



The Recognition of Customary Marriages

1. Introduction

Recently the Department of Justice and Correctional Services announced its intention to amend the Recognition of Customary Marriages Act 120 of 1998 (RCMA). This is a consequence of a Constitutional Court judgement handed down on 30th November 2017, in terms of which section 7(1) of RCMA was found to be inconsistent with the Constitution and therefore invalid, in that it discriminates unfairly against women in polygamous customary marriages entered into before the commencement of the RCMA ('pre-Act marriages'), on the basis of gender, race and ethnic or social origin. Parliament has been given 24 months to correct the defect giving rise to this constitutional invalidity.¹

2. Background

According to Statistics SA's 2013 figures, the highest number of customary marriages were registered in KwaZulu-Natal [2 391 (68.4%)], followed by Limpopo [312 (8,9%)] and the Eastern Cape [281 (8,0%)]. The Northern Cape had the lowest number of customary marriages.² There has been a steady decline in the prevalence of customary marriages, with a total of 3 498 being registered in 2013.³ By no means are all of these marriages polygamous, but a significant number are.⁴

In his article '*Critical Reflections on Polygamy in the South African Context*', Elijah Baloyi writes that, culturally and economically, polygamy is seen as addressing the following societal functions:

- a remedy for problems of infertility;
- a solution [for the husband] in the event of the menopause;
- a solution [for the husband] during pregnancy and nursing;

- a remedy against the social exclusion of unmarried women;
- a source of labour;
- providing greater opportunity to fulfil the desire for a male heir;
- a solution [for the husband] during a wife's ill-health, absence and the phenomenon of working mothers;
- a way of taking care of widows;
- a remedy in cases of sexual incompatibility.⁵

Some of these motivations for the continued practice of polygamy have been highlighted in Kenya, where the practice is common and became legal in 2014. "Proponents of polygamy in Kenya claim the practice helps alleviate the problem of single parenting, while others say that it helps address the disparity between women who want to marry and the lack of men who want to settle down and commit."⁶ Polygamy is recognised under civil law in almost 50 countries, while customary law recognises it in 12 other countries, including eight countries in Southern Africa.⁷

3. The Act

In South Africa, the definition of a customary marriage is one that is "negotiated, celebrated or concluded according to any of the systems of indigenous African customary law which exist in South Africa."⁸ This does not include marriages concluded in accordance with Hindu, Muslim or other religious rites. While South Africa prohibits bigamy in civil marriages, it allows multiple customary marriages in terms of the RCMA. The SA Law Reform Commission comments that: "A situation that is peculiar to South Africa is the legal recognition of polygamous customary marriages for some members of the population, while for the rest a bigamous marriage is null and void."⁹

Polygamy is a culturally determined, socially acceptable and legally recognised form of

permanent marriage, in which a man has more than one wife at a time.¹⁰ However, in terms of section 7 (1) of the RCMA, women who entered into customary marriages prior to the enactment of the RMCA do not have marital property rights.¹¹ This effectively limits their claim to economic rights while their children's right of inheritance is by no means assured. It is this aspect of the Act that the Constitutional Court has deemed unconstitutional.

The focus of the RCMA is on the equal status and capacity of the spouses. To this end, section 6 of the Act provides that:

“A wife in a customary marriage has, on the basis of equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity, including the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that she might have at customary law.”

In addition, the parties to the marriage must be over the age of 18, which is the age of majority; the consent of both the bride and bridegroom is required; and the marriage must be registered with the Department of Home Affairs.

A husband who is already in a customary marriage and who seeks to enter into an additional customary marriage is required to obtain court approval of a contract governing the “matrimonial property systems of his marriages”¹²; and his existing wife or wives must be joined as parties to such proceedings.

4. International Instruments of Human Rights

The *International Covenant on Civil and Political Rights (ICCPR)* states in Article 3 that, “the States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant”.¹³

Article 5(a) of the *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)* asserts that parties to the Convention must “modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men

and women”.¹⁴ Furthermore, it states that polygamous marriage contravenes a woman's right to equality.¹⁵ In its general recommendations on equality in marriage and family life, it states that “polygamous marriage contravenes a woman's right to equality with men, and can have such serious emotional and financial consequences for her and her dependents that such marriages ought to be discouraged and prohibited.”¹⁶

A ‘Genderlinks’ Discussion Paper highlights the Southern African Development Community's *Protocol on Gender and Development*, Article 4, which encourages endeavours by SADC countries “to enshrine gender equality and equity in their constitutions and ensure that no provisions, laws or practices compromise either.” Furthermore, Article 21 “mandates state parties to take measures, including legislation, where appropriate, to discourage traditional norms, including social, economic, cultural and political practices which legitimise and exacerbate the persistence and tolerance of gender-based violence with a view to eliminate them.”¹⁷

A poll conducted in 2010 at the time of former President Zuma's fifth marriage reflected that 74 percent of the 2 000 South Africans surveyed felt that polygamy was a problem, with women more opposed to it than men.¹⁸

5. The Position of the Catholic Church

Scholar Alan Henriques points out that the response of the Church to polygamous marriages is from the perspectives of the emancipation of women and the need for conjugal fidelity; it also addresses the issues of double standards and ‘the mentality of perpetual bachelorhood’ prevalent within South Africa.¹⁹ The recent response of the Kenyan Bishops to the increasing incidence of polygamy in that country has been unequivocal. They issued a statement saying that polygamy “is against the will of God and we must desist from it” and that “we should uphold human dignity, and especially the dignity of the woman.”²⁰

Increasingly, the Church recognizes that there that there will be circumstances when there may be more than one component to a marriage contract: a customary marriage, which is not polygamous, a church marriage ceremony, and the civil marriage. The harmonization of these three dimensions of a marriage contract should be encouraged.

6. Conclusion

We do not know exactly how Parliament will set about implementing the decision of the Constitutional Court. It will not be a simple matter of deleting section 7(1) from the Act, because this would leave 'pre-Act' marriages without a suitable matrimonial property regime. Fortunately, the Court has already ruled that, while the parliamentary process is under way, the following regime will apply:

“(a) Wives and husbands will have joint and equal ownership and other rights to, and joint and equal rights of management and control over, marital property, and these rights shall be exercised as follows:

- (i) in respect of all house property, by the husband and the 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.

- (b) Each spouse retains exclusive rights to her or his personal property.”

It would make sense for this formulation to be adopted by Parliament and inserted into the Act. Either way, the proposed amendment to the RCMA is overdue, and will address a lacuna in our law that has compromised the dignity, equality and economic security of a hitherto marginalized group of women, providing them with much needed protection.

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¹ Ramuhovhi and Others v President of the Republic of South Africa and Others [2017] ZACC 41

² <http://www.statssa.gov.za/publications/P0307/P03072013.pdf>

³ *Ibid.*

⁴ In the context of most African customary law, polygamy refers to the practice of a man having more than one wife. Strictly speaking, this is 'polygyny', while 'polyandry' refers to a woman having more than one husband, and 'polygamy' simply describes the situation of a person with more than one spouse.

⁵ <http://uir.unisa.ac.za/handle/10500/9970?show=full>

⁶ <http://dailycaller.com/2018/05/11/catholic-church-polygamy-against-will-of-god/>

⁷ https://genderlinks.org.za/wp-content/uploads/imported/articles/attachments/16129_polygamy_policy_briefrev.pdf

⁸ <https://www.westerncape.gov.za/service/customary-marriages>

⁹ The South Africa Law Reform Commission comments in the Discussion Paper 104 on Domestic Partnerships Project 118, Domestic Partnerships, section 7.7.21. 2003.

¹⁰ http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S0256-95072013000800006

¹¹ The section reads: “The proprietary consequences of a customary marriage entered into before the commencement of this Act continue to be governed by customary law.”

¹² <http://www.endvawnow.org/en/articles/625-polygamous-marriages.html>

¹³ Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976.

¹⁴ Convention on the Elimination of All Forms of Discrimination against Women Adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979 entry into force 3 September 1981.

¹⁵ https://genderlinks.org.za/wp-content/uploads/imported/articles/attachments/16129_polygamy_policy_briefrev.pdf

¹⁶ https://genderlinks.org.za/wp-content/uploads/imported/articles/attachments/16129_polygamy_policy_briefrev.pdf

¹⁷ https://genderlinks.org.za/wp-content/uploads/imported/articles/attachments/16129_polygamy_policy_briefrev.pdf

¹⁸ <https://mg.co.za/article/2010-01-11-most-south-africans-against-polygamy-survey-shows>

¹⁹ <http://uir.unisa.ac.za/handle/10500/9970?show=full>

²⁰ <http://dailycaller.com/2018/05/11/catholic-church-polygamy-against-will-of-god/>

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