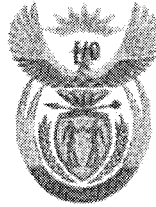


GOVERNMENT NOTICES • GOEWERMENTSKENNISGEWINGS

DEPARTMENT OF HOME AFFAIRS

NO. 412

11 May 2021



MINISTRY OF
HOME AFFAIRS
REPUBLIC OF SOUTH AFRICA

Private Bag X741, Pretoria, 0001, Tel: (012) 432 6635 Fax: (012) 432 6675
Private Bag X9102, Cape Town, 8000, Tel: (021) 469 6507, Fax: (021) 461 4191

GREEN PAPER ON MARRIAGES IN SOUTH AFRICA

I, Dr Pakishe Aaron Motsoaledi, Minister of Home Affairs, intend in terms of section 85 of the Constitution of the Republic of South Africa (Act No. 108 of 1996) to publish the Green Paper on Marriages in South Africa for public comments.

Interested persons and organisations are invited to submit any substantive comments or representation by no later than 30 June 2021. Written submissions can be forwarded to the following address:

The Director-General: Department of Home Affairs, Private Bag x114, Pretoria, 0001
For attention: Mr Sihle Mthiyane, Chief Director: Policy and Strategic Management
Email: marriagegreenpaper@dha.gov.za
Tel: 012 406 4352


DR. PA MOTSOALEDI, MP
MINISTER OF HOME AFFAIRS

DATE: 27/4/2021



home affairs

Department:
Home Affairs
REPUBLIC OF SOUTH AFRICA

GREEN PAPER¹ ON MARRIAGES IN SOUTH AFRICA

PUBLIC CONSULTATION VERSION

20 APRIL 2021

¹ A Green Paper is a government policy discussion paper that details specific issues, and then points out possible courses of action in terms of policy and legislation. It articulates possible solutions that are yet to be adopted by government. The Green Paper is a precursor for a White Paper. The White Paper articulates a policy position of government that has been approved by Cabinet.

CONTENTS

PREFACE 5

SECTION 1: POLICY OVERVIEW..... 9

 Chapter 1: Marriage policy context 9

 1. Overview of the Home Affairs mandate 9

 2. Purpose of the marriage policy (Green Paper) 9

 3. Problem statement..... 10

 4. Scope of the marriage policy (Green Paper) 11

 5. Overview of the policy chapters 12

 6. Research methodology 13

 Chapter 2: Understanding marriage in the South African context..... 15

 1. Introduction 15

 2. Constitutional provisions for the marriage policy 15

 3. Perspectives on family and marriage 18

 4. Concluding observations..... 25

 Chapter 3: Overview of the marriage legal framework and analysis..... 27

 1. Introduction 27

 2. Overview of marriage legislation 27

SECTION 2: STATISTICS ON MARRIAGES AND DIVORCES 35

 Chapter 4: Statistics on marriage..... 35

 1. Introduction 35

 2. Civil marriages 35

 3. Customary marriages..... 38

 4. Civil unions..... 39

 5. Conclusion 40

| | |
|--|----|
| Chapter 5: Statistics on divorce | 41 |
| 1. Trends in divorce (2008 – 2017) | 41 |
| 2. Conclusion | 44 |
| SECTION 3: POLICY FRAMEWORK AND IMPLEMENTATION STRATEGY | 45 |
| Chapter 6: Policy analysis and options | 45 |
| 1. Introduction | 45 |
| 2. Vision statement | 45 |
| 3. Foundational policy principles | 47 |
| 4. Policy options and remedies | 47 |
| Chapter 7: High-level implementation strategy | 58 |
| 1. Introduction | 58 |
| 2. Principles of co-operative government and intergovernmental relations | 58 |
| 3. Public administration principles | 60 |
| 4. High-level implementation plan | 61 |
| ANNEXURE 1: INTERSECTIONALITY OF FAMILY LAW | 62 |
| Marriage regimes in South Africa | 62 |
| 1. Introduction | 62 |
| 2. Marriage in community of property | 62 |
| 3. Marriage out of community of property | 63 |
| 4. Marriage out of community of property with accrual | 64 |
| Legal consequences of marriage | 66 |
| 1. Introduction | 66 |
| 2. Intestate Succession Act 81 of 1987 | 66 |
| 3. Wills Act 7 of 1953 | 67 |
| 4. Maintenance of Surviving Spouses Act 27 of 1990 | 68 |
| 5. Divorce Act 70 of 1979 | 69 |

4

| | |
|---|----|
| 6. Matrimonial Affairs Act 37 of 1953 | 71 |
| ANNEXURE 2: EMERGING LEGISLATIVE LITERATURE | 72 |
| Case law from the courts | 72 |

PREFACE

The Constitution requires the Department of Home Affairs (DHA), as an institution of the State, to establish a State capacity that provides marriage services (solemnisation and registration) impartially, fairly, equitably and without bias. Such services must be provided to all people who live in South Africa in line with the following Constitutional provisions:

- Section 9(1) of the Constitution provides that everyone is equal before the law and has the right to equal protection and benefit of the law.
- Section 9(3) of the Constitution provides that the State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- Section 9(4) of the Constitution provides that no person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- Section 9(5) of the Constitution provides that discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.
- Section 10 of the Constitution provides that everyone has inherent dignity and the right to have their dignity respected and protected.
- Section 15(1) of the Constitution provides that everyone has the right to freedom of conscience, religion, thought, belief and opinion.
- Section 31(1) of the Constitution provides that persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community – (a) to enjoy their culture, practise their religion and use their language; and – (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.
- However, Section 31(2) of the Constitution states that the rights in subsection 31(1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

The marriage legislation that regulates marriages in South Africa is not informed by an overarching policy based on the above constitutional provisions. The legislation is a combination of legacy legislation (colonial and apartheid era) and new law that was introduced post-1994 to redress historical injustices. Instead of creating a harmonised system of marriage in SA, the State has sought to give recognition to different marriage rituals by passing a range of different marriage laws. Marriages in SA are regulated through the following legislation:

- The Marriage Act 25 of 1961 (monogamous marriage for opposite sex couples)
- The Recognition of Customary Marriages Act 120 of 1998 (polygamous marriages for opposite sex couples who are black South Africans)
- The Civil Union Act 17 of 2006 (monogamous partnerships for both same and opposite sex couples).

Historically, monogamous marriages of heterosexual black persons were governed by the partly repealed Black Administration Act 38 of 1927. The democratic dispensation also inherited the marriage systems of the former homelands states such as Transkei, Venda, Bophuthatswana and Ciskei (TBVC states) and Gazankulu, KaNgwane, KwaNdebele, KwaZulu, Lebowa and Qwaqwa.

Despite the efforts of the State to redress the injustices of the past, the current marriage statute still deprives certain cultural and religious communities from concluding legally recognised marriages. This includes Islamic and Hindu marriages, customary marriages concluded in some African communities and marriages of transgender persons.

The purpose of the marriage policy is to establish a policy foundation for regulating the marriages of all persons that reside in SA. The envisaged marriage statute will enable South Africans and residents of all sexual orientations, religious and cultural persuasions to conclude legal marriages that will accord with the principles of equality, non-discrimination, human dignity and unity in diversity, as encapsulated in the Constitution.

The Green Paper on Marriages (Green Paper) is a product of extensive research and consultation. The process of drafting the Green Paper began in the 2019/2020

financial year, when the DHA hosted country-wide ministerial dialogues with various interest groups with the purpose of stimulating discussions and soliciting inputs on the key issues that should be addressed by the marriage policy. Stakeholders that were consulted include the following:

- Religious leaders (Muslims, Hindus, Christians, Rastafarians, etc.)
- Chapter 9 institutions such as the South African Human Rights Commission and Commission for Gender Equality
- Human rights and gender activists, including the LGBTQIA+ activists
- Traditional leaders (Contralesa and houses of traditional leaders)
- KhoiSan community leaders
- South African Law Reform Commission
- Academics and family law practitioners

The Green Paper is being gazetted to invite substantive comments from the public. The DHA anticipates receiving competing submissions, as it was the case during the ministerial dialogues. While all submissions will be considered, views that infringe the rights of others will not be incorporated into the White Paper on Marriages. The DHA is obliged to craft a marriage policy that respects, protects, promotes and fulfils the rights incorporated in the Bill of Rights. This task ought to be undertaken with the understanding that the Constitution does not accord hierarchical precedence to any particular right over any other rights entrenched in the Bill of Rights.

This is the beginning of a crucial public discourse that will re-define the concept of marriage in SA. The process will unearth issues that may make some of us uncomfortable, but will encourage dialogue within the South African and international communities. The roadmap to implementing the marriage policy will entail the following steps:

- Gazetting the draft marriage policy for public comments by 30 April 2021
- Submitting the marriage policy to Cabinet for approval by 31 March 2022
- Submitting the Marriage Bill to Cabinet for approval by 31 March 2023
- Submitting the Marriage Bill to Parliament for approval by 31 March 2024.

LIST OF ABBREVIATIONS

| | |
|-----------------|--|
| CC | Constitutional Court |
| DHA | Department of Home Affairs |
| LGBTQIA+ | Lesbian, gay, bisexual, transgender, queer, intersex and asexual plus all other groups that fall under those umbrellas |
| NPR | National population register |
| SCA | Supreme Court of Appeal |
| StatsSA | Statistics South Africa |
| TBVC | Transkei, Bophuthatswana, Venda, Ciskei |
| WCC | Western Cape Division, Cape Town |

SECTION 1: POLICY OVERVIEW

Chapter 1: Marriage policy context

1. Overview of the Home Affairs mandate

The policy framework and laws that enable the State to establish the legal status of every individual in South Africa is the foundation of our sovereignty and the legitimate exercise of State power. Affirming the identity and status of every person that lives in South Africa is indispensable for the State, which must respect, protect, promote and fulfil constitutional and international obligations and commitments.² The Department of Home Affairs (DHA) is central to developing an inclusive population register as well as the civil registration³ system that serves the Constitution and the needs of all people who live in South Africa.

To realise the above constitutional and international obligations, the DHA was established to fulfil the following exclusive mandate:

- Manage civil registration and citizenship
- Manage international migration
- Manage refugee protection.

2. Purpose of the marriage policy (Green Paper)

The purpose of the marriage policy (as articulated in the Green Paper) is to establish a policy foundation for regulating the marriages of all persons that reside in South Africa, including citizens, international migrants, asylum seekers and refugees. The marriage policy will therefore cover issues that straddle the three mandates of the

² White Paper on Home Affairs p9.

² The Constitution of the Republic of South Africa Section 1.

³ Civil registration is a process whereby major vital events (***birth, marriage and death***) occurring in a population are officially recorded. It is defined by the United Nations as 'the continuous, permanent, compulsory and universal recording of the occurrence and characteristics of vital events in a population', in accordance with the legal requirements of the country.

DHA. The envisaged marriage statute will enable South Africans and residents of all sexual orientations, religions and cultural persuasions to conclude legal marriages that will accord with the principles of equality, non-discrimination, human dignity and unity in diversity, as encapsulated in the Constitution.

3. Problem statement

In 1994, South Africa inherited a marriage regime that was based on the Calvinist Christian and Western traditions, which stemmed from the era where the State and church were mutually reinforcing if not synonymous. Accordingly, there were strong references in some of the laws governing marriage that harken to the religious marriage rituals practiced in Christian and Western marriages (“white wedding”). In the new era of democracy, the values of equality and diversity underpin our quest for nationhood, and all religious and cultural practices are given equal recognition and status in line with Section 15(1) of the Constitution.

Instead of creating a harmonised system of marriage in South Africa, the State sought to give recognition to different marriage rituals by passing a range of different marriage laws. As a result, there are now parallel structures and processes that stand side by side. Marriages in South Africa are regulated through the following legislation:

- The Marriage Act 25 of 1961 and its associated regulations
- The Recognition of Customary Marriages Act 120 of 1998 and its associated regulations
- The Civil Union Act 17 of 2006 and its associated regulations.

The problem statement is further elaborated below:

- The legislation that regulates marriages in South Africa is not informed by an overarching policy that is based on constitutional values and the understanding of modern society dynamics.
- The current legislation does not regulate some religious marriages such as the Hindu, Muslim and other customary marriages that are practiced in some African or royal families and KhoiSan communities.

- The existing legislation makes provision for the marriage of minors, provided that the legally required consent has been granted and submitted to the marriage officer in writing.
- Discrimination against same-sex couples is legislated through the legal provision that allows marriage officers to refuse to solemnise civil unions on the grounds of religious beliefs. This discrimination is seen as unfair given that this responsibility is limited to State officials and religious leaders. Other social groups, including traditional leaders and gender non-conformists, are not allowed to solemnise marriages.
- The legislation does not make provision for couples who change their sex status while married under the Marriage Act and want to retain their marital status without going through a divorce, as required by the current law.
- The Recognition of Customary Marriages Act does not make provision for a polygamous marriage with non-citizens. This poses a serious challenge for such marriages, particularly among community members from the same clan that are separated by a borderline.
- According to African tradition and practice, traditional leaders have a recognised role in the conclusion of a customary marriage; however, the legislation does not extend a similar responsibility to traditional leaders.

Given the diversity of the South African population, it is virtually impossible to pass legislation governing every single religious or cultural marriage practice. Against this background, the DHA is embarking on the process of developing a marriage policy as a foundation for drafting a new marriage legislation. The new Marriage Act will enable South Africans of different religious and cultural persuasions to conclude legal marriages that will accord with the doctrine of equality, non-discrimination and human dignity encapsulated in the Constitution of the Republic of South Africa.

4. Scope of the marriage policy (Green Paper)

The scope of this policy seeks to address the following issues:

- Recognition of the principles of equality, non-discrimination, human dignity and unity in diversity in the marriage legislation.

- Consideration of religious and customary marriages that are not recognised by the current marriage legislation.
- Removal of barriers to the change of sex status for married couples.
- Implications of the types of matrimonial property regimes for monogamous and polygamous marriages.
- Matrimonial property implications for unregistered customary marriages.
- Equitable recognition of the right to freedom of conscience, religion, thought, belief and opinion in the solemnisation and registration of marriages.
- Recognition of the role of various stakeholders in the solemnisation, registration and dissolution of marriages, including traditional leaders and any other secular organisations.
- Solemnisation and registration of marriages that involve foreign nationals.
- Abuse of the marriage statute using fraudulent marriages and marriages of convenience.
- Prohibition on marriages that involve minors (persons under 18 years).
- Regulation of polygamous marriages that involve foreign nationals and other racial and religious groups.
- Designation of other social groups as marriage officers.
- Synchronisation of the marriage and divorce registration processes between the DHA and the Department of Justice and Constitutional Development.

5. Overview of the policy chapters

Chapter 1 provides a brief historical evolution of the marriage policy and legislation in South Africa.

Chapter 2 lays the foundation by providing an understanding of marriage in the South African context. In doing so, this chapter considers a variety of perspectives on marriage including African perspectives, religious perspectives, and feminist and LGBTQIA+ perspectives as gleaned from the ministerial dialogues.

Chapter 3 analyses the problems affecting marriages in South Africa. This analysis includes an assessment of the limitations of the current marriage legislation, child marriages, marriages of convenience and fraudulent marriages.

Chapters 4 and 5 discuss the statistical report on marriages and divorces released by Statistics South Africa (StatsSA) on 28 February 2019.

Chapter 6 considers policy interventions as remedies to the deficiencies of the current legal regime governing marriages, and the form and substance of the new marriage policy.

Chapter 7 is the concluding chapter, which summarises salient policy provisions and provides a high-level implementation plan.

Annexure 1 sets out the marriage regimes applicable in South Africa as set out in the Matrimonial Property Act 88 of 1984. In doing so, sections covered under annexure 1 address the consequences of the respective marriage regimes.

Annexure 2 discusses emerging legislative literature from organs of State to the extent that such literature has not been covered in other chapters. In so doing, sections covered under annexure 2 consider cases, Bills from parliament and legislative amendments from the government.

6. Research methodology

The material that has been considered in drafting this policy consists of a combination of primary and secondary sources of law. The primary sources include interviews with government officials, traditional leaders, religious leaders, LGBTQIA+ representatives, questionnaires that were completed during dialogues, speeches by the minister and deputy minister of Home Affairs, and participants and panel members from the ministerial dialogues.

The secondary sources include international, regional and national legal instruments on marriage; judicial decisions by national, regional and international courts; resolutions, statements, reports, South African Law Reform Commission papers; and reports of the United Nations and other regional bodies. The issue relating to marriages has also received attention in academic literature. Thus, academic literature has also been considered.

Due to the theoretical orientation of this research, the methodology employed was primarily desktop. The research methodology included an analysis of current

legislation, common law, academic articles and case law. International legal instruments, basic principles and judgments were also consulted to identify acceptable national and international norms and standards.

It is universally recognised that statistics play a crucial role in policy formulation. Therefore, the statistical report on marriages and divorces released by Stats SA on 28 February 2019 was also considered. The statistical discussion focuses on civil marriages, customary marriages and civil unions. Particular attention was given to issues relating to solemnisation, age at the time of marriage and general trends relating to registration and other related issues.

In recognition of the State's obligation to facilitate public participation in the policy and legislative processes, the DHA hosted a series of ministerial dialogues on the development of the marriage policy throughout the country to ensure that the views of all South Africans were canvassed and considered in the decision-making process. As reflected in the subsequent chapters, the often divergent views of stakeholders such as traditional leaders, religious leaders, gender and human rights activists, civil society organisations and academics have also been canvassed in the drafting process.

Chapter 2: Understanding marriage in the South African context

1. Introduction

The purpose of this chapter is to provide an understanding of marriage in the South African context. This chapter considers a variety of perspectives on marriage in the South African context, including African, religious, feminist and LGBTQIA+ perspectives on marriage and family as gleaned from the ministerial dialogues.

One perspective of marriage is that it is essential for the stability of families and, ultimately, society's wellbeing.⁴ Marital structures provide profound benefits for men, women and children while, on the other hand, the breakdown of stable marital structures imposes significant social costs on individuals and society. Marriage is understood as more than the union of two persons, it is a social institution that is culturally patterned and integrated into basic social institutions.⁵

2. Constitutional provisions for the marriage policy

Marriage in South Africa is recognised by the country's Constitution. Although the Bill of Rights does not contain the right to marry or found a family, marriage as an institution is recognised. This is clear from the provisions of Section 15(3)(a)(i) of the Constitution.⁶ The Constitution prohibits marriage discrimination based on sexual orientation, cultural and religious beliefs.

Marriage is also safeguarded by legislation in South Africa, which allows for the legal standing of marriages and civil partnerships between persons, regardless of their sexual orientation or gender. Family law supplements this legislation and governs

⁴ Green Paper on Families: Promoting Family Life and Strengthening Families in South Africa p23 available at https://www.gov.za/sites/default/files/gcis_document/201409/34692gen756a0.pdf accessed on 18 December 2019.

⁵ Ibid, p31.

⁶ Volks NO v Robinson and Others, 2005 (5) BCLR 446 (CC) para 80.

domestic or family-related issues that pertain to marriage or a legal status similar to marriage, the dissolution of marriage and aspects relating to children and death.⁷

The Constitutional Court has observed that marriage and family are important social institutions in our society. Marriage has a central and special place, and forms one of the important bases for family life in our society.⁸ The Constitutional Court has made the following observation relating to marriage:

Marriage and the family are social institutions of vital importance. The institutions of marriage and family are important social institutions that provide security, support and companionship of members of our society and bear an important role in the rearing of children. The celebration of a marriage gives rise to moral and legal obligations, particularly the reciprocal duty of support placed upon spouses and their joint responsibility for supporting and raising children born of the marriage.⁹

The Constitutional Court has also, however, precluded the wholesale extension of marriage-like rights to opposite-sex unmarried cohabitants on the basis that differentiating between rights of married and unmarried couples is fair because the Constitution and international law recognises the importance of marriage as a fundamental social institution.¹⁰ The former justice in the Constitutional Court of South Africa, Justice Ngcobo, held that opposite sex partners have a choice to marry and thereby gain their entitlement to legal protection associated with marriage.¹¹

The constitutional recognition of marriage is an important starting point for developing a marriage policy that will lay the foundation for drafting a new legislation. The legislation will enable South Africans of varying sexual orientation, religious and

⁷ Green Paper on Families, op cit, p32.

⁸ *Volks v Robinson*, op cit, para 52. See *Daniels v Daniels*; *Mackay v Mackay* 1958 (1) SA 513 AD at 532E, where Hoexter JA referred to marriage as “the most important unit of our social life, the family.” See also in *Belfort v Belfort* 1961 (1) SA 257 AD at 259H, where the same judge states that marriage “is the very foundation of the most important unit of our social life, the family.”

⁹ *Dawood and Another v Minister of Home Affairs and Others*; *Shalabi and Another v Minister of Home Affairs and Others*; *Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) para 30 – 31.

¹⁰ *Volks v Robinson*, op cit, paras 50 – 57, 80 – 87.

¹¹ Par [90].

cultural persuasions to conclude marriages that will accord with the principles of equality and non-discrimination as encapsulated in the Constitution.

The new marriage policy will be underpinned by the provisions of the Bill of Rights enshrined in the Constitution:

- Section 9(1) of the Constitution provides that everyone is equal before the law and has the right to equal protection and benefit of the law.
- Section 9(3) of the Constitution provides that the State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- Section 10 of the Constitution provides that everyone has inherent dignity and the right to have their dignity respected and protected.
- Section 15(1) of the Constitution provides that everyone has the right to freedom of conscience, religion, thought, belief and opinion.
- Section 36 of the Constitution provides that the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

The Constitution accords equal recognition and protection to both culture and religion. Section 9(3) of the Constitution prohibits the State from unfairly discriminating against anyone on one or more grounds, including, among others, 'religion, conscience, belief, [and] culture'. Section 15(1) bestows on everyone the right to 'freedom of conscience, religion, thought, belief and opinion'.¹² Section 31 entitles persons belonging to a cultural, religious or linguistic community – (a) to enjoy their culture, practise their religion and use their language; and – (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society'.¹³ Moreover, culture also enjoys constitutional recognition and protection by virtue of sections 181(1)(c), 211

¹² Ndivhuwo Isheml Moleya 'Equality for all religions and cultures in the South African legal system' *De Rebus* in 2018 (July) *DR* 30 Available at <http://www.derebus.org.za/equality-for-all-religions-and-cultures-in-the-south-african-legal-system/>

¹³ *Ibid.*

and 212 of the Constitution. It is clear that neither culture, nor religion enjoy elevated constitutional protection.¹⁴

The State is obliged to craft a marriage policy that respects, protects, promotes and fulfils the rights in the Bill of Rights. This task ought to be undertaken with the understanding that the Constitution does not accord hierarchical precedence to any particular right over any other rights entrenched in the Bill of Rights.¹⁵ Under these circumstances the balancing of different interests such as the right to equality, the right to human dignity, the right to freedom of religion and belief and the right to cultural practices must be taken into consideration.

3. Perspectives on family and marriage

Given South Africa's diversity, it stands to reason that a multiplicity of perspectives exist on marriage and family in the country. As such, the DHA's series of ministerial dialogues were part of an effort to engage with interest groups and ensure that the views of all South Africans were canvassed and deliberated on when developing the marriage policy.

In addressing stakeholders at the ministerial dialogues, Minister of Home Affairs Dr Aaron Motsoaledi commented:

... your collective expertise, experiences, wisdom and indeed your views will go a long way in crafting and enriching a policy that will lay the ground for new legislation which is aligned and subscribes to the doctrine of the constitutional principles of equality, non-discrimination and human dignity as per the Constitution of the Republic of South Africa. Through the consultations, we aim to identify key issues that should be addressed by the new marriage policy.¹⁶

¹⁴ Ibid.

¹⁵ *Johncom Media Investments Limited v M and Others* 2009 (4) SA 7 (CC) para 19.

¹⁶ Keynote Address by Home Affairs Minister Dr Aaron Motsoaledi For The Marriage Policy Dialogues <http://www.dha.gov.za/index.php/statements-speeches/1283-keynote-address-by-home-affairs-minister-dr-aaron-motsoaledi-for-the-marriage-policy-dialogues>

This statement encapsulated the purpose of the ministerial dialogues and the value derived from them.

The stakeholder engagement report provided an account of the inputs received at the ministerial dialogues. The various perspectives on marriage that have emerged from the ministerial dialogues are summarised in the following subsection.

3.1. African perspectives on marriage and family

These perspectives on marriage were gleaned from the ministerial dialogues with traditional leaders:

- Marriage is a union exclusively between a man and a woman. Generally speaking, traditional leaders do not accept same-sex marriages. Traditional leaders believe that the age requirement for marriage must be 18 years of age.
- Polygamous marriages are an acceptable form of marriage. Traditional leaders; however, object to the proposition that the consent of the first wife in a polygamous marriage is a requirement for the subsequent marriage of her husband to be valid. Traditional leaders emphasised that women are not equal to men and that each gender has its own role in the family and society. Only men are permitted to have multiple spouses; accordingly, traditional leaders deem polyandry an unacceptable practice because it is not of African origin.
- Questions were raised about the equal treatment of women in polygamous marriages. Traditional leaders submitted that women are generally vulnerable during the divorce proceedings in polygamous marriages. It emerged that due to their possession of a marriage certificate, registered wives hold a stronger position in law than unregistered wives. Unregistered wives bear the onerous burden of proving the existence of a polygamous marriage.
- From a cultural perspective, marriage involves the coming together of two families, hence the importance of ilobolo negotiations and paying of a bride price by a male.
- The Recognition of Customary Marriage Act of does not fully recognise the cultural practices of “ukuthelwa ngenyongo” and “ukugcagca” (traditional celebration of marriage), which are essential elements of solemnising a marriage in Africa. Traditional leaders also submitted that the Recognition of Customary Marriages Act does not recognise the cultural practice of

“ukungena” (once a woman marries into a particular family, she is married into that family for life).

- “Ukuthwala” (the practice of abducting young girls and forcing them into marriage, often without the consent of their parents) is still practised in certain parts of the country, particularly under circumstances where the parties do not have sufficient finances to initiate “ilobolo” and decide to elope.
- Traditional leaders argued for the recognition of the following wives in customary marriages:
 - ✓ Recognition of a candle or principal wife (Lebone or Timamollo or Mmakgoši); that is, a woman chosen by the nation and married to the king for the sole purpose of giving birth to a future king.
 - ✓ Recognition of a family wife (Ngwetsi ya lapa); that is, a woman that is married into the family where there is no male heir in order to continue the family name.
- In circumstances where the first wife is not able to bear children, traditional leaders advocated for the recognition of the rights of customary wives who are married to fulfil the purpose of giving birth to a future king in an instance that the principal wife is unable to bear a male child.
- Many polygamous marriages are not registered. Traditional leaders therefore emphasised that they should be able to issue marriage certificates and highlighted the need to explore practical ways of recording marriages, such as keeping affidavits with izinduna (traditional councils).
- The issue relating to marriages with persons from neighbouring countries was also raised. Traditional leaders stated that polygamous marriages with persons from neighbouring countries also exist. The need to recognise these marriages was highlighted.
- The KhoiSan traditional leadership highlighted that marriage is an essential part of family life. Emphasis was also placed on the need to recognise, respect and to promote KhoiSan culture.
- The KhoiSan traditional leadership also stated that the rights of women need to be honoured and respected. Particular attention was drawn to the needs and the rights of women in polygamous marriages.

- The KhoiSan traditional leadership equally emphasised that they should be able to issue marriage certificates. Many KhoiSan marriages are unregistered as the DHA centres are some distance away. A concern was raised around the non-recognition of the KhoiSan customary marriages by the Recognition of Customary Marriages Act. The importance of pre-marital counselling was also identified.

The following perspectives on marriage were gleaned from the plenary discussion:

- Women are the most vulnerable in marriages especially during the institution of divorce proceedings.
- It remains a matter of grave concern that there are women who do not enjoy the matrimonial property interests after divorce because their marriage was not registered.
- Questions were raised about the equal treatment of women in polygamous marriages. Stakeholders submitted that registered wives hold a higher status than unregistered wives due to their ability to produce a proof of marriage. Unregistered wives have the burden of proof hanging over them.
- Stakeholders further submitted that polygamous marriages with foreign nationals need to be legally accommodated.
- The DHA must consider appointing izinduna and chiefs as marriage officers since the DHA offices are far from rural areas where most customary marriages take place. As such, the need for communities to be further educated on these topics in rural areas was identified.
- Issues around the ongoing practice of ukuthwala in certain parts of the country are also a great concern. Considering that ukuthwala predominantly affects women and children, the continuation of this practice raises serious questions relating to consent, abduction, rape and the protection of women and children's rights.
- South African law generally does not recognise the right of a woman to take more than one husband. Queen Modjadji (also known as the Rain Queen) of the Balobedu people is the exception. However, this exception, is yet to find expression in law.

3.2. Religious perspectives on marriage and family

The following perspectives on marriage were gleaned from the ministerial dialogues with religious leaders:

- Marriage is a union exclusively between a man and a woman. Generally speaking, religious leaders do not accept same-sex marriages. Religious leaders also believe that the age requirement for marriage must be 18 years of age. Furthermore, religious leaders of the Christian faith emphasised that polygamous marriages are not recognised by their faith.
- It should be noted that religious leaders generally objected to being expected to solemnise same-sex couples as this was contrary to their religious beliefs.
- Religious leaders from the Hindu, Jewish, Muslim and Rastafarian faiths highlighted that marriages according to their respective faiths were still not recognised under South African laws. That notwithstanding, religious leaders of these faiths continued to solemnise marriages according to their respective faiths, but registration remains an issue. Women are disproportionately affected by this gap as they struggled to obtain equitable distribution of assets in the event of divorce or death.

The following perspectives on marriage were gleaned from the plenary discussion:

- The objection by religious leaders to solemnising same-sex marriages is discriminatory. All genders must be recognised, including transgender and non-gender conformists. Other stakeholders submitted their objection to marrying same-sex couples.
- Rastafarians remain a largely unrecognised cultural and religious community that believes in polygamous marriages.
- Others were of the view that women suffer the most during divorce proceedings as they struggle to obtain matrimonial property interests when their divorce is finalised.
- It was proposed that marriage officers ought to be vetted and trained to curb the scourge of fraudulent marriages. The DHA was also encouraged to introduce a biometric system to curb fraudulent activities.

- Questions were raised about the double standards of religious denominations who support polygamous marriages and not polyandrous marriages.
- Hindu, Jewish, Muslim and Rastafarian marriages are not recognised by South African law. Despite this, adherents of these religious faiths continue to perform their own religious marriages rituals. Consequently, women are particularly prejudiced as they struggle to obtain an equitable division of the joint marital estate.

3.3. Human rights and gender perspective on marriage and family

The following perspectives on marriage were gleaned from the ministerial dialogue with human rights and gender activists (activists):

- The age requirement for marriage must be 18 years of age. The State must respect and promote the rights of same-sex couples. Everyone must be able to enter into a marriage; this must include all genders, including transgender and non-gender conformists. Activists believe that the religious leaders' objection to solemnising same-sex marriages is discriminatory.
- A concern was raised about the legal requirements for couples who undergo surgical and/or medical treatment to alter their sexual characteristics from those of a male to those of a female (or vice versa). Activists see the need for individuals who undergo sex changes to divorce and remarry under a different Act as problematic. They also highlighted that the process is daunting as DHA officials are rude, discriminatory and defamatory.
- Marrying a foreign national is a long and strenuous process.
- Many members of the LGBTQIA+ community remain unmarried due to rude DHA marriage officers. As a result, some members of the LGBTQIA+ community choose unregistered domestic partnerships. This therefore strips the affected individuals of their dignity.
- Moreover, activists submitted that equality demands that polyandry be legally recognised as a form of marriage.

The following perspectives on marriage were gleaned from the plenary discussion:

- Gender non-conformists require their sense of identity to be recognised by DHA systems. It was submitted that laws limit full expression of their identity and

dignity. It was further stated that a sex change does not enable them to remain married under the Marriage Act.

- Stakeholders demanded that the DHA and pastors (marriage officers) solemnise their marriages. It was further demanded that marriage officers ought to be precluded by law from refusing to solemnise the marriages of same-sex couples as currently provided for in the Civil Union Act.
- DHA officials make defamatory remarks about them. As such, they required training in order to rectify their demeaning conduct.
- The Civil Unions Act does not fully recognise all issues pertaining to same-sex marriages such as those that pertain to non-binary people.
- People who have undergone sex changes and those who do not recognise gender norms find that the DHA and current marriage laws are exclusionary, strip them of their dignity and treat them unequally.
- If men are permitted to have more than one wife under customary law, then equality demands that polyandry be recognised so as to be consistent in the application of the equality principle.
- The contradictory position relating to the various ages of consent in South African law arose. For example, contradictions relating to legislation that regulates the age of consent for sexual intercourse, statutory rape, abortion and marriage were highlighted. The need for legal harmony was identified as an issue that needs legislative intervention.

3.4. Civil society and academic perspectives on marriage

The following perspectives on marriage were gleaned from the ministerial dialogue with civil society and academics:

- The age requirement for marriage must be 18 years of age. Civil society and academics emphasised that children are incapable of giving consent. They also submitted that proxies under these circumstances limit children's development.
- The State needs to respect and promote the rights of same-sex marriages. The religious leaders' objection to solemnising same-sex marriages is discriminatory. Civil society and academics state that legal recognition should be granted to all genders, including transgender and gender non-conformists.

- Muslims, Hindu and Jewish marriages are largely unrecognised by South African law. The need to redefine marriages and families was emphasised.
- Women are the most disadvantaged in divorces. They do the housework without compensation and are left in a worse position after divorce as men hide their money in trusts.
- The DHA must comply with a plethora of court cases that compel government to make it easier to register marriages as well as to protect the rights of women.
- The DHA should also consider international jurisprudence on how nuances around gender have been dealt with. To this end, civil society and academics suggested the need to draw from the marital regimes of Kenya and Tanzania.
- There is also a general need to provide more protection to women in marriages and to establish family courts.
- The DHA needs to be open to gender non-conformists in its forms and processes. In developing a new marriage policy, the DHA should consider developing gender-neutral marriages whereby any person can marry an individual of their preferred choice.

4. Concluding observations

It is clear from the various perspectives elicited from the ministerial dialogues that South Africans have divergent views on marriage. This is unsurprising considering South Africa's diverse population. Indeed, marriages in South Africa have a deeply religious and cultural dimension. For instance, certain stakeholders believe that marriage should only be between a man and a woman, in other words, marriage should be reserved for heterosexual couples. On the other hand, there were stakeholders who had an inclusive understanding of marriage that incorporates same-sex couples and gender non-conformists. According to these stakeholders, marriage is an institution that should be made accessible to all, irrespective of gender.

The issue of polygamy and polyandry also was topical and controversial during the engagements. While some stakeholders believed in the practice of polygamy, there were also those who opposed it. This equally applies to the practice of polyandry. Ironically, stakeholders who believed in the practice of polygamy (polygene) were opposed to the practice of polyandry. There were also stark differences about the

manner in which marriages are entered into. For instance, some stakeholders stated that from a cultural perspective, marriage involves the coming together of two families, hence the importance of the requirement of negotiation and the involvement of the respective families. This, however, did not seem to be the prevailing view amongst stakeholders who entered into civil marriages and civil unions. Other stakeholders only emphasised the importance of consent between the parties who are getting married.

Despite these differences, stakeholders were unanimous that children should not be permitted to enter into marriages irrespective of parental consent. Legal reform in this regard was called for. Stakeholders also unanimously articulated the need to protect the matrimonial property interests of women at the stage of divorce, particularly women in polygamous marriages.

The issue of the recognition of Muslim, Hindu and Jewish marriages arose and stakeholders raised the urgent need for the State to recognise these marriages through legislative means.

Chapter 3: Overview of the marriage legal framework and analysis

1. Introduction

Marriages in South Africa are currently regulated through four pieces of legislation: the Marriage Act, which governs monogamous marriages of heterosexual persons; the Black Administration Act, which governs monogamous marriages of heterosexual black persons who married before 1988, the Recognition of Customary Marriages Act, which governs monogamous and polygamous marriages of heterosexual persons; and the Civil Unions Act, which governs the monogamous marriages of same-sex persons. There are strong references in some of the laws governing marriages that harken to the religious marriage rituals practiced in Christian Western marriages.

The democratic dispensation also inherited the marriage systems of the former homelands states such as Transkei, Venda, Bophuthatswana, Ciskei (TBVC states), Gazankulu, KaNgwane, KwaNdebele, KwaZulu, Lebowa and Qwaqwa.

The purpose of this chapter is to analyse the problems affecting marriages in South Africa. The analysis includes an assessment of the limitations of the current marriage legislation, child marriages, marriages of convenience and fraudulent marriages.

2. Overview of marriage legislation

As previously stated, there are four pieces of legislation that govern marriages in South Africa. These are briefly discussed below:

2.1. Marriage Act 25 of 1961

The Marriage Act governs monogamous marriages of heterosexual persons. The provisions of the Marriage Act and its regulations are applicable to all adult heterosexual persons of all population groups who marry in South Africa. The Marriage Act also makes provision for the marriage of minors provided that the legally required consent has been granted and submitted to the marriage officer in writing. Generally, the consent of both parents is required. A guardian or step-parent can give consent only if they have been lawfully appointed as the legal guardian of the minor.

According to the Marriage Act, every magistrate, every special justice of the peace and every native commissioner shall, by virtue of his or her office and so long as he or she holds such office, be a marriage officer for the district or other area in respect of which he or she holds office. The minister and any officer in the public service authorised by him may designate any officer or employee in the public service or the diplomatic or consular service of the State to be, by virtue of his office and so long as he holds such office, a marriage officer, either generally or for any specified race or class of persons or country or area.

Furthermore, the Marriage Act states that the minister and any officer in the public service authorised by him may designate any minister of religion or any person holding a responsible position in any religious denomination or organisation to be, so long as he is such a minister or occupies such position, a marriage officer for the purpose of solemnising marriages according to Christian, Jewish or Mohammedan rites or the rites of any Indian religion.

In terms of the Marriage Act a marriage officer shall solemnise any marriage in a church or other building used for religious services or in a public office or in a private dwelling-house. A marriage shall be solemnised in the presence of the parties themselves and at least two competent witnesses.

In solemnising any marriage, the marriage officer, if he is a minister of religion or a person holding a responsible position in a religious denomination or organisation, may follow the rites usually observed by his religious denomination or organisation, but if he is any other marriage officer the marriage shall be solemnised according to a prescribed formula.

To register the marriage, the couple, the two witnesses and the marriage officer must sign the marriage register immediately after the solemnisation of the marriage. Then the marriage officer must issue the parties with a handwritten marriage certificate free of charge. The marriage officer must then submit the marriage register to the nearest office of the DHA, where the marriage details will be recorded in the national population register (NPR). Not fulfilling these requirements (registering a marriage) does not affect the validity of the marriage and registration of the marriage can be effected postnuptially. A duly signed marriage certificate serves as *prima facie* proof of the existence of the marriage.

Limitations of the Marriage Act

Despite its many redeeming features, the following issues have been identified in the Marriage Act:

- The Marriage Act makes provision for the marriage of minors provided that consent, which is legally required, has been granted and submitted to the marriage officer in writing. This is contrary to the State's constitutional, international and regional obligations to protect children and to act in their best interests.
- According to the Marriage Act, a marriage officer who is a minister of religion or a person holding a responsible position in a religious denomination or organisation may refuse to solemnise a marriage that would not conform to the rites, formularies, tenets, doctrines or discipline of his religious denomination or organisation. This provision lends itself to discriminatory behaviour disguised as religious doctrine.
- The Marriage Act does not provide for a transitional mechanism for persons who initially got married under the provision of this Act but subsequently underwent a sex change.¹⁷
- Aside from magistrates and special justices of the peace, the Marriage Act does not provide for the solemnisation of marriages by other social groups.

2.2. Black Administration Act 38 of 1927

The partly repealed Black Administration Act is the conduit through which the erstwhile government sought to control and manage black people. Historically, civil marriages of black people were governed by the Black Administration Act and civil marriages of white people were governed by the Marriage Act.¹⁸

The Black Administration Act governs monogamous marriages of heterosexual black persons who married prior to 1988. All civil marriages concluded by Africans were automatically out of community of property while all other civil marriages concluded in

¹⁷ KOS and Others v Minister of Home Affairs and Others 2017 (6) SA 588 (WCC).

¹⁸ Rautenbach and Du Plessis, 'African customary marriages in South Africa and the intricacies of a mixed legal system: Judicial (in)novatio or confusio?' (2012) 57:4 *McGill Law Journal – Revue de droit de McGill*, p758.

the country were regarded as being in community of property, except where the parties had concluded an antenuptial contract. If a black couple wanted their marriage to be in community of property, they had to make a declaration stating their intention before a commissioner one month prior to the wedding.¹⁹

The Marriage and Matrimonial Property Law Amendment Act, which came into operation on 2 December 1988, amended the Black Administration Act. The effect was that all marriages in South Africa were given equal standing and the Matrimonial Property Act was made applicable to civil marriages of black people that were concluded after 2 December 1988. Marriages concluded from 2 December 1988 were automatically in community of property unless an antenuptial contract was entered into and registered within three months of its attestation before a notary in the deeds registry.²⁰

Limitations of the Black Administration Act

The provisions of Section 21(2) of the Matrimonial Property Act are unconstitutional and invalid as they maintain and perpetuate the discrimination created by Section 22(6) of the Black Administration Act. According to these provisions, the marriages of black people under the Black Administration Act prior to 1988 are automatically out of community of property.

2.3. Recognition of Customary Marriages Act 120 of 1998

The Recognition of Customary Marriages Act governs monogamous and polygamous marriages of heterosexual persons. This Act:

- provides for the recognition of customary marriages
- specifies the requirements for a valid customary marriage
- regulates the registration of customary marriages
- provides for the equal status and capacity of spouses in customary marriages
- regulates the proprietary consequences of customary marriages and the capacity of spouses in such marriages

¹⁹ Ibid.

²⁰ Bhuqa and West, 'Patrimonial Consequences'. *Lexis Digest*, available at <http://www.ghostdigest.com/articles/patrimonial-consequences/53773>

- regulates the dissolution of customary marriages
- provides for regulations
- repeals certain provisions of certain laws.

The Recognition of Customary Marriages Act, requirements for a valid customary marriage are that the prospective spouses must both be over the age of 18 years, they must both consent to be married to each other under customary law and the marriage must be negotiated and entered into or in accordance with customary law. If either of the prospective spouses is a minor, parents or a legal guardian must consent to the marriage.

The spouses of a customary marriage have a duty to ensure that their marriage is registered. Either spouse may apply to the registering officer using the prescribed form and must furnish the prescribed information and any additional information that the registering officer may require to be satisfied about the existence of the marriage.

A certificate of registration of a customary marriage issued under the Recognition of Customary Marriages Act constitutes *prima facie* proof of the customary marriage and the particulars contained in the certificate. Failure to register a customary marriage does not affect the validity of the marriage.

Limitations of the Recognition of Customary Marriages Act

The Recognition of Customary Marriages Act makes provision for the marriage of minors provided that the prospective spouses' parents, or legal guardian, consent to the marriage. This is contrary to the State's constitutional, international and regional obligations to protect children and to act in their best interests.

Although the Act provides for the registration of customary marriages, it is not compulsory for the marriage to be registered. In other words, failure to register a customary marriage does not affect its validity. This generally leaves women and children vulnerable. The vulnerability is amplified during divorce and when either of the spouses passes away. This also has an impact on the proprietary consequences of the marriage.

The Traditional Leadership and Governance Framework Act 41 of 2003 provides for the establishment and recognition of traditional councils. This is in line with Sections

211 and 212 of the Constitution. Traditional councils are officially recognised as the traditional leadership of the traditional communities that they serve by statute and for whom they perform certain public functions, in accordance with the Constitution. Accordingly, they are organs of State. Their authority and power are devolved upon them as organs of State from the Constitution itself.²¹

Nevertheless, the Recognition of Customary Marriages Act does not envisage a role for traditional councils in the registration process of customary marriages, even though involving them would be advantageous because of their authority and proximity to the communities that they serve. Many marriages were not registered simply because DHA offices are too far away. In this way, the DHA's role in the registration process of customary marriages could be augmented by traditional councils.

To a certain extent, this explains the low registration rate of customary marriages per annum. While the Recognition of Customary Marriages Act recognises polygamous marriages, no such recognition is accorded to polyandrous marriages.

Section 7(1) of the Recognition of Customary Marriages Act provides that the proprietary consequences of customary marriages before this Act commenced continue to be governed by customary law. While section 7(2) provides that customary marriages entered to after the commencement of this Act are marriages in community of property. The differential treatment raised by sections 7(1) and 7(2) for customary marriages before and after the commencement of the Act is unconstitutional as it unjustifiably limits the right to human dignity and the right not to be unfairly discriminated against.²² This order has been confirmed by the Constitutional court as well.

The Act also does not clarify that a valid customary marriage could be concluded without the full payment of ilobolo, nor does it make provision for entering into a polygamous marriage with non-citizens. This poses a challenge when such marriages occur, especially among persons who are members of the same clan but are separated by a borderline.

²¹ *Pilane and Another v Pilane and Another* 2013 (4) BCLR 431 (CC) para 44.

²² *Ramuhovhi and Others v President of the Republic of South Africa and Others* 2018 (2) BCLR 217 (CC)

2.4. Civil Union Act 17 of 2006

The Civil Union Act regulates the solemnisation and registration of civil unions either by marriage or a civil partnership and provides for the legal consequences of civil unions. In essence this Act seeks to govern monogamous marriages of both same-sex and of opposite sex persons.

A marriage officer may solemnise a civil union according to the provisions of the Civil Union Act, and has all the powers, responsibilities and duties conferred under the Marriage Act to solemnise a civil union.

Under the Civil Union Act, prospective civil union partners must individually and in writing declare their willingness to enter into their civil union with one another by signing the prescribed document in the presence of two witnesses.²³ The marriage officer must keep a record of all civil unions they conducted,²⁴ and transmit the civil union register and records to the public service official responsible for the population register in that area.²⁵ The public service official must then register the particulars of the civil union to be included in the population register.

Limitations of the Civil Union Act

Section 6 of the Civil Union Act allows marriage officers to object to solemnising a civil union between persons of the same sex on grounds such as conscience, religion and belief, and they cannot be compelled to do so. The objection is discriminatory as all genders are recognised by the Constitution, including transgender and non-conforming persons.

According to gender activists, Section 6 is used as a vehicle to perpetuate discrimination against same-sex couples, particularly where the impact of a conscientious objection provision is markedly greater on the couple than on the potential objector.

²³ Section 12(1).

²⁴ Section 12(5).

²⁵ Section 12(6).

2.5. Religious marriages that are excluded by current legislation

Muslim, Jewish, Hindu and other religious marriages could potentially be conducted in terms of the Marriage Act, because the Act provides for the appointment of marriage officers 'for the purpose of solemnising marriages according to Christian, Jewish or Mohammedan rites or the rites of any Indian religion'.²⁶ However, unless these marriages also comply with the other requirements of the Marriage Act, including the marriage formula, opposite sex couples, presence of both parties and so forth, they would not be valid in terms of the Marriage Act. For this reason, members of religions other than mainstream Christian and Jewish institutions often enter into both civil and religious marriages. When they are not also married according to the Marriage or Civil Union Acts, the religious marriages have no legal validity.

The courts have extended many marriage-like rights and processes to spouses in Muslim marriages.²⁷ There has been less litigation on behalf of adherents of the Hindu²⁸ and other faiths, with the result that these religious marriages have fewer and weaker rights than Muslim marriages. In most respects spouses in unrecognised religious marriages, are in the same position as unmarried intimate partners.

The failure to recognise these religious marriages is untenable and discriminatory. There have been many jurisprudential and legislative developments in the form of Bills in an attempt to formalise the recognition of these marriages. These jurisprudential and legislative developments are discussed in chapters that follow.

²⁶ Section 3(1).

²⁷ For instance, *Amod v Multilateral Motor Vehicle Accidents Fund* 1999 4 SA 1319 (SCA); *Daniels v Campbell* 2004 5 SA 331 (CC); *Hassam v Jacobs* 2009 5 SA 572 (CC); *Hoosein v Dangor* [2010] 2 All SA 55 (WCC).

²⁸ For instance, *Govender v Ragavayah* 2009 3 SA 178 (D); *Singh v Ramparsad* 2007 3 SA 445 (D).

SECTION 2: STATISTICS ON MARRIAGES AND DIVORCES

Chapter 4: Statistics on marriage

1. Introduction

The purpose of this chapter is to provide an overview of all marriages registered on the NPR. The discussion focuses on civil marriages, customary marriages, civil unions and issues relating to solemnisation, age at the time of marriage, general trends on registration and other related issues.

Statistics South Africa released a report on 28 February 2019 relating to civil marriages, customary marriages and civil unions that were registered in 2017 on the NPR, which is maintained by the DHA. The report demonstrates trends in the number of marriages and unions as well as demographic and other dynamics among married couples. Furthermore, the report highlights trends in divorces including the demographic and occupational characteristics of the plaintiffs; age at the time of divorce; duration of marriage at the time of divorce and divorces involving couples with minor children as well as divorces that were granted in 2017 by the courts. The information on marriages and divorces is important for understanding the formation and dissolution of marriage relationships and implications on the household structure and composition.²⁹

2. Civil marriages

In 2017, 135 458 South African citizens and permanent residents registered civil marriages with the DHA. The number of registered marriages had consistently declined in the ten-year period between 2008 and 2017, except for a slight increase of 0,6% between 2015 and 2016. During the period from 2008 to 2017, the highest number of marriages was recorded in 2008 (186 522) and the lowest number in 2017.

²⁹ Statistical Release P0307, *Marriages and Divorces 2017*, p 1, Available at <http://www.statssa.gov.za/publications/P0307/P03072017.pdf> accessed on 18 December 2019.

The 2017 figure of 135 458 civil marriages shows a decrease of 2,9% from the 139 512 marriages recorded in 2016.³⁰

2.1. Solemnisation of civil marriages

More than half of the 135 458 marriages (78 768 or 58,1%) were solemnised by DHA marriage officers and 38 981 (28,8%) by 'religious' rites. The type of solemnisation rite was not specified in 17 709 (13,1%) marriages. Furthermore 418 (0,3%) marriages were solemnised outside the borders of South Africa but subsequently registered in South Africa.³¹

The report analysed provincial variations in marriage registration and noted that the province of marriage registration was not necessarily the province of the couple's usual residence, as couples could choose where to marry. The results further indicated that in 2017, most marriages were registered in Gauteng (35 359 or 26,1%) and the least in the Northern Cape (3 950 or 2,9%). North West had the highest proportion of marriages solemnised by civil marriage officers, at 81,0% (7 479). The Western Cape recorded the highest proportion of marriages solemnised by religious marriage officers, at 50,7% (11 230).

2.2. Marital status at the time of civil marriage

The majority of marriages in all provinces in 2017, for both bridegrooms and brides, were first-time marriages. There were 111 306 (82,2%) men that had never married, 5 074 (3,7%) divorcees and 1 171 (0,9%) widowers. Women that had never married accounted for 117 779 (86,9%) brides, while 3 227 (2,4%) were divorcees and 896 (0,7%) were widows. The marital status of 17 907 (13,2%) bridegrooms and 13 556 (10,0%) of brides were unspecified. A high proportion of marriages between bridegrooms and brides marrying for the first time was observed in Limpopo, where 8 514 (86,1%) and 9 163 (92,6%) were never married men and women respectively. The profile of those that were remarrying showed that remarriages were more prevalent among divorcees than the widowed. Divorcees accounted for 5 074 (3,7%)

³⁰ Ibid, p2.

³¹ Ibid.

males, while 1 171 (0,9%) were widowers; women accounted for 3 227 (2,4%) divorcees and 896 (0,7%) widows.³²

Irrespective of their marital status, however, men generally married women who had never been married. Thus, of men that had never been married before 104 859 (94,2%) wedded women that had never been married before, 1 151 (1,0%) married divorcees and 643 (0,6%) married widows. In addition, irrespective of more divorcees and widowers marrying women that had never been married before, male divorcees married more female divorcees (826 or 16,3%) than widows (43 or 0,8%). Similarly, the number of widowers who married widows, at 167 (14,3%), was higher than the 27 (2,3%) that married female divorcees.³³

The report showed that men tended to marry younger women, as 103 901 (76,7%) of the 135 458 bridegrooms were older than their brides. However, 21 144 (15,6%) were younger than their brides and 10 412 (7,7%) were the same age as their brides. This observed age pattern is the same irrespective of the marital status of the bridegroom at the time of marriage. However, the magnitude differs by the marital status of the spouses at the time of marriage. For example, 44,2% of men that had never married before but who married divorcees were younger than their brides and 4,7% of male divorcees who married widowed women were also younger than their brides. A relatively small percentage (5,6%) of male divorcees married women that had never married before who were older than them.³⁴

2.3. Age at the time of civil marriage

In 2017, marriages were registered for 2 bridegrooms and 70 brides aged less than 18 years, with 62 of these brides marrying for the first time. Most men marrying for the first time (28 591 or 25,7%) were 30–34 years whereas most women marrying for the first time (34 351 or 29,2%) were 25–29 years. There were more younger women (less than 35 years) that married for the first time than younger men that had never been married before; the opposite was true at older ages (35 years and older).³⁵

³² Ibid, p 3.

³³ Ibid.

³⁴ Ibid.

³⁵ Ibid.

The median age of bridegrooms had remained 36 years since 2015 and brides 32 years since 2016. This indicates that women generally married younger than men. For first time marriages in 2017, the median ages for men and women was 34 years and 31 years respectively, showing an age difference of three years. For remarriages, the median age for widowers and widows in 2017 was 55 years and 31 years respectively, which is a 24-year age gap. While the median age for widowers increased consistently from 50 in 2013 to 55 in 2017, except for the decrease to 49 years in 2014, the median age of widows fluctuated between 30 and 32 years between 2013 and 2017.³⁶

3. Customary marriages

3.1. Trends in the registration of customary marriages (2008–2017)

In 2017, 2 588 customary marriages were registered with the DHA, indicating a decrease of 34,9% from 3 978 customary marriages registered in 2016. The number of registered customary marriages fluctuated between 2008 and 2017. The highest number of registered customary marriages was recorded in 2008 (16 003) while the lowest number was recorded in 2017 (2 588).³⁷

The majority of customary marriages were registered later than the year of marriage. From 2013 to 2017, the proportion of marriages that were registered in the same year they took place ranged from 18,6% in 2013 to 22,4% in 2017.³⁸

3.2. Age at the time of customary marriage

In 2017, 1 452 (56,1%) of registered customary marriages were from KwaZulu-Natal, followed by Limpopo with 535 (20,7%). The other seven provinces had less than 7% each. In 2017, 8 (0,3%) bridegrooms and 77 (3,0%) brides were younger than 18 years.³⁹

³⁶ Ibid, p 4.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Ibid.

Similar to civil marriages, bridegrooms were generally older than brides, with an age difference of about five to six years for customary marriages registered between 2013 and 2017. The median ages of both bridegrooms and brides fluctuated over the period, from between 33 and 35 years for men and 27 and 29 years for women. A further comparison of the ages of bridegrooms and brides shows that in 2017, 85,9% of bridegrooms were older than their brides, 9,7% were younger and 4,4% were the same age.⁴⁰

3.3. Polygamous marriages with multiple spouses

As of September 2019, 342 809 customary marriages were registered on the NPR. The majority of these marriages, 333 387, were registered with one spouse and 8 410 were registered with two spouses. Marriages registered with three to nine spouses range from 814 to two. Only one was registered with 10 spouses.

4. Civil unions

4.1. Trends in the registration of civil unions (2013–2017)

In 2017, 1 357 civil unions were registered (including three civil unions of South African citizens and permanent residents living outside South Africa). In general, the number of civil unions registered in South Africa increased over the five-year period. Registered civil unions increased by 2,0% from 1 331 in 2016 to 1 357 in 2017. The provincial distribution of civil unions registered in 2017 indicated that Gauteng and the Western Cape, with 507 (37,4%) and 391 (28,8%) registrations respectively, had the highest number of civil unions. In total, 66,2% of civil unions in 2017 were registered in these two provinces. The lowest number of registered civil unions was 16 (1,2%) in the Northern Cape and 15 (1,1%) in Limpopo.⁴¹

4.2. Fraudulent marriages and marriages of convenience

The DHA receives at least 2 000 queries about illegal marriages a year. In the period between 1 April 2018 and 31 May 2019, the DHA discovered 2 132 cases of fraudulent

⁴⁰ Ibid.

⁴¹ Ibid.

marriages. Of these 1 160 were found to be fraudulent and were annulled by the department. Some of these happen because of fraud syndicates consisting of DHA officials and some marriage officers outside the department. Such marriage officers knowingly submit fictitious marriages for registration and, working with Home Affairs officials, such marriages get registered on the NPR.

A further 646 marriages were found to be legitimate, even though undesirable; that is, marriages of convenience that can only be annulled through a court process. These marriages occur when a South African and a non-South African marry each other for convenience. The South African, usually a woman, is rewarded with huge sums of money and the non-South African gains easy citizenship through this marriage.

5. Conclusion

The report records that in total, 135 458 civil marriages were registered in South Africa in 2017, with 78 768 (58,1%) being solemnised by DHA marriage officers. The highest number of civil marriages was registered in Gauteng (35 359), followed by the Western Cape (22 144) and KwaZulu-Natal (21 206), and the lowest was registered in Northern Cape (3 950). The majority of civil marriages in 2017 for both bridegrooms (111 306) and brides (117 779) were first time marriages, with women generally entering into marriage at younger ages than men.⁴²

The number of registered customary marriages in 2017 was 2 588, a decrease of 34,9% from the 3 978 recorded in 2016. The majority of bridegrooms (2 223 or 85,9%) were older than their brides, with the gap in median ages at registration of customary marriage much wider than other types of marriages. Of the 1 357 registered civil unions in South Africa in 2017, most were registered in Gauteng (507) and the Western Cape (391), with the smallest number in the Northern Cape (16) and Limpopo (15).⁴³

⁴² Ibid, p 8.

⁴³ Ibid.

Chapter 5: Statistics on divorce

1. Trends in divorce (2008 – 2017)

The purpose of this chapter is to consider the statistics relating to divorces in South Africa. Divorces in 2017 increase by 64 (0,3%) to 25 390 from the 25 326 cases processed in 2016. An analysis showed that while the number of divorces fluctuated between 2008 to 2011, it increased consistently from 2012 to 2017. The highest number of divorces was observed in 2009 (30 763) and the lowest in 2011 (20 980). In 2017, about 155 divorces were granted to same-sex couples, of which 115 were female and 40 were male. In 2017, the observed crude divorce rate was 0,4 divorces per 1 000 of the estimated resident population.⁴⁴

Black African couples had the highest number of divorces compared to other population groups during the ten-year period (2008 to 2017). In 2017, 11 309 (44,5%) of the 25 390 divorces were from the black African population group, followed by 6 048 (23,8%) white, 4 517 (17,8%) coloured and 1 401 (5,5%) Indian/Asian.⁴⁵ The population group of 1 282 couples was not specified.

1.1. Characteristics of plaintiffs

More wives initiated divorce proceedings than husbands; 12 938 (51,0%) of women compared to 8 878 (35%) of men, while 1 728 (6,8%) divorces were initiated by both husband and wife. The sex of the plaintiff was not specified in 1 846 (7,3%) cases. Although women from the black African population had a lower proportion of plaintiffs (45,1%), the proportion of women plaintiffs from the white, Indian/Asian and coloured population groups were 58,2%, 56,6% and 56,2% respectively. Among black African divorcees, 10% of divorces were initiated by both partners.⁴⁶

The provincial distribution indicates that the Western Cape (6 050), Gauteng (6 046), KwaZulu-Natal (4 349) and Eastern Cape (3 285) had the highest number of divorces

⁴⁴ Ibid, p 7.

⁴⁵ Ibid.

⁴⁶ Ibid.

granted. Together, the four provinces contributed 19 730 (77,7%), or over three-quarters of the divorces granted in 2017. However, these numbers could also be because these provinces have the largest populations. Eastern Cape had the largest proportion of both husband and wife being plaintiffs (14,8%).⁴⁷

1.2. Number of divorces by way of solemnising marriage

Of the 2017 divorce cases, 11 675 (46%) were from marriages that were solemnised by religious rites and 11 275 (44,4%) by civil rites. Over two-thirds (68,9%) of divorces from the white population group and 66% of divorces from the coloured population group were from marriages solemnised by religious rites. Most divorces from the black African and Indian/Asian population groups, 66,1% and 52% respectively, were from marriages that were solemnised by civil rites.⁴⁸

1.3. Number of times married

More than 80% of divorces for men and women were from first-time marriages compared to 11,6% of men and 10% of women from second-time marriages. Less than 2% of men and women were getting divorced for at least the third time.⁴⁹

1.4. Age at the time of divorce

The median age at the time of divorce in 2017 was 44 years for males and 40 years for females, indicating that generally, divorced males were older than divorced females, with a difference of about four years. The pattern of median ages in 2017 by population group showed that black African males had the highest median age at 45 years, while the Indian/Asian population group recorded the lowest median age for both sexes. The difference in the median ages at the time of divorce between males and females was greater in the black African population group (five years) compared to the coloured, Indian/Asian and white population groups, with median age differences of three years between males and females.⁵⁰

⁴⁷ Ibid, p 6.

⁴⁸ Ibid.

⁴⁹ Ibid, p 7.

⁵⁰ Ibid.

There were fewer divorces among the younger (less than 25 years old) and the older (65 years and older) divorcees; however, divorces started later for black African males than other population groups and slightly earlier for Indian males at older ages. For males, the peak age group at divorce was 40 to 44 years for all except the white population group, where the peak was from the age group 45 to 49 years. In the case of females, the peak age group for black African and coloured population groups was 35 to 39 years and the peak for Indian/Asian and white population groups was 40 to 44 years.⁵¹

The median age of male divorcees increased from 53 years in 2013 to 55 years in 2015, and remained at that level until 2017. In comparison, the median age of female divorcees remained at 48 years between 2013 and 2015, and thereafter showed an increase from 48 years in 2015 to 49 years in 2016 and 2017. There was a six-year age difference in the median ages between male and female divorcees who married in 2017.⁵²

1.5. Duration of marriage of divorcing couples

Most divorces (6 906 or 27,2%) occurred after between five and nine years of marriage. This group is followed by 4 985 (19,6%) marriages that lasted between ten and 14 years and 4 424 (17,4%) marriages that lasted for less than five years. Results showed that of the 25 390 divorces in 2017, 11 330 (44,6%) or four in ten were of marriages that had lasted for less than 10 years.⁵³

Irrespective of the population group, the highest proportion of divorces occurred in couples that had been married for five to nine years. Population group variations showed that 29,5% of divorces from black African, 26% from white, 24,9% from coloured and 20,7% from Indian/Asian population groups were from marriages that lasted between five and nine years. The white population had the highest proportion (22%) of divorces that occurred in the first five years. The proportion of divorces in all population groups declined as the duration of marriage increased, with a significant decline being observed after nine years of marriage. The proportion of divorces from

⁵¹ Ibid.

⁵² Ibid, p 4.

⁵³ Ibid, p 7.

Indian/Asian population group is higher than the other population groups between ages 15 and 34 years.⁵⁴

1.6. Divorces involving couples with minor dependents

In 2017, 14 121 (55,6%) of the 25 390 couples divorcing had children younger than 18 years while 11 266 (44,4%) had no children. The profile of white divorcees showed that more than half of the recorded divorces were without children (55,3%). Looking at the coloured and black African divorcees, divorces involving couples with minor children constituted about 61,6% and 61% respectively. So, 49,6% of children affected by divorce were from the black African population group; 20% from the coloured population group; 18,7% from the white population group and 5% from the Indian/Asian population group.⁵⁵

2. Conclusion

In conclusion, the report showed that 25 390 divorces were granted in South Africa in 2017. Generally, there was an increase in the proportion of divorces for black Africans and a decline for the white population group from 2008 to 2017. Divorces were mainly from people who had married for the first time. More wives than husbands filed for divorce, with husbands generally getting divorced at a later age than wives. The provincial distribution shows that the Western Cape (6 050), Gauteng (6 046), KwaZulu-Natal (4 349) and the Eastern Cape (3 285) had the highest number of divorces granted. About 23 170 children aged less than 18 years were affected by divorces in 2017.⁵⁶

⁵⁴ Ibid.

⁵⁵ Ibid, p 8.

⁵⁶ Ibid.

SECTION 3: POLICY FRAMEWORK AND IMPLEMENTATION STRATEGY

Chapter 6: Policy analysis and options

1. Introduction

South Africa has what is generally referred to as a hybrid or mixed legal system underpinned by the Roman-Dutch and English common law systems, customary law, case law and legislation.⁵⁷ Unsurprisingly, the hybrid nature of the South African legal system is reflected in the manner in which legislation governing marriages is configured. As a result, South Africa does not have a harmonised system of marriage; instead it has parallel systems of marriage that stand side by side.

The preceding chapters showed an in-depth analysis of the deficiencies affecting marriages in South Africa. Based on feedback from the various ministerial dialogues, court judgments about the multiplicity of laws governing marriages in South Africa, various Bills from the legislature and academic material, many deficiencies were identified in the current legal regime governing marriages. The purpose of this chapter is to consider policy interventions as remedies to the deficiencies of the current legal regime governing marriages.

2. Vision statement

The envisaged marriage statute will enable South Africans of all sexual orientations, and religious and cultural persuasions to conclude legal marriages that accord with the principles of equality, non-discrimination, human dignity and unity in diversity, as encapsulated in the Constitution.

In redressing the injustices of the current marriage regime, the new marriage policy will be underpinned by the provisions of the Bill of Rights enshrined in the Constitution:

⁵⁷ Rautenbach, Christa, 'Deep Legal Pluralism in South Africa: Judicial Accommodation of Non-State Law' (2010) 60, *Journal of Legal Pluralism and Unofficial Law*, 143-177.

- Everyone is equal before the law and has the right to equal protection and benefit of the law (Section 9(1) of the Constitution).
- The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth (Section 9(3) of the Constitution).
- Everyone has inherent dignity and the right to have their dignity respected and protected (Section 10 of the Constitution).
- Everyone has the right to freedom of conscience, religion, thought, belief and opinion (Section 15(1) of the Constitution).
- Section 15(3) allows the State to enact legislation that recognises marriages concluded under any tradition or system of religious, personal or family law, or systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.

It is important to underline that Section 36 of the Constitution provides for the limitation of the rights contained in the Bill of Rights only in terms of laws of general application, to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Thus, as the adjudicator of competing interests, the State is duty bound to balance these competing interests in an equitable manner.

Accordingly, the State is obliged to craft a marriage policy that respects, protects, promotes and fulfils the rights in the Bill of Rights. This task ought to be undertaken with the understanding that the Constitution does not accord hierarchical precedence to any particular right over any other rights entrenched in the Bill of Rights. While the DHA has received various competing submissions during the ministerial dialogues, it cannot accommodate all submissions in the new marriage policy since some views infringe on the rights of other people. For this reason, the effort of the State to equitably balance the interests of all people who live in South Africa must be observable in all the policy options and remedies.

3. Foundational policy principles

All marriages concluded in South Africa, irrespective of race, gender, sex orientation, religion and cultural beliefs, will have to comply with the following foundational principles:

- Realisation of equality for all constitutionally sound marriages irrespective of race, culture, socio-economic status and religious persuasion.
- Realisation of non-discrimination in all constitutionally sound marriages irrespective of race, culture, socio-economic status and religious persuasion.
- Realisation of human dignity for all people in constitutionally sound marriages irrespective of race, culture, socio-economic status and religious persuasion.
- Promotion of acceptance, tolerance and unity in diversity among all people in constitutionally sound marriages irrespective of race, culture, socio-economic status and religious persuasion.
- Protection of women's rights irrespective of race, culture, socio-economic status and religious persuasion.
- Protection of children's rights irrespective of race, culture, socio-economic status and religious persuasion.
- Protection of gender diversity irrespective of sexual orientation.
- Protection and equal treatment of all recognised cultural and religious rights.
- Separation of religious and cultural rites and the State's functions.
- Marriage is a legally binding agreement entered into between two or more living human beings with a legal capacity to consent. However, marriages may be registered by the State posthumously.

4. Policy options and remedies

4.1. Inclusiveness of the marriage statute

This paper has demonstrated that, despite the efforts of the State to redress the injustices of the past, the current marriage statute still deprives certain cultural and religious communities from concluding legally recognised marriages. This includes Islamic and Hindu marriages, and marriages in some African communities such as the KhoiSan. The key distinctive nature of these marriages is summarised below:

- Islamic marriages that are polygamous in nature cannot be concluded under the current marriage legislation, which is the Recognition of Customary Marriages Act.
- Islamic marriages are automatically out of community of property. When such marriages are dissolved either by death or divorce, women and children suffer the consequence since they are not protected by the marriage law. The divorce process is concluded through religious and not court processes.
- KhoiSan marriages that are polygamous in nature cannot be concluded under the current marriage legislation, which is the Recognition of Customary Marriages Act.
- Divorce in Hindu marriages is a taboo, which leaves women in limbo when the man decides to leave the family. What complicates the situation is that such marriages are not protected by the law.
- Customary marriages that involve foreign nationals are not protected by the Recognition of Customary Marriages Act.

In view of the above exclusionary conditions as well as the recognition of the principle of the protection and equitable treatment of all recognised cultural and religious rights, the following remedies should be considered:

Option 1: Inclusive customary and religious marriage regime

- The Recognition of Customary Marriages Act could be amended to cater for all polygamous marriages irrespective of race, cultural and religious persuasions.

Option 2: Religion and culture-neutral marriage regime

- South Africa could do away with categorising marriages along racial, religious and cultural lines. That means South Africa will adopt a dual system of either monogamous or polygamous marriages. Monogamous marriages will either be homogeneous or heterogeneous.

Option 3: Gender neutral marriage regime

- South Africa could do away with categorising marriages along lines of race, sexual orientation, religion and culture. That means South Africa will still adopt a dual system of either monogamous or polygamous marriages as in option 2.

The difference between options 2 and 3 is that this option is gender neutral. Therefore all marriages, whether monogamous or polygamous, could be concluded regardless of the sex or sexual orientation of the person. This would accommodate both polygyny and polyandry.

The political appetite of the country to confront the challenges of the current marriage statute will be tested through these options. However, if Section 9 of the Constitution was to be implemented in its entirety, option 3 will tick all the boxes. It must be noted that all options are not limited to citizens but also accommodate marriages concluded with foreign nationals.

4.2. Unrecognised customary marriages

The problem addressed by this intervention

The current marriage statute does not recognise certain customary marriages concluded in some African communities, including royal families. The following options are proposed for the recognition of customary marriages that are practiced in some African communities, including royal families.

Option 1: Recognition of principal and supporting wives for royal families

- The Marriage legislation may recognise the royal family tradition of designating a woman that is chosen by the royal family as a principal wife.⁵⁸
- A supporting wife⁵⁹ (**from the family or relatives of the principal wife**) may be recognised by law since it is a practice in royal families. However, proper adoption processes must be followed with regards to the registration of children born by the supporting wife.

Option 2: Recognition of principal and supporting wives for all polygamous marriages

- The Marriage legislation may extend the tradition of designating a woman as a principal wife to all other polygamous marriages.

⁵⁸ This is a woman that is selected by the nation and married to the king for the sole purpose of giving birth to a male child – future king.

⁵⁹ This is a woman that married to give birth to an heir on behalf of the queen in the event that the queen is unable to give birth to a future king.

- A supporting wife may be recognised by law for all polygamous marriages.

4.3. Design of the new marriage legislation

The design of the new legislation is directly linked to the preceding subsection that deals with the inclusiveness of the marriage regime. The design will also test the principle of acceptance, tolerance and unity in diversity among the people who live in South Africa.

Generally, all laws in force immediately before the commencement of the Constitution, in any area that forms part of South Africa's national territory, continues to be in force subject to the Constitution, or their repeal or amendment by a competent authority.⁶⁰ The democratic government seemed to embark on a piecemeal repeal of the apartheid government's legislation rather than wholesale changes to the country's laws. This has led, as demonstrated in this paper, to a situation where discriminatory legislation of a bygone era continues to cast a shadow over South Africa's marriage legislation.

Option 1: Single Marriage Act

It has not been uncommon for the democratic government to pass legislation that seeks to unify different laws. For instance, in 1996 the Justice Laws Rationalisation Act 18 of 1996 was passed. This Act provided for uniform laws regarding judicial matters throughout South Africa. It made the laws on judicial matters that were in force in the area of the former Republic of South Africa, applicable throughout the national territory. It also repealed laws on judicial matters that were in force in the former TBVC states and self-governing territories. Unifying the law in this context entails completely replacing different legal systems with one uniform legal system.⁶¹

The difficulty with this approach is that it may have the unintended consequence of harmonising irreconcilable legal systems. It is doubtful whether this approach would pass constitutional muster. Secondly, this approach could also have the unintended consequence of bringing about cultural and religious discrimination. Consequently, a

⁶⁰ S v Makwanyane and Another 1995 (6) BCLR 665 para 28.

⁶¹ South African Law Reform Commission, Project 144 Single Marriage Statute, p14. Also see Prinsloo 1990 XXIII CILSA 324 – 336 at 325; Rautenbach C 'South African common and customary law of intestate succession: a question of harmonisation, integration or abolition' (2008) *Electronic Journal of Comparative Law* at 6.

single Marriage Act that unifies a set of requirements and consequences applying to all marriages may not be suitable for the country's mixed legal system and might not pass constitutional muster.

Option 2: Omnibus or umbrella Marriage Act

Harmonising the existing marriage legislation aims to remedy and eliminate conflicts between different legal systems, although they will be allowed their distinct recognition and continuation.⁶² This approach is consistent with the principle of reasonable accommodation, which requires an exercise in proportionality that ultimately depends on the facts. This approach also seeks to ensure that the often conflicting gender, religious and cultural rights are able to coexist.

The omnibus legislation is a single Act that contains different chapters to reflect the current diverse set of legal requirements for civil marriages, civil unions, customary marriages and other marriages that are not accommodated by the legislation. However, the limitations of the current marriage legislation will not be incorporated in the new Act. That means all legal provisions will be tested against the key principles of the marriage policy derived from the Bill of Rights.

Option 3: Parallel Marriage Acts

The retention of the status quo is also an option that requires consideration. Although this option would generally be suitable for the country's mixed legal system, retaining the status quo would not be consistent with the transformative nature of the country's Constitution. Furthermore, this would require the amendment of various interlinked legislation and the promulgation of new legislation to govern a variety of religious and cultural marriages that are excluded by the current legal regime.

4.4. Solemnising marriages

Currently a marriage officer who is a minister of religion or a person holding a responsible position in a religious denomination or organisation may refuse to solemnise a marriage that would not conform to the rites, formularies, tenets, doctrines or discipline of his or her religious denomination or organisation. This provision

⁶² Ibid, p15. Also see Prinsloo, op cit; Rautenbach C, op cit, at 235.

extends to government employees who are required to inform the minister in writing should they be unwilling to solemnise same-sex unions. This provision appears to be subjective and tends to lend itself to discriminatory behaviour. To align the marriage statute with Section 9 of the Constitution, the following remedies are recommended:

Option 1: Non-discriminative solemnisation of marriages

Marriage officers assume these positions voluntarily. In doing so, they perform a public function and not a cultural or religious function. This is an important distinction. In choosing to accept the position as a marriage officer and its corresponding responsibilities, the officer will not be permitted to refuse to perform his or her duties on these grounds. As a matter of policy, marriage officers must therefore serve all members of the public who wish to marry, without exception. This option embeds the principle for separation of cultural and religious rites from the State function. However, the challenge for this option is with Section 15 of the Constitution, which provides for grounds of refusal on the basis of conscience, religion, thought, belief and opinion.

Option 2: Non-discriminative solemnisation of marriages by public servants

Recognising the constitutional challenges of making it compulsory for non-State marriage officers to solemnise all marriages, the State could limit the application of the non-discriminative solemnisation provision to public servants. That is, only marriage officers who are government employees must serve all members of the public who wish to marry, without exception. This principle is applicable to all identity and status (civil registration) services that departments provide to the people of South Africa. At no stage can an employee of the State refuse to, for instance register a birth, marriage and death, on the basis of Section 15 of the Constitution.

In order to accommodate those government employees who will feel that their rights will be infringed by this provision, the solemnisation of marriages must be as gender, culture and religion neutral as possible. This could mean marriage officers will not perform the ceremonial part of the marriage, which requires people to express their love for each other. In fact, the ceremonial part of the marriage is not a State, but a religious or cultural function.

Option 3: Broadening the scope for the designation of marriage officers

Section 9(3) of the Constitution provides that the State may not unfairly discriminate, directly or indirectly, against anyone on one or more grounds including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

In keeping with Section 9(3) while not infringing on the rights of those that are protected by Section 15(1) of the Constitution, the policy must make provision for all social groups to apply to be designated as marriage officers. In that way, the policy will cater for the competing interests of all social groups. This option does not absolve public servants from the solemnising all marriages.

All marriage officers must meet the requirements, which could include the following:

- Passing a mandatory examination
- Being a citizen or a permanent resident
- Obtaining a required security clearance, etc.

Option 4: Solemnising marriages without marriage officers

Recognising the constitutional principles of equality and non-discrimination and the objective of ensuring that marriage is as gender, culture and religion neutral as possible, another option could be to solemnise marriages without the intervention of a marriage officer. In this option, the marriage officer would not perform any of the ceremonial functions generally associated with marriage.

Marriage parties would be required to approach the DHA to officially register their marriage after the ceremonial component has been concluded. Under these circumstances the government employee's function would be administrative in nature, akin to the registration of birth or any other analogous administrative function. The marriage would therefore only be registered if certain stipulated requirements are met. This option could ameliorate any unintended discriminatory consequences of the first three options.

4.5. Marriages that involve couples who are regarded as minors

The existing legislation makes provision for the marriage of minors provided that the legally required consent has been granted and submitted to the marriage officer in writing. As indicated in chapter 4 of this paper, in 2017 the civil marriages were

registered of 2 bridegrooms and 70 brides that were less than 18 years old, with 62 of these brides marrying for the first time. A further 8 bridegrooms and 77 brides who were younger than 18 years were registered in customary marriages. These figures demonstrate that girls are disproportionately affected by child marriages compared to boys. This practice is contrary to the country's constitutional, international and regional obligations, which aim to protect children and to act in their best interests.

The Children's Act 38 of 2005 already has already legislated 18 years as the age of majority. South Africa has also signed the SADC Protocol on Gender and Development, which states that 'no person under the age of 18 shall marry, unless otherwise specified by law, which takes into account the best interests and welfare of the child.'

During the ministerial dialogues, all stakeholders discouraged the marriage of minors and recommended that, as a matter of principle, laws that permit child marriage should be repealed without exception. Therefore, the legal capacity for entering into a marriage contract will be 18 years. Given the vulnerability of children, criminal sanctions shall be visited upon those who facilitate child marriages and those who marry children.

4.6. Transitional mechanisms for sex alteration

The existing legislation does not provide a transitional mechanism for persons who initially married under the provisions of the Marriage Act but who subsequently undergo a sex change. Requiring persons who have undergone sex alteration to obtain a divorce and thereafter remarry under the Civil Union Act infringes on their rights to non-discrimination and human dignity. Therefore, as a matter of policy there shall be transitional mechanisms for persons who undergo sex alteration. This requirement might fall off if an omnibus legislation that is gender neutral is adopted.

4.7. Registration of customary marriages

Although the Recognition of Customary Marriages Act provides for the registration of customary marriages, it is not compulsory for the marriage to be registered. In other words, failure to register a customary marriage does not affect its validity. This generally leaves women and children vulnerable. The vulnerability is amplified when the existence of such a marriage is contested during divorce or when either of the

spouses passes away. This also has an impact on the proprietary consequences of the marriage.

Many customary marriages are not registered simply because DHA offices are a distance away and awareness among poor and rural communities is at a low level. To a certain extent, this explains the low registration rate of customary marriages per annum. For instance, 2 588 customary marriages were registered in 2017 while 135 458 civil marriages were registered. The Traditional Leadership and Governance Framework Act provides for traditional councils to be established and recognised. This is in line with sections 211 and 212 of the Constitution. Traditional councils are officially recognised as the traditional leadership of the traditional communities that they serve by statute to perform certain public functions in accordance with the Constitution. As such, traditional councils are organs of State, with the authority and power devolved upon them from the Constitution itself.⁶³ However, the Recognition of Customary Marriages Act does not envisage a role for traditional councils in the registration process of customary marriages. Involving traditional councils in this registration process could have advantages because of their authority and proximity to the communities that they serve. In this way the DHA's role in the registration process of customary marriages will be augmented by traditional councils.

To curb the fraudulent registration of customary marriages, the legislation must make it compulsory for the spouses to appear before the registration authority. The provision that allows one partner to register a marriage should only apply when the marriage is registered posthumously; that is, if the other partner is deceased.

4.8. Solemnisation and registration of marriages that involve foreign nationals

The process for solemnising marriages and civil unions that involve foreign nationals is complicated. Prior to solemnising a marriage that involves a foreign national, the marriage officer must confirm the following:

- The validity of the passport and visa/permit
- Letter of non-impediment that confirms that the person is not married

⁶³ *Pilane and Another v Pilane and Another* 2013 (4) BCLR 431 (CC) para 44.

- Immigration marriage interview report.

This process has proven to be daunting for religious marriage officers who find it almost impossible to verify the authenticity of the required documents. As a result, some marriages are fraudulently solemnised as fake documents were submitted. As part of the strategy for curbing fraudulent marriages, marriages that involve foreign nationals will only be solemnised by DHA officials. This will also improve the amount of time it takes to conclude such marriages.

4.9. Customary marriage with non-citizens

The Recognition of Customary Marriages Act does not make provision for entering into a customary marriage with non-citizens. This poses a challenge for people entering such marriages, especially where the persons are members of the same clan but are separated by a borderline. Customary marriage with non-citizens will be legally permissible, whether within the borders of the country or not, provided that the marriage is entered into in compliance with the provisions of the law in South Africa.

4.10. Black civil marriages before 1988

The provisions of Section 21(2) of the Matrimonial Property Act are unconstitutional and invalid to the extent that they maintain and perpetuate the discrimination created by Section 22(6) of the Black Administration Act. In these cases, the marriages of black people entered into under the Black Administration Act prior to 1988, are automatically out of community of property. The discrimination against black persons married before 1988 constitutes an inequality that inhibits the enjoyment and exercise of the constitutional rights of a large number of black women in the country. Section 22(6) of the Black Administration Act denied thousands of black women the protection afforded by a marriage in community of property. This section also exacerbated their vulnerability and rendered them entirely dependent on the goodwill of their husbands who generally control the vast majority of the family's wealth and assets.⁶⁴

Civil marriages of black persons that were entered into before 1988 will be brought on par with other marriages. However, going forward no marriage regimes should be

⁶⁴ Sithole & Others vs Sithole & Another Case No: D12515/2018 para 53.

regarded as a default position. All couples must be provided with an opportunity to knowingly elect a particular marriage regime.

4.11. Proprietary consequences of polygamous marriages

Section 7(1) of the Recognition of Customary Marriages Act provides that the proprietary consequences of customary marriages entered into before the Act commenced continue to be governed by customary law. While section 7(2) provides that customary marriages entered to after the commencement of this Act are marriages in community of property. The differential treatment raised by sections 7(1) and 7(2) is unconstitutional as it unjustifiably limits the right to human dignity and the right not to be unfairly discriminated against. All polygamous marriages shall be governed by the same law.

4.12. Premarital counselling

Premarital counselling is a form of therapy that helps couples prepare for marriage. It is said that by participating in premarital counselling prior to marriage, couples can begin to build a healthy, strong relationship that helps provide a healthier foundation for their union. Premarital counselling can help couples of any gender, race, or religion identify and address potential areas of conflict in their relationship.⁶⁵

Given its recognised societal benefit, reasonable measures such as premarital counselling should be taken to ensure that the institution of marriage is supported. Over and above encouraging premarital counselling, persons who wish to marry shall be required to undergo prescribed premarital counselling sessions prior to marriage. To ensure compliance to this requirement, persons who wish to marry shall be required to furnish the marriage officer with written proof that they have indeed undergone premarital counselling. A standard form affidavit shall be provided by the DHA for these purposes. Premarital counselling must include explaining to couples the various marriage regimes and their implications.

⁶⁵ <https://careersinpsychology.org/premarital-counseling/>

Chapter 7: High-level implementation strategy

1. Introduction

No system of law can remain static. Indeed, it is desirable and essential that the law be constantly revised for it to remain abreast of constitutional and societal requirements.⁶⁶ Given the policy shortcomings of the current marriage legislation, this Marriage Policy Paper argues that South Africa needs to adopt a new policy paradigm grounded in constitutional values. Successfully implementing this policy will depend on establishing a responsive interdepartmental institutional framework. The framework must foster strong adherence to sections 41 and 195 of the Constitution.

2. Principles of co-operative government and intergovernmental relations

Section 41(1) of the Constitution requires that all spheres of government and all organs of State within each sphere must:

- preserve the peace, national unity and the indivisibility of the Republic
- secure the well-being of the people of the Republic
- provide effective, transparent, accountable and coherent government for the Republic as a whole
- be loyal to the Constitution, the Republic and its people
- respect the constitutional status, institutions, powers and functions of government in the other spheres
- not assume any power or function except those conferred on them in terms of the Constitution
- exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere
- co-operate with one another in mutual trust and good faith by –

⁶⁶ Fortieth annual report of the South African Law Reform Commission (2012/2013) p7 available at <https://www.justice.gov.za/salrc/anr/2012-2013-anr-salrc.pdf>

- fostering friendly relations
- assisting and supporting one another
- informing one another of, and consulting one another on, matters of common interest
- co-ordinating their actions and legislation with one another
- adhering to agreed procedures
- avoiding legal proceedings against one another.

This policy paper has demonstrated that the marriage statute is one of the few legislations that constitute the family law and have an impact on the structure of families in SA. The interconnected nature of family law necessitates a well-crafted strategy that enables the State to comply with Section 41 of the Constitution. The departments that administer legislation that has an impact on marriages and on the family structure are outlined below.

- Department of Justice and Constitutional Development is responsible for the following relevant legislation:
 - Intestate Succession Act 81 of 1987
 - Wills Act 7 of 1953
 - Maintenance of Surviving Spouses Act 27 of 1990
 - Divorce Act 70 of 1979
 - Matrimonial Affairs Act 37 of 1953.
- Department of Traditional Affairs is responsible for the following relevant legislation:
 - The Traditional Leadership and Governance Framework Act 41 of 2003
 - Intergovernmental Relations Framework Act 13 of 2005.
- Department of Social Development is responsible for the following relevant legislation:
 - Children's Act 38 of 2005.
- Department of Women, Youth and Persons with Disabilities is responsible for the following relevant legislation:
 - SADC Gender and Development Protocol
- DHA is responsible for the following relevant legislation:
 - The Marriage Act 25 of 1961

- The Recognition of Customary Marriages Act 120 of 1998
- The Civil Union Act 17 of 2006.

The marriage policy can only be implemented through a 'whole of government and whole of society approach'. Thus, the adoption of this approach to implement this marriage policy and, subsequently, marriage legislation will enable the State to, among others, provide effective, transparent, accountable and coherent government for South Africa as a whole.

3. Public administration principles

Section 195 of the Constitution outlines basic values and principles that must govern public administration. The administration of the marriage legislation must, therefore, comply with the following provisions of Section 195:

- A high standard of professional ethics must be promoted and maintained
- Efficient, economic and effective use of resources must be promoted
- Public administration must be development-oriented
- Services must be provided impartially, fairly, equitably and without bias
- People's needs must be responded to, and the public must be encouraged to participate in policymaking
- Public administration must be accountable
- Transparency must be fostered by providing the public with timely, accessible and accurate information.

A world founded on these principles is one where – as the Freedom Charter envisaged – 'The rights of the people shall be the same, regardless of race, colour or sex'. This Green Paper is based on desktop research, interviews and discussions with internal and external stakeholders (workshops, and dialogues). It is also informed by a practical knowledge of problems that have emerged since the publication of the Marriage Act 25 of 1961.

4. High-level implementation plan

The new Marriage Act will enable South Africans of different sexual orientation, and religious and cultural persuasions to conclude legal marriages that align to the doctrine of equality as encapsulated in the Constitution of the Republic of South Africa. The critical milestones towards implementing the new marriage policy and legislation includes the following activities:

- Submit the draft marriage policy to the minister for approval by 30 November 2020
- Host a virtual interministerial roundtable by 30 November 2020
- Submit the draft marriage policy to the Justice, Crime Prevention and Security, Governance State Capacity and Institutional Development, and Social clusters for recommendation to Cabinet by 30 December 2020
- Submit the draft marriage policy to Cabinet to request approval for public consultation by 31 December 2020
- Gazette the draft marriage policy for public comments by 31 March 2021
- Submit the marriage policy to Cabinet for approval by 31 September 2021
- Submit the Marriage Bill to Cabinet for approval by 31 March 2022
- Submit of the Marriage Bill to Parliament for approval by 31 March 2023.

The outcome of the Parliamentary process on the Civil Union Amendment Bill and other court judgments will be considered during the development of the new marriage policy and legislation.

ANNEXURE 1: INTERSECTIONALITY OF FAMILY LAW

Marriage regimes in South Africa

1. Introduction

The purpose of this annexure is to set out the marriage regimes applicable in South Africa in terms of the Matrimonial Property Act 88 of 1984 and other relevant legislative provisions. In doing so, this subsection also addresses the consequences of the respective marriage regimes. There are essentially two matrimonial dispensations in South Africa: marriages in and marriages out of community of property. They differ substantially from one another.⁶⁷

2. Marriage in community of property

Marriage in community of property is the default marital regime in South Africa. If persons marry without an antenuptial contract they are automatically married in community of property. The estates of the spouses are joined upon marriage and each spouse has an equal share in the joint estate, both spouses have assets and liabilities. Upon dissolution of the marriage the estate will be divided equally among the spouses. A person in a marriage in community of property has the same powers with regard to the disposal of assets of the joint estate, contracting debts that lie against the joint estate and the management of the joint estate.

A spouse shall not, without the written consent of the other spouse:

- alienate, mortgage, burden with a servitude or confer any other real right in any immovable property forming part of the joint estate

⁶⁷ JA Robinson, Matrimonial property regimes and damages: the far reaches of the South African Constitution, PER/PELJ, 2007(10)3.

- enter into any contract for the alienation, mortgaging, burdening with a servitude or conferring of any other real right in immovable property forming part of the joint estate
- alienate, cede or pledge any shares, stock, debentures, debenture bonds, insurance policies, mortgage bonds, fixed deposits or any similar assets, or any investment by or on behalf of the other spouse in a financial institution, forming part of the joint estate
- alienate or pledge any jewelry, coins, stamps, paintings or any other assets forming part of the joint estate and held mainly as investments
- withdraw money held in the name of the other spouse in any account in a banking institution, a building society or the Post Office Savings Bank of the Republic of South Africa
- enter, as a consumer, into a credit agreement to which the provisions of the National Credit Act, 2005 apply, as 'consumer' and 'credit agreement' are respectively defined in that Act, but this paragraph does not require the written consent of a spouse before incurring each successive charge under a credit facility, as defined in that Act
- as a purchaser enter into a contract as defined in the Alienation of Land Act 68 of 1981, and to which the provisions of that Act apply; bind himself as surety.

It is worthy to note that Section 13 of the Civil Union Act expressly states that civil unions carry the same consequences as marriages entered into in terms of the Marriages Act 25 of 1961. This means that the marital regimes are fully applicable to civil unions.

3. Marriage out of community of property

Should parties conclude an antenuptial contract before marriage, the default regime will be out of community of property with accrual, unless expressly excluded in the antenuptial contract. When parties are married out of community of property, each party keeps their separate estate; however, each party has an equal share in the growth of each spouse's estate at the end of the marriage. Section 4(1)(a) defines accrual as the amount by which the net value of a spouse's estate at the dissolution of the marriage exceeds the net value of the estate at the commencement of that

marriage.⁶⁸ When determining the value of the accrual, any amount that accrued to the spouse's estate by way of damages, other than patrimonial damages, are excluded from the account.⁶⁹ The accrual of the estate of a deceased spouse is determined before any testamentary disposition is given effect.⁷⁰ The following are not taken into account when determining the accrual:

- Any asset excluded from the accrual system under the antenuptial contract, as well as any other asset that the spouse acquired by virtue of his/her possession or former possession of such asset.
- Any inheritance, legacy, trust or donation received by a spouse during the marriage from any third party.
- Any other asset that the spouse has acquired by virtue of his/her possession or former possession of the inheritance, legacy, trust or donation, unless the spouses have agreed otherwise in their antenuptial contract or the testator or donor has stipulated otherwise.
- Any donation between the spouses.
- Any amount that accrued to a spouse by way of damages, other than damages for patrimonial loss or the proceeds of an insurance policy in respect of a dread disease.⁷¹

4. Marriage out of community of property with accrual

When parties marry out of community of property without the accrual, the parties must have entered into a valid antenuptial contract and must have expressly excluded accrual.⁷² Under this marital regime each spouse keeps the assets that they acquired before the marriage and the assets and liabilities they acquire during the subsistence of the marriage. Prior to 1 November 1984 parties only had an option to either marry in community of property or out of community of property with no option of accrual. At

⁶⁸ Ibid s4(1)(a).

⁶⁹ Ibid s4(1)(b).

⁷⁰ Ibid s4(2).

⁷¹ Ibid ss4(1)(b) and s5.

⁷² Ibid s2.

the dissolution of a marriage concluded before 1 November 1984, the court, at its own discretion, could order a redistribution of assets if the spouse seeking the order was able to prove that they directly or indirectly contributed to the maintenance or the increase of their spouse's estate.⁷³

⁷³ Divorce Act 70 of 1979 s7(3)(a).

Legal consequences of marriage

1. Introduction

This subsection discusses the legal consequences of marriage in South Africa, considering the various relevant statutes. Marriage, like any other legal contract, comes with legal consequences for the parties entering into the marriage.

Section 13(2)(b) of the Civil Union Act states that the words 'husband', 'wife' or 'spouse' in any other legislation shall include a civil union partner. The legal consequences discussed here are therefore fully applicable to civil unions. Section 7(2) of the Recognition of Customary Marriages Act states that monogamous customary marriages carry the same consequences as civil marriages and the legal consequences are applicable. There are, however, instances where the legislation may not apply fully to customary marriages. Such instances are discussed below.

2. Intestate Succession Act 81 of 1987

The Intestate Succession Act governs how the estate of a person who dies without having executed a will devolves. In accordance with Section 1(1)(a) of the Intestate Succession Act, where a deceased person who dies intestate is survived by a spouse (surviving spouse) and no descendants, the surviving spouse shall inherit the entire deceased estate.⁷⁴ In the instance where the deceased spouse is survived by a spouse and descendants, the surviving spouse shall inherit a child share in the estate or an amount set by the Minister of Justice in the Government Gazette, whichever is greater.⁷⁵ The amount is currently set at R125 000,00. The surviving spouse is entitled to this share regardless of the marital regime. If the spouses were married in community of property the joint estate will first be divided by half before the child share is calculated in terms of Section 1(1)(c)(i).

⁷⁴ Intestate Succession Act s1(1)(a).

⁷⁵ Ibid s1(1)(c)(i).

Should a husband in a polygamous customary marriage die, all the wives will be entitled to equally inherit from the deceased estate. The wives each inherit a child share or R250 000-00, whichever is greater. Should the estate not be large enough, all the wives inherit equally and the descendants of the deceased do not inherit.⁷⁶

3. Wills Act 7 of 1953

The Wills Act governs how the estate of a person who died testate devolves, the testator determines how the estate devolves and who inherits from the estate, the testator is free to include or exclude persons from the will (Freedom of testation). However, where the spouses were married in community of property, the freedom of testation is limited as the surviving spouse is entitled to a 50% share of the deceased spouse's estate.⁷⁷

Where the parties were married out community of property excluding the accrual system, the testator has the freedom to disinherit the surviving spouse. If the parties were married out of community of property with accrual, Section 4(2) of the Matrimonial Property Act states that the accrual of the deceased spouse's estate is determined before effect is given to any testamentary disposition.⁷⁸

The marital regime has consequences for how the estate of the deceased spouse devolves, regardless of whether the deceased spouse had executed a valid will in terms of the Wills Act. A consequence of marriage is that a testator's freedom of testation is limited in instances where the parties were married in community of property or out of community of property with accrual.

⁷⁶ <https://www.justice.gov.za/master/wills-is.html> last accessed on 26 January 2020.

⁷⁷ Freedom of Testation – Can a person disinherit a spouse? Pg 3 available at <http://www.saflii.org/za/journals/DEREBUS/2013/225.html> last accessed on 24 January 2020.

⁷⁸ Matrimonial Property Act No 88 of 1984 s4(2).

4. Maintenance of Surviving Spouses Act 27 of 1990

In the matter of *Crouse v Crouse*⁷⁹ the court held that a duty of support is created between parties when they enter into a marriage. According to the Maintenance of Surviving Spouses Act, a surviving spouse may have a claim for maintenance against the estate of the deceased spouse. The claim for spousal maintenance must be reasonable and such claim will be terminated by the death of the surviving spouse or the remarriage of the surviving spouse.⁸⁰ To determine whether maintenance is reasonable or not, the following factors must be taken into consideration:

- The amount available for distribution among heirs and legatees.
- The existing and expected means of the surviving spouse; further cognisance must be taken of the financial needs and obligations of the surviving spouse and the expected earning capacity.
- The standard of living of the surviving spouse during the subsistence of the marriage and the age of death of the deceased spouse.⁸¹

Should the surviving spouse not meet these requirements, they will not be able to claim for spousal maintenance against the deceased estate. In the case of *Friedrich and Others v Smit NO and Others*⁸² the second respondent (referred to as the surviving spouse) claimed for maintenance in terms of Section 2 of the Act against the deceased spouse's estate. The spouses were married out of community of property and the deceased spouse executed a will in terms of which the surviving spouse was disinherited. The surviving spouse claimed for maintenance of R4 468 519,24 leaving R886 785,00 to be distributed among the heirs.⁸³ The court found that the maintenance sought by the surviving spouse was unreasonable as the surviving spouse failed to satisfy requirements (b) and (c) of Section 3 of the Act.⁸⁴

⁷⁹ *Crouse v Crouse* 1957 (2) SA 642 (O).

⁸⁰ Maintenance of Surviving Spouses Act s2(1).

⁸¹ *Ibid* s3.

⁸² *Friedrich and Others v Smit NO and Others* 2017 (4) SA 144 (SCA).

⁸³ *Ibid* para 3–4.

⁸⁴ *Ibid* para 18.

In the case of *Kambule versus The Master*⁸⁵, the applicant (also referred to as the 'surviving spouse') was married to her late husband in terms of customary law. When the surviving spouse sought to claim maintenance against the deceased estate, she discovered that the deceased was in a polygamous marriage at the time of his death. The court held that the applicant had proved that a valid customary marriage was in existence and the applicant was entitled to spousal maintenance in terms of the Act. This case led to the change of the definition of a "survivor" so that it includes the spouse of a customary marriage that was dissolved by her husband entering into a civil marriage with another woman.⁸⁶

5. Divorce Act 70 of 1979

The Divorce Act governs the dissolution of marriages by living spouses and matters incidental to the dissolution. The Act sets out the grounds under which a divorce order may be granted by the court. The court may grant a decree of divorce if there has been an irretrievable breakdown of the marriage or one spouse has suffered a mental illness or continuous unconsciousness.⁸⁷ Parties to divorce proceedings may enter into an agreement known as a settlement agreement, which may be granted by the court. In the absence of an agreement, a court may order that one spouse pays maintenance to the other. The court will consider the existing and prospective means of each of the parties, financial obligations of the parties and the duration of the marriage.⁸⁸

Section 7(3)(a) of the Act also allows the court to order a redistribution of assets at the dissolution of a marriage entered into prior to 1 November 1984 under the out of community of property regime. In the case of *V v V*,⁸⁹ the parties were married out of community of property before the Matrimonial Property Act commenced. The defendant claimed that 50% of the Plaintiff's assets should be transferred to her.⁹⁰ The

⁸⁵ *Kambule v The Master of the High Court and Others* 2007 (3) SA 403 (E).

⁸⁶ *When Death Intervenes* available at <https://www.iol.co.za/personal-finance/tax/when-death-intervenes-1670022> last accessed on 26 January 2020.

⁸⁷ Divorce Act s3(a)-(b).

⁸⁸ *Ibid* s7(1)-(2).

⁸⁹ *V v V* (19579/20130 [2017] ZAGPPHC 942).

⁹⁰ *Ibid* para 2.

court was satisfied that the defendant had directly or indirectly contributed to the maintenance of the plaintiff's estate as contemplated in Section 7(4).⁹¹ The court therefore ordered that 50% of the plaintiff's assets be transferred to the defendant.⁹²

Section 7(7) of the Divorce Act allows a party to claim a share of the pension interest as this interest forms part of the pension member's assets. This, however, is not applicable to parties married out of community of property with the exclusion of accrual after the commencement of the Matrimonial Property Act.

According to the Divorce Act, where a divorce is granted on the grounds of irretrievable breakdown, a court can order a forfeiture of benefits. The court will consider the following:

- The duration of the marriage
- The circumstances leading to the breakdown of the marriage, or
- Substantial misconduct by either party.⁹³

The court in *KT v MR*⁹⁴ granted an order of partial forfeiture against the wife. In making the order the court considered that the marriage had only lasted for a period of 24 months, the husband had amassed a substantial estate prior to the marriage and the wife had sold the property she brought into the marriage and used the proceeds for her sole benefit.⁹⁵ Section 8(1) of the Recognition of Customary Marriages Act has listed irretrievable breakdown as the only grounds for the dissolution of a customary marriage. However the redistribution of assets for marriages out of community of property, as discussed above, and forfeiture of benefits are still consequences for customary marriages.⁹⁶

⁹¹ Ibid para 15.

⁹² Ibid para 20.

⁹³ Op cit Note 19 s9(1).

⁹⁴ *KT v MR* 2017 (1) SA 97 (GP).

⁹⁵ Moving Towards a Guilt Free Divorce <http://www.derebus.org.za/moving-towards-a-guilt-free-divorce/> last accessed on 25 January 2020.

⁹⁶ Recognition of Customary Marriages Act s8(4)(a).

6. Matrimonial Affairs Act 37 of 1953

In terms of the Matrimonial Affairs Act, there are instances where a spouse's powers are limited by the need to gain the written consent of the other spouse. A husband always requires his wife's written consent before he can alienate, mortgage, burden with a servitude or confer any real right in immovable property that is held by both parties in community, was brought into community by the wife at marriage and any gift or inheritance acquired during the subsistence of the marriage.⁹⁷

If a wife withholds written consent from her husband, he can apply to a judge for an order dispensing the consent. If the judge is satisfied that the consent was unreasonably withheld, such an order may be granted.⁹⁸ A husband is also limited by the Act and is not entitled to his wife's movable property without her written consent. The movable property includes any remuneration earned by the wife, policy pay outs in the name of the wife, any shares held by the wife and dividends earned.⁹⁹

⁹⁷ Matrimonial Affairs Act s1(1)(a)-(b).

⁹⁸ Ibid s1(3).

⁹⁹ Ibid s2.

ANNEXURE 2: EMERGING LEGISLATIVE LITERATURE

Case law from the courts

This annexure broadly considers various salient judicial pronouncements relating to marriages. Various pieces of legislation relating to marriage have come under judicial scrutiny due to their impracticality and discriminatory effects. Once a court has found a law or conduct to be inconsistent with the Constitution, it is obliged to declare the law unconstitutional and the conduct invalid.¹⁰⁰ The violation of constitutional rights impedes the realisation of the State's constitutional project to create a just and equal society. The need arises for our jurisprudence to be developed to coincide with insight gathered from individuals' lived experiences, particularly of those previously disadvantaged and, more specifically, of women in the context of marriage.

The archaic apartheid laws had designed a system to discriminately regulate relationships and marriages between black persons. One such piece of legislation is the Black Administration Act 38 of 1927.¹⁰¹ Section 22(6) of the Act prescribed that all civil marriages between black persons were automatically out of community of property.¹⁰² The domino effect was that many black women found themselves having no rights to their property and finances upon the dissolution of the marriage, either through death or divorce. This had a negative impact on the children and their family life.

The issue is illustrated in the recent judgement dealing with this conflict in the matter of Agnes Sithole and The Commission for Gender Equality v Gideon Sithole and the Minister of Justice,¹⁰³ which declared sections 21(1) and 21(2)(a) of the Matrimonial Property Act unconstitutional and invalid, and perpetuating the effect of the now-repealed Section 22(6) provision of the Black Administration Act.

¹⁰⁰ See Section 172 of the Constitution.

¹⁰¹ s22(6) repealed by Madondo DJP.

¹⁰² s22(6) 'A marriage between natives, contracted after the commencement of this Act, shall not produce the legal consequences of marriage in community of property between the spouses'.

¹⁰³ D12515/2018 [2020] ZAKZCHP 2 (24 January 2020)

The default position for all other married couples in South Africa is in community of property. However, African couples married before 1988 were excluded¹⁰⁴ unless they had declared to a magistrate, commissioner or marriage officer that they intended their marriage to be in community of property and proof and loss one month prior to their celebration. The consequence to older African couples married under this Act are undesirable and discriminatory towards African women on the grounds of both gender and race, as it became apparent to the applicant in the matter that assets that had accumulated during the subsistence of the marriage would now exclusively vest with her husband (the first respondent), to her exclusion.

The wider effect of this discriminatory law is that many black women in the country who concluded their marriages before 1988 were treated unequally and could not enjoy the rights seemingly enjoyed by South African women belonging to other races married in community of property. Black women remain impoverished after divorce and, in many instances, vulnerable as consent from their husbands is a requirement for the marriage to have been registered to be in community of property.¹⁰⁵ The right to either grant or withhold the consent remains exclusively with the husband, without any further remedy left to the wife should it be denied.

Section 7(3)(b) of the Divorce Act¹⁰⁶ does make some attempt to remedy this misfortune by allowing the equal distribution of assets upon the dissolution of the marriage where a court deems it to end equitably. However it does not remove the offending character of the discriminatory nature of the impugned provisions.

The judge in the matter went on to further pronounce that all marriages of black persons concluded out of community of property under Section 22(6) of the Black Administration Act be declared to be marriages in community of property.

Similarly, in the case of *Ramuhovhi and Another v President of the Republic of South Africa and Others*¹⁰⁷, the Constitutional Court was faced with the issue of determining

¹⁰⁴ The law was passed in 1984 and the amendment of 1988 allowed black African men and women to apply to convert their civil marriages to in community of property, but only within a two-year window.

¹⁰⁵ para 53

¹⁰⁶ Act 70 of 1979

¹⁰⁷ (CCT194/16) [2017] ZACC 41; 2018 (2) BCLR 217 (CC); 2018 (2) SA 1 (CC) (30 November 2017)

whether Venda customary law vests any rights of ownership or control over marital property in wives. The issue was propelled by a polygamous, customary marriage entered into before the commencement of the Recognition of Customary Marriages Act. The marriage was regarded as being out of community of property, not subject to the accrual system. The Constitutional Court declared Section 7(1) to be constitutionally invalid, confirming the finding in the Limpopo High Court.

An interesting note is that this was not the first time that the courts had been tasked with determining an issue of this nature. In *Gumede*,¹⁰⁸ the matter concerned a claim of unfair discrimination on the basis of gender and race against women married under customary law in terms of the Natal Code of Zulu law.¹⁰⁹ At the centre of the dispute was the question of ownership of property upon the dissolution of a customary marriage. The applicant applied to the Constitutional Court to confirm a declaratory order by the High Court of the constitutional invalidity, particularly of Section 7(1)¹¹⁰ and (2),¹¹¹ of the Recognition of Customary Marriage Act. The Constitutional Court found that the provisions were unconstitutional. The KwaZulu-Natal code was also declared inconsistent with the Recognition of Customary Marriage Act.

The adaptation of customary law serves a number of important constitutional purposes. Firstly, this process would ensure that customary law, like statutory law or the common law, is brought into harmony with our supreme law and its values, and in line with international human rights standards. Secondly, the adaptation would salvage and free customary law from its stunted and deprived past. And lastly, it would fulfil and reaffirm the historically plural character of our legal system, which now sits under the umbrella of one controlling law – the Constitution.¹¹²

¹⁰⁸ *Gumede v President of the Republic of South Africa and others* 2009 (3) BCLR 243 (CC)

¹⁰⁹ Natal Code of Native Law Proclamation 168 of 1932

¹¹⁰ Section 7(1) of the Recognition of Customary Marriages Act (Recognition Act) provides that the proprietary consequences of a customary marriage entered into before the commencement of the Recognition Act continue to be governed by customary law.

¹¹¹ (2) A customary marriage entered into after the commencement of this Act in which a spouse is not a partner in any other existing customary marriage, is a marriage in community of property and of profit and loss between the spouses, unless such consequences are specifically excluded by the spouses in an antenuptial contract which regulates the matrimonial property system of their marriage.

¹¹² para 21

The judgment in *Women's Legal Centre Trust v President of the Republic of South Africa and Others*¹¹³ declared that the State is obliged by Section 7(2) of the Constitution to respect, protect, promote and fulfil the rights in sections 9, 10, 15, 28, 31 and 34 of the Constitution. It would do this by preparing, initiating, introducing, enacting and bringing into operation, diligently and without delay as required by Section 237 of the Constitution, legislation to recognise marriages solemnised in accordance with the tenets of Sharia law (Muslim marriages) as valid marriages and to regulate the consequences of such recognition.¹¹⁴

Similarly the judgments in *Faro v Bingham NO*.¹¹⁵ and *Others*, and in *Esau v Esau and Others* 2018 (6) SA 598 (WCC), echo the decades-long frustration of parties to Muslim marriages. Commonplace to these proceedings is the vulnerability of women falling victim to stubborn patriarchal practices that infringe on the rights of wives whose marriages are dissolved upon death or divorce, leaving them with no protection in relation to ownership of property and maintenance.

In essence, Muslim marriages concluded in accordance with Shariah law have not enjoyed full recognition in our constitutional democracy and the effects of it are felt mostly by women and children. While the delay in enacting legislation to recognise marriages solemnised in accordance with the tenets of Sharia law is concerning, the courts are actively immersed in matters affecting the Islamic community and are giving effect to rights for those who need them the most. For example, in the case of *Hassam v Jacobs NO and Others* 2009 (5) SA 572 (CC), the Constitutional Court held that the right to claim maintenance from a deceased spouse, as decided in the *Daniels*¹¹⁶ case, was also to be extended to polygamous Muslim marriages as well. Subsequently, the Interstate Act was found to be unconstitutional, resulting in an order that afforded protection to multiple spouses in a polygamous Muslim marriage.

Other challenges faced by the Islamic community include there being no statute that deals comprehensively with the legal position of persons married by Shariah law.

¹¹³ *Women's Legal Trust v President of the Republic of South Africa and Others* (CCT13/09) [2009] ZACC 20; 2009 (6) SA 94 (CC) (22 July 2009).

¹¹⁴ The first order granted in the matter of the Women's Centre Trust at the Western Cape high Court

¹¹⁵ *Faro v Bingham NO and Others* (4466/2013) [2013] ZAWCHC 159 (25 October 2013)

¹¹⁶ *Daniels v Campbell and Others* (CCT 40/ 03) [2004] ZACC 14; 2004 (5) SA 331 (CC); 2004 (7) BCLR 735 (CC) (11 March 2004)

Furthermore, there is no legislation regulating the dissolution of such unions. Since such a union is not regarded as a 'marriage' for the purposes of the Divorce Act 70 of 1979, the latter Act does not regulate the dissolution of Islamic marriages. This position would change if the marriage was solemnised.