

PROPOSED CHANGES TO THE LAW ON CUSTOMARY MARRIAGE

Dianne Hubbard, Gender Research & Advocacy Project
Legal Assistance Centre, 2005

Dianne Hubbard of the Legal Assistance Centre presents a summary of a bill recently proposed by the Law Reform and Development Commission (LRDC) on the recognition and registration of customary marriages. The proposal was the result of consultation with many traditional leaders and with organisations such as the Legal Assistance Centre, the Law Society of Namibia and the Council of Churches in Namibia.

The background to the proposed law

It is interesting to note that, according to the 2001 census, not many people in Namibia get married in terms of customary law these days. More than half of the Namibian population aged 15 and above have never been married (56%). About 19% of all Namibians were married in civil marriages at the time of the census, compared to only about 9% of people in customary marriages. Another 7% were living as husband and wife without being formally married in any way.

These figures, however, obscure that fact that some people marry in terms of both civil and customary norms, and may look to either system of law in the case of a dispute.

Years ago, President Sam Nujoma explained the need for laws reform to bring customary law in harmony with the Constitution: "Since our Constitution provides a clear and unambiguous position on the status of women, Government is committed to eradicating the injustices of the past that have been perpetrated against women. In this regard, our aim is to reconcile existing customary laws and practices with the provisions of the Constitution regarding equality of women and men, and to ensure that the Constitution prevails where there is conflict with such customary laws and practices." (statement made on 28 September 1996).

As part of the effort to achieve this aim, the Law Reform and Development Commission has put forward proposals for giving full legal recognition to customary marriage, as well as altering the principles which prevent men and women from being equal partners in such marriages.

The key proposals

Customary marriages will have full legal recognition. Before independence, the government gave less recognition to customary marriages than to civil marriages. Customary marriages were not treated as real marriages, but only as "customary unions".

Since independence, customary marriages and civil marriages have been treated equally for many purposes, such as citizenship rights and employees' compensation. But up to now, they have not been fully recognised in the eyes of the law.

In terms of the new law, customary marriages will no longer have second-class status. They will have full legal recognition, just as civil marriages do. People married under customary law will receive marriage certificates. They will qualify for all the benefits of spouses in every aspect of life – such as medical aid, pensions and housing schemes.

In future, any law or insurance policy or pension fund that uses the word "marriage" will apply equally to civil marriage and customary marriage.

There will be new minimum requirements for customary marriages. These new requirements will apply only to customary marriages that take place AFTER the new law comes into force. Customary marriages that have already taken place

BEFORE the new law comes into force will be recognised if they have followed all the requirements for marriages under their community's customary law.

The first new requirement will be minimum age. In order to be married in a customary marriage in future, both the man and the woman must be 18 years of age. If a person is under the age of 21, both parents must consent to the marriage. A person under age 18 can marry only with consent from both the parents and the government. Because this rule applies only to future marriages, a woman or a man who got married many years ago at age 16 (for example) would still have a valid customary marriage. This change will make the age requirements identical for all kinds of marriage.

The second requirement is consent to be married. No one can be forced into a customary marriage. Article 14(2) of the Namibian Constitution says that "marriage shall be entered into only with the free and full consent of the intending spouses".

The third requirement will be monogamy -- one person, one marriage: The proposed law will allow people to marry only one person at a time, regardless of the type of marriage that is involved. This means that a person who is already married in a civil marriage or a customary marriage will NOT be allowed to marry anyone else in any kind of marriage. Polygamy will no longer be allowed. But polygamous marriages that took place BEFORE the new law comes into force will still be recognised. The proposed law will forbid only future polygamous marriages.

Aside from these requirements, the rules and procedures for customary marriage will be the same ones that already apply under customary law. This means that customs such as *lobola* will be allowed to continue even though some argue that this discriminates against women.

If two people from communities with different customs want to get married in a customary marriage, they can choose which set of customs to follow.

Customary marriages must be registered. Customary marriages that take place AFTER the new law comes into force MUST be registered to be recognised as marriages in the eyes of the law. Failing to register a new customary marriage will not be a crime, but the marriage will not be recognised for purposes of things like laws, insurance policies and pensions.

Where the customary marriage took place BEFORE the law comes into force, people will be ENCOURAGED to register the marriage. But a marriage which took place BEFORE the law comes into force will still be valid even if it is not registered. However, registration has the advantages of providing proof that the marriage really took place. Anyone who has an interest in proving that the marriage exists -- the spouses, a child of the marriage or others such as creditors or heirs -- can apply for registration of a customary marriage that took place BEFORE the new law comes into force.

Existing customary law marriages can be registered at any time. Registration will be free for two years after the law comes into force. After that, there will be a fee for registering customary marriages which took place BEFORE the law came into force.

The registration process will be carried out by customary marriage officers. The Ministry of Regional and Local Government will appoint traditional leaders from the community to be customary marriage officers. The customary marriage officer will decide if the requirements for marriage in that community have taken place. The customary marriage officer will work together with the traditional authority for the community. If all the necessary minimum requirements and traditional customs have been followed, then the customary marriage officer *must* register the customary marriage. The couple will get a marriage certificate showing that they have a valid customary marriage.

The register of customary marriages will be kept at the Ministry of Home Affairs, just like the register of civil marriages and the registers of births and deaths.

Future customary marriages will be “in community of property” unless the couple make an agreement before the marriage that applies some other property arrangement. This means that customary marriages which take place AFTER the new law comes into force will be placed on the same footing as civil marriages with respect to property. “In community of property” means that all of the property brought into the marriage by either spouse becomes part of a joint estate which is shared half and half if the marriage comes to an end by death or divorce. Both spouses share in the gains of the household, and debts of either spouse are also taken out of the joint property. This system will be a big change from current customary law regarding property in marriage.

But remember that “community of property” is only the default system. No one will be forced to adopt this system. It is just the system that will apply automatically if the couple do not agree to some other system before getting married. The couple can make an agreement in advance of the marriage that applies customary law, or “out of community of property” or any other approach that suits them. (“Out of community of property” means that the spouses keep their property separate at all times and retain only their own property when the marriage comes to an end.)

The property arrangements in customary marriages which took place BEFORE the new law comes into force will continue to follow the customary law of that community. But these couples can use a simple procedure to change their property regime to “in community of property” – as long as the husband is not married to any other women in polygamous marriages. Couples will be allowed to make this change for a period of at least two years after the new law comes into force, and maybe even longer.

Husbands and wives must deal with their joint property together. The provisions of the Married Persons Equality Act which apply to civil marriages “in community of property” will also apply to customary marriages “in community of property”. This means that husband and wife must get each other’s consent for major property transactions which affect the joint estate. It should be noted that transactions in livestock are specifically named by the Married Persons Equality Act as being an area that requires the consent of both spouses.

Both husbands and wives will have full legal status and capacity. In accordance with the Namibian Constitution, husbands and wives will have the same legal rights and powers. This means that a woman will be able to own and dispose of her own property without the consent of anyone else, including her husband – although husbands and wives will both have to consult each other about major transactions involving joint property if they are married “in community of property”.

Women will also be entitled to bring cases in civil or traditional courts, without the assistance or approval of anyone else.

Husbands will no longer have any form of ‘marital power’ over their wives in the eyes of the law. How people arrange their marital relations privately is their own business, but the law will not support either one of them as the “head of the household”.

Two people who have already married under one law may not marry each other under another law. Sometimes people get married under customary law, and then later have a church or court ceremony -- or vice versa. Civil and customary marriages have different consequences in some respects. In future, couples will be bound by the first marriage that takes place between them. They cannot change their minds later on about whether they want a customary marriage or a civil marriage. They have to pick one or the other and stick to it.

Sometimes people want to have an official church or court ceremony, while still observing some of their community’s traditional customs. This will still be okay, as long as the parties are clear about which form of marriage they are actually choosing.

Divorce from customary marriages will take place in a way that is similar to divorce from civil marriages. In future, people will be able to get divorces from customary marriages only for 'irretrievable breakdown' – in other words, only on the grounds that the marriage has broken down beyond repair. This is the same basis for divorce that has been proposed for civil marriages.

This ground for divorce will be the *only* one that will apply. Many things that have been reasons for divorce in the past might lead to 'irretrievable breakdown', but they will not be reasons for divorce on their own. This approach removes the problem that some of the customary reasons for divorce are not equal for men and women – such as adultery by the wife, but not by the husband.

The procedure for divorce will follow customary law – as long as the procedure follows the Constitution and is not unfair in any way. For example, it might be that a requirement that *lobola* must be returned in the case of divorce would be considered so unfair that it would not be allowed.

The divorce will not be official until the customary marriage officer has issued a divorce certificate -- and this certificate cannot be issued until there is either an agreement between the spouses about property and children, or a court order that decides the dispute on these issues.

If the parties cannot agree on how to divide their property and on arrangements for their children, then the High Court will settle the dispute – as in the case of civil marriages. Divorced spouses can also get help from the High Court to enforce a divorce agreement that they made between themselves and their families in terms of customary law. Anyone who wants help from the High Court can start the process at the local magistrate's court, to make it more accessible.

This system is intended to safeguard women and children, who are more likely to be the vulnerable parties when a marriage breaks down. It also makes sense that once marriages are registered, divorces must be registered as well.

Debates ahead

These proposals would make far-reaching changes to the current system of customary law. It is important that they be fully discussed and debated, because a law which is ignored by most people will not be of much use to anyone. Change in intimate areas of life such as marriage and the family is always difficult and controversial, and it is unlikely that everyone in Namibia will agree on the way forward. But a thorough examination of the proposals is likely to help Parliament enact a law which will be well-understood and accepted. We encourage you to make your opinions on the proposals known to the decision-makers in government.

For more information about the proposed law reforms, see Report on Customary Law Marriages by the Law Reform and Development Commission (Project 7, LRDC 12).