



Customary Law v Common Law Marriages: A Hybrid Approach in South Africa

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1. Introduction

The conflict between customary law and common law is a theme that permeates the history of colonialism in Africa. In the English speaking colonies customary law was, according to Allott, recognised as a result of treaties, the economic benefit of allowing traditional leaders to handle traditional disputes in stead of government courts, the idea that English law was too advanced to be understood by traditional communities and the fear of conflict.¹ The so-called “repugnancy” test was introduced.² Hooker³ states that “[r]epugnancy is a term used to indicate that customary law will not be admitted ‘if repugnant to justice, morality, or good conscience’.”

A similar approach to customary law initially was followed in the Cape. With the introduction of the Black Administration Act 38 of 1927, formal provision was made that Blacks could conclude common law⁴ marriages but customary marriages⁵ were not recognised⁶ owing to their polygamous nature.⁷ The only favourable provision of the Act in reference to customary marriages was that a court could not find that the tradition of *lobola* (bridewealth) was against

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¹ A.N. ALLOTT, *NEW ESSAYS IN AFRICAN LAW* 12-13 (London 1970).

² See M.B. HOOKER, *LEGAL PLURALISM* 129-135 (Oxford 1975); Allott, *supra* note 1, at 158-181.

³ HOOKER, *supra* note 2, at 130.

⁴ Marriages concluded in terms of predecessors to the Marriage Law Amendment Act 17 of 1921 and subsequent amendment acts as well as the Marriage Act 25 of 1961.

⁵ See para. 2 *infra*.

⁶ Section 22(6).

⁷ *Seedat's Executors v The Master (Natal)* 1917 AD 302, C.R.M. Dlamini, *The New Marriage Legislation affecting Blacks in South Africa*, JOURNAL OF SOUTH AFRICAN LAW 410 (1989); J.M.T. Labuschagne *Erkenning van die inheemse huwelik: Zinnat Insurance Co Ltd v Chawanda 1991 2 SA 825 (ZS)*, JOURNAL OF CONTEMPORARY ROMAN DUTCH LAW 844 (1991), M.W. Prinsloo, *Regspluralisme, 'n menseregte-akte en die interne aanwysingsreg*, DE JURE 357-363 (1990).

natural justice and public policy (the so-called repugnancy clause).⁸ Sometimes their existence was taken into account when disputes arose. Limited recognition was given to wives from customary marriages in actions dealing with the negligent causation of the death of the breadwinner.⁹ In some instances the courts resolved that a marriage concluded in terms of the Marriage Act 25 of 1961 could not undo a customary marriage.¹⁰

The non-recognition of customary marriages sometimes led to severe hardship in that children were not regarded as legitimate and that wives of customary marriages were not given the same status as wives from civil marriages in matters of intestate succession and maintenance.¹¹

The South African Law Reform Commission wrote several Discussion Papers and made proposals regarding the recognition of customary marriages. The Commission attempted to reconcile customary and civil law traditions in proposed legislation.¹²

With the introduction of the Interim Constitution (Constitution of the Republic of South Africa 200 of 1993) and the final Constitution of the Republic of South Africa, 1996 (hereafter Constitution) a new dispensation was introduced. Not only does section 112 of the Constitution state that customary law must be applied where applicable, subject to the Constitution, but section 15(3) states that nothing prevents legislation from recognising, *inter alia*, marriages concluded 'under any tradition, or a system of religious, personal or family law.' Section 9 of the Constitution further regulates that everyone should have the right to equal protection of the law.

The Recognition of Customary Marriages Act 120 of 1998¹³ was enacted in terms of section 15(3) of the Constitution.¹⁴ As the name of the Act indicates, the purpose of the Act is to recognise customary marriages and, by implication, polygamy. The question is, however, if the Act succeeds in this purpose and if, indeed, full recognition is given to traditional marriages or whether a new marriage regime was created?

The purpose of the paper is to compare customary law marriages before and after enactment of the Recognition Act in order to determine the Constitutional and common law influences on the Act.¹⁵

In this paper a historical overview will be given of the recognition of customary law and customary marriages and then a comparison will be made between customary marriages before and after the introduction of the Recognition Act in order to come to a conclusion.

⁸ Section 11(1) Black Administration Act 38 of 1927. See also L. Rubin, *The adaptation of customary family law in South Africa*, in AFRICAN LAW ADAPTATION AND DEVELOPMENT 198-215 (H. Kuper & L. Kuper L eds., 1965 London) 198-215.

⁹ Section 31 Black Laws Amendment Act 76 of 1963.

¹⁰ Section 22(7) Black Administration Act.

¹¹ F. Kaganas & C. Murray, *Law and women's rights in South Africa: An overview*, ACTA JURIDICA 1-38 (1991).

¹² South African Law Reform Commission 1997 <http://wwwserver.law.wits.ac.za/salc/discussn/dp74.html> (last visited 5 Jan. 2004).

¹³ Henceforth Recognition Act.

¹⁴ The Act was put into operation on 15 November 2000.

¹⁵ The paper is partially based on a LLM dissertation by M. HERBST, DIE BESTAANBAARHEID VAN GEWOONTEREGTELIKE HUWELIKE IN DIE LIG VAN DIE GRONDWET (2005 North-West University) [Compatibility of customary marriages in view of the Constitution].

2. Recognition of Customary Marriages – Historical Overview

African customary law in the modern sense of the word (i.e., with Western influence):¹⁶

denotes all those legal systems originating from African societies as part of the culture of particular tribes or groups that have been maintained, supplemented, amended and or superseded in part by:

- (a) changing community views and the demands of the changing world;
- (b) contact with societies with other legal systems;
- (c) contact with and the influence of other legal systems; and
- (d) the direct and indirect influence of foreign (non-indigenous) government structures.

Customary law is used in contrast with common law. Common law¹⁷ is not used in its traditional Anglo-American sense, but refers to South African law based on Roman Dutch Law and English law as amended by legislation.¹⁸

According to South African common law before 2002, a marriage was regarded as a voluntary institution between one man and one woman to the exclusion of anyone else¹⁹ while African customary marriages were potentially polygamous. Legislation, however, stated that a court may not find that *lobolo*²⁰ is in conflict with public policy.²¹

After the introduction of the 1994 Constitution, the South African Law Reform Commission investigated the possible recognition of customary marriages. The dilemma was whether common law or customary law should be the point of departure. A bill was proposed that eventually formed the basis for the Recognition Act.

The Commission attempted to codify customary law, taking into account the right to equality, dignity and freedom. Sections 9,²² 15(3),²³ 30²⁴ and 31²⁵ of the Constitution place an indirect obligation on government to recognise customary marriages in the same manner as common law marriages. However, the recognition of customary marriages as well as the exercise of cultural rights may not be in conflict with any other provision in the Bill of Rights.²⁶ There

¹⁶ N.J.J. OLIVIER *et al.*, INDIGENOUS LAW 186 (Durban 1996). See also A.N. ALLOTT, ESSAYS IN AFRICAN LAW 61-64 (London 1960); ALLOTT, *supra* note 1, at 145-157.

¹⁷ South African law is also referred to as civil law - but then again not in the European tradition - it is used as a synonym for common law – see note 18.

¹⁸ South African law is a mixed legal jurisdiction based on Roman Dutch law and English law. The South African private law is not codified and is regarded as customary law. Customary law in this paper, however, refers to African Customary or Indigenous law. See also ALLOTT, *supra* note 16, at 14-16; Rubin, *supra* note 8, at 196-198.

¹⁹ In 2006 a Civil Union Act 17 of 2006 was approved, recognising marriages between persons of the same sex.

²⁰ Payment of bridewealth. Also, *inter alia*, referred to as *bogadi*, *bohali*, *xuma*, *lumalo*, *thaka*, *ikhazi*, *magadi* and *emabhaka* – see also section 1 Recognition of Customary Marriages Act 120 of 1998.

²¹ Section 11(1) Black Administration Act 38 of 1927; section 54A of the Magistrates' Court Act 32 of 1944 and section 1 of the Law of Evidence Amendment Act 45 of 1988.

²² Equality clause.

²³ Freedom of religion, belief and opinion.

²⁴ Language and culture.

²⁵ Cultural, religious and linguistic communities.

²⁶ Sections 15(3)(b), 30 and 31(2).

are rules in customary law which at first glance from a western perspective may be in conflict with the Bill of Rights, for example with the right to equality, which complicated the dilemma of the Law Reform Commission even further.²⁷ The eventual Recognition Act was a compromise negotiated at workshops held countrywide.

The Constitution is the supreme law of South Africa and any law or conduct inconsistent therewith is invalid.²⁸ There is a Constitutional obligation on the courts to develop customary law in order to promote the Bill of Rights.²⁹ Before the Constitution, customary rules were only recognised if they were not in conflict with natural justice or public policy. Since 1994, the rules of natural justice and public policy were substituted by the rules contained in the Constitution.³⁰ In *Alexkor Ltd v Richtersveld Community*,³¹ the Constitutional Court confirmed that customary law is part and parcel of South African law and that it should be regarded as such.

The debate on the recognition of customary law within a human rights dispensation is based on the idea that customary law *per se* is in conflict with the Constitution, and especially of the equality clause. The supporters of this idea argue that the nature of customary law and human rights differs. Customary law is based on the idea of community and communal rights while human rights are of an individual nature. It is, however, not true that individuals adhering to a system of customary law only have rights pertaining to the group. Individual rights also are recognised although these rights must be exercised within the group. Customary law is continuously adapting to changing circumstances unique to Africa and, especially, South Africa.³²

3. Customary Law v Common Law

For many years parliament and the courts found it difficult to refer to marriages concluded in terms of customary law as “marriages” and the term “customary union” was preferred due to its polygamous nature.³³ However, in this paper the term “customary marriages” is preferred as the correct terminology referring also to pre-2000 marriages. In order to determine the nature of customary marriages, pre and post 2000 a comparison will be made pertaining to

²⁷ See also the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

²⁸ Section 2 Constitution.

²⁹ Section 39 Constitution.

³⁰ Section 211(3) of the Constitution: “The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.”

³¹ 2003 12 BCLR 1301(KH) para. 51.

³² See in this regard T.W. BENNETT, HUMAN RIGHTS AND CUSTOMARY LAW UNDER THE SOUTH AFRICAN CONSTITUTION 28 (Cape Town 1995); J.Y. de Koker, *Die bestaanbaarheid van lobolo in die nuwe Suid-Afrikaanse regsbedeling*, JOURNAL OF JURIDICAL SCIENCE 79-80 (1996); T.R. Nhlapo, *The African family and women's rights: Friends or foes?*, ACTA JURIDICA 138 (1991), J.C. Bekker, *Interaction between Constitutional reform and family law*, ACTA JURIDICA 1-17 (1991); I.P. Maithufi, *The effect of the 1996 Constitution on the customary law of succession and marriage in South Africa: Some observations*, DE JURE 285-293 (1998); C.M.A. Nicholson, *The realisation of human rights within the context of African customary marriages*, JOURNAL OF CONTEMPORARY ROMAN DUTCH LAW, 373-388 (2003) and L.P. Vorster, *South African customary law and ethnicity: Challenges for South Africa*, SOUTH AFRICAN JOURNAL OF ETHNOLOGY 119-124 (2001).

³³ *Seedat's Executors*, *supra* note 7; Dlamini, *supra* note 7, at 410; Prinsloo, *supra* note 7, at 357-363; T.W. Bennett, *The equality clause and customary law*, SOUTH AFRICAN JOURNAL OF HUMAN RIGHTS 122-127 (1994).

polygamy, requirements of a valid marriage, matrimonial property regime, dissolution of a marriage and the status of women in such marriages.

3.1 Poligamy

As has been stated before, the colonial authorities did not recognise a customary marriage due to its polygamous nature. The nature of customary marriages was not well understood and polygamy was seen as a form of slavery.³⁴ *Lobolo*³⁵ was regarded as payment for the wife.

In terms of customary law a man may marry more than one wife - a woman may not marry more than one husband.³⁶ There is no restriction on the number of wives a husband may have, except that he should be able to maintain all of his wives and that *lobolo* should be paid for each one.³⁷

Different family units are created. Each spouse in a multiple household has her own status and authority, forms a separate unit and has a form of independence.³⁸ The status and “rank” of the house depend largely on the woman’s social prestige, her relationship to the other households and the status of her children in relation to intestate succession.³⁹ A distinction is made between a single household and a complex polygamous system.⁴⁰

Section 2(3) recognises all polygamous marriages concluded before the commencement of the Recognition Act as marriages. Similarly, section 2(4) provides for the conclusion of polygamous marriages after commencement of the Act. However, these marriages must comply with the requirements of the Recognition Act. In terms of customary law the husband did not need to consult his wives when he decided to conclude another marriage. The Recognition Act protects the rights of the first wife or wives in that the husband has to apply to court to change the matrimonial property regime of the first marriage and to approve a written contract regulating the future matrimonial property regime.⁴¹

3.2 Requirements for a Valid Marriage

There were various requirements for a valid customary marriage, namely consensus between the parties, a formal ceremony to transfer the bride to the other family and the payment of *lobolo*.⁴² These requirements will be referred to briefly.

³⁴ W. du Plessis, *Poligamie, buite-egtelikheid en intestate erfreg: Dhansay v Davids 1991 4 SA 200 (K)* JOURNAL OF CONTEMPORARY ROMAN DUTCH LAW 151 (1993).

³⁵ See 3.2.3 *infra*.

³⁶ Marriages between women are sometimes recognised by customary law – see B. Oomen, *Traditional woman-to-woman marriages, and the Recognition of Customary Marriages Act*. JOURNAL OF CONTEMPORARY ROMAN DUTCH LAW 274-282 (2000).

³⁷ In Islamic law, for example, a man may not marry more than four wives - A. PEARL, A TEXTBOOK ON MUSLIM PERSONAL LAW, 2nd ed., 514 (London 1987).

³⁸ OLIVIER *et al.*, *supra*, note 16 at 57-58; T.W. BENNETT, SOURCEBOOK ON AFRICAN CUSTOMARY LAW 232-237 (Cape Town 1991) and I.P. Maithufi, *Do we have a new type of voidable marriage?*, JOURNAL OF CONTEMPORARY ROMAN DUTCH LAW 628-630 (1992).

³⁹ BENNETT, *supra* note 38, at 401-405, N.J.J. OLIVIER *et al.*, INHEEMSE REG 44-45 (Durban 1998).

⁴⁰ J.C. BEKKER, SEYMOUR’S CUSTOMARY LAW IN SOUTHERN AFRICA, 4th ed. 126 (Cape Town 1982).

126.

⁴¹ Section 7(6). See HERBST, *supra* note 15, at 95-96.

⁴² See in this regard OLIVIER *et al.*, *supra* note 1, at 20.

3.2.1 Consensus

The customary law initially was not concerned with consensus between the two marrying parties. The marriage was regarded as a union between two families rather than two individuals.⁴³ An essential requirement was that the family councils had to be in agreement as to the identity of the two parties. The family councils could take into account the preferences of the two marrying individuals. The courts, however, changed this requirement by insisting that both individuals to the marriage (at the time of the union) should agree to the marriage, resulting in subsequent legislation and courts prohibiting forced marriages. In the former Transkei and KwaZulu-Natal, women who had reach the age of majority could undertake their own marriage negotiations and the permission of the fathers or family elders were not necessary.⁴⁴

In terms of some of the customary law systems it is possible to abduct a girl to another family household in order to force the girl's family to give permission for the marriage. This is known as *ukuthwala*. More often than not, the girl agreed to the abduction, but the former Transkei and KwaZulu-Natal banned the practice as it was not always possible to ascertain if the girl indeed did agree to be abducted.⁴⁵

The Recognition Act explicitly requires permission of both individuals to the marriage.⁴⁶ The purpose is to prevent forced marriages similar to those that occurred in the former Transkei and KwaZulu-Natal. The Recognition Act does not define what should be regarded as permission but only states that permission of the individual is needed as a minimum requirement. The Recognition Act therefore amends the traditional position in that the individuals now decide on the conclusion of the marriage and not the families.⁴⁷

3.2.2 Age Requirement

Customary law does not have a specific age requirement but the Recognition Act includes an age requirement to allow the individuals to the marriage to take an informed decision with regard to the consequences of the marriage.⁴⁸ In terms of customary law puberty and initiation ceremonies are prerequisites to accept someone as an adult in the community. Puberty was regarded as the minimum requirement for marriage as the ultimate goal of a marriage was regarded as procreation.⁴⁹

⁴³ *Mabena v Letsoalo* 1998 2 SA 1068 (T).

⁴⁴ Sections 42 and 116(1)(b) of the KwaZulu-Natal Codes on Zulu Law; see also *Zimande v Sibeko* 1948 NAC (K) 21.

⁴⁵ OLIVIER, *et al.*, *supra* note 39, at 11, N. Bohler-Müller, *Cultural practises and social justice in a Constitutional dispensation: some (more) thoughts on gender equality in South Africa*, *OBITER* 142-152 (2001); HERBST, *supra* note 15, at 64. In terms of the Constitution, such action would be in conflict with sections 9, 10 and 12 of the Constitution, namely the right to equality, the right to dignity and the right to freedom and security of a person.

⁴⁶ Section 3(2)(a). See also J.C. Bekker, *Requirements for validity of customary marriages*, *SOUTH AFRICAN JOURNAL OF ETHNOLOGY* 44 (2001); I.P. Maithufi & J.C. Bekker, *The Recognition of Customary Marriages Act of 1998 and its impact on family law in South Africa* *CILSA* 185 (2002); South African Law Reform Commission, *supra* note 12.

⁴⁷ T.W.A. BENNETT, *CUSTOMARY LAW IN SOUTH AFRICA* 202 (Landsdown 2004); South African Law Reform Commission, *supra* note 12, R.B. MQEKE, *CUSTOMARY LAW AND THE NEW MILLENNIUM* 87 (Alice 2003).

⁴⁸ OLIVIER *et al.*, *supra* note 39, at 6.

⁴⁹ See also Labuschagne, *supra* note 7, at 545-549, De Koker, *supra* note 32, at 82-83.

The Recognition Act provides that both parties should be at least 18 years of age.⁵⁰ The age requirement is based on the requirement stated in the *African Charter on Human and Peoples' Rights* of 1981.⁵¹ If a person under the age of 18 wants to conclude a marriage, he or she needs permission from the Minister of Internal Affairs as well as his or her parents. In this regard the requirements of the 1961 Marriage Act was incorporated into the Recognition Act.⁵²

3.2.3 *Lobolo*

Lobolo is defined in the Recognition Act as “property in cash or kind ... which a prospective husband or head of his family undertakes to give to the head of a prospective wife’s family in consideration of a customary marriage.”⁵³ *Lobolo* could consist of cattle, other animals or any other property as agreed to by the parties. In modern times cash is the preferred *lobolo*.⁵⁴ The validity of a customary marriage is based on the agreement to pay *lobolo*. It is not necessary to pay *lobolo* prior to a marriage but it may be paid during the existence of a marriage.⁵⁵ Communities have different practices pertaining to the payment and nature of *lobolo* which should be taken into account in disputes pertaining to customary marriages. In 1995 in *Thibela v Minister van Wet en Orde*⁵⁶ the court again confirmed again that *lobolo* is not against the rules of natural justice or public policy.⁵⁷

⁵⁰ Section 3(1)(a)(i).

⁵¹ Article 6 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, of 13 September 2000 (entered into force 25 November 2005).

⁵² South African Law Commission, *supra* note 12. The South African Law Reform Commission attempts to give effect to section 28(2) of the Constitution that states that the best interest of the child should be the ultimate goal to be achieved - *see* also section 5 of the Recognition of Customary Marriages Act 120 of 1998. In terms of the Guardianship Act 192 of 1993 children under the age of 21 years must obtain their parents’ permission to marry. According to section 24 of the Marriages Act 25 of 1961 this permission should be in writing. Section 26(1) of the Act determines that a boy under the age of 18 and a girl under the age of 15 should obtain permission from the Minister of Internal Affairs. *See* also Bennett, *supra* note 47, at 206-207.

⁵³ Section 1.

⁵⁴ *See* also A. SACHS & G.H. WELCH, *LIBERATING THE LAW* 86-110 (London 1990) on *lobolo* in Mozambique. The Mozambican government did not interfere with *lobolo* and the authors state the following at 98: “It is precisely in a situation of major social and cultural transformation that the usefulness and limitations of the law as an instrument of social control and social change become most evident. In the case of *lobolo* the strategy of the law was neither to recognize nor to penalize, but rather deliberately to ignore the institution. The State denounced but did not suppress it ... The courts said in effect that *lobolo* was a social transaction that might have meaning for the parties involved and even for the community to which they belong, but that it had no legal significance as far as state institutions were concerned ... they could never use it as the basis for founding a legal claim.” Communities continued to deal with *lobolo* issues outside the courts.

⁵⁵ The courts regarded the full payment of *lobolo* as a requirement for a valid customary union –creating injustice in some instances - *see Mtembu v Letsela* 1998 2 SA 675 (T); *see* also A. van der Linde, *Inheemse reg: Intestate erfreg. Mtembu v Letsela* 1998 2 SA 675 (T), DE JURE 380-384 (1998) and F. van Heerden *Die intestate erfopvolgingsreg van ‘n swart vrou in ‘n gebruklike huwelik - Mtembu v Letsela* 1997 2 SA 936 (T), JOURNAL OF CONTEMPORARY ROMAN DUTCH LAW 522-532 (1998). The Constitutional Court specifically stated in *Bhe v Magistrate, Khayelitsha*, *supra* note 31, at para. [5] that it is not a requirement that the *lobolo* should be paid in full before a marriage is concluded. An agreement to pay *lobolo* is sufficient.

⁵⁶ 1995 3 SA 147 (T).

⁵⁷ 149F-J; 150H. The claimant instituted a claim for damages and loss of maintenance based on the unlawful causation of the death of the breadwinner. The deceased paid *lobolo* for the claimant and her illegitimate son. *See* also E. Knoetse, *Inheritance in terms of a putative marriage: A Transkeian case visited*, OBITER 146-153 (1998).

Although the Recognition Act includes a definition of *lobolo* it does not state that it is a requirement for a valid marriage.⁵⁸ Section 3(1)(b) only states that marriages must be “negotiated and entered into or celebrated in accordance to customary law.” The South African Law Reform Commission proposed that the parties should decide if they wish to negotiate and insist on the payment of *lobolo* and that it should not be a formal requirement for customary marriages.⁵⁹ *Lobolo* is not a requirement for any other recognised marriage in South Africa.

3.2.4 Transfer of the Bride

A customary marriage was only valid once the bride was formally transferred to the family of the prospective husband. She is then formally regarded as part of the husband’s family. The release of the bride from her own family relationship to incorporation into her husband’s family is celebrated with extensive public rituals and ceremonies. The courts initially had difficulty in determining if the ceremony should be regarded as a requirement of a customary marriage, but gradually it was accepted as such.⁶⁰

The Recognition Act does not regulate the transfer of the bride but it could be regarded as a custom referred to in section 3(6) of the Act. If a specific custom is in conflict with the Constitution, the courts would most probably deal with it on an *ad hoc* basis as was the case in *Mabuza v Mbata*.⁶¹ In this case the question was if the *ukumekeza* custom was a requirement for a valid customary marriage. In terms of this custom a woman is expected to cry when formally transferred to the family of the husband. She has to appear semi-naked in front of her prospective family - if she does not cry she could be beaten until she does.⁶² Hlophe J found that the custom is not necessarily a prerequisite for a Swazi marriage and that dispensation thereof cannot be regarded as a fatal flaw in the marriage ceremony. He also stated that marriage practices evolve as customary law does and that he should consider whether practices are in conflict with the Constitution or not, for example in this case the right to human dignity.⁶³ He must then develop customary law to ensure that it is not in conflict with the Constitution.

Marriage ceremonies are not described in the Marriage Act 25 of 1961, except the formal questions that a marriage officer should ask with regard to consensus of the parties.⁶⁴

⁵⁸ In Tanzania it was regarded that the declaration that *lobolo* was not a requirement for a valid customary marriage, undermined the practice. It was, however, also established in various research projects that it was virtually impossible to abolish the practice of *lobolo* - see in this regard B.A. Rwezaura, *The integration of marriage laws in Africa with special reference to Tanzania*, in LAW, SOCIETY AND NATIONAL IDENTITY IN AFRICA 141-142 (J.M. Abun-Nasr, U. Spellenberg & U. Wanitzek eds., Hamburg 1990).

⁵⁹ South African Law Reform Commission, *supra*, note 12; see also De Koker, *supra* note 32, at 80-81, Maithufi & Bekker, *supra* note 46, at 186-187; J.Y. de Koker, *Proving the existence of an African customary marriage*, JOURNAL OF SOUTH AFRICAN LAW 843 (2001). See also BENNETT, *supra* note 47, at 234-236 and L.L. Mofokeng *The lobolo agreement as the ‘silent’ prerequisite for the validity of a customary marriage in terms of the Recognition of Customary Marriages Act*, JOURNAL OF CONTEMPORARY ROMAN DUTCH LAW 277-288 (2005).

⁶⁰ N.J.J. OLIVIER, W.H. OLIVIER & N.J.J. OLIVIER, PRIVAATREG VAN DIE BANTOETAALSPREKENDES 52-53 (Durban 1989); BENNETT, *supra* note 38, at 213.

⁶¹ 2003 4 SA 218 (KH).

⁶² Para. [22].

⁶³ The constitutionality of the practice was, however, not in dispute but the question whether the parties were married or not and whether a divorce order could be granted - see 226C-E.

⁶⁴ Sections 29-30.

3.2.5 Absence of a Common Law Marriage

Prior to 1988 a man could enter into a common law marriage with someone other than his customary wife during subsistence of a customary marriage. The customary marriage would have been regarded as dissolved and only the common law marriage would receive recognition.⁶⁵ Section 1 of the Marriage and Matrimonial Property Law Amendment Act 3 of 1988 amended this position by stating that a spouse should first dissolve his or her customary marriage before entering into a common law marriage. There was no obligation on the husband to pay maintenance to his customary wives.

Section 3(2) of the Recognition Act explicitly states that none of the parties to a customary marriage will be allowed to conclude a marriage in terms of the 1961 Marriage Act. Section 10(1), however, provides that two parties in a monogamous customary marriage may conclude a common law marriage but not vice versa. It is clear that the intention of section 10 is to further monogamous marriages rather than polygamous marriages. There is no sanction involved if parties do not adhere to sections 3(2) or 10(1) of the Act and it is uncertain if the subsequent marriage will be voidable or void.⁶⁶

The Recognition Act is not retrospective in nature and therefore all marriages concluded before 1 November 2000 are regulated in terms of customary law.⁶⁷ Any practice of such a customary marriage that any of the parties might regard as being in conflict with the Constitution will have to be dealt with on an *ad hoc* basis.

3.2.6 Registration

Before commencement of the Recognition Act it was not necessary to register customary marriages except in KwaZulu-Natal.⁶⁸ Parties could apply to register marriages in the former Transkei but it had no effect on the validity of the marriage.⁶⁹

The South African Law Reform Commission was of the opinion that registration would be necessary to provide proof of the marriage to third parties as well as to determine the matrimonial property system.⁷⁰ Section 4 of the Recognition Act places an obligation on parties to register their marriages but omission to do so has no effect on the validity of the marriage.⁷¹

⁶⁵ BENNETT, *supra* note 38, at 239-241. It was uncertain what the influence of section 22 of the Black Administration Act 38 of 1927 would be on common law marriages. In *Ndhlovu v Ndhlovu* 1937 NAC (N&T) 80 the court found that a subsequent marriage would be invalid while the court in *Malaza v Mndaweni* 1975 BAC (C) 45 found that the common law marriage would be voidable. See also OLIVIER, OLIVIER & OLIVIER, *supra* note 60, at 227. The customary wife and children were protected in terms of section 22(7) of the Black Administration Act 38 of 1927 in relation to inheritance.

⁶⁶ L.N. van Schalkwyk, *Kommentaar op die Wet op Erkenning van Gebruiklike Huwelike 120 van 1998*, JOURNAL OF CONTEMPORARY ROMAN DUTCH LAW 480-481 (2000).

⁶⁷ BENNETT, *supra* note 38, at 239.

⁶⁸ Sections 44-50 of the KwaZulu-Natal Codes on Zulu Law.

⁶⁹ Bekker, *supra* note 46, at 43; A. West *Proprietary consequences of marriages in customary law and the contractual capacity of spouses so married*, DE REBUS, 47 (Oct. 2002); BENNETT, *supra* note 38, at 218.

⁷⁰ South African Law Reform Commission, *supra* note 12.

⁷¹ Section 4(a).

3.2.7 Prohibited Degrees of Relationship

Each community had their own rules pertaining to the prohibited degrees of relationship. One such rule was, for example, that people should not marry within the same tribe, but since tribes are no longer small entities the chance of blood relations marrying one another is no longer perceived to be a problem. Other rules similar to common law developed.⁷² Incest, however, could be reversed with a cleansing ceremony.⁷³

The Recognition Act states that with regard to prohibited degrees of relationship the customary rules apply.⁷⁴

3.3 Matrimonial Property System

In terms of customary law, a single household is an undivided economic unit under control of the head of the family if a man is married to one wife. In the case of a polygamous marriage, a distinction is made between family property controlled by the family head and house property controlled by the members of a specific household.⁷⁵

According to the KwaZulu-Natal Codes of Zulu Law, house property belongs to the specific house but is still under the control of the family head. The house property must, however, be utilised for the benefit of the members of the specific household. The family head must maintain the daily needs of his wife (wives) and children. Family property includes all the property in the family excluding house property and personal property. Personal property includes, for example, clothes and other smaller items of personal nature or gifts that were received. Women had control over their personal property only.⁷⁶

Section 7(1) of the Recognition Act provides that customary law regulates the matrimonial property regime of marriages concluded before commencement of the Act. The matrimonial property regime of marriages concluded after 1 November 2000 is regulated by section 7(2) of the Recognition Act. The Recognition Act abolishes the customary law matrimonial property system by determining that customary marriages are marriages concluded in community of property and of profit and loss between the spouses, except if a pre-nuptial contract is concluded to regulate otherwise. The matrimonial property regime must be regulated anew if a man wants to marry another wife. A court application must be done in this regard. In effect, aspects of the Marriage Act 25 of 1961 and the Matrimonial Property Act 88 of 1984 substitutes the customary matrimonial property regime.⁷⁷ Spouses may decide to change their matrimonial property regimes and women may apply for maintenance in the case of dissolution of the marriage.⁷⁸

⁷² BEKKER, *supra* note 40, at 123-124; I. SCHAPER, A HANDBOOK OF TSWANA LAW AND CUSTOM 127 (Hamburg 1994), J.C. BEKKER, MARRIAGE, MONEY, PROPERTY AND THE LAW, 6 (Durban 1983).

⁷³ BENNETT, *supra* note 38, at 207.

⁷⁴ Section 3(6); Bekker, *supra* note 46, at 87.

⁷⁵ OLIVIER, *et al.*, *supra* note 39, at 57-58.

⁷⁶ See BENNETT, *supra* note 38, at 232-237 and Maithufi, *supra* note 38, at 628-630

⁷⁷ BENNETT, *supra* note 47, at 261-262; Maithufi & Bekker, *supra* note 46, at 187-190.

⁷⁸ Section 7(4); see also Van Schalkwyk, *supra* note 66, at 489-490.

3.4 Dissolution of the Marriage

Initially a customary marriage was only dissolved at the death of the husband. The marriage could, however, continue if the woman was transferred to one of the brothers of the deceased to sire a heir. If a woman returned to her father's household owing to ill-treatment by her husband or any other valid reason, a husband may *phutuma* (fetch) his wife by paying a fine to his wife's father. If she is not "phuthuma" within a reasonable time, it could have been accepted that the husband did not want to continue with the marriage. These rules developed into rules that constitute divorce. If the wife refuses to return to her husband, he could reclaim some of the *lobolo* paid. If the husband wants to get rid of the wife, he could, if he has reason to do so, send her back to her father. If the divorce was initiated by the wife, the father had to repay some of the *lobolo*. Once the *lobolo* is repaid, the marriage was regarded as dissolved.⁷⁹

Numerous grounds for the dissolution of customary marriages developed through the ages. However, men may rely on more reasons for divorce than the wife. If a wife leaves her husband, she may only leave with her personal property and is not allowed to take any portion of the family property even if she contributed thereto. Her only obligation is to raise her children at her father's homestead.⁸⁰ The marriage was informally dissolved.

The grounds for divorce in terms of customary law relates to the idea of irretrievable breakdown of the marriage.⁸¹ Section 8 of the Recognition Act therefore refers to irretrievable breakdown of the marriage as the main ground for divorce. Parties also may rely on other grounds set out in the Marriages Act 25 of 1961, for example insanity and presumption of death. The marriage can only be dissolved by court order. It excludes the role of the father of the woman who may still order her back to her husband's homestead. The courts decide when there is irretrievable breakdown of the marriage and also what would be just and equitable in each instance.⁸²

A husband may not claim *lobolo* if the dissolution of the marriage was due to his fault only. If the wife's actions led to divorce, her father has to repay the *lobolo* but may deduct some money or keep some of the cattle as legitimate deductions.⁸³

The Recognition Act does not regulate the repayment of *lobolo*, nor does it place any obligation to do so and the customary rules most probably will apply.

3.5 Status

Women married in accordance with customary law (outside KwaZulu-Natal) were regarded as perpetual minors before 2000. Section 11(3) of the Black Administration Act 38 of 1927 and section 38 of the Transkei Marriage Act 21 of 1978 entrenched this position. It was perceived to give recognition to the customary law position of women.⁸⁴ Section 11A was introduced in

⁷⁹ OLIVIER, *et al.*, *supra* note 39, at 67-77.

⁸⁰ Maithufi & Bekker, *supra* note 46, at 261.

⁸¹ BENNETT, *supra* note 38, at 246-249; Maithufi & Bekker, *supra* note 46, at 262-264.

⁸² Maithufi & Bekker, *supra* note 46, at 261-262

⁸³ Maithufi & Bekker, *supra* note 46, at 261; SCHAPER, *supra* note 72, at 62.

⁸⁴ It is disputed if this was indeed the customary position of women - *see* in this regard D. Balatseng, *Equality and women under customary law*, 36(335) WOORD EN DAAD/WORD AND ACTION 9-11 (36(355) 1996), C.R.M. Dlamini, *The role of customary law in meeting social needs*, ACTA JURIDICA 71-85 (1991).

the 1980s to allow these women to at least obtain immovable property either in ownership or leasehold. The age of majority in KwaZulu-Natal was 21 years for men and women⁸⁵

Section 6 of the Recognition Act determines that a woman has full status and capacity in addition to any other rights she may have in terms of customary law. It is stated explicitly that she has the right to conclude contracts, to litigate and to acquire assets and to dispose of them. Equal status infers that the man is no longer the sole head of the family and decisions should be taken jointly. The age of majority is established in terms of the Age of Majority Act 57 of 1972.⁸⁶ Section 6 confers the rights and powers of women in terms of customary law upon her and therefore the ranking of women in terms of customary marriages still may prevail.⁸⁷ The unequal position pertaining to customary wives that was created by legislation therefore is abolished by the Recognition Act. Mothokoa,⁸⁸ however, argues that equality is still not a reality for women in the rural areas and that despite the Recognition Act their lives continue in a traditional setting.

4. Conclusion

Customary marriages are formally recognised by the Recognition of Customary Marriages Act. The question was whether the traditional customary marriage was recognised or if a different form of marriage emerged.

The Constitution had a huge influence on the development of both the common law and customary law of South Africa. In the decision to draft legislation recognising customary marriages, the South African Law Reform Commission had to take the provisions of the Constitution into account. Equality issues had to be addressed.

If one reflects again on the history of the recognition of customary law, customary law was recognised because it suited the colonial authorities to do so. The recognition was, however, made subject to the so-called repugnancy clause that was later refined to public policy and natural justice. Customary marriages were not recognised as such marriages were regarded to be in conflict with public policy due to its polygamous nature. It became, however, clear that the marriages or union as it was called existed and had to be regulated in some way or another. It was then stated that courts may not find that *lobolo* is against public policy. The courts and parliament did give indirect recognition to customary unions when disputes had to be dealt with - also in relation to succession. But this recognition or regulation was *ad hoc* and not done in a consistent manner.

⁸⁵ L.P. Vorster, N. Dlamini-Ndwandwe & M.J. Molapo, *Consequences of the dissolution of customary marriages*, *SOUTH AFRICAN JOURNAL OF ETHNOLOGY* 63-67 (2001).

⁸⁶ Section 9. Section 13 repeals the provisions dealing marital power in the Transkei Marriage Act 21 of 1978 and the KwaZulu-Natal Codes of Zulu Law.

⁸⁷ Bekker, *supra*, note 46 at 48-50.

⁸⁸ M. Mothokoa *New families, new property, new laws: the practical effects of the Recognition of Customary Marriages Act* *SOUTH AFRICAN JOURNAL OF HUMAN RIGHTS* 616-641 (2004); A. Hellum "Human rights and Gender Relations in Postcolonial Africa: Options and limits for the subjects of legal pluralism" eli.warwick.ac.uk/global/issue/2001-1/hellum.html (last visited 12 Jun. 2007).

The Constitution of the Republic of South Africa recognises customary law but again only if the rules are not in conflict with the Constitution. Although far removed from colonial rule, a new limitation, namely the Bill of Rights, was placed on the recognition of customary laws by the new rulers.

In the pre-1994 dispensation judges and magistrates, consisting mostly of white males, from their perspective gave content to the public policy. Their own ideas and upbringing influence their decisions and in most instances the common law was seen to be superior to the customary law.⁸⁹ Since 1994 judges have to give content to the Bill of Rights - a new dispensation with a judiciary reflecting the diversity of South Africans. This time, however, the measuring instrument is more concrete and the playing field levelled. The Bill of Rights dictate the public policy and judgements. In a more sophisticated way, again, another legal system dictates the contents and interpretation of African customary law as Hlophe J states:⁹⁰

[I]f one accepts that African Customary Law is recognised in terms of the Constitution and relevant legislation to give effect to the Constitution, such as the Recognition of Customary Marriages Act No 120 of 1998 referred to above, there is no reason, in my view, why the courts should be slow at developing African Customary Law. Unfortunately one still finds dicta referring to the notorious repugnancy clause as though one were still dealing with a pre-1994 situation. Such dicta, in my view, are unfortunate. The proper approach is to accept that the Constitution is the supreme law of the Republic. Thus any custom which is inconsistent with the Constitution cannot withstand constitutional scrutiny. In line with this approach, my view is that it is not necessary at all to say African Customary Law should not be opposed to the principles of public policy or natural justice. To say that is fundamentally flawed as it reduces African Law (which is practised by the vast majority in this country) to foreign law – in Africa!

Customary law is not static and develops continuously.⁹¹ The development of customary law cannot be forced into a specific format that will fit into a individualistic human rights dispensation but should be reconciled with the Bill of Rights, taking into account the communal nature of customary law.⁹² The Recognition Act only succeeds marginally in this regard.

Customary marriages are recognised in terms of the Recognition Act. For the first time official recognition is given to polygamous marriages, but only to a limited extent. The marriage regime is amended to align it with the Bill of Rights and the existing common law marriage system. The Recognition Act's requirements is a mixture of statutory rules as well

⁸⁹ See also D.V. Cowen *African legal studies - a survey of the field and the role of the United States in AFRICAN LAW NEW LAW FOR NEW NATIONS* 19 (H.W. Baade & R.P. Everett, (eds.), New York 1963).

⁹⁰ *Mabuza v Mbata*, *supra*, note 61 at para. [30].

⁹¹ L. du Plessis, *Legal and Constitutional means designed to facilitate the integration of diverse cultures in South Africa: a provisional assessment*, *STELLENBOSCH LAW REVIEW* 376 (2002); see also SACHS & WELCH, *supra*, note 54 at 130 who states that "Traditional law in Mozambique, as traditional law in all African countries, has a dynamic and vitality of its own. It is not composed of rigid, compartmentalized and impersonal norms. Reflecting its character as part of the symbolic life of the people, of the community life of social interaction and mutual aid, of respect for the ancestors and for the elderly, traditional law is, in addition to being law, part of our culture."

⁹² Maithufi & Bekker, *supra*, note 46 at 261. The Constitution is based on negotiation. The Constitution does not reflect western values only as people from all cultures participated in the discussions.

as customary law.⁹³ The only elements of traditional marriages that remained are the reference to the conclusion and negotiation of the marriage, the reference to *lobolo*⁹⁴ and the role of the traditional leader in mediation of marriage disputes.⁹⁵ The matrimonial property regime is similar to that of the Matrimonial Property Law Act and the rules of dissolution are similar to those contained in the Divorce Act 70 of 1979. One traditional element that is still included is that the traditional leader may still act as mediator in marital disputes and dissolution.⁹⁶

Customary marriages no longer can be regarded as traditional customary marriages but what was developed is a hybrid approach between common law and customary law, making the South African system perhaps more complex as a mixed legal jurisdiction - now not only a mixture of Roman Dutch and English law, but a mixed legal jurisdiction of Roman Dutch, English and African Customary Law within a Constitutional dispensation.⁹⁷

From a western and constitutional perspective the improvement of women's position is lauded, but traditionalists still argue that the Recognition Act interferes with traditional practices and customs. Traditionalists are of the opinion that individuals should choose whether they would like to submit themselves to customary law or not and that parliament should not interfere in how a customary marriage should be regulated.⁹⁸ Bekker⁹⁹ states in this regard that

society will (not) change by legal decree. The living law will probably for a long time to come differ from the law on paper. The so-called common law may in fact distort customary law and practice to the extent that the enacted version becomes meaningless in society.

In considering whether traditional communities will adhere to the Recognition Act or if they will continue traditional practices even if their marriages will not be recognised, the following remark of Allott¹⁰⁰ should be remembered:

Social change is desirable; law can be a potent tool in aiding that change. But it is a precision tool, and one which like the carpenter's chisel, is easily blunted in unskilled hands.

⁹³ Bekker, *supra*, note 46 at 50.

⁹⁴ BENNETT, *supra*, note 47 at 199, Bekker, *supra*, note 46 at 46.

⁹⁵ See also J.C. Bekker, *The official status of customary law – ten years later*, ANTHROPOLOGY SOUTHERN AFRICA 129-130 (2003).

⁹⁶ Section 8(5).

⁹⁷ See also W. Tetley, "Mixed jurisdictions: common law vs civil law (codified and uncoded)" www.unidroit.org/english/publications/review/articles/1999-3.htm par 5 (last visited 12 Jun. 2007) who is of the same opinion. See www.droitcivil.uottawa.ca/word-legal-systems/eng-tableau.php (last visited 12 Jun. 2007) for an alphabetical list of the world's legal jurisdictions as well as their foundations. Mixed legal jurisdictions also are identified.

⁹⁸ Maithufi & Bekker, *supra*, note 46 at 196.

⁹⁹ *Supra*, note 95 at 130.

¹⁰⁰ As quoted by R. Mqoke 'Rainbow jurisprudence' and the institution of marriage with emphasis on the Recognition of Customary Marriage Act 120 van 1998 OBITER 52 (1999). Hellum, *supra*, note 98 argues that not all women have a similar experience of laws such as the Recognition Act. The level of education and the living conditions of a person could make a huge difference. However, empirical research is necessary to determine the long term effect (or not) of the Recognition Act.

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