

Ukungena Unions: An Urgent Need for Law Reform

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Abstract

Ukungena union is a custom practiced by both Nguni and Sesotho speaking groups according to which a widow cohabitates with the brother or any male relative of the deceased husband. According to this custom, death of one of the spouses in a customary marriage does not dissolve the marriage because marriage is between to family groups. Ukungena union is still recognized in South Africa and is not statutorily regulated. This poses some problems, firstly, CEDAW has grouped ukungena as one of the harmful traditional practices and recommended for its abolition because it promotes the inferiority and discrimination against women. South Africa is a signatory to CEDAW and if CEDAW's recommendation is taken seriously by South Africa, ukungena union would be against the right to equality. Secondly, ukungena union is one of the reasons that led Africans to practice polygyny. Some people refer to ukungena as wife or widow inheritance. If a male person is already married and then practice the custom of ukungena, automatically that person would be a polygamist in reality. This is so despite the fact that ukungena union is not treated as marriage in the true sense of the word. This is exacerbated by the fact that the rights of the first wife are not taken into consideration as it normally happen on the regulation of polygyny .In view of the latter problems posed by the continuation of ukungena union in its current legal position, the writer attempts to argue for an urgent need for law reform that would align the custom with the Constitution.

Keywords: Ukungena Unions, Freedom of Expression, Economic Exploitation & HIV/AIDS.

Introduction

Ukungena union is a custom practiced by both Nguni and Sesotho speaking groups according to which a widow cohabitate with the brother, half-brother or any male relative of the deceased (Olivier 1995; Gwarinda 2009). This custom is referred to as ukungena in Zulu, as kenela in Sotho and as levirate union or wife inheritance in English. It is usually practiced when the husband died without leaving a male heir that would inherit his estate or to increase the nominal offspring of the deceased (Natal Code 1987; Kwazulu Act 1985).

Despite the definition of ukungena unions in terms of the Natal Codes, the latter codes prohibited the practice of ukungena unions by stipulating that a customary marriage is dissolved by the death of one of the spouses in a marriage. This is in sharp contrast with the position in customary law because in customary law a marriage is between two family groups and therefore customary marriage is not automatically dissolved by death of one of the spouses (Koyana 1980; Rautenbach 2010). This is reaffirmed by the recent legislation regulating customary marriages in South Africa, that is, the Recognition of Customary Marriages Act (hereinafter referred to as Recognition Act). Section 8 of the Recognition Act does not include death of one of the spouses in a customary marriage as a ground for the dissolution of a marriage. The reading and interpretation of section 8 of the Recognition Act leads to an inference that it permits the continuation of ukungena unions in South Africa. In addition to this, recent enquiries about ukungena unions in South Africa proved that these unions still persist (Bekker & Koyana 2012).

This poses some problems, namely:

Firstly, the Convention on Elimination of all Forms of Discrimination against Women (CEDAW) has grouped ukungena unions as one of the harmful traditional practices that promote inferiority and discrimination against women. As a result of this, CEDAW made a recommendation in its concluding observations that ukungena unions ought to be discouraged and abolished. South Africa is a signatory of CEDAW and if the latter recommendation is taken seriously by South Africa, ukungena unions would be against the right of women to equality as entrenched in section 9 of the Constitution.

Secondly, ukungena union is one of the reasons that drove Africans to practice the custom of polygyny (Maillu 1988). Some people refer to ukungena union as wife or widow inheritance. If a male person has a wife already and then practice the custom of ukungena, automatically that person would be a polygamist in reality. This is so despite the fact that according to South African customary law, ukungena unions are not treated as marriages in the true sense of the word. This is exacerbated by the fact that ukungena unions are not regulated in South Africa and the rights of the first wife are not taken into consideration as it normally happens on the regulation of polygyny. According to South African law a male person who wants to marry the second wife or other wives is expected to start by seeking consent from the existing wife or wives.

In view of the latter problems posed by the continuation of ukungena unions in their current legal position, the writer attempts to argue for an urgent need for law reform in order to align the custom with the Bill of Rights.

In view of the persisting ethnocentrism, this article will begin by attempting to make a serious and in-depth analysis of the historical reasons that led Africans to practice ukungena unions. The second part will discuss criticisms levelled against ukungena unions and the third part will attempt to make recommendations for law reform.

The following section will discuss the historical reasons for the practice of ukungena unions.

Historical Reasons for the Continuation of Ukungena Unions

It is noted that the birth of a child, especially the male child, is of great significance in African society. Childlessness is not merely regarded as unfavorable occurrence but it is regarded as a great misfortune (Maillu, 1988). This is so in the context of a society that had no life insurance policies and old age homes to take care of the elderly people. They believed that adults take care of children while they are still powerless and helpless with the hope that during old age children would be fully grown up to take care of their elderly parents.

Owing to the communitarian ethic, customary law attempted to protect those who were disadvantaged by providing social security system. Therefore, widows and the aged are protected and provided for (Dlamini 2002). In an African society the integrity of the homestead depended on the preparedness of its owners to take responsibility when crisis arise. In catering for the psychological, physical and well-being of the widow, African society through its morals, tries its maximum best to provide for either replacement or a helper to the widow. If there is a brother of the deceased whom the widow likes and if he is married, arrangements can be made that he will take care of her as an additional wife. This is because Africans regard leaving the widow and her children in the cold as lack of love for the family.

In the traditional society a widow could easily fall prey to unscrupulous men. On the other hand, the custom of ukungena provided the widow with security, companionship, sexual satisfaction and the right to procreate legitimate child (Simons, 1968). These are important considerations if one bears in mind that in traditional society if the widow left after the death of her deceased husband, she would forfeit her children, house property and support. Moreover, she would not be in a position to earn a living on her own as there were no employment opportunities for women.

Criticism against Ukungena unions

Freedoms of expression

The widow is not forced to enter into an Ukungena union with one of her deceased husband's brothers. This shows that she has a freedom of choice, that is, the choice to avoid remarriage or to re-marry after her husband's death (Nyarwath, 2012; Braadvedt, 1940). However, the fact that the death of one of the spouses in a customary marriage does not dissolve the marriage and that the dissolution of a customary marriage will be complete when the woman is returned to her family group and when ilobolo is refunded back to her husband's family, might cause pressure to the widow and affect her private independence when choosing to re-marry or not to do so (Werner, 1928). Therefore, if remarriage of the widow would lead to the return of lobolo from the widow's family to the deceased husband's family, so it would mean that the widow's apparent freedom of choice would be an iron hand in a velvet glove. It is submitted that lobolo should not be returnable should the widow remarry. This is because in some cultural groups such as Zulus, the bride has to buy marriage gifts and furniture for her parents in law. In doing so, she utilizes money that was obtained through lobolo (Rautenbach, 2010).

Economic Exploitation

It appears that in our contemporary society that is highly influenced by capitalism and greed, wife inheritance becomes more attractive when there is property involved. No one is interested in the inheritance of a poor woman (Nyarwath, 2012). It may be argued that some people in our modern society may not be aware of the religious and moral principles on which the custom of ukungena was based on. This ignorance may lead to serious abuses of the custom of ukungena to the detriment of widows (Nyarwath, 2012). Traditionally, the custom of ukungena is not necessarily aimed at economic exploitation of the widow. However, it is aimed at the protection and security of the childless widow. In addition to this, ukungena is based on the spirit of brotherly affection and involves an act of pity whereby a man might forego inheritance to provide an heir for his deceased brother (Dlamini, 1984).

Spread of HIV/AIDS

The practice of the custom of ukungena has a strong possibility to enhance the spread of HIV/AIDS among those who continue to practice it. The whole family is at risk if the inherited wife is HIV positive and the infected wife might not be aware of her HIV positive status when marrying the brother of her deceased husband (Mswela, 2009).

Recommendations for Law Reform

As argued before, CEDAW recommended that ukungena or wife inheritance promotes the inferiority and discrimination against women. It is a reality that the custom of ukungena belongs to the patriarchal, patrilineal family system which is on the decline. This raises a question whether ukungena union constitutes discrimination against women in the true sense or not. This can be answered by referring to the equality jurisprudence of the Constitutional Court of South Africa. The court held that discrimination in South Africa means 'treating people differently in a way which impairs their fundamental dignity as human beings' (Prinsloo v Van der Linde, 1997 & Ferreira v Levin, 1996). Inner worth and autonomy are core components of human dignity and autonomy can be equated to freedom of choice (Bhana and Pieterse, 2005). A widow who ends up entering into an ukungena union with one of her deceased husband's brothers is not forced to do so. Therefore, it is hard to believe that a woman who decided freely to be involved in an ukungena union after taking all factors into account could be regarded as being discriminated against unfairly and it is unlikely for South Africa to follow CEDAW's recommendations on the issue of wife inheritance. It submitted that ukungena custom is gradually losing popularity and is bound to disappear in the long run and it would be better to allow it to die a natural death.

As argued before, ukungena unions continue to be recognized in South Africa but without any form of statutory recognition. This creates some problems because a woman entering into an ukungena union does so out of her own free will and volition while the wife of a male who intends to practice ukungena is not given the same opportunity. Traditionally, if a male person is married in terms of customary law and decides to enter into an ukungena relationship with the widow of his deceased brother, widow is expected to consent in order for the relationship to be valid while the consent of the existing wife is not expected. This may infringe the right of an existing wife to human dignity because her consent is not taken into consideration.

Conclusion

This paper concludes by arguing that there is no justifiable evidence supporting the recommendations of CEDAW when they concluded that ukungena perpetuates the inferiority and discrimination against women. It is argued that law reform is necessary to give an existing wife a right to agree or disagree with a prospective ukungena union in order for the custom of ukungena to be in line with the Constitution. However, this does not necessarily mean that everything would be perfect about an ukungena relationship because it may perpetuate economic exploitation of women and spread of HIV/AIDS.

In view of the fact that historically the practice ukungena union is aimed at catering for the psychological, physical and well-being of the widow, it is better to develop the custom in order for it to be in line with the Constitution. It is suggested that the abolition of ukungena unions should be left to other forces and die its natural death as changing socio-economic conditions shows that the practice of

the custom of ukungena has a strong possibility to enhance the spread of HIV/AIDS among those who continue to practice it.

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