**SUMMARY OF COMMENTS AND EVALUATION: RECOGNITION OF CUSTOMARY MARRIAGES AMENDMENT BILL**

**FEBRUARY 2020**

**Introduction**

* The Portfolio Committee on Justice and Constitutional Development invited stakeholders and interested persons to make written submissions on the Recognition of Customary Marriages Amendment Bill, 2019. A total of 6 written submissions has been received.
* Commentatorswho submitted comments are:

1. Women's Legal Centre

2. National House of Traditional Leaders

3. Helen Suzman Foundation

4. Commission for Gender Equality

5. COSATU

6. Mr Mali George Buthelezi

* The table below provides a summary of the submissions and general comments.

**SUBMISSIONS/RECOMMENDATIONS**

| **COMMENTATOR** | **COMMENT** | **DEPARTMENT RESPONSE** |
| --- | --- | --- |
| 1. Women's Legal Centre (WLC) | 1. The Bill complies with the Constitutional Court order in the *Ramuhovhi*-judgment. The amendment will end the perpetuation of inequality between husbands and wives in existing pre-Act polygamous customary marriages, and upholds the Constitutional right to equality and dignity.  2. WLC welcomes the inclusion of the amendment to section 7(2) of the Recognition of Customary Marriages Act, 1998 (the Act), which it recommended to the DOJ&CD during the consultation process. This provides women with legal certainty of their position in law.  3. WLC raises an issue of defining "marital property", "house property", "family property" and "personal property", since the very reason for contestation, disputes and litigation within families relates directly to the assets accumulated by the parties during the subsistence of the marriage. There is a concern that patriarchal stereotypes will feed into the manner in which these terms are defined and practised within custom.  4. There is no need for litigation to be brought in the future to address what constitutes different forms of property and whether custom is lawful or constitutional. Due to expensive litigation, the law must endeavour to provide clarity and guidance as much as possible to ensure enjoyment of substantive equality and rights. These terms can and should be defined now while the amendment process is under way.  5. The CC has said in both the *Gumede-* and *Mayelane-*judgments that the relevant Departments should educate people who practise the custom that there have been normative developments of their rights. There is no indication that the Department of Home Affairs has ever embarked on an education drive to educate people on the judgment and its impact on their lives.  6. The class of vulnerable women to whom the amendment speaks will continue not to reap the benefits if they are not properly informed, educated and empowered. The Department must ensure that those directly affected are informed of the Bill, its content and the impact on their lives. | **Ad 1 and 2:**  Noted.  **Ad 3 and 4:**  The DOJ&CD intentionally left the terminology in question to be given its meaning as contemplated in customary law, as it exists in different parts of the country. If necessary, the courts will give meaning to the terms, on the strength of evidence placed before them on what the terms mean in the particular area of jurisdiction. In this way jurisprudence will develop and adapt as customary law itself evolves. To define these terms could lead to unintended consequences, which the Department is trying to avoid. The issue of definitions would need further in-depth research and broad consultation.  It should also be noted that the Constitution recognises customary law. Section 211(3) of the Constitution provides that the courts MUST apply customary law when the law is applicable, subject to the Constitution and any legislation that specifically deals with customary law. The Department is of the opinion that these terms should be interpreted in terms of the customary law of the persons concerned.  **Ad 5 and 6:**  The Department has a "Let's Talk Justice" programme that is broadcast live on local radio stations, where the Deputy Minister or officials of the Department discuss relevant topics on the development of the law. This programme is intended to teach the people about various legal issues affecting them. A communications initiative will be undertaken by the Department once the legislation is passed. |
| 2. Helen Suzman Foundation (HSF) | 1. The Bill refers to four categories of property, namely “marital property”, “house property”, “family property” and “personal property”. Clause 2*(d)* of the Bill describes these categories as having “the meaning ascribed to them in customary law.” HSF argues that at the legislative level this description is vague and lacks certainty and clarity. This vagueness is compounded by the existent definition of **Customary law** which is defined in the Act as “**the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples**.  2. Lack of certainty around these terms which do not have a consistent definition means that they will not have a consistent application upon dissolution of a marriage. This will hold especially true for the category of “personal property” which is subject to exclusive rights ownership instead of community of property. This unintentional loophole ripens the opportunity for abuse, and creates avoidable vulnerabilities for women in customary marriages. By leaving the ascription of the meaning of these terms to customary law, the Portfolio Committee allows for the potential of having a meaning attached to types of property which goes against Constitutional imperatives of equality.  3. The intent of both the *Gumede* and *Ramuhovhi* judgments was to further safeguard the rights, entitlements, and legal protection of women who, upon dissolution of their marriages, often find themselves vulnerable and unable to enforce these protections. The Portfolio Committee should seek to buttress the Bill against falling into the trap of creating legal ambiguities and it can do this by inserting definitions of property categories which can be held to a uniform standard of application upon the dissolution of a marriage. The definitions need not be exhaustive, but instead they should seek to add clarity and guidance to the types of property which should be considered in the distinction between the various categories. | **Ad 1, 2 and 3:**  See previous comments in this regard. |
| 3. National House of Traditional Leaders (NHTL) | 1. NHTL proposes that-  (a) section 3A be inserted to provide for the appointment of traditional leaders as registering officers to be able to participate in the registration of any customary marriage;  (b) section 4(2) must remain unchanged that either spouse (and not both) may apply for the registration of their customary marriage; and  (c) the Minister must consult the NHTL when making regulations.  2. The proposed amendments to section 7(2) mean that a husband and his wives in pre-Act polygamous customary marriages must share equally in the right of ownership of, and other rights attaching to, family property including the right of management and control of the family property. The amendments also mean that a husband and his wives in each of the marriages constituting the pre-Act polygamous customary marriage must have similar rights in respect of house property.  3. NHTL submits that customarily, when the husband marries a wife, there is consensual agreement between two families with respect to the two individuals who are to marry and *lobola* is paid. It is a matter of family rather than the individual concerned, and there will be a transfer of the bride by her family group to the family of the husband. The wife gets married to the husband's family (i.e. it is the family that *lobola* the wife), meaning that she belongs to the family, including the assets.  4. A homestead consists of a number of houses, family property/marital property and house property. Family property is communal property, consisting of family members (i.e. parents, siblings *etc*) and ownership of the property belongs to the parents. The house property and marital property belong to the parties (as they might have contributed) and they will not own it if the property is in the homestead and in the same village as they do not own the land. Therefore, spouses in a customary marriage cannot have joint and equal ownership and the rights of management and control over marital property.  5. Before any divorce a reconciliation process is encouraged, where the parties are brought together by the elders who negotiated the *lobola* in order to try resolve the matter. NHTL recommends that before the court grants a divorce, an affidavit from the people involved in the *lobola* negotiations must be filed confirming that mediation took pace and that the parties are divorcing.  6. Regarding section 8(1) of the Act the NHTL is of the view that the same process that took place during the *lobola* negotiations must take place even when the parties are divorcing. The court must obtain an affidavit from *lobola* negotiators that there is no prospect of the restoration of a normal marriage relationship between the parties.  7. Regarding section 8(5) the NHTL applauds the recognition of the role of traditional leaders in the mediation of disputes arising prior to the dissolution of the marriage by a court. | **Ad 1:**  The proposal relates to sections 3, 4 and 11 of the Act, dealing with the validity of customary marriages, the registration of customary marriages and regulations respectively. The administration of these sections has been transferred by the President to the Minister of Home Affairs. The NHTL was informed accordingly.  **Ad 2:**  Noted.  **Ad 3 and 4:**  The intention of the Bill is to enable spouses to have equal in say and control over, the property they are customarily entitled to have a say and control on. If property is something that no one can own in terms of custom, then the parties will not own that property. It should be noted that the Bill follows closely the remedy provided in the judgment of the Constitutional Court, as an interim remedy and which is, for all intents and purposes, the law at this point in time.  **Ad 5 and 6:**  Section 8(5) is broad enough to allow for mediation if the custom of a particular community requires mediation to be undertaken. The Department suggests that it is not necessary to made the submission of an affidavit to court, as suggested, a statutory requirement. The legislation does not prohibit this. However, in case of a dispute, one of the *lobola* negotiators may be called as a witness in court to testify about the mediation undertaken.  **Ad 7:**  Noted. |
| 4. Commission for Gender Equality (CGE) | 1. The Commission applauds the respective Constitutional Court judgments rendering section 7(1) of the Act unconstitutional in *Gumede* and *Ramuhovhi* due to its differential application of matrimonial property regimes to spouses in monogamous customary marriages, polygamous customary marriages and polygamous marriages concluded after the 15th of November 2000.  2. The judgments bound the Legislature to amend the division of matrimonial property in that spouses in polygamous customary marriage share the customary law property equally in the ownership of, and other rights attached to, family property, including the right of management and control of family property, and each spouse must have similar rights in respect of the house property.  3. The Bill seeks to rectify the existing inequality by seeking to provide equal treatment of women in pre-Act monogamous and polygamous customary marriages. The amendments seek to fulfil the constitutional imperatives of equality wherein spouses will now have joint and equal proprietary rights over marital property.  4. The CGE receives complaints mostly from women who report that they are turned away from registering their customary marriage if they are not accompanied by their spouses. This conduct is contrary to section 4(2) which entitles either spouse to register the customary marriage so long as proper documentation is supplied. This must be cleared through the issue of directives, or mechanisms for reporting or sanctions must be inserted in the legislation should registration of a marriage be declined.  5. The CGE argues that the Constitutional Court held in *Mayelane's* case that the consent of the first wife in a polygamous marriage is a requirement for a subsequent marriage of her husband to be valid, even though the Recognition of Customary Marriages Act is silent on the issue. This decision reinforces the equality of spouses in a polygamous marriage and customary marriages in general, as envisaged by the Act and as the Constitution demands. It also criticizes the Legislature's failure to give guidance regarding the absence of consequences for failure to comply with the requirement for a husband to seek the court's approval of a contract to regulate future marriages before he marries a subsequent wife. The Legislature should revisit the Act to repeal the provision or stipulate consequences for the failure to comply. The CGE recommends that a provision be inserted under section 3 providing that express consent must be received from the current wife for a man to enter into a subsequent customary marriage. | **Ad 1, 2 and 3:**  Noted.  **Ad 4:**  The proposal relates to section 4 of the Act, dealing with the registration of customary marriages, the administration of which has been transferred by the President to the Minister of Home Affairs.  **Ad 5:**  The CC pointed out in *MM v NM* 2013 (4) SA 415 (CC) that customary law is living and develops as a common law in its own right. In this case the majority judgment was limited and held that Xitsonga customary law is developed to require the consent of the first wife to a customary marriage for the validity of a subsequent customary marriage entered into by her husband. The CC also noted the differences between the different customs in the country and that each custom has its place. The CC at paragraph 84 said the following:  “The facts of this matter concern the situation where there is only one existing wife in a customary marriage. The mere fact that there may be situations where there is more than one wife in an existing customary marriage cannot mean that the constitutional norm of equality cannot find application in those cases. But that situation is not before us. That is one reason why we should not determine that issue here. Another, no less important reason is that living customary law should be allowed its own space to adjust to that requirement, to the extent that it may not yet do so.”.  The proposal relates to section 3 of the Act, dealing with the validity of customary marriages, the administration of which has been transferred by the President to the Minister of Home Affairs.  However, the Department is of the view that the broader issue raised by the CGE is something that should be researched and consulted on comprehensively. |
| 5. COSATU | 1. COSATU and its affiliate unions welcome and support the Bill as it is progressive and seeks to enhance the protection of women in customary and polygamous marriages.  2. However, COSATU is alarmed by the length of time it has taken Parliament to process the Bill. It is unacceptable for Government and Parliament to once again fail to abide by the very generous timeframes set by the Constitutional Court to correct constitutionally invalid and discriminatory legislation.  3. There are no acceptable excuses for this lack of urgency by Parliament and Government. This is not a once off occurrence but a frequent problem on the part of the Legislature and the Executive that must be addressed. The continuous failures to table legislation and by the Legislature to draft and pass legislation timeously have significant impacts upon workers and the vulnerable.  4. COSATU welcomes and strongly supports the Bill as it seeks to correct a constitutionally unfair and acceptable unintended consequence of the Recognition of Customary Marriages Act, namely the failure to afford adequate protection to women married before the commencement of the founding legislation in 1998. This has shamefully put women in pre-1998 customary marriages at significant risk of discrimination and hardship, especially with regards to divorces, deaths and the separation and settlement of estates.  5. COSATU supports this Bill as it will now eliminate this unfair and serious form of discrimination. It does not have any proposed amendments to the Bill and urges its speedy passage by Parliament without further delay. | Noted |
| 6. Mr Mali George Buthelezi | 1. The law should allow members of every community to be married according to their custom and not to enter into two types of marriages, like entering into a marriage according to western culture, and also getting married according to the African culture/custom.  2. Other communities should marry according to their customs. Each man should marry not less than five wives and should not pay *lobola*. If there is love the husband's and the wife's sides must negotiate for the preparation of the marriage because *lobola* is the cause of people not getting married and cohabiting as they do not have cows or money to pay *lobola*.  3. A customary marriage without paying *lobola* will be useful because it will address the problem of the so called mistresses, and children born out of marriage (“illegitimate children”) and sexually transmitted diseases.  4. The law on marriages should not allow those married to dissolve the marriage for any reason whatsoever. Those married own the assets of the marriage jointly because they are “one”. | **Ad 1:**  Section 3(2) prohibits a spouse in a customary marriage from entering into a marriage under the Marriage Act, 1961. Also section 10(4) prohibits a spouse in a marriage under the Marriage Act, 1961, while such marriage still subsists from entering into any other marriage. Therefore, a person cannot enter into two types of marriages.  **Ad 2 and 3:**  The law cannot impose how many wives a man can marry, and cannot do away with the *lobola* payment. A man is entitled to marry any number of wives he wishes, without any restriction or compulsion. On the other hand, the two families of spouses to be do negotiate the *lobola* with its terms, and they can agree on no payment of *lobola* without this being imposed by legislation.  **Ad 4:**  The law cannot force spouses to remain married, and any law that does so could be found to be unconstitutional. |