

Does the Marriage and Divorce Bill 2009 adequately protect the land rights of women under customary marriages?

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1. Introduction

The purpose of the marriage and divorce bill is to reform and consolidate existing legislation relating to marriage, separation and divorce into compliance with Article 31 (1) of the constitution of Uganda which provides that “men and women are entitled to equal rights at marriage, during marriage and at its dissolution”. The bill stipulates how this will be applied to Civil, Christian, Hindu, Bahai and Customary marriages. The marriage bill has some positive clauses that would significantly increase protection for women’s rights in line with the constitution and Uganda’s international obligations. For example, the Bill fixes the minimum legal age for marriage for both sexes at 18, grants women the right to choose their spouse and the right to divorce spouses. The bill goes further to define matrimonial property, provides for equitable distribution of property in case of divorce but unfortunately demonstrates limited appreciation of property rights for people married under customary law, and yet the bill intends to develop a law that is fair, will achieve social justice, address issues of poverty, and protect the human rights of all members of the family irrespective of the type of marriage.

2. LEMU’s interest in the Marriage and Divorce Bill 2009

Land is the most important resource in Uganda because the majority of the people especially women depend on it for cultivation and their livelihoods. Over 80% of land in Uganda is held under customary tenure system.¹ This is the reason LEMU has, over the last ten years, worked in association with clan and traditional leaders to undertake extensive research to

bring an understanding to customary land rights and responsibilities in Northern and Eastern regions of Uganda by documenting their customary practices. LEMU’s findings confirm that the majority of rural women in these regions derive their livelihoods from land rights often through marriage, inheritance or gifts. These practices constitute the starting points on which to improve women’s and children’s rights to land and should be correctly understood and protected. If the bill is passed into law without proper understanding of the social context, it will very likely have a negative impact on the very people it seeks to protect.

3. Roles of Traditional institutions in Customary Marriages.

Traditional institutions play a major role in marriages in Uganda and yet this fact has not been recognized in the Marriage and Divorce Bill of 2009. For the Bill to be socially contextualized, acceptable and enforceable, it ought to consider the role of the traditional institutions in marriage. Their roles in the administration of justice in customary marriages and protection of land rights clarified in the law. The role should include dealing with the issues around land rights protection, marriage gifts, issuing “certificates” or letters to show that a marriage, divorce or land rights allocation has formally taken place. Even if registration is to take place at the Sub County as prescribed in the Bill, documents from the relevant traditional institutions should be required as significant documents to use in allowing registration and dissolution of customary marriages. Under Clause 134, Courts jurisdiction in Matrimonial cases must include the clans who are at the centre of family governance which includes marriage, land rights allocation, protection, divorce and inheritance. This clause should therefore replace Local Council (LC) with the clan or clan representatives of the couple in matrimonial cases.

¹LEMU - customary land tenure means a system of land regulated by customary rules often administered by clan leaders

4. Preliminary / Definitions Marriage and Divorce Bills

Definitions	Proposes changes
“conjugal right” and “consortium”	<p>Issue: The two definitions appear to have been interchanged which leaves room for misinterpretation.</p> <p>Recommendation: Need to review the two definitions and place them correctly</p>
“Co-ownership” of property”	<p>Issue: the definition in the bill is an incorrect interpretation of customary land rights allocated to a husband and wife.</p> <p>Recommendation: Under customary tenure, land is managed in turn by the head of family who are unmarried woman, a married man, divorced woman or a widow. These heads of family are stewards of the land owned by families. They are therefore responsible for holding the land in trust for the whole family. They hold the land jointly and not in common.</p>
“Custom”	<p>Issue: “Custom” of customary land tenure of the Lango, Teso, Acholi and Kumam communities, is now written down and referred to as the “Principles, Practices, Rights and Responsibilities – PPRR.</p> <p>Recommendation: The Bill should embrace the PPRR and include its definition in the Bill.</p>
“Family”	<p>Issue: The definition of ‘family’ in the Bill has been limited to the definition of a monogamous union of husband, wife and their offspring. This definition excludes other family units such as: – polygamous families, families of widows, unmarried women, divorced women and co-habiting family.</p> <p>Recommendation: The definition of family should be extended to include polygamous unions, families of widows, unmarried women and divorced women. This is important for the protection of family land rights.</p>
“Matrimonial home”	<p>Issue: In rural areas, the houses are often grass thatched and occupy a very small area of the land, in general. This leaves the bulk of the land for agriculture.</p> <p>Recommendation: The definition of matrimonial home should include the land used for agriculture by family members;</p>
“Non-monetary contribution”	<p>Issue, the definition is confined to contributions made by a spouse for the maintenance of family and acquisition of matrimonial property other than by way of money.</p> <p>Recommendation: “definition of non monetary” should be expanded to include the allocation of inherited land given to a husband and wife by the husband’s family, to an unmarried woman, or a divorced woman who returns back to her family</p>
“Head of family”	<p>Issue: the definition of head of family is not included in the definitions in the bill.</p> <p>Recommendation: the Head of family should be defined to include; a married man, a widow, an unmarried woman with or without children and a divorced woman as defined by customary practice. They manage family land in trust for the rest of the family members who have equal birth rights to the land.</p>
a “Person in authority”	This definition should include the “Head of family”.
“Spouse”	The definition of spouse should include both “husband and wife”
a “Potentially polygamous marriage”	Should require consent of the first and or other women customarily married to the same man.
“widow inheritance”	<p>Issue, widow inheritance is abolished under this bill but the definition of widow inheritance remains in the bill. Recommendation: The definition “widow inheritance” is limiting and misleading; it should therefore be replaced by “widow’s choice” or “widow’s option” and defined as the right of a widow to choose to live with a man friend from within or outside the clan, to choose to return to her maiden home and remarry, or to live without a man, in her marital or maiden home.</p>

5. Separation / Divorce/ Marriage gifts

Customarily, the return of dowry signified the end of a marriage which is usually important to allow a woman the freedom to contract another marriage or to enter into a love relationship with a man friend. The Bill makes bride price optional with no requirement for the return of a marriage gift as has been the practice. The Bill should be clear on the difference between a man who is co-habiting and has not paid any gift and a man who is married but has not given any marriage gifts either. It is important that the Bill incorporates a token, document, or ceremony to formally replace the function of returning dowry to mark a marriage or divorce. This document should be to represent the formal marriage or divorce as provided for in other types of marriages. The families of wife and husband should be given this responsibility but with a link to the state registrar.

6. Widow inheritance Clause 13 (“Widow’ choice”)

The Marriage and divorce Bill 2009 prohibits the practice of widow inheritance and provides for a conviction or a fine for persons that contravene the provisions of section 13. This section brings about a huge change in the practice of ‘widow inheritance’ and ‘bride price’. In many of the tribes in Uganda, the father’s family and clan determine a person’s identity and status in the community as children belong to their father’s clan. This custom and tradition also promotes the practice of bride price in which the woman essentially moves to her husband’s clan on marriage through the payment of “bride price”. She is sheltered by customary practices and has rights over land through marriage. However, in some families, on the death of her husband, the woman finds herself forced into widow inheritance. The Marriage and Divorce bill 2009 Clause 13 (3) seems to suggest a solution that a widow can remarry while still living in the inherited marital home. According to research findings by LEMU on customary clan traditions and cultural practice based on a patriarchal social structure, this would be difficult to enforce. If a widow remarries, custom requires that she relocates to the home of her new husband; but her children will have rights on their deceased father’s land. For example, among the Lango, Acholi and Iteso, a widow has two options at the death of a husband. She can choose to continue to live in her marital home with or without a man of her choice or to return to her maiden home and remarry. LEMU’s research has revealed that most widows in rural areas prefer to stay in their matrimonial homes unless there are serious bodily threats to her life from in-laws or clan members, or do not have children. In most marriages, a widow will have the right to land, to occupy, cultivate, farm and till the land until she remarries or dies. She cannot sell the land

without the consent of the family members and the clans because she, like her husband before her, holds the land in trust for the family. Widowers remain heads of families on the land and so they can remarry, occupy the land. They too cannot sell the land without family and clan consent.

Recommendation: The definition “widow inheritance” in the current Bill be scrapped as it is unhelpful, limiting, misleading and is likely to have a negative impact on the widows; it should be replaced by “widow’s choice” as this clearly reflects the choice defined by customary law, as the right of the widow to choose a man and marry by mutual consent from within or outside the clan. The widow should also have the right to choose a man friend when living on the marital home or to return to her maiden home and remarry. What should be prohibited is forcing a man on a widow.

7. Matrimonial Property/Ownership in common (Clause 115 –116)

Section 4 of the land Act 2008 allows “any person, family or community holding land under customary tenure” to register that land. Under customary land tenure, when a man marries, his father allocates family land to him and his wife for them to own jointly. Inherited land is the most common way women own land in the North and East of Uganda. This land is owned by husband and wife jointly, but in trust for the family because all their children have automatic, equal rights to land.

Recommendation: The Bill should clearly stipulate that heads of families are managers of the inherited land in trust for the family members. The rights of the children on inherited land, even when the widow remarries remain intact. Co ownership in common, means that the owners have individual but undivided shares in the property. Each person has a separate interest in a single property. On the death of an owner, his or her heir inherits the separate interest in the single property. On the other hand Joint ownership arises where land is owned by two or more persons. When one owner dies, the property vests or passes on to the surviving owner(s). Customary land law allows joint ownership and not ownership in common. The Bill should make this change.

Recommendation: It is recommended that Matrimonial properties should include inherited land allocated by the family of the husband to the husband, wife and children. This will provide protection for the majority of rural women who are married into inherited land allocated to her and her husband.

Recommendation: The Bill should also include unmarried women who are in cohabitation and their children. If inherited land is allocated to the couple, it should be clearly stipulated that the couple hold the land in trust for the family; none of them can sell without the consent of the clan and family members, including wives and children who have automatic rights to the allocated land at marriage and birth, respectively.

8. Matrimonial property in polygamous marriages/ Clause 128, 155

According to customary tenure, when a man marries, he and his wife are allocated land which cannot be taken back by the giver or anyone else. If he marries subsequent wives, then he is required to buy land for those additional wives. The Kumam customary law specifically restricts a husband from taking land from the first wife to allocate to any subsequent wives. This practice of the Kumam should be adopted by the Bill. Even the land bought when in marriage by the two should not be shared or given to subsequent wives.

Under customary tenure, after a divorce, a woman is expected to return to her maiden home and get an allocation of land from family (father, mother or brother). But obviously there will be difficulties in reclaiming land that was already inherited. Similarly, customs presupposes that all women will marry and not return. If she does not marry, an unmarried woman is allocated land by her father. Because of the assumption that all girls will marry and not divorce or return to maiden homes, the common practice is for families to allocate all land to boys only. The bill should therefore make it mandatory for families to leave land in the family pool for the eventuality of a girl not marrying, a widow choosing to return or a girl divorcing.

9. Sharing matrimonial resources at divorce.

In rural areas, there is not much that can be called “assets”. Most rural families invest in children, bicycles, motorcycles, animals and agricultural produce. The bill should provide that, at divorce, all moveable assets/properties be shared equally between the divorcing or cohabiting parties.

10. Rights of parties in cohabitation.

Under customary tenure, cohabitation is frowned upon as wrong although it is widely practiced. Because of this, any man who cohabits with a woman and the woman dies during cohabitation is punished, usually by paying for bride price/dowry for the dead girl. In some rare cases, if the man dies, dowry is still paid if the girl chooses to remain in the deceased family.

Recommendation. It is recommended that this customary practice be put into this bill as a deterrent of cohabitation because cohabitation is a serious problem in rural communities today leading to children born being denied by both the mothers family and the family of the man said to be responsible for the pregnancy.

It is further recommended that the families of the cohabiting couples work together to determine the clan membership of the child before or immediately the child is born since it is only after this determination that the land rights of a child is determined. This bill should give the families this responsibility.

11. Any Other Business.

- 1) The Land Act should be included under Cross References.
- 2) Form 3 - “Certificate of customary marriage” should be removed and re-phrased as “legally” binding marriage on conversion because this implies that customary marriage is not legally binding until after conversion.
- 3) Bride price is optional and the proposal is that this becomes a gift –it is important that a distinction is made between a man in cohabitation and a married man that opted not to give a gift.
- 4) There needs to be a symbolic item or letter that indicates when a customary marriage is solemnized and when a marriage ends.

Conclusion. The Spirit of this Bill does not cater for matrimonial property on inherited land under customary tenure and yet inherited land is where the majority of rural women get land rights. It is proposed that land rights, as provided for by customs, be factored into this bill. It is further proposed that inherited land under customary tenure be held jointly in trust for families by the heads of the family, as described in this policy brief. Forms prescribed to be used under this Bill should therefore be reviewed to reflect the suggestions proposed in the bill.

It is LEMU's belief that if the above proposals are accepted and incorporated in the Marriage and Divorce Bill, the bill will become more acceptable and relevant and more likely to bring positive change in the lives of the rural woman.

