

DRB Coalition: For a Just and Fair Family Law in Uganda

Memorandum on the Marriage and Divorce Bill 2009

Submitted by The DRB Coalition
UWN

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C/O Uganda Women's Network (UWONET)

MEMORANDUM ON THE MARRIAGE AND DIVORCE BILL, 2009

Introduction:

This memorandum is presented by the Domestic Relations Bill Coalition, brings together over --- women and human rights organizations in Uganda, which are committed to just and fair marriage and divorce laws.

Background:

As proof of its commitment to the promotion and protection of human rights principles and standards, the Government of Uganda is signatory to many of the major human rights instruments at international and regional level. These include:

1. The International Convention on Civil and Political Rights (ICCPR)
2. International Convention on Economic, Social and Cultural Rights (ICESCR)
3. The Convention on the Elimination of Discrimination Against Women (CEDAW)
4. The African Charter on Human and Peoples Rights (ACHPR) and
5. The Protocol To The African Charter On Human and Peoples' Rights On The Rights of Women in Africa

The instruments above recognize basic human rights of individuals and groups which State Parties have a responsibility to respect, protect and fulfill. Key human rights principles include the indivisibility and universality of all rights (i.e. all human rights are linked and applicable to all human beings globally) and the right of all human beings to equality and non discrimination. Women's rights are fully recognized as human rights.

Additional to these instruments, Uganda also has a very progressive Constitution which contains a comprehensive Bill of Rights that spells out in clear detail the rights of men and women as follows:

- Article 2(1): The Constitution is the supreme law of Uganda and shall have the binding force on all authorities and persons throughout Uganda

- Article 2(2): If any other law or any custom is inconsistent with any of the provisions of the Constitution, the Constitution shall prevail, and that other law or custom shall, to the extent of its inconsistency, be void
- Article 21(1): 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.
- Article 21(2): A person shall not be discriminated against
- Article 21(3): To discriminate means to give different treatment to different persons attributable only or mainly to their respective descriptions by sex, etc
- Article 32(2): Laws, cultures, customs and traditions which are against the dignity, welfare or interest of women or any other marginalized group or which undermine their status, are prohibited by the Constitution.
- Article 33(1): A man and woman are entitled to marry only if they are each of the age of eighteen years and above and are entitled at that age (a) to found a family and (b) to equal rights in marriage, during marriage and at its dissolution.
- Article 31(3): Marriage shall be entered into with the free consent of the man and woman intending to marry
- Article 32(2): Laws, cultures, customs and traditions which are against the dignity, welfare or interest of women or any other marginalized group to which clause (1) relates or which undermine their status, are prohibited by the Constitution.
- Article 33(1): Women shall be accorded full and equal dignity of the person with men.
- Article 33(4): Women shall have the right to equal treatment with men and this right shall include equal opportunities in political, economic and social activities.

Rationale for the Marriage and Divorce Bill:

Two major reasons for the enactment of the Marriage and Divorce Bill include:

1. The need for Uganda to be in conformity with its obligations under international law to domesticate the human rights conventions and treaties that it ratifies (see the ones listed above). Several times the CEDAW Committee has reminded the Government of Uganda about its obligation to enact a family law that complies with and reflects the human rights standards with regard to the Convention on Elimination of All Forms of Discrimination Against Women.

The Committee expressed concern about the continued existence of national legislation that discriminates against women and the slow law reform process in spite of having in place constitutional provisions that promote equality between women and men and prohibit discrimination on the grounds of sex. In addition the Committee was concerned about the slow progress in removing de jure discrimination and preventing and eliminating de facto discrimination.

The Committee therefore recommended acceleration of the law reform process to bring national legislation in tandem with the constitutional principles of non-discrimination and equality between women and men. In this regard it was further recommended that the enactment of the draft Land Act, Domestic Relations Bill (DRB) should be expedited. (Page 13 of the Uganda Country Report on CEDAW)

2. The requirement to bring the laws into conformity to the Constitution of Uganda, which is the supreme law of the country (See Article 2 of the Constitution).

Some of the Problems with the Current Domestic Relations Laws

1. Because of the plural legal system with different laws regulating the same institution, this has culminated in the current confused state of affairs where it is difficult to figure out, for example, the essential requirements for marriage, its celebration or who can marry under the different systems of marriage currently existing in the country.
2. The existing laws, enacted between 1906 and 1916 during the colonial era discriminate on the basis of religion and race. Non African Christians may only contract a marriage under the Marriage Act, an African Christian couple may only contract a monogamous marriage under the Marriage of

Africans Act and Muslims, even if they may wish, may not contract a civil marriage under the Marriage Act.

3. Multiple marriage ceremonies: There are many instances where, through ignorance, a couple goes through a customary marriage and subsequently contracts a Christian marriage. The issue raised here is whether the customary marriage automatically converts into a Christian marriage on contracting a second marriage, or whether a man may successfully contract a subsequent customary marriage arguing that since the first marriage was contracted under a potentially polygamous marriage, then the subsequent Christian or Civil marriage would void and hence he can contract another customary marriage.
4. The lack of a uniform age of marriage. The various pieces of legislation provide for different marriage ages for girls and boys, save for the Mohammedans Act which does not specify a marriage age.
5. The current laws do not spell out any of the rights and duties accruing to married people and such rights and duties may differ depending on the marriage one has contracted.

The Marriage and Divorce Bill 2009

The purpose of the Marriage and Divorce Bill is to reform and consolidate the law relating to civil, Christian, Hindu, Bahai and customary marriages; to provide for the types of recognized marriages in Uganda, marital rights and duties, separation and divorce and the consequences thereof and for other connected matters.

The Marriage and Divorce Bill is aimed at addressing and streamlining the interests of all members of the family, both men and women as a basis for creating stability and justice in the most basic unit of society – the family.

The Marriage and Divorce Bill is also aimed at reforming the law of marriage to reflect and conform to the both the Constitution of Uganda, which is the supreme law in Uganda, as well as other regional and international human rights instruments that Uganda is signatory to.

PART I: Preliminary

Part I of the Bill mostly deals with definitions of the Bill. The Coalition is in agreement with the definitions.

PART II: General

Part II addresses three major issues namely: the recognized marriages in the Bill, widow inheritance and marriage gifts as a non-essential requirement in marriage. On these three subjects our comments are as follows:

1. **Polygamy:** In Uganda marriage falls into two broad categories, monogamy and polygamy. Muslim and Customary marriages are potentially polygamous marriages, i.e. the man has the capacity to contract another marriage during the subsistence of the first marriage. In Uganda, polygamy is recognized based on culture and religion. However, with regard to the question of polygamy, the CEDAW Committee in its General Recommendation 21 (in which it describes how the CEDAW articles are to be interpreted and applied), says this:

“Polygamous marriage contravenes a woman's right to equality with men, and can have such serious emotional and financial consequences for her and her dependents that such marriages ought to be discouraged and prohibited. The Committee notes with concern that some States parties, whose constitution's guarantee equal rights, permit polygamous marriage in accordance with personal or customary law. This violates the constitutional rights of women, and breaches the provisions of article 5 (a) of the Convention.”

By its very nature and practice polygamy confers power, status and privilege to the man over and above that of a woman. Polygamy entrenches women's subordination within the institution of marriage. The Marriage and Divorce Bill attempts to regulate what is essentially a discriminatory practice and this is wrong. Right from marriage, to rights to consortium, to the property provisions for those in polygamous unions, the women are treated as less than and not equal to the man as is demanded by the Constitution and other international human rights instruments to which Uganda is signatory. The Bill attempts to give wives in polygamous marriages equal rights and yet polygamy by its very nature is a very unequal relationship. By recognizing polygamy the Marriage and Divorce Bill merely codifies masculine bias and systematically discriminates against women.

If Uganda is to comply both with the Constitution and the international instruments it is signatory to, then Government has to rethink its position on polygamy.

2. **Widow Inheritance:** We agree with the current position of the Bill that widow inheritance be prohibited which would be in conformity with Article 32(2) the Constitution of Uganda which states that laws, cultures, customs and traditions which are against the dignity, welfare and interest of women or which undermine their status, are prohibited by the Constitution. Additionally, Article 5, the Women's Rights Protocol, specifically addresses elimination of harmful cultural practices and requires States Parties to prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognized international standards. The Protocol requires States Parties to take all necessary legislative and other measures to eliminate such practices
3. **Marriage Gifts:** In Uganda, the practice of giving marriage gifts is widespread and takes different forms in different cultures. The aims of giving marriage gifts include exchanging wealth for reproductive powers, validating a marriage and to compensate the bride's parents for her upbringing and loss of labor to her family. Marriage gifts have an effect on the rights, duties and status of partners within marriage. It can effectively grant the husband the right to major decision making, control and ownership of family property, ownership of the children and control over the wife. The Coalition is in agreement with the position of the Bill with regard to marriage gifts, i.e. that they shall not be an essential requirement for any marriage under the Bill and where marriage gifts are given, it is an offence to demand their return.
4. **Cohabitation:** The Bill is curiously silent on the status of cohabitation in Uganda. The CEDAW Committee in General Recommendation 21 states that generally a de facto union is not given legal protection at all. Women living in such relationships should have their equality of status with men both in family life and in the sharing of income and assets protected by law. Such women should share equal rights and responsibilities with men for the care and raising of dependent children or family members.

In Uganda many men and women cohabit but because the law does not give legal recognition to this form of relationship, both parties are rendered very vulnerable. As one person put it :

“The Law should state that once a man lives with a girl for at least two years as his wife then she is regarded as his wife. It is only then that men will stop playing around with people’s daughters. Many times a man rents a house for a girl and even controls her life setting rules as to what she should and should not do, but when he is tired of her he just abandons her.; nothing is done to him yet all along he has wasted this girl’s time. Many times a man starts living with a girl, even starts visiting her parents (even if he never goes through customary ceremonies); her parents start regarding his as their daughter’s husband and then one day such a man just leaves the sad girl. After all, what is there to show that they are married? The law should declare ...that as long as one brings a woman into his house she is a wife. “

Recommendation: For as long as the decision whether or not to marry remains that of the man, then many Ugandan women will continue to suffer numerous human rights violations within cohabiting unions. In order for Uganda to comply with its obligations under CEDAW, the Bill should protect men and women in cohabitation by expressly stating that persons who have cohabited for a period of years shall be presumed to be marriage.

PART III to PART VII: Requirements, Preliminaries and Solemnization of Recognized Marriages

Part III to Part VII of the Marriage and Divorce Bill deals with marriage preliminaries and formalities of the recognized marriages including the capacity to marry. Our comments on this section are:

- 1. Age of Marriage:** With regard to age of marriage, the Coalition is in agreement that it should be set at 18, as is required by the Constitution and the various regional and international human rights instruments that Uganda is signatory to. By setting the same age of marriage for men and women, the Bill upholds the principle of non-discrimination on the basis of sex and equality of men and women before and under the law.
- 2. Consent to Marriage:** A woman's right to choose a spouse and enter freely into marriage is central to her life and to her dignity and equality as a human being.¹ Subject to reasonable restrictions based for example on woman's youth or consanguinity with her partner, a woman's right to choose when, if, and whom she will marry is protected by the Marriage and Divorce Bill. Very important for Uganda, the Bill also prohibits

¹ See General Recommendation 21, by the CEDAW Committee

widow inheritance (i.e. the marriage of a widow by a male relative of the deceased, where the widow's consent is immaterial). The Bill protects a widow's right to marriage with her consent. Suffice to note though that in all the human rights instruments that Uganda is signatory to, the language used for consent to marry is free and full. We thus propose that in conformity with these human rights standards, the Bill adopt the same language with regard to consent to marry.

Consent Language in Human Rights Instruments:

- The International Covenant on Civil and Political Rights, which states in Article 23(3) No marriage shall be entered into without the free and full consent the intending spouses.
- The Convention on Elimination of all Forms of Discrimination Against Women, Article 16 (1)(b) States parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women the same right freely to choose a spouse and to enter into marriage only with their free and full consent.
- The Protocol to the African Charter on Human and Peoples Rights on the Rights of Women: Article 6 (a) States Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. They shall enact appropriate national legislative measures to guarantee that no marriage shall take place without the free and full consent of both parties. Article 20 (b) a widow shall have the right to remarry, and in that event, to marry the person of her choice

PART VIII: Matrimonial Rights and Obligations:

The general standard under the Constitution and the regional and international human rights instruments that Uganda is signatory to, is that men and women should have equal rights during marriage. This right is expressed as follows:

- Article 31(1) (b) of the Constitution: a Man and woman are entitled to marry only if they are eighteen years and above and are entitled at that age to equal rights...during marriage.
- ACHPR, Article 18 (3): The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of women as stipulated in international declarations and conventions.

- ICCPR, 23(4) State Parties to the present Convention shall take appropriate steps to ensure the equality of rights and responsibilities of spouses... during marriage
- CEDAW Article 16 (1) (c): States parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women the same rights and responsibilities during marriage

The Marriage and Divorce Bill details the rights and responsibilities of spouses in Uganda and this is a positive step forward because it provides clarity for all married men and women as to what rights and responsibilities are expressly covered. It is also positive in the sense that all the rights apply to all men and women regardless of the marriage they contract and thus are applied without distinction (in compliance with equality principles set forth in the Constitution and human rights treaties).

Comments of the Coalition With Regard to Marital Rights and Obligations:

1. **Right to consortium and Protection Against Sexual Violence in Marriage:** Uganda's current marriage regime does not address sexual violence within marriage – save for the recently passed Domestic Violence Bill 2009. The Coalition concurs with the position in the Bill, i.e. both to name the right to consortium but also the recognition that such right can be withheld upon reasonable ground, and that to have sex without the consent of the spouse is a rights violation. The Coalition acknowledges that the Bill comes short of proscribing the offense of marital rape, but appreciates the attempt to recognize and name it in some form.
2. **Property Rights Within Marriage:** The recognition of property rights within marriage is an attempt to comply with the Constitution as well as regional and international human rights instruments. The Bill, in conformity with the Constitution, protects and promotes the rights of spouses to own property individually as well as together, as husband and wife. This is in compliance with the following articles:
 - Article 26(1) of the Constitution: Every person shall have the right to own property either individually or in association with others.
 - CEDAW, Article 16 (1) (h) States parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on

a basis of equality of men and women 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.

- African Women's Rights Protocol, Article 6(j) States Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. They shall enact appropriate national legislative measures to guarantee that during her marriage, a woman shall have the right to acquire her own property and to administer and manage it freely

The Marriage and Divorce Bill defines matrimonial property and the rights of each spouse regarding property. The Bill also recognizes the right of either spouse to acquire and own property individually. These are very important provisions because property ownership in marriage is very controversial and in most cases women are disadvantaged because their contribution to the acquisition of that property cannot be quantified.

In line with Section 39 of the Land (Amendment Act) 2004, the Marriage and Divorce Bill requires that all transactions entered into with respect of any matrimonial property from which the family derives sustenance must be with the written consent of the other spouse. This is further added protection for the rights of women with respect to property and is in line with the human rights standards highlighted above.

The Coalition supports the provisions relating to property rights within marriage which are clearly outlined in detail in the Bill.

Marital Rights and Duties not Addressed By The Bill

The Coalition is of the view that the Bill in its current form, while it addresses marital rights and obligations, at the same time, it falls short of complying fully with CEDAW and other international human rights instruments because it does not cover all the rights that are required to be covered during marriage. These include:

- Rights under Article 16 of CEDAW: (d) Spouses have the same rights and responsibilities as parents, in matters relating to children. In all cases the interest of the children shall be paramount. (e) Spouses shall have the same rights to decide freely and responsibly the number and spacing of their children and to have access to the information, education and means to enable them carry exercise this right. (g) The same personal rights as

husband and wife including the right to choose a family name, a profession and an occupation.

- Article 6 of the African Women's Rights Protocol which includes the following rights: (e) the husband and wife shall by mutual agreement choose the matrimonial regime and place of residence; (f) a married woman shall have the right to retain her maiden name, to use it as she pleases, jointly or separate with her husband's surname; (g) a woman shall have the right to retain her nationality or to acquire the nationality of her husband; (h) a woman and man shall have equal rights with respect to the nationality of their children except where this is contrary to the provision in national legislation or is contrary to national security interests; (i) a woman and man shall jointly contribute to safeguarding the interests of the family, protecting and educating the children

Recommendation:The Coalition is of the strong view that the Bill should cover and protect all the marital rights and obligations that accrue to spouses so as to be clear of the full ambit of such rights and obligations.

PART IX: Breakdown of Marriage

As seen above, the Constitution and the various regional and international instruments that Uganda is signatory to, require that even at the dissolution of marriage, rights of men and women be equal. The following are the rights that are recognized by DRB and which are in compliance with the standard of equality between men and women:

1. **Sole ground for divorce:** The sole ground of divorce provided for under the Marriage and Divorce Bill is irretrievable breakdown of marriage. The present Divorce Act (Cap. 249), which was struck down by the Constitutional Court for its discriminatory nature², presents different

²See Uganda Association of Women Lawyers and 5 Others Vs. Attorney General, Constitutional Petition No. 2 of 2003. As Twinomujuni JA stated in that case, the Divorce Act (cap 249) is archaic in content. It is in substance a colonial rule whereby the traditional patriarchal family elevated the husband as the head of the family and relegated the woman to a subservient role of being a mere appendage of the husband, without a separate legal existence. This concept of the family has been drastically altered in recent decades. Marriage is now viewed as an equal partnership between husband and wife. Still, the old ideas and patterns persist, as do their psychological and economic ramifications. That notwithstanding, women are entitled to full equality in respect of the right to form a family, so proclaims Article 31(1) of the Constitution. It is glaringly impossible to reconcile the impugned provisions of the Divorce Act with our modern concepts of equality and non-discrimination between the sexes enshrined in our 1995 Constitution.

standards for men and women in matters of divorce especially regarding the grounds. While a man could divorce his wife on the sole ground of adultery, the woman had to prove two grounds one of them being adultery. The law in this case was not only discriminatory but gave our socialization legality through the notion that men are adulterous by nature and thus a woman could not divorce her husband on the sole ground of adultery. In other words, for a man adultery was a given and could not alone form a ground for divorce, so the woman had to prove another ground. But the former Divorce Act was also discriminatory against men because it assumed that the only marital wrong women were capable of was adultery and did not take into consideration the very real prospect that women too can be cruel, or can desert their spouses, etc. The Bill does away with this differential and gender biased treatment of the sexes by providing for a sole ground of divorce for both spouses.

2. **Property Division Upon Divorce:** the Marriage and Divorce Bill clearly states that upon divorce, the Court in determining the beneficial interest of each spouse in the matrimonial home and property, shall have regard to the monetary and non-monetary contributions of each spouse. This is in direct conformity with the recommendation on Article 16 (on equality in marriage) of the CEDAW Committee which states that: In some countries, on division of marital property, greater emphasis is placed on financial contributions to property acquired during a marriage, and other contributions, such as raising children, caring for elderly relatives and discharging household duties are diminished. Often, such contributions of a non-financial nature by the wife enable the husband to earn an income and increase the assets. Financial and non-financial contributions should be accorded the same weight.
3. **Maintenance after divorce:** Under the Divorce Act that was declared unconstitutional, alimony was only paid by the man to the woman thus reinforcing the notion that women are dependent on men and that it is the duty of the man to maintain the wife even after divorce. The Marriage and Divorce Bill makes provision of alimony gender neutral by stating that court may order one party to continue maintaining the other party. This maintenance will not be dependent upon the gender of the party but upon circumstances such as one's financial capability to maintain the spouse with lesser means - who may in some instances, be the man and in that regard the Bill is positive.

Some Issues of Concern:

1. Jurisdiction of local council courts in matrimonial causes arising out of customary marriage: any issue here?
2. Adultery should be defined
3. Remove homosexuality as a form of sexual perversion

Final Recommendations Beyond Passage of the Marriage and Divorce Bill:

Recommendation 1: Expeditiously pass a marriage law that defines and proscribes rights for Muslim men and women as they are currently excluded from the Marriage and Divorce Bill. Such law should conform to the Constitution and to the regional and international human rights instruments which Uganda has ratified.

Recommendation 2: Beyond reform of the law, the Government needs to ensure that they make appropriate budgetary allocations for sensitization and awareness once new laws are passed so that both men and women can know of the new marriage and family laws and be enabled to exercise the rights therein. The sensitization also needs to address “prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women” that are evident in marriage and family relations in Uganda.

Recommendation 3: Promote registration of marriage, which is called for in the African Women Rights Protocol, to ensure that women and men have documentation to strengthen their claims over marital or inherited property. Since customary marriages are rarely registered in Uganda, it is often difficult for widows who were married customarily to benefit from the inheritance to which they are entitled, especially if the husband has not left a will. Promotion of marriage registration will likely need to involve religious leaders, opinion leaders, or LCs. Look to successful campaigns such as Plan International’s birth registration campaign in Uganda for possible best practices.