



REPUBLIC OF NAMIBIA

LAW REFORM AND DEVELOPMENT COMMISSION

**WORKING PAPER ON ISSUES RELATED TO
FAMILY LAW IN NAMIBIA:
SWAKOPMUND FAMILY LAW WORKSHOP**

LRDC 23

Windhoek, Namibia;

July 2012

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SWAKOPMUND FAMILY LAW WORKSHOP**

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Mr. Clever Mapaure of the Law Faculty of UNAM has also contributed to the compilation of this document.

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LAW REFORM AND DEVELOPMENT COMMISSION

The Namibian Law Reform and Development Commission (the LRDC) is a creature of statute established by **Section 2** of the **Law Reform and Development Commission Act, 1991 (Act No. 29 of 1991)**.

The core mandate of the Commission is to undertake research in connection with all branches of law and to make recommendations for the reform and development thereof.

The Commission members are –

Mr S Shanghala, Chairperson

Ms D Hubbard, Deputy Chairperson

Adv J Walters, Ombudsman

Mr M Frindt

Mr N Marcus

Ms D Muroko

Mr F Nghiishililwa

Mr R Rukoro

The Secretary to the Commission is Mr. J.T. Namiseb who heads the Directorate of Law Reform, an organizational component in the Ministry of Justice. The Directorate of Law Reform serves as Secretariat to the Commission, assisting the Commission in the exercise of its powers and the performance of its duties and functions under the Act. The Secretariat is housed on the 2nd Floor, Old Mutual Plaza Building, Post Mall Street, and Windhoek.

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FOREWARD

The Law Reform and Development Commission (LRDC) is a statutory body established in terms of the Law Reform and Development Commission Act, 1991 (Act No. 29 of 1991). The LRDC has the statutory mandate to conduct research on all branches of the Namibian Law and to make recommendations for amendments, repeal and enactment of new laws, as the case may be to the Minister of Justice for consideration.

The LRDC has among others, submitted reports on:

- Matrimonial Property Consequences of Common Law Marriages -2003;
- Divorce – 2004
- Customary Law Marriages – 2004
- Matrimonial Property – 2010
- The Report on Intestate Succession – 2012 also forms part of the subject matter.

As the LRDC continued to peruse through the comments made by previously consulted stakeholders it was made aware that the problems persist on the issues raised in the above-mentioned reports.

The LRDC therefore resolved that it was essential to conduct a Family Law Workshop where the Reports were resubmitted to the former Minister of Justice and other relevant stakeholders. The Family Law Workshop was held from 23 - 27 July at Swakopmund.

It emanated from this consultation that some of the most pertinent issues discussed, needed to be consulted on further particularly with Traditional Authorities, the mass media and the public at large.

The LRDC profoundly expresses regret for the non-involvement of faith-based organisations and religious bodies such as the Council of Churches in Namibia (CCN) as well as the Namibia Islamic Council and Jewish communities. These faith-based bodies have since been consulted and will be part of the impending consultative process pertaining to the outstanding matters.

With this publication however the LRDC hopes that members of the academia, the Legal Profession, religious organisations, Traditional Authorities and society at large may be presented with a document which clarifies some of these long standing matters.

Sincerely,



Mr Sakeus E. Shanghala

Chairperson: LRDC

WELCOMING SPEECH AT THE FAMILY LAW WORKSHOP

BY THE MINISTER OF JUSTICE

Hon, Mrs. Pendukeni Iivula-Ithana, MP

Honourable Minister of Gender, Mrs. Doreen Sioka,

Honourable Minister of Home Affairs, Mrs. Rosalia Nghidinwa,

Honourable Chairperson of the Parliamentary Standing-Committee of Constitutional and Legal Affairs, Mrs. Eveline Nawases-Tayele,

Honourable Deputy Ministers and Special Advisors,

Honourable Chairperson, Mr. Sakeus Shanghala, Commissioners and Secretary to the Law Reform and Development Commission,

Distinguished Permanent Secretaries,

Honorable Traditional Leaders, Chief Kauluma and Chief !Gaseb,

Invited Guests, Ladies and Gentlemen,

Good morning,

I welcome you all to Swakopmund, and I thank you for taking the time to congregate here, together, for what I hope will be a constructive and fruitful Family Law Workshop.

This week presents an opportunity for all parties to critically engage in debate, relating to the laws, which are anachronistic and out-of line with the Namibian Constitution. We must be mindful that we are a relatively new nation, and a consequence of this nascent democracy is that, at times, we must make a concerted effort to identify and align laws that are not consonant with our legal system.

It cannot be tolerated by a democratic state that one group of society should be treated in a manner completely obscured from the rest. It must always remain at the core of our activities to engender a balance between safeguarding human dignity, justice and rights

while being cognizant of the diverse customs and values that embody the Namibian hearth and home. For this reason, it is important that we actively seek to reform all laws that reflect a retrogressive legal orientation.

Before I delve into a brief explanation of the main issues of contention before us this week, allow me the opportunity to recognize and give my appreciation to all those who have committed their time and efforts to identify and report on the incongruous laws which continue to surreptitiously pervade our legal system.

To the Chairperson of the LRDC, Mr. Shanghala, I would like to extend the appreciation of all of us here today for your efforts in administering this week's conference. I am aware that a great deal of effort has gone into developing the reports presented to us this week, and that a great deal of research and consultation has already been conducted on these issues. You have eased the burden of effort for us all, as it is our duty from here to merely polish and affirm the recommendations to be tabled in Parliament in 2013. I would further like to extend my gratitude to the ancillary work and dedication by the Legal Assistance Centre who have contributed tremendously to the research and compilation of the reports.

Central to our debate this week entails a discussion of the *Native Administration Proclamation 15 of 1928*, most notably Sections 17 and 18. What is of importance to acknowledge is that, the *Native Administration Proclamation of 1928* has manifold consequences that have permeated within, and across, concomitant laws. In this regard, the *Native Administration Proclamation of 1928* may be interpreted as a nefarious interlocutor across the various reports, and so, our efforts to rectify these laws will conversely act as a means to eliminate clandestine prejudices from our colonial past.

The *Matrimonial Property Consequences of Common Law Marriages Report* of the LRDC is the most urgent and requires swift deliberation and action as it recommends the repeal of section 17(6) of the *Native Administration Proclamation of 1928*. The section is both arbitrary and discriminatory and, if I may echo the sentiments of the LRDC, the need for its repeal should be considered as *logical and cannot be controversial*.

It is arbitrary as section 17(6) of the *Native Administration Proclamation, 1928* only applies to marriages that are convened north of the old 'Police Zone' and only convened

among “*natives*”. The section provides that the matrimonial default regime for this region is out-of-community of property, which is incongruous with the other default marriage regime, being in-community of property, elsewhere in the country. It is discriminatory as its language employs an explicitly offensive classification of people.

Related to this, is the Report on Marital Property and the matter of intestate succession. Here we may identify the manifest implications of Native Administration Proclamation of 1928, and how the variation in marital regimes may foster a situation, upon the death of a spouse, that prevents or complicates the succession of an estate or inheritance of assets. This is both deplorable and extraneous. The law is both racially and geographically discriminatory and must be reformed. Forthcoming legislation in this matter must treat marriages throughout the country with the same protocol and must take necessary measures to recognize and register customary marriages, and we need to discuss the attendant issues as a result of the policy decisions we arrive at during this Workshop.

The Report on Customary Law Marriages deals with the issue of bigamy and the discriminate application to common law marriages and customary marriages thereof. Again the said report demonstrates the clandestine effects of the Native Administration Proclamation of 1928 and the requisite need for its reform. The *Report on Divorce* demonstrates that the laws of divorce are anachronistic and not conversant with the everyday-social realities of the Namibian people. The fact that the last major statutory reform of the law of divorce took place nearly a century ago, for instance, the Divorce Laws Amendment Ordinance dated 1935, indicates that these laws require our attention. In this regard then, the reform of the Namibian law on divorce remains a matter that is long overdue.

If I may proffer my opinion of your role in the coming days, I would encourage that the discussions here should be aimed at ensuring constructive dialogue; with a view to developing a strong consensus on the recommendations to be espoused. I encourage you all to engage in every facet of this week’s agenda, with completeness, and to the best of your ability, so that we may move forward and beyond the issues before us today. I implore you all, allow for the wake of this

Workshop to provide the steady tides for a more objective and equitable dispensation of the law. In return, I offer you all my sincerest commitment to ensuring that Family Law will be a priority in our activities hereon in.

With these few remarks, I wish you the best in our deliberations and look forward to the conclusions and recommendations.

Thank you!

1. Introduction

- 1.1 The Law Reform and Development Commission (LRDC) Family Law Workshop, convened in Swakopmund in the Erongo Region, endeavoured to provide a platform for eminent members within the Government and the legal fraternity to engage in dialogue on the topical issues, relating to family law in Namibia, that require reform. This paper seeks to highlight the issues that were discussed, relating to customary law marriages, succession, marital property, divorce and conflict of laws.
- 1.2 The Minister of Justice, Honourable Mrs Pendukeni Iivula-Ithana, officially opened the workshop on July 23, 2012, whereas the Minister of Home Affairs and Immigration, Honourable Mrs Rosalia Nghidinwa officially closed the workshop on July 26, 2012. The workshop delegation included *inter alia*, the Minister of Justice, the Minister of Gender and Equality, the Minister of Home Affairs and immigration, the Chairperson of the Parliamentary Standing-Committee of Constitutional and Legal Affairs, Deputy Ministers, Special Advisors, Permanent Secretaries, Traditional Leaders, as well as senior government officials from the involved Ministries.

2. Customary Marriages

- 2.1 The co-existence of a dual framework of customary and common law is fraught with tensions and contradictions, and its adverse impact is commonly manifested in societal relationships.¹
- 2.2 The recognition of customary marriages – as it may be interpreted from the Namibian Constitution² does not, in fact, correspond to a number of issues pertaining to the recognition of a marriage under common law. Although customary law will provide answers in some instances, to a certain extent, these answers are not mutually exclusive nor are they sufficient to cure the everyday predicaments in which societies find themselves. These questions include *inter alia*:

¹Hinz M O & Mapaure C. (2009) *Legal Pluralism And The Apartheid Past: Challenges To Namibian Family*

² *Vide* Articles 19 and 66(1).

- i. What are the criteria of a valid customary marriage?
- ii. What are the rules governing the relationship between spouses?
- iii. What is the matrimonial property regime?
- iv. What are the grounds for divorce?
- v. How is divorce effected?

2.3 Constitutional Motivation for Reform

2.3.1 The provisions of the Namibian Constitution reflected hereunder, serve as motivation to the reform of the recognition of customary marriages and are relevant to the debate on the reform of Namibian family law:

2.3.1.1 Article 4(3) provides that citizenship by marriage extends to spouses under customary marriages.

2.3.1.2 Article 10 provides:

- “(1) All persons shall be equal before the law.
- (2) No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.”

2.3.1.3 Article 12 provides:

- “(f) No persons shall be compelled to give testimony against themselves or their spouses, who shall include partners in a marriage by customary law, and no Court shall admit in evidence against such persons testimony which has been obtained from such persons in violation of Article 8(2)(b) hereof.”

2.3.1.4 Article 14 provides that:

- “(1) Men and women of full age, without any limitation due to race, colour, ethnic origin, nationality, religion, creed or social or economic status shall have the right to marry and to found a family. They shall be entitled to equal rights as to marriage, during marriage and at its dissolution.

(2) Marriage shall be entered into only with the free and full consent of the intending spouses.”

2.3.1.5 Article 19, Culture, provides:

“Every person shall be entitled to enjoy, practice, profess, maintain and promote any culture, language, tradition or religion subject to the terms of the Constitution and further subject to the condition that the rights protected by this Article do not impinge upon the rights of others or the national interest.”

2.3.1.6 Article 66 (1) provides that:

“Both the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent to which such customary or common law does not conflict with this Constitution or any other statutory law.”

2.3.1.7 Article 95, titled *Promotion of the Welfare of the People*, provides that:

“The State shall actively promote and maintain the welfare of the people by adopting, *inter alia*, policies aimed at the following:

(a) enactment of legislation to ensure equality of opportunity for women, to enable them to participate fully in all spheres of Namibian society...”

2.4 Recognition and validity of customary marriages

2.4.1 There is an exigent need to legally recognize customary law marriages. This acknowledgement must also be extended to customary marriages already in existence.

2.5 Registration of customary marriages

2.5.1 It is extremely challenging to prove the existence of a customary marriage; there is no, or wanting, reliable record of marriages celebrated under customary law. It is

similarly imperative that encyclopaedic records should be founded and adequately maintained.

2.6 Contractual capacity of spouses

- 2.6.1 Customary law does not have a specific age requirement for entry into marriage. In terms of customary law, puberty and initiation ceremonies are prerequisites to accept someone as an adult in the community. Puberty is regarded as the minimum requirement for marriage as the ultimate goal of a marriage was regarded as procreation.³
- 2.6.2 The Namibian Constitution under Article 14 requires that marriage be entered into with the free and full consent of the intending spouses.
- 2.6.3 Section 24 (1) of the *Marriages Act, 1961 (Act No. 25 of 1961)* fixes the ages to conclude a valid marriage at 18 for men and 15 for women and requires a marriage to be monogamous. Any person who is already married commits the offence of bigamy if they contract a subsequent marriage.⁴ The *Age of Majority Act, 1972 (Act No. 57 of 1972)* under section 1 pronounces 21 years as the age of majority for both sexes; in addition the Age of Majority Act, 1972 is not expressive on whether it is applicable to persons subject to customary law. This situation creates a great deal of conflict, considering, a major in customary law would not necessarily be a major under general law, and a major under general law would be a child at customary law. It is suggested that some uniformity is required on this aspect.

2.7 Dissolution of customary marriages

- 2.7.1 A marriage under customary law can be terminated on the occurrence of one or more of the following: adultery by the wife or the taking of a second wife where consent by the first wife(s) is wanting.

³ N.J.J. Olivier et al. (1996) *Indigenous Law* p. 186; Durban. Vide A.N. Allott, (1960) *Essays In African Law*. p.61-64: London p. 145-157.

⁴Barnard A. H., Cronje D.P.S. & Olivier P.J.J. (1992) *South African Law of Persons and Family Law*; Durban: Butterworths.

- 2.7.2 Under customary law, divorce is usually accomplished by an informal procedure. This takes place without intervention from traditional leaders, who are more likely to become involved only if there are issues of contention that cannot be resolved between the families. The families of the two spouses play a pivotal role in mediation and attempt to resolve the marital disputes.
- 2.7.3 To this extent, it is not clear whether adultery must further be introduced as a ground for dissolution and, if so, would it also cover the practice of polygyny by men.

2.8 Polygamous nature

- 2.8.1 Namibian marriage law is still encumbered by the *Hyde v Hyde*⁵ principle, as adopted by the courts in *Ebrahim v Mahomed Essop*, *Ismail v Ismail*⁶ and the Marriage Act of 1961⁷ in which the courts echo monogamy and commitment to a single spouse and reinforce the notion that polygamy is not to be in line with the aspirations of a civilized society.
- 2.8.2 Polygyny may be defined as one man married to more than one wife⁸. All traditional marriages that take place under customary law in Namibia are potentially polygamous⁹. Such arrangements give even less security to the women involved.
- 2.8.3 The law as it is, allows for a spouse to a customary marriage to conclude a subsequent valid marriage at common law, this practice does not render such party to customary marriage liable under the common law crime of bigamy.

⁵1905 T.S. 59. This was a famous US case in which Penzance J made the following famous dictum: '*I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others*'.

⁶1983 (1) SA 1006.

⁷ Act No. 25 of 1961.

⁸ PN Anyolo, "Children in Polygynous Marriages from a Customary Perspective": In *Children's Rights in Namibia*, O.C. Ruppel (Eds) (2009) Macmillan Publishers: Windhoek.

⁹ Becker & Hinz (1995:89).

2.9 Proprietary consequences of customary marriages

- 2.9.1 The matrimonial property consequences of customary marriages are dependent on the rules and procedures as defined by a respective customary (ethnic) group. While anthropological research in northern Namibia indicates that there is a strong inclination towards the regime of out-of-community of property, the default system applicable North of the Red Line, the disparity created by the *Native Administration Proclamation, 1928 (Proc. No. 15 of 1928)* nevertheless calls for the unification of systems between customary marriages and civil marriages.

3. Marital Property

3.1 Matrimonial consequences of common law marriage

- 3.1.1 Namibia has no *default* matrimonial consequence of common law marriage. What has been termed *default* applies to a minority of the population. This is a result of the applicability (of certain surviving provisions) of the *Native Administration Proclamation, 1928 (Proc. No. 15 of 1928)*, which was brought into operation in 1930 by the *Government Notice 165 of 1929*.
- 3.1.2 The Notice excluded Part IV of the *Native Administration Proclamation, 1928*. Certain provisions of the excluded Part IV of the *Native Administration Proclamation, 1928* were later made applicable to Namibia (then the Territory or South West Africa) by *Government Notice 67 of 1954 [Section 17 (6) and Section 18 (3) & (9)]* which was made applicable to only certain parts of the country, including present day Regions of Oshana, Omusati, Oshikoto, Ohangwena, Kavango and Caprivi.
- 3.1.3 What is applicable in the rest of Namibia cannot be termed to be *default* in comparison to what occurs in the above regions by virtue of the *Native Administration Proclamation, 1928*. The very assertion of this *default system* is offensive to the majority of the Namibian population, who are geographically

impacted by section 17(6) of the *Native Administration Proclamation, 1928* and who reside in the above-cited regions.

- 3.1.4 At best, it can be said that there are two default marriage systems affecting marital property: Out of Community of Property for *natives* in the affected areas and In Community of Property for everyone and everywhere else in Namibia.

3.2 Applicable Marriage Systems

- 3.2.1 Effectively, there are 3 marriage systems applicable in Namibia:

- (i) Customary law marriages (less common);
- (ii) North of the Police Zone marriages (Out-of-Community of Property by virtue of the *Native Administration Proclamation, 1928*);¹⁰ and
- (iii) Police Zone marriages/Common law marriages (universal property/community of property).

3.3 Quaere

- 3.3.1 What is the effect of a marriage between a *non-native* and a *native* solemnized in the former Bantustans without a Declaration? Would it entail marriages convened out-of-community of property for the *native* and in-community of property for the *non-native*?

3.4 The Police Zone

- 3.4.1 In the Police Zone, *natives* may marry In Community of Property under the Common law; however, their estates only evolve as if the *native* was European if such *native* was not a party to a customary union. If the deceased *native* was a party to a customary union his/her estate shall dissolve in terms of *native law* and *custom i.e.* customary law.

¹⁰ North of the Police Zone marital property regimes are racially and territorially determined– meaning that, in the affected *Homelands/Bantustans*, the law only applies to *natives*.

3.5 Cases

3.5.1 A profound number of marriages *north of the Police Zone / Red Line* coming to Court have been found to be In Community of Property. The following cases are the leading cases in Namibia on the subject matter concerning marriages solemnized *North of the Police Zone / Red Line*:

3.5.2 *Mofuka v Mofuka* (2003) NR 1 (SC)

While the High Court held that the agreement made and evidenced by the affidavit made by the parties to the effect that they are or intended to be married in community of property is valid between the parties *inter se*. The parties however remain married out of community of property with regards to third parties. The Supreme Court ruled that the respondent failed to prove the presence of such agreement and that the agreement between the parties was made prior to the solemnization of the marriage. A change as to the matrimonial property consequences of a marriage cannot be made after the solemnization of the marriage,¹¹ and the Supreme Court therefore found the affidavit invalid.

3.5.3 *Nakashololo v Nakashololo* (2006) NaHC Case No.: I 543/06

In this case, the High Court held that the parties had been married in community of property and that the declaration need not be done in a prescribed manner, as long as it was done before the solemnization of the marriage.

3.5.4 *Walenga v Walenga* (2011) NaHC 366

Whilst this matter concerned a High Court Rule 43 application for maintenance pending the divorce of the parties, the High Court ruled that the Parties were married in community of property, that the husband should maintain the wife and children, and that maintenance is not confined to a monetary amount. This was the first case of its kind, where the court made such a finding in a Rule 43 application, essentially determining the case.

¹¹*Mofuka v Mofuka* (Supreme Court Judgment) at p.8, Strydom A. C. J cited *Honey v Honey* 1992 (3) SA 609 (WLD) at 611 A-D and *Union Government (Minister of Finance) v Larkan* 1916 AD 212 at 224. The two cases provide, in essence, that in terms of common law, property once excluded cannot be introduced and once introduced cannot be excluded.

3.6 Common law

- 3.6.1 In terms of common law the default matrimonial property regime is universal community of property.¹² Common law marriages in Namibia do not conform to this position as the default system varies with respect to *North of the Police Zone* as per the *Native Administration Proclamation, 1928* and *Government Notice 67 of 1954* titled Application of Certain Provisions in Chapter IV of Proclamation 15 of 1928 to the Area Outside the Police Zone.
- 3.6.2 Whilst there is agreement for the reform of the marriage laws, as they are impacted by the *Native Administration Proclamation, 1928* or differentiated because of it, it is not so clear that there is/was no other South African law applicable (and perhaps gone unnoticed) on the law books on the subject matter, given the full bench ruling of the South African Supreme Court in 1998 in the case of *Kauluma & 2 Others v The Cabinet for the Interim Cabinet for South West Africa & 2 Others*¹³ which ruled that the South African Parliament never ceased being the supreme legislator for South West Africa. For the avoidance of doubt, a wider reform should be conducted.

3.7 The Problem

- 3.7.1 Regrettably, due to the continued existence of the *Native Administration Proclamation, 1928* and the effects thereof, *native* as a legal term still exists in Namibia.
- 3.7.2 *Native* is defined in the *Native Administration Proclamation, 1928* as:
“any person who is a member of any aboriginal race or tribe of Africa: Provided that any person residing in an area defined under paragraph (c) of section 1 of the proclamation, or set aside as a reserve under section 16 of the *Native Administration Proclamation of 1922*, or in any native location,

¹² Cronje, D.S.P. & Heaton, J. (2004) *South African Family Law* 2nd ed. p.89.

¹³ [1988] SA Supreme Court 138 (8 November 1988).

under the same conditions as a native, shall be regarded as a native for the purpose of the Proclamation.”

The definition is identical to the definition contained in other South African legislation¹⁴.

3.7.3 Article 140 (1) of the Namibian Constitution provides that all laws in force immediately before independence shall remain in force until repealed by an Act of Parliament or declared unconstitutional by a competent court. The provision therefore legally sustains the existence of the *Native Administration Proclamation, 1928*.

3.7.4 Article 66 (2) of the Namibian Constitution provides that the application of common law and customary law may be confined to particular parts of Namibia or to particular periods. Therefore the fact that the default system of marriage, Out of Community of Property Common Law marriages, North of the Police Zone, as per the *Native Administration Proclamation, 1928* and the *Government Notice 67 of 1954* may, in this regard, be justified, even if not desirable.

3.8 Grounds for discrimination

3.8.1 It is contended that section 17 (6) of the *Native Administration Proclamation, 1928* is discriminatory, racist and anachronistic as the provisions predispose marriages of ethnic persons (defined by the Proclamation as *natives*) to a legislative regime that discriminates against them on the ground of race. The attack is founded on Article 10 of the Namibian Constitution, which has been interpreted by Strydom CJ in *Muller v President of the Republic of Namibia and Another* 1999 NR 190 (SC) at 199 (2000 (6) BCLR 655 (Nms)) at 664H as follows:

¹⁴Section 1 of Bantu Education Act, 1953 (Act No. 47 of 1953) and the Population Registration Act, 1950 (Act No. 30 of 1950) amongst others.

“The grounds mentioned in Article 10(2) namely sex, race, colour, ethnic origin, religion, creed or social or economic status, are all grounds which, historically, were singled out for discriminatory practices exclusively based on stereotypical application for presumed group or personal characteristics. Once it is determined that a differentiation amounts to discrimination based on one of these grounds, a finding of unconstitutionality must follow.”

3.8.2 The judgment continues at 200 (NR) and 665F - G (BCLR) as follows:

“It seems to me that inherent in the meaning of the word discriminate is an element of unjust or unfair treatment. In South Africa, the Constitution clearly states so by targeting unfair discrimination, and thus makes it clear that it is that particular type of discrimination that may lead to unconstitutionality. Although the Namibian Constitution does not refer to unfair discrimination, I have no doubt that in the context of our Constitution that is also the meaning that should be given to it.”

3.9 The Ante-nuptial Contract

3.9.1 There exists a great deal of confusion and uncertainty in terms of the administrative knowledge of the marital regimes by the marriage officers and by the public at large. The confusion stems from what an Ante-nuptial Contract (ANC) refers to, and when it should be utilized. It is often brought into contention, by what is understood of the marriage declaration, which is signed one month prior to the solemnization of a marriage as a means to confer the marriage In Community of Property against the default regime, as per the *Native Administration Proclamation, 1928*. Actual review of the Marriage Register of the Ministry of Home Affairs and Immigration revealed the following four most common examples of the registration certificates:

- (i) There are incidents of individuals who are registered as married without an ANC and with the required Declaration, resulting in marriages In Community of Property;

- (ii) There are incidents of individuals registered as married without an ANC and without the required Declaration, resulting in a marriage Out of Community of Property as per the Native Administration Proclamation, 1928;
- (iii) There are incidents of individuals whose marriage registration forms made no reference to an ANC and no Declaration is made, thus resulting in a marriage Out of Community of Property; and
- (iv) There are incidents where individuals who are registered are recorded as having made the required Declaration at marriage, and have also indicated the presence of an ANC, thus resulting in a marriage Out of Community of Property.

3.9.2 There is clear confusion as to the distinction between the required declaration and the ante-nuptial contract, as indicated on the marriage register form, and as to its effect. Many people do not know about marital property regimes, at times, it is evident from the marriage register, that not even the marriage officers understand the marital property regimes.

3.9.3 If we break-down the meaning of the Ante-nuptial Contract; '*Ante*' means before and '*nuptial*' means marriage. In terms of the Common Law, and in the context of the said Proclamation, an ante-nuptial contract serves the purpose of excluding universal community of property in the instance where it is a default regime.

3.9.4 The required Declaration is in terms of the said *Native Administration Proclamation, 1928* and was intended to have the effect of evading the default regime of Out of Community of Property (north of the Police Zone). Therefore, individuals who indicated to have been married or registered as married without an ANC intended for the consequence of 'universal community of property', however, in the absence of the required declaration, these parties are married in the default 'Out-of-Community of Property'.

3.9.5 Other parties indicated to have been married or registered with an ANC and with the required Declaration. In those cases, the effect of the ANC would prove futile in the context of the *Native Administration Proclamation, 1928* as property is excluded by default, the Declaration would then mean parties are married 'In Community of Property'. The uncertainty arises in the instance in which a party had intended to exclude property with the ANC, however, based on the misinformed understanding that the default system in the area is already Out of Community of Property, have also made the required Declaration, thereby placing them In Community of Property.

3.10 International Conventions

3.10.1 Namibia is signatory to the United Nations International Convention on the Elimination of all Forms of Racial Discrimination of 1965 since 11 November 1982.¹⁵The entire system as per the *Native Administration Proclamation, 1928* clearly causes confusion and the consequences are prejudicial.

3.11. Administering the Joint Estate

3.11.1 Currently, joint bank accounts are not allowed for married couples in Namibia, despite the fact that there is no law prohibiting this. However, although Namibian based banks raise objections to the idea, other countries such as Kenya, New Zealand and Ireland utilize the system. Moreover, business partners in Namibia support the induction of such a system. Allowing for joint bank accounts could greatly benefit spouses married In Community of Property in the administering of their joint estate.

¹⁵ Mchomba, S. (2009) *The Universality of Human Rights: Challenges for Namibia (Human Rights and the Rule of Law in Namibia)* KAS: Windhoek. NB: Although it has been cited in some articles that Namibia has ratified the International Convention on the Elimination of all forms of Racial Discrimination (CERD) through the UN Committee for Namibia (formed in 1955 to represent the aspirations of the Namibian people at International fora), it is arguable that the UN Committee could have bound Namibia as the Territory was still under the jurisdiction of the Union of South Africa by virtue of the mandate granted under the 1919 Treaty of Versailles. See *Kauluma & 2 Others v The Cabinet for the Interim Cabinet for South West Africa & 2 Others* [1988] ZASCA 138 (8 November 1988).

3.11.2 No resolution has been made as to what will happen to the matrimonial home upon the death of one spouse, either in the old law or the proposed Bill.

3.11.3 There has been no framework established, as of yet, that may determine the effective ways in which to guard against fraudulent transactions, in instances where either spouse becomes insolvent.

3.12 Polygamy

3.12.1 The solution offered for polygamous marriages (to outlaw it) does not settle the problem effectively and it is foreseen that the system may cause hardships in practice.

4. Divorce

4.1 Current Divorce Law

4.1.1 Namibia's current divorce law is based on the Roman Dutch common law, which provides for divorce based on fault.

4.1.2 In order to obtain a divorce, the intending spouse must prove the other spouse's guilt, in terms of known grounds of divorce, namely; adultery or malicious desertion *inter alia*. Where a marriage relationship disintegrates to an extent that no reasonable prospect of restoration can be sought, parties often resort to furnishing their reasons within the known grounds of divorce.

4.2 Current Divorce Process

4.2.1 The current divorce process is both formal and complicated, with the result that a party seeking divorce must invariably do so through a lawyer, mostly at an exorbitant cost. Additionally, matters pertaining to divorce are only heard by the

High Court, based in Windhoek, which results in this forum becoming inaccessible to people living in the outlying areas.

4.3 Current Legislation

4.3.1 Legislation governing divorce, namely; *Divorce Law Amendment Ordinance, 1935*, *Matrimonial Causes Jurisdiction Act, 1939*, *Matrimonial Causes Jurisdiction Act, 1984* and *the Matrimonial Affairs Ordinance, 1955* are out-dated.

4.3.2 Currently, divorce law in Namibia has a strict approach to marital property regime and grants courts sufficient discretionary powers to distribute marital property fairly.

5. Succession

5.1 Current Discriminatory Practices

5.1.1 The estate of a deceased person devolves in terms of different laws, which are as a result of the deceased's *ethnic origin* and *race*. These laws are in violation of Article 10 of the Namibian Constitution, which provides that all persons shall be equal before the law.¹⁶

5.1.2 The estate(s) of *white*¹⁷ people and *coloured* people who die intestate follow a law called the *Intestate Succession Ordinance, 1946*. The Master of the High Court administers their estates.

5.1.3 The estate(s) of *natives*¹⁸ South of the Red Line, married in terms of a civil marriage and who do not have a spouse in terms of customary law, follow the same rules as the estates of *white* people and are administered by the Master of the High Court.

¹⁶ Article 10(1) of the Namibian Constitution.

¹⁷ The definition of *white* was introduced under section 1(xv) of the Population Registration Act, 1950 (Act No. 30 of 1950) which defines a *white person* as:

“a person who in appearance obviously is, or who is generally accepted as a white person, but does not include a person who, although in appearance obviously a white person, is generally accepted as a coloured person.”

5.1.4 The estate(s) of “*native*” people *North of the Red Line*, and those South of the Red Line who have a customary law wife, follow customary law. Magistrates administered these estates before 2005.

5.2 Cases

5.2.1 In the High Court decision of *Else Kavendjaa v Kenneth Koo Kaunozondunge N.O. and Others*,¹⁹ the Notice of Motion sought *inter alia* the following relief:

5.2.1.1 Declaring the provisions of Section 18 of the Native Administration Proclamation, 1928 (Proclamation 15 of 1928) and the Regulations promulgated in terms thereof in Government Notice G.N. 70 of 1954 to be unconstitutional.

5.2.1.2 Declaring the common law rule prohibiting illegitimate children from succeeding to their biological fathers’ estate(s) to be discriminatory and as such unconstitutional.

5.2.2 On the unconstitutionality of s 18 and the regulations made thereunder, Damaseb, JP found it unnecessary to resolve the dispute, and made the following comment:

“As I have shown, this Court already declared ss 18(1), 18(2) and 18(9), and the Regulations made under s 18(a) unconstitutional and gave Parliament time, since extended to December 2005, to rectify the defect found by the Court to exist. In argument, when I heard the present application, Mr. Skickerling submitted as follows in respect of prayer I of the Notice of Motion:

¹⁸ Section 25 of the Native Administration Proclamation, 1928 (Proc. No. 15 of 1928 contains the following definition:

“*native*” shall include any person who is a member of any aboriginal race or tribe of Africa: Provided that any person residing in an area defined under paragraph (c) of section *one* of this Proclamation or set aside as a native reserve under section *sixteen* of the Native Administration Proclamation 1922 (Proclamation No. 11 of 1922), or in any native location, under the same conditions as a native shall be regarded as a native for the purposes of this Proclamation;”

¹⁹ 2005 NR 450 (HC).

[It is respectfully submitted that in the premises [i.e. the fact that the court found the provisions unconstitutional but suspended the operation of unconstitutionality] the relief prayed for by the applicants in paragraph 1 of the Notice of Motion has become purely academic and until such time as parliament has remedied the defect the parties are bound by the provisions of the Proclamation and the Regulations promulgated in terms thereof.] “

5.2.2.1 He thus found that for the purpose of the proceedings before him, the relevant provisions of S18 and the Regulations under it are valid and govern the dispute.

5.2.2.2 On the constitutionality of the common law rule that an illegitimate child cannot inherit from the father, Damaseb JP, held that where an applicant seeks to have a provision of the common law declared unconstitutional, it is essential that all necessary parties who may have an interest in the matter be joined as respondents. In the present case, neither the Attorney-General, other government ministers, nor any other possible interested parties were cited as respondents. For this reason, this part of the application cannot be entertained without the relevant authorities being granted an opportunity to participate in the proceedings.

5.2.3 Although the *Administration Of Estates (Rehoboth Gebiet) Proclamation, 1941 (Proc. No. 36 of 1941)* has been repealed by the *Estates and Succession Amendment Act of 2005*, Schedule 2 of the Proclamation has been reinstated, as far as members of the Rehoboth Baster Community are concerned. This Schedule deals with the rules for intestate succession for the estates of people who are members of the *Rehoboth Baster*²⁰ community. However, the intestate succession

²⁰Section 29 of the proclamation describes a Rehoboth Baster as follows:

“Member of the Rehoboth Bastard Community” shall mean and include any person who, by reason of his birth or parentage. Possesses full burgher rights in the Gebiet under the laws and Constitution of the Rehoboth Bastard Community. Or any non-European person whose application to be accepted as a burgher of the Gebiet has been approved in accordance with the laws and constitution of the Rehoboth Bastard Community, or the wife of any born or accepted burgher, or any legitimate child of any parents both of whom are members of the Rehoboth Bastard Community as aforesaid, or any illegitimate child whose mother is a member of the Rehoboth Bastard Community as aforesaid.”

rules will apply to a Rehoboth Baster whether he/she is resident in the district of Rehoboth or not.

5.2.4 In, *Berendt and Another v Stuurman and Others*,²¹ Manyarara AJ made an order in the following terms:

“1.) Sections 18(1), 18(2) and 18(9) of the Native Administration Proclamation No. 15 of 1928 (the proclamation), and the regulations made under section 18(9) thereof, are declared to be in conflict with the Constitution of Namibia. Parliament is required to remedy the defect by 30th June 2005.

2.) Until the defect is remedied or until the expiry of the time set by this Order, whichever be the shorter, ss 18(1) and 18(2) of the Proclamation and the regulations made under s18(9) of the Proclamation shall be deemed valid.”

5.2.5 In *Government of the Republic of Namibia v The Master of the High Court & 3 Others*²² on application by the State to extend the order granted by Manyarara AJ in the *Berendt* matter *supra*, Heathcote AJ made the following order:

“1. That the applicant's inability to comply with the deadline set by this court is hereby condoned.

2. That the time limit set by this Honourable Court is hereby extended to 30th December 2005.”

5.2.5 *The Succession and Estates Amendment Act, 2005* (Act No. 15 of 2005) was enacted to curtail the discriminatory provisions of the *Native Administration Proclamation, 1928*. There is, however, a need to reform the system further.

5.3 Persisting Issues

5.3.1 Some of the issues that still persist include:

²¹2003 NR 81 HC.

²² Unreported Case No 105/2003.

5.3.2 Land Grabbing

5.3.2.1 "Grabbing" poses a serious problem. This practice has resulted in situations where many widows are denied access to the property of their late husbands. In terms of this practice, which is often justified in terms of customary laws, the relatives of a deceased will take all the assets, which belonged to the deceased person and his spouse.

5.3.3 Conflict of Laws

5.3.3.1 The conflicting positions between customary law based rules of intestate succession, on the one hand, and the common law based rules of succession, on the other, has led to unconstitutional aspects of the law on inheritance.

5.3.3.2 Deceased's spouse and children are not always provided for in some way and where the deceased was a man in a polygamous marriage, who died intestate, all of the wives do not necessarily share in the estate. A problem that will be encountered is the fact that Customary Laws of the various tribes have not been codified or ascertained with the result that it is seldom certain which rules must be applied.²³

5.3.3.3 *Quaere*

5.3.3.3.1 To the extent that the deceased's parents are from different ethnic groups, which laws must be applied?

5.3.4 Levirate/ Sororate Union

5.3.4.1 Currently it is not a criminal offence for a person to coerce the surviving spouse of a deceased person to enter a levirate or sororate union against that spouse's

²³ The LRDC is in the process of embarking on a project to ascertain the customary laws of all the recognized Traditional Authorities in Namibia.

will. This poses a serious problem as it violates Article 14 (1) and (2) of the Namibian Constitution which provides that:

“(1) Men and women of “*full age*”, without any limitation due to race, colour, ethnic origin, nationality, religion, creed or social or economic status shall have the right to marry and to found a family. They shall be entitled to “*equal rights as to marriage, during marriage and at its dissolution*”.

(2) Marriage shall be entered into only with the “*free and full consent of the intending spouses.*”²⁴

5.4 Retrospective Application

5.4.1 The new legislation may cause more harm than good if it does not clearly establish how it should be applied retrospectively, in terms of civil and customary marriages entered prior to its enactment, if at all.

5.5 Adoption

5.5.1 Is provided for by the *Children's Act, 1960 (Act No. 33 of 1960)* vide section 74 thereof.

5.5.2 *Quaere*: Can A, who was adopted by B who was adopted by C, inherit from C?

5.5.3 The problem is the interpretation of the word “*relative*” in section 74(2)(b) of the *Children's Act, 1960*. The Afrikaans text, that was signed, uses the words “bloedverwant” (“blood-relative”). To date there has been no clear decision by any Court on this point, although, it would appear, based on the interpretation of the text, that the courts will apparently favour the position that A would be incapable of inheriting from C.

²⁴ The italics in the text are not from the Namibian Constitution and are utilized to clarify the point being made in paragraph 5.3.4.1.

6. Conflict of Laws: Family Law in Namibia

6.1 Matrimonial Domicile

6.1.1 The matrimonial domicile determines the patrimonial consequences of a marriage under Private International Law. The matrimonial domicile is the domicile of the parties at the date of the marriage. If the husband and wife have different domiciles at the date of the marriage, then the matrimonial domicile will be that of the husband. This means that if a Namibian woman domiciled in Namibia, and a Namibian man who is domiciled in Spain gets married in Namibia, the matrimonial property regime will be determined by the law of Spain, as being the domicile of the husband.

6.1.2 Matrimonial domicile, and the immutability thereof, can have adverse disadvantages for women and this is despite the fact that the wife's domicile of dependence has been abolished by section 12 of the *Married Persons Equality Act, 1996 (Act No. 1 of 1996)* and Article 10 of the Namibian Constitution, which provides for equality between men and women.

6.2. Implications of the SWAPO Family Act²⁵

6.2.1 Implications of the SWAPO Family Act with regards to Marriage in Namibia.

6.2.1.1 The *Recognition of Certain Marriages Act, 1991 (Act No. 18 of 1991)* provides for the recognition of marriages solemnized in terms of the *SWAPO Family Act, 1977*. The recognition of the *Family Act, 1977* and marriages there under may, however, present problems for matrimonial property regimes in Namibia.

6.2.1.2 In the High Court decision of *Tulihongeni Tuyenekelao Amadhila (Born Shiluwa) v Matti Amadhila*,²⁶ whilst still in exile during 1989, the plaintiff and the defendant

²⁵ Swapo Family Act, 1977. It has been questioned whether indeed the "SWAPO Family Act" can be called an Act in the strict sense of the word considering it was not promulgated by a legislative body as existing at the time.

²⁶ 1996 NAHC 34.

married one another at Lubango, in the Republic of Angola. The marriage was contracted in accordance with the provisions of the SWAPO Family Act, 1977. It is this marriage which the plaintiff sought to dissolve.

6.2.1.3 In describing the SWAPO Family Act, the Court states that:

“The SWAPO Family Act, approved by the Central Committee of the South West Africa People's Organisation of Namibia, was promulgated by the SWAPO Government in exile on 1 December 1977. It is premised on the fundamental principle of equality of men and women and was conceived to, amongst others, regulate the family relations of the many thousands of Namibians who had left their country to participate in the struggle for independence. It deals, inter alia, with the contraction, institution and dissolution of marriage, the matrimonial property consequences thereof and the legal relationship between parents and children.”²⁷

6.2.1.4 The Court noted that when Namibia became independent on 21 March 1990, the SWAPO Family Act, 1977 (hereinafter referred to as the "*Family Act*") was not amongst those pre-independence laws which were kept in force by Article 140(1) of the Namibian Constitution. It thus became necessary for Parliament to recognise and regulate the status of those marriages and to provide for matters incidental to the dissolution thereof. On 11 December 1990 the Recognition of Certain Marriages Act, 1991 was promulgated. Section 2 thereof provides as follows:

"(1) Subject to the provisions of this section, every marriage which was contracted outside Namibia by a competent authority as contemplated in the Family Act -

3. before 21 March 1990;

4. in accordance with the provisions of the Family Act, shall be recognized, from the date it was contracted, as a marriage which has the status in law equal to that of a marriage contracted by a marriage officer as defined in the Marriage Act, 1961 (Act 25 of 1961), as if it had been contracted in accordance with the provisions of that Act.

(2)

²⁷ At page 3

(3) (a) Notwithstanding the provisions of any law or the common law, the rights and obligations relating to the matrimonial property of the spouses of a marriage recognized by subsection (1) or in the case of the dissolution of such marriage, shall be governed by the provisions of the Family Act.

(b) For the purposes of paragraph (a), any reference in the Family Act to the agency competent for matrimonial and family affairs shall be deemed to be a reference to the High Court of Namibia.

(4) Save as is otherwise provided in this Act, any marriage recognized by subsection (1) shall, from the date of commencement of this Act, for all purposes, be governed by the laws relating to marriages in Namibia."

6.2.1.5 With the exception of the rights and obligations of the spouses in relation to the matrimonial property (both during the subsistence of the marriage and on dissolution thereof), the status of all marriages contracted outside Namibia prior to the date of independence in accordance with the provisions of the Family Act, are in all respects the same as those marriages contracted in terms of the Marriages Act, 1961. It follows that, notwithstanding the wide ranging grounds for dissolution of a marriage provided for in Articles²⁸ 55 to 63 of the Family Act (some of them rather progressive but alien to our common law), the grounds on which one or both partners in such a marital relationship can sue for divorce are the same as those applicable to common law marriages.

6.2.1.6 In the matter before the Court the defendant was ordered to restore conjugal rights to the plaintiff and that the joint estate of the parties should not be divided in terms of Articles 53 and 54 of the SWAPO Family Act, 1977²⁹

6.2.1.7 In terms of Article 47 of the *SWAPO Family Act, 1977*:

²⁸ The Swapo Family Act, 1977 expressly refers to its sections as Articles.

²⁹ At page 8

“The property which has belonged to either spouse at the time of marriage shall remain his/her own and he/she shall retain the right to manage it and dispose of it independently.”

6.2.1.8 In this regard then, the provision creates an Out of Community regime for couples married under the *SWAPO Family Act, 1977*. Bearing in mind the provisions of Article 47 of the *SWAPO Family Act*, Article 48 states that the property acquired by the spouses through work in the course of marriage shall be their joint property. This, in effect, creates an Out of Community of property regime with an accrual system.

Quaere

6.2.1.9 What matrimonial property regime will apply to a marriage that is solemnized in another country (for example, Zambia) registered under the *SWAPO Family Act, 1977* and is further registered in Namibia (for example, Oshakati) upon the couples return from exile? [NB: Oshakati marriages are by default Out of Community of Property]

6.2.1.10 It is a foregoing fact that many Namibians during the time of the liberation struggle sought refuge in countries, which were politically friendly towards Namibia, namely: Cuba, Zambia, the former USSR and Angola, to mention but a few. It was common that some refugees either convened, or at least celebrated, their marriages in those countries. It is further recorded that, subsequent to their repatriation to Namibia, some of those individuals married under the *SWAPO Family Act, 1977* further registered their marriages in Namibia, either South or North of the *Red Line*. Uncertainties have subsequently arisen, with regard to which matrimonial regime applies in such cases:

- (i) Would it be subject to section 17(6) of the *Native Administration Proclamation 15 of 1928*, which designates the region North of the Police Zone as enacting the default marital regime being convened

Out of Community of Property for those who fled into exile but were resident North of the Red Line?

- (ii) Would it retain the marriage regime as prescribed by the *SWAPO Family Act, 1977* as per Article 47?
- (iii) Would it be applicable to apply the trite principles of Private International Law, which provide that the applicable law is the *lex domicilii matrimonii*?
- (iv) Is it an inter-play of theories of law such as the doctrine of dual domicile?
- (v) Is it the so-called '*default universal community of property*'? or
- (vi) Is it the domicile of the husband whose law should apply?

Quaere

6.2.1.11 If it should be (vi) above, where would the domicile be in the instance of returnees (including high profile returnees) living in the former Police Zone and have residences (and are village headmen even) in the areas North of the Police Zone and may or may not have registered their marriages North of the Police Zone upon their return?

6.2.2 Implications of the SWAPO Family Act with regards to Divorce in Namibia

6.2.2.1 *The Recognition of Certain Marriages Act, 1991 (Act No. 18 of 1991)* provides for the recognition of marriages under the *SWAPO Family Act, 1977*. The recognition of the *Family Act, 1977* and marriages there under, however, presents problems with regard to grounds for divorce in Namibia.

6.2.2.2 In summation, the grounds of divorce under the *SWAPO Family Act, 1977* include:

- (i) Marriage shall be dissolved by divorce only in socially justifiable cases and on statutory grounds.³⁰
- (ii) Either spouse may seek the divorce if the marital relations have deteriorated to the extent of making their matrimonial union completely and lastingly intolerable and if there are irreconcilable differences.³¹ In divorce proceedings, causes of the breakdown of marriage shall be established and stated in the decree of divorce.
- (iii) Either spouse may seek the divorce on the grounds of adultery committed by the other spouse. Rights to seek the divorce shall expire in this case one year after the adultery has been discovered.³²
- (iv) A spouse whose life has been endangered by the other spouse may seek the divorce. Divorce may be sought even when the other spouse has only been aware that a third party has been endangering the life of his/her spouse and has omitted to protect or inform the latter.³³
- (v) Either spouse may seek the divorce if the other spouse has been convicted of a crime against the Namibian People's Revolution or some other dishonorable act.³⁴
- (vi) Either spouse deserted by the other spouse without justified grounds may seek the divorce one year after the desertion thereby. The spouse deserting the other spouse may also seek the divorce three years after the desertion thereof or if he/she has established a

³⁰ *Vide* Article 57. What is socially justifiable however is not defined and may prove difficult to define.

³¹ *Vide* Article 58. Irretrievable breakdown is not yet a ground for divorce under Namibian Law.

³² *Vide* Article 59. This prescription is alien to our law.

³³ *Vide* Article 60. Does this include reckless driving?

³⁴ *Vide* Article 61. Assuming that the revolution continues (through the slogan *Aluta Continua!*), what are these crimes? Is imprisonment under SWAPO in the refugee camps a ground for divorce?

factual matrimonial union with another person, or if he/she intends to marry.³⁵

6.2.3 Current Position

6.2.3.1 A total of four grounds for divorce exist in Namibia (with the exclusion of customary law grounds), set forth in Roman-Dutch common law, and the *Divorce Laws Amendment Ordinance 18 of 1935*.

6.3.2.2 They include: (1) adultery; (2) malicious desertion; (3) the imprisonment for at least five years of a spouse who has been declared a habitual criminal; or (4) the incurable insanity of a spouse which has lasted for at least seven years.

6.3.2.3 These grounds (with the exception of incurable insanity) are based on the principle of fault – the idea that one spouse must be guilty of committing some type of wrong against the other spouse.

6.2.3.4 Adultery occurs when one spouse has voluntary sexual intercourse with a person other than the other spouse in the marriage in question. The common law defences to a divorce case, based on adultery, include condonation (forgiveness in full knowledge of the misconduct), connivance (anticipatory consent to future misconduct), and collusion (where the parties act in agreement). Other excuses, such as seduction by a third party, or long absence by the other spouse, do not constitute legal defences to adultery. It is possible for the “innocent” spouse to bring a civil case against the third party for damages based on loss of consortium (the marital relationship), and this is occasionally still done in Namibia.³⁶

6.2.3.5 There are four forms of malicious desertion:

³⁵ Article 62.

³⁶ *Vide Burger v Burger & another (I 3742/2010) [2012] NAHCMD 15 (10 October 2012)* in which Acting Judge Miller ordered that the defendant (3rd party) was to pay damages in the amount of N\$10 000 (ten thousand Namibian dollars) to the plaintiff (the husband) based on the loss of consortium.

- (1) Actual or physical desertion occurs when one spouse leaves the other without good cause, and with the intention to end the marriage relationship;
- (2) Constructive desertion occurs when one spouse, without good reason, and with the intention to end the marriage relationship, forces the other spouse to leave; for example, by making life dangerous or unbearable for him or her. Thus, domestic violence could create a form of constructive desertion;
- (3) Malicious desertion also includes the situation where one spouse continually refuses to have sex with the other spouse without good reason; and
- (4) Life imprisonment is sometimes referred to as a variant of malicious desertion, and sometimes referred to as an independent common-law basis for divorce. The defences to a claim of malicious desertion include condonation, collusion, consent, justification and resumption of cohabitation.

6.2.3.6 In a case based on habitual criminality, the defendant must have been declared a habitual criminal in terms of the *Criminal Procedure and Evidence Act, 1917* [as applied to “South West Africa” by the *Criminal Procedure and Evidence Proclamation, 1919 (Proc. No. 20 of 1919)*] and must have been imprisoned for at least five years after this declaration. The Court may, however, refuse to grant a divorce on this ground “if it is satisfied that the plaintiff voluntarily assisted the defendant in the commission of any crime of which he or she has been convicted.”

6.2.4 Quaere

6.2.4.1 What is the cause and effect of the grounds for divorce, as provided for under the *SWAPO Family Act, 1977*, but not under common law or the *Divorce Laws*

Amendment Ordinance 18 of 1935, if a spouse was convicted for a crime against the Namibian People's Revolution?

6.2.4.2 Only two grounds exist, namely; adultery and malicious desertion, under Roman-Dutch common law. The other two (imprisonment of a spouse for at least five years who has been declared a habitual criminal, and the incurable insanity of a spouse which has lasted for at least seven years) were added by the *Divorce Laws Amendment Ordinance, 1935 (Ord. No. 18 of 1935)*, in an effort to mitigate some of the hardships of the narrowly defined common-law grounds.

6.2.4.3 Unlike the law of most countries today, Namibian law does not allow a divorce to be granted simply because the couple's marriage has irretrievably broken down; however a peculiar situation is created by the *SWAPO Family Act, 1977* in that more grounds are created, including divorce on the ground that marital relations have deteriorated to such an extent making the matrimonial union completely and lastingly intolerable for persons married under the said Act.

7. Conclusion

7.1 Law reform is not an easy task. Those individuals tasked with the duty to reform the law must be consciously aware of the continual interplay of the plurality of legal codes. Family law is very much living law and at the core of our society, thus, reforms always touch on delicate arrangements in the community. It is therefore relevant that law reform adopts "a human-centred, participatory, bottom-up approach in African laws, based on trial and error, not on prescribed blueprints imported from abroad."³⁷

7.2 Widespread law reform is vital in some instances, particularly where far-reaching inconsistencies are encountered, nonetheless; a compromise is necessary to find equilibrium between different systems of law. Further sensitization of members of

³⁷Menski C. F. W. (2006) *Comparative Law in a Global Context. Legal Systems of Asia and Africa*. 2nd ed. Cambridge: Cambridge University Press: 492. Cited in Hinz M O & Maupare C. (2009) *Legal Pluralism and the Apartheid Past: Challenges to Namibian Family Law Reform and Development*. International Survey of Family Law.2009 Edition. Bill Artikin (Ed).

the community is imperative to achieve widespread implementation and acceptance of any new legislation.

- 7.3 This paper intended to lay out all the considerations lucidly for the policy makers and for members of society to consider as the process of reform commences.

Reference List:

List of Statutes

1. Age of Majority Act, 1972 (Act No. 57 of 1972)
2. Bantu Education Act, 1953 (Act No. 47 of 1953)
3. Children's Act, 1960 (Act No. 33 of 1960)
4. Criminal Procedure and Evidence Act, 1917 (Act No. 31 of 1917)
5. Criminal Procedure and Evidence Proclamation, 1919 (No. 20 of 1919)
6. Divorce Laws Amendment Ordinance, 1935 (No.18 of 1935)
7. Estates and Succession Amendment Act, 2005 (Act No. 15 of 2005)
8. Government Notice, 1954 (No. 67 of 1954)
9. Intestate Succession Ordinance, 1946 (No. 12 of 1946)
10. Marriages Act, 1961 (Act No. 25 of 1961)
11. Married Persons Equality Act, 1996 (Act No. 1 of 1996)
12. Native Administration Proclamation, 1928 (No. 15 of 1928)
13. Population Registration Act, 1950 (Act No. 30 of 1950)
14. Recognition of Certain Marriages Act, 1991 (Act No. 18 of 1991)
15. SWAPO Family Act, 1977

List of Cases

1. Berendt and Another v Stuurman and Others 2003 NR 81 HC
2. Burger v Burger & another (I 3742/2010) [2012] NAHCMD 15 (10 October 2012)
3. Ebrahim v Mahomed Essop 1904 T.S. 59
4. Else Kavendjaa v Kenneth Koo Kaunozondunge N.O. 2005 NR 450 (HC)
5. Government of the Republic of Namibia v The Master of the High Court & 3 Others Unreported Case No 105/2003
6. Ismail v Ismail 1983 (1) SA 1006
7. Kauluma & 2 Others v The Cabinet for the Interim Cabinet for South West Africa & 2 Others [1988] ZASCA 138 (8 November 1988)
8. Mofuka v Mofuka 2003 NR 1 (SC)

9. Muller v President of the Republic of Namibia and Another 1999 NR 190 (SC)/ [2000] (6) BCLR 655 (Nms)
10. Nakashololo v Nakashololo 2006 NaHC Case No.: I 543/06
11. TuliHongeni Tuyenekelao Amadhila (Born Shiluwa) v Matti Amadhila 1996 NAHC 34
12. Walenga v Walenga [2011] NAHC 366

Legal Literature

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3. Becker, H & Hinz, M.O (1995) Integrated Report on *Marriage and Customary Law*. CASS: Windhoek
4. Cronje, DSP & Heaton, J 2nd ed. (2004) *South African Family Law*. LexisNexis: Durban
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6. Mchomba, S. (2009) *The Universality of Human Rights: Challenges for Namibia* (Human Rights and the Rule of Law in Namibia) Konrad Adenauer Stiftung: Windhoek
7. Olivier, N.J. J. et al., (1996) *Indigenous Law*. Durban

CLOSING SPEECH AT THE FAMILY LAW WORKSHOP
BY THE MINISTER OF HOME AFFAIRS & IMMIGRATION

Hon, Mrs Rosalia Nghidinwa, MP

July 26, 2012

Honourable Minister of Gender Equality & Child Welfare, Mrs. Doreen Sioka,

Honourable Deputy Ministers and Special Advisors,

Honourable Chairperson, Mr Sakeus Shanghala, Commissioners and Secretary to the Law Reform and Development Commission,

Distinguished Permanent Secretaries,

Honorable Traditional Leaders, Elenga Elifas, Chief !Gaseb and Elenga Kamanya,

Invited Guests, Ladies and Gentlemen,

All protocols observed.

Good Afternoon,

On behalf of the Honourable Minister of Justice, Mrs Pendukeni Iivula-Ithana, I wish to impart a few concluding remarks as a means to acknowledge the salient issues and conclusions that have been availed during this week's consultation.

I must first begin by extending my sincere appreciation for the time you have all taken to be with us this week, including those that have already left to attend to other matters. I am aware that we all have busy schedules, and your commitment to being here for this week reflects a positive dedication, and commitment to the improvement and more equitable dispensation of the law.

Moreover, I would like to thank you all for devoting your energy and expertise in the deliberation and development of the recommendations brought forward this week.

The multitude of customs in Namibia makes it difficult to provide laws that are inclusive and respectful to all customs and traditions, while also remaining in tune with modern, secular and international practices. Although at times, the debate may have felt

intransigent, it must be remembered that it is only through such vigorous debate, that we may reform old laws, or introduce new one's that are inclusive and well-adjusted. We must remember that as we sit here together, we are friends, we are comrades and we are countrymen and women.

I would further like to extend my gratitude to the hard work and dedication exemplified by the students with us this week. On behalf of all of us, I thank you for your presentations and the concise summation of the Reports. It fills me with pride to see the young faces of those who will be guiding and protecting the dignity of our laws in the years to come.

The Reports that were introduced to us this week present interrelating and complicated matters. They also present matters that, to some degree, affect us all. With this in mind, it is important that we move forward from this Workshop in earnest, and ensure that every effort has been harnessed to guarantee the successful implementation of the recommendations espoused this week. It is from within our individual capacities, but with a joint purpose in mind, that we can all be part of the positive development of our legal system.

Therefore I look forward to further consulting with my colleagues, the Minister of Justice and the Minister of Gender Equality and Child Welfare, so that we may facilitate the implementation of the recommendations, and consider further consultations as suggested with the traditional authorities of Namibia.

I wish you all a safe journey to your respective homes, and I thank you again for your participation.

Annexure A:

STATISTICAL ANALYSIS³⁸

ON THE RATE OF MARRIAGES CONVENED IN- OR OUT OF COMMUNITY OF PROPERTY IN OWAMBOLAND³⁹ DURING 1990; 2000 AND 2010

- 1.1 The following tables, graphs and charts represent the figures obtained from the records of marriage registers held at the Ministry of Home Affairs and Immigration. The figures present an abridged impression of the ratio of marital regimes, across the decades, prevailing after independence.
- 1.2 The majority of the records reflect confusions regarding the status of the matrimonial property systems. The two most predominant misunderstandings involved; firstly, the instance in which the registration certificate indicated marriage “*without*” ANC, however, the requisite declaration was not provided. This would result in the marriage remaining within the default system, meaning a marriage convened out-of-community of property.
- 1.3 The second misunderstanding included the instance in which the registration certificate indicated marriage “*with*” an ante-nuptial-contract (ANC) as well as with a declaration. This would indicate a general confusion with the meaning of an ANC. As they had the requisite declaration, it would result in the deviation from the default system, as the marriage would be convened in-community of property.
- 1.4 These confusions are indicative of a lack of administrative knowledge of the marital regimes among the marriage officers and by the public at large.
- 1.5 The Ante-nuptial Contract, [*‘Ante’* means before and *‘nuptial’* means marriage] in terms of the Common law, serves the purpose of excluding universal community of property in the instance where it is the default regime. In terms of the said *Native Administration Proclamation, 1928*, the required declaration, signed one month prior to the solemnization of a marriage by a marriage officer, serves the purpose of evading the default regime, which was Out-of-Community of Property north of the Police Zone.

³⁸ Caveat: The data depicted in the tables, graphs and charts presents cursory information gathered from a single source and gathered across ten-year intervals. There is no supplementary information indicating indices that would alter the results and our profundity thereof.

³⁹ The term “Ovamboland refers to the area defined under regulation 1 of Proclamation No. 27 of 1929 of the Territory of South West Africa, and, as referred to under Section 2 (f) of the Development of Self-Government for Native Nations in South West Africa Act, 1968 (Act No. 54 of 1968). This is the area affected by the Native Administration Proclamation, 1928 in its reference to North of the Red Line.

TABLE 1: FIGURES FROM YEAR 1990 RECORDS

1990				
IN	OUT	OUT (WITHOUT ANC AND WITHOUT DECLARATIO N)	IN (WITH ANC AND WITH DECLARATI ON)	TOTAL
JANUARY				
78	6	3	31	118
FEBRUARY				
42	5	2	16	65
MARCH				
-	-	-	-	-
APRIL				
25	4	2	16	47
MAY				
22	2	2	17	43
JUNE				
54	4	3	18	79
JULY				
50	11	9	41	111
AUGUST				
35	1	8	21	65
SEPTEMBER				
61	3	11	35	110
OCTOBER				
-	-	-	-	-
NOVEMBER				
33	2	8	16	59
DECEMBER				
268	30	25	80	403
TOTAL				
668	68	73	291	1100

* The data for the months of March and October were unavailable from Home Affairs at time of compilation.

1.6 The majority, 87%, of marriages registered in 1990 were convened In Community of Property. However, 26% of the registration forms indicated “with ANC” as well as having the requisite Declaration attached. This indicates a misunderstanding of the meaning of ANC. It may have been possible that those signing the form may have assumed the ANC to mean the Declaration, in which case they signed the form “with ANC”. However, we do not have ancillary information that would corroborate this notion.

1.7 We consulted with a number of churches to determine the reason for the high rate of marriages convened in-community of property during the 1990s. Bishop

Shanghala⁴⁰ telephonically explained that before the application of the *Native Administration Proclamation, 1927* and that of *1928*, individuals who married in the Lutheran Church were married In Community of Property. Upon the adoption of the *1927 Proclamation* and later the *1928 Proclamation* the parties were asked which regime they wished to adopt or marry under. According to the Lutheran Bishop, the adoption and application of the *1928 Proclamation* led to confusion and hence most people who married after independence found themselves in a dilemma regarding the marital property regimes.

⁴⁰ In a telephonic interview on Friday, 13th July 2012 at 16:42

GRAPH 1: MARRIAGES IN- OR OUT-OF-COMMUNITY OF PROPERTY IN 1990

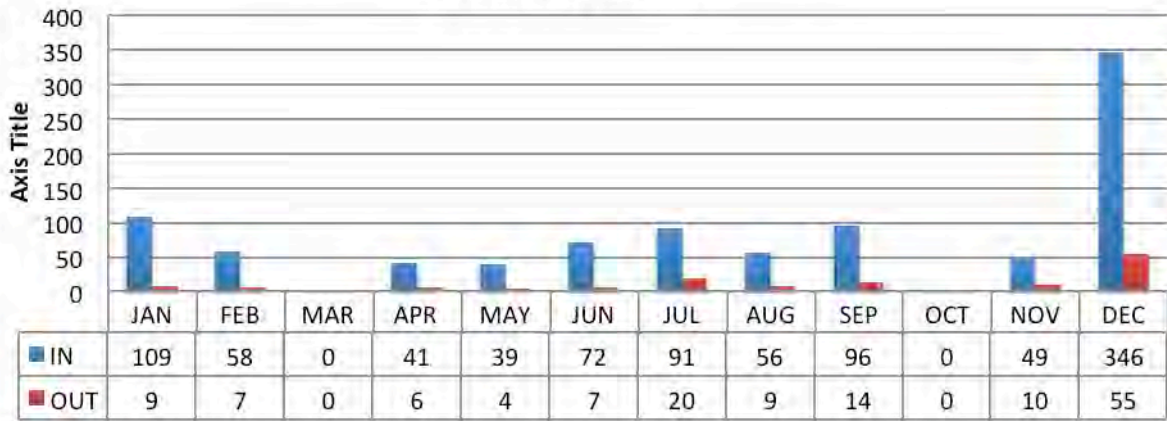


CHART 1: PERCENTAGE PER ANNUM (1990)

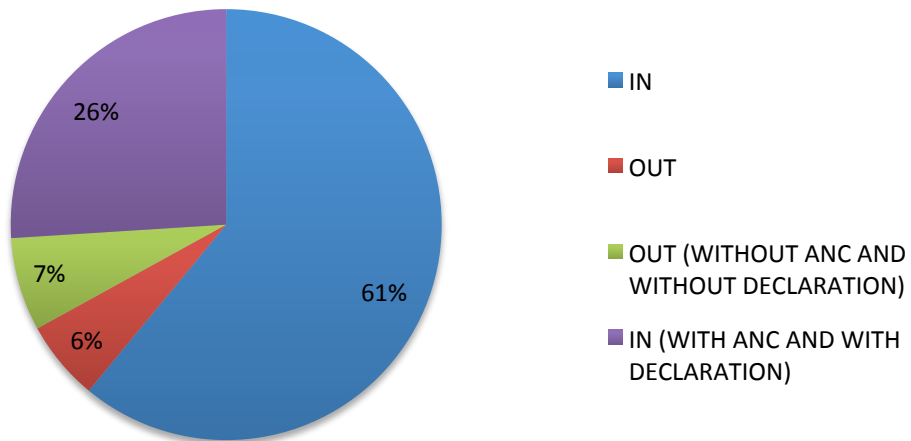


TABLE 2: FIGURES FROM YEAR 2000 RECORDS

2000				
IN	OUT	OUT (WITHOUT ANC AND WITHOUT DECLARATION)	IN (WITH ANC AND WITH DECLARATION)	TOTAL
JANUARY				
57	0	75	0	132
FEBRUARY				
43	0	26	0	69
MARCH				
49	0	26	0	75
APRIL				
59	0	64	1	124
MAY				
88	0	80	0	168
JUNE				
66	0	51	0	117
JULY				
47	0	42	0	89
AUGUST				
81	0	97	0	178
SEPTEMBER				
92	0	98	0	190
OCTOBER				
92	0	124	0	216
NOVEMBER				
93	0	159	0	252
DECEMBER				
124	0	529	0	653
TOTAL				
891	0	1371	1	2263

- 1.8 The table, graph and chart for the year 2000 again indicates a clear confusion to the distinction between the required declaration and the ante-nuptial contract. The fact that 61% of people signed “*without ANC*” and without the requisite declaration indicates a grave procedural misunderstanding. It is unclear whether they intended to indicate their marriage In Community (without ANC) or Out of Community (without ANC meaning without the declaration, and therefore intending to be Out of Community).

GRAPH 2: MARRIAGES IN- OR OUT-OF-COMMUNITY OF PROPERTY IN 2000

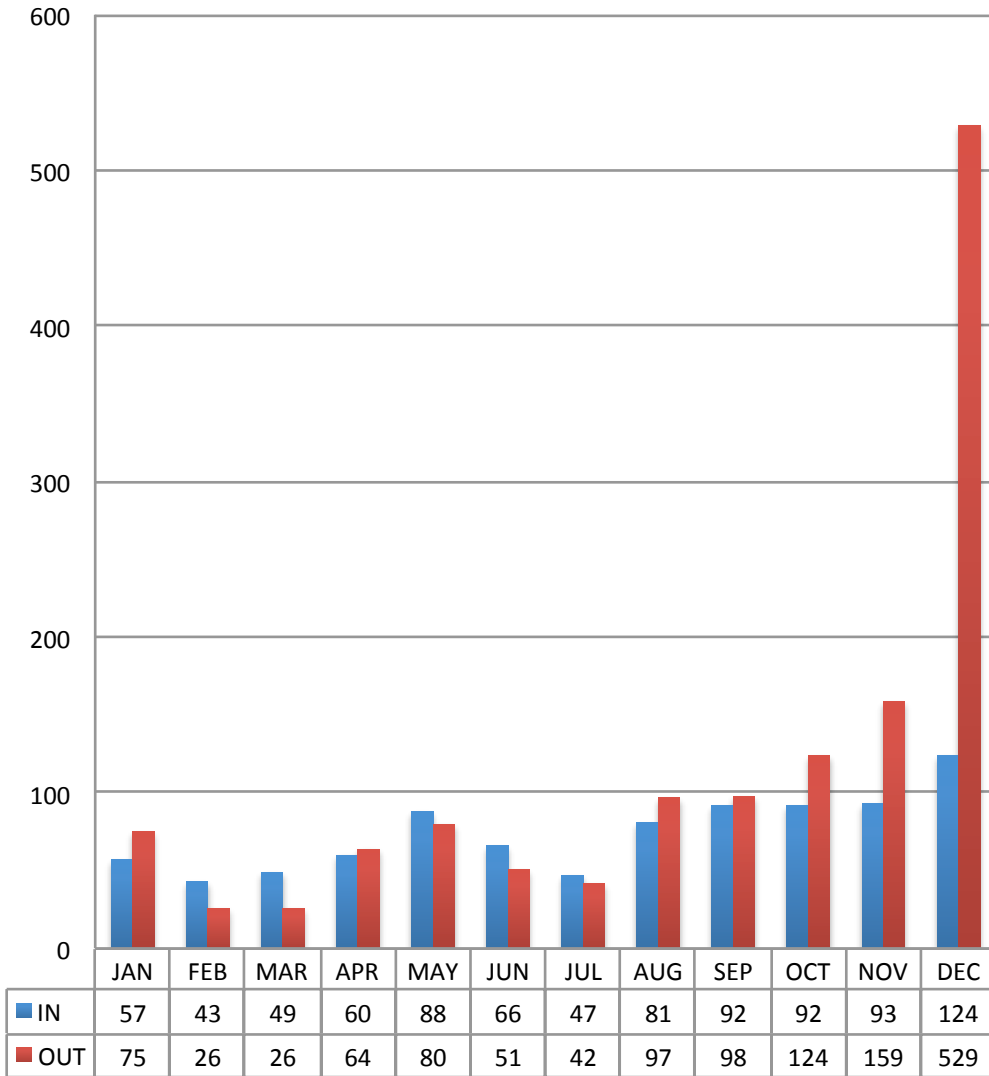


CHART 2: PERCENTAGE PER ANNUM (2000)

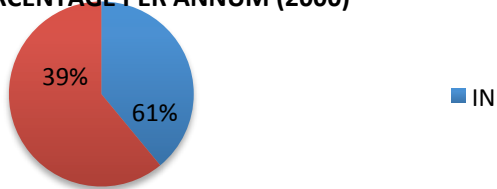


TABLE 3: FIGURES FROM YEAR 2010 RECORDS

2010				
IN	OUT	OUT (WITHOUT ANC AND WITHOUT DECLARATION)	IN (WITH ANC AND WITH DECLARATION)	TOTAL
JANUARY				
63	0	27	0	90
FEBRUARY				
34	0	10	0	44
MARCH				
37	1	10	0	48
APRIL				
49	1	14	0	64
MAY				
104	1	75	0	180
JUNE				
35	0	20	0	55
JULY				
48	1	15	0	64
AUGUST				
223	4	116	0	343
SEPTEMBER				
153	7	75	0	235
OCTOBER				
108	1	47	0	156
NOVEMBER				
79	0	22	0	101
DECEMBER				
646	9	339	0	994
TOTAL				
1579	25	770	0	2374

- 1.9 Again, we see that the lack of administrative knowledge and procedure for filling out the register forms was not improved upon in 2010. The same uncertainty remains, in terms of those who signed the form “*without ANC*” and without the requisite declaration.

GRAPH 3: MARRIAGES IN- OR OUT-OF-COMMUNITY OF PROPERTY IN 2010

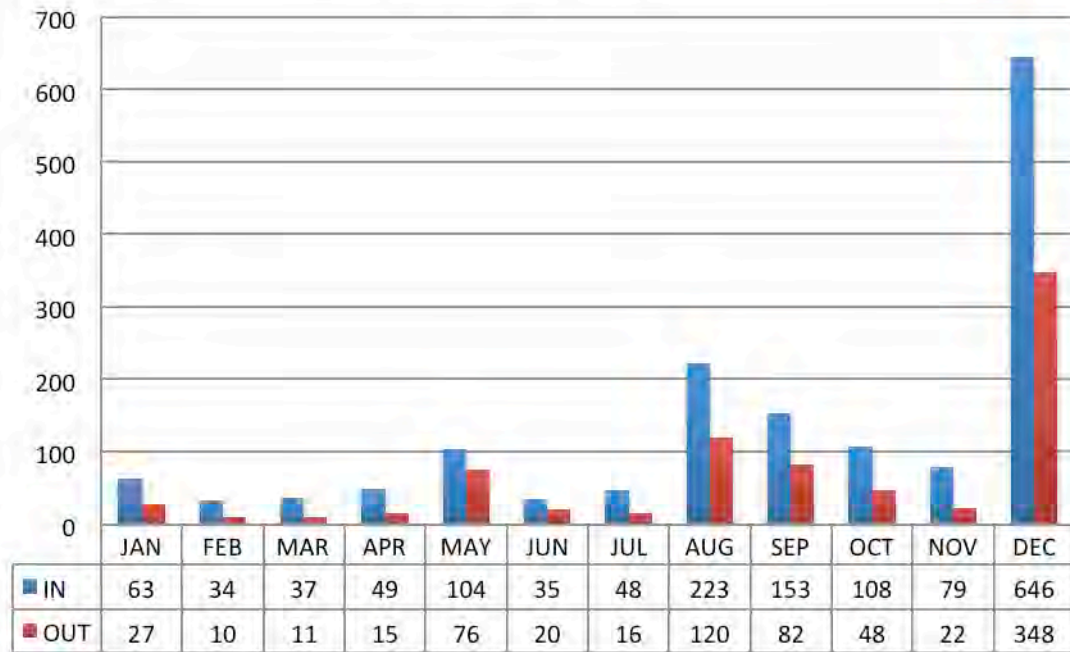
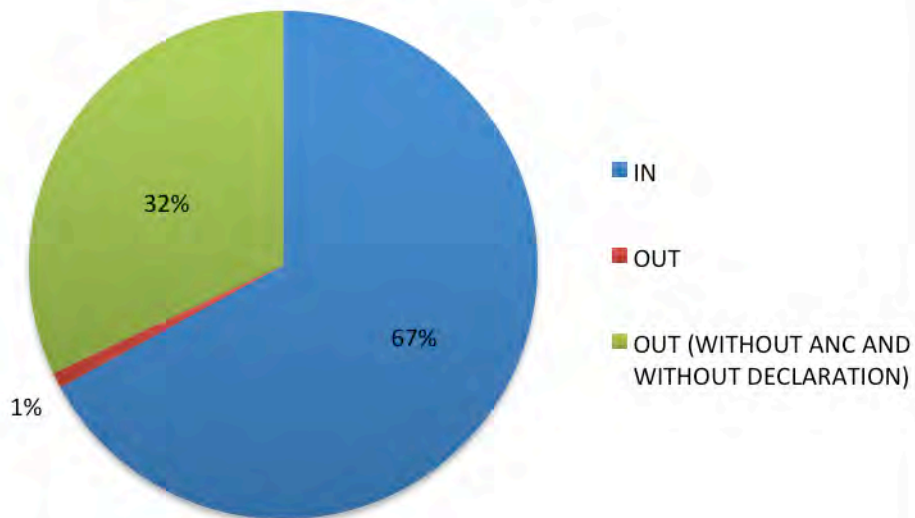
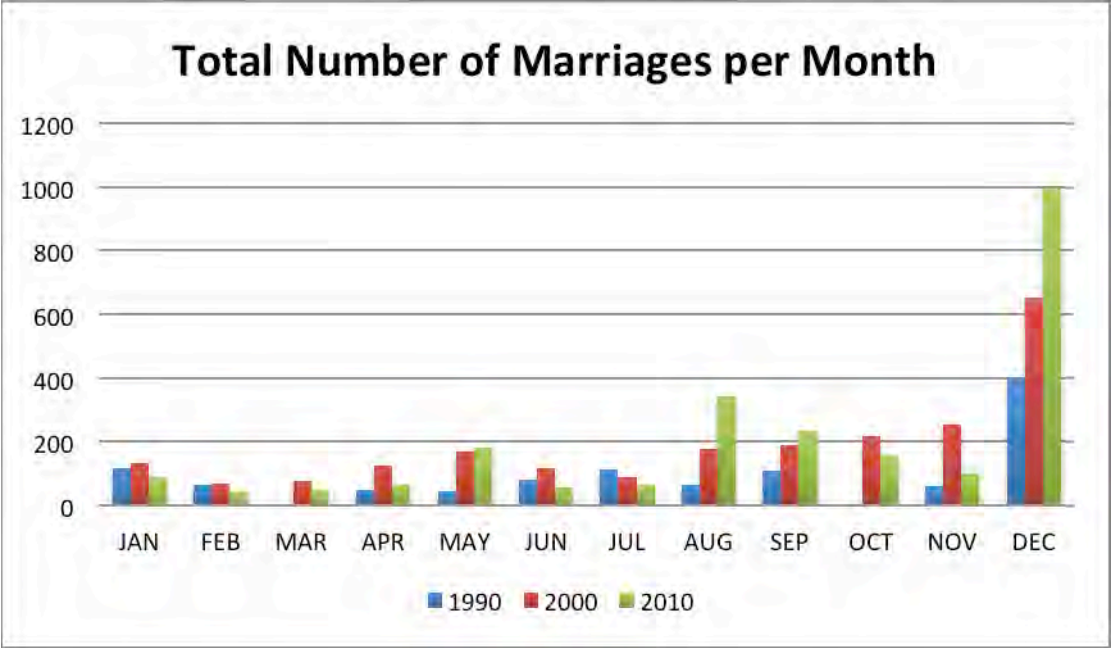


CHART 3: PERCENTAGE PER ANNUM (2010)

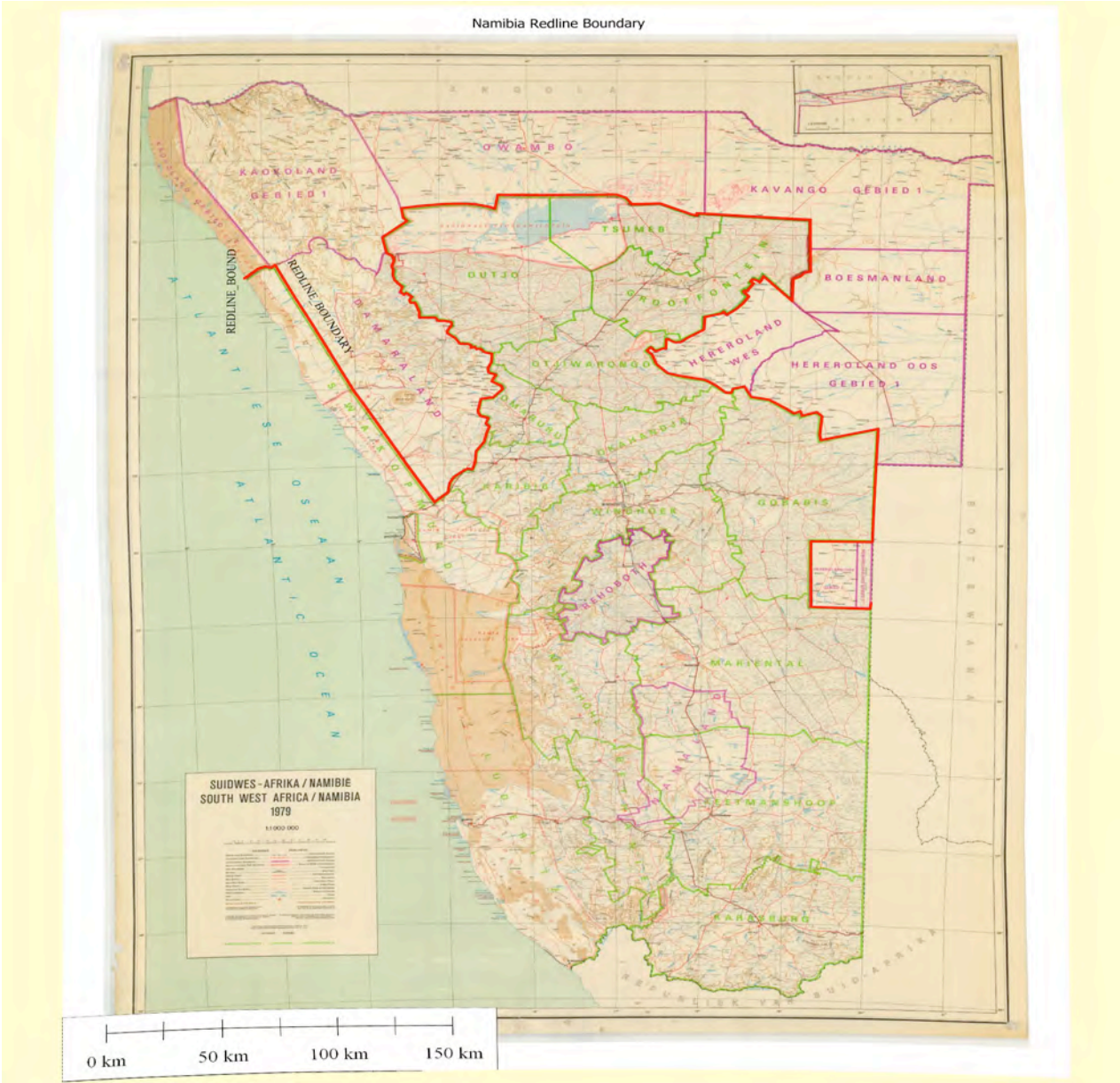




1.10 This graph illustrates the increase in marriages, across the ten-year intervals examined. There was a steady increase in the total number of marriages convened per annum with 1990 totalling 1100 marriages; 2000 with 2263 marriages; and 2010 convening 2374 marriages.

Annexure B:

Map of Police Zone & Homelands of SWA



This map demarcates the exact coordinates of the Red Line as provided in the Native Administration Proclamation, 1928 (No. 15 of 1928).

Without Declaration.



3-1/0053

1-1/0021

REPUBLIC OF NAMIBIA
MINISTRY OF HOME AFFAIRS
DEPARTMENT OF CIVIC AFFAIRS
MARRIAGE REGISTER

85295

A. PARTICULARS OF HUSBAND

1. Surname: DAVIS 2. Identity no.: [REDACTED]

3. First names in full: DAVID

4. Date of birth: Day [REDACTED] Month [REDACTED] Year [REDACTED] 5. Country of birth: NAMIBIA

6. Marital Status: BACHELOR

B. PARTICULARS OF WIFE

7. Maiden name: [REDACTED] 8. Identity no.: [REDACTED]

9. Present legitimate surname: [REDACTED]

10. First names in full: [REDACTED]

11. Date of birth: Day [REDACTED] Month [REDACTED] Year [REDACTED] 12. Country of birth: NAMIBIA

13. Marital Status: SPINSTER

C. PARTICULARS OF MARRIAGE

14. Date of marriage: Day 16 Month 12 Year 2000 15. Consent to the marriage given by (to be completed in the case of minors only): (a) Father: SELF (b) Mother: SELF

16. Marriage solemnized at (a) City / Town / Farm: ENGELA (b) District: D. H. ANGWENA

17. By / without antenuptial contract: WITHOUT

18. Remarks: DECLARATION IN TERM OF SECTION 17(6) OF PROCL. 15 OF 1928

D. (I) DECLARATION BY MARRIED COUPLE

19. This marriage between us was contracted in the presence of the undersigned witnesses:

Signature (Husband): [Signature] Signature (Wife): [Signature]

20. Witnesses: (a) [Signature] (b) Emilia Hamunzela
Signature Signature

D. (II) DECLARATION BY MARRIAGE OFFICER

21. This marriage was solemnized by me on this 16 day of DECEMBER 2000

22. Rev. Shinana Signature 23. 60119 Designation Number (Church marriage officer)

24. NATANAEL SHINANA Full names

25. Denomination/Office stamp (ex officio marriage officer) 26. Address of church marriage officer
EV. LUTH. CHURCH IN NAMIBIA ENGELA
(CALCIN) P.O. Box 536
ENGELA D. H. ANGWENA

E. CERTIFICATE BY MARRIAGE OFFICER
(Section 6 of Act 25 of 1961)

I hereby declare that at the time of the solemnization of this marriage, I was empowered in terms of the Marriage Act, 1961 or prior law, to solemnize this marriage.

Hebe 14 (2-07) Rev. Shinana
Signature Signature

Windhoek Printers-96-21740

* With Declaration

0/2724 (2)

0/2723 (2)

SUIDWES-AFRIKA / SOUTH WEST AFRICA
DEPARTEMENT VAN BURGERSAKE EN MANNEKRAG / DEPARTMENT OF CIVIC AFFAIRS AND MANPOWER

MANPOWER

HUWELIKSREGISTER / MARRIAGE REGISTER
(Artikel 40 van Wet 81 van 1963) / (Section 40 of Act 81 of 1963)

F A MARRIAGE

..W.: VOLTOOI DUIDELIK IN DRUKSKRIF / N.B.: PRINT CLEARLY

H 13235

A. BESONDERHEDE VAN MAN / PARTICULARS OF HUSBAND

1. Van: Surname: [REDACTED] 2. Identiteitsno. Identity No. [REDACTED]

3. Volle voorname: Forenames in full: [REDACTED] *Hy was by die ballingskap in Angl*

4. Geb. datum: Day 17 Maand 08 Jaar 1951 5. Land van geboorte: Country of birth: [REDACTED]

6. Huwelikstaats: Marital status: [REDACTED]

B. BESONDERHEDE VAN VROU / PARTICULARS OF WIFE

7. Van: Surname: [REDACTED] 8. Identiteitsno. Identity No. [REDACTED]

9. Huidige wettige van: Present legitimate surname: [REDACTED]

10. Volle voorname: Forenames in full: [REDACTED]

11. Geb. datum: Day 30 Maand 03 Jaar 1961 12. Land van geboorte: Country of birth: [REDACTED]

13. Huwelikstaats: Marital status: [REDACTED]

C. BESONDERHEDE VAN HUWELIK / PARTICULARS OF MARRIAGE

14. Datum van huwelik / Date of marriage: Day 29 Maand 09 Jaar 1990

15. Toestemming tot die huwelik verleen deur (moet ingevul word net in die geval van minderjarige(s)) / Consent to the marriage given by (to be completed in the case of minors only): (a) Man: Husband: [REDACTED] (b) Vrou: Wife: [REDACTED]

16. Huwelik bevestig te: Marriage solemnized at (a) Stad/Dorp/Plaas City/Town/Farm: Onawa Ombalantu (b) Distrik: District: Owambo

17. Met/sonder huweliksvoorwaardes: By/without antenuptial contract: Met

18. Opmerkings: Remarks: huwelik voorwaardes

D (I) VERKLARING DEUR EGPAAR / DECLARATION BY MARRIED COUPLE

19. Hierdie huwelik is tussen ons voltrek in die teenwoordigheid van die ondergetekende getuies: This marriage between us was contracted in the presence of the undersigned witnesses:

X Handtekening (Man) / Signature (Husband) [REDACTED] Handtekening (Vrou) / Signature (Wife) [REDACTED]

20. Getuies: Witnesses: (a) P. Portia S. M. M. Handtekening / Signature [REDACTED] (b) M. M. D. Handtekening / Signature [REDACTED]

D (II) VERKLARING DEUR HUWELIKSBEVESTIGER / DECLARATION BY MARRIAGE OFFICER

21. Hierdie huwelik is deur my bevestig op hierdie dag van September 19 90 This marriage was solemnized by me on this day of

22. [REDACTED] Handtekening / Signature [REDACTED] 23. Ref. No. 40. 116 Benoemingsnommer / Designation Number (Kerlike huweliksbevestiger) / (Church marriage officer) MOSES SHIKONGO Volle name / Full names

24. Kantoordatumstempel

25. Kerkenootskap / Kantoorstempel (ampelike huweliksbevestiger) Denomination / Office stamp (ex officio marriage officer) Ilcin

26. Adres van kerlike huweliksbevestiger Address of church marriage officer Onawa Ombalantu Pk. Ombalantu

E. EIENDOMSREGTE VAN PARTYE KRAGTENS ARTIKEL 17 (6) VAN PROKLAMASIE 15 VAN 1928 / PROPERTY RIGHTS OF PARTIES IN TERMS OF SECTION 17 (6) OF PROCLAMATION 15 OF 1928

(Moet ingevul word slegs indien ALBEI partye Swartes is) / (Must be filled in only if BOTH parties are Blacks)

Meld hieronder: (a) gemeenskap van goedere uitgesluit of (b) in gemeenskap van goedere. State hereunder: (a) community of property excluded or (b) in community of property.

F. HUWELIKSBEVESTIGERSERTIFIKAAT / CERTIFICATE BY MARRIAGE OFFICER

(Artikel 6 van Wet 25 van 1961) / (Section 6 of Act 25 of 1961)

Alle huweliksbevestigers moet hierdie sertifikaat onderteken / All marriage officers must sign this certificate

Hiermee verklaar ek dat ek ten tye van die bevestiging van hierdie huwelik uit hoofde van die Huwelikswet, 1961, of 'n vorige Wet bevoeg was om hierdie huwelik te bevestig. I hereby declare that at the time of the solemnization of this marriage, I was empowered in terms of the Marriage Act, 1961 or a prior law, to solemnize this marriage.

Moses Shikongo Handtekening / Signature [REDACTED]

k

9000

BAND/WIFE

is is en and correct and

in gelang van die geval. as the case may be.

19 90

gestel het en sy/haar down his/her answers

ing is beedig/bevestig Onawa

19 90

was sworn to/affirmed

19 90

(Rank)

© Windhoek Printers-7-1940

WITH DECLARATION

0/2724 (2)

3 (2)

SUIDWES-AFRIKA / SOUTH WEST AFRICA
DEPARTEMENT VAN BURGERSAKE EN MANNEKRAG / DEPARTMENT OF CIVIC AFFAIRS AND MANPOWER

HUWELIKSREGISTER / MARRIAGE REGISTER

(Artikel 40 van Wet 81 van 1963) / (Section 40 of Act 81 of 1963)

L.W.: VOLTOOI DUIDELIK IN DRUKSKRIF / N.B.: PRINT CLEARLY

H 06314

E

A. BESONDERHEDE VAN MAN / PARTICULARS OF HUSBAND

1. Van: [REDACTED] 2. Identiteitsno. [REDACTED]
Surname: [REDACTED] Identity No. [REDACTED]

3. Volle voorname: [REDACTED]
Forenames in full: [REDACTED]

4. Geb. datum: Dag 17 Maand 02 Jaar 1966
Date of birth: Day Month Year

5. Land van geboorte: NAMIBIA
Country of birth:

6. Huwelikstaats: BACHELOR
Marital status:

B. BESONDERHEDE VAN VROU / PARTICULARS OF WIFE

7. Van: [REDACTED] 8. Identiteitsno. [REDACTED]
Surname: [REDACTED] Identity No. [REDACTED]

9. Huidige wettige van: [REDACTED]
Present legitimate surname: [REDACTED]

10. Volle voorname: [REDACTED]
Forenames in full: [REDACTED]

11. Geb. datum: Dag 17 Maand 03 Jaar 1969
Date of birth: Day Month Year

12. Land van geboorte: NAMIBIA
Country of birth:

13. Huwelikstaats: SPINSTER
Marital status:

ec/4/15

C. BESONDERHEDE VAN HUWELIK / PARTICULARS OF MARRIAGE

14. Datum van huwelijk / Date of marriage:
Dag 17 Maand 12 Jaar 1990
Day Month Year

15. Toestemming tot die huwelijk verleen deur (moet ingevul word net in die geval van minderjariges) / Consent to the marriage given by (to be completed in the case of minors only):
(a) Man: [REDACTED] (b) Vrou: [REDACTED]
Husband: Wife:

16. Huwelijk bevestig te (a) Stad/Dorp/Plaas O D I B O
Marriage solemnized at City/Town/Farm:
(b) Distrik: OWAMBO
District:

17. Met/sonder huweliksvoorwaardes: N/A (SEE E)
By/without antenuptial contract:

18. Opmerkings: BOTH PARTIES TO THE MARRIAGE ARE BLACK
Remarks:

D (I) VERKLARING DEUR EGPAAR / DECLARATION BY MARRIED COUPLE

19. Hierdie huwelijk is tussen ons voltrek in die teenwoordigheid van die ondergetekende getuies:
This marriage between us was contracted in the presence of the undersigned witnesses:

20. Getuies: (a) RO SHIKOMI (b) S. KASHI
Witnesses: (a) Handtekening / Signature (b) Handtekening / Signature

D (II) VERKLARING DEUR HUWELIKSBEVESTIGER / DECLARATION BY MARRIAGE OFFICER

21. Hierdie huwelijk is deur my bevestig op hierdie 10 dag van DECEMBER 1990
This marriage was solemnized by me on this day of

22. [Handtekening] 23. CO 244
Handtekening / Signature (Kerklike huweliksbevestigter) / (Church marriage officer)

24. NIEHEMIAH SHIHOA HANUWEMBE
Kantoorstempel Volle name / Full names

25. ANGLICAN DIOCESE OF NAMIBIA
Denominasie / Office stamp (ex officio marriage officer)

26. AIBAG 505
Adres van kerklike huweliksbevestigter
Address of church marriage officer

E. EIENDOMSREGTE VAN PARTYE KRAGTENS ARTIKEL 17 (b) VAN PROKLAMASIE 15 VAN 1928 / PROPERTY RIGHTS OF PARTIES IN TERMS OF SECTION 17 (b) OF PROCLAMATION 15 OF 1928

(Moet ingevul word slegs indien ALBEI partye Swartes is) / (Must be filled in only if BOTH parties are Blacks)

Meld hieronder: (a) gemeenskap van goedere uitgesluit of (b) in gemeenskap van goedere.
State hereunder: (a) community of property excluded or (b) in community of property.

COMMUNITY OF PROPERTY EXCLUDED

F. HUWELIKSBEVESTIGERSERTIFIKAAT / CERTIFICATE BY MARRIAGE OFFICER

(Artikel 6 van Wet 25 van 1961) / (Section 6 of Act 25 of 1961)

Alle huweliksbevestigters moet hierdie sertiikaat onderteken / All marriage officers must sign this certificate

Hiermee verklaar ek dat ek ten tye van die bevestiging van hierdie huwelijk hoofds van die Huwelikswet, 1961, of 'n vorige Wet bevoeg was om hierdie huwelijk te bevestig.
I hereby declare that at the time of the solemnization of this marriage, I was empowered in terms of the Marriage Act, 1961 or a prior law, to solemnize this marriage.

[Handtekening]

Amended by Home Affairs:

0/2724 (2)

0/2723 (2)

SUIDWES-AFRIKA / SOUTH WEST AFRICA
DEPARTEMENT VAN BURGERSAKE EN MANNEKRAG / DEPARTMENT OF CIVIC AFFAIRS AND MANPOWER

HUWELIKSREGISTER / MARRIAGE REGISTER

(Artikel 40 van Wet 81 van 1963) / (Section 40 of Act 81 of 1963)

MANPOWER

OF A MARRIAGE

W.: VOLTOOI DUIDELIK IN DRUKSKRIF / N.B.: PRINT CLEARLY

H 13233

I. BESONDERHEDE VAN MAN / PARTICULARS OF HUSBAND

1. Van: [Redacted] Surname: [Redacted] 2. Identiteitsno. Identity No. [Redacted]

3. Volle voorname: [Redacted] Forenames in full: [Redacted] *My was by die Ballyngskap in Angola*

4. Geb. datum: Dag 01 Maand 11 Jaar 1955 Date of birth: Day 01 Month 11 Year 1955 5. Land van geboorte: Country of birth: [Redacted]

6. Huwelikstaats: Marital status: [Redacted]

I. BESONDERHEDE VAN VROU / PARTICULARS OF WIFE

7. Van: [Redacted] Surname: [Redacted] 8. Identiteitsno. Identity No. [Redacted]

9. Huidige wettige van: Present legitimate surname: [Redacted] *My was by die Ballyngskap in Angola*

10. Volle voorname: [Redacted] Forenames in full: [Redacted]

11. Geb. datum: Dag 02 Maand 11 Jaar 1969 Date of birth: Day 02 Month 11 Year 1969 12. Land van geboorte: Country of birth: [Redacted]

13. Huwelikstaats: Marital status: [Redacted]

II. BESONDERHEDE VAN HUWELIK / PARTICULARS OF MARRIAGE

14. Datum van huwelik / Date of marriage: Dag 21 Maand 07 Jaar 1990 Day 21 Month 07 Year 1990 15. Toestemming tot die huwelik verleen deur (moet ingevul word net in die geval van minderjariges); / Consent to the marriage given by (to be completed in the case of minors only):

(a) Man: Husband: *Onawa Ombalantu* (b) Vrou: Wife: *Owambo*

16. Huwelik bevestig te Marriage solemnized at (a) Stad/Dorp/Plaas City/Town/Farm: *Onawa Ombalantu* (b) Distrik: District: *Owambo*

17. Met/sonder huweliksvoorwaardes: By/without antenuptial contract: *met* *Without*

18. Opmerkings: Remarks: *huwelik voorwaardes*

(i) VERKLARING DEUR EGPAAR / DECLARATION BY MARRIED COUPLE

19. Hierdie huwelik is tussen ons voltrek in die teenwoordigheid van die ondergetekende getuies: This marriage between us was contracted in the presence of the undersigned witnesses:

Handtekening (Man) / Signature (Husband): [Redacted] Handtekening (Vrou) / Signature (Wife): [Redacted]

20. Getuies: Witnesses: (a) *FRANS HEITA* Handtekening / Signature (b) *EMILIA TAVIA* Handtekening / Signature

(ii) VERKLARING DEUR HUWELIKSBEVESTIGER / DECLARATION BY MARRIAGE OFFICER

21. Hierdie huwelik is deur my bevestig op hierdie This marriage was solemnized by me on this 30 dag van day of Juli 19 90

22. *Moses Shikongo* Handtekening / Signature 23. *Ref. No. 40. 116* Benoemingsnommer / Designation Number (Kerklike huweliksbevestigter) / (Church marriage officer) *MOSES SHIKONGO* Volle name / Full names

24. Kantoordatumstempel 26. Adres van kerklike huweliksbevestigter Address of church marriage officer *Onawa Ombalantu Pk. Ombalantu*

25. Kerkgenootskap / Kantoorstempel (ampstelike huweliksbevestigter) Denomination / Office stamp (ex officio marriage officer) *Elcin*

III. EIENDOMSREGTE VAN PARTYE KRAGTENS ARTIKEL 17 (b) VAN PROKLAMASIE 15 VAN 1928 / PROPERTY RIGHTS OF PARTIES IN TERMS OF SECTION 17 (b) OF PROCLAMATION 15 OF 1928

(Moet ingevul word slegs indien ALBEI partye Swartes is) / (Must be filled in only if BOTH parties are Blacks)

Meld hieronder: (a) gemeenskap van goedere uitgesluit of (b) in gemeenskap van goedere. State hereunder: (a) community of property excluded or (b) in community of property.

IV. HUWELIKSBEVESTIGERSERTIFIKAAT / CERTIFICATE BY MARRIAGE OFFICER

(Artikel 6 van Wet 25 van 1961) / (Section 6 of Act 25 of 1961)

Alle huweliksbevestigters moet hierdie sertifikaat onderteken / All marriage officers must sign this certificate

Hiermee verklaar ek dat ek ten tye van die bevestiging van hierdie huwelik uit hoofde van die Huwelikswet, 1961, of 'n vorige Wet bevoeg was om hierdie huwelik te bevestig. I hereby declare that at the time of the solemnization of this marriage, I was empowered in terms of the Marriage Act, 1961 or a prior law, to solemnize this marriage.

Moses Shikongo Handtekening / Signature

Windhoek Printers-7-1970

9000 ✓

ISBAND/WIFE

jus is en — and correct and —

na gelang van die geval. court. as the case may be.

19 90 ✓

er gestel het en sy/haar te down his/her answers

laring is beëdig/bevestig nawa

g 90,

h was sworn to/affirmed awa

19 90

on (Rank)

Windhoek Printers 7-1840

DECLARATION UNDER SECTION 22 (3) OF THE NATIVE ADMINISTRATION ACT, 1927 (No. 38 OF 1927)

VERKLARING INGEVOLGE ARTIKEL 22 (3) VAN DIE NATURELLE-ADMINISTRASIE WET, 1927 (No. 38 VAN 1927)

I, [redacted] Id. No. [redacted]
Ek, [redacted] P. No. [redacted]

son of [redacted]
seun van [redacted]
at present residing at Okathitukambanda Ongandjere Oorambo
tans woonagtig te

in the [redacted] in die [redacted]
district of Owambo in contemplation of a marriage
distrik is van plan om my in die

proposed to be entered into by me with [redacted]
huwelik te begeef met [redacted]
Id. No. [redacted] residing at Okathitukambanda
P. No. [redacted] woonagtig te

*Delete where inapplicable.
*Skrap wat nie van toepassing is nie.

*daughter/ward of [redacted]
*dogter/pleegkind van [redacted]
at present residing at Okathitukambanda Ongandjere Oorambo 3.11/85
op die oomblik woonagtig te

in the district of Owambo
in die distrik

*Delete where inapplicable.
*Skrap wat nie van toepassing is nie.

do hereby solemnly and sincerely declare that there is no customary union subsisting
en verklaar hierby plegtig dat daar geen gebruiklike verbinding tussen my en 'n ander
between me and any woman* (other than the above-named).
vrou* as bogenoemde bestaan nie.

[redacted signature]
Signature. Handtekening.

WITNESSES:
GETUIES:
1. Abraham Shiwela
2. Tertius Magdaleen-adilas

The deponent has acknowledged that he knows and understands the contents of this
Die verklaander erken dat hy ten volle op hoogte is van die inhoud van hierdie verklaring
declaration.
en dit begryp.

Declared before me at
Verklaar voor my te
this 4 day of July 19 85
op hede die dag van

Minister of Religion authorised to solemnize marriages or other marriage officer.
Leraar gemagtig om huwelike te voltrek of 'n ander huweliksbevestigter.

N.B.--This form should accompany the Duplicate Original Marriage Register when that document is forwarded to the office of the Bantu Affairs Commissioner/Magistrate for registration/Director of the Bantu Reference Bureau for permanent record.
N.B.--Hierdie vorm moet die Duplikaat Oorspronklike Huweliksregister vergesel wanneer daardie dokument aangesour word na die kantoor van die Bantoesakekommissaris/Landdroos vir registrasie/Direkteur van die Bantobewysburo vir permanente bewaring.

DEPARTEMENT VAN BANTOE-ADMINISTRASIE EN -ONTWIKKELING
DEPARTMENT OF BANTU ADMINISTRATION AND DEVELOPMENT

DUPLIKAAT-OORSPRONKLIKE/DUPLICATE ORIGINAL

HUWELIKSREGISTER/MARRIAGE REGISTER No.

BESONDERHEDE VAN MAN/PARTICULARS OF HUSBAND

1. Van Surname.....
2. Bewysboek-/paspoortnommer
Reference book/Passport Number.....
3. Voornam First names.....
4. Geboortedatum Date of birth.....
5. Etniese groep Ethnic group... OWAMBEO
6. Huwelikstaat Marital status... SONKMAN
7. Woonadres Residential address... ONINKINDINDOU LINDONGA OWAMBEO

BESONDERHEDE VAN VROU/PARTICULARS OF WIFE

8. Nooiensvan Maiden name.....
9. Bewysboek-/paspoort-/identiteitsnommer
Reference book/Passport/Identity Number.....
10. Huidige wettige van (voor hierdie huwelik) Present legitimate surname (before this marriage).....
11. Etniese groep/Ras Ethnic group/Race... OWAMBEO
12. Voornam First names.....
13. Geboortedatum Date of birth... 31. 11. 1959
14. Huwelikstaat Marital status... SONGEBOETER
15. Woonadres Residential address... ONAKATWIBE LINDONGA OWAMBEO

BESONDERHEDE VAN HUWELIK/PARTICULARS OF MARRIAGE

16. Datum van huwelik Date of marriage... Tweede Julie 1985
17. Bevestig te Solemnised at... Onandjokwe
18. Distrik District... OWAMBEO
19. Provinsie Province... SUIDWES-AFRIKA
20. In gemeenskap van goedere (ja of nee) In community of property (yes or no)... JA
21. Toestemming tot die huwelik verleen deur (vul in slegs in geval van minderjariges) Consent to the marriage given by (complete in the case of minors only)
(a) Man Husband... SELF
(b) Vrou Wife... SELF
22. Opmerkings Notes... HERWED. G. M. GEMEENSAP VAN GOEDERE EN WINS EN VERLIES KRAGTENS ARTIKEL 17.6 VAN PROKLAMASIE 15 VAN 1978

VERKLARING DEUR EGPAAR/DECLARATION BY MARRIED COUPLE

23. Hierdie huwelik is tussen ons voltrek in die teenwoordigheid van ondergetekende getuies:
This marriage between us was contracted in the presence of the undersigned witnesses:

24. Handtekening (man)/Signature (husband)..... Handtekening (vrou)/Signature (wife).....
25. Getuies Witnesses (a) Moses Nekomo (b) Beata Haindanga
Handtekening/Signature Handtekening/Signature

VERKLARING DEUR HUWELIKSBEVESTIGER/DECLARATION BY MARRIAGE OFFICER

26. Hierdie huwelik is deur my bevestig op hede die 2de dag van JULIE 1985
This marriage was solemnised by me on this... day of... 1985
- Festus Ahipala HM 1820
Handtekening/Signature Benoemingsnommer/Appointment Number

FESTUS AHIPALA

Volle naam in drukskrif/Full name in block letters

27. (a) Kerkgenootskap Denomination... Ev. Luth. Owambokavango (b) Bantoesakekommissaris/Landdros/Magistraat
Bantu Affairs Commissioner/Magistrate
Kerk

Adres van kerklike huweliksbevestiger
Address of church marriage officer... ONANDJOKWE Luth. Hospital
P.O. ONDANGWA SWA.

AN

* Without Declaration.

0/2724 (2)

SUIDWES-AFRIKA / SOUTH WEST AFRICA
DEPARTEMENT VAN BURGERSAKE EN MANNEKRAG / DEPARTMENT OF CIVIC AFFAIRS AND MANPOWER

HUWELIKSREGISTER / MARRIAGE REGISTER

(Artikel 40 van Wet 81 van 1963) / (Section 40 of Act 81 of 1963)

L.W.: VOLTOOI DUIDELIK IN DRUKSKRIF / N.B.: PRINT CLEARLY

H 21252

A. BESONDERHEDE VAN MAN / PARTICULARS OF HUSBAND

1. Van: [Redacted] 2. Identiteitsno. [Redacted]
Surname: [Redacted] Identity No. [Redacted]

3. Volle voorname: [Redacted]
Forenames in full: [Redacted]

4. Geb. datum: Dag 31 Maand 08 Jaar 1940 5. Land van geboorte: NAMIBIA
Date of birth: Day Month Year Country of birth:

6. Huwelikstaat: Widower

B. BESONDERHEDE VAN VROU / PARTICULARS OF WIFE

7. Van: [Redacted] 8. Identiteitsno. [Redacted]
Surname: [Redacted] Identity No. [Redacted]

9. Huidige wettige van: [Redacted]
Present legitimate surname: [Redacted]

10. Volle voorname: [Redacted]
Forenames in full: [Redacted]

11. Geb. datum: Dag 10 Maand 06 Jaar 1948 12. Land van geboorte: NAMIBIA
Date of birth: Day Month Year Country of birth:

13. Huwelikstaat: Spinster

C. BESONDERHEDE VAN HUWELIK / PARTICULARS OF MARRIAGE

14. Datum van huwelik / Date of marriage:
Dag 09 Maand 12 Jaar 1990
Day Month Year

15. Toestemming tot die huwelik verleen deur (moet ingevul word net in die geval van minderjariges) / Consent to the marriage given by (to be completed in the case of minors):
(a) Man: [Redacted] (b) Vrou: [Redacted]
Husband: [Redacted] Wife: [Redacted]

16. Huwelik bevestig te (a) Stad/Dorp/Plaas: OMUTUNDUNGU
Marriage solemnized at City/Town/Farm:
(b) Distrik: OWAMBO
District:

17. Met/sonder huweliksvoorwaardes: The first wife of Wilhelm Rafael Martha Johannes
By/without an nuptial contract: deced 22.12.53 Reg of Deaths 8483 R.C. M.Oshikuku

18. Opmerkings: REMARKS

D (i) VERKLARING DEUR EGPAAR / DECLARATION BY MARRIED COUPLE

19. Hierdie huwelik is tussen ons voltrek in die teenwoordigheid van die ondergetekende getuies:
This marriage between us was contracted in the presence of the undersigned witnesses:
Handtekening (Man) / Signature (Husband): [Redacted] Handtekening (Vrou) / Signature (Wife): [Redacted]

20. Getuies: HERLUKA TSHIMWANDI (a) Vanessa Jacob (b)
Witnesses: (a) Handtekening / Signature (b) Handtekening / Signature

D (ii) VERKLARING DEUR HUWELIKSBEVESTIGER / DECLARATION BY MARRIAGE OFFICER

21. Hierdie huwelik is deur my bevestig op hierdie dag van 9th DECEMBER 19 90
This marriage was solemnized by me on this day of

22. F. Joz. Beveler 23. C 0197
Handtekening / Signature (Kerlike huweliksbevestigter) / (Church marriage officer)

24. 09 DEC 1990 25. R.C.M. Oshikuku
Kantoorstempel / Denomination / Office stamp (ex officio marriage officer)

26. P/BAG X5517
Adres van kerlike huweliksbevestigter / Address of church marriage officer
OSHAKATI
9000

E. EIENDOMSREGTE VAN PARTYE KRAGTENS ARTIKEL 17 (6) VAN PROKLAMASIE 15 VAN 1928 / PROPERTY RIGHTS OF PARTIES IN TERMS OF SECTION 17 (6) OF PROCLAMATION 15 OF 1928

(Moet ingevul word alegs indien ALBEI partye Swartes is) / (Must be filled in only if BOTH parties are Blacks)

Meld hieronder: (a) gemeenskap van goedere uitgesluit of (b) in gemeenskap van goedere.
State hereunder: (a) community of property excluded or (b) in community of property.

F. HUWELIKSBEVESTIGERSERTIFIKAAT / CERTIFICATE BY MARRIAGE OFFICER

(Artikel 6 van Wet 25 van 1961) / (Section 6 of Act 25 of 1961)

Aller huweliksbevestigters moet hierdie sertifikaat onderteken / All marriage officers must sign this certificate

Hiermee verklaar ek dat ek ten tye van die bevestiging van hierdie huwelik uit hoofde van die Huwelikswet, 1961, of 'n vorige Wet bevoeg was om hierdie huwelik te bevestig.
I hereby declare that at the time of the solemnization of this marriage, I was empowered in terms of the Marriage Act, 1961 or a prior law, to solemnize this marriage.

F. Joz. Beveler
Handtekening / Signature

RIAGE

d -

geval. e may bc.

90

sy/haar
answers

bevestig

90

affirmed

90

R

nters-7-1840

* Without Declaration

0/2724 (2)

SUIDWES-AFRIKA / SOUTH WEST AFRICA
DEPARTEMENT VAN BURGERSAKE EN MANNEKRAG / DEPARTMENT OF CIVIC AFFAIRS AND MANPOWER

HUWELIKSREGISTER / MARRIAGE REGISTER

(Artikel 40 van Wet 81 van 1963) / (Section 40 of Act 81 of 1963)

L.W.: VOLTOOI DUIDELIK IN DRUKSKRIF / N.B.: PRINT CLEARLY

H 22551

A. BESONDERHEDE VAN MAN / PARTICULARS OF HUSBAND

1. Van: Surname: [REDACTED] 2. Identiteitsno. Identity No. [REDACTED]

3. Volle voorname: Forenames in full: [REDACTED]

4. Geb. datum: Day 21 Maand 09 Jaar 1947
Date of birth: Day 21 Month 09 Year 1947

5. Land van geboorte: Namibia
Country of birth: Namibia

6. Huwelikstaat: bachelor
Marital status: bachelor

B. BESONDERHEDE VAN VROU / PARTICULARS OF WIFE

7. Van: Surname: [REDACTED] 8. Identiteitsno. Identity No. [REDACTED]

9. Huidige wettige van: Present legitimate surname: [REDACTED]

10. Volle voorname: Forenames in full: [REDACTED]

11. Geb. datum: Day 08 Maand 02 Jaar 1969
Date of birth: Day 08 Month 02 Year 1969

12. Land van geboorte: Namibia
Country of birth: Namibia

13. Huwelikstaat: spinster
Marital status: spinster

C. BESONDERHEDE VAN HUWELIK / PARTICULARS OF MARRIAGE

14. Datum van huwelik / Date of marriage:
Day 01 Maand 09 Jaar 1990
Day 01 Month 09 Year 1990

15. Toestemming tot die huwelik verleen deur (moet ingevul word net in die geval van minderjariges) / Consent to the marriage given by (to be completed in the case of minors only):
(a) Man: Husband: (b) Vrou: Wife:

16. Huwelik bevestig te Marriage solemnized at
(a) Stad/Dorp/Plaas City/Town/Farm: Onkwaya
(b) Distrik: District: Owanbo, Namibia

17. Met/sonder huweliksvoorwaardes: without
By/without antenuptial contract: without

18. Opmerkings: Remarks: → the marriage was good

D (i) VERKLARING DEUR EGPAAR / DECLARATION BY MARRIED COUPLE

19. Hierdie huwelik is tussen ons voltrek in die teenwoordigheid van die ondergetekende getuiers:
This marriage between us was contracted in the presence of the undersigned witnesses:

Handtekening (Man) / Signature (Husband) [REDACTED] Handtekening (Vrou) / Signature (Wife) [REDACTED]

20. Getuiers: Witnesses: (a) E. Haruotemdu Handtekening / Signature (b) L. Erasmus Handtekening / Signature

D (ii) VERKLARING DEUR HUWELIKSBEVESTIGER / DECLARATION BY MARRIAGE OFFICER

21. Hierdie huwelik is deur my bevestig op hierdie dag van first dag van September 1990
This marriage was solemnized by me on this day of September 1990

22. L.H. Haukongo Handtekening / Signature

23. C 0273 Benoemingsnommer / Designation Number (Kerklike huweliksbevestigter) / (Church marriage officer)

24. LAZARUS HUWAPPO HAUWONGO Kantoordatumstempel Volle name / Full name

25. Kerkgenootskap / Kantoorstempel (amptelike huweliksbevestigter) Denomination / Office stamp (ex officio marriage officer)
The Anglican church in Namibia

26. Adres van kerklike huweliksbevestigter Address of church marriage officer
Onkwaya P.O. Box 47 Oshikango, Owanbo, Namibia

E. EIENDOMSREGTE VAN PARTYE KRAGTENS ARTIKEL 17 (6) VAN PROKLAMASIE 15 VAN 1928 / PROPERTY RIGHTS OF PARTIES IN TERMS OF SECTION 17 (6) OF PROCLAMATION 15 OF 1928
(Moet ingevul word slegs indien ALBEI partye Swartes is) / (Must be filled in only if BOTH parties are Blacks)

Meld hieronder: (a) gemeenskap van goedere uitgesluit of (b) in gemeenskap van goedere.
State hereunder: (a) community of property excluded or (b) in community of property.

community of property included

F. HUWELIKSBEVESTIGERSERTIFIKAAT / CERTIFICATE BY MARRIAGE OFFICER
(Artikel 6 van Wet 25 van 1961) / (Section 6 of Act 25 of 1961)

Alle huweliksbevestigters moet hierdie sertifikaat onderteken / All marriage officers must sign this certificate

Hiermee verklaar ek dat ek ten tye van die bevestiging van hierdie huwelik uit hoofde van die Huwelikswet, 1961, of 'n vorige Wet bevoeg was om hierdie huwelik te bevestig.
I hereby declare that at the time of the solemnization of this marriage, I was empowered in terms of the Marriage Act, 1961 or a prior law, to solemnize this marriage.

L.H. Haukongo Handtekening / Signature

Annexure D



REPUBLIC OF NAMIBIA

LAW REFORM AND DEVELOPMENT COMMISSION

IN PARTNERSHIP WITH THE KONRAD ADENAUER FOUNDATION

Family Law Workshop, Alte Brucke Conference, Swakopmund

Workshop Resolutions

23rd – 26th July 2012

Swakopmund, Erongo Region

Introduction

- 1.1 A multitude of customs in Namibia makes it difficult to provide laws that are inclusive and respectful to all customs and traditions, while also remaining in tune with modern, secular and international practices.
- 1.2 The Workshop presented an opportunity for all relevant stakeholders to critically engage in debate relating to Family Laws, which are anachronistic and out-of line with the Namibian Constitution.
- 1.3 There are legal instruments that guide our decisions, some locally based, and other international instruments, which we ratify and which obligate our actions. We cannot put laws in place that confuse these concomitant laws. We must ensure a careful balance between the different precepts of the law and ensure that they reflect the customs as well as the secular nature of a modern state.

2. The LRDC Report on Customary Marriages

2.1 Solemnisation

- 2.1.1 Currently, there is no mention of solemnisation in the draft Bill. Definitions pertaining to solemnisation have not been mentioned.
- 2.1.2 In order to legislate for the practice of solemnisation of customary marriages, we have two options from which to decide.
 - ii. The one possibility would be to determine a common practice for solemnisation across all customary marriages.
 - iii. The second possibility is to appoint customary marriage officers who would be in a position to certify that the requisite customs have been carried out, and then to issue a marriage certificate. It was agreed that this issue shall be the subject of further consultations with traditional authorities.

2.1.4 The need for legal certainty and unambiguity must be balanced with the need to recognise the diversity of customs.

2.1.5 The legislation must include explicit definitions and certain timelines for the solemnisation process to be determined.

2.2 Recognition/Registration

- 2.2.1 The customary law marriage registers must remain will all other marriage registers stored at the Ministry of Home Affairs. Therefore this ministry should be the one which administers the Recognition of Customary Marriages Act.

2.3 Polygamy

- 2.3.1 If the practice of polygamy is outlawed under customary and common law, we must be mindful that there will be practical implications of this.
- 2.3.2 Outlawing the practice of polygamy does not mean that it will cease to exist, rather it will continue to occur, however, more informally in society, and it will merely act to deprive women and children of their rights and protection under the law if there is no protection for informally-cohabiting couples.
- 2.3.3 We must consider the possibility of regulating the practice so as to legislate certain safeguards for women and children. Requirements and criteria could be determined as a means to regulate it, for example placing a limit on the number of wives permitted and protecting the rights of existing wives when new ones are added.

2.4 Cohabitation

- 2.4.1 We must be able to distinguish between cohabitation and civil or customary marriage.
- 2.4.2 We should consider providing legal protection for relationships that do not fall within customary law marriages and common law marriages, for relationships that produce offspring, and who have vested time and interest in each other's lives. There should be some protection provided that safeguards their rights. However, cohabitation relationships cannot be "deemed" to constitute marriage as this would violate the Constitutional requirement that marriage requires the consent of both spouses.
- 2.4.3 We must examine the timeframes and factors that may be identifiable as criteria for cohabitation, so as to determine parameter for issues such as property rights.
- 2.4.4 Cohabitation should be researched further, and dealt with in a separate report.

2.5 Retrospective application of the new Bill

- 2.5.1 It has been proposed that marriages concluded before the application of the new bill should not be affected by the new law unless spouses bring forward a post nuptial contract which states otherwise.
- 2.5.2 A grace period should be granted for the registration of customary marriages.

2.5.3 In order to ensure the certainty of registration, in the cases in which a party will not come forward to register, it will be the onus of the courts to prove that a marriage was in fact concluded.

3. The LRDC Report on Marital Property

3.1 Default versus choice

3.1.1 There is unanimity that the two default regimes that are practiced above and below the old "*Police Zone*" should be harmonized. However the Report raised a dichotomy of opinion, split between the notion to either:

- i. Introduce a uniform default marital regime across the entire country. Default would be either In-Community, or Out-of-Community of property, with the option of an ante-nuptial-contract to infer the alternate option.
- ii. Eliminate the uniform default regime, and replace it with various options. The LRDC Report suggests four basic property regimes:
 - a. Simple community of property (which mirrors the SWAPO Family Act system)
 - b. Extended community of property
 - c. Out of community with profit sharing (accrual)
 - d. Strict out of community of property

3.1.2 The dichotomy of opinion relates to two different perspectives. The proposal for a uniform default regime, and the choice between the two options of In-Community and Out-of-Community of property, resonated from the belief that already there is much confusion in terms of the property regimes and their implications, and therefore it would be useful to keep the law as simple as possible.

3.1.3 The second opinion resonates from the belief that, the confusion has not stemmed from the existence of the property regimes, but rather in the different application of the regimes above and below the "*Police Zone*". Therefore the confusion resides in the misapplication of the law. The option of choice, between the marital regimes allows a standardized variety of choice of property regimes, which would otherwise be reserved only for wealthy people who can afford to employ a lawyer who can draft an ante-nuptial contract. Another argument for this approach was that the law should be suitable for future circumstances in Namibia, and not just the present situation.

3.1.4 A campaign should be endeavoured to educate marriage officers, and the public at large, on the different property regimes and the consequences thereof.

3.2 Traditional property

3.2.1 Inherited property and traditional property are excluded from the joint estate in both the simple community of property and extended community of property regimes.

3.3 Property regime of customary marriages

3.3.1 What do we do with customary marriages; do we introduce a default out-of-community regime for customary law marriages (as this is similar to the tradition in most communities)? Do we say that customary marriages will follow the property regime that applies under customary law (insofar as this is consistent with the Constitution)? Or do we align customary marriages with civil law marriages so as to ensure equality and harmonisation of common and customary law?

3.3.2 The application of customary law does not have to be uniform as Article 66(2) states that the application of customary law can be confined to a certain place to a specified period of time.

3.3.3 In terms of polygamous marriages, if we consider retaining the practice, two suggestions have been proposed:

- i. Firstly, the first marriage may have the option to choose the property regime, while the second marriage will be forced to follow a strict out-of-community of property regime.
- ii. The second option entails that the customary law marriage would not have the same regimes as civil marriages; rather, they would have a regime in terms of their own customs.

3.3.4 This will be the subject of further consultation with Traditional Authorities.

3.4 Retrospective application

3.4.1 Regarding retrospective application of any legal change on marital property regimes, there are two options:

- i. A grace period should be implemented to allow for a post-nuptial contract to change the marital regime for persons who were disadvantaged by the Native Administration Proclamation.
- ii. Post-nuptial contracts can be allowed as a general rule since (a) many people on both sides of the Red Line were uninformed or incorrectly informed of the property consequences of their marriages and (b) some couples want to change their property regime after marriage, which could be allowed if sufficient safeguards are provided for creditors.

3.4.2 We must implement safeguards to protect the interests of women and children who may be vulnerable to the manipulation by post-nuptial contracts, in which they may be forced into a regime which disadvantages them.

4. Proposals for the implementation of LRDC Reports 11 and 15

4.1 The issue of the old “*Police Zone*” is a critical issue and must be attended to immediately. Report 11 has already been widely consulted on and thus should be sent to the legal drafters with the aim to prepare a document to be sent to Cabinet to be approved.

4.1.1 It was noted that dividing legal changes into two steps could cause confusion and complicate public awareness initiatives.

4.1.2 The urgency of repealing the Native Administration Proclamation was also noted.

4.2 Report 12, without confusing it with 15, it can stand on its own to be discussed. However, a few points should be addressed and adjusted, for example we must consider changing the default regime for customary marriages to the property regime which applies under customary law.

4.3 We must also consider the issue of determining who will have authority to register customary marriages, as many traditional authorities are currently not formally recognised. We must determine the criteria for who may be designated as a registration authority.

4.4 Report 15 would benefit from additional consultation with Chief and traditional leaders. However, the report as it is, provides a stable platform from which to begin the process of reform. The report is able to diagnose issues that have been

overlooked. The fact that the report deals with civil and customary marriages identically should be reconsidered and guided by the consultations.

4.5 Regarding further consultation with traditional leaders, the Ministries must collaborate in the endeavour, and must determine the respective contributions in terms of time and resources. It has been suggested that the LRDC should coordinate the consultations while the Ministry of Justice should avail specific directorates (for example Legal Advice) to assist in ancillary support. The Ministry of Justice and Ministry of Home Affairs agreed to discuss the possibility of providing the necessary financial support.

5. The LRDC Report on Divorce

5.1 Grounds for divorce

5.1.1 There has been agreement that suggestions from the LRDC Report on ground of divorce should be implemented. These include:

- i. That the current divorce laws, based on fault, should be done away with.
- ii. That the ground for divorce be irretrievable breakdown of the marriage.

5.1.2 It is further suggested that these grounds are to be included in the application of divorce law in customary law marriages.

5.1.3 It has been suggested that issues such as mental illness or continued unconsciousness be seen as a special form of irretrievable breakdown, as this provides special safeguards for the protection of the property rights of the mentally ill (defined as institutionalised indefinitely, or mentally ill to the point that no relationship can continue and there are no reasonable grounds for recovery) or unconscious persons (medically determined as having no reasonable prospects of recovering consciousness).

5.1.4 LRDC Report proposes limits on the return of gifts (bride wealth) as criteria for divorce as this many prevent women for asking for a divorce and may thus trap them in violent relationships.

5.2 Jurisdiction to issue divorce orders

5.2.1 On the issue of jurisdiction, divorce should not happen in Windhoek and Oshakati High Court alone, it must be expanded to be more accessible to the populace. Service must be brought closer to the people.

5.2.2 LRDC should explore possible methods for opening up the process to the magistrates. It is proposed that magistrates should perhaps have jurisdiction over divorce at least in instances in which:

- i. There are no children,
- ii. There are no marital property disputes, and;
- iii. The divorce is unopposed.

5.2.3 It was also proposed that magistrates might have jurisdiction where the property of the marriage is below a set value (similar to the criteria for giving magistrates jurisdiction over deceased estates).

5.2.4 During past consultations, some object to giving divorce jurisdictions to magistrates because this is a status matter – but the magistrate courts have powers to do adoptions, which also concern status.

5.2.5 In terms of customary law marriages, the dissolution must take place at the local level. Headmen should be considered as the party with initial authority over the dissolution of marriages; however the option for a right of appeal should be considered.

5.3 Records of Divorces

5.3.1 Home Affairs are currently busy automating their births, death and marriage registers. However, after consulting with High Court, it has become apparent that there is no current database indicating the rate of divorce in Namibia.

5.3.2 A system for recording divorce records must be established and implemented. The draft Marriage Bill of the MHA already proposed a system for gathering High Court records of divorces, but this would need to be adapted if other authorities have jurisdiction over divorces in future.

5.3.3 There must also be a mechanism in which to capture customary divorce records in writing. As a means to provide certainty, a divorce certificate must balance the marriage certificate for customary marriages.

5.4 Deemed Assets:

5.4.1 It was proposed that retirement fund and life policy are considered as deemed assets so an appropriate apportion of the anticipated proceeds can be taken into account when division of the estate of a marriage comes about. This is provided for as a means to protect the spouse who has been financially dependent on the other.

5.4.2 No consensus was reached on this issue. It was suggested that it be further discussed with Namfisa and the pros and cons reassessed in light of the workshop discussion.

6. The LRDC Report on Succession of Estates

6.1 It was suggested that the proposal that 80% of the estate shall devolve as per section 3 of this Act and 20% distributed amongst customary law heirs that are not included in section 3 be further discussed with traditional authorities.

7.2 Certain technical drafting issues were noted and will be refined by a subcommittee before the report is revised in its final form.

8. Conflict of Laws

7.1 Matrimonial Domicile

7.1.1 It is recommended that the common law rule which makes the husband's domicile the guiding rule for choice of law on marital property regimes should be replaced by a rule based on the *Hague Convention on the Law Applicable to Matrimonial Property Regimes*, meaning that:

- (a) Spouses domiciled in different countries could make an express agreement stating which law on marital property would apply to their marriage; and
- (b) In the absence of such an agreement, the applicable law would be that of the country where both spouses establish their first habitual residence after marriage

7.1.2 This change would remove the last remaining vestige of differential legal treatment of husband and wife.

7.2 Recognition of Certain Marriages Act

7.2.1 The *Recognition of Certain Marriages Act, 1991 (18 of 1991)* must be clarified as its meaning is unclear and causing.

7.2.3 Divorce grounds should be harmonised for all Namibian marriages, including SWAPO Family Act marriages.