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SOUTH AFRICA'S FAMILY AND MMARRIAGE LAW REFORMED: TOWARDS ONE SYSTEM FOR ALL SOUTH AFRICANS.

by

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Preface

South Africa is undergoing a violent revolution, verging on civil war. The revolutionary forces operate in two parts. One, led by the outlawed African National Congress, conducts a struggle in exile with allies who are also banned. The other part, the mass democratic movement, is an internal revolt of many organisations banned together in a united front for the abolition of apartheid: votes for all adults, and the right to elect men and women of their own choosing to take part in decision-making at all levels of government.

These stirring events might seem far removed from the domestic scene of household affairs, women, men and children living together, their rights and duties during marriage, the effect on them of dissolution by death or divorce, the ownership and distribution of family property, the claims of in-laws and other kinsfolk to the estate of a deceased person. Yet these ordinary things are of primary concern to most of us, irrespective of political and religious outlook, occupation, language and culture. Family matters need to be looked at for their own sake and because they bear upon the great changes now taking place in our society.

The growth of people's power and advances to democratic, majority rule are the outcome of centuries of conflict and cohesion between members of different national groups. The industrial revolution that began with the great diamond and gold discoveries in the second half of the last century brought together in big urban-industrial centres large numbers of men and women of many races and cultures. A string of towns and villages took shape along the Witwatersrand before the end of the century. This was the melting pot from which came the beginnings of a common society shared by black, brown and white men and women of different nationalities and social classes.

Our common society is the outcome of colonial wars of conquest, inter-racial conflicts of interests and prejudices. Sex and marriage was a binding force since the first days of white settlement, giving rise to the large Coloured community, the brown people, who form a bridge between Africans and whites. Racism was not a factor in the first fifty years. Emancipated slaves could marry whites, attend church services with them, share their schools, and live next to highly placed officials in the best residential

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areas. The Dutch East India Company decreed in 1685 that slaves with a white father should be freed on reaching adult age. Marriages between them and whites were legal and fairly common.

Race discrimination grew and hardened into a rigid pattern during the next 100 years of slave labour and colonial expansion under Dutch rule. When Britain took the Cape by force of arms in 1806, the colony had a population of 30,000 slaves, 26,000 whites, 20,000 free Coloured, Nama and Khoi in white employ, and an unknown number living in far distant places. Townsmen and farmers alike had sex with slaves, Coloured and Nama, but kept them in strict subordination, excluding them from schools, government and the ownership of land.

Taboos on inter-racial sex, marriage and family life blocked the free flow of people and ideas across social barriers. The repeal in 1985 of the Prohibition of Mixed Marriages Act of 1949, and of Section 16 of the Immorality Act, removed the main legal obstacles to marriage and sex between white and black. Anti-apartheiders dismissed the repeal, saying it was cosmetic: hardline racists said that 'mixed marriage' couples were murderers of their nation, and the State President, P.W. Botha told his party that the laws created enemies for the country. Racial mixing, he pointed out, had taken place from the time of Jan van Riebeeck's arrival in 1652 to the introduction in 1927 of the Immorality Act; but 'a nation which required laws to maintain itself was not worth maintaining'. This was the official line of the ruling nationalist party, yet 49% of whites interviewed in an opinion poll disapproved.

The removal of barriers is necessary to liberate people from the fears and dogmas of their race-ridden past, but the process of demystification is bound to continue for many decades after the formal establishment of a democratic state based on majority rule. The recent changes in family law will contribute meaningfully to the process, and are the main subject of this essay. It begins, however, with a short note on aspects of the historical setting.

A Conflict of Laws

Legal systems form part of a society's superstructure, belong to the state's apparatus, uphold its institutions and give effect to government policies. In South Africa, as elsewhere in the colonial world, the white man's law was imposed on the peoples who lived there without so much as a by-your-leave. This typical colonial practice followed as a matter of course on the heels of wars of conquest. Afrikaner settlers and British

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governments brought their laws with them, a medley of medieval concepts from Germanic., Roman, Roman-Dutch, English and Scottish sources. The rules were updated and blended into a common law, applied in principle to all inhabitants. A conflict of laws is actually a clash between cultures and ways of living. When colonists found that their interests collided with those of the original inhabitants, the Khoikhoi hunters, nicknamed bushmen, and their first cousins, the stockbreeders, the misnamed hottentots, the invaders used their superior weaponry to dispel and destroy. The hunters and herders rose in the first wars of liberation fought on South African soil, but were hunted and killed like wild beasts or broken by imported diseases for which they had no immunity.[1]

The bantu-speaking farmers and stockbreeders were more numerous, compact and better equipped to withstand the onslaught of boer commandos and British regular troops. Xhosa-speaking chiefdoms and boer commandos fought the first 'kafir' war on the Eastern Cape frontier in 1793; the last of its kind broke out in 1878, when British and colonial troops overpowered the Ngqika and their allies; and the Cape annexed the Transkei in stages between 1879 and 1894.[2]

African language and cultural groups in South Africa are usually listed as Zulu-Xhosa (the Nguni), Sotho-Tswana (southern, western, and northern), Shangana-Tsonga (a blend of Sotho and Nguni), Venda, and Lobedu (of Sotho origin). All had advanced legal systems, well defined legal rules and popular courts at various levels of administration to settle disputes and punish offenders.

Apart from Shepstone of Natal, colonial administrations made little attempt to understand the customary laws, but rode roughshod over practices that offended the moral code of whites or posed a threat to their security. The Inyanga (known also as Ngqika and Nyaka) was so regarded. A custodian of traditional values and history, he ranked second to the chief in influence and often led the opposition to white invaders. He combined the skills of a herbalist and medical doctor with power to detect wrongdoers who used magic for anti-social ends. Colonial governments introduced witchcraft ordinances to punish the 'doctor' while allowing the alleged sorcerer to go scotfree.

Most chiefdoms imposed the death penalty, sometimes with a cattle fine, for murder and culpable homicide. The Zulu-Xhosa, in contrast, punished the killer by confiscating the cattle of his family and handing them to the chief to whom the lives and property of his subjects belonged. Commenting on this practice, the Tembuland Commissioner, Mr Warner, reported in 1856

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that the 'practical working must be good, or the Kafirs are the opposite of bloodthirsty; as the shedding of blood, except in times of war, is a rare occurrence among them.[3]

Colonial administrations, however, overruled the customary criminal law and enforced their own code in courts staffed by whites.

Family Law

African family law was a living reality deeply rooted in age-old traditions and involving important property interests. They could not be easily set aside by bans or the substitution of Roman-Dutch Law, which condemned polygamy and the lobolo (bogadi) institution, the African equivalent of the dowry practised by the propertied classes in Europe.

Colonial governments dealt with the conflict in different ways,[4] that reflected the prejudices of the settlers, their dependence on low cost workers and determination to segregate them in urban complexes. These issues came to the surface in both the Transvaal and Orange Free State Republics, where legislatures took strong exception to polygamy and lobolo, yet refused to allow Africans to marry in church, for that would promote an equality which the constitution prohibited.

At the other end of the continent, the 'liberal' Cape extended its statutes and the Roman-Dutch Law to all inhabitants of 'kaffraria' which the colony annexed in 1865. The government did not ban customary marriages; it simply ignored them, and allowed chiefs to settle matrimonial disputes by what amounted to a process of arbitration. When the Cape Government extended the colony's boundaries beyond the Great Kei River, it had reason to respect traditional rulers who had shown in the Gcaleka-Ngqika war of 1877 that they had the will and ability to resist imperialist invasion. The Transkeian Annexation Act of that year gave the governor power to legislate by proclamation, excluded Cape statutes unless extended by proclamation, and directed magistrates to follow Roman-Dutch Law 'except where all the parties ..... are what are commonly called Natives, in which case it may be dealt with

experience inclined him to settle disputes personally or through chiefs applying customary law. A Royal Instruction of March 1848 sanctioned these proceedings, stipulating that customary law should apply, unless it was repugnant to 'the general principles of humanity recognised throughout the whole civilised world'. Ordinance 3 of 1849 gave effect to the Instruction and placed Sheptstone's Administration on a secure legal footing.

The Ordinance exempted Africans from Roman-Dutch Law, sanctioned the application of customary law in cases involving only Africans, provided for the appointment of administrators, made the Governor-in-Council the final Court of Appeal, and vested in the Governor the traditional powers and authorities of a supreme chief. This was the origin of the colonial absolutism and bureaucratic despotism that spread from Natal to the rest of South Africa.

Marriage regulations issued in 1869 initiated attempts at reforming the customary family and marriage law by means of codes to guide judicial officers. The codes, which were revised and made binding on the courts throughout Natal in 1932, elaborated the reforms of 1869 and maintained the principle of patriarchal power, introduced concepts of feminine inferiority unknown to the traditional society, and burdened Natal women with disabilities not experienced in other provinces.

Special Courts for Africans

The Native Administration Act, 38 of 1927, was the brainchild of the arch segregationist, General Hertzog, and a corner stone in his scheme of removing Cape African voters from the common roll. He devoted his years of office as Premier (1924-39) to the main objective of achieving pre-eminence for Afrikaner nationalism, language and culture; detached South Africa from the British connection, and prepared the ground for the apartheid vision that became a reality in 1948.

Act 38 of 1927 combined Natal's repressive methods of colonial rule with the Transkei's flexible formula for dealing with the conflict between common and customary law. As regards the former feature, the Governor-General was made 'supreme chief' of all Africans in the Union, with power to appoint and depose chiefs, divide or amalgamate tribes, deport and banish persons and groups, and make laws by proclamation for the scheduled reserves.

The Act created a separate court system, consisting of the courts of chiefs, native commissioners, native appeal and native divorce, presided over by whites above the lowest rung of the chiefs' courts. The commissioners' oourts were given a discretionary power to apply customary

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law in suitable cases. The Act sanctioned customary marriage, gave lobolo its blessing, attached some consequences of customary marriage to civil marriages in certain cases, and applied customary law to the distribution of estates.

Parliament welcomed the Bill with great enthusiasm, which only went to show, said Hertzog, that the need of such a statute had been felt for many years. Most of the approval centred, however, around an 'incitement' clause which created the crime of acting with intent to provoke hostility between Africans 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, however, that past administrations had made a big mistake by undermining the authority of chiefs and depriving them of power to restrain their young men. Yet the Act, however, continued the trend of discouraging chiefs to take part in the work of the African National Congress or other political organisations, and reducing them to the level of 'mere amapayisa or constables, adjuncts of the local magistrate or district commissioner'.[5]

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 in person before the court hearing the appeal, to explain the issues and the reasons for judgement. The procedure emphasises the inferiority of the chief's court and its dependence on the commissioner.

For this and other reasons members of the Native Representative Council questioned the validity of the special court system, during debates in 1944 and 1945. They acknowledged that many Africans continued to observe their traditions. It was only right that their disputes should be dealt with under their customary law, but it ought to be revised constantly and brought into harmony with new social conditions.

A recess committee, chaired by Professor Z K Matthews, told the Council that the system of 'judicial segregation violates the principle of equality before the law, implies that Native life is static whereas in point of fact it is gradually becoming integrated with the general life of the country and it (judicial segregation: my comment) bolsters up the restrictive laws differentially affecting the Natives'. The separate courts system, he argued, gave Africans an impression that they were getting a different kind of justice. Many cases coming before the commissioners' courts fell under the common law. The recognition of customary law did not necessarily imply a separate court system for Africans. He saw no reason why the supreme court should not administer tribal law. 'After all, there is nothing mysterious about Native Law'.

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The main drawback to judicial segregation is that it encourages in-breeding, made visible in a cult that tends to prolong adherence to 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 Orange Free State, gave priority to the common law, making customary law a subsidiary. In Natal, however, the customary law in its codified form was the primary system in suits between AFricans. It was the Natal tradition that gained the upper hand during a long period of judicial wrangling.[6]

Abolition of Special Courts

Forty years went by before the attack on the special courts system was renewed in 1983, on this occasion from within the top circles of the ruling National Party. The indictment appeared in the report of a commission, headed by Justice Hoexter, appointed to inquire into the structure and functioning of the courts (RP78/1983). The commission had much to say about the way in which candidates for appointment to the supreme court were chosen and appointed, and the complaints of bias in the assignment of judges to preside over treason and state security trials.

The commission strongly condemned the system of separate criminal courts, presided over by commissioners in the Ministry of Co-operation and Development - previously called the Native Affairs Department. It was 'in the commission's view, 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 regarded 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 dis-locating his family life'.

Other unfavourable factors were the poor standards of criminal justice administered in these courts and the Africans' increasing absorption in western culture and urban life. The special courts should be scrapped immediately.

... No sooner said than done! The Special Courts for Blacks Abolition Bill was tabled in 1984 and enacted in April 1986. It did away with the courts of commissioners and their courts of appeal. A new section inserted in the magistrate's court act, 32 of 1944, gives common law courts a discretionary power to take judicial notice of African customs and apply African law in suits between Africans provided that the law is in force and not opposed to principles of public policy and natural justice. The 'judicial notice'

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proviso enables magistrates to do away with the need to call experts to 'prove' customary law rules.

The switch to common law courts was largely one of name only and made little difference to the judicial system. Most commissioners were also magistrates or had the same minimum qualifications. Before the end of 1985, all but 52 commissioners' courts out of a total of 305 had been transferred from the Department of Co-operation and Development to the Department of Justice.[7] The courts falling within its jurisdiction have much the same discretionary powers to apply customary law as those vested in the defunct commissioners' courts. Both types of courts are presided over by whites of the same social class and outlook. There is no reason to expect from the common law courts a more enlightened approach than that of the special courts to the problems of African litigants or the conflict of laws.

The Hoexter Commission of 1983 found that 'the proliferation of courts and the fragmentation of adjudication in family matters are not conducive to the preservation of the family as the fundamental social unit.' The Commission recommended the abolition of special divorce courts for Africans and the establishment of a family court for all South Africans.

The proposed innovations, if introduced, would, however, fall far short of the most pressing need, which is to prepare and implement a single family and marriage law for all South Africans.

The Reform of Marriage and Family Laws

Three legal systems regulate African matrimonial and family affairs in South Africa. One is the customary law; another the common law. The third is an amalgam of elements from the parent stocks, and constitutes the biggest advance made to date towards a uniform system.

African women have both gained and lost from this medley.[8] They suffer badly from the persistence of the patriarchal power. Wives of customary marriages are at a great disadvantage if their husbands enter into a civil law marriage with other women, or if a polygamist marries one of his wives under common law. Women are excluded from a share of family property in both kinds of marriage, and from the lobolo contract which is strictly a men's only affair. Men, women and children are victims of the effects of migrant labour on rural communities and the refusal of the apartheid state to permit the natural growth of a balanced, stable family life in towns and industrial centres in 'white' South Africa.

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African women have outgrown their customary roles and the values assigned to them in traditional society, but are handicapped in their efforts to throw off the shackles of convention and male domination. White judicial officers who preside over courts for African litigants share male prejudices, resist African emancipation, deplore the liberating influence of social change, and uphold patriarchal power, perpetual tutelage and the denial to women of proprietary capacity.

African women are a great force in the liberation movement. Many fight side by side with men for the overthrow of apartheid and the creation of a common society with equal rights and freedoms for women and men of all races and national groups. Yet, in spite of this display of a mature political awareness, a substantial number of women seem to put up with traditional patriarchy and female subordination. Only a handful have raised their voice to press for parity with men at home and in family life. Others appear to have internalised old-fashioned values and practices that treat them as 'goods of exchange'.

Oliver Tambo, President of the African National Congress, expressed similar opinions in an address to the Women's Section of Congress in 1981. He told them that women'have a duty to liberate us men from antique concepts and attitudes about the place and role of women in society and in the development and direction of our revolutionary struggle'. He went on to say that 'The struggle to conquer oppression in our country is the weaker for the traditionalist, conservative and primitive restraints imposed on women by man-dominated structures within our Movement, as also because of equally traditionalist attitudes of submission and surrender on the part of women'.

The forces for change came mainly from within the system, from white women who over many years carried on a successful campaign against disabilities imposed on their sex under the common law; and more surprisingly, from top layers of the legal profession, represented by the South African Law Commission. In 1985 it published a working paper on 'Marriages and Customary Unions of Black Persons', proposing many significant changes and a draft bill for the amendment of the customary law. The Transkei, KwaZulu, Lesotho and Zimbabwe had taken the plunge, and that was reason enough for South Africa to keep abreast of the swelling movement to emancipate African women from the constraints of patriarchal custom.

The Commission claimed that its aim was to give customary marriages 'the status of a common law marriage'. To this end, changes were proposed in procedures and substance, such as the registration of a customary marriage, the issue of a marriage certificate and the introduction of

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judicial divorce. The contractual capacity of Africans would be determined by commonlaw unless the right or obligation in question was governed by customary law. Community of property, profit and loss would be excluded in respect of property possessed or acquired by the wife in her own name. She would have the right to dispose of her property without the husband's assistance. Customary law would regulate succession to the position of family head, and the inheritance of house property. Other property could be disposed of by will and, in its absence, by inheritance in accordance with the commonlaw. A court, when dissolving a customary marriage could grant to either parent the sole guardianship or custody of a minor child of the marriage, and order the payment of maintenance by one party to the other for any period. The powers of a guardian over minor children would vest in the husband, or widow, or unmarried mother. Anyone having the status of a major at common law would be exempted from submission to the guardianship of any person.

Any attempt to narrow the thrust of patriarchal power ought to please champions of women's emancipation, but cannot make much headway without the backing of the democratic movement. Reforms, such as those sponsored by the law commission, that take place from above and within the framework of apartheid structures do not reduce the extent of white power or tresspass on its preserves, and therefore fail to win the approval of people wanting to dismantle apartheid. A case in point is the lifting of the ban on inter-racial sex mentioned earlier in this essay. A parallel case was the repeal in 1961 of prohibition constraints by the Liquor Law Amendment Act, which allowed Africans to buy wine and spirits in bottle stores. The measure benefited the traders and wine growers, removed a prolific source of friction between Africans and the police, spoiling the large illicit liquor trade, but made no big change in the distribution of political power.

The removal of old myths and taboos inflicts pain on people who rely on them to keep their own minds and those of other addicts in chains, but should be welcome to free thinkers who prefer objective truth to prejudices that serve special interests.[11] The opposition comes from tribal traditionalists and apartheid officials who uphold patriarchal power for its own sake and to check the advance of the movement for women's emancipation. It has much in its favour. The ability of bantustan leaders to obstruct reforms have been weakened by their collaboration with the racist regime, failure to stop the process of rural decay, and isolation from the mainstream of social change. Hereditary rulers and patriarchs have difficulty to persuade landless peasants and migrants workers to rally around the lost cause of keeping women in subjection. The churches, at one time strong critics of polygamy, lobolo

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and paganism, now welcome reforms that weaken racism. Women's major disabilities come from apartheid and not from customary law, but the cause of liberty for all South Africans is lessened by the persistence of out-moded restraints on the right of women to achieve equality with men in all fields of social action.

Always a Minor

To appreciate the significance of changes introduced by the Marriage and Matrimonial Property Law Amendment Act, 1988 in African marriage and family law, one should have in mind the essential rules of the matrimonial regime imposed by the Native (now Black) Administration Act, 1927.[12] 9

The patriarchal bias of customary African law in South Africa was suited to a patrilineal, polygamous family system in which everyone lived in an extended household whose legal head was always a man. He had authority over his wives, children, dependants, and others residing in the household, was obliged to support them and could be held liable for their wrongful acts. They, in turn, contributed services and earnings to the household's upkeep, produced most of what they consumed, and shared its fortunes in equal measure.

A woman could never be the legal head of the household or acquire parental power over her children. It vested in her husband, if she was married, and in her father or other male guardian if she had an illegitimate child. A divorced woman or widow might be allowed to take her young children with her on leaving her husband's home, but they always 'belonged' to him or his heir. The duty of supporting her and her children rested on the head of the household in which they resided. In the words of the repealed Natal Marriage Code 1932, a man's legitimate minor children 'belong' to him during his marriage and after its dissolution. Old prejudices die hard. An attempt was made in the 1987 Natal Code of Zulu Law to tone down the glaring bias in its predecessors towards patriarchal power, but it persists, as might be seen from the following thumbnail sketch of some relevant sections.

Every woman or man becomes a major at the age of 21, or on marriage, but a married woman is subject to her husband's marital power! He is the guardian of his minor child born of the marriage. An unmarried mother is the guardian of her minor child born out of wedlock, but if she herself is a minor the child falls under the guardianship of her own guardian until she attains majority.

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A woman has the status of a family head if she owns the family house or is the mother of the minor heir of a deceased family head. The guardianship of a minor devolves upon its mother if the legal guardian dies or becomes incapacitated. If she dies, the guardianship of the minor devolves on its paternal grandfather. On the death of a spinster who is survived by a minor child born out of wedlock, its maternal grandfather becomes the guardian.

Majors are free to enter into a customary marriage without obtaining the consent of their father or guardian; but the bride must declare in public to the official witness at the celebration of the marriage that it is concluded with her free will and consent. This is an important step towards freedom of marriage, and it is taken without prejudice to the right of anyone entitled to the lobolo payable by the bridegroom.

Majority Status in KwaZulu

In spite of concessions to custom, the Zululand Government's decision to confer majority status on women at the age of 21 has put in their hands a great lever to shift from their backs the heavy weight of patriarchal power. Like all instruments, its efficacy varies with the skills and determination of the user, but its potential is undoubtedly considerable, as can be seen from relevant sections of the Code.

S. 13. Any African may acquire property. This right, when it affects the family property of a family head, is subject to the provisions of S. 19 which entitles the head to a reasonable share of the earnings of minor children, tobe used primarily for the benefit and maintenance of the family and a particular house.

S. 36. A customary marriage is a civil contract entered into by and between the intending partners for life until the death of one of them, or divorce by a competent court.

S. 48. Either partner may sue for divorce or apply for nullity on specified grounds, one being the wife's bigamous marriage, another the husband's marriage to another woman by civil rites.

S. 51. No order for the return or forfeiture of lobolo shall be made in any action for the dissolution of a customary marriage unless the lobolo holder is cited as a party to the action.

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S. 59. An ummarried mother, widow, and divorcee vested with the sole rights of guardianship of children born out of her former marriage, is entitled to stipulate and receive lobolo for her daughter. This right is held also by a woman who has established her own family home.

S. 94. Any unmarried girl whose chastity has been publicly denied, scoffed at, or impeached by any person, shall be entitled to damages.

S.107. Women shall not be regarded or treated in any way as property or chattels, in spite of rights of action arising out of their customary marriages.

Plural Marriages and the Decline of Polygamy

S. 36 of the Code states that polygamous customary marriages shall be recognised. This is the position in all provinces within the ambit of customary law and in proceedings between Africans. The common law courts, however, refuse to confer legitimacy on customary marriages because they are actually or potentially polygamous; while leading authorities argue that 'under the law of the land, the union is an illicit cohabitation' and 'not a valid marriage in our law; the husband does not become a husband within the meaning of 'our law', while the 'wife', has 'neither the status nor the rights of a lawfully wedded wife'.[14] The assumption that 'our law' or the 'law of the land' consists only of the Roman-Dutch Law is racist and incorrect. African customary law is recognised by the Constitution, regulates, in part, the lives of most South African citizens, and, regarded from their point of view, is as much 'our law' as the Roman-Dutch. The proper question to ask is not whether the common law 'recognises' customary marriage (it obviously cannot), but whether the common law courts should treat it as a lawful marriage 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, bearing in mind the probability of a wide gap between the number of actual and aspiring polygamists, the term used to describe men with more than one wife. The oldest set of figures available came from Natal, where the government's marriage regulations of 1869 imposed a registration fee of £5 payable by the bridegroom on every

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marriage. Of the customary marriages registered between 1871-80 in the colony, 43% were polygamous; in 1894-1903 the proportion was 36%. In the Transkei at the beginning of the century, 22% of married men had more than one wife. Calculations based on population census returns suggest that fewer than 10% of men married under customary law in 1951 had more than one wife.

In the pre-colonial society, an abundance of land, the predominantly subsistence economy of self-sufficient joint families, practising agriculture with stock-breeding, a surplus of women and polygamy were strands in the texture of peasant societies. Women were the chief producers of foodstuffs and domestic utensils. They did most of the work in the fields and at home. The more wives a man had, the larger was the area his family could cultivate, and the greater was the surplus available for paying tribute to the chief, and providing food and beer to dependants and visitors. Polygamy went hand in hand with rank and wealth. The more wives a man had, the more generous he could afford to be, and the words of a man with many wives carried weight in the Chief's Council.

Polygamy in the traditional society had the great merit of enabling all women to marry and have children. The peasant economy provided few wage-earning occupations or gainful employment of any kind outside the domestic group, except to a handful of specialists. No woman, and for that matter, no man, could live independently of a family. The choice for a woman lay between marriage and lifelong dependence on a father, brother or other male kinsman. Since there were more marriageable women than men - because the women married at an earlier age and lived longer - the adoption of monogamy would have left some women in a state of permanent spinsterhood, fof which condition the pre-colonial society contained no arrangements.

The sharing of a husband might not have seemed too great a price to pay for the advantages of being a wife and mother in a society where other careers were not open to women. Co-wives shared the burden of work and of bearing children. Some communities prohibited sex with a woman while she breastfed her child, perhaps for two or three years. A major gain from polygamy was the protection it gave against excessive child-bearing, which harassed working-class wives in monogamous societies. The voice

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of women was seldom heard in debates on the merits of polygamy. From all accounts, one gathers that a first wife rarely opposed her husband's decision, and often urged him to take a second wife. IT was a matter of pride to wives that they belonged to a large establishment in which they were ranked with privileges attached to their position.

The device that harmonises the distribution of women with the claims of rank and wealth is lobolo. It is an essential element in customary marriage, and one of the factors that distinguish marriage from illicit cohabitation. Another factor is the consent of the girl's people, conveyed in the lobolo agreement and made conditional on the payment of lobolo. Legislatures and courts have added a third element: the bride's free consent. African customary law and morality penalise illegitimacy and give precedence to legitimate children. To procreate legitimate children, a man must marry their mother, and this he can do under customary law only by handing lobolo to the head of her family. Customary marriage is a socially approved relationship between a man and a woman which is established by the transfer of lobolo and which has as one of its aims the procreation and rearing of legitimate children.

All men in the traditional society probably aspired to be polygamists, but many did not possess the means to marry more than one wife. They were monogamous of necessity and not by choice. Most of those who, at any one time, had only one wife would have taken another if they lived long enough and had the means. The position is different today. Now the great majority of men accept monogamy. A large and growing prpportion marry by civil and christian rites, which impose monogamy, while the bulk of those who marry under customary law remain content, if only by force of circumstance, with one wife.

The decline of polygamy is due to a variety of conditions, among which are acute land scarcity, ~~the former~~ hut tax, ~~the introduction of~~ the plough, the migrant labour system, the absorption of villagers in the market economy, an inflated lobolo and expensive wedding festivities, low incomes, the high cost of maintaining a household and of raising and educating children, the shortage of housing in rural and urban areas, the spread of christianity, education, and the growth of new ideas of ideal

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family relationships and the position of women.

The African family system is undergoing a revolutionary change from the patriarchal, polygamous, joint family institutions that prevailed a hundred years ago, to the monogamous, 'nuclear' family, consisting of one wife, one husband, their offspring and a dependant or two, which is the standard form in the industrial societies of today.

Directions of Change

The most important changes came about when Africans migrated to budding towns to build houses, factories, mines, shops, roads, railways, harbours and the network of structures that goes with the creation of an industrial society. This townward flow was the outcome of 200 years of colonial wars, land expropriation, forced labour and job-seeking.

White employers, backed by governments, recruited and competed for peasant-workers, but objected to their permanent settlement with families in urban areas. To account for their exclusion from the municipal franchise in the Transvaal, racists invented the fiction that towns were the creation of whites. Africans would be allowed there to serve white interests and should depart when unemployed or unable to work because of old age, ill health and disease.

Only domestic servants were allowed to live in rooms on the employer's premises. Other Africans were segregated in labour compounds and locations well away from the city, to which they travelled daily to their places of work. They could not own land outside the reserves, and had great difficulty in forming stable households and communities.

Women are regarded as makers of homes, not producers of wealth. Their presence in towns leads to the growth of permanent, balanced local township communities. Legislation introduced in 1930 and extended in 1937 authorised a local authority to prohibit the entry of an African woman unless she had various certificates of approval. Section 10 of the Urban Areas Act, enacted in 1952, prohibited women and men alike from remaining for more than 72 hours in any town unless they had lived there continuously since birth, or worked there continuously for one employer for ten years, or had completed 15 years of continuous lawful residence in the

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area, or was the wife, unmarried daughter or son under taxable age of an exempted person, or had been granted permission by a labour officer to remain, if accommodation ~~is~~ was available in a township.

As in all emigrant communities, women find ways of overcoming obstacles to their settlement in places where their menfolk have gone as pioneers. Fifteen times as many African females and five times as many males, lived in urban areas in 1960 as lived there 50 years before. The excess of urban males over females increased during the half century from 312,000 to 558,000 but the number of females to every 100 males rose during this period from 24 to 70.

Census returns indicate that most Africans marry under customary law; but their marriages are usually monogamous. Fewer than 10% of married men have more than one wife. The decline of polygamy goes hand in hand with shrinkage of the domestic household. This trend marks one of the major changes in African culture and the position of women.

Their direct contribution to the upkeep of the home has declined since the days of the self-sufficient subsistence economy. There is a great scarcity of land for Africans in the 13% of the land mass set aside for them under segregation land laws. Men are the main breadwinners and migrate in large numbers to places of work. A plurality of wives and many children are less of an economic asset than in traditional society. The joint family household is rare in towns and is steadily losing ground in rural areas to the simple nuclear family of wife, husband and unmarried children.

Men and women tend to marry at a later age than in the old society. Many girls spend their adolescent years away from home, receiving education or working for a wage. They acquire property, possess it in their own right, marry men of their own choice, and achieve a degree of emancipation from patriarchal controls that women could not experience in the old society.

The emergence of unattached, independent women is another major development, Spinsters, many of whom are mothers, widows, divorcees, and deserted wives, form a significant part of the female population. A large number support themselves and are in fact, if not always in law, the heads of independent households.

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The breakdown of the patriarchal family, coupled with the creation of opportunities for gainful employment, imposes new responsibilities on women, but also provides them with scope for developing a spirit of self-reliance and independence.

Towards A Common Legal System

President P W Botha told parliament in January 1986 that South Africa had outgrown the outdated colonial system and concept of apartheid. The country was multicultural and should enable all citizens to share power while protecting minority rights. His Government, he said, accepted

+ the principle of an undivided South Africa (exclusive of the 'independent homelands');
+ the right of all communities within its boundaries to take part in its institutions through collective negotiations;
+ the introduction of one citizenship for all South Africans;
+ the rule of sovereignty of the law and equality before the law;
+ the adoption of measures to protect human dignity, life, Liberty and property of all persons, regardless of colour, race, creed, or religion;
+ the establishment of a democratic system of government to accommodate the legitimate political aspirations of all South African communities; and
+ the goal of participation of all South Africans in government through their elected representatives.

An important part of the reconstruction was the enactment in 1986 of two statutes dealing with pass laws and influx controls. One, called the Identification Act, introduced a single population register and uniform identity documents for all races. It furthermore repealed the Blacks (abolition of passes and co-ordination of documents) Act, 1952 and large parts of the 1950 Population Registration Act which had required all Africans to carry passes and produce them on demand.

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The other measure was the Abolition of Influx Control Act. It repealed, wholly or in part, 34 statutes and amended three others. One of the repealed laws was the Urban Areas (Consolidation) Act of 1945, pivot of the pass system and the notorious Section 10. In a period of 65 years (1916-81), at least 17 million Africans had been arrested for pass law offences, bringing the whole legal system into disrepute. This festering sore could no longer be tolerated, once the government had admitted that African urbanisation was inevitable and that influx control had ceased to serve a constitutional purpose. For the first time ~~in our history~~, Africans obtained the right to freedom of movement in 'white' South Africa.

Instead of relying on Stallard's formula to deny the legitimacy of a permanent African urban population, Pretoria was obliged to face the issue of reconciling its presence with the dictates of white supremacy. The new approach was called 'orderly settlement' and brought other big changes in its trail, one being the passing of the Black Communities Development Amendment Act, 1986 which enabled African citizens living legally in 'white' South Africa to obtain full ownership rights under freehold title to land in townships in 'white' South Africa.

The national committee against removals (NCAR) pointed out that urban policy had shifted from race discrimination to class distinctions between poor Africans and those able to acquire rights in land. Controls, as tight as those under pass laws, could be imposed on the movement and settlement of poor pepple by changes in the Prevention of Illegal Squatting Act, 1951, Group Areas Act, 1966, Slums Act, 1979, and health regulations, together with municipal policing and the effects of housing needs of a large and chronic scarcity of land.

Better off women and men would buy government-owned houses in townships under 99-year leasehold or 30-year ownership schemes, both introduced in 1983. Only 48,000 houses had been sold by the end of 1986, the slow rate of purchases being blamed on the economic slump, unemployment and dislike for the small 'matchbox' type of house offered to buyers. To speed up home ownership, a more ambiitious programme is on foot, involving the South African Housing Trust, a private business concern, which undertakes to survey large tracts in townships, divide them into

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building plots, and encourage unemployed and low income people to build 'core houses' with the aid of loans secured by a bond on the building plot. Women and men are both included in the scheme.

Women have also benefited from the new outlook which agrees that Africans are in town to stay and like other people deserve opportunities and freedom to build decent homes and a stable family life. They also need to clear up the mess surrounding their marriage and divorce laws by reconciling, among other things, the system of polygamous customary unions and monogamous common law marriages.

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The South African Law Commission's proposal to give customary unions the status of common law marriages was shelved pending the outcome of discussions with bantustans and other states in Southern Africa, but a start was made with the Marriage and Matrimonial Property Law Amendment Act, 3 of 1988. It emanated from the Law Commission's Report and makes the Matrimonial Property Act of 1984 applicable to African common law marriages on the same terms as for other population groups.

The courts refuse to recognise a customary union as a valid marriage. It is, according to this view, no better than an illicit cohabitation which can be terminated by either party without any judicial process. Either party can enter into a monogamous marriage under the common law with a third person, thereby cancelling the union and leaving the discarded wives and children in a state of uncertainty.

To stop such practices and prevent men with several wives from dissolving their unions by entering into a civil marriage with one of them - usually the latest and youngest - Act 3 of 1988 declares that no party to a customary union may enter into a common law marriage during the union's subsistence. The only exception is a marriage between a man and wife who are partners in a customary union, provided that the man is not at the time of marriage a partner in a customary union with another woman.

Not in Community

S. 22(6) of the BAA of 1927 drastically changed the common law consequence of monogamous marriages between Africans by arbitrarily excluding community of property, profit and loss between the spouses unless they decided to choose a comunity in which case they had to announce their decision to an authorised officer within a month before the marriage. The declarations were seldom made, consequently most African common law marriages were not in community. What they actually were was a subject of dispute in the special courts for Africans until the appellate division decided in Ex parte Minister of Native Affairs: in re Molefe v. Molefe, 1946 AD 315 that the common law governed the proprietary capacity of Africans whose marriages were not in community because of S. 22(6). The wife owned her property and the husband his, but he had the marital power and administered both estates.

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Objections to a marriage in community have come mainly from patriarchal traditionalists in bantustans and white women of the propertied classes. It has however several advantages for women in the lower income bracket where the man is usually the main breadwinner and the wife has few opportunities to acquire property of her own. She would gain, therefore, by belonging to a community that entitles her to a half share of the joint estate on dissolution of the marriage by death or divorce. It is precisely this prospect of independence that backward looking chauvinists often resent and sometimes fear.

The 1988 Act deleted subsection 6 of S. 22 of the Black Administration Act, the subsection which had grafted the property relations of customary unions on African common law marriages. The effect of the deletion is to ensure that monogamous marrigges entered into after the commencement of the Act are in community unless the spouses exclude it by an ante-nuptial contract. If the ANC also excludes the marital power, the wife is legally competent to manage her affairs and can prevent her husband from squandering her assets. If, on the other hand, he retains the marital power, he may make contracts binding her estate, whereas she cannot make valid contracts unaided, or dispose of her property without his consent.

Marriages in Community

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

The 1953 Act was a timid step towards limiting the husband's marital power. He may not, without her written consent, take possession of her wages, salary, compensation, savings or money from an insurance policy taken out for her children's education. African women who receive wages, or obtain income from a trade or profession, and are subject to the marital power also benefit from

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the wider legal capacity including the disposal of fixed property, shares and other investments. A woman who administers a joint estate with her husband in terms of the 1953 Matrimonial Affairs Act has as much power as he to enter into transactions that deplete the joint estate. Those concluded without her consent are binding against a third party who does not know that consent was not given.

These and other provisions were set out in Chapters II and III of the 1984 Act, Section 25(1) of which excluded African marriages from their operation. That discrimination was removed by the Amendment Act, 3 of 1988. The result of the deletion is that common law marriages of Africans have the same consequence as marriages entered into by other South Africans.

A move towards equal partnership between husband and wife could bring about substantial improvement in the position of African women. They will pay the price by having to take a greater degree of responsibility for the maintenance of the family and the cost of household expenses. The burden may be heavy on divorced women who are the heads of one-parent families. This, however, is a risk common to the women of all national groups. Afrieans generally prefer to shoulder the responsibilities of equality rather than suffer the hardships and humiliations of apartheid. For this reason alone they should welcome the reform introduced by the 1988 Act.

The most serious remaining disability suffered by 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, or by means of a notarial contract made within two years after the coming into force of the 1988 Matrimonial Act, or by application to the supreme court for an order excluding the marital power. These devices other women are able to avoid merely by making use of the common law and the provisions of the 1984 Act.

Do Africans prefer marriage out of community and without the husband's marital power? We cannot tell in the absence of special research. According to the South African Law Commission, by far the majority of couples whose common law marriages were regulated S. 22(6) of the 1927 Black Administration Act chose to make a pre-nuptial declaration accepting marriage in community

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and with the husband's marital power. Though this response is hard to believe, the wife was certainly better off under this arrangement than prescribed as S. (6) which imposed a separation of the husband's and wife's property and placed both under the husband's sole management. It is too soon to judge the effects of changes brought about by the 1988 Act, but past experience and trends in frontline states indicate that the central issue on the matrimonial front will be the principle of patriarchal power.

The parties to a monogamous, common law marriage can surrender ~~it~~ by means of an ante-nuptial contract or notarial agreement. If they fail to use this option the husband will continue to administer his and the wife's property. Kobie Coetzee, the Justice Minister, defended this decision during the second reading of the 1988 Bill. He pointed out that the contractual capacity of African wives had been greatly enlarged by the application of the 1984 Matrimonial Act, which effectively reduced the extent of the marital power. The summary removal of what remained by a unilateral act of parliament, he argued, would undermine the husband's authority, invade family life, cause more divorces and unhappiness, and have political consequences.

One might add that what the Minister evidently wanted to avoid was a repetition of the marriage and family instability brought about by the unreformed apartheid system. So far so good. Repentance is good for the soul. But the retention of the patriarchal rule leaves women in a state of subordination. To emancipate them, the forces of liberation will have to struggle for women's equality no less than for equality between races and national groups.

Equality for Women

I began this essay by drawing attention to the ~~assembly~~ wide gap between marriage reform and the aim of liberating all South Africans from the injustices and humiliations of apartheid. The body of the essay shows that marriage reform has really taken place, reaching a point where one can see the beginnings of a single marriage and family system for all South Africans. In conclusion, I intend to draw on fairly recent field notes and comments to illustrate my contention that marriage reform is very much to the point of the struggle for a constitution providing

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equal rights and votes for all South Africans without discrimination on grounds of race, sex, colour, religion, language and culture.

Women are not Toys

'Speak', a publication issued by Speak Collective at the Ecomenical Centre, Durban, carries an article under this title in its quarterly bulletin of March-May 1987. The writer complains that sexual harassment of girls takes place almost daily, so much so that girls are afraid to go shopping. 'Women are whistled at, sometimes grabbed, sometimes chased, sometimes raped'. The boys might think it a joke, but women don't like this kind of thing. They want to feel free to go about at night, to work or attend meetings without fear of being treated as toys.

Jobs for Sex

Andries Raditsela, a Dunlop shop steward and highly thought of leader in the Chemical Workers' Industrial Union (who died in 1985 while in police detention) wrote to Speak complaining that in many factories women are forced to have sex with personnel and training officers to obtain and keep a job. Sex relations take place during lunch hours and at weekends.

Women's Work Never Ends

Ilva Mackay told an ANC women's unit meeting in December 1983 about experiences in a residence occupied by married couples sharing a joint household. The women did all the domestic work - cooking, washing, looking after the children, housecleaning - and were too busy to listen to news, read newspapers or take part in serious political discussions. Women in the movement who worked outside the home were usually employed as typists, and seldom had the opportunity to acquire skills for management and administrative positions.

Fighting Women

Lillian Ngoyi (1911-80), President of the ANC's League Federation of South African Women (FSAW), who led a march of 20,000 women to Pretoria to protest the extension of pass laws to African women, criticised men in Congress who kept women tied to the home. They talked of democracy, she said, but did not practise it. 'Freedom does not come walking towards you - it must be won'.

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FSAW's Women's Charter declared that there would not be freedom as long as women remained in bondage. Demands put forward by women during the campaign for the Freedom Charter of 26 June 1955 included the right ~~of~~ women to vote and stand for election to parliament, equal rights with men in marriage, property and guardianship, full trade union rights for all workers and free, compulsory education for all. The demands were boiled down in the Freedom Charter of 26 June 1955 to a simple call in the preamble for a democratic state 'without distinction of colour, race, sex, or beliefs. A similar idea is put forward in the ANC's constitutional guidelines for a democratic South Africa. Paragraph (u) states that 'Women shall have equal rights in all spheres of public and private life and the state shall take affirmative action to eliminate inequalities and discrimination between the sexes'.

Such attempts to sweep the 'woman's question' under the carpet of a related but different set of concepts is a form of reductionism to which militant women object. Albertina Sisulu, a Co-President of the United Democratic Front (UDF), complained that it had few women in leading positions and urged affiliates to remove obstacles to their participation in top leadership. Leila Patel ~~in~~ put forward the familiar argument that though men are also responsible for emancipating women, they must bear the main burden themsleves. Old habits often stand in they way of Indian and African women speaking in public or taking part in door to door campaigns. When they do take part, husbands often object, causing conflict in the family. ~~Leila~~ Ms Patel ~~in~~ an executive member of the Transvaal Federation of Women noted that 'women's question had moved from a stage where it was ignored by the liberation movement to the present, where women in 23 regions, are pushing for equal treatment and a national policy linking Africans, the most severely oppressed, with Indian, Coloured and white women, in a movement for women's rights '(~~South African Women's Struggle in the 1980's, April 1987. Lecturer in Community Social Work, University of Witwatersrand~~)'.

The Gender Issue

'Genderism' or the movement for feminine emancipation, has a long history associated with the marxist theory that the overthrow of capitalism and its replacement by socialism under working

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class rule would usher in an era of universal freedom for all population groups. In the 1960s marxist theory feminists took up the position of women in socialist countries where, contrary to theory, they continued to occupy a subordinate position in public life. The sexual exploitation of women, the control of reproduction, and the notion that women's proper role is to look after children and the kitchen and church. Marxism came under fire because it subordinated the oppression of women to that of workers but recognised as being the only theory of history which makes oppression the point of departure and the fundamental reality. The concept of 'gender' stresses the social basis of relations between the sexes within the structures of class, race and national conflict.

In the 1960s, women with a marxist leaning began a probe into the position of working women and housewives in socialist countries. Some writers claimed to have found a contradiction between the declared aims of state policy and the practice of keeping women in a backseat in public life. The fault, they said, did not lie in marxism, the only school of thought to acknowledge the primary importance of oppression in social analysis and the process of social change. Party leaders and ideologists, however, were wrong in treating the oppression of women as a secondary issue, taking second place to the struggle for liberation from capitalist exploitation, race discrimination and national oppression. Feminists argued that the liberation of women was equally important and should be made manifest in all declarations of aims. For this purpose an autonomous feminist movement was needed to provde a basis for continuous resistance to patriarchal domination.

This approach led to a shift in emphasis from 'work-place politics' to the sexual division of labour within the home. A leading concept of historical materialism is that the special soical relations of production perpetuate class inequalities. This principle applies also in the relations between wives and husbands. Women's work at home is unpaid and the source of economic exploitation. The only obligation of a husband is to satisfy the family's basic needs for shelter, food, education and transport, leaving the wife to manage the household and perform all domestic work without reward. Men are able to pursue careers

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outside the home, improving their skills and moving up the social scale, while housewives stagnate in the daily round of child care, kitchen and church. Some feminists conclude that marriage is an institution for extracting unpaid labour from wives.[20]

~~In conclusion, my account of~~ The 'gender question' debate ~~is intended to~~ emphasises the need to promote women to leading positions in all areas of the liberation movement and not only in the 'Women's Section'.

Jack Simons
25 November 1989
Lusaka

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