

RECOGNITION OF CUSTOMARY MARRIAGES

A SUMMARY OF THE LAW REFORM AND DEVELOPMENT COMMISSION PROPOSAL



Legal Assistance Centre
2005

This is a summary of a bill proposed by the Law Reform and Development Commission (LRDC) on recognition of customary marriages.

The Law Reform & Development Commission's 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 bill deals only with customary marriages. Civil marriages are dealt with in other laws.

This summary will help you understand the law reform that is being proposed. Your feedback is important. Laws are made to serve the people of Namibia. You can state your opinion directly to the Ministry of Justice, or the MPs who represent you in Parliament. The Legal Assistance Centre will also collect feedback from different parts of the country and pass it on to the government.

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.

President Sam Nujoma, 28 September 1996

TERMINOLOGY

“Customary marriage” is a marriage which takes place in terms of the customs of the community. A **“civil marriage”** takes place in a church or in front of a magistrate. Some people observe traditional customs and also get married in a church.

“In community of property” means that all the property of the husband and the wife are put together into what is called a “joint estate”. Everything that belonged to the husband before the marriage and everything that belonged to the wife before the marriage become part of the joint estate. Any money earned by either of them during the marriage becomes part of the joint estate. Everything they buy during the marriage also goes into the joint estate, no matter who actually paid for the thing.

The money and property in the joint estate can be used to pay loans or debts, no matter which spouse is responsible for them. The husband and the wife each own half of everything in the joint estate. They are required by the Married Person Equality Act to consult each other on major transactions which affect the joint estate. If the marriage comes to an end, the joint estate is divided equally between husband and wife.

“Out of community of property” means that the husband and the wife each have their separate property. Everything that belonged to the husband before the marriage remains his, and everything that belonged to the wife before the marriage remains hers. They each keep their own earnings. Everything the husband buys during the marriage is his only, and everything the wife buys during the marriage is hers only.

The husband and the wife are each responsible for their own loans and debts. During the marriage, both husband and wife are free to deal with their own separate property in any way they wish. They are not required to consult each other about the use of separate property. If the marriage comes to an end, the husband and the wife each keep their own separate belongings.

“Joint estate” is the combined property and possessions of a couple married in community of property. Each spouse is entitled to half of the joint estate if the marriage ends by death or divorce.

“Polygamy” is a customary practice where a man has more than one wife at the same time.

“Spouse” is a gender-neutral word that means either a husband or a wife.

BACKGROUND INFORMATION

According to the 2001 census, not many people in Namibia get married in terms of customary law. 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. About 3% were divorced at the time of the census, and about 4% were widowed.

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.

These are the key points in the government's proposed law reform.

1. 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.

If a couple got married under customary law before the new law comes into force, their marriage will also be legally recognised.

2. There will be new minimum requirements for customary marriages.

The law will set some new minimum requirements for **customary marriages**. The new requirements 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.

(1) 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 of all kinds of marriage.

(2) Consent to be married: No one can be forced into a 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".

(3) One person, one marriage: The new 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.

This means that polygamy will no longer be allowed. But polygamous marriages that took place **BEFORE** the new law comes into force will still be recognised. The law forbids only future polygamous marriages.

QUESTIONS FOR DISCUSSION:

- * Do you agree with the proposal to outlaw polygamy?
- * Will outlawing polygamy mean that more people will live together as husband and wife without being formally married?
- * Will women in informal relationships need greater legal protection for their rights in future?
- * Would you prefer a system where polygamy is allowed if the first wife or wives agree to it?

Other than these requirements, the rules about customary marriage will be the same ones that already apply under customary law. For example, the customary law rules about which family members are forbidden to marry will still apply (such as rules against parents getting married to their children).

The process for entering into a customary marriage will be the same process that already applies under customary law. This means that customs like lobola will continue even though some people say 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.

QUESTIONS FOR DISCUSSION:

- * Should the law allow lobola to continue in those communities that use it, or should the law make it illegal?**
- * If lobola continues, should the new law say anything about the requirement in some communities that lobola must be returned (in some circumstances) if there is a divorce?**

3. 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.

Registration has the advantages of providing proof that the marriage really took place. Any of the following people can apply for registration of a customary marriage that took place BEFORE the new law comes into force:

- the husband or the wife
- a child of the marriage
- anyone who has an interest in proving that the marriage exists, such as creditors, pension funds or heirs.

Anyone who has an interest in the matter can present information to the customary marriage officer showing that there really is or is not a customary marriage.

Existing customary law marriages can be registered at any time. But 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.

QUESTIONS FOR DISCUSSION:

- * Will people who marry under customary law be willing to register their marriages with the government in order to get a marriage certificate?**
- * Will men who want to continue to have polygamous marriages simply avoid registering their marriages?**
- * Should the law require that new customary marriages be registered in order to be recognised as valid marriages? Will this create any practical problems? In South Africa, registration is encouraged, but unregistered marriages that take place in the future are still recognised as being valid marriages.**
- * The law gives several interested parties a right to request registration of a customary marriage that took place BEFORE the law comes into force. But only the married couple themselves have the right to seek registration of a customary marriage which takes place AFTER the law comes into force. Will this create any practical problems?**
- * Is it fair to impose a registration fee for customary marriages that took place BEFORE the law comes into force once the two-year grace period for free registration is over? Will this discourage people from registering their marriages after that date?**

4. 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. They could 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.

The property arrangements in customary marriages which took place BEFORE the new law comes into force will 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 2 years after the new law comes into force, and maybe even longer.

QUESTIONS FOR DISCUSSION:

*** Most customary laws do not have a concept of joint property in a marriage. Will the system of ‘in community of property’ work for customary marriages in practice?**

*** Is there some other property system which would work better for customary marriages? One option is “out of community of property’, which means that the property of husband and wife stay separate at all times. Another option is ‘accrual’, which means that property stays separate during the marriage, but all the gains to *both* spouses’ property are shared equally between the two of them upon divorce. Similarly, If one spouse dies, half of the total “accrual” goes to the surviving spouse, and the other half to the heirs of the deceased. A third option would be to continue to apply customary laws to the property of all customary marriages. New options could be created to suit customary marriages if necessary.**

* Will there be problems with 'community of property' in cases where extended family members have an interest in certain forms of property such as cattle?

* How do you feel about the different property arrangements for future customary marriages and existing customary marriages? Future customary marriages are *automatically* in community of property unless the couple take steps to apply a different system, while existing customary marriages can get community of property *only if they take action within a certain period of time* after the law comes into force.

5. 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 which are 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.

QUESTIONS FOR DISCUSSION:

* Will the system of joint decision-making work for customary marriages in practice? How can it be best enforced?

* Do you have any other suggestions on how to give men and women equality in the control of joint property during marriage?

6. Both husbands and wives will have full legal status and capacity.

In accordance with the Constitution of Namibia, all adult men and women will have full legal capacity. They will have the same legal rights and powers, regardless of whether they are married or single.

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. (But remember that 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".

7. 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 must 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.

8. Divorce from customary marriages will take place in a way that is similar to divorce from civil marriages.

There will be a new approach to divorce from customary marriages. In future, people will be able to get divorces from customary marriages only for the reason that the marriage has broken down beyond repair. This is called 'irretrievable breakdown'. This reason for divorce is also going to be applied to civil marriages in future.

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. 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.

QUESTIONS FOR DISCUSSION:

- * Will people try to avoid the new rules on customary divorce by separating informally?**
- * Is the High Court the right place for people to get help with customary divorces? Should disputes about customary divorces be dealt with by magistrates’ courts or community courts instead?**

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.