

# CIVIL AND CUSTOMARY MARRIAGE: The Choices

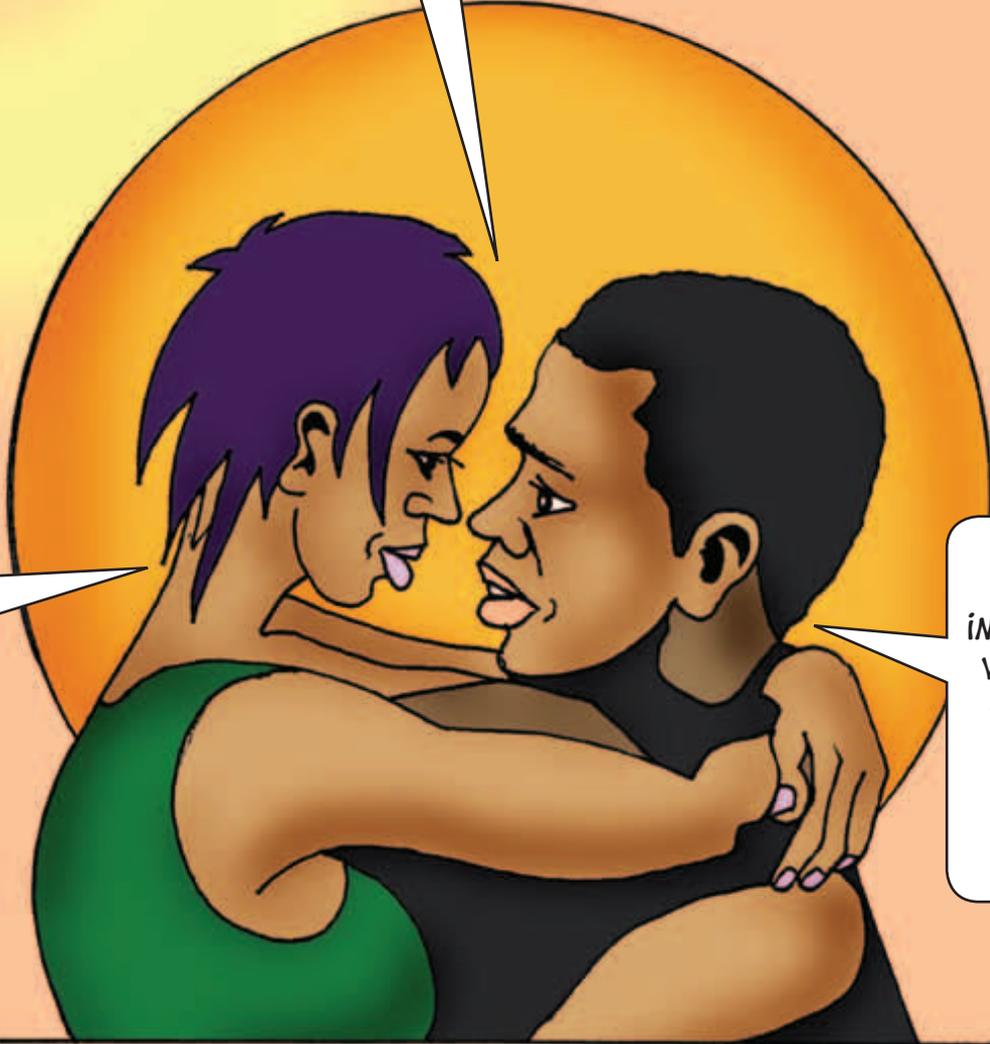


Will you marry me?

Yes!!

I am so happy that we are going to get married – we should have the ceremony as soon as possible.

I am very happy too, but we must not get married too quickly. There are options we must consider. We can have a civil marriage or a customary marriage. Our choice of ceremony will affect our rights. This is important – it will affect how we will own and manage our property once we are married.



That sounds important – we should speak to someone who can tell us more.

Most civil marriages in Namibia are **IN** community of property. This means that everything each of you owns before and during your marriage will be shared as part of the joint estate. If the marriage ends because of divorce or death, the joint estate will be divided in half and shared equally.

We are planning to get married and we would like more information about our options.



But what if we disagree about how we spend our money or if we want to sell property?

If you are married **IN** community of property, major financial decisions must be made together. For example, you must both agree if you want to apply for a loan on your house. This fact sheet will help explain more.



If you are married **OUT** of community of property, everything you and your partner have before you marry remains your own separate property. Once you are married you keep your own earnings as well. You each manage your own property, and you keep only what is yours if the marriage ends or your partner dies.



I cannot tell you which property regime is best. The answer to that question is different for different couples. It depends on your personal financial situation and your plans for the future.



# BASIC FACTS ON THE MARRIED PERSONS EQUALITY ACT



## FACT SHEET

Gender Research & Advocacy Project  
LEGAL ASSISTANCE CENTRE  
Windhoek, Namibia.

### What is the Married Persons Equality Act (MPEA)?

The MPEA removes sexual discrimination from civil marriages. Married equality means that husbands and wives have equal power to make decisions.

### Property and marriage

#### *In* community of property:

- Everything a husband and wife had before they were married becomes part of the joint estate. Everything earned or bought once married also becomes part of the joint estate. Each partner owns half of the joint estate. If one partner has a debt, money from the joint estate can be used to pay this debt.
- Both partners must agree to sell, give away or borrow money or property. Both partners must agree if they want to take out a large loan.
- If the couple divorce or if one partner dies, the property will be split in half.



#### *Out* of community of property:

- Everything a husband and wife had before they were married remains their own. Once they are married they keep their own earnings. They are each responsible for their own loans and debts.
- The husband or the wife can buy or sell their belongings without asking the other person. They can each take out a loan without asking the other person.
- Not all costs are separate. The cost of household needs should be shared because a husband and a wife have a duty to maintain each other.
- If a couple want a divorce, they each keep their own property and anything they bought together is divided in half. If one partner dies, it is only that partner's separate property which goes to the heirs.



### Which system of marital property applies?

Most civil marriages in Namibia are *in* community of property. If you want to be married *out* of community of property you must make a contract before you are married and register it at the office of the Registrar of Deeds.

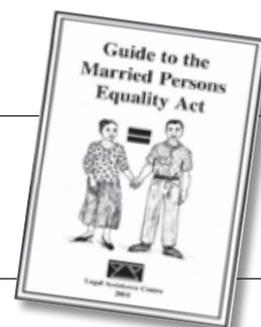
But if you live north of the old "Police Zone", in the areas known as Owamboland, Kavango and Caprivi, marriages that take place between "Africans" on or after 1 August 1950 are *out* of community of property.

If you want to be married *in* community of property you must make a contract with the marriage officer before the marriage takes place.

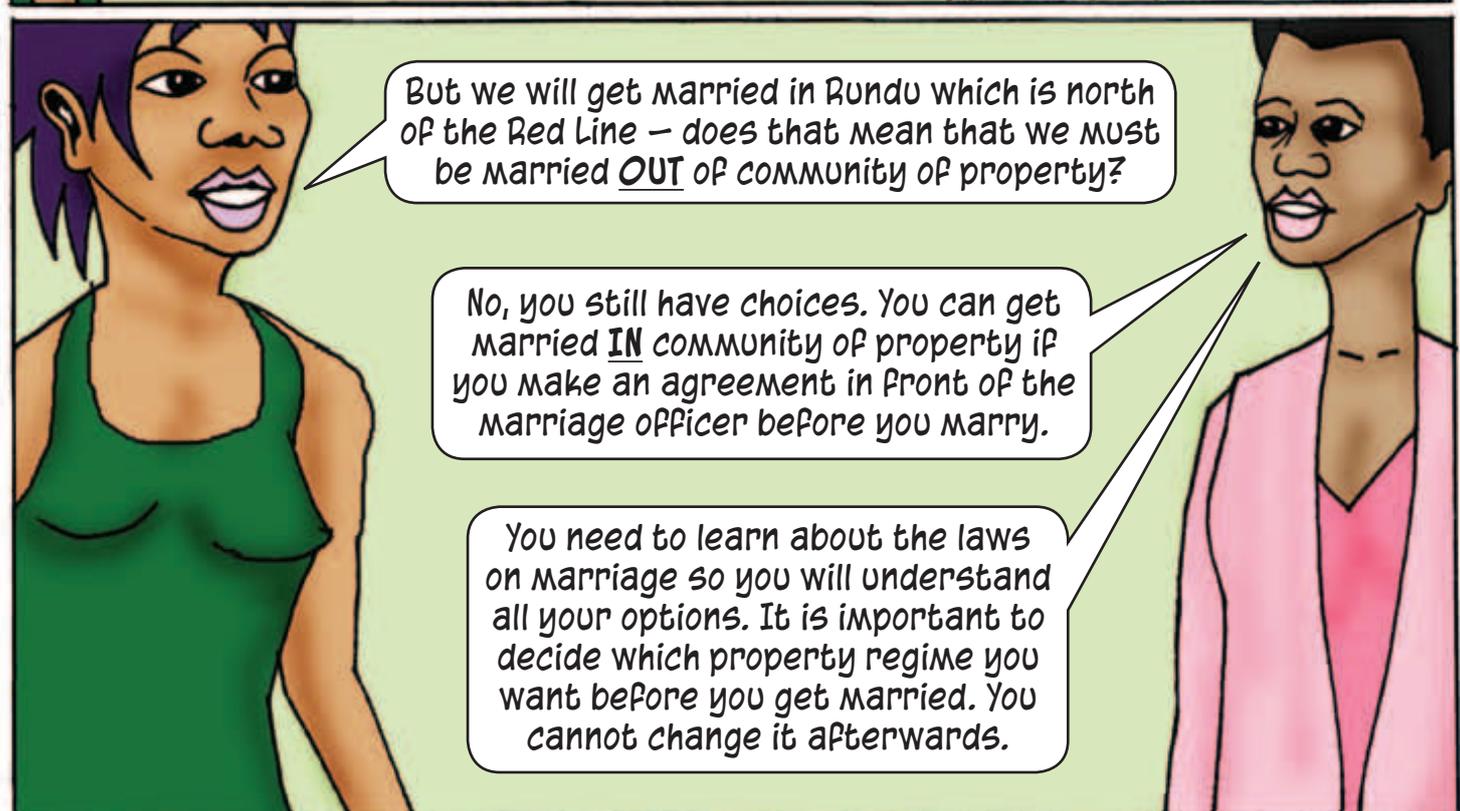
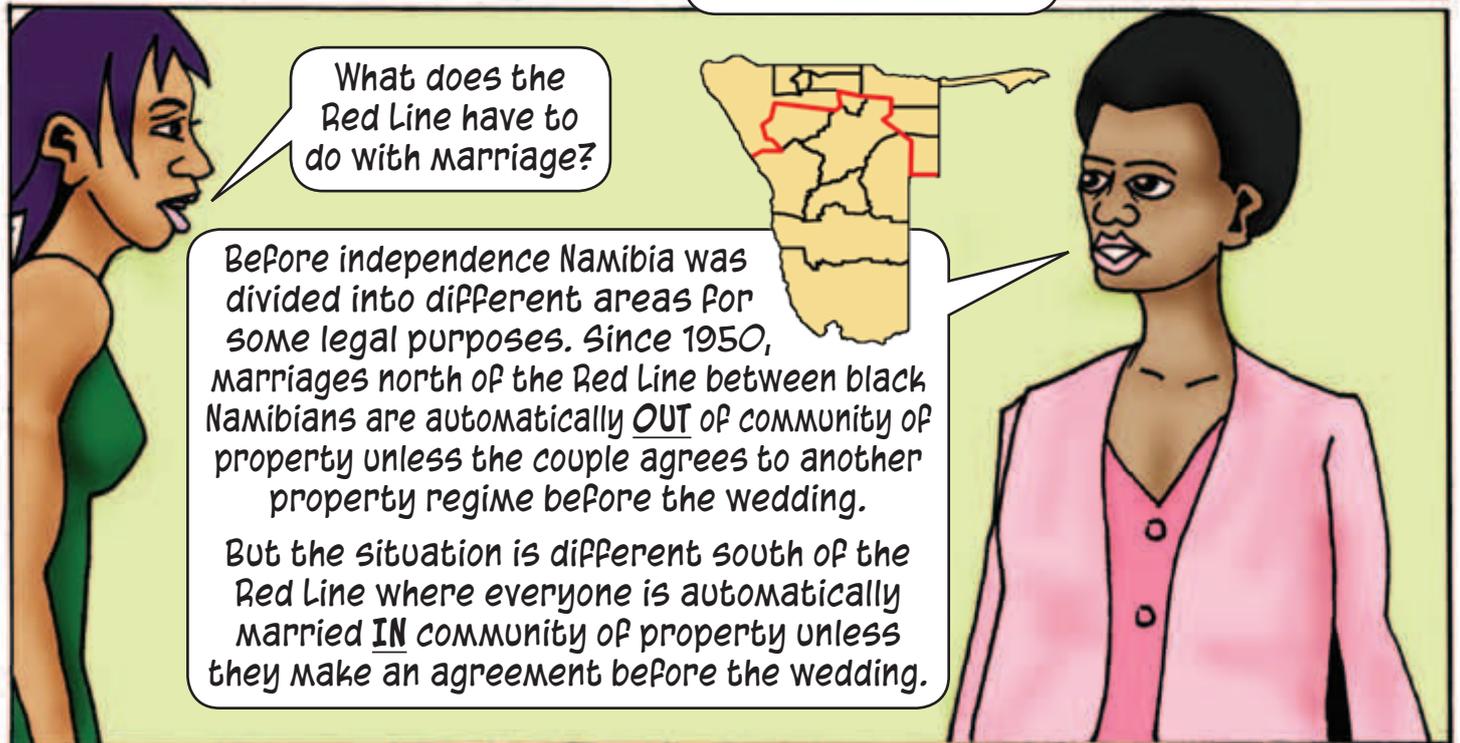
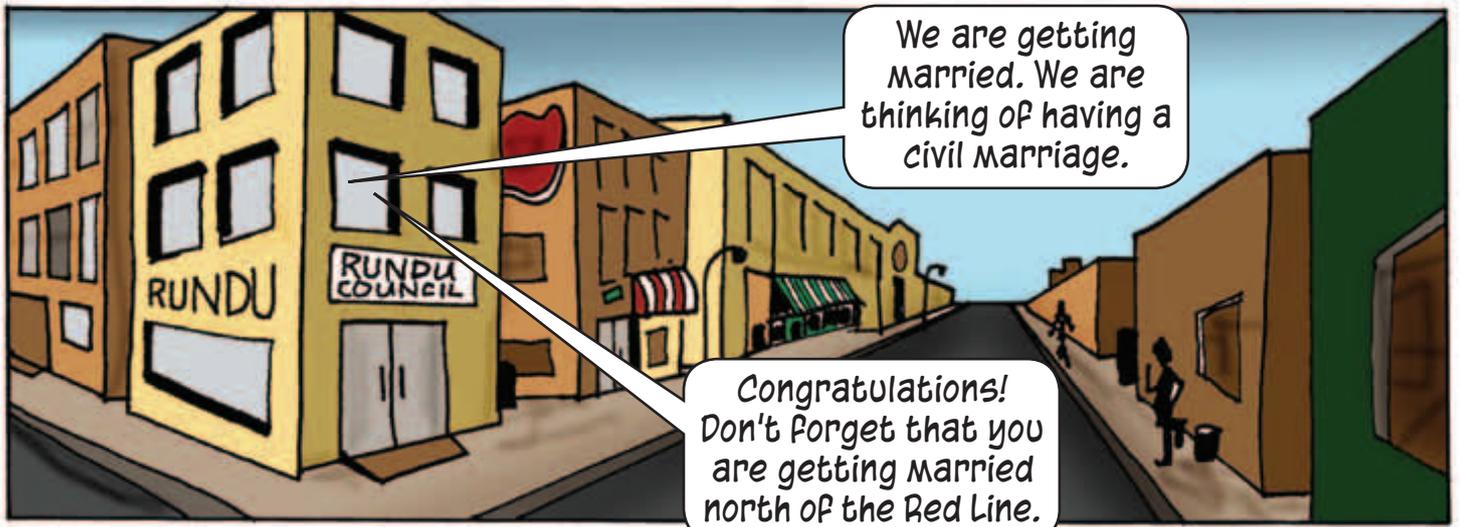
### Marriage and children

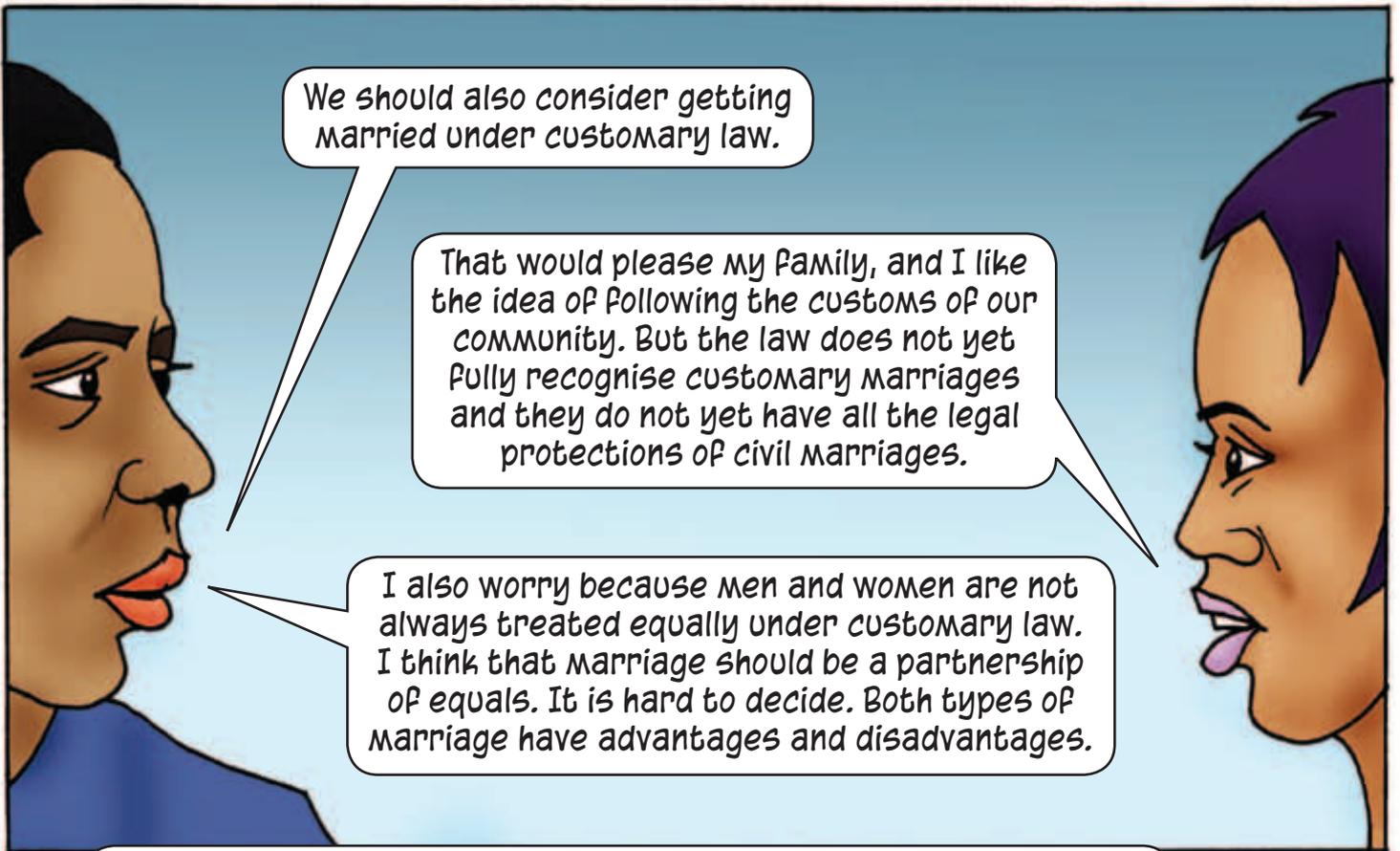
The MPEA states that both parents are *joint* custodians and *equal* guardians. This means both parents can make decisions about how their children are brought up. They do not have to consult each other on most decisions. But some decisions, such as deciding to put the child up for adoption or removing the child from Namibia, must be made together.

See the Legal Assistance Centre's *Guide to the Married Persons Equality Act* for more details.



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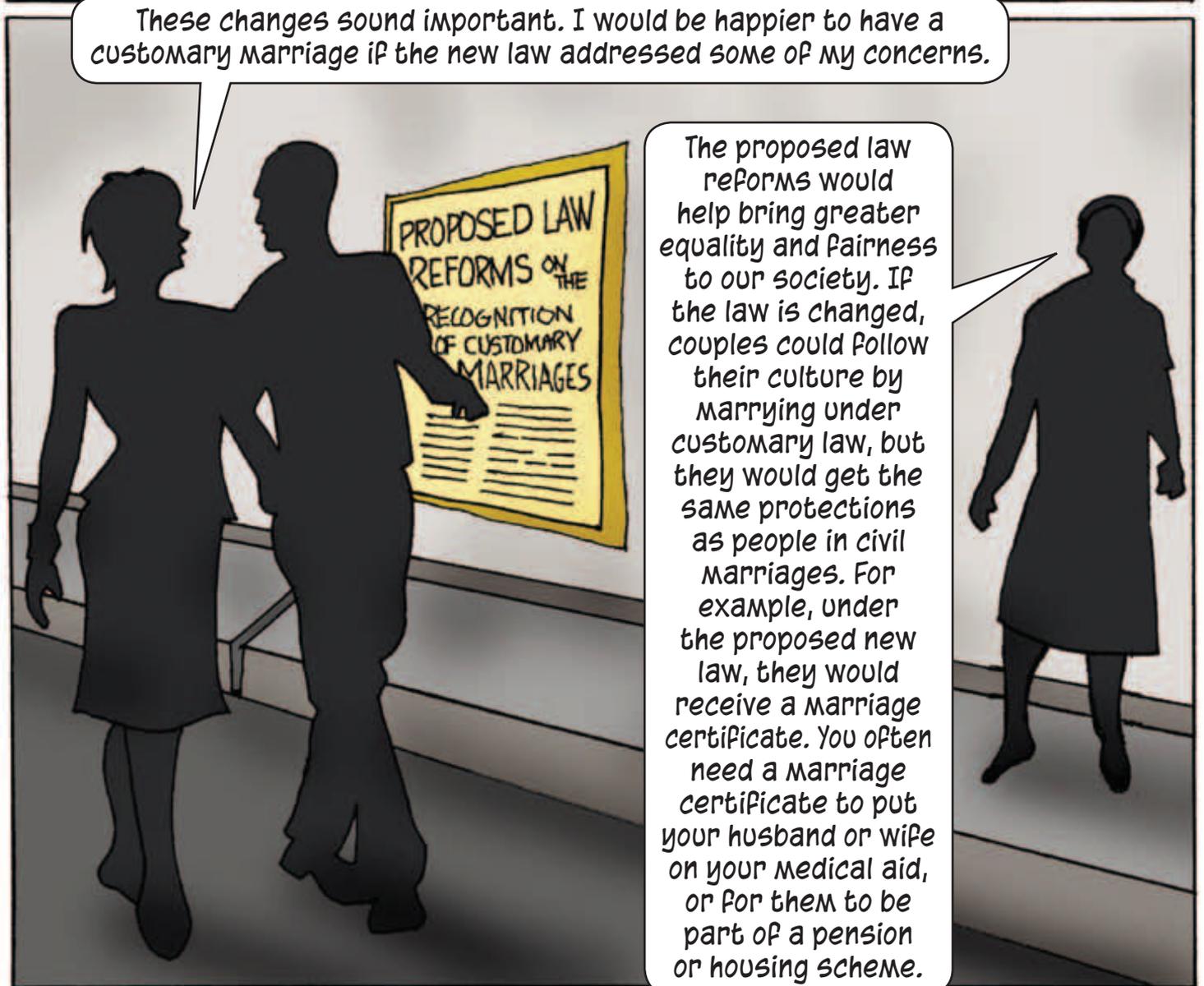


We should also consider getting married under customary law.

That would please my family, and I like the idea of following the customs of our community. But the law does not yet fully recognise customary marriages and they do not yet have all the legal protections of civil marriages.

I also worry because men and women are not always treated equally under customary law. I think that marriage should be a partnership of equals. It is hard to decide. Both types of marriage have advantages and disadvantages.

These changes sound important. I would be happier to have a customary marriage if the new law addressed some of my concerns.



The proposed law reforms would help bring greater equality and fairness to our society. If the law is changed, couples could follow their culture by marrying under customary law, but they would get the same protections as people in civil marriages. For example, under the proposed new law, they would receive a marriage certificate. You often need a marriage certificate to put your husband or wife on your medical aid, or for them to be part of a pension or housing scheme.

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# FACT SHEET

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## Government's Proposed Law Reforms on the Recognition of Customary Marriages

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### 1. Customary marriages would have full legal recognition

- People married under customary law would receive marriage certificates from customary law marriage officers (who would probably be traditional leaders). Having marriage certificates would help them qualify for benefits such as medical aid, pensions and housing schemes.

### 2. There would be minimum requirements for customary marriages

- Both the man and the woman would have to be age 18 to marry under customary law. Persons under age 21 would need the permission of both parents, and persons under age 18 could enter a customary marriage only if they had the permission of their parents AND the government. (Civil marriage already has these age requirements.)
- No-one can be forced to marry. Article 14(2) of the Namibian Constitution states that marriage can only be entered into "with the free and full consent of the intending spouses".
- The proposed law would end polygamy. People would be allowed to marry only one person at a time, regardless of the type of marriage. A person who is already married under civil or customary law would NOT be allowed to marry anyone else.

### 3. Customary marriages would be registered

- Future customary marriages would be registered in the same way as civil marriages. The traditional authority would write the marriage certificate. The traditional authority would also have to register divorces.

### 4. Future customary marriages would use the same marital property regimes as civil marriages

- This means that couples could choose the property arrangement they want before they marry.

### 5. Both husbands and wives would have full legal status and capacity

- All men and women would have the same legal rights and powers regardless of whether they are married or single.
- Women would be able to bring cases in civil or traditional courts without the assistance or approval of anyone else.

### 6. Two people who have already married under one law would not be able to marry each other under another law

- Couples would be bound by the first marriage that takes place between them, whether it is a civil a marriage or a customary marriage. They would have to pick one option, and they could not later change their minds.

### 7. Divorce from customary marriages would take place in a way that is similar to divorce from civil marriages

- In the future, there would be one ground for divorce from a customary marriage: "irretrievable breakdown", which means that the marriage has broken down beyond repair.
- Divorce from customary marriages would follow customary procedures, but there could be no sex discrimination. Women and men would have the same rights to request a divorce.
- Customary marriages would still follow customary procedures for divorce, but either spouse could ask the High Court to resolve disputes about the division of property or children of the marriage if necessary, just like a couple in a civil marriage.
- The divorce would not be official until there was a written divorce certificate issued by a customary law marriage officer.

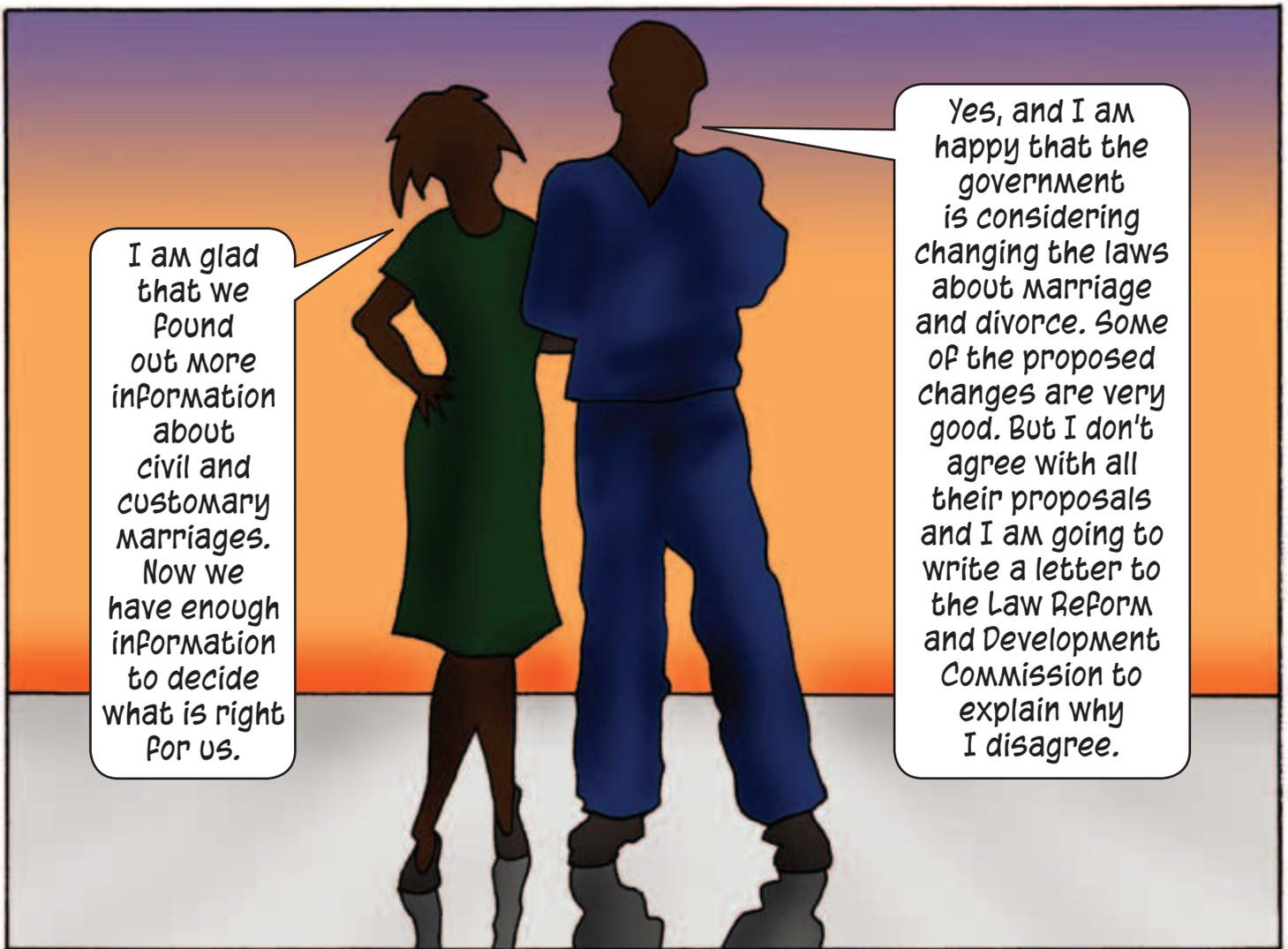
OFFICE OF THE CLERK OF COURT

What will happen if we get a divorce?

There are proposed law reforms on divorce for both civil marriage and customary marriage. Under the proposed new laws, you could divorce if there was an "irretrievable breakdown" in your marriage without having to accuse each other of any wrongdoing. The proposed laws would also give the courts greater powers to divide property fairly and protect the children of the marriages.

What does an irretrievable breakdown mean?

It means that the marriage has been broken beyond repair. In many cases both the husband and the wife want the divorce. In these situations it does not make sense for one of them to blame the other. By allowing people to agree that the marriage has broken down, the court can focus on more important issues such as the division of property and how the children will be cared for.



I am glad that we found out more information about civil and customary marriages. Now we have enough information to decide what is right for us.

Yes, and I am happy that the government is considering changing the laws about marriage and divorce. Some of the proposed changes are very good. But I don't agree with all their proposals and I am going to write a letter to the Law Reform and Development Commission to explain why I disagree.

# What do **YOU** think about the government's proposals for law reform?

Contact the **Legal Assistance Centre** or the **Law Reform and Development Commission**

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