WHITE PAPER ON MARRIAGES IN SOUTH AFRICA

MARCH 2022

home affairs

Department:
Home Affairs
REPUBLIC OF SOUTH AFRICA

2030 NDP

We Care!

CONTENTS

LIST OF ABBREVIATIONS 3

EXECUTIVE SUMMARY 3

SECTION 1: BACKGROUND AND CONTEXT 6

CHAPTER 1: INTRODUCTION AND RATIONALE 6
1. *Historical context 6*
2. *Problem statement 6*
3. *Foundational Issues addressed by the White Paper 7*

CHAPTER 2: UNDERSTANDING MARRIAGE IN THE SOUTH AFRICAN CONTEXT 8
1. *Introduction 8*
2. *Definition of marriage 8*
3. *Constitutional provisions for the marriage policy 8*
4. *Concluding Observations 10*

CHAPTER 3: EXISTING MARRIAGE LEGAL FRAMEWORK AND ANALYSIS 11
1. *Introduction 11*
2. *Synopsis of marriage legislation 11*

SECTION 2: TRENDS AND STATISTICS ON MARRIAGES AND DIVORCES 16

CHAPTER 4: STATISTICS ON MARRIAGE 16
1. *Introduction 16*
2. *Civil marriages 16*
3. *Customary marriages 18*
4. *Civil unions 18*
5. *Conclusion 19*

CHAPTER 5: STATISTICS ON DIVORCE 20
1. *Trends in divorce (2008 – 2017) 20*
2. *Conclusion 22*

SECTION 3: POLICY FRAMEWORK AND IMPLEMENTATION STRATEGY 23

CHAPTER 6: POLICY ANALYSIS AND OPTIONS 23
1. *Introduction 23*
2. *Vision Statement 23*
3. *Foundational Policy Principles 24*
4. *Policy Options and Remedies 24*

CHAPTER 7: HIGH-LEVEL IMPLEMENTATION STRATEGY 35
1. *Introduction 35*
2. *Structural barriers 35*
3. *Principles of co-operative government and intergovernmental relations 35*
4. *Public administration principles 36*
5. *High-level implementation plan 37*

ANNEXURE 1: INTERSECTIONALITY OF FAMILY LAW 38

MARRIAGE REGIMES IN SOUTH AFRICA 38
1. *Introduction 38*
2. *Marriage in community of property 38*
3. *Marriage out of community of property 39*
4. *Marriage out of community of property with accrual 39*
5. *Public Comments on existing marital property regimes 40*

LEGAL CONSEQUENCES OF MARRIAGE 42
1. *Introduction* *42*
2. *Intestate Succession Act 81 of 1987* *42*
3. *Wills Act 7 of 1953* *42*
4. *Maintenance of Surviving Spouses Act 27 of 1990* *43*
5. *Divorce Act 70 of 1979* *43*
6. *Matrimonial Affairs Act 37 of 1953* *45*

ANNEXURE 2: EMERGING LEGISLATIVE LITERATURE 46

CASE LAW FROM THE COURTS 46

LIST OF ABBREVIATIONS

CC	Constitutional Court
DHA	Department of Home Affairs
LGBTQIA+	Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, Asexual plus
NPR	National Population Register
SADC	Southern African Development Communities
SCA	Supreme Court of Appeal
StatsSA	Statistics South Africa
TBVC	Transkei, Bophuthatswana, Venda, Ciskei
WCC	Western Cape Division, Cape Town

EXECUTIVE SUMMARY

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 legislation that regulates marriages in South Africa is a combination of legacy legislation (colonial and apartheid era) and new law that was introduced post-1994 to redress historical injustices. Marriages in SA are regulated through the following legislation:

- The Marriage Act 25 of 1961
- The Recognition of Customary Marriages Act 120 of 1998
- The Civil Union Act 17 of 2006

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 statutory interventions as precipitated by constitutional court judgements the current marriage statutes still deprives, amongst others (whether directly or indirectly) members of Hindu community, members of the Khoi and San community, members of the Muslim community, Rastafarians and some LGBTQIA+ persons from concluding legally recognised marriages.

The White Paper is going to establish a policy foundation for regulating the marriages of all persons that reside in SA. In this regard the White Paper recommends policy and strategic interventions in the following policy areas:

- Monogamous marriages;
- Polygamous marriages;
- Polygamous marriages in royal families;
- Customary pseudo-marriages or marriage-like relationships;
- Polyandrous marriages;
- Solemnisation and registration of marriages;
- Consent to a marriage;
- Child marriages;
- Registration of customary marriages;
- Transitional mechanisms for transgender couples;
- Different marriage regimes;
- Fraudulent marriages and marriages of convenience; and
- Marriage Legal Framework.

SECTION 1: BACKGROUND AND CONTEXT

Chapter 1: Introduction and rationale

1. Historical context

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.

The Marriage Act 25 of 1961 is a reflection of this mutually reinforcing relationship between the Christian Church and the state. To date South Africa's legal framework for regulating marriages is still premised on the aforementioned Calvinist Christian and Western Traditions which fail to give credence to legal pluralism and cultural and religious diversity that embodies South Africa's social structuring. 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.

The failure of South Africa's marriage legal framework to give legal recognition to the various religious and cultural marital practices has resulted in affected members and interest groups challenging various aspects of South Africa's marriage legal framework via constitutional litigation. The successes of the litigation has resulted in the State seeking to give recognition to different marriage practices or existing benefits and protections available by operation of the Marriage Act, the Matrimonial Property Matrimonial Property Act[1], the Divorce Act[2], passing new statutes or amending existing one in order to address a range of different marriage issues instead of creating a harmonised system of marriage in SA. As a result, there are now parallel structures and processes that stand side by side. 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); and
- 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.

2. Problem statement

The principal problem is that the legislation that regulates marriages in SA is not informed by an overarching policy that is based on Constitutional values and the understanding of modern society dynamics. This is exacerbated by the following issues:

- 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 Khoi and San 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

[1] 88 OF 1984

[2] 70 OF 1979

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 25 of 1961 and want to retain their marital status without going through a divorce, as required by the current law.
- The Recognition of Customary Marriages Act 120 of 1998 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[3].

In order to cure this defect, the DHA embarked on a process of developing a new policy to regulate marriages in South Africa. In this regard, the DHA compiled a Green Paper on Marriages which was approved by Cabinet for Public Consultation in April 2021 and in May 2021 the Department gazetted it for pubic consultation. Subsequently, the DHA is compiling a White Paper on Marriages and life partnerships in South Africa which will provide a foundation for drafting new marriage legislation(s). 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.

3. Foundational Issues addressed by the White Paper

The policy interventions articulated in the White Paper seek to address the following foundational issues:

- The lack of recognition of the principles of equality, non-discrimination, human dignity and unity in diversity in the marriage legislation.
- The lack of consideration of religious and customary marriages that are not recognised by the current marriage legislation.
- The existence 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.
- The lack of equitable recognition of the right to freedom of conscience, religion, thought, belief and opinion in the solemnisation and registration of marriages.
- The lack of 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.
- The existence and legislative compliance to marriages that involve minors (persons under 18 years).
- The lack of regulation of polygamous marriages that involve foreign nationals and other racial and religious groups.
- The failure to designate members 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.

[3] Christa Rautenbach opines that "John Eekelaar cautions against the clothing of family norms with the force of law, because families are groups within which power structures exist which are not and should not be regulated by state laws. In addition, he argues that laws cannot or should not cater for the nuances in personal relationships, and neither should they impose dominant ideologies upon the personal lives of individuals".- Christa Rautenbach- Book Review: Managing Family Justice in Diverse Societies- Potchefstroom Electronic Law Journal- 2013 Volume 16 No 4

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. Definition of marriage

The regulation of marriages must be founded upon a universal understanding of what the institution of marriage is in the South African context and this understanding is guided by how marriage is defined. In the circumstances it is prudent that this White Paper establishes characteristics which will be instructional in the understanding of marriages and in the construction of a definition of marriages by the envisaged statute.

The characteristics of a definition of marriage are as follows:

- a consensual monogamous and or polygamous legal, social and physical union;
- entered into between heterosexual and or homosexual and or non-binary persons;
- who are over the age of 18 years;
- who undertake reciprocal rights and obligations of financial, emotional and psychological care and maintenance.
- who undertake reciprocal rights of emotional, physical and psychological intimacy

3. 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 between persons, regardless of their sexual orientation or gender. Family law supplements this legislation and governs 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:

---

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.

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."

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 previously 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 policy to regulate marriages that will lay the foundation for drafting a new legislation. The legislation will enable South Africans of varying sexual orientation, religious and cultural persuasions to conclude marriages that will accord with the principles of equality and non-discrimination as encapsulated in the Constitution.

The White Paper on Marriages in South Africa is 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 and 212 of the Constitution. It is clear that neither culture, nor religion enjoy elevated constitutional protection.[14]

---

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].

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.

14 Ibid.

4. Concluding Observations

The State is obliged to craft a policy on marriages 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.

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

Chapter 3: Existing 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. Synopsis of marriage legislation

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

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.[16]

- Aside from magistrates and special justices of the peace, the Marriage Act does not provide for the solemnisation of marriages by other social groups.

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.[17]

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 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.[18]

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.[19]

---

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

17 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.

18 Ibid.

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

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.

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
- 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.[20]

[20] Pilane and Another v Pilane and Another 2013 (4) BCLR 431 (CC) para 44.

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.[21] 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.

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.[22] The marriage officer must keep a record of all civil unions they conducted,[23] and transmit the civil union register and records to the public service official responsible for the population register in that area.[24] 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.

[21] Ramuhovhi and Others v President of the Republic of South Africa and Others 2018 (2) BCLR 217 (CC)

[22] Section 12(1).

[23] Section 12(5).

[24] Section 12(6).

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'.[25] 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.[26] There has been less litigation on behalf of adherents of the Hindu[27] 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.

[25] Section 3(1).

[26] 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).

[27] For instance, Govender v Ragavayah 2009 3 SA 178 (D); Singh v Ramparsad 2007 3 SA 445 (D).

SECTION 2: TRENDS AND 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 18 March 2021 relating to civil marriages, customary marriages and civil unions that were registered in 2019 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 2019 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.[28]

2. Civil marriages

In 2019, 129 597 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 2010 and 2019, except for a slight increase of 0,6% between 2015 and 2016. During the period from 2010 to 2019, the highest number of marriages was recorded in 2010 (170 826) and the lowest number in 2019. The 2019 figure of (129 597)civil marriages shows a decrease of 1,3% from the 131 240marriages recorded in 2018.[29]

Solemnisation of civil marriages

More than half of the 129 597marriages 75 519 or 58,3%were solemnised by DHA marriage officers and 40 657 or 31,4%)by 'religious' rites. The type of solemnisation rite was not specified in 13 421 (10,4%)marriages. Furthermore 557 (0,4%)marriages were solemnised outside the borders of South Africa but subsequently registered in South Africa.[30]

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 2019, most marriages were registered in Gauteng [32 352 (25,0%)]and the least in the Northern Cape [3 692 (2,8%)]. Free State had the highest proportion of marriages solemnised by civil marriage officers, at 80,2% (6 977). The Western Cape recorded the highest proportion of marriages solemnised by religious marriage officers, at 48,1%% (8 065).

[28] Statistical Release P0307, *Marriages and Divorces 2019*, p 1, Available at http://www.statssa.gov.za/publications/P0307/P03072019.pdf accessed on 01 February 2022.

[29] Ibid, p2.

[30] Ibid.

Marital status at the time of civil marriage

The majority of marriages in all provinces in 2019, for both bridegrooms and brides, were first-time marriages. There were 105 163 (81,1%) men that had never married, 4 852 (3,7%) divorcees and 918 (0,7%) widowers. Women that had never married accounted for 111 464 (86,0%)brides, while 3 328 (2,6%)were divorcees and 622 (0,5%) were widows. The marital status of 18 664 (14,4%) bridegrooms and 14 183 (10,9%) of brides were unspecified. A high proportion of marriages between bridegrooms and brides marrying for the first time was observed in Limpopo, where 8 629 (85,6%) and 9 243 (91,7%) 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 4 852 (3,7%) males, while 918 (0,7%) were widowers; women accounted for 3 328 (2,6%) divorcees and 622 (0,5%) widows.[31]

Irrespective of their marital status, however, men generally married women who had never been married. Thus, of men that had never been married before 98 779 (93,9%) wedded women that had never been married before, 1 225 (1,2%) married divorcees and 435 (0,4%) married widows. In addition, irrespective of more divorcees and widowers marrying women that had never been married before, male divorcees married more female divorcees 800 (16,5%) than widows 47 (1,0%). Similarly, the number of widowers who married widows, at 118 (12,9%)was higher than the 30 (3,3%).that married female divorcees.[32]

The report showed that men tended to marry younger women, as 98 714 (76,2%) of the 129 597bridegrooms were older than their brides. However, 20 730 (16,0%) were younger than their brides and 10 151 (7,8%) 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, 43,8% of men that had never married before but who married divorcees were younger than their brides and 10,6% of male divorcees who married widowed women were also younger than their brides. A relatively small percentage (5,3%) of male divorcees married women that had never married before who were older than them.[33]

Age at the time of civil marriage

In 2019, marriages were registered for 3 bridegrooms and 68 brides aged less than 18 years, with 60 of these brides marrying for the first time. Most men marrying for the first time [26 595 (20,5%)] were 30–34 years whereas most women marrying for the first time [30 699 (23,7%)] 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).[34]

The median age of bridegrooms had increased from 36 years in 2015 to 37 in 2019 and that of brides from 31 years to 33 years during the same period. This indicates that women generally married younger than men. For first time marriages in 2019, 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 2019 was 57 years and 34 years respectively, which is a 23-year age gap. While the median age for widowers increased consistently from 52 in 2015 to 57 in 2019.The median age of widows fluctuated between 30 and 34 years between 2015 and 2019.[35]

31 Ibid, p3.

32 Ibid.

33 Ibid.

34 Ibid.

35 Ibid, p4.

3. Customary marriages

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

In 2019, 2789 customary marriages were registered with the DHA, indicating a decrease of 11,7% from 3160 customary marriages registered in 2018. The number of registered customary marriages fluctuated between 2010 and 2019. The highest number of registered customary marriages was recorded in 2010 (9 996) while the lowest number was recorded in 2017 (2 588).[36]

The majority of customary marriages were registered later than the year of marriage. In 2019, about 18,3% of marriages were registered the same year it took place.

Age at the time of customary marriage

In 2019, 1 163 (41,7%)of registered customary marriages were from KwaZulu-Natal, followed by Limpopo with 634 (22,7%) and Mpumalanga 323 (11,6%). The other six provinces had less than 10% each. In 2019, 9 (0,3%) bridegrooms and 121 (4,3%) brides were younger than 18 years.[37]

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 2015 and 2019. The median ages of both bridegrooms and brides fluctuated over the period, from between 34 and 36 years for men and 27 and 30 years for women. A further comparison of the ages of bridegrooms and brides shows that in 2019, 86,1% of bridegrooms were older than their brides, 8,8% were younger and 5,0% were the same age.[38]

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 8410 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

Trends in the registration of civil unions (2015–2019)

In 2019, 1 771 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 7,3% from 1 650 in 2018 to 1 771 in 2019. The provincial distribution of civil unions registered in 2019 indicated that Gauteng and the Western Cape, with 779 (44,0%)and 443 (25,0%)registrations respectively, had the highest number of civil unions. In total, 69,0% of civil unions in 2019 were registered in these two provinces. The lowest number of registered civil unions was 16 (1,0%) in the Northern Cape and 23 (1,3%) in Limpopo.[39]

[36] Ibid.

[37] Ibid.

[38] Ibid.

[39] Ibid.

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 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, 129 597civil marriages were registered in South Africa in 2019, with 75 519 (58,3%)being solemnised by DHA marriage officers. The highest number of civil marriages was registered in Gauteng (32 352) followed by KwaZulu-Natal (21 753) and Western Cape (16 783) and the lowest was registered in Northern Cape (3 692). The majority of civil marriages in 2019 for both bridegrooms 105 163) and brides (111 464)were first time marriages, with women generally entering into marriage at younger ages than men.[40]

The number of registered customary marriages in 2019 was 2 789, a decrease of 11.7% from the 3 160 recorded in 2086. The majority of bridegrooms [2 401 (86,1%)] 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 1 771 registered civil unions in South Africa in 2019, most were registered in Gauteng (779) and the Western Cape (443), with the smallest number in Limpopo (23) and the Northern Cape (18).[41]

[40] Ibid, p 8.

[41] 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 2019 decreased by 1 574 (6,2%) to (23 710) from the 25 284cases processed in 2018. An analysis showed that the total number of divorces decreased from 2010 to 2011 followed by a consistent increase in the years 2012 to 2017 and a slight decrease of 0,4% between 2017 and 2018. In 2019, about 174 divorces were granted for same-sex couples. In 2019, the observed crude divorce rate was 40 divorces per 100 000 of the estimated resident population.[42]

Black African couples had the highest number of divorces compared to other population groups during the ten-year period (2010 to 2019). In 2019, 10 677 (45,0%) of the 23 710 divorces were from the black African population group, followed by 5 268 (22,2%) white, 4 502 (19,0%) coloured and 1 299 (5,5%) Indian/Asian.[43] The population group of 1 148 couples was not specified.

1.1. Characteristics of plaintiffs

More wives initiated divorce proceedings than husbands, 12 615 (53,2%) women compared to 8 210 (34,6%). The sex of the plaintiff was not specified in 2 885 (12,2%) cases. Although women from the black African population had a lower proportion of plaintiffs (48,9%), the proportion of women plaintiffs from the white, Indian/Asian and coloured population groups were 58,3%, 57,9% and 57,2% respectively. The plaintiffs for the interracial couples show that 53,6% of the divorces were filed by wives.[44]

The provincial distribution indicates that Gauteng (6 318), the Western Cape (6 108), KwaZulu-Natal (4 033) and Eastern Cape (3 137) had the highest number of divorces granted. Together, the four provinces contributed 82,6%of the divorces granted in 2097. However, these numbers could also be because these provinces have the largest populations.[45]

1.2. Number of divorces by way of solemnising marriage

Of the 2019 divorce cases, 10 876 (45,9%) were from marriages that were solemnised by religious rites and 10 581 (44,6%) by civil rites. Over two-thirds About 68,8% of divorces from the white population group and 66,0% of divorces from the coloured population group were from marriages that were solemnised by religious rites. Most divorces from the black African and Indian/Asian population groups, 66,0% and 52,5% respectively., were from marriages that were solemnised by civil rites.[46]

1.3. Number of times married

More than 80% of divorces for men and women were from first-time marriages compared to 11,8% of men and 10,1% of women from second-time marriages. Less than1,5% of men and women were getting divorced for at least the third time.[47]

---

42 Ibid, p 7.

43 Ibid.

44 Ibid.

45 Ibid, p 6.

46 Ibid.

47 Ibid,

1.4. Age at the time of divorce

The median age at the time of divorce in 2019 was 45 years for males and 41 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 2019 by population group showed that black African males and white males had the highest median age at 45 years, while the Indian/Asian population group recorded recorded the median ages of 43 years. The difference in the median ages at the time of divorce between males and females was greater in the black African population group (four years) compared to the coloured, Indian/Asian and white population groups, with median age differences of three years between males and females.[48]

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.[49]

Although there were differences in the ages at which most men and women from the various population groups divorced, the age patterns were quite similar.

1.5. Duration of marriage of divorcing couples

Most divorces [6 225 (26,3%)] occurred after between five and nine years of marriage. This group is followed by [4 964 (20,9%)] marriages that lasted between 10 and 14 years and [3 996 (16,9%)] marriages that lasted for less than five years. Results showed that of the 23 710 divorces in 2019, 10 221 (43,1%) or four in ten were of marriages that had lasted for less than 10 years.[50]

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 28,6% of divorces from the black African; 25,1% from coloured, 23,9% from white and 21,0% from Indian/Asian population groups were from marriages that lasted between five and nine years. The white population had the highest proportion (21%) of divorces that occurred in the first four years. The proportion of divorces in all population groups declined as the duration of marriage increased, with a significant decline being observed after fourteen years of marriage. The proportion of divorces from Indian/Asian population group is higher than the other population groups between ages 15 and 34 years.[51]

1.6. Divorces involving couples with minor dependents

In 2019, 13 264 (55,9%) of the 23 710couples divorcing had children younger than 18 years while 10 446 (44,1%) had no children. The profile of white divorcees showed that more than half of the recorded divorces were without children (55,9%). Looking at the coloured and black African divorcees, divorces involving couples with minor children constituted about 60,9% and 63% respectively. So, 49,6% of children affected by divorce were from the black African population group; 21,8% from the coloured population group; 17,0% from the white population group and 4,8% from the Indian/Asian population group.[52]

---

48 Ibid.

49 Ibid.

50 Ibid,

51 Ibid.

52 Ibid,

2. Conclusion

In conclusion, the report showed that 23 710 divorces were granted in South Africa in 2019. Generally, there was an increase in the proportion of divorces for black Africans and a decline for the white population group. 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 Gauteng (6 318), Western Cape (6 108), KwaZulu-Natal (4 033) and Eastern Cape (3 137) were the provinces with the highest number of divorces granted. About 22 084children aged less than 19 years were affected by divorces in 2019.[53]

[53] Ibid.

SECTION 3: POLICY FRAMEWORK AND IMPLEMENTATION STRATEGY

Chapter 6: Policy analysis and options

1. Introduction

The preceding chapters showed an in-depth analysis of the deficiencies affecting marriages in South Africa. Based on feedback from the public consultations, written submissions from the public, responses to questionnaires, 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. In this chapter, the policy interventions which are intended to serve as remedies to the deficiencies of the current legal regime governing marriages will be articulated.

2. Vision Statement

The envisaged marriage statute will enable South Africans of all sexual orientations, and religious and cultural persuasions to conclude legal marriages and permanent life partnerships 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 is underpinned by the provisions of the Bill of Rights enshrined in the Constitution:

- 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. For this reason, the effort of the State to equitably balance the interests of all people who live in South Africa must be observed 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

In an attempt to create a marriage policy that is based on egalitarian principles which are intended to enable South Africans of all sexual orientations, religious and cultural persuasions to conclude legal marriages that will accord with the principles of equality, non-discrimination and human dignity as encapsulated in the Constitution, the White Paper identifies various policy intervention options. This section considers the status quo, policy options outlined in the Green Paper, and thematically outlines the recommended policy interventions and the rationale thereof.

4.1. Monogamous Marriage

Status Quo

Monogamous 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 marriages of heterosexual persons; and the Civil Unions Act, which governs the monogamous marriages of same-sex persons.

Policy Proposal

In recognition of the principle of equitable treatment of all recognised cultural and religious rights, the following remedies were 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.
- Although option 1 seeks to cater for all polygamous marriages irrespective of race, cultural and religious persuasions, it has the unintended consequence of excluding monogamous and same-sex marriages. It is doubtful whether this would pass constitutional muster.

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. 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.

Recommended Policy Intervention and Rationale

It is recommended that the monogamous marriage legal framework must cater for both heterosexual and homosexual couples. The marriage contract or certificate thereof will be gender neutral. This inclusive approach means that there shall be indiscriminate recognition of all monogamous marriages, including religious marriages that were solemnized in accordance with religious rites and beliefs such as Muslim, Hindu & Rastafarian marriages. This proposal is also consistent with recent judicial pronouncements on Muslim marriages wherein the Supreme Court of Appeal, among others, declared the Marriage Act and the Divorce to be inconsistent with ss 9, 10, 28 and 34 of the Constitution in that they fail to recognise marriages solemnised in accordance with Sharia law (Muslim marriages) as valid marriages (which have not been registered as civil marriages) as being valid for all purposes in South Africa, and to regulate the consequences of such recognition.

The recognition of all monogamous marriages will be legislated for and must follow Constitutional principles of equality, non-discrimination and uphold the dignity of all persons involved as envisaged in section 9 and 10 of the constitution respectively. Thus, the existing legislative framework must be amended in order to enable the realisation of an inclusive and gender-neutral monogamous marriage framework.

4.2. Polygamous Marriages

Status Quo

The Recognition of Customary Marriages Act regulates polygamous marriages for indigenous Black South Africans. That is, the law only allows polygamy in circumstances whereby a man has multiple wives. The Recognition of Customary Marriages Act does not regulate polygamous marriages such as Islamic, Jewish, Shembe, Khoi and San marriages and customary marriages concluded with non-citizens.

Policy Proposal

In accordance with principle of equality and human dignity enshrined in the Constitution, the legal framework that will regulate polygamous marriages will be inclusive of all marriages irrespective of race, religion, culture, sex, gender, nationality.

Recommended Policy Intervention and Rationale

An inclusive marriages framework that regulates polygamous marriages promotes values of non-discrimination and the realization of human dignity and tolerance. Similarly, this proposal is also consistent with recent judicial pronouncements on Muslim marriages which instructed government to introduce legislation that will regulate Muslim marriages.

However due to the challenges associated with polygamous marriages that involve foreign nationals it is appropriate to curtail the extension of the right of foreign nationals to conclude polygamous marriages or to have their polygamous marriages recognized. Some of the challenges include the need to align marriage legislations with other countries to ensure that all parties in a polygamous marriages are

protected by the laws of South Africa regarding marriage and property rights. The issue of reciprocity also needs to be addressed. Marriages involving foreign nationals are currently provided for on condition that there is a letter of non-impediment confirming that a foreigner who intends to enter into a marriage with a citizen or permanent resident or refugee is not married.

The DHA postulates that in order to permit the recognition or the conclusion of a polygamous marriage involving a foreign national, the DHA would in the least require receipt of a letter from the country of origin of the foreigner confirming that polygamy is permitted. This would have to be accompanied by a letter from the wife consenting to her husband marriage to another woman in SA.

However, there are currently no reliable means of authenticating letters of no impediment as evinced by the high levels of fraudulent letters being submitted. Furthermore, the DHA does not have the resources to authenticate the purported consent of would be polygamous spouses from foreign jurisdictions nor the letters that would confirm that polygamy is permitted in that would be foreign spouses country of origin.

The existing legislative framework must be amended in order to enable the realization an inclusive polygamous marriage framework subject to the aforementioned restrictions in accordance with section 36 of the Constitution.

4.3. Polygamous Marriages in Royal Families

Status quo

The Recognition of Customary Marriages Act makes provision for the legal recognition of both monogamous and polygamous customary marriages, provided they are concluded according to the customs traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples.

However, the current marriage statute doesn't recognise certain customary marriages that are concluded in some African communities, including royal families. This includes the practice of marriages that are concluded for the purpose of giving birth to a future king or heir.

Policy Proposal

Marriage legislation must enable the recognition of customary marriages that are practiced in some African communities, including royal families. In this regard, the following remedies were considered:

Option 1: Recognition of royal family tradition of marrying principal wife

- The Marriage legislation may recognise the royal family tradition of marrying a principal wife as the designated mother of the future king. In the event that the principal wife is unable to give birth to a future king, the woman that is married by the royal family to give birth to a future king, as a supporting wife, may be recognised by law.

Option 2: Recognition of Principal and Supporting wives for all polygamous marriages.

Recommended Policy Intervention and Rationale

Principal wives in royal families must be legally recognised. However, consent from the first wife, who might not be a principal wife, remains a legal requirement. Indeed, this right is already protected under South African law. Bringing a second wife to any marriage has a serious implication for a chosen marital property regime. This policy intervention will afford marriages concluded under any traditional system recognition. Furthermore, this will inevitably strengthen the protection of women's rights. Consequently, the existing legislative framework must be amended to enable the recognition of principal wives.

4.4. Customary Pseudo-Marriages

Status Quo

There are marriage-like customary relationships that are observed in various African communities for a purpose of giving birth to an heir or a person who will continue a particular surname. These relationships are recognised by the Recognition of Customary Marriages Act.

Policy Proposal

In considering marriage-like customary relationships that are observed in various African communities, this policy is called upon to pronounce on whether or not the following customary marriage-like relationships may be legalized:

- **The supporting wife**
  This relates to a practice whereby a woman is married into or brought into a royal family, to bear a heir on behalf of the queen under circumstances wherein she cannot bear a son who is supposed to be a future king.

- **Family wife Marriage:**
  This relates to a practice whereby a woman is married into the family where there is no male in order to continue the family name.

- **Ukungenwa**
  Once a woman marries into a particular family, she is married into that family for life. This traditional practice is underpinned by the idea that once a woman marries into a particular family; she is married into that family for life. Therefore, if the husband dies, the union does not die and she, as a widow, will be required to marry her dead husband's male relative.

Recommended Policy Intervention and Rationale

Legislating for these customary marriage-like relationships may be impossible as they are based on principles that violate rights of both women and children. The State is however, not in a position to pronounce on whether or not such practices should continue as they are entered into between consenting adults. The only principles that must be observed and protected by the State under these circumstances are as follows:

- Children born by supporting wives and family wives must have rights similar to those of adopted children. That is, they have a right to know their biological parents.
- Ukungenwa must only be practiced only if the affected woman consents to it.

The marriage policy and legislation will only make provisions for marriages or civil unions which can be dissolved either by death or divorce. Conjugal partner and common-law partner relationships will therefore be out of scope for the marriage statute.

4.5. Polygamous (Polyandry) Marriages

Status Quo

The Recognition of Customary Marriages Act provides for the conclusion of polygamous marriages between one man and more than one woman (polygamy). That notwithstanding, South African law does not recognize the right of a woman to take more than one husband (polyandry).

Policy Proposal

In light of the move towards developing a new policy that accords sections 9 and 10 of the Constitution and the fact that during the Ministerial Dialogues held in 2019 calls by gender activists argued for the introduction of polyandry, the DHA is tabling this policy for consideration. In their view, this proposal was consistent with the principles of equality, protection of women's rights and gender emancipation. Those that were advocating for this proposal did so on the basis of a gender equal society and it being a Constitutional right for women.

Recommended Policy Intervention and Rationale

This proposal received a significant amount of negative media and public attention. Further rejection for this proposal was registered by most of the stakeholders who attended the marriage dialogues and colloquium using a "morality" rather than a legal or human rights rationale. Reasons for rejection included:

- Polyandry being contrary to the dominant patriarchal culture which accepts or tolerates men who have multiple partners;
- Polyandry being contrary to traditional and religious practices;
- Polyandry having the potential to negatively affect the family structure; and
- Difficulties associated with proving paternity for children who will be born in a polyandrous relationship.

While there is no constitutional or legal basis for rejecting polyandry, it is recommended that this proposal should not be included in the marriage policy or statute. The State is however, not in a position to pronounce on whether or not polyandrous relationships should continue as they are entered into between consenting adults. Although the inclusion of polyandrous marriages would promote the principles of equality, protection of women's right and gender emancipation, polyandry doesn't seem to be practiced widely enough to warrant recognition at this stage of development of the country's constitutional democracy.

4.6. Solemnisation and Registration of Marriages

Status Quo

Currently only religious leaders and government officials (Home Affairs and magistrates) can be designated as marriage officers. Marriages officers may refuse to solemnise marriages that are incongruent with the provision of the Marriage Act including same sex marriages. Since the introduction of the Civil Union Amendment Act in 2020, government officials may no longer refuse to solemnise civil unions for same sex couples. Other social groups including Traditional Leaders, LGBTIQ+ are not eligible to be designated as marriage officers.

Policy Options

The following remedies were considered:

Option 1: Indiscriminative solemnisation of marriages by all marriage officers without exception.

- 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: Indiscriminative 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 of the scope for the designation of marriage officers from all social groups. This includes all religious denominations, traditional councils and LGBTIQA+ community.

- 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 addition to not discriminate on the basis of disability, the DHA must put in place measures and protocols that enable disabled persons to register as marriage officers and that enable disabled would be spouses to have their marriages solemnised unencumbered.

- 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
    - Obtaining a required security clearance, etc.

Recommended Policy Intervention and Rationale

The following recommendations are made in this regard:

- Only citizens who have no criminal record may be appointed as marriage officers after successfully complying with the prescribed conditions;
- Provisions will be made for all religious formations to have their marriage officers who will solemnise marriages according to their religious rights while observing the marriage legislation;
- Provisions will be made for all social groups to have their marriage officers who will solemnise in line with their value system while observing the marriage legislation;
- Provisions will be made for traditional and Khoi and San leaders to be appointed as marriage officers; and
- DHA officials will be required to provide marriage services to all members of the society. Officials will, however, not perform any ceremonial functions generally associated with solemnisation of a marriage. State functions must not be conflated with those of the religious or traditional formations.

4.7. Consent to Marriage

Status Quo

During the solemnisation of customary and religious marriages the presence of both spouses is not mandatory for cultural and religious reasons. For instance, when concluding a Muslim marriage, a woman may not be present but a father may stand in as a proxy.

Policy Proposal

The proposed remedy for this problem is that no marriage shall be legally entered into without the full, informed and free consent of the intending spouses.

Recommended Policy Intervention and Rationale

The foundational principle that must be observed by all marriage officers is to establish full, informed and free consent of the intending spouses. By necessary implication this also requires that marriage officers ensure that would be spouse have full mental capacity to consent and that the consent is unfettered. In instances where the other spouse is unable to be present during the solemnisation of a marriage, for whatever reason, arrangement must be made to provide consent to the marriage officer in instances where both parties cannot be present. This will also accommodate Muslims who opt for gender-separate wedding ceremonies where men and women sit separately.

4.8. Child Marriages

Status Quo

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. 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 has already legislated 18 years as the age of majority. In this regard, the African Union has embarked on an extensive campaign to end child marriages on the continent. South Africa has also signed the Southern African Development Community 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.' Furthermore, the African Charter on the Rights and Welfare of the child states that child marriage and the betrothal of girls and boys shall be prohibited and that effective action including legislation shall be taken to specify the minimum age of marriage to be 18 years.

Policy Options

The proposed remedy is that no person under the age of 18 years will be permitted to marry. 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 existing legislation must be amended in order to outlaw child marriages.

Recommended Policy Intervention and Rationale

The abovementioned 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 existing legislation must be amended in order to outlaw child marriages.

4.9. Registration of Customary Marriages

Status Quo

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.

Policy Proposal

The following remedies were proposed:

- The registration of customary marriages should be made compulsory in order to curb fraudulent registration of marriages.
- The provision that allows one partner to register marriage should only apply when the marriage is registered posthumously; that is, if the other partner is deceased.

Recommended Policy Intervention and Rationale

To curb the fraudulent registration of customary marriages, the legislation will make it compulsory for spouses to register their customary marriage. The existing legislation must be amended to make it compulsory to register all marriages, including customary marriages.

4.10. Transitional mechanisms for transgender couples

Status Quo

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 alteration. Indeed, this issue arose in the matter of KOS and Others v Minister of Home Affairs and Others wherein the Western Cape High Court found that declared that in terms of section 172(1)(a) of the Constitution, the manner in which the DHA dealt with the applications by the first, third and fifth applicants under the Alteration of Sex Description and Sex Status Act 49 of 2003 ('the Alteration Act') was conduct inconsistent with the Constitution and unlawful in that it (a) infringed the said applicants' right to administrative justice; (b) infringed the said applicants' rights and those of the second, fourth and sixth applicants to equality and human dignity; and (c) was inconsistent with the State's obligations in terms of s 7(2) of the Constitution.

Recommended Policy Intervention and Rationale

As a matter of policy, there must be transitional mechanisms for persons who undergo sex alteration. 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. There was general agreement during the stakeholder engagements that there should not be any discrimination against transgender persons. In the future, a change of a person's sex or gender will have no bearing on a person's marriage.

4.11. Different marriage regimes

Status Quo

There are three marriage regimes applicable in South Africa in terms of the Matrimonial Property Act 88 of 1984. That is, marriage in community of property, marriage out of community of property with accrual and marriage out of community of property without accrual. Marriage in community of property is the default marriage regime in South Africa. If the intending spouses marry without an ante nuptial contract, their marriage will be automatically in community of property. Some religious marriages are automatically out of community of property.

Recommended Policy Intervention and Rationale

No marriage regime should be regarded as a default position. During pre-marital counselling, the marriage officer must ensure that the intending spouses understand the legal implications of a chosen marriage regime. All marriage regimes must be as economic as possible and accessible to all intending spouses irrespective of their economic status. Thus, existing legislative framework must be amended to enable the accessibility of all marriage regimes. However, this provision should not repeal the protection afforded by section 7(2) of the Recognition of Customary Marriages Act to poor and vulnerable by making all customary marriages in community of property.

4.12. Fraudulent Marriages and Marriages of Convenience

Status Quo

A marriage of convenience occurs when a South African national and a foreign national marry each other for convenience. This is usually done through a mutually beneficial transactional relationship. The South African, usually a woman, is rewarded with large sums of money and in exchange the foreign national gains citizenship through this marriage.

Fraudulent marriages occur when syndicates consisting of DHA officials and certain marriage officers outside the department collude to register fictitious marriages in exchange for money and citizenship through this marriage.

Recommended Policy Intervention and Rationale

Stringent enforcement measures should be put in place to regulate interface between the marriage status, permanent residence and acquisition of citizenship. In order to eradicate marriages of convenience, the following measures must be enforced prior to granting of permanent residence and citizenship on the grounds of marriage:

- Continuation of a marriage (faithful spousal relationship) for a period of at least five years must be confirmed before permanent residence is granted;
- Continuation of a marriage (faithful spousal relationship) for a period of at least five years after the granting of permanent residence must be confirmed before citizenship is granted.

In order to prevent fraudulent registration of marriages, the following measures will be introduced:

- Change of a person's status on the National Population Register, including marriage, will be done in accordance with the Protection of Personal Information Act. Furthermore, proof of consent from the data subject will be compulsory.

Co-conspirators for fraudulent marriages and marriages of convenience will be punishable by law.

4.13. Marriage Legal Framework

Generally, all laws in force immediately before the commencement of the Constitution, in any area that forms part of South Africa's national territory, continue to be in force subject to the Constitution, or their repeal or amendment by a competent authority.54 The democratic government seems to have embarked upon 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 policy 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.55

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 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.56 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.

---

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

55 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.

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

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.

Recommended Policy Intervention and Rationale

Ultimately, option 2, which is the Omnibus Marriage Act is the preferred legislative framework. The Omnibus Marriage Act is inclusive and balanced. On one hand, by accommodating marriages that don't currently find legislative expression in the country, it recognizes everyone's right to equal protection and benefit of the law. On the other hand, by containing different chapters that reflect the current diverse set of legal requirements for marriage, it ensures that constitutional principles such as equality, human dignity and right to freedom of religion and belief find expression in the contemplated legislative framework without retaining the limitations of the current marriage legislation.

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.[57] 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. Structural barriers

It will be prudent to take note of the existing structural barriers to the adoption of a new policy paradigm grounded in constitutional values. For example;

- The doctrine of entanglement. According to this doctrine, a court should only become involved in a dispute [involving religious doctrine] where it is strictly necessary for it to do so. Even then it should refrain from determining doctrinal issues in order to avoid entanglement.' It reasons that 'a proper respect for freedom of religion precludes courts from pronouncing on matters of religious doctrine'[2].
- Lack of understanding of the available marital property regimes and their consequences by members of rural cultural communities. How can we guarantee the efficacy of the new policy paradigm if a significant portion of the people that it will apply to do not understand the dimensions of the current paradigm?
- There are not enough marriage officers if any who come from traditional African communities, the Khoi and San community, the Muslim community the Rastafarian community and the LGBTQA+ community. In the circumstances these communities are not adequately catered for by the current system of solemnising and registration of marriages.

3. 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 –
    - 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; and
    - avoiding legal proceedings against one another.

[57] 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

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.

a) 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.

b) 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.

c) Department of Social Development is responsible for the following relevant legislation:
   - Children's Act 38 of 2005.
   - The African Charter on the Rights and Welfare of the child

d) Department of Women, Youth and Persons with Disabilities is responsible for the following relevant legislation:
   - SADC Gender and Development Protocol

e) 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.

4. 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; and
- Transparency must be fostered by providing the public with timely, accessible and accurate information.
- Good human resource management and career development practices, to maximise human potential, must be cultivated.
- Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.

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'.

5. 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 White Paper to the Minister by 31 September 2021
- Submit Final Draft of White Paper to Cabinet for Approval by 21 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.[58]However these dispensations have a history of inequitable and sometimes disastrous consequences for women and children[59]. Some of these defects have been cured through piecemeal yet far reaching constitutional court judgments however problems still remain. For example muslim marriages are not afforded the automatic court oversight of section 6 of the Divorce Act in relation to care and maintenance[60]. In the circumstances the policy positions to be investigated need to be carefully considered in order to adequately address outstanding deficiencies in South Africa's marital regimes especially when considering their effect on women and children.

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;
- 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 jewellery, 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 property regimes are fully applicable to civil unions.

---

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

[59] See in general Jacqueline Heaton "Striving for substantive gender equality in family law: Selected issues" South African Journal on Human Rights 2005 (21):4 547 et seq.

[60] De Rebus → Issues → Archive 2021 → Has Muslim personal law been given recognition in the light of the recent appeal court judgment?-accessed on 15 September 2021.

The same applies for customary marriages as evinced in the recent amendments to the Recognition of Customary Marriages Act 120 of 1998. Section 7(1) now provides that: The proprietary consequences of a customary marriage in which a person is a spouse in more than one customary marriage, and which was entered into before the commencement of this Act, [continue to be governed by customary law] are that the spouses in such a marriage have joint and equal—(i) ownership and other rights; (ii) rights of management and control, over marital property"[61]. Section 7(2) now provides: 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".

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.[62] 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.[63] The accrual of the estate of a deceased spouse is determined before any testamentary disposition is given effect.[64] 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.[65]

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.[66] 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 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.[67]

---

[61] Recognition of Customary Marriages Amendment Act, No. 1 of 2021.

[62] Ibid s4(1)(a).

[63] Ibid s4(1)(b).

[64] Ibid s4(2).

[65] Ibid ss4(1)(b) and s5.

[66] Ibid s2.

[67] Divorce Act 70 of 1979 s7(3)(a).

5. Public Comments on existing marital property regimes

South Africa (SA) is a religious and culturally diverse country where all cultural, religious and other belief systems are accorded equal constitutional protection. However, it can hardly be gainsaid that, in practice, certain religious beliefs and practices enjoy more protection and privileges than others[68]. For example, Muslim, Hindu and Khoi and San marriages do not have full legal recognition in South African law notwithstanding the protection they are entitled to in terms of the constitution. the lack of legal recognition of Muslim marriages was challenged in the case of "the Women's Legal Centre Trust v President of the Republic of South Africa and Others (United Ulama Council of South Africa and Others as amicus curiae) and two related matters.[69]This matter went all the way up to the Supreme Court of Appeals and the court held as follows;

- The Marriage Act and Divorce Act are declared inconsistent with the Constitution as they fail to recognise Muslim marriages.
- Section 6 of the Divorce Act is inconsistent with the Constitution as it fails to provide for mechanisms to safeguard the welfare of children of Muslim marriages.
- Section 7(3) of the Divorce Act is inconsistent with the Constitution as it fails to provide for redistribution of assets.
- Section 9(1) of the Divorce Act is inconsistent with the Constitution as it fails to make provision for forfeiture of matrimonial benefits of a Muslim marriage.
- Declarations of constitutional invalidity are referred to the CC for confirmation.
- The common law definition of marriage is declared inconsistent with the Constitution and invalid to the extent it excludes Muslim marriages.
- The declarations of invalidity in paras 1.1 to 1.4 are suspended for a period of 24 months to enable the President and Cabinet, together with Parliament to remedy the foregoing defects by either amending legislation or passing new legislation within 24 months in order to ensure the recognition of Muslim marriages as valid marriages for all purposes in SA and to regulate the consequences arising from such recognition.
- Pending legislation, a Muslim marriage may be dissolved in accordance with the Divorce Act as follows:
- The Divorce Act shall be applicable save that all Muslim marriages shall be treated as out of community of property, except where there are agreements to the contrary.
- Section 7(3) of the Divorce Act shall apply.

The Constitution accords both culture and religion equal recognition and protection. i.e.:

- 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 everyone the right to 'freedom of conscience, religion, thought, belief and opinion' but excludes culture;
- Section 30 confers every person the right to 'use the language and to participate in the cultural life of their choice' but only to the extent consistent with the Bill of Rights. The provision excludes religion;
- Section 31 entitles persons belonging to a cultural, religious or linguistic community –
    - (a) to enjoy their culture, practice their religion and use their language; and;
    - (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society'.

[68] De Rebus → Practice area → Constitutional law → Equality for all religions and cultures in the South African legal system- Ndivhuwo Ishmel Moleya

[69] [2018] 4 All SA 551 (WCC).

- Culture also enjoys special constitutional recognition and protection by virtue of ss 211 and 212 and 181(1)(c) of the Constitution. It is clear from the foregoing that neither culture, nor religion enjoy elevated constitutional protection. The mere fact that culture is not included in s 15(1) does not, in itself, point to its insignificance. If that were so, the same would be said of the exclusion of religion under s 30.

It is against this backdrop that public views and or perceptions on marital property regimes should be viewed. An analysis of public comments revealed a commonly held view that there should not be a default position in respect of a marital property regime. There is also a desire that all marital property regimes must be equally accessible.

However community of property comes into being by operation of law as soon as the marriage is solemnised[70]. It is arguably the most equitable marital property regime and it provides the most protection to the rights and interests of women and children. Its automatic application to marriages means that potential spouses have to actively opt out of this regime and incur the expense of having an ante nuptial contract drafted and notarized. In the very same breath it can be argued that it is the most accessible marital property regime.

The public comments also revealed concerns about the following:

- There is a problem with adequate consent or the lack thereof as occasioned by the lack of adequate pre-marital counselling on the consequences of each matrimonial property regime.
- The other marital property regimes (out of community of property with accrual and without accrual) are not accessible for the following reasons;
    - People in rural and township communities are not properly educated on the consequences of these regimes. Some members of the community do not even know they are available;
    - There are legal fees incurred when opting to have an ante nuptial contract drafted. This might dissuade people who might otherwise benefit from the protections offered by these regimes.
    - Lack of adequate training for marriage officers;

[70] JA ROBINSON-MATRIMONIAL PROPERTY REGIMES AND DAMAGES: THE FAR REACHES OF THE SOUTH AFRICAN CONSTITUTION - PER/PELJ 2007(10)-PG 71

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.[71] 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.[72] 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).

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.[73]

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.[74]

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.[75]

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.

---

71 Intestate Succession Act s1(1)(a).

72 Ibid s1(1)(c)(i).

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

74 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.

75 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[76] 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.[77] 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.[78]

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[79] 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.[80] 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.[81]

In the case of Kambule versus The Master[82], 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.[83]

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.[84] 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.[85]

---

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

77 Maintenance of Surviving Spouses Act s2(1).

78 Ibid s3.

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

80 Ibid para 3–4.

81 Ibid para 18.

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

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

84 Divorce Act s3(a)-(b).

85 Ibid s7(1)-(2).

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,[86] 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.[87] The 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).[88] The court therefore ordered that 50% of the plaintiff's assets be transferred to the defendant.[89]

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.[90]

The court in KT v MR[91] 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.[92] 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.[93]

The constitutionality of the Divorce Act was challenged in the Women's Legal Trust matter[94] in this matter the lack of automatic court oversight of section 6 of the Divorce Act in relation to care and maintenance in Muslim marriages was challenged, amongst others. Following the declaration that the state was obliged by the Constitution to establish legislation to recognise Muslim marriages as valid marriages and regulate the consequences of such recognition by the Western Cape High Court, the supreme court of appeal held;

- The Marriage Act and Divorce Act are declared inconsistent with the Constitution as they fail to recognise Muslim marriages.
- Section 6 of the Divorce Act is inconsistent with the Constitution as it fails to provide for mechanisms to safeguard the welfare of children of Muslim marriages.
- Section 7(3) of the Divorce Act is inconsistent with the Constitution as it fails to provide for redistribution of assets.
- Section 9(1) of the Divorce Act is inconsistent with the Constitution as it fails to make provision for forfeiture of matrimonial benefits of a Muslim marriage.

---

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

87 Ibid para 2.

88 Ibid para 15.

89 Ibid para 20.

90 Op cit Note 19 s9(1).

91 *KT v MR* 2017 (1) SA 97 (GP).

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

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

94 President of the RSA and Another v Women's Legal Centre Trust and Others; Minister of Justice and Constitutional Development v Faro and Others; and Minister of Justice and Constitutional Development v Esau and Others (SCA) (unreported case no 612/19, 18-12-2020)

- The common law definition of marriage is declared inconsistent with the Constitution and invalid to the extent it excludes Muslim marriages.
- The declarations of invalidity are suspended for a period of 24 months to enable the President and Cabinet, together with Parliament to remedy the foregoing defects by either amending legislation or passing new legislation within 24 months in order to ensure the recognition of Muslim marriages as valid marriages for all purposes in SA and to regulate the consequences arising from such recognition.
- Pending legislation, a Muslim marriage may be dissolved in accordance with the Divorce Act;
- The Divorce Act shall be applicable save that all Muslim marriages shall be treated as out of community of property, except where there are agreements to the contrary.
- Section 7(3) of the Divorce Act shall apply.
- In the case of a husband who is a spouse in more than one Muslim marriage, court:
    - Shall consider any contract or agreement and must make an equitable order.
    - May order person with sufficient interest joined in proceedings.
    - Declared that s 12(2) of the Children's Act 38 of 2005 applies to Muslim marriages.
    - The provisions of s 3 of the Recognition of Customary Marriages Act 120 of 1998 apply to Muslim marriages.
    - Any interested party may approach the court.

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.[95]

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.[96] 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.[97]

[95] Matrimonial Affairs Act s1(1)(a)-(b).

[96] Ibid s1(3).

[97] 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.[98] 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.[99] Section 22(6) of the Act prescribed that all civil marriages between black persons were automatically out of community of property.[100] 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,[101] 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.

The default position for all other married couples in South Africa is in community of property. However, African couples married before 1988 were excluded[102] 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.[103] 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 Act[104] 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.

[98] See Section 172 of the Constitution.

[99] s22(6) repealed by Madondo DJP.

[100] 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'.

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

[102] 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.

[103] para 53

[104] Act 70 of 1979

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[105], the Constitutional Court was faced with the issue of determining 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 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,[106] 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.[107] 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)[108] and (2),[109] 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.[110]

The judgment in Women's Legal Centre Trust v President of the Republic of South Africa and Others[111] 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.[112]

Similarly the judgments in Faro v Bignham[113] 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.

---

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

[106] Gumede v President of the Republic of South Africa and others 2009 (3) BCLR 243 (CC)

[107] Natal Code of Native Law Proclamation 168 of 1932

[108] 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.

[109] (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.

[110] para 21

[111] 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).

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

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

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[114] 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. 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. This constitutional incongruity was addressed comprehensively by the Supreme Court of appeals in the Women's Legal Trust case[115]. The details of the order are elucidated above. The effect of the order is that a court may redistribute assets of a couple of a Muslim marriage on the dissolution of the marriage in a manner, which the court may deem just. The wife may also be granted maintenance beyond the iddah period ('the period a woman must observe after the death of her spouse or after a divorce, during which she may not marry another man. Its purpose is to ensure that the male parent of any offspring produced after the cessation of a nikah (marriage) would be known' unless there is an agreement on dissolution[116].

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

[115] Supra 103

[116] Supra 69