

Submissions of the Recognition of Customary Marriages Amendment Bill (B12 of 2019)


Introduction

1. The Women's Legal Centre ('WLC') welcomes the opportunity afforded by the Portfolio Committee on Justice and Correctional Services to engage in this public participation process in respect of the Recognition of Customary Marriages Amendment Bill ('RCMAB').
2. The WLC is an African feminist legal centre that advances women's rights and equality through strategic litigation, advocacy, and partnerships. We aim to defend and protect the rights of vulnerable and marginalised women, in particular black women, and to promote their access to justice and equitable resources. We seek to advance women's freedom from violence, improve substantive equality, and advocate for agency in all aspects of their lives at home, at work, in the community and in society at large.




General Comments

3. We note that the amendment to the Recognition of Customary Marriages Act 120 of 1998 ('RCMA') is necessitated by a Constitutional Court Judgment and order declaring section 7(1) of the RCMA unconstitutional. Further that in terms of the said order the defect in the relevant section should have been corrected by 30 November 2019. The Constitutional Court having provided the Department of Justice and the legislature 24 months to remedy the rights violation. It is further noted that the deadline will not be reached and that the Minister of Justice has brought an application to the Constitutional Court requesting an extension of the 24 months deadline. We await the Courts decision in respect of the application.
4. It is further worth noting that the WLC was the *amicus curiae* in the Constitutional Court matter of **Ramuhovhi and Others v The President of the Republic of South Africa and Others** 2018 (2) SA 1 (CC) which the case that has prompted the amendment of the RCMA.
5. The submission, which we make to the Committee falls into our programmatic focus area on relationship rights and are in line with our submissions made to the Constitutional Court during the hearing of the matter, and to the Department of Justice in June of 2018 when they sought comment on an earlier draft of the Bill.

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6. This amendment is of particular importance to a very specific category of women. These women have been affected for many years from the lack of protection that was afforded to other women who could have their marriages and rights in marriage recognised through the RCMA. In our experience that are older women who live in both urban and rural areas. They live in accordance with their custom and seek to give effect to their Constitutional rights to do so.
 7. The amendment is therefore important as it seeks to remedy discrimination against women who were precluded from owning or holding rights in property and managing and controlling property equally with their husbands.

Current reading of the Bill

8. The WLC is in support of the proposed Bill as it seeks to give effect to the remarks made in **Ramuhovhi** that parliament is enjoined by the foundational values of the Constitution, to amend the law to create a default position that allows for the rights of women in pre-Act polygamous customary marriages to prevail. In doing so, the legislature must remedy a situation that has discriminated against these women on the basis of gender and marital status, and infringed their right to dignity. The Bill provides parliament with the opportunity to do so.
9. As it currently reads, the Bill is in keeping with the Constitutional Court order as regards the interim relief granted in **Ramuhovhi**. It captures the essence of the




Court's recommendations and therefore seeks to fulfil the purpose of the RCMA itself in giving recognition to all wives of their marriages and the matrimonial property, which flows therefrom. Further it enforces the principle of equality in status and capacity of spouses in polygamous marriages as well as monogamous marriages.

10. The amendment will put an end to the perpetuation of inequality between husband's and wives in existing pre-Act polygamous customary marriages, and upholds the Constitutional right to dignity and equality.

The content of the Bill

11. We further note the inclusion of the amendment to section 7(2) of the RCMA in the Bill. We welcome this inclusion, which we recommended to the Department of Justice during their consultation process.

12. The **Gumede (born Shange) v President of the Republic of South Africa and Others** (CCT50/08) found this section to be unconstitutional but no amendment to the legislation was ever effected by the relevant department. It has been ten years since the **Gumede** order was handed down and we welcome the deletion of the wording "entered into after the commencement of this Act". This at last provides women with legal certainty of their position in law.



13. We would like to raise the issue of defining what is meant by *“marital property”*, *“house property”*, *“family property”* and *“personal property”* in the proposed section 7(1)(d) of the Bill. In our experience the very reason for contestation, disputes and litigation within families relate directly to the assets accumulated by the parties during the subsistence of the marriage.

14. We recognise and acknowledge the role of custom within how property may be acquired, owned and shared in a family context. We are also mindful that the Constitutional Court has repeatedly pointed out and confirmed that customary practices and laws are steeped in patriarchy and patriarchal principles¹.

15. At the dawn of our democracy the Constitutional Court had to declare male primogeniture unlawful as it discriminated against female children as heirs to deceased estates². In many of our communities and families property is still distributed contrary to the Constitutional Court judgment and male primogeniture is still being upheld. Rights based education remains a major challenge within our communities.

16. There is therefore a concern that patriarchal stereotypes will feed into the manner in which *“marital property”*, *“house property”*, *“family property”* and *“personal property”* is defined and practiced within custom.

¹ Mayelane v Ngwenyama and Another (CCT 57/12) 2013 ZACC 14

² Bhe and Others v Khayelitsha Magistrate and Others (CCT 49/03) 2004 ZACC 17





17. We have a unique opportunity now to establish and define these terms.

Concern has been expressed by the Department of Justice during their public participation process that defining the terms may alter or change the custom.

18. This may very well be the case, but we also have to recognise that the Constitutional Court has expressly confirmed the living nature of customary law³. Our Courts have pronounced in certain instances on the need for custom to be declared unconstitutional where it violates the rights of those who practice it⁴. Further there have been instances where the Courts have found it necessary for the development of the custom to eradicate discrimination⁵.

19. We would suggest that there is no need for litigation to be brought in the future to address the issue of what constitutes these different forms of property and whether the custom is lawful or constitutional. Litigation is increasingly becoming too expensive and the majority of women that we see on a daily basis cannot afford to litigate to vindicate their rights. The law must therefore endeavour to provide us much clarity as possible and as much guidance as possible so as to ensure substantive equality and rights enjoyment. These are terms that can and should be defined now while the amendment process is underway.

³ Shilubana and Others v Nwamitwa (CCT 03/07) 2008 ZACC 9 and more recently in the Supreme Court of Appeal judgment in Mbungela and Another v Mkabi and Others case no. 820/2018

⁴ Bhe and Others v Khayelitsha Magistrate and Others (CCT 49/03) 2004 ZACC 17

⁵ Mayelane v Ngwenyama and Another (CCT 57/12) 2013 ZACC 14





Implementation of the Bill once enacted

20. In both the **Gumede** as well as **Mayelane** Judgments the Court ordered that the relevant department must ensure the implementation of the judgement and must therefore ensure that those who are impacted by it is made aware of the content and the implication. In other words the Court recognised that there was a need to educate people who practice the custom that their has been normative development of their rights.

21. We can find no indication that the relevant government department (The Department of Home Affairs) ever embarked on an education drive to educate people on the judgment and its impact on their lives.

22. It is critically important in the absence of financial and other resources and with limited access to justice the class of vulnerable women to who this amendment speaks will continue not the reap the benefits if they are not properly informed, educated and empowered. The relevant departments must therefore ensure that those directly affected are informed of the Bill, its content and the impact on their lives.

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