

**Using the Law to Secure Women's Rights
to Housing and Security of Tenure:
A brief examination of some key aspects of family and customary
law and domestic violence legislation**

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Background

Tshwaranang Legal Advocacy Centre (TLAC) has been requested by the Centre for the Study of Violence and Reconciliation (CSVR) to examine how current laws regulating the granting of a divorce and division of property on divorce, including the provisions of the Recognition of Customary Marriages Act, can be used to secure women's rights to property and housing. TLAC has also been requested to examine the manner in which customary laws impact on women's rights to own property and to examine how the provisions of the Domestic Violence Act could be used more effectively to protect these rights.

This paper is divided into several sections:

1. The [first section](#) sets out the relevant provisions of the Matrimonial Property and Divorce Acts and describes the different matrimonial property regimes that are available to parties, and the proprietary consequences of the divorce. The section also briefly examines the position of women who are excluded from the acts.
2. [Section 2](#) deals with the provisions of the Divorce Act on redistribution of assets and forfeiture of benefits.
3. [Section 3](#) deals with the relevant provisions of customary law.
4. [Section 4](#) deals with the provisions of the Domestic Violence Act.

Section 1: Matrimonial Property and Divorce Acts

The Matrimonial Property Act regulates the proprietary consequences of all civil marriages in South Africa. Since the Marriage Act currently defines marriage as an exclusive partnership entered into between a man and a woman, other relationships are excluded from the protection offered by this act and the Divorce Act. Non-Christian marriages, unless they have been conducted by a duly appointed marriage officer, have been excluded, as have

same sex partners and women living in domestic partnerships. The Constitutional Court has however recently recognised that the current definition unfairly discriminates against same sex couples and has ordered the Department of Home Affairs to amend the Marriage Act. The Civil Union Bill, currently before Parliament, was developed in response to the judgement.

Customary marriages

Customary marriages were legally recognised by the Recognition of Customary Marriages Act in 1998 and the proprietary consequences of such marriages are regulated by this act and by certain provisions of the Matrimonial Property Act. This is discussed in more detail later.

Muslim marriages

Muslim marriages are currently not recognised as valid marriages. The South African Law Reform Commission (SALRC) has produced a discussion paper, along with draft legislation. The Discussion Paper has proposed a system of registration of marriages, including polygamous marriages, and gives parties the right to enter into contracts that regulate the matrimonial proprietary regime, either by way of Muslim Personal Law or civil law. These proposals have been criticised by gender activists as failing to provide adequate protection to vulnerable women and there has been particular concerns that the Project Committee has failed to recommend that, in the absence of a contract, Muslim marriages are automatically concluded in community of property. The law reform process however appears to have stalled and it was unclear at the writing of this paper when, and how, the Department of Justice would deal with the matter.

The effect of the delay of law reform is that Muslim women married under Muslim law, particularly those in polygamous marriages, lack certainty about the legal status of their marriages and the legal consequences. Although the courts have begun to develop some jurisprudence about the duty of support between spouses in Muslim marriages, there is a lack of clarity on the property rights of spouses, particularly with regard to polygamous marriages. Two cases, *Amod* (which dealt with the right of a woman to claim from the Road Accident Fund following the death of her husband) and *Daniels* (which dealt with the rights of a Muslim spouse in terms of the Intestate Succession Act) have built on equality jurisprudence to secure the property rights of women after the death of their spouses. In a currently unreported case in the High Court (Transvaal Provincial Division), *Khan v Khan*, the court considered whether a husband in a polygamous Muslim marriage, owed a duty of support to his first wife. The court stated that, with regard to polygamous marriages, "*Public policy considerations in interpreting legislation have changed with the advent of the Constitution*". The court went on to find that in the past, other courts had come to the assistance of wives in polygamous relationships. The court stated that:

... the argument that it is contra bonis mores to grant a Muslim wife, married in accordance with Islamic Rites, maintenance where a marriage is not polygamous, can no longer hold water. It will be blatant discrimination to grant in the one instance a Muslim wife in a monogamous Muslim marriage a right to maintenance, but to deny a Muslim wife married in terms of the same Islamic Rites (which is inherently polygamous) and which has the same faith and

believes as the one in the monogamous marriage, a right to maintenance ... I am there of the opinion that partners in a Muslim marriage, married in accordance with Islamic Rites (whether monogamous or not) are entitled to maintenance.

Despite these developments, there remain areas of uncertainty that must be addressed in order to provide women in Muslim marriages with the protection of the law. In the absence of full legal recognition of their marriages and legislation that clearly spells out the legal consequences, Muslim wives remain vulnerable.

Same sex marriages

Although various aspects of same sex relationships have been legally recognised by a series of cases decided by the Constitutional Court, the judgements fell short of full recognition of same sex relationships. However, in the recent case of *Minister of Home Affairs v Fourie*, the Court found that the definition of marriage was inconsistent with the provisions of the Constitution insofar as it excluded gays and lesbians from enjoying the same rights in marriage as those enjoyed by heterosexual couples. The judgement, handed down by the court on 1 December 2005, gave government 12 months within which to amend the Marriage Act.

On 23 August 2006, Cabinet approved the Civil Unions Bill in response to the Fourie judgement. The bill, which must now be tabled in Parliament, provides for the recognition of domestic partnerships for both homosexual and heterosexual couples.

The bill currently proposes that same sex relationships be solemnised by a registered marriage officer and be entered into the population register.

The legal consequences of a civil union will be the same as those of marriage.

As we indicate, this bill was drafted in response to the Constitutional Court pronouncement that the Marriage Act unfairly discriminated against gays and lesbians on the grounds of sexual orientation. By establishing a completely separate institution, namely a civil union or partnership for same sex couples, rather than extending the definition of marriage to include them, the bill appears to perpetuate such discrimination.

Domestic partnerships

It is important to note that marriage may no longer represent the most common form in which men and women live together. South African statistics suggest that increasing numbers of people do not marry. The 1996 census data showed that approximately 1.2 million people were cohabiting with a partner. Other research has suggested that the rate of marriage is declining, with Statistics SA showing a decrease of 2168 officially recorded marriages between 2003 to 2004 (the latest data available). The 2001 census data also shows that significant numbers of men and women cohabit rather than marry:

1. In the age group 20–24 years, just under 10% of African, coloured and white women were living with a partner (the figure for Indian women was 2.4%);
2. In the age group 25–29 years, the figures were 14.4%, 12.6% and 8.8% respectively

(the figure for Indian women living with a partner continue to remain significantly lower than for other race groups, at 2.7%).

The 2001 census reveals that where women do marry, they tend to do so at younger ages than men across all race groups, for example, in the age group 20–24 years, 93.1% of African men had never been married, compared to 80.3% of African women. For Indians or Asians, the figures were 84.5% of men compared to 65.6% of women. It further shows that significant numbers of people do not marry at all - in the age group 35–39 years, 33.6% and 33.4% of African women of African men had never been married – the highest amongst all race groups.

Internationally, similar trends emerge - in 1999, French national statistics showed that one in five of all couples in France live together. In the United States, it is estimated that 45% of all couples live together.

It is therefore striking that, in the context of large numbers of unmarried women who live with their partners, the law continues to ignore them. The SALRC in its discussion paper on domestic partnerships, recognised that while cohabitation may be a matter of choice for the middle class, "it is a real problem out of the control of most poor women". Poverty and unemployment were cited as key reasons why women remain in relationships where men chose not to marry them.

Currently the law provides no protection for women who live with their partners – no duty of support is created between the parties, she is not entitled to inherit upon the death of her partner, unless he specifically nominates her as a beneficiary in his will, and she has no proprietary claim against his estate. The SALRC, recognising the difficulties created by the failure to provide any legal protection to cohabitees, particularly women, has recommended a system of registration of domestic partnerships. This process would assist those couples, including same sex couples who choose not to marry, to protect their rights within a domestic partnership and also to regulate the legal consequences of such a relationship.

Importantly, the SALRC has also proposed a limited legal recognition of "de facto unregistered" partnerships. In making these proposals, the SALRC states that "Its main drawback (the registration of domestic partnerships), however lies in the fact that the most likely victims of injustice, those who need the protection, namely the vulnerable, disorganised, pressurised, naïve, unsophisticated and ill-informed, are those who will most likely not register their partnership. They are also the ones who may be persuaded by a strong-willed partner not to register the relationship. Those whom the law aims to protect may thus not benefit from such a system". The SALRC proposed that where two people were in an "intimate relationship", certain limited legal consequences would flow from that relationship if it were not registered. The draft legislation set out the criteria for determining whether a relationship exists, including the duration of the relationship, the nature and extent of the relationship, whether the parties shared a residence, the degree of financial support or interdependence, ownership, use and acquisition of any property, degree of mutual commitment to a shared life, the care and support of any children, the performance of household duties and the reputation and public aspects of the relationship.

Although the SALRC did not go so far as to propose that the parties in a de facto partnership owe a reciprocal duty of support to one another, it did state that general legal

consequences of an unregistered domestic partnership should include:

1. Joint liability for household expenses;
2. Partners would be regarded as spouses for the purposes of medical decisions and be entitled to have access to each other's medical records;
3. Partners would be protected by marital privilege in criminal and civil matters;
4. A surviving partner would be entitled to a child's share from a deceased partner who died intestate; and
5. Protection of the partnership property - partners could not dispose of this property, which would include the family home, household goods, jointly owned property and all property acquired for the joint benefit of the partnership, without the consent of the other partner.

When a partnership was dissolved and the partners were unable to agree on a division of the partnership property, the court could make an order of division, "taking into account that that each of the partners is entitled to share equally in the partnership property."

The Discussion Document containing these proposals was submitted to the Department of Justice in 2004. To date, they have not been acted upon by the Department of Justice with the result that many extremely vulnerable women continue to live outside of the protection of the law. The Civil Unions Bill, which will recognise domestic partnerships, will not assist women where their partners chose not to marry or register their relationships.

The Constitutional Court was given an opportunity to consider the rights of women in domestic partnerships in the *Robinson* case, but in a conservative judgement, declined to recognise the duty of support between cohabiting partners. The majority judgement held that the distinction between married and unmarried people was not unfair when considered in the context of the rights and responsibilities that are attached to marriage, including the reciprocal duty of support. The court found that it would be unfair to extend a duty of support by a deceased partner to the surviving partner when no such duty was owed during the deceased partner's lifetime. A separate judgement, confirming the majority view, found that since there was no impediment to the marriage of heterosexual couples, those who chose not to marry could not legitimately claim the protect of the law.

There were two minority judgements which did offer a different view to the majority. Notably Justice Sachs held that the key question for the court to decide was whether the relationship was deserving of protection and whether it was unfair to leave the surviving partner without any means of support because they were unmarried. This is an aspect that should be further explored in any challenges to the case.

The Civil Union Bill takes up some of the SALRC proposals. In addition to establishing civil partnerships for same sex couples, the bill states that one of its objectives is to "ensure the rights of equality and dignity of the partners in domestic partnerships". The bill therefore provides for two forms of partnerships and spells out the legal consequences for both a registered domestic partnership, where the parties choose to register their relationship and enter into a domestic partnership agreement, and an unregistered domestic partnership.

Registered partnerships

The bill states that parties may only enter into one registered domestic partnership and a person who is married, who has entered into a civil union or is already a partner in another registered partnership may not register a second partnership.

Partners in a registered partnership owe a reciprocal duty of support and neither partnership may sell, donate, mortgage, let, lease or dispose of joint property without the consent of the other partner. Significantly, the bill gives each partner a right of occupation of the family home during the existence of the partnership, "irrespective of which of the registered partners owns or rents the property". The partner who owns or rents the property may not evict the other partner from the family home without providing suitable alternative accommodation.

The bill also provides for the termination of a registered partnership, which can occur through the death of a partner, agreement between both parties or on application to court.

When a partnership is ended, the bill sets out the proprietary consequences:

- The court may order a partner to pay maintenance to the other partner and the bill includes a list of factors that the court may take into account when determining whether to award maintenance - these include the contributions that each partner made to the partnership, the existing and prospective means of each partner, their ages, the duration of the partnership, and the standard of living prior to the end of the partnership;
- A surviving partner is entitled to claim maintenance from the deceased estate of a partner and is also entitled to inherit a spouse' share, if the deceased partner died without a will;
- The court can order a division of joint or separate property, if the parties cannot agree on division themselves. When making such an order, the court must order a division that is "just and equitable".

Unregistered partnerships

Although the introduction and regulation of domestic partnerships will have positive consequences for many women, it is unlikely to assist vulnerable classes of people, including poor women. This issue was explicitly recognised by the SALRC and formed the basis on which it proposed a limited legal recognition of unregistered partnerships.

The bill makes provision for an unregistered domestic partner to apply to court for assistance to claim a maintenance order, an intestate succession order or a property division order. These orders may only be sought within two years after a domestic partnership has ended. When making any one of the three orders, the court must consider all relevant circumstances of the relationship, including "the duration and nature of the relationship, the nature and extent of the common residence, the degree of financial dependence and interdependence, and any arrangements for financial support, ... the ownership, use and acquisition of property, the degree of mutual commitment to a shared life, the care and support of children ... the performance of household duties, the reputation and public aspects of the relationship and the relationship status of the unregistered partners with third

parties".

In making a maintenance order, the court may make an order for a specific period. It does not appear, as is the case with a registered partner, that the order may last until the death of the partner. In case of a claim for maintenance after the death of an unregistered partner, the claim of a surviving partner will receive the same preference as that of a surviving dependent child. The bill specifically gives the court the power to make maintenance orders that are "just and equitable" where there are multiple surviving spouses. The bill also provides that a surviving unregistered partner may apply to court to inherit a child's share of the intestate estate.

The court may also order the division of joint or separate property. With regard to a division of the joint property, the court must make an order that is "just and equitable" but with regard to a division of separate property, it must be satisfied that the partner who applies for the division, contributed directly or indirectly to the maintenance or increase of the property.

Although this bill clearly closes some of the gaps and will offer enhanced protection to women who cohabit in unregistered domestic relationships, in our view, it does not go far enough. Of particular concern is the failure to recognise a duty of support between partners during the relationship and also to protect the right to occupy the family home.

Matrimonial property regimes

Matrimonial property regimes in South Africa are governed primarily by the Matrimonial Property Act, which recognises two forms of matrimonial property regimes: in community of property and out of community of property.

In community of property

Unless the parties explicitly state otherwise by entering into an ante-nuptial agreement, all marriages are automatically in community of property.

Marriages in community of property are governed by sections 14-20 of the act. In these marriages, the estates of the parties entering into the marriage are joined together and the spouses become co-owners of all their assets, those that were owned prior to the marriage as well as those they acquire afterwards. There are exceptions to this general rule and some property may continue to be owned by only one party (e.g. an inheritance received by one party).

There are several advantages to this approach. Section 14 of the act states that both spouses have equal power to administer the joint estate. This means that each spouse can administer the joint estate without the consent of the other spouse. In order to protect spouses and third parties, the act does identify a number of juristic acts for which consent from both spouses is needed (e.g. selling immovable property). On division of the estate on divorce it does not matter who acquired the assets and in this regard, women who do not work or whose earning capacity is less than that of their husbands', will benefit upon the division, as each party is entitled to an equal share of the joint estate.

There are also disadvantages to this regime, many of which particularly disadvantage women. "A marriage in community of property not only results in community of assets but also community of liabilities". This means that liabilities incurred by one partner can be recovered from the joint estate or from the other partner. In principle, this applies not only to liabilities that are incurred during the marriage, but also to certain debts that are incurred prior to the marriage, which are still outstanding at the time that the marriage is concluded.

With regard to contractual debts incurred during the marriage, the law requires an assessment of whether the partner who incurred the debt was authorised to bind the joint estate. If so, the debt can be recovered from the joint estate, even if the partner who incurred the debt has separate assets. Section 19 of the Matrimonial Property Act regulates how delictual debts may be recovered. In such cases, the creditor must first attempt to recover the debt from the separate estate of the party who incurred the debt, and then from the joint estate, if there are insufficient assets in the separate estate to satisfy the debt.

The only protection that a spouse has, if a debt is recovered from the joint estate, is to apply for an adjustment of the division when the marriage is dissolved. If the estate is big enough to accommodate the adjustment, then the spouse will be protected. If not, the spouse has no further recourse and will lose her share of the joint estate.

Once the marriage has been dissolved, outstanding debts incurred before the marriage was concluded, can only be recovered from the spouse that incurred them. Debts that were incurred during the marriage can be recovered in full from the spouse who incurred them, or 50% can be claimed from each spouse.

Out of community marriage

There are different types of marriages out of community of property and since all marriages are automatically in community of property unless the parties indicate otherwise, parties who do not wish to conclude their marriage in community of property must explicitly indicate otherwise and enter into an ante-nuptial contract. The primary purpose of the ante-nuptial contract is to determine what matrimonial property regime will govern the marriage. Certain formalities must be completed before a valid ante-nuptial contract can be concluded.

There are three different types of out of community of property marriages:

- ***Out of community of property without the accrual system*** – under this regime, the parties remain in the same position as they were before the marriage. Each party keeps the property they owned prior to the marriage. Upon dissolution of marriage by divorce, the parties retain ownership of their separate estates. This regime is particularly disadvantageous for women, especially those who do not work or who are unemployed, as they have no claim on the estate of their spouses.
- ***Out of community of property with the retention of community of profit or loss*** – under such a regime, the parties retain separate ownership of the assets they owned prior to the marriage. However, any assets that are acquired during the marriage are jointly owned by the parties. Although this regime is more beneficial for women, it also has its disadvantages during the subsistence of the marriage as the parties are

jointly liable for debts incurred by either party.

- ***Out of community with accrual*** – this system is relatively new and was introduced by the Act, specifically to address gender disparity within marriage. Although during the subsistence of the marriage, the parties retain separate ownership of their assets, when the marriage is dissolved by divorce, the spouses share in the growth of their estates. This regime was intended specifically to address the concerns regarding the manner in which proprietary consequences of divorce prejudice women.

In summary, it is clear that a legal framework exists within which the proprietary consequences of a marriage are regulated. The law, as amended, does offer opportunities to protect married women's rights to property during and after the dissolution of the marriage. However, as with any other law, the effectiveness of any legal protection depends on the ability of individual women to access information about their rights and available resources, including legal advice and assistance, to enforce them. The law regarding matrimonial property regimes is unnecessarily inaccessible and complex. Accessible information on women's legal rights concerning their property prior to, and during, marriage, including plain language versions of the relevant legislation, will assist them in making appropriate choices.

Divorce

South Africa has a "no fault" system of divorce, which means that a divorce will be granted on the basis that one of the parties believes that there has been an "irretrievable breakdown of the marriage relationship" and does not believe that there are reasonable prospects of restoring the relationship. This means that the marriage can be dissolved even if one of the parties does not wish to get divorced.

Civil marriages and those religious marriages conducted by registered marriage officers can only be dissolved by order of the High Court or the Family Court. The spouse wishing to end the marriage must issue a summons against the other spouse, stating that the relationship has broken down, that there is no reasonable prospect of restoring the relationship and stating what the matrimonial property regime that governs the marriage, is. The summons must make provision for the division of the estate, either stating that the parties have entered into a prior agreement or asking the court to divide the joint estate or enforce the provisions of the ante-nuptial contract. Parties must also set out what the arrangements are with regard to the custody of, and access to, any children born of the marriage.

Notice of the action for divorce must be given personally to the other spouse, who may decide to oppose the action.

Parties who are divorcing have various options for regulating the division of property:

1. The party who receives the summons may elect not to oppose it, in which case the order of divorce will be granted on an unopposed basis and the court will grant the order relating to the division of property as set out in the summons.
2. They may enter into a written agreement that regulates the property issues flowing

from the dissolution of the marriage and any issues relating to children. The parties have full contractual freedom to either follow the matrimonial property regime that regulated their marriage or to conclude an agreement that they find better suited to their circumstances. The agreement will be made an order of court when the decree of divorce is granted and it will then regulate the division of the property of the marriage. The advantage of this approach is that it limits the legal costs related to the divorce, but often parties fail to specify how the property should be divided, merely requesting a division of the joint estate, and this frequently leads to conflict and further litigation at a later stage.

3. If the parties cannot reach agreement, including when one of the parties has applied for a redistribution of assets or a forfeiture of benefits, the court will adjudicate on the issues. Litigation in the High Court is however prohibitively expensive and therefore not easily available to the majority of women.

In addition to dividing the estate in accordance with the matrimonial property system entered into by the parties at the commencement of the marriage, the court also has the power to vary that system in certain circumstances.

Women's property rights on dissolution of marriage have not received much attention and have tended to be ignored, to their detriment. Where legal advice and assistance is available, it tends to focus on the position of the children and the arrangements for their futures. Litigation is extremely expensive and poor women are generally not able to secure their rights in the courts. The Legal Aid Board will not provide representation unless custody and access to children are in dispute. The Legal Aid Board should be lobbied to provide legal advice (perhaps not representation) to women who wish to divorce and/or whose partners have instituted divorce proceedings against them, specifically on how to safeguard their rights to property. The Legal Aid Board should also be lobbied to provide legal advice and representation to women who are unable to enforce divorce orders and settlement agreements.

Section 2: Redistribution and Forfeiture

Redistribution of Assets

As mentioned above, the accrual system was introduced by the Matrimonial Property Act and was intended to allay the situation where, in cases of an out of community of property marriage, a spouse had no legal right to share in the assets that the other spouse acquired during the marriage.

The "redistribution of assets" section of the act was introduced to assist spouses who married out of community of property prior to the enactment of the Matrimonial Property Act in 1984 or the Marriage and Matrimonial Property Amendment Act in 1988. This section now only applies to a relatively small number of marriages but may well still be important to a particularly vulnerable class of women, namely older women who are less likely to find employment upon divorce and who do not qualify for either child support grants (as their children would be older) or state pensions.

Section 7(3) and (4) of the Divorce Act gives the court a discretion in appropriate

circumstances to make an order that a spouse must transfer a portion of his or her estate to the other spouse, if the court is satisfied that the spouse either directly or indirectly, financially or otherwise (for example by rendering services), contributed to the increase or the maintenance of the other's spouse's estate.

The section sets out an open-ended list of factors that the court may consider when deciding whether to redistribute the property to the other spouse.

The section reads as follows:

7(3) A court granting a decree of divorce in respect of a marriage out of community of property –

a) entered into before the commencement of the Matrimonial Property Act, 198, in terms of the ante nuptial contract by which community of property, community of property and accrual sharing in any form are excluded; or

b) entered into before the commencement of the Marriage and Matrimonial Property Law Amendment Act, 1988, in terms of section 22(6) of the Black Administration Act, 1927 (Act No. 38 of 1927) as it existed immediately prior to its repeal by the said Marriage and Matrimonial Property Law Amendment Act, 1988

may, subject to the provisions of subsections (4) and (5) and (6), on application by one of the parties to the marriage, in the absence of any agreement between them regarding the division of their assets, order that such assets, or part of the assets, of the other party as the court may deem just be transferred to the first mentioned party

7(4) An order under subsection (3) shall not be granted unless the court is satisfied that it is equitable and just by reason of the fact that the party in whose favour the order is granted, contributed directly or indirectly to the maintenance or the increase of the estate of the other party during the subsistence of the marriage, either by the rendering of services, or the saving of expenses which would otherwise have been incurred, or in any other manner.

Section 7(4) sets out two requirements to be met when the court applies its discretion on whether to grant redistribution order:

1. the spouse seeking the order must have contributed directly or indirectly to the maintenance or the increase of the other spouse's estate during the marriage;
2. the court must be satisfied that by reason of such a contribution, it would be equitable and just to make a redistribution order.

Although the law allows either spouse to apply for a redistribution order, in practice the section has largely been used by women.

In *Beaumont v Beaumont* Judge Botha specifically considered the previous gender imbalances for women in terms of accessing the labour market, and stated that wives' household duties should not be viewed as of less value than the employment duties of the husband. He further stated that the wording of this section is sufficiently wide to cover *any* contribution a spouse makes and would include the "ordinary duties" of a wife.

In *Katz v Katz* the court found that it was not necessary for an applicant to show which assets he or she made a contribution to, but merely to prove that a contribution had been made to the other spouse's estate.

Section 7 gives the court a wide discretion and the court may consider "any other factor" when it exercises its power to make a redistribution order. There is therefore the possibility that the court may well consider a history of domestic violence as a ground to order that a redistribution of assets is made. There are currently no cases that deal specifically with domestic violence, but in *Beaumont*, the court warned that it would adopt a conservative approach in assessing whether misconduct is a relevant factor. The Constitutional Court has however indicated unequivocally that violence against women, including domestic violence, is a serious infringement of women's constitutional rights:

All crime has harsh effects on society. What distinguishes domestic violence is its hidden, repetitive character and its immeasurable ripple effects on our society and in particular, on family life. It cuts across class, race, culture and geography, and is all the more pernicious because it is so often concealed and so frequently goes unpunished ...
... to the extent that it is systemic, pervasive and overwhelmingly gender-specific, domestic violence both reflects and reinforces patriarchal domination, and does so in a particularly brutal form.

Section 39 of the Constitution states that when interpreting the law or developing the common law, "every court, tribunal or forum must promote the spirit, purport and objectives of the Bill of Rights".

In our view, the courts, in assessing the weight to be placed on any allegations of misconduct on the part of a spouse, would be obliged to consider the Constitutional Court's interpretation of the seriousness of domestic violence.

Forfeiture of benefits

The Divorce Act also makes provision for forfeiture of benefits in section 9 within the different marriages.

The Act states:

When a decree of divorce is granted on the ground of irretrievable breakdown of the marriage, the court may make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other, either wholly or in part, if the court, having regard to the duration of the marriage, the circumstances which led to the breakdown thereof and any substantial misconduct on the part of either of the parties, is satisfied that, if the order for

forfeiture is not made the one party will in relation to the other be unduly benefited.

In terms of this section, the court must examine certain criteria in deciding whether to grant a forfeiture application. These factors include the

1. duration of the marriage;
2. circumstances leading to the breakdown;
3. substantial misconduct of one of the parties; and
4. any other factor that the court feels must be taken into account to make a reasonable order.

There has been a controversy regarding what weight each of these factors should be given when assessing whether to order a forfeiture. In an early case, *Matyila v Matyila*, the court held that all three factors had to be alleged and proved and that forfeiture could not be ordered unless there was "proof of substantial misconduct and it was established whose conduct had led to the irretrievable breakdown of the marriage". This decision has not been followed in other cases, and in *Engelbrecht v Engelbrecht*, the court specifically stated that misconduct should not be seen as a more important factor. In *Wijker* the Appellate Division (as it then was) clarified the position and stated that all three factors do not have to be present and they need not be considered cumulatively. Misconduct therefore is no longer a factor that must be considered in the granting of a forfeiture order. The court held the substantial misconduct could include behaviour that had little or nothing to do with the breakdown of the marriage and warned that "too much importance should not be attached to misconduct which is not of a serious nature". It therefore appears that the key question for the court is to decide whether, if the order is not granted, the party against whom it is sought will be benefited.

In the more recently decided case of *Botha*, the court on deciding whether forfeiture should be granted, stressed that all the factors listed in the provision would have to be investigated, rather than looking at any one of the three. These factors though should be used as guidelines and not as a closed list. The court in the above matter when examining the duration of the marriage found that ten years was a sufficiently long enough period on which to decide whether to order a forfeiture of assets.

It appears from the above mentioned cases that the courts are reluctant to define what constitutes substantial misconduct. No firm definitions have emerged from the cases and each case has been considered on its own merits. There are no reported cases on whether domestic violence has been considered as substantial misconduct. In line with the views we express under the section dealing with redistribution of assets, it would appear to us that the views of the Constitutional Court on domestic violence will influence how the courts view it as a factor in assessing whether to award a forfeiture. A test case on whether domestic violence can be considered to be "substantial misconduct" for the purposes of claiming forfeiture of benefits should be investigated.

Section 3: Customary Law

Customary marriages

As indicated above, the Recognition of Customary Marriages Act, which came into effect in November 2000, conferred full legal recognition on marriages concluded in terms of customary law. The act sets out the requirements for a valid marriage and deals with the proprietary consequences of the marriage.

Marriages concluded before the act came into law

Customary marriages concluded before the act came into effect continue to be regulated by customary law, unless the spouses agree to change this. If they wish to do so, they must jointly apply to the court and the court will grant the application if it is satisfied that there are good reasons for the change, that written notice has been given to all creditors and that no-one will be prejudiced by the change. Although the section does present an opportunity for women to bring their marriages under the ambit of the act, it will not assist women in cases where their partners do not wish to be bound by the provisions of the act. Since the provisions of the act regarding the matrimonial property regime apply only to those marriages concluded after 2000, it is older women who will be likely to be prejudiced because they will not benefit from the protection of the act.

Section 6 of the acts states that:

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

Although this section was clearly intended to address the perpetual minority of women living under customary law and those who are unable to apply to court, in reality it does not assist them. Under customary law, men are the heads of households and retain full control over the family property. This means that "the wife's capacity to acquire and deal with property and her capacity to act are therefore still severely restricted".

Marriages concluded after the act

The act makes provision for the registration of customary marriages, but states that the failure to register the marriage will not automatically cause the marriage to be invalid. The marriage may be registered by both parties, or on application by one of the parties. The registering official must be satisfied that the marriage was concluded in terms of the relevant customary law before it can be registered.

In the case of a monogamous customary marriage, the proprietary regime is determined in the same way as a civil marriage – parties are automatically married in community of property unless they choose to enter into an ante-nuptial contract. The act specifically states that the provisions of the Matrimonial Property Act will apply.

Where the marriage is polygynous, the husband must apply to court to enter into a written agreement which will regulate the future matrimonial property system of the marriages. With regard to the existing marriage, the court will order a division of the joint estate (depending on whether it is a marriage that was entered into in or out of community of property).

Proprietary consequences of divorce

The courts now have the same power to regulate the financial consequences of a customary marriage as they do for a civil marriage. The commentary under section 2 therefore applies to these marriages.

There is however some disagreement amongst commentators about whether the provisions regarding redistribution of assets can be applied to customary marriages. Section 7(3) of the Divorce Act explicitly states that it can only be applied to marriages concluded before the coming into operation of the Matrimonial Property Act and the Marriage and Matrimonial Property Law Amendment Act.

It is clear from work conducted by various paralegal organisations, including TLAC, that many women are unaware of their legal rights, both at the time they marry and when they get divorced. In particular, it appears that women lack accessible information regarding the different matrimonial property regimes and the consequences on the division of property. The lack of high quality, affordable legal services available to poor women has a major impact on their ability to negotiate and enforce appropriate settlement agreements.

The provisions relating to redistribution and forfeiture could potentially have an important impact on battered women's ability to retain ownership and occupation of their homes at the end of a marriage. However, insufficient work has been done to ensure that women are able to undertake litigation to protect their rights.

Ownership of property

As indicated above, in terms of customary law, men were regarded as the heads of households and the owner of all property in the marriage. Women were considered to be perpetual minors and could not own any property without the assistance of a husband or father.

All women, including women who live under customary law, are now regarded as adults in the eyes of the law, once they reach the age of majority, recently lowered to 18 years by the Children's Act. Section 6 of the Customary Marriages Act explicitly confers equal status on women married in terms of customary law. This means that adult women are entitled to acquire and dispose of property.

Customary law also prevented women from inheriting the estate of their deceased husbands. The rule of primogeniture meant that the estate would bypass the wife and female descendants and go to the male heirs – the sons, the father or brothers of the deceased. Traditionally, the male relative who inherited the property had a duty to protect and support the surviving female members of the deceased's family. In practice however, this did not happen and women and children were frequently left destitute when relatives

removed all property belonging to the deceased.

The SALRC undertook an investigation into the customary law of succession and made recommendations that would protect the rights of women and children.

The *Bhe* case successfully challenged the rule of male primogeniture. Currently, in the absence of legislation, the case provides that all cases of intestate succession be treated in terms of the existing civil law on succession. This means that women are permitted to inherit from the estate of their deceased husbands and that boys and girls are not treated differently.

Section 4: The Domestic Violence Act

The Domestic Violence Act contains several provisions that both directly and indirectly assist women to protect their rights to housing on an interim and temporary basis.

Section 7 of the Domestic Violence Act sets out the court's powers when it issues a protection order. The section states that:

(1) The court may, by means of a protection order ... prohibit the respondent from:

- (a) committing any act of domestic violence;
- (b) enlisting the help of any other person to commit any such act;
- (c) entering a residence shared by the complainant and respondent;
Provided that the court may impose this prohibition only if it appears to be in the best interests of the complainant;
- (d) entering a specified part of such a shared residence;
- (e) entering the complainant's residence;
- (f) entering the complainant's place of employment;
- (g) preventing the complainant who ordinarily lives or lived in a shared residence as contemplated in paragraph (c) from entering or remaining in the shared residence; ...

(3) In ordering a prohibition contemplated in subsection 1(c), the court may impose on the respondent obligations as to the discharge of rent or mortgage payments having regard to the financial needs and resources of the complainant and the respondent.

The section also provides for the payment of emergency monetary relief to the complainant, depending on the financial needs and resources of both parties, and also permits the complainant to conceal her physical address from the respondent so as to protect her "safety, health and well-being".

Several evaluations of the effectiveness of the act have been undertaken and we have drawn on these to assess how the provisions of section have been used to protect women's right to housing and shelter.

An evaluation conducted by the Consortium on Violence Against Women in 2000 examined the provisions of section 7 of the act relating to eviction and stated that the section "is one of the more controversial ones, and has attracted a great deal of criticism".

The report evaluated protection orders granted in three magistrates' courts, Mitchell's Plain, Cape Town and George. It found that the forms that complainants must complete to obtain a protection order were particularly confusing with regard to the sections on evictions. This resulted in many complainants not requesting the eviction of the respondent or requesting that conditions be attached to the eviction, which could be mutually exclusive. The report also identified a key concern for criminal justice personnel in granting an eviction order, "the tension between ordering and effecting eviction for the protection of the complainant and his/her family and the material and financial hardship that could result from the eviction".

The report also evaluated whether and how the provisions of the act relating to the payment of emergency monetary relief were used. Again the report identified the confusing nature of the forms as one of the reasons that complainants frequently fail to use this provision more effectively. There was also confusion on the part of justice officials regarding the overlap between the provisions of the act relating to the payment of emergency monetary relief and rent, and existing or potential maintenance orders.

Another research study, also undertaken by the Consortium on Violence Against Women, examined how magistrates interpreted section 7 of the act. The report again revealed confusion on the part of magistrates and it appears that many magistrates would only order an eviction at the stage when a final protection order is granted. Many would also only order a temporary eviction, so as to give the parties time to agree on living conditions. The report indicated that "Magistrates were cautious about granting restrictive conditions prohibiting respondents from entering areas surrounding the home and other 'common' sites which both the respondent and the complainant frequented".

Eviction orders granted in terms of the Domestic Violence Act are potentially a useful mechanism to protect women's rights to housing in the immediate aftermath of an incident of violence. They are however limited in the long term as they cannot be used to permanently deprive a perpetrator of his property or any part thereof. It is not however clear how occupation and possession of a property over which an eviction order is granted will be resolved. In cases where divorce proceedings are instituted and finalised, this will serve as a vehicle to determine who maintains possession and occupation, as well as ownership of the property. In cases where the parties elect to remain married, or where they are not married, it would appear that parties will have to negotiate this.

It is clear from the research cited above that magistrates are often unsure on how to interpret the provisions of the act, including those dealing with evictions. It is recommended that guidelines be developed that assist magistrates to understand how to interpret the act and also ensure standardization within the courts.

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