to conclude a further customary marriage but have not done so? Why should the mere intention, with no further action, affect their proprietary rights? It is unclear that the courts will look at the intention of the parties, which is hard to ascertain, rather than the actual state of affairs. The section's ambiguity results from poor drafting and it should be corrected before passing the Bill.

In conclusion, the Marriage Bill creates several lacunae in regulating the proprietary consequences of customary marriages. The failure to provide a default marriage system for monogamous customary marriages would leave many parties in an unregulated space, and the requirement of a contract regulating the proprietary consequences of a polygamous customary marriage would probably invalidate many polygamous marriages. The ambiguity in rights and the invalidation of marriages would serve only to further disenfranchise our most vulnerable citizens. These are pressing concerns that could be addressed with the provision of a default matrimonial system – as proposed by the SALRC and discussed below – and that would not require a contract to regulate the proprietary consequences of a marriage for it to be deemed valid.

#### **4 Discussion Paper 160: Review of aspects of matrimonial property law**

In June 2023 the SALRC issued a Discussion Paper on its investigation into South Africa's matrimonial property law. This was a separate and parallel investigation to that conducted by the Department of Home Affairs and its Marriage Bill set out above, and the article explores whether the proposals in the Discussion Paper address some of the deficiencies in the Marriage Bill and the current matrimonial property framework.

##### **4.1 *Monogamous marriages***

The SALRC provides two default marital property system options for monogamous marriages and life partnerships.<sup>63</sup> Regarding option one, the significant change from our current regime is the exclusion of customary

---

<sup>63</sup> SALRC *Project 100E, Discussion Paper 160* ch 2.

family property. The default regime remains an in-community property estate, provided that customary family property is excluded from the joint estate.<sup>64</sup> Where the parties conclude an antenuptial contract, the default regime is out of community of property with accrual unless explicitly excluded, and customary family property is considered an excluded asset.<sup>65</sup>

Regarding option two, which the SALRC favours, the SALRC recommends excluding customary family property but also proposes a change of the default matrimonial proprietary regime.<sup>66</sup> In what may be considered a more radical recommendation, the SALRC proposes that, as a default, all monogamous marriages are out of community of property with accrual and that customary family property is considered an excluded asset.<sup>67</sup> If there is no antenuptial contract, then the commencement value is deemed to be zero,<sup>68</sup> as is currently the position when there is no declaration as to the commencement value.<sup>69</sup>

As customary marriages are rarely registered,<sup>70</sup> let alone accompanied by an antenuptial contract, most marriages would likely be out of community of property with accrual and a commencement value of zero. The deeming of the commencement value as zero means that all qualifying assets<sup>71</sup> are captured as growth in the estate and are included in the calculation of the accrual and sharing of the estate at the end of the marriage, which promotes fairness in the sharing of the estate.<sup>72</sup>

The out-of-community default property regime brings the important change that spouses have separate estates and are no longer jointly liable for debts

---

<sup>64</sup> SALRC Project 100E, Discussion Paper 160 25.

<sup>65</sup> SALRC Project 100E, Discussion Paper 160 25-26.

<sup>66</sup> SALRC Project 100E, Discussion Paper 160 26.

<sup>67</sup> SALRC Project 100E, Discussion Paper 160 26.

<sup>68</sup> SALRC Project 100E, Discussion Paper 160 26.

<sup>69</sup> Section 6(4)(b) of the *Matrimonial Property Act* 88 of 1984 (the *Matrimonial Property Act*).

<sup>70</sup> Himonga and Moore *Reform of Customary Marriage* 59 and Budlender *et al Women, Land and Customary Law* 74. Also, see De Souza 2013 *Acta Juridica* for a discussion on the impact of non-registration.

<sup>71</sup> Certain assets such as an inheritance, legacy and donation, (s 5(1) of the *Matrimonial Property Act*) and damages for non-patrimonial loss (s 4(1)(b)(i) of the *Matrimonial Property Act*) are excluded in the calculation of accrual.

<sup>72</sup> This is perhaps best illustrated by an example. Assume spouse A has an estate of R100,000 and spouse B has an estate of 0. At the end of the marriage, the value of spouse A's estate is R150 000, and spouse B's estate is R10 000. If the commencement value of the estate is deemed to be 0, then spouse A's estate would show an accrual of R150 000, while spouse B's estate would have an accrual of R10 000. Spouse A must share half the difference in the accrual  $(R150\ 000 - R10\ 000) / 2$ , being R 70 000 with spouse B. But if the commencement value is set at the actual value of the estates (being 100 000 and R0), then Spouse A's accrual would be R50 000 and Spouse B's R10 000, and Spouse A must share  $(R50\ 000 - R10\ 000) / 2$ , being R 20 000 with spouse B.



incurred in the marriage. This means that upon the termination of the marriage, people cannot be saddled with crippling debt incurred by their spouses during the existence of the marriage. Spouses nonetheless remain jointly and severally liable to third parties for household necessities proportional to their means, as an invariable consequence of marriage.<sup>73</sup> Household necessities such as food and clothing are items or services required to run the joint household.<sup>74</sup> Accordingly, in a scenario where a woman opens various store credit cards to buy groceries or school uniforms for the household, the spouses would remain jointly and severally liable for the costs on a pro-rata basis. The out-of-community regime does not allow spouses to shirk their responsibility for such debt.

The SALRC furthermore recommends that the courts have a general discretion to redistribute assets in divorce proceedings in marriages that are out of community without accrual with no further stipulation as to when the marriage must have been concluded.<sup>75</sup> This recommendation is consistent with recent jurisprudence<sup>76</sup> which has sought to abolish the restriction on the exercise of judicial discretion<sup>77</sup> to marriages concluded before 1 November 1984, being the date of the introduction of the accrual regime into South African matrimonial law by the *Matrimonial Property Act*.<sup>78</sup>

The SALRC has further invited comments on whether judicial discretion should be extended to all marriages regardless of the marital regime.<sup>79</sup> Indeed, as early as in 2008, in *Gumede*, the Constitutional Court stated in obiter that the court's equitable discretion to redistribute property should not be limited to marriages that are out of community of property.<sup>80</sup> The SALRC's recommendation appears to be an acknowledgment that no matrimonial proprietary regime achieves substantive equality and it is the general discretion of the courts to effect a redistribution that may be more important in pursuit of such a goal. Cognisant of the possibility that the approach may be critiqued for introducing uncertainty into the law, the SALRC addresses the criticism in a commendable head-on manner. It states that the creation of uncertainty is "more apparent than real" and has not materialised in the contract law sphere, where courts use the broad

---

<sup>73</sup> Barratt "Personal Consequences of Civil Marriage" 212.

<sup>74</sup> Barratt "Personal Consequences of Civil Marriage" 211-213.

<sup>75</sup> SALRC *Project 100E, Discussion Paper 160* 75.

<sup>76</sup> *EB (born S) v ER (born B); KG v Minister of Home Affairs* 2024 1 BCLR 16 (CC).

<sup>77</sup> As contained in s 7(3) of the *Divorce Act* 70 of 1979.

<sup>78</sup> *Matrimonial Property Act* 88 of 1984.

<sup>79</sup> SALRC *Project 100E, Discussion Paper 160* 75.

<sup>80</sup> *Gumede v President of the Republic of South Africa* 2009 3 SA 152 (CC) paras 41-44.

notion of public policy to determine the enforceability of a contract.<sup>81</sup> And the courts have for years exercised discretion in family law.<sup>82</sup>

While judicial discretion may in theory sound ideal, in practice it may be problematic. For courts to exercise their discretion, they would most likely have to hear from the parties themselves in action proceedings with witnesses, instead of resolving the matters on the papers. This may have the unintended consequence of lengthening proceedings and increasing the costs of divorce proceedings. It thus may be better to limit the exercise of judicial discretion to instances where the parties have concluded an antenuptial contract to exclude accrual and where family property is involved – a point I return to later.

Finally, it must be noted that any change to the default matrimonial proprietary regime will take a significant time before it is understood and implemented by parties.<sup>83</sup> In this regard, any statutory amendment should be unambiguous and in clear, plain language that is understandable and accessible to the public. Reform should also be accompanied by public educational programmes to ensure the dissemination of the new knowledge. In reality, parties will likely continue to govern themselves under the belief that the previous regime applies, but given that the proposal's effect would still allow parties to share in the estate's growth, it is arguable that the change is not so drastic that it would undermine people's understanding of their rights.

What is significant is that the SALRC's proposal addresses the fundamental critique of the current regulation of monogamous customary marriage: that family property is subsumed into the joint estate. The proposals exclude customary family property, which is now regarded as an excluded asset. But it nonetheless remains uncertain how family property is meant to be understood and will be treated in the legal framework. If family property is understood only as property in rural areas and held under customary tenure, this does not address the problem. Immovable property located in rural areas is currently excluded from the process of the formal administration of estates because of the lack of title deed and valuation, though the exclusion is not provided for in the statute.<sup>84</sup> The Master's Office has explained that because the property is not valued in the ordinary course of events, it cannot be included in the estate for distribution.<sup>85</sup> It is presumably excluded from the division of an estate upon divorce for similar reasons. The newly

---

<sup>81</sup> SALRC *Project 100E, Discussion Paper 160 76*.

<sup>82</sup> SALRC *Project 100E, Discussion Paper 160 76*.

<sup>83</sup> For a discussion of the limitation of statutory interventions see Himonga "Constitutional Rights of Women" 317.

<sup>84</sup> Osman *Administration of Customary Law Estates* 81.

<sup>85</sup> Osman *Administration of Customary Law Estates* 81.

inserted exclusion is significant only if implemented by courts to encompass property held under a title deed, often by the husband, but that serves the broader family interests and functions as family property. It is the definition and understanding of family property that will be important. As discussed previously, defining family property broadly in terms of customary law may not be the solution, as courts tend to rely on official and dated accounts of customary law. Here the SALRC must research how communities understand and treat family property. These understandings would not have to be codified in the statutory provisions but would provide useful guidance to courts in understanding the notion of family property today and exercising their discretion in respect of such property.

The Discussion Paper does not specify how customary family property will be regulated except that the parties should be compensated for substantial renovations to the customary family property that does not form part of the matrimonial estate.<sup>86</sup> Here it is important to understand that the factual matrix and social circumstances may differ significantly from one case to the other as in some cases women may have contributed to the maintenance and improvement of family property and in others not. A blanket rule conferring upon women rights and entitlements to the property (as is currently the case with old polygamous marriages) or denying their rights to the property would be problematic. For example, imagine a scenario where A marries B according to customary law. A has property registered in his name that is considered family property as it is used by the broader family and in which his siblings live. Three months later A and B divorce. It would be wholly unfair if B, merely on the basis of the marriage, obtained fifty per cent of the family property. The proposed out of community of property regime and the exclusion of family property from the estate precludes B from the property.

On the other hand there may be circumstances in which a woman has lived on the property for years and made substantial improvements thereto. To assert that the property is family property to deny the woman's claims thereto would be problematic especially in cases where the property may be the woman's home and other family members are considered to have negligible entitlements thereto. Court discretion here is important because of the varied circumstances in which claims around family property may arise and the impossibility of effectively legislating for every scenario.

Accordingly, the SALRC's recommendation that the court have the discretion to redistribute assets upon the dissolution of a marriage must encompass family property. The property is rightfully excluded from the marital estate, as parties should not be able to exercise individual ownership

---

<sup>86</sup> SALRC *Project 100E, Discussion Paper 160* 118.

rights over such property, but it should not be excluded from the court's discretion. While this may seem theoretically problematic as the court may be exercising discretion over property that is not part of an individual's estate, it is reconcilable given the nature of customary law property. Family property is property that is not owned by an individual and therefore must be excluded from the marital estate, as otherwise there would be a risk of subsuming such property into the marital estate and erasing the entitlements of the greater family to the property. But allowing the courts the discretion to re-distribute such property is an acknowledgment that in some cases it may be just and equitable to order the re-distribution of the property - for example, where a spouse has contributed thereto - and in other cases it may not. The discretion does not mean that the property must or will always be re-distributed; rather, the distribution should be determined taking all relevant circumstances at the time into account.

As family property is a social fact and not determined by the type of marital regime, courts must have discretion regarding the redistribution of family property upon divorce, regardless of the type of marriage. This means that the court's discretion must be regulated in a nuanced manner. Courts should not have a general discretion to re-distribute property in all marital regimes, but they must have the discretion to re-distribute family property regardless of the matrimonial proprietary regime. This is because of the myriad of circumstances in which claims to family property may arise. Discretion regarding the distribution of family property is essential for protecting interests. For example, there may well be circumstances in which a spouse who has contributed to the family property should share therein, whereas in other circumstances this may yield an unjust result.

This approach finds support in the current legislative regulation of customary law estates. The *Reform of Customary Law of Succession Act*<sup>87</sup> regulates the estates of individuals who live according to customary law and die without a will. The *Reform Act* provides that the *Intestate Succession Act*<sup>88</sup> applies to regulate the devolution of the estate, with some accommodation for customary law practices. But more importantly, section 5 of the *Reform Act* provides that in the event of a dispute in respect of the devolution of family property, among other matters, the Master has the discretion to make a just and equitable determination to resolve the dispute.<sup>89</sup> It makes sense for the courts to be able to exercise a similar discretion upon the divorce of the parties.

---

<sup>87</sup> *Reform of Customary Law of Succession and Regulation of Related Matters Act* 11 of 2009 (the *Reform Act*.)

<sup>88</sup> *Intestate Succession Act* 81 of 1987.

<sup>89</sup> Section 5(1) of the *Reform Act*.

In summary, the SALRC's proposal concerning monogamous customary marriages is conceptually sound and far better than that which the Department of Home Affairs has proposed. The proposals must be reconciled and the SALRC's should hopefully shape the reform.

#### **4.2 Polygynous marriages**

In polygynous marriages the SALRC proposes two options for regulating the proprietary consequences of the marriage where the husband failed to conclude a contract as contemplated in section 7(6) of the RCMA. Regarding option one, each wife retains "the right of use over the property in her own 'house'. The husband retains control over the family customary property if any. Personal property is retained individually by the spouses."<sup>90</sup>

In terms of option two:

[t]he husband and all his wives share property in community, excluding family property but subject to the court's discretion to deviate from equal distribution and considering the following factors: (a) duration of each marriage; (b) husband's knowledge of requirements in section 7(6) of the RCMA; (c) wives' knowledge of husbands' marriage(s) to other women; (d) spouses' financial and non-financial contributions; (e) a wife's right of use and control over house property; (f) the treatment of lobolo in respect of each marriage.<sup>91</sup>

Earlier on, the SALRC also proposes that the court considers several factors, such as knowledge of the spouses (presumably being the husband's knowledge of requirements in section 7(6) of the RCMA and the wives' knowledge of the husbands' marriage(s) to other women) and their relative contributions to the marriage, in the determination of the applicable regime<sup>92</sup> and then lists four possible default options such as wives sharing the estate where the husband has ignored the statutory provisions; husband and wives sharing the estate equally; wives sharing half the estate in proportion to the duration of their marriage; and the husband and the wives sharing the estate in proportion to the duration of their marriage without the husband receiving an equal share.<sup>93</sup> The SALRC solicits comments on the proposals without seeming to favour any.

In this regard, research on the proprietary rights of spouses in polygamous marriages is limited, we require further research to understand how individuals experience and exercise their property rights and how they wish them to be regulated. Hopefully the solicitation for input on the SALRC's Discussion Paper will yield real insights into the matter so that further proposals are anchored in living practice. However, the SALRC must also carry out independent research to ensure that customary law reform is done

---

<sup>90</sup> SALRC Project 100E, Discussion Paper 160 117-118.

<sup>91</sup> SALRC Project 100E, Discussion Paper 160 117-118.

<sup>92</sup> SALRC Project 100E, Discussion Paper 160 26-27.

<sup>93</sup> SALRC Project 100E, Discussion Paper 160 26-27.

carefully and taken seriously. We must be cautious of proposing reform without understanding the law's nuances and people's needs. Customary law is found in the practices of people<sup>94</sup> and these cannot be reformed by those sitting in armchairs far removed from those who live it. Such reform risks becoming paper law with no effect in practice.<sup>95</sup>

## 5 Conclusion

South African family law may be described "as an embarrassment of riches"<sup>96</sup> with three statutes recognising marriages<sup>97</sup> and historically a further two under consideration.<sup>98</sup> The reality, however, is that equality and the realisation of rights do not lie in the broad rhetoric regarding the importance of the recognition of pluralistic family formations but in the detail in which these family formations are regulated. This article examines the proposed reform of the propriety consequences of customary marriages to evaluate whether this detail has now been given effect. It argues that the Marriage Bill is impractical and, if it is implemented as it is, will probably have adverse consequences – such as leaving individuals married according to customary law with an unregulated matrimonial proprietary regime. It risks the distortion of rights, ambiguity and vagueness, creating great hardship for people.

In this regard the Department of Home Affairs is urged to release the report by the SALRC on a potential Single Marriage Statute and to consider carefully the recommendations made by the SALRC in its Discussion Paper on the Review of aspects of matrimonial property law. The SALRC's recommendations for reform address current socio-economic issues by proposing a change in the default matrimonial proprietary regime to one of out of community of property without accrual and excluding family property from the marital estate. These constitute significant shifts in our law that seem to take cognisance of the lived realities of people and bring customary law concepts of property more firmly into our law. Furthermore, it is hoped that the Discussion Paper will solicit meaningful input as to the regulation of polygamous marriages so that any recommendation to protect people's rights is guided by practice.

---

<sup>94</sup> For a discussion of the differences between living and official customary law see Himonga and Bosch 2000 *SALJ* 319-331; Diala 2017 *J Legal Plur* 143; Bennett "'Official' v 'Living' Customary Law" 138; Sanders 1987 *CILSA* 405; Himonga and Nhlapo *African Customary Law* 27; Bekker and Maithufi 1992 *JJS* 47 and Diala 2017 *J Legal Plur* 143-165.

<sup>95</sup> For a discussion of the consequences of the statutory regulation of customary law see Osman 2019 *PELJ* 1-24.

<sup>96</sup> Smith and Robinson 2010 *PELJ* 30-75.

<sup>97</sup> The *Marriage Act* 25 of 1961, the *Civil Union Act* 17 of 2006 and the RCMA.

<sup>98</sup> Namely the Draft Muslim Marriages Bill (2011) and the Draft Domestic Partnership Bill (2008).

## Bibliography

### Literature

Bakker 2022 *PELJ*

Bakker P "Integration of the Bride and the Courts: Is Integration as a Living Customary Law Requirement Still Required?" 2022 *PELJ* 1-21

Bapela and Monyamane 2021 *Obiter*

Bapela MP and Monyamane PL "The 'Revolving Door' of Requirements for Validity of Customary Marriages in Action – *Mbungela v Mkabi* [2019] ZASCA 134" 2021 *Obiter* 186-193

Barratt "Personal Consequences of Civil Marriage"

Barratt A "Personal Consequences of Civil Marriage" in Barratt A (ed) *Law of Persons and the Family* 3<sup>rd</sup> ed (Maskew Miller Learning Cape Town 2023) 202-218

Bennett *Customary Law*

Bennett TW *Customary Law in South Africa* (Juta Cape Town 2004)

Bennett "'Official' v 'Living' Customary Law"

Bennett T "'Official' v 'Living' Customary Law: Dilemmas of Description and Recognition" in Claassens A and Cousins B (eds) *Land, Power and Custom: Controversies Generated by South Africa's Communal Land Rights Act* (Legal Resources Centre Durban 2008) 138-153

Bekker and Maithufi 1992 *JJS*

Bekker JC and Maithufi IP "The Dichotomy between 'Official Customary Law' and 'Non-Official Customary Law'" 1992 *JJS* 47-60

Bekker and Van Niekerk 2009 *SAPL*

Bekker J and Van Niekerk G "*Gumede v President of the Republic of South Africa*: Harmonisation, or the Creation of New Marriage Laws in South Africa?: Case Note" 2009 *SAPL* 206-222

Bolt and Masha 2019 *SAJHR*

Bolt M and Masha T "Recognising the Family House: A Problem of Urban Custom in South Africa" 2019 *SAJHR* 147-168

Brits 2018 *SA Merc LJ*

Brits R "Executing a Judgment Debt against Immovable Property Occupied as a Family Home in Customary Law: *Nedbank Limited v Molebaloa*" 2018 *SA Merc LJ* 348-367

Budlender *et al Women, Land and Customary Law*

Budlender D *et al Women, Land and Customary Law* (Community Agency for Social Enquiry Johannesburg 2011)

Cousins "Characterising 'Communal' Tenure"

Cousins B "Characterising 'Communal' Tenure: Nested Systems and Flexible Boundaries" in Claassens A and Cousins B (eds) *Land, Power and Custom: Controversies Generated by South Africa's Communal Land Rights Act* (UCT Press Cape Town 2008) 109-137

Cross 1992 *SAJHR*

Cross C "An Alternate Legality: The Property Rights Question in Relation to South African Land Reform" 1992 *SAJHR* 305-331

De Souza 2013 *Acta Juridica*

De Souza M "When Non-Registration Becomes Non-Recognition: Examining the Law and Practice of Customary Marriage Registration in South Africa" 2013 *Acta Juridica* 239-272

Diala 2017 *J Legal Plur*

Diala AC "The Concept of Living Customary Law: A Critique" 2017 *J Legal Plur* 143-165

Himonga "Constitutional Rights of Women"

Himonga C "Constitutional Rights of Women under Customary Law in Southern Africa: Dominant Interventions and 'Old Pathways'" in Baines B, Barak-Erez D and Kahana T (eds) *Feminist Constitutionalism: Global Perspectives* (Cambridge University Press Cambridge 2012) 317-335

Himonga and Bosch 2000 *SALJ*

Himonga C and Bosch C "The Application of African Customary Law under the Constitution of South Africa: Problems Solved or just Beginning?" 2000 *SALJ* 306-341

Himonga and Moore *Reform of Customary Marriage*

Himonga C and Moore E *Reform of Customary Marriage, Divorce and Succession in South Africa* (Juta Cape Town 2015)

Himonga and Nhlapo *African Customary Law*

Himonga C and Nhlapo T *African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* (Oxford University Press Cape Town 2014)

Himonga and Pope 2013 *Acta Juridica*

Himonga C and Pope A "*Mayelane v Ngwenyama and Minister for Home Affairs*: A Reflection on Wider Implications" 2013 *Acta Juridica* 318-338

Johnson 2023 *Acta Juridica*

Johnson E "The Active Role of South Africa's Constitutional Court in Advancing Women's Rights and Proprietary Interests in the Customary Law of Marriage" 2023 *Acta Juridica* 46-76



Kohn 2017 *SAJHR*

Kohn L "*Ramuhovhi v President of the Republic of South Africa: A Bittersweet Victory for Women in 'Old' Polygamous Customary Marriages*" 2017 *SAJHR* 120-137

Kruise and Sloth-Nielsen 2014 *PELJ*

Kruise H and Sloth-Nielsen J "Sailing between Scylla and Charybdis: *Mayelane v Ngwenyama*" 2014 *PELJ* 1709-1738

Maithufi 2013 *De Jure*

Maithufi IP "*Modjadji Florah Mayelane v Mphephu Maria Ngwenyama* [2013] ZACC 14. The Effect of Lack of Consent of a Spouse of a Customary Marriage on the Validity of a Further or Subsequent Customary Marriage of her Husband: Recent Case Law" 2013 *De Jure* 1078-1088

Maithufi 2013 *THRHR*

Maithufi IP "The Validity of a Second or Further Customary Marriage: Call for the Amendment of the Recognition of Customary Marriages Act of 1998: *Ngwenyama v Mayelane*" 2013 *THRHR* 688-696

Mamashela 2004 *SAJHR*

Mamashela M "New Families, New Property, New Laws: The Practical Effects of the Recognition of Customary Marriages Act" 2004 *SAJHR* 616-641

Nkuna-Mavutane and Jamneck 2023 *PELJ*

Nkuna-Mavutane ME and Jamneck J "An Appraisal of the Requirements for the Validity of a Customary Marriage in South Africa, Before and After the Recognition of Customary Marriages Act 120 of 1998" 2023 *PELJ* 1-30

Osman *Administration of Customary Law Estates*

Osman F *The Administration of Customary Law Estates Post the Enactment of the Reform of Customary Law of Succession Act: A Case Study from Rural Eastern Cape, South Africa* (PhD-thesis University of Cape Town 2019)

Osman 2019 *J Legal Plur*

Osman F "The Ascertainment of Living Customary Law: An Analysis of the South African Constitutional Court's Jurisprudence" 2019 *J Legal Plur* 98-113

Osman 2019 *PELJ*

Osman F "The Consequences of the Statutory Regulation of Customary Law: An Examination of the South African Customary Law of Succession and Marriage" 2019 *PELJ* 1-24

Osman 2020 *SALJ*

Osman F "The Recognition of Customary Marriages Amendment Bill: Much Ado about Nothing?" 2020 *SALJ* 389-407

Osman 2020 *Stell LR*

Osman F "Precedent, Waiver and the Constitutional Analysis of Handing Over the Bride [Discussion of *Sengadi v Tsambo* 2018 JDR 2151 (GJ)]" 2020 *Stell LR* 80-90

Osman 2023 *De Jure*

Osman F "*Mshengu v Estate Late Mshengu* 9223/2016P – Considering the Ownership of House Property in Customary Law" 2023 *De Jure* 13-24

Osman and Barratt "Customary Marriages"

Osman F and Barratt A "Customary Marriages" in Barratt A (ed) *Law of Persons and the Family* 3<sup>rd</sup> ed (Maskew Miller Learning Cape Town 2023) 297-310

Osman and Himonga 2017 *J Legal Plur*

Osman F and Himonga C "The Constitutionality of Section 7(1) of the Recognition of Customary Marriages Act: *Ramuhovhi v President of the Republic of South Africa*" 2017 *J Legal Plur* 166-182

Pienaar "Law of Property"

Pienaar J "Law of Property" in Rautenbach C *Introduction to Legal Pluralism in South Africa* 5<sup>th</sup> ed (LexisNexis Durban 2018) 117-143

Radebe 2022 *De Jure*

Radebe KM "*Tsambo v Sengadi* (244/19)[2020] ZASCA 46 (30 April 2020); *Sengadi v Tsambo*; *In Re: Tsambo* (40344/2018)[2018] ZAGPJHC 666;[2019] 1 All SA 569 (GJ)(8 November 2018). Assessing the Insurmountable Challenge in Proving the Existence of a Customary Marriage in Terms of Section 3 (1)(b) of the Recognition of Customary Marriages Act 120 of 1998 and the Misplacing of Gender Inequality" 2022 *De Jure* 77-86

SALRC *Project 100E, Discussion Paper 160*

South African Law Reform Commission *Project 100E: Review of Aspects of Matrimonial Property Law – Discussion Paper 160* (SALRC Pretoria 2023)

SALRC *Project 144, Discussion Paper 152*

South African Law Reform Commission *Project 144: Single Marriage Statute – Discussion Paper 152* (SALRC Pretoria 2021)

SALRC *Project 144, Issue Paper 35*

South African Law Reform Commission *Project 144: Single Marriage Statute – Issue Paper 35* (SALRC Pretoria 2019)

Sanders 1987 *CILSA*

Sanders AJGM "How Customary is African Customary Law?" 1987 *CILSA* 405-410

Smith and Robinson 2010 *PELJ*

Smith BS and Robinson JA "An Embarrassment of Riches or a Profusion of Confusion? An Evaluation of the Continued Existence of the Civil Union Act of 2006 in the Light of Prospective Domestic Partnerships Legislation in South Africa" 2010 *PELJ* 30-75

Van Niekerk 2013 *SAPL*

Van Niekerk GJ "The Courts Revisit Polygyny and the Recognition of Customary Marriages Act 120 of 1998" 2013 *SAPL* 474-481

Weeks 2021 *CCR*

Weeks SM "Constitutionally Transforming South Africa by Amalgamating Customary and Common Law: Ramuhovhi, the Proprietary Consequences of Marriage and Land as Property" 2021 *CCR* 1-41

Women's Legal Centre *Recognition of Customary Marriages*

Women's Legal Centre *Recognition of Customary Marriages* (Women's Legal Centre Cape Town 2011)

### **Case law**

*EB (born S) v ER (born B); KG v Minister of Home Affairs* 2024 1 BCLR 16 (CC)

*Fanti v Boto* 2008 5 SA 405 (C)

*Gumede v President of the Republic of South Africa* 2009 3 SA 152 (CC)

*Hadebe v Rambau* (2021/26962) [2022] ZAGPJHC 89 (21 February 2022)

*Khwashaba v Ratshitanga* (27632/14) [2016] ZAGPJHC 70 (29 February 2016)

*Mabuza v Mbatha* 2003 4 SA 218 (C)

*Mbungela v Mkabi* 2020 1 SA 41 (SCA)

*MN v MM* 2012 4 SA 527 (SCA)

*MM v MN* 2013 4 SA 415 (CC)

*Molokane v Williams* (2015/12381) [2023] ZAGPJHC 1210 (24 October 2023)

*Motsoatsoa v Roro* 2010 JDR 1392 (GSJ)

*Mrapukana v Master of the High Court* 2008 JOL 22875 (C)

*Nedbank Limited v Molebaloa* (37780/2015) [2016] ZAGPPHC 863 (12 August 2016)

*Ramuhovhi v President of the Republic of South Africa* 2016 6 SA 210 (LT)

*Ramuhovhi v President of the Republic of South Africa* 2018 2 SA 1 (CC)

*Shai v Makena Family* 2013 JDR 0608 (GNP)

### **Legislation**

*Civil Union Act* 17 of 2006

*Divorce Act* 70 of 1979

*Intestate Succession Act* 81 of 1987

*Marriage Act* 25 of 1961

*Matrimonial Property Act* 88 of 1984

*Recognition of Customary Marriages Act* 120 of 1998

*Recognition of Customary Marriages Amendment Act* 1 of 2021

*Reform of Customary Law of Succession and Regulation of Related Matters Act* 11 of 2009

### **Government publications**

Draft Domestic Partnership Bill (2008)

Draft Marriage Bill (2022)

Draft Muslim Marriages Bill (2011)

Marriage Bill [B43-2023]

### **Internet sources**

DHA 2024 <https://www.dha.gov.za/index.php/about-us>

Department of Home Affairs 2024 *About Us* <https://www.dha.gov.za/index.php/about-us> accessed 17 April 2024

DoJ & CD 2024 [https://www.justice.gov.za/legislation/acts/acts\\_full.html](https://www.justice.gov.za/legislation/acts/acts_full.html)

Department of Justice and Constitutional Development 2024 *Acts/Statutes Administered by the Department* [https://www.justice.gov.za/legislation/acts/acts\\_full.html](https://www.justice.gov.za/legislation/acts/acts_full.html) accessed 17 April 2024

### **List of Abbreviations**

CCR

Constitutional Court Review

CILSA

Comparative and International Law Journal  
of Southern Africa

---

DHA	Department of Home Affairs
DoJ & CD	Department of Justice and Constitutional Development
J Legal Plur	Journal of Legal Pluralism and Unofficial Law
JJS	Journal for Juridical Science
PELJ	Potchefstroom Electronic Law Journal
RCMA	Recognition of Customary Marriages Act 120 of 1998
SA Merc LJ	South African Mercantile Law Journal
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SALRC	South African Law Reform Commission
SAPL	Southern African Public Law
Stell LR	Stellenbosch Law Review
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg