

REPUBLIC OF SOUTH AFRICA

RECOGNITION OF CUSTOMARY MARRIAGES BILL

*(As submitted by the Portfolio Committee on Justice (National Assembly) in terms of
Rule 147(2)(b), after consideration of the Recognition of Customary Marriages Bill
[B 110—98])*

(MINISTER OF JUSTICE)

[B 110B—98]

REPUBLIEK VAN SUID-AFRIKA

WETSONTWERP OP ERKENNING VAN GEBRUIKLIKE HUWELIKE

*(Soos voorgelê deur die Portefeuljekomitee oor Justisie (Nasionale Vergadering) ingevolge
Reël 147(2)(b), na oorweging van die Wetsontwerp op Erkenning van Gebruiklike Huwelike
[W 110—98])*

(MINISTER VAN JUSTISIE)

[W 110B—98]

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GENERAL EXPLANATORY NOTE:

Words underlined with a solid line indicate insertions in existing enactments.

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 provide for the equal status and capacity of spouses in customary marriages; to regulate the proprietary consequences of customary marriages and the capacity of spouses of such marriages; 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 High Court of South Africa, or a family court established under any law, and for purposes of section 8, a Divorce Court established in terms of section 10 of the Administration Amendment Act, 1929 (Act No. 9 of 1929); (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) 10
 - (iii) “customary marriage” means a marriage concluded in accordance with customary law; (i)
 - (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; (v) 15
 - (v) “Minister” means the Minister of Home Affairs; (vi)
 - (vi) “prescribed” means prescribed by regulation made under section 11; (ix) 20
 - (vii) “registering officer” means any person appointed as registering officer for purposes of this Act by the Minister or an officer acting under the Minister’s written authorization; (vii)
 - (viii) “this Act” includes the regulations; (iii) and
 - (ix) “traditional leader” means any person who in terms of customary law or any other law holds a position in a traditional ruling hierarchy. (viii) 25

Recognition of customary marriages

2. (1) A marriage which is a valid marriage at customary law and existing at the commencement of this Act is for all purposes recognised as a marriage.
- (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. 5
- (3) If a person is a spouse in more than one customary marriage, all valid customary marriages entered into before the commencement of this Act are for all purposes recognised as marriages.
- (4) If a person is a spouse in more than one customary marriage, all such marriages entered into after the commencement of this Act, which comply with the provisions of this Act, are for all purposes recognised as marriages. 10

Requirements for validity of customary marriages

3. (1) For a customary marriage entered into after the commencement of this Act to be valid—
- (a) the prospective spouses— 15
- (i) must both be above the age of 18 years; and
- (ii) must both consent to be married to each other under customary law; and
- (b) the marriage must be negotiated and entered into or 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), during the subsistence of such customary marriage. 20
- (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 consent to the marriage.
- (b) If the consent of the parent or legal guardian cannot be obtained, section 25 of the Marriage Act, 1961, applies. 25
- (4) (a) Despite subsection (1)(a)(i), the Minister or any officer in the public service authorised in writing 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. 30
- (b) Such permission shall not relieve the parties to the proposed marriage from the 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, declare the marriage in writing to be a valid customary marriage. 35
- (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. 40
- (6) The prohibition of a customary marriage between persons on account of their relationship by blood or affinity is determined by customary law.

Registration of customary marriages

4. (1) The spouses of a customary marriage have a duty to ensure that their marriage is registered. 45
- (2) Either spouse may apply to the registering officer in the prescribed form for the registration of his or her customary marriage and must furnish the registering officer with the prescribed information and any additional information which the registering officer may require in order to satisfy himself or herself as to the existence of the marriage. 50
- (3) A customary marriage—
- (a) entered into before the commencement of this Act, and which is not registered in terms of any other law, must be registered within a period of 12 months after

that commencement or within such longer period as the Minister may from time to time prescribe by notice in the *Gazette*; or

- (b) entered into after the commencement of this Act, must be registered within a period of three months after the conclusion of the marriage or within such longer period as the Minister may from time to time prescribe by notice in the *Gazette*. 5

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

(b) The registering officer must issue to the spouses a certificate of registration, bearing the prescribed particulars. 10

(5) (a) If for any reason a customary marriage is not registered, any person who satisfies a registering officer that he or she has a sufficient interest in the matter may apply to the registering officer in the prescribed manner to enquire into the existence of the marriage. 15

(b) If the registering officer is satisfied that a valid customary marriage exists or existed between the spouses, he or she must register the marriage and issue a certificate of registration as contemplated in subsection (4).

(6) If a registering officer is not satisfied that a valid customary marriage was entered into by the spouses, he or she must refuse to register the marriage. 20

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

(a) the registration of any customary marriage; or

(b) the cancellation or rectification of any registration of a customary marriage effected by a registering officer. 25

(8) 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.

(9) Failure to register a customary marriage does not affect the validity of that marriage. 30

Determination of age of minor

5. (1) A registering officer may, in respect of a person who allegedly is a minor, accept a birth certificate, an identity document, a sworn statement of a parent or relative of the minor or such other evidence as the registering officer deems appropriate as proof of that person's age. 35

(2) 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, the registering officer may in the prescribed manner submit the matter to a magistrate's court established in terms of the Magistrates' Court Act, 1944 (Act No. 32 of 1944), which must determine the person's age and issue the prescribed certificate in regard thereto, which constitutes proof of the person's age. 40

Equal status and capacity of spouses

6. A wife in a customary marriage has, on the basis of equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity, including the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that she might have at customary law. 45

Proprietary consequences of customary marriages and contractual capacity of spouses 50

7. (1) The proprietary consequences of a customary marriage entered into before the commencement of this Act continue 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 antenuptial contract which regulates the matrimonial property system of their marriage. 55

(3) Chapter III and sections 18 , 19, 20 and 24 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).

(4) (a) Spouses in a customary marriage entered into before the commencement of this Act may apply to a court jointly for leave to change the matrimonial property system which applies to their marriage or marriages and the court may, if satisfied that— 5

- (i) there are sound reasons for the proposed change;
- (ii) 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 10
- (iii) no other person will be prejudiced by the proposed change,

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 will be regulated on conditions determined by the court. 15

(b) In the case of a husband who is a spouse in more than one customary marriage, all persons having a sufficient interest in the matter, and in particular the applicant's existing spouse or spouses, must be joined in the proceedings.

(5) Section 21 of the Matrimonial Property Act, 1984 (Act No.88 of 1984) is applicable to a customary marriage entered into after the commencement of this Act in which the husband does not have more than one spouse. 20

(6) A husband in a customary marriage who wishes to enter into a further customary marriage with another woman after the commencement of this Act must make an application to the court to approve a written contract which will regulate the future matrimonial property system of his marriages. 25

(7) When considering the application in terms of subsection 6—

- (a) the court must—
 - (i) in the case of a marriage which is in community of property or which is subject to the accrual system—
 - (aa) terminate the matrimonial property system which is applicable to the marriage ; and 30
 - (bb) effect a division of the matrimonial property;
 - (ii) ensure an equitable distribution of the property; and
 - (iii) take into account all the relevant circumstances of the family groups which would be affected if the application is granted; 35

- (b) the court may—
 - (i) allow further amendments to the terms of the contract;
 - (ii) grant the order subject to any condition it may deem just; or
 - (iii) refuse the application if in its opinion the interests of any of the parties involved would not be sufficiently safeguarded by means of the proposed contract. 40

(8) All persons having a sufficient interest in the matter, and in particular the applicant's existing spouse or spouses and his prospective spouse, must be joined in the proceedings instituted in terms of subsection (6).

(9) If a court grants an application contemplated in subsection (4) or (6), the registrar or clerk of the court, as the case may be, must furnish each spouse with an order of the court including a certified copy of such contract and must cause such order and a certified copy of such contract to be sent to each registrar of deeds of the area in which the court is situated. 45

Dissolution of customary marriages 50

8. (1) A customary marriage may only be dissolved by a court by a decree of divorce on the ground of the irretrievable breakdown of the marriage.

(2) A court may grant a decree of divorce on the ground of the irretrievable breakdown of a marriage if it is satisfied that the marriage relationship between the parties to the marriage has reached such a state of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between them. 55

(3) The Mediation in Certain Divorce Matters Act, 1987 (Act No. 24 of 1987) and section 6 of the Divorce Act, 1979 (Act No. 70 of 1979), apply to the dissolution of a customary marriage.

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

- (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); 5
- (b) must, in the case of a husband who is a spouse in more than one customary marriage, take into consideration all relevant factors including any contract, agreement or order made in terms of section 7(4), (5), (6) or (7) and must make any equitable order that it deems just; 10
- (c) may order that any person who in the court's opinion has a sufficient interest in the matter be joined in the proceedings;
- (d) may make an order with regard to the custody or guardianship of any minor child of the marriage; and 15
- (e) may, when making an order for the payment of maintenance, take into account any provision or arrangement made in accordance with customary law.

(5) Nothing in this section may be construed as limiting the role, recognised in customary law, of any person, including any traditional leader, in the mediation, in accordance with customary law, of any dispute or matter arising prior to the dissolution 20 of a customary marriage by a court.

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).

Change of marriage system

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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 spouse in a subsisting customary marriage with any other person.

(2) When a marriage is concluded as contemplated in subsection (1) the marriage is 30 in community of property and of profit and loss unless such consequences are specifically excluded in an antenuptial contract which regulates the matrimonial property system of their marriage.

(3) Chapter III and sections 18, 19, 20 and 24 of Chapter IV of the Matrimonial Property Act, 1984 (Act No. 88 of 1984), apply in respect of any marriage which is in 35 community of property as contemplated in subsection (2).

(4) 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

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11. (1) The Minister of Justice, in consultation with the Minister, may make regulations—

(a) relating to—

- (i) the requirements to be complied with and the information to be furnished to a registering officer in respect of the registration of a customary 45 marriage;
- (ii) the manner in which a registering officer must satisfy himself or herself as to the existence or the validity of a customary marriage;
- (iii) the manner in which any person including any traditional leader may participate in the proof of the existence or in the registration of any 50 customary marriage;
- (iv) the form and content of certificates, notices, affidavits and declarations required for the purposes of this Act;
- (v) the custody, certification, implementation, rectification, reproduction and

- disposal of any document relating to the registration of customary marriages or of any document prescribed in terms of the regulations;
- (vi) any matter that is required or permitted to be prescribed in terms of this Act; and
 - (vii) any other matter which is necessary or expedient to provide for the effective registration of customary marriages or the efficient administration of this Act; and
- (b) prescribing the fees payable in respect of the registration of a customary marriage and the issuing of any certificate in respect thereof.
- (2) Any regulation made under subsection (1) must, before publication thereof in the *Gazette*, be submitted to Parliament.
- (3) Any regulation made under subsection (1) which may result in financial expenditure for the State or regulations made under subsection (1)(b) must be made in consultation with the Minister of Finance.
- (4) Any regulation made under subsection (1) may provide that any person who contravenes a provision thereof or fails to comply therewith shall be guilty of an offence and on conviction be liable to a fine or to imprisonment for a period not exceeding one year.

Amendment of laws

12. (1) Section 17 of the Deeds Registries Act, 1937 (Act No. 47 of 1937), is hereby amended by the substitution for paragraph (b) of subsection (2) of the following paragraph:

“(b) where the marriage concerned is governed by the law in force in the Republic or any part thereof, state whether the marriage was contracted in or out of community of property or whether the matrimonial property system is governed by customary law in terms of the Recognition of Customary Marriages Act, 1998;”.

(2) Section 45*bis* of the Deeds Registries Act, 1937, is hereby amended—

(a) by the substitution for paragraph (b) of subsection (1) of the following paragraph:

“(b) forms or formed an asset in a joint estate, and a court has made an order, or has made an order and given an authorization, under section 20 or 21(1) of the Matrimonial Property Act, 1984 (Act No. 88 of 1984) or under section 7 of the Recognition of Customary Marriages Act, 1998, as the case may be, in terms of which the property, lease or bond is awarded to one of the spouses,”; and

(b) by the substitution for paragraph (b) of subsection (1A) of the following paragraph:

“(b) forms or formed an asset in a joint estate and a court has made an order, or has made an order and given an authorization under section 20 or 21(1) of the Matrimonial Property Act, 1984 (Act No. 88 of 1984), or under section 7 of the Recognition of Customary Marriages Act, 1998, as the case may be, in terms of which the property, lease or bond is awarded to both spouses in undivided shares,”.

Repeal of laws

13. 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

14. 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)(b), 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(3)
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 customary 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 culture and 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. The Bill makes it clear that recognition is extended only to customary marriages that were valid in customary law at the date of commencement of the Act.

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. Other requirements are stated broadly to accommodate different systems of customary law, including those in which lobolo is not an essential requirement for marriage.

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. 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. The clause allows spouses in existing customary marriages to take advantage of registration, and sets time limits. Provision is also made for late registration of a marriage by the children of that marriage and other parties with a legitimate interest in the marriage.

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 the equal status and capacity 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(6) comes into play, and a new property system 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.

Clauses 7(4) and 7(5) allow spouses in existing customary marriages to change the property system in their marriage, under the supervision of a court of law. As long as they make a joint application, they may choose any of the available property systems.

Clause 7(6) bridges the gap between existing customary marriages with their vested customary law proprietary rights and any future dispensation that aims to improve the position of women and children. A husband intending to marry another wife must present a court with a property settlement agreed to by all parties involved. This subclause makes it clear that these arrangements affect only those parties to a customary marriage entered into after the commencement of the Act.

Clause 7(7) confers a wide discretion on the court with regard to the division of the assets. The court must scrutinise the proposed settlement and ensure that all vulnerable parties are protect, with emphasis being placed on equity.

Clause 7(8) provides a simple procedure in the registration of a future property regime, avoiding a notarial contract 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 spouses’ 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 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 determine 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 a potentially polygamous marriage may be converted into a monogamous marriage, to allow the reverse would seriously prejudice the position of the wife. Subclause (2) ensures that there is no implication that the customary marriage is superseded by a civil marriage when parties have contracted both. The parties are merely seen as converting from one set of consequences to another.

3.11 Clause 11 provides for regulations.

3.12 Clause 12 accommodates customary marriages in the relevant provisions of the Deeds Registries Act, 1937.

3.13 Clause 13 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) to (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, 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.

