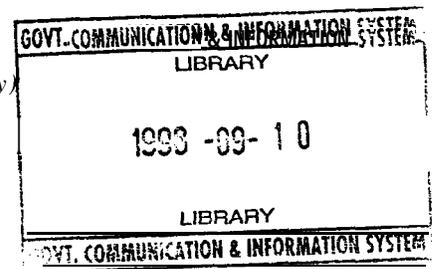


REPUBLIC OF SOUTH AFRICA

RECOGNITION OF CUSTOMARY MARRIAGES BILL

(As introduced in the National Assembly)

(MINISTER OF JUSTICE)



[B 110—98]

REPUBLIEK VAN SUID-AFRIKA

WETSONTWERP OP ERKENNING VAN GEBRUIKLIKE HUWELIKE

(Soos ingedien in die Nasionale Vergadering)

(MINISTER VAN JUSTISIE)

[W 110—98]

ISBN O 621285005

BILL

To make provision for the recognition of customary marriages; to specify the requirements for a valid customary marriage; to regulate the registration of customary marriages; to regulate the proprietary consequences of customary marriages and the contractual capacity of spouses of such marriages and their competency to litigate; to regulate the dissolution of customary marriages; to provide for the making of regulations; to repeal certain provisions of certain laws; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Definitions

1. In this Act, unless the context otherwise indicates—
- (i) “court” means a division of the High Court of South Africa or a family court established under any law; (iv) 5
 - (ii) “customary law” means the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples; (ii)
 - (iii) “customary marriage” means a marriage entered into in accordance with customary law; (i) 10
 - (iv) “lobolo” means the property in cash or in kind, whether known as *lobolo*, *bogadi*, *bohali*, *xuma*, *lumalo*, *thaka*, *ikhazi*, *magadi*, *emabheka* or by any other name, which a prospective husband or the head of his family undertakes to give to the head of the prospective wife’s family in consideration of a customary marriage; (iv) 15
 - (v) “Minister” means the Minister of Home Affairs; (vi)
 - (vi) “prescribed” means prescribed by regulation; (ix)
 - (vii) “registering officer” means any person appointed by the Minister as registering officer for purposes of this Act; (vii) 20
 - (viii) “regulations” means regulations made under section 11; (viii) and
 - (ix) “this Act” includes regulations. (iii)

Recognition of customary marriages

2. (1) A customary marriage existing at the commencement of this Act is for all purposes recognised as a marriage. 25
- (2) A customary marriage entered into after the commencement of this Act, which complies with the requirements of this Act, is for all purposes recognised as a marriage.
- (3) If a person is a spouse in more than one customary marriage, all such marriages entered into before the commencement of this Act are for all purposes recognised as marriages and all such customary marriages entered into after the commencement of this Act, which comply with the provisions of this Act, are for all purposes recognised as marriages. 30

Requirements for validity of customary marriages

3.(1) For a customary marriage entered into after the commencement of this Act to be valid—

(o) the prospective spouses—

(i) must both be above the age of 18 years: and 5

(ii) must both consent to be married to each other under customary law; and

(b) the marriage must be entered into and celebrated in accordance with customary law.

(2) Save as provided in section 10(1), no spouse in a customary marriage shall be competent to enter into a marriage under the Marriage Act, 1961 (Act No. 25 of 1961). 10 during the subsistence of such customary marriage.

(3)(a) If either of the prospective spouses is a minor, both his or her parents, or if he or she has no parents, his or her legal guardian, must also consent to the marriage.

(b) If the consent of the parent or legal guardian cannot be obtained, section 25 of the Marriages Act, 1961 (Act No. 25 of 1961) applies. 15

(4)(a) Despite subsection (1)(a)(i), the Minister or any officer in the public service authorised thereto by him or her, may grant written permission to a person under the age of 18 years to enter into a customary marriage if the Minister or the said officer considers such marriage desirable and in the interests of the parties in question.

(b) Such permission shall not relieve the parties to the proposed marriage from the 20 obligation to comply with all the other requirements prescribed by law.

(c) If a person under the age of 18 years has entered into a customary marriage without the written permission of the Minister or the relevant officer, the Minister or the officer may, if he or she considers the marriage to be desirable and in the interests of the parties in question, and if the marriage was in every other respect in accordance with this Act, 25 declare the marriage in writing to be a valid customary marriage.

(5) Subject to subsection (4) section 24A of the Marriage Act, 1961, applies to the customary marriage of a minor entered into without the consent of a parent, guardian, commissioner of child welfare or a judge, as the case may be.

(6) The rules of customary law determine the validity of a customary marriage 30 between persons related to each other by blood or affinity.

Registration of customary marriages

4. (1) The spouses of a customary marriage must—

(a) in the case of a marriage entered into before the commencement of this Act, within a reasonable time after that commencement: or 35

(b) in the case of a marriage entered into after the commencement of this Act, within a reasonable time after the conclusion of that marriage.

cause the marriage to be registered by a registering officer.

(2)(a) A registering officer must, if satisfied that the spouses concluded a valid customary marriage, register the marriage by noting the identity of the spouses, the date 40 of the marriage, any *lobolo* agreed to and any other particulars prescribed by the regulations.

(b) The registering officer must issue to the spouses a certificate of registration, bearing the prescribed particulars. ‘

(3) If a registering officer is not satisfied that a valid customary marriage was entered 45 into by the spouses, he or she must refuse to register the marriage.

(4)(a) If for any reason a customary marriage is not registered, any person having an interest in the matter may require a registering officer to enquire into the existence of the marriage.

(b) If the officer is satisfied that a valid customary marriage exists, he or she must 50 register it and issue a certificate of registration.

(5) A court may upon application made to that court and upon investigation instituted by that court order—

(a) the registration of any customary marriage: and

(b) the cancellation or rectification of any registration of a customary marriage 55 effected by a registering officer,

(6) A certificate of registration of a customary marriage issued under this section or any other law providing for the registration of customary marriages constitutes *prima facie* proof of the existence of the customary marriage and of the particulars contained in the certificate.

(7) Failure to register a customary marriage does not affect the validity of that marriage. 5

Determination of age of minor

5. If the age of a person who allegedly is a minor is uncertain or is in dispute, and that person's age is relevant for purposes of this Act, a registering officer, a commissioner of child welfare or a court may determine the person's age and issue a certificate in regard thereto. which constitutes proof of the person's age. 10

Equal status of spouses

6. The wife in a customary marriage has in all respects a status equal to that of her husband.

Proprietary consequences of customary marriages and contractual capacity of spouses 15

7. (1) The proprietary consequences of a customary marriage entered into before the commencement of this Act continues to be governed by customary law.

(2) A customary marriage entered into after the commencement of this Act in which a spouse is not a partner in any other existing customary marriage, is a marriage in community of property and of profit and loss between the spouses, unless such consequences are specifically excluded by the spouses in an antenuptual contract which regulates the matrimonial property system of their marriage. 20

(3) Chapter III and sections 18, 19 and 20 of Chapter IV of the Matrimonial Property Act, 1984 (Act No 88 of 1984), apply in respect of any customary marriage which is in community of property as contemplated in subsection (2). 25

(4) A person who is a spouse in a customary marriage entered into before the commencement of this Act may apply to a court jointly with that person's spouse or spouses, for leave to change the matrimonial property system which applies to their marriage and the court may, if satisfied that— 30

(a) there are sound reasons for the proposed change:

(b) sufficient written notice of the proposed change has been given to all creditors of the spouses for amounts exceeding R500 or such amount as may be determined by the Minister of Justice by notice in the *Gazette*; and

(c) no other person will be prejudiced by the proposed change, 35

order that the matrimonial property system applicable to such marriage or marriages will no longer apply and authorise the parties to such marriage or marriages to enter into a written contract in terms of which the future matrimonial property system of their marriage or marriages would be regulated on the conditions determined by the court.

(5) (a) A spouse in an existing customary marriage who wishes to enter into a further customary marriage with another person must make an application to the court— 40

(i) to suspend the matrimonial property system which is applicable to the existing marriage or marriages:

(ii) to effect a division of the matrimonial property of the spouses in such marriage or marriages; and 45

(iii) to approve a written contract which would regulate the future matrimonial property dispensation of all the spouses in all customary marriages in which the applicant is or would be a partner.

(b) All persons having an interest in the matter, and in particular all the existing spouses of the applicant and the prospective spouse, must be joined in the proceedings. 50

(c) When deciding whether to grant an application under paragraph (a), the court must take into account all the circumstances of the family groups to be affected by its order to effect an equitable distribution of property.

(6) (a) If a court approves a contract for the regulation of the matrimonial property system of spouses as contemplated in subsection (4) or (5), the registrar or clerk of the court, as the case may be, must furnish each spouse with a certified copy of such contract and must cause a certified copy of such contract to be sent to the registrar of deeds of the area in which the court is situated. 5

(b) The registrar of deeds must on receipt of such certified copy register in the deeds registry the matrimonial property system of the spouses as reflected in the contract.

Dissolution of customary marriages

8.(1) The dissolution of an existing customary marriage must be effected by a decree of divorce or nullity given by the court. 10

(2) A court may dissolve a customary marriage on the ground of the irretrievable breakdown of the marriage.

(3) Section 6 of the Divorce Act, 1979 (Act No. 70 of 1979), applies to the dissolution of a customary marriage.

(4) A court which hears an action to dissolve a customary marriage may— 15

(a) appoint any suitably qualified person to assist a spouse who is unable to conduct the proceedings in person or to afford the services of a legal representative; and

(b) order the joinder in the proceedings of any person who has a sufficient interest in the matter. 20

(5) The Mediation in Certain Divorce Matters Act, 1987 (Act No. 24 of 1987), applies to the dissolution of a customary marriage.

(6) The procedure for the dissolution of a customary marriage must be regulated by the rules of the court hearing the matter.

(7) A court granting a decree for the dissolution of a customary marriage— 25

(a) has the powers contemplated in sections 7, 8, 9 and 10 of the Divorce Act, 1979, and section 24(1) of the Matrimonial Property Act, 1984 (Act No. 88 of 1984);

(b) may make an order with regard to the custody or guardianship of any minor child of the marriage; and 30

(c) may, when making an order for the payment of maintenance, take into account any payment made in accordance with customary law.

Age of majority

9. Despite the rules of customary law, the age of majority of any person is determined in accordance with the Age of Majority Act, 1972 (Act No. 57 of 1972), or an order of a court made under that Act. 35

Change of marriage system

10. (1) A man and a woman between whom a customary marriage subsists are competent to contract a marriage with each other under the Marriage Act, 1961 (Act No. 25 of 1961), if neither of them is a partner in a subsisting customary marriage with any other person. 40

(2) If a marriage is contracted as contemplated in subsection (1)—

(a) the customary marriage between the spouses is deemed to have been dissolved when the spouses conclude the marriage under the Marriage Act, 1961; and 45

(b) the matrimonial property system of the marriage must be regulated by a matrimonial property contract entered into by the spouses and attested by a notary; failing such contract the marriage must be in community of property and the provisions of Chapter III and sections 18, 19 and 20 of Chapter IV of the Matrimonial Property Act, 1984 (Act No. 88 of 1984), must apply to the marriage. 50

(3) Despite subsection (1), no spouse of a marriage entered into under the Marriage Act, 1961, is during the subsistence of such marriage competent to enter into any other marriage.

Regulations

- 11.** The Minister may make regulations relating to—
- (a) the requirements to be complied with and the information to be furnished to a registering officer in respect of the registration of a customary marriage;
 - (b) the manner in which a registering officer must satisfy himself or herself as to the existence or the validity of a customary marriage;
 - (c) the issuing and the form of certificates of registration of customary marriages; and
 - (d) generally, any matter which is necessary or expedient to provide for the effective registration of customary marriages.

10

Repeal of laws

12. The laws mentioned in the Schedule are hereby repealed to the extent set out in the third column of the Schedule.

Short title and commencement

13. This Act is called the Recognition of Customary Marriages Act, 1998, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

SCHEDULE
REPEAL OF LAWS
(SECTION 12)

No. and year of law	Short title	Extent of repeal
Act No. 38 of 1927	Black Administration Act, 1927	Sections 11(3) <i>ubi</i> , 22(1) to (5) and 22 <i>bis</i>
Act No. 21 of 1978	Transkei Marriage Act, 1978 (Transkei)	Sections 3, 29, 37, 38 and 39
Act No. 16 of 1985	KwaZulu Act on the Code of Zulu Law, 1985	Sections 22 and 27-30
Proclamation No. R151 of 1987	Natal Code of Zulu Law, 1987	Section 27(3)

MEMORANDUM ON THE OBJECTS OF THE RECOGNITION OF CUSTOMARY MARRIAGES BILL, 1998

1. INTRODUCTION

Main objects of the Bill

1. The main object of the Bill is to extend full legal recognition to marriages entered into in accordance with indigenous law or traditional rites, The Bill also improves the position of women and children within these marriages by introducing measures which bring customary law in line with the provisions of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996), and South Africa's international obligations.

2. NATURE OF THE BILL

The Bill lays the foundation for a uniform code of marriage law that will be applicable to all South Africans. It provides a structure compatible with the future recognition of religious and other forms of marriages. The principles laid down in this Bill for example, consent and minimum ages for spouses, community of property and judicial regulation of divorce in a system of family courts are intended to provide a uniform national framework receptive to all marriages.

The Bill removes elements of discrimination against the customary legal tradition and thus gives expression to two constitutional principles: the right to systems of family law based on any tradition or religion protected in section 15(3), and the cultural pluralism guaranteed by sections 30 and 31 of the Constitution. The Bill furthermore strives to reconcile this preservation of the African culture tradition with the competing claims posed by the constitutional requirement to establish norms of equal treatment and non-discrimination.

3. SUMMARY OF THE PROVISIONS OF THE BILL

3.1 Clause 1 makes provision for definitions.

3.2 Clause 2 recognises existing customary marriages, whether they are monogamous or polygamous. The main reasons for not imposing a ban on polygamy are that such a ban would be almost impossible to enforce and that the popularity of the practice is waning.

3.3 Clause 3 provides for requirements for validity of customary marriages. Spouses must consent to be married according to customary law and both must be above the age of 18 years. A child under the age of 18 years is nevertheless permitted to contract a marriage with the prior permission of the Minister.

3.4 Clause 4 deals with registration of customary marriages. The Bill requires registration of all customary marriages so that marital status will become more certain and easier to prove. This has the advantage of giving qualified officials an opportunity to ensure that the spouses fully consented and to explain the implications of their act. No obvious penalty exists to induce compliance with the registration requirements since declaring unregistered marriages void would lead to great hardship for the spouses and would deprive many existing marriages of potential validity. Hence, the Bill provides that failure to register a marriage does not affect its validity.

3.5 Clause 5 deals with determination of age of minor. This provision covers the situation, likely to occur in customary marriages, where there is no written proof of a person's age.

3.6 Clause 6 provides for equal status of the spouses.

3.7 Clause 7 deals with proprietary consequences of customary marriages and contractual capacity.

Clause 7(1) provides that the Bill will have no retroactive effect on existing property arrangements.

Clause 7(2) provides for automatic community of property in case of *de facto* monogamous, “new” marriages. Parties are however entitled to opt for an antenuptial contract. If a spouse wishes to enter into another marriage, clause 7(5) comes into play, and a new property dispensation must be negotiated.

Clause 7(3) incorporates certain provisions of the Matrimonial Property Act, 1984 (Act No. 88 of 1984), relating to the joint management of the estate.

Spouses in existing customary marriages may change the matrimonial property system of their marriage. They may thus opt for community of property, or any other regime, as long as they agree to make a joint application. Where no agreement is reached, the matter will not get to court. Any agreement reached must be enshrined in a written contract approved by the court after it has satisfied itself that the interests of creditors and other third parties will not be prejudiced. (subclause 4) ‘

The Bill bridges the gap between, existing customary marriages with their vested customary law proprietary rights and a future dispensation that aims to improve the position of women and children. It does this by interposing the court as “umpire” between the old and the new. Any intention to increase the family by marrying another wife triggers this provision: the parties must then submit to the court’s “refereeing” powers in the development of a new property system. In the process, the assets are assessed, the position of the existing wife or wives and the children is scrutinised and no settlement is possible unless the court, is satisfied that nobody will be prejudiced. (subclause 5)

A discretion is conferred on the court with regard to the division of the assets. In the exercise of the discretion, circumstances pertaining to the different family groups created by such marriages should be taken into account, with specific emphasis being placed on equity.

Clause 7(6) provides for an alternative to the notarial contract: a simpler, cheaper procedure in the formation and registration of a future marriage regime, in line with the economic standing and legal awareness of most people expected to marry by customary law. The provision now speaks of “a contract” and bypasses lawyers by having the order of the court transmitted directly to the Deeds Registry.

3.8 Clause 8 provides for dissolution of customary marriages. Because customary law allows marriages to be dissolved extra-judicially by the spouse’s families, women and children are put at risk. The Bill therefore stipulates that any subsisting customary marriage may be terminated only by a decree of the court.

Only one ground of divorce is recognised: irretrievable breakdown of the marriage.

Courts granting divorces are given the powers they already exercise in respect of marriages contracted under the Marriage Act, 1961 (Act No. 25 of 1961). The discretion enjoyed by the courts when making these orders will allow them to take into account customary principles, such as maintenance already paid under customary law or where a child’s best interests happen to lie.

3.9 Clause 9 determines the Age of Majority in accordance with the Age of Majority Act, 1972 (Act No. 57 of 1972).

3.10 Clause 10 governs change of marriage system. A couple in a subsisting customary marriage may therefore remarry under the Marriage Act, 1961, but, if they are already parties to a civil marriage, they may not validly contract a subsequent customary marriage. These provisions assume that, although an open-ended, potentially polygamous marriage may be converted into a monogamous marriage, to allow the reverse would seriously prejudice the position of the wife.

3.11 Clause 11 provides for Regulations. The Regulations empower the Minister of Home Affairs to regulate in respect of the registration of customary marriages.

3.12 Clause 12 repeals laws.

Section 11(3) of the Black Administration Act of 1927 is repealed to remove South Africa’s most notorious reason for the “perpetual minority” of African women.

Section 22(1)–(5) of the Black Administration Act of 1927 is repealed because it will be superfluous after the commencement of this Act.

Sections 22 and 27(3) of the KwaZulu Act on the Code of Zulu Law, 1985, are repealed as they entrench the notion of a man as head of the family, and the marital power, respectively, in KwaZulu-Natal.

Section 27(3) of the Natal Code of Zulu Law, 1987, corresponding to the KwaZulu Code, is also repealed.

Sections 3, 29, 37, 38 and 39 of the Transkei Marriage Act, 1978, are hereby repealed because they are incompatible with this Act in diverse areas such as minimum age, marital power, consequences and procedures on divorce.

4. DEPARTMENTS, INSTITUTIONS AND BODIES CONSULTED

During the development of the Bill the Law Commission published, on separate occasions, an Issue Paper and a Discussion Paper. These documents, taken together, were disseminated and discussed at a total of 23 provincial and national workshops which involved non-governmental organisations, women's groups, traditional leaders, the legal profession, state departments, and the religious community. The Discussion Paper alone elicited written submissions from five national state departments, two provincial ones, three Houses of Traditional Leaders and seven women's organisations.

5. PARLIAMENTARY PROCEDURE

This Bill should, in the opinion of the State Law Advisers and the Department of Justice, be dealt with in accordance with section 75 of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996).