

‘BLACKS’

Many of these laws, while still technically in force, are primarily of historical interest.

Concessions from Natives Proclamation 8 of 1915.

Summary: This Proclamation provides that concessions for mineral, trading and other rights obtained (and to be obtained) by private individuals from “coloured and native inhabitants” shall be invalid.

Native Reserves Trust Funds Administration Proclamation 9 of 1924.

Summary: This Proclamation requires that separate Native Reserve Trust Funds be set up for each native reserve established pursuant to the Native Administration Proclamation 11 of 1922 (which is no longer in force), and governs the administration of such funds. It appears to be obsolete.

Amendments: The Proclamation is amended by Proc. 15/1928, Proc. 21/1936, Proc. 6/1939, Ord. 11/1954, RSA Proc. 62/1963, RSA Proc. 228/1969 and RSA Proc. 84/1977.

This Proclamation was repealed in Damaraland by the Damara Community and Regional Authorities and Paramount Chief and Headman Ordinance 2 of 1986 of the Damara Legislative Assembly (OG 5355). Repeals in respect of other areas may exist, but have not been located.

Native Reserves Fencing Proclamation 12 of 1926.

Summary: This Proclamation provides for the recovery of the costs of fencing native reserves from the reserves’ inhabitants.

Native Administration Proclamation 15 of 1928.

Summary: The surviving portions of this Proclamation deal with primarily with the marriage and succession of “natives”.

The Proclamation, with the exception of Chapter IV on Marriage and Succession, came into force in all of South West Africa on 1 January 1930 (GN 165 of 11 December 1929). Selected portions of Chapter IV -- section 17(6) and sections 18(3) and (9) -- were subsequently applied to the area north of the Police Zone with retroactive effect from 1 August 1950 (GN 67 of 1 April 1954).

The whole of section 18 and its accompanying regulations was made applicable to the whole of South West Africa *with the exception of Owambo, Kavango and Caprivi* by RSA Proclamation R.192 of 15 February 1974.

Thus, only sections 17(6) on marriage and sections 18(3) and 18(9) on succession apply in Owambo, Kavango and Caprivi (with effect from 1950). None of section 17 on marriage applies elsewhere, but the whole of section 18 on succession applies to the remainder of Namibia (with effect from 1974).

Amendments: The Proclamation is amended by Proc. 25/1937, Proc. 24/1941, Proc. 35/1943, Ord. 11/1954, Ord. 4/1955, RSA Proc. 360 of 1968, RSA Proc. 41/1973, AG 46/1978, Act 27/1985, Ord. 2/1986 (Damaras), AG 14/1989 and Act 23/1992.

The Traditional Authorities Act 17 of 1995 repeals the remaining sections of the Proclamation *with the exception of* sections 17, 18, 23, 24, 25, 26 and 27 and any regulations made in terms of those sections.

The Estates and Succession Amendment Act 15 of 2005 repeals portions of section 18, but provides that they shall “continue to be of force in relation to persons to whom the relevant rules would have been applicable had the said provisions not been repealed”.

Regulations: Regulations relating to the “administration and distribution of native estates” in the area north of the Police Zone were issued pursuant to section 18(9) in GN 70 of 1 April 1954. These regulations were subsequently extended to the whole of South West Africa *with the exception of* Owambo, Kavango and Caprivi by RSA Proc. R.192 of 15 February 1974.

The Proclamation was affected by RSA Proc. 2/1973 (criminal jurisdiction of native commissioners).

Comment: This Proclamation was once supplemented by the Native Administration Proclamation 11 of 1922, which was repealed in its entirety by the Local Authorities Act 23 of 1992, effective 31 August 1992.

Cases: *Mofuka v Mofuka* 2001 NR 318 (HC), 2003 NR 1 (SC); *Berendt & Another v Stuurman & Others*, 2003 NR 81 (HC) (declares sections 18(1), (2) and (9) unconstitutional with effect as of 30 June 2005; time period extended to 30 December 2005 by *Government of the Republic of Namibia v The Master of the High Court & 3 Others*, case no 105/2003; see Estates and Succession Amendment Act 15 of 2005); *Kavendjaa v Kaunozondungo NO & Others* 2005 NR 450 (HC) (section 18 and related regulations); *Nakashololo v Nakashololo* 2007 (1) NR 27 (HC) (factual enquiry finds joint oral declaration to marriage officer before solemnisation of marriage, attested to by marriage officer, sufficient to make marriage in community of property in terms of section 17(6)); *Valindi v Valindi & Another* 2009 (2) NR 504 (HC) (factual enquiry concerning section 17(6)).

Articles: Law Reform and Development Commission, *Report on Uniform Consequences of Common Law Marriages (Repeal of Section 17(6) of Native Administration Proclamation, 1928 (Proclamation 15 of 1928)* (LRDC 11).

Additional information: The history of the application of this Proclamation to persons in various parts of Namibia is complex; as one judicial opinion recently stated, “any discussion of the wider aspects of the Proclamation and the regulations made thereunder has always created more heat than light” (*Nakashololo v Nakashololo* 2007 (1) NR 27 (HC) at 28I). For this reason, some excerpts on the Proclamation’s history and purpose have been included below.

The Native Administration Proclamation 15 of 1928 is modelled on South Africa’s Black Administration Act 38 of 1927. The Administrator of South West Africa gave the following explanation of the Proclamation’s purpose to the League of Nations:

It may be stated that to meet the position legislation is being introduced which a) will simplify procedure in native cases generally; b) will give Native

Commissioners power to deal with all matrimonial cases and so cheapen and expedite proceedings. There will, of course, be a right of appeal to the High Court; c) will secure the inheritances under native law of the offspring of a marriage or alliance contracted under native custom in the event of a marriage in accordance with civil law being entered into subsequently; d) will simplify marriage procedure.” (UG 31/1928: para 41)

The Native Administration Proclamation 15 of 1928, with the exception of Chapter IV on Marriage and Succession, generally came into force in all of South West Africa on 1 January 1930 (GN 165 of 11 December 1929).

Selected portions of Chapter IV -- section 17(6) and sections 18(3) and (9) -- were subsequently applied to the area north of the Police Zone with retroactive effect from 1 August 1950 (GN 67 of 1 April 1954).

On 1 April 1954, regulations concerning inheritance were promulgated, in terms of section 18(9) of the Proclamation, in GN 70 of 1 April 1954 (hereinafter referred to as ‘Regulation GN 70’). These regulations were by their own terms applicable only “to native estates in that portion of the territory north of the Police Zone”.

The Police Zone is the area south of (‘within’) an imaginary line drawn through Namibia. It is defined in the First Schedule to Proclamation 26 of 1928. The area north of (‘outside’) the Police Zone was primarily viewed as labour reserves during the early colonial period. During German colonization, there was no direct colonial rule of this area. When South Africa assumed administration of Namibia, it had no clear policy on how to deal with this area.

The whole of section 18 of the Proclamation and Regulation GN 70 was made applicable to the whole of South West Africa *with the exception of* Owambo, Kavango and Caprivi by RSA Proclamation R.192 of 15 February 1974.

Technically, RSA Proclamation R.192 of 15 February 1974 excludes the areas “referred to paragraphs (d), (e) and (f) of section 2(1) of the Development of Self-Government for Native Nations in South West Africa Act, 1968 (Act 54 of 1968)”.

The result was as follows:

- (1) In Owambo, Kavango and Caprivi, sections 17(6) on applied to marriages between Africans, and sections 18(3) and 18(9) on succession and Regulation GN 70 applied (with effect from 1950).
- (2) In all of Namibia north of the old Police Zone, section 17(6) on marriage applied to marriages between Africans (with effect from 1950).
- (3) Inside the old Police Zone, none of section 17 on marriage applied.
- (4) In all of Namibia *other than* Owambo, Kavango and Caprivi, the whole of section 18 on succession, including Regulation GN 70, applied (with effect from 1974).

The Native Administration Proclamation Amendment Act 27 of 1985 repealed sections 18(3), 18(4), 18(5), 18(7), 18(8) and 18(9)(c).

In *Berendt & Another v Stuurman & Others*, 2003 NR 81 (HC), the High Court declared sections 18(1), 18(2) and 18(9) and Regulation GN 70 to be in conflict with the Constitution.

The Estates and Succession Amendment Act 15 of 2005 repeals subsections 18(1), 18(2), 18(9) and 18(10), but states:

Despite the repeal of the provisions referred to in subsection (1), the rules of intestate succession that applied by virtue of those provisions before the date of their repeal continue to be of force in relation to persons to whom the relevant rules would have been applicable had the said provisions not been repealed.

This would appear to leave the subsections in question, along with Regulation GN 70, applicable to the same persons in the same parts of Namibia as before the *Berendt* case.

However, the constitutionality of the approach taken by the Estates and Succession Amendment Act 15 of 2005 is an open question.

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The Western concept of a civil marriage and the legal consequences thereof were foreign to the indigenous peoples of Southern Africa during the pre-colonial era. There was one of (potentially) polygynous customary unions concluded without formal officiation according to the tradition of each tribe and cemented by bridewealth agreements between the families of the partners in such unions. The arrival of European colonial powers in Southern Africa and their 'mission to "civilize" their colonies' (T W Bennett *Application of Customary Law in Southern Africa* (1985) at 138) had a far-reaching impact upon African customary legal systems. A choice was given to members of those indigenous groups to conclude civil marriages. The personal and proprietary consequences of those marriages were, however, not only foreign to the indigenous people but, if so contracted, had the potential to cause serious prejudice to other parties in existing customary unions.

Hence, uncoordinated attempts were made prior to 1928 to address those concerns by legislation (see J M T F Labuschagne 'Spanningsveld tussen die Psigo-Kulturele en die Juridiese: Opmerkinge oor die Vermonsregtelike gevolge van gemeenregtelike Huwelike tussen Swartes' *THRHR* (1995) 302 at 303-304). From 1 January 1929 the position was comprehensively regulated in South Africa by s 22 of the Native Administration Act, 1927. Being a mandated territory of the Republic of South Africa at the time, the legislative authorities in the then South West Africa soon followed suit with the promulgation of the Native Administration Proclamation, 1928. Section 17 dealt with 'Marriage' in almost identical terms as s 22 of Act 38 of 1927 (RSA).

However, whereas s 22 became of force and effect in South Africa from the beginning of 1929, s 17 of Proc 15 of 1928 did not. In terms of s 27 of the Proclamation, the Administrator had to fix the date on which it would commence by notice in the Gazette and he could exclude from application in such notice any specified part or provision of the Proclamation 'which shall thereupon not apply until brought into operation by a further notice'. When the Administrator brought the Proclamation into operation with effect from 1 January 1930 by Government Notice 165 of 11 December 1929, he expressly excluded Chap IV (which contains s 17). That chapter, with all the legislative intentions to protect customary unions, was never applied in Namibia. That is, except for ss 17(6) and 18(3) and (9), which were applied with effect from 1 August 1950 only to the area north of the 'Police Zone' as defined in the first schedule to the Proclamation. That area includes Ovamboland.

Section 17(6) of the Proclamation (as amended by s 6 of Act 27 of 1985) provides as follows:

'A marriage between Blacks, contracted after the commencement of this Proclamation, shall not produce the legal consequences of marriage in community of property between the spouses: Provided that in the case of a marriage contracted otherwise than during the subsistence of a customary union between the husband and any woman other than the wife it shall be competent for the intending spouses at any time within one month previous to the celebration of such marriage to declare jointly before any magistrate or marriage officer (who is hereby authorised to attest such declaration) that it is their intention and desire that community of property and of profit and loss shall result from their marriage, and thereupon such community shall result from their marriage.'

... the plaintiff did not challenge the constitutionality of s 17(6)... and did not attack the validity of GN 67 of 1954 or the retroactive effect thereof on the pleadings or in argument. Hence, those questions do not arise for decision and I shall refrain from expressing any view thereon....

The legislative intention behind the promulgation of the subsection, according to Bennett (op cit at 155) (dealing with an almost identical s 22(6) of the RSA Act), was to ensure that 'the parties to the marriage would not be caught unawares by a property system with which they would be unfamiliar'.

The effect of this section on the legal consequences of civil marriages between Blacks contracted after 31 July 1950 in the area defined as the 'Police Zone' is significant. No longer does community of property follow unless excluded - rather, the converse applies: The marriage is out of community of property, unless declared or agreed otherwise. After a careful and authoritative analysis of s 22(6) of the RSA Act, Watermeyer CJ concluded as follows in *Ex parte Minister of Native Affairs: in re Molefe v Molefe* (1946 AD 315 at 320):

'The proprietary rights of native spouses who contract a valid marriage at a time when no customary union subsists between the husband and another woman, and who do not make a declaration in terms of s 22(6) of Act 38 of 1927, will, except in so far as there is a specific statutory provision, depend upon whether or not parties have entered into any antenuptial agreement with regard to their proprietary rights after marriage. If they have entered into such an antenuptial agreement then their proprietary rights will depend upon the legal effects, whatever they may be, of such agreement. If they have not entered into any such antenuptial agreement then, since community of property, and of profit and loss, does not result from marriage, each spouse retains, subject to any statutory provision, the ownership of his or her own property, but the control of the property of the spouses vests in the husband by virtue of his marital power.'

Those remarks apply, *mutatis mutandis*, to s 17(6).

Mofuka v Mofuka 2001 NR 318 (HC) at 320B-322E

Ovamboland Affairs Proclamation 27 of 1929.

Summary: This Proclamation enables the Administrator to make regulations for the government of Ovamboland, the establishment of a trust fund and the establishment of the Ovamboland Police.

Amendments: The Proclamation is amended by Proc. 26/1930, Proc. 34/1940, Proc. 38/1940, Proc. 15/1941, Proc. 20/1941, Proc. 2/1948, Proc. 52/1950, SA GN 1503/1957 and RSA Proc. R.1/1976.

Caprivi Zipfel Affairs Proclamation 27 of 1930.

Summary: This Proclamation makes provision for the establishment of trust funds for any "tribe or aggregate of tribes" in the Caprivi Zipfel, and for the Administrator to make regulations for the area or particular classes of persons or "tribes or portions of tribes" in the area.

Okavango Native Territory Affairs Proclamation 32 of 1937.

Summary: This Proclamation enables the Administrator to make regulations for the government of the Okavango Native Territory, the establishment of a trust fund and the establishment of the Okavango Native Territory Police.

Amendments: This Proclamation is amended by Proc. 38/1940, Proc. 26/1948 and Proc. 53/1950.

Native Trust Funds Proclamation 23 of 1939.

Summary: This Proclamation established the "Herero Tribal Trust Fund" and

authorised the Administrator-General to establish similar funds for other “tribes” or “aggregations of natives”. It did not repeal the Native Reserves Trust Funds Administration Proclamation 9 of 1924, although there is some overlap between the two. However, the 1929 Proclamation ties the funds created under it to the land, while this Proclamation relates rather to groups of people.

Black Reserves (South West Africa) Act 44 of 1945.

Summary: This Act authorises the dis-establishment of one area reserved for Black occupation, in exchange for the establishment of another.

Applicability to SWA: This Act applies specifically to South West Africa. It governed only the one particular transaction and has no ongoing applicability.

Black Affairs Act 55 of 1959, as amended in South Africa to 1970.

Summary: This Act establishes a Commission for Black Affairs, so as to facilitate the administration of black affairs. It was repealed in South Africa by Act 108/1991.

Applicability to SWA: Section 16A, which was inserted by Act 49/1970, provides that “sections 2, 3 and 4 and any regulation made under section 15(1)(a) shall also apply in respect of the territory of South-West Africa, including the Eastern Caprivi Zipfel”. This wording does not appear to make South African amendments automatically applicable to SWA, and none of the amending acts after Act 49/1970 were made expressly applicable to SWA.

Transfer of administration to SWA: The administration of the Act was transferred to SWA by the Executive Powers Transfer Proclamation (AG 3/1977, as amended), dated 28 September 1977.

Reservation of State Land for Natives Ordinance 35 of 1967.

Summary: This Ordinance authorises the Administrator-General of South West Africa to set aside and reserve state land “for the sole use and occupation of natives”.

Amendments: This Ordinance is amended by Ord. 5/1969, Ord. 19/1971, Ord. 16/1974, Ord. 5/1975, Ord. 6/1977 and Ord. 5/1978.

Development of Self-Government for Native Nations in South-West Africa Act 54 of 1968.

Summary: This Act was intended to assist the “native nations” in South West Africa to “develop in an orderly manner to self-governing nations and independence”. It seems to remain in force in technical terms in some areas of “South West Africa”.

Section 52 of the Representative Authorities Proclamation, AG 8/1980 (as amended by AG 4/1981) provided that the Act would be repealed in Hereroland, Kaokoland, Kavango, Eastern Caprivi, Owamboland and Damaraland when representative authorities for these areas came into operation, and in other parts of the territory on a

date determined by the Administrator-General by proclamation. No proclamation specifying dates for repeals in other parts of South West Africa has been located.

Promotion of the Economic Development of National States Act 46 of 1968, as amended in South Africa prior to Namibian independence.

Summary: This Act provides for the establishment of development corporations so as to carry out the economic development of homelands (“national states”).

Applicability to SWA: Section 32 states “This Act and any amendment thereof also apply in the territory of South-West Africa, including that portion of the said territory known as the Eastern Caprivi Zipfel and mentioned in section 3 of the South-West Africa Affairs Amendment Act, 1951 (Act No. 55 of 1951).”

Transfer of administration to SWA: The relevant transfer proclamation is the Executive Powers Transfer Proclamation (AG 3/1977, as amended), dated 28 September 1977. However, this Act is excluded from the operation of section 3(1) of the transfer proclamation by section 3(2)(b), meaning that it was not transferred to SWA.

Namaland Consolidation and Administration Act 79 of 1972, as amended in South Africa to September 1977.

Summary: This Act sets aside an area in South West Africa for the sole use and occupation of the Nama and provides for the administration of this area.

Applicability to SWA: This Act obviously applies to South West Africa by virtue of its subject matter.

Transfer of administration to SWA: The administration of this Act is transferred to SWA by the Executive Powers Transfer Proclamation (AG 3/1977, as amended), dated 28 September 1977. There were no amendments to the Act in South Africa prior to Namibian independence.

Amendments: AG 39/1978 amends this Act by adding specified areas of land to Namaland. Act 15/1979 amends section 1, section 2 and Schedule 1. The Representative Authority of the Namas Proclamation (AG 35/1980) (which was repealed by the Namibian Constitution) repeals section 3, amends 6 and affects the application of Schedule 1. AG 71/1980 amends section 2 and Schedule 1. Act 4/1986 also amends section 2 and Schedule 1.

See also Native Stock Brands Proclamation 15 of 1923 and Dried Peas Control Ordinance 35 of 1957 (AGRICULTURE).

See also Kaffir Beer (Rural Areas) Control Ordinance 36 of 1957 (ALCOHOL, DRUGS AND TOBACCO).

See also Racial Discrimination Prohibition Act 26 of 1991 (CRIMINAL LAW AND PROCEDURE).

See also **CUSTOMARY LAW**.

See also Natives Minimum Wage Proclamation 1 of 1944 (**LABOUR**).

See also Crown Land Disposal Proclamation 13 of 1920 (reservation of land for the use of “aboriginal natives, coloured persons and Asiatics”) (**LAND**).

See also Consent to Operations on Native Minors Proclamation 37 of 1943 (**MEDICINE AND MEDICAL PROFESSIONS**).

See also *Black Authorities Service Pensions Act 6 of 1971* and *Railways and Harbours Pensions for Non-Whites Act 43 of 1974* (**PENSIONS**).