Submission in response to the Recognition of Customary Marriages Amendment Bill, 2019

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For attention: Mr Vhonani Ramaano
Per email: vramaano@parliament.gov.za
Portfolio Committee: Justice and Correctional Services

Please find the written submission of the Helen Suzman Foundation on the Recognition of Customary Marriages Amendment Bill, 2019

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1. Introduction

The Helen Suzman Foundation ("HSF") welcomes the opportunity to make submissions to the Portfolio Committee on Justice and Correctional Services ("the Committee") on the Recognition of Customary Marriages Amendment Bill, 2019 ("the Bill").

The HSF is a non-governmental organisation whose main objective is to promote and defend the values of our constitutional democracy in South Africa, with a focus on the rule of law, transparency and accountability.

2. Background to the Bill

The HSF recognises and commends the work of this Committee in seeking to regulate the proprietary consequences of customary marriages entered into before the commencement of the Customary Marriages Act, 1998 ("the Act") to bring the provisions of the Act in line with the Order in the judgment of *Ramuhovhi and Others v President of the Republic of South Africa*[1] (*Ramuhovhi*).

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

Prior to *Ramuhovhi,* this section was declared invalid in the case of *Gumede v President of the RSA*[2] *(Gumede)* to the extent that it concerned monogamous marriages entered into before the commencement of the Act – the effect of this judgment was the protection of spouses in monogamous customary marriages entered into before the commencement of the Act by subjecting these marriages to the proprietary regime of community in property.

Such protection, however, did not extend to polygamous customary marriages entered into before the Act. These marriages were to be governed by customary law. This omission was particularly pernicious as customary law includes certain rules which preclude women from owning or holding rights in property and managing and controlling property equally with their husbands. The *Ramuhovhi* decision addresses this omission through the Order of the judgment, and the directive to Parliament to remedy the Act to ensure that all customary marriages – whether monogamous or polygamous, or pre- or post-Act – must be regulated by the same proprietary consequences.

The HSF commends this Committee for working to ensure that the spirit of the two judgments of *Gumede* and *Ramuhovhi* are condensed into the Act.

[1] [2017] ZACC 41
[2] 2009(2) SA 152 (CC)

3. Substantive comments: definitions of categories of property

The Bill refers to four categories of property. These are: "marital property", "house property", "family property", and "personal property".

The proposed section 2(1)(d) of the Bill, describes these categories as having "the meaning ascribed to them in customary law."

At the legislative level this "description" is vague and lacks certainty and clarity. This vagueness is compounded by the existent definition of customary law. "**Customary law**" is defined in the Act as "**the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples**;".

Customs and usages among traditional communities lack uniformity – there is no way to determine with any degree of certainty how these categories of property will be understood according to their *meaning* if that *meaning* is derived from a fluid system of law such as customary law. The lack of certainty around terms which do not have a consistent definition means that they will not have a consistent application upon dissolution of the marriage. This will hold especially true for the category of "personal property" which is subject to exclusive rights ownership instead of community of property.

The Committee should be aware that this unintentional loophole ripens the opportunity for abuse, and creates avoidable vulnerabilities for women in customary marriages.

Justice Madlanga's comments above in paragraph 63 of the *Ramuhovhi* judgment opines:

"The High Court's order excluded personal property from the shared management and control of property by husbands and wives. Personal property comprises items of a purely personal nature, such as clothing. Based on the nature of this property, each party to a pre-Act polygamous customary marriage is entitled to retain her or his sole ownership and control of personal property."

These comments, although neither prescriptive nor definitive, reveal what the Court envisages should be considered personal – purely personal items such as clothing. By leaving the ascription of meaning to customary law, the Committee allows for the potential of having a meaning attached to types of property which goes against Constitutional imperatives of equality.

4. Recommendation

The Committee should insert definitions of the four categories of property in line with the spirit of the Constitutional Court's judgment. These definitions need not be exhaustive – instead the definitions should seek to add clarity and guidance to the types of property which should be considered in the distinction between the various categories.

The risk to be mitigated is in whether the usages, traditions, or even codified provincial codes could potentially skew the application of the meaning of the categories of property against women. This is especially pronounced in the instance of "personal property" which the spouses retain exclusive rights over and will not fall to the joint estate upon dissolution.

The precarious position, especially of indigent, women in traditional communities cannot be overstated. The intent of both the *Gumede* and *Ramuhovhi* judgments were to further safeguard the rights, entitlements, and legal protection of women who upon dissolution routinely find themselves vulnerable and unable to enforce these protections.

The Committee should seek to buttress the Bill against falling into the trap of creating legal ambiguities and it can do this by inserting definitions of property categories which can be held to a uniform standard of application upon dissolution.

5. The legal conundrum of variation orders

Paragraph 65 of the *Ramuhovhi* judgment holds:

"The proposed relief traverses terrain that is fraught with imponderables. I cannot discount the possibility that – despite the effort that has been made – someone may suffer harm not foreseen in this judgment. For that reason, it is necessary to make it possible for an interested person to approach this Court for a variation of the order."

Point 9 of the Order states:

> 1. *Any interested person may approach this Court for a variation of this order in the event that she or he suffers harm not foreseen in this judgment.*

The HSF recognises that there is nothing that this Committee can do in this Bill to cater for a special remedy such as this. It is nonetheless prudent to consider the application of point 9 of the Court's Order which gives effect to paragraph 65 of the judgment. It is unclear what the effect of a party seeking a variation order will have in so far as the application of the Bill goes. The question of whether parties can seek to escape the application of the Bill through variation orders is noteworthy – and perhaps this Committee would be inclined to seek further legal advice on this point.

We thank the Committee for considering our comments.

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