



**REPUBLIC OF NAMIBIA**

---

**LAW REFORM AND DEVELOPMENT COMMISSION**

---

**REPORT ON UNIFORM DEFAULT  
MATRIMONIAL PROPERTY CONSEQUENCES OF  
COMMON LAW MARRIAGES**  
(REPEAL OF SECTION 17(6) OF NATIVE ADMINISTRATION PROCLAMATION,  
1928 (PROCLAMATION 15 OF 1928))

---

**PROJECT 6**

---

**LRDC 11**

**Windhoek, Namibia  
July 2003**

**ISSN 1026-8405  
ISBN 99916-63-57-6**

**PUBLICATIONS OF LRDC:****ANNUAL REPORTS** (ISSN 1026-8391)\*

First Annual Report – 1992 (ISBN 0-86976-382-2)\*

Second Annual Report – 1993 (ISBN 0-86976-383-0)\*

Report on Activities from 1994 to 2002 (ISBN 0-86976-604-X)

Annual Report - 2003 (ISBN 0-86976-643-0)

**OTHER PUBLICATIONS** (ISSN 1026-8405)\*

- LRDC 1\* Aspects of Family Law: The Abolition of Marital Power and Equalization of Rights between Spouses (ISBN 0-86976-384-9)\*
- LRDC 2 The Ascertainment of Customary Law and the Methodological Aspects of Research into Customary Law: Proceedings of Workshop, February/ March 1995 (ISBN 0-86976-385-7)
- LRDC 3 T.W. Bennett, Customary Law and the Constitution, October 1996 (ISBN 0-86976-397-0)
- LRDC 4 Report on the law pertaining to Rape (ISBN 0-86976-406-3)
- LRDC 5 Report on Maintenance (ISBN 0-86976-407-1)
- LRDC 6 Report on Small Claims Courts (ISBN 0-86976-412-8)
- LRDC 7 Violence against and Abuse of Women and Children Project: Formal Addresses made at the National Hearing-May 1997 (ISBN 0-86976-412-6)
- LRDC 8 - Violence against and Abuse of Women and Children Project: Verbatim Discussions held at the National Hearing-May 1997 (ISBN 0-86976-490-X)
- LRDC 9 Domestic Violence Cases reported to the Namibian Police – Case Characteristics and Police Responses (ISBN 0-86976-516-7)
- LRDC 10 Report on Domestic Violence (ISBN 0-86976-555-8)
- LRDC 11 Report on Uniform Consequences of Common Law Marriages (Repeal of Section 17(6) of Native Administration Proclamation, 1928 (Proclamation 15 of 1928)) (ISBN 99916-63-57-6)

\*Number of publication and ISSN and ISBN numbers not printed on all copies.

## LAW REFORM AND DEVELOPMENT COMMISSION OF NAMIBIA

To: **The Honourable Minister of Justice**

I have the honour to submit to you, in terms of section 9(1) of the Law Reform and Development Commission Act, 1991 (Act No. 29 of 1991), the Commission's Report on Uniform Default Matrimonial Property Consequences of Common Law Marriages (Repeal of Section 17(6) of the Native Administration Proclamation, 1928 (Proclamation 15 of 1928)).

Mr U D Nujoma  
**Chairperson**  
2003 – 07 - 22

## LAW REFORM AND DEVELOPMENT COMMISSION OF NAMIBIA

The LRDC was established by the Law Reform and Development Commission Act, 1991 (Act No. 29 of 1991) which came into operation on 15 July 1992.

The members of the LRDC on 18 July 2003 are:

Mr U D Nujoma (Chairperson – Full-time)  
Adv. B Gawanas (Ombudswoman)  
Mr A Vaatz (Legal Practitioner)  
Adv. D Sauls (Legal Practitioner)  
Mr G M Mutwa (Deputy Chief: Legislative Drafting)  
Mr G N Ndauendapo (Legal Practitioner)  
There are two vacancies.

The Secretariat of the Commission (Directorate Law Reform) is housed in the Ministry of Justice, Justitia Building, Independence Avenue, Windhoek.

All correspondence to the Commission should be addressed to:

The Secretary  
Law Reform and Development Commission  
Private Bag 13302  
WINDHOEK  
Republic of Namibia

Fax: (09264) (61) 240064  
Tel.: (09264) (61) 280-5111  
E-mail: [lawreform@moj.gov.na](mailto:lawreform@moj.gov.na)

*This publication of Law Reform and Development Commission is issued with the technical and financial assistance of the Legal Capacity Building Programme, implemented jointly by the Ministry of Justice of Namibia and the Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) mbH as implementing agency for technical co-operation of the German Federal Ministry of Economic Co-operation and Development (BMZ)*

## CONTENTS

	<i>Page</i>
1. Introduction.....	1
2. The Effects of sections 17 and 18 of the Native Administration Proclamation, 1928 (Proclamation 15 of 1928) .....	2
3. Repeal of section 17(6) and Confirmation of Common Law .....	5
4. Change of Matrimonial Property System .....	6
5. Explanation of recommended Bill.....	8
6. Conclusion .....	9
ANNEXURE A: Matrimonial Property Amendment Bill	
ANNEXURE B: Text of sections 17 and 18 of Native Administration Proclamation, 1928 (Proclamation 15 of 1928)	

## 1. INTRODUCTION

- 1.1 The Law Reform and Development Commission has since its establishment in 1992 given considerable attention in general to family law and to customary law. In due course matters that needed special and priority attention were identified and specific projects for such matters were established.
- 1.2 The Commission finalized in 1994 its project that led to the enactment of the Married Persons Equality Act, 1996 (Act No.1 of 1996). The Commission is still dealing with three ongoing projects in the field of family law, namely the Succession and Estates Project (Project 6), the Customary Law Marriages Project (project 7) and the Divorce Project (Project 8). The Succession and Estates Project deals with the law of succession and the law of the administration of estates. (It was sometimes in the past referred to as the "Inheritance" Project and it has only lately been numbered as Project 6.)
- 1.3 The Commission recently discussed a comprehensive document, dealing with a wide range of issues related to succession and estates, prepared by its Secretariat. The Commission took decisions on various issues that will be incorporated in that document and that document will then be used for further consultations with stakeholders before a final report will be submitted to the Minister of Justice.
- 1.4 The Commission is very much aware of the urgency of these matters and is therefore committed to speed up its recommendations and to finalize its comprehensive report as soon as possible. The Commission has however, after thorough deliberations, decided to go even further and to fast-track one of the issues, namely the repeal of section 17(6) of the Native Administration Proclamation, 1928 (Proclamation 15 of 1928), and to deal with the issue separately in this Report to the Minister of Justice.
- 1.5 The background to this section 17(6), its effects and the need for its repeal, together with further recommendations of a remedial nature, are reflected below. As far as this separate attention to this issue, and the recommendations for fast-track action, are concerned, the motivation is as follows:

Although the most notorious effect of the said section 17(6) lies in its linkage to succession and estates matters, it is not the only effect. There can be absolutely no doubt that it must be repealed. The effect of its repeal will merely be to confirm that, in future, the position of that category of people to whom it is at present still applicable will be exactly the same as for the rest of the people of Namibia. That is logical and cannot be controversial. The Commission's other recommendations on succession and estates must first go through a further consultation process that, no matter how much it may be speeded up, will take some time. The Commission is convinced that this issue of the repeal of the said section 17(6) can be dealt with separately without any negative effects and it is therefore recommended that the legislation recommended in this Report be submitted to Parliament as soon as possible.

- 1.6 The Commission would just, for information, like to highlight a few of its special activities up till now with regard to customary law:

- 1.6.1 During March 1995 the Commission, with very generous support from the GTZ, held a workshop on "The Ascertainment of Customary Law and the Methodological Aspects of research into Customary Law" Papers on various topics were delivered by eminent participants from Namibia and the Southern African region as well as from the United Kingdom. The Commission published the proceedings of this workshop (LRDC 2).
- 1.6.2 The Commission, with the assistance of the GTZ, also commissioned an expert on customary law, Prof. T W Bennett, for a Background and Discussion Paper on "Customary Law and the Constitution" and published it (LRDC 3).
- 1.6.3 Some field research was done in this regard under the leadership of Dr M Rüniger, the Chief Technical Adviser of the Legal Capacity Building Program of the GTZ.

## **2. THE EFFECTS OF SECTIONS 17 AND 18 OF THE NATIVE ADMINISTRATION PROCLAMATION, 1928 (PROCLAMATION 15 OF 1928)**

- 2.1 The full text of sections 17 and 18, i.e. Chapter IV, of the Native Administration Proclamation, 1928 (Proclamation 15 of 1928) is attached as Annexure B to this Report. The full meaning of those sections, and their effect on the Namibian society, are however far more complicated than what may seem on the face of it. This is the result of the very unique way in which the provisions of those sections came into operation. The historical background, i.e. the different phases through which the South African regime's occupation of Namibia had gone, and in particular the application of its apartheid policy, is of course very significant for a proper perspective on these issues. The Commission however doesn't regard it, for the purposes of this Report, necessary to deal with that in any detail.
- 2.2 The Native Administration Proclamation as promulgated in 1928 was quite similar to the Black Administration Act, 1927 (Act No. 38 of 1927) of South Africa - and as far as Chapter IV is concerned, almost identical. The Proclamation came into force on 1 January 1930 (Government Notice 165 of 1929, dated 11 December 1929) except Chapter IV (which contains sections 17 and 18). It was not until 1954, i.e. 24 years later, that sections 17 and 18, but only parts of it and only for a part of the country, were put into operation, namely with effect from 1 August 1950 (Government Notice 67 of 1954, dated 1 April 1954) - i.e. retrospectively! The more vigorous application of a detailed apartheid policy in Namibia (or the "territory of South West Africa" as it was then called) is most probably quite significant in this regard.
- 2.3 Only sub-section (6) of section 17 of the Proclamation was put into operation at that time - and only to the "north" (see paragraph 2.4.4 below). None of the other sub-sections were ever put into operation. This section 17(6) is probably the most notorious provision still on the Namibian statute book, in particular the effects of it when applied with the provisions of section 18, which deals with succession and the administration of estates.
- 2.4 When explaining the effects of this law below, terminology that is indeed offensive is used. It however refers to a certain historical period with its particular political agendas and by using it in this way, the context stays intact and one can explain the crux of the provisions far more easily. The word "native" is defined in section 25 of the Proclamation as "persons who are

members of any aboriginal race or tribe of Africa and persons residing in areas "set aside" for natives "under the same conditions as a native" are regarded as "natives" for the purposes of the Proclamation. The paragraphs below are also just a summary and one that intends to be user-friendly. It must therefore be borne in mind that such a summary always carries the risk that it is, from a legal perspective, over simplified and never correct in all respects, or never absolutely comprehensive.

2.4.1 This section 17(6) provides that marriages (which means common law marriages) between "natives" shall be marriages that "shall not produce the legal consequences of marriage in community of property between the spouses". (In practice it is usually simply referred to as marriages "out of community of property".) If the couple would like "community of property and of profit and loss" to result from their marriage, they must, within a period of one month before their marriage, jointly declare before a magistrate this intention. This declaration is however only available to a couple if the husband is not already married to another woman under customary law.

2.4.2 Other common law marriages are in community of property and of profit and loss unless such consequences are specifically excluded in an ante-nuptial contract between the spouses that regulates their matrimonial property system - i.e. in community of property is the default (or primary; or automatic) system (or "regime"). For the purposes of this Report it seems unnecessary to go into detail in what these matrimonial property systems entail, except to point out that in a marriage in community of property both spouses own one-half of the undivided joint estate - and it stays undivided until dissolution of the marriage by death or divorce.

2.4.3 The rationale behind the enactment of section 17(6) could have been as follows:

2.4.3.1 Firstly, it must be borne in mind that the legislation was copied from South Africa - but then the rest of the section was never put into operation in Namibia! In South Africa the similar provision was apparently motivated on the basis that it was a safeguard for the interests of a husband's first customary law wife if he then afterwards concludes a further common law marriage. Such a husband's second marriage stays out of community of property, thereby ensuring that the assets that he brings into the second marriage stay separate.

2.4.3.2 Secondly, it could be that at that time such a provision was regarded as more in accordance with the customary law and therefore it was provided that the default system for these common law marriages of people who may otherwise be subject to customary law, should be the alternative to a marriage in community of property. It was probably accepted that their first choice would probably have been an out of community of property system because it corresponds the nearest to what is the position under customary law, and the Roman Dutch concept of universal community of property was considered to be alien to black persons. This however seems, as pointed out below, what a lot of people actually don't want. It must also be pointed out that these people can, like all other people, make ante-nuptial contracts, in which case they can determine more aspects of their matrimonial property arrangements in such a contract.



- 2.4.4 The fragmentary way in which separate sub-sections of sections 17 and 18, were brought into operation
- as far as sub-sections;
  - as far as areas; and
  - as far as from what date;
- are concerned, severely complicates matters. Section 17(6) was at that stage, i.e. 1954, but retrospectively to 1950, made applicable to only what was generally known as "the north". (This area was also generally known as that part of the "territory" (of South West Africa) "outside the police zone" or the area beyond of what was known as the "red line". It comprises, as they were then known, Owamboland, Kavango and Caprivi; i.e. that is where the "Owambo's, Kavango's and Caprivians" lived during the time when the movement of persons to and from these areas were restricted. Generally speaking the commercial farm land as well as the communal land (then called "reserves"), or other land, of the other population groups in Namibia (San, Damara, Nama, Herero, Tswana, Basters) were not part of this "beyond the police zone". Subsection (6) therefore did not apply to this part, the south, of Namibia - or as the intention was, to members of these last-mentioned population groups. It must be noted that this "north" excludes the north-western part of the country, i.e. "Kaokoland" as it was then called.
- 2.4.5 Just for the record: The other sub-sections of section 17 which were never put into operation provided, in a nutshell, as follows: Sub-section (1) prohibits a second customary law marriage unless a declaration before the magistrate is made with information on other wives, children and property and sub-section (5) makes it an offence. Sub-section (2) contains consequential provisions on the documentation and its evidentiary value. Sub-section (3) prohibits marriage officers for civil marriages to marry such persons and sub-section (4) makes it an offence. Sub-section (7) provides that rights under the first customary law marriage shall not be inferior to that of any further marriage and sub-section (8) provides that sections 17 and 18 shall not affect legal rights of persons married in community of property before those provisions become law.
- 2.4.6 The effects of the matrimonial property system forced upon couples to whom section 17 (6) applies, becomes of course very prominent when the marriage is dissolved through divorce or death. In practice the most unwanted result of section 17(6) usually surfaces when the husband dies.
- 2.4.7 The position with regard to what law of intestate succession is to be applied to different categories of persons in Namibia is quite complicated, mainly because of the very unique way that the regulations in terms of section 18 of the Native Administration Proclamation, dealing with the position of "natives", are drafted. It is therefore also quite difficult to summarize it in a user-friendly way. The following is however an attempt to indeed so summarize it:
- 2.4.7.1 The estates of all Whites, Coloureds and Basters, and all "natives of the south" who marry under common law, whether in community of property (because they do nothing special about their matrimonial property regime when they marry) or out of community of property (as the result of an ante-nuptial contract), as well as

the estates of all "natives of the north" who marry in community of property (because they made the special declaration before a magistrate referred to above) will devolve in terms of the common law of intestate succession (i.e. "the law of the Whites"; the said regulations say, in the case of "natives", "as if they are 'Europeans'"). This also applies to unmarried Whites and Coloureds - the Bastards still have their own Intestate Succession law, namely as per the Second Schedule of the Administration of Estates (Rehoboth Gebiet) Proclamation, 1941 (Proclamation 36 of 1941).

2.4.7.2 The property of all other "natives" shall when they die "be distributed according to native law and custom". In short this means that customary law of succession is applicable to all "natives" who are not married under common law as well as to "natives of the north" who are married under common law, but did not ensure, before they got so married, that their marriages are in community of property.

2.5 In terms of the common law of intestate succession, a widow who was married in community of property, firstly, keeps her own half of the joint estate and, secondly, inherits at least a minimum share of her husband's estate, i.e. from the other half. It therefore regularly comes as a shock to such widows when they realize that they are in fact married out of community of property; moreover that their husband's estate must devolve in terms of customary law.

2.6 It seems that the spouses to whom section 17(6) applies are often under the impression that they have made the necessary declaration if at their wedding they indicate that they want to be married in community of property (and perhaps something to that effect has been entered on forms). Such an indication is however not valid as they have not made a (separate) declaration before a magistrate during the month before the wedding as required by section 17(6).

### **3. REPEAL OF SECTION 17(6) AND CONFIRMATION OF COMMON LAW**

3.1 The mere repeal of this section 17(6) (together with the other sub-sections to clean up the statute book) should have the result that the marriages under common law (often called "civil marriages") of the couples to whom the section apply (i.e. "natives from the north") will, like all other persons in Namibia, be subject to the default (or automatic; or primary) matrimonial system of in community of property - i.e. if persons want it to be otherwise they must take additional steps, i.e. make an ante-nuptial contract. The Commission however deems it advisable to strengthen this by now confirming (or codifying) the common law position in a statute. This general rule is embodied in clause 1 of the proposed bill attached to this Report as Annexure A.

3.2 The issue of which matrimonial property system should be the general default (or automatic; or primary) system for marriages in Namibia was often debated. Moreover, the concepts of "in community of property" or "out of community of property" are common law concepts and another question that was therefore often raised was whether new concepts should not be developed. The Commission's approach, namely to recommend that the repeal of section 17(6) must be fast-tracked, however leaves no doubt that this should not now be further debated in this exercise. This step only entails to get the people to whom section 17(6) applies in line with

the rest of Namibians. It is in any event totally unacceptable that such a reference to a part of Namibia's population, based on race, still exists. . It further indeed seems that by and large people who don't explicitly address the matrimonial property consequences of their marriage have an in community of property regime in mind or at least something similar thereto. Moreover, it is, no doubt, the more fair regime towards the vulnerable persons in a marriage, i.e. usually women, which will then bring it more in line with the emphasis in the Namibian Constitution as far as equal rights for women are concerned. This does of course not exclude the possibility that modifications to these basic concepts of in community of property and out of community of property may be effected in due course.

- 3.3 The Commission must point out that such a solution does not address the possible unfairness against the husband's other wife or wives under customary law (see paragraph 2.4.3.1 above) - i.e. the Commission does not recommend that the new law must stipulate that all future common law marriages of couples in those cases where the husband is also married under customary law, must still be out of community of property. The whole section 17 was intended to regulate, in a more orderly way, polygamous common law marriages, which followed upon a customary law marriage - but then the crucial subsections of the section have never been put into operation. Moreover, section 17(6) was never applied to a very large part of Namibia. The solution most probably lies in a total prohibition of a further common law marriage if the husband is already married under customary law. This is what South Africa did when they changed section 22 of the Black Administration Act, 1927 (Act No. 38 of 1927) by their Marriage and Matrimonial Property Law Amendment Act, 1988 (Act No.3 of 1988) - i.e. the section on which section 17 of the Native Administration Proclamation was based (see paragraph 2.4.3.1). The Commission is in the process of finalizing its Report on Customary Law Marriages and has indeed in its working documents proposed that such bigamy be outlawed. It would defeat the whole purpose of this fast-track Report if such related matters were now addressed.

#### **4. CHANGE OF MATRIMONIAL PROPERTY SYSTEM**

- 4.1 As already mentioned above, many people to whom section 17(6) applies are under the impression that they are married in community of property whereas they are indeed not so married because the necessary declaration in terms of the said section 17(6) was not properly made. Usually it is a widow who to her surprise discovers that she has no rights to her deceased husband's estate. The Commission has therefore often been requested to recommend legislation whereby such persons can change, through a simple procedure, their matrimonial property system to an in community of property system. The Commission therefore looked into this.
- 4.2 Section 88 of the Deeds Registries Act, 1937 (Act No. 47 of 1937) provides for the registration of post-nuptial contracts if there was an unwritten contract before marriage. Such a process involved the courts and would be quite costly. There may also be options in administrative law for persons who married under wrong impressions or who were misled. It would however simply be quite complicated to pursue such an option. These possibilities therefore don't provide the general simple remedy that is required.

- 4.3.1.1 The Commission has therefore decided to recommend that provision be made for those who got married while section 17(6) was applicable to them, and who did

not make the declaration before the marriage (i.e. who are married out of community of property), to change their matrimonial property system to a marriage in community of property by way of the execution and registration of a notarial contract to that effect. The Commission has not included provisions in the recommended bill that such a possibility be limited to only those marriages where the husband is not married to a second wife under customary law - for the same reasons as set out in paragraph 3.3 above.

4.3.1.2 Such marriages will then of course, after so changed, have the provisions of Part II of the Married Persons Equality Act, 1996 (Act No.1 of 1996) applicable to it, namely provisions dealing with the equal powers of spouses as far as the joint estate is concerned, acts that require the other spouses' consent too, litigation, etc.

4.3.2 The Commission must point out that what it recommends is indeed unique and in view of the decision to fast-track these recommendations, the Commission could not conduct the consultations that it would normally have conducted. Usually provisions for such a change will require the involvement of the courts. If an opportunity should be provided for couples to change their marriages from an in community of property system into an out of community of property system, notice to creditors and the involvement of the courts would of course be an absolute necessity, as such a possibility will be misused by people who want to dodge their creditors. The Commission however is of opinion that the simple procedure of the execution and registration of a notarial contract, without a court process, can be justified for the change from an out of community of property system to an in community of property system. Some formalities and registration must, for the sake of clarity and transparency, and to be effective against third parties, inevitably be required. The Commission recommends the procedure as contained in clause 2 of the proposed bill attached as Annexure A to this Report - it is further discussed in paragraph 5.2 below.

4.4 There is at present no provision in Namibian law for any changes of matrimonial property systems after marriage. The Commission is aware that a broader provision for such changes than merely for couples to whom section 17(6) applied when they got married, is most probably necessary. However, consistent with the Commission's approach to recommend that the repeal of section 17(6) must be fast-tracked, the Commission, in this Report, and the proposed bill, recommends that at this point in time provision be only made for persons who are suffering as a result of section 17(6) to change their matrimonial property system. A broader application of such a provision, as well as provision for people who are married in community of property to change their marriages to a marriage out of community of property, which, as already pointed out above, obviously necessitates more formal steps to protect creditors, will in due course get further attention from the Commission.

4.5 The Commission would also like to point out that it is indeed aware that the whole issue of matrimonial property must get further attention and it will most probably result in significant reform proposals. Namibia has fallen behind the rest of the world in this regard and new features like e.g. the so-called accrual system is not available to Namibians. The Commission hopes that it will be able to tackle these issues in the near future. Once such recommendations are enacted in law, it will be more appropriate to then provide for married couples to make changes in their matrimonial property systems, as they can then consider all options. The

Commission would however like to emphasize that even if it is decided to wait for such recommendations before an opportunity to change their matrimonial property system is given to couples to whom section 17(6) applied when they got married, it will still be advisable to repeal section 17(6) as soon as possible so as to prevent the problems created by this subsection to increase.

- 4.6 It is quite likely that people will not readily make use of this opportunity that will now be created. The reason is of course that people usually only start thinking about these matters when their marriage breaks down or when one of the spouses passes away. The Commission trusts that in particular the non-governmental organizations that campaigned for this legislation will play an active role in motivating people to make use of this opportunity.
- 4.7 The Commission has, in view of the urgency of the matter, not consulted the Ministry of Lands, Resettlement and Rehabilitation, under which the Deeds Office resorts, as far as the recommended amendments of the Deeds Registries Act, 1937 (Act No.47 of 1937), as contained in the recommended bill (Annexure A - and see paragraph 5.3 below), are concerned. These amendments are merely consequential and the Commission trusts that the Ministry of Justice will conduct such consultations during the further processes with regard to envisaged legislation.

## **5. EXPLANATION OF RECOMMENDED BILL**

### 5.1 Clause 1:

5.1.1 Sub-clause (1): This sub-clause restates the common law position. It only deals with marriages under the common law and not with customary law marriages. The said section 17(6) of the Proclamation deals with such common law marriages only. The Commission is hopeful that it will finalize its report on customary law marriages in the near future. It should be mentioned that the Commission in its first draft of a Recognition of Customary Law Marriages Bill, which was accepted for consultation purposes, recommends that in community of property will also be the default system for future customary law marriages.

5.1.2 Sub-clause (2): Apart from sub-section (6), the other sub-sections of section 17 of the Proclamation, i.e. those which were never put into operation, are still on the statute book and must therefore also be repealed.

5.2 Clause 2: This clause provides for the change from a marriage out of community of property to a marriage in community of property by way of the execution and registration of a notarial contract. This is available for those couples to whom section 17(6) of the Native Administration Proclamation applied when they got married - i.e. those who were automatically married out of community of property unless they made the declaration before a magistrate. Such a notarial contract must be registered in the Deeds Office. A notarial contract is a contract that is attested by a notary public; i.e. an experienced legal practitioner who is appointed as such by the Chief Justice. Such a contract and its registration will provide the necessary legal certainty. It seems advisable to have a cut off point - and therefore two years, which can be extended by the

Minister of Justice for six months or longer, are recommended.

- 5.3 Clauses 3 and 4: These clauses provide for amendments to the Deeds Registries Act, 1937 (Act No. 47 of 1937). The amendments are merely consequential- they only ensure that the notarial contracts provided for in this bill will be dealt with in the same way as other notarial contracts.
- 5.4 Clause 5: It contains the short title and provides that the Minister of Justice must put it in operation, by notice in the Gazette, on a date to be determined by him or her. It is of course imperative that such a date shall be known in advance.

## 6. CONCLUSION

The Commission recommends the enactment of the bill attached hereto as Annexure A.

**BILL**

**To repeal section 17(6) of the Native Administration Proclamation, 1928; to confirm the uniform automatic matrimonial property consequences of all marriages under the common law; to provide that the matrimonial property consequences of certain marriages can be changed by way of the execution and registration of a notarial contract; to amend the Deeds Registries Act, 1937, to provide for such notarial contracts; and to provide for incidental matters.**

*(Introduced by the Minister of Justice)*

BE IT ENACTED by the Parliament of the Republic of Namibia as follows:-

**1. Matrimonial property consequences of marriages and repeal of section 17 of Proclamation 15 of 1928, as amended by section 7 of Act No. 27 of 1985**

(1) The matrimonial property consequences of all marriages under the common law contracted after the commencement of this section are in community of property and of profit and loss unless such consequences are specifically excluded in an ante-nuptial contract which regulates the matrimonial property system of that marriage.

(2) Section 17 of the Native Administration Proclamation, 1928 (Proclamation 15 of 1928) is hereby repealed.

**2. Change of matrimonial property system**

(1) Notwithstanding anything to the contrary in any law or the common law contained, the spouses to a marriage entered into before the commencement of section 1, and to whom section 17(6) of the Native Administration Proclamation, 1928 (Proclamation 15 of 1928), as it was in force immediately before its repeal in terms of section 1(2) of this Act, applied at the date of their marriage, and whose marriage has not produced the legal consequences of a marriage in community of property between them, may cause their marriage to be in community of property and of profit and loss by the execution and registration of a notarial contract to that effect within two years from the commencement of this section, or such longer period, but not less than six months, determined by the Minister of Justice by notice in the Gazette.

(2) The provisions of Part II of the Married Persons Equality Act, 1996 (Act No. 1 of 1996) shall apply to a marriage contemplated in sub-section (1) from the date on which the notarial contract is registered.

### **3. Amendment of section 3 of Act No. 47 of 1937**

Section 3 of the Deeds Registries Act, 1937 (Act No. 47 of 1937) is hereby amended by the insertion in paragraph (k) of sub-section (1), after the word "contracts", of the words "and contracts contemplated in section 2 of the Matrimonial Property Act, 2003"

### **4. Insertion of section 89 in Act No. 47 of 1937**

The following section is hereby inserted in the Deeds Registries Act, 1937 (Act No. 47 of 1937), after section 88:

"Registration of  
certain postnuptial  
contract

The provisions of sections 86 and 87 shall, with the necessary changes, apply in respect of a contract contemplated in section 2(1) of the Matrimonial Property Amendment Act, 2003."

### **4. Short title and commencement**

(1) This Act is called the Matrimonial Property Amendment Act, 2003, and shall come into operation on a date to be determined by the Minister of Justice by notice in the Gazette.

(2) Different dates may be determined under sub-section (1) for the commencement of different provisions of the Act.



**NATIVE ADMINISTRATION PROCLAMATION, 1928 (PROCLAMATION  
15 OF 1928)**

**CHAPTER IV**

**Marriage and Succession**

**[Explanation**

Sub-sections/paragraphs/words crossed out were repealed/deleted by the Native Administration Proclamation Amendment Act, 1985 (Act No. 27 of 1985)]

**Marriages of natives Property rights.**

17.(1) No male native shall during the subsistence of any customary union between him and any woman, contract a marriage with any other woman unless he had first declare 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 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.

(2) Upon the official before whom such declaration is made being satisfied of the accuracy thereof, it shall be recorded by him, and such original record of the declaration, or a copy thereof certified under the hand of any magistrate ~~or native commissioner~~ of the district in which it was recorded, shall be admissible in evidence in any proceedings in which the facts therein declared may be relevant, and any document purporting to be such a record, or a copy thereof certified as aforesaid, shall prima facie be so admissible without proof of its execution.

(3) No minister of the Christian religion authorized under any law to solemnize marriages, nor any marriage officer, shall solemnize the marriage of any native male person unless he has first taken from such a person a declaration as to whether there is subsisting at the time any customary union between such person and any woman other than the woman to whom he is to be married and, in the event of any such union subsisting, unless there is produced to him by such person a certificate under the hand of a magistrate ~~or native commissioner~~ that the provisions of this section hereinbefore set out have been duly complied with.

(4) Any person contravening sub-section (3) shall be guilty of an offence, and shall upon conviction be liable to a fine not exceeding twenty-five pounds, or, in default of payment, to imprisonment for a period not exceeding three months.

(5) Any native male person who during the sub-sistence of any customary union between him and any woman contracts a marriage with any other woman without having previously made a declaration referred to in sub-section (1) or sub-section

(3) shall be guilty of an offence and shall, upon conviction, be liable to a fine not exceeding fifty pounds or, in default of payment, to imprisonment for a period not exceeding six months; and any native male person who knowingly makes any false statement in any such declaration shall be guilty of an offence and punishable in the same manner as if he had committed the crime of perjury.

(6) A marriage between natives, contracted after the commencement of this Proclamation, shall not produce the legal consequences of marriage in community of property between spouses: 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 authorized to attest such declaration) that it is their intention and desire that community of property and of profit and loss shall result from their marriage, and there-upon such community shall result from their marriage.

(7) No marriage contracted after the commencement of this Proclamation during the subsistence of any customary union between the husband and any woman other than the wife shall in any way affect the material rights of any partner of such union or any issue thereof, and the widow of any such marriage and any issue thereof shall have no greater rights in respect of the estate of the deceased spouse than she or they would have had if the said marriage had been a customary union.

(8) Nothing in this section or in section eighteen shall affect any legal right, which had accrued or may accrue as the result of a marriage in community of property contracted before the commencement of this Proclamation.

### **Succession.**

18.(1) 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 upon his death devolve and be administered under native law and custom.

(2) All other property of whatsoever kind belonging to a native shall be capable of being devised by will. Any such property not so devised shall devolve and be administered according to native law and custom.

~~(3) Any dispute or question which may arise out of the administration or distribution of any estate in accordance with native law shall be determined by the native commissioner, or where there is no native commissioner by the magistrate of the district in which the deceased ordinarily resided, or in respect of immovable property by the native commissioner or, where there is no native commissioner, by the magistrate of the district where such property is situate, and every decision of a native commissioner or magistrate under this section shall be subject to an appeal to the High Court of South West Africa.~~

~~(4) Any claim or dispute in regard to the administration or distribution of any estate of a deceased native shall, unless all the parties concerned are natives, be decided in an ordinary court of competent jurisdiction.~~

~~(5) In connection with any such claim or dispute, the heir or in case of minority his guardian, according to native law, or the executor testamentary shall be regarded as the executor in the estate as if he has been duly appointed as such according to the law governing the appointment of executors.~~

~~(6) Letters of administration from the Master of the High Court of South West Africa shall not be necessary in, nor shall the Master have any powers in connection with the administration and distribution of the intestate of any deceased native~~

~~(7) The Master of the High Court of South West Africa may revoke letters of administration issued by him in respect of any native estate.~~

~~(8) In regard to property validly bequeathed by the will of a deceased native, native law shall not apply, in which case a certificate by the native commissioner of magistrate designating the heir or guardian, or executor testamentary, as the case may be, as executor in terms of sub-section (5), shall be regarded for all purposes as equivalent to letters of administration.~~

(9) The Administrator may make regulations not inconsistent with this Proclamation -

(a) prescribing the manner in which the estate of deceased natives shall be administered and distributed;

(b) dealing with the disherison of natives;

~~(c) prescribing the powers and duties of native commissioners or magistrates in carrying out the functions assigned to them by this section;~~

(d) prescribing tables of succession in regard to natives; and

(e) generally for the better carrying out of the provisions of this section.

(10) Any native estate which has, prior to the commencement of this Proclamation, been reported to the Secretary for South West Africa shall be administered as if this Proclamation had not been passed, and the provisions of this Proclamation shall apply in respect of every native estate which had not been so reported."