

**Does love know any boundaries? Your questions answered on marriage and the law**  
M. H. Ovis, Legal Assistance Centre, 2004

Damoline<sup>1</sup> is a grade 1 learner. It is alleged that Damoline is expected to enter into a customary marriage. At the time of writing this article, a concerned teacher at her school with the assistance of a social worker is in the process of determining whether there is any truth in the allegation. Customary laws in Namibia do not set a minimum age for marriage, and it has been said that marriage generally does not take place before puberty or before the attainment of an acceptable level of social maturity. Child betrothals have taken place in the past, and if the allegations regarding Damoline turns out to be true, it would appear child betrothals may even be practiced today. Recently, a 14 year old girl and her 29 year old boyfriend unsuccessfully sought permission from the court to be allowed to marry. They had to seek permission because the civil law prescribes that a girl below the age of 18 is barred from marrying unless she has obtained permission from both her parents and the government.

Why this difference in our law? There are two different legal systems in Namibia namely general law and customary law. General law comes from the decisions that courts have made in the past (common law), from the laws passed by Parliament (statutes), and from international agreements that apply to Namibia (international law). General law applies to everyone in Namibia and is sometimes referred to as 'civil' law. Customary law is the customs of certain communities and applies only to people in that community.

In Namibia we therefore distinguish between civil and customary law marriages. A civil law marriage takes place either before a magistrate or in a church and is solemnised by a single formality. A customary marriage, on the other hand, is a process which is accomplished by a series of rites and negotiations which takes place over time. In some communities for example, lobola is expected to be paid to the bride's family. Customary marriages are also described as a union between two families or kin group as opposed to a union between two individuals.

Marriage as an institution is difficult to define, particularly in the context of customary law. Under customary law a man may inherit his dead brother's wife, raising questions whether such a union can be considered a marriage. It is generally accepted that marriage gives rise to reciprocal rights and obligations. So for instance it gives a wife and husband total or partial monopoly over each other's sexuality.

During the colonial period, customary marriages were never recognized due to their polygynous nature (polygyny is the practice where a man may customarily marry more than one wife). Currently, unlike civil marriages, if one marries customarily one does not get a marriage certificate which serves as proof of the validity of the marriage. The Native Administration Proclamation, which dates back to 1928, sought to give effect to customary law and make limited provision for marriage. It provides that if you are a 'Black' person living in Kavango, Eastern Caprivi or Owambo your marriage will automatically be regarded as out of community of property, unless you have made a declaration before a magistrate, one month prior to the celebration of the marriage that you want the marriage to be in community of property. In respect of civil marriages, irrespective of where one resides, one's marriage is automatically in community of property.

---

<sup>1</sup> Not her real name.

A marriage in community of property has the effect that the parties share jointly what they have acquired before and during marriage. Spouses are also liable for each other's debts. In respect of a marriage out of community of property, the parties each retain their separate property acquired before and during marriage. Spouses are however not liable for each other's debts. Women in marriages that are out of community of property are often times negatively affected. When they divorce they may find themselves without any property with which to support themselves.

With independence new laws have been enacted, such as the Constitution, which is the supreme law of Namibia. The Constitution formally recognizes customary law alongside the common law, but makes both subject to fundamental rights such as the right to be treated equally before the law. Any law which does not follow the Constitution can be changed by Parliament or ruled unconstitutional by a court. The Constitution makes specific provisions regarding marriage. Article 14(1) guarantees men and women equal rights as to marriage, during marriage and when a marriage is dissolved (such as by death or divorce). No-one can be forced to marry and the free and full consent of both persons involved are required. Failure by the Namibian government to address discrimination through laws is a violation of its obligations in terms of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), which guarantees equality of men and women in all matters related to marriage.

Namibia is slowly addressing issues of discrimination in marriage under both systems, so as to bring them in line with the Constitution. Up and until the late 90's, one of the consequences of civil marriages used to be that the husband was the 'head of the household' and could take important financial decisions without consulting his wife. This was changed by the Married Persons Equality Act so that spouses are now required to consult one another regarding certain financial transactions, such as selling livestock for example. This Act unfortunately does not apply to customary marriages.

The Government has now made proposals in an effort to give legal recognition to customary marriages and to bring these marriages on par with civil marriages. Any proposed law must not only be contextualized and shaped by the values enshrined in our Constitution and CEDAW, but also has to be responsive to social and economic changes. This means recognizing women's equality and acknowledging their economic independence.

If the proposed law is adopted in its current form, all future customary law marriages will be required to be registered so that the question of marital status becomes more certain. There shall be a two year grace period after the coming into operation of the proposed new law for the registration of existing customary law marriages. There will be new minimum requirements for customary marriages. There must be free consent between the parties wishing to get married. The age requirement for customary marriages will be the same as for civil marriages. The new law will only allow people to marry one person at a time. Existing polygamous marriages will however enjoy legal recognition. All future customary marriages will be automatically in community of property unless a couple make an agreement before the marriages that applies some other property arrangement. Generally, customary laws have the effect of vesting ownership of all marital property in the husband. This allows for a situation, which manifestly discriminate against women, which this law seeks to eradicate. The provisions of the Married Person's Equality Act will also be made applicable to customary marriages.

Divorce from customary marriages will also take place in the same way that is similar to divorce from civil marriages so that henceforth a divorce will not be binding unless a divorce certificate has been issued. Such a certificate can only be issued if there is an agreement between the spouses about the property and children.

If Damoline should enter into a customary marriage before the proposed new law is enacted, her marriage may arguably still be regarded as invalid, as it can hardly be disputed that such a marriage would not withstand constitutional scrutiny. Damoline should be able to complete her education without being burdened with the responsibilities that come with marriage.