

Submission

to the

Minister of Justice and Correctional Services

on the

Recognition of Customary Marriages Draft Amendment Bill, 2018

15 June 2018

c/o Ms A van der Walt

AlVanderWalt@justice.gov.za

Sheena Swemmer

Head of Programme - Gender

Centre for Applied Legal Studies

Direct Tel: 011 717 8609

Email: sheena.swemmer@wits.ac.za

Thandeka Kathi

Candidate Attorney

Centre for Applied Legal Studies

Direct Tel: 011 717 8302

Email: thandeka.kathi@wits.ac.za

Vuyolethu Mntonintshi

Candidate Attorney

Centre for Applied Legal Studies

Direct Tel: 011 717 8619

Email: vuyolethu.mntonintshi@wits.ac.za

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1. Introduction

- 1.1. The Centre for Applied Legal Studies ('CALs') is a civil society organisation based at the School of Law at the University of the Witwatersrand. CALs is also a law clinic, registered with the Law Society of the Northern Provinces. As such, CALs connects the worlds of both academia and social justice. CALs' vision is a socially, economically and politically just society where repositories of power, including the state and the private sector, uphold human rights.
- 1.2. CALs operates across a range of programmes including: rule of law, business and human rights, environmental justice, basic services, and gender. A specific focus of the gender programme is the interrelation of violence and gender with other rights in the Bill of Rights.
- 1.3. Historically CALs has engaged in gendered issues through numerous submissions to Parliament. Some of CALs' submissions include submissions to the Department of Women on the United Nations Convention on the Elimination of Discrimination Against Women (CEDAW),¹ the Speaker of the National Assembly on the Choice on Termination of Pregnancy Amendment Draft Bill,² the Director-General of Justice and Constitutional Development on the Draft Regulations to the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 made in 2015,³ and to Director-General

¹ <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/CALS%20submission%20CEDAW%20Final-Oct%202015.pdf>.

² <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/gender/CALS%20Submissions%20on%20the%20Termination%20of%20Pregnancy%20Amendment%20Bill%20.pdf>.

³ <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/Sexual%20Offences%20Court%20November%202015.pdf>.

of Justice and Constitutional Development on the Draft Regulations Relating to Sexual Offences Courts: Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007) in 2018.⁴

- 1.4. In light of the above CALS asserts that it is well placed to comment on the substance of the proposed amendment bill.

2. Reflections on the proposed amendment

2.1. CALS would like to take this opportunity to thank the Minister of Justice and Correctional Services for making the call for submissions to the above draft Amendment Bill focusing on whether the proposed bill remedies the constitutional inadequacies of 7(1) of the Recognition of Customary Marriages Act, 120 of 1998 (“Recognition Act”) as identified in the judgment of the Constitutional Court in *Ramuhovhi and Others v President of the Republic of South Africa and Others*.⁵

2.2. Background to the draft Amendment Bill

2.3. Section 7(1) of the Recognition Act stipulates that, ‘[t]he proprietary consequences of a customary marriage entered into before the commencement of this Act continue to be governed by customary law’. This section was the proposed remedy to the constitutional challenge and subsequent declaration of constitutional invalidity identified in *Gumede (born Shange) v President of the Republic of South Africa and Others*.⁶ In this case

⁴ <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/gender/Centre%20for%20Applied%20Legal%20Studies%20-%20Submissions%20on%20the%20Draft%20Regulations%20Relating%20to%20Sexual%20Offences%20Courts.pdf>.

⁵ ZACC 41; 2018 (2) BCLR 217 (CC); 2018 (2) SA 1 (CC) (“Ramuhovhi”).

⁶ [2008] ZACC 23; 2009 (3) BCLR 243 (CC) ; 2009 (3) SA 152 (CC) (“Gumede”).

the Constitutional Court had to decide whether customary marriages entered into prior to the coming into effect of the Recognition Act could be regulated by the Act. The court only extended the application of the Recognition Act to monogamous marriages entered into prior to the coming into effect of the aforementioned act. This was despite the amicus curiae's request that the application of the Act be extended to polygamous customary marriages. The court was of the view that parliament was better placed to deal with the lacunae created by the Gumede judgment and that the court's duty was to draw parliament's attention to it.

2.4. Essentially the court's decision in *Ramuhovhi*, in stipulating that the Recognition Act governs polygamous customary marriages entered into prior to the coming into effect of the of the Act, has fixed the lacunae created in *Gumede*.

2.5. Concerns in relation to the draft Amendment Bill

2.6. The proposed draft amendment to section 7 of the Recognition Act reads thus:

'Section 7 of the Recognition of Customary Marriages Act, 1998 is hereby amended by the substitution for subsection (1) of the following subsection:

*"(1)(a) The proprietary consequences of a customary marriage, whether polygamous, or not, entered into before the commencement of this Act **[continue to be governed by customary law.]** are that the spouses in such a marriage have joint and equal—*

(i) ownership and other rights; and

(ii) rights of management and control, over marital property.

(b) The rights contemplated in paragraph (a), must be exercised—

(i) in respect of all house property, by the husband and wife of the house concerned, jointly and in the best interests of the family unit constituted by the house concerned; and

(ii) in respect of all family property, by the husband and all the wives, jointly and in the best interests of the whole family constituted by the various houses.

(c) Each spouse retains exclusive rights over his or her personal property.

(d) For purposes of this subsection the terms “marital property”, “house property”, “family property” and “personal property” have the meaning ascribed to them in customary law.’

2.7. The issue that arises from the suggested amendment to section 7 of the Recognition Act is that the amendment does provide definitions for certain terms. For example the terms “marital property”, “house property”, “family property” and “personal property” are not given definitions in the draft Amendment Bill nor does the Recognition Act provide such.

2.8. Section 7(1)(d) reads: ‘[f]or purposes of this subsection the terms “marital property”, “house property”, “family property” and “personal property” have the meaning ascribed to them in customary law.’ Yet, it remains uncertain as to how a definition will be established merely by referencing the meaning ascribed to phrases in terms of customary law.

2.9. One can make the argument that these terms have been left intentionally undefined by the legislature as there may be shifts in definitions in different customary systems. This would then allow for different definitions under different customary systems to also be recognised under the draft Amendment Bill. However, we have to be cognisant of the words of the court in *Shilubana and Others v Nwamitwa*⁷ when it stated that

courts [or in this instance the legislature] must be cognisant of the fact that customary law, like any other law, regulates the lives of people. The need for flexibility and the imperative to facilitate development must be balanced against the value of legal certainty, respect for vested rights, and the protection of constitutional rights.⁸

⁷ (CCT 03/07) [2008] ZACC 9; 2008 (9) BCLR 914 (CC); 2009 (2) SA 66 (CC).

⁸ Ibid at para 47.

- 2.10. The issue around the lack of a clear definition or clarity around the terms “marital property”, “house property”, “family property” and “personal property” in terms of customary law, is that conflict usually arises around succession and inheritance if the house property is a single compound and the wives in a polygamous marriage live in separate house property within the compound. For example if individual A (the man) is married in terms of a polygamous customary law to B, C, D and E, (the women) and B, C, D and E all stay on the same “Family Property” (single compound with separate rooms or huts for the different wives) and acquire assets in each of the different household in the compound “Personal Property” with each of the different wives “Marital Property”, how will the law deal with the inheritance and the succession upon the death of the deceased husband?
- 2.11. The draft Amendment Bill needs to be clear to avoid different interpretations on inheritance and succession when “marital property”, “house property”, “family property” and “personal property” which might cause conflict to arise. Furthermore, without a specific test to determine the meaning of such words according to customary law, courts will bear the burden of statutory interpretation of such.