University of Namibia

Faculty of law

LLB Dissertation

Year 2010

Topic: The law on divorce and dissolution of marriages in Namibia: A reform analysis of the types of marriages found in Namibia and the divorce laws pertaining to such marriages.

In part fulfillment of the LLB program.

Name of student: Uugwanga Charles

Student number: 200610911

Name of supervisor: Ms Yvonne Dausab
The law on divorce and dissolution of marriages in Namibia: A reform analysis of the types of marriages found in Namibia and the divorce laws pertaining to such marriages.
Declaration

I, Uugwanga Charles, hereby declare that this dissertation entitled ‘The law on divorce and dissolution of marriages in Namibia: A reform analysis of the types of marriages found in Namibia and the laws pertaining to divorce on such marriages.’ is my own original work and has not previously been submitted to any other institution of higher learning.

........................................
Signature

Date

SUPERVISORS CERTIFICATE

I, Yvonne Dausab, hereby certify that the research and writing of this dissertation was carried under my supervision.

........................................
Signature

Date
Abstract

Divorce or the dissolution of marriages has been and still is a complex reality. With divorce statistics said to be on the increase\(^1\), the existing divorce procedures continue to be too formal and complicated for being almost impossible for individuals to navigate without legal professional assistance,\(^2\) never mind the cost factor involved. It is rather unfortunate that at times, spouses opt to lose the protection of the law due to the cumbersome processes involved in divorce matters.

The questions that need to be assessed are whether the current divorce laws are still relevant in today’s society and how the divorce process can be simplified. What alternative legal means if any, can be employed to make the divorce process less confrontational and more a peaceful settlement, that will enhance the relationships of all parties involved, particularly when there are children involved if any. This will ensure that custody, control and maintenance issues are dealt with in a cooperative manner between the divorce parties.

The paper aims to postulate a discussion that looks at the types of marriages recognized in the Namibian legal system and how laws apply to such marriages. Further discussions in the paper will include the creation of an understanding of the consequential aspects of each of the type of marriage that is discussed. Further considering the fact that traditionally, certain aspects of the law of inheritance such as interspouse inheritance, were always closely discussed and associated with the laws of marriage, a reference to

---

\(^1\) Proposal for Divorce Law Reform in Namibia: Legal Assistance Centre 2000. Pg 4

\(^2\) See also Namibian Census Report 2001

inheritance laws as they are relevant to marriage laws will therefore be made in the paper.

Other focus areas of the paper will include: A discussion on the rationale behind the promulgation and the continuous application of the Native Administration Proclamation 15 of 1928 which provides for a default matrimonial property regime of marriages north of the red line, and what its relevance is in today’s Namibian society; A discussion on customary law, its position under the common law and under the Namibian constitution; The accessibility of divorce justice in Namibia (divorce legislation) and the need for divorce law reform, which is aimed at consolidating the existing but scattered divorce legislations in Namibia; Moving towards a more peaceful divorce settlement, mediation as a possible means of dissolving marriages as opposed to litigation. What are the prospects of mediation being an effective means, affording the parties the opportunity to resolve disputes themselves, including property division on an equitable basis and arrangements made by the parties themselves that are in the best interest of the child, in respect of maintenance and custody; Revisiting the fault base system which provides that, to obtain a divorce, the spouse seeking a divorce must prove that the other spouse committed a wrong which is recognized by law as a ground for divorce, usually adultery or malicious dissertation.

Content
1. **Introduction**

1.1 The situation of divorce in Namibia  
1.2 Statement of problem  
1.3 Research methodology  
1.4 Objective of research  
1.5 Literature review

2. **Types of marriages in Namibia**

2.1 Customary law and marriages in relation to state law  
2.1.1 Customary inheritance practices in communities such as the Ovambo, Kavango, Nama-Damara and Caprivi in Namibia  
2.2 Civil law marriages

3. **The Native Administrative Proclamation 15 of 1928**

3.1 The default marital regime system  
3.2 The effect of the default system  
3.3 Recommendations

4. **Civil divorce provisions and the proposed reform law**

5. **Divorce mediation v divorce litigation**

5.1 Mediation  
5.1.2 Why divorce mediation  
5.1.3 Possible shortcomings of divorce mediation  
5.2 Litigation
5.2.1 Why divorce litigation
5.2.2 Possible shortcomings of divorce litigation
5.3 Recommendations

6. Overview

1 Introduction
1.1 The situation of divorce in Namibia

Marriage is meant to last forever but divorce can be an inevitable reality for some marriages. Current and up to date divorce statistics are not available but statistics from the 1991 census report indicates that the divorce rate was at 3% and considering the number of years that had passed since that census, the divorce rate would have significantly increased from the previous rate.

Customary marriages are currently not recognized even though they constitute 9% of all the marriages entered into in Namibia. As a result many women who are married in terms of customary laws continue to be at the receiving end because certain customary practices are discriminatory towards women, for example, women married in terms of customary law lose out on property right at divorce as a result of the non legislative recognition and regulation of customary law so as to protect their rights and interests.

The debate for divorce law reform in Namibia has been ongoing for a substantial period of time now, particularly since the adoption of a constitution at independence. The arguments advance in favor of reform is that the laws on divorce are outdated because divorce laws continues to be regulated by the Roman Dutch Common Law, and that some laws such as the Native Administrative Proclamation 15 of 1928, is not within the spirit and tenure of a new constitutional dispensation. The third argument is that there is a need to harmonize customary marriage and divorce laws with the civil marriage and divorce laws.

---

3 Proposal for Divorce Law Reform in Namibia. Legal Assistance Centre 2000. Pg 4
4 Proposal for Divorce Law Reform in Namibia. Legal Assistance Centre 2000. Pg 4
See also: Namibian Census Report 2001
It follows therefore that the current divorce laws fail to appeal to modern issues and therefore do not adequately cater for the need of parties intending to divorce. Divorce affects the rights of the parties involved, hence the need to ensure the divorce laws recognize the need to adequately address the rights of all parties concerned.

Even with research efforts by the Law Reform and Development Commission and the Legal Assistance Centre to have the laws on divorce and marriages applicable in Namibia reformed, the legislature is yet to promulgate reformatory legislature in this regard.

1.2 Statement of problem

Divorce laws are old and outdated. As a result, there is the overreliance on common law to regulate the phenomenon of divorce. At times however, common law does not adequately provide for the protection of all parties concerned particularly when it comes to matters of the division of properties. For example, parties are left to conclude a settlement agreement themselves. In the instances however where the legislation deals with aspects of divorce, such pieces of legislations are scattered around and hence there is the need to consolidate legislations that have a bearing on divorce into one single piece of legislation.

Many provisions on divorce laws do not reflect contemporary social factors, for example, the Native Administrative Proclamation 15 of 1928 which provides for a separate default marital regime for marriages entered into north of the redline, and the fault based ground for divorce which is still in use. Legislature on the other hand still refuses to regulate customary marriages even though the Namibian constitution recognition customary law
as a source of law in Namibia. It is important that customary marriages are regulated because such regulation will also necessitate the regulation of customary divorce laws and practice of such customary marriages. This is because the two concepts are closely related. The regulation of customary marriages and divorce in particular will provide for much needed protection particularly to women who may find themselves at the receiving end of the current prevailing customary laws and practices which are unregulated by legislature. This is particularly as regards the rights of women at divorce and inheritance rights where the husband passes on.

The problem with the civil divorce process for many years has predominantly been the fact that such processes of divorce are long and therefore costly and also at times difficult for parties themselves to understand the proceedings even with the assistance of legal practitioners. There is therefore the need to simplify the civil divorce process, because it is such factors that lead one to conclude by general observation that at times, parties intending to divorce may not to approach the courts to seek relief because the divorce process could be too cumbersome. Instead, a party intending to divorce may rather stay in a marriage while living separate lives but still officially married.

1.3 Research methodology

Much of the debate regarding the need to reform the divorce and customary laws in Namibia has been captured by research projects conducted by the Law Reform Commission of Namibia and the Legal Assistance Centre advocacy projects, the work

---

5 Article 66 of the Namibian constitution
prepared by these institutions on this topic, will be used to provide guidance in the writing of this paper. An extensive books and articles review will be explored in the paper in order to capture the views of some of the commentateurs and writers on the subjects. The list of literature review provided below reflects the extent of research that went into the finalization of this paper. Some important recent cases particularly on the Constitutionality of the Native Administrative Proclamation 15 of 1928 will also be cited and their importance extracted.

1.4 Objective of research

The objective of the paper is to draw the attention of the reader on the current situation of divorce laws in Namibia in both the civil and customary setup. The paper is further aimed at adding to the current ongoing debate on whether it is time for law reform in Namibia as regards the law on divorce or whether the status quo should remain. The paper also discusses customary marriage and divorce laws and practices with the idea that any serious attempts of law reform in regards to civil divorce laws in Namibia will not be complete without the proper consideration of customary laws which are a reality and continue to affect persons in the communities where such customary laws are applicable, particularly in consideration that the Namibian constitution purports to protect every person in Namibia.
1.5 Literature review

**Journals**


  The particular views that are referred to in this paper are those on the whether the final decisions and agreements in a mediation process are enforceable and therefore effective. The writers conclude that the issue of enforceability is one of the shortcomings of the mediation process as it would mean that another process of ensuring that final decisions are enforced needs to be devised and which process may be cumbersome.


  Discusses the importance of mediation as an alternative to litigation, and his views are particularly referred to on the aspect that mediation allows for an open exchange of information between spouses in the negotiation of the divorce.

The views of the writer stresses the fact that divorce is a serious matter as it affects the rights of parties involved and therefore any serious thought of using mediation as a platform of dissolving a marriage should be thought through properly as it further may involve the interest of children which must be ensured at all times.


Stresses the for divorce mediation to be successful, there will have to be adequate regulation by a tasked state institution to oversee the conducting of mediation processes to ensure that the rights and interests of parties involved are adequately protected


The writer criticizes the reliance on mediation for dissolving marriages for being impractical at time. For example it fails to address issues such as were there is domestic violence involved and parties having to live together due to economic reasons while the mediation process is ongoing.
Books


The writers work is referred to in light of his views on the fault based ground for divorce applied at common law, which provides that a spouse seeking a divorce must prove that the other spouse committed a wrong that justifies or constitutes a ground for divorce. It is the conclusion in this paper that such a ground is outdated and no longer has relevance in modern society.


The writer discusses the concept of irretrievable breakdown as the main ground for divorce in most jurisdiction and the discarding of the previously applied fault based ground for divorce. The view of the writer is adopted in this paper particularly because the irretrievable ground of divorce forms the central focus of the proposed law reform on divorce laws in Namibia.


The writer emphasis the fact that mediation affords the parties the opportunity to go through a divorce process that is less confrontational and which seeks the parties cooperation to reach a settlement that both parties can identify with as
being their own and not imposed by court.

- D. Lebeau et al. Women’s property and Inheritance Rights in Namibia 2004 (study)

In this paper, the writers zoom into the customary practices of inheritance and access the rights of women to inherit in terms of such customary practices and laws.

**Papers**

- Prof Hinze: Strengthening Women’s Rights: The need to address the gap between customary and statutory law in Namibia.

The Professor in his paper stresses the need to regulate customary marriages because of the inherent inequalities that particularly disadvantage women in some customary law practices related to marriages. Also discussed in the paper is the apparent gap of women’s rights between customary and civil laws. It is further stressed in the paper that women continue to be discriminated against when it comes to matters of inheritance when the husband passed on and also at divorce if they were married according to customary laws. He comes to the conclusion that customary law is a valuable source of law that can be used hand in hand with statutory law in order to address shortcomings in the law on marriages.

- Mercedes H. Ovis: Paper: A constitutional perspective on women’s property and
inheritance rights within Namibia’s legislative framework: A collusion of two systems. Legal Assistance Centre.

The writer discusses the need for the recognition of customary marriages in order to facilitate the protection of the rights of women who are affected by customary law which appear to be discriminatory. The writer further provides for an analyses of the efforts made towards law reform as regards the recognition of customary marriages and what still needs to be done, the application of the Native Administrative Proclamation 15 of 1928 and the issues surrounding women’s rights to inherit under customary marriages.


The writer makes a contribution to the discussion on mediation as an alternative procedure to litigation in divorce matter, with particular emphasis of the issue of dealing with emotions and concludes that mediation helps parties involved to deal with their emotion in a calmer manner given the environment and avoids confrontations. The writer’s views are captured in the chapter on Mediation v litigation in this paper.

– Letter to the international women’s Human Rights Clinic by the Legal Assistance Centre Namibia. 15 2008: Supplementary submission to the committee on the
Elimination of Racial Discrimination: Supplementing Namibia’s 2007 country report.

The letter was a supplementary submission to the CERD supplementing Namibia’s 2007 Country Report to the Committee. It highlights the fact the race based civil and customary laws, adversely affect impact black women’s rights to non discrimination, equality, property and housing. The paper also stresses the fact that some apartheid laws such as the Native Administrative Proclamation 15 of 1928, violates black women’s rights.

**Reports**

- Proposed changes to the law on customary marriages. Dianne Hubbard, Gender Research and Advocacy Project. Legal Assistant Centre (2005)

  The author provides in a discussion form a summary of the Bill Project 7 no: 12) on The Recognition and Registration of Customary Marriages which was prepared by the Law Reform and Development Commission. The author therefore provides a summary of the salient features of the proposed Bill.


  The country report is a report prepared by government on the status of women’s rights in the country.

The authors analyse the effect of the default marital regime of out of community of property that is applicable in the areas north of the redline or north of the former police zone. They offer the view an out of community default marriage system disadvantages black women in the areas north of Namibia.


The report provides for an extensive research on the current divorce laws applicable in Namibia and provides for the draft reform proposed Bill as an annexure. The report was based on the ground work undertaken by the Legal Assistance Centre on the status of divorce laws in Namibia and the need to reform such laws in a paper titled: Proposal for Divorce Laws in Namibia.


The report provides an extensive research into the status of customary marriages in Namibia and the need for law reform in that regard. The work that went into the report is babes on the proposals made by the Legal Assistance Centre in a
proposal paper titled Proposals for Law Reform on the Recognition of Customary Marriages.

**Websites**

  The Legal Assistance Centre provides for an in-depth insight into the discussions of law reform regarding divorce laws and customary marriages in Namibia. The LAC website provides for a collection of research on this topics and is used as a primary source of research reference in this paper.

- [http://www.info@negotiatingtable.com](http://www.info@negotiatingtable.com)
  The article discusses the cost factor of litigation and mediation and comes to the conclusion that mediation can be a more cost effective means of dissolving a marriage compared to litigation particularly because the mediation process would normally not last as long as litigation would.

  The writer of the article discusses the advantages and disadvantages of mediation *vis-a-vis* litigation, and thereby providing a good reference point in this paper in the chapter on Mediation v Litigation.
2. Types of marriages in Namibia

There are two basic types of marriages in Namibia, that is civil marriages and customary marriages. It is important that a discussion on these types of marriages is advance in the paper at this point because the subsequent discussions on the divorce laws will be based on these types of marriages.

I) Civil marriages: This is a marriage in terms of the Marriage Act 25 of 1961 and registered in term of the Marriage, Death and Birth Registration Act 81 of 1963. A civil marriage is a marriage solemnized by state recognized and authorized marriage officer such as a magistrate officer or a religious leader such as a religious minister or priest.

II) Customary marriage: This is a marriage entered into in terms of the traditions or customs of the communities of the parties to such marriage. It follows therefore that customary marriages do not conform to one single or specific form because customs differ from one community to another; hence the term is used holistically to denote a marriage in indigenous communities in terms of such communities’ customs or traditions.

The essence of making reference to the types of marriages as stated in the preceding

---

6 It is here also important to note that civil marriage for historical reasons in Namibia also includes those marriages contracted by Namibians while in exile. These marriages are recognised by the effects of the Recognition of Certain Marriages Act 18 of 1991

7 Proposals for Divorce Law Reform in Namibia. LAC 2000 at pg 3
paragraph, finds sense in the fact that the natural flow of reasoning dictates that where there are two systems or type of marriages recognized in a particular jurisdiction, such as civil and customary marriages, there should naturally be a corresponding number of divorce systems.

Building up on the above analyses, it follows that the fact that there has yet to be a formal statutory recognition of customary marriages in Namibia denotes that a formal customary divorce law system is also yet to be recognized. The current status of customary marriage law in Namibia is such that only a few references are made in that respect in a selected statutes including the Namibian constitution, where reference to customary law is made sorely for specific purposes such as citizenship, spousal privileges in criminal proceedings. The reality, however, is that customary marriages do exist and this reality should not be ignored. It is therefore logical that any serious undertakings on law reform in the field of divorce law should take into account the phenomenon of customary marriages. In other words, customary marriages can and should be relevant as a topic on its own in any attempted discourse on divorce law reform in Namibia.

---

8 There is a draft proposal bill on customary divorce law. Annexure: Report on Customary Law Marriages by the Law Reform and Development Commission (Project 7, LRDC 12).

9 Article 4(3)(b) which addresses the acquisition of citizenship and 12(1)(f) on privilege not to testify against once spouse of The Namibian Constitution

10 A possible criticism by those who may be opposed to the state regulation or legal intervention on customary divorce practices, may be based on the argument that the nature of customary marriages is so engraved in indigenous customs and traditions that if the state is to regulate, it would take away its customary essence, if this argument holds logic than the question should follow that why should the state regulate customary divorce if it is not logical for it to regulate customary marriages? One can submit that this can only be done on the basis of upholding the principle of the constitution.
2.1 Customary law and marriages in relation to statutory law

Customary law is a set of unwritten laws under which African indigenous societies conduct their marriages, divorce, inheritance, land rights and such other affairs inherent in their day to day interactions (my emphasis added). \(^{11}\)

The position of customary marriages in relation to civil marriages or statutory law in general, has been an inferior one which enjoyed second class status to civil marriages. \(^{12}\) Prior to independence, customary marriages were not even referred to as marriages proper or considered as real marriages, but were considered as mere unions, properly referred to as customary unions. \(^{13}\) In the past, the practice in our courts when an issue of recognizing a customary marriage was before court, the court would deny the recognition of such customary marriages by relaying on the argument that such marriages are potentially polygamous. \(^{14}\) This argument is rather unfair considering the fact that the test was based on the notion and criteria of a civil marriage, a phenomenon not indigenous to Africa but to the Western world.

\(^{11}\) Mercedes H. Ovis: Paper: A constitutional perspective on women’s property and inheritance rights within Namibia’s legislative framework: A collusion of two systems. Legal Assistance Centre at pg 3

\(^{12}\) Prof Hinze: Strengthening Women’s Rights: The need to address the gap between customary and statutory law in Namibia. At pg 95

\(^{13}\)

\(^{14}\) Rayland v Endros 1997 (1) BCLR 77 (C) Rejected this reasoning of refusing to recognise Muslim and incidentally on customary marriages on the basis that they are potentially polygamous
It is nevertheless recognized here that customary law is not all in all perfect a law, hence there is the need to reconcile existing customary laws and practices with first, the provisions of the constitution particularly in light of addressing the issues of inequalities between men and women,\textsuperscript{15} and second statutory law. While it may be said that perhaps one of the major reasons why issues of inequalities persist in customary marriages is due to the lack of statutory regulation and non official statutory recognition of these marriages, the reverse side of the coin may also dictate that it is due to these inequalities that are inherent in customary laws that justifies its non official recognition. This can be true even though certain parts of customary marriages have been recognized by statutory law for example, reference is made to customary marriages for specific purposes such as those mentioned in Articles 4, 12,\textsuperscript{16} or specific statutes like the Married Persons Equality Act 1 of 1996, sections 13 which applies to domicile of married women, section 14 which applies to guardianship of children and domicile of children under 18 years old born of both customary and civil marriages. It is only for the above purpose that customary and civil marriages are treated equally after independence. It is however clear that if at all customary law had to meet certain requirements for it to be recognized by legislature before independence, customary law should now comply with even more stricter constitutional requirements for its validity. This is because, even legislature should conform to the constitutional spirit and tenure for its validity.\textsuperscript{17}

As part of the drive to address the conflicts between the constitution and customary laws
\textsuperscript{15} The relevance laying in Article 10 of the Namibian constitution on Equality
\textsuperscript{16} Article 4(3)(b) on the acquisition of citizenship and article 12(1)(f) regarding the privilege on testimony against self and spouse of the Namibian Constitution.
\textsuperscript{17} The popular constitutional test of validity
and practices, the Law Reform and Development Commission started preparing and working on a proposal to give full legal recognition to customary marriages. A bill was as a result proposed by the Law Reform and Development Commission. The salient features of the bill include:

(1). That the Act would apply only to subsequent marriages once enacted. This means that it will not have a retrospective effect.

(2). There would be an age requirement of 18 years in order for one to enter into a customary marriage and the parents consent is required in the event that an intending party to marry in terms of customary law is under the age of 21.

(3). There must be consent by both intending parties to get married out of free will and voluntarily.

(4). That the customary marriage is completely of a monogamous nature.

(5). That Registration of such marriages should take place as is the case with civil marriages.

(6). Future customary marriages to be in community of property unless parties agree to some other property arrangement.

(7). Both husband and wife to have full equal rights to joint property together.

---

18. Dianne Hubbard, Gender Research and Advocacy Project. Proposed changes to the law on customary marriages Legal Assistant Centre (2005) (document not numbered)

19. In adherence to article 14(2) of the Namibian constitution which requires that a marriage shall be entered into only with the free and full consent of the intending parties.

20. This seems important in light of the requirement in Article 6(d) under the 2003 Protocol to the African Charter on Human and Peoples Rights on the Rights Of Women in Africa, that every marriage shall be recorded and registered in accordance with national law.

21. Providing for a default community of property regime like that of civil marriages south of the area formerly called the police zone or red line. This is in terms of section 10 of the draft Customary Marriage Act.
(8). Both husband and wife are to have full legal status and capacity.\textsuperscript{22}

(9). The law on bigamy to apply to customary marriages as applied to civil marriage.\textsuperscript{23}

(10). Divorce process in customary law to be similar to that of civil marriage.

Finally one of the most significant features of the proposal is a provision directing that divorce in customary marriages would in future only be granted on the basis of irretrievable breakdown.\textsuperscript{24} It is argued that adopting this single ground for divorce addresses the criticisms against customary divorce grounds that are in favor of men as opposed to both parties. This is because in some communities such as the Ovambo communities, some of the customary grounds for divorce cannot be invoked equally by women the same way as by men.\textsuperscript{25} For example adultery by the wife is a ground for divorce but not adultery by a husband. The Recognition of Customary Marriages Bill seems to leave the aspect of divorce procedure to customary practices as long as they are not in conflict with any provision of the constitution. This is important particularly in light of the rights of all individuals enshrined in the bill of rights of the Namibian constitution. The said Bill further provides that an agreement regarding division of property, and issues of child custody should first be agreed upon by the spouses before a divorce certificate is issued. In the event that the parties cannot agree, the High Court will

\textsuperscript{22} In light of the Married Persons Equality Act 6 of 1996 doing away with marital powers and husbands consent. The arrangements of the marital affairs by the couples themselves should however not be the business of the law, this should also be the case for customary marriages

\textsuperscript{23} Section 4 of the draft legislation

\textsuperscript{24} It should be noted that at this point, irretrievable breakdown is not a ground for divorce in civil marriages in Namibia but that this proposed divorce ground for customary marriages is rather in anticipation of the law reform in this regard for civil marriages also. This provision in the draft Act thus goes beyond what we have in civil marriages.

\textsuperscript{25} Dianne Hubbard supra
settle the dispute. The High Court may also be approached to enforce divorce agreements made between the parties and their families in terms of customary practices. This means ensuring that the custody of children born of the customary marriages are a priority and agreements thereto are decided upon in the best interest of the children. The said Bill also safeguards the interest of particularly the women in matters of property distribution at divorce by providing for a default in community of property marital regime in the absence of any other contrary arrangement made between the parties.

It is nonetheless important to appreciate that there is still a substantial number of people that marry under customary law in Namibia, hence there is the need to address the shortcomings of customary marriage and divorce laws in order to provide for certainty and predictability to those still bound by such customary laws.

Is there a need for legislative intervention in the substantive law of customary marriages

Hinze M O, states that there is a need for legislative intervention as regards customary marriages due to the fact that the mere recognition of customary marriages does not address issues such as the criteria for valid customary marriages, the rules governing the relationship between the spouses, the matrimonial property regime, how divorce is effected, grounds for divorce, and other such incidental matters. Legislative intervention is also needed for the sake of certainty for the parties to the marriage, certainty for the children, and one may add certainty for the public. All the more, there is the need to have

---

26 Proposal for Divorce Law Reform in Namibia. Legal Assistance Centre 2000. Pg 4

27 In his article: Strengthening Women’s Rights: The need to address the gap between customary and statutory law in Namibia. At pg 96
a statute that is comparable to the Marriage Act 25 of 1961 (as amended) and the Married Persons Equality Act 1 of 1996, this is so in order to have a legal instrument regulating the conduct and practice of customary marriages as such will ensure that those that such legislation aims to protect, given the shortcomings of current customary laws and practices, are protected by the regulation of defective customary laws. The need for regulation is in light of the spirit and tenure of the Namibian constitution.

It is however unfortunate that the draft customary legislation is yet to be introduced as a bill in the Namibian parliament.

Grounds for divorce in customary marriages
As stated earlier above, the grounds for customary divorce in some communities such as the Ovambo communities are not the same for men and women. The effect of such inequality may force a wife to remain in marriage’s that had broken down as a result of the husband having committed adultery because the wife cannot rely on adultery as a valid ground for divorce under the customary law of that particular community.28 Therefore, unlike the grounds of divorce available for both men and women of all races married under civil law, there are sex based grounds available unequally to black men and women married under customary law in some communities.29 In other words, customary grounds for divorce in such a community are stereotypical in some instances in the sense that a particular divorce ground such as adultery can only be invoked by the husband and not by the wife, hence this denoting that adultery is tolerated at the instance

28 Letter to the international women’s Human Rights Clinic by the Legal Assistance Centre Namibia. 15 2008: Supplementary submission to the committee on the Elimination of Racial Discrimination: Supplementing Namibia’s 2007 country report at page 8
29 Proposals for divorce law reform in Namibia, LAC at 95
of a husband but not the wife.

2.1.1 Customary inheritance practices

The discussion on inheritance in customary law or practices, is advanced primarily due to the need to address and empower women and children who may easily be considered more vulnerable. Women and children may be considered vulnerable when it comes to inheritance matters particularly in the customary law setup because they are more often in an unfair position to inherit under customary laws and practices as opposed to their older male counterparts. The reasons for such inequality is due to the fact that women and children while they may be considered as having a more legitimate interest in their late husband and father’s estate for reasons of acknowledging the importance of a family unit, they may at the same time be considered as having a less powerful claim to the estate due to the husband and fathers extended family and their involvement. This situation therefore necessitates the need to protect the women and children as they can end up being left with nothing but themselves if the husband and father passes on. The extended families can take anything and everything, from land, livestock, clothing, furniture’s etc, claiming it as belonging to their own.\textsuperscript{30}

\textsuperscript{30} Hinze M O: supra At pg 99-101
Ovambo, Kavango, Nama-Damara and Caprivi in Namibia

There are three main systems of inheritance in customary practices:

i) Matrilineal decent

ii) Patrilineal decent

iii) Cognatic/mixed decent

In a partilineal community, property status and rights are transmitted in the father’s line as opposed to the mother’s line in a matrilineal community. This defines the composition of the inheriting group. While there is significant difference between matrilineal, patrilineal, and cognatic communities, it is true that the spouse and more particularly the widow does not have a right to inherit from the estate and in extreme situations, the widow might be seen as part of the estate to be inherited by the brother of the late husband.  

Mercedes H. Ovis\(^\text{32}\) states that the Ovambos and the Kavango communities follow a matrilineal decent, the Namas and Damara follow a patrilineal decent and the Hereros a bifurcated decent. The communities of Caprivi are said to be cognatic as they have a matrilineal system but with a strong partrilineal influence. In the matrilineal community, the intestate sister of the deceased and her children are the primary beneficiary and therefore most likely to challenge the widow’s claim to a share of the estate. In the partrilineal community, the youngest son is the preferred heir. If women does inherit they

\(^{31}\) This practice is still common among the Ovamo, Herero and Lozi communities. D. Lebeau et al Women’s property and Inheritance Rights in Namibia 2004 at 42

\(^{32}\) Mercedes H. Ovis: supra at pg 7
were most likely precluded from inheriting properties of value such as land, buildings valuable or large movable property such as vehicles.\textsuperscript{33}

There is a cultural presumption in most of the above stated communities that all properties of a married couple belong to the husband. Such a presumption places widows at the receiving end as they may lose out on properties that are rightfully theirs considering the fact that they too contributed to the joint estate.

The unfair prejudice on women as illustrated above has not gone uncritizised and some writers on the subject\textsuperscript{34} argue that such practices should be faced out because modern inheritance law is characterized or modeled more towards privileging the surviving partner to the marriage and their children. This is quite contrary to certain customary preferred practices which recognizes the interest to distribute the estate to the extended family of the deceased.

It is however unfortunate that these customary practices are not being challenged by the very people they affect. The current status quo is that no cases are forthcoming in our courts that are challenging what may be seen as unfair customary laws or practices, the only case that seems to have come close was the \textit{Berendt v Stuurman} case,\textsuperscript{35} which dealt with an estate that was to be administered and distributed in terms of customary law, but the important issue that transpired however was the fact that the court declared section 18 (1) of the Native Administrative Proclamation 15 of 1928 unconstitutional. The court further went on to access the constitutionality of the Regulations of

\textsuperscript{33} D. Lebeau et al Women’s property and Inheritance Rights in Namibia 2004 at 50

\textsuperscript{34} Runger 1999:107 cited in Hinze M O supra

\textsuperscript{35} Berendt & Another v Stuurman & Others, High Court Case No. (P) A 105/2003, 14 July 2003 (declares sections 18(1), (2) and (9) unconstitutional with effect as of 30 June 2005).
Government Notice 70 (GN 70) which provided that: All movable property belonging to a native and allotted by him or accruing under native law or custom to any women with whom he lived in a customary union, or to any house, shall upon his death devolve and be administered under native law and customs. The court concluded that the Regulations were also unconstitutional and invalid as it placed widows who were married in terms of customary marriages or unions in the wording of the section, in an unfair disadvantage.

**The Bhe v Magistrate, Khayelitsha & Others**[^36], which is a South African case, nevertheless offers an encouraging discourse as a starting point for assessing the fairness of some customary practices as regards women’s rights to inherit under such customary laws. The case dealt with the customary rule of male primogeniture which favors male heirs as opposed to female heirs. This concept of male primogeniture was therefore found to be unconstitutional for being discriminatory to females in that it prevents females to inherit.

Therefore, the question that follows is whether there is a need to replace or abolish customary inheritance laws and replace it with a more unified system of inheritance to be applicable in line and alongside the civil law system of inheritance or whether customary inheritance law should continue to be applied in so far as it does not conflict with the constitution. The former view is criticized by Hinz,[^37] where he states that such a move will only be met with resistance by the very people it affects. The more viable way is rather to regulate than abolish.

[^36]: 2005 (1) BCLR 1 (CC) SA
[^37]: Hinze M O: supra At pg 101
What is the way forward for customary inheritance law

Namibia needs a system of intestate succession which accommodates the range of indigenous law and blends it with aspects that promote gender emancipation\textsuperscript{38}, it is not ideal to leave everything to indigenous law which may lack clarity and which may easily be subject to manipulation and discrimination due to its lack of clarity.

After the judgment in the Berendt case (above), parliament promulgated the Estate and Succession Amendment Act 15 of 2005, but in so doing, parliament still considered it appropriate to leave in place the customary rules and customs governing the distribution of intestate estates. Therefore, black intestate property presently continues to be distributed according to native laws and customs as provided for by the Native Administration Proclamation, as opposed to the Intestate Succession Ordinance 12 of 1946.

Moreover it suffices to point out that in South Africa, the South African Law Commission had during the time of considering customary law reform, also 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.\textsuperscript{39}

2.2 Civil law marriages

Prior to colonialism, the local indigenous people practiced customary marriages. The

\textsuperscript{38} Letter to the International Women’s Human Rights Clinic by the Legal Assistance Centre Namibia. 15 2008: supplementary submission to the committee on the Elimination of Racial Discrimination: Supplementing Namibia’s 2007 country report at page 8

\textsuperscript{39} Hinze M O: supra At pg 104.
Western concept of a civil marriage and the legal consequences thereof were foreign to the indigenous peoples of Southern Africa during the pre-colonial era. These western marriages now known as civil marriages only came with the European settlers.\textsuperscript{40}

Legally, the German law was the first European law that was applicable to civil marriages in Namibia, but however, the German laws did not develop to significantly in Namibia during the German colonial era. It is the South African law that developed civil law and forms the basis of the Namibian civil law legal system. The earliest South African laws that regulated civil marriages in Namibia was the Proclamation 16 of 1915 which repealed some of the German civil law provisions and provided for the empowering of magistrate officers in the military government to act as marriage officers.

Another important piece of legislation was the Administration of Justice Proclamation 1919 which had the provision that the Roman Dutch Common law as applicable in the Cape was to be the law applicable to the territory of South West Africa. Of particular importance in this piece of legislation is the fact that this proclamation introduced the Roman Dutch Common Law divorce law into Namibia which applies up until this day and as extended by article 66 of the Namibian constitution. The Roman Dutch Common Law however still forms the back bone of the civil divorce law in Namibia.\textsuperscript{41}

To summarize the divorce legislations in Namibia, divorce law is based on RDL and Divorce laws amendment ordinance No 18 of 1935, matrimonial causes Jurisdiction act 22 of 1939, matrimonial causes jurisdiction act 35 of 1945, matrimonial affairs ordinance no 25 of 1955. The analysis here shows that the Namibian divorce laws are scattered and

\textsuperscript{40} Mofuka v Mofuka supra
\textsuperscript{41} Proposals for Divorce Law Reform in Namibia. LAC pg 18
also that the last major statutory reform of the law on divorce took place half a century ago.  

**Important functions of the law of divorce:**
1. To decide under what circumstances an organised society will regard the continuation of a marriage as untenable, this lays in the fact that marriage is considered as a social institution
2. By regulating the consequences of divorce, to try and solve the problems caused by the failure of a marriage in the most satisfactory way possible.

The primary effect or consequence of divorce has to do with the patrimony of the spouses, which is the division of assets, payment of maintenance and also the interest of children if any. It is however important to note that the effect that divorce has on the patrimony of the spouses is based on whether they were married in or out of community of property, accrual system or instances where court orders forfeiture of patrimonial benefits. It is further argued by Cronje that sound divorce law aims not at making divorce easier or more difficult but has its primary purpose or focus on a realistic regulation of divorce itself. This in my opinion is a good premise for any serious attempt at divorce law reform in Namibia. This is because it would be naive and unreasonable to require that divorce laws be made in such a way so as to be able to solve the social problems resulting from broken and disrupted marriages. Divorce law does not and

---

42 LRDC Report on divorce project 8- introduction at 1
44 Ibid at 325
45 Ibid at 311
should not concern itself with solving the social problems that lead to failed marriages, simply because the law of divorce never caused such problems in the first place.\footnote{46 Hahlo HR 1954 SALJ 391)

What is needed are divorce laws that are reconcilable with the present day needs and challenges and which laws take into consideration the interests of all involved and society at large.

3. The Native Administrative Proclamation 15 of 1928

The objective of the Native Administrative Proclamation 15 of 1928 was to set up different rules regarding marriage and inheritance based on varying factors such as where the person resides, whether the person was party to a civil marriage or customary marriage, the marital regime applicable to the civil marriage and such incidental matters. The determining factor to all this is the race a person belongs to. The devolution of the estate of a person other than a black person were and continue to be regulated by the Intestate Succession Ordinance 12 of 1946 and the Wills Act 7 of 1953 and is to be administered in terms of the Administration of Estates Act 66 of 1965. There was therefore two different systems applicable to such incidental matters depending on the race of the person(s) concerned.

The result of having two different systems applying in one jurisdiction, gave rise to
serious challenges. For example, the present situation resulting from the different default marital regimes systems applied in Namibia, these are; that all marriages entered into North of the redline are by default out of community of property and that all marriages entered into South of the redline are in community of property, may be summarised as follows:

(a) A black person in Kavango, Eastern Caprivi or Ovambo 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;
   
   - movable property allotted to or accruing under customary law to any woman with whom he lived in a customary union or
   
   - 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.47

The conclusion reached on the above legal analysis of what seems to be a confusion, which may be expressed as a “confusing web of customary and civil law”, is therefore that; 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.

3.1 The default marital regime system

The default marital regime system for marriages between Africans outside of the former police zone which is one of the components despicable from the application of the Native Administrative Proclamation 15 of 1928 which is concerned with the of consequences of such marriages regulated by the proclamation. The proclamation provides that such marriages are by default out of community of property unless the parties specifically agree to the contrary. Such an agreement should be made one month before the marriage ceremony; and the intending spouses should jointly declare before a magistrate or a marriage officer that it is their intention that the property regime to be applicable to their

47 Mercedes H. Ovis: at pg 6
marriage should be that of in community of property.\textsuperscript{48} The problem faced with this is that many of the intending parties are not aware of these requirements and in practice, it is a reoccurrence that such declarations are not properly executed, with the result that even if it was the intention of the parties to contract a marriage in community of property, if the declaration is not executed or properly so executed, such marriages would be considered by law to be out of community of property.\textsuperscript{49} The consequence will be that such an estate will be administered in terms of customary law and the problem that follows is that women’s rights to their deceased husband’s estates are limited because the women’s rights are hardly recognized under customary law as stated earlier above.

The above situation has however not gone unnoticed. For example, in the Mofuka v Mofuka case,\textsuperscript{50} our courts took cognizance of the unfortunate position that the Native Administrative Proclamation places on women, established what they considered an informal and unregistered ante-nuptial agreements between parties although not enforceable against third parties, which spouses conclude either expressly or impliedly which regulate the property consequences of the marriage between themselves.

The conclusion of the case is plausible because it is questionable why such a law should persist without challenge, considering the fact that it affects a large number of the Namibian population. This is trite because 40% of the Namibian population lives in the

\textsuperscript{48} Section 17(6) of the Native administration proclamation 15 of 1928

\textsuperscript{49} L Agnew and D Hubbard. Marital property Regimes and the native Proclamation Legal Assistance Centre August 2001 3-4

\textsuperscript{50} 2001 NR 318 (HC), Namibian Supreme Court, 20 November 2003
four O regions of the northern part of Namibia,\textsuperscript{51} this is excluding Caprivi and Kavango which also forms part of the areas north of the Former police zone and which are affected by the proclamation.

\section*{3.2 The effect of the default system}

A marriage in community of property often offers more protection to women compared to that out of community of property. This is because a marriage in community of property provides for equal access and control over shared marital properties to spouses and if the marriage ends, whether by divorce or death, each spouse is entitled to half of the shared marital property.\textsuperscript{52}

The unfortunate reality is that many of the spouses who are affected by section 17 of the Native Administrative Proclamation 15 of 1928 are often under the erroneous assumption or impression that they have either entered into a marriage in community of property or that they made the necessary declaration to ensure an in community of property marital regime if they so indicated at their wedding.\textsuperscript{53}

It is further unfortunate that the Proclamation affects mostly those people who are in a rural set up where illiteracy rates are high among women and where women continue until today to be economically depended on their husbands. It is also in these

\begin{itemize}
\item \textsuperscript{51} Proposal for Divorce Law Reform in Namibia. Legal Assistance Centre 2000. Pg 4
\item See also: Namibian Census Report 2001
\item \textsuperscript{52} Leigh-Anne Angnew and Dianne Hubbard. Marital Property Regimes and the Native Administrative Proclamation 2 (2001) : cited in Legal Assistance Centre Proposals for Divorce law Reform in Namibia 26 (2000)
\item \textsuperscript{53} Letter to the International Women’s Human Rights Clinic by the Legal Assistance Centre Namibia. Supra at page 4
\end{itemize}
communities where cultural presumptions such as that all properties in a marriage belong to the husband persists, and further where the record of ownership of properties owned by women may not be well documented as a result. Women’s contribution to the household in this areas are in most instances limited to the basic day to day care of the household and not contribution in property and wealth, and as a result are considered not to have contributed to the assets.

The default system of out of community of property to marriages north of the redline therefore cultivates a system that is disadvantageous to women as it produces an unfortunate result which restrict the women’s claim to any marital property upon divorce or the death of their husbands.\(^{54}\) Another important factor is that husbands can invoke section 17(6)\(^{55}\) at divorce to totally disregard any contribution made by the wife and leaving the wife with no properties at divorce or death of the husband because the marriage is considered to have been out of community of property.

There is therefore no logical basis why the default marital regime system imposed by the Proclamation on marriages concluded in the areas north of the former police zone, should continue to apply. Even with the argument that the provisions of the Proclamation were made deliberately in order to apply harmoniously with the already existing system of inheritance under the customary laws and practices in those communities, this would not make much logic considering the fact that there are other indigenous communities living South of the former police zone that also have a similar inheritance system.

\(^{54}\) Ibid at page 5

\(^{55}\) In terms of the said section, marriages between Blacks are automatically out of community of property, unless the intending spouses made a declaration one month prior to the marriage before a Magistrate or a marriage officer that they want their marriage to be in community of property.
3.3 Recommendations

Perhaps what is needed is a test case challenging the constitutionality of section 17 of the Native Administrative Proclamation 15 of 1928 because parliament is not being proactive in repealing the proclamation in its totality. If a test case is brought before the courts, such courts will have to decide the issue once and for all by deciding on its constitutionality and if found to be unconstitutional, the court may direct that parliament make the necessary amendments. Even the Law Reform Development Commission had already made recommendations for the law to be repealed.\(^{56}\)

There can be no justification for the maintenance of two separate default systems with one being discriminatory and therefore unconstitutional in terms of article 10 of the Namibian constitution in that it is based on skin colour and in addition a black person’s place of marriage.\(^{57}\) No person should be treated differently by the law purely on this basis or in the absence of justifiable discrimination, surely on this basis and on the strength of article 10 of the Namibian constitution alone; this law should be rendered unconstitutional and repealed.

It is therefore difficult not to conclude that the Proclamation was made with the primary objective of advancing the colonial and apartheid ideology\(^{58}\) of dividing dark skin people and legislating oppressive laws applicable to dark skinned people only.

\(^{56}\) Law Reform and Development Commission Report on Divorce: Project 8 (Draft Divorce Bill)
\(^{58}\) An ideology based on segregation, and oppressive laws and policies towards dark skin people.
As stated earlier it is unfortunate that parliament is dragging its feet in addressing the issue of repealing the Proclamation. In the year 2010, the debate came up once again in Parliament thereby providing for an opportunity to debate and access the pace at which efforts are being made to repeal the Proclamation in its totality but the question posted by honorable Ms Iipinge to the honorable Minister of Justice on 17 February 2010 No: 21-2010 question number 97 regarding the proclamation had however lapsed. The query amongst other things enquired:

i) Why such a race based law is allowed to continue applying in our legal system
ii) Whether the Law Reform and Development Commission continues to work towards law reform in this regard
iii) Whether couples whose marriage is subject to this law will be allowed to change their marriage regimes without having to divorce and remarry in order to do so.

The question had lapsed because the parliament session was ending and it was never answered by the honorable Minister of Justice. The only way to reintroduce the issue back to Parliament is to re-submit the questions in the new or subsequent sessions.

4. Civil divorce provisions and the proposed reform law

The most important provisions of the current divorce laws in Namibia are outlined in this chapter and in order to avoid repeating these laws in another chapter dealing with the shortcomings of these laws and the proposed reforms, both the current divorce provisions and the proposed changes will be discussed concurrently in this chapter.
Main aspects introduced for reform

Under the Roman Dutch Common Law the current divorce law is based on a fault based system, the divorce bill proposes the adoption of a divorce regime based on irretrievable breakdown. Key issues that are addressed by the divorce bill are:

1. To eliminate the fault based system or ground for adultery and introduce one based on irretrievable breakdown
2. Simplify divorce procedure in cases where there are no real dispute about the divorce or terms thereof
3. Give courts sufficient power to distribute marital properties fairly to avoid injustice by strictly applying the existing property regimes
4. Ensure child’s best interest is considered before a divorce is granted particularly matters pertaining to child custody and additional protection.

The immediate challenge if the ground for irretrievable breakdown is introduced would be the question of what would constitute irretrievable breakdown. The irretrievable breakdown principle is however clear that where both parties allege irretrievable breakdown, the reasons for breakdown should be considered irrelevant on the question whether or not to grant a divorce, it is equally irrelevant when irretrievable breakdown is alleged and the other party does not oppose the divorce.

---

59. This means that the marriage has broken down beyond any repair) rather than fault. HR Hahlo (1985) The South African law of husband and wife 5th edition. Juta and Co Ltd. Cape Town at pg 330
The extension of the High Court’s divorce jurisdiction

In terms of section 2 of the draft bill, which deals with jurisdiction, the challenge is that currently, divorce can only be granted by the High Court because Magistrate Courts do not have divorce jurisdiction. In terms of the reform proposals, the High Court would hear such issues on circuit under certain circumstances such as serious cases of disability. Perhaps the second branch of the High Court that was recently opened in Oshakati, should be given full jurisdiction in order to also have civil jurisdiction because currently it only has criminal jurisdiction.

The irretrievable ground of divorce to replace the fault based ground for divorce

At Roman Dutch Common law, the only grounds for divorce are:
1. Adultery

As a result, the common law grounds for divorce are based on fault and hence establishes the fault based principle. The fault based system is based on an idea that in every divorce action, there was a guilty and innocent party, that one of the spouses had committed a matrimonial offence and evidence had to be given to that effect. The fault system also dictates that only the innocent party could claim maintenance and that the guilty party forfeited all benefits of the marriage if a forfeiture order was applied for by the innocent party.

---

62 HR Hahlo (1985) supra at pg 330
Section 3 of the new divorce bill on the other hand is based on irretrievable breakdown rather than on fault,
Two grounds are proposed
1. Irretrievable breakdown
2. Mental illness or continuous unconsciousness.
Without trying to shirk the promise to care for the other “in sickness and in health”, the second ground is necessary because it would equally be unfair to impose a legal responsibility on a person who is not willing or able to take on such a moral responsibility.

The reason for doing away with the fault based system is because:

1. Marriages are complex relationships and the distinction between guilt and innocence is too simplistic.
2. Where people want a divorce they will always manage to make their case fit the law, which in fact makes the fault system a legal fiction.
3. There is no point in trying to revive a dead marriage. The South African Divorce Act 70 of 1979 contains a similar clause.

The concept of irretrievable breakdown is defined in section 4 of the draft bill, which also outlines what constitutes irretrievable breakdown. The said section provides that irretrievable breakdown occurs where a marriage relationship has reached such a stage of disintegration that there is no reasonable prospect of restoring a normal marriage relationship.

Factors that can assist the court in determining whether a marriage had irretrievably
broken down will include: 64

1. In instances where spouses had not lived together as husband and wife for a continuous period of at least one year immediately prior to date on which the divorce application is instituted

2. Adultery by either spouse, and

3. Either spouse has committed physical, sexual or psychological abuse against the other

4. Either spouse has been sentenced to an effective term of imprisonment of at least five years

The above is in line with the view that there seems to be a worldwide shift to irretrievable breakdown as the main ground for divorce. 65

Another significant proposed change to the current divorce law, is in regards to the High Court rules, in particular rule 43 of the High Court rules. Under the current provision, rule 43 is a powerful tool for parties seeking interim relief pending the finalisation of the divorce proceedings, the rule also provides for a simple and quick procedure.

This is because, applications would now be simplified as far as possible and done on the basis of affidavit evidence unless the court insists on a hearing and parties also have the option of using standard affidavit forms thereby making the process easier.

---

64 section/clause 4(5) of the draft bill
65 HR Hahlo (1985). Supra at 331
5. **Divorce mediation v divorce litigation**

The relevance for the discussion of the topic of divorce mediation is based on accessing the important question whether there is also a need to consider procedural law reform in regards to divorce laws as is the case for the substantive law aspects of marriage and divorce laws as discussed in the preceding chapters.

Mediation is already used in customary divorce cases where both the extended families of both spouses help in attempting to resolve marital disputes, hence the relevance of mediation to divorce is already tested at least in the customary sphere of our law.

As already alluded to above, divorce or the dissolution of marriages posses serious challenges for being relatively formal and complicated. The result is that parties would need the services of a legal practitioner which means that they should also be prepared to foot the bill for such services. It is rather unfortunate that at times, spouses are rather unprepared to seek divorce proceedings due to such challenges and opt rather to lose the protection of the law in that regard.

From the preceding discussions, it is a legitimate question to ask whether divorce litigation as it is, is still relevant in today’s society and how divorce as a process can be made less cumbersome. Is there any legal mechanism that can be employed to help make the divorce process less confrontational and more towards a peaceful settlement that will help maintain the relationships of the parties involved, for the sake of the children if any?

This chapter puts forth a discussion on the advantages and disadvantages of both divorce

---

66 Proposals for Divorce Law Reform in Namibia. LAC pg 18
litigation and divorce mediation in an attempt to address some of the questions posed above.

It is however not the aim here in this paper to put forth a contest between divorce litigation and divorce mediation but the conclusion directed here is one aimed at moving towards supplementing the two approaches, an emphasis is here placed on moving towards a more peaceful divorce settlement; identifying effective means to afford the parties the opportunity of resolving the dispute themselves, including property division on an equitable basis and arrangements in the best interest of the child as decided upon by both parties themselves..

5.1 Mediation

Mediation may be defined in the context of divorce as, an assisted negotiation between the two parties who are in the process of divorce. The mediator is impartial and helps to ensure that each participant comes to a fair agreement, which means the mediator cannot give advice to either party, and also can't act as a lawyer for either party. Burman S, perceives mediation as “a social process of conflict resolution where the mediator is a selected third party who, while remaining neutral, facilitates the achievement of a mutually satisfying agreement by utilizing specific techniques”

Further, divorce mediation, may be considered as an informal process, an instrument for the application of equity rather than the rule of law. It allows for the consideration of the

---

67 Kressel K 1993: at 384

social and cultural contexts of the relationship, and for the emotional aspects of the situation. 69

From the above definitions, it is apparent that neutrality of the mediator and party autonomy in the process is key. The mediator remains neutral between the husband and the wife. What the mediator can do, though, is to point out in open session to both spouses the aspects that each of them should be aware of and what they are trying to accomplish. The openness and free exchange of information opens up both spouses to negotiate with each other in confidence. Because both spouses are working with the same base of information, it usually takes far less time to negotiate a resolution that makes sense to both spouses. 70

It follows that the goal of mediation is a fair outcome created and accepted by both parties. The result of mediation is a plain language Memorandum of Agreement which includes all decisions made by the couple themselves.

5.1.2 Why divorce mediation

Promote good spirit between the parties:
Unlike litigation where a legal battle is pursued by the parties, mediation encourages finding common ground for an agreement. Any positive feelings that remain between former spouses should be preserved and not destroyed especially when there are children to take into account. Mediation therefore helps maintain relationships, it provides the two

69 Kressel K 1993: at 386.
70 Robert H. Mnoonkin and Lewis Kornhauser 1979: at 88
parties with a way to settle the conflict between themselves, which is natural and inevitable, in a way that could even help them to work together as parents if there are children involved after their divorce. Such a kind of corporation can make all the difference for a party recovering from their divorce, thus making it easier for them to move on with their lives. Mediation allows the two parties to get through a divorce with less conflict than would be experienced in an adversarial divorce.

The element of control over the process by the parties themselves: The parties control the pace of the process, they make the decisions themselves throughout the mediation process. This is opposed to the litigation process where step by step procedures have to be followed such as setting court dates, when to file documents, when to argue the matter and when judgment will be given. Because the courts rolls are full, it is a factor that delays the process considering that it may be difficult to speedily obtain a trial date. Considering the fact that divorce is already an unpleasant situation, to stretch the process over a long period as such, could place a huge emotional burden on the families.

The mediation process is emotionally more manageable:
More often, children are subjected to the conflict between their parents and they are placed right in the middle of these conflicts. Therefore, children can be bruised emotionally by this process of divorce litigation as. Mediation on the other hand affords a certain degree of comfort and assurance that the process could be easier for the parties and their children, knowing that they as the parties had handled the divorce proceedings.

---

71 Kim Hess. Pros and Cons of Mediation at http://www.mamashealth.com
73 Kim Hess. Pros and Cons of Mediation at http://www.mamashealth.com
by coming to a mutual agreement without putting the kids in the middle. Ending a marriage is difficult but a mediation process can help prevent a traumatic and time consuming divorce as opposed to litigation.  

It still keeps your options of going to court open:
If you decide on divorce mediation, and are not satisfied with the outcome, you will not give up your right to go to court. There is thus nothing to lose but rather potentially everything to gain. This is because the success of a mediation process is based on an consensus between the parties and if such consensus is lacking, the mediation process fails. It is therefore important that a mediation process should not vitiate the option or rights of the parties to commence divorce litigation if the mediation process fails. In other words, if the mediation process fails, none of the parties can raise the defence that the matter was already adjudicated on. \textit{(res judicate)}.  

Cost factor:
As regards cost, the process of mediation may prove to be more costs efficient given the fact that costs are shared by both parties and because the process is a more speedier one, cost may be less as compared to litigation where each party hires a separate attorney, and the process is stretched and cumbersome, thus generally and potentially could involve higher cost than mediation.  

5.1.3 Possible shortcomings of divorce mediation

\footnote{R Bush and J Folger 1994 at 2, 26 and 84.}
\footnote{info@negotiatingtable.com}
Impossible to not give legal advice:

Due to the fact that marriage and divorce, are important concepts because they affect the legal status of persons, it follows that one way or the other, there would always be legal structure that are sanctioned to overlook this processes, hence legal skills and knowhow is necessary when it comes to divorce because the rights of persons are involved. This insight in the law may be something that any ordinary mediator may lack in. Therefore, legal practitioners must still be involved, which increases the cost of the mediation.

Parties may be so emotionally charged that co-operation is hampered:

At times it would be difficult to have parties to negotiate because their pride can stand in their way and just as in the case of divorce litigation, parties may get to busy trying to be impossible to co-operate due to emotions such as hurt, feeling betrayed, and thus being vengeful. This may cause not to co-operate on the issues discussed, whether as regards the division of properties or on child custody matters.

The success of Meditation is too depended on the ability of the parties to reach a consensus:

Because the decision of the mediator is not binding, the parties must be committed to reaching an agreement. If one or both parties are not ready to agree, or if one party does not want a divorce, the mediation process could become frustrating and waste of time as it would fail.

---

76 Kim Hess. Pros and Cons of Mediation at http://www.mamashealth.com

77 Kim Hess. Pros and Cons of Mediation at http://www.mamashealth.com
Divorce is a complex process that requires insight from the person charged to oversee the process:

A lot depends on the skill of the mediator. An unskilled or poorly trained mediator can do more damage than help. An unsuccessful attempt at mediation can add substantial costs and delays to the divorce process. Further as stated earlier, divorce affects the rights and status of persons, therefore a person charged with the responsibility of overseeing a divorce process including a mediator should have insight in the law regarding the consequences of a divorce, such as proprietary, and other such incidental matters. Even if the parties come to an agreement themselves, it is important that the final decision is an equitable one and the person charged with overseeing the process of divorce must be able to ensure that the interest of all parties and particularly vulnerable parties are protected.

Openness and easiness in not always possible:

Some people especially women who are not experienced in expressing their needs and desires, may not be able to articulate their point of view effectively in a mediation process. In some instances cultural factors may dictate that a woman remain submissive to their male counterparts.

The elements of legal protection mechanisms may be lacking:

The checks and balances of a legal state sanctioned institution is an important safeguard for the rights of parties to disputes, and it may be dangerous to shift decision making to a mediation process which lacks these protections. Folberg J 1992: at 8 The conducting of unregulated mediations would be difficult for the state to monitor the proper functioning of such processes. For example would mediation processes be reviewable? The need for keeping
divorce statistics and other incidental matters would be difficult to ensure without the state involvement in this processes of mediation.

5.2 Litigation

Litigation is a method of adjudication, whereby active and unhindered parties, usually through their lawyers, contest with each other and present support in favor of their respective positions, usually through the presentation of evidence, examination and cross-examination thereof, to a neutral and independent decision-maker. This concept is particularly inherent in an adversarial system.

Under the modern adversarial system, legal proceedings usually involve the opposing parties approaching matters in a competitive way. Each of the adversaries is given an opportunity to present arguments and evidence that supports their claims. The adversaries are generally also given the opportunity to question one another. 79

The adversarial system is time consuming, that it is slow and cumbersome. The judge, acting as a neutral fact finder, can do little to accelerate a trial, and procedural and evidentiary rules further slow the process. Likewise, the wide availability of appellate review means that a final determination can take years.

5.2.1 Why divorce litigation

Divorce is a serious matter:

79 www.llm-guide.com/
The main argument advanced in favor of this option is that divorce cases are matters of status, and rights and therefore require attention from a court at a high level. Also, divorces often involve the welfare of minor children, making it appropriate for the High Court as the upper guardian of all children to be involved.\textsuperscript{80}

**Parties come to court as a means of last resort:**
Mediation schemes usually fail to provide adequately for the fact that the parties may still have contact with each other. Therefore a certain level of negotiation takes place outside the mediation conference. This is particularly possible where economic constraints could necessitate that some divorcing couples continue to share the same home while the divorce proceedings are still ongoing.\textsuperscript{81}

**Home based violence can have an effect on mediation:**
The prevalence of domestic violence against women means that women may not be able to negotiate with their husbands as equals, without fear. Any workable mediation scheme in Namibia would have to take account of these concerns.\textsuperscript{82}

**Parties can still negotiate in divorce litigation during Pre-trial conferences:**
There is still an element of negotiation in divorce litigation in the form of pre-trial conferences. This avenue allows parties to agree on various aspects thus minimizing the number of issues in the process, and has the potential of helping the parties reach possible settlements.

\begin{footnotesize}
\begin{enumerate}
\item Kressel K 1993: at 233
\item Burman S and Rudolph D 1990 at 251
\item Ibid
\end{enumerate}
\end{footnotesize}
Ample time to reconcile:
Although divorce litigation is sometimes a long process, it also affords the parties’ time to sort out their conflicts and re-unite, for example the provision put in place to issue restitution orders allows parties to take time off and reconcile.

Legal binding judgments:
At the end of divorce litigation, the court makes a ruling that is legally binding and enforceable, failure to adhere to such judgment may be considered as contempt of court or met with an enforcement order. Once a divorce decree is given by the court, it if final, there is no return from it.

5.2.2 Possible shortcomings of divorce litigation

Cost factor:
Divorce laws in Namibia are old and scattered, there is the need for consolidation, because of this, legal insight is important to understand and facilitate a divorce process, hence the hiring of experts (legal practitioners) is crucial, and the process is overstretched hence cost generally increases with the length of the process. Considering that parties are not themselves in charge of the process, they have no control over the length that the process may take as is the case with mediation.

Personal issues may not always be relevant:
The fault based system which is a central principle in divorce litigation, is already
criticized for being outdated. The digging by the court into the reasons for the breakdown of the marriage is unnecessary. What the parties do in an adversarial system of divorce litigation is to hand over the most personal matters of their lives to the court and by so doing, allow the courts to dig through them and make a judgment.

**Practical enforceability:**
Court orders do not always deal with the specifics of how marital property will be divided; the parties are left to decide these issues in a settlement agreement. This leaves another platform for dispute open and to be resolved by the parties after the court case. Enforcement of court orders on divorce may also be difficult and cumbersome.\(^{83}\)

**Accessibility of divorce litigation:**
Currently the High Court is the only court with the jurisdiction to change the status of a person, this includes divorce. This court is based in Windhoek and although a new branch of the High Court was recently opened in Oshakati, this branch only has half jurisdiction which is only the criminal jurisdiction and lacks civil jurisdiction. Other parts of Namibia continue to be faced with the challenge of costs to travel to Windhoek. Another factor is also the cost, many people may not afford divorce litigation, hence many be forced by social factors to lose the protection of the law.

**Court battle:**
The divorce litigation in an adversarial jurisdiction has the characteristics of subjecting the parties to a court battle, this is not encouraging on the need for the parties to maintain a future relationship especially where children are involved.

\(^{83}\) Erikson S and McKnight M 1990 at 383
There above discussions on the advantages and disadvantages of each approach should not be considered as exhaustive, and they may be used contradistinctively in that one advantage of one approach may be applied as a disadvantage for the other.

5.3 Recommended

It is without doubt that the current divorce system is clearly not serving many members of the public well. New approaches are needed to make the law more responsive to the needs of the communities it serves.\footnote{Gender Research & Advocacy Projects of the Legal Assistance Centre, \textit{Divorce Law Reform: A Summary of the Law Reform and Development Commission Proposals}, LAC. 2000:143}

Divorce mediation on the other hand strikes out to be an inviting approach, it is one possibility. As an informal process it is an instrument for the application of equity rather than the rule of law and allows the social and cultural context of relationships to be considered and emotions to be dealt with. Legal rights are not abandoned but the hierarchical element of the adversarial adjudicatory system is eliminated through the promotion of self-determination.

It is also proposed that mediation can help to revisit the fault base system which provides that, to obtain a divorce, the spouse must prove that the other spouse did something wrong and which is recognized by law as warranting a decree of divorce, usually malicious dissertation or adultery. Because of this, it presupposes that parties are at each other’s throats, and there should be an underlying conflict. This ignores the fact that
parties may simply want a divorce for other reasons and not necessarily due to conflict.\textsuperscript{85}

The question that however remains is: How can divorce processes be made more comprehensible to the common person seeking divorce?

It is important to understand that although both approaches, that is, divorce litigation and divorce mediation, may seem attractive given their respective advantages, the practical applicability of both may have inherent shortcomings. Hence it may be justified to say that, shooting one approach down at the expense of the other on the basis of their respective advantages and disadvantages may be premature a choice if one has not appreciated the practicality of each.

It is suggested here that instead of choosing one approach over the other, why not use them to supplement each other. While the substantive law on marriages and divorce is in serious need for reform, mediation can be used effectively in the procedural aspect of divorce and at least parties can themselves agree on certain issues and the court is required to certify the settlement agreement. It is here highly recommended that, the laws on divorce litigation must first be consolidated in order to make the role of mediation clear in supplementing the adversarial divorce litigation process.

As appears above, one of the serious criticisms leveled against divorce mediation related to child issues such as custody, maintenance. It is recommended, in extending the above proposition that the two approaches can supplement each other, in that parties can be allowed to settle other aspects of divorce matters while the court can retain its existing power to overrule agreements between the parties if necessary. furthermore the High

\textsuperscript{85} Hence the need for law reform to provide for the ground of irretrievable breakdown.
Court which is the upper guardian of minors should be involved, family advocates should be involved to investigate the circumstances surrounding the best interest of child and report to court, and courts should ensure that the settlement agreements concluded by the parties should divide properties on an equitable basis. No divorce decree should be issued until the court is satisfied that all arrangements in respect of minor or dependent children are in their best interests and that property division has been agreed upon on an equitable basis.

6. Overview

The paper discussed the two types of marriages practiced in Namibia, namely civil and customary marriages and further the laws pertaining to such marriages. In so doing the paper pointed out the shortcomings of such laws and emphasized the need for reform in that regard. It has however transpired in the paper that efforts were made particularly by the legal Assistance Center and the Law Reform and Development Commission to reform the customary and divorce laws in Namibia via extensive research; however the legislature is yet to legislate to that effect. The issue of divorce and customary law reform is illustrated in this paper to be of great importance considering the fact that divorce and marriage laws affect substantive rights and interest of parties involved.

The current divorce and marriage laws are outdated and no longer relevant to current needs, hence the reform of such laws is long overdue and a matter of urgency. The regulation and recognition of customary marriages in particular is necessarily in order to
protect particularly the interest and right of women who continue to be discriminated against but certain aspects of customary law such as when it comes to matters of inheritance. The paper also discussed and concluded that the civil divorce process poses a serious challenge to the parties involved and therefore there is the need to consider divorce mediation as a possible alternative to divorce litigation but without concluding that mediation replaces litigation. The paper proposes that the two methods, that is mediation and litigation can be applied interchangeably where the circumstances permit. It is therefore the conclusion of this paper that debates on the aspects discussed in the paper continue, in order that the law reform efforts on divorce and marriage laws in Namibia are finally realized.