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Analysis of the Marriage Bill, Administration of Estates Bill
and the Matrimonial Property Bill

CANGO

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ESWATINI & WAS PRODUCED IN 2021.***

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A. Introduction

The Kingdom of Eswatini finds itself time and again having had to make new pieces of legislations to replace older ones. The reason for promulgating a new law all together instead of amending the existing legislation is based on the premise that most of the laws to be reviewed dates back to five decades ago and some eve close to a century. The reason for this is that after adopting a new constitution in 2005 Eswatini did not embark on a law review process to ensure that the laws are in harmony with the constitution. Currently Eswatini is in a process of promulgating three pieces of legislation; Marriage Bill,¹ the Administration of Estates Bill² and the Matrimonial Property Bill. It must be stated from the outset through the Matrimonial Property Bill is not yet a bill in the strict sense in that it has not yet been gazetted (as a Bill). It is a draft paper that will be eventually tabled as a bill in parliament. But for the purposes of this assignment it shall be referred to as a Bill. If these are passed through an act of parliament and accented to by His Majesty the King, they will become the law of Eswatini. This assignment analyzes the bills in their totality and provide a comparative analysis with the existing legislations, if any.

1. Marriages Bill No. 23 of 2019

The purpose of the bill is set out the memorandum of objects and reasons. It provides *in extenso*:

The object of this Bill is to reform and consolidate the laws relating to marriage and to bring them in conformity with the Constitution and give effect to international obligations on human rights, in particular, provide for –

- (a) the types of recognised marriages;*
- (b) essential requirements of a valid marriage, whether civil or customary;*
- (c) solemnization of marriages;*
- (d) marital rights and duties of spouses in a marriage;*
- (e) status and capacity of spouses in a marriage;*
- (f) dissolution and deregistration of marriages;*

¹ It seeks to replace the Marriage Act 47 of 1964 and the Validation of Marriages Act No. 26 of 1902

² Which seeks to replace the administration of Estates Act 28 of 1902.

- (g) *the repeal of the Marriage Act No. 47 of 1964 and the Validation of Marriages Act No. 26 of 1902; and*
- (h) *other incidental matters.*

The long title of the Bill states it is “*an Act to reform and consolidate the law relating to marriages and to provide for the types of recognised marriages, essential requirements of a marriage, marital rights and duties of spouses, dissolution of marriages and for other incidental matters.*” The bill is necessary since there has not been legal reform in the area of marriage law. Therefore, close to five decades later it was necessary to have a statute that would replace the 1964 act.

The Bill now provides for solemnization of all marriages by a marriage officer. To that extent traditional local authority may be appointed marriage officers for marriage under Swazi customary law.³ Under the Bill a marriage shall be valid on solemnization by a marriage officer.⁴ The Bill further provides for the recognition of marriages both under civil rites and customary marriages.⁵ In terms of section 5(2) of the Bill marriages contracted to lawfully in a foreign country shall be recognized in Eswatini.

1.1 Cohabitation

In an unprecedented move the Bill recognizes cohabitation as a social issue. While the Bill does not recognize cohabitation as a marriage or giving rise to presumption of marriage.⁶ The Bill defines cohabitation as means the fact of an unmarried man and an unmarried woman living together as if they were husband and wife for a period of five years or more. Seeing as the couple is not married, cohabitation is not regulated by law and does not receive the same protection as a marriage. There is no common law marriage in Eswatini and the duration that couples spend living together does not mean that a marriage came into existence. The Bill seeks give some rights to parties to the relationship of cohabitation. In terms of the Bill parties to the relationship of cohabitation may:

- (a) The parties may register with the Registrar of Births Marriages and Deaths their contributions made during the cohabitation period.

³ Section 4(4) of the Bill.

⁴ Section 3 of the Bill.

⁵ Section 5(1) of the Bill.

⁶ Section 7(1) of the Bill.

- (b) At the cessation of the cohabitation the court,⁷ upon application, shall distribute the property in accordance with the registered amounts of contribution made by each party.
- (c) Failure to register shall not deprive any of the parties' ownership of their contribution – the party alleging existence of facts of contribution bears the responsibility of proof.
- (d) The court has a discretion, if it satisfied that parties cohabitated, to distribute the property equitably between the parties.

Lastly, the Bill provides that for one to enjoy rights conferred by the provisions on cohabitation it should be someone who has the legal capacity to get married. In a nutshell no person can get can cohabitante unless he or she has attained the marriageable age.

1.2 Minimum age of consent

The Bill establishes the age of marriage at 21 years and exceptionally allows people to get married at 18 years provided they obtain written consent of parents or legal guardian. The Bill provides in section 8(1) that the age of marriage is 18 years. This is for all parties to a marriage. The Bill seeks to correct the discriminatory nature of the existing piece of legislation (the Marriage Act) which provided the age of marriage differently; being 18 for males and sixteen for women (on consent of the parents).⁸ The departure from the present order is understandable, since Eswatini promulgated the Sexual Offences and Domestic Violence Act (SODV Act) of 2018 which prohibits sexual intercourse for any person below the age of 18. It is therefore, prudent to align the present law with the SODV Act.

Restriction of widow or widower marriages

The Bill, similar to the Marriage Act still restricts marriage of widows or widowers with minor children. Such marriages should take place once section 89⁹ of the Administration of Estates

⁷ Kindly note that in terms of the definition section of the Act court means the Magistrate's Court or the High Court.

⁸ 3(1) No male person below the age of eighteen years and no female person below the age of sixteen years may marry: Provided that if the special circumstances of any case, in the opinion of the Minister, warrant such a marriage, the Minister may grant special dispensation allowing such a marriage.

⁹ *Prohibition of remarriage of surviving parent until minors' shares have been secured.*

Act¹⁰ has been complied with.¹¹ It has a small addendum, however, this shall not apply to if the person being married by the widow or widower is a relative of the Deceased.¹² Even though this provision may *prima facie* appear to be discriminatory against widows and widowers it is however meant to protect minor children. This provision applies only to a widow or widower with minor children. The bill further adds another provision making it an offence to contravene section 10.¹³

89. (1) Whenever any person who is a widower or widow and the parent of a minor child entitled to claim from such person any inheritance from the estate of such person's deceased spouse intends to marry again such person shall (whether the marriage be by special licence or after publication of banns) obtain a certificate from and under the band of the Master to the following effect:

- (a) if the estate of the deceased spouse or the joint estate of the deceased spouse and the surviving spouse if of the value of two hundred emalangeni or more a certificate that the amount of inheritance due to such minor child from the estate has been paid into the Guardian's Fund or otherwise secured;
- (b) if any estate is of less value than two hundred emalangeni a certificate stating such fact.

(2) Every such certificate shall be delivered to the marriage officer or minister of religion before whom such marriage is intended to be solemnised.

(3) Any such widower or widow who marries again without obtaining the certificate required by sub-section (1) shall forfeit at the instance of the Master or of such child aforesaid when he or she attains the age of twenty-one years a sum equal to one-fourth of such widower or widow's share in the joint estate of such person and the deceased spouse for the benefit of any such child and shall in addition be guilty of an offence and liable on conviction to a fine not exceeding two hundred emalangeni.

(4) Every marriage officer or minister of religion who solemnises any such marriage unless there has been first delivered to him a certificate mentioned in this section shall in addition to any other liability be guilty of an offence and liable on conviction to a fine not exceeding one thousand emalangeni.

¹⁰ Act No. 28 f 1902.

¹¹ Section 10 (1) of the Bill.

¹² Section 10 (2) of the Bill.

¹³ Any person who contravenes this section commits an offence and is liable, on conviction, to a fine not exceeding two thousand Emalangeni or imprisonment not exceeding one year or both.

1.3 Declaration of status of marriage

The Marriage Act in section 7¹⁴ prohibits bigamy. However, the Bill makes no mention of bigamy rather it peremptory that a party intending to get married should first prove by a way of a declaration before a marriage officer that that party is not party to any other existing marriage.¹⁵

1.4 Status of the marriage and voidable marriages

Unlike the Marriage Act which recognizes both civil rites marriage (both contracted with or without community of property) and marriage under Swazi customary law.¹⁶ The Bill, unlike the Act, gives the parties to contract in marriage in community of property the option to bring to the joint estate some of the assets they acquired before marriage.¹⁷ It is now not peremptory that assets acquired before the marriage form part of the matrimonial estate. The parties may also agree that only assets acquired by them after the marriage should form part of their joint estate.¹⁸

Section 16 of the Bill list grounds for a voidable marriage. Voidable, in law, is a transaction or action that is valid but may be annulled by one of the parties to the transaction. Voidable is usually used in distinction to *void ab initio* (or void from the outset) and unenforceable. Voidable grounds are as follows:-

¹⁴ Person already married.

7. (1) No person already legally married may marry in terms of this Act during the subsistence of the marriage, irrespective of whether that previous marriage was in accordance with Swazi law and custom or civil rites and any person who purports to enter into such a marriage shall be deemed to have committed the offence of bigamy:

Provided that nothing contained in this section shall prevent parties married in accordance with Swazi law or custom or other rites from re-marrying one another in terms of this Act.

(2) No person married in terms of this Act shall, during the subsistence of the marriage, purport to contract a legally recognized ceremony of marriage with any person other than the lawful spouse of the first-named person.

(3) Any person who contravenes sub-section (2) shall be deemed to have committed the offence of bigamy.

¹⁵ Section 12 (1) of the Bill.

¹⁶ Section 13(1) of the Bill

¹⁷ Section 13(2) (a).

¹⁸ Section 13(2) (b).

- (a) The woman in marriage is pregnant or is expecting a child with another person at the time of the marriage and that is unknown to the other party;
- (b) Refusal to consummate the marriage for a period of three months from the date of marriage;
- (c) Unable to consummate the marriage within nine months.
- (d) Permanent impotence.
- (e) Non registration of the marriage within the prescribed period of time.

The bill now provides for a notice to marry which must be signed by one of the parties into a civil marriage. This means that before the Registrar of BMD's must be made aware of the intention to marry by the parties. Upon receipt of such intention the Registrar shall enter the notice into the register and satisfy himself or herself that that there is no subsisting marriage involving either of the parties.¹⁹ Once the Registrar is satisfied with his or her actions as contemplated in section 18 he or she may issue the marriage licence.

1.5 Customary marriage

For the first time the Bill seeks to provide prescribe preliminaries to customary marriage. As part of Swazi law and custom which is unwritten and survives through oral tradition there has been no formal laid down requirements to contract on marriage under customary law. Like marriage under civil rights a person intending to enter into a marriage under customary law needs to give notice to the Register.²⁰ But in customary marriage the notice also goes to the local traditional authority of both the bride and the groom. It is peremptory that the notice of intention to marry be displayed at *Inkhundla* centre and *umphakatsi* of the intending parties to a marriage.²¹ On the requirements of the marriage the following is proposed:

- (a)** Marriage shall be contracted and celebrated under Swazi law and custom.
- (b)** *Emalobo*²² to be agreed upon by the families.

¹⁹ Section 18 of the Bill.

²⁰ Section 23(1) of the Bill

²¹ Section 23(2) of the Bill.

²² "lobolo" means cattle or their equivalent in money which a prospective husband or the head of the family of that husband undertakes to give to the head of family of the prospective bride in consideration of a marriage in accordance with Swazi law and custom;

(c) It is obligatory that the bride be smeared with *libovu* in the presence of at least two witnesses.

It should be noted that that payment or non-payment of *lobola* is does not invalidate the marriage as long as all the other requirements are met. It is observed, however, that the requirement of having the marriage ceremony celebrated and contracted under Swazi law and custom is rather vague.

1.6 Conditions to marry a second wife

Since Swazi customary marriage allows polygamy, the bill proposes and set down conditions for a marrying a second wife. For a man to marry a second wife he needs to make an application to the local traditional authority.²³ The Applicant is required to show the traditional local authority that:

- ✚ a matrimonial home has been provided for the second wife. (an exception occurs when the current wife has agreed to live with the subsequent wife)
- ✚ the man is capable of giving same treatment to all the wives
- ✚ an inventory has been made of the property owned separate from the spouse in the existing marriage.

The local traditional authority has discretion to grant or refuse an application for a second wife. If the application has been refused written reasons must be provided to the applicants who may approach the court for proper redress.

1.7 Conversion of marriage

Under the proposed Bill marriage can be converted from civil rites to customary marriage and from customary marriage to civil rites, vice versa. However, for the latter the conversion is only on condition that the husband has only one wife at the time of the conversion. Again any moves to convert a marriage must be brought to the attention of the Registrar. The parties' shall then make an application to the court to change their matrimonial property system.²⁴ Significantly, it

²³ Section 25 of the Bill.

²⁴ See section 37 of the Bill.

must be noted that the bill makes it peremptory that customary marriages be registered within three months after completion of the ceremonies.

1.8 Dissolution of marriage

For the first Eswatini will have a statute which provides for divorce. All along people sought refuge in common law for dissolution of civil rites marriage. The Bill provides for a sole ground for dissolution of marriage - the marriage has irretrievably broken down.²⁵ Irretrievable breakdown of marriage is defined in the definition section of the Bill as ***“means a situation where one or both of the spouses proves to the court that they can no longer live together in consortium as husband and wife and the marriage relationship has reached a state of disintegration to the extent that there is no reasonable prospect of restoration to a normal marriage relationship.”*** The list the following factors as a sign of irretrievably broken down marriage:-

- (a) the adultery of the respondent and the fact that because of it, the plaintiff finds it intolerable to live with the respondent;
- (b) sexual perversion on the part of the respondent;
- (c) cruelty, whether mental or physical on the part of the respondent affecting the health of the plaintiff;
- (d) the desertion by the defendant of the plaintiff for a continuous period of at least six months immediately preceding the presentation of the action without any justifiable cause; and
- (e) a change of religion by the respondent where both parties followed the same faith at the time of the marriage and, where the plaintiff cannot tolerate the change of religion

²⁵ Section 45 of the Bill.

2. The Administration of Estates Bill 2020

The Administration of Estates Bill seeks to replace the current Administration of Estates Act No. 28 of 1902. The Current Act is close to a century there was, therefore, a need to review the current legislation. The purpose of the bill is set out the memorandum of objects and reasons. It provides in *extenso*:

The object of this Bill is to -

- (a) revise the law relating to the administration of estates of persons dying having made a valid will and incidental matters;*
- (b) provide for the recognition of customary law marriages for the administration of estates;*
- (c) provide for the appointment and qualifications of the Master, Deputy Master and Assistant Masters;*
- (d) provide for the extension of the powers of the Master so as to remove an executor where, inter alia, the executor has been nominated by an invalid or void will or does not perform his or her duties satisfactorily and to issue a certificate of discharge to an executor who satisfactorily discharges his or her duties in connection with the administration, distribution and liquidation of the estate;*
- (e) provide for the opening of an Estate Bank Account by an executor in the name of the estate into which all moneys accruing to the estate must be paid;*
- (f) provide for the lodging of late claims against the estate of the deceased and for dealing with claims against the estate which are either disputed or rejected by the executor;*
- (g) restrict an executor who administers an estate of his or her close relative or associate from purchasing property of that estate without the consent or approval of the Master;*
- (h) provide for an increase in the levels of penalties both pecuniary and custodial so as to secure compliance with the law and an increase in the scale of fees charged for various services provided by the office of the Master;*
- (i) provide for an increase in the interest rate on moneys kept in the Guardian's Fund;*
- (j) provide for an increase in the value of an estate to which the Master may appoint an executor dative to reflect the prevailing economic value of the currency; and provide for incidental matters.*

The long title of the bill provides that it is “An Act to revise the law relating to, the administration of estates of deceased persons, the administration of the property of minors and persons under curatorship and of derelict estates and to provide for incidental matters.”

For starters the Bill has a broad definition of a spouse. In terms of the definition section of the Bill a “spouse” means a person who, at the time of the deceased’s death was-

(a) *married to the deceased, under-*

(i) *the Marriage Act;*

(ii) *Swazi law and custom; or*

(iii) *foreign law under which the marriage was celebrated; or*

(b) *in a cohabitation relationship with the deceased for a period of five years or more, in such circumstances as to have acquired the reputation of being husband and wife.*

With regards to the latter part of the definition it means that the bill recognizes marriage under Swazi law and custom which was not the case with the current legislation. What is more is that the bill recognizes cohabitation as a form of partnership similar characteristics as a marriage in that the parties to it had undertaken reciprocal duties of support.

2.1 The Master of the High Court

While the current act has a provision of the office of the Master of the High Court it, however, did not have any provision on qualifications and appointment of Master, Deputy Master and Assistant Master. The Bill does explicitly provides for this under section 3 thereof. What is clear that the office of the Master or Deputy Master shall be held by someone with an LLB degree. The Bill, however, does not provide for admission as an attorney as a requirement but working experience as a legal practitioner.

2.2 Estate bank accounts

The Bill provides for the compulsory opening if an estate bank account. An executor of the estate is enjoined by section 37 to open a cheque account in the name of the estate with a banking institution in Eswatini and shall deposit in the account the moneys which he has in hand and such other moneys as he or she may from time to time receive for the estate. The executor of an estate is required from time to time to appraise the Master on the activities of

the bank account including providing bank statements. The mandatory opening of an estate bank account will minimize the risk of abuse of estate funds by executors or any other person. An executor may at any time be removed from office by the Master if,

- (i) if he or she has been nominated by will and the will has been declared to be void by the Court or has been revoked either wholly or is so far as it relates to his or her nomination or if he or she has been nominated by will and the Master is of the opinion that the will is for any reason invalid; or
- (ii) if he or she is convicted in Eswatini or elsewhere of theft, fraud, forgery, uttering forged document or perjury, and is sentenced to serve a term of imprisonment without the option of a fine or to a fine exceeding E200; or
- (iii) if at the time of his or her appointment he or she was incapacitated, or if he or she becomes incapacitated to act as executor of the estate of the estate of the deceased; or
- (iv) if he or she fails to perform satisfactorily any duty imposed upon him or her by or under this Act or to comply with any lawful request of the Master;
- (v) if he or she applies in writing to the Master to be relieved of his or her office.

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3. The Matrimonial Property Bill of 2020

The matrimonial property Bill's objects are to give effect to section 34²⁶ of the Constitution by regulating the property rights of spouses. The Bill seeks to provide for:-

- (a) equal access to the property of spouses jointly owned or acquired during the subsistence of a marriage;
- (b) the equitable distribution of matrimonial property between the spouses;
- (c) the abolition of marital power;
- (d) agreements regulating property rights of cohabitees;
- (e) accrual system in out of community of property;
- (f) protection of matrimonial home; and
- (g) incidental matters.

The bill abolishes marital power in terms of section of 3 thereof. However this provision comes in rather late as the High Court in the matter of *Makhosazane Eunice Sacolo (nee Dlamini) and Another vs. Jukhi Justice Sacolo and 2 Others*²⁷ declared that the marital power doctrine was unconstitutional because it discriminated against married women and violated their dignity, holding that spouses married under the Marriage Act and in community of property had equal capacity to administer their property. The Court also struck down all parts of the Marriage Act that imposed customary law because they discriminated on the basis of race. To reach these conclusions, the Court did not rely on the international treaties and conventions the plaintiffs had presented in their briefs because the decision could be thoroughly based on the domestic constitution and jurisprudence.

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²⁶ *Property rights of spouses.*

34.(1) A surviving spouse is entitled to a reasonable provision out of the estate of the other spouse whether the other spouse died having made a valid will or not and whether the spouses were married by civil or customary rites.

(2) Parliament shall, as soon as practicable after the commencement of this Constitution, enact legislation regulating the property rights of spouses including common-law husband and wife

²⁷ (1403/16) [2019] SZHC (166)

The Bill introduces changes to the current law attributing the husband sole responsibility to administer matrimonial property. Written consent is required of both spouses before transactions are made over matrimonial property, and the matrimonial home shall not be mortgaged or leased without the written and informed consent of both spouses.²⁸ Hence, in section 8,²⁹ spouses married in community of property have joint capacity to acquire, administer, hold, control, use and dispose of property whether movable or immovable. They also have joint capacity to enter into a contract and sue and be sued in their own name. A spouse can institute or defend legal proceedings without the consent of the other spouse if the legal proceedings are in respect of that spouse's separate property, or for the recovery of damages not related to patrimonial loss, and in respect of a matter relating to the profession, trade or business of the other spouse.³⁰

²⁸ Section 6 of the Bill.

²⁹ *Equal powers of spouses married in community*

8. Subject to the provisions of this Act, a wife in a marriage in community of property has the same powers with regard to the disposal of the assets of the joint estate, the contracting of debts which lie against the joint estate, and the management of the joint estate as those which a husband in such a marriage had immediately before the commencement of this Act.

³⁰ *Litigation by or against spouses*

11. (1) A spouse married in community of property shall not without the written consent of the other spouse institute legal or proceedings against another person or defend legal proceedings instituted by another person, except legal proceedings-

- (a) in respect of his or her separate property;
- (b) for the recovery of damages, other than damages for patrimonial loss, by reason of the commission of a delict against him or her;
- (c) in respect of a matter relating to his or her profession, trade or business.

(2) A party to legal proceedings instituted or defended by a spouse may not challenge the validity of the proceedings on the ground of want of the consent required in terms of subsection (1).

(3) If costs are awarded against a spouse in legal proceedings instituted or defended by him or her without the consent required in terms of subsection (1), the court may, with due regard to the interest of the other spouse in the joint estate and the reason for the want of consent, order that those costs be recovered from the separate property, if any, of the first-mentioned spouse and, in so far as those costs cannot be so recovered, that they be recovered from the joint estate, in which case the court may order that upon the division of the joint estate an adjustment shall be effected in favour of the other spouse.

(4) An application for the surrender of a joint estate shall be made by both spouses and, an application for the sequestration of a joint estate shall be made against both spouses, however that, no application for the

4. Conclusion

The Constitution of Eswatini contains extensive measures to protect and advance women. Section 20 prohibits discrimination on the grounds of gender and permits Parliament to pass laws that are "*necessary for implementing policies and programmes aimed at redressing social, economic or educational or other imbalances in society*". Section 28 enshrines the right of women "*to equal treatment with men and that right shall include equal opportunities in political, economic and social activities*" and protects women from being compelled to "*undergo or uphold any custom to which she is in conscience opposed*". Section 59(5) obliges the State to afford equality of economic opportunity to all and takes steps to ensure the full economic integration of women. Section 60(4) provides that the State must ensure that gender balance must be attained in all bodies, constitutional or otherwise. Based on the foregoing it is concluded that:-

- ❖ The bills are a step in the right direction towards protection of fundamental human rights especially the rights of women.
- ❖ The bills seeks to give dignity to women married under customary law (I.e. the Marriage Bill sets conditions on how a man may marry a second wife. It appears the welfare for the current wife is a precursor for a second marriage.
- ❖ The Marriage Bill further develops our family law in that it has a broader grounds for divorce compared to the current order.
- ❖ The Marriage Bill, however, partly maintains the status quo in that it continues oust the jurisdiction of the courts to grant divorce for marriages contracted under customary law. This discrimination is unnecessary since the grounds for divorce are similar regardless of which marital regime one has contracted into the procedure for dissolution should also be the same – courts.

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sequestration of the estate of a debtor shall be dismissed on the ground that such debtor's estate is a joint estate if the applicant satisfies the court that despite reasonable steps taken by him or her he or she was unable to establish whether the debtor is married in community of property or the name and address of the spouse of the debtor.

(5) Where a debt is recoverable from a joint estate, the spouse who incurred the debt or both spouses jointly may be sued therefor, and where a debt has been incurred for necessities for the joint household, the spouses may be sued jointly or severally therefor.

- ❖ The Administration of Estates Bill recognizes customary marriages and further gives the power to the Master to remove an executor. Furthermore, the Bill provides for the estate bank account.
- ❖ All the Bills recognizes cohabitation as a legally acknowledged form of partnership.
- ❖ The Matrimonial Property Bill is a constitutional advancement legislation and would better protect women's right to property.

