

**THE NEED FOR A FLEXIBLE AND DISCRETIONARY SYSTEM OF
MARITAL PROPERTY DISTRIBUTION IN THE SOUTH AFRICAN LAW OF
DIVORCE**

BY

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Distribution in the South African Law of Divorce****KEY TERMS:**

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SUMMARY OF THESIS

Substantive gender equality has yet to be achieved in South Africa. As such, when a decision is made for one of the spouses to a civil marriage to stay at home and care for the children born of the marriage, or make career sacrifices to care for children, that spouse is usually the wife. As a result, while the husband continues to amass wealth and grow his earning potential, the wife is unable to do so. In circumstances where such spouses are married out of community of property or subject to the accrual system with onerous exclusion clauses in the antenuptial contract, the wife may be left with little more than a claim for rehabilitative maintenance in the event of a divorce. The courts only have the discretion to make an equitable distribution of marital property in civil marriages with complete separation of property concluded prior to 1 November 1984 (or 2 December 1988) and customary marriages. It is arguable that this limitation of the judicial discretion violates the equality clause contained in the Constitution of the Republic of South Africa, 1996. A broad judicial discretion to equitably redistribute the spouses' assets upon divorce is therefore proposed in this dissertation.

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CHAPTER ONE

PROBLEM STATEMENT

This dissertation concerns the questions whether in its current state the South African matrimonial property distribution system on divorce negatively impacts upon the financially weaker spouse in a marriage and whether a more flexible and discretionary system applicable to civil marriages ending in divorce would be the answer to the current shortcomings. In addition, the promising inroads towards fairness and equity which have been made in areas of the law applicable to marriages falling out of the civil sphere such as customary marriage are contrasted to the more rigid structure applicable to civil marriages ending in divorce.

1.1 INTRODUCTION

The concepts of “family” and “family values” in the traditional paradigm contemplate a married couple with children.¹ However, in the light of the changing societal norms and attitudes towards divorce in the Western world these concepts have for many years been challenged on an ever-increasing scale. Increasingly, couples worldwide are exercising their right to get divorced and their right to cohabit, without the need for a civil or religious stamp of approval, and to have children outside of wedlock.²

Legislation in many countries, including South Africa, has grown and developed alongside the “divorce epidemic”.³ Prior to the promulgation of the Divorce Act 70 of 1979 our divorce law was a fault-based system which recognised an innocent and a guilty party, the grounds for divorce being adultery, malicious desertion, incurable mental illness lasting at least seven years, and imprisonment for at least five years after having been declared a habitual criminal.⁴ The principle of fault was utilised by the courts in reaching

¹ Sclater SD *Divorce: A psychosocial study* (1999) 2.

² Sclater *Divorce: A psychosocial study* 4-5.

³ Sclater *Divorce: A psychosocial study* 2.

⁴ Hahlo HR *The South African law of husband and wife* 4th ed (1985) 330-331.

decisions pertaining to the patrimonial and related consequences of the divorce.

1.2 GROUNDS FOR DIVORCE IN SOUTH AFRICA

With the increasing acceptability of divorce as a social practice, Westernised legal systems have moved away from the concept of fault and guilt towards a system based purely on the breakdown of the relationship. The Divorce Act, which reflects the revolutionary ideas pertaining to divorce and the breakdown of marriages in Western society, was promulgated in 1979. Section 3 of the Divorce Act sets out the grounds for divorce in South Africa as being the irretrievable breakdown of the marriage and a spouse's incurable mental illness or continuous unconsciousness. When the fault-based system of divorce was abandoned, the concept of compensating a spouse for the wrongdoing of his or her spouse was greatly diluted. Certain vestiges of the fault-based system are, however, still evident in the provisions of sections 7(2) and 9 of the Divorce Act.⁵ Section 7(2) provides that a court in determining whether or not spousal maintenance will be awarded needs to consider, *inter alia*, each spouse's conduct in so far as it may be relevant to the breakdown of the marriage. Similarly, section 9 of the Divorce Act provides that substantial misconduct and the circumstances which led to the breakdown of the marriage are two of the three factors which the court will consider when making an order for forfeiture of patrimonial benefits.

1.3 REVOLUTIONISED APPROACH TO FAMILIES, MARRIAGE AND DIVORCE

A further and prominent characteristic of the move towards a revolutionised approach to families, marriage and divorce is a change in attitudes with a shift away from a patriarchal structure in which the husband is the breadwinner and provider and the wife a homemaker and mother, to one of spousal equality.⁶ In 1982, a South African Law Commission Report⁷ was

⁵ Although s 7(3)-(6) of the Divorce Act does not expressly make provision for fault or misconduct, it can nonetheless be taken into account under s 7(4)(d), which provides that the court may take any other factor into account when making a redistribution order.

⁶ Sutherland EE "Imperatives and challenges in child and family Law" in Sutherland EE (ed) *The future of child and family law international predictions* (2012) 23.

published which reflected the growing move towards spousal equality in the context of matrimonial property.⁸ The 1982 Commission Report heralded the promulgation of the Matrimonial Property Act 88 of 1984, which introduced the accrual system into our matrimonial property law and ultimately the abolition of the marital power. Accordingly, after 1984 couples could elect to be married in community of property, out of community property (as they were entitled to do prior to 1984) or out of community of property with the inclusion of the accrual system. The intention of the South African Parliament was to ameliorate the hardships caused by out of community of property marriages.⁹

The impression of lawmakers and courts in Westernised societies that women have attained equality in all spheres of their lives¹⁰ has lent credence to a growing application in decisions by courts pertaining to the patrimonial consequences of divorce, including the division of marital property and the payment of maintenance, of what has become known as the “clean-break principle”.¹¹ The principle has as its goal the expeditious termination of all financial ties between divorcing parties as soon as possible. The South African courts have welcomed the idea of the “clean break principle”, which was applied in *Beaumont v Beaumont*.¹²

1.4 FLAWS IN THE CURRENT MATRIMONIAL PROPERTY DISTRIBUTION SYSTEM

There are, however, various difficulties with the South African matrimonial property distribution system on divorce. Whilst the South African legal system, having the Constitution of the Republic of South Africa, 1996 as its supreme law,¹³ has made impressive and progressive strides towards satisfying the fundamental rights of human dignity and equality, *inter alia*,

⁷ SA Law Commission *Project 15 The matrimonial property law with special reference to the Matrimonial Affairs Act, 1953, the status of married women, and the law of succession in so far as it affects spouses* (1982).

⁸ Kaganas F and Murray C “Law and women’s rights in South Africa: An overview” in Murray C (ed) *Gender and the new South African legal order* (1994) 12.

⁹ Barratt A “‘Whatever I acquire will be mine and mine alone’: Marital agreements not to share in constitutional South Africa” 2013 *SALJ* 690.

¹⁰ Kaganas and Murray “Law and women’s rights” 14.

¹¹ Kaganas and Murray “Law and women’s rights” 14.

¹² 1987 (1) SA 967 (A).

¹³ Heaton J “South Africa: Changing the contours of child and family law” in Sutherland EE (ed) *The future of child and family law international predictions* (2012) 400.

and while the law pertaining to the division of matrimonial property and spousal support appears to be a system of legal equality,¹⁴ in reality it is not. At first glance the system appears to be a fair one, enabling parties to freely and intelligently choose the contract or system which best suits them. However, on divorce a strict application of the contractual regime applicable to civil marriages and the “clean break” principle which is underpinned by the concept of equality between men and women in a marriage often leads to hardship for the financially weaker spouse.¹⁵ An inequitable distribution on divorce flowing from the strict application of the matrimonial property regime chosen by parties can nonetheless only be remedied by the operation of judicial discretion in very limited contexts, namely in civil marriages concluded prior to the promulgation of the Matrimonial Property Act¹⁶ (and the Marriage and Matrimonial Property Law Amendment Act 3 of 1988).¹⁷ The fact that, unlike civil marriages, all spouses in customary marriages which end in divorce have access to an equitable distribution on divorce, will be examined in chapter 4.¹⁸

A spouse’s pension interest currently forms part of his or her estate for purposes of patrimonial claims;¹⁹ but this asset is very often excluded by the spouses in their antenuptial contract at the commencement of the relationship. Upon divorce, however, the pension interest very often equates to the asset of most value. A further exacerbating feature is the fact that a spouse’s income stream derived from their employment and experience within the workplace – which is usually enhanced by the spouse who assumes the lion’s share of the domestic responsibilities in regard to the children and the home – is not viewed, or treated, as an asset upon divorce.²⁰

In addition, although the choice women now have to structure their marital property regime in terms of an antenuptial contract may appear to make for

¹⁴ Sutherland “Imperatives and challenges” 24.

¹⁵ Kaganas and Murray “Law and women’s rights” 14-15.

¹⁶ *Ie* on 1 November 1984.

¹⁷ *Ie* on 2 December 1988.

¹⁸ Whenever concluded, except polygamous customary marriages concluded before the promulgation of the Recognition of Customary Marriages Act 120 of 1998.

¹⁹ S 7(7) of the Divorce Act; s 37D of the Pension Funds Act 24 of 1956.

²⁰ Heaton J “Striving for substantive gender equality in family law: Selected issues” 2005 *SAJHR* 570.

fairness and equality, there are a myriad of factors which may well influence parties when entering into antenuptial contracts, as has been shown. An imbalance of financial power and occupational status leads to an imbalance of bargaining power.²¹ Parties may in addition be labouring under cognitive distortion and accordingly be unable to comprehend that their marriage may end in divorce and that their spouse may behave in a dishonourable way.²² The situation that results may be far from ideal: because of her inability to properly assert her position and protect her interests in a worst case scenario, the wife-to-be may well choose a matrimonial property regime for herself that will ultimately be to her detriment. The difficulties experienced by women at the commencement of the marriage are usually still present at the termination of the relationship and are evidenced in their inability to negotiate adequately for a settlement of the issues which will enable them to live with dignity after divorce.²³ These issues are compounded by the interplay between men and women when they are embroiled in negotiations pertaining to the financial implications of the divorce and the primary residence entitlements. In view of the caregiving role which women assume in the family, they are often anxious to retain primary residency of the children born of the marriage and the threat of a counterapplication for primary residency can be utilised against them by a stronger spouse to induce them to accept a smaller financial settlement.²⁴

The premise of spousal equality or gender equality between spouses upon which, in particular, the clean-break principle and the accrual system are founded is problematic for many reasons. These reasons include the overriding fact that gender equality has not been fully realised²⁵ nor can it in the context of the fact that women alone are able to bear children²⁶ and in general still assume the lion's share of the domestic and child-raising responsibilities.²⁷ This trend continues after the dissolution of the marriage

²¹ Heaton "Striving for gender equality" 550.

²² Heaton "Striving for gender equality" 554.

²³ Heaton "Striving for gender equality" 566-567.

²⁴ Heaton "Striving for gender equality" 567; Bonthuys E "Labours of love: Child custody and the division of matrimonial property at divorce" 2001 *THRHR* 209.

²⁵ Sutherland "Imperatives and challenges" 23.

²⁶ Sutherland "Imperatives and challenges" 23.

²⁷ De Jong M "New trends regarding the maintenance of spouses upon divorce" 1999 *THRHR* 79; Fineman MA "Societal factors affecting the creation of legal rules for distribution of property at divorce" in Fineman MA and Thomadsen NS (eds) *At the boundaries of law: feminism and legal theory* (1991) 278; Barratt "Marital agreements" 689.

in that women are afforded primary residency of their children and their ex-husbands are free to pursue their careers while their ex-wives usually have to endeavour to work part time to balance their career against child-care duties.²⁸ Accordingly, the harsh realities of systems which encourage a clean-break principle and the sanctity of contractual relationships in the marital context are undermining the very rights they seek to protect and further. It has recently been reported by the World Economic Forum that economic equality between men and women will not be achieved for eight decades.²⁹ The study by the World Economic Forum of 142 countries found that women's attainments and opportunities in the workplace were 60% those of men. A report conducted in 2006 found this percentage to be 56%.³⁰ South Africa ranked eighteenth overall out of the 142 countries.³¹ The gendered wage gap still places women at a disadvantage in the workplace and shows no signs of closing.³²

1.5 RESEARCH DESIGN

1.5.1 *Point of departure and assumptions*

Our matrimonial law in relation to civil marriages which end in divorce needs to be developed further to make allowances for greater judicial discretion and a system of equitable distribution. The Constitution guarantees all South Africans substantive equality. The guarantee is not fulfilled when children are left looking in on the affluence of their fathers while their mothers battle to make ends meet while shouldering the primary responsibility of caregiver and parent. The legislature and courts should extend and broaden the applicability and requirements of section 7(3) of the Divorce Act to incorporate all civil marriages. The matrimonial property regime and wide judicial discretion applied in England and Wales (and the effect thereof) and the current proposed reforms when juxtaposed with the South African system make for a challenging and valuable comparative analysis.

²⁸ De Jong "New trends" 80.

²⁹ Bosley C "Female financial equality a lifetime away" 29 October 2014, available at <http://www.bdlive.co.za/world/2014/10/29/female-financial-equality-a-lifetime-away> (accessed on 29 October 2014).

³⁰ *Ibid.*

³¹ *Ibid.*

³² Barratt "Marital agreements" 703.

1.5.2 Hypothesis

Our current matrimonial property regime applicable to civil marriages does not adequately protect women and children and ensure an equitable distribution of assets and income.

1.5.3 Methodology

A literature review of South African law as it pertains to marital property regimes was conducted. It encompassed a review of statutes, case law, common law, textbooks and articles together with internet-based electronic material. In addition, a comparative study of English law was conducted as it pertains to marital property encompassing a review of statutes, case law, common law, textbooks and articles together with internet-based electronic material. English law was chosen as it currently follows a system which is based on a legislated right of the courts to order an equitable distribution upon divorce. This system is currently in a state of flux, however, and the acceptability or otherwise of allowing parties to regulate their marital property affairs by contractual means is being evaluated and debated.

In chapter 2 a more detailed analysis of the various matrimonial property regimes is undertaken. Chapter 3 deals with the difficulties which arise as a result of the inflexibility of the South Africa matrimonial property distribution system on divorce and the arguments in favour of and against the system are discussed and analysed. The exceptions to the strict application of our matrimonial property distribution system are set out in chapter 4, which includes an analysis of sections 7(3)–7(6) and 9 of the Divorce Act and section 8(4)(a) and (b) of the Recognition of Customary Marriages Act 120 of 1998. The question whether the limited application of the exceptions dealt with in chapter 4 passes constitutional muster is posed in chapter 5 and a comparative analysis of South African matrimonial property law and that of England and Wales is undertaken in chapter 6. In chapter 7 recommendations are made for the possible reform of our matrimonial property law on divorce.

CHAPTER TWO

THE MATRIMONIAL PROPERTY REGIMES IN SOUTH AFRICA

2.1 HISTORY

South Africa inherited the Roman-Dutch legal system, which embraces the idea that parties entering into a marriage may contract out of the default matrimonial property system by concluding an antenuptial contract.³³ Prior to 1984 and the promulgation of the Matrimonial Property Act 88 of 1984, parties to a civil marriage effectively had two options when choosing which matrimonial property regime would govern their marriage. If they did not enter into an antenuptial contract, their marriage was automatically in community of property³⁴ (that is the default system) and the wife was subject to the husband's marital power.³⁵ The system of marital power placed a wife in the position of a minor under her husband's guardianship.³⁶ The advantage of a civil marriage in community of property was that the wife was entitled, at the dissolution of the marriage, to an undivided half share of the estate.

Insofar as parties entered into an antenuptial contract, the marriage was out of community of property and the parties were able to exercise their rights in respect of their estates independently of one another.³⁷ The advantage of this system was that the wife was not subject to the marital power of her husband (which placed women under the tutelage of their husbands).³⁸ The disadvantage was that at the dissolution of the marriage, the financially weaker party (usually the wife, particularly if she had elected to stay at home and care for the children born of the marriage and perform the function of homemaker) was placed in a position where she was not entitled to a share in the wealth her husband had accumulated over the years of marriage.

³³ Bonthuys E "Family contracts" 2004 *SALJ* 881.

³⁴ *Edelstein v Edelstein NO* 1952 (3) SA 1 (A) at 10.

³⁵ *Campher v Campher* 1978 (3) SA 797 (O) at 801-802. See also Sonnekus JC "Matrimonial property" in Clark B (ed) *Family Law Service* (2012) 1.

³⁶ Sonnekus in Clark *Family law service* 3.

³⁷ Sonnekus in Clark *Family law service* 1.

³⁸ Kaganas and Murray "Law and women's rights" 8.

The disadvantaged position of women was highlighted and challenged in the area of family and matrimonial law in particular by scholars in the political arena.³⁹ These efforts, which were directed at achieving the abolishment of the marital power and the treatment of marriage as a partnership of equals, paid off and in 1982 a Law Commission project was established to examine the Matrimonial Affairs Act 37 of 1953 with particular regard to matrimonial property.⁴⁰ The Law Commission report of 1982⁴¹ heralded the promulgation of the Matrimonial Property Act and the beginning of a perceived move towards spousal equality within civil marriages.

The abolishment of the marital power (which was ultimately removed in all its forms by section 29 of the General Law Fourth Amendment Act 132 of 1993) and the extension of equal status to mothers *vis-à-vis* their children in terms of the Guardianship Act 192 of 1993, were seen as measures which overcame the last obstacles to affording women equality within the family in terms of civil law.⁴²

2.2 CURRENT MATRIMONIAL PROPERTY SYSTEMS

2.2.1 *Community of property*

Community of property or universal community is the default or ordinary system of matrimonial property which applies to all civil marriages concluded without an antenuptial contract.⁴³ In essence the system combines all assets acquired by each party before and after the marriage into a joint estate (save for certain exceptions which include gifts or bequests subject to an exclusion clause, non-patrimonial damages, and costs in matrimonial proceedings)⁴⁴ which is then divided between the spouses at the dissolution of the marriage.⁴⁵ In general the debts of each spouse incurred before and after the marriage are treated alike (save for the exception created in section 19 of the Matrimonial Property Act regarding delictual damages of a

³⁹ Kaganas and Murray "Law and women's rights" 11.

⁴⁰ Sclater *Divorce: A psychosocial study* 12.

⁴¹ SA Law Commission *Project 15*.

⁴² Kaganas and Murray "Law and women's rights" 13.

⁴³ Church J "Proprietary consequences of marriage" in Joubert WA (ed) *The law of South Africa* (2006) 73.

⁴⁴ Church "Proprietary consequences of marriage" 80.

⁴⁵ Church "Proprietary consequences of marriage" 74.

spouse). While the system incorporates the concept of a true partnership into marriage, the administrative requirements can be onerous.⁴⁶ In addition, the joint estate is exposed in insolvency proceedings and in respect of creditors' claims generally.⁴⁷

2.2.2 Separation of property or marriage out of community of property

This matrimonial property system applies where spouses conclude an antenuptial contract which specifically excludes the accrual system and all forms of community of property and community of profit and loss.⁴⁸ Accordingly, each spouse's estate is entirely separate from that of the other spouse and upon divorce there is no sharing of assets acquired during the course of the marriage. A spouse married out of community of property will retain the right to claim maintenance in terms of section 7(2) of the Divorce Act 70 of 1979 but no cause of action will arise in terms of section 9 of the Divorce Act for forfeiture in an instance where no benefit has accrued to a spouse in terms of the marriage.⁴⁹ Women married in terms of an antenuptial contract, out of community of property, after 1984⁵⁰ accordingly have no recourse, other than a maintenance claim upon dissolution of the marriage regardless of any gross inequities which may arise in consequence.

2.2.3 The accrual system

The accrual system was introduced to ameliorate the harsh effects of complete separation of property, particularly in situations where one spouse has accumulated wealth during the marriage and the other has not been in a position to do so.⁵¹ The accrual system effectively created a form of deferred community of gains in terms whereof parties who entered into an antenuptial contract with the operation of the accrual system are financially independent during the course of the marriage and at the dissolution of the marriage are entitled to share equally in the growth of each other's respective estates

⁴⁶ Church "Proprietary consequences of marriage" 85-94.

⁴⁷ Church "Proprietary consequences of marriage" 94-97.

⁴⁸ Church "Proprietary consequences of marriage" 107.

⁴⁹ See para 4.3 below.

⁵⁰ See paras 4.1 and 4.4 below.

⁵¹ Heaton J *South African family law* 3 ed (2010) 93.

from the inception of the marriage.⁵² The introduction of the accrual system therefore went some way towards creating a fairer matrimonial property system by which parties could choose to order their property affairs upon marriage.

Section 2 of the Matrimonial Property Act states that every marriage out of community of property in terms of an antenuptial contract by which community of profit and loss is excluded, which is entered into after the commencement of the Act, is subject to the accrual system except in so far as that system is expressly excluded by the antenuptial contract. However, and in the light of the fact that the Act was not made retrospective, civil marriages concluded prior to the promulgation of the Matrimonial Property Act in terms of an antenuptial contract by which community of property, community of profit and loss and accrual sharing were excluded remained out of community of property. Section 7(3) of the Divorce Act was accordingly promulgated and applies to civil marriages entered into before the commencement of the Matrimonial Property Act, in terms of an antenuptial contract by which community of property, community of profit and loss and accrual sharing in any form are excluded. A court granting a decree of divorce in respect of those marriages may, subject to the provisions of subsections (4), (5) and (6), on application by one of the parties to that marriage, in the absence of any agreement between them regarding the division of their assets, order that such assets, or part of the assets, of the other party as the court may deem just be transferred to the first mentioned party.

Section 7(3) also extends the power of the court to order the transfer of assets in respect of marriages out of community of property entered into before the commencement of the Marriage and Matrimonial Property Law Amendment Act 3 of 1988, in terms of section 22(6) of the Black Administration Act 38 of 1927, as it existed immediately prior to its repeal by the said Marriage and Matrimonial Property Law Amendment Act 3 of 1988.

⁵² Sonnekus in Clark *Family law service* 11-12; ss 3 and 4 of the Matrimonial Property Act.

2.3 CONCLUDING REMARKS ON MATRIMONIAL PROPERTY SYSTEMS

In summary, our “progressive” matrimonial property law allows couples to choose which system should apply to their union.⁵³ Prospective spouses, whilst they retain the right to create their own contractual matrix which will apply to their marriage, generally choose one of the three matrimonial property systems provided for by our matrimonial property law, namely marriages without an antenuptial contract which are automatically in community of property, marriages subject to an antenuptial contract with the inclusion of the accrual system, and marriages subject to an antenuptial contract which specifically excludes the operation of the accrual system, community of property and community of profit and loss. On the face of it the hardships created by the strict matrimonial property regimes which existed prior to the promulgation of the Matrimonial Property Act were to some degree ameliorated by the Matrimonial Property Act⁵⁴ and the Divorce Act⁵⁵ and a semblance of fairness and equality was brought into the South African system of matrimonial property distribution on the dissolution of a civil marriage. In the next chapter the inflexibility of the matrimonial property distribution system on divorce will be scrutinised in more detail.

⁵³ Church “Proprietary consequences of marriage” 72.

⁵⁴ By the introduction of the accrual system; Barratt “Marital agreements” 690.

⁵⁵ By the provision of an equitable redistribution system for marriages confined to an out of community of property regime due to the time constraints imposed by the Matrimonial Property Act.

CHAPTER 3

THE INFLEXIBILITY OF THE MATRIMONIAL PROPERTY DISTRIBUTION SYSTEM ON DIVORCE

3.1 STRICT APPLICATION OF CONTRACTUAL RULES TO FAMILY OR RELATIONAL CONTRACTS UPON DIVORCE

The South African system of matrimonial property division, governed in the main by the Divorce Act 70 of 1979 and the Matrimonial Property Act 88 of 1984 has for many years been inflexible. Our law relating to civil marriage has its origins in the Roman-Dutch system which recognises the right of spouses to exclude the default matrimonial property system in terms of an antenuptial contract.⁵⁶ The court, unless the parties have resolved the financial issues pertaining to their marriage in an agreement of settlement, will take cognisance of the manner in which the parties were married, and calculate the distribution of assets according to the formula indicated by the Matrimonial Property Act, the Divorce Act, case law and/or our common law.⁵⁷ Where parties have concluded a settlement agreement (which is commonplace in South African divorces) the court will apply the terms of the agreement without reference to any financial inequities which may arise as a result thereof. (The court does, however, retain a discretion where parental responsibilities and rights are concerned.)⁵⁸ There has been an increase in the use of and the importance attached to contracts in the realm of family law which not only extends to antenuptial contracts but also incorporates settlement agreements upon the dissolution of marriages and, more recently, cohabitation agreements.⁵⁹

Moreover, and until recently, there was a noticeable trend in the South African law of contract towards disallowing the principles of good faith and public policy to upset the dictates of freedom of contract and *pacta sunt servanda*⁶⁰ where the terms of a contract result in the unfair exploitation of

⁵⁶ Bonthuys "Family contracts" 881.

⁵⁷ De Jong M "The need for new legislation and/or divorce mediation to counter some commonly experienced problems with the division of assets upon divorce" 2012 *Stell LR* 225.

⁵⁸ Bonthuys "Family contracts" 881.

⁵⁹ Bonthuys "Family contracts" 881.

⁶⁰ Ie that valid contracts should be enforced.

one of the parties.⁶¹ This trend, which is present where parties contract at arm's length (that is not in a family setting), has to a certain extent permeated the family law environment.⁶² There have in the recent past been instances where the courts were more inclined to set aside exploitative contracts that offended the principles of public policy.⁶³ In *Baart v Malan*⁶⁴ a husband and wife concluded a settlement agreement in terms of which the wife agreed to pay over her entire annual salary and bonus by way of maintenance for the two children born of the marriage, until such time as the children reached the ages of 35 and 29. The agreement was overturned on the basis that it was against public policy for a person not to obtain some commercial gain from their efforts in the workplace.⁶⁵ However, a few years later in the case of *Brisley v Drotsky*⁶⁶ a landlord cancelled a lease agreement on the basis of late payment of the rent by the tenant. The tenant averred that the landlord had orally agreed to extend the time for the payment of the rent. In the light of a non-variation clause in the lease agreement this argument was rejected. The Supreme Court of Appeal went further by stating that the tenant's argument that the landlord's use of the *Shifren* principle⁶⁷ offended the dictates of good faith must fail on the basis that the requirement of *bona fides* or good faith was not a rule of the law of contract.⁶⁸

Even where clear imbalances in the negotiating power between parties are evident, the rules of contract have historically been strictly applied. In *Afrox Healthcare Bpk v Strydom*⁶⁹ a patient was required to sign a contract in terms of which a hospital contracted out of responsibility for all negligence, including gross negligence. The patient's argument was threefold. Firstly, he argued that the clause was contrary to public policy, secondly that there was a clear imbalance in the bargaining power which existed at the time of contracting between the unwell patient who required medical care and the

⁶¹ Bonthuys "Family contracts" 890.

⁶² Bonthuys "Family contracts" 890-891.

⁶³ Bonthuys "Family contracts" 890-891.

⁶⁴ 1990 (2) SA 862 (E).

⁶⁵ At 869E-F.

⁶⁶ 2002 (4) SA 1 (SCA).

⁶⁷ Which provides that no oral amendment of a contract is effective if the contract contains a non-variation clause, unless such variation is reduced to writing and signed by both parties to the contract.

⁶⁸ Bonthuys "Family contracts" 891; *Brisley v Drotsky* 2002 (4) SA 1 (SCA) at 15D-G.

⁶⁹ 2002 (6) SA 21 (SCA).

hospital which was to provide the care and thirdly that there was a constitutional duty on the hospital to provide adequate care. The patient relied in addition upon the fact that the clause was contrary to the principle of good faith.⁷⁰ The Supreme Court of Appeal rejected all the arguments. More recently, in *SH v GF*,⁷¹ the issue of the variation of a maintenance order contained in a settlement agreement came before the Supreme Court of Appeal. The court *a quo*⁷² found, *inter alia*, that the maintenance order had been varied by oral agreement in spite of the presence of a *Shifren* clause on the basis that it would offend against public policy to enforce the non-variation clause and not recognise the variation agreed to between the parties.⁷³ The Supreme Court of Appeal, in disallowing the variation in the face of a non-variation clause, stated that the validity of a non-variation clause such as the one present in *SH v GF*⁷⁴ is itself based on considerations of public policy, which considerations are rooted in the Constitution.⁷⁵ The Supreme Court of Appeal in reaching its decision refused to endorse the court *a quo*'s decision not to enforce the non-variation clause for reasons of public policy. It went further by stating, as mentioned above, that the validity of a non-variation clause is itself based on considerations of public policy which are rooted in the Constitution.⁷⁶

More recently, the Constitutional Court's decision in *Maphango v Aengus Lifestyle Properties (Pty) Ltd*⁷⁷ took up the debate of what the role of the Constitution is in developing the common-law of contract.⁷⁸ Interestingly, the Constitutional Court was, *inter alia*, divided on the importance of the considerations of fairness, good faith and reasonableness in contractual agreements.⁷⁹ Whilst the Supreme Court of Appeal in the court *a quo* was clearly not prepared to accommodate a view that an unreasonable and unfair result stemming from a contract would render it unenforceable,⁸⁰ the Constitutional Court judges recognised a constitutional need for parties to

⁷⁰At 33F-G. See also Bonthuys "Family contracts" 892.

⁷¹2013 (6) SA 621 (SCA).

⁷²In *GF v SH* 2011 (3) SA 25 (NGP).

⁷³At 33A-C.

⁷⁴2013 (6) SA 621 (SCA).

⁷⁵At 626A-C.

⁷⁶At 626A-C.

⁷⁷2012 (3) SA 531 (CC).

⁷⁸Dafel M "Curbing the constitutional development of contract law: A critical response to *Maphango v Aengus Lifestyle Properties (Pty) Ltd*" (2014) 131 SALJ 271.

⁷⁹Dafel "Curbing the development of contract law" 282.

⁸⁰Dafel "Curbing the development of contract law" 283.

negotiate in good faith when concluding contracts. The minority judges went further in stating that the lack of fairness in a contract could certainly lead to its terms being unenforceable in the face of an unjust result.⁸¹ The existence of an imbalance in bargaining power was also considered in the minority judgement as a relevant factor; however, the facts of the case did not require a finding in this regard.⁸² Whilst the minority judgement in *Maphango v Aengus* has certainly not brought about a sea change in the South African courts' approach to the law of contract, the consideration of the important aspects of fairness and bargaining power are noteworthy.

3.2 ARGUMENTS IN FAVOUR OF A STRICT CONTRACTUAL APPLICATION SYSTEM

Those who favour the strict application of a contractual system such as that governing the law of divorce in South Africa argue that it affords a level of certainty and predictability to divorcing spouses in respect of what they can expect to receive in terms of a financial distribution upon divorce.⁸³ In addition, the strict application of contractual terms recognises (and protects) parties' contractual freedom and freedom of choice⁸⁴ which is embodied in legal systems worldwide. In *Printing and Numerical Registration Co v Sampson*⁸⁵ the court emphasised the importance of ensuring that parties enjoyed the utmost liberty to contract, that contracts entered into freely and voluntarily are enforced by courts of justice and that the courts should not lightly interfere with parties' freedom of contract. A further argument in support of the application of strict contractual principles in the arena of family contracts is the avoidance of paternalism or the over-involvement of the State in parties' private affairs.⁸⁶ Further to this argument, parties should be afforded and guaranteed freedom of choice in relation to the ordering of their matrimonial property.⁸⁷ An argument which further bolsters the sanctity of the contract in a family or relational environment is that men and women have achieved equality in all spheres of life and women are accordingly able

⁸¹ Dafel "Curbing the development of contract law" 284.

⁸² *Ibid.*

⁸³ Bonthuys "Family contracts" 895.

⁸⁴ SA Law Commission *Project 15* 13; see also Sonnekus "Grense aan kontrakvryheid vir eggenote én voornemende eggenote? (deel 2)" 2010 *TSAR* 234.

⁸⁵ (1875) LR 19 Eq 462 465.

⁸⁶ SA Law Commission *Project 15* 17.

⁸⁷ SA Law Commission *Project 15* 17.

to negotiate on an equal footing and reap the benefits of being economically viable members of society on a par with their male counterparts.⁸⁸

3.3 DISADVANTAGES OF THE STRICT CONTRACTUAL APPLICATION SYSTEM

Many difficulties arise in the interpretation and enforcement of “family contracts”, however, owing to the tension that inevitably arises between the strict application of the pure rules of contract to these documents and the treatment of the family negotiation process as a commercial one.⁸⁹ Moreover, many liberal theorists support the view that the ordering of the family should be a private affair untainted by interference and involvement by the State.⁹⁰ However, if partners in relationships are to be given absolute autonomy to order their affairs without any involvement by the legislature or the judiciary, while certainty as to the outcome of disputes will prevail, it is certain that fairness will not.⁹¹

A disadvantage of the inflexible system is that it cannot take judicial cognisance of the plethora of issues which may well have existed at the time when the agreement pertaining to the marital property system was concluded and the changes which have occurred in the relationship during the course of the marriage.⁹² When parties contract with one another in an intimate environment, their judgement is clouded and influenced by many factors.⁹³ An imbalance of financial power and occupational status leads to an imbalance of bargaining power.⁹⁴ Parties may in addition be labouring under cognitive distortion and accordingly be unable to comprehend that their marriage may end in divorce and that their spouse may behave in a dishonourable way.⁹⁵ In addition, when parties bargain with one another in the family environment they do so while labouring under cultural and gender stereotypical expectations.⁹⁶ Worldwide there is still a perception that the

⁸⁸ Kaganas and Murray “Law and women’s rights” 11.

⁸⁹ Heaton “Striving for gender equality” 554.

⁹⁰ Sinclair J assisted by Heaton J *The law of marriage* vol 1 (1996) 20-21.

⁹¹ For the reasons stated below. See also Bonthuys “Family contracts” 894-896.

⁹² Chapter 2 above.

⁹³ Bonthuys “Family contracts” 895.

⁹⁴ Heaton “Striving for gender equality” 550.

⁹⁵ Heaton “Striving for gender equality” 554.

⁹⁶ Bonthuys “Family contracts” 896.

public and private spheres are divided between men on the one hand and women on the other.⁹⁷ Because women bear the children, they are expected to stay at home and nurture and care for the children. The criticism which is levelled at women is that these choices are made willingly and freely; however, there is an equally compelling counterargument that the choices are the result of social pressures and stereotyping.⁹⁸ Generally, no value is ascribed to women's work in the home. These gender stereotypical expectations not only prevent women from driving a hard bargain in order to ensure the conclusion of a fair contractual dispensation, they are also the cause of the ultimate hardships experienced by women once their relationships have broken down.⁹⁹ In addition, these gender expectations are evidenced in many women's inability to insist upon receiving independent advice when deciding which marital property system will govern their marriages and their reluctance to assert themselves and insist upon what they view (having received such advice) as a fair dispensation.¹⁰⁰ While feminists argue that a woman's biological capacity to bear children is irrelevant to her ability to match a man in the workplace and that the private and public sphere division of labour between men and women should be ignored,¹⁰¹ this presupposes that the division of labour and care in respect of the children born from relationships and the domestic responsibilities in the home are equal, which they are not.¹⁰² Women still assume the lion's share of domestic responsibilities¹⁰³ and the equal division of labour in the private sphere has yet to be reached in society.¹⁰⁴ This imbalance is exacerbated by the fact that working environments generally are not accommodating to women who are compelled to balance and manage both work and family commitments.¹⁰⁵ The inflexible system may therefore not always be equitable to women who have spent their time caring for the home and looking after the children during the marriage.

⁹⁷ Heaton "Striving for gender equality" 549.

⁹⁸ Heaton "Striving for gender equality" 552.

⁹⁹ Bonthuys "Family contracts" 896-897.

¹⁰⁰ Heaton "Striving for gender equality" 554.

¹⁰¹ Kentridge J "Measure for measure: Weighing up the costs of a feminist standard of equality at work" in Murray C (ed) *Gender and the new South African legal order* (1994) 87.

¹⁰² De Jong "New trends" 79; Kentridge "Measure for measure" 85.

¹⁰³ Heaton "Striving for gender equality" 549.

¹⁰⁴ Sinclair *The law of marriage* 67-69.

¹⁰⁵ Heaton "Striving for gender equality" 550; Sinclair *The law of marriage* 27.

The avoidance of unfair results is being sacrificed at the altar of legal certainty and finality.¹⁰⁶ The difficulties which arise in the negotiation of antenuptial contracts as referred to above are also present when parties negotiate settlement agreements at the dissolution stage of their marriages. Because of the nature of such negotiations, these contracts do not always reflect the true intention of the contracting parties and accordingly cannot be adjudicated by a strict application of contractual rules.¹⁰⁷ This is exacerbated by the fact that in addition women tend to be more risk and conflict averse than men.¹⁰⁸ Accordingly they will opt for a negotiated process upon dissolution of their marriages rather than a more conflictual litigation process; this choice can lead to a gender-biased result as women are more inclined to relent and accept a lesser financial settlement, for example, in exchange for what they consider to be greater control in regard to their children.¹⁰⁹

The very basis of a family contract is good faith and trust and family contracts should accordingly be adjudicated against this backdrop and with this requirement uppermost in the mind of the judiciary.¹¹⁰ To treat parties to a contract as if they are equals when there has been an imbalance in bargaining power is to further strengthen the hand of the stronger party.¹¹¹ Moreover, if family contracts are not adjudicated in accordance with the requirement of a fair outcome, the consequences are far more dire than those encountered in a purely commercial setting – they strike at the very core of society and an unfair result will usually impact upon children and women who are simply unable to foresee or counter the consequences of the contractual inequity.¹¹²

In short, the factors surrounding the negotiation of a family or relational contract often lead to the weaker party (usually the woman) agreeing to a less than favourable matrimonial property system prior to marriage or an

¹⁰⁶ Bonthuys “Family contracts” 895.

¹⁰⁷ *Ibid.*

¹⁰⁸ Heaton “Striving for gender equality” 568; Stark B “Psycho-feminism and divorce law: Oedipus wrecks” in Mercuro N and Stark B (eds) *International Review of Comparative Public Policy* (1992) 57.

¹⁰⁹ Fineman “Societal factors” 57.

¹¹⁰ Bonthuys “Family contracts” 896.

¹¹¹ Bonthuys “Family contracts” 897.

¹¹² Bonthuys “Family contracts” 897.

inequitable financial settlement upon divorce. A woman may agree to exclude the accrual system or to clauses which will effectively absorb any growth in her prospective husband's estate in terms of the accrual. She may not have the capacity to understand or contemplate the end result of her choices for the reasons already dealt with.

In this regard, while the choice of the accrual system may be a hugely advantageous one for many couples it can also lead to gross unfairness in situations where clauses are inserted into the contract which effectively negate the possibility of any share in the growth of the wealthier spouse's estate or the accrual system is excluded in its entirety. In *Barnard v Barnard*,¹¹³ a wife-to-be, more than forty years the junior of her prospective husband, was induced to consult only with her husband's attorney and her husband (twice divorced) persuaded her to enter into an antenuptial contract which excluded the accrual system – at the time of the marriage she was an unsophisticated young girl of 24. The court rejected her argument that the contract was contrary to public policy because of her husband's superior bargaining power¹¹⁴ and in so doing relied on *Sasfin (Pty) Limited v Beukes*¹¹⁵ in reaching its decision that contracts should be set aside on the grounds of public policy only in very rare and limited circumstances.¹¹⁶ The court assumed that the parties to the antenuptial contract negotiated on an equal footing and that as such they were deemed to know and understand the terms of the contract they signed.¹¹⁷

¹¹³ 2003 (3) SA 741 (C).

¹¹⁴ Heaton "Striving for gender equality" 555.

¹¹⁵ 1989 (1) SA 1 (A).

¹¹⁶ 2003 (3) SA 741 (C) at 754D.

¹¹⁷ 2003 (3) SA 741 (C) at 754E.

CHAPTER 4

THE EXCEPTIONS TO THE RULE: FLEXIBILITY IN CIVIL MARRIAGES WITH THE OLD STANDARD FORM ANTENUPTIAL CONTRACT AND CUSTOMARY MARRIAGES

4.1 INTRODUCTION

There are exceptions to the rule of strict application of contractual laws which are of limited assistance to the weaker party where unfairness would otherwise result.¹¹⁸ These exceptions do not, however, go far enough in remedying the problems which arise from the application of an inflexible matrimonial property system and there remains a need for an appropriate and realistic examination of the circumstances surrounding (and influencing) the parties at the time of contracting¹¹⁹ and the application of special policy considerations, such as the best interests of children, equality and non-discrimination in family law matters.¹²⁰

4.2 SECTION 7(3) READ WITH SECTION 7(4) OF THE DIVORCE ACT

Firstly, as far as civil marriages are concerned, section 7(3) of the Divorce Act 70 of 1979 authorises a court granting a decree of divorce in respect of a marriage with complete separation of property, entered into before the commencement of the Matrimonial Property Act 88 of 1984 on 1 November 1984, to order, on application by one party, that a share in the other party's assets as the court may deem just be transferred to the applicant party. Section 7(4) of the Divorce Act provides that the order in terms of section 7(3) may only be granted if the court is satisfied that it would be just and equitable and that the applicant party contributed directly or indirectly to the maintenance or increase of the estate of the other party. Here, the ordinary duties of the wife in the private sphere are considered to be a contribution in

¹¹⁸ See paragraphs 4.2 to 4.4 below.

¹¹⁹ Heaton "Striving for gender equality" 556.

¹²⁰ See *GF v SH* 2011 (3) SA 25 (NGP) at 29F-30J. Although this case was overturned on appeal in *SH v GF* 2013 (6) SA 621 (SCA), the appeal did not deal with the considerations that determine public policy in family law matters.

terms of section 7(4).¹²¹ In the matter of *Beaumont v Beaumont*¹²² the prerequisites set out in section 7(3) were discussed and the interpretation of section 7(4) agreed on as embracing the performance by the wife of her ordinary duties of looking after the home and caring for the family.¹²³

The interpretation of what constituted a “contribution” for the purposes of section 7(4) was confirmed in *Bezuidenhout v Bezuidenhout*¹²⁴ in which the court noted that both parties were extremely hard working – the husband in his business and the wife in the home (as a home-maker and mother) and to a certain extent in the husband’s business. The court went further in stating that it considered these separate roles (of the husband in his business and the wife in the home) to be of equal importance in determining their respective contributions for the purposes of section 7(3).¹²⁵ In the limited number of civil marriages concluded with complete separation of property before 1 November 1984, the courts accordingly have the discretion or flexibility to redistribute the parties’ assets equitably and to take into account a wife’s contribution as homemaker and caregiver of the children.

The rationale behind the promulgation of sections 7(3) and 7(4) was the fact that no accrual system existed prior to the promulgation of the Matrimonial Property Act, and this led to an inequitable result for parties who married prior to 1984, out of community of property.¹²⁶ Section 7(3) was accordingly introduced to protect those who, for whatever reason, chose, prior to 1984 to enter into a marriage out of community of property instead of in terms of the default regime, namely community of property.¹²⁷ In addition, section 7(3) was amended in 1988 to extend the operation of the redistribution mechanism to marriages which were subject to section 22(6) of the Black Administration Act 38 of 1927, and concluded before the coming into operation of the Marriage and Matrimonial Property Law Amendment Act 3

¹²¹ S 7(4) of the Divorce Act; *Bezuidenhout v Bezuidenhout* 2003 (6) SA 691 (C); *Beaumont v Beaumont* 1987 (1) SA 967 (A); *Kritzinger v Kritzinger* 1989 (1) SA 67 (A).

¹²² 1987 (1) SA 967 (A).

¹²³ At 997F-G.

¹²⁴ 2003 (6) SA 691 (C).

¹²⁵ At 711I-712B.

¹²⁶ See also para 2.2.3 above.

¹²⁷ Law Commission Report *Project 15* 5.

of 1988 on 2 December 1988.¹²⁸ The limited operation of section 7(3) was controversial at the time of its promulgation and remains so.¹²⁹

4.3 SECTIONS 8(4)(a) and (b) OF THE RECOGNITION OF CUSTOMARY MARRIAGES ACT 120 of 1998

The second exception is found in sections 8(4)(a) and (b) of the Recognition of Customary Marriages Act which confer the powers contained in sections 7, 8, 9 and 10 of the Divorce Act on the court appointed to dissolve a customary marriage and empowers the court to make any equitable order that it deems just. Section 7(1) of the Recognition of Customary Marriages Act originally provided that the proprietary consequences of customary marriages entered into before the commencement of the Recognition of Customary Marriages Act would be subject to customary law. Section 7(2) stated further that a monogamous customary marriage concluded after the Recognition of Customary Marriages Act would be a marriage in community of property.

The constitutionality of sections 7(1) and 7(2) of the Recognition of Customary Marriages Act was challenged in the case of *Gumede v President of the Republic of South Africa*.¹³⁰ The Constitutional Court held that section 7(1) in its entirety and the words “entered into after the commencement of this Act” in section 7(2) were unconstitutional and invalid.¹³¹ In reaching its decision the court also considered the applicability of section 8(4)(a) of the Recognition of Customary Marriages Act against the backdrop of the limited application of section 7(3) of the Divorce Act. It was argued by the government that the same limitation as that contained in section 7(3), namely that for the section to be applicable the marriage must be out of community of property, should likewise be applied to customary marriages.¹³² The effect of this argument, if successful, would have been that only those customary marriages which were out of community of property would have fallen within the ambit of section 8(4)(a) of the Recognition of Customary Marriages Act and been eligible for an equitable

¹²⁸ Heaton *South African family law* 134.

¹²⁹ Barratt “Marital agreements” 690.

¹³⁰ 2009 (3) SA 152 (CC).

¹³¹ At 177A-C.

¹³² At 170B-C. See further para 5.3 below for a more detailed discussion of this case.

distribution order. The Constitutional Court held that there was no cogent reason for limiting the scope of the equitable jurisdiction conferred on the divorce court seized with the dissolution of a customary marriage either by date¹³³ or by matrimonial property regime.¹³⁴ It therefore appears that the courts do have the discretion or flexibility to redistribute the parties' assets equitably and to take into account a wife's contribution as homemaker and caregiver of the children in all customary marriages, regardless of when they were concluded and of which matrimonial property system applies to the marriage.

4.4 SECTION 9(1) OF THE DIVORCE ACT

Section 9 of the Divorce Act states that the court may make an order to the effect that the patrimonial benefits of the marriage should be forfeited by one party in favour of the other, either wholly or in part, if the court having regard to the duration of the marriage, the circumstances which gave rise to the breakdown thereof and any substantial misconduct on the part of either of the parties, is satisfied that if the order for forfeiture is not made, one party will be unduly benefited in relation to the other. However, forfeiture cannot be utilised to rectify the usual consequences that arise as a result of the matrimonial property regime, for reasons of fairness.¹³⁵ In *Wijker v Wijker*¹³⁶ the court *a quo* found that an order of forfeiture was competent on the basis of a principle of fairness¹³⁷ in circumstances where a spouse had not contributed towards the management, administration or profit-making of the applicant spouse's business. The order was overturned on appeal and the appeal court was at pains to point out that section 9 contains no provision which allows for the application of a principle of fairness.¹³⁸ The guiding principle in a forfeiture order has clearly been stated as being whether or not either party would be unduly benefited, taking into account the factors set out in the section. Whether or not the division of the estate on divorce would be unfair, taking into account an imbalance in the respective contributions of

¹³³ S 7(1).

¹³⁴ At 172B-D. See also s 7(3) of the Divorce Act read with s 8(4)(a) the Recognition of Customary Marriages Act.

¹³⁵ Heaton *South African family law* 131.

¹³⁶ 1993 (4) SA 720 (A).

¹³⁷ At 731C-D.

¹³⁸ At 731E-G.

the parties to the marriage which led to the growth in the other's estate, is irrelevant.¹³⁹

Furthermore, a practice has arisen in terms of which forfeiture orders are only granted against the spouse whose estate has shown the smaller accrual (where an antenuptial contract is in place) or who contributed the least to the joint estate (in marriages in community of property).¹⁴⁰ Effectively the spouse who claims forfeiture will do so on the basis that their estate has accrued more, alternatively that their spouse contributed less than they did to the joint estate. On either basis, the poorer spouse will be denied the right to share in the spoils of the marriage.¹⁴¹ However, nowhere in the Divorce Act does it state that the spouse whose estate has accrued more than the other, or who has contributed to a greater extent to the joint estate may not forfeit a percentage of that accrual or share in the joint estate to the poorer spouse on the grounds that he or she has been unduly benefited, in the light of the duration of the marriage, the circumstances which gave rise to the breakdown thereof and any substantial misconduct on the part of the "wealthier" spouse.

The practice of forfeiture by the poorer spouse has developed on dubious grounds without taking into account the statements of the Roman and Roman-Dutch authorities that spouses can forfeit those assets which they brought into the marriage.¹⁴² A further difficulty is that in the development of the practice the authorities have lost sight of the fact that a spouse's non-monetary contributions can and should be accorded value when ordering forfeiture.¹⁴³

In Roman times, marriages were generally similar to the current regime of marriage out of community of property.¹⁴⁴ In addition, there were certain provisions pertaining to forfeiture in terms of which a wife could forfeit her *dos* (which was a contribution towards the household expenses made at the commencement of the marriage by the wife) and a husband his *donatio*

¹³⁹ See also *Engelbrecht v Engelbrecht* 1989 (1) SA 597 (C) at 601F-G.

¹⁴⁰ Bonthuys E "The rule that a spouse cannot forfeit at divorce what he or she has contributed to the marriage: An argument for change" 2014 *SALJ* 439.

¹⁴¹ Bonthuys "An argument for change" 439.

¹⁴² Bonthuys "An argument for change" 441.

¹⁴³ Bonthuys "An argument for change" 450.

¹⁴⁴ Bonthuys "An argument for change" 442 note 4.

propter nuptias (a marriage settlement made at the commencement of the marriage to support the wife in the event of the husband's death).¹⁴⁵

In Roman-Dutch Law, marriages were akin to the current regime of marriage in community of property and a spouse could likewise forfeit those assets he or she had brought into the marriage.¹⁴⁶

Prior to the promulgation of the Divorce Act in 1979, case law varied, with some courts allowing for the forfeiture of assets brought into a marriage by a spouse and others disallowing such an order. The generally accepted rule that a spouse could not forfeit that which he had brought into the marriage was introduced in *Celliers v Celliers*,¹⁴⁷ in which Solomon J (with Mason J and Curlewis J concurring) decided that, in the light of the conflicting Roman and Roman-Dutch case law, and earlier South African case law, a court could not order a guilty spouse to forfeit property which he or she had brought into the marriage.¹⁴⁸ The court went further in stating that, even if a rule existed whereby property could be forfeited, such a rule had become obsolete.¹⁴⁹

The interpretation of section 9 is now entrenched and forfeiture orders are only applied to those benefits derived from a marriage that the spouse against whom the order is sought did not contribute to or generate.¹⁵⁰ Moreover, a court may not order the partial forfeiture of a spouse's separate estate – the rule applies only to the benefits derived from the marriage.¹⁵¹ This is dissimilar to Roman-Dutch and English law¹⁵² which recognised and recognises that, in order to arrive at an equitable solution, the transfer of assets brought into the marriage by one spouse to the other spouse may be required.

¹⁴⁵ Bonthuys "An argument for change" 443.

¹⁴⁶ Bonthuys "An argument for change" 443.

¹⁴⁷ 1904 TS 926 at 926-927.

¹⁴⁸ At 933.

¹⁴⁹ At 936. See also Bonthuys "An argument for change" 446.

¹⁵⁰ Bonthuys "An argument for change" 453.

¹⁵¹ Hahlo *The law of husband and wife* 376; *Rousalis v Rousalis* 1980 (3) SA 446 (C) at 450D-E (cannot order partial forfeiture of separate asset).

¹⁵² See para 6.2 below.

A further casualty of the development of the way in which forfeiture orders are dealt with has been the manner in which a wife's non-monetary contributions are dealt with. In the matter of *Gates v Gates*,¹⁵³ the court expressed the opinion that a wife's contributions in performing domestic duties, by virtue of the fact that they were a cost-saving exercise for the benefit of the earning spouse, fell to be credited to her account in the determination of the respective contributions to the joint estate.¹⁵⁴ The principle espoused in *Gates*, which ascribed value to a wife's non-monetary contributions to a joint estate, was criticised in the post-1979 case of *Singh v Singh*,¹⁵⁵ in which a wife was only allowed a twenty percent share of the joint estate in a marriage in community of property in the light of her having done very little to establish her contribution to the estate other than keeping house and looking after the children.¹⁵⁶ Upon the dissolution of a marriage in community of property a spouse is entitled a half share of the joint estate, and it is thus anomalous that, in a forfeiture situation, the right to share is assessed on a contribution basis, that is, a calculation is made on the basis of each spouse's contribution to the estate. The correct application of the rule should arguably utilise the fifty percent share in the joint estate as the starting point rather than the spouses' respective contributions to the joint estate.¹⁵⁷

Accordingly and while an order in terms of section 9 may appear to be an attempt to ameliorate the harsh consequences of a strict application of the marital property regime, it only serves to protect the wealthier spouse and fails to take into account any contribution made by the poorer spouse in the private sphere.

4.5 PRACTICAL CONSEQUENCES OF THE VARIOUS SYSTEMS AND THEIR APPLICATION UPON THE DISSOLUTION OF MARRIAGES

Spouses who marry after 1984 and do not fall within the purview of sections 7(3) of the Divorce Act may find themselves destitute upon the dissolution of

¹⁵³ 1940 NPD 361 at 365-366.

¹⁵⁴ Bonthuys "An argument for change" 447-448.

¹⁵⁵ 1983 (1) SA 781 (C).

¹⁵⁶ At 790C-F. See also Bonthuys "An argument for change" 450.

¹⁵⁷ Bonthuys "An argument for change" 453.

the marriage and without any right of recourse available to them to remedy this inequitable result.

Upon the dissolution of a marriage out of community of property the poorer spouse may have a claim for maintenance in terms of section 7(2) of the Divorce Act. However, she will not have a claim for forfeiture in terms of section 9 of the Divorce Act nor will she have a claim in terms of section 7(3) unless she falls within the very narrow ambit of the section.¹⁵⁸ Moreover, and to compound the potential inequitable consequence of her choice of matrimonial property regime, she will be unlikely to receive a permanent maintenance award in keeping with the increased support by our courts of the clean-break principle.¹⁵⁹ Although the clean-break principle may be effective in equitable distribution jurisdictions where parties are awarded sufficient assets to ensure an equitable result¹⁶⁰ (and hence do not need more than a rehabilitative term of maintenance), the consequences in a system like the one applicable in South Africa (which has very limited redistribution mechanisms), compounded by the high incidence of maintenance defaulters,¹⁶¹ force many women into poverty after divorce. In *Beaumont v Beaumont*¹⁶² the clean-break principle was dealt with in a comparative analysis and accepted as being part of our law. It was noted that courts should always bear in mind the possibility of using their powers in such a way as to achieve a complete termination of the financial dependence of one party on the other if circumstances permit.¹⁶³ It is important to note that in the *Beaumont* case the court was dealing with a redistribution situation and as such was able to contemplate that in those circumstances, with the grant of an adequate financial award, it was feasible to do away with maintenance on the basis that the wife would be able to live off the fruits of the capital settlement. The court went on to state that there would no doubt be many cases in which the constraints imposed by the facts would not allow justice to be done between parties by effecting a final termination of the financial dependence of one on the other.¹⁶⁴

¹⁵⁸ See para 4.1 above.

¹⁵⁹ Heaton "Changing the contours" 425; Sinclair *The law of marriage* 151.

¹⁶⁰ Parkinson P *Family law and the indissolubility of parenthood* (2011) 27; De Jong "New trends" 81; see also paragraph 6.2 below.

¹⁶¹ Sinclair *The law of marriage* 151.

¹⁶² 1987 (1) SA 967 (A).

¹⁶³ At 993A-C.

¹⁶⁴ At 993D-F.

Another aggravating factor for which the system of matrimonial property distribution does not cater upon divorce is the fact that, in many instances, the major asset which the wealthier spouse has built up over the course of the marriage is an ability to earn an elevated income or human capital acquired as a result of the wife's efforts in the home and in respect of the children.¹⁶⁵ There is no entitlement in our law for a spouse who has supported her husband and allowed him to go from strength to strength in the workplace to share in this enhanced income stream upon divorce.¹⁶⁶

Moreover, where the accrual system does apply in a marriage, there are numerous other ways in which an antenuptial contract can be structured to ensure that, upon divorce, any growth has been absorbed by an elevated commencement value or excluded list of assets. An order for forfeiture in terms of section 9 of the Divorce Act is not available to a poorer spouse in these circumstances, owing to the limited application of section 9.¹⁶⁷ As a further exacerbating feature, where a wife has stayed at home (as a consequence of choices made within the marriage), sacrificed her career and been dependent upon her husband for years, the court will expect her in most circumstances¹⁶⁸ to achieve financial independence within a very short time. Therefore, the effect of an inflexible matrimonial property system coupled with the growing acceptance of the clean-break principle can and does lead to hardship and an inequitable result for many spouses (particularly women) upon divorce.

In the 2012 cases of *EA v EC*¹⁶⁹ and *JW v CW*¹⁷⁰ a different approach was utilised in endeavouring to ameliorate the harsh consequences that arose on divorce from "no-sharing" antenuptial contracts.¹⁷¹ Here, the wives endeavoured to assert claims based on universal partnership in order to circumvent the unfairness that arose from the application of their matrimonial property regimes. Both cases failed on the bases, *inter alia*, that, to prove a universal partnership in an instance where a no-sharing

¹⁶⁵ Heaton "Striving for gender equality" 570; De Jong "New trends" 82.

¹⁶⁶ De Jong "New trends" 82.

¹⁶⁷ See para 4.3 above.

¹⁶⁸ Except for the very elderly wife who has not worked for decades.

¹⁶⁹ 2012 ZAGPJHC 219.

¹⁷⁰ 2012 (2) SA 529 (NC).

¹⁷¹ Barratt A "Marital agreements" 688.

antenuptial contract existed would be to contradict the terms of the contract and allow a revocation of the contract which could not be allowed.¹⁷²

It has accordingly again become necessary to examine the question whether or not the limited application of the remedy provided for in section 7(3) as read with section 7(4) of the Divorce Act is justifiable, particularly in the light of the Constitution of the Republic of South Africa, 1996 – a factor which was not examined by the Law Commission¹⁷³ in 1990. This factor will therefore be examined next.

¹⁷² Barratt "Marital agreements" 689.

¹⁷³ SA Law Commission *Project 12 Report on the review of the law of divorce: Amendment of section 7(3) of the Divorce Act, 1979* (Pretoria 1990). See also chapter 5 in this regard.

CHAPTER 5

CONSTITUTIONALITY OF THE PRESENT POSITION WHERE COURTS HAVE A JUDICIAL DISCRETION ONLY IN CERTAIN MARRIAGES

5.1 CONSTITUTIONAL PROVISIONS

Section 9(1) of the Constitution of the Republic of South Africa, 1996, states that everyone is equal before the law and has the right to equal protection and benefit of the law. Section 9(3) states in addition that the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender and marital status. The Constitutional Court has on many occasions made it clear that substantive equality and not mere formal equality forms the basis of this guarantee.¹⁷⁴

The test for determining whether the equality clause in section 9 has been breached was set out in *Harksen v Lane NO*.¹⁷⁵ The court has to determine whether the law or action in question differentiates between people or categories of people. If it has been found to do so, the court has to determine whether a legitimate governmental purpose exists for the differentiation and whether there was a rational connection between the purpose of the government and the differentiation in question.¹⁷⁶ Once that enquiry has been undertaken it is necessary to determine whether the differentiation amounts to discrimination and if so whether such discrimination is unfair. The differentiation does amount to discrimination if it is based on one of the listed grounds set out in section 9, and in those circumstances unfairness will be presumed (and insofar as the differentiation is not on a listed ground, an objective inquiry into whether the differentiation amounts to discrimination which is unfair will have to be undertaken).¹⁷⁷ A determination will then need to be made as to whether or not the unfair discrimination is justifiable under section 36 of the

¹⁷⁴ *President of the Republic of South Africa and another v Hugo* 1997 (4) SA 1 (CC); *Brink v Kitshoff NO* 1996 (4) SA 197 (CC) at 214F-G, 216J-217B, 217C-E; *Bannatyne v Bannatyne (CGE as Amicus Curiae)* 2003 (2) SA 363 (CC) at 377B-378A. See also Heaton "Striving for gender equality" 549.

¹⁷⁵ 1998 (1) SA 300 (CC), which dealt with the interim Constitution, Act 200 of 1993, and in particular with s 8(1) thereof.

¹⁷⁶ At 325F-G.

¹⁷⁷ At 328B-G.

Constitution.¹⁷⁸ The factors to be taken into account in establishing unfair discrimination were stated in the *Harksen* case as including the position of the complainants in society and whether they had been discriminated against in the past, the nature of the provision or power being scrutinised and the purpose sought to be achieved by it, the extent to which the discrimination has affected the rights of the complainants and whether it has led to an impairment of their dignity.¹⁷⁹

5.2 LAW COMMISSION FINDINGS

The question of the extension of the applicability of section 7(3) of the Divorce Act so as to automatically apply to all marriages out of community of property was dealt with by the South African Law Commission in July 1990.¹⁸⁰ There were a number of arguments raised in support of the extension of the section, including the fact that women who excluded the accrual system from their marriages would be in the same economic position after a divorce as those protected by the judicial discretion accorded by section 7(3),¹⁸¹ the fact that parties may well choose to exclude the accrual system through being wrongly advised or simply through ignorance¹⁸² and the fact that there is often an imbalance of power present at the pre-contractual negotiation stage and this can translate into an economically disadvantageous marriage contract.¹⁸³

The arguments raised against the expansion of the discretion in section 7(3) included the need to recognise and maintain the parties' contractual freedom of choice,¹⁸⁴ the principle that the law does not protect those who have contracted foolishly,¹⁸⁵ the fact that the discretionary concept contained in section 7(3) would lead to legal uncertainty,¹⁸⁶ the understanding that section 7(3) was an emergency measure for a limited

¹⁷⁸ *Petersen v Maintenance Officer, Simon's Town Maintenance Court* 2004 (2) SA 56 (C) at 63G-64B; *Brink v Kitshoff NO* 1996 (4) SA 197 (CC) at 218A-F. See also Heaton J *Casebook on South African family law* 3 ed (2010) 255-256.

¹⁷⁹ At 328H.

¹⁸⁰ SA Law Commission *Project 12 Report on the review of the law of divorce: Amendment of section 7(3) of the Divorce Act, 1979* (Pretoria 1990).

¹⁸¹ SA Law Commission *Report on the review of the law of divorce* 4.

¹⁸² SA Law Commission *Report on the review of the law of divorce* 5.

¹⁸³ SA Law Commission *Report on the review of the law of divorce* 11. See also para 3.3 above.

¹⁸⁴ SA Law Commission *Report on the review of the law of divorce* 13.

¹⁸⁵ SA Law Commission *Report on the review of the law of divorce* 15.

¹⁸⁶ SA Law Commission *Report on the review of the law of divorce* 17.

time¹⁸⁷ and furthermore the argument that the legal discretionary system is a rich man's law.¹⁸⁸

The Commission ultimately decided against the extension of the judicial discretion conferred by section 7(3), and in so doing, expressed approval for the German system of matrimonial property law which is similar to our present accrual system.¹⁸⁹ The Commission disagreed with the English system in terms of which there is a separation of assets during the marriage but an equitable distribution on divorce.¹⁹⁰ At the time of the review the Constitution had not been promulgated and accordingly questions of equality and compliance with the ideals stated in section 9 were not taken into account by the Commission in reaching its ultimate decision.

5.3 GUMEDE V PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA¹⁹¹

In *Gumede v President of the Republic of South Africa* the court had to decide whether or not to uphold the court *a quo's* decision to declare the legislative provisions regulating the proprietary consequences of a customary marriage set out in, *inter alia*, sections 7(1) and 7(2) of the Recognition of Customary Marriages Act 120 of 1998 inconsistent with the Constitution and invalid. In so doing, the enquiry set out in *Harksen v Lane*¹⁹² was applied,¹⁹³ that is, whether the provisions discriminated unfairly against the applicant and other women similarly situated and if so whether such discrimination was justifiable.¹⁹⁴

The sections in question differentiated between the proprietary consequences of marriages concluded before the commencement of the Recognition of Customary Marriages Act and those concluded after the commencement of the Act. Women married prior to the commencement of the Act ("old marriages") would be married in accordance with the customary

¹⁸⁷ *Ibid.*

¹⁸⁸ *Ibid.*

¹⁸⁹ SA Law Commission *Report on the review of the law of divorce* 22.

¹⁹⁰ *Ibid.*

¹⁹¹ 2009 (3) SA 152 (CC).

¹⁹² 1998 (1) SA 300 (CC).

¹⁹³ See para 5.1 above.

¹⁹⁴ At 159E-G.

law as codified and applicable to their marriage¹⁹⁵ and women married after the commencement of the Act (“new marriages”) would be married in community of property and profit and loss unless these consequences were excluded by an antenuptial contract.¹⁹⁶

The government defended its position on the basis, *inter alia*, that the discrimination was justifiable because section 8(4)(a) of the Recognition of Customary Marriages Act conferred the equitable distribution powers contained in section 7(3) of the Divorce Act on the divorce court dealing with all customary marriages.¹⁹⁷ The court found that the differentiation between women who were party to an “old marriage” and those who were party to a “new marriage” was discriminatory on the basis of gender and as between husband and wife.¹⁹⁸ In reaching its ultimate decision the court also considered it necessary to consider the scope and efficacy of section 8(4)(a) of the Recognition of Customary Marriages Act. The scope of the equitable jurisdiction conferred by section 8(4)(a)¹⁹⁹ was held to be applicable to all customary marriages upon consideration of the circumstances relevant to the marriage in determining a just and equitable result.²⁰⁰ Accordingly, the court confirmed that the provisions of sections 7(1) and 7(2) of the Recognition of Customary Marriages Act unfairly discriminated against the applicant on the ground of gender on the basis that the impugned sections unfairly distinguished between marriages on the basis of the date on which they were concluded (that is either before or after the commencement of the Recognition of Customary Marriages Act).²⁰¹

The court stressed that any distinction between the consequences of customary marriages concluded prior to the commencement of the Recognition of Customary Marriages Act and those entered into thereafter were clearly discriminatory, inconsistent with the Constitution, invalid, unfair

¹⁹⁵ At 168A-C. What this entailed for Mrs Gumede was that she would be married in accordance with the Kwazulu Act on the Code of Zulu Law 16 of 1985 and the Natal Code of Zulu Law Proclamation 151 of 1987 the effect of which was that all property would be owned by the head of the family, Mrs Gumede’s husband. Had Mrs Gumede married after the effective date of the Recognition of Customary Marriages Act, she would have been married in community of property.

¹⁹⁶ At 164H-165B.

¹⁹⁷ At 169C-170B.

¹⁹⁸ At 167H-J.

¹⁹⁹ By its incorporation of the provisions of s 7(3) of the Divorce Act.

²⁰⁰ At 172B-D.

²⁰¹ At 173G-J.

and not justifiable.²⁰² The comments made in the *Gumede* judgment, namely that the power conferred on the divorce courts to exercise equitable jurisdiction is consonant with the underlying ethos of customary law which strives for equity in resolving conflict,²⁰³ are telling. In *Gumede* the redistribution power contained in section 7(3) as read with section 8(4)(a) of the Recognition of Customary Marriages Act was extended to all customary marriages regardless of the matrimonial property system applicable thereto. The question which arises is why this discretion (and indeed ethos) should not be extended to all marriages and not only those falling within the purview of section 7(3) of the Divorce Act and section 8(4)(a) and (b) of the Recognition of Customary Marriages Act?

5.4 CONCLUDING REMARKS

Firstly, a distinction is drawn between civil marriages concluded out of community of property before 1 November 1984 (or 2 December 1988 in the case of African spouses) and those concluded after that date. The question which arises is whether the use of the wedding date in section 7(3) as the criterion as to whether or not the remedy of equitable distribution will be extended to parties is a fair methodology. There are many women who have married after 1984 with the exclusion of the accrual system or in terms of antenuptial contracts with onerous conditions and who are then left destitute on divorce without the remedy of a fair distribution.²⁰⁴ They are in the same situation as those who married with complete separation of property prior to 1984, but without the benefit of an equitable distribution remedy. To distinguish on the basis of the date of the marriage is arbitrary and discriminatory.²⁰⁵ It is arguable that this differentiation on the ground of the date of the marriage infringes the equality clause contained in section 9 of the Constitution.²⁰⁶ In taking the argument to its logical conclusion, and in determining whether or not a legitimate government purpose exists for the differentiation, recourse can be had to the arguments raised by the South

²⁰² Bekker J and Van Niekerk G “*Gumede v President of the Republic of South Africa: Harmonisation, or the creation of new marriage laws in South Africa?*” 2009 SA *Public Law* 209.

²⁰³ *Gumede* case at 172A.

²⁰⁴ Heaton *South African family law* 136.

²⁰⁵ Sinclair *The law of marriage* 147.

²⁰⁶ Heaton *South African family law* 136. See also Heaton J “Family law and the Bill of Rights” in Mokgoro Y and Tlakula P (eds) *Bill of Rights compendium* (1998) para 3C26.

African Law Commission²⁰⁷ in refusing to extend the judicial discretion in 1990, namely the need to respect the contractual choices made by prospective spouses and the danger of the legal uncertainty which would arise should the extension be allowed. It is submitted that the argument pertaining to the sanctity of a party's right to contract simply cannot be upheld in the light of the research which exists pertaining to the many difficulties which arise between contracting parties in a family setting.²⁰⁸ In addition, the *Gumede* decision went a long way towards destroying the argument for legal certainty as a ground of justification for the retention of a narrow judicial discretion as contemplated in section 7(3) of the Divorce Act.²⁰⁹ Objectively, to discriminate against any spouse, whatever the form their marriage may take, on the arbitrary basis of the date of their marriage (or for that matter the matrimonial property system applicable to their marriage) certainly appears to amount to discrimination which, if tested objectively, leads to gross unfairness. The grounds raised by the Law Commission would in addition be unlikely to constitute sufficient grounds for a favourable finding in terms of section 36 of the Constitution.²¹⁰

Secondly, following the *Gumede* decision there is differentiation between civil marriages and customary marriages. This differentiation, like the discrimination found in section 7(3), has to be tested in order to ascertain whether or not it amounts to unfair discrimination. While there are clear differences between customary marriages and civil marriages and the court in the *Gumede* decision stressed the importance of recognising these differences,²¹¹ these differences cannot outweigh the need for fairness in the redistribution of matrimonial property as established in the *Gumede* decision.²¹² The government's purpose in making provision for the redistributive power was to enable courts to rectify any injustices arising from the strict application of a matrimonial property system. To restrict this power to certain types of marriages cannot serve a legitimate government purpose.²¹³ The legitimate government purpose for the extension of the power in the *Gumede* decision is clearly to avoid inequities arising in

²⁰⁷ SA Law Commission *Report on the review of the law of divorce* 13, 15 and 17.

²⁰⁸ See para 3.3 above.

²⁰⁹ Heaton *South African family law* 136. See also para 5.3 above.

²¹⁰ See para 5.1 above.

²¹¹ At 171F-H.

²¹² At 173G-174H; See also Heaton *South African family law* 137.

²¹³ Heaton *South African family law* 137.

customary marriages. Objectively, to refuse to extend the same remedy to spouses in civil marriages leads to inequality and unequal protection of the law and accordingly to unfair discrimination. Moreover, while it is unclear whether people who are not black may conclude customary marriages, insofar as they cannot the differentiation may amount to unfair discrimination on the basis of race as well.²¹⁴ Accordingly, the fact that the equitable distribution provision contained in section 7(3) is extended to all customary marriages (regardless of the proprietary regime) whereas it is only applicable to civil marriages which are out of community of property and concluded before a certain date is further evidence of the need for a constitutional challenge to the provision and its scope on the basis that this differentiation amounts to discrimination against spouses in civil marriages.²¹⁵ Moreover, the argument previously raised by the Law Commission that the extension of the remedy in section 7(3) of the Divorce Act would lead to uncertainty in our law does not hold water in the light of the extension of the power of distribution to all customary marriages.²¹⁶ At the time of the South African Law Commission's review²¹⁷ the 1996 Constitution had not yet been promulgated and an argument in favour of the extension of the discretionary system in terms of section 9 of the Constitution would, it is submitted, have been a compelling one, particularly in the light of the *Gumede* decision and the position of the financially weaker party in customary marriages.

A proposed solution to the difficulties created by our current matrimonial property law in respect of civil marriages, coupled with the clean-break principle inherited from Western legal systems, would be the extension of a general redistributive power²¹⁸ to all marriages. This general redistributive power should be applicable, regardless of when the marriage was concluded, how it was concluded or whether or not it was a civil or customary marriage. The extension of this power would be a relatively simple way of conferring the relevant power on the courts to deal with inequities as and when they arise. This could be achieved by a constitutional challenge based upon similar themes to those found in *Gumede* in respect

²¹⁴ Heaton *South African family law* 137.

²¹⁵ Bonthuys "An argument for change" 459.

²¹⁶ Heaton *South African family law* 136. See also para 5.3 above.

²¹⁷ SA Law Commission *Report on the review of the law of divorce* 22. See also para 5.2 above.

²¹⁸ Bonthuys "An argument for change" 459; Heaton "Striving for gender equality" 556, 562.

of the limited application of section 7(3) of the Divorce Act and the extension of a general redistributive power to all customary marriages by section 8(4)(a) of the Recognition of Customary Marriages Act.²¹⁹ This general redistributive power has been in force in English and Welsh matrimonial property law since the 1970s with the enactment of the Matrimonial Proceedings and Property Act of 1970, which was consolidated into the Matrimonial Causes Act of 1973.²²⁰ Moreover, the adjustive discretion was introduced by section 7(3) to avoid gross and inequitable discrepancies in parties' financial position after divorce. Accordingly, a minimum requirement should be that this power be extended wherever there is complete separation of property.²²¹

²¹⁹ See para 5.3 above.

²²⁰ Sinclair *The law of marriage* 52. See also chapter 6.2 below.

²²¹ Sinclair *The law of marriage* 145 note 388.

CHAPTER SIX

THE CURRENT MATRIMONIAL PROPERTY SYSTEM APPLICABLE IN ENGLAND AND WALES AND THE PROPOSED INCLUSION OF MARITAL PROPERTY AGREEMENTS

6.1 INTRODUCTION

The courts in England and Wales have far-reaching powers and judicial discretion to make equitable distribution awards between all divorcing parties since the matrimonial property system applicable in England and Wales is one of complete separation of assets during the marriage with an equitable distribution on divorce.²²² Currently, the courts in England and Wales base their decisions regarding matrimonial property distribution in divorce matters on the Matrimonial Causes Act 1973.²²³ Sections 22A to 24G of the Act set out the types of orders the court may make in exercising its judicial discretion. These include periodical payments, lump sum payments, maintenance payments, property adjustment and pension sharing orders. Section 25 of the Act contains the matters which a court is to have regard to in exercising its discretion. These matters include the welfare of any children born of the marriage,²²⁴ the income, earning capacity, property and financial resources, both current and in the foreseeable future, of the parties,²²⁵ their standard of living,²²⁶ their age and the duration of the marriage,²²⁷ the respective contributions made or likely to be made to the welfare of the family, and the conduct of the parties.²²⁸ Section 25(2)(b) of the Act further directs the court to take into account the financial needs, obligations and responsibilities of the parties to the marriage. This concept of financial need has been one of the most problematic areas for courts when exercising their discretion.²²⁹ Where

²²² Clark B “English law of divorce and dissolution and finance and property distribution on divorce and dissolution” in Clark B (ed) *Family Law Service* (LexisNexis Durban 2012) 10.

²²³ The Law Commission “Consultation Paper no 208: Matrimonial property, needs and agreements – A supplementary consultation paper” available at http://lawcommission.justice.gov.uk/docs/cp208_matrimonial_property.pdf (accessed on 24 September 2014) para 2.5.

²²⁴ S 25(1).

²²⁵ S 25(2)(a).

²²⁶ S 25(2)(c).

²²⁷ S 25(2)(d).

²²⁸ S 25(2)(f).

²²⁹ The Law Commission “Consultation Paper no 208: Matrimonial property, needs and agreements” para 3.25.

there are children born of the marriage, the court will commence the process by focusing on provision for the children's needs, their primary carer's needs and the provision of a home and an income for the children and their primary carer.²³⁰ The statute is, however, silent on what the courts should be aiming to achieve in making the distribution orders contemplated in section 25.²³¹ Accordingly, the courts have developed the law and the approach has changed over the years.²³²

6.2 HISTORICAL DEVELOPMENT

Historically the courts had the right to vary a settlement on divorce or order a settlement in a manner similar to the South African notion of forfeiture.²³³ When the Matrimonial Causes Act 1973 was promulgated the need for this device fell away as the Act allowed judges and registrars to make just orders when distributing matrimonial property on divorce on the basis of the "minimal loss" principle which entailed an endeavour to put the parties in the position they would have been in had the marriage not broken down.²³⁴ The Matrimonial Proceedings and Family Affairs Act 1984 amended the Matrimonial Causes Act in certain respects, including the replacement of the "minimal loss" principle with the "clean-break" principle.²³⁵ The underlying themes of the Matrimonial Proceedings and Family Affairs Act include an express emphasis on minor children, the wife's earning capacity, the consideration of "conduct" of the parties and the clean-break principle.²³⁶ The Matrimonial Causes Act subsequently conferred upon the courts a broad judicial discretion to make orders on the dissolution of marriages pertaining to financial provision,²³⁷ property adjustment,²³⁸ the sale of property²³⁹ and

²³⁰ The Law Commission "Consultation Paper no 198: Marital property agreements – a consultation paper" available at http://lawcommission.justice.gov.uk/docs/cp198_marital_property_agreements_consultation.pdf (accessed on 24 September 2014) para 2.27.

²³¹ The Law Commission "Consultation Paper no 208: Matrimonial property, needs and agreements" para 2.12.

²³² The Law Commission "Consultation Paper no 208: Matrimonial property, needs and agreements" para 2.13.

²³³ Sinclair J "Financial provision on divorce: Need, compensation or entitlement" 1981 *SALJ* 469 472.

²³⁴ Sinclair "Financial provision" 472.

²³⁵ Sinclair *The law of marriage* 142 note 379.

²³⁶ Wilkinson KHP and De Haas MR *Property distribution on divorce* 3 ed (1989) 53.

²³⁷ S 23.

²³⁸ S 24.

²³⁹ S 24A.

pension sharing.²⁴⁰ These powers are specifically exercised with an emphasis on the welfare of minor children and ensuring the termination of financial obligations between the parties on a just and reasonable basis.²⁴¹

The difficulty that the courts faced in exercising their discretion, however, was the lack of guidance in reaching fair orders.²⁴² In the absence of any guidance in this regard the courts developed their own manner of dealing with the equitable distribution of matrimonial property according to the parties' reasonable requirements.²⁴³ The trend that developed was one of providing for a spouse's reasonable requirements, the effect of which was that, in a situation where there was a disparity in the wealth of spouses, the poorer spouse's reasonable requirements would be provided for and any surplus would remain with the wealthier spouse.²⁴⁴ Redistribution was applied on a scale which allowed the poorer spouse to maintain his or her matrimonial standard of living.²⁴⁵ In many cases the courts applied the so-called one-third rule, whereby the poorer spouse received a third of the family assets and the remaining two-thirds remained with the other spouse.²⁴⁶ This approach changed in 2000, with the decision in *White v White*.²⁴⁷ In this case the court took a view that spouses should be treated equally, regardless of what tasks or roles they performed or adopted during the marriage and ruled that the distribution of assets should take place on a shared basis. This led to what was known as the "sharing" principle²⁴⁸ which did not equate to an equal division but nonetheless was used as a general guide.²⁴⁹ The development of the sharing principle meant that even in cases where a spouse's domestic financial contributions far outweighed the domestic contribution of the other spouse, and the poorer spouse's financial needs were more than taken care

²⁴⁰ S 24B.

²⁴¹ S 25.

²⁴² The Law Commission "Consultation Paper no 208: Matrimonial property, needs and agreements" paras 3.20, 3.23, 3.26 and 3.33.

²⁴³ The Law Commission "Consultation Paper no 208: Matrimonial property, needs and agreements" para 3.33.

²⁴⁴ The Law Commission "Consultation Paper no 198: Matrimonial property agreements" paras 2.34-2.35.

²⁴⁵ *Dart v Dart* [1966] 2 FLR 286.

²⁴⁶ *Wachtel v Wachtel* [1973] 2 WLR 366.

²⁴⁷ [2001] 1 AC 596, [2000] 2 FLR 981. See also The Law Commission "Consultation Paper no 198: Matrimonial property agreements" paras 2.46-2.51.

²⁴⁸ The Law Commission "Consultation Paper no 198: Matrimonial property agreements" paras 2.59-2.61. See also The Law Commission "Consultation Paper 208: Matrimonial property, needs and agreements" para 2.17; Barratt A "Marital agreements" 692.

²⁴⁹ Barratt "Marital agreements" 692.

of, any surplus would still be shared by the parties.²⁵⁰ In addition there was an inconsistency between regions in ascertaining the financial needs of parties and an inconsistent exercise of the judicial discretion in different regions.²⁵¹ Following upon the development of the law after the *White* decision there has been regular press and public criticism of the level of awards often made in favour of wives balanced with a level of concern regarding the need to ensure equality between divorcing spouses.²⁵² An issue which seems to go hand in hand with the expressed difficulties, and which has led to a call for certainty, was the call for a level of recognition for marital property agreements.

6.3 PRENUPTIAL AND POSTNUPTIAL AGREEMENTS

In the nineteenth century prenuptial and postnuptial agreements were contractually void on grounds of public policy.²⁵³ In more recent times, however, they have been taken into account by the courts as one of the factors to be considered in reaching a decision as to an equitable distribution.²⁵⁴ The Supreme Court in England stated recently in the matter of *Radmacher v Granatino*²⁵⁵ that “this rule is obsolete and should be swept away”.²⁵⁶ The court went further and afforded decisive weight to the prenuptial agreement entered into between the divorcing parties²⁵⁷ and started the debate in regard to no-sharing antenuptial contracts in England.²⁵⁸ This was done on the basis that the agreement was entered into willingly and knowingly by responsible adults and that the husband (who interestingly enough was not the breadwinner but the homemaker and carer of the children) had a proper understanding of the consequences of his agreement.²⁵⁹ Lady Hale in her dissenting judgment referred to the fact that the question of the enforceability or otherwise of antenuptial contracts was

²⁵⁰ The Law Commission “Consultation Paper no 208: Matrimonial property, needs and agreements” para 2.17.

²⁵¹ The Law Commission “Consultation Paper no 208: Matrimonial property, needs and agreements” paras 3.30, 3.36, 3.37.

²⁵² The Law Commission “Consultation Paper no 208: Matrimonial property, needs and agreements” paras 3.38, 3.41.

²⁵³ The Law Commission “Consultation Paper no 198: Marital property agreements” para 1.27; Barratt A “Marital agreements” 693.

²⁵⁴ *Ibid.*

²⁵⁵ [2010] UKSC 42.

²⁵⁶ At para 52.

²⁵⁷ At para 123.

²⁵⁸ Barratt A “Marital agreements” 692.

²⁵⁹ At paras 114, 119 and 129.

now in the hands of the Law Commission and Parliament.²⁶⁰ As to how the matter would be dealt with in the interim, the court was of the view that courts would take an antenuptial agreement into account when applying section 25 of the Matrimonial Causes Act in accordance with its developing jurisprudence.²⁶¹ While the judges in the *Radmacher* case respected the public interest in the fair and just exercise of the court's discretion they acknowledged the benefit of an appreciation of party autonomy as well, however within limits.²⁶² The most salient points which emerged from the *Radmacher* case were essentially that a court is not obliged to give effect to nuptial agreements but must afford the appropriate weight to such agreements,²⁶³ the agreement will be only one of the matters which the court will take into account²⁶⁴ and the court should give effect to a nuptial agreement that has been freely entered into unless to do so would lead to an unfair result²⁶⁵ – effectively fairness trumps autonomy when examining the facts of each case.²⁶⁶ The court in addition did not distinguish between pre- and postnuptial agreements (which they referred to as “separation agreements”) and the efficacy of the judgment accordingly extends to both.²⁶⁷

6.4 LAW COMMISSION

In the light of these developments a project and consultation process was set up in 2011 by the Law Commission for England and Wales to review the law relating to agreements made before or during a marriage or civil partnership which seek to regulate the couple's affairs regarding, *inter alia*, the financial consequences of divorce.²⁶⁸ Although the project formally commenced in 2009, the consultation paper was not published until January 2011, because the Commission was awaiting the outcome of the *Radmacher v Granatino* decision.²⁶⁹ The scope of the project in question was extended to cover two further aspects of the law relating to financial orders, namely the role of

²⁶⁰ At para 133.

²⁶¹ At para 83. See also para 6.1 above.

²⁶² At para 78; Barratt “Marital agreements” 693.

²⁶³ At para 2.

²⁶⁴ At para 3.

²⁶⁵ At para 75; Barratt “Marital agreements” 693.

²⁶⁶ Barratt “Marital agreements” 694.

²⁶⁷ At para 63.

²⁶⁸ The Law Commission “Consultation Paper no 198: Marital property agreements” para 1.4.

²⁶⁹ See para 6.3 above.

provision for needs on divorce²⁷⁰ and recommendations about non-matrimonial property.²⁷¹ The Law Commission included financial need in the scope of the project because there was a substantial degree of uncertainty as to what the concept meant and there had been differing applications of the concept by different courts. By way of an example of the uncertainty that can and does arise in the adjudication of financial needs, an interesting decision was recently handed down by Mostyn J, a High Court family division judge. In adjudicating a dispute over the sharing of assets in a divorce matter Mostyn J reduced the wife's entitlement to share in the assets of the marriage on the basis that she had started a relationship with an army officer. The judge was of the view that she accordingly needed a smaller settlement than if she had remained single.²⁷² The definition of financial need will be delineated by the Family Justice Council in due course;²⁷³ however, it has been suggested that a formulaic approach to the division of assets and maintenance may be proposed.²⁷⁴ In 2014, the final report of the Law Commission was published.²⁷⁵ Insofar as marital property agreements were concerned, the Law Commission was in favour of the abolishment of the common law rule that agreements pertaining to financial provision on separation would be illegal.²⁷⁶ Interestingly, the Commission commented on the importance of the certainty which a nuptial agreement would introduce, which outweighed the importance of parties' rights to contractual autonomy.²⁷⁷ Furthermore, the Commission recommended that legislation be introduced to provide for "qualifying nuptial agreements". These agreements would have to meet certain requirements, and would, it predicted, be utilised in appropriate

²⁷⁰ See para 6.1 above.

²⁷¹ The Law Commission "Consultation Paper no 208: Marital property, needs and agreements" para 1.2.

²⁷² Gayle D "Divorcing wives should keep away from new romances once battling their husbands for cash, says top judge" 23 September 2014, available at <http://www.dailymail.co.uk/news/article-2765989/Divorcing-wives-away-new-romances-battling-husbands-cash-says-family-court-judge.html> (accessed on 29 September 2014).

²⁷³ Trim H "The law commission's report on matrimonial property, needs and agreements" 27 February 2014, available at http://www.familylaw.co.uk/news_and_comment/hayley-trim-s-analysis-the-law-commission-s-report-on-matrimonial-property-needs-and-agreements# (accessed on 24 September 2014).

²⁷⁴ Trim "The law commission's report" 1.

²⁷⁵ The Law Commission (Law Com no 343) "Matrimonial property, needs and agreements" 27 February 2014, available at http://lawcommission.justice.gov.uk/docs/lc343_matrimonial_property.pdf (accessed on 24 September 2014).

²⁷⁶ The Law Commission (Law Com no 343) "Matrimonial property, needs and agreements" para 4.28.

²⁷⁷ The Law Commission (Law Com no 343) "Matrimonial property, needs and agreements" para 5.35.

circumstances where the wealth of parties exceeded the amount required to meet their needs.²⁷⁸ A draft Nuptial Agreements Bill was annexed to the report.²⁷⁹ The Law Commission, however, recognised the dangers inherent in parties' contracting at a time when they intended the marriage to continue.²⁸⁰ The Law Commission accordingly issued the caution that qualifying nuptial agreements could not be utilised to contract out of the obligation to provide for one another's financial needs, which would include a party's future need for housing, childcare and income or any other aspect pertaining to financial need.²⁸¹ The definition of financial needs was also addressed by the Commission and it was explained that it is far wider than the concepts of spousal support (in Canada) and alimony (in the United States of America) which contemplate periodical payments towards income. Financial need in England and Wales encompasses income and capital provisions for present and future requirements, the provision of a home and provision for old age.²⁸² Against this backdrop parties are expected to obtain independence from one another as soon as is reasonably and feasibly possible, with an emphasis on the need not to impose an artificial time limit on the period applicable in various cases.²⁸³

Furthermore, and insofar as the requirements for the qualifying nuptial agreements were concerned, the Law Commission recommended that these include a contractually valid agreement made by deed in terms of which the parties acknowledge the fact that the agreement will remove the court's discretion save in situations where a party has effectively contracted out of the obligation to provide for the needs of the other.²⁸⁴ Furthermore, both parties must have received financial disclosure from the other at the time of

²⁷⁸ The Law Commission (Law Com no 343) "Matrimonial property, needs and agreements" para 5.4.

²⁷⁹ Appendix A to the report.

²⁸⁰ The Law Commission (Law Com no 343) "Matrimonial property, needs and agreements" para 5.34.

²⁸¹ The Law Commission (Law Com no 343) "Matrimonial property, needs and agreements" para 5.68.

²⁸² The Law Commission (Law Com no 343) "Matrimonial property, needs and agreements" para 3.8.

²⁸³ The Law Commission (Law Com no 343) "Matrimonial property, needs and agreements" paras 3.65-3.67.

²⁸⁴ The Law Commission (Law Com no 343) "Matrimonial property, needs and agreements" para 6.40.

contracting and must also have received independent legal advice.²⁸⁵ The Law Commission expressed a view that qualifying nuptial agreements would essentially be for parties who had previously been married and wished to safeguard assets from their previous marriage and parties who had provided amply for their soon to be ex-spouse's financial needs and wished to safeguard their surplus.²⁸⁶ Conversely, qualifying nuptial agreements would not be appropriate or available to young couples marrying for the first time. Although the decision in *Radmacher v Granatino* demonstrated the increasing willingness of the courts to reflect the terms of a marital property agreement in financial orders, nothing has really changed.²⁸⁷ Until such time as the relevant legislation is passed it remains up to the court to decide whether or not it will take a marital property agreement into account when exercising its discretion. The marital property agreement will simply be one of the factors which the court will take into account and the parties to the agreement cannot oust the court's jurisdiction to make financial orders.²⁸⁸

²⁸⁵ The Law Commission (Law Com no 343) "Matrimonial property, needs and agreements" paras 6.91, 6.125.

²⁸⁶ The Law Commission (Law Com no 343) "Matrimonial property, needs and agreements" para 5.4.

²⁸⁷ The Law Commission (Law Com no 343) "Matrimonial property, needs and agreements" para 4.31.

²⁸⁸ The Law Commission (Law Com no 343) "Matrimonial property, needs and agreements" para 4.32.

CHAPTER 7

CONCLUDING REMARKS AND RECOMMENDATIONS

Western society increasingly favours the clean-break principle in the distribution of matrimonial property on divorce.²⁸⁹ This principle is premised and justified on the basis that women have attained equality in all aspects of their lives including the workplace, remuneration and the division of domestic chores and childcare responsibilities.²⁹⁰ Taken to its logical conclusion, this principle implies that neither party to a marriage should have any financial obligation following divorce and the need for financial relief should ultimately become redundant. However, substantive equality between men and women has yet to be achieved and the reality of divorce is that at the end of a marriage there is usually a spouse who has had the opportunity of generating more wealth and has greater prospects of future earnings – often thanks to the sacrifices made by the spouse who bears the burden of domestic responsibilities and child care.²⁹¹ Husbands to a large extent are able to accumulate wealth during the course of a marriage and wives who have assumed the non-remunerative roles in the home are, at the termination of the relationship left with no discernible assets.²⁹²

While there are ways in which parties can structure their financial affairs prior to marriage which will lead to a fair dispensation upon divorce, there are in addition a number of regimes available to prospective spouses marrying in South Africa which can and do lead to inequity on divorce and often lifetime poverty and economic difficulties for the poorer spouse.²⁹³ While there is certainly an obligation on prospective spouses to educate themselves as to the ramifications of their decisions, when there is a failure to adequately do so and this failure leads to a manifestly unfair result, there has to be a remedy available to ameliorate the injustice. It is not a complete argument to rely upon the sanctity of contract or the certainty that a formulaic matrimonial property system provides. However, our matrimonial property system

²⁸⁹ See para 1.4 above.

²⁹⁰ See para 1.3 above.

²⁹¹ See para 4.5 above.

²⁹² Barratt “Marital agreements” 689.

²⁹³ See para 3.3 above.

applicable to civil marriages is formulaic and rule driven.²⁹⁴ A positive aspect of the system is that it lends certainty as to what parties can expect when divorcing.²⁹⁵ However, it fails to provide the necessary remedy when a divorcing party is left without a home or means of subsistence. Our courts, when faced with a manifestly unfair result arising from a particular matrimonial property regime or a settlement agreement entered into in terms of a negotiated process, have very little discretion or ability to ameliorate the financial plight of the poorer spouse – who is often the wife owing to social and cultural norms and strictures.²⁹⁶ Our matrimonial property law in relation to civil marriages is weighted in favour of sharing, the default common-law position being that of an in community of property regime.²⁹⁷ However, where parties to a civil marriage have specifically contracted out of the common-law position and then gone further and excluded the ameliorating effect of the accrual system, the Divorce Act permits an uncritical enforcement of this position and fails to provide a remedy.²⁹⁸

By way of an example, a woman who marries after 1984 in terms of an antenuptial contract with the express exclusion of the accrual system and who then, with her husband's consent, stays at home to care for the children born of the marriage and sacrifices her career for a decade, will find herself destitute upon divorce. In addition, the South African matrimonial property system does not have the power or ability to take into account the human capital which has been built up over the years of the marriage at the expense and with the assistance of the homemaker/carer spouse.²⁹⁹ She will not be able to rely upon the remedy provided by section 7(3) of the Matrimonial Property Act 88 of 1984,³⁰⁰ nor will she have a claim in terms of section 9(1) of the Divorce Act 70 of 1979.³⁰¹ She may have a claim for maintenance for a limited period of time,³⁰² but this will be of short duration and is certainly not an automatic right,³⁰³ and thereafter she will have to be able to sustain herself. It has also been made clear by the courts that a maintenance claim is

²⁹⁴ See paras 2.3 and 3.1 above.

²⁹⁵ See para 3.2 above.

²⁹⁶ See para 5.4 above.

²⁹⁷ Barratt "Marital agreements" 693.

²⁹⁸ Barratt "Marital agreements" 698.

²⁹⁹ See para 1.4 above.

³⁰⁰ See para 4.2 above.

³⁰¹ See para 4.4 above.

³⁰² See para 1.3 above and especially insofar as the clean-break principle is concerned.

³⁰³ Barratt "Marital agreements" 700.

not akin to a redistribution of assets claim and cannot be squeezed into this matrix.³⁰⁴ In addition and should she not have had proper recourse to independent legal advice and driven a hard enough bargain when concluding the antenuptial contract (or the settlement agreement), the court will probably not be able to come to her assistance unless she has the means and the stamina to challenge the constitutionality of the rule bound civil marriage order in a Constitutional Court setting, or unless she was able to assert and prove the contractual requirements of duress or undue influence.³⁰⁵

By way of comparison, such a spouse's counterpart living in England or Wales would be far better off. Currently, the court would make an equitable distribution in terms of sections 23 and 24 of the Matrimonial Causes Act 1973, taking into account the matters set out in section 25 of the Act³⁰⁶ and, depending upon the financial health of the respective estates of the parties to the marriage, she could expect to be provided with a home, a capital settlement and sufficient income to provide for her financial needs both current and future.³⁰⁷ Looking into the future, and should the notion of the qualifying nuptial agreement be made law in England and Wales, any agreement concluded between parties cannot preclude the responsibility to provide for the needs of the other – hence the spouse in this example would still be protected.³⁰⁸ Moreover, the provision for her financial needs would not be for an unreasonably short time and would take into account the actual circumstances surrounding her ability to care for herself and the children born of the marriage in years to come.³⁰⁹ Moreover, should the spouse in question not have had recourse to independent legal advice and full and proper financial disclosure by her prospective husband at the outset and prior to the signature of the qualifying nuptial agreement, it would appear that the agreement would then be subject to judicial scrutiny and may well not be taken into account at all, these factors being a requirement proposed by the Law Commission.³¹⁰ Additionally, section 25(2)(b) takes cognisance of a party's future earning potential³¹¹ and this is also taken into account in

³⁰⁴ *Ibid.*

³⁰⁵ See para 3.3 above.

³⁰⁶ See para 6.1 above.

³⁰⁷ See para 6.4 above.

³⁰⁸ See para 6.4 above.

³⁰⁹ See para 6.4 above.

³¹⁰ See para 6.4 above.

³¹¹ See para 6.1 above.

providing for the financial needs of the poorer spouse and children born of the marriage. The English courts therefore retain a healthy ability to take full cognisance of a wife's contribution in the home in a non-discriminatory manner³¹² and make allowances for the sacrifices made by such a spouse in terms of their career for the good of the family and the home³¹³ or for a prospective spouse's inability to see into the future when concluding an antenuptial contract.

In addition, a spouse to a customary marriage, concluded at any stage whether before or after 1984 or before or after the promulgation of the Recognition of Customary Marriages Act 120 of 1998, the equitable power of distribution provided for in section 8(4)(a) of the Recognition of Customary Marriages Act (and by extension section 7(3) of the Divorce Act) would be available to the court in distributing the matrimonial property of both spouses in the marriage. This remedy would be available to her, regardless of the matrimonial property regime governing her customary marriage.³¹⁴

It is noteworthy that England and Wales are considering a matrimonial property system which incorporates both elements of a broad judicial discretion and a form of antenuptial agreement. According to Van Wyk, the amalgamation of a discretionary system and a conceptual approach with a clear structure and fixed rules is virtually impossible.³¹⁵ As England and Wales appear to be favouring such an amalgamation it will be interesting to see whether the system proves to be a workable one. The courts have already gone some way towards developing the law in regard to nuptial agreements and recognised such agreements as being a factor to be taken into consideration when making an order in terms of section 24 of the Matrimonial Causes Act.³¹⁶ The key to managing the juxtaposition of a party's right to contractual autonomy and a broad judicial discretion seems to be the notion of fairness. If the agreement does not lead to a manifestly unfair result, the terms have been taken into account by the courts in reaching a decision as to the property distribution order applicable.³¹⁷ The Law Commission has

³¹² Barratt "Marital agreements" 701.

³¹³ Barratt "Marital agreements" 699.

³¹⁴ See paras 1.4 and 4.3 above. See also note 16.

³¹⁵ SA Law Commission *Project 15* 17.

³¹⁶ See para 6.3 above.

³¹⁷ See para 6.3 above.

in addition stressed the need for requirements at the time of contracting, namely that legal advice be obtained and financial disclosure made and provisos pertaining to the content of the agreements, namely that they are relevant in situations where parties have amassed some wealth before the marriage and furthermore that no party can contract out of the obligation to provide for the financial needs of the other.³¹⁸ All in all it would appear that the exercise of a judicial discretion, coupled with the existence of antenuptial contracts, is a workable and effective solution in situations where manifestly unfair results arise upon dissolution of a marriage.

The extension of the broad judicial discretion to civil marriages ending in divorce could be relatively easily achieved in South Africa, as has been demonstrated in the case of *Gumede v The President of the Republic of South Africa*.³¹⁹ A level of certainty could still exist in that agreements which resulted in a “fair” dispensation upon divorce would not be scrutinised by the courts while those that did not would be capable of being overturned by the judiciary and replaced by an equitable and fair distribution order. That being said, the extension of the power should ideally be along the lines of that currently in place in England and Wales and recourse should be had to the sentiments of the Law Commission: An effective equitable distribution system should take cognisance of a primary carer’s need for housing, an income for a reasonable period of time (and not an arbitrarily short rehabilitative term), provision for retirement and the recognition of the valuable human capital and earnings potential available to the economically viable spouse as an asset.³²⁰ Moreover, the law pertaining to the conclusion of antenuptial contracts should be scrutinised and amended to incorporate more stringent provisions pertaining to the time when the contracts can and should be concluded (that is, well before the marriage date), financial disclosure and the importance of independent legal advice. No sharing antenuptial contracts which lead to a gender-biased and discriminatory outcome when juxtaposed with our entrenched right to equality cannot stand up to scrutiny in the current constitutional environment.³²¹

³¹⁸ See para 6.4 above.

³¹⁹ See paras 5.3 and 5.4 above.

³²⁰ See para 6.4 above.

³²¹ Barratt “Marital agreements” 704.

To quote Albert Einstein, “Life is like riding a bicycle. To keep your balance, you must keep moving”.³²² Similarly, the development of the law must be dynamic and outwardly focused otherwise failure to provide for the ever-changing needs of society is an inevitability.

³²² Bright Drops “27 Quirky Albert Einstein quotes on everything” available at <http://brightdrops.com/albert-einstein-quotes> (accessed on 12 October 2014).

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