



DOES THE MARRIAGE BILL MEET THE HUMAN RIGHTS YARDSTICK?

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Introduction

The Marriage Bill sets out to put in place a legal framework to reform and consolidate the law relating to marriage, separation and divorce; to provide for the types of recognized marriages in Uganda, marital rights and duties, grounds for breakdown of marriage, rights of parties on dissolution of marriage and for other connected purposes. Enactment of this piece of legislation recognizes that the family is the basic unit of organization in society and requires legislation cognizant of the human rights of both women and men to provide a legal basis for marriage, separation and divorce. The Bill deals with civil marriages, Christian marriages, customary marriages, Hindu marriages and Bahai marriages; and also deals with widow inheritance and separation.





The civil society coalition on the Marriage Bill has over the past 4 years built on previous women's rights advocacy for enactment on this important piece of legislation. Advocacy has focused on separation of the myths from the facts in the bill based on perceptions from an ill informed understanding of its content and purpose. The Bill was first read in Parliament in December 2009 then referred to the Committee on Legal and Parliamentary Affairs in accordance with the rules of Parliamentary Procedure of the 8th Parliament. In the process of analysis of the Bill, the committee received memoranda from 7 stakeholders including UWONET. The committee report was not discussed in the 8th Parliament but taken up by the same committee in the 9th Parliament which is awaiting the opportunity to present the report to the full house.

Why this policy brief?

The purpose of this policy brief is to contribute to the on-going discussion for enactment of the Marriage Bill by the 9th Parliament of the Republic of Uganda. The aim is to influence the final legislative processes through focus on the human rights fundamentals with specific reference to those aspects of the Bill deemed to be contentious. Part 1 of the policy brief addresses the legal framework for enactment of this piece of legislation; highlighting key human rights instruments. Part 2 focuses on issues deemed to be contentious in the Bill and the human rights arguments that underpin their inclusion. Part 3 assesses the implications of not enacting this Bill.

Finally, part 4 provides policy recommendations for various stakeholders who will move the Bill forward as a legitimate instrument to correct ambiguities and inconsistencies with regard to existing provisions on marriage and divorce in Uganda.

1. The legal framework for a law on Marriage

The legal framework for a law on Marriage is premised on key international, regional and national legal instruments underpinning the inalienable human rights of every woman and man. Among these are: the Universal Declaration of Human Rights adopted by UN General Assembly Resolution 217 A (III) of 10th December 1948, the Convention on the Elimination of All forms of discrimination against women ratified by the Government of Uganda on 22nd July 1985; the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa – ratified by the GoU in July 2010 and popularly referred to as the Maputo Protocol and the Constitution of the Republic of Uganda promulgated in October 1995.

■ The Universal Declaration of Human Rights

The Universal Declaration of Human Rights is agreed to be the foundation of international human rights law. In its preliminary article, it states that all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a true spirit of brotherhood. Article 16 of the Declaration focuses on the right to Marry

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and form a family. It states in clause (1) that men and women of full age, without any limitation due to race, ethnicity, or religion have the right to marry and to found a family. They are entitled to equal rights at marriage, during marriage and at its dissolution. Clause (2) provides for free will in entering marriage stating that marriage shall be entered into only with the free and full consent of the intending spouses. While clause (3) states that the family is the natural and fundamental unit of society and is entitled to protection by society and the state.

■ The Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) in relation to rights under Marriage

In its preamble, the Convention explicitly acknowledges that “extensive discrimination against women continues to exist”, and emphasizes that such discrimination “violates the principles of equality of rights and respect for human dignity”. As defined in article 1, discrimination is understood as “any distinction, exclusion or restriction made on the basis of sex...in the political, economic, social, cultural, civil or any other field”. The Convention gives positive affirmation to the principle of equality by requiring States parties to take “all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men”(article 3).



The agenda for equality is specified in fourteen subsequent articles. In its approach, the Convention covers three dimensions of the situation of women. Civil rights and the legal status of women are dealt with in great detail. In addition, and unlike other human rights treaties, the Convention is also concerned with the dimension of human reproduction as well as with the impact of cultural factors on gender relations.

In article 16, the Convention returns to the issue of marriage and family relations, asserting the equal rights and obligations of women and men with regard to choice of spouse, parenthood, personal rights and command over property.

The Convention also devotes major attention to a most vital concern of women, namely their reproductive rights. The third general thrust of the Convention aims at enlarging our understanding of the concept of human rights, as it gives formal recognition to the influence of culture and tradition on restricting women’s enjoyment of their fundamental rights. These forces take shape in stereotypes, customs and norms which give rise to the multitude of legal, political and economic constraints on the advancement of women.

■ Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa in relation to rights under marriage

The Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa derives its mandate from the African Charter on Human and People’s Rights which provides for special protocols or agreements if necessary to supplement the provisions of the African Charter. Article 18 of the African Charter on Human and People’s Rights calls on all States Parties to eliminate every discrimination against women and to ensure the protection of the rights of women as stipulated in international declarations and conventions; a recommendation was therefore made by the African Commission on Human and People’s Rights and endorsed by Heads of State and Government of the Organization of African Unity in June 1995, for the elaboration of a Protocol on the Rights of Women in Africa. Article 7 of the Protocol addresses itself to separation, divorce and annulment of marriage.

■ The Constitution of the Republic of Uganda in relation to rights under marriage

The Constitution of the Republic of Uganda was promulgated by the Constituent Assembly in October 1995. The Constitution gives positive affirmation to the

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Principle of Equality between women and men through several articles including article 21 which recognizes equality and freedom from discrimination noting in clause 1 that all persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy protection of the law. Article 31 on the Right of the Family states in clause 1 that women and men of the age of 18 years and above have the right to marry and to found a family and are entitled to equal rights in marriage, during marriage and at its dissolution.

This constitutional provision provides the legal mandate for enactment of a law on marriage and divorce.

2. The Marriage Bill: What are the Human rights fundamentals on the Contentious Articles?

The process towards realization of consensus on the content of the Marriage Bill has been rife with contention placing human rights at variance with ideological, cultural and religious arguments. While agreement was realized on several provisions within the Bill; other provisions deemed to be contentious are not fully resolved. Among these are: co-habitation, co-ownership, abuse of conjugal rights and marriage gifts. UWONET together with members of the coalition believes that in order for a law on Marriage to fully respond to issues pertaining to the institution of marriage in society, these issues regarded as contentious by some, must be provided for within the law.

Co-habitation

Co-habitation as defined by the Marriage Bill refers to “a man and woman living together as husband and wife.” This relationship has however not been solemnized through the legal provisions for recognition of marriage. The existence of co-habitation is a social reality recognizing that many couples do not formally pursue the registration of their unions; however, there should be some form of protection to the parties and their children. Article 33 (3) of the Constitution of Uganda, with regard to the Rights of Women recognizes that the state shall protect women and their rights taking into account their unique status and natural maternal functions in society. While article 1 of CEDAW indicates that “discrimination against women” shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their



marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. By inference then, some form of protection of women who find themselves in relationships based on co-habitation must be provided particularly in relation to property rights and rights over children. There is a legal basis for this in article 26 of the constitution which provides for protection from deprivation of property and article 21 (1) that states that All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.

The Marriage Bill further provides for jactitation of marriage – where a person falsely claims or asserts that he or she is married to a particular person - as an offence with criminal liability. The provision, however does not exclude co-habitation through which an individual may believe by all intents and purposes that they are the spouse of another party. The offence of jactitation should therefore include an explicit provision excluding co-habitation as an offence under the article.

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Co-ownership of property

Co-ownership of property as defined by the Marriage Bill means the concurrent ownership, possession and enjoyment of property by a person with his or her spouse. It is important that the law provides for co-ownership of property/ matrimonial property to protect the socio-economic rights of all parties, particularly women and children. Art. 33 (6) of the Constitution indicates that laws, cultures or traditions which are against the dignity, welfare or interest of women or which undermine their status are prohibited by this constitution. The belief that women are not entitled to property is a culturally circumscribed belief that subjugates the equal rights of women as enshrined in the constitution. While, Art. 2(f) of CEDAW commits State parties

to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women. Both provisions therefore prohibit discrimination on the basis of sex over property rights. In addition, Art. 16 (h) of CEDAW commits state parties to put in place measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure the same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

Provisions for matrimonial property rights in the event of the breakdown of marriage are included in Art. 7 of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa which addresses separation, divorce and annulment of marriage and in clause (d) states that "... women and men shall have the right to an equitable sharing of the joint property deriving from the marriage." Further, to take cognizance of the inevitability of death, Art 31 (2) on the Right of the Family notes that "Parliament shall make appropriate laws for

the protection of the rights of widows and widowers to inherit the property of their deceased spouses and to enjoy parental rights.

Conjugal Rights

Marital rape is a form of Sexual and Gender-based Violence in which one spouse has forceful sexual intercourse with the other spouse – usually the female – against their will. The Marriage Bill makes reference to marital rape through the provision on conjugal rights which enumerates grounds for which one spouse may deny the other the right to sexual intercourse including poor health, surgery that affects the capacity to engage in sexual intercourse, child birth or reasonable fear that engaging in sexual intercourse is likely to cause physical or psychological injury or harm. The penalties for contravening this provision include both civil and criminal liability.

Art 4 of the Maputo Protocol focuses on the Rights to Life, Integrity and Security of Person and in clause (a) commits state parties to enact and enforce laws prohibiting all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public. This article provides a legal basis for inclusion of the provision in the Marriage Bill.

Marriage Gifts

Marriage gifts as defined by the Marriage Bill means a gift, by whatever name known, in cash or in kind given by either party to a marriage in respect of that marriage and includes bride price and bride wealth. The Bill recognizes that Marriage Gifts are not an essential requirement for marriage under this Act. This is consistent with Art 21 (1) of the Constitution on equality and freedom from discrimination which provides that all persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law. The spirit of equality of persons in this constitutional provision as well as in Art 1 of CEDAW reinforces the provision in the Marriage Bill placing marriage gifts as non-essential for marriage and criminalizing the offence of demanding return of marriage gifts. Marriage gifts place an unnecessary socio-cultural and economic burden on the female spouse in a marriage and can tend to commodify women. In addition, marriage gifts have led to non-consensual marriage arrangements, particularly in those instances where women and girls are viewed as a source of monetary value to their families.

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“If the relationship is violent and a woman is attempting to leave, culture demands that she returns the bride price paid for her yet she cannot afford the refund since she cannot own any property. Bride price is a critical issue of our time because the majority of poor people in Africa are subject to customary law whose main tenet is the subordinate position of women.”

The Mifumi Project, an organization that has done extensive work on the link between Marriage gifts and violence against women

Art 6 (a) of the Maputo Protocol provides that State Parties shall enact appropriate national legislative measures to guarantee that no marriage shall take place without the free and full consent of both parties. This derives from the social reality that marriage gifts are known to perpetuate the subjugation of women; and may lead to non-consensual marriages.

Similarly, the Constitution of the Republic of Uganda provides for free and full consent in relation to marriage. This provision is specifically, stated in article 31 on the Right of the family.

3. The Implications/ costs of not enacting this bill

The implications / costs of not enacting this piece of legislation cover the social, economic and political spheres.

Denial of individual rights during a marriage and at its dissolution

The cost of inaction on this bill includes the continued denial of rights/ arbitrary approach to individual rights during a marriage and at its dissolution. It also maintains a lacunae in the law with regard to provisions for divorce declared unconstitutional by the Courts of Law . In addition, women and men in relationships based on co-habitation have no recourse to justice during the union and in the event that it ends, because there is no legal framework in place to recognize their rights.

Gender-based Violence

The cost of inaction on this Bill includes the continued prevalence of GBV demonstrated in physical and sexual violence; economic deprivation; psychological abuse; and, control of women’s mobility and decision-making

powers even over their own bodies. This is a manifestation of deeper socio-cultural beliefs and practices including the patriarchal tendency to believe that: payment of bride price provides full authority over a woman by a man/community; women should not have property rights; and conjugal rights in a marriage. These beliefs denigrate the principles of equality of persons laid out in the Constitution and in both CEDAW and the Maputo Protocol. According to a study by the Centre for Domestic Violence Prevention (CEDOVIP), an economic cost can be attached to domestic violence, and places this cost - for the minority who seek outside help - at about 0.35% of Uganda’s GDP and 0.75% of the national budget.

Perpetuation of Poverty and injustice

The cost of inaction on this Bill includes the perpetuation of poverty particularly for women – both in economic terms and as a result of powerlessness. While recent indicators point to a decline in poverty to 24.5% of the population, Although the data is not sex disaggregated, there are indications that female headed households experience higher rates of poverty. This feminization of poverty is attributed to several factors including women’s



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subordination and status in society. In relation to property rights, women will continue to derive their legitimacy in the home only through a male – husband, father or son; which legitimacy ceases when that individual is no longer there to defend their rights. The overall impact of the denial of rights in marriage and at its dissolution will largely maintain generations in a perpetual cycle of poverty and impact on national development processes.

4. Policy Recommendations

For Parliament, the Executive and the Judiciary

- i. Expedient enactment of the Marriage Bill by the 9th Parliament of the Republic of Uganda
- ii. Costing of the bill to ensure its effective implementation
- iii. Development of an action plan with involvement of key stakeholders for roll out of the new law on Marriage and divorce and its regulations.

CSOs and development partners

- i. Continued advocacy on matters deemed to be contentious in the Marriage Bill.
- ii. Support towards implementation of the action plan for roll out of the new law on Marriage and divorce and its regulations.
- iii. Engaging with progressive cultural institutions and faith-based organizations on the provisions of the bill.
- iv. Sensitisation of the public on the legislation – taking cognizance of gender, generational and locational differences for context specific messaging for social change.

UWONET coordinates the coalition on the Marriage Bill and the members as of 2011 include:

1. Action Aid International- Uganda
2. Action for Development (ACFODE)
3. Akiika Embuga Women's Self Help Association
4. Akina Mama wa Afrika
5. Associates for Change
6. Association of Uganda Women Medical Doctors (AUWMD)
7. Association of Women Judges (AWJ)
8. Association of Women Lawyers in Uganda (FIDA – U)
9. Bukedi Development Foundation (BUDEF)
10. Bahai Faith

11. Department of Women & Gender Studies
12. Development Network of Indigenous Voluntary Associations (DENIVA)
13. Disabled Women's Resource Network Organisation (DWRNO)
14. East African Post-Beijing Sub Regional Support Initiative (EASSI)
15. Centre for Domestic Violence Prevention (CEDOVIP)
16. Community Development Rural Network (CDRN)
17. Foundation for Human Rights Initiative (FHRI)
18. Forum for Women in Democracy (FOWODE)
19. Hope After Rape
20. Human Rights Peace Center (HURIPeC)
21. Human Rights Network (HURINET)
22. Isis –Women's International Cross Cultural Exchange (Isis WICCE)
23. LAW and Advocacy For Women In Uganda (LAW – U)
24. Ministry of Gender, Labour and Social Development
25. Mpigi Women's Development Trust (MWODET)
26. MIFUMI Project
27. National Association of Disabled Persons of Uganda (NUDIPU)
28. National Association of Women's Organizations in Uganda (NAWOU)
29. Uganda National NGO Forum
30. The Council for the Economic Empowerment of Women in Africa- Uganda (CEEWA)
31. Uganda Women Parliamentarian's Association (UWOPA)
32. Uganda Change Agent
33. Uganda Law Society
34. Uganda Joint Christian Council (UJCC)
35. Uganda Land Alliance (ULA)
36. Uganda Law Reform Commission (ULRC)
37. Uganda Media Women's Association (UMWA)
38. Uganda Women's Finance Trust (UWFT)
39. Uganda Network on Law, Ethics and HIV/AIDS (UGANET)
40. VECO – U
41. Volunteer Efforts for Development Concerns (VEDCO)

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About UWONET

Uganda Women's Network-UWONET, is an advocacy and lobby network comprising of 16 national women's organizations, institutions and 9 individuals. It was established in 1993 to provide space for collective engagement of organizations advocating for women's rights especially the eradication of gender based discrimination.

Vision

A Ugandan society free of all forms of gender based discrimination.

Mission

To coordinate collective action among members and other stakeholders through networking, capacity building, resource mobilization, policy research and advocacy for the attainment of gender equality in Uganda.



Gender Transformation & Empowerment

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