

WORKING DRAFT AS OF 26/10/98
REPUBLIC OF SOUTH AFRICA

RECOGNITION OF CUSTOMARY MARRIAGES BILL
(As introduced)

(MINISTER OF JUSTICE)

[B - 98]

010598DE

BILL

To make provision for the recognition of customary marriages; to specify the requirements for a valid customary marriage; to regulate the registration of customary marriages; to regulate the proprietary consequences of customary marriages and the contractual capacity of spouses of such marriages and their competency to litigate; to regulate the dissolution of customary marriages; to provide for the making of regulations; to repeal certain provisions of certain laws; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Definitions

1. In this Act, unless the context otherwise indicates—

- (i) "court" means a division of the High Court of South Africa or a family court established under any law; (iv)
- (ii) "customary law" means the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples; (ii)
- (iii) "customary marriage" means a marriage entered into in accordance with customary law; (i)
- (iv) "lobolo" means the property in cash or in kind, whether known as *lobolo*, *bogadi*, *bohali*, *xuma*, *lumalo*, *thaka*, *ikhazi*, *magadi*, *emabheka* or by any other name, which a prospective husband or the head of his family undertakes to give to the head of the prospective wife's family in consideration of a customary marriage; (iv)
- (v) "Minister" means the Minister of Home Affairs; (vi)
- (vi) "prescribed" means prescribed by regulation; (ix)
- (vii) "registering officer" means any person appointed as registering officer [by the Minister as registering officer] for purposes of this Act by the Minister or an official acting under the Minister's authorization; (vii)
- (viii) "regulations" means regulations made under section 11; (viii) and
- (ix) "this Act" includes regulations. (iii)

Recognition of customary marriages

2. (1) A [**customary**] marriage which is a valid marriage at customary law and existing at the commencement of this Act is for all purposes recognised as a marriage.

(2) A customary marriage entered into after the commencement of this Act, which complies with the requirements of this Act, is for all purposes recognised as a marriage.

(3) If a person is a spouse in more than one customary marriage, all such marriages entered into before the commencement of this Act are for all purposes recognised as marriages and all such customary marriages entered into after the commencement of this Act, which comply with the provisions of this Act, are for all purposes recognised as marriages.

Requirements for validity of customary marriages

3. (1) For a customary marriage entered into after the commencement of this Act to be valid—

(a) the prospective spouses —

(i) must both be above the age of 18 years; and

(ii) must both consent to be married to each other under customary law; and

(b) the marriage must be negotiated and entered into [**and**] or celebrated in accordance with customary law.

(2) Save as provided in section 10(1), no spouse in a customary marriage shall be competent to enter into a marriage under the Marriage Act, 1961 (Act No. 25 of 1961), during the subsistence of such customary marriage.

(3) (a) If either of the prospective spouses is minor, both his or her parents, or if he or she has no parents, his or her legal guardian, must also consent to the marriage.

(b) If the consent of the parent or legal guardian cannot be obtained, section 25 of the Marriage Act, 1961 (Act No. 25 of 1961), applies.

(4) (a) Despite subsection (1)(a)(i), the Minister or any officer in the public service authorised thereto by him or her, may grant written permission to a person under the age of 18 years to enter into a customary marriage if the Minister or the said officer considers such marriage desirable and in the interests of the parties in question.

(b) Such permission shall not relieve the parties to the proposed marriage from the obligation to comply with all the other requirements prescribed by law.

(c) If a person under the age of 18 years has entered into a customary marriage without the written permission of the Minister or the relevant officer, the Minister or the officer may, if he or she considers the marriage to be desirable and in the interests of the parties in question, and if the marriage was in every other respect in accordance with this Act, declare the marriage in writing to be a valid customary marriage.

(5) Subject to subsection (4) section 24A of the Marriage Act, 1961, applies to the customary marriage of a minor entered into without the consent of a parent, guardian, commissioner of child welfare or a judge, as the case may be.

(6) [**The rules of customary law determine the validity of a customary marriage between persons related to each other by blood or affinity**] The

prohibition of marriage between persons on account of their relationship by blood or affinity is determined by customary law.

Registration of customary marriages

4. (1) The spouses of a customary marriage **[must—**
(a) **in the case of a marriage entered into before the commencement of this Act, within a reasonable time after that commencement; or**
(b) **in the case of a marriage entered into after the commencement of this Act, within a reasonable time after the conclusion of that marriage, cause the marriage to be registered by a registering officer]** have a duty to ensure that their marriage is registered.

(2) A marriage —

(a) entered into before the commencement of this Act, and which is not registered in terms of any other law, must be registered within a period of twelve months after that commencement or within such longer period as the Minister may from time to time prescribe by notice in the *Gazette*; or

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

(3) Either spouse may apply to the registering officer in the prescribed form for the registration of his or her customary marriage and must furnish the registering officer with the prescribed information and any additional information which the registering officer may require in order to satisfy himself or herself as to the existence of the marriage.

~~[(2)]~~(4) (a) A registering officer must, if satisfied that the spouses concluded a valid customary marriage, register the marriage by noting the identity of the spouses, the date of the marriage, any *lobolo* agreed to and any other particulars prescribed by the regulations.

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

~~[3]~~(5) If a registering officer is not satisfied that a valid customary marriage was entered into by the spouses, he or she must refuse to register the marriage.

~~[4]~~(6) (a) If for any reason a customary marriage is not registered, any person **[having an interest in the matter may require a]** who satisfies a registering officer that he or she has sufficient interest in the matter may apply to the registering officer to enquire into the existence of the marriage.

(b) If the registering officer is satisfied that a valid customary marriage exists or existed between the spouses, he or she must register **[it]** the marriage as contemplated in subsection (3) and issue a certificate [of registration] bearing the prescribed particulars.

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

~~[5]~~(7) A court may upon application made to that court and upon investigation instituted by that court order—

(a) the registration of any customary marriage; and

(b) the cancellation or rectification of any registration of a customary marriage

effected by a registering officer.

[6](8) A certificate of registration of a customary marriage issued under this section or any other law providing for the registration of customary marriages constitutes *prima facie* proof of the existence of the customary marriage and of the particulars contained in the certificate.

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

Determination of age of minor

5. If the age of a person who allegedly is a minor is uncertain or is in dispute, and that person's age is relevant for purposes of this Act, **[a registering officer]** a commissioner of child welfare or a court may determine the person's age and issue a certificate in regard thereto, which constitutes proof of the person's age.

Equal status of spouses

6. **[The wife in a customary marriage has in all respects a status equal to that of her husband]** A wife in a customary marriages has, on the basis of equality with her husband, full rights and powers to acquire and dispose of assets, to enter into contracts and to litigate, in addition to any rights and powers that she might have at customary law or in terms of any other law.

Proprietary consequences of customary marriages and contractual capacity of spouses

7. (1) The proprietary consequences of a customary marriage entered into before the commencement of this Act continue to be governed by customary law.

(2) A customary marriage entered into after the commencement of this Act in which a spouse is not a partner in any other existing customary marriage, is a marriage in community of property and of profit and loss between the spouses, unless such consequences are specifically excluded by the spouses in an antenuptial contract which regulates the matrimonial property system of their marriage.

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

(4) A person who is a spouse in a customary marriage entered into before the commencement of this Act may apply to a court jointly with that person's spouse or spouses for leave to change the matrimonial property system which applies to their marriage and the court may, if satisfied that —

(a) there are sound reasons for the proposed change;

(b) sufficient written notice of the proposed change has been given to all creditors of the spouses for amounts exceeding R500 or such amount as may be determined by the Minister of Justice by notice in the *Gazette*; and

(c) no other person will be prejudiced by the proposed change, order that the matrimonial property system applicable to such marriage or marriages will no longer apply and authorise the parties to such marriage or marriages to enter into a written contract in terms of which the future matrimonial property system of

their marriage or marriages would be regulated on the conditions determined by the court.

(5) (a) **[A spouse in an existing customary marriage]** A husband in a customary marriage entered into after the commencement of this Act, which is in community of property or is subject to the accrual system, who wishes to enter into a further customary marriage with [another person] any other woman must make an application to the court—

(i) to **[suspend]** terminate the matrimonial property system which is applicable to the **[existing]** marriage **[or marriages]**;

(ii) to effect a division of the matrimonial property **[of the spouses in such marriage or marriages]**; and

(iii) to approve a written contract which would regulate the future matrimonial property dispensation of **[all the spouses in all customary]** his marriages [in which the applicant is or would be a partner].

(b) All persons having an interest in the matter, and in particular **[all the]** the applicant's existing [spouses] wife [of the applicant] and [the] his prospective [spouse] wife, must be joined in the proceedings.

(c) **[When deciding whether to grant an application under paragraph (a), the court must take into account all the circumstances of the family groups to be affected by its order to effect an equitable distribution of property]** In order to ensure an equitable distribution of property the court must, when considering the application, take into account all the relevant circumstances of the family groups which would be affected if the application is granted.

(d) The court may grant the application subject to any condition it may deem just with regard to the safeguarding of the existing wife and any of her children from the marriage or it may refuse the application if in its opinion such interest would not be sufficiently safeguarded by means of the proposed contract.

(6) (a) If a court **[approves a contract for the regulation of the matrimonial property system of spouses as]** grants an application contemplated in subsection (4) or (5), the registrar or clerk of the court, as the case may be, must furnish each spouse with a certified copy of such contract and must cause a certified copy of such contract to be sent to **[the]** each registrar of deeds of the area in which the court is situated.

[(b) The registrar of deeds must on receipt of such certified copy register in the deeds registry the matrimonial property system of the spouses as reflected in the contract.]

Dissolution of customary marriages

8. (1) The dissolution of an existing customary marriage must be effected by a decree of divorce or nullity given by the court.

(2) A court may dissolve a customary marriage on the ground of the irretrievable breakdown of the marriage.

(3) Section 6 of the Divorce Act, 1979 (Act No. 70 of 1979), applies to the dissolution of a customary marriage.

(4) A court which hears an action to dissolve a customary marriage may [—

(a) **appoint any suitably qualified person to assist a spouse who is unable**

to conduct the proceedings in person or to afford the services of a legal representative; and

(b) order the joinder in the proceedings of any person who has a sufficient interest in the matter] order that any person who in the court's opinion has a sufficient interest in the matter be joined in the proceedings.

(5) The Mediation in Certain Divorce Matters Act, 1987 (Act No. 24 of 1987), applies to the dissolution of a customary marriage.

(6) The procedure for the dissolution of a customary marriage must be regulated by the rules of the court hearing the matter.

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

(a) has the powers contemplated in sections 7, 8, 9 and 10 of the Divorce Act, 1979, and section 24(1) of the Matrimonial Property Act, 1984 (Act No. 88 of 1984);

(b) may make an order with regard to the custody or guardianship of any minor child of the marriage; and

(c) may, when making an order for the payment of maintenance, take into account any **[payment] provision or arrangement** made in accordance with customary law.

Age of majority

9. Despite the rules of customary law, the age of majority of any person is determined in accordance with the Age of Majority Act, 1972 (Act No. 57 of 1972), or an order of a court made under that Act.

Change of marriage system

10. (1) A man and a woman between whom a customary marriage subsists are competent to contract a marriage with each other under the Marriage Act, 1961 (Act No. 25 of 1961), if neither of them is a partner in a subsisting customary marriage with any other person.

(2) **[If a marriage is contracted]** When a marriage is concluded as contemplated in subsection (1)[—

(a) **the customary marriage between the spouses is deemed to have been dissolved when the spouses conclude the marriage under the Marriage Act, 1961; and**

(b) **the matrimonial property system of the marriage must be regulated by a matrimonial property contract entered into by the spouses and attested by a notary; failing such contract the marriage must be in community of property and the provisions of Chapter III and sections 18, 19 and 20 of Chapter IV of the Matrimonial Property Act, 1984 (Act No. 88 of 1984), must apply to the marriage]** the marriage is in community of property and of profit and loss and the provisions of Chapter III and of sections 18, 19, 20 and 24 of Chapter IV of the Matrimonial Property Act, 1984 (Act No. 88 of 1984), apply to the marriage unless such consequences are specifically excluded in an antenuptial contract which regulates the matrimonial property system of their marriage.

(3) Despite subsection (1), no spouse of a marriage entered into under the Marriage Act, 1961, is during the subsistence of such marriage competent to enter into any other marriage.

Regulations

11. The Minister may make regulations **[relating to]**—

(a) relating to —

[(a)](i) the requirements to be complied with and the information to be furnished to a registering officer in respect of the registration of a customary marriage;

[(b)](ii) the manner in which a registering officer must satisfy himself or herself as to the existence or the validity of a customary marriage;

[(c)](iii) the issuing and the form of certificates of registration of customary marriages; **[and]**

(iv) the custody, certification, implementation, rectification, reproduction and disposal of any document relating to the registration of customary marriages;

[(d)](v) generally, any matter which is necessary or expedient to provide for the effective registration of customary marriages; and

(b) prescribing the fees payable in respect of the registration of a customary marriage and the issuing of any certificate in respect thereof.

Amendment of laws

12. (1) Section 17 of the Deeds Registries Act, 1973 (Act No. 47 of 1937), is hereby amended by the substitution for paragraph (b) of subsection (2) of the following paragraph:

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

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

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

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

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

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

Repeal of laws

[12]13. (1) The laws mentioned in the Schedule are hereby repealed to the extent set out in the third column of the Schedule.

Short title and commencement

[13]14. This Act is called the Recognition of Customary Marriages Act, 1998,

and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

SCHEDULE

REPEAL OF LAWS

(SECTION 12)

NO. AND YEAR OF LAW	SHORT TITLE	EXTENT OF REPEAL
Act No. 38 of 1927	Black Administration Act, 1927	Sections 11(3)(b), 22(1) to (5) and 22 <i>bis</i>
Act No. 21 of 1978	Transkei Marriage Act, 1978 (Transkei)	Sections 3, 29, 37, 38 and 39
Act No. 16 of 1985	KwaZulu Act on the Code of Zulu Law, 1985	Sections 22 and 27(3)
Proclamation No. R151 of 1987	Natal Code of Zulu Law, 1987	Section 27(3)

Resolution: B110-98

Report of the Portfolio Committee on Justice on the *Recognition of Customary Marriages Bill* [B110-98] (National Assembly-sec 75), dated 30 October 1998, as follows:

The Portfolio Committee on Justice, having considered the subject of the *Recognition of Customary Marriages Bill* [B110- 98] (National Assembly sec 75), referred to it, submits the *Recognition of Customary Marriages Bill* [B110B- 98] (National Assembly-sec 75).

The Committee further wishes to report as follows:

1. This Bill has at long last removed one of the glaring inequities of the previous dispensation, by providing that customary marriages concluded after the commencement of this Bill and all valid customary marriages concluded before the commencement of this Bill, shall henceforth be valid marriages. This long overdue legislative enactment is welcomed, but the possible practical implications are of some concern to the Committee. The Committee is concerned about the lack of accessibility of rural and poor communities to the courts, in particular the High Courts and Divorce Courts which are designated to adjudicate in most cases under

this Bill. The Committee consequently recommends that the Minister of Justice, the Judges President of the High Court and the Presidents of the Divorce Courts should consider Instituting regular civil circuit courts in rural areas, especially rural areas not usually serviced by such courts, to deal in particular with proceeding emanating from Clause 7(4) to 7(7) and Clause 8 (divorce matters). The Committee trusts that this proposal will substantially address the practical problems which might be encountered by the poorest amongst us and will save expenses for rural people because it will obviate the need to travel to and from courts.

2. The Committee also recommends that the Minister of Justice should consider the extension of the Divorce Court by creating more seats of these courts in order to promote accessibility. However, these courts at present only have the capacity, resources and rules to deal with divorce matters. It is for this reason that only Clause 8 of the Bill has been made applicable to Divorce Courts. The Committee recommends that when these courts have acquired the necessary capacity and rules have been adapted accordingly, the Minister should consider amending this legislation to provide Divorce Courts with jurisdiction in respect of all matters in this Bill.

3. The Committee is also concerned about the lack of a set of uniform rules for the High Courts and the Divorce Courts when they must apply the divorce provisions of this Bill. The Committee consequently recommends that the Minister of Justice should examine the possibility of a uniform approach in this regard and to further provide for procedures which are more affordable and accessible.

Furthermore, it would appear that there are currently no rules which regulate proceedings in terms of Clause 7(4) to 7(7) of the Bill. The need to provide for such rules should immediately be proceeded with.

4. In view of the need to put the Bill into operation as soon as possible, the regulations in terms of the Bill must be promulgated as a matter of urgency.

5. The Department of Home Affairs (with the Department of Justice), must develop a comprehensive and detailed implementation plan to ensure the effective implementation and administration of the Bill and must table such implementation plan in the Committee within six months of the passing of the Bill.

6. The Department of Justice (preferably with members of the South African Law Commission who assisted in drafting and finalising the Bill), must produce and explanatory memorandum to explain the broad aims and provisions of the Bill, as well as the intention of Parliament when passing the Bill, in order to promote accessibility and to assist registering officers and other persons engaged in the administration of the Bill with its implementation. Such memorandum must be tabled in the Committee within six months of the passing of this Bill.

7. The Bill, the implementation plan, the memorandum and this resolution must be forwarded to all relevant role-players, especially the Minister of Home Affairs.

Judges President of the High Court, Presidents of the Divorce Courts and Chairperson of the Judicial Services Commission.

8. The Department of Justice (with the Department of Home Affairs) must table a report with the Committee within six months of the passing of this Bill, dealing with all aspects of this resolution.

Report to be considered

	PSC President Government	W	Reporting Officer / Area Officer
	PSC President Government		
	PSC President Government		