



PROJECT 144

SINGLE MARRIAGE STATUTE

ISSUE PAPER 35

Closing date for comment

31 August 2019

ISBN: 978-0-621-47268-4

Introduction

The South African Law Commission was established by the South African Law Reform Commission Act, 1973 (Act 19 of 1973).

The members of the South African Law Reform Commission are –

The Honourable Mr Justice Narandran (Jodie) Kollapen (Chairperson);
Mr Irvin Lawrence (Vice-Chairperson);
Prof Mpfariseni Budeli-Nemakonde;
Adv Johan de Waal SC;
Prof Wesahl Domingo;
Prof Karthi Govender;
Adv Retha Meintjes SC;
Adv Anthea Platt SC; and
Adv Tshepo Sibeko.

The members of the Advisory Committee appointed for this investigation are:

Professor Ronald Thandabantu Nhlapo, emeritus professor of private law and former Deputy Vice-Chancellor at the University of Cape Town (Chairperson).
Prof Wesahl Domingo of the University of the Witwatersrand (Project Leader);
The honourable Mr Justice Mahomed Navsa of the Supreme Court of Appeal;
Prof Amanda Barratt of the University of Cape Town;
Prof Elsje Bonthuys of the University of the Witwatersrand;
Ms Mothokoa Phumzile Mamashela; emeritus senior researcher of the University of Kwa-Zulu Natal;
Mr Motseotsile Clement Marumoagae of the University of the Witwatersrand; and
Prof Christa Rautenbach of the North West University.

The Secretary of the SALRC is Mr Nelson Matibe. The project leader responsible for this investigation is Prof Wesahl Domingo.

The SALRC's offices are located in the Spooral Park Building, 2007 Lenchen Avenue South, Centurion.

Correspondence should be addressed to:

The Secretary
South African Law Commission
Private Bag X668
PRETORIA
0001

The researcher assigned to this investigation is Mr Pierre van Wyk.

Telephone: (012) 622 6317
E-mail: pvanwyk@justice.gov.za

Preface

This issue paper is the first document published during the course of this investigation. It aims to announce the investigation, initiate and stimulate debate, seek proposals for reform, and will serve as a basis for further deliberation by the Commission. At this stage the paper does not contain proposals for law reform.

The Commission seeks comments on any issues contained in the issue paper, and on any related issues. Comments will provide direction on the proposed scope and focus of the investigation.

The Commission assumes that respondents agree to the attribution of and quoting from their comments, unless representations are marked confidential. Respondents should be aware that the Commission may in any event be required to release information contained in the representations in terms of the Promotion of Access to Information Act 2 of 2000.

On the strength of these responses a discussion paper will be prepared, setting out the Commission's provisional proposals. Responses to the discussion paper will then be collated and evaluated to prepare a report setting out the Commission's final recommendations. The report (with draft legislation) will be submitted to the Minister of Justice and Correctional Services for submission to the Minister of Home Affairs.

Respondents are requested to submit written comment, representations or submissions to the Commission by **31 August 2019** at the addresses appearing on the previous page.

Any enquiries should be addressed to the Secretary of the Commission or the researcher allocated to this project, Pierre van Wyk.

This issue paper is also available on the Internet at:
<http://www.justice.gov.za/salrc/ipapers.htm>

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Chapter 1

A. The inclusion of the investigation in the SALRC's research programme

1. Request that this investigation be conducted

1.1 In response to an invitation from the Minister of Justice and Constitutional Development, Minister Radebe, in 2013 to suggest areas of research for consideration of the South African Law Reform Commission (SALRC), Minister Pandor, then Minister of Home Affairs, replied that:

The ministry of Home Affairs would like to propose the investigation of the development of a single Marriage Act for South Africa.

Such an Act will enable South Africans of different religious and cultural persuasions to conclude legal marriages that will accord with the doctrine of equality as set out in the Constitution of the Republic of South Africa.

We propose that the study should be a comparative study that will serve to inform our country's reform of the marriage dispensation in South Africa. This will, I believe, create a legal marriage regime that will create universal provisions that adequately cover the interests that the state holds in marriage contracts while providing due recognition to all religious and cultural marriage practices.

1.2 Minister Pandor attached an explanatory appendix to her letter which set out the Department's concerns and interests of the Department of Home Affairs, including the possibility that:

a single marriage Act that will enable South Africans of different religious and cultural persuasions to conclude legal marriages that will accord with the doctrine of equality as encapsulated in the Constitution of the Republic of South Africa ...

We inherited a marriage regime that was based on the Calvinist Christian tradition which stemmed from the era where the state and church were mutually reinforcing if not synonymous. Accordingly there are strong references in some of the laws governing marriage that harken to the religious marriage rituals practiced in the Christian marriages. 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.

However instead of developing a single marriage regime that would take adequate cognizance of the separation between the state and churches, it appears as though the department together with the Justice department sought to give recognition to different marriage rituals through passing a range of different marriage laws. Instead of creating a harmonized system of marriage in South Africa, there are now parallel structures that stand side by side.

Given our diversity it is virtually impossible to pass legislation governing every single religious or cultural marriage practice, and it appears to me that this is not the best practice internationally.

The state has a few vested interests as it pertains to the institution of marriage in regard to its citizens primarily: some of these relate to the acquisition of citizenship; the establishment of consent and the marital age. Polygamy is also practiced by a wide range of religious and cultural traditions in South Africa. In this regard the issue of social justice is required to be maintained and the state in recognizing marriages in this context extends its protection over each of these relationships. In addition, our department has a duty to ensure that each person's status is accurately captured on our data base which is ultimately going to underpin many other digital systems of government and will in future also extend into our broader economy. The accuracy and integrity of our data base is therefore a major concern for our department as we invest huge sums of money to evolve into a more secure and trusted system of identity and status.

Beyond the above considerations, the state should have no interest in who one marries, how the religious or cultural rituals are conducted and should therefore have no interest in giving legal legitimacy to one or other practice in relation to the conclusion of a marriage. In our endeavour to do so however, government has expended much time and resources without achieving integrity in relation to those aspects of primary concern to the state ...

It is therefore my submission that the Law Reform Commission be requested to embark on a comparative study to inform the department's reform of the marriage dispensation in South Africa, in order to instil universal provisions that adequately cover the interests that the state holds in marriage contracts while according due recognition to all religious and cultural marriage practices.

2. Consideration by the Commission of the request for inclusion of proposal

1.3 Minister Pandor's request was considered according to the SALRC selection criteria and a proposal paper compiled for consideration by the Commission.

1.4 The Deputy Minister of Home Affairs raised the issue of sham marriages with the Chairperson shortly before the Commission's first meeting in 2016. The proposal paper of 17 September 2016 did not include issues around sham or bogus marriages.

1.5 The proposal paper identified the scope of the proposed investigation as follows:

- determining the possible development of a comprehensive single marriage statute to allow persons of all religious persuasions and cultural practices in South Africa to conclude legal marriages that will accord with the doctrine of constitutional equality, the acquisition of citizenship by marriage;
- determining whether parties consent to marriage;
- what the marital age ought to be;
- affording recognition to all polygynous marriages;
- regulating marriage notice requirements;
- certification of marriage officers from all religious denominations and recognised traditional leaders;

- comparative practices in other countries with diverse communities and with similar constitutions to the South African Constitution; and
- ensuring that the interests of the state are adequately and properly taken into account by the proposed legislation.

1.6 The Commission decided at its meeting on 17 September 2016 that the proposal paper should be adapted for purposes of a meeting which was to be held between the Chairperson of the SALRC and the Deputy Minister of the DHA to clarify the scope of the investigation. Sham marriages were addressed in the adapted proposal paper. The meeting between the Chairperson and the Deputy Minister of the DHA was finally held on 22 May 2017. The Chairperson, the Secretary of the SALRC, a DHA official and the Deputy Minister of the DHA attended the meeting where clarity about the scope of the investigation was obtained.

3. Approval by the Commission for the inclusion of the investigation in the programme

1.7 At its meeting on 17 September 2017 the Commission approved the recommendation to the Minister to approve the inclusion of the investigation in the SALRC's research programme.

4. Approval by the Minister of the inclusion of the investigation in the research programme

1.8 In October 2017 the SALRC recommended to the Minister of Justice and Correctional Services that he approves, in terms of section 5(1) of the South African Law Reform Commission Act 19 of 1973, the inclusion of an investigation into the possible adoption of a single marriage statute, including measures against sham measures in the law reform programme of the SALRC; and that an 'A' priority rating be allocated to this investigation.

1.9 On 1 November 2017 the Minister approved the inclusion on the research programme of the SALRC of an investigation into the possible adoption of a single marriage statute including measures against sham marriages.

B. Appointment of an advisory committee to assist the SALRC

1.10 The Commission considered and nominated the following candidates for appointment as advisory committee members to the Minister of Justice and Correctional Services for this investigation:

- 1.10.1 Professor Amanda Barratt of the University of Cape Town;
- 1.10.2 Professor Elsje Bonthuys of the University of the Witwatersrand;
- 1.10.3 Ms Mothokoa Phumzile Mamashela; emeritus senior researcher of the University of Kwa-Zulu Natal;
- 1.10.4 Mr Motseotsile Clement Marumoagae of the University of the Witwatersrand;
- 1.10.5 Professor Ronald Thandabantu Nhlapo, emeritus professor of private law and former Deputy Vice-Chancellor at the University of Cape Town; and
- 1.10.6 Professor Christa Rautenbach of the North West University.

1.11 The Minister approved the appointment of the advisory committee members on 24 January 2018.

1.12 At its first meeting on 21 April 2018 the advisory committee resolved that its committee membership be increased with one additional member. Judge of Appeal Mahomed Navsa of the Supreme Court of Appeal – who was the chairperson of the SALRC’s investigation into Muslim personal law in the early 2000s – was nominated as advisory committee member to the Minister and appointed by the Minister on 22 August 2018.

C. The advisory committee’s recommendations on the scope of the investigation

1.13 The advisory committee met for the first time on 21 April 2018 and proposed that the Issue Paper should deal with the following issues:

- 1.13.1 The different forms of marriages provided for by present legislation, namely the civil and religious marriages in terms of the Marriage Act of 1961; the customary marriages in terms of the Recognition of Customary Marriages Act of 1998 (RCMA); civil unions in terms of the Civil Unions Act of 2006; and other types of unrecognised religious marriages and intimate unrecognised relationships.
- 1.13.2 Intimate unmarried partnerships.

- 1.13.3 The meaning of marriage as compared with sham marriages.
- 1.13.4 The meaning and consequences of pluralism in the South African family context.
- 1.13.5 Ensuring that the interests of the state are adequately taken into account by the proposed legislation.
- 1.13.6 The constitutional imperatives and South Africa's treaty obligations in relation to marriage and civil partnerships.
- 1.13.7 A comparative study with emphasis on other jurisdictions with similar pluralistic systems.
- 1.13.8 Whether the investigation should include consequences of marriages in relation to maintenance and the division of property given the ongoing investigations by the SALRC on maintenance and matrimonial property.
- 1.13.9 Dissolution of marriages and unmarried intimate relationships.
- 1.13.10 The use of alternative dispute resolution to resolve issues around property distribution when marriages and unmarried intimate relationships come to an end.
- 1.13.11 The impact of the single marriage statute in relation to associated legislation, including the Divorce Act, the Matrimonial Property Act, guardianship, succession, etc.

D. Approval of the Issue Paper for publication

1.14 The advisory committee considered a first draft issue paper at its second meeting held on 29 September 2018. It decided about amendments which had to be effected. The advisory committee considered a further draft issue paper at its third meeting held on 2 March 2019. The advisory committee approved recommending to the Commission the publication of the draft issue paper subject to further amendments which were subsequently effected.

1.15 The Commission considered the draft issue paper at its meeting on 16 March 2019 and approved the publication of the issue paper for general information and comment.

E. The quest for uniform marriage legislation

1.16 The SALRC has, in the past, investigated the viability of uniform marriage legislation governing all marriages entered into in South Africa. The SALRC's Project 90 into *the*

Harmonisation of the Common Law and the Indigenous Law: Report on Customary Marriages,¹ in accordance with its title, sought to create a uniform code of marriage law which would apply to all South Africans.²

1.17 This aim struck a ready chord with several respondents.³ Some respondents proposed a striking image of marriage as 'a house with many doors', implying that, there should be a single set of minimum requirements and consequences for marriage, which would be accessible through many cultural and religious 'doors' for Muslim, Hindu, Jewish, African and other communities alike.

1.18 The SALRC noted that South Africa's new Constitution provided the opportunity to make a break with the past⁴ to send a clear message that discrimination would no longer be tolerated. The SALRC was of the view that that message had to be reflected in the principle of a single marriage law which would apply equally to all South Africans. Equality would bring not only a new respect for the African legal tradition and improve the position of women and children who had been previously disadvantaged by the old regime. In addition, other, more technical factors supported the creation of a single marriage statute.⁵ Apartheid policies had led to a proliferation of legislation on family law in the former homelands, including a Marriage Act in Transkei, a Succession Act in Bophuthatswana, a new Code of Zulu law in KwaZulu and various decrees governing marriage in Ciskei. The conflicts between these different marriage laws created legal uncertainty and confusion.⁶

1.19 The SALRC felt that marriage was an area where citizens should know what their rights and duties are.⁷ The SALRC therefore considered that a single code of law would go part of the way to meeting this requirement. The SALRC was forced, however, to abandon its initial objective.⁸ It noted that despite the sound arguments in favour of a unified marriage law, a measure of dualism was inevitable, and a compromise on the issue of unification was required by ss 30 and 31 of the Bill of Rights.

¹ SALRC *Report on Customary Marriages* see http://www.justice.gov.za/salrc/reports/r_prj90_cstm_1998aug.pdf.

² SALRC *Report on Customary Marriages* paras 2.1.1 – 2.2.31.

³ SALRC *Report on Customary Marriages* par 2.1.2.

⁴ SALRC *Report on Customary Marriages* par 2.1.5.

⁵ SALRC *Report on Customary Marriages* par 2.1.6.

⁶ SALRC *Report on Customary Marriages* par 2.1.8.

⁷ SALRC *Report on Customary Marriages* par 2.1.10.

⁸ SALRC *Report on Customary Marriages* par 2.1.11.

1.20 Instead of fixating over the debate about unification or plurality of laws, the SALRC focused on the need to solve common social problems like spousal violence, child custody disputes and claims for post-marital financial support. The SALRC sought to create effective means of remedying these problems which would offend neither the aim of unification nor that of cultural pluralism. Because the urgent need to alleviate conditions for vulnerable women and children in customary law required immediate action, it was decided to proceed with reform of customary marriage, while leaving the issue of a unified system of marriage law for future consideration. The SALRC argued that retaining a separate system of customary marriage should not, however, imply permanently abandoning the ideal of unification.⁹ The SALRC considered that experience and further study would deepen and advance understanding of the problems associated with Hindu, Muslim and other forms of marriage, and that the goal of legal unity could be pursued in future legislation. The question arises whether these considerations and concepts of unification had not changed in the meantime in light of experience since the late 1990s?

1.21 In 1996 the Department of Home Affairs requested that the SALRC review and investigate the Marriage Act 25 of 1961 with the aim of creating a new marriage dispensation for South Africa which would comply with the dictates of the Constitution of 1996.¹⁰ The SALRC consequently conducted a review of and issued a report on the Marriage Act in May 2001, focussing on the need to amend certain provisions of the Marriage Act of 1961. One respondent pointed out that, at the time, the SALRC was conducting four separate investigations on different themes: the Review of the Marriage Act (project 109); Customary Marriages (project 90); Islamic Marriages and Related Matters (project 59); and Domestic Partnerships (project 118).¹¹ The respondent suggested that this piecemeal approach be replaced with a holistic view of the interrelated issues in all these statutes. Another respondent argued that research on Muslim and Hindu marriages should be finalised before incorporating all marriage laws into a single statute¹² based on common principles and rules. Another view contended that the narrow focus on marriage should be expanded to protect vulnerable family members even outside of marriage.¹³ To this end, it was suggested that families be afforded legal protection based on their social and economic functions rather than reserving protection only for those who fit into the monogamous, nuclear, heterosexual family form.

⁹ SALRC *Report on Customary Marriages* par 2.1.28.

¹⁰ SALRC *Report on the Review of the Marriage Act 25 of 1961* (Project 109) par 1.1.1 see http://salawreform.justice.gov.za/reports/r_prj109_marr_2001may.pdf.

¹¹ SALRC *Report on the Review of the Marriage Act* par 2.1.3.

¹² SALRC *Report on the Review of the Marriage Act* par 2.1.4.

¹³ SALRC *Report on the Review of the Marriage Act* par 2.1.5.

1.22 The SALRC was not at the time persuaded by arguments that all marriages and intimate relationships should be regulated by a single statute.¹⁴ It was of the view that the amendments which were identified in its review of the Marriage Act should be implemented forthwith, and that a consolidated statute to address civil, religious and customary marriages could be enacted in future. The SALRC did not foresee that this approach would result in contradictory statutory provisions regulating different forms of marriage.

1.23 The SALRC's 2006 Report on Domestic Partnerships dealt with the lack of legal recognition and regulation of permanent unmarried intimate relationships between people of the same- or opposite-sex.¹⁵ The SALRC recommended that an inclusive definition of marriage be inserted into the Marriage Act to accommodate all those who wished to marry, irrespective of their religion, race, culture or sexual orientation. In order to accommodate those who did not wish to marry in terms of the expanded, culturally and religiously inclusive Marriage Act, the SALRC recommended the enactment of an additional Orthodox Marriage Act, accessible only to opposite-sex couples and mirroring the provisions of the current Marriage Act. This approach, it was thought, would be in line with section 15(3)(a)(i) of the Constitution, which allows legislation recognising marriages concluded under any tradition, or a system of religious, personal or family law.

1.24 The SALRC further recommended a Domestic Partnership Act to provide legal recognition and regulation to same- and opposite-sex couples who did not wish to get married, but nevertheless wanted to formally commit themselves to support and assist each other. It provided criteria and consequences at termination for both for registered and unregistered domestic partnerships.

1.25 Over time the SALRC has investigated the idea of a single statute regulating different forms of intimate relationships and the initial resistance to this idea was gradually replaced by an increasing perception that such legislation may be both necessary and practical.

1.26 There have been various initiatives towards unification of marriage laws in other countries like India, Malawi, Kenya, Uganda, Tanzania etc. The possibility of a single marriage statute in the form of a unified marriage law has therefore been raised frequently not only in South Africa in the past but also in other jurisdictions. It has also enjoyed a great measure of

¹⁴ SALRC *Report on the Review of the Marriage Act* par 2.1.7.

¹⁵ SALRC *Report on Domestic Partnerships* see http://salawreform.justice.gov.za/reports/r_prj118_2006_march.pdf.

support in the academic literature (despite the presence of a few dissenting views).¹⁶ However, for a variety of reasons, this path was not pursued, and we currently have a pluralist system of laws applying to marriage in South Africa.

F. Legal pluralism in South Africa and its meaning in family law

1.27 South Africa is a multicultural society with 11 official languages.¹⁷ According to the 2011 Census the statistics by first language of the population expressed by percentage was as follows: Afrikaans 13.5%; English 9.6%; IsiNdebele 2.1%; IsiXhosa 16.0%; IsiZulu 22.7%; Sepedi 9.1%; Sesotho 7.6%; Setswana 8.0%; sign language 0.5%; SiSwati 2.5%; Tshivenda 4.5%; and other languages 1.6%.¹⁸ South Africa is also home to a large number of religions. Statistics released by Statistics South Africa in 2014 indicates that approximately 85% of the population described in the 2013 household survey to follow the Christian religion; 5% ancestral, tribal, animist or other traditional African religions; 2% of the population described themselves Muslim; 0,2% Jewish; 1% Hindu; and 5,6% of the population is not affiliated to any religion.¹⁹

1.28 As a result of our colonial and apartheid history, and in common with other many societies, South Africa has a pluralist system of marriage and family laws, which means that

¹⁶ Rautenbach C 'Some comments on the current (and future) status of Muslim personal law in South Africa' 2004 *PER/PELJ* Vol 7 No 2 96 – 129 at 122; Rautenbach Christa 'Deep legal pluralism in South Africa: judicial accommodation of non-state law' 2010 *Journal of Legal Pluralism* Nr 60 143 – 178 at 172; Bakker P 'Towards the recognition of diversity: Muslim marriages in South Africa' 2009 *THRHR* 394 – 406 at 405; Van der Vyver Johan 'Multi-tiered marriages in South Africa' at 200 in *Marriage and divorce in a multicultural context: Multi-tiered marriage and the boundaries of civil law and religion* Cambridge University Cambridge Press 2012; Bonthuys 2016 *Oñati Socio-legal Series* at 1307; Kruuse Helen 'You reap what you sow: regulating marriages and intimate partnerships in a diverse, post-apartheid society' 2013 *International Survey of Family Law* at 360 – 361 at 343; Bakker P 'Chaos in family law: a model for the recognition of intimate relationships in South Africa' 2013 *PER/PELJ* Vol 16 n 3 pages 116 – 151 at 139; Amien Waheeda 'Reflections on the recognition of African customary marriages in South Africa: seeking insights for the recognition of Muslim marriages 2013 *Acta Juridica* Issue 1 357 – 384 at 381; Prinsloo MW 'Pluralism or unification In family law in South Africa' 1990 *XXIII CILSA* 324 – 336 at 335 – 336.

¹⁷ Section 6(1) of the Constitution.

¹⁸ Census_2011_Census_in_brief Table 2.8: Population by first language and population group (percentage) available at http://www.statssa.gov.za/census/census_2011/census_products/Census_2011_Census_in_brief.pdf.

¹⁹ Statistics South Africa Statistical release P0318: General household survey 2013 18 June 2014 available at <https://www.statssa.gov.za/publications/P0318/P03182013.pdf> accessed 4 June 2018. The 1996 Census established that roughly 30,0 million people followed one of the Christian religious groups. See *Census 2001: Primary tables South Africa Census '96 and 2001 compared* 5 Religion page 24 available at http://www.statssa.gov.za/census/census_2001/primary_tables/RSAPrimary.pdf. This number showed an increase to 35,8 million followers in the 2001 Census. The Christian churches were the primary or conventional Christian churches and included the reformed churches, Anglican, Methodist, Presbyterian, Lutheran, Roman Catholic and Orthodox churches and the United Congregational Church of South Africa. In the 1996 Census roughly 4,6 million persons indicated following no religious group, whilst by the 2001 Census the figure grew to 6,8. This represented 11,7% of the population in the 1996 Census and 15,1% in the 2001. Approximately 33% of the population reported in 2001 following one of the independent churches which include the Zionist churches, iBandla lamaNazaretha and Ethiopian type churches.

multiple legal or normative orders regulate marriages and families within the same state.²⁰ The pluralist system of marriage and families laws is hierarchical in the sense that the historical privilege afforded to certain European-derived forms of marriage continues to shape the legal recognition and, consequently, the rights afforded to partners in different marital and unmarried relationships.²¹

1.29 Historically dominant is marriage in terms of the 1961 Marriage Act, which is derived from the principles of, Christian, Roman-Dutch and English law. It is essentially monogamous and heterosexual. These marriages can be conducted by state officials as purely secular marriages, but certain of the Act's provisions relating to the appointment of marriage officers together with longstanding practices by mainstream Christian and Jewish institutions mean that some Judaeo-Christian marriages are automatically also recognised as civil marriages.

1.30 Closely aligned with the Marriage Act is the Civil Union Act 17 of 2006, which largely mirrors the requirements and consequences of civil marriage, but which is open to both same-sex and opposite sex monogamous couples. Religious organisations may apply to conclude civil unions in terms of this Act and some religious marriages may therefore also coincide with civil unions.²² People who conclude civil unions in terms of this legislation may choose to have their unions registered either as marriages or civil partnerships, essentially a matter of terminology, because the designation does not have any effect on the rights of the partners.²³ The legal rights and responsibilities flowing from civil unions are the same as those which arise from marriage in terms of the Marriage Act, except insofar as they may also apply to partners of the same sex.

1.31 Marriages in terms of the Marriage Act and the Civil Union Act are often referred to as 'civil marriage'.

²⁰ Von Benda-Beckmann Franz 'Who's afraid of legal pluralism?' 2002 *Journal of Legal Pluralism and Unofficial Law* 34 37 – 83 at 37; see Rautenbach Christa and Bekker and Jan Christoffel (eds) *Introduction to legal pluralism in South Africa* LexisNexis 2014. For customary law see Rautenbach Christa and Du Plessis Willemien 'African customary marriages in South Africa and the intricacies of a mixed legal system: Judicial (in)novatio or confusio?' 2012 *McGill LJ* ' 57 749-780 at 755 – 8; TW Bennett *Customary law in South Africa* Juta 2004 chapters 6 – 11; Himonga Chuma and Moore Elena *Reform of customary marriage, divorce and succession in South Africa: Living customary law and social realities* Juta 2015.

²¹ Bonthuys Elsje 'A patchwork of marriages: the legal relevance of marriage in a plural legal system' 2016 *Oñati Socio-Legal Series* 1303 – 1323 at 1308 – 9.

²² Civil Union Act s 5.

²³ Civil Union Act s 12(3).

1.32 Customary marriages are the potentially polygynous²⁴ marriages of indigenous African people. They have received limited legal recognition since colonial times, but never had the same status as marriages under the Marriage Act and were termed ‘unions’ rather than marriages. Since November 2000 customary marriages have been fully valid and their consequences determined by the Recognition of Customary Marriages Act 120 of 1998. They are now governed by a mixture of statute, common law and norms of customary law.²⁵ Customary marriages can be monogamous or polygynous.

1.33 Because the Marriage Act historically offered certain advantages not available under customary marriage and because many African people are Christian, many African people have in the past and continue at present to enter into simultaneous customary marriages and marriages under the Marriage Act. Alternatively, civil marriages of African people often entail customary elements, like the payment of bridewealth.²⁶

1.34 Muslim, Hindu and other religious marriages could also potentially be conducted in terms of the Marriage Act, because the Act provides for the appointment of marriage officers ‘for the purpose of solemnizing marriages according to Christian, Jewish or Mohammedan rites or the rites of any Indian religion’.²⁷ However, unless these marriages also comply with the other requirements of the Marriage Act, including the marriage formula, 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.

1.35 The SALRC Report on Islamic Marriages recommended the adoption of legislation to give legal effect to these marriages in 2003, but no statute has yet been enacted. An appeal against the order compelling government to enact this legislation in *Women’s Legal Centre*

²⁴ Polygyny refers to the type of marriage where a husband marries more than one wife. Polygamy refers to the situation where either a man or a woman may have more than one spouse, and polyandry refers to the situation where only a wife can marry more than one husband.

²⁵ For an overview of the plural South African marriage laws see Rautenbach and Bekker eds *Introduction to legal pluralism in South Africa*. For customary law see Rautenbach Christa and Du Plessis Willemien ‘African customary marriages in South Africa and the intricacies of a mixed legal system: Judicial (in)novation or confusio?’ 2012 *McGill LJ* 57 749 – 780 at 755 – 8; Bennett TW *Customary law in South Africa* chapters 6 – 11; Himonga and Moore *Reform of customary marriage, divorce and succession in South Africa: Living customary law and social realities*.

²⁶ Rautenbach and Du Plessis 2012 *McGill LJ* at 758 – 776.

²⁷ Section 3(1).

*Trust v President of the RSA; Faro v Bingham; Esau v Esau*²⁸ was lodged at the Supreme Court of Appeal.

1.36 As a result of numerous cases brought by women who are spouses in unrecognised Muslim marriages, the courts have extended many marriage-like rights and processes to spouses in Muslim marriages.²⁹ There has been less litigation on behalf of adherents of the Hindu³⁰ 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, except for Muslim marriages, are in the same position as unmarried intimate partners.

1.37 Partners in unmarried intimate relationships have very few legal rights, except for the occasional cases granting rights to share in partnership assets on the basis that the partners had concluded tacit partnership agreements.³¹ Recently, the Supreme Court of Appeal in the *Paixão* case recognised a right to mutual support for opposite-sex intimate partners who had undertaken such duties in the context of a claim against a third party for the loss of support.³² The Constitutional Court judgment in *Volks v Robinson* has, however, precluded the wholesale extension of marriage-like rights to opposite-sex unmarried cohabitants on the basis that differentiating between rights of married and unmarried couples is fair because the Constitution and international law recognises the importance of marriage as a fundamental social institution.³³ Justice Ngcobo held that opposite sex partners have a choice to marry and thereby gain their entitlement to legal protection associated with marriage.³⁴

1.38 However, it must be noted that, as a result of litigation in respect of same-sex unmarried partners which preceded the adoption of the Civil Union Act, the courts have extended stronger rights to same-sex unmarried partners than is available for opposite sex unmarried partners. These rights continue to exist for same-sex intimate partners, despite the fact that they can now marry under the Civil Union Act.³⁵

²⁸ [2018] ZAWCHC 109.

²⁹ 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).

³⁰ For instance *Govender v Ragavayah* 2009 3 SA 178 (D); *Singh v Ramparsad* 2007 3 SA 445 (D).

³¹ See generally Bonthuys Elsje 'Exploring universal partnerships and putative marriages as tools for awarding partnership property in contemporary family law' 2016 *PELJ* 19; Barratt Amanda 'Whatever I acquire will be mine and mine alone: Marital agreements not to share in constitutional South Africa' 2013 *SALJ* 688 – 704.

³² *Paixão v Road Accident Fund* 2012 6 SA 377 (SCA).

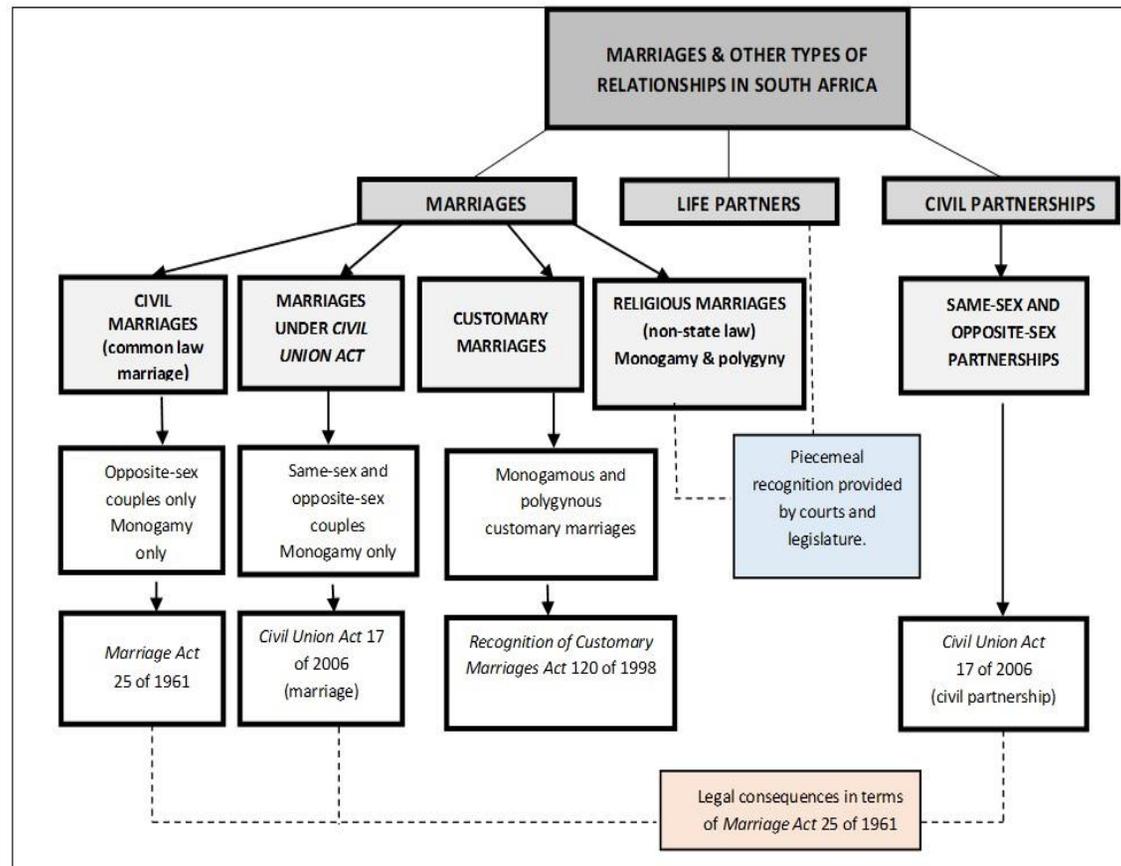
³³ *Volks v Robinson* 2005 5 BCLR 446 (CC) paras 50 – 57, 80 – 87.

³⁴ Par [90].

³⁵ *Gory v Kolver* 2007 4 SA 97 (CC); *Laubscher v Duplan* 2017 2 SA 264 (CC).

1.39 The complexity and interconnected nature of the South African marriage law landscape is represented by the following diagram:

Schematic representation of state and non-state marriages in South Africa³⁶



³⁶

Based on the scheme provided by JA Robinson *et al Introduction to South African Family Law* 6th ed Printing Things, Potchefstroom 2016 40 and adapted by Christa Rautenbach.

1.40 The final, and crucial layer of legal complexity is added by the provisions of the Constitution, with which any future legislation must accord. While section 15(3) allows the state to enact legislation which recognises marriages associated with specific religions or cultures, and while section 31 protects the rights of individuals to practice their cultures and religions and to use their languages, Rautenbach, Jansen van Rensburg and Pienaar argue that:³⁷

... section 15(3)(a) only warrants recognition of religious and traditional legal systems by means of legislation and does not create a right to have those legal systems recognised

1.41 Moreover, both the exercise of religious, cultural and linguistic rights and the recognition of religious or cultural marriages are subject to other constitutional rights, including the values of human dignity, non-racism and non-sexism³⁸ and right to equality, which means that the legislation may not discriminate against anyone on the basis of 'race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.'³⁹

G. Way forward with investigation: single marriage statute or omnibus legislation?

1.42 In the DHA request for the investigation it is observed that '[i]nstead of creating a harmonised system of marriage in South Africa, there are now parallel structures that stand side by side'.

1.43 The main aim of this investigation is therefore to explore the questions whether and how provision should be made in South Africa for the adoption of a single marriage statute. One often sees accounts of legislation which sought to harmonise or unify different statutes. Unification of law could entail the complete replacement of different legal systems with one uniform legal system.⁴⁰ Integration on the other hand means a limited integration of rules taken from different legal systems into one statute and can be effected circumspectly and slowly.

³⁷ Rautenbach Christa, Jansen van Rensburg Fanie and Pienaar Gerrit 'Culture (and religion) in constitutional adjudication' 2003 *PER/PELJ* at 15 – 17.

³⁸ Constitution s 1.

³⁹ Constitution s 9(3).

⁴⁰ Prinsloo 1990 *XXIII CILSA* 324 – 336 at 325; see also 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.

Harmonisation aims to remedy and eliminate conflicts between different legal systems although they are allowed their distinct recognition and continuation.⁴¹

1.44 A single marriage statute can take two different forms – either a unified set of requirements (and possibly consequences) applying to all marriages, which we refer to as a single or unified marriage act, or alternatively a single act which contains different chapters which reflect the current diverse set of legal requirements for and consequences of civil marriages, civil unions, customary marriages, Muslim and possibly other religious marriages. The latter could be thought of as an omnibus or umbrella marriage statute.

1.45 The academic consensus seems to be in favour of the creation of a single basic statute to govern different cultural, religious and secular marriages rather than retaining the current piecemeal situation.⁴²

H. Questions about a single or omnibus marriage or unmarried intimate relationship statute

1.46 In the late 1990s the SALRC considered that a compromise on the issue of unification of marriage legislation was required by ss 30 and 31 of the Bill of Rights. If fundamental rights required separate statutes at that time, what do respondents consider has changed in the mean time?

1.47 Should South Africa continue with different regulatory regimes for different forms of marriages?

1.48 What would be the advantages and disadvantages of a single or unified statute setting out a unified set of requirements for all marriages?

1.49 What would be the advantages and disadvantages of an omnibus statute containing all

⁴¹ Prinsloo *CILSA* 1990 at 325.

⁴² Rautenbach 2004 *PER/PELJ* Vol 7 96 – 129 at 122; Rautenbach 2010 *Journal of Legal Pluralism* Nr 60 143 – 178 at 172; Bakker 2009 *THRHR* 394 – 406 at 405; Bonthuys 2016 *Oñati Socio-legal Series* at 1307; Kruuse *International* 2013 *Survey of Family Law* at 343; and Bakker 2013 *PER/PELJ* at 139. See, however, Van der Vyver 'Multi-tiered marriages in South Africa' at 200 in *Marriage and divorce in a multicultural context: Multi-tiered marriage and the boundaries of civil law and religion* and Amien 2013 *Acta Juridica* at 384 who remarks 'there is no one-size-fits-all solution for the recognition of different types of religious and cultural marriages'.

the different requirements for all marriages?

1.50 If either a unified or omnibus statute is adopted, should the statute only cover marriages and a separate statute on unmarried partnerships be adopted, or should the statute cover both marriages and unmarried partnerships? What would be the advantages and disadvantages of these options?

1.51 If either a unified or omnibus statute is adopted, should it only set out the requirements for valid marriages and/or unmarried intimate partnerships, or should it also cover the legal consequences of such relationships for the period of their duration and when they end? What would be the advantages and disadvantages of each option?

Chapter 2

A. Marriage requirements or essentials in South Africa

1. Definitions for marriage

a. *Introduction*

2.1 A civil marriage is defined as ‘the legally recognised voluntary union of a man and a woman to the exclusion of all other persons’.⁴³

2.2 The distinguishing feature of civil marriages and civil unions is that civil marriages involve exclusively a man and a woman whereas civil unions involve either opposite or same sex partners.⁴⁴ The distinguishing feature of customary marriages, and some religious marriages is that the husband to these marriages is allowed to conclude marriages with more than one wife.⁴⁵ This isn’t the only distinction – in customary marriage for instance, lobolo would be distinctive.

b. *Questions about the definition of marriage*

2.3 How should the proposed legislation define marriage?

2.4 The Recognition of Customary Marriages Act permits polygynous marriages and the draft Muslim Marriages Act provided likewise for polygynous marriages. Should the envisaged legislation make provision for polygynous marriages, and if so, how?

2.5 What constitutes an unmarried intimate partnership which would qualify partners to share in legal protections in terms of the omnibus statute?

2. Consent and capacity to marry

a. *Introduction*

⁴³ Heaton Jacqueline and Hanneretha Kruger *South African Family Law* 4th edition LexisNexis 2015 at 13.

⁴⁴ Heaton and Kruger *South African Family Law* at 13 and 203.

⁴⁵ Heaton and Kruger *South African Family Law* at 13.

2.6 The international community has adopted measures to ensure that persons with mental capacity and with free consent enter into marriage. The 1948 Universal Declaration of Human Rights provides in article 16 that marriage shall be entered into only with the free and full consent of the intending spouses. The United Nations Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages⁴⁶ provides in article 1(1) that no marriage shall be legally entered into without the full and free consent of both parties, such consent to be expressed by them in person after due publicity and in the presence of the authority competent to solemnise the marriage and of witnesses, as prescribed by law. Article 1(2) caters, however, for exceptional circumstances by providing that it shall not be necessary for one of the parties to be present when the competent authority is satisfied that the circumstances are exceptional and that the party has, before a competent authority and in such manner as may be prescribed by law, expressed and not withdrawn consent. Article 11 of the Hague Convention on Celebration and Recognition of the Validity of Marriages provides that a Contracting State may refuse to recognise the validity of a marriage.⁴⁷ Two grounds listed in Article 11 are that at the time of the marriage, under the law of that State – one of the spouses did not have the mental capacity to consent; or one of the spouses did not freely consent to the marriage.

2.7 The general rule in South Africa is that every person has the capacity and is entitled to marry whoever he or she wishes to marry.⁴⁸ This rule is subject to absolute and relative incapacity to marry. Absolute incapacity exists, firstly, when one or both of the prospective spouse or spouses are already married to someone else; secondly, in regard to persons who have serious mental incapacities rendering them incapable of understanding the nature of marriage and the responsibilities involved in marriage; and finally, minors below the minimum marriageable age of 15 years for girls and 18 years for boys, unless the permission of the Minister of Home Affairs is obtained for their marriage. Relative incapacity to marry existed, firstly, in the past when marriages between the different race groups in South Africa was prohibited; secondly, in regard to persons of the same sex, before the adoption of the Civil Union Act; thirdly, and this is the position which still applies today which prohibits persons within prohibited degrees of relationship to marry; and fourthly, a marriage between the legal guardian and his or her ward under his or her guardianship as the guardian cannot provide consent for his or her own marriage to his or her ward, therefore the consent of a court is required for this marriage.

⁴⁶ See <https://www.ohchr.org/en/professionalinterest/pages/minimumageformarriage.aspx>.

⁴⁷ See <https://www.hcch.net/en/instruments/conventions/full-text/?cid=88>.

⁴⁸ Hahlo HR *The South African Law of Husband and Wife* 5th edition Juta 1985 at 64 to 73.

2.8 The Marriage Act requires that a marriage takes place in the presence of the parties to the marriage and at least two witnesses.⁴⁹ The Marriage Act also prohibits a proxy representing a party to the marriage.⁵⁰

2.9 In its *Report on customary marriages* the SALRC considered how to determine whether the spouses genuinely consented to their marriage.⁵¹ Some respondents to the Issue and Discussion Papers suggested that the process of negotiating marriage demands no more than that a woman acknowledge she knows the man who is proposing. Her consent is then inferred. To overcome this problem it was suggested that marriage officers (or officials registering marriages) should include in the marriage formula questions about each party's free consent. Participants in the SALRC Workshops raised a somewhat different problem namely that of the non-consenting groom.⁵² What could be called 'acceptable coercion' was discussed, ie, cases where an individual's consent is either deemed irrelevant or is inferred from the fact of that person's compliance with custom. It was stressed that a traditional leader may have to marry the wife chosen for him by the community; if he refused, he would have to abdicate. Even ordinary citizens are subject to several practices relating to marriages arranged by parents, sometimes at a time when the prospective spouses are still of a young age.⁵³

2.10 At another workshop on customary marriages it was agreed that it would be futile to try to ensure 'pure unfettered' consent by legislation, because there are too many reasons why people act or refrain from acting.⁵⁴ The SALRC took the point arguing that even in common law, what constitutes duress sufficient to invalidate consent is still not settled. The SALRC felt that legislation would be most effective in fixing a specific age at which individuals may be presumed mature enough to decide their marital destiny. The SALRC considered that although there was no harm in requiring marriage or registering officers to establish consent, such a requirement was less likely to be effective on its own.

2.11 A final implication of requiring consent for customary marriages was deciding when final consent should be established.⁵⁵ The SALRC argued that it bears in mind that the marriage negotiations may take several weeks (if not months), then it may have to ask when a potential

⁴⁹ Section 29(2).

⁵⁰ Section 29(4).

⁵¹ SALRC *Report on Customary Marriages* par 4.2.11.

⁵² SALRC *Report on Customary Marriages* par 4.2.12.

⁵³ Maithufi IP 'The requirements for validity and proprietary consequences of monogamous and polygynous customary marriages in South Africa: Some observations' 2015 *De Jure* 261 – 279 at 265.

⁵⁴ SALRC *Report on Customary Marriages* par 4.2.13.

⁵⁵ SALRC *Report on Customary Marriages* par 4.2.14.

spouse could withdraw consent and whether consent should refer to all the rituals entailed in the marriage process. The answer to these questions seemed to the SALRC to be that, if the marriage is formally registered, the most convenient time for settling the issue of consent would be at the date of registration.

2.12 In several decided cases (eg, *N v D*) the courts have had to pronounce on whether certain rituals and ceremonies performed amounted to consent within the language of s3(1)(b) of the RCMA, which requires parties to consent to marry “each other under customary law”.⁵⁶

2.13 The SALRC’s investigation into the practice of *ukuthwala* is also of relevance in the context of consent to marriage. The SALRC explained in its Discussion Paper 132⁵⁷ that *ukuthwala* involves the act of taking a marriage partner in unconventional ways, seemingly forceful ways, sometimes with the sanction of certain adults who have a stake in the possibility of formalising a resulting partnership.⁵⁸ It was noted that is practised among indigenous African communities in Southern Africa, in various mutations, within the context of many other customary practices related to marriage. Many of these practices are aimed at satisfying the traditional standards or norms relating to marriage, and sometimes accommodate unconventional ways of doing so. The case of *Jezile v the State* made it clear that modern-day abuses of *ukuthwala* are criminal offences. The accused in this case was charged with human trafficking, rape, assault with intent to cause grievous bodily harm and common assault. He was convicted and sentenced to 22 years of imprisonment, a verdict and sentence that were upheld on appeal.⁵⁹ The *Jezile* judgment has resulted in critical comment about both the RCMA and Marriages Act providing for parental consent enabling minors to conclude marriages and ‘indirectly fuelling the rape, abduction, assault, trafficking and coercion of women into marriages in the name of custom’.⁶⁰ A call has been made for amendments to the legislation concerned for the protection of minor children to prevent their parents from arranging marriages for them and to safeguard South Africa complying with its international and regional instruments regarding child marriage.⁶¹

⁵⁶ (2011/3726) [2016] ZAGPJHC 163 (15 June 2016). See also Manthwa Aubrey ‘Lobolo, consent as requirements for the validity of a customary marriage and the proprietary consequences of a customary marriage: *N v D* (2011/3726) [2016] ZAGPJHC 163’ 2017 *Obiter* Vol 38 No 2 438 – 445 at 445.

⁵⁷ SALRC Project 138 *Discussion Paper 132 the Practice of Ukuthwala* May 2014 see <http://www.justice.gov.za/salrc/dpapers/dp132-Ukutwala.pdf>.

⁵⁸ SALRC *Discussion Paper 132 the Practice of Ukuthwala* par 2.4.

⁵⁹ *Jezile v S and Others* (A 127/2014) [2015] ZAWCHC 31; 2015 (2) SACR 452 (WCC); 2016 (2) SA 62 (WCC); [2015] 3 All SA 201 (WCC) (23 March 2015).

⁶⁰ See Mudarikwa Mandivavarira ‘The Practice of ukuthwala in *Jezile v The State*’ Legal Resources Centre.

⁶¹ See Moore Elena and Chuma Himonga ‘Living Customary Law and Families in South Africa’ in *South African Child Gauge 2018* Children, Families and the State Collaboration and contestation edited by Katharine Hall, Linda Richter, Zitha Mokomane and Lori Lake Children’s Institute University of Cape Town pages 61 – 69 at 63.

2.14 The SALRC also noted in its report on *Islamic Marriages and Related Matters*⁶² that the concern expressed by certain respondents in relation to consent by the legal guardians according to the Shaf'i School of Interpretation was duly considered, and a reference to the *Wali* (legal guardian) has been included. The SALRC stated that authority to consent to a marriage of people below the marriageable age can be delegated by the Minister and, in the SALRC's view, the Minister can be prevailed upon to make such delegation to Muslim authorities. Regarding concerns about actual consent, the SALRC explained that its proposed provision provides that there should be consent, and that Islamic law makes it obligatory for marriage officers to be satisfied in this respect.

2.15 The LMA of Tanzania provides that no marriage shall be contracted except with the consent, freely and voluntarily given, by each of the parties thereto.⁶³ It further provides that consent shall not be held to have been freely or voluntarily given if the party who purported to give it was influenced by coercion or fraud; was mistaken as to the nature of the ceremony; or was suffering from any mental disorder or mental defect, whether permanent or temporary, or was intoxicated, so as not fully to appreciate the nature of the ceremony.

2.16 In other jurisdictions debates have been conducted about the lack of capacity or consent where a vulnerable person is exploited to enter into a predatory marriage.⁶⁴ One definition of predatory marriage⁶⁵ is 'a spousal relationship between a much younger caregiver and a rich, older or sickly person, for the covert and primary purpose not of love, but an interest in the estate of that other person'. In 2017 the Marriage and Civil Partnership Bill 2017 – 19 (a private member's bill) was introduced in the House of Commons of England and Wales.⁶⁶ The Bill aims to better regulate consent to concluding marriages and civil partnerships.

b. Questions regarding consent and capacity to marry

⁶² *Report on Islamic Marriages and Related Matters* Par 3.117.

⁶³ Section 16.

⁶⁴ Wozniak Dagmara 'Predatory marriage: a modern day marriage trap' Siskinds LLP 7 January 2014; 'The threat of predatory marriages' 16 July 2018 *Goodtimes*; WEL Partners 'Australia's approach to predatory marriages' 2014; Matthews Frances 'Cognitive impairment and the capacity to marry' *Irish Journal of Legal Studies* 2015 Vol 5 Issue 2 52 – 83 at 66; Carey 'Adult children call for law change after 90yo mum married "carer" in secret' *News Com AU* 4 December 2018; Johnstone Alasdair 'Protecting The family inheritance from a "predatory" marriage' *Mondaq* 7 December 2018; 'MP calls for "predatory marriage" law change' *BBC News* 21 November 2018; Bruineman Marg 'Calls to change legislation to stop predatory marriages' *Law Times* 19 November 2018.

⁶⁵ *Duhaime's Law Dictionary* predatory marriage.

⁶⁶ See <https://services.parliament.uk/bills/2017-19/marriageandcivilpartnershipconsent.html>.

2.17 Is the common law test and the statutory requirement which is applied to determine capacity to marry which requires that both parties be present when concluding a marriage adequate or is there a need for reform in South African law?

2.18 Do respondents consider a proxy should be allowed to represent a party to a marriage?

2.19 Is there support for legislative measures which adequately take into account autonomy and informed consent to take decisions about marriage?

2.20 Should the envisaged legislation require specifically that parties should have mental capacity to enter into marriage as the Australian Marriage Act does in this regard?

2.21 Should the consent of the first wife be required if the husband wishes to conclude a second marriage?

3. Minimum age for marriage

a. Requirements set by International instruments

2.22 Article 16(1) of the 1948 Universal Declaration of Human Rights provides that men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family and that they are entitled to equal rights as to marriage, during marriage and at its dissolution.⁶⁷ The African Charter on the Rights and Welfare of the Child of 1990⁶⁸ in article 21(2) provides that child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa of 2003⁶⁹ also provides for 18 as the minimum marriage age.

2.23 In December 2016 the General Assembly of the United Nations adopted a resolution on the rights of the child which addressed, among others, migrant girls and child marriage.⁷⁰ The General Assembly noted the well-documented infringements on the rights the girl child faces, saying that it '[n]otes with concern that child, early and forced marriage disproportionately affects girls, including migrant girls, who have received little or no formal education and is itself a

⁶⁷ See <http://www.un-documents.net/a3r217a.htm>.

⁶⁸ See at http://www.achpr.org/files/instruments/child/achpr_instr_charterchild_eng.pdf.

⁶⁹ See http://www.achpr.org/files/instruments/women-protocol/achpr_instr_proto_women_eng.pdf.

⁷⁰ UN Res 71/177 Rights of the child see http://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_71_177.pdf.

significant obstacle to educational opportunities for girls and young women, in particular girls who are forced to drop out of school owing to marriage and/or childbirth, recognizing that educational opportunities are directly related to women's and girls' empowerment, employment and economic opportunities and to their active participation in economic, social and cultural development, governance and decision-making'.

b. Position in South Africa

2.24 In October 2017 the local media reported about South Africa's 2016 Community Survey⁷¹ which revealed the worrying statistics and the effects of girls below the age of 18 getting married preventing them to complete secondary education.⁷² Many commentators have highlighted the extent and adverse effects of child marriages internationally including South Africa and called for measures against child marriages.⁷³

2.25 The Marriage Act distinguishes between marriages contracted by majors and those by minors. The Marriage Act provides in section 24 that no marriage officer shall solemnise a marriage between parties of whom one or both are minors unless the consent to the party or parties which is legally required for the purpose of contracting the marriage has been granted and furnished to him or her in writing.⁷⁴ The Marriage Act further provides that a minor does not include a person who is under the age of twenty-one years and previously contracted a valid marriage which has been dissolved by death or divorce.⁷⁵ The Children's Act reduced the age of majority to 18 years. The Marriage Act does not yet reflect this amendment. Furthermore, a concern is that the Marriage Act allows for children below the age of 18 years to get married with the permission of the Minister of Home Affairs. This provision also differentiates between girls and boys. Girls can marry at a younger age of 15 years than boys at 18 years, which is a disadvantage. The second concern is the difference between the various statutes on marriageable age, with the Civil Union Act not allowing marriage under the age of 18. The RCMA allows for underage marriage with consent of the parents.

⁷¹ Statistics SA *Community Survey 2016*.

⁷² Mbude Phelokazi 'Shocking child marriage stats paint a dire picture' *Citypress* 31 October 2017; see also Staff reporter 'SA child-bride stats paint a grim picture' *IOL* 31 October 2017; Mmakgomo Tshetlo 'Stats SA: KZN and Gauteng have the highest underage marriages in South Africa' *702* 30 October 2017; 'SA's dark under belly of under-age marriage' *Cape Argus* 23 Nov 2017.

⁷³ Centre for Human Rights University of Pretoria 'A Report On Child Marriage in Africa' 2018 at 11. See also Mokati Noni 'Commission for Gender Equality calls for end to child marriages' *IOL* 14 December 2017; Lebitse Palesa 'Underage, marginalised, married' *Mail & Guardian* 22 June 2018; 'More needs to be done to address child marriages – Centre for Child Law' *News24.com* 9 July 2018; and Mudarikwa Mandivavarira, Elgene Roos and Nombuso Mathibela 'Girls must not be brides' Legal Resources Centre 2018.

⁷⁴ Section 24(1).

⁷⁵ Section 24(2).

2.26 In many other jurisdictions there is a non-negotiable minimum age of marriage of 18 applicable to both boys and girls. No parental or official permission can allow a deviation from this. These measures are compliant with international and regional instruments. There are discrepancies between the Marriage Act and the RCMA on the one hand, and the Civil Union Act on the other hand as the latter sets the minimum age of marriage at 18 without any exceptions. The Marriage Act sets the minimum age for marriage for boys at the age of 18 for boys and 15 for girls. Under the Marriage Act and the RCMA parents, functionaries and courts are empowered to grant consent for a marriage of parties below the age of 18.

2.27 The SALRC noted in its *Report on Islamic Marriages and Related Matters*⁷⁶ that it had considered all the submissions by stakeholders in relation to the age of the parties and it agreed that the age of the parties should be the same, namely 18 years. The SALRC remarked further that consent may in any event in appropriate circumstances be obtained for persons under that age to marry.

c. Questions on minimum age for marriage

2.28 Do stakeholders agree that the discrepancies between the Marriage Act, Recognition of Customary Marriages and the Civil Union Act as regards the minimum age for marriage must be remedied?

2.29 Do respondents agree South Africa has a duty to comply with international and regional instruments to set a uniform minimum age for marriage of 18 without any exceptions for third party consent by parents, courts, or any other official to prevent children being married or to enter into unmarried intimate relationships?

4. Giving of notice of intention to marry and issuing of marriage licences

a. Introduction

2.30 The DHA favours the re-introduction of a marriage licence framework. The request for the investigation proposed that '[a] marriage license is required before any marriage officer – whether a priest or an official is able to proceed to conduct a marriage' and '[i]n requiring the

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SALRC *Report on Islamic Marriages and Related Matters* par 3.115.

couple to obtain a marriage license the State is able to canvass matters relating to the availability of vital documents such as the ID or if there are citizenship implications for foreign nationals etc'. In 1970 the Marriage Act was amended to abolish the requirement of bans of marriage, the publication of notices of intention to marry and special marriage licenses.⁷⁷

2.31 Many countries, including Ghana, Tanzania, Kenya, Australia, Canada, the United Kingdom and the Netherlands⁷⁸ require the giving of notice for marriage in order for marriage licenses to be issued. Countries such as Tanzania and Kenya⁷⁹ require that both parties give notice of the intended marriage. In countries such as Ghana⁸⁰ and New Zealand⁸¹ one of the prospective spouses must give notice of the intended marriage. In Ghana the notice is published by affixing it on the outer door of the office of the marriage registrar or on a notice board outside the office.⁸² The notice must be kept exposed until the grant of the notice certificate, or until three months have elapsed. Generally the required period of the written notice of the intention to marry is twenty-one days before the intended marriage.

b. *Questions on the giving of notice or marriage licence requirements:*

2.32 Do respondents agree with the re-introduction of the giving of notice and the issue of marriage licences in South Africa?

2.33 Do respondents think the giving of notice or the issue of a marriage licence will contribute towards safeguarding government interests in marriages being concluded?

2.34 If the answer is in the affirmative what information should the notice contain?

5. The role of marriage officers and other functionaries

a. Introduction

2.35 Officialdom is involved in civil marriages and civil unions and sometimes in religious marriages. Do they still need to play a part and should they? In *Ex parte L (Also Known As A)* the court explained the rule that only authorised marriage officers are empowered to conduct

⁷⁷ See <http://www.lac.org.na/laws/GGsa/rsagg2822.pdf> accessed on 29 January 2018.

⁷⁸ Dutch Civil Code Book 1 Law of Persons and Family Law Title 1.5 Marriage.

⁷⁹ Marriage Act 4 of 2014 Kenya section 24.

⁸⁰ Ghana Marriages Act 1884 – 1985 CAP 127.

⁸¹ Section 23(1) of the Marriage Act 92 of 1955 of New Zealand.

⁸² Section 45(1) of the Ghana Marriages Act.

valid marriages by saying: 'The Court is not vested with any general jurisdiction where-under it can declare to be legally binding a ceremony of marriage, which, whatever its religious solemnity, was not performed by a Marriage Officer duly appointed as such according to law'.⁸³

b. Marriage officers in terms of the Marriage Act

2.36 The following is the position regarding marriage officers conducting marriages in terms of the Marriage Act:

- The holders of public office such as magistrates, special justices of the peace, and the former Native Commissioners were marriage officers as long as they held their office for the area or district in respect of which they held office. Since 1 June 1996 magistrates no longer conduct marriages.
- Officers or employees in the public service or the diplomatic or consular service of the RSA are designated marriage officers by virtue of their office. Since 1 June 1996 officials of the Department of Home Affairs take responsibility for conducting civil marriages.
- Ministers of religion and other persons attached to religious institutions may apply in writing to be designated as marriage officers by the Minister of Home Affairs.
- Where someone has acted as a marriage officer during any period or within any area in respect of which he or she was not a marriage officer the DHA may direct in writing that such person shall for all purposes be deemed to have been a marriage officer if satisfied that the person acted under the genuine belief that he or she was a duly designated marriage officer.
- The designation of a person as a marriage officer may be revoked on the ground of misconduct or for any other good cause, and the authority of a marriage officer to conduct marriages can be limited.
- A marriage officer who is authorised to solemnise marriages in any country outside the RSA may solemnise a marriage only if the parties thereto are both South African citizens domiciled in the RSA.
- Marriages may be conducted by a designated marriage officer only meaning that a person who is not a marriage officer and who purports to conduct a marriage is guilty of an offence. A marriage ceremony conducted in accordance with the rites

or formularies of any religion does which not purport to effect a valid marriage is not in contravention of the Marriage Act.

- Parties wishing to be married must submit their identity documents for verification to the marriage officer or must complete the prescribed declaration regarding their identity particulars if not in possession of an identity document.
- Upon receipt of an objection to any proposed marriage the marriage officer concerned must inquire into the grounds of the objection, and if satisfied that there is no lawful impediment to the proposed marriage, the marriage officer may solemnise the marriage. If not so satisfied the marriage officer will refuse to solemnise the marriage.

c. Marriage officers in terms of the Civil Union Act

2.37 The provisions of the Civil Union Act largely correspond with the provisions of the Marriage Act as regards solemnisation of civil unions without any substantial differences. The one difference which has recently been dealt with by the legislature is the deletion in 2018 of the provision providing for marriage officers objecting to solemnising a civil union between persons of the same sex. The repeal of the provision was adopted by the Home Affairs Portfolio Committee on 28 November 2018. The Portfolio Committee on Home Affairs included a clause in the Bill which provides that the existing exemption from solemnising same sex marriages by DHA marriage officers under the Civil Union Act will be valid for 24 months. Training and sensitising of officials will be provided to DHA officers on the constitutional rights of same sex couples. DHA marriage officers currently exempted from conducting same-sex marriages will continue to enjoy exemption for 24 months. On 6 December 2018 the National Assembly passed the Bill which was then sent to the NCOP select committee on Social Services for concurrence.

2.38 A person may only be a spouse or partner in one marriage or civil partnership at any given time. A person in a civil union may not conclude a marriage under the Marriage Act or the Customary Marriages Act. A person who is married under the Marriage Act or the Customary Marriages Act may not register a civil union. A prospective civil union partner who has previously been married under the Marriage Act or Customary Marriages Act or registered as a spouse in a marriage or a partner in a civil partnership, must present a certified copy of the divorce order, or death certificate of the former spouse or partner, to the marriage officer as proof that the previous marriage or civil union has been terminated. The marriage officer may not proceed with the solemnisation and registration of the civil union

unless in possession of the relevant documentation. A civil union may only be registered by prospective civil union partners who would, apart from the fact that they are of the same sex, not be prohibited by law from concluding a marriage under the Marriage Act or Customary Marriages Act.

d. Traditional leaders as marriage officers

2.39 The request for this investigation suggested that recognised traditional leaders be appointed as marriage officers in South Africa. In its Report on Customary Marriages the SALRC explained the question arose whether the spouses' customary marriage should be given a greater degree of certainty by having their marriage formally solemnised before state authorities and then registered.⁸⁴ The SALRC noted that in 1985, the then Law Commission had proposed the following as essential elements of customary marriage: competence of the parties at customary law to marry one another; consent of the husband, the wife and legal guardian of either of them if they were below the age of 21; and solemnization by a marriage officer and registration.⁸⁵ These proposals were broadly in line with then existing statutory regimes in KwaZulu/Natal and Transkei although outside KwaZulu/Natal and Transkei, South Africa had never insisted on formal solemnization of customary marriages.⁸⁶ It was also doubtful whether in uncodified customary law the many consents listed in university curricula were ever really observed in practice.⁸⁷

2.40 Calls were also made when the SALRC developed the RCMA that provision ought to be made for marriage officers in the conclusion of customary marriages.⁸⁸ During the consultations the SALRC grappled with the issue, conscious of the fact that a marriage officer represents the state, which is the one granting married status to the parties. However, in African custom the parties negotiate the marriage themselves as an alliance between two kinship groups. That is why the SALRC settled for the concept of a registering officer instead of a marriage officer. The notion of a customary marriage being 'solemnised' by a state official continues to divide opinion in traditional circles.

⁸⁴ See http://www.justice.gov.za/salrc/reports/r_prj90_cstm_1998aug.pdf par 4.5.1.

⁸⁵ SALRC Report on Customary Marriages par 4.5.2.

⁸⁶ SALRC Report on Customary Marriages par 4.5.3.

⁸⁷ Himonga and Moore *Reform of customary marriage, divorce and succession in SA: Living customary law and social realities* at 100.

⁸⁸ Statistics SA 'The Customary Marriages Act: background and rationale towards improving the registration of marriages and divorces in South Africa' Workshop 24 February 1999 page 3.

e. *Questions about the role of marriage officers*

2.41 We note that the Marriage Act and other legislation refer to officials and functionaries in relation to the conclusion of marriages. Do respondents support marriage officers and other functionaries being involved in the solemnisation and registration of any or all forms of marriages? If not, do respondents propose any alternatives?

2.42 If respondents support the involvement of marriage officers what should be the requirements for their involvement?

2.43 If marriage officers should still be involved in solemnising marriages what should their function be: recording the marriage, assisting with registration of the marriage or anything else to provide evidence of the marriage for official purposes?

B. Registration of marriages

1. Registration of marriages as required by international instruments

2.44 The Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages of 10 December 1962 provides in article 3 that all marriages shall be registered in an appropriate official register by the competent authority. The UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979 provides also in article 16(2), among others, that necessary action, including legislation, shall be taken to make the registration of marriages in an official registry compulsory.

2.45 The African Charter on the Rights and Welfare of the Child deals in article 21 with protection against harmful social and cultural practices. It requires that states take effective action, including legislation to make registration of all marriages in an official registry compulsory.⁸⁹ The Committee on the Elimination of Discrimination against Women adopted its General Recommendation 21, on equality in marriage and family relations in 1994. Of importance is paragraph 39 of its recommendations which provides that States parties should also require the registration of all marriages whether contracted civilly or according to custom or religious law.⁹⁰

⁸⁹ Available at http://www.un.org/en/africa/osaa/pdf/au/afr_charter_rights_welfare_child_africa_1990.pdf.
⁹⁰ General Recommendation No. 21 (13th session, 1994) adopted on 4 February 1994 see <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>.

2. Civil registration of vital events

2.46 As Justice Sachs remarked in *Minister of Home Affairs v Fourie*:

[69] ... formalisation of marriages provides for valuable public documentation. The parties are identified, the dates of celebration and dissolution are stipulated, and all the multifarious and socially important steps which the public administration is required to make in connection with children and forward planning, are facilitated. ...

2.47 The DHA request for the investigation notes that that the DHA 'has a duty to ensure that each person's status is accurately captured on our data base which is ultimately going to underpin many other digital systems of government and will in future also extend into our broader economy' and that '[t]he accuracy and integrity of our data base is therefore a major concern for our department as we invest huge sums of money to evolve into a more secure and trusted system of identity and status'.

3. Registration of customary marriages

2.48 The RCMA provides that the spouses of a customary marriage have a duty to ensure that their marriage is registered.⁹¹ Either spouse may apply to the registering officer in the prescribed form for the registration of his or her customary marriage and must furnish the registering officer with the prescribed information and any additional information which the registering officer may require in order to satisfy himself or herself as to the existence of the marriage.⁹²

2.49 A registering officer must, if satisfied that the spouses concluded a valid customary marriage, register the marriage by recording the identity of the spouses, the date of the marriage, any lobolo agreed to and any other particulars prescribed.⁹³ The registering officer must issue to the spouses a certificate of registration, bearing the prescribed particulars.⁹⁴ If for any reason a customary marriage is not registered, any person who satisfies a registering officer that he or she has a sufficient interest in the matter may apply to the registering officer in the prescribed manner to enquire into the existence of the marriage.⁹⁵

⁹¹ Section 4(1).

⁹² Section 4(2).

⁹³ Section 4(4)(a).

⁹⁴ Section 4(4)(b).

⁹⁵ Section 4(5)(a).

2.50 If the registering officer is satisfied that a valid customary marriage exists or existed between the spouses, he or she must register the marriage and issue a certificate of registration.⁹⁶ If a registering officer is not satisfied that a valid customary marriage was entered into by the spouses, he or she must refuse to register the marriage.⁹⁷ A court may, upon application made to that court and upon investigation instituted by that court, order the registration of any customary marriage or the cancellation or rectification of any registration of a customary marriage effected by a registering officer.⁹⁸ A certificate of registration of a customary marriage constitutes *prima facie* proof of the existence of the customary marriage and of the particulars contained in the certificate.⁹⁹ Failure to register a customary marriage does not affect the validity of that marriage.¹⁰⁰

2.51 The SALRC, in its *Report on Customary Marriages*, was at pains to explain the dilemma it faced. On the one hand, it had to acknowledge the legal and administrative benefits of registration and the state's interest in the certainty that it would bring, not to mention the pressure from the country's treaty obligations in this regard. Yet, on the other hand, it was facing the social reality that African families do not set great store by registration, and compliance levels were low. There was also a considerable body of evidence showing that the imposition of any formal requirement on customary marriages would have the effect of depriving existing marriages of whatever limited validity they might otherwise have enjoyed.¹⁰¹ Accordingly, the SALRC argued that registration of a marriage should not be compulsory. To allow registration at the instance of one of the parties would sensibly acknowledge the fact that this formality has no intrinsic merit: it is a pragmatic means of proving marriage if and when the spouses find it necessary to do so.

2.52 From this proposal, the SALRC explained, it followed that, if spouses did not have their marriage registered, they could prove its existence by other means.¹⁰² This position was supported by one stakeholder on the ground that cohabitation and general repute are useful criteria for proving marriage. Others added that the current presumption that cohabitants may be deemed married would assist in establishing the existence of a valid union.

⁹⁶ Section 4(5)(b).

⁹⁷ Section 4(6).

⁹⁸ Section 4(7).

⁹⁹ Section 4(8).

¹⁰⁰ Section 4(9).

¹⁰¹ SALRC *Report on Customary Marriages* par 4.5.6.

¹⁰² SALRC *Report on Customary Marriages* par 4.5.7.

2.53 The SALRC considered then that the time had come, however, to rethink the recommendations on solemnization and registration. An astonishing number of the respondents to the Issue and Discussion Papers on Customary Marriages were in favour of registration, if not a full ceremony of solemnization.¹⁰³ The Registrar of Deeds went so far as to say that even marriages contracted before the proposed Act should be registered to ensure proof of the marital status of parties to documents registered in Deeds Offices. Research findings indicated that women in particular wanted their marriages to be registered under the civil law so that they could secure full legal protection.¹⁰⁴ Another stakeholder too, felt that a marriage certificate would give greater security to marriage relationships by setting boundaries with intrinsic (legal) merit.

2.54 If registration was to be made compulsory, questions were raised at the SALRC's Provincial Workshops as to what type of customary unions would have to be registered.¹⁰⁵ If there is no actual wedding, as in the case of *ukungena* and *ukuvusa* unions, should the parties seek registration? The Workshops' point was that registration assumes both a wedding ceremony and a living bride and groom (who can be asked whether they consented). The answer to this problem was to treat these unions as continuations of existing marriages (not as new marriages). If need be, the introduction of a new spouse may be endorsed on to the registration certificate.

2.55 The SALRC noted that another problem to arise from insisting on registration was the strong likelihood that state-imposed formalities would not be observed.¹⁰⁶ People who regard family approval and lobolo as the critical elements of a valid union would see no point in having any additional formalities; nor could the cooperation of people in rural areas be expected if registering officers were located only in towns. Various respondents had suggestions for encouraging compliance with the law such as recommending extending an existing practice in KwaZulu/Natal - that *lobolo* be certified - to registration and the creation of a central registry with computer facilities. Another suggestion was that the bureaucracy be tightened up so that the registration network would become wide, accessible and efficient.¹⁰⁷ To make the administrative framework of registration more accessible the SALRC had already recommended that traditional authorities be constituted registering officers. This proposal received warm support from the public. As for the problem that urban areas and certain rural areas lacked traditional leaders,

¹⁰³ SALRC Report on Customary Marriages par 4.5.8.

¹⁰⁴ SALRC Report on Customary Marriages par 4.5.9.

¹⁰⁵ SALRC Report on Customary Marriages par 4.5.11.

¹⁰⁶ SALRC Report on Customary Marriages par 4.5.12.

¹⁰⁷ SALRC Report on Customary Marriages par 4.5.13.

stakeholders felt that traditional representatives in the townships should be established and employed to register marriages.

2.56 A major difficulty faced by the SALRC in making registration compulsory was the inability to find an appropriate sanction for failure to comply. To rule that unregistered unions are void would work great hardship for the spouses and would deprive many existing unions of potential validity. It is not equal hardship for both spouses.¹⁰⁸ Literature indicates that failure to register affects women more than men, because women are the ones who at the end of marriage usually need to share in the marital assets. However, a regime which visits failure to register a marriage with invalidity also affects women more than men, for the same reason. Hence, where a marriage has not been registered, the parties should be permitted to allege other forms of proof of its existence.¹⁰⁹ To encourage more people to register their marriages, the traditional authorities should be constituted registering officers.¹¹⁰

2.57 Himonga and Moore suggested that traditional leaders who are not designated registration officers would be able to fulfill a crucial role in the registration of customary marriages particularly in promoting protection of women to customary marriages and also in providing proof of the existence and validity of a customary marriage, and for purposes of succession and inheritance.¹¹¹

2.58 Himonga and Moore reflect also on the decline in the statistics of registration of customary marriages.¹¹² They remark that their findings support the argument that officials of the DHA were giving priority to registering marriages in terms of the civil marriage legislation instead of a customary marriage in terms of the RCMA. They mention a number of reasons why this might happen such as the paperwork being more elaborate to investigate and register a customary marriage; and officials might be ignorant of the differences between customary and civil marriages and especially the different consequences which apply when a civil marriage gets registered when it actually a customary marriage was entered into.

4. Registration of civil unions and marriages

¹⁰⁸ De Souza Monica 'When non-registration becomes non-recognition: examining the law and practice of customary marriage registration in SA' 2013 *Acta Iuridica* 239 – 272 at 243.

¹⁰⁹ SALRC *Report on Customary Marriages* par 4.5.18.

¹¹⁰ SALRC *Report on Customary Marriages* par 4.5.19.

¹¹¹ Himonga and Moore *Reform of customary marriage, divorce and succession in South Africa: Living customary law and social realities* at 118.

¹¹² Himonga and Moore *Reform of customary marriage, divorce and succession in SA: Living customary law and social realities* at 128.

2.59 Prospective civil union partners must under the Civil Union Act 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.¹¹³ In terms of the Civil Union Act a marriage officer must keep a record of all civil unions conducted by him or her.¹¹⁴ The marriage officer must transmit the civil union register and records concerned to the official in the public service with the delegated responsibility for the population register in the area in question.¹¹⁵ Upon receipt of the said register the official must cause the particulars of the civil union concerned to be included in the population register.¹¹⁶

5. Registration of Muslim marriages

2.60 In its report on Islamic Marriages and Related matters the SALRC explained that it could not accept the rationale of those respondents who, as a matter of principle, were opposed to registration of Muslim marriages.¹¹⁷ In the SALRC's view registration of marriages would ensure certainty, operate as an evidential record, and would avoid disputes and abuse. The SALRC further moved its provisional provision relating to the conclusion of a marriage through proxies to clause 5(1). Regarding the proposal in respect of the imposition of sanctions on a marriage officer where he knowingly registers a marriage, in contravention of the Bill, the SALRC introduced a sanction in clause 6(8). On whether the registration particulars should include the *mazhab*¹¹⁸ of the parties to the marriage, the SALRC, after discussion, decided that it was preferable not to incorporate provisions in this regard as the choice of *mazhab* is not directly relevant at the time of registration.¹¹⁹ It was also considered that in Islamic law each party could choose to retain his or her *mazhab*. The issue could be raised by the parties at the time of dissolution of the marriage in the case of a dispute requiring adjudication by the court or through the recommended mechanism on voluntary arbitration in clause 14. The SALRC had also increased the period for registration of marriages entered into before the commencement of the Act to two years in line with submissions by a number of respondents.¹²⁰ Provision had also been made for a marriage officer to inform the parties about the contractual options open to them at the time of the conclusion of the marriage by referring to the standard forms set out in

¹¹³ Section 12(1).

¹¹⁴ Section 12(5).

¹¹⁵ Section 12(6).

¹¹⁶ Section 12(7).

¹¹⁷ Par 3.137.

¹¹⁸ Mazhab is explained as follows: 'Mazhab (more commonly transliterated as madhab, from the arabic مذهب), is a school of Islamic jurisprudence. This term has changed its meaning through the centuries ... see <https://www.quora.com/What-is-meant-by-mazhab>.

¹¹⁹ Par 3.138.

¹²⁰ Par 3.139.

the regulations and by further informing them that they may structure a contract in whatever form they choose. This was in line with many submissions made.

2.61 The SALRC further explained about registration of Muslim marriages that Clause 6 of the proposed Bill would require the registration of both future and existing marriages, but that the failure to register existing marriages would not invalidate such marriages.¹²¹ This effectively meant that registration was strictly speaking not required and that parties who fail to register existing marriages without an election to opt out of the provisions of the Act, would still enjoy the protections afforded by the Act. The rationale was that there are sections of the Muslim community who because of illiteracy, lack of means or infirmity are unable to comply with the prescribed formalities. It was felt that these persons should not be deprived of the benefits of the Act. Registration, however, would promote legal certainty and was encouraged.

2.62 In *Women's Legal Centre Trust v President of the RSA* the court noted in August 2018 the DHA project initiated for the registering of imams to conduct Muslim marriages, that the DHA would be involved in the registration of Muslim marriages, and the DOJCD in dissolving Muslim marriages and possible legislative amendments or the development of *omnibus legislation* on religious marriages.¹²²

6. Questions about registration

2.63 We have noted above that the DHA supports the registration of all marriages. Do respondents support registration of marriages?

2.64 Should failure to register affect the validity of a marriage?

2.65 If a marriage can still be valid without registration, should there be alternative ways to prove the existence of a marriage? What would those alternatives be?

2.66 Should it be necessary for both parties to a marriage to register a marriage or should one party be able to register? If one party can register a marriage, what information and processes would be necessary to prevent the registration of bogus marriages?

2.67 Should parties be able to register marriages at any stage after their conclusion? What

¹²¹ Par 3.362.

¹²² *Women's Legal Centre Trust v President of the RSA* par [23].

would be the benefits and disadvantages to allowing registration at any time before the end of the marriage?

2.68 Should unmarried intimate relationships be registered to afford the partners legal rights or should registration merely serve to prove the existence of such relationships? Or should registration not be required at all for unmarried intimate relationships?

2.69 If unmarried intimate relationships should be registered, what information should be required and what would the best registration process be?

2.70 If registration of unmarried intimate relationship merely serves as evidence of the relationship, what other ways should there be to prove the existence of such relationships and what evidence should be considered as proof of such relationships?

2.71 Are there any other issues regarding registration of marriages respondents wish to highlight which need further consideration?

C. Marriage ceremony

1. Background

2.72 The DHA request that this investigation be conducted explains that ‘the state should have no interest ... how the religious or cultural rituals are conducted and should therefore have no interest in giving legal legitimacy to one or other practice in relation to the conclusion of a marriage’ and that ‘any marriage officer ... may conduct the marriage ceremony according to any religious; cultural or secular practice’. Furthermore, the DHA already in 1996 when it required the SALRC to review the Marriage Act noted that ‘[t]here is ever increasing pressure on the Department to provide for less formal requirements regarding places where a marriage might take place’.¹²³

2.73 The Marriage Act provides for two eventualities as regards the marriage formula to be used by marriage officers. The first instance is a marriage officer who is a designated minister of religion or a person holding a responsible position in a religious denomination or organization may in solemnising a marriage follow the formula and rites usually observed by the religious

¹²³

SALRC *Report on the Review of the Marriage Act* at page 2.

denomination or organisation concerned if the marriage formula has been approved by the Minister of Home Affairs. The second instance is that a designated minister of religion or a person holding a responsible position in a religious denomination or organization if the marriage formula has not been approved by the Minister, or in the case of any other marriage officer, the marriage officer concerned shall put the following questions to each of the parties separately, each of whom shall reply thereto in the affirmative: 'Do you, A.B., declare that as far as you know there is no lawful impediment to your proposed marriage with C.D here present, and that you call all here present to witness that you take C.D. as your lawful wife (or husband)?'. The formula further provides that thereupon the parties shall give each other the right hand and the marriage officer concerned shall declare the marriage solemnised in the following words: 'I declare that A.B. and C.D. here present have been lawfully married'.

2.74 The Marriage Act also provides for the validity of a marriage where the marriage formula has not been strictly been complied with relating to relating to the questions be put to each of the parties or to the declaration whereby a marriage is declared solemnised or to the requirement that the parties shall give each other the right hand. The requirements are that there was not strict compliance due to an error, omission or oversight committed in good faith by the marriage officer; or an error, omission or oversight committed in good faith by the parties or owing to the physical disability of one or both of the parties. The further conditions are that the marriage has in every other respect been solemnised in accordance with the provisions of the Act or a former law, that marriage shall, provided there was no other lawful impediment thereto and provided further that such marriage, if it was solemnised before the commencement of the Marriage Amendment Act 51 of 1970,¹²⁴ has not been dissolved or declared invalid by a competent court and neither of the parties to such marriage has after such marriage and during the life of the other, already lawfully married another, be as valid and binding as it would have been if the said provisions had been strictly complied with.

2.75 The Civil Union Act prescribes a formula for the solemnisation of a marriage or a civil partnership.¹²⁵ A marriage officer must inquire from the parties appearing before him or her

¹²⁴ The long title of the Marriage Amendment Act of 1970 indicates the range of amendments this Act effected namely: 'To amend the Marriage Act, 1961, so as to assign the administration of the provisions thereof in respect of any Bantu in the Republic and any member of any of the native nations in the territory of South-West Africa to the Minister of Bantu Administration and Development, and to provide that the administration of certain other laws may be assigned to the said Minister in respect of any Bantu; to abolish banns of marriage, notices of intention to marry and special marriage licences; to enable girls of the age of fifteen year to marry without the permission of the Minister; to apply the said Act to the territory of South-West Africa, including the Eastern Caprivi Zipfel: and to provide for incidental matters.

¹²⁵ Section 11 of the Civil Union Act.

whether their civil union should be known as a marriage or a civil partnership.¹²⁶ In solemnising any civil union, the marriage officer must put the following questions to each of the parties separately, and each of the parties must reply thereto in the affirmative: ‘Do you, A.B., declare that as far as you know there is no lawful impediment to your proposed marriage/civil partnership with C.D. here present, and that you call all here present to witness that you take C.D. as your lawful spouse/civil partner?’. Thereupon the parties must give each other the right hand and the marriage officer concerned must declare the marriage or civil partnership, as the case may be, solemnised in the following words: ‘I declare that A.B. and C.D. here present have been lawfully joined in a marriage/civil partnership’.¹²⁷

2.76 If the provisions relating to the questions to be put to each of the parties separately or to the declaration whereby the marriage or civil partnership shall be declared to be solemnised, or to the requirement that the parties must give each other the right hand, have not been strictly complied with owing to— an error, omission or oversight committed in good faith by the marriage officer; an error, omission or oversight committed in good faith by the parties; or the physical disability of one or both of the parties, and such civil union has in every other respect been solemnised in accordance with the provisions of the Civil Union Act, that civil union shall, provided there was no other lawful impediment thereto, be valid and binding.¹²⁸

2. Questions about marriage ceremonies and a prescribed or approved marriage formula

2.77 In the DHA request for this investigation it is said that the state should have no interest in how the religious or cultural rituals are conducted in a marriage ceremony. The Marriage Act and Civil Union Act prescribe the formulae to be used during certain marriage ceremonies. Do respondents agree and if not why?

2.78 Do respondents consider that a prescribed marriage formula contributes in any way towards effecting legal certainty as to a marriage having been conducted, and if so how?

¹²⁶

Section 11(1) of the Civil Union Act.

¹²⁷

Section 11(2) of the Civil Union Act.

¹²⁸

Section 11(3) of the Civil Union Act.

D. Matrimonial and patrimonial consequences of marriages

1. The SALRC's investigation into matrimonial property law

2.79 The SALRC is presently reviewing aspects of matrimonial property law in its project 100E.¹²⁹ The SALRC published its Issue Paper 34 in August 2018 for general information and comment. The SALRC explains in the Issue Paper that the underlying aim of the investigation is to review the current law with regard to matrimonial property for greater legislative fairness and justice governing interpersonal relationships between spouses. The SALRC further remarked that the wide ambit of the investigation will ensure that the SALRC is not limited in its review of current law.¹³⁰ Issue Paper 34 further explains that the main purpose of the Issue Paper is to establish the extent of this review.¹³¹ Clarity is needed on whether a complete review with the aim of a full-scale overhaul of the current matrimonial regime and its patrimonial consequences on divorce is necessary, or whether particular aspects could be addressed to bring relief. Ad hoc as well as wider issues are thus covered in the questions posed in the Issue Paper. The SALRC anticipated that this exploratory consultation with the public and experts will assist in guiding the ambit of the investigation.

2. Proprietary consequences of customary marriages

2.80 The proprietary consequences of customary marriages, before the RCMA came into operation on 15 November 2000, were regulated in terms of customary law. This applied to both monogamous and polygynous customary marriages.¹³² The Constitutional Court considered section 7(1) and (2) of the RCMA in *Gumede v President of the Republic of South Africa*¹³³ in December 2008. The Court held that the distinction between customary marriages concluded before 15 November 2000 and those concluded thereafter is discriminatory and not justifiable in terms of our Constitution. The court also struck down section 20 of the KwaZulu Act on the Code of Zulu Law of 1985¹³⁴; and sections 20 and 22 of the Natal Code of Zulu Law of 1987¹³⁵ as unconstitutional. The Constitutional Court furthermore declared section 7(1) of the RCMA invalid to the extent that it related to monogamous customary marriages and deleted the words “entered into after the commencement of this Act” from section 7(2) of the RCMA. This means

¹²⁹ See http://www.justice.gov.za/salrc/ipapers/ip34_prj100E-MatrimonialProperty-2018.pdf.

¹³⁰ Page 1.

¹³¹ Page 2.

¹³² Section 7(1) of the Recognition of Customary Marriages Act.

¹³³ 2009 (3) SA 152 (CC) (hereinafter ‘Gumede’).

¹³⁴ Act 16 of 1985.

¹³⁵ Proclamation No. R.151 of 1987.

that monogamous customary marriages entered into before the commencement of the Act were also deemed to be in community of property.

2.81 On the argument that community of property is incompatible with polygynous marriages, the Court held that the constitutional invalidity of section 7(1) was limited to monogamous marriages and should not affect polygynous relationships or their proprietary consequences. The Court did not overlook the fact that this prolongs the existing disparity between women in monogamous marriages and those in polygynous marriages. It ruled that polygynous marriages should continue to be 'regulated by customary law until parliament intervenes'. Since the judgment in *Gumede* there has been no undertaking by the legislature to correct the situation. The SALRC, in its Discussion Paper 133,¹³⁶ brought to the attention of the Department of Home Affairs that the Constitutional Courts decision had not been given effect to. Commenting on the SALRC Discussion Paper 133, the Department of Home Affairs indicated that the provisions of section 7 would be incorporated into the draft Recognition of Customary Marriages Amendment Bill to give effect to the Constitutional Court judgment in the *Gumede* matter. An important aspect of the *Gumede* judgment is that the Constitutional Court created a judicial discretion to deviate from the chosen matrimonial property regime in customary marriages, which doesn't exist in the Marriage Act. This could be regarded as discriminating against women in non-customary marriages and it should be extended to all relationships – in other words, even when partners have agreed on a property regime, the courts should have a (probably circumscribed) discretion to deviate from that in the interests of justice and gender equality when the relationship ends.

2.82 On 30 November 2017 the Constitutional Court in *Ramuhovhi and Others v President of the Republic of South Africa and Others*¹³⁷ extended the impact of the *Gumede* judgment to polygynous customary marriages entered into before the enactment of the RCMA. The Constitutional Court ordered Parliament to amend the legislation within 24 months. In the interim, however, the remedy of this legislative defect would be that husbands and wives in pre-RCMA polygynous marriages must share equally in the right of ownership, management and control of the matrimonial property.

2.83 In April 2018 the Minister of Justice and Correctional Services invited written comment on the proposed draft Recognition of Customary Marriages Amendment Bill, which gives effect

¹³⁶ SALRC Discussion Paper 133: Project 25: Statutory Law Revision: Legislation Administered by the Department of Home Affairs 2015 see <http://www.justice.gov.za/salrc/dpapers/dp133.pdf>.

¹³⁷ 2017 ZACC 41.

to the judgment in *Ramuhovhi and Others v President of the RSA*.¹³⁸ The proposed amendment of section 7(1) of the RCMA provides that the proprietary consequences of a customary marriage, whether polygamous, or not, entered into before the commencement of the Act are that the spouses in such a marriage have joint and equal — (i) ownership and other rights; and (ii) rights of management and control, over marital property. It further provides that the rights must be exercised— (i) in respect of all house property, by the husband and wife of the house concerned, jointly and in the best interests of the family unit constituted by the house concerned; and (ii) in respect of all family property, by the husband and all the wives, jointly and in the best interests of the whole family constituted by the various houses. Each spouse retains exclusive rights over his or her personal property. For purposes of section 7(1) the terms ‘marital property’, ‘house property’, ‘family property’ and ‘personal property’ have the meaning ascribed to them in customary law.

3. Marriages conducted in terms of the Transkei Marriage Act

2.84 The Constitutional Court case of *Holomisa v Holomisa* highlighted the discriminatory situation that women married out of community of property under the Transkei Marriage Act 21 of 1978 do not enjoy the protection, on divorce, of section 7(3) of the Divorce Act.¹³⁹ Section 7(3) of the Divorce Act empowers a court granting a decree of divorce in respect of a marriage out of community of property to order a redistribution of assets where it considers it just and equitable to do so, taking into consideration the contribution, monetary and otherwise, of the parties to the marriage. The effect of this section was mainly to make transfers possible that favoured women married out of community of property. The Court was asked to order that section 7(3) of the Divorce Act 70 of 1979 be declared unconstitutional to the extent that it does not allow a spouse married out of community of property without having entered into an antenuptial contract as contemplated in the repealed section 39 of the Transkei Marriage the right to claim a redistribution of property on divorce.¹⁴⁰ The Court could not think of any reason why Transkei women in the position of the applicant should be deprived of the benefits of a possible just transfer of assets on divorce in terms of section 7(3) of the Divorce Act.¹⁴¹

4. Matrimonial consequences of Muslim marriages

¹³⁸ See <http://www.justice.gov.za/legislation/notices/2018/20180420-gg-41581-gon188-RCMA-Invite-DraftBill.pdf>.

¹³⁹ (CCT146/17) [2018] ZACC 40 (23 October 2018).

¹⁴⁰ *Holomisa v Holomisa* par [11].

¹⁴¹ *Holomisa v Holomisa* par [23].

2.85 In the case of *Women's Legal Centre Trust v President of the RSA* the Court was informed that the SALRC was requested to consider the possible adoption of such legislation. Judge Boqwana considered in this case, among others, the argument that all Muslim marriages should be in community of property noting the following:

[208] An argument that an order that deems all Muslim marriages to be in community of property would not be just and equitable is compelling; such an order could be viewed as intruding on religious freedom. It would convert marriages that are currently 'out of community of property' in terms of *Sharia* law to marriages 'in community of property'. This will apply to both existing and future marriages. It is one thing to make available the existing ordinary civil remedies for spouses in Islamic marriages to enforce their rights and quite another to drastically alter the matrimonial regime that applies to Islamic marriages. The legislature may, ultimately decide to make such an inroad into religious freedom, but that is a decision that should be left with Parliament.

5. Questions on matrimonial consequences of marriages

2.86 If there is support for a single marriage statute or omnibus legislation, what should it provide for in regard to matrimonial property and what would its impact be on existing legislation?

2.87 What are the views of respondents in relation to the matrimonial consequences of all marriages and intimate unmarried relationships being regulated by a single marriage statute or omnibus legislation?

2.88 Respondents are requested to once again indicate whether there are any others matters regarding matrimonial property which should be considered by the SALRC.¹⁴²

E. Spousal support

1. Background

2.89 A marriage or civil union leads to variable and invariable consequences.¹⁴³ Parties to a marriage or civil union are able to reach agreement on the variable consequences of their relationship regarding their estate by setting out the proprietary consequences in an antenuptial agreement. The invariable consequences of a relationship are the consequences of a civil marriage.

¹⁴²

See http://www.justice.gov.za/salrc/ipapers/ip34_prj100E-MatrimonialProperty-2018.pdf.

¹⁴³

See Heaton and Kruger *South African Family Law* at 41.

2.90 One of the invariable consequences of a civil marriage is the reciprocal duty of support between spouses in a civil marriage.¹⁴⁴ This duty exists in terms of the common law until it comes generally to an end either by divorce or death.¹⁴⁵ The provision of maintenance forms part of this duty. The Maintenance of Surviving Spouses Act 27 of 1990, however, provides that the survivor shall have a claim against the estate of the deceased spouse for the provision of reasonable maintenance needs until death or remarriage in so far as the surviving spouse is not able to provide therefor from own means and earnings.¹⁴⁶ Upon divorce the court is also able in terms of the Divorce Act to make an order for maintenance.¹⁴⁷ The duty for support is determined by the need of the party claiming the payment of maintenance and the other party being able to provide maintenance. The spouse who took care of a joint household and children and who was not in a position to accumulate an estate is in a disadvantageous position compared to the spouse who participates in economic activities and who is able to build an estate.¹⁴⁸ This is particularly so when the spouse reached an age where limited potential exists for building a career and for earning a substantial income. The duty to support exists as regards both spouses depending on their means to provide the support claimed.¹⁴⁹

2.91 The Constitutional Court noted in *Satchwell v President of Republic of South Africa and Another*¹⁵⁰ that 'section 9 generally does not require benefits provided to spouses to be extended to all same-sex partners where no reciprocal duties of support have been undertaken'. The Court also held that '[t]he Constitution cannot impose obligations towards partners where those partners themselves have failed to undertake such obligations'. The Constitutional Court considered that depending on the circumstances of each a duty of support may exist between partners in a same-sex life partnership.¹⁵¹

¹⁴⁴ See Heaton and Kruger *South African Family Law* at 44 and *Harlech-Jones v Harlech-Jones* (188/2011) [2012] ZASCA 19 at par 12 (also reported as *EH v SH* 2012 (4) SA 164 at 167); see also *Du Plessis v Road Accident Fund* (443/2002) [2003] ZASCA 86 (19 September 2003) par 11.

¹⁴⁵ *Zwiegelaar v Zwiegelaar* (607/98) [2000] ZASCA 68; 2001 (1) SA 1208 (SCA); [2001] 1 All SA 261 (A) (28 November 2000) available at <http://www.saflii.org/za/cases/ZASCA/2000/68.html>. See also generally the SALRC *Report on Domestic Partnerships* par 3.2.33 to 3.2.46.

¹⁴⁶ Section 2.

¹⁴⁷ Sections 7(1) and (2).

¹⁴⁸ *Harlech-Jones v Harlech-Jones* at par 11 and *EH v SH* par 11.

¹⁴⁹ See *Reyneke v Reyneke* 1990 (3) SA 927 (E) at 932 – 933:

... one of the fundamental principles for an award of maintenance is an ability to pay on the part of the spouse from whom maintenance is claimed. This is a factual matter. As Van den Heever J (as he then was) put it in *Oberholzer v Oberholzer* (*supra* at 297):

... (T)he duty to maintain is facultative: it depends upon the reasonable requirements or needs of the party claiming it and the ability of the party from whom it is claimed to furnish it.'

¹⁵⁰ (CCT45/01) [2002] ZACC 18; 2002 (6) SA 1; 2002 (9) BCLR 986 (25 July 2002) par [24] see <http://www.saflii.org/za/cases/ZACC/2002/18.html>.

¹⁵¹ *Satchwell v President of RSA* par [25].

2.92 In *Du Plessis v Road Accident Fund* the Supreme Court of Appeal took into account various facts such as the ceremony the parties conducted before witnesses, that they lived together for 11 years in a stable and permanent relationship, their relationship was accepted as such by their friends, shared family responsibilities, pooled their incomes, appointed each other as the sole heir in their respective wills, and the deceased financially supported the plaintiff after his medical discharge from work prior to his death in determining that the inference that the plaintiff and the deceased undertook reciprocal duties of support and that there existed a contractual duty of support between the deceased and the plaintiff.

2.93 As regards opposite-sex cohabitants, in *Harlech-Jones v Harlech-Jones*¹⁵² (or *EH v SH*) the wife moved out of the marital home to cohabit with a third party. She lodged a claim for support against the husband she left. The Supreme Court held that the facts of each case need to be taken into account and that ‘in the modern, more liberal (some may say more “enlightened”) age in which we live, public policy demands that a person who cohabits with another should for that reason alone be barred from claiming maintenance from his or her spouse’.¹⁵³

2.94 The Supreme Court of Appeal in *Paixão and Another v Road Accident Fund*¹⁵⁴ dealt with the question of the development of the common law to extend the dependants’ action to permanent heterosexual relationships. In this case the applicant was in a cohabitation relationship with the deceased who was at that stage still married according to Portuguese law. His marriage was dissolved under South African law. He obtained a divorce in Portugal subsequently. The applicant and the deceased planned to marry and she was introduced to his family in Portugal. He was the sole breadwinner and supported the applicant and her children. He and the applicant had a joint will and her children would inherit from their consolidated estate. A wedding date was set for the date of the 50th wedding anniversary of the parents of the deceased in Portugal. He died however before the planned journey to Portugal. The Court held:

[39] ... The proper question to ask is whether the facts establish a legally enforceable duty of support arising out of a relationship akin to marriage. Evidence that the parties intended to marry may be relevant to determining whether a duty of support exists, as in this case. But it does not mean that there must be an agreement to marry before the duty is established. And once a dependant establishes the duty, the law ought to protect it.

¹⁵²

At par [11].

¹⁵³

See also ‘Can a wife claim maintenance from her husband when she lives with another another man?’ available at <https://divorceattorneys.wordpress.com/2012/05/27/maintenance-divorce-adultery/>.

¹⁵⁴

(640/11) [2012] ZASCA 130; [2012] 4 All SA 262 (SCA); 2012 (6) SA 377 (SCA) (26 September 2012).

2.95 Commenting on the judgment of *Paixão v Road Accident Fund*, Bonthuys remarks as follows about the possible limited application of this judgment to women in partnerships who are also partners in customary marriages:¹⁵⁵

... the dicta raise the difficult issue of the extent to which duties of support can exist when one of the same- or opposite-sex cohabitants is also married or in another cohabitation relationship, or put differently, the question of polygamous cohabitation relationships. Despite the *Paixão* judgment, it is difficult to imagine courts treating existing South African civil marriages as lightly if the plaintiff were asserting a right to support from an intimate partner with whom she neither lived, nor was married to. The reasoning in the *Paixão* is therefore not likely to assist African women whose partners are also married in civil law. I say this because the legal history of the privileging of civil marriages over customary marriages, to the extent of a civil marriage to another woman at times invalidating an existing customary marriage, would most likely dissuade courts from similar reasoning, especially when the customary relationships in question are not marriages but unmarried intimate relationships. (Footnote omitted.)

2.96 In *Laubscher N.O. v Duplan and Another*¹⁵⁶ the Constitutional Court considered, among others its judgment in *Volks v Robinson*. The majority noted¹⁵⁷ that in *Volks* the Court's 'reluctance to grant a right for a permanent partner to claim maintenance against a deceased estate was brought on by the fact that the right to claim maintenance would never have arisen by operation of law during the lifetime of the deceased'.

2.97 In his minority judgment Justice Froneman held, among others, as follows in *Laubscher v Duplan* about getting out of the *Volks* judgment:

[85] ... The initial obvious way to change our society's views on unmarried partnerships was to show that they exhibited the same characteristics as married partnerships. Central to this was the existence of reciprocal duties of support between partners in both married and unmarried relationships. The most comfortable way to ease the road to equality was to remove the impediment of formal marriage to previous unmarried partners. But that was only a pragmatic start on the road we need to travel. The logic of similar reciprocal duties of support does not necessitate equalisation in that particular way. To the contrary, it creates a new form of unfair discrimination against unmarried couples who do not wish to marry. The same reciprocal duties of support remain, but some are protected, others still not. That residual unfair discrimination cannot be allowed to stand.

2.98 Commenting on the Constitutional Court cases of *Volks v Robinson* and *Laubscher v Duplan* Bonthuys suggests the rethinking of the judgment in *Volks v Robinson*:¹⁵⁸

¹⁵⁵ Bonthuys E 'A duty of support for *all* South African unmarried intimate partners Part I: The limits of the cohabitation and marriage based models' 2018 *PER/PELJ* Vol 21 at 24 see <http://dx.doi.org/10.17159/1727-3781/2018/v21i0a4410>.

¹⁵⁶ (CCT234/15) [2016] ZACC 44; 2017 (2) SA 264 (CC); 2017 (4) BCLR 415 (CC) (30 November 2016).

¹⁵⁷ At par [44].

¹⁵⁸ Bonthuys E 'A duty of support for *all* South African unmarried intimate partners Part 2: Developing customary and common law and circumventing the *Volks* judgment' 2018 *PER/PELJ* Vol 21 no 1 at 31.

The choice argument should not apply to women in invalid customary marriages, because they would usually not be aware of the defects which render their marriages void, especially where the man is already involved in another customary or civil marriage.

Given these issues, which have been pointed out repeatedly by many academic commentators, the time has come to re-visit the choice argument in *Volks*. The minority judgment by Froneman J in *Laubscher v Duplan* presents an opportunity for re-evaluation, which should be further developed in future jurisprudence.

2.99 In 2014 the SALRC published its Issue Paper dealing with the review of the law of maintenance.¹⁵⁹ A discussion paper is presently being developed in this investigation. The SALRC also published its Issue Paper 34 on the review of matrimonial property in August 2018.¹⁶⁰ This Issue paper noted that the lack of a statutory remedy to claim a share of partnership property outside of valid marriages, is a problem with significant gendered consequences, potentially leading to the social and economic vulnerability of women (and often children) when intimate relationships end.¹⁶¹ The SALRC explained that although the law has been developed by the courts to provide life partners with the possibility of entering into a universal partnership, disputes about the existence and the terms of universal partnerships in the context of cohabitation are common; and the need for a statutory framework to bring clarity with regard to the position of cohabitants has been increasingly emphasised by academic commentators. The SALRC also commented in this Issue Paper that although the three issues (matrimonial property; maintenance; and care of and contact with children), are reviewed under different investigations, the interrelatedness between property envisages that any issues respondents raise about remedies to the law regarding spousal support need to become part of this investigation.¹⁶²

2. Questions about spousal support

2.100 Calls have been made in the past to recognise spousal support also in circumstances where there is no valid marriage and no duty presently recognised by law imposing a duty for the payment of support. Should the law recognise a statutory duty of support between unmarried partners?

2.101 Should the duty of support also extend to circumstances where one of the unmarried partners is also in an unmarried partnership or a spouse in a marriage? The SALRC will see to it

¹⁵⁹ SALRC Issue Paper 28 (Project 100) 'Review of the Maintenance Act 99 of 1998' see <http://www.justice.gov.za/salrc/ipapers/ip28-prj100-Maintenance-2014.pdf>.

¹⁶⁰ Issue Paper 34 see http://www.justice.gov.za/salrc/ipapers/ip34_prj100E-MatrimonialProperty-2018.pdf.

¹⁶¹ See Issue Paper 34 page 5.

¹⁶² See Issue Paper 34 page 3.

that comment by respondents gets considered in the relevant investigation, be it the review of maintenance or the law of matrimonial property.

F. Ante-nuptial agreements

1. Background

2.102 The Divorce Act provides for the division of assets and maintenance of parties upon divorce:

7(1) A court granting a decree of divorce may in accordance with a written agreement between the parties make an order with regard to the division of the assets of the parties or the payment of maintenance by the one party to the other.

(2) In the absence of an order made in terms of subsection (1) with regard to the payment of maintenance by the one party to the other, the court may, having regard to the existing or prospective means of each of the parties, their respective earning capacities, financial needs and obligations, the age of each of the parties, the duration of the marriage, the standard of living of the parties prior to the divorce, their conduct in so far as it may be relevant to the break-down of the marriage, an order in terms of subsection (3) and any other factor which in the opinion of the court should be taken into account, make an order which the court finds just in respect of the payment of maintenance by the one party to the other for any period until the death or remarriage of the party in whose favour the order is given, whichever event may first occur.

2.103 The subject of litigation in the Western Cape High Court in *W v H*¹⁶³ was an antenuptial agreement concluded in 1992 when the wife was 28 and the husband 53. The Court noted, among others, that it ‘contains clauses and provisions which are difficult to imagine any right thinking woman would have agreed to have incorporated in’¹⁶⁴ and ‘[n]o self-respecting South African attorney who is familiar with the provisions of the Matrimonial Property Act of South Africa and who practised in that field would have allowed his client to sign a document such as I am asked to accept as a binding agreement between the parties in respect of their marriage to each other’.¹⁶⁵ The Court upheld the argument proffered by the wife that the provisions waiving her right to maintenance in the antenuptial agreement were contrary to public policy and unenforceable.¹⁶⁶

2.104 Commenting on *W v H* Prof Bonthuys¹⁶⁷ notes that the case of *W v H* ‘illustrates that the relational nature of a contract can render the contracting parties more susceptible to influence

¹⁶³ (25394/2010) [2016] ZAWCHC 97; [2016] 4 All SA 260 (WCC); 2017 (1) SA 196 (WCC) (5 August 2016) available at <http://www.saflii.org/za/cases/ZAWCHC/2016/97.html>.

¹⁶⁴ Par [7].

¹⁶⁵ Par [49].

¹⁶⁶ See par [22].

¹⁶⁷ Bonthuys E ‘Public policy and the enforcement of antenuptial contracts’ *W v H* 2018 SALJ Vol 135 No 2 237 – 248 at 248.

from one another in ways which go beyond the traditional doctrines of misrepresentation and undue influence'. She therefore suggests that consideration be given to the adoption of 'special rules or expand the scope of existing rules to capture the effects of relationships in certain kinds of contracts'. Bonthuys considers one option would be to require 'more altruistic standards of conduct within these contracts'.

2.105 The sequel to *W v H* was the Supreme Court of Appeal dealing in *ST v CT*¹⁶⁸ with the waiver clause in the antenuptial agreement regarding maintenance for the wife. The majority of the court was in agreement that the waiver clause was unenforceable. Rogers AJJA explains in *ST v CT* that he agrees that the maintenance waiver was not enforceable¹⁶⁹ but held that there was no need to brand a prenuptial waiver as per se contrary to public policy. His conclusion was that the legislation does indeed provide a mechanism to address the policy concerns alluded to by in the majority judgment, namely by giving the divorce court an overriding discretion to disregard the waiver. Judge Rogers noted 'the nuanced and enlightened approach prevailing in England, Canada and elsewhere' which 'eschews paternalistic thinking and promotes party autonomy while at the same time giving the court a generous jurisdiction to prevent unfair outcomes'.¹⁷⁰

2.106 The SALRC also deals with ante-nuptial agreements in its Issue Paper 34 on matrimonial property.¹⁷¹ The SALRC explained that in South Africa, the economic consequences of an intimate relationship are increasingly being regulated by contract. It said that parties to civil and customary marriages, and to civil unions, are allowed to conclude ante-nuptial contracts to regulate the variable consequences of their marriages. It noted that in practice, the ante-nuptial contract determines the matrimonial property system of the parties. It is moreover accepted practice for divorcing parties to enter into a settlement agreement upon divorce. Although the courts do not have to endorse a settlement agreement, they have discretion to make an order in accordance with such agreement. The SALRC asked a range of questions in its Issue Paper 34 about these agreements.¹⁷²

2. Question about ante-nuptial agreements and discretion of the court in making fair orders

¹⁶⁸ 1224/16) [2018] ZASCA 73 (30 May 2018).

¹⁶⁹ *ST v CT* par [183].

¹⁷⁰ *ST v CT* par [197].

¹⁷¹ See http://www.justice.gov.za/salrc/ipapers/ip34_prj100E-MatrimonialProperty-2018.pdf.

¹⁷² Issue Paper 34 pages 18 – 19 see http://www.justice.gov.za/salrc/ipapers/ip34_prj100E-MatrimonialProperty-2018.pdf.

2.107 Should the single marriage statute make provision for the conclusion, registration and enforcement of antenuptial agreements?

G. Dissolution of relationships and alternative dispute resolution

1. Background

2.108 The Divorce Act requires that marriages be dissolved by a court. Section 3 provides that a marriage may be dissolved by a court by a decree of divorce and the only grounds on which such a decree may be granted are— (a) the irretrievable break-down of the marriage (b) the mental illness or the continuous unconsciousness of a party to the marriage. The RCMA requires too the dissolution of customary marriages by a court. Section 8 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. A court may grant a decree of divorce on the ground of the irretrievable breakdown of a marriage if it is satisfied that the marriage relationship between the parties to the marriage has reached such a state of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between them. The Civil Union Act does not make specific reference to the Divorce Act for dissolution of civil union. As the Court noted in *Steyn v Steyn* the Civil Union Act itself contains no provisions which govern the dissolution of a civil union.¹⁷³ The Court considered that the rationale for this obvious omission is that the Legislature intended that the provisions of section 13(2)(a) of the Civil Union Act should incorporate the relevant provisions of the Divorce Act as the applicable statute to dissolve these unions or marriages.¹⁷⁴

2.109 The draft Domestic Partnerships Bill provided that a registered domestic partnership would terminate upon the death of one or both registered domestic partners or informally by a termination agreement as contemplated in clause 14 or a court order as contemplated in clause 15 of the Bill. The Bill further proposed that a death certificate, or a termination certificate issued in terms of the Bill, or a termination order made by the court in terms of the Bill, would be *prima facie* proof that such a registered domestic partnership has ended.¹⁷⁵ The Bill also provided for a right to approach a court for certain kinds of relief.

¹⁷³ *Steyn v Steyn* (6427/2010) [2010] ZAWCHC 224 (27 October 2010).

¹⁷⁴ *Steyn v Steyn* par [29].

¹⁷⁵ Clause 12.

2.110 In its report on Muslim Marriages the SALRC also addressed the dissolution of Muslim marriages. The SALRC in its evaluation of comment by stakeholders explained that the crucial concern of certain respondents was that a pronouncement of dissolution of a marriage (*faskh*) by a non-Muslim judge is not permissible in Islamic law.¹⁷⁶ This was addressed by introducing a new subclause (1)(a)19 in clause 15 to provide that the Judge-President or other titular head of the relevant court must appoint a Muslim judge or acting judge to adjudicate disputes under the proposed legislation. Certain respondents also raised the question of appeal procedures. It was decided that all appeals should be heard by the Supreme Court of Appeal and that, to assist that court on issues of Islamic law, two accredited Muslim institutions should submit written comment to that court which should form part of the appeal record. The court in arriving at its decision, should have due regard to such comment. Accordingly, subclauses (4) and (5) were inserted to cover the situation. Some respondents were concerned about the qualifications of assessors, and made proposals in this regard, to ensure that duly qualified persons would preside over cases. These proposals were duly considered, but the Commission decided that the criteria governing assessors should appropriately be prescribed regulations under clause 18 of the amended draft Bill. After careful consideration, including a consideration of technical feasibility, a change was brought about in subclause (2) to ensure that assessors act in an advisory capacity and, where they differ from the presiding judicial officer, to record their reasons for doing so. Provision has also been made for legal aid to indigent litigants (subclause (6)).

2.111 How can alternative dispute resolution (ADR) be used to resolve disputes arising from family law matters? The SALRC is presently investigating family mediation in its Project 100D. A discussion paper is presently being developed with the aim of developing an Alternative Dispute Resolution Act, which will also deal with mediation. The SALRC considers that a coordinated approach in respect of the various pieces of legislation that deal with ADR will be needed with regard to the definition of mediation. The ADR Act will ultimately provide the basis for all mediation processes.

2.112 The SALRC discussion paper on family dispute resolution will include mandatory family mediation, compulsory information and education programmes and family arbitration, parenting coordination and collaborative dispute resolution to be regulated in the context of an integrated family law system. A Family Dispute Resolution Bill is being developed in this investigation. An Advisory Committee meeting was held on 12 April 2018 where the frameworks for the

¹⁷⁶

Par 3.277.

Discussion paper and the draft Bill were discussed. The development of the Discussion paper and draft Bill, in accordance with the Advisory Committee's instructions, is receiving attention.

2.113 Bennett has noted that before divorce actions could be instituted in the family courts, traditional rulers should be given the opportunity to attempt a reconciliation of the spouses, which is the traditional method for handling marital disputes.¹⁷⁷ He noted that the RCMA provides that none of its provisions should be construed as limiting the customary role of any person, including a traditional leader, in the mediation of marital disputes.

2. Question about extra-judicial dissolution of relationships and alternative dispute resolution in family matters

2.114 Since the SALRC is conducting focussed investigations into dispute resolution regarding family disputes it is clear that the SALRC ought not to duplicate its efforts but should rather make use of its resources in an optimal way. If respondents have views how alternative dispute resolution mechanisms could be applied to resolve family law disputes, they are requested to submit their views to the SALRC in order that they be taken into account as part of the other investigations already being conducted by the SALRC. Comments will be taken into account in those investigations in taking forward respondent comment.

H. Sham or bogus marriages

1. Background

2.115 We noted above that we were requested by the DHA to also consider sham marriages as these marriages proved to pose a particular challenge in South Africa.¹⁷⁸ Already in 2004 the media reported about the existence of large numbers of fake or sham marriages in South Africa.¹⁷⁹ In some instances brides learnt that they were unknowingly already married when they attempted to register a marriage or when applying for the issue of identity documents.¹⁸⁰

¹⁷⁷ Bennett TW 'Legal pluralism and the family in South Africa: lessons from customary law reform' 2011 *Emory International Law Review* 1029 – 1059 at 1057.

¹⁷⁸ See the Department of Home Affairs 2004 – 2005 *Annual Report* for information about measures taken by the Department to address marriages fraudulently concluded see http://www.dha.gov.za/files/Annual%20Reports/Annual_Report_2004-2005.pdf.

¹⁷⁹ '600 fake marriages: Priest held' *News 24 Archives* 7 September 2004.

¹⁸⁰ 'Find out if you're married' *News 24 Archives* 19 August 2004. See also 'SA women warned on fake weddings' *BBC News* 26 July 2004; Political Bureau '7 000 locals in fraudulent marriages' *IOL* 22 July 2010.

2.116 Marriages of convenience have also been the subject of consideration by courts in South Africa. In *Maseko v Maseko* the parties reached agreement to marry in order to conceal property from creditors. The Court noted that [i]t has been held on a number of occasions that a marriage of convenience is a valid marriage and a Court will not set it aside on that ground.¹⁸¹ In *Martens v Martens* the Court the parties argued that¹⁸² they did not intend that there should be a marriage, with none of the consequences of marriage, therefore they did not really intend to be married. The Court found that the parties 'got married because they thought that they could easily be divorced afterwards'. The Court held that 'they fully realised that there would be a binding marriage needing divorce to dissolve it'.¹⁸³

2.117 The question is how one should distinguish between marriages of convenience, genuine marriages and sham or bogus marriages. On 26 September 2014 the European Union Commission Staff made available a Handbook on addressing the issue of alleged marriages of convenience between EU citizens and non-EU nationals in the context of EU law on free movement of EU citizens.¹⁸⁴ The EU Handbook notes that there are different types of genuine marriages and marriages of convenience:¹⁸⁵ A genuine marriage is explained in the EU Handbook as follows:

Genuine marriages are characterised by the **intention of the married couple to create together a durable family unit** as a married couple **and to lead an authentic marital life**. Marriages of convenience are characterised by the lack of such an intention.

2.118 The EU Handbook provides the following guidance on bogus or sham marriages and marriages of convenience:¹⁸⁶

Sometimes, marriages of convenience are labelled as bogus or sham but this is, strictly speaking, not correct. Unlike marriages of convenience, which are formally valid, **bogus or sham marriages are invalid** or entirely fictitious. Bogus marriages may involve forgery or the misuse of documents relating to another person.

The formal validity of marriages of convenience is their '*competitive advantage*' over bogus marriages.

¹⁸¹ [1992] 3 All SA 207 (W) at 213.

¹⁸² [1952] 2 All SA 190 (W) at 191.

¹⁸³ Page 192.

¹⁸⁴ *European Commission Handbook on addressing the issue of alleged marriages of convenience between EU citizens and non-EU nationals in the context of EU law on free movement of EU citizens* available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014SC0284 &from=IT> at page 11.

¹⁸⁵ Section 2.2 page 10.

¹⁸⁶ *European Commission Handbook on alleged marriages of convenience* at page 14.

2.119 In *R (on the application of Baiai and others) v Secretary of State for the Home Department* Baroness Hale of Richmond explained the effect of sham marriages in English law, among others, as follows:¹⁸⁷

34. A “sham” marriage is still a valid marriage in English law. “The fact is that in the English law of marriage there is no room for mental reservations or private arrangements regarding the parties’ personal relationships once it is established that the parties are free to marry one another, have consented to the achievement of the married state and observed the necessary formalities” ... This has long been recognised as a rule of public policy. The ecclesiastical courts from whom our marriage law was derived did not want parties to an apparently valid marriage claiming that it was void because of some private reluctance to accept all of the obligations it entailed. How would one single out which obligations were essential and which not? There are many happily married couples who do not live together and many more who do not have children together. Nor are all so-called “sham” marriages entered into for “a nefarious purpose”; as Lord Simon of Glaisdale has pointed out, “Auden married the daughter of the great German novelist, Thomas Mann, in order to facilitate her escape from persecution in Nazi Germany” ...

2. Question about bogus or sham marriages

2.120 Respondents are requested to suggest suggestions how to best prevent bogus marriages and to deal with them after they have been concluded?

I. Concluding question: have we covered everything in this issue paper we ought to have covered?

2.121 Respondents are invited to provide suggestions not already covered by issues raised above in so far as they may contribute towards the investigation.

¹⁸⁷

See <https://publications.parliament.uk/pa/ld200708/ldjudgmt/jd080730/rhome.pdf>.