MARRIAGE, DIVORCE AND FAMILY RELATIONS BILL, 2014

MEMORANDUM

This Bill seeks to implement the recommendations of a special Law Commission contained in the report of the Law Commission on the Review of the Laws on Marriage and Divorce (Law Commission Report No. 16) published on 26th June, 2006.

Background

In September, 2001, the Government, in response to the new and emerging socio-political dispensation in Malawi, and also, in recognition of the commitment to international and regional instruments on gender equality Government’s and women’s empowerment, through the Law Commission, constituted a special Law Commission (the “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.

In November, 2002, the 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. The Commission identified three areas of law in urgent need of reform or development, namely, the law on succession, especially the issue of property grabbing; the laws on marriage and divorce; and the development of a gender equality statute. This Bill relates to reforms on the laws relating to marriage and divorce:

Law on Marriage and Divorce

The core statutes on marriage and divorce were enacted in pre-independence Malawi. With the advent of coming into force of the Republican Constitution of 1994, a number of critical constitutional developments have taken place in Malawi. 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. The paradigm shift has consequences on the rights and obligations of persons, including parties in a marriage contract, and it is critical, therefore, that these constitutional developments are properly articulated in the scheme of the laws on marriage and divorce. Further, Malawi has an obligation to meet international legal standards in its laws, and the laws on marriage and divorce are no exception from that perspective.

Establishment of a Unified Regime on the Law on Marriage

The Commission, among other things, noted that the current status of the law on marriage is unsatisfactory as it is determined by three types of marriages, and each regime of marriage has a different set of rights and obligations. This creates various problems in terms of equality. These problems are further compounded by the fact that the laws governing the three regimes of marriage are derived from different sources, making them inaccessible and confusing for the majority of the population. The Commission, therefore, recommended that there must be one law in Malawi that consolidates statutory and customary laws on marriage and divorce.

The Bill, in effect, proposes to consolidate 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 Bill also proposes the retention of the current marriage regimes, in so far as the preliminary formalities for entering into marriage are concerned. However, under the new scheme, the rights and obligations of parties to any marriage, regardless of the applicable formalities under which the marriage was contracted, shall remain the same.
The Bill identifies and stipulates the types of formalities that may be validly followed by parties under a marriage contract, namely, 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, the marriage; and maintenance of parties during the subsistence and dissolution of marriage.

The title of the Bill - “Marriage, Divorce and Family Relations Bill” – and the long title which reads 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”,

reflects the fact that it goes beyond the regulation of the relationship of a husband and wife or two persons living together in a conjugal relationship, but regulates other aspects of a family relationship.

Status and Effect of Current Marriage Regimes under the Proposed New Legislation

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 of the regimes 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.
Marriage by repute or permanent cohabitation

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 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, therefore, 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, therefore, recommended 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.

Capacity to Marry

Age

The Commission considered the lack of consistency as to the age of marriage within the various regimes of marriage unsatisfactory: only statutory marriages set the age of 18 years as the minimum age for marriage. Both customary marriages and religious marriages have no fixed age requirement and the attainment of puberty tends to be a critical determinant of capacity to marry.

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; and 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 noted that in the case of the girl child, marriage under the age of eighteen years is a health hazard; early marriage also has negative development implications, and unless early marriages involving girls are discouraged, the attainment of the Millenium Development Goals; especially Goal 3, which emphasizes the need for girl child education, or the goal on Human Capital Development under the Poverty Reduction Strategy Paper may be elusive.

In light of the foregoing, the Commission recommended and the Bill proposes, the following provision on capacity to enter a valid marriage –

"Subject to section 22 of the Constitution, 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."

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. 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 maintained 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. 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 recommended that marriages in Malawi must be heterosexual unions and, therefore, the law regulating marriages must prohibit homosexual unions. The Commission felt fortified in making this recommendation as
sodomy, a sexual offence usually associated with homosexuality, is a criminal offence in Malawi.

In light of the foregoing, the Commission recommended, and the Bill proposes, that the term "sex" be defined in the Interpretation section of the proposed new legislation as follows—

""sex", in relation to the gender of a person, means the sex of that person at birth.".
MARRIAGE, DIVORCE AND FAMILY RELATIONS BILL, 2014

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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 and commencement

1. This Act may be cited as the Marriage, Divorce and Family Relations Act, 2013, and shall come into operation on such date as the Minister shall appoint by notice published in the Gazette.

Interpretation

2. In this Act, unless the context otherwise requires -

“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 Part IV and Part 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;

Application 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.

PART II - GENERAL

Registrar of Marriages 4.- (1) There shall be the office of the Registrar of Marriages which shall be a public office.

(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.

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.

(2) The several registrars shall have custody of the books of Marriage certificates delivered to them.

7. Every marriage celebrated in accordance with this Act shall be registered by a registrar.

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.

(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 on application make certified copies from it upon payment of a fee prescribed in the 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.

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.

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.

(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;

(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 -

(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 relation; and

(i) any other factors that the court considers fit.
PART III - ESSENTIAL ELEMENTS OF A MARRIAGE

15. Subject to section 22 of the Constitution, 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.

Marriages within prohibited degrees of kindred and affinity

Third Schedule

16. 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

First Schedule

17. 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

Declaration of marital status prior to marriage

18. A person entering into a marriage under this Part shall first prove, by way of declaration before a registrar, that he or she is single.
19. A person who contracts a civil marriage shall be married to one spouse only.

20. (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 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.

21. (1) If the person giving notice under section 20 is unable to 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.
Notice to be entered in Marriage Notice Book and published

Publication of a marriage notice

Registrar’s permit

First Schedule

23. A registrar shall enter the notice under section 20 in the Marriage Notice Book.

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 notice 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.

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 –

(a) the parties have complied with sections 15, 16, 18 and 19;

(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 registrar, and may grant a special licence, in Form E in the First Schedule, authorizing the celebration of a marriage between the parties named in the licence by a registrar.

PART V - PRELIMINARIES TO RELIGIOUS AND CUSTOMARY MARRIAGES

Marriages under this Part to accord with customs and rites of religious body, sect, denomination or ethnic group

Notice of intention to marry

First Schedule

27. Subject to sections 15 and 16, 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.

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

First Schedule

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-

(a) the parties have complied with sections 15 and 16; 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.

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 caveat grounds.

PART VII - CELEBRATION OF CIVIL MARRIAGE

34. 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 -

(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.

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.

36. 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.

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

38. A customary or religious marriage shall be celebrated in accordance with the procedures and formalities under Part V.

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.

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 recognised 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.

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.

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 authorizes 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.
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.

(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.

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.

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

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.

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.
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.

(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, nurturing and maintenance of the children of the marriage.

(6) Both spouses shall 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-

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

(b) in divorce proceedings.

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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 in a civil marriage

52. A person who contracts a civil marriage under Part VII and who subsequently is married or purports to be married, to more than one spouse, commits an offence, and is liable on conviction to a fine of K100,000 and imprisonment for five years.

Marriage ceremony with a married person

53. An unmarried person who goes through the ceremony of a civil marriage with a person whom he or she knows to be married to another person, commits an offence and is liable on conviction to a fine of K100,000 and imprisonment for five years.

Making false declarations in relation to marriage

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 on conviction to a fine of K100,000 and to imprisonment for five years.

Registrar unlawfully performing ceremony

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 on conviction to a fine of K100,000 and to imprisonment for five years.
56. A person who knowingly and willfully 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 on conviction to a fine of K100,000 and to imprisonment for five years.

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 willfully fails to perform his or her duty, commits an offence and is liable on conviction to a fine of K100,000 and to imprisonment for five years.

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 on conviction to a fine of K100,000 and to imprisonment for five years.

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 on conviction to a fine of K100,000 and to imprisonment for five years.
 General principles 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;

(b) the parties to a marriage which may have broken down are to take all practical steps, whether by counseling 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
Limitations of this Act

61.- (1) 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

62.- (1) The court may, upon satisfying itself that 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.

Rape during judicial separation

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.

Irretrievable breakdown of marriage

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.

(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—

(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;

(d) 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;

(e) the respondent has since the celebration of the marriage treated the petitioner with cruelty;

(f) 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

(g) 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 -
(a) the marriage has irretrievably broken down;

(b) the parties have undergone marriage counseling; and

(c) the requirements of section 67 are satisfied.

Arrangements for the future in case of divorce or 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) 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;
68. There is a rebuttable presumption that adultery is not condoned unless consummation has been continued or subsequently resumed of the parties free will.

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.

70.- (1) On the presentation of a petition for divorce, the court shall the 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 shall not be 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 the petition;
(c) cruelty towards the other party to the marriage;

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

(f) such willful 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.

(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.