

# WOMEN AND THE LAW

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Women in Development  
Agency for International  
Room 3243, New State  
Washington, D.C. 20523  
(202) 632-3992

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# MARRIAGE

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## WHAT IS MARRIAGE LEGALLY?

The answer depends on whether you are planning a civil marriage or a customary marriage.

### Civil (Common law)

1. For a civil marriage you must first apply to the DC's office. The marriage officer will ask you questions and may ask you to produce documents. You must announce your marriage by a notice posted at the DC's office for 3 weeks or announce it at church for 3 consecutive Sundays.
2. The civil ceremony is held at the DC's office and the marriage officer will pronounce you husband and wife. You may also have a church ceremony, but the person conducting the ceremony must be a Marriage Officer with a licence to perform marriages. If not, you will not be properly married.
3. You may only marry one person at a time. Neither you nor your husband may be married to anyone else either by custom or civil rites.

### Customary

1. Your family must negotiate with your future husband's family to decide such things as lobola.
2. A series of customary ceremonies formalize the marriage, culminating in the anointing of the bride with red ochre (libovu) to signify that she is now married.
3. A man may have more than one wife.

## Civil (Common law)

4. You must be 16 years or older. Your intended husband must be 18 or older. If you or your partner are under 21, you must have the permission of your parents or guardians.
5. You may not marry a blood-relative. However, you may marry some relations such as cousins.

### 6. Marital power.

A husband has the final say in matters concerning "the common life of the spouses". He decides where the family will live and in what style. The husband cannot beat his wife: tell her what to wear, whom to be friends with, whether to smoke or drink, what to read, whom to work for, etc.

Marital power also means the husband's power to control the family property and the power (and duty) to represent his wife in court. These aspects of marital power may be excluded from the marriage, if you agree to exclude them at the time of the marriage by an ante-nuptial contract (see below).

## Customary

4. There is no fixed age for a customary marriage.

5. Customary rules prohibiting marriage between relatives (even distant ones) are strict. You cannot marry someone who bears the same surname as yours, or a related one.

### 6. Marital power.

In customary law the power of a husband over his wife is vast, and includes control over her personal life in decisions such as what she may wear, whom she may associate with, and whether or not she may seek employment. Her position is analogous to that of a minor under guardianship.

The husband may not, however, treat her unreasonably, or hurt her physically.

## Civil (Common law)

### 7. Property.

You can either marry "in community of property" or "out of community of property." These will be discussed below.

### 8. Divorce.

There are two grounds for divorce:

a) Adultery - either the husband or the wife may sue for divorce if the other partner has sex with someone else during marriage.

b) Malicious desertion - either the husband or the wife may sue for divorce if the other partner deserts the common household. If one partner behaves cruelly and forces the other to leave, then the one who is forced to leave may sue for divorce.

In some cases, refusal of sexual privileges for no good reason can be desertion.

A divorced person may marry again.

## Customary

### 7. Property.

Most property belongs to the husband. A wife owns her household utensils and certain traditional cattle reserved for her use. She owns any property acquired by her own efforts. Her wages are her own.

### 8. Divorce.

A husband may divorce his wife on the following grounds:

a) Adultery (if the husband has sex with someone else, the wife cannot sue him for divorce).

b) Barrenness - if the wife fails to have children she may be divorced, but the situation is usually discussed with the wife's family with a view to providing a substitute wife to bear children.

c) Witchcraft - a wife suspected of witchcraft can be divorced.

Civil (Common law)

Customary

8. Divorce (continued)

"Neglect of duty" on the part of either party is an offence against marriage, and may end the marriage.

9. Death dissolves a civil marriage and the remaining spouse becomes single again.

9. Death does not necessarily dissolve a customary marriage; the relationship between the remaining spouse and her in-laws may continue (with full legal obligations) as if death had not occurred.



## HOW DO I CHOOSE WHETHER MY MARRIAGE IS GOVERNED BY COMMON LAW OR CUSTOM?

If you and your partner are both Africans, then:

- 1) the marital power of your husband, and
- 2) property rights in the marriage: are governed by customary law even if you are married by civil rites, UNLESS you:
  - a) agree with your partner that you want the law of your marriage to be the common law
  - b) tell the Marriage Officer of your agreement
  - c) make sure that he records the agreement on the marriage register. (This is usually done by inserting the words "common law" in the appropriate column on the marriage register.)

To be married by civil rites does not mean that your marriage is fully governed by common law. You must note your preference on the register.

If you are not both Africans, then if you marry by civil rites your marriage will be governed by common law.

## WHAT KINDS OF MARRIAGE ARE THERE UNDER COMMON LAW?

If you decide that you want your marriage to be governed by common law, you must choose between three kinds of marriage:

### 1) IN COMMUNITY OF PROPERTY:

If you say nothing at all about the property system you prefer for your marriage, you are automatically married "in community of property." This means:

\* the property of both partners (including debts) is owned jointly regardless of who contributed what.

\* the husband has "marital power" which means that the wife cannot perform any legal act without his assistance.

\* the husband is the "administrator of the joint estate." This means that he can sell, mortgage, lend or give away the property without his wife's permission.

\* whenever the husband deals with the joint property, he is dealing with the wife's half-share as well. For example, if he makes a donation of £100, that means £50 comes from his half of the estate, and £50 from her half.

\* though you own a half-share of all the property, you cannot sell or give away your half during the marriage. You can only do so by will, effective after your death. If the husband as administrator wastes the property, the only protection for the wife is to apply to court for separation of the property, or an interdict restraining him from administering her share. These are not easy remedies to obtain. A husband with the marital power has a right to administer the property, even if he does so unwisely. E.g. if he loses it in a bad business venture, he is perfectly entitled to do so. The courts will take away this right only in very extreme cases, for instance if he is gambling the family property away or threatening to donate it to his mistress.

\* some property (e.g. wedding gifts) is excluded from the community.

\* the position of a woman married in community is similar to that of a minor under parental guardianship.

\*\* If you do not wish to marry in community of property, then you must make an ante-nuptial contract. This contract may provide for:

## 2) MARRIAGE OUT OF COMMUNITY BUT WITH THE MARITAL POWER:

This comes about when you enter into an ante-nuptial contract excluding Community of Property but not the Marital Power of the husband. This type of marriage means:

- \* the partners privately own their separate property, and there is no joint estate.

- \* however, because of the marital power, the husband administers and controls the wife's separate property.

- \* he may sell, mortgage or use the wife's property without her consent and any contracts he makes regarding her property are binding on her during and even after the marriage.

- \* if he abuses his power she has the same remedies as a woman married in community of property (i.e. interdicts).

## 3) MARRIAGE OUT OF COMMUNITY AND WITHOUT THE MARITAL POWER:

This is the most common form of ante-nuptial contract marriage. It comes about when you enter into an ante-nuptial contract excluding both community of property and the husband's marital power. Under this form of marriage the woman has full rights over her person and her property.

- \* she owns her separate property as she did before marriage; the husband owns his property in the same way. Whatever they buy during the marriage belongs to them separately.

- \* she can deal with her property in any way she sees fit; she can enter into contracts over the property, and she can sue and be sued on those contracts in her own right (i.e. without being represented or assisted by the husband in the legal proceedings).

\* their debts are also separate; neither can be forced to pay the other's debts.

\* she can sue the husband for damages if he in any way deals with her property without her authorisation. (If he has sold or donated the property to somebody else, she can sue that other person for its return.)

\* the two spouses can even enter into contracts with each other, and these contracts can be enforced in a court of law.

\* people tend to fear this type of arrangement unnecessarily. Africans in particular see it as "excluding" the other party from the riches you might collect during the marriage. In truth, separation of property is not as unfriendly as it sounds ("my furniture, your pots"). It is not enforced separation: it simply means that all joint ventures must be consciously and deliberately agreed upon beforehand. If the couple want to invest in a jointly-owned home or car, or if they wish to set up bank accounts or trusts for each other or for the children, this system forces them to sit down and talk about it at length first -- and then enter into a formal agreement setting out the precise terms of what they intend to do.

**\*\*CHOOSE THE PROPERTY SYSTEM THAT SUITS BOTH OF YOU.  
IF IN DOUBT, GET SOME LEGAL ADVICE. REMEMBER,  
ONCE YOU HAVE MADE YOUR CHOICE YOU CANNOT CHANGE IT  
DURING THE COURSE OF THE MARRIAGE!**

## MUST MY HUSBAND SUPPORT ME?

If your marriage is governed by either customary law or common law, your husband has the primary duty to support you, but when times are hard for him you also have a duty to support him. If your husband does not support you and his children, you can:

- a) sue him for support in a court of law.
- b) report to Social Welfare Officer at DC's office. He will call your husband to find out what is the problem and help settle the matter.
- c) buy or contract for "household necessities" on credit and he will be obliged to pay for them if he has been neglecting his duty to support his family.

This is under the Maintenance Act.

## IF I WANT TO SEPARATE FROM MY HUSBAND, BUT DO NOT WANT TO BE DIVORCED, WHAT MAY I DO?

If you were married by civil rites, you may apply to court for judicial separation. The court will only grant judicial separation if your spouse is making life together intolerable or dangerous. This is not another name for divorce, it only frees you from the duty to live together:

- \* you cannot enter into another marriage.
- \* sexual intercourse with someone else is adultery.
- \* despite this, your spouse cannot force you to have sex with him/her against your will.

There are certain circumstances where your marriage is not really a marriage. If this happens then the legal consequences of marriage will not result, for instance, the children will not be legitimate.

A marriage is void if:

- \* you do not follow the formalities prescribed by law.
- \* you marry someone of your own sex.
- \* you marry a second person when you are still married to the first.
- \* you are below marriageable age and you marry without permission of the Minister.
- \* if you have not really agreed to the marriage (e.g. if you were forced into it).
- \* you are insane (or your partner is).
- \* you and your partner are related within the prohibited degrees.

WHERE DO I GO IF I NEED LEGAL ADVICE ON MARRIAGE, DIVORCE, MAINTENANCE, OR CUSTODY OF THE CHILDREN?

FAMILY LIFE ASSOCIATION  
P.O. BOX 1286  
MBABANE  
Tel. 46680

FAMILY LIFE ASSOCIATION  
P.O. BOX 1051  
MANZINI  
Tel. 53586

## WHAT DOES MARRIAGE MEAN?

- Marriage in the traditional sense means joining your husband's family. Smearing with red ochre can be done before or after the ceremony. It means a life and relationship based on laws which are not the same as in the civil marriage. It means your husband can take another wife.
- Traditional marriage means that your family must produce a maiden to bear children for you or on your behalf without paying lobola for her. You can be "returned" to your own family if you don't produce a child.
- A civil marriage means a permanent commitment to your partner. It means sticking with him through thick and thin for the rest of your days.
- Yet, many marriages don't survive through the bad times because people tend to give up or are not prepared to put enough effort into making their marriage work. Few marriages are smooth all the way - all couples must expect to have their ups and downs.
- There are many reasons why a marriage might break up. It could be finances or it could be an argument about the way the children are behaving. It could be dissatisfaction with the sex relationship. It could be pressures at work, unemployment, or possibly alcoholism. It could be infidelity.
- Most problems can be solved. The problem might be discussed and solved by the family. Sometimes it requires someone from the outside to help and offer advice. It may be a clergyman, it may be a friend, a doctor or a counsellor.

- Marriage means many changes: changes to your freedom, your tax and legal status. It means joining another family. It means making decisions which involve more than just yourself.
- It is not something to be treated lightly. To marry means making a serious commitment.

### ARE YOU READY FOR MARRIAGE?

- do you feel really settled and ready for marriage? Are you ready to stick with one partner or is this the first time you have been in love?

Remember that our emotions are always changing and that if under 25 years of age the chances are that you might not be ready to make such a permanent decision.

- do you have enough financial security?
- are you getting married because YOU want to or because your parents tell you that you should?
- are you getting married because you feel old and "on the shelf" and afraid of being left single?
- do you really know your partner and his habits? Do you trust him? Does he like to drink and stay out late at night? Does he go to Church or not? Is he messy or lazy?

- do you share the same interests? If he wants to spend all his leisure time watching or playing soccer when you can't stand the game, you are likely to come to blows.
- do you agree as to how your money should be spent or saved?
- do you agree with family planning or do you want to start a family straight away? Do you want lots of children or just a few?
- are you going to resent it if he refuses to help you in the house or do you like to do all the domestic jobs yourself?

These and many more questions besides should be asked before taking the plunge. If in doubt, don't. OR, seek advice from a Marriage Officer, or FLAS counsellor or your mother, grandmother, etc.

## MONEY ..... THE ROOT OF ALL EVIL?

Money matters are usually difficult to discuss. When you are married and trying to meet all the expenses of the monthly payments on the furniture and maybe the car, you and your husband may come to blows in trying to decide who pays for what.

What you must decide is:

- who will pay for the light, water, food, rent and children's education? Will you split these costs? Will he pay for them or will you?

- what about your personal needs: Will he grumble if you spend money on yourself even when it is with money you have earned or will he complain if you ask him for money to meet your personal needs?
- who is responsible for keeping copies of the bills and hire purchase payments? If he does this, do you know how much money you have in the bank or do you leave it all to him?
- will you share a bank account or keep a separate savings account?
- what about the money he spends on alcohol? Do you resent this?
- will he give you your income tax rebate?
- if he dies or if you separate, will you be able to recover the money you have put into your house? Who will inherit the estate?
- do you save money every month?



## FAMILY SIZE ..... BIG? SMALL? NOW OR LATER?

A major issue which can cause confrontation between two married people is whether to have children or not, when, and how many.

Some men even like their future wife to "prove that she is fertile" before he is willing to make the final legal commitment.

Naturally every man and woman is curious to know whether he or she is capable of being a parent, but this should not be taken lightly. One just has to assume one is and plan the family to fit in with one's economic and emotional situation.

There is no point in taking a risk and finding out that one is indeed fertile, only to decide that now isn't the right time for a child. A child deserves to be given the best. It deserves a home, parental security and love. It doesn't deserve to be cast out when inconvenient.

You must agree on this issue before a battle ensues. Ask yourself these questions:

- will the husband-to-be agree to your taking contraception or will he disagree because he fears you will be unfaithful? if that is the case, why not encourage him to use contraception?
- have you thought about the effect that children will have on your relationship? Are you ready? Have you had time to get to know each other properly? Do you agree on childrearing methods? Do you think that the husband should help in the house and with the children, and if so, will your

husband do that? (If he doesn't, you might start to resent him, especially if you too, have a full-time job. You will then discover that you have two full-time jobs and if there is no support from him, will you become tired and resentful?

## SEX ISN'T WHAT YOU THOUGHT IT WOULD BE.....

Sexual intercourse is a very important aspect of marriage. When it goes wrong, it makes both husband and wife unhappy and can even break a relationship.

A newly married couple should realise that real life is not the way it is shown in the True Love comics. It takes time and a lot of patience for a sexual relationship to be mutually satisfying.

There are various ingredients which are necessary for its success: love, trust, privacy, time, lack of guilt, patience, knowledge and freedom from the fear of pregnancy if neither the husband or wife want to start a family straight away.

Most couples are shy with each other to begin with. Sex is a very intimate and special act. It involves the sharing of both body and soul and nowadays does not have to involve procreation but can be equally enjoyed by both man and woman without fear or guilt.

Many couples worry that they are not "performing normally". The man worries that he is not virile and the woman worries that she does not satisfy the man's

needs and that he might go elsewhere. They should realize that "performance" improves with time and that once they stop worrying about it, they will be perfectly satisfied with each other.

Now that they are lovers in the true sense, they should learn to communicate as a means of letting the other person know what they like and dislike in the sex act. If they feel ignorant about the body and its functions, they can seek information from literature which is now available from organizations like the Family Life Association or ask advice from one of their counsellors.

Some people have genuine problems. Most of them can be overcome. All of them require patience and understanding from the partner.

## COMMON SEXUAL PROBLEMS

### -- Premature ejaculation

This is when a man will ejaculate sperm soon after the beginning of the sex act. He is unable to control his ejaculation. This is common in young men and can be solved.

### -- What is a climax?

Both husband and wife are entitled to enjoy the sex act. The final conclusion of intercourse is the climax which describes the very intense feeling of pleasure experienced by BOTH partners when they are properly stimulated.

The man will ejaculate when he reaches his climax or orgasm. The woman will just experience a very nice feeling.

Many women, however, find that they cannot reach the climax. It is not difficult for them to find out how, once they have a better knowledge of their bodies and discuss the matter with the husband.

It is important that she does not pretend that she is enjoying the sex act when she is not. She might start to resent her husband for being selfish, but he may not know if she doesn't tell him.

--What does it mean to be frigid?

Most women experience times of not wanting to have sex. These times usually coincide with the week before her periods start or before or after the delivery of a baby. She may also become frigid when she feels distant to her husband. Sexual response is a very good measure of a person's feelings towards another.

This problem, like all the others, requires time, patience and caring on the part of the partner.

All these sexual problems can be counselled at FLAS or by your doctor.

## WHAT HAPPENS IF I CAN'T GET PREGNANT?

Not getting pregnant when you want to is a big problem for many women. Fertility is very important to most people yet there are an increasing number of men and women who find they are infertile. Why?

- the woman might not be ovulating. This means that there is no egg being released by the ovary each month, meanwhile her periods might be quite normal.
- the woman might have blocked fallopian tubes which means that the egg is unable to travel down the tube. Sometimes a sperm might meet the egg which it then fertilises and the egg becomes imbedded in the tube because it can't travel further. This is very dangerous and is called an ECTOPIC PREGNANCY which must be terminated.
- the woman's vagina might have very acidic secretions which will kill the sperm.
- the man might have too few sperm in his ejaculate.
- the tubes which carry the sperm from the testes to the urethra, might have become blocked from an untreated venereal disease.

## WHAT CAN BE DONE TO CURE INFERTILITY?

The first thing to do is to see a doctor. He or she will ask you whether you or your husband has had a child before.

He will need to do an internal examination and take your medical history.

If your husband has never had a child, the doctor will ask him to produce a sample of sperm which will be tested in the laboratory.

## CURES

There are not many successful ways of curing infertility.

- the tubes of the woman (fallopian tubes) can sometimes be cleared as long as they are not damaged. This requires a small operation and the tubes are "blown out."
- the woman can take a fertility drug. This drug stimulates the ovaries to produce eggs. The danger is that it can overstimulate the ovaries thus creating multiple births. It is not a good idea to take the drug for prolonged periods otherwise it might have side effects and it should only be taken on a doctor's prescription.
- the acidic secretions a woman produces may be altered by diet, or by hormones which change the PH or acidity of the vagina. All women have natural secretions and yeast and most develop yeast infections which also tend to destroy sperm.
- women who are periodically separated from their husbands might find that they are not having intercourse at the right time of the month. She must learn when her fertile period is (12-16 days after the onset of her periods) and try to see her husband at this time. She can also test her fertility by taking the temperature of her vagina on a daily basis. This requires patience and instruction and can be taught from a doctor or the Family Life Association.

## WHAT ABOUT ADOPTION?

If nothing will help you to get pregnant, there is no reason why you can't adopt a child needing a loving home. It may not be exactly the same as having your own baby but it is surprising how many women get pregnant after they adopt a child. It is thought perhaps that once they accept the situation and relax, the body will be left to its own devices.

If you are interested in adoption, contact your nearest Social Welfare Officer at the DC's office or FLAS. Please see WOMEN AND THE LAW: CHILD MAINTENANCE AND ADOPTION booklet for further information.

## PROBLEMS RELATED TO SEXUALLY TRANSMITTED DISEASES

STD's or venereal diseases as they used to be called can be a major cause of trauma in a marriage relationship.

To have an STD almost invariably means that one of the partners has been unfaithful and yet so few people are brave enough to tell their partner. This means that many people go untreated which results in incurable medical problems later on such as infertility.

There is still a lot of ignorance about what they are, where they come from and what they can do.

## DID YOU KNOW THAT .....

- STD's cannot be caught on a toilet seat, door knob or towel. Except for fungal or yeast infections, STD's come from having sex with an infected person.
- most women suffer from fungal or yeast infections which have similar symptoms to other STD's. They cause irritation and discharge and painful intercourse. They can be passed to the man but not always. They should be treated.
- 60 out of every 100 women who have gonorrhoea do not know it because they have no symptoms. This means that they can carry the disease and should be treated. If a woman's partner has gonorrhoea and she has no symptoms -- she should still be treated.
- if either the man or wife has an infection, BOTH of them should go for treatment to be certain that neither of them are carriers. This requires honesty and trust between the two.
- to be treated too often means that the antibiotics become less effective. It may result in no effective treatment being available.

## GENERAL SIGNS AND SYMPTOMS OF STD'S

- both men and women get a yellowish, smelly discharge
- there may be a burning sensation when urinating
- there may be painful sores on the genitals
- for women, there may be lower abdominal pain and discomfort during sex

If any of these symptoms are evident - seek treatment from your doctor or FLAS without delay and do not have sex until you are clear.

## SO YOU WANT TO GET MARRIED?

If you choose to marry according to Civil Law, you can choose between:

- a religious ceremony in a Church, or
- a civil ceremony at the District Commissioner's Office

First decide whether you wish to draw up an ante-nuptial contract or one which provides for community of property.

### THE CHURCH MARRIAGE

Speak to your priest or vicar and ask him if he will marry you. Arrangements for the service can be drawn up by yourselves. If he agrees, Banns must be read for three consecutive weeks either in the Church or displayed at the DC's office. If you are unable to wait three weeks, you may obtain a special licence from the DC's office which exempts you from the Banns. This will cost about £10.25. Any other costs involved in the marriage will be given to you by the priest.

### THE REGISTRY OFFICE

The District Commissioner or the District Officer can marry you anytime on a Friday or a Monday. Similar to the Church wedding, the Banns must be read unless you pay for a special licence.

For both weddings you will need:

- two witnesses
- a wedding ring

All other details can be obtained from the DC's office or from your local church.