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The Practical Implications and Effects of  
**The Recognition of Customary Marriages Act**  
**No. 120 of 1998**

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**Mothokoa Mamashela**

Law School

University of Natal – Pietermaritzburg

**Thokozani Xaba**

School of Development Studies

University of Natal - Durban

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## Introduction

The Recognition of Customary Marriages Act, 120 of 1998 came into operation in November 2000. It recognises customary marriages which were, hitherto, partially recognized according to South African general law.<sup>1</sup> The Act also espouses equality between spouses (sec 7(2) and(3)) and thus changes fundamentally, the personal and proprietary consequences of customary marriages. It further states that a customary marriage entered into after its commencement will be in community of property (sec 7(2)) and provides for conversion of customary marriages contracted before its operation into civil marriages. (sec 7(4)) This study investigated the practical effects of the Act. That is, how the personal and proprietary equality in the Act impact on the lives of the spouses.

The Recognition of Customary Marriages Act of 1998 has been hailed as a step in the right direction by some legal scholars<sup>2</sup> and criticized by others.<sup>3</sup> On the one hand, Dlamini (1999) argues that the recognition of customary marriages, for all purposes, puts to an end their hitherto dubious status. Mqoke (1998), on the other hand, laments the supplanting of customary law by Roman Dutch law, an equally patriarchal system. He concludes that there is not much customary law left in the Act.

This study aimed to find empirical evidence of the impact and practical effects of the Recognition of Customary Marriages Act on married women. It

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<sup>1</sup> Dlamini, CRM 'The Family' in Introduction to Legal Pluralism in South Africa Part 1, Customary Law, Bekker JC, Labuschagne JMT and Vorster LP eds 2002 Butterworths 35-38, 37.

<sup>2</sup> Dlamini C.R., 'The Ultimate Recognition of the Customary Marriage in South Africa', *Obiter* 1999 14-40 p.14

<sup>3</sup> Mqoke R.B., 'The "Rainbow Jurisprudence" and the Institution of Marriage with emphasis on the Recognition of Customary Marriages Act 120 of 1998', *Obiter* 1999 52-68 p52.

sought to establish whether the changes introduced by the Act are welcome or not by married women. It also sought to establish whether the new changes are helpful to married women in enforcing their legal rights.

### **Hypotheses and Research Questions**

The main objective of this study is therefore, to establish whether the Act has made any difference in the day to day lives of women married under customary law. Given the nature of relation between men and women in traditional societies, the study sought to determine if the aspirations espoused in the Act are realized. For instance, do married women own property during marriage as well as at its dissolution by death or divorce? A widow usually faces various property-related problems at the dissolution of her marriage. For instance, an heir may want to step into his deceased father's shoes to administer the estate on behalf of the family or appropriate it for himself. What effect does the legal empowerment provided by the Recognition of Customary Marriages Act have on the woman's position? Has the new law helped married women overcome the structural hurdles they face.

### **Significance of the Study**

This study investigates the practical implication of the application of the Recognition of Customary Marriages Act of 1998. The 1998 Act claims to recognize customary marriages and seeks to address what it considers to be an inferior position of women and children in marital relations. This study highlights some of the common misconceptions of customary marriages. It also underlines that what the framers of the 1998 Act considered to be customary marriage was a version of it that had been warped by various processes such as urbanization and modernization, among many.

This study reveals that the 'recognition' of customary marriages is nothing but their 'civil-isation' (i.e. the attempt is to make customary marriages function

like civil marriages.) Thus what remains is customary marriage in name only. In all intents and purposes, they supposed to function like civil marriages. This study identifies some of the major obstacles in seeing this lofty goal to fruition.

### **Assumptions and Limitations**

On the assumption that customary marriages practices are relatively similar throughout KwaZulu-Natal, this study was conducted in and around the Midlands of KwaZulu-Natal. This means that, at best, the findings will be appropriate for KwaZulu-Natal.

This study is based on interviews with women and not men. This is because the study focuses on the legal status of women married under customary law. Also, the aim of previous amendments to laws relating to customary marriages was to improve the situation of women in customary marriages. Our aim, therefore, is to see whether the Recognition of Customary Marriages Act has improved women's lives.

Although all the women that were interviewed were married before the Recognition of Customary Marriages Act was passed, the assumption was that they would have registered their marriages according to the provisions of the Act. Furthermore, another assumption was that even if they had not registered their marriages, the KwaZulu Act on the Code of Zulu Law of 1981, which has similar provisions to the new Act, applied to their marriages.

Most of the women who were interviewed were women who were experiencing difficulties in their marriages. The reason for this was that it is not easy to determine power relations and ownership rights during the subsistence of a marriage. It is normally during turbulent times in a marriage that control, access and ownership of property and children are exposed.

Most women interviewed for this study came from rural areas. This is because, in urban and peri-urban areas, women under civil law.

## **Research Methods**

For the purposes of this study, interviews and court records were used to determine the practical applications and effects of the application of the 1998 Customary Marriages Act.

### **Population and Sample**

In as much as the Act is a national Act, the population should be all people married by customary rites in South Africa. However, for the purposes of this study, the population is all women married by customary rites in KwaZulu-Natal. From this population, the sample that was chosen consisted of those women who are serviced by the co-ordinators of the Centre for Criminal Justice (CCJ). The CCJ is an NGO which educates disadvantaged people on all aspects of human rights with outreach community centres on the outskirts of Pietermaritzburg, Mpendle, Talyor's Halt, Plessislaer, Bulwer, Hamsville, Donneybrook, Newcastle, Glencoe, Escort and Mpumalanga. The CCJ has 12 co-ordinators serving 12 magisterial districts of KwaZulu-Natal.

Out of these 12, a purposive sample of 5 magisterial districts was chosen for interviews. Of importance in the selection of a magisterial district was the size of the population serviced, the fact that the district serviced a population from which there would be people married by customary rites as well as the accessibility of the magistrates' offices and records. The sampling produced the magisterial districts in two District Councils (DCs) and 4 Municipal Councils. The District Councils are DC22 and DC43. The Municipal Councils are KZ5a1 (Bulwer), KZ221 (New Hanover), KZ224 (Impendle), and KZ225

(Pietermaritzburg). The populations of the different Municipal Councils are as follows;

<b>Municipality</b>	<b>Population</b>
KZ5a1	95151
KZ221	114136
KZ224	33948
KZ225	521805
<b>Total</b>	<b>765040</b>

Save for KZ225, the Municipal Councils are mostly rural where most people have no income, still use either pit or bucket latrines, get water from natural sources or boreholes and where telephone services are either non-existent or public. While there are tarred arterial roads in all the Municipal Councils, the transport service is infrequent for most people such that a public transport round trip from Bulwer to Pietermaritzburg (2 hours away by car) normally takes the whole day.

### **Instruments and Procedures**

A composite questionnaire was compiled for use with both CCJ co-ordinators and magistrates. Four co-ordinators were interviewed on services that they provide to community members. From the co-ordinators, the questionnaire sought information relating to knowledge of customary and legal rights as well as the exercise of such rights by women married according to customary law. Co-



ordinators were also asked information relating to the numbers of people who approach their offices with problems related to customary marriages.

Four magistrates were also interviewed on their application of the laws before and after 1998. The magistrates were asked questions about the numbers of people who approach the courts for relief on matters relating to customary unions as well as on the implications and effects (particularly, with respect to property and children) of customary unions during marriage, divorce and at the death of one of the partners.

Twenty women were interviewed regarding their experience on matters relating to customary marriages. These women were identified from among those who approached the CCJ offices for concerns relating to their customary marriages. With the permission of interviewees, all the interviews were tape-recorded.

We also read and analysed 10 divorce cases and 10 deceased estate cases from the various magistrates' offices.

### **Design and Data Analysis**

In order to see the application of Customary Law before and after 1998, we decided that the application of the law would be most evident in property relations, during marriage, after divorce and at the death of one of the partners. Therefore, we collected information from CCJ co-ordinators, magistrates and ordinary women on property relations during the three stages. The information from each group of interviewees was compared with information from the other two groups for consistency and difference.

The information was then analysed with a view to determine continuities and discontinuities between the two periods (i.e. before and after the 1998 legislation).

Before we discuss the findings of the study, it is necessary to outline the evolution of laws governing marital relation between spouses married according to customary law.

## **The Evolution of Laws Governing Spouses in Customary Marriages**

### **Introduction**

The laws governing relations between spouses in a customary marriage have evolved from traditional customary law, through the Natal Code of Zulu Law of 1891, to the Recognition of Customary Marriages Act of 1998. The evolution has affected the status, role and functions of men and women in a customary marriage. This is particularly important with respect to property rights, legal status, and the rights to children.

### **Traditional Customary Law**

In traditional customary law, on marriage, a man was entitled to arable land and a residential site. As the head of the family, he was expected to plough the land and produce food to maintain the family.<sup>4</sup> As the land belonged to the whole community, he did not own it. Stock, namely, cattle, horses, donkeys, sheep and goats were equally a male domain because *uphawu/letsoao*, an identification mark for stock, was allocated to men only.<sup>5</sup> However, the husband did not own this family property in the Western sense of the word as he was only a 'caretaker' who administered it on behalf of all the family members.

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<sup>4</sup> Bennett TW *A Sourcebook of African Customary Law for Southern Africa*, Juta 1995 p301; Bekker JC, Seymour's *Customary Law in Southern Africa* Juta 1989 p75.

<sup>5</sup> Bennett 1995 note 4 p229; Bekker 1989 note 4 p 92

For instance, he could not sell the property, i.e. the house and stock and pocket the money as it was not his personal property. Besides, the other senior male family members provided checks and balances in that he had to consult them each time he had to take a major decision, be it about property or the family. In a situation where the family had to perform a ritual that necessitated the slaughtering of a cow, the family head had to discuss the matter with other family members.<sup>6</sup> He could not unilaterally decide which cow to slaughter and go ahead without discussing the matter with the rest of the family. A consensus had to be reached for any decision to stick.

Because the marriage is patrilocal, the wife leaves her family and home to join her husband and family.<sup>7</sup> As she is expected to leave her natal family on marriage, no future provision is made for her in her natal family. For instance, she does not have any property rights. However, she can access land through her father or his heir.<sup>8</sup> On marriage a woman will only have access to such land and other family property through her husband.

According to customary law, children born in wedlock are legitimate and belong to their father's lineage. As a result, they assume his surname and belong to his side of the family. Moreover and most importantly, the father exercises superior guardianship and custody rights over 'his' children because they belong to him and his lineage.<sup>9</sup>

Since customary marriage was between two families and not between two individuals, divorce, in the Western sense, was foreign to customary law. On dissolution of the marriage by a 'divorce' in which the wife was responsible for

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<sup>6</sup> Simons 'Customary Unions in a Changing Society' 1958 Acta Juridica 320-341 at 323; Bennett 1995 note 4 p 237.

<sup>7</sup> Bennett 1995 note 4 p232; Mamashela et al Family Belonging in Lesotho, Women and Law in Southern Africa Research Project 1996 p40.

<sup>8</sup> Kerr AJ The Customary Law of Immovable Property and Succession, Juta 1990 p 100; Bennett 1995 p232 note 4.

<sup>9</sup> Dlamini CRM 'The modern legal significance of ilobolo in Zulu society' 1984 De Jure 148-166 p156; Bennett note 4 p339; Bekker note 4 p227.

the marriage breakdown, the husband would be entitled to keep the lobolo cattle.<sup>10</sup> The wife was expected to return to her natal home with only her personal belongings and household utensils. Conversely, if he was guilty of the marriage break-down, he would forfeit the lobolo cattle.<sup>11</sup> Obviously, in contested and acrimonious divorce, she would invariably go back home empty-handed and would have to start all over again. As the children belong to the father's lineage, she was not allowed to take them along with her to her natal home. Her father or the heir (if the father was dead) was expected to welcome her and take care of her emotional and financial needs.

If, however, the dissolution of the marriage was as a result of the husband's death, her first-born son would, in line with the principle of primogeniture,<sup>12</sup> step into his father's shoes. According to this principle, succession goes through the male line of the family. As a result, the son administered the family estate and took care of his mother and the rest of the family. The justification for this practice is aptly put by Marcus thus:

'Male children maintain the family name ... female members of households are always bound to be married. Therefore, if they inherit property and thereafter get married, the property of the deceased is left in the hands of a stranger.'<sup>13</sup>

The security (or lack of it) of a widow in marriage and within the husband's family depended, to a large extent, on the duration of the marriage and her age on the death of her husband. In a nutshell, a married woman had no independent, individual property rights under old, traditional customary law except for her own personal belongings and some household utensils. However, she had familial rights to cultivate the land for the family.

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<sup>10</sup> Bennett note 4 p233; Bekker note 4 p94 and Kerr note 8 p102.

<sup>11</sup> Dlamini note 9 p168; Bennett note 4 p246; Bekker note 4 p162.

<sup>12</sup> Mthembu v Letsela & ano. 1997 (2) SA 936 (T); Nkala M., 'Any Chance of Emancipation for the African Woman?' De Rebus 1999 p39; Robb J. & Cassette J., 'Customary Law of Primogeniture upheld in Zimbabwe.' De Rebus 1999 p. 44; Marcus T. Eales K and Wildschut A. Down to Earth: Land Deamand in the New South Africa Indicator Press Durban, 1996 p92.

<sup>13</sup> Marcus T., et al note 12 p.93.

This section demonstrates that in traditional societies neither men nor women had individual rights to property. The interests of the community/family took precedent over personal rights. Consequently, neither men nor women had personal property rights. Generally, men administered property on behalf of the community/family. This traditional communal ethic was gradually changed by the missionaries, the colonial administration and the apartheid government.

### **The Natal Code of Zulu Law, 1891**

In 1875 the Governor of Natal appointed a Board of Native Administration to write a Code of customary law for guidance for the Administration and the court.<sup>14</sup> The Natal Code of Native Law was published in 1878.<sup>15</sup> It was not legally binding in Natal but was in Zululand by Proclamation 2 of 1887. In 1891 parliament made the Code law – at that time it became the Natal Code of Zulu Law. The Code was divided into twenty-six chapters which dealt with diverse topics, namely politics, criminal law, civil law, the courts, family relations and succession. The code did not in any way claim to be a comprehensive compilation of customary law.

The personal status is discussed in Chapter viii. It dealt with the status of family members – married, unmarried, female, male, widowed, divorced, legitimate and illegitimate children. According to this chapter ‘all natives are either kraal head, or are subject to a kraal head except married males or widowers as regards their private and personal dealing with their third parties...’ (sec 90). Married women are subject to their husbands, and in all kraal matters to the kraal head. (sec 91 c)

Chapter vi dealt with kraal heads. It did not define it but identified the situations in which a person might be a kraal head ... “by virtue of being the owner thereof

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<sup>14</sup> Dlamini ‘Recognition of a customary marriage’ 1982 De Rebus 593-610 p595; Bennett note 4 p136.

<sup>15</sup> Originally: ‘The Natal Code of Native Law’ legalized by Law 19 of 1891 with effect from 1 October 1891. Compiled by E Looch; Bennett note 4 p138.

and head of the houses therein, or by virtue of being the guardian during the minority of the chief heir.” The functions of the Kraal head in the community and powers towards the family members and family property are described in sec 66. The head of a kraal can be a head because he is an owner of the kraal or because he is acting on behalf of a minor heir.

According to sec 68, the kraal head is the absolute owner of all property belonging to his kraal, which does not specifically belong to any individual house in his kraal. As regards property belonging to houses of his family, he has charge, custody or control thereof, and he may in his discretion use the same for his own personal wants and necessities. . . he may use, exchange, loan or otherwise alienate the same for the benefit of the house to which it belongs . . .’ (sec 68). A kraal head may inflict corporal punishment upon the inmates of his kraal for the purpose of correction, and to maintain peace and order . . . (sec 76)

Chapter x deals with Marriage and stipulates in the main formalities that have to be met for a valid customary marriage. The legal status of the spouses to the marriage and the consequences of the marriages are not mentioned. Presumably, the reader is left to deduce them from Chapter vi, vii and x which deal with the powers of the kraal head.

When these chapters are read together, it is obvious that the husband is the head of the family and the wife is under his guardianship. However, two new concepts are apparent, own and alienate. These words were not only foreign to traditional customary law but connoted a different individualistic value system. Instead of administering the property for the good of the whole family, the Code vested the kraal head with new powers. It made him the owner of the family property and endowed him with the right to alienate it. In my view, the introduction of these foreign concepts supports Chanock’s thesis of the creation

of a new version of customary law. The Code distorted customary law and was therefore out of step with African practice and opinion.<sup>16</sup>

In 1927 the Apartheid government enacted The Black Administration Act 38, 1927 which further had a detrimental effect on the legal status of customary marriages and a woman married under customary law.

### **The Black Administration Act 38, 1927**

Before the Union of South Africa, the four provinces<sup>17</sup> pursued different routes to dealing with customary law. After the union in 1910, the new united government suggested a uniform approach towards customary law and customary marriages through the promulgation of The Black Administration Act 38 of 1927.<sup>18</sup> It was designed to provide for better management of Black Affairs by the government of the day. There was a shift in government policy: It recognized customary law in all provinces through The Native Administration Act 1927.<sup>19</sup> It provided for a uniform approach to the recognition of customary law and the creation of separate courts to settle disputes between Africans.<sup>20</sup>

The Black Administration Act accorded customary marriages partial recognition and accepted bride wealth. Sec 35 of the Act, as amended by sec 9 Act 9 of 1929 downgraded a customary marriage to 'a customary union'.<sup>21</sup> It also distinguished 'a marriage' from 'a union'. 'A marriage' meant a union of one man with one woman in accordance with any law, for the time being, in force in any province governing marriages, but does not include any union contracted under Black law and custom or any union recognized as a marriage in Black law under the provision of sec 147 of the Natal Code.<sup>22</sup> 'A customary union' was defined as

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<sup>16</sup> Chanock Law, Custom and Social Order, the colonial experience in Malawi and Zambia 1985 Cambridge University Press p45 ; Bennett note 4 p 140.

<sup>17</sup> The Orange Free State, Cape Province, Natal and the Transvaal.

<sup>18</sup> Bennett note 4 p173.

<sup>19</sup> Bennett note 4 p173.

<sup>20</sup> Bennett note 4 p173.

<sup>21</sup> Simons HJ 'Customary Unions in a changing society' 1958 Acta Juridica 320-345 at 321

<sup>22</sup> Simons HJ note 21 p325; Bennett note 4 p171; Dlamini note 14 p597.

an association of a man and woman in a conjugal relationship according to Black law and custom, where neither of them was a party to a subsisting marriage.

A consequence of this new law was that customary marriages were not considered completely valid under common law.<sup>23</sup> An offshoot of this partial recognition was that if a man contracted two marriages, a customary and a civil one with two different women, the civil / Christian marriage nullified the prior customary marriage because of its inferior status – *Nkambula v Linda* 1951 (1) SA 377.

The repercussions of this law were that a woman who was married under customary law was divorced without her knowledge if her husband married a second wife under civil law. Evidence in this study will show situations where women married under customary law in some rural villages were divorced without their knowledge. This problem is still rife and is compounded by the fact that previously, customary marriages were not registered. Consequently, the wife had no certificate to prove the existence of her marriage.

With regard to the legal status of a woman married according to customary law, sec 11(3)(b) of the Black Administration Act provided that 'a Black woman (excluding a Black woman who permanently resides in the province of KwaZulu-Natal) who is married according to customary law and lives with her husband shall be deemed to be a minor under her husband's guardianship'. This provision was however repealed by sec 14 of KwaZulu Act on the Code of Zulu Law No 16, 1985 which states thus:

. . . a citizen becomes a major in law on marriage or on attaining the age of twenty-one years and for the purposes of this subsection age may, in the absence of proof, be determined and recorded by the Commissioner or Magistrate, whose decision shall be final.

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<sup>23</sup> Hlophe JM 'The KwaZulu Act on the Code of Zulu Law, 6 of 1981, a guide to intending spouses and some comments on the custom of lobolo,' *Comparative and International Law Journal of South Africa*, CILSA 1984 163-171 p164; Dlamini note 14 p598.



Sec 22 went on to state that

The inmates of a family home irrespective of sex or age shall in respect of all family matters be under the control of and owe obedience to the family head. With regard to guardianship of children and the wife, sec 27 (1) provided that a father shall be the legal guardian of his legitimate minor offspring born of his marriage.

Sec 27(3) provided that a married woman shall be under the marital power of her husband; provided that the marital power of the husband in a civil marriage out of community of property may be excluded by an antenuptial contract. Sec 22 read with sec 27(3) endowed the father/husband/family head with absolute powers of control and guardianship over the inmates of his household which included his children. Sec 27(3) meant that the wife was under her husband's guardianship which meant that she was stripped of her legal capacity. As a minor she could not own property nor could she contract without her husband's consent. She was worse off than a minor under guardianship.<sup>24</sup>

### **The KwaZulu Act on the Code of Zulu Law, 6 of 1981**

The homeland of KwaZulu gained legislative competence in 1972. In 1978 the legislative assembly of KwaZulu appointed a commission of enquiry into the legal disabilities of women.<sup>25</sup> Subsequently, the entire Natal Code was reviewed with the exception of chapter 2 and the review culminated in the KwaZulu Act on the Code of Zulu Law.<sup>26</sup> The Act introduced profound changes which enhanced the legal status of Zulu women. It also enhanced their rights to property, inheritance, succession and guardianship.<sup>27</sup>

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<sup>24</sup> Bennett note 4 p317 .

<sup>25</sup> Hlophe note 23 p164. Act 6 of 1981 was subsequently amended by Act 13 of 1984 and then revised and reissued as KwaZulu Act on the Code of Zulu Law, 16 of 1985, see Bennett TW note 4 p138.

<sup>26</sup> Bennett TW note 4 p138.

<sup>27</sup> Hlophe note 23 p170 and Bennett TW note 4 p138.

Under personal status, the code provides that any person may acquire movable property. The provision thus affirms the right of women to acquire and own property.<sup>28</sup> It provides that subject to the Age of Majority Act (Act 57 of 1972) a citizen becomes a major on marriage or on attaining the age of 21 years (sec 16). An unmarried major mother, a widow or a divorcee, whether she has established her family or not is released from the guardianship of a family head. (Sec 27(2)(4)) The Act abolished Sec 11 (3) (b) of the Black Administration Act 38 of 1927 which provided that a woman married under customary law was a minor under her husband's guardianship. The age of majority for all is 21 years. The Act refers to a marriage between blacks according to customary law as a customary marriage not a customary union.<sup>29</sup> The KwaZulu Act on the Code of Zulu law 1985 was amended in 1989, 1990, 1991 and finally in 1998.<sup>30</sup> Both codes, the Natal code and the KwaZulu Act, purport to be authoritative statements of Zulu personal law.<sup>31</sup>

This situation lasted until 1994<sup>32</sup> when a new Constitutional Dispensation was ushered in, in South Africa. The Constitution recognizes different cultures and other laws as forming part of the whole South African legal system. Customary law and customary marriages are thus fully recognized in the new political dispensation. Accordingly, the Recognition of Customary Marriages Act was promulgated in 1998.

### **The Recognition of Customary Marriages Act, 1998**

The above discussion on the legal status of a customary marriage during the colonial rule and the Apartheid era showed that a customary marriage was not fully recognized as a marriage. The following discussion will highlight the fundamental changes that The Recognition of Customary Marriages Act has

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<sup>28</sup> Hlophe JM note 23 p170.

<sup>29</sup> Hlophe JM note 23 p173.

<sup>30</sup> Bennett TW note 4 p139.

<sup>31</sup> Bennett TW note 4 p140.

<sup>32</sup> Bennett TW note 4 p139. In terms of Proclamation No 107 of 1994 the administration of the KwaZulu Act was assigned to the province of Natal.

introduced with regard to the personal status of a woman married under customary law, her property rights and her rights to the custody and guardianship of her children.

The Recognition of Customary Marriages Act introduced a fundamental change in this regard in that it recognises marriages concluded according to customary law before the Act.<sup>33</sup> It also recognizes marriages entered into after the Act, provided they comply with the requirements of the Act. Polygynous customary marriages concluded before and after the enactment of the Act are also recognized. (Sec 2) The Act defines a customary marriage as a marriage concluded in accordance with customary law. Customary law is defined as 'customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those people'.<sup>34</sup> In my view, the promulgation of the Recognition of Customary Marriages Act is in line with Bennett's suggestion that the legislature should enact laws to change customary law in controversial areas like the equality of spouses under customary law.

Whereas under traditional customary law discussed earlier, there was no equality between spouses married under customary law, the Recognition of Customary Marriages Act has changed that. It accords a wife equal status to her husband.(sec 6) Thus, she has full status and capacity to acquire assets and to dispose of them and capacity to enter into contracts. She may sue and be sued in her own name.

Under Sec 7 of the Act, provision is made for the proprietary consequences of a customary marriage as well as contractual capacity of the spouses. The Act provides that the proprietary consequences of a customary marriage concluded before the commencement of the Act will continue to be governed by customary

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<sup>33</sup> Dlamini, note 2 p14; Mqoke, note 3 p56.

<sup>34</sup> Dlamini,note 2 p 16.

law (sec 7 (1)). However, the married couple may apply to a court jointly for leave to change their matrimonial system. In the case of a customary marriage entered into after the commencement of the Act where neither of the spouses is a partner to an existing customary marriage, community of property and of profit and loss between the spouses will result unless community has been excluded by the spouses in an antenuptial contract which regulates the matrimonial property system of their marriage (sec 7(2) ).

Where the marriage is in community of property and of profit and loss, the separate estates of the husband and wife are automatically merged into one joint estate for the duration of the marriage and all the liabilities incurred by either spouse must be paid out of the joint estate. They both have equal powers to manage the joint estate. Under the provisions of section 15(1) of the Matrimonial Property Act a spouse married in community of property cannot perform any juristic act with regard to the joint estate, without the consent of the other spouse. Thus, in this regard the wife's capacity to act is restricted just as that of her husband's. Upon the termination of the marriage all liabilities are settled from the joint estate and the balance is then distributed equally between the husband and wife. Where the marriage is terminated by the death of one of the spouses the surviving spouse acquires his / her half because of his / her ownership and not as a consequence of the law of succession.

This new property regime, i.e. community of property, implies a drastic change in the matrimonial regime of the erstwhile customary marriage. Prior to this, a customary marriage was neither in nor out of community of property but a separate house was established with its separate property.<sup>35</sup>

The spouses who were married by customary law before the commencement of the Act are entitled to change the matrimonial regime that applies to their marriage. They must jointly apply to court for the change and give written notice

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<sup>35</sup> Simons note 6 p325; Bennett note 4 p232.

(in the Gazette) of the proposed change to the creditors of amounts exceeding R500 or an amount determined by the Minister of justice. (Sec 7(4)(a)) If the court is satisfied that all these formalities have been complied with the court will authorize a change to the said matrimonial regime and will order the parties to enter into a written contract in terms of which the future matrimonial property system of their marriage will be regulated. In the case of a husband who has more than one wife, all persons having a sufficient interest in the matter and especially the applicant's existing wife / wives must be joined in the proceedings.

Where a husband in a customary marriage wishes to contract a second customary marriage, he must make an application to the court to approve a written contract which will regulate the future matrimonial property system of his marriages.(sec 7(6)) In considering his application, the court must in the case of a marriage in community of property or which is subject to an accrual system, terminate the matrimonial property system which is applicable to the marriage and order a division of the property. Moreover, it will take into account all the relevant circumstances of the family groups which would be affected if the application is granted.(sec 7(7)) The court may refuse the application if in its opinion the interests of any other parties involved would not be sufficiently safeguarded by means of the proposed contracts.

The main objective of section 7 is the equitable distribution of family property to all affected members of the family particularly the first wife and her children. The Act aims to cut down on the excessive powers which a husband used to wield and exercise in a marriage. Previously, as discussed earlier (in section 4ii), a man used to take a second or a third wife without consulting the first one. Moreover, he used to deprive her access to her house property and gave it to the second wife, an irregular but prevalent practice which is out of step with traditional customary law.

## **Findings of the Study**

The first set of findings relate to the impact of the Act on families, particularly women and children. The second set of findings relates to the role of institutions administering the new Act and the procedures proposed in the Act on the lives of people it is meant to help.

### **The Impact on Families**

#### **During Marriage**

The review of literature has established that, for the most part, family property namely land, cattle, and the house belong to the husband during marriage. Interviews conducted for this study confirmed this fact. According to these interviews the husband is still the head of the family. When asked to whom the property and children belonged, a CCJ co-ordinator responded

It all belongs to the husband; the wife only owns the pots and dishes in the kitchen. According to the customary rules, children belong to the husband's family. This perception comes from the understanding that the man is the head of the family. This perception still exist, as a result most men don't want to accept that women also have rights

A magistrate responded in this way;

According to Zulu culture the man is the head so the property belongs to him. The wife does not have power upon property especially the cattle. She only has power over the cows paid by her daughter's husband, but not to do as she wishes with them without her husband's approval. Even the children belong to the father.

Interviews with women married according to customary law reveal that they do not have rights to immovable property during marriage. Other cases reveal that women married according to customary law do not have rights even to movable property.

Because I was talented in sewing, he bought me a sewing machine. He forbade me to use the money generated from sewing and asked me to open a bank account, instead. He told me that he would want the money at the end of the year. I did as he said. The business grew and I even started teaching other people to sew. I used some of the money to build a two-roomed outside building in which to work and I bought a stove for the house. He scolded me for “spending the money on useless things” saying that we needed to buy a car which would help the business.

I agreed to buy a car from the profit. I bought a second hand car for R4500. He took the car, the car was always with him and I could not get it when I needed it for the business. The car became the cause of many of our problems. He started abusing the children and me. When I went to ask his family to intervene, he did not deny that he was abusing us. He said that he was doing his duty as a husband. His family could not help. So I decided to go back to my parents’ home. Everything, the car, the land and the cows were left with him. I didn’t get any share.

Contrary to reviewed literature which says that the guardianship and custody of legitimate children belong to the father, the study found that, in practice, when spouses divorce or separate, children usually stay with their mothers. In most cases, husbands are migrant labourers. Under such conditions, children are ordinarily left at home with the wife. Thus, when the husband deserts and does not come back home, the children become the responsibility of the wife. Out of 20 interviews, 15 husbands deserted their wives and children during the marriage. In many cases of desertion the husband also fails to maintain the family. The interviews indicated two types of desertion; actual and constructive. Actual desertion applies to a situation where the husband actually leaves the house and does not come back. Constructive desertion means that the husband makes the wife’s life so unbearable (physically and emotionally) that she is forced to leave the marital home.

Many cases of divorce start-off as cases of actual desertion. The following is just one case;

In 1991 my husband disappeared for a long time. People told me that he was staying with another woman. He then came back from his disappearance and told me that he had completed paying lobolo for the other woman and that he was about to get married. He told me to do what I would like to do, to go back home if I wanted to. After he left, I went back home.

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My husband always loved women since we got married, but I tolerated him. He worked far from home and he only came home during month end. He started coming home without money saying that he had a lot of debts to pay. On 23<sup>rd</sup> December that year he came home with only R400. That R400 was not going to be enough for food, clothes and for the children. Usually, in December he would take six weeks before he went back to work. But, in that year, he said there was work that he was supposed to go back and complete. He left on the 6<sup>th</sup> January. From then he has not returned home or sent us any money for groceries.

The following is one case of constructive desertion;

My husband started to abuse me, by having girl friends and not coming back home. One day, when I was going to fetch water, he jumped from the bush and assaulted me. At that time, I was expecting my ninth child. He accused me of walking alone to fetch water and implied that my intention was not to fetch water but was to see some man. I took the matter to the police. When the police questioned him, he changed the story and claimed that he caught me with another man. Because of that the police did not arrest him.

Because of that beating, the child I was carrying did not survive. So I took a decision to go. Since I did not have a home to go to, I went to my uncle's home. From there, I looked for a job. I left the children with my husband because I didn't want to worry my uncle.

In almost all the cases of desertion, the man had left the home and was cohabiting with either a girlfriend or a second 'wife'. Normally the first wife does not know about the second 'marriage'. Before the year 2000, it was possible for a man married under customary law to marry a second wife civilly because the latter superseded the former. Marrying for the second time became possible in



cases where customary marriages were not registered. Many women stumbled over their husband's second marriages while looking for some other information at Home Affairs.

On 03 July 2001 I gave birth to my first-born child. I went to Home Affairs to get her a birth certificate. When I got to Home Affairs I found out that my husband was married to another wife. When I got home, I asked him about what I had found out at Home Affairs but he denied it. I even called both families to discuss the matter. He also denied that he was married to another woman. Later, I found out that his mother knew about this other wife.

One day he went somewhere for a visit. I decided to check his car where, under the driver's seat, I found the marriage certificate of the marriage he was denying. They were married in 1998. The problem now is that my marriage doesn't appear at Home Affairs.

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The problem started in 1990, when he started not to come back home. If he came, he would come back wearing things that I don't know. If I asked him where he got the clothes from, he would give excuses that the clothes belonged to his brother. He started taking his clothes from our house, one by one, until they were all with him. In 1991, I heard that he was married to another woman. In 1992, I went to look for a job because he was not supporting us. In 1994 I had to get my child's birth certificate from Home Affairs. That is when I found out that he was really married because the computer showed the second marriage that I didn't know of.

### **On divorce/separation**

According to magistrates and clerks of the court, there were hardly any divorce cases involving people in customary marriages. The main reasons given by them were traditional ones namely that there was no divorce under customary law. In the case of irreconcilable differences, the husband simply stopped giving the wife conjugal rights and took another wife. For the woman, she had to

tolerate the situation. If she could not, she left for her natal home. A magistrate made the following comment;

The divorce was not common before, if a wife misbehaved she was taken out of the main house and the husband would build her a separate house but would not divorce her. In a case where the man was wrong, the wife had to tolerate him or his behaviour. If she decides to go back home she wouldn't take anything with her. Even the children would be left behind with the husband's family.

One of the women interviewed presented a story which concurs with the observations of magistrates;

I do not have children. I had 4 but they all died. While we were trying to solve that problem in 1996, my husband disappeared. I did not know where he had gone. He came back in 1998 but things were not good between us. In 2001 he got married to another wife, they've got one child.

While it could be argued that the man in this case married for the second time because he wanted to have children, it still remains that, instead of either addressing his wife's problem or divorcing her, he chose to find another wife.

This is what one magistrate said about divorce cases in his court;

There are very few customary cases that I hear in this court, sometimes not even one the whole year. There are three reasons for this, one, it is socially unacceptable for a woman to return to her natal home from a marriage. Secondly, women are taught to persevere and thirdly marital problems are resolved through family discussion.

Another magistrate said in 2002, "since I moved to this court in 1996, I have not presided over a customary divorce."

It is possible that because customary marriages were not recognised by the government, spouses who wanted their marriages recognised either married

civily or converted their customary marriages to civil marriages. Also, spouses who were Christians had to have their customary marriages blessed in church. This process effectively resulted in the conversion of a customary marriage into a Christian/civil marriage.

The magistrates stated that, since the Recognition of Customary Marriages Act of 1998 which took effect in November 2000, they do not hear divorces involving customary marriages cases because, according to section 8 of the Act, divorces involving customary marriage can only be heard by the High Court. Therefore, we searched for customary divorce cases instituted before 2001 in the magistrates courts of Impendle, Hlanganani, New Hanover and Pietermaritzburg. Our search found only 10 cases, 5 from Pietermaritzburg, 3 from Hlanganani and 2 from Impendle.

The case records do not have enough information, particularly with respect to the property owned by the spouses during the marriage. Also, the records do not even mention the existence of property between the spouses and there is no mention of how the property was divided at the dissolution of marriage. Consequently it is not possible to tell from the cases whether the wife received any property on divorce.

The only information covered by the cases is the date of marriage, the number and custody of children, and the grounds for divorce. Of the 10 cases, 6 were instituted by women and 4 were instituted by men. In all the cases, the main ground for divorce is given as 'irretrievable breakdown of marriage', which means adultery, desertion, refusal of conjugal rights, or lack of maintenance for children.

In all the cases, the custody of children was given to the plaintiff. In cases where the husband had deserted the family, children became the wife's responsibility.

## **At the Death of Husband**

This section seeks to establish what happens on the death of the husband, since he is the head of the family and all the property belongs to him while he is alive. African intestate estates are administered under the regulations proclaimed in Government Notice R200 of 1987.<sup>36</sup> According to these regulations, a magistrate supervises the winding up of the estate. She/he may appoint a representative of the estate who will be responsible for paying all the debts and collecting the assets.<sup>37</sup> She/he has to see to the distribution of the property and the general administration of the estate. She/he or the magistrate must determine the beneficiaries who are entitled to the property and distribute the estate.

The information for this section was obtained from the deceased estate records at the respective magistrates' offices. We obtained 10 cases of deceased estates instituted and/or concluded by 2001. The purpose of perusing the deceased estate records was to establish whether the wife received any property after the death of her husband. Out of the 10 records found, the wife was appointed heir in seven cases in which she also acted as a family representative. The property involved ranged from land, residential houses, established legal business (Tea Room), savings in the bank, vehicles, cattle and clothes.

The cases presented above seem to suggest that a widow has property rights after her husband's death. However, information from magistrates and CCJ co-coordinators provides cases where the woman loses property.

In one case a couple that had married customarily did not have children. However, the husband had an extra-marital child. On his death, the deceased man's relatives demanded property namely cattle and claimed that it belonged to the extra-marital son as he was the only child of the deceased.

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<sup>36</sup> Government Gazette 1060 of 6 February 1987, 'Law of Succession and Inheritance', Rautenbach et al in Introduction to Legal Pluralism in South Africa Part 1 Customary Law 109-123 p122.

<sup>37</sup> Rautenbach et al note 36 p 122.

In yet another case a married man who was estranged from his wife, contracted a second clandestine marriage which the first wife did not know about. He had a son with the 'second wife'. On his death, the son claimed his father's property, taxis and sold them. When the first wife went to court to claim her deceased husband's property, she was told that there was no evidence of her marriage and she was therefore 'unmarried'. For that reason she could not claim any of her husband's property.

As stated earlier in the literature review, traditionally, the rule that applied was that land and family property belonged to the family and not to one individual. Consequently, on the death of the head of a family line, an heir was expected to take over the administration of the estate. In a situation where there was no heir, the deceased's brother stepped in. In the above two cases, because the two wives had no sons/heirs, the respective family members used an extra-marital son in one and a son from the 'second wife', in another, to disinherit the two widows. However, in these two instances the family members abused the above-mentioned custom in that customarily an extra-marital son was never recognized as an heir. Secondly, the deceased's private property, for instance, a kombi was claimed as family property.

This form of abuse of custom goes further than the use of extra-marital sons or sons from second marriages. For instance, in one case,

a man who was married customarily was persuaded by his mother on his death-bed, to bequeath his property to his younger sister. When he eventually died, the wife discovered that the deceased had given all his property to his sister. In this way she was disinherited.

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In another case a widow who wanted to claim her deceased husband's death benefits was prevented by family members who refused to give her the necessary documents such as the deceased husband's death certificate and his Identity Document.

## **The Role of Institutions and Procedures**

### **1. Knowledge of the law (ordinary people)**

According to Magistrates and CCJ co-ordinators and the women who were interviewed, most people do not know of the existence of the Recognition of Customary Marriages Act.

In our view, since organisations such as the CCJ already facilitate workshops on various aspects of rural life, such organisations need to be engaged to facilitate workshops on the Recognition of Customary Marriages Acts.

### **2. Inappropriate application of the law (Home Affairs)**

From the interviews with women, it emerged that some Home Affairs staff were not conversant with the new law. For instance, one respondent said that when he went to register his second customary marriage, he was turned back and was told that, since he was already married, he could not be married for the second time. The first marriage was a customary marriage. According to the new act, a man may marry more than one wife, provided that he follows the procedures stipulated in the Act.

Another respondent said that when she went to register her marriage, after the husband's death, she was turned back. The reason given to her was that she could not register a marriage after her husband's death. Consequently, she could not access the husband's estate. The Act is silent on the registration of marriages after the death of one spouse.

Yet another person who wanted to register a marriage was asked bring the wife and her bride's maids, his best man, and immediate members of both families. Such an entourage would have necessitated the hiring of a minibus – an expense the groom could not afford. According to the Act,

one or two of the spouses are required to register the marriage as long as they have both identity documents and the marriage certificate.

### **3. Expensive divorce**

The magistrates, CCJ co-ordinators and other interviews were of the view that divorce at the High Court will be very expensive because it will require the services of a lawyer. Most people cannot afford the cost of hiring a lawyer. Consequently, they may not take their divorces to the High Court.

Besides, High Courts are few and far in between. They are normally very far from rural areas. Going to the High Court becomes an unaffordable additional expense for rural people. Also, High Court registers are already congested and it takes a long time for cases to be heard. If customary divorces are added to the already congested registers of High Courts, it would take a long time before a customary divorce is heard.

### **4. Procedure to marry a second wife**

Section 7 provided for the procedure that a man married under customary law must follow in order to contract a second marriage. It is quite elaborate and has to be authenticated by the High Court. It will also turn out to be costly because the application must be heard in the High Court. However, in practice, as demonstrated by interviews, men simply desert the first wife and cohabit or marry a second wife. It is likely that Section 7 will only be paper tiger.

### **5. Problems of making customary law similar to civil law**

The 1998 Law attempts to make customary law similar to civil law. While there are instances where this might improve the lot of women, there are cases where it would not make a difference as the following case demonstrates;

A woman was married civilly and in community of property to a man who owned a thriving business of taxis which ran between Durban and Johannesburg was also divorced without her knowledge. Unknown to her, her husband got married to another woman in Johannesburg. Thereafter, he instituted divorce proceedings against the first wife. The court granted the divorce but did not grant an order dividing the property. Instead, it asked the husband and wife to work out their own division of property. On arriving home, the man told the woman that he bought and owned all the family property. She, therefore, had no right to any of the property. The only property that the woman received was the furniture she brought with her on her wedding day. When she pursued the matter because she wanted a share of the taxi business, she discovered that her husband had registered all the taxis in the name of the second wife. She, therefore, could not get any share of the business.

The case illustrates the point that even women who are married civilly can be divorced without their knowledge. The nature of the marriage will not stop a husband from deserting and divorcing his wife secretly.

## Summary

Traditionally, the husband did not own family property because of the communal ethic of traditional societies. The advent of colonialism resulted in the codification of customary law. One of the consequences of the codification of customary law was the creation of a new version of customary law which in turn gave the husband absolute powers over the family property. He became the 'owner' of the property. As a result, the wife's control and access to the family property depended on the husband alone and not the family. Later, statute law that was introduced during the apartheid era reduced the legal status of a married woman to that of a minor. KwaZulu Natal changed a woman's minority status and gave her legal capacity through the Code in 1985.

The Kwa Zulu Act on the Code of Zulu Law No 16 of 1985 enhanced the legal status of women married under customary law in KwaZulu-Natal. It gave them equality to their husbands. Despite these legal changes, in practice, as is



revealed by the interviews and cases in this study, the status of women has not changed significantly. The husband is still the head of the family, owns most of the property, and does with it as he pleases.

On divorce or separation, the wife's position is precarious in that he may demand that she goes back to her natal home or he may marry the second wife and take the property.

At the death of the husband, her situation depends on her rapport with the rest of the family members. If she is favoured by family members, they support and assist her in her efforts to acquire the husband's estate. If she is out of favour with the family, they expel her from the house and disinherit her.

Like the Kwa-Zulu Act on the Code of Zulu Law, the Recognition of Customary Marriages Act also recognizes customary marriages and seeks to enhance the legal status of married women in customary marriages. Since the Code does not seem to have an effect in the legal status of women married according to customary law, it is doubtful if the Recognition of Customary Marriages Act will change the conditions of women in customary marriages.