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The recognition of Customary Marriages Act: many women still left out in the cold

Summary

This paper focuses on the position of women in monogamous customary marriages concluded before the commencement of *The Recognition of Customary Marriages Act, 120 of 1998*. This Act alleviated (on appearances) the subordination and inferior status of women in customary law. Sec 6 specifically stipulates that a wife in a customary marriage has, on the basis of equality with her husband and *subject to the matrimonial system governing the marriage*, full status and capacity. According to sec 7 the proprietary consequences of marriages entered into *before* the commencement of the Act continue to be governed by customary law. However, the question arises – what is the point of sec 6 granting a wife equality with her husband and the capacity to acquire assets, but still subject to the customary law which places the marital property under the control and almost complete discretion of her husband? Many of the sections of the *Divorce Act* and the *Matrimonial Property Act* (which was introduced mainly to improve the position of women) are also only applicable to customary marriages entered into *after* the commencement of the Act. It is submitted that arguments which supported a retrospective change to proprietary regimes, should have been adopted in the legislation. Sec 7(1) of the Act should be amended to provide that a monogamous customary marriage entered into before the commencement of the Act, is a marriage in community of property and of profit and loss.

Opsomming

Hierdie artikel fokus op die posisie van vroue in monogame gebruiklike huwelike gesluit voor die inwerkingtreding van die *Wet op Erkenning van Gebruiklike Huwelike, 120 van 1998*. Hierdie Wet poog om die ondergeskikte en minderwaardige status wat vroue in die inheemse reg het, op te hef. Art 6 bepaal dat 'n vrou in 'n gebruiklike huwelik op grond van gelykheid met haar man en *onderhewig aan die huweliksgoederebedeling* wat die huwelik reël, volle status en bevoegdhede het. Volgens art 7 bly die vermoënsregtelike gevolge van 'n gebruiklike huwelik wat voor die inwerkingtreding van die Wet gesluit is, egter onderhewig aan die gewoontereg. Wat is dan die waarde van art 6, wat gelyke status met haar eggenoot en die bevoegdheid om eiendom te verkry verleen, maar dit steeds onderworpe aan die gewoontereg maak (in terme waarvan al die huweliksbaties onder die eggenoot se kontrole en diskresie val?). Baie van die artikels van die *Wet op Egskeiding* en die *Wet op Huweliksgoedere* (wat hoofsaaklik ingestel is om die posisie van die vrou te verbeter) is ook slegs van toepassing op gebruiklike huwelike wat aangegaan is *na* die inwerkingtreding van die Wet. Dit word aan die hand gedoen dat die argumente ten gunste van 'n terugwerkende wysiging van die vermoënsregtelike bestel, in wetgewing aanvaar moes gewees het. Art 7(1) moet gewysig word en bepaal dat 'n monogame gebruiklike huwelik wat gesluit is *voor* die inwerkingtreding van die Wet, 'n huwelik binne gemeenskap van goed en van wins en verlies is.

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1. Introduction and background

The Constitution of the Republic of South Africa¹ acknowledges both the South African common law and customary law (indigenous law) as primary legal systems. In accordance with this dual legal system, two types of marriages can be entered into: a civil marriage (concluded according to common law principles) or a customary marriage.²

On 15 November 2000 the Recognition of Customary Marriages Act came into effect.³ This Act afforded long overdue recognition, for all intents and purposes, of customary marriages — both monogamous and polygamous — with retrospective effect. One of the objectives of this Act was to improve the position of women “by introducing measures which bring customary law into line with the provisions of the Constitution of the Republic of South Africa, 108 of 1996, and South Africa’s international obligations”.⁴ In this regard, the right to equality and the right not to be discriminated against in section 9 of the Constitution and international human rights law, are of importance. The United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which South Africa has signed and ratified in 1995,⁵ should be mentioned.

The Constitution raised customary law to an equal footing with the common law, but it also subjects it to the same constitutional requirements.⁶ Few legal topics received as much academic attention since the dawn of the new dispensation as the position of customary law. The debate has been posited as a conflict between the right to equality, one of the cornerstones of the South African democracy, and the right to culture.⁷

According to Bennett, the Constitution has, by implicitly recognising customary law and at the same time prohibiting gender discrimination, brought about a head-on confrontation between two opposed cultures — “admittedly a confrontation that has long been gathering force”.⁸ Not surprisingly, another objective of the Recognition of Customary Marriages Act is to reconcile the preservation of culture and tradition with competing

1 Act 108/1996.

2 Marriages concluded in accordance with the religious legal systems are presently not acknowledged in South Africa.

3 Act 120/1998.

4 Vorster 1999:89.

5 Article 5(a) of the Convention states that parties are obliged “To 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 superiority of either of the sexes or on stereotyped roles for men and women”. Article 16 provides for the equal treatment of women in all spheres and aspects of family law and marriage.

6 Robinson 1995:469. “The right to culture is not a shield to defend aspects of customary law that deny the equality and dignity of women.”

7 Pieterse 2000:627.

8 Bennett 1994:123.

claims posed by the constitutional requirement to establish norms of equal treatment and non-discrimination.⁹

The Recognition of Customary Marriages Act alleviated (on appearances) the subordination and inferior status of women in customary law. The status of African women is dictated by a deeply entrenched tradition of patriarchy.¹⁰ Traditionally, women were regarded as perpetual minors, always under the guardianship of a male: her father; then her husband and after his death his heir (usually his eldest son).¹¹ Despite these rules of customary law, the Act determines that the age of the majority of any person is now determined by the Age of Majority Act.¹² To remove any doubt, section 6¹³ specifically stipulates 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.¹⁴

The proprietary consequences of a customary marriage entered into after the commencement of the Act, are that such a marriage is in community of property and profit and loss, except where the spouse (male) is a party to an existing customary marriage with another woman or if an antenuptial contract was entered into. Many of the sections of the Matrimonial Property Act¹⁵ (which was introduced mainly to improve the position of women) are applicable to these marriages.¹⁶

This article, however, focuses on the position of women in monogamous¹⁷ customary marriages concluded before the commencement of the Act. As will be seen in the discussion below, the Act did little to remedy their position. "This impacts detrimentally, particularly on older women who were further disadvantaged by apartheid restrictions on their education and freedom of movement."¹⁸

9 Vorster 1999:89.

10 Akinnusi 2000:144; Bennett 1994:123.

11 Olivier 1994:4.

12 Act 57/1972.

13 Recognition of Customary Marriages Act 120/1998.

14 See discussion in 2.1 below.

15 Act 88/1984.

16 For example, Chapter III (which regulates the joint and equal management of partners married in community of property) and section 18, 19, 20 and 25 of the Act (dealing with damages which are excluded from community and recoverable from the other spouse; liability for delicts committed by spouses; the power of the court to order the division of the joint estate and the distribution of matrimonial property upon dissolution of marriage for want of consent of parents or guardian).

17 Polygamous customary marriages are not included in this discussion. According to the South African Law Commission nearly all customary marriages are monogamous. See South African Law Commission 1998:106.

18 Bonthuys 2001:211.

2. Customary marriages entered into before 15 November 2000

2.1 Status of women and proprietary consequences

Section 6 of the Recognition of Customary Marriages Act is of primary importance:

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.

Because the wife's status is "subject to the matrimonial property system governing the marriage", sections 6 and 7(1) of the same Act go hand in hand:

The proprietary consequences of a marriage entered into before the commencement of this Act, continue to be governed by customary law.¹⁹

These marriages are neither in nor out of community of property.²⁰ Two important aspects of proprietary rights come to the fore: ownership and control.²¹

The position in customary law is that if there is only one wife, there is a single undivided economic unit under the control and almost complete discretion of the husband as head of the family.²² This means that whatever is in the household belongs to the family pool, that is property acquired in whatever manner by the individual members of the family.²³ The provisions regulating control of property in polygamous households have no bearing on the requirements of modern marriages, which are nearly all monogamous.²⁴ As stated above, this paper will therefore focus on the monogamous customary marriage.

The head of the household is required to administer the matrimonial estate for the common good of the family. The main limitation on his management is

19 Section 7(1).

20 Dhlamini 2002:46.

21 Akinnusi 2000:147.

22 Olivier 1994:49; South African Law Commission 1998:109.

23 Mqeke 1999:63. In *Mpungose v Mpungose* 1946 NAC (T&N) 37:40 the court declared "native social system regards the family as a whole and all members of the family participate in its possessions. The head of the family is virtually a trustee or director of the possessions of the family and not, as in common law, the owner."

24 South African Law Commission 1998:106. In a polygamous family the man must establish separate houses for his various wives. The proprietary "assets" in the family are divided as follows: (a) the house property belonging to a house; (b) the general family property; and (c) personal property. See Olivier 1994:49 and further.

a general duty to maintain dependants, which would in practice be enforceable only through complaints to family elders.²⁵ Thereafter he can use the property to settle his own *lobolo* ("bride wealth") debt and any damages due for wrongs committed by members of the house. Then he is free to use house property to satisfy his personal wants and needs.²⁶

Traditionally, women had a fair degree of independent decision-making powers regarding the day-to-day running of their households.²⁷ Before 15 November 2000 the woman, being a "minor", could not control property and as a result of this she was deemed to lack "proprietary capacity".²⁸ Women had proprietary capacity only in relation to specific items of a personal²⁹ or ritual nature.³⁰ These occasional rights that women enjoyed to livestock of ritual significance are, however, irrelevant in a modern economic context.³¹

It can be argued that conferment of absolute control of the matrimonial estate on the husband is not necessarily prejudicial to the wife or wives in customary marriages, but it cannot be denied that the person who is in control of the family property, also controls that family. It allows him to impose his decision-making on the rest of the members of that family.³² The husband as head of the family has no more than a moral duty to consult his wife on matters of major importance.³³ Allowing the husband to have absolute control over the matrimonial estate, therefore gives him a substantial amount of control over his wife.³⁴

What then is the value of section 6 of the Recognition of Customary Marriages Act granting a wife equality with her husband and the capacity to acquire assets, *et cetera*, while the proprietary consequences of the marriage are still governed by customary law? Mqeke is of the opinion that "the customary-law wife's improved legal status will have a meaning only in so far as it may relate to rights and duties arising out of the received common law".³⁵ In customary-law matters (in this instance the position of the wife in a marriage with the matrimonial property system governed by customary law) "it will be a formal rather than a real status". According to him, this Act is an example of a failed law because it does not come anywhere close to social reality.³⁶

25 South African Law Commission 1998:109.

26 Akinnusi 2000:147.

27 Vorster 1998:45.

28 Akinnusi 2000:147.

29 According to Olivier 1994:50 this will include clothing and other smaller items of a personal nature made by or donated to her.

30 Bennett 1994.

31 South African Law Commission 1998:106.

32 Akinnusi 2000:147.

33 South African Law Commission 1998:94.

34 Akinnusi 2000:147.

35 Mqeke 1999:61.

36 Mqeke 1999:61,62.

What is the social reality? Nkosi³⁷ gives us a glimpse:

The cultural allocation of functions in most black South African *rural* communities consigns women to menial domestic chores with little or no economic value. Thus, in most rural households the wife or wives are expected to tend to the raising of children, tilling of the soil and the gathering of wood and fetching of water for fuel and domestic use, respectively. Men on the other hand have allocated themselves the pleasurable roles of supervision, acquiring an education and working for real incomes in the western establishments.

The customary principle that acquisitions accrue to the matrimonial estate (house property) had serious implications for modern working women,³⁹ because it gave family heads an almost unmitigated control over their wives' income. This was the position until 15 November 2000. Section 6 mentions nothing about having retrospective effect. Without anything to the contrary, it must consequently be accepted that this section does not have retrospective effect.⁴⁰ The result is that these women will have ownership and control only of those assets personally acquired by them after the commencement of the Act. Granting majority status clearly gives the woman the power to hold property, but it does not give her rights (as opposed to the head of the family) with regard to the family estate acquired prior to the commencement of the Act. "In other words, the law of persons cannot cure the deficiencies in the law of property".⁴¹

Control of property is the key to social empowerment.⁴² Studies have shown that whenever women have been important producers and managers of property, their family decision-making capacity has been comparatively enhanced⁴³ — which is not the case in the marriages under discussion.

A problem arises if the family head is absent or otherwise unable to discharge his duties. According to customary law his wife has no automatic authority to deal with the marital estate. In all probability she might be subject to one of her husband's senior agnates.⁴⁴

Sections 7(4)(a) and (b)⁴⁵ provide that spouses to a customary marriage concluded before the commencement of the Act, may apply jointly to a court for leave to change the matrimonial property system applicable to their marriage or marriages. If the court is satisfied that:

37 2000:49.

38 Italics added.

39 South African Law Commission 1998:106.

40 Van Schalkwyk 2000:488.

41 South African Law Commission 1998:106.

42 South African Law Commission 1998:102.

43 Akinnusi 2000:147.

44 South African Law Commission 1998:110. She may, however, be installed as an "eye" or "keeper" of the household to attend to day-to-day disbursements in her husband's absence.

45 Recognition of Customary Marriages Act 120/1998.

- (i) there are sound reasons for the proposed change;
- (ii) sufficient written notice of the proposed change has been given to all creditors of the spouses for amounts exceeding R500 or such amount as may be determined by the Minister of Justice by notice in the *Gazette*; and
- (iii) no other person will be prejudiced by the proposed change,

the court may order that the matrimonial property system applicable to such marriage or marriages will no longer apply and authorise the parties to such marriage or marriages to enter into a written contract in terms of which the future matrimonial property system of their marriage or marriages will be regulated on conditions determined by the court.

It is submitted that few, if any, partners in customary marriages will have their matrimonial property system changed in this way. The reasons being that, firstly, parties must apply *jointly* and it will obviously be difficult for the wife to persuade her husband to let go of his sole discretion and control of the matrimonial estate in a culture that is pervaded by the principle of patriarchy. Secondly, the requirements of subsection 4(a) must be met (i.e. to convince the court that there are sound reasons for the proposed change). Thirdly, the cost factor involved in bringing the application, will be a major stumbling block. Finally, the lack of information and education makes this option inaccessible for those it was meant to help.⁴⁶

A husband in a customary marriage who wishes to conclude a further customary marriage with another woman, has to make an application to the court to approve a written contract which will regulate the future matrimonial property system of his subsequent marriages (section 7(6)).⁴⁷ It is irrelevant whether the previous customary marriage or marriages were concluded before or after the commencement of the Act.⁴⁸ When the application is considered, the court must terminate the matrimonial property system applicable to the existing marriage. A division of the matrimonial property in the case of a marriage in community of property, or which is subject to the accrual system, must also be affected. Marriages of which the proprietary consequences are governed by customary law are not mentioned in subsection (7)(a)(i), but subsections (7)(a)(ii) and (iii) and (7)(b)⁴⁹ will be applicable to these marriages: The court must ensure an equitable distribution of property and take into account all the relevant circumstances of the family groups which would be affected if the application is granted. The court may allow further amendments to the contract, grant the order subject to any condition it may deem just, or refuse the application if in its opinion the interests of any of the parties would not be safeguarded by the proposed contract. All persons having a sufficient interest in the matter, in particular the applicant's existing spouse or spouses and his prospective spouse, must be joined in the proceedings.

⁴⁶ See also Bonthuys 2001:211.

⁴⁷ Recognition of Customary Marriages Act 120/1998.

⁴⁸ See also Van Schalkwyk 2000:491.

⁴⁹ Recognition of Customary Marriages Act 120/1998.

Subsections (6) and (9) mention a contract — in the singular. The only interpretation of this is that the same (changed) matrimonial property system will apply henceforth to all customary marriages.⁵⁰

The meaning and effect of subsection (7)(a)(ii), namely that the court is empowered to ensure an equitable distribution of property, is vague and uncertain. Except for the relevant circumstances of the family groups which would be affected if the application is granted, the Act does not provide for any additional factors that must be taken into account when exercising a discretion.⁵¹ The Act also makes no provision for the appointment of a marriage officer at the conclusion of a customary marriage. There is therefore nobody to ensure that the requirements of section 7(6) and (7) are met.⁵²

2.2 Divorce

In traditional customary law it was envisaged that upon dissolution of the customary marriage the wife would return to her family's home with only her personal possessions, to be absorbed back into her family. The children remained with their father's family who would look after them.⁵³ Property acquired from her earnings during the subsistence of the marriage remained with the husband and formed part of his estate.⁵⁴ The effect of community of property of marriages entered into after the commencement of the Act changes the position, in theory giving the woman independence and freedom to pursue her own life after divorce.⁵⁵

The position of women who entered into customary marriages prior to the commencement of the Act is, however, different. Section 8(4)(a) stipulates that the court granting a decree for the dissolution of a customary marriage has the powers contemplated in section 7, 8, 9 and 10 of the Divorce Act⁵⁶ and section 24(1) of the Matrimonial Property Act.⁵⁷

Section 7(1) and (2) of the Divorce Act empowers the court to make an order with regard to the payment of maintenance by the one party to the other. Due to the fact that these marriages entered into prior to the commencement of the Recognition of Customary Marriages Act are now valid, women are able to bring civil divorce proceedings and claim maintenance from their husbands. Other than this, the Act did nothing to remedy their position.⁵⁸

50 Van Schalkwyk 2000:491.

51 Van Schalkwyk 2000:492.

52 Van Schalkwyk 2000:493.

53 Bonthuys 2001:212.

54 South African Law Commission 1998:122; Singh 1999:315.

55 Singh 1999:320.

56 Act 70/1979.

57 Act 88/1984.

58 Liebenberg and O'Sullivan 2002:73.

The system of post-divorce maintenance is inefficient and difficult to enforce.⁵⁹ In traditional customary law the purpose of divorce was to end all connection between the parties, there was no system of maintenance. Bekker pointed out that "African men would simply not cooperate, and it must be admitted that giving a former wife a right to maintenance is a radical break with customary law".⁶⁰ Bonthuys explains the situation as follows:

A paternal family that has paid *lobola* will not take kindly to a wife's obtaining custody of children and claiming maintenance. Since they are the guardians of the ancestral spirits of the children, it is in the interests of the children that the mother does not antagonise them by claiming maintenance. In customary law a man is obliged to maintain his wife, who must, in return, render household and sexual services. If a woman claims maintenance for her children, but especially for herself, a former husband may assume a continuation of this relationship. Women may avoid claiming maintenance to avoid this. Customary principles which sanction 'reasonable chastisement' of wives by husbands may furthermore discourage women from claiming maintenance for fear of physical violence.⁶¹

Section 7(3)-(6)⁶² empowers a court to make an equitable distribution of assets in respect of certain civil marriages out of community of property.⁶³ Although these provisions apply to customary marriages out of community of property, Van Schalkwyk is correct in submitting that they cannot find application in the case of a customary marriage in which the proprietary consequences are governed by customary law.⁶⁴

It is further submitted by Van Schalkwyk that section 7(7)-(8) of the Divorce Act (a pension interest of a party shall, subject to certain exceptions be deemed to be part of his assets) will also apply only to customary marriages entered into after the commencement of the Act, and not to marriages where the proprietary consequences are governed by customary law.⁶⁵

59 South African Law Commission 1998:135. "The system is inefficient in the sense that maintenance orders require investigation of the circumstances of each party. The result is an increase in litigation, which is potentially a hindrance to the realization of rights. In addition, the degree of compliance with orders eventually obtained is notoriously low."

60 South African Law Commission 1998:136.

61 2001:212.

62 Divorce Act 70/1979.

63 Section 7(3) reads as follows: "A court granting a decree of divorce in respect of a marriage out of community of property —

(a) entered into before the commencement of the Matrimonial Property Act, 1984, in terms of an antenuptial contract by which community of property, community of profit and loss and accrual sharing in any form are excluded; or

(b) entered into before the commencement of the Marriage and Matrimonial Property Law Amendment Act, 1988, in terms of section 22(6) of the Black Administration Act, 1927 (Act No. 38 of 1927), as it existed immediately prior to its repeal by the said Marriage and Matrimonial Property Law

A m e n d m e n t Act, 1988.

64 Van Schalkwyk 2000:496.

As pointed out above, section 9 of the Divorce Act also finds application to customary marriages.⁶⁶ This section empowers a court to order a forfeiture of patrimonial benefits of the marriage by one party in favour of the other. As in the case of section 7(3)-(6) it is doubtful whether this section finds application in customary marriages in which the proprietary consequences are governed by customary law.⁶⁷

It seems as if the position at time of divorce of these women is dubious at best and probably much worse than in traditional customary law where she could at least revert to her own family for maintenance.

2.3 Death of husband

The position in traditional customary law was that when either of the spouses died, the marriage agreement between the two family groups continued to exist. The widow was expected to stay in the family group of her deceased husband and to be available for the procreation of children on behalf of the deceased.⁶⁸ It is therefore strange that the Act does not provide for the death of a spouse as a ground for dissolution of a customary marriage.⁶⁹ It is not clear whether it was intentionally done in order to extend implicit recognition to the indigenous customs of spousal substitution (for example the *ukungena* and *seantlo* customs).⁷⁰

If the husband dies intestate, customary law applies. Being female, the wife is, according to official customary law, excluded from any inheritance from the estate to which she contributed by way of her labour and skills.

The general principle is that males succeed males in the family lineage. Accordingly, the principle of primogeniture applies, whereby the eldest son (or his eldest male descendant) succeeds the deceased.⁷¹ According to these principles, it is generally assumed that general and house property is not divided and that such property is inherited by general and house successors respectively.⁷² Recent research reveals a more complex picture, which has been summarised as follows:⁷³

General property may include agricultural implements such as tractors, ploughs and wagons, other property such as motor vehicles, investments and money. Such property was used during the lifetime of the deceased to the benefit of all the members of the household, and this basic principle continues to apply after the death of the family head. Property should be used for his funeral and to settle any debts

65 Van Schalkwyk 2000:496.

66 Section 8(4)(a) of the Recognition of Customary Marriages Act 120/1998.

67 Van Schalkwyk 2000:496.

68 Olivier 1994:163. This is according to the *ukungena* custom.

69 Van Schalkwyk 2000:494.

70 Vorster 1998:46.

71 Olivier 1994:147-148.

72 That is the position in a polygamous household. In a monogamous household there is only one successor.

there may be. The balance should be used to maintain the various units of the household, and especially the wives and dependent children of the deceased.

House property usually includes the house and the land on which it is erected, fields allocated to the wife for cultivation, animals, furniture and cooking utensils, and occasionally also money savings of the wife. Such property is used to maintain the wife and her children after her husband's death.

Both in law and common perception women are therefore supposed to rely on men (the successor/s) who carry the responsibility for supporting them. "Reality, however seldom corresponds to the law or popular belief."⁷⁴ Most of the hardship encountered by the surviving spouse occurs if the husband dies without a male descendant. His eldest surviving brother then normally succeeds him and, in many instances, will maintain the woman only if he can also have her as his "wife".⁷⁵

The South African Law Commission is presently preparing a report with a view to changing the customary law of succession.

3. Conclusion

It is obvious that women in customary marriages in which the proprietary consequences continue to be governed by customary law because these marriages were concluded before the commencement of the Recognition of Customary Marriages Act, are still left out in the cold.

The South African Law Commission, in its Report on Customary Marriages,⁷⁶ considered the critical question of whether legislation relating to the reform of proprietary regimes should operate prospectively only or whether it should include the estates of spouses already married under the old dispensation.⁷⁷

It is submitted that the arguments of Sinclair and the Gender Research Project who supported a retrospective change, should have been adopted in the legislation. They argued that the constitutional guarantee of equality requires women and men to have equal access to marital property, and to suggest that women be denied this right on the basis of their ethnicity and the date on which they married, would be unconstitutional.⁷⁸

Over the years various reforms have been introduced by the legislature to change the common law because it was regarded as unsatisfactory and unfair

⁷³ Dhlamini 2002:115-116.

⁷⁴ South African Law Commission 1998:12.

⁷⁵ There has been a public outcry by women against these practices. See for example *Die Volksblad* 14 February 1994: "These men claim equal rights but do not grant it to women" (my translation).

⁷⁶ 1998.

⁷⁷ South African Law Commission 1998:117.

to women.⁷⁹ No such reforms were, however, made in respect of women in customary marriages until the enactment of the Recognition of Customary Marriages Act. No wonder it was greeted with a great deal of enthusiasm.⁸⁰ This new dispensation should apply to as many women in customary marriages as possible. Section 7(1)⁸¹ should be amended to provide that a monogamous customary marriage entered into before the commencement of the Act, is a marriage in community of property and of profit and loss between the spouses.

Vorster⁸² argues to the contrary: "... it would be extremely unfair to change the property dispensation of people without allowing them a say in the matter" and that people should be given the opportunity to make an informed decision as to whether or not they want this new dispensation. The question may well be asked: Unfair to whom? To the husbands by upsetting rights already acquired⁸³ (in an unfair dispensation) under existing marriages?

To combat this argument and to allow people a say in the matter, it is proposed that section 7(1) be amended as suggested above, and then that the parties should be allowed the opportunity to apply to a court *jointly* for an order that customary law should continue to govern the proprietary consequences of their marriage. The equitable result will be that the woman then freely waives her rights and the husband does not remain in a privileged position that may actually prove to be unconstitutional.⁸⁴ In this way the Act will protect the women it was meant to protect. The problem of prejudice or unfairness normally only becomes an issue when there is disharmony in the marriage.⁸⁵ If the marriage ends up in dissolution, the women will at least be in a more favourable position.

Although perhaps not as overtly as bills of rights, human dignity is a goal also supported by African family law.⁸⁶ A further feature of customary law has always been its adaptability. In a new social environment, it has become necessary to extend the transformation already achieved in customary family law. It should, however, be kept in mind that changes to family law are

78 South African Law Commission 1998:117-118.

79 South African Law Commission 1998:118. The Matrimonial Property Act of 1984 was promulgated, which gave courts the discretion when distributing marital estates to avoid inequity and preventing one spouse from leaving the marriage empty-handed. Section 11 of this Act also abolished the marital power in all marriages of Whites, Coloureds and Asians contracted after 1 November 1984. Section 11 was made applicable to African civil marriages concluded after 2 December 1988 by the Marriage and Matrimonial Property Law Amendment Act 3/1988. Section 29 of the General Law Fourth Amendment Act 132/1993 finally abolished the concept of marital power retrospectively in all common law marriages.

80 See for example Maithufi 2000:515-516; Akinnusi 2000:144; compare Mqeke 1999:67-68.

81 Recognition of Customary Marriages Act 120/1998.

82 Vorster 1998:46.

83 South African Law Commission 1998:118.

84 South African Law Commission 1998:107,118.

85 Akinnusi 2000:147.

notoriously difficult to implement.⁸⁷ It is therefore of the utmost importance that the main “beneficiaries” of the Act, namely women in rural areas, be made aware of these rights.⁸⁸ Funds should also be made available for the poor and the powerless to gain access to organs of state for the enforcement of their rights.

⁸⁶ Bennett 1994:123.

⁸⁷ Bennett 1994:130. It is contended by Labuschagne 1995:364,368 “that the human rights ideal should be legally entrenched, even if it cannot be realised fully in a particular society”.

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