

## **RECOGNITION OF CUSTOMARY MARRIAGES IN SOUTH AFRICA: A MODEL FOR NAMIBIA?**

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In the days of apartheid, customary marriages were given a second-class status as 'customary unions'. They were not considered to be real marriages for many legal purposes.

Since independence, customary marriages have been accorded new respect and acknowledged as marriages for a wide range of legal purposes. But there is still a need for law reform in this area.

Namibia's Law Reform and Development Commission is considering a new law which would give formal recognition to customary marriages. This law would provide a system of registration for customary marriages, so that couples in a customary marriage would have a marriage certificate similar to the certificates provided for civil marriages.

South Africa has already passed such law, in 1998. It may be useful to discussions in Namibia to consider the approach taken by our neighbours.

### **Requirements for a valid customary marriage**

In South Africa, a customary marriage entered into after the new law was passed is valid if it meets three criteria: (1) both prospective spouses were above the age of 18 (or had government consent to marry at a younger age) (2) both consented to be married to each other under customary law and (3) the marriage was negotiated and entered into in accordance with customary law.

Marriages do not have to be registered to be valid, but spouses are expected to make sure that they register the marriage. The register will record the names of the spouses, the date of the marriage, and the *lobola* which was agreed to (if any). The certificate of marriage can be used by the spouses as proof that the marriage exists – which is often useful for medical aid schemes and pension plans.

### **Property in customary marriages**

Customary marriages which took place before the new law continue to have the property consequences determined by customary law. But customary marriages which take place after the law came into force will be in community of property, just like civil marriages, unless the spouse make an antenuptial contract in which they agree to some other property arrangement.

Husbands and wives in customary marriage have equal powers to deal with property, enter into contracts, bring or defend lawsuits. However, this power is subject to the matrimonial property regime governing the marriage, meaning that wives in marriages which took place before the law came into force may still be disadvantaged.

### **Polygamy**

Polygamy is allowed in terms of the new law, but there are new safeguards to protect the interests of all the wives. A husband who wishes to take on a new wife must make an application to a court to approve a property system which takes all the marriages into account, including the interests of all the family groups which would be affected. Everyone who has an interest in the matter has a right to have a say on the matter, particular the present wife or wives, and the prospective wife.

Each spouse will get a copy of the contract which sets forth the marital property system, and the contract must also be registered at a deeds office.

The issue of polygamy was hotly debated in South Africa. A survey of one area (Empangeni) found that 80% of women were opposed to polygamy, while 70% of men were in favour of it. Some argued that polygamy should be abolished because it violates the fundamental rights of women to equality in marriage, but people were concerned that women

who could might be left in unregistered partnerships without any legal protection if polygamy were abolished.