

A Patchwork of Marriages: The Legal Relevance of Marriage in a Plural Legal System

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Abstract

Like other former colonies, South Africa has a plural family law system, which has historically recognized the polygynous marriages practiced by indigenous African people. However, recognising these marriages by way of legal pluralism does not afford them equal status with monogamous Judaeo-Christian marriage, nor does it ensure gender equality within families. Instead, the interaction between the colonial and apartheid socio-economic oppression of black people on the one hand, and legal pluralism on the other hand, produces a highly complex family law system, best described as 'a patchwork of patriarchies.' This paper argues for a move away from conjugality as the basis of family law in order to recognize kinship relationships which have been central to African family practices and which have assisted many families to weather colonial and white domination. This move away from conjugality would also acknowledge the decreasing incidence of marriage and nuclear families in contemporary South Africa and would shift the focus of legal regulation to protecting socially valuable relationships, rather than protecting marriage as an institution.

Key words

Pluralism; polygamy; conjugality; racial discrimination; gender discrimination

Resumen

Al igual que otras antiguas colonias, Sudáfrica tiene un sistema de derecho de familia plural, que ha reconocido históricamente los matrimonios en poliginia practicados por personas indígenas africanas. Sin embargo, el reconocimiento de estos matrimonios mediante pluralismo jurídico no les garantiza el mismo estatus que el matrimonio monogámico judeocristiano, ni garantiza la igualdad de género dentro de las familias. Al contrario, la interacción entre la opresión socioeconómica colonial y el apartheid a las personas negras por un lado, y el pluralismo jurídico por otro, produce un sistema de derecho de familia muy complejo, que se puede describir mejor como "un mosaico de patriarcados". Este artículo defiende un alejamiento de la conjugalidad como base del derecho de familia, para reconocer relaciones de parentesco que han sido centrales en las prácticas familiares africanas y que han ayudado a muchas familias

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a sobrellevar la dominación colonial blanca. Este alejamiento de la conjugalidad también reconocería la disminución de la incidencia del matrimonio y las familias nucleares en la Sudáfrica contemporánea y cambiaría el enfoque de la regulación jurídica para proteger las relaciones socialmente valiosas, en lugar de proteger el matrimonio como institución.

Palabras clave

Pluralismo; poligamia; conjugalidad; discriminación racial; discriminación de género

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1. Introduction: Re-thinking marriage in the South African context

This article occupies a somewhat unique position within this collection of papers on the theme of radically re-thinking marriage. Following upon the legalisation of same-sex marriage in the North-American and many Western-European jurisdictions, the focus of many progressive engagements with families and family law has shifted towards multiple-spousal marriages, both polygynous and the emerging issue of polyamorous families. Suzanne Lenon (2016), Samia Bano (personal communication, 2016)¹ and Cindy Schoepner's (personal communication, 2016)² papers deal with the context of religiously sanctioned polygyny, while Christian Klesse's (2016) paper explored the possibility of secular, multiple-gender polygamous families.³ As Margaret Denike (personal communication, 2016)⁴ demonstrates, the spectre of polygamous marriage is regarded as deeply unsettling in many jurisdictions, in contrast with monogamous marriage which is held up as the hallmark of civilised societies. Chief amongst the objections lodged against legal recognition of polygynous marriages is its inevitable association with gender inequality and the exploitation of women and children (Lenon 2016). In fact, as Bano points out, in Britain women are regarded as the victims of Islamic marriages, while the legal and social forms of oppression within monogamous marriage are(?) often denied or glossed over.

South Africa is differently situated in these debates because, apart from being the first country expressly to prohibit discrimination on the basis of sexual discrimination in its constitution, it was also the first outside Europe and North America to give full legal recognition to same-sex marriage – after Canada and Spain, but before other jurisdictions in this collection. More significantly, the great majority of South Africans are black and have been the victims, rather than the beneficiaries, of British and Dutch colonialism. Many indigenous African groups practised polygyny in pre-colonial times and certain forms of polygyny have received legal recognition for a long time. Polygyny is therefore a well-known feature of the South African legal landscape and the legal recognition of polygyny pre-dates the recognition of same-sex marriage. This is not to say that all polygynous marriages have been recognised or that their recognition has been on an equal footing with Judaeo-Christian monogamous marriage. African forms of polygyny have historically been accommodated within a racially-based plural legal system, while the constitutional landscape within which we are currently wrestling with polygyny also contains features which are unknown in other jurisdictions, such as the constitutional prohibition of discrimination on the bases of religion, race, culture and family status.

Legal pluralism is common to former colonies, usually combining rules and systems derived from the colonial powers with those of indigenous groups and sometimes also with other religious or cultural rules as a result of labour immigration in colonial times (Therborn 2004, p. 13, Bennett 2011). Nevertheless, pluralism in family and marriage law may become more globally relevant as a consequence of international migration patterns and the increased acceptance of universal human rights norms. For instance, it may become more difficult for countries to justify non-recognition of marriages which do not comply with existing domestic legal prerequisites because failure to recognise these 'foreign' marriages can adversely affect women and children from such families. Moreover, some scholars argue that legal pluralism is becoming more prevalent worldwide 'as a consequence of a transnationalisation of

¹ S. Bano. "British Muslim Women and the Politics of Polygamy in Britain", personal communication, Oñati, 16 July 2015.

² C. Schoepner. "Rethinking Reynolds: The Possibility of Polygamy Then and Now", personal communication, Oñati, 16 July 2015.

³ I use the term polygyny to refer to marriages to multiple women. Polygamy is the collective term for marriages which have either multiple wives or multiple husbands. The latter situation, known as polyandry, is not common in South Africa.

⁴ M. Denike. "Evolutionary Thought and Anti-Immigrant Sentiment: Affective Politics and the Criminal Ban on Polygamy in Canada" personal communication, Oñati, 16 July 2015.

law and the emergence of new versions of traditional and religious laws' (Benda-Beckmann and Benda-Beckmann 2006, p. 31). Indeed, one of the ways of providing legal recognition to polygynous marriages is by way of legal pluralism within family law. The South African pluralism conundrum therefore raises issues which can be instructive both in former colonies and worldwide.

Another common impulse in this set of papers, and in scholarship about families more generally, is to question the centrality of sexual relations between spouses as a defining feature of both marriage and family status in general. While Jennifer Koshan (2016), Sally Goldfarb (2016) and Ummni Khan (2016) problematize the particular notions of (hetero)sex which characterise traditional marriage models, Nicola Barker's (2016) feminist re-writing of the judgment in *Burden v United Kingdom* examines the potential benefits and disadvantages of awarding legal rights to non-conjugal family members. This theme is also found in Bruce Ryder and Brenda Cossman's (personal communication, 2016)⁵ work on the Law Commission of Canada's Beyond Conjuality project which argues that the legal recognition and protection of relationships need not necessarily be limited to conjugal opposite- or same-sex relationships, but that parties themselves can designate the relationships which they value, whether these relationships are of a conjugal (sexual) nature or based on family ties or friendship.

The second thrust of my article links up with these papers by arguing that mere recognition of different marriage forms is inadequate in the current South African context, where marriage is declining, while alternative household forms are becoming more prevalent. Indeed, what is called for is a more radical, and historically and socially more useful legal movement towards recognising those broader kinship ties which have provided indigenous South Africans with the material support and social resilience to survive the ravages of colonial and apartheid rule.

In keeping with the theme of 're-thinking marriage,' my analysis draws upon earlier work in family law and other disciplines. As a general proposition I extend Fineman's (1995) argument for the abolition of marriage as a legal category by viewing marriage from the perspective of legal pluralism. I contend that in a multicultural but unequal society protecting different forms of marriage necessarily results in a hierarchy which continues to favour the historically material and social privilege afforded to the descendants of the European colonists, while indigenous family concepts continue to be neglected.

The argument that indigenous family concepts are inherently patriarchal and must be reformed to achieve gender equality, which is often the premise for particular forms of legal pluralism, is shown to be a partial truth. Using Bozzolli's (1983) concept of the patchwork of patriarchies, the article shows that subordination of women is not unique to indigenous or religious societies and that the very phenomenon of separate forms of marriage was a technique of colonialist governance rather than an attempt to improve the lot of indigenous women. I argue that dislodging marriage as the central legal concept in family law may be more effective in achieving gender equality and recognising a range of family relationships, especially those kinship relations which continue to be central to African experience.

The next section of the paper provides a sketch of the very complicated plural family law system in South Africa and the degrees to which different polygynous marriages are recognised within this system. The third part draws upon non-legal literature, especially the work of Bozzoli (1983) and Russell (2003a, 2003b), to explore the contours of and reasons for the recognition of African (customary) marriage within the contexts of capitalism, colonialism and apartheid. It attempts to explain the symbolic and material consequences of recognition of customary marriages and illuminates those crucial aspects of customary families which have not been

⁵ B. Cossman and B. Ryder. "Fourteen Years Beyond Beyond Conjuality" personal communication, Oñati, 17 July 2015.

recognised, namely patrilineal kinship structures. The concluding part of the paper argues for the legal recognition of significant relationships, rather than the institutions of monogamous or polygynous marriage and explores different models for giving practical effect to these relationships. I suggest that marriage should be legally decentralised or even abolished as a legal concept, while offering some suggestions for other jurisdictions facing similar issues.

2. South Africa's plural system of family law

As a former Dutch and British colony, South Africa has a pluralistic legal system, manifesting mainly in an enormously complicated network of family law regimes (see generally Bennett 2011, Bonthuys 2014a). Civil marriage, concluded in terms of the Marriage Act and partly derived from Roman-Dutch common law, is the dominant form of marriage and affords the most extensive legal rights to women. It can co-exist with religious marriages if the officiating religious leader has also been appointed as a marriage officer. In practice, mainstream Christian and Jewish marriages are automatically recognised as civil marriages, but in the past Hindu and Muslim people have either concluded only religious marriages, which have limited legal consequences, or entered into civil marriages in addition to the religious ceremonies. Moreover, the potential for polygyny has constituted an additional obstacle to the legal validity of Muslim religious marriages. Legislation regulating and recognising Muslim marriages has been mooted since 2001 (South African Law Reform Commission 2001, 2003), but the legislative process has stalled and instead the courts have gradually extended marriage-like consequences to Muslim marriages on a case-by-case basis (*Ryland, Amod, Khan, Hassam, AM v RM, Hoosain*).

Indigenous African marriages, known as customary marriages, have always received stronger legal recognition than Muslim or Hindu marriages, but until the adoption of the Recognition of Customary Marriages Act in 1998, they were not fully valid and wives had no entitlement to share in property, while also being subject to husbands' legal control. In order to escape these consequences, and also as a marker of 'modern' or Christian identity, African people often entered into civil, rather than customary marriages. However, their civil marriages were usually attended by distinctively African customs, specifically the payment of bridewealth. As a result of the recent Constitutional Court decision in *Gumede*, customary wives now benefit from a general judicial discretion to distribute marital assets equitably upon divorce. Such a general discretion is not available in civil marriages and customary wives are currently in a more advantageous position than civil law wives in this respect. Although polygyny remains possible in customary marriage, the practice is not widespread and recent caselaw (*Mayelane*) has made it more difficult for men to enter into polygynous marriages without the permission of existing wives.

The newest form of marriage is the result of the prohibition, in the Bill of Rights, of discrimination on the basis of sexual orientation. As a result, the Civil Union Act now allows same-sex couples to enter into marriages which have the same consequences as civil marriages. The recognition of same-sex marriages was the culmination of a long process of strategic litigation which resulted in the gradual extension of marriage-like consequences to long term same-sex cohabitation relationships (*National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000, *Langemaat, Satchwell, Du Toit, Du Plessis, J v Dept of Home Affairs, Gory*). Arguably, these rights continue to exist for same-sex cohabitants even after the enactment of the Civil Union Act, with the result that they have considerably stronger legal rights than opposite sex cohabitants in certain respects. On the other hand, a recent line of cases has extended rights to share in partnership assets to opposite sex cohabitants (*Sepheri, Ponelat, Butters, Cloete*). Because these rights were gained as the result of litigation, they do not yet apply to same-sex partners and opposite-sex cohabitants therefore currently have stronger rights to property sharing than same-sex cohabitants.

An overview of the legal rules which apply to different family formations therefore reveals separate, dissimilar and unequal sets of legal rights for different kinds of relationships. Many of these rights have been extended by the courts on a case-by-case basis, with the result that the rights are unevenly distributed. Same-sex cohabitants for instance have stronger rights to certain marriage-like benefits than opposite sex cohabitants and Hindu spouses, while women in customary law have stronger rights to redistribution of property at divorce than wives in civil marriages. Muslim wives in monogamous marriages have stronger rights than wives in polygynous Muslim marriages and both have weaker rights than Muslim spouses who have also concluded civil marriages. These legal differences between various relationship forms are the inevitable result of pluralism in a partly statutory, partly case-based family law system.

Also inevitably, the classification of relationships is central to a system which allocates legal rights to intimate partners according to the category into which their relationship falls. This process of classification is therefore crucial to determine people's legal rights, but it may be difficult and highly contested. For instance, customary marriages should, according to section 3 of the Recognition of Customary Marriages Act, comply with the customary practices within African communities. However, the nature of these practices are not defined by the statute and they vary from one community to the next, leading to numerous disputes about whether or not a particular relationship constitutes a customary marriage or a cohabitation relationship (Motsoatsoa, Womald). Similar problems arise where customary marriages co-exist with civil marriages or where polygynous customary marriages don't comply with the customary requirements (Netshituka, Mayelane).

Bakker's observation, that 'the current system of law regulating intimate relationships is in a state of chaos' (Bakker 2013, p. 118) could therefore be apt. He motivates his criticism by referring to the definition of a chaotic system in the physical sciences, as a system which appears to be totally random and unpredictable, but nevertheless contains some elements of stability and regularity and in which developments on the micro level can in turn influence and change the macro level (Bakker 2013, p. 117-118). This description accurately captures the ad hoc texture of certain of the legal developments in family law. The pluralistic lens through which law has traditionally viewed families and the need to develop legal rules on a case-by-case basis have led the legislature, courts and academics to treat families in a fragmented, compartmentalised manner. In this model macro developments in family law are indeed not driven by strategy or principle, but by individual court decisions about specific forms of marriage or relationships. Legal development of family law as a body of rules is therefore haphazard, piecemeal and sometimes impenetrable. Nevertheless, the constitutional prohibition of discrimination on the grounds of race, religion, culture and marital status provides an impetus towards standardisation, since affording certain rights to particular relationships, but not to others, could constitute discrimination against spouses in other family forms. In this sense, therefore, legal developments related to one form of marriage may affect developments in other forms.

3. The social and legal patchwork of patriarchies

Bakker's chaos model of family law may somewhat overstate the randomness of the law at the expense of recognising the larger patterns or structures which dictate the terms on which the legal regulation of different family forms are premised (Bakker 2013). These underlying patterns and hierarchies are better understood by using Belinda Bozzoli's well-known metaphor of a "patchwork of patriarchies," to which I turn next.

[M]erchant capitalism on its own does not destroy or create uniformity among the systems which it encounters. It results in a "patchwork-quilt" – a system in which forms of patriarchy are sustained, modified and even entrenched in a variety of ways

depending on the internal character of the system in the first instance. (Bozzoli 1983, p. 149).

This metaphor was developed in the context of the debate between feminists in the 1980s, about the relationship between capitalist exploitation of labour and the means of production, on the one hand, and the oppression of women, on the other hand. Bozzoli takes issue both with the Marxist view of gender oppression as merely an aspect or consequence of the more fundamental problem of capitalist exploitation and also with the radical feminist insistence on an all-encompassing concept of patriarchy which affects all women in the same way (Bozzoli 1983). Most interesting, for my purposes, is that Bozzoli investigates the capitalism/patriarchy relationship by way of a historical analysis of the positions occupied by different South African women within their families (Bozzoli 1983). Her argument highlights the different effects of capitalism on these families, showing that gender oppression manifests in different ways for different groups of women.

Bozzoli's article suggests first, a closer attention to the actual conditions of various pre-colonial family formations and second, the concept of domestic struggle. Domestic struggle has both internal elements, in which women contest resources, labour and control with other (often male) family members, and external elements, in which families struggle with externally imposed structures like capitalism, racism and colonialism (Bozzoli 1983, p. 146-147). The different positions which women occupy in the various family formations, as mediated by race, class and culture, and the different priorities and agendas of capitalism in respect of these differently situated women mean that internal and external domestic struggles have different consequences for them, resulting in neither a uniform capitalist exploitation, nor uniform manifestations of patriarchy. Instead we find the patchwork of patriarchies, produced by the contestation between various capitalist agendas, allied with and mediated by other historical axes of privilege and exploitation, such as race, religion and class on the one hand, and the various positions of strength or vulnerability occupied by women within pre-existing cultural and family formations on the other hand.

I find this useful in four respects. First, it is an intersectional theory which gives due consideration not only to culture, religion, gender and race, but recognises the uneven effects of economic exploitation upon differently situated women. Second, the notion of internal and external domestic struggles acknowledges the agency of individual women while also highlighting the structurally constrained positions of groups of similarly situated women. Third, the simultaneous focus on both the material and ideological consequences of capitalist and colonial structures (of which law is one example) foreshadows the 'redistribution' and 'recognition' dimensions of legal regulation as articulated by Nancy Fraser (Fraser and Honneth 2003). Finally, it highlights the historical origins and aims of the different sets of family law rules in the plural legal system and offers a way of explaining their continuous effects upon families and individual women in post-apartheid South Africa.

In the remainder of this paragraph I offer a similarly disaggregated analysis of civil and customary marriages to show the logic underlying the patchwork of South African marriages and its effects on current family formation. Space does not permit an equivalent examination of other marriage forms, but this is available elsewhere (see for instance Alibertyn 2013, Amien 2010, 2013).

Bozzoli remarks of middle class white women that their release from having to perform domestic labour was premised on the exploitation of black female domestic workers (Bozzoli 1983, p. 159-161). The price for becoming 'managers of labour, rather than the performers thereof' was their isolation in the 'purdah-like seclusion of the wealthy suburbs' and their inability to undertake meaningful work in the public sphere, which remained male-dominated (Bozzoli 1983, p. 161).

Apartheid capitalism thus aimed to preserve the reproductive labour of middle class (white) women exclusively for their families, allowing privileged white men and children to benefit from being the sole focus of wives' attention and care. Considerable cultural and religious pressure to assume the identities of mother and wife was brought to bear on middle class women who were taught to see family relationships as the most important goals of a worthy female life. The same social pressures assigned the responsibility for making their marriages work to wives, who had to invest emotionally energy and time in the educational, sporting, career and social achievements of their husbands and children. Added to this was their own and their children's financial dependence on husbands, given that even educated female employees typically earned less than their male counterparts. These dynamics remain true of large numbers of middle class women, some of whom are also now black.

Family law promotes the same agenda in legal terms. On the one hand the religious marriages of mainstream Christians and Jews automatically grant them full legal rights and privileges, thus recognising the social and legal value of these marriages. Women who marry in terms of civil law also have the most generous property (distribution) and status (recognition) entitlements (Fraser and Honneth 2003, p. 8-31) which the law currently bestows on intimate relationships. However, this status and the associated rights come at the price of legal subordination to the husband and the family unit. Historically civil marriage was a sexist institution, incorporating husbands' marital power over their wives and, until relatively recently, allowing a husband to assault and even rape his wife. Husbands had stronger rights to children, even though social and legal expectations required that wives be the primary caretakers - thereby either losing or at least diminishing wives' abilities to earn money outside the home. As divorce became more freely available in the 1970s women's rights to post-divorce maintenance and to share in marital property were gradually reduced. At divorce women seldom receive an adequate share of the relationship property and often end up poorer than their former husbands (Heaton 2005, Bonthuys 2014b). Leaving an unsatisfactory marriage therefore entails the potential loss of their financial privileges. The move away from the maternal preference-doctrine, which favoured mothers as post-divorce custodians of children, and the tendency to regard working women as less adequate mothers means that women also risk losing custody of their children at divorce and they often forego financial benefits in order to retain custody (Bonthuys 1999, 2001). The law on civil marriages therefore simultaneously privileges those women who enter into civil marriages, but also traps them within marriage and punishes those who wish to leave it.

For African women different historical, social, cultural, racial and economic constellations create different problems. The partial recognition of African customary marriages in the colonial and apartheid versions of legal pluralism was not intended to benefit African women or families, but was offered as a quid pro quo for the collaboration of certain male traditional leaders with the colonial powers (Corradi 2010, p. 76, Bennett 2011, p. 1030, 1041, Albertyn 2013, p. 395). It has long been recognised that the particular versions of customary law applied on behalf of the colonial and apartheid state bore little resemblance to actual social practices and systematically favoured traditionalist, patriarchal interests (Bennett 2011, p. 1042). Legal pluralism therefore did not proceed from a benign wish to respect indigenous cultures and to accommodate different family forms, but as a cynical political mechanism to bolster white political and economic hegemony. At the same time as professing to preserve and value African culture through legal pluralism, this culture and its associated family forms were disparaged as a marker of African inferiority which justified the imposition of white rule and its 'civilising' missions. Both because African patriarchy suited this agenda and because it was not truly concerned with African women, the apartheid legal system failed to alleviate the gender inequalities in customary marriages, which persisted until the enactment of the Recognition of Customary Marriage Act in 1998 (Albertyn 2013, p. 393-395).

As a result, African women have ambivalent attitudes towards customary marriage. On the one hand, claims for the preservation of culture by a coalition of white and African patriarchs have been used to subordinate African women, to keep them in rural families and polygynous marriages, to render them responsible for impoverished households and for performing the vast majority of domestic and agricultural work. On the other hand, the customary family remained a bulwark of resistance to colonial, capitalist and apartheid incursions into the lives of indigenous people. Faced with the apartheid legal edifice of migrant labour, influx control and pass laws which aimed to attract poorly paid male workers to the capitalist economy, while forcing them to abandon their families in the impoverished rural areas, extended traditional families and the strength of the women who supported these families were crucial for survival and this strengthened the authority of women within traditional rural families (Bozzoli 1983, p. 162). By the 1940s and 50s when African women started to migrate to the cities in larger numbers, they sometimes entered into marriages of convenience, designed to secure them the rights to live in the urban areas (Posel 2006), or else became the mainstays of new urban family units (Bozzoli 1983, p. 165) – often intergenerational female headed households– which excluded adult men, except as children or relatives.

The effects of apartheid on African families endure. Although the legal exclusion of rural family members from urban areas has been discontinued since the late 1980s, the practical and economic reasons for migrant labour persist and temporary labour migrancy remains a feature of the South African family landscape (Posel 2001, 2010). This means that male and female migrant workers are often separated from rural families and spouses for large parts of the year.

In South Africa, as elsewhere in the world, heterosexual marriage has declined, and more people cohabit or remain unmarried (Posel *et al.* 2011, p. 103-104, Hosegood *et al.* 2009). The median age at first marriage for women is 30 and for men 34 – quite late compared even to developed countries (Statistics South Africa 2012, p. 3). Within this trend, marriage rates for African people are starkly lower than for other population groups. This is probably the consequence of the destabilisation of African families by migrant labour and other apartheid policies (Posel 2006). In addition, the inability to afford increasing amounts of bridewealth may have become an obstacle to marriage by African people in customary marriages (Posel *et al.* 2011). Ever since colonial times, urban and educated African people tended to conclude civil rather than customary marriages in order to access the financial benefits and enhanced status associated with the former. Nevertheless, many people continue to negotiate and pay bridewealth, thus retaining customary elements in their civil marriages. This preference for civil marriage combined with customary features persists, even though customary marriages have been given full legal force by the Recognition of Customary Marriages Act (Albertyn 2013, p. 395).

Even as marriage rates have declined, sexual and familial relationships nevertheless continue outside of marriage. Research on HIV transmission has shown that a significant feature of the South African family landscape is the coexistence of multiple relationships, especially amongst people of African origin (Therborn 2004, Kenyon and Zondo 2011). Married people are often involved in other short- or long-term relationships and many unmarried people have more than one concurrent relationship. The social acceptance of certain multiple relationships in pre-colonial societies, as institutionalised in polygynous marriages (Russell 2003b, p. 159), has been exaggerated by the effects of Apartheid social, spatial and economic structures. Some long-term concurrent relationships are formalised as polygynous customary marriages, but polygyny is still not widely practised (Mbhatha *et al.* 2007, p. 177).

As a result many children are born either in cohabitation relationships, or to unmarried non-cohabiting mothers (Posel and Rudwick 2013, p. 173). In 2008 only 30% of all African children shared a household with their fathers, as compared to 70% of white children (Posel and Rudwick 2013, p. 174). This does not necessarily

mean that children have no relationships with their fathers, since fathers can and do continue to provide financially and emotionally for children even when they do not live with them (Hosegood and Madhavan 2010, p. 259). Although fertility rates have declined amongst all population groups since the 1960s (Moultrie and Timaeus 2003), many households are now also caring for orphans (Hosegood *et al.* 2007). This is in addition to the fact that it has always been relatively common for African children to live with members of their extended families rather than their parents and to move from one household to another, depending on educational and other needs (Russell 2003a, p. 25, Jones 2005, Hunt 2006, Bray and Brandt 2007).

The salient point of this description is that large numbers of South Africans do not marry, or carry on short- and long-term relationships outside of marriage and large numbers of children live in families which don't consist of married biological parents. These trends are demographically slanted, occurring particularly amongst the largest population group – people of African origin. At the same time, the interaction between apartheid policies and capitalism has had a particularly detrimental effect on families in this group. Although marriage remains one important indicator of the existence of intimate relationships between adults and of caring relationships with children, it is by no means the only way in which these relationships are established and, if current trends continue, it may become even less prevalent.

4. Problems of legal pluralism

Our current system has been described by Barker (2011, p. 453) as 'a flawed but supposedly equal plural system of marriage.' Apart from being convoluted and complicated, we can identify three main themes in respect of which the current pluralistic model falls short. The first is the fact that the plural marriage model still excludes a significant number of families and family relationships, many of which had also historically been marginalised by the interaction of apartheid and capitalism. This leads to the second set of problems, which is that the current pluralistic marriage model maintains and perpetuates a hierarchy in which certain family relationships, and thereby certain families, are favoured above others. The third problem is that pluralism presupposes a choice of either one or another form of marriage. This does not accord with practices which meld civil marriage with customary practices like the payment of bridewealth. I will discuss each of these in more detail below.

I have already demonstrated that, by rendering the attainment of family status dependent upon the existence of one or another of the recognised forms of marriage, the South African model of pluralism excludes those relationships which either don't comply with particular marriage requirements, like the customary marriages in which traditional requirements have not been met, or which have not been formalised at all. Although the South African courts have recently adapted the universal partnership contract to award rights to share in partnership property to opposite sex cohabitants, this does not apply to all cohabitants. Moreover, basing familial rights and obligations on contract is problematic for the implicit assumption of equal bargaining power between male and female cohabiting parties, which is seldom accurate. Another large category of excluded families is therefore cohabitation relationships in which there is no clear basis for finding a universal partnership, in particular cohabitation relationships which coexist with civil or customary marriages. Even though such relationships may last for many years and include the raising of children, courts will probably not be eager to award legal rights to share in property on the basis of universal partnerships.

In addition Margo Russell's work suggests that the exclusion of certain families is rooted in a particularly Eurocentric perception of marriage or marriage-like sexual relationships as a precondition for family formation. She contrasts two basic concepts of family:

Black and white South Africans are brought up with two radically different kinship idioms. One is derived from the conjugal system which has predominated in north-

western Europe for at least five hundred years; the other is the consanguinal descent system characteristic of most of Africa...At the heart of the prevailing family tradition amongst white people is the conjugal couple, who are strongly expected to set up their own independent household in which they alone will rear their own dependent children to maturity. The African tradition...is very different. Descent, rather than marriage is the central principle; in Southern Africa, patrilineal or agnatic descent, i.e. descent from father. (Russell 2003a, p. 8)

This Western centrality of conjugality is directly reflected in family law's preoccupation with marriage and marriage-like relationships and the extension of family rights and responsibilities to hitherto excluded families in the democratic era remains premised upon the existence of one of the recognised forms of marriage, or a strong resemblance to marital relationships, as demonstrated by the developments in relation to same-sex relationships, cohabitation and Muslim marriages. In other words, central to both status and contract as foundational principles of family is conjugality – the existence of long-term sexual relationships between the adult partners. Martha Fineman's (1995) critique of conjugality as the defining feature of family law in the United States becomes even more pressing in the South African context where both historical and contemporary alternatives exist and, moreover, have been central to the lives of the majority of its people.

Although patrilineal descent in customary law is linked to customary marriage (Russell 2003a, p. 16), marriage or marriage-like relationships are not absolutely prerequisites for kinship. For instance, patrilineal kinship can be established when a man pays customary 'damages' in respect of an extra-marital child without marrying the mother. This emphasis on kinship has been crucial in ensuring the survival of African families against the combined onslaught of Christianity, capitalism and apartheid. For example, the fact that children always belong to either their paternal or maternal families have enabled both mothers and fathers to undertake migrant labour while children were cared for by members of their extended families (Russell 2003a, p. 25). Although kinship practices have shifted and developed in response to social and economic change, Russell argues that their basis in kinship may have made African families more adept at dealing with new social and economic pressures, than the Eurocentric ideal of the married nuclear family, which is also straining under these same conditions (Russell 2003a p. 38). The continued importance of patrilineal kinship rather than marriage permits a flexible and wide range of contemporary household and family arrangements (Russell 2003b, p. 170, 171). These are adaptations to changing conditions. They are not, according to Russell, gradual changes towards nuclear marital families and, even amongst urbanised African people:

South African black families retain their distinctiveness, which is rooted in a different past and a different set of inherited household practices and shaped by a different experience of history. (Russell 2003b, p. 170)

The point is therefore that the eurocentric focus on marriage as the primary indicator of family status is out of kilter with the priorities and experiences of the majority of South Africans. An obsession with customary marriages, in particular, denies and distorts the broader notions of kinship upon which many African families continue to rely. It does this by focussing on the marital bond between spouses, while failing to take cognisance and give legal effect to other relationships which may be as important in kinship and practical terms, such as the roles of uncles, cousins or extended family members who actually care for children. In saying this, I do not wish to deny the historical and contemporary role of marriage as a paradigm through which kinship is established (Griffiths 1997, p. 216-220), nor do I wish to contradict the ideological power of marriage as the template for the social and legal treatment of all relationships, including extra-marital relationships (Griffiths 1997, p. 224). However, it is clear from the demographic studies that many African people currently do not marry and that kinship bonds are can accommodate a wider range of relationships in addition to or beyond marriage (Russell 2003b, p. 170-171).

The second way in which the current model of pluralism in family law fails is its premise that people will marry in terms of either one or another recognised marital or family category. This dichotomy between civil law, on the one hand, and customary law, on the other is both artificial and fails accurately to reflect the ways in which civil and customary norms influence one another. It also ignores the extent to which people incorporate both civil and customary norms in their lives, either alternating between these two normative systems or adhering to some or other blended version of both. This accords with the academic literature on legal pluralism which rejects the stark separation between different normative orders, pointing out the ways in which they can overlap and mutually transform one another by hybridising or vernacularising (Benda-Beckmann and Benda-Beckmann 2006, p. 19). This blending of civil and customary legal norms in people's lives and in their relationships (Griffiths 1997, p. 204, Benda-Beckmann and Benda-Beckmann 2006, p. 13) is well illustrated by the widespread payment of bridewealth, even when couples conclude civil marriages. Nevertheless the purpose, nature and form of bridewealth have also undergone many changes and cannot be equated with the payment of bridewealth in pre-colonial times (Bennett 2004, p. 223, 230). The result is a new form of marriage, a hybrid between the traditional and the contemporary, between custom and civil law and between kinship and marriage.

At the more official level, a certain level of hybridisation was introduced to customary family law by the Recognition of Customary Marriages Act itself and by the jurisprudence which interprets it. Customary marriage as reflected in the legislation accords neither with pre-colonial customary practices, nor with apartheid-era versions of customary law (Bennett 2011, p. 1056) and contains many elements of civil marriage, including dissolution by a court and the redistributive mechanisms available at divorce (*Gumede v President of the Republic of South Africa* 2009).

Despite this hybridisation, many have argued that the relationship between customary law and civil law is not one of equality (Pieterse 2001). Neither are customary marriages legally equal to civil marriages, despite the assurance in the Recognition of Customary Marriages Act (s 2) that customary marriage 'is for all purposes recognised as a marriage'. The very fact that legal hybridisation primarily entails replacing norms of customary law with civil law norms rather than civil law being infused with customary concepts shows that civil law remains the template for official norms of marriage and that civil norms are the dominant ingredients in the hybrid legal concept (Bonthuys 2002, p. 55).

Barker's observation, made in the context of same sex marriage, therefore also describes a plural legal system which ascribes family status primarily on the basis of various forms of marriage:

Marriage recognition...upholds the existing hierarchies of marriage despite (and even through) the symbolism of recognising the 'outsider' groups. (Barker 2011, p. 459)

Central to debates about legal pluralism in family law is the difficult issue of balancing rights to gender equality on the one hand, with rights to practise particular cultural or religious forms of marriage and family. Viewing the pluralistic South African family law system as a patchwork of interlinking patriarchies highlights certain issues. First, it is clear that the patchwork nature of family law is not the result of benign impulses, but a technique of governing by colonial and apartheid states. Customary family law therefore had inconsistent consequences for African women and their relationship with the institution remains one of ambivalence as reflected in the low marriage rates amongst African people. Second, positing a sharp distinction between customary marriage on the one hand, and civil marriage on the other, is in itself detrimental to African women by requiring them to choose between different aspects of their identities. The long-standing practice of paying bridewealth in combination with civil marriages shows how people combine African cultural elements with civil marriage and this hybrid or modern African identity could be reflected in the law (Bronstein 1998, Van der Meide 1999, p. 112, Bonthuys 2002). Perhaps a different focus

altogether, like a focus on kinship obligations, may rid us of this conundrum and remove the impulse to 'reform' customary marriage to become more and more like western nuclear marriage.

Finally the central unstated assumption in the debate about pluralism is that, while cultural and religious marriages should be reformed in order to meet the requirements of gender equality, civil marriage has already reached that goal and is the template towards which all other forms of marriage should aspire. The concept of a patchwork of patriarchies and a vision of how race, class and gender interact within family law shows, however, that this preoccupation with gender versus culture is a distraction, for patriarchy is alive and well in even the most privileged version of family law. Even civil marriage and the very pluralist patchwork of legal marriage subordinate women in a myriad of different ways, depending upon their class, race and religions. The issue is therefore not one of culture versus gender equality, but unravelling the apparent chaos of the plural system of family law to identify the means and mechanisms by which the various legal forms of marriage interact with historical, economic, social, cultural and religious factors to oppress various groups of women.

5. One universally applicable marriage norm or decentralising marriage in family law?

In critiquing the role of conjugality in American family law, Martha Fineman (2001, p. 244-245) has suggested that:

The concept of marriage, and the assumptions it carries with it, limit the development of family policy...[M]arriage is expected to do a lot of work in our society. Children must be cared for and nurtured, dependency must be addressed, and individual happiness is of general concern. The first question we should be asking is whether the existence of marriage is, in and of itself, essential to accomplishing any of the societal goals or objectives we assign to it.

Cathi Albertyn (2013, p. 386-387) argues that legal debates and contests can function as productive spaces in which norms can be debated and that those very contested processes of legal reform and litigation present opportunities for reconciling the values of religious and cultural diversity with the dictates of substantive gender equality. Within this vision of legal reform as a space for dialogue the need for women within particular religious and cultural groupings to confront and debate sexism within their particular contexts is a compelling consideration, harkening back to An-Na'Im's (1994, p. 170) notion of intra-cultural dialogue. Maintaining plural marriage laws therefore, can afford women within non-dominant cultures and religions the space within which to debate the nature of identity, culture and the meaning of their religious rules in a constitutional framework which also guarantees gender equality (Albertyn 2013).

Another solution, advocated by many academic commentators but not widely supported, is a unified system of family law with a basic set of rules which applies to all marriages and which is premised on gender equality within families (Albertyn 2013, p. 407). It would have to be created by legislation rather than gradual common law development. However, such a statute represents such thorny political territory that government is very unlikely to venture there. We know this from the fact that neither the 1961 Marriage Act nor the 1979 Divorce Act have been re-written to reflect contemporary concerns and the Muslim Marriage Bill is so fraught that it has not yet been adopted, even though it has been in the pipeline since 2001. Legislative inertia in marriage law probably results from the fact that a large majority of people are ideologically, religiously or culturally committed to marriage, even while they abandon the institution in ever larger numbers. Another problem with this solution is that the trend towards cohabitation or short-term relationships rather than marriage means that a growing number of relationships will not necessarily benefit from a

uniform marriage regime. These relationships will therefore probably continue to be governed by contract law, or the law of universal partnerships.

Another useful way to answer Fineman's (2001) question about the effectiveness of focussing on the institution of marriage can be found in Nedelsky's argument that the purpose of legal rights is to order, structure and manipulate human relationships and her proposal that the law should explicitly foreground the kinds of relationships which we wish the law to foster and protect (Nedelsky 1993, p. 14). An analogous question is whether the centrality of marriage in family law either strengthens or weakens those family relationships which people value and which provide nurture and security.

In this thought process, it is helpful to recognise that institutions, like legal rights, may have egalitarian features, but may nevertheless ultimately result in fundamental inequality. Nedelsky (1993, p. 21) uses as example property rights which treat all property owners similarly or equally in certain respects. Nevertheless, at the end of the day the very concept of private property creates and upholds inequality between those who have ownership rights and those who don't. This generates tensions between claims to equality and the inequality created by property rights. The argument can be extended to the institution of marriage, which, like private property, functions as a foundational category of legal organisation and thus of legal inclusion and exclusion. Marriage can be said to be an inherent source of inequality – this is evident from the historical hierarchies between husbands, wives, children and servants or slaves – but it remains true in contemporary times when family status based on marriage is afforded to some relationships, but denied to others. In other words, even were spouses to be treated according to the strictest norms of substantive equality, a legal focus on the institution of marriage would necessarily exclude those people whose relationships are not deemed sufficiently marriage-like to provide them with legal recognition and protection. The current focus on marriage as the touchstone for family status means that relationships are compared and measured, calibrated precisely to judge the extent to which they approximate the ideal of civil marriage. In the South African context of plural, but unequal forms of marriage, the inequality is exacerbated when certain forms of marriage or marriage-like relationships are privileged over others.

Like property rights, however, protecting the institution of marriage does not necessarily have to be a goal in itself; instead family law could protect a wide range of relationships as 'a *means* to the higher values we do treat as constitutional rights – life, liberty and security of the person' (Nedelsky 1993, p. 22). We could then argue that marriage is simply one category through which law can protect certain valuable aspects of relationships – identity, human dignity, security, nurturing, and caring. Moreover, protecting marriage would not be equated with protecting the family, which may require legal recognition of much wider array of relationships. In his analysis of trends in family law systems Dewar (2000, p. 62) observed that the institution of marriage used to function as a convenient way of allocating legal rights and responsibilities to family members. However, the effectiveness of this strategy depended upon the assumption that 'most family life is conducted within marriage' (Dewar 2000, p. 62). In South Africa, as elsewhere, we must acknowledge that this is no longer the case. Specifically, when marriage is at the center of family law, kinship relations, which remain important to the survival and the very identity of a great many people remain legally invisible and are thus devalued. Relational rights recognises that 'our essential humanity is neither possible nor comprehensible without the network of relationships of which it is a part...we are literally constituted by the relationships of which we are a part' (Nedelsky 1993, p. 12).

In family law the question must therefore be how we best foster socially responsible intimate human relationships. Is it by the boundary-drawing exercise which a focus on marriage entails, or by creating a pluralistic hierarchy of marriages and lesser marriage-like relationships – or should we simply look at better ways of fostering socially responsible relationships? Although marriage can do this indirectly, the

current drop in marriage rates indicates that even the real legal privileges associated with marriage has not succeeded in encouraging more people to marry in the face of other circumstances which may be more compelling in their lives.

I want to suggest the possibility of displacing the centrality of marriage as a radical form of pluralism in which the different ways in which families can be established don't determine the rights and duties of family members. They should just be the triggers for the law to recognise the existence of a family relationship and to deal with it equitably and fairly, always applying a notion of substantive gender equality, irrespective of the form of the relationship. In other words, people can enter into family relationships in any manner, but once a relationship of economic, social and familial interdependence is established, the law recognises this relationship and provides certain legal consequences and remedies. The role of the law is therefore protecting vulnerabilities (Fineman 2001, p. 246) arising from a relationship of interdependence on the one hand, and on the other hand ensuring just and fair distribution of the costs and benefits of the relationship, rather than focussing on various forms of marriage. This argument would point to a shift in the legal focus from protecting institutions of monogamous or polygynous marriage towards a wider concern with valuable relationships, including non-conjugal relationships, like kinship.

I must emphasise that I am not arguing that people should be prevented from marrying. Those who want to get married may do so in any form and manner dictated by their culture, religion or personal whims. Where there is a marriage, it would be an indication of an intimate relationship. However, the state would have no interest in regulating the conditions and requirements for a valid marriage. Leckey (2006, p. 13) points to the examples of burial and baptism which the modern Canadian state has replaced with the legal recording of birth and death, despite their earlier legal significance. Now, therefore, these religious rituals exist outside of the legal framework. Various religious and cultural conceptions of marriage can therefore coexist with the broader legal concept of family relationships rather than determining the ambit of legal protection.

The potential for radical pluralism lies in the possibility that the law would no longer recognise a set of marriages – all of which are modelled on the western Judaeo-Christian template – which set the boundaries for legal family responsibilities, but it would focus instead on recognising and protecting a wider set of existing familial relationships, including kinship obligations. In other words, rather than being written out of family law by the focus on marriage, kinship relationships, which remain important to the lives of many people, could receive legal recognition as family obligations. This would effectively move the ambit of legal regulation from 'marriage law,' to 'family law.'

There are already some precedents for disposing of marriage as a factor determining whether or not legal relief should be available within families, particularly in relation to parental rights and domestic violence. These legal rules focus more on the nature of the relationship than on whether or not there is a marriage. So, if children need financial support, the nature of their parents' relationship does not determine their entitlement to legal relief, nor the nature of the available relief. In the case of domestic violence, legal remedies are available if the parties are in a domestic relationship, which is extremely widely defined to include people who share a household, but don't have a sexual tie.

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