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SOUTH AFRICAN MARRIAGE IN POLICY AND PRACTICE: A DYNAMIC STORY

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ABSTRACT

Law forms one of the major structural contexts within which family lives play out, yet the precise dynamics connecting these two foundational institutions are still poorly understood. This article attempts to help bridge this gap by applying sociolegal concepts to empirical findings about state law's role in family, and especially in marriage, drawn from across several decades and disciplines of South Africanist scholarly research. I sketch the broad outlines of a nuanced theoretical approach for analyzing the law-family relationship, which insists that the relationship

entails a contingent and dynamic interplay between relatively powerful regulating institutions and relatively powerless regulated populations. Accordingly, while my argument broadly distinguishes the more repressive regimes of colonialism and apartheid from the more expansive post-apartheid legal regime, it also partially undoes that periodisation by highlighting limits and evasions of repressive law and obstacles impeding access to post-apartheid law's expansive promises.

KEYWORDS

apartheid; colonialism; law and society; marriage; post-apartheid; sociolegal studies

Law and family are among society's most important institutions, yet the relationship between them is poorly understood. Law's impact on families can be foundational or negligible, planned or unintended, and any of these can trigger responses that go on to shape the future direction of law. Empirical findings about law and family's entanglement in South Africa are scattered across the already scattered South Africanist family literature, small asides in arguments focused elsewhere. Yet there are clearly important stories to explore. For example, colonial and apartheid regulation deeply transformed central features of African customary marriage, but never truly won full authority to define its boundaries. Family-related anxieties shaped colonial and apartheid policies far beyond the boundaries of family law, especially around migration and residence, that created wrenching hardship for African, coloured, and Indian families—but that were also unevenly implemented and frequently evaded. Post-apartheid law, for its part, boasts one of the globe's most expansive marriage-recognition regimes—alongside record low marriage rates, marriage now far less common than single motherhood in wide swathes of the country. Law clearly matters—but sometimes, under some conditions, for some people, in varying ways that trigger varying responses.

The extremes of South Africa's history make it urgent to understand this relationship. They also make it potentially illuminating. So self-consciously have family issues animated lawmaking across multiple eras of South African history, and so substantial are the changes wrought under colonial, apartheid, and post-apartheid rule, that South Africa could hold vivid lessons for a broader sociology of the law-family relationship. Amid the many social science studies of family that mention law, surprisingly few explicitly theorise how the two are related. Most family scholarship draws on theories that locate the prime driver of family change in broad macro-historical trends such as industrialisation or modernisation (e.g., Adams 2010; Goode

1982), implying that these trends more or less simultaneously shape both official law and everyday family practice. For example, the essays in Adams and Trost's (2005) comprehensive handbook on family scholarship around the world rarely consider how law and family relate; the only chapter to do so at length is Ziehl's (2005) on South Africa. The more interesting threads of this scholarship do acknowledge law, but tend implicitly to frame it as the outcome rather than the cause of everyday practice (e.g., Powell et al. 2010). Most sociologists of law, however, would suggest this assumption is insufficient even within liberal democracies where (some) regulated people enjoy at least some formal access to the levers of lawmaking, let alone in colonial or other relatively closed political systems. Displacing this simplistic assumption requires a more robust cross-subfield conversation than currently exists between the social science of family and of law.

This article attempts to help bridge that gap by gathering together empirical observations and arguments about law's role in family, especially in marriage, from decades of South Africanist scholarship, and interpreting them through the lens of core sociolegal concepts. A comprehensive review would be impossible, but in what follows I gather some suggestive nuggets from the historical, sociological, and anthropological literature in order to sketch a broad set of baseline theoretical assumptions upon which empirical questions about the law-family relationship could be more productively built. Along the way I suggest a few such empirical questions specific to South Africa that emerge from the literature I consider.

The baseline assumptions I advocate conceptualise the relationship between law and family neither as a monolithic, top-down imposition of state law onto family practice nor as a simple filtering up of practice into law, but instead as a contingent and dynamic interplay between the practices of relatively powerful regulating institutions and relatively powerless

regulated people. Methodologically, I argue that the relationship between law and family is best examined from the “ground up,” starting from people’s actual practices rather than from law. As some sociolegal scholars have argued, if one begins by asking what a law’s impact has been, one risks over-interpreting the evidence of its alleged traces (Sarat 1985). Starting from actual practices, by contrast, allows one to focus on people’s experiences of marriage and family in their actual lived contexts, tracing law’s role in helping produce those experiences. This methodological ordering is essential for grasping the full, dynamic interplay between legal regulation and grassroots action. In the South African context, this involves a number of intersecting systems, including not only state law but also customary law—both as administered by the state and as actually practised on the ground—as well as religious laws. The import of this “legal pluralism,” as sociolegal scholars call it, is best captured when avoiding state-centric assumptions (Griffiths 1986).

Applying this approach to South Africa, I advance a series of interrelated arguments. First, I argue that marriage and other family laws have never perfectly achieved their aims, whether the laws in question have taken more restrictive or more expansive approaches. Implementation has often been uneven, relying on a range of actors whose interests and ideologies often conflicted, and repeatedly producing what sociolegal scholars call a “gap” between “the law on the books” and “the law in action” (Sarat 1985). Second, law’s uneven consequences have also reflected the range of innovative responses developed by those targeted for regulation, such as the widespread phenomenon among black South Africans of “dual marriages” whose wedding ceremonies and day-to-day lives frequently combine African and Western traditions (Rudwick and Posel 2014; Mbatha 1997). Finally, I argue that the most consequential laws for the lived reality of marriage have often been not marriage laws

themselves but instead laws governing a wide range of matters including labour, migration, housing, and social grants (Sachs 1990). In the sections that follow, these broad arguments unfold across a rough periodisation distinguishing the more repressive regimes of the colonial and apartheid states from the more expansive regime of the post-apartheid period. They also partially undo that periodisation, however, highlighting limits and evasions of colonial and apartheid regulation and the many obstacles impeding access to post-apartheid law's more expansive promises.

COLONIAL ERA: CONSTITUTING STATE AUTHORITY

My analysis begins with the colonial period, which unleashed wrenching upheaval into the family structures of indigenous societies often already reeling from their own political and military struggles. Across regional and ethnic differences, southern African marriages were classically understood as binding to each other not two individuals but two extended families through a gradual process completed over time primarily through the payment of lobola and similar practices (Evans-Pritchard 1931; Dlamini 1984; Gluckman 1950; Kuper 1982).¹ In many scholarly accounts, marriage was the very centre of pre-colonial African societies, critical to constituting a wide web of key social relations (Bryant 1949; Guy 1990). Wage labour and Christian missions introduced more individualist trends that transformed marriage's meanings and began to erode its frequency and stability (Hunter 2005). The possibility—eventually, the necessity—of working for wages pulled young African men into a new economic circuit that enabled them to pay their own lobola, an increasing necessity as rural decline undermined their fathers' cattle-raising capacities (Hunter 2010; Welsh 1971). This helped shift power over

¹ For simplicity's sake, in this article I use the term “lobola” to refer to similar practices throughout the region.

marriage from elder to younger generations, and together with missionary ideologies increasingly imbued marriage with connotations of romantic love between two individuals (Erlank 2000; Hunter 2004, 2005; Meintjes 1990). In certain respects these trends expanded young men's and women's autonomy, but they also helped make marriage more difficult. The increasing proportion of lobola paid in cash helped facilitate its inflation (Welsh 1971), while those who did marry increasingly found their rural homesteads stressed by land shortages and the extended absences of migrant labour (Walker 1990a).

Many of these changes reflected explicit colonist attempts to transform African marriage, whether for moral reasons or to facilitate the availability of young African male labour (Essop Sheik 2014; Welsh 1971). Colonies most directly regulated African family life through their various approaches to what came to be called "customary law," i.e., governance and dispute resolution practices (claiming to be) based on indigenous traditions (Bennett 2004; Chanock 1989, 1991; Myers 2008). Theophilus Shepstone famously devised the Natal Colony's especially influential intervention, which consigned "natives" to territorial reserves governed by traditional leaders, some newly installed by the Natal government, and subjected them to the legal jurisdiction of customary law in most matters (Guy 2013; McClendon 2010; Welsh 1971). Although Shepstone long argued that codifying the substantive content of customary law would fossilise the previously flexible practices of African societies, he eventually acquiesced, beginning with a marriage law enacted in 1869. This written statute required African wedding ceremonies to include the bride's public consent and to be registered in writing by a colonial or customary official, and it limited to ten the number of cattle transferable for a commoner bride's lobola (plus one beast for her mother).² State-recognised divorce required a hearing by a native

² Lobola above this amount could be seized by the bride's family's chief (Welsh 1971).

affairs magistrate. Separate regulations taxed every hut on a homestead in order to discourage polygyny,³ each wife in a polygynous household typically living with her uterine children in her own structure.

The Shepstone system left clear marks on African marriage in Natal that can be discerned even today. As colonial elites wanted, young men did assume greater control over marriage and, at least at first, begin marrying more frequently—although this latter trend began to reverse, and marriage has generally declined since (Hunter 2007; Mhongo and Budlender 2013; Posel, Rudwick and Casale 2011; Posel and Casale 2013). Ten cows also seems to have quickly become the standard expected lobola amount in many Natal communities, and today many isiZulu-speaking people understand this number as a cultural rather than colonial prescription (Rudwick and Posel 2014; Yarbrough n.d.). It is not universal, however, and finer-grained research on the timing and reach of its spread could helpfully illuminate the dynamics of the Shepstone system's instantiation. For example, research on segregation-era Zululand, to which the Natal Native Code had been extended after Natal conquered the Zulu kingdom, documents that some manipulated their commoner/noble status to evade the lobola cap (MacKinnon 1999), and similar evasions may have occurred in colonial Natal. At stake here is both a specific historical question about Natal marital regimes and a broader theoretical question about the relationship between state law's enforcement practices and ideological capacities.

In other respects the Shepstone system's effects were more complicated. Chief among these were gender relations and women's autonomy. Senior men frequently complained that women and girls were challenging their authority, and indeed records document many cases

³ Essop Sheik (2014) questions this interpretation, highlighting what a large portion of Natal colonial revenues derived from hut taxes and arguing this made the state dependent on polygyny rather than disapproving of it.

brought by women in magistrates' courts. At the same time, however, interactions between different portions of the Shepstone code intensified women's status as legal minors, for example by placing them under the continued guardianship of their ex-husbands (Essop Sheik 2014). There is still much work to do to precisely trace the contours of African women's autonomy during this time (Walker 1990b).

The Cape Colony used a very different approach, not codifying customary law but granting magistrates discretion to apply it. An 1883 Cape Commission 'refused to ban polygyny and accepted lobola as a contractual accessory to marriage' (Bennett 2004: 189). The Transvaal, meanwhile, established a system of magistrates' courts allowed to apply customary law in civil disputes among Africans, but refused to recognise customary marriages or lobola agreements on grounds that they were repugnant to civilisation (39). The Orange Free State never adopted comprehensive customary law policies, and customary law's treatment of marriage varied widely by location (40). This makes research into state law's impact on family there that much more difficult, but also potentially that much more illuminating if ways can be found to compare similar people's practices under different legal regimes.

It was not just family law that reshaped African marriage, but also a range of laws addressed to other matters. The wage-paying jobs, for example, that enabled young men to pay their own lobola rested upon bodies of labour, property, and tax law at the core of the colonial project (Marks and Rathbone 1983b: 12). Or consider Jo Beall's (1990) work on Indian indentured labourers in colonial Natal. Indian law required that for every 100 men leaving for a colony, 40 women must accompany them. Although married women were entitled to accommodation and rations without working, 'marriage by Indian religious rites was not

recognised in colonial Natal' (152). These intersections of immigration, labour, and marriage law made Indian women 'ultra-exploitable' (146) by employers and husbands alike.

Many of these examples highlight the full question at stake for the colonial period: not only how colonial state law transformed marriage but also how those transformations helped instantiate state law's authority as a defining feature of the social landscape (Merry 2000). New arrivals on the scene, colonial states and their legal systems could increase compliance using violent enforcement, but that alone would not entrench authority in the eyes of colonised African peoples. Indeed, the colonies' various ways of recognising customary law were all attempts to extend colonial authority by co-opting existing indigenous systems into the colonial apparatus (Erlank 2003; McClendon 2002; Welsh 1971; see also Berry 1992). The project effectively attempted to borrow the authority enjoyed by a few persistent customary practices to legitimise an overall system whose content departed in many respects from pre-colonial realities. Some, especially those disadvantaged in existing customary power relations, turned to colonial courts as a resource in disputes. While they often lost their cases, each observed verdict built colonial authority out across the landscape bit by bit. In short, colonial law did not only transform African marriage. African marriage also helped transform and consolidate colonial law.

That growing authority is reflected in the fact that much of the work cited above relies primarily on records of colonial bureaucracies and courts. A key difficulty for scholarship on this period is that little written evidence exists, and colonial records are among the few sources able to fill this gap. This is especially true for family matters, which composed a large disproportion of customary law's jurisdiction. Historians have used court records to help illuminate the perspectives of those marginalised by race, gender, and class, court testimony representing some of the few written traces we have of such perspectives (McClendon 1995). And of course such

records are especially important as documents of the actual operation of colonial state power. Yet they also have profound limitations. Of particular importance to this article: Court disputes represent only a tiny fraction of social life. Most disputes do not make it to official forums (McClendon 2002: 28), and the great bulk of social action involves more (superficial, at least) consensus than dispute. An important strand of sociolegal scholarship focuses on the ways law and society “mutually constitute” each other, helping to form the unstated assumptions undergirding social action in a particular historical moment (Ewick and Silbey 1998; Sarat and Kearns 2009). Court records open at best a partial window into such questions, tending to emphasise that which is contested more than assumed. A full appreciation of colonial law’s reconstitution of African marriage thus requires new data and methodologies extending beyond court records.

SEGREGATION AND APARTHEID ERAS: URBANISATION AND ‘BREAKDOWN’

Military and economic struggles produced political unification in 1910, within a broader context of industrialisation and urbanisation. South Africans of all races streamed to cities seeking work, and family instability continued to rise. This provoked widespread concern and some strategic political alliances between, most importantly, white state bureaucrats and black traditional leaders, who both saw strengthening African patriarchal authority as the necessary solution. The Union government implemented a range of policies designed to control black movement between urban areas and rural reserves, vesting day-to-day governance over the latter in chiefs and Native Commissioner courts in a new, nationwide customary law system based largely on the Shepstone model. Neither influx control nor customary law managed to stem the

growing numbers of Africans in town, but both left major marks on the family and marriage practices of black South Africans.

Segregation-era lawmakers saw themselves as confronting a core dilemma: how to make male black labour available in rapidly industrialising cities without altering the fundamentally white character of those cities (Marks and Rathbone 1983a). Their thinking eventually converged on a segregation strategy constructed primarily through residential and migration law in order to support the emerging institution of migrant labour. A key early legislative component was the 1913 Natives Land Act, which prohibited Africans from owning or renting land outside the reserves and areas earmarked for future reserve expansion (McClendon 2002). Reserve land was minimal, low-quality, and overcrowded, increasingly unable to sustain the agricultural base of African homestead economies even as white industrial employers expected it to perform that function. In town, the presence of black men was regulated by the 1911 Native Labour Regulation Act and the 1923 Native (Urban Areas) Act, which elaborated early versions of the infamous “pass system” that would become an apartheid cornerstone and that established nationwide frameworks within which municipalities could develop residential segregation policies (Walker 1990a). These statutes did not at that time apply to women, but many smaller regulations attempted to control women’s presence in town, including municipal policies limiting township housing to single men and married couples (Posel 1995, 2006). Out of these laws and a consolidating set of employer practices emerged the migrant labour system that would dominate the South African economy for much of the twentieth century.

This system had complex, wrenching effects for marriage and family. Perhaps the most widespread effect was to remove many husbands and fathers from their families for much of the year, leaving wives as de facto rural household heads but also rendering them vulnerable to

dispossession, especially if widowed or abandoned (Walker 1990a). Many fathers remained in rural homes as tenants on white farms, but the progressive implementation of the Natives Land Act made rent tenancy illegal and strengthened white farmers' negotiating power, increasingly pushing such families toward labour tenancy (McClendon 2002). This system required fathers to commit their children, especially sons, to farm labour, but their ability to do so eroded as the higher wages of industrial work drew sons to town seeking cash for taxes, lobola payments, and discretionary consumption. This was one iteration of a broader trend, in which children found opportunities in town to pursue lives and initiate romances outside the strictures of rural kinship.

Elites, both white and black, grew anxious about these changes. Many thought the necessary response was to shore up African patriarchal authority, and opinion eventually coalesced around a Shepstonian system of customary law as the tool for doing that (Bennett 2004; McClendon 1995, 2002; Posel 1995). The 1927 Native Administration Act (NAA) formally codified a body of customary law applicable to disputes among Africans, and it vested authority for adjudicating those disputes in traditional leaders, now incorporated into and sometimes created by the state,⁴ alongside a nationwide system of Native Commissioner (NC) courts staffed by white officials. Authorised to hear appeals from traditional courts as well as original cases, NC courts had more power than traditional courts to direct customary law's actual application, and scholars agree that beginning in the 1930s they tended toward rigid and conservative interpretations (Bennett 2004; McClendon 2002). We know less about traditional courts, which did not begin keeping records until the 1950s (McClendon 2002).⁵

⁴ Some chiefs resisted the NAA regime because of this cooptation (Posel 1995).

⁵ The vast majority of NC court records were also destroyed in the 1970s and 1980s by the South African Archives Service. See McClendon 1995, 2002.

While the NAA extended the core structure of the Shepstone system nationwide, the provisions aimed at rationalising customary marriage were never so extended. The NAA did authorise provinces to create formal registers for customary marriages, but only Natal did so (Posel 1995). Customary marriages' legal fragility was further underlined by their recognition in law as "unions"—pointedly, not "marriages"—and the scattershot selection of purposes for which they were legally enforceable (Albertyn and Mbatha 2004; Mbatha 2005; Nhlapo 1994). Most strikingly, a civil marriage, even to a new spouse, completely nullified the legal validity of any existing customary union. The Act specifically allowed the practice of lobola but made no provisions for regulating it or adjudicating lobola disputes. Perhaps its most concrete provision regarding customary marriage was one intended to confirm its patriarchal character: Customarily married wives were deemed minors, unable to represent themselves legally.⁶

While this system strengthened the legal basis for African patriarchies, it did little to stem the flow of urban migration. This migration was overwhelmingly male, helping produce new practices such as "mine marriages" between older men and younger male "wives" who provided their husbands with household labour and sexual companionship until they aged into husband status themselves and took their own wives (Achmat 1993; Epprecht 2004; Moodie 1988). Yet women's urban migration grew at a faster clip than men's over this period, composed especially of women escaping their disadvantaged rural kinship positions—unmarried, unhappily married, or widowed (Walker 1990a). Probably the most widespread consequence of customary marriage's partial recognition was to dispossess many rural women at the hands of newer "paper wives" married in town under civil law or in-laws able to manipulate marital proof after a husband's death (South African Law Commission 1997). Yet it also provided some unexpected

⁶ The Natal Code, incorporated into the NAA, went further, declaring all African women, married or not, perpetual minors.

openings, as women and men sometimes declared themselves customarily married in order to gain access to urban housing. Impossible to prove or disprove, their declarations were usually accepted (Posel 1995), and some municipal housing bureaucracies even developed mechanisms for facilitating sudden marriages for this purpose (Posel 2006). More broadly, attempts to extend pass laws to women clashed with African men's desire to control 'their' women, a site of tension between the customary law and migration control sides of the segregation regime.

As elsewhere in the world, this period also saw major growth in empirical social science research. Anthropologists and sociologists conducted a range of studies on everyday South Africans, within which marriage and family questions often featured prominently. Responding to the concerns of the day, much of this research was framed around the 'breakdown' of family and other social ties. These concerns extended beyond Africans, such as in the Carnegie study of poor whites (Willoughby-Herard 2010). Much of the work on Africans pegged colonialism as the source of such breakdown, but rarely with an explicit focus on law. The driving force was instead frequently framed as 'contact' with white cultures (e.g., Hunter 1933; Wilson 1964) or the political economic conditions created by colonial settlement (Krige 1936). Moreover, scholars of the time tended toward uncritical understandings of 'tradition,' frequently presenting the norms they identified as pre-colonial in origin without acknowledging the decades of colonial entanglement preceding the research (e.g., Bryant 1949; Krige 1957). Using these sources thus requires care, as with the colonial legal documents discussed above. An advantage for this era is that some of its children are still living, and some recent scholars have used oral history interviews to contextualise and triangulate colonial documentary evidence (e.g., Carton 2000; McClendon 2002). Such multi-methodological approaches are especially invaluable for

understanding the social operation of law, and more such work is urgently needed while it remains possible.

Many trends begun under segregation continued into the apartheid era, growing in scale and intensity and producing qualitatively new consequences. For example, rapid black urbanisation produced a new segment of the population born and raised in town with fewer ties to rural social structures and norms (Mayer and Mayer 1971). Massive informal settlements enacted new forms of sociality, physically reproducing both racial domination and a relative freedom from rigid rural kinship relations (Hickel 2014; Hunter 2010). African marriage rates continued to decline and the single-mother household became more common (Posel and Devey 2006). Rural households, meanwhile, continued to suffer increasing pressures as rural areas transitioned from labour reserves into even more peripheral reservoirs of the unemployed. Yet even amid all these transformations some practices persisted. These included lobola, by now clearly beginning to take on new meanings yet as fiercely valued as ever (Haas 1987; Rudwick and Posel 2014; Walker 1992). One could see lobola's persistence as the cornerstone of a broader practice of dual weddings combining an African with a Christian white wedding, by this period the emerging cultural norm among wide swathes of the country's urban and even rural African populations (Erlank 2014; Mbatha 1997).

There were few such hybridities in law, which quickly translated apartheid ideology into a series of sexual regulations beginning with the Prohibition of Mixed Marriages Act of 1949 and the Immorality Amendment Act of 1950, which extended segregation-era prohibitions against interracial sex (Hoad, Martin and Reid 2005). A further amendment to the Immorality Act increased prohibitions against same-sex sex (Cameron 1994), reflecting the conservative Christian foundations of apartheid ideology (Retief 1994). Interestingly, the text of the Marriage

Act of 1961 somewhat countered this trend, authorising marriages under “Mohammedan” and Indian religions. Court decisions invalidated these clauses, however, due to Muslim and Hindu marriages’ potential for polygyny. More work is needed to understand the Marriage Act in its historical context, for, together with the just-mentioned court decisions, it formed the constitutive foundations of marriage law throughout most of the apartheid era.

It also may be worth exploring possible links between these sexual regulations and a shift in urban residential and planning policy begun in the segregation era that reached its fullest expression under apartheid. The colonial era’s focus on pushing Africans back to reserves was reluctantly replaced in the segregation era with a slow acquiescence to their presence in town, epitomised by planned township communities of single-family homes designed to, among other things, produce nuclear households in the Western model (Hickel 2014). The first such communities emerged in the early 20th century, with the largest established after the National Party took power in 1948. Driven by concerns that informal urban settlements had dangerously upended traditional kinship structures, these communities were violently created through forced removals that themselves tore holes in kinship networks.

POST-APARTHEID ERA: EXPANSIVE RIGHTS, CONSTRICTING ECONOMIES

The instability and diversification of family formations of previous eras has continued in the post-apartheid era, in a context simultaneously defined by expansive liberal rights and acute economic struggle. Marriage continues to become increasingly rare, and cohabitation more common (Posel and Rudwick 2014). Although hard data do not exist, one can safely say that increasing numbers of South Africans identify as lesbian, gay, bisexual, and/or transgender (LGBT), forming same-sex romances and households (de Vos 2001; Matebeni 2011; Smuts

2011). Female-centred households now dominate the broader familial landscape, and researchers increasingly speak of “fluid” household structures (Seekings 2003, 2008; Spiegel 1996). This diversification reflects both economic pressures that have made kinship relations difficult for most to maintain and, to varying degrees, a measure of agency to construct those caring relationships one most trusts to help weather those pressures.

In law, South Africa’s reckoning with the narrow confines of apartheid marriage law has produced perhaps the globe’s most expansive marital recognition regime. The Recognition of Customary Marriages Act (RCMA) of 1998 extended full state recognition to customary marriages, including polygynous marriages (Albertyn and Mbatha 2004). Eight years later the Civil Unions Act (CUA) offered state recognition to couples regardless of gender, allowing them to choose either the term “marriage” or “civil partnership” (Judge, Manion and De Waal 2008). This statute rests on the constitution’s Equality Clause, the world’s first to prohibit discrimination based on sexual orientation (Berger 2008; Cameron 1993; de Vos 2008; Reddy 2006), and it is also the first statute under which clerics of all religions may potentially register to be marriage officers (Bilchitz and Judge, 2009). A long-debated Muslim Marriages Bill has yet to be enacted (Amien 2014), but dozens of Muslim imams were recently deputised as marriage officers under the Marriage Act, for the first time in South African history. Attempts to expand recognition to unmarried partnerships have faltered, however (Goldblatt 2001).

So far these recognition expansions have generally taken a modular approach, with separate statutes and administrative structures extended to supposedly distinct communities. I have argued that this approach encodes a regime of “gendered multiculturalism” in South African marriage law, officially defining “cultures” in terms of their supposedly characteristic gender relations (Yarbrough 2015) in a manner that echoes apartheid ideologies. Yet, while such

ideas are widespread on the ground in South Africa, there is little evidence that the marriage laws themselves have helped entrench them. Indeed, each of the statutes appears to have had very different effects. It seems clear that knowledge about the RCMA is rare (Mamashela 2004; Mbatha 2005; Yarbrough n.d.), while awareness of the CUA is likely high—due in part, ironically, to the controversy around its enactment. Implementation of both has been uneven (de Souza 2013; Judge, Manion and De Waal 2008).

As striking as the recognition expansions have been, probably the most consequential domain of post-apartheid family policy has been social grants. Tens of millions of South Africans are currently receiving some form of social grant from the government, falling into one or more of three broad categories: the elderly, the disabled, and caregivers for minor children. Grandparents and young mothers make up a large proportion of grant recipients, with profound and complicated consequences for family relations. While their access to cash can help bolster their power in households, it can also produce tension (Dubbeld 2013; Mosoetsa 2011).⁷ Many on the ground believe the child grant has discouraged women from marrying (Naidoo and Misra 2008). Although there are many other social forces contributing to that shift, the belief has powerful ideological consequences for the social position of young women.

One major excitement of the post-apartheid period is an explosion of research on various dimensions of marriage and family, coming from a range of disciplines and practitioners and relying on new data sources, including more large-scale survey research. This work often includes observations about law, but as with the family literature more generally there remains a need for greater synthesis of these findings. The legal academy has been an especially important font of social science research on marriage and family as they relate to law. Organisations such

⁷ Similar tensions attend struggles over maintenance payments legally mandated from fathers to mothers for the care of children (Khunou 2012)

as the Centre for Law & Society at the University of Cape Town and the Centre for Applied Legal Studies (CALS) at the University of Witswatersrand have supported qualitative and sometimes quantitative research into marriage and family practices under systems of customary law (see, e.g., Claassens 2013; Claassens and Smythe 2013; Goldblatt 2001; Mbatha 1997; Mnisi Weeks 2013). Ultimately aimed at law reform, these studies have emphasised questions about laws' impacts and efficacy.

CONCLUSION

That state law has shaped marriage and family in South Africa cannot be doubted. Law has been both a conduit for broader economic and political forces and exerted its own, relatively autonomous pressures, the latter often in contexts of intra-state contestation that muddle the coherence of its ideologies and the evenness of its implementation. Another critical factor has been the response of regulated populations, in the forms both of organised political action and of everyday practice. South Africans have, variously, run to town to flee rural hardship, paid lobola in cash to break parental control over marriage, sued each other for divorce in a range of different fora, developed a new custom of dual marriage to secure all necessary forms of secular and sacred marital recognition, and litigated a series of cases culminating in a constitutional right to same-sex marriage. Often these responses drew on, or were shaped by, legally pluralist non-state regulatory systems situated in cultural and religious institutions that themselves have been treated very differently in different eras of state law. So, although one cannot deny law's impact on family, neither can one simply assert it as self-evident.

The contours of the law-family relationship are complex and varied, requiring careful and highly contextualised examination. Such close attention to historical context tends to frustrate

broader arguments about historical continuities and ruptures, yet some key domains for such analysis do emerge even from this article's cursory review. One such domain comprises struggles over patriarchy and gender relations. From the earliest moments of colonial encounter until today, women have struggled for greater autonomy over their marriage and family relations. In very broad terms the legal context for these struggles has become more favorable to women from the onset of colonial rule until today, from colonial Natal regulations that generally minimized women's scope of action, through unintended openings created by segregation-era officials' inability to settle on coherent urban residence policies, to the post-apartheid entrenchment of constitutional rights to gender equality and social grants programs. One should not overinterpret this general trend, however, as individual women's positions have radically depended on the conjuncture of highly localized factors. Put more simply: While post-apartheid law is clearly more favorable to women than colonial law, true gender equality remains a frustratingly elusive goal.

This complexity is related to another, perhaps surprising, continuity: the enduring centrality of "cultural" distinctions in family-related political debates and policy frameworks. Apartheid governance's strategic reliance on supposed cultural distinctions between racial and ethnic groups had rendered such notions highly suspect among many in the anti-apartheid struggle, yet such distinctions lived on in various ways in post-apartheid law. These include the continued inclusion of traditional authorities in post-apartheid legal frameworks, an inclusion that has generally expanded over time. As I write this, the Zuma administration is preparing to once again introduce a Traditional Courts Bill consigning most disputes in customarily governed communities to the jurisdiction of traditional courts. This persistence also manifests in the post-apartheid elaboration of multiple and distinct marriage laws for customary marriages and gender-

neutral marriages, with a potential Muslim marriage bill still on the horizon. The gendered multiculturalist architecture of these expansions reflects not only the traditionalist political impulses that also drive the strengthening of traditional leaders, but also the belief of many feminists that expanding women's autonomy requires attention to the specific contexts in which they live—contexts that, for better or worse, are defined in part by the very cultural distinctions colonial and apartheid policy helped to cultivate.

In other words, the shape of post-apartheid marriage law *itself* reflects the dynamic interplay between state policy and everyday practice. The dynamic and interactional framework I have advocated in this article is thus important not only for the sociological understanding of family practice in its legal context, but also for a sociological understanding of that legal context itself. To be sure, my theoretical intervention here remains limited, and much work remains to elaborate its details. Similarly, the empirical nuggets I have shared here from existing literature are but a few from among many dispersed across several decades and disciplines of social science research. It is worth gathering more, precisely because South Africa's extreme history has produced such a dynamic, uneven set of outcomes. In many ways, a more systematic sociology of the law-family relationship would measure the state's reach into the most intimate scale of life, where so much of socialisation and social action happens. To study marriage and family in this way is thus to study governance itself.

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