

PROPOSALS FOR LAW REFORM ON THE RECOGNITION OF CUSTOMARY MARRIAGES

**Legal Assistance Centre
1999**



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PO Box 604
Windhoek
Namibia

ISBN 99916-765-0-3

SUMMARY OF RECOMMENDATIONS

1. **RECOGNITION AND UNIFICATION**: Recognise customary marriages as being valid marriages for all legal purposes and adopt a single marriage law which applies the same basic substantive rules to both civil and customary marriages, whilst still allowing for some distinctions.

2. **MANDATORY V OPTIONAL REGISTRATION**: Make the registration of customary marriages mandatory, but with no penalty for failure to register. Recognise unregistered customary marriages as being valid for the same purposes as registered marriages. Use the advantages of certainty and proof as inducements to register.

3. **MINIMUM REQUIREMENTS**: (1) There should be a minimum age of 18 which is applicable to all marriages, with persons below that age being able to marry only with the consent of an appropriate state official. (2) The free consent of both intending spouses should be required, in accordance with the Namibian Constitution. (3) The existing law on parental consent for minors should be retained, with safeguards such as those provided by the Marriage Act for civil marriages. (4) The law should require generally that the marriage be entered into and celebrated in accordance with the relevant custom, but it should not attempt to be more specific. (5) Prohibited degrees of relationship for customary marriages should be determined in accordance with customary law rather than being prescribed in the statute. (6) There should be no reference to “bridewealth” in the statute, although the transfer of bridewealth might continue outside the legal framework.

4. **POLYGyny**: (1) Recognise polygynous customary marriages as valid marriages in order to protect the rights of the vulnerable parties to such marriages and the social and legal status of the children of the marriage. (2) Make the subsistence of a registered civil marriage an absolute bar to a subsequent customary marriage with a different woman, and forbid civil marriage if there is a subsisting customary marriage with a different woman. But allow couples who marry each other in terms of both church and customary rites to choose the form in which they will register their marriage – as a monogamous civil marriage acknowledged by the performance of customary rites, or as a potentially polygynous customary marriage blessed by the church (if the church is willing to do so).

5. **SAFEGUARDS FOR PARTIES TO POLYGYNOUS MARRIAGES:** (1) Require the consent of any existing wives to a subsequent customary marriage by the husband. (2) Require the formation of an agreement for the equitable distribution of marital property amongst all the interested parties before allowing the registration of the subsequent customary marriage.

6. **MARITAL PROPERTY REGIMES:** (1) Allow the property regime of customary marriages to continue to be determined in accordance with custom, until such time as there is universal law reform on marital property regimes. (2) Give couples greater freedom of choice immediately by allowing them to register an ante-nuptial agreements in respect of customary marriages. (3) Protect women against unfair discrimination in respect of marital property by making it possible for either spouse in a customary marriage to ask a court for a settlement of certain property interests during the course of the marriage or at its dissolution, along the lines of the provisions applicable to civil marriages in the Married Persons Equality Act.

7. **EQUAL RIGHTS AND POWERS OF SPOUSES:** (1) Make the Age of Majority Act explicitly applicable to all women. (2) Give husbands and wives in customary marriage full status and capacity on a basis of equality, including equal capacity to acquire and dispose of property, to enter into contracts and to bring legal actions in customary or general law forums

8. **DIVORCE:** Make the grounds and procedures for divorce identical for all marriages in a new divorce law which establishes new, more modern grounds for divorce and makes divorce proceedings more accessible, particularly to those in rural areas.

9. **INHERITANCE:** Enact a new system of intestate succession which essentially applies one set of rules to both civil and customary marriages, but allows for some variations between communities in areas which do not involve sex discrimination.

10. **HYBRID MARRIAGES:** (1) If a couple fulfil the requirements for registering their marriage as either a civil or a customary marriage, require them to choose one form or the other at the time of registration, after being given an explanation of the differences between the two types of marriage by the registering officer. (2) Allow conversion from a customary marriage to a civil marriage, but not the other way around, in order to ensure that women are not put under pressure to exchange a

monogamous form of marriage for a polygynous one. If the conversion involves a change of the couple's marital property regimes, safeguards to prevent prejudice of either spouse, or of any third party, should be included.

11. **PROSPECTIVE OR RETROSPECTIVE EFFECT?:** All existing and future customary marriages should be recognised as being valid, and provisions providing for the equality of husband and wife should be automatically applicable to all marriages. If the new law includes a default marital property regime for customary marriages, couples in existing marriages could be allowed to decide whether to adopt the new scheme or remain under their existing one at the time of registration.

12. **LEGAL PROTECTION FOR COHABITATION:** A new law on the recognition of customary marriages should be accompanied, or followed as soon as possible, by a law which addresses the consequences of informal cohabitation.

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1. INTRODUCTION

1.1 This paper explores possible legal reforms for the recognition of customary marriages in Namibia. It emphasises recognition rather than merely registration, since registration might or might not be a prerequisite for recognition. The paper includes brief background material, a summary of the available statistics on marriage and divorce in Namibia, an overview of the current characteristics and status of customary marriage, an examination of the position of customary marriage in a sampling of other countries and preliminary recommendations for Namibia.

1.2 This paper was written by Dianne Hubbard of the Legal Assistance Centre. Legal research for the paper was done with the assistance of David Bigge, a law student who served an internship with the Legal Assistance Centre under the auspices of the Harvard Law School Human Rights Programme. Statistical data was compiled by Willem Odendaal of the Legal Assistance Centre. Funding was provided by Austrian Development Cooperation and the Harvard Law School Human Rights Programme.

1.3 This paper should be considered in conjunction with a research paper by the Legal Assistance Centre on divorce law reform in Namibia (forthcoming in early 2000). The Legal Assistance Centre also plans to publish research papers on the related questions of marital property regimes and informal cohabitation during the year 2000.

1.4 The Legal Assistance Centre believes that all law reform proposals concerning family law should be made available to the public and discussed widely before any final decisions are taken. It is our hope that this series of research papers on family law will be helpful in the formulation of proposals which can be used as the basis for community consultation.

2. THE NAMIBIAN CONSTITUTION & CEDAW

2.1 Both the Namibian Constitution and the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) obligate Namibia to take action to prevent discrimination on the basis of sex by any person. Article 10 of the Namibian Constitution provides that “all persons shall be equal before the law” and prohibits discrimination on the basis of “sex, race, colour, ethnic origin, religion, creed or social or

economic status”. Article 1 of CEDAW emphasises that the forbidden “discrimination against women” applies to all women “irrespective of their marital status.”¹

2.2 Article 5 of the Namibian Constitution explicitly states that all of the fundamental rights protected by the Constitution shall be “respected and upheld by the Executive, Legislature and Judiciary and all organs of the Government and its agencies and, *where applicable to them, by all natural and legal persons in Namibia...*” Although this statement is somewhat vague (“where applicable to them”), it appears that the state has some obligation to prevent discrimination on the prohibited grounds by any person. This is sometimes referred to as the horizontal application of constitutional rights. (Vertical application protects persons only against the infringement of their rights *by the state*.) The obligation to apply the principle of non-discrimination horizontally is made even more clear by CEDAW, which obligates Namibia to ensure that men and women are equal before the law, and to eliminate discrimination against women by “*any person, organisation or enterprise*”.²

¹ Article 1 of CEDAW reads in full as follows:

For the purposes of this Convention, the term “discrimination against women” shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social and cultural, civil or any other field.

² CEDAW, Articles 15(1) and 2. There are several arguments which suggest that the horizontal/vertical distinction is an artificial one, both universally and in terms of the specific Namibian situation. First, state-recognized marriage can be generally characterized as a state-sanctioned institution. It is protected by the state and the married couple receives benefits from the state for their married status, such as the requirement that dissolution of the marriage take place by means of a formal divorce procedure to protect the rights of the parties. Civil marriage may be a private union, but it has the force of the state behind it.

Further, there are many areas of human rights in which the relations between private citizens are strictly regulated without objection from the public – indeed, most people would be horrified if the government did not act horizontally. For example, a man may not kill, abuse, or (in many societies) rape his wife without state criminal repercussions. Similarly, it is illegal in most if not all societies for one person to enslave another. To suggest that the state never can or does interfere with the relations between private individuals would be a misleading argument. (See Frances Olsen, “The Myth of State Intervention in the Family” in Martha Minow, ed, *Family Matters: Readings on Family Lives and the Law* (1993).)

Furthermore, there are provisions in the Namibian Constitution that clearly regulate horizontal relations, such as the provisions of Article 14 which state that spouses are “entitled to equal rights as to marriage, during marriage and at its dissolution” and that “marriage shall be entered into only with the free and full consent of the intending spouses”. These provisions clearly contemplate state intervention in the marriage process. Article 15(1) similarly contemplates state regulation of the parent-child relationship.

See *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC) at paragraphs 30-ff, for a brief overview of comparative law on horizontal and vertical application of various constitutions.

2.3 The Namibian Constitution protects the rights of all citizens to practice their own cultures. However, unlike the constitutions of some other African countries (such as Zimbabwe), the Namibian Constitution makes this right subordinate to the right of sexual equality. Article 19 guarantees every Namibian citizen the right to pursue any “culture, language, tradition, or religion *subject to the term of this Constitution and further subject to the condition that the rights protected by this article do not impinge on the rights of others...*” It is significant that this Article contains a limitation clause, unlike many of the other fundamental rights and freedoms in the Namibian Constitution which are stated in absolute terms.³

Article 66 specifically states that both the customary law and the common law in force on the date of independence shall remain valid *only to the extent that they do not conflict with the Constitution*, subject to the caveat in Article 140 that all such laws remain in force until repealed, amended or declared unconstitutional by a competent court.⁴ Thus, in terms of the Namibian Constitution, there is no room for an argument that customary laws can be allowed to overrule the prohibition on discrimination against women.

The Constitutional position has been reinforced by Traditional Authorities Act 17 of 1995, which emphasises that customary law is valid *only* to the extent that it is consistent with the Constitution and with other statutory law, making explicit mention of the invalidity of discriminatory customary law. Section 11 of this Act states that--

(a) any custom, tradition, practice or usage which is discriminatory or which detracts from or violates the rights of any person as guaranteed by the Constitution or any other statutory law, or which prejudices the national interest, shall cease to apply;

(b) any customary law which is inconsistent with the provisions of the Constitution or any other statutory law, shall be invalid to the extent of inconsistency.

2.4 The Namibian Constitution gives both men and women ‘the right to marry’, whilst CEDAW gives men and women “the same right to enter into marriage”.⁵ Both the Namibian Constitution and CEDAW specifically guarantee men and women equal rights to women and men as to marriage, during marriage and at its dissolution.⁶ To argue that the Constitutional references to “marriage” apply only to civil marriage and not to customary marriage would be

³ Article 22 of the Namibian Constitution, which discusses limitations upon fundamental rights and freedoms, applies only where such a limitation is authorised *elsewhere* in terms of the Constitution. It does not constitute an independent basis for limitation. See *Julius v Commanding Officer, Windhoek Prison* 1996 NR 390 (HC) at 393D.

⁴ See *S v Sipula* 1994 NR 41 (HC).

⁵ Namibian Constitution, Article 14(1); CEDAW, Article 16(1)(a).

⁶ Namibian Constitution, Article 14; CEDAW, Article 16(1).

a violation of the concept of non-discrimination on the grounds of race, ethnic origin and social status.

Although the term “marriage” is not defined anywhere in the Constitution, the entitlement in Article 19 to “enjoy, practice, profess, maintain and promote” any individual culture lends credence to an all-inclusive interpretation of “marriage”. The restatement of the right to religious and cultural freedom in Article 21(c) reinforces the idea that no distinction between types of marriages was intended in Article 14. Furthermore, Article 14(3) makes the policy statement that families are “the natural and fundamental group unit of society”, and it would seem very odd indeed if family relationships created by customary marriage were not intended to be included among these fundamental units.

The drafters of the Constitution make specific reference to customary marriages in respect of citizenship in Articles 4(3)(b) and with reference to the prohibitions on spousal testimony in Article 12(1)(f). In both of these provisions, customary marriage is explicitly placed on an equal footing with any other marriage.⁷ One might therefore ask why there was no similarly explicit inclusion of customary marriage in the other constitutional references to marriage. However, on balance, the overarching context of the Constitution, with its explicit recognition of customary law, argues in favour of reading the general references to “marriage” as including both civil and customary marriage.

This means that the provisions on sexual equality in all aspects of marriage are applicable to both civil and customary marriage in Namibia.

2.5 CEDAW contains detailed provisions concerning equality between men and women with respect to legal capacity and property rights. Article 15(2) of CEDAW states that women must have in civil matters “a legal capacity identical to that to men and the same opportunities to exercise that capacity”, including “equal rights to conclude contracts and to administer property” and equal treatment “in all stages of procedure in courts and tribunals”.⁸

⁷ Article 4(3)(b), which sets forth the qualifications for obtaining Namibian citizenship by marriage, states that “for the purposes of the Sub-Article (and without derogating from any effect that it may have for any other purposes) a marriage by customary law shall be deemed to be a marriage: provided that nothing in this constitution shall preclude Parliament from enacting legislation which defines the requirements which need to be satisfied for a marriage by customary law to be recognised as such for the purposes of this Sub-Article. “

Article 12(1)(f) reads: “No persons shall be compelled to give testimony against themselves or their spouses, who shall include partners in a marriage by customary law...”

It should be noted that both of these provisions refer to customary *marriage*, rather than using the term “customary union” which has historically been used in legal contexts to indicate the lesser legal status of customary marriage.

⁸ General Recommendation 21 of the UN Committee which monitors CEDAW compliance expands on this right by stating: “When a woman cannot enter into a contract at all, or have access to financial credit, or can do so only with her husband’s or a male relative’s concurrence or guarantee, she is denied legal autonomy. Any such restriction prevents her from holding property as the sole owner

Article 16(h) of CEDAW refers explicitly to equal property rights in the context of marriage, guaranteeing “the same rights for both spouses in respect to ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.”

2.6 Article 16(2) of CEDAW requires the registration of all marriages: “The betrothal and marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and *to make the registration of marriages in an official registry compulsory.*”

General Recommendation No. 21 issued by the UN Committee which monitors compliance with CEDAW elaborates on this requirement as follows:

States parties should also require the registration of all marriages whether contracted civilly or according to custom or religious law. The State can thereby ensure compliance with the Convention and establish equality between partners, a minimum age for marriage, prohibition of bigamy and polygamy and the protection of the rights of children.⁹

3. CONCEPTS OF CUSTOMARY LAW

3.1 A great deal of literature exists on theoretical issues pertaining to customary law.¹⁰ This paper will not attempt to reiterate the conceptual debates here, but will rather emphasise only a few key points.

and precludes her from the legal management of her own business or from entering into any other form of contract. Such restrictions seriously limit the woman’s ability to provide for herself and her dependants.” (paragraph 7)

⁹ Paragraph 39, *General Recommendation 21: Equality in marriage and family relations* (1994), available at <http://www.unhchr.ch>.

As will be discussed in more detail below, this requirement should not necessarily be understood to mean that unregistered marriages will be invalid. See, for example, TW Bennett, *Customary Law and the Constitution: A Background and Discussion Paper*, Law Reform and Development Commission (1996) at 103.

¹⁰ Useful background material pertaining specifically to Namibia is contained in Bennett (n9); Law Reform and Development Commission, *The Ascertainment of Customary Law and the Methodological Aspects of Research into Customary Law: Proceedings of a Workshop, February/March 1995*; Heike Becker and Manfred Hinz, *Namibia Papers No. 30: Marriage and Customary Law in Namibia* (1995) (hereinafter “Becker/Hinz”) and in Robert J. Gordon, *Vernacular Law and the Future of Human Rights in Namibia*, Namibian Institute for Social and Economic Research, Discussion Paper No. 11 (1991).

3.2 Some writers use the term “indigenous law” to refer to the laws observed by communities which are indigenous to the country. This paper refers to “customary law” because this is the term used in the Namibian Constitution.¹¹

3.3 Analysts generally agree that there are various different understandings of customary law. Commentators apply different labels and descriptions, but there are at least four overlapping categories:

(1) *traditional law* -- historical practices which may or may not continue to be practised today, and which are sometimes consciously or unconsciously idealised;

(2) *chief's customary law* – the law which is actually applied by traditional leaders;

(3) *court's customary law* – customary law as it has been understood, interpreted and applied by the state courts, usually based on a variety of sources including case precedent, the testimony of traditional leaders, and the writings of “experts” who are unavoidably influenced by their own cultural backgrounds and biases; and

(4) *living customary law* – the current flexible, dynamic rules and practices which govern the everyday lives of people.¹²

3.4 It is generally acknowledged that customary law changes over time, as a result of natural social change and evolution, and in response to external influences including Christianity and the influence of missionaries, economic imperatives (such as the migrant labour system and the growth of a cash-based economy), and interference by colonial administrations.

¹¹ See South African Law Commission, Project 90-The Harmonisation of the Common Law and the Indigenous Law, *Report on Conflicts of Law* (1999) (hereinafter “SALC *Report on Conflicts of Law*”) at paragraph 1.2. See also *Mabena v Letsoalo* 1998 (2) SA 1068 (T) at 1074H-1075B on the distinction between “official” documented versions of customary law and the living law observed by the community.

Gordon (n10) uses the term “vernacular law” to denote “a discourse which looks like proper law but has its own nuances and twists shaped by local exigencies and once removed from its local context it loses much of its character” (at 29).

¹² For the sake of simplicity, this paper adopts the terminology used in a paper previously prepared for the Law Reform and Development Commission on the same topic: Tami Friesen & Jewel Amoah, *Reform of Namibia's Customary Marriage Law: Issue Paper*, Centre for Applied Social Sciences (1999) (hereinafter “Friesen/Amoah”) at paragraph 1.2.2. See also Alice Armstrong *et al*, *Uncovering Reality: Excavating Women's Rights in African Family Law*, Women and Law in Southern African Working Paper No. 7 (undated) at 12-ff.

There are further distinctions between customary law and customary practice. See, for example, *Hlophe v Mahlalela and Another* 1998(1) SA 449 (T) which notes at 457-8 that “it cannot be accepted that all cultural practices are indigenous law”, endorsing the observation of Bennett that people recognise an authority in customary law which they do not accord to customary practices (citing TW Bennett, *A Source-book of African Customary Law for South Africa* (1991) at 6).

3.5 As in other countries in southern Africa, the colonial government in Namibia set up special courts for “natives” which had the discretion to apply a version of “native law”. Section 9(1) of the Native Administration Proclamation 15 of 1928 stated:

Notwithstanding the provisions of any other law, it shall be in the discretion of the courts of native commissioners in all suits or proceedings between natives involving questions of customs followed by natives, to decide such questions according to the native law applying to such customs except in so far as it shall have been repealed or modified: **Provided that such native laws shall not be opposed to the principles of public policy or natural justice:** Provided further that it shall not be lawful for any court to declare that the custom of *ovitunya* or *okuonda* or other similar custom is repugnant to such principles.¹³

Thus, this system applied only a certain version of “customary law”, on which the colonial authorities found acceptable. (Provisions such as the one quoted in bold are commonly referred to as “repugnancy” clauses, since they recognised only the customary law which was not “repugnant” to colonial sensibilities.) The situation was complicated by the fact that the courts of the native commissioners in some cases lacked the ability to correctly ascertain what customs should apply.

3.6 It is generally acknowledged that colonial governments manipulated customary laws and practices for their own ends. As Gordon states:

The use of “customary law” by the state was an essential part of its strategy of co-optation of chiefs and other petty political figures into the control apparatus... Chiefs and headmen had to be kept strong enough to control their own people but weak enough to be controlled by the regime.¹⁴

The strategy of the colonial government is illustrated by the fact that the South African-appointed Administrator in Namibia gave himself the legal status of “supreme or paramount native chief”.¹⁵ Some traditional leaders found that they could increase their own power through various forms of co-operation and collaboration with colonial regimes.¹⁶

3.7 Attempts at colonial interference extended into the area of marriage and divorce under customary law. For example, a Kavango Native Commissioner made the following statement while addressing a “tribal meeting” around 1950:

¹³ Section 9(1) (emphasis added). The sections of the Native Administration Proclamation pertaining to the Courts of Native Commissioners were repealed by Act 27 of 1985.

¹⁴ Gordon (n10) at 27-28.

¹⁵ Native Administration Proclamation 15 of 1928, §1(g), which was repealed in 1995 (by the Traditional Authorities Act 17 of 1995).

¹⁶ See for example, Gordon (n10) at 14-ff.

Chiefs, Headmen and Tribesmen: -- I will be patient with you. The basis of a strong tribe lies in the wisdom of their marriage laws. I regret to tell you that your laws are not fixed in your minds yet – you are unable, when I question you, to tell me what your marriage law is... **(It was) my duty to acknowledge all good native customs and laws but that any custom which allowed a woman or man to desert and thereby break up the marriage was against accepted principles and would no longer be sanctioned...** in future no person would have the right to divorce himself or herself...¹⁷

3.8 Since independence, there have been a number of legislative enactments which have affected customary law, such as the Traditional Authorities Act, the Married Persons Equality Act, and the forthcoming Communal Land Reform Act. In contrast to the colonial situation, these changes have been decided upon by the democratically-elected representatives of the entire Namibian population.

3.9 A useful perspective on democratically driven change has been articulated by two South African commentators (in an article on bridewealth):

Whatever the nation decides, it should not fear to allow custom to develop and change with the times. The hallmark of customary law was its flexibility, enabling it to meet modern demands as they became evident. Only when it was frozen into immobility by the codification of the colonizers did it lose this feature. With the end of apartheid, Africans will no longer need to fear that their own customs will be swept away by outside influences. It will not be necessary to refer to the past to discover how African social structures should be organised; a confident and developing society can take note of its traditions while accommodating the demands of the future.¹⁸

3.10 In summary, customary law is a complex, dynamic system which is constantly changing and evolving in response to a wide variety of internal needs and external influences. Thus, any notion of customary law as a static system which must be “preserved” reflects a misunderstanding of the nature of customary law. Continued change and evolution in response to the influence of the new constitutional regime of a democratic and independent Namibia would not violate the fundamental nature of customary law.

¹⁷ As cited in Gordon (n10) at 22 (emphasis added).

¹⁸ Sandra Burman & Nicolette van der Werff, “Rethinking Customary Law on Bridewealth”, *social dynamics* 19.2 (1993): 111-127 at 124-25.

4. PATRIARCHY VERSUS EQUALITY

4.1 Some writers suggest that to apply the principles of sexual equality to customary law would change it so completely as to undermine its continued existence. For example, a recent paper of the South African Law Commission states:

Because many rules of customary law reflect, directly or indirectly, the patriarchal traditions of African culture, large parts of the law could be declared invalid for infringing the right to equal treatment. If that were allowed, the constitutional recognition given to customary law ... would be an empty gesture.”¹⁹

South African customary law expert Tom Bennett has expressed similar concerns. He asserts that “because customary law is pervaded by the principle of patriarchy”, full-scale application of the fundamental rights in the Namibian Constitution to customary law would have the result of “abolishing the personal law of the majority of the population”. Thus, he advocates a qualified application of human rights norms to private law:

...[E]xperience elsewhere has shown that constitutional rights have a ‘natural’ scope of operation. Application is limited by balancing social, economic and political consideration against human rights. The Constitution of the United States is a good example: although it contains no express limitation on the application of its bill of rights, these rights are far from being absolute. They may be validly infringed, provided that a potentially offending law complies with certain standards laid down by the Supreme Court.²⁰

The South African Law Commission similarly rejects the idea that “any rule of customary law in conflict with the Bill of Rights must automatically give way to the latter”:

Testing the constitutional validity of rules of private law... involves a more flexible approach. Three inquiries are necessary: when is the Constitution applicable to private relationships; do circumstances warrant limitation of fundamental rights; and how are the abstract and generalized terms of these rights to be construed in a South African context? In answering these questions, a measure of discretion is introduced into what would otherwise be an entirely mechanical process.²¹

¹⁹ South African Law Commission, *Report on Conflicts of Law* (n11), paragraph 1.63.

See also *Mthembu v Letsela and Another* 1997 (2) SA 936 (T), where the court upheld primogeniture as “one of the most hallowed principles of customary law” (at 945, citing TW Bennett, *A Source Book of African Customary Law for Southern Africa* (1991) at 400), finding that it did not constitute unfair sex discrimination because the right to succession by a male heir was accompanied (at least in theory) by a concomitant duty to support the deceased’s widow and children. This view was reiterated in further proceedings in *Mthembu v Letsela and Another* 1998 (2) SA 675 (T).

²⁰ Prof TW Bennett, “Customary law in Constitutional and International Perspective” in Law Reform and Development Commission (n10) at 50. Bennett points to the German doctrine of “*mittelbare Drittwirkung*” as an example of the qualified application of human rights to private law, at 51.

²¹ South African Law Commission, Project 90-The Harmonisation of the Common Law and the Indigenous Law, *Report on Customary Marriages* (1998) (hereinafter “SALC *Report on Customary Marriages*”) at paragraph 2.3.5.

4.2 On the other hand, “culture” is sometimes used as an excuse for the retention of power by individuals or groups. As Becker and Hinz point out: “An approach to a gender perspective on customary law must first... look at how culture, including its customs, norms, traditions and law, is defined and by whom. It should also be asked who stands to gain from preserving a cultural tradition.”²²

A South African writer points out that it is wrong to conceptualise disputes about sexual equality under customary law as a contest between “equality” and “culture”. A woman who approaches a court with a dispute about her status does not dislodge herself from her culture, but rather seeks assistance with a dispute that is taking place *within* the culture. The contest is between two interest groups within the culture who seek to retain or change existing power relations (which are in any event constantly evolving).²³

4.3 Furthermore, as noted above, customary law is dynamic and has historically been transformed by community responses to internal and external influences. This process is still underway, and will continue regardless of whether or not it is influenced by legislation.

For example, it has been noted that, contrary to “traditional” matrilineal descent customs, it is becoming more common for Ovambo men to establish their own households in a new locality, evidencing evolution toward a more patrilineally-organised society. The result is that matrilineal relatives are geographically dispersed between different localities, weakening their kinship bonds, and giving the father scope to exercise much more authority over his children.²⁴

Similarly, it has been observed that the increasing importance of animal husbandry in Okavango communities over the years has led to a major shift in the division of labour between the sexes, with a corresponding enhancement of the economic position and status of men that has stimulated the development of patrilineal ties within the matrilineal context.²⁵

²² H Becker and O Hinz, “Customary Law Research in Namibia: Methodological Remarks” in Law Reform and Development Commission (n10) at 82.

²³ See V Bronstein, “Reconceptualising the Customary Law Debate in South Africa” 14 *South African Journal on Human Rights* 3 (1998); Sharita Samuel, “Women married in customary law: no longer minors”, 40 *Agenda* 23 (1999) at 23-24.

²⁴ JS Malan, *Peoples of Namibia* (1995) at 19. Another author comments: “Patrilocal residence seems to be promoted by any change in culture or the conditions of life which significantly enhances the status, importance and influence of men in relation to the opposite sex. Particularly influential is any modification in the basic economy whereby masculine activities in the sex division of labour come to yield the principle means of subsistence”. Ibid at 24, quoting GP Murdock, *Social Structure* (1949) at 206.

²⁵ Malan (n24) at 42.

Another such change is the emergence of new principles of inheritance in Herero communities which signify greater paternal control and influence over the children of the marriage.²⁶

If customs can shift to allow for *greater* male influence and power, they can surely be altered in the opposite direction to encompass greater sexual equality.

4.4 The draft Customary Land Reform Bill which is before Parliament at the time of writing clearly chooses sexual equality over patriarchal custom, by providing that both widows and widowers will have the right to remain on their land after the death of their spouses. This right to occupation will continue to be held by surviving spouses of both sexes even if they subsequently remarry.²⁷

The same is true of the Married Persons Equality Act, which gives husbands and wives in both civil and customary marriages equal powers of guardianship over their children and independent rights of domicile.²⁸

4.5 The inevitability of change to bring customary law in line with the Namibian Constitution was expressed by participants in a CASS project which trained 30 legal resource persons, half men and half women, from the Uukwambi community during 1994:

...[I]t appeared during the discussions that both male and female participants were in favour of making changes to their culture and law, and they were aware that the Namibian Constitution demanded change. They never assumed that they could live in isolation according to a real or imagined Uukwambi tradition. The Kwambi men and women thus were conscious of the fact that their existing culture and laws were not immune from challenges by other sectors of Namibian society. Most participants of both genders proved to be quite sensitive to some customary norms detrimental to women, but women (more clearly than men) wanted customary laws relating to marriage, the family and the status of women in general to be changed.²⁹

A teacher in northern Namibia sums up this position in even more straightforward terms: “We should look at the things that happened in the past and then decide what we should keep and what should be done away with.”³⁰

²⁶ Ibid at 77.

²⁷ Customary Land Reform Bill [B.10-‘99], section 26.

²⁸ Act 1 of 1996, discussed in greater detail below in section 8. The provisions which apply to civil marriages alone can also be seen as changing “customs” which previously applied to these marriages.

²⁹ Dr H Becker, “Experience with Field Research into Gender and Customary Law in Namibia” in Law Reform and Development Commission (n10) at 97.

³⁰ Ibid at 81.

5. WHAT DEGREE OF UNIFICATION?

5.1 One of the key policy questions which must be answered is: Does Namibia want to have a **single system of family law** which draws on both civil and customary law, and allows for different forms appropriate to different communities while applying one basic set of substantive rules? Or does Namibia want to preserve **parallel systems of family law**, a civil law system and a variety of customary law systems operating side by side?

5.2 The Law Reform and Development Commission (hereinafter “LRDC”) has a statutory duty to advance “the integration or harmonization of the customary law with the common and statutory law”.³¹

But these terms themselves are ambiguous. For example, one analyst makes the following distinctions between “unification”, “integration” and “harmonisation”:

Unification entails a change in the condition of legal pluralism to unity of law. Complete unification means the creation of a uniform system of law which substitutes the existing legal systems completely. In the case of family law it would mean one system with the same rules for all persons and groups.... The uniform system could be composed of element of the different legal systems or the unification process could be the adoption of one system as uniform law for all persons and abolition of the other systems.

Integration amounts to partial unification, however small it may be. It means bringing together under one enactment the different laws with regard to a particular branch, for example marriage or family matters, in order that the different systems continue to exist but without conflict and that some elements thereof may be unified. Integration embodies a practical approach to the question of unification, namely that unification can be achieved gradually or by a cumulative process, unifying rules where this is possible and leaving matters which cannot be unified to the personal laws of the parties.

Harmonisation is also seen as different from integration. It seeks to eliminate points of friction between the different legal systems but leaves the systems to continue to exist separately. An example of harmonisation would be to place the customary and civil marriage on an equal basis, that is considering both marriages as valid marriages with recognition and protection of the rights of the spouses and children.³²

But the Centre for Applied Legal Studies in South Africa expresses a different understanding of the concept of “harmonisation” of family law:

³¹ Law Reform and Development Commission Act 29 of 1991.

³² MW Prinsloo, “Pluralism or unification in family law in South Africa” XXIII *CILSA* 1990 at 325 (emphasis added). Prinsloo cites Tanzania, Zimbabwe and Transkei as examples of countries which have unified or integrated their laws on marriage.

The harmonisation process is the bringing together of the historically divided systems of family law into one new system which complies with the values of the Constitution. In so doing, customary law should not simply be incorporated into the existing legal system. Harmonisation should involve drawing on the positive elements of both systems and the creation of a new, more appropriate and progressive system for all... families.”³³

Because of the different understandings of the terms, it appears that Namibia has the option of adopting a range of degrees of unification of family law within the context of the existing Constitutional and statutory framework.

A unitary system

5.3 The historical system of colonialism and apartheid has emphasised the differences between “African and western forms of marriage”, resulting in “an undue distinction between customary law and common law” and an assumption that civil and Christian marriages were superior to customary marriages.³⁴

5.4 A unitary system with the option of different rites of solemnisation has been clearly described by Albie Sachs (who is now a judge on South Africa’s Constitutional Court)

A softer less intolerant variant of this policy [a unitary system] would be to have a single South African marriage law based upon a single concept of the essential characteristics of marriage, but enabling various rites to constitute due solemnization. Various state, religious and community leaders could be recognised as marriage officers capable of performing or recognizing marriage ceremonies. They would have to satisfy themselves that the pre-requisites of a proper marriage were present (for example minimum age, monogamous relationship, free consent) and make some form of registration, but otherwise the ceremonies could be in a magistrate’s court or a church or a temple or a synagogue or in a village centre or at a homestead, and accompanied by prayers or the slaughter of an ox, and in Zulu or Afrikaans or Tsonga.

What would matter would be that, irrespective of the form of marriage followed, the law would attribute the same rights and responsibilities to the couple, with possibly some choice regarding property relationships. Beyond this, the parties would be quite free, if they both so wished, to apply the particular rules of their faith or custom to the marriage. Thus persons married in a Catholic church might accept that their marriage is indissoluble, even though the law granted them the possibility of divorce. Similarly, if lobola were paid, the intricate rules governing the relationships

³³ Centre for Applied Legal Studies, *Response by the Gender Research Project, Centre for Applied Legal Studies, University of the Witwatersrand, to the South African Law Commission’s Report on the Harmonisation of the Common Law and the Indigenous Law (Customary Marriages)* (1996) (“hereinafter “*CALS Response*”) at paragraphs.13-14.

³⁴ See South Africa Law Commission, Project 90: The Harmonisation of the Common Law and the Indigenous Law, *Discussion Paper 74: Customary Marriage*(1998) (hereinafter “*SALC Discussion Paper*”) at paragraph 2.1.1; *SALC Report on Customary Marriages*(n21) at paragraph 2.1.3.

between the two families involved might be followed in detail, if the persons concerned so wished.

These social and religious rules would be enforceable according to the convictions of the parties, and to some extent according to community pressure, but not in law. The marriage law would establish a common set of fundamental principles applicable to all recognised marriages, principles which could be invoked by either party, with or without the consent of the other. To sum up: the religious or traditional rules would operate outside the formal legal system and have sanctions of a moral and social but not of a legal kind.

Such an approach has many advantages. It encourages the concept of a common society, with a common citizenship and a common platform of legal rules applicable to all, irrespective of colour, language, religion, origin, or gender. Family law would be set in the context of fundamental constitutional rights that emphasized the basic principles of democracy, freedom, and equality.

At the same time it would be flexible and sensitive to the cultural and religious diversity of the country inasmuch as it would acknowledge that there are many ways in which people marry, and it would be tolerant in the sense that it would permit informal marriage rules based on tradition or religion to exist outside the formal state sector. Individuals and families could continue to follow practices and beliefs that have special meaning for them, and the law would only intervene if they could not agree amongst themselves and at least one of the parties preferred to invoke his or her constitution rights.³⁵

Drawing on international trends, Sachs suggests that the common principles which would apply to all marriages in a unitary system would most likely be the prohibition of child marriages, the encouragement of monogamy, the voluntary consent of both spouses, requiring shared parental rights and responsibilities, and equitable sharing of property acquired during the marriage upon its dissolution. The main problem with a unitary system might be that some people would refuse to register their marriages in order to opt out of such common principles.³⁶

Sachs gives a vivid description of how judges would approach cases involving marriage under a unified system.

[J]udges could say: whether they are Muslim or Xhosa-speaking or Catholic or Jews or Jehovah's Witnesses or African Zionists is their business; they have freedom of religion [and culture, one might add] and the right to organise their family life as they wish, subject only to restrictions against domestic violence, child abuse, and so on; they can try to resolve their problems by resorting to traditional or religious leaders, or just accepting the decisions of the family councils, if they so choose; but once they bring the matter before us, we will apply the general principles of the new... law, irrespective of their religious or ethnic background.³⁷

³⁵ Albie Sachs, *Protecting Human Rights in a New South Africa* (1990) at 72-3.

³⁶ Ibid at 70-ff.

³⁷ Ibid at 76.

5.5 The Centre for Applied Legal Studies lists these arguments in favour of its recommendation for a unitary system of marriage:

- (1) Keeping family law in separate systems would maintain historical divisions and prevent society from uniting around common approaches to marriage.
- (2) It will be simpler to administer one system of family law in all parts of the country.
- (3) Operating under multiple systems can make it difficult to determine which system regulates the life of particular individuals.
- (4) People adopt certain cultural practices in family arrangements in order to achieve a sense of community and belonging. They look to the law for a different purpose.
- (5) The idea of “choice of law” assumes that people are connected to only one set of cultural values, whereas they may draw on values and experiences from a variety of sources (such as their community and their church).³⁸

A plural system

5.6 Legal pluralism in the area of family law would preserve the various different customary systems of marriage and divorce, although it could involve a single system of administration (such as one marriage registry for all kinds of marriages).

Such a pluralist system could be tempered by the establishment of a few common ground rules, such as setting a minimum age of marriage applicable to all systems of marriage. One of the key problems with such a system is “choice of law” – meaning that in a pluralist system courts must sometimes determine what sort of marriage is involved in a case before them and which rules to apply.³⁹

³⁸ *CALS Response* (n33) at paragraph16 (summarised and paraphrased).

³⁹ A recent British case illustrates how difficult this task can be. In *McCabe v. McCabe* (1 FLR. 410 (1994)), a British judge was asked to determine whether a marriage had in fact taken place between a woman from Ghana and a man from the South of Ireland. The reputed marriage took place according to Akan tradition, and while neither of the parties was at the ceremony, which took place in Ghana, both the man and the woman knew about the ceremony. No civil marriage took place in Britain, where they were living. The British judge ruled that to determine whether the parties were actually married, he would have to interpret Akan tradition and see if it was followed. As opposed to scholarly text regarding Akan customary marriages, the judge relied on criteria laid out in a 1961 court case in Ghana for interpreting Akan custom with regard to marriage. Thus, the criteria for determining whether a valid marriage had been made were twice removed from the actual societies creating and living in those customs. The British judge, using the criteria laid out by the Ghanaian judge, ruled that there had been a legitimate marriage. There is no guarantee in this situation that there was in fact a legitimate marriage according to the actual traditions, nor is there even proof that a modern Ghanaian judge would have ruled that there was a marriage. For further discussion of this case, see KY Yeboa, *Formal and Essential Validity of Akan and Ghanaian Customary Marriages*, 19 University of Ghana L. J. 133 (1993-1995). See also Gordon R Woodman, *Essentials of an Akan Customary Marriage: McCabe v. McCabe*, 37 Journal of African Law 199 (1993).

Sachs gives this description of how judges would approach cases involving marriage under a strictly plural system:

They could say: this is a Muslim couple, therefore we apply Muslim law; or this is a Xhosa marriage, therefore we apply Xhosa law; or these people were married in the Catholic Church; or are Jews or Jehovah's Witnesses or African Zionists and we must apply the appropriate rules of each religion; or they were married before a magistrate therefore we apply state family law provisions.⁴⁰

A house with many rooms

5.7 There are many options between the extremes at the two opposite ends of the spectrum. In South Africa, a member of the public referred to a unitary system which allowed for different marriage rites as "a house with many doors".⁴¹ In the same vein, one might refer to a system which provides for one basic framework for all marriages, whilst still preserving some scope for variation on certain matters, as "a house with many rooms".

6. INCIDENCE OF CIVIL AND CUSTOMARY MARRIAGE AND DIVORCE IN NAMIBIA

6.1 This section gives background information on the incidence of civil and customary marriage and divorce in Namibia. It also gives information on the incidence of polygyny, cohabitation and "second house" relationships.⁴² This data should help to ground the law reform debate in current Namibian realities.

Some data which is discussed here has been analysed in racial or ethnic terms. It must be emphasised that there is no intention to reproduce or endorse the discriminatory attitudes of the past, but merely to examine legacies of apartheid and practices of different Namibian communities which may be relevant to current legal and social policy.

⁴⁰ Sachs (n35) at 76.

⁴¹ SALC *Report on Customary Marriages* (n21) at paragraph 2.1.2.

⁴² Many scholars use the terms "polygyny" and "polygynous" as opposed to "polygamy" and "polygynous" to emphasize that only men have the capability to marry multiple spouses. (The corresponding term for women with multiple husbands is "polyandry".)

"Second house" relationships are situations where a man who is married to one woman under civil law maintains a permanent relationship with another women. The system of migration to urban areas for employment means that the man may spend some time "living" in both households.

Nationwide data

6.2 The **1991 Population and Housing Census** provides data about the marital status of persons 15 years old and above. Half of the population in this age group reported that they had never married. Only 30% were married, while 12% were living together. The census questionnaire did not collect information on the distinction between civil and customary marriage.

Only 3% of the population reported that they were divorced or separated. While the statistics on “divorce” and “separation” can be broken down, these percentages must be viewed with caution as public understanding of the difference between the two terms may not be reliable.⁴³

Table 1: Marital status of individuals from the 1991 Population and Housing Census

Marital Status	Percentage
Never married	50%
Married	30%
Living together	12%
Divorced/Separated divorced (2%) separated (1%)	3%
Widowed	4%

Adapted from Central Statistics Office, *1991 Population and Housing Census: Basic Analysis with Highlights* at 10.

⁴³ The terms used in the census were as follows:

- (i) Never Married referred to persons who never married before in their lifetime.
- (ii) Married legally or customarily referred to persons who during the reference period were married under the legal systems of the country or the customs of the local area.
- (iii) Living together referred to persons who were living together as husband and wife without the legal or customary ceremony.
- (iv) Separated referred to married persons who were not living together as husband and wife without the performance of any legal or customary ceremony.
- (v) Divorced referred to persons whose marriage had been cancelled legally or customarily and had not remarried.
- (vi) Widowed referred to persons whose spouses were dead and were not remarried at the time of the census.

Central Statistics Office, *1991 Population and Housing Census: Basic Analysis with Highlights* at Appendix A, page 3.

The gender-disaggregated statistics on marital status of both heads of households (Table 2) and individuals (Table 3) show that a far greater number of women are divorced or separated – almost *three times* as many women as men fall into these two categories. The difference is not necessarily significant in the cases of heads of households, since the fact of the divorce or separation may be the reason why the women was identified as the head of household. (If the marriage were still in place, the husband would probably have been identified as the head of household. ⁴⁴) However, the greater number of divorced/separated women is clearly significant in respect of individuals.

Table 2: Divorced and separated heads of households from the 1991 Population and Housing Census

	Male	Female	Total
Divorced	2,850	7,421	10,271
Separated	1,694	4,167	5,861
TOTAL	4,544	11,588	16,132

Adapted from 1991 Population and Housing Census: Report A, Statistical Tables, Volume I .

Table 3: Divorced and separated individuals over the age of 15 years from the 1991 Population and Housing Census

	Male	Female	Total
Divorced	4,920	12,558	17,478
Separated	2,994	7,448	10,442
Total	7,914	20,006	27,920

Adapted from 1991 Population and Housing Census: Report A, Statistical Tables, Volume II.

The following table (Table 4) shows the regional variations. The highest percentages of married persons occur in Caprivi, Karas and Okavango. Correspondingly, Caprivi and Okavango have the lowest percentages of individuals who have never married, while Karas contains the lowest percentage of individuals who are informally cohabitating.

Caprivi shows the highest percentage of divorces and separations. One possible explanation may be because Caprivi is the only region where customary marriage tends to take place on its own, without an accompanying church or civil ceremony, meaning that customary law divorces, which are far more simple and accessible than civil law divorces, are more common.

⁴⁴ The 1991 Population and Housing Census defined “head of household” in gender-neutral terms as “the person, male or female, who is recognised as such by the household members”. However, it is likely that husbands rather than wives would have been identified as the head of household where husbands were present. Central Statistics Office (n43) at 37.

Table 4: Marital status of individuals 15 years and above by region from the 1991 Population and Housing Census

REGION:	Never married	Married	Living together	Divorced/Separated	Widowed
Caprivi	39%	44%	4%	7%	5%
Erongo	50%	28%	16%	2%	4%
Hardap	49%	32%	12%	2%	5%
Karas	48%	39%	7%	2%	4%
Khomas	54%	30%	11%	2%	3%
Kunene	45%	27%	20%	3%	4%
Ohangwena	53%	24%	11%	5%	6%
Okavango	30%	45%	13%	5%	6%
Omaheke	50%	25%	18%	2%	4%
Omusati	54%	26%	10%	4%	6%
Oshana	59%	22%	12%	3%	4%
Oshikoto	54%	27%	12%	3%	4%
Otjozondjup a	47%	25%	21%	2%	3%
TOTAL	50%	30%	12%	3%	4%

Adapted from 1991 Population and Housing Census: Basic Analysis with Highlights at 11-23.

Table 5: Marital status of individuals over age 15 by sex & urban/rural residence from the 1991 Population and Housing Census

MARITAL STATUS	URBAN				RURAL				TOTAL	
	Urban Male		Urban Female		Rural Male		Rural Female			
	number	%	number	%	number	%	number	%	number	%
Never married	87,405	55.0%	79,461	53.5%	127,571	54.0%	114,641	41.0%	409,078	50.0%
Married	50,109	32.0%	41,048	27.5%	66,638	28.0%	85,401	31.0%	243,196	30.0%
Living together	16,114	10.0%	16,150	11.0%	29,897	13.0%	37,675	13.5%	99,836	12.0%
Separated	761	0.5%	1,187	1.0%	2,233	1.0%	6,261	2.0%	10,442	1.0%
Divorced	1,757	1.0%	3,395	2.0%	3,163	1.5%	9,163	3.0%	17,478	2.0%
Widowed	1,499	1.0%	6,773	4.5%	3,039	1.5%	25,231	9.0%	36,542	4.5%
Not Stated	949	0.5%	432	0.5%	2,383	1.0%	1,197	0.5%	4,961	0.5%
TOTAL	158,594	100.0%	148,446	100.0%	234,924	100.0%	279,569	100.0%	821,533	100.0%

Source: 1991 Population and Housing Census, Report A, Statistical Tables, Volume II at 489 – 491.

The urban/rural breakdown in Table 5 shows that rural females are somewhat less likely than other groups to have never been married.⁴⁵ Living together informally is slightly more popular amongst rural men and women than amongst urban men and women. Rural

⁴⁵ The 1991 Population and Housing Census defined “urban localities” as municipalities and townships which had been proclaimed as such by the government at the time of the census. These were as follows: Windhoek, Swakopmund, Gobabis, Grootfontein, Karabib, Karasburg, Keetmanshoop, Mariental, Okahandja, Omaruru, Otavi, Otjiwarongo, Outjo, Tsumeb, Usakos, Henties Bay, Luderitz, Okakarara, Ondangwa, Ongwediva, Opuwo, Oshakati, Rehoboth, Katima Mulilo, Rundu, Khorixas and Arandis. Central Statistics Office (n43) at Appendix A, page 2 and Appendix C, page 9.

women are the *most likely* to be divorced or separated, with urban men being the *least likely* to fall into either of these categories. Both urban and rural women were far more likely to be living as widows than their male counterparts, with rural women in this category constituting twice the national average.

6.3 The **1992 Demographic and Health Survey**, which involved a nationally representative sample of 5 421 women aged 15-49 years, produced findings similar to those of the 1991 Population and Housing Census.

About 42% of the respondents were currently in some sort of conjugal relationship, with 27% of these being “married” and 15% living together informally. The survey report does not distinguish between civil and customary marriage. About 51% of the respondents stated that they have never been married. Only 5% said that they were divorced or separated. It is not clear if the respondents who stated that they were “divorced” meant that they were divorced in the formal, legal sense of the term. The report commented: “The percentage of women who are currently married or in union is low. In Namibia, various forms of relationships are found in which the partners do not live together.”⁴⁶

Table 6: Findings on marital status from the 1992 Demographic and Health Survey

Marital Status	Percentage
Never married	51%
Married	27%
Living together	15%
Divorced	3%
Separated	2%
Widowed	1%

Source: Ministry of Health & Social Services, *Demographic and Health Survey*, Table 2.7

When analysed by age, this data indicates that the practice of remaining unmarried has increased in recent years. The age data also shows that the average age of first marriage is increasing.⁴⁷

This survey showed no significant differences in marital status between rural and urban women, but there were regional and educational variations (Table 7). The highest percentages of women who never married were found in the Northwest (64%), followed by the Central and South regions (47%), whilst it was less common for women in the Northeast

⁴⁶ Ministry of Health & Social Services, *Demographic and Health Survey* (1992) at 16, 47.

⁴⁷ Ibid at 47-48.

to have never been married (30%). Women with some education were more than twice as likely to retain their single status as women with no education.

Table 7: Marital status of women by background characteristics from the 1992 Demographic and Health Survey

BACKGROUND CHARACTERISTIC	MARITAL STATUS			
	Never married	Currently married	Previously married	Number of women
<u>Residence:</u>				
Urban	50.2%	42.2%	7.6%	2077
Rural	52.1%	41.3%	6.6%	3344
<u>Region:</u>				
Northwest	63.9%	31.7%	4.2%	2246
Northeast	30.3%	54.2%	15.5%	879
Central	47.2%	50.4%	2.3%	674
South	47.0%	45.0%	8.0%	1622
<u>Education:</u>				
No education	24.1%	64.8%	11.1%	785
Some primary	53.8%	39.2%	7.0%	2113
Primary completed	54.6%	37.7%	7.7%	510
Secondary/higher	58.6%	36.3%	5.1%	2013
<u>TOTAL</u>	51.3%	41.7%	7.0%	5421

Source: 1992 Demographic and Health Survey

One out of every eight women in this survey (12.5%) stated that their husbands currently had other wives.

Older women were more likely to be in polygynous unions. Such unions were twice as common in rural areas as in urban areas, and were most likely to be found in the Northeast or the Northwest regions. Women with secondary or higher education were somewhat less likely to be in a polygynous union than women with lower levels of education. (See Table 8.)

About half of the women in polygamous unions have one other co-wife, whilst the other half have two or more co-wives.⁴⁸

⁴⁸ Ibid at 48-49.

Table 8: Background characteristics of women in polygynous unions from the 1992 Demographic and Health Survey

Background characteristic	Percentage of women in polygynous unions
<u>1. Residence:</u>	
Urban	7.2%
Rural	16.2%
<u>2. Region:</u>	
Northwest	14.5%
Northeast	25.1%
Central	9.2%
South	4.3%
<u>3. Education:</u>	
No education	17.5%
Some primary	14.8%
Completed primary	10.6%
Secondary/higher	7.3%
<u>TOTAL POPULATION</u>	12.6%

Source: 1992 Demographic and Health Survey

6.4 More information on marital status may be revealed by the **1999 National Gender Study** conducted by the Gender Training and Research Programme at the University of Namibia. Questionnaires have been administered to a nationwide sample of individuals, but the results of this survey were not yet available at the time of writing. The questionnaire asks respondents to indicate which of the following applies: traditional monogamous marriage, traditional polygamous marriage, married monogamous, never married, widowed, divorced, separated, or cohabitating/living together.⁴⁹ Unfortunately, there is no category which asks about the co-existence of civil and customary marriages between the same partners.

6.5 Over the last 10 years, an average of about 5 600 civil marriages have been registered annually nationwide. The average number of divorces (in respect of civil marriages) is about 400 each year over the same period. There are no comparable figures on customary marriage or divorce. However, should a registration system be adopted in respect of customary marriage, similar national records should be compiled.

⁴⁹ Household Composition and Demographic Section of Questionnaire used for National Gender Study, Gender Training and Research Programme, University of Namibia (1999).

Table 9: Registered civil marriages 1989-1999

YEAR	REGISTERED CIVIL MARRIAGES
1989	5 275
1990	7 379
1991	5 064
1992	7 468
1993	4 107
1994	4 260
1995	4 077
1996	6 048
1997	6 095
1998	6 240
1999	5 820+
TOTAL	61 833

Source: Ministry of Home Affairs.

Information for 1999 is current to October 1999.

Table 10: Civil divorces 1989-1999

	Jan	Feb	March	April	May	June	July	Aug	Sept	Oct	Nov	Dec	Total
1989	42	24	15	19	26	30	19	26	31	18	24	N/A	274
1990	33	18	7	18	21	21	15	21	24	25	46	19	268
1991	25	15	13	23	42	31	21	40	24	30	30	25	319
1992	44	34	15	35	42	23	34	19	24	39	36	23	368
1993	51	29	3	35	35	37	54	27	44	32	25	19	391
1994	7	25	11	53	37	46	42	36	54	30	33	8	382
1995	58	32	54	33	36	36	35	47	42	54	54	38	519
1996	42	32	19	37	51	29	35	49	32	64	62	19	471
1997	64	25	7	41	59	31	45	42	34	49	42	22	461
1998	53	51	17	53	42	40	58	58	46	44	51	24	537
1999	37	41	13	48	32	44	64	36	48	73	10*	N/A	446
Total	456	326	174	395	423	368	422	401	403	458	413	197	4436

Source: Ministry of Health and Social Services and High Court.⁵⁰

Information for 1999 is current through 12 November 1999.

Regional and local data

6.6 A pre-independence survey of a representative sample of 569 households in the different residential areas of **Windhoek** produced some data on marriage and divorce as of **1988/89**. For purposes of analysis, the survey data was separated into three racial categories: “white”, “coloured” and “African”. The results showed that whites and coloured persons living in Windhoek were far more likely to be formally married than “Africans” living in Windhoek, who were more likely to be living together without being formally married at that

⁵⁰ The High Court has for many years sent monthly reports on final divorce orders to the Ministry of Health and Social Services. Unfortunately, some of the Ministry’s records of final divorce orders have been lost in recent years, and had to be reconstructed by manually going through the High Court roles. The Ministry is in the process of constructing a database for such records, according to Ministry officials.

time. The report unfortunately did not differentiate between civil and customary marriage. It also lumped together the categories of “separated”, divorced” and “widowed”.⁵¹

This survey also found that white and coloured people living in Windhoek were most likely to have spouses from the same ethnic group (with this being the case in 82% and 86% of the marriages, respectively), whilst only 64% of African marriages involved spouses from the same ethnic group.⁵² This point is potentially significant in respect of customary law, as there could be complex conflict of law questions in respect of marriages involving partners from different communities which have different customary law on marriage.

Table 11: Marital status in Windhoek, 1988/89

MARITAL STATUS	AFRICAN		COLOURED		WHITE		TOTAL	
	N	%	N	%	N	%	N	%
Never married	41	19%	16	14%	30	13%	87	15%
Married	104	49%	79	71%	181	78%	364	66%
Separated, Divorced, Widowed	24	11%	10	9%	16	7%	50	9%
Living together	42	20%	6	5%	6	3%	54	10%
TOTAL	211	100%	111	100%	233	100%	555	100%

Source: NISER, *Health and Daily Living Survey of Windhoek Namibia (1988 -1989)* at 44.

6.7 Two studies of the **Katutura** population were conducted by Wade Pendleton – one based on data gathered between **1968-1970** (published in 1974 in a book called *Katutura: A Place Where We Do Not Stay*) and one based on data gathered between **1988-1993** (published in 1994 in a book called *Katutura: A Place Where We Stay*).

Marital status was one aspect of these comparative studies. What Pendleton refers to as “traditional marriages, based on customs predating the colonial era in South West Africa” were rare in both studies. Only 3% of the conjugal households and 2% of the entire sample of households were found to involve “traditional marriages” in the first study, and even fewer in the second one:

The Damara and Nama [in Katutura] no longer contract traditional marriages. Owambo informants said they knew of no Owambo resident in Katutura who would even consider contracting an Owambo traditional marriage, although it was said that traditional marriages are sometimes contracted in rural Owambo... The only ethnic group in this study that still contracts traditional marriages are the Herero, although this custom is practised only by a few.⁵³

⁵¹ Namibia Institute for Social and Economic Research, *Health and Daily Living Survey of Windhoek Namibia (1988-1989)* at 11, 44

⁵² Ibid at 11-12, 43.

⁵³ Wade Pendleton, *Katutura: A Place Where We Stay* (1994) at 90.

At the same time, there was an increase in civil marriage between the two studies, with about 24% of couples in “conjugal households” being in civil marriages in the first study, rising to about 47% in the second:

The major increase for the substantial increase in legal marriage is of an economic nature. People in Katutura now have more money and more sources for money. The cost of marriage is not as great a barrier as it was in the past, and this is reflected in the greater number of legal marriages.⁵⁴

Pendleton notes that a civil marriage certificate had certain advantages for a Katutura resident, particularly prior to independence. The certificate made it easier for a couple to obtain housing, and some white employers were willing to give dependants’ allowances and pay rent for their employees if they could produce a marriage certificate. Some black women also found a marriage certificate to be a useful document, in the absence of identification documents or other papers, if their presence in Katutura was challenged by the police. The influence of Western ideas and values about marriage may also have made civil marriage an attractive option, especially after televisions became more common in Katutura households. Church influence was also an important factor.⁵⁵

Table 12: Civil marriages of “Africans” in Windhoek, 1933-1968

Year	Number of <u>church</u> marriages	Percentage increase/decrease per 4-year period	Number of <u>magistrate’s court</u> marriages	Percentage increase/decrease per 4-year period
1933-1936	39	--	17	--
1937-1940	70	+82%	80	+371%
1941-1944	83	+17%	91	+14%
1945-1948	73	-12%	75	-18%
1949-1952	72	-1%	49	-35%
1953-1956	107	+49%	49	0%
1957-1960	70	-35%	207	+323%
1961-1964	128	+83%	256	+24%
1965-1968	199	+56%	155	-40%

Source: Wade Pendleton, *Katutura: A Place Where We Stay* (1994) at 126, 139, Table 18 (percentages rounded to the nearest whole)

⁵⁴ Ibid at 82.

⁵⁵ Ibid at 83-84.

Pendleton's study examined attitudes regarding the two forms of civil marriage rites – a church wedding and a legal ceremony performed by a magistrate. Respondents from all of the ethnic groups in the study spoke of a magistrate's marriage as a "cheap" marriage "which is considered to be less binding than a church marriage".⁵⁶ Yet the number of marriages performed by magistrates tripled between 1957 and 1964. This was attributable to the threatened closure of the Old Location, since many people thought that they could improve their chances of being allocated a house in Katutura if they had a marriage certificate – and a ceremony performed by a magistrate was the simplest and most inexpensive way to obtain a marriage certificate.⁵⁷

The most common type of marriage in Katutura during both study periods was actually a hybrid form of marriage – a church marriage accompanied by the observance of certain traditional customs, most notably the exchange of bridewealth. The popularity of church marriage as a part of the marriage process also explains the economic factor:

Church marriage is an expensive proposition for a man and his family. Besides being required to pay the bride price, the groom is supposed to purchase the new clothes for the ceremony for himself and the bride, pay the majority of the expenses for the marriage celebration, provide housing and food for friends and relatives from out of town, and take care of various other expenses. In Katutura before [at the time of the first study], a minimum estimate for all these expenses came to about R250, and could prove to be even more expensive. Today [at the time of the second study], the cost may be ten times as high, or higher. As most men do not have this amount of money, couples first live together, planning to marry in church once they have saved enough money. However, a larger percentage of couples can afford the costly church marriage today than was the case in the past.⁵⁸

The couple would usually remain in the house where they been previously living together, regardless of whether it was technically the man's or the woman's. However, if the house was previously in the name of the woman, it was common for men to have the house placed in their names once they had the marriage certificate in hand to present at the Katutura housing office.⁵⁹

Church marriages were found to be highly valued by Damara and Nama residents of Katutura:

⁵⁶ Ibid at 90.

⁵⁷ Id. There was strong public opposition to the government's plan to close the "Old Location" and move its inhabitants far away from the residential areas of the whites. This opposition came to a head in December 1959, culminating in the fatal shooting of 11 protesters on 10 December 1959 (which is now commemorated as a public holiday in Namibia). Forced removals continued, and the "Old Location" was officially closed by the government on 31 August 1968. Ibid at 12-ff.

⁵⁸ Ibid at 85.

⁵⁹ Id..

A Damara informant explained that “a traditional marriage was something special and mystical in pre-European times”, and said that today, in the absence of traditional marriage, the church marriage is viewed in this way.⁶⁰

However, some Damara respondents feared being trapped in a church marriage: “Some Damara women said that they did not want to marry in church because their husbands would beat them and there would be nothing they could do about it.”⁶¹

Church marriage was found to be equally popular amongst Owambo residents of Katutura:

For the Owambo, the ideal conjugal union is a church marriage. A man who was not married in church is referred to as “not having a house”.⁶²

It was also noted that civil marriage in Owambo urban households was often accompanied by a shift in authority away from the wife’s maternal uncle or brother, to her husband.⁶³

There was one exception to the general increase in civil marriage in Katutura. Pendleton found that civil marriages *declined* amongst Herero residents of Katutura over the years. He suggests that one reason for this may have been the establishment of the *Oruano* Herero church in 1955, because ministers of this church were not licensed as marriage officers and so could not perform legally-recognised church marriages.⁶⁴ He also suggests that the Herero experienced particularly intense pressure from relatives in the rural areas to contract traditional marriages. One interesting observation is that there was often a sequence of forms of marriage over time amongst Hereros in Katutura:

The same couple may contract one or more types of conjugal unions over time, and some couples have two different types of conjugal unions. A couple might start their relationship by living together, but then contract a magistrate’s marriage due to social pressure. Later, when they have saved enough money for a church marriage, they may even marry in church. Herero who still wish to contract a traditional marriage may find it necessary to also get legally married on account of the need for a marriage certificate.

⁶⁰ Ibid at 87.

⁶¹ Ibid at 88.

⁶² Id.

⁶³ Pendleton refers to Gibson on this point, concluding that “the parental reproductive family has taken over some of the responsibilities of the extended matrilineal family”. Citing D Gibson, “Changes in the Position of Matrilineal Oshiwambo-Speaking Women in Katutura, Namibia” (unpublished seminar paper, 1991) at 19, 50, 51.

⁶⁴ See also Malan (n24) at 84.

The number of couples living together as husband and wife without any form of marriage, customary or civil, was about the same in both studies of Katutura -- remaining constant at about 20% of all households.⁶⁵

Unfortunately, Pendleton's discussion of household social structures did not include an analysis of divorce and separation, noting only that divorced, separated or widowed households made up 10% of total Katutura households, most of which were female-centred and had the lowest household incomes.⁶⁶ However, one case study from the fieldwork conducted shortly after independence gives some indication of the fluidity of the concepts of marriage and separation:

In 1966 a man wanted to marry me. I agreed to get married, but we decided to make a 'short marriage' at the magistrate's. Although getting married in church is very important to the Owambo people, we decided to get married at the magistrate's. I wanted the paper so I could get permission to stay in Windhoek. Then, when the police stopped me, I just showed them the paper with my husband's name on it. But our life was not very good. He beat me so much it affected my health... We stayed married for 13 years and then I decided to leave him. I found out he had a wife in Owambo, and I was tired of the beatings. In 1979, I went back to Owambo and stayed for a year; then I went to stay with my mother's brother on a farm near Otavi. Then I returned to Windhoek to discover my husband had told the magistrate I had died and he had married another woman. [Owambo women in her 50s living in Katutura]⁶⁷

6.8 A **1992/93** survey of 600 women in **three Owambo communities** – Uukwambi, Ombalantu and Uukwanyama – indicated that about 38% of the respondents were currently married. (This percentage is somewhat higher than that found in the 1991 Population and Housing Census). . The vast majority of the respondents who said that they were married indicated that they were married under civil law – mostly in church weddings. However the survey apparently did not record information on how many people had undergone *both* civil and customary rites.⁶⁸

⁶⁵ Pendleton (n63) at 80-81: "Women were excluded from many of the regulations with which men were forced to comply, and it appeared that it was easier for women to qualify for urban residence than it was for men. A common pattern before [at the time of the first study] was that a woman would have a child, be allocated her own house, and the child's father or another man would then move in. Later the house was transferred into the man's name."

⁶⁶ Ibid at 92.

⁶⁷ Ibid at 82.

⁶⁸ Namibia Development Trust, SIAPAC-Namibia, FES & CASS, *Improving the Legal and Socio-Economic Status of Women in Namibia, Part 2: The Legal Aspects* (1994) (hereinafter "NDT Survey") at 23.

Table 13: Women's marital status in Uukwambi, Ombalantu and Uukwanyama, 1992/93

MARITAL STATUS	<u>Uukwambi</u>	<u>Ombalantu</u>	<u>Uukwanyama</u>
Single	37.0%	37.2%	26.0%
Civil marriages (civil marriages in church)	34.9% (34.0%)	29.9% (29.2%)	34.3% (34.0%)
Customary marriages	2.4%	6.2%	6.1%
Living together	8.3%	7.7%	7.3%
Divorced	2.1%	3.5%	6.8%
Separated	1.2%	2.5%	2.0%
Widowed	14.1%	12.2%	17.5%
TOTAL	100.0%	100.0%	100.0%

Source: NDT, SIAPAC-Namibia, FES & CASS, *Improving the Legal and Socio-Economic Status of Women in Namibia*.

As in the national surveys, the percentage of divorced women in this regional survey was very small. However, interviews with the respondents indicated that their concept of divorce did not refer to the technical, legal meaning of the term:

In-depth interviews with respondents who had given their marital status as “divorced” during the survey revealed that these women were mostly oblivious to the consequences of civil law marriage when it comes to the dissolution of the marriage. None of the respondents was aware of the fact that the divorce of a civil law marriage can only be pronounced by the High Court in Windhoek; they were furthermore mostly of the opinion that the dissolution of a marriage does not require the involvement of a third party. One of the interviewees said, for instance: “Nobody gave us permission to get a divorce, we got divorced by ourselves.”⁶⁹

Some 12 to 15% of the women surveyed in these three Ovambo communities reported that they were living in a polygynous relationship, although not all of these followed the traditional customs historically associated with polygyny. Because the number of women who said they were living in polygynous marriages is higher than the number of women who said that they were married under customary law, it is possible that some of these “polygynous marriages” were actually informal cohabitation arrangements with men who were married to other women.⁷⁰

⁶⁹ Becker/Hinz (n10) at 55.

⁷⁰ According to Becker/Hinz (n10) at 63: “In the Ovambo as well as the Kavango communities, the traditional form of polygynous marriage involved a clear ranking and division of rights and duties between the co-wives who all lived in the same homestead although they each had their separate household. Although the first wife, the one whom the husband has married first, enjoyed a position of enhanced power and prestige over her co-wives, this traditional form of polygynous marriage secured every wife her place.” The modern version of “informal polygyny” may provide less protection for the women involved than these traditional systems.

Women living in polygynous marriages usually shared the same homestead with the other wife or wives, and most of them cited lack of adequate financial support as a major problem of polygynous marriages and “second house” relationships. They also cited emotional problems relating to polygyny, such as jealousy and frequent arguments.⁷¹

6.9 Information from traditional leaders and from the magistrate’s court in **Caprivi in 1994** indicate that the incidence of civil marriages (either in the magistrate’s court or in church) is extremely low, in contrast to other regions of Namibia. It has been estimated that 90% to 95% of couples marry *only* in terms of customary law, and the few couples who marry under civil law usually marry under customary law as well. Traditional leaders who were interviewed indicated that traditional marriages are regarded as “stronger”. Getting married according to civil law is seen as “not wise” because it is suspected that this will cause problems with respect to divorce and inheritance.⁷²

6.10 A **1994** study of **Southern Communal Areas in the Hardap and Karas Regions** compared information from the 1991 Population and Housing Census with information collected from 43 interviews with women in these areas. There was, unfortunately, no discussion of the type of marriages which took place in the area.⁷³

This report contains an interesting discussion of why the rate of formal marriage in the study areas is low:

Since marriage is a family matter, men are sometimes concerned that they will be unable to carry the social and financial burdens of a marriage, ie meet the expectations and demands of their future wife’s family. They therefore prefer to maintain a loose partnership until they are in a position to meet these demands. Mothers, on the other hand, sometimes discourage their daughters from getting married on the grounds that once married, a daughter will not be as easily able to

⁷¹ *NDT Survey* (n68) at 4.

⁷² Becker/Hinz (n10) at 91: “Only two to three marriages are concluded in court in Katima Mulilo every month. Although most Caprivians, like Namibians in other parts of the country, belong to Christian denominations, mostly the Seventh Day Adventist and the Roman Catholic Church, cases of church marriages are also rather rare. Apart from some people who ‘want to be very good Christians’ and for that reason get married in church, it is predominantly educated men and women who are employed in the formal sector, the public service in particular, that chose to ‘get a marriage certificate’ because this is regarded as advantageous with regard to tax rebates, for example.”

⁷³ Adelheid Iken, Melinda Maasdorp & Colette Solomon, *Socio-Economic Conditions of Female-Headed Households and Single Mothers in Namibia’s Southern Communal Areas* (UNICEF/SSD 1994) at 82-83.

Another study by Iken states that some women in the south who have never married do not want to marry because of fears of losing their economic independence or personal freedom. Others say that they cannot find a potential husband who meets their expectations, that their parents will not consent, or that the person they are having a relationship with does not wish to marry. Adelheid Iken, *Women-headed Households in Southern Namibia* (1999) at 181-ff.

financially support her mother since her income will have to be shared with her husband.

Among educated women, conflicting gender roles was cited as the main obstacle preventing marriage: women felt that their lifestyle and independence would be constrained because the man would automatically assume the traditional position of head of household. The fact that men are often loath to marry women who are better educated than they are or who earn better salaries also prevents some women from marrying.

A further deterrent to marriage is the fear that a new partner might not get along with the children the woman already has. Parents' disapproval of the partner may also serve as a deterrent. Women also complained that there is a shortage of responsible men, ie men who are employed and do not abuse alcohol.

Women are also often unaware of the fact that the father of their child is already married or that he has other children. In other instances, the relationship had already ended by the time the woman realised that she was pregnant, or she felt that she was too young for marriage, or the father denied paternity.

The study suggested that the low percentage of divorce in these Nama-speaking areas stems from the fact that divorce is not approved by the church (particularly the Catholic church) or by the community. However, women interviewed generally knew that couples have the right to get legally divorced if they decide to separate, even though this choice is seldom made. The report went on to say:

Whether or not they then [when they decide to separate] share their assets depends entirely on the husband. Although women in such situations did not claim any property from their husbands, they nonetheless felt that the animals should have been shared. Women who decided to leave their husbands simply took their personal belongings and left home. None of the women interviewed realised the importance of a legal divorce to secure their rights to property.⁷⁴

Hybrid forms of marriage

6.11 As noted above, civil marriages seem to be growing in popularity, partly as a result of the influence of Christianity, except in the Caprivi Region. However, there is also evidence that it is not uncommon in regions other than the Caprivi for a couple to marry in terms of *both* civil and customary law, and to rely upon different legal and social norms, depending on the situation at hand.

For example, as noted above, civil marriage has risen in popularity in Katutura in recent years, applying to almost half of the conjugal households in the early 1990s, while customary marriages are extremely rare. However, civil marriages in Katutura often incorporate customs usually associated with traditional marriage, such as bridewealth, thus producing an intertwining of the two systems.⁷⁵

⁷⁴ Ibid at 20, 52.

⁷⁵ Pendleton (n63) at 82, 90.

A similar pattern can be observed in some rural areas. For example, the 1992/93 study of three Ovambo communities noted above found that only about 5% of respondents had been married solely in accordance with customary law, while 33% of the respondents had been married in church or a magistrate's court. However, there were many cases in which traditions associated with marriage under customary law were observed in conjunction with the marriages solemnised according to civil law. What is particularly important to note is that in these study areas, "people did not choose between the general and customary legal systems; they tended to mix elements of both."⁷⁶

Similarly, a study of Herero communities in Omatjette conducted in the late 1980s found that most married couples in the area had married both in church (in a civil marriage) and in terms of customary law.⁷⁷ In all Herero communities, the transfer of *otjitunga* is usually an integral part of church marriages, which formalises them in terms of customary law as well as civil law.⁷⁸

6.12 Religious influence has contributed to the fact that many people combine civil marriage and customary marriage. For example, many want the blessing of the church (which makes their marriage into a civil marriage if the religious leader performing the marriage is a marriage officer), whilst at the same time intending that customary law will determine the consequences of the marriage.⁷⁹

6.13 Sometimes couples enter a civil marriage because they want the formal recognition of marriage certificate. This can be useful for matters such as obtaining housing or (in the past) for tax benefits.⁸⁰ For example, according to research conducted by Becker and Hinz, some couples enter into a civil marriage after living together for some years in a customary marriage or in a more informal relationship, and after having children together. Their reasons may be a belief that such a marriage will strengthen their relationship, increase their social reputation or bring certain monetary benefits they are entitled to only when married under general law. But the research results indicate that "the civil marriage conducted under such

⁷⁶ H Becker, "Experience with Field Research into Gender and Customary Law in Namibia" in Law Reform & Development Commission (n10) at 95.

⁷⁷ HP Steyn, *Huwelikspatrone by die Herero van Omatjette, Namibie*, in 14 (3) *South African Journal of Ethnology* 79, quoted in Becker/Hinz (n10) at 78.

⁷⁸ Becker/Hinz (n10) at 82.

⁷⁹ See, for example, *ibid* at 32.

⁸⁰ All remaining distinctions between married and single taxpayers were removed by Act 25 of 1992.

circumstances may not be seen by the couple as an act that changes the matrimonial property regimes which the couple exercised over the years of living together”.⁸¹

6.14 Many commentators refer to the situation where the same two spouses conclude a marriage in terms of both civil and customary law as “dual marriage”. This paper uses the term “hybrid marriage” as being more accurately descriptive, because it would be misleading in many cases to conceive of two separate processes or events. In fact, the civil and customary formalities are sometimes carried out simultaneously, or intertwined.

Furthermore, it is not accurate to imply that the spouses themselves consider that they have two separate forms of marriage. Couples who marry in terms of both civil and customary law may simply choose to conduct their marriages according to the norms which are familiar to them.

For example, in Owambo and Kavango communities, couples who have a civil marriage often continue to follow community customs when it comes to the organisation of their married lives. Research in three Ovambo communities indicated that the marital property regime which officially applies to couples married under civil law has little impact on ownership and control of property during the marriage, or on the distribution of property upon death or divorce. In fact, people who were interviewed on this issue did not even understand the difference between “in community of property” and “out of community of property”.⁸²

The term “hybrid marriage” also points to the difficulty of dealing with the inconsistent consequences of the differing forms of marriage, such as conflicting marital property regimes. For example, in Herero communities, civil marriages are usually technically in community of property, while husband and wife have separate property in terms of customary law.⁸³

Informal cohabitation

6.15 The statistics quoted above show that informal cohabitation is an increasingly common arrangement. It is also becoming a substitute for traditional forms of polygyny where a married man sets up a “second house” with another woman.

⁸¹ Becker/Hinz (n10) at 32.

⁸² Ibid at 64. For example, even in marriages in community of property, modern commodities such as radios or motor vehicles are often considered to be the personal property of the spouse who provided the cash to acquire them. Ibid at 65.

⁸³ Ibid at 85.

6.16 Informal cohabitation may in some cases be followed by a formal marriage, or it may gradually evolve into a relationship which is viewed by the community as having the same status as a formal marriage. For example, a study of Herero communities in Omatjette conducted in the late 1980s found that many couples in this community live together for years before entering into any formal marriage, with the result that the distinction between formal marriages and these informal arrangements has become blurred.⁸⁴

6.17 There is at present no law specifically governing informal cohabitation, with the result that women in these informal relationships can be very vulnerable when the relationship comes to an end.

Conclusions

6.18 The following conclusions can be drawn from the data which is available.

- Only about 30% of Namibia's population is married, whilst about 12%-15% are living together informally. Around half of the population has never been married and is not living together with a partner. This may mean that there are other forms of relationships which do not involve marriage or cohabitation.
- Only about 3-5% of Namibians are separated or divorced. There are almost three times as many women as men amongst this group, with rural women predominating. The distinction between the categories "divorced" and "separated" is not always clear, as people sometimes refer to themselves as "divorced" when they actually mean that they are informally separated.
- The highest percentages of married persons are found in the Caprivi, Karas and Okavango regions.
- Civil marriages have increased in popularity over the years, due to church influence as well as to the fact that marriage certificates sometimes give couples concrete benefits.
- With the exception of the Caprivi region, there are indications that civil marriages and "hybrid marriages" which combine civil and customary elements are the most common. Caprivi is marked by a high incidence of customary marriages which take place on their own, without accompanying civil ceremonies.
- Couples may engage in various civil and customary marriage rites simultaneously or at different times. The form of marriage does not necessarily determine how the couple will conduct their married lives, as they may follow norms that are familiar to them regardless of the laws governing the marriage.

⁸⁴ HP Steyn, *Huwelikspatrone by die Herero van Omatjette, Namibie*, in 14 (3) *South African Journal of Ethnology* 79, quoted in Becker/Hinz (n10) at 78.

- Polygyny affects about 12% of married women. However, there are indications that some relationships which are identified as “polygyny” are not polygynous in the formal, traditional sense of the word, but rather involve adultery, “second house relationships” or men who are informally cohabitating with more than one woman.
- Informal cohabitation affects a significant number of couples, but has no legal consequences at present, regardless of the period of cohabitation. Rural men and women are slightly more likely to be living together informally than their urban counterparts. Data from the southern communal areas suggests that couples may be reluctant to marry in situations where the men are not able to meet the social and financial demands of marriage.
- Women are more likely to be living as widows than men are to be living as widowers, with rural women constituting a large percentage of this category.

7. CUSTOMARY LAW ON MARRIAGE AND DIVORCE IN NAMIBIA

7.1 There are several excellent summaries of the marriage and divorce customs of various Namibian communities, although up-to-date information on some communities is lacking.⁸⁵ This paper will not attempt to repeat or to summarise the work of others, but will rather highlight a few key principles which are relevant to the discussion of customary marriage and divorce.

7.2 **KINSHIP SYSTEMS:** Namibian communities follow a variety of kinship and lineage systems. The four main systems are matrilineal (Ovambo and Kavango communities), patrilineal (San, Nama and Damara communities), double descent (Herero and Himba communities) and cognatic (communities in the Caprivi). Kinship involves a complex set of social relations between the various members of a kin group.

7.3 **CONCEPT OF MARRIAGE:** A customary marriage is conceptualised as a union between two families or kin groups rather than a union between two individuals.

7.4 **AGE OF MARRIAGE:** Customary laws in Namibia do not set a minimum age for marriage, but marriage generally does not take place before puberty, or before the attainment of an acceptable level of social maturity. Child betrothals have taken place, particularly in the past, but marriages were never consummated before puberty.

⁸⁵ See particularly Becker/Hinz (n10), Bennett (n9) and Friesen/Amoah (n12).

7.5 CONSENT TO MARRIAGE: Family consent is generally required for a marriage to proceed, but nowadays (in most communities) the consent of both the intended spouses is generally necessary as well.⁸⁶

7.6 FORMALITIES: A customary marriage is a process which is accomplished by a series of rites and negotiations which take place over time, in contrast to civil marriages which are solemnised by a single formality.

7.7 BRIDEWEALTH: Bridewealth does not exist in some Namibian communities. In communities where payments are made to the bride's family, they play differing functions, as the following examples will show:

- In Ovambo communities, the giving of *oyonda* has been described as a “marriage ratification custom” rather than lobola, because the price of the gift given by the husband or his family to the bride or her family does not depend on any qualities of the wife (such as her level of education) but traditionally consists of a “wedding ox” that would be slaughtered for the wedding feast.⁸⁷
- In Herero communities, the *otjitungia* delivered to the bride's family varies according to the woman's qualities, especially education. The payment of *otjitungia* is a pivotal part of the marriage process, and marriages without *otjitungia* are considered invalid.⁸⁸ Similarly, in Caprivi, *lobolo* is essential to a valid marriage and the amount demanded by the family of the bride will be directly correlative to the bride's qualities.⁸⁹
- In Nama and Damara communities, some informants say that *!gu//gab* is often paid along with a church marriage, but the importance of the custom is declining. Young people today often pay *!gu//gab* only to satisfy the expectations of older family members. Some church leaders speak out against the custom now, because the difficulty of affording *!gu//gab* can encourage couple to live together without formalising their relationship in church.⁹⁰

⁸⁶ There are conflicting reports on the issue of consent by the prospective spouses in Herero communities. Becker/Hinz (n10) at 81.

⁸⁷ See generally *ibid* at 59-62. However, there are indications that some men in Ovambo communities have recently begun to regard the “marriage consideration” as a “purchase” of the wife which entitles them to obedience from her. This could be part of a gradual modern shift towards patriarchal practices in Ovambo societies. *Ibid* at 61-62.

⁸⁸ *Ibid* at 82-83. The meaning and import of the custom seems to be variable. For example, Becker and Hinz write that some younger Herero couples who are both earning an income save together for the *otjitungia*. On the other hand, women interviewed in the Okakarara area in 1991 stated that their husbands justified patriarchal control over the wife by saying that they had “bought” her by paying “lobola”.

⁸⁹ *Ibid* at 95-96.

⁹⁰ Personal informants. Iken states that “there is no bride price involved in a traditional Nama marriage”, although the groom's family is expected to contribute more animals for the wedding festivities. Iken (n73) at 72, 184-5.

- In Kavango communities, no marriage gift or bridewealth is given. Instead, bride service is expected, whereby the bridegroom will work in the home of the bride's family for a period of time prior to marriage.⁹¹ Bride service is also reportedly performed in San communities.⁹²

7.8 POLYGYNY: All traditional marriages which take place under customary law in Namibia are potentially polygynous. However, there seems to be a growing trend for formal polygynous unions to be replaced by "second house" relationships where a married man sets up house with another woman without following any civil or customary formalities. Such arrangements give even less security to the women involved than a traditional polygynous union.

7.9 LEVIRATE AND SORORATE: The custom whereby a widow is "inherited" by one of her husband's male relatives is still common in some Herero communities, although this does not seem to be compulsory for the widow.⁹³ The converse custom whereby a widower marries his deceased wife's sister is also reportedly still practised in some communities, although this also seems to be an optional choice for the sister.⁹⁴

7.10 MARITAL PROPERTY: Joint marital property is not a common concept in Namibian customary systems, although Caprivi communities treat certain types of marital property as joint property.⁹⁵ Women have control over their own separate property in some communities, although the consent of the husband or the wife's male relatives may be

Pendleton (n63) at 87-88 refers to this payment as a "bride price", but notes that "this is not actually a Damara tradition". On the other hand, Iken (n73) indicates (in her note 263) that there *is* a "brideprice" in Damara tradition (citing A Kuper, *Auskommen ohne einkommen: Leben in der Bergbausiedlung Uis in Namibia* (1995) at 203).

⁹¹ Becker/Hinz (n10) at 59-62.

⁹² Malan (n24) at 107.

⁹³ Becker/Hinz (n10) at 83.

⁹⁴ Effa Okupa, *Reform and Harmonisation of Family Laws*, Law Reform and Development Commission, 1997 at paragraph 8.7.

⁹⁵ In the Caprivi there are two classes of property: household property (such as clothes and household utensils) which are treated as joint property, and belongings acquired separately before or during the marriage which remain the separate property of the spouse who acquired them. Crops harvested from the land are treated as joint property. Becker/Hinz (n10) at 99-100.

required for at least some transactions.⁹⁶ Women can be allotted land in some communities, but in practice communal land is usually allocated to the husband.

7.11 LEGAL CAPACITY: The legal capacity of women under customary law is in some respects unclear. There is no fixed “age of majority” for men or women or men. Individual control over property is generally tempered with respect to both husband and wife by the involvement of wider kin groups. Although the wife may have some areas of independent decision-making power, the husband in most cases has a greater share of authority or is considered to be the head of the household with respect to its internal affairs

7.12 LOCUS STANDI: A wife’s right to bring cases in traditional forums varies in different communities. Traditional authorities in Owambo areas claim that women are free to present cases, but women themselves say that they are excluded from active participation in traditional tribunals. In Herero communities, sources indicate that women do not have the right to bring court proceedings and must institute suits through the husbands. On the other hand, in Kavango communities, there is reportedly no barrier to prevent women from bringing cases. In the Caprivi, women reportedly have the right to attend and to speak in court, but a wife who wishes to bring marital problems before the *khuta* needs assistance from her father or another senior male member of her family.⁹⁷

7.12 PARENTAL RIGHTS OVER CHILDREN: Although both parents have some parental authority (particularly in matrilineal communities), the father will often have decisive decision-making power on important matters. Technically, the Married Persons Equality Act has already given husbands and wives in customary marriages equal powers of guardianship over their children.⁹⁸

⁹⁶ In matrilineal communities, spouses have some control over their own individual property. However, wives need their husband’s consent for some property transactions, where husbands do not conversely need the consent of their wives. Furthermore, modern consumer goods which confer status (such as motor cars) tend to be treated in practice as “male property” regardless of which spouse actually acquired them. Control of major property, particularly cattle, usually vests in the wife’s male relatives. Ibid at 72.

In Herero communities both spouses may own and control property, including cattle, individually. However, there are some reports that male consent was necessary, at least as a formality, for some property transactions. Ibid at 86.

In Caprivi communities, wives generally have varying degrees of control over their own separate property. Ibid at 103.

⁹⁷ Bennett (n9) at 79, citing Becker/Hinz (n10) at 73-4, 87.

⁹⁸ See section 8 of this paper.

7.13 ADULTERY: As a corollary of the concept of polygyny, it is generally considered acceptable for a husband to have extramarital affairs, whilst the wife is expected to remain faithful to her husband.

7.14 DIVORCE: A number of grounds for divorce are recognised under Namibia's various customary systems. These include adultery by the wife, taking a second wife without the consent of the first, and various forms of unacceptable behaviour such as drunkenness, witchcraft or neglect of the children.⁹⁹ The extended families of the two spouses play a large role in mediation and attempting to resolve marital disputes. Divorce is usually accomplished by an informal procedure which takes place without any intervention from traditional leaders, who are more likely to become involved if there are issues which cannot be resolved between the couple and their families.¹⁰⁰

- RETURN OF LOBOLA: The return of lobola is not required in Ovambo, Nama or Damara communities. Traditionally, in Herero communities, the *otjitunia* had to be returned in a divorce if the woman was the "guilty party".¹⁰¹ In some Caprivi communities, if the wife deserts her husband or is guilty of causing the divorce, the *lobolo* must be returned. She may also have to pay an additional fine of up to 15 head of cattle. But if the husband is the guilty party, he will "lose" his *lobolo* and possibly an additional fine. In some communities, the *lobolo* will be split in half between husband and wife if both are considered to be at fault in the break-up of the marriage.¹⁰²
- CUSTODY OF CHILDREN: There is a large degree of variation on this issue, with traditional rules being applied with some flexibility and the wishes of the children sometimes being taken into account.¹⁰³
- DIVISION OF PROPERTY: Customs regarding property division upon divorce vary greatly between communities, but the wife will in many cases end up with nothing more than her personal belongings. "Ownership" of property is not decisive, and the

⁹⁹ See Okupa (n94) at paragraph 5.11.

¹⁰⁰ See Friesen/Amoah (n12) at 85, 89, 95.

¹⁰¹ Becker/Hinz (n10) at 82.

¹⁰² Ibid at 96.

¹⁰³ For example, when a marriage comes to an end in matrilineal communities, the children should in principle stay with the mother because they "belong" to her side of the family. However, older children are sometimes allowed to choose for themselves whether they will live with their father, mother or mother's brother. Ibid at 75.

In Herero communities, children traditionally remained with the father if there was a divorce. Young children might remain with the mother until they were weaned, but would be returned to the father at that point. Ibid at 88.

In the Caprivi, children usually remain with the father in the case of a divorce, although there is some flexibility and the children's wishes are sometimes taken into account. Ibid at 104-5.

wife's position may be dependent in some cases on her husband's "good will".¹⁰⁴ In the Caprivi, one of the few areas in which some categories of property are recognised as joint property (primarily household goods), this joint property is divided half and half in the event of a divorce.¹⁰⁵

- MAINTENANCE: Traditionally, the concept of lobola and the obligations of kin networks ensured that women and children were adequately taken care of following a divorce. However, these mechanisms are no longer adequate in many cases. The maintenance procedures under the Maintenance Act apply to both civil and customary marriages, but women in some communities feel that it is culturally and socially inappropriate to make use of these mechanisms.

8. CUSTOMARY MARRIAGE AND DIVORCE IN NAMIBIAN STATUTE LAW

8.1 Customary marriage was never recognised as "marriage" during the colonial period, primarily because of its potentially polygynous nature. An Owambo Native Commissioner has been quoted as making the following statement in 1957:

Marriage is a monogamous relationship, established by means of a State ceremony, between a male and a female who have agreed to get married, obliging them to live together for life until the union is set aside by a competent court, and to afford each other conjugal rights.¹⁰⁶

The term "*customary union*" was used in laws and other official contexts to differentiate unrecognised customary marriages from civil marriages.

The Native Administration Proclamation 15 of 1928

8.2. This history of the Native Administration Proclamation is important to a discussion of the recognition of customary marriage for several reasons: (a) It provided rules guided in part by forms of marriage for when customary law would apply and when "European" law would apply to questions of succession. (b) It acknowledged a particular form of polygyny – a customary marriage co-existing with a subsequent civil marriage. (c) It provided special legal provisions on matrimonial property and succession to deal with this one form of polygyny. (d) It established a state forum – the Native Commissioner's Courts – empowered to deal with divorces arising from both customary and civil marriages.

¹⁰⁴ See Friesen/Amoah (n12) at 67-68.

¹⁰⁵ Becker/Hinz (n10) at 100.

¹⁰⁶ Ibid at 30, citing M Tuupainen. "Marriage in a Matrilineal African Tribe: A Social Anthropological Study of Marriage in the Ondonga Tribe in Ovamboland" (1970) at 121.

8.3 The Native Administration Proclamation (most of which came into force on 1 January 1930) provided for the establishment of special courts presided over by “Native Commissioners”, to hear civil cases between “natives”, including divorces under civil or customary law.

As noted above, these courts had the discretion to apply a version of “native law” which was not opposed to the colonial “principles of public policy or natural justice”.¹⁰⁷ Native Commissioners had the power to involve assessors who could be, but rarely were, “natives”. Lawyers could not appear in these courts without the permission of the Native Commissioner. In theory, appeals from these courts could go to a civil court. However, in practice, there were virtually no such appeals.¹⁰⁸

According to one official, these courts usually heard divorce cases.¹⁰⁹ In fact, in 1941 the Native Administration Proclamation was amended to provide that the Native Commissioners’ Courts in Kaokoveld, Ovamboland and the Okavango Native Territory would henceforth have authority to hear *only* “matrimonial causes”.¹¹⁰

A further amendment added in 1954 expanded the divorce jurisdiction of the Native Commissioners’ Courts. The previous rule had been that these courts could hear civil cases if the *defendant* resided in the court’s area of jurisdiction. But after 1954, they also had jurisdiction over actions for divorce if the *plaintiff* resided in the court’s area of jurisdiction.

¹¹¹

Although the Native Commissioners’ Courts had the power to apply “native law”, in practice they dealt exclusively with matrimonial cases arising from Western-style civil

¹⁰⁷ See paragraph 3.5 above. The sections of the Native Administration Proclamation pertaining to the Courts of Native Commissioners were repealed by Act 27 of 1985.

It has been suggested that the purpose of transforming custom on bridewealth into law, as suggested by the second proviso to the quoted section, was “that it gave to custom the quality of certainty to marriage whereby rights over women and their children were clearly established thus enabling courts to control them rather than because it was a customary requirement”. John Y. Luluaki, “Customary Marriage Laws in the Commonwealth: A Comparison Between Papua New Guinea and Anglophonic Africa”, 11 *International Journal of Law, Policy, and the Family* 1 (1997) at 6.

¹⁰⁸ Gordon (n10) at 6-7, note 9.

¹⁰⁹ Ibid at 7. In terms of RSA Proclamation R. 348 of 1967, which set forth the civil and criminal jurisdiction of chiefs and headmen, these traditional leaders were empowered to adjudicate “civil claims arising out of native law and custom”, but did not have the power “to determine any question of nullity, divorce or separation arising out of marriage” (§2(1)).

¹¹⁰ Section 8(3)*bis*, added by Proclamation 24 of 1941. As in other cases in other areas, the court had authority to hear matrimonial cases where the defendant resided in the court’s area of jurisdiction.

¹¹¹ Section 8(3)*ter*, added by Ordinance 11 of 1954.

marriages. It has been suggested that legal disputes in respect of customary marriage were resolved locally, without involving the Native Commissioners' Courts.¹¹²

8.4 Sections 17 and 18 of the Native Administration Proclamation 15 of 1928, which deal with marriage and succession, did not come into force along with the rest of the Proclamation. However, in 1954, three subsections from these provisions were brought into force in the area north of the Police Zone *only*, with effect from 1 August 1950. These three provisions were section 17(6), section 18(3) and section 18(9).¹¹³

(1) Section 17(6) provided that civil marriages between “natives” (which took place north of the Police Zone after 1 August 1950) would ordinarily be *out* of community property. This was in contrast to the default system of *in* community of property which applied to all other civil marriages in the absence of an ante-nuptial contract providing otherwise. There was an important proviso to this arrangement, however:

Provided that in the case of a marriage contracted otherwise than during the subsistence of a customary union between the husband and any woman other than the wife it shall be competent for the intending spouses at any time within one month previous to the celebration of such marriage to declare jointly before any magistrate, native commissioner or marriage officer (who is hereby authorised to attest such declaration) that it is their intention and desire that community of profit and loss shall result from their marriage, and thereupon such community shall result from their marriage.

This proviso makes the purpose of the legislation clear. Marriages between “natives” were intended to be *out* of community of property in the areas of the country where polygyny was common, as a means of protecting the rights of existing wives married under customary law to a man who subsequently concluded a civil marriage with another women. However, if there was no pre-existing customary union, then the couple intending the civil marriage could choose to make their marriage *in* community of property.¹¹⁴

In fact, many civil marriages solemnised in churches after this provision came into force were still *in* community of property (as opposed to the default marital property regime of *out of* community of property), because church leaders favoured the concept of joint marital property.¹¹⁵

(2) Section 18(3) gave native commissioners and magistrates the power to resolve disputes or questions about the distribution of estates “in accordance with native law”, and provided for a right of appeal to the High Court of South West Africa.

¹¹² Gordon (n10) at 8-12.

¹¹³ Government Notice 64 of 1954.

¹¹⁴ This reasoning is confirmed by the provisions in the parts of the Proclamation which never came into force. These provisions are discussed in paragraph 8.7 below.

¹¹⁵ See Becker/Hinz (n10) at 32, 64.

(3) Section 18(9) empowered the Administrator to make regulations, among other things, “prescribing the manner in which the estates of deceased natives shall be administered and distributed”.

Regulations on succession were promulgated, and were made applicable *only* to the area north of the Police Zone as from 1 August 1950.¹¹⁶ These regulations made the type of marriage and the marital property regime the criteria for determining the rules of intestate succession which would apply to “natives”.

If a native dies leaving no valid will, his property shall be distributed in the manner following:

- (a) If the deceased, at the time of his death, was –
 - (i) a partner in a [civil] marriage in community of property or under ante-nuptial contract; or
 - (ii) a widower, widow or divorcee, as the case may be, of a [civil] marriage in community of property or under ante-nuptial contract *and was not survived by a partner to a customary union entered into subsequent to the dissolution of such marriage,*the property shall devolve as if he had been a European.
- (b) If the deceased does not fall into a class described in paragraph (a) hereof, the property shall be distributed according to native law and custom.

8.5 As the result of a confusing set of subsequent adjustments to the areas of applicability of various portions of sections 17 and 18 of the Native Administration Proclamation (and the quoted regulation)¹¹⁷, the present situation can be summarised as follows.

¹¹⁶ Government Notice 70 of 1954.

¹¹⁷ Twenty years later, in 1974, the whole of section 18 on succession was made applicable to the whole of Namibia, with the exception of Kavango, Eastern Caprivi and Owambo (RSA Government Notice R.192 of 1974.). The result is that only sections 18(3) and 18(9) (and the quoted regulation) apply in those three areas, whilst the whole of section 18 (along with the quoted regulation) applies to the rest of Namibia. Thus, except in the three areas of Kavango, Eastern Caprivi and Owambo, section 18(1) provides that all moveable property belonging to a “native” and “allotted by him or accruing under native law or custom to any woman with whom he lived in a customary union, or to any house shall devolve and be administered under native law and custom”. In terms of section 18(2), all other property “belonging to a native” can be devised by will, but if there is no will that it shall be “administered according to native law and custom”.

But, in terms of the quoted regulation which still applies throughout Namibia, the property of a “native” who is or was a party to a civil marriage which is either in community of property or under an ante-nuptial contract, shall be treated like that of a “European” *unless* there is a surviving spouse of a subsequent (but not a previous) customary marriage who must be provided for.

In the parts of Namibia other than Kavango, Eastern Caprivi and Owambo, both the regulation and sections 18(1) and (2) apply. The problem is that that these seem to contradict each other. The regulation provides for succession in “European” fashion in certain circumstances, while sections 18(1) and (2) essentially call for the application of “native law and custom” in all circumstances, unless there is a will. See *Ex parte Minister of Bantu Administration and Development: In Re Jili v Duma and Another* 1960 (1) SA 1 (A). See also Clinton Light, *The Succession To and Administration of Black Estates*, Legal Assistance Centre (July 1995, revised April 1998). The other anomalies of this legislation which deal only with succession, without reference to marriage, will not be discussed here.

In 1985, to complicate matters further, sections 18(3), (4), (5), (6), (7), (8), and (9)(c) were repealed with respect to the whole of Namibia (Native Administration Proclamation Amendment Act 27 of 1985, section 7).

Section 17 on “marriages of natives” was never generally applicable to any part of Namibia, except for section 17(6) which was made applicable to the area north of the Police Zone.

(a) A black person in Kavango, Eastern Caprivi or Owambo has full power to devise his or her estate by will.

(b) A black man in any other part of Namibia can devise his or her estate freely by will EXCEPT (a) movable property allotted to or accruing under customary law to any woman with whom he lived in a customary union or (b) any movable property accruing under customary law to a house. Property which falls into these two categories must devolve according to customary law. (The law is unclear on the position of the estate of a woman in this regard.)

(c) In the absence of a will, the following principles apply:

- The estate of a black person north of the Police Zone follows the general law IF that person is civilly married in community of property or by ante-nuptial contract AND is NOT survived by a partner in a customary union entered into after the dissolution of the civil marriage.
- The estate of any black person north of the Police Zone follows customary law. This would apply to a single person, a person in a customary marriage or a person in a civil marriage whose marriage is automatically out of community of property in terms of section 17(6) (discussed above).
- The estate of a black person south of the Police Zone follows customary law.
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8.6 Thus, the rules of succession which apply depend on a person's race and (for a black person) on the part of Namibia where the person resides, whether that person is or was a party to a civil or customary marriage, and what marital property regime applied to the civil marriage.

8.7 It is relevant to note that, although the entire Native Administration Proclamation was not brought into force, the system it envisaged would have acknowledged that there could be customary unions followed by subsequent civil marriages (but apparently not the other way around).

The portions of the Proclamation which were never enacted in any part of Namibia included several provisions which were meant to give protection to a woman in a customary marriage if her husband contracted a subsequent civil marriage with another woman. Section 17(1) read as follows:

No male native shall, during the subsistence of any customary union between him and any woman, contract a [civil] marriage with any other woman, unless he has first declared upon oath, before the magistrate or native commissioner of the district in which he is domiciled, the name of every such first-mentioned woman, the name of every child of any such customary union, the nature and amount of the movable

¹¹⁸ See also Light (n117)..

property (if any) allotted by him to each such woman or house under native custom, and such other information relating to any such union as the said official may require.

This was supplemented by a requirement that no marriage officer could solemnise the marriage of any “male native person” without first taking a declaration as to whether or not there was a previous customary union still subsisting and, if the answer was yes, making sure that the required certificate had been obtained. (§17(3)) Furthermore, section 17(7) provided that, where a civil marriage was contracted after the Proclamation came into force and there was a pre-existing customary marriage with another woman, the widow and the children of the civil marriage would “have no greater rights” than if the marriage “had been a customary union”.

Section 17(6), which is in force only north of the old Police Zone, similarly acknowledges the possibility that a civil marriage may be contracted during the subsistence of a customary marriage with another woman.¹¹⁹

The only reference in this legislative scheme to a customary union entered into after a civil marriage contemplates that this can occur only after the dissolution of the civil marriage.

¹²⁰

The Married Persons Equality Act 1 of 1996

8.8. With the passage in 1996 of the Married Persons Equality Act (hereinafter MPEA), the Namibian government took a much-heralded stride forward in the protection of women’s rights in Namibia. The main effect of the MPEA was to abolish the Roman-Dutch concept of “marital power” which had previously applied to all civil marriages, unless the parties made an ante-nuptial agreement specifically excluding it. In the provision of the act which generated the most controversy, the MPEA also removed the common-law assumption that the husband was automatically the “head of the household”.

8.9 The MPEA eliminates “marital power” completely, in respect of both existing and future marriages, thus eliminating the legal disabilities suffered by women married under civil law. In terms of the MPEA, couples who are in a civil marriage which is in community of property now have equal rights over their joint property. They are required to consult each other on major transactions, with husbands and wives being party to identical powers and restraints. There are avenues of redress where consent to a transaction is unreasonably withheld by either spouse. Where the requirement of consent was ignored by either the

¹¹⁹ This provision is quoted in paragraph 8.4 above.

¹²⁰ See the regulation quoted in paragraph 8.5 above., which is still applicable to all parts of Namibia.

husband or the wife, the wronged spouse can in theory seek recourse during the existence of the marriage as well as upon its dissolution. If the marriage is out of community of property, the abolition of marital power means that husband and wife each control their own separate property.

8.10 The provisions of the Act pertaining to marital power and the head of household were not extended to customary marriages, since these were common-law concepts which were applicable only to civil marriages. However, the vulnerable position of those married under customary marriage was noted at the time. As one member of Parliament said;

Many, many people in this country still marry under customary law ... Our Constitution says everyone living in Namibia will be equal. It is discrimination in terms of our Constitution. Every woman who marries should have the same rights, whether they marry in a civil marriage, under the common law or under customary law.¹²¹

8.11 There are two aspects of the MPEA which were made applicable to “marriages by customary law” as well as to civil marriages.¹²² One is the provision that partners in a marriage will normally have equal guardianship of any minor children of that marriage. Guardianship powers can be exercised by each parent independently and without the consent of the other parent, provided that both parents must consent to the following --

- (a) the contracting of a marriage by the minor child;
- (b) the adoption of the minor child;
- (c) the removal of the minor child from Namibia by either of the parents or by any other person;
- (d) the application for the inclusion of the name of the minor child in the passport issued or to be issued to any one of the parent;
- (e) the alienation or encumbrance of immovable property or any right to immovable property vesting in the minor child.¹²³

¹²¹ The Hon. Mr Hartmut Ruppel (MP, SWAPO), quoted in Republic of Namibia, *First Country Report in terms of CEDAW* (1996) at 137.

¹²² Section 16.

¹²³ Section 14. Section 16 explains which part of the Act do not apply to “marriages by customary law”. The provision of section 14 which requires that both husband and wife must consent to a “marriage” by a minor child raises an interesting interpretative question. Because the provision as a whole applies to “marriages by customary law”, then it clearly means that husbands and wives in a customary law marriage must both give consent to a “marriage” by their minor child – but does the consent requirement apply both to a civil law marriage and a customary law marriage by the child? It would be strange in the overall context of the act to argue that the term “marriage” – which is used to refer to customary marriages in section 16 – refers only to civil law marriage in section 14(2)(a). Therefore, this paper assumes that the law requires the consent of both husband and wife for any form of marriage by their child.

8.12 The provisions of the MPEA dealing with domicile also apply to both civil and customary marriages. Domicile concerns the jurisdiction where a person resides for the determination of choice of law questions. The domicile of a woman married under either civil or customary law is to be determined without reference to her husband, but by considering her case in the same manner as that “of any other individual capable of acquiring a domicile of choice”.¹²⁴ Similarly, the domicile of any child under the age of 18 will be the place with which the child is most closely connected, and not necessarily the domicile of either parent.

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Other statutes

8.13 The treatment of such terms as “marriage” or “spouse” in other relevant statutes is inconsistent. However, there seems to be a general trend in post-independence laws to explicitly include customary marriage in general provisions concerning marriage more often than not. The following list is not comprehensive, but it does give some idea of the range of statutory treatment of customary marriage:

- The **Maintenance Act 23 of 1963**, a law inherited from South Africa which governs maintenance in Namibia, explicitly includes customary marriages for its purposes: “For the purposes of determining whether a Black or a native... is legally liable to maintain any person, he shall be deemed to be the husband of any woman associated with him a customary union” (§5(6), as amended by §2 of Act 39 of 1970).
- Section 10 of the **Civil Proceedings Evidence Act 25 of 1965** inherited from South Africa, provides for marital privilege in court proceedings and applies to both “a marriage or a putative marriage” (§10(2)). It is possible that either the term “marriage” or “putative marriage” includes customary marriages, although neither is defined.¹²⁶ In any event, this statutory provision has been overruled by the Namibian Constitution, which in Article 12(f) provides that spouses shall not be forced to give testimony against their respective spouses, “who shall include partners in a marriage by customary law.”

¹²⁴ Section 12.

¹²⁵ Section 13.

¹²⁶ A putative marriage occurs when one or both of the parties is ignorant at the time of contracting the marriage of some impediment to the marriage and thus believes in good faith that they were lawfully married. It has some, but not all, of the consequences of a valid marriage. See *Wille's Principles of South African Law (Eighth Edition)*, 1991 at 175-77.

See also *Makhiliso and Others v Makhiliso and Others* 1997 (4) SA 509 (Tk) in which a customary marriage was found to be a putative marriage for purposes of intestate succession.

- The **Namibian Citizenship Act 14 of 1990** applies the Constitution’s inclusion of customary marriage in the concept of citizenship by marriage by providing as follows:

A marriage by customary law having been recognised as such for the purposes of the acquisition of citizenship by marriage, shall only be so recognised, if the Minister or any person designated by the Minister is satisfied upon information submitted to him or her by the applicant and such other person alleged to be the applicant’s spouse by customary law, in a declaration made in the prescribed form, that the applicant is in fact married by customary law to the person in question (§3(3)(a)).¹²⁷

Thus, this Act essentially puts into place a substitute for a formal system of registration of customary marriages for the limited purpose of citizenship.

- The **Members of the National Assembly and Other Office-Bearers Pensions Act 21 of 1990** defines “dependent” to include “... any minor child, including any stepchild, legally adopted child or child born out of a marriage by customary law...” (§1(1)). However, the terms “widow” and “widower” are not similarly defined, but left open to interpretation.
- The **Recognition of Certain Marriages Act 18 of 1991** provides for the recognition of marriages which took place in terms of the Swapo Family Act that applied to Swapo members in exile during the liberation struggle. Interestingly, the Swapo Family Act provided only for marriages which were analogous to civil marriages in form – in order to be valid, these marriage had to take place before a marriage officer in a prescribed form. They were then to be registered in Namibia “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, 1960 (Act 25 of 1961), as if it had been contracted in accordance with the provisions of the Act” (§2(1)). The reason may have been that the conditions in exile, particularly the separation of individuals from their families and communities, made it impossible for customary marriages to take place in the traditional manner.
- The **Regional Councils Act 22 of 1992**, in discussing disclosures of conflicts of interest, refers to persons related to the council member by blood or marriage, persons in the council member’s household, business associations and any person “with whom such member is in terms of the traditional laws and customs a partner in a customary union” (§16(1)(b)(iii)). This provision is repeated verbatim in the **Local Authorities Act 23 of 1992**.
- Section 26 of the **Immigration Control Act 7 of 1993** states that an alien may get permanent residence in Namibia if he or she is a “spouse... of a person permanently resident in Namibia...”. However, the statute provides no definition of “spouse”, thus arguably leaving the question open as to whether the term applies to both civil and customary marriages.¹²⁸

¹²⁷ The following provision gives the Minister limited investigative powers to clarify the question if necessary:

The Minister or the person so designated may, in addition to any information contained in the declaration submitted in terms of paragraph (a) or to clarify any information so submitted, call for further information to be submitted to him or her, and may call upon any person who is present to appear before him or her and require or allow such person to give such oral information or produce such other information as in the opinion of the Minister or the person so designated may assist him or her in deciding the matter in question (§3(3)(b)).

¹²⁸ Dealing with an immigration case, Levy, AJ, may have given insight and expansion to the term “spouse”, by ruling in what was perhaps *obiter dictum* that two lesbian women who had

- The **Dissolution of Marriages on Presumption of Death Act 31 of 1993**, which is designed to facilitate the dissolution of marriages where one of the spouses is presumed dead, does not define “marriage” or “married person”.
- The **Employees Compensation Act 30 of 1941 (as amended by Act 5 of 1995)** makes explicit provision for customary marriage, by stating in §4(3) that “surviving spouse” (for purposes of the section on payment of compensation in the event of death from a work-related accident) includes “a surviving partner in a marriage by customary law”.
- The **Medical Aid Funds Act 23 of 1995** defines “dependent” in relation to a registered medical aid scheme as including the “spouse” of a member and the child of a member (including a step-child or an adopted child) (§1), but it does not define “spouse” or make any reference to customary marriage.
- The **Arms and Ammunition Act 7 of 1996** defines “spouse” to include “a person who is, in terms of the traditional laws and customs, a partner in a customary union” for the purposes of the provision on possession of a firearm by the spouse of a licence-holder (§8(4)).
- The **Identification Act 21 of 1996** (which had not yet come into force at the time of writing) requires that a popular register be established, which would record in respect of every citizen and permanent resident “the particulars of his or her marriage as contained in the relevant *marriage register or any other document relating to the contracting of his or her marriage* and such other particulars concerning his or her marital status as may be furnished” (§3(d), emphasis added). While there is no definition of marriage in the statute, as matters stand at present, the “marriage register” will have a record only of those marriages contracted under civil law. The “other document” referred to is not likely to exist in a strictly customary marriage (although it might be possible in theory).¹²⁹
- The **Combating of Rape Bill** currently before Parliament would include customary marriages in its removal of the marital rape exemption, although they are not referred to explicitly: “No marriage or other relationship shall constitute a defence to a charge of rape under this act” (§2(3)).

essentially created a marriage, but because of Namibian statute could not officially marry, should be considered spouses at least for the purposes of the Immigration Control Act. “A Universal Partnership concluded tacitly has frequently been recognised by our courts of law as between a man and a woman living together as husband and wife but who have not been married by a marriage officer [cases omitted]... I have no hesitation in saying that the long term relationship between applicants in so far as it is a universal partnership, is recognised by law.” *Frank and Another v. Chairperson of the Immigration Selection Board*, A 56/99 (judgement delivered on 24 June 1999, as yet unpublished). Thus, two people engaged in such a universal partnership are in essentially the same position as spouses, at least for the limited purposes of immigration law. By implication, a customary marriage not formally convened under statute could also be considered a valid universal partnership for this purpose.

¹²⁹ While “other particulars” of a customary marriage might be available, the joining of the two relevant clauses with the word “and” means that even if “other particulars” exist, the particulars from the “marriage register or any other document” must be recorded in the population register for the fact of the marriage to be reflected.

- The **Communal Land Reform Bill** currently before Parliament specifically defines “spouse” as including “the spouse or partner in a customary union, whether or not such customary union has been registered, and ‘marriage’ shall be construed accordingly” (§1).

9. EXAMPLES FROM OTHER COUNTRIES

9.1. This paper considers the treatment of customary marriage in Papua New Guinea, Zimbabwe, and South Africa. These countries were chosen (a) because relevant material was accessible and (b) because the differences between their approaches is significant enough to allow for instructive comparisons.

Papua New Guinea retains a dual system of marriage law for civil and customary marriage. It gives full recognition of all customary marriages without any sort of registration and very little statutory regulation.

In Zimbabwe, where there is mandatory registration, the consequences of failure to register are such that there are actually three forms of marriage: civil marriage, *registered* customary marriage and *unregistered* customary marriage. Zimbabwe applies some of the same consequences to civil marriages and to *registered* customary marriages, but allows unregistered customary marriages to continue to follow customary norms outside the statutory system. Recent case law has also strengthened the role of customary norms even in registered customary marriages.

South Africa recently adopted a system which is a unitary one in many essential respects, whilst still allowing for some significant differences between civil and customary marriages. The 1998 South African law on customary marriage gives full recognition to all customary marriages. It applies certain minimum standards and uniform consequences to all marriages, registered or not. The law “requires” registration but does not penalise failure to register.

PAPUA NEW GUINEA

9.2 Papua New Guinea, like Namibia, is a former colony of a former colony. It was once under the dominion of Australia, itself once a colony of England. It encompasses an incredible degree of cultural diversity, with some 1 000 tribes and over 800 languages in a population of only 4 million.

9.3 The Papua New Guinea Constitution states that “a complete relationship in marriage rests upon an equality of rights and duties of the partners, and that responsible parenthood is

based on that equality”. It also gives general recognition to the principle of sexual equality.

¹³⁰ The Constitution gives explicit recognition to customary law, provided that it does not infringe other provisions of the Constitution or statute law and is not “repugnant to the basic principles of humanity”. ¹³¹

The Law Reform Commission proposals of 1978

9.4 In 1978, the Law Reform Commission of Papua New Guinea published a working paper which made recommendations on new family law legislation. ¹³² In this paper, the Law Reform Commission proposed one substantive law on marriage, which would allow for different forms of marriage. The key recommendations were as follows:

(a) *There is one state of marriage, in which one man and one woman intend to be voluntarily joined for their joint lives.*

(b) *A marriage may be entered by customary or non-customary form. The difference is in form, not in the substance of the state of marriage. However, a marriage entered in customary form may be potentially polygamous, under certain circumstances.*

(c) *A polygamous customary marriage shall be valid only if the existing wife or wives give consent.*

(f) *A non-customary marriage may be conducted by religious or civil ceremony.*

(h) *Marriages conducted by civil ceremony may be potentially polygamous only if both parties agree at the time of marriage that the marriage is to be a potentially polygamous marriage.*

(i) *Where a customary marriage is “blessed” by a religious representative, it shall remain a customary marriage in all respects except that it shall then be monogamous.* ¹³³

9.5 The Law Reform Commission was of the opinion that there should be a common basis for all marriages – free consent of both prospective spouses, an intention to form a

¹³⁰ Clause 2(11) and section 55, which states that “all citizens have the same rights, privileges, obligations and duties irrespective of race, tribe, place of origin, political opinion, colour, creed, religion or sex”. Quoted in Jean G. Zorn, “Women, Custom and State Law in Papua New Guinea” in *Third World Legal Studies* (1994) at 172.

¹³¹ Schedule 2.1.

¹³² Law Reform Commission of Papua New Guinea, *Family Law*, Working Paper No. 9, March 1978.

¹³³ *Ibid* at 6-ff.

permanent union and a minimum age. Beyond that, they proposed that customary marriage and non-customary marriages should be equally valid in the eyes of the law. (Even the report's terminology of "customary and non-customary" marriage moves away from the idea that civil marriage has any kind of superiority over customary marriage.)

On polygamy, the theory was that all church marriages would be monogamous. All other non-customary marriages would be presumed to be monogamous, unless the parties stated a contrary intention at the time. All customary marriages would be potentially polygamous. However, the Commission hoped that the requirement that existing wives must give consent to polygamous unions would discourage the practice.

Where a couple asked a church to perform any rites in relation to a marriage which is otherwise a customary marriage, this would have the effect of converting the marriage from a potentially polygamous one to a monogamous one. But this would not work the other way around; if a church marriage were followed by customary rites, this would not convert the monogamous union into a potentially polygamous union.

9.7 The Commission recommended that all forms of marriage be registered in a central marriage registry, although they did not envisage registration as being a pre-requisite for validity.¹³⁴

9.8 The principles of equal guardianship and joint custody of children would apply to all marriages, along with the duty to maintain children in accordance with the respective financial resources of the parents.

9.9 Any party to a marriage claiming a share in the property of the marriage would have a right to make application to a court for the settlement of property interests during the subsistence of the marriage or upon its dissolution. The court would be required to consider both the financial and non-financial contributions of the respective parties, including

¹³⁴ On this point they stated: "The proposals leave the essential ingredients for a customary marriage somewhat general, because of the many variations between societies. Where there is a dispute or doubt about whether two people are properly married under custom, the Act puts up some criteria which the court could look at in making its decision about the existence of the customary marriage. These criteria are not exhaustive, but are some of the recurring aspects of customary marriage which emerged from a comprehensive study of customary marriage in many different Papua New Guinea societies." Ibid at 9.

The criteria contained in the proposed bill were the payment of bridewealth or dowry, the betrothal and engagement, the wedding ceremony, the delivery of the bride, cohabitation, birth of a child, whether the community to which each of the parties belong has accepted the parties as being married under custom and any other matters which the court thinks relevant. Conflicts between the custom of the husband and the custom of the wife would be determined by the custom of the wife. Draft Family Law Bill 1978, section 5(2)-(3).

contributions as a homemaker or a parent, and would have a wide discretion to make orders altering the parties' property interests as it saw fit.

9.10 The Law Reform Commission suggested that the procedure for dissolution of marriage should continue to differ according to the form of marriage. Non-customary marriages could be dissolved only by courts, on listed grounds. But customary marriages could continue to be dissolved under custom, without interference from a court or any public authority, although it appears from the proposed bill that any party to a customary marriage would also have the option of approaching a court for an order of dissolution, and for a concomitant property settlement.

Where a divorce case (or any other family law case) came before a court, the court would have the power to adjourn proceedings for the purpose of attempting a reconciliation between the parties or for mediating disputes over matters such as maintenance or custody.

The current position in Papua New Guinea

9.11 The recommendations of Papua New Guinea's Law Reform Commission were never adopted. Instead the government chose to retain a dual system with extremely minimal regulation of customary marriage.¹³⁵ The primary statutory provision on customary marriage reads as follows:

3.(1) Notwithstanding the provisions of this Act or of any other law, a native, other than a native who is a party to a subsisting marriage under Part V [a civil marriage] may enter, and shall be deemed always to have been capable of entering, into a customary marriage in accordance with the custom prevailing in the tribe or group to which the parties to the marriage or either of them belong or belongs.

(2) Subject to this Act, a customary marriage is valid and effectual **for all purposes**.¹³⁶

9.12 There is no system of registration, nor any guidelines for recognition. Even the minimum age requirements apply only to civil marriages.¹³⁷ However, Local Government

¹³⁵ Debate on the issue of polygamy may have been one factor which impeded law reform on customary marriages. A Task Force on Family Law Reform established by the Law Reform Commission issued a statement in 1990 asserting that polygamy should be abolished by Parliament because it is unchristian as well as being a violation of the Constitutional guarantees of sexual equality. The Governor-General who took office Papua New Guinea in 1991 had two wives at the time, sparking a national furore when he chose only one of them to act as his "First Lady". See Owen Jessup, "The Governor-General's Wives – Polygamy and the Recognition of Customary Marriage in Papua New Guinea", 7 *Australian Journal of Family Law* 29 (1993) at 29, 41-42; Luluaki (n107) at 26-ff.

¹³⁶ Marriage Act (Ch 280), §3 (emphasis added).

¹³⁷ Ibid, §6(3).

councils have the power to make rules in respect of customary marriage, including the power to regulate the kind, manner or amount or value of customary settlements or similar matters”, which appears to refer to bridewealth.¹³⁸

9.13 The law gives some protection to women who are forced to enter into customary marriages against their will, by empowering local courts to make an order forbidding a customary marriage from proceeding if the woman objects to the marriage and

(a) excessive pressure has been brought to bear to persuade her to enter into the marriage; or

(b) in the circumstances it would be a hardship to compel her to conform to custom.¹³⁹

It is a criminal offence to marry a woman in contradiction of such a court order, and a marriage which take place under such circumstances can be annulled.¹⁴⁰ However, this provision has apparently never been used in practice.¹⁴¹

9.14 It has been suggested that the recognition of customary marriages “for all purposes” may mean-

that, with the major exception of laws dealing with divorce (and post-divorce maintenance and property settlement), the laws dealing with the rights of spouses in relation to such matters as maintenance during marriage, taxation, adultery and enticement, workers’ compensation, accident claims in tort, and intestacy and family provision will apply without distinction to both statutory and customary spouses.¹⁴²

However, the actual interpretation of the law appears to be still evolving. For example, court cases have held that customary marriage is equivalent to civil marriage with respect to the common law rule which protects spouses for having to testify against each other¹⁴³, and for purposes of the marital rape exemption contained in the Criminal Code.¹⁴⁴

¹³⁸ Local Government Act (Ch 57), §71(2), cited in Luluaki (n107) at 29.

¹³⁹ Marriage Act (Ch 280), §5(1).

¹⁴⁰ Ibid, §§ 5(2)-(3).

¹⁴¹ At least as of 1997. Luluaki (n107) at 16; Jessep (n135) at 32.

¹⁴² Jessep (n135) at 36. Abdul Paliwala has suggested that, while it is not entirely clear, “case law suggests that wherever legislation refers to marriage it should automatically refer also to customary marriage.” (informal consultations).

¹⁴³ *State v Uniss Kamugaip (SCR No 3 of 1985)* [1985] PNGLR 278, cited in Jessep (n135) at 35.

¹⁴⁴ *John Kaina v The State* (1990) SC 387, cited in Jessep (n135) at 35.

Commentators refer to several cases where courts have intervened with customary marriage on the Constitutional grounds of equality. One is the 1991 case of *Re Kaka Ruk and the Constitution Section 42(5)*, which dealt with a situation where a village court had gaoled a woman after she committed adultery with her husband's brother. On appeal, the National Court found that her husband must share the blame for neglecting her while he was absent at work on a plantation. The court stated:

This custom that the husband is seeking to apply which leads to her gaoling when he is in the dominating position and where the situation has been partly caused by his behaviour must be a custom that denigrates women and is thus repugnant to the general principles of humanity and should be denied a place in the underlying [or customary] law... People in Papua New Guinea must come to terms with the law that women are not chattels that can be bought and thus bonded forever. They are equal partners in the marriage and in society.¹⁴⁵

In another case involving similar facts, an unfaithful wife with a husband who had been absent without any communication for several years was imprisoned when she failed to pay the compensation for adultery ordered by the village court. This order was overturned on appeal on the grounds that it violated the Constitution's equality clause and "was denigrating to her status as a woman" by making her "bonded almost in slavery to the husband even when the husband neglects her".¹⁴⁶ The court stated:

The Village Courts [which are customary tribunals] must recognize the nature of the changes in Papua New Guinea and that the enforcement of custom must not conflict with the principles and rights given in the Constitution... Customs that denigrate women should be denied a place in the underlying [customary] law in Papua New Guinea because they conflict with the National Goals of equality and participation which have been laid down clearly in the Constitution.¹⁴⁷

Another case addressed a customary rule which forbade widows (but not widowers) to have any sexual contact with other men during a "mourning period" which varies from community to community, with violations of this rule being treated as adultery. When a woman was imprisoned by a village court for adultery in this sense, she was released on appeal with the court holding that the custom was unconstitutionally "oppressive to women".

¹⁴⁸

¹⁴⁵ *Re Kaka Ruk and the Constitution Section 42(5)* (1991) N 963 at 3-4, cited in Jessep (n135) at 33.

¹⁴⁶ *Re Wagi Non and the Constitution Section 42(5)* (1991) N 959 at 3-4, cited in Jessep (n135) at 33. Luluaki (n107) at 30 interprets both of these cases as being less about adultery and more about the inability of women to divorce without their husband's consent under customary law. Without access to the actual cases, it is not possible to determine whose reading is correct.

¹⁴⁷ *Re Wagi Non and the Constitution Section 42(5)* (1991) N 959, as quoted in Zorn (n130) at 171-2.

¹⁴⁸ *Re Kepo Raramu and Yowe Village Court* (1993) N 1262, cited in Luluaki (n107) at 31.

These cases are not unusual. In 1990 alone, the National Court ordered at least 44 women released from prison in cases “which in the end appear to be clear discrimination or harsh application of customary laws against women”.¹⁴⁹

9.15 These fairly recent cases indicate that customary marriage has retained many of its historical features, and is being slowly transformed at least in part through incremental court action. The recent signs of progress towards greater sexual equality must be placed in context, however. A 1998 Human Rights Report published by the United States Department of State suggests that some forms of violence and discrimination in Papua New Guinea stem from the persistence of certain traditions relating to customary marriage:

Violence committed against women by women frequently stem from domestic disputes. In areas where polygyny is still customary, an increasing number of women have been charged with the murder of another of their husband’s wives. According to one report, 65 percent of women in prison are there for attacking or killing another woman.

The Constitution and laws have provisions for extensive rights for women dealing with family, marriage, and property issues. Some women have achieved senior positions in business, the professions, and civil service. However, traditional patterns of discrimination against women persist. Many women, even in urban areas, are considered second-class citizens. Village courts tend to impose jail terms on women found guilty of adultery, while penalizing men lightly or not at all. Circuit-riding National Court justices frequently annulled such village court sentences. In 1996 the Government approved amendments to the Village Courts Act requiring that orders for imprisonment be endorsed by a district court before they take effect. Polygyny and the custom of paying bride price tend to reinforce the view that women are property.

In addition to the purchase of women as brides, women also are sometimes given as compensation to settle disputes between clans. The courts have ruled that such settlements are a denial of the women’s constitutional rights. During the year [1998], the Jimi clan in the Western Highlands province included two 16-year-old girls as part of the compensation offered in the settlement of an interclan fight. The National Court has ordered a judicial inquiry.¹⁵⁰

The World Bank, in its 1999 report on funding to Papua New Guinea for gender-related projects, rather paradoxically blames both custom and the “breakdown of tradition” for negative impacts on women:

The rapid socio-economic and *legal “modernization” and the breakdown of tradition* in contemporary PNG society has created a range of unfavourable circumstances for women, from violence against women to women’s disinheritance. Although the modern Constitution ensures both men and women equal opportunity for socio-economic development, it also validates *customary laws, which often legitimize male superiority and reproduce traditional perceptions of sex roles*— i.e. men as warriors

¹⁴⁹ Papua New Guinea Supreme Court, Annual Report by the Judges, 1990 at 7, quoted in Zorn (n130) at 174.

¹⁵⁰ http://www.state.gov/www/global/human_rights/1998_hrp_report.

and decision-makers while women as a chattel wife, purchased with bride-price – in such areas as on marriage, inheritance and dispute settlement.¹⁵¹

One analyst argues that it would be an oversimplification to ascribe the discriminatory treatment of women in Papua New Guinea to “custom”:

It may be that the customs that have survived as customary law through the colonial period and into statehood reflect male attitudes more than they reflect the actual state of affairs in pre-colonial villages. Today’s “customs” are as much a product of the colonial and post-colonial periods as they are of the pre-colonial era.¹⁵²

ZIMBABWE

9.16 Zimbabwe, which achieved its independence in 1980, has two main ethnic groups amongst its population of about 11 million – the Shona and the Ndebele.

9.17 The Constitution of Zimbabwe originally prohibited discrimination on the basis of race, tribe, place of origin, political opinions, colour or creed” but not sex or gender. A 1996 constitutional amendment added “sex” to the list of prohibited grounds for discrimination.

Thus, section 23(1) currently states that “no law shall make any provision that is discriminatory either of itself or in its effect”, which means that a law may not prejudice “persons of a particular description by race, tribe, place of origin, political opinions, colour, creed or sex” (§23(2)). However, all aspects of customary law and personal law are explicitly *excluded* from this equality clause. Section 23(3) specifically exempts certain areas from the foregoing sections

(a) adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law;

(b) the application of African customary law in any case involving Africans or an African and one or more persons who are not Africans where such persons have consented to the application of African customary law in the case.¹⁵³

A Constitutional Commission is currently tasked with the job of drafting a new Constitution for Zimbabwe.

¹⁵¹ <http://www.worldbank.org/gender/info/papua.htm>. The World Bank report also notes that only three women have been elected to Parliament since PNG’s independence in 1975, and that violence against women is rife. Two thirds of all married women in rural areas report being beaten by their husbands; a 1978-82 survey found that 73% of all murders of adult women were committed by their husbands, while *all* murders by women against men resulted from revenge for long-term abuse at the hands of those men.

¹⁵² Zorn (n130) at 181.

¹⁵³ See *Magaya v Magaya* Civil Appeal No. 635/92, SC 210/98 (1999).

The current statutory law

9.18 The Customary Marriages Act [*Chapter 5:07*] of Zimbabwe was originally formulated in 1951 (known at that stage as the “African Marriages Act [*Chapter 238*]”), but has been subsequently amended. This Act must be read together with the Marriage Act [*Chapter 5:11*] which governs formalities pertaining to civil marriage. It must also be read together with the Married Persons Property Act [*Chapter 5:12*] and the Matrimonial Causes Act [*Chapter 5:13*], both of which apply to all “solemnised” marriages.

9.19 The Customary Marriages Act provides that a customary marriage shall be “regarded as a valid marriage” only if it is registered in terms of the Act (or its predecessors) (§3(1)).¹⁵⁴ However, *unregistered* customary marriages will be “valid marriages” for “the purposes of customary law and custom relating to the status, guardianship, custody and rights of succession of the children of such marriage” (§3(5)). Thus, in essence, an unregistered customary marriage operates in terms of customary law totally outside the general legal system.

The Customary Marriages Act even takes this principle so far as to provide that the rules protecting spouses from being compelled to testify against each other in court do not apply to unregistered customary marriages (§14).

9.20 The Zimbabwean requirements for registration add a great deal of rigidity to formerly fluid customs in the process of recognizing customary marriages. In order to qualify as a valid customary marriage under the act, the following conditions must be met:

- The marriage must be solemnised by a customary marriage officer of the district in which the woman or her guardian resides (§4(1)).
- The woman’s guardian or the guardian’s deputy must be present, unless the marriage is authorised by a magistrate who is satisfied that the guardian has consented to the marriage “and has agreed to the form and amount of the marriage consideration”.¹⁵⁵

The magistrate may authorise the marriage without the guardian’s consent if the guardian is unreasonably withholding consent, or cannot be found (§§4(2)(a), 5).

¹⁵⁴ There is a provision for the late registration of marriages which took place between certain dates but were not registered in terms of the legislation for registration in force at that time. Failure to register the marriages which fall into this category will result in a fine. Provision is also made for customary marriages contracted outside Zimbabwe, which will be valid if they are recognised as valid marriages in the country where they took place (§§3(2)-(4)).

¹⁵⁵ “Marriage consideration” is defined in §1 as “the consideration given by or to be given by any person in respect of the marriage of an African woman, whether such marriage is contracted according to customary law or solemnised in terms of the Marriage Act or this Act”.

- The marriage must be witnessed by the chief, headman or village-head of the woman's guardian, or some other person approved by the customary marriage officer, and this witness must be paid a fee of one dollar (§4(2)(b)).
- The guardian of the woman and the intended husband must have agreed upon the amount and form of the marriage consideration. The magistrate may also fix the amount of the marriage consideration after consultation with the guardian if agreement on this point cannot be reached (§§7, 5(1)(b)).
- The intended husband and wife must both "freely and voluntarily consent to the marriage". There is a penalty for compelling any "African female" to enter into a marriage against her will (§7(1)(b), 15).

There is no minimum age requirement.¹⁵⁶ The Act is also silent on the issue of polygyny. However, the Zimbabwe Supreme Court ruled in 1999 that a customary marriage is potentially polygynous, while a civil marriage under the Marriage Act is monogamous.¹⁵⁷

9.21 In comparison, the following are the basic requirements for a valid civil marriage in terms of the Marriage Act:

- The marriage must be solemnised by a magistrate or another marriage officer, who can be a religious leader of a Christian, Jewish, Islamic, Hindu or any other religion (§§3-4,8).
- The parties must publish banns of marriage or a notice of intention to marry, or obtain a marriage licence from a magistrate (§9-ff).
- The minimum age for marriage without state consent is 18 for males and 16 for females. A minor also needs the consent of his or her parents or guardians (§§22,20).
- Prohibited degrees of consanguinity and affinity are prescribed (meaning that marriage between certain relatives is prohibited) (§24).
- The parties must consent to marry each other.¹⁵⁸

All civil marriages are monogamous.¹⁵⁹

¹⁵⁶ Section 12 of the Customary Marriages Act previously made it illegal to pledge girls under the age of 12. See W Ncube, *Family Law in Zimbabwe* (1989) at 138. However, now it is illegal in terms of this section for a person to pledge or promise any girl or woman in marriage.

¹⁵⁷ See Artwell Manyemba, 'Supreme Court judgement sparks debate', *The Herald*, 11 March 1999.

¹⁵⁸ This requirement is not explicitly contained in the statute, but has its source in the common law. See Ncube (n156) at 145-ff.

¹⁵⁹ See *ibid* at 133, 138.

9.22 “Africans” who want their marriages to be registered as civil marriages in terms of the Marriage Act must first obtain a certificate from a magistrate stating that the parents or the guardian of the woman agree to the marriage, and giving details about the marriage consideration (the consideration paid, its value, any consideration still to be paid, and the terms of payment agreed upon).¹⁶⁰ The effect of this provision is to import the concept of “marriage consideration” into civil marriages between Africans as a legal requirement.

9.23 Until 1997, the proprietary consequences of a *civil* marriage between Africans was governed by *customary* law.¹⁶¹ This meant in practice that all property acquired during the marriage came under the ownership and control of the husband.¹⁶²

Now the Married Persons Property Act applies to “any marriage solemnized between spouses whose matrimonial domicile is in Zimbabwe”.¹⁶³ This apparently covers both civil marriages and registered customary marriages, as the laws governing the recognition of these respective types of marriage refer to “solemnization” as the operative action for validity.¹⁶⁴ For all solemnized marriages entered into after 1 January 1929, the default property regimes is *out* of community of property unless there is an ante-nuptial agreement to the contrary.¹⁶⁵

9.24 In terms of the Matrimonial Causes Act, all registered marriages, civil or customary, can be dissolved only by order of a court, and the grounds for divorce are the same for all such marriages. Historically the grounds for divorce in Zimbabwe were similar to those which presently apply to civil marriages in Namibia (adultery, malicious desertion, cruelty, insanity and long-term imprisonment), and divorce was premised on the concept of a guilty and an innocent spouse.¹⁶⁶ However, the Matrimonial Causes Act was amended in 1985 to

¹⁶⁰ Customary Marriages Act, §12. After the Legal Age of Majority Act came into force, Africans were allowed to enter civil marriages without obtaining this certificate. Ncube (n156) at 143. However, the case of *Magaya v. Magaya* (which is discussed below) appears to have limited the applicability of the Legal Age of Majority Act. The impact on this requirement is unclear, however, since the rule concerns civil marriage rather than customary marriage.

¹⁶¹ Customary Marriage Act, section 13, repealed by Act 6 of 1997 with effect from 1 November 1997. See also Ncube (n156) at 133.

¹⁶² Ncube (n156) at 170.

¹⁶³ Married Persons Property Act, §2(1).

¹⁶⁴ Marriage Act, §§8, 31; Customary Marriages Act, §3.

¹⁶⁵ Married Persons Property Act, §2. This was previously the automatic property regime for civil marriages between non-Africans only. Ncube (n156) at 168.

¹⁶⁶ The first two grounds were derived from Roman-Dutch common law, while the last three were recognised by the Matrimonial Causes Act of 1943. See Ncube (n156) at 200-01.

abolish the fault concept, and to reformulate the grounds for divorce as either (a) irretrievable breakdown of the marriage, or (b) incurable mental illness or continued unconsciousness.¹⁶⁷

The only difference between divorce for a civil marriage and divorce for a registered customary law marriage is procedural: civil law marriages can be dissolved only by the High Court, whilst registered customary law marriages can be dissolved by either the High Court or a magistrates' courts.¹⁶⁸

Unregistered customary marriages are dissolved in terms of local custom.

9.25 Thus, one can say that in Zimbabwe there are actually *three* categories of marriage: (1) civil marriages (solemnised in terms of the Marriage Act), (2) registered customary marriages (solemnised in terms of the Customary Marriages Act) and (3) unregistered customary marriages, usually referred to "customary law unions" (which follow customary law and are not valid for general law purposes).¹⁶⁹

Civil marriages and registered customary marriages have the same property consequences and the same substantive rules concerning dissolution, but unregistered customary marriages follow local custom on these points.

Judicial interpretation

9.26 The purposes for which an unregistered customary marriage are valid are limited and, due to a lack of legislative clarity, are gradually being defined by case law. For example, the case of *Katiyo v. Standard Chartered Zimbabwe Pension Fund* involved a spouse of a deceased member of the pension fund. The deceased and the spouse had been married under customary law, but had failed to register the marriage. The court ruled that "the refusal by the trustees of the fund to treat the plaintiff as a spouse for the purposes of the fund did not violate §23 of the Constitution because the Customary Marriages Act provides that unregistered customary law unions are valid only for the customary law rules on status, guardianship and rights of succession of children".¹⁷⁰

¹⁶⁷ See J Stewart, W Ncube, M Maboreke, A Armstrong, "The Legal Situation of Women in Zimbabwe", *The Legal Situation of Women in Southern Africa* (1990) at 173-74. However, the old grounds of divorce are still relied on in practice as a means of proving that a marriage has irretrievably broken down. See section 5(2) of the Matrimonial Causes Act.

¹⁶⁸ Matrimonial Causes Act, 2(1) ("appropriate court"). Ncube (n156) at 208 and note 41.

¹⁶⁹ Ncube (n156) at 133.

¹⁷⁰ 1995 (1) ZLR 225 (HC).

Another example is the case of *S v Ndhlovu*, where the court ruled that a man could not be found guilty of incest for sexual relations with his step-daughter if the marriage had not been registered.¹⁷¹

Thus, in Zimbabwe, a woman married in an unregistered customary marriage is in an extremely vulnerable position. Mandatory registration, seemingly a means for securing more women's rights, has resulted in fewer rights for some, as failure to register is tantamount to a forfeiture of certain rights. The problem is made worse, according to Jessie Majome of the Constitutional Commission in Zimbabwe, because many women are not even aware of the possibility of registration. "This is the kind of information that I think people should have off-hand so that they know how far their rights stretch," she was quoted as saying in *The Zimbabwe Standard*.¹⁷²

9.27 Inequalities between registered civil marriages and registered customary marriages also persist. For example, the Supreme Court of Zimbabwe recently handed down a decision stating that a woman in a registered customary marriage (unlike her husband) does not have the right to sue for adultery. The court reasoned that all customary marriages are to be regarded as potentially polygamous, meaning that there could be no cause of action by the wife for adultery.¹⁷³ "If the intention of the legislature was to completely do away with the difference between customary law marriages and general law marriages, the legislature would have provided for that in the Act," read the decision.¹⁷⁴

One effect of this judgment was to reinforce the "second-class status" of customary marriage in terms of women's rights. One legal officer questioned the relevance of a customary marriage certificate, since wives in customary marriages are generally afforded a lesser degree of legal protection than those in civil marriages. A lawyer commented that

¹⁷¹ 1997 (1) ZLR 225 (HC).

¹⁷² Joyce Hambaga, "A married feminist now on the Commission", *The Zimbabwe Standard* (Harare), 13 June 1999.
Found at http://www.africanews.org/women/stories/19990613_feat1.html.

¹⁷³ See Artwell Manyemba, "Supreme Court judgment sparks debate", *The Herald*, 11 March 1999.

¹⁷⁴ See Nomsa Nkala, *Adultery not recognised under customary law*, *The Herald*, 20 February 1999.

This case has also sparked debate over the general rule that abandoned spouses can sue the adulterous lovers, and not the cheating spouses themselves. "A wife's contract is with her husband to be faithful, not with other women not to sleep with him. Why sue the lover? This pits woman against woman; penalises one woman if damages are awarded; and lets the man off the hook, untouched and unpunished." Mercedes Sayagues, "Woman pitted against woman while Zimbabwean men keep on philandering", *Independent Foreign Service*.

Found at <http://www.inc.co.za/online/news2/general/africa/24Oped1.html>.

“wherever possible couples should re-negotiate or elevate their marriage type to civil or common law marriage”.¹⁷⁵

9.28 The position of customary marriages in Zimbabwe must be viewed in light of the Legal Age of Majority Act 15 of 1982, which – until recently – was understood to give all Zimbabwean women above age 18 full legal capacity.

Prior to the enactment of this legislation, all African women in Zimbabwe were perpetual minors, under the guardianship of their fathers, their husbands or some male relative. The effect of the Act was to give all women over the age of 18 full contractual capacity, independent power to sue or to be sued, full power to assert their legal rights without assistance, and full power to acquire, won and dispose of property.¹⁷⁶

This Act explicitly states that its key provisions apply “for the purpose of any law, including customary law”.¹⁷⁷ The 1984 case of *Katekwe v Muchabaiwa*¹⁷⁸ interpreted this to mean that women had independent freedom of choice in matters pertaining to customary marriage:

It seems to me that an African woman with majority status can if she so desires, allow her father to ask for *roora/lobola* from the man who wants to marry her. She and she alone can make that choice. If she does agree to her father asking for *roora* from his future son-in-law before marriage the father can go through the contractual procedures required before an African marriage is effected. The position, as from 10 December 1982, when the Legal Age of Majority Act came into effect, is that an African woman of majority status can contract a marriage, whether that marriage be in terms of the African Marriages Act [Chapter 238] or the Marriage Act [Chapter 37] without the consent of her guardian.¹⁷⁹

9.29 However, the applicability of the Legal Age of Majority Act to women who are subject to customary law has recently been undermined by the widely-criticised decision in

¹⁷⁵ Artwell Manyemba, ‘Supreme Court judgment sparks debate’, *The Herald*, 11 March 1999, quoting Theresa Mugadza and Yvonne Mahlunge. The complainant in the case was quoted in this article as saying that her family had encouraged her to register her marriage as a civil marriage, since it was blessed in a church, so that the couple would be able to open a joint banking account and easily accommodate their children in their medical aid schemes. But the couple chose to register the marriage only as a customary marriage because this was the form used by most of their relatives.

¹⁷⁶ See, for example, Stewart *et al* (n167) at 170. Women in civil marriages which are in community of property are still subject to their husband’s “marital power”. However, this form of property regime is rare in Zimbabwe. Ncube reports that only three ante-nuptial contracts establishing “community of property and of profit and loss” were registered in Zimbabwe between 1929 and 1984. Ncube (n156) at 168.

¹⁷⁷ The Act is now section 15 of the General Law Amendment Act [Chapter 8:07]. See §15(3).

¹⁷⁸ 1984 (2) ZLR 112.

¹⁷⁹ At 124-25 (*obiter dictum*).

the case of *Magaya v. Magaya*.¹⁸⁰ In this case, which dealt primarily with the right of a widow to inherit under customary law, the court ruled that *Katekwe* and the cases following it were wrongly decided because the discrimination against women in customary law did not stem from their perpetual minority but from more fundamental tenets of customary law. The court stated that the Legal Age of Majority Act cannot give women rights which they never had under customary law, where women had no rights to “heirship, demanding payment of lobola..., or to contract a marriage under the Customary Marriages Act [Chapter 5:07]”.¹⁸¹

On the intention of the Legislature in passing the Majority Act, my view is that although it wanted to emancipate women by giving them *locus standi* for ‘competencies’ in all matters generally, especially under common law, it was never contemplated that the courts would interpret the Majority Act so widely that it would give women additional rights which interfered with and distorted some aspects of customary law.¹⁸²

As the concurring opinion pointed out, the import of the *Magaya* opinion is that while a woman over the age of 18 might be competent to enter into a civil marriage without her father’s consent as a result of the Legal Age of Majority Act, she cannot do so under the provisions of customary law.¹⁸³ Others have stated that the decision effectively repeals the Legal Age of Majority Act insofar as it applies to customary law.¹⁸⁴

9.30 The ruling in the *Magaya* case cited three rationales for its backtracking on women’s rights under customary law:

In the first instance, it must be recognised that customary law has long directed the way African people conducted their lives and the majority of Africans in Zimbabwe still live in rural areas and still conduct their lives in terms of customary law. In the circumstances, it will not readily be abandoned, especially by those such as senior males who stand to lose their positions of privilege...

Secondly, the application of customary law generally is sanctioned by the Constitution and some would elevate this to a right having been conferred by the Constitution.

¹⁸⁰ Civil Appeal No. 635/92, S.C. 210/98.

¹⁸¹ At 12.

¹⁸² At 14. The court went on to suggest that the Legislature itself considered the courts’ interpretation of the Legal Age of Majority Act to be too broad, noting “widespread calls in and out of Parliament” for its amendment. The court also cited a statement attributed to President Mugabe “apparently in a moment of jest, that if his sister were to get married, he would demand *lobola*, and if the intended husband pointed to the *Katekwa* judgment, he would say to him: OK that is the judgment. Do you want to marry my sister or not?” At 14, referring to *Hansard* 12 September 1984.

¹⁸³ McNally, JA at 18-19, who goes on to say: “She could not, as it were, accept and reject customary law at the same time.”

See also *Women and Law in Southern Africa Research Trust Newsletter*, June 1999 at 4.

¹⁸⁴ See *Women and Law in Southern Africa Research Trust Newsletter*, June 1999 at 5, reprinting a protest letter signed by seven women’s groups in Zimbabwe.

Thirdly, the application of customary law, especially in inheritance and succession, is in a way voluntary, that is to Africans married under customary law or those who choose to be bound by it. It could therefore be argued that there should be no or little interference with a person's choice...

In view of the above, I consider it prudent to pursue a pragmatic and gradual change which would win long term acceptance rather than legal revolution by the courts.¹⁸⁵

9.31 The *Magaya* decision has created an international furore. Zimbabwean women have responded by mobilising to push for the removal of the constitutional clause which shields customary law from the prohibitions on sex discrimination. Two members of the UN Committee which monitors CEDAW have written to Zimbabwe's Constitutional Commission appealing for constitutional reform on this point, and many groups around the world have added their voices to the protest, including the World Bank (which asked the Zimbabwean government for clarification on the implications of the judgement before providing anticipated financial assistance). A protest letter signed by seven Zimbabwean women's groups argued that judges "should address the lived realities of the people, determining where justice lies rather than perpetuating discriminatory practices towards women." This letter also stated that "an African woman cannot be a major at general law and simultaneously remain a minor at customary law", thus objecting to the dualism perpetuated by the decision.¹⁸⁶

An international watchdog group, the International Women's Rights Action Watch (IWRAP), criticised the judge's objections to the previous cases dealing with the Legal Age of Majority Act because the rulings "were tantamount to bestowing on women rights they never had under customary law". Commented the IWRAP:

That, of course, is precisely the point. The Legal Age of Majority Act does give women rights they did not have under customary law. It gives them the right to be treated as adults and to challenge men on an equal legal footing. What the court really says in this opinion is that women are adult persons for some purposes in Zimbabwean society, regardless of custom, but not for others, where male power over property and over women's fate is threatened.

9.32 Thus, in Zimbabwe, there is a persisting duality in respect of marriage which has actually been strengthened by a legislative regime that on its face appeared to create more points of commonality between the different types of marriage. Moreover, the recent judicial backlash against the expansion of sexual equality in the customary arena means that the rights

¹⁸⁵ At 15-16.

¹⁸⁶ See *Women and Law in Southern Africa Research Trust Newsletter*, June 1999 at 6. The same newsletter reprints a official letter written on the instructions of the Chief Justice defending the decision and warning that further such "insults" would be dealt with as contempt of court.

See also IWRAP, *The Women's Watch*, September 1999.

of women have taken a step backward. But the high level of controversy and debate indicates that Zimbabwe is still struggling with the issue of change in this area.

SOUTH AFRICA

9.33 The new South African Constitution states that all persons have the right to equality before the law and forbids discrimination on the grounds of gender and sex.¹⁸⁷ It also provides the freedom to pursue one's culture, subject to the Bill of Rights.¹⁸⁸ Unlike the Namibian Constitution, the South African Constitution contains no provisions explicitly addressing marriage.¹⁸⁹

As in Namibia, the South African Constitution has horizontal applicability, but in ambiguous circumstances. The Bill of Rights applies to natural persons "if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right".¹⁹⁰

The South African Constitution also provides that the courts must apply customary law "when that law is applicable", subject to any legislation dealing with customary law and to the Constitution.¹⁹¹

9.34 According to the South African Law Commission, while this provision could be interpreted literally to mean that the Bill of Rights must invalidate any rule of customary law which conflicts with it, a more flexible approach is recommended:

Three inquiries are necessary: when is the constitution applicable to private relationships; do circumstances warrant limitation of fundamental rights; and how are the abstract and generalised terms of these rights to be construed in a South African context?¹⁹²

The opposing viewpoint is represented by the response of the Centre for Applied Legal Studies, which asserts that "both the plain language and the underlying purposes of the constitutional text make clear that the equality clause will always prevail over provisions of

¹⁸⁷ Section 9.

¹⁸⁸ Sections 30-31.

¹⁸⁹ SALC *Report on Customary Marriages*(n21) at paragraph 2.3.1.

¹⁹⁰ Section 8(2).

¹⁹¹ Section 211(3).

¹⁹² SALC *Discussion Paper*(n34) at 30. .

customary law which deprive individuals or classes of persons of their right to equality.”¹⁹³

This submission added:

The centrality of the values of democracy, equality and the full development of the potential of each individual to the South African Constitution shape the interpretation of the right to culture. We value culture only to the extent to which it is capable of developing each individual’s human potential. Culture provides a framework of values, norms and approaches to life which the individual uses to develop an autonomous sense of self... Because the value of culture lies in its capacity to foster autonomy, it may only be protected to the extent that it facilitates the autonomy of all its members.¹⁹⁴

9.35 One recent South African case suggested that the government has a constitutional obligation to eradicate discrimination between different kinds of marriages: *Ryland v Edros* indicated that the failure to recognise potentially polygamous Muslim marriages might violate the right to equality between different cultural or religious groups.¹⁹⁵

9.36 The South African Law Commission (SALC) has been contemplating customary law for many years now. Its 1985 *Report on Marriages and Customary Unions of Black Persons* in 1985 recommended the recognition of customary marriage, but this proposal was not implemented.

In 1996, the SALC published an *Issue Paper* on customary marriages which called for public comment. Initial comments received from the public were summarised and incorporated into a *Discussion Paper* published in August 1997. This paper formed the basis for discussion at a series of countrywide workshops. It was followed by a *Report on Customary Marriages*, published in August 1998, which summarised public response and made final recommendations.

The work of the SALC led to the Recognition of Customary Marriages Act 120 of 1998.

¹⁹³ *CALS Response* (n33) at paragraph 18.1.

¹⁹⁴ *Ibid* at paragraph 18.4.

¹⁹⁵ 1997 (1) BCLR 77 (C), discussed in SALC *Discussion Paper* (n34) at 32 and in *CALS Response* (n33) at note 3. The marriage before the court was potentially, but not actually, polygamous. The court stated that “it is quite inimical to all the values of the new South Africa for one group to impose its values on another”, asserting that “the courts should only brand a contract as offensive to public policy if it is offensive to those values which are shared by the community at large and not only by one section of it”. The court further noted that “the values of equality and tolerance o diversity and the recognition of the plural nature of our society are among the values that underlie our Constitution”.

Other aspects of this case are problematic. It found that the parties had by entering into an Islamic marriage contract agreed to be governed by Islamic law. The court, however, elected to follow is patriarchal interpretations of Islamic law which denied the wife the opportunity to share in the marital property. This approach, in the words of CALS, “risks immunising family relations from constitutional review”.

Recommendations of the South African Law Commission

9.37 The recent papers of the South African Law Commission (“SALC”) generally propose that customary law should be retained as a separate legal system, but that the areas of marriage and succession should “be integrated into a single code of rules”.¹⁹⁶ The Discussion Paper on customary marriages, whilst acknowledging the need to eradicate prejudices against African cultural institutions and customary law, explained the need for a unified marriage law in the following terms:

A state dedicated to the equal treatment of all individuals, whatever their race, gender or social origin, should in principle have one marriage law. Our Constitution has sent a clear message to the country that discrimination will no longer be tolerated and that women and children can expect the law to be changed in their favour. This message must be repeated in any future marriage code, since legislation has an important educative and standard-setting function for a society that is in transition.¹⁹⁷

However, the SALC’s subsequent Report on Customary Marriage explains that it ultimately modified this goal somewhat, falling back on “a measure of dualism”.¹⁹⁸ The SALC noted that law reforms “will become paper law if they do not fall into a receptive community” and that “family law is an area notoriously resistant to outside interference”.¹⁹⁹ In light of these concerns, the SALC proposed “to establish a set of minimum requirements for contracting a valid marriage and uniform consequences for all marriages, while allowing certain distinctively African traditions to continue”.²⁰⁰

The SALC proposed in essence that a marriage by customary law should have the same consequences as any other marriage, with certain exceptions relating primarily to polygyny and some aspects of marital property.²⁰¹

9.38 The SALC recommended that all customary marriages continue to be potentially polygynous. It based this recommendation on several factors: (a) Polygyny does not clearly constitute unfair discrimination against women, as there are widely divergent opinions on its impact on women. (b) A ban on polygyny would be impossible to enforce and would

¹⁹⁶ SALC *Report on Conflicts of Law* (n11) at paragraph 1.68.

¹⁹⁷ SALC *Discussion Paper* (n34) at paragraph 2.2.1.

¹⁹⁸ SALC *Report on Customary Marriages* (n21) at paragraph 2.1.11.

¹⁹⁹ *Ibid* at paragraphs 2.1.18-2.1.19.

²⁰⁰ *Ibid* at paragraph 2.1.25.

²⁰¹ SALC *Discussion Paper* (n34) at paragraphs 3.1.8-3.1.9; SALC *Report on Customary Marriages* (n21) at paragraphs 3.2.2. 6.1.25.

encourage informal unions which give less protection to women and children. (c) The majority of public opinion seemed to be in favour of allowing the practice to die of its own accord or encouraging its decline by means of education and economic empowerment for women. Instead of outlawing polygyny, the SALC proposed rules concerning marital property aimed at equitable protection of the rights of all spouses.²⁰²

9.39 The SALC suggested that the primary requirement for a valid customary marriage should be the free consent of the spouses, although the statute could include a set of minimum requirements for the sake of certainty.²⁰³ It also suggested that the same minimum age of 18 should apply to all marriages.²⁰⁴

9.40 The SALC Discussion Paper called for further comment on how bridewealth should fit into the scheme – as one of the requirements of marriage, as acceptable evidence that a customary marriage has been concluded without being a requirement, or as a token of appreciation or a mark of the cultural attributes of the marriage without any legal significance?²⁰⁵

Public opinion was extremely divided on this question. The SALC ultimately recommended that the payment of lobolo should *not* be a requirement for a valid customary marriage, although it might be evidence that a customary marriage has in fact taken place. The SALC also suggested that courts granting divorces should have the power to order the return of lobolo upon divorce.²⁰⁶

9.41 The SALC proposed that all customary marriages should be registered, but that failure to register should not result in any penalty, nor should unregistered marriages be considered legally invalid, because of the potential hardship this would cause for the spouses. It suggested that registration should rather be encouraged by making traditional authorities

²⁰² SALC *Report on Customary Marriages* (n21) at paragraphs 6.1-ff.

²⁰³ SALC *Discussion Paper* (n34) at paragraphs 4.1-ff; SALC *Report on Customary Marriages* (n21) at paragraphs 4.2.1-ff.

²⁰⁴ SALC *Discussion Paper* (n34) at paragraph 5.1.10; SALC *Report on Customary Marriages* (n21) at paragraph 5.1.19.

²⁰⁵ SALC *Discussion Paper* (n34) at paragraph 4.5.

²⁰⁶ SALC *Report on Customary Marriages* (n21) at paragraphs 4.3-ff.

registering officers. It also suggested that “interested persons” should have the right to ask a registering officer to enquire into the existence of an unregistered marriage.²⁰⁷

9.42 As in Namibia, couples in South African often marry in terms of both customary and civil or church rites. The SALC suggested that the consequences of the marriage should be determined by the law expressly chosen by the parties to the marriage. If no choice was expressed, then a court should apply the law that is consonant with the lifestyles of the parties. The law should furthermore discourage the “mixing” of the two systems of marriage.²⁰⁸

9.43 The SALC suggested that spouses in customary marriage should have equal legal and contractual capacity, as well as equal powers of decision-making. It also suggested that the Age of Majority Act should be made explicitly applicable to persons subject to customary law.²⁰⁹

9.44 The SALC initially recommended that customary marriages should continue to be assumed to be automatically *out* of community of property (in contrast to civil marriages which are automatically *in* community of property), unless the parties enter into an antenuptial agreement specifying a different system.

This proposal met with strong public opposition, however, primarily on the basis that a default regime of *in* community of property would be more consonant with existing customary norms. The SALC then altered its recommendation accordingly.²¹⁰

9.45 On the issue of rights and powers over marital property, the SALC called for “a clear legislative statement” that “everyone be deemed capable of owning and possessing property and that full ownership in individual acquisitions be recognised”. It also suggested that the common law rule presently applicable only to civil marriages, which allows one spouse to bind the other’s estate for household necessities, be extended to customary marriages. This would, for example, give wives clear authority to deal with day-to-day household

²⁰⁷ SALC *Discussion Paper* (n34) at paragraph 4.5.11, section 5(3) of the appended draft bill; SALC *Report on Customary Marriages* (n21) at paragraphs 4.5.17-4.5.19.

²⁰⁸ SALC *Discussion Paper* (n34) at paragraph 3.2.11; SALC *Report on Customary Marriages* (n21) at paragraphs 3.3-ff.

²⁰⁹ SALC *Discussion Paper* (n34) at paragraphs 6.2.2.20-6.2.2.21.

²¹⁰ SALC *Report on Customary Marriages* (n21) at paragraphs 6.3.4.11-6.3.4.13.

administration in their husband's absence, without the requirement of consulting other extended family members.²¹¹

9.46 On divorce, the SALC recommended that customary marriage, like civil marriage, should be terminated only by a court decree. Whilst the SALC recommended that traditional leaders should be able to exercise conciliation powers prior to the action for divorce, it thought that all divorce actions should be processed through the family courts which South Africa hopes to establish in due course. It was suggested that the Constitutional provision giving everyone the right to have any dispute resolved "before a court or, where appropriate, another independent and impartial tribunal" compelled this course of action.²¹²

Either spouse should be competent to bring a divorce action, and the sole ground for divorce should be the irretrievable breakdown of the marriage (as it is for civil marriage).²¹³ Under the SALC's proposal, the court would have the power to order the return of bridewealth if the person who received the bridewealth was made party to the action.²¹⁴

The SALC recommended that maintenance should be available to both spouses and children of customary marriage, both during the existence of the marriage and upon divorce, although recognising that this would constitute a radical break with previous traditions of customary law.²¹⁵ It explained:

Customary law had no concept of post-marital maintenance, since the purpose of divorce was to put an end to the spouses' relationship and that of their families. Wives were expected to return to their guardians, who took over the responsibility for maintaining them. Today, however, women have no guarantee of support from their natal families and they are often left to raise minor children alone.²¹⁶

The SALC thought that social change justified importing this provision from civil and common law to deal with modern conditions.²¹⁷

²¹¹ SALC *Discussion Paper*(n34) at paragraph 6.3-6.4.

²¹² Ibid at paragraph 7.1.12, referring to section 34 of the South African Constitution.

²¹³ Ibid at paragraph 7.1-7.3.

²¹⁴ Ibid, at section 8(5)(b) of the bill appended to the paper.

²¹⁵ Ibid at paragraph 7.4.

²¹⁶ Ibid at paragraph 7.4.1.

²¹⁷ See also SALC *Report on Customary Marriages*(n21) at paragraphs 7.1-7.4 on these points.

9.47 With respect to rights over children born of customary marriage, the recommendation was to apply the guiding principle of the best interests of the child to all aspects of custody, guardianship and access whilst ensuring that mothers have equal rights with fathers.²¹⁸

The Recognition of Customary Marriages Act

9.48 The Act which was adopted followed most of the major recommendations of the SALC. The Act extends full legal recognition to all customary marriages, whether or not they are registered in terms of the Act. Any customary marriage entered into before and after the act is “for all purposes recognised as a marriage”, provided that marriages entered into after the commencement of the Act comply with the requirement that both spouses are above the age of 18 (or have obtained state permission to marry at a younger age), and have given their free consent to the marriage.²¹⁹

9.49 The Act follows the latter recommendation of the SALC that customary marriages shall be *in* community of property and of profit and loss (like civil marriages) unless there is an ante-nuptial contract which provides otherwise. If a husband who is already in a customary marriage wishes to enter another customary marriage, then he must first make an application to the court to approve a written contract which will regulate the future matrimonial property systems of the marriages in an equitable manner.²²⁰

9.50 The Act provides that all customary marriages entered into *prior* to the commencement of the Act will continue to be governed by the proprietary provisions of customary law, although such couples may apply to the court for leave to change their marital property system – an approach which is doubtful to be a realistic remedy for women in most cases since the spouses must act jointly to accomplish this.

²¹⁸ SALC *Discussion Paper* (n34) at paragraphs 7.5.12; SALC *Report on Customary Marriages* (n21) at paragraphs 7.5-ff.

²¹⁹ Section 2. Several laws were specifically repealed or amended to bring them in line with the new act. Among these were marital power sections of the Black Administration Act 38 of 1927, “repealed to remove South Africa’s most notorious reason for the ‘perpetual minority’ of African women.” *Memorandum on the Objects of the Recognition of Customary Marriages Bill*, attached to the RCMA, B-110B-98. Section 11(3) of the Black Administration Act 38 of 1927 read, in pertinent part, “a Black woman... who is a partner in a customary union and who is living with her husband, shall be deemed to be a minor and her husband shall be deemed to be her guardian.” The Transkei, KwaZulu, and Natal marriage regulations were amended to remove the concept of marital power.

²²⁰ Section 7.

The distinction between past and future marriages undercuts the promise of equal rights and full legal capacity for husband and wife, as these are made “subject to the matrimonial property regime governing the marriage”.²²¹

The Act’s failure to make its property clauses retrospective has been criticised on the grounds that this discriminates on the basis of date of marriage and thus “produces an underclass of consistently disadvantaged people who are unable to improve their position by lawful means”.²²²

9.51 The Act rejects the SALC’s proposal that a court should have the power to order the refund of bridewealth upon the dissolution of the marriage. At the time of registration, the Act provides that any *lobolo* agreed to must be recorded in the marriage register. But *lobolo* is not specifically mentioned in connection with divorce. Instead, the Act provides more generally that the court granting the divorce decree “may, when making an order for the payment of maintenance, take into account any provision or arrangement made in accordance with customary law”.²²³

The possibility of drawing a connection between *lobolo* and maintenance has been criticised, since *lobolo* usually goes to the family of the bride rather than to the bride herself. In light of this fact, it has been suggested that *lobolo* should have no connection to maintenance upon the dissolution of marriage.²²⁴

Discussion of the South African approach

9.52 The SALC considered recommending mandatory registration of all customary marriages, but faced difficulty when confronted with the appropriate penalty for breaking this requirement. Any penalty seemed to be an unfair hardship on the married couple, especially in poorer areas where access to a registration facility was difficult. Therefore, the SALC recommended that traditional authorities be given the power to register marriages as registration officers, in the hope that most people will voluntarily choose to register their marriages if given an easy option to do so, thereby removing the need to make registration mandatory.

²²¹ Sections 6-7.

²²² See, for example, Samuel (n23) at 27-28.

²²³ Section 8(4)(e). The Act defines *lobolo* in section 1 as “the property in cash or in kind, whether known as *lobolo*, *bogadi*, *bohali*, *xuma*, *lumalo*, *thaka*, *ikhazi*, *magadi*, *emabheka* or by any other name, which a prospective husband or the head of his family undertakes to give to the head of the prospective wife’s family in consideration of a customary marriage.

²²⁴ See, for example, Samuel (n23) at 29.

The Act follows the recommended approach. Registration of customary marriage is “required”²²⁵, but failure to register does not affect the validity of the marriage.²²⁶ Registration has the advantage of providing the parties with a certification of registration which constitutes “prima facie proof of the existence of the customary marriage and of the particulars contained in the certificate (including the identity of the parties, the date of the marriage and any lobolo agreed to)”.²²⁷ The only legal consequence of failure to register is contained in §4(5), which states:

If for any reason a customary marriage is not registered any person who satisfies a registering officer that he or she has a sufficient interest in the matter may apply to the registering officer in the prescribed manner to enquire into the existence of the marriage.

Further, a court, “upon application made to that court and upon investigation instituted by that court” may order the registration of any customary marriage or the cancellation of any such registration.

The memorandum accompanying the bill gave the following explanation for this approach to registration:

The bill requires registration of all customary marriages so that marital status will become more certain and easier to prove. No obvious penalty exists to induce compliance with the registration requirements since declaring unregistered marriages void would lead to great hardship for the spouses and would deprive many existing marriages of potential validity. The clause allows spouses in existing customary marriages to take advantage of registration, and sets time limits. Provision is also made for late registration of a marriage by the children of that marriage and other parties with a legitimate interest in the marriage.²²⁸

Likely inspirations for attempts at late registration would be situations where children of an unregistered marriage wanted to secure their inheritance rights, or situations where benefits from a third party -- such as an insurance payment designated to a spouse -- would otherwise be denied.²²⁹

²²⁵ “The spouses of a customary marriage have a duty to ensure that their marriage is registered.” (§4).

²²⁶ Section 4(9). Parties to a customary marriage entered into prior to the Act have 12 months from the commencement of the Act to register their marriages. Marriages entered into after the commencement of the Act must be registered within three months of the conclusion of the marriage. The Minister of Home Affairs has the power to extend these cut-off dates. §4(3)

²²⁷ Sections 4(8), 4(4)(a).

²²⁸ *Memorandum on the Objects of the Recognition of Customary Marriages Bill, 1998* at 3.4.

²²⁹ See, for example, *Amod and Commission for Gender Equality v Multilateral Motor Vehicle Accidents Fund*, Supreme Court Case No. 444/98, in which the issue at dispute was the payment of damages to a widow in respect of the death of her husband, where they were married under Islamic law but the marriage was not registered as a civil marriage. See also *Makholiso and Others v Makholiso*

9.53 The Centre for Applied Legal Studies recommended that the law's recognition of customary marriage should ignore customary practices such as the exchange of bridewealth, explaining this in the following terms:

We support a third definition of recognition which treats customary practices as purely private matters. Parties are free to resort to custom as one among many permissible forms leading to the solemnization of marriage. On occasions where parties seek the intervention of the state in family disputes it will only be the egalitarian unified state law which will be applied... In this way we hope to celebrate the positive aspects of both systems while moving away from the discriminatory or problematic elements within them. This neutral framework will regulate marriage in the spirit of *ubuntu* and equality, while allowing the flourishing of all South African cultures.²³⁰

It felt that bridewealth in particular “should remain untouched by legislation and constitute an optional cultural attribute of marriage”.²³¹

and Others 1997 (4) SA 509 (Tk), concerning an inheritance dispute between the children of a civil marriage and the children of a subsequent customary marriage between the same man and a different woman. Neither of these cases involves the Recognition of Customary Marriage Act, but they illustrate scenarios in which the existence of an unregistered customary marriage could be in dispute.

²³⁰ *CALS Response* (n33) at paragraph 19.2.3.

²³¹ *Ibid* at paragraph 27.5. A strongly worded argument against *lobola* written by a black South African man (Babusi Sibanda) recently appeared in a popular magazine. This argument read, in essence, as follows:

Lobola may differ slightly from one part of Africa to another. The ritual may be more elaborate in some parts and the negotiators may consist of different sets of people. Ultimately, though, lobola is the negotiation among men about the price at which the bride will change hands. ‘Bride-price’ defines it exactly.

Apologists for the lobola industry will tell you that the only problem is that it's become commercialised. Otherwise, they say, it was traditionally supposed to be a “token of appreciation”. A gift.

A token whose quantity and nature is set by the receiver? A token that would have to be returned if the new wife couldn't bear children? ...

Many abusive husbands use as an excuse the fact that they paid lobola; many parents “advise” their daughters to stay on in abusive and loveless marriages because lobola was paid (and the father and his brothers – rarely the mother – have used it up). Any wonder these marriages are so “stable” and “durable”?

The tradition of *ukungena* – the taking over of the widow by her dead husband's brother is directly linked to lobola. So is the dispossession of a widow by the brothers of her deceased husband. Apologists will tell you that these are the exceptions to the rule. They should try telling that to Africa's rural women. Or to the widows of Zambia's 1993 national soccer team who were thrown out of their homes when their husbands were wiped out in a plane crash.

Those who say that lobola has been commercialised are just whinging about the price. Lobola has always been commercial. The currency may have changed here and there but where wealth is expressed as cattle people still pay pretty much the same as a hundred years ago...

Why should a young man pay money and give cattle to a young woman's father? For raising and educating her? What about his own mother? So many South Africans are educated by their mothers; who is going to pay *her* for raising and educating *him*? They are marrying each other; he is *not* marrying her! Lobola transfers ownership of the woman's capacity and

However, as noted above, the law does formally recognise lobola, and record it on the marriage certificate.

9.54 The issue of polygyny was hotly debated. A survey of one area in South Africa found that while 80% of women were opposed to polygyny, 70% of men were in favour of it.²³²

Whilst some groups and individuals argued that polygyny should be abolished because it violates the fundamental right of women to equality in marriage, concerns were also expressed about women who could be thereby left in unregistered partnerships without any legal protection.

The potential dangers of outlawing polygyny outright are illustrated by the 1997 case of *Makholiso and Others v Makholiso and Others*, where children of an illegal polygamous marriage would have been disinherited had the court not protected their interests by holding that the marriage could be recognised as a “putative marriage”.²³³

The approach actually taken by the new law is to recognise polygynous marriages if the previous wife or wives consent to a property settlement which is agreeable to all of the parties involved.

Some have argued that the concept of consent is problematic, asserting that this will in practice amount to no more than a right to be *informed* since to refuse consent would be to risk divorce or marital discord. There is also a danger that women might be influenced to give their agreement by misinformation about the true economic position of their husbands, or by their position of economic dependency.²³⁴

CALS suggested that the law should give limited legal recognition to polygyny, as a way to provide a degree of protection to women within these unions. It suggested that the law should define the financial and other consequences of these arrangements, but without

services from her father to her husband and, on his death, his brothers. And we want to lug this baggage on women’s backs, into the 21st century, under the flag of African culture. *Femina*, August 1999 at 12.

²³² SALC *Discussion Paper* (n34) at paragraph 6.1.3, referring to a survey of Empangeni conducted by the National Human Rights Trust.

²³³ 1997 (4) SA 509 (Tk). See also Harry Barker, “Polygyny versus Equality”, *De Rebus-The South African Attorneys’ Journal* (April 1998). This case concerned a polygamous marriage which followed upon a monogamous civil marriage, but similar problems could arise in cases involving multiple customary marriages if polygamy were outlawed.
Available at <http://www.derebus.org.za/current/update/equality.htm>.

²³⁴ SALC *Discussion Paper* (n34) at paragraph 6.1.8, summarising submissions to the Commission from various parties.

allowing them to be registered as full marriages, dealing with them in the same way as other cohabitation arrangements which are in need of legal protection.²³⁵

9.55 As noted above, the Act's failure to cover customary marriages entered into before the advent of the new law has been criticised as a form of unfair discrimination based on the date of marriage.²³⁶ The Act makes it possible for spouses of customary marriages which were already existing when the Act came into force to apply jointly to a court to change their customary property regime, but some feel that this is not an adequate remedy.²³⁷

OTHER COUNTRIES

Australia

9.56 Patterns of traditional marriage amongst Aborigines continue strongly in Australia's Northern Territory, and also in parts of Western Australia, South Australia, and Queensland. In a 1996 report, the Australian Law Reform Commission recommended that parties to traditional Aboriginal marriage should be regarded as married persons for the purposes of general Australian law pertaining to such questions as the status of children; adoption, fostering and child welfare laws; inheritance; accident compensation; social security; spousal compellability and marital communications in the law of evidence; and spousal income tax rebates.²³⁸ The Commission further recommended that there should not be any minimum age requirements for traditional marriages, and that registration should not be required, but rather that traditional authorities should be granted the option of setting up registration systems for themselves. These recommendations have apparently not yet been implemented.²³⁹

Tanzania

9.57 According to the South African Law Commission, Tanzania is an example of a highly unified system of marriage law. While there are two types of marriage – monogamous and polygamous -- both have the same general consequences in terms of property and dissolution.

²³⁵ *CALS Response* (n33) at section 21.

²³⁶ See *SALC Report on Customary Marriages* (n21) at paragraphs 6.3.4.18-ff for a summary of the debate around this point.

²³⁷ As noted above, see Samuel (n23) at 27-28.

²³⁸ John McKenzie, *Recognition of Aboriginal customary law*, 31 L. Society J., No. 5, 37 (1993).

²³⁹ See generally <http://www.austlii.edu.au>.

²⁴⁰ Without giving any details, the SALC implies that this reform has not been successfully observed in practice. ²⁴¹

10. PROPOSALS FOR NAMIBIA

10.1 The following are some preliminary proposals based on an examination of existing information about the Namibian situation and the experiences of other countries. The Legal Assistance Centre believes that any proposals on customary marriage should be widely discussed in consultation meetings throughout the country to ensure that legal changes in this area will meet the needs of the population. Special consultation techniques, such as focus group discussions attended by women only, must be employed to make sure that the views of women are canvassed in an environment where women will be able to express themselves freely.

(1) RECOGNITION AND UNIFICATION: Will customary marriage and civil marriage follow essentially the same set of substantive rules on matters such as property rights, custody, guardianship of children, divorce and inheritance?

Options:

(A) Do not recognise customary marriages.

(B) Recognise customary marriages, but make the consequences of customary marriages dependent on customary law alone.

(C) Apply a few minimum standards (such as a common minimum age) to customary marriage and civil marriage, whilst allowing for fundamental differences in all other areas (such as property consequences, divorce and inheritance).

(D) Apply identical substantive rules to both customary marriages and civil marriages, whilst allowing for different forms of solemnisation and different approaches on a few specific issues (“one house with many rooms”).

Option A can be ruled out, as being inconsistent with Namibia’s constitutional and statutory framework, which already recognises customary marriages as “marriages” for a number of significant purposes such as the right to citizenship by marriage, entitlement to

²⁴⁰ 1971 Tanzanian Law of Marriage Act.

²⁴¹ SALC *Report on Customary Marriages*(n21), citing Rwezaura (1983-4) 1-2 *Zimbabwe LR* 85 and Rwezaura & Wanitzek (1988) 2 *Int J Law & Family* 20.

maintenance under the Maintenance Act and employees' compensation. Furthermore, without recognition, customary marriage will remain a "second class citizen" in Namibian family law, and those who would actually prefer to marry only in terms of customary law may find it necessary to contract a civil marriage in order to attain legal recognition for specific purposes.

The problem with both Options B and C is that with state recognition comes state support. The state must be careful not to give its endorsement to practices and customs that might discriminate against women.

It is submitted that Option D, which follows the example of South Africa, is most consistent with the goal of non-discrimination. A movement toward a single unified marriage law should not be seen as giving primacy to civil marriage and subsuming customary marriage into civil law norms. On the contrary, what is actually happening is that *both* civil and customary marriage systems are already being overhauled by the legislature to bring them in line with modern norms and with the principle of equality.

For example, the Married Persons Equality Act in effect altered the historical "customs" which apply to civil marriages, as well as making certain new principles of equality applicable to both civil and customary marriage by giving husbands and wives equal powers over their children and the equal capacity to have an independent domicile.

Similarly, the Communal Land Reform Bill treats men and women equally in respect of communal land allocations, and indications are that the subcommittee of the Law Reform and Development Commission which is currently examining the law on inheritance is likely to recommend a single system of intestate succession which will apply to all persons, regardless of the form of their marriage.

Option D is also most consistent with what is actually happening in Namibia, where many people marry in terms of both civil and customary law and rely on elements of both systems to regulate their married lives. Thus, people are in fact already moving towards a new "hybrid" system.

Acceptance of Option D does not mean that civil and customary marriages will be identical in all respects. That is why this option is conceptualised as "one house with many rooms".

Ideally, there should ultimately be one law dealing with the formalities, registration and consequences of all marriages. This law could eventually incorporate the existing statutory provisions on marriage and divorce as well as future legal reforms pertaining to

marital property regimes.²⁴² However, it would not be necessary to achieve this ultimate goal with one stroke.

RECOMMENDATION: Recognise customary marriages as being valid marriages for all legal purposes and adopt a single marriage law which applies the same basic substantive rules to both civil and customary marriages, whilst still allowing for some distinctions.

(2) MANDATORY V OPTIONAL REGISTRATION: Should the registration of customary marriages be mandatory or optional, and what will be the consequences of failure to register?

Options:

(A) Do not provide for registration of customary marriages.

(B) Make registration strictly voluntary.

(C) Make registration mandatory, with no effects on the validity of the marriage, and no statutory penalties.

(D) Make registration mandatory, with no effects on the validity of the marriage, but with statutory penalties (such as a fine for failure to register).

(E) Make registration mandatory, and make unregistered customary marriages valid only for certain legal purposes.

(F) Make registration mandatory, and make unregistered customary marriages totally invalid in terms of the general law.

Option A, which is the approach taken by Papua New Guinea, would be inconsistent with Namibia's obligations under CEDAW. The CEDAW monitoring committee, in response to Namibia's first country report under CEDAW, recommended that the government "ensure, as soon as feasible, the registration of all customary marriages" although it did not specify how this should be done.²⁴³

²⁴² This would include the Divorce Laws Amendment Ordinance 18 of 1935, the Matrimonial Causes Jurisdiction Act 22 of 1939, the Matrimonial Causes Jurisdiction Act 35 of 1945, the Matrimonial Affairs Ordinance 25 of 1955, the Marriage Act 25 of 1961, the Births, Marriages and Deaths Registration Act 81 of 1963, and the Married Persons Equality Act 1 of 1996.

It is relevant to note here that the South African Law Commission has recently published a Discussion Paper on the Marriage Act 25 of 1961, which has many points in common with Namibia's version of this Act. South African Law Commission, Project 109-Review of the Marriage Act 25 of 1961, *Discussion Paper* 88(1999).

²⁴³ CEDAW/C/1997/II/L.1/Add.2, paragraph 57.

An example of Option B is the approach taken by Zambia, which has made registration optional, but has had little success in actually registering such marriages. One study concluded:

Although customary marriages have been registerable since colonial days, the registration has always been voluntary. Therefore, the majority of customary marriages are not registered. In the present study we found that those who had registered their marriages did so mainly to satisfy employers who demanded a marriage certificate as evidence of marriage.²⁴⁴

Option C is represented by South Africa. The new Recognition of Customary Marriages Act places a “duty” on the spouses to register the marriage and sets a time limit, but there is no sanction for failure to carry out this duty.²⁴⁵ The Act explicitly provides that “failure to register a customary marriage does not affect the validity of that marriage”.²⁴⁶ The primary impetus for registration is that a registration certificate constitutes *prima facie* proof of the marriage. A provision which allows for the late issuance of a certificate of registration gives extra protection for unregistered marriages.

An example of Option D is Uganda, which requires that all customary marriages be registered within six months of the marriage. Failure to register does not result in the delegitimization of the marriage, but it does result in a significant fine.²⁴⁷ This approach seems unreasonably harsh, particularly given the fact that many people in Namibia who contract customary marriage are rural dwellers who are not in a strong economic position.

Option E (which is similar to Zimbabwe) and Option F are also unduly harsh, and would undermine the goal of protecting the rights of women.²⁴⁸ The remark of Dr Tom Bennett is relevant in this regard:

CEDAW requires the registration of all marriages. Arguably this requirement is too stringent. That spouses are entitled to have the status of their union made certain may be implicit in the freedom to marry, but the nature of the formalities entailed can hardly be said to impinge on fundamental human rights. Systems of municipal law should be free to implement the spouses’ entitlement in any way they think best. Nor can the difference in the formalities required of civil/Christian and customary

²⁴⁴ Women and Law in South Africa Research Project, *Inheritance in Zambia Law and Practice* (1993) at 72.

²⁴⁵ Section 4.

²⁴⁶ Section 4(9).

²⁴⁷ Sections 5(1) and 12 of the Customary Marriage Registration Decree, No. 16 of 1973 (Uganda).

²⁴⁸ For an example of the potentially harsh consequences of such approaches, see *Kwitshane v Magalela and Another* 1999 (4) SA 620 (T), where a customary marriage which did not comply with the mandatory registration requirements of the Transkei Marriage Act 21 of 1978 was held to be unlawful with the result that the surviving spouse had no right to inherit from the deceased spouse.

marriages be said to constitute discrimination; rather the difference signifies tolerance of cultural pluralism.²⁴⁹

Bennett suggests that registration of customary unions should be viewed as merely one means to a broadly conceived end.²⁵⁰

Option C (the South African approach) seems to strike the most appropriate balance between the mandates of CEDAW and the need to ensure that a registration requirement does not actually undermine the rights of the women it is meant to protect. The registration of customary marriages can be encouraged by means of community education, and by the attractions of proof and certainty which have in the past inspired many people who follow customary law to enter into civil marriage.

It might be possible to offer other benefits as an inducement to register. But conditioning any benefit on registration makes the denial of that benefit to persons whose marriages are *not* registered the same as a penalty in disguise – the carrot which is really a stick. It would be inadvisable to include any “benefit” that would carry a risk of harming the vulnerable parties the law reform is meant to serve.

RECOMMENDATION: Make the registration of customary marriages mandatory, but with no penalty for failure to register. Recognise unregistered customary marriages as being valid for the same purposes as registered marriages. Use the advantages of certainty and proof as inducements to register.

(3) MINIMUM REQUIREMENTS: What will be the minimum requirements for a valid customary marriage?

Options:

- *Minimum age?*
- *Consent of both intending spouses?*
- *Parental consent for minors?*
- *Marriage performed according to relevant custom?*
- *Prohibited degrees of relationship?*
- *Exchange of bridewealth in communities where this is customary?*

²⁴⁹ Bennett (n9) at 103 (footnotes omitted).

²⁵⁰ Ibid at note 40.

MINIMUM AGE

The Married Person Equality Act makes the minimum age of *civil* marriage 18 for both boys and girls. Children below that age need the permission of a designated government official to marry.²⁵¹

We suggest that the minimum age of 18 should be similarly extended to customary marriages. There is already some public support for this move, although this comes primarily from urban women. A group submission to the Parliamentary Committee on Human Resources joined by some 20 groups included the following point:

[W]e urge that the question of a minimum age for customary marriage be examined. Children under the age of 18 need state consent as well as parental consent to enter into a civil marriage, but there is no corresponding age limit for customary marriage. We believe that this should be remedied.²⁵²

Additional support for this minimum age comes from the 1992 Demographic and Health Survey, which found that the age of first marriage for women is increasing. Nationwide, the median age of first marriage is 23 years for women over the age of 45, and 25 years for women between the ages of 30-34. The lowest median age of first marriage was in the Northeast, where it was still over 18 years of age (18.9 years).²⁵³

Allowing for the possibility that persons under age 18 could enter into customary marriages with state consent (as for civil marriages) would mean that a minimum age would not necessarily inhibit existing customs. It would rather provide a monitoring mechanism to safeguard young people.

Setting a universal minimum age of 18 would also be consistent with the UN Convention on the rights of the Child which considers a child to be a person under the age of 18.

CONSENT OF BOTH PARTIES

If it is accepted that the references to “marriage” in the Namibian Constitution refer to both civil and customary marriage, then Article 14(2) makes the requirement of free consent by both intending spouses a matter beyond question.

²⁵¹ Section 24, which amends section 26 of the Marriage Act 25 of 1961.

²⁵² Submission on the Combating of Rape Bill prepared by the Legal Assistance Centre on the basis of input at a workshop held on 15 July 1999.

²⁵³ Ministry of Health & Social Services, *1992 Demographic and Health Survey* at 49-50.

PARENTAL CONSENT FOR MINORS

In terms of the Married Persons Equality Act, minors (under the age of 21) already need the permission of both of their parents to contract either a civil or a customary marriage.

²⁵⁴

It should be noted that section 25 of the Marriage Act 25 of 1961 provides a procedure for dispensing with parental consent in certain circumstances. Similar safeguards should be applied to parental consent for a customary marriage, although different decision-making forums (such as relevant traditional leaders) might be utilised for greater accessibility.

MARRIAGE PERFORMED ACCORDING TO RELEVANT CUSTOM

It would be very difficult to legislate formalities for customary marriage in a country as diverse as Namibia. Furthermore, any attempt to define customary marriage rites would have the effect of freezing and formalising them, which is contrary to the fundamental nature of customary law. None of the countries examined have gone into detail on this point (with the exception of Zimbabwe's incorporation of lobola as a requirement for a registered customary marriage).

It is suggested that Namibia should follow the example of South Africa by simply requiring in general terms that the marriage be "negotiated, and entered into or celebrated in accordance with customary law".²⁵⁵ Zimbabwe's terminology of "solemnisation" could also be considered, but this might be viewed as imposing an inappropriate civil marriage concept onto the extended process of customary marriage.

If traditional leaders were recognised as registering officers for the purpose of registering customary marriages, as in South Africa, they could be expected to possess appropriate expertise to determine whether or not relevant customs have been properly observed.²⁵⁶ There could be a process of appeal in any case where the decision of a registering officer was disputed by the couple.

PROHIBITED DEGREES OF RELATIONSHIP

The law on civil marriages forbids marriage between certain close relatives. Different customary systems have different rules on this issue. Therefore, it is suggested that Namibia follow the example of South Africa and Zimbabwe by allowing this issue to be

²⁵⁴ Section 14, read together with section 16.

²⁵⁵ Recognition of Customary Marriages Act 120 of 1998, §3(1)(b).

²⁵⁶ Zimbabwe allows chiefs and various government officials to be appointed as customary marriage officers, along with all magistrates. Customary marriages must be "solemnised" in the presence of a customary marriage officer. Customary Marriages Act, sections 2, 4, 18.

determined in accordance with the customary law of the community. The question of prohibited degrees of relationship by blood or affinity would thus actually be subsumed in the question of whether or not the customary marriage has been properly entered into in accordance with the relevant custom.

BRIDEWEALTH

In contrast to the position in South Africa and Zimbabwe, the transfer of bridewealth is *not* observed by all of the Namibian communities which follow customary law. Therefore, this clearly could not be made a requirement for *all* customary marriages.

The transfer of bridewealth could be made a requirement for those communities which do observe the custom. This is also problematic, however, for several reasons:

- Bridewealth serves different functions in different communities.
- Practices concerning bridewealth are not static, but evolving.
- A couple may be considered by the community to be validly married before the transfer of bridewealth has been completed.
- Because some people find the notion of bridewealth to have negative connotations, the state should not give its endorsement to the practice by incorporating it into a new law on customary marriage.

It is submitted that the legislation should remain silent on bridewealth, which should remain an “optional cultural attribute” of customary marriage.²⁵⁷ If the law remains silent on the issue of bridewealth, this does not prevent communities from continuing their traditions, in the same way that some religious requirements for marriage take place outside the legal framework.

Furthermore, a traditional leader acting as a registering officer could refuse to register a marriage which had not complied with that community’s prevailing custom on bridewealth, on the grounds that it had not been entered into in accordance with the relevant customary law. This would allow for natural evolution of bridewealth customs and give flexibility to allow for differing treatments of bridewealth in different communities.

RECOMMENDATION: (1) There should be a minimum age of 18 which is applicable to all marriages, with persons below that age being able to marry only with the consent of an appropriate state official. (2) The free consent of both intending spouses should be required, in accordance with the Namibian Constitution . (3) The existing law on parental consent for minors should be retained, with safeguards such as those provided by the

²⁵⁷ The phrase in quotation marks is borrowed from the Centre for Applied Legal Studies as it seems to provide an apt description. *CALS Response* at paragraph 27.5.

Marriage Act for civil marriages. (4) The law should require generally that the marriage be entered into and celebrated in accordance with the relevant custom, but it should not attempt to be more specific. (5) Prohibited degrees of relationship for customary marriages should be determined in accordance with customary law rather than being prescribed in the statute. (6) There should be no reference to “bridewealth” in the statute, although the transfer of bridewealth might continue outside the legal framework.

(4) POLYGYNY: How should polygyny be treated? If polygynous marriages are recognised, then what will be the relationship between polygynous customary marriages and monogamous civil marriages?

Options:

(A) Make all civil and customary marriages monogamous and outlaw polygyny.

(B) Allow polygyny to continue, but do not recognise polygynous marriages as valid.

(C) Enact legal provisions to protect all the parties involved in polygynous marriages, without encouraging polygyny by (i) recognising polygynous marriages as being valid in order to regulate their consequences or (ii) treating polygynous marriages as informal cohabitation arrangements and enacting legal provisions to protect the rights of all parties to such relationships.

(D) Make all civil and customary marriages polygynous, with the possible exception of those which are solemnised in churches that forbid polygyny.

RECOGNITION OF POLYGYNOUS MARRIAGES

Polygyny is a hotly debated issue. CEDAW does not speak directly to polygyny, but the CEDAW Committee treats polygyny as discrimination against women:

Polygamous marriage contravenes a woman’s right to equality with men, and can have such serious consequences for her and her dependants that such marriages ought to be discouraged and prohibited. The Committee notes with concern that some States parties, whose constitutions guarantee equal rights, permit polygamous marriage in accordance with personal or customary law. This violates the constitutional rights of women, and breaches the provisions of Article 5(a) of the Convention.²⁵⁸

When Namibia presented its first country report in terms of CEDAW, the monitoring Committee pointed to the need to address polygamy, saying that this should not be so difficult

²⁵⁸ *General Recommendation 21* at paragraph 14. Article 5(a) of CEDAW requires states parties to take all appropriate measures “to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on stereotyped roles for men and women”.

in a country where a majority of the population are Christian.²⁵⁹ Yet the fact that Christianity frowns on polygyny cannot be a justification for outlawing it in a secular state such as Namibia.

One argument against polygyny is that relationships structured around one man and several wives will inevitably harm the women involved. However, this is a debatable point. It has been asserted that polygyny is not inherently offensive to a woman's right to equality or dignity.²⁶⁰ In the past, polygyny played "a strong social role in protecting women from the vulnerability of life without marriage".²⁶¹ Polygyny can actually be an advantageous choice for some individual women. As long as women have less access to economic resources than men, a system which allows more women to marry can in theory give an increased measure of economic security to more women. It may also be a preferable alternative to divorce for senior wives.²⁶²

On the other hand, polygyny can lead to competition between women for the attention and resources of a single man. It can be used as an excuse for abandoning an older wife. And the theoretical advantages of economic security have weakened as the traditional obligations of support have eroded. Furthermore, polygyny gives men a greater sense of status and power, along with greater opportunities for sexual gratification. Of course, some of these problems are not directly caused by polygyny itself, but by the generally subordinate position of women in society – and it certainly cannot be argued that monogamous marriages are necessarily free of sexual inequality or adulterous behaviour.²⁶³

It is also argued that women have the power to choose whether or not to be party to a polygynous relationship. A first wife could in theory protect herself by insisting on a civil marriage or by refusing to consent to subsequent customary marriages. Other women could subsequently refuse to marry a man who already has other wives. But the idea of free choice is not always realistic in practice. A woman with inadequate access to economic resources may feel that she has no alternative but to accept a polygynous relationship. She may lack

²⁵⁹ See UN General Assembly Meetings Coverage, Committee on Elimination of Discrimination Against Women, 337th meeting, WOM/977, 8 July 1997.

²⁶⁰ See, for example, Christina Murray, "Is Polygamy Wrong?" in *22 Agenda* 37 (1994) at 39; Felicity Kaganas and Christina Murray, "Law, Women and the Family: The Question of Polygamy in a new South Africa" *Acta Juridica* 116-134 (1991). This article quotes (at 127-28) a Nigerian commentator who states "whether one considers that women who have to share a husband are underprivileged depends on the value placed upon husbands". The article concludes that it is patriarchy rather than polygyny which is at the root of women's oppression.

²⁶¹ Armstrong et al (n12) at 24.

²⁶² Ibid at 27.

²⁶³ SALC *Report on Customary Marriages*(n21) at paragraph 6.1.9; Armstrong *et al* (n12) at 26-28.

full information about her husband's other wives, or the possibility that he may acquire other wives. She may be given an exaggerated estimate of his ability to support multiple households. And a first wife may be forced to "consent" to subsequent wives to avoid divorce or community censure.²⁶⁴

After considering the practical advantages and disadvantages of polygyny for women, the South African Law Commission concluded that "on balance, the case does not seem to be conclusively made that a bilateral arrangement between one man and one woman is the only valid and morally defensible method of constituting a family in a multicultural society".²⁶⁵

A more straightforwardly discriminatory aspect of polygyny is that it gives men a right that women lack, and thus violates the Constitutional imperative that men and women are entitled to equal rights "as to marriage".²⁶⁶ On the other hand, it can also be said that polygyny gives a husband a correspondingly unequal *duty* to support multiple wives, whilst the wife has a duty of support towards only one man.²⁶⁷

To give women the same right to have multiple husbands (known as "polyandry") would be of no help since this custom is not part of any Namibian cultural or religious traditions. On the other hand, to outlaw polygyny entirely would probably result in an increase in informal unions that would give *less* protection to the women and children involved. In South Africa, it was feared that a failure to register might create a new category of "limping marriages".²⁶⁸ This is very likely in Namibia, as there are already indications of an evolution in this direction, with informal unions providing less security than more formal polygyny.²⁶⁹

This concern seems to argue in favour of Option C -- discouraging polygyny whilst still taking steps to protect the interests of parties to polygynous marriages. This would be in line with Namibia's obligation in terms of CEDAW, since the CEDAW committee's report urged the government, in collaboration with NGOs and churches, to "introduce an intensive programme to discourage polygamy".²⁷⁰

²⁶⁴ SALC *Report on Customary Marriages* (n21) at paragraph 6.1.7-ff; Armstrong *et al* (n12) at 26-27.

²⁶⁵ SALC *Discussion Paper* (n34) at paragraph 6.1.1.

²⁶⁶ Article 14(1).

²⁶⁷ Armstrong *et al* (n12) at 26.

²⁶⁸ SALC *Report on Customary Marriages* (n21) at paragraph 6.1.16.

²⁶⁹ See, for example, Becker/Hinz (n10) at 64, 83.

²⁷⁰ CEDAW/C/1997/II/L.1/Add.2, paragraph 56.

There are two possible routes to the achievement of this objective. One would be to treat polygynous marriages as valid marriages, and to regulate the division of property between all the parties involved. The other approach would be to refuse to recognise polygynous marriages as being valid marriages, treating them as cohabitation arrangements and then applying legal protections to all cohabitation arrangements.

The problem with the latter approach is that failing to recognise a polygynous marriage as a “marriage” would almost inevitably disadvantage the parties to the marriage, as well as the children of the marriage. For example, if a polygynous marriage were not a marriage at all, the spouses could be forced to testify against each other in court, the children might be socially disadvantaged, and pension plans or insurance companies might refuse to pay benefits to the “spouses” of these unrecognised unions. Surely it would be unfair to impose these legal disadvantages on persons who consider themselves to be validly married.

Thus, the most practical approach seems to be the legal recognition of polygynous marriages as marriages, however uncomfortable this may be as a matter of principle. However, since polygyny in the traditional sense appears to be declining in Namibia, this could be seen as part of a process of phasing out the practice. The simplest legal protections may, after all, discourage parties from formalising their polygynous relationships, in favour of leaving them as informal “second house” relationships – thereby accelerating the existing trend. (Of course, such a development will make it even more urgent to extend legal protections to parties who are informally cohabitating.)

RELATIONSHIP BETWEEN POLYGYNOUS AND MONOGAMOUS MARRIAGES

If polygynous marriages are recognised as valid customary marriages, this raises questions about the relationship between civil marriages and polygynous or potentially polygynous marriages.

Historically, monogamous civil marriage was given precedence because of colonial attitudes and religious influence. However, the portion of Namibia’s Native Administration Proclamation which never came into force recognised the possibility that a civil marriage might be entered into when there was a pre-existing “customary union”, and would have provided a mechanism for protecting the property rights of all of the wives and children in such cases.²⁷¹ However, it was never legally proposed or accepted in Namibia that a monogamous civil marriage could be followed by a customary union.²⁷²

²⁷¹ Native Administration Proclamation 15 of 1928, section 17(1), quoted in paragraph 8.7 above.

²⁷² See paragraph 8.7 above.

The old South African bantustan of Transkei attempted to collapse the distinction between polygamy and monogamy by making all marriages, whether civil or customary, potentially polygamous.²⁷³

The Law Reform Commission of Papua New Guinea proposed a spectrum of three possibilities: (a) monogamous church marriages, (b) other civil marriages which were assumed to be monogamous unless the parties stated a contrary intention at the time, and (c) customary marriages which are potentially polygynous.²⁷⁴ Although this proposal was not enacted, the goal was apparently to give the parties a full range of free choice.

The South African legislation gives precedence to monogamy. If a civil marriage is in place, there can be no subsequent customary marriage. Similarly, if a customary marriage is already in place, there can be no subsequent civil marriage. A couple who have already formed a potentially polygynous marriage under customary law can convert that marriage to a monogamous one by entering into a subsequent civil marriage with each other (if there are no other customary marriages in place), but they cannot convert a monogamous civil marriage into a potentially polygynous customary marriage.²⁷⁵

There are practical problems with adopting the South African approach in Namibia, because of the existence of “hybrid marriages”. Giving precedence to monogamous civil marriages may not capture the true intention of parties who undergo both civil and customary rites.

One advantage of giving precedence to monogamous civil marriages is allowing for certainty.²⁷⁶ A party who enters a monogamous civil marriage could thus be immune from pressure to register the marriage as a polygynous one, or to change it to a polygynous one at a later date. On the other hand, it may also be argued that giving precedence to monogamy exhibits an unfair bias towards civil marriage and the “western” way of doing things.

There is no ideal solution. However, because of the need to provide safeguards for wives who may not be in a position to give free “consent” to a husband’s subsequent marriage to another wife, it seems to be a good idea to make the registration of a civil marriage an

²⁷³ SALC *Report on Customary Marriages*(n21) at paragraph 2.1.17.

²⁷⁴ See paragraph 9.6 above. The Commission proposed the following approach to “mixed ceremonies”: “Where there is a customary marriage and during or after the marriage ceremony, certain religious rites are at the parties request, performed in relation to the marriage, the marriage shall from the time the religious rites are performed become monogamous, but in all other respects shall remain a customary marriage.” Draft Family Law Act 1978, §12.

²⁷⁵ Recognition of Customary Marriages Act 120 of 1998, section 3(2) read together with section 10.

²⁷⁶ In Lesotho, where no precedence was given to either form of marriage, the result was legal confusion. TW Bennett, *Application of Customary Law in Southern Africa* (1985) at 197-8.

absolute bar to the contracting of a subsequent customary marriage with another woman— and to allow a civil marriage to take place only if there is no pre-existing customary marriage with another woman. This will give wives in civil marriages a strong degree of certainty and some protection from pressure to agree to other marriages.

However, it is further suggested that couples who marry in terms of *both* church and customary rites should be able to choose the form in which to register their marriage – not just to resolve the conflict between monogamy and polygyny, but also to give couples a chance to identify their marriage with the form which most closely suits their own understanding of it. This, together with the possibility of utilising choice over the applicable marital property regime for both civil and customary marriage, would make it possible for couples to get appropriate legal protection for the consequences of marriage which they actually intend to follow. The possibility of free choice would be a positive contrast to a legal system which has in the past forced some couples to marry in forms which they would not have freely chosen in order to obtain legal acknowledgement for the marriage.

Choice could be preserved by drawing a legal distinction between the solemnisation of a civil marriage in church, and a church ceremony performed to give a blessing to a customary marriage. If churches object to the possibility that a marriage blessed in a church ceremony might be registered as a potentially polygynous customary marriage, this can be dealt with outside the boundaries of the law -- in the same way that some religions forbid divorce or marriage with persons of another faith even though the law allows it.²⁷⁷ For example, a couple might have to agree with their pastor that they will register the marriage as a civil marriage if they want to receive the blessing of that church. This approach would give the churches leeway to discourage the declining custom of polygyny, without making polygyny illegal.

RECOMMENDATION: (1) *Recognise polygynous customary marriages as valid marriages in order to protect the rights of the vulnerable parties to such marriages and the social and legal status of the children of the marriage.* (2) *Make the subsistence of a registered civil marriage an absolute bar to a subsequent customary marriage with a different woman, and forbid civil marriage if there is a subsisting customary marriage with a different woman. But allow couples who marry each other in terms of both church and customary rites to choose the form in which they will register their marriage – as a*

²⁷⁷ On a similar point, section 31 of the Marriage Act 25 of 1961 states:

Nothing in this Act contained shall be construed so as to compel a marriage officer who is a minister of religion or a person holding a responsible position in a religious denomination or organisation to solemnise a marriage which would not conform to the rites, formalities, tenets, doctrines or discipline of his religious denomination or organisation.

monogamous civil marriage acknowledged by the performance of customary rites, or as a potentially polygynous customary marriage blessed by the church (if the church is willing to do so).

(5) SAFEGUARDS FOR PARTIES TO POLYGYNOUS MARRIAGES: What safeguards can be put into place to give protection to the parties to polygynous marriages?

Options:

- *Require the consent of previous wife or wives.*
- *Make rules concerning the equitable division of property amongst all the parties.*

CONSENT

When the South African Law Commission suggested a requirement that a first wife must consent to any additional customary marriages by her husband, critics pointed out that this might be a meaningless provision in practice. A first wife who failed to give her agreement might face divorce or domestic violence or, at best, a difficult situation at home. Furthermore, a husband might give misrepresentations about his ability to support more than one family in order to secure consent. Another problem is the question of what sanction to impose if the marriage proceeds without the required consent – declaring the second marriage invalid punishes the second wife (who may or may not have known of the first wife’s failure to agree) as much as the husband.²⁷⁸ In light of these valid criticisms, the South African law does not require consent, but does require an equitable adjustment of marital property.

Some of the problems pertaining to consent in this context apply to other kinds of consent as well, such as the requirement that any marriage must be entered into with the free consent of both intending spouses. Yet the fact that strong family pressure may be brought to bear on one or the other intending spouse does not lead to the removal of the consent requirement in that context.

It is submitted that a Namibian law should require the consent of the first wife (or wives) before a subsequent customary marriage between the husband and another woman can be registered. Even if this requirement does not operate meaningfully in all cases, the law should not assume that there will be *no* women who are in a position to make meaningful decisions on this point. Requiring the agreement of all parties concerned will help to ameliorate the aspects of polygyny which may be discriminatory. Furthermore, including

²⁷⁸ See SALC *Report on Customary Marriages*(n21) at paragraph 6.1.17–ff.

such a provision in the law may help to empower some women to register their objections to polygyny more openly.

PROPERTY DIVISION

On this point, the South African legislation offers a useful model. A husband in a customary marriage who wishes to enter into an additional customary marriage must make application to a court “to approve a written contract which will regulate the future matrimonial property system of his marriages”. If the first marriage was in community of property or subject to the accrual system, this system must be terminated, the property divided, and a new and equitable division determined. All of the interested parties must be given an opportunity to participate in this division of property.²⁷⁹

One potential problem with this approach is that the requirement may operate to drive polygyny “underground” by encouraging informal cohabitation over formal polygyny. A possible alternative would be to make the process of property division more accessible by empowering traditional leaders to mediate it, rather than a court. Ensuring the adequate support of all of the family “houses” would be in line with tradition on polygyny, so traditional leaders should be in a position to identify an equitable approach for protecting the interests of all parties. But if this were in doubt, it would also be possible to have such agreements concluded before a traditional leader and reviewed by a court before finalising the registration of the subsequent marriage.

RECOMMENDATION: (1) Require the consent of any existing wives to a subsequent customary marriage by the husband. (2) Require the formation of an agreement for the equitable distribution of marital property amongst all the interested parties before allowing the registration of the subsequent customary marriage.

(6) MARITAL PROPERTY REGIMES: What marital property regime should apply to customary marriages? Should couples in customary marriages be able to make ante-nuptial agreements?

Options:

DEFAULT MARITAL PROPERTY REGIMES

(A) Make the default property regime identical for civil and customary marriages.

²⁷⁹ Recognition of Customary Marriages Act 120 of 1998, §7(6)-(7).

(B) Provide one default property regime for all civil marriages and another for all customary marriages.

(C) Provide one default property regime for all civil marriages and allow local custom to determine the property regime for customary marriages.

ANTE-NUPTIAL AGREEMENTS

(A) Make it possible for the parties to a customary marriage to vary the property consequences of the marriage by means of an agreement made at the time of registration.

(B) Forbid such ante-nuptial agreements in respect of customary marriages.

DEFAULT MARITAL PROPERTY REGIMES

As a legacy of colonial times, the default property regimes for civil marriage are different in different parts of Namibia – *in community of property* in most of the country, and *out of community of property* for marriages entered into after 1 August 1950 north of the old Police Zone. The situation is complicated by the fact that there is little clear public understanding of the meaning of either of these marital property regimes.

This is a situation which is badly in need of independent examination and reform. Such an enquiry should include an examination of the position with respect to customary marriage. Here, the fact that members of wider kinship networks have an interest in some forms of marital property will be a complicating factor.

The absence of a clear and acceptable position for civil marriage makes it more difficult to decide if the two forms of marriage should follow the same default regime or not. Zimbabwe applies the same default regime (out of community of property) to all registered marriages, while South Africa applies the same default regime (in community of property) to all valid marriages. Both countries allow for ante-nuptial contracts to alter the default regimes.

One possibility is to conduct a fuller examination of the question of marital property regimes before enacting legislation which recognises customary marriages. Another is to allow custom to continue to determine the default regime of customary marriages for the moment, while introducing two interim measures aimed at protecting the rights of the parties:

(i) Make it possible for couples to register an ante-nuptial agreement in respect of customary marriages.

(ii) Make it possible for either spouse to ask a court for a settlement of certain property interests during the course of the marriage or at its dissolution.

ANTE-NUPTIAL AGREEMENTS

The principle of allowing a couple to choose their marital property regime should form part of both short-term and long-term approaches to the property consequences of marriage. Ante-nuptial contracts serve as a mechanism to enable a couple to get legal

protection for the form of marriage which they actually intend to observe. Ultimately, the present procedure for forming ante-nuptial agreements should be re-examined to see if such documents can be made more accessible and understandable to wider segments of the public in both urban and rural areas. For example, simply-worded forms with accompanying explanatory material might be provided by the registering officer at the time of registration, to give couples a set of clear choices regarding marital property regimes.

However, even without revising the present approach to ante-nuptial agreements, it would be only fair to extend their use to customary marriage. Couples who want to make their marriage follow a regime that is contrary to the accepted custom of their community would have to negotiate this with interested parties outside of the legal framework. One problem which might arise is that a couple's intentions on marital property might depart so radically from accepted community custom that the registering officer could not find that the marriage had satisfied the requirement of being concluded in accordance with customary law. But this problem could be dealt with on a case-by-case basis, and need not undermine the principle of allowing for some freedom of choice – particularly given the evolving nature of customary law.

COURT DISTRIBUTIONS

Another safeguard is to protect the respective rights of the spouses in a manner analogous to that provided for civil marriages which are in community of property by the Married Persons Equality Act. In this context, the court has the power to adjust the joint estate, or to suspend the powers of an irresponsible spouse, during the subsistence of the marriage if necessary, or to make an equitable distribution of the estate upon the dissolution of the marriage which compensates for losses suffered when one spouse entered transactions without the consent of the other. A similar approach was proposed by the Papua New Guinea Law Commission, which thought that courts should have even wider powers to make equitable adjustments of marital property at any stage of the marriage, in light of the financial and non-financial contributions of each spouses to the household and the needs of the children.²⁸⁰

Allowing for court intervention in the distribution of marital property for customary marriages, following on the example of the Married Persons Equality Act, would place customary marriages on a more equal footing with civil marriages in terms of protection for the property rights of the individual spouses. The disadvantage of this approach is that it would involve courts in the difficult business of ascertaining customary law, if customary marriages continue to follow customary rules on marital property. However, if the experience

²⁸⁰ See Married Persons Equality Act 1 of 1996, Part II; Draft Family Law Act 1978, §§38-39.

of the Married Persons Equality Act is an accurate guideline, this remedy might influence attitudes without actually involving courts in frequent cases in practice. The possibility of judicial intervention would be particularly important for the enforcement of spousal rights to equal *control* of marital property (discussed below).

RECOMMENDATION: (1) Allow the property regime of customary marriages to continue to be determined in accordance with custom, until such time as there is universal law reform on marital property regimes. (2) Give couples greater freedom of choice immediately by allowing them to register an ante -nuptial agreements in respect of customary marriages. (3) Protect women against unfair discrimination in respect of marital property by making it possible for either spouse in a customary marriage to ask a court for a settlement of certain property interests during the course of the marriage or at its dissolution, in light of specified factors, in a manner analogous to the provisions applicable to civil marriages in the Married Persons Equality Act.

(7) EQUAL RIGHTS AND POWERS OF SPOUSES: How can the constitutional requirement of equality between spouses be implemented in respect of customary marriages?

Possible steps to ensure equality of husband and wife:

- *Make the Age of Majority Act explicitly applicable to all women.*
- *Give husbands and wives in customary marriages full status and capacity on a basis of equality, including equal capacity to acquire and dispose of property, to enter into contracts and to bring legal actions in customary or general law forums.*

If it is accepted that the reference to “marriage” in the Namibian Constitution includes customary marriage, then legal steps to ensure that husband and wife are on an equal footing are not optional.

This is likely to be very controversial, as was the abolition of the husband’s status as head of household in respect of civil marriages by the Married Persons Equality Act. However, as in the case of the Married Persons Equality Act, the law will not stop people from dividing authority within their own homes as they wish – but the law must no longer sanction and enforce marital inequalities.²⁸¹

²⁸¹ This point was also acknowledged in respect of the South African reforms. See SALC *Report on Customary Marriages* (n21) at paragraph 100.

In order to remove existing inequalities in customary marriage, the Age of Majority Act 57 of 1972 should be clearly extended to all women, regardless of any provisions of customary law.²⁸² This alone will not be sufficient, however, for it is not clear that all of the incapacities women experience under customary law are derived from a lack of legal majority.

The statute should also contain a provision explicitly giving husbands and wives full legal status and capacity, to cover contractual capacity, the right to bring legal actions (*locus standi*) and the right to own personal property. The South African model is a useful example on this point:

A wife in a customary marriage has, on the basis of equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity, including the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that she might have at customary law. (S6)

RECOMMENDATION: (1) Make the Age of Majority Act explicitly applicable to all women. (2) Give husbands and wives in customary marriage full status and capacity on a basis of equality, including equal capacity to acquire and dispose of property, to enter into contracts and to bring legal actions in customary or general law forums.

(8) DIVORCE: Should civil and customary marriages have the same substantive and procedural rules for divorce?

Options:

(A) Make the grounds and procedures for divorce identical for all marriages.

(B) Make the grounds and procedures for divorce identical for all registered marriages.

(C) Make the grounds for divorce identical for all marriages, but allow different forums and procedures for civil and customary marriages.

(D) Allow different grounds and procedures for civil and customary marriages.

²⁸² Bennett (n9) at xiv. The South African Recognition of Customary Marriages Act includes the following provision:

“Despite the rules of customary law, the age of majority of any person is determined in accordance with the age of Majority Act, 1972 (Act No. 57 of 1972).” (S9)

Namibia has a Constitutional imperative to ensure that husbands and wives are treated equally at the dissolution of marriage.²⁸³ This objective could, in theory, be accomplished within the context of any of the options identified above.

A very low percentage of the Namibian population identify themselves as being either informally separated or formally divorced. At present, the law on divorce which applies to civil marriages is outdated and inaccessible. Divorces can be granted only by the High Court in Windhoek on fault-based grounds. This law and proposals for its reform are discussed in detail in another research paper of the Legal Assistance Centre.

In general, it is submitted that new grounds and procedures for divorce should be developed which are appropriate and accessible for all types of marriage. Namibia should follow South Africa's example of providing one law on divorce for all types of marriage, by adopting Option A. The arguments for this are:

- the need to protect the interests of women and children;
- the symmetry of matching state regulation of the formation of marriage with state regulation of its dissolution;
- the need for certainty and clarity;
- the possibility that state involvement is mandated by Article 12(1)(a) which states that all persons "shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law" in the determination of their civil rights and obligations.²⁸⁴

A new law on divorce could be enacted simultaneously with the implementation of a law recognising customary marriages. Alternatively, customary marriages could be recognised in a law which allows them to continue to be dissolved according to custom (as at present) until a new globally applicable law on divorce is ready.

RECOMMENDATION: Make the grounds and procedures for divorce identical for all marriages in a new divorce law which establishes new, more modern grounds for divorce and makes divorce proceedings more accessible, particularly to those in rural areas.

(9) INHERITANCE: Should the laws on intestate inheritance be the same for persons in civil and customary marriages?

²⁸³ Article 14(1).

²⁸⁴ See SALC *Report on Customary Marriages*(n21) at paragraph 7.1

Options:

(A) Let unwritten custom continue to govern intestate succession for customary marriages whilst intestate succession in civil marriage is subject to statutory rules.

(B) Make separate statutory regimes applicable to intestate succession in respect of civil and customary marriage.

(C) Make one set of statutory rules concerning intestate inheritance applicable to civil and customary marriages.

This paper has not covered the question of inheritance, because this issue has already been under study by a subcommittee of the Law Reform & Development Commission for some time. It is raised here simply as a reminder that it is part and parcel of a new family law regime for civil and customary marriage.

For civil marriages, intestate succession is governed by the Intestate Succession Ordinance 12 of 1946. Intestate succession in customary marriage is generally governed by customary law, although (as discussed above) there is a complex statutory overlay which has the result of applying different rules to different parts of Namibia, depending on the deceased's race and form of marriage.²⁸⁵ Thus, Namibia at present follows a variant of Option A.

It is submitted that the Constitutional guarantee of spousal equality upon the dissolution of marriage, along with Namibia's obligations under CEDAW, compel the government to make statutory rules ensuring that there is no sex discrimination in the rules of inheritance which apply to any marriage. This could in theory be accomplished by means of Option B or Option C. Or, there could be a system which applies one basic set of rules whilst still allowing for some flexibility in areas that did not involve any sex discrimination – the “one house with many rooms” again.

An inspiring example here is Malawi, which has taken a very strong stance against property grabbing. According to Malawi's Wills and Inheritance Act, if a husband dies intestate, 50% of his property goes to the wife and children while 50% goes to the heirs as designated by the customary law of the family.²⁸⁶ But this statute is not observed in practice by those who believe that the husband's property belongs solely to his kin group. To combat the problem, Malawi has amended its Wills and Inheritance Act, setting up special prosecutors to investigate and prosecute those accused of property grabbing.²⁸⁷

²⁸⁵ See section 8 above.

²⁸⁶ Shenhard Flint Mazengera, “Enforcing Women's Rights in Malawi: Special Prosecutors Take Up Cases of Property Grabbers”, *Network: Newsletter of the Southern African Human Rights Legal NGOs*, May 1999, at 14.

²⁸⁷ This amendment is justified by a special provision of the new Malawi Constitution, passed in 1996, which states that “legislation may be passed addressing inequalities in society and prohibiting

RECOMMENDATION: *Enact a new system of intestate succession which essentially applies one set of rules to both civil and customary marriages, but allows for some variations between communities in areas which do not involve sex discrimination.*

(10) HYBRID MARRIAGES: How should the law treat marriages which combine both civil and customary law aspects?

Options:

(A) Give one form of marriage dominance. (If the requirements for that form of marriage are met, then the marriage must be registered as that type of marriage.)

(B) Let the order of the rites determine the type of marriage. (Give precedence to either the prior or the latter form of solemnisation.)

(C) If there is any ambiguity concerning the type of marriage which subsists, let the court infer an intent from the couple's lifestyle.

(D) Require couples to choose the form of their marriage at the time of registration.

(E) Allow both marriages to subsist side-by-side.

HYBRID MARRIAGE FORMS

As noted above, “hybrid marriages” are common, particularly marriages which combine a church ceremony (making them civil marriages) with traditions in terms of customary law. It has already been suggested above that the law should allow couples who conclude such “hybrid marriages” to register them in the form which most closely corresponds to the couple's own understanding of the marriage, to facilitate appropriate legal protection for both parties. Failure to require the couple to choose one form of marriage or the other could result in a shuffling back and forth between the two sets of norms to the advantage of one spouse and the detriment of the other.²⁸⁸

Options A and B should be rejected as unacceptably arbitrary, bearing no clear relationship to the wishes and intentions of the spouses themselves. Allowing one type of

discriminatory practices and the propagation of such practices and may render such practices criminally punishable by the courts” Section 20(2), text of the Constitution of Malawi as found at http://www.sas.upenn.edu/African_Studies/Govern_Political/mlwi_const.html.

“Whether in practice the special prosecutors will help in protecting the rights of widows is yet to be seen. One has also to recognise that the underlying causes of property grabbing are social problems which might require some special solutions.” Mazengera (n286) at 15.

²⁸⁸ See, for example, Thandabantu Nhlapo, “No cause for optimism: bigamy and dual marriage in Swaziland” in Alice Armstrong, ed, *Women and Law in Southern Africa* (1987) at 129-132.

marriage to take precedence over the other would imply, wrongly, that one is superior to the other. And the timing of the various rites is likely to stem from economics or convenience, rather than being an expression of the couple's intent. (In any event, arguments could be made for giving precedence to either the earlier or the later rite, thus illustrating the inadequacy of this approach.)

Option C is unworkable. As was pointed out to the South African Law Commission, how can a predominate lifestyle be inferred to couples who draw elements from both western culture and their home communities? Even the couples themselves might not be able to identify a single culture which influences the totality of their life choices.²⁸⁹

The South African Law Commission thought that the optimal solution to this problem would be to require spouses to state expressly whether their marriage was to be a civil or a customary one, as Option D suggests.²⁹⁰ It recommended that "registering officers should be required to explain to prospective spouses the difference between the two forms of marriage (namely the different consequences and implications) and then endorse the fact that the couple heard and understood the explanation on the marriage certificate".²⁹¹

As noted above, the possibility of choosing which form of marriage to register, alongside the possibility of entering into an ante-nuptial agreement, gives couples the maximum degree of flexibility to obtain clear legal recognition for the kind of marriage they actually intend.

Option E would give *both* types of marriage legal recognition, which might be the closest to what the couple actually intend:

The parties have clearly manifested an intention to marry under both systems and therefore both marriages must be regarded as subsisting side by side. Instead of adopting a negative attitude in terms of which one of the marriages is treated as overridden, subsumed or of no significance, a positive approach is needed which will give life and meaning to the fruitful merging of two cultures.²⁹²

Whilst such an approach sounds very attractive, it would probably be unworkable in practice unless *all* of the consequences of both types of marriages were identical. Otherwise, a couple who approached a court for enforcement of their legal rights would be creating difficult choice of law questions. A court in such a situation would almost certainly be forced to adopt one of the other approaches – giving precedence to one form of marriage over another,

²⁸⁹ See SALC *Report on Customary Marriages* (n21) at paragraph 3.2.14 and note 52.

²⁹⁰ Ibid at paragraph 3.2.13, 3.3.5.

²⁹¹ Ibid at paragraph 4.1.14. The Act itself makes no explicit mention of choice with respect to registration, but neither is it inconsistent with this proposal.

²⁹² S Poulter, *Legal Dualism in Lesotho* (1981) at 37-ff and 72-ff, as quoted in Becker/Hinz (n10) at 89.

looking to the marriage which was concluded first (or most recently) or trying to identify the couple's intentions after the fact on the basis of their actions, statements or lifestyle.

On balance, it is submitted that Option D would best serve both the goal of certainty and the desire to allow for freedom of choice. Couples who qualify to register either a civil or a customary marriage should indicate their intentions on this point clearly at the outset of the marriage. This would leave the couple free to draw on both civil and customary norms as they chose *outside* the framework of the legal system, but it would give courts clear guidance on how to proceed if it became necessary for the court to resolve a dispute at a later stage. Allowing such a degree of choice would, however, necessitate intensive education on the options available and what they would mean in practice.

CONVERSION

A related question concerns conversion. In South Africa, the parties to a marriage which is registered as a customary marriage can contract a subsequent civil marriage with each other, with civil marriage consequences. But such a conversion is not possible the other way around -- because the South African Act gives precedence to monogamy, it is not possible to turn a civil marriage into a customary marriage once it has been registered as being civil. The justification for allowing only one-way conversion was that civil marriage is a stricter and more highly-regulated regime than an "open-ended" customary marriage, and that it would not be practical for parties to change from the stricter regime to the more flexible one.²⁹³

It is submitted that Namibia should follow the South African example on this point, particularly to provide certainty on the question of potential polygyny (if polygynous marriages are in fact given legal recognition as marriages). A woman who contracts a monogamous civil marriage should not be able to be placed under pressure to convert the marriage to a customary one at a later date in order to allow for polygyny.

Regardless of what decision is taken on polygyny, if any scheme allowing conversion makes it possible for the couple's marital property regime to be altered, there will have to be safeguards to ensure that neither spouse, nor any third party, is prejudiced by such an alteration. Examples of such safeguards can be found in section 7(4)(a) of the South African Act, which requires prior notice of the proposed change to all creditors of the spouses for

²⁹³ SALC *Report on Customary Marriages*(n21) at paragraph 3.3.6.

amounts above a specified level, and a judicial finding that no other person will be prejudiced by the change.²⁹⁴

RECOMMENDATION: (1) *If a couple fulfil the requirements for registering their marriage as either a civil or a customary marriage, require them to choose one form or the other at the time of registration, after being given an explanation of the differences between the two types of marriage by the registering officer.* (2) *Allow conversion from a customary marriage to a civil marriage, but not the other way around, in order to ensure that women are not put under pressure to exchange a monogamous form of marriage for a polygynous one. If the conversion involves a change of the couple's marital property regimes, safeguards to prevent prejudice of either spouse, or of any third party, should be included.*

(11) PROSPECTIVE OR RETROSPECTIVE EFFECT?: Should the Act be made applicable in every respect to customary marriages already existing when the act comes into force?

Options:

(A) *Recognise only customary marriages entered into after the commencement of the act as being valid marriages.*

(B) *Recognise existing customary marriages as being valid, but do not apply any new arrangements to them retrospectively.*

(C) *Recognise existing customary marriages as being valid, and apply new arrangements to them only if couples choose to register them.*

(D) *Recognise existing customary marriages as being valid, and allow couples to choose which new arrangements will apply to them at the time of registration.*

(E) *Recognise existing customary marriages as being valid, and apply the new law in its entirety to all existing customary marriages.*

In Namibia, the closest precedent for this issue is the Married Persons Equality Act which was made applicable to existing and future marriages (in respect of the parts of the act that applied only to civil marriages, and the parts of the act that applied to both civil and customary marriages).

Options A and B discriminate against existing customary marriages in an unreasonable fashion, and would possibly be unacceptable in constitutional terms because

²⁹⁴ Recognition of Customary Marriages Act, §7(4). In the South African Act these precautions do not apply to conversion but to couples who contracted a customary marriage before the commencement of the Act and would like to change their matrimonial property regime.

they would apply the constitutional promises of spousal equality to some but not others purely on the arbitrary basis of date of marriage.

South Africa falls between the listed options, because its new law recognises past and future customary marriages as being valid marriages for all purposes (§2(1)), whilst the proprietary consequences of the new law apply only to customary marriage entered into *after* the commencement of the act. Existing marriages follow the property consequences of customary law (§7(1)). This is perhaps not unduly harsh, because couples in existing marriages have the power to alter their marital property regime by making joint application to a court. But what is problematic – and what might discourage couples from acting jointly to change their marital property regime – is that the provision giving husbands and wives equal status and capacity is “subject to the matrimonial property system governing the marriage” (§6).

If reform of marital property regimes is left to a later stage in Namibia, this problem is simplified. An act which gives recognition to customary marriages and equalises the powers and capacities of the spouses in such marriage should apply to all existing customary marriages, just as the exclusion of marital power by the Married Persons Equality Act applied to all existing civil marriages. This should be automatic and not at the option of the couple, since many men would undoubtedly be reluctant to agree to give up their greater share of power. It is also important not to create any disincentive to registration. Option E should apply.

If reform of marital property regimes takes place simultaneously with the enactment of a law giving full recognition to customary marriages, then Option D could apply *only* with respect to the choice of marital property regime. However, to avoid creating disincentives to registration, the law could provide that the default marital property regime contained in the act for customary marriages will automatically apply unless the couple choose to make an agreement retaining their existing property consequences at the time of registration.

RECOMMENDATION: All existing and future customary marriages should be recognised as being valid, and provisions providing for the equality of husband and wife should be automatically applicable to all marriages. If the new law includes a default marital property regime for customary marriages, couples in existing marriages could be allowed to decide whether to adopt the new scheme or remain under their existing one at the time of registration.

(12) LEGAL PROTECTION FOR COHABITATION: What protections should the law give to informal cohabitation?

This question is outside the scope of this paper. However, it should be noted that any scheme to recognise customary marriage could encourage informal cohabitation by parties who want to circumvent the new legal consequences of customary marriage, or who simply want to avoid the bother of registration. Thus, the need to make legal provision for the protection of women and children in such relationships will be made even more urgent if a new law providing for the recognition of customary marriage is enacted.

***RECOMMENDATION:** A new law on the recognition of customary marriages should be accompanied, or followed as soon as possible, by a law which addresses the consequences of informal cohabitation.*

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APPENDICES

- A. PAPUA NEW GUINEA: Proposed Family Law Act 1978 (never enacted)**

- B. PAPUA NEW GUINEA: Marriage Act (Chapter 280)**

- C. ZIMBABWE: Customary Marriages Act [*Chapter 5:07*]**

- D. ZIMBABWE: Married Persons Property Act [*Chapter 5:12*]**

- E. ZIMBABWE: Legal Age of Majority Act
now section 15, General Law Amendment Act [*Chapter 8:07*]**

- F. SOUTH AFRICA: Recognition of Customary Marriages Act 120 of 1998**