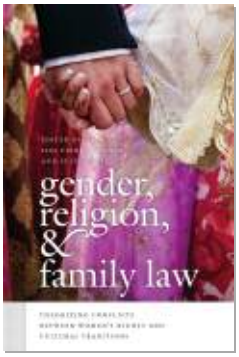
Gender, Religion, and Family Law

Joffe, Lisa Fishbayn



Published by Brandeis University Press

LIKHAPHA MBATHA AND LISA FISHBAYN JOFFE

Chapter Seven Recognition of Polygamous Marriages in the New South Africa

Introduction: Why Did Post-apartheid South Africa Recognize Polygamous Marriage?

> "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."[1]

In Setswana, the word for "polygyny" is *lefufa*. It also means "jealousy." *Mogadikane*, the word for "co-wife" is derived from the verb meaning "to rival, annoy, or cause a pain in the stomach."[2] Women complain that polygyny breeds insecurity, hostility, and witchcraft among those who find themselves in competition for their shared husband's scarce economic and emotional resources.[3] Polygyny brings with it both the humiliation of being supplanted in their husband's affections and anxiety over access to school fees and improved housing.[4] In many cases, women find themselves involved in a polygamous relationship without their knowledge or consent. Women outside polygyny reject it, and women in it hope that their children will avoid being party to it.[5] Eighty percent of South African women surveyed oppose the practice.[6]

The Universal Declaration of Human Rights,[7] the African Charter on Human and People's Rights,[8] and the International Covenant on Civil and Political Rights[9] all describe key rights in relation to marriage, which are honored to varying degrees by South African law.[10] They include the freedom to marry, the capacity to consent to marriage (and the correlative right to

refuse marriage), the ability to have marriages registered (rendering rights annexed to marriage more readily enforceable), and the right to equality under substantive law during marriage and at its dissolution. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) expands upon these rights to require that state parties "modify the social and cultural patterns of conduct of men and women, with the view to achieving the elimination of prejudices which are based on customary and all other practices that deal with the idea of the inferiority of either of the sexes or on stereotyped roles for men and women."[11] With regard to the practice of polygamy, the mandate of the International Covenant on Civil and Political Rights could not be more clear: "Polygamy violates the dignity of women. It is an inadmissible discrimination against women. Consequently it should be abolished wherever it continues to exist."[12]

South Africa is a signatory to these instruments and to many other international agreements on the human rights of women. However, when it reformed its marriage laws in 1998, South Africa granted legal recognition to polygamous marriages contracted under African Customary Law, for the first time.[13] This novel legislation was part of a concerted effort to bring the full range of South African laws in line with the mandates of the new, post-apartheid, Constitution, a document that identifies equality as one of its central values.[14] Why would a government committed to gender equality choose to do this? While a minority marital practice, polygamy occupies a disproportional space in public discourse about the dignity of African cultural values. The drafters of the new polygamy law faced the challenge of balancing competing obligations to comply with human rights norms, satisfy the political expectations of a newly empowered Black majority, and protect the interests of vulnerable members in existing polygamous families. The Recognition of Customary Marriages Act is the innovative, if imperfect, result of this balancing exercise.

A History of Polygamy in South Africa

African Customary Law permits polygyny. The number of wives that a man may marry is not subject to any formal limitation. The practice was already in decline by the early twentieth century[15] and is now quite rare.[16] It both reflected the high status of the husband and enhanced his status.[17] Additional wives

enabled him to father more children and thus become a hallowed ancestor to a large clan.[18] Additional wives could also be a basis for increased landholdings, as a man would be allocated a supplementary piece of land for each wife to farm. A man might also take a further wife in situations where a couple had difficulties producing children.[19] Of course, polygamy also offered men the benefits of sexual novelty.

Speaking in the nineteenth century, Moshoeshoe, the king of Lesotho, summed up the various advantages of polygyny:

> Our women age rapidly and we cannot resist the temptation of taking younger ones. Among the older women there are some who become lazy, and they are the first to advise us to take one more wife, hoping to make a servant of her. For us chiefs, it is a means of contracting alliances with the heads of other nations, which helps to preserve peace. Moreover, we receive many travellers and strangers; how could we lodge them and what could we feed them, if we did not have several wives?[20]

The association of polygamy with prestige and the prerogatives of kings has enjoyed a resurgence in South Africa since Jacob Zuma assumed the presidency in 2009. Zuma has five wives married in accordance with Zulu customary law. His defense of his family life with reference to Zulu tradition is identified as one source of his enormous popularity, particularly in rural communities.[21] He invokes the history of colonial contempt for African values in defending his marriages: "When the British came to our country they said everything we are doing was barbaric, was wrong, inferior in whatever way. . . . I don't know why they are continuing thinking that their culture is more superior than others."[22]

The customary law scholar J. C. Bekker also sees echoes of the colonial project in efforts to reform customary family law to recognize women's rights: "The Bill of Rights has replaced Christianity, but the principle is still the same: things African are uncivilised, unconstitutional — un-Christian if you wish."[23]

Contemporary advocates for women's rights seeking to transform the institution of polygyny thus face a complex challenge, for their arguments indeed resonate with White supremacists' arguments made against it in the nineteenth century. Victorian campaigners against polygyny objected to the practice as an indignity to women because it was inconsistent with the Christian notion of marriage and because it reversed the perceived natural order of dependency between the sexes by making women work to support their husbands.

White objections to polygyny also had a material basis. Opponents were quite explicit that whatever its moral valence, the polygynous homestead family constituted an ideal working unit with which the White farmer could not effectively compete. In 1853, Governor Pine of Natal Province asked, "How can an Englishman with one pair of hands compete with a Native man with five to twenty slave wives?"[24] In this narrative, African men were portrayed as shiftless and unmotivated to work for European employers because they could rely on the labor of multiple wives to provide for their needs. The abolition of polygyny was called for in order to "force the Native man to work, and thus habituate him to labour."[25]

The decline in the popularity of formal polygny in South Africa has been ascribed to a number of causes. The active intervention of the state had a major effect. Changes in taxation policy based assessements on the number of huts within a homestead, so that increasing the number of wives would multiply a husband's tax liability. Limitations on the size of landholdings under individual tenure meant that new wives could not be given sufficient arable land to support a new household.[26] The apartheid state acted to break apart monogamous and polygamous families alike through the imposition of mobility controls. While migrant labor took men away from home for much of the year, their families were prevented by pass laws from joining them in urban areas. Thus, while formal polygamy has declined, de facto polygyny has become quite widespread. Many men have a partner or spouse in their rural home and other non-marital partners in the cities where they reside for work.[27]

In the past, women might enter into polygyny to gain status as married women, to secure economic support, or to gain access to land to use to support themselves. However, in contemporary South Africa, marriage no longer plays the role of sole gatekeeper to resources. Most of the land laws enacted during the constitutional dispensation period allow women to acquire land on an equitable basis with men.[28]

The legal status of polygyny in South African courts was already improving before the passage of the Recognition of Customary Marriages Act in 1998. The decision in *Rylands v. Edros* in 1997 was a watershed moment in this regard. The case turned on whether a marriage contracted solely under Islamic law constituted a valid contract under South African law. Until this point, South African courts refused to recognize Islamic marriages, because their potentially polygynous nature rendered them contrary to public policy.

However the *Rylands* case found that it was no longer tenable under the new constitutional dispensation to define public policy with reference only to the institution of Christian marriage at the expense of other marital traditions. Islamic marriage contracts, even potentially polygamous ones, could therefore give rise to enforceable claims in South African courts.[29] The recognition of actually polygamous marriages, solemnized under Islamic law and African Customary Law, was not far behind.[30]

History of the Reform of South African Customary Law

In discussing customary law, it is important to draw a distinction between *traditional law*, which may be defined as a speculative reconstruction of norms and practices in the distant past; *official customary law*, which is the system of laws, characterized as continuous with traditional norms, that is applied by state courts; and forms of *customary practice* with which families and individuals resolve disputes and organize their affairs in a fashion that they understand to be consistent with tradition.[31] There is a general consensus among scholars, practitioners, and courts in South Africa that emergent practices are an authoritative form of customary law.[32] Customary law may best be understood as the creation of dialectic processes involving the communities from which the law springs and official organs of the state by which it is interpreted and applied.[33]

This notion of contemporary customary law as a shifting, contested, and adaptive practice has been accepted by the Constitutional Court in affirming communal attempts to redefine customary law in line with constitutional norms.[34] In the 2005 case of *Bhe v. Magistrate Khayelitsha & Others*, the court rejected "official customary law" as a "poor reflection, if not a distortion of the true customary law" and held that "[t]rue customary law will be that which recognizes and acknowledges the changes which continually take place."[35] In the recent case of *Shilubana v. Nwamitwa*,[36] the court's preference for living customary law over official accounts was made even more clear. There the court had to evaluate a novel chieftainship policy adopted by the Valoyi traditional community that allowed a woman to be appointed chief. A rival male candidate, supported by the Congress of Traditional Leaders of South Africa, argued that this position failed to respect and apply customary law. The community

had reinterpreted the customary law of chiefly succession through a resolution which stated, "[T]hough in the past it was not permissible by the Valoyis that a female child be heir, in terms of democracy and the new Republic of South Africa Constitution it is now permissible that a female child be heir since she is also equal to a male child."[37] The Constitutional Court found that this sort of transformative reinterpretation of customary law at the local level to bring it into conformity with the Constitution was a prime example of the "living law" and upheld the policy.[38]

South African courts now accept that the processes for the elaboration of customary law have been inflected by struggles over power within the customary law–observing community and between African communities and the colonial and apartheid state. In his classic work, the historian Martin Channock argued that the interpretation and enforcement of customary law by state courts transformed a fluid range of norms subject to negotiation into a more rigid system of rules in ways that disadvantaged women. While the embodiment of customary norms in rules had the advantage of certainty and coherence, it failed to capture the ways in which these rules were constantly changing. Women's successful negotiation of enhanced rights in practice was not reflected in rules that had been recorded at an earlier stage. Moreover, the rules themselves were defined against women's interests, as those drafting the codes of customary law relied upon the expert evidence of male elites. It was in the latter's interest to provide an account of customary law that privileged patriachal authority and diminished the claims of women and younger men.[39] Given this fraught history, Channock argued that there should be nothing to prevent communities from dismantling existing customary law norms or doctrines and developing and transmitting new ones.

The post-apartheid state has a complex relationship to this academic understanding of customary law. The Constitution of the Republic of South Africa provides protection for both gender equality and the right to participate in one's culture.[40] It permits the recognition of "systems of personal and family law under any tradition, or adhered to by persons professing a particular religion,"[41] and requires that African Customary Law be applied where appropriate.[42] The South African Constitution also allows legislation to be enacted recognizing religious and cultural marriages.[43] The Constitution seeks to solve the problem of the coexistence of equality and culture by prescribing that any

cultural practice is protected only to the extent that it does not contravene other provisions in the Bill of Rights.[44]

Colonial and apartheid governments did not recognize customary marriages as valid legal marriages with legal consequences. The Black Administration Act defined marriage to exclude unions contracted "under Black law and custom."[45] When Black people did marry under civil law, their unions had different proprietary consequences than those contracted by Whites. Until 1988, civil marriages contracted by Black people were presumed to be out of community of property, while the default regime for White couples was in community of property.[46]

With the end of apartheid in 1994, the new regime made the improvement of the quality of life of Black South Africans one of its immediate objectives. Recognizing customary marriages was identified as one way of advancing that goal. What recognition of these marriages might actually entail was not properly mapped out.

The South African Law Reform Commission's Inquiry into Customary Marriage

The reform of the customary law of marriage in South Africa was part of a larger project to harmonize the common law and the indigenous laws of marriage under the Constitution. This, in turn, formed part of a broader agenda of extending equal civil rights in marriage that would come to embrace Islamic marriage, Hindu marriage, same-sex couples, and registered non-marital partnerships.[47] The coexistence of cultural and equality rights, together with the application of both customary law and human rights norms, were major concerns during the transition from the apartheid government to a democratic South Africa.

For decades, debate about the path for the reform for South African family law revolved around whether it was possible or appropriate to incorporate customary marriage practices into the civil law regime or whether a distinctive customary marriage law should be maintained but rendered more egalitarian. Channock, for example, advocated for multiple means of solemnizing marriage but for a single law regarding its financial, proprietary, and custodial consequences.[48] At the beginning of the investigation into customary mar-

riages, the South African Law Commission (SALC) also favored the notion of enacting a single law of marriage containing elements of both the civil and customary regimes.[49]

The SALC analyzed the position of customary marriages in countries such as Tanzania, Botswana, Lesotho, Swaziland, and Zimbabwe. It showed that in some of these countries customary marriages were allowed to run parallel to civil marriages, while others had a single marriage code with provisions dealing with customary marriages. It also discussed the position in the Transkei (then a self-governing state in South Africa, now the Eastern Cape Province) where a single marriage law encompassing all the different types of marriage had been enacted.[50]

In its initial discussion paper, the Law Commission recommended that customary marriages should be fully recognized in order to correct past injustices[51] and to assist the country in overcoming historical divisions and inequalities. This generated twenty-seven written submissions providing overwhelming support for the recognition of customary unions as full legal marriages. Two main positions were evident: One group of responses supported the retention of a plural marriage regime, while another supported the creation of a single code of marriage for all. Support for the retention of plural regimes came from various provincial houses of traditional leaders, while women's groups pushed for a single marriage law.

We prepared the submissions on behalf of the Gender Research Project of the Centre for Applied Legal Studies (CALS) at the University of the Witwatersrand to the Law Commission. The Gender Research Project's work was motivated by the notion that law reform should be informed by the best current research about the operation of customary law on the ground. In collaboration with a leading South African women's group, the Rural Women's Movement (now the National Movement of Rural Women), CALS conducted extensive research on women's attitudes toward customary marriage. The CALS data was collected from Limpopo, the North West province, and Gauteng province, including both urban and rural areas. Two discussion groups were held in each of the areas mentioned to cross-check the information collected during the one-to-one interviews. The aim of the interviews was to identify customary cultural practices of marriage worthy of promotion and protection in line with the constitutional provisions.

CALS's findings informed the tone of these submissions. CALS concluded that very few people were still practicing polygyny. From the data collected during sixty interviews, only seven interviewees lived in polygynous relationships. Women said that polygyny forced women into endless strife over their husband and his resources. Polygamy presented a material threat to their prosperity because a husband might redistribute a woman's property to another wife or spread resources too thinly to adequately provide for multiple wives and children.[52] Women involved in such unions hoped that their children would not follow in their footsteps. They often stated that they felt that they were driven by circumstance to accept polygamy because they feared being stigmatized as "spinsters." The majority of women opposed its continuation.

The participants identified the problems of polygamy in different ways depending upon their age and whether they identified as a first or subsequent wife. Older women wanted the law to oblige their husbands to treat all wives equally. Some older women condemned their young co-wives for appropriating their husbands. They also accused the younger women of not being in love with their husbands but of being interested only in the property they had accumulated through the joint efforts of the spouses during the first marriage. Senior co-wives also felt vulnerable because they claimed that young women entering into polygyny sought to change the institution, the distribution of resources, and the role of men by dictating terms to their husbands.

Where the wives cohabited in the same household, young women claimed they were ill-treated by their senior co-wives by being relegated to the role of servants expected to discharge domestic chores. Although young women might possess the status of married women in the eyes of the outside world, and in instances where their husbands were well off, might be envied by their peers, these women complained of a lack of status within their marriages.

Polygamy was also problematic in the far more common situation in which wives did not cohabit. Many women sought to marry their husbands twice, under both the civil and customary regimes, in an attempt to secure the benefits available under both systems. While civil law might provide access to enforceable property rights, customary marriage was necessary for recognition of the validity of the marriage by the community.[53] One of the advantages of undergoing a civil ceremony was that it could, in theory, protect a wife from later becoming party to a polygamous union. However, their husbands' failure to disclose their true marital status at the time of marriage meant they

often lost this protection. Both younger and older women in polygynous marriages argued that their husbands' misrepresentation had contributed to their problems in polygyny. Their husbands had led them to believe they were the only spouse or that the senior wives were long divorced. The prevalence of migrant labor often meant that wives of polygynists did not know of each other's existence.[54] Some women became involved in polygamous marriages when a migrant husband married under customary law to a wife in a rural area chose to marry another wife under civil law in the city without disclosing the existence of the other relationship to either woman. In the past, taking a subsequent wife might have been of benefit to the first wife because is provided her with someone to assist her with domestic chores and conferred the prestige of conspicuous wealth on the broader family.[55] Now, the older rural wife is more often merely thrown over for the new, urban wife and left to fend for herself.[56] A new customary practice has thus emerged that accommodates men's desire to take multiple wives while dispensing with their obligations to provide ongoing support for older wives.[57] It has also become clear that the abolition of formal polygamy has largely been replaced by such geographic de facto polygamy, as migrant workers keep a rural wife at home to mind their landholdings and a live-in girlfriend in town.[58]

The information collected by CALS suggested that it would be possible to bring customary law in line with the Constitution. CALS supported the Law Commission's recommendation for a unified law of marriage but emphasized the importance of synthesizing the positive elements from both legal systems. They urged that there be one law of marriage with a set of minimum requirements and consequences to accommodate the diversity of cultural and religious practices relating to marriage.[59]

Analysis of the CALS data showed that women in customary unions were not happy with the uncertainty of customary unions particularly with regard to women's rights to property during the marriage and in the event of divorce or death of the male spouse. Employed women may be particularly resentful that their wages are used to provide gifts, support, or brideprice for a new wife.[60] In practice a number of Black South Africans were already entering into marriages that were a hybrid of civil and customary law, for example, by contracting civil law marriages and paying *lobolo* (brideprice).

Given that both men and women sought to negotiate between the plural legal regimes to achieve their perceived advantage and that communities

leading customary lives had *already* fused the requirements for both marriage laws in practice, CALS argued for a single marriage law for all South Africans.[61] A uniform system such as this would not simply treat civil law as the benchmark but would recognize the pervasiveness of this sort of hybrid legal life.

However, the Law Commission did not go down this road. It pointed to several factors that led to the rejection of consolidating the laws of marriage. Firstly, they cautioned that customary law could be lost in the unification process. Concerns were voiced with regard to the ideological impact of the assimilation of African customary family law into a single code of marriage.[62] The legacy of colonial and apartheid repudiation of African law could not be ameliorated by creating a single regime that rendered distinct African norms invisible. At least at this point in time, a dual regime was best able to express respect for the values of the newly empowered African majority.

Secondly, consolidation would not necessarily be the best approach to ameliorating the position of women and children already involved in polygamy. Because these marriages were not already recognized, the Law Commission did not have the option of simply grandfathering those marriages into the law and declaring that no polygamous marriages could be entered into in the future. Comprehensive legislation regulating past and future forms of polygyny was needed. The door was left open to full consolidation in the future, however, when material and ideological conditions might have changed.[63]

The Impact and Significance of the Recognition of the Customary Marriages Act

The resulting bill, the Recognition of Customary Marriages Act (RCMA), was passed in 1998 and came into full effect two years later. The RCMA gives legal recognition to both monogamous and polygamous customary marriages.[64] Its structure reflects recommendations CALS made based on its research findings. CALS suggested an approach that would permit polygyny but subject its most egregious effects to regulation. These regulatory impacts would kick in when a man sought to convert a monogamous union into a polygamous one. Polygamous members of the Rural Women's Movement had urged that the law make available a serial division of property. If a man sought to take a

new wife, the first wife could elect to demand that the property of the existing marriage be divided before he could proceed. Thus, he could marry without dissipating her current entitlements although her rights in property acquired in the future would be diminished if she stayed in the marriage.

The RCMA makes clear that only men may have more than one spouse. Different rules and entitlements apply depending on whether these marriages existed prior to November 15, 2000, the date on which the act came into effect. Since 2000, when a man purports to enter into a polygamous marriage, he must submit to the review provisions of the act.[65] He must apply to a court for approval of his plan to take a second wife.[66] His current and prospective wives must be joined as parties to the application.[67] This provision requires the man and his existing wife/wives, as well as his intended wife, to draw up a contract setting out a division of property among all the wives, including the future wife. Where the first marriage was in community of property or the accrual system (where title remains separate but the value of family assets accrued over the course of the marriage are shared equally upon dissolution), the court is obligated to terminate this joint property regime and ensure an equitable division of property between the existing spouses before a new spouse can be allowed to enter the marriage. Some commentators have argued that while the act does not explicitly require the first wife or wives to consent to the marriage, their status as parties to this review means that they can frustrate or even veto the approval of a proprietary contract such that their consent to the marriage is implied.[68]

In theory, each spouse may own this share of the family property as separate property. This means that existing wives will not risk seeing their property rights redistributed to new partners to the marriage. The husband enters into his subsequent marriage with his share of the family property, and it is only this share that may be subject to community of property with the new wife. It is unclear what sort of arrangements the spouses might agree on in these contracts to regulate their polygamous marriage going forward. A wife who lacks the skill or resources to negotiate an initial marriage contract or who is dependent upon her husband's wages may bargain away her entitlements in this new contract for the polygamous marriage. The court has the power to amend the contract if fairness requires, but this discretion may be exercised by judges who share the patriarchal views embodied in traditional customary property norms.[69] The court also has the power to refuse the application on

the basis that the contract does not sufficiently protect the interests of the other wives and family members.[70]

The act does not say what happens if the man fails to reapply. It also does not specify the consequences if the husband does not bother to apply for court approval at all. A recent judgment of the High Court in Gaunteng, however, has applied this provision to declare the second customary marriage invalid.[71] The court held that interpreting the Recognition of Customary Marriage Act in light of the equality guarantees of the Constitution meant that the first wife could not be made party to a polygamous marriage without her knowledge and acquiescence. Given the power disparities that might exist between husband and wife, the court rejected the notion that her failure to object to the new marriage could be taken as acquiescence. The court held that:

> An existing wife may very often be entirely dependent upon her husband together with her children, may be unaware of her rights, may be illiterate or too timid or impecunious to seek legal advice, and may suffer the economic and emotional deprivation brought about by a subsequent marriage long before a separation as a result of death or divorce. To rely on an absence of protest by a wife who may live in fear of rejection — not to mention the children born of an earlier union — would be to consign the issue of voidability to a most uncertain and indeed arbitrary test.[72]

In making this decision, Judge Bertelsmann acknowledged the hardship this ruling imposed upon the second wife. He suggested that she might have a basis to sue her husband or his estate for his deception. This failure of husbands to register their marriages can only be addressed by educating women, both existing wives and intending spouses, about their rights under the act and the implications if its provisions are not followed.[73]

Mothoka Mamashela and Marita Carnelley object that the new law should not entirely disenfranchise the second wife, but should restore her right to share in the entitlements that flow from a recognized marriage.[74] However, while a second wife who entered into such a marriage based on her husband's deceit might experience hardship, it is not at all clear why a woman who was indifferent or willfully ignorant of his marital status should be treated with the same concern. As women learn more about how this new conception of polygamy operates, they may be incentivized to learn more about their intended partner's marital history, preventing the creation of complex relations of dependence before they start.

Conclusion: The Future of South African Polygamy

Despite its adherence to international human rights instruments that would appear to require the contrary, South Africa has chosen to provide legal recognition to polygamous marriage. It made this choice for a range of pressing reasons in the era immediately after the end of apartheid. In symbolic repudiation of colonial and apartheid expressions of contempt for African cultural and legal norms, it recognized this distinctly African marital practice. As an aspect of political strategy, to avoid stigmatizing feminist reform with the taint of colonial reformist rhetoric, it chose to recognize this practice increasingly associated with Zulu nationalist ideology. As an instance of pragmatic law reform, it responded to the fact that abuses of power under formal polygamy now pale in comparison to the problems raised by the widespread practice of de facto geographic polygyny and abandonment of first families.

The impact of the recognition of polygamy in the RCMA is ambiguous. It has not undermined sexist conceptions that see men as family heads and women as subordinate in conventional representations of South African Customary Law. It may, in fact, have provided support for these notions.[75] However, this recognition has occurred in the context of dramatic enhancements to women's capacity to renegotiate their position under customary law. Constitutional litigation has become one of a number of tools in renegotiating gendered rights in customary marriage. The passage of the Constitution itself and the creation of a culture of rights have also increased women's capacity to bargain for greater equality under customary law. In addition to revised chieftainship policies like that confirmed in the *Shilubana* case, many local communities revised their policies on land allocation to allow women to hold land in their own right after 1994.[76]

The recognition of polygamy subject to regulation was not intended to eradicate polygamy or render it a fully egalitarian form of marriage. We suggest, rather, that it was meant to be a neutral placeholder that would ameliorate some of the worst abuses of the practice while allowing customary law norms to be revised around it. Polygamy, or at least its more exploitive forms, will only decline as women gain greater power to choose other marital arrangements under customary law. This view is supported by the position of the Law Commission itself. It concluded in its report:

> The Commission accepts the common point of these objections: that legislating a right for the first wife might create "paper law." . . . It should be noted that, if several other recommendations made in this Report are adopted, the position of the wife in a customary marriage will be stronger than before. Formal recognition of her equal proprietary, contractual and decision-making capacity and locus standi, the confirmation of her majority status and the removal of the marital power over her, should all conduce to the improvement of her bargaining position on major family issues. Education and economic empowerment above all else are the true emancipators, and where they exist they are infinitely more potent protections against practices such as polygyny than potentially unenforceable state laws.[77]

It is, therefore, wrong to place too much emphasis on the question of whether the Recognition of Customary Marriages Act has improved the position of women in polygamous customary marriages. Indeed, critics have rightly doubted the capacity of the act to improve the lives of parties to customary unions from its inception,[78] cautioning that the polygamy provisions will only be a "paper tiger."[79]

The recognition and regulation of polygyny by the RCMA was intended to allow this practice to develop in compliance with the Constitution. However, its effects cannot be seen in compliance with the terms of the act. Few customary marriages, whether monogamous or polygamous, have been registered under the act.[80] The act requires the high court to hear applications to take a second wife. In practice, men simply desert the first wife and cohabit or marry a second wife. Even if one were inclined to register, there are too few of these courts, and most are inaccessible because they are situated in urban areas.[81] Court personnel lack the expertise to deal with these cases, and potential litigants lack access to courts, legal literacy, and the conviction that they are entitled to equality in marriage that would enable them to pursue their cases.

The South African Law Commission had very modest expectations for these provisions on polygamy. The recognition of polygamy was intended to achieve the symbolic effect of affirming a distinctive South African Customary Law tradition, while awaiting changes in the legal and cultural context in which polygamy operated. While giving first wives a formal right of notice, if not consent, to their husbands' further unions, the commission admitted that the economic dependence of first wives on their husbands' resources and the social dependence upon marriage as a source of legitimate identity would vitiate most

women's capacity to exercise this consent.[82] However, they stressed that this perhaps symbolic recognition of polygyny needed to be read in the context of the more wide-ranging changes in the status of women in customary marriage being wrought by other provisions of the RCMA and other legislative reform initiatives. The RCMA ended the legal minority of African women and created formal equality between men and women in terms of legal status and capacity.[83] It also granted women greatly enhanced property rights within marriage by making community of property the default regime for most marriages.[84] It is these advances and consequent changes in power relations that will bring an end to abusive forms of polygamy under South African customary family law.

Notes

1. Informant quoted in Mothokoa Mamashela and Thokozani Xaba, *The Practical Implications and Effects of the Recognition of Customary Marriages Act No. 120 of 1998* (Research Report No. 89, 2004).

2. Jean Comaroff and John Comaroff, *Of Revelation and Revolution: Christianity, Colonialism and Consciousness in South Africa*, vol. 1 (Chicago: University of Chicago Press, 1991), 133.

3. Alice Armstrong et al., "Uncovering Reality: Excavating Women's Rights in African Family Law," *International Journal of Law, Policy and the Family* 7, no. 3 (1993): 326.

4. Comments of participants, "Seminar on Customary Marriage and the Constitution," Transvaal Rural Action Committee, Johannesburg (1996).

5. Likhapha Mbatha, "How Black South Africans Marry" (1997), unpublished research report for the Centre for Applied Legal Studies, University of the Witswatersrand, Johannesburg, South Africa (on file with the authors).

6. Findings of a survey by the South African National Human Rights Trust, as cited in (*Project 90), The Harmonization of the Common Law and Indigenous Law: Report On Customary Marriages* (Pretoria: South African Law Commission, 1998), 84. The same study found that 70 percent of men support the practice.

7. Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), article 16.

8. African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986, article 18.

9. International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI),

21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976, articles 18 and 19.

10. Section 23 of the Constitution of the Republic of South Africa, 1996, requires South African courts to interpret national law, including customary law, in line with the provisions of relevant international agreements.

11. Convention on the Elimination of All Forms of Discrimination against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force Sept. 3, 1981, article 5. South Africa ratified CEDAW without reservation on the December 15, 1995.

12. "General Comment on the International Covenant on Civil and Political Rights," 28–29/03/2000.

13. Recognition of Customary Marriages Act, Republic of South Africa, 1998.

14. Ibid., section 9.

15. See, for example, Isaac Schapera, *A Handbook of Tswana Law and Custom*, 2nd ed. (Oxford: Oxford University Press, 1955); Sebastian Poulter, *Family Law and Litigation in Basotho Society* (Oxford: Clarendon Press, 1975), 69.

16. A recent study by the Community Agency for Social Enquiry (CASE) found that the rate of formal polygyny in even the most conservative rural areas of South Africa does not rise above 7 percent. However, the rate of those involved in informal plural relationships outside of marriage is much higher. Debbie Budlender, specialist researcher at CASE, personal communication, July 7, 2010.

17. Comaroff and Comaroff, *Of Revelation and Revolution*, 132.

18. Armstrong et al., *Uncovering Reality*, 15.

19. J. C. Bekker, *Seymour's Customary Law in Southern Africa* (Cape Town: Juta, 1989), 106–9. Anecdotal evidence suggests that where the husband was the one who was sterile, this may have been resolved clandestinely by arranging that another male family member impregnate the wife. Participant information from workshops organized by the Centre for Applied Legal Studies, Gender Research Project in Limpopo, North West, and Gauteng (1997). For a fictionalized account of such practices, see Lola Shoneyin, *The Secret Lives of Baba Segi's Wives* (London: Serpent's Tail, 2010).

20. Armstrong et al., *Uncovering Reality*, 23.

21. Miriam Koktvedgaard Zeitzen, "The Many Wives of Jacob Zuma," *Foreign Policy*, March 12, 2010.

22. Elizabaeth Diffin, "How Do Zulus Explain Polygamy?" BBC Online, http://news.bbc.co.uk/2/hi/uk_news/magazine/8549429.stm. Zuma characterizes such criticism as based on racial misunderstandings. However, criticism of his public romantic dramas, including fathering a child out of wedlock and undergoing a

healing ceremony with a wife who is expecting a child by another man, also comes from colleagues within the African National Congress. See R.W. Johnson, "Zuma's Marital Own Goal Blots World Cup," *The Sunday Times*, June 6, 2010, http://www.timesonline.co.uk/tol/news/world/africa/article7144830.ece

23. J. C. Bekker, "Recognition of Customary Marriages Act: An Evaluation," *South African Journal of Ethnology* 24, no. 2 (2001): 450.

24. H. J. Simons, *African Women: Their Legal Status In South Africa* (London: C. Hurst and Co., 1968), 21.

25. Belinda Bozzoli, "Marxism, Feminism and the South African State," *Journal of Southern African Studies* 9, no. 2 (April 1983): 158.

26. Simons, *African Women*, 79.

27. Beth Goldblatt, *Cohabitation and Gender in the South African Context: Implications for Law Reform* (Johannesburg: Gender Research Project of the Centre for Applied Legal Studies of the University of the Witwatersrand, November 2001), s. 1.4.1.

28. See, for example, the Restitution of Land Rights Act 22 of 1994, which provides for restitution of rights to those who were dispossessed of land through racially based policies of the apartheid government. Section 35(3) gives the Land Claims Court the power to impose conditions to ensure that all the dispossessed members of the community, including women, have access to the land or compensation on a nondiscriminatory basis.

29. See Rylands v. Edros 1997(2) SA 690 (C). See also Amod v. Multilateral Motor Vehicle Accident Fund 1999 (4) SA 1319 (SCA). For an extended discussion of the *Rylands* case, see Lisa Fishbayn, "Litigating the Right to Culture: Family Law in the New South Africa," *International Journal of Law, Policy and the Family* 13, no. 2 (1999): 160.

30. See Rashida Manjoo, "Muslim Family Law in South Africa: Conflating the Right to Religion with the Privileging of Religion?" in this volume, text accompanying footnotes 10–15.

31. Alice Armstrong, *Struggling over Scarce Resources: Women and Maintenance in South Africa* (Harare: University of Zimbabwe Publications, 1992), xi.

32. Ian Hamnett, *Chieftainship and Legitimacy: An Anthropological Study of Executive Law in Lesotho* (London: Routledge and Kegan Paul, 1975), 13.

33. T. W. Bennett, "Re-Introducing African Customary Law to the South African Legal System," *American Journal of Comparative Law* 57, no. 1 (2009): 28.

34. Catherine Albertyn, "'The Stubborn Persistence of Patriarchy'? Gender Equality and Cultural Diversity in South Africa," *Constitutional Court Review* 2 (2011) 165, text preceeding footnote 67.

35. Bhe v. Magistrate Khayelitsha & Others 2005 (1) BCLR 1 (CC), at paragraph 42.

36. Shilubana and Others v. Nwamitwa 2008 (9) BCLR 914 (CC).

37. *Shilubana*, paragraph 4.

38. *Shilubana*, paragraph 49.

39. Martin Channock, "Law, State and Culture: Thinking About 'Customary Law' after Apartheid," 1991 *Acta Juridica* 52, 71.

40. Constitution of the Republic of South Africa, sections 30 and 31.

41. Ibid., section 15.

42. Ibid., section 211

43. Ibid., section 15(3)(b).

44. Ibid., sections 30 and 31.

45. Ibid., section 35.

46. Marriage and Matrimonial Property Law Amendment Act 3 of 1988, repealing s. 22(6) of the Black Administration Act 38 of 1927.

47. See Michael Yarbrough, *South Africa's Wedding Jitters: Consolidation, Abolition, or Proliferation? Yale Journal of Law and Feminism* 18, no. 2 (2007): 497–521.

48. Channock, "Law, State and Culture," 65.

49. South African Law Commission, *(Project 90), The Harmonization of the Common Law and Indigenous Law (Customary Marriages)*, Issue Paper 3 (Pretoria: South African Law Commission, 1996).

50. See Transkei Marriage Act 21 of 1978.

51. South African Law Commission, *(Project 90) Harmonization of Customary and Indigenous Law (Customary Marriages)*, Discussion Paper 74 (Pretoria: South African Law Commission, 1997), paragraph 1.

52. Conflicts over school fees and housing were a source of widespread anxiety. Comments of participants, "Seminar on Customary Law and the Constitution," Transvall Rural Action Committee, Johannesburg (1996).

53. Gender Research Project, *Final Report on Gender, Citizenship and Governance Project* (Johannesburg: Centre for Applies Legal Studies, 2002), 18.

54. Armstrong et al., *Uncovering Reality*, 27.

55. Mamashela and Xaba, *The Practical Implications and Effects of the Recognition of Customary Marriages Act*, 24.

56. Ibid., 25.

57. Ibid., 27.

58. Comments of Lydia Kompe, MP, at the Rural Women's Movement Annual General Meeting, Johannesburg (1996).

59. South African Law Commission, *Report on Customary Marriages*, paragraph 2.1.2.

60. Thabile Mbatha, "In and Out of Polygyny: A Case of Black South African Women's Experiences of Marriage," *Agenda* 25, no. 1 (2011): 32.

61. Gender Research Project, *Gender, Citizenship and Governance*, 20.

62. South African Law Commission *Report on Customary Marriages*, paragraph 2.1.29.

63. Ibid., paragraph 2.1.28

64. Sections 2(1) and (2) of the Recognition of Customary Marriages Act. Section 2(1) provides that "marriages that are valid under customary law and existing at the commencement date of the Act are for all purposes recognised." Customary marriages that were entered into during the subsistence of a civil marriage were void *ab initio* under section 22 of the Black Administration Act 38 of 1927. See *Nkambula v. Linda* 1951(1) SA 377 (A). The RCMA repealed this provision, but its impact remains ambiguous. See, for example, E. Bonthuys and M. Pieterse, "Still Unclear: The Validity of Certain Customary Marriages," *Journal of Contemporary Roman-Dutch Law* 63, no. 4 (2000): 621; and I. P. Maithufi and G. M. B. Moloi, "The Need for the Protection of Rights of Partners to Invalid Marital Relationships: A Revisit of the 'Discarded Spouse' Debate," *De Jure* 38, no. 1 (2005): 144.

65. For an extended discussion of the operation of the RCMA, see the Centre for Appplied Legal Studies, *Customary Marriage Bench Book* (Pretoria: Justice College, Department of Justice and Constitutional Development, 2004).

66. Recognition of Customary Marriages Act, section 7(6).

67. Ibid., section 7(8).

68. Centre for Applied Legal Studies, *Customary Law Bench Book*.

69. Mamashela and Xaba, *The Practical Implications and Effects of the Recognition of Customary Marriages Act*.

70. Recognition of Customary Marriages Act, section 7(b)(iii).

71. MM v. MN 2010 (4) SA 286 (GNP). The first wife had been married in 1986; the second in 2008. The wives learned of the other's existence only upon the husband's death in 2009.

72. MM v. MN, paragraph 32.

73. MM v. MN, paragraph 34.

74. Mothokoa Mamashela and Marita Carnelley, "The Catch 22 Situation of Widows from Polygamous Marriages Being Discarded under Customary Law: *MM v. MN* 2010 (4) SA 286 (GNP) in a Historical Context," *Agenda* 25, no. 1 (2011): 112, 118–19.

75. Centre for Appplied Legal Studies, *Customary Marriage Bench Book*, 31.

76. Aninka Claassens and Sindiso Mnisi, "Rural Women Redefining Land Rights in the Context of Living Customary Law," *South African Journal of Human Rights* 3 (2009): 491, 493.

77. South African Law Commission, *Report on Customary Marriages*, paragraphs 6.1.19 and 6.1.20.

78. For example, Victoria Bronstein, "Confronting Custom in the New South African State: An Analysis of the *Recognition of the Customary Marriages Act 120 of 1998*," *South African Journal of Human Rights* 16 (2000): 558–75.

79. Mamashela and Xaba, *The Practical Implications and Effects of the Recognition of Customary Marriages Act*.

80. I. P. Maithufi and J. C. Bekker, "The Existence and Proof of Customary Marriages for Purposes of Road Accident Fund Claims," *Obiter* 30, no. 1 (2009): 164, 173.

81. Although draft legislation would amend the law to allow couples to register before the far more accessible magistrates courts. See Draft Recognition of Customary Marriages Bill, 2009.

82. South African Law Commission, *(Customary Marriages) Discussion Paper*, paragraphs 6.1.12.

83. Recognition of Customary Marriages Act, section 6.

84. The RCMA has provided a basis for other advances in the position of women under customary marriage law. Section 7 (2) makes all customary marriages contracted after 2000 subject to a community of property regime but section 7(1) held that marriages entered into prior to that point would continue to be governed by customary law. In the recent case of *Gumede v. President of the Republic of South Africa*, the wife challenged section 7(1) as a violation of her rights to gender equality under the Constitution. The effect in her case would have been to make her property rights subject to Zulu law, which granted her husband exclusive rights to the family's property and gave her no right to property upon divorce. The court agreed, finding that this version of customary law resulted in a "particularly crude and gendered form of inequality which left women and children singularly marginalized and destitute." The provision was thus declared unconstitutional and now all customary marriages, whenever contracted, are subject to community of property (at paragraphs 50–54).