

Understanding Some Aspects of the Vhavenda Customary Law Marriage Practices: A Descriptive Approach

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ABSTRACT Marriage is the ideal way that most societies approve for starting a family. As the family is a critical part of the society, there is a need to protect it. The society achieves this by protecting the marriage institution. Different scholars have approached the institution of marriage from different perspectives including amongst others, the Western cultural perspective and the African cultural perspective. In the Western culture marriage is viewed as an event that primarily concerns the bride and groom only, while in the African culture it is viewed as communal and primarily concerns two families. Customary law practices of the Vhavenda community also guard the institution of the family. The qualitative methodology was used in this study. Purposive sampling was used to select a sample of 10 senior traditional leaders from within the Vhavenda community who were then subjected to interviews.

INTRODUCTION

South Africa is a multicultural society consisting of more than 11 ethnic groups, some of which are the Tswana, Swazi, Tsonga, Ndebele, Xhosa, Zulu, Pedi, Sotho and Venda. Each of these ethnic groups had its own customary laws which regulated its customary marriages. After the attainment of democracy in South Africa, and with the Constitution being the supreme law of the country, all the customary marriage laws of the different ethnic groups, including the Vhavenda ethnic group, had to be regulated under one law. The new law, called the Recognition of Customary Marriages Act (Act 120 of 1998), commonly known as the RCMA, was passed by the Parliament in 1998 and signed by the former president Nelson Mandela. The new law was to give effect to the equality clause as per section 9 of the Constitution. This paper seeks to document some of the valuable customary marriage practices of the Vhavenda community before the enactment of the RCMA.

Literature Review

Throughout the world, marriage is an institution for all societies, regardless of religious conviction. The practice differs from one culture to the other (Bennett 2008: 188). The concept of marriage has been defined differently by

scholars. According to Soanes and Stevenson (2009), marriage is “the formal union of a man and a woman, typically as recognized by law, by which they become husband and wife.”

This is the definition that appears to be adopted by Horton and Hunt (1989: 234) who define marriage as the formal union of a man and a woman in which they become husband and wife.

Strong (2008: 8) on the other hand, defines marriage as ‘... a legally recognized union between two people, a man and a woman, in which they are united sexually, cooperate economically and may give birth to, or adopt, or bear children.’

Strong sees marriage as an event which primarily concerns a man and a woman who agree to form a union and as something that the individuals can do by themselves. He further indicates that the woman’s child-bearing capacity is not an issue. If a couple cannot biologically bear children, they may decide to live without them or adopt.

According to Heaton (2007: 15), common law defines marriage in South Africa as ‘the legally recognized life-long voluntary union between one man and one woman to the exclusion of other persons’.

The above definition of marriage is similar to the one given by Herbst and du Plessis (2008: 3) who define marriage as a ‘voluntary institution between one man and one woman to the exclu-

sion of anyone else'. It means that marriage is for two individuals of opposite sex who are committed to each other for as long as they both live. Thus, 'until death do them apart'. Upon the death of one spouse, the remaining spouse is free to remarry. This union does not include or involve any other person: even family members or friends are excluded from this marriage.

From the foregoing definitions, marriage is in essence, an institution which is decided, organized and executed by two individuals of opposite sex with their full consent, without the involvement of any other person. These definitions conceive marriage as a monogamous union. All the above definitions are derived from the conception of marriage from the Western ideology, mostly by European scholars and judges.

What marriage is in Africa is however at variance with what it is in Europe. In South African traditional customary law, marriage is not just an affair between two individuals, but also an alliance between two families. Thus, marriage in Africa is between two families (Bradfield 2013: 7). Marriage is a communal institution. All members of the family, including parents, grandparents, children, in-laws, brothers, sisters, nephews, cousins as well as the ancestors, become involved in the marriage of one of their members. The African society regards marriage as a sacred institution that involves the welcoming of a new member into the clan. It has much say on how one enters and exits the marriage institution. By virtue of marriage being a communal institution, Africans put the needs and desires of the family above those of the individual to the extent where they deem it fit to arrange marriage partners for their children (Oyeka 2015: 3).

The Vhavenda community of Vhembe District, a South African cultural group, has a peculiar cultural marriage practice, aspects of which some are discussed below.

METHODOLOGY

In this study the researcher used the qualitative method to collect data. He employed purposive sampling to select a sample of 10 senior traditional leaders from within the Vhavenda community. Senior traditional leaders are considered by their communities as the custodians of customs. The sampled respondents were then subjected to the process of interviews. Interview questions consisted of closed-ended questions and open-ended questions, all of which were developed by the researcher. On the day of

the interview the researcher read out each question to each respondent. Where necessary, the researcher probed the respondents to respond towards the expected objective of the study. This process was followed by the analysis and interpretation of the qualitative data. The findings revealed amongst others that with the customary law practices of the Vhavenda community, divorce was an extreme option.

OBSERVATIONS AND DISCUSSION

Under Vhavenda customary law, marriage is not just an affair between two individuals, but also an alliance between two families. It is regarded as a sacred institution because it involves the welcoming of a new member into the clan. For that reason, it cannot be left in the hands of an individual to decide; that is, an individual may not choose a partner on his or her own for marriage.

Customary law marriage must comply with certain requirements. These requirements include capacity, consent, and bride price ceremony. This paper now proceeds to discuss these requirements one by one.

Capacity

For any parties to enter into marriage under customary law they must have the capacity to do so. Capacity has two requirements. The first is the capacity to marry or to get married, and the second is the capacity to marry each other. Regarding the first one, there is no stipulated age at the attainment of which somebody would have the capacity to marry. For a man, he must be at least capable of taking care of a family, while a woman should be capable of bearing children and undertaking domestic chores. The Vhavenda prepare their children for marriage through the traditional initiation schools that are intended to make them 'mature' (Spencer 1985: 64). They include *vhusha* (puberty rites for girls), *tshikanda* (secret initiation rites for girls), and *domba* (group rites as preliminary to marriage for girls). *Vhusha* is the first phase in the girls' initiation. Girls should attend *vhusha* immediately after their first menstruation. At *vhusha*, girls are introduced to marriage related laws which are meant to prepare them for their future roles as wives and mothers. *Tshikanda* is the second phase in the girls' initiation. At

tshikanda, considerable time is spent practising marriage-related laws which were introduced during the *vhusha* phase. *Domba* is the third and final phase in the girls' initiation. It is the final qualification for Vhavenda customary law marriage. This phase is characterised by a special dance which symbolizes the mystical act of sexual communion, conception, the growth of the foetus as well as the child-birth. According to Stayt (1931: 112), *domba* 'stresses the value of institutionalized motherhood, with all the checks and balances necessary to maintain the stability of the social system. It is the dramatic final stage'.

Regarding the second requirement, the people who propose to marry each other must have the capacity to marry each other. People would be said not to have the capacity to marry each other if, for example, they are close relatives or if there exists a feud between the families. Regarding the capacity to marry each other, Herbst and du Plessis (2008: 10) state that 'each community has their own rules pertaining to the prohibited degrees of relationship'. The Vhavenda do not allow blood relations to marry one another. If there exists an enmity between the two families, the two families will not ordinarily allow their children to marry each other. When circumstances arise when they have to marry each other, it would take the form of reuniting the two families which have problems.

Consent

Consent is another requirement for a valid Vhavenda customary marriage. In terms of the customary law, the validity of a marriage is not based on the free and voluntary consent of the partners but on the arrangement of their families. Often this would be the consent of the parents, particularly the fathers of the prospective spouses. A customary marriage will be invalid if the consent of the parents is not sought or obtained. Parents would choose and arrange marriages for their children without seeking their consent (Bennett 2008: 199). This means that family consent is generally required for a customary marriage to be valid. As marriage proposals in many African communities, including the Vhavenda, are initiated by the groom's family, the consent of at least the bride's father is essential for a customary marriage to be valid (Olivier 1995: 19). The consent of the girl does not matter at all.

Girls are sometimes viewed as a source of wealth. Thus, they could be married off at an early age so that money can be obtained. This goes to an extent that when the husband dies, there are instances when she would be forced to enter into a marriage with a male relative of the husband. This suggests that she enters into another marriage not by choice, but by the husband's family arrangement, since she belongs to them and has since been "paid" for.

Without the parents' consent however, a customary marriage would be invalid. While consent is generally a requirement, it is biased as against women.

Bride Price

There are diverse and divergent opinions regarding the real meaning and function of bride price. Bride price is a term which is used to denote the property in cash or in kind, 'which a prospective husband or head of the groom's family undertakes to give to the head of the prospective wife's family in consideration of a customary marriage' (Government Gazette No. 120 1998).

Bennett (2008: 220) defines bride price as a term used to denote a transfer of property, preferably livestock (sheep, goats, cattle) by a bridegroom's family to the bride's family as part of the process of constituting a marriage. In other words, bride price is a marriage payment that the groom has to pay in order to marry the bride. According to Higgins et al. (2006: 19), bride price is a widely-practiced custom across South African ethnic groups, including the Vhavenda, and enjoys widespread support. As an institution, bride price is 'central to the African conception of marriage' (Higgins et al. 2006: 23). This means that bride price is an integral part of a customary marriage through which legal customary marriages are established. According to Nhlapo (1998), 'bride price is the language that the ancestors understand and bless'. This means that with the payment of bride price comes the blessing of the marriage from the ancestors.

Vhavenda have peculiar practices pertaining to the payment and nature of bride price, which should be taken into account in disputes pertaining to customary marriages. Bride price is a requirement which is negotiated by the two families (the bride's and the groom's) when they arrange and organize marriages for their children.

When negotiating, the two teams need to agree on the bride price that the groom has to “pay” in order to marry the bride.

In disputes pertaining to customary marriage, the two families (the bride’s and the groom’s) and traditional leadership are compelled to intervene if the marriage negotiations had taken place and the bride price has been paid, not necessarily in full, by the groom’s family, in consideration of a customary marriage. If the above has not taken place, the union thereof is not considered as a valid customary marriage and when disputes arise, there is no obligation on the side of the families to address them since there is nothing that binds their relationship.

Among the Vhavenda, bride price does not constitute a purchase and sale transaction, where the husband can purchase and sell the wife, like when he purchases and sells property (Kunene 1995). It is not to be equated to a dowry system that exists in other societies (Radcliffe-Brown and Forde 1975: 46). Traditionally, Vhavenda’s wealth is determined by the number of cattle they own. Cattle are a highly treasured asset and they serve as the currency in many customary social relations, hence cattle are mostly used for the payment of bride price.

It is the duty of the bridegroom’s father to pay the bride price for his son’s marriage. On the other hand, it is the duty of the bride’s father to receive the bride price payment (Bennett 2008: 228). Mothers have a muted role in the whole process of Vhavenda customary law marriages. Since the payment of bride price validates a customary marriage, the following indicate the importance of the bride price:

It Is a Token of Appreciation to the In-laws

The bride price is considered as a gesture of gratitude on the part of the groom’s family to the bride’s parents for bearing and rearing a wife for them. Higgins et al. (2006: 23), giving a typical contemporary explanation of the importance of bride price, state that it ‘involves compensating the bride’s family for the loss of a daughter reflecting in large part the expenditure on her upbringing...’

It Builds and Binds the Relationships between Two Families

The bride price is a unifying force which builds, binds and cements the relationship between the bride’s and groom’s families. It is a

means of keeping the relations between the two families alive and stronger. This means that without the bride price, the marriage relationship between the families is loosely held. In other words, the union of the bride and the groom is in terms of customary marriage not recognized as a marriage by their respective families.

It Gives the Groom’s Family Rights Over Children

The primary importance of the payment of bride price is to transfer the reproductive capacity of the bride to the family of the bridegroom. This means that the bride price entitles the groom and his family to claim rights to any children born to his wife during marriage. According to Bennett (2008: 285), “if obligations under agreement have been fulfilled, the husband and his family are entitled to any children born to the wife”. This means that in case of the husband’s death, the children’s custody is with the husband’s family if the bride price obligations have been met.

It Gives the Father the Legal Custody of the Children

The bride price gives the father an absolute legal right to the custody of children in case of divorce. According to Radcliff-Brown and Forde (1975: 80), the “possession of children is determined by the marriage payment”. This means that even if the children’s best interest would better be achieved if custody is granted to their mother or any member of the mother’s family, custody of the children has to be granted to the father because of the bride price.

It Gives the Husband’s Family Rights Over the Wife

Where the bride price obligations have been fulfilled, the death of the husband does not terminate a customary marriage. The husband’s family ordinarily still has rights over the wife. This means that the widow continues to be a wife in her late husband’s family. She is supposed to marry a brother of her late husband because of the payment of bride price (Mbiti 1990: 140). The husband’s family must provide a brother to the widow.

It Discourages Divorce

Mohamed (1998: 54) states that “if a wife seeks a divorce, her family is theoretically obliged

to return bride price..." The return of the bride price upon divorce by the wife's family to the husband's family, of course subject to who between the husband and the wife is guilty, makes it hard for wives to exit customary marriages. Regarding bride price repayment, Higgins et al (2006: 24) state that 'the threat of her family having to repay bride price may discourage an unhappy or abused wife from leaving a marriage'. This means that a wife in a customary marriage may be discouraged from leaving a marriage because her natal family would not be able to make bride price repayments. If she attempts to leave the customary marriage, and her family is unable to repay the bride price, the family may force her to go back to her husband without even taking into consideration the circumstances that led to her departure (Herbst and du Plessis 2008: 13).

CONCLUSION

In terms of the Vhavenda customary law, all matters related to marriage are dealt with entirely by the families concerned: the family of the bride and the family of the groom. The law regulates the procedure of entering into and exiting a customary marriage. Under this law, it is relatively hard to exit a customary marriage. Mechanisms are in place to ensure that marriage is stable and prevent divorce. Such mechanisms promote negotiation, mediation, collaborative law, arbitration as well as conciliation.

RECOMMENDATIONS

This paper recommends that customary law marriage practices that are not in conflict with the provisions of The Constitution and the Human Rights in particular should be revived by the communities. The Department of Traditional Affairs should find the means to fund the revival of those valuable customary practices. Traditional leaders, as custodians of customs, should

find a way to restore the good cultural practices in their communities. Parliament should pass a law that regulates the diverse cultural practices of South African ethnic groups.

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