

# From the African Customary Marriages Law to the Recognition of Customary Marriages Act (Act 120 of 1998) (RCMA): A Descriptive Analysis

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**ABSTRACT** Marriage is the approved social pattern whereby two or more persons establish a family. In South Africa within the last two decades, there has been a crumbling of an oppressive legal order (apartheid), which was replaced by a new democratic order. This new order does not seem to have affected only the apartheid legacy, but it has also affected other spheres of life, marriage being one of them. Concerning customary marriages, an Act of Parliament known as the *Recognition of Customary Marriages Act (Act 120 of 1998)* (RCMA) was enacted to give effect to the new legal order, that is, in particular, to address the inequality that had been midwifed by customary practices. The study made use of the qualitative research approach to collect data from secondary resources. This paper seeks to describe, compare and analyze the transition from customary marriages law practices to the RCMA practices in South Africa.

## INTRODUCTION

In South Africa, customary marriages under the apartheid legal order were regulated by customary law, while under the new democratic order are regulated by RCMA.

Under the customary marriages law, there is a glaring bias in the unequal treatment of husbands and wives. The unequal treatment of husbands and wives under customary marriages law is evident in the following, that is, consent to enter marriage, status and capacity, gender roles, polygamy, proprietary implications of customary marriages, and dissolution of customary marriages (Hughes 2014: 59).

The RCMA was enacted to regulate and harmonize customary marriage principles and guidelines with the requirements of the Constitution, which is the supreme law of the country. The RCMA achieves all the above by specifying requirements for a valid customary marriage, regulating the registration of customary marriages, providing for the equal status and capacity of spouses, giving legal recognition to both monogamous and polygamous customary marriages, and determining the manner in which a customary marriage may be ended.

## METHODOLOGY

The researcher employed the qualitative method to collect data from secondary sources, namely, books, journals and articles by various authors and scholars. A comprehensive literature review was undertaken to explore the transition of customary marriage practices from customary marriages law period to the RCMA.

## OBSERVATIONS

It has been observed that prior the enactment of the RCMA, customary marriage laws in South Africa were framed in favor of men and at the disadvantage of women. This means that social change was desirable. However, the change from customary law marriages to the provisions contained in the RCMA is highly beneficial in that gender-based discrimination, such as insubordination and oppression of women in customary marriages, is abolished by law. This is evident in the following respects:

1. The validity of customary marriages is now based on the free and voluntary consent of both partners in any case.
2. Both the husband and the wife now have full status and capacity.

3. The division of work and responsibilities between the husband and wife is no longer based on gender.
4. Engaging in additional customary marriages by the husband is regulated by courts.
5. Both the husband and wife may now choose to exit a customary marriage with legal backing and enjoy the same rights during divorce.

It is worth noting that there are still couples married under the customary marriages law who despite all the benefits cited above are not willing or prepared to change their marriage regime to the RCMA. Failure to change their customary marriage regime to the RCMA could be attributed to lack of knowledge of the legislation or ignorance.

### DISCUSSION

The RCMA was enacted in terms of section 15(3) of the Constitution of the Republic of South Africa Act (Act 108 of 1996), specifically to recognize customary marriages. In other words, customary marriages are recognized in terms of the RCMA. Following this is the discussion of each aspect of customary marriages law, which conflicts with the requirements of the Constitution and how the RCMA seeks to redress it.

#### Consent

Consent is one of the requirements for a customary marriage to be valid under the RCMA. In most customary marriages women have a silent voice on the issue of consent. The parties to the marriage are often not involved in the marriage negotiations. Marriage issues are dealt with entirely by the two families, the groom's and the bride's. Marriage proposals are initiated by the groom's family (Olivier et al. 1995: 19). The validity of the marriage is not based on the free and voluntary consent of the partners in any case (Bennett 2008: 212). The consent of the woman, in particular, is not required for a customary law marriage as it is considered irrelevant. The consent of the bride's father is essential for a customary marriage to be valid. This means that women in particular are generally forced to enter into customary marriages without their consent. According to Maluleke (2012: 11), sometimes a girl or a young woman is kidnapped 'by a man and his friends or peers with the intention of

compelling the girl or young woman's family to endorse marriage negotiations'. By kidnapping the girl or young woman she is forced to enter into marriage without her consent. There are also instances when widows are also compelled to marry the brother or any male relative of the late husband. This is often done without the widow's consent (Maluleke 2012: 11). According to Higgins et al. (2006: 24), the husband's family enforces this practice because 'the family had paid the bride price, and hence she must remain with them'. The payment of bride price in this instance creates a sense of ownership on the part of the husband's family and seems to commodify the woman. Many wives married under customary law therefore stay in the marriage not by choice or consent.

The customary law marriage practice cited above shows that women are discriminated against, as they do not have the same rights as men to enter into marriage with free and full consent.

In order to ensure that women have the same right to enter into marriage by choice with free and full consent, section 3(1) (a) (ii) of the RCMA provides that for customary marriages to be valid, that is, "the prospective spouses must both consent to be married to each other under customary law".

This means that the RCMA would not recognize a customary marriage, which is entered into without the consent of both spouses. It gives individuals, especially women, the right to reject the customary marriages they do not wish to enter into (Higgins et al. 2006: 1671). The above provision of the RCMA directly contradicts the provision of customary law marriage, in which the consent of parties, especially the bride, is considered irrelevant and is not even required.

#### Status and Capacity

Under most customary laws, the husband heads the family. According to Mamashela and Xaba (2003), "the husband is the head of the family and the wife is under his guardianship".

He is the sole holder of decision-making power and authority in the family. The wife is considered inferior while her husband is regarded as her legal guardian (Maluleke 2012: 11). Bennett (2008: 03), quoting Ramphele and Boonzarier (1988), states the following regarding the sta-

tus of a woman from the Inkatha's *Ubuntu-Botho* (Good Citizenship):

*The woman knows that she is not equal to her husband. She addresses her husband as 'father' and by doing so the children also get a good example of how to behave. A woman refrains from exchanging words with a man, and if she does, this reflects bad upbringing on her part.*

The wife is not generally permitted to take any decision without the husband's approval. Even in the absence of the husband, she may have to wait for his authorization, irrespective of the urgency of the decision that has to be taken. This suggests that the husband has the decisive voice on most matters (Higgins et al. 2006: 1659).

Women are perpetual minors under the South African customary law. As the head of the family, the husband is in charge of the marital property, and he has full capacity to use, abuse or dispose of matrimonial property. The woman lacks the capacity to do so and would need the permission and approval of her husband (Tshwaranang Legal Advocacy Centre (TLAC)). This demonstrates that the wife does not enjoy full status and capacity in equality with her husband. In other words, customary marriage does not provide for the equal status and capacity of the spouses (Olivier et al. 1995: 5).

In order to improve the status and legal capacity of women in customary marriages, Section 6 of the RCMA provides for the equal status and capacity of spouses. It states the following:

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

This means that all the assets and liabilities, which the husband and the wife have in terms of the RCMA, fall into the joint or communal estate of both the spouses, subject to the matrimonial property system that governs their marriage. Unless otherwise stated in the antenuptial contract, which regulates the matrimonial property system of their marriage, both the husband and the wife in a customary marriage own all property and other assets equally. They are likewise

jointly and severally liable for all debts and liabilities.

### Gender Roles

The concept gender refers to the feelings, attitudes and behaviors that a particular culture or social group associates with the state of being a male or female. It is the gender socialization in customary law that teaches people that males and females have different roles. This means that in customary law marriages, there is a highly gendered division of labor between the wife and the husband. Olivier et al. (1995: 4) state that under customary law, "generally, there is an accepted division of labor between the sexes".

The roles of husbands and wives are clearly defined as follows. Husbands are generally responsible for livestock, ploughing and building of homesteads. They also hold the positions of authority in almost all social institutions, including religion and work. They are responsible for the family's monetary and physical survival. They are perceived as warriors and should be able to protect themselves and their families.

Wives on the other hand are responsible for harvesting as well as all the domestic chores, which include managing and directing the affairs of the household, such as cooking, cleaning and taking care of the children. This means that they are considered homemakers and nurturers.

According to Higgins et al. (2006: 9), these social and cultural patterns of conduct of husbands and wives "...are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women".

In the quest to eliminate customary law patterns of conduct of husbands and wives that reflect the inferiority or the superiority of either of the sexes or stereotyped gender roles for husbands and wives, the RCMA has sought to neutralize gender roles. In terms of the RCMA, the division of work and responsibilities within a customary marriage is not based on gender. In essence, there is no specific task meant for the husband and the wife. If a spouse carries out a particular task, it should be by choice or consent, not by being compelled by gender ascriptions. In terms of the RCMA there is nothing wrong with the husband cooking, cleaning and taking care of the children's tasks, which in terms of customary law would be defined as feminine tasks. The same applies to a wife (Higgins et al.

2006:1659). This position is in line with the equity theory, which proposes that husbands and wives in equitable marriages should be fairly content and satisfied.

### **Polygamy**

Polygamy is the practice of having more than one spouse (wife or husband) at a time. This practice allows a husband to have several wives, which is termed polygyny, or a wife to have several husbands, which is termed polyandry. It simply means a plurality of husbands or wives. Cases of polyandry, where a woman can have more than one husband at the same time are rare under African customary law (Bennett 2008: 03). For the purposes of this paper, only polygyny, which is the marriage of a husband to more than one wife, is considered. Polygyny is widely practiced in almost every African traditional society (Mbiti 1990: 82). Under customary law, husbands are generally free to enter into as many subsequent additional marriages as they can afford to support (Higgins et al. 2006:1684). Customary law does not require the husband to obtain the consent of the first wife to engage in further marriages. The same freedom granted to husbands to enter into further marriages by customary law is not granted to wives. Thus polygyny denies wives their right to equality by increasing the factors that engender unequal power relations. This denial is in violation of equality clause in section 9 of the Constitution.

In seeking to protect the rights of the first wife or wives, section 7(6) of the RCMA provides that a husband who wishes to enter into an additional customary marriage with another woman after the commencement of the RCMA must apply to court to approve a written contract, which will regulate the future matrimonial property system of his marriages (that is, the existing marriage and the prospective one). This implies that the RCMA protects the rights of the wife by specifying a change in the matrimonial property regime and a division of existing matrimonial property. The RCMA seeks to ensure that the first wives become parties to polygamy by choice or consent.

### **Proprietary Implication**

Given that in most customary marriages the husband is the head of the family, he has seemingly absolute control over matrimonial property. Upon divorce he gets virtually everything

and the wife is entitled to virtually nothing but her personal belongings (Higgins et al. 2006: 1659). Her personal belongings under Venda customary law are cited by Olivier et al. (1995: 51) as including,

*Her clothing and ornaments, all gifts given to her by her family, for example, cattle, poultry, domestic appliances, and the increase of these animals, earnings of the wife, for example as a herbalist when she learned the art from her family.*

She would not even have a say in the administration of the marital property, as she is regarded as property (Bennett 2008: 247).

This means that in terms of customary law, the default matrimonial property regime is not in community of property, but separate property. This default matrimonial property regime is based on contributions to property acquired during a marriage. Gender roles attached to husbands include making a contribution to the matrimonial property, while gender roles attached to the wives, which include discharging household duties, are considered as minimal or no contribution at all. Hence, upon divorce, she can only take her personal belongings (Higgins et al. 2006: 1659).

In the quest to ensure equitable division of marital property upon divorce, section 7(2) of the RCMA provides that:

*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.*

It means that the RCMA, in the determination of marital property, accords financial and non-financial contributions of the husband and the wife the same or equal weight, unlike under customary law, in which other contributions, such as raising children and discharging household duties by the wife, are viewed as non-contribution. Most often such non-financial contributions by the wife are the ones that enable the husband to earn an income and increase the marital property (Higgins et al. 2006: 1659).

The default matrimonial property regime under the RCMA is in community of property. According to Mamashela and Xaba (2003), this new

matrimonial property regime, "... that is, community of property, implies a drastic change in the matrimonial regime of the customary marriage".

Deviation from the above default regime is by choice, which still needs to be approved by the court (Higgins et al. 2006: 1659).

### **Dissolution of Customary Marriages**

In terms of customary law, whenever there is a marital dispute, it is a matter for the families to attend to. The aim of the family in resolving the dispute is reconciliation, and divorce is not an option. According to Olivier et al. (1995: 51),

*In traditional societies dissolution of marriage is not easily resorted to. The complex personal relationships, the property implications, the care of the children, moral and social considerations and the subordinate status of the wife, all factors tend to stabilize the marriage and cause dissolution to be resorted to only in exceptional circumstances.*

Customary law provides that in the case of a marital dispute, the aggrieved spouse complains or registers his or her dissatisfaction and intentions to file for divorce with the husband's senior family members, particularly the senior aunt (Olivier et al. 1995: 50). This means that the wife is not even allowed to consult any member of her family before consulting her husband's family. It also suggests that under customary law, it is difficult for a woman to obtain a divorce. Upon receiving the grievance or intention to divorce the matter would at first be attended to by the husband's family, which could be biased in their determination in that the same misconduct could be condemned if committed by the wife and condoned if committed by the husband. Under customary law, the grounds available to men for divorce are more than those available for the women.

According to Herbst and du Plessis (2008: 11 ),

*If a woman returned to her father's household owing to ill treatment by her husband or any other valid reason, a husband may phutuma (fetch) his wife by paying a fine to his wife's father.*

This means that it is relatively hard for a wife to divorce her husband. If she wants to exit from customary marriage, the option would be to flee. This suggests that the wife's access to divorce in terms of customary law is limited, meaning that the husband and the wife do not have equal

access to divorce (Higgins et al. 2006: 30). Sometimes women are forced to stay in demeaning marriages because their families are unable to make bride price repayment to the husband's family (Gibbs 1963: 558). They would compel her to stay in the marriage regardless of her discomfort. This suggests that bride price payment limits the wife's ability to exit marriage. This means that wives married under customary law may stay in marriage not by choice.

Seeking to level the playing field in women's access to divorce, Section 8(1) of the RCMA provides that "a customary marriage may only be dissolved by a court by a decree of divorce on the ground of the irretrievable breakdown of the marriage".

This means that women, on an equal basis with men, may choose to exit a customary marriage with legal backing and enjoy the same rights as men during divorce.

### **CONCLUSION**

In South Africa, prior 1998, most customary marriage law practices were tilted in favor of men and to the disadvantage of women. The Constitution of South Africa, being the supreme law of the country, is one tool that abolishes customs or practices, including customary marriages practices, which are inconsistent or in violation of its provisions. The RCMA is no doubt a commendable and timely step in redressing the collusion between the apartheid legal order, patriarchy and customary marriage law, which were discriminatory against women in particular. However, both the South African Constitution (Act 108 of 1996) and the RCMA seem to have set up a potential conflict in the context of customary marriages in that men who are strongly committed to customary norms may feel that their practices are being curtailed.

### **RECOMMENDATIONS**

Although change is hard and painful, it was worthwhile, in order for customary marriages to change from the South African Customary Marriages Law to the RCMA in line with the provisions of the Constitution. With many people still resisting change by not registering their customary marriages under the RCMA, it is recommended that the Department of Home Affairs should ensure that prospective couples and

couples married under customary law are educated about the legality of customary law marriages and are sufficiently motivated to want to register their customary law marriages under the RCMA. This could be achieved by visiting traditional tribal offices, chiefs' kraals and community cultural functions. Since most people in rural areas have great confidence in their traditional leadership, which is inspired by their ready accessibility and availability, the state should create conditions that would ensure that traditional leaders, being the custodians of culture, become agents of change in their communities.

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