

# REFORMING MARRIAGE: A DEEP DIVE INTO UGANDA'S MARRIAGE BILL 2024



## 1. History of Marriage Laws in Uganda: From the Marriage Act to the 2024 Marriage Bill

Uganda's legal framework governing matrimony has undergone substantial evolution, influenced by colonial-era legislation, post-independence reforms, and recent endeavors to modernize antiquated provisions. Here's a historical overview leading to the Marriage Bill 2024:

### **a) The Marriage Act of 1904**

The Marriage Act (1904) was one of Uganda's earliest statutes enacted during the British colonial era. Its primary objective was to regulate civil and Christian marriages, emphasizing monogamous unions. The Act established legal procedures for registering marriages, restrictions on bigamy and provisions for divorce under specific circumstances, such as adultery or cruelty.

### **b) Post-Independence Developments**

Following Uganda's independence in 1962, the country maintained a significant portion of its colonial legal framework while introducing additional legislation to recognize customary, Islamic, and Hindu marriages.

- i. The Customary Marriages Registration Act (1973) enabled the formal acknowledgment of customary unions.
- ii. The Hindu Marriage and Divorce Act (1961) addressed the requirements of the small Hindu community.
- iii. Islamic marriages continued to be governed by Sharia law in matters pertaining to marriage and divorce.

These laws resulted in a fragmented legal framework where different types of marriages were subject to distinct regulations, often placing women at a disadvantage in areas such as property rights and divorce proceedings.

### **c) Domestic Relations Bill (2003–2009)**

In 2003, a significant legislative initiative known as the Domestic Relations Bill was introduced with the primary objective of modernizing and unifying marriage-related laws. The bill sought to address several key areas:

- i. Addressing Inequalities: The bill aimed to rectify disparities and inequalities in marriage, divorce, and property rights, ensuring fairer treatment for all individuals.
- ii. Regulation of Bride Price: Provisions were included to regulate the practice of bride price, aiming to establish guidelines and prevent potential exploitation.
- iii. Recognition of Cohabitation Relationships: The bill proposed recognizing cohabitation relationships, acknowledging the evolving nature of partnerships and providing legal protections for such arrangements.

However, the bill encountered substantial opposition, particularly from religious and cultural leaders who expressed concerns that it posed a threat to traditional values and societal norms. Specific contentious issues included provisions that advocated for gender equality in the division of property during divorce were met with resistance from those who believed it undermined customary practices.

# History of Marriage Laws in Uganda: From the Marriage Act to the 2024 Marriage Bill (Cont'd)



Despite the challenges, the Domestic Relations Bill sparked important discussions and highlighted the need for comprehensive reforms in the realm of domestic relations regarding restrictions on polygamy and regulation of bride price.

In 2009, a proposed bill aimed at regulating bride price faced resistance and a lack of consensus, leading to its shelving.

## **d) Marriage and Divorce Bill (2010s)**

A revised version of the bill, known as the Marriage and Divorce Bill, was reintroduced in the 2010s. Despite substantial revisions, it encountered similar challenges:

- i. Religious leaders expressed opposition to clauses concerning cohabitation and bride price.
- ii. Cultural institutions argued that the bill undermined traditional practices.
- iii. Public debates were highly polarized, with some viewing the bill as progressive and others perceiving it as intrusive.

Ultimately, the bill was abandoned, leaving Uganda with outdated marriage laws.

## **e) The Marriage Bill 2024**

The Marriage Bill 2024, proposed by Member of Parliament Sarah Achieng Opendi, aims to consolidate and modernize Uganda's marriage laws. It draws upon previous efforts while addressing ongoing challenges in the following key areas:

### **i. Child Protection:**

The bill criminalizes child marriages, imposing strict penalties of up to 10 years in prison to deter this harmful practice.

### **ii. Marital Property:**

It recognizes non-financial contributions made by spouses towards property acquisition, ensuring equitable distribution of property rights.

### **iii. Marriage Gifts:**

The bill prohibits the demand for the return of marriage gifts upon separation, safeguarding the interests of both parties.

### **iv. National Marriage Register:**

The proposal introduces an electronic registry system to enhance transparency and provide legal certainty in marriage-related matters.

### **v. Cohabitation**

While the bill does not explicitly recognize cohabitation as a legal marriage, it addresses the rights and responsibilities of cohabiting couples.

## **2. Analysis of Key Clauses & Implications of the Bill**

Societal progressions and advancements have informed several of the changes that are being proposed in the current Marriage Bill that is being tabled before the Parliament. Whereas the changes are intended to bring out positive change, equality and respect for human rights, it is also apparent that a good number of these changes are going to foster inequality, gender disparity and also undermine some religious values. This section will dissect the different proposed changes and the possible implications of the same should the Marriage Bill be passed into law.

a. Civil marriages are to be potentially polygamous (clause 4). This implies that if a man contracts a civil marriage with a woman, he can marry as many women as he wishes via the civil marriage route. This undermines the public policy that has been informed by socio-cultural and historical patterns of behavior in the Ugandan society which frown upon polygamy in general as something that is detrimental to the institution of marriage. The Customary Registration Act and the Mohammedan Marriages Act already recognize potentially polygamous marriages. These two types of marriages are treated separately because, while both allow polygamy, they are rooted in distinct cultural traditions that include safeguards for the individuals involved, their children, families, and other stakeholders. Introducing polygamy into civil marriages without a clear philosophical framework would result in a system lacking protections, especially for children and other parties affected by such unions.

b. Related to the above is the provision that allows for all marriages to be potentially polygamous. Clause 39 of the Bill provides that parties to a monogamous marriage may agree to convert it to a potentially polygamous one. This shall be done by making a declaration in writing before a magistrate or registrar of marriage. The practice of requiring spousal consent is not a new one in Ugandan law, but is one that has led to several fraudulent transactions where many have forged the signatures of their spouses or brought other individuals to pose as their spouses (**See Alice Okiror & Anor v. Global Capital Save 2004 & Anor**). This provision raises controversy on the grounds that it infringes on the sanctity of marriage, especially the Christian form of marriage.

c. The Draft Bill also proposes that the Minister can recognize any other form of Marriage by Statutory Instrument under Clause 4 sub clause g. However, according to the Minister powers to recognize any form of marriage undermines the general will of the people to get involved in legislating marriage provisions let alone providing room for introduction and recognition of marriages that could potentially conflict with Uganda's societal, cultural and religious norms. Any amendment to the types of marriage ought to engage the people should be done with due consultation from the people and their representatives.

d. The Marriage Bill makes it mandatory for parties to undergo premarital counselling prior to contracting a marriage. Whereas this was just a matter of good practice, especially in church marriages, the Bill requires under clause 15, that parties intending to contract any form of marriage produce proof of undergoing premarital counselling. This may be advantageous in as far as preparing parties for commitment in marriage is concerned, however, is it a sufficient ground for refusing to wed parties intending to get married? Pre-marital counselling is already conducted by various officiants in Cultural, Christian, and Islamic marriages. Making it mandatory is unnecessary; it should remain a choice for the individuals and the institutions solemnizing the marriages. This is especially true because, for many, marriage education begins at home and can be delivered through other means besides formal pre-marital counselling.

Additionally, the aspect of requiring a letter indicating parental consent and premarital counselling was challenged in the Constitutional Court in the case of **Michael Aboneka v. Watoto Church Ltd**; Constitutional Petition No. 19 of 2018 where he contended that this was unconstitutional as it dealt away with his free will. The Constitutional Court held that if one chooses to celebrate a marriage from an organization that has particular guidelines, he brings himself into the subjection of these guidelines. That a person was at free will to participate or not to participate in a marriage ceremony organized by the church, but if he chose to do so, then he ought to comply with the requirements stipulated by it. Whereas this was in relation to church guidelines, the Bill now makes it a mandatory requirement regardless of which marriage is being contracted.

e. The Bill provides for contracting a marriage where a party may be digitally present. In clause 16, the Bill stipulates that a party may obtain the permission of the Registrar General to get married through a prescribed digital platform in case he/she cannot be physically present on the allocated date. Whereas some may celebrate this in recognition of technological advancements and incidents where they may be limited by international travel limitations or international work schedules, this may also open up opportunities for many deceitful parties to contract marriages while in other subsisting marriages or relationships.

f. The Bill also allows for contracting of marriages at Foreign Missions of Uganda under clause 21. Whereas individuals previously had to return to Uganda in order to be able to legally get married under the laws of Uganda, the Bill provides that the Registrar General shall appoint a member of each Foreign Mission as a Registrar of Marriage who shall be responsible for wedding intending parties abroad. This may ease life for Ugandans abroad, but if there is no reconciliation of the marriages contracted at foreign missions with the National Register of Marriages, then this may open the floodgates for several instances of bigamy.

g. The Bill expressly prohibits same sex marriages under clause 28. This is in tandem with the recent decision of the Constitutional Court in Consolidated Petitions No. 14, 15, 16 and 85 of 2023 which generally declared the Anti-Homosexuality Act of Uganda constitutional.

h. Clauses 41 & 42 provide for a voidable marriage for reason of failure to consummate, concealment of facts, and annulling the marriage. The bill fails to consider the unique circumstances that may result in the non-consummation of a marriage, particularly when caused by a medical condition, and provides insufficient time for reconciliation or treatment. Given that marriage is intended to be a lifelong commitment, it should neither be too easy to enter nor too easy to dissolve.

i. The Bill, under clause 47, provides for pre-nuptial and postnuptial agreements where parties to a marriage can agree on ownership of property during and after the subsistence of a marriage. Additionally, clause 48 makes a legal creation of individual property. Whereas some have applauded this addition as one which will solve the disputes that arise concerning distribution of matrimonial property upon dissolution of a marriage, many have argued that this punctures trust between partners in any relationship and ultimately creates a conducive atmosphere for divorce.

j. The Bill also elaborately provides for contribution to the acquisition of matrimonial property under clause 53 and factors court ought to take into consideration when distributing property upon the dissolution of a marriage. The degrees of contribution of each spouse and family members ought to be taken into consideration. This appears to be in tandem with the recent Court of Appeal decision in the case of **Ambayo Joseph Waigo v. Aserua Jackline (C.A.C.A No. 0100 of 2015)** wherein it was held that spouses do not automatically acquire a 50-50 share in matrimonial property, but distribution is dependent upon one's contribution.

k. Clause 61 Creates a presumption of Marriage for the maintenance of children. Sub-clause 1 imposes a mandatory obligation on the Court to presume a marriage upon application by a party, effectively granting the Court the power to establish marriages. Furthermore, this provision does not allow the Court any discretion to reject such applications, regardless of merit or other considerations. This lowers the standard for the creation of marriages and makes the process obligatory. Under the Constitution, the Court's role is to administer justice, not to create or solemnize marriages, which are administrative, religious, or cultural functions. Therefore, this subtle attempt to introduce a new form of mandatory marriage by application is both impractical and unconstitutional.

l. Clause 66 presents instances of separation of parties to a marriage by mutual separation, judicial separation, and registration of separation. However, separation arrangements undermine Christian marriage principles. In any case, Separation is already adequately provided for under the current laws.

m. Whereas the issue of collusion to obtain a divorce has previously arisen in instances where parties seek to divorce and enter into a consent judgment, the Bill expressly provides for a procedure where parties can agree to dissolve their marriage mutually. Clause 73 provides that where the parties have separated for at least a year, court may grant an order dissolving the marriage by mutual consent.

n. Irretrievable breakdown of marriage is presented as a new ground for divorce in clause 74 of the Bill. This changes the previous practice where courts have been rejecting this as a ground for divorce even where the parties no longer see eye-to-eye but do not satisfy the grounds for divorce laid out under section 4 of the Divorce Act. In fact, most would resort to desertion and

waiting it out for the lapse of the 2 years before filing for divorce. In the case of **Rebecca Nagidde v. Charles Steven Mwasa; Court of Appeal Civil Appeal No.160 of 2018**, the Court of Appeal emphasized that there is no such ground as irretrievable breakdown of a marriage. The introduction of this as a ground for divorce could lead to increased divorce rate as the threshold for proof of this is too low; parties simply need to prove that the marriage has irretrievably broken down. Anyone can claim this.

o.The Bill criminalizes the practice of refunding marriage gifts under clause 87. Whereas the contracting of most traditional marriages in Uganda requires the presentation of gifts to the woman's family, most traditions recognized separation in a traditional marriage through the return of the gifts (bride price). In the case of **Mifumi (U) Ltd & Anor v. A.G & Anor; Supreme Court Civil Appeal No. 2 of 2014**, the Supreme Court deemed the practice of returning marriage gifts unconstitutional. The Bill seeks to criminalize this and any person who demands for a refund shall be liable to pay a fine not exceeding Ugx. 10,000,000/- (Uganda Shillings Ten Million) or to imprisonment for three years.

p.Breach of promise to marry is also criminalized in the Marriage Bill in clause 90. Whereas there was previously no express provision regarding breach of promise to marry in the Ugandan marital laws, the courts have previously only enforced it as a matter of common law principles and where a party can prove that there existed some form of contract to marry. Perhaps the introduction of an express provision will protect many from heartbreaks in instances where they have been dating unserious partners. A party found liable for breach of promise to marry shall be liable for paying damages for the breach.

q.Bigamy (marrying a person who is already married in a monogamous marriage) is expressly criminalized under section 92 and a person found liable shall pay a fine of Ten Million Shillings or imprisoned for five years.

r.Lastly, the Bill criminalizes cohabitation under clause 89. It provides that parties who hold out as though married; that is, living together as husband and wife, acquiring property jointly and bearing children together, shall be deemed to have committed an offence and shall be liable to a fine of Ten Million Shillings or imprisonment for a period of three years. Whereas the spirit of the Bill in this provision seems to be that of protecting individuals against the dangers of cohabitation, this provision seems to exacerbate the problem rather than resolve it. It appears to ignore aspects such as financial impediments that contribute to cohabitation. The offense seeks to undermine fundamental rights, including the right to own property individually or jointly, the right to freedom of association, and the right to establish and maintain a family. It is important to note that the right to establish a family is not contingent on formal marriage but rather on the union of two heterosexual adults and their children. Countries like Kenya have instead created laws which recognize cohabitation as constructive marriages after a particular period of time so as to protect especially women's rights in instances of death or separation. The Ugandan Marriage Bill seems to present a harsher solution to the problem at hand.



### 3. International perspectives and best practices in marriage legislation



Marriage laws play a critical role in establishing the rights and responsibilities of spouses, ensuring equity, and fostering societal cohesion. Across jurisdictions, best practices focus on ensuring consent, promoting gender equality, and balancing cultural traditions with international human rights standard through case law, statutory frameworks, and international authorities as below;

#### **a) Consent and Capacity in Marriage**

Marriage is founded on the principles of free and informed consent. To protect this fundamental right, national governments are bound by international and regional treaties, such as the **UN Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages** (adopted on 7th November 1962) which requires that both parties give their full and free consent to the marriage, expressed in person before a competent authority and witnesses as prescribed by law to ensure that consent is freely given and informed. **The African Charter on the Rights and Welfare of the Child** (adopted by the 26th Ordinary Session of the Assembly of Heads of State and Government of the OAU at Addis Ababa, Ethiopia - July 1990 and entered into force on 29 November, 1999) for example, prevents child marriages and early betrothals, and mandates that all states enact effective legal measures to ban such practices and set the minimum age for marriage at 18 years.

The judiciary has played a significant role in defending the principles of consent in marriage, as illustrated by several landmark cases. In **Hyde v. Hyde and Woodmansee (1866)**, the court emphasized the voluntary nature of marriage, highlighting the indispensable role of consent in marital unions. Similarly, **Mwita v. United Republic of Tanzania (1992)** solidified the prohibition of forced marriages, recognizing that consent must be voluntary even in customary contexts.

To safeguard consent and capacity in marriage, various countries have enacted laws that reflect international human rights standards including:

- i. United Kingdom: In 2014, the United Kingdom passed the Anti-social Behaviour, Crime and Policing Act, making forced marriage a criminal offense.
- ii. Tanzania: The Law of Marriage Act of Tanzania established 18 years as the minimum age for marriage.

Consent, freely given is the cornerstone of a marriage. International treaties and charters stress the importance of consent in marital unions, and countries are expected to pass laws that align with these standards.

#### **b) Gender Equality in marriage**

Marriage laws should protect both spouses, including rights in property, parenting, and decision-making. This is crucial for strengthening family relationships while leveraging the unique contribution and strengths of each party. International frameworks, like the **UN Convention on the Elimination of all Forms of Discrimination against Women New York adopted on 18th December 1979**, highlight the importance of marital equality in rights, responsibilities, and access to resources.

Courts have also been instrumental in striking down discriminatory laws and upheld equal rights for women in matters of citizenship, residency, and marital dissolution. **Shayara Bano v. Union of India (2017)** prohibited "triple talaq," an Islamic divorce practice where the husband could unilaterally end the marriage by merely repeating the word "divorce" three times. This decision protected women from being unilaterally and arbitrarily divorced. Botswana and India have made significant strides in aligning their domestic laws with international standards to promote gender equality in marriage, ensuring that women have the same rights as men in all areas of their lives, including their marriages.

## International perspectives and best practices in marriage legislation (Cont'd)



### c) Harmonizing Traditions with Rights in Marriage

To protect vulnerable groups and ensure compatibility with international standards, marriage laws must balance cultural and religious practices with constitutional and human rights principles.

**The Protocol to the African Charter on Human and People's Rights on The Rights of Women in Africa adopted by the 2nd Ordinary Session of the Assembly of the Union Maputo, Mozambique 11th July 2003 (Maputo Protocol)** advocates for the eradication of harmful practices, such as child marriage and polygamy, that violate the rights of women.

The **Southern African Development Community (SADC) Model Law on Eradicating Child Marriage and Protecting Children Already in Marriage** is another significant initiative that establishes minimum age limits (18 years) and enforcement mechanisms to regulate customary practices in marriage.

The judiciary has also played a significant role in striking a balance between cultural norms and legal standards in marriage. In **United States v. Reynolds (1879)**, the U.S. Supreme Court upheld the ban on polygamy, ruling that cultural practices cannot override public policy or established legal norms. **The Mwita v. United Republic of Tanzania (1992)** case, decided by the Tanzanian Court of Appeal, exemplified the need for customary practices to conform to human rights standards. In this case, the court emphasized that even within the context of customary practices, forced or child marriages violate the fundamental right to consent.

South Africa has also made great strides in reconciling customary marriage practices with human rights and legal protections. The **Recognition of Customary Marriages Act of 1998** recognizes the validity of customary marriages and the rights of spouses in such unions, while ensuring their regulation and oversight. The amendments to the act, notably the **Recognition of Customary Marriages Amendment Act 1 of 2021**, further address issues of gender inequality in polygamous marriages, giving women equal property rights and ensuring fair distribution of assets. Furthermore, court decisions like **Ramuhovhi v. President of South Africa (2017)** and **Ngwenyama v. Mayelane (2012)** have emphasized the importance of aligning customary law with constitutional principles by upholding women's property rights in polygamous marriages and addressed gender discrimination.

In summary, while marriage laws must respect cultural and religious practices, they must also align with human rights principles and constitutional provisions to safeguard vulnerable groups, especially women and children. By striking a balance between customary practices and legal standards, countries can ensure that marriage laws uphold dignity, justice, and fairness for all.

### d) Marriage Registration

The registration of marriages serves several crucial functions, including; Legal Recognition as registered marriages are officially recognized by the states, which affords spouses and children the protections and benefits that come with legal marriage status; Rights Protection in a way that registered marriages provide spouses and children with security and safeguards against potential disputes, as their status and rights are formally recognized by law; and Family Welfare whereby comprehensive legal frameworks ensure families receive social and economic benefits and minimize the potential for conflicts.

Marriage, as a fundamental human right, must be recognized and protected by law. **The Universal Declaration of Human Rights** emphasizes the importance of the family, which is protected by both society and the state. **The Hague Convention of 14 March 1978** on Celebration and Recognition of the Validity of Marriages establishes guidelines to ensure uniformity in marriage laws and legal recognition across borders, protecting the rights of spouses in international and cross-jurisdictional marriages.

In **Nachimson v. Nachimson (1930)**, the court demonstrated the significance of formal registration of marriages, especially in cross-border disputes. The ruling highlighted that without proper registration, parties involved in marital disputes may encounter difficulties in asserting their rights or pursuing legal claims. Marriage registration provides legal recognition, protects rights, and promotes family welfare by offering legal status and safeguards for spouses and children. Registration minimizes disputes and enhances social and economic stability.



## Conclusion

Uganda's journey from the colonial Marriage Act of 1904 to the Marriage Bill of 2024 exemplifies a protracted evolution in legal and societal norms. While the 2024 Bill constitutes a seemingly substantial stride in harmonizing marriage laws with contemporary values, its ultimate efficacy hinges on the delicate balance between reform and ensuring religious, cultural and societal acceptance. It is important for this bill and any proposed amendments to be rooted in strong religious values, recognizing that marriage is not only a legal contract but also a spiritual union.

