SOUTH AFRICAN LAW COMMISSION

PROJECT 90

THE HARMONISATION OF THE COMMON LAW AND THE INDIGENOUS LAW

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CUSTOMARY MARRIAGES

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INTRODUCTION

The South African Law Commission was established by the South African Law Commission Act, 1973 (Act 19 of 1973).
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The project leader responsible for this project is Professor RT Nhlapo.

PREFACE

This Discussion Paper (which reflects information gathered up to the end of June 1997) was prepared to elicit responses and to serve as a basis for the Commission's deliberations, taking into account any responses received. The views, conclusions and recommendations in this paper are accordingly not to be regarded as the Commission's final views. The Discussion Paper is published in full so as to provide persons and bodies wishing to comment or to make suggestions for the reform of this particular branch of he law with sufficient background information to enable them to place focussed submissions before the Commission.

The Commission will assume that respondents agree to the Commission quoting from or referring to comments and attributing comments to respondents, unless representations are marked confidential. Respondents should be aware that the Commission may in any event be required to release information contained in representations under the Constitution of the Republic of South Africa, Act 108 of 1996.

Respondents are requested to submit written comments, representations or requests to the Commission by 19 January 1998 at the address appearing on the previous page. The researcher will endeavour to assist you with particular difficulties you may have. Comment already forwarded to the Commission should not be repeated; in such event respondents should merely indicate that they abide by their previous comment, if this is the position.

The researcher allocated to this project, who may be contacted for further information, is Mr PA van Wyk. The project leader responsible for the project is Professor RT Nhlapo.

The Commission is indebted to Professor TW Bennett (a member of the project committee) who undertook the research for this Discussion Paper.

SUMMARY OF RECOMMENDATIONS AND REQUESTS FOR COMMENTS

The following recommendations are made in this Discussion Paper:

1. In order to remove the anomalies created by many years of discrimination, customary marriage must now be fully recognized. To do so will comply with ss 9, 15, 30 and 31 of the Constitution, provisions which suggest that the same effect be given to African cultural institutions as to those of the western tradition. (See par 3.1.9.)

2. When spouses marry both by customary and Christian (or civil) rites to allow both forms of marriage equal effect would create irreconcilable conflicts and legal confusion. Hence the consequences of the union should be determined by the law expressly chosen by the parties. If the parties did not express any choice, a court may apply the law that is consonant with their cultural orientation (as indicated by their lifestyles and other relevant factors) and with the rites and customs governing their marriage. For greater legal clarity in the future and to protect the position of women in monogamous marriages, the law should discourage, rather than encourage, any 'mixing' of the systems. (See par 3.2.11.)

3. Legislative provision must be made for a minimum set of essential requirements for marriage. (See par 4.1.5.)

4. The main requirement for a valid customary marriage should be the consent of the spouses. (See par 4.2.10.)

5. Traditional wedding ceremonies and the formal handing over of the bride should also be considered optional. Together with bridewealth, however, these institutions will serve to identify a union as one celebrated according to African rites. (See par 4.4.6.)

6. All customary marriages should be registered. The Commission is sympathetic to the complaint that customary marriage is uncertain and difficult to prove. If registration were made compulsory, however, it would be difficult to decide on an appropriate

penalty to induce compliance. To rule that unregistered unions are void would work great hardship for the spouses and would deprive many existing unions of potential validity. On the other hand, more people should be encouraged to register their marriages, and to this end the traditional authorities should be constituted registering officers. (See par 4.5.11.)

7. In order to ensure that the spouses' consent is properly informed, a minimum age for marrying should be fixed for all persons in the country. (See par 5.1.10.)

8. Underage children should nevertheless be permitted to contract a marriage on terms prescribed in the Marriage Act. (See par 5.1.11.)

9. Under the Constitution and the United Nations Convention on the Rights of the Child, a parent's power to consent to marriage must be exercised only in the child's best interests. Accordingly, a guardian may not unreasonably prevent a ward's marriage. Instead, consent of a guardian should be deemed necessary to remedy deficiencies in the judgment of minors. Thus, marriages by children below age, where such consent was not supplied, should be voidable at the instance of a spouse or guardians concerned. (See par 5.2.13.)

10. Existing statutory and common-law rules regulating the consent of absent or incompetent guardians should now be extended to marriages by customary law. (See par 5.2.14.)

11. To avoid unfair discrimination on the ground of gender, parental consent should be deemed to include the consent of both the father and mother of an underage child. (See par 5.2.15.)

12. The prohibition of marriage between persons on account of their relationship by blood or affinity should be decided by the systems of law to which they are usually subject. (See par 5.3.3.)

13. For various reasons, especially the difficulty of enforcing a ban and the fact that polygyny appears to be obsolescent, customary marriages should continue to be potentially polygynous. (See par 6.1.17.)

14. Reform in the area of spousal relations is now needed to harmonize customary law with social changes in South African society and to give effect to the principle of equal treatment contained in s 9 of the Constitution and CEDAW. (See par 6.2.1.8.)

15. Women should be deemed to have contractual capacity, locus standi and proprietary capacity (and in consequence delictual capacity) on a par with men. It is therefore recommended that section 11(3)(*b*) of the Black Administration Act be repealed. In addition, to cure many years of uncertainty, provision must be made that the Age of Majority Act applies to persons subject to customary law. (See par 6.2.2.20.)

16. To discharge its obligations under CEDAW and the Constitution, legislation should provide that spouses have equal capacities and powers of decision-making. Such legislation will entail a repeal of section 27(3) in the KwaZulu/Natal Codes and section 39 of the Transkei Marriage Act (which both declare that wives are under the marital power of their husbands). (See par 6.2.2.21.)

17. While age of majority legislation can free people to engage in commercial and other dealings with the world at large, it cannot protect their acquisitions from other members of their own family. It is therefore recommended that individual proprietary capacity now be placed beyond doubt. A clear legislative statement is needed that everyone be deemed capable of owning and possessing property and that full ownership in individual acquisitions be recognized. (See par 6.3.1.16.)

18. Full ownership in individual acquisitions will involve consequential alteration to the existing rules on the delictual liability of family heads. While control of property and liability in delict are intimately connected, this is an issue that should be attended to by the courts (as happened in the past) rather than the legislature. (See par 6.3.1.17.)

19. In order to supply a lack of rules in customary law on the management of family estates, the common-law rule governing a spouse's power to bind the other's estate for household necessaries should be extended to customary law. A spouse should be liable to contribute to necessaries for the joint household *pro rata* according to his or her financial means. A spouse who contributed more in respect of necessaries than he or she was liable to contribute, should have a right of recourse against the other spouse. Moreover, remedies in the KwaZulu/Natal Codes for restraining or deposing a person who mismanages a family estate should be made available to all members of the family. (See par 6.3.2.7.)

20. Spouses should have the power to enter into an antenuptial contract to vary the automatic property consequences of marriage. (See par 6.3.3.4.)

21. In keeping with previous law on this topic, the Commission recommends that spouses be considered to be married out of community of property, but subject to the current statutory rules permitting courts to order an equitable distribution of their estates on divorce. (See par 6.4.19.)

22. On the question whether the matrimonial property system, namely out of community of property, should apply only to marriages entered into after legislation is passed, the Commission was persuaded by the argument that prospective law reform might constitute unfair discrimination against the spouses of earlier marriages. On the other hand, the Commission was also concerned about upsetting rights already acquired under existing marriages. Particular comment is therefore requested on whether or not proposed legislation should operate prospectively. (See par 6.4.18 - 6.4.20.)

23. The private regulation of divorce in customary law places women and children at risk. It is therefore recommended that no marriage may be terminated except by decree of a competent court. (See par 7.1.16.)

24. The current anomalous position that magistrates' courts and the courts of traditional leaders have jurisdiction over customary divorces (and Black Divorce Courts have

jurisdiction over divorces prosecuted by Africans married by civil or Christian rites) should be ended as soon as possible. All divorce actions and actions about other family-law issues referred to in this Discussion Paper should be processed through the family courts. The Commission also recommends that family courts be instituted as a matter of urgency. (See par 7.1.17.)

25. Traditional authorities should be entitled to exercise conciliation powers prior to a divorce action. (See par 7.1.18.)

26. Only one ground of divorce should be entertained: irretrievable breakdown of the marriage. In exercising their discretion under this principle, courts should take into account pre-divorce conciliation procedures available in customary law and appropriate cultural norms governing marital behaviour. They should not, however, favour husbands at the expense of wives. (See par 7.2.7.)

27. Either spouse should be competent to apply for divorce. If a spouse is unable to prosecute the action unaided, the court should appoint a *curator ad litem* (a kind of guardian appointed to protect the interests of that spouse during the litigation). Certain progressive reforms made to the common-law divorce procedure, such as the appointment of a family advocate, should be extended to customary marriages. (See par 7.3.11.)

28. In spite of numerous problems of enforcement, maintenance should in principle be available to the spouses and children of customary marriage, both *stante matrimonio* (during the marriage) and on divorce. (See par 7.4.7.)

29. In accordance with s 28(3) of the Constitution and the United Nations Convention on the Rights of the Child, the child's best interests should govern all aspects of custody, guardianship and access to children. Because the best interests principle has no specific content, cultural expectations may be accommodated by the courts. To avoid unfair discrimination against women, mothers should have equal rights to children. (See par 7.5.12.)

30. If marriage must comply with certain predetermined criteria, a concept of nullity is by implication introduced to customary law. There would, however, be no need to specify grounds for nullity. It is recommended that a court granting an order of nullity should be entitled to make suitable arrangements for the protection of vulnerable parties (and return of bridewealth if necessary). (See par 8.5.)

The Commission requests particular comment on the following issues:

1. Bridewealth is synonymous with marriage in African tradition. Once a husband had fulfilled his obligations under a bridewealth agreement, he and his family would have full rights to any children born to the wife. Hence, if a divorce were granted the children would remain under the care and guardianship of the father. Mothers were allowed custody, but they did not acquire a right equivalent to that of the father. In view of the prohibition on gender discrimination under section 9 of the Constitution and under the Guardianship Act, 1993, both spouses should have equal rights and powers over minor children. The questions arise whether the fate of children should depend on payment of bridewealth, and whether the courts should be allowed to take other factors into account when considering awards of custody and guardianship over children. Specific comment is invited on the following issues.

    * Should bridewealth have a purely social function: as a token of appreciation or a mark of the cultural attributes of a marriage? In this case, bridewealth would be an optional element in marriage, analogous to the solemnization of marriages by religious rites.
    * What effect should bridewealth agreements have on the validity of marriage, the rights and duties of the spouses towards one another or their rights to children?
    * Should a wife's guardian be allowed to use the customary remedies for enforcement of a bridewealth agreement, ie 'impounding' the wife and/or withholding guardianship of children? (See par 4.3.4.10.)

2. Minimum ages should be fixed at which prospective spouses may be presumed mature enough to give their consent to marriage. The minimum ages established in the Marriage Act are 18 for men and 15 for women. Differentiation between the ages at which males and females can marry may be considered to constitute unfair discrimination on the ground of sex; in the past this differentiation was justified by the commonly held belief that boys and girls mature physically at different ages. Whether valid or not, this justification will be superseded if South Africa decides to ratify the African Charter on the Rights and Welfare of the Child (which specifies a minimum age of 18 for both men and women). The Commission requests particular comment on this issue. (See par 5.1.12.)

3. On the question whether the proposed legislation should apply only to marriages entered into after legislation is passed, the Commission is concerned that prospective law reform might constitute unfair discrimination against the spouses of earlier marriages. On the other hand, the Commission is also concerned about upsetting rights already acquired under existing marriages. Particular comment is therefore requested on whether or not the proposed legislation should operate prospectively. (See par 6.4.20.)

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CHAPTER 1

INTRODUCTION

1.1 Origin of the investigation

1.1.1 In 1986 The Commission published a report on its investigation into the marriages and customary unions of Black persons (Project 51). Two Bills were recommended in the report. The first resulted in the Marriage and Matrimonial Property Law Amendment Act 3 of 1988. The second Bill dealt with the customary marriages of Black persons. With regard to this Bill the Commission recommended that further consultations with the leadership of the TBVC states and the self-governing states should take place. After a series of high level meetings the proposal that the so-called customary union be recognised as a valid marriage was endorsed: however, on 10 April 1992 the Minister ordered that the implementation of the Bill be suspended until the constitutional position of the TBVC states and the self-governing territories was clarified.

1.2.1 The matter was subsequently referred to the newly-formed Project Committee on the Harmonisation of the Common Law and the Indigenous Law, whose term of office lapsed together with that of the Commission.

1.3.1 The new Commission, at a meeting on 23 and 24 February 1996, approved the reconstitution of the Project Committee[1] and the ranking proposed by the outgoing committee which had identified the law of marriage and divorce as a priority area. The new Project Committee had its first meeting on 7 June 1996 at which it decided to revive the issue of customary marriage. To this end the committee developed an issue paper which set out the nature of the problem in respect of customary marriages, and a range of proposals for addressing the problem: chief among these was that the law should grant full recognition to customary marriages, confirming the position adopted by the Commission in its 1986 report. An allied aim

1 Which consists of the following members:
Professor TR Nhlapo (Chairperson); Madame Justice JY Mokgoro; Professors TW Bennett & CRM Dhlamini; Ms L Baqwa; and Advocate F Bosman.

of the Issue Paper was to seize the opportunity offered by the recognition of customary marriages to improve the position of women and children within these marriages.

1.2 The Issue Paper and Responses to it

1.2.1 The Issue Paper on customary marriages was published on 31 August 1996, with 31 October 1996 set as the closing date for comments. This date was very quickly compromised as various role players requested extensions. A process of countrywide workshops to explain and discuss the paper, set in motion by the Deputy Minister, also contributed to the decision to maintain flexibility in respect of the closing date. The deadline ultimately shifted to 30 April 1997.

1.2.2 In the new Commission's working methodology, an Issue Paper represents the first public announcement of an investigation. It aims to set out the Commission's view of the perceived problem, and the possible solutions, and it invites comment on the Commission's approach. It thus tries to involve the public at the very beginning of an investigation in the hope that feedback will help the Commission to settle preliminary issues, such as those relating to the scope of the project and the approach. Experience has shown that most respondents do not make the distinction between preliminary matters and matters of substance. It thus becomes necessary to sift carefully through the responses to separate those that are relevant to the purposes of the Issue Paper and those substantial recommendations which properly belong to the next stage in the process - ie the Discussion Paper.

2.3 37 written responses to Issue Paper 3 were received. (See Annexure B). They came from a variety of sources and many were stimulated by the workshops on the Issue Paper which were conducted in different parts of the country. The scale of the response has made it impossible to include all replies. Hence, in the interests of brevity, especially when most people agreed with the proposals made by the Commission in the Issue Paper, only replies raising pertinent new issues will be mentioned. These are dealt with in the body of the Discussion Paper, in the relevant section, rather than separately.

CHAPTER 2

BACKGROUND DISCUSSION: CUSTOMARY MARRIAGE, LAW REFORM AND THE CONSTITUTION

2.1 INTRODUCTION

2.1.1 Marriage, an institution that fulfils many fundamental social needs, is common to all cultures. It follows that all forms of marriage will exhibit certain broad similarities. Through colonialism, segregation and apartheid, however, South Africans have been predisposed to stress the differences between African and western forms of marriage.[1]

2.1.2 One consequence of this thinking was to maintain an undue distinction between customary and common law. Marriages by African rites were subject to customary law and civil or Christian unions were generally subject to the common law. Use of rules and principles derived from one legal system to cure deficiencies in the other was infrequent, and any trade in ideas always assumed that common law was the superior system.[2]

2.1.3 Recognition of the cultural differences underlying this racial division would perhaps have been unobjectionable, if difference had implied equal treatment. But, in South Africa, civil and Christian marriages were given a privileged position. State policy was predicated on the understanding that only a `voluntary union for life of one man and one woman to the exclusion of all others' was a true marriage.[3] Because customary marriages are potentially polygynous, they have consistently been denied full recognition.

2.1.4 A further consequence of apartheid thinking was a proliferation of legislation on family law. When Transkei, Ciskei, Bophuthatswana and Venda acquired 'independence' from

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1 And, through its ban on marriage between racial groups, under the Prohibition of Mixed Marriages Act 55 of 1949, South African law ensured that African and European ideas of marriage would not merge.

2 Customary law would in any case never have been considered worthy enough to supply principles for the development of common law.

3 The classic formulation in *Hyde v Hyde & Another* (1866) LR 1 PD 130 was accepted into South African law by *Seedat's Executors v The Master (Natal)* 1917 AD 302. See Dlamini (1985) 102 *SALJ* 701 at 708.

South Africa, the new entities used their legislative autonomy to enact far-reaching reforms of domestic law: a Marriage Act in Transkei,[4] a Succession Act in Bophuthatswana[5] and various decrees governing recognition of marriage and marital relationships in Ciskei.[6] Although no decisions were given on the issue, in principle, rules of private international law would suggest that these enactments applied to domiciliaries of the TBVC states.

2.1.5 Under the National States Constitution Act,[7] those homelands that remained partial independence could still legislate on marriage and customary unions in the areas for which they were established. KwaZulu, for instance, used its power to promulgate a fresh version of the Code of Zulu Law, in which several changes were effected to matrimonial law and the status of women.[8] Other homelands passed laws on various aspects of family law and succession.[9]

2.1.6 It was obscure when and to whom this legislation should apply. Private international law (and the concept of domicile) might have been applicable, but the National States Constitution Act implied that laws passed by the national states were enforceable only against `citizens'.[10] The Natal Code of Zulu Law and its counterpart in KwaZulu, on the other hand, have generally been deemed applicable only within the territory concerned.[11] Hence, application of the new laws was uneasily poised on the contradictory premises of personality (entailing domicile in or citizenship of a homeland) and territoriality.

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4 21 of 1978. Sections 42 to 50 (inclusive) of this Act were repealed by s 3 of the Justice Laws Rationalisation Act 18 of 1996, as read with Schedule II.

5 23 of 1982, as amended by the Intestate Succession Law Amendment Act 13 of 1990. This has been repealed by s 3 of the Justice Laws Rationalisation Act 18 of 1996, as read with Schedule II.

6 The Customary Law Amendment Decree 23 of 1991 and the Matrimonial Property Decree 7 of 1992. The latter decree was repealed by s 3 of the Justice Laws Rationalisation Act 18 of 1996, as read with Schedule II.

7 Section 3, as read with the First Schedule, of Act 21 of 1971.

8 Act 16 of 1985 (Z). In Natal, Zulu law is contained in a similar Code, differing only in detail from the KwaZulu version. The current version of the Code was promulgated in Proc R151 of 1987.

9 All of which have been repealed by the Justice Laws Rationalisation Act 18 of 1996.

10 As defined in s 3 of the National States Citizenship Act 26 of 1970.

11 *Zwana v Zwana & another* 1945 NAC (N&T) 59 and *Mashapo & another v Sisane* 1945 NAC (N&T) 57.

2.1.7 Before South Africa was reunited into a single state, there was a feeling of despair about the `burgeoning and volatile lawmaking bodies' of South Africa.[12] Under the Interim Constitution, action was immediately taken to repeal apartheid statutes which had allowed the fragmentation of South Africa,[13] and nine new provincial units were created.[14] But the legislation of the former national homelands and TBVC states was expressly preserved until repealed.[15] Most, but not all, of this legislation was then repealed in 1996 by the Justice Laws Rationalisation Act.[16]

2.1.8 The legal tangles of the past have not been completely unravelled, however. A lingering uncertainty is whether still valid laws, such as portions of the Transkei Marriage Act and the KwaZulu/Natal Codes, are subordinate to South African legislation, particularly the Marriage and Matrimonial Property Law Amendment Act.[17] Another chronic uncertainty, implicit in all plural legal systems, is when individuals should be subject to their regimes of personal law. One of the most intricate questions in South Africa, for example, is when customary or common law applies to relationships created by civil and customary marriages. This inquiry is so complex that even lawyers avoid it.[18] Marriage law, however, is an area where citizens should be in a position to know broadly what their rights and duties are.[19]

2.2 THE GROUNDS OF REFORM

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12 See Bekker in Sanders *The Internal Conflict of Laws in South Africa* 38 and the hypothetical examples given by Sinclair *The Law of Marriage* 208 fn 7.

13 Schedule 7 of the Constitution of the Republic of South Africa Act 200 of 1993.

14 Section 124, as read with Schedule 1, of the Interim Constitution.

15 Section 229 of the Interim Constitution and Schedule 6(2) of the 1996 Constitution.

16 Notwithstanding this Act, Schedule 6(2) of the 1996 Constitution explicitly subjects all these laws to the Constitution and the Bill of Rights. See Mqeke (1995) 112 *SALJ* 343 on the complex question of the constitutional validity of various provisions in the Transkei Marriage Act.

17 3 of 1988. Other South African laws, such as the Divorce Act 70 of 1979 and the Matrimonial Property Act 88 of 1984, were extended to the entire `national territory' by s 2 of the Justice Laws Rationalisation Act 18 of 1996. See Sinclair (n12) 129-31.

18 Such vagueness would infringe the fundamental right to certain and intelligible law. See Van der Vyver (1982) 15 *CILSA* 312-14.

19 A point made by **T S B Jali** in commenting on the Issue Paper.

2.2.1 A state dedicated to the equal treatment of all individuals, whatever their race, gender or social origin, should in principle have one marriage law. Our Constitution has sent a clear message to the country that discrimination will no longer be tolerated and that women and children can expect the law to be changed in their favour. This message must be repeated in any future marriage code, since legislation has an important educative and standard-setting function for a society that is in transition.

2.2.2 On the other hand, the need to eradicate former prejudices against African cultural institutions suggests that customary law deserves new respect. Balancing considerations of a uniform, national standard and the pluralism implicit in recognizing customary law invites a brief excursus on the topic of legal unification.[20] This issue has generated much political and legal debate.

2.2.3 Nearly all the movements that sought independence from colonial rule in Africa demanded a better deal for indigenous legal systems:[21] African law was to be treated as a national heritage, something to be protected and cultivated. At the same time, the newly independent African states wanted a single legal system to be administered by one body of courts.[22] It was hoped that by unifying the law and judicial system standards in the administration of justice would be improved and national unity promoted.[23] In general, the call for unification expressed a reaction against the racism - and the related legal dualism - of the colonial past.[24]

2.2.4 Ideals, however, had to be compromised.[25] Plans to unify substantive laws soon foundered on the problem of which law to take as the basis for a new regime: the received European law or an indigenous system? And, if indigenous law, which one? Few people were

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20 A topic on which **R W Skosana** made several useful observations.

21 Elias *Nature of African Customary Law* Preface. See, too, Women and Law in Southern Africa (WLSA) *Uncovering Reality* 11, citing Rwezaura and Chanock (n21) 53-4.

22 This principle was adopted prior to independence, at a conference of judicial advisers in 1953 at Makerere College in Uganda. See Brooke (1954) 6 *J Afr Admin* 69ff and Allott (1965) 14 *ICLQ* 366.

23 Cotran (1963) 1 *J Mod Afr Studies* 214.

24 See Spalding et al (1970) 2 *Zambia LJ* 85-98.

25 Spalding op cit 79ff and Opoku (1976) 9 *Verfassung und Recht* 65.

prepared to argue for customary law, since it was seldom properly recorded and did not seem to commend itself as the normative order of a modern state. Unification of the courts was a more easily won goal, but even here concessions had to be were made to pluralism,[26] since no African state could afford to dispense with the courts run by traditional leaders.[27]

2.2.5 Hence, full-scale unification of national law was generally abandoned. Ivory Coast was an exception to this rule. In 1964, customary law was all but abolished in favour of a new code of civil law.[28] (The express purpose of this legal revolution was to create a new social order, one based on the nuclear family.)[29] As might be expected, none of the anglophone countries contemplated a reform as dramatic as this. True to the common-law tradition, they contented themselves with piecemeal legislation on specific topics, notably succession,[30] which sought to incorporate both customary and common law into a single enactment.[31]

2.2.6 Reform of marriage and divorce law was more tentative. Proposals for reform began in Ghana in 1961,[32] but neither of the government's bills was accepted. Apart from a new divorce law,[33] the legislative initiative here faltered.[34] Seven years later, Kenya set up a commission on marriage and divorce. The government here, too, did not translate its recommendations into

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26 A conference on Local Courts and Customary Law, held in 1963 (discussed in Spalding (n27) 76ff), noted that their courts continued to offer cheap and accessible forums for rural litigants.

27 Even Zimbabwe, which had sought to deprive traditional leaders of their powers, returned judicial competence under the Customary Law and Local Courts Act 20 of 1990.

28 By Law No 64-375 (on marriage) and Law No 64-376 (on divorce and judicial separation).

29 Abitbol (1966) 10 *JAL* 141.

30 See, for example, the Wills and Inheritance Act 25 of 1967 (Malawi), Law of Succession Act 1972 (Kenya) and Intestate Succession Act 91 of 1989 (Zambia).

31 The more obvious points of conflict between the two legal systems were removed. This process is generally referred to as 'integration': Prinsloo (1990) 23 *CILSA* 325.

32 Where the government published a White Paper on Marriage Divorce and Inheritance No 3/61.

33 The Matrimonial Causes Act 367 of 1971, which introduced the irretrievable breakdown principle and an informal conciliation procedure.

34 The Ghanaian White Paper proved influential in a Ugandan commission on marriage, divorce and the status of women, but the only substantive change made to Ugandan law was a Customary Marriage (Registration) Decree 16 of 1973, which required registration of all marriages and certain minimum requirements for customary unions.

legislation,[35] but the commission's report was later to provide a basis for the most thorough-going reform of marriage law in anglophone Africa.

2.2.7 In 1971, Tanzania promulgated an act in which the customary, Islamic and common-law rules on marriage and family law were integrated into a single code.[36] The Act allowed two kinds of marriage - polygamous (Islamic or customary) and monogamous[37] - both having broadly the same consequences, which were derived from English law. For example, spouses were deemed to have separate estates during marriage, and, on separation or divorce, the courts were given a qualified discretion to distribute the assets acquired during the marriage by joint effort.[38] Divorce was permitted only on the irreparable breakdown of a marriage.[39]

2.2.8 In 1978, inspired partly by the Tanzanian experiment, Transkei also attempted an integrated code of marriage law. The Marriage Act,[40] however, did not go as far as its Tanzanian forerunner had done in creating a uniform legal regime. While most of the consequences of marriage, notably marital property,[41] status of wives,[42] divorce[43] and custody and guardianship of children,[44] were common to both customary and civil marriages, in other areas, such as essential requirements,[45] the separate identities of the two types of marriage were preserved. The most

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35 See Bennett & Peart 1983 *AJ* 154-5.

36 The Law of Marriage Act 5 of 1971. For commentary see Read (1972) 16 *JAL* 19.

37 Section 10(1). Sections 20 to 22 allowed wives to prevent subsequent polygynous unions, and s 11(5) gave Christian marriage a privileged position by providing that it could not be converted to a polygynous union while the parties continued to profess the Christian faith.

38 Read op cit 32. Section 56 introduced various improvements to the status of women, whereby wives were given full capacity to hold and dispose of property, make contracts and sue and be sued in contract or delict.

39 Read op cit 33.

40 21 of 1978. For general commentary, see Bekker *Seymour's Customary Law in Southern Africa* 255-62 and Van Loggerenberg 1981 *Obiter* 1.

41 Section 39(1) provided that all marriages, whether customary or civil, were out of community of property. Under s 39(2), however, parties to a civil marriage could establish a community regime by antenuptial contract or prenuptial declaration before a magistrate or marriage officer.

42 According to s 37 women were invariably deemed to be under the guardianship of their husbands,

43 Section 43, as read with s 48, provided the same grounds for divorce for both types of marriage.

44 Section 45 provided that these issues were to be regulated by the common law.

45 Chapters 2 and 3.

dramatic innovation was to make all marriages, whether civil, Christian or customary, potentially polygynous.[46]

2.2.9 However desirable the political and social goals of unifying or integrating domestic laws, there is a good chance that reform will remain paper law if it does not fall into a receptive community.[47] We have scant information on the efficacy of the legislation mentioned above, but from available evidence it seems that customary law continues to be regularly applied by traditional authorities and it still governs people's everyday lives.[48] Patchy success is to be expected, because family law is notoriously resistant to outside interference,[49] and many case studies have shown that reforms are acted upon only when the intended beneficiaries are educated and capable of asserting their legal rights.[50] In fact, far from welcoming the well-intended intervention of legislators, oppressed people may be content to put up with the burdens they know and have learned to cope with.

2.2.10 Hence, whatever the dictates of state law, any authentic, `living' customary regime will by definition persist. The discipline of legal pluralism has repeatedly demonstrated its resilience.[51] We can therefore count on legislation being reliably applied only by authorities under direct state supervision. In areas where the influence of the state is weak, informal institutions will continue to flourish in the way they always have.[52] And, of course, customary

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46 Section 3. Otherwise, if a person subject to customary law contracted a marriage with a person who was not so subject, s 51 of the Act provided that customary law was to apply.

47 On the Tanzanian Law of Marriage Act, for instance, see Rwezaura (1983-4) 1/2 *Zimb LR* 85 and Rwezaura & Wanitzek (1988) 2 *Int J Law & Family* 20.

48 Which, according to Welsh et al in Armstrong *Women and Law in Southern Africa* 105ff, was what happened in Mozambique. Other commentators have observed that laws available to ameliorate the status of women were simply ineffective, because they were operating in a culture that was impervious to legal reform. See Nhlapo in Armstrong op cit 51 and May *Zimbabwean Women* chs 12 and 13.

49 See Bennett 1991 *AJ* 32 and, particularly, Allott *The Limits of Law* 196-202.

50 Cheater (1989) 16 *Zambezia* 105.

51 For background on the body of research that has come to be called `legal pluralism', see Griffiths (1986) 24 *J Legal Pluralism* 1, Merry (1988) 22 *Law & Soc R* 869 and the collection of papers in Allott & Woodman *People's Law and State Law*.

52 Griffiths op cit 3 therefore refutes the idea that `law is ... the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions'. The contributors to Morse & Woodman *Indigenous Law and the State* document the widespread dualism of this nature.

laws will not be readily abandoned by those, such as senior males, who stand to lose their positions of privilege and authority.

2.2.11 The limits inherent in what the law can do to uplift and protect vulnerable parties in marriage and the respect now due to the African legal tradition suggest that it would be both wrong and inadvisable to ignore customary law.

2.2.12 If the common law appears to enjoy a supervening role in this Discussion Paper, this is only because the phrase `common law' is being used in its widest meaning to include both Roman-Dutch law and legislation. We can have no hesitation in extending current statutes to customary marriages, when those statutes attempted to improve on Roman-Dutch law (and especially when statutory reforms were previously confined to civil and Christian marriages). Roman-Dutch law itself is by no means flawless,[53] and, in several areas, it too must be adjusted to meet the requirements of the Bill of Rights.

2.2.13 It must be appreciated that no single legal system can offer the perfect model for reform, because `family law is everywhere in turmoil, in a state of flux and conceptual disarray'.[54] Thus, instead of brooding over the somewhat abstract debate about unification of laws, our point of departure should be common social problems. People from all communities, whatever their personal law or the type of marriage they contracted, experience similar domestic problems, whether spousal violence, disputes about child custody or financial support. We should be seeking the most realistic means of solving these problems, whatever legal system an appropriate rule may be derived from.

2.2.14 In drawing up proposals for recognition of customary marriages, we obviously have to defer to the overriding requirements of the Bill of Rights, and, in addition, to South Africa's obligations to implement the international human rights conventions it has ratified. As it

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53 The **Gender Research Project (CALS)** in their response to the Issue Paper, for instance, said that common law cannot be taken as the standard against which to judge customary law. Glendon *Transformation of Family Law* 307 lists a series of major problems still awaiting solution in western legal systems, notably the plight of women who must raise children, act as caretakers and homemakers and, at the same time, work outside the home.

54 Sinclair (n15).

happens, the foundations for much of this work have already been laid. Through scholarly research, judicial decisions[55] and the Law Commission's *Report on Marriages and Customary Unions of Black Persons* (1985), many useful recommendations have been made on how to bring customary marriage law into line with human rights.

2.2.15 A further invaluable source of ideas has been the observations of the concerned groups and individuals who responded to the Issue Paper published in 1996. These suggestions have been most welcome, not only for indicating the attitudes and requirements of the public but also for giving much needed information on the current state of customary law.

2.3 CUSTOMARY LAW: THE `OFFICIAL' AND `LIVING' VERSIONS

2.3.1 The greatest value of custom in Africa is its `dynamism reflected in the spirit or tolerance, dialogue, and consultation which bear out custom as a process whereby claims and disputes are negotiated'.[56] Unfortunately, these same qualities present the greatest problem when customary law comes to be applied in a predominantly western legal culture.

2.3.2 Customary law varies from community to community;[57] it is flexible and liable to constant and imperceptible change. Not only is customary law diverse and volatile, but it also exists in at least two versions. The version usually relied upon by courts and other state organs is a so-called `official' law. This collection of rules has been called into question by modern scholarship on the grounds that it is tainted by apartheid, out of date and a distortion of genuine community practices. A distinction is now generally drawn between `official' and `living' law, the latter denoting law actually observed by African communities.[58]

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55 Especially decisions not to apply customary law where it was incompatible with natural justice or public policy (a proviso currently contained in s 1(1) of the Law of Evidence Amendment Act 45 of 1988).

56 WLSA (n21) 8.

57 See Molokomme in Women and Law in Southern Africa (WLSA) *The Legal Situation of Women in Southern Africa* 13, for example, regarding the capacity of women in Botswana.

58 Sanders (1987) 20 *CILSA* 405ff.

2.3.3 Differences between these two versions have been highlighted in other parts of Africa by empirical studies of the laws administered by higher and lower courts. One would expect judges in the higher courts to be more sensitive to individual rights, but, ironically, they are hesitant to depart from the strictly patriarchal, `traditional' version of customary law in the official code.[59] Instead, women are more likely to receive a sympathetic hearing in chiefly courts, notwithstanding the fact that these tribunals are controlled by traditional rulers.[60] The explanation is not necessarily that these courts are deliberately trying to advance the cause of women. Rather, it seems that they respond more immediately to shifts in local attitudes and practice than the higher courts. What is more, unlike western-style courts, they do not feel constrained by pre-ordained rules. Their concern is with substantive justice. This divergence in law, and the judicial attitudes to it, adds a further complication to an already complex situation of legal pluralism,[61] but it is inevitable, given the different legal traditions involved.

2.3.4 The official version has origins in attempts by colonial administrations to reduce the uncertainty inherent in an oral tradition to a system of written rules. The Natal Code of Zulu Law[62] was an early example of this initiative. By the end of the nineteenth century, when it was decided to report judgments handed down by the Native High Court in Natal[63] and the Native Appeal Court in Transkei,[64] judicial precedents were yielding new sources of law. These formal sources were continually being supplemented by the works of anthropologists.

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59 See, for example, the findings of Women and Law in Southern Africa (WLSA) Stewart (ed) *Inheritance in Zimbabwe*. And, for a specific study, see *Maagwi Kimito v Gibeno Werema* CA Civ App 20/84 (unreported), which is discussed by Bakari (1991) 3 *Afr J Int & Comp L* 549ff.

60 See Armstrong et al (1993) 7 *Int J of Law & Family* 328, and the studies by Ndulo (1985) 18 *CILSA* 90, Coldham (1990) 34 *JAL* 67 and Himonga et al in WLSA (n57) 151-3. Cf Griffiths (1984) 22 *J Legal Pluralism* 1 regarding traditional courts in Botswana.

61 And, as WLSA (n21) 17, noted, `Those with knowledge of or control over the rules, and the power to manipulate them, have the most to gain in such a system.' Women are unlikely to be in such a favoured position.

62 The first version, promulgated in 1878, was a compilation of various administrative measures and the more important institutions of customary law, suitably modified to meet colonial policies. It has been revised several times (in 1891, 1932, 1967 and 1987). Any customary law in conflict with the Code is superseded: *Molife* 1934 NAC (N&T) 33 and *Ndhlovu v Molife* 1936 NAC (N&T) 33.

63 Established in 1898.

64 Established in 1894. The successor to these colonial courts was the Native Appeal Court, established by the Black Administration Act 38 of 1927. Decisions of this court continued to be reported until shortly before it was abolished by Act 34 of 1986.

2.3.5 Although the state's demand for known and certain rules has been amply supplied, critical jurisprudence has revealed that much of the work done during the colonial and apartheid eras was directed by, or at least disposed towards, the interests of the state.[65] The legitimacy of former systems of justice depended on customary law being cast as a tradition, a regime with origins in an autonomous, pre-colonial African society. Thus, the official version of customary law described less what people previously did (or were actually doing) and more what the government and its chiefly rulers thought they ought to be doing.[66] As several historians of customary law have said, it is an `invented tradition'.[67]

2.3.6 A particular failing of early empirical studies was a tendency to represent only the interests of senior males. The administrators, missionaries and anthropologists who were responsible for collecting data were unwittingly blinkered by their own culture, which, like African culture, was also patriarchal. Hence, issues explored by fieldworkers were determined largely by men,[68] and, in nearly all cases, informants were male elders, for it was assumed that only men controlled significant information.[69]

2.3.7 Authors of the official version of customary law cast it in western terms. Women, for instance, were described as `minors' under the `guardianship' of their husbands and fathers or they were said to be subject to `marital power'. Less obvious than these subtle distortions, but equally deceiving, was the certainty and precision given to customary law through devices of

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65 Kuper *Anthropology and Anthropologists* 99ff. Cf Gluckman in Fortes & Patterson *Studies in African Social Anthropology* 21ff.

66 Chanock `Neither Customary nor Law: a case of mistaken identity' (1987) unpublished paper cited by Nhlapo *Marriage and Divorce in Swazi Law and Custom* 3 therefore says that: `rural male elders in some areas were able to press for and establish as "customary law" a form of marriage which was clearly not that practised by most people in pre-colonial or early colonial times and which was indeed effectively resisted by many. Their assertion of control over women and family property was supported by the colonial administration as it accorded with the administrators' own prescriptions for African societies.'

67 A concept introduced to the study of law in Africa by Chanock *Law, Custom and Social Order*. The adjective `invented' is meant to warn us that writers were creating a past that did not in fact exist. See further, on South Africa, Burman (1979) 12 *Verfassung und Recht* 129 and Gordon (1989) 2 *J Historical Sociology* 41.

68 Quinn (1977) 6 *Annual Rev Anthrop* 186.

69 Baerends (1990-91) 30/31 *J Legal Pluralism* 38.

stare decisis, codification and restatement.[70] Because the basis of any custom is an accepted social practice, which is continually (though often imperceptibly) changing, the fixity of precedent and legislation is alien.[71]

2.3.8 Critical questions in any inquiry into customary law will therefore be whether rules were derived from the `invented African tradition', whether they were deformed in the process of fitting them into a western legal mould and, most important, whether they are now obsolete. In principle, only customary rules grounded on contemporary social practice should be deemed valid.

2.3.9 In spite of all its shortcomings, however, the official version cannot be dismissed out of hand. In the first place, it must be appreciated that a genuine system of custom can never be immediately accessible to those who are not living in the communities concerned. Participant observers aside, an outsider will always have to rely on second-hand sources.[72] In the second place, precedents of the former Black Appeal Courts give valuable guides on how to accommodate two legal traditions. These decisions are instructive for those who now have to decide whether customary law conforms to fundamental human rights.[73]

2.3.10 In the third place, much of the official version will persist for the simple reason that we have no other, more reliable account of customary law. It is true that litigants are not bound by rules from this source. They are free to allege a better version by calling proof of a new or more

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70 Bennett *Application of Customary Law in Southern Africa* 23. Thus, as Chanock wrote in (n69) chs 10 and 11, the subtle and fluctuating obligations of African marriage were refashioned into rights and duties that brought it into line with a western legal discourse.

71 See the discussion by Hamnett *Chieftainship and Legitimacy* 10-13 of qualities that typify `customary' law.

72 Traditional rulers are different. Because they are not socially removed from the cases they adjudicate, they are more likely to be aware of changes occurring in the law.

73 Bennett (n49) 23-5.

authentic custom.[74] But, if a party doing so does not meet the standards required for proving custom,[75] then the official version will prevail for want of better evidence.[76]

2.3.11 It is unfortunately not possible, as many people have requested, to mount a nation-wide survey in order to establish which customs are still observed and which serve the interests of the African community. The time and resources are not available to engage in such an immense research project. Even if it were possible, the legal status of the findings would be bound to be controversial, and, no matter how sensitively done, any such statement of law is soon overtaken by changes in social conditions.

2.4 CUSTOMARY LAW AND THE CONSTITUTION

2.4.1 The development of customary marriage law will obviously have to comply with the Bill of Rights contained in South Africa's new Constitution.[77] Of special relevance are the principles of equality and non-discrimination. Section 9(1) of the Constitution declares that `Every person shall have the right to equality before the law and to equal protection of the law', and s 9(2) provides that `No person shall be unfairly discriminated against, directly or indirectly' on grounds, inter alia, of gender, sex or age. Many aspects of customary law, which generally endorses the patriarchal traditions of Africa, could now be in conflict with these provisions.

2.4.2 Although the Constitution contains no sections on marriage,[78] this topic is regulated by existing public policy and various international conventions. The most important treaties are the 1981 Convention on Elimination of Discrimination against Women (CEDAW), the 1990 United Nations Convention on the Rights of the Child and the 1962 Convention on Consent to Marriage,

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74 Either under a proviso to s 1(1) of the Law of Evidence Amendment Act, that customary law may be applied only if it `can be ascertained readily and with sufficient certainty', or under s 1(2), which states that `[t]he provisions of subsection (1) shall not preclude any party from adducing evidence of the substance of a legal rule contemplated in that subsection which is in issue at the proceedings concerned ....'

75 For which, see *Mazibuko* 1930 NAC (N&T) 143, *Ex parte Minister of Native Affairs: in re Yako v Beyi* 1948 (1) SA 388 (A) at 394-5 and *Masenya v Seleka Tribal Authority & Another* 1981 (1) SA 522 (T) at 524.

76 See, for example, *Ruzane v Paradzai* 1991 (1) ZLR 273 (SC) at 278.

77 Chapter 2 of the Constitution of the Republic of South Africa 1996.

78 See Sinclair 71 esp fn 176.

Minimum Age for Marriage and Registration of Marriages. These conventions have been ratified by South Africa, which in consequence has an international obligation to adjust its domestic law in accordance with their injunctions.

2.4.3 Customary law received little attention during the drafting of South Africa's interim and final Constitutions.[79] In the final Constitution, it was given express mention in s 211(3), which declares that the courts *must* apply customary law `when that law is applicable', but subject to any legislation specifically dealing with it and also subject to the Constitution.[80]

2.4.4 On a literal interpretation of s 211(3), any rule of customary law in conflict with the Bill of Rights must give way to the Bill of Rights. Testing the constitutional validity of rules of private law, however, involves a more flexible approach. Three inquiries are necessary: when is the Constitution applicable to private relationships; do circumstances warrant limitation of fundamental rights; and how are the abstract and generalized terms of these rights to be construed in a South African context? In answering these questions, a measure of discretion is introduced into what would otherwise be an entirely mechanical process.

2.4.5 The first question is whether the Bill of Rights should apply horizontally (ie to relationships of citizens inter se) or whether it should be applicable only vertically (ie to relationships between citizens and the state). The drafters of the final Constitution seem to have opted for horizontal application by providing in s 8(2) that a provision in the Bill of Rights will bind natural persons `if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right'.[81]

2.4.6 The word `applicable' in this clause could be interpreted in such a way that the fundamental rights would be deemed to apply only when organs of state were involved. Such a reading would, however, defeat a clear intention. A sensible approach to a provision as

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79 This oversight is apparent in s 8(3), which enjoins the courts to develop only *common* law to give effect to or to limit the fundamental rights.

80 Formerly, s 1(1) of the Law of Evidence Amendment Act 45 of 1988 did no more than empower courts to take judicial notice of customary law. *Thibela v Minister van Wet en Orde* 1995 (3) SA 147 (T), however, interpreted this provision to be mandatory rather than permissive.

81 Section 8(1) provides that the Bill of Rights applies `to all law, and binds the legislature, the executive, the judiciary and all organs of state'.

ambiguous as this would be to follow jurisprudence abroad,[82] where constitutional norms have been extended from their traditional sphere of vertical operation, but only by way of exception. Courts have had to consider the nature of the right concerned and the offending rule - matters already provided for in s 8(2) - together with social context.[83]

2.4.7 This more circumspect approach to horizontality requires both a policy decision on the extent to which the state should intervene in domestic relations (an issue considered below) and a legal assessment of how constitutional rights should relate to one another. The right to equal treatment, for instance, must be weighed against the right to culture.[84] Implicit in this balancing of interests is the further inquiry of limitation: whether one right may limit application of another or whether a rule of private law may limit a constitutional right.

2.4.8 In this regard, the clauses allowing freedom to pursue a culture of choice, namely ss 30 and 31 of the Constitution, contain express limitation provisos to the effect that they are subject to the Bill of Rights. Hence, an argument of culture alone may not limit application of the right to non-discrimination. If recognition of customary law is to be something more than an empty gesture towards the African cultural tradition, however, application of the Bill of Rights must be construed in such a way that a set of western values does not become dominant.[85]

2.4.9 We have a forbidding precedent from the colonial era of customary law being all but eliminated in the cause of western standards. In the former Transvaal, for example, while the government was prepared to apply laws and customs of the African population,[86] it deemed

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82 In particular those in the United States, Canada and Germany, since the laws of these countries have exerted a considerable influence on the formation of our Constitution.

83 The leading South African case, *Du Plessis & others v De Klerk & another* 1996 (5) BCLR 658 (CC), also rejected a uniform doctrine of horizontality, although in the context of the 1993 Interim Constitution. See too *Mthembu v Letsela & another* 1997 (2) SA 936 (T), which considered the extent to which customary law actually prejudices women and children.

84 **Adv D Singh** contended that, where two provisions of the Constitution conflict, the one which provides the greater positive benefit [presumably to the individual] should prevail. This argument is in line with Kaganas & Murray (1994) 21 J Law & Society 415-17 and 424-5, who looked to the general tenor of the Constitution, and concluded that it favoured an individual right to non-discrimination rather than a group right to culture.

85 An issue explored in more detail by Bennett *Human Rights and African Customary Law* chs 1 and 2, in the context of the 1993 Interim Constitution.

86 Provided, according to s 2 of Law 4 of 1885, that they were compatible with `general principles of

polygyny and bridewealth `uncivilized'.[87] As a result, the courts `bastardised almost the entire Native population ... deprived practically every Native father of guardianship or other rights to his children [and] ... destroyed any equitable claim in property'.[88]

2.4.10 No one in South Africa today would wish this fate on customary law. At the same time, the state cannot abdicate its responsibility to protect its citizens and to improve their lot in life. In deciding which aspects of customary law are to be deemed unconstitutional, obvious targets would be rules of the `official' version that owe little to an authentic African tradition or to contemporary social practice. In so far as they fall foul of the Bill of Rights, they must be deemed invalid. Moreover, where no settled rule can be distilled from social praxis or where rules are vague and contradictory, constitutional norms must fill what is in essence a gap in the law.[89]

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civilization'.

87 *R v Mboko* 1910 TPD 445 at 447 and *Kaba v Ntela* 1910 TPD 964 at 969, respectively.

88 Stubbs P, reported in (1929) 1 NAC (N&T) 1. See too *Meesadoosa v Links* 1915 TPD 357 at 361.

89 In German law this is known as the *Drittwirkung* of constitutional principles to private law. See Bennett (n85) 38-40.

CHAPTER 3

RECOGNITION OF CUSTOMARY MARRIAGES

3.1 RULES OF RECOGNITION

A. Excerpt from the Issue Paper

3.1.1 The issue paper contained the following recommendation on the recognition of customary marriages:[1]

> "[South African law]... should seek to correct the prejudices of the past by recognising whatever union is clearly accepted by the established cultural system of South Africa. It follows that customary marriage must be given full recognition".[2]

B. Problem analysis

3.1.2 Recognition of customary marriages in South Africa is still governed by the 1927 Black Administration Act. Here a careful distinction is drawn between 'marriages' and 'customary unions'. The latter are fully recognized only in courts of traditional leaders.[3] Hence the peculiarity that, so far as the common law of South Africa is concerned, customary unions are not deemed valid marriages. While they have recognition in certain statutes for special purposes,[4] they had no general currency in the legal system.

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1 At p 4.

2 See para 11.2 of the Law Commission's 1985 *Report*.

3 Section 35 of the Black Administration Act 38 of 1927, as amended by s 9 of the Black Administration (Amendment) Act 9 of 1929, provided that:
`"Customary union" means the association of a man and a woman in a conjugal relationship according to Black law and custom, where neither the man nor the woman is party to a subsisting marriage;
"marriage" means the union of one man with one woman in accordance with any law for the time being in force in any Province governing marriages, but does not include any union contracted under Black law and custom' or any union under the provisions of the Natal and KwaZulu Codes.'

4 Section 5(6) of the Maintenance Act 23 of 1963, s 1 of the Compensation for Occupational Injuries and Diseases Act 130 of 1993, s 1 of the Income Tax Act 58 of 1962, s 21(13) of the Insolvency Act 24 of 1936 and s 27 of the Child Care Act 74 of 1983. See further Sinclair 252-5.

3.1.3 Dependants' actions for damages caused by the death of a breadwinner exposed the anomalies inherent in refusing customary marriage full recognition.[5] If a suit had been initiated in a commissioner's court, because the marriage was fully recognized, there the claim might succeed.[6] But success depended on the accident of jurisdiction.[7] In 1963, the patent absurdity and injustice of this situation[8] provoked legislative intervention. Customary unions were recognized for purposes of claims for `damages for loss of support from any person who unlawfully causes the death of the other partner'.[9]

3.1.4 A further consequence of the refusal to recognize customary unions was the overriding effect given to civil or Christian marriages. The partner of a customary marriage could nullify his or her union simply by marrying again in a church or civil registry.[10] Husbands in particular[11] had an easy method of ridding themselves of their wives without having to go through the regular divorce procedure.[12] Conversely, of course, the logic of the principle that customary marriage was not a true marriage meant that, if the spouse of a civil or Christian union purported to marry another person by customary rites, the second union would be null and

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5 See Kerr (1956) 73 *SALJ* 402-8.

6 *Kanyile v Mbeje* 1939 NAC (N&T) 25 and *Zitulele v Mangquza* 1950 NAC 249 (S).

7 See *Mokwena v Laub* 1943 (2) PH K64 (W).

8 *Santam v Fondo* 1960 (2) SA 467 (A) at 470-4. See Kahn (1960) 77 *SALJ* 279-84.

9 Section 31 of the Black Laws Amendment Act 76 of 1963. Even so, the marriage had to be proved by `a certificate issued by a commissioner', a technical requirement that frustrated many otherwise unassailable claims. See *Mayeki v Shield Insurance Co Ltd* 1975 (4) SA 370 (C) at 373. In *Makgae v Sentraboer (Koöperatief) Bpk* 1981 (4) SA 239 (T) at 247, it was held that the certificate specified in s 31(2) was a condition precedent to the enforceability of the action. In *Dlikilili v Federated Insurance Co Ltd* 1983 (2) SA 275 (C) at 283, the court held that the document required must be `a certificate of an extract from a formal register', ie a `record (of) a *registered* customary union'. Other forms of proof would not suffice. See Dlamini (1984) 101 *SALJ* 34-9 and Kerr (1984) 101 *SALJ* 224-7.

10 *Nkambula v Linda* 1951 (1) SA 377 (A). See Peart (1983) 16 *CILSA* 40-1.

11 Although wives, too, could automatically terminate their customary unions by this method: *Njombani v Tshali* 1952 NAC 62 (S).

12 Because the `discarded' wife was put at risk, the legislature intervened again, in s 22(7) of the Black Administration Act 38 of 1927, to protect `the material rights of any partner' of a subsisting customary union.

void.[13] It would not be deemed bigamous, since customary marriages were not recognized as marriages for purposes of criminal law.[14]

3.1.5 In 1985 the Law Commission recommended full recognition for customary marriages.[15] Partial reform followed three years later: civil or Christian marriages were no longer allowed to supersede existing customary unions.[16]

C. Evaluation

3.1.6 Section 15(3)(*a*) of the Constitution now authorizes Parliament to promulgate legislation recognizing `marriages concluded under any tradition, or a system of ... personal or family law'. It would seem that the government is not simply *permitted* to act, for it has a constitutional obligation to eradicate discrimination between customary and civil/Christian marriages. *Ryland v Edros*,[17] for instance, held that failure to recognize Muslim marriages (which have suffered even worse discrimination in South African law than customary marriages) would violate the right to equality between cultural or religious groups.

3.1.7 As a further reason for recognizing the marriages of religious and cultural groups, the same case alluded to the spirit of tolerance on which the Constitution was based. This argument receives adventitious support from ss 30 and 31 of the Constitution, which allow individuals and groups the freedom to participate in and pursue the culture of their choice. Implicit in this freedom is a duty on the state to recognize their cultural institutions.[18]

3.1.8 It follows that individuals who have celebrated their marriage according to customary rites may create a union as valid as one celebrated in Church or civil registry. With certain

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13 *Gwalata* 1932 NAC (N&T) 51, *Ntseki* 1933 NAC (C&O) 61, *Xalisa* 1942 NAC (C&O) 103, *Zulu v Mcube* 1952 NAC 225 (NE), *Sogoni v Jacisa* 1970 BAC 76 (S) and *Qitini v Qadu* 1981 AC 42 (S).

14 *Zonyane v Rex* 1912 EDL 361.

15 *Report on Marriages and Customary Unions of Black Persons* (1985) para 11.2.

16 Section 1 of Act 3 of 1988, amending s 22 of the Black Administration Act.

17 1997 (1) BCLR 77 (C).

18 Bennett *Human Rights and African Customary Law* 114.

exceptions (concerning the relative capacity of the spouses, polygyny and the proprietary consequences), a marriage by customary law will have the same consequences as any other lawful union.

D. Recommendation

3.1.9 In order to remove the anomalies created by many years of discrimination, customary marriage must now be fully recognized. To do so will comply with ss 9, 15, 30 and 31 of the Constitution, provisions which suggest that the same effect be given to African cultural institutions as to those of the western tradition.

3.2 CONVERSION FROM ONE FORM OF MARRIAGE TO ANOTHER AND THE PROBLEM OF DUAL MARRIAGES

A. Excerpt from the Issue Paper[19]

3.2.1 The issue paper contained the following recommendation on the parties' freedom to establish the nature of their marriage and to change from one form of marriage to another:

> "Parties would normally be free to establish whether their marriage is customary, civil or Christian at the time the union is contracted, but there is no reason why the spouses should be permanently bound by their choice. Provided no injury is done to the interests of the third parties, spouses could make a joint declaration to change the nature of their marriage before a judge or magistrate."

B. Problem analysis

3.2.2 Once customary marriages have full recognition, the statutory amendment passed in 1988 to prevent civil or Christian marriages from automatically terminating customary unions will

19 At p4

become redundant.[20] As the law now stands, however, spouses of an existing customary marriage may remarry one another by civil or Christian rites, provided that the man is not already partner to a customary union with another woman.[21]

3.2.3 The converse situation - where the partner of a subsisting civil marriage contracts a customary-law marriage with a person other than the spouse of the civil marriage - is still governed by the common law. Since civil and Christian marriages are strictly monogamous, the second union (which earlier courts described as an 'immoral contract')[22] is deemed null and void.[23]

3.2.4 If all marriages produce the same legal consequences, the form of a union would be irrelevant to deciding what law should govern its effects. According to the proposals made below, however, certain differences will continue to distinguish customary from civil or Christian marriages, notably the husband's entitlement under customary law to take more wives.[24] These differences are unlikely to cause any legal problems, but, where the same spouses celebrate their marriage according to two forms, complications are bound to occur.

3.2.5 Most Africans marry by both traditional customary and Christian rites. (An almost invariable companion to Christian marriage, for instance, is a bridewealth agreement.)[25] The

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20 Section 1 of Act 3 of 1988. The Law Commission's Report on *Marriages and Customary Unions of Black Persons* para 11.2.7 proposed this amendment to the common law.

21 Because the 1988 amending legislation was not retrospective, discarded spouses of customary marriages that had been dissolved before 2 December 1988 continue to receive the dubious protection of s 22(7) of the Black Administration Act, namely, a civil or Christian marriage does not disturb their material rights.

22 See *Moshesh v Matee* 4 NAC 78 (1920) and *Sogayise v Mpahleni* 1931 NAC (C&O) 13.

23 *Zulu v Mcube* 1952 NAC 225 (NE), *Sogoni v Jacisa* 1970 BAC 76 (S) and *Qitini v Qadu* 1981 AC 42 (S). But the union is not bigamous, because customary marriages were not recognized as full marriages: *Zonyane v Rex* 1912 EDL 361.

24 A more complex issue, which cannot be regulated by legislation, is the spouses' relationship with third parties. The husband's obligation to his father-in-law under a bridewealth agreement is one such relationship. Another is the husband's customary right to sue his wife's lover for damages for adultery. *Mdodana & another v Nokulele* 2 NAC 138 (1911) and *Mtshengu v Mawengu* 1954 NAC 172 (S) held that, in cases of civil or Christian marriage, common law applies to cases of abduction or enticement on the understanding that these actions arise out of an interference with conjugal rights established by the marriage. Cf Poulter *Legal Dualism in Lesotho* 64-5.

25 See, for example, Raum & De Jager *Transition and Change in a Rural Community* 55ff and Koyana *Customary Law in a Changing Society* 27ff. In systems of customary law that link bridewealth and the validity of marriage, the bridewealth agreement would denote a second union. According to the proposals

question then arises: which marriage should be given precedence in order to determine the legal consequences of the marriage? The answer in South Africa, until recently, was to allow civil or Christian marriage an overriding effect.[26] This ruling was prompted in part by the superior position enjoyed by Christian marriage, and in part by the understanding that it operated as an indication of the spouses' orientation towards western culture.[27]

3.2.6 We are not bound to continue this principle. Both customary and civil marriages could be treated as equally valid, as is the case in Lesotho,[28] and Swaziland.[29] The result of equal status, however, has been legal confusion.[30] What law determines the spouses' rights and duties?[31] One scholar[32] urges a utopian merger of the two legal regimes, but, this is easier said than done, since not all consequences of the marriages can be reconciled.[33]

3.2.7 Under the Transkei Marriage Act, husbands of civil or Christian marriages could validly contract additional customary marriages.[34] (To placate established Churches, however, ministers

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in par 4.4.4.10 below, however, because bridewealth agreements will be **optional contracts** with no effect on the marriage, they would operate in these circumstances as **evidence** of an additional, customary union.

26 Which spouses might have intended, because Christian marriage offered women important secular benefits, notably of course monogamy: Phillips *Marriage Laws in Africa* 29.

27 Hence the form of the marriage subjected the spouses and their children to common law. *Cole* (1898) 1 NLR 15 (supported in *Asiata v Goncallo* (1900) 1 NLR 41) held that, if people married in Church, it would be `sufficient to show that ... the marriage contract and all the consequences flowing therefrom should be regulated exclusively by [common] law'.

28 *Majara v Majara & others* CIV/APN/138 of 1989 (unreported), for instance, held that a Christian marriage contracted after a valid and subsisting customary marriage was null and void. See Rugege (1991) 7 *Lesotho LJ* 73 for commentary.

29 In *Dube v R* 1970-76 SLR 93, a man who had married in South Africa by civil rites subsequently married another woman in Swaziland under customary law. He was convicted of bigamy. In *Ex parte Ginindza & another* 1979-81 SLR 361, a man who had married by civil rites during a customary marriage managed to have the civil marriage declared void (so that he could remarry his second wife under customary law). See Nhlapo *Marriage and Divorce in Swazi Law and Custom* 29ff, who considers the cases in Swaziland since the decisions in *R v Mabuza & another* 1979-81 SLR 8 and *Dladla v Dlamini* 1977-78 SLR 15 established the equal status of customary and civil marriages.

30 Bennett *Application of Customary Law in Southern Africa* 198-9.

31 See Maqutu (1983) 16 *CILSA* 378 and *Contemporary Family Law of Lesotho* 44ff.

32 Poulter (n24) 34ff.

33 Nhlapo (n29) 36.

34 Act 21 of 1978. Husbands who were parties to civil marriages could not contract subsequent *civil* unions, presumably with women other than their existing spouses. The Act said nothing about the status of the forbidden unions.

of religion could refuse to solemnize marriages which did not conform to the tenets of their religion.)[35] Here the effect of the second union was to change the legal status of the wife married by civil or Christian rites. Her position was henceforth governed by customary law. [36]

3.2.8 The possibility of validly contracting two different types of marriage was carefully regulated by the Act. In the first place, because a civil marriage did not automatically terminate a customary union,[37] any rights acquired during the subsistence of customary marriage were specially protected.[38] In the second place, to avoid creating intractable disputes about joint estates in polygynous marriage the husband's right to marry again was conditional upon his first union being out of community of property.[39]

C. Evaluation

3.2.9 The changes of status and the legal complexity of the Transkeian approach do not recommend it. The existing rule under South African law (ie that the civil/Christian form should prevail) could, of course, be retained, partly to extend greater protection to women and partly for the sake of certainty and simplicity. Other solutions are no doubt possible. It could be decided that the later (or possibly the earlier) marriage determined the consequences of both unions, but this approach seems arbitrary. A better solution would be to hold that the parties' intention be allowed to determine the predominant form of marriage.[40] The optimum situation would be where spouses expressly said that their marriage was customary or civil (eg in a registration or marriage certificate); otherwise, a court could look to the predominant form of their union paying particular attention to the spouses' lifestyle.

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35 Section 9.

36 Section 38. Hence, if a man became party to more than one marriage, irrespective of whether one of the marriages was a civil one, the status of his wives and children was to be regulated by customary law.

37 Section 1 of the Act, which contained definitions, made it clear that all marriages were on an equal footing.

38 By s 3(2).

39 Section 3. And subsequent customary unions were out of community.

40 Which was the effect of the judgment in *Mabitle v Mochema* 1971-3 LLR 271.

3.2.10 Under the Tanzanian Law of Marriage Act,[41] provision was made for spouses to change the nature of their marriage by joint declaration in court. Christian marriages, however, were given a privileged position, for no marriage celebrated in Church may be converted, as long as the parties continue to profess the Christian faith.[42] A suggestion was made in the Issue Paper that spouses be permitted a similar option in South Africa, provided that the change of form would do no injury to the interests of third parties. **Prof A J Kerr** questioned the viability of this proposal, noting both the difficulty of determining who would qualify as an interested third party and the consequential changes that would be effected to the matrimonial property regime. Limiting the right of conversion also has the benefit of affording greater protection to wives who may agree to make joint declarations under threat of marital breakdown if they should refuse. Given the fact that this type of option has never existed in South Africa and that we have no indication how the Tanzanian procedure works in practice (nor how often it is invoked), it seems advisable to abandon this proposal.

D. Recommendation

3.2.11 It is recommended that when spouses marry both by customary and Christian (or civil) rites to allow both forms of marriage equal effect would create irreconcilable conflicts and legal confusion. Hence the consequences of the union should be determined by the law expressly chosen by the parties. If the parties did not express any choice, a court may apply the law that is consonant with the spouses' life styles (as indicated by their lifestyles and other relevant factors) and with the rites and customs governing their marriage. For greater legal clarity in the future and to protect the position of women in monogamous marriages, the law should discourage, rather than encourage, any 'mixing' of the systems.

41 Section 11(2) of Act 5 of 1971.

42 Section 11(5). For a commentary on this provision see Read (1972) 16 *JAL* 25.

CHAPTER 4

ESSENTIALS OF CUSTOMARY MARRIAGE

4.1 THE PROBLEM OF DEFINING CUSTOMARY MARRIAGE

A. Problem analysis

4.1.1 In pre-colonial times, marriage in Africa served three major functions: to propagate families, to provide domestic labour and to establish political and economic alliances. It followed that marriage was a matter of family, rather than individual concern.[1]

4.1.2 Further important characteristics of African marriage were its private and processual nature.[2] It was an arrangement between two families that could be adjusted to suit their needs and the exigencies of particular situations;[3] it had no precise moment of beginning or end. Rather, the spouses' relationship matured and strengthened over years, gaining definition with the birth of children and payment of bridewealth. Death of a spouse did not necessarily terminate the union, since the families could arrange its continuation through levirate or sororate unions.[4]

B. Evaluation

4.1.3 The ambiguity and flexibility of customary marriage would not have been perceived as problematic in the close-knit communities of the past. Where people knew one another, proof of marriage was seldom a problem. If the validity of a union was called into question, it could be

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1In sharp contrast with the western concept of marriage: Women and Law in Southern Africa (WLSA) *Uncovering Reality* 5.

2See Phillips *Survey of African Marriage and Family Life* xi-xvii.

3Thus, as Molokomme in Women and Law in Southern Africa (WLSA) *The Legal Situation of Women in Southern Africa* 14-15 found in Botswana, a marriage would be deemed to exist if the families were in agreement and bridewealth had been transferred.

4For useful anthropological accounts of customary marriage in southern Africa, see: Mönnig 193-4, Holleman 128-45, Van Tromp 40ff, Schapera *Handbook* 130-8, Hammond-Tooke *Bhaca Society* 102-5, Reader 174-84 and Whooley in Verryn *Church and Marriage in Modern Africa* 245ff.

attested by many factors, including the evidence of go-betweens and family elders and the public rituals of negotiation and consummation. In modern society, however, people are more mobile and relationships are far looser. Not only is it more difficult to establish customary marriage in these circumstances but there are also more occasions on which it needs to be proved. For a wide variety of reasons, such as claiming insurance benefits and council housing, marital status has to be precisely fixed.[5]

4.1.4 While all groups in South Africa should have the freedom to pursue the dictates of their culture or religion, certainty must now be brought to marriage. To achieve this purpose certain minimum requirements for all unions must be set, requirements that will secure the fundamental human right on which marriage is based: the individual's freedom to determine a spouse of choice.

C. Recommendation

4.1.5 It is recommended that legislative provision must be made for a minimum set of essential requirements for marriage.

4.2 CONSENT OF THE SPOUSES

A. Excerpt from the Issue Paper

4.2.1 The Issue Paper contained the following discussion of and recommendation on the consent of spouses: [6]

> "No one today is likely to dispute the principle that validity of marriage depends upon the free consent of the spouses. Ideally, even in customary law, spouses were not forced to marry against their will, for it was appreciated that an unhappy marriage would

5A problem raised by **The National Human Rights Trust**.

6At p 5.

eventually erupt into domestic conflict with repercussions for the entire family. In any event, the courts have always refused to uphold forced marriage, a rule that is endorsed by most international human rights documents.[7]"

B. Problem analysis

4.2.2 In European legal systems of the nineteenth century, marriage was considered to be a consensual union ratified by the Church or state. Colonial courts therefore held that, in so far as a customary marriage was to be recognized, it depended for its validity on the consent of the main parties, namely, the bride, the groom and the bride's guardian.[8] Evidence of consent was found in the conventions traditionally considered necessary in Africa to contract a marriage:[9] bridewealth, observance of appropriate rituals and handing over the bride.[10]

4.2.3 Under pre-colonial customary law, where marriage was an agreement between kin groups rather than individuals, however, consent of the spouses would strictly speaking be unnecessary. In the past, girls might be promised as brides, possibly even before they were born.[11] Further, where the kinship system favoured sororal polygyny, a young girl might automatically follow the path of her older married sister, if the latter were to die young or prove barren.[12] In short, a woman's marital destiny could be determined by lineage politics, kinship amity or simply the need recoup bridewealth that her guardian had already paid over to contract other marriages.[13]

4.2.4 To suggest that a bride's consent was irrelevant would oversimplify the issue. Forced marriage could never have been common, since the ideal union was the culmination of a youthful

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7Such as art 16(1)(b) of CEDAW

8Thus *Zimande v Sibeko* 1948 NAC 21 (C) at 23 held that a marriage that procured without the volition of one of the parties was `repugnant to our civilized conscience'. See, too, *Zulu v Mdhletshe* 1952 NAC 203 (NE) and *Mngomezulu v Lukele* 1953 NAC 143 (NE).

9Mere cohabitation was not on its own indicative of an intention to be married: *Ngcongolo v Parkes* 1953 NAC 103 (S) at 105. Cf *Ndaba v Tabete* 1917 NHC 63 and *Nyembe v Mafu* 1979 AC 186 (NE).

10See generally Olivier et al *Die Privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes* 44ff and Bekker *Seymour's Customary Law in Southern Africa* 105.

11Matthews (1940) 13 Africa 19ff.

12Schapera *Handbook* 155. See further Kuper in Radcliffe-Brown & Forde *African Systems of Kinship* 99 and Marwick 136ff.

13So the following demand could be put: `Cousin (paternal uncle's child) marry me, [in order] that the cattle return to the kraal': Ashton 63.

romance, sealed by a bridewealth contract.[14] The approved way of negotiating marriage assumed a period of courtship by the prospective spouses. Once they had decided to marry, the boy was supposed to secure his father's approval, and then the girl's family could be approached.[15] When the terms and conditions of bridewealth had been settled, the families would be regarded as bound by an affinition agreement, which would be ratified by delivery of one or two beasts as earnest.[16] Supporting this ideal was a general awareness that unhappy matches led to domestic conflict.

4.2.5 Besides, young people had various strategies for getting their own way. For instance, if a girl's guardian were unreasonable in insisting on a particular union, she could appeal to her uncles or she could elope to her chosen lover.[17] The elaborate rituals of courtship, marriage negotiation and the wedding ceremony itself also gave a bride-to-be many opportunities to voice her doubts and objections.[18]

4.2.6 On the other hand, women were generally expected to be obedient and to make the best of their circumstances.[19] By modern standards, it would not be easy to judge whether marriage was voluntarily contracted, since a bride's acquiescence could well mask reluctance or outright refusal. Customs that sanctioned mock abduction as a prelude to marriage,[20] and others, such as

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14Cf Nhlapo in WLSA (n3) 109-10, Nhlapo *Marriage and Divorce in Swazi Law and Custom* 47 and Burman in Hirschon *Women and Property/Women as Property* 120.

15See Reader 179-84 and, further, Mönnig 130ff, Raum & De Jager *Transition and Change in a Rural Community* 43, Schapera *Handbook* 129, Holleman 99ff and Krige *Zulu* 126-8.

16Customary law took no cognizance of a private engagement between a boy and girl, because they had no authority to negotiate marriage. Only an affinition agreement between the guardians of the prospective spouses had legal consequence.

17As a last resort, she might even ask her the traditional authority of her people to intervene. See Schapera *Handbook* 129, Simons *African Women* 102-3 and the account given by the court in *Nomatusi v Nompetu* 3 NAC 165 (1915).

18See *Simelane v Sugazie* 1935 NAC (N&T) 45.

19Simons 1958 *AJ* 328-9.

20Namely, the practice whereby an ardent suitor and his friends carry off the girl with or without the connivance of her own father. See Van Tromp 63ff, Ashton 65, Simons (n17) 117-19 and Hunter 187-8 and 531-2. This preliminary to marriage was a way of forcing the girl's father to give his consent, avoiding the expense of a wedding, hastening matters where the girl was pregnant or persuading her to marry. Mock abduction is still popular: Manona in Mayer *Black Villagers in an Industrial Society* 189-93 and Whooley in Verryn (n4) 295ff.

the requirement that women should pretend indifference to suitors or that they should `weep' ritually on the wedding day, further obscured the reality of their consent.[21]

4.2.7 Colonial governments paid little attention to these social nuances. They immediately took action to ban forced marriage.[22] In Natal and the Transkeian Territories, such practices were made criminal offences,[23] and, where no specific legislation was passed, the courts refused to give effect to forced unions on policy grounds.[24] Child betrothals, too, were declared to be contrary to public policy and unenforceable,[25] although, in this case, if the deficiency of consent were later cured, the union could become a valid marriage.[26]

C. Evaluation

4.2.8 Today, no one is likely to dispute the requirement that spouses freely consent to their marriage. This principle rests on the freedom to marry, which is fully accepted in international law[27] as well as in South African public policy.[28] An individual's right to decide his or her marital destiny is clearly a universal human right,[29] and it is endorsed by over a century of

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21See Matthews (n11) 7ff and Nhlapo *Marriage and Divorce in Swazi Law and Custom* 53-6. Moreover, a duty to be modest on all occasions discouraged women from displaying great enthusiasm for a suitor. See Phillips & Morris *Marriage Laws in Africa* 99, Wilson in Krige & Comaroff *Essays on African Marriage in Southern Africa* 136.

22See Peart 1982 *AJ* 110-12. And they were more than suspicious of mock abduction, since technically it could amount to kidnapping. See Labuschagne (1988) 13 *TRW* 33ff, *Mkupeni v Nomungunya* 1936 NAC (C&O) 77 and s 101 of the KwaZulu/Natal Codes.

23Sections 30 of Procs 110 and 112 of 1897 and s 29 of Proc 140 of 1885 for Transkei; and s 116(1)(*b*) of the KwaZulu/Natal Codes. These prohibitions were not popular with guardians of the young, who correctly saw them as a major derogation from parental authority. See Simons (n17) 103 and the Cape Commission *Report on Native Laws and Customs* Evidence 517 cited by him.

24*Mbanga v Sikolake* 1939 NAC (C&O) 31, *Gidja v Yingwane* 1944 NAC (N&T) 4, *Gebeleiseni v Sakumani* 1947 NAC (C&O) 105 and *Zimande v Sibeko* 1948 NAC 21 (C) at 23.

25*Sibeko v Malaza* 1938 NAC (N&T) 117 and *Butelezi v Ndhlela* 1938 NAC (N&T) 175.

26When the person concerned reached a marriageable age. Until then, on the basis of the pari delicto rule, anything paid over in consequence of the agreement could not be recovered: *Zulu v Mdhletshe* 1952 NAC 203 (NE), *Mngomezulu v Lukele* 1953 NAC 143 (NE).

27See art 16(2) of the Universal Declaration of Human Rights, art 23(3) of the Covenant on Civil and Political Rights, art 10(1) of the Covenant on Economic, Social and Cultural Rights, art 1 of the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages and art 16(1)(*b*) of CEDAW.

28See, for example, *Barclays Bank DC&O NO v Anderson* 1959 (2) SA 478 (T).

29See the international instruments cited above in footnote 27.

precedent and legislation in South Africa.[30] It is more important now to consider the implications of requiring of spousal consent, namely, the most appropriate means of ensuring that a properly informed consent is given. Colonial courts and legislatures, for instance, paid no attention to the age at which a prospective spouse could formulate consent. (Ages fixed under the Marriage Act[31] were assumed to apply only to civil or Christian unions.)[32] Nor were women released from the need to obtain their guardians' approval in order to marry.

4.2.9 Determining whether a woman genuinely consents to her marriage is still a problem. The **Gender Research Project (CALS)**, for example, said that the process of negotiating marriage demands no more than that a woman acknowledge that she knows the man who is proposing. Her consent is then inferred. Moreover, even in common law, what constitutes duress sufficient to invalidate consent is still not absolutely settled.[33] These problems are not amenable to solution by statute. Legislation would be more effective in fixing a specific age at which individuals may be presumed mature enough to decide when and whom they want to marry.[34]

D. Recommendation

4.2.10 It is recommended that the main requirement for a valid customary marriage should be the consent of the spouses.

4.3 BRIDEWEALTH

A. Excerpt from the Issue Paper

30Moreover, none of the respondents to the Issue Paper challenged the principle that individuals should be free to marry the spouses of their choice, or, conversely, should be allowed to refuse an unwanted union.

31Section 26 of Act 25 of 1961.

32See, for example, Law Commission *Investigation into the Advancement of the Age of Majority* para 11.1.

33Under the common law, only a reasonably held fear of force (or threat of force) of such a degree as to vitiate consent suffices. (According to Sinclair *Law of Marriage* 359, the test is both subjective and objective.) Metus reverentialis, the fear of offending a parent or superior, which would be particularly apposite to the situation of African women, is not enough.

34See below in Chapter 5.

4.3.1 The Issue Paper contained the following discussion of and recommendation on bridewealth:[35]

> "Bridewealth is critical to all customary forms of marriage. Despite the contention that it demeans the status of women, there can be no question of banning bridewealth, in part because of the important role it plays in maintaining the African cultural tradition and in part because of the difficulty of enforcing a prohibition.
>
> It can be questioned, however, whether payment or non-payment of bridewealth should affect the validity of marriage, influence the spouses' marital obligations or determine rights to children. Even in customary law, payment of bridewealth is often deferred and the status of a marriage is seldom placed in doubt through failure to pay timeously. One approach would be to make bridewealth optional, analogous to the celebration of a marriage by religious rites. Such an approach would underwrite the law in KwaZulu/Natal[36] and would support the courts' ruling that bridewealth is not essential for civil or Christian unions."

B. Problem analysis

4.3.2 Meaning and function of bridewealth

(a) Problem analysis

4.3.2.1 **Bridewealth denotes the giving of property by a husband or his guardian to his wife's family as part of the process of marrying. 'Bridewealth' was the word chosen to avoid importing any particular connotations implicit in the terms *lobolo, bogadi, bohali, munywalo, ikhazi*, etc. As Dr A M S Majeke (University of Fort Hare) correctly points out, however, `bridewealth' cannot conceptually do justice to `lobola', since the former word signifies a transfer of wealth, whereas `lobola is a blood contract a mandatory and imperative *sine qua non* condition for *any* marriage in indigenous African communities'. We none the less felt it important not to privilege any particular language, hence we preferred use of a neutral term.** Although this practice is synonymous with marriage in all the systems of customary law in southern Africa, it was frowned upon by colonial administrations,

35At p 7.

36See s 38(1) of the Codes, Proclamation R151 of 1987 and Act 16 of 1985 (Z)

because giving bridewealth was thought to represent the purchase price for a wife.[37] Some governments therefore attempted to ban the practice.[38]

4.3.2.2 The idea that bridewealth buys wives has now been exposed as a fallacy,[39] and, in general, twentieth-century anthropology has encouraged a much more positive interpretation of the institution.[40] While Marxist theory contends that bridewealth is a mechanism whereby seniors can preserve their dominance over juniors and women,[41] anthropologists of the functionalist school have shown that bridewealth is no more than a consideration for a wife's reproductive potential.[42] It is a quid pro quo that compensates the wife's family for the loss of a daughter.[43]

4.3.2.3 According to this more tolerant perspective, bridewealth works to stabilize marriage[44] and to protect wives,[45] a view that is supported by the rule that husbands who mistreat their wives ought to be penalized when claiming return of bridewealth on divorce. Some writers

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37And as such should best be rendered by the term `brideprice'. See Chigwedere *Lobola - the Pros and Cons* and Dlamini *Juridical Analysis of Ilobolo* 90-3.

38As, for example, under s 24 of Law 3 of 1876 of the Transvaal. See *Kaba v Ntela* 1910 TPD 964 at 967.

39Since the wife is not treated as a slave or chattel: Dlamini (n37) 169. See further Murray & Lye *Transformations on the Highveld* 112ff, Hunter 192 and Simons (n17) 88.

40An account of the functions of bridewealth is given by Dlamini 1984 *De Jure* 150-5.

41See Terray *Marxism and `Primitive' Societies* 163ff and Meillassoux (1960) 4 *Cahiers d'Etudes Africaines* 38ff.

42Holleman 148-9 and Evans-Pritchard (1947) 6 *Afr Studies* 187. Interpreted in this way, bridewealth could plausibly be rendered as `child price', a term endorsed by the customary-law principle that parental rights are determined by payment of bridewealth. See Reuter *Native Marriages in South Africa* 218-22, Mathewson (1959) 10 *J Racial Affairs* 72, Jeffreys (1951) 10 *African Studies* 145ff and Brandel (1958) 17 *Afr Studies* 34ff. Nevertheless, rights to children and payment of bridewealth do not always coincide, for, even if a husband's family does not make full payment, it usually retains the children.

43Preston-Whyte in Hammond-Tooke *The Bantu-speaking Peoples of Southern Africa* 187-8.

44Anthropologists also argued that high levels of bridewealth discouraged divorce: Gluckman in Radcliffe-Brown & Forde (n12) 182ff. Later this hypothesis was revised in light of further research indicating that high marriage payments depended on the stability of marriage, rather than the other way round: Gluckman *Ideas and Procedures in African Customary Law* 62-3. The arguments seem inconclusive, however: Simons (n17) 95 and Dlamini (n37) 171.

45The 1883 Cape Commission *Report* on *Native Laws and Customs* 70.

have gone so far as to say that bridewealth is `the Bantu woman's charter of liberty'[46] and that it benefits women by providing a public measure of their worth.[47]

4.3.2.4 Functionalism has also stressed the ritual significance of bridewealth by showing how it binds families and their relations to the ancestors.[48] As **R W Skosana** said in response to the Issue Paper, abolishing bridewealth would be an assault on African religion. The ritual importance of bridewealth is apparent in the practice of segregating property used for marriage from ordinary trade goods. Thus, in some communities, the livestock given as bridewealth are withdrawn from the general economy into a closed system of marital transactions.[49]

(b) Evaluation

4.3.2.5 Since colonial occupation, however, bridewealth has changed.[50] In response to the profound influences of capitalism, cattle and the other goods formerly reserved for marriage transactions have acquired a new value, measurable against cash and consumer goods. Livestock have lost their special symbolic qualities,[51] and alien imports, because of their rarity and cost, have been assimilated to the category of marriage goods. Nearly everyone now gives cash or a combination of cash and livestock as bridewealth.

4.3.2.6 With changes in the composition of bridewealth came changes in function.[52] While no doubt people at first resisted commercialization of the institution, the general economy has had an irrevocable influence. Hence, the amounts paid in bridewealth have increased enormously.[53] People say that the bride's family must be compensated for their expenditure on

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46Soga *Ama-Xosa* 274-5.

47See Dlamini (n40) 151-2, Hunter 190 and Chinyenze (1983-4) 1-2 *Zimb LR* 241.

48Krige (1939) 12 *Africa* 403, Van Tromp 49 and Dlamini (n37) 191.

49See Sansom in Kapferer *Transaction and Meaning* 143ff.

50Mathewson (n42) 72-6 and Holleman (1960) 11 *J Racial Affairs* 106-9.

51Simons (n19) 95. See, too, Lugg (1945) 4 *Afr Studies* 26-7.

52See generally Dlamini (n37) 179-81, (1985) 18 *CILSA* 365 and (n40) 150ff.

53This trend is matched, although overshadowed, by a tendency for the cost of pre-marriage gifts and wedding festivities to rise too.

her education.[54] It is probably true that a feeling of reciprocity is inherent bridewealth - that it should be used by the bride's family to buy gifts and to host the wedding[55] - but families have a strong temptation to profiteer. The danger of this tendency is to encourage men, who cannot afford the sums asked, to enter into informal unions, which in turn undermine the entire institution of marriage and render offspring illegitimate.[56]

4.3.2.7 Moreover, people charge bridewealth for their daughters simply because they themselves had to pay it for their own marriages, and, of course, to settle inherited marriage debts.[57] Guardians have a plausible reason for satisfying their immediate economic needs and husbands can justify their refusal to pay maintenance for wives and children on breakup of marriage.[58] The property received by the bride's parents, especially when it is cash rather than cattle, is no longer being kept as financial security for the divorced or widowed wife. Instead, it is being spent on day-to-day living expenses.[59] The **Gender Research Project (CALS)**, for example, found that most of the cash is used by parents to pay for the education of other siblings or to improve their households by acquiring new furniture. Bridewealth is therefore no longer available to support a wife and her children if the marriage breaks down.[60] Thus, while people interviewed by the **Gender Project** were aware that bridewealth could be returned, none of them had actually seen it happening.

4.3.2.8 In communities that are desperately poor, bridewealth seems a profligate practice.[61] Nevertheless, research by the **Gender Research Project (CALS)** confirmed that needy families still feel obliged to enter into bridewealth agreements. No actual transfer of

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54See Brandel (n42) 34.

55Which was pointed out by **Judge S S Ngcobo**.

56Hlophe (1984) 17 *CILSA* 168-70 and Dlamini (n40) 158.

57Hlophe op cit 169.

58Burman & Berger (1988) 4 *SAJHR* 340.

59Cf Dlamini (n52) 362.

60In any event, to say that bridewealth gave women financial or social security was misleading, since the property accrued to a wife's guardian, not to the woman herself.

61Although it still functions to redistribute wealth from the junior generation (which is more economically active) to the senior: Murray (1977) 21 *JAL* 80 and (1976) 35 *Afr Studies* 99ff. See further Murray & Lye (n39) 114, Koyana *Customary Law in a Changing Society* 2ff and Brandel (n42) 34ff.

property may take place, which seems to suggest that bridewealth is important primarily to give a sense of validity to the marriage and to incorporate parents and kin groups into marriage negotiations.[62]

4.3.3 Recognition and control of bridewealth

(a) Problem analysis

4.3.3.1 In 1927, the Black Administration Act gave bridewealth special protection from any further suggestion that it was contrary to natural justice or public policy.[63] An identical provision was included in the current legislation recognizing customary law:[64]

> "it shall not be lawful for any court to declare that the custom of lobola or bogadi or other similar custom is repugnant to (public policy or natural justice)'.

4.3.3.2 A new objection to bridewealth has now arisen, however, one that harks back to colonial days:[65] that bridewealth leads to the subordination of women. A common charge is that, because of commercialization, it functions as the purchase price for women,[66] thereby demeaning their status.[67] **Adv J Y de Koker**, for instance, said that although its original purpose was not to humiliate, denigrate or objectify women, bridewealth now serves to strengthen the authoritative position of the husband.[68] By talking about bridewealth as the consideration for acquiring rights to a wife, people encourage this negative image.

4.3.3.3 Nevertheless, this objection goes to matters of symbolism and interpretation. (As **R W Skosana** said, when a husband gives his wife a ring, is he buying her?) And opinion on the

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62 And most respondents, such as those at the **Law Commission Workshop (Western Region)**, felt that parents ought to play a part in the process of marriage.

63 Section 11(1) of the Black Administration Act 38 of 1927.

64 Section 1(1) of the Law of Evidence Amendment Act 45 of 1988.

65 See *Meesadoosa v Links* 1915 TPD 357 at 359.

66 Mathewson (n42) 75. Commercialization of bridewealth is widely deplored, as discovered by the **Law Commission Workshop (Eastern Cape)**, but it is impossible to control the manner in which people will perceive and manipulate such institutions to their immediate advantage.

67 See Chinyenze (n47) 229.

68 And, because bridewealth and parental rights are linked, a father may retain his children, even if they would be better off with their mother.

issue seems to be divided. Women interviewed by the **Gender Research Project (CALS)**, for instance, did not agree on the effect that bridewealth had on their status. Some claimed that it dignified them, while others said that they were disgraced by being treated in the same way as property.

(b) Evaluation

4.3.3.4 Giving bridewealth does not directly involve discrimination against women contrary to s 9 of the Constitution. After all men have to pay, not women.[69] An argument of *indirect* discrimination (which is prohibited by s 9(3) of the Constitution) is also unlikely to succeed. Indirect discrimination suggests that, although a practice appears gender-blind, the way in which it operated over time worked to the detriment of women.[70] Again, however, it would be impossible to demonstrate that payment of bridewealth was the condition precedent to the unfavourable treatment of wives, especially in view of the substantial literature claiming that bridewealth functions to benefit women.

4.3.3.5 Bridewealth may have a more concrete effect on individual rights and freedoms by binding women to unwanted marriages. If a wife seeks a divorce, her family is usually obliged to return bridewealth, and, rather than do so, they may force her to put up with an unhappy relationship.[71] But the objection of undue pressure cannot be remedied by legislation. Women have the freedom to end their marriages when they wish, and the law cannot control all economic and social circumstances that might compel or persuade them to remain married.[72]

4.3.3.6 Notwithstanding the economic and social abuses of bridewealth, few people would want to see it abolished. It is a remarkably durable practice that has strong appeal as a symbol of African cultural identity.[73] The **Rural Women's Movement**, for instance, felt that

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69Hence any argument, under s 9 of the Constitution, of direct discrimination would fail.

70See Albertyn & Kentridge (1994) 10 *SAJHR* 164-7. The inquiry accordingly shifts from a specific act of prejudice to the long-term effect of a practice upon women as a group.

71Armstrong et al (1993) 17 *Int J of Law & Family* 340.

72Hence Welch & Sachs (1987) 15 *Int J Sociology of Law* 390 recommended education and persuasion as the appropriate methods of combatting the negative aspects of bridewealth.

73Dlamini (n37) 198. Whooley in Verryn (n4) 313 puts it thus: `Lobola ... is the framework that people use to

bridewealth signifies respect for the spouses' ancestors and that it dignifies the wife.[74] Several studies indicate that, whatever its drawbacks, people remain deeply attached to the institution.[75]

4.3.3.7 Another important consideration is the difficulty of enforcing laws that seek to ban bridewealth or to restrict the amount payable. In the past, these prohibitions proved easy to circumvent:[76] bridewealth could be paid in forms other than cattle or cash and pre-marriage gifts could be deliberately inflated.[77] Hence, any prohibition (or even regulation) on bridewealth would be impossible to enforce and inadvisable.

4.3.4 Is bridewealth an essential requirement for customary marriage?

(a) Problem analysis

4.3.4.1 Africans have always thought of marriage and bridewealth as inseparable,[78] but payment of bridewealth is not necessarily essential to the validity of marriage. Sotho-Tswana law treats bridewealth as the crux of a marriage, but other systems do not.[79] What is more, in practice, bridewealth alone does not necessarily distinguish marriage from informal unions, since payment is often deferred and may even be waived.

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express and to bring about complicated changes in terms of relationships and deep changes in terms of emotional realities, values, attitudes and concepts. It is also the language that the ancestors understand and bless.'

74A view also held by the **Law Commission Workshop (Western Region)**.

75Durand *Swartman, Stad en Toekoms* 39 established that 95 per cent of the people they questioned were in favour of retaining bridewealth, and, in their brief survey in KwaZulu/Natal, the **National Human Rights Trust** established that more than 80 per cent of the men and women questioned were of the same view. See further Dlamini (n47) 363, Chigwedere (n37) 52ff, Brandel (n42) 49 and De Haas (1987) 46 *Afr Studies* 41-2.

76See Welch & Sachs (n72) 388 and Uzodike (1990) 2 *Afr J Int & Comp L* 290. Under s 61(1) of the KwaZulu/Natal Codes, however, the amount of bridewealth is limited to ten head for the daughter of a commoner and fifteen head for the daughter of a headman, the son, brother or uncle of a chief. No limit is specified for marriage to chiefs' daughters.

77Dlamini (n37) 232.

78Matthews (n11) 18.

79Notably the Nguni systems, which regard transfer of the bride as more important to establishing a marriage. See Kuper *Wives for Cattle* 127.

4.3.4.2 In view of these ambiguities, the question whether bridewealth should be deemed an essential ingredient of marriage has not been settled in the official version of customary law. The courts' decisions have been contradictory. On the one hand, certain judgments have held that bridewealth is `the rock on which the customary marriage is founded'[80] and that `there can be no marriage if there are no dowry cattle in the kraal of the woman's father'.[81] Other judgments have treated bridewealth as an ancillary (and voluntary) contract.[82]

4.3.4.3 Even in cases where bridewealth was considered essential, the courts did not specify whether the goods had to be physically delivered or whether a mere agreement sufficed. In practice, it proved impossible to insist on delivery, for the husband's ability to pay had to be taken into account (together with the ever-escalating cost of bridewealth relative to average income). Hence, in Transkei, the courts never required actual delivery of the full amount of bridewealth,[83] and the Natal and KwaZulu Codes state that neither payment nor agreement is essential to marriage.[84]

4.3.4.4 In any event, transfer of property is an equivocal act,[85] since mere payment of cash or livestock may signify not only an instalment of bridewealth but also a pre-marriage gift or damages for seduction. The social context of a payment can, of course, clear up any uncertainty. Thus goods handed over prior to cohabitation can usually be assumed to be bridewealth,[86] but, if cohabitation preceded delivery, the context itself offers no clue as to the purpose of payment.[87]

(b) Evaluation

80*Mbanga v Sikolake* 1939 NAC (C&O) 31 and Bekker (n10) 151.

81*Sipoxo & another v Rwexwana* 4 NAC 205 (1919) at 206.

82Blaine P 1927 NAC (N&T) 4. See, too, Jeffreys (n42) 150ff and Comaroff *Meaning of Marriage Payments* 17-18.

83*Maxayi v Tukani* 1 NAC 99 (1905) and *Ntobole a/b Ceza v Mzanywa & another* 3 NAC 190 (1914).

84Section 38(1). See *Dhlamini* 1967 BAC 7 (NE) and Dlamini (n37) 346.

85If the parties had no common intention in giving and receiving property, the purpose of a payment becomes uncertain, especially since livestock can function both as marriage goods and as commercial commodities.

86*Matholo v Moquena* 1946 NAC (C&O) 17 and *Nyembe v Mafu* 1979 AC 186 (NE).

87The attitude of the woman's guardian is then all important: did he receive the consideration as bridewealth or seduction damages? See *Mpanza v Qonono* 1978 AC 136 (C) and *Jama v Sikosana* 1972 BAC 21 (S).

4.3.4.5 In the circumstances, it seems sensible to regard bridewealth as one form of evidence, albeit weighty evidence, of the parties' intention to contract a marriage. By implication, payment of bridewealth would be optional, analogous to the solemnization of marriages by religious rites.[88] This approach to bridewealth is already implicit in the courts' judgments;[89] it is endorsed both by the KwaZulu and Natal Codes[90] and a general reluctance in customary law to call the status of a union into doubt when payment is not forthcoming.

4.3.4.6 If bridewealth is not necessary to the formation of a customary marriage, then non-payment will have no effect on the rights of the spouses towards one another or their children (a proposal made by certain respondents to the Issue Paper).[91] It follows that bridewealth will have purely social functions: as a token of appreciation (as suggested by the **Law Commission Workshop (Central Region)**) or a mark of the cultural attributes of a marriage (**Gender Research Project (CALS)**).

4.3.4.7 A ruling that bridewealth will not affect spousal rights has direct implications for enforcement of the agreement. Customary law did not normally allow an action in court to compel delivery of bridewealth.[92] The main long-term inducement to pay was the threat of losing parental rights to any children born of the union. A child's fate can no longer depend on payment or non-payment of bridewealth, however, since the child's interests are now of paramount importance.[93]

88This echoes an early view in s 84(*b*) of the 1883 Cape Commission on *Native Laws and Customs* that bridewealth be treated as a contractual accessory to marriage.

89Simons (n19) 327-8. Moreover, for civil or Christian marriages, bridewealth has never been considered essential to the validity of the union. See *Tobiea v Mohatla* 1949 NAC 91 (S), *Ntsimango* 1949 NAC 143 (S) and *Ntabeni v Mlobeli & another* 1949 NAC 158 (S).

90See s 38(1).

91See the **Law Commission Workshop (Southern Region)**, **The Women's Lobby** and **A M Moleko**. The **Rural Women's Movement**, too, felt that the need to agree on bridewealth should not be allowed to inhibit the spouses' marriage.

92A husband's neglect to pay might mean that he was dissatisfied with his wife or that he simply lacked the means. If the father-in-law were allowed to bring an action, an otherwise happy union might be disrupted.

93See par 7.5.7 - 7.5.8 below.

4.3.4.8 An alternative enforcement mechanism was the practice of ukutheleka (the Xhosa term), whereby the wife's guardian could put pressure on the husband to pay by `impounding' the wife, sometimes with her children.[94] If it was apparent that the husband had the means, but still did not pay, action could then be taken to dissolve the marriage.[95] This practice, too, must fall away, since it obviously does not accord with the spouses' right to an undisturbed marital consortium.[96]

4.3.4.9 If customary means of ensuring payment of bridewealth are no longer permissible, enforcement methods used for ordinary contractual debts would be available, but subject to conditions and circumstances relevant in customary law.[97] Moreover, a decree of divorce should operate to end any bridewealth agreement appended to the marriage, and courts granting divorce should have the power to order return of bridewealth (less the usual deductions customary law allowed the wife's guardian).[98]

(c) Request for comment

4.3.4.10 Specific comment is invited on the following issues -

* **Should bridewealth have a purely social function: as a token of appreciation or a mark of the cultural attributes of a marriage? In this case, bridewealth**

94If the wife's guardian were to institute an action for bridewealth, the husband could raise the failure to theleka as a defence: *Skweyiya v Sixakwe* 1941 NAC (C&O) 126, *Tonya v Matomane* 1949 NAC 138 (S) and *Menzi v Matiwane* 1964 NAC 58 (S).

95*Zenzile v Roto* 1 NAC 223 (1909).

96Or the right in s 18 of the Constitution to freedom of association.

97The courts have already held that, if the parties agreed to pay a specific amount or if the amount was fixed in accordance with a conventional scale, the wife's guardian may sue for payment: *Ngalimkulu v Mndayi* 1947 NAC (C&O) 65 and *Mavuma v Mbebe* 1948 NAC (C&O) 16. Under s 66(1) the KwaZulu/Natal Codes a court action is also permitted.

98**Prof A J Kerr's** question in this regard was answered by the Law Commission's report on *Marriages and Customary Unions of Black Persons* para 11.8.9. In practice, however, where bridewealth was immediately spent on receipt, the courts may find, as the **National Human Rights Trust** pointed out, that compulsory return of bridewealth on divorce is not possible.

	would be an optional element in marriage, analogous to the solemnization of marriages by religious rites.
*	**What effect should bridewealth agreements have on the validity of marriage, the rights and duties of the spouses towards one another or their rights to children?**
*	**Should a wife's guardian be allowed to use the customary remedies for enforcement of a bridewealth agreement, ie 'impounding' the wife and/or withholding guardianship of children?**

4.4 THE WEDDING CEREMONY AND HANDING OVER OF THE BRIDE

A. Problem analysis

4.4.1 According to all the systems of customary law in South Africa, marriage is patri- or virilocal, which means that a bride has physically to leave her family and go to live with her husband (either at his own or his father's homestead).[99]

4.4.2 In seeking to isolate the essential ingredients of a valid customary marriage, the courts attached great significance to a bride moving from one homestead to another, but many exceptions had to be allowed.[100] With the Tswana, for example, a wife goes to live with her husband only after bridewealth has been paid and she has given birth to a child.[101] In cases of mock abduction, the woman is already at her husband's homestead when the bridewealth negotiations start.[102] More important is the fact that exigencies of employment or accommodation may prevent the parties from complying with the rule of virilocality.

99With Nguni peoples especially, this is one of the principal determinants of marriage: Preston-Whyte in Hammond-Tooke (n44) 179 and Ngubane in Krige & Comaroff (n21).

100See *Mothombeni v Matlou* 1945 NAC (N&T) 123, *Ntabenkomo v Jente & another* 1946 NAC (C&O) 59 and *Sefolokele v Thekiso* 1951 NAC 25 (C).

101See Matthews (n11) 21-3 and Schapera *Handbook* 134ff.

102*Dlomo v Mahodi* 1946 NAC (C&O) 61 and *Ngcongolo v Parkes* 1953 NAC 103 (S) had to overcome these particular difficulties by allowing what they called `constructive' delivery.

4.4.3 When it was not possible to define the existence of a marriage through transfer of a bride, reference was possible to observance of traditional wedding ceremonies. After all, marriages everywhere are accompanied by a certain degree of ceremony,[103] which functions to separate the socially significant from the mundane. In certain African communities, observance of a long-recognized ritual may clearly distinguish marriage from mere cohabitation. For instance, with the Swazi, *libovu* (smearing of red ochre on the bride's face),[104] is a ritual critical to determining the marital state. With the Sotho the ritual is *tlhabiso* (the slaughtering of an ox)[105] and with the Xhosa *ukutyis' amasi* (drinking sour milk).[106]

B. Evaluation

4.4.4 Customary law nevertheless tends to be flexible and pragmatic.[107] Ceremonies may be abbreviated as circumstances dictate, and, especially in urban areas, they may be ignored altogether. In addition, even within a close-knit community, there is likely to be considerable variation in opinion on how essential a ceremony is and how it should be performed. Finally, many people have discarded traditional ceremonies or have combined them with western and Christian rituals.[108] For these reasons, the courts have treated customary rituals as optional, no matter how deeply rooted they were in tradition.[109] Ceremony was regarded as `the religious element of the proceedings', of no more importance than `prayer, music, singing or a wedding reception in a European marriage'.[110]

103See Tiersma (1988) 9 *J Legal History* 15-17 generally, and Krige and Ngubane in Krige & Comaroff (n19) 185 and 84, respectively.

104Nhlapo in WLSA (n3) 113 and Nhlapo (n14) 44ff.

105Poulter *Family Law and Litigation in Basotho Society* 118-22, Murray *Families Divided* 121-2 and Maqutu *Contemporary Family Law of Lesotho* 76. Cf *Lebenya v Mosola* 1947 NAC (C&O) 58.

106Van Tromp 77-9 and Manona in Mayer (n20) 189.

107So, for example, the ceremony might be simplified or abridged, because the man was marrying for a second time (Schapera *Married Life in an African Tribe* 71), by reason of poverty (Schapera op cit 72 and Van Tromp 57-8) or because pregnancy or an elopement called for a quick marriage.(Marwick 121). See further Nhlapo (n14) 65-6.

108For example, a wedding ring may now be used in place of the traditional gall bladder of a slaughtered beast: Ashton 68. And, for many, a church ceremony has become essential: Ashton 70-1, Schapera (n107) 65ff and Pauw *The Second Generation; a Study of the Family among Urbanised Bantu in East London* 94.

109*Ntenze v Ntsolo* 1930 NAC (C&O) 30, *Sila & another v Masuku* 1937 NAC (N&T) 121 and *Sibiya v Mtembu* 1946 NAC (N&T) 90.

110*Sila's* case supra at 123. See further Simons (n19) 322-5.

4.4.5 Inevitably then, compliance or otherwise with a particular ceremony should have no effect on the validity of a union.[111] Like bridewealth, this element of marriage must be considered discretionary, the equivalent of celebrating a union in a church, mosque or synagogue. It does not follow that ceremonies have no significance at all, however, since (in combination with bridewealth) they will help to establish the nature of a marriage.[112]

C. Recommendation

4.4.6 Traditional wedding ceremonies and the formal handing over of the bride should also be considered optional. Together with bridewealth, however, these institutions will serve to identify a union as one celebrated according to African rites.

4.5 FORMALITIES AND REGISTRATION

A. Excerpt from the Issue Paper

4.5.1 The Issue Paper contained the following discussion of and recommendation on registration as an essential requirement for marriage:[113]

> **"**Given [a]... persistently low level of compliance and evidence that imposition of formal requirements has the effect of depriving existing marriages of whatever limited validity they might otherwise have enjoyed, it seems expedient to retain the current law [on registration].
>
> Accordingly, registration of a marriage should not be compulsory. To allow registration at the instance of one of the parties sensibly acknowledges the fact that this formality has no intrinsic merit: it is a pragmatic means of proving marriage if and when the spouses

111 *Ngcongolo v Parkes* 1953 NAC 103 (S).

112 See par 4.3.2 - 4.3.4.10 above.

113 At p 6.

find it necessary to do so. Hence, a certificate of registration 'shall on its mere production in any court or in any other proceedings be *prima facie* proof of its contents'.[114]"

B. Discussion

4.5.2 The most fundamental requirement for a valid marriage is consent of the spouses.[115] Consent is, of course, an abstract requirement that usually has to be inferred from such facts as long cohabitation, performance of marital roles, payment of bridewealth and participation in marriage ceremonies. The ambiguity of these factors (which is apparent in the discussion above) suggests that a relationship may be contested, especially when an issue of inheritance arises.

4.5.3 Hence a critical factor, that must now be considered, is whether the spouses' union should be given a greater degree of certainty by being formally solemnized in a public context. Historically, this requirement testifies to the growing involvement of central authorities in what was previously a private arrangement.[116] Although the main purpose of insisting that all marriages comply with formalities laid down by the Church or state was to bring certainty to status, it also served to ensure that spouses had in fact consented. In most legal systems, once the spouses had had their union solemnized, they would have it registered in order to supply readily ascertainable proof. Thus solemnization and registration normally went hand-in-hand.[117]

4.5.4 In 1985, the Law Commission proposed the following as essential elements of customary marriage:

(a) competence of the parties at customary law to marry one another;

(b) consent of the husband, the wife and legal guardian of either of them if they were below the age of 21; and

(c) solemnization by a marriage officer and registration.[118]

114Regulation 8(4).

115Their competence to formulate a proper consent belongs to the issue of capacity, and so too does the requirement of their guardians' consent. This topic is dealt with in Chapter 5.

116And, at the same time, the juridification of religious or customary rituals: Glendon *State, Law and Family* 51.

117Thus, in English law (the system inherited by South Africa), marriages are registered after solemnization in a general public registry of birth, marriages and deaths: Glendon op cit 52-4.

118*Marriages and Customary Unions of Black Persons* 194.

These proposals were broadly in line with existing statutory regimes in KwaZulu/Natal[119] and Transkei.[120]

4.5.5 Outside KwaZulu/Natal and Transkei, however, South Africa has never insisted on formal solemnization of customary marriages.[121] Instead, an optional registration procedure was made available to allow the parties to obtain official proof of their union.[122] Under the current law, therefore, registration is compellable at the instance of the husband, the wife or the wife's guardian.[123] Failure to register does not affect the validity of a customary marriage. Rather, a certificate of registration simply provides prima facie evidence of the union,[124] and those who did not register their marriages may advance other forms proof (assisted by the courts' presumption in favour of marriage).

C. Evaluation

4.5.6 The time has come to rethink the currently permissive law on solemnization and registration. Most of the respondents to the Issue Paper were in favour of registration, if not a full ceremony of solemnization.[125] Research findings of the **Gender Research Project (CALS)**, for instance, indicate that women seek to register their marriages under the civil law in order to secure full legal protection. The **National Human Rights Trust** also felt that a marriage

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119Section 38(1) of the Codes. Certain differences are apparent, however. The Codes stipulate a declaration in public by the intended wife to an official witness at the celebration of the union that the union is of her own free will and consent. Section 45 requires registration of marriages within a month of celebration.

120Section 31 of the Marriage Act 21 of 1978 provides that ceremonies and procedures (if any) `shall be in accordance with the customary law applicable to the male party', and that each party (or, if under the age of 21, his or her guardian) consents. Sections 33 and 34 also require registration of the union.

121An attempt was made in the Transkeian territories at the time of annexation (by Procs 110 and 112 of 1879 and 140 of 1885) to encourage people to register their marriages by providing that, if they did so, the registered union would have the same effect as a civil marriage. This measure was abandoned by Proc 142 of 1910.

122See generally on the question of registration Janisch (1941) 15 *Bantu Studies* 11, Lewin (1941) 15 *Bantu Studies* 23, Shropshire *Primitive Marriage* ch 3 and Simons (n19) 340-1.

123Regs 7 and 16 of GN R1970 of 25 October 1968, promulgated under s 22*bis* of the Black Administration Act 38 of 1927.

124Regulation 8(4). Conversely, under s 45(3) of the KwaZulu/Natal Codes and ss 33 and 34 of the Transkei Marriage Act 21 of 1978, registration is conclusive evidence of marriage.

125**Rural Women's Movement**, **Law Commission Workshop (Eastern Cape)**, **J Borias**, **R W Skosana** and **A M Moleko**.

certificate would give security to marriage relationships by setting boundaries with intrinsic (legal) merit.

4.5.7 It is significant, too, that, in the interests of bringing certainty to marital status, CEDAW, the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages [126] and the African Charter on the Rights and Welfare of the Child (which South Africa is also considering ratifying) also require, inter alia, that signatories shall make registration of all marriages in an official registry compulsory. Arguably, however, South Africa has already complied with its obligations under these conventions.

4.5.8 For various reasons, state-imposed formalities have seldom been observed in Africa.[127] One explanation would be that people who regard family approval and bridewealth as the critical elements of a valid union see no point in having any other formalities. A further reason would be the inaccessibility of public officials to perform marriage ceremonies in remote rural areas. At all costs the law should not be allowed to degenerate into pure technicality. We already have the unhappy precedent of claims for damages for death of a breadwinner, where the requirement of certification has been exploited to nullify otherwise perfectly valid customary marriages.[128]

4.5.9 If solemnization and registration were made obligatory, what penalties would be imposed for failure to comply? Some penalty is clearly necessary, Invalidity of a union is an obvious answer, but invalidity could have unduly harsh results, especially for widows who may later seek to lodge claims against deceased estates.[129] Moreover, this penalty would have the effect of depriving many customary unions (which hover on the verge of being or becoming full marriages) of whatever limited validity they might otherwise enjoy.[130] The alternative is a

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126Articles 16(2) and 3, respectively.

127As observed by **Prof J C Bekker** in his response to the Issue Paper and Simons (n19) 341.

128See par 3.1.3 above.

129Cf the Zimbabwe case, *Zimnat Insurance Co Ltd v Chawanda* 1991 (2) SA 825 (ZSC), where the court held that the wife of a customary marriage would claim damages for the death of her spouse, even though her union had not been registered as required under statute. See case note by Francis & Freemantle (1992) 109 *SALJ* 197. Ghana, on the other hand, has an uncompromising attitude: s 15 of the Customary Marriage and Divorce (Registration Act) 1985 requires a registered marriage before a spouse can claim any benefits under the Intestate Succession Law.

130See Parker (1987) 1 *Int J L & Family* 133ff.

criminal punishment, but fines seem otiose where there is no victim other than the perpetrator of the offence.

4.5.10 It is proposed that spouses should still be free to celebrate their unions by whatever rites they choose, whether customary, Christian, Muslim, Jewish or civil. Thereafter, they should be encouraged to register their marriage. Where a marriage has not been registered, however, they should be permitted to allege other forms of proof. More people might be induced to have their unions registered if the procedures were made more accessible to people in rural areas. Hence, as certain respondents requested, the traditional authorities should be given powers of registration.[131]

D. Recommendation

4.5.11 It is recommended all customary marriages should be registered. The Commission is sympathetic to the complaint that customary marriage is uncertain and difficult to prove. If registration were made compulsory, however, it would be difficult to decide on an appropriate penalty to induce compliance. To rule that unregistered unions are void would work great hardship for the spouses and would deprive many existing unions of potential validity. On the other hand, more people should be encouraged to register their marriages, and to this end the traditional authorities should be constituted registering officers.

131**Gender Research Project (CALS)**, **T S B Jali** and the **Law Commission Workshops (Central and Western Regions**).

CHAPTER 5
CAPACITY AND MINIMUM AGE

5.1 CAPACITY AND MINIMUM AGE

A. Excerpt from the Issue Paper

5.1.1 The Issue Paper contained the following proposals on capacity and minimum age:[1]

> "Customary law prescribed no specific age for acquiring the capacity to marry (or indeed the end of childhood). In order to marry prospective spouses simply had to be physically and intellectually capable of sustaining the relationship. In practice, therefore, the difference between customary- and common-law views on what constitutes a marriageable age is negligible.
>
> 18 was chosen as the age at which childhood ends for purposes of enjoying constitutional rights[2], and, to contract a civil marriage, fixed ages of 18 for men and 15 for women have been laid down by statute.[3] There should be no objection to stipulating these as minimum ages for all marriages, whether customary or civil."

B. Problem analysis

5.1.2 The customary-law emphasis on family, rather than individual interests in marriage gave a family head power to choose whichever boy or girl seemed most suitable for a good match. Any rules prescribing the age or capacities of future spouses (or requiring their consent) would have derogated from this power.[4]

5.1.3 Notwithstanding the absence of any definite rules regulating marital capacity in customary law, because the main purpose of marriage was to raise a family, spouses had at least to be over the age of puberty. Attainment of puberty varies from person to person, and, in

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1 At p 5.

2 Section 28(3), which is in line with art 1 of the UN Convention on the Rights of the Child.

3 Section 26 of the Marriage Act 25 of 1961.

4 Rules governing capacity are imposed when the state or Church begins to take an interest in marriages. Reuter *Native Marriages in South Africa* 105-10.

societies where age cannot be fixed precisely, the usual practice was simply to wait until spouses were physically mature.[5]

5.1.4 In the case of a prospective groom, capacity was linked to his ability to discharge adult responsibilities for a new family unit. Adulthood was achieved over a period of time, depending on an accumulation of factors, notably physical and intellectual maturity and a degree of economic self-sufficiency. In many societies, the transition from child- to adulthood used to be marked by an initiation ceremony.[6] Today attitudes to initiation vary. In some communities the tradition has lapsed,[7] in others it has been transformed into a requirement that young men go to work in the mines or cities.[8]

5.1.5 The pragmatic approach of customary law to capacity suggests that, although the spouses generally had to be physically capable of sustaining a marital relationship, puberty was probably the most basic requirement.[9] The problem with such flexibility is that a guardian can manipulate a ward's status to his own advantage, thereby denying the child rights and powers that come with majority.[10] Women especially are at risk, because they are never free of the need to obtain a guardian's consent. For venal or unscrupulous ends of their own, guardians therefore have the opportunity to postpone marriage indefinitely.

C. Evaluation

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5 Holleman 72, Van Tromp 35-6, Van Warmelo & Phophi 159, Krige *Zulu* 103, Roberts 23, Campbell (1970) 3 *CILSA* 216-17. Roman law also had no fixed age for contracting a valid marriage. Marriageability depended on the attainment of puberty, an age that was finally settled as being 12 for girls and 14 for boys (Gaius *Institutes* 1.196). This was the rule accepted into Roman-Dutch law.

6 With some peoples, notably the Zulu, Pedi and Tswana, initiation ceremonies were assimilated to service in military regiments. Hence, it was only after completion of this duty that recruits were permitted to marry. See Krige *Zulu* 106-17, Schapera *Handbook* 104-17, Roberts 24 and Mönnig 119ff esp 124.

7 Mayer in De Jager *Man: anthropological essays presented to O F Raum* 7ff. Nevertheless, as Wilson & Mafeje *Langa* and Pauw *Second Generation* 88-9 show, even in urban settings, initiation ceremonies may persist.

8 McAllister in Mayer *Black Villagers in an Industrial Society* 243 and Hammond-Tooke *Bhaca Society* 82.

9 Olivier et al *Die Privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes* 9 and Van Warmelo & Phophi 159.

10 Thus facilitating child marriage or denying children the right to marry or to acquire their own property. See Uzodike (1990) 4 *Int J Law & Family* 88.

5.1.6 To ensure that future spouses can formulate a proper consent to marriage and to obviate potential exploitation of children, a minimum age for marriage is now arguably a necessary step to securing individual human rights.[11] The international Convention on Elimination of All Forms of Discrimination against Women (CEDAW)[12] and the Convention on Consent to Marriage[13] both require states parties to take legislative action to specify a uniform minimum age for marriage. However, these treaties do not stipulate what the age should be.

5.1.7 A straightforward solution would have been to apply the ages laid down in the Marriage Act - 18 for men and 15 for women - to customary marriages.[14] While accepting this general proposal, the **Gender Research Project (CALS)** and the **National Human Rights Trust** said that preserving a difference in age discriminated unfairly on the basis of sex and that one age should now apply to both men and women.[15] If companionship is seen as the only goal of marriage, this argument would be relevant.[16] But it could be argued that the Marriage Act does not constitute an unfair discrimination,[17] in view of the alleged differences in the rates at which boys and girls physically mature.

5.1.8 The **Gender Research Project (CALS)** suggested a minimum age of 18 for both sexes. This proposal would bring South African law into line with international standards, for determining the change from child- to adulthood, since the United Nations Convention on the Rights of the Child,[18] the Constitution[19] and the African Charter on the Rights and Welfare of the

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11 And should be seen as linked with the state's policy, under s 29(1) of the Constitution that all children are entitled to an education.

12 Article 16(2).

13 Article 2.

14 Section 26 of the Marriage Act 25 of 1961. This position was confirmed by the **Law Commission Workshop (Western Region)**. A snap survey by the **National Human Rights Trust** indicated that 80 per cent of the men and women questioned stated that the marriageable ages of both boys and girls should be increased, a view also held by the **Law Commission Workshop (Central Region)**.

15 A position endorsed by **Prof J C Bekker**.

16 Women and Law in Southern Africa (WLSA) *Uncovering Reality* 20.

17 Under s 9(3) of the Constitution.

18 Article 1. Principle II of the United Nations Recommendation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages of 1965, however, proposes 15. See *International Documents on Children* editor G Van Bueren Dordrecht: Martinus Nijhof Publishers 1993 91.

Child[20] specify 18. Since South Africa's ratification of the latter Charter is at present under consideration, it is proposed that the minimum age of 18 for marriage should apply to both men and women.

5.1.9 If the individual freedom to marry is to be fully implemented in our law, then a boy or girl who is under age should still, in the appropriate circumstances, be entitled to contract a marriage. The rules in the Marriage Act,[21] which are designed to govern such a situation, could conveniently be extended to customary marriages. Prospective spouses would need to obtain the written permission of the Minister of Home Affairs, together with their guardians' consent.

D. Recommendation

5.1.10 It is recommended that, in order to ensure that the spouses' consent is properly informed, a minimum age for marrying should be fixed for all persons in the country.

5.1.11 Underage children should nevertheless be permitted to contract a marriage on terms prescribed in the Marriage Act.

E. Request for comment

5.1.12 Minimum ages should be fixed at which prospective spouses may be presumed mature enough to give their consent to marriage. The minimum ages established in the Marriage Act are 18 for men and 15 for women. Differentiation between the ages at which males and females can marry may be considered to constitute unfair discrimination on the ground of sex; in the past this differentiation was justified by the commonly held belief that boys and girls mature physically at different ages. Whether valid or not, this justification

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19 Section 28(3). This rule was endorsed by the **Law Commission Workshop (Eastern Cape)** and **The Women's Lobby**.

20 Article 21: "Child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be eighteen years and make registration of all marriages in an official registry compulsory."

21 Section 26 of Act 25 of 1961.

will be superseded if South Africa decides to ratify the African Charter on the Rights and Welfare of the Child (which specifies a minimum age of 18 for both men and women). The Commission requests particular comment on this issue.

5.2 PARENTAL CONSENT

A. Excerpt from the Issue Paper

5.2.1 The Issue Paper contained the following discussion of and recommendation on parental consent:[22]

> "While a trend worldwide has been away from parents negotiating marriages for their children to merely ratifying matches already made, the power to control marriage (especially the power of the bride's father) remains synonymous with African tradition. Because of its cultural significance, the need for parental consent cannot be lightly disregarded.
>
> But tradition should not be retained for its own sake. The purpose for securing parental permission - to establish favourable circumstances for a new marriage so that the spouses will be assured maximum support and protection - is still valid. Thus it seems desirable that underage children should look to their guardians for approval of a proposed marriage; absence of consent would render the marriage voidable at the instance of an aggrieved guardian. Once a child has attained the age of 21, however, parents may neither insist on a ward marrying a particular spouse nor prevent a child from marrying the person of his or her choice."

B. Problem analysis

5.2.2 A father's power to control the marriages of his children is closely identified with the African cultural tradition, and in the official version of customary law consent of a guardian, especially the bride's guardian, is treated as an essential element of a valid marriage.[23]

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22 At p 5.

23 See s 38(1) of the KwaZulu/Natal Codes. See, too, Bekker *Seymour's Customary Law in Southern Africa* 106.

5.2.3 The **Gender Research Project (CALS)** said that the key role played by guardians of potential spouses reflected a conviction that parents or kin groups ought to be included in marriage negotiations in order to ensure that the ultimate union was fully valid. Indeed, allowing guardians such a degree of control has the positive social function of embedding a marriage in the social network of two families. As the **Rural Women's Movement** said, `marrying a family is protective of a woman'.

5.2.4 The bride's guardian, however, is well placed to abuse his powers. Because he is the person who requests and receives bridewealth, he is in a position to deny his ward's freedom to marry. He may prevent a union by refusing her suitor's offer of bridewealth or he may make unreasonable demands. Alternatively, he may encourage marriage with a suitor of his own choice by accepting whatever bridewealth the man offers. In practice, a woman could appeal to senior males in her family to persuade her father to reconsider his decision, but she had no formal method of compelling him to give consent to her marriage no matter how unreasonable or avaricious his motives for withholding it.[24]

5.2.5 In systems of western law, the function of parental control over marriage has changed considerably. Historically, the trend has been away from parents negotiating marriage on behalf of a child to approving and ratifying a match already made.[25] In the common law, for instance, a guardian's approval is now regarded as necessary only to cure defects in the judgment of minors.[26]

5.2.6 The official version of customary law, on the other hand, did not conceive of the family head's control over marriage in a way that would have protected vulnerable wards. In the case of men, for example, provided a minor groom was over the age of puberty, his father's consent was

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24 Cf Phillips & Morris *Marriage Laws in Africa* 102-3.

25 Glendon *State, Law and Family* 24-5. The conception of guardianship has correspondingly changed, so that it now operates for the benefit of the ward rather than for the benefit of the guardian and family.

26 Law Commission *Advancement of the Age of Majority* para 3.1.

unnecessary.[27] Conversely, in the case of women, regardless of the individual bride's age or actual capacity, her guardian's consent was always deemed essential.[28]

5.2.7 The strictures of the official version were relaxed in KwaZulu/Natal [29] and Transkei,[30] where major women may contract their own marriages. Moreover, in KwaZulu/Natal a guardian may not unreasonably withhold consent, since a `district officer' may administratively investigate any complaint and authorize marriage.[31] Elsewhere in South Africa, a woman's only method of avoiding the requirement of parental consent is to enter a civil or Christian marriage.[32]

C. Evaluation

5.2.8 Under the Constitution[33] and the United Nations Convention on the Rights of the Child,[34] all powers associated with guardianship must now be conceived in the child's interests. It follows that the exercise and extent of a guardian's powers must be read subject to this limitation. Such a view would be consonant with the ideal in customary law, since the need to obtain parental approval was generally to ensure favourable circumstances for the ward's union so that the spouses and their offspring would be assured of long-term support and protection.

5.2.9 It follows that minor children must still look to their guardians for approval of a proposed marriage.[35] But, once children have attained the age of 21,[36] parents may neither insist on a

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27 Except for KwaZulu/Natal where his consent is required under (s 38(1)(*b*) of the Codes).

28 *Gcina v Ntengo* 1935 NAC (C&O) 21 and *Dlomo v Mahodi* 1946 NAC (C&O) 61.

29 Without prejudice to the rights of any person normally entitled to bridewealth: s 38(2) and (3) of the Codes. Hlophe (1984) 17 *CILSA* 165-7 claims that the status of majority conferred by s 16 of the Codes entitles women to marry without bridewealth.

30 Section 38(1)(*a*)(ii) of the Transkei Marriage Act 21 of 1978.

31 Section 38(1)(*a*) of the Codes. Under s 39 the district officer may make an appropriate order regarding the amount of bridewealth payable.

32 But then, presumably, only if she had attained the age of majority under the Age of Majority Act 57 of 1972.

33 Section 28(2).

34 Article 3(1).

35 A principle supported by all the respondents who addressed this question in the Issue Paper. Research by the **Gender Research Project (CALS)** revealed that in practice familial consent could always be provided. Hence, where parents refused to represent their children in bridewealth negotiations, a substitute was found

particular spouse nor prevent a marriage which the ward is determined to contract.[37] Women especially may contract marriage without a guardian's support.[38]

5.2.10 For a minor child below 21, the absence of parental consent is not a fatal defect in the union. The marriage will be voidable at the instance of an aggrieved guardian.[39] Otherwise, existing statutory rules may be extended to customary unions to allow children desiring marriage to supply the consent of a guardian. Hence, if one parent is unobtainable or incapable of giving consent, application may be made in the first instance to the commissioner of child welfare.[40] If a parent unreasonably withholds consent, a minor may apply to court for leave to marry.[41] For customary marriages, a court would have the further power to determine any bridewealth payable.[42]

5.2.11 In customary law, parental consent is normally taken to be the consent of senior male members in the family. Both the constitutional principle prohibiting discrimination on grounds of sex or gender, and the Guardianship Act,[43] which gives both spouses equal powers and rights over minor children, would suggest that fathers no longer have exclusive power to give or withhold consent to a ward's marriage. The mother's consent should also be necessary.[44]

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from other members of the extended family. Their suggestion that mechanisms for the substitution of consent by other family members, where parental consent for a minor's marriage is unreasonably withheld, is a sensible one that could be met by allowing consent to be given by a parent or `other appropriate guardian'.

36 As discussed in par 5.2.1 above. In addition, it should be noted that, under s 7 of the Age of Majority Act 57 of 1972, because a person becomes a major on marriage, widows, widowers and divorcees do not require consent to remarry, even if they are under the age of 21.

37 To do so would be contrary to the freedom to marry. See art 16 of the Universal Declaration of Human Rights.

38 One of the major reasons why guardians withhold consent - payment of bridewealth - will become irrelevant if bridewealth is not essential to the validity of the union.

39 Or at the instance of an underage spouse, as suggested by **J Heaton**.

40 Section 25(1) of the Marriage Act 25 of 1961.

41 Section 25(1) and (4) of the Marriage Act 25 of 1961.

42 This proposal follows a query raised by the **National Human Rights Trust**.

43 192 of 1993. This Act was evidently intended to supersede customary law, since s 1(1) provides that: `Notwithstanding anything to the contrary contained *in any law* or the common law ....'

44 Section 1(2) of the Guardianship Act already provides that each parent is independently entitled to exercise any right or power associated with guardianship, except in matters regarding consent to marriage, when the consent of both parents is required unless a competent court orders otherwise.

5.2.12 If a mother is entitled to supply the consent to her ward's marriage, then she would also be entitled to arrange the bridewealth. Under the KwaZulu/Natal Codes,[45] de jure emancipated women already have this power.[46]

D. Recommendation

5.2.13 It is recommended that, under the Constitution and the United Nations Convention on the Rights of the Child, a parent's power to consent to marriage must be exercised only in the child's best interests. Accordingly, a guardian may not unreasonably prevent a ward's marriage. Instead, consent of a guardian should be deemed necessary to remedy deficiencies in the judgment of minors. Thus, marriages by children below age, where such consent was not supplied, should be voidable at the instance of a spouse or guardians concerned.

5.2.14 Existing statutory and common-law rules regulating the consent of absent or incompetent guardians should now be extended to marriages by customary law.

5.2.15 To avoid unfair discrimination on the ground of gender, parental consent should be deemed to include the consent of both the father and mother of an underage child.

5.3 RELATIVE CAPACITY: PROHIBITED DEGREES AND PREFERRED MARRIAGES

45 Section 59.

46 According to the Zimbabwe decision in *Katekwe v Muchabaiwa* 1984 (2) ZLR 112 (S), women may gain considerable powers to arrange marriage once they are deemed majors. Dumbutshena CJ found that, when a woman attained the age of 18 years, she was completely emancipated. Thus he held (at 127) that a father no longer had an independent legal entitlement to demand bridewealth when his daughter married. Cf Ncube (1983-4) 1 & 2 *Zimbabwe LR* 217ff.

A. Problem analysis

5.3.1 Common and customary law agree on the prohibition against marriage between ascendants and descendants of the same patriline, and common law would also agree with the extension of this rule by most Nguni peoples to marriage with persons related through any of the four grandparents.[47] The Sotho-Tswana regime, on the other hand, does not so strictly distinguish affinal relatives from relatives by blood. While the prohibition against marriage between men and women related in the direct line of descent remains,[48] any relative on the father's or the mother's side is marriageable and certain unions (typically between cross-cousins) are positively encouraged.[49] It is apparent, therefore, that different conceptions of appropriate marriage partners exist.

B. Evaluation

5.3.2 We have no indication that determining the range of approved or forbidden marriage has caused any specific social or legal problem.[50] (Respondents to the Issue Paper were noticeably silent on the matter.) None the less, relative capacity is a morally charged issue (involving incest taboos)[51] that should continue to be dictated by the cultural or religious nature of a marriage chosen by the spouses.[52] Thus spouses who choose to celebrate their union according to

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47 Van Tromp 36, Krige *Zulu* 156 and Hunter 184-6. Levirate and sororate unions are by implication not permitted: Van Tromp 37. Cf s 37 of the KwaZulu/Natal Codes.

48 And marriage is prohibited between a man and his aunts, nieces, stepdaughters, step-sisters and their daughters: Mönnig 194, Matthews (1940) 13 *Africa* 9-12, Campbell (n2) 218, Poulter *Family Law and Litigation in Basotho Society* 74-5, Schapera *Handbook* 125-7 and Coertze 211-19.

49 See further on the Tswana law Schapera *Handbook* 127-8, Roberts 25-6 and Lye & Murray *Transformations on the Highveld* 115ff (for both the Sotho and Tswana). See Van Warmelo & Phophi Part I 8-61 on the Venda and Krige & Krige 142-4 on the Lovedu.

50 Moreover, where family ties have weakened, as in urban areas, rules tend to be less rigourously enforced. Doubtless the spread of Christianity has also affected traditional African conceptions of forbidden and preferred relations. See Wilson & Mafeje (n4) 76, Mair in Phillips *Survey of African Marriage and Family Life* 12-13 and Pauw (n4) 113-4 and 125-6.

51 Not only is marriage between persons related within the prohibited degrees forbidden but usually also sexual intercourse: *Mhlanga v Msibi* 1930 NAC (N&T) 80 at 82, *Nyawo* 1936 NAC (N&T) 12 and *Mountain v Mandla* 1946 NAC (C&O) 38.

52 This is an area in which it would seem appropriate to invoke the freedom to pursue a culture or religion of choice under ss 30 and 31 of the Constitution.

customary rites would be bound to observe customary rules prohibiting marriage between certain kinfolk.

C. Recommendation

5.3.3 It is recommended that the spouses' relative capacity to marry should continue to be governed by customary law.

CHAPTER 6

CONSEQUENCES OF MARRIAGE

6.1 POLYGYNY

A. Excerpt from the Issue Paper

6.1.1 The issue paper contained the following discussion of and recommendations on polygyny:[1]

> "Although customary marriages should be recognized on the basis of the constitutional right to culture, it is necessary to distinguish areas where human rights prevail. A perennially controversial issue in this regard is a husband's right to take more than one wife. While very few men are in fact polygynists, the polygynous potential of customary marriage has for many years been the main obstacle to its recognition, and it is still questionable whether polygyny should be tolerated in view of the constitutional commitment to gender equality.
>
> The concern that polygyny tends to lower the status of women, in a symbolic sense at least, is widespread. None the less, an outright ban on polygyny would be inadvisable, for it would be extraordinarily difficult to enforce. Moreover, there is some evidence that in a patriarchal world, where there is no economic, social or political equality between men and women, it is the institution of marriage itself (whether monogamous or polygynous) which disadvantages women. On balance, the case does not seem to be conclusively made that a bilateral arrangement between one man and one woman is the only valid and morally defensible method of constituting a family in a multicultural society. It does not follow, however, that men should continue to enjoy an unrestricted freedom to contract additional marriages to the detriment of their existing wives. The right of a first wife to object to any subsequent union contemplated by her spouse may have to be recognised."

B. Problem analysis

6.1.2 Under customary law a man may marry as many wives as he wishes, and, because wives were a source of wealth and status, polygyny was said to be the goal of all men.[2] Yet, even in the

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1 At p 4 - 5.

2 Marwick 38.

past, polygyny was unlikely to have been a common practice.[3] Today it lingers as a potential rather than an active practice, for very few men can now afford more than one wife.[4] A form of de facto polygyny is more usual, whereby migrant workers marry a wife in the rural areas and later informally take a second woman in the city.[5] The freedom to have more than one wife has long been condemned, and heated debate on the issue persists, as was indicated by the fact that nearly all replies to the Issue Paper dealt with this topic.

C. Submissions

6.1.3 Predictably, very few female respondents to the Issue Paper were in favour of polygyny.[6] The **National Human Rights Trust** reported that, from a snap survey in Empangeni, 80 per cent of women were against polygyny while 70 per cent of men were in favour. Those in support of the institution claim that it performs valuable social functions.[7] A woman who might otherwise remain unmarried can be legally absorbed into a domestic unit, and a man who might be tempted to commit adultery (and risk the breakdown of his marriage) may instead contract another valid union.[8]

6.1.4 As to whether polygyny is a positive or negative force in society, **Prof C R M Dlamini** compared divorce. He said that divorce works considerable hardship on women, but for no obvious reason it is construed as a lesser evil than polygyny. Amongst his other arguments in favour of polygyny is that any element of wrongfulness in the institution is vitiated by consent, ie, if a woman is prepared to waive her constitutional right to dignity in her own interest, why

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3 Wilson in Krige & Comaroff *Essays on African marriage* 133-4 and 138-9.

4 See Moller & Welch *Polygamy and Well-being* 60. Cf Armstrong et al (1993) 7 *Int J Law & Family* 338.

5 In fact, there is every reason to believe that polygyny is obsolescent and that in time it will disappear. See Women and Law in Southern Africa (WLSA) *Uncovering Reality* 25. In fact, most of the criticisms from women's groups target this particular practice and highlight the plight of the rural wife. (It is also worth remembering that the precarious position of the first wife was due, not to polygyny, but to the refusal in South African law to recognize customary marriage.

6 **Adv J Y de Koker, The Women's Lobby and the Rural Women's Movement, for example were against.**

7 Which were ably put by **Prof C R M Dlamini** in his response to the Issue Paper and in 1991 *AJ* 77-9.

8 See Dlamini (n6) 342-3 and 77-9. This point was also made by **Mrs I Kumalo (Pierre Odendaal en Kie)**.

should she not be free to do so? The Constitution should protect, not take away existing rights (ie, the right to contract polygynous marriages), and the state should not decide for individuals the relationships they may form. **Judge S S Ngcobo** commented that the fact that polygyny is *practised* unconstitutionally cannot make the institution itself unconstitutional. He suggested upgrading the status of women rather than banning polygyny.

6.1.5 Although many of the current opponents of polygyny echoed the moral objections of the past, the main charge today is purely secular: that polygyny infringes the constitutional prohibition on discrimination against women.[9] Polygyny can also be used as a justification for abandoning older women who are past child-bearing age, whereas in monogamous marriages women are protected from abandonment by divorce laws.[10]

6.1.6 Respondents claimed that women of polygynous marriages tended to suffer material prejudice. While subsequent unions redounded to the benefit of the first wife (who gained in status and extra hands to do domestic chores), the junior wives had less status, more work and their children fewer entitlements to property on inheritance.[11]

6.1.7 Some respondents suggested that, although the state should not ban polygynous unions, it should refuse to register them.[12]

6.1.8 An idea put forward in the Issue Paper, that the consent of the first wife of a potentially polygynous marriage be obtained before the husband could contract a subsequent union, was supported by the **Law Commission Workshops (Western Region)** and **(Eastern Cape)** and **A M Moleko**. Other respondents objected to this proposal. The **Gender Research Project (CALS)** noted that the first wife's right would be interpreted as no more than a right to be *informed* that her husband intended taking an additional wife, and that a woman in a secure

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9 This also emerges from the work of the international Committee on the Elimination of Discrimination Against Women, set up under art 17 of CEDAW. See Kaganas & Murray 1991 *AJ* 126. See, more generally, Simons *African Women* ch 8 and Dlamini (1989) 22 *CILSA* 330.

10 WLSA (n5) 27-8.

11 WLSA (n5) 24.

12 A proposal by **J Heaton** (which also found support with the **Gender Research Project (CALS)**).

marriage relationship would be most unlikely to withhold consent. Furthermore, both the **Gender Research Project (CALS)** and **Women in Law in Southern Africa** have discovered that the customary ideal of consultation is no longer being realized in the living law, and **Prof C R M Dlamini** noted that to refuse consent would be to risk divorce or subsequent marital discord. The **Gender Research Project** also felt that women are seldom in a position to give a properly informed consent, since men often misrepresent their true marital status and women are heavily influenced by their precarious economic position.

D. Evaluation

6.1.9 The claim that polygyny infringes the constitutional prohibition on discrimination against women implies two different arguments: that men have a right which women lack and that a conjugal relationship structured on one husband and several wives inevitably results in prejudice to women. If men have a right that women do not, application of a principle of non-discrimination could require either abolishing the male right or allowing women to take more than one husband. The former of these alternatives will be explored below. The latter enjoys little serious support. Polyandry is not accepted in any of the cultural or religious traditions of South Africa and to introduce it as a solution to objections against polygyny appears arbitrary and contrived.

6.1.10 The argument that polygyny works to the prejudice of women is a more complex issue. It is no doubt true that having several wives may give men an unwarranted sense of status and greater opportunity for sexual gratification, and that women in compound families are more likely to be thrown into competition, and therefore conflict, over resources.[13]

6.1.11 Polygyny alone, however, is not the cause of female subordination nor is it directly responsible for abuses suffered by women.[14] Rather, it is one factor contributing to the patriarchal nature of a society. Furthermore, the argument that polygyny prejudices women must

13 As indicated by the **Gender Research Project (CALS)** and WLSA (n5) 26.

14 The same is true of bridewealth. Cf Becker & Hinz *Marriage and Customary Law in Namibia* 118-19.

be viewed in light of claims referred to by respondents that the institution performs valuable social functions.[15]

6.1.12 Deciding whether a legal rule or institution constitutes infringement of the constitutional right to equal treatment very often leads to a balancing of interests, a process that entails consideration of broader social, political and economic issues. Investigation of the social effects of legal institutions, however, should be adopted only with caution. In deciding whether polygyny constitutes *unfair* discrimination, for example, we need to be careful that we are not drawn into an examination of its manifest and latent social functions, since this is likely to be a complex and inconclusive inquiry.

6.1.13 We must also appreciate that only the first wife of a customary marriage suffers direct prejudice, since she is the person who may be compelled to submit to subsequent unions against her will. (And even she can protect herself by insisting on a civil or Christian marriage.) A later wife (or wives) has a choice in the matter. None the less, many people question how real a woman's choice is, because her freedom must be evaluated in terms of the alternatives available: given current socio-economic conditions, women can gain access to resources (especially to land) only through their attachment and submission to men.[16] Economic and social pressures undoubtedly drive women into less than perfect marriages, but these pressures cannot be legally controlled. The best the law can do is to ensure that spouses consent to marriage.

6.1.14 A ban on polygyny would be inadvisable. On the one hand, it would be impossible to prevent husbands from taking additional wives, on the other, men would be encouraged to engage in informal unions,[17] which offer women and children no legal protection at all. Hence, the suggestion made by some respondents that the state should not ban polygynous unions but should rather refuse to register them, seems unwise. This proposal would result in the creation of a new set of 'limping' marriages, similar to the 'discarded families' created under section 22(7) of the Black Administration Act. As a similar colonial experiment in the Transkeian territories

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15 **Prof C R M Dlamini** and **Mrs I Kumalo (Pierre Odendaal en Kie)**.

16 Armstrong et al (n4) 336-7.

17 Kaganas & Murray 133. According to Becker & Hinz 63, this is happening in Namibia.

showed, the intended beneficiaries of the legislation, women, were put at risk.[18] Instead, it seems preferable to allow the gradual process of disuse to take its course.[19]

6.1.15 We noted above that an interim compromise with the principle of non-discrimination was suggested in the Issue Paper: that the consent of the first wife of a potentially polygynous marriage be obtained before the husband may contract a subsequent union.[20] This rule would complement the customary practice that, if a man wants to marry again, he should at least consult his senior wife (or wives).[21]

6.1.16 It was also noted above that respondents raised various objections to this proposal. They considered that the first wife's right would be interpreted as no more than a right to be *informed* that her husband intended taking an additional wife, that a woman in a secure marriage relationship would be most unlikely to withhold consent and that women are seldom in a position to give a properly informed consent. The common point of these observations is accepted: that legislating a right for the first wife might create 'paper law'. In addition, it would be difficult to formulate a suitable penalty if a husband were to contract the second marriage notwithstanding his first wife's refusal to approve it. The Commission felt that declaring the second marriage invalid would constitute such a grave departure from customary law that few people would pay any attention to the penalty.

E. Recommendation

18 Simons 1958 *AJ* 339.

19 And, one of the reasons put forward in *Ismail* 1983 (1) SA 1006 (A) at 1024 for refusing to recognize polygynous marriages - the problem of creating a suitable matrimonial property system - can be met by a system of separate estates. **Judge S S Ngcobo** pointed out, however, that to take account of an accrual regime all wives would have to be joined as parties to a divorce action.

20 Which was derived from the 1968 Kenyan commission on marriage. For comment see Read (1969) 5 *East African LJ* 116.

21 See Wanda (1988) 27 *J Legal Pluralism* 130, who discusses the elevation of this practice to a legal duty in three unreported cases from Malawi.

6.1.17 It is recommended that for various reasons, especially the difficulty of enforcing a ban and the fact that polygyny appears to be obsolescent, customary marriages should continue to be potentially polygynous.

6.2 PERSONAL RELATIONS OF SPOUSES

6.2.1 Patriarchy and equal treatment

A. Excerpt from the Issue Paper

6.2.1.1 The issue paper contained the following discussion and recommendations on patriarchy and equal treatment:[22]

> "Traditionally, senior African men enjoyed a generous range of rights and powers over women and juniors, an authority that is generally denoted by the term 'patriarchy'. This is a vague concept, but men take it as justification for claiming disparate and ill-defined rights to chastise wives and demand sexual favours at will, to decide whether to adopt birth control measures, whether to buy or alienate a family home, how to educate children, whether wives may work, etc.
>
> Originally, a family head's position would have entailed full responsibility to care for those under his control; but in the development of the 'official' version of customary law emphasis was placed on the incapacities suffered by his subordinates. Many of these incapacities have never been precisely defined and some are clearly distortions of customary law. Section 11(3)(*b*) of the Black Administration Act,[23] for instance, which provides that wives of customary marriages are deemed 'minors' and their husbands 'guardians', employs common-law concepts that cannot capture the actual nuances of marital relationships under customary law.
>
> Popular assumptions about male status and the 'official code' of customary law need to be re-examined. In the first place, women now play social and economic roles that have long since outgrown the restrictions of customary law. There is no reason to think that the 'traditional' regime enjoys universal acceptance, for most of the issues arising in contemporary spousal relations were never contemplated in the past and none has been properly tested in court.[24]

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22 At p 8 - 9.

23 38 of 1927.

24 With the exception of marital rape: s 5 of the Prevention of Family Violence Act 133 of 1993 outlawed

> In the second place, legal developments must now be guided by constitutional norms. South Africa is committed to the principle of non-discrimination both by its own Bill of Rights and by its accession to CEDAW. These obligations suggest that a new code of marriage law should seek to right the balance in the husband-wife relationship. On such questions as birth control, guardianship of children and the purchase and alienation of family property, consideration should be given to according wives decision-making powers on a par with husbands.[25]"

B. Problem analysis

6.2.1.2 Over the years, the South African legislature has introduced a series of reforms to marital relations in order to ameliorate the common-law status of women.[26] True to the pattern of such reforms, no attention was paid to customary marriages.[27] Spousal relations in these unions therefore continue to be governed by customary law.

6.2.1.3 The official version in this regard represents some of the worst features of the 'invented tradition'. The living law is no better state, however, since it is both nebulous and contradictory.[28] The state of the living law is not unexpected, for marriage generates various broad expectations and responsibilities of a social or moral nature which are not readily amendable to legal regulation.[29] Thus it is far from clear what the rules of contemporary customary law are.

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marital rape and was specifically extended by s 1(2) to customary marriages and cohabitations.

25 Most of these issues could be dealt with by applying the rule in s 29 of the General Law Fourth Amendment Act 132 of 1993 that husbands no longer have marital power over their wives.

26 The Matrimonial Affairs Act 37 of 1953, the Divorce Act 70 of 1979 and the Matrimonial Property Act 88 of 1984.

27 The strict segregation of marriage law was finally bridged in the 1985 Law Commission report on *Marriages and Customary Unions of Black Persons*, where it was recommended (in para 11.4ff) that the consequences of customary marriages should be amended in various significant ways to bring them into line with civil marriage.

28 We also suffer from having very little current empirical information. The anthropological accounts given in Van Tromp 97-109, Mönnig 216-17, Holleman 202-11, Clerc (1938) 12 *Bantu Studies* 94ff, Poulter *Family Law and Litigation in Basotho Society* 167ff and Campbell (1970) 3 *CILSA* 328-31 are all dated.

29 In the case of civil and Christian marriages, too, most of the duties between spouses are merely hortatory: Sinclair *The Law of Marriage* 423.

6.2.1.4 Popularly held views on proper gender roles have heavily influenced the law.[30] These views are in turn drawn from the African tradition of patriarchy, which husbands take as a cultural justification for exercising a vague aggregate of rights and powers over their wives. Male entitlements are often linked to payment of bridewealth, for men say that if they paid bridewealth they should have full power over their wives.[31] (In Zambia the popular view is that, because a husband paid bridewealth, he should be entitled to income derived from his wife's full-time employment. Formerly, she would have worked in the fields for her husband. By going out to work, she deprives him of this service, and so it is argued that her wages compensate him.)[32] On this understanding, many husbands claim the right to chastise their wives and to demand sexual favours at will, or the power to make decisions in matters such as adopting birth-control measures, buying and selling the family house, educating children and allowing wives to work.[33] Although in practice a wife may exercise considerable powers of her own, it is generally supposed that her husband is head of the family with no more than a moral duty to consult his wife on matters of major importance.[34]

6.2.1.5 The widely held assumption that all the claims made by men are endorsed by the law is groundless. With the exception of marital rape,[35] none of the issues mentioned above has been properly tested in court and many of them were never contemplated in the past. It follows that contemporary male views about their legal powers have no foundation in 'tradition', especially since women have long since outgrown the social and economic constraints that used to be imposed on them.

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30 Thus Nhlapo in WLSA *The Legal Situation of Women in Southern Africa* 99 says that Swazi tradition dictates that women be obedient, submissive and humble and compliant to their proper roles as child-bearers, food-producers and household manageresses.

31 A point made by **Adv J Y de Koker**. See, too, Molokomme and Seeiso et al in WLSA (n30) 16 and 52, respectively.

32 Himonga et al in WLSA (n30) 156-7.

33 See, for example, Seeiso et al in WLSA (n30) 65.

34 Molokomme in WLSA (n30) 15. Hence, Adinkrah (1990-91) 30/31 *J Legal Pluralism* 16 says that the claim that women had an inherent right to influence all major decisions in the family is pure rhetoric.

35 See *S v Ncanywa* 1992 (2) SA 182 (Ck) and *S v Ncanywa* 1993 (2) SA 567 (CkA). Section 5 of the Prevention of Family Violence Act 133 of 1993 outlawed marital rape, however, and s 1(2) makes the Act applicable to customary marriages and cohabitations.

C. Submissions

6.2.1.6 More than one respondent to the Issue Paper noted that male entitlements are often linked to payment of bridewealth, for men say that if they paid bridewealth they should have full power over their wives.[36] **Prof J C Bekker** considered that female oppression is widespread in all societies and that customary law cannot on its own be held accountable. Yet, none of those replying to the Issue Paper contested the proposal that a new code of marriage should seek to right the balance in the husband-wife relationship.

D. Evaluation

6.2.1.7 The uncertainty of customary law in the area of spousal relations is such that state intervention is invited. Reform in the area of spousal relations is now needed to harmonize customary law with social changes in South African society and to give effect to the principle of equal treatment, which is contained in s 9 of the Constitution[37] and the Convention on Eliminating all Forms of Discrimination against Women (CEDAW).[38]

E. Recommendation

6.2.1.8 Reform in the area of spousal relations is now needed to harmonize customary law with social changes in South African society and to give effect to the principle of equal treatment contained in section 9 of the Constitution and CEDAW. (See the next heading for substantive proposals to effect legislative reform in order to ensure such equality.)

36 The point was clearly made by **Adv JY de Koker**.

37 This would be a situation where horizontal application of constitutional rights should be encouraged, for customary law often lacks specific rules of its own.

38 Article 5(*a*) of the Convention provides that states 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'. See also art 16(1)(*c*)-(*g*), which deals specifically with spousal relations.

6.2.2 IMPROVING FEMALE CAPACITY

A. Excerpt from the Issue Paper

6.2.2.1 See paragraph 6.2.1 above.

B. Problem analysis

6.2.2.2 Before creating a more equitable regime in marriage, the general legal status of women must be upgraded, since, according to the official version of customary law, women (and especially the wives of customary marriages) have no capacity to hold and dispose of property, contract and sue or be sued in court.

6.2.2.3 Deprivation of capacity rested on a belief that women were not versed in the ways of the world. It followed that they needed the help of a male guardian when dealing with people outside the family. Based on a widespread analogy with children,[39] the courts have tended to assimilate African women to the status of minors in common law.[40] Full capacity is therefore regarded as a senior male preserve.

6.2.2.4 Women are not allowed to bring legal actions in their own names. If they were to do so, a hallowed principle of customary law would be destroyed,[41] one that goes 'to the very root of Native custom'.[42] Women are supposed to be ignorant of the forensic arts, and thus in need someone to argue their cases for them. Here the common-law institution of minority seems to have influenced customary law. A woman cannot (formally at least) be denied her action; she merely requires assistance to bring it.[43] If her guardian does not appear in court with her, a curator ad litem will be appointed.[44]

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39 Molokomme in WLSA (n30) 13.

40 Which was hardly surprising, given the status of women under Roman-Dutch common law before the reforms of the Matrimonial Affairs Act 37 of 1953. See Clark in Visser *Essays on the History of Law* 188-9.

41 *Kutuka v Bunyonyo* 4 NAC 302 (1920).

42 *Mashinini* 1947 NAC (N&T) 25.

43 *Ngcamu v Majozi* 1959 NAC 74 (NE). Cf *Zondi v Southern Insurance Association Ltd* 1964 (3) SA 446

6.2.2.5 Women also lack contractual capacity,[45] but, to judge from the scarcity of cases on this issue, surprisingly little has been made of it. (In this regard it seems as if women were treated like minors at common law.)[46] Instead, the most serious incapacity suffered by women is proprietary. Although women throughout Africa have always played a vital part in food-production, they are usually denied control over land and livestock (the means of producing food). From the general principle that women are subordinate to men, the courts then extrapolated a rule that women have no capacity to hold or deal with property.[47] Women were like 'minors' subject to 'guardianship'.

6.2.2.6 Having arrived at this conclusion, the courts could have construed female incapacity to deal with property in the same protective manner as a minor's incapacity under common law.[48] But African women were given no such benefits. In fact, the meaning of proprietary incapacity in customary law is uncertain. It could denote the absence of a *power* to acquire property, the *freedom* to use and dispose of it or the *right* to vindicate it. The courts have never specified which.[49]

6.2.2.7 In 1943, legislation was introduced to amend the customary law governing contractual capacity and locus standi. Section 11(3) was inserted into the Black Administration Act to give all those subject to customary law the capacity to conclude common-law contracts and the locus standi to sue or be sued for debts arising out of the common law. This section provided that-

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(N).

44 *Cele & another v Cele* 1957 NAC 144 (NE), *Ndlala v Makinana* 1963 BAC 18 (S) and *Phakathi v Phakathi & another* 1966 BAC 48 (NE).

45 *Ndhlovu* 1954 NAC 59 (NE).

46 As, for example, in *Zwane v Dhlamini* 1938 NAC (N&T) 278.

47 Chanock (1991) 32 *J Afr History* 80-1.

48 Conversely, the courts never questioned the capacity of independent men. A person over the age of seven can acquire ownership of property if this improves his or her position. Guardians have the power to administer their wards' estates, but they are obliged to act bona fide in the minor's best interests.

49 Bennett *Human Rights and African Customary Law* 87.

> "The capacity of a Black person to enter into any transaction or to enforce or defend his rights in any court of law shall, subject to any statutory provision affecting any such capacity of a Black, be determined as if he were a European ....'

6.2.2.8 In 1985, by the insertion of s 11A, the Black Administration Act was further amended to give women the power to acquire the then newly enacted statutory rights in black townships (especially 99-year leaseholds created under Act 90 of 1985). This amendment had no effect on women's general contractual or proprietary capacity.

6.2.2.9 In general s 11(3) did not change capacity for contracts and debts governed by customary law.[50] And the main clause of the section refers to 'a transaction', which implies that capacities associated with delict and property claims were excluded (although on occasion the courts held that claims relating to property should be governed by the common law, and so locus standi was determined by the same system).[51]

6.2.2.10 Powers given to women in the main part of s 11, were largely nullified by a proviso in s 11(3)(*b*), which provided as follows:

> "a Black woman (excluding a Black woman who permanently resides in the province of Natal) who is a partner in a customary union and who is living with her husband, shall be deemed to be a minor and her husband shall be deemed to be her guardian."

6.2.2.11 This provision was a distortion typical of the official version of customary law. The common-law concepts of minority and guardianship could not capture the actual nuances of female status, and, even when s 11(3)(*b*) was promulgated, it did not reflect the social reality that many married women were living independent lives. Quite apart from the unwarranted legal burdens it imposed on women, s 11(3)(*b*) has been the source of much confusion, for it depended on a woman being married by customary law and 'living with' her husband, two qualifications that were ambiguous and difficult to apply. In the first place, customary marriages could not be defined with precision. In the second place, it was difficult to known what was meant by the

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50 Under s 11(3)(*a*).

51 *Maqula* 1950 NAC 202 (S), *Nhlanhla v Mokweno* 1952 NAC 286 (NE) and *Kunene* 1953 NAC 163 (NE).

phrase 'living with'. (The courts refused to interpret it literally.)[52] Finally, it was not clear whether customary or common law had to be used to identify the woman's guardian.[53]

6.2.2.12 The call has come from many quarters in South Africa to have s 11(3)(*b*) repealed. It has already been abolished in KwaZulu,[54] and, as a result, wives of customary marriages there benefit from a common-law contractual capacity and locus standi.

C. Submissions

6.2.2.13 **The Rural Women's Movement** and the **Centre for Applied Legal Studies (Wits)** suggested that s 11(3)(*b*) of the Black Administration Act should be repealed. Several respondents to the Issue Paper, namely the **Women's Lobby, Prof J C Bekker and the Gender Research Project (CALS)** called for application of the Age of Majority Act. **The Gender Research Project (CALS)** and **the Rural Women's Movement** proposed that, if particular married couples feel happier with existing patriarchal traditions, they should be free to structure their relationships accordingly, but that wives should not be legally bound to accept their husbands as family head and sole decision-maker.

D. Evaluation

6.2.2.14 In view of the general condemnation of s 11(3)(*b*) of the Black Administration Act, there can be no argument in favour of this anomaly of the past.

6.2.2.15 The capacities of women could be enhanced by a ruling that the Age of Majority Act applies to persons subject to customary law.[55] Because majority status empowers generally, women over the age of 21 would automatically acquire full capacity as emancipated adults on a

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52 *Tofu v Mntwini* 1945 NAC (C&O) 83 at 84.

53 Kerr (1965) 82 *SALJ* 487 and (1973) 90 *SALJ* 4.

54 By s 119 of the KwaZulu Code (Act 13 of 1984).

55 57 of 1972. A recommendation to this effect was made in clause 14(3) of the draft bill appended to the Law Commission's Report on *Marriages and Customary Unions of Black Persons.*

par with men. It is a moot point, however, whether the Act overrides customary law.[56] (The same doubt about the effect of age of majority legislation is apparent in other African countries.)[57] In order to dispel uncertainty, Natal and KwaZulu had to pass special amendments to the Codes to provide that the Age of Majority Act had supervening force.[58]

6.2.2.16 It was noted above that several respondents to the Issue Paper called for application of the Age of Majority Act, and reform of spousal relationships provides a suitable occasion for recommending that this be done. Nevertheless, the Age of Majority Act will still not have the effect of empowering women *under* the age 21. Hence, a more general reform seems to be required. Article 15(2) of CEDAW, which is directly relevant to proprietary and contractual capacity and locus standi, obliges South Africa as a party to the Convention to:

> 'accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.'

6.2.2.17 Provision should therefore be made, that men and women henceforth will enjoy the same legal capacities. Once this has been done, the way is clear for establishing equality within the marital relationship, in particular, equal powers of decision-making over birth control, the rearing of children and the purchase and alienation of family property.[59]

6.2.2.18 After South Africa had signed CEDAW, the old common-law rule that husbands had marital power over their wives was abolished, first for non-Africans, who married after the commencement of the Matrimonial Property Act, [60] later for Blacks, who married by civil of

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56 In *Mnyandu* 1974 BAC 459 (C), *Mpanza v Qonono* 1978 AC 136 (C) at 139 and *Khumalo v Dladla* 1981 AC 95 (NE), the courts appear to have thought that it did. Besides, all statutes supersede the common law and later statutes repeal earlier ones. See Bekker (1975) 38 *THRHR* 394. But the legislature gave no indication of intending the Age of Majority Act to replace customary law or to repeal s 11(3) of the Black Administration Act (the earlier enactment).

57 Molokomme and Nhlapo in WLSA 14 and 131, respectively. The one exception is Zimbabwe, for which see Stewart et al in WLSA 170 and Armstrong (1988-9) 27 *J Family L* 344-6.

58 Section 14 of the Codes.

59 The problem of spousal violence is already catered for by the Prevention of Family Violence Act 133 of 1993.

60 Act 88 of 1984.

Christian rites after the commencement of the Marriage and Matrimonial Property Law Amendment Act.[61] Abolition was made retrospective only by s 29 of the General Law Fourth Amendment Act.[62] It is not clear, however, whether the further common-law principle that the husband is head of the family (and thus has overriding powers of decision-making for all issues common to the marital consortium) was also repealed.[63] Notwithstanding this uncertainty, whatever their form of marriage, all wives should now have powers and rights equal to those of their husbands. If particular spouses are prepared to retain adopt patriarchal traditions, they may do so, but in general wives should not be forced to accept their husbands as sole decision-makers.[64]

6.2.2.19 From these proposals it follows that the rule in the KwaZulu/Natal Codes[65] and the Transkei Marriage Act,[66] that husbands have marital power over their wives, must be repealed.

E. Recommendation

6.2.2.20 Women should be deemed to have contractual capacity, locus standi and proprietary capacity (and in consequence delictual capacity) on a par with men. It is therefore recommended that section 11(3)(*b*) of the Black Administration Act be repealed. In addition, to cure many years of uncertainty, provision must be made that the Age of Majority Act applies to persons subject to customary law.

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61 Act 3 of 1988.

62 Act 132 of 1993.

63 This principle was included in s 13 of the Matrimonial Property Act 88 of 1984, and it is questionable whether it was repealed by the General Law Fourth Amendment Act 132 of 1993. See Sinclair 132-3.

64 A proposal by the **Gender Research Project (CALS)** and **the Rural Women's Movement**.

65 Section 27(3). This section contains a proviso that, if the spouses were married by civil or Christian rites, they may exclude marital power by antenuptial contract. In the normal course, s 27(3) would be overruled by Act 132 of 1993, but for no good reason the Codes are usually assumed to be immune from family-law legislation.

66 Section 39 provides that marital power may not even be excluded by antenuptial contract.

6.2.2.21 To discharge its obligations under CEDAW and the Constitution, legislation should provide that spouses have equal capacities and powers of decision-making. Such legislation will entail a repeal of section 27(3) in the KwaZulu/Natal Codes and section 39 of the Transkei Marriage Act (which both declare that wives are under the marital power of their husbands).

6.3 PROPRIETARY RELATIONS DURING MARRIAGE

6.3.1 The customary law on property: personal, house and family estates

A. Excerpt from the issue paper

6.3.1.1 The issue paper contained the following discussion and recommendations on proprietary relations:[67]

> "Other than a general principle that husbands own and manage the matrimonial estate, customary law has no clear provisions on the spouses' proprietary relations. Through two rules, however, wives can find themselves seriously disadvantaged on dissolution of marriage. First, because a wife is deemed not to have full proprietary capacity, anything she acquires becomes her husband's property. Hence, when her marriage ends, the wife is liable to forfeit all acquisitions to her husband or his family. Secondly, because it is assumed that a divorcée or widow will be supported by her own family, husbands have no duty to pay post-divorce maintenance.
>
> The first step towards resolving the wife's predicament (and towards creating a fairer matrimonial proprietary regime) would be to give women the proprietary capacity enjoyed by men. The current understanding of female capacity is far from clear. According to the 'official' version of customary law, only senior males have full powers. Although women have recognized rights to specific items of a ritual nature, their capacity to acquire, control and dispose of the wages, salaries and consumer goods associated with a market economy has not been decided. Section 9 of the Constitution can no doubt be construed in conjunction with other fundamental rights[68] to give women the right to

67 At p 10 - 11.

68 Section 25(1) of the Constitution provides that 'No one may be deprived of property except in terms of law of general application', but the remaining subsections make it clear that this provision was intended only to protect citizens in their relations with the state.

protect whatever property customary law allows them to hold. But more is necessary: a directive that women have *full* capacity in respect of all types of property."

B. Problem analysis

6.3.1.2 Control of property is the key to social empowerment,[69] and, had married women been given clear rights and powers over property, their overall position would have been much improved. Unfortunately, property relations happen to be one of the least unexplored areas of customary law.[70] Aside from empirical research in the Cape,[71] we have little direct information on the living law.[72] While it is quite likely that many women, especially those who are single, widowed or divorced, independently work for and hold property, the vagueness of customary law allows men to invoke patriarchal tradition to their own advantage.[73]

6.3.1.3 Before colonization, there would have been little need for an elaborate code of property law, because people had a relative abundance of food and land and the economy was geared mainly to subsistence. An individual's responsibility to support dependants was given far greater emphasis than proprietary rights.[74] It is understandable then that only a few rules about property entered the official version of customary law. Those rules were predicated upon polygynous households and the need in such circumstances to keep estates strictly separate.[75]

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69 Hirschon *Women and Property/Women as Property* 1, Howard *Human Rights in Commonwealth Africa* 199 and Armstrong et al 343.

70 Not only did the courts shy away from judicial law-making but, as **Prof J C Bekker** says, this aspect of female status has been interpreted in such a way as to inflict severe disadvantages on women. See, too, Becker & Hinz 77.

71 By Prof S B Burman and associates. Notable monographs are Burman & Barry `Divorce and deprivation in South Africa' (1984) Second Carnegie Inquiry Paper 87, Burman (1987) 1 *Int J Law & Family* 206 and Burman & Berger (1988) 4 *SAJHR* 194 and 334.

72 In other parts of Southern Africa, however, early anthropological accounts are gradually being supplemented by more up-to-date fieldwork. See WLSA's research, notably vol II *The Legal Situation of Women in Southern Africa*. Contributors to this volume confirm general observations in this Discussion Paper.

73 Molokomme in WLSA (n30) 16, for instance, says that there is no specialized matrimonial property regime in Botswana; much depends on the whim of the husband. Interesting fieldwork conducted in northern Namibia by Becker & Hinz confirms patriarchal dominance, although one might have expected matrilineal kinship and uxorilocal residence to yield greater female powers.

74 Bennett (1997) 9 *Afr J of Int and Comp L* 91-2.

75 So that, on the death of the family head, the heir to each house would inherit a separate estate.

6.3.1.4 On marriage, each wife established a house that, according to the date of marriage, was ranked in relation to the other houses.[76] Within the family, rights to an item of property were determined by the position of the person acquiring and having regular control over it and the use to which the item would be put. Thus the courts drew two distinctions, one between personal property and goods attracting the wider interests of the family and the other between property in each house and a general family estate.[77]

6.3.1.5 Things of an intimate nature, which served only the interests of the holder, such as wearing apparel, tools and weapons, were deemed to be personal, and could therefore be used and disposed of without reference to anyone else.[78] On a similar basis, gifts given by a husband to his wife became her own property,[79] and so too did the livestock given to ensure her spiritual protection.[80] For example, the beast given by a bridegroom to his mother-in-law as a tribute to his wife's ancestors was considered the woman's personal property.[81]

6.3.1.6 Productive property, on the other hand, especially large livestock, attracted family interests.[82] This property was generally not subsumed under the personal category.[83]

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76 See *Maganu* 1938 NAC (N&T) 14 and *Sijila v Masumba* 1940 NAC (C&O) 42. Sections 68 and 69 of the Codes establish the hierarchy of houses in KwaZulu/Natal.

77 See s 1(1) of the KwaZulu/Natal Codes, *Sijila's* case supra at 44-7 and *Zulu* 1955 NAC 107 (NE).

78 So far as the wife is concerned, this rule is supported in *Yimba* 1940 NAC (N&T) 35, *R v Njokweni* 1946 NPD 400, *Xakaxa v Mkize* 1947 NAC (N&T) 85, *Mpungose v Shandu* 1956 NAC 180 (NE) and *Dhlamini* 1967 BAC 7 (NE).

79 *Monelo v Nole* 1 NAC 102 (1906) and *Mpafa v Sindiwe* 4 NAC 268 (1919).

80 The rule was not invariable, however. Section 78 of the KwaZulu/Natal Codes regards the mbeka beast given by the Zulu, an important gift symbolizing the woman's family and their ancestors, as house property. With the Xhosa, on the other hand, although there was some conflict in the courts about a similar institution (the ubulunga beast), the balance of authority favoured the husband as owner. See *Rarabe* 1937 NAC (C&O) 229 at 232, *Kilasi v Matshaka* 1944 NAC (C&O) 99 and *Zilwa v Gagela* 1954 NAC 101 (S). For further comments see Olivier *Die Privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes* 159-61 and Koyana *Customary Law in a Changing Society* 55-9.

81 See Holleman 182. See further *Mpongo v Mandlela & another* 3 NAC 34 (1913) and s 67(2) of the KwaZulu/Natal Codes. The beast therefore did not become house property: *Mpungose v Shandu* 1956 NAC 180 (NE), *Mbanjwa* 1964 BAC 122 (NE), *Khanyile d/a v Zulu* 1966 BAC 35 (NE), *Ndebele* 1971 BAC 70 (NE), *Mbutho v Cele d/a* 1975 BAC 247 (NE) and *Mpungose v Zulu* 1981 AC 50 (NE).

82 This finds expression in a legal presumption that `ownership in all cattle within the kraal vests in the kraalhead' until the contrary is proved: *Cili* 1935 NAC (N&T) 32 at 33.

83 It would be possible to accommodate modern consumer goods in this scheme of things, but distinctions

6.3.1.7 The status of the person acquiring property determined whether it would be treated as house or family estate. Anything obtained by or through a member of a house accrued automatically to the house concerned. Traditional items in this category were the bridewealth given for a daughter's marriage, the damages paid for her seduction and the acquisitions of children.[84] Today, a significant source of house property is a wife's earnings, since whatever a woman earns after marriage is deemed to belong to her husband.[85]

6.3.1.8 Apart from property that accrued automatically to a house, a family head could make specific allotments.[86] An important item in this regard, especially in rural areas, would be the agricultural fields allotted to wives by the head of the household.[87] Family dependants, and women in particular, generally had no right to demand land from the traditional authorities.[88] Their access to land was indirect, derived from a duty incumbent on heads of households to provide them with the means of support. Thus every wife, on marriage, would be entitled one or more plots of land on which to grow food for herself and her children.[89]

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would be extremely difficult to draw. For instance, expensive items of household equipment, such as the kitchen and bedroom suites acquired during marriage, could be deemed house property, because they are used by the whole family, but what of cars and the other appliances usually found in modern households?

84 *Mfazwe v Modikayi* 1939 NAC (C&O) 18 at 22 and *Mofokeng* 1948 NAC (C&O) 20.

85 This view originated in the Transkei from the decision in *Sixakwe v Nonjoli* 1 NAC 11 (1896). See too *Fanekiso v Sikade* 5 NAC 178 (1925) at 180 and *Mpantsha v Ngolonkulu & another* 1952 NAC 40 (S). Similar rulings emanated from the Transvaal: *Mkwanazi* 1945 NAC (N&T) 112 at 114. Only two cases were prepared to make an exception. In *Majomboyi & another v Nobeqwa* 2 NAC 63 (1911) and *Logose v Yekiwe* 4 NAC 105 (1919), the courts held that the earnings of a wife living apart from her husband did not accrue to him. The position in KwaZulu/Natal is governed by ss 13, 19, 20 and 78 of the Codes, which are discussed in *Masuku v Kunene* 1940 NAC (N&T) 79.

86 See the definition of house property in s 1(1) of the KwaZulu/Natal Codes and: *Fanekiso v Sikade* 5 NAC 178 (1925) and *Mguguli* 1966 BAC 53 (S).

87 See *Soni* 1951 NAC 366 (NE) at 368 and *Dodo v Sebasaba* 1945 NAC (C&O) 62.

88 Although there is ample evidence from various parts of southern Africa to show that independent women are in fact being allowed to hold land on their own account. See, for example, Schapera *Native Land Tenure in the Bechuanaland Protectorate* 150, Letsoalo *Land Reform in South Africa* 20 and Sheddick *Land Tenure in Basutoland* 164.

89 Dependent widows, mothers, and possibly even divorcées or adult unmarried daughters would also be entitled to claim a plot. See Kuper *African Aristocracy* 149, Schapera *Handbook* 202 and *Land Tenure* 46 and 81-2, Mönnig 153, Wilson & Mills *Keiskammahoek Rural Survey* vol4 10 and Duncan 87 and 90-1.

6.3.1.9 All the assets in a house estate fell under the husband's overall control, to be administered for the common good of the house.[90] In the first instance, therefore, a family head had to maintain the wife and children in the house concerned.[91] But he could also call upon house property to settle his own bridewealth debt and any damages due for wrongs committed by members of the house.[92] Thereafter, he was free to use house property to satisfy his personal wants and needs.[93]

6.3.1.10 Any unallotted property, together with the family head's earnings, accrued to the family estate. A family head could obviously use this property in his discretion for his own needs, but his duty to support dependants would in practice take precedence. Thus the major difference between family and house property lay in a rule that the head of the family could not divert house property from one house to another without obtaining prior approval of the wife in the house affected.[94] Otherwise, when the family head died, his main heir inherited the family estate and the heirs of each house inherited the estate within that house.

C. Submissions

6.3.1.11 Gender equity in the allocation of land is a matter of general concern throughout South Africa.[95] The **Gender Research Project (CALS)** expressed the view of many women

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90 Hunter 121-2 and ss 19 and 20 of the KwaZulu/Natal Codes.

91 *Tonose* 1936 NAC (C&O) 103, *Phalane v Lekoane* 1939 NAC (N&T) 132, *Sijila v Masumba* 1940 NAC (C&O) 42 and *Mbekushe v Dumiso* 1941 NAC (C&O) 57. This duty would traditionally include providing bridewealth for the oldest son of the house (*Rubushe v Jiyane* 1952 NAC 69 (S) and *Cheche v Nondabula* 1962 NAC 23 (S)) and furnishing a daughter's trousseau (Bekker *Seymour's Customary Law in Southern Africa* 75 and 147).

92 See generally Bekker op cit 74-7 and Olivier 151ff.

93 See *Sitole* 1945 NAC (N&T) 50 and *Ngcobo* 1946 NAC (N&T) 14.

94 Together with the eldest son if he were old enough: *Fanekiso v Sikade* 5 NAC 178 (1925). Transfer of property from one house to another creates an obligation for the recipient household to repay the debt: *Sijila v Masumba* 1940 NAC (C&O) 42 at 45, *Mbuli* 1939 NAC (N&T) 85 and ss 20 and 21 of the KwaZulu/Natal Codes.

95 Marcus (1990) 6 *SAJHR* 179-80. Article 14(2) of CEDAW obliges states to ensure that rural women have the right to equal treatment in land matters and agrarian reform.

when it said that no gender discrimination should be shown by organs of state in their response to claims put by individuals, families and communities for return of land. This is an issue that cannot be considered in a law on marriage, however, since it involves the powers of traditional leaders and more properly falls to be considered under public law.[96]

6.3.1.12 **Prof A J Kerr** pointed out that a rule deeming everyone capable of owning property and giving full ownership over individual acquisitions, would involve consequential alteration to the rules on the liability of family heads for delicts committed by family members.

D. Evaluation

6.3.1.13 The principle that acquisitions accrue to a house has serious implications for modern working women, because it gives family heads an almost unmitigated control over their wives' income. Occasional rights that women traditionally enjoyed to livestock of ritual significance are irrelevant in modern economic contexts. A customary rule - that women practising as diviners, herbalists and midwives kept whatever they earned[97] - could have been developed by the courts to include wages and earnings, but in South Africa creative judicial law-making of this nature did not occur.[98]

6.3.1.14 Nothing has been done to adjust customary law to changes in the economic relationships of family members. On the one hand, courts were reluctant to interfere with the privileges of patriarchy, which they thought would have had the effect of depriving minors of 'that valuable asset in Native Law of Communal support, especially in the provision of a wife'.[99] On the other, because no account has been taken of the fact that very few modern households are in fact polygynous, the law is now irrelevant to the requirements of monogamous families.[100]

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96 Hamnett *Chieftainship and Legitimacy* 70, for instance, says that in customary law domestic allotments of land would not be recognized outside the family, since in principle each wife's allotment was secure only against other houses, not against the world at large.

97 Simons (n9) 195.

98 Cf Himonga et al in WLSA (n30) 158 regarding Zambia.

99 *Mfazwe v Modikayi* 1939 NAC (C&O) 18. See *too Mlanjeni v Macala* 1947 NAC (C&O) 1-2 and *Ngqulunga* 1947 NAC (N&T) 84.

100 See Murray *Families Divided* 116-18.

6.3.1.15 None the less, by extending the common-law age of majority to Africans, the official version of customary law allowed individuals certain powers over property. In the former Transkeian Territories,[101] for instance, where special provision was made for all persons over the age of 21 to become majors, it was held in two cases that the age of majority introduced 'individual ownership of property as opposed to family ownership'.[102] Whether these decisions were correct is debatable. Granting majority clearly gives individuals the *power* to hold property, but it does not necessarily give *rights* (opposable against the head of the family).[103] In other words, the law of persons cannot cure the deficiencies of the law of property.

E. Recommendation

6.3.1.16 While age of majority legislation can free people to engage in commercial and other dealings with the world at large, it cannot protect their acquisitions from other members of their own family. It is therefore recommended that individual proprietary capacity now be placed beyond doubt. A clear legislative statement is needed that everyone be deemed capable of owning and possessing property and that full ownership in individual acquisitions be recognized.

6.3.1.17 Full ownership in individual acquisitions will involve consequential alteration to the existing rules on the delictual liability of family heads. While control of property and liability in delict are intimately connected,[104] this is an issue that should be attended to by the courts (as happened in the past) rather than the legislature.

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101 Section 39 of Procs 110 and 112 of 1879 and s 38 of Proc 140 of 1885.

102 *Ndema* 1936 NAC (C&O) 15 and *Mlanjeni v Macala* 1947 NAC (C&O) 1.

103 Cf s 14 of the KwaZulu/Natal Codes, as read with the definition of `family property' in s 1(1). See, too, *Dhlamini* 1960 NAC 49 (NE).

104 Bennett in Sanders *Southern Africa in Need of Law Reform* 18ff.

6.3.2 Management of marital estates

A. Excerpt from the Issue Paper

6.3.2.1 The issue paper contained the following discussion of and recommendations on the management of marital estates:[105]

> "Once it has been established that women have proprietary capacity, the way is open to deciding the modalities of a matrimonial proprietary regime. In the case of African marriages (even those contracted according to civil or Christian rites), the tendency has been to presume that spouses would be culturally predisposed to favour separate estates.[106] There appears to be no harm in retaining this rule, provided that the economically weaker spouse has the power to bind the other's estate for household necessaries and provided that a joint estate may be equitably distributed on divorce."

B. Problem analysis

6.3.2.2 Linked to the paucity of rules on property in customary law is an absence of rules designed to regulate the management of family estates. Heads of households had total control of family and house property, together with the sole authority to represent the family in dealings with third parties. Apart from a general duty to maintain dependants, which would in practice be enforceable through complaints to family elders, the family head was subject to no limitations in his management of house and family estates.

6.3.2.3 Problems could arise in two situations, however. In the first, if a family head were to dissipate assets through negligence or incompetence, family members would have few formal mechanisms to restrain him. His wife's ultimate remedies would be desertion and possibly divorce. In the second, if the family head were absent or otherwise unable to discharge his duties, his wife had no automatic authority to deal with property. It is true that she might be installed as an 'eye' or 'keeper' of the household to attend to day-to-day disbursements in her

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105 At p 11.

106 Under s 22(6) of the Black Administration Act 38 of 1927. This rule was also adopted by s 39(1) of the Transkeian Marriage Act 21 of 1978.

husband's absence.[107] If such an arrangement had not been made, however, the wife would be subject to one of her husband's senior agnates.[108]

6.3.2.4 The KwaZulu/Natal Codes introduced new provisions to regulate the first situation. A minor may initiate an 'administrative enquiry' through a district officer or traditional ruler to obtain an order that the family head desist from using the minor's income 'unreasonably'.[109] Alternatively, any interested person may have a family head suspended if he was handling family property 'foolishly or prodigally'.[110]

6.3.2.5 These remedies need to be generalized in the sense that any family member should be entitled to restrain the actions of one with control over property in which others have interests.[111] The somewhat drastic measures of divorce or removal from office (the latter equivalent to a common-law declaration of prodigality) will in any event become less relevant once family members are given ownership in their own acquisitions. Individuals could then bring proprietary actions to prevent the family head from disposing of their assets.[112]

6.3.2.6 As for the second situation, a rule is now required that either spouse may bind the estate for household necessaries. This provision (which in the common law is based on the principle of implied agency)[113] will promote more efficient management of the marital estate and

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107 *Cebekulu v Sitole* 1944 NAC (N&T) 48. If necessary, according to *Mpahlwa v Mcwaba* 4 NAC 302 (1919), she could sue for return of property.

108 In any event, she would not be permitted to dispose of valuable assets, such as cattle, without first consulting one of her husband's senior male relatives: *Qolo v Ntshini* 1950 NAC 234 (S).

109 Section 19.

110 Section 30(1). A complaint may be made to a district officer and an administrative inquiry may then be held: s 30(2).

111 Similarly under Ghanaian customary law, the only remedy that members of the family formerly had against the head of a family was to have him removed from office: *Abude & others v Onane & others* (1946) 12 WACA 102 at 104. Section 1 of the Head of the Family Accountability Law of 1985 provided that the family head was accountable to the family and that he could be required to file an inventory of that property. See Daniels (1987) 31 *JAL* 103ff and Kludze (1987) 31 *JAL* 107ff.

112 Although family members are always protected by the personal right to claim support, the wisdom of maintaining this situation is questionable. *Real* rights give better protection to the individual and take account of the disintegration of the bonds of kinship.

113 Clark in Visser 177-8. This rule applies whether the spouses are married in or out of community of property.

will give cognizance to the fact that wives already exercise considerable de facto powers over family property. It will also complement the principle that spouses have equal powers of decision-making.

C. Recommendation

6.3.2.7 It is recommended that in order to supply a lack of rules in customary law on the management of family estates, the common-law rule governing a spouse's power to bind the other's estate for household necessaries should be extended to customary law. A spouse should be liable to contribute to necessaries for the joint household *pro rata* according to his or her financial means. A spouse who contributed more in respect of necessaries than he or she was liable to contribute, should have a right of recourse against the other spouse. Moreover, remedies in the KwaZulu/Natal Codes for restraining or deposing a person who mismanages a family estate should be made available to all members of the family.

6.3.3 Antenuptial contracts

A. The Issue Paper

6.3.3.1 The issue paper recommended that spouses should be allowed to conclude antenuptial contracts in which they can specify the property consequences of their union.[114]

B. Problem analysis

6.3.3.2 It has always been assumed that only partners to civil or Christian marriages could conclude antenuptial contracts, but there is no good reason for this assumption.

C. Submissions

114 At p 11.

6.3.3.3 **The Gender Research Project (CALS)** considered that, although prospective spouses should be entitled to conclude antenuptial contracts, these agreements should be subject to judicial scrutiny, because they may contain clauses discriminating on grounds of gender.

D. Recommendation

6.3.3.4 Spouses should have the power to enter into an antenuptial contract to vary the automatic property consequences of marriage.

6.4 PROPERTY CONSEQUENCES

A. Excerpt from the issue paper

6.4.1 The Issue Paper contained the following discussion of and recommendation on division of property:[115]

> "Customary law had no notion of a joint marital estate. All property vested in the husband with the result that, when a marriage ended, the wife salvaged only her few personal possessions.
>
> On dissolution of marriage, the major concern of customary law was to find an equitable balance of the two families' interests through return or retention of bridewealth. The same idea of fair distribution could by analogy provide a basis for apportioning the spouses' assets on divorce. Courts would be required to take into account the length of marriage and the spouses' contributions (whether material or by provision of services) to the estate. These principles are consonant with the common law, which, via the accrual system,[116] forfeiture of benefits and straightforward equity,[117] allows the courts a generous discretion to make whatever order seems just."

B. Problem analysis

115 At p 12.

116 Under ch 1 of the Matrimonial Property Act 88 of 1984.

117 Under s 7(3) to (6) of the Divorce Act 70 of 1979.

6.4.2 In former times, an individual's economic welfare depended on the support of kinfolk and to a lesser extent on neighbours and traditional rulers. Today, most people are responsible for their own livelihoods,[118] although rising unemployment has forced increasing numbers to turn to the state for social welfare benefits.[119]

6.4.3 During marriage, both spouses work directly or indirectly to support the family. On divorce, the remnant family faces a drastic fall in income relative to its needs (which remain at a fairly high level). The burden of satisfying these needs then usually falls on the least qualified and most poorly paid spouse: the former wife.[120]

6.4.4 Because customary law is still based on the understanding that an individual's primary source of support is the extended family, the maintenance of wives and children is of little consequence.[121] Both in law and common perception, women are supposed to be dependent on men, who therefore carry the full responsibly for supporting them. Reality, however, seldom corresponds with the law or popular belief.[122]

6.4.5 Poverty and the attenuation of family ties have made women and children economic burdens to their families. Hence, on the break-up of marriage, women are likely to find themselves at a serious disadvantage. While their employment opportunities are far worse than men's, and their pay is lower,[123] gender roles dictate that mothers must raise children (while

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118 See Glendon and Sen in Meulders-Klein & Eekelaar *Family, State and Individual Economic Security* vol 1 3ff and 70ff, respectively, and Land in Freeman *State, the Law and the Family* 25.

119 The welfare system in South Africa, however, is still so basic that it does not nearly meet the needs of the indigent. See Burman & Barry *Divorce and Deprivation in South Africa* 10 and Burman & Berger (1988) 4 *SAJHR* 197.

120 See Davis et al (1983) 13 *Family L* 217ff.

121 To this end, bridewealth was seen as provision of security for the wife if she had to return to her natal family.

122 See generally Armstrong *Struggling over Scarce Resources* 43-4.

123 And, as Burman & Barry (n119) 6-8 show, African women in South Africa felt the effects of apartheid most keenly.

husbands retain guardianship, with its attendant benefits). Women therefore find that, unaided, they must support not only themselves but also their offspring.[124]

C. Submissions

6.4.6 Many respondents to the Issue Paper, in particular the **Law Commission Workshops (Central Region, Eastern Cape and Southern Region)** and **the Rural Women's Movement**, called for an equitable division of the matrimonial estate on divorce. The **Gender Research Project (CALS)** also called for due cognizance to be taken of the wife's contribution as homemaker and child-rearer.

D. Evaluation

6.4.7 When confronted with a similar problem, western legal systems reacted in two ways: by extending the husband's liability to maintain his wife and children beyond the termination of marriage and by giving the wife a share of the matrimonial estate. The former solution - a so-called 'support' approach - was prospective, working on an assumption that the spouses had a perpetual duty to maintain one another.[125] The latter solution - a 'property' approach - was retrospective, founded on proprietary rights established automatically (or by contract) at the time of marriage.

6.4.8 Subsequent experience with these two approaches revealed that the support system is inefficient and difficult to enforce.[126] Because maintenance orders necessitate investigation of the circumstances of each case, they encourage litigation, which is potentially a hindrance to realization of rights.[127] In addition, the degree of compliance with maintenance orders is

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124 And their problems are exacerbated by shortage of accommodation and child-care centres. See further Burman (1987) 1 *Int J L & Family* 210-11.

125 See Gray *Reallocation of Property* 282.

126 See generally O'Donovan (1982) 45 *MLR* 424, Smart *The Ties that Bind* 166 and, for example, Van Houtte & De Vocht (1981-2) 16 *Law & Soc R* 321ff.

127 For women in particular. See Ncube in Armstrong *Women and Law in Southern Africa* 26 and Armstrong (n122**)** 89ff.

notoriously low.[128] Husbands frequently default, and not necessarily because they are unwilling to pay; rather, the husband is likely to remarry or contract an informal union, which puts him in a position where he cannot afford to discharge maintenance obligations towards two partners.

6.4.9 To improve compliance with support obligations under common law the Maintenance Act was amended[129] to make criminal prosecutions and garnishee orders available.[130] But these remedies are difficult to procure, and, of course, they are useless where men are unemployed.[131] The overall problem of enforcement is compounded by procedural delays in the maintenance courts and bureaucratic inefficiency.[132]

6.4.10 Many western legal systems have partially or wholly abandoned the support approach in favour of the property approach.[133] They could afford to do so, because this approach works best where the society is affluent and the spouses have more property to share.[134] The change also made sense, for women were starting to attain a greater degree of financial security through better job opportunities and equal pay policies. In these circumstances, continuation of the husband's maintenance obligation became redundant.

6.4.11 Far-reaching changes are necessary to the present regime of customary law to make some provision for the financial needs of divorced wives and children.[135] As was indicated above, according to the official version, women generally lack proprietary capacity and there are few

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128 See Burman & Berger (n119) 339-41 for a survey in Cape Town.

129 By Act 2 of 1991.

130 Section 11 of the Maintenance Act 23 of 1963.

131 Burman (n124) 215 and 221-2 and Burman & Berger (n119) 205.

132 Burman & Barry (n119) 19-21 and Burman & Berger (n119) 350-1. See Armstrong (n122) 108ff.

133 See Sinclair *The Law of Marriage* 149-50.

134 See Gray (n125) 290.

135 In Zimbabw, for example s 7(1) of the Matrimonial Causes Act 33 of 1985 allowed the court granting a divorce to order division of the matrimonial estate, paying due regard to such matters as the contributions made `by looking after the home and caring for the family' (s 7(3)(*e*)). Under s 16 these reforms were extended to customary marriages. See Ncube in Armstrong 9 and 12ff, Stewart et al in WLSA 176 and Armstrong (1988-9) 27 *J Family L* 346-7. See Rwezaura 93-4 and (1988) 2 *Int J Law & Family* 11-12 and 16-18 for reforms in Tanzania.

rules that would be appropriate to regulating contemporary divorce problems.[136] By assigning the wife's earnings to the category of house property - which is deemed to belong to the husband - a wife leaves her marriage empty-handed.

6.4.12 It is quite possible that the living customary law is already evolving towards remedying the financial problems experienced by divorced women. Research conducted by the Women and Law in Southern Africa Project into property consequences of divorce in Zambia,[137] for example, indicated that, while customary law did not support the idea of maintenance, certain lower courts in urban areas were ordering husbands to pay lump sums of `compensation' on divorce. The purpose of these orders was partly to protect women who had been divorced without good cause and partly to compensate them for services they had rendered during marriage.

6.4.13 The first step towards creating a fairer proprietary regime would be to give wives full proprietary capacity. Once women can acquire property on their own account, the way is open to deciding a matrimonial proprietary regime. This is a complex subject, even in the common law, which now permits at least four different possibilities.[138] In the case of African marriages, the tendency in the past was to assume that spouses would be more likely to accept a separation of estates.[139] Both the **National Human Rights Trust and the Gender Research Project (CALS)**, however, objected to the suggestion in the Issue Paper that Africans were culturally predisposed to having separate estates. Nevertheless as **R W Skosana** says, if polygynous marriage is accepted, separation of estates would be the regime most compatible with a compound household. **Judge S S Ngcobo** also felt that polygyny would be inconsistent with community of property.

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136 Ncube and Nhlapo in Armstrong (n122) 11 and 45, respectively.

137 Himonga et al in WLSA (n5) 151ff. See further Himonga in Armstrong (n122) 56ff and Mabula (1988-9) 27 *J Family L* 332-3.

138 With many more variations by way of antenuptial contract. See Hahlo *The South African Law of Husband and Wife* 154-5.

139 Section 22(6) of the Black Administration Act 38 of 1927, therefore, deemed Africans who contracted civil or Christian marriages to be married out of community. See Olivier et al *Die Privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes* 246 and para 10.2.7 of the Report of the Law Commission on *Marriages and Customary Unions of Black Persons*. The same rule was adopted by s 39(1) of the Transkeian Marriage Act 21 of 1978 and the Tanzania Law of Marriage Act (for which see Read 32).

6.4.14 It should be noted at this point that, since 2 December 1988, all civil and Christian marriages between Africans (or between an African man and a woman of another racial group) are automatically in community of property and profit and loss.[140] In addition, both spouses have equal, concurrent powers to administer the joint estate.[141] For those who are already married out of community, a court granting a divorce has a measure of discretion to distribute property equitably.[142]

6.4.15 The principal goal to be achieved is an equitable distribution of assets on breakup of the marriage, a principle that is inherent in the customary notion that the two families' interests should be fairly balanced (taking into account, as **Prof A J Kerr** noted, the relative fault of the spouses). Whether estates are deemed to be held separately or in community during marriage is in practice immaterial to spousal relations, provided that the economically weaker spouse is suitably protected on divorce. Statutory procedures for doing so are already available for civil and Christian marriages, namely, an automatic accrual regime,[143] forfeiture of benefits,[144] recognition of the wife's contribution as homemaker and child-rearer[145] and consideration of future benefits (such as pensions and retirement annuities).[146]

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140 Section 1(*e*) of the Marriage and Matrimonial Property Law Amendment Act 3 of 1988 (which repealed s 22(6) of the Black Administration Act 38 of 1927). Section 2 provides that marriage by antenuptial contract produces separation of estates, subject to an accrual regime, unless the latter is expressly excluded.

141 Instead of the former rule that the wife fell under the husband's marital power: s 11 of the Marriage and Matrimonial Property Law Amendment Act 3 of 1988.

142 The courts' power arose from an amendment to s 7 of the Divorce Act 70 of 1979 (by s 36 of the Matrimonial Property Act 88 of 1984), a power that was expressly extended to African civil marriages by s 2 of the Marriage and Matrimonial Property Law Amendment Act 3 of 1988.
The reform legislation did not, however, repeal s 22(7) of the Black Administration Act, which preserves the material rights of the so-called 'discarded' wife, ie, the woman whose customary marriage had been nullified by her husband's subsequent civil marriage to another woman. Section 7(5)(*a*) of the Divorce Act was amended (by s 2(*b*) of the Marriage and Matrimonial Property Law Amendment Act 3 of 1988) to include as one of the factors the courts are required to take into account in determining the extent of assets to be transferred `any obligation that the husband may have under s 22(7) of the Black Administration Act. As Sinclair 232 says, this section obliges a court dissolving a civil marriage to take account of s 22(7) rights when deciding the *extent* of any assets to be transferred to the wife of the civil marriage.

143 Under ss 2 and 3 of the Matrimonial Property Act 88 of 1984.

144 Under s 9 of the Divorce Act 70 of 1979.

145 The Gender Research Project (CALS) called for due cognizance to be taken of this factor.

146 Under ss 7(4) and 7(*a*) of the Divorce Act 70 of 1979.

6.4.16 A critical question is whether reform legislation should operate only prospectively or whether it should include the estates of spouses married under the old regime. (As indicated by the **Council of SA Banks**, third parties in particular will be affected.) Prof Sinclair[147] and the **Gender Research Project (CALS)** say, that the 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.

6.4.17 Sinclair further argues that Parliament changed the former common-law regime by the Matrimonial Property Act of 1984 because it regarded that regime as unsatisfactory and unfair to women. Thus courts were given a discretion in distributing marital estates to avoid the inequity (that is especially likely to arise in cases of separation of estates) of one spouse leaving the marriage empty-handed. Sinclair says that to condemn spouses married before 1984 to an admittedly unfair regime on the ground of the date of their marriage is unsound as a constitutional principle for differentiating between people in identical circumstances.[148]

6.4.18 On the question whether this matrimonial property system should apply only to marriages entered into after legislation is passed, the Commission was persuaded by the argument that prospective law reform might constitute unfair discrimination against the spouses of earlier marriages. On the other hand, the Commission was also concerned about upsetting rights already acquired under existing marriages.

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147 Sinclair (n133) 143ff.

148 Sinclair (n133) 144.
"What can be adduced to palliate the sense of unfairness that women feel who are now emerging impecunious from broken marriages from which the accrual system was excluded?"
And see her discussion of the Law Commission proposals in its *Report on Review of the Law of Divorce* Project 12 of 1990.

E. Recommendation

6.4.19 In keeping with previous law on this topic, the Commission recommends that spouses be considered to be married out of community of property, but subject to the current statutory rules permitting courts to order an equitable distribution of their estates on divorce.

F. Request for comment

6.4.20 Particular comment is requested on whether or not proposed legislation should operate prospectively.

CHAPTER 7
DIVORCE

7.1 THE NEED FOR JUDICIAL REGULATION OF DIVORCE

A. Excerpt from the Issue Paper

7.1.1 The Issue Paper contained the following discussion and recommendations on the judicial regulation of divorce:[1]

> "At present, customary marriages may be terminated extra-judicially. In the interests of protecting vulnerable parties, especially wives and children, this position must be changed by a requirement that all divorces be duly processed by the courts.
>
> In principle, a single system of family courts should administer a common code of divorce law."

B. Problem analysis

7.1.2 Two features distinguish divorce in customary law from divorce in common law.[2] In the former system, divorce is a private matter that can be arranged by the spouses and their families on any terms they choose. Recourse to a court or third party is necessary only if agreement is impossible.[3] In addition, questions of maintenance, distribution of the matrimonial estate and rights to children are of little account.[4] Customary law was predicated on an assumption that wives would return to their own families and children would either remain with their fathers or move to their maternal families.[5]

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1 At p 11 - 12.

2 Some works avoid using the term 'divorce' in the context of customary law in favour of 'dissolution' (a culturally non-specific term). See Cotran & Rubin *Readings in African Law* vol 2 209. Dissolution is too broad, however, since in common law marriage is dissolved by death, whereas in customary law a union may be prolonged through levirate or sororate unions. Hence the term divorce is used in this Discussion Paper.

3 Under common law, although a marriage may be dissolved inter vivos only by decree of a court, the parties may privately negotiate certain issues, such as division of the marital estate, maintenance and child custody.

4 See Phillips & Morris *Marriage Laws in Africa* 126.

5 Depending, of course, upon payment of bridewealth. In common law, on the other hand, if the spouses cannot agree maintenance, distribution of the matrimonial estate, custody and access to children are the

C. Submissions

7.1.3 **Dr A M S Majeke** (Univ of Fort Hare) claims that customary law has no true conception of divorce, since the ties of marriage are regarded as eternal.

7.1.4 Currently, civil and Christian divorces must be heard by the High Court. Through a legislative oversight, however, magistrates' courts still have jurisdiction to hear customary divorces. As **Judge S S Ngcobo** pointed out, this situation persists despite s 46 of the Magistrates' Courts Act 32 of 1944. **The Law Commission Workshop (Western Region)** made a proposal - which was supported by the **Law Commission Workshop (Central Region)** - that the breakdown of a marriage first be discussed within the family, and then, if no resolution can be found, referred to a traditional leader for adjudication.

D. Evaluation

7.1.5 It is true that in some systems of customary law divorce is rare, and in general it is difficult to procure. Spouses may, of course, separate for a period of time, but where marriage involves the union of two families, terminating the relationship is no easy matter.[6] The durability of African marriages is often attributed to the stabilizing effect of bridewealth,[7] but this view - which in any event was never uncritically accepted[8] - is not convincing, given changes in the nature and function of bridewealth.

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focus of the divorce action. Much of the law in this regard was predicated on a nuclear family, the husband as full-time worker and the mother as child-rearer. Neither party could rely on an extended family for support.

6 Raum & De Jager *Transition and Change in a Rural Community* 79-80, Van Tromp 151, Marwick 133, Schapera *Handbook* 159, Nhlapo in Women and Law in Southern Africa (WLSA) *The Legal Situation of Women in Southern Africa* 116 and *Marriage and Divorce in Swazi Law and Custom* 77-8, Ashton 85-7, Maqutu *Contemporary Family Law of Lesotho* 127 and Mönnig 334.

7 See Chapter 3 par 4.3.2 above. The major work on this point was by Gluckman (1953) 53 *Man* 141.

8 Since it was complicated by a comparison of matri- and patrilineal societies. See Mitchell in Southall *Social Change in Modern Africa* 316ff and Mair *Marriage* 189-91.

7.1.6 In fact, the stability of customary marriages must be a matter of conjecture, for we have very little statistical information on the divorce rate.[9] The private nature of customary marriage is the principal reason for the lack of data. Even if an empirical study were to be undertaken, however, it would be almost impossible to pronounce definite findings, given the problems of determining whether a customary marriage exists.[10]

7.1.7 In fact, there is, every reason to believe that customary marriages could be as unstable as their common-law counterparts. Labour migrancy, the legacies of influx control and forced removals, together with the acute shortage of urban housing, are all factors that conduce to the breakdown of marriage.[11] Burman cites figures to show that 68,2 per cent of all African children born in 1988/9 were born outside any form of marriage (in part because of the high rate of marriage breakup) and that over 50 per cent of African marriages in Cape Town ended in at least de facto divorce.[12]

7.1.8 In these circumstances, it is questionable whether customary rules regulating divorce would function as effectively as they did in the past. An equitable settlement of bridewealth was always the central issue. Because fulfilment of marital responsibilities governed distribution of bridewealth, the duty of the wife's guardian to return some or all of the livestock depended on who was at fault in causing breakdown of the marriage[13] and whether the wife had given birth to children.[14] Bridewealth was therefore supposed to function as a restraint on the spouses' behaviour.

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9 Cf Weinrich *African Marriage in Zimbabwe and the Impact of Christianity* 160ff, Hunter 212 and Mönnig 334.

10 See Comaroff & Roberts (1977) 21 *JAL* 113-14.

11 See Burman (1987) 1 *Int J L & Family* 210.

12 Burman (1991) 7 *SAJHR* 215.

13 See, for example, *Ncose v Nandile* 4 NAC 197 (1920) and *Shabangu v Masilela* 1939 NAC (N&T) 86.

14 The general rule is that the wife's guardian is entitled to retain one head of cattle for every child born of the union: *Nkuna v Kazamula* 1941 NAC (N&T) 128 and *Manjezi v Sirunu* 1950 NAC 252 (S). In *Mekoa v Masemola* 1939 NAC (N&T) 61 the court went so far as to say that this was an expression of natural justice. The approach to deductions for the wife's services during marriage is less consistent. Compare *Novungwana v Zabo* 1957 NAC 114 (S) with *Ng'cobo v Zulu* 1964 BAC 116 (NE) and *Mzizi v Pamla* 1953 NAC 71 (S).

7.1.9 It seems unlikely, however, that these principles can be realized in practice. As bridewealth goods have become assimilated to the general economy, they tend to be expended on day-to-day subsistence, and, if bridewealth is not available for return, the wife cannot expect her guardian to support her divorce. Unaided, however, she is not competent to pursue the action. As a result women will be forced to put up with their marriages, no matter how untenable a relationship may have become.

7.1.10 Moreover, through fragmentation of the extended family, not to mention the heavier burdens involved in educating and supporting children, the wife is not going to be a welcome addition to her natal family. With no assistance forthcoming from their guardians, women have to support both themselves and their children. It follows that private divorce settlements can work to the disadvantage of women and children.[15]

7.1.11 The courts, however, have disclaimed any general authority to issue divorce decrees on the understanding that dissolution of marriage is notionally a private affair in customary law.[16] Accordingly, they are prepared to exercise jurisdiction only if it is clear that one party was determined on divorce and that his or her intention had already been clearly expressed to the other party (a rule that has led to inordinate technicality in pleadings).[17] While it is implicit in KwaZulu/Natal that dissolution of marriage may no longer be arranged privately without reference to a court,[18] the Transkei Marriage Act provides only that courts *may* grant divorce decrees, with the implication that extra-judicial divorce is still permissible.[19]

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15 See Rwezaura (1983-4) 1/2 *Zimb LR* 91-2 for Tanzania.

16 *Duba v Nkosi* 1948 NAC 7 (NE) and *Saulos v Sebeko & another* 1947 NAC (N&T) 25.

17 If a husband sued only for dissolution, his petition would be dismissed, because the courts did not consider that they had an essential role to play in dissolving marriages: *Maseko v Mhlongo* 1953 NAC 40 (C). Conversely, if the husband sued only for return of bridewealth, the case would also be dismissed for disclosing no cause of action: *Nyembe v Zwane* 1946 NAC (N&T) 26 and *Matlala v Tompa* 1951 NAC 404 (NE).

18 *Mlaba v Myeni* 1942 NAC (N&T) 6. It follows that, if the court does not consider the plaintiff's grounds for suit sufficient, it may refuse the divorce. See, for example, *Nyaka & another v Nyaka* 1947 NAC (N&T) 16.

19 Section 48 of Act 21 of 1978, as read with s 37.

7.1.12 The Constitution now gives everyone 'the right to have any dispute that can be resolved by the applicable of law decided ... before a court or, where appropriate, another independent and impartial tribunal or forum'.[20] Thus, courts may no longer refuse to entertain customary divorce actions at the suit of a spouse. Once an impartial third party intervenes in the divorce proceedings, the wife and children may be afforded procedural protection and action can be taken to enforce rules on post-divorce support and custody.

7.1.13 Currently, while civil and Christian divorces must be heard by the High Court, magistrates' courts still have jurisdiction to hear customary divorces (despite s 46 of the Magistrates' Courts Act). There is no principled reason for this segregation.[21] Admittedly, the costs of proceeding in magistrates' courts are lower than in the High Court (which retains concurrent jurisdiction), but to maintain these distinctions of the apartheid period smacks of unequal treatment.

7.1.14 The recommendation made by the **Law Commission Workshop (Western Region)**, referred to above, that the breakdown of a marriage first be discussed within the family, and then, if no resolution can be found, referred to a traditional leader for adjudication, may reflect an existing practice, since families probably attempt to reconcile the spouses, and traditional authorities already have jurisdiction to hear customary divorces.[22] When the long-awaited 1993 Magistrates' Courts Amendment Act[23] comes into operation to establish family courts, however, all divorce actions should be processed in a single system of courts.

7.1.15 Traditional authorities may nevertheless continue to exercise some role in the divorce process. As **R W Skosana**[24] suggests, they may seek to mediate between the parties, and, if

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20 Section 34.

21 Nor is there any reason why Africans married by civil or Christian rites may prosecute their divorces in the Black Divorce Courts, which were established by s 10 of Act 9 of 1929.

22 Although their power is implicit rather than express. In the proviso to s 12(1) of the Black Administration Act 38 of 1927 jurisdiction over civil or Christian unions is excluded. It follows that the courts do have power to dissolve customary marriages.

23 No 120, which is designed to replace the special Black Divorce Courts with family courts that will have jurisdiction to adjudicate divorces for all communities in South Africa.

24 The presenter of a substantial number of workshops conducted on the Issue Paper.

possible, to reconcile them. If it is determined that a marriage has irretrievably broken down, the parties can then approach the family courts.

E. Recommendation

7.1.16 The private regulation of divorce in customary law places women and children at risk. It is therefore recommended that no marriage may be terminated except by decree of a competent court.

7.1.17 The current anomalous position that magistrates' courts and the courts of traditional leaders have jurisdiction over customary divorces (and Black Divorce Courts have jurisdiction over divorces prosecuted by Africans married by civil or Christian rites) should be ended as soon as possible. All divorce actions and actions about other family-law issues referred to in this Discussion Paper should be processed through the family courts. The Commission also recommends that family courts be instituted as a matter of urgency.

7.1.18 It is also recommended, however, that traditional authorities should be entitled to exercise conciliation powers prior to the action.

7.2 GROUNDS FOR DIVORCE

A. Excerpt from the Issue Paper

7.2.1 The Issue Paper contained the following recommendation on the grounds for divorce:[25]

> "As far as grounds of divorce are concerned, irretrievable breakdown should be deemed the sole ground for dissolving a marriage, a rule that would accommodate particular cultural views as to what constitutes an untenable relationship."

B. Problem analysis

25 At p 11.

7.2.2 Customary law had no 'grounds for divorce' in the sense of conditions to be proved to the satisfaction of a court before a divorce order would be granted.[26] Acceptable *reasons* for divorce were nevertheless important, as refund of bridewealth (which depended partly on the fault of the parties) was always likely to be in issue.[27]

7.2.3 Serious failure by either spouse to perform marital duties would provide good cause for ending a marriage.[28] In reality, however, husbands enjoyed a privileged position. On the one hand, they needed no specific reason to divorce (although arbitrary action would result in loss of bridewealth),[29] and, on the other, if they sought a reason, they had a wider range available than wives.[30] For instance, bearing offspring was seen as a wife's primary duty.[31] Thus wives who failed to produce children could be blamed for obstructing the purpose of marriage.

7.2.4 By contrast, a wife had to have an especially good reason to end her marriage, because she had to convince her guardian to support her case. Hence, women would seldom have cause for complaining about their husbands' sexual misconduct (although a woman's extra-marital affaires were always deemed more serious).[32] A wife's most reliable reasons for leaving her husband were that he did not support her or had exceeded his powers of chastisement.

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26 Grounds of divorce exist only 'where a divorce requires the formal sanction of judicial authorities': Mair 182. Thus s 48 of the KwaZulu/Natal Codes specified grounds for divorce and so, too, do ss 43 and 48 of the Transkei Marriage Act 21 of 1978.

27 If the parties could not agree on the amount to be returned, they had to appeal to a third party, and, in a public forum, they would have to have convincing arguments to show that one party acted in a blameworthy fashion according to the accepted standards of marital behaviour.

28 See Roberts 50, Campbell (1970) 3 *CILSA* 334-7 and Nhlapo *Marriage and Divorce in Swazi Law and Custom* 79ff.

29 *Kos v Lephaila* 1945 NAC (C&O) 4 and Mair 187-8.

30 See Molokomme in WLSA (n6) 20 for Botswana

31 And, because determination of family size is the prerogative of men, wives have no right to abortion. See Sinclair *The Law of Marriage* 106 and the sources she cites in fn 280.

32 Which is indicated by the rule that only a husband has an action for damages for adultery. If he pursued this action, however, he would be deemed to have condoned his wife's behaviour, with the result that he could no longer claim divorce: *Tetani v Mnukwa* 1 NAC 38 (1900).

7.2.5 Divorce should now be available on a single ground: that a marriage is irretrievably broken down.[33] While this ground is normally associated with Divorce Act,[34] it actually reflects customary law, where termination of marriage has always been based on frank acceptance of the fact that the parties can no longer maintain their relationship. By using this broad principle as a foundation for all divorce actions, the courts may accommodate the parties' cultural orientation and at the same time integrate the conciliation procedures typical of customary law into the divorce process.[35]

7.2.6 Deciding whether a marriage has broken down is a matter of judicial discretion, one that must now be exercised in accordance with the constitutional principle of equal treatment. Hence courts must guard against the customary-law bias in favour of husbands.

C. Recommendation

7.2.7 It is recommended that only one ground of divorce should be entertained: irretrievable breakdown of the marriage. In exercising their discretion under this principle, courts should take into account pre-divorce conciliation procedures available in customary law and appropriate cultural norms governing marital behaviour. They should not, however, favour husbands at the expense of wives.

7.3 THE PROCEDURE

A. Excerpt from the Issue Paper

7.3.1 The Issue Paper contained the following discussion of divorce procedure:[36]

33 Sections 3 and 4 of Act 70 of 1979.

34 Section 4 of Act 70 of 1979.

35 As in Tanzania. See Read (1972) 16 JAL 34.

36 At p 11.

> "Although under customary law wives may not of their own accord end their marriages, the constitutional principle of non-discrimination would imply that women should have *locus standi* to sue for their own divorces and for related matters, such as maintenance and custody.[37] This principle complements an existing rule that a woman may not be forced into a marriage against her will: just as she is free to refuse to contract a marriage, a woman should be free to end a union when she wishes."

B. Problem analysis

7.3.2 Because courts exercise their greatest measure of control over procedure, it might have been hoped that they would have taken positive action to advance the cause of vulnerable parties in divorce proceedings. Very little has been done, however, to protect women and children. Instead, by seeking to remain true to African traditions, the official version of customary law has given unwarranted rights and powers to husbands and the guardians of wives.

7.3.3 Although termination of a marriage was arranged privately in customary law, some public demonstration was necessary to signify what had happened. A general method of indicating divorce is to reverse the events creative of marriage. In the case of customary law this involved the wife leaving her husband and her guardian returning bridewealth.[38] On its own, however, a wife's act of desertion[39] or the spouses' living apart[40] is equivocal, for neither necessarily implies an irretrievable breakdown of the relationship. To cure these ambiguities, the courts insisted on clear manifestation of an intent to end the marriage.[41] Return of bridewealth[42] or observance of a

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37 This would follow from ss 9 and 34 of the Constitution.

38 See Kuper *The Swazi* 19, Schapera *Handbook* 161-2 and Van Warmelo & Phophi 453, 519 and 531.

39 Wives customarily return to their families for short periods to give birth to children or to incite further payment of bridewealth. Thus, neither desertion by the wife (*Ponya v Sitate* 1944 NAC (C&O) 13) nor a husband's eviction of his wife (*Ngcongolo v Parkies* 1953 NAC 103 (S)) amounts to divorce.

40 Unless for a very long time: *Speelman* 1944 NAC (N&T) 53 and *Mhlanga v Hleta & another* 1944 NAC (N&T) 40. *Didi v Maxwele* 4 NAC 198 (1921) held that this inference is not lightly drawn.

41 As signified by a prior phuthuma, for example. See *Nkonzo v Jim* 1951 NAC 341 (S), *Zondela v Mpayi* 1952 NAC 92 (S) and *Gova v Gushu* 1953 NAC 261 (S).

42 *Nkabinde v Mlangeni & another* 1942 NAC (N&T) 89 and *Kosane v Molotya* 1945 NAC (N&T) 70. Conversely, where bridewealth had already been refunded, *Novungwana v Zabo* 1957 NAC 114 (S) held that the marriage had been ipso facto dissolved.

conventional divorce procedure, such as the husband escorting his wife back to her family and reporting the matter to a headman,[43] were deemed to suffice.

7.3.4 According to the official version of customary law, only the husband and the wife's guardian could terminate the marriage.[44] Following the logic of the system, if wives had not received the bridewealth necessary to create the union, they could not tender its return.[45] By implication, the fate of a wife depended on whether her husband and guardian could agree on what to do about bridewealth. On the one hand, a woman's guardian could end the marriage simply by tendering return of bridewealth.[46] On the other, if he wanted to avoid returning bridewealth - which might well have already been spent - he could refuse to prosecute the divorce action on her behalf.[47]

7.3.5 Certain early decisions of the Transkeian courts allowed wives to bring divorce actions unassisted[48] and even to return bridewealth on their own account.[49] After 1927, however, this progressive approach was reversed. Albeit reluctantly, the Native Appeal Court held that wives were not parties to divorce actions,[50] and that they lacked the power to end their marriages.[51] The courts nevertheless accepted two principles: that a wife could not be compelled to abide by

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43 *Bobotyane v Jack* 1944 NAC (C&O) 9 at 11, *Mshweshwe* 1946 NAC (C&O) 9 and *Jack v Zenani* 1962 NAC 40 (S). Similarly, if a wife decided to leave her husband, *Mxonya v Moyeni* 1940 NAC (C&O) 87 held that she should report her purpose to a headman.

44 As *Mnyandu v Dludla* 1978 AC 64 (NE) held, the wife's guardian was a full party to the action. He did not appear in court only to cure his ward's procedural incapacity.

45 *Sweleni v Moni* 1944 NAC (C&O) 31, *Mokgatle* 1946 NAC (N&T) 82 and *Nhlabati v Lushaba* 1958 NAC 18 (NE).

46 Less any deductions to which he would be entitled. See *Mendziwe v Lubalule* 3 NAC 170 (1913) and *Mayile v Makawula* 1953 NAC 262 (S).

47 Although the courts have held that a wife's refusal to return to her husband was tantamount to dissolution of the marriage: *Manamela v Kekana* 1944 NAC (N&T) 35 and *Kabi v Punge* 1956 NAC 7 (S) at 12.

48 *Noklam v Qanda* 4 NAC 202 (1920) and *Qeya v Latyabuka* 4 NAC 203 (1920).

49 *Noenjini v Nteta* 2 NAC 106 (1911).

50 *Nqambi* 1939 NAC (C&O) 57 at 59 and *Phiri v Nkosi* 1941 NAC (N&T) 94-5 and 97-8. Simons *African Women* 129-35 gives a critical commentary of this case.

51 *Mpilo v Tshabalala* 1948 NAC 24 (C) and *Mpantsha v Ngolonkulu & another* 1952 NAC 40 (S).

her marriage and that her guardian could not end his ward's marriage without her consent.[52] If a guardian refused to assist in bringing an action, the court would appoint a curator ad litem.[53]

C. Evaluation

7.3.6 A woman was heavily dependent on her guardian to obtain a divorce.[54] Her presence in court was necessary only to give evidence when deciding custody of children.[55]

7.3.7 Some change to this obviously inequitable situation has already been effected by legislation in KwaZulu/Natal. The Codes made the wife a full party to the divorce action,[56] along with her guardian.[57]

7.3.8 Reform of customary law is clearly necessary. The common-law divorce regime, however, is not necessarily a model to which reform should aspire. In the first place, a noticeable tendency of western legal systems has been to delegalize the divorce process, which brings them to the same position as customary law.[58] In the second place, when matters do come to court, the accent on win-or-lose solutions and the adversarial proceedings tend to work to the disadvantage of women and children and tend to hinder harmonious post-divorce relations.[59]

7.3.9 Proposals have been made to remedy these shortcomings by involving social welfare agencies,[60] providing legal aid,[61] instituting a family advocate to represent children[62] and making

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52 *Marawu v Mzima* 3 NAC 171 (1915) and *Jubele v Sobijase* 5 NAC 56 (1924).

53 In which case the guardian had to be joined as co-defendant with the husband in the divorce action. Conversely, if he was prepared to assist her, *Mokgatle* 1946 NAC (N&T) 82 and *Nhlabati v Lushaba* 1958 NAC 18 (C) at 20 held that he and his ward had to be joined as co-plaintiffs.

54 *Nhlabati v Lushaba* 1958 NAC 18 (NE).

55 See *Sibiya v Mbata* 1942 NAC (N&T) 71 and *Nkabinde v Mlangeni & another* 1942 NAC (N&T) 89.

56 Section 48(1).

57 Section 51.

58 See Weitzman *Divorce Revolution* 1-51 for a history of divorce law.

59 Schäfer 1983 *AJ* 193 and Burman (1990) 107 *SALJ* 251.

60 Cf Law Commission *Report on the Law of Divorce* RP57 of 1978 paras 8.9.3 and 18.7.

61 Cf Burman 1983 *AJ* 174-5.

provision for specialized family tribunals.[63] For various reasons most of these remedies have not been fully implemented in South Africa, but, when they are, they should be extended to all divorces, whether the marriages involved are customary, civil or Christian.

7.3.10 A particular feature of the reforms in common law was the institution of mediation or conciliation proceedings prior to adjudication.[64] This development was clearly in keeping with customary law, which always preferred to settle disputes within the family and where possible to reconcile the spouses.[65] Hence, the statutory conciliation procedures may confidently be extended to customary divorces.[66]

D. Recommendation

7.3.11 It is recommended that either spouse should be competent to apply for divorce. If a spouse is unable to prosecute the action unaided, the court should appoint a curator ad litem. Certain progressive reforms made to the common-law divorce procedure, such as the appointment of a family advocate, should be extended to customary marriages.

7.4 MAINTENANCE

A. Excerpt from the Issue Paper

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62 Under s 4 of the Mediation in Certain Divorce Matters Act 24 of 1987.

63 Under s 1 of the Magistrates' Courts Amendment Act 120 of 1993.

64 Section 4(3) Divorce Act 70 of 1979.

65 Section 50 of the KwaZulu/Natal Codes goes as far as obliging the recipient of lobolo to 'attempt to reconcile the partners'. If he fails, 'the wife may institute proceedings for a divorce in a magistrate's court'.

66 Mediation or conciliation is now a feature of divorce legislation in other African jurisdictions: s 9 of the Ghanaian Matrimonial Causes Act No 367 of 1971 and s 106(2) of the Tanzania Law of Marriage Act 5 of 1971. See the study by Rwezaura in Abel *Politics of Informal Justice* vol 2 65 and Rwezaura & Wanitzek (1988) 2 *Int J Law & Family* 20-1 of the Tanzanian procedure.

7.4.1 The Issue Paper contained the following discussion of and recommendation on maintenance:[67]

> "Customary law had no concept of post-marital maintenance, since the purpose of divorce was to put an end to the spouses' relationship and that of their families. Wives were expected to return to their guardians, who took over the responsibility for maintaining them. Today, however, women have no guarantee of support from their natal families and they are often left to raise minor children alone.
>
> The courts are already prepared to hold a father liable to support his children, but, in spite of a recommendation by the Law Commission,[68] they have not yet changed the position regarding spousal maintenance. Courts must therefore be empowered, along the lines of s 7 of the Divorce Act,[69] to order either spouse to pay maintenance in appropriate circumstances."

B. Problem analysis

7.4.2 The absence of a system of post-divorce maintenance in customary law has already been noted (in 6.4.4) and so, too, has the problem of enforcing common-law rights (in 6.4.8 and 9). Whatever the difficulties of securing compliance, however, a maintenance order should in principle be available to the spouse of a customary marriage. Although the sum awarded may be very low, it will probably be a relatively large proportion of the divorcee's income.[70]

7.4.3 Giving a former wife a right to maintenance will be a radical break with customary law, where the purpose of divorce was to end all connection between the parties.[71] The general rule was that whoever had custody of a child was obliged to support it.[72] (Hence fathers still refuse to pay maintenance for children living in another's household.) Nevertheless, a father generally had to pay a beast (isondhlo in Xhosa) to the person who had raised his child.[73] While this practice

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67 At p 13.

68 In clause 9(9) of the Bill appended to the Working Paper.

69 70 of 1979.

70 Burman (1987) 1 *Int J L & Family* 220.

71 Armstrong *Struggling Over Scarce Resources* 47.

72 Armstrong (n71) 41-2.

73 When demanding custody of a child (whether legitimate or illegitimate). See Van Tromp 139-42, Duncan 8-9, Armstrong (n71) 34-5 and Schapera *Handbook* 166 and 172.

superficially resembles maintenance, it is not the same, because isondhlo is not a full reimbursement for past expenditure nor is it a contribution to future costs.[74] The courts, however, have confounded isondhlo with maintenance, sometimes inadvertently[75] and sometimes deliberately in order to update customary law to meet modern conditions.[76] The effect of these efforts in judicial law-making has been confusion, because it is now uncertain whether a person claiming custody of a child has to pay isondhlo or maintenance or both.[77]

C. Submissions

7.4.4 **Prof J C Bekker** says that African men will never understand why they should continue supporting women when all relationships have been severed. **Mr R W Skosana,** on the other hand, suggested that customary notions of maintenance are now untenable because of social change.

D. Evaluation

7.4.5 Whether statutory and common-law rights to maintenance have superseded customary law altogether [78] is not clear in South Africa.[79] Shortly before they were abolished, the Black

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74 *Cele* 1947 NAC (N&T) 2 at 3. See too *Mbata v Zungu* 1949 NAC 72 (NE) and *Sibanda vSitole* 1951 NAC 347 (NE). Significantly, any right to payment of isondhlo does not vest in the child. Isondhlo is also a concrete token of the transfer of parental rights to the donor: *Gatyelwa v Ntsebeza* 1940 NAC (C&O) 89.

75 *Mafanya v Maqizana* 3 NAC 158 (1914) and *Mtetwa v Nkala* 1937 NAC (N&T) 157.

76 *Hlengwa v Maphumulo* 1972 BAC 58 (NE). A similar development has occurred in Zimbabwe, where Stewart et al in WLSA 190 note that *chiredzwa* (a rearing fee) can no longer be distinguished from maintenance.

77 See Whelpton 1993 *TSAR* 574. Elsewhere in southern Africa, Armstrong (n71) 55 says that the different laws on maintenance are blending, although in case of conflict between customary and statute (or common law), the latter tends to prevail.

78 Through the rule that all common and customary law must be read subject to applicable legislation or through application of the repugnancy proviso under s 1(1) of the Law of Evidence Amendment Act 45 of 1988.

79 Various provincial enactments passed about the turn of the century to protect deserted wives and children created substantive rights to maintenance. In 1943 these enactments were incorporated into s 10*bis* of the Black Administration Act 38 of 1927. This section was later repealed by the Maintenance Act, 'except in so far as it may impose any liability upon any person to maintain any other person'. Roman-Dutch law and the provincial enactments then provided substantive rights and 4(1) of the Maintenance Act 23 of 1963 a statutory machinery for enforcing them against any person 'legally liable'. Although the Maintenance Act did not provide substantive rights, s 5(6) was amended by Act 2 of 1991 to provide that a man would be deemed to be the husband of any woman he had married by customary law.

Appeal Courts simply applied the common law to maintenance claims, although without examining the reasons for doing so.[80] The KwaZulu/Natal Codes empower courts granting decrees of divorce to make orders of maintenance for minor children as may be `just and expedient'.[81]

7.4.6 In 1985, the Law Commission[82] sought to put liability for maintenance beyond doubt by recommending that the common law should be applied, `provided that any provision that has been made at customary law for the support of another should be taken into account in determining the extent of the duty to support'.[83] The Law Commission then recommended a statutory provision modelled closely on s 7 of the Divorce Act,[84] which allows courts to make orders of spousal maintenance or to confirm the spouses' private agreements. This recommendation is endorsed.

E. Recommendation

7.4.7 It is recommended that, in spite of numerous problems of enforcement, maintenance should in principle be available to the spouses and children of customary marriage, both *stante matrimonio* and on divorce.

7.5 CUSTODY AND GUARDIANSHIP OF CHILDREN

A. Excerpt from the Issue Paper

80 See *Gcumisa* 1981 AC 1 (NE), *Lekwakwe v Diale* 1979 AC 299 (C), *Muru* 1980 AC 39 (S) and *Ngcobo v Nene* 1982 AC 342 (NE) at 348.

81 Section 53.

82 *Marriages and Customary Unions of Black Persons* para 11.5.1.

83 And see clause 9(5) of the Bill appended to the Report.

84 70 of 1979.

7.5.1 The Issue Paper contained the following discussion of and recommendations on custody and guardianship of children:[85]

> "Under customary law, while payment of bridewealth theoretically determines guardianship of children, the rule is seldom strictly applied and rights may always be waived to enable the most capable family to rear a child.
>
> The courts have long held that custody is to be determined by the interests of the child, a principle that has been extended to customary law. Not much has been said of the possibility that the principle exists in customary law as well, albeit in a form that conceives of those interests as being best safeguarded by not alienating the child from the resources of its patriline. In any event, the principle of the best interests of the child - which is in accordance with both international[86] and constitutional[87] norms - should now direct all aspects of the law regarding children, including guardianship and custody.
>
> Strictly speaking, a mother had no right to her children in customary law, because they fell under the control of her guardian. Clearly, in view of the constitutional norm of non-discrimination, recommendations to change customary law,[88] reforms in KwaZulu/Natal[89] and under the Guardianship Act,[90] both spouses should now have equal rights and powers over minor children."

B. Problem analysis

7.5.2 According to customary law, once a husband had fulfilled his obligations under the bridewealth agreement, he and his family had full rights to any children born to the wife. Because marriage was a private matter, however, the families could agree to vary this rule,[91] and, because marriage was only gradually established as bridewealth payments are made, parental rights tended to be uncertain.[92]

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85 At p 13 - 14.

86 Namely, arts 3 and 18 of the UN Convention on the Rights of the Child.

87 Section 28(2) of the Constitution.

88 By para 11.6 of the Law Commission's *Report*.

89 Section 27(2) of the KwaZulu/Natal Codes has already provided that an unmarried woman may be legal guardian of her minor child, and s 27(5) allows women to be appointed sole guardians on divorce.

90 192 of 1993.

91 This flexibility is apparent in Holleman 296-7, 306-7 and 314. See further Simons ch 21, Schapera *Handbook* 161 and Van Warmelo & Phophi Part 3 589ff. Private settlements, of course, leave the way open to exploitation of the weaker parties: Freeman *Rights and the Wrongs of Children* 198-9.

92 See Murray (1976) 35 *Afr Studies* 104-5.

7.5.3 As upper guardian of all minors, the courts assumed an overriding protective jurisdiction over children. Especially when a child's parents separated, the courts would intervene both to settle disputes about custody and to ensure protection of the child. This gave them an opportunity to declare the welfare of the child to be of paramount importance in making orders of custody.[93] Hence, in the official version of customary law, the rule about bridewealth is applied to decide issues of guardianship.[94] (And, during the subsistence of marriage, the father as natural guardian is deemed to have full rights to any children.)[95] The concept of custody, however, was distinguished: here the child's best interests prevailed.[96]

7.5.4 None the less, the courts worked on an assumption that a father should have full parental rights on divorce, which meant that anyone alleging that it would be in the child's best interests to remain in its mother's custody had to prove that the father was not a fit and proper person.[97] Conversely, a mother was presumed to be best suited to look after young children. Hence she was generally given custody until the child was old enough to fend for itself.[98] No specific age for the transfer of the child to the father was fixed, but it was normally taken to be about seven

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93 It is not altogether clear whether the welfare rule has been incorporated into customary law, as in *Mkize* 1951 NAC 336 (NE) and *Msiza & another v Msiza* 1980 AC 185 (C) at 191, or whether customary law has simply been excluded in favour of the common law on the basis of public policy, as in *Mbuli v Mehlomakulu* 1961 NAC 68 (S).

94 See, for example, *Radoyi v Ncetezo* 2 NAC 174 (1911) and *Matsupelele v Nombakuse* 1937 NAC (C&O) 163.

95 *Mokoena v Mofokeng* 1945 NAC (C&O) 89, *Kabe & another v Inganga* 1954 NAC 220 (C) and s 27(1) of the KwaZulu/Natal Codes. This approach was, of course, consonant with Roman-Dutch law, which assumed that the father was natural guardian of children born in wedlock and the mother natural guardian of illegitimate children.

96 In common law custody refers to the day-to-day control of the child and guardianship administration of the child's property: Hahlo 394-6. Under common law any benefits that might accrue to the parents are largely affective, but under customary law the economic benefits could be substantial, for the guardian is entitled to a daughter's bridewealth. See *Nkabinde v Mlangeni & another* 1942 NAC (N&T) 89 at 91 and *Mokoena v Mofokeng* 1945 NAC (C&O) 89.

97 *Gumede* 1955 NAC 85 (NE) and *Mahlangu v Nhlapo* 1968 BAC 35 (C). In Zimbabwe, the courts regularly assumed it to be in the child's interests to allow the father custody, because he would determine the child's marriage: Maboreke in Armstrong (n71) 143.

98 *Mkize* 1951 NAC 336 (NE), *Muru* 1980 AC 39 (S) and *Motloung v Mokaka & another* 1980 AC 159 (C). Customary and common Law are similar on this point.

years.[99] In the case of young children, therefore, if the father wanted custody, he bore the onus of proving that the mother was not a fit and proper person.[100]

C. Submissions

7.5.5 The principle of extending the rule of the child's best interests to cover all aspects of custody and guardianship was also supported by all those respondents who addressed the matter in the Issue Paper, namely the **Women's Lobby and the Law Commission Workshop (Western Region)**. **Mr R W Skosana** simply said that common law should govern custody and access to children of all marriages.

7.5.6 Most respondents to the Issue Paper considered that spouses should have equal rights of custody and guardianship to children: **Rural Women's Movement**, **the Women's Lobby**, the **Law Commission Workshop (Southern Region)** and **Adv J Y de Koker**. **J Heaton** added that this would then suggest that neither parent alone has sole power to nominate a guardian.

D. Evaluation

7.5.7 The emphasis in the common law dealing with children has shifted from parents' rights to parents' responsibilities to protect children.[101] While customary law obviously never ignored the interests of children, its tendency was to deem their fate inseparable from that of the family's.[102] Hence, when necessary, a child's interests would be subordinated to those of the family.[103] Existing case law, s 28(2) of the Constitution and the United Nations Convention on the Rights of the Child,[104] provide weighty authority for extending the rule of the child's best interests to

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99 *Maruping* 1947 NAC (N&T) 129.

100 *Maruping's case* supra. Or he had to prove that the conditions in which the mother lived were likely to cause the child physical or moral harm: *Mohapi v Masha* 1939 NAC (N&T) 154.

101 Alston *The Best Interests of the Child* 5.

102 Rwezaura in Alston op cit 100. See, too, Armstrong et al (1995) 3 *Int J of Children's Rights* 335-6, esp 349.

103 See Nhlapo in Eekelaar & Sarcevic *Parenthood in Modern Society, legal and social issues for the twenty-first century* 47 and Rwezaura in Alston op cit 90-1.

104 Article 3(1).

cover all aspects of custody and guardianship. It was noted above that this principle was also supported by all those respondents who addressed the matter in the Issue Paper.

7.5.8 The child's best interests principle has no specific content. (Based on its wording in relative terms, its function is mainly to rank conflicting claims and rules.)[105] This indeterminacy has given the courts a generous discretion to implement whatever views are current on proper child-rearing,[106] and, by the same token, it allows them to take into account the relevant parties' cultural orientation.[107]

7.5.9 A particular question that now arises about parental rights is gender equality. In the official version of customary law, although mothers were allowed custody, they did not acquire a right equivalent to that of the father. Following the strict logic of customary law, a woman had no rights at all, since she was not a party to the marriage.[108] If bridewealth had not been paid, for instance, the children went to the wife's guardian, not to the wife.

7.5.10 The KwaZulu/Natal Codes considerably improved the wife's position, by allowing her to be awarded sole guardianship of her children on divorce,[109] and in 1985 the Law Commission[110] proposed formal recognition of a mother's parental right to her children. Clearly, in view of the prohibition on gender discrimination under s 9 of the Constitution and the Guardianship Act,[111] both spouses should now have equal rights and powers over minor children.

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105 Alston (n101) 15-16.

106 See Eekelaar (1986) 6 *Oxford J Legal Studies* 170 and King (1987) 17 *Family L* 186.

107 See Alston and Parker in Alston (n101) 19-20 and 39, respectively.

108 It was held in *Nkosi v Dhlamini* 1955 NAC 27 (C) that the mother had no locus standi in custody suits, since the action was brought by her guardian. All the courts required was the wife's presence during the custody action: *Mbenyane v Hlatshwayo* 1953 NAC 284 (NE), *Ngakane v Maalaphi* 1955 NAC 123 (C) and *Mpete & another v Boikanyo* 1962 NAC 3 (C).

109 Sections 27(5).

110 Paragraph 11.6.1 of *Marriage and Customary Unions* and clause 9(6), as read with clause 14(1)(*c*) of the bill attached.

111 192 of 1993. From the wording of s 1(1) the statute seems clearly to be applicable to customary law.

7.5.11 Whatever the law on children may be, poverty has an intractable effect on their care.[112] A child's material prospects are nearly always better if he or she remains with the father,[113] and, even though the courts may award custody to the mother, she may be forced to send the child to its grandparents or to other relatives in a rural area.[114] Nevertheless, the message that should be sent by the law is equal parental responsibility towards children, since children have a fundamental right to preserve the strongest possible bond with both parents, despite breakdown of the marriage.[115]

E. Recommendation

7.5.12 It is recommended that in accordance with s 28(3) of the Constitution and the United Nations Convention on the Rights of the Child, the child's best interests should govern all aspects of custody, guardianship and access to children. Because the best interests principle has no specific content, cultural expectations may be accommodated by the courts. To avoid unfair discrimination against women, mothers should have equal rights to children.

112 As Armstrong in Alston 151ff notes, a child's best interests in the context of Zimbabwe are reduced to ensuring that the child has basic education and food. Cf Kamchedzera (1991) 5 *Int J Law & Family* 243.

113 Because whoever has custody is normally obliged to shoulder the full burden of educating the child. Since women are in a worse financial position than men, they can seldom offer their children the same benefits as the fathers. Rwezaura and Banda in Alston 108 and 196, respectively, note that, although women may be entitled to custody, it is pointless for them to claim it, if they cannot at the same time obtain maintenance.

114 See Izzard (1985) 11 *JSAS* 258 regarding Botswana and Murray *Families Divided* 110-12 regarding Lesotho.

115 Sinclair 157.

CHAPTER 8

NULLITY

A. Excerpt from the Issue Paper

8.1 Although the Issue Paper did not discuss the matter of nullity, it is a matter that cannot be ignored in the reform of marriage law.

B. Problem analysis

8.2 The sanction which the common law invokes for failure to comply with the requirements for creating a marriage, nullity,[116] is seemingly non-existent in customary law.[117] None the less, the concept of nullity has been adopted into marriage legislation in many parts of Africa, including the KwaZulu/Natal Codes.[118]

8.3 It has been argued that introducing this concept to customary law was unwise.[119] While a divorce decree operates prospectively (from the time that it is granted), a nullity decree declares that the union is terminated retroactively (because there never was a marriage). If no marriage existed, the court may not order a property settlement or maintenance.[120] Nevertheless, a law

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116 Historically, the concept of nullity was due in part to the canon-law prohibition on divorce and in part to the imposition of essential requirements for marriage. See Roberts *Law and the Family in Africa* 241ff.

117 If the relevant requirements for marriage were not present (which is difficult to conceive, given the processual nature of customary unions) the marriage would probably be dissolved in the ordinary way.

118 Section 49 of the KwaZulu/Natal Codes provides that a declaration of nullity may be requested on various grounds, including insanity and impotence. (The latter is more properly a ground for divorce.) For present purposes, a more important ground mentioned in the Codes is a subsisting civil/Christian marriage: the monogamous nature of the union would render a subsequent customary marriage void.
Section 49 of the Transkei Marriage Act 21 of 1978 also provides that any party to a customary marriage may apply for a declaration of nullity on grounds that a party was insane at the time of marriage, the woman was already married by customary or civil rites or `any other ground which shall, in accordance with the customary law which applied to the consummation of such customary marriage, be sufficient for a declaration of nullity'.

119 See Pauwels in Roberts (n116) 231 at 237.

120 And formerly, of course, children would have been deemed illegitimate. Cf s 6 of the Children's Status Act 82 of 1987.

that insists on certain requirements for a valid marriage will inevitably produce situations where it must be determined whether a union came into existence.

8.4 Because consent is the most important element of marriage, any vitiation of consent (by fraud, duress, mental instability, lack of age, etc) would render the union voidable, if not void. Although no specific legislative provision need be made for declarations of nullity, since the grounds are implicit in the requirements for marriage, courts should have the power to effect an equitable settlement between the partners to the union, notably a power to order return of bridewealth[121] and to make provision for matters of custody and maintenance.[122]

C. Recommendation

8.5 If marriage must comply with certain predetermined criteria, a concept of nullity is by implication introduced to customary law. There would, however, be no need to specify grounds for nullity. It is recommended that a court granting an order of nullity should be entitled to make suitable arrangements for the protection of vulnerable parties (and return of bridewealth if necessary).

121 Including any increase, which, together with orders for the refund of expenses incurred in connection with the union, is provided for under s 55 of the KwaZulu/Natal Codes.

122 These matters were governed by s 50 of the Transkei Marriage Act 21 of 1978.

ANNEXURE A

GENERAL EXPLANATORY NOTE:

[ ] **Words in bold type in square brackets indicate omissions from existing enactments.**

_____ **Words underlined with a solid line indicate insertions in existing enactments.**

BILL

To make provision for the recognition of customary marriages entered into before or after the commencement of this Act as valid marriages for all purposes in law; to specify the requirements for contracting valid customary marriages; to regulate the registration of customary marriages; to regulate the legal consequences of customary marriages; to provide for dissolution of customary marriages; to specify the application of the Age of Majority Act, 1972; to amend the Black Administration Act, 1927, the Codes of Zulu Law in KwaZulu/Natal, 1985 and 1987, and the Transkei Marriage Act, 1978, in order to enhance the capacity of women; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:-

Definitions

1. In this Act, unless the context otherwise indicates-

(i) "court" means a family court established under the 1993 Magistrates' Courts Amendment Act 120 of 1993 and includes any competent division of the High Court of South Africa;

(ii) "guardian" means the person specified in the Guardianship Act 192 of 1993, and failing any such guardian the person who would be considered guardian in customary law;

(iii) "registering officer" means any person or traditional authority appointed under section 2 of the Black Administration Act 38 of 1927 or the magistrate, or additional or assistant magistrate, of a district or area.

Recognition of customary marriages

2. A customary marriage entered into before or after the commencement of this Act shall be recognized as a valid marriage for all purposes in law.

Requirements for contracting valid customary marriages

3. (1) The requirements for a valid customary marriage are the following:

(a) the prospective male spouse must be over the age of 18 and the female spouse must be over the age of 15 and both parties must consent to the marriage;

(b) if the prospective male spouse is under the age of 18 or the prospective female spouse is under the age of 15, such person must comply with the provisions of section 26 of the Marriage Act 25 of 1961 to obtain consent to enter into the marriage;

(c) if a prospective male spouse is above the age of 18 or a prospective female spouse is above the age of 15, but is still a minor, that person must obtain the consent of his or her guardian to enter into the marriage;

(2) The prohibition of marriage between persons on account of their relationship by blood or affinity will be decided by the systems of law to which they are usually subject.

ALTERNATIVE DRAFT OF CLAUSE 3

3. (1) The requirements for a valid customary marriage are the following:

(a) the prospective spouses must be over the age of 18 and must consent to the marriage;

(b) if a prospective spouse is under the age of 18, such person must comply with the provisions of section 26 of the Marriage Act 25 of 1961 to obtain consent to enter into the marriage;

(c) if a prospective spouse is above the age of 18, but is still a minor, that person must obtain the consent of his or her guardian to enter into the marriage;

(2) The prohibition of marriage between persons on account of their relationship by blood or affinity will be decided by the systems of law to which they are usually subject.

Relationship of customary marriage and marriage by civil or Christian rites

4. (1) No person already married by civil or Christian rites may enter a valid customary marriage with the existing spouse or with another person.

(2) Where spouses have simultaneously celebrated their marriage both by civil or Christian rites and by customary rites, the consequences of such marriage shall be determined according to the law which the spouses have expressly agreed should apply; failing such agreement, a court may take into account the following factors to determine which law prevails:

(a) the spouses' cultural orientation as indicated by their mode of life and other relevant factors; and

(b) those rites and customs which predominate in the spouses' marriage.

(3) A person who is already a spouse in a customary marriage (whether it is potentially or actually polygynous) may not subsequently marry an additional spouse by civil or Christian rites during the existence of the customary marriage.

Registration of customary marriages

5. (1) Within a reasonable time of celebrating their customary marriage spouses must have their marriage registered under this section.

(2) A certificate of registration obtained under the Regulations contained in GN R1970 of 25 October 1968 constitutes prima facie proof of a customary marriage.

(3) If no certificate of registration exists or if the facts attested to by the certificate appear inaccurate, an interested person may request that a court, whether a family court or any other court, investigate the existence of a customary marriage and make an appropriate order.

(4) If the court finds that the marriage does exist, it must order confirmation of the certificate of registration or that the marriage be registered immediately.

(5) For purposes of this Act, all traditional authorities appointed under sections 2(7) and (8) of the Black Administration Act 38 of 1927 shall be competent to register customary marriages in accordance with the Regulations contained in GN R1970 of 25 October 1968.

The customary marriages of minors

6. (1) A prospective minor spouse who has no guardian or whose guardian is unable to give consent or unreasonably withholds consent may none the less conclude a valid customary marriage by complying with section 25 of the Marriage Act 25 of 1961.

(2) If it is doubtful whether a person is a minor, a registering officer or any competent court or commissioner of child welfare may determine that person's age.

(3) The court or commissioner of child welfare which approves a minor's marriage under this section may order payment of a reasonable sum of bridewealth in accordance with the system of customary law applicable to the marriage.

(4) A court may declare a customary marriage invalid on the ground that either of the spouses was a minor. An application for such an order may be brought by -

(a) either of the spouses to the marriage before he or she attains majority or within a reasonable time thereafter; or

(b) the guardian of a minor spouse provided that he or she takes action before the spouse attains majority and within a reasonable time of becoming aware of the existence of the marriage.

(5) A court granting an order under subsection (4) has the same powers that it would have under section 8(5) of this Act.

Legal consequences of customary marriages

7. (1) A wife of a customary marriage will have the same legal powers as her husband, and for all purposes the spouses will have equal powers of decision-making.

(2) All property that a spouse brings into the marriage and all property that a spouse subsequently acquires will be deemed to be that spouse's personal property.

(3) A customary marriage will not create a community of property or of profit and loss.

(4) A spouse is liable to contribute to necessaries for the joint household *pro rata* according to his or her financial means. Any spouse who contributed more in respect of necessaries than he or she was liable to contribute under this section has a right of recourse against the other spouse.

(5) The spouses may enter into an antenuptial contract to vary subsections (2), (3) and (4) of this section. Such antenuptial contracts will be subject to the provisions of section 21 of the Matrimonial Property, 1984 (Act No. 88 of 1984).

(6) This section will apply to all customary marriages whether they were entered into before or after the commencement of this Act.

ALTERNATIVE DRAFT OF CLAUSE 7(6)

7. (6) This section will apply to all customary marriages entered into after the commencement of this Act.

Dissolution of customary marriages

8. (1) A customary marriage will subsist until it is dissolved by the decree of a court as defined in this Act.

(2) For purposes of this section a court may -

(a) appoint a suitably qualified person to represent spouses who appear unable to conduct the proceedings themselves; and

(b) order that polygynous wives be joined as parties to the action.

(3) The provisions of the Mediation in Certain Divorce Matters Act, 1987 (Act No. 24 of 1987) will apply to customary marriages.

(4) A divorce may be obtained upon the irretrievable breakdown of a customary marriage, if a court is satisfied that the spouses have no reasonable prospect of the restoring a normal marriage relationship.

(5) A court ordering dissolution of a customary marriage has -

(a) the same powers under sections 6, 7, 8 and 9 of the Divorce Act 70 of 1979 as it would have had over a civil or Christian marriage;

(b) the power to order return of bridewealth according to the system of customary law applicable to the marriage, provided that the person who received bridewealth is joined in the action; and

(c) when ordering maintenance, the power to take into account any payment made under customary law.

Application and repeal of laws

9. The Age of Majority Act 57 of 1972 will apply to all persons subject to customary law.

10. (1) Section 11 of the Black Administration Act 38 of 1927, is hereby amended by the deletion of paragraph (b) of subsection 3.

(2) Section 22 of the Black Administration Act 38 of 1927, is hereby amended by the deletion of subsections (1) to (5) inclusive.

11. (1) Section 27 of the Codes of Zulu Law in KwaZulu/Natal, Act 16 of 1985, is hereby amended by the deletion of subsection (3).

(2) Section 27 of Proclamation R151 of 1987, is hereby amended by the deletion of subsection (3).

12. Sections 37 and 39 of the Transkei Marriage Act 21 of 1978, are hereby repealed.

Short title and commencement

13. This Act shall be called the Customary Marriages Act, 19.., and shall come into operation on a date fixed by the President by proclamation in the *Gazette.*

LIST OF RESPONDENTS **ANNEXURE B**

Judiciary

1. Judge SS Ngcobo of the Cape of Good Hope Provincial Division of the High Court;

Magistracy

2. JJ Boshoff, Acting Magistrate Nelspruit;
3. Mr CPM Meyer, Additional Magistrate, Grahamstown;
4. Mr JJ Scherman, Magistrate, Pretoria North, District Wonderboom;
5. Mr Besana Skosana, Magistrate, Johannesburg (Convenor of 35 workshops in Gauteng involving 1 185 people);

Law Societies

6. Attorney MJH Anderson on behalf of the Law Society of the Cape of Good Hope;
7. Attorney TSB Jali, of the firm Cox Yeats, who was requested by the Natal Law Society to submit a comment;
8. Attorney AM Moleko, of the firm AM Moleko & Co, who was requested by the Natal Law Society to submit a comment;

Attorneys

9. Attorney Iris Kumalo, of the firm Pierre Odendaal & Kie;

Bar Societies

10. Advocate KK Mthiyane, SC, on the behalf of the Society of Advocates of Natal;

Individuals

11. Professor JC Bekker, formerly of Vista University;
12. Joshua Borias, Dobsonville;
13. Advocate Jeanne de Koker, Department of Private Law, Faculty of Law, Vista University (Bloemfontein Campus);
14. Professor CRM Dlamini, Rector and Vice-Chancellor, University of Zululand;
15. Marsha Freeman, University of Minnesota, International Women's Rights Action Watch;

16. Professor J Heaton, Department of Private Law, University of South Africa;

17. Professor AJ Kerr, Professor Emeritus of Law and Honorary Research Fellow, Rhodes University;

18. Dr AMS Majeke, Department of African and Comparative Law, Faculty of Law, University of Fort Hare;

19. Mr Sam Moremi, Waterkloof Ridge;

20. NMS, Venda;

21. Advocate D Singh, Department of Private Law, University of Durban-Westville;

22. Robert William Skosana, Mamelodi West;

23. Tania van Rooyen, Walkerville;

24. Shelly Booysen, Umtentweni;

25. Thomas Mohope, Johannesburg

Religious organisations

26. The Zion Christian Church;

Women's Organisations

27. Ms Beth Goldblatt, Ms Likhapha Mbatha, & Lisa Fishbayn on behalf of the Gender Research Project Centre for Applied Legal Studies (University of the Witwatersrand);

28. Ms Likhapha Mbatha & Ms Lisa Fishbayn on behalf of the Rural Women's Movement;

29. Zandile Malinga on behalf of Hlomelikusasa (Rural Women's Organisation);

30. Babette Kabak & Doris Ravenhill on behalf of the Women's Lobby;

31. Mrs M Koornhof, on the behalf of Afrikaanse Christelike Vroueverenigning;

32. Umhlangano Womama Basemakhaya Omayelana Nesithembu;

Traditional leaders

33. Khosi TJ Ramouha, Thohoyandou;

Human Rights Organisations

34. Mrs Romola Rapiti on the behalf of the National Human Rights Trust;

Provincial Government

35. Ms D Nkwanyana, Principal State law Adviser at the Gauteng Provincial Government;

Local authorities

36. Dr ND Tshibangu, Health Services Department, City Council of Pretoria;

Business sector

37. The Association of Trust Companies of South Africa;

38. Mr Stuart Grobler, General Manager, Council of South African Banks reporting on the views of "one of the major Banks";

Workshops

39. Workshop on Customary Law: Western Region

40. Workshop on Customary Law: Southern Region

41. Workshop on Customary Law: Central Region

42. Workshop on Customary Law: Eastern Cape