



THE RECOGNITION OF CUSTOMARY MARRIAGES IN ZIMBABWE AND THE PROPOSED MARRIAGE BILL

SALC Policy Brief

No. 5 of 2019

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LITIGATION CENTRE**

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Overview

The proposed [Marriages Bill, 2019](#) (the Bill), gazetted by the Government of Zimbabwe on 19 July 2019, seeks to harmonise marriage laws in Zimbabwe and bring the governance of marriages under a single Act. It also seeks to align the law with the provisions of the Constitution. This policy brief will examine the Bill in relation to existing law on the recognition of customary marriages and constitutional and social requirements.

Zimbabwe has a dual legal system, where customary law co-exists with general law. The application of this dual system creates differences in marriage norms and rights. Marriages that are recognised in terms of the general law, are civil marriages (Marriage Act, Chapter 5.11) and customary law marriages solemnised in terms of the Customary Marriages Act (Chapter 5.07). Solemnisation of customary marriages involves parties appearing before a customary marriage officer (who can be a magistrate or other appointed official), taking oaths, signing a marriage register, and receiving a marriage certificate. Customary marriages that are not solemnised in terms of the Customary Marriages Act are not recognised in terms of general law and only valid and recognised at customary law. There is limited recognition in terms of general law, for the purposes of child rights and welfare, and deceased estates succession. They are commonly known as Unregistered Customary Law Unions (UCLU). The law therefore creates a hierarchy of marriages, with civil marriages at the top of the hierarchy, then solemnised customary law marriages and lastly, the UCLU. The solemnised customary law marriage can be “upgraded” into a civil marriage if it is not polygamous, and the UCLU is upgraded by solemnisation in terms of the Customary Marriage Act or the Marriage Act.

The different systems of marriage impact on dissolution of the marriage and distribution of property between the parties. For example, upon dissolution of a customary marriage, when property is distributed under customary law, a woman will only be entitled to “umai” or “mawoko” property, (referring to household utensils such as linen, pots, pans and other movables which she used), regardless of her contribution to other, valuable property purchased during the subsistence of the marriage. Under general law, however, the law regulating divorce and distribution of matrimonial property (Matrimonial Causes Act, Chapter 5.06), provides for just and equitable distribution of property upon dissolution of marriage by the High Court, and the Court has a wide discretion to consider several factors, including the respective contributions of the parties to the marriage (direct and indirect) in doing so. Only civil marriages and solemnised customary law marriages benefit from the provisions of the Matrimonial Causes Act. The different marital systems therefore reinforce gender inequalities and class disparities.

Class Differentiation and Other Inconsistencies

The existing law perpetuates class differentiation between people subject to customary law and those subject to general law. In terms of section 3(5) of the Customary Marriages Act, there is only limited recognition of the UCLU, in cases of custody, guardianship and maintenance at customary law. The fact that this is limited to recognition only under customary law was emphasised by the High Court in the 2003 case of *Katedza v Chunga And Another* where the Court awarded sole guardianship of children in an UCLU to their mother, on the basis that their parents' marriage was not recognised under general law. In terms of the common law, the father of children born out of wedlock has no legal rights of guardianship or custody, and the mother has superior rights.

The current legal framework contains multiple inconsistencies. Section 68(3) and 68(4) of the Administration of Estates Act recognises a spouse married under a UCLU as a spouse even if there is a subsequent civil marriage. Both marriages are treated as polygamous for inheritance purposes, provided that where a civil marriage was the first marriage, the subsequent marriage is not recognised.

Another contradiction is that the criminal law punishes bigamy and defines it in the context of UCLUs and registered marriages, whereas the marriage law does not. In terms of Section 104 of the Criminal Law (Codification and Reform) Act any person in a civil marriage, which is monogamous, who enters into another marriage with someone else commits bigamy. For purposes of this law, a UCLU is legally recognised as a marriage, making it also a criminal offence for anyone in a UCLU to contract a civil marriage with another person. This contradiction is most aptly illustrated by the fracas surrounding the marriage of the late former Prime Minister Morgan Tsvangirai in 2012. The High Court ruled that a woman claiming to be in an UCLU with him (by virtue of the payment of *lobola*) could not stop him contracting a civil marriage with another woman because the former marriage was not a recognised marriage under law. However, she managed to eventually stop the marriage by lodging an objection to the issuance of a marriage licence using the criminal law, on the basis that going ahead with the marriage would be committing an offence (bigamy).

Divorce and Property Rights

The Marriage Act and the Customary Marriages Act clearly stipulate when a marriage comes into existence and the formalities required for its validity. At dissolution of the marriage, the Matrimonial Causes Act sets out the factors and procedures for dissolution of marriage. In contrast, there is no legal recognition or standard for when a customary marriage not solemnised in terms of the general law comes into existence or when it officially ends. In terms of tradition, a man can divorce his wife at customary law by the giving of a divorce token, which can be a coin, but there is no consensus on whether a woman can do the same.

The marriages recognised under general law give better rights than the UCLU, particularly in the area of property rights. The Matrimonial Causes Act, in Section 7, prescribes a number of factors to consider in achieving equitable distribution of matrimonial property at divorce, and only applies to legally recognised marriages. Some of the factors that the High Court is required to take into account at dissolution include individual contributions to acquisition, length of the marriage, and the individual needs of the spouses and any children of the marriage. The purpose of these considerations is to put the parties as much as possible in the position they would have been had there been no divorce. The flexibility in the Matrimonial Causes Act to achieve equity is significant, because marriages in Zimbabwe are out of community of property (by virtue of the Married Persons Property Act, Chapter 5:12). This means that, essentially, each spouse maintains his/her own individual property within the marriage. The law seeks to achieve equity by in fact, when necessary, overlooking individual property ownership rights bestowed by title in order to do justice. In considering individual contributions by the parties to a marriage in purchasing or obtaining assets, the court may consider indirect contributions. This is progressive, and has allowed women, who would not have been in formal employment, and thus, not “earning”, to claim a share in matrimonial property held in the name of the other spouse.

In contrast, UCLUs do not have established and formal means of determining distribution of property upon dissolution of a relationship. As stated above, under customary law, women would only be entitled to “mawoko” property at distribution.

The courts, in response to some of these problems, have attempted to develop standards for equitable distribution of property through applying common law equity principles, but the process is complicated and far from certain. The courts have ruled that in cases of distribution of property following dissolution of a customary law union, the application of common law principles is not automatic; it has to be specifically requested in court papers. This is difficult, as many women do not have access to adequate legal representation to understand the complexities of the legal system. Even some legal practitioners have found it difficult to traverse this area properly, as in the case of *Jokonya v Pavarivega* where the High Court pointed out errors made by legal practitioners in filing cases for sharing of property in unregistered customary law unions. The Court said that the existence of an unregistered customary law union does not in itself constitute a reason to approach the court for distribution of the assets.

Even though the courts have attempted to develop principles to achieve justice for vulnerable people (predominantly women) in UCLUs upon dissolution, including finding the existence of a universal tacit partnership, and unjust enrichment, these have ultimately proved not to be adequate. For example, in a tacit universal partnership, women are often unable to prove direct contribution to acquisition or maintenance of property that is required.

The courts, commendably, in their attempts to remedy the situation, have, to a degree, made certain inroads. In the case of *Jengwa v Jengwa* (High Court, 1992) Gillespie J suggested a more equitable

approach that recognises indirect contribution. However, the absence of clear legislative direction on the appropriate criteria leaves parties in the hands of individual judges, and the progressiveness of the outcome becomes dependent on the progressiveness of the individual judge.

The courts have thus, in a number of cases, made a clarion call for law reform, which should include the recognition of UCLUs as valid marriages, in order for the principles of property distribution in the Matrimonial Causes Act to apply to all marriages.

What are the Effects of the Proposed Bill?

The [Bill](#) proposes several changes to the formalities, registration and validity of customary marriages. There appear to be two different types of customary marriages contemplated in the Bill, one conducted according to customary law and subsequently registered in terms of the Bill, and one solemnised and registered in terms of the Bill. Solemnisation of a customary marriage in terms of the Bill includes making of a declaration before a customary marriage officer and signing of a marriage register.

The marriage conducted according to customary law is only valid once registered, and, if unregistered, only valid under customary law for purposes of guardianship, custody, maintenance and succession, of children born in the marriage. Thus, the [Bill](#) maintains the current position of UCLUs.

Section 16 of the Bill provides that registration of the marriage conducted according to customary law is to be done within 3 months of the marriage. The parties to the marriage approach the Registrar and furnish him/her with the appropriate information and are issued with a certificate of registration after the record is made. Existing unregistered customary law marriages are required to be registered within 12 months of the operation of the [Bill](#). It is not clear what happens when an attempt is made to register after 12 months, unlike the 3 months registration period for customary law marriages entered into after the Bill is law, which may be subject to extension. In addition, the period appears to be inadequate, considering that unregistered customary law marriages are highly prevalent.

The [Bill](#) designates magistrates and chiefs within their respective districts as marriage officers for the solemnisation and registration of the marriage. Ministers of religion can also be designated as marriage officers, but they cannot solemnize a customary law marriage. The difference here, is that in the existing Customary Marriages Act, customary marriage officers may include chiefs or other people designated as such by the Minister, whilst in the [Bill](#), it is only magistrates and chiefs who can be customary marriage officers. It may be worthwhile revisiting this, as restricting eligibility of customary marriage officers to chiefs only centralises the process to a district level, whereas some flexibility may allow local traditional leaders like village headmen to solemnise or register customary law marriages. This would require training.

Unregistered Customary Law Marriages Still Not Legally Recognized Marriages

It is of concern that the Bill retains the colonial position of invalidity of customary law marriages that are unregistered, perpetuating the inequalities outlined above. It is a concern because most customary marriages in Zimbabwe are [unregistered](#), and the Bill has not made any provision to deal with the factors that prevent registration. Some of the factors that affect willingness to register, according to [Chirawu](#), include ignorance, fears by husbands in the unions of the acquisition of new “rights” by their wives, and the relative ease with which parties can dissolve the marriage, without the need to obtain a judicial divorce order.

The UCLU is a social and cultural institution that, in the absence of harm, might not require reform. The Bill continues to differentiate marriages by regime, and by implied class. Section 5(5) of the Bill states that all marriages registered in terms of the law are equal, which implies that the UCLU maintains its subjugation to other marriages. All the other rights and principles prescribed by the Constitution pertaining to marriage, including equality between men and women, are therefore withheld from people in customary marriages that are unregistered.

Conclusion

South Africa, with a similar colonial history to Zimbabwe as far as the invalidation of customary marriages is concerned, may provide useful lessons. In South Africa, the legislature enacted the [Recognition of Customary Law Marriages Act](#) to ensure the legal recognition of customary marriages. In terms of the Act, customary marriages come into being when they are negotiated, celebrated or entered into according to African customs and traditions, and between consenting adults. There is a registration requirement, like the Zimbabwe [Marriage Bill](#), but failure to register the marriage does not render the marriage invalid. The most contentious issue, which has been the subject of extensive litigation, is how parties can prove the existence of an unregistered customary law [marriage](#). However, once this hurdle is passed, the marriage is recognised and is subject to the rights and obligations provided for at law. It is also possible to register a customary law marriage after the death of a spouse, and either spouse, or even an interested third party can register the marriage.

Whilst Zimbabwe undoubtedly has its own unique circumstances that may justify taking a different approach, it is recommended that the South African law on recognition of customary marriages be considered in determining the best approach; an approach that should result in equality between men and women and equality between the different types of marriage.