Proposals for the Reform of the Law of Marriage in Botswana - Some Observations

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Introduction

Dualism of laws has bedevilled the reform of laws in post independence Africa. Attempts have been made especially in the area of personal laws to 'marry', as far as practicable, the indigenous laws with those imposed by the colonial government with varying degrees of success.[1] The difficulty has always been how to draw a balance between traditional rules and social change in order to make the resultant law to reflect the social reality. The Botswana Law Reform Committee in its recent report to Parliament[2] has made some proposals towards achieving this seemingly impossible goal in the area of marriage laws and it is intended to examine in this paper how feasible the proposals will be towards this end.

Background to the Proposals

The Law Reform Committee, unlike its counterparts in other Commonwealth countries, is one of the nine select committees of the National Assembly[3] appointed for the duration of the life of Parliament (usually five years). It is entrusted with the duty of reviewing legislation passed by the National Assembly and may receive and consider suggestions from the Attorney-General and the general public on possible changes in the operative laws of the country or for the enactment of new ones. It is in furtherance of this duty that the Committee undertook an extensive tour of the country in 1986 to seek the views of Batswana[4] and to consult with chiefs and interest groups on five specific legislation, one of which was the Marriage Act and its relationship with customary laws.[5] The Committee held Kgotla[6] meetings and took oral depositions from individuals and interested groups.

At the end of the exercise, the Committee came to the following conclusion:

> "The public generally agreed that the customary law and the Marriage Act should be consolidated into one statute incorporating the best of both laws. It is also the general view that a man be allowed to marry a second wife if the first one is incurably ill or infertile".

Despite this general consensus of public opinion to integrate the laws, the committee rejected integration and opted for the elevation of the customary law to a statutory status. The Committee gave the following reasons:

1. "The current marriage Act is monogamous and if it is merged with the customary law which is potentially polygamous, this would create a distortion on the former and not an amendment as was envisaged,
2. Because the major characteristics of the current Marriage Act is

monogamous, introducing an element of polygamy to it would be virtually repealing it,

3. If we amend the Marriage Act and introduce a provision for polygamy on grounds of infertility and illness, this would undermine existing monogamous marriages,
4. In essence, the two are irreconcilable and the only alternative was to maintain them both and give the customary laws statutory status."[7]

These reasons, with respect, are weak and portray a desire to maintain the status quo and do not seriously address the general desire to have one law of marriage. Perhaps it may be said that the Committee was partly influenced by the overwhelming support for statutory recognition of polygamy and partly by a desire to satisfy christian opinion.[8] In consonance with the above reasons, the Committee recommended some general proposals which should form the basis of a Customary Law Marriage Bill and it is to these that attention will now be focused.

The Proposals

1. All customary law marriages should with effect from a given date be certified. Any marriage without a certification would not be considered as valid;
2. Marriages under this law should be consummated[9] by customary courts of record which should issue certificates;
3. A fee is to be charged for the certificates along the same lines as marriages under the Marriage Act;
4. There should be a central customary marriage register with enough space for a number of wives that may be married to one man for those who wish to practice polygamy;
5. There should be a limit of not more than four wives that may be married by any one man;

6. It shall be deemed that marriages under Customary law Marriage Act are in community of property;
7. Those already married under customary law have the option to acquire certificates under the new Act;
8. That customary courts of record have the powers to grant divorce and the customary Court of Appeal to handle appeal of such cases;
9. Previous customary marriages should be entitled to register all their marriages under the new Act.[10]

These proposals are in themselves not revolutionary. They only provide a comprehensive record of customary marriage transactions. The value of such documentary record cannot be over emphasised[11] as it obviates the need for such marriages to be proved by parol evidence as is presently the case where its celebration is being disputed or called into question. The lack of a documentary record has always caused problems for spouses when the need arises for them to proof they are lawfully married.[12] If ever the National Assembly comes round to enact the proposals into law, it will help to solve this problem.

Observations

A problem associated with non-registration of a customary marriage, as envisaged by proposal 1 above, is the legal effect of such non-registration. The proposal states that any marriage without a certificate will be considered invalid. The certificate will be issued after the marriage has been consummated (sic.) in the customary court. The question that may be asked is will the non-celebration of the marriage in a customary court render it invalid although the parties may have complied with all the requirements stipulated by the relevant customary law? Or will a non-registration of a marriage already existing before the enactment of the Act make it invalid? It seems to be the view that a customary marriage will only be valid under the proposed Act if

it is celebrated in a customary court of record or registered in the same. This will seem to impose an additional requirement on those already stipulated by customary law. Also, what will be the legal status of marriages which under proposals 7 and 8, the parties have an option to register under the proposed Act? Would non-registration render them void or voidable? It is submitted that in the event of non-registration of such marriages, they should be voidable bearing in mind legal consequence of such designation and the fact that they were already valid under the pre-existing customary law.

The next observation that may be made is that the limitation proposed to be placed on the number of wives that a man can register will prove unworkable. It must be conceded though that the rationale behind this particular proposal seems to be to give legal recognition to all the wives and this is commendable. However, will this limitation prevent a man from contracting other relationships outside those registered? And if so, what will be the legal status of those relationships. The probable answer is no, for this will not prevent the situation found to exist on a wide scale by the Committee whereby relations which have the semblance of marriage but lacked the legal ingredients of either customary law or statutory law are prevalent. The proposal will not accord legal recognition to these. Plurality of wives is a question of personal choice and should be left to the individual to register as many wives as his economic circumstances will allow him.

The presumption in favour of community property is unfortunate for this does not accord with Tswana custom under which the husband is the dominant figure in the marriage and there is no community of property.[13] Under Tswana customary law, any property a woman possesses at the time of her marriage or acquires during the subsistence of the marriage, is never looked upon as part of her husband's estate but as her individual property in which she has a full right and say in its disposal.[14] Under the concept of community property as being proposed, the spouses become joint

owners of the common estate in equal undivided shares under the control of the husband. The division of the estate will generally be done on the termination of the marriage by death or dissolution by which time the husband may have dissipated the estate and there will be nothing left to divide.[15] This, it is submitted, will be detrimental to the wife and may leave her destitute after years of perhaps contributing to the joint estate. True the concept of community property can be excluded by an ante-nuptial agreement[16] but when this is not done either through ignorance or inadvertence, the presumption in favour of community property may create hardship. Moreso in a situation where the bulk of the people who may be affected by the proposal may be illiterate,[17] it will be more appropriate to give a wide discretion to the customary courts in the event of the marriage coming to an end, to arrange the financial and proprietary affairs of the spouses as best as they can taking into account such factors as the contribution of the spouses to the establishment of the estate directly or in kind, the interest of other wives, if any, and any peculiar relief recognised by the relevant customary law. The very nature of customary marriage, namely, it being potentially polygamous, makes the operation of the concept in the customary realm difficult and unrealistic. It erroneously presupposes that the marriage will be and remain de facto monogamous.

The proposals, as submitted to the National Assembly, will serve only a limited purpose if enacted into law. It will only elevate customary marriages into the statutory realm without any serious attempt at changing the nature of such marriages apart from the additional requirement that it must be celebrated in a customary court in order to make it valid. It is submitted that a good opportunity was lost by the Committee in not integrating the laws of marriage in Botswana. The reasons given for not opting to recommend an integrated law were, with respect, excuses for not coming to grips with the reality of the prevailing situation and take the bold, albeit difficult, decision to integrate the laws of marriage. It was done in Tanzania, and there is no reason to think that with informed thinking and a comprehensive rethink of the current situation

it cannot be achieved in Botswana.[18]

Conclusion

One could sympathise with the Committee in that it lacked the necessary expertise and support staff to undertake such an important task as set out above. This calls into question the whole regime of law reform in Botswana. The Committee as earlier pointed out, is a Parliamentary committee, and it is difficult to see how its members, with their other parliamentary commitments, can do an effective job of reforming the laws of Botswana. As has been pointed out by a learned writer,[19] "From the point of view of a disciplined law reform this body shows serious short-comings, so much so that it may well prove to be an obstacle rather than an aid" to law reform. This criticism can only be met by the establishment of a Law Reform Committee or Commission, backed by statute and answerable to Parliament. In the event of this measure being taken in the near future, the question of the co-existence of statutory and customary law marriages can be re-examined and a more thorough and comprehensive job done about their possible integration. This will further harmonious social relationship and it is hoped that this will be done sooner rather than later.

NOTES

1. See for example, Tanzania's Law of Marriage Act 1971 (Act No.5 of 1971), Kenya's Commission on the Law of Marriage and Divorce 1968, Ghana Government's White Paper on Marriage, Divorce and Inheritance 1961 and Nigerian Law Reform Commission's Report No.2 of 1981.

2. The Report was submitted to Parliament on the 8th of March 1989 and covered the period June - December 1986.

3. For example in Ghana and Nigeria the Law Reform Committee/Commission are statutory bodies independent of the Legislature.

4. Citizens of Botswana are called by that name; the singular form of which is Motswana.

5. The other laws were: The law of Inheritance; The Citizenship Act; The Constitution; and The Electoral Act.

6. Tribal gathering called by the Chief.

7. See pp.3 - 4 of the Report.

8. Some 5,462 people voted for statutory recognition of polygamy whilst 2,560 voted for upholding monogamy at the various Kgotla meetings held by the Committee around the Country.

9. The Committee by the use of this word presumably meant solemnise as consummation of a marriage in law takes place after its celebration when the parties have their first sexual intercourse. See Dredge v. Dredge (1947) 1 All E.R. 29.

10. See pp.4 - 5 of the Report.

11. See E.K. Quansah, "Updating Family Law: Recent Developments in Ghana" (1987) 36 I.C.L.Q. 389 at 394.

12. See Sowa v. Sowa (1960) 3 All E.R. 196. 199 n.4 and Ohochuku v. Ohuchuku (1960) 1 All E.R. 253. It seems some Chiefs (e.g. Batlokwa) issue marriage certificates but this is without statutory authority.

13. The marriage remains valid until one of the parties takes steps to annul it.

14. See Shapera, A Handbook of Tswana, Law, and Custom (Frank Cass, London) 1984 pp.150 - 153.

15. See Generally, Hahlo, The South African Law of Husband and Wife (Juta, Cape Town) 4th Ed. 1975 pp.213 - 256.

16. See the Antenuptial Contracts Act (Cap 29:02) and S.3 of Married Persons Property Act 1971.

17. There is no Completely Reliable Figure for the Adult Literacy Rate in Botswana but it is Known that Nearly Half of the Population over 20 Years of Age Have Never Attended School. (See Education in Botswana - A Profile; A British Council Publication, March 1989).

18. See The Law of Marriage Act op. cit.

19. Saunders, "Ten Years of the Botswana Matrimonial Causes Act" (1982) J.A.L. Vol. 26 163.