2002 Journal for Juridical Science 27(1): 54-69

JG Horn & AM Janse van Rensburg

Practical implications of the recognition of customary marriages*

Summary

This paper evaluates the *Recognition of Customary Marriages Act* 120 of 1998, and attempts to, with reference to the requirements for a valid customary marriage and its consequences upon celebration and dissolution, highlight the possible practical and interpretative problems which may arise upon the application of the Act.

Praktiese implikasies van die erkenning van gewoonteregtelike huwelike

Hierdie artikel poog die *Wet op die Erkenning van Gewoonteregtelike Huwelike* 120 van 1998 te evalueer, deur met spesifieke verwysing na die vereistes vir die sluiting van 'n geldige gewoonteregtelike huwelik, asook die gevolge van huweliksluiting en -ontbinding, die praktiese en interpretatiewe probleme van die aanwending van die Wet uit te lig.

* We are indebted to Professor Willemien du Plessis for her constructive comments and suggestions which enabled us to finalise this article.

JG Horn, Lecturer in the Department of Private Law, Vista University (Bloemfontein).
AM Janse van Rensburg, Lecturer in the Faculty of Law, Rand Afrikaans University.

1. Introduction

The recently commenced *Recognition of Customary Marriages Act* [1] (hereinafter 'the *Recognition Act*') has brought about fundamental changes to African customary marriage law ... or has it? Dlamini[2] applauds it for bringing an end to the 'dubious and precarious existence' of customary marriage.[3] Mqeke,[4] on the other hand, voiced the fear that the Act is doomed to become paper law, for it was 'drafted by people who (knew) nothing about the very people they sought to legislate for'.[5]

In order to understand the impact of the Act, one has to understand the nature of customary marriage. Bekker[6] describes a customary marriage as a union which

> [...] brings into being reciprocal rights and obligations between the spouses for which their respective family groups are collectively responsible.

A customary marriage can be regarded as a contract or agreement between two families which includes the payment of a 'bride-price' (*lobolo*), permits polygamy and obligates all parties to perform specific duties. It is more than a union between two individuals — it is a union between two family groups[7] — bringing about a special relationship between the wife and her new family, a union which continues to exist even after the death of her husband.[8]

The fact that customary marriages were potentially polygamous, rendered it, in terms of the common law, *contra bonos mores*.[9] The judiciary had, from early on, struggled to keep this concept in line with the changing attitudes of our society, and consequently its decisions had a profound impact on the recognition of potentially polygamous marriages, whether custom-based or founded in religious rites. Despite the fact that merely all the case law relating to polygamy referred to marriages entered into in terms of religious rites, the development is *sito-sito* applicable to customary marriages.

In the case of *Ismail v Ismail* [10] Trengove JA stated that

> (he) ha(s) come to the conclusion that we would not be justified in deviating from the long line of decisions in which our courts have consistently refused, on grounds of public policy to recognize, or to

1 *Recognition of Customary Marriages Act* 120/1998.
2 Dlamini 1999:14-40.
3 Dlamini 1999:15.
4 Mqeke 1999:52-68.
5 Mqeke 1999:66.
6 Bekker 1989:97.
7 Bennett 1995:182.
8 It is common cause that the death of the husband does not terminate a customary marriage, and that the widow is deemed to be the wife of the deceased.
9 *Seedat's Executors v The Master (Natal)* 1917 AD 302:307-309 and later in *Ismail v Ismail* 1983 1 SA 1006 (A):1024.
10 *Ismail v Ismail*:1024 C-F.

> give effect to the consequences of polygamous unions contracted in SA, statutory exceptions apart.

The judge further stated that a union can be regarded as *contra bonos mores* if it is

> contrary to the customs and usages which are regarded as morally binding upon all members of our Society.[11]

The court *in casu* held that because of the potentially polygamous nature of the relationship between the parties, the defendant's claim was unenforceable.[12] After 1994,[13] the courts were under a constitutional mandate, not only to observe customary law and apply where necessary, but to develop customary law.

In *Ryland v Edros* [14] the court had the opportunity to decide an issue similar to the issue in *Ismail* 's case, and took its first tenuous steps under its constitutional mandate and, not surprisingly, took a liberal approach in its interpretation thereof. An approach advocated by Farlam J when he stated that he

> [...] agree(s) with the submission that the values of equality and tolerance of diversity and the recognition of the plural nature of our society are among the values that underlie our constitution. In my view those values 'radiate ... the concepts of public policy and *boni mores* that our courts have to apply'.[15]

It is clear that the court intended to shed light on the *status quo*, namely that a large portion of our society practised cultures (whether custom- or religiously based), which allows polygamy despite the absence of legalization. This was indeed a step in the right direction, in that it allows a judicial officer to take into account, not only, the facts in front of him, but also the nature of our society and the societal structure in which the constitutional rights operate, through the recognition of the non-static nature of custom as a society-based phenomena.

The legislature, on the other hand, had given partial recognition to customary marriages in 1927, with the promulgation of the *Black Administration Act*.[16] This *de facto* [17] recognition had continued through the years, until the early 1990s when the constitutional provisions in the interim[18]

---

11 *Ismail v Ismail*:1026 B-C.

12 Jazbhay 1997:114-115.

13 The year of the promulgation of the Interim Constitution, the *Constitution of the Republic of South Africa* 200/1993.

14 *Ryland v Edros* 1997 2 SA 690 (C).

15 *Ryland v Edros*:709 B-C.

16 *Black Administration Act* 38/1927; Bennett 1995:172.

17 Customary marriages enjoyed *de facto* recognition in various pieces of legislation, for example the *Black Laws Amendment Act* 76/1963 made it possible for a partner in a customary union to sue for damages caused as a result of the wrongful death of her partner, and the *Black Communities Development Act* 4/1984 referred to the wife or partner in a customary union.

18 *Constitution of the Republic of South Africa* 200/1993 (hereinafter in the text 'the interim Constitution').

and final Constitution[19] forced the legislator to revise the situation regarding the actual non-recognition of customary marriages and the application of custom at large.[20]

Non-recognition of polygamous marriages had a tremendous impact on people involved in customary marriages, as they were denied legalization of their marriages and recognition of their rights. This situation changed drastically in 1998, when the legislator had, in line with these decisions, initiated the process in legalizing customary marriages. This resulted in the South African Law Commission's discussion paper on "The harmonisation of the common law and the indigenous law".[21] As a result of the Law Commission's work, Act 120 of 1998, namely the *Recognition of Customary Marriages Act*, was published and accented to on 2 December 1998. This Act was proclaimed on the 1 November 2000 and came into force on the 15 November 2000.[22] Up until then, the only officially recognized marriages in South Africa were marriages in accordance with the *Marriage Act* [23] or so-called common law marriages.

The consequences of the legalization of customary marriages, as potentially polygamous marriages, are profound to say the least. Not only is it in line with the societal tendencies, as advocated by the judiciary, but sets down regulations, which will effectively regulate its operation and consequences.[24] The sole purpose of this paper is to analyse the Act as tabled, by taking into account the practical implications of the provisions of the Act as it relates to the customary law position, as was practised outside KwaZulu-Natal,[25] and the manner in which it will impact on the individuals or grouping affected by it, with specific reference to the legal requirements for a valid customary marriage, the registration requirement, its consequences, proprietary and otherwise, and its dissolution.[26] This will enable us to make a sensible evaluation of the impact of the Act, its shortcomings, and its successes.

---

19 *Constitution of the Republic of South Africa* 108/1996 (hereinafter in the text 'the final Constitution').

20 Section 39(2) of Act 108/1996 states that "(w)hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights". Especially when sections 30 and 31 of the Constitution are taken into account.

21 Discussion Paper 74 (Project 90).

22 Proclamation R66 the Commencement of the *Recognition of Customary Marriages Act*, 1998 (Act 120/1998) of 1 November 2000.

23 *Marriage Act* 25/1961.

24 The aims of Act 120/1998 are stated *inter alia* as, to provide recognition of customary marriages, in other words to legalize them; to specify the requirements for a valid customary marriage and provide regulations for the registration of such marriages; to give equal status and capacity to spouses and to regulate the proprietary consequences of such a marriage as well as the dissolution thereof.

25 Where applicable the position inside KwaZulu-Natal, as is related by the KwaZulu Law on the *Code of Zulu Law* 16/1985, will be relayed, albeit to make a particular position clear. This will be done, as the exception, not as the rule.

26 It is not the purpose of this contribution to get entangled in the contemporary debates or to express an opinion either way regarding *lobolo* or polygamy.

2. Legal requirements for a valid customary marriage[27]

Traditionally it was not uncommon to arrange customary marriages, sometimes even without the knowledge of the girl or the young man to be wed. As a matter of fact the two essential requirements for a valid customary marriage were (a) consensus between the two family groupings with respect to the two individuals to be wed and the *lobolo* to be paid, and (b) the transfer of the bride to her new family. Today the position is slightly different in that the actual consent of the bridal couple is required. The whole process is more individualised. The customary requirements for a legally binding[28] customary marriage can be listed as follows:[29]

(1) The consent of all the parties involved.[30]

(2) The handing-over of the bride.[31]

(3) The arrangement of *lobolo*.[32]

(4) The non-existence of a civil marriage.

The *Recognition Act* brought about fundamental changes with regard to the requirements of a valid customary marriage. For the first time a minimum age requirement to enter into a customary marriage is set down. Section 3(1)(a)(i) of the Act lists as a requirement that both prospective spouses must be above eighteen years of age. Subsection (4)(a)-(c) stipulates the procedure to be followed when one or both of the parties do not meet the minimum age requirement. This procedure is similar to the one

---

Neither do we foresee to express an opinion as to whether *lobolo* as a requirement for a valid customary marriage is abolished by this Act or not. This issue will be discussed in a subsequent article, by the same authors.

27 A few assumptions regarding marriage come into play when determining the validity of the customary union. There is a rebuttable presumption that when two people live together as a married couple, a valid union exists. A further irrebutable presumption exists, as to the consent of the father of the bride , with regard to the reception of the *lobolo* cattle.

28 Olivier 1995:21. The non-consummation, for whatever reason, does not invalidate the customary union; however, the ability of the wife or wives to reproduce is an important factor in determining the maintenance of the continued marital relationship. The two essential elements of a valid union still remain the transfer of the bride into the family of the husband and the delivering of the *lobolo*.

29 Olivier 1995:17 and further. See also Bekker 1989:105-109, Hahlo 1985:29.

30 Bennett 1995:175-179; The consent of the father or guardian of the bridegroom, the father or guardian of the bride, the bridegroom (given explicitly or implicitly) and the bride (even when consent is assumed). In such circumstances the *onus* is on the bride to voice her unhappiness with the proposed nuptials. In the event that she remains quiet, her silence is regarded as consent.

31 Bennett 1995:192-195.

32 Even though highly controversial, the arrangement of *lobolo* is still an essential requirement for the validity of a customary union. Physical delivery is not a requirement, for the parties to the agreement can merely point out the to-be-delivered livestock.

envisaged in Section 24A of the *Marriage Act*,[33] except that the minimum age requirement for a girl is set at fifteen by the latter Act.[34]

Secondly, section 3(1)(a)(ii) prescribes that both spouses must consent to contract the marriage under customary law. By doing so, the legislator clearly individualises the normally communal nature of marriage negotiations, in referring to the 'spouses' and their individual consent. Whether this consent must be explicit is unclear, and it remains to be seen if the legislator intended implicit consent by the parties, as is currently the position, to be regarded as a fulfilment of the consent-requirement cited.

Thirdly, the legislator, while introducing new requirements in subsection (1)(a), still persists in giving recognition to customary rules in subsection (1)(b), in that the parties are not only obligated to consent the application of customary law, but, they are obligated to enter into and celebrate the marriage in accordance with customary law. Considering the prescriptive wording of section 3(1), the question which comes to mind is: are the requirements of sub-sub-section (a) subject to the requirements set out in sub-sub-section (b) or *vice versa*? Furthermore, it is unclear whether the *lobolo*-requirement is retained by the Act, for no specific mention is made of the negotiation of *lobolo*.[35] It is submitted that, despite the pre-promulgation hype, *lobolo* was indeed retained as a prerequisite for a valid customary marriage. Section 3(1)(b) requires that the marriage must be entered into and celebrated in accordance with customary law, and this entails, it is submitted, that *lobolo* be negotiated.

It seems that the legislator followed the path of least intrusion in prescribing the prerequisites for a valid customary marriage, for despite the age-requirement, the parties are left to enter into the marriage in accordance with customary law, which, in turn, allows the parties great freedom, and notwithstanding the uncertainties expressed above, leaves the customary law position relatively unaltered.

3. The registration of customary unions

Previously the registration of a customary marriage, outside KwaZulu-Natal and the Transkei, was not considered to be compulsory. Both the *Kwazulu and Natal Codes* [36] and the *Transkei Marriage Act* [37] allow for the registration of customary marriages, but non-compliance with these provisions does not affect the validity of the marriages.[38]

33 Act 25/1961.

34 Section 26(1) of Act 25/1961.

35 As stated earlier, we will only focus on the practical and interpretative implications of the Act and not commit ourselves by making any submissions with regard to the *lobolo* debate and the equality question. These matters will be dealt with in depth in a subsequent study.

36 KwaZulu Law on the *Code of Zulu Law* 16/1985.

37 *Transkei Marriage Act* 21/1978.

38 Olivier 1995:23; see also Bennett 1995:221-223.

Section 4 of the *Recognition Act* deals with the registration of customary marriages and places a duty[39] on the spouses to register their marriage,[40] notwithstanding the fact that the failure to comply with this section has no influence on the validity thereof.[41] It is submitted that this constitutes a contradiction which renders the compulsory provision ineffective.

The public nature of the wedding ceremony and the pre-ceremony negotiations, as well as the fact that the marriage can at a later stage be registered at the office of the tribal secretary, might be stated as the reasons for the non-compliance of this requirement and why the registration prerequisite is regarded as inoperative, but it is clear that a registration procedure, similar to the one in KwaZulu-Natal, is envisioned by the Act. It will ensure legal certainty, on the one hand, and enable parties to provide proof of the existence of a customary marriage without any hassle, on the other.

4. Personal consequences and effects of customary unions or marriages

The union creates a special bond between, not only the man and the woman, but also between the two families, as the woman is taken into the family grouping, and becomes a member of the husband's family. The man and woman and their child(ren) constitute a new household within the already existing family units in the husband's household. Traditionally the position and status of the wives within a polygamous customary marriage were affected every time her husband remarried.[42] The relationship between the spouses is governed by a complex system of customs and beliefs, all of which seems to promote the concept of patriarchy.[43] Traditionally it was perceived that she could only act on her own as far as she administered money for the household, and even then she required the consent of her husband. Even though she enjoyed a great deal of autonomy within her own home, her husband decided where she must reside.[44] Up until recently a black woman under customary law was considered to be a perpetual minor, a status that not even marriage could change. A woman could decide on the day-to-day running of the household, but this did not constitute true equality, as was envisaged in section 9 of the Constitution.[45]

The legislator had by means of the *Black Administration Act*, attempted to legislate on the powers and capacities of black people. According to Section 11(3)(b) of the *Black Administration Act*, which is repealed by this

39 According to the *Oxford Advanced Learner's Dictionary* 1989:377 duty is a "moral" or "legal obligation".
40 Section 4(1) of Act 120/1998.
41 Section 4(9) of Act 120/1998.
42 Olivier 1995:40 and 44-46; see also Bekker 1989:126-134 and Bennett 1995:224-228.
43 Bennett 1995:228-229.
44 Olivier 1995:48.
45 The equality clause. Section 8 of Act 200/1993.

Act, in other words the *Recognition Act*,[46] a woman was seen as a perpetual minor, first under the supervision of her father or guardian and then her husband. The *KwaZulu- Natal Codes* changed the position to a great extent with regard to the women in KwaZulu-Natal, in that it provided that a black person attained majority status at the age of twenty-one or with marriage irrespective of sex.[47] It was uncertain whether the *Age of Majority Act* [48] provided women outside of KwaZulu-Natal with majority status.

Section 6 deals with the status and capacity of the spouses. This section states that a wife in a customary marriage has full and equal status and capacity, subject to the matrimonial property system governing their marriage,[49] including the capacity to acquire assets and to generally interact in the commercial sphere. This is contrary to the existing position in customary law.

The changes brought about by section 6 are a major step towards gender equality. It surpasses the traditional house managing position and is more in line with, and similar to, the common law position.[50]

Another thorny issue is the status and position of wives in a polygamous household, especially when the exact wording of the section is taken into account. Cronje and Heaton[51] anticipate interpretational problems *re* this specific section, for they aver the section lends itself to two possible interpretations: first, the section may be interpreted to mean that all members of a polygamous household are equal, in other words have the same status as the husband, or secondly, irrespective of the fact that the section bestows equal status to the women and the man, 'in addition to any rights and powers that (they) might have at customary law', can be construed to imply that the relative status of the women remains unaltered, for example that the main wife retain her superior status (for it is a power attained at customary law). The authors prefer the latter possibility in favour of the former.

We are in agreement with the learned authors that the latter part of section 6 might prove problematic, for it is unclear what is meant by 'rights and powers that she might have at customary law', and therefore we favour their preferred interpretation.

46 Section 6 of Act 120/1998.
47 Section 14 of Act 16/1985.
48 *Age of Majority Act* 57/1972.
49 In the event of marriage in community of property the consent requirement, with regard to the alienation or incumbrance of immovable property, must be adhered to.
50 However, the matrimonial property system of marriages entered into before this Act is still governed by the customary law, and it is submitted the position of these women is uncertain. The Act provides a mechanism which assists these women in changing their matrimonial property dispensation, but only upon application and after 'sound reasons' are afforded. This defeats one of the highly published purposes of this Act, namely to provide for the equal status and capacity of spouses in (all) customary marriages.
51 Cronje and Heaton 1999:226.

5. The proprietary consequences of the valid customary union

The newly formed union creates a single economic unit within the greater household, the wealth accumulated by the household is under the control of the husband as the head of the household.

In a polygamous household a distinction is made between house property,[52] family property,[53] and personal property.[54] [55]

The different households, though considered to be individual entities, form part of the greater family unit. Therefore property in the care and possession of a particular household can be utilised in the interest of the whole family, for example to support the wife and all the members of the household in question. The family head, however, has unqualified rights to dispose of the general family property, but he acts under the *proviso* that he deals with the property as to serve the best interest of the household.[56]

---

52 Bennett 1995:232-237. This property belongs to a particular house and is made up of the following:
(a) The earnings of the wife or another member of the house.
(b) The earnings for the sale of produce or cattle raised by the wife or any other member of the house, as well as the actual products of livestock.
(c) *Lobolo* received for the daughters affiliated to a particular house.
(d) Fines received for delicts committed against the wife or daughters in a particular house, for example for seduction.
(e) Donations received by the wife or children belonging to a single unit.
(f) Allocations made by the head of the household to a specific house.
(g) The actual houses and furniture kept in the particular houses.
(h) Household effects, such as pots, sleeping mats, utensils, and so on.

53 Bennett 1995:237-238. This property belongs to the entire family unit and is made up of the following:
(a) Goods obtained through the labours of the family head.
(b) Goods or cattle inherited by the head of the household.
(c) Donations received by the head of the household.
(d) Fines paid to the head of the household for delicts committed against him or his property.
(e) *Lobolo* received by the head of the household for the marriage of his granddaughters.
(f) The personal belongings of the head of the household.
(g) *Lobolo* returned to the family head on the dissolution of his marriage.

54 Bennett 1995:238-242. Property which does not form part of the family or household unit, such as the clothes of a particular family member.

55 Olivier 1995:49-52; see also Bekker 1989:134-140.

56 Olivier 1995:52-53; see also Bekker 1989:130-140. It is clear though that one house may not be enriched at the expense of another. This principle must be applied when dealing with inter-house debts. If the circumstances call for it, the head of the household may use property of a particular house to pay a debt to a third party; this is done subject to the *proviso* that when the property of that house is utilised to pay a debt incurred to the benefit of another house, the 'impoverished' house is entitled to a refund.

Section 2 of the Act legalized customary marriages which existed at the time of commencement of the Act, as well as polygamous marriages. This is really a big step forward and it will strengthen the position of thousands of women currently spouses in traditional marriages. Section 7(2) states clearly that a customary marriage entered into after the commencement of the Act will be deemed in community of property and of profit and loss, unless such consequences are explicitly excluded by the spouses in an antenuptial contract. The position of women involved in these marriages is thus very similar to the position of women married in terms of the common law.

However, section 7(1) of the Act provides that the proprietary consequences of marriages entered into before the commencement of the Act are still ruled by customary law. This means that although the customary marriage is legalized in terms of this Act, the consequences of this marriage are still governed by the customary law. A lot of uncertainty and problems concerning this situation will necessarily arise, for one, the actual customary position is very difficult to determine. But, as is seen from subsection (4) all is not lost: the spouses may apply to a court jointly for leave to change the matrimonial property dispensation governing their marriage, provided that the court find sound reasons for the change and that no one is prejudiced by the proposed change. It is clear that, even though the option is made available to the spouses, such a change is by no means guaranteed.

Section 7(6) regulates the procedure which a man had to adhere to in the event that he wants to enter into a further customary union. In this scenario he is forced to make an application to the Court to change his matrimonial property system. A new antenuptial contract has to be drawn up to regulate the future matrimonial property system with his prospective bride, resulting also in a change of his current matrimonial property system. This situation leads to a few questions regarding the practicality in implementing this system:

Firstly, before entering into this antenuptial contract, should he first divide his estate with the first wife or not? Secondly, does he now build up a new estate with the first and second wives or the second wife only? Thirdly, when he takes a third wife, does the estate between only him and the second wife dissolve or between him and both his existing wives? It is submitted that in the event that you answer the second question above, it will probably solve the last problem as well.

The Court will, according to subsection (7), have the discretion to end the current matrimonial property system and divide the matrimonial property if the husband is married in community of property. Subsection (8) states that people with sufficient interest, especially his existing and future spouses, need to be joined in the proceedings.

Despite the elaborate arrangements by the legislator, section 7 poses some problems, first of which are the severe financial constraints placed on the applicants. This implies that the applicant should either have a few thousand rand ready for the cost of the application in the High Court, and also for every subsequent application for future marriages, or parties will

have to wait at least six months to get the application approved in one of the divorce courts with its sluggish procedure.

Even if the Family courts could handle this procedure, it will still be expensive and a legal hassle. Furthermore, when looking at subsection (8), considering that the parties who need to be joined and can oppose the application, as well as the time involved, it is clear that the cost will soon be even higher.

6. Dissolution of customary unions

In traditional society there are no fixed 'grounds' for dissolution, considering that 'grounds' implies a certain set of formalities to be complied with before the parties can be released from their commitment.[57] Yet, there are a few generally accepted reasons for dissolution. The reasons can be summarized as follows:

(1) The death of the wife terminates the customary marriage.[58]

(2) In accordance with an agreement between the parties, the parties can agree to dissolution without taking into consideration specific grounds.[59]

(3) The husband can take the initiative to dissolve the marriage by driving his wife away or by sending her back to her father. If proven to be unjust the husband might face a forfeiture of the *lobolo*. The following actions of the wife might indicate just cause for the husband to dissolve the marriage on his own initiative, without forfeiture of the *lobolo*:[60]

  (3)(1) Adultery of the wife.

  (3)(2) Premarital pregnancy which is not caused by the husband.

  (3)(3) Absconding by the wife. Custom places an obligation on the husband to find his wife when grounding his claim for dissolution of the disappearance of the wife.

  (3)(4) Behaviour that serves as a sign of repudiation of the union by the wife.

(4) Dissolution initiated by the wife and the father. In this case the *lobolo* cattle is returned to the husband, when a recognized ground for dissolution exists, but in the circumstances listed below the *lobolo* need not be returned.

57 Bennett 1995:246-247.

58 Bennett 1995:243-244; see also Bekker 1989:175-176; The death of the husband does not dissolve it, for the widow continues to be considered as a 'wife' in the deceased husband's family.

59 Olivier 1995:61; see also Bekker 1989:176.

60 Bennett 1995:259-262.

(4)(1) Serious assault and ill-treatment of the wife by the husband.

(4)(2) When the husband accuses the wife of witchcraft.

(4)(3) When the husband drives the wife away.

(4)(4) When the husband abandons the wife.

(4)(5) When the husband is impotent.[61]

(5) The customary union is automatically dissolved when the husband and the wife enters into a civil union. Subsequently the potentially polygamous union is converted into a monogamous one.

(6) Adultery and neglect to support by the husband does not entitle the wife to dissolve the marriage.

(7) The customary union may also be dissolved as a result of court proceedings instituted by the husband, or the wife and the father, or in certain circumstances, the wife.[62]

When a customary marriage is dissolved the former wife must sever all ties with the house to which she belonged, and the former wife is therefore not entitled to claim accommodation, food and so forth. On dissolution of the union, in practice, the wife's sole source of income might be maintenance, but this is not always guaranteed. This situation is worsened by the fact that the amount payable to the ex-wife depends on for instance the husband's obligation to support his other wives, parents and children.[63] The dissolution restores the *status quo ante* the union, but in some cases, as discussed above, the husband forfeits the *lobolo*.[64]

According to Section 8(1) of the Act, a marriage in terms of the Act may only be dissolved by a court by a decree of divorce on the ground of irretrievable breakdown of the marriage. It is submitted that any of the reasons detailed above may be construed to constitute 'irretrievable breakdown'.

Allowing the Family Advocate to play a role in determining the custody of the children is a welcome change,[65] especially taking into account that the best interests of the child(ren) must be adhered to. It is unclear how the question regarding the separation of siblings will affect the decision of the Family Advocate, considering the structure of a polygamous household.

61 Olivier 1995:64-70; see also Bekker 1989:187-195.
62 Olivier 1995:74-78.
63 Bennett 1995:277-288.
64 Bennett 1995:269-271; see also Bekker 1989:198-199. According to the *Code of Zulu Law* the custody of minor children born out of such a customary union befalls the husband at the dissolution of the union, but if the parties take recourse to courts, the court can make a just order regarding the custody of the children, and if necessary their maintenance.
65 Section 8(3) of Act 120/1998.

7. Conclusion

7.1 Practical implications

We identified a few practical problems in the course of our discussion. One of the first problems faced by the parties involved in a customary marriage would be problems arising during adjudication. According to the definitions as set out in Section 1 of the Act, the courts which could adjudicate these matters are the High Court of South Africa, a Family Court and a Divorce Court established in terms of Act 9 of 1929. The same courts will therefore have jurisdiction in customary and common law marriages. The problems experienced in common law divorce proceedings regarding the court system will therefore also be experienced in customary marriage dissolutions. If the parties do not agree about the divorce settlement, even before action is instituted, then they will probably both go to attorneys. That means exorbitant legal fees, especially if they decide to sue in the High Court. With the long waiting list for a trial date in an opposed matter, this type of divorce could also be delayed for months and cost the parties an arm and a leg.

Fortunately the parties are provided the option of mediation in the divorce proceedings,[66] by, among others, traditional leaders.[67] This addition, it is submitted, will not only curb expenses, but will allow for a sympathetic, but more importantly, a knowledgeable ear *re* customary law. This is advantageous considering the specialized nature of customary law. It is further submitted that the possible complications *re* the fate of the children in a polygamous marriage, in the event of a divorce, as was postulated above, will be best addressed if the latter is opted for.

The Act makes no mention of the manner in which said consent must be obtained, nor does it require an official witness to be present at the ceremony as is the position in KwaZulu-Natal.[68] Considering that customary law does not require an official witness, it can therefore be deduced that the Act does not require such a witness. It is submitted that the situation would have been more tenable if it was necessary for the wife to indicate her consent to an unbiased official witness. Firstly, there would be no uncertainty as to whether she had been forced to pretend that she wanted the marriage to take place, and secondly, it provides her with an opportunity to state her case in front of an official witness in the event that she is not satisfied with the situation. This would curtail the influence of duress. Furthermore, the presence of a witness will, it is submitted, ease the registration process, in that the witness will be able to attest to the existence of such a marriage.

66 Section 8(3) of Act 120/1998.
67 Section 8(5) of Act 120/1998.
68 Section 38 of Act 16/1985.

7.2 Interpretative implications

The requirement of a minimum age[69] as a prerequisite for marriage is something unknown in customary law. What poses a problem is not the fact that such a requirement has been introduced by the legislator, but why this age requirement differs from the one for civil marriages.[70] Does this not constitute unfair differentiation? One could ask oneself what the implications of this practice would be when one takes into account the equality provision[71] enshrined in the Bill of Rights. Or is this not a way of the legislator to dissuade the people from entering into these kinds of marriages?

Another possible equality challenge encapsulated in the Act is the one relating to the change of matrimonial property dispensation. The Act makes it clear that if the parties, who were married before the commencement of the Act, wanted to change their matrimonial property dispensation from the customary property dispensation to in community of property, they could apply to the High Court, after complying with the procedure contained in section 7. The Act does not allow for the conversion, on application, of a marriage in community of property to the customary property dispensation.

It is predicted that the confusion regarding the interpretation of section 6, as discussed above, will cause a range of problems. Fortunately these problems might only prove to be academic, without real practical implications.

Equality considerations aside, it appears that the requirements as set out by the Act might prove problematic, for, it is submitted, it is not clear what is meant by 'celebration in accordance with customary law'. Does this mean that *lobolo* is retained as a prerequisite? The uncertainty regarding this issue is clearly illustrated by the recent *Mthembu*-decisions.[72]

A further uncertainty pertains to the registration requirement. A duty is placed on the prospective spouses to register the union, but failure to register such a union does not affect the validity thereof. This will not be an incentive to parties to register their union, but will be a perpetuation of the existing problems caused by non-registration.

Furthermore the provisions encapsulated in the Act are very technical and its application will prove tiresome. Mqeke[73] argues that "(u)nless the government embarks on a large scale education campaign explaining the complex provisions of the Act" the changes will only amount to paper law.

We are in complete agreement with the sentiment voiced by Mqeke. Even though the ideals purported by the Act are somewhat revolutionary, it is clear that the legislator had a western-minded approach to customary marriages. Fortunately the Act, in section 11, allows the Minister of Justice

69 Section 3(1) of Act 120/1998.
70 Section 26(1) of Act 25/1961.
71 Section 9 of Act 108/1996.
72 *Mthembu v Letsela and Another* 1997 2 SA 936 (T); 1998 2 SA 675 (T); 2000 3 867 (SCA).
73 Mqeke 1999:66.

to issue regulations relating to, amongst others, the requirements for validity, the registration process and the disposal of assets. It is submitted that these regulations might save the Act, and simplify its application and enforcement.

Bibliography

BEKKER JC
1989. *Seymour's customary law in Southern Africa*. 5th ed. Cape Town: Juta.

BENNETT TW
1995. *A sourcebook of African customary law for Southern Africa*. Cape Town: Juta.

CRONJE DSP AND HEATON J
1999. *South African family law*. Durban: Butterworths.

CROWTHER J (ed)
1989. *Oxford advanced learner's dictionary of current English*. 4th edition. Oxford: Oxford University Press.

DLAMINI CRM
1999. The ultimate recognition of the customary marriage in South Africa. *Obiter* :14-40.

HAHLO HR
1985. *The South African law of husband and wife*. Cape Town: Juta.

JAZBHAY SA
1997. Recent constitutional cases. *De Rebus* Vol 349:114-115.

MQEKE RB
1999. The 'rainbow jurisprudence' and the institution of marriage with emphasis on the *Recognition of Customary Marriages Act* 120 of 1998. *Obiter* :52-68.

SOUTH AFRICAN LAW COMMISSION
1998. *The harmonisation of the common law and the indigenous law*. Discussion paper 74. Project 90. Pretoria: Government Printer.