

REPORT OF THE LAW COMMISSION ON THE REVIEW OF LAWS  
ON MARRIAGE AND DIVORCE

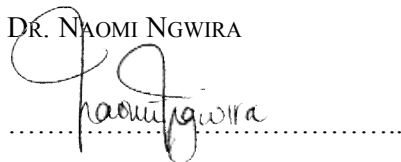
To: THE HONOURABLE HENRY PHOYA, MINISTER OF JUSTICE

This is the Second Report of the Law Commission which was appointed under section 133 of the Constitution to review gender-related laws in Malawi. The Report is on the review of statutory laws on marriage and divorce: the Marriage Act (Cap. 25:01), the African Marriage (Christian Rites) Registration Act (Cap. 25:02), the Asiatics (Marriage, Divorce and Succession) Act (Cap. 25:03), the Divorce Act (Cap. 25:04), the Married Women (Maintenance) Act (Cap. 25:05), the Affiliation Act (Cap. 26:02) and the Maintenance Orders (Enforcement) Act (Cap. 26:04); and customary laws on marriage and divorce.

The Commission hereby submits the Report pursuant to section 135 (d) of the Constitution and commends the recommendations contained in this Report to the Government, Parliament and people of Malawi.

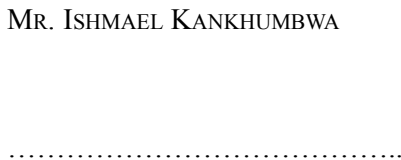
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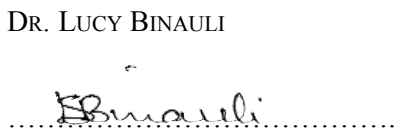
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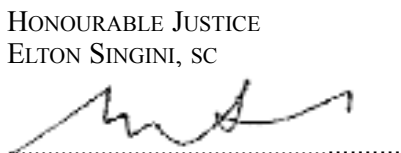
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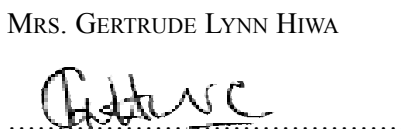
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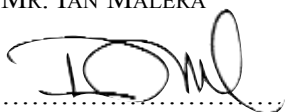
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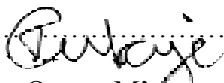
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Date: 30th December, 2005



**Programme Officers**

The programme officers for this programme were Mr. Chikosa Mozesi Silungwe, Mrs. Fiona Mwale, LLB with Honours (Leeds), LLM (Warwick) and Mr. Chizaso Nyirongo, LLB with Honours (Malawi), LLM (Oslo).

**Changes in the Composition of the Commission**

During the course of the review of the laws on marriage and divorce, Commissioner Kanyongolo left Malawi to pursue doctoral studies in law in England. While she contributed to the preliminary work of the Commission, she was not party to the final recommendations made by the Commission. She has therefore not appended her signature to this Report.

Further, in a sad development, Commissioner Kankhumbwa passed away on 23rd November, 2005. This was during the course of the National Consultative Workshop held by the Commission on 22nd and 23rd November, 2005 at the Malawi Institute of Management in Lilongwe, Malawi. Commissioner Kankhumbwa was a self-starter. He was a hardworking and resourceful person who made valuable contribution to the work of the Commission. His untimely death has robbed Malawi of a true son whose efforts and contribution to the achievement of gender equality in Malawi must never be forgotten. May his soul rest in eternal peace.

**Acknowledgements**

Funding for this programme was jointly provided by the Governments of the Kingdoms of Norway and Sweden through the Norwegian Agency for Development (NORAD) and the Swedish International Development Agency (sida) respectively. The funding was administered by NORAD through the Embassy of the Government of the Kingdom of Norway to Malawi.

The Commission also acknowledges the funding provided by the United Nations Children's Fund (UNICEF), Malawi Office, for the regional consultations that were conducted by the Commission in January, 2005.

## 1.0 Work Methodology

The Commission adopted the following methodology in reviewing the Act—

- Submissions were invited from members of the general public through notices in newspapers and in the *Gazette*, and several written submissions were received.
- The Commission met for five days once a month for a total period of 14 months. During these meetings, the Commission scrutinised the relevant laws on marriage and divorce. These laws were examined in light of the Constitution, international law and comparable foreign municipal law.
- The Commission made extensive consultations with the communities in the following districts: Zomba, Mangochi and Balaka in the Eastern Sub-region; Mchinji, Dedza and Dowa in the Central Region; Karonga, Nkhata Bay and Mzimba in the Northern Region; and Mwanza, Blantyre and Thyolo in the Southern Region of Malawi.
- The Commission also arranged consultative meetings with members of the Hindu Community, Moslems of Asiatic ethnicity and Moslems of indigenous Malawian ethnicity.
- The Commission held a National Consultative Workshop at the end of the review. The Commission presented its findings and recommendations to the Workshop for further feedback. The participants at the Workshop were drawn from the public service; academia; faith organizations; traditional leadership especially Chiefs; private sector; and the general public.
- The Commission reconvened to consider the feedback from the various consultative fora. All submissions, comments and criticisms that have been made were considered and debated and in some cases have been incorporated in this Report.

## 2.0 Structure of the Report

The narrative part of this Report contains specific findings and recommendations made by the Commission; and all recommendations for enactment made by the Commission are indicated in **bold**.

## 3.0 Draft Legislation

A draft of legislation for the enactment of the recommendations of the Commission is attached as part of this Report. The proposed new law shall be called the **Marriage, Divorce and Family Relations Act**.

The Report also contains the Penal Code (Amendment) Bill in light of the Commission's observations and recommendations in relation to section 153 of the Penal Code.

#### 4.0 Use of Masculine or Feminine Gender

The Commission resolved that in both the narrative of the Report and the Draft Bills it shall use both the masculine and feminine gender, except where the context requires the use of any or the other gender.

#### 5.0 Background

In September, 2001, Government through the Malawi Law Commission constituted a special Law Commission to undertake a review of the Laws of Malawi in accordance with Government's policy to promote gender equality and the empowerment of women in all spheres of life in Malawi. This is in response to the new and emerging socio-political dispensation in Malawi and also in recognition of Government's commitment to international and regional instruments on gender equality and women's empowerment.<sup>1</sup>

In November, 2002, Law Commission conducted two workshops with stakeholders; one with gender stakeholders and the other with the Parliamentary Women Caucus, for the purpose of setting priority for the law reform process. In the end, three areas of law were identified as in urgent need of reform or development; namely, (a) the law on succession, especially the issue of property grabbing; (b) the laws on marriage and divorce; and (c) the development of a gender equality statute. The Commission has since then finalised the review of the Wills and Inheritance Act (Cap. 10:02).<sup>2</sup>

The core statutes on marriage and divorce were enacted in pre-independence Malawi and the scheme of the law is colonialistic in its agenda. A number of critical constitutional developments have taken place in Malawi with the coming into force of the Republican Constitution of 1994. The country has since evolved from a legal system based on parliamentary supremacy to one based on constitutional supremacy with an entrenched bill of rights. Such a paradigm shift has consequences on the rights and obligations of persons, let alone parties in a marriage contract. It is critical therefore that these constitutional developments are eloquently articulated in the scheme of the laws on marriage and divorce. Further, Malawi has an obligation to meet international legal standards in its municipal laws.<sup>3</sup> The laws on marriage and divorce are no exception from that perspective.

Family can be described as all persons related by blood or marriage. In another sense, family can mean all members of a household, including parents and children with perhaps other relations, lodgers and servants.<sup>4</sup> However, these scenarios cover a wide spectrum and may be difficult to put in context. Family law therefore addresses three types of relationships: first, the relationship may be that of husband and wife or two persons living together in a conjugal

<sup>1</sup> Malawi Law Commission (2003) *Overview and Issues of Gender-Based Law Reform in Malawi*. Limbe: Montfort Press, p. iii (hereafter referred to as "*The Gender Overview*").

<sup>2</sup> Malawi Law Commission (2004) *Report on the Review of the Wills and Inheritance Act*. Malawi Government Gazette Extraordinary.

<sup>3</sup> These include: the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child, the Beijing Declaration and Platform for Action, the SADC Declaration on Gender and Development, and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

<sup>4</sup> Nigel Lowe & Gillian Douglas (1998) *Bromley's Family Law*. 9th Edn. London: Butterworths, p.1 (hereafter referred to as "*Bromley*").

relationship. Second, a family may be constituted by a parent living with one or more children. Third, brothers and sisters or other persons related by blood or marriage may be regarded as forming a family. The third scenario relationship however has very limited effect on their legal position and any legal consequences arise only on occurrence of death of another member of the family.<sup>5</sup>

In Malawi, like in most English common law jurisdictions, family law has mainly regulated the relationship of a husband and wife and other attendant matters in the contract of marriage. Further, in the understanding of family law in Malawi there is an incipient clash between customary law and received law from English common law;<sup>6</sup> where the former involves not only a marriage of two persons but two extended families while the latter restricts itself to the two persons.<sup>7</sup> Family law has not addressed other forms of family such as single parent households, child-headed households, and grand-parent headed households.<sup>8</sup>

As a contract, marriage is *sui generis*; that is to say, it is a contract peculiar to the relationship of a man and woman in matrimony as distinct from commercial contracts generally. On the other hand, marriage, just like any other contract, creates rights and obligations which accrue from the actions of the persons entering into marriage. These rights and obligations are predominantly determined by statute, customary law and the Constitution in Malawi.

The marriage contract therefore observes certain formality relating to the nature of the contract itself; the capacity of the persons entering into marriage; and the circumstances in which the contract may be invalidated.<sup>9</sup> However, a marriage contract, being *sui generis*, precludes a person from entering into another marriage contract unless the marriage contract in question is potentially polygamous. A marriage contract forms the basis of social institutions such that persons within certain close degrees of relationship known as consanguinity or affinity cannot enter into a valid marriage.<sup>10</sup> Finally, a marriage contract under Malawi statutory law nor at custom, cannot be terminated by rescission, by one of the parties, or through collusion or mutual consent.

## **6.0 Overview of the Current Laws on Marriage and Divorce**

### **6.1 Types of Marriage**

Under the present scheme of the law on marriage, the choice of law is determined by the type of marriage in question. Currently, there are three regimes of marriage under Malawi law, namely:

- (a) Statutory marriage;

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<sup>5</sup> *ibid.*

<sup>6</sup> See Martin Chanock (1995) "Neither Customary nor Legal: African Customary Law in An Era of Family Law Reform" in Gordon Woodman and A.O. Obilade (eds.) *African Law and Legal Theory*. Sidney: Dartmouth, 171–189.

<sup>7</sup> See generally Prof. R.T. Nhlapo (1998) "The Legal Situation of Women in Southern Africa" in *Women and the Law in Southern Africa*. Lusaka: Women and the Law in Southern Africa Trust.

<sup>8</sup> *The Gender Overview*, p. 26.

<sup>9</sup> i.e. the voidability of the marriage contract.

<sup>10</sup> See section 34 of the Marriage Act.

- (b) Customary marriage; and
- (c) Marriages by repute or permanent cohabitation.

The three different regimes are each governed by different consideration of laws, ranging from statute, custom and the Constitution. Further, each of the three different regimes is characterised by its own set of formalities and rights and obligations for the parties to the marriage which are discussed in detail below.

### **6.1.1 Statutory Marriage<sup>11</sup>**

The marriage contract under this regime is principally regulated by the Marriage Act. The Act was originally passed as the Marriage Ordinance in 1902, but came into force in 1903. It was originally intended to regulate the marriages of the Caucasian British working in the colonial administration of the Crown, white estate owners and missionaries. This regime has inherited very complex procedure on preliminary formalities on celebration of marriage; and the requirement for the actual celebration of a marriage.

#### **6.1.1.1 Preliminary Formalities**

Before a marriage under this regime can be solemnised, a notice<sup>12</sup> must be issued to the Registrar of Marriages specifying the intention of the parties to marry. Once the notice has been received by the Registrar of Marriages, he or she may<sup>13</sup> issue a Certificate enabling the parties to proceed with lawfully celebrating their marriage. The Certificate is proof that the parties have complied with the preliminary requirements of the Act. In circumstances where there is proof that there is no legal impediment to a proposed marriage and, where necessary, consent has been obtained, the Minister may grant a special licence to marry. The special licence under these circumstances has the same effect as the Registrar's Certificate.<sup>14</sup>

The purpose of the notice is to enable any person who has a legal objection to the marriage to lodge the objection with the Registrar of Marriages. This objection is called a caveat and may be entered either by a person whose consent to marriage is required under the Act<sup>15</sup> or persons who, by just cause, have knowledge as to why the marriage should not take place. The effect of a caveat is that no Registrar's Certificate may be issued until the caveat is removed.<sup>16</sup>

<sup>11</sup> Elsewhere in the Report, this type of marriage will be referred to as "civil marriage" under the new scheme of the laws on marriage, divorce and family relations. *See* also footnote 54.

<sup>12</sup> Section 7 of the Marriage Act.

<sup>13</sup> This depends upon whether the conditions set out in section 11 of the Marriage Act are satisfied. These conditions are that: one of the parties must be ordinarily resident in the district where the marriage is to be celebrated 15 days prior to the issue of the certificate; each of the parties is 21 years of age or older; the parties do not fall within the prohibited degrees of relationship; and the parties are single or if married at custom, they are married to each other.

<sup>14</sup> Section 14 of the Marriage Act.

<sup>15</sup> Section 16 of the Marriage Act.

<sup>16</sup> A caveat may either be removed by summary procedure in the High Court or, if the grounds for entering the caveat are unsatisfactory, it may be removed by the Registrar of Marriages.

### 6.1.1.2 The Celebration itself

After the issuance of a Registrar's Certificate or a Minister's special licence or after the removal of a caveat, the marriage may then be celebrated. Celebration of the marriage can either be by a minister of a religion either in a licenced place of worship or specially authorized premises; or by the Registrar of Marriages. After the celebration, the official officiating the marriage must issue a Marriage Certificate.<sup>17</sup> The effect of a Marriage Certificate and entry in the Marriage Register Book<sup>18</sup> is primary evidence of the marriage.

### 6.1.1.3 Capacity to Marry

In terms of age, under the Act, persons who are at least twenty one years of age can validly enter into a marriage contract.<sup>19</sup> Where a person is under the age of twenty one years, he or she must obtain consent from a parent before a licence can be issued.<sup>20</sup> If either parent is incapable of giving consent, either a minister of religion, a Judge of the High Court, or a District Commissioner may give consent instead.<sup>21</sup>

As regards sex, the Act presupposes a heterosexual union. Sex is however not easy to determine as advances in surgical procedure have made it possible for persons to undergo "sex-change" operations. The position at common law, which applies to Malawi, is that the sex of a person is determined at birth.<sup>22</sup>

As regards marital status, marriages under the Act are strictly monogamous as bigamy is an offence.<sup>23</sup> A marriage will therefore be void under the Act if either of the parties was already married at custom to a different person or was married under any other law and that marriage is still subsisting.<sup>24</sup> However, where persons were initially married at custom and subsequently marry each other again under the Act, the legal consequences of such marriage are that the divorce can only be determined under statute while matters of custody of children will be determined by customary law.<sup>25</sup>

Lastly, the Act specifies prohibited degrees of relationship referred to as prohibited degrees of kindred and affinity. These prohibited degrees of relationship prevent marriages of persons related either by blood or marriage. The law nonetheless makes exception allowing a man to marry the sister or niece of a deceased wife.

### 6.1.2 Customary Marriage

Customary law varies from area to area and there is therefore no single Malawian customary law. Customary marriages are potentially polygamous and

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<sup>17</sup> Sections 26 and 29 of the Marriage Act.

<sup>18</sup> Section 33 of the Marriage Act.

<sup>19</sup> Section 19 of the Marriage Act.

<sup>20</sup> *ibid.*

<sup>21</sup> Section 22 of the Marriage Act.

<sup>22</sup> *Corbett v. Corbett* (1888) 13 P.D. 136.

<sup>23</sup> Section 43 of the Marriage Act.

<sup>24</sup> See *Chithyola v. Chithyola* Civil Cause Number 394 of 1980 (Unreported).

<sup>25</sup> See *Kamcaca v Nkhota* (1966-68) 4 ALR Mal. 58.



require the involvement of the extended family. A marriage at custom transcends the union of the husband and wife and becomes a merger of two families.<sup>26</sup> Customary marriages are very common in Malawi. Quantitative data from a household survey<sup>27</sup> carried out in the country showed that almost 77% of respondents opt for *chinkhoswe* or customary officiation of their marriage while 23% or so opt for church officiation under the African Marriage (Christian Rites) Registration Act. This Act merely makes provision for the celebration of African marriages in accordance with Christian rites. All a church does under the Act is to register the marriage but the marriage remains a customary one in every respect. It is for this reason that customary law prevails and the marriages celebrated under the African Marriage (Christian Rites) Registration Act remain potentially polygamous.

#### 6.1.2.1 Formalities

The formalities and procedural requirements for entering into a customary marriage vary according to the custom of the various ethnic groups in Malawi.<sup>28</sup> Generally, the following formalities have to be complied with if the marriage is to be valid:

##### (a) *The agreement to enter into a marriage contract*

Ordinarily, the agreement to enter into a marriage contract is concluded by the parents of the parties. In practice, however, the groom proposes and the bride accepts a betrothal. Uncles who undertake the role of *ankhoswe* (marriage advocates) on either side are then entrusted with the negotiation of the marriage contract itself. In the interim period, while the groom may run errands or chores at the bride's home, he is not allowed to consummate the relationship.

##### (b) *Consent*

Consent may take any of these three forms:

- First, consent of the parties is vital in all cases as the Constitution expressly requires that no person shall be forced to enter into a marriage.<sup>29</sup>
- Second, consent of the parents is very important especially in virilocal societies where it is a critical formality in the negotiation of the marriage contract.
- Lastly, consent of the marriage advocates is also crucial to the validity of the marriage.

<sup>26</sup> See Prof. R.T. Nhlapo at footnote 7 in this Report.

<sup>27</sup> Ngwira *et al* (2002) *Women's Property and Inheritance Rights in Malawi*. Draft Copy. Zomba: University of Malawi, Gender Studies Unit, p. 17.

<sup>28</sup> For example, under the Asiatics (Marriage, Divorce and Succession) Act, non-Christian Asiatics in Malawi may marry and divorce in the manner customary in Malawi among persons professing the religion of either party to the marriage.

<sup>29</sup> Section 22 of the Constitution.

(c) *Capacity*

There is no specific age requirement before one can enter into a marriage at custom. For most ethnic groups puberty and not age tends to be the major determining factor. For other groups such as the *Lomwe* and the *Yao* in Southern Malawi, graduation from an initiation rites ceremony is the critical prerequisite to marriage.

Differences abound as to the prohibited degrees of kindred and affinity among the different ethnic groups in Malawi. The prohibitions are generally more flexible under customary law than statutory law. Under the customary law obtaining among the *Sena* in Nsanje,<sup>30</sup> for example, a man can marry his niece (the daughter of his sister) after his wife's death.<sup>31</sup> Among the *Chewa*, it is not uncommon for first cousins to marry if the siblings that make up one of their parents are not the same sex (each of the children of a brother and sister can marry but each of the children of a brother and a brother or a sister and a sister are prohibited from marrying each other).

In some ethnic groups, sanity is an explicit prerequisite to marriage. Suffice to say that sanity remains an implicit prerequisite to marriage in all ethnic groups in Malawi.

### 6.1.3 Marriage by Repute or Permanent Cohabitation

The third regime of marriage is marriages by repute or permanent cohabitation. These marriages are recognised under subsection (5) of section 22 of the Constitution. Subsections (3) and (4) of section 22 of the Constitution accord all men and women the right to marry and found a family and prohibit forced marriages respectively. Subsection (5) of section 22 of the Constitution extends the application of the rights and freedoms in subsections (3) and (4) to "all marriages at law, custom and marriages by repute or permanent cohabitation". This is the only reference in the Constitution to marriages by repute or permanent cohabitation and no guidance is given as to how such marriages may be contracted or dissolved.

In the absence of express statutory or constitutional procedural guidelines, the courts have tended to treat marriages by repute or permanent cohabitation not as marriage *per se*, but as a default position, which enables cohabiting couples to access the same rights and privileges as couples who are formally married under statute or at custom.<sup>32</sup> What emerges therefore is that the courts exercise unfettered discretion in determining whether a marriage by repute or permanent cohabitation exists.

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<sup>30</sup> *Gomani v. Simbi* Civil Appeal Number 28 of 1978 (Unreported).

<sup>31</sup> Cf. section 34 (1) of the Marriage Act.

<sup>32</sup> The entrenched English law position was that parties purportedly married by repute or permanent cohabitation had no greater rights over and above those possessed by a brother or sister living together. In such relationships, parties often found themselves unable to enforce rights which they would otherwise have but for the involvement of fornication which branded them immoral and against public policy: *See Upfill v Wright* [1911] 1 KB 506 and also *Diwell v Farnes* [1959] 2 All ER 379. The position in England has since changed through progressive case law: *Cooke v Head* [1972] 2 All ER 38, CA; *Heglibiston Establishment v Heyman* [1977] 121 Sl. Jo. 851, CA and under statute: the Inheritance (Provision for Family and Dependents) Act, 1975; Domestic Violence and Matrimonial Proceedings Act, 1976.

Case law giving cohabiting couples rights and privileges ordinarily accruing to persons under a marriage contract predates the Constitution of 1994 and can be traced to 1964 when in *Nelson v Magombo*,<sup>33</sup> the Court presumed the couple to be married even though no marriage ceremony had taken place. The Court relied on the fact that the couple had cohabited for a period of seventeen years. Case law in this regard has however been inconsistent. In the later case of *Khembo v Khembo*,<sup>34</sup> the court refused to recognize the cohabitation that had taken place as a marriage and therefore only granted the petition for maintenance in favour of the children of the association and not the woman petitioner as no marriage had taken place at custom in the presence of marriage advocates as is required at custom. On the other hand, in *Gertrude Lunguzi et al. v Sera Lunguzi and Lucy Mauluka*,<sup>35</sup> the Court accepted that the co-respondent and the deceased had cohabited as wife and husband for eleven years and the co-respondent was entitled to inherit the deceased estate as a spouse.

While length of cohabitation has been central to the decisions of the courts, it is not as automatic a condition as *Khembo* demonstrates. The English common law position is that a presumption of a marriage by repute or permanent cohabitation depends on the facts of each case for purposes of enjoying property rights and rights of succession or inheritance.

## **6.2 Rights and Obligations of Parties under a Marriage Contract**

### **6.2.1 Statutory Marriage**

#### **6.2.1.1 Right of Consortium**

##### *(a) Mutual Identity*

Mutual identity is an aspect of the right to consortium. Parties to a marriage contract have a legitimate expectation to share a common domestic life and to share a mutual identity.

Historically, a female spouse is entitled to use her husband's surname. A female spouse is not in breach of the law if she retains her maiden name.

The other dimension to mutual identity is the implication for the citizenship of spouses. Presently, a "foreign husband" cannot acquire Malawi citizenship.

##### *(b) Right to share a common home*

Parties to a marriage contract have a right to share a common home. The Commission observed that it is not always possible in some cases for parties to share a common home and long periods of separation may form acceptable grounds of divorce.

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<sup>33</sup> (1964–1966) ALR Mal. 134.

<sup>34</sup> Civil Appeal No. 16 of 1969 (Unreported).

<sup>35</sup> Civil Cause No. 1750 of 1998 (Unreported).

The Commission noted that it is problematic for a marriage of a Malawi woman and a foreign husband, for example, to enjoy the right to share a common home.

(c) *Right to Consummation*

It is a requirement that marriage must be consummated. Lack of consummation may constitute a ground for divorce.

The Commission recommends that parties to a marriage contract may withdraw consummation on reasonable grounds, for example, on account of ill-health; post-natal recuperation; or post-surgical convalescence.

(d) *Mutual Marital Confidences*

The Commission noted that the common law position regarding information acquired by a spouse by reason of cohabitation is privileged.<sup>36</sup> However, the privilege is not absolute and information may be divulged if it is in the interests of justice to do so.<sup>37</sup>

### 6.2.2 Customary Marriage

In addition to the four aspects of the right to consortium, which are similar in effect at customary law as under statute, parties to a customary law marriage also enjoy the following rights—

#### 6.2.2.1 Right to Accommodation

A husband is obliged to provide a house for his wife or wives.

#### 6.2.2.2 Right to Maintenance

A husband is obliged to support his wife or wives and children by providing for their needs.

#### 6.2.2.3 Obligation to Discharge Domestic duties

A wife is obliged to take care of the household and generally take care of the children.

### 6.2.3 Marriage by Repute or Permanent Cohabitation

Whether any of the above rights and obligations are available to parties whose marriage is classified as a marriage by repute or permanent cohabitation is entirely at the discretion of the courts. For example, in both *Nelson v. Magombo* and *Lunguzi*, the Court held that a marriage existed even though no formalities had taken place and the widows in both cases were entitled to inherit property of their deceased husbands.

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<sup>36</sup> See *Argyll v Argyll* [1965] All ER 611;619.

<sup>37</sup> See *Rumping v DPP* [1962] 3 All ER 256; *Theodoropoulos v Theodoropoulos* [1963] 2 All ER 772; section 194 of the Criminal Procedure and Evidence Code (Cap.8:01); and, in cases of divorce proceedings, for example, *R v Algar* [1953] 2 All ER 1381 and *R v Young* (1851) 5 Cox CC 296.

### 6.3. Maintenance

The duty of one person to support another originates from common law. This duty arises whenever the relationship between the parties is such as to create such a duty between them. The relationships which give rise to a duty of support by operation of law are those of husband and wife, parent and child, grandparents and grandchildren and brothers and sisters.<sup>38</sup> The common law duty arises when one of the parties to the relationship is unable to support himself or herself and that the person from whom support is claimed is able to provide the required support.

The Laws of Malawi also contain statutory provisions with regard to maintenance as a consequence of marriage, the most significant of which are contained in the Married Women (Maintenance) Act. However, this Act does not provide for the right to maintenance in the absence of any “wrongdoing” by the husband<sup>39</sup> nor does it apply where the husband and wife reside together.<sup>40</sup> In effect, the application of the Act is based upon “fault” of only one of the parties to the marriage; namely, the husband.

At custom, however, a husband has a duty to provide the wife with all household amenities while the wife has a corresponding duty to perform domestic chores for the family. The husband’s duty to maintain his wife includes provision of a house.<sup>41</sup>

### 6.4 Custody of Children

Custody of children under a marriage contract arises by virtue of the Constitution and applicable international law in the sense that as far as possible, the law provides that children have a right to know, be cared for and to be raised by their parents.<sup>42</sup>

### 6.5 Termination of a Marriage contract

A valid marriage may only be terminated by the death of one of the parties or by a decree of dissolution or divorce pronounced by a court of competent jurisdiction.

#### 6.5.1 Death and Presumption of Death

Death obviously terminates a marriage contract celebrated under the Marriage Act. In cases of disappearance (or absence) for a period of seven years there is a legal presumption of death.<sup>43</sup> What is important under the statute is the petitioner’s belief. In *Thompson v Thompson*,<sup>44</sup> Sachs, J., held that nothing must have happened during the period of seven years from which the petitioner, as a

<sup>38</sup> See South African Law Reform Commission (1998) *Interim Report on Maintenance. Project 100*, p. 3.

<sup>39</sup> See section 3 of the Married Women (Maintenance) Act.

<sup>40</sup> See section 4 of the Married Women (Maintenance) Act.

<sup>41</sup> *Matimati v Chimwala* (1964-66) 3 ALR Mal. 34.

<sup>42</sup> See section 23 of the Constitution and Articles 5 and 7 of the Convention on the Rights of the Child.

<sup>43</sup> See section 14 of the Divorce Act.

<sup>44</sup> [1956] 1 All ER 603.

reasonable person, would conclude that the other spouse was still alive. The position at custom in light of practices such as *kulowa kufa*<sup>45</sup> is not so definite as to termination of marriage by reason of death.<sup>46</sup>

### 6.5.2 Divorce

The law regarding the termination of a marriage through pronouncement by a court of law depends on the type of marriage. The principal legislation governing the termination of a statutory marriage is the Divorce Act. The Act was enacted in 1905 as the Divorce Ordinance in order to govern the termination of marriages celebrated under the Marriage Ordinance, 1902. Termination of such marriages is possible only upon proof of at least one of the grounds provided for under section 5 of the Divorce Act.

In theory, it is not easy to terminate customary marriages and some commentators go as far as saying that customary marriages are indissoluble.<sup>47</sup> Customary law, however, does not oblige parties to remain in a marriage if they do not so wish. It is a prerequisite that before a customary marriage is dissolved there should be evidence of an attempt at conciliation.<sup>48</sup>

Termination of customary marriage cannot be discussed along the lines of “grounds for divorce” in the sense of conditions to be proved to the satisfaction of a court in the technical sense of grounds under the Divorce Act. Nevertheless, acceptable reasons for divorce are important.<sup>49</sup>

There are two schools of thought as to whether a customary marriage may be terminated extra-judicially or that in all cases there must be a decree absolute issued by a court of competent jurisdiction.<sup>50</sup>

As regards marriages by repute or permanent cohabitation, there are no express grounds of terminating such a marriage. Termination in such cases therefore remains at the discretion of the courts after taking all the circumstances into account.

## 6.6 Conclusion

Having considered the current laws on marriage and divorce, the Commission noted a number of gaps in the law which have been discussed in

<sup>45</sup> Wife inheritance by a brother of a deceased husband.

<sup>46</sup> See Nhlapo, above at footnote 7; *The Gender Overview*, p. 36-37. Practices like *kusudzula* (which literally means “release” in respect of a widow) entail that, in appropriate cases, death may terminate a customary marriage.

<sup>47</sup> See Nhlapo, above at footnote 7, p. 116.

<sup>48</sup> *Namate v Namate* (1978–80) 9 MLR 334.

<sup>49</sup> Being found in a lonely dark spot at night with somebody's wife may lead to an inference of adultery: *Mguku v Kamvazaana* Civil Appeal Number 430 of 1980 (Unreported); failure to have sexual intercourse with wife: *Gondwe v Moyo* Civil Appeal Number 21 of 1979 (Unreported).

<sup>50</sup> See rule 39 (2) of the Traditional Courts (Procedure) Rules under the Traditional Courts Act (Cap. 3:03); *Chitekwe v Navicha* Civil Appeal No. 14 of 1965 (Unreported), where it was held that private, unilateral and extra-judicial divorces are invalid. Cf. *R v Karonga* (1923–60) 1 ALR Mal. 212, where it was held that if the parties agree, a village headman can end the marriage. In light of section 41 of the Constitution (on access to justice and legal remedies) and subsection (2) of section 103 of the Constitution (on the jurisdiction of the courts over all issues of a judicial nature), extra-judicial divorces are unconstitutional.

relation to the specific findings and recommendations the Commission is making in this Report. In its specific findings and recommendations, the Commission was guided by the following strategic principles—

- *Non-Discrimination:* Women's rights focus mainly on the human rights principle of non-discrimination because, despite various human rights instruments, extensive discrimination against women continues to exist. The Convention on the Elimination of all Forms of Discrimination Against Women, to which Malawi is a signatory, clearly makes non-discrimination an underlying principle. Malawi must undertake appropriate measures in developing and following policies and legislation that eliminate discrimination against women.
- *Affirmative Action:* Temporary special measures must be adopted to accelerate equality between men and women.
- *Identification and elimination of discrimination against women:* Actively engage in the assessment and analysis of legal, social and other norms and practices and effectively eliminate them to promote gender equality.
- *Service facilitation for the well being of every woman as a woman:* Provide service to address the needs of every woman as woman.
- *Prohibition of practices that demean women:* Eliminate all prejudices, customary and all other practices that are based on gender stereotyping or inequality between the sexes.
- *The interests of children must be a primordial consideration in all cases:* Family education must include proper understanding of maternity as a social function and the common responsibility of female and male people in the upholding and development of their children.
- *Women's participation in all spheres:* A woman must participate in political, civil, social, economic, cultural and other decisions and actions at all levels.
- *Priorities for girls and rural women:* Taking into account the discrimination and particular problems faced by such women and ensure that they enjoy their human rights.

However, since gender as a concept is not only concerned about the rights of women and girls,<sup>51</sup> the Commission emphasised the following three main principles in this work in order to achieve a general, gender-based law reform that incorporates the welfare, interests, dignity and participation of women and men. These principles are—

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<sup>51</sup> The current practice requires focus on such rights.

- *Non-Discrimination* in the enjoyment of human rights and development for girls, boys, men and women.
- *Equal participation* of both men and women.
- *Affirmative action* to achieve gender equality and combat discrimination.



## 7.0 SPECIFIC FINDINGS AND RECOMMENDATIONS

### 7.1 ESTABLISHMENT OF A UNIFIED REGIME ON THE LAW ON MARRIAGE

The Commission was of the view that the current status of the law on marriage is unsatisfactory as it is determined by the type of marriage and each regime of marriage has a different set of rights and obligations. This creates various problems in terms of equality which are further compounded by the fact that the laws governing the three regimes are derived from different sources<sup>52</sup> making them inaccessible and confusing for the majority of the population. It was not surprising to the Commission that most people are unaware of the existence of the three regimes and of the differences in rights and obligations pertaining to each regime. The Commission therefore recommends that there must be one law in Malawi that consolidates statutory and customary laws on marriage and divorce. This entails the repeal of the statutory laws on marriage and divorce; namely: the Marriage Act, the African Marriage (Christian Rites) Registration Act, the Asiatics (Marriage, Divorce and Succession) Act, the Divorce Act, the Married Women (Maintenance) Act, and the Maintenance Orders (Enforcement) Act; and those aspects of customary laws on marriage and divorce governing the rights and obligations of the parties, maintenance, custody of children and divorce.

The Commission recommends that the proposed new law retains the current marriage regimes in so far as the preliminary formalities for entering into marriage are concerned. However, the rights and obligations of parties to a marriage under the new scheme to any marriage under it, regardless of the applicable formalities under which the marriage was contracted, shall remain the same.

Further, the Commission recommends that the proposed new law should identify and state the types of formalities that may be validly followed by parties under a marriage contract: the capacity of parties to enter into a marriage contract; matters of formality under a marriage contract; the rights and obligations of parties under a marriage contract during the subsistence of and at the dissolution of their marriage; and maintenance of parties during the subsistence and dissolution of marriage.<sup>53</sup>

In addition, the Commission was of the view that the name of the proposed new law should reflect the fact that it shall go beyond the regulation of the relationship of a husband and wife or two persons living together in a conjugal relationship as the new law shall regulate other aspects of a family relationship. In this vein, the Commission recommends that the name of the new Act shall read as follows—

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<sup>52</sup> Statute, customary law, the common law and the Constitution.

<sup>53</sup> This position reflects the philosophy behind Article 16 of the Universal Declaration of Human Rights and Article 23 of the International Convention on Civil and Political Rights. *See also The Gender Overview*, p. 36.

### **Marriage, Divorce and Family Relations Act.**

In light of the recommendation regarding the name of the Act, the long title shall read as follows—

**“An Act to make provision for marriage, divorce and family relations between spouses and between unmarried persons, their welfare and maintenance and that of their children; and for connected matters”**

In light of the recommendation regarding the name of the Act, the short title to the Act shall read as follows—

**This Act may be cited as the Marriage, Divorce and Family Relations Act.**

#### **7.2 STATUS AND EFFECT OF CURRENT MARRIAGE REGIMES UNDER THE PROPOSED NEW ACT**

The Commission observed that the present state of the law of marriage perpetuates inequalities due to the differences between the rights and obligations available to spouses under each regime of marriage. The lack of certainty as to the extent, if any, of rights and obligations available to spouses married by repute or permanent cohabitation further exacerbates this inequality. The Commission noted that the State and society have a duty to protect all the parties to a marriage contract in order to realise their rights under a marriage.

Consequently, the Commission recommends a provision on the types of marriage that will be recognized under the proposed new law to read as follows—

<b>Marriages recognized under the Act</b>	<p><b>(1) A marriage recognized under this Act shall be either—</b></p> <ul style="list-style-type: none"> <li><b>(a) a civil marriage;<sup>54</sup></b></li> <li><b>(b) a customary marriage;<sup>55</sup></b></li> <li><b>(c) a religious marriage;<sup>56</sup> or</b></li> <li><b>(d) marriage by repute or permanent cohabitation.</b></li> </ul> <p><b>(2) A marriage conducted in accordance with the laws of another country, where one or both of the parties is subject to the laws of that country, shall be recognized in Malawi as a valid marriage except where the marriage is between parties of the same sex.</b></p>
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<sup>54</sup> A “civil marriage” means a marriage celebrated by the Registrar of marriages or a person delegated by him or her under statute.

<sup>55</sup> A “customary marriage” means a marriage celebrated in accordance with rites under customary law of one or both of the parties to the marriage.

<sup>56</sup> A “religious marriage” means a marriage celebrated by a cleric in accordance with the recognized rites of a religion, religious body, denomination or sect to which one or both of parties to the marriage belong.

**(3) All marriages recognized under this Act shall have the same legal status.**

**(4) Without prejudice to any procedures prescribed for marriage under this Act, any institution or procedure that traditionally facilitates the celebration of a customary marriage shall continue to be recognized as such under this Act.**

The Commission recognized that there may be exceptional circumstances necessitating the recognition of marriages celebrated in accordance with preliminary formalities not envisaged by the proposed new scheme of the law. In this regard, the Commission recommends that marriages of members of the Defence Force should also be recognized as valid marriages under the proposed new law. The Commission therefore recommends the following new provisions—

Validity of  
marriages of  
members of  
the Defence  
Force serving  
abroad

**(1) A marriage of a member of the Defence Force celebrated before a cleric or any other person in a foreign territory where that member is on a tour of duty shall be a valid marriage.**

**(2) Where a marriage purports to have been celebrated as specified under subsection (1), it shall not be necessary in any legal proceedings for purposes of the determination of the validity of the marriage—**

**(a) to prove the authority of the person by or before whom it was celebrated;**

**(b) give any evidence of want of authority.**

The Commission recognized that since the proposed new law introduces equal rights and obligations to all married couples regardless of the formalities that they went through, it will be unfair for couples who celebrated their marriages before the new Act comes into operation not to benefit from it. The Commission considered that in fostering the right of equality before the law granted under the Constitution,<sup>57</sup> all parties who celebrated their marriages before the new law comes into operation should also benefit from equal treatment in terms of rights and obligations of parties to a marriage under the proposed new law. The Commission therefore recommends that the new law applies retroactively to the marriages celebrated prior to its coming into force. This will allow those Parts of the new law governing the rights and obligations of parties to a marriage, divorce, maintenance and custody of children to apply to all marriages regardless of the date those marriages were celebrated.

The Commission therefore recommends the following provision—

Application

**... This Act applies to marriages contracted on or after the day it comes into operation; but section . . .<sup>58</sup> shall apply to all marriages regardless of the date they were celebrated.**

<sup>57</sup> See section 20 of the Constitution.

<sup>58</sup> This is to facilitate the retroactive application of the sections on the rights and obligations as well as the sections on divorce, maintenance and custody of children.

### 7.3 ISSUES FOR REFORM

The Commission also observed that in addition to the need for a unified and comprehensive law on marriage, divorce and family relations each of the different marriage regimes is replete with its own gender-related problems that must be addressed in the proposed new law. A detailed discussion of these problems follows.

The Commission,<sup>59</sup> identified three gender-related problems with customary and statutory marriages. Customary marriages are potentially polygamous. In practice, what is common is polygyny, that is, the practice of a husband being married to more than one wife at the same time. Polyandry, that is, the practice of a wife being married to more than one husband, is nonexistent in Malawi. In this respect, customary law favours men. Although custom provides that polygyny must be with the consent of the first wife, there is little or no protection at custom for the first wife if the husband insists on marrying another woman without her consent. As marriage is a form of social and economic security, many women have no choice but to remain in the marriage regardless of the fact that they may be opposed to polygyny. The Commission was also of the view that on the question of polygyny, the Constitution fails to comply with international standards in discouraging polygamy. States are required to enact legislation prohibiting polygamy.<sup>60</sup>

The second problem is that the law refuses to accept that Christian men and women who solemnise their marriages under religious rites intend their marriages to be monogamous. The effect of section 3 of the African Marriage (Christian Rites) Registration Act is that any marriage celebrated under it is a customary marriage, despite its registration under Christian rites. Consequently, such a marriage is potentially polygamous. The cumulative effect of the Act is therefore to force couples wishing to contract a monogamous marriage to abandon custom and marry under the Marriage Act. Again, the gender imbalance in this scenario negatively impacts women who are constantly faced with the threat that their husbands may marry another wife and therefore have unequal bargaining power in the relationship. Further, as evidenced through information brought to the attention of the Commission by a “victim”, most women are unaware that marriages celebrated in a Christian church remain customary and are shocked to find they have no statutory redress if their husbands choose to marry another wife.

The third and last problem relates to the differences between the rights and obligations of marriage available under the different marriage regimes. As most people, especially women, are unaware that there are different marriage regimes and different rights and obligations pertaining to each regime, the ability to make informed choices on the type of marriage they may want to enter into is seriously undermined.

The Commission also noted that the difference between marriages by repute or permanent cohabitation, on the one hand, and marriages under statute or custom, on the other, is that the former is only recognized after two people

<sup>59</sup> *The Gender Overview*, p.28.

<sup>60</sup> See also subparagraphs (d) and (e) of Article 7 of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa.

have lived together or have been reputed to have conducted themselves in a manner similar to spouses. There is no requirement of formality and there is no guarantee that the courts will decide that any such relationship was in fact a marriage. The current scenario consequently causes hardship to parties in such marriages, especially women, who may find themselves with no right to succession or inheritance; distribution of property, maintenance or even to custody of children at the dissolution of the marriage. The Commission resolved that the proposed new law should regulate marriages by repute or permanent cohabitation by setting clear guidelines on the requisite extent of repute or length of cohabitation necessary to constitute such a marriage.

### 7.3.1 CAPACITY TO MARRY

#### 7.3.1.1 AGE

The Commission considered the lack of consistency as to the age of marriage within the various regimes of marriage unsatisfactory. As noted earlier, only statutory marriages set the age of 18 years as the minimum age for marriage.<sup>61</sup> Both customary marriages and religious marriages<sup>62</sup> have no fixed age requirement and the attainment of puberty tends to be a critical determinant of capacity to marry.

Further, the Commission noted that under subsection (6) of section 22 of the Constitution, a person of eighteen years of age may enter into a marriage without first seeking the consent of his or her parents. In addition, under subsection (7) of section 22 of the Constitution, persons aged between fifteen and eighteen years must obtain parental consent before they can validly enter into a marriage contract. The Commission was aware that the Commission on the Technical Review of the Constitution recommended that the minimum age for parental consent for purposes of marriage should be raised from fifteen years of age to sixteen.<sup>63</sup> At one point, the Commission considered raising the minimum age for marriage to the age of twenty-one years. Upon consideration of submissions made by members of the Asiatic community specifically consulted on the issue as well as respondents consulted at regional level,<sup>64</sup> the Commission recommends that the new law should not allow marriages for persons aged below eighteen years. Consequently, the need for parental consent for marriages of persons aged between fifteen and eighteen years of age also falls away under this recommendation. The Commission found further justification in its approach by reference to the Convention on the Rights of the

<sup>61</sup> Section 19 of the Marriage Act.

<sup>62</sup> See, for example, the Asiatics (Marriage, Divorce and Succession) Act.

<sup>63</sup> See Malawi Law Commission (1998) *Report on the Technical Review of the Constitution*. Malawi Government Gazette Extraordinary, p. 259.

<sup>64</sup> Regional consultations were undertaken by the Commission in the Eastern Sub-region, Southern Region, Central Region and the Northern Region of Malawi. Respondents from an average of three districts were consulted in each region and one village was visited in each district. The proposed minimum ages for marriage in the areas consulted were as follows: Eastern sub-Region (Zomba, Machinga and Balaka)–Girls, 18 and Boys, 21; Central Region (Mchinji, Dedza and Dowa)–Girls, 18 and Boys 20-24; Southern Region (Mwanza, Blantyre and Thyolo)–Girls, 18–20 and Boys, 21–26; Northern Region (Karonga, Nkhata bay and Mzimba)–Girls, 18 - 20 and Boys, 22-25.

<sup>65</sup> Article 1.

Child which provides that a child is a person who is below the age of eighteen years unless the municipal law provides for an age of majority at an earlier age.<sup>65</sup>

Whilst the Commission appreciated the concerns raised by members of the Asiatic community that marriage at a later age than the immediate onset of puberty encourages the sin of illicit sex under Islam, reproductive health implications of early marriage on the girl child also had to be considered. The Commission heard from several health personnel during the regional consultations who have had actual experience with child-birth related complications in teenage mothers which complications sometimes result in the death of either the mother, the child or both. The health personnel described the condition, *obstetric fistula*, characterised by the abnormal opening between the vagina and bladder or rectum, as a common complication in young mothers.

There are many causes of *obstetric fistulae* including sexual violence such as rape or other sexual assault which causes direct trauma to a girl or a young woman. Other causes include poverty, early child bearing and malnutrition. According to the United Nations Population Fund (UNFPA),<sup>66</sup> the incidence of *obstetric fistulae* disproportionately affects very young and very poor women. Girls under the age of fifteen are 25 times more likely to have critical complications related to pregnancy than women in their 20s. Very poor women often may have complications related to poor nutrition and stunted growth and often are without access to emergency obstetric care.<sup>67</sup>

Reliable data on the incidence of *obstetric fistulae* are practically non-existent, although the problem has been reported throughout Africa and the Indian subcontinent. The World Health Organization (WHO) estimates that some 2 million women are living with *obstetric fistulae*, with an additional 50,000 to 100,000 new cases occurring every year. These figures are probably low, however, as many women suffering from the problem remain hidden and in shame. *Obstetric fistulae* should be considered a long-term disability as it is not uncommon for women to live with *obstetric fistulae* for decades.<sup>68</sup>

In the case of the girl child, marriage under the age of eighteen years is a health hazard because sexual relations under that age may result in a lot of health complications ranging from early contraction of HIV and AIDS and other sexually transmitted infections such as herpes simplex and human papillomavirus, tendencies to develop cervix cancer later in life or high probability of death, should she become pregnant. According to medical doctors from the National AIDS Commission who attended the National Consultative Workshop, a teenager's vagina is not well lined with protective cells as that of a mature woman. Her cervix may be more easily eroded and this potentially enhances the risk of HIV infection. In very young girls chances of sexual intercourse causing trauma is also very high. Unfortunately, girls and indeed parents and community members are not aware of such dangers as they all seem to think that puberty is an indication that the girl should begin to engage in sex.

<sup>66</sup> UNFPA, *Preventing Fistulae and other Disability*. Available from <http://www.unfpa.org/mothers/disability.htm>

<sup>67</sup> *ibid.*

<sup>68</sup> *ibid.*

Early marriage also has negative development implications. The attainment of the Millenium Development Goals; especially Goal 3, which emphasises the need for girl child education or the goal on Human Capital Development under the Poverty Reduction Strategy Paper may be elusive.

Lastly, the Commission also considered the cognitive development of both the girl and the boy child. The girl and boy child may not be mature, both physically and intellectually, to cope with the rigours of parenting, marriage and family life. The fact that respondents at the regional consultations suggested a higher minimum age for boys than for girls was an indication of the perception by society that boys mature at a slower rate than girls and should ideally marry at a later age. Respondents from the regional consultations also cited various incidents where boys have married at an early age and have failed to provide for and maintain a family with the result that their parents have had to step in and make all necessary provisions on their behalf. This places an unnecessary burden on families that are already struggling to cope with the rigours of life.

Having carefully considered the arguments for having two separate minimum ages for boys and girls, the Commission nonetheless decided to retain one standard age. The Commission was of the view that two separate ages as suggested by participants to the various consultations would be discriminatory and unconstitutional. Further, the Commission was not convinced that a boy has to be older in every marriage for the sole reason that he would be the bread winner and therefore needs to be mature as suggested by the participants. The Commission found this reasoning gender insensitive as the girl can also head a household and indeed provide for a family. The Commission finally recommends that a person entering into marriage must at least have attained the age of eighteen years. In deciding on that age, the Commission was of the view that at that age, a boy would have received a reasonable length of education and would have sufficient life skills to provide for a family. The negative reproductive health implications would also be reduced for the girl. It is the Commission's view that eighteen years is a suitable minimum age aimed at protecting children from early marriage. The Commission also considered the age of eighteen years as a sufficient compromise to the concerns about puberty raised by members of the Moslem faith.

The Commission was also aware that subsection (7) of section 22 of the Constitution permits marriages of persons aged between fifteen and eighteen years so long as there is parental consent. However, the Commission still maintains its recommendations that parental consent should be abolished and that eighteen years should be the minimum age for marriage. It is the Commission's view that the Constitution sets the minimum standard for the protection of children from early marriage. It would not be amiss for a law regulating marriage to set a higher standard. Nonetheless, the Commission also recommends that subsection (7) of section 22 of the Constitution should be

amended so that children aged below the age of eighteen years must be prohibited from entering into marriage.<sup>69</sup>

The Commission also recommends that subsection (5) of section 23 of the Constitution should be amended so that the threshold on the minimum age for “child” should be raised from sixteen years of age to “**eighteen**”. The Commission found justification to its approach by reference to the Convention on the Rights of the Child which provides that a “child” is a person who is below the age of eighteen years,<sup>70</sup> and the African Charter on the Rights and Welfare of Children which provides that protection against early marriage and betrothal should be effective and legally binding and eighteen years is the age stipulated for marriage.

In light of the foregoing, the Commission recommends the following provision on capacity to enter a valid marriage—

**Capacity to enter into a valid marriage      Two persons of the opposite sex who are both not below the age of eighteen years and are of sound mind may enter into marriage with each other.**

#### 7.3.1.2 SEX

The Commission observed that the scheme of the law on the various types of marriages in Malawi presupposes a heterosexual union. The Commission was aware of instances where persons have undergone “sex change” operations and the legal debates that ensue in those cases when it comes to capacity to marry.<sup>71</sup> The Commission was also aware of instances where persons of the same sex can validly enter into a marriage contract in some foreign jurisdictions.

The Commission maintains the position at common law as regards the sex of a person that sex is determined at birth hence sex for purposes of marriage will continue to be regarded as one’s sex at birth.<sup>72</sup> Such a determination of sex at birth avoids any potential problems caused by transsexuals or persons who have undergone sex-changing surgery later in life from marrying a person who prior to that sex-changing surgery was of the same sex as them. Further, the Commission recommends that marriages in Malawi must be heterosexual unions and therefore the law regulating marriages must prohibit homosexual unions. The Commission is fortified in making this recommendation as sodomy, a sexual offence usually associated with homosexuality, is a criminal offence in Malawi.<sup>73</sup> The Commission considered section 153 of the Penal Code and has made recommendations for its amendment. Those recommendations are discussed in this Report in the context of divorce.

<sup>69</sup> See *The Gender Overview*, p. 30. See also sub-Article (2) of Article 23 of the International Convention on Civil and Political Rights and Article 3 of the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages.

<sup>70</sup> Article 1.

<sup>71</sup> See the discussion on capacity to marry at p. 11 of this Report.

<sup>72</sup> *Corbett v Corbett*.

<sup>73</sup> See section 153 of the Penal Code (Cap. 7 : 01).



In light of the foregoing, the Commission recommends that sex be defined in the Interpretation section as follows—

**“sex”, in relation to the gender of a person, means the sex of that person at birth.**

#### 7.3.1.3 MARITAL STATUS

As noted elsewhere in this Report, the current position of the law in Malawi is that marital status is only an issue in relation to statutory marriages as provided for under the Marriage Act. A person can enter into a marriage contract under the Act if he or she is single in terms of the Act itself or at custom. Further, marriage under the Marriage Act presupposes a monogamous relationship as bigamy is an offence under the Act.<sup>74</sup> Hence, a marriage will be void under the Marriage Act if one of the parties to the marriage contract is already married whether under the Act or at custom.<sup>75</sup>

The Commission recommends that matters on divorce, maintenance and custody of the children should no longer depend on the status of the parties prior to the celebration of the marriage.<sup>76</sup> The Commission recommends that legal consequences of marriage in terms of divorce, maintenance, distribution of property and custody of children shall apply equally regardless of marital status.

The Commission further recommends that all marriages under the new scheme of the law shall be strictly monogamous. In this vein, the Commission proposes that all persons intending to marry shall first be required to prove their single marital status before the celebration of the marriage.

In order to enforce the precondition on single marital status, the Commission recommends the following new provision—

<b>Declaration of marital status prior to marriage</b>	<b>A person entering into a marriage under this Act shall first prove, by way of declaration before a registrar, that he or she is single.</b>
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Additionally, the Commission recommends that both the preliminary formalities and the formalities on celebration of marriage as set out in the Marriage Act in terms of notice should be incorporated into the proposed new law and shall apply to all marriages. The Commission took this view because by requiring parties to give notice of their intended marriage, any person who knows of any lawful impediment as to why the parties should not marry, is given an opportunity to place an objection or caveat,<sup>77</sup> preventing the marriage from going ahead. The requirement of notice in this respect will assist enforcing the

<sup>74</sup> See section 43 of the Marriage Act.

<sup>75</sup> See *Chithyola v Chithyola* at footnote 24.

<sup>76</sup> At present, where persons were initially married at custom and subsequently marry under the Marriage Act, the legal consequences of such marriage are that the marriage becomes a statutory marriage under the Act and divorce can only be determined under the Divorce Act while matters of custody of children will be determined by customary law.

<sup>77</sup> See sections 15, 16, 17 and 18 of the Marriage Act.

precondition of single marital status before a person can enter into marriage under the proposed new law. It will not be possible for a person who is already married to contract a subsequent marriage whilst the original marriage is still subsisting.

#### 7.3.1.4 POLYGAMY

The Commission deliberated at length on the issue of polygamy. The Commission observed that polygamy is prohibited only in respect of statutory marriages since bigamy is an offence under section 43 of the Marriage Act. Further, as noted elsewhere in this Report, polygyny, as an aspect of polygamy, is predominant at custom in Malawi as the prohibition of polygamy available under the Marriage Act is non-existent at custom. In view of the gender inequalities perpetuated by allowing only men under customary or religious marriages to marry more than one wife, the Commission has decided to universally outlaw polygamy. The Commission did not find the partial prohibition of polygamy under the law tenable.

The Commission was strengthened in its decision by the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women, to which Malawi is a party, which obliges State parties to discourage polygamous marriages.

During the regional consultations carried out by the Commission, ninety five per cent of the respondents cited more disadvantages than advantages of polygamy. These disadvantages (all based on gender inequality) included such issues as polygamy being a vehicle for suppressing women, a source of cheap labour, a cause of strife and misunderstanding within the family. The respondents also cited polygamy as one of the factors perpetuating poverty as men marry more wives and father more children than they can afford to reasonably maintain. Other respondents believed that polygamy helps in the spread of HIV and AIDS. The implications of HIV and AIDS infection in a polygamous family were considered quite serious as large numbers of a family may be wiped out by the pandemic.<sup>78</sup> In sum, it was widely agreed, even by practising polygamists, that there are very few advantages to a polygamous marriage.

The minority that advocated polygamy were mainly chiefs who cited customary rites pertaining to their chieftainship in justifying polygamy. There was however no consensus as to whether the customary rites cited are relevant today. Further, the advocates of polygamy proposed that it must be retained with stringent conditions such as creating legal obligations for a husband to provide a separate house for each spouse, spend equal time and money or resources on each spouse and her children and only marry a limited number of women, proportional to the man's resources.

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<sup>78</sup> See the National HIV and AIDS Policy which urges Government and civil society to promote and encourage monogamous marriages in light of the HIV and AIDS pandemic.

Members of the Asiatics community that were consulted by the Commission however cited religion (Islam) as providing an inalienable right to polygamy within the confines of the Qur'an.<sup>79</sup> Ultimately, it is the laws of Islam that govern the members of its religion. These members of the Asiatics community made specific reference to their right to freedom of religion as guaranteed by section 33 of the Constitution.

The Commission also had recourse to a South African Law Reform Commission Report<sup>80</sup> on the object of Islamic marriages. The Commission observed that prior to a landmark (South African) Supreme Court of Appeal decision in 1999,<sup>81</sup> a marriage contracted under Islamic law was not legally recognized in any form in South Africa. In the face of the new Republican Constitution in South Africa, the South African Law Reform Commission proposed a draft Bill regulating Muslim marriages separate from other types of marriage in that country. The Gender Commission noted that the South African Law Reform Commission proceeded on the basis that polygamy is undesirable and must be outlawed. Hence the draft Bill regulating Muslim marriages in South Africa has elaborate and rigorous conditions that a person wishing to enter into polygamy must satisfy.

The compromise in the draft Bill proposed by the South African Law Reform Commission, was to acknowledge that under Islamic laws polygamy is circumscribed and the legislature is permitted to regulate polygamy to ensure that it does not lead to abuse, hardship and oppression of women. In this regard, the Gender Commission initially decided to maintain polygamy for both customary and religious (especially Islamic) marriages.

The Commission's initial recommendation was to require any husband intending to contract a polygamous marriage to first prove to the satisfaction of the Registrar of Marriages that—

- (a) he is economically capable of maintaining his wife or wives and children at least at the same level;
- (b) he has made provision for a separate matrimonial home, save in exceptional circumstances, including that the current wife or wives have agreed to live together in the same home;
- (c) he is capable of giving the same treatment to all wives.<sup>82</sup>

Hence, the Commission's initial position on polygamy was allow the practice under the new law with restrictions aimed at protecting women from abuse, hardship or oppression.

However, the Commission revisited the issue with reference to its mandate to improve the welfare of women as the main victims of gender inequality and inequity. The Commission's initial decision to impose conditions or restrictions

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<sup>79</sup> A husband is required to love each wife equally, spend equal time and money or resources on each spouse and her children and he must only marry a limited number of women.

<sup>80</sup> South African Law Reform Commission (2003) *Islamic Marriages and Related Matters*. Project 59.

<sup>81</sup> *Amoa v Multilateral Motor Vehicle Academy Fund* [1999] (4) SA 1319 (SCA).

<sup>82</sup> Cf. section 66 of the Domestic Relations Bill, 2003 (of Uganda).

on the practice of polygamy was subsequently viewed as insufficient to curb the gender-related vices of polygamy pointed out by participants during the regional consultations.

The Commission having considered, in totality, the arguments for and against polygamy recommends that the practice of polygamy is unacceptable and must be abolished in its entirety. Polygamy is discriminatory. To the extent that polygyny is prevalent in Malawi over polyandry, men are permitted to take more than one wife but women are forbidden from taking more than one husband. Women are therefore denied the right to equality which is guaranteed by the Constitution.<sup>83</sup> The Commission is also mandated to look into the welfare and maintenance of children of a marriage or in a family setting. During the regional consultations that the Commission carried out, the participants made it very clear that it is very rare to find children of a polygamous marriage who are happy with the arrangement and are adequately cared for. Most children from polygamous families suffer, in some way, from neglect.

Imposing strict legal obligations on men to prove that they will be able to support all their children before they contract a subsequent marriage was considered by the Commission to be an insufficient safeguard against neglect. A man may be able to show sufficient means at the outset of contracting a subsequent polygamous marriage, but the practicality of the situation is that in due course, the number of children and wives may exceed the income or means of the man. Such situations may lead to destitution by women and children. The conditions precedent to entering into a polygamous marriage may be difficult to enforce.

Although customary law requires that men consult and indeed seek the approval of their wives before contracting subsequent polygamous marriages, in practice, this is never done. This situation is demeaning to women who are reduced to mere possessions or acquisitions as men continue to acquire more women without consultation. The Commission was of the view that creating conditions precedent for entering into a polygamous arrangement does very little to prevent the treatment of women as “property”. Due to the financial or material dependence of women on men,<sup>84</sup> it is unlikely that a wife, even if she appeared before the Registrar of marriages, would be able to voice a dissenting view or indeed admit to not having been consulted prior to the application. Wives are in a vulnerable position and may easily be coerced into making false statements. The Commission therefore resolved that the only way to prevent demeaning or degrading women in this respect is to prohibit the practice of polygamy.

The Commission also considered whether prohibiting polygamy would result in cultural or religious discrimination and thereby infringe the Constitution. Whilst the Commission acknowledges that freedom to manifest one’s religion is a collective and individual right guaranteed by the Constitution, it also recognizes that religion can in itself be a cause for discrimination against women and for taking away their fundamental human rights. Religion can

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<sup>83</sup> Section 20.

<sup>84</sup> See *The Gender Overview*, p. 33.

be interpreted or manipulated to control women.<sup>85</sup> Religion did not invent discrimination against women. The history of religions of the world reveal a predominance of patriarchy.

The Commission also noted that while freedom of religion is guaranteed under the Constitution, the mode of practising one's religion can be controlled by the State. Polygamy is not a religion. Polygamy may be a facet of some religions but in as far as it is shown that it in fact violates women's fundamental rights and dignity, it can be prohibited by the State. The Commission compared its recommendation to outlaw polygamy with the position in the United States of America where polygamy is outlawed but has a Constitution that guarantees freedom of religion.<sup>86</sup> Prohibition of polygamy can not be regarded as an infringement of this right. Malawi is a secular State and ultimately all persons within its jurisdictions are obliged to comply with its laws. It is the Commission's view that the prohibition on polygamy does not infringe upon any constitutional right.

In this vein, while recognizing the fact that the proposed new law shall also apply to marriages that will have followed formalities provided for at custom, the Commission considered that the observance of such customary formalities shall not entail that those marriages are potentially polygamous. The Commission therefore recommends that all parties entering into a marriage contract must be single and recommends the following new provision—

**Prohibition on  
polygamy**

**... No person shall be married to more than one spouse.**

#### 7.3.1.5 KINDRED OR AFFINITY

Section 34 of the Marriage Act outlines the degrees of relationship either by blood or marriage within which persons are prohibited from marrying each other. These relationships are known as the prohibited degrees of kindred and affinity.<sup>87</sup> Kindred refers to blood relationships and is restricted to a relationship between any two persons with a common ancestor no more remote than a great-great-grandparent. Affinity refers to a relationship by marriage.

The historical position at common law is that in cases of kindred prohibition is based on moral and genetic grounds.<sup>88</sup> In terms of eugenics,

<sup>85</sup> United Nations (2002) *Civil and Political Rights (Religious Intolerance): Report of the Special Rapporteur on Freedom of Religion or Belief in accordance with Resolution 2001/42 of the Commission on Human Rights*. Unofficial Summary in English.

<sup>86</sup> In *Reynolds v United States* (1878) 98 U.S. 145, the US Supreme Court held that a federal law that prohibited polygamy was constitutional even in the context of freedom of religion. See also *Cleveland v United States* (1946) 329 U.S. 14; U.S. Revised Code, section 5210 (1862). In any event, the Malawi Supreme Court of Appeal, in *Attorney General v Malawi Congress Party et al* MSCA Criminal Appeal Number 22 of 1996 (Unreported), has held that human rights jurisprudence in Malawi prohibits discrimination, in the literal sense of "different treatment", only if it is not reasonably justifiable.

<sup>87</sup> See Bromley on degrees of kindred and affinity.

<sup>88</sup> Medical science has documented many cases of severe genetic disorder causing physical or mental disability where the parents are closely related by blood. Jancar J & Johnson SJ (1990) "Incest and Mental Handicap". *J. Mert. Defic. Res.* 483-490.

marrying a relative increases the risk of giving birth to a child with a pair of abnormal or faulty genes. Every individual carries several abnormal or faulty genes. The harmful effect of such abnormality is usually shielded because genes come in pairs and the normal gene in the pair usually overrides the faulty gene. Thus the abnormal gene becomes suppressed or is recessive. Recessive genes only become a problem when they occur in pairs and such abnormality results in a birth defect. In the case of two totally unrelated people, they will usually have completely different abnormal genes. The children born to such a couple are thus unlikely to inherit two copies of the same faulty gene. As regards relatives however the proportion of shared faulty genes becomes higher as all their genes come from a common ancestor. It is for this reason that there is an increased risk of their child receiving a pair of their abnormal genes. For this reason, relationships of the whole or half blood are viewed with abhorrence, and it is immaterial that the parents of either or any person through whom the relationship is traced have not been married to each other.<sup>89</sup>

The Commission observed that under the present Marriage Act, certain degrees of kindred or affinity are prohibited from entering into a valid marriage. The law follows the guidelines on kindred and affinity obtaining under the law in England, especially the First Schedule to the Marriage Act, 1949 (of England). The Commission recommends the retention of the provisions on prohibited degrees of relationship. However, the Commission recommends that the guidelines on those degrees must be provided under the new law itself and need not make reference to an English statute.

Further, in light of the peculiar nature of society in Malawi, especially in the context of the extended family, the Commission recommends that first cousins should form part of the relations between whom marriage is prohibited based on kindred. The Commission was aware that in certain cultures, such as among the *Chewa*, marriage between first cousins is allowed if the siblings who are the parents of such first cousins are not of the same sex. As observed elsewhere in this Report, it is permissible among the *Chewa* for the son of a brother to marry the daughter of the sister to that brother. The Commission did not find the distinction on the grounds of the sex of the parents of the cousins a valid basis for permitting marriage of first cousins as the nature of the blood relationship remains the same.

The Commission goes further to recommend the addition of sisters and nieces of a wife (deceased or divorced) as persons that a man should not be allowed to marry. Similarly, the Commission recommends that a woman should not be allowed to marry the brother or nephew of her husband (deceased or divorced). This recommendation was made with a view to eliminating the undesirable cultural practices of widow inheritance or *chokolo*<sup>90</sup> practised by some ethnic groups that has contributed to the proliferation of HIV and AIDS.<sup>91</sup> Another consideration was that such marriage between such closely related people complicate the lines of relationship between children of the marriage.

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<sup>89</sup> See *R v Brighton Inhabitants* (1861) 1 B & S 447. See also *Bromley*, pp. 31–34.

<sup>90</sup> This is when a widow is married off either to a brother or an uncle of her deceased husband with a view to keeping the family wealth under the deceased estate in the family and as a way of ensuring that the children of the deceased are cared for by his family.

<sup>91</sup> See also the National HIV and AIDS Policy.

In light of the foregoing, the Commission recommends the following new provision—

Marriages within prohibited degrees of kindred and affinity	<b>... A marriage celebrated between—</b>
Third Schedule	<p><b>(a) a man and any of the persons mentioned in the first column of Parts I, II, and III of the Third Schedule;</b></p> <p><b>(b) a woman and any of the persons mentioned in the second column of Parts I, II and III of the Third Schedule,</b></p> <p><b>shall not be valid on the ground of kindred or affinity.</b></p>

#### 7.3.1.6 FORMALITY UNDER MARRIAGE CONTRACT

Formalities are an important part of any marriage contract. Following the strict requirements of any formality or ceremony ensures the validity of the marriage. The Commission noted that currently people either register their marriage with their local assembly through the office of the District Commissioner or the Registrar of Marriages or at a church. The formal requirements of such registration depend upon whether the marriage is one under the Marriage Act or at custom, all of which have different registration forms and requirements.

The Commission was also aware that some customary marriages are not registered even though all the necessary customary formalities are followed. It is mainly customary marriages that are celebrated at places of worship that tend to be registered, especially those governed by the African Marriage (Christian Rites) Registration Act. The Commission concluded that places of worship are very important and should be recognized in the new law as an important forum for the celebration of marriage.

Currently, the African Marriage (Christian Rites) Registration Act makes provision for the registration of marriages celebrated using Christian rites only. This position was considered to be discriminatory by members of the Islamic community<sup>92</sup> whose clerics at present have no official powers to issue marriage certificates upon solemnising a marriage. Further, the Commission did not consider it tenable that only places of worship that have been designated by the Minister should be able to grant marriage certificates as is the case under the Marriage Act. The Commission recommends that the law must allow for the validation of all marriages celebrated at all places of worship, regardless of religion, as long as the places of worship have been licenced by the Minister under the proposed new law.

<sup>92</sup> Views were presented by a representative from the Muslim Association of Malawi at a meeting the Commission held with members of the Asiatics Community at Capital Hotel in Lilongwe on 9 March, 2005.

During the deliberations of the Commission, some Commissioners raised concerns in light of the current increases in the number of cults and religious orders and the extent of the capacity of those cults or orders to register marriages. However, the Commission recommends that all religious institutions registered in accordance with the Trustees Incorporation Act (Cap. 5:03) or any other written law must be provided with a statutory standard form of marriage certificates under the law. Those religious institutions that have been duly registered and licenced under the new law shall be required to register marriages as agents of the Registrar of Marriages and shall be required to make returns to Government.<sup>93</sup> The Commission recommends that any religious institution failing to file returns of marriages shall have its licence revoked.

The Commission recommends the following provision—

Minister to  
license places  
of worship to  
celebrate  
marriages  
Cap. 5:03

**... (1) The Minister may, upon application, license any place of public worship to be a place for the celebration of marriages under this Act.**

**(2) Notwithstanding subsection (1), a place of worship shall not be licensed unless it is incorporated or registered under the Trustees Incorporation Act or any other written law.**

**(3) The Minister may at any time revoke the licence under subsection (1) if he or she satisfied upon reasonable grounds that a place is not fit for the celebration of marriages under this Act.**

**(4) The Minister shall give notice of the licensing of a place of worship or the revocation of the licence—**

**(a) in the *Gazette*; and**

**(b) to the person in charge of the place of worship.**

Further, the Commission noted that there are two types of formalities regulating civil marriages under the Marriage Act. These are the preliminaries leading to the celebration of the marriage and the procedure or requirements for the celebration of the marriage. The Commission recommends the retention of these formalities for marriages celebrated at the office of the Registrar of Marriages or the District Commissioner acting on his or her behalf. The Commission decided to retain these formalities as they are internationally recognized and would ease recognition by foreign countries of Malawian marriages celebrated in this manner. The Commission therefore recommends that the formalities provided for under sections 7 to 18 (on “Registration”); sections 31 to 33 (on “Evidence of marriages”); sections 37 to 39 (on “Marriages already celebrated”); and sections 43 to 53 (on “Offences and penalties”) of the Marriage Act must be incorporated into the new law to apply to civil marriages.

<sup>93</sup> The Commission was informed that Government has developed the National Registration Bill, 2005 which shall provide for mandatory registration of all births, deaths and marriages in Malawi.



As regards customary marriages, the Commission recommends that such marriages may continue to be celebrated at the offices of District Commissioner,<sup>94</sup> at churches or within the customary setting. The Commission however recommends that under the new scheme of the law, all marriages, even those that are formalised purely in a customary setting, must be registered. The position reached by the Commission is supported by the Convention on Consent to Marriage, Minimum Age of Marriage, and Registration of Marriages which requires, in sub-Articles (2) and (3) of Article 16, that all marriages must be compulsorily registered. Further, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa requires, in paragraph (e) of Article 7, that every marriage is to be recorded, where possible, in writing.

The Commission further recommends that these marriages must be registered at the office of a District Commissioner, at places of worship of any religion that have been authorised to register and by Traditional Authorities.<sup>95</sup> The Commission also recommends a mechanism in the new law for correction of errors in the Register.

The requirement of "notice" is unique to statutory marriages. Notice is an important preliminary requirement to statutory marriages the law stipulates that a statutory marriage cannot take place until the expiry of a specified period of time. During this time, any person who knows of any legal reason why the parties should not marry, is required to lodge an objection, called a caveat. Until the caveat is removed, the parties cannot be married by law.

In view of the proposed new strict legal requirements for marriage that have been recommended by Commission, the time period for notice will serve as an important enforcer of the concepts recommended. Any person who has knowledge that a person intending to marry is either under the age of eighteen years; is already married; or is related to his intended spouse within the prohibited degrees of relationship can lodge an objection.

The Commission therefore recommends the introduction of new Parts to encompass:

- (1) Preliminaries to a civil marriage;
- (2) Preliminaries to religious and customary marriages;
- (3) Objections (Caveats) to all marriages recognized under the Act;
- (4) Celebration of civil marriage; and
- (5) Celebration of customary and religious marriages.

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<sup>94</sup> As a delegate of the Registrar of marriages.

<sup>95</sup> This is also in line with the scheme of the law under the National Registration Bill, 2005.

## PART ...

## PRELIMINARIES TO A CIVIL MARRIAGE

Notice in a  
civil marriage  
*First  
Schedule*

... (1) A party to an intended marriage shall sign and give to the registrar a notice in Form B in the First Schedule.

(2) Where the party to the intended marriage giving the notice desires the marriage to be celebrated in a district other than that in which he or she resides, that party shall so inform the registrar.

(3) If a marriage is intended to be celebrated in another district, the registrar of the original district shall forward a copy of the notice to the registrar of the other district, and immediately upon receiving the notice, the other registrar shall affix the notice onto the outer door of his or her office or place of worship or work.

Signature of  
notice by  
person unable  
to write or  
understand  
the English  
language  
*First  
Schedule*

... (1) If the person giving notice under section ... is unable to write or understand the English language, it shall be sufficient if he or she places a mark or a cross as appropriate in the presence of a person literate in the English language and that person shall attest the marking or crossing.

(2) An attestation made under subsection (1) shall be in Form C in the First Schedule.

Registrars to  
supply forms  
of notice

... Every registrar shall supply forms of the notice under section ... without charge to any person applying for them.

Notice to be  
entered in  
Marriage  
Notice Book  
and published

... A registrar shall enter the notice under section ... in the Marriage Notice Book.

Publication of  
a marriage  
notice

.. After entering a notice of marriage in the Marriage Notice Book, the registrar shall publish the notice by affixing a copy of it onto the outer door to his or her office or place of worship or work, there to be kept exposed until he or she grants a permit or until three months have elapsed whichever is the sooner.

Registrar's  
permit  
*First Schedule*

... A registrar who receives the notice under section ... shall at any time after the expiry of twenty-one days and before the expiry of three months from the date of the notice, issue a permit in Form D in the First Schedule if he or she is satisfied that—

(a) the parties have complied with sections ....;

- (b) one or both of the parties has or have been resident within the district for at least fifteen days preceding the granting of the certificate;
- (c) there is no caveat under section ... lodged against the marriage or if a caveat has been lodged, it has been removed in accordance with the procedure set out in Part ...;
- (d) the parties are within the prohibited degrees of kindred or affinity; or
- (e) neither of the parties to the intended marriage is married to another person.

Power of  
Minister to  
grant licence  
to marry  
*First Schedule*

... The Minister, upon proof being made to him or her by affidavit that there is no lawful impediment to a proposed marriage, may, in his or her discretion, dispense with the giving of notice, and with the issue of the permit of a registrar, and may grant a special licence, in Form E in the First Schedule, authorising the celebration of a marriage between the parties named in the licence by a registrar.

#### PART ...

#### PRELIMINARIES TO RELIGIOUS AND CUSTOMARY MARRIAGES

Marriages  
under this  
Part to accord  
with customs  
and rites of  
religious body,  
sect, denomi-  
nation or  
ethnic groups

... Subject to sections..., the procedures preceding the celebration of a religious or customary marriage shall be governed by the customs or rites which are usual among the ethnic group, religion or sect under which the marriage is celebrated.

Notice of  
intention to  
marry  
*First  
Schedule*

... (1) A person intending to marry under this Part shall, in addition to the customs or rites referred to in section ..., give notice of intention to marry in writing to a registrar in Form B in the First Schedule.

(2) The registrar shall enter the notice in the Marriage Notice Book.

(3) The notice shall be displayed for twenty-one days in a conspicuous place on the premises of the office or place of worship or work of the registrar.

Issue of  
customary or  
religious  
marriage  
permit  
*First  
Schedule*

... (1) At the expiry of the twenty-one days referred to in section ..., the registrar, shall issue a marriage permit in Form D in the First Schedule.

(2) A marriage permit under subsection (1) shall be issued if—

- (a) the parties have complied with sections ...;
- and
- (b) there is no caveat under section ... lodged against the marriage or if a caveat was lodged, it has been removed in accordance with the procedure set out in Part ...

### PART ...

#### OBJECTIONS (CAVEATS) TO ALL MARRIAGES RECOGNIZED UNDER THE ACT

Marriage to  
take place  
within three  
months after  
date of notice

... (1) Except as provided in section ..., a marriage shall take place within three months after the date of the notice.

(2) Failure to comply with subsection (1) shall render the notice and all the proceedings consequent upon it void, and a fresh notice shall be given before the parties can lawfully marry.

Caveat

... (1) A person who knows of any just cause why a marriage should not take place may enter a caveat against the issue of a permit, by—

(a) writing at any time before its issue the word “Forbidden”, opposite to the entry of the notice in the Marriage Notice Book; and

(b) appending his or her name and address and the grounds upon which the claim to forbid the issue of the permit is made.

(2) A registrar shall not issue a permit until the caveat is removed as provided in sections ...

Caveat to be  
referred to  
court

... (1) Where a caveat is lodged in accordance with section ..., a registrar shall refer the matter to a court of competent jurisdiction.

(2) The court to which a caveat is referred shall summon and hear the parties to the intended marriage and the person who made the objection to show cause why a permit should not be issued.

(3) The court shall determine the matter by summary procedure.

(4) If the court decides that the permit should be issued, it shall remove the caveat—

(a) by cancelling the word “Forbidden” in the Marriage Notice Book;

(b) by writing below the cancellation, the words “cancelled by order of the court”;

(c) by appending the signature of the judicial officer and the court seal to the entry.

(5) The registrar shall proceed to issue a permit and the marriage shall proceed as if the caveat had not been entered, but the time that has elapsed between the entering and the removal of the caveat shall not be computed in the period of three months under section ...

Compensation  
and costs for  
wrongful  
caveat

... A court may, upon application, award compensation and costs to an injured party if it appears that a caveat was entered based on insufficient grounds.

#### PART ...

#### CELEBRATION OF CIVIL MARRIAGE

Marriage in a  
registrar's  
office

...—(1) After the issue of a permit under section ..., or of a licence under section..., the parties may contract a marriage before a registrar—

(a) with open doors, between the hours of 8 o'clock in the forenoon and 6 o'clock in the afternoon, and in the manner prescribed in section ...; and

(b) in the presence of two or more witnesses.

(2) A witness to a marriage shall be at least eighteen years of age and of sound mind.

Oath of  
marriage in  
civil marriages  
*First Schedule*

...A registrar, after production to him or her of the permit or licence, shall, administer the oath of marriage in Form F in the First Schedule.

Civil  
certificate  
to be signed  
*First Schedule*

... Immediately after the celebration of a civil marriage, the registrar shall—

(a) complete in duplicate a marriage certificate in Form G in the First Schedule;

(b) state and enter in the counter foil, the number of the certificate, the date of the marriage, the names of the parties, and the names of the witnesses; and

(c) deliver one copy of the certificate to the parties and file the other in his office.

Marriage of  
under special  
licence

... Where a special licence authorises the celebration marriage at a place other than the office of a registrar, the

registrar shall, upon the production of the licence, deliver to the person producing it a blank certificate of marriage in duplicate and shall comply with section ...

## PART ...

### CELEBRATION OF CUSTOMARY AND RELIGIOUS MARRIAGES

Application of Part ... to marriages under this Part ... A customary or religious marriage shall be celebrated in accordance with the procedures and formalities under Part ...

Traditional Authority to register customary marriages ... The Minister shall deliver to every Traditional Authority Marriage Register Books in which each Traditional Authority shall record particulars of all customary marriages celebrated in his or her area of authority.

Marriage in a licensed place of worship ... (1) A religious marriage may be celebrated in a place of worship which has been duly licensed by the Minister under section ... or in any place that the Minister may by special licence direct in accordance with the rites of a religion or religious body, denomination or sect to which one or both of the parties belong.

(2) A marriage celebrated under subsection (1) shall be celebrated—

(a) with open doors between the hours of 8 o'clock in the forenoon and 6 o'clock in the afternoon; and

(b) in the presence of two or more witnesses, who shall include the marriage advocates of the parties recognized as such at custom, besides the registrar.

(3) A witness to a marriage shall be a person who is at least eighteen years of age and of sound mind.

Oath to be administered in customary and religious marriages ... A registrar celebrating a customary or religious marriage shall administer an oath, if any, as prescribed either by the religion or custom of one or both of the parties to the marriage.

Registrar not to celebrate marriage where there is impediment nor without permit, etc. ... A registrar shall not celebrate any marriage if he or she knows of any just impediment to such marriage, nor until the parties deliver to him or her a permit under section ...

Customary  
or religious  
under special  
licence  
*First  
Schedule*

... Where a special licence authorises the celebration of a customary or religious marriage other than at the office, place of worship or work of a registrar, the registrar or shall, upon receipt of the licence, proceed to celebrate the marriage and complete the certificate of marriage in Form G in the First Schedule in duplicate after strictly observing all the formalities for customary and religious marriages prescribed under this Act.

Register of  
customary  
or religious  
marriages  
*First  
Schedule*

... (1) A registrar who celebrates a customary or religious marriage under this Act shall keep a register of the celebration in Form H in the First Schedule, and shall make and sign in the Marriage Register Book an entry of marriage celebrated by him or her.

(2) A registrar shall as soon as possible after the 31st December in each year, send to the Registrar of marriages a copy of the Register of all marriages celebrated during the past year by any person delegated by him or her to celebrate marriages.

Entries to be  
made in  
marriage  
certificate  
*First  
Schedule*

... Immediately after the celebration of a customary or religious marriage, a registrar shall complete in duplicate a marriage certificate in Form F in the First Schedule, and also state and enter in the counterfoil the number of the certificate, the date of the marriage, names of parties, and the names of the witnesses.

Signature to  
marriage  
certificate

... A registrar, the parties to a marriage and two or more witnesses to the marriage shall sign the certificate of marriage in duplicate.

Duplicate  
certificate to  
be sent to the  
Registrar

... In addition to signing the certificate as required by section ..., a registrar celebrating a customary or religious marriage shall deliver the duplicate copy of the marriage certificate to the Registrar of marriages.

Marriage  
certificate to  
be Registered

... The registrar shall file the duplicate copy of the marriage certificate in the Marriage Register Book kept in his or her office.

In relation to marriages by repute or cohabitation, the Commission noted that there are no formalities that the parties enter into in order to contract a marriage. Initially, the Commission proposed laying down some formalities to regulate such marriages. However, after consultation,<sup>96</sup> the Commission took

<sup>96</sup> The Commission sought views precisely on this topic on a radio phone-in-programme, aired on Capital Radio in May, 2005. Listeners who phoned in with their views were overwhelmingly against the idea of allowing cohabitants any of the rights and obligations of marriage. Their view was that if the parties had not bothered to formalise their union, the law should not make provision for their inadvertence as this would water down the sanctity of marriage.

the view that the proposed new scheme of the law should set down guidelines of factors that a court may take into account in determining whether a marriage is one of repute or permanent cohabitation. This formulation will ensure that although couples married in this way will be eligible for some of the privileges of marriage, whether or not they can access them will depend upon whether their union can be recognized as a marriage using the set guidelines. The Commission was convinced that in light of *Nelson v Magombo* and *Lunguzi* (referred to elsewhere in this Report), marriage by repute or permanent cohabitation is a necessary legal fiction to protect women from abuse or neglect.

The Commission therefore recommends the following new provision—

Marriages  
by repute or  
permanent  
cohabitation

**... A marriage by repute or permanent cohabitation shall only be recognized under this Act upon a finding of a court of competent jurisdiction where that court considers—**

- (a) the length of the relationship;**
- (b) the fact of cohabitation;**
- (c) the existence of a conjugal relationship;**
- (d) the degree of financial dependence or interdependence or any agreement for financial support between the parties;**
- (e) ownership, use and acquisition of property;**
- (f) the degree of mutual commitment to a shared life;**
- (g) whether the parties mutually care for and support children;**
- (h) the reputation of the parties in the community as being married and the public display of aspects of their shared relationship; and**
- (i) any other factors that the court considers fit.**

#### 7.1.3.7 RIGHTS AND OBLIGATIONS OF THE PARTIES UNDER A MARRIAGE CONTRACT

As discussed in the Background and Overview sections of this Report, the Commission observed that the laws on marriage and divorce do not properly contextualise the rights and obligations of the parties during the subsistence of the marriage. In this vein, the Commission recommends that the new law should provide for the rights and obligations of the parties during the subsistence of the marriage.

While recognizing the four broad facets of the Right of Consortium that accrue to parties at common law under a marriage contract, the Commission observed that under the Marriage Act and at custom, marriage has an inherent



character of inequality between the man and the woman whereby the man is invariably regarded as superior to the woman.<sup>98</sup> Such inequality is reflected in many forms, *inter alia*, the enjoyment of, and access to, rights in property, the inherent polygamous nature of a customary marriage and the nature of the laws on maintenance.

### 7.3.2 RIGHT TO CONSORTIUM

The concept of consortium is an abstract notion which refers to the living together of a husband and wife “together with all the incidents (in so far as these can be defined) that flow from such a relationship”.<sup>99</sup> These incidents include the right to a mutual identity, the right to share a common home, the right to consummation and the right to mutual marital confidences. Historically, the right to consortium used to favour men as it was commonly believed that only a man had the right to his wife’s consortium but the wife did not have such a right but only a duty to give her husband her company and other services.<sup>100</sup> However, this view has changed over the years and the Commission decided that in order to ensure that all aspects of consortium are gender sensitive, they should all be examined methodically and relevant recommendations must be made for inclusion in the new law.

#### (a) *Right to Mutual Identity*

Mutual identity is one of the facets constituting consortium. It is very important for people sharing a common domestic life to share a mutual identity. The common law position has been that a wife is entitled to use the husband’s surname. However, a wife is not in breach of the marriage contract if she retains her maiden name.<sup>101</sup> The Commission noted that most women are unaware that they are not obliged by law to change their name to that of their husbands. The Commission therefore recommends that the proposed new law must make it very clear that a woman is at liberty to maintain her maiden name upon entering into marriage if she so chooses. Similarly, there is also nothing in the law against the use of double-barrel surnames as has become trendy in recent times.<sup>102</sup>

The Commission also observed that in some cases women wish to retain the name of their spouses after divorce. In cases where a wife establishes academic and professional credentials in the name of her spouse, it becomes very important that this name may be retained. In the absence of a jactitation order taken by a husband to forbid a former wife

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<sup>97</sup> See below.

<sup>98</sup> See also *The Gender Overview*, p. 33.

<sup>99</sup> *Bromley*, p. 53. See also *Lynch v Knight* (1861) 9 HL Cas 577.

<sup>100</sup> *Bromley*, p. 55.

<sup>101</sup> *Bromley*, p. 56.

<sup>102</sup> Cf. *Bromley*, p. 56.

from using his name, a wife is entitled to carry on using the name. A jactitation order is usually granted where a wife uses her husband's name fraudulently or for other improper purpose. The Commission recommends that the proposed new law must also make it clear that a wife can retain her husband's name at dissolution of marriage.

The other dimension to mutual identity is the legal consequence of the right to citizenship. In Malawi, the current position is that a "foreign husband" is not entitled to Malawi citizenship.<sup>103</sup> Mutual identity as it relates to citizenship has been discussed in greater detail below.<sup>104</sup>

(b) *Right to Share a Common Home*

The nature of a marriage relationship requires that the couple share a common home. However this is not always possible and long periods of separation are acceptable grounds of divorce. The Commission was aware that in today's global society, marriages may take place between couples of different nationalities. In this respect, it is very important that nationality laws accommodate such diversity by enabling couples to acquire each other's citizenship and therefore entitling them both to permanently reside in any of their two countries. The Commission noted that the Malawi Citizenship Act is not conducive to the sharing of a matrimonial home between spouses where one is not a Malawian national.<sup>105</sup>

By virtue of section 9 of Malawi Citizenship Act, a Malawian woman who acquires another citizenship through marriage, automatically loses her Malawi citizenship unless within a year of her marriage she makes a declaration that she will retain her Malawian citizenship. There is no correlative automatic loss of citizenship for Malawian men who acquire foreign citizenship by marriage. Further, under section 16 of the same Act, foreign wives of Malawi citizens may be registered as citizens of Malawi, however the same right is not extended to foreign husbands of Malawian wives. In order to ensure ease of permanent residence, the Commission recommends that these gender insensitive laws be amended.

The Commission therefore reaffirms the recommendations of the Commission on the Review of Certain Laws of Malawi.<sup>106</sup> In that Report the Commission recommends the removal of those aspects of section 9 and section 16 of the Malawi Citizenship Act respectively that discriminate against women.

<sup>103</sup> See section 16 of the Malawi Citizenship Act (Cap. 15:01).

<sup>104</sup> Under the right to share a common home.

<sup>105</sup> Cf. *Republic v Minister of Home Affairs ex-parte Nyalani* Miscellaneous Civil Cause No. 14 of 2004 (Unreported) where the High Court has ruled that section 29 of the Malawi Citizenship Act is unconstitutional to the extent that it discriminates against women since it allows the Minister to grant or refuse Malawi citizenship without giving reasons.

<sup>106</sup> Malawi Law Commission (1996) *Report of The Law Commission on The Review of Certain Laws of Malawi under Chapter XII of the Constitution (Review of certain laws on Defilement of Young Girls, Wills and Inheritance, Citizenship, Marriage and Affiliation)*. Malawi Government Gazette Extraordinary.

(c) *Right to Consummation*

The Commission observed that each party to a marriage owes the other a duty to consummate the marriage (with certain exceptions). The incapacity or wilful refusal of one or the other to consummate the marriage may lead to a decree of nullity.<sup>107</sup> After the initial duty on the parties to a marriage of consummating their marriage, the right of consummation subsists throughout the marriage.

A question that may also arise in the context of the right of consummation is whether a husband can rape his wife. The common law position prior to 1950 and indeed the position under Malawi law<sup>108</sup> is that a husband cannot rape his wife. The rationale is that upon the marriage contract, a husband has a right and privilege to consummate the marriage with his wife and this right cannot ordinarily be withdrawn.<sup>109</sup> Where, however, there is no legal duty to cohabit, a husband who “rapes” his wife at this time commits an offence at common law.<sup>110</sup>

After lengthy deliberations, the Commission resolved to maintain the current position where marital rape is not a crime.<sup>111</sup> The Commission did however consider that marital rape is an undesirable evil which, either taken with other forms of gender-based violence or on its own, is responsible for significant abuses with life threatening consequences on women. The Commission therefore recommends that the common law position, that a claim of a right of sexual intercourse ought to be reasonable,<sup>112</sup> must be entrenched in the proposed new law.

The Commission also recommends that the concept of the right to consummation must be specifically addressed in the new law so that each spouse may be allowed to deny the other spouse sexual intercourse on reasonable grounds.<sup>113</sup> Further, the Commission also recommends that unreasonable demand for sexual intercourse should amount to a reason for divorce as such conduct can be tendered as proof that the marriage has irretrievably broken down.<sup>114</sup>

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<sup>107</sup> See *Bromley*, p. 57; pp. 87–91.

<sup>108</sup> Cf. the definition of rape under section 132 of the Penal Code.

<sup>109</sup> See *Bromley*, p. 57; *Lord Audley's Case* (1631) 3 State Tr. 401, HL, *R v Leak* [1975] 2 All ER 1059, CA and more importantly, *R v Clarence* (1888) 22 QBD 23, pp 53-4. However, in *R v R* [1991] 4 All ER 481, the House of Lords held that a husband can rape his wife whether during judicial separation or in the normal life of their marriage.

<sup>110</sup> *R v Clark* [1949] 2 All ER 448.

<sup>111</sup> The Commission was aware of a similar position taken by the Commission on Criminal Justice Reform: See Malawi Law Commission (2000) *Report of the Law Commission on Criminal Justice Reform on the Review of the Penal Code (Cap. 7:01)*. Malawi Government Gazette Extraordinary.

<sup>112</sup> Cf *Holborn v Holborn* above.

<sup>113</sup> This position is comparable to the developments of the law in the England and Wales legal system entrenched under the Family Law Act of 1996.

<sup>114</sup> The concept of irretrievable breakdown shall be fully discussed in the context of the Part on Divorce in this Report.

*(d) Right to Mutual Marital Confidences*

Any information a spouse may acquire during cohabitation should not be relayed to a third party.<sup>115</sup> This is particularly important when a marriage breaks down because the hatred and enmity that ensues at the end of such relationship may lead one spouse to reveal information that was relayed by the other spouse in strict marital confidence. It is important that such information should be kept in confidence. However, there are exceptions to the rule based on the interests of justice.<sup>116</sup> The Commission noted that at common law an action for breach of confidence arises upon proof of the following three elements—

- the information must have the necessary quality of confidence about it;<sup>117</sup>
- it must have been imparted in circumstances importing an obligation of confidence; and
- there must be unauthorized use of that information to the detriment of the party communicating it.<sup>118</sup>

In light of the foregoing, the Commission therefore recommends the following new Part on rights and obligations of the parties to a marriage—

**PART ...****RIGHTS AND OBLIGATIONS OF PARTIES  
TO A MARRIAGE**

Right to  
consortium

**...—(1) A party to a marriage is entitled to equal rights as the other in their right to consortium.**

**(2) A wife is entitled to retain her maiden name or to use the surname of her husband, or both, during the subsistence of the marriage.**

**(3) A wife is entitled to the continued use of the surname of her husband at the dissolution of the marriage, unless it is proved before a court that she has used the name for an improper purpose or a fraudulent motive.**

**(4) Notwithstanding any other written law to the contrary in force at the commencement of this Act, a spouse has the right to retain his or her nationality or citizenship during the subsistence of the marriage.**

**(5) A spouse may severally, or jointly with the other, exercise responsibility towards the upbringing, nurture and maintenance of the children of the marriage.**

<sup>115</sup> *Argyll v Argyll* [1965] A11 ER 611; 619.

<sup>116</sup> See *Rumping v DPP*; *Theodoropoulos v Theodoropoulos*; section 194 of the Criminal Procedure and Evidence Code (Cap. 8:01); and in cases of divorce proceedings, for example, *R v Algar* and *R v Young*.

<sup>117</sup> See *Bromley*, p. 59; *Stephen v Avery* [1988] 2 All ER 477 where it was said that information about the parties' sexual conduct, their health, financial matters or any other matter the publication of which was not contemplated at the time it was imparted will be protected.

<sup>118</sup> See *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41.

**(6) Both spouses have the right to mutual custody of the children of the marriage during the subsistence of the marriage.**

**(7) Notwithstanding subsection (1), a spouse may deny the other spouse the right to consummation on reasonable grounds which may include—**

**(a) poor health;**

**(b) post-natal recuperation;**

**(c) post surgical convalescence;**

**(d) reasonable fear that engaging in sexual intercourse is likely to cause physical or psychological injury or harm to either spouse; or**

**(e) reasonable respect for custom.**

Right to  
mutual  
marital  
confidences

**...—(1) A spouse is entitled to mutual trust and confidences during the subsistence of a marriage and, in the event of the dissolution of the marriage, after its dissolution.**

**(2) Notwithstanding subsection (1), a spouse may disclose information if the disclosure is in the interests of justice as required—**

Cap. 8:01

**(a) under the Criminal Procedure and Evidence Code or other written law; or**

**(b) in divorce proceedings.**

Duty to  
maintain  
family

**...—(1) Subject to subsections (2) and (3), both spouses have a duty to maintain each other and any children of the marriage.**

**(2) The monetary contribution of each spouse shall be proportionate to his or her income.**

**(3) The non-monetary contribution of each spouse shall also be taken into account when determining the contribution of a spouse to the maintenance of the other spouse or children of the marriage.**

### 7.3.3. CUSTODY OF CHILDREN

The issue of custody of children under a marriage contract arises by virtue of the Constitution and applicable international law in the sense that the law provides that, as far as possible, children have the right to know, be cared for and raised by their parents.<sup>119</sup> The Commission was aware that custody of children has been extensively handled by the Commission on the Review of Child Rights-Related Laws which has made substantial recommendations on child

<sup>119</sup> See section 23 of the Constitution and Articles 5 and 7 of the Convention on the Rights of the Child.

care and protection by the family. The issue of custody of children falls within the larger context of parental responsibility which has been defined by that Commission as “entailing all incidents, whether rights, claims, duties, powers or authority, the purpose of ensuring the moral and material welfare of children.”<sup>120</sup> Consequently, in light of section 23 of the Constitution, any parent, is entitled to apply for custody of a child to a child justice court.<sup>121</sup>

This Commission will only touch upon issues concerning the custody of children where they arise ancillary to the dissolution of marriage.

#### 7.4. MAINTENANCE

##### 7.4.1 BACKGROUND

The obligation to provide support for another member of the family may be seen as the most tangible recognition of the moral ties created by family relationships. Different societies at different times impose the obligation to support on different degrees of family relationships. These relationships include those between spouses, parents and children, brothers and sisters and grandchildren and grandparents.

Under common law, the duty to maintain sprung from the doctrine of unity of legal personality. Under this doctrine, the wife who lacked legal capacity to hold property and to enter into contract, could neither own basic necessities of life nor enter into a legal contract to purchase them. The consequences of this position were that a married man was placed under a duty to provide his wife with necessities and the wife could under no circumstances be placed under a similar duty to provide for such amenities. The husband’s duty to provide his wife with necessities was usually discharged when the husband provided a home. There was no right to separate maintenance in a separate home unless there was justification to live separately. The right to be maintained was lost when the wife committed adultery or deserted the husband.

The common law position that spouses could not sue each other precluded the woman from exercising her right to be maintained through an action if the husband failed to fulfill his duty to maintain her. In present times, maintenance can be claimed from the husband and the means for achieving this are governed by statute. Under the Laws of Malawi, the statutory provisions with regard to maintenance as a consequence of marriage or family relations are contained in the Married Women (Maintenance) Act and the Maintenance Orders (Enforcement) Act.

As noted elsewhere in this Report, at custom, however, a husband has a duty to provide for the wife all household amenities while the wife has a corresponding duty to perform domestic chores for the family. The husband’s duty to maintain his wife includes provision of a house.<sup>123</sup>

<sup>120</sup> Malawi Law Commission (2005) *Report on the Review of the Children and Young Persons Act*. Malawi Government Gazette Extraordinary, p. 72.

<sup>121</sup> The Commission on the Review of Child Rights-Related Laws has recommended the establishment of these specialised courts to deal with issues concerning children.

<sup>122</sup> See South African Law Reform Commission (1998) *Interim Report on Maintenance*, p. 3.

<sup>123</sup> *Matimati v Chimwala*. This position is arguably a right to the wife.

#### 7.4.2 THE STATUTES

The Married Women (Maintenance) Act was enacted with a view to providing protection and maintenance of married women and their children.<sup>124</sup> Research carried out by the Commission into the existing case law on marriage revealed that the Married Women (Maintenance) Act has in fact never been used. The Commission concluded that the Act is either of limited relevance or the lack of its utilization is a reflection of legal illiteracy by society. Nonetheless, the Commission recommends that the substantive principles under the Act must be incorporated into the proposed new law.

The Commission also considered the Maintenance Orders (Enforcement) Act. The Commission found the Act (which was enacted in 1921) to be generally obsolete in most parts. The Commission concluded that the Act was intended for white settlers married under the Marriage Ordinance (which subsequently became the Marriage Act). Research carried out by the Commission found out that the procedure under this Act has been used in two cases only, one decided in 1961 and the other in 1962 and both instituted by whites.<sup>125</sup> Both cases were heard under the Maintenance Orders (Enforcement) Ordinance, prior to the enactment of the present Act. There have been no cases (reported or unreported) under the Act subsequent to *McCall* and *ex parte Murray*.

#### 7.4.3 JUSTIFICATION FOR REVIEW

The Commission systematically reviewed the two Acts with a view to incorporating, with amendments where necessary, some of the provisions in the existing law and to proposing new provisions in areas where the existing legislation is silent. Although maintenance is a duty arising out of the rights and obligations of parties of varying degrees of family relationships or positions of guardianship, the Commission resolved to place the provisions relating to maintenance under a separate Part under the proposed new law on marriage, divorce and family relations. This approach was considered necessary in view of the multifaceted issues surrounding the Commission's recommendations with regard to maintenance.

The Commission found the statutes on maintenance piecemeal as provisions dealing with maintenance are located in different pieces of legislation<sup>126</sup> as well as within the realms of customary law. The Commission considered this situation unsatisfactory and that the law needed to be consolidated. The Commission therefore recommends the incorporation of the provisions on the law on maintenance under the proposed new law.

The Commission also found that the Married Women (Maintenance) Act does not provide for the right to maintenance in the absence of any "wrongdoing" by the husband<sup>127</sup> nor does it apply where the husband and wife reside together.<sup>128</sup> In effect, the application of the Act is based upon "fault" of

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<sup>124</sup> See the long title of the Act.

<sup>125</sup> *McCall v. McCall* (1961-62) ALR Mal 170 and *Webb v. Murray, ex parte Murray* (1961-62) ALR Mal 205.

<sup>126</sup> The Married Women (Maintenance) Act, the Maintenance Orders (Enforcement) Act and the Divorce Act.

<sup>127</sup> See section 3 of the Married Women (Maintenance) Act.

<sup>128</sup> See section 4 of the Married Women (Maintenance) Act.

the husband only. By restricting the Act to married women, the Commission found that the Act is discriminatory not only against men, but also against cohabitants or single and unmarried mothers who cannot claim maintenance under the Act.

The Commission also concluded that the restrictions under the Married Women (Maintenance) Act (such as residence with a husband) operate as a barrier to a claim for maintenance and in the process the law is unfair to women. In fact, the Commission observed that there was no provision for maintenance during the subsistence of the marriage. The Commission therefore recommends the removal of such barriers and the creation of new provisions to cater for the noted shortfalls. The Commission also recommends new provisions to be created providing for maintenance of single pregnant mothers by putative fathers and payment of maintenance in non-cash form.

Despite the seemingly lack of relevance of the Maintenance Orders (Enforcement) Act to most Malawians as evidenced by its limited usage, the Commission nonetheless recognized that due to the migratory nature of Malawians today, the scheme of the Act is still relevant. Malawians married and resident abroad, who divorce or separate formally in a foreign court may, if one party returns to Malawi, seek the recourse of the Malawi courts to enforce the foreign maintenance order ancillary to the divorce or separation proceedings in that foreign court. In this respect, the Commission recommends that the list of countries to which the Act applies needs to be revisited. The United States of America as well as the United Kingdom were given as examples of countries to be added to the list as were most SADC countries since many Malawians have taken up residence there.

#### 7.4.4 FINDINGS AND RECOMMENDATIONS

Starting with the Married Women (Maintenance) Act, the Commission's findings and recommendations are as follows—

##### 7.4.4.1 MARRIED WOMEN (MAINTENANCE) ACT

###### 7.4.4.1.1 APPLICATION OF THE LAW

The Commission found that the short title of this Act restricts the application of the Act to parties who are not solely married at custom. Further, as the title of the Act indicates, maintenance is restricted only to 'married women'. This means that cohabitants or single and unmarried mothers are unable to claim maintenance under the Act. The Commission considers this position discriminatory and unconstitutional in terms of section 20 of the Constitution since it disadvantages some women on account of their marital status. In order to ensure equal application of the law to parties to marriage, the Commission recommends a new provision on maintenance to ensure that both men and women, whether married or not, and regardless of the way in which their union is formalized should be able to claim maintenance in appropriate circumstances.



The Commission recommends all references to “woman”, “wife” or “husband” must be deleted and be replaced with the gender neutral term “**spouse**” so that the provisions apply to both parties.

In view of the Commission’s recommendation that maintenance may also be claimed in situations where the married couple are still living together, the Commission did not find any reason why an order for maintenance should only be enforceable if the wife does not reside with the husband. The Commission accordingly recommends the repeal of section 4.

#### 7.4.4.1.2 INTERPRETATION

The Commission generally recommends the retention of the definitions set out in the interpretation section of the Act, subject to moving the definitions to the interpretation section of the proposed new law and to making amendments to some of these definitions. The Commission recommends that the definition of “court” should be extended to include subordinate courts so as to improve access to the courts for maintenance by people in the rural areas.

The Commission also noted that although the term “habitual drunkard” has been defined, there is no reference to it in the main body of the Act. The Commission observed that the reference to this term may have been in relation to a provision that no longer exists in the Act making habitual drinking a ground for separation and therefore for seeking maintenance. The Commission recommends the retention of the definition and that a substantive provision should be added creating an obligation for a spouse to maintain the other if he or she is guilty of excessive drinking and thereby neglects to provide for the family or induces a separation. Consequently, the Commission recommends that “habitual drunkard” be re-defined in the new law.

#### 7.4.4.1.3 GROUNDS FOR MAINTENANCE

Section 3 of the Married Women (Maintenance) Act provides for grounds under which a wife may apply for a maintenance order. These grounds include imprisonment for offences against the person of the wife, desertion, cruelty, suffering from a venereal disease and compelling the wife into prostitution. The Commission was of the view that this list is not exhaustive. The Commission therefore recommends the addition of paragraphs to include habitual drunkenness and adultery.

In terms of the ground of neglect to provide for infants under paragraph (d) of section 3 of the Act, the Commission found no justification to limit its application only in respect of “infants”. It should be sufficient that a parent has been guilty of wilful neglect to provide reasonable maintenance for any child within the definition of the term “child”. The Commission recommends that the word “infant” should be deleted and replaced with “**child**” as defined by the Commission.

Further, section 3 of the Act makes specific reference to wrongdoing on the part of the husband and therefore the duty of husbands to maintain their wives and children in the case of such wrongdoing. The Commission recommends that the section should apply to wrongdoing by either party and any reference to the words “husband” or “wife” should be replaced with the gender neutral term, “**spouse**”. The Commission also recommends revising the fine upwards from K20 to **K100,000** which shall go towards the maintenance of the spouse.

#### 7.4.4.1.4 POWERS OF THE COURT

##### (a) *General*

The Married Women (Maintenance) Act provides for the powers of the Courts to make particular orders under the Act. The Commission recommends that jurisdiction to hear matters of maintenance should be extended to subordinate courts so as to allow greater access to justice. The Commission further recommends that the marginal note should read “**powers of the courts**” to reflect the wider access that the Commission is seeking to achieve. The Commission further recommends that any reference to “husband” and “wife” wherever they appear must be replaced with the gender neutral term “**spouse**”.

In addition, the Commission observed that the sums of maintenance of monthly sums not exceeding K60 and K8 respectively provided for under paragraphs (c) and (d) of section 7 of the Act are now outdated. In order to avoid the need to constantly review the maintenance figure, so as to align it to fluctuating economic conditions, the Commission recommends that no figure should be prescribed in the new provision so that it is left to the courts’ discretion to come up with a sum of maintenance that is in the best interests of the child or is reasonable for the spouse or partner taking into account the standard of living that such spouse or partner is accustomed to.

The Commission also noted that under paragraph (d) of section 5 of the Act, the husband is supposed to pay a specified monthly sum in maintenance of a child below sixteen years of age. The Commission recommends that this provision must be brought into consistency with the provisions of the Affiliation Act which was revised in 1997 to require that a child shall be maintained until the completion of university education.<sup>129</sup>

In order to provide equal maintenance to all children regardless of circumstances of their birth, the Commission recommends that paragraphs (b), (c) and (d) must be redrafted in the new law.

In situations where the parties separate, the courts may make further orders such as non-molestation orders and residence or occupation orders compelling either a violent or aggressive spouse to stay away from the

<sup>129</sup> The Commission was aware that the special Law Commission on the Review of Child Rights-related Laws has recommended the repeal of the Affiliation Act. Nonetheless, the Commission recommends that certain substantive principles within the Affiliation Act (such as section 5) must be incorporated into the proposed new law.

applicant and children or compelling the spouse to continue to house the applicant at a reasonable level. The Commission has made specific recommendations on non-molestation orders and occupation orders in the context of divorce and judicial separation. These recommendations are discussed under the relevant Part of this Report.

The Commission found the powers of the Court to make interim payments<sup>130</sup> whenever an application is adjourned to be in order and recommends its retention subject to all references to “woman”, “wife” or “husband” being deleted and replaced with the gender neutral term “**spouse**” so that the provision applies generally.

*(b) Orders Regarding Adulterous Women*

Section 6 of the Act precludes a woman who has been guilty of adultery from making an application for maintenance under the Act. The Commission was of the view that this provision applies to married couples only. Originally, the Commission was of the view that there is no justification in picking only adultery as a ground to precluding maintenance when there are other acts that a woman, or indeed any party to the marriage, can commit that are equally nefarious.

Upon careful consideration of the issues however, the Commission recognized that the maintenance payable under this Act is paid whilst the relationship is still subsisting, albeit that the parties are living apart. Adultery is in itself so morally unacceptable that it is one of the reasons that may be adduced as proof that a marital relationship has irretrievably broken down. It is for this reason that the spouse should not be forced to continue to support a spouse who has transgressed against the sanctity of the institution of marriage unless he or she condoned or connived at the adultery. The Commission recommends that this provision must be retained subject to its redrafting in order to accommodate both spouses so that the adultery of either the maintained husband or wife will be cause for the maintenance order to be suspended or for no order to be made at all during judicial separation. The Commission thus recommends the deletion of the words “woman” and “husband” wherever they appear and to replacing them with the gender neutral term “**spouse**”.

*(c) Variation or discharge of Orders*

Section 7 of the Act makes provision for the Courts to vary or discharge any order of maintenance upon either the married woman or her husband providing fresh evidence why such order should be varied or discharged. The Commission found this section to generally be in order. However, the Commission recommends that the references to “married woman” or “her husband” must be deleted and replaced with the gender neutral term “**spouse**”. Further, the Commission recommends that in light of the recommendation in relation to paragraphs (c) and (d) of section 5, the

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<sup>130</sup> Section 8 of the Married Women (Maintenance) Act.

sum of maintenance which the court may award upon a variation order under subsection (1) of section 7 of the Act should not be prescribed but should be left to the courts' discretion after the court has taken all relevant factors into account.

The Commission also had some reservations with subsection (2) of the provision which provides that the court may refuse to discharge an order on the ground of adultery if such adultery was induced to by the husband due to his failure to make payments. The Commission did not find the distinction between what the provision considers as different factors for the commission of adultery tenable when any act of adultery offends against the very core of the sanctity of marriage. The Commission therefore had misgivings about the court appearing to approve of certain factors for committing adultery over others. The Commission therefore recommends the deletion of paragraph (a) of subsection (2) of section 7 of the Act so that no factors are considered exceptional to justify adultery.

*(d) Enforcement*

Section 9 of the Act provides that orders under this Act may be enforced in the same manner as orders made under subsection (2) of section 5 of the Affiliation Act.

The procedure for enforcement of orders under the Affiliation Act is such that if after the expiry of a month the person ordered to make a payment has not done so, the court may by warrant cause such person to appear before it. If such person having been brought before the court refuses or neglects to make payment of the sums due under the order, the court may, by warrant, direct that the sums due as well as any costs be recovered by distress and sale of goods of that person or that such person be detained and kept in safe custody until he satisfies the court that the money shall be paid. The Commission found this provision satisfactory in terms of enforcement and also recommends that the procedure for enforcement under subsection (8) of section 5 of the Affiliation Act which provides that the monies payable under the order can be obtained directly from an employer should also apply to order of maintenance as a measure of effective enforcement.

The Commission was aware that the Commission on the Review of Child Rights-Related Laws has repealed the Affiliation Act. As the Affiliation Act was promulgated to make provision for illegitimate children which are less favourable than provisions applicable to legitimate children, that Commission considered the Act to be discriminatory. Therefore, that Commission, guided by the constitutional provision on the equality of all children,<sup>131</sup> has formulated a new law known as the Child, (Care, Protection, and Justice) Act.

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<sup>131</sup> Subsection (1) of section 23 of the Constitution.

In this regard, the Commission observed that section 9 of the Married Women (Maintenance) Act makes provision for the procedure for enforcing orders for the payment of money by making reference to the procedure in the Affiliation Act. The Commission recommends that since there is nothing discriminatory in the procedure itself and that the procedure is actually to be used to benefit spouses, the procedure itself should be retained. The Commission therefore recommends that this section must be incorporated into the proposed new law.

The Commission was initially concerned that the recommended provision for the “Enforcement of orders for payment of money” did not cater for the self-employed. The difficulty in enforcing orders on this category of persons through banks may arise due to their ability to refrain from using them at will and this may mean that enforcement is next to impossible. The Commission was however satisfied that the normal civil procedures for recovering civil debts could be used in such circumstances.

#### 7.4.4.1.5 MISCELLANEOUS

##### (a) *Change of address*

Section 10 requires any person against whom an order to pay maintenance has been made, to notify the court of any change in his address, and makes failure to give such notice an offence liable to a fine of K10.

The Commission noted that while there is this requirement to give notice of change of address, there is no corresponding requirement anywhere in the Act to provide one’s address in the first place. There is no obligation anywhere in the Act for any person against whom an order has been made to give his or her address to the court. The Commission recommends that such requirements must be incorporated into the new law so as to bolster this provision. The Commission also recommends the revision of the sum of money specified for the fine to “**K50,000**”.

##### (b) *Appeals, Forms and Fees*

The Commission recommends the retention of this section subject to substituting the references to “married woman and her husband” with the term “**applicant**” so as to make the provision gender neutral. The Commission considered the provision on forms and fees a procedural section and in good order and recommended its retention.

#### 7.4.4.1.6 NEW PROVISIONS

From the systematic reading of the Married Women (Maintenance) Act, the Commission observed that there are no provisions in the following areas:

(a) *Maintenance during the subsistence of a marriage*

The Commission noted that there is no provision under statute or common law currently addressing the issue of maintenance during the subsistence of a marriage where neither party is at fault in the marriage relationship.<sup>132</sup> This obvious gap in the law makes it difficult especially for women whose husbands, whilst having the means, intentionally choose to neglect them and their children.

The Commission also recognized the need for the courts to act expeditiously in every case of an application for maintenance as the provision of necessities of life in a family should not be affected by delays arising out of court procedures. In cases where the aggrieved spouse is incapacitated and is thereby unable to make application, the Commission recommends that the proposed new law should make provision for relatives, next of kin and any other interested parties to make the application on behalf of that spouse. The Commission therefore recommends that a new provision must be inserted into the new law accordingly.

The Commission further recommends the introduction of two concepts to maintenance legislation that will enable cases of neglect and abuse, whilst the couple is living together, to be brought to the attention of the courts for redress. These are—

(i) *Notifiable Family Misconduct*

The Commission recognized the difficulty that ill-maintained or neglected spouses might face in reporting the other spouse to the courts and thereby make an application for maintenance during the subsistence of a marriage. Spouses may be intimidated or may physically or financially be or feel unable to take any action if neglected during the subsistence of the marriage. Accordingly, in order to ensure that the provisions for maintenance during the subsistence of a marriage are invoked, the Commission recommends that third parties should be able to report cases of neglect to the authorities so that action may be taken.

To that end, the Commission recommends that any member of the general public or any person in the neighbourhood or persons in public and private institutions especially social service providers should be empowered to report of any instances of neglect or abuse in a family to the Department of Social Welfare. School teachers or health workers, for example, are in a position to notice children in need of care and attention or mothers who are themselves malnourished and poorly maintained and they should be required to report such cases.

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<sup>132</sup> Cf. the position at customary law where a wife has a right to be maintained during the subsistence of a marriage. See also *Matimati v. Chimwala*.

The Department of Social Welfare should be able to facilitate the separation of the victims of such family misconduct from the perpetrator if such course of action is necessary and to enlist the services of counsel or the assistance of State institutions such as Human Rights Commission to claim maintenance on behalf of the person through the courts. The Commission did recognize that there may be difficulties of *locus standi* if this action is taken on behalf of an adult. The Commission therefore recommends a new provision to be incorporated in the new law to this effect.

(ii) *Family Counselling Panels*

In order to ease the tension that may arise in a family as a result of one party taking court action to seek maintenance during the subsistence of the marriage, the Commission recommends the establishment of family counselling panels before which the court may order such couples to appear in order to address the underlying problems that lead one party to neglect the other or the children of the family or to commit any notifiable family misconduct. The Commission therefore recommends the introduction of a new provision in the proposed law accordingly.

(b) *Maintenance of a single pregnant woman*

The Commission noted that the law ought to provide for the maintenance of a single pregnant woman by the putative father of the unborn child. In this respect, courts must be able to make orders for maintenance payments. The Commission was of the view that in cases of complicated pregnancy, a pregnant woman may have needs for which the support of a putative father may be required. From a gender perspective, the Commission was of the view that fairness requires that the putative father takes his share of the responsibility of the pregnancy and meet some of the needs and expenses arising out of the pregnancy. The Commission therefore recommends the incorporation of a new provision in the new law.

(c) *Maintenance payments made in kind and not in cash*

The Commission observed that the only types of maintenance payments recognized under the Act are pecuniary. The Commission was aware that practice on the ground recognizes payments in kind so long as they reach an agreed financial value. This practice is preferred by some spouses who would like to see provisions bought for the maintained spouse and children so that the maintenance payments are not wasted on non-essentials.

The Commission also observed that the obligation to provide accommodation, which is a very important part of maintenance, was also missing from the categories of maintenance that are available under the Act. The Commission recommends that any spouse seeking judicial

separation due to “fault” of the other party should not be disadvantaged by being required to leave the matrimonial home. If the matrimonial home is an institutional house belonging to the employer of the spouse or partner who has committed the wrongful act, that spouse or partner should be required to provide suitable accommodation for the “wronged” spouse or partner which as far as possible is commensurate to the standard of living that the maintained spouse or partner was accustomed to.

The Commission therefore recommends the incorporation of new provisions recognizing payments of maintenance in kind and specifying the issue of shelter as an aspect of maintenance.

The Commission pondered over additional orders that a court may make which are ancillary to maintenance orders. Such orders may include restraining orders or non-molestation orders preventing contact between the parties during the subsistence of an order of judicial separation so as to protect vulnerable spouses from physical or psychological abuse. The Commission recommends the incorporation of a new provision to this effect. This has been dealt with in the context of divorce and judicial separation.

#### 7.4.4.2 MAINTENANCE ORDERS (ENFORCEMENT) ACT

Generally, the Commission recommends that the retention of the provisions of the Act subject to their simplification and localization. The provisions of the Act will be incorporated into the proposed new law. The Commission therefore recommends the repeal of the Act as a stand-alone statute.

However, upon a systematic reading of the Act, the Commission made the following findings and recommendations.

##### 7.4.4.2.1 APPLICATION OF THE LAW

As the Commission recommends that this Act be incorporated into the proposed new Act, consideration of the short title was considered unnecessary. The Commission recommends that the long title of the proposed new law will reflect the fact that it will also cater for matters of maintenance and enforcement.

The Commission found no justification why in modern Malawi, England and Ireland should be the only countries referred to in the Act as being the only jurisdictions with reciprocal arrangement for enforcement of maintenance orders. The number of foreign countries with which Malawi has ties has increased since independence in 1964. The restriction to England and Ireland under the Act reveals a colonialistic agenda. The Commission therefore recommends that when incorporating the provisions of this Act to the proposed new law, references to “England and Ireland” be replaced with the words “**other country**” wherever they appear and that “England and Ireland” simply be added to the schedule of foreign countries to which this Act applies in the subsidiary legislation that may be made under the new law.



The Commission recommends the retention of the provision on transmission of an order made in Malawi subject to the substitution of **“other country”** for “England and Ireland”.

#### 7.4.4.2.2 INTERPRETATION

The Commission generally recommends the retention of the definitions set out in the interpretation section of the Act, subject to moving these to the interpretation section of the proposed new law and to making amendments to some definitions. The Commission’s first observation on the definition of “dependants” was that there is no law in Malawi providing for the maintenance of dependants. The law only provides for their right to succession and inheritance under the Wills and Inheritance Act (Cap. 10:02).<sup>133</sup> The Commission resolved to maintain the *status quo* by not making any provision for dependants in terms of maintenance and recommends the retention of the definition only in so far as it deals with a maintenance order originating from a jurisdiction which recognizes the payment for dependants. To this end, the Commission recommends the insertion of the word **“foreign”** just before the word “country” for added emphasis.

The Commission was also concerned that the definition of “maintenance order” excludes the enforcement of affiliation orders which is basically a negation of the rights of (hitherto) illegitimate children. At one point the Commission understood this to be the case because there was a separate Affiliation Act that dealt with matters of affiliation of children born out of wedlock. Nonetheless, the Commission recommends that negative reference to affiliation orders must be deleted from the definition. The reference to “periodical” must be deleted from the definition in order to avoid discrimination and to cover lump sum payments. The Commission also recommends the deletion of the reference to sums of money to allow for maintenance payments made in kind. Hence, the Commission recommends the reference to sums of money in the law must be replaced with **“in cash or of a specified cash value”**.

The definition of “maintenance orders” goes further to provide for the “wife or other dependants” without making any reference to the children. Again, the Commission finds this position an anomaly by excluding children and recommends the insertion of the word **“children”** after the words “the wife” which should be amended to **“spouse”** in order to reflect the gender neutrality of the amended definition. The words “other dependants” must be deleted from the definition.

#### 7.4.4.2.3 POWERS OF THE COURT

##### (a) *Provisional Orders*

The Commission was generally satisfied with section 5 which provides for power of a Court to make provisional orders against a person resident in England and Ireland. The Commission recommends its retention subject to making a few amendments. Primarily, the Commission was

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<sup>133</sup> Cf. Malawi Law Commission (2004) *Report on the Review of the Wills and Inheritance Act*. Malawi Government Gazette Extraordinary, p. 19, on the new definition of “dependant”.

concerned that under subsection (1) of section 5 the order made by the foreign court is provisional until confirmed and was of the view that this would cause delay in getting the order enforced to the detriment of the spouse and children who would be waiting a long time before payments were made. It was however conceded that it may not be possible to prescribe limits during which an order remains provisional due to the regulations that courts have to comply with in terms of the time limits prescribed for serving documents outside the jurisdiction. The Commission was aware that the issue of time limits for the process of serving documents could not be curtailed. The Commission only wished to register its dissatisfaction with such procedure especially in view of destitute spouses and children awaiting maintenance. Further, the Commission recommends that reference to “England and Ireland” should be replaced with reference to “**other country**”.

*(b) Confirmation of Foreign Orders*

The Commission noted that section 6 is the exact opposite of section 5. Section 5 provides for what happens when an order is made by a court abroad whereas section 6 provides for what happens when an order is made by a court in Malawi. At one point, the Commission considered that the sections could be merged, but concluded that the two provisions be maintained as separate sections.

Originally, the Commission was concerned that our courts should take judicial notice of, or accept, all foreign orders as authentic without even inquiring into their authenticity. The Commission also wondered whether there is reciprocity of this provision in other jurisdictions. However, upon lengthy debate and upon further research into similar provisions from other countries in the Commonwealth,<sup>134</sup> it was discovered that this legislative provision is standard. Most jurisdictions take judicial notice of foreign orders because of the difficulties and expense as well as the length of time that would ensue from trying to prove the foreign orders.

7.4.4.2.4 MISCELLANEOUS

The Commission finds the provision granting powers to the Chief Justice to make rules for facilitating communications between courts satisfactory and recommends its retention in the proposed new law.<sup>135</sup> The Commission equally further finds the provision on the mode of enforcing orders satisfactory and recommends its retention.<sup>136</sup>

7.4.2.5 MAINTENANCE ORDERS (ENFORCEMENT) RULES

Generally, the rules were considered by the Commission to be overly procedural. The Commission was aware that any provisions dealing with this kind of process requires great detail and it would be best left to the courts to

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<sup>134</sup> Such as the United Kingdom, Canada and Australia.

<sup>135</sup> Section 7 of the Maintenance Orders (Enforcement) Act.

<sup>136</sup> Section 8 of the Maintenance Orders (Enforcement) Act.

specify the process for the enforcement of the maintenance orders either through each individual order, or through the Rules.

In particular, the Commission wondered why in rule 6, the person collecting the monies may take proceedings in his own name contrary to the usual procedure of instituting proceedings in the name of the person to whom such maintenance is due. This provision places the person collecting the monies in a position of trust but does not make any provisions setting out the details of the trusteeship. The Commission finally resolved that due to the complexity of the issues raised, the Rules will be retained under the proposed new law as subsidiary legislation subject to their amendment in line with recommendations made to the proposed principal legislation.

In light of the foregoing extensive discussion on maintenance generally, the Commission recommends the adoption of the following provisions under the new Parts on Maintenance—

#### **PART ...**

#### **MAINTENANCE DURING SUBSISTENCE OF MARRIAGE**

Maintenance  
during  
subsistence  
of marriage

...—(1) A party to a marriage, a child or a person specified in subsection (3) may apply to a court for an order against the other party or a party to the marriage for maintenance in respect of the necessities of life for a family member including shelter, food and education.

(2) In granting an order for maintenance under this section, the court may consider—

(a) the standard of living enjoyed by the parties at the time of the application;

(b) the financial commitments of the party against whom the application is made;

(c) the ability of the person against whom the application is made to provide for the necessities applied for;

(d) the income of the party making the application relative to the income of the party against whom the application is made; and

(e) any other consideration that the court considers relevant.

(3) An application under subsection (1) may also be made by a parent of a party to the marriage or, a next of kin or other close relative or any other person on behalf of such party to the marriage or such child of the marriage.

Spouse may  
apply for  
order  
Cap. 7:01

... A married person whose spouse—

(a) is convicted of an offence against her person under Chapters XXII or XXIV of the Penal Code;

(b) deserts him or her;

(c) is guilty of persistent cruelty to him or her or to his or her children;

(d) is guilty of wilful neglect to provide reasonable maintenance for him or her or his or her children whom he or she is legally liable to maintain;

(e) or is a habitual drunkard,

may apply to the court where the conviction took place, or in which the cause or complaint wholly or partly arises, for an order for maintenance under the Act in Form I in the First Schedule.

*First  
Schedule*

(2) A court shall upon receipt of an application under subsection (1) issue summons to the respondent in the application in Form J in the First Schedule.

*First  
Schedule*

Notifiable  
family  
misconduct

...—(1) Where a party to a marriage neglects to maintain the other party or to provide for the needs of the children to such an extent that the health, safety or security, nutrition and education of such other party or such children, as the case may be, is adversely affected, that neglect constitutes notifiable family misconduct and any of the persons named in section ...shall be under a duty to report the neglect to the Minister responsible for social welfare.

(2) Upon receipt of a report of neglect, the Minister responsible for social welfare shall, where appropriate, facilitate the separation of the parties and may make an application for maintenance under section ...

Establishment  
of Family  
Counseling  
Panel

...—(1) The Minister may, by order published in the *Gazette* or by directions in writing, establish Family Counseling Panels to counsel parties to a marriage to prevent or to address any case of notifiable family misconduct.

(2) A Family Counseling Panel may intervene in a case of neglect or abuse upon information it may receive from a party to the marriage or from any person.

(3) In any case of neglect or abuse coming before a court, the court shall inquire if the case was referred to a Family Counseling Panel and may itself refer the case to a Family Counseling Panel, but the intervention of a Family

Counseling Panel, whether before or upon reference to it by a court, shall have no effect on any ensuing proceedings for maintenance before any court.

(4) The Minister may make rules for the regulation and functioning of Family Counseling Panels.

#### PART ...

### MAINTENANCE FOLLOWING DIVORCE, JUDICIAL SEPARATION AND NULLITY OF MARRIAGE

Maintenance  
pending the  
suit

...—(1) A spouse, whether or not he or she has obtained a protection order, may apply to the court, for an order of maintenance pending the suit.

(2) In granting the order of maintenance pending the suit, the court shall have regard to the financial resources of the party against whom the order is made, the conduct of the parties or any other factors it considers relevant.

(3) An order of maintenance pending the suit shall continue in the case of a decree *nisi* of divorce or nullity, until the decree is made absolute.

Permanent  
maintenance

...—(1) On a decree absolute declaring a marriage to be dissolved, or on a decree of judicial separation obtained by the applicant, the court may order the respondent to secure to the applicant such sum of money as it thinks reasonable, having regard to—

- (a) his or her income;
- (b) the income of the respondent;
- (c) the ability of the respondent; and
- (d) the conduct of the parties.

(2) The court may direct the maintenance to be paid either in a lump sum or in yearly, monthly, or weekly payments for any period not exceeding the life of a spouse, and for that purpose may cause a proper instrument to be executed by all necessary parties.

(3) The court may direct the maintenance to be paid either to the spouse himself or herself or to a trustee to be approved on his or her behalf by the court, and may impose such terms and restrictions, and may direct the execution of the trust deeds as it considers fit, and may from time to time appoint a new trustee.

Discharge or  
alteration of  
order for  
maintenance

...—(1) Where an order has been made for the payment of maintenance, and the respondent subsequently becomes unable to make the payments, the court may discharge, modify, or suspend the order in whole or in part.

(2) A court may revive the order in whole or in part, upon application, if there is a change in the circumstances of the respondent.

Power to  
vary  
settlements

...—(1) Subject to subsection (2), after a decree absolute of divorce or of nullity of marriage, a court may inquire into the existence of ante-nuptial or post-nuptial settlements made by the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or part of the settled property, whether for the benefit of the husband or wife or of the children, if any, or of both children and the parties, as the court considers appropriate.

(2) No order for the benefit of the parties, or either of them, shall be made at the expense of the children.

Welfare of  
the children

...—(1) In any proceedings for divorce or judicial separation or any proceedings brought by either party to the marriage, the court shall consider—

(a) whether there are any children of the marriage to whom this section applies; and

(b) if there are any children to which this section applies, whether, in light of the arrangements which have been, or are proposed to be, made for their upbringing and welfare the court should exercise any of its powers under the Child (Care, Protection and Justice) Act in respect to any of them.

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Commission  
Report,  
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(2) Where, in any case to which this section applies, it appears to the court that—

(a) the circumstances of the case require it to refer the child to the court exercising jurisdiction on children under the Child (Care, Protection and Justice) Act; and

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Commission  
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(b) there are exceptional circumstances which make it desirable in the best interests of the child that the court exercising jurisdiction on children under the Child (Care, Protection and Justice) Act should give a direction under this section,

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Commission  
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the court may direct that the decree absolute of divorce or judicial separation is not granted until the court exercising jurisdiction on the children under that Act orders otherwise.

(3) In deciding whether the circumstances as mentioned in subsection (2) (a) exist, the court shall treat the welfare of the child as paramount and shall also have particular regard, on the evidence before it, to—

(a) the wishes and feelings of the child considered in relation to his or her age and level of understanding and the circumstances in which those wishes are expressed;

(b) the conduct of the parties in relation to the upbringing of the child;

(c) the general principle that, in the absence of evidence to the contrary, the welfare of the child will best be served—

(i) by his or her regular contact with those who have parental responsibility for him or her and with other members of his or her family and where siblings are brought up together in the same family; and

(ii) where the maintenance of a good continuing relationship with his or her parents is possible;

(d) any risk to the child attributable to—

(i) the place where the person with whom the child will reside, is residing or proposes to reside;

(ii) any person with whom that person is residing or with whom he or she proposes to reside with; or

(iii) any other arrangements for the care and upbringing of the child.

#### PART ...

#### MAINTENANCE OF SINGLE PREGNANT WOMAN

Maintenance  
during  
pregnancy  
of a single-  
woman

...—(1) Where a woman is pregnant and the alleged father does not dispute responsibility for the pregnancy or is adjudged by the court to be responsible for the pregnancy, he shall be liable to maintain the woman during

the period of the pregnancy and to pay for or reimburse the attendant costs of delivery and the court may, on application by the woman, make an order for enforcement as the court may consider appropriate.

(2) An application for an order of enforcement under this section may be heard in like manner as an application under section ...<sup>137</sup>

(3) Where the alleged father is a child, liability shall lie against his parent or guardian, but such liability shall revert to him after he ceases to be a child or to be dependent on his parents or guardian.

#### PART ...

#### GENERAL PROVISIONS ON MAINTENANCE

Powers of  
the courts to  
make orders

...— (1) Subject to subsection (2), notwithstanding that a marriage has been declared void by the court, the court shall have the power to make an order—

(a) for property settlement;

(b) for temporary or permanent maintenance; or

(c) for the award of custody of any children of the annulled marriage,

in favour of either of the parties as may be deemed appropriate.

(2) Where an order for the maintenance or custody of a child is made, the court shall base its decision on the best interests of the child.

Court may  
vary or  
discharge  
order

...— A court having jurisdiction in the place in which any order under this Act has been made may—

(a) on the application of either party;

(b) upon cause being shown; or

(c) upon fresh evidence to the satisfaction of the court,

vary or discharge the order.

Mode of  
maintenance  
payments

...— The court may allow non-pecuniary payments amounting to the value of the sum ordered either at the request of either or both of the parties to the action or on its own motion where having regard to all the circumstances, the court considers the non-pecuniary payments to be appropriate.

Order for  
accommoda-  
tion

... (1) Where an applicant is entitled to an order for maintenance following a decree of judicial separation, the court may, in addition to making an order for maintenance, also make an order—

<sup>137</sup> See section on "Maintenance during subsistence of marriage".



(a) giving the applicant the right not to be evicted or excluded from the matrimonial house or any part of it by the respondent for such period as may be specified in the order; and

(b) prohibiting the respondent from evicting or excluding the respondent during the period.

(2) If the respondent is entitled to occupy the matrimonial house by virtue of a beneficial estate or interest or contract or any other legal entitlement but the applicant is not so entitled, the court may order the respondent to provide suitable accommodation for the applicant and any child who is entitled to be maintained.

(3) In making an order under this section, the court shall consider—

(a) the financial and other resources of each of the parties;

(b) the needs of each of the parties and any child who is entitled to be maintained;

(c) the likely effect of an order, refusing to grant an order for accommodation, on the health, safety or well-being of the parties or any child;

(d) the conduct of the parties in relation to each other;

(e) the state of the inter-personal relationship between the parties;

(f) the length of time during which the parties have lived together as husband and wife;

(g) whether there are or have been children who are children of both parties or for whom both parties have responsibilities;

(h) if the parties are separated, the length of time that has elapsed since the parties ceased to live together; or

(i) any other relevant factors.

Address to  
be provided  
to the court

...— (1) A person obliged by order to make payments, of maintenance shall provide full details of his or her address in writing to the clerk of the court which made the order and shall notify such court of any change in his or her address.

(2) A person who contravenes subsection (1) commits an offence and is liable to a fine of K50,000 which shall be applied to the maintenance of the other party or child by order of the court.

Appeals  
against  
maintenance  
orders

...— For avoidance of doubt, an appeal from an order for maintenance or the refusal of an order by a court shall lie, in the case of a court subordinate to the High Court, and in the case of the High Court, to the Supreme Court of Appeal.

#### PART ...

### EXTRATERRITORIAL ENFORCEMENT OF MAINTENANCE ORDERS MADE IN OR OUTSIDE MALAWI

Registration  
of a mainte-  
nance order  
made in a  
foreign  
country

...—(1) Where, before or after the commencement of this Act—

(a) a maintenance order is made against a person by a court in a foreign country; and

(b) a certified copy of the order has been transmitted to the Registrar of the High Court,

the Registrar of the High Court shall send a copy of the order to the office of a court, as specified in subsection (2), for registration of the order in Malawi.

(2) Where—

(a) the order was made in the court of superior jurisdiction in the foreign country, it shall be registered in the High Court;

(b) the order was not made in a court of superior jurisdiction, it shall be registered in a court of a resident magistrate or a court of a magistrate of the first or second grade as the Registrar of the High Court shall consider appropriate in the circumstances.

Transmission  
of order made  
in Malawi

... Where a court in Malawi has made a maintenance order against any person before or after the commencement of the Act, and it is proved to the court that the person against whom the order is made is resident in a foreign country, the court shall send a certified copy of the order to the appropriate authority in the foreign country.

Power to  
make  
order against  
person  
resident in  
foreign  
country

... (1) Where a maintenance order is made in a court in Malawi against any person who is proved to be resident in a foreign country, the court may make an order in his or her absence as if a summons had been duly served on him or her and he or she failed to appear if, after hearing the evidence the court is satisfied of the propriety of the application.

(2) The evidence of any witness who is examined on the application shall be put into writing, and the deposition shall be read over to and signed by him or her.

**(3) Where the order is made, the court shall send to the appropriate authority in the foreign country—**

**(a) any deposition taken;**

**(b) a certified copy of the order;**

**(c) a statement of the grounds on which the making of the order might have been opposed if the person against whom the order is made had been duly served with summons and had appeared at the hearing; and**

**(d) any other information as the court possesses for facilitating the identification of that person, and ascertaining his or her whereabouts.**

**(4) It shall be permissible for the appropriate authority in a foreign country, which receives a provisional order for confirmation, to remit the order back to Malawi for purposes of taking further evidence.**

**(5) The court in Malawi shall after giving the prescribed notice proceed to take the evidence in the same manner and subject to the same conditions as evidence in support of the original application.**

**(6) Where upon the hearing of the evidence it appears to the court in Malawi that the order ought not to have been made, the court may rescind the order, and any depositions taken shall be dealt with in the same manner as an original deposition.**

**(7) Subject to subsection (9), the confirmation of an order made under this section shall not affect any power of a court to vary or rescind that order.**

**(8) On the making of a varying or rescinding order, the court shall send a certified copy of the order to the appropriate authority in the foreign country, and that in the case of an order varying the original order, the order shall not have any effect unless and until confirmed in same way as the original order.**

**(9) The applicant shall have the same right of appeal, if any, against refusal to make a provisional order as he or she would have had against a refusal to make the order had a summons been duly served on the person against whom the order is sought to be made.**

Chief Justice  
to make rules  
for facilitating  
communica-  
tion

... The Chief Justice may make Rules as to the manner in which a case may be remitted to a court authorized to confirm a provisional order, and generally for facilitating communication between a court in Malawi and an appropriate authority in a foreign country.

Mode of  
enforcement

.... (1) A court—

(a) in which an order is registered under this Act;

(b) by which an order has been confirmed under this Act;

shall take all such steps for enforcing the orders as may be prescribed.

(2) An order registered or confirmed under this Part is enforceable in the same way as a civil debt and is recoverable summarily.

(3) A warrant of distress or commitment issued by a court for the purpose of enforcing any order so registered or confirmed under this Act may be executed in any part of Malawi in the same way as if the warrant had been originally issued or subsequently endorsed by a court having jurisdiction in the place where the warrant is executed.

Proof of  
documents  
of court  
offices

...—(1) A document purporting to be signed by a judge or officer of a court in a foreign country shall, until the contrary is proved, be deemed to have been signed accordingly without proof of the signature or judicial or official character of the person appearing to have signed it.

(2) The officer of a court by whom a document is signed shall, until the contrary is proved, be deemed to be the proper officer of the court to sign the document.

Depositions  
to be  
evidence

... A deposition taken in a court in a foreign country for the purposes of this Act may be received in evidence in proceedings before a court under this Act.

Powers of  
President to  
extend Act  
to other  
countries

... Where the President is satisfied that reciprocal provisions have been or are about to be made by the legislature of any foreign country for the enforcement within that country or part of it of maintenance orders made by courts in Malawi, he or she may by proclamation extend the Act to a foreign country or part of it, and this Act shall apply accordingly in respect of that country or part as if the references to foreign country in this Act were references to that country.

## 7.5 TERMINATION OF A MARRIAGE CONTRACT

### 7.5.1 DEATH AND PRESUMPTION OF DEATH

The death of either party brings a statutory marriage to an end. As noted elsewhere in this Report,<sup>138</sup> the position at custom is not as definite. Section 14 of the Divorce Act provides for a presumption of death where a party to a marriage has been continuously absent for a period of at least seven years.<sup>139</sup>

The Commission grappled with the seven year period and deliberated at length as to whether the law can provide for a shorter period. The Commission noted that a number of jurisdictions have adopted the seven year rule. These include Malaysia, England, South Africa, Namibia, Zimbabwe and United States of America (especially the states of South Dakota and Pennsylvania respectively). The Commission was informed that the seven year rule represents an international practice rather than settled international law. Research conducted by the Commission did not find an established rule of international law to the effect that presumption of death arises after seven years. It is possible to argue that the presumption is *lex ferenda*, that is, it is emerging into a customary international rule of a very private nature. The seven year rule is common international practice mostly in jurisdictions based on, or influenced by, the English common law. In the end, the Commission recommends the retention of the presumption of death in the proposed new law.

### 7.5.2 DIVORCE

#### 7.5.2.1 APPLICATION OF THE LAW

As noted elsewhere in this Report, the law applicable upon dissolution of a marriage depends on the type of the marriage.<sup>140</sup> The Commission considered the restriction, in practice, in the application of the Divorce Act to marriages under the Marriage Act. The Commission observed that nowhere in the Divorce Act is it provided that the Act shall only regulate the dissolution of marriages celebrated under the Marriage Act. The Commission established that jurisdiction in the application of the Divorce Act is vested in the High Court as provided for under section 4. Under the Traditional Courts Act,<sup>141</sup> traditional courts have the sole jurisdiction over marriages at custom within their locality or jurisdiction.<sup>142</sup> Hence the High Court exercises jurisdiction over foreign customary law marriages only on account of the application of the Traditional Courts Act to local customary marriages.<sup>143</sup> As traditional courts apply customary law peculiar to their locality or jurisdiction, they cannot apply the Divorce Act which is based on received law under English common law.<sup>144</sup>

<sup>138</sup> See p. 17.

<sup>139</sup> Cf. section 19 of the Matrimonial Cause Act, 1973 (of England and Wales).

<sup>140</sup> See p. 17 of this Report.

<sup>141</sup> Cap. 3:03 of the Laws of Malawi. Traditional Courts have been suspended since 1993.

<sup>142</sup> See section 12 of the Traditional Courts Act. The Court in *Namate v Namate* ruled that the attribution of sole jurisdiction over customary marriages to traditional courts is ill-conceived.

<sup>143</sup> See *Makumba v Kara* (1968-70) 5 ALR Mal. 245 (SCA).

<sup>144</sup> See *Mungomo v Mungomo* Matrimonial Cause No. 6 of 1996 (Unreported).

The Commission recommends the repeal of the Divorce Act as it relates only to statutory marriages. The Commission recommends a new scheme of law on divorce that encompasses all the regimes of marriage recognized under the proposed new law. The Commission further recommends that the new scheme of the law on divorce must be a separate Part within the structure of the proposed new law. In addition, the Commission recommends that courts at all levels within the formal justice structure should exercise jurisdiction over divorce matters under the proposed new law.

Originally, the Commission was of the view that restricting the exercise of jurisdiction over matters of divorce to the courts would make it difficult for rural women to seek divorce and thus force them to remain in violent or abusive relationships. The Commission therefore initially recommended granting jurisdiction to traditional authorities to terminate marriages. Upon deliberation, the Commission however resolved that termination of a marriage is a judicial function and empowering traditional authorities to terminate marriages would in effect be unconstitutional.<sup>145</sup> The Commission noted that although such leaders have been given the power to register marriages, this is only an administrative process unlike divorce which is a judicial process requiring the observance of legal procedures; *inter alia*, rules of natural justice.

The Commission further noted that the Constitution is against “private divorces”. Subsection (2) of section 41 of the Constitution gives every person “access to any court of law or any other tribunal with jurisdiction for final settlement of legal issues”. The Commission concluded therefore that “private divorce” of customary marriage is undesirable and unconstitutional.

The Commission proceeded to extensively examine the Divorce Act and has made recommendations regarding the incorporation of the specific provisions from that Act into the proposed new law. These recommendations will cover all types of marriages under the new law except marriages by repute or cohabitation.

#### 7.5.2.2 DOMICILE

The Commission observed that domicile is a requirement before the Act may be applied in dissolving a marriage or for a court in Malawi to exercise jurisdiction. The Commission originally agreed that the new law should apply to any marriage contracted under any valid law in any country as long as the foreign law is proved in a Malawi court as a fact.

The Commission therefore decided that the position in the present Divorce Act must be retained. Domicile shall continue to determine the jurisdiction of the courts to dissolve a marriage.

#### 7.5.2.3 JURISDICTION

Jurisdiction over the divorce of statutory marriages as provided for under section 4 of the Divorce Act is restricted to the High Court. The section states that jurisdiction may be exercised in accordance with the law applied in

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<sup>145</sup> See section 103 (2) of the Constitution.

matrimonial proceedings in the High Court of Justice in England. The Commission recommends that jurisdiction under the new law must extend to subordinate courts since the High Court is not accessible to most Malawians in rural areas. The Commission observed that the inaccessibility of the High Court entails that most women are denied access to justice. Further, the Commission did not see any justification that jurisdiction under the Divorce Act should be exercised in accordance with the law applied in matrimonial proceedings in the High Court of Justice in England. The Commission has therefore developed extensive rules for matrimonial proceedings which shall form part of the subsidiary legislation under the new law.

#### 7.5.2.4 GROUNDS FOR DIVORCE

Section 5 of the Divorce Act outlines five grounds of divorce; namely, adultery; desertion; cruelty; insanity; or that the husband has since the celebration of the marriage been guilty of rape, sodomy or bestiality.

The Commission observed that developments elsewhere reveal a paradigm shift in the law to allow spouses to divorce where their marriage has irretrievably broken down.<sup>146</sup> It has been argued that the insistence on the commission of a matrimonial “offence” (as envisaged, for example, under section 5 of the Divorce Act) “lays stress upon the symptoms of breakdown rather than on the breakdown itself”.<sup>147</sup> The Commission was made aware of the radical reforms to divorce law in England and Wales introduced under the Divorce Reform Act, 1969. Under that Act, irretrievable breakdown of marriage became the sole ground for divorce and reasons comparable to those under section 5 of the present Divorce Act could be proved as evidence of the extent and nature of the breakdown. The position in England and Wales was retained under the Matrimonial Causes Act, 1973 and subsists under the Family Law Act, 1996.

The Commission recommends that irretrievable breakdown of marriage must be the sole ground for divorce in Malawi. The grounds for divorce contained under section 5 of the Divorce Act shall constitute, *inter alia*, the reasons for the irretrievable breakdown of a particular marriage. The Commission noted that the five instances that were envisaged under the Divorce Act may not be the only instances that may show that a marriage has irretrievably broken down. The Commission recommends that the new law must be couched in general terms so that factors that may be peculiar to a particular case may be considered in the determination of the question whether that marriage has irretrievably broken down.

The Commission also observed that the fifth ground under the present Divorce Act only applies to men. However, the Commission noted that similar acts listed under that ground may be committed by a female spouse. When the

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<sup>146</sup> Bromley, p. 227.

<sup>147</sup> *ibid.*

Commission made reference to the Penal Code, it further noted that section 153 on unnatural offences restricts those offences as being capable of being committed by men only. The Commission also noted that if a female spouse commits the applicable acts against which a conviction would obtain against a male spouse, there is no offence at law to which she would answer. The Commission therefore recommends that section 153 of the Penal Code must be amended in order to include women as capable of committing unnatural offences envisaged under that provision.

The Commission further noted that the Special Law Commission on Criminal Justice Reform considered, in their Report on the Review of the Penal Code,<sup>148</sup> the introduction of a provision prohibiting sexual activities for commercial purposes generally within the ambit of activities constituting prostitution. The proposed provision, section 147A, prohibits 'prostitution' which is defined thereunder as meaning "any sexual activity with another person for money or personal value" and further defines 'sexual activity' as "including sexual intercourse whether in the form of genital, oral-genital or anal-genital contact or otherwise, whether between persons of the same or opposite sex." The Commission considered that while this prohibition of sexual activity is within the ambit of prostitution under the proposed section 147A, sexual activities between females may be committed outside the ambit of prostitution and should equally be criminalised as unnatural offences under section 153 of the Penal Code. The Commission recommends the amendment of section 153 of the Penal Code accordingly. An amendment Bill to the Penal Code is attached as part of this Report.

#### 7.5.2.5 HIV AND AIDS AND DIVORCE

The Commission also considered the HIV and AIDS pandemic and its contribution to the breakdown of marriages today. In view of the prevalence of HIV and AIDS and the need to protect spouses from infecting each other within the family setting, the Commission at one time considered recommending that HIV and AIDS should also be one of the reasons culminating in the irretrievable breakdown of the marriage. The Commission was aware that making a person's sero status a reason for the irretrievable breakdown of a marriage can be objectionable in some quarters as it may be considered discriminatory against those persons who are sero positive and may increase the stigma attached to HIV and AIDS.<sup>149</sup> In the final analysis, the Commission resolved to exclude highlighting HIV sero status as a separate reason for the irretrievable breakdown of marriage. However, the Commission was of the view that HIV sero status may be adduced in evidence as a specific reason for the irretrievable breakdown of marriage in appropriate cases where it is a proven medical fact and that a party refuses to manage his or her sero status. The Commission further noted that HIV and AIDS and other attendant matters are treated under specific laws on HIV and AIDS in comparable foreign municipal jurisdictions.<sup>150</sup>

<sup>148</sup> Malawi Law Commission (2000), Malawi Government *Gazette* Extraordinary.

<sup>149</sup> See the National HIV and AIDS Policy.

<sup>150</sup> See, for example, Zimbabwe and South Africa which criminalise the wilful transmission of HIV under a separate regime of law from their laws on marriage and divorce.



If the parties to a marriage are aware of each other's status and choose to remain married, the law will not prevent them from doing so and therefore the issue of discrimination does not arise. The whole purpose of the consideration of HIV and AIDS here is to allow couples to manage their infection if they test positive. The Commission considered it paramount that parties must be left with the choice to choose a suitable option for themselves when faced with HIV and AIDS infection.

#### 7.5.2.6 JUDICIAL SEPARATION

The Commission established that under English law the principal effect of judicial separation was to relieve the petitioner of the duty to cohabit with the respondent. During the life of a decree of judicial separation neither spouse could be held to be in desertion.<sup>151</sup>

According to Halsbury's Laws of England, "a petition for judicial separation may be presented to the court by either party to a marriage on the ground that any such fact as may prove irretrievable breakdown on a petition for marriage exists".<sup>152</sup> In this regard, the Commission resolved to tackle the issue simultaneously with divorce.

The Commission observed that judicial separation is covered under sections 15 to 21 of the Divorce Act. Under section 15 of the Divorce Act, the grounds for judicial separation are the same as the grounds for divorce under section 5 of the Divorce Act.

The Commission found the provisions satisfactory and recommends their retention and incorporation into the new law subject to making all references to "husband" and "wife" gender neutral where appropriate.

Section 32 of the Divorce Act provides that all matrimonial proceedings shall be regulated by the procedure followed in matrimonial proceedings in England. In practice, the Malawi Courts have tended to follow the procedure under the Matrimonial Causes Rules, 1951 (as amended). As pointed out elsewhere, the Commission has recommended the incorporation of extensive procedural rules as subsidiary legislation under the proposed new law.

#### 7.5.2.7 PROCEDURE ON DIVORCE

##### (a) *Pleadings*

Section 33 of the Divorce Act provides that matrimonial proceedings shall be commenced by a Petition. A petition shall be verified as a plaint, that is, as a writ of summons or originating summons. In this case, a petition is a pleading. In terms of the general law on pleadings, a petition can state facts and not law. A petition can also not state the evidence by which the facts are to be proved.<sup>153</sup> The Commission recommends the retention of the provision in the proposed new law.

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<sup>151</sup> See, for example, subsection (1) of section 18 of the Matrimonial Causes Act, 1973 (of England and Wales).

<sup>152</sup> 13 Halsbury's Laws (4th edn) para 648.

<sup>153</sup> See Order 18 of the Rules of the Supreme Court (of England).

(b) *Parties*

The law generally recognized that spouses shall be parties to a petition for divorce, judicial separation or nullity of marriage.<sup>154</sup>

Section 6 of the Divorce Act provides that where the husband is a petitioner and the petition is presented on the ground of adultery, the alleged adulterer shall be made a co-respondent to the proceedings. The Commission recommends retention of the provision of the law on parties to matrimonial causes. Further, the Commission found the principle of enjoining the other party to the adultery as co-respondent to be satisfactory but recommends that it should apply in both cases where either the wife or husband commits adultery.

(c) *Inquiry on Condonation, Collusion and Connivance*

Section 7 of the Divorce Act places a duty on the courts to inquire as to whether there has been any connivance, condonation or collusion<sup>155</sup> in the presentation of a petition for divorce. If the court finds that these factors exist, the court is obliged to dismiss the petition. This requirement is necessary to ensure that divorce is not allowed on the basis of a mutual agreement.

The Commission noted that courts have accepted that resumption of consummation between parties constitutes condonation and therefore acts as a bar to divorce.<sup>156</sup> The Commission was originally convinced that condonation and collusion should be removed from the provision because it was aware that women in relationships where they suffer abuse do stay on and their husbands continue to intimidate them into exercising their right of consummation. The Commission felt that resumption of consummation in such circumstances should not be taken as condonation.

The courts have also decided that mere forgiveness does not amount to condonation.<sup>157</sup> In order for forgiveness to amount to condonation, “the forgiveness must completely restore the offending spouse and must be followed by cohabitation.”<sup>158</sup> Again the Commission was of the opinion that in abusive relationships or in situations where the woman victim of the abusive relationship has no means to set up a home of her own, cohabitation may not be voluntary and should not be taken as a sign of condonation.

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<sup>154</sup> See section 5, 11 and 15 of the Divorce Act.

<sup>155</sup> Connivance in matrimonial proceedings refers to the behaviour of a person designed to cause his or her spouse to commit a matrimonial offence. Condonation refers to the resumption of marital cohabitation, by one of the matrimonial parties, in the face of a known matrimonial “offence” committed by the other, constitute a ground for divorce. Finally, Collusion refers to an agreement between two or more persons to defraud a person of his rights by the forms of law, or to obtain an object forbidden by law. It implies the existence of fraud of some kind, the employment of fraudulent means, or of lawful means for an unlawful purpose.

<sup>156</sup> See *Chidzero v. Chidzero* (1978-80) 9 MLR 22 and *Malinki v. Malinki* (1975-77) 8 MLR 141.

<sup>157</sup> *Abdul Panjwani v. Farida Panjwani and Farook Mussa and Hassina Mussa* Matrimonial Cause No. 5 of 1995 (Unreported).

<sup>158</sup> *Bickford v. Bickford* Civil Cause No. 48 of 1978 (Unreported).

The Commission found that Malawian case law on the subject of collusion and connivance does not give much guidance on how these concepts are to be proved before the court in order for the court to satisfy itself that condonation, connivance or collusion have taken place in presenting the petition for divorce. It is common practice that at the beginning of every court decision in an uncontested petition of divorce, the Court first warns itself of the possible dangers of condonation, connivance or collusion in such cases. The Court goes on to satisfy itself on the basis of the evidence in the case that there was no collusion in the presentation of the petition at hand. The analysis of the evidence leading up to such finding is not made.<sup>159</sup> The statement of caution by the Court is made as a matter of course.

The Commission recommends that in terms of condonation, there must be a rebuttable presumption that resumption of sexual intercourse or forgiveness coupled with resumption of cohabitation should be deemed condonation. This presumption shall be rebutted by evidence to the contrary by the party wishing to prove that there was no condonation. Such evidence can be in the form of evidence of the abusive or violent conduct of the other party that led the party adducing this evidence to feel threatened or intimidated and therefore submit to the resumption of conjugal activities or cohabitation. Again, as regards connivance and collusion, the Commission recommends that there must be a rebuttable presumption that there was no connivance and collusion in the presentation of the divorce petition, unless evidence is adduced to the contrary.

Regarding the question whether divorce should be allowed on a mutual agreement of the parties, the Commission reiterated the premise of the sanctity of the family institution as protected by subsection (1) of section 22 of the Constitution. If couples could divorce on agreement, that would give access to marriages by convenience (especially between immigrants and citizens where after the desired immigration status in the country has been acquired by the immigrant, the couple would merely agree to divorce and simply go to court to formalise their agreement).

*(d) Prohibition of Divorce Petitions during the First Three Years of Marriage*

Under section 8 of the Divorce Act, the Court can only hear a petition for divorce after three years from the date on which the parties were married. The Commission observed that this three-year restriction on divorce is unfair as it causes unnecessary hardship to suffering parties, especially women.

The Commission also noted that the exceptions to the three-year rule, namely, exceptional hardship or exceptional depravity, are so wide as to make the rule redundant or of no effect. The Commission therefore recommends that the rule should be abolished.<sup>160</sup>

<sup>159</sup> See, for example, *Namalomba v. Namalomba* (1990) 13 MLR 287 and *Malata v. Malata* (1990) 13 MLR 209.

<sup>160</sup> The reforms to family law of England and Wales contained in the Family Law Act, 1996 have dispensed with the three year restriction.

#### 7.5.2.7 RELIEFS

The major reliefs available to a petitioner under the Divorce Act are threefold. First, the declaration of a decree *nisi* (subsequently absolute) for divorce based on the grounds specified in section 5 of the Divorce Act. Second, the decree of nullity of marriage based on the grounds specified under section 12 of the Divorce Act. Finally, the decree of judicial separation based on the grounds specified under section 15 of the Divorce Act.

The Commission recommends retention of the provisions in the new law subject to ensuring that the reliefs shall be available to both the male and female spouse.

The Commission also noted that section 23 of the Divorce Act allows a husband to claim damages for the adultery of his wife. Originally, the Commission considered repealing this provision as there appeared to be an undesirable transactional element to receiving damages for the adultery of one's spouse. Upon lengthy debate, the Commission opted to retain the concept of damages so as to protect the sanctity of the institution of marriage. The Commission was convinced that imposing damages on parties that commit adultery with other people's spouses shall have a deterrent effect and therefore protect marriages. The Commission however recommends that the section should be available to both a husband and a wife.

#### 7.5.2.8 PETITIONS FOR NULLITY OF MARRIAGE

Under the present law a petition for nullity of marriage is provided for under section 11 of the Divorce Act. A petition of nullity is presented to the courts as a way of terminating the marriage when either of the party wishes to have the marriage declared null and void. The effect of a declaration that a marriage is null and void by the court is to declare that the marriage never took place and therefore the status of matrimony was never conferred upon the parties by whatever marriage formalities that were entered into.<sup>161</sup> The reasons for seeking a nullity rather than a divorce are purely technical and usually due to factors that are beyond the knowledge or control of at least one of the parties.

The Commission observed that just because the court makes a declaration that the marriage never took place does not in itself result in the erasing of the fact that the couple were in a relationship and may have children and accumulated property during the time when their relationship was subsisting.

The issue of property settlements and other attendant issues such as the custody of children upon nullity revealed that English courts distinguish between marriages that are void and marriages that are voidable and only allow property settlements for marriages that are voidable. The purpose of this distinction is that void marriages are those that are deemed never to have existed in the first place due to some technicality; for example, the parties were within the prohibited degrees of relationship.

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<sup>161</sup> See *R v. Algar* [1954] 1 QB 279 at 287.

Voidable marriages, on the other hand are those in which it was open to the petitioner to have the marriage declared void on a technicality such as that one formality provided for by the law was not carried out, but he or she chose to remain in the marriage and conducted himself or herself in a manner that reasonably led the respondent to believe that the petitioner would not seek to have the marriage declared void. Such marriages are regarded as valid and subsisting until a decree of nullity has been obtained during the lifetime of the parties. Therefore, unlike void marriages, voidable marriages are regarded to have existed to the point of the decree of nullity. In those cases, the courts have the power to order maintenance for either party to the marriage and to make or vary property settlements on petitions to annul voidable marriages. The law recognizes that a marital relationship existed during which property was accumulated.<sup>162</sup>

The Divorce Act does not, however, distinguish between void and voidable marriages and treats all marriages as void. This means that, technically, the courts have no power to make any property settlements under a decree of nullity of marriage. Indeed the one reported case on nullity<sup>163</sup> was decided on the premise that as the law (in the case being the Divorce Ordinance) makes no reference to the granting of permanent maintenance on the annulment of marriage, the High Court had no power to grant permanent maintenance in such cases. The only way in which the High Court could grant maintenance was if the parties had expressly made an agreement for maintenance prior to the Court declaring their marriage null and void. The Commission found this position unsatisfactory as it overlooks the fact that a relationship did exist and therefore that the court must have powers to make property settlements for the spouses and children, if any.

In the case of *Chirunga v. Chirunga*,<sup>164</sup> the High Court considered issues of maintenance and custody on a petition for nullity and awarded custody to the petitioner on the grounds of the happiness and welfare of the children since the petitioner was employed and the respondent was unemployed. No maintenance was ordered as the respondent was unemployed but the petitioner was given leave to reapply for a maintenance order should the respondent's position change.

For the sake of consistency and clear guidance to the courts, the Commission recommends the grant of an express power to the courts to order maintenance for either party and to make and vary property settlements as well as to settle any issues on the custody of children upon any petition for nullity.

The Commission recommends that the position on property settlement and the issue of the custody of the children can easily be addressed by a provision that expressly states that notwithstanding the fact that the marriage is declared void by a court, for the purposes of property settlement, maintenance and the

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<sup>162</sup> 13 Halsbury's Laws, 4th Edn, paras 540–542.

<sup>163</sup> *Watts v. Watts* (1923-60) ALR (Mal) 327 and *Watts v. Watts* (No. 2) (1923-60) ALR (Mal) 359.

<sup>164</sup> Matrimonial Cause No. 4 of 1995 (Unreported).

custody of children, the court may make an order to sell and to share the proceeds of the property, and order for permanent or temporary maintenance or an order for the custody of any children respectively, as appropriate. The Commission also recommends that an order of property settlement, maintenance or custody of any children must be made regardless of “fault” on the part of either of the parties.

The Commission therefore recommends the incorporation of the substance of section 11 of the Divorce Act in the proposed new law and the introduction of a new provision to reflect the reasoning and recommendations in the foregoing.

#### 7.5.2.9 CHILDREN OF ANNULLED MARRIAGES

This is governed by section 13 of the Divorce Act. The Commission noted that by declaring a marriage null and void, which is in effect a declaration that the marriage never existed in the first place, serious implications were raised in consequence of the legitimacy of any children born to that purported marriage. In jurisdictions that differentiate between void and voidable marriages, this only becomes a problem with void marriages since in voidable marriages, the law accepts that a marriage existed up until one of the parties sought a petition for nullity. Section 13 of the Divorce Act gets around this problem by making provision that any child born from marriages voided on certain grounds can, for purposes of succession or inheritance, be treated as a legitimate child. The Commission nonetheless found a number of problems with this formulation.

First, the types of marriage that enable children to benefit from this legitimate status are limited to marriages annulled because: a former spouse was living and the subsequent marriage was contracted in good faith; the marriage is voided on the ground of insanity; and the respondent was at the time of the marriage suffering from a venereal disease in communicable form. The other grounds for voiding a marriage are excluded from this formulation which the Commission found to be an anomaly.

Secondly, children born from marriages voided on the restricted grounds are only considered legitimate for the purposes of succession or inheritance, and for no other reason. The Commission found this formulation inconsistent with subsection (1) of section 23 of the Constitution which accords all children, regardless of the circumstances of their birth, the right to equal treatment before the law. The Commission also recalled its earlier recommendation during the review of the Wills and Inheritance Act in which for the purposes of succession or inheritance, “child” was redefined as “a child of the deceased person, regardless of the circumstances of the birth of the child and includes an adopted child, and an unborn child in the womb of its mother.”<sup>165</sup>

In conclusion, to the extent that section 13 of the Divorce Act caters for the right to succession or inheritance of children of an annulled marriage, the Commission recommends the deletion of this provision as it is redundant.

<sup>165</sup> See Malawi Law Commission Report (2004) *Report on the Review of the Wills and Inheritance Act* Malawi Government Gazette Extraordinary, p. 17.

#### 7.5.2.10 DISTRIBUTION OF PROPERTY DURING JUDICIAL SEPARATION

Matters of property belonging to a female spouse are dealt with under section 16 of the Divorce Act generally. The Commission noted that there is no provision for the way property is treated during the period of judicial separation. The Commission recommends that the law should make provision for the distribution of property during the separation so as to prevent hardship.

The Commission also recommends that the law should apply to property of both men and women and not just women as provided in the section. In particular, the section only provides for the way in which the property of the wife should be distributed in the event she dies intestate while a decree of judicial separation is in force. The Commission recommends that such distribution upon intestacy should apply to either party and not just the wife. The Commission's decision was justified with reference to the position under English law where if, while a decree of judicial separation is in force, either of the parties dies intestate in relation to all or any of his or her property, the property with respect to which such party died intestate devolves as if the other party to the marriage had been dead.<sup>166</sup> This formulation avoids the discrimination that currently exists by the restricted reference to wife in the present Act.

The Commission further recommends that the law should make provision that during the separation, the matrimonial property should not be alienated in any way unless evidence is adduced of mutual agreement permitting such alienation.

In granting a decree for judicial separation, the Commission recommends that the court should be given powers to make ancillary orders regarding distribution or use of the matrimonial property as well as orders regarding the maintenance and custody of children. In this regard, the Commission was of the opinion that the proviso to section 17 of the Divorce Act which deals with maintenance and the exercise of joint powers by husband and wife upon separation is more suited to this provision.

#### 7.5.2.11 DISTRIBUTION OF PROPERTY UPON DISSOLUTION OF MARRIAGE

The question of property ownership or entitlement to matrimonial property usually arises when a marriage is dissolved as a consequence of divorce. At present, there is no statutory law that provides for the division of matrimonial assets upon the dissolution of marriage. This aspect has been left entirely to the common law where courts exercise unfettered discretion. This state of affairs has led to the perpetuation of injustices especially upon women as the decisions of the courts fail to appreciate the power imbalances between divorced spouses.<sup>167</sup>

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<sup>166</sup> Cf. section 18 of the Matrimonial Causes Act, 1973 (of England).

<sup>167</sup> Mwenifumbo A.W.A. (2003) *Property Division after Divorce: Unmasking the Courts' role in perpetrating power imbalances between spouses*. LL. B (Honours) Dissertation: University of Malawi. See also *The Gender Overview*, p. 38.

In jurisdictions where ownership of property is easily established through the concept of “community of property,”<sup>168</sup> the settlement or distribution of matrimonial property after dissolution is less onerous as it is done on a fifty-fifty basis. Basically, under community of property, each spouse owns an undivided one-half interest in property acquired during the marriage in the absence of a matrimonial agreement or contract to the contrary.

In Malawi, on the other hand, as is the case in other common law jurisdictions, the ascertainment of ownership of matrimonial property is not as straightforward. Ownership of property depends on a number of principles which a court has to consider. The application of these principles has tended to be patriarchal.<sup>169</sup> Common law in the area of ownership of matrimonial property reveals these principles to be—

(a) *Common Intention*

Each party to the marriage is deemed to own the property that he or she bought unless at the time of the acquisition of property there was a common intention (for which evidence by express agreement or implied by words or conduct is required) to own the property jointly and either spouse has acted to his or her detriment in reliance of that common intention,<sup>170</sup> then the property will be declared to be jointly owned. Forgoing a monthly salary from outside employment in order to manage the family business without pay may be an example of such detriment.

(b) *Contribution*

Any party to the marriage wishing to prove that he or she is entitled to a share in any object of property must prove that he or she contributed to it.<sup>171</sup> This contribution has to be a direct financial contribution.<sup>172</sup> Therefore, an indirect contribution such as housekeeping, childcare or maintaining the property, is not sufficient to entitle a party to the marriage to a share of the matrimonial property.

(c) *Registration in both names*

If the parties to the marriage are registered as joint owners to the title of the property, they will be deemed joint owners unless there is clear evidence that the name of one spouse was merely added for expediency or convenience.

As there are no strict guidelines to determine to what extent, if at all, any of these principles apply to any particular case on division of marital assets, the Commission recommends that the new law should specifically lay down

<sup>168</sup> Community of property is a Roman-Dutch law concept that is used mainly on the European Continent, South Africa, Botswana, Rwanda and Namibia. In the United States of America, there are nine States that incorporate community of property in their law: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington and Wisconsin.

<sup>169</sup> See *The Gender Overview*, p. 37.

<sup>170</sup> See *Nyangulu v Nyangulu* (1981-83) 10 MLR 435.

<sup>171</sup> *Malinki v Malinki* (1978-80) 9 MLR 441.

<sup>172</sup> *Nanyanga v Nanyanga* Matrimonial Cause No. 21 of 1998 (Unreported).



extensive guidelines to guard against abuse of discretion by the courts. This approach will prevent weaker family members, invariably women, from suffering loss.<sup>173</sup>

Ultimately, despite the increase of women in the employment and business sector, women in Malawi remain largely relegated to the home in performance of domestic chores. Their contributions, though not financial, are significant and the Commission finds it untenable that the established *corpus* of Malawi law fails to recognize such contributions in the division of property.

The Constitution offers little assistance in determining how property is to be distributed. Subparagraph (i) of subsection (1) (b) of section 24 of the Constitution accords women the right to full and equal protection by the law and the right to a fair distribution of property that is owned jointly with a spouse. In view of the manner in which property is deemed to be owned by married couples in Malawi, the Commission found this constitutional provision inherently unfair and ultimately discriminatory against women. As with the common law position, the Commission decried the fact that in the ordinary course of events, women do not directly contribute (as much as men do) financially towards acquisition of property and therefore there is very little, if any, property that they can be deemed to jointly own through the principle of contribution.

The Commission was also aware that it is very rare for men (who in most cases possess the purchasing power) to either declare an intention that the property shall be owned jointly or to register property in the joint names of the spouses. The Commission found that husbands were more likely to register property bought by them individually in their own names or in the names of children of the marriage. It is also highly unlikely that the wife being the weaker spouse will ask, during the subsistence of the marriage, for a share in each and every asset that is acquired as such kind of behaviour leads to distrust.<sup>174</sup> There is therefore very little property in a marriage that a couple can call jointly owned and therefore the constitutional provision does nothing to improve the plight of women who are disadvantaged by not being accorded the right to a fair distribution since only property that is jointly owned can be the subject of a fair distribution.

As the Constitution could not have intended to make the provision to the detriment of women (and in fact the Constitution has a provision relating to equality<sup>175</sup>), the Commission resolved that the Constitution, in section 24, sets a minimum standard for the fair distribution of matrimonial property and that it was left to enabling legislation to expand upon this minimum standard. The Commission recommends that a provision must be incorporated into the proposed new law which equitably distributes matrimonial property based upon such factors as need, custody of children, earning capacity and other

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<sup>173</sup> *ibid*, p. 3.

<sup>174</sup> Cf. Mwenifumbo A.W.A., p. 40.

<sup>175</sup> See section 20.

responsibilities and obligations of the spouses after divorce.<sup>176</sup> This principle of distribution is not based on ownership or title as is presently the case. However, the Commission recommends that only matrimonial property or property that is clearly intended for use and enjoyment by the family must be distributed this way. In order to give effect to the constitutional provision of a fair distribution, the Commission recommends that all the factors surrounding the dissolution should be taken into account. The distribution need not be an equal one as long as it is fair. The emphasis on fairness rather than equality as a basis for distribution is necessary to ensure that the spouse that has the custody of the children is not disadvantaged by having to support the children on his or her half of the property.<sup>177</sup> A regular income should also be included as property that is subject to a fair distribution upon dissolution of the marriage.

The Commission recognized that in cases of customary land, a fair distribution might not always be possible as the rights to such land are usufruct only and ownership of property on such land as well as the land itself cannot be alienated or transferred to a former spouse as the land is intended for the use of a particular clan. The Commission therefore recommends that in cases of divorce the interest in customary land must be transferred to the children of the marriage.

The Commission recognized that a fair distribution of the property upon dissolution will depend upon a full and frank disclosure of all the matrimonial property, whether owned jointly, severally or enjoyed in common by the parties to the marriage. The Commission therefore recommends that any wilful or intentional failure to disclose this information, fully and frankly, shall be made a criminal offence.

#### 7.5.2.12 PROTECTION ORDERS

Section 17 of the Divorce Act provides that a wife shall be considered unmarried woman for purposes of liability under tort or contract during the subsistence of a decree of judicial separation.

The Commission established that section 17 is based on an obsolete English common law position known as *coverture* which referred to the state or condition of a married woman. Until enactment in England of the Married Women's Property Acts in 1882, 1893 and 1907 as well as the Law Reform (Married Women and Tortfeasors) Act, 1935, a married woman could not own property free from her husband's claim or control and could not enter into contracts or be sued under a contract or any tort personally as only husbands had title to property and were therefore the rightful parties to sue or to be sued on any action concerning property. This common law position can no longer stand in light of section 20 of the Constitution which prohibits all forms of

<sup>176</sup> Mwenifumbo, A.W.A., p. 42.

<sup>177</sup> Cf. Mwenifumbo, A.W.A., p. 62.

discrimination. In particular, subparagraphs (i) and (ii) of subsection (1) (a) of section 24 of the Constitution accords women the right to full and equal protection of the law and the right not to be discriminated against on the basis of their gender or marital status. This includes the right of women to enter into contracts as well as the right to acquire and maintain property independently or in association with others regardless of their marital status. The Commission therefore rejects the principle of *coverture* and the settlement of a wife's property as envisaged under section 28 of the Divorce Act. In the same vein, sections 29 and 30 of the Divorce Act fall away as the crux of the two provisions has been incorporated in the provision on powers of the court to make orders on settlement or maintenance. The Commission does not recommend the adoption of the two principles in the proposed new law.

#### 7.5.2.13 RESTITUTION OF CONJUGAL RIGHTS

Section 22 of the Divorce Act allows a spouse to apply for restitution of conjugal rights where the same have been withdrawn without reasonable excuse. Any of the factors constituting grounds for a decree of judicial separation or divorce amount to a defence to an application for restitution of conjugal rights.

The Commission considered the provision on the restitution of conjugal rights by the courts unrealistic and recommends the deletion of the entire provision. The historical objective of restituting conjugal rights was to preserve the sanctity of marriage by preventing unnecessary breakdowns in the marriage. Whilst the Commission applauds this rationale it recommends its deletion as the difficulties in enforcement make the provision redundant.

The Commission was aware that the Chief Justice has promulgated new Rules to the Courts Act<sup>178</sup> which requires all parties to submit to mediation before commencement of litigation. Moreover, a couple shall be required to go for mediation under the recommended new provisions of this Act where evidence of attempts to restore the marriage shall be adduced before the court can dissolve the marriage. The Commission accordingly recommends the repeal of this section.

#### 7.5.2.14 COSTS OF LITIGATION

Section 24 of the Divorce Act provides that a co-respondent may bear the costs of litigation in divorce proceedings. The Commission was of the view that penalising the co-respondent to adultery that is proved before the courts was a progressive way of ensuring that the sanctity of marriage is protected and its dignity retained. The Commission therefore recommends the retention of this provision subject to replacing the references to "wife" with "**spouse**" so as to make the provision applicable to both parties in the marriage.

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<sup>178</sup> Courts (Mandatory Mediation) Rules, 2004.

## 7.5.2.15 ALIMONY PENDENTE LITE AND PERMANENT ALIMONY

Section 25 of the Divorce Act provides for alimony *pendente lite*. Alimony *pendente lite* literally refers to the maintenance available to a wife pending the commencement of matrimonial proceedings. Section 26 of the Divorce Act provides for permanent alimony. Permanent alimony is available to a wife upon a decree absolute for divorce or a decree of judicial separation. A court will consider the fortune of the wife, the ability of the husband and the conduct of the parties before making an order of permanent alimony. Permanent alimony may be ordered for a period not exceeding the life of the wife. Section 27 of the Divorce Act allows the Court to discharge or alter an order for alimony.

The Commission observed that alimony at common law referred to the allowance of a married woman when she was under the necessity of living apart from her husband.<sup>179</sup> The term “alimony” is no longer used in matrimonial causes and has been replaced by maintenance pending suit and permanent maintenance.<sup>180</sup>

The Commission resolved to retain the provision on alimony generally. The Commission recommends that the provisions on alimony must refer to maintenance so that the provisions apply to both parties to a marriage.

## 7.5.2.16 GENERAL PROCEDURE

The Commission examined sections 33 to 44 of the Divorce Act and recommends their retention subject to extending the jurisdiction of the courts to subordinate courts and to the repeal of sections 41 and 42.

In light of the foregoing discussion relating to divorce, judicial separation and nullity of marriage, the Commission recommends the following new Part—

**PART ...****DIVORCE, JUDICIAL SEPARATION AND  
NULLITY OF MARRIAGE**

General  
principles

**... (1) In exercising a function under this Part, a court shall have regard to the following general principles that—**

- (a) the institution of marriage is to be protected;**
- (b) the parties to a marriage which may have broken down are to take all practical steps, whether by counselling or otherwise, to save the marriage;**
- (c) a marriage which has broken down and is being dissolved should be brought to an end—**
  - (i) with minimum distress to the parties and to the children affected;**

<sup>179</sup> Rutherford, Leslie and Sheila Bone (eds.) (1993) *Osborne's Concise Law Dictionary*. 8th edn. London: Sweet & Maxwell, p. 22.

<sup>180</sup> See the Matrimonial Causes Act, 1973 (of England) and the Maintenance Enforcement Act, 1991 (of

Limitations  
of this Act

(ii) with questions dealt with in a manner designed to promote as good a continuing relationship between the parties and any children affected as is possible in the circumstances;

(iii) without costs being unreasonably incurred in connection with the procedure to be followed in bringing the marriage to an end; or

(d) any risk of violence to one of the parties and to any children of the marriage shall, as far as is reasonably practicable, be removed or diminished.

... Nothing in this Act shall authorize—

(a) the making of any decree of dissolution of marriage unless the petitioner is domiciled in Malawi at the time when the petition is presented; or

(b) the making of any decree of nullity of marriage unless—

(i) the petitioner is domiciled in Malawi at the time when the petition is presented; or

(ii) the marriage was celebrated in Malawi.

Divorce and  
judicial  
separation

... (1) The court may, upon satisfying itself that the marriage has irretrievably broken down—

(a) grant a decree of judicial separation to provide for the separation of parties to a marriage; or

(b) grant a decree of divorce to dissolve the marriage.

(2) A decree of judicial separation comes into force upon being made.

(3) A decree of judicial separation remains in force—

(a) while the marriage continues;

(b) until cancelled by the courts on the joint application of the parties; or

(c) until a decree *nisi* of divorce is granted by a court.

(4) Where the court grants a decree of judicial separation, it shall no longer be obligatory for a spouse to exercise rights to consortium with the other spouse and a court shall have powers to make ancillary orders to enforce the separation of the parties.

Rape during judicial separation	... A husband commits the offence of rape during the subsistence of a decree for judicial separation if he has sexual intercourse with his wife without her consent.
Irretrievable breakdown of marriage	<p>... (1) A petition for divorce may be brought by either party to a marriage on the sole ground that the marriage has irretrievably broken down.</p> <p>(2) In deciding whether or not a marriage has irretrievably broken down, the court shall have regard to all the relevant facts regarding the conduct and circumstances of the parties and, in particular, shall refuse to grant a decree where a petition is founded exclusively on the petitioner's own wrongdoing.</p>
Evidence of breakdown of marriage	<p>... In deciding whether or not a marriage has irretrievably broken down, the court may accept any one or more of the following facts as evidence that the marriage has irretrievably broken down—</p> <p>(a) the respondent has committed adultery and the petitioner finds it intolerable to live with him or her;</p> <p>(b) the respondent has been convicted of the offence of rape or of an offence under section 153 of the Penal Code;</p> <p>(c) the respondent has deserted the petitioner without cause for a continuous period of at least one year immediately preceding the presentation of the petition for divorce;</p> <p>(d) the respondent has since the celebration of the marriage treated the petitioner with cruelty;</p> <p>(e) the respondent is of incurable unsound mind and has been under care and treatment for a continuous period of at least two years immediately preceding the presentation of the petition; or</p> <p>(f) any other factors that the court considers relevant.</p>
Cap. 7:01	
Circumstances in which decrees are made	<p>... A court may upon application grant a decree <i>nisi</i> of divorce or a decree of judicial separation if—</p> <p>(a) the marriage has irretrievably broken down;</p> <p>(b) the parties have undergone marriage counselling; and</p> <p>(c) the requirements of section ... are satisfied.</p>

Arrangements  
for the future  
in cases of  
divorce or  
judicial  
separation

... (1) The court, in granting an order for decree *nisi* of divorce or an order for judicial separation shall first be satisfied that the parties to the marriage have made arrangements for the future by producing one of the following—

(a) a court order, made by consent or otherwise, dealing with their financial arrangements;

(b) a negotiated settlement as to their financial arrangements;

(c) a declaration by both parties that they have made their financial arrangements; or

(d) declaration by the party, to which no objection has been notified to the court by the other party, that—

(i) he or she has no significant asset and does not intend to make an application for maintenance;

(ii) he or she believes that the other party has no significant assets and that the other party does not intend to apply for maintenance;

(iii) there are no financial provisions to be made; and

(iv) the parties do not desire to make any financial arrangement.

Rebuttable  
presumption  
of condonation  
of adultery

... There is a rebuttable presumption that adultery is not condoned unless consummation has been continued or subsequently resumed of the parties free will.

Co-respondent

... Where the petition is presented on the ground that the respondent has since the celebration of the marriage committed adultery, the petitioner shall make the person with whom the respondent committed the alleged adultery a co-respondent to the petition unless the petitioner is excused by the court from so doing on one of the following grounds—

(a) that he or she does not know the name of the alleged adulterer although he has made due efforts to discover the name; or

(b) that the alleged adulterer is dead.

Duty of  
court on the  
presentation  
of a petition  
for divorce

... (1) On the presentation of a petition for divorce, the court shall inquire into the facts alleged to establish—

(a) whether there has been connivance or condonation by the petitioner;

(b) whether any collusion exists between the parties; or

(c) whether there is substance in any counter-charge made against the petitioner.

(2) If the court is satisfied on the evidence that—

(a) the case for the petitioner has been proved; and

(b) the petition is not presented or prosecuted in collusion with the respondent or either of the respondents,

it shall pronounce a decree *nisi* of divorce.

(3) Where the court is not satisfied of the alleged matters, it shall dismiss the petition.

(4) The court is not bound to pronounce a decree *nisi* of divorce and may dismiss the petition if it finds that the petitioner has during the marriage been guilty of—

(a) adultery;

(b) unreasonable delay in presenting or prosecuting to petition;

(c) cruelty towards the other party to the marriage;

(d) having, without cause, deserted or wilfully separated himself or herself from the other party before the adultery or cruelty complained of;

(e) such wilful neglect or misconduct as has contributed to the adultery or unsoundness of mind or desertion; or

(f) any other act or omission causing the marriage to irretrievably breakdown.

Proceedings  
for decree of  
presumption  
of death and  
dissolution of  
marriage

...—(1) A married person who alleges that reasonable grounds exist for supposing that the other party to the marriage is dead may present a petition to the court to have it presumed that that other party is dead and to have the marriage dissolved.

(2) Where the court is satisfied that reasonable grounds exist, it may make a decree of presumption of death and of dissolution of the marriage.

(3) In proceedings for the decree of presumption of death, the fact that one party to the marriage has been continually absent from the petitioner for a period of seven



years or more and the petitioner has no reason to believe that the other party is still alive, is evidence that he or she is dead until the contrary is proved.

Distribution  
of property  
during judicial  
separation

... (1) Where a judicial separation has been decreed under this Act, the spouses shall, from the date of the decree, and whilst the separation continues, be considered unmarried with respect to any property which each spouse may acquire individually during the period of separation and such property may be disposed of by each spouse individually in all respects as if he or she was not married to the other.

(2) Where one of the parties dies intestate during the subsistence of a decree of judicial separation, the property owned individually by the deceased shall devolve as if the parties were not married to each other.

(3) Subject to an agreement evidenced in writing or otherwise, where the parties to the marriage who were under judicial separation cohabit again with each other, all property to which either party acquired individually during the judicial separation shall be held to the separate ownership of that party.

(4) Subject to subsections (5) and (6), where a court grants a decree for judicial separation, the court may, in addition, make any one or more of the following orders—

(a) an order to make provision for the distribution of any or all of the matrimonial property as may be necessary to prevent undue hardship to either spouse;

(b) an order prohibiting alienation or distribution of the matrimonial property to any third party unless there is evidence of a mutual agreement between the parties permitting such alienation or distribution; and

(c) an order that either party shall pay to the other party a periodical payment or a lump sum or supply necessities in kind to the requisite cash value as may be specified in the order, either for the benefit of that other party or for the benefit of the children of the marriage.

(5) Where maintenance has been decreed or ordered to be paid to either party upon the decree of judicial separation, and such maintenance is not duly paid, the defaulting party shall be liable for the necessities supplied for the use of the other party.

(6) Nothing in this section shall prevent either party from joining the other party, at any time during the separation, in the exercise of a joint power given to that party and the other party.

Petition to  
reverse decree  
of judicial  
separation

...—(1) A party to a marriage against whom a decree of judicial separation has been pronounced, may present a petition praying for a reversal of the decree on the ground that it was obtained in his or her absence, and that there was reasonable excuse for the conduct alleged as the ground for separation.

(2) The court may, on being satisfied of the truth of the grounds of the petition, reverse the decree of judicial separation.

Divorce  
proceedings  
after grant  
of judicial  
separation

...—(1) A person shall not be prevented from presenting a petition for divorce, or the court from pronouncing a decree *nisi* of divorce, for the sole reason that such person has at any time been granted a judicial separation upon the same or substantially the same facts as those proved in support of the petition for divorce.

(2) On a petition for divorce, the court may treat the decree of judicial separation as sufficient proof of any ground on the basis of which it was granted, but the court shall not pronounce a decree *nisi* of divorce without receiving evidence from the petitioner.

(3) For the purpose of a petition for divorce, a period of desertion without cause immediately preceding the institution of proceedings for a decree of judicial separation, if the parties have not resumed cohabitation and the decree has been continuously in force since its granting, shall be deemed to precede the presentation of the petition for divorce.

Distribution  
of property  
upon  
dissolution of  
marriage

...—(1) A court shall equitably divide and re-allocate property upon the dissolution of a marriage taking into account—

- (a) the income of each spouse;
- (b) the assets of each spouse;
- (c) the financial needs of each spouse;
- (d) the obligations of each spouse;
- (e) the standard of living of the family during the subsistence of the marriage;
- (f) the age and health of each spouse; or

(g) the direct and indirect contributions made by either spouse, including through the performance of domestic duties.

Effect of reversal or discharge of judicial separation or protection order

...—(1) The reversal, discharge, or variation of a decree of judicial separation, or of a protection order, shall not affect any rights or remedies which a person would otherwise have had in respect of any contracts or acts of either spouse entered into or done between the dates of the decree or order and of the reversal, discharge or variation.

(2) A person who, in reliance on any decree or order, makes a payment to or permits a transfer or act to be made or done by the spouse shall notwithstanding—

(a) that the decree or order may then have been reversed, discharged or varied;

(b) the separation of the wife from her husband may have ceased; or

(c) at some time since the making of the decree or order may have been discontinued,

be protected and indemnified as if at the time of the payment, transfer or other act, the decree or order was valid and still subsisting without variation, and the separation had not ceased or been discontinued.

(3) Subsection (2) shall not apply where the person has at the time of payment, transfer or other act, known of the reversal, discharge or variation of the decree or order or of the cessation or discontinuance of the separation.

Costs against a co-respondent

...—(1) A co-respondent may be ordered to pay the whole or any part of the costs of the proceedings if adultery with the spouse of the petitioner has been established against him or her.

(2) The co-respondent shall not be ordered to pay the costs of the petitioner—

(a) if at the time of the adultery, he or she had no reason to believe the respondent is married; or

(b) if the respondent was at the time of the adultery living apart from his or her spouse.

Grounds for decree of nullity

...—(1) The following are grounds on which a decree of nullity of marriage may be made—

(a) that the respondent was permanently impotent at the time of the marriage;

(b) that the parties are within the prohibited degrees of kindred or affinity;

(c) that either party was of unsound mind at the time of the marriage;

(d) that the former husband or wife of either party was living at the time of the marriage, and the marriage with such former husband or wife was then in force;

(e) that the consent of either party to the marriage was obtained by force, duress, deceit or fraud;

(f) that the marriage has not been consummated owing to the wilful refusal of the respondent to consummate the marriage;

(g) that the respondent was at the time of the marriage suffering from a sexually transmitted infection; or

(h) that the respondent was at the time of the marriage—

(i) pregnant by some person other than the petitioner; or

(ii) responsible for a pregnancy of some person other than the petitioner.

(2) If the court finds that the case for the petitioner has been proved it shall announce a decree *nisi* declaring the marriage to be null and void.

(3) In the cases specified in subsection (1) (c), (g) and (h), the court shall not grant a decree *nisi* unless it is satisfied—

(a) that the petitioner was at the time of the marriage ignorant of the facts alleged;

(b) that the proceedings were instituted within a year from the date of marriage; and

(c) that sexual intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the grounds for a decree.

(4) Nothing in this section shall be construed as validating any marriage which is by law void, but with respect to which a decree of nullity has not been granted.

The Commission further recommends that the term “matrimonial property” be defined in the interpretation section of the Act as follows:

**“matrimonial property” includes—**

- (a) the matrimonial home or homes;**
- (b) household property in the matrimonial home or homes; or**
- (c) any other property whether movable or immovable acquired during the subsistence of a marriage which by express or implied agreement as between the spouses or by their conduct is used, treated or otherwise regarded as matrimonial property;**

#### 7.6 THIRD PARTY INTERFERENCE

The Commission wishes to emphasise the constitutional obligation to protect the family as the natural and fundamental group unit of society by making specific provisions that prevent the arbitrary breakdown of marriages. In this regard, the Commission recommended the introduction of a new concept to sanction against interference from third parties that would lead to the breakdown of a marriage. The Commission noted that a different concept of third party interference is captured under the Divorce Act where adultery is not only a ground for divorce but also punishable through damages claimable from a third party. The Commission sought to distinguish interference of an adulterous nature and interference through other forms of conduct.

The Commission stands by the definition of family as the matrimonial union of a man, a woman and children whether or not one of these parties may be absent from such a union. As such, the Commission identifies a third party as any other individual outside this core group. The Commission seeks to distinguish the common notion at custom that a family is the union of two families of the spouses. The Commission observed that at custom, marriage advocates or *ankhoswe* play an integral role at entry, during subsistence of, and upon exiting a marriage. However, the Commission was of the view that due to the role that *ankhoswe* assume, their position is open to abuse as they are strategically placed to either build or break a marriage. The Commission similarly observed that a third party for purposes for interference into a marriage could extend by definition to parents, siblings, friends and other relations of either spouse generally.

Third party interference is a novel concept, not only to Malawi law, but remains unknown to many other jurisdictions. The Commission observed that during the regional consultations it carried out in the course of its work the people consulted brought up the issue of interference in family affairs especially by influential relations, who may be marriage advocates, parents, brothers and sisters of a spouse, uncles or aunties, etc. In all places where consultations were held, there was unanimity in advocating for a law that would prohibit and punish conduct that is destructive to a marriage and family life. While some of the people consulted were in favour of criminalising the

interference of third parties, others expressed fear that to penalise third party interference may in effect criminalise the role of *ankhoswe* and restrict their counseling role to a marriage. In response to these fears, the Commission resolved that leaving the role of *ankhoswe* unregulated would promote serious abuse and make them unaccountable to society. The introduction of a provision prohibiting and punishing third party interference would, therefore, encourage their positive role in protecting the family unit except for cases where they conduct themselves in a manner that is destructive to the marriage. Only in such cases shall their conduct be punishable.

The Commission recommends the following new provision to regulate the conduct of the third parties in relation to marriage—

Conduct by  
third  
parties

...—(1) A person who uses his or her influence, as a close relation to a party, to a marriage, whether by conduct or language to—

(a) cause a breakdown of a marriage relationship between the parties to a marriage;

(b) instigate any conduct by either or both of the parties to the marriage likely to adversely affect the marriage relationship;

(c) cause one party of the marriage to withhold maintenance or support from the other; or

(d) in any way render a marriage relationship to deteriorate or fail,

commits an offence and is liable to a fine of K50,000 and to imprisonment for six months.

(2) The court may, upon application, make an order of restraint or compensation against a person convicted of an offence under subsection (1).

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## **APPENDIX I**

### **MARRIAGE, DIVORCE AND FAMILY RELATIONS BILL, 20...**

**MARRIAGE, DIVORCE AND FAMILY RELATIONS  
BILL, 20...**

**ARRANGEMENT OF SECTIONS**

**SECTION**

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2. Interpretation
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**PART II—GENERAL**

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5. Publication of list of registrars
6. Registrars etc, to be provided with books of marriage certificates
7. Registration of marriages
8. Marriage Register Book
9. Correction of clerical errors in marriage certificates
10. Evidence of marriage
11. Minister to license places of worship to celebrate marriages
12. Marriages recognized under the Act
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14. Marriages by repute or permanent cohabitation

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16. Declaration of marital status prior to marriage
17. Prohibition on polygamy
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20. Notice in a civil marriage
21. Signature of notice by person unable to write or understand the English language
22. Registrars to supply forms of notice
23. Notice to be entered in Marriage Notice Book and published
24. Publication of a marriage notice
25. Registrar's permit
26. Power of Minister to grant special licence to marry

**PART V—PRELIMINARIES TO RELIGIOUS AND CUSTOMARY  
MARRIAGES**

27. Marriages under this part to accord with customs and rites of religious body, sect, denomination or ethnic groups



28. Notice of intention to marry
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PART VI—OBJECTIONS TO ALL MARRIAGES RECOGNIZED  
UNDER THE ACT

30. Marriage to take place within three months after date of notice
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33. Compensation and costs for wrongful caveat

PART VII—CELEBRATION OF CIVIL MARRIAGE

34. Marriage in a registrar's office
35. Oath to be administered in civil marriages
36. Marriage certificate to be signed
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PART VIII—CELEBRATION OF CUSTOMARY AND RELIGIOUS  
MARRIAGES

38. Application of Part V to marriages under this Part
39. Traditional Authority to register customary marriage
40. Marriage in a licensed place of Worship
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43. Customary or religious marriage under special licence
44. Register of customary or religious marriages
45. Entries to be made in marriage certificate
46. Signature of certificate
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PART IX—RIGHTS AND OBLIGATIONS OF PARTIES TO A MARRIAGE

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51. Duty to maintain family

PART X—OFFENCES AND PENALTIES RELATING TO MARRIAGE

52. Polygamy and bigamy
53. Marriage ceremony with a married person
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PART XI—DIVORCE, JUDICIAL SEPARATION AND NULLITY OF  
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60. General principles
61. Limitations of this Act
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63. Rape during judicial separation
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65. Evidence of breakdown of marriage
66. Circumstances in which decrees are made
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68. Rebuttable presumption of condonation of adultery
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70. Duty of the court on the presentation of a petition for divorce
71. Proceedings for decree of presumption of death and dissolution of marriage
72. Distribution of property during judicial separation
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**A BILL**

*entitled*

**An Act to make provision for marriage, divorce and family relations between spouses and between unmarried couples, their welfare and maintenance and that of their children; and for connected matters.**

ENACTED by the Parliament of Malawi as follows—

PART I—PRELIMINARY

- |                |  |
|----------------|--|
| Short title    | <b>1.</b> This Act may be cited as the Marriage, Divorce and Family Relations Act.   |
| Interpretation | <b>2.</b> In this Act, unless the context otherwise requires—<br>“adultery” means voluntary sexual intercourse by a married person with a person other than his or her spouse; |

“certified copy”, in relation to an order of a court, means a copy of the order certified by a proper officer of the court to be a true copy of the order;

“child” means a person who is below the age of eighteen years;

“civil marriage” means a marriage celebrated by a registrar in accordance with Parts IV and VII respectively;

“cleric” means a recognized cleric or minister of a religion, religious body, denomination or sect, belonging to a place of worship licensed as a place for the celebration of marriage under section 11;

“cohabitation” means the fact of a man and a woman, not married to each other in accordance with this Act, living together as, or as if they were husband and wife;

“consortium” means the fact of a husband and wife living together, and includes a right to consummation, companionship, care, maintenance and rights and obligations commensurate with the status of marriage;

“country” includes any protected State and any trust territory administered by the Government of any country;

“court” means the High Court or other court having jurisdiction as specified under this Act and, in relation to any claim within its jurisdiction, includes a traditional or local court;

“customary marriage” means a marriage celebrated in accordance with rites under the customary law of one or both of the parties to the marriage;

“dependant”, in relation to another person against whom there is a maintenance order by a court or tribunal of a foreign country, means such person as that other person is, according to the law in force in that foreign country, liable to maintain;

“habitual drunkard” includes a person whose excessive drinking of liquor or taking of habit forming substances prevents or otherwise makes him or her unable to provide reasonable maintenance for a spouse or any child of the marriage dependent on such person;

“irretrievable breakdown of marriage” means a situation where one or both of the spouses prove to the court that they can no longer live together in consortium as husband and wife;

“judicial separation” means the separation of a husband and wife by court decree;

“maintenance order” means an order for the payment in cash or of a specified cash value towards the maintenance of a spouse, a single pregnant woman, child, a dependant or a person entitled under this Act;

“marriage notice” means the prescribed notice of marriage required under this Act;

“Marriage Register Book” means a book of register issued to every registrar for the registration of marriages under this Act;

“matrimonial property” includes—

(a) the matrimonial home or homes;

(b) household property in the matrimonial home or homes;

(c) any other property whether movable or immovable acquired during the subsistence of a marriage which by express or implied agreement between the spouses or by their conduct is used, treated or otherwise regarded as matrimonial property;

“non-monetary contribution” means the contribution made by a spouse for the maintenance, welfare or advancement of the family other than by way of money and includes—

(a) domestic work and management of the home;

(b) child-care;

(c) companionship;

(d) the endurance of the marriage; or

(e) any other manner or form of contribution as the court may consider fit;

“permit” means a certificate issued by the Registrar under section 25 or section 29, as the case may be, after the preliminary formalities of marriage have been completed permitting the parties to celebrate their marriage;

“registrar” means the Registrar of Marriages or other public officer or other person acting under his or her authority as specified under section 4 (3);

“Registrar of marriages” means the public officer designated as such under section 4;

“religious marriage” means a marriage celebrated by a cleric in accordance with the recognized rites of a religion, religious body, denomination or sect to which one or both parties to the marriage belong;

“sex”, in relation to the gender of a person means the sex of that person at birth;

3. This Act shall apply to marriages entered into on or after the day it comes into operation; but sections 49, 50 and 51 shall apply to all marriages regardless of the date they were celebrated.

Application

## PART II—GENERAL

4.—(1) There shall be the office of the Registrar of marriages which shall be a public office.

Registrar of marriages

(2) The officer for the time being holding or acting in the office of Registrar General shall be the Registrar of marriages.

(3) The following offices shall perform the functions of the Registrar of marriages subject to the general or special direction of the Registrar of marriages (and are, in this Act, referred to as registrars)—

(a) the District Commissioner in respect of the district of his or her jurisdiction;

(b) a traditional authority with powers to register a marriage under the Act; and

(c) a cleric.

5. The Minister shall, by order published in the *Gazette*, publish a list of registrars of marriages under this Act.

Publication of list of registrars

6.—(1) The Registrar of marriages shall deliver to the several registrars books of marriage certificates in duplicate and with counterfoil in Form A in the First Schedule.

Registrars etc., to be provided with books of marriage certificates

(2) The several registrars shall have custody of the books of Marriage certificates delivered to them.

First Schedule

7. Every marriage celebrated in accordance with this Act shall be registered by a registrar.

Registration of marriages

8.—(1) A registrar shall enter into the Marriage Register Book all particulars of certificates of marriage which have been filed in his or her office, place of worship or work in Form A in the First Schedule.

Marriage Register Book  
First Schedule

(2) An entry under subsection (1) shall be—

(a) made in its chronological order;

(b) signed by a registrar; and

(c) indexed in a manner that is best suited for easy reference.

(3) A registrar shall make the Marriage Register Book available for inspection during office hours and shall make certified copies from it upon payment of a fee prescribed in the Second Schedule.

Second Schedule

(4) Within ten days after the last day of each month, every registrar shall send to the Registrar of marriages a certified copy of all entries made by him or her in the Marriage Register Book during the preceding month, and the Registrar of marriages shall file the certified copy in his or her office.

Correction of  
clerical errors  
in marriage  
certificates

**9.—**(1) A registrar may correct a clerical error in any certificate of marriage filed in his or her office upon the production of the certificate delivered by any party to the marriage.

(2) A registrar shall authenticate any correction in a certificate of marriage by his or her signature, official stamp and the date of the correction.

Evidence of  
marriage

**10.** The following shall be admissible as evidence of a marriage to which it relates—

(a) a certificate of marriage filed in the office of a registrar;

(b) a copy of a certificate of marriage, signed and certified as a true copy by a registrar;

(c) an entry in a Marriage Register Book; or

(d) a signed and certified copy of an entry in a Marriage Register Book.

Minister to  
license  
places of  
worship to  
celebrate  
marriages  
Cap. 5:03

**11.—**(1) The Minister may, upon application, license any place of worship to be a place for the celebration of marriages under this Act.

(2) Notwithstanding subsection (1), a place of worship shall not be licensed unless it is incorporated or registered under the Trustees Incorporation Act or any other written law.

(3) The Minister may at any time revoke the licence under subsection (1) if he or she satisfied upon reasonable grounds that a place is not fit for the celebration of marriages under this Act.

(4) The Minister shall give notice of the licensing of a place of worship or the revocation of the licence—

(a) in the *Gazette*; and

(b) to the person in charge of the place of worship.

Marriages rec-  
ognized under  
the Act

**12.—**(1) A marriage recognized under this Act shall be either—

(a) a civil marriage;

(b) a customary marriage;

(c) a religious marriage; or

(d) a marriage by repute or permanent cohabitation.

(2) A marriage conducted in accordance with the laws of another country, where one or both of the parties is subject to the laws of that country, shall be recognized in Malawi as a valid marriage except where the marriage is between parties of the same sex.

(3) All marriages recognized under this Act shall have the same legal status.

(4) Without prejudice to any procedures prescribed for marriage under this Act, any institution or procedure that traditionally facilitates the celebration of a customary marriage shall continue to be recognized as such under this Act.

**13.—**(1) A marriage of a member of the Defence Force celebrated before a cleric or any other person in a foreign territory where that member is on a tour of duty shall be a valid marriage.

Validity of marriages of members of the Defence Force serving abroad

(2) Where a marriage purports to have been celebrated as specified under subsection (1), it shall not be necessary in any legal proceedings for purposes of the determination of the validity of the marriage to—

(a) prove the authority of the person by or before whom it was celebrated; or

(b) give any evidence of want of authority.

**14.** A marriage by repute or permanent cohabitation shall only be recognized under this Act upon a finding of a court of competent jurisdiction where that court considers—

Marriages by repute or permanent cohabitation

(a) the length of the relationship;

(b) the fact of cohabitation;

(c) the existence of a conjugal relationship;

(d) the degree of financial dependence or interdependence and any agreement for financial support between the parties;

(e) ownership, use and acquisition of property;

(f) the degree of mutual commitment to a shared life;

(g) whether the parties mutually care for and support children;

(h) the reputation of the parties in the community as being married and the public display of aspects of their shared relationship; and

(i) any other factors that the court considers fit.



Capacity to enter into a valid marriage	<b>15.</b> Two persons of the opposite sex who are both not below the age of eighteen years and are of sound mind may enter into marriage with each other.
Declaration of marital status prior to marriage	<b>16.</b> A person entering into a marriage under this Act shall first prove, by way of declaration before a registrar, that he or she is single.
Prohibition on polygamy	<b>17.</b> No person shall be married to more than one spouse.
Marriages within prohibited degrees of kindred and affinity <i>Third Schedule</i>	<b>18.</b> A marriage celebrated between—  (a) a man and any of the persons mentioned in the first column of Parts I, II, and III of the Third Schedule;  (b) a woman and any of the persons mentioned in the second column of Parts I, II, and III of the Third Schedule,  shall not be valid on the ground of kindred or affinity.
Explanations to be given by a registrar  <i>First Schedule</i>	<b>19.</b> A registrar shall explain to the parties intending to marry the prohibited degrees of kindred or affinity, the prohibition on polygamy and the penalties which may be suffered for offences under this Act, and shall cause the parties to sign a prescribed form of acknowledgement of such explanation in Form K in the First Schedule.

#### PART IV—PRELIMINARIES TO A CIVIL MARRIAGE

Notice in a civil marriage  <i>First Schedule</i>	<b>20.—(1)</b> A party to an intended marriage shall sign and give to the registrar a notice in Form B in the First Schedule.  (2) Where the party to the intended marriage giving the notice desires the marriage to be celebrated in a district other than that in which he or she resides, that party shall so inform the registrar accordingly.  (3) If a marriage is intended to be celebrated in another district, the registrar of the original district shall forward a copy of the notice to the registrar of the other district, and immediately upon receiving the notice, the other registrar shall affix the notice onto the outer door of his or her office or place of worship or work.
Signature of notice by person unable to write or understand the English language  <i>First Schedule</i>	<b>21.—(1)</b> If the person giving notice under section 20 is unable to write or understand the English language, it shall be sufficient if he or she places a mark or a cross as appropriate in the presence of a person literate in the English language and that person shall attest the marking or crossing.  (2) An attestation made under subsection (1) shall be in Form C in the First Schedule.

- 22.** Every registrar shall supply forms of the notice under section 20 without charge to any person applying for them. Registrars to supply forms of notice
- 23.** A registrar shall enter the notice under section 20 in the Marriage Notice Book. Notice to be entered in Marriage Notice Book and published
- 24.** After entering a notice of marriage in the Marriage Notice Book, the registrar shall publish the notice by affixing a copy of it onto the outer door to his or her office or place of worship or work, there to be kept exposed until he or she grants a permit or until three months have elapsed whichever is the sooner. Publication of a marriage notice
- 25.** A registrar who receives the notice under section 20 shall at any time after the expiry of twenty-one days and before the expiry of three months from the date of the notice, issue a permit in Form D in the First Schedule if he or she is satisfied that— Registrar's permit  
*First Schedule*
- (a) the parties have complied with sections 15, 16, 17 and 18;
  - (b) one or both of the parties has or have been resident within the district at least fifteen days preceding the granting of the permit;
  - (c) there is no caveat under section 31 lodged against the marriage or if a caveat has been lodged, it has been removed in accordance with the procedure set out in Part VI;
  - (d) the parties are not within the prohibited degrees of kindred or affinity; or
  - (e) neither of the parties to the intended marriage is married to another person.
- 26.** The Minister, upon proof being made to him or her by affidavit that there is no lawful impediment to a proposed marriage, may, in his or her discretion, dispense with the giving of notice, and with the issue of the permit of a registrar, and may grant a special licence, in Form E in the First Schedule, authorising the celebration of a marriage between the parties named in the licence by a registrar. Power of Minister to grant special licence to marry  
*First Schedule*

#### PART V—PRELIMINARIES TO RELIGIOUS AND CUSTOMARY MARRIAGES

- 27.** Subject to sections 15, 16, 17 and 18, the procedures preceding the celebration of a religious or customary marriage shall be governed by the customs or rites which are usual among the ethnic group, religion or sect under which the marriage is celebrated. Marriages under this Part to accord with customs and rites of religious body, sect, denomination or ethnic groups

Notice of  
intention to  
marry  
*First Schedule*

**28.—**(1) A person intending to marry under this Part shall, in addition to the customs or rites referred to in section 27, give notice of intention to marry in writing to a registrar in Form B in the First Schedule.

(2) The registrar shall enter the notice in the Marriage Notice Book.

(3) The notice shall be displayed for twenty-one days in a conspicuous place on the premises of the office of the registrar.

Issue of  
customary  
or religious  
marriage  
permit

**29.—**(1) At the expiry of the twenty-one days referred to in section 28, the registrar shall issue a marriage permit in Form D in the First Schedule.

(2) A marriage permit under subsection (1) shall be issued if—

*First Schedule*

(a) the parties have complied with sections 15, 16, 17, and 18; and

(b) there is no caveat under section 32 lodged against the marriage or if a caveat was lodged, it has been removed in accordance with the procedure set out in Part VI.

#### PART VI—OBJECTIONS TO ALL MARRIAGES RECOGNIZED UNDER THE ACT

Marriage to  
take place  
within three  
months after  
date of notice

**30.—**(1) Except as provided in section 32(5), a marriage shall take place within three months after the date of the notice.

(2) Failure to comply with subsection (1) shall render the notice and all the proceedings consequent upon it void, and a fresh notice shall be given before the parties can lawfully marry.

Caveat

**31.—**(1) A person who knows of any just cause why a marriage should not take place may enter a caveat against the issue of a permit, by—

(a) writing at any time before its issue the word “Forbidden”, opposite to the entry of the notice in the Marriage Notice Book; and

(b) appending his or her name and address and the grounds upon which the claim to forbid the issue of the permit is made.

(2) A registrar shall not issue a permit until the caveat is removed as provided in sections 32 and 33.

Caveat to be  
referred to  
court

**32.—**(1) Where a caveat is lodged in accordance with section 31, a registrar shall refer the matter to a court of competent jurisdiction.

(2) The court to which a caveat is referred shall summon and hear the parties to the intended marriage and the person who made the objection to show cause why a permit should not be issued.

(3) The court shall determine the matter by summary procedure.

(4) If the court decides that the permit should be issued, it shall remove the caveat—

(a) by cancelling the word “Forbidden” in the Marriage Notice Book;

(b) by writing below the cancellation, the words “cancelled by order of the court”;

(c) by appending the signature of the judicial officer and the court seal to the entry.

(5) The registrar shall proceed to issue a permit and the marriage shall proceed as if the caveat had not been entered, but the time that has elapsed between the entering and the removal of the caveat shall not be computed in the period of three months under section 30.

**33.** A court may, upon application, award compensation and costs to an injured party if it appears that a caveat was entered based on insufficient grounds.

Compensation  
and costs for  
wrongful  
caveat

#### PART VII—CELEBRATION OF CIVIL MARRIAGE

**34.—**(1) After the issue of a permit under section 25, or of a licence under section 26, the parties may contract a marriage before a registrar—

Marriage in a  
registrar’s  
office

(a) with open doors, between the hours of 8 o’clock in the forenoon and 6 o’clock in the afternoon, and in the manner prescribed in section 35; and

(b) in the presence of two or more witnesses.

(2) A witness to a marriage shall be at least eighteen years of age and of sound mind.

**35.** A registrar, after production to him or her of the permit or licence, shall administer the oath of marriage in Form F in the First Schedule.

Oath to be  
administered in  
civil  
marriages  
*First Schedule*

**36.** Immediately after the celebration of a civil marriage, the registrar shall—

Marriage  
certificate to be  
signed

(a) complete in duplicate a marriage certificate in Form G in the First Schedule;

*First Schedule*

(b) state and enter in the counter foil, the number of the certificate, the date of the marriage, the names of the parties, and the names of the witnesses; and

(c) deliver one copy of the certificate to the parties and file the other in his office.

Marriage  
under special  
licence

**37.** Where a special licence authorises the celebration of marriage at a place other than the office of a registrar, the registrar shall, upon the production of the licence, deliver to the person producing it a blank certificate of marriage in duplicate and shall comply with section 36.

#### PART VIII—CELEBRATION OF CUSTOMARY AND RELIGIOUS MARRIAGES

Application  
of Part V to  
marriages  
under this Part

**38.** A customary or religious marriage celebrated shall be celebrated in accordance with the procedures and formalities under Part V.

Traditional  
Authority to  
register  
customary  
marriages

**39.** The Minister shall deliver to every Traditional Authority Marriage Register Books in which each Traditional Authority shall record particulars of all customary marriages celebrated in his or her area of authority.

Marriage in a  
licensed place  
of worship

**40.—(1)** A religious marriage may be celebrated in a place of worship which has been duly licensed by the Minister under section 12 or in any place that the Minister may by special licence direct in accordance with the rites of a religion or religious body, denomination or sect to which one or both of the parties belong.

(2) A marriage celebrated under subsection (1) shall be celebrated—

(a) with open doors between the hours of 8 o'clock in the forenoon and 6 o'clock in the afternoon; and

(b) in the presence of two or more witnesses, who shall include the marriage advocates of the parties to the marriage recognized as such at custom, besides the registrar.

(3) A witness to a marriage shall be a person who is eighteen years of age and of sound mind.

Oath to be  
administered  
in customary  
and religious  
marriages

**41.** A registrar celebrating a customary or religious marriage shall administer an oath, if any, as prescribed either by the religion or custom of one or both of the parties to the marriage.

Registrar  
not to  
celebrate  
marriage where  
there is  
impediment,  
nor without  
permit, etc.

**42.** A registrar shall not celebrate any marriage if he or she knows of any just impediment to such marriage, nor until the parties deliver to him or her a permit under section 29.

**43.** Where a special licence authorises the celebration of a customary or religious marriage other than at the office, place of worship or work of a registrar, the registrar shall, upon receipt of the licence, proceed to celebrate the marriage and complete the certificate of marriage in Form G in the First Schedule in duplicate after strictly observing all the formalities for customary and religious marriages prescribed under this Act.

Customary or religious marriages under special licence  
*First Schedule*

**44.—(1)** A registrar who celebrates a customary or religious marriage under this Act shall keep a register of the celebration in Form H in the First Schedule, and shall make and sign in the Marriage Register Book an entry of every marriage celebrated by him or her.

Register of customary or religious marriages  
*First Schedule*

(2) A registrar shall as soon as possible after the 31st December in each year, send to a Registrar of marriages a copy of the Register of all marriages celebrated during the past year by any person delegated by him or her to celebrate marriages.

**45.** Immediately after the celebration of a customary or religious marriage, a registrar shall complete in duplicate a marriage certificate in Form F in the First Schedule, and also state and enter in the counterfoil the number of the certificate, the date of the marriage, names of the parties, and the names of the witnesses.

Entries to be made in marriage certificate  
*First Schedule*

**46.** A registrar, the parties to a marriage and two or more witnesses to the marriage shall sign the certificate of marriage in duplicate.

Signature to marriage certificate

**47.** In addition to signing the certificate as required by section 46, a registrar celebrating a customary or religious marriage shall deliver the duplicate copy of the marriage certificate to the Registrar of marriages.

Duplicate to be sent to Registrar

**48.** The Registrar of marriages shall file the duplicate copy of the marriage certificate in the Marriage Register Book kept in his or her office.

Marriage certificate to be registered

#### PART IX—RIGHTS AND OBLIGATIONS OF PARTIES TO A MARRIAGE

**49.—(1)** A party to a marriage is entitled to equal rights as the other in their right to consortium.

Right to consortium

(2) A wife is entitled to retain her maiden name or to use the surname of her husband, or both, during the subsistence of the marriage.

(3) A wife is entitled to the continued use of the surname of her husband at the dissolution of the marriage, unless it is proved before a court that she used the name for an improper purpose or a fraudulent motive.

(4) Notwithstanding any other written law to the contrary in force at the commencement of this act, a spouse has the right to retain his or her nationality or citizenship during the subsistence of the marriage.

(5) A spouse may severally, or jointly with the other, exercise responsibility towards the upbringing, nurture and maintenance of the children of the marriage.

(6) Both spouses have the right to mutual custody of the children of the marriage during the subsistence of the marriage.

(7) Notwithstanding subsection (1), a spouse may deny the other spouse the right to consummation on reasonable grounds which may include—

- (a) poor health;
- (b) post-natal recuperation;
- (c) post surgical convalescence;
- (d) reasonable fear that engaging in sexual intercourse is likely to cause physical or psychological injury or harm to either spouse; or
- (e) reasonable respect for custom.

Right to  
mutual marital  
confidences

**50.**—(1) A spouse is entitled to mutual trust and confidences during the subsistence of a marriage and, in the event of the dissolution of the marriage, after its dissolution.

(2) Notwithstanding subsection (1), a spouse may disclose information if the disclosure is in the interests of justice as required—

Cap. 8:01

- (a) under the Criminal Procedure and Evidence Code or other written law; or
- (b) in divorce proceedings.

Duty to  
maintain  
family

**51.**—(1) Subject to subsections (2) and (3), both spouses have a duty to maintain each other and any children of the marriage.

(2) The monetary contribution of each spouse shall be proportionate to his or her income.

(3) The non-monetary contribution of each spouse shall also be taken into account when determining the contribution of a spouse to the maintenance of the other spouse or children of the marriage.

#### PART X—OFFENCES AND PENALTIES RELATING TO MARRIAGE

Polygamy and  
bigamy

**52.** A person who is married or purports to be married to more than one spouse commits an offence and is liable to imprisonment for five years.

- 53.** An unmarried person who goes through the ceremony of marriage with a person whom he or she knows to be married to another person, commits an offence and is liable to imprisonment for five years. Marriage ceremony with a married person
- 54.** A person who makes or issues a false declaration, certificate, permit, licence, document or statement by law for the purpose of marriage commits an offence and is liable to a fine of K100,000 and to imprisonment for five years. Making false declarations, etc., of marriage
- 55.** A registrar who performs the ceremony of marriage knowing that any of the matters required by law for the validity of a marriage have not been fulfilled, so that the marriage is void on any of those matters, commits an offence and is liable to a fine of K100,000 and to imprisonment for five years. Registrar unlawfully performing ceremony
- 56.** A person who knowingly and wilfully celebrates or purports to celebrate a marriage when he or she is not competent under this Act to do so commits an offence and is liable to a fine of K100,000 and to imprisonment for five years. Unlawful performance of ceremony by person not legally competent
- 57.** A person who is charged with the duty to complete the marriage certificate of a marriage celebrated by him or her, or its duplicate, or to deliver the certificate to the Registrar of Marriages, and who wilfully fails to perform his or her duty, commits an offence and is liable to a fine of K100,000 and to imprisonment for five years. Wilful neglect of duty to fill up or transmit certificate of marriage
- 58.** A person who—  
 (a) impersonates another person in entering into marriage; or  
 (b) marries under a false name or description with the intention to deceive the other party to the marriage,  
 commits an offence and is liable to a fine of K100,000 and to imprisonment for five years. Personification in marriage
- 59.** A person who goes through the ceremony of marriage, or any ceremony which he or she represents to be a ceremony of marriage, knowing that the marriage is void on any ground, and that the other person believes it to be valid, commits an offence and is liable to a fine of K100,000 and to imprisonment for five years. Fictitious marriage

#### PART XI—DIVORCE, JUDICIAL SEPARATION AND NULITY OF MARRIAGE

- 60.—(1)** In exercising a function under this Part, a court shall have regard to the following general principles that—  
 (a) the institution of marriage is to be protected; General principles



(b) the parties to a marriage which may have broken down are to take all practical steps, whether by counselling or otherwise, to save the marriage;

(c) a marriage which has broken down and is being dissolved should be brought to an end—

(i) with minimum distress to the parties and to any affected children;

(ii) with questions dealt with in a manner designed to promote as good a continuing relationship between the parties and any children affected as far as is possible in the circumstances;

(iii) without costs being unreasonably incurred in connection with the procedure to be followed in bringing the marriage to an end, or

(d) any risk of violence to one of the parties and to any children shall, as far as is reasonably practicable, be removed and diminished.

Limitations of  
this Act

**61.—(1)** Nothing in this Act shall authorise—

(a) the making of any decree of dissolution of marriage unless the petitioner is domiciled in Malawi at the time when the petition is presented; or

(b) the making of any decree of nullity of marriage unless—

(i) the petitioner is domiciled in Malawi at the time when the petition is presented; or

(ii) the marriage was celebrated in Malawi.

Divorce and  
judicial  
separation

**62.—(1)** The court may, upon satisfying itself that the marriage has irretrievably broken down—

(a) grant a decree of judicial separation to provide for the separation of parties to a marriage; or

(b) grant a decree of divorce to dissolve the marriage.

(2) A decree of judicial separation comes into force upon being made.

(3) A decree of judicial separation remains in force—

(a) while the marriage continues;

(b) until cancelled by the courts on the joint application of the parties; or

(c) a decree *nisi* of divorce is granted by a court.

(4) Where the court grants a decree of judicial separation, it shall no longer be obligatory for a spouse to exercise rights to consortium with the other spouse and a court shall have powers to make ancillary orders to enforce the separation of the parties.

**63.** A husband commits the offence of rape during the subsistence of a decree for judicial separation if he has sexual intercourse with his wife without her consent.

Rape during  
judicial  
separation

**64.—(1)** A petition for divorce may be brought by either party to a marriage on the sole ground that the marriage has irretrievably broken down.

Irretrievable  
breakdown of  
marriage

(2) In deciding whether or not a marriage has irretrievably broken down, the court shall have regard to all the relevant facts regarding the conduct and circumstances of the parties and, in particular, shall refuse to grant a decree where a petition is founded exclusively on the petitioner's own wrongdoing.

**65.** In deciding whether or not a marriage has irretrievably broken down, the court may accept any one or more of the following facts as evidence that the marriage has irretrievably broken down—

Evidence of  
breakdown of  
marriage

(a) the respondent has committed adultery and the petitioner finds it intolerable to live with him or her;

(b) the respondent has been convicted of the offence of rape or of an offence under section 153 of the Penal Code;

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(c) the respondent has deserted the petitioner without cause for a continuous period of at least one year immediately preceding the presentation of the petition for divorce;

(d) the respondent has since the celebration of the marriage treated the petitioner with cruelty;

(e) the respondent is of incurable unsound mind and has been under care and treatment for a continuous period of at least two years immediately preceding the presentation of the petition; or

(f) any other factors that the court considers relevant.

**66.** A court may upon application grant a decree *nisi* of divorce or a decree of judicial separation if—

Circumstances  
in which  
decrees are  
made

(a) the marriage has irretrievably broken down;

(b) the parties have undergone marriage counselling; and

(c) the requirements of section 67 are satisfied.

Arrangements  
for the future  
in cases of  
divorce or  
judicial  
separation

**67.**—(1) The court, in granting an order for decree nisi of divorce or an order for judicial separation, shall first be satisfied that the parties to the marriage have made arrangements for the future by producing one of the following—

(a) a court order, made by consent or otherwise, dealing with their financial arrangements;

(b) a negotiated settlement as to their financial arrangements;

(c) a declaration by both parties that they have made their financial arrangements; or

(d) a declaration by the party, to which no objection has been notified to the court by the other party, that—

(i) he or she has no significant asset and does not intend to make an application for maintenance;

(ii) he or she believes that the other party has no significant assets and that the other party does not intend to apply for maintenance;

(iii) there are no financial provisions to be made; and

(iv) the parties do not desire to make any financial arrangement.

Rebuttable  
presumption  
of condonation  
of adultery

**68.** There is a rebuttable presumption that adultery is not condoned unless consummation has been continued or subsequently resumed of the parties free will.

Co-respondent

**69.** Where the petition is presented on the ground that the respondent has since the celebration of the marriage committed adultery, the petitioner shall make the person with whom the respondent committed the alleged adultery a co-respondent to the petition unless the petitioner is excused by the court from so doing on one of the following grounds—

(a) that he or she does not know the name of the alleged adulterer although he has made due efforts to discover the name; or

(b) that the alleged adulterer is dead.

Duty of the  
court on the  
presentation of  
a petition for  
divorce

**70.**—(1) On the presentation of a petition for divorce, the court shall inquire into the facts alleged to establish—

(a) whether there has been connivance or condonation by the petitioner;

(b) whether any collusion exists between the parties; or

(c) whether there is substance in any counter-charge made against the petitioner.

(2) If the court is satisfied on the evidence that—

(a) the case for the petitioner has been proved; and

(b) the petition is not presented or prosecuted in collusion with the respondent or either of the respondents,

it shall pronounce a decree *nisi* of divorce.

(3) Where the court is not satisfied of the alleged matters, it shall dismiss the petition.

(4) The court is not bound to pronounce a decree *nisi* of divorce and may dismiss the petition if it finds that the petitioner has during the marriage been guilty of—

(a) adultery;

(b) unreasonable delay in presenting or prosecuting to petition;

(c) cruelty towards the other party to the marriage;

(d) having without cause deserted or wilfully separated himself or herself from the other party before the adultery or cruelty complained of;

(f) such wilful neglect or misconduct as has contributed to the adultery or unsoundness of mind or desertion; or

(g) any other act or omission causing the marriage to irretrievably breakdown.

**71.—**(1) A married person who alleges that reasonable grounds exist for supposing that the other party to the marriage is dead may present a petition to the court to have it presumed that that other party is dead and to have the marriage dissolved.

Proceedings  
for decree of  
presumption  
of death and  
dissolution of  
marriage

(2) Where the court is satisfied that reasonable grounds exist, it may make a decree of presumption of death and of dissolution of the marriage.

(3) In proceedings for the decree of presumption of death, the fact that one party to the marriage has been continually absent from the petitioner for a period of seven or more years and the petitioner has no reason to believe that the other party is still alive, is evidence that he or she is dead until the contrary is proved.

**72.—**(1) Where a judicial separation has been decreed under this Act, the spouses shall, from the date of the decree, and whilst the separation continues, be considered unmarried with respect to any property which each spouse may acquire individually during the period of separation and such property may be disposed of by each spouse individually in all respects as if he or she was not married to the other.

Distribution  
of property  
during  
judicial  
separation

(2) Where one of the parties dies intestate during the subsistence of a decree of judicial separation, the property owned individually by the deceased shall devolve as if the parties were not married to each other.

(3) Subject to an agreement evidenced in writing or otherwise, where the parties to the marriage who were under judicial separation cohabit again with each other, all property to which either party acquired individually during the judicial separation shall be held to the separate ownership of that party.

(4) Subject to subsections (5) and (6), where a court grants a decree for judicial separation, the court may, in addition, make any one or more of the following orders—

(a) an order to make provision for the distribution of any or all of the matrimonial property as may be necessary to prevent undue hardship to either spouse;

(b) an order prohibiting alienation or distribution of the matrimonial property to any third party unless there is evidence of a mutual agreement between the parties permitting such alienation or distribution; and

(c) an order that either party shall pay to the other party a periodical payment or a lump sum or supply necessities in kind to the requisite cash value as may be specified in the order, either for the benefit of that other party or for the benefit the children of the marriage.

(5) Where maintenance has been decreed or ordered to be paid to either party upon the decree of judicial separation, and such maintenance is not duly paid, the defaulting party shall be liable for the necessities supplied for the use of the other party.

(6) Nothing in this section shall prevent either party from joining the other party, at any time during the separation, in the exercise of a joint power given to that party and the other party.

Petition to  
reverse decree  
of judicial  
separation

**73.—**(1) A party to a marriage against whom a decree of judicial separation has been pronounced, may present a petition praying for a reversal of the decree on the ground that it was obtained in his or her absence, and that there was reasonable excuse for the conduct alleged as the ground for separation.

(2) The court may, on being satisfied of the truth of the grounds of the petition, reverse the decree of judicial separation.

Divorce  
proceedings  
after grant of  
judicial  
separation

**74.—**(1) A person shall not be prevented from presenting a petition for divorce, or the court from pronouncing a decree *nisi* of divorce, for the sole reason that such person has at any time been granted a judicial separation upon the same or substantially the same facts as those proved in support of the petition for divorce.

(2) On a petition for divorce, the court may treat the decree of judicial separation as sufficient proof of any ground on which it was granted, but the court shall not pronounce a decree *nisi* of divorce without receiving evidence from the petitioner.

(3) For the purpose of a petition for divorce, a period of desertion without cause immediately preceding the institution of proceedings for a decree of judicial separation, if the parties have not resumed cohabitation and the decree has been continuously in force since its granting, shall be deemed to precede the presentation of the petition for divorce.

**75.—**(1) A court shall equitably divide and re-allocate property upon the dissolution of a marriage taking into account—

Distribution of property upon dissolution of marriage

- (a) the income of each spouse;
- (b) the assets of each spouse;
- (c) the financial needs of each spouse;
- (d) the obligations of each spouse;
- (e) the standard of living of the family during the subsistence of the marriage;
- (f) the age and health of each spouse; or
- (g) the direct and indirect contributions made by either spouse, including through the performance of domestic duties.

**76.—**(1) The reversal, discharge, or variation of a decree of judicial separation, or of a protection order, shall not affect any rights or remedies which a person would otherwise have had in respect of any contracts or acts of either spouse entered into or done between the dates of the decree or order and of the reversal, discharge or variation.

Effect of reversal or discharge of judicial separation or protection order

(2) A person who, in reliance on any decree or order, makes a payment to or permits a transfer or act to be made or done by the spouse shall notwithstanding —

- (a) that the decree or order may then have been reversed, discharged or varied;
- (b) the separation of the wife from her husband may have ceased; or
- (d) at some time since the making of the decree or order may have been discontinued,

be protected and indemnified as if at the time of the payment, transfer or other act, the decree or order was valid and still subsisting without variation, and the separation had not ceased or been discontinued.

(3) Subsection (2) shall not apply where the person has at the time of payment, transfer or other act, known of the reversal, discharge or variation of the decree or order or of the cessation or discontinuance of the separation.

Costs against a  
co-respondent

**77.—**(1) A co-respondent may be ordered to pay the whole or any part of the costs of the proceedings if adultery with the spouse of the petitioner has been established against him or her.

(2) The co-respondent shall not be ordered to pay the costs of the petitioner—

(a) if at the time of the adultery, he or she had no reason to believe the respondent is married; or

(b) if the respondent was at the time of the adultery living apart from his or her spouse.

Grounds for  
decree of  
nullity

**78.—**(1) The following are grounds on which a decree of nullity of marriage may be made—

(a) that the respondent was permanently impotent at the time of the marriage;

(b) that the parties are within the prohibited degrees of kindred or affinity;

(c) that either party was of unsound mind at the time of the marriage;

(d) that the former husband or wife of either party was living at the time of the marriage, and the marriage with such former husband or wife was then in force;

(e) that the consent of either party to the marriage was obtained by force, duress, deceit or fraud;

(f) that the marriage has not been consummated owing to the wilful refusal of the respondent to consummate the marriage;

(g) that the respondent was at the time of the marriage suffering from a sexually transmitted infection; or

(h) that the respondent was at the time of the marriage—

(i) pregnant by some person other than the petitioner; or

(ii) responsible for a pregnancy of some person other than the petitioner.

(2) If the court finds that the case for the petitioner has been proved it shall announce a decree *nisi* declaring the marriage to be null and void.

(3) In the cases specified in subsection (1) (c), (g) and (h), the court shall not grant a decree *nisi* unless it is satisfied—

(a) that the petitioner was at the time of the marriage ignorant of the facts alleged;

(b) that the proceedings were instituted within a year from the date of marriage; and

(c) that sexual intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the grounds for a decree.

(4) Nothing in this section shall be construed as validating any marriage which is by law void, but with respect to which a decree of nullity has not been granted.

PART XII—GENERAL PROCEDURE ON DIRVOCE, JUDICIAL  
SEPARATION AND NULLITY OF MARRIAGE

**79.—**(1) A petition shall state, as distinctly as the nature of the case permits, the facts on which the claim is based, and shall be verified as if it were a writ of summons or an originating summons, and may at the hearing be referred to as evidence. Petitions

(2) A petition for dissolution of marriage or for judicial separation or for nullity of marriage, shall state that there is no condonation or connivance on the part of the petitioner nor collusion between the petitioner and the respondent.

**80.—**(1) A petition shall be served on the party to be affected either within or outside Malawi, in a manner that the court may, by general or special order, from time to time direct. Service of  
petition

(2) A court may dispense with the service under subsection (1) where it is necessary or expedient to do so.

**81.—**(1) Subject to subsection (2), a witness in any proceedings shall be examined orally. Examination  
of witnesses

(2) Subsection (1) shall not apply where a party verifies his or her case by affidavit, but in such cases a court shall allow the deponent to be orally cross-examined and re-examined either on application of the other party or by direction of the court.

**82.** On any petition presented by a spouse for the dissolution of the marriage on the ground of adultery coupled with cruelty or desertion without reasonable excuse, the husband and wife respectively shall be competent and compellable to give evidence relating to such cruelty or desertion. Husband and  
wife  
compellable  
witnesses

**83.** The court may hear the whole or part of any proceedings under this Act behind closed doors. Sittings in  
camera

**84.** The court may adjourn the hearing of any petition under this Act, and may require further evidence. Adjournment



Making decree  
*nisi* absolute

**85.**—(1) No decree *nisi* of dissolution or nullity of marriage shall be made absolute until after the expiry of six weeks from the date it is granted or such longer period as the Chief Justice may by Rules prescribe.

(2) During the intervening period between a decree *nisi* and before that decree may be made absolute, any person may show cause why the decree should not be made absolute by reason of its having been obtained by collusion, or by reason of material facts not having been, or being, brought before the court.

(3) On cause being shown the court shall—

(a) make the decree absolute;

(b) reverse the decree *nisi*; or

(c) otherwise deal with the case as the interests of justice demand.

(4) A court may order the costs arising from cause to be paid by the parties or whichever one of them the court considers fit.

(5) Where a petitioner fails to move within a reasonable time that the decree *nisi* must be made absolute, the court may dismiss the suit.

(6) Where no application is for a decree *nisi* to be made absolute is made by the party who obtained it, the party against whom it is granted is at liberty to apply to the court at any time after the expiry of six weeks from the earliest date on which the other party could have made the application.

(7) Upon the application referred to in subsection (6), the court has the power to—

(a) make the decree absolute;

(b) reverse the decree *nisi*;

(c) order an inquiry; or

(d) otherwise deal with the matter as it considers fit.

Enforcement  
of orders for  
payment of  
money

**86.**—(1) An applicant may apply to a court deponing that a sum to be paid to him or her following an order of that court has not been paid.

(2) The court may, by warrant compel the respondent or any person against whom the order is made, to be brought before it, to be examined.

(3) If the court finds that the respondent or any other person brought before it neglects or refuses to pay the sum due together with any costs that may have been incurred, it may, by warrant,

direct that all sums due be recovered by distress or sale of goods and chattels of that person, and may also order that the person be detained and kept in safe custody until return can be made to the warrant of distress.

(4) Where the person gives sufficient security by way of recognisance or otherwise to the satisfaction of the court for his or her appearance before the court, on a day which may be appointed for the return of the warrant of distress, within seven days of taking the security, that person need not be detained nor kept in safe custody.

(5) If at the time of making an order for maintenance, it is known to the satisfaction of the court that the spouse or person against whom the order for maintenance is made is employed and receives a salary, wage, benefit or other regular pecuniary employment benefit, the court may, if it considers fit, direct that the amount of maintenance so ordered shall be deducted by the employer from the salary, benefit or other employment benefit of the person against whom the order is made and paid to the applicant in such manner as the court may direct having regard to—

- (a) the regular or particular needs of the applicant and any dependent children;
- (b) defaults or likelihood of default by the person against whom the order is made in making such payments;
- (c) places where the parties reside ; and
- (d) any other relevant factors that the court considers fit.

(6) An employer who, having been served with an order of the court, fails to comply with the order commits an offence and is liable to a fine of up to K100,000, the whole or part of which may, by order, be applied for the maintenance of the applicant or any children concerned.

**87.** It is lawful for parties to a marriage which—

Re-marriage  
of the parties

(a) is dissolved by a decree of nullity and the time limit for appealing against it expires but no appeal is presented; or

(b) is dissolved or annulled after an appeal,

to marry again as if the prior marriage had been dissolved by death.

**88.** The Chief Justice may make Rules regulating the procedure for petitions for divorce, judicial separation or nullity of marriage under this Act.

Rules of  
court

## PART XIII—MAINTENANCE DURING SUBSISTENCE OF MARRIAGE

Maintenance  
during  
subsistence of  
marriage

**89.**—(1) A party to a marriage, a child or person specified in subsection (3) may apply to a court for an order against the other party or a party to the marriage for maintenance in respect of the necessities of life for a family member including shelter, food and education.

(2) In granting an order for maintenance under this section, the court shall consider—

(a) the standard of living enjoyed by the parties at the time of the application;

(b) the financial commitments of the party against whom the application is made;

(c) the ability of the person against whom the application is made to provide for the necessities applied for;

(d) the income of the party making the application relative to the income of the party against whom the application is made; and

(e) any other consideration that the court considers relevant.

(3) An application under subsection (1) may also be made by a parent of a party to the marriage, a next of kin or other close relative or any other person on behalf of such party to the marriage or child.

Spouse may  
apply for  
order  
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**90.**—(1) A married person whose spouse—

(a) is convicted of an offence against her person under Chapters XXII or XXIV of the Penal Code;

(b) deserts him or her;

(c) is guilty of persistent cruelty to him or her or to his or her children;

(d) is guilty of wilful neglect to provide reasonable maintenance for him or her or his or her children whom he or she is legally liable to maintain; or

(e) is a habitual drunkard,

First Schedule

may apply to the court where the conviction took place, or in which the cause or complaint wholly or partly arises, for an order for maintenance under the Act in Form I in the First Schedule.

First Schedule

(2) A court shall upon receipt of an application under subsection (1) issue summons to the respondent in the application in Form J in the First Schedule.

91.—(1) Where a party to a marriage neglects to maintain the other party or to provide for the needs of the children to such an extent that the health, safety or security, nutrition and education of such other party or such children, as the case may be, is adversely affected, that neglect constitutes notifiable family misconduct and any of the persons named in section 89 (3) shall be under a duty to report the neglect to the Minister responsible for social welfare.

Notifiable  
family  
misconduct

(2) Upon receipt of a report of notifiable family misconduct, the Minister responsible for social welfare shall, where appropriate, facilitate the separation of the parties and may make an application for maintenance under section 89.

PART XIV—MAINTENANCE FOLLOWING DIVORCE, JUDICIAL  
SEPARATION AND NULLITY OF MARRIAGE

92.—(1) A spouse, whether or not he or she has obtained a protection order, may apply to the court, for an order of maintenance pending the suit.

Maintenance  
pending the  
suit

(2) In granting the order of maintenance pending the suit, the court shall have regard to the financial resources of the party against whom the order is made, the conduct of the parties or any other factors it considers relevant.

(3) An order of maintenance pending the suit shall continue in the case of a decree *nisi* of divorce or nullity, until the decree is made absolute.

93.—(1) On a decree absolute declaring a marriage to be dissolved, or on a decree of judicial separation obtained by the applicant, the court may order the respondent to secure to the applicant such sum of money as it thinks reasonable, having regard to—

Permanent  
maintenance

- (a) his or her income;
- (b) the income of the respondent;
- (c) the ability of the respondent; and
- (d) the conduct of the parties.

(2) The court may direct the maintenance to be paid either in a lump sum or in yearly, monthly, or weekly payments for any period not exceeding the life of a spouse, and for that purpose may cause a proper instrument to be executed by all necessary parties.

(3) The court may direct the maintenance to be paid either to the spouse himself or herself or to a trustee to be approved on his or her behalf by the court, and may impose such terms and restrictions, and may direct the execution of the trust deeds as it considers fit, and may from time to time appoint a new trustee.

Discharge or  
alteration of  
order for  
maintenance

**94.**—(1) Where an order has been made for the payment of maintenance, and the respondent subsequently becomes unable to make the payments, the court may discharge, modify, or suspend the order in whole or in part.

(2) A court may revive the order in whole or in part, upon application, if there is a change in the circumstances of the respondent.

Power to vary  
settlements

**95.**—(1) Subject to subsection (2), after a decree absolute of divorce or of nullity of marriage, a court may inquire into the existence of ante-nuptial or post-nuptial settlements made by the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or part of the settled property, whether for the benefit of the husband or wife or of the children, if any, or of both children and the parties, as the court considers appropriate.

(2) No order for the benefit of the parties, or either of them, shall be made at the expense of the children.

Welfare of  
children

**96.**—(1) In any proceedings for divorce or judicial separation or any proceedings brought by either party to the marriage, the court shall consider—

(a) whether there are any children of the marriage to whom this section applies; and

(b) if there are any children to which this section applies, whether, in light of the arrangements which have been, or are proposed to be, made for their upbringing and welfare the court should exercise any of its powers under the Child (Care, Protection and Justice) Act in respect to any of them.

Law  
Commission  
Report No. 14

(2) Where, in any case to which this section applies, it appears to the court that—

(a) the circumstances of the case require it to refer the child to the court exercising jurisdiction on children under the Child (Care, Protection and Justice) Act; and

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Commission  
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(b) there are exceptional circumstances which make it desirable in the best interests to the child that the court exercising jurisdiction on children under the Child (Care, Protection and Justice) Act should give a direction under this section,

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Commission  
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the court may direct that the decree absolute of divorce or judicial separation is not granted until the court exercising jurisdiction on the children under that Act orders otherwise.

(3) In deciding whether the circumstances as mentioned in subsection (2) subsection (2) (a) exist, the court shall treat the welfare of the child as paramount and shall also have particular regard, on the evidence before it, to—

(a) the wishes and feelings of the child considered in relation to his or her age and level of understanding and the circumstances in which those wishes are expressed;

(b) the conduct of the parties in relation to the upbringing of the child;

(c) the general principle that, in the absence of evidence to the contrary, the welfare of the child will best be served—

(i) by his or her regular contact with those who have parental responsibility for him or her and with other members of his or her family and where siblings are brought up together in the same family; and

(ii) where the maintenance of a good continuing relationship with his or her parents is possible;

(d) any risk to the child attributable to—

(i) the place where the person with whom the child will reside, is residing or proposes to reside;

(ii) any person with whom that person is residing or with whom he or she proposes to reside with; or

(iii) any other arrangements for the care and upbringing of the child.

#### PART XV—MAINTENANCE OF SINGLE PREGNANT WOMAN

**97.—**(1) Where a woman is pregnant and the alleged father does not dispute responsibility for the pregnancy or is adjudged by the court to be responsible for the pregnancy, he shall be liable to maintain the woman during the period of the pregnancy and to pay for or reimburse the attendant costs of delivery and the court may, on application by the woman, make an order for enforcement as the court may consider appropriate.

Maintenance during pregnancy of a single woman

(2) An application for an order of enforcement under this section may be heard in like manner as an application under section 89.

(3) Where the alleged father is a child, liability shall lie against his parents or guardian, but the liability shall revert to him after he ceases to be a child or to be dependent on his parents or guardian.

#### PART XVI—GENERAL PROVISIONS ON MAINTENANCE

**98.—**(1) Subject to subsection (2), notwithstanding that a marriage has been declared void by the court, the court shall have the power to make an order—

Powers of the courts to make orders

(a) for property settlement;

(b) for temporary or permanent maintenance; or

(c) for the award of custody of any children of the annulled marriage,

in favour of either of the parties as may be deemed appropriate.

(2) Where an order for the maintenance or custody of a child is made, the court shall base its decision on the best interests of the child.

Courts may  
vary or  
discharge  
orders

**99.** A court having jurisdiction in the place in which any order under this Act has been made may—

(a) on the application of either party;

(b) upon cause being shown; or

(c) upon fresh evidence given to the satisfaction of the court, vary or discharge the order.

Mode of  
maintenance  
payments

**100.** A court may allow non-pecuniary payments amounting to the value of the sum ordered either at the request of either or both of the parties to the action or on its own motion where having regard to all the circumstances, the court considers the non-pecuniary payments to be appropriate.

Order for  
accommod-  
ation

**101.—(1)** Where an applicant is entitled to an order for maintenance following a decree of judicial separation, a court may, in addition to making an order for maintenance, also make an order—

(a) giving the applicant the right not to be evicted or excluded from the matrimonial home or any part of it by the respondent for such period as may be specified in the order; and

(b) prohibiting the respondent from evicting or excluding the respondent during the period.

(2) If the respondent is entitled to occupy the matrimonial home by virtue of a beneficial estate or interest or contract or any other legal entitlement but the applicant is not so entitled, the court may order the respondent to provide suitable accommodation for the applicant and any child who is entitled to be maintained.

(3) In making an order under this section, the court shall consider—

(a) the financial and other resources of each of the parties;

(b) the needs of each of the parties and any child who is entitled to be maintained;

(c) the likely effect of an order refusing to grant an order for accommodation, on the health, safety or well-being of the parties or any child;

(d) the conduct of the parties in relation to each other;

(e) the state of the inter-personal relationship between the parties;

(f) the length of time the parties have lived together as husband and wife;

(g) whether there are or have been children who are children of both parties or for whom both parties have responsibilities;

(h) if the parties are separated, the length of time that has elapsed since the parties ceased to live together; or

(i) any other relevant factors.

**102.**—(1) A person obliged by order to make payments of maintenance, shall provide full details of his or her address in writing to the clerk of the court which made the order and shall notify the court of any change in his or her address.

Address to be provided to the court

(2) A person who contravenes subsection (1) commits an offence and is liable to a fine of K50,000 which shall be applied to the maintenance of the other party or child by order of the court.

**103.** For avoidance of doubt, an appeal from an order for maintenance or the refusal of an order by a court shall lie, in the case of a Court subordinate to the High Court, to the High Court and in the case of the High Court, to the Supreme Court of Appeal.

Appeals against maintenance orders

#### PART XVII—EXTRATERRITORIAL ENFORCEMENT OF MAINTENANCE ORDERS MADE IN OR OUTSIDE MALAWI

**104.**—(1) Where, before or after the commencement of this Act—

(a) a maintenance order is made against a person by a court in a foreign country; and

(b) a certified copy of the order has been transmitted to the Registrar of the High Court,

the Registrar of the High Court shall send a copy of the order to the office of a court, as specified in subsection (2), for registration of the order in Malawi.

Registration of a maintenance order made in a foreign country

(2) Where—

(a) the order was made in the court of superior jurisdiction in the foreign country, it shall be registered in the High Court;

(b) the order was not made in a court of superior jurisdiction, it shall be registered in a court of a resident magistrate or a court of a magistrate of the first or second grade as the Registrar of the High Court shall consider appropriate in the circumstances.

**105.** Where a court in Malawi has made a maintenance of order any person before or after the commencement of the Act, and it is proved to the court that the person against whom the order is made is resident in a foreign country, the court shall send a certified copy of the order to the appropriate authority in the foreign country.

Transmission of order in Malawi



Power to make  
order against a  
person resident  
in a foreign  
country

**106.—(1)** Where a maintenance order is made in a court in Malawi against any person who is proved to be resident in a foreign country, the court may make an order in his or her absence as if a summons had been duly served on that person and he or she failed to appear, if, after hearing the foreign evidence the court is satisfied of the propriety of the application.

(2) The evidence of any witness who is examined on the application shall be put into writing, and the deposition shall be read over to and signed by him or her.

(3) Where the order is made, the court shall send to the appropriate authority in the foreign country—

(a) any deposition taken;

(b) a certified copy of the order;

(c) a statement of the grounds on which the making of the order might have been opposed if the person against whom the order is made had been duly served with summons and had appeared at the hearing; and

(d) any other information as the court possesses for facilitating the identification of that person, and ascertaining his or her whereabouts.

(4) It shall be permissible for the appropriate authority in a foreign country, which receives a provisional order for confirmation, to remit the order back to Malawi for purposes of taking further evidence.

(5) The court in Malawi shall after giving the prescribed notice proceed to take the evidence in the same manner and subject to the same conditions as evidence in support of the original application.

(6) Where upon the hearing of the evidence it appears to the court in Malawi that the order ought not to have been made, the court may rescind the order, and any depositions taken shall be dealt with in the same manner as an original deposition.

(7) Subject to subsection (9), the confirmation of an order made under this section shall not affect any power of a court to vary or rescind that order.

(8) On the making of a varying or rescinding order, the court shall send a certified copy of the order to the appropriate authority in the foreign country, and that in the case of an order varying the original order, the order shall not have any effect unless confirmed in same way as the original order.

(9) The applicant shall have the same right of appeal, if any, against refusal to make a provisional order as he or she would have had against a refusal to make the order had a summons been duly served on the person against whom the order is sought to be made.

**107.** The Chief Justice may make Rules as to the manner in which a case may be remitted to a court authorized to confirm a provisional order, and generally for facilitating communication between a court in Malawi and an appropriate authority in a foreign country.

Chief Justice  
to make rules  
for  
facilitating  
communica-  
tion

**108.—**(1) A court—

(a) in which an order is registered under this Act;

(b) by which an order has been confirmed under this Act;

shall take all such steps for enforcing the orders as may be prescribed.

Mode of  
enforcement

(2) An order registered or confirmed is enforceable in the same way as a civil debt and is recoverable summarily.

(3) A warrant of distress or commitment issued by a court for the purpose of enforcing any order so registered or confirmed under this Part may be executed in any part of Malawi in the same way as if the warrant had been originally issued or subsequently endorsed by a court having jurisdiction in the place where the warrant is executed.

**109.—**(1) A document purporting to be signed by a judge or officer of a court in a foreign country shall, until the contrary is proved, be deemed to have been signed accordingly without proof of the signature or judicial or official character of the person appearing to have signed it.

Proof of  
documents

(2) The officer of a court by whom a document is signed shall, until the contrary is proved, be deemed to be the proper officer of the court to sign the document.

**110.** A deposition taken in a court in a foreign country for the purposes to be of this Act may be received in evidence in proceedings before a court under this Act.

Depositions  
to be  
evidence

**111.** Where the President is satisfied that reciprocal provisions have been or are about to be made by the legislature of any foreign country for the enforcement within that country or part of it of maintenance orders made by courts in Malawi, he or she may by proclamation extend the Act to a foreign country or part of it, and this Act shall apply accordingly in respect of that country or part so that the references to foreign country in this Act were references to that country.

Power of  
President to  
extend Act to  
other coun-  
tries

## PART XVIII—MISCELLANEOUS

Establishment  
of Family  
Counselling  
Panels

**112.**—(1) The Minister may, by order published in the *Gazette* or by directions in writing, establish Family Counselling Panels to counsel parties to a marriage to prevent or to address any case of notifiable family misconduct.

(2) A Family Counseling Panel may intervene in a case of neglect or abuse upon information it may receive from a party to the marriage or from any person.

(3) In any case of neglect or abuse coming before a court, the court shall inquire if the case was referred to a Family Counseling Panel and may itself refer the case to a Family Counseling Panel, but the intervention of a Family Counseling Panel, whether before or upon reference to it by a court, shall have no effect on any ensuing proceedings for maintenance before any court.

(4) The Minister may make rules for the regulation and functioning of Family Counseling Panels.

Conduct by  
third parties

**113.**—(1) A person who uses his or her influence, as a close relation to a party to a marriage, whether by conduct or language to—

(a) cause a breakdown of a marriage relationship between the parties to a marriage;

(b) instigate any conduct by either or both of the parties to a marriage likely to adversely affect their marriage relationship;

(c) cause one party of the marriage to withhold maintenance or support from the other; or

(d) in any way render a marriage relationship to deteriorate or fail,

commits an offence and is liable to a fine of K50,000 and to imprisonment for six months.

(2) The court may, upon application, make an order of restraint or compensation against a person convicted of an offence under subsection (1).

Forms and  
Fees

**114.** The Chief Justice may prescribe the forms to be used and the fees to be paid by a person applying for an order of maintenance under this Act.

Repeals and  
Savings

**115.**—(1) The following statutes are hereby repealed—

(a) the Marriage Act;

(b) the African Marriage (Christian Rites) Registration Act;

(c) the Asiatics (Marriage, Divorce and Succession) Act;

(d) the Divorce Act;

- (e) the Married Women (Maintenance) Act; and
- (f) the Maintenance Orders (Enforcement) Act.

(2) A licence or certificate issued, notice published, registration effected, caveat entered or other thing done under any enactment repealed by this Act shall, if in force at the commencement of this Act, continue in force, and have effect as if issued, published, effected, entered or done under the corresponding provisions of this Act.

(3) Where a period of time specified in any enactment repealed by this Act is current at the commencement of this Act, this Act shall have effect as if the corresponding provisions of this Act had been in force when that period begun to run.

(4) A document referring to an enactment repealed by this Act shall be construed as referring to the corresponding provisions of this Act.

(5) Nothing in this Act shall affect the validity of any marriage celebrated before the commencement of this Act, under an enactment repealed by this Act.

(6) Any proceedings taken with reference to—

- (a) a marriage celebrated or entered into;
- (b) a register book kept; or
- (c) any warrant issued,

under an enactment repealed by this Act, shall have effect as if taken with reference to the corresponding provisions of this Act.

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## FIRST SCHEDULE

FORM A

## MARRIAGE, DIVORCE AND FAMILY RELATIONS ACT

## Marriage Register Book

No.  
Contracting  
Parties

Date when celebrated  
(Man)

(Woman)

(Man)

Age

(Woman)

(Man)

Nationality

(Woman)

(Man)

Village

(Woman)

(Man)

Traditional  
Authority

(Woman)

(Man)

District

(Woman)

(Man)

Occupation

(Woman)

(Man)

Residence

(Woman)

(Man)

(1)

Witness

(2)

Signature .....

(Registrar)

Celebrated under the above Act according to Rites of the .....  
..... (religious body, sect, denomination or ethnic group)

Entered this ..... day of ..... 20 ..... at the Registry of  
Marriages at ..... District Address .....

Date of signature .....

(The register is in duplicate)

FORM B

## MARRIAGE, DIVORCE AND FAMILY RELATIONS ACT

## Notice of Marriage

*under ss. 20, 28*

To the Registrar of Marriages for the ..... District of Malawi.

I HEREBY give you notice that a marriage is intended to be held within three months from this date between me, the undersigned, and the other party named at .....

Name	Status	Occupation, Rank or Profession	Age	Dwelling or Place of abode

Witness my hand this ..... day of ..... 20 .....

.....  
*Signature*

FORM C

## MARRIAGE, DIVORCE AND FAMILY RELATIONS ACT

## Form of Attestation

*under s. 21*

Signed by the said ....., at .....,  
on the ..... day of ..... 20 ..., this notice  
having been first read over to him [her] [or, read over and truly interpreted to him [her]  
in the ..... Language] by ..... He [she] seemed  
to understand the same and made his [her] mark thereto in my presence.

.....  
*Signed*

FORM D

## MARRIAGE, DIVORCE AND FAMILY RELATIONS ACT

Registrar's Permit

*under ss. 25, 29*

I,....., Registrar of marriages in the ..... District in Malawi, do hereby certify that on the ..... day of ....., 20 ..., notice was duly entered in the Marriage Notice Book of this district of the marriage intended between the parties herein named and described, such notice being delivered under the hand of ..... one of the parties, that is to say—

Name	Status	Occupation, Rank or Profession	Age	Residence	Length of Residence

Date of notice entered ..... day of ..... 20 .....

Place of intended marriage as set out in the Notice of Marriage.

Date of certificate given, ..... day of ....., 20 .....

No caveat has been entered against the issue of this certificate: or

A caveat was entered against the issue of this certificate on the ..... day of ....., 20 ....., but it has been cancelled.

.....  
*Signed, A.B.*

*Registrar of Marriages* ..... *District*

NOTE: This permit will be void unless the marriage is solemnised on or before the ..... day of ....., 20 ...

FORM E

## MARRIAGE, DIVORCE AND FAMILY RELATIONS ACT

## Special Licence

*under s. 26*

Whereas A.B. and C.D. desire to marry, and sufficient cause has been shown to me why the preliminaries required by the Marriage, Divorce and Family Relations Act should be dispensed with:

Now, therefore, in pursuance of the Act, I do dispense with the giving of notice and the issue of the prescribed permit, and do hereby authorise any registrar of marriages, to celebrate the marriage between the said A.B. and C.D. at [*place of celebration*], within ..... days from the date specified in this licence.

This marriage may be celebrated by a registrar of marriages between the hours of 8 o'clock in the forenoon and 6 o'clock in the afternoon.

Given under my hand this ..... day of ....., 20 ...

.....  
*Minister*

FORM F

## MARRIAGE, DIVORCE AND FAMILY RELATIONS ACT

## Oath of Marriage

*under s. 35*

Registrar: "Do I understand that you A.B., and you C.D., have come here for the purpose of being husband and wife"

If the answer is "Yes", the registrar shall proceed as follows—

"By the public declaration that you take each other as husband and wife made in my presence, and in the presence of persons now here, and by their subsequent attestation and by signing your names to that effect you become legally married to each other, although no other rite of a customary or religious nature shall take place, and that this marriage cannot be dissolved during your lifetime except by a valid decree of divorce, and if either of you before the death of other shall contract another marriage while this remains undissolved you commit an offence and shall be liable to punishment for that offence."

Each of the parties shall then say to the other—

"I call upon all persons present here to witness that I, A.B. takes C.D., to be my lawful wife (or husband)."



FORM G

## MARRIAGE, DIVORCE, AND FAMILY RELATIONS

*Under s. 36*

MALAWI									
The Marriage, Divorce and Family Relation Act									
Section ...									
Marriage celebrated in the ..... at ..... in Malawi									
CERTIFICATE OF MARRIAGE									
	No.	When Married	Names and Surnames	Age	Status	Profession	Residence at time of Marriage	Parent(s) name	Occupation or profession of parent(s)
Name of Husband }									
Name of wife }									
Witnesses }									
Married at ..... by (or before) me <div style="text-align: right;">A.B., Minister (or Registrar) (as case may be)</div>									
This marriage was celebrated between us } A.B. { in the presence of us } E.F. G.H.									
<i>Witnesses</i>									

MALAWI									
The Marriage, Divorce and Family Relations Act									
Section ...									
Marriages celebrated in the ..... at ..... in Malawi									
CERTIFICATE OF MARRIAGE									
	No.	When Married	Names and Surnames	Age	Status	Profession	Residence at time of Marriage	Parent(s) name	Occupation or profession of parent(s)
Name of Husband }									
Name of wife }									
Witnesses }									
Married at ..... by (or before) me <div style="text-align: right;">A.B., Minister (or Registrar) (as case may be)</div>									
This marriage was celebrated between us } A.B. { in the presence of us } E.F. G.H.									
<i>Witnesses</i>									

## MARRIAGE, DIVORCE AND FAMILY RELATIONS ACT

Marriage celebrated in the ..... at ..... in Malawi.

## CERTIFICATE OF MARRIAGE

Date ..... 20 .....

	No	When married	Name and Surnames	Full age or minor	Status	Rank or Profession	Resistance at time of Marriage	Parent(s) name	Rank or Profession of Parent(s)
Husband									
Wife									
Witness									
Witness									

Married at ..... by (or before) me, ..... (Signature of Cleric)

This Marriage was celebrated between us { Signature of Husband ..... } in the presence of us { Signature of First Witness ..... }  
 { Signature of Wife ..... } { Signature of Second Witness ..... }

FORM H

## MARRIAGE, DIVORCE AND FAMILY RELATIONS ACT

## Copy of Register of Marriages

under s. 44

No	Date	Contracting Parties	Age	Nationality	Village	Traditional Authority	District	Witness	Signature of officiating minister, address and date of signature
		Man							
		Woman							

\* religious body, sect, denomination or ethnic group

FORM I

## MARRIAGE, DIVORCE AND FAMILY RELATIONS ACT

## APPLICATION

*under s. 90*

In the High Court of Malawi ..... Registry

In the Resident Magistrate's Court

..... at .....

In the ..... Grade Subordinate Court

Matrimonial Cause No. .... of 20 ...

..... *Applicant*

and

..... *Respondent*

The application of ..... of .....  
 (hereinafter called the "Applicant") who states that his or her spouse .....  
 ..... of ..... (hereinafter  
 called the "Respondent"):

(a) On the ..... day of ..... 20 ..... at .....  
 ..... in the District of ..... was convicted in the  
 ..... Court of an offence against his or her person namely  
 ..... contrary to section ..... of the Penal Code and  
 sentenced to pay a fine of K ..... (or imprisonment for a term of  
 .....)

(b) That legal custody of .....  
 (child(ren)) of the marriage between the Applicant and the Respondent be committed to  
 the Applicant until the age of 16 years;

(c) The Respondent pay to the Applicant personally, or for her use to any officer  
 of the Court or third person on her behalf, such weekly sum as the Court shall, having  
 regard to the means both of the Applicant and the Respondent, consider reasonable.

(d) That the costs of the Court and of the Applicant shall be paid by the Respondent.

.....  
(Applicant)

1. Taken before me this ..... day of ..... 20 ..... at .....  
 .....  
 Registrar/Magistrate

2. Filed on behalf of the Applicant this ..... day of ..... 20...

.....  
*Legal Practitioner for the Applicant*

NOTE: If the Applicant is not represented by a Legal Practitioner he or she must appear  
 before the Magistrate in person and (2) should be deleted.

If the Application is filed by a Legal Practitioner on his or her behalf (1) must be  
 deleted.

Fee is K10 payable for filing.

FORM J

## MARRIAGE, DIVORCE AND FAMILY RELATIONS ACT

## SUMMONS

*Under s.90*

In the High Court of Malawi ..... Registry

In the Resident Magistrate's Court

at .....

In the ..... Grade Subordinate Court

Matrimonial Cause No. .... of 20 ....

.....*Applicant*

and

.....*Respondent*

To:

Of:

TAKE NOTICE that you are required to attend before this Court by yourself or by your legal practitioner at .....o'clock in the ..... noon on the ..... day of .....20 ... to show cause why an order should not be made against you pursuant to the application of ..... made herein the .....day of ..... 20 ..... ( a copy of which application is attached to this Notice).

AND FURTHER TAKE NOTICE that in default of such appearance an order may be made in your absence.

Dated this ..... day of ..... 20 ... at .....

(Seal)

*Registrar/Magistrate*

FORM K

## MARRIAGE, DIVORCE AND FAMILY RELATIONS ACT

## ACKNOWLEDGEMENT OF REGISTRAR'S EXPLANATION

*under s. 19*

We ..... and .....  
acknowledge that the registrar at ..... in .....  
..... district has explained to us, in accordance with section 19 of the Act,  
the prohibited degrees of kindred or affinity, the prohibition on polygamy and the penalties applicable for offences under this Act.

Signed: [AB]

Signed: [CD]

*Registrar*

Date: .....

## SECOND SCHEDULE

## FEES

*under s. 114*

	K	t
Filling every notice and entering same .. .. .	10	00
Issuing each certificate or certified copy or any certified copy of an extract from it .. .. .	20	00
On each marriage in the Registrar's office .. .. .	50	00
Special Licence .. .. .	50	00
For each search of the Marriage Register Book .. .. .	10	00
For each search of the Marriage Notice Book .. .. .	10	00

## THIRD SCHEDULE

## PROHIBITED DEGREES OF KINDRED AND AFFINITY

## PART I

Mother	Father
Adoptive mother or former adoptive mother	Adoptive father or former adoptive father
Daughter	Son
Adoptive daughter or former adoptive daughter	Adoptive son or former adoptive son
Father's mother	Father's father
Mother's mother	Mother's father
Son's daughter	Son's son
Daughter's daughter	Daughter's son
Sister	Brother
Father's sister	Father's brother
Mother's sister	Mother's brother
Brother's son	Brother's son
Sister's daughter	Sister's son
First cousin	First cousin

## PART II

Daughter of former wife	Son of former husband
Former wife of father	Former husband of mother
Former wife of father's father	Former husband of father's mother
Former wife of mother's father	Former husband of mother's mother
Daughter of son of former wife	Son of son of former husband
Daughter of daughter of former wife	Son of daughter of former husband

## PART III

Mother of former wife	Father of former husband
Former wife of son	Former husband of daughter

## PART IV

Sister of deceased or divorced wife	Brother of deceased or divorced husband
Daughter of brother of deceased or divorced wife	Son of brother of deceased or divorced husband

Daughter of sister of deceased or divorced wife	Son of sister of deceased or divorced husband
Sister of father of deceased or divorced wife	Brother of father of deceased or husband
Sister of mother of wife	Brother of mother of deceased husband

MARRIAGE, DIVORCE, AND FAMILY RELATIONS ACT  
LICENSED PLACES FOR MARRIAGE

*under s. 12*

The under-mentioned places of public worship have been licensed for the celebration of marriages—

The Church of Scotland Mission—

Churches at Blantyre (1st April, 1903), Zomba (1st April 1903), Domasi (1st April, 1903), Mulanje (Gen. N. 91/1910), Nakola (Gen. N. 54/1928), Bandawe (1st April, 1904) and Livingstonia (1st April, 1904). The Church of Scotland at Ekwendeni in the Mzimba District (G.N. 150/1951). The Church of Scotland at Embangweni in the Mzimba District (G.N. No. 150/1951, 199/1970). The Church of Scotland at Karonga (G.N. 123/1955).

The Dutch Reformed Church Mission—

Nkhoma Mission Station Schools Church, Nkhoma, Lilongwe (12th December, 1903).

Mvera Church, Dowa District (14th January, 1904).

Mlanda Church, Dedza District (Gen. No. 55/1908 and Gen. N. 76/1908).

Lingadzi C.C.A.P. Church, Plot No. 12/396, Area 12, Capital City, Lilongwe 3 (G.N. 1/1977).

Kongwe Church, near Dowa, Dowa District (Gen. N. 115/1928).

The Church at Chintembwe in the District of Nkhotakota (G.N. 40/1950)

The Roman Catholic Churches

*Nsanje District*

Muona (formerly Chapinga) G.N. 57/1958),

Nsanje (G.N. 134.1923) and

Tengani (G.N. 203/1966)

*Chikwawa District:*

Chikwawa (G.N. 134/1923),

Mkate (G.N. 54/1964(M)),

Misomali (G.N. 203/1966),

Nchalo (G.N. 203/1966) and

Ngabu (formerly Mpeza) G.N. 57/1958)

*Thyolo District:*

Bangwe (G.N. 126/1967),

Chingadzi (G.N. 54/1964(M)),

Konzalendo (G.N. 203/1966),

Lipumulo (G.N. 197/1950),

Lisungwi (G.N. 126/1967),

Mitengo (G.N. 126/1967),  
Molere (G.N. 25/1937) and  
Thunga (G.N. 11/1957).

*Mulanje District:*

Bango (G.N. 126/1967),  
Chisitu (G.N. 53/1968)  
Fort Lister (G.N. 34/1932),  
Gambula (G.N. 126/1967),  
Malosa (G.N. 181/1964(M),  
Mendulo (G.N. 126/1967),  
Mitembe (G.N. 8/1928),  
Mtepua (G.N. 126/1967),  
Mulopwe (G.N. 103/1975),  
Mwanga (G.N. 181/1964 (M)),  
Namulenga (G.N. 117/1941),  
Nasiyaya (G.N. 67/1969) and  
Phalombe (G.N. 24/1932).

*Blantyre District:*

Bandawe (G.N. 54/1964 (M)),  
Bangwe (G.N. 126/1967),  
Blantyre (Gen. N. 134/1923),  
Chilomoni (G.N. 126/1967),  
Kadikira (G.N. 67/1969),  
Limbe (Gen.N. 134/1923),  
Lirangwe Parish (G.N. 142/1963),  
Lisungwi (G.N. 126/1967),  
Lunzu Parish (G.N. 142/1963),  
Masanjala Parish (G.N. 142/1963),  
Mkwai (G.N. 54/1964 (M)),  
Mwanza (Gen.N. 8/1928),  
Mzedi (G.N. 142/1963),  
Ndirande (G.N. 67/1969),  
Neno (Gen.N. 134/1933),  
Nguludi (Gen.N. 134/1933),  
Njuli (at Kamwendo) (G.N. 300/1965),  
Nyungwe (G.N. 10/1970),  
Soche (at Blantyre) (G.N. 300/1965),  
Stella Maris Church (at Chikwawa Road–City of Blantyre) (G.N. 188/1972),  
Zacima (G.N. 126/1967).

*Zomba District:*

Chapel of the Catholic Secondary School (at Zomba) (G.N. 220/1952),  
Chingale (G.N. 87/1954),  
Magomero (G.N. 85/1956),  
Nankunda (Gen.N. 134/1923),  
Pirimiti (G.N. 137/1955),  
Sacred Heart (at Zomba) (Gen.N. 140/1925) and  
St. Anthony's Church (at Thondwe) (G.N. 242/1966).

*Machinga District:*

Mpiri (G.N. 25/1937) and  
Utale (G.N. 134/1923).

*Mangochi District:*

Nankhwali (G.N. 6/1939) and  
St. Augustine (Mangochi) (G.N. 232/1966).

*Lilongwe District:*

Chapel at Poor Clares' Convent at Lilongwe (G.N. 66/1963),  
Church and Chapel at the Bishop's House (Lilongwe) (G.N. 66/1963),  
Church of Our Lady of Africa, St. John's Teachers Training College (Lilongwe)  
(G.N. 132/1962),  
Church of the Sacred Heart (Lilongwe) (G.N. 66/1963),  
Likuni (10th August 1903),  
Nambuma (G.N. 38/1935),  
Namitete (until such time as the Church shall be consecrated, any room set aside  
for public worship within the Mission) (G.N. 130/1954) and  
St. Paul (Lilongwe) (G.N. 39/1956) and  
Chilinde Catholic Parish Church, Kawale, Lilongwe (G.N. 132/1976).

*Mchinji District:*

Guilleme (G.N. 38/1935) and  
Kachebere (Gen.N. 168/1923).

*Dowa District:*

Madisi (G.N. 30/1958).

*Kasungu District:*

Chipaso (G.N. 30/1958) and  
Holy Cross Parish Church at Chisemphere (G.N. 84/1970).

*Ntcheu District:*

Nsipe Estate (Gen.N. 332/1928),  
Nzama and Tsango (near Gochi) (G.N. 80/1954) and  
Sharpe Vale (G.N. 137/1955).

*Nkhata Bay District:*

Nkhata Bay (G.N. 58/1957) and  
St. Joseph's Parish Church (G.N. 84/1970).

*Ntchisi District:*

Mperere (G.N. 46/1940).

*Karonga District:*

Karonga (G.N. 111/1945),  
Kaseye (G.N. 58/1957),  
Vinthukutu (G.N. 58/1957),  
St. Anne's Parish Church at Chilumba (G.N. 84/1970) and  
St. Mary's Parish Church at Karonga (G.N. 84/1970).

*Rumphi District:*

Rumphi (G.N. 171/1956) and  
St. Patrick's Parish Church at Rumphi (G.N. 84/1970).



*Mzimba District:*

Katete (G.N. 12/1939),  
 Lunyangwa (G.N. 58/1957),  
 Mzambazi (G.N. 31/1941),  
 St. Theresa's Parish Church at Champira (G.N. 84/1970),  
 St. John's Parish Church at Euthini (G.N. 84/1970) and  
 St. Paul's Parish Church at Mzimba (G.N. 84/1970).

*Chitipa District:*

St. Micheal's Parish Church at Chitipa (G.N. 84/1970) and  
 St. Matias' Parish Church at Chitipa (G.N. 84/1970).

*Mzuzu District:*

St. Peter's Parish Church at Mzuzu (G.N. 84/1970).

## The Church of the Province of Central Africa Anglican Diocese of Malawi—

Saint George's Church, Zomba (G.N. 138/1912).  
 St. Peter's Church, Lilongwe (G.N. 119/1951).  
 The Anglican Church of Christ the King at Soche, Blantyre District  
 (G.N. 70/1961).  
 The Cathedral Church of St. Peter, Likoma (Gen.N. 114/1925).  
 The Church of All Saints, Nkhotakota (G.N. 114/1913).  
 The Church of St. Andrew, Mangochi (G.N. 57/1928).  
 The Church of St. Martin, Malindi (G.N. 114/1913).  
 The Church of St. Mary, Likoma, Chisumulu (Gen.N. 114/1913).  
 The Church of St. Paul the Apostle, Blantyre (Gen.N. 145/1922 and  
 Gen.N. 166/1922).  
 The Church of St. Peter and St. Paul, Mponda, Mangochi (Gen.N. 114/1913).  
 The Church of the Holy Innocents, Limbe (Gen.N. 38/1935).  
 The Ngaiai Church and Manga's Church, Zomba District (Gen.N. 209/1919).  
 The North Nyasa Mission Chapel, Mzimba (G.N. 128/1958).

The Church of All Saints, Thyolo, in the Thyolo District (G.N. 88/1954).

The Church of St. Marks, Mzuzu (G.N. 129/1959).

## The Seventh Day Adventist Church—

The Church at Malamulo Station, Thyolo District (Gen.N. 106/1908).

## The African Methodist Episcopal Church—

The Church of the African Methodist Episcopal Church Mission at Chief  
 Mwase's Village, Kasungu (G.N. 20/1932).

The Church of the South Africa General Mission at Chididi in the Nsanje District  
 (G.N. 11/1955).

The Church of Seventh Day Baptist Mission at Makapwa in the Thyolo District  
 (G.N. 72/1959).

The Church of Zambezi Mission Evangelical and Interdenominational  
 Incorporated at Mitsidi, Blantyre (G.N. 190/1961).

Blantyre Baptist Church, Makata Road, Blantyre (G.N. 4/1975).

Lilongwe Baptist Church (G.N. 200/1965).

Church of the Nazarene, Bangwe, near Limbe (G.N. 282/1963).

Blantyre Secondary School Chapel at Blantyre (G.N. 144/1966).

The Church of Central Africa Presbyterian, situated in the Lilongwe Township (G.N. 212/1969).

The Epiphany Evangelical Lutheran Church at Ndirande (G.N. 85/1970).

Saint Andrew's Church, Mulanje (G.N. 12/1973).

The Holy Trinity Lutheran Church situated one mile from Salima Town (G.N. 146/1973).

St. Thomas Anglican Church (Lingadzi Parish), Plot No. 8, Area 18, Capital City, Lilongwe 3 (G.N. 81/1982).

St. Mary's Anglican Church (Biwi and Kawale Parish), Plot No. 8, Area 8, Capital City, Lilongwe 3 (G.N. 82/1982).

Baha'i Teaching Institute Amalika Village, Thyolo District Title Deed No. 36643 (G.N. 97/1986).

Baha'i Centre, Plot No. CC 711, Limbe (G.N. 98/1986).

United Apostolic Church in Malawi, Chilomoni Township, Blantyre

United Apostolic Church in Malawi, Thomu Village, Chikwawa (G.N. 32/1987).

United Apostolic Church in Malawi, Lundu Village, Nsanje

United Apostolic Church in Malawi, Nyakamera Village, Nsanje (G.N. 38/1987).

Capital City Baptist Church, Plot No. 7, Area 14, Presidential Way, Lilongwe (G.N. 125/1987).

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MARRIAGE, DIVORCE AND FAMILY RELATIONS  
(PROCEDURE) RULES, 20..

*under s. 88*

ARRANGEMENT OF RULES

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1. These Rules may be cited as the Marriage, Divorce and Family Relations (Procedure) Rules. Citation

2. In these Rules, unless the context otherwise requires,— Interpretation

“Registrar” means the Registrar of the High Court as defined under section 2 of the Courts Act; Cap. 3:02

“Rules of the Supreme Court” means the Rules of the Supreme Court, 1883, in England as defined under section 2 of the Courts Act. Cap. 3:02

3.—(1) Every matrimonial cause shall be commenced by filing a petition addressed to the court. Commence-  
ment of  
proceedings

(2) A petition shall not be filed if there is before the court another petition by the same petitioner which has not been dismissed or otherwise disposed of by a final order.

(3) Every application in a matrimonial cause for ancillary relief, including—

(a) maintenance pending suit, except where a claim for such relief is made in the petition;

(b) maintenance of any children of the marriage except where a claim for such relief is made in the petition;

(c) the payment by a spouse, on a decree for divorce or nullity of marriage, of monthly or weekly sums for the maintenance and support of his or her spouse except where a claim for such relief is made in the petition;

(d) the securing by a spouse, on a decree for divorce or nullity of marriage, of a gross or annual sum of money to his or her spouse or for the benefit of the children of the marriage, except where a claim for such relief is made in the petition;

(e) the payment of maintenance to a spouse in whose favour a decree for judicial separation or against whom a decree for judicial separation has been made;

(f) the application of the whole or any part of the property comprised in any ante-nuptial or post nuptial settlement made on the spouses, either for the benefit of the children of the marriage or of the spouses;

(g) an order discharging, modifying or temporarily suspending any order for maintenance pending suit, maintenance of the children, maintenance during the subsistence of marriage, maintenance of a single pregnant woman, permanent maintenance,

shall be made by notice in accordance with Form 2 issued out of court.

(4) Where the parties have agreed upon the terms of the proposed order the application may be made by summons to a Registrar except in the case of an application under sub paragraph (b) or (g) of sub-Rule (2).

(5) Except where these Rules otherwise provide, every other application in a matrimonial cause or matter—

(a) shall be made to the Registrar or magistrate; and

(b) shall be made by summons.

**4.—(1)** A petition shall state—

(a) the names of the parties to the marriage, the place and date of the marriage and in the case of the female spouse, where applicable, her maiden name;

(b) the principal addresses at which the parties to the marriage have cohabited within the jurisdiction or, if it be the case, that there has been no cohabitation within the jurisdiction;

(c) whether there are living any children of the marriage and, if so, the names and dates of birth or ages of such children and, if it be the case, that the parentage of any living child of any of the spouses born during the marriage is in dispute;

(d) the occupation, the residence and domicile of the parties to the marriage at the date of the institution of the cause;

(e) in the case of a petition for presumption of death and dissolution of the marriage, the residence and domicile of the petitioner;

(f) whether there have been in court previous proceedings with reference to the marriage or the children of the marriage by or on behalf of either of the parties to the marriage, and, in the case of proceedings with reference to the marriage, whether there has been any resumption of cohabitation since the making thereof;

(g) the matrimonial offences alleged, or other grounds upon which relief is sought, setting out with sufficient particularity the individual facts relied on, but not the evidence by which they are to be proved, and, if such be the case, that any person with whom adultery or sodomy is alleged to have been committed has died before the presentation of the petition;

(h) in the case of a petition for presumption of death and dissolution of the marriage, the last place of cohabitation of the parties, the circumstances in which the parties ceased to cohabit, the date when and the place where the respondent was last seen or heard of, and the steps which have been taken to trace the respondent;

(i) in the case of a petition for restitution of conjugal rights, the date when and the circumstances in which the respondent refused or ceased to render conjugal rights to the petitioner, the desire of the petitioner for a restitution of conjugal rights and willingness of the petitioner to render them to the respondent;

(j) where adultery is alleged, whether the petitioner has in any way been accessory to or connived at or condoned the adultery, and, where cruelty is alleged, whether the petitioner has condoned the cruelty;

(k) in the case of a petition for nullity of marriage under section 78 of the Act, whether the petitioner was at the time of the marriage ignorant of the facts alleged and whether sexual

intercourse with the consent of the petitioner has taken place since the discovery by the petitioner of the existence of grounds for decree; and

(1) whether the petitioner is presented or prosecuted in collusion with the respondent or any of the co-respondents;

(2) A petitioner may include in his or her petition a claim for maintenance pending suit, maintenance of the children, maintenance or a secured provision, in which case the petition shall contain a statement in general terms of income and property of the other spouse in so far as they are within knowledge or belief of the petitioner.

(3) The petition shall conclude with a prayer setting out particulars of the relief claimed, including the amount of any claim for damages, any claim for costs, and, in appropriate cases, a prayer that the court will exercise its discretion to grant a decree *nisi* notwithstanding the adultery of the petitioner during the marriage.

(4) The prayer made under sub-Rule (3) may also include a claim for—

(a) custody of the children of the marriage;

(b) maintenance pending suit;

(c) maintenance of the children; or

(d) permanent maintenance.

(5) A petitioner for jactitation of marriage shall state—

(a) the occupation, residence and domicile of the petitioner and the respondent at the date of the institution of the cause;

(b) the dates, times and places of the alleged assertions;

(c) that the alleged assertions are false and that the petitioner has not acquiesced therein;

and shall conclude with a prayer setting out the relief claimed.

(6) Every petition shall, if settled by, a legal practitioner be signed by him or her, or by the petitioner if he or she is acting in person.

(7) The legal practitioner for a petitioner shall endorse on the petition his or her name or the name of his or her firm and the address of his or her or of his or her firm's place of business within the jurisdiction, which shall be an address for service.

(8) A petitioner acting in person shall endorse on the petition an address for service, which shall be his or her place of residence, or, if he or she has no place of residence within the jurisdiction, an address for service within the jurisdiction.

5.—(1) Unless otherwise directed, where a petition alleges adultery, the alleged adulterer shall, if living at the date of the filing of the petition, be made a co-respondent in the cause.

Co-respondent and interveners

(2) Where a person charged with adultery or sodomy in a petition is not made a respondent or co-respondent under sub-rule (1), he or she shall be entitled to appear and intervene in the proceedings.

(3) Unless otherwise directed, a party intervening in a cause under these Rules shall join in the proceedings at the stage which those proceedings have reached at the time he or she appears and his or her name shall appear thereafter in the title of the cause.

6.—(1) Every petition shall be supported by an affidavit by the petitioner verifying the facts of which he or she has personal knowledge and deposing as to belief in the truth of the other facts.

Affidavit in support of petition

(2) The affidavit in support of the petition shall be contained in the same document as the petition and shall follow at the foot or end thereof.

7. Every copy of a petition for service on a co-respondent or person charged with adultery or sodomy, whether made a respondent or not, shall be accompanied by a notice of proceedings in accordance with Form 5, a form of acknowledgment of service in accordance with Form 3 and a memorandum of appearance in duplicate in accordance with Form 4.

Notice of petition and notice of proceedings

8.—(1) A notice of an application for ancillary relief and every copy thereof for service shall, if the respondent to the application has not already entered an appearance to the petition in the matrimonial cause in which the application is made, contain a notice to appear in accordance with Form 7, and shall be accompanied by a form of acknowledgment of service in accordance with Form 3 and a memorandum of appearance in duplicate in accordance with Form 8.

Notice of application for ancillary relief

(2) A notice of an application for maintenance pending suit, maintenance of the children, permanent maintenance, and every copy thereof for service, shall contain a notice to file evidence in accordance with Form 9.

9.—(1) Unless otherwise directed—

(a) a copy of every petition shall be served personally or by registered post upon respondent, co-respondent and person charged with adultery or sodomy who is named in the petition; and

Service of petition and notice for ancillary relief



(b) a copy of every notice of an application for ancillary relief shall be served personally or by registered post upon the respondent thereto, unless the respondent thereto is the petitioner or, being respondent in the cause, has entered a general appearance to the petition in the cause in which the application is made, in which case the notice may be served by leaving it at, or sending it by pre-paid post to, the address for service.

(2) Personal service shall in no case be effected by the petitioner or the intended petitioner.

(3) Notwithstanding sub-rule (1), a document shall be deemed to have been duly served by registered post if it is sent by pre-paid registered post to the party to be served, and an acknowledgment of service in accordance with Form 3, of his or her identity and of his or her receipt of the document is signed by him or her and returned to the legal practitioner for the petitioner, or to the petitioner if he or she is acting in person, at the address for service.

(4) Where the party to be served is a respondent spouse, his or her signature on the acknowledgment of service shall be proved at the trial or hearing.

(5) An application for leave to substitute for the modes of service prescribed by this Rule some other mode of service, or to substitute for service notice of the proceedings by advertisement or otherwise, shall be made *ex parte* by lodging with the Registrar or magistrate an affidavit setting out the grounds on which the application is made.

(6) Where leave is given to substitute for service notice of the proceedings by advertisement, the form of the advertisement shall be settled by the Registrar or magistrate and copies of the newspapers containing the advertisement shall be filed, together with any notice of petition or notice of proceedings.

(7) Service may be dispensed with altogether in any case in which it may appear necessary or expedient to do so.

(8) An application for leave to dispense with service on a respondent spouse shall be made to a judge and an application for leave to dispense with service in any other case shall be made to the Registrar.

Service out  
of the  
jurisdiction

**10.—(1)** A petition, notice or other document in a matrimonial cause or matter may be served out of the jurisdiction without leave in manner provided by these Rules, or may be served in accordance with the procedure prescribed by Rules 8 and 11 of Order XI of the Rules of the Supreme Court and in such event the provisions of Rule 12 of that Order shall apply to the service of the document, so that the official certificate required by paragraph (3) of Rule 8 of that

Order shall, in the case of a document served personally, show the server's means of knowledge as to the identity of the person served.

(2) Where a petition or notice of an application for ancillary relief is to be served out of the jurisdiction the time limited for appearance which is to be entered in the notice accompanying the petition or contained in the notice shall be fixed having regard to the place or country where or within which the petition or notice is to be served in accordance with the practice adopted under Rule 5 of the said Order XI.

**11.** Unless otherwise directed, and except where the provisions of Rules 9 or 10 have been complied with, a petition shall not proceed to trial unless the respondent and every co-respondent thereto and every person named therein—

Proof of  
service

(a) has entered an appearance; or

(b) is shown by affidavit in accordance with Form II to have been served with the petition personally or in accordance with an order for substituted service; or

(c) has returned to the legal practitioner for the petitioner, or to the petitioner if he or she is acting in person, an acknowledgment of service in accordance with Form 4, which shall be lodged with the Registrar or magistrate.

**12.—(1)** Unless otherwise directed, service or delivery of any notice or other document in a matrimonial cause may, if no other mode of service or delivery is prescribed, be effected—

Service of  
other  
documents

(a) where the party to be served is the petitioner or has entered an appearance, by leaving the notice or document at, or by sending it by pre-paid post to, the address for service;

(b) in any other case, by delivering the notice or document to the party to be served or by leaving it at, or by sending it to him or her by pre-paid registered post to his or her last known address.

(2) A copy of every affidavit filed in support of or in answer to an application for ancillary relief or in pursuance of an order for interrogatories or discovery shall be delivered to the opposite party, if he or she is the petitioner or has entered an appearance, within twenty-four hours after the affidavit has been filed; and where the opposite party is not the petitioner and has not entered an appearance and the time for entering an appearance has not expired, a copy of the affidavit shall be served upon him or her with the originating summons or notice in support of which the affidavit is filed.

Entry of  
appearance

**13.—**(1) If the person desiring to appear is acting in person he or she shall either leave at or send by post to a court a memorandum of appearance in duplicate in accordance with Form 4, 6, 8, or 11, whichever is appropriate, containing an address for service within the jurisdiction.

(2) If a legal practitioner is acting on behalf of the person desiring to appear, he or she shall leave at or send by post to the court a notice of entry of appearance in duplicate in accordance with Form 12, and the production of that notice shall be *prima facie* evidence that the appearance has been duly entered.

(3) The Registrar or magistrate, on receipt of the memorandum of appearance, shall forthwith enter an appearance in the court file, and shall send by post to the petitioner or his or her legal practitioner, as the case may be, one copy of the memorandum sealed with the seal of the court, and shall deliver or send by post to the person entering the appearance a notice in accordance with Form 12, and the production of that notice shall be *prima facie* evidence that the appearance has been duly entered.

Form of  
appearance

**14.—**(1) An appearance may be made under protest and may be general or limited to any claim made in the petition or by subsequent application or to making an application under these Rules and may be entered at any time.

(2) An appearance under protest shall state concisely the grounds of protest and the party so appearing shall, before the expiry of the time allowed for filing an answer, apply for directions as to the determination of any question arising by reason of such appearance and in default of such application shall be deemed to have entered an unconditional appearance.

(3) Any directions made under sub-Rule (2) may provide for the trial of a preliminary issue, or for determination of the matters in question at the hearing of the cause and for any interlocutory matters incidental to the application.

Amendment  
and  
supplementary  
petitions

**15.—**(1) A petition may be amended before service—

(a) upon the filing of an affidavit by the petitioner; or

(b) with leave, upon the filing of an affidavit by the legal practitioner acting for the petitioner; verifying the new facts alleged.

(2) A petition may, after service to a respondent or co-respondent, be amended with the leave of court.

(3) A supplementary petition may be filed with the leave of court after service of the original petition to a respondent or co-respondent.

(4) An application for leave to amend a petition after service or for leave to file a supplementary petition shall, unless otherwise directed, be supported by an affidavit by the petitioner verifying the new facts alleged and shall, unless otherwise directed, be served on every opposite party who has entered an appearance, or may, if no appearance has been entered, be made *ex parte* by filing the affidavit.

(5) Any affidavit filed under this Rule shall verify the new facts of which the deponent has personal knowledge and depose as to belief in the truth of the other new facts alleged.

(6) Any affidavit filed under this Rule, shall, in relation to those facts, contain the information required by in the case of the original petition.

(7) An order made under this Rule shall—

(a) in cases where an appearance has been entered in the original proceedings fix the time within which the memorandum of appearance must be amended or the answer must be filed or amended;

(b) if made after the Registrar or magistrate has given his or her certificate under Rule 29, provide for a stay of the hearing until that certificate has been renewed.

(8) Unless otherwise directed, a copy of the amended petition or of the supplementary petition, together with a copy of the order, if any made under this Rule, shall be served upon the respondent, co-respondent or person named therein and, in the case of a respondent, co-respondent or person who is not named in the original petition or who is named therein but has not entered an appearance thereto, the amended petition or supplementary petition shall be accompanied by a notice of petition in accordance with Form 2 or, as the case may be, by a notice of proceedings in accordance with Form 5, a form of acknowledgement of service in accordance with Form 3 and a memorandum of appearance in duplicate in accordance with whichever of Forms 4 or 6 is appropriate and the provisions of Rules 8, 9, and 10 shall apply to amended petitions and supplementary petitions as they apply to petitions.

**16.—(1)** A respondent, co-respondent or person named in a petition who entered an appearance to a petition and who wishes to defend all or any charges made therein shall, within fourteen days after the expiration of the time limited for the entry of appearance, file an answer to the petition by sending it by pre-paid post to, or by leaving it at, the court the petition is filed. Answer

(2) A co-respondent or person named in a petition, whether a respondent or not, who indicates in the memorandum of appearance that he or she intends only to deny a particular charge, or any of them, shall be entitled, without filing an answer, to defend at the trial by denying such charges.

(3) Where the time limited for entry of appearance has expired and no appearance has been entered, then, if the certificate is granted under Rule 29, the time for filing an answer shall be deemed to have expired, notwithstanding that the said period of fourteen days has not elapsed.

Form of  
answer,  
parties cited,  
and service  
of answer

**17.—**(1) Every answer or subsequent pleading containing more than a simple denial of the facts stated in the petition or answer, as the case may be, shall set out with sufficient particularity the facts relied upon but not the evidence by which they are to be proved.

(2) Where the answer of a spouse alleges adultery and prays for relief, or contains a claim for costs against an alleged adulterer, the alleged adulterer shall, if living at the date of the filing of the answer, be added to the title of the cause as a party cited and shall, unless otherwise directed, be served with a copy of the answer accompanied by a notice of proceedings in accordance with Form 5, a form of acknowledgment of service in accordance with Form 3, and a memorandum of appearance in duplicate in accordance with Form 6, as if it were a petition.

(3) A party cited or person named in a petition shall be entitled to appear and intervene in the proceedings.

(4) Service of a copy of an answer under sub-Rule (1) shall be effected and proof of service shall be given in the manner provided for by Rule 8, 9 and 10.

(5) A party cited or person named in an answer who has entered an appearance to the answer and who wishes to defend all or any charges made therein shall, within fourteen days after the expiration of the time limited for the entry of appearance, file an answer to the charges by sending it by prepaid post to, or by leaving it at, the court the petition is filed.

(6) A party cited or person named in an answer who indicates in the memorandum of appearance that he or she intends only to deny a particular charge, or any of them, shall be entitled, without filing an answer, to defend himself or herself at the trial by denying such charges.

(7) Every answer or subsequent pleading shall—

(a) if settled by a legal practitioner, be signed by him or her; or

(b) if not settled by a legal practitioner, or by the party acting in person.

**18.—**(1) No reply shall be filed without leave of court except where the answer contains counter charges and a prayer for relief, in which case a reply shall be filed within fourteen days from the delivery of the answer. Reply

(2) No subsequent pleading shall be filed without leave of court.

**19.** Any originating summons, notice of an application for ancillary relief, summons, pleading or other document may be amended without leave before service, or with leave after service, subject to any directions as to verification by affidavit, as to re-service or as to consequential amendment of pleadings already filed with a court. Amendments

**20.—**(1) No pleading shall be filed out of time without leave after the certificate has been granted under Rule 29. Pleadings out of time

(2) A co-respondent, party cited or person named, whether made a respondent or not, shall not, without leave, be heard to deny any charge, unless he or she has entered an appearance before the certificate has been granted under Rule 29.

**21.—**(1) Any party may by letter require any other party to furnish particulars of any allegation or other matter pleaded and, if the other party fails to furnish such particulars within a reasonable time, the party requiring the particulars may apply for an order of the court that particulars must be given. Particulars

(2) All particulars, whether given in pursuance of an order or otherwise, shall be filed within twenty-four hours after being furnished to the party requiring them.

**22.** A copy of every answer, except an answer which is required to be served in the same manner as a copy of a petition, and of every reply and subsequent pleading shall, within twenty-four hours after it is filed, be delivered to the opposite parties or their legal practitioners. Delivery of subsequent pleadings

**23.—**(1) Any party to a matrimonial cause may with leave deliver interrogatories in writing for the examination of an opposite party. Discovery

(2) A copy of the interrogatories proposed to be delivered shall be lodged in the court where the summons is issued and a further copy shall be served with the summons.

(3) Interrogatories shall, unless otherwise ordered, be answered by affidavit to be filed within ten days.

(4) Any party to a matrimonial cause may apply for an order for discovery of documents by an opposite party, who may be ordered to make such general or limited discovery on oath as the Registrar or magistrate may think fit.

Medical  
inspection

**24.—(1)** In proceedings for nullity of marriage on the ground of impotence or incapacity the petitioner shall, after an answer has been filed, or, if no answer has been filed or appearance entered to the cause, after the expiration of the time allowed for filing an answer or entering an appearance, as the case may be, apply to a Registrar or magistrate for the determination of the question whether a medical inspector of the court should be appointed to examine the parties.

(2) Upon an application under sub-rule (1), the Registrar or magistrate shall, if in the circumstances of the case he or she considers it expedient to do so, appoint a medical inspector, of the court to examine the parties and to report to the court the result of the examination.

(3) At the hearing of the application under this Rule the court, if it thinks fit, may appoint a medical inspector, to examine any party who has not been examined or to examine further any party who has already been examined.

(4) Notice of the time and place of the inspection shall be served upon the respondent and service and proof of service shall be in the manner provided for by Rules 8 and 10 in the case of services of a copy of a petition on a respondent.

(5) In proceedings for nullity of marriage on the ground that the marriage has not been consummated owing to the wilful refusal of the respondent to consummate the marriage, either party may apply for the appointment of a medical inspector to examine the parties and to report to the court the result of the examination.

(6) Upon an application under sub-rule (5), the Registrar or magistrate shall appoint a medical inspector, of the court and either of the parties shall be at liberty to submit himself or herself for examination to the inspector so approved.

(7) Every examination under this Rule, shall, if either party so requires, be held at the premises of the medical inspector, appointed by a court under this Rule or at some other convenient place selected by any or all of the parties, and in every other case shall be held at the court making the appointment under this Rule or at such other place as the Registrar or magistrate may direct.

(8) The medical inspector shall call upon the legal practitioners for the parties, if any, to identify the parties to be inspected and, after identification, the parties and their legal practitioners shall sign their names and the paper bearing the signatures shall be signed by the inspector and shall be annexed to his or her report to the court.

(9) Every report made in pursuance of this Rule shall be filed and either party shall be entitled to be supplied with a copy upon payment of the prescribed fee.

**25.—**(1) Witnesses at the trial of a matrimonial cause shall be examined *viva voce* and in open court. Evidence

(2) A court may—

(a) subject to the provisions of sub-rule (3) of this Rule, order that any particular facts to be specified in the order may be proved by affidavit;

(b) order that the affidavit of any witness may be read at the trial on such conditions as the court may think reasonable;

(c) order that evidence of any particular facts to be specified in the order shall be given at the trial by statement on oath of information and belief, or by production of documents or entries in books, or by copies of documents or entries, or otherwise as the court may direct; and

(d) order that not more than a specified number of expert witnesses may be called.

(3) Where it appears to the court that any party reasonably desires the production of a witness for cross-examination and that such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by affidavit, but the expenses of such witness at the trial shall be specifically reserved.

(4) Any party may apply for the appointment of an examiner or for a commission or for letters of request to examine a party or witness in any cause, and for leave to give the depositions taken on the examination in evidence at the trial, and the provisions of Rules 6 to 25 of Order XXXVII of the Rules of the Supreme Court shall apply to the examination, save that in Rule 16 of the said Order there shall be substituted for the reference to the Central Office a reference to the registry of court hearing the matrimonial cause.

(5) Nothing in any order made under this Rule shall affect the power of the court at the trial to refuse to admit evidence tendered in accordance with the order if it is in the interests of justice to do so.



Staying  
proceedings  
for restitution

26. At any time after the commencement of proceedings of restitution of consummation the respondent may apply for an order to stay the proceedings on the ground that he or she is willing to resume or to return to cohabitation with the petitioner.

Trial of issues

27. An application for directions for the separate trial of any issue or any question as to the jurisdiction of the court shall be made to a judge or magistrate as the case may be.

Discretion  
statement

28.—(1) Every party to a matrimonial cause praying that the court shall exercise its discretion to grant a decree *nisi* notwithstanding his or her adultery shall lodge in the registry of the court in which the matrimonial cause was commenced a discretion statement signed by him or her or his or her legal practitioner, stating that the court will be asked to exercise its discretion in his or her favour notwithstanding his or her offence, and setting forth particulars of the acts adultery committed and of the facts which it is material for the court to know for the purpose of the exercise of its discretion.

(2) Where the application for the certificate under Rule 29 is made by the party praying for the discretion of the court the discretion statement shall be lodged in a sealed envelop with the application for the certificate or, where the application for that certificate is made by any other party to the cause, the discretion statement shall be lodged in a sealed envelop within ten days after the receipt of notice that the cause has been set down for trial.

(3) The envelop containing the discretion statement made under sub-rule (2) shall be endorsed with a certificate by the legal practitioner for the party praying for the discretion of the court, or by that party if he or she is acting in person, that the statement is signed and dated, and that sub-rule (5) of this Rule does not apply or has been complied with.

(4) A discretion statement shall be open to the inspection of the Registrar, where applicable, but, except by the direction of a judge or magistrate, shall not be open to inspection by any other person.

(5) Where an application is made to the Registrar or magistrate by or on behalf of a party who has filed a discretion statement for leave to give his or her own evidence by affidavit, the discretion statement shall be open to inspection by the Registrar or magistrate.

(6) Where a discretion statement contains an allegation of a matrimonial offence on the part of the other spouse which is not referable to any specific allegation in the pleadings, notice of the allegation shall be given forthwith to that spouse.

(7) A court may at the trial dispense with the notice if it is satisfied that failure to give the notice was justified.

(8) Neither the fact that a discretion statement has been lodged or that such notice as aforesaid has been given nor the contents of the discretion statement or notice shall be given as evidence against the party lodging or giving the same in any matrimonial cause or matter except when that party has put the discretion statement or notice or the contents thereof in evidence in open court.

**29.** Unless otherwise directed, all causes or issues shall be tried by a judge or magistrate sitting alone. Mode of trial

**30.—(1)** The petitioner or any party who is defending a matrimonial cause shall, before settling down the cause for trial, refer the pleadings and proceedings in the cause to a Registrar, or magistrate who shall give a certificate that the cause is fit to be set down for trial if he or she is satisfied— Certificate and directions for trial

(a) that a copy of the petition, and any document required to be serviced in the same manner as a copy of a petition, has been duly served;

(b) if appearance has not been entered, that the time for entering an appearance has expired;

(c) if an appearance has been entered, that the time for filing an answer or any subsequent pleading has expired;

(d) in proceedings for nullity of marriage on the ground of impotence or incapacity, that a report by a medical inspector or inspectors appointed under Rule 23 (1) has been filed, or an order made that there shall be no medical inspection;

(e) in proceedings for nullity of marriage on the ground that the marriage has not been consummated owing to the willful refusal of the respondent to consummate the marriage, that the report of medical inspector or inspectors appointed under Rule 23(5) has been filed.

(2) The application for the certificate of the Registrar or magistrate shall—

(a) ask for directions as to the place of trial;

(b) include a statement in writing of the probable length of time to be occupied by the hearing and the event that circumstances arise before the trial tending to show that the statement is inaccurate, a further statement must be lodged with the court; and

(c) include a statement in writing of the places in which the witness whom it is proposed to call at the trial reside and any other facts relevant to the choice of place of trial.

(3) The certificate of the Registrar or magistrate shall issue directions as to the place of trial, and in giving such directions the Registrar or magistrate shall have regard to all the circumstances of the case, including the convenience of the parties and their witnesses, costs, the date on which the trial can take place, and the estimated length of the hearing.

(4) The Registrar or magistrate may, upon the application of any party, vary any directions given as to the place of trial of any cause.

Setting down  
for trial

**31.—**(1) The petitioner, after the certificate of the Registrar or magistrate has been obtained, or, where directions have been given for the separate trial of any issue, shall set the cause or issue down for trial in the registry in which it is proceeding, and shall, within twenty-four hours thereafter, give to each party who has entered an appearance notice of his or her having set the cause down for trial.

(2) If the petitioner fails to set the cause down within fourteen days after the granting of the certificate of the Registrar or magistrate, any party defending the cause may set it down for trial and shall, within twenty-four hours thereafter, give to the petitioner and all other parties who have entered an appearance notice of his or her having set the cause down for trial.

(3) Except with the consent of all parties or by leave of court, no cause shall be tried until after the expiration of ten days from the date of setting down.

Right of  
respondent,  
co-respondent  
or party cited  
to be heard  
without filing  
answer

**32.—**(1) After entering an appearance, a respondent, co-respondent, or party cited in an answer may, without filing an answer, be heard as to any question of custody of or access to any children of the marriage.

(2) A co-respondent or party cited in an answer shall, with leave of the court, be heard in respect of any question as to damages unless he or she has entered an appearance before the certificate of the Registrar or magistrate has been granted under Rule 29.

(3) A bill of costs not directly referable to a decree *nisi* or decree absolute or other final decree shall be taxed against a party who has appeared, other than a spouse against whom a decree has been pronounced, unless notice has been given to such party of the intention to apply for an order that the costs should be costs in the cause; and

(4) A respondent, co-respondent or party cited may, before the expiration of the period mentioned in the order for payment of the costs by him or her after taxation, apply to a court to discharge the order making the costs in the cause, so that a party who has not appeared shall first enter an appearance for the purpose.

**33.—**(1) Every decree of a court shall be signed by the Registrar, in the case of a matrimonial cause heard before the High Court or Supreme Court of Appeal, or a magistrate, as the case may be.

Form of  
decree

(2) A decree of a court shall state whether the court has exercised its discretion under Rule 27 or not.

(3) A sealed or other copy of any decree of a court may be issued to any person requiring it on payment of the prescribed fee.

**34.** Where any part of any court fees payable in respect of a matrimonial cause or matter is not paid, a court may order the legal practitioner, if any of the party by whom the fee has been incurred personally to pay the fee.

Non-payment  
of court fees

**35.—**(1) An application for re-hearing of a cause by a court where no error of the court at the hearing is alleged shall be made to a court having immediate appellate jurisdiction over the initial court.

Re-hearing

(2) The application shall be by notice of motion and shall—

(a) state the grounds on which it is based;

(b) be filed in the registry of the court having immediate appellate jurisdiction; and

(c) served upon the opposite parties within six weeks after judgment.

(3) The application under sub-rule (1) shall give a notice of fourteen days to the parties and may be amended at any time by leave of the court.

**36.—**(1) When any person desires to show cause against making absolute a decree *nisi*, he or she shall enter an appearance in the cause in which the decree has been pronounced and shall, within seven days thereafter, file an affidavit setting forth the facts upon which he or she relies and within twenty-four hours of filing such affidavit shall deliver a copy thereof to the party in whose favour the decree has been pronounced and, if the affidavit alleges collusion, to the other party or parties to the alleged collusion.

Intervention  
against decree  
*nisi*

(2) Any party to whom a copy of the affidavit has been delivered as aforesaid may, within fourteen days thereafter, file an affidavit in answer and shall, within twenty-four hours after filing the affidavit, deliver a copy thereof to the person showing cause who may within fourteen days file an affidavit in reply and shall, within twenty-four hours after filing the affidavit, deliver a copy thereof to each party to whom he delivered a copy of his or her original affidavit.

Decree  
absolute

(3) No further affidavits shall be filed without leave of the court.

**37.—**(1) An application by a spouse to make absolute a decree *nisi* pronounced in his or her favour shall be made by lodging in the registry where the cause is proceeding a notice of application in accordance with Form 14 on any day after the expiration of the period prescribed for making the decree absolute.

(2) If the Registrar or magistrate, after searching the court record, is satisfied—

(a) that no appeal against the decree and no application for re-hearing under Rule 34 is pending;

(b) that no order has been made by the court enlarging the time for appealing against the decree or for making application for re-hearing, or, if any such order has been made, that the time so enlarged has expired; and

(c) that no appearance has been entered, or, if appearance has been entered, that no affidavits have been filed within the time allowed for filing, by or on behalf of any person within to show cause against the decree being made absolute,

shall make absolute a decree *nisi*.

(3) An application to make absolute a decree *nisi* made after the expiration of one year from the date of the decree *nisi* there shall be lodged with an affidavit by the applicant accounting for the delay.

(4) An application by a spouse to make absolute a decree *nisi* pronounced against him or her shall be made to the Registrar or magistrate by giving fourteen days notice to the opposite parties and shall be accompanied by a notice of application in accordance with Form 14 and on any such application the Registrar or magistrate may make such order as he or she thinks fit, or, in the case of the Registrar, he or she may refer the application to a judge.

(5) A certificate in accordance with Form 15 or Form 16, whichever is appropriate, that the decree has been made absolute shall be prepared and filed by the Registrar or magistrate and the certificate shall be authenticated by fixing thereto the seal of the court.

Reversal of  
decree of  
judicial  
separation

**38.—**(1) A petition for the reversal of a decree of judicial separation shall set out particulars of the decree and the grounds for reversal on which the petitioner relies.

(2) No such petition shall be filed unless an appearance was entered in the cause in which the decree was pronounced by the party praying for a reversal of the decree.

(3) A copy of the petition, accompanied by a form of acknowledgment of service in accordance with Form 4, shall be served upon the party in whose favour the decree was pronounced, who may within fourteen days after service file an answer to the petition and a copy of the answer shall be delivered to the petitioner within twenty-four hours after the answer is filed with the court.

(4) Service of a copy of the petition shall be effected and proof of service shall be given in the manner provided for by Rule 8, 9 and 10 in the case of a document served on a respondent to a petition.

(5) All subsequent proceedings on the petition shall be carried on in the same manner, so far as practicable, as the proceedings on the petition for judicial separation.

**39.** A petitioner may apply for maintenance pending suit at any time after entering appearance in a petition. Maintenance pending suit

**40.** An application for maintenance of the children may be made— Maintenance of children

(a) by a petitioner at any time after service of a petition in which custody of any children of the marriage is claimed or after making a subsequent application for custody;

(b) by a respondent spouse, after entering an appearance to a petition;

(c) by the guardian of any children of the marriage or by any person who has obtained leave to intervene in the cause for the purpose of applying for the custody of, or who has under an order of the court, the custody or control of such children after entering an appearance to the petition in accordance with Form 12; or

(d) by any person in terms of section 89 of the Act.

**41.—(1)** An application for maintenance, where a prayer for maintenance after such relief has not been included in the petition, or variation of variation of marriage settlements may be made by the petitioner, and by a settlements respondent spouse at any time after entering an appearance to the petition, but no such application shall be made later than two months after final decree except by leave of the court. Application for maintenance after final decree and variation of marriage settlements

(2) Upon an application for variation of marriage settlements, the court shall, unless it is satisfied that the settlement makes adequate provision for any children of the marriage, or, as the case may be, that the proposed variation does not adversely affect the rights or interests of any children of the marriage, direct that the children be separately represented on the application by a legal practitioner and

counsel, and may assign a guardian *ad litem* by whom any children may appear upon the application an affidavit of fitness of the proposed guardian in accordance with Form 17 shall be filed with the court.

Permanent  
maintenance

**42.** An application for permanent alimony may be made at any time after a decree for divorce or judicial separation, as the case may be, has been pronounced.

Evidence on  
application for  
maintenance

**43.—(1)** Where a spouse is served with a petition in which maintenance pending suit, maintenance of the children, maintenance and enters an appearance, he or she shall, within fourteen days after the expiration of the time limited for appearance, file an affidavit setting out full particulars of his or her property and income.

(2) Where a spouse is served with a notice of an application for maintenance pending suit, maintenance of the children, or permanent maintenance, the applicant spouse shall, within fourteen days after service of the notice upon him or her, or if he or she has not at the time of such service entered an appearance, after entering an appearance and within fourteen days after the expiration of the time limited for appearance, file an affidavit setting out full particulars of his or her property and income, unless in the case of any such application, other than an application for maintenance pending suit, the applicant spouse at the time of service of the application gives notice to the respondent spouse of his or her intention to proceed with the application upon the evidence already filed on his or her application for maintenance pending suit.

(3) Within fourteen days after delivery of any affidavit by a respondent spouse under this Rule, the applicant spouse may file an affidavit in reply.

Variation of  
maintenance  
order

**44.** A petitioner or respondent if he or she has entered an appearance to the petition, may at any time apply for variation of an order of maintenance.

Evidence on  
application  
for variation  
or settlement

**45.—(1)** An application for variation of marriage settlements shall state the nature of the settlement or variation proposed and shall, unless otherwise directed, be supported by an affidavit by the petitioner stating the facts relied on in support of the application and the affidavit shall set out, full particulars of the marriage, any children of the marriage, all settlements, whether ante-nuptial or post-nuptial, and of the funds brought into the settlements by the spouses.

(2) The application shall, in addition to being served on the respondent, be served on the trustees of any settlements and upon

such other persons as the Registrar or magistrate may direct, and any party so served may, within fourteen days after such service and after entering an appearance in accordance with Form 12, file an affidavit in answer.

**46.—**(1) An appointment shall be fixed for the hearing by the Registrar or magistrate of any application for ancillary relief which has not been dealt with at trial.

Preliminary investigation by Registrar or magistrate of application for ancillary relief

(2) Notice of the appointment shall be given by the applicant to every other party to the application who has entered an appearance and to the petitioner if he or she is not the applicant.

(3) The Registrar or magistrate shall, in the presence of the parties or their legal practitioners, investigate the allegations made in support of and in answer to the application, and may take the oral evidence of witness, and may order the attendance of any person for the purpose of being examined or cross-examined, and may at any stage of the proceedings order the discovery and production of any document or call for further affidavits.

**47.** In the case of a claim, contained in a petition, for maintenance pending suit, maintenance of the children, permanent maintenance, or of an application for ancillary relief, other than an application for variation of marriage settlements where there are children of the marriage, the Registrar or magistrate shall, after completing his or her investigation under Rule 45, make such order as he or she thinks fit, or, in the case of the Registrar, refer the application or any question arising therefrom to the judge for his or her decision, and, pending the final determination of the application, the Registrar may make an interim order upon such terms as he or she may think just.

Applications heard by Registrar or magistrate

**48.—**(1) The petitioner, the respondent spouse or the guardian of any children of the marriage or any person who has obtained leave to intervene in the cause for the purpose of applying for the custody of, or who has under an order of the court the custody or such children may at any time, either before or after final decree, apply to a court for an order relating to the custody or control of the children of the marriage, or for directions that proper proceedings be taken for placing such children under the protection of the court.

Custody of and access to children

(2) A petitioner may at any time after filing a petition in a matrimonial cause, and a respondent spouse may at any time after entering an appearance, apply for access to any children of the marriage.



Information  
as to other  
proceedings  
relating to  
children

**49.** On any application under these Rules relating to any children of a marriage, there shall, if there are any proceedings relating to such children in progress in the court, be filed a statement as to the nature of those proceedings.

Application in  
case of wilful  
neglect to  
maintain

**50.—(1)** An application by a spouse who alleges that his or her spouse has been guilty of wilful neglect to provide reasonable maintenance for her or the children of the marriage shall be made by originating summons in accordance with Form 17 and the applicant or his or her legal practitioner shall take out a Notice of Appointment in accordance with Form 18.

(2) There shall be filed in support of the summons an affidavit by the applicant which shall state—

(a) the names of the parties to the marriage, the place and date of the marriage and the name and status of the applicant before the marriage;

(b) the names and dates of birth or ages of any living children of the marriage and the place where and the person with whom such children are residing;

(c) whether there have been in any court any, and if so what, previous proceedings with reference to the marriage or the children of the marriage by or on behalf of either of the parties to the marriage or any other person, the date and effect of any decree or order made in such proceedings, and, in the case of proceedings with reference to the marriage, whether there has been any resumption of cohabitation since the making thereof;

(d) particulars of the alleged wilful neglect by the spouse to provide reasonable maintenance for the applicant or the children of the marriage and whether the spouse is or has been making any, and if so what, payments to the applicant by way of maintenance for himself or herself or the children;

(e) the means of the applicant and of the respondent spouse in so far as they are within the applicant's knowledge or belief;

(f) whether application is made for an order that the respondent spouse do secure the payments prayed for by the applicant; and

(g) the facts upon which it is claimed that the court has jurisdiction to entertain the proceedings.

(3) The copy of the summons for service on the respondent shall be accompanied by a form of acknowledgement of service in accordance with Form 3 and a memorandum of appearance in duplicate in accordance with Form 11, with such modifications as the case may require.

(4) If the respondent enters an appearance to the summons, he or she shall, within fourteen days after the expiration of the time limited for appearance, file an affidavit in answer to the application, setting out the grounds on which he or she intends to contest the application and containing in a schedule full particulars of his or her property and income.

(5) Where the respondent's affidavit alleges a matrimonial offence, a copy of the affidavit but omitting the schedule referred to in the sub-rule (4), shall, unless otherwise directed, be served on a party cited, if any, together with a notice of proceedings in accordance with Form 5, a form of acknowledgment of service in accordance with Form 4 and a memorandum of appearance in duplicate in accordance with Form 6, with such modifications as the case may require, and the party cited shall be entitled to appear and intervene in the proceedings.

(6) The provisions of Rules 9 and 10 relating to service of petitions shall apply to service of a copy of an affidavit under sub-rule (5) and if the party cited does not enter an appearance or return an acknowledgment of service to the respondent or his legal practitioner which acknowledgment shall be lodged with a Registrar or magistrate such person shall, except where the provisions of Rule 9(6) have been complied with, be shown by means of an affidavit to have been served with the copy of the affidavit personally or in accordance with an order for substituted service.

(7) A party cited in the respondent's affidavit who has entered an appearance and who wishes to defend all or any charges made in the affidavit shall, within fourteen days after the expiration of the time limited for the entry of appearance, file an affidavit in answer by sending it by prepaid post to, or by leaving it at, the registry of the court.

(8) Where a party cited has entered an appearance, his or her name shall appear thereafter in the title of the application.

(9) Within fourteen days after receiving the respondent's affidavit the applicant may file an affidavit, in reply and shall, within twenty-four hours after filing the affidavit, deliver a copy thereof to any party cited.

(10) No further affidavits may be filed without leave of court.

(11) When all the affidavits have been filed, a time and date shall be fixed for the hearing of the summons before a court and the applicant shall, unless otherwise directed, serve notice thereof in accordance with Form 18 on any party who has entered an appearance.

(12) On hearing of the application a court may make such order as it thinks fit, or may investigate into the means of the parties to the marriage and, pending the final determination of the application, the court may make an interim order upon such terms as it thinks just.

(13) An application to discharge, modify or suspend an order made under this Rule shall be made to and dealt with by a Registrar or magistrate in the same manner as an application for a variation of an order under these Rules.

(14) A spouse may apply for security for his or her costs of an application under this Rule when all the affidavits have been filed and the Registrar or magistrate shall ascertain a sufficient sum of money to cover those costs, and if, after taking all the circumstances into account, including the means of the spouses, he or she considers that the one of the spouses should provide security for all or some of the costs of the incidental to the application, he or she may order that spouse to pay the sum so ascertained, or some portion of it, into court, or give security therefore within such time as he or she may fix.

(15) The application under this Rule shall be dealt with as if it were a matrimonial cause and as if the originating summons were a petition and the applicant were the petitioner.

Proceedings in  
chambers

**51.** The name of the cause or matter and of the person taking out a summons shall be endorsed on the summons, and a copy thereof shall be served on the party to whom the summons is addressed or on his or her legal practitioner at least two clear days before the summons is returnable.

Hearing of  
summons

**52.—(1)** The party taking out a summons shall, at the time appointed therein, attend with the original summons at the place appointed for hearing.

(2) If any party to the summons does not attend within a reasonable time after the time appointed, the court may proceed in his or her absence upon being satisfied by affidavit or otherwise that such party had due notice of the time appointed.

Appeals from  
Registrar

**53.** A party may appeal from an order or decision of the Registrar to a judge in chambers by summons to be issued within seven days of the order or decision complained of and returnable on the first day on which summons are heard after that period has elapsed, but the appeal shall not, unless otherwise ordered, act as a stay of the order or decision complained of.

Appeals from  
magistrate

**54.** A party may appeal from an order or decision of a magistrate to a judge in chambers by summons to be issued within seven days of the order or decision complained of and returnable on

the first day on which summons are heard after that period has elapsed, but the appeal shall not, unless otherwise ordered, act as a stay of the order or decision complained of.

**55.** Subpoenas in any cause or matter to which these Rules apply may issue out of the registry in which the cause or matter is proceeding or out of the registry to which the file relating to that cause or matter has been transferred for the purpose of the trial.

Subpoenas

**56.** An application for attachment or committal shall be made to a judge or magistrate, and any person attached or committed may apply to a judge or magistrate for his or her discharge.

Attachment  
and  
committal

**57.—(1)** In default of payment to any person of any sum of money at the time appointed by any order of the court for the payment thereof, a writ of *feri facias*, sequestration, or *elegit* shall be sealed and issued out of the court upon an affidavit of service of the order and of non-payment.

Enforcement  
of orders

(2) A decree or order requiring a person to do an act thereby ordered shall state the time within which the act is to be done, and the copy to be served upon the person required to obey the same shall be endorsed with a notice in accordance with Form 19 and shall be served personally on that person or shall be delivered to his legal practitioner.

(3) Where a party who has been ordered to lodge damages in court fails to do so in accordance with the order, the party in whose favour the order was made may at any time apply to a court to vary the order by directing the payment of such damages to an individual to be specified in the application and the court may, if satisfied that in the circumstances it is just and equitable to do so, vary the order accordingly upon an undertaking by that individual to lodge the damages in court or otherwise deal with them, as and when received, as the court may direct and if the application is made after decree absolute or other final decree, the court may, if satisfied as aforesaid, dispense with the undertaking.

(4) Where a party who has been ordered to pay costs into court fails to do so in accordance with the order the party in whose favour the order was made may apply to the Registrar or magistrate to vary the order by directing payment to an individual to be specified in the application and the Registrar or magistrate may, if satisfied that in the circumstances it is just and equitable to do so, vary the order accordingly, so however that, if the application is made before decree absolute, the order shall be made only upon an undertaking by the said individual to pay the costs into court.

## Motions

**58.**—(1) Except as otherwise provided by these Rules and unless a court shall otherwise direct, notice of any motion other than an ex parte motion, shall be made by five clear days, to the court and shall be served on all parties who may be affected by the proposed order.

(2) A copy of the notice shall be filed with the court and the affidavits to be used in support of the motion and the original documents referred to therein or intended to be used at the hearing of the motion shall at the same time be lodged with the court.

(3) Copies of all such affidavits or documents shall be delivered upon request to the parties who are entitled to be heard on the motion.

Children and  
persons of  
unsound mind

**59.**—(1) A child or a person of unsound mind may commence and prosecute any cause or make any application to which these Rules apply by his or her next friend and may defend or intervene in any such cause by his guardian *ad litem*, and except as otherwise provided by this Rule, no appointment of a guardian *ad litem* shall be necessary.

(2) Before the name of any person is used in any proceedings as next friend, the legal practitioner for the child or person of unsound mind shall obtain a written authority signed by that person.

(3) The authority shall be attested by a legal practitioner, who shall certify that the proposed next friend has no interest in the proceedings adverse to that of the child or person of unsound mind.

(4) Where in any cause to which these Rules apply any document is required to be served and the person on whom service is to be affected is a child, the document shall, unless otherwise directed, be served on the parent or guardian of the child or, if he or she has no parent or guardian, upon the person with whom he or she resides or under whose care he or she is, and service so effected shall be deemed good service on the child, so that a Registrar or magistrate may order that service effected or to be effected on the child shall be deemed good service.

(5) A legal practitioner or other person seeking to enter an appearance on behalf of an child or person of unsound mind shall file an affidavit of fitness in accordance with Form 17.

(6) Where a petition or answer has been served on a person who is an child or a person of unsound mind and no appearance has been entered in the cause by or on behalf of the child or person of unsound mind, or where an originating summons has been served on an child or person of unsound mind, the party at whose instance the petition, answer or originating summons was served shall,

before proceeding further with the cause, apply for an order that some proper persons be assigned guardian of the child or person of unsound mind by whom he or she may appear and defend or intervene in the proceedings.

(7) Where any cause to which these Rules apply is commenced against a person who is of unsound mind where a petition is filed for nullity of marriage on the ground that the respondent was at the time of the marriage of unsound mind, the applicant or petitioner shall not proceed with the cause without leave, whether an appearance is entered or not, and a Registrar or magistrate may, if he or she considers that the respondent is not properly represented or ought to be represented, order that some proper person be assigned as guardian of the respondent by whom he or she may appear and defend the cause.

**60.**—(1) After the certificate under Rule 29 has been granted, or, with leave, at an earlier stage of the cause, a spouse who is a petitioner or who has filed an answer may apply for security for his or her costs of the cause up to the hearing, and incidental to the hearing. Security for costs

(2) At the hearing of an application for a commission or for letters of request or for the appointment of a special examiner to examine a party or witness who is outside the jurisdiction of the court, or at any time after such an examination is granted, a spouse who is a petitioner or who has entered an appearance to a petition may apply for security for costs of and incidental to the examination.

(3) Where an application for security has been made under this Rule, the Registrar or magistrate shall ascertain a sum of money to cover the costs of the spouse and if, after taking all the circumstances into account, including the means of the spouse, he or she considers that the respondent should provide security for all or some of the costs of the applicant spouse, he or she may order the respondent spouse to pay the sum so ascertained, or some portion of it, into court or to give security therefor within such time as he or she may fix, and may direct a stay of the proceedings until the order is complied with.

(4) The bond taken to secure the costs of an applicant spouse under this Rule shall be given to the Registrar or magistrate and shall be filed and shall not be delivered out or sued upon without leave of the Registrar or magistrate.

**61.** Every bill of costs shall be referred to taxation and may be taxed by the Registrar or magistrate. Taxation

Payment of  
costs

**62.—**(1) Upon the certificate as to costs, an order of the court may issue for payment of the costs within seven days after service of the order or such other order as the Registrar or magistrate may direct.

(2) An order for payment of costs contained in an order drawn up before the decree is made absolute, shall direct payment into court, and, unless otherwise directed, such costs shall not be made out of court until the decree has been made absolute.

Payment of  
money out of  
court

**63.** A person entitled to payment of money out of court applying for payment, lodge in the registry in which the proceeding a form in writing setting out the date on which he or she applied for was paid into court, the amount applied for and address of the person to receive it.

Exercise of  
jurisdiction  
under Married  
Women's  
Property Act,

**64.** The Registrar or magistrate may exercise all the jurisdiction and powers conferred upon a judge of the High Court by section 17 of the Married Women's Property Act, 1882, and in the case of the Registrar, the exercise of such jurisdiction shall be without prejudice to the exercise of any jurisdiction conferred on him or her by Rule 12 of Order LIV of the Rules of the Supreme Court.

Application to  
proceedings

**65.** These Rules shall apply to any cause or matter which is pending at the date on which these Rules come into operation subject to such directions as a court may deem fit.

#### FORM 1

#### *Notice of Application for Ancillary Relief*

In the [.....]<sup>(1)</sup>

In the Matter of a Petition by ..... for [*here set out particulars of the matrimonial cause in which the application is made*]

To

TAKE NOTICE that the petitioner (respondent) intends to apply to the court for an order that [*here set out the ancillary relief claimed*]

[*Insert here in appropriate cases the contents of Form 7 or 9*]

THIS NOTICE IS issued by [*state name and address of applicant or legal practitioner*]

DATED the ..... day of ..... 20...

(1) Name of court

## FORM 2

*Notice of Petition**(Respondent spouse)*In the [.....]<sup>(1)</sup>

To:

TAKE NOTICE that a Petition (respondent) has been presented to this court by ..... A copy of it is delivered with this Notice.

You must complete the accompanying Form of Acknowledgment of Service and send it to ..... (the legal practitioner for) (2) the Petitioner, at (address)

If you do not intend to answer the charges, nor to be heard on the other claims made in the Petition, and if you do not wish to make any application on your own account, you need not do anything more than send the Form of Acknowledgement of Service to the above address. The court may then, without further notice to you, proceed to hear the Petition and pronounce judgment, notwithstanding your absence.

If you wish to be heard on the matter in connection with the Petition you (or your legal practitioner) must complete the accompanying Memorandum of Appearance in duplicate and send or deliver both copies (without fee) so as to reach the Registry within eight days<sup>(3)</sup> after you received this Notice. You (or your legal practitioner) will receive notice of the case being set down for hearing. When the case is heard, you must attend the hearing.

If you wish to defend the case at the hearing, you (or your legal practitioner) must, in addition to sending the Memorandum of Appearance, send or deliver an Answer in writing together with the prescribed fee so as to reach the court's Registry within fourteen days after the time allowed for sending the Memorandum of Appearance. You (or your legal practitioner) must at the same time send a copy of your Answer to (the legal practitioner for) (4) the Petitioner.

<sup>(5)</sup> If you wish to oppose the claim for alimony, maintenance of the children, maintenance or a secured provision, you (or your legal practitioner) must, in addition to sending the Memorandum of Appearance, also send or deliver, so as to reach the court's Registry within fourteen days after the time allowed for sending the Memorandum of Appearance, an affidavit (which must be sworn before a Commissioner for Oaths) giving full particulars of your property and income, together with the prescribed fee.

You (or your legal practitioner) must at the same time send a copy of your affidavit to (the legal practitioner for) (6) the Petitioner. If you wish to allege that your spouse has property or income you should say so in your affidavit.



*Note:* If you intend to instruct a legal practitioner to act for you in these proceedings you should at once complete and sign the Form of Acknowledgement of Service and then give him or her all the documents which have been served upon you, so that he or she may take the necessary steps on your behalf within the times specified.

Dated the ..... day of ..... 20.....

Registrar (Magistrate)<sup>7</sup>

- (1) Name of court.
- (2) Delete if not applicable.
- (3) Or as the case may be.
- (4) Delete if not applicable.
- (5) Delete or amend this paragraph as necessary.
- (6) Delete if not applicable.
- (7) Delete as necessary.

#### FORM 3

##### *Acknowledgement of Service*

In the [ ..... ]<sup>(1)</sup>

Between  
and  
and

Petitioner  
Respondent  
Co-respondent

I am the person named as ..... in the Petition<sup>(2)</sup>.

I received on the ..... day of ....., 20.., at (*place of receipt*)

- 1. A copy of the Petition<sup>(2)</sup> filed in this case.
- 2. Notice of Petition/Proceedings<sup>(3)</sup>
- 3. Memorandum of Appearance in duplicate<sup>(4)</sup>.

(Signed)

DATED

To [*the Petitioner [or the Respondent] or his or her legal practitioner*]

- (1) Name of court.
- (2) Or as the case may be.
- (3) Delete whichever is not applicable.
- (4) Delete if not applicable.

#### FORM 4

##### *Memorandum of Appearance (Respondent spouse)*

In the [ ..... ]<sup>(1)</sup>

Between  
and  
and

Petitioner  
Respondent  
Co-respondent

1. Have you received and read the Petition for divorce <sup>(2)</sup> by your wife/husband <sup>(3)</sup> and the Notice of Petition which are delivered with this Form?
2. On what date and at what address did you receive them?
3. Are you the person named as ..... in the Petition?
4. Do you intend to defend the case at the hearing?  
(Answer "Yes" or "No".)
5. Even if you do not wish to defend the case: -

A <sup>(4)</sup>

B

Do you wish to be heard as to other claims made in the petition, namely—

- (1) Costs.
- (2) Custody of the children.
- (3) Maintenance of the children.
- (4) Maintenance pending suit.
- (5) Permanent Maintenance.

Do you wish to make any application on your own account, namely—

- (1) Access to the children.
- (2) Custody of the children.
- (3) Maintenance of the children.
- (4) Maintenance pending suit.
- (5) Permanent Maintenance.

(Answer "Yes" or "No" against each item.)

6. What is your address to which communications should be sent?

DATED the ..... day of ..... 20 .....

(Signed) <sup>(5)</sup>

*Note* : If you intend to instruct a legal practitioner to act for you in these proceedings, give this form to him or her. In any event, leave the space below blank.

*To be completed only by the Respondent's legal practitioner.*

On the instruction of my/our client, enter an appearance in the terms of the above Memorandum for ..... the Respondent in this cause.

(Signed) .....

*Note* : If this Form is used, **both** copies must be completed and sent to the Registry.

- (1) Name of court.
- (2) Or as the case may be.
- (3) Delete whichever is not applicable.
- (4) To be struck out or altered if not applicable.
- (5) To be signed by the Respondent only if a legal practitioner is not being instructed.

## FORM 5

*Notice of Proceedings**(Co-respondent, party cited or person named)*In the [ ..... ] <sup>(1)</sup>

To:

TAKE NOTICE that in proceedings in this court by .....  
 ..... for divorce <sup>(2)</sup>, it has been alleged by  
 ..... that you have  
 committed adultery <sup>(2)</sup>, with .....  
 ..... A copy of the Petition <sup>(2)</sup>, is delivered with this Notice.

You must complete the accompanying Form of Acknowledgment of Service and send it to ..... (the legal practitioner for) <sup>(3)</sup> the Petitioner <sup>(4)</sup>, at (*address*)

If you do not intend to answer the charges, nor to be heard on the other claims made in the Petition <sup>(4)</sup>, you need not do anything more than send the Form of Acknowledgment of Service to the above address. The court may then, without further notice to you, proceed to hear the Petition <sup>(4)</sup>, and pronounce judgment, notwithstanding your absence.

If you wish to be heard on the matter in connection with the Petition <sup>(4)</sup>, you (or your legal practitioner) must complete the accompanying Memorandum of Appearance *in duplicate* and send or deliver both copies (without fee) so as to reach this Registry within eight days<sup>(4)</sup> after you received this Notice.

If you wish to defend the case only by denying the charges of adultery, or by resisting the claim for damages <sup>(5)</sup>, or if you wish to be heard only as to costs <sup>(5)</sup>, you need take no further step after sending the Memorandum of Appearance until the case is heard, when you must attend the hearing. You (or your legal practitioner) will receive notice of the case being set down for hearing.

If you wish to defend the case at the hearing on some other ground, you (or your legal practitioner) must, in addition to sending the Memorandum of Appearance, send or deliver an Answer in writing, together with a fee of ..... so as to reach this Registry within fourteen days after the time allowed for sending the Memorandum of Appearance. You (or your legal practitioner) must at the same time send a copy of your Answer to (the legal practitioner for) <sup>(5)</sup> the Petitioner <sup>(6)</sup>.

*Note :* If you intend to instruct a legal practitioner to act for you in these proceedings you should at once complete and sign the Form of Acknowledgment of Service and then give him or her all the documents which have been served upon you, so that he or she may take the necessary steps on your behalf within the times specified.

Dated the ..... day of ..... 20..

Registrar (Magistrate) <sup>7</sup>

- (1) Name of court.
- (2) Or as the case may be.
- (3) Delete if not applicable.
- (4) Or as the case may be.
- (5) Delete if not applicable.
- (6) Or as the case may be.
- (7) Delete as necessary

FORM 6

*Memorandum of Appearance*

*(Co-respondent, party cited or person named)*

In the [.....] <sup>(1)</sup>

Between  
and  
and

Petitioner  
Respondent  
Co-respondent

1. Have you received and read the Petition <sup>(2)</sup> by Notice of Proceedings which are delivered with this Form?

2. On what date and at what address did you receive them?

3. Are you the person named as .....  
..... in the Petition <sup>(2)</sup>?

4. Do you intend to defend the case by denying the charges of adultery made against you, and if so, which of them?

5. Do you intend to defend the case on any ground other than a denial of the charges of adultery made against you?

6. <sup>(3)</sup> Do you intend only to resist the claim of damages against you?

(Answer "Yes" or "No".)

7. <sup>(4)</sup> If you do not intend to defend the case, do you wish to be heard as to costs?

(Answer "Yes" or "No".)

8. What is your address to which communications should be sent?

DATED the ..... day of ..... 20 ..

*(Signed)* <sup>(5)</sup>

*Note* : If you intend to instruct a legal practitioner to act for you in these proceedings, give this form to him or her. In any event, leave the space below blank.

*To be completed only by the Respondent's legal practitioner.*

On the instruction of my/our client, enter an appearance in the terms of the above Memorandum for ..... the Respondent in this cause.

(Signed) .....

(Address for Service) .....

*Note* : If this Form is used, **both** copies must be completed and sent to the Registry.

- (1) Name of court.
- (2) Or as the case may be.
- (3) Not applicable if no claim for damages.
- (4) Not applicable if no claim for costs.
- (5) To be signed by the party appearing only if a legal practitioner is not being instructed.

#### FORM 7

*Additional Notice to be included in Form 1 only if there has been no appearance to the petition*

AND FURTHER TAKE NOTICE that you must complete the accompanying Form of Acknowledgement of Service and send it to ....., (the legal practitioner for) <sup>(1)</sup> the applicant, at (address)

If you do not intend to oppose the application, you need not do anything more than send the Form of Acknowledgement of Service to the above address. The court may then, without further notice to you, proceed to hear the application and make such order as it may think fit, notwithstanding your absence.

- (1) Delete if not applicable.
- (2) Delete whichever is not applicable.
- (3) Or as the case may be.

#### FORM 8

##### *Memorandum of Appearance*

*(Limited to application for ancillary relief made by notice)*

In the [ ..... ] <sup>(1)</sup>

Between  
and

Petitioner  
Respondent

1. Have you received and read the Notice of Application for (2) ..... which is delivered with this Form?
2. On what date and at what address did you receive it?
3. Are you the person named as ..... in the Notice?
4. Do you wish to oppose the Applicant's claim for (2) .....  
.....
5. What is your address to which communications should be sent?  
DATED the ..... day of ..... 20 .....

(Signed) (3)

*Note* : If you intend to instruct a legal practitioner to act for you in these proceedings, give this form to him or her. In any event, leave the space below blank.

*To be completed only by the Respondent's legal practitioner.*

On the instruction of my/our client, enter an appearance in the terms of the above Memorandum for ..... the Respondent in this cause.

(Signed) .....

(Address for Service) .....

*Note* : If this Form is used, both copies must be completed and sent to the Registry.

(1) Name of court.

(2) Insert nature of ancillary relief claimed.

(3) To be signed by the Respondents only if a legal practitioner is not being instructed.

#### FORM 9

#### *Notice to File Evidence*

AND FURTHER TAKE NOTICE that if you wish to oppose the application and unless at the same time of service hereof upon you (the legal practitioner for) (1) the applicant gives notice to you dispensing with this requirement you (or your legal practitioner) must (in addition to sending the Memorandum of Appearance) (2) send or deliver so as to reach the Registrar (or magistrate at ..... (3) within twenty-two days (4) after you received this Notice an affidavit (which must be sworn before a Commissioner for Oaths) giving full particulars of your property and income, together with the prescribed fee. You (or your legal practitioner) must at the same time send a copy of your affidavit to (the legal practitioner) (1) the applicant. If you wish to allege that the applicant has property or income, you should say so in your affidavit.

If you do not intend to oppose the application, you need not do anything more than send the Form of Acknowledgement of Service to the above address. The court may then, without further notice to you, proceed to hear the application and make such order as it may think fit, notwithstanding your absence.

- (1) Delete if not applicable.
- (2) Delete if an appearance has been entered.
- (3) Strike out whichever is not applicable or omit if contents of Form 7 are included.
- (4) Or as the case may be, and substitute "Fourteen days" if appearance has already been entered.

---

FORM 10

*Affidavit of Service*

In the [.....] (1)

Between  
and  
and

Petitioner  
Respondent  
Co-respondent

I, ..... of ..... make oath and say:

1. That a copy of the ..... (*petition, originating summons or notice*) bearing date the ..... day of ..... 20 ..... filed in this court together with a Memorandum of Appearance in duplicate. Notice of Petition/Proceedings (2) and Form of Acknowledgement of Service was duly served by me on ..... the ..... in this case at ..... on the ..... day of ..... 20 ... by delivering to the said ..... Personally a copy thereof.

(*Means of knowledge of identity of the person served must be inserted here.*)

SWORN etc.

(1) Name of court.

(2) Delete whichever is not applicable.

---

FORM 11

*Memorandum of Appearance*

In the [.....] (1)

Between  
and  
and

Petitioner  
Respondent  
Co-respondent

Enter an appearance [in person] (2) for ..... the respondent (3) in this cause.

(Signed)

of ..... whose address for service is ..... agent  
for ..... of .....

DATED the ..... day of ..... 20.....

(1) Name of court.

(2) If such is the case.

(3) Or as the case may be.

## FORM 12

*Notice of Entry of Appearance*

In the [ ..... ] (1)

Between  
and  
and

Petitioner  
Respondent  
Co-respondent

TAKE NOTICE that an appearance has been entered in the above Registry on your behalf to the petition filed in this cause [state whether the appearance is general or limited to any particular relief].

TAKE NOTICE further that any order, notice, copies of pleadings or other instruments which are required to be served on or delivered to you but of which personal service is not required may be served or delivered by the petitioner's legal practitioner by leaving them at or sending them by post to you at the address of service given by you, namely .

DATED the ..... day of ..... 20...

(Registrar/Magistrate)(2)

(1) Name of court.

(2) Delete whichever is not applicable.

## FORM 13

*Notice of Application for Decree Nisi to be made Absolute*

In the [ ..... ] (1)

Between  
and  
and

Petitioner  
Respondent  
Co-respondent

I [full name and description] legal practitioner for the petitioner (2) give notice that application is hereby made on behalf of the petitioner (2) that



the decree *nisi* pronounced in this cause on the day of .....  
 ..... 20..... be made absolute.

(Signed)

DATED the ..... day of ..... 20...

(1) Name of court.

(2) Or respondent.

FORM 14

*Certificate of making Decree Nisi Absolute (Nullity)*

In the [.....] (1)

Between  
and

Petitioner  
Respondent

Referring to the decree made in this Cause on the ..... day of  
 ..... 20.., whereby it was ordered that the Marriage in fact had  
 and solemnised on the day ..... of  
 ..... at ..... between  
 ..... the Petitioner and .....  
 the Respondent be pronounced and declared to have been and to be absolutely  
 null and void to all intents and purposes in the law whatsoever by reason  
 ..... and the said Petitioner .....  
 be pronounced to have been and to be free of all bond of Marriage with the said  
 Respondent ..... unless sufficient cause be shown to  
 the court within ..... weeks from the making thereof why the said Decree  
 should not be made absolute and no such cause having been shown, it is hereby  
 certified that the said Decree was on the ..... day of .....  
 20... made final and absolute and that the said Marriage was absolutely null and  
 void and that the said Petitioner was and is free from all bond of Marriage with  
 the said Respondent.

DATED the ..... day of ..... 20...

(1) Name of court.

FORM 15

*Certificate of Making Decree Nisi Absolute (Divorce)*

In the [.....] (1)

Between  
and  
and

Petitioner  
Respondent  
Co-respondent

Referring to the decree made in this Cause on the ..... day of ..... 20..., whereby it was ordered that the Marriage had and solemnised on the day ..... of ..... at ..... between ..... the Petitioner and ..... the Respondent be dissolved by reason that ..... unless sufficient cause be shown to the court within ..... weeks from the making thereof why the said Decree should not be made absolute and no such cause having been shown, it is hereby certified that the said Decree was on the ..... day of ..... 20... made final and absolute and that the said Marriage was thereby dissolved.

DATED the ..... day of ..... 20...

(1) Name of court.

#### FORM 16

##### *Affidavit of fitness of guardian ad litem*

In the [.....] (1)

Between  
and  
and

Petitioner  
Respondent  
Co-respondent

I, ..... of .....  
make oath and say that as follows:

1. I am well acquainted with A.B. of ..... and verily believe that he or she is a fit and proper person to act as guardian *ad litem* of the respondent <sup>(2)</sup> in this cause. The consent of the said A.B. to act as such guardian is hereto annexed.

2. The said A.B. has no interest in the matters in question in this cause adverse to that of the said

SWORN etc.

(1) Name of court.

(2) Or as the case may be.

#### FORM 17

##### *Originating Summons*

In the [.....] (1)

In the Matter of an Application by A.B. under

LET C.D. of ..... within eight days <sup>(2)</sup> after the service of this summons on him or her, inclusive of the day of such service, cause an appearance to be entered for him or her to this summons, which is issue upon the application of A.B. who claims that the said C.D., being the lawful spouse of the applicant, has wilfully neglected to provide reasonable maintenance for (and the children of the marriage) <sup>(3)</sup> and prays that he or she be ordered to make to him or her such payments for his or her maintenance (and the maintenance of the said children) <sup>(3)</sup> as may be just (and that he or she be further ordered to secure such payments) <sup>(3)</sup>.

DATED the ..... day of ..... 20...

This summons was taken out by ..... legal practitioner for the above-named A.B.

To C.D.

TAKE NOTICE:

A copy of the affidavit to be used in support of the application is delivered with this summons.

You must complete the accompanying Form of Acknowledgement of Service and send it to ..... (the legal practitioner for) <sup>(3)</sup> the applicant, at (*address*)

If you do not intend to oppose the application you need not do anything more than send the Form of Acknowledgement of Service to the above address. The court may then, without further notice to you, proceed to hear the application and make such order as it may think fit, notwithstanding your absence.

If you wish to be heard on any matter in connection with this application you (or your legal practitioner) must complete the accompanying Memorandum of Appearance *in duplicate* and send or deliver both copies (without fee) so as to reach the Registrar or magistrate of .....<sup>(1)</sup> within eight days <sup>(5)</sup> after you received this Summons.

If you wish to oppose this application you (or your legal practitioner) must, in addition to sending the Memorandum of Appearance, send or deliver, so as to reach the Registrar, within fourteen days after the time allowed for send the Memorandum of Appearance, an affidavit (which must be sworn before the Commissioner of Oaths) in answer to the applicant's affidavit, containing in a Schedule exhibiting to the affidavit full particulars of your property and income, together with a fee of ..... You (or your legal practitioner) must at the

same time send a copy of your affidavit to (the legal practitioner) (5) the applicant.

*Note:-* If you intend to instruct a legal practitioner to act for you in these proceedings, you should at once complete and sign the Form of Acknowledgement of Service and then give him all the documents which have been served upon you, so that he or she may take the necessary steps on your behalf within the times specified.

- (1) Name of court.
- (2) Or as the case may be.
- (3) Delete if not applicable.
- (4) Or as the case may be.
- (5) Delete if not applicable.

---

FORM 18

*Notice of Appointment to hear Originating Summons*

In the [ .....] <sup>(1)</sup>  
To

TAKE NOTICE that you are required to attend before .....  
at the .....<sup>(2)</sup> on the ..... day of,  
..... 20 .. at ..... o'clock in the  
.....noon, for the adjourned <sup>(3)</sup> hearing of the summons issued herein  
on the day of ....., 20.., and that if you do not attend at the time  
and place mentioned, such order will be made and proceedings taken as the court  
may deem fit.

*(Signed)*

Legal Practitioner for the Applicant

- (1) Name of court.
  - (2) Or elsewhere as the case may be.
  - (3) Delete if not applicable.
- 

FORM 19

*Notice to be endorsed on a Decree or Order*

TAKE NOTICE that if you the within named A.B. neglect to obey the  
decree [*or order*] within the time therein you will be liable to process of  
execution for the purpose of compelling you to obey the same.

---

MARRIAGE, DIVORCE AND FAMILY RELATIONS  
(ENFORCEMENT OF MAINTENANCE ORDERS) RULES

*under s. 107*

ARRANGEMENT OF RULES

RULE

1. Citation
2. Copy of order sent to magistrate where defendant resides
3. Registering of copies of orders
4. Notice to court which issued order
5. Order that payments to be made to officer of court or other person
6. Collection of monies
7. Notice of further proceedings

Citation                    **1.** These Rules may be cited as the Marriage, Divorce and Family Relations (Enforcement of Maintenance Orders) Rules.

Copy of order sent to magistrate where defendant resides                    **2.** The copy of a provisional order made by a court outside Malawi and received under section 104 of the Act shall if appropriate be sent to the Resident Magistrate or the magistrate of the first or second grade of the District in which the defendant is alleged to be living, with accompanying documents and a requisition for the issue of a summons.

Registering of copies of orders                    **3.** The Registrar or the magistrate to whom an order is sent in accordance with these Rules shall enter it in a special register to be kept for that purpose on the date on which he or she receives it and the transmitted copies shall be filed in the registry of the court.

Notice to court which issued order                    **4.** When an order provisionally made outside Malawi has been confirmed, with or without modification, under section 104 of the Act by a Resident Magistrate's court or a magistrate's court of the first or second grade, or the court has decided not to confirm it, the magistrate shall, subject to any other Rules which may be made under section 107 of the Act, send notice of it to the Registrar for transmission to the court from which it issued.

Order that payments to be made to officer of court or other person                    **5.** When an order has been registered in any court in Malawi under section 104 of the Act, or a provisional order has been confirmed by a court of a Resident Magistrate or a court of a magistrate of the first or second grade under section 104 of the Act, the court shall, unless satisfied that it is undesirable to do so, direct that all payments due under it shall be made through an officer of the court or such other person as it may specify for the purpose.

6. The person through whom payments are directed to be made shall collect the moneys due under the order and may take proceedings in his own name for enforcing payment, and shall, subject to any other Rules which may be made under section 107 of the Act, send the moneys when so collected to the Registrar of the High Court for transmission to the court from which the order originally issued.

Collection of  
monies

7. When a provisional order made under section 106 of the Act has been remitted under subsection (5) of that provision, to a court in Malawi for the purpose of taking further evidence, notice specifying the further evidence required and the time and place fixed for taking it shall be sent by the court to the person on whose application the provisional order was made.

Notice of  
further  
proceedings

## MARRIAGE, DIVORCE AND FAMILY RELATIONS (FAMILY COUNSELLING PANELS) RULES

*under s. 112*

### ARRANGEMENT OF RULES

#### RULE

1. Citation
2. Interpretation
3. Application
4. Appointment and composition of family counselling panels
5. Convening of meeting of family counselling panel
6. Proceedings of family counselling panels
7. Purpose and nature of counselling
8. Reference to state institutions for applications to court for maintenance orders
9. *Pro bono* counselling

1. These Rules may be cited as the Marriage, Divorce and Family Relations (Family Counselling Panels) Rules.

Citation

2. In these Rules, unless the context otherwise requires—  
“matrimonial proceedings” means an action for divorce, nullity of marriage, judicial separation, maintenance, distribution of property or custody of children under the Act.

Interpretation

3. These Rules shall apply to all matrimonial proceedings pending in a court.

Application

4.—(1) The Minister shall appoint appropriate persons to serve on family counselling panels which shall operate in every district of Malawi for purposes of enforcing the provisions of section 91 of the Act; and the Minister shall ensure that such number of panels, as is appropriate, are constituted in a particular district.

Appointment  
and  
composition  
of family  
counselling  
panels

(2) Every family counselling panel appointed in accordance with subsection (1) shall include persons representing the following interests—

- (a) matters of social welfare;
- (b) access to justice;
- (c) affairs of women;
- (d) affairs concerning children;
- (e) health;
- (f) human rights;
- (g) affairs concerning the youth;
- (h) a member of the local government authority of the area serving as a ward councillor or an officer;
- (i) a member of the clergy; and
- (j) a woman representative of any grouping of women active in the area or country.

(3) Members of a family counselling panel shall perform their functions on a voluntary basis and shall hold their respective positions for a period of three years subject to re-appointment.

(4) A person appointed to fill a vacancy on a family counselling panel shall serve for the remainder of the term and shall be eligible for re-appointment.

(5) A family counselling panel may co-opt any reputable person to assist it in its proceedings.

Convening of  
meeting of  
family coun-  
selling panel

**5.** A district social welfare officer, or his or her delegate, shall convene the maiden meeting of a family counselling panel where the members shall elect a Chairperson and deputy Chairperson of the panel.

Proceedings  
of family  
counselling  
panels

**6.—(1)** The Chairperson of a family counselling panel shall preside at meetings of the panel and in his or her absence, the deputy Chairperson shall preside.

(2) In the absence of both the Chairperson and the deputy Chairperson, members of the family counselling panel present and forming a quorum shall elect one of their number to preside at that meeting.

(3) The quorum of the family counselling panel shall be formed by a simple majority of the members of the panel.

(4) Decisions of the family counselling panel shall be in accordance with the vote of the majority of members present and

voting, but in the event of an equality of votes, the Chairperson or, the person performing the functions of the Chairperson at the meeting concerned, shall have a casting vote in addition to his or her deliberative vote.

(5) Meetings of the family counselling panel shall be as often and at such times and places as the Chairperson shall determine.

(6) A district social welfare officer or his or her delegate shall be the secretary of a family counselling panel.

(7) A family counselling panel shall regulate its own procedure and shall make recommendations, references or determinations as it considers appropriate.

7.—(1) In conducting any counselling session under these Rules—

Purpose and  
nature of  
counselling

(a) the panel shall facilitate communication between or among the parties in relation to notifiable family misconduct in order to assist the parties in reaching a mutually acceptable resolution;

(b) the panel shall, in an independent and impartial manner, do everything necessary to help the parties to resolve their difference; and

(c) the panel shall ensure that the parties reduce costs and delays occasioned by litigation and facilitate the early and fair resolution of the dispute.

(2) A family counselling panel shall make orders against any person for purposes of enforcing the provisions of section 91 of the Act.

8.—(1) Notwithstanding the power of the Minister responsible for social welfare under section 91 of the Act, a family counselling panel shall, wherever it is appropriate, refer any matter to the Department of Legal Aid, the Human Rights Commission or any other state institution for purposes of making an application to a court for an order of maintenance on behalf of an aggrieved party appearing, in person or otherwise, before the panel.

Reference to  
state institu-  
tions for  
applications  
to court for  
maintenance  
orders

(2) A family counselling panel may make the reference under subsection (1) notwithstanding that there may be matrimonial proceedings in a court involving the parties appearing, in person or otherwise, before the panel.

(3) Where the Department of Legal Aid, the Human Rights Commission or any other state institution receives a reference made under subsection (1), such institution shall, subject to any other written law, provide its legal services without requiring the aggrieved party to make any contribution towards the cost of its services.



*Pro bono*  
counselling

9. A person for whom counselling is provided under these Rules shall not be required to make any contribution towards the cost of counselling.

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MARRIAGE, DIVORCE AND FAMILY RELATIONS ACT

PROCLAMATION OF EXTENSION OF MARRIAGE,  
DIVORCE AND FAMILY RELATIONS ACT

*under s. 113*

The Seychelles .. .. .	133/1923
The State of South Wales .. .. .	222/1924
Uganda .. .. .	226/1924
Zambia .. .. .	2/1925
Lesotho .. .. .	58/1925
Botswana .. .. .	58/1925
Swaziland .. .. .	58/1925
Southern Rhodesia .. .. .	251/1925
Kenya .. .. .	3/1926
The United States of America, South Australia, Queensland, Tasmania, and Western Australia .. .. .	317/1928
The Territory for the seat of Government of the Commonwealth of Australia .. .. .	23/1929
The Republic of India excluding the State of Jammu and Kashmir	105/1955
The Bailiwick of the Island of Guernsey .. .. .	96/1956
The Bailiwick of Jersey .. .. .	53/1961
The Isle of Man .. .. .	189/1961
Singapore .. .. .	232/1970
Northern Territory of Australia .. .. .	1/1972
The Republic of South Africa .. .. .	74/1972
United Republic of Tanzania .. .. .	189/1972
England .. .. .	
Ireland .. .. .	

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## **APPENDIX II**

### **PENAL CODE (AMENDMENT) BILL, 20..**

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**PENAL CODE (AMENDMENT) BILL, 20...****ARRANGEMENT OF SECTIONS****SECTION**

1. Short Title
2. Replacement of section 153 to Cap. 7:01

**A BILL**  
*entitled***An Act to amend the Penal Code.**

ENACTED by the Parliament of Malawi as follows—

1. This Act may be cited as the Penal Code (Amendment) Act. Short title
2. Section 153 of the Penal Code is repealed by deleting the present section 153 and replacing it as follows— Replacement  
of section 153  
to Cap. 7:01

“**153.** A person who—

(a) commits a sexual act with any person against the order of nature;

(b) commits a sexual act with an animal;

(c) permits a male person or an animal to commit an act of a sexual nature with him or her against the order of nature,

commits an offence and is liable to imprisonment for fourteen years.”.

**OBJECTS AND REASONS**

The object of this Bill is to give effect to the recommendation made by the Law Commission in its Report on the review of the laws on marriage and divorce which extends the commission of the unnatural offences covered under the present section 153 of the Penal Code to female persons.

*Attorney General*

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GAZETTE EXTRAODINARY

**The Malawi Gazette Supplement, dated 26th June, 2006, containing  
Report of the Law Commission (No. 4D)**

LAW COMMISSION REPORT NO. 16

CONSTITUTION OF MALAWI

REPORT OF THE LAW COMMISSION ON THE REVIEW OF THE  
LAWS ON MARRIAGE AND DIVORCE

The Report of the Law Commission on the Review of the Laws on Marriage and Divorce is hereby published and shall be laid in Parliament pursuant to section 135 (*d*) of the Constitution.

Date this 26th day of April, 2006

(FILE NO. LC/01/04)

H. D. PHOYA  
Minister of Justice

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