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'SOUTH AFRICA'S FAMILY and MARRIAGE LAW REFORMED. TOWARDS ONE SYSTEM FOR ALL SOUTH AFRICANS

BY

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SOUTH AFRICA'S FAMILY AND MARRIAGE LAW REFORMED
TOWARDS ONE SYSTEM FOR ALL SOUTH AFRICANS

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BACKGROUND

South Africa is undergoing a violent revolution, verging on a civil war, which the apartheid regime tried to crush by giving policemen and soldiers unlimited powers of arrest and detention under State of Emergency decrees.

In the midst of the turmoil, President P.W. Botha put forward a programme of reform. He told Parliament in January 1986 that the country had outgrown the obsolete system of colonial paternalism and apartheid; and promised citizenship rights to all Africans other than those living in the 'independent' bantu homelands.

Pass laws and influx controls would be abolished, he said.
Instead of trying to limit the number of Africans in 'white' urban areas to the bare minimum required by the white people's economy, the government would open the doors, allow them freedom of movement, and face the problems of African urbanisation within the citadels of white supremacy.

Though a great relief, the removal of the hated pass laws failed to cure more fatal defects. Contradictions in the government's two-pronged strategy multiplied. Africans of all classes and national groups rejected a citizenship which denied them the vote and excluded them from a system of government reserved for minority groups compromising a mere quarter of the total population.

Stirred to new heights of revolutionary ardour, men and women, young and old, used violence to repel the state's violence, with a passion that stirred the imagination of people around the world and aroused the sympathy of left-wing radicals in all racial groups.

The collapse of President Botha's strategies and the failure of the state's terrorism to stop the advance of the liberation movement, brought about a crisis in the leadership of the ruling Nasionale party. F.W. de Klerk's rise to power in February 1989 as the party's leader, followed by his elevation to the position of State President in August, opened the way to a new deal. On February 1, 1991 he issued a manifesto for a 'New South Africa', committed to the formation of a free and democratic political order in which all people would be free, equal before the law, and with the same rights regardless of race, colour, sex or creed. The government would at all times be based on the consent of the governed, while they were assured of being able to participate fully at all levels of decision making on the basis of a universal adult franchise.

These promises have far outstripped the government's peformance. As Professor Sampie Terreblanche, (1) an economist at Stellenbosch University, has pointed out, the reform process slowed down in the first half of this year.

Apartheid and sanctions continue to have devastating effects on the 15 million blacks living in abject poverty. The country needs a 'War On Poverty' programme which would bring highly needed relief and convince the liberation movement of the government's sincerity. It could reduce the spiral of violence and enable Mr de Klerk to educate white taxpayers about the inevitable consequences of reform and repentance, thereby strengthening social stability and the prospects for success in constitutional negotiations and economic revival.

A disturbing feature of the counter-revolution is the violence employed by white racist extremists in defence of white supremacy. The Legal Education Action Project (2) in the Institute of Criminology, University of Cape Town, remarked that 'Rightwing and racist violence is part of everyday life for many South Africans but very few people report such actions to the police, lawyers or newspapers. The victims, who are mainly black, have no faith in the police, the law or the media. Abusive behaviour by whites is also so common that it may seem 'normal'.'

A MAN'S WORLD

These stirring events, which are bound to leave an imprint for the rest of the century and beyond, are the work mostly of males. Women's voices are seldom heard in the debates and deliberations that go into the making of decisions, laws and judgements. Men are supposed to represent the interests of women, who in turn have no interests of their own, apart from the interests of male guardians, fathers, husbands and lovers. The assumption is widespread and seldom challenged by women themselves, also in the liberation movement.

Chairman O R Tambo's statement(3) to the National Conference of the African national Congress Women's League in Kimberley, April 1991, asserted that black women suffer the worst form of oppression under apartheid rule. Any liberation that fails to emancipate women is just a shadow of its true self. The ANC has said as much in many resolutions, he pointed out, yet women in the democratic movement seldom rise above the level of receptionists, secretaries and menials; and are seldom seen as likely candidates for high office. They are said to lack the necessary experience, but can never acquire it without the necessary exposure. The time has come for us to move from resolutions to positive action in the interests of the ANC and our society at large.

Public life is the domain of the state's officials who enforce white supremacy under the laws made by a white dominated parliament and carried out by a white judiciary. State Violence invades the houses, huts, shanties and shacks of the township residents when police squads burst into their homes without search warrants, and bundle the occupants into pick-up vans for transport to prisons and courts, where they are sentenced to pay fines or undergo imprisonment for crimes under apartheid laws that carry no moral stigma among any section of the population.

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(1) Cape Times, June 13 1991: 4.

(2) 'Back to the Laager. The Rise of White Rightwing Violence in South Africa', Legal Education Action Project ('LEAP', February 1991)

(3) ANC Women's League, Newsletter No.2, 1991. Report on ANC Consultative Conference as League, April 1991

(4) In Diana E.H.Russel, Lives of Courage. Women for a New South Africa, N.Y., Basic Books, 1989: 81-90

Generations of children grow to maturity in this sub-culture of crime, violence and lawlessness. Many are arrested, jailed, prosecuted and detained in correction homes at an early age. Out of this crucible emerge the youngsters who roam the streets in gangs, attack passengers on suburban trains and buses, and throw stones at motor vehicles. Some parents aid and abet their delinquent children; most can do no more than bewail their loss of innocence.

Audrey Coleman (4) quotes official figures showing that 34 to 40% of persons detained under emergency regulations in the 12 months ending June 1987 were juveniles aged 18 years and under, some only 12 years old. Township children grow up in a violent and insecure society. They are watching, daily, their parents being beaten up, their homes being broken into, their brothers and sometimes their mothers or their fathers being taken away. Out on the streets, they see the army, the police, guns, tanks, shooting. So even at the age of two, some will pick up a stone when they see a soldier or policeman because they are frightened. They don't have to be told to pick up that stone; it's a natural response to feeling insecure. The youth are having to fight with stones against very sophisticated arms. They try to protect their homes by putting furrows along the roads so that the casspir (a large army vehicle) will fall into it. Sometimes they put up stone barricades across the roads when they know that there are going to be rent evictions and their families will be thrown out of their homes'.

RACE AND SEX TABOOS

The criminal sub-culture exists side by side with the legal, established order which regulates the rights, duties and claims of individuals, families and households. The nature of marriage, its dissolution by death or divorce, the property rights of spouses and their children, inheritance, succession, the husband's marital power and the custody of children, are daily, ordinary things. Yet they are of first rate importance to most people, no matter what may be their religion, politics, social class, occupation, wealth, culture and style of life. Family affairs should be looked at for their own sake and because of their bearing on public life.

Debates involving the growth, distribution and classification of populations, group areas, separate schools, games and playgrounds arise from vested interests of whites and their opposition to reforms that threaten their supremacy. As procreators, producers of wealth, partners in sex, women occupy key positions on all such issues, but because of poor organisation or awareness of their potential strength they tend to occupy a back seat and leave decision-making to the men.

Contributing to this state of inertia are racial taboos on sex, marriage and family life which impede the free flow of people and ideas across social barriers. Freedom of choice in marriage is inconsistent with rigid social divisions. When status is closely linked to racial type, assimilation that blurs visible physical differences is seen as a threat to the dominant group, which tends to forbid sex between its members and the underlying black population. (5)

White males, who have had sex with black women since the days of Jan van Riebeeck, consistently denied corresponding rights to white women. The taboo was conventional, enforced by moral, religious and social pressures, but none the less more effective than fines and jail sentences.

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(5) George M. Frederickson, White Supremacy, OUP, 1981 chapter 3.

The diamond and gold discoveries in the last quarter of the 19th century attracted large numbers of immigrants who did not share the prejudices of the older inhabitants. White prostitutes paraded the streets in mining centres and ports, soliciting black and white men alike. (6) The Nasionale-Labour pact government, which took office in 1924, was the first to impose a statutory constraint on sex between the white men and African women by passing the Immorality Act of 1927. It prohibited 'illicit carnal intercourse' between 'europeans and natives'. This was followed in 1949 by a ban on marriages between whites and blacks under the Prohibition of Mixed Marriages Act. The Immorality Amendment Act of 1950 prohibited extra-marital sex between the two groups, and defined 'Non-European' as a person who in appearance obviously is, or who by general acceptance and repute is, a non-European.

A revised Immorality Act, enacted in 1957, reverted to the terminology of the former Boer republics which classified Africans, Coloured and Indians under the label of 'coloured' or 'kleurling' in the Afrikaans text. 'Coloured' was classified as 'any person other than a white person'. A notable feature of this exercise in semantics is the ommission of any reference to ancestry, an inquiry into which is bound to reveal many skeletons in the cupboards of worthy citizens.

These laws, operating together with the Population Registration of 1949, inflicted untold hardship and anguish on thousands of men, women and children whose only fault was their ancestry. Marriage is included in the United Nations Charter as a basic human right. Its flagrant violation in South Africa has been a running store in the country's politics that required urgent surgery.

The occasion for an operation arose as a consequential result of the new constitution adopted in 1984. Coloured and Indian houses in the three chamber parliament refused to put up with state's totalitarian invasion of family life, marriage and sex. Pretoria's apartheid regime made the repeal of the offending statutes an important step in the reform programme. The Prohibition of Mixed Marriages Act of 1949 and Section 16 of the Immorality Act were repealed on 19 June 1985. Opponents of apartheid scoffed at the repeal, saying it was merely cosmetic, while right-wing racists said that whites who married blacks were 'murdering their nation'. These misgivings apart, the removal of sex taboos will help to free people from the fears and prejudices of their race-ridden past. The purging of its iniquities may take decades, but increasing equality and interdependence will speed up the process. It will gain much from the changes in marriage and family law that are the main concern of this essay.

CONFLICT OF LAWS

Legal systems form part of the state's apparatus, uphold its institutions and give effect to government policies. In South Africa, as in all colonies, the white man imposed his law on all inhabitants without as much as a by-your-leave. Afrikaner and British settlers brought their laws with them, a medley of medieval concepts of Germanic, Roman-Dutch, English and Scottish sources, which were modified and blended into a common law, applied in principle to all people.

African law, though subsidiary, was a living reality, deeply rooted in ancient traditions and involving important property interests. The customary family law could not be easily set aside by decrees, or replaced by the common law, which condemned bride-price (lobola or bogadi) and polygamy.

The customary law was allowed to operate under varying degrees of recognition that reflected a wide range of ignorance, bias and hostility among settlers and administrations.

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(6) H.J.Simons, African Women, Christopher Hurst, London, 1968: 106-108.

The Transvaal Republic went so far as to deny Africans the facilities to enter into valid marriage of any kind. Law 3 of 1876 declared that 'In furtherance of morality, the purchase of women and polygamy among the coloured races is not recognised in the Republic by the law of the land'. An earlier marriage law (3 of 1871) provided only for the marriage of whites and promised a separate law for the marriage of 'kleurling', the generic term of all groups of 'blacks'. The Volksraad adopted a bill to this effect in 1897 by 13 votes to 12.

The Orange Free State and the Cape Colony made one concession to customary law by stipulating that the property of an African who died without leaving a valid will would be distributed according to custom. In other respects the wives of customary marriages were considered no better than concubines and their children were illegitimate under common law.

Natal went the other way. Prompted by Royal Instructions and Shepstones's self-appointed role of paramount chief, the Executive Council issued an ordinance in 1849 that exempted Africans from Roman-Dutch law, sanctioned the application of customary law, provided for the appointment of magistrates to enforce it, and vested the powers of a supreme chief in the Governor. The colony/province also codified customary law in 1878, 1891, 1932 and 1969.

The codes vested great powers in the Governor, who was styled 'Supreme Chief', defined the essentials of customary marriage, provided for their registration, detached lobolo from marriage and inflicted women with the burden of perpetual tutelage. In other South African colonies they became majors with full legal capacity at 21 if unmarried, widowed or divorced. Originating in an alleged attempt to free women from the tyranny of patriarchal power, the codes imposed disabilities greater than those endured before the white invasion.

The Cape first abandoned its practice of imposing the common law on Africans when it took charge of Lesotho in 1871. In the words of the Annexation Act, the government rejected the assimilation of a people 'not yet sufficiently advanced in civilisation and social progress' to assume full responsibility of citizenship. When the Colony extended its boundaries to include the Transkei in 1877 it gave the Governor power to legislate by proclamation and magistrates a discretionary right to apply customary law if it was not 'repugnant to justice and equity' or contrary to good policy and public morality. When Parliament in 1927 attended to the long neglected revision of the chaotic state of African law in the legal system, it made the Transkeian law a model for uniformity in all provinces.

SPECIAL COURTS FOR AFRICANS

The Native Administration Act, 38 of 1927 (restyled the Black Administration Act, and hereinafter referred to as the BAA) was the brain-child of the arch segregationist General Hertzog, and a corner stone in his scheme of removing Cape African voters from the common roll. He devoted the years of his office as premier (1924 - 39) to the aims of achieving pre-eminence for Afrikaner nationalism; detached South Africa from the British connection; and prepared the ground for the apartheid dream that became a reality in 1948.

The BAA combined Natal's repressive methods of colonial rule with the Transkei's flexible formula for dealing with the conflict between common law and customary law. As in Natal, the head of state, the Governor-General, was declared 'Supreme Chief' of all Africans in the Union, with power to appoint and dispose chiefs, divide or amalgamate tribes, deport and banish persons and groups, and proclaim laws for scheduled reserves without parliamentary debate.

The BAA created Social Courts, consisting of headmen, chiefs, native commissioners, native appeal courts and native divorce courts, presided over by whites above the lowest rung occupied by the courts of chiefs and headmen. The commissioners courts were given a discretionary power to apply customary law, instructed to sanction customary marriages and enforce claims to lobola.

Parliament welcomed the bill with great enthusiasm, which went to show, said the Prime Minister, that the need of such a statute had been felt for many years. Most of the approval centred around an 'incitement' clause which created the crime of acting with intent to provoke hostility between African and whites. Members on both sides of the House called for immediate repressive action against notorious agitators, bolsheviks, and Kadalie's ICU.

Hertzog and Smuts agreed that past administrations had made a big mistake by undermining the authority of chiefs and depriving them of power to restrain their young men. The BAA, however, sought to revive chieftainship by turning chiefs into low-grade civil servants. 'Concurrently, and not coincidentally, the status of the chieftaincy declined with the once-respected rulers virtually stripped of their administrative and judicial functions and increasingly seen as mere amapayisa or constables, adjuncts of the local magistrates or district commissioners' (7)

Chiefs and headmen are at the bottom of the pile in the judicial hierarchy. Since they are not courts of record, an appeal from their judgement requires them or a representative to appear before the appeal court, to explain the issues and the reasons for judgement. Because of their inferior status and other reasons members of the Native Representative Council questioned the logical basis of these special courts. A recess committee reported in 1945 that though they thought it was proper to apply customary law and recognise chiefs' courts in suitable circumstances, the system of special courts was wrong because 'it violates the principle of equality before the law, implies that Native life is static whereas in fact it is gradually becoming integrated with the general life of the country and it bolsters up the restrictive laws differentially affecting the natives'. The recognition of customary law did not necessarily imply a separate court system. Professor Z K Mathecos saw no reason why the Supreme Court should not administer customary law. 'After all', he concluded,'there is nothing mysterious about Native Law'.(8)

The main drawback to judicial segregation is that it encourages inbreeding and a cult to prolong customary law beyond its span of useful life. That is what happened in the practice of special courts. They began with two opposing traditions. One, inherited from the Cape, Transvaal and the Orange Free State, gave priority to the common law making customary law a subsidiary. In Natal, the customary law in its codified form was the primary system in cases between Africans. The Natal tradition gained the upperhand after much judicial wrangling.

ABOLITION OF SPECIAL COURTS

Forty years went by before the attack on the special court system was renewed, on this occasion from within the top circles of the ruling Nasionale Party. The indictment appeared in the report of the Commission (Hoexter) of Inquiry into the Structure and Functioning of the Courts (RP78/1983). The Commission responded to complaints about the selection and appointment of Supreme Court judges and their assignment to preside over treason and state security trials.

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(7) Peter Walshe, The Rise of African Nationalism in South Africa. The African National Congress, 1912 - 1952, C. Hurst & Co. London, 1970: 212, 385.

(8) Native Representative Council, Adjouned Eighth Session 1945, Proceedings. vol. ii: 225 - 227

It strongly condemned the practice of putting Africans on trial for alleged crimes in court presided over by commissioners in the Ministry of Co-operation and Development, the new name of BAD (Black Affairs Department). It was, the Commission remarked 'by any civilised standard, unnecessary, humiliating and repugnant that Africans, who were inhabitants of the same country, should 'purely on the grounds of race, be criminally prosecuted in separate courts for any offence whatever'. Africans looked down on these courts as instruments used by the Government to 'subjugate the black man by restricting his freedom of movement, by limiting his opportunities for work, and by dislocating his family life'.

Other unfavourable features were the poor standards of criminal justice in the special courts, and African absorption in urban life and Western Culture. The special courts, the commission recommended, should be scrapped immediately.

No sooner said than done! The Special Courts for Blacks Abolition Bill was tabled in 1984 and enacted in April 1988. It did away with the Commissioners' courts and their Courts of Appeal. An amendment to the Magistrate's Court Act, 32 of 1944, gave the common law courts a discretionary power to take judicial notice of the customary law in suits between Africans provided that the law was operative and conformed to principles of public policy and natural justice. The insertion of the words 'judicial notice' enabled the court to do without expert witnesses to prove the law.

The Hoexter Commission also found that 'the proliferation of courts and the fragmentation of adjudication in family matters are not conducive to the preservation of the family as a fundamental social unit'. The special divorce courts for Africans should be abolished and family courts for all South Africans introduced.

AFRICAN MARRIAGES

South African law recognises two systems of marriage for Africans. One is called the 'customary union'. It is polygamous, allowing a man to have more than one wife at a time. The distribution of wives is regulated by the ukulobolo or bogadi custom, which requires a bridegroom to confirm the marriage by transferring cattle, money or goods to the bride's guardian.

The other system is marriage under the common law, which is available to all people. It is a legally sanctioned sex relation between one man and one woman for life, or until it is dissolved by order of a competent court. A civil law marriage is one entered into before a magistrate or other state official; a religious marriage is performed by an authorised minister of religion.

I use the words 'customary' and 'civil' to describe the two systems. Because customary marriages are potentially polygamous, the common law courts refuse to recognise their validity when they conflict with civil marriages. Prior to the Matrimonial Property Amendment Act, 3 of 1988, the conflict was regulated by section 22 (1) of the 1927 BAA. It enabled parties to a customary union to dissolve it merely by entering into civil marriage with each other. The civil marriage absorbs the customary marriage and determines the status and rights of the couple and their children.

Either partner of a customary marriage could dissolve it by contracting a civil marriage with a third person. If a customary married wife deserted her husband for another man, lived with him in adultery and married him in church, the civil marriage annulled the customary marriage, but children of the adulterous relationship belong to her first husband.

When the position is reversed, and it is the husband who contracts a civil marriage, it dissolves all subsisting customary marriages to which he is a party. The discarded wives are free to leave him and remarry. He cannot claim the children they bear after the separation, but retains ownership of the property of the joint household. Whether he is a polygamist who marries one of his wives in church, or a man with one wife who contracts a civil marriage with another woman, his marriage is likely to harm one of the discarded wives. He retains their children and household property, while the wives might become destitute and be forced to find shelter with their natural guardians.

Section 22 of the BAA rules out community of property in a civil marriage entered into during the subsistence of a customary marriage with a woman other than the wife. It goes further, and attempts to protect the interests of the discarded wife and her children. The man may not solemnize the marriage unless he has declared and placed on record the names of his customary marriage wives and children together with the nature of the moveable property allotted by him to each wife or house. His marriage may not diminish the material rights of the discarded wife and her children. When he dies, his widow and her issue shall have no greater rights in the deceased's estate than if she had married him under customary law.

The safegauards may have little value. In declaring the property allocated and accruing to the house of the discarded wife, he does not surrender his rights, and may dispose of the property in accordance with custom. She may use property allotted to the house in accordance with custom only for so long as she submits to her former husbands's authority and lives at a place that he nominates. G.H.B. Whitfield (9) described her position in the following passage:

> 'The native wife would no longer be the wife of the man after he had contracted a marriage according to the Christian or civil rites, and she would only be subject to his control and entitled to his protection in the Native sense whilst living at the kraal he appointed for her residence. After contracting such a marriage he could no longer lawfully co-habit with her; she could legally marry another man; and she would be entitled to leave his kraal and return to her own people or elsewhere, but, if she did so, she could no longer claim that he should maintain or protect her. She would be subject to his control whilst living at his kraal, not as a wife, but as a mother of her children and as an ordinary inmate of his kraal'.

The Appellate Division ruled (10) that customary marriage was not lawful in terms of the common law and did not constitute a legal obstacle to a marriage between one of the partners and a third person. The civil marriage ousted the competing customary marriage wife, who was justified in leaving her former husband without obliging her guardian to refund the lobolo.

In keeping with the rule that the man's civil marriage dissolves a subsisting customary marriage, a woman who is the partner of a man in a customary marriage could lawfully during its subsistence marry another by civil rites. Like any divorced woman, she loses rights of the children and property in the customary marriage. If she cohabits with the second husband before marrying him, he is liable to damages for adultery and the first husband is entitled to the children born during the cohabitation and before the marriage.

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(9) South African Native Law, 1929 (1948, 2nd ed.) Juta, Cape Town : 310 - 312

(10) Nkambula v Linda, 1951 (1) SA 377 (AD)

Such difficulties will persist as long as people are able to switch from customary marriages to civil marriage and back again. The fundamental flaw is the inferior status of customary marriages. I argued in 1961 that the two kinds of marriage should be placed on an equal footing; and drew attention to proposals to this effect by the Cape Native laws and Customs Commission of 1883 and the United Territories General Council in 1921.(11)

Another possibility is contained in the Transkei's Marriage Act 21 of 1978 which allows a man to marry more than one wife by civil or customary rites. Such 'mixed' marriages are ruled out in Lesotho, Botswana and Swaziland which bar a person married under customary or civil law from entering into a second marriage unless the first has been dissolved by death or divorce.

EQUALIZING MARRIAGE SYSTEMS

The first step towards achieving parity between the two systems is to introduce formal, bureacratic procedures for validation of customary marriages, which are in a state of confusion similar to that of common law marriages in Europe prior to the church Council of Trent's decree in 1563. (12) A ceremony is not prescsribed for the formation of a customary marriage, nor is it registered, except in Natal. Matrimony is a private affair of the couple and their families. A family head is a party to his daughter's betrothal, takes charge of the lobola, acts for her in domestic disputes and divorce proceedings and has the power to disrupt her marriage.

Patriarchy, at one time a shield to protect a wife against ill-treatment by her husband and kinsmen, now tends to hinder the growth of co-operation, mutual trust and intimacy between husband and wife. One way of reducing the power of the patriarchy is to create a legal and administrative framework for customary marriages similar to that in civil marriages.

The Natal Code of Zulu Law of 1987 does just that. It confers the status of majority on women at 21, provides for the registration of customary marriages and the issue of marriage certificates, and requires lobolo claims to be recorded. Polygamy is declared valid in customary marriages, which are defined as civil law contracts binding for life unless annulled or dissolved by a competent court. Men are prohibited from entering into a customary marriage during the subsistence of a civil marriage contracted in accordance with the Marriage Act, 25 of 1961.

THE DECLINE OF POLYGAMY

Section 36 of the Natal Code states that polygamous marriages shall be recognised. This is the position in all provinces within the confines of the customary law and in the proceedings between Africans. Where non-Africans are involved, as in claims for damages, the common law courts refuse to confer legitimacy on customary marriages on the ground that they are actually or potentially polygamous.

Leading authorities have argued that 'under the law of the land, the union is an illicit co-habitation'(13) ; and 'not a valid marriage in our law'. (14) The assertions rest on the assumption that Roman-Dutch or English law are South Africa's only system of law. It is not so in fact. Parliament has validated African Customary law for many purposes; and in 1963 enacted that a partner to a customary marriage was entitled to claim damages for loss of support from anybody who unlawfully caused the death of the other spouse provided that neither the husband nor the wife was married by civil rites at the time of the death. (15)

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(11) Simons, 1960
(12) Simons, 1969: chapter 11
(13) Seymour, 1960: 171
(14) Hahlo, 1953: 436
(15) Section 31, Act 76 of 1963

African customary law is recognised by the constitution, regulates in part the lives of most Africans in South Africa, and regarded from their viewpoint is as much 'our law' as the Roman-Dutch. The proper question is whether the common law courts should recognise customary marriages as lawful for particular purposes.

It might be more useful in this short essay to look at the incidence of polygamous marriages and the reasons for its decline. The oldest set of figures available were recorded in Natal, where the marriage regulations of 1869 imposed a registration fee of five pounds payable for each marriage. Of the customary marriages registered between 1871 and 1880, 43% were polygamous. The proportion was 36% in 1894-1903. One-fifth of married men in the Transkei had more than one wife. Of the married men enumerated in the 1921 population census 14% were polygamists.

In 1951 the census returns recorded 1,08% men and only 1,04% women who claimed to be married by customary law. The excess of husbands over wives is probably the result of migratory labour. Married men from labour-supply countries enter the Republic without their wives. Since the incidence of customary marriages is not published, one can only speculate about the number of polygamists in the home-born population. A conservative estimate indicates that the proportion ranges from 5 to 10 per cent.(16)

The African family system is undergoing a revolutionary change from patriarchal, polygamous, joint family organisation of the traditional society to the conjugal, monogamous, simple family of urban-industrial civilisation. Important causes of the change are the market economy, industrialism, urbanisation, school education and Christianity or kindred beliefs. The change cannot be halted, let alone reversed, if Africans are to continue their advance to progressive and enlightened social forms. Women in particaular will lose much and gain nothing by being forced back into the mould of the patriarchal rule, along the lines laid down for an orthodox Hindu wife by the Indian Laws of Manu (17):

> 'A woman is never to be independent. She must not attempt to free herself from her father, husband, or sons.....She shall obey as long as she lives with him to whom her father (or with her father's permission, her brother) has given her; and when he is dead, she must never dishonour his memory....Even a husband of no virtue, without any good qualities at all, and pursuing his pleasures elsewhere, is to be worshipped unflaggingly as a god.... In reward for such conduct, the female who controls her thoughts, speech, and actions, gains in this life highest renown, and in the next a place beside her husband.'

LOBOLO AND PATRIARCHY

The South African parallel to the Hindu patriarchy is bound up with the institution of lobolo, the Zulu noun that describes a man's obligation to pay cattle, money or other property to the guardian of his intended bride. It is a necessary element of customary marriage; it accompanies most civil marriages of all social classes; it figures prominently in marriage and divorce; and has survived the many great changes in African life.

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(16) Simons, 1969: Chapter Eight

(17) Campbell, 1985: 56

When the Special Courts for Africans existed, they insisted that lobolo was the 'keystone'of customary marriages, which persisted while the wife's group retained lobolo property. If she left her husband and refused to return, her people had to refund at least one lobolo beast to dissolve the marriage. She could not enter into a valid second cutomary marriage until this had been done. Any children she had by her lover pending the return of lobolo belonged to her husband, who was entitled to claim damages for adultery from her lover.

If the lobolo holder refused his consent, she could not sue unaided for divorce but had to ask the court for permission to bring an action against him, calling on him to show cause why he should not return lobolo to terminate the marriage. In cases of extreme cruelty or neglect by the husband, the court might allow her to obtain a divorce without a refund of lobolo, but nearly always preferred to uphold the patriarchal power.(18)

Lobolo enables a woman's guardian to keep a close grip on her domestic life after marriage. When his relations with the son-in-law are strained, he can press claims to unpaid lobolo to the extent of breaking up his daughter's marriage. W. Carmichael(19), dissenting from a majority judgement that upheld the patriarchal power, called it 'the essentially slave law of parental divorce' and urged that a customary marriage should be regarded as dissoluble in life only by the will and act of the husband or wife.

Lobolo has lost its former function of providing proof of marriage and regulating the distribution of women among polygamists. The institution has suffered most from the decline of polygamy, the fading away of the extended family system and the emergence of nuclear family units. Marriage today is more of an individual relationship than in traditional society. Girls are less inclined to marry men chosen for them. Men are likely to find their own lobolo instead of getting it from relatives; and are therefore less responsive to family pressures. Customary law has not been adjusted to these changes. Lobolo still enables a man to exercise control over his daughter's marriage and domestic life.

ALWAYS MINORS

Men and women who are sane, solvent and over 18 years of age have full legal capacity under common law and statute, unless they are subject to their husbands' marital power. According to the now defunct commissioners' courts, women were perpetual minors in customary law. They could not own property, inherit, act as guardians of their children, enter into contracts, sue or be sued without the aid of their male guardians. At all ages and regardless of marital or social status, they were legally obliged to submit to the patriarchal authority.

This interpretation rested on faulty premises and a misreading of traditional African culture. Women had more rights than those conceded by alien courts. Common law terms such as ownership, contract and status are saturated with western concepts of individualism unknown in the traditional society before colonial invasion. The family rather than individuals had full legal capacity. It was both a producing and consuming unit, undertaking a wide range of activities performed by private enterprise or public agencies in capitalist and socialist states. More than a million African women, forming 65% of those who are economically active, work for wages outside their homes in professions, factories offices, shops or farms. Many women are marketeers, herbalists, diviners and makers of goods in the informal sector. Many are actually heads of families and assert individual claims to property.

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(18) Mokoena v. Mafokeng, 1945 NAC (C&O) 89

(19) Sipoxo v. Rwexwana, NAC 205 (1919)

WITHOUT PROPERTY

Customary law has not kept pace with these changes. White judicial officers, who are outside the communities whose laws they administer, are only slighltly exposed to the pressure of African opinion, and incline to stress the qualities of authority, certainty and uniformity. They tend to draw a sharp line between 'majors' and 'minors', credit the patriarchal authority with the 'ownership' of all property acquired by members of the household; and repudiate customs that enable women to own cattle and conduct lobolo marriages on their own behalf. The special courts for Africans ignored regional differences, devised stereotypes that lacked the flexibility of archaic law, and yielded to the opinion of African male assessors who served the interests of creditors by allowing them to attach cattle belonging to a wife in settlement of her husband's debts.

A woman sued her husband for cattle she earned in doctor's fees.(20) The assessors said that if a wife makes a mat or basket it belongs to her husband. 'Even if she acquires a knowledge of medicine, the medicine belongs to her husband's kraal. She cannot claim cattle earned by her during the subsistence of the marriage.' On such a slender basis the courts ruled that a wife has no proprietary capacity. Customary marriage, according to Young, P.(21), does not create a partnership between husband and wife. Her position 'is assimilated to that of a child and, with certain exceptions, she cannot hold property, either in her own right or in partnership with her husband'.

Household goods and personal effects given to her as wedding gifts belong to him. He is entitled to keep them on the dissolution of the marriage. Her earnings and anything she buys with them accrue to her house and come under his control.(23)

IN OR OUT OF COMMUNITY

Civil marriages established a community of property between African couples in the Cape. Members of the Transkei General Council (24) complained that they neither understood nor wanted a community of property with their wives; nor did they want the common law of sucession to apply to their deceased estates. It caused divisions between co-wives, quarrels among sons, and benefited mainly the lawyers.

Proclamation 142 of 1910 was an attempt to reconcile civil marriages with the customary law of male primogeniture, and also protect the interests of discarded wives whose husbands married in church. Section 22(6) of the BAA of 1927 extended these principles to all provinces. Unless preceded by a declaration to an authorised officer accepting community, the marriage would be out of community, and have the same proprietary effects as a non-African marriage which excluded community of property, profit and loss.(25) The wife owned her property, her husband owned his, and administered both estates by reason of his marital power.

Most wives lost more than they gained from these arrangements, which were made to satisfy traditionalists who did not want their wives to control property or share the husband's estate. They objected to marriages in community because they entitled wives to receive a half share of the joint estate on divorce or death of the husband.

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(20) Nomtwebula v Ndumndum, 2 NAC 121 (1911)
(21) Mlondlani v Magcaka 1929 NAC (C&O) 89
(23) Mpantsha v Nkolonkulu, 1952 NAC 40 (S)
(24) Proceedings and Reports, Umtata, 1908-09
(25) Ex Parte Minister of Native Affairs in re Molefe v Molefe 1946 AD 35

Most Africans die intestate, not having made a valid will. Their estates pass to a male heir in accordance with the system of male primogeniture. Section 23 of the BAA enforced it in the inheritance of house property and quitrent land. As a result the great majority of African deceased estates go to a male heir, who may be a father or brother-in-law, stepson or more remote kinsmen by marriage. Many women support themselves and their children by their labour. It is unjust and socially harmful to deny them a share in the estates of fathers, brothers, husbands and sons. Yet, this is the general rule.

MARRIAGE LAW REFORM

The most important official contribution to the reform process has come from the South African Law Commission. It circulated a hefty duplicated document of 215 pages in 1985 entitled Marriages and Customary Unions of Black Persons.(26)
The Commission said it wanted to give customary unions 'the status of a common law marriage' by means of such changes as the registration of the 'union', the issue of marriage certificates and divorce by a court of law.

In addition to these procedures, the Commission suggested important changes in the substantive law that would uplift the powers and capacity of customary marriage wives by excluding community of property, profit and loss in property held by the wife in her own name. She would have the right to dispose of it without her husband's assistance; and the right to make contracts in accordance with the common law unless the right or obligation involved was governed by customary law. Other proposed changes in the law of inheritance, succession, guardianship, custody of minors and the payment of maintenance would strengthen the position of women and relieve them of constraints imposed by the patriarchal power.

The Commission's proposal to give customary marriages the status of civil marriages was shelved pending the outcome of discussions with bantu homelands and Frontline states. Meanwhile, the justice department went ahead with aspects of the reform programme by introducing the Matrimonial Property Law Amendment Act, 3 of 1988, which arose from the Commission's findings and made the Matrimonial Property Act of 1984 applicable to African common law marriages on the same terms as for the rest of the population.

As I pointed out earlier, the common law courts had refused to validate customary marriages because they were potentially polygamous and therefore no better than an illicit cohabitation which either partner could terminate at will, and enter into a civil marriage with a third person. To stop such practices, Act 3 of 1988 states that no party to a customary marriage can, during its subsistence, enter into a civil marriage, the only exception being a civil marriage between the spouses of a customary marriage provided that the husband at the time of the civil marriage is not married by customary law to another woman.

COMMUNITY OF PROPERTY AND THE MARITAL POWER

The Matrimonial Property Act, 88 of 1984, did away with the husband's marital power and produced a community of property for Whites, Coloureds and Asians who married without an antenuptial contract. The joint estate is administered by both spouses, under the guiding hand of the husband who is head of the family with the final say in matters of domicile and guardianship of children. Each spouse, acting on her or his own, may perform any juristic act concerning the joint estate, but in a number of specified transactions one spouse shall not act unilaterally without the other's agreement.

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(26) Working Paper 10. Project 51. September 1985

These provisions did not apply to Africans because of a ruling by the Appellate Division (27) that the common law determined the proprietary capacities of those whose civil marriages were not in community by reason of section 22(6) of the BAA. It excluded community of property, profit and loss between the spouses unless they announced their intention to marry in community to an authorised officer within a month before the marriage. The prescribed declarations were seldom made, hence most African common law marriages were not in community. The wife owned her property and the husband his, but he had the marital power and managed both estates.

Objections to a marriage in community come from patriarchal traditionalists and propertied whites, but it has advantages for working class women whose husbands are the main breadwinners, and the wife has few opportunities to aquire property of her own. She gains by belonging to a community which entitles her to a half share of the joint estate if her husband dies before her or if they divorce. It is this possibility of a woman's independence that backward looking chauvinists often resent and sometimes fear.

The 1988 Act deleted section 22(6) of the BAA which had grafted the property relations of customary marriages on African civil marriages. As a result, civil marriages entered into after the Act's coming into effect are in community, unless the spouses chooses to exclude it by an ante-nuptial contract. If it also excludes the marital power, the wife is legally able to manage her affairs and prevent the husband from squandering her assets. On the other hand, if he retains the marital power, he is able to make contracts binding her estate, while she requires his consent to make valid contracts or dispose of her property.

THE ACCRUAL SYSTEM

In South African marriage law accrual is the gain made by a husband and wife during the subsistence of a marriage entered into with an ante-nuptial contract which excluded community of property, profir and loss, and the husband's marital power. Each spouse manages his or her property independently of the other, but gains accrued during the marriage by each are shared on its dissolution in a manner laid down by the Matrimonial Property Act, 88 of 1984.

Section 25(1) of the Act excludes Africans from the provisions of chapter 1, which regulates the accrual system, chapter II which abolishes the marital power, and chapter III which replaces it with joint administration in marriages of community.

Section 2 of the Act applies the accrual system to marriages contracted 'in terms of an ante-nuptial contract by which community of property and community of profit and loss are excluded.' Afrcan civil marriages are not of this kind. They are out of community because the effects of section 22(6) of the BAA of 1927, and not as the result of an ante-nuptial contract. They are consequently held to be ineligible for the benefits of accrual.

The Matrimonial Property Ammendment Act, 3 of 1988, overcame these obstacles by deleting section 22(6) of the 1927 Act, and including Afrian civil marriages within the scope of chapters I, II and III of the main Act.

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(27) Ex Parte Minister of Native Affairs : in re Molefe v Molefe, 1946 AD 315

THE MARITAL POWER

Professor June Sinclair (28), in her penetrating study of Act 88 of 1984, argues that

> 'the abolition of the marital power should have been extended to blacks. The reason advanced for excluding blacks from the reform, generally, is not apposite here. The legal incapacity of wives in civil marriages has nothing to do with a discarded customary-union wife, whose material rights compete with those of a civil marriage and must be protected. It is the particular matrimonial proprietary system that brings about competing claims between women. Full legal status for black married women would not have harmed anyone.'
> 'Black (urban) women who marry out of community and those who can be co-owners of a joint estate in marriages in which community can operate should have been given full contractual capacity and locus standi in judicio. Lamentably, in spite of their inferior legal status, they are in fact responsible to a far greater extent than they should be for the support of their children.' (p.224)

Women who marry with an ante-nuptial contract that excludes community and the marital power are legally competent to manage their affairs, and prevent a spendthrift husband from dissipating their assets. It is the release from male domination rather than the separation of estates that constitutes the main attraction of this form of marriage. But an African wife whose marriage is out of community in terms of section 22(6) of the BAA loses the benefits of a community without receiving the compensating advantage of escaping from her husband's authority over her actions and property. She is a minor. He can make contracts binding her estate, while she may not dispose of her property without his approval or enter unaided into contracts.

The Matrimonial Affairs Act of 1953 limits his power of control. Based on the recommendations of the Women's Legal Disabilities Commission of 1949, (29) the Act was the fruit of many years of agitation for a reform of the marriage system. Organisations like the National Council of Women protested, in particular, against the wide powers vested by the common law in a husband over his wife's property and actions. The reformers objected to a community that absorbed the wife's assets and earnings and placed them under her husband's unrestricted control.

Described by a leading authority (30) as 'but a timid and hesitant step foward,' the 1953 Act has the merit of applying to all couples, including Africans, who are parties to a civil marriage in or out of community, and whether or not the marital power is excluded. A man may not, save with his wife's consent or a court order, alienate, mortgage or confer a real right in her immovable property. He may not, without her written consent, receive or take possession of her earnings, compensation for personal injuries, savings in a public institution and money paid under an insurance policy taken out by her for her children's education. When married out of community both spouses are jointly and individually liable for debts incurred for household necessities. If she has paid the debt, wholly or in part, she is entitled to recover the amount from her husband.

These and related provisions were contained in Chapters II, and III of the Matrimonial Property Act. As I noted earlier, section 25(1) of the Act excluded Africans from the operation of the chapters. The amending Act, 3 of 1988, removes the discrimination. African civil marriages now have the same consequences as the marriages of other people.

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(28) An Introduction to the Matrimonial Property Act 1984, Juta, Johannesburg, 1984 : 65

(29) Report, S.A.1949, U.G. 18

(30) H.R.Hahlo, The South African Law of Husband and Wife, Juta and Co., Johannesburg, 1963: 15

A move towards an equal partnership between a wife and her husband could sustantially improve her position. Women would have to pay a price by taking more legal responsibility for the family's maintenance and the cost of household expenses.

The burden may be heavy on divorced women and the heads of one-parent households, but that is a risk common to all women of all national groups. Enlightened African women should prefer to shoulder the responsibilities of equality rather than suffer the hardships and humiliation of apartheid. For this reason alone, they ought to welcome the reforms brought about by the Matrimonial Property Law Amendment Act, 3 of 1988.

PATRIARCHAL POWER

The most serious remaining disability of women under the new matrimonial regime is their continued subjection to the husband's patriarchal power. They can escape from it by means of an ante-nuptial contract excluding the marital power. Such technical and expensive devices are peculiar to Africans. Other women can avoid them merely by making use of the common law and the provisions of the Matrimonial Property Act of 1984.

Do Africans prefer a marriage out of community and excluding the marital power ? According to the South African Law Commission, those who entered into a civil law marriage regulated by the former section 22(6) of the BAA, and who wished to marry in community, usually agreed to the retention of the husband's marital power. This may well have been the case. Wives had very little real choice under the old arrangement, which was supervised by magistrates and officials who disapproved of women's emancipation. It is too soon to judge the effects of changes brought about by the 1988 Act, but experience and trends on the matrimonial front indicate that the main issue will be the institution of patriarchal power.

Africans who enter into a civil marriage can surrender the power by means of an ante-nuptial contract or notarial agreement. If they fail to use this option the husband will be legally entitled to administer his and his wife's property.

Kobie Coetzee, the Minister of Justice, defended this position during the second reading of the Matrimonial Property Amendment Act of 1988. He pointed out that the contractual capacity of African women was being greatly enhanced, effectively reducing the scope of the marital power. The instant removal of what remained by a unilateral act of parliament, he argued, would undermine the husband's authority, invade family life, increase the rate of divorce, and have political consequences.

Whatever might be the effects on family life of women's emancipation, they could not conceivably equal the damage done and the suffering inflicted on African communities during the forty years of aggressive, immoral apartheid. The case against the retention of patriarchal rule in any degree is that it leaves women in a state of inferiority, subservient to the authority of men.

The reforms have gone a long way, reaching a stage where we can see the beginnings of a single pattern of rules, duties, rights and obligations for all South Africans. To achieve this objective, the women must carry on the struggle, independently of their menfolk, who regard women as a means to the wider aim of national liberation.

MARRIAGES UNDER COMMON LAW : A SUMMARY

The system has been radically changed by the Marriage and Matrimonial Law Amendment Act, 3 of 1988; and is practically the same for all South Africans outside the bantu homelands.

Africans, like other people, can marry in or out of community, and with or without the husband's marital power, by making an ante-nuptial contract. The spouses can choose between pooling their resources and property in a joint fund under the husband's control, or separating what belongs to the wife from the husband's estate, each spouse controlling her or his property and income. In other respects also there is no difference between the African's civil marriage and the marriages of other South Africans. The divorce law is the same for everyone, and the accrual system - the sharing of incomes on death or divorce - applies to all. The only discrimination concerns the marital power, meaning the legal control that a husband has under the common law over the wife's property and person.

FIRST LIBERATION, THEN WOMEN'S EMANCIPATION !

That was the prevailing attitude in the African National Congress until recently. Mavis Nhlapo (31) secretary of the ANC's secretariate of the Women's Section, explained in 1981 that although all Congress doors were open to women, they still had to overcome the effects of low levels of formal education, lack of self-confidence, and the disabilities of apartheid. This was a secondary issue, which received less attention than the main goal, 'because we believe that in the main course of the struggle for national liberation, women will assert themselves and therefore will assume their rightful place in the struggle and in society'.

President Oliver Tambo, speaking at a conference of the ANC's Women Section in Luanda in September 1981, was more critical. The women, he said, had a duty to liberate men from old-fashioned ideas about women's role in society. 'The struggle to conquer oppression in our country is the weaker for the traditionalist, conservative and primitive restraints imposed by man-dominated structures within our Movement, as also because of equally traditionalist attitudes of surrender and submission on the part of women.' (32)

It is satisfactory to note, in conclusion, that the ANC's Discussion Document on Constitutional Principles and Structures for a Democratic South Africa,(33) includes a 'non-sexist' perspective. It acknowledges that law and practice keep South African women out of their rightful place and deprive them of rights as individuals. The new Constitution must guarantee equal rights for women and men in all spheres of activity, create mechanisms for the rapid removal of discrimination to which women have been subjected, recognise reproductive and birth rights, guarantee protection against sexual violence, abuse, harrassment or defamation; and ensure that women are heard in all issues and participate actively in all levels of society.

End.

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(31) Sechaba, Official Organ of the ANC, March 1981: 17 - 20

(32) Ibid., December 1981: 13 - 14

(33) Constitutional Committee, University of the Western Cape, April 1991.

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